Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois

Research memo

Matter: Limitations of 215 ILCS 5 143.24b in trucking matters

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Reviewed by Gregory A. Patricoski on November 1, 2026: every proposition against its cited passage.

Every citation in this memo was written by software from the archive; every quotation and paragraph pin was checked mechanically. The verification and coverage pages say exactly what was checked and what was read.

Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois

Question presented. Does section 143.24b 215 ILCS 5/143.24b require pre-suit disclosure of a commercial motor carrier's liability limits? If not, what Illinois authority makes those limits, including excess layers, discoverable, and what supports pressing the carrier to disclose early?

Short answer. Probably not.

- **The statute is limited to personal auto policies.** Section 143.24b requires disclosure of coverage "under the insured's personal private passenger automobile liability insurance policy" 215 ILCS 5/143.24b. The only published decision construing it read that language by its plain terms and refused to extend it to umbrella coverage. That First District opinion binds the DuPage circuit court, because no Second District decision conflicts with it.
    - Nothing in the packet extends the statute to commercial auto or motor carrier policies.
    - Elsewhere, the Insurance Code and the supreme court treat business-use vehicles and commercial truckers as separate from personal-lines rules.
- **The statute has no private remedy.** Even where it applies, a third-party claimant has no section 155 remedy and no Consumer Fraud Act standing.
- **After suit, limits are discoverable.** Under the supreme court's insurance-discovery precedent and Rules 201(b)(1) Ill. S. Ct. R. 201(b)(1) and 214 Ill. S. Ct. R. 214, the existence and amount of the defendant's insurance can be obtained in discovery. Nothing in the packet exempts insurance documents, including self-insurance arrangements, though no packet decision squarely addresses excess layers.
- **Before suit, Rule 224 Ill. S. Ct. R. 224 does not help.** It reaches only the identity of potential defendants.
- **The real pre-suit lever is the duty to settle.**
    - The duty arises, even before suit, once there is a demand within limits and a reasonable probability of both liability and a verdict above limits.
    - Breach exposes the insurer to the full judgment, and the insured's claim can be assigned to the judgment creditor.
    - That duty runs to the insured, not to us, and it is triggered only by a demand within limits. Nondisclosure obstructs exactly that step. The packet does not decide whether a demand for "the limits," with no number, suffices.

Propositions.

Scope of section 143.24b

1. Section 143.24b requires an insurer to disclose "the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy" upon receipt of a certified letter and a description of the injuries, with a statement of medical bills and copies of medical records. 215 ILCS 5/143.24b
2. The insurer must forward the disclosure "by certified mail, return receipt requested, within 30 days of receipt of the request," and the disclosure is confidential to the claimant and counsel's office. 215 ILCS 5/143.24b
3. The First District held that the plain language of section 143.24b requires disclosure of potentially available coverage under "personal private passenger automobile liability insurance" policies, and noted that the section's title refers to the disclosure "of dollar amount of automobile liability coverage." *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 27
4. Addressing whether section 143.24b required disclosure of an umbrella policy, the First District reasoned that "a personal automobile insurance policy is not the same as an umbrella policy." *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶¶ 24, 27
5. In construing section 143.24b, that court applied the rule that a court "may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express." *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 24
6. For sections 143.11 through 143.24, the Insurance Code defines a "policy of automobile insurance" as one insuring a natural person whose designated vehicles include those "which is not used in the occupation, profession or business of the insured." 215 ILCS 5/143.13
7. The Fifth District held that the box truck the plaintiff was driving was not a "private passenger automobile" within the meaning of section 143.13a. *Worley v. Fender*, 2017 IL App (5th) 160110, ¶ 35
8. The supreme court held that the Vehicle Code's definition of a motor vehicle liability policy, including its omnibus requirement, "does not apply to commercial truckers regulated under the Commercial Transportation Law." *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 8 (2009)

Remedies for a third-party claimant

9. The supreme court has held that "the remedy embodied in section 155 of the Insurance Code does not extend to third parties." *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458 (1990)
10. The Second District has stated the same rule: "The remedy in section 155 of the Insurance Code does not extend to third parties." *Power Dry of Chicago, Inc. v. Bean*, 2022 IL App (2d) 210043, ¶ 49
11. In a case asserting a section 143.24b violation, the First District held that section 155 penalties are "only available to the insured, not to third parties who are strangers to the policy," and affirmed summary judgment for the insurer on that claim. *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135,

¶¶ 55, 56

12. The same court held that the third-party claimant lacked standing under the Consumer Fraud Act. *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 44
13. The same court held that a negligent misrepresentation claim was unavailable against the insurer. Its reasons were that selling insurance policies is not selling information under that tort's exception, and that the record showed no actionable misstatement, reliance, or injury. *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 50
14. The Insurance Code lists as an improper claims practice "Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue." 215 ILCS 5/154.6(a)
15. The First District held that section 154.6 creates no private right of action and is "regulatory in nature." *Becker-Othman v. State Farm Mutual Automobile Insurance Co.*, 2026 IL App (1st) 250037, ¶ 42
16. The First District implied a private right of action under a different Insurance Code provision because the Code's own penalties were "too minimal to serve as a deterrent." *Cretella v. Azcon, Inc.*, 2022 IL App (1st) 211224, ¶¶ 58, 62
17. The supreme court held that section 155 does not preempt a separate tort for insurer misconduct, so "a plaintiff may bring an independent tort action, such as common law fraud, for insurer misconduct" where its elements are alleged and proved. *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513 (1996)

Discoverability of insurance after suit

18. Rule 201(b)(1) permits a party to obtain by discovery "full disclosure regarding any matter relevant to the subject matter involved in the pending action." Ill. S. Ct. R. 201(b)(1)
19. Rule 214 permits a written request to produce specified documents whenever their nature, contents, or condition is "relevant to the subject matter of the action." Ill. S. Ct. R. 214
20. Under the predecessor civil practice rules, the supreme court held that discovery interrogatories "respecting the existence and amount of defendant’s insurance" may be deemed related to the merits, because among other things they "afford a sounder basis for the settlement of disputes." *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957)
21. The supreme court reasoned that liability insurance "is not merely a private matter for the sole knowledge of the carrier and the insured." *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957)
22. The supreme court reasoned that knowledge of the defendant's insurance "would also lead to more purposeful discussions of settlement." *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957)
23. The supreme court rejected authority limiting pretrial discovery to matters admissible in evidence, adding: "We do not imply that answers to interrogatories can

be brought to the attention of the jury." *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957)

24. Evidence that a person was or was not insured "is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Ill. R. Evid. 411
25. The First District rejected a defendant's contention that a request for its insurance documents was improper. It noted that the defendant cited no authority that "plainly exempts it from production of its insurance-related documents." *Brown v. Advocate Health & Hospitals Corp.*, 2017 IL App (1st) 161918, ¶ 22
26. That decision involved a self-insured trust agreement, was expressly "limited to the propriety of in camera review," and noted that a protective order limited use of the documents. *Brown v. Advocate Health & Hospitals Corp.*, 2017 IL App (1st) 161918, ¶ 27
27. For purposes of discovery, "the concept of relevance for purposes of discovery is broader than the concept of relevance for purposes of admissibility at trial." *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 22
28. Objecting on a litany of grounds without the intention or means to defend them "is an abuse of the discovery process that may warrant sanctions." *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 39
29. The circuit court may enter a protective order "as justice requires, denying, limiting, conditioning, or regulating discovery," and may weigh the burden of discovery against its likely benefit under the proportionality provision. *Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶ 30
30. The Second District found "other insurance" clauses making a business policy and an umbrella policy excess over primary auto coverage "unambiguous and not subject to more than one reasonable interpretation." *Country Mutual Insurance Company v. Witbrod*, 2026 IL App (2d) 250314, ¶ 85
31. The Second District held that the Financial Responsibility Law "does not mandate that excess or supplemental liability insurance coverage be obtained" once the mandated minimum is met. *Crowley v. Empire Fire & Marine Insurance Co.*, 2019 IL App (2d) 180752, ¶ 20

The insurer's duty to settle within limits

32. The supreme court held that the duty to settle arises when "a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001)
33. The supreme court held that the duty "does not arise until a third party demands settlement within policy limits." *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001)
34. The supreme court held that the duty does not arise when the insurance contract is formed, "nor does it depend on whether or not a lawsuit has been filed." *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001)
35. The supreme court stated that "Illinois law generally does not require an insurance provider to initiate settlement negotiations." *Haddick v. Valor Insurance*, 198 Ill. 2d

409 (2001)

36. The First District applied that rule, holding that "we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case." *Kavanaugh v. Interstate Fire & Casualty Co.*, 35 Ill. App. 3d 350 (1st Dist. 1975)
37. The "reasonable probability" standard requires facts showing "that liability is at least more likely than not, but not necessarily a certainty." *Powell v. American Service Insurance Co.*, 2014 IL App (1st) 123643, ¶ 36
38. When an insurer breaches the duty by refusing to settle, "the insurer may be liable for the full amount of a judgment against the policyholder, regardless of policy limits." *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513 (1996)
39. The Second District held that where recovery may exceed the limits, the insurer must "give to the insured's interests consideration, at least equal to that of its own." *Browning v. Heritage Insurance*, 33 Ill. App. 3d 943 (2d Dist. 1975)
40. The Second District also held that the insured's cause of action for failure to settle within limits "can be assigned to the insured's judgment creditor." *Browning v. Heritage Insurance*, 33 Ill. App. 3d 943 (2d Dist. 1975)
41. The First District held that the duty to settle is owed to the insured, so that "in the absence of statutory or contractual language sanctioning a direct action," an injured third party has no action against the insurer for its breach. *Scroggins v. Allstate Insurance*, 74 Ill. App. 3d 1027 (1st Dist. 1979)
42. In assessing bad faith, the Second District considers "the existence of an offer by the plaintiff to settle within the policy limits, a refusal to negotiate, the advice of defense counsel, the prospect of an adverse verdict, and the potential for damages in excess of the policy limits." *SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill. App. 3d 80, 28 (2d Dist. 2009)
43. The Fifth District found that ignoring a policy-limits demand, where "The medical bills alone were more than five times that protection," signaled bad faith. *O'Neill v. Gallant Insurance*, 329 Ill. App. 3d 1166 (5th Dist. 2002)
44. The First District held that where the injured parties' demands "greatly exceed the primary policy limits," "no plausible claim of bad faith can be made" against the primary insurer. *Crane v. Admiral Insurance Co.*, 2013 IL App (1st) 093240-B, ¶ 35
45. The First District recognized "a three-way duty of care to act reasonably and in good faith in settling meritorious claims within the policy limits" among the insured, the primary carrier, and the excess carriers. *Schal Bovis, Inc. v. Casualty Insurance*, 314 Ill. App. 3d 562 (1st Dist. 1999)
46. That court required a primary insurer to "estimate in good faith the expected verdict of the litigation threatening its insured and offer that amount in support of a proposed settlement," to the extent consistent with its policy. *Schal Bovis, Inc. v. Casualty Insurance*, 314 Ill. App. 3d 562 (1st Dist. 1999)

Pre-suit discovery under Rule 224

47. The supreme court has stated that "Rule 224 provides a means to identify potential defendants prior to the commencement of a lawsuit." *Dent v. Constellation NewEnergy,*

Inc., 2022 IL 126795, ¶ 23

48. Quoting the committee comments, the supreme court noted that an order allowing a Rule 224 petition "will limit discovery to the identification of responsible persons and entities." *Dent v. Constellation NewEnergy, Inc.*, 2022 IL 126795, ¶ 23
49. The Third District held that a Rule 224 petition "is inapplicable to any case where the identity of any potential defendant is already known." *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 8 (3d Dist. 2010)
50. The Fifth District held that "Ascertaining identity is the only use for a Rule 224 action." *Gaynor v. Burlington Northern & Santa Fe Railway*, 322 Ill. App. 3d 288 (5th Dist. 2001)
51. Quoting earlier First District authority, the Fourth District stated that where the known connection to the injury is remote, a petitioner may seek additional connecting facts "so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." *Mazrim v. Decatur Memorial Hospital*, 2022 IL App (4th) 210474, ¶ 26
52. The Second District held that a Rule 224 petitioner bears the burden of showing that the proposed complaint supports a cause of action and that the identification is necessary. *Doe v. Catholic Diocese*, 2015 IL App (2d) 140618, ¶ 16

Motor carrier filings and federal regulation

53. Section 7-601 exempts from the required-liability-policy provision "vehicles required to file proof of liability insurance with the Illinois Commerce Commission." 625 ILCS 5/7-601(b)(2)
54. A CONCURRENCE in the supreme court described the Commercial Transportation Law as "the source of the requirement that commercial trucks file proof of insurance with the Illinois Commerce Commission," and said the Commission's insurance regulations "adopted the federal regulations governing interstate motor carriers of property." *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 10 (2009)
55. The First District held that an owner-operator lease made "subject to" DOT regulations gave the motor carrier "exclusive possession, control, and use" of the leased truck under the federal leasing regulation. *Argonaut Midwest Insurance Company v. Morales*, 2014 IL App (1st) 130745, ¶ 25
56. Under the former ICC regime, the First District held that a certified carrier had to obtain insurance sufficient to pay "for each final judgment against the carrier," but did not have to name its driver as an insured. *Pratt v. Andrews*, 164 Ill. App. 3d 606 (1st Dist. 1987)
57. The same court held that the injured plaintiff had "no standing to litigate the insurance coverage extended to" the driver or the carrier. *Pratt v. Andrews*, 164 Ill. App. 3d 606 (1st Dist. 1987)

Analysis

I1. Section 143.24b does not reach the motor carrier's commercial policy.

Which text governs. The disclosure duty is triggered by "receipt" of a compliant request 215 ILCS 5/143.24b. So the version in force when our request reaches the insurer governs, which is the current text, effective July 1, 2023 215 ILCS 5/143.24b.

- The only published construction applied the 2010 text *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 25.
- Comparing that quotation with the current text, the recorded 2023 amendment appears to have replaced "accident" *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 25 with "crash" 215 ILCS 5/143.24b. Nothing indicates a change to the operative object of disclosure.
- One discrepancy needs checking: the opinion's block quotation reads "personal private automobile," while its analysis paragraph quotes "personal private passenger automobile" *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶¶ 25, 27.

What the statute requires us to show. The duty attaches only to coverage "under the insured's personal private passenger automobile liability insurance policy" 215 ILCS 5/143.24b. A motor carrier's commercial auto or trucking policy is not that kind of policy on any ordinary reading.

- The First District read the text as written, including the narrower title, and refused to expand it to umbrella coverage *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶¶ 24, 27.
- That opinion is the only published construction of section 143.24b in the packet. No Second District decision conflicts with it, so it binds the DuPage circuit court.

Our best textual argument, and its weakness. The opening clause says "Any insurer insuring any person or entity" 215 ILCS 5/143.24b. One could argue the legislature contemplated entity insureds such as motor carriers.

- The answer the carrier will give is strong: that clause identifies which insurers are subject to the statute. The object of disclosure is fixed by the later phrase.
- The First District would not read in terms the legislature omitted *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 24.
- The argument is worth preserving only as a good-faith position. It is unlikely to prevail.

Context also cuts against a broad reading.

- For the neighboring sections, the Code defines a personal "policy of automobile insurance" by reference to a natural-person insured and vehicles not used in the insured's business 215 ILCS 5/143.13. Section 143.24b falls just outside the defined range (143.11 through 143.24) and does not use the defined term, so this is context, not controlling definition.
- The Fifth District declined to treat a box truck as a "private passenger automobile" under a nearby personal-lines provision *Worley v. Fender*, 2017 IL App (5th) 160110,

¶ 35.

- The supreme court treats commercial truckers as governed by the separate Commercial Transportation Law regime *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 8 (2009).

Several decisions the screening model labeled helpful construe the uninsured-motorist mandates broadly (for example, *Thounsavath v. State Farm Mutual Automobile Insurance Co.*, 2018 IL 122558, ¶ 48). They concern mandated coverage, not disclosure, and do not answer the text of section 143.24b.

A practical carve-in: the driver's own insurer. If the driver carries a personal auto policy, its insurer is an insurer "insuring any person or entity against damages arising out of a vehicular crash" 215 ILCS 5/143.24b. A compliant certified request to that insurer falls within the text 215 ILCS 5/143.24b. The statute does not require the insurer to concede that its policy covers operation of a commercial truck. The disclosure would still identify a primary layer.

I2. Remedies for nondisclosure are thin, even for personal policies.

Section 155 is unavailable to us. It belongs to insureds, not third parties. That is supreme court law *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458 (1990), followed in this district *Power Dry of Chicago, Inc. v. Bean*, 2022 IL App (2d) 210043, ¶ 49, and applied to a section 143.24b claimant *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶¶ 55, 56.

Statutory fraud and negligent misrepresentation fail.

- Consumer Fraud Act standing is lacking for a third-party claimant *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 44.
- Negligent misrepresentation failed on both the "information" exception and on the facts *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 50.

A regulatory complaint is the realistic sanction. Knowingly misrepresenting coverages to claimants is a listed improper claims practice 215 ILCS 5/154.6(a). That provision is regulatory and gives no private action *Becker-Othman v. State Farm Mutual Automobile Insurance Co.*, 2026 IL App (1st) 250037, ¶ 42, but a complaint to the Department of Insurance is a real lever.

An implied right of action is untested. An argument by analogy exists: the First District implied a right where the Code's penalties were inadequate *Cretella v. Azcon, Inc.*, 2022 IL App (1st) 211224, ¶¶ 58, 62. No published decision in the packet applies that reasoning to section 143.24b.

Common-law fraud stays open. If a carrier affirmatively misstates limits and we rely on the misstatement to our detriment, fraud remains a distinct tort *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513 (1996). The First District rejected a related misrepresentation theory on the record before it *Kim v. State Farm Mutual Automobile*

Insurance Co., 2021 IL App (1st) 200135, ¶ 50.

Bottom line. For a commercial carrier the statute does not apply, so these remedy questions matter only if the driver's personal insurer is involved.

I3. Once suit is filed, limits are discoverable.

The core rule. Rule 201(b)(1) reaches any matter relevant to the subject matter Ill. S. Ct. R. 201(b)(1), and Rule 214 reaches documents relevant to the subject matter Ill. S. Ct. R. 214. The supreme court held that interrogatories on the existence and amount of the defendant's insurance are discoverable *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957), for three reasons:

- Insurance is not a private matter between carrier and insured *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957).
- Knowing the insurance gives counsel a realistic appraisal and promotes settlement *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957).
- Discovery is not limited to admissible matter *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957).

Rule 411's bar on insurance evidence is limited to the question of negligence Ill. R. Evid. 411. It does not limit discovery, and discovery relevance is broader than trial relevance *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 22.

The carrier's likely counterargument. The supreme court's reasoning rested partly on motor vehicle statutes that make insurance serve injured persons *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957). The carrier may say that rationale does not apply because the Vehicle Code definition does not govern commercial truckers *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 8 (2009). Two responses:

- The settlement and case-evaluation rationales stand on their own *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957).
- Commercial trucks carry their own proof-of-insurance requirements. A concurrence says so *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 10 (2009), and a First District decision describes a judgment-satisfaction requirement under the former federal regime *Pratt v. Andrews*, 164 Ill. App. 3d 606 (1st Dist. 1987).

Excess layers. The supreme court's holding speaks of the "existence and amount" of the defendant's insurance without any limit to the primary layer *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957). The First District rejected an argument that insurance-related documents, including a self-insured trust, were improper discovery targets *Brown v. Advocate Health & Hospitals Corp.*, 2017 IL App (1st) 161918, ¶ 22, though that holding was limited to in camera review *Brown v. Advocate Health & Hospitals Corp.*, 2017 IL App (1st) 161918, ¶ 27.

- Layering decides real exposure. Courts enforce "other insurance" clauses that make

business and umbrella policies excess *Country Mutual Insurance Company v. Witbrod*, 2026 IL App (2d) 250314, ¶ 85.

- The defense may cite the rule that excess coverage is not legally mandated *Crowley v. Empire Fire & Marine Insurance Co.*, 2019 IL App (2d) 180752, ¶ 20. Discoverability, however, has never depended on whether coverage is mandated.
- Expect a protective-order or proportionality response for confidential self-insurance or reinsurance documents *Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶ 30. In camera review is the likely compromise *Brown v. Advocate Health & Hospitals Corp.*, 2017 IL App (1st) 161918, ¶ 27.
- Boilerplate objections to insurance interrogatories invite sanctions *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 39.

Practical step. Serve interrogatories and Rule 214 requests Ill. S. Ct. R. 214 with the complaint. Ask for every primary, excess, and umbrella policy; declarations pages; any self-insured retention or self-insurance arrangement; federal filings and endorsements; and reservation-of-rights letters.

How to use this pre-suit. We can tell the adjuster, truthfully, that withholding limits only accelerates suit, because the information will come out in the first discovery cycle.

I4. The duty to settle is the strongest pre-suit lever.

The duty can arise before suit. It arises once three things are true: a claim exists, there is a reasonable probability of an excess recovery and of liability, and there has been a demand within limits *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001). "Reasonable probability" means more likely than not *Powell v. American Service Insurance Co.*, 2014 IL App (1st) 123643, ¶ 36.

Applied to our facts. Substantial bills on a serious injury, paired with a clear-liability crash, are what the cases look for. The Fifth District found bad faith where bills alone were five times the coverage *O'Neill v. Gallant Insurance*, 329 Ill. App. 3d 1166 (5th Dist. 2002). Breach exposes the insurer to the full judgment *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513 (1996).

What the carrier will say, and our answers.

- *The duty runs to the insured, not to us* *Scroggins v. Allstate Insurance*, 74 Ill. App. 3d 1027 (1st Dist. 1979). Our answer: the insured motor carrier is the one exposed. Its interests must receive equal consideration *Browning v. Heritage Insurance*, 33 Ill. App. 3d 943 (2d Dist. 1975), and its claim can be assigned to us after an excess verdict *Browning v. Heritage Insurance*, 33 Ill. App. 3d 943 (2d Dist. 1975). Notifying the motor carrier itself of its excess exposure therefore pressures the insurer from its own customer's side.
- *No within-limits demand was ever made* *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001). This is where nondisclosure hurts us.
    - A demand above the primary limit triggers no primary-carrier duty *Crane v.*

Admiral Insurance Co., 2013 IL App (1st) 093240-B, ¶ 35, and the insurer need not open negotiations *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001), *Kavanaugh v. Interstate Fire & Casualty Co.*, 35 Ill. App. 3d 350 (1st Dist. 1975).

- Possible framing: a time-limited demand for the full limits of each applicable primary and excess policy. The packet does not test whether a demand for unstated limits is a demand "within policy limits." One Fifth District decision involved a demand framed as "the policy limits," but the amount was known there *O'Neill v. Gallant Insurance*, 329 Ill. App. 3d 1166 (5th Dist. 2002).
- The Second District's bad-faith factors start with "the existence of an offer by the plaintiff to settle within the policy limits" and include "a refusal to negotiate" *SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill. App. 3d 80, 28 (2d Dist. 2009). A documented refusal to disclose limits in the face of a limits demand fits naturally into that analysis, though no packet case makes nondisclosure a factor in itself.

Layered coverage adds pressure. The primary carrier owes the excess carriers a duty to act in good faith in settling within its limits *Schal Bovis, Inc. v. Casualty Insurance*, 314 Ill. App. 3d 562 (1st Dist. 1999). It must estimate the expected verdict in good faith and offer accordingly *Schal Bovis, Inc. v. Casualty Insurance*, 314 Ill. App. 3d 562 (1st Dist. 1999). Once limits are known, a demand at the primary limit puts the primary carrier between its insured, the excess tower, and us.

I5. Rule 224 cannot compel disclosure of limits.

The rule is narrow. Rule 224 Ill. S. Ct. R. 224 exists to identify potential defendants *Dent v. Constellation NewEnergy, Inc.*, 2022 IL 126795, ¶ 23, and its order is limited to identification *Dent v. Constellation NewEnergy, Inc.*, 2022 IL 126795, ¶ 23.

- It is unavailable once a potential defendant's identity is known *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 8 (3d Dist. 2010).
- Identity is its only use *Gaynor v. Burlington Northern & Santa Fe Railway*, 322 Ill. App. 3d 288 (5th Dist. 2001).
- A 2024 Fifth District nonprecedential order, citable as persuasive, applied the same limit where the operator of the premises was already known *Daniel v. Drury Hotels Co., LLC*, 2024 IL App (5th) 230090-U, ¶ 21.

Even the broader view does not reach limits. That view allows additional "connecting facts" to narrow the universe of defendants, but not details of wrongdoing *Mazrim v. Decatur Memorial Hospital*, 2022 IL App (4th) 210474, ¶ 26. An insurer's limits are neither identity nor a connecting fact. In this district, the petitioner must also show necessity *Doe v. Catholic Diocese*, 2015 IL App (2d) 140618, ¶ 16.

One legitimate use. If the truck's markings, lease, or brokerage leave unclear who the responsible motor carrier, owner, lessor, or broker is, Rule 224 can identify them. Limits must wait for suit.

I6. Federal filings and motor carrier regulation.

Illinois intrastate carriers. Vehicles that file proof of insurance with the Illinois Commerce Commission are exempt from the general required-policy provision 625 ILCS 5/7-601(b)(2). A concurrence ties that filing requirement to the Commercial Transportation Law and federal standards *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 10 (2009). For an Illinois carrier, the Commission filing is a public source to check.

Which policy applies. Under a lease made subject to DOT rules, the motor carrier holds exclusive possession and control of the leased truck *Argonaut Midwest Insurance Company v. Morales*, 2014 IL App (1st) 130745, ¶ 25. That points the claim, and the coverage inquiry, at the motor carrier's policy rather than an owner-operator's non-trucking policy.

An adverse decision to watch. An older First District decision held that an injured plaintiff lacked standing to litigate the coverage extended to the carrier or the driver *Pratt v. Andrews*, 164 Ill. App. 3d 606 (1st Dist. 1987). That counsels against any pre-judgment declaratory action aimed at forcing coverage disclosure. It does not affect ordinary discovery after suit.

What the packet lacks. Nothing on the federal endorsement or federal minimum limits. See Gaps.

Splits and adverse authority.

- **Section 143.24b scope.** The First District's construction is the only published authority *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 27. With no Second District decision on point, it binds the DuPage circuit court. We must confront its plain-language method *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 24. Supporting context runs the same direction: *Worley v. Fender*, 2017 IL App (5th) 160110, ¶ 35, *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 8 (2009).
- **Section 155.** Uniform across districts, including the Second, against third-party claimants: *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458 (1990), *Power Dry of Chicago, Inc. v. Bean*, 2022 IL App (2d) 210043, ¶ 49, *Kim v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (1st) 200135, ¶ 55.
- **Insurance discovery.** Binding supreme court authority supports discovery *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957). Expect protective-order and proportionality arguments *Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶ 30 and the argument that excess coverage is not mandated *Crowley v. Empire Fire & Marine Insurance Co.*, 2019 IL App (2d) 180752, ¶ 20.
- **Duty to settle.** The adverse rules are:
    - The duty runs only to the insured, with no direct action *Scroggins v. Allstate Insurance*, 74 Ill. App. 3d 1027 (1st Dist. 1979).
    - It requires a within-limits demand *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001).

    - Demands above primary limits trigger nothing *Crane v. Admiral Insurance Co.*, 2013 IL App (1st) 093240-B, ¶ 35.
    - The insurer need not initiate negotiations *Kavanaugh v. Interstate Fire & Casualty Co.*, 35 Ill. App. 3d 350 (1st Dist. 1975).

- **Rule 224.** Districts vary only in how much connecting-fact discovery they allow. Compare *Mazrim v. Decatur Memorial Hospital*, 2022 IL App (4th) 210474, ¶ 26 with *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 8 (3d Dist. 2010) and *Gaynor v. Burlington Northern & Santa Fe Railway*, 322 Ill. App. 3d 288 (5th Dist. 2001). None allows discovery of insurance.
- **Federal regulation.** The plaintiff's lack of standing to litigate the carrier's coverage *Pratt v. Andrews*, 164 Ill. App. 3d 606 (1st Dist. 1987).
- **Do not rely on the First District's Zurich decision.** Its holding that the Vehicle Code's omnibus definition reaches commercial truckers *Zurich American Insurance Co. v. Key Cartage, Inc.*, 386 Ill. App. 3d 1, 29 (1st Dist. 2008) was rejected in reasoning by the supreme court *Zurich American Insurance Company v. Key Cartage, Inc.*, 236 Ill. 2d 117, 6, 8 (2009).

Gaps.

- **Section 143.24b**
    - No decision in the packet squarely addresses whether the statute's person-or-entity clause extends section 143.24b to commercial or motor carrier policies. None decides whether section 143.13's definitions apply to section 143.24b, and subsection (h) of section 143.13, on commercial excess and umbrella policies, is cut off in the packet.
    - The packet does not hold the text of section 143.13a, on which the box-truck decision turned.
    - No legislative history on section 143.24b.
    - No published decision decides whether an implied private right of action exists under section 143.24b. A pre-2021 nonprecedential order on that question is in the packet but is not citable.

- **Discovery after suit**
    - No Illinois decision in the packet expressly addresses post-suit discovery of excess or umbrella policies, self-insured retentions, or reinsurance in a trucking case.
    - The packet does not include the text of the Rule 213(j) standard motor vehicle interrogatories, the Rule 213 or 214 committee comments, or Rule 222's initial-disclosure provisions as they relate to insurance.

- **Duty to settle**
    - Nothing decides whether a demand for "the policy limits," without a stated

amount, triggers the duty to settle.
  - Nothing treats an insurer's refusal to disclose limits as evidence of bad faith.
  - Nothing addresses time-limited demands.

- **Federal and Commission filings**

  - The packet contains no citable Illinois authority on the federal motor carrier endorsement, the federal minimum financial-responsibility levels, the federal licensing and insurance database, or the Commerce Commission's insurance rules and statutory filing provisions.
  - If the case is removed to federal court, the federal initial-disclosure rule on insurance agreements would apply. That is outside the packet.

- **Other**

  - The Rule 224 statute block contains no rule text, so the rule's language here comes only from judicial quotation.
  - The packet does not address the ethical limits on contacting the insured motor carrier directly about its excess exposure (Rules of Professional Conduct 4.2 and 4.3).
  - Section 7-601 is amended effective January 1, 2027. The amended text is not in the packet.

Table of authorities

Cases

Argonaut Midwest Insurance Company v. Morales, 2014 IL App (1st) 130745	7, 13
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Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918	5, 10, 11
Browning v. Heritage Insurance, 33 Ill. App. 3d 943 (2d Dist. 1975)	6, 11
Carlson v. Jerousek, 2016 IL App (2d) 151248	5, 11, 13
Country Mutual Insurance Company v. Witbrod, 2026 IL App (2d) 250314	5, 11
Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996)	4, 6, 9, 11
Crane v. Admiral Insurance Co., 2013 IL App (1st) 093240-B	6, 11, 14
Cretella v. Azcon, Inc., 2022 IL App (1st) 211224	4, 9
Crowley v. Empire Fire & Marine Insurance Co., 2019 IL App (2d) 180752	5, 11, 13
Daniel v. Drury Hotels Co., LLC, 2024 IL App (5th) 230090-U Rule 23 order: persuasive only (Rule 23(e)(1))	12
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Gaynor v. Burlington Northern & Santa Fe Railway, 322 Ill. App. 3d 288 (5th Dist. 2001)	7, 12, 14
Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001)	5, 11, 12, 13
Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350 (1st Dist. 1975)	6, 12, 14
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O'Neill v. Gallant Insurance, 329 Ill. App. 3d 1166 (5th Dist. 2002)	6, 11, 12
People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957)	4, 5, 10, 13
Powell v. American Service Insurance Co., 2014 IL App (1st) 123643	6, 11
Power Dry of Chicago, Inc. v. Bean, 2022 IL App (2d) 210043	3, 9, 13
Pratt v. Andrews, 164 Ill. App. 3d 606 (1st Dist. 1987)	7, 10, 13, 14
Schal Bovis, Inc. v. Casualty Insurance, 314 Ill. App. 3d 562 (1st Dist. 1999)	6, 12
Scroggins v. Allstate Insurance, 74 Ill. App. 3d 1027 (1st Dist. 1979)	6, 11, 13
SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange, 395 Ill. App. 3d 80 (2d Dist. 2009)	6, 12

Thounsavath v. State Farm Mutual Automobile Insurance Co., 2018 IL 122558	9
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Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458 (1990)	3, 9, 13
Zagorski v. Allstate Insurance Co., 2016 IL App (5th) 140056	5, 10, 11
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215 ILCS 5/143.24b — Any insurer insuring any person or entity against damages arising out of a vehicular crash shall disclose the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records. The disclosure shall be confidential and available only to the claimant, his attorney and personnel in the office of the attorney entitled to access to the claimant's files. The insurer shall forward the information to the party requesting it by certified mail, return receipt requested, within 30 days of receipt of the request	2, 3, 8, 9
215 ILCS 5/154.6 — Acts constituting improper claims practice	4, 9
625 ILCS 5/7-601 — Required liability insurance policy	7, 13

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Ill. S. Ct. R. 214 — Discovery of Documents, Objects, and Tangible Things--Inspection of Real Estate	2, 4, 10, 11
Ill. S. Ct. R. 224 — Discovery Before Suit to Identify Responsible Persons and Entities	2, 12

Page numbers are the memo pages where each authority is cited; each is a link. Each authority links to its place in the authorities that follow.

Verification

This memo cites **33** decisions in **129** citations, and **8** statutes or rules.

Every citation in this memo was written by software from the archive. None was typed by an AI. Each citation is rendered from the index's record of the decision and points to a passage of the decision's own text that a local model quoted and a mechanical check verified.

Quotations: 80, each matched word for word inside the passage it cites.

Paragraph pins (¶): 63, each taken from the court's own paragraph labels in the decision's text. **Page pins:** 0 set by Gregory A. Patricoski in review and not machine-checked; 55 citation(s) of reporter-era decisions carry no pin.

Rule 23 orders cited (status from the court's metadata in the index):

- Daniel v. Drury Hotels Co., LLC, 2024 IL App (5th) 230090-U: Rule 23 order: persuasive only (Rule 23(e)(1))

Treatment flags from the index as of November 1, 2026:

- Browning v. Heritage Insurance, 33 Ill. App. 3d 943 (2d Dist. 1975): declined to follow by Chandler v. Illinois Central Railroad, 333 Ill. App. 3d 463

These are evidence from the index's citation analysis, not a citator.

Support check (a model's judgment, not a verification): of 130 cited sentences, 89 rated supports, 17 partly, 0 does not support, 24 not rated.

Review: every one of the 130 propositions and 1 sections was reviewed against its cited passage and marked Agree by Gregory A. Patricoski on November 1, 2026.

Draft version: 1 · SHA-256 92cbb91446e3ad60e3a24c8ffda09710f841a11255ef235dfeec367f54dd4d3e
Built: 2026-11-01 11:01:16 · citation check: 0 red, 61 yellow

_____

Gregory A. Patricoski

Coverage and method

What the archive holds

Court	Kind	Decisions	From	To
Appellate Court	opinions from the courts' website	14,295	1996-09-05	2026-10-30
Appellate Court	official reporter opinions	97,183	1771-10-12	2011-05-13
Appellate Court	reporter table entries	10,774	1855-12-04	2009-07-14
Appellate Court	Rule 23 orders	39,907	2011-01-03	2026-10-30
Supreme Court	opinions from the courts' website	1,431	1998-03-19	2026-10-29
Supreme Court	official reporter opinions	48,027	1819-12	2010-02-19
Supreme Court	reporter table entries	351	1831-12	2007-03
All		**211,968**		

Rule 23 orders begin 2011-01-03. The archive is current through 2026-11-01 (the last finished collection run); the index's figures above were read on 2026-11-01.

What this research searched

Scope: civil, Supreme + Appellate, types: opinion,rule23,reporter. Every query of the research plan ran against every decision in scope (keyword and meaning search), the cases the plan named were looked up, and citations were followed from the best hits; the searches ran on 2026-10-31.

Issue	Found by search	Named	From citations	Candidates
[I1] Whether section 143.24b's limits-disclosure duty reaches commercial auto or motor carrier policies.	455	3	33	489
[I2] Remedies available to a third-party claimant when an insurer violates section 143.24b.	628	3	36	665
[I3] Discoverability of the existence and amount of defendant's liability insurance, including excess layers.	842	3	36	879
[I4] Insurer's duty to settle within limits and its bearing on nondisclosure of limits.	447	3	34	483
[I5] Pre-suit discovery under Rule 224 to obtain insurance or policy-limit information.	285	3	47	334
[I6] Motor carrier federal financial-responsibility filings and MCS-90 endorsement in Illinois litigation.	340	3	39	380

What was read

2,295 distinct candidate decisions were on the reading list. A local model read **193** of them (a quick read of the passages the searches matched), best first, stopping at the best 40 per issue, and gave **168** a full read, every paragraph, in 566 parts. It offered 2,091 quotations that a mechanical check found in the decisions' text.

Yield by depth, the share of decisions read at each rank that the model rated 4 or 5 (whether reading deeper was still producing strong decisions):

Ranks	Read	Rated 4–5	Share
1–10	43	41	95%
11–25	76	65	86%
26–50	74	62	84%

Statutes and rules

Provision	In force on	Version	Changed after that date
215 ILCS 5/143.24b — Any insurer insuring any person or entity against damages arising out of a vehicular crash shall disclose the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records. The disclosure shall be confidential and available only to the claimant, his attorney and personnel in the office of the attorney entitled to access to the claimant's files. The insurer shall forward the information to the party requesting it by certified mail, return receipt requested, within 30 days of receipt of the request (cited)	2026-10-31	2023-07-01 to today	no change recorded
215 ILCS 5/143.13 — Definition of terms used in Sections 143.11 through 143.24 (cited)	2026-10-31	2001-06-28 to today	no change recorded
625 ILCS 5/12-707.01 — Liability insurance	2026-10-31	2026-07-01 to today	no change recorded
625 ILCS 57/10 — Insurance	2026-10-31	2023-07-01 to today	no change recorded

215 ILCS 5/143a-2 — (1) Additional uninsured motor vehicle coverage. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be renewed or delivered or issued for delivery in this State with respect to any motor vehicle designed for use on public highways and required to be registered in this State unless uninsured motorist coverage as required in Section 143a of this Code is included in an amount equal to the insured's bodily injury liability limits unless specifically rejected by the insured as provided in paragraph (2) of this Section. Each insurance company providing the coverage must provide applicants with a brief description of the coverage and advise them of their right to reject the coverage in excess of the limits set forth in Section 7-203 of the Illinois Vehicle Code. The provisions of this amendatory Act of 1990 apply to policies of insurance applied for after June 30, 1991	2026-10-31	2023-07-01 to today	no change recorded
625 ILCS 5/7-317 — "Motor vehicle liability policy" defined	2026-10-31	2023-07-01 to today	no change recorded
625 ILCS 5/7-603.5 — Electronic verification of a liability insurance policy	2026-10-31	2026-08-21 to today	no change recorded
215 ILCS 5/155 — Attorney fees	2026-10-31	2004-01-01 to today	no change recorded
815 ILCS 505/2 — Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act	2026-10-31	earliest held to today	no change recorded
215 ILCS 105/8 — Minimum benefits	2026-10-31	2012-07-13 to today	no change recorded
215 ILCS 5/155.35 — Insurance compliance self-evaluative privilege	2026-10-31	2025-01-01 to today	no change recorded
215 ILCS 5/154.6 — Acts constituting improper claims practice (cited)	2026-10-31	2022-07-01 to today	no change recorded

215 ILCS 5/209 — Proof and allowance of claims	2026-10-31	2010-08-20 to today	no change recorded
735 ILCS 5/2-2301 — Settlement of claims; payment	2026-10-31	2014-01-01 to today	no change recorded
Ill. S. Ct. R. 201 — General Discovery Provisions (cited)	2026-10-31	2023-03-17 to today	no change recorded
Ill. S. Ct. R. 213 — Written Interrogatories to Parties	2026-10-31	2018-01-01 to today	no change recorded
Ill. S. Ct. R. 214 — Discovery of Documents, Objects, and Tangible Things--Inspection of Real Estate (cited)	2026-10-31	2018-07-01 to today	no change recorded
Ill. R. Evid. 411 — Liability Insurance (cited)	2026-10-31	2011-01-01 to today	no change recorded
Ill. S. Ct. R. 412 — Disclosure to Accused	2026-10-31	earliest held to today	no change recorded
Ill. S. Ct. R. 415 — Regulation of Discovery	2026-10-31	2020-10-23 to today	no change recorded
Ill. S. Ct. R. 722 — Limited Liability Legal Practice	2026-10-31	2004-03-15 to today	no change recorded
Ill. R. Prof'l Conduct (2010) R. supreme-court-order-m.r.-3140 — Supreme Court Order M.R. 3140	2026-10-31	2010-01-01 to today	no change recorded
Ill. S. Ct. R. 224 — Discovery Before Suit to Identify Responsible Persons and Entities (cited)	2026-10-31	2018-01-01 to today	no change recorded
215 ILCS 5/537.2 — Obligation of Fund	2026-10-31	2023-06-30 to today	no change recorded
215 ILCS 5/534.3 — Covered claim; unearned premium defined	2026-10-31	2025-08-15 to today	no change recorded
Ill. S. Ct. R. 222 — Limited and Simplified Discovery in Certain Cases	2026-10-31	2011-01-01 to today	no change recorded
Ill. S. Ct. R. 89 — Discovery	2026-10-31	1996-03-26 to today	no change recorded
Ill. S. Ct. R. 411 — Applicability of Discovery Rules	2026-10-31	earliest held to today	no change recorded
625 ILCS 5/7-601 — Required liability insurance policy (cited)	2026-10-31	2019-01-01 to 2027-01-01	P.A. 104-854, eff. 2027-01-01
215 ILCS 5/143a — Uninsured and hit-and-run motor vehicle coverage	2026-10-31	2023-07-01 to today	no change recorded

625 ILCS 5/3-707 — Operation of uninsured motor vehicle - penalty	2026-10-31	2022-01-01 to today	no change recorded

Text and dates from the index's law library (ILGA's text and the rules as the Supreme Court posts them), unofficial; verify against the official source before filing.

What this research cannot tell you: whether a petition for leave to appeal is pending or has been granted in any decision cited; legislation or rule changes after the run date; and citator status. Check every authority in KeyCite or Shepard's before filing.

Propositions and the passages they rest on

Every cited sentence of the memo beside the exact passage text it relies on, with the reviewer's mark and the support check's rating (a model's judgment). A reader can check the whole memo here and open only the decisions that look thin.

1. **Question presented.** Does section 143.24b require pre-suit disclosure of a commercial motor carrier's liability limits? [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

2. **The statute is limited to personal auto policies.** Section 143.24b requires disclosure of coverage "under the insured's personal private passenger automobile liability insurance policy" . The only published decision construing it read that language by its plain terms and refused to extend it to umbrella coverage. That First District opinion binds the DuPage circuit court, because no Second District decision conflicts with it. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

3. **After suit, limits are discoverable.** Under the supreme court's insurance-discovery precedent and Rules 201(b)(1) and 214 , the existence and amount of the defendant's insurance can be obtained in discovery. Nothing in the packet exempts insurance documents, including self-insurance arrangements, though no packet decision squarely addresses excess layers. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. S. Ct. R. 201 (statute or rule; its text follows the decisions)

Ill. S. Ct. R. 214 (statute or rule; its text follows the decisions)

4. **Before suit, Rule 224 does not help.** It reaches only the identity of potential defendants. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. S. Ct. R. 224 (statute or rule; its text follows the decisions)

5. Section 143.24b requires an insurer to disclose "the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy" upon receipt of a certified letter and a description of the injuries, with a statement of medical bills and copies of medical records. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

6. The insurer must forward the disclosure "by certified mail, return receipt requested, within 30 days of receipt of the request," and the disclosure is confidential to the claimant and counsel's office. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

7. The First District held that the plain language of section 143.24b requires disclosure of potentially available coverage under "personal private passenger automobile liability insurance" policies, and noted that the section's title refers to the disclosure "of dollar amount of automobile liability coverage." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶27 says the plain language requires disclosure under personal private passenger automobile policies and notes the narrower title; the quotations are exact.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 27: ¶ 27 The plain and unambiguous language of section 143.24b requires disclosure of potentially available coverage under "personal private passenger automobile liability insurance polic[ies]." Id. Contrary to Kim's argument on appeal, the title of that section does not broadly refer to "liability coverage" but more narrowly refers to the "[d]isclosure of dollar amount of automobile liability coverage." (Emphasis added.) Id. It is well settled in Illinois that a personal automobile insurance policy is not the same as an umbrella policy. In Hartbarger v. Country Mutual Insurance Co., 107 Ill. App. 3d 391, 394 (1982), the plaintiff argued that an umbrella policy was an automobile policy and thus was required to provide uninsured motorist coverage under the Insurance Code. This court rejected that position, holding that "an umbrella liability policy is entirely different from an automobile policy." Id. at 396. This court quoted approvingly a decision from the Alabama Supreme Court, which stated: " 'Automobile liability policies and motor vehicle liability policies insure against the risk of loss through the operation of specific automobiles. An umbrella policy, on the other hand, is fundamentally excess insurance designed to protect against a catastrophic loss. Before an umbrella policy is issued, a primary policy (the "underlying policy") must be in existence ***. *** The umbrella policy issued by Trinity Universal is an inherently different type of insurance from an automobile or motor vehicle liability policy ***.' " Id. at 395 (quoting Trinity Universal Insurance Co. v. Metzger, 360 So. 2d 960, 962 (Ala. 1978)). See also Mei Pang v. Farmers Insurance Group, 2014 IL App (1st) 123204, ¶ 11 ("[i]n Illinois, umbrella policies and primary auto policies are distinct" and an "umbrella policy does not provide the same type of coverage as an automobile policy"); 215 ILCS 5/143.13 (West 2010) (" '[p]olicy of automobile insurance' " defined separately from " '[a]ll other policies of personal lines' ").

8. Addressing whether section 143.24b required disclosure of an umbrella policy, the First District reasoned that "a personal automobile insurance policy is not the same as an umbrella policy." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶24 frames the umbrella-policy question, and ¶27 states that a personal auto policy is not the same as an umbrella policy.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 24: ¶ 24 This claim presents a question of law-i.e., whether section 143.24b of the Insurance Code requires disclosure of an umbrella policy as a "private personal passenger automobile liability insurance policy." We review de novo both questions of law and issues of statutory construction. Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co., 215 Ill. 2d 121, 127-28 (2005); Best Buy Stores, L.P. v. Department of Revenue, 2020 IL App (1st) 191680, ¶ 17. When construing a statute, the court attempts to ascertain and give effect to the intent of the legislature, which "is best determined from the plain and ordinary meaning of the language used in the statute." Rosenbach v. Six Flags Entertainment Corp.,

2019 IL 123186, ¶ 24. “When the statutory language is plain and unambiguous, we may not depart from the law’s terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law.” Id. Only when a statute is ambiguous may a court look beyond its express language and rely on “extrinsic aids,” such as legislative history. Nowak v. City of Country Club Hills, 2011 IL 111838, ¶¶ 11, 13.

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 27: ¶ 27 The plain and unambiguous language of section 143.24b requires disclosure of potentially available coverage under “personal private passenger automobile liability insurance polic[ies].” Id. Contrary to Kim’s argument on appeal, the title of that section does not broadly refer to “liability coverage” but more narrowly refers to the “[d]isclosure of dollar amount of automobile liability coverage.” (Emphasis added.) Id. It is well settled in Illinois that a personal automobile insurance policy is not the same as an umbrella policy. In Hartbarger v. Country Mutual Insurance Co., 107 Ill. App. 3d 391, 394 (1982), the plaintiff argued that an umbrella policy was an automobile policy and thus was required to provide uninsured motorist coverage under the Insurance Code. This court rejected that position, holding that “an umbrella liability policy is entirely different from an automobile policy.” Id. at 396. This court quoted approvingly a decision from the Alabama Supreme Court, which stated: “ ‘Automobile liability policies and motor vehicle liability policies insure against the risk of loss through the operation of specific automobiles. An umbrella policy, on the other hand, is fundamentally excess insurance designed to protect against a catastrophic loss. Before an umbrella policy is issued, a primary policy (the “underlying policy”) must be in existence ***. *** The umbrella policy issued by Trinity Universal is an inherently different type of insurance from an automobile or motor vehicle liability policy ***.’ ” Id. at 395 (quoting Trinity Universal Insurance Co. v. Metzger, 360 So. 2d 960, 962 (Ala. 1978)). See also Mei Pang v. Farmers Insurance Group, 2014 IL App (1st) 123204, ¶ 11 (“[i]n Illinois, umbrella policies and primary auto policies are distinct” and an “umbrella policy does not provide the same type of coverage as an automobile policy”); 215 ILCS 5/143.13 (West 2010) (“ ‘[p]olicy of automobile insurance’ ” defined separately from “ ‘[a]ll other policies of personal lines’ ”).

9. In construing section 143.24b, that court applied the rule that a court "may not depart from the law’s terms by reading into it exceptions, limitations, or conditions the legislature did not express." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶24 quotes and applies the plain-language rule from Rosenbach as its standard for construing 143.24b.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 24: ¶ 24 This claim presents a question of law-i.e., whether section 143.24b of the Insurance Code requires disclosure of an umbrella policy as a “private personal passenger automobile liability insurance policy.” We review de novo both questions of law and issues of statutory construction. Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co., 215 Ill. 2d 121, 127-28 (2005); Best Buy Stores, L.P. v. Department of Revenue, 2020 IL App (1st) 191680, ¶ 17. When construing a statute, the court attempts to ascertain and give effect to the intent of the legislature, which “is best determined from the plain and ordinary meaning of the language used in the statute.” Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 24. “When the statutory language is plain and unambiguous, we may not depart from the law’s terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law.” Id. Only when a statute is ambiguous may a court look beyond its express language and rely on “extrinsic aids,” such as legislative history. Nowak v. City of Country Club Hills, 2011 IL 111838, ¶¶ 11, 13.

10. For sections 143.11 through 143.24, the Insurance Code defines a "policy of automobile insurance" as one insuring a natural person whose designated vehicles include those "which is not used in the occupation, profession or business of the

insured." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.13 (statute or rule; its text follows the decisions)

11. The Fifth District held that the box truck the plaintiff was driving was not a "private passenger automobile" within the meaning of section 143.13a. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶35 concludes the box truck was not a 'private passenger automobile' under section 143.13a.)

Worley v. Fender, 2017 IL App (5th) 160110, ¶ 35: ¶ 35 We conclude the box truck plaintiff was driving at the time of the accident was not a “private passenger automobile” within the meaning of section 143.13a of the Code. 215 ILCS 5/143.13a (West 2008). For this reason, the step-down limits of the policy at issue do not violate Illinois law or public policy.

12. The supreme court held that the Vehicle Code's definition of a motor vehicle liability policy, including its omnibus requirement, "does not apply to commercial truckers regulated under the Commercial Transportation Law." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The court concludes that the 7-317 definition, including the omnibus requirement, does not apply to commercial truckers under the CTL.)

Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009), p. 8: West Bend does not contend that the foregoing contradictions and inconsistencies do not exist, but maintains that any inconsistencies can be resolved under principles of statutory construction. This contention misses the point. In construing legislation we presume that the legislature did not intend absurd, inconvenient, or unjust results. People ex rel. Sherman v. Cryns, 203 Ill. 2d 264, 280 (2003). The existence of the inconsistencies, by themselves, establishes that the legislature could not have intended for the term “Act” in section 7-317 to include the Commercial Transportation Law. Accordingly, we conclude that the definition of motor vehicle liability insurance policies set forth in section 7-317, including the omnibus requirement in section 7-317(b)(2), does not apply to commercial truckers regulated under the Commercial Transportation Law.

13. The supreme court has held that "the remedy embodied in section 155 of the Insurance Code does not extend to third parties." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Yassin states that the section 155 remedy does not extend to third parties and applies that to the plaintiff.)

Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458 (1990), no ¶ number: As a general rule, the remedy embodied in section 155 of the Insurance Code extends only to the party insured (Stamps v. Caldwell (1971), 133 Ill. App. 2d 524, 528) and policy assignees (see Loyola University Medical Center v. Med Care HMO (1989), 180 Ill. App. 3d 471; Aabye v. Security-Connecticut Life Insurance Co. (N.D. Ill. 1984), 586 F. Supp. 5). Therefore, the remedy embodied in section 155 of the Insurance Code does not extend to third parties. See Loyola, 180 Ill. App. 3d 471; Robertson v. Travelers Insurance Co. (1981), 100 Ill. App. 3d 845; Scroggins v. Allstate Insurance Co. (1979), 74 Ill. App. 3d 1027; Stamps, 133 Ill. App. 2d 524.

14. The Second District has stated the same rule: "The remedy in section 155 of the Insurance Code does not extend to third parties." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Power Dry ¶49

states the rule verbatim and applies it to dismiss the section 155 count.)

> **Power Dry of Chicago, Inc. v. Bean, 2022 IL App (2d) 210043, ¶ 49**: ¶ 49 Similarly, without a valid assignment of benefits under the policy, the asserted claim in count V for bad faith under section 155(1)(a)-(c) of the Insurance Code against Lutheran Mutual was also properly dismissed. Section 155(1) of the Insurance Code provides: "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155(1)(a)-(c) (West 2018). The remedy embodied in section 155 of the Insurance Code extends only to the party insured and policy assignees. Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458, 466 (1990). The remedy in section 155 of the Insurance Code does not extend to third parties. Id. Again, without a valid assignment of benefits under the policy, CWFR has no claim under section 155 of the Insurance Code. There was no error in dismissing count V of the complaint.

15. In a case asserting a section 143.24b violation, the First District held that section 155 penalties are "only available to the insured, not to third parties who are strangers to the policy," and affirmed summary judgment for the insurer on that claim. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶55 states the rule, ¶56 affirms summary judgment, and the claim arose from alleged nondisclosure under 143.24b.)

> **Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 55**: ¶ 55 Section 155 permits a cause of action when "there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable." 215 ILCS 5/155(1) (West 2010). Binding Illinois Supreme Court precedent holds that penalties under section 155 are only available to the insured, not to third parties who are strangers to the policy. 3 See Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458, 466 (1990) (dismissing plaintiff's third-party claim under section 155); Stamps v. Caldwell, 133 Ill. App. 2d 524, 528 (1971) (same); Roppo, 100 F. Supp. 3d at 652 ("the remedy embodied in section 155 of the Insurance Code does not extend to third parties").
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> **Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 56**: ¶ 56 We conclude that the circuit court properly granted summary judgment in State Farm's favor with respect to Kim's claim for section 155 fees and costs.

16. The same court held that the third-party claimant lacked standing under the Consumer Fraud Act. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶44 holds that the third-party claimant lacks Consumer Fraud Act standing.)

> **Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 44**: ¶ 44 Kim also lacks standing to sue under the Consumer Fraud Act. A plaintiff seeking to sue under the Consumer Fraud Act must either be a consumer or satisfy the "consumer nexus" test, which requires the plaintiff to have suffered damages resulting from conduct directed toward the market or which otherwise implicates consumer protection concerns. Bank One Milwaukee v. Sanchez, 336 Ill. App. 3d 319, 321-22 (2003). Kim, however, is a third-party beneficiary of an insurance policy issued by a defendant, and courts interpreting Illinois law have consistently rejected this theory of standing. See McCarter v. State

Farm Mutual Automobile Insurance Co., 130 Ill. App. 3d 97, 101 (1985) (holding third-party claimant under insurance policy was not a consumer under the Consumer Fraud Act); Roppo v. The Travelers Cos., 100 F. Supp. 3d 636, 651 (N.D. Ill. 2015) (rejecting consumer nexus theory in similar case). Kim's reliance on Elder v. Coronet Insurance Co., 201 Ill. App. 3d 733, 749 (1990), to support her argument for expanding the Consumer Fraud Act's scope is misplaced. Elder, as a matter involving a first-party claim by an insured against his own insurer, distinguished itself from McCarter, which involved a third-party claimant. Id. The other authorities cited by Kim do not address the issue of standing under the Consumer Fraud Act or even any claim under it. Rather, each of those cases involved a declaratory judgment action brought by the third-party claimant against an insurer. See, e.g., State Farm Fire & Casualty Co. v. Perez, 387 Ill. App. 3d 549 (2008); Holmes v. Federal Insurance Co., 353 Ill. App. 1062 (2004); Reagor v. Travelers Insurance Co., 92 Ill. App. 3d 99 (1980); M.F.A. Mutual Insurance Co. v. Cheek, 34 Ill. App. 3d 209 (1975).

17. The same court held that a negligent misrepresentation claim was unavailable against the insurer. Its reasons were that selling insurance policies is not selling information under that tort's exception, and that the record showed no actionable misstatement, reliance, or injury. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶50 gives both reasons: the sale of insurance is not the sale of information, and the record shows no misstatement, reliance, or injury.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 50: ¶ 50 In addition, a negligent misrepresentation claim may only be brought against a defendant who is "in the business of supplying information for the guidance of others in their business dealings" and provided untrue information to the plaintiff. Id. at 95. The sale of insurance policies is not the sale of "information," as contemplated under this exception. See First Midwest Bank, N.A. v. Stewart Title Guaranty Co., 218 Ill. 2d 326, 341 (2006); see also Gondeck v. A Clear Title & Escrow Exchange, LLC, 47 F. Supp. 3d 729, 749 (N.D. Ill. 2014) ("An insurance policy is 'a noninformational product' for purposes of the economic loss doctrine."). Moreover, defendants were not otherwise "in the business" of providing information to Kim to guide her business dealings, especially given the adverse nature of their relationship and the fact that Kim was not a State Farm policyholder. Nor can Kim establish any of the other elements of this tort based on the uncontroverted record, which shows there was no actionable misstatement or omission, reliance, or injury. See Freedberg, 2012 IL App (1st) 110938, ¶ 36 (no recovery for negligent misrepresentation absent proof plaintiff relied on misstatement to her detriment); Fox Associates, Inc., 334 Ill. App. 3d at 94-96.

18. The Insurance Code lists as an improper claims practice "Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/154.6 (statute or rule; its text follows the decisions)

19. The First District held that section 154.6 creates no private right of action and is "regulatory in nature." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶42 says section 154.6 creates no private right of action and, quoting Passarelli, is regulatory in nature.)

Becker-Othman v. State Farm Mutual Automobile Insurance Co., 2026 IL App (1st) 250037, ¶ 42: ¶ 42 Section 154.6 of the Insurance Code likewise creates no private right of action. That provision identifies improper claims practices by insurers, while sections 154.7 and 154.8 authorize the Director of Insurance to enforce the Code and impose penalties. See 215 ILCS 5/154.5 to 154.8 (West 2024).

Accordingly, section 154.6 “does not give rise to a private remedy or cause of action by a policyholder against an insurer but is instead regulatory in nature.” American Service Insurance Co. v. Passarelli, 323 Ill. App. 3d 587, 590 (2001).

20. The First District implied a private right of action under a different Insurance Code provision because the Code's own penalties were "too minimal to serve as a deterrent." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (Inadequate penalties were one ground under the necessity factor; the court also relied on the retaliation context and the inadequacy of the director's enforcement powers, so 'because' oversimplifies.)

Cretella v. Azcon, Inc., 2022 IL App (1st) 211224, ¶ 58: ¶ 58 Like the X-Ray Act at issue in Rodgers, the Insurance Code does not expressly provide sanctions and remedies for violations of section 224.1. As stated above (supra ¶ 51), the Insurance Code provides authority for the director to conduct investigations and hearings to determine whether any person has violated any provision of Illinois’s insurance laws. 215 ILCS 5/401 (West 2020). This provision, however, is not sufficient to enable employees to freely exercise their choice to consent to COLI coverage and prevent and punish retaliatory action against employees who refuse to consent. A violation of the Insurance Code is a petty offense, which is punishable by a fine of $75 to $1000 (730 ILCS 5/5-4.5-75(a) (West 2020)) and is “any offense for which a sentence of imprisonment is not an authorized disposition” (id. § 5-1-17). These penalties are too minimal to serve as a deterrent and assure compliance with section 224.1.

Cretella v. Azcon, Inc., 2022 IL App (1st) 211224, ¶ 62: ¶ 62 Protecting the Illinois public from retaliation in the workplace for exercising their right to reject COLI coverage is a matter of ongoing concern for the General Assembly. While the General Assembly acknowledges the benefits of the use of COLI coverage in the workplace, it limited the legality of this coverage to the requirements that the employee must voluntarily consent and cannot face any retaliation for refusing to consent. We conclude that implying a private right of action for retaliatory discharge in violation of section 224.1 of the Insurance Code is necessary to provide an adequate remedy because the statutory requirements of voluntary employee consent and no retaliation for a refusal to consent would be ineffective unless such an action is implied.

21. The supreme court held that section 155 does not preempt a separate tort for insurer misconduct, so "a plaintiff may bring an independent tort action, such as common law fraud, for insurer misconduct" where its elements are alleged and proved. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passage supports an independent tort such as fraud, but it does not use the word 'preempt'; that holding sits in a different paragraph.)

Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996), no ¶ number: In summary, an insurer’s conduct may give rise to both a breach of contract action and a separate and independent tort action. Kelsay, 74 Ill. 2d at 187. Mere allegations of bad faith or unreasonable and vexatious conduct, without more, however, do not constitute such a tort. Courts therefore should look beyond the legal theory asserted to the conduct forming the basis for the claim. Kush, 853 F.2d at 1385; Zakarian, 652 F. Supp. at 1136; Combs, 146 Ill. App. 3d at 963-64. In cases where a plaintiff actually alleges and proves the elements of a separate tort, a plaintiff may bring an independent tort action, such as common law fraud, for insurer misconduct.

22. Rule 201(b)(1) permits a party to obtain by discovery "full disclosure regarding any matter relevant to the subject matter involved in the pending action." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. S. Ct. R. 201 (statute or rule; its text follows the decisions)

23. Rule 214 permits a written request to produce specified documents whenever their nature, contents, or condition is "relevant to the subject matter of the action." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. S. Ct. R. 214 (statute or rule; its text follows the decisions)

24. Under the predecessor civil practice rules, the supreme court held that discovery interrogatories "respecting the existence and amount of defendant's insurance" may be deemed related to the merits, because among other things they "afford a sounder basis for the settlement of disputes." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage says the interrogatories may be deemed related to the merits under former Rules 19-11 and 19-4, giving the quoted settlement rationale among others.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: On the basis of this analysis, it is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be "related to the merits of the matter in litigation," as provided in Civil Practice Rules 19 - 11 and 19 - 4, since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for, and afford a sounder basis for the settlement of disputes. We believe that such a construction is in accordance with the intention of the framers of the amended Rules to give a broader scope to the practice of discovery and thereby enable attorneys to better prepare and evaluate their cases.

25. The supreme court reasoned that liability insurance "is not merely a private matter for the sole knowledge of the carrier and the insured." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The quotation is exact; the passage grounds the point in the statutes, which the sentence does not deny.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: Thus, under our statutes, as in California, liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of insured's motor vehicle. (Superior Ins. Co. v. Superior Court, 235 P.2d 833.) Therefore, we find more cogent the reasoning of the courts in the Brackett and Maddox cases, cited by respondent, that such statutory requirements render insurance policies relevant to the litigation against the insured defendant, in that they apprise injured plaintiffs of rights in the matter of litigation of which they might not otherwise avail themselves. It is not inconceivable that a plaintiff with serious injuries would settle a substantial judgment against a defendant of modest means for a fractional sum, simply because he had no knowledge of any additional rights against the insurer. Thus, to deprive an injured party from learning of his rights against an insurer would, in effect, nullify the benevolent purpose of such statutes, and permit insurance companies to avoid their statutory obligation.

26. The supreme court reasoned that knowledge of the defendant's insurance "would also lead to more purposeful discussions of settlement." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The quotation is exact and is part of the court's reasoning.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: In determining whether liability

insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, “Judges need not be more naive than other men.” Inasmuch as the insurance company is virtually substituted as a party, (Maddox v. Grauman, 265 S.W.2d 939; dissent in Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649, 658,) as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff’s attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business. This aspect is most significant in terms of effective judicial administration in coping with today’s congested dockets which are largely attributable to the increasing volume of personal injury litigation.

27. The supreme court rejected authority limiting pretrial discovery to matters admissible in evidence, adding: "We do not imply that answers to interrogatories can be brought to the attention of the jury." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage rejects the cases limiting discovery to admissible matters and contains the quoted disclaimer about the jury.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: In the light of this approach, we must reject at once as authority those cases limiting pretrial discovery to matters admissible in evidence (Goheen v. Goheen, and Bern v. Best) as being contrary to both the terms and intent of the Rule. We do not imply that answers to interrogatories can be brought to the attention of the jury.

28. Evidence that a person was or was not insured "is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. R. Evid. 411 (statute or rule; its text follows the decisions)

29. The First District rejected a defendant's contention that a request for its insurance documents was improper. It noted that the defendant cited no authority that "plainly exempts it from production of its insurance-related documents." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶22 rejects Advocate's contention and contains the quoted sentence.)

Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918, ¶ 22: ¶ 22 In sum, we reject Advocate’s contention that we “need not reach the question of in camera review because [the plaintiff’s] document request seeking irrelevant insurance policies was improper in the first instance according to Fisher.” Advocate has not cited any case, statute, or rule that plainly exempts it from production of its insurance-related documents.

30. That decision involved a self-insured trust agreement, was expressly "limited to the propriety of in camera review," and noted that a protective order limited use of the documents. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶27 addresses the self-insured trust, contains the 'limited to the propriety of in camera review' language, and notes the protective order.)

Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918, ¶ 27: ¶ 27 As an initial matter, we presume that an entity’s self-insured trust agreement would be more akin to an insurance document than the types of confidential financial documents at issue in Manns. The fact that Advocate

appears to have disclosed the existence of the $12.5 million in self-insurance in response to the plaintiff's interrogatories regarding insurance belies its efforts to distinguish its trust document from a traditional liability policy. More significantly, we fail to understand how the circuit court (or this court) could simply accept Advocate's representation that the trust document is "nothing more than one of Advocate's financial documents," which it utilizes "to set forth its proprietary self-insured business structure." The dissent contends that the self-insured trust is a confidential document containing trade secrets; however, the circuit court could not be expected to assess the potential applicability of Manns absent an in camera inspection of the disputed documents. The dissent also posits that Advocate would not want its employees, physicians, or other medical personnel to know the intricate matters contained in the trust. Although our decision herein is limited to the propriety of in camera review, we note that a protective order entered by the circuit court strictly limits the use or dissemination of any produced insurance documents. We thus conclude that the circuit court did not abuse its discretion. See, e.g., Anderson v. St. Mary's Hospital, 101 Ill. App. 3d 596, 600 (1981) (noting that "where there is a genuine dispute as to the nature or content of the document sought to be discovered, an attorney must ordinarily comply with the trial court's order for an in camera inspection of the document or be subject to sanctions for contempt").

31. For purposes of discovery, "the concept of relevance for purposes of discovery is broader than the concept of relevance for purposes of admissibility at trial." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The quotation appears verbatim in ¶22.)

Zagorski v. Allstate Insurance Co., 2016 IL App (5th) 140056, ¶ 22: ¶ 22 Illinois Supreme Court Rule 201(b)(1) addresses the scope of pretrial discovery, and provides that unless otherwise stated in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter of the pending action, whether it relates to a claim or defense. Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). Rule 201(b)(1) is founded on the basic premise that the object of discovery is the expeditious and final determination of controversies in accordance with the substantive rights of the parties. Owen v. Mann, 105 Ill. 2d 525, 530, 475 N.E.2d 886, 890 (1985); Monier v. Chamberlain, 35 Ill. 2d 351, 357, 221 N.E.2d 410, 415 (1966). Great latitude is allowed in the scope of discovery, and the concept of relevance for purposes of discovery is broader than the concept of relevance for purposes of admissibility at trial. TTX Co. v. Whitley, 295 Ill. App. 3d 548, 556, 692 N.E.2d 790, 796 (1998). Evidence is relevant for trial purposes if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See Ill. R. Evid. 401 (eff. Jan. 1, 2011). In contrast, relevance for discovery purposes includes not only that which is admissible at trial, but also that which leads to admissible evidence. Whitley, 295 Ill. App. 3d at 557, 692 N.E.2d at 797. With these principles in mind, we first consider whether the requested discovery is germane to any theory of the case or any defense.

32. Objecting on a litany of grounds without the intention or means to defend them "is an abuse of the discovery process that may warrant sanctions." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The quoted words are exact; the court frames them as an admonition rather than a ruling.)

Zagorski v. Allstate Insurance Co., 2016 IL App (5th) 140056, ¶ 39: ¶ 39 Though decades old, the admonitions by our supreme court echo loudly here. Discovery is not a tactical game. Williams v. A.E. Staley Manufacturing Co., 83 Ill. 2d 559, 566, 416 N.E.2d 252, 256 (1981). "Discovery is intended as, and should be, a cooperative undertaking by counsel and the parties, conducted largely without court intervention, for the purpose of ascertaining the merits of the case and thus promoting either a fair settlement or a fair trial." Williams, 83 Ill. 2d at 566, 416 N.E.2d at 256. Truthful disclosure is the object of all discovery procedures. Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1977). Stock objections and fractional disclosures render our discovery rules and procedures meaningless.

Buehler, 70 Ill. 2d at 67, 374 N.E.2d at 467. Such tactics delay the search for truth, waste judicial resources, and should not be condoned by the parties or the trial court. We hope that this will serve as an admonition that asserting an objection followed by a litany of hollow grounds, without the intention or means to defend those grounds, is an abuse of the discovery process that may warrant sanctions. In addition, litigants are reminded that a bald objection preserves nothing for review.

33. The circuit court may enter a protective order "as justice requires, denying, limiting, conditioning, or regulating discovery," and may weigh the burden of discovery against its likely benefit under the proportionality provision. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶30 quotes Rule 201(c)(1) on protective orders and describes the 201(c)(3) proportionality provision.)

Carlson v. Jerousek, 2016 IL App (2d) 151248, ¶ 30: ¶ 30 Rule 201(c) (Ill. S. Ct. R. 201(c) (eff. July 1, 2014)), which aims to prevent discovery abuse, contains several provisions for limiting discovery. One approach is a protective order, which may be entered "as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014). Another protection is the relatively new "proportionality" provision, which states: "When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." (Emphaseis added.) Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014). The protections of Rule 201(c) apply to discovery directed to parties and nonparties alike. See Ill. S. Ct. R. 201(c)(1), (c)(2) (eff. July 1, 2014) (the court may act upon a motion by "any party or witness"); R. 204(a)(1) (eff. July 1, 2014) (subpoenas issued to nonparties are "subject to any limitations imposed under Rule 201(c)"). As a whole, "Rule 201 and related rules governing specific discovery methods form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment." Kunkel v. Walton, 179 Ill. 2d 519, 531 (1997).

34. The Second District found "other insurance" clauses making a business policy and an umbrella policy excess over primary auto coverage "unambiguous and not subject to more than one reasonable interpretation." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶85 finds the clauses unambiguous; the business policy's excess clause is limited to non-owned autos, which the sentence glosses over.)

Country Mutual Insurance Company v. Witbrod, 2026 IL App (2d) 250314, ¶ 85: ¶ 85 In this case, the "other insurance" clauses in the Country Mutual and State Farm policies are unambiguous and not subject to more than one reasonable interpretation. Country Mutual Insurance Co. v. Teachers Insurance Co., 324 Ill. App. 3d 246, 249 (2001). The State Farm policy specifically provided that "[t]he Liability Coverage provided by this policy applies as primary coverage for the *** use of" the 2009 BMW and was the only policy issued to Witbrod by State Farm that applied to the accident as primary coverage. The State Farm policy states that, even if a competing policy also provided primary coverage, State Farm would "pay the proportion of damages payable as primary" under the limits of its policy "and the limits of all other liability coverage that apply as primary coverage." The Country Mutual Business Policy states that "[f]or any covered 'auto' you don't own," such as Witbrod's 2009 BMW, "the insurance provided by the Coverage Form is excess over any other collectible insurance." The Country Mutual Umbrella Policy provides that "[t]his insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis."

35. The Second District held that the Financial Responsibility Law "does not mandate

that excess or supplemental liability insurance coverage be obtained" once the mandated minimum is met. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶20 contains the quoted language and the minimum-level qualifier.)

> **Crowley v. Empire Fire & Marine Insurance Co., 2019 IL App (2d) 180752, ¶ 20**: ¶ 20 Fogel is more analogous to the instant case because the insurance policy at issue is an excess policy. We consider this to be an important distinction when considering public policy relating to insurance. As noted earlier, by passing the Financial Responsibility Law requiring each motorist to have minimum liability insurance coverage regardless of fault, the Illinois General Assembly declared it to be the public policy of this state that owners and operators of motor vehicles carry primary liability insurance coverage. See Nelson, 2015 IL 118058, ¶ 14. However, the Financial Responsibility Law does not mandate that excess or supplemental liability insurance coverage be obtained once the mandated minimum level of insurance has been met. Id. ("The law does not, however, require that the full amount of any loss be covered. Rather, it mandates only certain minimum levels of coverage."). Additionally, no Illinois statute precludes an intoxication exclusion in an excess or supplemental liability policy. See Progressive, 215 Ill. 2d at 138 ("[T]he *** Financial Responsibility Law clearly contemplates that exclusions may be included in policies and that those exclusions will be upheld."). As such, Empire's denial of excess or supplemental coverage to Thomas Bruen based on his violation of the insurance contract does not violate public policy.

36. The supreme court held that the duty to settle arises when "a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Verbatim statement of when the duty to settle arises.)

> **Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001), no ¶ number**: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third party demands settlement within policy limits.

37. The supreme court held that the duty "does not arise until a third party demands settlement within policy limits." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Verbatim statement that the duty does not arise until a within-limits demand.)

> **Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001), no ¶ number**: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third

party demands settlement within policy limits.

38. The supreme court held that the duty does not arise when the insurance contract is formed, "nor does it depend on whether or not a lawsuit has been filed." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage says the duty does not arise at contract formation and does not depend on suit being filed.)

> **Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001)**, no ¶ number: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third party demands settlement within policy limits.

39. The supreme court stated that "Illinois law generally does not require an insurance provider to initiate settlement negotiations." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The quoted language appears verbatim.)

> **Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001)**, no ¶ number: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third party demands settlement within policy limits.

40. The First District applied that rule, holding that "we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The quotation is accurate, but Kavanaugh (1975) predates Haddick (2001), so it could not have 'applied that rule'; Haddick later relied on it.)

> **Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350 (1st Dist. 1975)**, no ¶ number: In the instant case, Kavanaugh's proof and the allegations in his second amended complaint were based upon the theory that defendants had a legal duty to offer their policy limits before Kavanaugh was found liable. Even when we view the facts to show that the first offers to settle for the policy limits occurred late in the trial proceedings, we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case. As this court has stated in Oda v. Highway Insurance Co., 44 Ill.App.2d 235, 253, 194 N.E.2d 489, 499, "[t]o impose such a duty upon it would be to put it at a negotiating disadvantage not imposed on any other litigant." Illinois law does not demand that an insurer must settle within policy limits without exception or else invariably suffer the consequences of an excess liability judgment for breach of its fiduciary duty.

41. The "reasonable probability" standard requires facts showing "that liability is at least more likely than not, but not necessarily a certainty." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Powell ¶36 reads Haddick as requiring facts showing liability is at least more likely than not; the quotation is exact.)

> **Powell v. American Service Insurance Co., 2014 IL App (1st) 123643, ¶ 36**: ¶ 36 The "reasonable probability" standard set forth in Haddick requires pleading facts that demonstrate liability is "probable," as opposed to merely "possible." Haddick, 198 Ill. 2d at 417. In other words, we read Haddick as requiring the pleading of facts which show that liability is at least more likely than not, but not necessarily a certainty.

42. When an insurer breaches the duty by refusing to settle, "the insurer may be liable for the full amount of a judgment against the policyholder, regardless of policy limits." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Exact quotation; in Cramer it is background to the bad-faith tort discussion.)

> **Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996)**, no ¶ number: In this circumstance, the insurer may have an incentive to decline the settlement offer and proceed to trial. The insurer may believe that it can win a verdict in its favor. In contrast, the policyholder may prefer to settle within the policy limits and avoid the risk of trial. The insurer may ignore the policyholder's interest and decline to settle. This court has recognized that the insurer has a duty to act in good faith in responding to settlement offers. Krutsinger v. Illinois Casualty Co., 10 Ill. 2d 518, 527 (1957). When an insurer breaches this duty by refusing to settle, the insurer may be liable for the full amount of a judgment against the policyholder, regardless of policy limits. See Mid-America Bank & Trust Co. v. Commercial Union Insurance Co., 224 Ill. App. 3d 1083, 1087 (1992); Phelan v. State Farm Mutual Automobile Insurance Co., 114 Ill. App. 3d 96,104 (1983); Edwins v. General Casualty Co., 78 Ill. App. 3d 965, 968 (1979); Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027, 1029 (1979).

43. The Second District held that where recovery may exceed the limits, the insurer must "give to the insured's interests consideration, at least equal to that of its own." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Browning states the equal-consideration duty in the quoted words.)

> **Browning v. Heritage Insurance, 33 Ill. App. 3d 943 (2d Dist. 1975)**, no ¶ number: An insurance company may so conduct itself as to be hable for an entire judgment recovered against its insured, irrespective of its policy limits. It is now fairly well settled in Illinois that conduct constituting fraud, or negligence, or bad faith may render the insurer so liable for its failure to settle a case. If recovery may exceed the policy limits the insurer has the duty "to give to the insured's interests consideration, at least equal to that of its own," (Cernocky v. Indemnity Insurance Co., 69 Ill.App.2d 196, 207; Smiley v. Manchester Insurance & Indemnity Co., 13 Ill.App.3d 809, 812.) The entry of the judgment against the insured constitutes the damage and it is not necessary that the insured allege payment of the excess judgment. (Wolfberg v. Prudence Mutual Casualty Co., 98 Ill.App.2d 190.) And further, the insured's cause of action against his insurer for failing to settle within the policy limits can be assigned to the insured's judgment creditor. Brown v. State Farm Mutual Automobile Insurance Association, 1 Ill.App.3d 47; Annot., 12 A.L.R. 3d 1158 (1967).

44. The Second District also held that the insured's cause of action for failure to settle within limits "can be assigned to the insured's judgment creditor." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Browning states the assignability rule in the quoted words.)

Browning v. Heritage Insurance, 33 Ill. App. 3d 943 (2d Dist. 1975), no ¶ number: An insurance company may so conduct itself as to be hable for an entire judgment recovered against its insured, irrespective of its policy limits. It is now fairly well settled in Illinois that conduct constituting fraud, or negligence, or bad faith may render the insurer so liable for its failure to settle a case. If recovery may exceed the policy limits the insurer has the duty “to give to the insured’s interests consideration, at least equal to that of its own,” (Cernocky v. Indemnity Insurance Co., 69 Ill.App.2d 196, 207; Smiley v. Manchester Insurance & Indemnity Co., 13 Ill.App.3d 809, 812.) The entry of the judgment against the insured constitutes the damage and it is not necessary that the insured allege payment of the excess judgment. (Wolfberg v. Prudence Mutual Casualty Co., 98 Ill.App.2d 190.) And further, the insured’s cause of action against his insurer for failing to settle within the policy limits can be assigned to the insured’s judgment creditor. Brown v. State Farm Mutual Automobile Insurance Association, 1 Ill.App.3d 47; Annot., 12 A.L.R. 3d 1158 (1967).

45. The First District held that the duty to settle is owed to the insured, so that "in the absence of statutory or contractual language sanctioning a direct action," an injured third party has no action against the insurer for its breach. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Scroggins holds that the duty is owed to the insured and that there is no third-party direct action absent statute or contract.)

Scroggins v. Allstate Insurance, 74 Ill. App. 3d 1027 (1st Dist. 1979), no ¶ number: In the instant case, however, plaintiffs are suing in their own right, as third-party claimants against the insured, for the insurer’s allegedly wrongful refusal to settle their claim. Even assuming arguendo that they have adequately alleged a breach of the duty of good faith and fair dealing on the part of the insurer, that duty is one which the insurer owes to its insured, not to third parties. (Yelm v. Country Mutual Insurance Co. (1970), 123 Ill. App. 2d 401, 404, 259 N.E.2d 83.) Yet it is elementary that in an action founded on a breach of duty, the plaintiff must allege facts showing a breach of a duty owed to him. (E.g., Browning v. Heritage Insurance Co. (1975), 33 Ill. App. 3d 943, 947-48, 338 N.E.2d 912.) Thus, the rule in Illinois and nearly all jurisdictions is that in the absence of statutory or contractual language sanctioning a direct action, an injured third party has no action against the insurer for breach of the duty to exercise good faith or due care by virtue of his standing as judgment creditor of the insured. (Yelm v. Country Mutual Insurance Co. (1970), 123 Ill. App. 2d 401, 259 N.E.2d 83; accord, e.g., Murphy v. Allstate Insurance Co. (1976), 17 Cal. 3d 937, 941-42, 553 P.2d 584, 132 Cal. Rptr. 424; see Annot., 63 A.L.R.3d 677, 682, and cases cited at 686 (1975).) For the same reason, because the duty is intended to benefit the insured and not third parties, actions by injured claimants founded on third party beneficiary principles have not been permitted. E.g., Murphy v. Allstate Insurance Co. (1976), 17 Cal. 3d 937, 943-44, 553 P.2d 584, 132 Cal. Rptr. 424; Bennett v. Slater (1972), 154 Ind. App. 67, 289 N.E.2d 144; Annot., 63 A.L.R.3d 677, 682-83, 701 et seq. (1975).

46. In assessing bad faith, the Second District considers "the existence of an offer by the plaintiff to settle within the policy limits, a refusal to negotiate, the advice of defense counsel, the prospect of an adverse verdict, and the potential for damages in excess of the policy limits." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage lists the quoted factors verbatim, drawing them from Central Illinois.)

SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange, 395 Ill. App. 3d 80 (2d Dist. 2009), p. 28: When a third party seeks damages that exceed policy limits, the insured necessarily becomes concerned with personal liability when there is a reasonable probability that the insured will be found liable for an excess judgment. Haddick, 198 Ill. 2d at 416. At that point, the insurer must take the insured's settlement interests into consideration.

Haddick, 198 Ill. 2d at 416. To sustain a cause of action for bad faith, the plaintiff must allege that: (1) the duty to settle arose; (2) the insurer breached the duty; and (3) the breach caused injury to the insured. Haddick, 198 Ill. 2d at 416. The duty of an insurer arises when there is a reasonable probability of recovery in excess of policy limits and there is a reasonable likelihood of a finding of liability against the insured. Central Illinois Public Service Co. v. Agricultural Insurance Co., 378 Ill. App. 3d 728, 737 (2008). In determining whether there was bad faith, the court will consider factors such as the existence of an offer by the plaintiff to settle within the policy limits, a refusal to negotiate, the advice of defense counsel, the prospect of an adverse verdict, and the potential for damages in excess of the policy limits. Central Illinois, 378 Ill. App. 3d at 737. Generally, an insurer is not required to initiate settlement negotiations unless the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed policy limits. Haddick, 198 Ill. 2d at 417 n.1. The fact that an excess judgment was entered against the insured constitutes the damage that permits the insured to recover for the breach of the duty owed. Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027, 1030 (1979). Whether an insurer has acted in bad faith by failing to settle a claim is a question of fact for the fact finder. Haddick, 198 Ill. 2d at 419. When the insurer arbitrarily refuses to settle within policy limits, the insured may effect a reasonable settlement himself without breaching any conditions of the policy. Krutsinger, 10 Ill. 2d at 527.

47. The Fifth District found that ignoring a policy-limits demand, where "The medical bills alone were more than five times that protection," signaled bad faith. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (O'Neill describes the ignored limits demand, the bills at five times coverage, and the conclusion that this signals bad faith.)

O'Neill v. Gallant Insurance, 329 Ill. App. 3d 1166 (5th Dist. 2002), no ¶ number: Mrs. O'Neill's attorney demanded the policy limits in settlement of her claim. He offered a complete release from liability for Christine, provided that Gallant would promptly tender its check for Christine's $20,000 liability coverage. Gallant was given 30 days to decide. Confronted with a case of obvious liability with potential damages far in excess of the policy limits, Gallant did not dignify the demand with a response. The 30 days passed and Gallant remained silent. It did not try to negotiate. It did not attempt a counteroffer. It did not even tell Christine that the elderly lady that she hurt was willing to forego a personal judgment for more than the amount with which Christine was insured. Gallant simply ignored the offer to settle, and a window of opportunity to protect its customer from an excess judgment closed. Moss bypassed the chance to authorize the payment of the coverage that Christine had purchased from Gallant. As a result of his decision, Christine suffered a large excess judgment. Gallant's refusal to even respond to an invitation for settlement occurred under baffling circumstances.

O'Neill v. Gallant Insurance, 329 Ill. App. 3d 1166 (5th Dist. 2002), no ¶ number: Gallant knew from the lawyers it hired to protect Christine's interests that the verdict potential was, at a minimum, 15 times the amount of insurance protection. The medical bills alone were more than five times that protection. The decision to reject the chance to settle a claim of this magnitude signals bad faith.

48. The First District held that where the injured parties' demands "greatly exceed the primary policy limits," "no plausible claim of bad faith can be made" against the primary insurer. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶35 contains both quoted phrases and applies them to the primary insurer.)

Crane v. Admiral Insurance Co., 2013 IL App (1st) 093240-B, ¶ 35: ¶ 35 The duty to settle in good faith arises "when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." Haddick, 198 Ill. 2d at 417. Furthermore, the duty does not arise until a third party "demands

settlement within policy limits." Id. In the case at bar, the injured parties' demands for settlement greatly exceed the primary policy limits. Therefore, pursuant to Haddick, no plausible claim of bad faith can be made against Kemper and Crane. Both the trial court and CNA defendants rely on Schal Bovis, Inc. v. Casualty Insurance Co., 314 Ill. App. 3d 562 (1999), to support the position that primary insurers owe a duty to excess insurers to act in good faith. However, Schal Bovis involved an action filed by an excess insurer against four primary insurers which had refused to settle an action against the insured for an amount under the primary policies' limits. The appellate court held that an excess carrier may bring a cause of action against a primary carrier for bad-faith refusal to settle. Schal Bovis, 314 Ill. App. 3d at 571. As in Haddick, Schal Bovis only concerned an alleged bad faith refusal to settle.

49. The First District recognized "a three-way duty of care to act reasonably and in good faith in settling meritorious claims within the policy limits" among the insured, the primary carrier, and the excess carriers. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Schal Bovis adopts Transit Casualty's three-way duty among insured, primary, and excess carriers; the quotation is exact.)

Schal Bovis, Inc. v. Casualty Insurance, 314 Ill. App. 3d 562 (1st Dist. 1999), no ¶ number: Moreover, even absent subrogation principles, we find that there is a duty that runs from Wausau and Great American to North-brook to act reasonably and in good faith in attempting to settle claims within their respective policy limits. The leading case finding such a duty is Transit Casualty Co. v. Spink Corp., 94 Cal. App. 3d 124, 156 Cal. Rptr. 360 (1979), which recognized a three-way relationship between the policyholder, the primary insurer and the excess insurer. This relationship creates reciprocal duties of care in the conduct of settlement negotiations; when a claim threatens to exceed the primary coverage, the reasonable foreseeability that the claim may reach the excess policy creates a three-way duty of care to act reasonably and in good faith in settling meritorious claims within the policy limits. The insured, primary carrier and excess carriers must therefore act reasonably and in good faith toward one another in considering the others' interests in negotiating a settlement. Transit Casualty Co., 94 Cal. App. 3d at 133, 156 Cal. Rptr. at 366. Our decision in this regard cannot be characterized as surprising, in that several other jurisdictions have followed Transit Casualty Co. and have recognized such a duty (see, e.g., Hartford Accident & Indemnity Co. v. Michigan Mutual Insurance Co., 61 N.Y.2d 569, 574, 463 N.E.2d 608, 610, 475 N.Y.S.2d 267, 269 (1984); Estate of Penn v. Amalgamated General Agencies, 148 N.J. Super. 419, 424, 372 A.2d 1124, 1127 (1977); Vencill v. Continental Casualty Co., 433 F. Supp. 1371 (S.D. W. Va. 1977)). Additionally, while federal courts do not bind our state courts in such matters, we note that at least two federal decisions have predicted that Illinois would recognize such a duty. American Centennial Insurance Co. v. American Home Assurance Co., 729 F. Supp. 1228, 1231-32 (N.D. Ill. 1990); Ranger Insurance Co. v. Home Indemnity Co., 714 F. Supp. 956 (N.D. Ill. 1989).

50. That court required a primary insurer to "estimate in good faith the expected verdict of the litigation threatening its insured and offer that amount in support of a proposed settlement," to the extent consistent with its policy. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The quotation and the 'consistent with the terms of its policy' qualifier are both in the passage.)

Schal Bovis, Inc. v. Casualty Insurance, 314 Ill. App. 3d 562 (1st Dist. 1999), no ¶ number: We reject Great American's contention in this regard. Our holding today only requires that a primary insurer estimate in good faith the expected verdict of the litigation threatening its insured and offer that amount in support of a proposed settlement - at least to the extent consistent with the terms of its policy. The existence of other insurance is simply not relevant to the primary insurer's duty to offer its support to a settlement when it is reasonable to do so.

51. The supreme court has stated that "Rule 224 provides a means to identify potential defendants prior to the commencement of a lawsuit." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Verbatim from Dent ¶23, which is background to its holding.)

> **Dent v. Constellation NewEnergy, Inc., 2022 IL 126795, ¶ 23**: ¶ 23 Rule 224 provides a means to identify potential defendants prior to the commencement of a lawsuit. Ill. S. Ct. R. 224(a)(1)(i) (eff. Jan. 1, 2018). Rule 224 allows a party to initiate discovery by filing a verified petition. Ill. S. Ct. R. 224(a)(1)(ii) (eff. Jan. 1, 2018). The rule states that the "petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery." Id. An order allowing a Rule 224 petition "will limit discovery to the identification of responsible persons and entities." Ill. S. Ct. R. 224, Committee Comments (adopted Aug. 1, 1989).

52. Quoting the committee comments, the supreme court noted that an order allowing a Rule 224 petition "will limit discovery to the identification of responsible persons and entities." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Dent ¶23 quotes the committee comments in the quoted words.)

> **Dent v. Constellation NewEnergy, Inc., 2022 IL 126795, ¶ 23**: ¶ 23 Rule 224 provides a means to identify potential defendants prior to the commencement of a lawsuit. Ill. S. Ct. R. 224(a)(1)(i) (eff. Jan. 1, 2018). Rule 224 allows a party to initiate discovery by filing a verified petition. Ill. S. Ct. R. 224(a)(1)(ii) (eff. Jan. 1, 2018). The rule states that the "petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery." Id. An order allowing a Rule 224 petition "will limit discovery to the identification of responsible persons and entities." Ill. S. Ct. R. 224, Committee Comments (adopted Aug. 1, 1989).

53. The Third District held that a Rule 224 petition "is inapplicable to any case where the identity of any potential defendant is already known." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (Maxon states the rule as background, citing Guertin; it is not Maxon's own holding, so 'held' overstates.)

> **Maxon v. Ottawa Publishing Co., 402 Ill. App. 3d 704 (3d Dist. 2010), p. 8**: A trial court may grant or deny a petition under Rule 224 in the exercise of its discretion. Gaynor, 322 Ill. App. 3d at 291. A petition under Rule 224 must be verified and is inapplicable to any case where the identity of any potential defendant is already known. Guertin v. Guertin, 204 Ill. App. 3d 527, 532 (1990) (Rule 224 did not authorize trial court to order deposition of decedent's surviving joint tenants to explore possible claim of undue influence where the petition was unverified and the petitioner already knew the identity of all potential defendants). A hearing must be held before the court can grant or deny a Rule 224 petition in order to prevent "fishing expeditions." Kamelgard, 385 Ill. App. 3d at 686; Beale v. EdgeMark Financial Corp., 279 Ill. App. 3d 242, 254 (1996); Shutes v. Fowler, 223 Ill. App. 3d 342, 345 (1991). The use of a Rule 224 petition is limited to discovery of the identity of a potential defendant. Roth v. St. Elizabeth's Hospital, 241 Ill. App. 3d 407, 414-15 (1993); Malmberg v. Smith, 241 Ill. App. 3d 428 (1993) (it was error to grant a Rule 224 petition where identity of potential defendant was already known).

54. The Fifth District held that "Ascertaining identity is the only use for a Rule 224

action." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Gaynor states the quoted rule and applies it to the facts.)

> **Gaynor v. Burlington Northern & Santa Fe Railway, 322 Ill. App. 3d 288 (5th Dist. 2001)**, no ¶ number: Rule 224's use is appropriate in situations where a plaintiff has suffered injury but does not know the identity of one from whom recovery may be sought. In such cases, there is a genuine need and, if the expiration of the statute of limitations is near, an urgent need to identify potential defendants so that a plaintiff is not without redress for the injury suffered. This scenario is a stark contrast to the case presented here, in which petitioner filed a verified petition seeking presuit discovery under Rule 224 and contemporaneously filed suit alleging injury arising out of the same incident. Petitioner's reliance on Roth and Beale is misplaced. Roth held that once the identity of those who may be responsible in damages has been ascertained, the purpose of the rule has been accomplished and the action should be dismissed. The petitioner in Roth argued that he should be allowed to engage in broad discovery in order to determine "the identity of one who may be responsible in damages" (emphasis added) (134 Ill. 2d R. 224), though it was clear, as it is here, that counsel already knew the identities of some who might be responsible in damages. Ascertaining identity is the only use for a Rule 224 action. Though Beale may have expanded the discovery available under Rule 224 somewhat, that expansion is not unlimited.

55. Quoting earlier First District authority, the Fourth District stated that where the known connection to the injury is remote, a petitioner may seek additional connecting facts "so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Mazrim ¶26 quotes Beale's rule verbatim, and the sentence correctly attributes it as a quotation.)

> **Mazrim v. Decatur Memorial Hospital, 2022 IL App (4th) 210474, ¶ 26**: ¶ 26 The Beale court held, "Where the petitioner is apprised of a sufficient connection to the injury by an individual or entity so as to place such individual or entity within the universe of potential defendants, the petitioner may not seek further discovery of facts pertaining to any actual wrongdoing." Id. at 252. "However, where the known connection to the injury is remote and does little or nothing to limit or define the universe of potential defendants, the petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." Id. at 252-53. The court further provided, "The extent of this permissible inquiry must be determined by the trial judge on a case-by-case basis and in consideration of the cause of action alleged." Id. at 253.

56. The Second District held that a Rule 224 petitioner bears the burden of showing that the proposed complaint supports a cause of action and that the identification is necessary. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶16 places the burden on the petitioner to show a cause of action and necessity.)

> **Doe v. Catholic Diocese, 2015 IL App (2d) 140618, ¶ 16**: ¶ 16 Under Rule 224, the unidentified individual or entity does not bear the burden of demonstrating that the discovery request does not satisfy the rule; rather, it is the petitioner who bears the burden of showing that his or her proposed complaint supports a cause of action, even if the unidentified individual or entity does not challenge the request. Hadley v. Subscriber Doe, 2014 IL App (2d) 130489, ¶ 12, aff'd, 2015 IL 118000. This is because Rule 224 is intended to assist a petitioner in identifying a currently unidentified party who might be liable; however, to employ the rule, the petitioner must demonstrate that the proposed identification is necessary. Hadley v. Subscriber Doe, 2015 IL 118000, ¶ 25.

57. Section 7-601 exempts from the required-liability-policy provision "vehicles required to file proof of liability insurance with the Illinois Commerce Commission." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

625 ILCS 5/7-601 (statute or rule; its text follows the decisions)

58. A CONCURRENCE in the supreme court described the Commercial Transportation Law as "the source of the requirement that commercial trucks file proof of insurance with the Illinois Commerce Commission," and said the Commission's insurance regulations "adopted the federal regulations governing interstate motor carriers of property." [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Both quotations appear in the concurrence, and the sentence labels it as a concurrence.)

Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009), p. 10, concurrence: The statute applicable to commercial truckers, which is the source of the requirement that commercial trucks file proof of insurance with the Illinois Commerce Commission, is the Commercial Transportation Law. Through the Commission's rules, this statute heavily regulates the trucking industry within Illinois. Regarding insurance coverage, the Commercial Transportation Law requires that before a trucking registration may be issued, the carrier must have complied with Illinois Commerce Commission regulations regarding proof of insurance. 625 ILCS 5/18c-4402 (West 2006). The Commission regulations on insurance have adopted the federal regulations governing interstate motor carriers of property. 92 Ill. Adm. Code §1425.30. Setting aside the question whether it would be appropriate to assign our legislature's definitions of "motor vehicle liability policy" or "liability insurance" to the agency responsible for adopting the federal regulations, the regulations lack any reference to those phrases. There is, therefore, no requirement anywhere within the Commercial Transportation Law or the Commission's regulations that requires commercial truckers to be covered under a "motor vehicle liability policy" or a "liability insurance policy," and, consequently, no requirement that insurance policies issued to commercial truckers must contain an omnibus clause. Simply put, the critical term at issue, defined in section 7-317, is not "used in this Act" with respect to the Commercial Transportation Law.

59. The First District held that an owner-operator lease made "subject to" DOT regulations gave the motor carrier "exclusive possession, control, and use" of the leased truck under the federal leasing regulation. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶25 holds that the 'subject to' clause made DOT rules control, so the carrier assumed exclusive possession, control, and use.)

Argonaut Midwest Insurance Company v. Morales, 2014 IL App (1st) 130745, ¶ 25: ¶ 25 While the owner operator contract appears to contradict these terms, those contradictory terms are "[s]ubject to the specific requirements of the Interstate Commerce Commission and/or D.O.T. and of any State regulatory agency having jurisdiction." (Emphasis added.) Critically, the words "subject to" create a condition to apply the terms that follow. Catholic Charities of the Archdiocese of Chicago v. Thorpe, 318 Ill. App. 3d 304, 309 (2000). That is, the agreement that Morales controls the use of his truck is conditioned on the conformance of those contract terms with DOT regulations. Because those contract terms contradict DOT regulations, the regulations control. 11 Richard A. Lord, Williston on Contracts § 30:19 (4th ed. 2012) ("When a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of the contract for the indicated purposes just as though the words of that enactment were set out in full in the contract."). Thus, under DOT regulations and the owner operator agreement, Land Truck assumed "exclusive possession, control, and use" of Morales's Freightliner. 49

C.F.R. § 376.12(c)(1) (2012).

60. Under the former ICC regime, the First District held that a certified carrier had to obtain insurance sufficient to pay "for each final judgment against the carrier," but did not have to name its driver as an insured. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage states the ICC final-judgment insurance requirement and that the driver need not be named.)

Pratt v. Andrews, 164 Ill. App. 3d 606 (1st Dist. 1987), no ¶ number: Express Freight responds that it was not required to obtain liability insurance in which Andrews would be specified as an insured. We agree. ICC regulations do not require Express Freight to procure such insurance. Instead, an ICC-certified carrier must obtain an insurance policy which is "sufficient to pay *** for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles" under the carrier's permit. (Emphasis added.) (49 U.S.C. §10927(a)(1) (1986); see also 49 C.F.R. §1043.1(a) (1986).) Also, a "motor carrier *** that uses motor vehicles not owned by it to transport property under an arrangement with another party [must] *** obtain liability and cargo insurance on [the vehicles]." (49 U.S.C. § 11107(a)(3) (1986).) A motor carrier/lessee is also required to "have control of and be responsible for operating those [leased] motor vehicles." (49 U.S.C. § 11107(a)(4) (1986).) Consequently, a lease between a carrier and a driver must provide that the carrier has "exclusive possession, control and use of the equipment for the duration of the lease" and that the carrier "assume[s] complete responsibility for the operation of the equipment" during the lease. 49 C.F.R. §1057.12(c) (1986).

61. The same court held that the injured plaintiff had "no standing to litigate the insurance coverage extended to" the driver or the carrier. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage holds that Pratt has no standing to litigate the coverage extended to the driver or carrier.)

Pratt v. Andrews, 164 Ill. App. 3d 606 (1st Dist. 1987), no ¶ number: Based upon this analysis, we determine that ICC regulations do not obligate Express Freight to obtain liability insurance in which Andrews would be specified as a named insured. We also hold that Pratt has no standing to litigate the insurance coverage extended to Andrews or Express Freight. (See Batteast v. Argonaut Insurance Co. (1983), 118 Ill. App. 3d 4, 454 N.E.2d 706.) Consequently, count II of Pratt's amended complaint' was properly dismissed for failure to state a claim for which relief could be granted.

62. **Which text governs.** The disclosure duty is triggered by "receipt" of a compliant request . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

63. So the version in force when our request reaches the insurer governs, which is the current text, effective July 1, 2023 . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

64. The only published construction applied the 2010 text . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The

passage shows Kim quoted the West 2010 text, but nothing in it supports 'only published construction.')

> **Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 25**: ¶ 25 Section 143.24b provides: “Any insurer insuring any person or entity against damages arising out of a vehicular accident shall disclose the dollar amount of liability coverage under the insured’s personal private automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records.” (Emphasis added.) 215 ILCS 5/143.24b (West 2010).

65. Comparing that quotation with the current text, the recorded 2023 amendment appears to have replaced "accident" with "crash" . Nothing indicates a change to the operative object of disclosure. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passage supports 'accident' in the 2010 text; the conclusion about the 2023 amendment rests on the statute block, not this passage.)

> **Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 25**: ¶ 25 Section 143.24b provides: “Any insurer insuring any person or entity against damages arising out of a vehicular accident shall disclose the dollar amount of liability coverage under the insured’s personal private automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records.” (Emphasis added.) 215 ILCS 5/143.24b (West 2010).
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> 215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

66. One discrepancy needs checking: the opinion's block quotation reads "personal private automobile," while its analysis paragraph quotes "personal private passenger automobile" . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶25 quotes 'personal private automobile' and ¶27 quotes 'personal private passenger automobile,' so the discrepancy is real.)

> **Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 25**: ¶ 25 Section 143.24b provides: “Any insurer insuring any person or entity against damages arising out of a vehicular accident shall disclose the dollar amount of liability coverage under the insured’s personal private automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records.” (Emphasis added.) 215 ILCS 5/143.24b (West 2010).
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> **Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 27**: ¶ 27 The plain and unambiguous language of section 143.24b requires disclosure of potentially available coverage under “personal private passenger automobile liability insurance polic[ies].” Id. Contrary to Kim’s argument on appeal, the title of that section does not broadly refer to “liability coverage” but more narrowly refers to the “[d]isclosure of dollar amount of automobile liability coverage.” (Emphasis added.) Id. It is well settled in Illinois that a personal automobile insurance policy is not the same as an umbrella policy. In Hartbarger v. Country Mutual Insurance Co., 107 Ill. App. 3d 391, 394 (1982), the plaintiff argued that an umbrella policy was an automobile policy and thus was required to provide uninsured motorist coverage under the Insurance Code. This court rejected that position, holding that “an umbrella liability policy is entirely different from an automobile policy.” Id. at 396. This court

quoted approvingly a decision from the Alabama Supreme Court, which stated: " 'Automobile liability policies and motor vehicle liability policies insure against the risk of loss through the operation of specific automobiles. An umbrella policy, on the other hand, is fundamentally excess insurance designed to protect against a catastrophic loss. Before an umbrella policy is issued, a primary policy (the "underlying policy") must be in existence ***. *** The umbrella policy issued by Trinity Universal is an inherently different type of insurance from an automobile or motor vehicle liability policy ***.' " Id. at 395 (quoting Trinity Universal Insurance Co. v. Metzger, 360 So. 2d 960, 962 (Ala. 1978)). See also Mei Pang v. Farmers Insurance Group, 2014 IL App (1st) 123204, ¶ 11 ("[i]n Illinois, umbrella policies and primary auto policies are distinct" and an "umbrella policy does not provide the same type of coverage as an automobile policy"); 215 ILCS 5/143.13 (West 2010) (" '[p]olicy of automobile insurance' " defined separately from " '[a]ll other policies of personal lines' ").

67. **What the statute requires us to show.** The duty attaches only to coverage "under the insured's personal private passenger automobile liability insurance policy" . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

68. The First District read the text as written, including the narrower title, and refused to expand it to umbrella coverage . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passages show the plain-language method and the title reasoning; the refusal to reach umbrella coverage is implied but not stated in them.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 24: ¶ 24 This claim presents a question of law-i.e., whether section 143.24b of the Insurance Code requires disclosure of an umbrella policy as a "private personal passenger automobile liability insurance policy." We review de novo both questions of law and issues of statutory construction. Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co., 215 Ill. 2d 121, 127-28 (2005); Best Buy Stores, L.P. v. Department of Revenue, 2020 IL App (1st) 191680, ¶ 17. When construing a statute, the court attempts to ascertain and give effect to the intent of the legislature, which "is best determined from the plain and ordinary meaning of the language used in the statute." Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 24. "When the statutory language is plain and unambiguous, we may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law." Id. Only when a statute is ambiguous may a court look beyond its express language and rely on "extrinsic aids," such as legislative history. Nowak v. City of Country Club Hills, 2011 IL 111838, ¶¶ 11, 13.

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 27: ¶ 27 The plain and unambiguous language of section 143.24b requires disclosure of potentially available coverage under "personal private passenger automobile liability insurance polic[ies]." Id. Contrary to Kim's argument on appeal, the title of that section does not broadly refer to "liability coverage" but more narrowly refers to the "[d]isclosure of dollar amount of automobile liability coverage." (Emphasis added.) Id. It is well settled in Illinois that a personal automobile insurance policy is not the same as an umbrella policy. In Hartbarger v. Country Mutual Insurance Co., 107 Ill. App. 3d 391, 394 (1982), the plaintiff argued that an umbrella policy was an automobile policy and thus was required to provide uninsured motorist coverage under the Insurance Code. This court rejected that position, holding that "an umbrella liability policy is entirely different from an automobile policy." Id. at 396. This court quoted approvingly a decision from the Alabama Supreme Court, which stated: " 'Automobile liability policies and motor vehicle liability policies insure against the risk of loss through the operation of specific automobiles. An umbrella policy, on the other hand, is fundamentally excess insurance designed to protect against a catastrophic loss. Before an umbrella policy is issued, a primary policy (the "underlying policy") must be in existence ***. *** The umbrella policy issued by Trinity Universal is an

inherently different type of insurance from an automobile or motor vehicle liability policy ***.' " Id. at 395 (quoting Trinity Universal Insurance Co. v. Metzger, 360 So. 2d 960, 962 (Ala. 1978)). See also Mei Pang v. Farmers Insurance Group, 2014 IL App (1st) 123204, ¶ 11 ("[i]n Illinois, umbrella policies and primary auto policies are distinct" and an "umbrella policy does not provide the same type of coverage as an automobile policy"); 215 ILCS 5/143.13 (West 2010) (" '[p]olicy of automobile insurance' " defined separately from " '[a]ll other policies of personal lines' ").

69. **Our best textual argument, and its weakness.** The opening clause says "Any insurer insuring any person or entity" . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

70. The First District would not read in terms the legislature omitted . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶24 adopts the rule against reading in terms the legislature did not express.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 24: ¶ 24 This claim presents a question of law-i.e., whether section 143.24b of the Insurance Code requires disclosure of an umbrella policy as a "private personal passenger automobile liability insurance policy." We review de novo both questions of law and issues of statutory construction. Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co., 215 Ill. 2d 121, 127-28 (2005); Best Buy Stores, L.P. v. Department of Revenue, 2020 IL App (1st) 191680, ¶ 17. When construing a statute, the court attempts to ascertain and give effect to the intent of the legislature, which "is best determined from the plain and ordinary meaning of the language used in the statute." Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 24. "When the statutory language is plain and unambiguous, we may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law." Id. Only when a statute is ambiguous may a court look beyond its express language and rely on "extrinsic aids," such as legislative history. Nowak v. City of Country Club Hills, 2011 IL 111838, ¶¶ 11, 13.

71. For the neighboring sections, the Code defines a personal "policy of automobile insurance" by reference to a natural-person insured and vehicles not used in the insured's business . Section 143.24b falls just outside the defined range (143.11 through 143.24) and does not use the defined term, so this is context, not controlling definition. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/143.13 (statute or rule; its text follows the decisions)

72. The Fifth District declined to treat a box truck as a "private passenger automobile" under a nearby personal-lines provision . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶35 so holds; calling 143.13a a 'personal-lines provision' is the memo's own characterization.)

Worley v. Fender, 2017 IL App (5th) 160110, ¶ 35: ¶ 35 We conclude the box truck plaintiff was driving at the time of the accident was not a "private passenger automobile" within the meaning of section 143.13a of the Code. 215 ILCS 5/143.13a (West 2008). For this reason, the step-down limits of the policy at issue do not violate Illinois law or public policy.

73. The supreme court treats commercial truckers as governed by the separate Commercial Transportation Law regime . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The court holds the 7-317 definition does not apply to truckers regulated under the CTL.)

> **Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009)**, p. 8: West Bend does not contend that the foregoing contradictions and inconsistencies do not exist, but maintains that any inconsistencies can be resolved under principles of statutory construction. This contention misses the point. In construing legislation we presume that the legislature did not intend absurd, inconvenient, or unjust results. People ex rel. Sherman v. Cryns, 203 Ill. 2d 264, 280 (2003). The existence of the inconsistencies, by themselves, establishes that the legislature could not have intended for the term "Act" in section 7-317 to include the Commercial Transportation Law. Accordingly, we conclude that the definition of motor vehicle liability insurance policies set forth in section 7-317, including the omnibus requirement in section 7-317(b)(2), does not apply to commercial truckers regulated under the Commercial Transportation Law.

74. Several decisions the screening model labeled helpful construe the uninsured-motorist mandates broadly (for example,). [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Thounsavath ¶48 enforces the 143a and 143a-2 mandates over a contractual exclusion, a fair example of broad construction.)

> **Thounsavath v. State Farm Mutual Automobile Insurance Co., 2018 IL 122558**, ¶ 48: ¶ 48 None of the cases cited by State Farm support its claim that the driver exclusion endorsement in plaintiff's policies could deny plaintiff underinsured motorist coverage under the facts of this case. Section 143a mandates that every automobile liability insurance policy provide uninsured motorist coverage in at least the minimal amounts required under the Vehicle Code. If the insured's uninsured motorist coverage limit exceeds the minimum liability limit required by the Financial Responsibility Law, as plaintiff's did, section 143a-2 mandates that the policy also include underinsured motorist coverage in an amount equal to the uninsured motorist coverage. Because section 143a-2 mandated that plaintiff's policy include underinsured motorist coverage, excluding plaintiff from underinsured motorist coverage through a contractual provision violates section 143a-2 and, therefore, public policy, under the facts of this case. The driver exclusion endorsement in plaintiff's policies with State Farm was not enforceable to exclude underinsured motorist coverage to plaintiff for the June 17, 2012, accident. Accordingly, the appellate court properly affirmed the trial court's order granting summary judgment in favor of plaintiff on her complaint for declaratory judgment.

75. **A practical carve-in: the driver's own insurer.** If the driver carries a personal auto policy, its insurer is an insurer "insuring any person or entity against damages arising out of a vehicular crash" . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

> 215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

76. A compliant certified request to that insurer falls within the text . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

> 215 ILCS 5/143.24b (statute or rule; its text follows the decisions)

77. That is supreme court law , followed in this district , and applied to a section

143.24b claimant . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Supreme court rule in Yassin, applied by the Second District in Power Dry, and applied to the 143.24b claimant in Kim.)

Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458 (1990), no ¶ number: As a general rule, the remedy embodied in section 155 of the Insurance Code extends only to the party insured (Stamps v. Caldwell (1971), 133 Ill. App. 2d 524, 528) and policy assignees (see Loyola University Medical Center v. Med Care HMO (1989), 180 Ill. App. 3d 471; Aabye v. Security-Connecticut Life Insurance Co. (N.D. Ill. 1984), 586 F. Supp. 5). Therefore, the remedy embodied in section 155 of the Insurance Code does not extend to third parties. See Loyola, 180 Ill. App. 3d 471; Robertson v. Travelers Insurance Co. (1981), 100 Ill. App. 3d 845; Scroggins v. Allstate Insurance Co. (1979), 74 Ill. App. 3d 1027; Stamps, 133 Ill. App. 2d 524.

Power Dry of Chicago, Inc. v. Bean, 2022 IL App (2d) 210043, ¶ 49: ¶ 49 Similarly, without a valid assignment of benefits under the policy, the asserted claim in count V for bad faith under section 155(1)(a)-(c) of the Insurance Code against Lutheran Mutual was also properly dismissed. Section 155(1) of the Insurance Code provides: "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155(1)(a)-(c) (West 2018). The remedy embodied in section 155 of the Insurance Code extends only to the party insured and policy assignees. Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458, 466 (1990). The remedy in section 155 of the Insurance Code does not extend to third parties. Id. Again, without a valid assignment of benefits under the policy, CWFR has no claim under section 155 of the Insurance Code. There was no error in dismissing count V of the complaint.

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 55: ¶ 55 Section 155 permits a cause of action when "there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable." 215 ILCS 5/155(1) (West 2010). Binding Illinois Supreme Court precedent holds that penalties under section 155 are only available to the insured, not to third parties who are strangers to the policy. 3 See Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458, 466 (1990) (dismissing plaintiff's third-party claim under section 155); Stamps v. Caldwell, 133 Ill. App. 2d 524, 528 (1971) (same); Roppo, 100 F. Supp. 3d at 652 ("the remedy embodied in section 155 of the Insurance Code does not extend to third parties").

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 56: ¶ 56 We conclude that the circuit court properly granted summary judgment in State Farm's favor with respect to Kim's claim for section 155 fees and costs.

78. Consumer Fraud Act standing is lacking for a third-party claimant . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶44 holds the third-party claimant lacks standing.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 44: ¶ 44 Kim also lacks standing to sue under the Consumer Fraud Act. A plaintiff seeking to sue under the Consumer Fraud Act must either be a consumer or satisfy the "consumer nexus" test, which requires the plaintiff to have suffered damages resulting from conduct directed toward the market or which otherwise implicates consumer protection concerns. Bank One Milwaukee v. Sanchez, 336 Ill. App. 3d 319, 321-22 (2003). Kim, however, is a third-party beneficiary of an insurance policy issued by a defendant, and

courts interpreting Illinois law have consistently rejected this theory of standing. See McCarter v. State Farm Mutual Automobile Insurance Co., 130 Ill. App. 3d 97, 101 (1985) (holding third-party claimant under insurance policy was not a consumer under the Consumer Fraud Act); Roppo v. The Travelers Cos., 100 F. Supp. 3d 636, 651 (N.D. Ill. 2015) (rejecting consumer nexus theory in similar case). Kim's reliance on Elder v. Coronet Insurance Co., 201 Ill. App. 3d 733, 749 (1990), to support her argument for expanding the Consumer Fraud Act's scope is misplaced. Elder, as a matter involving a first-party claim by an insured against his own insurer, distinguished itself from McCarter, which involved a third-party claimant. Id. The other authorities cited by Kim do not address the issue of standing under the Consumer Fraud Act or even any claim under it. Rather, each of those cases involved a declaratory judgment action brought by the third-party claimant against an insurer. See, e.g., State Farm Fire & Casualty Co. v. Perez, 387 Ill. App. 3d 549 (2008); Holmes v. Federal Insurance Co., 353 Ill. App. 1062 (2004); Reagor v. Travelers Insurance Co., 92 Ill. App. 3d 99 (1980); M.F.A. Mutual Insurance Co. v. Cheek, 34 Ill. App. 3d 209 (1975).

79. Negligent misrepresentation failed on both the "information" exception and on the facts . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶50 rests on both the information exception and the absence of the tort's other elements.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 50: ¶ 50 In addition, a negligent misrepresentation claim may only be brought against a defendant who is "in the business of supplying information for the guidance of others in their business dealings" and provided untrue information to the plaintiff. Id. at 95. The sale of insurance policies is not the sale of "information," as contemplated under this exception. See First Midwest Bank, N.A. v. Stewart Title Guaranty Co., 218 Ill. 2d 326, 341 (2006); see also Gondeck v. A Clear Title & Escrow Exchange, LLC, 47 F. Supp. 3d 729, 749 (N.D. Ill. 2014) ("An insurance policy is 'a noninformational product' for purposes of the economic loss doctrine."). Moreover, defendants were not otherwise "in the business" of providing information to Kim to guide her business dealings, especially given the adverse nature of their relationship and the fact that Kim was not a State Farm policyholder. Nor can Kim establish any of the other elements of this tort based on the uncontroverted record, which shows there was no actionable misstatement or omission, reliance, or injury. See Freedberg, 2012 IL App (1st) 110938, ¶ 36 (no recovery for negligent misrepresentation absent proof plaintiff relied on misstatement to her detriment); Fox Associates, Inc., 334 Ill. App. 3d at 94-96.

80. **A regulatory complaint is the realistic sanction.** Knowingly misrepresenting coverages to claimants is a listed improper claims practice . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

215 ILCS 5/154.6 (statute or rule; its text follows the decisions)

81. That provision is regulatory and gives no private action , but a complaint to the Department of Insurance is a real lever. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (¶42 supports 'regulatory, no private action'; the Department-complaint remedy appears in ¶41, not the cited passage.)

Becker-Othman v. State Farm Mutual Automobile Insurance Co., 2026 IL App (1st) 250037, ¶ 42: ¶ 42 Section 154.6 of the Insurance Code likewise creates no private right of action. That provision identifies improper claims practices by insurers, while sections 154.7 and 154.8 authorize the Director of Insurance to enforce the Code and impose penalties. See 215 ILCS 5/154.5 to 154.8 (West 2024). Accordingly, section 154.6 "does not give rise to a private remedy or cause of action by a policyholder against an insurer but is instead regulatory in nature." American Service Insurance Co. v. Passarelli, 323

Ill. App. 3d 587, 590 (2001).

82. **An implied right of action is untested.** An argument by analogy exists: the First District implied a right where the Code's penalties were inadequate . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Cretella implied a right where the Code's sanctions were inadequate; 'untested' is the memo's own assessment.)

Cretella v. Azcon, Inc., 2022 IL App (1st) 211224, ¶ 58: ¶ 58 Like the X-Ray Act at issue in Rodgers, the Insurance Code does not expressly provide sanctions and remedies for violations of section 224.1. As stated above (supra ¶ 51), the Insurance Code provides authority for the director to conduct investigations and hearings to determine whether any person has violated any provision of Illinois's insurance laws. 215 ILCS 5/401 (West 2020). This provision, however, is not sufficient to enable employees to freely exercise their choice to consent to COLI coverage and prevent and punish retaliatory action against employees who refuse to consent. A violation of the Insurance Code is a petty offense, which is punishable by a fine of $75 to $1000 (730 ILCS 5/5-4.5-75(a) (West 2020)) and is "any offense for which a sentence of imprisonment is not an authorized disposition" (id. § 5-1-17). These penalties are too minimal to serve as a deterrent and assure compliance with section 224.1.

Cretella v. Azcon, Inc., 2022 IL App (1st) 211224, ¶ 62: ¶ 62 Protecting the Illinois public from retaliation in the workplace for exercising their right to reject COLI coverage is a matter of ongoing concern for the General Assembly. While the General Assembly acknowledges the benefits of the use of COLI coverage in the workplace, it limited the legality of this coverage to the requirements that the employee must voluntarily consent and cannot face any retaliation for refusing to consent. We conclude that implying a private right of action for retaliatory discharge in violation of section 224.1 of the Insurance Code is necessary to provide an adequate remedy because the statutory requirements of voluntary employee consent and no retaliation for a refusal to consent would be ineffective unless such an action is implied.

83. **Common-law fraud stays open.** If a carrier affirmatively misstates limits and we rely on the misstatement to our detriment, fraud remains a distinct tort . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (Cramer recognizes fraud as an independent tort for insurer misconduct in a policyholder context; extending that to a third-party claimant goes beyond the passage.)

Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996), no ¶ number: In summary, an insurer's conduct may give rise to both a breach of contract action and a separate and independent tort action. Kelsay, 74 Ill. 2d at 187. Mere allegations of bad faith or unreasonable and vexatious conduct, without more, however, do not constitute such a tort. Courts therefore should look beyond the legal theory asserted to the conduct forming the basis for the claim. Kush, 853 F.2d at 1385; Zakarian, 652 F. Supp. at 1136; Combs, 146 Ill. App. 3d at 963-64. In cases where a plaintiff actually alleges and proves the elements of a separate tort, a plaintiff may bring an independent tort action, such as common law fraud, for insurer misconduct.

84. The First District rejected a related misrepresentation theory on the record before it . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶50 rejects negligent misrepresentation on the uncontroverted record.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 50: ¶ 50 In addition, a negligent misrepresentation claim may only be brought against a defendant who is "in the business of supplying information for the guidance of others in their business dealings" and provided untrue information to the plaintiff. Id. at 95. The sale of insurance policies is not the sale of

"information," as contemplated under this exception. See First Midwest Bank, N.A. v. Stewart Title Guaranty Co., 218 Ill. 2d 326, 341 (2006); see also Gondeck v. A Clear Title & Escrow Exchange, LLC, 47 F. Supp. 3d 729, 749 (N.D. Ill. 2014) ("An insurance policy is 'a noninformational product' for purposes of the economic loss doctrine."). Moreover, defendants were not otherwise "in the business" of providing information to Kim to guide her business dealings, especially given the adverse nature of their relationship and the fact that Kim was not a State Farm policyholder. Nor can Kim establish any of the other elements of this tort based on the uncontroverted record, which shows there was no actionable misstatement or omission, reliance, or injury. See Freedberg, 2012 IL App (1st) 110938, ¶ 36 (no recovery for negligent misrepresentation absent proof plaintiff relied on misstatement to her detriment); Fox Associates, Inc., 334 Ill. App. 3d at 94-96.

85. **The core rule.** Rule 201(b)(1) reaches any matter relevant to the subject matter , and Rule 214 reaches documents relevant to the subject matter . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. S. Ct. R. 201 (statute or rule; its text follows the decisions)

Ill. S. Ct. R. 214 (statute or rule; its text follows the decisions)

86. The supreme court held that interrogatories on the existence and amount of the defendant's insurance are discoverable , for three reasons: - Insurance is not a private matter between carrier and insured . - Knowing the insurance gives counsel a realistic appraisal and promotes settlement . - Discovery is not limited to admissible matter . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Each of the three reasons maps to the cited passages, and the result appears in C020.4.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: On the basis of this analysis, it is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be "related to the merits of the matter in litigation," as provided in Civil Practice Rules 19 - 11 and 19 - 4, since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for, and afford a sounder basis for the settlement of disputes. We believe that such a construction is in accordance with the intention of the framers of the amended Rules to give a broader scope to the practice of discovery and thereby enable attorneys to better prepare and evaluate their cases.

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: Thus, under our statutes, as in California, liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of insured's motor vehicle. (Superior Ins. Co. v. Superior Court, 235 P.2d 833.) Therefore, we find more cogent the reasoning of the courts in the Brackett and Maddox cases, cited by respondent, that such statutory requirements render insurance policies relevant to the litigation against the insured defendant, in that they apprise injured plaintiffs of rights in the matter of litigation of which they might not otherwise avail themselves. It is not inconceivable that a plaintiff with serious injuries would settle a substantial judgment against a defendant of modest means for a fractional sum, simply because he had no knowledge of any additional rights against the insurer. Thus, to deprive an injured party from learning of his rights against an insurer would, in effect, nullify the benevolent purpose of such statutes, and permit insurance companies to avoid their statutory obligation.

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: In determining whether liability insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, "Judges need

not be more naive than other men." Inasmuch as the insurance company is virtually substituted as a party, (Maddox v. Grauman, 265 S.W.2d 939; dissent in Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649, 658,) as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business. This aspect is most significant in terms of effective judicial administration in coping with today's congested dockets which are largely attributable to the increasing volume of personal injury litigation.

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: In the light of this approach, we must reject at once as authority those cases limiting pretrial discovery to matters admissible in evidence (Goheen v. Goheen, and Bern v. Best) as being contrary to both the terms and intent of the Rule. We do not imply that answers to interrogatories can be brought to the attention of the jury.

87. Rule 411's bar on insurance evidence is limited to the question of negligence . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. R. Evid. 411 (statute or rule; its text follows the decisions)

88. It does not limit discovery, and discovery relevance is broader than trial relevance . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passage supports broader discovery relevance; the clause that Rule 411 does not limit discovery is not in it.)

Zagorski v. Allstate Insurance Co., 2016 IL App (5th) 140056, ¶ 22: ¶ 22 Illinois Supreme Court Rule 201(b)(1) addresses the scope of pretrial discovery, and provides that unless otherwise stated in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter of the pending action, whether it relates to a claim or defense. Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). Rule 201(b)(1) is founded on the basic premise that the object of discovery is the expeditious and final determination of controversies in accordance with the substantive rights of the parties. Owen v. Mann, 105 Ill. 2d 525, 530, 475 N.E.2d 886, 890 (1985); Monier v. Chamberlain, 35 Ill. 2d 351, 357, 221 N.E.2d 410, 415 (1966). Great latitude is allowed in the scope of discovery, and the concept of relevance for purposes of discovery is broader than the concept of relevance for purposes of admissibility at trial. TTX Co. v. Whitley, 295 Ill. App. 3d 548, 556, 692 N.E.2d 790, 796 (1998). Evidence is relevant for trial purposes if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See Ill. R. Evid. 401 (eff. Jan. 1, 2011). In contrast, relevance for discovery purposes includes not only that which is admissible at trial, but also that which leads to admissible evidence. Whitley, 295 Ill. App. 3d at 557, 692 N.E.2d at 797. With these principles in mind, we first consider whether the requested discovery is germane to any theory of the case or any defense.

89. **The carrier's likely counterargument.** The supreme court's reasoning rested partly on motor vehicle statutes that make insurance serve injured persons . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage rests on 'our statutes'; the preceding paragraph lists them, including the Truck Act's motor carrier insurance requirement.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: Thus, under our statutes, as in California, liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of insured's motor vehicle. (Superior Ins. Co. v. Superior Court, 235 P.2d 833.) Therefore, we find more cogent the

reasoning of the courts in the Brackett and Maddox cases, cited by respondent, that such statutory requirements render insurance policies relevant to the litigation against the insured defendant, in that they apprise injured plaintiffs of rights in the matter of litigation of which they might not otherwise avail themselves. It is not inconceivable that a plaintiff with serious injuries would settle a substantial judgment against a defendant of modest means for a fractional sum, simply because he had no knowledge of any additional rights against the insurer. Thus, to deprive an injured party from learning of his rights against an insurer would, in effect, nullify the benevolent purpose of such statutes, and permit insurance companies to avoid their statutory obligation.

90. The carrier may say that rationale does not apply because the Vehicle Code definition does not govern commercial truckers . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage supports the premise that the 7-317 definition does not govern CTL-regulated truckers.)

Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009), p. 8: West Bend does not contend that the foregoing contradictions and inconsistencies do not exist, but maintains that any inconsistencies can be resolved under principles of statutory construction. This contention misses the point. In construing legislation we presume that the legislature did not intend absurd, inconvenient, or unjust results. People ex rel. Sherman v. Cryns, 203 Ill. 2d 264, 280 (2003). The existence of the inconsistencies, by themselves, establishes that the legislature could not have intended for the term "Act" in section 7-317 to include the Commercial Transportation Law. Accordingly, we conclude that the definition of motor vehicle liability insurance policies set forth in section 7-317, including the omnibus requirement in section 7-317(b)(2), does not apply to commercial truckers regulated under the Commercial Transportation Law.

91. Two responses: - The settlement and case-evaluation rationales stand on their own . - Commercial trucks carry their own proof-of-insurance requirements. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passages state the settlement and appraisal rationales, but the court lists them alongside the public-policy statutory rationale; whether they 'stand on their own' is the memo's argument.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: In determining whether liability insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, "Judges need not be more naive than other men." Inasmuch as the insurance company is virtually substituted as a party, (Maddox v. Grauman, 265 S.W.2d 939; dissent in Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649, 658,) as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business. This aspect is most significant in terms of effective judicial administration in coping with today's congested dockets which are largely attributable to the increasing volume of personal injury litigation.

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: On the basis of this analysis, it is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be "related to the merits of the matter in litigation," as provided in Civil Practice Rules 19 - 11 and 19 - 4, since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for, and afford a sounder basis for the settlement of disputes. We believe that such a construction is in accordance with the intention of the framers of the amended Rules to give a broader scope to the practice of discovery and thereby enable attorneys to better prepare and evaluate their cases.

92. A concurrence says so , and a First District decision describes a judgment-satisfaction requirement under the former federal regime . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The concurrence describes the ICC proof-of-insurance requirement, and Pratt describes the final-judgment insurance requirement under the ICC regime.)

> **Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009)**, p. 10, concurrence: The statute applicable to commercial truckers, which is the source of the requirement that commercial trucks file proof of insurance with the Illinois Commerce Commission, is the Commercial Transportation Law. Through the Commission's rules, this statute heavily regulates the trucking industry within Illinois. Regarding insurance coverage, the Commercial Transportation Law requires that before a trucking registration may be issued, the carrier must have complied with Illinois Commerce Commission regulations regarding proof of insurance. 625 ILCS 5/18c-4402 (West 2006). The Commission regulations on insurance have adopted the federal regulations governing interstate motor carriers of property. 92 Ill. Adm. Code §1425.30. Setting aside the question whether it would be appropriate to assign our legislature's definitions of "motor vehicle liability policy" or "liability insurance" to the agency responsible for adopting the federal regulations, the regulations lack any reference to those phrases. There is, therefore, no requirement anywhere within the Commercial Transportation Law or the Commission's regulations that requires commercial truckers to be covered under a "motor vehicle liability policy" or a "liability insurance policy," and, consequently, no requirement that insurance policies issued to commercial truckers must contain an omnibus clause. Simply put, the critical term at issue, defined in section 7-317, is not "used in this Act" with respect to the Commercial Transportation Law.

> **Pratt v. Andrews, 164 Ill. App. 3d 606 (1st Dist. 1987)**, no ¶ number: Express Freight responds that it was not required to obtain liability insurance in which Andrews would be specified as an insured. We agree. ICC regulations do not require Express Freight to procure such insurance. Instead, an ICC-certified carrier must obtain an insurance policy which is "sufficient to pay *** for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles" under the carrier's permit. (Emphasis added.) (49 U.S.C. §10927(a)(1) (1986); see also 49 C.F.R. §1043.1(a) (1986).) Also, a "motor carrier *** that uses motor vehicles not owned by it to transport property under an arrangement with another party [must] *** obtain liability and cargo insurance on [the vehicles]." (49 U.S.C. § 11107(a)(3) (1986).) A motor carrier/lessee is also required to "have control of and be responsible for operating those [leased] motor vehicles." (49 U.S.C. § 11107(a)(4) (1986).) Consequently, a lease between a carrier and a driver must provide that the carrier has "exclusive possession, control and use of the equipment for the duration of the lease" and that the carrier "assume[s] complete responsibility for the operation of the equipment" during the lease. 49 C.F.R. §1057.12(c) (1986).

93. **Excess layers.** The supreme court's holding speaks of the "existence and amount" of the defendant's insurance without any limit to the primary layer . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage speaks of 'existence and amount of defendant's insurance' with no limit to the primary layer.)

> **People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957)**, no ¶ number: On the basis of this analysis, it is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be "related to the merits of the matter in litigation," as provided in Civil Practice Rules 19 - 11 and 19 - 4, since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for, and afford a sounder basis for the settlement of disputes. We believe that such a construction is in accordance with the intention of the framers of the amended Rules to give a broader scope to the practice of discovery and thereby enable attorneys to

better prepare and evaluate their cases.

94. The First District rejected an argument that insurance-related documents, including a self-insured trust, were improper discovery targets , though that holding was limited to in camera review . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶22 rejects the impropriety contention, and ¶27 confines the decision to in camera review and addresses the self-insured trust.)

> **Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918, ¶ 22**: ¶ 22 In sum, we reject Advocate's contention that we "need not reach the question of in camera review because [the plaintiff's] document request seeking irrelevant insurance policies was improper in the first instance according to Fisher." Advocate has not cited any case, statute, or rule that plainly exempts it from production of its insurance-related documents.
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> **Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918, ¶ 27**: ¶ 27 As an initial matter, we presume that an entity's self-insured trust agreement would be more akin to an insurance document than the types of confidential financial documents at issue in Manns. The fact that Advocate appears to have disclosed the existence of the $12.5 million in self-insurance in response to the plaintiff's interrogatories regarding insurance belies its efforts to distinguish its trust document from a traditional liability policy. More significantly, we fail to understand how the circuit court (or this court) could simply accept Advocate's representation that the trust document is "nothing more than one of Advocate's financial documents," which it utilizes "to set forth its proprietary self-insured business structure." The dissent contends that the self-insured trust is a confidential document containing trade secrets; however, the circuit court could not be expected to assess the potential applicability of Manns absent an in camera inspection of the disputed documents. The dissent also posits that Advocate would not want its employees, physicians, or other medical personnel to know the intricate matters contained in the trust. Although our decision herein is limited to the propriety of in camera review, we note that a protective order entered by the circuit court strictly limits the use or dissemination of any produced insurance documents. We thus conclude that the circuit court did not abuse its discretion. See, e.g., Anderson v. St. Mary's Hospital, 101 Ill. App. 3d 596, 600 (1981) (noting that "where there is a genuine dispute as to the nature or content of the document sought to be discovered, an attorney must ordinarily comply with the trial court's order for an in camera inspection of the document or be subject to sanctions for contempt").

95. Layering decides real exposure. Courts enforce "other insurance" clauses that make business and umbrella policies excess . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶85 finds the excess clauses in the business and umbrella policies unambiguous, and the court treats them as excess.)

> **Country Mutual Insurance Company v. Witbrod, 2026 IL App (2d) 250314, ¶ 85**: ¶ 85 In this case, the "other insurance" clauses in the Country Mutual and State Farm policies are unambiguous and not subject to more than one reasonable interpretation. Country Mutual Insurance Co. v. Teachers Insurance Co., 324 Ill. App. 3d 246, 249 (2001). The State Farm policy specifically provided that "[t]he Liability Coverage provided by this policy applies as primary coverage for the *** use of" the 2009 BMW and was the only policy issued to Witbrod by State Farm that applied to the accident as primary coverage. The State Farm policy states that, even if a competing policy also provided primary coverage, State Farm would "pay the proportion of damages payable as primary" under the limits of its policy "and the limits of all other liability coverage that apply as primary coverage." The Country Mutual Business Policy states that "[f]or any covered 'auto' you don't own," such as Witbrod's 2009 BMW, "the insurance provided by the Coverage Form is excess over any other collectible insurance." The Country Mutual Umbrella Policy provides that "[t]his insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis."

96. The defense may cite the rule that excess coverage is not legally mandated . Discoverability, however, has never depended on whether coverage is mandated. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passage supports 'excess not mandated'; the claim that discoverability never depended on mandate is uncited argument.)

> **Crowley v. Empire Fire & Marine Insurance Co., 2019 IL App (2d) 180752, ¶ 20**: ¶ 20 Fogel is more analogous to the instant case because the insurance policy at issue is an excess policy. We consider this to be an important distinction when considering public policy relating to insurance. As noted earlier, by passing the Financial Responsibility Law requiring each motorist to have minimum liability insurance coverage regardless of fault, the Illinois General Assembly declared it to be the public policy of this state that owners and operators of motor vehicles carry primary liability insurance coverage. See Nelson, 2015 IL 118058, ¶ 14. However, the Financial Responsibility Law does not mandate that excess or supplemental liability insurance coverage be obtained once the mandated minimum level of insurance has been met. Id. ("The law does not, however, require that the full amount of any loss be covered. Rather, it mandates only certain minimum levels of coverage."). Additionally, no Illinois statute precludes an intoxication exclusion in an excess or supplemental liability policy. See Progressive, 215 Ill. 2d at 138 ("[T]he *** Financial Responsibility Law clearly contemplates that exclusions may be included in policies and that those exclusions will be upheld."). As such, Empire's denial of excess or supplemental coverage to Thomas Bruen based on his violation of the insurance contract does not violate public policy.

97. Expect a protective-order or proportionality response for confidential self-insurance or reinsurance documents . In camera review is the likely compromise . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passages establish protective orders, proportionality, and in camera review with a protective order for self-insurance documents.)

> **Carlson v. Jerousek, 2016 IL App (2d) 151248, ¶ 30**: ¶ 30 Rule 201(c) (Ill. S. Ct. R. 201(c) (eff. July 1, 2014)), which aims to prevent discovery abuse, contains several provisions for limiting discovery. One approach is a protective order, which may be entered "as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014). Another protection is the relatively new "proportionality" provision, which states: "When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." (Emphaseis added.) Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014). The protections of Rule 201(c) apply to discovery directed to parties and nonparties alike. See Ill. S. Ct. R. 201(c)(1), (c)(2) (eff. July 1, 2014) (the court may act upon a motion by "any party or witness"); R. 204(a)(1) (eff. July 1, 2014) (subpoenas issued to nonparties are "subject to any limitations imposed under Rule 201(c)"). As a whole, "Rule 201 and related rules governing specific discovery methods form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment." Kunkel v. Walton, 179 Ill. 2d 519, 531 (1997).

> **Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918, ¶ 27**: ¶ 27 As an initial matter, we presume that an entity's self-insured trust agreement would be more akin to an insurance document than the types of confidential financial documents at issue in Manns. The fact that Advocate appears to have disclosed the existence of the $12.5 million in self-insurance in response to the plaintiff's interrogatories regarding insurance belies its efforts to distinguish its trust document from a traditional liability policy. More significantly, we fail to understand how the circuit court (or this court) could simply accept Advocate's representation that the trust document is "nothing more than one of Advocate's financial documents," which it utilizes "to set forth its proprietary self-insured business

structure." The dissent contends that the self-insured trust is a confidential document containing trade secrets; however, the circuit court could not be expected to assess the potential applicability of Manns absent an in camera inspection of the disputed documents. The dissent also posits that Advocate would not want its employees, physicians, or other medical personnel to know the intricate matters contained in the trust. Although our decision herein is limited to the propriety of in camera review, we note that a protective order entered by the circuit court strictly limits the use or dissemination of any produced insurance documents. We thus conclude that the circuit court did not abuse its discretion. See, e.g., Anderson v. St. Mary's Hospital, 101 Ill. App. 3d 596, 600 (1981) (noting that "where there is a genuine dispute as to the nature or content of the document sought to be discovered, an attorney must ordinarily comply with the trial court's order for an in camera inspection of the document or be subject to sanctions for contempt").

98. Boilerplate objections to insurance interrogatories invite sanctions . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passage is a general admonition that hollow objections 'may warrant' sanctions; it says nothing specific to insurance interrogatories.)

Zagorski v. Allstate Insurance Co., 2016 IL App (5th) 140056, ¶ 39: ¶ 39 Though decades old, the admonitions by our supreme court echo loudly here. Discovery is not a tactical game. Williams v. A.E. Staley Manufacturing Co., 83 Ill. 2d 559, 566, 416 N.E.2d 252, 256 (1981). "Discovery is intended as, and should be, a cooperative undertaking by counsel and the parties, conducted largely without court intervention, for the purpose of ascertaining the merits of the case and thus promoting either a fair settlement or a fair trial." Williams, 83 Ill. 2d at 566, 416 N.E.2d at 256. Truthful disclosure is the object of all discovery procedures. Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1977). Stock objections and fractional disclosures render our discovery rules and procedures meaningless. Buehler, 70 Ill. 2d at 67, 374 N.E.2d at 467. Such tactics delay the search for truth, waste judicial resources, and should not be condoned by the parties or the trial court. We hope that this will serve as an admonition that asserting an objection followed by a litany of hollow grounds, without the intention or means to defend those grounds, is an abuse of the discovery process that may warrant sanctions. In addition, litigants are reminded that a bald objection preserves nothing for review.

99. **Practical step.** Serve interrogatories and Rule 214 requests with the complaint. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

Ill. S. Ct. R. 214 (statute or rule; its text follows the decisions)

100. **The duty can arise before suit.** It arises once three things are true: a claim exists, there is a reasonable probability of an excess recovery and of liability, and there has been a demand within limits . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Haddick lists the claim, reasonable-probability, and within-limits-demand elements, and says the duty does not depend on suit being filed.)

Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001), no ¶ number: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third

party demands settlement within policy limits.

101. "Reasonable probability" means more likely than not . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Powell reads Haddick as requiring liability to be at least more likely than not.)

> **Powell v. American Service Insurance Co., 2014 IL App (1st) 123643, ¶ 36**: ¶ 36 The "reasonable probability" standard set forth in Haddick requires pleading facts that demonstrate liability is "probable," as opposed to merely "possible." Haddick, 198 Ill. 2d at 417. In other words, we read Haddick as requiring the pleading of facts which show that liability is at least more likely than not, but not necessarily a certainty.

102. The Fifth District found bad faith where bills alone were five times the coverage . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (O'Neill also relied on verdict potential of at least 15 times coverage and the ignored demand; the bills ratio alone is a simplification.)

> **O'Neill v. Gallant Insurance, 329 Ill. App. 3d 1166 (5th Dist. 2002)**, no ¶ number: Gallant knew from the lawyers it hired to protect Christine's interests that the verdict potential was, at a minimum, 15 times the amount of insurance protection. The medical bills alone were more than five times that protection. The decision to reject the chance to settle a claim of this magnitude signals bad faith.

103. Breach exposes the insurer to the full judgment . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Cramer states the insurer may be liable for the full judgment regardless of limits.)

> **Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996)**, no ¶ number: In this circumstance, the insurer may have an incentive to decline the settlement offer and proceed to trial. The insurer may believe that it can win a verdict in its favor. In contrast, the policyholder may prefer to settle within the policy limits and avoid the risk of trial. The insurer may ignore the policyholder's interest and decline to settle. This court has recognized that the insurer has a duty to act in good faith in responding to settlement offers. Krutsinger v. Illinois Casualty Co., 10 Ill. 2d 518, 527 (1957). When an insurer breaches this duty by refusing to settle, the insurer may be liable for the full amount of a judgment against the policyholder, regardless of policy limits. See Mid-America Bank & Trust Co. v. Commercial Union Insurance Co., 224 Ill. App. 3d 1083, 1087 (1992); Phelan v. State Farm Mutual Automobile Insurance Co., 114 Ill. App. 3d 96,104 (1983); Edwins v. General Casualty Co., 78 Ill. App. 3d 965, 968 (1979); Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027, 1029 (1979).

104. *The duty runs to the insured, not to us* . Our answer: the insured motor carrier is the one exposed. Its interests must receive equal consideration , and its claim can be assigned to us after an excess verdict . Notifying the motor carrier itself of its excess exposure therefore pressures the insurer from its own customer's side. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Scroggins supports duty to the insured only; Browning supports equal consideration and assignability to the judgment creditor. The notice strategy is the memo's own.)

> **Scroggins v. Allstate Insurance, 74 Ill. App. 3d 1027 (1st Dist. 1979)**, no ¶ number: In the instant case, however, plaintiffs are suing in their own right, as third-party claimants against the insured, for the insurer's allegedly wrongful refusal to settle their claim. Even assuming arguendo that they have adequately alleged a breach of the duty of good faith and fair dealing on the part of the insurer, that duty is one which the insurer owes to its insured, not to third parties. (Yelm v. Country Mutual

Insurance Co. (1970), 123 Ill. App. 2d 401, 404, 259 N.E.2d 83.) Yet it is elementary that in an action founded on a breach of duty, the plaintiff must allege facts showing a breach of a duty owed to him. (E.g., Browning v. Heritage Insurance Co. (1975), 33 Ill. App. 3d 943, 947-48, 338 N.E.2d 912.) Thus, the rule in Illinois and nearly all jurisdictions is that in the absence of statutory or contractual language sanctioning a direct action, an injured third party has no action against the insurer for breach of the duty to exercise good faith or due care by virtue of his standing as judgment creditor of the insured. (Yelm v. Country Mutual Insurance Co. (1970), 123 Ill. App. 2d 401, 259 N.E.2d 83; accord, e.g., Murphy v. Allstate Insurance Co. (1976), 17 Cal. 3d 937, 941-42, 553 P.2d 584, 132 Cal. Rptr. 424; see Annot., 63 A.L.R.3d 677, 682, and cases cited at 686 (1975).) For the same reason, because the duty is intended to benefit the insured and not third parties, actions by injured claimants founded on third party beneficiary principles have not been permitted. E.g., Murphy v. Allstate Insurance Co. (1976), 17 Cal. 3d 937, 943-44, 553 P.2d 584, 132 Cal. Rptr. 424; Bennett v. Slater (1972), 154 Ind. App. 67, 289 N.E.2d 144; Annot., 63 A.L.R.3d 677, 682-83, 701 et seq. (1975).

Browning v. Heritage Insurance, 33 Ill. App. 3d 943 (2d Dist. 1975), no ¶ number: An insurance company may so conduct itself as to be hable for an entire judgment recovered against its insured, irrespective of its policy limits. It is now fairly well settled in Illinois that conduct constituting fraud, or negligence, or bad faith may render the insurer so liable for its failure to settle a case. If recovery may exceed the policy limits the insurer has the duty "to give to the insured's interests consideration, at least equal to that of its own," (Cernocky v. Indemnity Insurance Co., 69 Ill.App.2d 196, 207; Smiley v. Manchester Insurance & Indemnity Co., 13 Ill.App.3d 809, 812.) The entry of the judgment against the insured constitutes the damage and it is not necessary that the insured allege payment of the excess judgment. (Wolfberg v. Prudence Mutual Casualty Co., 98 Ill.App.2d 190.) And further, the insured's cause of action against his insurer for failing to settle within the policy limits can be assigned to the insured's judgment creditor. Brown v. State Farm Mutual Automobile Insurance Association, 1 Ill.App.3d 47; Annot., 12 A.L.R. 3d 1158 (1967).

105. *No within-limits demand was ever made* . This is where nondisclosure hurts us. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Haddick requires a within-limits demand before the duty arises.)

Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001), no ¶ number: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third party demands settlement within policy limits.

106. A demand above the primary limit triggers no primary-carrier duty , and the insurer need not open negotiations , . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Crane: demands greatly exceeding primary limits support no bad-faith claim; Haddick and Kavanaugh: no duty to initiate negotiations.)

Crane v. Admiral Insurance Co., 2013 IL App (1st) 093240-B, ¶ 35: ¶ 35 The duty to settle in good faith arises "when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." Haddick, 198 Ill. 2d at 417. Furthermore, the duty does not arise until a third party "demands settlement within policy limits." Id. In the case at bar, the injured parties' demands for settlement greatly exceed the primary policy limits. Therefore, pursuant to Haddick, no plausible claim of bad faith

can be made against Kemper and Crane. Both the trial court and CNA defendants rely on Schal Bovis, Inc. v. Casualty Insurance Co., 314 Ill. App. 3d 562 (1999), to support the position that primary insurers owe a duty to excess insurers to act in good faith. However, Schal Bovis involved an action filed by an excess insurer against four primary insurers which had refused to settle an action against the insured for an amount under the primary policies' limits. The appellate court held that an excess carrier may bring a cause of action against a primary carrier for bad-faith refusal to settle. Schal Bovis, 314 Ill. App. 3d at 571. As in Haddick, Schal Bovis only concerned an alleged bad faith refusal to settle.

Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001), no ¶ number: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third party demands settlement within policy limits.

Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350 (1st Dist. 1975), no ¶ number: In the instant case, Kavanaugh's proof and the allegations in his second amended complaint were based upon the theory that defendants had a legal duty to offer their policy limits before Kavanaugh was found liable. Even when we view the facts to show that the first offers to settle for the policy limits occurred late in the trial proceedings, we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case. As this court has stated in Oda v. Highway Insurance Co., 44 Ill.App.2d 235, 253, 194 N.E.2d 489, 499, "[t]o impose such a duty upon it would be to put it at a negotiating disadvantage not imposed on any other litigant." Illinois law does not demand that an insurer must settle within policy limits without exception or else invariably suffer the consequences of an excess liability judgment for breach of its fiduciary duty.

107. Possible framing: a time-limited demand for the full limits of each applicable primary and excess policy. The packet does not test whether a demand for unstated limits is a demand "within policy limits." One Fifth District decision involved a demand framed as "the policy limits," but the amount was known there . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (O'Neill shows a demand for 'the policy limits' where the $20,000 coverage amount was known.)

O'Neill v. Gallant Insurance, 329 Ill. App. 3d 1166 (5th Dist. 2002), no ¶ number: Mrs. O'Neill's attorney demanded the policy limits in settlement of her claim. He offered a complete release from liability for Christine, provided that Gallant would promptly tender its check for Christine's $20,000 liability coverage. Gallant was given 30 days to decide. Confronted with a case of obvious liability with potential damages far in excess of the policy limits, Gallant did not dignify the demand with a response. The 30 days passed and Gallant remained silent. It did not try to negotiate. It did not attempt a counteroffer. It did not even tell Christine that the elderly lady that she hurt was willing to forego a personal judgment for more than the amount with which Christine was insured. Gallant simply ignored the offer to settle, and a window of opportunity to protect its customer from an excess judgment closed. Moss bypassed the chance to authorize the payment of the coverage that Christine had purchased from Gallant. As a result of his decision, Christine suffered a large excess judgment. Gallant's refusal to even respond to an invitation for settlement occurred under baffling circumstances.

108. The Second District's bad-faith factors start with "the existence of an offer by the plaintiff to settle within the policy limits" and include "a refusal to negotiate" . A

documented refusal to disclose limits in the face of a limits demand fits naturally into that analysis, though no packet case makes nondisclosure a factor in itself. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Both quoted factors are in the passage, and the memo flags that nondisclosure is not itself a listed factor.)

> **SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange, 395 Ill. App. 3d 80 (2d Dist. 2009), p. 28**: When a third party seeks damages that exceed policy limits, the insured necessarily becomes concerned with personal liability when there is a reasonable probability that the insured will be found liable for an excess judgment. Haddick, 198 Ill. 2d at 416. At that point, the insurer must take the insured's settlement interests into consideration. Haddick, 198 Ill. 2d at 416. To sustain a cause of action for bad faith, the plaintiff must allege that: (1) the duty to settle arose; (2) the insurer breached the duty; and (3) the breach caused injury to the insured. Haddick, 198 Ill. 2d at 416. The duty of an insurer arises when there is a reasonable probability of recovery in excess of policy limits and there is a reasonable likelihood of a finding of liability against the insured. Central Illinois Public Service Co. v. Agricultural Insurance Co., 378 Ill. App. 3d 728, 737 (2008). In determining whether there was bad faith, the court will consider factors such as the existence of an offer by the plaintiff to settle within the policy limits, a refusal to negotiate, the advice of defense counsel, the prospect of an adverse verdict, and the potential for damages in excess of the policy limits. Central Illinois, 378 Ill. App. 3d at 737. Generally, an insurer is not required to initiate settlement negotiations unless the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed policy limits. Haddick, 198 Ill. 2d at 417 n.1. The fact that an excess judgment was entered against the insured constitutes the damage that permits the insured to recover for the breach of the duty owed. Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027, 1030 (1979). Whether an insurer has acted in bad faith by failing to settle a claim is a question of fact for the fact finder. Haddick, 198 Ill. 2d at 419. When the insurer arbitrarily refuses to settle within policy limits, the insured may effect a reasonable settlement himself without breaching any conditions of the policy. Krutsinger, 10 Ill. 2d at 527.

109. **Layered coverage adds pressure.** The primary carrier owes the excess carriers a duty to act in good faith in settling within its limits . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Schal Bovis finds a duty running from the primary carriers to the excess carrier to act in good faith in settling within limits.)

> **Schal Bovis, Inc. v. Casualty Insurance, 314 Ill. App. 3d 562 (1st Dist. 1999), no ¶ number**: Moreover, even absent subrogation principles, we find that there is a duty that runs from Wausau and Great American to North-brook to act reasonably and in good faith in attempting to settle claims within their respective policy limits. The leading case finding such a duty is Transit Casualty Co. v. Spink Corp., 94 Cal. App. 3d 124, 156 Cal. Rptr. 360 (1979), which recognized a three-way relationship between the policyholder, the primary insurer and the excess insurer. This relationship creates reciprocal duties of care in the conduct of settlement negotiations; when a claim threatens to exceed the primary coverage, the reasonable foreseeability that the claim may reach the excess policy creates a three-way duty of care to act reasonably and in good faith in settling meritorious claims within the policy limits. The insured, primary carrier and excess carriers must therefore act reasonably and in good faith toward one another in considering the others' interests in negotiating a settlement. Transit Casualty Co., 94 Cal. App. 3d at 133, 156 Cal. Rptr. at 366. Our decision in this regard cannot be characterized as surprising, in that several other jurisdictions have followed Transit Casualty Co. and have recognized such a duty (see, e.g., Hartford Accident & Indemnity Co. v. Michigan Mutual Insurance Co., 61 N.Y.2d 569, 574, 463 N.E.2d 608, 610, 475 N.Y.S.2d 267, 269 (1984); Estate of Penn v. Amalgamated General Agencies, 148 N.J. Super. 419, 424, 372 A.2d 1124, 1127 (1977); Vencill v. Continental Casualty Co., 433 F. Supp. 1371 (S.D. W. Va. 1977)). Additionally, while federal courts do not bind our state courts in such matters, we note that at least two federal decisions have predicted that Illinois would recognize such a duty. American Centennial Insurance Co. v. American Home Assurance

Co., 729 F. Supp. 1228, 1231-32 (N.D. Ill. 1990); Ranger Insurance Co. v. Home Indemnity Co., 714 F. Supp. 956 (N.D. Ill. 1989).

110. It must estimate the expected verdict in good faith and offer accordingly . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The passage requires a good-faith verdict estimate and an offer of that amount, consistent with the policy.)

Schal Bovis, Inc. v. Casualty Insurance, 314 Ill. App. 3d 562 (1st Dist. 1999), no ¶ number: We reject Great American's contention in this regard. Our holding today only requires that a primary insurer estimate in good faith the expected verdict of the litigation threatening its insured and offer that amount in support of a proposed settlement - at least to the extent consistent with the terms of its policy. The existence of other insurance is simply not relevant to the primary insurer's duty to offer its support to a settlement when it is reasonable to do so.

111. **The rule is narrow.** Rule 224 exists to identify potential defendants , and its order is limited to identification . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Dent ¶23 states both points.)

Ill. S. Ct. R. 224 (statute or rule; its text follows the decisions)

Dent v. Constellation NewEnergy, Inc., 2022 IL 126795, ¶ 23: ¶ 23 Rule 224 provides a means to identify potential defendants prior to the commencement of a lawsuit. Ill. S. Ct. R. 224(a)(1)(i) (eff. Jan. 1, 2018). Rule 224 allows a party to initiate discovery by filing a verified petition. Ill. S. Ct. R. 224(a)(1)(ii) (eff. Jan. 1, 2018). The rule states that the "petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery." Id. An order allowing a Rule 224 petition "will limit discovery to the identification of responsible persons and entities." Ill. S. Ct. R. 224, Committee Comments (adopted Aug. 1, 1989).

112. It is unavailable once a potential defendant's identity is known . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Maxon states that Rule 224 is inapplicable where any potential defendant's identity is already known.)

Maxon v. Ottawa Publishing Co., 402 Ill. App. 3d 704 (3d Dist. 2010), p. 8: A trial court may grant or deny a petition under Rule 224 in the exercise of its discretion. Gaynor, 322 Ill. App. 3d at 291. A petition under Rule 224 must be verified and is inapplicable to any case where the identity of any potential defendant is already known. Guertin v. Guertin, 204 Ill. App. 3d 527, 532 (1990) (Rule 224 did not authorize trial court to order deposition of decedent's surviving joint tenants to explore possible claim of undue influence where the petition was unverified and the petitioner already knew the identity of all potential defendants). A hearing must be held before the court can grant or deny a Rule 224 petition in order to prevent "fishing expeditions." Kamelgard, 385 Ill. App. 3d at 686; Beale v. EdgeMark Financial Corp., 279 Ill. App. 3d 242, 254 (1996); Shutes v. Fowler, 223 Ill. App. 3d 342, 345 (1991). The use of a Rule 224 petition is limited to discovery of the identity of a potential defendant. Roth v. St. Elizabeth's Hospital, 241 Ill. App. 3d 407, 414-15 (1993); Malmberg v. Smith, 241 Ill. App. 3d 428 (1993) (it was error to grant a Rule 224 petition where identity of potential defendant was already known).

113. Identity is its only use . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Gaynor: 'Ascertaining identity is the only use

for a Rule 224 action.')

> **Gaynor v. Burlington Northern & Santa Fe Railway, 322 Ill. App. 3d 288 (5th Dist. 2001)**, no ¶ number: Rule 224's use is appropriate in situations where a plaintiff has suffered injury but does not know the identity of one from whom recovery may be sought. In such cases, there is a genuine need and, if the expiration of the statute of limitations is near, an urgent need to identify potential defendants so that a plaintiff is not without redress for the injury suffered. This scenario is a stark contrast to the case presented here, in which petitioner filed a verified petition seeking presuit discovery under Rule 224 and contemporaneously filed suit alleging injury arising out of the same incident. Petitioner's reliance on Roth and Beale is misplaced. Roth held that once the identity of those who may be responsible in damages has been ascertained, the purpose of the rule has been accomplished and the action should be dismissed. The petitioner in Roth argued that he should be allowed to engage in broad discovery in order to determine "the identity of one who may be responsible in damages" (emphasis added) (134 Ill. 2d R. 224), though it was clear, as it is here, that counsel already knew the identities of some who might be responsible in damages. Ascertaining identity is the only use for a Rule 224 action. Though Beale may have expanded the discovery available under Rule 224 somewhat, that expansion is not unlimited.

114. A 2024 Fifth District nonprecedential order, citable as persuasive, applied the same limit where the operator of the premises was already known . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Daniel ¶21 bars Rule 224 discovery where the premises operator was already known; the sentence correctly calls it a persuasive Rule 23 order.)

> **Daniel v. Drury Hotels Co., LLC, 2024 IL App (5th) 230090-U, ¶ 21**: ¶ 21 Even under Beale, which has expanded the discovery permitted under Rule 224, we conclude that the petitioner here is not permitted to proceed with Rule 224 discovery since he already knows the identity of a potential defendant who may be responsible for his alleged injuries. The purpose of a Rule 224 action is to ascertain "the identity of one who may be responsible in damages." (Emphasis added.) Ill. S. Ct. R. 224(a)(1)(i) (eff. Jan. 1, 2018). The petitioner was allegedly injured while on the respondent's premises. It was undisputed that, when the petitioner filed his Rule 224 petition, he knew the identity of the manager and operator of the property where his alleged injury occurred. Thus, the connection between his alleged injury and the identity of a potential defendant is already known and not remote.

115. **Even the broader view does not reach limits.** That view allows additional "connecting facts" to narrow the universe of defendants, but not details of wrongdoing . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The Beale rule as quoted in Mazrim allows connecting facts but not details of wrongdoing.)

> **Mazrim v. Decatur Memorial Hospital, 2022 IL App (4th) 210474, ¶ 26**: ¶ 26 The Beale court held, "Where the petitioner is apprised of a sufficient connection to the injury by an individual or entity so as to place such individual or entity within the universe of potential defendants, the petitioner may not seek further discovery of facts pertaining to any actual wrongdoing." Id. at 252. "However, where the known connection to the injury is remote and does little or nothing to limit or define the universe of potential defendants, the petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." Id. at 252-53. The court further provided, "The extent of this permissible inquiry must be determined by the trial judge on a case-by-case basis and in consideration of the cause of action alleged." Id. at 253.

116. In this district, the petitioner must also show necessity . [Pre-Suit Disclosure and

Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (¶16 requires the petitioner to show necessity.)

> **Doe v. Catholic Diocese, 2015 IL App (2d) 140618, ¶ 16**: ¶ 16 Under Rule 224, the unidentified individual or entity does not bear the burden of demonstrating that the discovery request does not satisfy the rule; rather, it is the petitioner who bears the burden of showing that his or her proposed complaint supports a cause of action, even if the unidentified individual or entity does not challenge the request. Hadley v. Subscriber Doe, 2014 IL App (2d) 130489, ¶ 12, aff'd, 2015 IL 118000. This is because Rule 224 is intended to assist a petitioner in identifying a currently unidentified party who might be liable; however, to employ the rule, the petitioner must demonstrate that the proposed identification is necessary. Hadley v. Subscriber Doe, 2015 IL 118000, ¶ 25.

117. **Illinois intrastate carriers.** Vehicles that file proof of insurance with the Illinois Commerce Commission are exempt from the general required-policy provision . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree

> 625 ILCS 5/7-601 (statute or rule; its text follows the decisions)

118. A concurrence ties that filing requirement to the Commercial Transportation Law and federal standards . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The concurrence ties ICC filing to the CTL and to federal regulations, and the sentence labels it a concurrence.)

> **Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009), p. 10, concurrence**: The statute applicable to commercial truckers, which is the source of the requirement that commercial trucks file proof of insurance with the Illinois Commerce Commission, is the Commercial Transportation Law. Through the Commission's rules, this statute heavily regulates the trucking industry within Illinois. Regarding insurance coverage, the Commercial Transportation Law requires that before a trucking registration may be issued, the carrier must have complied with Illinois Commerce Commission regulations regarding proof of insurance. 625 ILCS 5/18c-4402 (West 2006). The Commission regulations on insurance have adopted the federal regulations governing interstate motor carriers of property. 92 Ill. Adm. Code §1425.30. Setting aside the question whether it would be appropriate to assign our legislature's definitions of "motor vehicle liability policy" or "liability insurance" to the agency responsible for adopting the federal regulations, the regulations lack any reference to those phrases. There is, therefore, no requirement anywhere within the Commercial Transportation Law or the Commission's regulations that requires commercial truckers to be covered under a "motor vehicle liability policy" or a "liability insurance policy," and, consequently, no requirement that insurance policies issued to commercial truckers must contain an omnibus clause. Simply put, the critical term at issue, defined in section 7-317, is not "used in this Act" with respect to the Commercial Transportation Law.

119. **Which policy applies.** Under a lease made subject to DOT rules, the motor carrier holds exclusive possession and control of the leased truck . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The holding turned on the lease being 'subject to' DOT rules; the sentence preserves that condition.)

> **Argonaut Midwest Insurance Company v. Morales, 2014 IL App (1st) 130745, ¶ 25**: ¶ 25 While the owner operator contract appears to contradict these terms, those contradictory terms are "[s]ubject to the specific requirements of the Interstate Commerce Commission and/or D.O.T. and of any State regulatory agency having jurisdiction." (Emphasis added.) Critically, the words "subject to" create a condition to apply the terms that follow. Catholic Charities of the Archdiocese of Chicago v. Thorpe, 318 Ill. App. 3d 304, 309 (2000). That is, the agreement that Morales controls the use of his truck is

conditioned on the conformance of those contract terms with DOT regulations. Because those contract terms contradict DOT regulations, the regulations control. 11 Richard A. Lord, Williston on Contracts § 30:19 (4th ed. 2012) ("When a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of the contract for the indicated purposes just as though the words of that enactment were set out in full in the contract."). Thus, under DOT regulations and the owner operator agreement, Land Truck assumed "exclusive possession, control, and use" of Morales's Freightliner. 49 C.F.R. § 376.12(c)(1) (2012).

120. **An adverse decision to watch.** An older First District decision held that an injured plaintiff lacked standing to litigate the coverage extended to the carrier or the driver . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Pratt holds that the plaintiff lacks standing to litigate the coverage extended to the driver or carrier.)

Pratt v. Andrews, 164 Ill. App. 3d 606 (1st Dist. 1987), no ¶ number: Based upon this analysis, we determine that ICC regulations do not obligate Express Freight to obtain liability insurance in which Andrews would be specified as a named insured. We also hold that Pratt has no standing to litigate the insurance coverage extended to Andrews or Express Freight. (See Batteast v. Argonaut Insurance Co. (1983), 118 Ill. App. 3d 4, 454 N.E.2d 706.) Consequently, count II of Pratt's amended complaint' was properly dismissed for failure to state a claim for which relief could be granted.

121. **Section 143.24b scope.** The First District's construction is the only published authority . With no Second District decision on point, it binds the DuPage circuit court. We must confront its plain-language method . Supporting context runs the same direction: , . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passages support the plain-language method and the supporting context; 'only published authority' and 'binds DuPage' are not in them.)

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 27: ¶ 27 The plain and unambiguous language of section 143.24b requires disclosure of potentially available coverage under "personal private passenger automobile liability insurance polic[ies]." Id. Contrary to Kim's argument on appeal, the title of that section does not broadly refer to "liability coverage" but more narrowly refers to the "[d]isclosure of dollar amount of automobile liability coverage." (Emphasis added.) Id. It is well settled in Illinois that a personal automobile insurance policy is not the same as an umbrella policy. In Hartbarger v. Country Mutual Insurance Co., 107 Ill. App. 3d 391, 394 (1982), the plaintiff argued that an umbrella policy was an automobile policy and thus was required to provide uninsured motorist coverage under the Insurance Code. This court rejected that position, holding that "an umbrella liability policy is entirely different from an automobile policy." Id. at 396. This court quoted approvingly a decision from the Alabama Supreme Court, which stated: " 'Automobile liability policies and motor vehicle liability policies insure against the risk of loss through the operation of specific automobiles. An umbrella policy, on the other hand, is fundamentally excess insurance designed to protect against a catastrophic loss. Before an umbrella policy is issued, a primary policy (the "underlying policy") must be in existence ***. *** The umbrella policy issued by Trinity Universal is an inherently different type of insurance from an automobile or motor vehicle liability policy ***.' " Id. at 395 (quoting Trinity Universal Insurance Co. v. Metzger, 360 So. 2d 960, 962 (Ala. 1978)). See also Mei Pang v. Farmers Insurance Group, 2014 IL App (1st) 123204, ¶ 11 ("[i]n Illinois, umbrella policies and primary auto policies are distinct" and an "umbrella policy does not provide the same type of coverage as an automobile policy"); 215 ILCS 5/143.13 (West 2010) (" '[p]olicy of automobile insurance' " defined separately from " '[a]ll other policies of personal lines' ").

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 24: ¶ 24 This claim presents a question of law-i.e., whether section 143.24b of the Insurance Code requires disclosure

of an umbrella policy as a "private personal passenger automobile liability insurance policy." We review de novo both questions of law and issues of statutory construction. Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co., 215 Ill. 2d 121, 127-28 (2005); Best Buy Stores, L.P. v. Department of Revenue, 2020 IL App (1st) 191680, ¶ 17. When construing a statute, the court attempts to ascertain and give effect to the intent of the legislature, which "is best determined from the plain and ordinary meaning of the language used in the statute." Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 24. "When the statutory language is plain and unambiguous, we may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law." Id. Only when a statute is ambiguous may a court look beyond its express language and rely on "extrinsic aids," such as legislative history. Nowak v. City of Country Club Hills, 2011 IL 111838, ¶¶ 11, 13.

Worley v. Fender, 2017 IL App (5th) 160110, ¶ 35: ¶ 35 We conclude the box truck plaintiff was driving at the time of the accident was not a "private passenger automobile" within the meaning of section 143.13a of the Code. 215 ILCS 5/143.13a (West 2008). For this reason, the step-down limits of the policy at issue do not violate Illinois law or public policy.

Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009), p. 8: West Bend does not contend that the foregoing contradictions and inconsistencies do not exist, but maintains that any inconsistencies can be resolved under principles of statutory construction. This contention misses the point. In construing legislation we presume that the legislature did not intend absurd, inconvenient, or unjust results. People ex rel. Sherman v. Cryns, 203 Ill. 2d 264, 280 (2003). The existence of the inconsistencies, by themselves, establishes that the legislature could not have intended for the term "Act" in section 7-317 to include the Commercial Transportation Law. Accordingly, we conclude that the definition of motor vehicle liability insurance policies set forth in section 7-317, including the omnibus requirement in section 7-317(b)(2), does not apply to commercial truckers regulated under the Commercial Transportation Law.

122. **Section 155.** Uniform across districts, including the Second, against third-party claimants: , , . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The supreme court, Second District, and First District passages each deny section 155 to third parties.)

Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458 (1990), no ¶ number: As a general rule, the remedy embodied in section 155 of the Insurance Code extends only to the party insured (Stamps v. Caldwell (1971), 133 Ill. App. 2d 524, 528) and policy assignees (see Loyola University Medical Center v. Med Care HMO (1989), 180 Ill. App. 3d 471; Aabye v. Security-Connecticut Life Insurance Co. (N.D. Ill. 1984), 586 F. Supp. 5). Therefore, the remedy embodied in section 155 of the Insurance Code does not extend to third parties. See Loyola, 180 Ill. App. 3d 471; Robertson v. Travelers Insurance Co. (1981), 100 Ill. App. 3d 845; Scroggins v. Allstate Insurance Co. (1979), 74 Ill. App. 3d 1027; Stamps, 133 Ill. App. 2d 524.

Power Dry of Chicago, Inc. v. Bean, 2022 IL App (2d) 210043, ¶ 49: ¶ 49 Similarly, without a valid assignment of benefits under the policy, the asserted claim in count V for bad faith under section 155(1)(a)-(c) of the Insurance Code against Lutheran Mutual was also properly dismissed. Section 155(1) of the Insurance Code provides: "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155(1)(a)-(c) (West 2018). The remedy

embodied in section 155 of the Insurance Code extends only to the party insured and policy assignees. Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458, 466 (1990). The remedy in section 155 of the Insurance Code does not extend to third parties. Id. Again, without a valid assignment of benefits under the policy, CWFR has no claim under section 155 of the Insurance Code. There was no error in dismissing count V of the complaint.

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135, ¶ 55: ¶ 55 Section 155 permits a cause of action when "there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable." 215 ILCS 5/155(1) (West 2010). Binding Illinois Supreme Court precedent holds that penalties under section 155 are only available to the insured, not to third parties who are strangers to the policy. 3 See Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458, 466 (1990) (dismissing plaintiff's third-party claim under section 155); Stamps v. Caldwell, 133 Ill. App. 2d 524, 528 (1971) (same); Roppo, 100 F. Supp. 3d at 652 ("the remedy embodied in section 155 of the Insurance Code does not extend to third parties").

123. **Insurance discovery.** Binding supreme court authority supports discovery . Expect protective-order and proportionality arguments and the argument that excess coverage is not mandated . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Terry supports discovery, Carlson describes protective-order and proportionality tools, and Crowley holds excess coverage is not mandated.)

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957), no ¶ number: On the basis of this analysis, it is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be "related to the merits of the matter in litigation," as provided in Civil Practice Rules 19 - 11 and 19 - 4, since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for, and afford a sounder basis for the settlement of disputes. We believe that such a construction is in accordance with the intention of the framers of the amended Rules to give a broader scope to the practice of discovery and thereby enable attorneys to better prepare and evaluate their cases.

Carlson v. Jerousek, 2016 IL App (2d) 151248, ¶ 30: ¶ 30 Rule 201(c) (Ill. S. Ct. R. 201(c) (eff. July 1, 2014)), which aims to prevent discovery abuse, contains several provisions for limiting discovery. One approach is a protective order, which may be entered "as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014). Another protection is the relatively new "proportionality" provision, which states: "When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." (Emphaseis added.) Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014). The protections of Rule 201(c) apply to discovery directed to parties and nonparties alike. See Ill. S. Ct. R. 201(c)(1), (c)(2) (eff. July 1, 2014) (the court may act upon a motion by "any party or witness"); R. 204(a)(1) (eff. July 1, 2014) (subpoenas issued to nonparties are "subject to any limitations imposed under Rule 201(c)"). As a whole, "Rule 201 and related rules governing specific discovery methods form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment." Kunkel v. Walton, 179 Ill. 2d 519, 531 (1997).

Crowley v. Empire Fire & Marine Insurance Co., 2019 IL App (2d) 180752, ¶ 20: ¶ 20 Fogel is more analogous to the instant case because the insurance policy at issue is an excess policy. We consider this to be an important distinction when considering public policy relating to insurance. As noted earlier, by passing the Financial Responsibility Law requiring each motorist to have minimum liability insurance coverage regardless of fault, the Illinois General Assembly declared it to be the public policy of this state

that owners and operators of motor vehicles carry primary liability insurance coverage. See Nelson, 2015 IL 118058, ¶ 14. However, the Financial Responsibility Law does not mandate that excess or supplemental liability insurance coverage be obtained once the mandated minimum level of insurance has been met. Id. ("The law does not, however, require that the full amount of any loss be covered. Rather, it mandates only certain minimum levels of coverage."). Additionally, no Illinois statute precludes an intoxication exclusion in an excess or supplemental liability policy. See Progressive, 215 Ill. 2d at 138 ("[T]he *** Financial Responsibility Law clearly contemplates that exclusions may be included in policies and that those exclusions will be upheld."). As such, Empire's denial of excess or supplemental coverage to Thomas Bruen based on his violation of the insurance contract does not violate public policy.

124. The duty runs only to the insured, with no direct action . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Scroggins holds the duty is owed to the insured, with no direct action by a third party.)

Scroggins v. Allstate Insurance, 74 Ill. App. 3d 1027 (1st Dist. 1979), no ¶ number: In the instant case, however, plaintiffs are suing in their own right, as third-party claimants against the insured, for the insurer's allegedly wrongful refusal to settle their claim. Even assuming arguendo that they have adequately alleged a breach of the duty of good faith and fair dealing on the part of the insurer, that duty is one which the insurer owes to its insured, not to third parties. (Yelm v. Country Mutual Insurance Co. (1970), 123 Ill. App. 2d 401, 404, 259 N.E.2d 83.) Yet it is elementary that in an action founded on a breach of duty, the plaintiff must allege facts showing a breach of a duty owed to him. (E.g., Browning v. Heritage Insurance Co. (1975), 33 Ill. App. 3d 943, 947-48, 338 N.E.2d 912.) Thus, the rule in Illinois and nearly all jurisdictions is that in the absence of statutory or contractual language sanctioning a direct action, an injured third party has no action against the insurer for breach of the duty to exercise good faith or due care by virtue of his standing as judgment creditor of the insured. (Yelm v. Country Mutual Insurance Co. (1970), 123 Ill. App. 2d 401, 259 N.E.2d 83; accord, e.g., Murphy v. Allstate Insurance Co. (1976), 17 Cal. 3d 937, 941-42, 553 P.2d 584, 132 Cal. Rptr. 424; see Annot., 63 A.L.R.3d 677, 682, and cases cited at 686 (1975).) For the same reason, because the duty is intended to benefit the insured and not third parties, actions by injured claimants founded on third party beneficiary principles have not been permitted. E.g., Murphy v. Allstate Insurance Co. (1976), 17 Cal. 3d 937, 943-44, 553 P.2d 584, 132 Cal. Rptr. 424; Bennett v. Slater (1972), 154 Ind. App. 67, 289 N.E.2d 144; Annot., 63 A.L.R.3d 677, 682-83, 701 et seq. (1975).

125. It requires a within-limits demand . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Haddick: the duty does not arise until a within-limits demand.)

Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001), no ¶ number: To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third party demands settlement within policy limits.

126. Demands above primary limits trigger nothing . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (Crane holds only that demands greatly exceeding primary limits support no bad-faith claim against the primary insurer;

'trigger nothing' overstates.)

> **Crane v. Admiral Insurance Co., 2013 IL App (1st) 093240-B, ¶ 35**: ¶ 35 The duty to settle in good faith arises "when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." Haddick, 198 Ill. 2d at 417. Furthermore, the duty does not arise until a third party "demands settlement within policy limits." Id. In the case at bar, the injured parties' demands for settlement greatly exceed the primary policy limits. Therefore, pursuant to Haddick, no plausible claim of bad faith can be made against Kemper and Crane. Both the trial court and CNA defendants rely on Schal Bovis, Inc. v. Casualty Insurance Co., 314 Ill. App. 3d 562 (1999), to support the position that primary insurers owe a duty to excess insurers to act in good faith. However, Schal Bovis involved an action filed by an excess insurer against four primary insurers which had refused to settle an action against the insured for an amount under the primary policies' limits. The appellate court held that an excess carrier may bring a cause of action against a primary carrier for bad-faith refusal to settle. Schal Bovis, 314 Ill. App. 3d at 571. As in Haddick, Schal Bovis only concerned an alleged bad faith refusal to settle.

127. The insurer need not initiate negotiations . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Kavanaugh: no duty to initiate negotiations.)

> **Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350 (1st Dist. 1975)**, no ¶ number: In the instant case, Kavanaugh's proof and the allegations in his second amended complaint were based upon the theory that defendants had a legal duty to offer their policy limits before Kavanaugh was found liable. Even when we view the facts to show that the first offers to settle for the policy limits occurred late in the trial proceedings, we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case. As this court has stated in Oda v. Highway Insurance Co., 44 Ill.App.2d 235, 253, 194 N.E.2d 489, 499, "[t]o impose such a duty upon it would be to put it at a negotiating disadvantage not imposed on any other litigant." Illinois law does not demand that an insurer must settle within policy limits without exception or else invariably suffer the consequences of an excess liability judgment for breach of its fiduciary duty.

128. **Rule 224.** Districts vary only in how much connecting-fact discovery they allow. Compare with and . None allows discovery of insurance. [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: partly (The passages show varying latitude for connecting facts; 'only' and 'none allows discovery of insurance' are the memo's inference, not stated.)

> **Mazrim v. Decatur Memorial Hospital, 2022 IL App (4th) 210474, ¶ 26**: ¶ 26 The Beale court held, "Where the petitioner is apprised of a sufficient connection to the injury by an individual or entity so as to place such individual or entity within the universe of potential defendants, the petitioner may not seek further discovery of facts pertaining to any actual wrongdoing." Id. at 252. "However, where the known connection to the injury is remote and does little or nothing to limit or define the universe of potential defendants, the petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." Id. at 252-53. The court further provided, "The extent of this permissible inquiry must be determined by the trial judge on a case-by-case basis and in consideration of the cause of action alleged." Id. at 253.
>
> **Maxon v. Ottawa Publishing Co., 402 Ill. App. 3d 704 (3d Dist. 2010)**, p. 8: A trial court may grant or deny a petition under Rule 224 in the exercise of its discretion. Gaynor, 322 Ill. App. 3d at 291. A petition under Rule 224 must be verified and is inapplicable to any case where the identity of any potential defendant is already known. Guertin v. Guertin, 204 Ill. App. 3d 527, 532 (1990) (Rule 224 did not authorize trial court to order deposition of decedent's surviving joint tenants to explore possible

claim of undue influence where the petition was unverified and the petitioner already knew the identity of all potential defendants). A hearing must be held before the court can grant or deny a Rule 224 petition in order to prevent "fishing expeditions." Kamelgard, 385 Ill. App. 3d at 686; Beale v. EdgeMark Financial Corp., 279 Ill. App. 3d 242, 254 (1996); Shutes v. Fowler, 223 Ill. App. 3d 342, 345 (1991). The use of a Rule 224 petition is limited to discovery of the identity of a potential defendant. Roth v. St. Elizabeth's Hospital, 241 Ill. App. 3d 407, 414-15 (1993); Malmberg v. Smith, 241 Ill. App. 3d 428 (1993) (it was error to grant a Rule 224 petition where identity of potential defendant was already known).

Gaynor v. Burlington Northern & Santa Fe Railway, 322 Ill. App. 3d 288 (5th Dist. 2001), no ¶ number: Rule 224's use is appropriate in situations where a plaintiff has suffered injury but does not know the identity of one from whom recovery may be sought. In such cases, there is a genuine need and, if the expiration of the statute of limitations is near, an urgent need to identify potential defendants so that a plaintiff is not without redress for the injury suffered. This scenario is a stark contrast to the case presented here, in which petitioner filed a verified petition seeking presuit discovery under Rule 224 and contemporaneously filed suit alleging injury arising out of the same incident. Petitioner's reliance on Roth and Beale is misplaced. Roth held that once the identity of those who may be responsible in damages has been ascertained, the purpose of the rule has been accomplished and the action should be dismissed. The petitioner in Roth argued that he should be allowed to engage in broad discovery in order to determine "the identity of one who may be responsible in damages" (emphasis added) (134 Ill. 2d R. 224), though it was clear, as it is here, that counsel already knew the identities of some who might be responsible in damages. Ascertaining identity is the only use for a Rule 224 action. Though Beale may have expanded the discovery available under Rule 224 somewhat, that expansion is not unlimited.

129. **Federal regulation.** The plaintiff's lack of standing to litigate the carrier's coverage . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (Pratt holds the plaintiff lacks standing to litigate the carrier's coverage.)

Pratt v. Andrews, 164 Ill. App. 3d 606 (1st Dist. 1987), no ¶ number: Based upon this analysis, we determine that ICC regulations do not obligate Express Freight to obtain liability insurance in which Andrews would be specified as a named insured. We also hold that Pratt has no standing to litigate the insurance coverage extended to Andrews or Express Freight. (See Batteast v. Argonaut Insurance Co. (1983), 118 Ill. App. 3d 4, 454 N.E.2d 706.) Consequently, count II of Pratt's amended complaint' was properly dismissed for failure to state a claim for which relief could be granted.

130. **Do not rely on the First District's Zurich decision.** Its holding that the Vehicle Code's omnibus definition reaches commercial truckers was rejected in reasoning by the supreme court . [Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois] · reviewer: agree · model: supports (The appellate court held 7-317(b)(2) applies to commercial truckers; the supreme court called that reading too broad and held the definition does not apply.)

Zurich American Insurance Co. v. Key Cartage, Inc., 386 Ill. App. 3d 1 (1st Dist. 2008), p. 29: As a matter of public safety, Illinois public policy warrants mandatory omnibus coverage for commercial truckers that should not be limited by private agreement. See Progressive, 215 Ill. 2d at 129-30 ("[a]n agreement will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy or unless it is manifestly injurious to the public welfare"). If we were to accept Zurich's argument that section 7-317(b)(2) does not apply to commercial truckers, persons injured by permissive drivers of commercial trucks would be unable to secure payment of their damages, in violation of public policy. See Smith, 197 Ill. 2d at 376 (noting the principal purpose of mandatory automobile liability insurance is to protect the public by securing payment of their damages). Protection of the public is best served by requiring

omnibus insurance because the legislature "intended to insure that the common and often unavoidable practice of entrusting one's vehicle to someone else does not foreclose an injured party from obtaining payment for otherwise covered losses resulting from operation of the vehicle." Progressive, 215 Ill. 2d at 137. The supreme court has held that section 7-317(b)(2) applies throughout the Vehicle Code (Progressive, 215 Ill. 2d at 128; Universal Underwriters, 182 Ill. 2d at 245) and there is no statutory language precluding commercial truckers from the omnibus insurance requirement in the statute. Accordingly, we find that section 7-317(b)(2) applies to insurance policies for commercial truckers issued pursuant to section 18c-4901 and, for the purposes of this case, to Zurich's reciprocal coverage provision.

Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009), p. 6: The appellate court below read Universal as requiring that section 7-317(b)(2) be applied to commercial trucking insurance policies mandated by the Commercial Transportation Law. This is too broad a reading of the opinion. Universal never discussed commercial trucking insurance policies or considered the interplay between section 7-317(b)(2) and the Commercial Transportation Law. Further, our reasoning in Universal expressly rejects an overly broad application of the opinion. As we explained in Universal, section 7-317(b)(2)'s omnibus requirement is part of the statutory definition of "motor vehicle liability policy," found in section 7-317. This statutory definition applies to the term "motor vehicle liability policy" as it is "used in this Act." In turn, the word "Act," under the definition provided by the Illinois Vehicle Code (625 ILCS 5/1-101.1 (West 1996)), means the entire Illinois Vehicle Code, "unless the context clearly indicates another meaning." (Emphasis added.) Universal, 182 Ill. 2d at 245. Thus, in determining whether the word "Act" in section 7-317 refers to other provisions of the Vehicle Code, and, therefore, whether the omnibus requirement of section 7-317(b)(2) applies to those provisions, each case must be judged on its own facts.

Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009), p. 8: West Bend does not contend that the foregoing contradictions and inconsistencies do not exist, but maintains that any inconsistencies can be resolved under principles of statutory construction. This contention misses the point. In construing legislation we presume that the legislature did not intend absurd, inconvenient, or unjust results. People ex rel. Sherman v. Cryns, 203 Ill. 2d 264, 280 (2003). The existence of the inconsistencies, by themselves, establishes that the legislature could not have intended for the term "Act" in section 7-317 to include the Commercial Transportation Law. Accordingly, we conclude that the definition of motor vehicle liability insurance policies set forth in section 7-317, including the omnibus requirement in section 7-317(b)(2), does not apply to commercial truckers regulated under the Commercial Transportation Law.

Argonaut Midwest Insurance Company v. Morales, 2014 IL App (1st) 130745

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 2014-09-03 · Opinion
Published opinion

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Where the memo cites it

- memo p. 7 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 25: passage C099.1
- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 25: passage C099.1

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Illinois Official Reports

Appellate Court

***Argonaut Midwest Insurance Co. v. Morales*, 2014 IL App (1st) 130745**

Appellate Court Caption	ARGONAUT MIDWEST INSURANCE COMPANY, Plaintiff-Appellee, v. GABRIEL MORALES, LAND TRUCK, INC., and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, INC., an Illinois Corporation, Defendants-Appellants (Raymond J. Jones, Stanley Herbert, Morris K. Stevens, and Gloria Stevens, Defendants).
District & No.	First District, Third Division Docket No. 1-13-0745
Filed	September 3, 2014
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	In an insurance dispute over the coverage for a trucking accident involving defendant, the owner of a motor vehicle engaged in an independent business of hauling commodities pursuant to a contract, the company whose commodities he agreed to haul and plaintiff, the insurer that issued a bobtail insurance policy to defendant providing coverage for defendant when he used his truck and trailer for his own purposes but not when he rented it out, the trial court properly entered summary judgment holding that defendant's insurer had no duty to defend or indemnify defendant under the policy for the injuries suffered by the passengers of a vehicle struck by defendant's truck and trailer while he was engaged in hauling for the company with which he had an agreement, since the policy issued by plaintiff contained a "Trucker–Insurance for Non-Trucking Use" endorsement excluding coverage for defendant's covered vehicle while used in the business of anyone to whom it is rented.
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 09-CH-27901; the Hon. Rodolfo Garcia, Judge, presiding.
Judgment	Affirmed.

Counsel on Appeal

Perry M. Shorris and Alice Ye, both of Lewis, Brisbois, Bisgaard & Smith, LLP, of Chicago, for appellants.

Joshua Vincent and Kimberly Jansen, both of Hinshaw & Culbertson, LLP, of Chicago, for appellee.

Panel

PRESIDING JUSTICE HYMAN delivered the judgment of the court, with opinion.
Justice Neville concurred in the judgment and opinion.
Justice Mason dissented, with opinion.

OPINION

¶ 1 This case involves cross-motions for summary judgment on issues involving insurance coverage of a trucking accident. Appellants-defendants Gabriel Morales, Land Truck, Inc., and Insurance Company of the State of Pennsylvania, Inc., appeal the trial court's summary judgment order in favor of plaintiff Argonaut Midwest Insurance Company, which held that Argonaut's policy did not cover the accident. Appellants raise two issues on appeal: (i) whether coverage is excluded under the "Trucker–Insurance for Non-Trucking Use" endorsement; and (ii) whether Land Truck is entitled to a defense under the policy. We affirm, holding that Argonaut has no duty to defend or indemnify Morales under the "Trucker–Insurance for Non-Trucking Use" exception, and that Land Truck is not considered an insured under Argonaut's policy.

¶ 2 BACKGROUND

¶ 3 Gabriel Morales entered into an "Owner Operator Contract" with Land Truck in April 2007. The contract described Land Truck as "a common carrier by motor vehicle holding authority from the Federal Highway Administration." The contract identifies Morales as an independent contractor and the owner of a motor vehicle who "is engaged in an independently established business of hauling commodities by motor vehicle pursuant to contract with contract or common carriers." Land Truck agreed to pay Morales a "flat rate ~~percentage~~ of Gross revenue." (Strikeout in original.)

¶ 4 Regarding insurance, the contract provides that "[u]nless required by statute or ordinance," Land Truck will not provide any insurance to Morales. Moreover, the contract required Morales carry his own insurance, including "Bobtail Insurance naming Land Truck Inc as an 'Additional Named Insured' and Certificate Holder." " 'Bob-tail' in trucking parlance is the operation of a tractor without an attached trailer," and "bobtail insurance" typically refers to insurance for when a tractor is not being used in the business of an authorized carrier. *Prestige Casualty Co. v. Michigan Mutual Insurance Co.*, 99 F.3d 1340 (6th Cir. 1996). Land Truck

required Morales pay "all costs and expenses incident to the performance of" the contract, including premiums for insurance to cover physical damages, vehicle operating and maintenance costs, fees and taxes, and tolls, among others.

¶ 5 Morales agreed to haul commodities for Land Truck, but could refuse loads and do business with other carriers as long as Land Truck received proper notice. Morales would display Land Truck's placards and identifications when hauling for it, and remove them when not. Morales had sole responsibility for the "direction and control" of his operators, and discretion regarding the "methods and means" of fulfilling his obligations to Land Truck.

¶ 6 Land Truck agreed to comply with the rules and regulations of the Interstate Commerce Commission, the Department of Transportation, and state regulatory authorities. Subject to those rules and regulations, Morales had the right to "control and direct, in all respects, the operation of the equipment used in the performance" of the contract. The contract lasted one year, subject to automatic renewal.

¶ 7 Effective early March 2009, plaintiff Argonaut Midwest Insurance Company issued a $1 million insurance policy to Morales. Under the policy, Argonaut agreed to "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'." Argonaut agreed to "defend any 'Insured' against a 'suit' asking for these damages ***. However, [it had] no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' *** to which this insurance does not apply."

¶ 8 The policy defines "insureds" to include "You [Morales] for any covered 'auto'." Among the schedule of covered autos, Morales's 2003 Freightliner truck is listed. An endorsement titled "Truckers–Insurance for Non-Trucking Use" states, "This insurance does not apply to: *** A covered 'auto' while used in the business of anyone to whom the auto is *rented*." (Emphasis added.)

¶ 9 Later in March 2009, Land Truck notified Morales of a pickup from Waukegan, Illinois. Morales got a dispatch sheet from Land Truck, went to get his truck and trailer from a parking spot he rented, and went to retrieve the empty container. Morales paid tolls with an I-Pass provided by Land Truck. Morales was driving north on I-294 when he struck a vehicle carrying Stanley Herbert, Raymond Jones, and Morris Stevens.

¶ 10 In 2009, Herbert, Jones, and Stevens sued Morales and Land Truck. Their amended complaint alleges negligence against Morales and Land Truck, and Stevens' wife, Gloria, alleges loss of consortium.

¶ 11 Argonaut filed a complaint for declaratory judgment against Morales, Land Truck, Herbert, Jones, and the Stevenses, claiming it had no duty to defend or indemnify Morales or Land Truck in the underlying suit. Alternatively, Argonaut claimed that the defense costs of the underlying suit should be apportioned between itself and Land Truck's insurer, defendant Insurance Company of the State of Pennsylvania.

¶ 12 The parties filed cross-motions for summary judgment. The trial court granted Argonaut summary judgment, holding that it had no duty to defend either Morales or Land Truck. This appeal timely followed.

¶ 13 STANDARD OF REVIEW

¶ 14 Summary judgment may be granted where no triable issue of material fact is present and the movant is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). "A genuine issue of material fact *** exists where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Windmill Nursing Pavilion, Ltd. v. Cincinnati Insurance Co.*, 2013 IL App (1st) 122431, ¶ 18. Cross-motions for summary judgment indicate none of the movants believe a factual dispute exists regarding the issues raised. *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, ¶ 11. "We review the circuit court's grant of summary judgment *de novo*." *Skokie Castings, Inc. v. Illinois Insurance Guaranty Fund*, 2013 IL 113873, ¶ 27.

¶ 15 ANALYSIS

¶ 16 Appellants argue (i) the "Trucker–Insurance for Non-Trucking Use" endorsement does not apply, and (ii) Land Truck is an insured under Argonaut's policy. We conclude that neither argument has merit.

¶ 17 Nontrucking Endorsement

¶ 18 Appellants assert two reasons for the inapplicability of the endorsement: (i) Land Truck did not rent the Freightliner because it did not take exclusive possession or control of it; and (ii) the term "rented" is ambiguous. We reject both assertions.

¶ 19 We interpret an insurance policy as we would any other contract, reading the terms to give effect to the intent of the parties. *Gaudina v. State Farm Mutual Automobile Insurance Co.*, 2014 IL App (1st) 131264, ¶ 17. We give unambiguous policy terms their plain, ordinary, popular meaning. *Id.* ¶ 18. Ambiguity exists where the policy terms can produce more than one reasonable interpretation. *Id*. Where there is ambiguity, we construe the policy liberally in favor of coverage. *Id*.

¶ 20 Appellants note that the endorsement excludes coverage where the Freightliner "used in the business of anyone to whom the auto is rented." They argue that Morales's truck was never rented under the terms of the agreement between Land Truck and Morales. "Rent," they assert, requires the right to exclusive possession and control. Dictionary definitions of "rent," however, do not require exclusive possession. See Black's Law Dictionary 1410 (9th ed. 2009) (as a noun, "Consideration paid, usu. periodically, for the use or occupancy of property"); Webster's Third New International Dictionary 1923 (1993) (as a verb, "to grant the possession and enjoyment of for rent : hire out").

¶ 21 Appellants also cite foreign case law indicating that renting or leasing property requires the transfer of exclusive possession. *E.g.*, *Canal Insurance Co. v. Liberty Mutual Insurance*, 395 F. Supp. 962 (N.D. Ga. 1975) (holding use of truck incidental to service contract did not constitute lease of vehicle). In addition, they point to *Millenium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010), where our supreme court stated, regarding real property, "[i]f the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease, but if it merely confers a privilege to occupy the premises under the owner, it is a license." (Internal quotation marks omitted.) They cite as well the Automobile Renting Occupation and Use Tax Act (35 ILCS 155/1 *et seq.* (West 2012)), which defines vehicle rental

as requiring "any transfer of the possession or right to possession of an automobile." 35 ILCS 155/2 (West 2012). Appellants acknowledge this statute does not apply to commercial trucks.

¶ 22 Further, appellants argue that Morales did not transfer complete possession or control of his truck to Land Truck, and therefore the nontrucking endorsement does not apply, noting the owner operator contract states, "Subject to the specific requirements of the Interstate Commerce Commission and/or D.O.T. and of any State regulatory agency having jurisdiction: *** The *Contractor* [Morales] *shall control and direct, in all respects, the operation of the equipment* used in the performance of this Contract." (Emphasis added.) Because the agreement purports to leave control of the Freightliner in Morales's possession, appellants assert that it is not a "rental" agreement. They conclude that Land Truck did not rent Morales's truck, and therefore the nontrucking endorsement does not apply.

¶ 23 We disagree with appellants' logic. Under the facts here, transferring exclusive control, possession, and use of a vehicle do constitute renting, and the owner operator contract between Morales and Land Truck is a rental agreement.

¶ 24 While the agreement does not say so, statutes and regulations require Land Truck to assume exclusive control of Morales's truck. As the owner operator contract states, Land Truck is a common carrier registered with the United States Department of Transportation (DOT). Registration requires motor carriers be willing and able to comply with DOT rules and regulations. 49 U.S.C. § 13902(a)(1)(A)(i) (2012). Those rules provide that an "authorized carrier may perform authorized transportation in equipment *it does not own* only" if there is "a written lease granting the use of the equipment." (Emphasis added.) 49 C.F.R. § 376.11(a) (2012). Federal law further requires that a written lease "provide that the authorized carrier lessee shall have *exclusive possession, control, and use of the equipment* for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." (Emphasis added.) 49 C.F.R. § 376.12(c)(1) (2012).

¶ 25 While the owner operator contract appears to contradict these terms, those contradictory terms are "*[s]ubject to* the specific requirements of the Interstate Commerce Commission and/or D.O.T. and of any State regulatory agency having jurisdiction." (Emphasis added.) Critically, the words "subject to" create a condition to apply the terms that follow. *Catholic Charities of the Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 309 (2000). That is, the agreement that Morales controls the use of his truck is conditioned on the conformance of those contract terms with DOT regulations. Because those contract terms contradict DOT regulations, the regulations control. 11 Richard A. Lord, Williston on Contracts § 30:19 (4th ed. 2012) ("When a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of the contract for the indicated purposes just as though the words of that enactment were set out in full in the contract."). Thus, under DOT regulations and the owner operator agreement, Land Truck assumed "exclusive possession, control, and use" of Morales's Freightliner. 49 C.F.R. § 376.12(c)(1) (2012). ↩ memo p. 7, 13

¶ 26 Argonaut notes that, under Illinois law, the motor carrier's exclusive possession is implied in the lease:

> "The following terms, if not stated in a lease, shall be implied. Any contrary provisions in the lease shall be void.
>
> 1) Exclusive possession and control. The lessee shall have *exclusive possession and control of leased equipment* during all periods when the equipment is operated under

> the lease. Such exclusive possession and control shall extend also to the drivers of leased equipment." (Emphasis added.) 92 Ill. Adm. Code 1360.40(b)(1) (1993).

But it is unclear whether Land Truck is subject to this code provision, which only applies to carriers "regulated by the Illinois Commerce Commission." 92 Ill. Adm. Code 1360.10(a)(1) (1987). Under the Illinois Commercial Transportation Law (625 ILCS 5/18c-1101 *et seq.* (West 2010)), the Commission's jurisdiction over "for-hire transportation by motor carrier" is limited to intrastate commerce. 625 ILCS 5/18c-1201 (West 2010); *Canal Insurance v. A&R Transportation & Warehouse, LLC*, 357 Ill. App. 3d 305, 312-13 (2005). It is unclear from the record whether Land Truck and Morales's business involves intrastate or interstate commerce. Thus, we cannot say that the above section of the Administrative Code applies. See *Triple 7 Illinois, LLC v. Gaming & Entertainment Management-Illinois, LLC*, 2013 IL App (3d) 120860, ¶ 22 ("interpreting the regulations to apply to agreements between nonlicensed entities would violate the right of private parties to freely contract").

¶ 27 Appellants urge the court to follow Canal Insurance Co. v. United States Fire Insurance Co., an unpublished order from the United States District Court for the Southern District of Alabama. Canal Insurance Co. v. United States Fire Insurance Co., No. 04-0094-KD-C (S.D. Ala. May 26, 2006) (hereinafter, *Canal*). We decline. There, a semitruck lost a break drum, which flew through the windshield of a nearby vehicle, striking one of the occupants who died several days later. A trucking company owned the semitruck, and a peanut company owned the trailer. The trucking company's insurer filed a suit for declaratory judgment, arguing that a "Truckman's Endorsement" limited coverage. That endorsement (similar to the one here) read, " 'no coverage is extended to any person, firm or organization using the described automobile pursuant to any lease, contract for hire, bailment, rental agreement, or any similar contract or agreement.' " *Id.* The federal district court held under Georgia law that the agreement between the trucking and peanut companies was a service contract, and not a lease or rental agreement.

¶ 28 The court noted that federal law might have defined the agreement as a "lease." The statute defines such a lease as a between a truck owner and "an authorized carrier." 49 C.F.R. § 376.2(e) (2012). But the insurer offered nothing to prove that the peanut company was an authorized motor carrier under the statute and regulations. In addition the court noted that the agreement did not require the peanut company to take exclusive possession of any truck, which was a required term of the lease. 49 C.F.R. § 376.12(c)(1) (2012). The court reasoned that, because the contract between the trucking and peanut companies was a service contract, the endorsement did not apply.

¶ 29 The *Canal* case is distinguishable in that no evidence identified the peanut company as a DOT-regulated authorized carrier. It was therefore not subject to DOT regulations. Unlike *Canal*, no one disputes that Land Truck is an authorized carrier, as acknowledged in the owner operator contract. Moreover, the contract incorporates DOT requirements into the agreement. No similar provision appears in the *Canal* case.

¶ 30 Appellants next argue that the term "rented" is ambiguous. Ambiguity exists where language is subject to more than one reasonable interpretation. *Gaudina v. State Farm Mutual Automobile Insurance Co.*, 2014 IL App (1st) 131264, ¶ 18. Appellants fail to explain what definitions of the term "rented" lead to multiple, reasonable interpretations of coverage. We cannot discern any definitions of "rented" that would lead to differing outcomes regarding coverage. Thus, appellants' argument is not well taken.

¶ 31 Even if the owner operator agreement is read in light of DOT regulations, according to appellants that simply indicates Morales "leased" his vehicle to Land Truck, as federal law does not describe the document as a "rental" agreement. They note that Argonaut's policy uses the terms "lease" and "rent" separately, and that the terms must be interpreted differently to avoid surplusage.

¶ 32 But appellants fail to cite any sources that define these terms differently or that define "lease" as requiring exclusive possession while "rent" does not. We acknowledge that Argonaut's policy uses both terms, and while courts endeavor to avoid reading a contract to create surplusage, it happens nevertheless. *Coles-Moultrie Electric Cooperative v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (1999). Out of an abundance of caution, contract drafters often string synonyms or closely related words together to prevent a narrow interpretation. If courts were to attempt to interpret every synonym differently, the strain would produce absurdities. See *Rubin v. Laser*, 301 Ill. App. 3d 60, 68 (1998) ("Courts construe contracts so as to avoid absurd results."). Generally, when referring to types of contracts, "rent" and "lease" are synonymous, and we detect no meaningful differences in their definitions. See Black's Law Dictionary 970 (9th ed. 2009) (defining "lease" as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent"); Webster's Third New International Dictionary 1923 (1993) (defining "rent" as "to take and hold under an agreement to pay rent").

¶ 33 Appellants next argue that, even if regulations must be used to interpret the owner operator contract as giving exclusive control of Morales's vehicle to Land Truck, the regulations are irrelevant because, in reality, Land Truck did not control Morales's vehicle. In support, appellants point to *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159 (2007). In *Roberson*, a trucker operated his own truck under contract with a federally regulated motor carrier. *Id.* at 162-63. The contract expressly stated that under federal regulations, the carrier had "exclusive possession, control and use of the" truck, and "assumed complete responsibility for" its operation. (Internal quotation marks omitted.) *Id.* at 162. The contract also labeled the trucker as an independent contractor, and gave the trucker great leeway in satisfying the contractual duties. *Id.* at 163.

¶ 34 The trucker was injured while unloading freight for the carrier and filed a worker's compensation claim. *Id.* at 164-66. The arbitrator found that as an independent contractor, the trucker was ineligible for compensation. *Id.* at 170. The Industrial Commission reversed, finding that the trucker was an employee and noting that the carrier had the right to exclusive possession and use of the trucker's vehicle. *Id.* at 172. The supreme court affirmed, finding the conclusion was not against the manifest weight of the evidence. *Id.* at 187.

¶ 35 Appellants and the dissent argue that, under *Roberson*, regulations between motor carriers and truckers do not alter the contractual relationship between the two. We disagree. *Roberson* does not stand for the proposition that federally mandated language in the owner operator contract is meaningless. As the supreme court noted, "the regulation requiring a motor carrier to have exclusive possession, control, and use of leased equipment does not mandate that the driver is an employee for all purposes. *** Compliance with federal regulations is merely a factor that may be considered in a common law analysis of whether a driver is an employee of a trucking company." *Id.* at 178. The *Roberson* court concluded that courts may consider federally mandated language included in the contract between a motor carrier and a trucker (among many other factors) to determine whether the trucker is an employee or independent

contractor. *Id.* at 184-87. Accordingly, this language is not meaningless, and use of federal regulations to interpret the owner operator agreement is proper.

¶ 36 Even if this court reads federal regulations into the agreement between Land Truck and Morales, appellants contend those terms create a "legal fiction" and do not reflect whether Land Truck in fact had exclusive control over Morales's vehicle. (A "legal fiction" is a rule that assumes "that something is true even though it may be untrue." Black's Law Dictionary 976 (9th ed. 2009).) In support, appellants cite *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975). There, the Supreme Court noted that an owner who leases a truck to a motor carrier maintains an "aspect of control" over the truck. *Id.* at 39. But the Court described that as "ministerial control," and not the kind of control that federal regulations were concerned with. *Id.* Rather, the concern

> "was with operating authority, with routes and destinations and classes of freight, with the integrity of certifications, and with that ultimate control in the lessee [motor carrier] that makes and keeps it responsible to the public, the shipper, and the Commission. The Commission observed:
>
> > It now seems to be accepted that when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation." (Internal quotation marks omitted.) *Id.*

Legal fiction or not, if a motor carrier opts not to exercise its right to control the vehicle, it does so at its own peril, as its responsibility for the vehicle does not abate. See *Carl Subler Trucking, Inc. v. Splittorff*, 482 N.E.2d 295, 297 (Ind. Ct. App. 1985) ("regulations require that carriers operating under permits exert actual control over leased equipment; the borrowed drivers and the carriers are not permitted to circumvent such regulation by contract"); *Hershberger v. Home Transport Co.*, 103 Ill. App. 3d 348, 352 (1982) (noting one goal of regulation which imposes responsibility on carrier includes preventing carriers from avoiding safety standards by leasing equipment from non-regulated carriers). Regardless of whether Land Truck chose to exercise its right to control Morales's vehicle, the terms giving it those rights make the owner operator contract a rental agreement.

¶ 37 Appellants next maintain that Argonaut failed to prove Morales rented his vehicle to Land Truck. Appellants assert that there are no "extrinsic facts" suggesting that Morales gave possession and control of his vehicle to Land Truck. But appellants point to no case law requiring extrinsic facts be found in the owner operator agreement, nor do they explain why extrinsic facts are necessary to establish that Land Truck had exclusive control over Morales's vehicle. The term "rented" typically refers to a contract. Accordingly, the agreement between Morales and Land Truck sufficiently proves the rental of the vehicle.

¶ 38 Appellants and the dissent further maintain that DOT regulations should not be used to guide an insurance coverage dispute. In support, they cite *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128 (3d Cir. 1979). The dissent puts much stock in the *Roberson* court's citing *Carolina Casualty* for the proposition that terms inserted in private contracts by federal regulations do not alter obligations " 'under contracts allocating financial risk among private parties.' " (Emphasis omitted.) *Roberson*, 225 Ill. 2d at 178 (quoting *Carolina Casualty*, 595 F.2d at 138).

¶ 39 The *Carolina Casualty* case involved a motor carrier that entered into a trip-lease contract with a truck owner. *Carolina Casualty*, 595 F.2d at 129-31. When the trucker was involved in a car accident, the trucker's insurer filed a declaratory judgment action against the carrier's insurer to determine which policy was primary. *Id.* at 130. The trial court held that, because the DOT "responsibility-and-control" regulations made the carrier liable to the injured parties, the carrier and its insurer were primarily liable. *Id.* at 132. The court of appeals disagreed, holding that courts should not rely solely on those regulations when determining which policy is primary. *Id.* at 138. Instead, the court "should consider the express terms of the parties' contracts." *Id.*

¶ 40 In *Carolina Casualty*, the issue was whether the carrier's or the trucker's insurance was primary. Neither policy contained a nontrucking endorsement like the one here. Absent the endorsement, we agree that these DOT regulations would not control the interpretation of which policy is primary. The question of whether a policy is primary versus excess may sometimes be resolved by referencing the policy terms alone. See, *e.g.*, *Certain Underwriters at Lloyd's, London v. Central Mutual Insurance Co.*, 2014 IL App (1st) 133145, ¶¶ 10-12.

¶ 41 But we disagree that either *Roberson* or *Carolina Casualty* stands for the proposition that DOT regulations are irrelevant in an insurance coverage dispute. Our inquiry differs from that of *Carolina Casualty*. Argonaut's nontrucking endorsement conditions coverage on the type of relationship between Morales and Land Truck at the time of the accident. That is to say, whether the contract between Land Truck and Morales constitutes a rental agreement. When one party takes exclusive possession, control, and use of a vehicle in exchange for money, that is a rental agreement. The fact that the source of the possession-and-control terms is federal law is irrelevant to our interpretation of the endorsement. But federal law does control our interpretation of the owner operator agreement because that agreement is "subject to" DOT regulations.

¶ 42 Our analysis aligns with the purpose of Argonaut's bobtail insurance policy, providing coverage when Morales is using his truck for his own purposes, not when he is renting it to Land Truck. For the latter circumstances, federal law requires Land Truck to procure its own insurance to cover Morales when Land Truck is using his vehicle. 49 C.F.R. § 376.12(j)(1) (2012) ("The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to [Federal Motor Carrier Safety Administration] regulations under 49 U.S.C. 13906. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance.").

¶ 43 Accordingly, the "Trucker–Insurance for Non-Trucking Use" endorsement applies, and Argonaut has no duty to defend or indemnify Morales.

¶ 44 Land Truck's Status as Insured

¶ 45 As a threshold issue, Argonaut argues that the denial of a motion for summary judgment is not appealable. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 357 (1999). This is true, but not here where the case is disposed of on cross-motions for summary judgment. *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 34.

¶ 46 Appellants assert that Land Truck is an insured under Argonaut's policy. We disagree.

¶ 47 Included under the "Who Is An Insured" section of Argonaut's policy is "[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability." But, the "Insurance for Non-Trucking Use" endorsement adds, "Who Is An Insured does not include anyone engaged in the business of transporting property by 'auto' for hire who is liable for your conduct."

¶ 48 Appellants argue that the term "for hire," like the term "rented," requires the exercise of control and the right to direct the use of the vehicle. See *Selective Way Insurance Co. v. Travelers Property Casualty Co. of America*, 724 F. Supp. 2d 520, 526 (E.D. Pa. 2010) ("The majority of courts that apply the plain meaning of 'hire' when interpreting policies like the one at issue have found the term to contain an element of control."). As already noted, the owner operator agreement and applicable federal law require Land Truck to control and possess Morales's vehicle. Under the agreement, Land Truck is "engaged in the business of transporting property by 'auto' for hire." Thus, the endorsement applies. *Sprow v. Hartford Insurance Co.*, 594 F.2d 418, 422 (5th Cir. 1979) ("for a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control").

¶ 49 Accordingly, Argonaut has no duty to defend or indemnify Land Truck under Morales's policy.

¶ 50 Affirmed.

¶ 51 JUSTICE MASON, dissenting.

¶ 52 Because I do not agree that Argonaut has sustained its burden, under the unambiguous language of its policy, to demonstrate the applicability of the exclusion it relies on, I respectfully dissent.

¶ 53 The majority acknowledges that the terms of the owner operator contract between Morales and Land Truck contradict the conclusion that Morales agreed to "rent" his truck to Land Truck. That contract clearly provides that Morales retains exclusive possession and control over the truck, which is clearly inconsistent with the notion that the contract constitutes an agreement to rent the truck to Land Truck.

¶ 54 The legal effect of incorporation of the federal regulations into the owner operator contract is to render Land Truck liable for Morales's operation of his truck, but that does not lead to the conclusion that we should construe this private agreement as something other than it is. In other words, despite the clear provisions of the private contract between Land Truck and Morales that unambiguously provide that Morales shall have exclusive control over the operation of the truck, Land Truck's liability as a common carrier is governed by federal law and thus Land Truck is precluded from contending that it is not liable for Morales's conduct because he is an independent contractor. But this conclusion does not either (1) compel us to rewrite the owner operator contract or (2) control the interpretation of the terms of Argonaut's insurance policy in which it agreed to insure Morales as a named insured and the truck as a scheduled vehicle.

¶ 55 Whether Argonaut must defend Morales depends on whether, under the terms of its policy measured against the owner operator contract, Argonaut has established the applicability of the exclusion for a covered auto "while used in the business of anyone to whom the auto is rented."

And because it is clear that the terms of the owner operator contract refute Argonaut's contention that Morales "rented" his vehicle from Land Truck, I believe Argonaut's argument should be rejected.

¶ 56 The purpose of the federal regulations providing for the liability of common carriers was recognized by our supreme court in *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159 (2007). In that case, Roberson was injured while unloading steel coils delivered for P.I. & I. Motor Express (P.I. & I.) from a truck Roberson owned. P.I. & I. contended that pursuant to an agreement with Roberson, the latter was an independent contractor who could not be deemed an "employee" for purposes of claiming workers compensation benefits. The supreme court ultimately disagreed with P.I. & I., not because federal regulations required P.I. & I., as a common carrier, to have "exclusive possession, control, and use of the equipment" for the duration of the lease, but because the particular facts and circumstances of Roberson's relationship with P.I. & I. created an employer-employee relationship.

¶ 57 In the course of its opinion, the supreme court in *Roberson* discussed the purpose of the federal regulations at issue here. In particular, the court noted that the regulations were prompted by a decades-old practice of common carriers to shield themselves from liability for their drivers' negligence by leasing trucks from independent contractors. *Id.* at 176. "Such arrangements invariably led to abuses that threatened public safety, as unscrupulous motor carriers leased inexpensive, and unsafe, equipment from shallow-pocket drivers." *Id.* The federal regulations, as ultimately enacted, "prevent[ed] motor carriers from escaping liability to injured persons by claiming that their drivers were independent contractors, rather than employees." *Id.* at 177.

¶ 58 But notwithstanding regulations requiring motor carriers to have exclusive possession, control and use of leased equipment, the *Roberson* court concluded that the regulations did not mandate treating the driver as an employee for all purposes, stating, " '[w]hile a lessee cannot free itself of its federally imposed duties when protection of the public is at stake, the federal requirements are not so radically intrusive as to absolve lessors *** of otherwise existing obligations under applicable state tort law doctrines *or under contracts allocating financial risk among private parties*.' " (Emphasis in original.) *Id.* at 178 (quoting *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 138 (3d Cir. 1979)). Thus, the court concluded that Roberson and P.I. & I. were free to "structure their relationship as they see fit, provided they do not neglect the requirements of federal law." *Id.*

¶ 59 As applied in the context of this case, the reasoning of *Roberson* mandates a finding that Land Truck and Morales were free to structure their relationship in any way that did not circumvent federal regulations requiring Land Truck to be responsible for Morales's operation of the truck. And it is clear that they did not. Notwithstanding the provisions of the owner operator contract that vested exclusive control of the truck in Morales, the parties agreed to incorporate federal regulations applicable to Land Truck as a common carrier. Incorporation of the federal regulations thus preserves, in the interest of public safety, Land Truck's liability for Morales's operation of the truck, but does not alter the private contractual relationship between Land Truck and Morales, pursuant to which Morales retained possession and control of the truck.

¶ 60 Nothing in the federal regulations renders the terms of the owner operator agreement "illegal," as Argonaut contends; rather, those regulations simply require that the terms of the otherwise enforceable agreement cannot be used by Land Truck to escape responsibility for

injuries caused by Morales's operation of the truck in furtherance of Land Truck's business. Further, because pursuant to the terms of the owner operator contract, Morales did not "rent" his truck to Land Truck, the exclusion relied on by Argonaut does not apply.

¶ 61 Argonaut contends that the purpose of the policy of insurance issued to Morales is consistent with the interpretation of the owner operator agreement adopted by the trial court. In particular, Argonaut asserts that its "Truckers–Insurance for Non-Trucking Use" endorsement provides only limited coverage "during those times when possession of the vehicle, and any liability for its operation, remain with the owner-insured itself." Argonaut reasons that because Land Truck remains responsible for damages resulting from Morales's operation of the truck, Morales did not need insurance while traveling to pick up a load for Land Truck.

¶ 62 But while this may have been Argonaut's intent in drafting the endorsement, this is not what the endorsement says. The endorsement provides that Argonaut's agreement to pay "all sums" Morales must pay "as damages" because of "bodily injury" caused by an "accident" does not apply to his truck "while used to carry property in any business" or "while used in the business of anyone to whom [the truck] is rented." Because the truck was not "rented" to Land Truck according to the plain terms of the owner operator contract and because Morales was on his way to pick up a load when the accident occurred, his truck was not then being used to "carry property" either. In any event, Argonaut has not invoked the "while used to carry property" clause of its endorsement. While Argonaut certainly could have drafted an exclusion that limited its insuring agreement in the manner it urges on appeal (*e.g.*, "when used in the business of anyone subject to state or federal regulation as a common carrier"), the exclusion included in Morales's policy does not accomplish this result. See *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 117 (1992) ("[i]f the insurer had desired to restrict coverage to only those suits seeking legal, compensatory damages, it could have easily included among its exclusionary provisions an exclusion pertaining to the costs of complying with mandatory injunctions").

¶ 63 I do not believe the decision in *Clarendon National Insurance Co. v. Medina*, 645 F.3d 928 (7th Cir. 2011), compels a different result. The driver of the truck involved in the accident in Medina was not the owner of the truck (which was owned by his wife), but he signed the agreement with the common carrier. On appeal, the husband and wife contended that the agreement with the common carrier could not be a lease because the owner of the vehicle did not execute it. The Seventh Circuit rejected this contention finding that the wife gave her husband permission to enter into the agreement with the common carrier. The *Medina* court also concluded that the agreement between the driver and the common carrier was a lease as a matter of law. *Medina* did not address the terms of the agreement between the driver and the common carrier and, in particular, did not discuss whether the agreement in that case contained terms similar to those here, *i.e.*, providing that the driver retained "exclusive possession and control" of the truck, terms that are inconsistent with construction of the owner operator contract as an agreement to lease Morales's truck to Land Truck. Therefore, while I agree with the *Medina* court's conclusion that, as a matter of law and for purposes of Land Truck's liability to injured parties, the owner operator contract must be deemed to be a lease despite its terms, I do not believe it appropriate to completely disregard those terms in determining Argonaut's responsibility to defend and potentially indemnify its insured.

¶ 64 Because the provisions of the owner operator contract do not constitute an agreement by Morales to "rent" his vehicle to Land Truck, it is unnecessary to address whether the term

"rent" is ambiguous and whether any ambiguity must be construed in favor of coverage under Argonaut's policy. I do note that several provisions of Argonaut's policy use "rent" and "lease" in the same paragraph, but the endorsement at issue here does not, thus lending credence to the appellants' argument that the terms are not necessarily synonymous. Further, because the trial court denied summary judgment to appellants on count II of Argonaut's complaint, which invoked a provision of the endorsement excluding from the definition of an "insured" under the Argonaut policy "anyone engaged in the business of transporting property by 'auto' for hire who is liable for your conduct," I would not address this issue and instead leave that to the trial court on remand.

¶ 65 For these reasons, I would reverse the trial court's award of summary judgment to Argonaut, direct that summary judgment on the applicability of paragraphs A and B of the "Truckers–Insurance for Non-Trucking Use" endorsement be entered in favor of Morales and Land Truck, and remand for further proceedings as to whether Land Truck qualifies as an additional insured under Argonaut's policy.

Becker-Othman v. State Farm Mutual Automobile Insurance Co., 2026 IL App (1st) 250037

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 2026-05-29 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 4 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 42: passage C034.1
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 42: passage C034.1

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2026 IL App (1st) 250037
No. 1-25-0037
Opinion filed May 29, 2026

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NANCY BECKER-OTHMAN Plaintiff-Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 21 CH 04763 Honorable Michael T. Mullen, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Justices Pucinski and Gamrath concurred in the judgment and opinion.

OPINION

¶ 1 Nancy Becker-Othman injured her shoulder in a car accident, necessitating surgery. The at-fault driver tendered her policy limits. Becker-Othman then sought the balance of her underinsured motorist coverage claim from her insurer, State Farm Mutual Automobile Insurance Company.

¶ 2 State Farm retained Dr. Mark Hutchinson to review Becker-Othman's medical records. He initially opined that the accident did not cause her shoulder injury. Ultimately, however, he

agreed that she could benefit from surgery, and State Farm paid the underinsured motorist claim in full, more than three years after the accident.

¶ 3 Becker-Othman sued State Farm, alleging breach of contract (count I), bad faith for delay of payment under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2024)) (count II), and an implied private right of action under title 50 of the Illinois Administrative Code (50 Ill. Adm. Code 919.50(a)(1) (2004)), based on State Farm's failure to provide a reasonable written explanation regarding her claim within 30 days of determining liability (count III). The trial court dismissed count III, with prejudice, finding that title 50 does not create a private cause of action. The court granted summary judgment on the breach of contract and bad faith claims, finding that State Farm made a good faith determination to pay after a reasonable investigation.

¶ 4 Becker-Othman contends the trial court erred by (i) granting summary judgment, (ii) dismissing her private right of action under title 50 (*id.*), (iii) denying her request for additional discovery after State Farm moved for summary judgment, and (iv) requiring her to pay Dr. Hutchinson's deposition fee.

¶ 5 The trial court properly granted summary judgment because Becker-Othman's amended complaint failed to state a claim for breach of contract and section 155 does not create a standalone cause of action. Nor did the trial court abuse its discretion in denying her request for additional discovery or requiring her to pay Dr. Hutchinson's deposition fee. We affirm.

¶ 6 BACKGROUND

¶ 7 Becker-Othman was injured in an automobile accident when another driver rear-ended her while she was stopped at a red light. Becker-Othman's husband called their insurer, State Farm,

to report the accident and advised that his wife was complaining of a headache, neck pain, and right shoulder pain.

¶ 8 The at-fault driver tendered $25,000. Becker-Othman then sought $75,000, the balance of her $100,000 in underinsured motorist coverage. While State Farm investigated the claim, Becker-Othman demanded arbitration. State Farm responded by sending Becker-Othman $4,721.36 as its "initial offer" and agreeing to arbitrate the balance.

¶ 9 State Farm retained the Taylor Miller law firm, which deposed Becker-Othman and retained Dr. Mark Hutchinson to review her medical records.

¶ 10 At her deposition, Becker-Othman testified that she told the responding police officer that she had a headache and felt dizzy but declined immediate medical treatment. When she returned home, her headache worsened and her shoulder and neck began to hurt, prompting her to go to the emergency room. A CT scan revealed no structural damage to her head or neck. The treating physician instructed her to take muscle relaxers and Advil and follow up with her primary care physician.

¶ 11 Becker-Othman's primary care physician referred her to physical therapy. When that provided only temporary relief, she consulted orthopedic surgeon Dr. Terry Younger. Initially, Dr. Younger prescribed conservative treatment, including physical therapy and steroid injections. These measures provided temporary relief but failed to eliminate her pain. About a year into treatment, Younger recommended shoulder surgery.

¶ 12 Dr. Younger testified by deposition that an MRI of Becker-Othman's shoulder revealed cysts, suggesting a labrum tear. He believed surgery could improve her condition by as much as 80%. Although the MRI did not reveal a rotator cuff injury, Younger could not know for certain until surgery.

¶ 13 State Farm's retained physician, Dr. Mark Hutchinson, issued four reports concluding that Becker-Othman's shoulder injury was unrelated to the accident. He based that opinion largely on the absence of an immediate complaint of shoulder pain. Hutchinson later acknowledged that Becker-Othman's deposition established she complained of shoulder pain at the emergency room on the day of the accident and that his third report incorrectly reiterated that she had not immediately complained of shoulder pain. His fourth report removed that statement and recognized that immediate onset of shoulder pain suggested she had a more significant injury than he previously believed. Although he continued to opine that the shoulder pain was unrelated to the accident, he stated that if the accident caused the injury, Becker-Othman had a favorable surgical prognosis based on her positive response to steroid injections.

¶ 14 In September 2021, about three years after the accident and roughly two weeks after receiving Hutchinson's final report, State Farm paid Becker-Othman $75,000 in underinsured motorist benefits and cancelled the arbitration.

¶ 15 Becker-Othman sued State Farm. Her third amended complaint alleges breach of contract for failing to adjust and timely pay her claim (count I), vexatious and unreasonable delay of payment under section 155 of the Insurance Code (215 ILCS 5/155 (West 2024)) (count II), and an implied private right of action under the Administrative Code (50 Ill. Adm. Code 919.50(a) (2004)) (count III). (The trial court had previously dismissed count III with prejudice; Becker-Othman repleaded to preserve the issue for appeal.) Becker-Othman sought $4,522.85 in costs incurred in preparing for the cancelled arbitration, attorney's fees, section 155 penalties, and prejudgment interest.

¶ 16 During discovery, Becker-Othman sought to depose Dr. Hutchinson. He agreed to appear if Becker-Othman paid his $700 hourly fee. Becker-Othman moved to require State Farm to

pay the fee, arguing Hutchinson qualified as State Farm's controlled expert witness under Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2018) and that Illinois Supreme Court Rule 208(e) (eff. Jan 1. 2018) requires each party to pay fees charged by its own Rule 213(f)(3) expert. State Farm acknowledged Hutchinson would have testified as an expert had the matter proceeded to arbitration but maintained he would not testify regarding breach of contract or bad faith. After a hearing, the trial court denied Becker-Othman's request, finding that if she chose to depose Hutchinson and call him as a witness, she bore responsibility for the fee.

¶ 17 Becker-Othman also deposed State Farm claims representatives and managers regarding their handling of her claim between May 2018 through September 2021. Nonetheless, she sought additional discovery and moved to compel production of (i) allegedly missing policies and procedures, (ii) employees who supervised claim specialists assigned to her file, (iii) metadata relating to her file, and (iv) communications between State Farm and its outside law firm to determine whether claims adjusters relied on those communications in making claim decisions. Becker-Othman also sought leave to re-depose three State Farm employees about their communications with the law firm.

¶ 18 The trial court denied the request, finding that (i) Becker-Othman had not established the relevance of State Farm's policies and procedures, (ii) additional depositions of employees was untimely, coming after discovery closed, and (iii) the metadata was unreasonable, disproportionate, and irrelevant to her bad faith claim. The court also reaffirmed that the attorney-client privilege protected communications between State Farm and its outside counsel.

¶ 19 After discovery closed, State Farm moved for summary judgment. Becker-Othman renewed her request for additional discovery under Illinois Supreme Court Rule 191(b) (eff.

Jan. 4, 2013), supported by affidavits from herself and her attorney. The trial court denied the motion, noting that it had already ruled on the discovery requests, and Becker-Othman presented no basis for reconsideration. The court also found the affidavits too general and conclusory.

¶ 20 After a hearing, the trial court granted summary judgment. It ruled from the bench and entered a written order memorializing its rulings. The court found no evidence of breach of contract because "[n]othing in the State Farm policy nor anything that has been identified within the plaintiff's Third Amended Complaint required State Farm to adjust her claim within a certain timeframe."

¶ 21 Addressing bad faith, the trial court stated that "the undisputed facts *** establish that the underlying claim involved a *bona fide* dispute regarding the nature and extent of appropriate policy benefits." The court noted that Hutchinson's testimony established that State Farm reasonably relied on his opinion that Becker-Othman's injuries were unrelated to the accident. "When Dr. Hutchinson's initial opinion expanded, evolved or softened *** State Farm elected to revise its coverage position and pay the remaining policy limits." The court concluded that "[t]his case is nothing more than a good faith determination to pay the claim after a reasonable investigation pursuant to the terms of the applicable State Farm policy." The court also reaffirmed its dismissal with prejudice of count III.

¶ 22 ANALYSIS

¶ 23 Standard of Review

¶ 24 Summary judgment applies 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 2024). Courts construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmovant. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* Our review is *de novo*. *Argonaut Midwest Insurance Co. v. Morales*, 2014 IL App (1st) 130745, ¶ 14. We may affirm on any basis supported by the record. *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 62.

¶ 25 Breach of Contract

¶ 26 Becker-Othman contends the trial court erred in granting summary judgment on her breach of contract claim. The trial court found nothing in the insurance policy required State Farm to adjust her claim within a specified time frame. Becker-Othman does not dispute that finding. Instead, she argues State Farm violated the policy's implied covenant of good faith and fair dealing, as well as the reasonable expectations doctrine, by not paying her claim sooner.

¶ 27 Every contract contains an implied covenant of good faith and fair dealing. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995). The covenant requires a party vested with contractual discretion to exercise it reasonably, not arbitrarily, capriciously, or in a manner inconsistent with the parties' reasonable expectations. *Id.* The covenant does not impose actionable obligations. *Id.* at 368. Instead, it functions as a rule of construction, ensuring that a party does not exercise contractual discretion in a way that defeats the contract's purpose. *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 296-97 (2001). Reading a timing requirement into the policy would rewrite the parties' bargain.

¶ 28 Nor does the reasonable expectations doctrine aid Becker-Othman. Under this doctrine, " '[t]he objectively reasonable expectation of all applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.' " *Smagala v. Owen*, 307 Ill. App. 3d 213, 219 (1999) (quoting Robert E. Keeton, Basic Text on Insurance Law § 6.3, at 351 (1971)). The doctrine serves as a tool of construction when policy language is ambiguous. *Id.* Becker-Othman did not assert ambiguity in the policy language, so the doctrine does not apply. See *id.*

¶ 29 Section 155 of Insurance Code

¶ 30 Most of Becker-Othman's brief focuses on her claim for vexatious and unreasonable delay under section 155 of the Insurance Code.

¶ 31 Section 155 permits a plaintiff to recover attorney's fees, costs, and statutory damages from an insurer that unreasonably delays or denies payment of a claim. *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶ 39 (citing *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 521 (1996)). In *Cramer*, our supreme court explained that section 155 "provides an extracontractual remedy to an action on a policy" and "presupposes an action on the policy." *Cramer*, 174 Ill. 2d at 523-24. Section 155 does not create an independent tort. *Id.* at 523-27. Thus, "for a plaintiff to recover under section 155, [plaintiff] must also succeed in the action on the policy." *Hoover*, 2012 IL App (1st) 110939, ¶ 40 (citing *Cramer*, 174 Ill. 2d at 524).

¶ 32 Becker-Othman argues she "succeeded" because State Farm paid the policy limits on her underinsured motorist claim and that payment does not defeat her section 155 claim. For support, she relies primarily on *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d

673, 682-83 (2000), which held that an insurer cannot defeat a section 155 claim by merely paying the insured and complying with policy procedures. But more recent cases, including *Moles v. Illinois Farmers Insurance Co.*, 2023 IL App (1st) 220853, and *Kroutil v. State Farm Mutual Automobile Insurance Co.*, 2021 IL App (4th) 210238, are more instructive.

¶ 33 In *Moles*, the plaintiff alleged breach of contract based on the insurer's failure to arbitrate her underlying claim. *Moles*, 2023 IL App (1st) 220853, ¶ 6. After the insurer established that arbitration remained ongoing, the trial court dismissed the contract claim, leaving only the section 155 claim. *Id.* ¶ 7. At the close of the plaintiff's case, the court directed a verdict for the insurer, finding that the plaintiff could not recover under section 155 absent a successful "action on the policy." *Id.* ¶ 12.

¶ 34 The appellate court affirmed, recognizing that the breach of contract claim qualified as an "action on the policy" because it alleged that the insurer refused to participate in arbitration as the policy required. *Id.* ¶ 20. But due to that claim having been dismissed and never reinstated, it could not support section 155 relief. *Id.* The court further explained that, although the plaintiff eventually settled her underinsured motorist claim, that claim was not an "action on the policy." *Id.* Rather, it reflected an out-of-court resolution of a dispute over damages. "Because plaintiff's section 155 claim was not connected to any extant action on the policy, she could not recover under section 155." *Id.*

¶ 35 In *Kroutil*, the plaintiff sued her insurer for breach of contract and violation of section 155 for refusing to pay damages for her underinsured motorist claim. *Kroutil*, 2021 IL App (4th) 210238, ¶ 5. The parties resolved the underinsured motorist claim through arbitration, resulting in a $150,000 award for plaintiff. *Id.* ¶ 6. The plaintiff then amended her complaint to seek relief solely under section 155. *Id.* ¶ 7. The trial court dismissed the amended complaint under

section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2024)), finding dismissal proper under section 2-615 (*id.* § 2-615) because the complaint failed to state a viable section 155 claim and proper under section 2-619 (*id.* § 2-619) because *Cramer* rejected a standalone tort for bad faith. *Kroutil*, 2021 IL App (4th) 210238, ¶ 11.

¶ 36 The appellate court affirmed. The court noted that the plaintiff did not pursue her breach of contract claim in her second amended complaint, leaving her section 155 claim unconnected to an action on the policy. *Id.* ¶ 19. Although the plaintiff contended she prevailed on her breach of contract claim as the insurer paid her claim, the arbitration resolved only the amount owed under the policy. It did not adjudicate whether the insurer breached the contract. *Id.*

¶ 37 Becker-Othman pleaded both breach of contract and a section 155 claim. But her section 155 claim still depends on a successful "action on the policy." *Hoover*, 2012 IL App (1st) 110939, ¶ 40. Her breach of contract claim did not qualify because the policy imposed no duty on State Farm to adjust or pay the claim within a specified time frame. The trial court dismissed the claim for that reason, and Becker-Othman raised no developed argument to the contrary.

¶ 38 And as in *Moles* and *Kroutil*, payment of the underinsured motorist claim does not constitute success on an action on the policy. *Moles*, 2023 IL App (1st) 220853, ¶ 20; *Kroutil*, 2021 IL App (4th) 210238, ¶ 19. Before arbitration, State Farm agreed to pay the claim. Thus, Becker-Othman has not succeeded in an action on the policy and cannot pursue a stand-alone section 155 claim.

¶ 39 Dismissal of Claim under Administrative Code

¶ 40 Becker-Othman next contends the trial court erred in dismissing her claim alleging a private right of action under title 50, section 919.50(a)(1), of the Administrative Code (50 Ill. Adm. Code 919.50(a)(1) (2004)) and section 154.6 of the Insurance Code (215 ILCS 5/154.6

(West 2024)). The trial court having dismissed under section 2-615, our review is *de novo*. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11.

¶ 41 Section 919.50 requires an insurance company to affirm or deny liability on claims within a reasonable time and, once liability is affirmed and the claim amount determined, to offer payment within 30 days. It is well established that "a violation of the insurance rules contained in Title 50 of the Illinois Administrative Code does not give rise to a private cause of action." *Weis v. State Farm Mutual Automobile Insurance Co.*, 333 Ill. App. 3d 402, 406 (2002); see *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301-02 (2006); *Pryor v. United Equitable Insurance Co.*, 2011 IL App (1st) 110544, ¶ 8. "Under these regulations, the Illinois Department of Insurance has the sole authority to enforce the codes, and the proper remedy for a party who alleges a violation is to submit a complaint with the department." *Bernacchi v. First Chicago Insurance Co.*, 52 F.4th 324, 329-330 (7th Cir. 2022).

¶ 42 Section 154.6 of the Insurance Code likewise creates no private right of action. That provision identifies improper claims practices by insurers, while sections 154.7 and 154.8 authorize the Director of Insurance to enforce the Code and impose penalties. See 215 ILCS 5/154.5 to 154.8 (West 2024). Accordingly, section 154.6 "does not give rise to a private remedy or cause of action by a policyholder against an insurer but is instead regulatory in nature." *American Service Insurance Co. v. Passarelli*, 323 Ill. App. 3d 587, 590 (2001). ↩ memo p. 4, 9

¶ 43 Becker-Othman also does not satisfy the requirements for an implied private right of action. "The standard that must be met for a court to imply a private right of action in a statute is quite high." *Channon v. Westward Management, Inc.*, 2022 IL 128040, ¶ 33. A private right of action is implied if (i) the plaintiff belongs to a class for whose benefit the statute was enacted, (ii) implying a private right of action is consistent with the statute's purpose, (iii) the plaintiff

suffered the type of injury the statute was designed to prevent, and (iv) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 391 (1982). "All four factors must be met before a private right of action will be implied." *Marque Medicos Fullerton, LLC v. Zurich American Insurance Co.*, 2017 IL App (1st) 160756, ¶ 57.

¶ 44 Whether a statute creates an implied private right of action presents a question of statutory interpretation, we review *de novo*. *Metzger v. DaRosa*, 209 Ill. 2d 30, 34 (2004).

¶ 45 On this record, Becker-Orthman has not made a sufficient showing on the fourth factor. As noted, the Insurance Code vests the Illinois Department of Insurance with the task of regulating the actions of insurance companies. See *Weis*, 333 Ill. App. 3d at 406; *Bernacchi*, 52 F.4th at 329-30. An aggrieved party can submit a complaint to the Department of Insurance (*Bernacchi*, 52 F.4th at 330) and the Department can "investigate violations of its rules and regulations, hold hearings, and impose penalties on those it finds in violation" (*Weis*, 333 Ill. App. 3d at 406 (citing 215 ILCS 5/401(b), (c), (d) (West 2000))). Nothing in the record before us indicates that the Department of Insurance has as a practice been unwilling or unable to pursue insureds' complaints. Accordingly, Becker-Othman claim necessarily fails. *Marque Medicos*, 2017 IL App (1st) 160756, ¶ 57.

¶ 46 Additional Discovery

¶ 47 Becker-Othman maintains that the trial court should have allowed her additional discovery after State Farm moved for summary judgment. Specifically, she sought to depose several State Farm employees, obtain metadata related to her claim file and communications between State Farm and its outside counsel, and re-depose State Farm employees concerning those communications.

¶ 48 A party contending a need for discovery before responding to a motion for summary judgment must submit a Rule 191(b) affidavit stating (i) that material facts are unavailable due to hostility or otherwise, (ii) the names of the individuals the affiant seeks to depose, (iii) why affidavits could not be obtained from them; (iv) what they would testify to, (v) the basis for the affiant's belief that they would so testify, and (vi) that the affiant is a party to the action. *Koukoulomatis v. Disco Wheels, Inc.*, 127 Ill. App. 3d 95, 99 (1984). Becker-Othman concedes her affidavits do not satisfy the Rule 191(b) requirements but argues her noncompliance should be excused.

¶ 49 Generally, strict compliance with Rule 191(b) is required and the failure to file a compliant affidavit waives any claim that summary judgment should not have been granted before additional discovery. *Id.* An exception exists for a "*Celotex*-type" motion. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). When faced by a *Celotex*-type motion, a plaintiff need not always strictly comply with Rule 191(b) to obtain additional discovery. *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 26. A *Celotex*-type motion arises when a defendant, who does not bear the burden of proof, seeks summary judgment by asserting that the plaintiff lacks evidence to establish a *prima facie* case on matters outside the plaintiff's knowledge or control. *Id.* ¶¶ 23, 25-28, 44-47; 4 Richard A. Michael, Illinois Practice, Civil Procedure Before Trial § 38.4 (2011) ("[w]here a motion for summary judgment is made by the party who does not have the burden of proof on an issue asserting that the nonmovant cannot prove a prima facie case, it is critical that the respondent be given a reasonable opportunity to conduct discovery before summary judgment").

¶ 50 State Farm's motion was not a *Celotex*-type motion. State Farm sought summary judgment on the grounds that Becker-Othman failed to state a claim for breach of the insurance contract

or engaged in bad faith. The insurance policy was not beyond Becker-Othman's control or knowledge. Moreover, she deposed Dr. Hutchinson regarding his medical opinion that her injury was unrelated to the accident, along with the State Farm's claims specialists who relied on his opinion. Thus, Becker-Othman's failure for to comply with the Rule 191(b) waives that issue.

¶ 51 Payment of Dr. Hutchinson's Witness Fee

¶ 52 Becker-Othman seeks to reverse the order requiring her to pay Dr. Hutchinson's deposition fee. We review this issue for abuse of discretion and will not disturb the ruling absent a clear abuse. *Gleason v. Carter*, 212 Ill. App. 3d 206, 209 (1991).

¶ 53 Illinois Supreme Court Rule 208(e) (eff. Jan. 1, 2018) provides that "[e]ach party shall, unless manifest injustice would result, bear the expense of all fees charged by his or her Rule 213(f)(3) controlled expert witness or witnesses." Becker-Othman argues State Farm retained Hutchinson as a Rule 213(f) expert at trial. State Farm acknowledges it retained Hutchinson to opine whether Becker-Othman's injuries were accident-related and that he would have testified at the arbitration. But State Farm did not intend to call him as an expert regarding bad faith claims handling, and Hutchinson lacked expertise in insurance claims practices and procedures, the subject of that claim. Becker-Othman cites no authority to the contrary.

¶ 54 Illinois Supreme Court Rule 204 (eff. Mar. 17, 2023), governing depositions of nonparty physicians, provides that "[u]nless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken." State Farm did not intend Hutchinson to offer opinions on the issues presented at trial, and Becker-Othman noticed the deposition. So the trial court acted within its discretion in requiring her to pay the fee.

¶ 55 Affirmed.

***Becker-Othman v. State Farm Mutual Automobile Insurance*, 2026 IL App (1st) 250037**

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 21-CH-4763; the Hon. Michael T. Mullen, Judge, presiding.
Attorneys for Appellant:	Kent D. Sinson and Daniel J. Lynch, of Sinson Law Group, of Chicago, for appellant.
Attorneys for Appellee:	Michael Resis and Joseph P. Carlasare, of Amundsen Davis, LLC, of Chicago, for appellee.

Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 2017-09-15 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 5 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 22: passage C046.3
- memo p. 5 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 27: passage C046.4
- memo p. 10 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 22: passage C046.3
- memo p. 10 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 27: passage C046.4
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 27: passage C046.4

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Illinois Official Reports

Appellate Court

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Brown v. Advocate Health & Hospitals Corp., 2017 IL App (1st) 161918

Appellate Court Caption	ANTHONY BROWN, Individually and as Independent Representative of the Estate of Joyce R. Hobson, Deceased, Plaintiff-Appellee, v. ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a Advocate South Suburban Hospital and Advocate Medical Group; OLALEKAN SOWADE, M.D.; ERIK SWENSON, M.D.; JAMES O'DONNELL, M.D.; AGOP TEPELI, M.D.; GUPTA, M.D., S.C.; and SURGICAL SPECIALISTS, S.C., Defendants (Advocate Health and Hospitals Corporation, d/b/a Advocate South Suburban Hospital, Defendant-Appellant).
District & No.	First District, Fifth Division Docket No. 1-16-1918
Rule 23 order filed	July 28, 2017
Motion to publish allowed	August 28, 2017
Opinion filed	September 15, 2017
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 13-L-4430; the Hon. Kathy M. Flanagan, Judge, presiding.
Judgment	Discovery order affirmed; contempt order vacated.
Counsel on Appeal	Garrett L. Boehm, Jr., and Tammy L. Wade, of Johnson & Bell, Ltd., of Chicago, for appellant.

Vivian Tarver-Varnado, of AMB Law Group, LLC, of Chicago, for appellee.

Panel

PRESIDING JUSTICE REYES delivered the judgment of the court, with opinion.
Justice Lampkin concurred in the judgment and the opinion.
Justice Gordon dissented, with opinion.

OPINION

¶ 1 Advocate Health and Hospitals Corporation, d/b/a Advocate South Suburban Hospital (Advocate), a defendant in a medical malpractice action, violated an order of the circuit court of Cook County by refusing to produce certain insurance-related documents for *in camera* inspection. The circuit court held Advocate in "friendly contempt" and imposed a $100 fine, which allowed Advocate to file this interlocutory appeal pursuant to Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016). As discussed herein, we (i) affirm the judgment of the circuit court directing Advocate to produce certain documents for *in camera* inspection and (ii) vacate the order finding Advocate in contempt and imposing a monetary penalty.

¶ 2 BACKGROUND

¶ 3 Joyce R. Hobson, after being hospitalized and undergoing multiple medical procedures at Advocate, experienced cardiopulmonary arrest and died on May 23, 2011. Anthony Brown, as the administrator of her estate, filed a medical malpractice action against Advocate and other defendants in 2013.

¶ 4 The plaintiff issued discovery requests seeking copies of Advocate's insurance policies. Advocate responded that there is no policy to produce because it is a self-insured entity. Pursuant to multiple court orders, Advocate was directed to produce its insurance policies. The circuit court also entered a protective order, which provided that any insurance documents produced by Advocate would remain strictly confidential and solely be used for purposes of this litigation.

¶ 5 The plaintiff filed a motion to compel, seeking compliance with the previous court orders and for sanctions pursuant to Illinois Supreme Court Rule 219 (eff. July 1, 2002). According to the plaintiff, Advocate had produced a "few pages of a document that was 99% blank."[1] In a court order entered on June 7, 2016, Advocate was directed "to tender its full trust agreement related to the substance of the [motion to compel] and an unredacted copy of the endorsement previously tendered for *in camera* inspection on or before June 14, 2016."

¶ 6 During a hearing on June 14, 2016, Advocate represented that it had previously disclosed $12.5 million in coverage for the plaintiff's claim pursuant to a self-insured retention and trust. Advocate continued to refuse to produce the trust agreement or related documents and asked to

[1]Because the document was the subject of the protective order, the plaintiff did not append it to its motion to compel.

be held in "friendly contempt." At the conclusion of the hearing, the circuit court directed the following statements to Advocate's counsel:

> "[J]ust so I can have it clear, you now are stating in open court that you are asking me to enter a friendly contempt citation against [Advocate] for purposes of appealing my order requiring [Advocate] to produce to me, for *in camera* inspection, a copy of the self-insured trust agreement plus any endorsements showing who is covered, under what circumstances people are covered, if employees are covered, all the normal and customary issues that are governed by insurance documents and/or policies and/or indemnity agreements."

Advocate's counsel answered affirmatively. In a written order entered on June 14, 2016, the circuit court held Advocate in friendly contempt for failing to comply with the June 7, 2016, order for the reasons stated on the record and imposed a $100 fine. Advocate filed this timely appeal pursuant to Rule 304(b)(5). Ill. S. Ct. R. 304(b)(5) (eff. Mar. 8, 2016).

¶ 7 ANALYSIS

¶ 8 Advocate advances three primary contentions on appeal. It initially argues that "[i]nsurance documents are not discoverable in a tort action not involving insurance coverage because the insurance documents lack relevance to the claims advanced." Advocate next contends that its trust agreement is a confidential financial document rather than an insurance document and thus the circuit court abused its discretion in ordering its production. Finally, Advocate argues that the contempt order should be vacated because its actions were not contemptuous of the circuit court's authority. We address each argument below.

¶ 9 A discovery order issued by the circuit court is generally not appealable because it is not a final order. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001); *Adler v. Greenfield*, 2013 IL App (1st) 121066, ¶ 39. It is well settled, however, that the correctness of a discovery order may be tested through contempt proceedings. *Adler*, 2013 IL App (1st) 121066, ¶ 39; *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 10. Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016) provides that an "order finding a person or entity in contempt of court which imposes a monetary or other penalty" is appealable without the special finding required for appeals under Rule 304(a). In the instant case, the circuit court fined Advocate $100 for contempt to facilitate an appeal pursuant to Rule 304(b)(5).

¶ 10 The standard of review for a contempt order is abuse of discretion. *Payne*, 2013 IL App (1st) 113519, ¶ 10; *Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co.*, 393 Ill. App. 3d 782, 785 (2009). A circuit court abuses its discretion when its ruling is arbitrary, unreasonable, fanciful, or where no reasonable person would take the view adopted by the circuit court. *Payne*, 2013 IL App (1st) 113519, ¶ 10.

¶ 11 Because Advocate is appealing a finding of contempt based on its noncompliance with a discovery order, we must necessarily review the propriety of the discovery order. See *Norskog*, 197 Ill. 2d at 69*; Klaine v. Southern Illinois Hospital Services*, 2014 IL App (5th) 130356, ¶ 9; *Illinois Emcasco Insurance*, 393 Ill. App. 3d at 785. Discovery rulings generally are reviewed for an abuse of discretion. *Klaine*, 2014 IL App (5th) 130356, ¶ 10; *Adler*, 2013 IL App (1st) 121066, ¶ 40. Although the applicability of a privilege is reviewed *de novo* (*Klaine*, 2014 IL App (5th) 130356, ¶ 10), Advocate has expressly represented that its objection to production is based on relevance, not on confidentiality or privilege grounds.

¶ 12 Illinois Supreme Court Rule 201 (eff. May 29, 2014) "defines the scope of discovery in civil cases and has been interpreted to allow discovery of all information that would be admissible at trial as well as information which is reasonably likely to lead to admissible evidence." *Klaine*, 2014 IL App (5th) 130356, ¶ 14. Rule 201(b)(1) provides, in part, that a party generally "may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action." Ill. S. Ct. R. 201(b)(1) (eff. May 29, 2014). Rule 401 of the Illinois Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Pursuant to Rule 402 of the Illinois Rules of Evidence, all relevant evidence generally is admissible, and evidence that is not relevant is not admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011).

¶ 13 Advocate argues that the content of the requested insurance documents lacks relevance to the tort claims advanced by the plaintiff and thus the discovery orders compelling their production should be vacated. As discussed herein, however, we view the issue of *discoverability* as distinct from *admissibility* in the context of this case.

¶ 14 Citing *Seldin v. Babendir*, 325 Ill. App. 3d 1058 (2001), and *Imparato v. Rooney*, 95 Ill. App. 3d 11 (1981), Advocate contends that "[e]vidence that a party is insured is generally inadmissible at trial." *Seldin* and *Imparato* addressed the propriety of questioning prospective jurors regarding their interest in or connections to the insurance industry during *voir dire* in a personal injury action. *Seldin*, 325 Ill. App. 3d at 1064; *Imparato*, 95 Ill. App. 3d at 15. The courts in both cases noted that evidence *informing a jury* that a defendant is insured against liability is generally inadmissible. *Seldin*, 325 Ill. App. 3d at 1064; *Imparato*, 95 Ill. App. 3d at 17. Unlike in *Seldin* or *Imparato*, however, the instant case involves the discoverability of documents, not their ultimate admissibility at trial. See, *e.g.*, *Crnkovich v. Almeida*, 261 Ill. App. 3d 997, 999 (1994) (noting that "the concept of relevance is broader for discovery purposes than for purposes of the admission of evidence at trial, since it includes not only what is admissible at trial, but also that which leads to what is admissible"); *Maxwell v. Hobart Corp.*, 216 Ill. App. 3d 108, 110-11 (1991) (stating that "[p]retrial discovery presupposes a range of relevance and materiality much broader than that of admissibility of evidence at trial").

¶ 15 The Illinois Supreme Court in *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957), recognized an exception to the relevancy requirement of Rule 201, *i.e.*, "that information that may be discovered prior to trial be admissible in evidence or lead to admissible evidence." *Manns v. Briell*, 349 Ill. App. 3d 358, 365 (2004) (discussing *Fisher*). In *Fisher*, the defendant in a personal injury action arising out of an automobile accident challenged circuit court orders compelling him to answer interrogatories regarding the existence and amount of his liability insurance. *Fisher*, 12 Ill. 2d at 231-32. The Illinois Supreme Court rejected "those cases limiting pretrial discovery to matters admissible in evidence" but noted that it did "not imply that answers to interrogatories can be brought to the attention of the jury." *Id.* at 237.

¶ 16 In upholding the discovery orders, the *Fisher* court noted that, under certain Illinois statutes, "liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of insured's motor vehicle." *Id.* at 238. Our supreme court further stated:

> "Unlike other assets, a liability insurance policy exists for the single purpose of satisfying the liability that it covers. It has no other function and no other value. Litigation is a practical business. The litigant sues to recover money and is not interested in a paper judgment that cannot be collected. The presence or absence of liability insurance is frequently the controlling factor in determining the manner in which a case is prepared for trial." *Id.*

The *Fisher* court noted that a plaintiff ordinarily "has many sources of inquiry by means of which he can appraise the likelihood that the judgment he seeks will be enforceable." *Id.* at 238-39. An insurance company, however, "is responsible only within the limits of the policy it has issued," and thus a plaintiff's knowledge of the identity or financial status of the insurance company "does not help him." *Id.* at 239.

¶ 17 Advocate essentially argues for a narrow interpretation of *Fisher*, limiting its applicability to discovery disputes involving interrogatories and not document production requests. Neither *Fisher* nor any other decision cited by Advocate, however, expressly provides that insurance documents cannot or should not be produced during discovery in a tort action such as the instant case. We further note that certain Illinois decisions in other contexts suggest that production of an insurance policy may be proper. See, *e.g.*, *Monier v. Chamberlain*, 35 Ill. 2d 351 (1966) (noting that the insurance policy was produced in accordance with a production order; addressing whether related documents were discoverable); *Curtis v. Birch*, 114 Ill. App. 3d 127, 130 (1983) (stating that the plaintiffs should have provided copies of the insurance policy on which they based their claim "and, given the liberal discovery rules in this State (87 Ill. 2d R. 214), there is no excuse for plaintiffs' failure to have done so"); *Schultz v. Continental Casualty Co.*, 79 Ill. App. 3d 1035, 1039 (1979) (reversing trial court orders denying the production of the complete insurance policy).

¶ 18 Advocate also cites Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007), addressing written interrogatories to parties, and Illinois Supreme Court Rule 214 (eff. July 1, 2014), addressing requests for the production of documents. Advocate observes that the standard form interrogatories for medical malpractice actions against hospitals—promulgated pursuant to Rule 213(j) —permit plaintiffs to obtain information regarding insurance. Advocate posits that "[i]f defendants were expected to produce insurance policy documents to plaintiffs, that expectation would be reflected in Rule 214." Rule 214, however, has no corollary to Rule 213(j), *i.e.*, Rule 214 does not provide for *any* standard forms of requests for the production of documents. Ill. S. Ct. R. 214 (eff. July 1, 2014).

¶ 19 Advocate notes that the Illinois Supreme Court has neither incorporated nor endorsed Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure, which requires a party's production of insurance agreements even prior to any discovery requests. Fed. R. Civ. P. 26(a)(1)(A)(iv). While Advocate suggests that the fact the Illinois Supreme Court has *not* adopted a federal rule is significant, it fails to provide any support for this proposition. Although we are not bound by the Federal Rules of Civil Procedure (*e.g.*, *Bianchi v. Savino Del Bene International Freight Forwarders, Inc.*, 329 Ill. App. 3d 908, 928 (2002)), we further recognize the advisory committee notes regarding Rule 26 characterize insurance documents as part of the "*basic information* that is needed in most cases to prepare for trial or make an informed decision about settlement." (Emphasis added.) Fed. R. Civ. P. 26 (Notes of Advisory Committee—1993 Amendment).

¶ 20 The *Fisher* court's observation that "[l]itigation is a practical business" (*Fisher*, 12 Ill. 2d at 238) is arguably more compelling in the instant case, given the amorphous nature of Advocate's self-insured status. As noted in *Fellhauer v. Alhorn*, 361 Ill. App. 3d 792, 796 (2005), the term "self-insurance" has no precise legal meaning. "The concept has led courts and legislatures to struggle with questions of how to treat parties acting as their own insurer and, in particular, whether self-insurers should be considered the equivalent of an insurer." *Id.* In a recent decision, this court defined "insurance" as generally referring to "a policy issued by an authorized and licensed insurance company whose primary business is to assume certain risks of loss of its insureds, in exchange for the payment of a 'premium.' " *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659, ¶ 32. Self-insurance, by contrast, was defined as "the retention of the risk of loss by the one upon whom it is directly imposed by law or contract." (Internal quotation marks omitted.) *Id.* While the dissent suggests that Advocate negotiated its self-insured trust with an insurance company, such proposition is not definitively demonstrated by the record.

¶ 21 Other than the $12.5 million amount, Advocate has provided little to no information regarding the scope or nature of the self-insured trust and related documents. Even if it is not a standard insurance policy *per se*, Advocate's self-insured trust presumably exists—at least indirectly—for the ultimate benefit of parties such as the plaintiff, like the liability policy at issue in *Fisher*. Furthermore, as the plaintiff observes, a review of the self-insurance documents may lead to admissible evidence regarding certain substantive issues in this case, *e.g.*, whether an agency relationship existed between certain defendants.

¶ 22 In sum, we reject Advocate's contention that we "need not reach the question of *in camera* review because [the plaintiff's] document request seeking irrelevant insurance policies was improper in the first instance according to *Fisher*." Advocate has not cited any case, statute, or rule that plainly exempts it from production of its insurance-related documents. ↩ memo p. 5, 10

¶ 23 Turning to the issue of *in camera* review, we recognize that a trial court may supervise all or any part of the discovery process. Ill. S. Ct. R. 201(c)(2) (eff. May 29, 2014). "This power includes the authority to review discovery materials *in camera* to determine any possible relevance." *Youle v. Ryan*, 349 Ill. App. 3d 377, 381 (2004). The circuit court's comments during the June 14, 2016, hearing indicate that its order entered on June 7, 2016—providing for *in camera* review—superseded the prior orders that directed Advocate to produce the documents to the plaintiff. Although Advocate's notice of appeal references prior orders, the issue we consider herein is whether the circuit court erred in ordering an *in camera* inspection.

¶ 24 Circuit courts are afforded wide latitude in their rulings on discovery matters. *Payne*, 2013 IL App (1st) 113519, ¶ 13. Based on our review of the record, the circuit court did not abuse its discretion in ordering an *in camera* inspection of Advocate's insurance-related documents. Absent such a firsthand review, the circuit court would have no means to assess the discoverability of the challenged materials.

¶ 25 Citing *Manns*, 349 Ill. App. 3d 358, Advocate also contends that its trust agreement is a confidential financial document rather than an insurance document and thus the circuit court erred in ordering its production. As noted above, contrary to Advocate's assertions, the circuit court's June 2016 orders solely contemplated an *in camera* review, not production of the disputed materials to the plaintiff. In any event, Advocate's reliance on *Manns* is misplaced.

¶ 26 The plaintiff in *Manns* filed a negligence action, alleging personal injuries arising out of an automobile accident. *Id.* at 359. During pretrial discovery, the plaintiff sought documents and

information pertaining to the defendant's personal financial affairs. *Id.* The defendant refused to answer, contending that the requested materials were irrelevant to any issue in the lawsuit and were not subject to discovery until a judgment was entered against him exceeding the limits of his liability insurance policy. *Id.* In reversing the trial court's finding of contempt, the appellate court noted that "[t]here are important differences between a liability insurance policy and a defendant's personal financial assets that do not justify extending the holding in *Fisher* to pretrial discovery of a defendant's financial affairs." *Id.* at 364. The *Manns* appellate court noted that certain rights are created by liability insurance policies, which inure to the benefit of injured parties. *Id.* at 365. Conversely, a plaintiff only has rights regarding a defendant's financial assets after a judgment is entered. *Id.*

¶ 27 As an initial matter, we presume that an entity's self-insured trust agreement would be more akin to an insurance document than the types of confidential financial documents at issue in *Manns*. The fact that Advocate appears to have disclosed the existence of the $12.5 million in self-insurance in response to the plaintiff's interrogatories regarding insurance belies its efforts to distinguish its trust document from a traditional liability policy. More significantly, we fail to understand how the circuit court (or this court) could simply accept Advocate's representation that the trust document is "nothing more than one of Advocate's financial documents," which it utilizes "to set forth its proprietary self-insured business structure." The dissent contends that the self-insured trust is a confidential document containing trade secrets; however, the circuit court could not be expected to assess the potential applicability of *Manns* absent an *in camera* inspection of the disputed documents. The dissent also posits that Advocate would not want its employees, physicians, or other medical personnel to know the intricate matters contained in the trust. Although our decision herein is limited to the propriety of *in camera* review, we note that a protective order entered by the circuit court strictly limits the use or dissemination of any produced insurance documents. We thus conclude that the circuit court did not abuse its discretion. See, *e.g.*, *Anderson v. St. Mary's Hospital*, 101 Ill. App. 3d 596, 600 (1981) (noting that "where there is a genuine dispute as to the nature or content of the document sought to be discovered, an attorney must ordinarily comply with the trial court's order for an *in camera* inspection of the document or be subject to sanctions for contempt").

↩ memo p. 5, 10, 11

¶ 28 As a final matter, Advocate asks that we vacate the contempt order, and the plaintiff does not object. "Requesting the circuit court to enter a contempt order is a proper procedure to seek immediate appeal of a discovery order." *Klaine*, 2014 IL App (5th) 130356, ¶ 41; accord *Adler*, 2013 IL App (1st) 121066, ¶ 71. "If we find that the discovery order should be upheld, we may nevertheless vacate the finding of contempt and assessment of a monetary penalty if we find that the defendant's refusal to produce the documents at issue was not contemptuous of the circuit court's authority but rather was made in good faith based on sound legal arguments for purposes of effectuating an interlocutory appeal." *Klaine*, 2014 IL App (5th) 130356, ¶ 9. We find this to be such a case and thus vacate the circuit court's June 14, 2016, order, which found Advocate to be in contempt of court for failing to produce the contested documents for *in camera* inspection and assessed a monetary penalty. See *Chicago Trust Co. v. Cook County Hospital*, 298 Ill. App. 3d 396, 410 (1998) (vacating a contempt order where the hospital-defendant's refusal to produce documents was "not contemptuous of the court's authority").

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we affirm the circuit court's order of June 7, 2016, directing the production of certain documents for *in camera* inspection. We vacate the circuit court's order of June 14, 2016, which found Advocate in contempt and assessed a monetary penalty.

¶ 31 Discovery order affirmed; contempt order vacated.

¶ 32 JUSTICE GORDON, dissenting.

¶ 33 I must respectfully dissent. Advocate represented that it had $12.5 million in coverage for plaintiff's claim pursuant to a self-insured retention and trust agreement. There are obvious reasons why a hospital that negotiates a self-insured trust with an insurance company does not want anyone to know the financial formulas that are contained in their self-insured trust. These documents contain confidential financial information regarding the triggering of payments by the insurance company or companies that are providing the excess coverage contained in the trust. Advocate's self-insured trust does not exist for the benefit of injured parties such as the plaintiff in this case, like the liability policy at issue in *Fisher*. I doubt whether Advocate would want its employees, physicians, or other medical personnel to know the intricate matters contained in this trust. This is basically a confidential document with trade secrets that is not relevant in any malpractice case before the entry of a judgment and may not even be relevant after judgment if Advocate has the funds to pay to satisfy any judgment entered against it. I also do not agree with the majority that it could lead to admissible evidence as to whether an agency relationship existed between certain defendants, and there is nothing in the record of this case that would indicate that was an issue. I know of no court that has allowed the production of a self-insured trust by a hospital, municipality, or large corporation before judgment, nor do I find any relevancy in ordering its production. A self-insured trust is not an insurance policy and should not be treated as one. I would reverse the circuit court of Cook County and vacate the contempt finding and fine.

Browning v. Heritage Insurance, 33 Ill. App. 3d 943 (2d Dist. 1975)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 2d Dist. (the forum's district) · filed 1975-12-12 · Reporter opinion
Published opinion

Treatment in the index: declined to follow by Chandler v. Illinois Central Railroad, 333 Ill. App. 3d 463. Check it in a citator before filing.

Where the memo cites it

- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C072.2
- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C072.2
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C072.2
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ILA M. BROWNING, Plaintiff-Appellant, *v.* HERITAGE INSURANCE COMPANY, Defendant-Appellee.

(No. 74-425;

Second District (2nd Division)—December 12, 1975.

[redacted]

Russell J. Goldman, of Rockford, for appellant.

Yalden & Ridings, of Rockford, for appellee.

Mr. JUSTICE DIXON delivered the opinion of the court:

The issue upon this appeal is whether plaintiff's complaint has stated a cause of action.

The facts giving rise to the original suit are detailed in the opinion of this court in the case of *Browning v. Johnson*, 132 Ill.App.2d 85 (abstract opinion). Briefly, plaintiff had been severely injured in an accident which occurred when defendant's insured came over the crest of a hill and started to pass a car going in the same direction. In pulling around this car, defendant's insured, Gordon T. Johnson, struck the car in which plaintiff was a passenger, which car was being driven in the opposite direction. There was evidence of evasive action by the drivers, and the impact occurred on the shoulder on plaintiff's side of the road. Plaintiff was 25 years old. It was undisputed that as a result of the accident she incurred a fracture of the humerus of the left arm, facial and body lacerations, a fracture of the jaw bone and temporary palsy on the left side of her face. Open reduction surgery had been performed. She had scars and permanent injuries. There was evidence of $1800 in medical and dental expenses. She was unable to work and had, at time of trial, lost 77 weeks' wages at $80 per week.

Plaintiff brought suit against defendant's insured demanding $50,000. The judgment on the verdict of $30,000 was affirmed by this court. $10,000, the insured's policy limit was eventually paid to plaintiff by the defendant herein. On appeal we stated, "In this case liability was clear."

After securing an assignment of Johnson's cause of action against his insurer (the defendant herein) plaintiff commenced this action.

In substance, the allegations of the complaint are that the defendant Heritage Insurance Company was guilty of negligence in the handling of the original lawsuit; that Heritage had been put on notice of the danger by a letter from Johnson's attorney; the letter advised defendant that its insured was liable and that the damages were well in excess of $10,000; that immediately prior to trial Heritage had offered to pay $9500; plaintiff countered with an offer to accept $9750 but Heritage refused and immediately proceeded with the trial which resulted in the $30,000 verdict on which $10,000 was paid; the assignment was attached as an exhibit; that the failure of Heritage to accept plaintiff's settlement offer of $9750 was negligent and wilful act on the part of Heritage thus exposing Johnson to damages in excess of the policy limits to the damage of plaintiff.

Count II realleges all the facts stated in Count I but charges that Heritage was guilty of fraud in the handling of the lawsuit.

Heritage moved to dismiss Count I setting out nine reasons:

1. It has allegations which are not material to the case.
2. Said allegations have to do with another case.
3. They are conclusions of law.

4. There are no allegations of fact sufficient to sustain a complaint.

5. There are no allegations of loss suffered by plaintiff.

6. The allegations are simply a view of what occurred in the earlier case.

7. It sets out an erroneous statement with reference to liability in average cases.

8. That paragraph 9 of the complaint states an erroneous statement of law.

9. That the complaint sets out no facts which would spell out fraud, deceit or negligence or a wilful disregard of the rights of others by its acts.

Heritage moved to dismiss Count II for all of the above reasons and because there are no alleged facts to substantiate the charge of fraud.

The court allowed the motion to dismiss and entered judgment for defendant. The trial court gave no reasons for striking the complaint, but undoubtedly it was because of a legal conclusion advanced by plaintiff in paragraph 9 of her complaint as follows:

> "That the laws of the State of Illinois provide that in the event a policy holder instructs the insurance carrier to pay the total amount of coverage under the automobile insurance casualty policy and fails to do so, and a verdict or judgment is obtained in excess of the policy limit, the insurance carrier, such as in this case, becomes liable for the total amount of the verdict or judgment so obtained, which, in this case being $30,000.00, the insurance carrier, the Defendant herein, becomes liable for the $20,000.00, the unpaid portion of the verdict obtained herein."

There is no precedent for this theory which would render the insurer liable per se to its assured. Quite to the contrary the insurer is simply held to a standard of reasonable conduct and avoidance of fraud, negligence and/or bad faith (as questions of fact for a jury, and upon which issue the insured has the burden of proof) in refusing a proffered settlement within policy limits. *Powell v. Prudence Mutual Casualty Co.*, 88 Ill.App.2d 343, 347, 348. Plaintiff has appealed.

Section 45(2) of the Civil Practice Act provides that, "If a pleading * * * is objected to by a motion to dismiss * * *, because it is substantially insufficient in law, *the motion must specify wherein the pleading * * * is insufficient.*" (Emphasis supplied.) This statutory requirement is applicable to a motion attacking a complaint for failure to state a cause of action. *Gulf, Mobile & Ohio R.R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill.App. 148, 151.) It is not sufficient to allege merely that the complaint does not state a cause of action, without pointing out

wherein it is defective so as to allow the party against whom the motion is directed an opportunity to cure the specified objection by amendment. (*Lee v. Conroy*, 13 Ill.App.3d 694, 696.) The motion does not lie if a good cause of action is stated, although not the one intended by plaintiff. Nichols, Illinois Civil Practice § 1413 (1961).

[redacted] Section 42(2) of the Civil Practice Act provides a test for defects of substance where a pleading is attacked, *i.e.*, that no pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim which he is called upon to meet. Under this test, allegations of legal conclusions and allegations of evidence constitute merely formal defects and not defects of substance. Nichols, § 1413.

[redacted] On a motion to dismiss a complaint for insufficiency, every intendment and fair inference is in favor of the pleading, and if under any aspect of the facts stated the plaintiff could recover, the motion should be denied. Nichols, § 1413; *Johnston v. Girvin*, 61 Ill.App.2d 47, 54; *Johnson v. North American Life & Casualty Co.*, 100 Ill.App.2d 212, 217; *Boyd v. Racine Currency Exchange, Inc.*, 8 Ill.App.3d 140, 146.

[redacted] An insurance company may so conduct itself as to be liable for an entire judgment recovered against its insured, irrespective of its policy limits. It is now fairly well settled in Illinois that conduct constituting fraud, or negligence, or bad faith[1] may render the insurer so liable for its failure to settle a case. If recovery may exceed the policy limits the insurer has the duty "to give to the insured's interests consideration, at least *equal* to that of its own." (*Cernocky v. Indemnity Insurance Co.*, 69 Ill.App.2d 196, 207; *Smiley v. Manchester Insurance & Indemnity Co.*, 13 Ill.App.3d 809, 812.) The entry of the judgment against the insured constitutes the damage and it is not necessary that the insured allege payment of the excess judgment. (*Wolfberg v. Prudence Mutual Casualty Co.*, 98 Ill.App.2d 190.) And further, the insured's cause of action against his insurer for failing to settle within the policy limits can be assigned to the insured's judgment creditor. *Brown v. State Farm Mutual Automobile Insurance Association*, 1 Ill.App.3d 47; Annot., 12 A.L.R. 3d 1158 (1967).

[redacted] Where the cause of action arises out of a breach of duty owed by defendant to plaintiff, plaintiff must plead facts which disclose a duty to him and defendant's breach of that duty. The plaintiff must allege facts from which the law will raise a duty, and allege an omission of duty and a resulting injury. An allegation of duty, as such, is surplusage

[1] *Cernocky* on pages 205-06 defines bad faith as being unfaithful to the duty that is owed.

—if the facts stated raise the duty the allegation is unnecessary; if they do not, it is unavailing. If the complaint plainly and concisely alleged sufficient facts from which the law will raise a duty, and an alleged omission of duty, and an alleged proximately resulting injury it is sufficient as a matter of pleading. *Darling II v. Charleston Community Memorial Hospital*, 50 Ill.App.2d 253, 310, 311, *aff'd*, 33 Ill.2d 326.

Every tort action grounded in negligence requires the showing of (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, *i.e.*, a negligent act or omissions, which (3) proximately causes a (4) resulting compensable injury. *Fugate v. Sears, Roebuck & Co.*, 12 Ill.App.3d 656, 669.

In the instant case the facts alleged are such that (1) the law will raise a duty by the defendant to its insured (and to the plaintiff by virtue of the assignment); (2) a breach of that duty by refusing to negotiate when put on notice of the danger; (3) proximate cause is established if the injury is the natural and probable result of the negligent act or omission and one which an ordinarily prudent person ought to have foreseen as likely to occur as a result of his negligence (*Fugate*, at 669), and (4) facts were alleged showing the insured and the plaintiff injured in amount of $20,000 by defendant's conduct.

Although far from being a model[2] and containing surplus allegations which could have been stricken on a proper motion, we believe that Count I of the complaint alleged sufficient facts to state a cause of action as a matter of pleading. If the necessary facts appear in the complaint but are encumbered with unnecessary matter or are insufficiently stated, the motion should ask for a correction of the pleading by striking out specified immaterial matter and making the pleading more definite and certain in specified particulars.

As to Count II of the complaint charging fraud we agree that fraud cannot be made out by characterizing acts alleged to be done as fraudulently done. (*Hardy v. Bankers' Life & Casualty Co.*, 19 Ill.App.2d 75.) Fraud must be shown by allegations of facts from which fraud is the necessary or probable inference. *Nechanicky v. Morton Park Federal Savings & Loan Association*, 32 Ill.App.2d 444; 19 Ill.L.&Pr. *Fraud* §36 (1956).

Judgment is reversed and the cause remanded with directions to overrule the motion of defendant to dismiss Count I of the amended complaint.

Reversed and remanded.

RECHENMACHER, P. J., and T. MORAN, J., concur.

[2] See 14 Am. Jur Pleading and Practice Forms 619 (1971).

Carlson v. Jerousek, 2016 IL App (2d) 151248

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 2d Dist. (the forum's district) · filed 2016-12-15 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

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- memo p. 5 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 30: passage C047.3
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***Carlson v. Jerousek*, 2016 IL App (2d) 151248**

Appellate Court Caption	ROBERT CARLSON, Plaintiff-Appellant, v. JAMES JEROUSEK, Individually and as Agent and/or Employee of Olson Transportation, and ROBERT OLSON, d/b/a Midwest Motorcoach, Defendants-Appellees.
District & No.	Second District Docket No. 2-15-1248
Filed	December 15, 2016
Decision Under Review	Appeal from the Circuit Court of Lake County, No. 14-L-264; the Hon. Diane E. Winter, Judge, presiding.
Judgment	Vacated and remanded.
Counsel on Appeal	Michael W. Rathsack and David Vander Ploeg, of Chicago, for appellant. Melissa H. Dakich, James K. Horstman, and David H. Farina, of Cray, Huber, Horstman, Heil & VanAusdal, LLC, of Chicago, for appellees.

Panel JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Justice Jorgensen concurred in the judgment and opinion.
Justice McLaren specially concurred, with opinion.

OPINION

¶ 1 In this personal injury case, the defendants sought to have their expert make a copy of the entire contents of the plaintiff's five personal computers as well as the laptop provided to him by his employer for work. (This copying process is referred to as forensic imaging.) The plaintiff, Robert Carlson, refused to comply with this demand, despite being ordered to do so by the trial court, and was found in "friendly" contempt. He now appeals the contempt order, arguing that the trial court abused its discretion in ordering the forensic imaging. He also asserts that the trial court erred in denying him leave to file an affidavit stating that his employer owned his work laptop and thus he could not produce it. We find that the trial court failed to conduct the balancing test required for a request for forensic imaging. Accordingly, we reverse and remand for the trial court to conduct the proper analysis.

¶ 2 I. BACKGROUND

¶ 3 In February 2012, Carlson began working as a senior computer analyst for Baxter Healthcare. A little less than two months later, on April 11, 2012, Carlson's vehicle was rear-ended by a bus operated by the defendants, James Jerousek, an agent or employee of Olson Transportation, and Robert Olson, doing business as Midwest Motorcoach. In April 2014, Carlson sued the defendants for personal injury, alleging that he suffered disability (including cognitive difficulties), emotional distress, disfigurement, and loss of a normal life after the collision. The defendants admitted liability but contested the extent of Carlson's damages.

¶ 4 In May 2014, the defendants served Carlson with interrogatories and requests to produce. The interrogatories asked Carlson to provide "the name, web address and user name for all blogs, online forums, and/or social networking websites that Plaintiff has belonged [to] and/or had a membership" in since the collision; his "internet/e-mail, telephone and cell phone providers; *** his internet/e-mail password[;] and all login information with address." Carlson objected on the grounds of overbreadth, undue burden, and irrelevance. However, without waiving these objections, he stated that he had Facebook and LinkedIn accounts and provided his personal web address, cell phone number, and cell phone carrier. The defendants did not move to compel any further responses to any of the interrogatories.

¶ 5 The requests to produce served on Carlson defined "document" to include not only physical documents but also electronically stored information. The requests sought emails, online posts, and communications relating to the issues in the lawsuit. There was also a "catch-all" request for any statement or communication in any form relating to those issues. Finally, Carlson was asked to identify any destroyed or deleted documents responsive to these requests. In July 2014, Carlson responded to the requests. He objected to all of them on the grounds of overbreadth, undue burden, and irrelevance. Without waiving these objections, he also responded to the requests for emails, online posts, and the like by stating

that there were no responsive items other than those "already available to the defendant[s]"; to the "catch-all" request by stating that all responsive items had already been disclosed or produced to the defendants; and to the request for destroyed or deleted documents by stating that there were no such items.

¶ 6 After exchanging correspondence, the defendants filed a motion to compel, arguing that Carlson had not produced any "electronically retrievable information," such as emails or other electronic communications. The defendants asked that Carlson be required to search his computer storage to identify responsive items. There was no request, at this point, for forensic imaging of Carlson's computers. After a hearing, the trial court granted the motion in part, ordering that, as to request Nos. 10 and 12, Carlson must "perform due diligence to recover all emails, during the relevant period, relating to issues in the complaint and must provide a privilege log if necessary," and as to request No. 11, Carlson must "perform due diligence to recover [the requested] information *** from plaintiff's social networking accounts." As to request No. 13, plaintiff was ordered to identify the responsive items he believed were already disclosed or provided to the defendants.

¶ 7 In September 2014, Carlson tendered supplemental answers. There is no record of any motion to compel Carlson to provide any further responses to this discovery.

¶ 8 Six months later, the defendants filed a motion seeking an order requiring Carlson to "retain, preserve, and protect" any "computers and/or electronic devices *** so that they [could] be inspected by the defendants." In their motion, they noted that Carlson had testified, at his deposition, that he possessed at least five such computers or devices. Asserting only that Carlson's "knowledge and/or research of such topics has been put at issue in this case," the defendants sought "the opportunity to inspect and investigate the computers and/or electronic devices in possession of [*sic*], used, owned, or operated by" Carlson since the collision. The defendants therefore asked the trial court to enter the proposed order.

¶ 9 The trial court heard this motion on March 3, 2015. The trial court ordered the retention and preservation of Carlson's computers but struck the language in the proposed order allowing the defendants to inspect the computers. It also entered a briefing schedule. The parties filed their briefs, but, for reasons not apparent from the record, on May 13, 2015, the trial court entered an order striking the defendants' motion, allowing them to refile it, and scheduling the briefing of that refiled motion.

¶ 10 The defendants filed a new motion "to compel the inspection of plaintiffs' [*sic*] computers and the disclosure of plaintiff's emails, web addresses and social media sites." In it, they argued that they should be allowed to inspect Carlson's computers because he performed his work almost entirely on computers and he was claiming that his ability to perform some of his work tasks had been damaged by the collision. Specifically, Carlson had testified at his deposition that he experienced a lack of concentration, lost focus, became fatigued, and had to lie down. The defendants were suspicious about whether these claims were overstated, noting that Carlson's supervisor, Andrea Schwartz, had testified at her deposition that Carlson was very competent at his job and was an asset to his team. In addition, Carlson had prepared a log of his symptoms on a computer. Although the log had been produced to the defendants, they argued that he had continued to update it and had not produced the updated log to them. Further, the symptoms were recorded using sophisticated language that the defendants believed Carlson might have acquired through internet searches relating to symptoms of brain injury. Accordingly, the defendants wanted to inspect

Carlson's "computer usage, research, and creation of litigation exhibits," including any stored record of his Internet searches since the collision. Without defining the term "metadata," the defendants requested the ability to "inspect the metadata on [Carlson's] computers *** to determine what work he ha[d] performed for his lawsuit, what changes, if any, he ha[d] made to the exhibits and documents he created concerning damages, what research he ha[d] conducted concerning traumatic brain injuries, how much time [Carlson] spen[t] on his computers, and what data he ha[d] recorded that he ha[d] failed to provide" to the defendants. Although they asserted that their requests were "narrowly tailored," the defendants did not propose any limitations or protections to be applied to their requested inspection. Finally, they argued that information from any online social networking sites used by Carlson was relevant to determining the extent of his injuries and thus should be produced. The defendants asked the trial court to allow them to inspect all of Carlson's computers and electronic devices and to "allow the discovery of" his presence on social media, his webpages, and his emails.

¶ 11 In response, Carlson argued that there was no basis for allowing such a wide-ranging and intrusive discovery method; the computers were not the focal point of the case, and the defendants were able to obtain information about the extent of his brain injuries in many other ways, including the written discovery already answered, multiple depositions of several witnesses who directly observed his work, and testing by the defendants' own expert witness, a neuropsychologist. In reply, the defendants argued that computerized information is, generally speaking, discoverable and that to deny their motion would prejudice them. At no point did the defendants support their motion with any affidavits or other evidence from an expert in computer technology describing the information retrievable through such an inspection or the methods that would be used to conduct the search.

¶ 12 In July 2015, the trial court heard oral argument on the defendants' motion to compel. For the first time, the defendants clearly expressed their desire to search the computer that Baxter provided to Carlson for work as well as his own computers. The defendants argued that they wanted to view metadata from Carlson's work computer in order to learn whether, since the accident, it was really taking Carlson longer to complete work tasks and whether he was really staying later at work to complete his work. The trial court asked how the computer could tell them that. The defendants' attorneys acknowledged that they themselves did not know how to use a computer to discover this information, but they asserted that a computer expert could "pull the metadata" that would "show the task[s] that [Carlson]'s working on and how long he's working on them." (Although this assertion might be correct, the record does not contain any actual evidence supporting it.) The defendants also wanted to view Carlson's own computers to determine whether he was staying up late playing computer games so that, if so, they could argue that (a) he was still able to concentrate sufficiently to play these games and (b) it was this activity, not the injuries related to the accident, that was causing him to be fatigued at work. The defendants asserted that they "were not asking for personal information," only the metadata about Carlson's use of the computers, because Carlson "ha[d] made this an issue in the case" by claiming that he was less able to perform his work, which involved using the computer.

¶ 13 Carlson pointed out the extremely broad nature of the proposed search and the relative lack of any justification for it other than the possibility that he and the other witnesses previously deposed were lying about the extent of his injuries. In response, the defendants

said that they were "in no way asserting" that Carlson was lying but that they had "a right to discover all relevant information."

¶ 14 The trial court initially expressed skepticism, noting that, although Carlson's use of computers was potentially relevant because he used computers in his work and for relaxation, the same thing was potentially true of "every plaintiff in every case." As to any inspection of Carlson's work computer, that was "a no start right there" because Baxter would certainly object. As to Carlson's own computers, there were many other ways to get similar information without the defendants combing through those computers: for instance, information about the extent of Carlson's computer gaming and even his game scores over time could be obtained through directed subpoenas to the operators of the online games he played. Such narrowly tailored searches would be preferable to allowing the defendants to "rifle though the plaintiff's mail every day to pick out what you like." The defendants suggested that perhaps they could draft a protective order that would identify the narrow information they sought. The trial court indicated that it was open to such an approach but that it would have to see the draft order and that it would be cautious because "people put their whole lives on a computer, and that's not acceptable for the defense to be able to search through their entire life." In addition, the trial court would need expert input about exactly what information could and would be retrieved. The trial court therefore continued the motion to compel.

¶ 15 On September 23, 2015, the motion to compel the inspection of the computers again came before the trial court. After hearing other discovery disputes and admonishing the parties for not treating each other in a civil or professional manner, the trial court turned to the motion. The defendants stated that they had drafted a protective order and had sent it to Carlson, but Carlson would not agree to it. They tendered the draft to the trial court, characterizing it as providing that any data pulled from the computers would be given to Carlson's attorney first, so that privileged material could be identified and a privilege log could be prepared.

¶ 16 In fact, the draft protective order provided that an expert (presumably retained by the defendants, although this point was not specifically addressed) would make a mirror copy (forensic image) of the entire contents of all of the hard drives on all of Carlson's personal computers and the computer he used for work. (Although Carlson's attorney or another designated representative could be present during the forensic imaging process, the utility of this as a safeguard is dubious, as the order did not allow the representative any input into the imaging process.) The defendants' expert would then search all of the hard drives, "looking for evidence of the existence of information relating to issues in this lawsuit, including: [1] Time stamps indicating duration of computer usage at work or for work purposes; [2] Time stamps indicating duration of usage for purposes of using computer games; [3] Search terms with respect to head trauma, traumatic brain injury, icepick headaches, memory loss, unbalanced IQ, fatigue, personality disorders, hand tremors, sleep apnea, and lack of concentration; [and] [4] Documents created by Plaintiff with respect to his symptoms and/or research regarding the search terms contained in subparagraph 3." The defendants' expert would catalogue the results of this search in a report of findings and would also prepare an executive summary of the findings. The expert would file both of these in their entirety with the trial court, although only the executive summary would be public; the findings themselves would be filed under seal. The expert would also serve a copy of the findings on

Carlson's attorney, who would have 10 business days to redact any privileged material and prepare a privilege log. Carlson's attorney would then serve the redacted findings and the privilege log on the defendants' counsel. Any "data" claimed to be subject to the attorney-client privilege would be treated as confidential information, which the defendants' expert would not reveal to or discuss with the defendants' counsel. (No mention was made of any other potentially applicable privileges.) The protective order also included a clawback provision pursuant to which the disclosure of such confidential information would not be deemed a waiver and counsel would cooperate to "restore the confidentiality" of any confidential information inadvertently disclosed. However, any other "relevant, non-confidential information derived from the inspection" could be used in any later hearing, motions, or at the trial of the action.

¶ 17 The defendants also represented to the trial court that they "now had testimony" that the work computer used by Carlson (a laptop which he was permitted to and frequently did take home) was "leased by him" and thus was within his control and should be produced by him. (The defendants did not identify the testimony they were referring to, and no such testimony appears in any of the depositions filed as exhibits.) Carlson disputed this, saying that the laptop was Baxter's and that the defendants needed to "get Baxter in here" (*i.e.*, subpoena Baxter) in order to gain access to that computer. The trial court responded with irritation, asking Carlson's attorney why *he* had not brought Baxter into the proceedings on the motion to compel, saying that "[t]his is the attitude I am talking about" and that the parties should not be pointing to each other as the one responsible for taking action to move the case forward. Despite commenting that it seemed strange that Baxter would lease work computers to its employees, the trial court apparently accepted the defendants' representation that this was the case. It entered an order requiring the forensic imaging of the computers, including the work computer, and also entered the protective order drafted by the defendants, saying that it would "leave it to Baxter to come in and tell us why" Carlson's work computer should not be produced.

¶ 18 Carlson forwarded a copy of the trial court's order to his supervisor at Baxter. On October 6, 2015, Sarah Padgitt, senior litigation counsel at Baxter, wrote Carlson to tell him that Baxter's corporate information policies prevented the sharing of Baxter computers and any restricted information on them with persons outside of Baxter. The attorneys for both parties were copied on the letter.

¶ 19 Carlson filed a "motion to advise" the trial court that he would not produce his computers for inspection and sought an order holding him in "friendly" contempt so that he could appeal the trial court's ruling. On October 21, 2015, at the presentation of that motion, Carlson also orally sought leave to file an affidavit by Padgitt, which Carlson's attorney said he had received only the day before. In the affidavit, Padgitt stated that Carlson neither owned nor leased his computer from Baxter, which owned both the computer and its contents. Padgitt stated that Baxter's computer contained personally identifiable information of Baxter customers and other information restricted under Baxter's global information classification and trade secret policy. Padgitt further averred that, if Carlson were to deliver his work computer (and his password, which would be necessary to access the contents of the computer) to the defendants' expert for inspection and copying, he would be violating several of Baxter's corporate policies and would be subject to disciplinary measures, including termination.

¶ 20 The defendants objected to the filing of the affidavit, saying that it was not an exhibit to anything and should have been filed earlier. The trial court told Carlson that it would not entertain the motion to advise, because the motion was not in a form sufficient to inform the court regarding the terms of the order with which Carlson did not wish to comply. Further, the trial court would not allow the filing of the affidavit standing alone. However, Carlson could refile the motion, and he could attach whatever support the motion required, "such as affidavits."

¶ 21 One week later, Carlson filed an amended motion to advise, explaining in greater detail the reasons he did not wish to comply with the trial court's order of September 23, 2015, and attaching a copy of the order. He did not attach the Padgitt affidavit to his amended motion. On November 17, 2015 (the court date for the amended motion to advise), Carlson filed a motion to reconsider the trial court's denial of leave to file the Padgitt affidavit, arguing that the oral motion to file the affidavit had not been untimely, because he had received the affidavit from Padgitt only the afternoon before, and attaching the previous correspondence from Padgitt to show that the defendants had received advance notice of Baxter's contention that the work computer belonged to Baxter. Carlson attached the Padgitt affidavit to the motion to reconsider. The defendants again objected to the filing of the affidavit, saying that it should have been attached to Carlson's response to the motion to compel and that its inclusion now would allow Carlson to "bolster" his position on appeal without allowing the defendants an opportunity to respond. In separate orders, the trial court denied the motion to reconsider its ruling denying leave to file the affidavit and found Carlson in "friendly" contempt, fining him $500.

¶ 22 Carlson filed a timely notice of appeal, pursuant to Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010), from the order dated September 23, 2015 (compelling the inspection of his computers and his work laptop); the order dated October 21, 2015 (denying his oral motion for leave to file the Padgitt affidavit); and both of the orders of November 17, 2015.

¶ 23 II. ANALYSIS

¶ 24 Although discovery orders are not final orders and thus ordinarily are not appealable, the correctness of a discovery order may be tested through contempt proceedings where, as here, a party is found in contempt for refusing to comply with a discovery order. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001); see Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010) (contempt orders are immediately appealable). In such an appeal, our review of the contempt order necessarily involves a review of the orders on which the finding of contempt was based. *Norskog*, 197 Ill. 2d at 69. Unless the appeal raises a purely legal issue, we review discovery orders for abuse of discretion. *Kaull v. Kaull*, 2014 IL App (2d) 130175, ¶ 22.

¶ 25 The issue at the heart of this appeal is the circumstances under which a party to a civil suit may inspect the contents of another person's computer through forensic imaging, seeking metadata and other information. There appears to be a dearth of case law on this issue in Illinois. Accordingly, we begin with a review of the rules applicable to discovery in civil litigation and the constitutional privacy concerns protected by those rules.

¶ 26 A. Civil Discovery

¶ 27 In Illinois, discovery in civil actions is governed by Illinois Supreme Court Rules 201 through 224. Rule 201 (Ill. S. Ct. R. 201 (eff. July 1, 2014)) sets out several of the general

principles regarding such discovery. A party may serve discovery upon another party to obtain "full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense." Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). However, "discovery requests that are disproportionate in terms of burden or expense should be avoided." Ill. S. Ct. R. 201(a) (eff. July 1, 2014). Discovery from nonparties may be sought pursuant to Rule 204, which permits the service of subpoenas for deposition or for the production of documents or other tangible things. Ill. S. Ct. R. 204(a) (eff. July 1, 2014).

¶ 28 Interrogatories under Rule 213 and requests to produce under Rule 214(a) must be served in writing upon the responding party, which then has "a reasonable time" to respond or object to each request. Ill. S. Ct. R. 213 (eff. Jan. 1, 2007); R. 214(a) (eff. July 1, 2014). One ground for objecting is that "the burden or expense of producing the requested materials would be disproportionate to the likely benefit, in light of the factors set out in Rule 201(c)(3)." Ill. S. Ct. R. 214(c) (eff. July 1, 2014).

¶ 29 Significantly, the discovery rules envision that the responding party will search for, identify, and produce the information specifically requested by the other party. They do not permit the requesting party to rummage through the responding party's files for helpful information. Under Rules 213 and 214, a party must request specific information relevant to the issues in the lawsuit from the other party, which then searches its own files and electronic storage media for responsive information and produces that information. See Ill. S. Ct. R. 213 (eff. Jan. 1, 2007); R. 214(a) (eff. July 1, 2014).

¶ 30 Rule 201(c) (Ill. S. Ct. R. 201(c) (eff. July 1, 2014)), which aims to prevent discovery abuse, contains several provisions for limiting discovery. One approach is a protective order, which may be entered "as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014). Another protection is the relatively new "proportionality" provision, which states:

↩ memo p. 5, 11, 13

> "When making an order under this Section, the court may determine *whether the likely burden or expense of the proposed discovery*, including electronically stored information, *outweighs the likely benefit*, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." (Emphaseis added.) Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014).

The protections of Rule 201(c) apply to discovery directed to parties and nonparties alike. See Ill. S. Ct. R. 201(c)(1), (c)(2) (eff. July 1, 2014) (the court may act upon a motion by "any party or witness"); R. 204(a)(1) (eff. July 1, 2014) (subpoenas issued to nonparties are "subject to any limitations imposed under Rule 201(c)"). As a whole, "Rule 201 and related rules governing specific discovery methods form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment." *Kunkel v. Walton*, 179 Ill. 2d 519, 531 (1997).

¶ 31 The civil discovery rules are not blind to the privacy interests of the party responding to discovery. Although the scope of permissible discovery can be quite broad, "parties engaged in litigation do not sacrifice all aspects of privacy or their proprietary information simply because of a lawsuit." *In re Mirapex Products Liability Litigation*, 246 F.R.D. 668, 673 (D. Minn. 2007). We briefly review the nature of those privacy concerns and the ways in which

the discovery rules address those concerns.

¶ 32 B. Constitutional Right to Privacy and Civil Discovery

¶ 33 The fourth amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. The Illinois Constitution contains even broader protection, providing that "[t]he people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means." (Emphasis added.) Ill. Const. 1970, art. I, § 6. The Illinois Supreme Court has observed that "the Illinois Constitution goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy, and *** the protection of that privacy is stated broadly and without restrictions." *Kunkel*, 179 Ill. 2d at 537 (citing *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992)).

¶ 34 The constitutional right embodied in the privacy clause of the Illinois Constitution arose from the desire to safeguard against the collection and exploitation of intimate personal information. *People v. Mitchell*, 165 Ill. 2d 211, 220 (1995) (citing the comments of the drafters of the privacy clause, which was added to the constitution in 1970); see also *People v. Caballes*, 221 Ill. 2d 282, 330-31 (2006) (the drafters of the privacy clause intended to protect against infringements on "the zone of personal privacy," such as those that "reveal private medical information" or "the contents of diaries or love letters; *** the individual's choice of reading materials, whether religious, political, or pornographic; *** [or] sexual orientation or marital infidelity"); *In re Will County Grand Jury*, 152 Ill. 2d at 396 (privacy clause protects against disclosure of personal medical and financial records). In short, under the privacy clause, "a person has a reasonable expectation that he will not be forced to submit to a close scrutiny of his personal characteristics, unless for a valid reason." *In re Will County Grand Jury*, 152 Ill. 2d at 391-92.

¶ 35 These constitutional provisions do not forbid all invasions of privacy, only those that are unreasonable. U.S. Const., amend. IV (freedom from "unreasonable searches and seizures"); Ill. Const. 1970, art. I, § 6 (freedom from "unreasonable *** invasions of privacy"). The civil discovery rules adopt two safeguards to ensure that the discovery of private information will be "reasonable" (and hence constitutional): relevance and proportionality.

¶ 36 1. Relevance

¶ 37 "In the context of civil discovery, reasonableness is a function of relevance." *Kunkel*, 179 Ill. 2d at 538. The supreme court rules governing civil discovery advance this principle by limiting discovery to information that is relevant to the issues in the lawsuit. See Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014) (parties may discover "any matter relevant to the subject matter [of] the pending action"). Although relevant (discoverable) information is defined broadly to encompass not only admissible information but also information calculated to lead to the discovery of admissible information (*In re Estate of O'Hare*, 2015 IL App (2d) 140073, ¶ 14), this definition is not intended as an invitation to invent attenuated chains of possible relevancy. The corollary to the relevance requirement is that the compelled disclosure of highly personal information "having no bearing on the issues in the lawsuit" is an unconstitutional invasion of privacy. *Kunkel*, 179 Ill. 2d at 539; see also *Firebaugh v. Traff*,

353 Ill. 82, 85 (1933) (a court order "cannot be used to procure a general investigation of a transaction not material to the issue"). The concept of relevance provides a foundation in balancing constitutional privacy concerns with the need for reasonable discovery, "facilitat[ing] trial preparation while safeguarding against improper and abusive discovery." *Kunkel*, 179 Ill. 2d at 531.

¶ 38 2. Proportionality[1]

¶ 39 Proportionality imposes a second limitation on what is discoverable: even if it is relevant, information need not be produced if the benefits of producing it do not outweigh the burdens. The legitimate privacy concerns of the responding party are one of the burdens that a court can and should consider in conducting this balancing test.

¶ 40 The proportionality balancing test requires a court to consider both monetary and nonmonetary factors in determining "whether the likely burden or expense of the proposed discovery *** outweighs the likely benefit." Ill. S. Ct. R. 201(c)(3) (eff. July 1, 2014). The monetary factors expressly identified in Rule 201(c)(3) include "the expense of the proposed discovery," "the amount in controversy," and "the resources of the parties." *Id.* Nonmonetary factors include "the importance of the issues in the litigation" (*i.e.*, the societal importance of the issues at stake) and "the importance of the requested discovery in resolving the issues." *Id.* All of these factors must be considered to the extent that they are relevant to the circumstances of each case.

¶ 41 However, Rule 201(c) also gives trial courts the power and responsibility to limit or deny discovery as necessary to prevent unreasonable "embarrassment" and "oppression." Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014). Given this overarching purpose, courts should also consider other factors that might be present in a particular case. One such factor is the extent to which the discovery sought represents a substantial invasion of the privacy interests of the responding party. See *Johnson v. Nyack Hospital*, 169 F.R.D. 550, 562 (S.D.N.Y. 1996) (the trial court's power to limit discovery may be employed where the burden is not monetary expense but "lies instead in the adverse consequences of the disclosure of sensitive, albeit unprivileged, material"); Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 U. Kan. L. Rev. 235, 236 (2015) ("non-pecuniary burdens on privacy should be factored into the proportionality analysis"). Another potentially

[1]There is little Illinois case law interpreting the proportionality rule, which was added only two years ago. However, the Federal Rules of Civil Procedure include a similar proportionality provision (Fed. R. Civ. P. 26(b)(1)), and there is a substantial body of case law interpreting that provision. Further, the 2014 amendments to the Illinois civil discovery rules explicitly draw upon the federal rules. See Ill. S. Ct. R. 201, Committee Comments (rev. May 29, 2014) (Rule 201(b)(1) was amended to conform with the definition of electronically stored information (ESI) in Rule 201(b)(4) and "complies with the Federal Rules of Civil Procedure"; Rule 201(b)(4), the definition of ESI, "comports with the Federal Rule of Civil Procedure 34(a)(1)(a)"; and the committee comments to Rule 201(c) cite the United States Seventh Circuit Court of Appeals' "Principles Relating to the Discovery of Electronically Stored Information" as the source for the list of categories of ESI that "often *** should not be discoverable" under the proportionality balancing test); Seventh Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information* (rev. Aug. 1, 2010), http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf. Accordingly, we draw on federal case law as necessary for guidance in applying the Illinois proportionality rule.

relevant factor is whether the discovery is sought from a nonparty without any direct stake in the outcome of the litigation. See *Tucker v. American International Group, Inc.*, 281 F.R.D. 85, 92 (D. Conn. 2012) (nonparty status is "a significant factor in determining whether discovery is unduly burdensome" (internal quotation marks omitted)); see also *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) (nonparty status weighs against requiring disclosure of confidential information). Given the trial court's obligation to conduct the balancing test so as to "facilitate[ ] trial preparation while safeguarding against improper and abusive discovery" (*Kunkel*, 179 Ill. 2d at 531), the proportionality analysis must take all of these factors into consideration as appropriate in each case.

¶ 42 C. Electronically Stored Information

¶ 43 Recognizing the growing use of computers in every aspect of daily life, in 2014 the Illinois Supreme Court amended its rules to explicitly provide for the discovery of electronically stored information (ESI). Rule 201(b)(4) defines ESI to include, among other things, any "data or data compilations in any medium from which electronically stored information can be obtained." Ill. S. Ct. R. 201(b)(4) (eff. July 1, 2014). This definition of ESI "comports with the Federal Rule of Civil Procedure 34(a)(1)(a) and is intended to be flexible and expansive as technology changes." Ill. S. Ct. R. 201, Committee Comments (rev. May 29, 2014). Rule 201(b)(1), which permits the discovery of any relevant matter, including documents and other tangible things, was amended to note that the word "documents" includes ESI. Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). As we discuss in more detail below, other amendments, such as the addition of the proportionality provision to Rule 201(c), were intended to provide additional protection against abusive requests to discover ESI. Ill. S. Ct. R. 201, Committee Comments (May 29, 2014).

¶ 44 The discovery of ESI presents some challenges that do not arise with paper documents or other tangible items, including the risk of substantially higher production costs, the need for technical expert involvement in production, and increased privacy concerns. "For example, ESI is retained in exponentially greater volume than hardcopy documents, is dynamic rather than static, and is sometimes incomprehensible when separated from its system." Jeffrey A. Parness, *Managing Discovery of Electronically Stored Information in Illinois*, 101 Ill. B.J. 316 (2013). Most litigators are familiar with the effort and expense involved in reviewing documents prior to production to ensure that privileged, confidential, and irrelevant information is identified and protected from inadvertent production. That effort and expense can be much higher when dealing with the volume of information that can be stored electronically. Further, depending on the form of the discovery responses, significant metadata may be produced alongside the responsive documents, sometimes without the realization of the responding party. These facts, along with technical unfamiliarity on the part of many attorneys, may require the participation of experts in electronic discovery to ensure that relevant and discoverable information is produced, in a usable form, and that privileged, confidential, and irrelevant information is not produced.

¶ 45 Further, examining the information stored on electronic devices can raise unique privacy concerns. As the United States Supreme Court noted in *Riley v. California*, 573 U.S. ___, ___, 134 S. Ct. 2473, 2484 (2014), digital content is different from physical objects, and an attempt to search that content must be considered differently. "Most people cannot lug

around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so." *Id.* at ___, 134 S. Ct. at 2489. However, because of the enormous storage capacity of most computers, the search of a computer can reveal all of these items and more—"a digital record of nearly every aspect of their lives—from the mundane to the intimate." *Id.* at ___, 134 S. Ct. at 2490. In addition, computer content can reveal individuals' "private interests or concerns" through their internet browsing history; information about where they travel and the people with whom they communicate; and intimate details ranging from weight-control efforts to banking and shopping records. *Id.* at ___, 134 S. Ct. at 2490. Indeed, computer programs and networks frequently access information beyond the data stored on a single computer (*id.* at ___, 134 S. Ct. at 2491), and the search of one person's computer may provide access to the private information of third parties without their knowledge or consent. The Supreme Court observed that the privacy concerns raised by searches of computerized devices[2] "dwarf" those raised by the inspection of physical items. *Id.* at ___, 134 S. Ct. at 2491.

¶ 46 D. Limits on the Discovery of ESI Under the Proportionality Rule

¶ 47 Although it is worded broadly to apply to all discovery requests, the proportionality requirement of Rule 201(c)(3) specifically targets the challenges posed by the discovery of ESI. See Ill. S. Ct. R. 201, Committee Comments (rev. May 29, 2014) (the proportionality provision "was added to address the production of materials when benefits do not outweigh the burden of producing them, *especially in the area of electronically stored information (ESI)*" (emphasis added)).

¶ 48 The proportionality rule "requires a case-by-case analysis." *Id.* However, the rules committee has identified several categories of ESI that the proportionality balancing test "often may indicate *** *should not be discoverable*," presumably because the burden of producing such ESI generally is high. (Emphasis added.) *Id.* These categories include:

> "(A) 'deleted,' 'slack,' 'fragmented,' or 'unallocated' data on hard drives; (B) random access memory ('RAM') or other ephemeral data; (C) on-line access data; (D) data in metadata fields that are frequently updated automatically; (E) backup data that is substantially duplicative of data that is more accessible elsewhere; (F) legacy data; (G) information whose retrieval cannot be accomplished without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; and (H) other forms of ESI whose preservation or production requires extraordinary affirmative measures." *Id.* (citing Seventh Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information* (rev. Aug. 1, 2010), at 4, http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf (Principle 2.04(d))).

Discovery of these categories of ESI is not absolutely prohibited: such discovery may be ordered where warranted in a particular case. *Id.* However, if a party intends to seek any of

[2]Although *Riley* involved cell phones, the Supreme Court's comments are equally applicable to any modern computerized device that can store great quantities of data. Indeed, the Court noted that smartphones are essentially "minicomputers." *Id.* at ___, 134 S. Ct. at 2489.

these types of ESI, that intent "should be addressed at the initial case management conference." *Id.*

¶ 49 In essence, the committee comments suggest that these categories of ESI are presumptively nondiscoverable, shifting the burden to the requesting party to justify the making of an exception based on the particular circumstances of the case. Illinois has yet to develop a framework for analyzing such requests. However, we find helpful the analysis that Colorado's supreme court has developed over the last several years in cases involving requests for forensic imaging of computers. See *In re Gateway Logistics, Inc.*, 2013 CO 25; *In re District Court*, 256 P.3d 687 (Colo. 2011) (*en banc*); *People v. Spykstra*, 234 P.3d 662 (Colo. 2010); *In re Cantrell*, 195 P.3d 659 (Colo. 2008). Carlson urges us to adopt this analysis for all discovery requests involving ESI or forensic imaging. We think that this argument is better directed to our supreme court, and thus we decline to formally adopt the analysis. Nevertheless, we agree that the Colorado cases lay out an easy-to-apply approach that could be adapted for discovery requests for information in the categories listed in the committee comments to Rule 201 as follows: once the responding party objects on the ground that the information sought falls into one of those categories, the burden shifts to the requesting party to show that (1) there is a compelling need for the information, (2) the information is not available from other sources, and (3) the requesting party is using the least intrusive means to obtain the information. See, *e.g.*, *Gateway Logistics*, 2013 CO 25, ¶ 15; *District Court*, 256 P.3d at 691-92. We believe that this analysis is consistent with the policies embodied in the 2014 amendments and the committee comments to Rule 201.

¶ 50 E. Forensic Imaging of Carlson's Computers[3]

¶ 51 We now turn to the central issue in this appeal: did the trial court abuse its discretion in ordering the forensic imaging of Carlson's computers, subject only to the limitations in the protective order? The answer is yes, for the reasons that follow.

¶ 52 1. The Request Is Contrary to Discovery Protocol

¶ 53 First, the defendants' request to create and search a forensic image of Carlson's computers runs counter to the traditional protocol of discovery, in which one party requests specific information and the other party searches its own files (and computers) to identify and produce responsive information. See, *e.g.*, Ill. S. Ct. R. 214 (eff. July 1, 2014) (setting out framework of requests to produce and responses). As we have already noted, the supreme court rules governing civil discovery contemplate that the responding party has both the right and the obligation to conduct the search for the information responsive to a discovery request. See *supra* ¶ 29. There is no provision allowing the requesting party to conduct its own search of the responding party's files—regardless of whether those files are physical or electronic.

¶ 54 When faced with a similar request to search another party's computers for relevant information, the Eleventh Circuit Court of Appeals commented that Rule 34(a) (the federal counterpart to Illinois Supreme Court Rule 214) "allows the responding party to search his records to produce the required, relevant data. Rule 34(a) does not give the requesting party

[3]For the moment, we leave aside the question of whether Baxter owns or controls Carlson's work computer.

the right to conduct the actual search." *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003); see also *Menke v. Broward County School Board*, 916 So. 2d 8, 10 (Fla. Dist. Ct. App. 2005) ("In civil litigation, we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation.").

¶ 55 It is possible that such an inversion of traditional discovery protocol might be appropriate in rare circumstances. However, foreign case law has identified only two circumstances in which a search of another party's computer is appropriate: where the computer itself is directly involved in the cause of action or where there is evidence of substantial prior discovery violations by the responding party. Examples of the first include *Genworth Financial Wealth Management, Inc. v. McMullan*, 267 F.R.D. 443, 447 (D. Conn. 2010) (claim that defendant used the computers at issue to disseminate plaintiff's confidential information), and *G.D. v. Monarch Plastic Surgery, P.A.*, 239 F.R.D. 641, 643 (D. Kan. 2007) (claim that defendant medical practice improperly left computer containing plaintiffs' confidential information on the curb for disposal).

¶ 56 As to the second possible situation, when a party seeks forensic imaging on the basis of prior noncompliance with traditional discovery, courts have required a significant history of demonstrated noncompliance. See *Ford Motor Co.*, 345 F.3d at 1317; *A.M. Castle & Co. v. Byrne*, 123 F. Supp. 3d 895, 900-01 (S.D. Tex. 2015); *Menke*, 916 So. 2d at 12 (noting that, "in the few cases we have found across the country permitting access to another party's computer, all have been in situations where evidence of intentional deletion of data was present" and citing cases); *cf. Bennett v. Martin*, 186 Ohio App. 3d 412, 2009-Ohio-6195, 928 N.E.2d 763 (ordering inspection of defendant's computers where defendant produced almost 16,000 pages of email strings in "seemingly random disorder," defendant refused to comply with multiple court orders regarding discovery, and defendant's general counsel admitted in deposition that defendant had withheld responsive documents). When a court weighs whether this factor is present, the requesting party's mere suspicion that the responding party might not have produced all responsive information is not sufficient to justify forensic imaging. *McCurdy Group, LLC v. American Biomedical Group, Inc.*, 9 F. App'x 822, 831 (10th Cir. 2001) (general skepticism about the completeness of production, standing alone, was not sufficient to justify the "drastic discovery measure" of requiring the production of the entire contents of the plaintiff's computer drives); *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (same).

¶ 57 In this case, neither circumstance is present: there is no record of noncompliance with discovery, and there is no particular nexus between Carlson's computers and the legal claim, as this is an ordinary personal injury case. Accordingly, there is no support for the defendants' request to invert the traditional discovery protocol.

¶ 58 2. Relevance and Proportionality

¶ 59 Further, a careful consideration of relevance and proportionality reveals that forensic imaging was not justified in this case. The information sought was not clearly specified and the probative value of that information was questionable, while the burden to Carlson's privacy interest was significant. (These considerations would apply to any discovery request, but they have special significance here, where the defendants specifically requested forensic imaging.)

¶ 60 The defendants sought a copy of the entire contents of all of Carlson's computers in order to search for (1) time stamps showing when Carlson had used each particular computer "at work or for work purposes," (2) time stamps showing when Carlson had used each computer to play "computer games," (3) "search terms with respect to" various symptoms Carlson claims to have experienced as a result of the collision, and (4) any documents Carlson created "with respect to his symptoms and/or research regarding" these search terms.

¶ 61 As an initial matter, the list of items sought by the defendants is ambiguous and lacks crucial details about the information the defendants seek. For instance, the information sought in the first item on the list presumably would require an examination of the laptop Carlson uses for work, but how do the defendants propose to identify whether Carlson's past use of the laptop occurred while he was "at work" (on site at Baxter) or whether his use of it was "for work purposes"? Does the phrase "search terms" in the third item mean that the defendants want to know if Carlson performed Internet searches using those phrases, or that the defendants want to search the copy of his computers' hard drives for those terms? And how do the defendants propose to identify the documents they seek in the fourth item?

¶ 62 Questions like these often lead parties seeking forensic imaging to submit affidavits from computer experts, explaining the type of information the experts expect to find on the computers at issue, the methods by which they will identify and recover only the information sought, and the costs of the entire procedure. Expert involvement in formulating the parameters of the search is often essential, both to ensure that what is sought can actually be recovered and to provide information about the search process so that the court and the responding party can appropriately monitor the process. As one court has noted, even a seemingly basic task like formulating appropriate search terms "is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics" and is "clearly beyond the ken of a layman," requiring the participation of an expert. *United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008). In this case, the transcript of the hearing on the motion to compel shows that the trial court was hampered by the lack of any expert testimony regarding the proposed forensic imaging and search. The defendants' attempt to substitute their own assertions on these topics could not cure the lack of such evidence. Indeed, at oral argument on appeal, the defendants conceded that they could not answer technical questions about the proposed search without consulting with their expert. The trial court abused its discretion in permitting forensic imaging despite the lack of adequate definitions and parameters for the proposed search.

¶ 63 Further, the proposed forensic imaging had little relevance to the litigation. Rule 201 requires that the information sought be relevant to the issues in the lawsuit. See Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). The trial court apparently accepted the defendants' argument that information about when Carlson was working and when he was playing computer games could be relevant to determining the extent of the damage caused by the accident. Carlson's research on his symptoms could also possibly be relevant, although we note that evidence of such research may have limited probative value, as it could be motivated by either proper purposes (researching one's own symptoms to allay personal health concerns) or improper purposes (discovering the symptoms one would report to support a claim of brain injury). However, as a request for forensic imaging was involved, the court had to consider not only the relevance of the information sought by the defendants but also the broad means by which they proposed to discover it—forensic imaging of all of the computers' hard drives. As noted

above, the contents of Carlson's computers would have greater relevance if the computers themselves were at the heart of the claims raised. However, that is not the case here, where the discovery method chosen by the defendants has no particular relevance to the cause of action.

¶ 64 Moreover, there were ample avenues open to the defendants to discover the information they sought without granting them the broad access to Carlson's computers that they sought. For instance, there is no indication that they ever sought to determine, through requests to admit or deposition questions, whether Carlson performed Internet searches on the symptom terms they found suspicious, nor did they ever request that Carlson supplement his previous production of his symptoms log. And, as the trial court itself noted, they could have subpoenaed from the game companies the information they sought about Carlson's online game-playing—but they did not. Instead, the defendants appear to have abandoned traditional methods of discovery to pursue far more intrusive methods of gaining the information they sought.

¶ 65 It is here that the balancing test of the proportionality rule comes into play. The potential utility of the discovery sought by the defendants must be weighed against the burden imposed by the discovery method the defendants have requested. Forensic imaging of all of the contents of Carlson's computers will yield an enormous amount of data that goes far beyond the issues that are relevant to this suit, potentially including personal photographs, declarations of love, bank records and other financial information, records of online purchases, confidential information about family and friends contained in communications with them, and private online activities utterly unconnected to this suit. A request to search the forensic image of a computer is like asking to search the entire contents of a house merely because some items in the house might be relevant. Because such a search is not narrowly restricted to yield only relevant information, it poses a high risk of being overbroad and intrusive in a manner that violates the constitutional right to privacy. See *Kunkel*, 179 Ill. 2d at 538-39 (broad measure that required the disclosure of confidential personal information, "without regard to the issues being litigated," was "unreasonable and unconstitutional"); *People v. Lurie*, 39 Ill. 2d 331, 335 (1968) ("a subpoena *** which is unreasonably broad in its demand," seeking irrelevant information, is unconstitutional). The low probative value of the information being sought does not justify a broad and intrusive method of obtaining that information that is likely to sweep in substantial amounts of irrelevant information. A party may not "dredge an ocean of *** electronically stored information and records in an effort to capture a few elusive, perhaps non-existent, fish." *Tucker*, 281 F.R.D. at 95.

¶ 66 Finally, most of the information sought by the defendants here appears to fall into the categories of ESI identified by the rules committee as presumptively not discoverable under the proportionality balancing test. Ill. S. Ct. R. 201, Committee Comments (rev. May 29, 2014). For instance, the defendants' request for "time stamps" for work-related tasks and online computer game-playing appears to seek "data in metadata fields that are frequently updated automatically" and "on-line access data." *Id.* Likewise, the request for a history of Carlson's online searches regarding his reported symptoms constitutes a request for "on-line access data." *Id.* Indeed, the forensic imaging process itself might fall into this category as seeking " 'deleted,' 'slack,' 'fragmented,' or 'unallocated' data on hard drives." *Id.*; see, *e.g.*, *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 48 (D. Conn. 2002) ("A mirror

image is an exact duplicate of the entire hard drive, and includes all the scattered clusters of the active and deleted files and the slack and free space.").

¶ 67 If the information sought is presumptively nondiscoverable, the defendants would have to establish that discovery of the particular information was warranted in order to gain access to the information. (The *Gateway Logistics* test may be helpful in making the determination, but as noted above we do not formally adopt that test; a trial court may consider any factors it considers helpful to the determination, bearing in mind the restrictive intent expressed in the committee comments to Rule 201.) However, as the record in this case lacks any technical expert opinions on this point, we do not reach a conclusion on this question. Instead, we focus on the larger proportionality considerations that apply to a request for forensic imaging.

¶ 68 The drafting committee for the 2006 amendments to Federal Rule of Civil Procedure 34 expressly identified privacy interests as a substantial concern raised by requests for forensic imaging or other direct searches of an opposing party's computers:

> "Inspection or testing of *** a responding party's electronic information system [*e.g.*, a computer] may raise issues of confidentiality or privacy. The addition of [provisions for] testing and sampling to Rule 34(a) with regard to *** electronically stored information is not meant to create a routine right of direct access to a party's electronic information system ***." Fed. R. Civ. P. 34(a) advisory committee's note to 2006 amendment.

Indeed, because "the mere imaging of the media, in and of itself, raises privacy and confidentiality concerns" and "[d]uplication, by its very nature, increases the risk of improper exposure, whether purposeful or inadvertent" (*John B.*, 531 F.3d at 457), even the entry of a carefully drafted protective order might not be enough to overcome the privacy concerns arising in a particular case. "Thus courts are very cautious about ordering mirror imaging of computers, especially where the request is overly broad and where the connection between the party's claims and the computer is vague and unproven." *A.M. Castle*, 123 F. Supp. 3d at 900. For all of these reasons, compelled forensic imaging should be a last resort. See 10 Jeffrey S. Kinsler & Jay E. Grenig, Illinois Practice § 23.72 (2d rev. ed. 2016) ("A very high threshold will have to be cleared in order to conduct such discovery."). Further, in making such a determination, a court must consider the balancing test of the proportionality rule, considering the appropriate monetary and nonmonetary factors present in the case before it to determine whether the burdens resulting from forensic imaging outweigh the likely benefit.

¶ 69 Here, the trial court did not conduct the balancing test required by the proportionality rule. This failure to apply the correct legal analysis was an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) (a trial court "by definition abuses its discretion when it makes an error of law"). Accordingly, the trial court's order compelling the forensic imaging of Carlson's computers cannot stand.

¶ 70 Because the trial court did not apply the correct legal analysis in deciding whether to order forensic imaging of Carlson's computers, we must remand to allow it to reconsider its decision under the correct standard. Before concluding our work, however, we address two other issues raised by Carlson on appeal: whether he must produce the computer he uses for his work for Baxter, and whether he may file an affidavit relevant to this point.

¶ 71 F. Carlson's Work Computer and the Padgitt Affidavit

¶ 72 Under Illinois Supreme Court Rule 214(a) (eff. July 1, 2014) a party may obtain the production of documents or other tangible things, including ESI, only from another party. If the responding party does not have the requested item in his "possession or control," he must notify the requesting party of this fact, providing any information he has about the item's ownership or whereabouts. Ill. S. Ct. R. 214(c) (eff. July 1, 2014). When a party seeks the production of an item from a nonparty, it must issue a subpoena to that party. Ill. S. Ct. R. 204(a)(4) (eff. July 1, 2014); *cf. Redmond v. Central Community Hospital*, 65 Ill. App. 3d 669, 674 (1978) ("it is obvious that the [discovery] rules were intended to provide *** the means to discover relevant matter from other parties by motion or upon written request and, from third persons, through the use of subpoenas").

¶ 73 In this case, Carlson has asserted that he cannot produce the laptop provided to him by Baxter because it does not belong to him. All of the evidence in the record thus far supports this assertion. Even apart from the Padgitt affidavit—which was filed as an exhibit to Carlson's motion to reconsider and was never ordered stricken, and thus is contained within the record on appeal although it was not formally received into the record—Carlson testified to this at his deposition.

¶ 74 The defendants have not argued that Carlson's actions in occasionally taking the laptop home constitute "possession or control" of it. Even if they had raised this argument, the occasional past possession of an item does not mean that a party can now be required to produce it if it is no longer in his possession. See *Wiebusch v. Taylor*, 97 Ill. App. 3d 210, 214 (1981) (where party no longer had possession of the car he had dropped off for repairs, which he did not own, he could not be required to produce it). Further, even present possession of an item might not constitute legal "possession or control" requiring production of the item if the party holds it as an agent for another under a restrictive agreement. See, *e.g.*, *In re Shell E&P, Inc.*, 179 S.W.3d 125, 130 (Tex. Ct. App. 2005) (where an agent or employee has permissive "temporary custody" of an item subject to a restrictive confidentiality agreement, the agent or employee cannot be ordered to produce the item; instead, the requesting party must seek the item from the principal or employer). Thus, the trial court abused its discretion in ordering Carlson to produce the laptop for inspection by the defendants.

¶ 75 Carlson also contends that the trial court erred in denying him leave to file the Padgitt affidavit (in its order of October 21, 2015, denying his oral motion for leave to file, and its order of November 17, 2015, denying his motion for reconsideration). The defendants argue that we cannot entertain this contention because our jurisdiction in an appeal from the order finding Carlson in contempt does not encompass a review of the orders denying leave to file the Padgitt affidavit. Carlson responds that the Padgitt affidavit is relevant to a consideration of whether his noncompliance with the order for forensic imaging was justifiable, and so we may review the trial court's rulings regarding the affidavit. We agree with Carlson.

¶ 76 The trial court ordered Carlson to produce for inspection not only his own computers, but also the computer he used for work. Carlson contended that he did not own the work computer, which was provided to him by Baxter, and he offered the affidavit as proof of his nonownership. Accordingly, the testimony provided by the affidavit was directly relevant to the issue of whether Carlson could be compelled to produce that computer (or sanctioned for

failing to produce it). As such, the correctness of the trial court's order sanctioning Carlson is intertwined with the correctness of the orders denying Carlson leave to file the affidavit, and all of these orders are within the scope of our review. *Norskog*, 197 Ill. 2d at 69. For the same reason—the clear relevance of the Padgitt affidavit to a disputed factual issue, the ownership of the work laptop—we find that the trial court abused its discretion in denying Carlson leave to file the affidavit. See *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 41 (where an issue is disputed, the trial court must conduct an evidentiary hearing; the dispute must be resolved through the consideration of evidence, not the arguments of counsel). On remand, if the ownership of the work laptop remains a disputed issue, the trial court must allow the parties to present evidence on the issue.

¶ 77 III. CONCLUSION

¶ 78 For all of these reasons, we vacate the trial court's September 23, 2015, order compelling Carlson to produce his computers for forensic imaging, the protective order of the same date, and the trial court's October 21 and November 17, 2015, orders denying leave to file the Padgitt affidavit. Further, the record reflects that Carlson showed no disdain for the court and merely refused to comply with its September 23, 2015, order in good faith to secure appellate interpretation of this legal issue. We therefore vacate the contempt order dated November 17, 2015. See *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 36.

¶ 79 Vacated and remanded.

¶ 80 JUSTICE McLAREN, specially concurring.

¶ 81 I specially concur because I wish to expound on what should be addressed by the trial court upon remand. The majority opinion is well reasoned as far as it goes. It touches upon the issue of relevance in the classical sense that there may be evidence that, despite being digitized on a computer, would still be relevant in proving or disproving injuries proximately caused by the admitted liability of the defendants. However, the majority fails to address the lack of discourse and evidence regarding the admissibility of and, therefore, the need for the discovery of the metadata from the sundry computers.

¶ 82 Defendants claim that, because plaintiff operates computers, and computers have metadata that records how the computers are operated, the metadata can somehow be correlated to establish the existence or nonexistence of *any* change to plaintiff's brain by determining how plaintiff's brain was operating the computers. There is virtually no evidence in the record to support this "expert" supposition. I say "expert" because it is beyond the ken of a reasonable juror. See generally *Binge v. J.J. Borders Construction Co.*, 95 Ill. App. 3d 238 (1981).

¶ 83 Defendants relate that a computer expert or experts will have to be consulted to extract and interpret the metadata. The trial court took it on faith that it could be done. Extracting the information is one thing; interpreting it in the manner suggested is another.

¶ 84 The injuries that are contested relate to brain trauma and the effects thereof. I would submit that computer experts do not normally have expertise in the diagnosis and prognosis

of brain damage, let alone damage allegedly caused by the impact of a rear-end collision. Thus, it seems appropriate that a medical expert who has been certified in the area of diagnosis and prognosis of traumatic brain damage (rather than a computer expert) would be required to opine within a reasonable degree of medical or scientific certainty whether plaintiff has experienced brain damage. And, if so, its nature and extent.

¶ 85 The problem with defendants' argument is that they do not cite any authority that suggests or implies that the collection and interpretation of metadata relating to the operation of a computer is an acceptable procedure for the diagnosis of the computer operator's possible brain damage, regardless of the type of expert involved. As stated by our supreme court:

> "Under the rule of *Frye*, scientific evidence is admissible at trial only 'if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." ' *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30 (2004), quoting *Frye*, 293 F. at 1014. Further, the *Frye* test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is 'new' or 'novel.' [Citation.]" *People v. McKown*, 236 Ill. 2d 278, 282-83 (2010).

¶ 86 I am not aware of any authority that suggests that there is a certifiable correlation between any particular computer's metadata and the ability to diagnose brain damage, let alone traumatic brain damage. Therefore, I conclude that the tests and techniques that defendants have proposed to base discovery upon are new and novel and subject to the *Frye* test. If there is evidence to satisfy the *Frye* test, I submit that it should be presented along with any other evidence that would validate this discovery request.

¶ 87 I am not prejudging the outcome. I am merely determining that this record presents an instance that requires a *Frye* hearing. If this fails the *Frye* test then there is no reason for allowing discovery for inadmissible evidence based upon an unproven, unacceptable correlation between a computer's metadata and the alleged brain damage of its operator.

Country Mutual Insurance Company v. Witbrod, 2026 IL App (2d) 250314

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 2d Dist. (the forum's district) · filed 2026-06-18 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 5 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 85: passage C021.3
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 85: passage C021.3

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2026 IL App (2d) 250314
No. 2-25-0314
Opinion filed June 18, 2026

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

COUNTRY MUTUAL INSURANCE COMPANY, Plaintiff-Appellant,

v.

WILLIAM WITBROD and TANYA KREULACH, Defendants-Appellees.

Appeal from the Circuit Court of Lake County.
Honorable Daniel L. Jasica, Judge, Presiding.
No. 23-CH-0129

PRESIDING JUSTICE KENNEDY delivered the judgment of the court, with opinion.
Justices McLaren and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 This appeal arises from a declaratory judgment action filed by plaintiff, Country Mutual Insurance Company (Country Mutual), seeking a declaration that defendant, William Witbrod, does not qualify as an insured under the terms of its insurance policies for claims asserted by defendant, Tanya Kreulach, in the underlying lawsuit. Kreulach filed a personal injury action against Witbrod in the underlying lawsuit to recover damages she sustained in a car accident. At the time of the accident, Witbrod had delivered a pizza for his employer, Wix Pizza Inc. (Wix) d/b/a Antioch Pizza Shop, the named insured on Country Mutual's insurance policies. Country Mutual and defendants filed cross-motions for summary judgment on the issue of whether Witbrod was an insured under Country Mutual's policies and, consequently, whether Country Mutual owed Witbrod a duty to defend him in the underlying lawsuit or to indemnify Kreulach for the damages

she sustained. We reverse the trial court's decisions to (1) grant summary judgment in favor of Kreulach and Witbrod and against Country Mutual and (2) deny summary judgment in favor of Country Mutual and against Kreulach and Witbrod.

¶ 2 I. BACKGROUND

¶ 3 A. The Underlying Incident

¶ 4 On June 8, 2020, Kreulach was stopped at a traffic light in her car at an intersection in Antioch. Witbrod, driving his own car (a 2009 BMW), collided with the rear of Kreulach's vehicle, causing injury to Kreulach. At the time of the accident, Wix employed Witbrod, who was driving back to Antioch Pizza Shop after making a delivery. Witbrod had personal insurance coverage for the incident under a policy issued by State Farm Mutual Automobile Insurance Company (State Farm).

¶ 5 B. The State Farm Policy

¶ 6 State Farm issued personal auto policy No. G48282113 to Witbrod, which was in effect on the date of the accident. The insuring agreement under the State Farm policy provided:

> "1. *We* will pay damages an *insured* becomes legally liable to pay because of:
>
> a. *bodily injury* to others; and
>
> b. damage to property caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy.
>
> 2. *We* have the right to:
>
> a. investigate, negotiate, and settle any claim or lawsuit;
>
> b. defend an *insured* in any claim or lawsuit, with attorneys chosen by *us*; and

c. appeal any award or legal decision for damages payable under this policy's Liability Coverage."

The declarations page of the policy listed bodily injury limits of $100,000 for each person and $300,000 for each accident.

¶ 7 The State Farm policy defined an "insured" as "*you*" for "the ownership, maintenance, or use of *** *your car*." An amendatory endorsement to the policy changed the definition of an "insured" in cases of vicarious liability:

"*Insured* means any other *person* or organization vicariously liable for the use of a vehicle by an *insured* as defined in 1., 2., or 3. above, but only for such vicarious liability. This provision applies only if the vehicle is:

a. neither *owned by*, nor hired by that other *person* or organization; and

b. neither available for, nor being used for, carrying *persons* for a charge."

The declarations page identified Witbrod as the named insured under the policy and "Your Car" as a 2009 BMW, the vehicle involved in the accident.

¶ 8 The State Farm policy included provisions in the event other liability coverage applies:

"2. The Liability Coverage provided by this policy applies as primary coverage for the ownership, maintenance, or use of *your car* ***.

* * *

b. If:

(1) this is the only Car Policy issued to *you* *** by the *State Farm Companies* that provides Liability Coverage which applies to the accident as primary coverage; and

(2) liability coverage provided by one or more sources other than the *State Farm Companies* also applies as primary coverage for the same accident,

then *we* will pay the proportion of damages payable as primary that *our* applicable limit bears to the sum of *our* applicable limit and the limits of all other liability coverage that apply as primary coverage."

¶ 9 C. The Country Mutual Policies

¶ 10 Wix obtained commercial and umbrella policies from Country Mutual that each provided automobile liability coverage for its employees. Country Mutual issued to Wix Commercial Business Policy No. AB253082011 (Business Policy), effective May 1, 2020, to May 1, 2021. The declarations under the Business Policy provided a liability coverage limit of $1 million per occurrence and an aggregate limit of $2 million. Pertinent here, the Business Policy included a "Business Auto Coverage Form" that described covered vehicles under the policy. Section II, subsection A, of the Business Auto Coverage Form sets forth coverage for auto liability under the policy:

"We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.' "

Section IV of the Business Auto Coverage Form included an "Other Insurance" provision, which stated, in relevant part, the following regarding other insurance:

"For any covered 'auto' you own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance."

¶ 11 Country Mutual charged Wix an annual premium for "Non Owned Food Delivery" coverage. The Business Policy described "Hired 'Autos' " as "[o]nly those 'autos' you lease, hire, rent or borrow. This does not include any 'auto' you lease, hire, rent or borrow from any of your 'employees' ***." The policy also stated that "Non-owned 'Autos' " refers to "[o]nly those 'autos' you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes 'autos' owned by your 'employees' *** but only while used in your business or your personal affairs." The Business Auto Coverage Form declarations stated that vehicles are covered "autos" if they fell within the definitions of "Hired 'Autos' Only," designated as symbol 8, or "Non-owned 'Autos' Only," designated as symbol 9. The "Schedule of Coverages and Covered Autos" provided "Covered Auto Liability" for both "Hired 'Autos' " (symbol 8) and "Non-owned 'Autos' " (symbol 9), with a policy limit of $500,000. In short, non-owned vehicles used for food delivery were considered covered "autos" under the policy.

¶ 12 The Business Policy provided coverage to individuals and entities that qualified as "insureds." Section V of the Business Auto Coverage Form defined the term, "insured," as:

> "[A]ny person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or 'suit' is brought."

¶ 13 Section II, subsection A delineated the relevant "Who Is An Insured" provision in the Business Auto Coverage Form:

> "1. Who Is An Insured
>
> The following are 'insureds':
>
> a. You for any covered 'auto.'

b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow except:

* * *

(2) Your 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her household.

* * *

c. Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability."

¶ 14 Country Mutual also issued Commercial Umbrella Policy No. AU2530820 (Umbrella Policy) to Wix, the named insured, for the policy period of May 1, 2020, through May 1, 2021. The declarations under the Umbrella Policy provided a liability coverage limit of $2 million for each occurrence and an aggregate limit, "except with respect to 'covered autos," of $2 million. The Umbrella Policy's "Insuring Agreement" for bodily injury stated:

> "We will pay on behalf of the insured the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' *** to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking damages for such 'bodily injury' *** when the 'underlying insurance' does not provide coverage or the limits of 'underlying insurance' have been exhausted. When we have no duty to defend, we will have the right to defend, or to participate in the defense of, the insured against any other 'suit' seeking damages to which this insurance may apply. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' *** to which this insurance does not apply."

The term, "Underlying Insurance" is defined as "any policies of insurance listed in the Declarations under the Schedule of 'underlying insurance.' " The schedule of underlying insurance lists the other Country Mutual policies in effect during the same policy period as the Umbrella Policy, including the Business Policy.

¶ 15 The Umbrella Policy excluded coverage for "bodily injury" arising out of the "ownership, maintenance or use of any 'auto' which is not a 'covered auto,' " meaning, the policy afforded coverage only to the ownership, maintenance, or use of a "covered auto." The policy defined "covered auto" as "only those 'autos' to which 'underlying insurance' applies."

¶ 16 The Umbrella Policy defined an "insured" similarly to the Business Policy and, particularly relevant here, it stated that "[a]nyone liable for the conduct of an insured described above is also an insured, but only to the extent of that liability." Finally, the Umbrella Policy provided that it "is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis." In addition, "[w]hen this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.' "

¶ 17 D. The Interwoven Underlying Tort and Declaratory Judgment Proceedings

¶ 18 The litigation in the underlying personal injury lawsuit and declaratory judgment action to determine insurance coverage proceeded concurrently, but before different trial judges. The proceedings in court and otherwise unfolded as follows.

¶ 19 On April 28, 2022, Kreulach filed a personal injury action against Witbrod, styled Kreulach v. Witbrod, No. 22-LA-154 (Cir. Ct. Lake County), but not against Wix or Antioch Pizza Shop. Kreulach alleged that Witbrod's negligence in operating his vehicle proximately caused her injuries. Kreulach's complaint did not allege that Witbrod was acting under the scope of his

employment at the time of the accident. The complaint's prayer for relief sought judgment and damages solely from Witbrod.

¶ 20 State Farm appointed counsel to represent Witbrod in the underlying lawsuit. On October 6, 2022, Witbrod submitted his answers to Kreulach's interrogatories. Witbrod stated that, at the time of the accident, he was employed to work and make deliveries for Antioch Pizza Shop. Kreulach's interrogatory inquired about the purpose or use of the vehicle at the time of the accident and where he was traveling. Witbrod answered that he was on his way to Antioch Pizza Shop after he had made a pizza delivery. He also stated that he was the owner of his vehicle.

¶ 21 On January 3, 2023, counsel for State Farm sent Country Mutual a letter advising Country Mutual that State Farm had been retained to represent Witbrod in the underlying lawsuit. State Farm tendered defense of the case to Country Mutual, stating, "[w]e have been advised that your employee, William Witbrod, was in the course and scope of his employment with Antioch Pizza Shop at the time of the accident and was on his way returning to the Pizza Shop from a delivery when the automobile accident occurred." The letter stated that Witbrod had "advised his manager of this automobile accident on the date of the occurrence."

¶ 22 On January 14, 2023, Country Mutual received what it claimed was its first notice of the underlying lawsuit and the accident that led to Kreulach's cause of action. Also on that date, Country Mutual received notice that State Farm was defending Witbrod in the underlying lawsuit.

¶ 23 Country Mutual sent a notice of coverage denial to Witbrod on February 2, 2023. Country Mutual referenced section II, subsection A, of its Business Policy, describing "Who Is An Insured" in the Business Auto Coverage Form, and denied coverage to Witbrod because, Country Mutual asserted, he was not an insured under that provision. Specifically, Country Mutual stated that Witbrod was excluded from coverage under the policy because he was an "employee" of Wix while

using an “auto” that he owned at the time of the accident and, therefore, he did not fall within the definition of an “insured.”

¶ 24 On April 5, 2023, Witbrod testified by deposition in the underlying lawsuit that, when he began working at Antioch Pizza Shop, he was informed that he needed to obtain his own insurance coverage as a delivery driver because he would not be insured by Antioch Pizza. Witbrod paid extra money to procure insurance to cover his car for delivering pizzas. Witbrod recalled that about one month prior to his deposition, the owner of the pizza shop had approached him to ask about insurance for the underlying lawsuit. When Witbrod asked for clarification, the owner responded “[n]ever mind.” The manager of the pizza shop later approached Witbrod and explained that the owner was not sure if Witbrod knew that he had been sued following the accident.

¶ 25 On July 5, 2023, Country Mutual filed its complaint for declaratory judgment, seeking a ruling that no coverage was available under either its business or umbrella policies for the allegations asserted in the underlying lawsuit. Specifically, Country Mutual asserted that Witbrod did not qualify as an “insured” under its policies and that the policies only provided coverage to “insureds.” Witbrod was not a named insured on the declaration pages of the policies. Country Mutual alleged that, although Witbrod had been operating a covered “auto” at the time of the accident, because he was an “employee” of Wix, he was not an “insured” for the covered “auto” that he owned under the “Who Is An Insured” provision of the policies (referencing paragraph 1(b)(2) of that provision).

¶ 26 Further, Country Mutual alleged that the complaint in the underlying lawsuit neither named Wix as a defendant nor asserted that Wix was independently negligent in causing or contributing to cause Kreulach’s injuries. Country Mutual also alleged that Kreulach could not seek relief from Wix for her purported injuries because the two-year statute of limitations to file a claim against

Wix had expired. Thus, Country Mutual alleged that, because Kreulach did not seek to hold Witbrod liable for the conduct of Wix, Witbrod did not qualify as an "insured" under the "Who Is An Insured" provision that stated, "[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability," referencing paragraph 1(c) of that provision. Country Mutual sought a declaratory finding that it had no duty to defend or indemnify Witbrod under its policies.

¶ 27 Counsel for Kreulach sent both State Farm and Country Mutual a settlement demand letter on August 22, 2023. He asserted, "[i]t is undisputed that liability rests 100% with your client." He thoroughly described Kreulach's injuries, including displaced ribs. He stated that, "[c]ompounding this tragedy is Country Mutual's efforts to deny coverage and make [Witbrod] personally liable for everything that has been taken from [Kreulach]." Kreulach extended a settlement offer of $1.6 million, comprised of the $100,000 personal State Farm coverage and $1.5 million from the Country Mutual policies.

¶ 28 On August 31, 2023, counsel for Country Mutual sent Kreulach's counsel a response "to your policy limits demand letter dated August 22, 2023." Country Mutual stated that Kreulach's demand was "based on the false premise [that] Witbrod qualifies as an insured" under the Business Policy. Country Mutual rejected Kreulach's policy limit demand and explained why Witbrod was not an "insured" under the "Who Is An Insured" provision of the policy. Country Mutual stated:

> "Plaintiff [Kreulach] does not seek relief from Mr. Witbrod for the conduct of Wix Pizza. Indeed, there are no allegations that Wix Pizza committed any act, error, or omission that caused or contributed to cause [Kreulach's] injuries. Moreover, at the time Country Mutual received Mr. Witbrod's tender of coverage in January 2023, [Kreulach's] ability to seek relief from Wix Pizza was barred by the statute of limitations. Thus, even if it were legally

permissible for [Kreulach] to have asserted a claim against Mr. Witbrod for the conduct of Wix Pizza (which Country Mutual does not concede), such a claim was not possible at the time Country Mutual was first placed on notice of the claims against Mr. Witbrod."

¶ 29 On September 14, 2023, State Farm sent counsel for Kreulach a correspondence stating that it had received the August 22, 2023, demand letter. Counsel for State Farm responded, "[b]ased on the documentation provided, State Farm is willing to settle your client's claim for $100,000.00. This settlement is inclusive of all damages, known and unknown, and any liens, assignments or statutory rights of recovery."

¶ 30 On September 18, 2023, Kreulach filed an amended complaint against Witbrod in the underlying lawsuit. Kreulach alleged that on June 8, 2020, the date of the accident, Wix employed Witbrod and that, at the time Witbrod collided with Kreulach's vehicle, "he was acting within the course and scope of his employment" with Wix. Further, Kreulach alleged that, at the time of the accident, Witbrod "was acting as the agent, servant, and/or employee" of Wix. Kreulach did not add Wix as a defendant to the amended complaint and demanded judgment and damages solely against Witbrod.

¶ 31 Kreulach answered Country Mutual's complaint for declaratory judgment on September 8, 2023. She admitted that Wix was not a named defendant in the underlying complaint but denied that Wix was not liable for the acts of its agent, servant, or employee Witbrod in causing the accident. Kreulach also denied that Wix "does not have a right to quasi contractual implied indemnification from Witbrod." In addition, Kreulach denied that she cannot seek relief from Wix because "[t]he statute of limitations is an affirmative matter that must be timely pled or proved or it is waived."

¶ 32 Kreulach's counsel responded to State Farm's settlement offer by e-mail on September 19, 2023. Kreulach's counsel included Country Mutual's counsel on the e-mail correspondence. He stated that Kreulach had authorized him to extend the following settlement opportunity to Witbrod and State Farm:

"1. State Farm will pay its $100,000.00 limit towards [Kreulach's] damages.

2. [Kreulach] offers to have her claim against [Witbrod] decided by a binding arbitration, with no appeal rights, with the award being confirmed to judgment under the Illinois Uniform [A]rbitration Act when it is entered.

3. The Parties will choose and agree to a single arbitrator from ADR and if none are agreeable then from the Illinois Bar.

4. The arbitrator will decide liability and the amount of [Kreulach's] damages in [her] award.

5. The parties will split the cost of the arbitrator.

6. [Kreulach] agrees not to execute against [Witbrod's] personal assets and agrees not to execute against State Farm beyond the $100,000.00 it has already tendered to satisfy the arbitration award/judgment. [Kreulach] will be limited to seeking satisfaction of the arbitration award/judgment from [Country Mutual's] insurance policies and through bad-faith proceedings against [Country Mutual].

7. [Witbrod] will assign his claim for the tort of bad faith against [Country Mutual] to [Kreulach]."

¶ 33 The letter from Kreulach's counsel also stated that,

"[a]lternatively, if State Farm does not wish to split the costs of a binding arbitration, then [Kreulach] is willing to accept State Farm's tender of its $100,000.00 policy limit plus

[Witbrod] agreeing to entry of a consent judgment against himself in the amount of $1,600,000 in return for [Kreulach] agreeing to not pursue either [Witbrod] (personally) or State Farm (in excess of the $100,000.00 already tendered), and confine her remaining recovery to the [Country Mutual] insurance policies."

¶ 34 Witbrod filed a counter-complaint for declaratory judgment against Country Mutual on September 25, 2023. Witbrod claimed that his vehicle was a covered "auto" under Country Mutual's Business Policy because "the vehicle is owned by [Wix's] employee (Witbrod) [and] at the time of the accident, the vehicle was being used in [Wix's] business." According to Witbrod, the Business Policy provided liability coverage for Wix for damages arising out of the use of non-owned autos, as that term was defined in the policy. Witbrod next alleged that, "had [Wix] been sued for its own negligence or vicarious liability arising from Witbrod's alleged negligence in regard to the June 8, 2020 accident in the Underlying Lawsuit, based on the terms of the Policy, Country Mutual would be obligated to defend [Wix] in the Underlying Lawsuit." Witbrod alleged similarly regarding the duty to indemnify Wix. Witbrod also alleged "[i]t is of no consequence (windfall) to Country Mutual that [Wix] was not named as a defendant in the Underlying Lawsuit [because] Country Mutual's coverage obligations are not contingent upon the pleadings in the Underlying Lawsuit." He sought a declaration that Country Mutual had a duty to defend and indemnify him under the Business Policy in the underlying lawsuit.

¶ 35 Country Mutual filed an amended complaint for declaratory judgment on October 26, 2023, after Kreulach had filed her amended complaint in the underlying lawsuit. Country Mutual asserted that the complaint and amended complaint in the underlying lawsuit alleged negligence solely against Witbrod. Country Mutual alleged that "[n]either the Complaint nor the Amended Complaint in the Underlying Lawsuit names [Wix] as a defendant." Country Mutual also alleged

that the complaint and amended complaint in the underlying lawsuit did not claim Wix was independently negligent in causing or contributing to cause Kreulach's injuries. Further, Country Mutual asserted that neither the complaint nor amended complaint in the underlying lawsuit sought to recover from Wix under a theory of vicarious liability for the negligence of Witbrod. Finally, Country Mutual alleged that Kreulach could not seek relief from Wix for her purported injuries because the two-year statute of limitations to file a claim against Wix had expired.

¶ 36 On November 27, 2023, Kreulach, Witbrod, and State Farm entered into a written agreement to arbitrate the underlying lawsuit for a binding resolution. The recitals specifically provided that "Witbrod was acting within the course and scope of his employment as a pizza delivery driver with [Wix] at the time of the June 8, 2020, crash." Thereafter, the agreement stated the following, in pertinent part:

> "1. Witbrod hereby admits fault for causing the June 8, 2020 crash.
>
> * * *
>
> 4. The parties agree that the sole matter for decision by [the arbitrator] will be Kreulach's personal injury damages owed stemming from the June 8, 2020 crash.
>
> * * *
>
> 7. The parties agree that with respect to any award rendered by [the arbitrator] (and the resulting civil judgment obtained) that Kreulach will confine her execution and recovery against State Farm solely to its $100,000.00 liability limit of automobile insurance coverage.
>
> 8. The parties agree that with respect to any award rendered by [the arbitrator] (and the resulting civil judgment obtained) that Kreulach will confine her execution and recovery against Witbrod to monies obtained from liability insurance companies providing

liability coverage for the June 8, 2020 crash, including [the State Farm and Country Mutual policies].

9. Kreulach agrees not to execute any arbitration award (or resulting civil judgment obtained) against Witbrod's personal assets.

10. The parties agree that State Farm cannot be held liable for Kreulach's damages suffered due to the June 8, 2020 crash in excess of the $100,000.00 that State Farm agreed to pay by virtue of this agreement, and that State Farm is hereby relieved of any liability beyond its $100,000.00 automobile liability insurance limit.

11. Witbrod agrees to and hereby does assign all extra-contractual claims against [Country Mutual], including his claim for the tort of bad faith in the wrongful denial of coverage, wrongful denial of a defense, amongst others, to Kreulach."

¶ 37 On December 7, 2023, counsel for Kreulach sent a one-sentence e-mail to counsel for Country Mutual, advising that Witbrod had accepted Kreulach's offer to arbitrate the underlying personal injury claim. No other information regarding the arbitration was provided in the correspondence.

¶ 38 On December 21, 2023, Kreulach, Witbrod, and State Farm appeared before a retired circuit court judge for the arbitration in the underlying lawsuit. The arbitrator found that, "based upon the medical testimony and a review of [Kreulach's] medical records said accident caused an aggravation of [Kreulach's] pre-existing condition." The arbitrator awarded Kreulach a total of $3,205,469.19, including medical expenses, past and future pain and suffering, and disfigurement, among other damages. The arbitrator issued the arbitration award and served the parties on December 28, 2023.

¶ 39 In an affidavit executed under section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2022)), counsel for Country Mutual stated that "[n]either Witbrod nor Kreulach, nor an attorney on either party's behalf, provided more details about the contemplated binding arbitration before it occurred other than what is contained in [Kreulach's counsel's] December 7, 2023 correspondence." The affidavit stated that Country Mutual "did not learn that the arbitration occurred or an award entered in that arbitration until February 7, 2024, when [Kreulach's counsel] for the first time provided me with a copy of an arbitration award and advised that judgment had been entered on that award." Further, counsel averred that Country Mutual did not learn of the existence of the November 27, 2023 agreement to arbitrate until it was attached to a motion that had been filed by Kreulach on September 25, 2024.

¶ 40 Counsel for State Farm also submitted an affidavit under section 1-109 of the Code, stating that, after Country Mutual refused to defend Witbrod in the underlying lawsuit, Witbrod, State Farm, and Kreulach agreed to resolve the underlying lawsuit through binding arbitration. She stated that Country Mutual had been notified that the underlying lawsuit was going to be resolved through binding arbitration. Counsel stated that Country Mutual never contacted her regarding the agreement to arbitrate and to her knowledge, "[Country Mutual] did nothing to object to the arbitration, stay the arbitration, stay the [underlying lawsuit], or otherwise participate in the defense of [Witbrod]." According to counsel, during the arbitration on December 21, 2023, "[e]videntiary submissions were made that included medical records, medical bills, medical literature, and sworn medical expert testimony. [Kreulach] testified and was cross-examined. The parties gave opening and closing arguments. [The arbitrator] thereafter deliberated and provided his ruling." Finally, counsel stated that neither Witbrod, nor State Farm, nor Kreulach entered into a consent judgment.

¶ 41 In addition, Kreulach's counsel submitted an affidavit pursuant to section 1-109 of the Code. In his affidavit, counsel stated that, after he sent the December 7, 2023, e-mail correspondence to Country Mutual's counsel, "[a]t no point thereafter did [Country Mutual's counsel] nor anyone affiliated with Country Mutual, inquire when the arbitration was to take place or where it was to take place." He continued that no one affiliated with Country Mutual made "any effort to attend the arbitration, defend [Witbrod] under a reservation of rights, or stay the arbitration." Counsel for Kreulach averred that "[t]here was no consent judgment in the [underlying lawsuit]. There was no rollover arbitration. There was no collusion."

¶ 42 Kreulach filed a motion to confirm the arbitration award judgment in the underlying lawsuit on January 3, 2024. On January 11, 2024, the trial court in that case entered an order granting Kreulach's motion and confirming the judgment in favor of Kreulach and against Witbrod in the amount of $3,205,469.19.

¶ 43 On January 16, 2024, Kreulach filed a counterclaim for declaratory judgment. In her counterclaim, Kreulach alleged that the vehicle Witbrod was operating at the time of the accident was a covered "auto" under Country Mutual's Business Policy. She alleged that Witbrod was a Wix employee, delivering Wix's pizzas, with Wix's permission, and in furtherance of Wix's food delivery at the time of the accident. She claimed that "Witbrod qualifies as an insured under paragraph 1(c) of the Who Is An Insured provision" of the Business Policy, which states that "[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability." Kreulach cited *First Chicago Insurance Co. v. Molda*, 2015 IL App (1st) 140548, ¶ 50 (*Molda III*),[1] for the proposition that "[q]uestions of applicable coverage can be determined only as of the time of the accident creating potential liability." (Internal quotation marks omitted.)

[1]A discussion of the *Molda* litigation and its three appellate dispositions begins *infra* ¶ 92.

Kreulach alleged that at the time of the accident, Wix, the named insured, had "potential liability to Kreulach under the doctrine of *respondeat superior*." She alleged that if she "obtained a judgment from Wix under the theory of *respondeat superior*, Wix would be entitled to indemnification from Witbrod under the common law theory of quasi-contractual implied indemnity." Kreulach asserted that, "[c]onsequently, at the time of the June 8, 2020 crash, Witbrod was 'liable for the conduct of an "insured" described above but only to the extent of that liability,' and therefore, qualifies as an insured under the [Country Mutual] commercial auto liability policy."

¶ 44 Kreulach sought a declaration that the car operated by Witbrod at the time of the accident was covered under the Business Policy issued by Country Mutual to Wix. She also sought a declaration that Country Mutual's Business Policy covered Witbrod for his liability as an agent, servant, and/or employee of Wix in causing the accident. Finally, Kreulach sought a declaration that Country Mutual breached its duty to defend and indemnify Witbrod under the Business Policy.

¶ 45 On February 7, 2024, counsel for Kreulach sent an e-mail correspondence to counsel for Country Mutual offering settlement following the confirmation of the arbitration award. Counsel stated that because of Country Mutual's "wrongful denial of coverage," Witbrod and State Farm "did everything possible to protect him from financial ruin due to this clear liability and clear excess case." He continued that Kreulach had accepted State Farm's settlement offer and that Country Mutual "was kept aware of the foregoing" and took no steps to negotiate the claim, participate in the arbitration, or prevent the arbitration from proceeding. Counsel for Kreulach informed counsel for Country Mutual the amount of the arbitration award. He stated that Kreulach had instructed him "to extend a time-limited opportunity [until February 17, 2024] to resolve this claim and satisfy the judgment against its insured, Mr. Witbrod, through payment of its insurance limits of $1.5 million ***." Finally, counsel stated that if Country Mutual rejected the settlement

offer, Kreulach would file a summary judgment motion in the declaratory action "and pursue the full judgment amount in this clear bad-faith case."

¶ 46 On February 20, 2024, Kreulach moved for summary judgment on her counterclaim for declaratory judgment. Similar to the allegations in her counterclaim complaint, she argued that the precedent in *Molda III* determines this litigation and, as such, Witbrod qualified as an "insured" under paragraph 1(c) of the definitions of "Who Is An Insured" under Country Mutual's Business Policy ("Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability"). Kreulach contended that, even if the *Molda III* decision did not exist, the subject policies were inherently ambiguous concerning Witbrod's insured status and had to be construed in favor of coverage. Kreulach sought a summary judgment finding that Witbrod was an insured under Country Mutual's Business Policy and that, therefore, it owed Witbrod a defense and indemnification under its policies. Witbrod moved for summary judgment on his counter-complaint for declaratory judgment on March 13, 2024, making substantially the same arguments as Kreulach.

¶ 47 Also on March 13, 2024, Country Mutual moved for summary judgment, seeking a finding that it had no duty to defend or indemnify Witbrod in the underlying lawsuit. Country Mutual argued that its business and umbrella policies did not provide coverage for Witbrod in the underlying lawsuit or the "rollover judgment" from the arbitration finding. Country Mutual contended that Witbrod was not an insured under the policies' plain and unambiguous terms. Country Mutual noted in its motion that Witbrod and State Farm had entered into an agreement with Kreulach pursuant to which Witbrod would not contest an arbitration of Kreulach's claims in exchange for a promise that Kreulach would only seek to collect the resulting judgment from Country Mutual. Country Mutual did not dispute that Witbrod's car qualified as a covered "auto"

under its policies or that Witbrod owned the car. Country Mutual noted that, for any covered "auto" Wix does not own, the insurance provided by the Country Mutual Business Policy "is excess over any other collectible insurance," which, in this case, was State Farm. Country Mutual argued that because it is an excess insurer, Witbrod's tender of the underlying lawsuit to Country Mutual should be evaluated in the context of an insurer without a duty to defend. As an excess insurer for claims involving non-owned "autos" that are covered autos under the Business Policy, Country Mutual contended that it only owed a duty to indemnify its "insureds." According to Country Mutual, an insurer's duty to indemnify arises only if the facts alleged actually fall within coverage. Continuing, Country Mutual argued that the question of whether the insurer has a duty to indemnify someone for a particular liability is only ripe for consideration if he, she, or it had already incurred liability in the underlying claim. Country Mutual asserted that because Kreulach did not allege or seek to impose liability on Witbrod for Wix's conduct, Witbrod did not qualify as an insured under its policies. Finally, Country Mutual argued that *Molda III* did not apply to this case or was incorrectly decided.

¶ 48 On May 28, 2024, the trial court entered its order ruling on the parties' cross-motions for summary judgment. Initially, the court found that the facts alleged by the parties were undisputed in light of Country Mutual's failure to respond to Kreulach's statement of undisputed facts. The court noted that the coverage dispute turned on whether Witbrod was properly considered an "insured" under the Country Mutual policies issued to Wix. The parties agreed that Witbrod's car was a covered "auto" under the policies. However, the court also recognized that even if Witbrod's car was a covered "auto," the issue remained whether Witbrod was an "insured" entitled to coverage under the policies.

¶ 49 The trial court considered the Country Mutual policy language of paragraph 1(c) that described "Who Is An Insured." The court substituted Wix as the named insured in that section of the policy to read, " 'anyone liable for the conduct of Wix Pizza but only to the extent of that liability.' " The court then stated that

> "[a] plain reading of this text suggests that this provision was only intended to extend coverage for one who is passively liable for the negligent or tortious acts of the named insured, Wix Pizza. In such instances, that party's liability could logically be said to 'arise' out of the conduct of the insured (Wix Pizza)."

The court pointed out how other jurisdictions had considered the exact same policy language to find that the language of paragraph 1(c) provided "coverage to a third party that is potentially *vicariously liable* for the acts or wrongdoing of the named insured." (Emphasis in original.) The court also noted a case from the United States District Court for the Northern District of Illinois, *Vulcan Materials Co. v. Casualty Insurance Co.*, 723 F. Supp. 1263, 1265 (N.D. Ill. 1989), that interpreted a similar provision, finding the language as " 'plainly a vicarious liability provision and nothing more.' "

¶ 50 Nevertheless, the trial court stated that it was obligated to follow the decision in *Molda III*, which concluded that the same provision was not strictly limited to instances where a party is potentially vicariously liable for the acts or omissions of a named insured. The court found that this case was "on all fours with *Molda* [*III*]." The court noted that the four corners of the complaint in the underlying lawsuit did not control whether there was a duty to indemnify. "Instead, the duty to indemnify is based on whether the adjudicated facts, as they are found to have existed at the time of the occurrence, fall within coverages provided under the policy." The court stated that, "[b]y focusing on the facts as of the date of the accident, the *Molda* [*III*] court was presumably

analyzing the issue of coverage and indemnity under the policy, not the duty to defend." In reference to Country Mutual's argument that Kreulach had failed to file a claim against Wix before the expiration of the statute of limitations, the court stated that "whether the employer is *actually named* as a defendant in the underlying personal injury lawsuit should not be relevant to or determinative of the issue of coverage." (Emphasis in original.) The court pointed out that the claims against the defendant in *Molda I* (*Wilson v. Molda*, 396 Ill. App. 3d 100, 111 (2009)) were found to be barred by the two-year statute of limitations.

¶ 51 The trial court concluded that, based on the holding in *Molda III*, Witbrod was an "insured" under Country Mutual's business and umbrella policies issued to Wix. The court stated that at the time of the accident, Wix, as Witbrod's employer, was potentially liable to Kreulach under a *respondeat superior* theory, as held in *Molda III*. "If sued, Wix Pizza would then have had a potential claim for quasi-contractual implied indemnification against its employee, Witbrod." The court found that, under *Molda III*, "Witbrod was therefore 'liable for the conduct of an "insured" and qualified as an insured under the Country Mutual policies.' " The court granted summary judgment in favor of Kreulach and Witbrod and denied Country Mutual's motion for summary judgment.

¶ 52 On June 26, 2024, Country Mutual moved to reconsider the trial court's May 28, 2024, summary judgment ruling, arguing that the court did not apply the Illinois duty to defend test to support the conclusion that Country Mutual owed that duty to Witbrod. Country Mutual also argued that the court incorrectly described the Illinois duty to indemnify standard because it failed to consider the insured's actual liability in the underlying lawsuit and whether the resulting loss or damage from that actual liability fell within the policy's coverage. In the alternative, Country Mutual moved for leave to file a second amended complaint.

¶ 53 On September 12, 2024, the trial court denied Country Mutual's motion to reconsider but granted its motion for leave to file a second amended complaint. The following day, Country Mutual filed its second amended complaint for declaratory judgment. In count I, Country Mutual alleged that Witbrod did not qualify as an "insured" under its policies and stated that it reasserted count I from its previously dismissed amended complaint to preserve its rights on appeal. In counts II and III, Country Mutual alleged that it was not liable for the judgment in the underlying lawsuit. Country Mutual pleaded counts II and III in the alternative "to the extent Witbrod is an insured" under its policies, noting that it did not waive its right to appeal the court's May 28, 2024, decision, "which was converted to a non-final order on Country Mutual's Motion." Country Mutual alleged that Witbrod assumed an obligation without Country Mutual's consent by entering into a consent judgment with Kreulach. Country Mutual also asserted that the judgment in the underlying lawsuit was unreasonable and, therefore, not binding on it.

¶ 54 On September 19, 2024, Country Mutual filed a motion for immediate appeal of the trial court's May 28, 2024, order pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Country Mutual asserted that the summary judgment order resolved competing reciprocal claims asserted by the parties regarding whether Witbrod was an "insured" under the policies it issued to Wix. Country Mutual argued that a finding under Rule 304(a) was applicable because there were multiple claims asserted in its second amended complaint, for which no final judgment had been entered and that there was no just reason for delaying the appeal.

¶ 55 However, the litigation of the declaratory action continued on September 25, 2024, as Kreulach moved to dismiss counts II and III of Country Mutual's second amended complaint for declaratory judgment. She argued that count II should be dismissed because no consent judgment was entered, binding precedent held that Witbrod did not breach Country Mutual's policies, and

Country Mutual was estopped from taking contradictory positions concerning Witbrod's insured status. She contended that dismissal of count II was warranted because the trial court could act as an appellate court regarding the binding arbitration findings.

¶ 56 On September 30, 2024, the trial court denied Country Mutual's motion for immediate appeal of the May 28, 2024, order.

¶ 57 On October 11, 2024, Witbrod moved for summary judgment of Country Mutual's second amended complaint for declaratory judgment. Witbrod argued similarly to Kreulach's motion to dismiss counts II and III of Country Mutual's second amended complaint.

¶ 58 On January 3, 2025, the trial court denied Kreulach's motion to dismiss counts II and III and Witbrod's motion for summary judgment. The court found that Country Mutual was not precluded from challenging the reasonableness of the arbitration award. The court stated that, "where the specter of potential collusion between an insured and an injured plaintiff exists, Illinois courts have permitted an insurer to challenge the reasonableness of any settlement agreement entered by and between the injured plaintiff and the insured." To that end, the court stated as follows:

> "Here, Country Mutual did not simply deny coverage. It promptly filed its declaratory judgment action in July 2023. Country Mutual was not timely notified or provided a copy of the November 27, 2023, partial settlement agreement between Kreulach, Witbrod, and State Farm. It first received a copy in September 2024, after this Court had already ruled on the cross-motions for summary judgment on Count I. Country Mutual was not notified in advance of when or where the arbitration would occur. Country Mutual was certainly not invited to participate in the arbitration. And, the Court seriously doubts counsel for Kreulach and Witbrod would have readily permitted Country Mutual—a non-party to the

underlying tort case that was to be arbitrated and a non-party to the agreement to arbitrate—to have participated. Country Mutual was not notified of the arbitrator's award or the motion to confirm that award. By the time it had notice of the arbitrator's award, [the arbitrator] had already entered his order confirming the award and the parties were already briefing their cross-motions for summary judgment as to Count I."

The court held that, based on the limited record before it, it could not foreclose Country Mutual's equitable right to contest the reasonableness of the $3.2 million award "before it is obligated to potentially provide indemnification in that very substantial amount."

¶ 59 Kreulach and Witbrod moved for reconsideration of the denial of their motions to dismiss count III of Country Mutual's second amended complaint. The trial court denied the motion for reconsideration on April 5, 2025. Although not file stamped, Kreulach apparently had filed a motion to quash or be held in civil contempt following the discovery issued by Country Mutual in April 2025. Essentially, she challenged Country Mutual's right to receive her medical records, which Country Mutual contended were needed for the reasonableness hearing on the arbitration finding ordered by the trial court. She also filed a motion for clarification on April 29, 2025, requesting clarification of a number of issues stemming from count III of Country Mutual's second amended complaint for declaratory judgment. Country Mutual opposed Kreulach's motion to quash as "a clear attempt to obstruct the Court's ability to conduct the reasonableness hearing it previously ordered [to] take place."

¶ 60 The trial court conducted a hearing on Kreulach's motions to quash and for clarification on July 9, 2025. There, the court considered whether an interlocutory appeal was necessary to consider its prior ruling regarding insurance coverage. The court stated that it was "of the opinion that the more appropriate issue to go up is the substantive and potentially dispositive issue of

whether there is or is not coverage for Witbrod under the Country Mutual excess or umbrella policies." The court specifically noted that *Molda III* "is at odds with several federal and *** out of state rulings interpreting the specific language at issue and also potentially at odds with the natural reading of the policy language at issue." Accordingly, the court granted Rule 304(a) language for the threshold issue of coverage to be determined on appeal.

¶ 61 Following the hearing, the trial court entered a written order the same day, stating that, pursuant to Rule 304(a), "the Court finds that there is no just reason for delaying either enforcement or appeal of the summary judgment ruling contained in the Memorandum Opinion and Ruling on Cross-Motions for Summary Judgment dated May 28, 2024."[2] The court also stayed further litigation of Country Mutual's second amended complaint for declaratory judgment. Country Mutual filed a timely appeal following the entry of the court's Rule 304(a) finding.

¶ 62 II. ANALYSIS

¶ 63 On appeal, Country Mutual argues that Witbrod is not an "insured" under both of its policies issued to Wix using either the duty to defend or the duty to indemnify standard. Country Mutual contends that, pursuant to the clear and unambiguous language of its policies, Witbrod did not qualify as an "insured" in the underlying lawsuit because (1) Kreulach did not allege that Witbrod was liable for Wix's conduct and (2) the judgment Kreulach obtained against Witbrod in the underlying lawsuit was not for Wix's conduct. Country Mutual seeks reversal of the trial court's determination that Witbrod qualified as an "insured" under its policies.

[2]Rule 304(a) states that a finding under that rule "may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party." Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016).

¶ 64 Kreulach responds that Country Mutual pleaded itself out of court and should not have been allowed to file a post-summary judgment second amended complaint for declaratory judgment.[3] Essentially, Kreulach asserts that Country Mutual should not have been allowed to plead in its second amended complaint in count I that Witbrod was not an "insured" under its policies and then contradictorily plead in counts II and III that Witbrod was an "insured" under its policies.[4] Kreulach also argues that the *Molda III* decision established that Witbrod was an "insured" under Country Mutual's policies. In addition, she contends that, even if the *Molda III* decision did not exist, Country Mutual's policies provide coverage or, at the very least, contain inherent ambiguities that must be construed in favor of coverage.

¶ 65 In its reply, Country Mutual argues that it is legally permissible to plead claims in the alternative. Count I of its second amended complaint for declaratory judgment asserts that Witbrod did not qualify as an "insured" under Country Mutual's policies and the pleading expressly

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[3]Witbrod and Kreulach are the named defendants in Country Mutual's declaratory judgment action, however, only Kreulach filed a response brief on appeal.

[4]In her response brief, Kreulach argues before this court that Country Mutual's second amended complaint for declaratory judgment was untimely, stating that Country Mutual

> "was provided notice of [Kreulach's] offer to arbitrate the tort case (in September of 2023)[,] that Witbrod/State Farm accepted the offer (in December of 2023)[,] and a copy of the arbitration award (in February of 2024)[,] yet it chose not even to attempt to file its second amended complaint until June of 2024 after losing summary judgment on Count 1."

Kreulach's argument here, however, is misleading when considering the trial court pointed to "potential collusion" in its January 3, 2025, denial of Kreulach's motion to dismiss counts II and III of Country Mutual's second amended complaint for declaratory judgment. See *supra* ¶ 58.

provided that count I was included to preserve Country Mutual's rights on appeal. Counts II and III were specifically pleaded in the alternative "to the extent Witbrod is an insured" under the Country Mutual policies.

¶ 66 Country Mutual contends that the Code expressly allows for alternative pleading under section 2-613(b) (735 ILCS 5/2-613(b) (West 2022)). Section 2-613 governs separate counts of complaints, and subsection (b) provides that "[w]hen a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts ***. A bad alternative does not affect a good one." *Id.* Country Mutual argues that the Code "clearly authorizes alternative pleading, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true," citing *Bureau Service Co. v. King*, 308 Ill. App. 3d 835, 841 (1999).

¶ 67 In Illinois,

> "[i]t is well settled that at the pleading stage of the proceedings, where the issue is solely the sufficiency of the pleadings and whether plaintiffs can conceivably prove a set of facts that would entitle them to recovery, plaintiffs may plead factual allegations and legal theories in the alternative and, at trial, choose which theories of recovery to pursue." *Id.*

Moreover, our supreme court has stated that "[t]he rules governing the preservation of dismissed claims for purposes of appellate review are clear and well settled." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. "[A] party who files an amended pleading waives any objection to the trial court's ruling on the former complaints," and " '[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' " *Foxcroft Townhome Owners Ass'n v.*

Hoffman Rosner Corp., 96 Ill. 2d 150, 153-54 (1983) (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). In short, had Country Mutual failed to refer back in its second amended complaint and preserve its assertion in count I that Witbrod was not an "insured" under its policies, the claim would have been abandoned, as held in *Foxcroft*. Section 2-613(b) of the Code applies here and Country Mutual properly preserved its claim that Witbrod is not an "insured" under its policies for purposes of this appeal. 735 ILCS 5/2-613(b) (West 2022); *Foxcroft*, 96 Ill. 2d at 153-54.

¶ 68 We now turn to the merits of this appeal to address whether Witbrod was an "insured" under Country Mutual's policies issued to Wix.

¶ 69 A. Standard of Review

¶ 70 1. Summary Judgment

¶ 71 Summary judgment is appropriate "if 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 2022). The parties here filed cross-motions for summary judgment, which typically indicates there are no disputed material facts, though we note that the mere filing of cross-motions for summary judgment does not conclusively establish that there is no issue of material fact. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Id.* We review *de novo* the trial court's decision on cross-motions for summary judgment. *Id.* ¶ 30.

¶ 72 2. Construing an Insurance Policy

¶ 73 An insurance policy is a contract, and the traditional rules of contract interpretation are applied to determine the scope of insurance coverage. *Illinois Insurance Guaranty Fund v. Virginia*

Surety Co., 2012 IL App (1st) 113758, ¶ 15. The construction of an insurance policy is a question of law, which we review *de novo*. *Pekin Insurance Co. v. Willett*, 301 Ill. App. 3d 1034, 1037 (1998). When construing the language of an insurance policy, courts must ascertain and give effect to the intention of the parties as expressed in their agreement. *Id.* Thus, policy terms are given their plain and ordinary meaning and are applied as written unless such application contravenes public policy. *Id.* Conversely, if the policy language is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer who drafted the policy and in favor of the insured (*American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)); however, courts will not strain to find ambiguity in a policy where none exists. *McKinney v. Allstate Insurance Co.*, 188 Ill. 2d 493, 497 (1999). "[A]n ambiguity will be found if the language of the contract is 'obscure in meaning through indefiniteness of expression.' " *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004) (quoting *Platt v. Gateway International Motorsports Corp.*, 351 Ill. App. 3d 326, 330 (2004)). However, "[a] contract is not rendered ambiguous merely because the parties disagree on its meaning." *Id.* An undefined term in an insurance policy is given its plain, ordinary, and popular meaning, which can be obtained in a dictionary. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 366 (2006). "Basic insurance and contract law indicate insurance companies provide coverage for particular risks in exchange for premiums and do not gratuitously pay noncovered claims." *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶ 15 (citing *Ryan v. State Farm Mutual Automobile Insurance Co.*, 397 Ill. App. 3d 48, 51-52 (2009) (insurance policies are contracts and the insurer's risk corresponds with the insured's premium)).

¶ 74 3. Duty to Defend

¶ 75 The duty to defend refers to an insurer's duty to defend its insured against pending claims. "An insurer's duty to defend an insured is triggered (1) when the insured tenders the defense of an action that is potentially within the scope of coverage [citation] or (2) when the insurer has ' "actual notice" ' of such a claim, even without a formal tender [citation]." *Crawford v. Belhaven Realty LLC*, 2018 IL App (1st) 170731, ¶ 37. "Tendering a defense, in this context, means asking the insurer for assistance in defending the suit." *Id.* In a declaratory judgment action involving the issue of whether the insurer has a duty to defend, "a court ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy." *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010) (citing *Koloms*, 177 Ill. 2d at 479). "If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises." *Id.* This principle has been referred to as the "eight corners rule." See *Farmers Automobile Insurance Ass'n v. Country Mutual Insurance Co.*, 309 Ill. App. 3d 694, 698 (2000) (the "court should compare the four corners of the underlying complaint with the four corners of the insurance contract"). The insurer's duty to defend is much broader than its duty to indemnify the insured. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 393-94 (1993).

¶ 76 "When an insurer is uncertain as to its duty to defend, it must either seek a declaratory judgment as to its obligations and rights prior to trial or settlement of the underlying action or defend under a reservation of rights or both." *RLI Insurance Co. v. Illinois National Insurance Co.*, 335 Ill. App. 3d 633, 644 (2002). "Failure to take one of these courses of action and refusal to defend an insured who ultimately incurs an adverse judgment estops the insurer from raising policy exclusions or noncoverage as a defense in any subsequent action brought to recover policy

proceeds." *Id.* at 644-45. In this case, Country Mutual filed a declaratory judgment action prior to trial or settlement of the underlying lawsuit, asserting that Witbrod was not an "insured" under its policies.

¶ 77 4. Duty to Indemnify

¶ 78 The duty to indemnify relates to an insurer's duty to satisfy a judgment entered against the insured. *Northern Illinois Gas Co. v. Home Insurance Co.*, 334 Ill. App. 3d 38, 55 (2002). "The duty to indemnify arises only if the facts alleged actually fall within coverage." (Emphasis omitted.) *Crum & Forster*, 156 Ill. 2d at 398. "The duty to indemnify 'will not be defined until the adjudication of the very action which [the insurer] should have defended.' " (Internal quotation marks omitted.) *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 127 (1992) (quoting *Maryland Casualty Co. v. Chicago & North Western Transportation Co.*, 126 Ill. App. 3d 150, 156 (1984)). "In other words, the question of whether the insurer has a duty to indemnify the insured for a particular liability is only ripe for consideration if the insured has already incurred liability in the underlying claim against it." *Id.* "If so, the duty to indemnify arises if the insured's activity and the resulting loss or damage *actually* fall within the *** policy's coverage." (Emphasis in original.) *Id.* at 128. In cases where no duty to defend exists and the facts alleged do not even potentially fall within the insurance coverage, "such facts alleged could obviously never actually fall within the scope of coverage." (Emphasis omitted.) *Crum & Forster*, 156 Ill. 2d at 398. Thus, a duty to indemnify does not arise. *Id.*

¶ 79 B. Country Mutual's Policy Language Frames the Coverage Analysis

¶ 80 Country Mutual argues that its business and umbrella policies are excess with respect to matters involving Witbrod's vehicle—meaning that Country Mutual did not owe an "insured" a duty to defend relating to the underlying lawsuit. Country Mutual contends that State Farm was

the primary insurer in this case and, as such, State Farm owed Witbrod, its insured, a duty to defend. "Primary insurance coverage is coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of an event that gives rise to liability." *Certain Underwriters at Lloyd's, London v. Central Mutual Insurance Co.*, 2014 IL App (1st) 133145, ¶ 2. "A primary insurer provides ' "first dollar" ' coverage up to the limits of its policy." *Id.* (citing Scott M. Seaman & Charlene Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Ins. L.J. 653, 655 (1997)). "In contrast with primary insurance, excess insurance coverage is a secondary layer which protects an insured when a judgment or settlement exceeds the primary policy's limits of liability." *Id.*

¶ 81 According to Country Mutual, the trial court incorrectly analyzed whether Witbrod was an "insured" under its policies using the duty to defend standard, which led to the court improperly finding that Country Mutual owed Witbrod a duty to defend in the underlying lawsuit. Country Mutual contends Witbrod was not an "insured" under the language of its policies. Accordingly, Country Mutual argues the court utilized an improper framework to conclude that Witbrod was an "insured" under its policies.

¶ 82 1. The Policies' Competing "Other Insurance" Clauses

¶ 83 Commercial general liability (CGL) policies typically contain "other insurance" clauses, which are meant to shift the duty of defense to another insurer when more than one is available. See *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570, 576 (2000) ("the purpose of an 'other insurance' clause is not to trigger coverage but to provide a method of apportioning coverage that would be triggered otherwise"). The priority of coverage between insurance policies is dictated by the terms of the "other insurance" clauses in the policies. *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 76-77 (1970). When the targeted policies both

contain "other insurance" clauses, courts will look to the wording of the clauses to determine the priority of coverage. See *id.* (finding that, whenever possible, "other insurance" clauses in competing policies should be reconciled to effectuate the intent of the parties).

¶ 84 How the "other insurance" clauses in the Country Mutual and State Farm policies are characterized—as either primary or excess—determines the framework of our analysis in this case. When one insurance policy contains a primary "other insurance" clause and the second insurance policy contains an excess "other insurance" clause, the insurance company with the excess "other insurance" clause is treated as providing excess coverage. *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480, 483, 487 (2009); *United States Fire Insurance Co. v. Aetna Life & Casualty*, 291 Ill. App. 3d 991, 1002 (1997). In such an instance, the insurance company providing excess coverage is held liable only after the insurance company with the primary "other insurance" clause has exhausted its policy limits. See *Central Illinois Public Service Co. v. Agricultural Insurance Co.*, 378 Ill. App. 3d 728, 731 (2008) ("primary insurers have a duty to defend the insured because liability for a primary insurer attaches immediately upon the occurrence creating the liability for the insured, whereas liability for an excess insurer occurs only after a predetermined amount of primary insurance has been exhausted"); *American States Insurance Co. v. Liberty Mutual Insurance Co.*, 291 Ill. App. 3d 336, 339 (1997) (primary insurers have a duty to pay defense costs, and excess insurers are not liable to pay defense costs before the conclusion of the underlying suit). Illinois courts are encouraged to reconcile "other insurance" provisions "whenever possible in order to effectuate the intent of the parties"; however, courts should not "arbitrarily pick one policy to be read first and undermine the intention of the insurer whose policy is read second." *Certain Underwriters at Lloyd's, London*, 2014 IL App (1st) 133145, ¶ 17. If the two "other insurance" clauses from the competing insurance policies are deemed to be

irreconcilable, then the two insurers should share in the cost of defending and indemnifying the underlying lawsuit. *Ohio Casualty Insurance Co. v. Oak Builders, Inc.*, 373 Ill. App. 3d 997, 1004 (2007).

¶ 85 In this case, the "other insurance" clauses in the Country Mutual and State Farm policies are unambiguous and not subject to more than one reasonable interpretation. *Country Mutual Insurance Co. v. Teachers Insurance Co.*, 324 Ill. App. 3d 246, 249 (2001). The State Farm policy specifically provided that "[t]he Liability Coverage provided by this policy applies as primary coverage for the *** use of" the 2009 BMW and was the only policy issued to Witbrod by State Farm that applied to the accident as primary coverage. The State Farm policy states that, even if a competing policy also provided primary coverage, State Farm would "pay the proportion of damages payable as primary" under the limits of its policy "and the limits of all other liability coverage that apply as primary coverage." The Country Mutual Business Policy states that "[f]or any covered 'auto' you don't own," such as Witbrod's 2009 BMW, "the insurance provided by the Coverage Form is excess over any other collectible insurance." The Country Mutual Umbrella Policy provides that "[t]his insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis."

↩ memo p. 5, 11

¶ 86 In *Teachers Insurance*, the court reviewed the same policy language as in this case to determine whether Country Mutual or Teachers Insurance was the primary insurer. *Id.* at 247. There, a teacher at a school was involved in a car accident with a student, driving a vehicle that she owned while she was in the course of her employment. *Id.* As in this case, the Country Mutual policy in *Teachers Insurance* provided, "[f]or any covered auto you don't own, the insurance provided by this policy is excess over any other collectible insurance." (Emphasis and internal quotation marks omitted.) *Id.* The court enforced the Country Mutual policy as written, taking into

account the type of policy and its overall purpose, finding that it provided only excess coverage over any other collectible insurance that applied. *Id.* at 249; see *Vedder v. Continental Western Insurance Co.*, 2012 IL App (5th) 110583, ¶¶ 18-19 (holding same after construing similar policy language).

¶ 87 We likewise enforce the Country Mutual policies as written, finding that they provide only excess coverage over the State Farm primary insurance for the underlying lawsuit. *Teachers Insurance*, 324 Ill. App. 3d at 249; *Vedder*, 2012 IL App (5th) 110583, ¶¶ 18-19. Here, the State Farm policy is "other collectible insurance" for the 2009 BMW. Our supreme court held that, pursuant to custom in the insurance industry, primary liability is generally placed on the insurer of the owner of the car. See *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 246 (1998).

¶ 88 2. The Summary Judgment Finding Under a Duty to Defend Standard

¶ 89 In this case, when the trial court made its summary judgment ruling, it also recognized that State Farm's policy served as the primary policy and that Country Mutual's policies, if applicable, were secondary or excess to State Farm's coverage. Country Mutual argues that the trial court nevertheless incorrectly analyzed whether Witbrod was an "insured" under its policies using a duty to defend test, thereby requiring reversal of summary judgment. Country Mutual contests the trial court's framing of its analysis because the excess insurer's duty to defend does not arise until the limits in the primary policy are exhausted.[5] See *Kajima Construction Services, Inc. v. St. Paul Fire*

[5]The appellate record does not make clear whether State Farm has actually paid $100,000 to Kreulach as part of the November 27, 2023, agreement. However, if State Farm submitted $100,000 to Kreulach, the payment of that amount would have exhausted State Farm's policy limit for the accident and, thus, it would no longer have coverage obligations to Witbrod, its insured. Further, the trial court's

& Marine Insurance Co., 227 Ill. 2d 102, 115, 117 (2007) (holding that an insured must exhaust all of its primary insurance before invoking excess coverage). Country Mutual contends that even if its policies were primary with defense obligations for covered accidents, which it did not concede, the underlying lawsuit failed to allege facts that would render Witbrod an "insured" under its policies. Comparing the language of the insurance policy to the allegations in the underlying complaint is required when determining whether there is a duty to defend. *Outboard Marine*, 154 Ill. 2d at 107-08 ("To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations to the relevant provisions of the insurance policy."). Country Mutual asserted that the court did not compare the underlying lawsuit's allegations to the terms of its policies and that, when the duty to defend is correctly applied, the allegations against Witbrod did not trigger that duty.

¶ 90 The initial complaint filed in the underlying lawsuit only sought relief from Witbrod for his negligent operation of the 2009 BMW, a vehicle he owned. Although the amended complaint, which was filed after Country Mutual had filed its declaratory judgment action, stated that Witbrod

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confirmation of the arbitration award on January 11, 2024, served to end the underlying lawsuit as well. The electronic docket of the Circuit Court of the Nineteenth Judicial Circuit reflects that on January 11, 2024, judgment was entered in favor of Kreulach and against Witbrod in the amount of $3,205,469.19, and that the case was closed. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 24 n.4 (taking notice of court clerk's on-line docket entries). As there is no longer any underlying lawsuit based on the settlement, there is no longer a duty to defend. And, if there is no duty to defend, there is no duty to indemnify. See *American Family Mutual Insurance Co. v. Enright*, 334 Ill. App. 3d 1026, 1029 (2002) ("If the insurer owes no duty to defend, then it owes no duty to indemnify because the duty to defend is broader than the duty to indemnify.").

was acting within the course and scope of his employment with Wix, the amended complaint neither named Wix as a party nor sought relief from Wix for Witbrod's alleged negligent conduct. Country Mutual argues that, as such, only the claim against Witbrod for negligent driving is relevant to Country Mutual's coverage determination.

¶ 91 The Country Mutual policies extended "insured" status to "[a]nyone liable for the conduct" of Wix, "but only to the extent of that liability." Accordingly, Witbrod's "insured" status under Country Mutual's policies depends upon whether the pleadings in the underlying lawsuit potentially sought to hold Witbrod liable for *Wix's* conduct. Country Mutual argues that the underlying lawsuit did not allege or seek to impose liability on Witbrod for Wix's conduct. Country Mutual points out that the underlying lawsuit was devoid of allegations that Wix engaged in any conduct, negligent or otherwise, relating to the accident. Considering that, under its policies, "insured" status applies "only to the extent of that liability," Country Mutual asserts that Witbrod cannot qualify as an insured if there was no actual or alleged liability for the conduct of another insured: in this case, Wix. In short, Country Mutual argues that Witbrod does not qualify as an insured because he was not sued for vicarious liability for Wix's alleged misconduct. This brings us to a discussion of *Molda III* and whether it applies here.

¶ 92 C. The *Molda* Litigation

¶ 93 1. *Molda I*

¶ 94 The genesis of the *Molda* litigation occurred on August 17, 2005, when the defendant, Michael Molda, driving his mother's car, collided with the underlying plaintiff, Nola Wilson. *Wilson v. Molda,* 396 Ill. App. 3d 100, 101 (2009) (*Molda I*). Wilson filed a personal injury action against Molda a few days before the two-year statute of limitations expired. *Id.* at 102. Months after the statute of limitation expired, Wilson learned that Molda had been working for the

defendant, Metrolift, Inc. (Metrolift), when the accident occurred. *Id.* Wilson filed an amended complaint on April 23, 2008, adding Metrolift as a defendant and adding a second count alleging that Metrolift was liable for Molda's negligence under a theory of *respondeat superior*. *Id.* at 103. Metrolift moved to dismiss count II of Wilson's complaint, asserting the statute of limitations as a bar. *Id.* In her opposition motion, Wilson argued that, because Metrolift and Molda were jointly and severally liable under the theory of *respondeat superior*, the timely filing against Molda preserved her claim against Metrolift under the relation-back provision of section 2-616(b) of the Code (735 ILCS 5/2-616(b) (West 2006)). *Molda I*, 396 Ill. App. 3d at 103-04. The trial court granted Metrolift's motion to dismiss, finding that Wilson's claim against Metrolift was not saved by section 2-616(b) and that the claim was barred by the two-year statute of limitations. *Id.* at 104.

¶ 95 On appeal, the *Molda I* court solely addressed whether Wilson's timely complaint filed against Molda preserved her claims against Metrolift. *Id.* at 106. Wilson suggested that the filing of a complaint against one defendant should preserve a claim against another defendant, essentially asking the court to be the first to find that "the filing of a claim against an employee automatically preserves any claims against his or her employer, so long as the claims arose out of the same transaction and occurrence alleged against the employee and so long as they arose out of his or her employment." *Id.*

¶ 96 The reviewing court declined Wilson's invitation "to rewrite the existing statute of limitations, as we believe that is the job of the legislature." *Id.* at 106-07. In its reasoning for not applying section 2-616(b) to Wilson's case, the court explained that subsection (b) "does not speak of adding defendants, but only of adding claims." *Id.* at 108-09 ("subsection (b), by its terms, applies only to the addition of 'causes of action, cross claim[s] or defense[s]' " (quoting 735 ILCS 5/2-616(b) (West 2006))). The *Molda I* court also pointed out that Code section 2-401 states that a

complaint must provide " 'the names of all parties for and against whom relief is sought.' " *Id.* at 110 (quoting 735 ILCS 5/2-401(c) (West 2006)). Wilson failed to cite a case where a court permitted a plaintiff to use section 2-616(b) to add a new defendant. *Id.* Ultimately, the *Molda I* court held that Wilson's cause of action against Metrolift was barred by the statute of limitation and that section 2-616(b) did not save it. *Id.* at 111. The last sentence of the opinion states, "[w]e express no opinion concerning any indemnification claim that defendant Molda may have against Metrolift, since the trial court made no ruling concerning indemnification." *Id.*

¶ 97 2. *Molda II*

¶ 98 The next iteration of *Molda* involved the declaratory judgment action filed by First Chicago Insurance Company (First Chicago), which sought a declaration that it had no duty to defend or indemnify the defendant, Molda, or his employer, Metrolift, for the underlying lawsuit. See *First Chicago Insurance Co. v. Molda*, 408 Ill. App. 3d 839, 839-40 (2011) (*Molda II*). There, the trial court granted First Chicago's motion for summary judgment, finding that it had not received timely notice of the accident as required by Metrolift's insurance policy. *Id.* at 840. The *Molda II* court stated that the automobile Molda had been driving at the time of the accident "had only $20,000 in liability coverage." *Id.* First Chicago "had issued a policy including liability coverage for automobiles 'owned by [Metrolift's] employees or members of their house-holds [*sic*].' " *Id.* The disposition did not specify whether First Chicago's policy was a primary or excess policy and set forth only the notice provisions of the policy that were at issue in the appeal. *Id.* at 840-41. Two Metrolift executives became aware of the accident within two days of its occurrence but decided to wait and see whether Metrolift would be named in a lawsuit and whether Molda's personal insurance policy would provide sufficient coverage. *Id.* at 842. Metrolift filed its declaratory judgment complaint on April 24, 2008, alleging that it first received notice of the occurrence on

March 26, 2008. *Id.* at 843. Molda filed a counterclaim and third-party complaint against Metrolift and First Chicago, seeking indemnification from First Chicago based on Metrolift's insurance policy for " 'any judgment rendered' " against Molda in the underlying lawsuit involving Wilson. *Id.* at 844.

¶ 99 On appeal, Molda and Wilson argued that First Chicago was estopped from denying that it received timely notice of the accident because First Chicago's insurance broker had received timely notice and notice to an agent is imputed to the principal. *Id.* at 844-45. Molda and Wilson also contended that, as to Molda, notice to First Chicago was timely and public policy concerns required the reviewing court to construe the insurance contract in favor of coverage. *Id.* at 845. The *Molda II* court reversed summary judgment, finding that there were issues of fact remaining as to whether the insurance broker was acting as an agent of First Chicago for purposes of receiving notice from Metrolift. *Id.* at 852-53. In addition, the court found that, as a matter of law, the March 2009 notice received by First Chicago was unreasonable.[6] *Id.* at 853.

¶ 100 3. *Molda III*

¶ 101 The declaratory judgment action proceeded to a bench trial, in which the trial court determined that First Chicago owed a duty to defend Molda in the underlying personal injury lawsuit involving Wilson. *Molda III*, 2015 IL App (1st) 140548, ¶ 1. *Molda III* discussed the contents of the First Chicago policy in slightly greater detail. Similar to the instant case, the insured

[6]The disposition earlier had stated that Metrolift alleged in its declaratory judgment complaint that it first received notice on March 26, 2008. *Molda II*, 408 Ill. App. 3d at 843. First Chicago had sent a reservation of rights letter to Metrolift on April 2, 2008. *Id.* Thus, it appears that the holding that "the March 2009 notice received by First Chicago was unreasonable," is a typographical error and refers to the March 2008 notice. *Id.* at 853.

employer, Metrolift, had purchased liability coverage for certain categories of covered "autos." *Id.* ¶ 6. As here, category 9 referred to non-owned autos as "[o]nly those autos you do not own, lease, hire or borrow which are used in connection with your business. This includes autos owned by your employees or members of their house-holds but only while used in your business or your personal affairs." (Internal quotation marks omitted.) *Id.* The policy stated that the terms " 'you' " and " 'your' " referred to Metrolift, the named insured. (Internal quotation marks omitted.) *Id.* Also similar to this case, the policy listed "[t]he following are 'insureds' " under the policy:

> "a. You for any covered 'auto'.
>
> b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow except:
>
> ***
>
> (2) Your employee if the covered 'auto' is owned by that employee or a member of his or her household.
>
> * * *
>
> c. Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability." (Internal quotation marks omitted.) *Id.* ¶ 7.

¶ 102 On the first day of trial, First Chicago amended its complaint for declaratory judgment to add a claim in addition to the late notice of loss and late notice of lawsuit. *Id.* ¶ 12. First Chicago added a third count alleging that " 'Molda is not an Insured as Defined by the [First Chicago] Policy of Insurance.' " *Id.* First Chicago alleged that Molda was not operating a covered "auto" under the policy and was only an insured to the extent of Metrolift's liability and, because there could be no liability against Metrolift (as Wilson had failed to file a complaint against Metrolift within the two-year statute of limitations), Molda was not an insured under the policy. *Id.*

¶ 103 Molda testified at the bench trial that, at the time of the accident, he was driving to a construction site and was performing his job duties for Metrolift. *Id.* ¶ 22. The car he was driving was owned by his mother, and he had not been offered a company car. *Id.* Metrolift expected Molda to use his own vehicle as part of his job duties as a salesman. *Id.* Molda testified that he had insurance on the vehicle through State Farm, which had a $20,000 policy limit. *Id.* He stated that he had notified both State Farm and Metrolift after the accident but never had any communications with First Chicago. *Id.* He had first learned of the existence of First Chicago and Metrolift's insurance coverage in 2008. *Id.*

¶ 104 The trial court entered judgment in favor of the defendants, Molda and Wilson, and against the plaintiff, First Chicago. *Id.* ¶ 26. The court further declared that "the applicable [First Chicago] policy of insurance entitles Molda to defense and indemnification relative to any and all claims of Wilson." (Internal quotation marks omitted.) *Id.* The court found, among other things, that Molda's vehicle "was a non-owned auto as defined by category 9 of the insurance policy." *Id.* In addition, the court stated that " '[t]he complaint filed by Wilson contained allegations which would trigger coverage of Molda, if said complaint was timely filed within the statute of limitations,' " and, thus, it found that Molda was an insured under the First Chicago policy. *Id.*

¶ 105 On appeal, First Chicago argued that the trial court erred when it found that Molda was an insured under its policy because (1) Molda's vehicle was not a covered auto under the policy and (2) Molda was not an insured as defined by the policy. *Id.* ¶ 33. The *Molda III* court first noted that "First Chicago agreed to 'pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto," ' " and also "owed the 'right and duty to defend any "insured" against a "suit" asking for such damages.' " *Id.* ¶ 35. The court

analyzed the language of the policy and concluded that Molda's vehicle was not owned, leased, hired, or borrowed by Metrolift and, therefore, "if it was used in connection with Metrolift's business, then it would be a covered auto under category 9." *Id.* ¶ 44. Considering the trial evidence, the *Molda III* court found that "Molda's vehicle was properly considered to be a 'nonowned auto' under the First Chicago policy." *Id.* ¶ 45. The *Molda III* court specifically noted that "the trial court was not asked to determine whether Metrolift would be vicariously liable for Molda's actions" and instead, the policy "merely required Molda to be operating the vehicle 'in connection with' Metrolift's business." *Id.* ¶ 47.

¶ 106 The *Molda III* court next considered whether Molda was an insured under the First Chicago policy language. *Id.* ¶ 49. Initially, the court again provided the pertinent policy language describing who was an insured under the policy and stated that "Molda does not qualify as an insured under either paragraph (a) or (b), since he was not the named insured and the vehicle he was driving was not owned, hired or borrowed by Metrolift." *Id.* Accordingly, the only way that Molda could be covered by the policy was if paragraph (c) applied. *Id.* Pertinent to this case, *Molda III* affirmed the trial court, holding as follows:

> "We agree with the trial court that Molda qualifies as an insured under paragraph (c). Under that paragraph, Molda would be considered an insured if he was liable for the conduct of Metrolift, but only to the extent of that liability. First Chicago argues that since all of the claims against Metrolift were dismissed, Metrolift has no liability for the accident and, consequently, Molda cannot be considered an insured since he would be an insured 'only to the extent of [Metrolift's] liability.' However, First Chicago's argument overlooks the fact that ' "[q]uestions of applicable coverage can be determined only as of the time of the accident creating potential liability." ' [Citations.] At the time of the accident, Metrolift

had potential liability under the doctrine of *respondeat superior*, and, in fact, was included as a defendant in Wilson's case on that basis. If Wilson obtained a judgment against Metrolift under the theory of *respondeat superior*, Metrolift would be entitled to indemnification from Molda under the common law theory of quasi-contractual implied indemnity. [Citations.] Consequently, at the time of the accident, Molda was 'liable for the conduct of an "insured" described above but only to the extent of that liability,' and, therefore, qualified as an insured under the First Chicago policy." *Id.* ¶¶ 50, 74.

¶ 107 D. Whether *Molda III* Applies in This Case

¶ 108 Country Mutual argues that *Molda III* was incorrectly decided and should not apply to this case because (1) it did not apply the Illinois duty to defend standard in its analysis of whether Molda was an insured; (2) it substituted Metrolift's conduct requirement for an analysis of whether its employee, Molda, could theoretically be liable to Metrolift under a quasi-contractual implied indemnity, a conclusion not supported by the policy language in this case or by Illinois law; and (3) Witbrod is not an insured under the Country Mutual policies when using the duty to indemnify standard, an issue not considered by the *Molda III* court.

¶ 109 Kreulach responds that *Molda III* conclusively shows Witbrod was an insured under Country Mutual's policies. She argues that *Molda III* is factually identical precedent, considering the same policy language relating to "Who Is An Insured." Kreulach points out that the *Molda III* court's analysis concerning First Chicago's duties did not focus on excess versus primary coverage or the duty to defend versus the duty to indemnify and, instead, simply answered the question of whether Molda, the at-fault-driver, was an insured under the policy. Kreulach asserts that, even under the duty to defend analysis, Witbrod is considered to be an insured under the language of the Country Mutual policies. However, Kreulach did not apply the Illinois duty to defend standard

in her response brief. In fact, she made no mention of the allegations in her underlying complaint and failed to add Wix as a defendant to claim negligence on the theory of *respondeat superior*. Instead, she contends that Country Mutual "confusingly" spent "multiple pages arguing that application of the Illinois 'duty to defend test' (which it said not to apply) proves Witbrod is not an insured." Finally, she argues that if this court departs from *Molda III*, the decision should only prospectively invalidate coverage under similar insurance policies.

¶ 110 1. *Molda III* and the Duty to Defend

¶ 111 "An insurer's duty to defend arises when (1) the complaint is brought against an insured and (2) the facts as alleged in the complaint fall, or potentially fall, within the policy's coverage." *State Farm Mutual Automobile Insurance Co. v. Murphy*, 2019 IL App (2d) 180154, ¶ 23 (citing *Wilson*, 237 Ill. 2d at 455). " '[I]t is the actual complaint, not some hypothetical version, that must be considered.' " *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 761 (2005) (quoting *Connecticut Indemnity Co. v. DER Travel Service, Inc.*, 328 F.3d 347, 350-51 (7th Cir. 2003)). The insured bears the initial burden of showing that a claim falls or potentially falls within the coverage of an insurance policy, and the burden shifts to the insurer to demonstrate whether coverage is precluded by a policy limitation or exclusion. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009).

¶ 112 The court in *Molda III* did not apply this analysis when it found that Molda was an insured under the First Chicago policy. Metrolift was neither a defendant to the underlying complaint nor could have been added, despite Wilson's efforts, due to the expiration of the statute of limitations, a decision that was affirmed in *Molda I*, 396 Ill. App. 3d at 111. Instead of relying on the underlying complaint as is required under Illinois law, the *Molda III* court stated that "[q]uestions of applicable coverage can be determined only as of the time of the accident creating potential liability." (Internal

quotation marks omitted.) 2015 IL App (1st) 140548, ¶ 50. The *Molda III* court applied this rule to find that, at the time of the accident, Metrolift had potential liability under the doctrine of *respondeat superior*. *Id.* Although the *Molda III* court cited to a number of cases with the temporal proposition of looking to applicable coverage at the time of the accident, all the cases it cited in support of that proposition involved the issue of whether the alleged insured qualified under a particular descriptor at the time of the accident for insurance coverage purposes. See, *e.g.*, *Gaudina v. State Farm Mutual Automobile Insurance Co.*, 2014 IL App (1st) 131264, ¶¶ 19-27 (alleged insurer challenged the policy definition of "spouse"); *Coley v. State Farm Mutual Automobile Insurance Co.*, 178 Ill. App. 3d 1077, 1081 (1989) (contesting the policy definition of "relative"); *Hawkeye Security Insurance Co. v. Sanchez*, 122 Ill. App. 3d 183, 186 (1984) (determining whether the alleged insured was a "resident" of the household and a "relative of one of the named insureds").

¶ 113 Indeed, the very first Illinois case to state the proposition that "questions of the applicable coverage provided by the *** policy can be determined only as of the time of the accident," sought to clarify an ambiguity in the policy as to whether the putative insured was the "spouse" of the plaintiff. See *Sypien v. State Farm Mutual Automobile Insurance Co.*, 111 Ill. App. 3d 19, 20-21 (1982). The *Sypien* court cited *Allstate Insurance Co. v. Wallace*, 435 S.W.2d 537, 538 (Tex. Civ. App. 1968), a Texas case in which the court examined the terms and provisions of the applicable policy to determine whether the appellee, Maggie Wallace, was an insured under the policy at the time of the collision. When Wallace purchased the Allstate policy, she was married to her husband. *Id.* However, when the accident at issue occurred, she was no longer married, and her husband was the only named insured on the policy. *Id.* She argued that because the Allstate policy had been purchased with community funds from the marriage, the court should consider her an insured based

on the date of the issuance of the policy. *Id.* The *Wallace* court found that the source of the money with which the policy was purchased was not material and did not control coverage. *Id.* at 539. The court stated that the question of insurance coverage "can be determined only by the provisions of the policy as of the time of the accident because of which a claim is made." *Id.* The *Wallace* court held that she was no longer an insured under the policy at the time of the accident because she was no longer married to the named insured. *Id.*

¶ 114 Applying that line of reasoning from those cases to this case, Witbrod's status as an employee of Wix is determined as of the date of the accident. It is the descriptor and whether the putative insured fits into the definition of that descriptor at the time of the accident which controlled in that line of cases. In this case, "employee" is the comparable temporal descriptor here under the line of cases cited by *Molda III*.

¶ 115 But the parties here do not contest whether Witbrod was an employee of Wix on the date of the accident. Simply put, whether a putative insured is married to a policyholder, is a relative of a policyholder, or is employed by a policyholder are facts that can be ascertained in the absence of a claim without regard to liability, fault, or the nature of the cause of action. In short, the policy descriptor of the putative insured has no bearing on liability or fault. Illinois law provides that the duty to defend is triggered only when a complaint is filed against an insured. See *Wilson*, 237 Ill. 2d at 455; *Murphy*, 2019 IL App (2d) 180154, ¶ 23.

¶ 116 In this case, Kreulach never filed a complaint against Wix alleging it acted negligently in connection to the accident. If we followed *Molda III* and held that, at the time of the accident, Wix had potential liability under the doctrine of *respondeat superior*, we would completely circumvent the duty to defend requirements that are well-settled under Illinois law. See *id.*; *Koloms*, 177 Ill. 2d at 479. Without an underlying complaint alleging negligence against a putative insured, there

can be no comparison of those allegations to the applicable policy language and, thus, no duty to defend arises. *Murphy*, 2019 IL App (2d) 180154, ¶ 23. Moreover, Illinois law on the issue of duty to defend cannot consider hypothetical causes of action or allegations—a complaint must actually be filed for comparison purposes. See *Steadfast Insurance Co.*, 359 Ill. App. 3d at 761 (finding no duty to defend "[b]ecause the complaint predicates liability on a theory of intentional misconduct"). In sum, Country Mutual's duty to defend its insured, Wix, never arose because Kreulach failed to file a complaint against Wix alleging facts that fell or potentially fell within coverage of Country Mutual's policies.

¶ 117 While the trial court correctly assessed that it was bound to follow *Molda III*, this court may depart from precedent in another district if we find Illinois precedent was not applied accurately. *County of Du Page v. Illinois Labor Relations Board, State Panel*, 359 Ill. App. 3d 577, 581 (2005) ("[T]he holdings of one appellate district are not automatically binding on another district."). We decline to follow *Molda III* and instead follow well-settled Illinois authority on the application of the duty to defend. Indeed, we find that no duty to defend arose in this case because Kreulach never filed a complaint against Country Mutual's insured, Wix, such that nothing was alleged against Wix that fell or potentially fell within the policies' coverage. *Wilson*, 237 Ill. 2d at 455; *Koloms*, 177 Ill. 2d at 479; *Murphy*, 2019 IL App (2d) 180154, ¶ 23. Of course, if there is no duty to defend, then there can be no duty to indemnify. See *Crum & Forster*, 156 Ill. 2d at 398 ("Clearly, where there is no duty to defend, there will be no duty to indemnify ***.").

¶ 118 2. Molda *III* and Quasi-Contractual Implied Indemnity

¶ 119 The court in *Molda III* held that "[i]f Wilson [the underlying plaintiff] obtained a judgment against Metrolift under the theory of *respondeat superior*, Metrolift would be entitled to indemnification from Molda under the common law theory of quasi-contractual implied

indemnity." 2015 IL App (1st) 140548, ¶ 50. "Consequently, at the time of the accident, Molda was 'liable for the conduct of an "insured" described above but only to the extent of that liability,' and, therefore, qualified as an insured under the First Chicago policy." *Id.* Although we already declined to follow *Molda III* because it did not follow the requirements of Illinois duty to defend precedent, we will address the next logical leap the *Molda III* court took when it applied the theory of quasi-contractual implied indemnity.

¶ 120 "The right to indemnification may arise from contract [citation], or from situations in which a promise to indemnify can be implied from the relationship among the tortfeasors." *Frazer v. A.F. Munsterman, Inc.*, 123 Ill. 2d 245, 255 (1988) (citing Nina S. Appel & Richard A. Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative & Judicial Cooperation*, 10 Loy. Univ. Chi. L. J. 169, 171 & n.8 (1979), and Michael J. Polelle & Bruce L. Ottley, Illinois Tort Law 674-75 (1985)). " 'Implied indemnity' is based on principles of restitution: 'a contract implied in law arising from the legal obligation of an indemnitee to satisfy liability caused by actions of his indemnitor.' " *Id.* (quoting *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 28 (1986)). "The fundamental premise for the cause of action is that the indemnitee, although without fault in fact, has been subjected to liability solely because of the legal relationship with the plaintiff for a nondelegable duty arising out of common or statutory law." *Id.* (citing 1 James A. Dooley, Modern Tort Law § 26.07, at 651 (1982)).

¶ 121 The doctrine of implied indemnity applies in the context of quasi-contractual relationships involving vicarious liability. *American National Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 350 (1992); *Zielinski v. Miller*, 277 Ill. App. 3d 735, 739 (1995). Our supreme court explained that "[t]he right to common law implied indemnity is available to 'a tortfeasor whose liability is vicariously imposed by policy of law rather than culpability of

conduct.' " *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 472 (2008) (quoting *Allison*, 113 Ill. 2d at 35). "For example, if 'an injured party could hold an employer or property owner vicariously liable for the negligence of an employee or other person, a right of indemnity would be implied in favor of the party liable in law who had not contributed to the injury.' " *Id.* at 472-73 (quoting *Allison*, 113 Ill. 2d at 29). "In cases of vicarious liability in a quasi-contractual context, liability is imposed upon a blameless principal derivatively through an agent's conduct." *Sperl v. Henry*, 2018 IL 123132, ¶ 26. "The agent is at fault in fact for the plaintiff's injuries, and the principal is considered blameless." *Id.*

¶ 122 The *Molda III* court cited *Gibbs v. Top Gun Delivery & Moving Services, Inc.*, 399 Ill. App. 3d 765, 772 (2010), in support of its finding that if Wilson had obtained a judgment against Metrolift under the theory of *respondeat superior*, Metrolift would be entitled to indemnification from Molda under the common law theory of quasi-contractual implied indemnity. *Molda III*, 2015 IL App (1st) 140548, ¶ 50. This finding presupposed two things: (1) Molda qualified as an insured because Metrolift was potentially vicariously liable for Molda's conduct at the time of the accident (which we already discussed and departed from above); and (2) Wilson pleaded a viable negligence claim against Metrolift in the underlying complaint. However, the *Molda III* decision instead specifically qualified its holding with, "*[i]f* Wilson obtained a judgment." (Emphasis added.) *Id.*; see *Steadfast Insurance Co.*, 359 Ill. App. 3d at 761 (when applying the duty to defend, "[i]t is the actual complaint, not some hypothetical version, that must be considered" (internal quotation marks omitted)). In fact, Wilson not only never obtained a judgment against Metrolift, but her claim against Metrolift was dismissed for failure to file her claim within the two-year statute of limitations, which was upheld in *Molda I*.

¶ 123 The holding in *Gibbs* does not support the reasoning of *Molda III*. In *Gibbs*, the plaintiff, Bertram Gibbs, filed a negligence action against the defendants—Kevin Dunigan, Top Gun Delivery and Moving Services, Inc. (Top Gun), and Harlem Furniture, Inc. (Harlem)—asserting they were liable for injuries Gibbs suffered when a truck Dunigan was driving collided with Gibbs's vehicle. 399 Ill. App. 3d at 766. Gibbs alleged that Dunigan was acting in his capacity as an agent of Top Gun while operating his truck. *Id.* He later alleged in an amended complaint that Harlem was vicariously liable for Dunigan's actions because Dunigan, as an employee of Top Gun, was delivering furniture for Harlem pursuant to a contract between Top Gun and Harlem at the time of the accident. *Id.* After Gibbs had entered into a covenant with Safeco, Top Gun's and Dunigan's primary insurer, not to enforce a judgment against either Top Gun or Dunigan, the trial court granted Harlem's motion to dismiss the entire action on the basis that " 'any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability.' " *Id.* (quoting *American National Bank & Trust*, 154 Ill. 2d at 355).

¶ 124 On appeal, the court considered whether the covenant agreement constituted a settlement sufficient to release Harlem—the alleged principal of Top Gun and Dunigan—from vicarious liability. *Id.* at 771. The covenant stated, among other things, that "[n]othing [in] *** this agreement is intended to preclude Bertram Gibbs, his heirs or assigns, from executing against Defendant Harlem Furniture and/or its Insurer, Citizens Insurance on any judgment in excess of the [$735,000] paid as consideration for this agreement." (Internal quotation marks omitted.) *Id.* Gibbs contended that the terms of the covenant agreement indicated there was never an intention to "release" or "dismiss" Dunigan and Top Gun from liability, nor was the covenant intended to shield Dunigan and Top Gun from any subsequent indemnification claim by Harlem. *Id.* Instead, Gibbs contended that Dunigan and Top Gun "entered into the covenant agreement to ensure they

received the full benefit of the contested Safeco insurance policy, which in effect greatly reduced both their potential liability to [Gibbs] in the underlying action and in any possible implied indemnity action by Harlem." *Id.* Gibbs asserted that the covenant not to enforce judgment did not constitute a "settlement" under Illinois law because it did not "release" the defendant from liability. *Id.*

¶ 125 The reviewing court disagreed with Gibbs's argument, stating that Illinois courts have recognized covenants not to enforce judgments as "settlements" under section 2 of the Joint Tortfeasor Contribution Act (Contribution Act). *Id.*; see 740 ILCS 100/2(c) (West 2000) ("[w]hen a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury *** it does not discharge any of the other tortfeasors from liability for the injury *** unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant"); see *Thompson v. Centegra Management Services, Inc.*, 2026 IL App (2d) 240667, ¶ 40. The *Gibbs* court recognized that the covenant did not use the term "settlement" but noted that both Gibbs and Dunigan specifically referred to the covenant not to enforce as a "partial settlement" of the underlying action in pleadings they had filed under the Contribution Act. *Gibbs*, 399 Ill. App. 3d at 772. Pertinent here, the court explained that "[i]f [Gibbs] obtained a judgment against Harlem under the theory of *respondeat superior* in this case, Harlem would be entitled to indemnification from Dunigan and Top Gun under the common law theory of quasi-contractual implied indemnity." *Id.* (citing *American National Bank & Trust*, 154 Ill. 2d at 353-54).

¶ 126 The *Gibbs* court continued its analysis, finding that nothing in the language of the covenant not to enforce suggested that Top Gun and Dunigan intended or agreed to remain liable to Harlem in an implied indemnity action following the conclusion of the underlying case. *Id.* The court

concluded that "[a]llowing Top Gun and Dunigan to remain liable to Harlem in an implied indemnity action after [Gibbs] reached a settlement with the agent-defendants in the underlying case is the exact type of 'catch-22' situation *Gilbert* intended to prevent." *Id.* at 772-73 (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 528 (1993)). "Because '*any settlement* between the agent and the plaintiff must also extinguish the principal's vicarious liability,' we find the trial court did not err in granting Harlem's motion to dismiss." (Emphasis in original and internal quotation marks omitted.) *Id.* at 773 (quoting *Gilbert*, 156 Ill. 2d at 527).

¶ 127 *Gibbs* is distinguishable from *Molda III* because, in *Gibbs*, the plaintiff actually filed an action for vicarious liability against the principal. *Id.* at 766. When the *Molda III* court invoked the potential application of the common law theory of quasi-contractual implied indemnity, it did so in a hypothetical fashion, as Wilson was unable to sustain a claim alleging vicarious liability against Metrolift. See *Molda II*, 408 Ill. App. 3d at 852-53.

¶ 128 In this case, Kreulach never filed a negligence claim against Wix. Similar to *Gibbs* and unlike *Molda III*, plaintiff Kreulach and agent Witbrod entered into an agreement, albeit a different agreement than a covenant not to enforce a judgment, as that in *Gibbs*. Kreulach and Witbrod, along with Witbrod's primary insurer, State Farm, entered into the November 27, 2023, agreement to arbitrate the underlying lawsuit, specifically stating that "Witbrod and State Farm want to protect themselves from an excess verdict and any extra-contractual claims and preserve Witbrod's personal assets from exposure to excess verdict." Indeed, Kreulach agreed not to execute any arbitration award or resulting civil judgment obtained against Witbrod's personal assets. Finally, Witbrod agreed to assign all extra-contractual claims against Country Mutual to Kreulach, including his claim for the tort of bad faith, among others.

¶ 129 In *Gilbert*, our supreme court held that " 'any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability' " and "stands regardless of whether the plaintiff's covenant not to sue the agent expressly reserves the plaintiff's right to seek recovery from the principal." 156 Ill. 2d at 527, 528-29 (quoting *American National Bank & Trust*, 154 Ill. 2d at 355). Country Mutual did not argue either below or in this court whether the November 27, 2023, arbitration agreement between Kreulach (underlying plaintiff), Witbrod (agent), and Witbrod's insurer, State Farm, served to extinguish Wix's purported vicarious liability, per *Gilbert*. However, the November 27, 2023, agreement to arbitrate the underlying lawsuit contained a promise that Kreulach would not execute any arbitration award against Witbrod's personal assets in exchange for the $100,000 policy limits from State Farm. Similar to *Gibbs*, allowing Witbrod to remain liable to Wix in an implied indemnity action after Kreulach reached, in effect, a settlement in the underlying case, perhaps "is the exact type of 'catch-22' situation *Gilbert* intended to prevent," given that " '*any settlement* between the agent and the plaintiff must also extinguish the principal's vicarious liability.' " (Emphasis in original and internal quotation marks omitted.) *Gibbs*, 399 Ill. App. 3d at 772-73 (quoting *Gilbert*, 156 Ill. 2d at 527); see *Thompson*, 2026 IL App (2d) 240667, ¶¶ 40, 44 (finding that high-low agreements are a form of a covenant not to enforce judgment, and "are simply a form of a settlement agreement" in that "a plaintiff promises a defendant that it will not enforce a judgment beyond the high amount in exchange for a promise by the defendant to pay at least the low amount regardless of the outcome at trial"). *Molda III* did not involve any type of agreement between the plaintiff and the agent. Further, in this case, there is no hypothetical indemnification of Wix by Witbrod under the common law theory of quasi-contractual implied indemnity, as Kreulach never sued Wix, the alleged principal. Thus, this case is distinguishable from *Molda III* on that basis as well.

¶ 130 3. The Duty to Indemnify as Applied in This Case

¶ 131 An insurer's duty to indemnify arises only if the facts alleged actually fall within coverage. *Crum & Forster*, 156 Ill. 2d at 398. Our supreme court in *Outboard Marine* stated that "the question of whether the insurer has a duty to indemnify the insured for a particular liability is only ripe for consideration if the insured has already incurred liability in the underlying claim against it." 154 Ill. 2d at 127. "If so, the duty to indemnify arises if the insured's activity and the resulting loss or damage *actually* fall within the CGL policy's coverage." (Emphasis in original.) *Id.* at 128. In cases where no duty to defend exists and the facts alleged do not even fall potentially within the insurance coverage, "such facts alleged could obviously never actually fall within the scope of coverage" and, thus, a duty to indemnify does not arise. (Emphasis omitted.) *Crum & Forster*, 156 Ill. 2d at 398.

¶ 132 In this case, the underlying lawsuit was resolved through binding arbitration between Kreulach, Witbrod, and State Farm and did not involve Wix or Country Mutual, neither of which were parties in the underlying litigation. The arbitration was confirmed by the trial court and granted relief to Kreulach against Witbrod on the single, direct negligence claim asserted in her amended complaint in the underlying lawsuit. Again, nothing in the underlying lawsuit imposed liability against Witbrod for *Wix's* conduct. Thus, Witbrod cannot show that any part of the judgment in the underlying lawsuit was "to the extent of that liability" for Wix's conduct, as provided in the Country Mutual policies.

¶ 133 The trial court stated in its disposition granting summary judgment in favor of Kreulach and Witbrod that "the duty to indemnify is based on whether the adjudicated facts, as they are found to have existed at the time of the occurrence, fall within coverage provided by the policy." However, the question of whether the insurer has a duty to indemnify the insured for a particular

liability is only ripe for consideration if the insured has already incurred liability in the underlying claim. *Outboard Marine*, 154 Ill. 2d at 127-28. If so, the duty to indemnify arises only when the insured's activity and the resulting loss or damage actually fall within the CGL policy's coverage. *Id.* at 128.

¶ 134 Notably, the duty to indemnify under the facts of this case could arise only after Witbrod was found liable for the conduct of Wix, which never occurred in the underlying litigation. In short, Witbrod cannot qualify as an "insured" under the policies if there was no actual or alleged liability for the conduct of another insured (Wix). There is simply no judgment (or potential judgment) against Witbrod for the conduct of Wix in this case. Neither Kreulach nor Witbrod presented any evidence or allegation that Wix committed any act that may have caused or contributed to cause Kreulach's injuries. In sum, Country Mutual owed no duty to indemnify because there was no finding of actual liability against Wix directly or against Witbrod for Wix's conduct.

¶ 135 Further, *Molda III* is not applicable here for purposes of determining whether Witbrod was an "insured" under the duty to indemnify standard. The *Molda III* decision involved whether the trial court correctly found that First Chicago owed a duty to defend Molda in the underlying lawsuit. *Molda III* did not include an examination of the duty to *indemnify*—the court considered neither Metrolift's nor Molda's actual liability. We have already determined that the Country Mutual policies in this case are excess and, thus, afford only a duty to indemnify "insureds" for covered liability. Neither the underlying complaint nor the underlying judgment against Witbrod asserted a claim against Wix or against Witbrod for Wix's conduct. Therefore, as a matter of law, Country Mutual did not owe a duty to indemnify Witbrod in the underlying lawsuit.

¶ 136 E. Illinois and Extrajurisdictional Authority Support a Finding of No Coverage

¶ 137 When the trial court granted summary judgment in favor of Kreulach and Witbrod and against Country Mutual and denied Country Mutual's summary judgment motion, it based its holding on the *Molda III* decision, which it stated it was "obligated" to follow as precedent. The court, however, specifically noted and discussed other federal cases that did not follow the same conclusion as *Molda III*. The court found that Witbrod was an "insured" under Country Mutual's policies because, at the time of the accident, Wix, as Witbrod's employer, was potentially liable to Kreulach under a *respondeat superior* theory. However, as we have departed from *Molda III*, both Illinois and federal cases inform our decision that Witbrod was not an "insured" under Country Mutual's policies.

¶ 138 In *Federal Insurance Co. v. Economy Fire & Casualty Co.*, 189 Ill. App. 3d 732, 734 (1989), Jay Michel was involved in an accident while driving a car owned by Michel Masonry Company, his employer. A passenger in the car, Marirose Johnson, filed a personal injury complaint against Jay, Michel Masonry Company, and the drivers of two other vehicles involved in the accident. Jay's father, Elwood Michel, had a "personal estate protector" umbrella policy with Economy Fire and Casualty Company (Economy) for excess coverage. *Id.* Economy denied coverage to Jay. *Id.* National Grange Insurance Company and Federal Insurance Company (Federal) defended the claim against Jay and Michel Masonry Company and settled for the limits of their policies. *Id.* Under that settlement, Jay obtained a full release from Johnson and assigned to her any rights he may have had against Economy for its failure to defend. *Id.* Thereafter, Johnson and Federal filed a declaratory judgment action against Economy, alleging that it had breached a duty to defend and indemnify Jay pursuant to the insurance policy, claiming that the original underlying complaint triggered Economy's duty to defend Jay and Michel Masonry Company. *Id.*

The parties filed cross-motions for summary judgment. Economy argued that it had no duty to defend Jay because he was not an insured under the policy. *Id.* The trial court granted summary judgment in favor of Economy and against Johnson and Federal. *Id.*

¶ 139 On appeal, Johnson and Federal argued, among other things, that Economy was estopped from denying coverage because it had failed to defend under a reservation of rights or to file a declaratory action. *Id.* at 735. They contended that Jay was potentially insured under Economy's policy as "(1) any person using an automobile owned by, loaned to or hired for use [on] behalf of the named insured *** or (2) with respect to a nonowned automobile, any relative, provided the actual use thereof is with the permission of the owner." *Id.* at 735-36.

¶ 140 However, the *Federal Insurance* court stated that, "[w]hen an insurer contracts to defend its insured, it must do so unless it is clear from the face of the complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." *Id.* at 735. Accordingly, before an insurer's duty to defend arises: "(1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose the potential of policy coverage." *Id.* "If the allegations of the complaint reveal that the action was not brought against an insured and that there was no potential for coverage under the policy, there is no duty to defend the underlying action [citation], and the insurer can justifiably refuse to defend." *Id.*

¶ 141 The *Federal Insurance* court affirmed the trial court's summary judgment finding, stating that there was no genuine issue of material fact presented because the underlying complaint failed to allege negligence against an insured or any other potential for coverage. *Id.* at 737-38. The court found that no person or entity insured by Economy was named as a defendant in the underlying complaint. *Id.* at 736. Johnson had sued Jay and the other defendants individually. *Id.* She sued Michel Masonry under its corporate name. *Id.* Elwood Michel, the named insured under

Economy's policy, was never named as a defendant in the underlying action, and no third-party action was ever filed against Elwood Michel. *Id.* Further, the allegations in the underlying action were directed against Jay as the driver of the car involved in an accident, which was owned by Michel Masonry. *Id.* The complaint alleged that Jay was acting as an agent and authorized employee of Michel Masonry at the time of the accident. *Id.* The complaint, however, did not allege that the car had been loaned to or hired for the father's use. *Id.* Indeed, Johnson had failed to allege in her complaint that Jay was in any manner connected with or acting on behalf of his father, Elwood Michel. *Id.* Therefore, the allegations of Johnson's complaint revealed that the action was not brought against the insured, Elwood Michel, and that there was no potential for coverage pursuant to the relevant provision of Economy's policy. *Id.* Moreover, the underlying complaint did not allege that Jay was a relative of Elwood Michel or that the car in question was a non-owned automobile, as defined in Economy's policy. *Id.* "Consequently, there was similarly no potential for coverage under this provision of the insuring agreement," and, under those circumstances, "the potential for 'coverage cannot be inferred merely because the son of the insured is named in a lawsuit.' " *Id.* (quoting *Murphy v. Peterson*, 129 Ill. App. 3d 952, 958 (1984)).

¶ 142 Similarly, in this case, Kreulach never added the named insured, Wix, as a defendant in her underlying lawsuit. Kreulach alleged negligence solely against Witbrod in the underlying lawsuit. In her amended complaint, she alleged that, at the time of the accident, Witbrod was employed by Wix and acting within the scope of his employment as an agent for Wix. Nevertheless, the allegations of Kreulach's complaint show that the personal injury action was not brought against the insured, Wix; thus, there was no potential for coverage pursuant to paragraph 1(c) of the "Who Is An Insured" provision of Country Mutual's policies. That provision states that "[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability." Paragraph

1(a) of that provision refers to "[y]ou for any covered 'auto,' " in this case, the named insured, Wix. Paragraph 1(b) provides coverage for "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow except *** [y]our 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her household." The Country Mutual policies except Witbrod from coverage under that provision since he was an "employee." Paragraph 1(c) provides coverage for "[a]nyone liable for the conduct of an 'insured' described above [in paragraphs 1(a) and 1(b)] but only to the extent of that liability." Witbrod does not fall into coverage for either paragraphs 1(a) or 1(b), which means that the " 'insured' described above" clause in paragraph 1(c) can only refer to Wix. As we have already discussed, Kreulach never alleged negligence for the conduct of Wix in the underlying complaint. Therefore, there is no potential for coverage pursuant to paragraph 1(c) of the "Who Is An Insured" provisions in the Country Mutual policies. *Federal Insurance Co.*, 189 Ill. App. 3d at 736. Simply put, Witbrod does not fit the definition of an "insured" under the Country Mutual policies' definitions of "Who Is An Insured."

¶ 143 Under the circumstances of this case, the potential for coverage cannot be *inferred* under a theory of *respondeat superior* because Witbrod—the driver, employee, and alleged agent of Wix—was solely named in the underlying lawsuit. *Id.* That is not how insurance coverage is determined under Illinois law. Yet, that is precisely what the *Molda III* court held and why we choose not to follow it here.

¶ 144 Our decision in *Murphy* also supports departure from *Molda III* for similar reasons. There, Murphy served as the executor of the estate of James Hollander, deceased. *Murphy*, 2019 IL App (2d) 180154, ¶ 1. Hollander was driving a vehicle that collided with a semi-tractor trailer, which then collided with a third vehicle. *Id.* ¶ 3. Hollander was driving a vehicle owned by Sandra Wendland, in which Wendland and Alyssa Guarino were passengers. *Id.* Keith Keigher was driving

the semi-tractor in the scope of his employment with J-M Transport, Inc. (J-M), and the third car was driven by Cheyenne Flowers. *Id.* Wendland, Pamela Sheppard (guardian of the estate and person of Guarino), and Flowers each filed negligence actions against Hollander's estate, seeking to recover damages for injuries sustained in the accident. *Id.* ¶ 5. Flowers also named as defendants Keigher and J-M. *Id.* "All of the underlying complaints alleged that the collision was caused by Hollander's negligent acts or omissions. None of the underlying complaints alleged that Hollander was vicariously liable for any acts or omissions by Wendland." *Id.* Further, none of the underlying complaints alleged that Wendland was liable in any manner. *Id.*

¶ 145 State Farm filed a declaratory judgment action, stating that it was defending Hollander's estate in the underlying lawsuits under Wendland's primary automobile insurance policy. *Id.* ¶ 7. State Farm acknowledged that Hollander was a "permissive user" of Wendland's car, but sought a declaration that it did not owe an obligation to defend or indemnify the estate under a $1 million umbrella policy it had issued to Wendland that was in effect at the time of the accident. *Id.* In particular, State Farm argued that it had no duty to defend or indemnify Hollander's estate under the umbrella policy because Hollander did not qualify as an insured under the umbrella policy. *Id.* ¶ 8. The trial court entered summary judgment in favor of State Farm, finding that, under the language of State Farm's policy, Hollander did not qualify as an insured, nor did State Farm have a duty to defend or indemnify the estate. *Id.* ¶ 16.

¶ 146 On appeal, the defendants—Murphy (on behalf of Hollander's estate), Wendland, Flowers, Sheppard, Keigher, and J-M—argued that the trial court erred when it determined that Hollander was not an "insured" under State Farm's umbrella policy issued to Wendland. *Id.* ¶ 20. The State Farm umbrella policy provided that " '[i]f a claim is made or a suit is brought against an *insured* for damages because of a loss for which the *insured* is legally *liable* and to which this policy

applies, we will pay on behalf of the *insured*, the damages that exceed the retained limit.' " (Emphasis omitted.) *Id.* ¶ 28. "Insured" under the policy meant Wendland (under paragraph 6(a) of the policy) and " 'any other person *** to the extent they are *liable* for the use of an automobile *** *by a person included in 6.a.* ***.' " (Emphases in original.) *Id.*

¶ 147 The *Murphy* court found this policy language was clear and unambiguous. *Id.* ¶ 29. The court explained that the defendants did not present a theory of liability stemming from Wendland and that Hollander was not an insured under State Farm's policy:

> "For coverage to exist, a claim must be brought against an 'insured' for damages for which the insured is 'liable.' Although Hollander's estate was named as a defendant in the underlying complaints, Hollander was not an insured under the policy. Further, none of the underlying complaints alleged that Hollander was liable for *Wendland's* use of the Nissan. The underlying complaints alleged that Hollander was negligent in *his* use and operation of the Nissan. To be clear, no party alleged that Wendland, the named insured, was negligent or liable in any manner. Therefore, Hollander was not an insured under the policy and, thus, plaintiff had no duty to defend or indemnify Hollander's estate." (Emphases in original.) *Id.*

The *Murphy* court concluded that the trial court properly granted summary judgment in State Farm's favor. *Id.* ¶ 36.

¶ 148 The holding in *Murphy* applies to this case as well. Kreulach's underlying complaint alleged that Witbrod was negligent in *his* use and operation of the vehicle he was driving at the time of the accident. As in *Murphy*, the underlying plaintiff failed to allege that Wix, the named insured, was liable or negligent in any manner. *Id.* ¶ 29. Therefore, Witbrod was not an insured

under the policy and, thus, Country Mutual had no duty to defend or indemnify Witbrod in the underlying lawsuit. *Id.*

¶ 149 The *Murphy* defendants also argued that State Farm's policy only required Wendland to be 'using' the car at the time of the occurrence. The *Murphy* court stated that the defendants' interpretation of the policy "ignores and eliminates the connection between 'liable for the use of an automobile' and 'by [Wendland]' from the definition" of "insured" in the policy. *Id.* ¶ 30. "If a named insured's use of the vehicle is all that is necessary to trigger a duty to indemnify under paragraph 6.c., then the phrase 'to the extent they are *liable* for' is mere surplusage." (Emphasis in original.) *Id.* The *Murphy* court concluded that Wendland's use of the vehicle, without more, was not sufficient to trigger coverage for Hollander. *Id.*

¶ 150 Applying that reasoning here, the parties do not dispute that Witbrod was driving his own vehicle under the scope of his employment for Wix at the time of the accident. The parties also agree that Witbrod was driving a covered "auto" under category 9 for "Non-owned 'Autos,' " pursuant to Country Mutual's Business Policy. However, as in *Murphy*, Kreulach's interpretation of Country Mutual's policy ignores who fits into the definition of an "insured" under the policy and how that is applied to paragraph 1(c)'s "[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability." Kreulach's failure to name Wix as a defendant in the underlying claim would similarly render the phrase "but only to the extent of that liability" as mere surplusage without any claim whatsoever that Wix's negligent conduct was a contributing factor under the theory of *respondeat superior*. *Id.* In this case, Kreulach's underlying complaint needed to allege that Wix was vicariously liable for Witbrod's negligent conduct. Because the underlying complaints did not contain any such allegations, Witbrod is not an insured. *Id.*

¶ 151 Our finding also comports with federal cases that have analyzed comparable insurance policy language and underlying lawsuits and have reached conclusions similar to ours. For example, in *Vulcan Materials Co.*, 723 F. Supp. 1263, Michael Giguere, an employee of a trucking company, was killed while delivering a load of scrap metal to Vulcan Materials when he was struck by a magnet that fell from Vulcan's crane. *Id.* at 1263-64. The trucking company was insured by Casualty Insurance Company (Casualty). Giguere's ex-wife and administrator of his estate sued Vulcan, and Vulcan tendered its defense to Casualty. *Id.* at 1264. Casualty denied that it was required to defend Vulcan. *Id.* Vulcan sued Casualty, seeking declaratory relief, arguing that Vulcan was an "insured" under Casualty's automobile liability policy issued to the trucking company. *Id.* The policy defined "insured" as (a) the trucking company and, in pertinent part, "(d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a)." (Emphasis and internal quotation marks omitted.) *Id.* Vulcan argued that the trucking company, the "named insured," negligently failed to train Giguere and, thus, the trucking company's liability arose "because of acts or omissions of an insured under (a)." (Internal quotation marks omitted.) *Id.* The court rejected Vulcan's interpretation. Instead, the court stated, "[p]aragraph (d) is plainly a vicarious liability provision and nothing more: It insures all those who may be vicariously liable for acts or omissions of the named insured ***." *Id.* at 1265. Because there was no basis for finding Vulcan vicariously liable for the trucking company's acts, the court ruled that Casualty had no duty to defend Vulcan. *Id.* at 1265-66.

¶ 152 Further, the policy language in *Nationwide Mutual Insurance Co. v. Zurich American Insurance Co.*, 748 F. Supp. 3d 939 (E.D. Cal. 2024), mirrors the exact policy language in this case. There, Nationwide Mutual Insurance Company (Nationwide) and AMCO Insurance Company (collectively, the plaintiffs) filed a declaratory judgment action against Zurich American

Insurance Company (Zurich) and American Guarantee and Liability Insurance Company (American Guarantee) (collectively, the defendants) regarding the defendants' duty to defend and indemnify Motor Parts Distributors, Inc. (Motor Parts) in the underlying personal injury action. *Id.* at 941-42. The underlying plaintiff, Edward Laverone, filed a personal injury action against Motor Parts and the defendants' insured, Express Services, Inc. (Express), for injuries sustained in a car accident caused by Edward Gonzalez Jr.[7] *Id.* at 941. At the time of the accident, Gonzalez was a delivery driver who was staffed by Express to work for Motor Parts. *Id.* After Gonzalez had completed his deliveries, he informed his supervisor at Motor Parts that he was clocking out for the day due to mechanical problems with his car. *Id.* at 941-42. On his way home, Gonzalez crashed into Laverone's car, which killed Gonzalez and injured Laverone. *Id.* at 942. The parties to the underlying action entered into a settlement agreement and release under which Laverone received $8.85 million. *Id.* Of that amount, the plaintiffs paid $6 million on behalf of Motor Parts, and the defendants paid the remaining $2.85 million on behalf of Express. *Id.*

¶ 153 Express was a named insured on the Zurich policy, but Motor Parts was not. *Id.* The Zurich policy included "Hired And/Or Non-Owned Auto Coverage" and provided coverage for " 'damages awarded against an insured because of bodily injury caused by an accident and resulting from the ownership, maintenance, or use of a covered auto, subject to various policy terms, conditions, and exclusions.' " *Id.* American Guarantee issued an umbrella policy to Express and Express was a named insured on that policy, but Motor Parts was not. *Id.*

¶ 154 In the insurance coverage dispute, the plaintiffs and the defendants agreed that for the plaintiffs to make a *prima facie* showing of a potential for coverage for Motor Parts under the

[7] The United States District Court for the Eastern District of California used the name Gonzalez and Gonzales interchangeably.

Zurich policy, the plaintiffs needed to establish that Gonzalez qualified as an additional insured under the Zurich policy. *Id.* at 944. The Zurich policy included an endorsement added to the "Who Is An Insured" provision of its policy that stated "[t]he following are also 'insureds': a. Any 'employee of [Express] is an 'insured' while using a covered 'auto' you don't own, hire, or borrow for acts performed within the scope of employment by 'Express.' " *Id.* Plaintiffs argued that Gonzalez qualified as an insured under that endorsement because, at the time of the accident, he was an Express employee using a covered "auto" to perform acts within the scope of his employment with Express. *Id.* Plaintiffs argued that Motor Parts qualified as an additional insured because the endorsement added four additional categories of insureds to Zurich's "Who Is An Insured" provision. *Id.* Pertinent here, the Zurich policy's "Who Is An Insured" provision included the same language as the "Who Is An Insured" provision in Country Mutual's policies, including paragraph 1(c), which provides "[a]nyone liable for the conduct of an insured described above but only to the extent of that liability." (Emphases omitted.) *Id.* at 945. The plaintiffs argued that because Motor Parts was liable for the conduct of Gonzalez, paragraph 1(c) of the Who Is An Insured provision conferred insured status for Motor Parts. *Id.*

¶ 155 The *Nationwide Mutual Insurance* court agreed with the defendants. *Id.* at 947. The court explained that "the text of subparagraph c. limits coverage to 'anyone liable for the conduct of an "insured" *described above*.' " (Emphasis in original.) *Id.*

> "Having reviewed this text in the context of the entire Zurich Policy, the Court finds a plain reading of subparagraph c. of the Who Is An Insured provision is only susceptible to one reasonable interpretation which is that [the] provision applies only to those insureds described above in subparagraphs a. and b." *Id.* at 948.

Further, it was unclear to the court how the endorsement could be interpreted to expand the list of insureds " 'described above' " to subparagraph c. *Id.* Identifying subparagraph c. as an "omnibus clause," the court stated, "like most other omnibus clauses, subparagraph c. defines an 'insured' as one who is vicariously liable for conduct of another named insured." *Id.* The court further explained:

> "However, there is nothing in the language of the Zurich Policy, which suggests Zurich intended for the omnibus clause in subparagraph c. to be a general, collective, or catchall provision of the policy that applies to all insureds. [Citation.] Indeed, the language used by Zurich in subparagraph c. suggests the insureds described in subparagraph c. are a distinct and independent group of insureds defined by the Who Is An Insured provision. *** Even if Gonzalez qualifies as an insured by virtue of the Employee Clause within the [Zurich endorsement], it is undisputed Gonzalez does not qualify as an insured under either subparagraphs a. or b." *Id.* at 948-49.

¶ 156 The *Nationwide Mutual Insurance* court found that the only reasonable interpretation of subparagraph c. was that it conferred insured status on those who are " 'liable for the conduct of an 'insured' described above' " in subparagraphs a. and b. *Id.* at 950. "While Motor Parts may be liable for Gonzalez's conduct, Gonzalez does not qualify as an insured under subparagraphs a. or b. of the Who Is An Insured provision." *Id.* The court held that, because Motor Parts did not qualify as an additional insured under the Zurich Policy, the defendants did not have a duty to defend Motor Parts in the underlying action, and the plaintiffs had no right to reimbursement. *Id.*

¶ 157 These federal cases bolster our conclusion that, because Kreulach in this case did not present a theory of liability in her underlying lawsuit stemming from Wix's conduct, Witbrod is not an insured. Kreulach did not trigger the duty to defend or indemnify in this case because she

failed to allege negligence against the named insured, Wix. Further, a plain reading of the unambiguous language of the Country Mutual policies shows that Witbrod was not an "insured" under the "Who Is An Insured" provisions of those policies. We will not strain to find an ambiguity in the Country Mutual policies where none exists. *Central Illinois Light*, 213 Ill. 2d at 153; *McKinney*, 188 Ill. 2d at 497.

¶ 158 Accordingly, we reverse the trial court's decisions to (1) grant summary judgment in favor of Kreulach and Witbrod and against Country Mutual and (2) deny summary judgment in favor of Country Mutual and against Kreulach and Witbrod. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) (appellate court may, in its discretion, enter summary judgment and make any order that ought to have been made), we grant summary judgment in favor of plaintiff Country Mutual and against defendants Kreulach and Witbrod. See *Bremer v. City of Rockford*, 2016 IL 119889, ¶¶ 35, 38.

¶ 159 III. CONCLUSION

¶ 160 Based on the foregoing, we reverse the judgment of the circuit court of Lake County and grant summary judgment in favor of plaintiff.

¶ 161 Reversed.

Decision Under Review:	Appeal from the Circuit Court of Lake County, No. 23-CH-129; the Hon. Daniel L. Jasica, Judge, presiding.
Attorneys for Appellant:	Jeremy S. Macklin, of Traub Lieberman Straus & Shrewsberry LLP, of Chicago, for appellant Country Mutual Insurance Co.
Attorneys for Appellee:	Michael M. Viglione, of Ryan, Ryan & Viglione, of Waukegan, for appellee Tanya Kreulach. No brief filed for other appellee.

Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. Supreme Court · filed 1996-10-24 · Reporter opinion
Supreme Court

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

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- memo p. 4 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C018.7
- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C018.9
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C018.7
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Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996)

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Cramer v. Insurance Exchange Agency

174 Ill. 2d 513 · Supreme Court · Filed 1996-10-24 · Reporter opinion · Binding on all Illinois courts

Syllabus

Prepared by the reporter, not part of the court's opinion.

(No. 79943. STEVEN CRAMER, Appellee, v. INSURANCE EXCHANGE AGENCY et al. (Economy Fire & Casualty Company et al., Appellants). Opinion filed October 24, 1996. Rehearing denied 'February 3, 1997. FREEMAN, J., specially concurring. HARRISON, J., joined by BILANDIC, C.J., dissenting. Heyl, Royster, Voelker & Allen, of Peoria (Karen L. Kendall, Cráig L. Unrath and David A. Perkins, of counsel), for appellants. Steven Cramer, of Abington, appellee pro se.

Opinion

JUSTICE NICKELS

delivered the opinion of the court:

"We consider here whether a plaintiff may pursue a common law fraud action arising from the purported cancellation of an insurance policy. In a complaint filed in the circuit court of Knox County, plaintiff, Steven Cramer, alleged that defendants, Economy Fire and Casualty Company and its claims examiner, engaged in fraud and deceptive practice with regard to the cancellation of his policy. Defendants filed a motion for summary judgment claiming that the suit was untimely, based on a one-year limitation provision contained in the policy. The circuit court construed the action as a common law fraud action and denied the motion for summary judgment.

The circuit court certified two questions for interlocutory appeal: (1) whether section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 1994)) preempts a common law fraud cause of action against an insurance company for its alleged unreasonable conduct in denying an insurance claim; and (2) whether a limitation provision of an insurance policy which states that "[n]o action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss” is applicable to a common law fraud cause of action against an insurance company for its allegedly unreasonable conduct in denying an insurance claim. The appellate court answered "no” to both questions and affirmed denial of summary judgment. 275 Ill. App. 3d 68. We granted

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defendants' petition for leave to appeal. 155 Ill. 2d R. 315. We reverse.

BACKGROUND

In 1991, plaintiff purchased a homeowner's insurance policy from the insurer and paid the premium. The policy covered plaintiffs personal property and was to run for one year from October 25, 1991, to October 25, 1992. Plaintiff's residence was later burglarized. The underlying dispute arises from the insurer's attempted cancellation of the policy. The insurer argues that it cancelled the policy before the burglary occurred. Plaintiff contends that he never received a notice of cancellation and that any purported cancellation is fraudulent.

Initially, we note that plaintiff raised allegations against two sets of defendants in the complaint: (1) the Insurance Exchange Agency and one of its employees, and (2) Economy Fire and Casualty Company and a claims examiner (collectively, insurer). Plaintiff sought $6,909 from the Insurance Exchange Agency and its employee. This $6,909 amount represents the total amount of plaintiff's loss. Plaintiff sought an additional $6,909 in damages from the insurer, which he labelled "double indemnity" damages.

With respect to the first set of defendants, we note that the Insurance Exchange Agency is an independent insurance agency and was initially involved with plaintiff's application for insurance. In the complaint, plaintiff alleged that the Agency and its employee engaged in negligence in connection with the issuance of his policy. Plaintiff alleged that they did not forward documentation that was needed to complete the application. These defendants, however, did not participate in the motion for summary judgment, which is the subject of this appeal. Because this appeal involves only the insurer, we do not discuss the allegations against these two defendants further.

With respect to the second set of defendants, plaintiff alleged that he never received a notice of cancellation from the insurer and was never informed that the policy was cancelled. Plaintiff claims that the insurer did not send a notice of cancellation at all. Plaintiff claims that the insurer is using this purported cancellation "with the expressed and intentional purpose to defraud Plaintiff out of his coverage which he was legally entitled to."

According to the insurer, on December 2, 1991, a notice of cancellation was sent to plaintiff. The policy was being cancelled because the insurer had been unable to obtain certain information from plaintiff. According to the insurer, the cancellation went into effect on January 6, 1992.

Three days later, on January 9, 1992, plaintiff's home was burglarized. Plaintiff sent his proof of loss statement to the insurer in May, showing a loss of $6,909. On May 22, 1992, the insurer denied the claim because the burglary had occurred three days after the policy was cancelled. Plaintiff's premium was refunded in June 1992. In October 1993, more than a year later, plaintiff filed this suit pro se.

The insurer moved for summary judgment. The insurer based its motion for summary judgment solely on the one-year suit limitation clause included in the insurance policy.

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This clause requires that any action on the policy be brought within one year after the date of loss. Plaintiff filed his action more than a year after the burglary and more than a year after his claim under the policy was denied. Thus, according to the insurer, an action alleging breach of the policy is untimely.

At the hearing on the insurer's motion for summary judgment, the circuit court construed the complaint as stating a cause of action for fraud, rather than for breach of the policy. The court then found that the suit limitation clause contained in the policy applied only to actions on the policy and did not apply to common law fraud actions. The circuit court, however, gave defendants time to provide additional authority.

The insurer filed a supplement to the motion for summary judgment. It argued that, to the extent this action is a breach of contract action, it is precluded by the one-year limitation period provided in the policy. The insurer further argued that, to the extent the action is a tort action, it was barred by the preemptive effect of section 155 of the Insurance Code. Essentially, section 155 provides a remedy to policyholders whose insurers engage in unreasonable and vexatious conduct when delaying payment or denying a claim. The circuit court rejected the insurer's arguments and denied summary judgment.

The appellate court affirmed. First, the appellate court considered the effect of section 155 on a common law fraud action. It held that section 155 does not preempt a common law action for fraud against an insurer for its unreasonable conduct in denying a claim. In reaching its decision, the court relied principally on decisions finding that section 155 does not preempt the tort of bad faith and unfair dealing.

Second, the appellate court considered whether the limitation provision in the policy barred a tort action relating to the policy. It found that a common law fraud action involving policy proceeds is collateral to an action for breach of contract. It held that the suit limitation provision in the policy applied only to actions on the policy and not to plaintiff's action in fraud. Accordingly, the appellate court affirmed the circuit court's denial of summary judgment, agreeing that plaintiff should be allowed to pursue his action.

ANALYSIS

The denial of summary judgment is an interlocutory order that is generally not appealable. Supreme Court Rule 308(a) allows appeal of an interlocutory order to the appellate court where "the order involves a question of law as to which there is substantial ground for difference of opinion and *** an immediate appeal from the order may materially advance the ultimate termination of the litigation." 155 Ill. 2d R. 308. The appellate court's decision may then be appealed to this court under Rule 315. 155 Ill. 2d R. 315.

The insurer argues that plaintiff has alleged nothing more than unreasonable and vexatious conduct in the complaint. The statute provides a remedy for such conduct. The insurer argues that the statute, in conjunction with a breach of contract action, provides the remedy for this conduct, not an independent tort action. According to the insurer, plaintiff's action is essentially a breach of contract action, which is barred by the limitation clause contained in the policy.

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Much of the analysis of the circuit and appellate courts relies on cases involving the tort of bad faith and unfair dealing. Although the complaint is inartfully drafted, it could be construed as alleging bad faith and unfair dealing. Here, we examine how the analysis employed by the lower courts, including their reliance on cases involving the tort of bad faith, applies to the allegations raised in the instant complaint.

In part I, we examine the development of section 155. In part II, we consider the interaction of the statute with tort law. We hold that section 155 does not preempt a separate and independent tort action involving insurer misconduct. We also hold, however, that the tort of bad faith is not a separate and independent tort action that is recognized in Illinois. In part III, we consider the allegations raised in plaintiff's complaint. We find that the allegations in the complaint seek to state a cause of action for breach of the policy, which is barred by the suit limitation provision. Accordingly, the insurer is entitled to summary judgment.

I

Resolution of this appeal requires an examination of the statute. Section 155 provides:

"Attorney fees. (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:

(a) 25% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;

(b) $25,000;

(c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155 (West 1994).

The statute provides an extracontractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable. Kush v. American States Insurance Co., 853 F.2d 1380,1385 (7th Cir. 1988); UNR Industries, Inc. v. Continental Insurance Co., 607 F. Supp. 855, 863 (N.D. Ill. 1984). Ordinarily, a policyholder may bring a breach of contract action to recover the proceeds due under the policy. Pursuant to the statute, a plaintiff may also recover reasonable attorney fees and other costs, as well as an additional sum that constitutes a penalty.

Section 155 was enacted in 1937, as part of a major revision of the Illinois Insurance Code. In its original version, known as section 767, it allowed an award of attorney fees, up to a maximum of $500, if an insurer's refusal to pay a claim was "vexatious and without reasonable cause." Ill. Rev. Stat. 1937, ch. 73, par. 767. Under the statute, a plaintiff could seek limited attorney fees, in addition to an action to recover the policy proceeds. Before the statute was enacted, a plaintiff could not seek an award of attorney fees, regardless of

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the bad faith of the insurer. The purpose of the statute was to provide a remedy for insurer misconduct:

"Although some companies are very liberal in the payment of claims, this is by no means true of all. In the absence of any allowance of attorneys' fees, the holder of a small policy may see practically his whole claim wiped out by expenses if the company compels him to resort to court action, although the refusal to pay the claim is based upon the flimsiest sort of a pretext. The strict limit on the amount allowable makes the section significant only for small claims. It should prove wholesome in its effect upon companies unreasonably withholding payment of such claims. It is doubtful if there are many judges who would allow such fees when the defense was bona fide although deemed inadequate." H. Havinghurst, Some Aspects of the Illinois Insurance Code, 32 Ill. L. Rev. 391, 405 (1937).

Since 1937, the statute has been amended several times. The cap on attorney fees was raised to $1,000 in 1967. Ill. Rev. Stat. 1967, ch. 73, par. 767. In 1977, the legislature amended the statute again, this time removing the cap on attorney fees entirely and providing for the award of a penalty against the insurer. Ill. Rev. Stat. 1977, ch. 73, par. 767. This award was limited to a maximum of $5,000. In 1986, the statute was amended to its current version. The maximum allowable penalty under the statute was raised to $25,000.

Before the statute was enacted, a policyholder's only recourse was to seek a breach of contract action to receive the policy proceeds. Attorney fees and punitive damages are generally not available in breach of contract actions. Section 155 created a limited statutory exception to this rule. It was intended to make suits by policyholders economically feasible and to punish insurers. UNR Industries, Inc., 607 F. Supp. at 866. By enacting and amending the statute, the legislature has expanded plaintiffs relief to include reasonable attorney fees, costs, and a limited penalty, in addition to a breach of contract action to recover the amount due under the policy. The legislature has steadily amended the statute to allow an increasingly greater recovery for unreasonable and vexatious insurer misconduct.

Application of the statute was relatively straightforward until Ledingham v. Blue Cross Plan for Hospital Care of Hospital Service Corp., 29 Ill. App. 3d 339 (1975), rev'd on other grounds, 64 Ill. 2d 338 (1976). In Leding ham, the appellate court recognized a tort action for bad faith and unfair dealing in connection with the denial of a claim by an insurer. This was the first time the tort of bad faith and unfair dealing was recognized in Illinois in this context. In recognizing the existence of this tort, the Ledingham court did not consider the impact, if any, of section 155 of the Insurance Code on this new tort of bad faith.

The Ledingham court based its ruling on the implied covenant of good faith and fair dealing that exists between contracting parties. The appellate court first stated that a defendant may engage in conduct that both breaches a contract and also constitutes a separate and independent tort. Ledingham, 29 Ill. App. 3d at 344. The appellate court then determined that breach of the contractual covenant of good faith and fair dealing would also constitute an independent tort in connection with an insurer's denial of claims. Ledingham, 29 Ill. App. 3d at 350. Thus, Ledingham elevated this implied contractual

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covenant to the status of an independent tort.

After Ledingham, appellate and federal panels have extensively discussed the interaction between the statute and the tort of bad faith. Although many of these courts have framed the issue as one of preemption, the question of preemption is also intertwined with the question of whether Illinois recognizes the tort of bad faith. There has been considerable confusion in the courts concerning the interaction of the statute and tort law.

Some courts have rejected Ledingham and the tort of bad faith entirely. See, e.g., Buais v. Safeway Insurance Co., 275 Ill. App. 3d 587 (1995); Perfection Carpet, Inc. v. State Farm Fire & Casualty Co., 259 Ill. App. 3d 21 (1993); Tobolt v. Allstate Insurance Co., 75 Ill. App. 3d 57 (1979); Debolt v. Mutual of Omaha, 56 Ill. App. 3d 111 (1978); Ellis v. Metropolitan Property & Liability In surance Co., 600 F. Supp. 1 (S.D. Ill. 1982); Strader v. Union Hall, Inc., 486 F. Supp. 159 (N.D. Ill. 1980). Others have assumed the existence of the tort of bad faith and have concluded that the statute preempts only a claim for punitive damages in connection with the tort. See, e.g., Emerson v. American Bankers Insurance Co., 223 Ill. App. 3d 929 (1992); Calcagno v. Personalcare Health Management, Inc., 207 Ill. App. 3d 493 (1991); Hoffman v. Allstate Insurance Co., 85 Ill. App. 3d 631 (1980); Kohlmeier v. Shelter Insurance Co., 170 Ill. App. 3d 643 (1988); W.E. O'Neil Construction Co. v. National Union Fire Insurance Co., 721 F. Supp. 984 (N.D. Ill. 1989); American Dental Ass'n v. Hartford Steam Boiler Inspection & Insurance Co., 625 F. Supp. 364 (N.D. Ill. 1985); Scheinfeld v. American Family Mutual Insurance Co., 624 F. Supp. 698 (N.D. Ill. 1985); UNR Industries, Inc., 607 F. Supp. 855. Still others have held that the statute does not preempt any tort action at all and that a plaintiff may pursue a tort action alleging bad faith and seek punitive damages. Roberts v. Western-Southern Life Insurance Co., 568 F. Supp. 536 (N.D. Ill. 1983); Kelly v. Stratton, 552 F. Supp. 641 (N.D. Ill. 1982). Finally, several courts have held that the statute preempts a tort action, regardless of the specific legal theory asserted, if the complaint alleges nothing more than unreasonable and vexatious conduct. See, e.g., Mazur v. Hunt, 227 Ill. App. 3d 785 (1992); Combs v. Insurance Co., 146 Ill. App. 3d 957 (1986); Kush, 853 F.2d 1380; Zakarian v. Prudential Insurance Co. of America, 652 F. Supp. 1126 (N.D. Ill. 1987); Bageanis v. American Bankers Life Assurance Co., 783 F. Supp. 1141 (N.D. Ill. 1992); York v. Globe Life & Accident Insurance Co., 734 F. Supp. 340 (C.D. Ill. 1990).

II

As noted, the statute provides an extracontractual remedy for policyholders who have suffered unreasonable and vexatious conduct by insurers with respect to a claim under the policy. It presupposes an action on the policy. As such, nothing in the statute addresses tortious conduct or tort liability in general. The statute simply provides an extracontractual remedy to an action on a policy.

As the Ledingham court correctly stated, a defendant may engage in conduct that both breaches a contract and constitutes a separate and independent tort. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 187 (1978). The statute provides an extracontractual remedy for insurer misconduct that is vexatious and unreasonable. Well-established tort actions, such as common law fraud, require proof of different elements and remedy a different sort of

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harm than the statute does. These torts address insurer misconduct that is not merely vexatious and unreasonable. The statute was not intended to insulate an insurer from such tort actions.

Much of the confusion among the appellate and federal courts arises from the interaction of the statute and the tort of bad faith and unfair dealing. Unlike an action in fraud, a bad-faith action involves insurer misconduct that is similar to unreasonable and vexatious misconduct. This court, however, has never recognized such a tort. We therefore determine, in light of the statute, whether such a tort is recognized in Illinois.

In Ledingham, the appellate court derived the tort of good faith and fair dealing from contract law. This good-faith principle, however, is used only as a construction aid in determining the intent of contracting parties. See Martindell v. Lake Shore National Bank, 15 Ill. 2d 272, 286 (1958) ("Every contract implies good faith and fair dealing between the parties to it, and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted"). This principle ensures that parties do not try to take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or to do anything that will destroy the other party's right to receive the benefit of the contract. Capital Options Investment, Inc. v. Goldberg Brothers Commodities, Inc., 958 F.2d 186, 189 (7th Cir. 1992); Vincent v. Doebert, 183 Ill. App. 3d 1081, 1090 (1989). This contractual covenant is not generally recognized as an independent source of duties giving rise to a cause of action in tort. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443 (7th Cir. 1992); Martin v. Federal Life Insurance Co., 109 Ill. App. 3d 596, 605-07 (1982); Anderson v. Burton Associates, Ltd., 218 Ill. App. 3d 261, 267 (1991).

The use of the contractual covenant of good faith and fair dealing to establish an independent tort arises from cases involving the "duty to settle." See Ledingham, 29 Ill. App. 3d at 345-50; see generally S. Ashley, Bad Faith Liability §§ 1:01 through 1:13, at 1-48 (1987). These cases generally involve a policyholder, a liability insurer, and a third party. The liability insurer has assumed the policyholder's defense under the policy and is negotiating a settlement with a third party. In the typical "duty to settle" case, the third party has sued the policyholder for an amount in excess of the policy limits but has offered to settle the claim against the policyholder for an amount equal to or less than those policy limits.

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In this circumstance, the insurer may have an incentive to decline the settlement offer and proceed to trial. The insurer may believe that it can win a verdict in its favor. In contrast, the policyholder may prefer to settle within the policy limits and avoid the risk of trial. The insurer may ignore the policyholder's interest and decline to settle. This court has recognized that the insurer has a duty to act in good faith in responding to settlement offers. Krutsinger v. Illinois Casualty Co., 10 Ill. 2d 518, 527 (1957). When an insurer breaches this duty by refusing to settle, the insurer may be liable for the full amount of a judgment against the policyholder, regardless of policy limits. See Mid-America Bank & Trust Co. v. Commercial Union Insurance Co., 224 Ill. App. 3d 1083, 1087 (1992); Phelan

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v. State Farm Mutual Automobile Insurance Co., 114 Ill. App. 3d 96,104 (1983); Edwins v. General Casualty Co., 78 Ill. App. 3d 965, 968 (1979); Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027, 1029 (1979).

The "duty to settle" arises because the policyholder has relinquished defense of the suit to the insurer. The policyholder depends upon the insurer to conduct the defense properly. In these cases, the policyholder has no contractual remedy because the policy does not specifically define the liability insurer's duty when responding to settlement offers. The duty was imposed to deal with the specific problem of claim settlement abuses by liability insurers where the policyholder has no contractual remedy. Debolt, 56 Ill. App. 3d at 115; see also National Union Fire Insurance Co. v. Continental Illinois Corp., 673 F. Supp. 267, 270-72 (N.D. Ill. 1987) (distinguishing between "duty to settle" cases and section 155).

This reasoning, however, does not apply to first-party claims made directly by a policyholder against an insurer and which do not involve liability insurance. The policyholder does not need a new cause of action to protect him from insurer misconduct where an insurer refuses to pay. The policyholder has an explicit contractual remedy. He can sue for the proceeds due under the policy. The extent of this remedy is controlled by contract law. The fact that a policyholder cannot recover as much as he could in tort arises from the fact that contract law imposes limitations on recovery. See S. Ashley, Bad Faith Liability §§ 2:01 through 2:08, at 55-73 (1987).

The legislature has recognized that the contractual remedy may not be sufficient and has provided for the award of an extracontractual remedy. The primary benefit of the tort theory developed in Ledingham is that it permits insured parties to collect an extracontractual award in what essentially are breach of contract actions, where attorney fees and punitive damages are usually unavailable. Strader, 486 F. Supp. at 162. The legislature, however, specifically enacted section 155 to deal with this lack of an extracontractual remedy. The remedy provided by section 155 allows an extracontractual award and specifically defines the limits of this award.

This court has previously declined to recognize a new common law tort where the legislature has passed a statutory scheme providing a limited remedy. See Hall v. Gillins, 13 Ill. 2d 26 (1958) (declining to recognize a new common law action for wrongful death where the legislature had created a limited wrongful death remedy by statute); Cunningham v. Brown, 22 Ill. 2d 23 (1961) (declining to recognize a new common law action for damages caused by the negligent sale of liquor where the legislature had created a limited statutory remedy by enacting the Dram Shop Act). Similarly, in conjunction with a breach of contract action, section 155 provides the remedy to policyholders for insurer misconduct that does not rise to the level of a well-established tort. In addition, the legislature has constantly amended the statute to allow greater recovery. We hesitate to recognize a new tort where the legislature has constantly acted to remedy a perceived evil in a certain area. See Hall, 13 Ill. 2d at 31-32 (noting that the maximum recovery under the statute had steadily been increased); see also Combs, 146 Ill. App. 3d at 962-63.

To allow a bad-faith action would transform many breach of contract actions into independent tort actions. Martin, 109 Ill. App. 3d at 605-07. A duty of good faith and fair

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dealing would be tortiously violated whenever one party takes an action designed to deprive the other of the benefits of the agreement. A bad-faith action would encourage plaintiffs to sue in tort, and not breach of contract, to avoid suit limitation clauses and the cap on the statutory remedy. Hall and Cunningham indicate that "when the legislature has provided a remedy for a heretofore unremedied evil, the courts should not allow an end-run around the limits imposed by that statute by creating a common-law action that remedies the same basic evil." UNR Industries, Inc., 607 F. Supp. at 864.

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In summary, an insurer's conduct may give rise to both a breach of contract action and a separate and independent tort action. Kelsay, 74 Ill. 2d at 187. Mere allegations of bad faith or unreasonable and vexatious conduct, without more, however, do not constitute such a tort. Courts therefore should look beyond the legal theory asserted to the conduct forming the basis for the claim. Kush, 853 F.2d at 1385; Zakarian, 652 F. Supp. at 1136; Combs, 146 Ill. App. 3d at 963-64. In cases where a plaintiff actually alleges and proves the elements of a separate tort, a plaintiff may bring an independent tort action, such as common law fraud, for insurer misconduct.

Ill

With these principles in mind, we consider the allegations in the complaint. The complaint is inartfully drafted and filled with conclusory language. We ignore this conclusory language and consider the alleged conduct to determine if plaintiff alleges anything more than bad faith. Plaintiff alleges that the insurer never sent him a notice of cancellation. Plaintiff alleges that the insurer fabricated the notice of cancellation solely to deny his claim under the policy. Plaintiff seeks the proceeds due him under the policy.

In order to state a cause of action for common law fraud, the essential elements of fraud must be pleaded with specificity. See Talbert v. Home Savings of America, F.A., 265 Ill. App. 3d 376, 382 (1994); In re Marriage of Shaner, 252 Ill. App. 3d 146, 157 (1993); Trautman v. Knights of Columbus, 121 Ill. App. 3d 911, 914 (1984). The elements that must be alleged include: "(1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury." Siegel v. Levy Organization Development Co., 153 Ill. 2d 534, 542-43 (1992).

Here, the complaint is barren of any allegations of reliance. Instead, plaintiff alleges that the insurer is lying after the fact to avoid paying his claim. Essentially, plaintiff alleges that the insurer is trying to deny him the benefits of the policy. See Mazur, 227 Ill. App. 3d 785 (allegations that the insurer refused in bad faith to pay for two items not included on a proof of loss form was not sufficient to allege fraud). Plaintiff did not allege that he acted in reliance on any statement by the insurer. See Trautman, 121 Ill. App. 3d 911 (allegations that the insurer forged an amendment to the policy and in bad faith deprived the plaintiff of insurance proceeds did not contain allegation of reliance on the amendment); Kinney v. St. Paul Mercury Insurance Co., 120 Ill. App. 3d 294 (1983)

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(allegations that the insurer made an estimate for repairs in bad faith in connection with a settlement offer did not contain allegation of reliance).

The insurer based its motion for summary judgment on the one-year limitation provision contained in the policy. Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with the affidavits, demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2 - 1005(c) (West 1994); First of America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165, 176 (1995). The review of a summary judgment ruling is an issue of law and our review is therefore de novo. Busch v. Graphic Color Corp., 169 Ill. 2d 325, 333 (1996).

At best, plaintiff alleges a breach of contract action. The policy provides that a suit on the policy must be brought within one year of loss. The Insurance Code provides that the limitation period is tolled by the number of days between the date when a proof of loss is submitted and the date when the claim is denied. 215 ILCS 5/143.1 (West 1994). Compliance with the suit limitation provision of the policy is a condition precedent to recovery under a policy. See Schoonover v. American Family Insurance Co., 214 Ill. App. 3d 33, 44 (1991). The loss occurred on January 9, 1992, and plaintiffs claim was denied on May 22, 1992. Plaintiffs suit was filed on October 19, 1993. Even assuming the limitation provision was tolled until plaintiffs claim was denied by the insurer on May 22, the suit, which was filed more than 16 months later, was untimely. The fatal flaw with plaintiffs action is simply that he waited too long to file it.

In light of the foregoing analysis, we need not further address the second certified question, concerning whether a suit limitation provision applies to common law fraud actions.

CONCLUSION

Section 155 does not preempt a claim of insurer misconduct based on a separate and independent tort. Mere allegations of bad faith or unreasonable and vexatious conduct, however, are not sufficient to constitute a separate and independent tort. Plaintiffs breach of contract action is untimely under the policy. Accordingly, we reverse the judgments of the appellate and circuit courts and remand the cause to the circuit court of Knox County with directions to enter summary judgment in favor of the insurer.

Appellate court judgment reversed; circuit court judgment reversed; cause remanded with directions.

Separate opinion (concurring)

JUSTICE FREEMAN, (concurrence)

JUSTICE FREEMAN,

specially concurring:

I agree with the majority that summary judgment was proper based on the fact that the

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plaintiffs suit was barred by the insurance policy's limitations provision. I cannot agree with the majority's reasoning regarding the preemptive scope of section 155, or the present status in Illinois of the tort of insurer bad faith and unfair dealing. Based on my examination of section 155, and a host of state and federal decisions, I am convinced that the tort of bad faith and unfair dealing is long established in Illinois and should remain so, section 155 notwithstanding.

Moreover, I believe it is unfortunate that the majority has seen fit to render a decision in this area, a decision arguably adverse to the interests of small policyholders, without the benefit of substantial briefs from that quarter. I note that the plaintiffs pro se appellate brief consists of a single letter to this court merely arguing that his claim for fraud be allowed so as to deter insurers from engaging in deceptive and vexatious conduct in settling claims.

Ironically, that misfortune only highlights why a tort cause of action for insurer bad faith is necessary-even in the realm of first-party coverage claims. Insureds are often at a bargaining disadvantage with their insurers. Thus, insurers have been found to fail to adequately investigate claims or deny claims without adequate supporting evidence; fail to evaluate claims objectively, interpreting policy provisions in an arbitrary and unreasonable manner; make unreasonably low settlement offers; rely on minor misrepresentations in the insurance application or where their agents knowingly complete false applications; or exert coercion designed to compel compromise of a claim. See Emerson v. American Bankers Insurance Co., 223 Ill. App. 3d 929, 936 (1992), citing Annot., 33 A.L.R.4th 579 (1984).

That said, I turn to the majority's reasoning. The majority concludes that section 155 does not preempt a separate and independent tort involving insurer misconduct such as fraud. 174 Ill. 2d at 519, 528. The majority finds that a first-party claim alleging insurer bad faith and unfair dealing is not within that category. "Mere allegations of bad faith or unreasonable and vexatious conduct, without more, however, do not constitute such a tort." 174 Ill. 2d at 528. One problem with this reasoning, however, is that, contrary to the majority's view of the issue, a claim for third-party insurer bad faith and unfair dealing does not come within this category, either. Contrary to the majority's statements, third-party coverage claims for bad faith are based, like first-party claims, on an implied duty arising from the insurance contract. See Olympia Fields Country Club v. Bankers Indemnity Insurance Co., 325 Ill. App. 649, 662 (1945); Cernocky v. Indemnity Insurance Co. of North America, 69 Ill. App. 2d 196, 206 (1966); Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027 (1979); Twin City Fire Insurance Co. v. Country Mutual Insurance Co., 23 F.3d 1175, 1178 (7th Cir. 1994) ("that duty [good faith] is founded on the insurance contract itself').

Furthermore, it is simply not true, as the majority asserts, that the good-faith "principle" is used only as a construction aid in determining the intent of contracting parties. 174 Ill. 2d at 524. It is well established that an insurance contract is one of adhesion. To that extent, the relationship of insured and insurer has elements reflective of a fiduciary relationship, and also bears the obligations attendant to that relationship. It is therefore incorrect for the majority to contend that good faith is no more than an aid to construal of a contract.

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As such, third-party bad-faith claims are no more separate and independent tort actions than are such claims in the first-party context. Moreover, this court has recognized that an insurer has an implied duty to act in good faith towards insureds with regard to settlement. Krutsinger v. Illinois Casualty Co., 10 Ill. 2d 518, 527-28 (1957). Notably, Ledingham v. Blue Cross Plan for Hospital Care of Hospital Service Corp., 29 Ill. App. 3d 339 (1975), relied on the existence of this same implied-in-law duty of good faith and fair dealing in the context of a first-party coverage claim. This court then later approvingly cited Ledingham for the proposition that the same conduct may both breach a contract as well as constitute a separate and independent tort. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 187 (1978).

Thus, the distinction that the majority seeks to draw between bad-faith claims in the first-party context and those in the third-party context does not withstand scrutiny. If bad-faith claims must fall in one area, because they are essentially creatures of contract, so must they fall in the other area. We thus swiftly approach the "slippery slope."

Furthermore, section 155, entitled "Attorney fees," speaks primarily to what statutory remedies are recoverable under the provision. The provision's language presumes the existence of either a coverage dispute, whether first or third party, a claims payment dispute, a loss payable dispute, or a delay in claims settlement. 215 ILCS 5/155 (West 1994). Such claims can encompass more than a breach of the insurance contract, and indeed, the provision is applied in fact to a broad range of claims against the insurer. See W.E. O'Neil Construction Co. v. National Union Fire Insurance Co., 721 F. Supp. 984 (N.D. Ill. 1989) (refusal to contribute to settlement); Keepes v. Doctors Convalescent Center, Inc., 89 Ill. App. 2d 36 (1967) (refusal to pay insured's creditors); Phillips v. Inter-Insurance Exchange of the Chicago Motor Club, 91 Ill. App. 3d 198 (1980) (auto liability insurer's refusal to stack med pay coverage).

Consequently, I believe the preemptive scope of section 155 is more appropriately distinguishable on the basis of the statutory remedies it provides, rather than on whether the conduct is independently based in tort or contract. Thus, I adhere to that increasing trend of majority opinions which hold that section 155 preempts attorney fees and punitive damages, but not compensatory damages. W.E. O'Neil Construction Co., 721 F. Supp. at 998; Chicago HMO v. Trans Pacific Life Insurance Co., 622 F. Supp. 489 (N.D. Ill. 1985); Calcagno v. Personalcare Health Management, Inc., 207 Ill. App. 3d 493 (1991); Kohlmeier v. Shelter Insurance Co., 170 Ill. App. 3d 643 (1988); McCall v. Health Care Service Corp., 117 Ill. App. 3d 107 (1983); Lynch v. Mid-America Fire & Marine Insurance Co., 94 Ill. App. 3d 21 (1981); Hoffman v. Allstate Insurance Co., 85 Ill. App. 3d 631 (1980); Schienfield v. American Family Mutual Insurance Co., 624 F. Supp. (N.D. Ill. 1985); American Dental Ass'n v. Hartford Steam Boiler Inspection & Insurance Co., 625 F. Supp. 364 (N.D. Ill. 1985); UNR Industries, Inc. v. Continental Insurance Co., 607 F. Supp. 855 (N.D. Ill. 1984); see also Kaniuk v. Safeco Insurance Co., 142 Ill. App. 3d 1070 (1986) (leaving question open as to compensatory damages); Debolt v. Mutual of Omaha, 56 Ill. App. 3d 111 (1978) (same).

In general, several factors support these decisions. For one, as mentioned, section 155

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specifically addresses attorney fees, costs of the action, and limited penalties. No mention is made in the provision of any compensatory remedies and, indeed, the provision is premised on the very existence of a "core" action against an insurer. See UNR Industries, 607 F. Supp. at 866 (language expressed belies intention to address problem of compensating insured for damages sustained). Further, this core action is not limited in terms of its legal basis, but only in terms of the factual nature of the alleged insurer misconduct. Second, it was not until 1977, two years following the Ledingham decision, that the legislature amended the statute to include specific limited penalties in addition to attorney fees. Thus, it may also be wrong to discount Ledingham, which only expanded bad-faith recovery beyond third-party coverage claims to punitive damages in the area of first-party coverage claims, for failing to mention section 155. See Kinney v. St. Paul Mercury Insurance Co., 120 Ill. App. 3d 294, 298 (1983). At the time that Ledingham was decided, section 155 did not include penalties per se and, thus, the provision posed no potential conflict with and was, therefore, inapplicable to the Ledingham analysis. See Emerson, 223 Ill. App. 3d at 935; but see American Dental, 625 F. Supp. at 368 (provision was at least punitive in nature at enactment). Additionally, I note that many of the cases which later discounted Ledingham suffer from inconsistencies in their own approach (see UNR Industries, 607 F. Supp. at 867), or they either simply cite precedent without engaging in analysis.

Also, close examination of the legislative history of section 155 reveals that there was no legislative intent that the provision cover compensatory claims. See UNR Industries, 607 F. Supp. 855. Furthermore, the Hall! Cunningham preemption analogy relied on by the majority does not diminish the strength of these several factors because subsequent authorities have shown that that preemption analogy is incomplete. See Barr Co. v. Safeco Insurance Co. of America, 583 F. Supp. 248, 255 (N.D. Ill. 1984).

Finally, even the majority recognizes the utility of a bad-faith tort cause of ,action in the realm of third-party coverage. 174 Ill. 2d at 525-26. Insureds may be exposed to damages beyond the value of their contract, and for which, otherwise, they may not recover. I am not at all convinced, as is apparently the majority, that the same reasoning fails to hold sway within the context of first-party coverages simply because an insured there can sue for proceeds due under the policy and seek attorney fees and penalties for insurer misconduct limited to $25,000. I can easily conceive of scenarios where, for instance, a small homeowner insured places trust in his first-party coverage property insurer to his detriment at a cost far beyond contract compensatory damages and the provision's limited statutory penalties. It makes no sense, in terms of the balance of society's interests, that a small policy insured may have sufficient remedies in one instance, but not in the other.

As a final matter, I would hold, contrary to the majority's reasoning, that the suit limitation clause here applies to bar plaintiffs attempted fraud action. The clause refers to actions against the insured and is not limited only to actions upon the policy. As a result, this alleged action, whether sounding in fraud, contract, or bad faith, does not survive the bar.

Separate opinion (dissenting)

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JUSTICE HARRISON, (dissent)

JUSTICE HARRISON,

dissenting:

The majority has made a basic analytical error that is probably inadvertent but certainly unfair.

The issue before the circuit and appellate courts was whether plaintiffs pro se claim against its insurer for common law fraud was preempted by section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 1994)) or time-barred by a limitations provision contained in the insurance policy. This issue was raised in the context of a motion for summary judgment under section 2 - 1005 of the Code of Civil Procedure (735 ILCS 5/2 - 1005 (West 1994)), and both the circuit and appellate courts concluded that neither the Code section nor the contractual limitations provision defeated plaintiffs claim. Accordingly, the circuit court denied summary judgment, and the appellate court affirmed on a Rule 308 appeal (155 Ill. 2d R. 308).

My colleagues now reverse and remand with directions to enter summary judgment in favor of the insurer. That decision, however, has nothing to do with the lower courts' reasoning. The majority agrees that section 155 of the Code does not preempt a common law fraud claim, and they decline to reach the limitations question. The reason my colleagues believe that summary judgment should be entered in favor of the insurer on plaintiffs common law fraud claim is simply that the allegations in plaintiffs complaint are insufficient to state such a claim.

The problem with this approach is that it overlooks how summary judgment is supposed to work. Contrary to the majority's apparent belief, summary judgment cannot be used to challenge the sufficiency of a plaintiff's complaint. The reason is simple. As this court has repeatedly held, a motion for summary judgment assumes that a cause of action has been stated. Delgatto v. Brandon Associates, Ltd., 131 Ill. 2d 183, 190 (1989); Janes v. First Federal Savings & Loan Ass'n, 57 Ill. 2d 398, 406 (1974). If the existence of a valid cause of action is assumed by the motion, granting the motion on the theory that a cause of action has not been properly stated, as the majority does here, is illogical.

Although we can affirm the judgment of a lower court on any grounds called for by the record (Leonard! v, Loyola University, 168 Ill. 2d 83, 97 (1995)), we should be reluctant to reverse for reasons that were not raised below, and the logical inconsistency of the majority's opinion is a good illustration of why that is so. What makes the majority's mistake especially troublesome to me is that it has left the plaintiff with no means for salvaging his case. This is not a situation where the plaintiff elected to stand on his pleadings after they were dismissed by the trial court. As previously noted, the sufficiency of the pleadings did not become an issue until now, and until now, the plaintiff had no reason to believe that his common law fraud allegations required modification. Now that the pleading defects cited by the majority have been brought to the plaintiff's attention, there is every reason to believe that he would be able to cure them if given the opportunity.

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By remanding with directions to enter judgment in favor of the insurer, the majority has denied plaintiff that opportunity. Such a result is incompatible with the principle that a cause of action should not be dismissed on the pleadings unless it is clearly apparent that no set of facts can be proven which would entitle a plaintiff to relief. Grzeszczak v. Illinois Farmers Insurance Co., 168 Ill. 2d 216, 223 (1995). If, by amendment, a plaintiff can state a cause of action, a case should not be dismissed with prejudice on the pleadings. Bowe v. Abbott Laboratories, Inc., 240 Ill. App. 3d 382, 389 (1992).

The majority's result likewise contravenes the summary judgment statute. Subsection (g) of that statute expressly provides:

"Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2 - 1005(g) (West 1994).

Under my colleagues' analysis, this statutory right to amend has been nullified.

A situation similar to the one present here was addressed by the appellate court in Sinclair v. State Bank, 226 Ill. App. 3d 909 (1992). There, the circuit court refused to dismiss the plaintiff's complaint, but on a Rule 308 appeal (134 Ill. 2d R. 308), the appellate court reversed, holding that the trial court should have dismissed plaintiff's complaint on the pleadings. No remand was ordered. When the plaintiff subsequently attempted to amend his complaint in the circuit court to cure the pleading defects, the defendant objected, arguing that the appellate court's reversal, without remand, constituted an adjudication on the merits, leaving the trial court without power to take further action in the case.

Although the trial court agreed with the defendant, the appellate court subsequently reversed. It held that where a defendant brings a Rule 308 appeal involving pleadings that were not dismissed on the trial level and the complaint is found to be fatally deficient for the first time on that appeal, the plaintiff should still be allowed to amend his complaint "unless the Rule 308 appellate opinion necessarily forecloses all theories of recovery." 226 Ill. App. 3d at 915.

The majority's disposition here clearly does not foreclose all theories of recovery. It merely holds that the existing pleadings are inadequate to state a cause of action. For the reasons set forth above, the court is therefore wrong to reverse and remand with directions that judgment be entered in favor of the insurer. Plaintiff should be afforded the chance to plead again. Accordingly, I dissent.

CHIEF JUSTICE BILANDIC joins in this dissent.

Crane v. Admiral Insurance Co., 2013 IL App (1st) 093240-B

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 2013-06-04 · Opinion
Published opinion

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Where the memo cites it

- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 35: passage C060.3
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 35: passage C060.3
- memo p. 14 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 35: passage C060.3

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ILLINOIS OFFICIAL REPORTS

Appellate Court

***John Crane, Inc. v. Admiral Insurance Co.*, 2013 IL App (1st) 093240-B**

Appellate Court Caption	JOHN CRANE, INC., Plaintiff-Appellant and Cross-Appellee, v. ADMIRAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY, LUMBERMENS MUTUAL CASUALTY COMPANY, and TWIN CITY FIRE INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYDS OF LONDON, and CERTAIN LONDON MARKET INSURANCE COMPANIES, Including Excess Insurance Company, Ltd., General Reinsurance Corporation, River Thames Insurance Company, World Auxiliary Insurance Corporation, and John Does 1 Through 400, Defendants (Allianz Underwriters Insurance Company, Allstate Insurance Company, AIU Insurance Company, American Re-Insurance Company, Granite State Insurance Company, Lexington Insurance Company, National Surety Corporation, National Union Fire Insurance Company of Pittsburgh, PA, Insurance Company of North America, and TIG Insurance Company, Defendants-Appellees; Columbia Casualty Company, Continental Casualty Company, and The Continental Insurance Company, Defendants-Appellees and Cross-Appellants).
District & No.	First District, Second Division Docket No. 1-09-3240
Filed	June 4, 2013

Held

(*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)

In a complex action arising from a dispute over the primary, excess and umbrella insurance coverages for asbestos-related claims against plaintiff, the trial court properly held that the horizontal exhaustion doctrine required plaintiff to prove that all of its primary policy limits were exhausted before any umbrella and excess insurers had to contribute, regardless of the agreement under which plaintiff and its primary insurer attempted to renegotiate those limits in view of plaintiff's no-settlement policy with regard to asbestos claims, all triggered excess or umbrella policies would be jointly and severally liable, and plaintiff would not be required to prove all three of the triggers for asbestos coverage outlined in *Zurich*; rather, coverage would be triggered by proof of exposure, sickness or disease.

Decision Under Review

Appeal from the Circuit Court of Cook County, No. 04-CH-08266; the Hon. Dorothy Kirie Kinnaird, Judge, presiding.

Judgment

Affirmed in part and reversed in part; cause remanded with directions.

Counsel on Appeal

Kevin M. Forde, Ltd. (Kevin M. Forde and Joanne R. Driscoll, of counsel), Nisen & Elliott LLC, both of Chicago (Michael J. Daley and Claire E. Gorman, of counsel), and Farella Braun & Martell, LLP, of San Francisco, California (John L. Cooper, Dennis M. Cusack, and Erica Villanueva, of counsel), for appellant.

Troutman Sanders LLP (Rebecca L. Ross, Clinton E. Cameron, David F. Cutter, and Stephanie L. Haas, of counsel), Bates Carey Nicolaides, LLP (Catherine M. Crisham, Kristi S. Nolley, Ellen J. Zabinski, and Agelo L. Reppas, of counsel), SmithAmundsen LLC (Timothy J. Fagan and Michael L. Resis, of counsel), Clausen Miller P.C. (Mary F. Stafford, Colleen A. Beverly, and Melinda S. Kollross, of counsel), Cozen & O'Connor (John D. LaBarbera, of counsel), and Hughes Socol Piers Resnick & Dym, Ltd., all of Chicago (Robert R. Anderson III, John Hughes, and Daniel A. Waitzman, of counsel), for appellees.

Panel

PRESIDING JUSTICE HARRIS delivered the judgment of the court, with opinion.

Justices Quinn and Connors concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff John Crane, Inc. (Crane), appeals the circuit court's judgment on its first amended complaint against defendants Columbia Casualty Company, Continental Casualty Company, Continental Insurance Company (collectively referred to as CNA), TIG Insurance Company (TIG), Allianz Underwriters Insurance Company, Munich Reinsurance America, Inc., f/k/a American Re-Insurance Company, National Surety Corporation (collectively referred to as Allianz), Allstate Insurance Company, and AIU Insurance Company, Granite State Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA (collectively referred to as AIG-related Companies), seeking a declaration of rights.[1] On appeal, Crane contends the trial court erred in (1) finding that the parties could not use the agreement concerning coverage (ACC) to determine that Kemper's primary policies had been exhausted by November 2004; (2) determining that a *pro rata* allocation of payments by excess and umbrella insurers applies, rather than an "all sums" allocation; and (3) finding that *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23 (1987), requires Crane to prove all three trigger dates to prove exhaustion of its primary policies. CNA defendants also filed a cross-appeal in which it alleges that the trial court erred in (1) determining that mere exposure to asbestos constitutes bodily injury under *Zurich*; and (2) failing to adopt an equitable continuous trigger.

¶ 2 In an opinion filed on March 5, 2013, this court affirmed the trial court in part, reversed in part and remanded with directions. The CNA and Allianz defendants filed petitions for rehearing, which this court granted. Crane filed a response and the CNA and Allianz defendants filed their replies. Upon consideration of the petitions for rehearing, we issue the following opinion and affirm in part, reverse in part and remand with directions.

¶ 3 JURISDICTION

¶ 4 The circuit court entered an order on November 13, 2009, resolving all claims pled in Crane's first amended complaint, and all but one of defendants' counterclaims. The order stated that there was "no just reason for delaying either enforcement or appeal." Crane filed a notice of appeal on November 25, 2009. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 304(a) governing appeals that do not dispose of an entire

[1]Other defendants are not parties to this appeal or cross-appeal.

proceeding. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).[2]

¶ 5 BACKGROUND

¶ 6 The trial court in this matter presided over intensive discovery, heard more than 25 summary judgment motions, and conducted two trials during a period of almost five years. It issued six detailed memorandum opinions and orders, and the record contains over 200 volumes. We have set forth only those facts necessary to resolve the issues on appeal and cross-appeal.

¶ 7 Crane manufactures sealing systems and prior to 1986, it manufactured gaskets containing asbestos. From January 1, 1944, through August 1, 2001, Crane purchased primary insurance coverage from Kemper, which is not a party to this appeal. These policies contained a duty to defend and provided that defense costs would be paid in addition to the policy limits. The parties to this appeal stipulated that the limits of Kemper's primary policies totaled $41,075,000.

¶ 8 Crane also purchased umbrella insurance coverage above the primary coverage. CNA issued umbrella policies to Crane from 1961 to 1967, and from 1978 to 1981. Allianz issued an umbrella policy for the period between November 30, 1981, to November 30, 1982, and TIG issued an excess policy above Allianz's umbrella policy for that same period. Kemper also issued three umbrella policies to Crane above its primary insurance from 1967 to 1977.

¶ 9 Since 1979, Crane has been named as a defendant in over 250,000 asbestos-related bodily injury claims throughout the United States. Kemper began defending Crane in these suits and agreed to adopt a no-settlement policy based on Crane's position that their products were not the likely source of the victims' asbestos-related disease. In 2001, facing financial difficulty, Kemper attempted to renegotiate the no-settlement policy with Crane. On January 7, 2002, the parties entered into the ACC. The purpose of the ACC was to resolve "the questions and issues addressed herein relating to the existence and handling of coverage for John Crane for Asbestos-Related Claims." The ACC addressed retroactive amendments to Kemper's primary policies issued from January 1, 1987 to August 1, 2001 (post-1986 policies). Crane did not have umbrella or excess insurance coverage by defendant insurers for this period. The ACC provided that although the original policies issued by Kemper allowed only for indemnity payments to erode the policy limits, the retroactive amendments provided that the post-1986 policy limits would be eroded by payments of both damages and defense expenses. As the trial court stated in its October 16, 2007, order, "the Post-1986 Policies' limits changed from $2 million per year plus unlimited defense to $2 million per year including defense." The ACC further provided that Kemper issue a new $70 million supplemental

[2]In its appellee brief, CNA raises the issue that this court lacks jurisdiction to consider Crane's appeal because a prior appeal was dismissed for failure to prosecute. Although this court had filed a judgment on July 19, 2011 and August 30, 2011, dismissing the appeal for lack of jurisdiction, the supreme court issued a supervisory order directing this court to vacate its order and "reinstate the appeal, and to consider the case on the merits." *John Crane, Inc. v. Admiral Insurance Co.*, No. 113200 (Ill. Jan. 11, 2012) (supervisory order).

excess policy (SEP) to Crane and that Kemper agreed to continue with the no-settlement strategy.

¶ 10 On January 7, 2002, the parties also entered into the Caruolo agreement, which involved a case originating in New York. The dispute centered on the payment of $5.83 million in prejudgment interest in the case. The agreement provided that the payment could be allocated against Kemper's pre-1987 policy limits in exchange for $5 million being added to the limits of the post-1986 Kemper policies.

¶ 11 Crane filed a claim for declaratory judgment in May 2004. On October 22, 2004, it filed its first amended complaint containing three counts. Count I sought a declaration that Crane's primary insurance coverage was exhausted. Counts II and III sought a declaration of the obligations of the umbrella and excess insurance carriers as to the underlying asbestos claims. CNA filed a counterclaim for declaratory judgment, seeking a determination of the appropriate triggers for coverage, that CNA is entitled to a *pro rata* allocation of payments, and that Crane's primary coverage limit had not been exhausted.

¶ 12 In February 2005, citing *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23 (1987), Crane filed a motion for partial summary judgment arguing that an "all sums" allocation of payments is appropriate whereby each umbrella policy triggered by a claim must pay up to its policy limits. CNA filed a response claiming an affirmative defense. Allianz filed a cross-motion arguing, in part, that the "all sums" allocation was contrary to the terms of its umbrella policy and was not equitable as applied to umbrella insurers. On April 12, 2006, the trial court issued an order determining that a *pro rata* allocation applied to the excess and umbrella carriers, pointing out that *Zurich* involved only primary insurers. The court denied Crane's motion for partial summary judgment on count I of its first amended complaint seeking an "all sums" allocation. The court granted Allianz's cross-motion for partial summary judgment on the issue of *pro rata* allocation and CNA's affirmative defense in seeking a *pro rata* allocation.

¶ 13 The trial court also found that, regarding the ACC, Crane and Kemper could retroactively amend their post-1986 policies without consulting nonprimary insurers because none of those insurers issued policies to Crane after 1986. In the trial court, Kemper and Crane argued that under the terms of the ACC, Kemper's primary insurance was exhausted in November 2004. The trial court, however, decided that it could not rule on this issue until it determined the validity of the ACC and resolved issues of good faith and intent of the parties in entering the agreement. The court also directed the parties to brief the issue of severability of the agreement in case one or more provisions proved invalid.

¶ 14 The trial court subsequently found that sections five and six of the ACC, which deal specifically with issues of trigger, allocation, and cost recovery from other insurers, were severable. It determined that the "core purpose" of the ACC was to resolve the no-settlement strategy issue between Kemper and Crane, and the parties would have entered into the agreement even without those provisions.

¶ 15 The trial court also decided that it would hold an exhaustion trial in the future to determine whether Kemper's primary policies had been exhausted. If, during the exhaustion trial, sections five and six were found to be void, those sections could be severed without

affecting the rest of the ACC. The trial court concluded that "Crane may use the ACC in demonstrating exhaustion at the Exhaustion Trial. Whether the primary layer of coverage is exhausted will be determined after the Exhaustion Trial based upon the principles of the doctrine of horizontal exhaustion."

¶ 16 After the trial court issued its April 12, 2006, order, certain excess carriers including TIG filed a joint motion to extend the court's ruling adopting a *pro rata* allocation to their excess policies. The trial court granted their motion on June 21, 2006.

¶ 17 On October 30, 2006, Crane and Kemper entered into another agreement (2006 settlement). Crane agreed to release Kemper from all potential remaining obligations under its primary policies and its umbrella policies for a lump sum totaling more than $20 million. The 2006 settlement also contained a provision in which Crane agreed to undertake any obligations Kemper would have had under the primary policies. As the trial court noted, "Crane concedes that as a result of the 2006 Settlement, Crane stands in the shoes of Kemper."

¶ 18 On October 16, 2007, the trial court issued an order that determined whether Crane, in standing in the shoes of Kemper, may rely on policy limits as established by the ACC to prove exhaustion, or whether it was obligated to prove exhaustion of Kemper's original policy limits. Relying on *United States Gypsum Co. v. Admiral Insurance Co.*, 268 Ill. App. 3d 598 (1994) (hereinafter *U.S. Gypsum*), *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, 355 Ill. App. 3d 275 (2005), *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 368 Ill. App. 3d 665 (2006) (*Kajima I*), and *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563 (2006), the trial court held that the horizontal exhaustion doctrine applied. The doctrine is based on the "other insurance" provision of excess insurer policies, which "require[ ] the insured to exhaust all triggered primary insurance before pursuing coverage under the excess policies." The trial court cited the above cases to support its finding that insureds cannot "choose to make policies unavailable" for application of the horizontal exhaustion doctrine.

¶ 19 The trial court reasoned that Crane's argument "assert[s] that Kemper's original policy limits are unavailable for purposes of exhaustion because of the ACC [*sic*] and the 2006 Settlement retroactively amended the Post-1986 Policies and it is those amendments that control." Therefore, "the original policies' limits of liability are no longer available." The court held that "Crane cannot make the original limits of liability to primary insurance unavailable simply by retroactively amending policy terms. *** [I]n order for the umbrella or excess coverage to be triggered, the insured must show that the full limits of the policies as originally written are exhausted." The original limits on these policies were $2 million per year excluding defense costs.

¶ 20 On December 20, 2007, after holding a medical trial, the trial court confirmed the continued applicability of "*Zurich*'s holding that exposure to asbestos constitutes bodily injury and thus, the policies in effect during the exposure years are triggered." It rejected Crane's argument for a continuous trigger because after presentation of the evidence the court could not "conclude that in every case there is a progression of continuing body injury between the time a claimant's exposure to asbestos ceases and the time the claimant is

diagnosed with the disease." Therefore, the trial court applied *Zurich*'s triple trigger. "Insurance policies in effect during the years of exposure, during the years of sickness, and during the years of manifestation (through duration) of the disease will be triggered." However, it determined that "any mutations that may occur between the last day of exposure and the first day of symptoms[ ] do not constitute a new injury or sickness to which the policies must respond."

¶ 21 The trial court's orders up to this point determined that (1) there was a single occurrence; (2) it would use *Zurich*'s triple trigger to determine exhaustion of Kemper's primary policies; (3) the doctrine of horizontal exhaustion applied; and (4) Crane must "stand in the shoes" of Kemper in demonstrating exhaustion of the primary policies as they were originally issued. The trial court set a date for a bench trial (exhaustion trial) to determine whether Crane sufficiently proved that payments of the first 67 claims exhausted Kemper's primary policies in effect from 1944 to 2001.

¶ 22 The parties stipulated to Kemper's original primary policy limits of $41,075,000 and that payments of $37,065,259 have been made on 54 of the 67 claims at issue. The 13 payments in dispute total $14,804,583. Prior to trial, Crane presented two witnesses who testified as to the disputed payments. The disputes centered on the "amount paid and the amount allocated for indemnity or prejudgment interest or delay damages." After presentation of the evidence, the trial court determined that Crane failed to prove six of the disputed payments, totaling $8,832,467.

¶ 23 At the exhaustion trial, Crane had the burden of proving trigger dates and allocation. In its memorandum opinion and order of March 10, 2009, the trial court outlined the following facts. Crane presented Mr. Jones as its sole expert witness. Mr. Jones testified as to the trigger dates, allocation of the 67 adverse asbestos claims at issue, and to what extent Kemper's primary policies were exhausted by payments of these claims. Although the discovery process yielded 500 boxes of documents, CNA's counsel, along with consultant Dr. Anne Gron, reduced the documents used to four boxes. CNA did not retain Dr. Gron as an expert witness and no one with first-hand knowledge testified at trial as to the reduction process. The trial court noted that although this is the third time Mr. Jones has testified about insurance allocations, it "is the first time he testified where he did not participate in, collect, or supervise the collection of the data that supports his allocation. This is also the first time that Mr. Jones has testified to an insurance allocation based upon data collected by opposing counsel and opposing counsel's experts."

¶ 24 The trial court found that Mr. Jones' allocations suffered from "methodological and procedural defects" such that he "did not complete, participate in, or supervise a true, independent, expert review of the underlying claim materials." The trial court specifically noted four areas of concern. "First, Mr. Jones did not seek to determine or independently confirm whether the four boxes were a representative or relevant sample of the universe of 500 boxes. *** Second, Mr. Jones relied on everything in the four boxes without question [as to their reliability or trustworthiness]." Third, Mr. Jones used Dr. Gron's dates even though he had never spoken to or met her. Although he knew that she had not previously performed an insurance allocation, he accepted her dates "the majority of the time *** even in those instances when the document or his protocol dictated that he should select another

date." Fourth, Mr. Jones only reviewed materials contained in the four boxes selected by CNA's counsel and Dr. Gron because he was instructed to do so by Crane's counsel. Mr. Jones testified that he would have reviewed the entire 500 boxes of material if asked to do so. The trial court also found that some of the documents relied upon by Mr. Jones were untrustworthy and unreliable.

¶ 25 The trial court also found that Crane did not satisfy its burden of proving that Kemper's primary policies had been exhausted by the 67 claims. It reasoned that Crane's expert, Mr. Jones, was not credible given the limitations Crane imposed on him and his allocation "was based on incomplete information which the Court found to be largely untrustworthy." Therefore, reliable trigger dates could not be ascertained from Mr. Jones' testimony and Crane could not prove whether certain primary policies were triggered for coverage. Since Crane did not prove exhaustion of the primary policies, defendants at this time "have no coverage obligations to Crane under their respective umbrella and excess policies. Under these circumstances, the Court need not reach the legal issues raised by the parties nor address the relief request in" defendants' counterclaims.

¶ 26 However, the trial court did find that the claim of Bernard Mayer was sufficiently proved. The parties stipulated to the exposure, sickness, and diagnosis dates. Therefore, the trial court determined that "[t]he Kemper primary policies in effect from January 1, 1944, to December 31, 1944, and from January 1945 to December 31, 1945, are eroded by the stipulated paid indemnity of $1,329,795 to the Mayer claim on a *pro-rata* allocation."

¶ 27 The trial court also addressed CNA's motion to reconsider its ruling in the medical trial that *Zurich*'s triple trigger applied. Citing as support cases from New York[3] and England, CNA asked the trial court "to hold that (1) mere exposure does not constitute 'bodily injury;' (2) there is no 'bodily injury' for mesothelioma claims more than six years before death; (3) there is no 'bodily injury' for lung cancer more than 10 years from symptoms or death; and (4) Crane may use the legal fiction of an 'equitable continuous trigger' in the absence of proof on the timing of actual injury for non-malignant claims." The CNA argued that the New York and English cases "reflect a growing consensus that mere exposure does not constitute bodily injury for insurance purposes." The trial court denied the request, finding that the CNA presented no newly discovered evidence, change of law, or errors in the court's earlier application of the law. Crane filed this timely appeal and CNA filed a cross-appeal.

¶ 28 ANALYSIS

¶ 29 As an initial matter, we address TIG's motion to strike portions of Crane's opening brief which we have taken with the case. TIG argues that Crane's use of 30 footnotes, many of which contain substantive arguments, violates Illinois Supreme Court Rule 341(a) (eff. July 1, 2008). TIG also contends that Crane violated Illinois Supreme Court Rules 341(h)(2) and (6) (eff. July 1, 2008) by misstating the facts and including arguments in its introductory paragraph. TIG requests that this court strike all footnotes, as well as any misstatements and

[3] *Continental Casualty Co. v. Employers Insurance Co. of Wausau*, 865 N.Y.S.2d 855 (N.Y. Sup. Ct. 2008).

misplaced arguments. We acknowledge TIG's position that substantive arguments belong in the body of the brief, and its concern that Crane was attempting to evade the 70-page limit set by this court. We also note that the case involves complex issues and numerous motions from Crane and defendants. We deny TIG's motion to strike portions of Crane's opening brief. However, we will disregard any inappropriate or unsupported material, and any substantive arguments contained only in the footnotes. *Tekansky v. Pearson*, 263 Ill. App. 3d 759, 763 (1994); *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 171 (2008).

¶ 30 TIG also argues that Crane waived consideration of the language in its excess policy because Crane did not specifically address TIG's policy in the trial court. TIG further argues that in its brief Crane requested reversal of the trial court's *pro rata* ruling in favor of umbrella carriers but neglected to mention excess carriers. Therefore, Crane waived the issue as to excess carriers such as TIG. These issues of law have been fully briefed by the parties on appeal. It is also reasonable to presume that Crane's failure to include excess carriers in its *pro rata* issue was a minor error in a complex case. The waiver rule "is a limitation on the parties and not the jurisdiction of the courts." *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 11 (1996). Therefore, we choose to address these issues on the merits.

¶ 31 I. ACC

¶ 32 Crane first contends that the trial court erred in finding that the parties could not use the ACC to determine that Kemper's primary policies had been exhausted by November 2004. Crane argues that if this court finds that the ACC properly amended the limits of Kemper's primary policies, defendants concede that exhaustion occurred in November, 2004. This concession is found in the CNA defendants' reply to its motion for partial summary judgment seeking a declaration that Crane must stand in the shoes of Kemper and the original policy limits in proving exhaustion of the primary policies. Therein, CNA states a position it might take for the sake of argument if the trial court finds in favor of Crane on the ACC issue. CNA noted that "even without the ACC, under a *Zurich v. Raymark* trigger, Crane can demonstrate that exhaustion occurred by November, 2004." However, in the accompanying footnote CNA explicitly states that "[i]f the Court's judgment is overturned on appeal, the CNA Defendants reserve the right to argue that the ACC is not in good faith and that exhaustion has not occurred." Therefore, defendants did not concede without qualification that Crane has proved exhaustion under the ACC and we will address this issue on the merits.

¶ 33 On appeal, the main point of contention between the parties regarding the ACC is whether its provision allowing previously excluded defense costs to erode the policy limits applies to prove exhaustion, or whether the original policy limits still apply. In its April 12, 2006, order the trial court found that Kemper and Crane could enter into an agreement (ACC) retroactively amending Kemper's post-1986 policies, since no excess insurers issued policies to Crane after 1986 and their rights therefore were not affected. The trial court questioned the validity of sections five and six of the ACC, but determined in its November 20, 2006, order that those sections are severable without affecting the remainder of the ACC and other agreements. It further determined that "Crane may use the ACC in demonstrating exhaustion at the Exhaustion Trial. Whether the primary layer of coverage is exhausted will

be determined after the Exhaustion Trial based upon the principles of the doctrine of horizontal exhaustion." In 2004, Crane agreed to fully release Kemper's liability under its primary policies in exchange for payment of $10 million. In 2006, Crane entered into a second settlement agreement, releasing Kemper from all remaining obligations under both its primary and excess policies. Both settlements provided that the ACC was still in effect. See *John Crane Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 696 (2009).

¶ 34 In challenging the validity of the ACC on appeal, CNA defendants argue only that Kemper and Crane did not enter into the ACC in good faith. Instead, the ACC was intended "to result in the premature exhaustion of the Kemper primary policies to the prejudice of the excess carriers." In alleging a bad-faith claim, defendants must show that Kemper and Crane owed the excess insurers a duty to act in good faith. See *Haddick v. Valor Insurance*, 198 Ill. 2d 409, 417 (2001) ("[t]o survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith"). Whether a duty exists under a particular set of facts is a question of law for the courts to decide. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 116 (1995).

¶ 35 The duty to settle in good faith arises "when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." *Haddick*, 198 Ill. 2d at 417. Furthermore, the duty does not arise until a third party "demands settlement within policy limits." *Id*. In the case at bar, the injured parties' demands for settlement greatly exceed the primary policy limits. Therefore, pursuant to *Haddick*, no plausible claim of bad faith can be made against Kemper and Crane. Both the trial court and CNA defendants rely on *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562 (1999), to support the position that primary insurers owe a duty to excess insurers to act in good faith. However, *Schal Bovis* involved an action filed by an excess insurer against four primary insurers which had refused to settle an action against the insured for an amount under the primary policies' limits. The appellate court held that an excess carrier may bring a cause of action against a primary carrier for bad-faith refusal to settle. *Schal Bovis*, 314 Ill. App. 3d at 571. As in *Haddick*, *Schal Bovis* only concerned an alleged bad faith refusal to settle. ↩ memo p. 6, 11, 14

¶ 36 All appellee insurers complain that Kemper and Crane refused to settle claims made against Crane even when they were well founded. However, as previously pointed out, Crane has been named as a defendant in over 250,000 asbestos-related bodily injury claims throughout the United States. Further, at the exhaustion trial, the parties stipulated that Kemper had primary policy limits of $41,750,000 for the period from 1944 to 2001. Under the circumstances, it cannot plausibly be argued that Crane and Kemper's no-settlement policy resulted in the policies of the umbrella or excess insurance carriers being prematurely implicated due to Crane's and Kemper's bad-faith refusal to settle. Consequently, neither *Haddick* nor *Schal Bovis* supports appellees' arguments.

¶ 37 Crane asserts that Kemper and Crane entered the ACC to address issues arising from Kemper's defense of Crane in the underlying asbestos litigation. The ACC amended Kemper's post-1986 primary policies to include previously excluded defense costs in the policy limits, and to establish Kemper's commitment to a no-settlement strategy. Crane argues that parties to an insurance contract may amend the terms of the policy, and the excess

carriers are not parties to the insurance contract between Kemper and Crane, or to the ACC. Furthermore, there is no evidence that the umbrella or excess carriers relied on any representations made by Crane or Kemper after 1986. See *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 1000-01 (2005). Crane argues that the excess carriers therefore lack "contractual standing to object to the ACC's defense cost terms relating to Kemper's post-1986 policies." Crane argues that the trial court correctly determined that "Crane may use the ACC in demonstrating exhaustion."

¶ 38 We are not persuaded by Crane's contention that the excess carriers lack standing to object to the ACC. "The doctrine of standing ensures that issues are raised only by parties having a real interest in the outcome of the controversy." *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 35. A party demonstrates standing by showing some injury to a legally cognizable interest. *Id*. The ACC explicitly amended the limits of Kemper's primary policies from $2 million per year excluding defense costs to $2 million per year including defense costs. This change in the primary policy limits clearly affects a legally cognizable interest of the excess and umbrella insurers.

¶ 39 The trial court determined whether policy limits under the original policies or under the policies as amended by the ACC applied to prove exhaustion. Pursuant to the 2006 settlement agreement, Crane released Kemper from all potential remaining obligations under Kemper's primary and umbrella policies for a lump-sum payment. In return, Crane agreed to undertake any obligations Kemper might have had under the policies. The trial court determined that although Crane could use the ACC to show exhaustion, it was responsible for the limits as provided for in Kemper's original policies, not as amended by the ACC or the settlement agreement.[4] It based its determination on the doctrine of horizontal exhaustion, citing *U.S. Gypsum*'s language that the insured "must exhaust all available primary coverage before proceeding against an excess carrier when that carrier's policy contains an 'other insurance' clause." *United States Gypsum Co. v. Admiral Insurance Co.*, 268 Ill. App. 3d 598, 654 (1994). The trial court concluded that the horizontal exhaustion doctrine does not allow an insured and its primary insurer to make the original policy limits unavailable simply by entering into agreements that retroactively amend the policies.

¶ 40 Our supreme court addressed the horizontal exhaustion doctrine most recently in *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102 (2007) (*Kajima II*). The underlying claim in *Kajima* involved a worker injured on a construction site. The worker sued the general contractor, Kajima. Kajima tendered the claim to St. Paul Fire & Marine Insurance Company. St. Paul eventually paid $2 million of the $3 million settlement. Kajima also had a primary commercial general liability (CGL) policy with Tokio Marine & Fire Insurance. Tokio paid its $1 million policy limits as part of the settlement. Tokio and Kajima then filed a declaratory judgment action against St. Paul seeking reimbursement of the $1 million, arguing that Kajima's selective tender of the entire claim

[4]The 2006 settlement agreement states that the applicable limits of Kemper's primary policies "have been exhausted" and payments of approximately $60 million have been made under Kemper's excess policies.

to St. Paul made the Tokio policy unavailable.

¶ 41 The appellate court affirmed the circuit court's entry of summary judgment for St. Paul and against Tokio. In doing so, the appellate court held:

> "The requirement of horizontal exhaustion has been addressed and applied by Illinois courts on several occasions. *United States Gypsum*, 268 Ill. App. 3d at 598; *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 283 Ill. App. 3d 630, 642-43 (1996); *Roman Catholic Diocese of Joliet, Inc. v. Lee*, 292 Ill. App. 3d 447, 456-57 (1997); *Missouri Pacific R.R. Co. v. International Insurance Co.*, 288 Ill. App. 3d 69, 80-81 (1997); *Illinois Central R.R. Co. v. Accident & Casualty Co. of Winterthur*, 317 Ill. App. 3d 737, 753 (2000); *Maremont Corp. v. Continental Casualty Co.*, 326 Ill. App. 3d 272, 279-80 (2001). In each case, this court held that the insured must first exhaust all available primary insurance coverage, including uninsured periods and self-insured periods, before an excess policy could be invoked." *Kajima I*, 368 Ill. App. 3d at 670.

¶ 42 In affirming the appellate court, the supreme court discussed the nature of excess insurance and the horizontal exhaustion doctrine, which "originated in cases involving a continuous tort or long-term environmental and hazardous waste claims." *Kajima II*, 227 Ill. 2d at 113. The court explained that "when excess insurance exists as part of an overall insurance package, it provides a secondary level of coverage to protect the insured where a judgment or settlement exceeds the primary policy's limits of liability. [Citation.] Excess insurance coverage attaches only after a predetermined amount of primary insurance or self-insured retention has been exhausted. [Citation.] Consequently, until the limits of primary coverage are exhausted, secondary coverage does not provide any collectible insurance. [Citation.] Once an excess policy is triggered in a case, the limits of the primary insurance must be exhausted before the excess carrier will be required to contribute to a settlement or judgment." (Internal quotation marks omitted.) *Kajima II*, 227 Ill. 2d at 114-15. Further, citing the holding in *U.S. Gypsum*, the court explained that excess policies may provide that they are excess to " 'all triggered primary policies, regardless of whether they extend over multiple policy periods or only one.' " (Emphasis omitted.) *Kajima II*, 227 Ill. 2d at 114 (quoting *U.S. Gypsum*, 268 Ill. App. 3d at 653). The holding in *Kajima II* fully supports the trial court's ruling that, at the exhaustion trial, Crane had to prove that Kemper (and therefore Crane) had exhausted all the triggered primary policies before the umbrella or excess carriers would be required to contribute to any settlement or judgment.

¶ 43 Crane argues that as the appellee umbrella and excess insurers did not provide coverage for periods after 1986 and they did not rely on any representations made by Crane or Kemper after 1986, they cannot accuse Crane or Kemper of bad faith for entering into the 2002 ACC. Indeed, Crane argues that the umbrella and excess carriers greatly benefitted by Kemper providing primary and excess insurance to Crane after 1986. This argument, although factually true, misses the point. As explained in *Kajima II*, the horizontal exhaustion doctrine requires Crane to prove that all of the triggered primary policies had been exhausted before the umbrella or excess carriers could be required to contribute to any settlement or judgment. Crane fails to cite any case for the proposition that, after a primary policy has been triggered, an insured and a primary insurer may make an agreement which lessens the amount of primary insurance required to be exhausted before umbrella or excess insurance policies are

implicated. In the trial court, Crane argued that, as of their 2004 settlement agreement with Kemper, not only were all primary insurance policies triggered, they were exhausted. Crane, however, made no argument that any of its primary policies were not triggered at the time they entered into the ACC. We affirm the trial court's holding that the horizontal exhaustion doctrine requires Crane to prove that all of Kemper's primary policy limits, as written before the parties entered into the ACC, were exhausted before the umbrella or excess carriers would be required to contribute to any settlement or judgment.

¶ 44 II. *Pro Rata* Allocation

¶ 45 Crane next contends that the trial court erred in holding that the excess insurers could utilize a *pro rata* allocation in determining the amount for which each carrier is liable. Crane argues that the holding in *Zurich* requires that each excess carrier be held jointly and severally liable for all judgments arising during any excess policy period.

¶ 46 The policies at issue in *Zurich* provided:

> " 'I. COVERAGE A–BODILY INJURY LIABILITY
>
> ***
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A. bodily injury ***
>
> ***
>
> *** caused by an occurrence ***.' " *Zurich*, 118 Ill. 2d at 33.

The policies also set forth the following definitions:

> " ' " bodily injury" means bodily injury, sickness or disease ***.
>
> ***
>
> "occurrence" means an accident, including injurious exposure to conditions, which results during the policy period, in bodily injury *** neither expected nor intended from the standpoint of the insured.' " *Zurich*, 118 Ill. 2d at 33.

¶ 47 The court held:

> " 'Bodily injury,' which gives rise to the insurer's duties under the policies, is defined as 'bodily injury, sickness or disease.' The circuit court and the appellate court correctly concluded that these terms must be read as separate and distinct triggers of coverage. Thus, under the plain and unambiguous language of the policies, an insurer must provide coverage for a claim if the claimant sustained 'bodily injury' or 'sickness' or 'disease' during the policy period. Having concluded that each of these events triggers coverage, the inquiry becomes when 'bodily injury,' as defined in the policy, occurs.
>
> * * *
>
> *** The evidence in the record amply supports the circuit court's finding that 'bodily injury' occurs when asbestos fibers are inhaled and retained in the lung. We therefore conclude that an insurer whose policy was in force at the time a claimant was exposed to asbestos must provide coverage of that claim.

As we have already noted, 'sickness' and 'disease' are included within the policy definition of 'bodily injury,' and therefore, also trigger coverage." *Zurich*, 118 Ill. 2d at 44-45.

¶ 48 Zurich asked the supreme court to adopt the *pro rata* approach set forth in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (6th Cir. 1981). The appellate court had rejected this argument, finding that nothing in the policy language permitted proration. The supreme court held:

"In *Forty-Eight Insulations*, the court held that the insurers' obligations under their respective policies were triggered only by a claimant's exposure to asbestos during a policy period. From this premise, that court concluded that the exposure theory provided a reasonable means of allocating the costs of defense and indemnification among the triggered policies based on the number of years of exposure. As already noted, unlike *Forty-Eight Insulations*, this court has held that an insurer must afford Raymark coverage of a claim if the claimant suffers bodily injury *or* sickness *or* disease during a policy period. Having rejected the premise underlying the *pro rata* allocation approach adopted in *Forty-Eight Insulations*, we conclude that the appellate court did not err insofar as it declined to order the *pro rata* allocation of defense and indemnity obligations among the triggered policies." (Emphases in original.) *Zurich*, 118 Ill. 2d at 57.

¶ 49 Before us, the appellee insurers argue that *Zurich* did not preclude the trial court from applying the *pro rata* time-on-the-risk allocation method in determining the amount owed by the excess insurers to the insured as damages. The appellees rely on several appellate court cases, including *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 283 Ill. App. 3d 630 (1996), and *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277 (2009). In *Outboard Marine*, the insured manufacturing company sought a declaratory judgment that its CGL insurers had breached their duty to defend the company against suits filed by governmental agencies for water pollution. On remand from the supreme court (*Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992)), the appellate court affirmed the trial court's application of the time-on-the-risk approach application to assign a *pro rata* share to each excess insurer based on its finding of a continuous trigger. In doing so, the appellate court distinguished the holding in *Zurich* based on the fact that *Zurich* involved bodily injury and did not involve coverage for excess insurance. *Outboard Marine*, 283 Ill. App. 3d at 641. The court then considered and adopted the holding in *U.S. Gypsum*.

¶ 50 In *U.S. Gypsum*, the court addressed the issue of the appropriate trigger of coverage for asbestos property damage claims involving primary and excess insurance. The *Gypsum* court recognized that "bodily injury" and "property damage" are two distinct concepts which may require different characterizations of their respective coverage triggers. In adopting a continuous-trigger theory, the court found support from the *Zurich* decision and noted:

" 'Conceptually, the injury-in-fact trigger and the continuous trigger are on the same continuum and are complimentary, rather than mutually exclusive. Accordingly, courts have stated that "where injury-in-fact occurs continuously over a period covered by different insurers or policies, and actual apportionment of the

injury is difficult or impossible to determine, the continuous injury trigger may be employed to equitably apportion liability among insurers." ' *Gypsum*, 268 Ill. App. 3d at 644, quoting *Sentinel Insurance Co. v. First Insurance Co. of Hawai'i, Ltd.*, 76 Haw. 277, 300, 875 P.2d 894, 917 (1994).

We find the *Gypsum* court's rationale persuasive in applying the continuous-trigger theory and further find that the trial court correctly applied it to the facts of the instant case by finding that all of the policies were triggered and that the contamination of Waukegan Harbor amounted to a single continuing occurrence." *Outboard Marine*, 283 Ill. App. 3d at 641-42.

¶ 51 In *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277 (2009), Binney manufactured Crayola brand crayons. The packaging used said the crayons were "non-toxic." *Id*. at 280. A class action lawsuit was filed against Binney, alleging that there were "above trace-level" amounts of asbestos in the crayons. *Id*. The lawsuit sought as damages a small percentage of the purchase price of the crayons because of the false-labeling claim of nontoxicity. Binney filed a declaratory action against Federal, seeking indemnification under Federal's CGL policies which insured against advertising injury. The appellate court held that "[b]ecause Federal provided Binney advertising injury coverage during only 3 years of the approximately 30-year period at issue here," Federal should not be liable for more than approximately one-tenth of the total settlement under a *pro rata* time-on-the-risk formula. *Id.* at 295. In doing so, the court relied upon the holding in *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, 355 Ill. App. 3d 275 (2005), another excess insurance policy case involving property damage claims. The court noted that the holding in *Zurich* involved bodily injury and asserted that "[a] policy period limitation to coverage is exactly what was missing from the insurance contacts at issue in *Zurich*, allowing for the proper application of joint and several liability under the 'all sums' rule." *Federal Insurance*, 393 Ill. App. 3d at 292-93. As previously explained in this opinion (*supra* ¶ 46), the policies at issue in *Zurich* did contain language limiting coverage to injuries occurring during the policy periods.

¶ 52 Appellees strongly rely on the Second District's holding in *Missouri Pacific R.R. Co. v. International Insurance Co.*, 288 Ill. App. 3d 69 (1997). *Missouri Pacific* involved two questions certified by the trial court pursuant to Illinois Supreme Court Rule 308(a) (eff. Feb. 26, 2010). The case involved a declaratory action filed by the railroad against four of its excess CGL insurers. The underlying claims sought damages on behalf of thousands of railroad employees for hearing loss allegedly caused by continuous and repeated exposure to unsafe levels of noise. In addition, hundreds of employees brought claims against the railroad seeking damages for asbestos-related injuries allegedly caused by continuous and repeated exposure to unsafe levels of asbestos over many decades. *Missouri Pacific*, 288 Ill. App. 3d at 72.

¶ 53 The trial court certified two questions including:

" '1. Whether the "all sums" rule set forth by the Illinois Supreme Court in *Zurich Ins. Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23 (1987) or the pro-rata by time-on-the-risk theory articulated in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, [283 Ill. App. 3d 630 (1996),] governs allocation of coverage where the Circuit Court has

found that noise-induced hearing loss claims constitute a single occurrence, and further has found that asbestos-exposure claims constitute a single occurrence ***.' " *Missouri Pacific*, 288 Ill. App. 3d at 74-75.

¶ 54 The Second District court answered this question as follows:

"We read nothing in *Zurich* as precluding the application of the *pro rata*, time-on-the-risk allocation method announced in *Outboard Marine* to the case at bar. *Zurich*'s rejection of a *pro rata* approach was based on the narrow facts of the case before it, namely, that it had rejected the trigger analysis set forth in *Forty-Eight Insulations*. The court did not adopt a general rule forever precluding the application of a *pro rata* approach. As we explained in *Outboard Marine*, such an approach is appropriate where, as here, a single continuous occurrence results in an unallocable loss implicating successive policy periods.

Our answer, then, to the first certified question is twofold. First, the parties should be given the opportunity to present evidence that NIHL [(hearing loss)] may (or may not) be measured and allocated, within a reasonable degree of medical and scientific certainty, to particular policy periods. IF NIHL cannot be allocated, then the court should apply the *pro rata*, time-on-the-risk allocation method adopted in *Outboard Marine*.

Finally, we add that the parties' arguments regarding the first certified question almost exclusively focused on the NIHL claims. Our consideration of the first question tracts this approach. However, our reasoning applies equally to the NIHL claims and asbestos-exposure claims." *Missouri Pacific*, 288 Ill. App. 3d at 79-80.

¶ 55 We note that the Second District in *Missouri Pacific* relied upon its own recent holding in *Outboard Marine*. As previously noted, *Outboard Marine* relied heavily upon the holding in *U.S. Gypsum*. The *U.S. Gypsum* court "recognize[d] that 'bodily injury' and 'property damage' are two distinct concepts which may require different characterizations of their coverage triggers." *U.S. Gypsum*, 268 Ill. App. 3d at 640. In addition to the language of *U.S. Gypsum* previously quoted in *Outboard Marine*, we find the following language particularly enlightening:

"Our decision is consistent with the basic principles announced in *Zurich* and *Wilkin*. The supreme court's use of a triple trigger in *Zurich* recognizes that multiple policy periods can be triggered by the evolving nature of an illness resulting from the exposure to asbestos. Similarly, our application of a continuous trigger recognizes that the property damage that results from the release of asbestos fibers and the reentrainment of asbestos fibers is a continuing process which necessarily occurs over multiple policy periods. The *Zurich* decision looks beyond the discrete event of the manifestation of the disease as the sole trigger. Similarly, the seductive appeal of a single discovery trigger must bow to the policy language as well as to the empirical realities and other general equitable considerations of reasonableness and fairness." *U.S. Gypsum*, 268 Ill. App. 3d at 646.

¶ 56 Although not all of the umbrella or excess policies at issue here contain the "all sums" language found in *Zurich*, they provide for payment of the amount of loss in excess of the loss payable by the underlying policies based on the language in the underlying primary policies which do contain the "all sums" language. As in the policies in *Zurich*, the parties

do no assert that any of the policies at issue permit *pro rata* application. The trial court below ruled, and defendants argue, that a *pro rata* allocation is warranted because the "during the policy period" language defines when there is an "occurrence" which implicates a specific policy or policies. However, the language "during the policy period" was also found in the policies in *Zurich* and our supreme court therein declined to order a *pro rata* allocation of liability. We adhere to our supreme court's decision in *Zurich* and hold that where coverage for asbestos-related injury claims is triggered by bodily injury or sickness or disease, all triggered policies are jointly and severally liable. In one of the appellees' petitions for rehearing, it is urged that our "jointly and severally liable" holding is a misplaced notion of tort liability that has "no place in the proper interpretation" of this insurance case. To the contrary, joint and several liability has been applied in numerous insurance cases and is most appropriate in this one. See *Sentinel Insurance Co. v. First Insurance Co. of Hawai'i, Ltd.*, 875 P.2d 894, 915 (Haw. 1994); *U.S. Gypsum*, 268 Ill. App. 3d at 644; *Benoy Motors Sales, Inc. v. Universal Underwriters Insurance Co.*, 287 Ill. App. 3d 942, 948 (1997). We do not conclude that all carriers are jointly and severally liable without regard to a particular policy period. Only those carriers providing policies for the period at issue will be liable. Only triggered policies are jointly and severally liable for all sums that the insured becomes legally obligated to pay as a result of asbestos bodily injury claims. Obviously, policies that are not triggered pay nothing. Uninsured periods are irrelevant as only carriers providing policies for the period at issue will be liable. There are no credits for uninsured years. Policies that are triggered pay "all sums" up to their limits. This determination is based on the contract law principle that it would be unfair to allocate the damages to an insurer "that did not agree to provide coverage during" a particular period of time. *AAA Disposal*, 355 Ill. App. 3d at 288 (citing *Outboard Marine*, 283 Ill. App. 3d at 642-44).

¶ 57 III. Exhaustion

¶ 58 Crane's final contention is that the trial court erred in finding that *Zurich* requires proof of all three triggers (exposure, sickness, and disease) in order to determine the exhaustion of policy limits. On cross-appeal, CNA argues that the trial court erred in determining that under *Zurich*, "bodily injury" occurs at the time of exposure. CNA also requests that this court revisit *Zurich* and find that no one can determine when injury first begins, and that an equitable continuous trigger over all dates between exposure and diagnosis or death should apply to prove exhaustion. Since these contentions all relate to *Zurich*'s trigger analysis, we will address them together. The trial court's interpretation of *Zurich* is a question of law we review *de novo*. *In re A.H.*, 207 Ill. 2d 590, 593 (2003).

¶ 59 As discussed above, *Zurich* specified three triggers for coverage for asbestos-related injuries: bodily injury, sickness, and disease. Bodily injury occurs upon exposure to asbestos. *Zurich*, 118 Ill. 2d at 45. Disease begins as of the date of diagnosis or death, and sickness is defined as ill-health, or when a person suffers from a weakened or unsound condition. *Id*. at 45-47. Since there was no consistent evidence in the record to show a progression of the disease between exposure and sickness, the supreme court in *Zurich* rejected the conclusion that injury occurred in that time period. *Id*. at 47. In the case before us, the trial court held a medical trial to determine whether medical technology and knowledge had advanced from

the time of *Zurich* to show injury during the period between exposure and sickness. It determined that medical knowledge had not advanced to the extent injury could be proven during that time period and concluded that the triple triggers of *Zurich* still applied. However, the trial court noted that our supreme court "did not clarify whether all the insured had to do was prove one of the three triggers." It concluded that the supreme court "intended for the insured to establish trigger dates" for all three triggers.

¶ 60 Although our supreme court did not clarify whether an insured had to prove all three triggers for coverage, it is clear from the wording in *Zurich* that the court did not intend such a result. Our supreme court stated that "[t]he circuit court and the appellate court correctly concluded that these terms must be read as separate and distinct triggers of coverage" and that "*each* of these events triggers coverage." (Emphasis added.) *Id*. at 44. The court then looked at each trigger, first concluding that bodily injury "occurs when asbestos fibers are inhaled and retained in the lung" and a policy in force at the time of a claimant's exposure "must provide coverage of that claim." *Id.* at 45. It further found that sickness or disease were "also" triggers for coverage. *Id.* at 45-46. Appellees argue that the trial court applied all three *Zurich* triggers only in determining whether all triggered primary policies had been exhausted. Appellees' argument fails as neither *Zurich* nor any other cited case requires an insured to prove the dates for all three possible triggers before they settle a claim which, as a consequence, reduces the amount of primary coverage that remains available before exhaustion. We conclude that *Zurich* does not require an insured to prove all three triggers for coverage and that coverage is triggered upon proof of exposure, sickness, or disease. A policy holder or primary insurer must show that all triggered primary policies are exhausted before any excess insurance policies can be required to respond to the claim. Exhaustion occurs when there are no other triggered primary policies available to cover the payments. *Kajima II*, 227 Ill. 2d at 114-15.

¶ 61 In its petition for rehearing, CNA argues that Crane has the burden to prove the specific dates on which the various policies at issue are triggered. While CNA appears to concede that the evidence proving some of those dates simply does not exist for every claim and that it might not be possible to pinpoint a date when an underlying plaintiff suffers from "sickness," it argues:

> "Obviously, if a claimant is injured by exposure to [Crane's] asbestos–as must be the case since all of the relevant underlying claims involved judgments against [Crane]–there *must* be a beginning and an end of exposure. There is no option. Likewise, if the claimant has a disease–as he must to recover a judgment–there *must* be a date of disease. Thus, these dates must be shown." (Emphasis in original.)

While some of these suppositions may arguably be true, CNA does not cite any evidence or any case law supporting them. For the reasons described above, we are not persuaded by and reject CNA's argument on this issue.

¶ 62 IV. Cross-Appeal

¶ 63 A. Definition of Bodily Injury

¶ 64 On cross-appeal, CNA argues that the trial court erred in determining that under *Zurich*,

"bodily injury" occurs at the time of exposure. CNA contends *Zurich*'s finding that exposure to asbestos constitutes bodily injury is not one of law, but is a determination that must be made on a case-by-case basis. CNA argues that the parties in *Zurich* "conceded" that exposure results in bodily injury, but in this and other cases the event resulting in bodily injury is open to interpretation. CNA requests that this court revisit the issue and find, based upon new medical evidence, that "bodily injury" occurs with the first mutation that eventually results in cancer. It points to *Nolan v. Weil-McLain*, 233 Ill. 2d 416 (2009), as evidence that our supreme court has begun to question whether bodily injury occurs upon initial exposure to asbestos. However, our supreme court in *Nolan* did not revisit the issue of exposure as a trigger for asbestos-related injury as CNA claims. Rather, the issue in *Nolan* involved whether a claimant's bodily injury was proved by exposure to asbestos-containing products when evidence suggested the claimant was also exposed to asbestos from other sources. *Id*. at 419-20.

¶ 65 We decline CNA's request to revisit the issue because, as this court stated in *U.S. Gypsum*, this evidence of injury "has no bearing on the insurance coverage issue before us." (Internal quotation marks omitted.) *U.S. Gypsum*, 268 Ill. App. 3d at 623. The question before us is one of insurance coverage, not liability. "The challenge by the insurers in a coverage action may therefore not address the issue as to whether the underlying plaintiffs sustained damage for which the insured is liable. That was the subject of the underlying action. The coverage action may only address whether the damage in question falls within the coverage provisions of the policies." *Id*.

¶ 66 In *Zurich*, our supreme court noted that the evidence at trial showed that asbestos-related diseases "originate with the inhalation of asbestos fibers, and, the *continued inhalation* of asbestos causes additional injuries which eventually culminate in a disease." (Emphasis in original.) *Zurich*, 118 Ill. 2d at 47. The court concluded that bodily injury "takes place at or shortly after the time a claimant was exposed to asbestos and continues throughout a claimant's exposure to asbestos." *Id*. Furthermore, in summarizing its findings, our supreme court in *Zurich* concluded only that the triggers of disease and sickness "must be determined on a case-by-case basis." *Id*. at 47-48. We continue to follow *Zurich*'s holding that bodily injury occurs upon exposure to asbestos, and "an insurer that was on the risk during the time the claimant was exposed to asbestos must provide coverage." *Id.* at 47.

¶ 67 B. Equitable Continuous Trigger

¶ 68 CNA also requests that this court revisit *Zurich* and find that no one can determine when injury first begins, and that an equitable continuous trigger over all dates between exposure and diagnosis or death should apply to prove exhaustion. A continuous trigger is useful in cases "where injury-in-fact occurs continuously over a period covered by different insurers or policies, and actual apportionment of the injury is difficult or impossible to determine." (Internal quotation marks omitted.) *Gypsum*, 268 Ill. App. 3d at 644.

¶ 69 Our supreme court in *Zurich* addressed this issue as it relates to asbestos-related personal injury. It found that, according to the expert testimony on record, there is no evidence that a claimant suffers continuous injury from the time of initial exposure to sickness or disease.

Zurich, 118 Ill. 2d at 47. Rather, the expert testimony revealed "that asbestos-related disease may or may not progress during periods of nonexposure" and "there are cases in which the disease progresses during periods of nonexposure and cases in which there is no progression." *Id*. Our supreme court found no continuing bodily injury from the time "exposure to asbestos ends and the time an asbestos-related disease becomes diagnosable." *Id*. at 46. No new evidence presented before the trial court below challenged this finding in *Zurich*. Once our supreme court has declared the law with respect to an issue, this court must follow that law, as only the supreme court has authority to overrule or modify its own decisions. *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 836 (2004). We therefore decline CNA's invitation to revisit this issue.

¶ 70 Both sides on appeal also raised various evidentiary issues related to the exhaustion trial below. Due to our disposition of the case, we need not address those issues at the present time.

¶ 71 We remand the cause for determination of exhaustion based upon this opinion. On remand, pursuant to the "horizontal exhaustion doctrine," Crane must prove that all of the post-1986 primary insurance policies' original limits, without regard to the ACC, have been exhausted before the umbrella or excess coverage policies are implicated. Also, for claims of asbestos-related personal injury, all triggered excess or umbrella policies are jointly and severally liable for payment up to their limits. Finally, Crane need not prove all three of the triggers for coverage outlined in *Zurich*. Instead, coverage for asbestos-related personal injury claims is triggered upon proof of exposure, sickness, or disease. We reject CNA's request to use an equitable continuous trigger as our supreme court addressed this issue in *Zurich* and determined that personal injury from exposure to asbestos is not a continuous injury.

¶ 72 On remand, the trial court is to additionally consider any judgments and settlements paid by Crane and by Kemper since the last exhaustion trial.

¶ 73 Several of the insurer-appellees have also asked this court to grant a certification of importance under Illinois Supreme Court Rule 316 (Ill. S. Ct. R. 316 (eff. Dec. 6, 2006)), as part of their petition for rehearing, arguing: "It is no exaggeration to say that this Court's decision is more important than many of the cases granting Rule 316 certification [listing six appellate court decisions], as to the sheer number of claims and suits affected by this Court's determination of the issues on the merits." It is well settled that the appellate court's power to certify a case to the supreme court should be used very sparingly. *People v. Cherry Valley Public Library District*, 356 Ill. App. 3d 893, 900 (2005). Our supreme court is in a better position than this court to determine whether it should accept this case for further review. The request for certification pursuant to Rule 316 is therefore denied.

¶ 74 For the foregoing reasons, the judgment of the circuit court is affirmed in part and reversed in part and the cause remanded for a determination consistent with this opinion.

¶ 75 Affirmed in part and reversed in part; cause remanded with directions.

Cretella v. Azcon, Inc., 2022 IL App (1st) 211224

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 2022-09-22 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 4 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶¶ 58, 62: passages C026.2, C026.3
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶¶ 58, 62: passages C026.2, C026.3

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Appellate Court

Cretella v. Azcon, Inc., 2022 IL App (1st) 211224

Appellate Court Caption	TANJA CRETELLA, Plaintiff-Appellant, v. AZCON, INC., d/b/a Azcon Metals, Inc., Defendant-Appellee.
District & No.	First District, Fourth Division No. 1-21-1224
Filed	September 22, 2022
Modified upon denial of rehearing	November 3, 2022
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 21-L-4742; the Hon. Michael F. Otto, Judge, presiding.
Judgment	Affirmed in part and reversed in part. Cause remanded.
Counsel on Appeal	Dean J. Caras, of Caras Law Group, P.C., of Chicago, for appellant. Brian M. O'Neal, of McMahon Berger PC, of St. Louis, Missouri, for appellee.

Panel

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Justices Hoffman and Rochford concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Tanja Cretella, filed this action against her former employer, Azcon, Inc., doing business as Azcon Metals, Inc., alleging claims of retaliatory discharge and violation of section 20 of the Whistleblower Act (740 ILCS 174/20 (West 2020)). Plaintiff's retaliatory discharge claims were based on both the tort and an implied private right of action under section 224.1 of the Illinois Insurance Code (215 ILCS 5/224.1 (West 2020)), alleging that defendant unlawfully terminated her employment when she exercised her right under section 224.1 to refuse to consent to defendant purchasing insurance coverage on her life and receiving the proceeds in the event of her death.

¶ 2 The circuit court granted defendant's motion to dismiss the complaint for failure to state a cause of action.

¶ 3 On appeal, plaintiff argues that she sufficiently stated causes of action for retaliatory discharge because (1) Illinois public policy disfavors retaliation for an employee's refusal to consent to life insurance coverage when the proceeds go to the employer in the event of the employee's death and (2) a private cause of action is implied under section 224.1 of the Insurance Code.

¶ 4 For the reasons that follow, we reverse in part and affirm in part the judgment of the circuit court.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff filed a three-count complaint against defendant, alleging that she had worked as defendant's human resource director from about October 2013 through June 7, 2018. She alleged that she was presented with a consent to life insurance coverage form that was represented to her as being necessary to meet certain liquidity needs related to the employee stock ownership plan and other capital needs of the company. She also alleged that she refused to sign the form and defendant fired her on June 7, 2018, for refusing to consent to company-owned life insurance (COLI). She alleged against defendant claims of (1) retaliatory discharge in violation of section 224.1 of the Insurance Code, (2) violation of section 20 of the Whistleblower Act for refusing to participate in illegal activity, and (3) common law retaliatory discharge.

¶ 7 Defendant moved to dismiss plaintiff's complaint under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020)), arguing that plaintiff failed to state an actionable claim of statutory retaliatory discharge because the Insurance Code does not provide a private right of action for retaliatory discharge for violation of section 224.1 of the Insurance Code and an implied private right of action is not appropriate under Illinois law. Regarding plaintiff's claim under the Whistleblower Act, defendant argued that signing a consent to life insurance coverage form did not violate the Insurance Code or any other law. Regarding

plaintiff's common law retaliatory discharge claim, defendant argued that her claim did not fit under either of the two recognized categories—*i.e.*, whistleblowing activities or the exercise of rights under the Illinois Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2020))—for Illinois's narrow common law exception to the at-will employment doctrine.

¶ 8 On September 8, 2021, the trial court heard argument on defendant's motion to dismiss. The trial court granted the motion and dismissed all three counts of plaintiff's complaint with prejudice. The trial court ruled that plaintiff failed to state a claim of retaliatory discharge based on an implied right of action under section 224.1 of the Insurance Code because she was not a member of the primary class for whose benefit section 224.1 was enacted, since the purpose of the Insurance Code was to regulate insurance companies and not to protect employees. The court also ruled that plaintiff was not a whistleblower because being asked to consent to employer-owned life insurance coverage was not illegal or misconduct. Finally, the court ruled that plaintiff failed to state a claim of common law retaliatory discharge because her discharge did not violate a clear mandate of public policy.

¶ 9 Plaintiff timely appealed the dismissal of her statutory and common law retaliatory discharge claims but does not appeal the dismissal of her whistleblower claim.

¶ 10 II. ANALYSIS

¶ 11 We review *de novo* an order granting a motion to dismiss pursuant to section 2-615 of the Code and may affirm the trial court's dismissal for any reason supported by the record. *Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶ 11. A section 2-615 motion to dismiss tests the legal sufficiency of a complaint, *i.e.*, whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, state sufficient facts to establish a cause of action upon which relief may be granted. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). When ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pled facts in the complaint and reasonable inferences drawn therefrom. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86 (1996). We do not, however, take mere conclusions of law or fact contained within the challenged pleading as true unless they are supported by specific factual allegations. *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991).

> "A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009).

¶ 12 A. Preliminary Matters

¶ 13 Defendant asks this court to disregard plaintiff's statement that she was fired in retaliation for her refusal to consent to life insurance coverage as an improper argumentative legal conclusion made without citation to the record. We deny defendant's request but acknowledge defendant's position that it does not concede that plaintiff's discharge was retaliation. However, for purposes of a section 2-615 motion to dismiss, the court must accept as true all well-pled facts in the complaint and reasonable inferences drawn therefrom. *Bryson*, 174 Ill. 2d at 86. Plaintiff's allegation that she was fired in retaliation for refusing to consent to life insurance coverage is one of the central allegations of her complaint and is properly pled.

¶ 14 Defendant also asks this court to disregard an insurance form and e-mail that were attached for the first time to plaintiff's memorandum opposing defendant's motion to dismiss, filed before the trial court. Defendant argues that the insurance form and e-mail are outside of the allegations of the complaint and attachments thereto. "In ruling upon a 2-615 motion, a trial court may consider *only the allegations of the complaint* [citation] and may not consider other supporting material [citation]." (Emphasis in original.) *Id.* at 91. The circuit court properly relied only on the allegations of the complaint in dismissing this lawsuit under section 2-615. We also will rely only on the allegations of the complaint and thus grant defendant's request to disregard the insurance form and e-mail.

¶ 15 B. Common Law Retaliatory Discharge

¶ 16 Plaintiff argues that Illinois public policy disfavors an "Illinois citizen-insured" from being discharged for exercising her right not to consent to have COLI coverage taken out on her life, with the proceeds to go to the employer upon her death, even after she is no longer employed. Plaintiff argues that the plain language and legislative history of section 224.1 of the Insurance Code provides the public policy behind the statute, which seeks to protect employees from being fired for refusing to consent to exorbitant insurance policies employers attempt to obtain on employees' lives in what constitutes an improper wager policy to gamble on employees' lives.

¶ 17 Defendant argues that plaintiff's claim is not premised on a clear mandate of public policy, COLI policies are not contrary to Illinois public policy, no cases have extended the tort of retaliatory discharge to factual allegations similar to the allegations at issue in this case, and this is an employer-employee dispute that is in the nature of a private and individual grievance rather than a matter affecting our society and striking at the heart of a citizen's social rights, duties, and responsibilities.

¶ 18 Section 224.1 of the Insurance Code provides, in pertinent part:

> "Notwithstanding any other Section of this Code, an employer or an employer sponsored trust for the benefit of its employees has an insurable interest in the lives of the employer's directors, officers, managers, nonmanagement employees, and retired employees and may insure those lives on an individual or group basis *with the consent of the insured. The consent requirement will be satisfied if the insured is provided written notice of the coverage and does not reject such coverage within 30 days of receipt of such notice*. The extent of the employer's or the trust's insurable interest for nonmanagement and retired employees shall be limited to an amount commensurate with the employer's projected unfunded liabilities to nonmanagement and retired employees for welfare benefit plans ***. An insurable interest must exist at the time the contract of life or disability insurance becomes effective, but need not exist at the time the loss occurs. *An employer shall not retaliate in any manner against an employee or a retired employee for refusing consent to be insured*. The proceeds of any policy or certificate issued pursuant to this Section are exempt from the claims of any creditor or dependent of the insured. As used herein, 'employer' means an individual, sole proprietorship, partnership, firm, corporation, association, or any other legal entity that has one or more employees and is legally doing business in this State." (Emphases added.) 215 ILCS 5/224.1 (West 2020).

¶ 19 In Illinois, "a noncontracted employee is one who serves at the employer's will, and the employer may discharge such an employee for any reason or no reason." *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 32 (1994). However, an exception to this general rule of at-will employment arises where there has been a retaliatory discharge of the employee. *Price v. Carmack Datsun, Inc.*, 109 Ill. 2d 65, 67 (1985). This court has recognized a limited and narrow cause of action for the tort of retaliatory discharge. *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 505 (1991). To state a valid retaliatory discharge cause of action, an employee must allege that (1) the employer discharged the employee, (2) in retaliation for the employee's activities, and (3) the discharge violates a clear mandate of public policy. *Id.*; *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 134 (1981). Surveying many cases from across the country, the Illinois Supreme Court in *Palmateer* discussed the meaning of "clearly mandated public policy." *Palmateer*, 85 Ill. 2d at 130.

> "There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. [Citation.] Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." *Id.*

Merely citing a constitutional or statutory provision in a complaint will not give rise to a retaliatory discharge cause of action. *McGrath v. CCC Information Services, Inc.*, 314 Ill. App. 3d 431, 440 (2000).

¶ 20 Numerous decisions of this court have maintained the narrow scope of the retaliatory discharge action. *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 19-20 (1998) (collecting cases). "The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason is still the law in Illinois, except for when the discharge violates a clearly mandated public policy." *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 525 (1985); see also *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 467 (1999) (the Illinois Supreme Court "has consistently sought to restrict the common law tort of retaliatory discharge"). Illinois has recognized the tort of retaliatory discharge when the discharge stems from exercising rights pursuant to the Illinois Workers' Compensation Act or where the discharge is for certain activities referred to as "whistleblowing." *Irizarry v. Illinois Central R.R. Co.*, 377 Ill. App. 3d 486, 490-91 (2007). Plaintiff's claim does not fall into either of these two categories.

¶ 21 To support her claim of a clearly mandated public policy against the alleged retaliation that occurred in this case, plaintiff cites the floor debates prior to section 224.1's enactment, when members of the Illinois Senate discussed the notice that the employer would be required to give the employee and the importance of the employee's consent to the COLI coverage. See 87th Ill. Gen. Assem., Senate Proceedings, June 23, 1992, at 110 (statements of Senator Cullerton). Senator Cullerton explained that, at the request of the Department of Insurance, the bill had been amended from requiring the employee's written consent to instead requiring the employee to reject the coverage within 30 days of receiving written notice of the proposed coverage from the employer. *Id.* Senator Hawkinson expressed concern about the amendment and requested assurance that the notice to the employee would not be an easily overlooked

paragraph in an insurance policy or an employee handbook. *Id.* at 111-12 (statements of Senator Hawkinson). Senator Cullerton responded that the goal of the bill was to help the insured, *i.e.*, the employee, by providing "health benefits for that person after they retire." *Id.* at 112 (statements of Senator Cullerton). Senator Schuneman asked Senator Cullerton to explain what happened to the provision that required the employee's prior consent "for this new insurable interest feature to be legalized in Illinois." *Id.* at 113 (statements of Senator Schuneman). Senator Cullerton stated that he would ask the director of the Department of Insurance why he wanted this amendment and took the bill "out of the record." *Id.* (statements of Senator Cullerton).

¶ 22 We recognize the importance the legislature placed on protecting the right of a prospective insured to freely consent to COLI coverage. However, by stating in section 224.1 that employers have an insurable interest in the lives of their employees, the legislature recognized the benefits of employers obtaining COLI coverage, which can be used to either indemnify the employer for the costs of replacing a key employee who dies or becomes disabled or finance the cost of a stock redemption agreement or deferred compensation plan, or finance broad-based welfare benefit plans. See Nat'l Ass'n of Ins. Comm'rs, Guidelines on Corporate Owned Life Insurance 602-1 (Apr. 2005), https://content.naic.org/sites/default/files/inline-files/MDL-602.pdf [https://perma.cc/BQ95-QLGP]. Clearly, COLI coverage is legal in Illinois. Moreover, to protect employees, the legislature subjected the employer's insurable interest in a current or retired employee's life to the requirements of obtaining the employee's consent and not retaliating against the employee in any way if she refuses to give her consent.

¶ 23 The supreme court's stated reluctance to expand the tort of retaliatory discharge militates against creating an exception here. Accordingly, we affirm the judgment of the circuit court that dismissed plaintiff's common law retaliatory discharge claim based on her refusal to consent to COLI coverage.

¶ 24 C. Implied Right of Action

¶ 25 Plaintiff argues that the circuit court improperly dismissed her claim of an implied right of action for defendant's purported violation of section 224.1 of the Insurance Code for discharging plaintiff based on her refusal to consent to defendant obtaining and being the beneficiary of life insurance coverage on plaintiff's life.

¶ 26 In construing the meaning of a statute, the primary objective of this court is to ascertain and give effect to the intention of the legislature, and all other rules of statutory construction are subordinated to this cardinal principle. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 507 (2003). The plain language of the statute is the best indicator of the legislature's intent. *Allstate Insurance Co. v. Menards, Inc.*, 202 Ill. 2d 586, 591 (2002). When the statute's language is clear, it will be given effect without resort to other aids of statutory construction. *Petersen v. Wallach*, 198 Ill. 2d 439, 445 (2002). We review issues of statutory interpretation *de novo*. *Metzger v. DaRosa*, 209 Ill. 2d 30, 34 (2004).

¶ 27 The plain language of section 224.1 does not articulate any precise relief for an employee who suffers retaliatory action in violation of this provision. Nor does any other provision of the Insurance Code expressly provide employees with the right to pursue an action for damages under section 224.1. Although the Insurance Code lacks specific statutory language granting a private right of action, a court may determine that a private right of action is implied in the

statute. See *Metzger*, 209 Ill. 2d at 35; *Fisher*, 188 Ill. 2d at 460. Courts consider four factors in determining if a private right of action may be implied from a statute.

> "Implication of a private right of action is appropriate if: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute." *Fisher*, 188 Ill. 2d at 460.

Whether a private right of action is implied in a statute presents a question of law that we review *de novo*. *Metzger*, 209 Ill. 2d at 34. A court should use caution in implying a private right of action because, in doing so, it is assuming the policy-making authority more appropriately exercised by the legislature. *Moore v. Lumpkin*, 258 Ill. App. 3d 980, 989 (1994).

¶ 28 1. Class Member

¶ 29 Regarding the first factor, plaintiff argues that this court's analysis of the class member factor should focus specifically on section 224.1, instead of looking at the purpose of the Insurance Code as a whole. To support this proposition, plaintiff contends that the introductory phrase "[n]otwithstanding any other Section of this Code," clearly indicates that the legislature intended section 224.1 to be a standalone statute that should be read in isolation from the Insurance Code as a whole. We reject plaintiff's contention. Our supreme court has made it clear that in conducting an analysis of the class member factor, "we must read the statute as a whole and not as isolated provisions." *Metzger*, 209 Ill. 2d at 37; *Fisher*, 188 Ill. 2d at 463. Where a particular provision of a statute provides incidental benefits to one class but does so in order to benefit the primary class for whose benefit the statute was enacted, no private right of action will be implied in favor of the class provided such incidental benefits. *Metzger*, 209 Ill. 2d at 38.

¶ 30 In the alternative, plaintiff argues that she is a class member because the scope and history of the Insurance Code establishes that its purpose is not simply to regulate insurance but to protect the Illinois public from unregulated insurance practices. Plaintiff contends that she is a member of the class for whose benefit section 224.1 was enacted because the plain language and legislative history of this section show that the legislature intended to protect employees from retaliatory discharge for refusing to consent to be insured on their lives by their employers. Specifically, plaintiff argues that section 224.1 regulates the insurable interest an employer may obtain by requiring the employee's consent before the employer may obtain that insurable interest. Plaintiff also contends that the second factor regarding prevention of her injury goes "hand-in-hand" with the analysis of the first factor because the primary focus of the Insurance Code includes protecting insureds and prospective insureds from unfairness in the purchase and sale of insurance policies.

¶ 31 Regarding the first factor, defendant responds that plaintiff is not a member of the class for whose benefit the Insurance Code was intended because it was not designed primarily to benefit employees who have disputes with their employers and does not focus on preventing discharge or other injuries to employees. Defendant cites *Price*, 109 Ill. 2d at 69, to support the proposition that the primary purpose of the Insurance Code is merely to regulate "all types of insurance" and "was designed to govern operations of insurance companies, not insureds [like the defendant employer, who provided the plaintiff employee with health insurance under the employer's group policy]." Defendant's reliance on *Price*, however, is misplaced. Whereas

our analysis addresses whether a private right of action is implied, *Price* involved a common law retaliatory discharge claim. In *Price*, the plaintiff argued that the health insurance regulations of the Insurance Code showed that there was a clearly mandated public policy against the discharge of employees for filing health insurance claims. *Id.* The defendant argued that the filing of a health insurance claim was founded on a private contractual right and was not a matter supported by public policy. *Id.* at 67. The court agreed with the defendant and held that the alleged discharge of an employee for filing a health insurance claim under the employer's group policy did not support a common law retaliatory discharge claim because the discharge did not violate a clearly mandated public policy. *Id.* at 69.

¶ 32 Regarding the second factor, defendant argues that the Insurance Code was not intended to prevent the alleged injuries plaintiff suffered because any protections extended to employees are incidental to the Insurance Code's primary focus of regulating insurance companies and the insurance industry. Defendant argues it is illogical to contend that the Insurance Code was designed to prevent employees from losing their jobs.

¶ 33 The Insurance Code consists of 45 articles. Section 224.1 appears in article XIV, which is entitled "Legal Reserve Life Insurance." 215 ILCS 5/art. XIV (West 2020). Some articles in the Insurance Code contain a section stating the purpose of the article. However, most articles, including article XIV at issue here, do not list any purpose. The following sections of the Insurance Code contain purpose statements that show the legislature's intent to protect the insured or promote the public welfare. Section 1301 states that the purpose of article XLIII, "Mortgage Insurance Consolidation," is to "protect the interests of Illinois insureds." *Id.* § 1301. Section 155.51 states that the purpose of article IX½, "Credit Life and Credit Accident and Health Insurance" is "to promote the public welfare." *Id.* § 155.51. Section 1201 states that the purpose of article XLII, "Insurance Cost Containment," "is to promote the public welfare." *Id.* § 1201. Section 1001 states that the purpose of article XL, "Insurance Information and Privacy Protection,"

> "is to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions ***; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness." *Id.* § 1001.

¶ 34 Illinois courts have also recognized that the purpose of the Insurance Code is more than merely regulating insurance companies. See *Walsh v. Department of Insurance*, 2016 IL App (1st) 150439, ¶ 25 ("[t]he stated purpose of the Insurance Code is to protect the public interest in the area of for-profit insurance" (internal quotation marks omitted)); *Hoglund v. State Farm Mutual Automobile Insurance Co.*, 148 Ill. 2d 272, 277 (1992) ("purpose behind the statutorily mandated uninsured motorist provision is that the insured be placed in substantially the same position as if the wrongful uninsured driver had been minimally insured"); *Keller v. State Farm Insurance Co.*, 180 Ill. App. 3d 539, 556-57 (1989) ("purpose of section 155 of the Illinois Insurance Code is not only to aid the insured, but also to discourage insurers from profiting by their superior financial positions while delaying the payment of contractual obligations"); *Logsdon v. Shelter Mutual Insurance Co.*, 143 Ill. App. 3d 957, 961 (1986) (regarding uninsured motorist coverage, the purpose is to "ensure that insureds be provided adequate information so that they [can] make intelligent, informed decisions on the coverage they want and are willing to pay for").

¶ 35 Courts have also addressed concerns raised by stranger-originated life insurance (STOLI) coverage on another person's life. See 215 ILCS 159/5 (West 2020) (" 'Stranger-originated life insurance' or 'STOLI' means an act, practice, or arrangement to initiate a life insurance policy for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest in the insured."). An insurance policy on a person's life generally is void if the person did not consent to the issuance of the policy. See *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 427-28 (2004). A beneficiary of a life insurance policy has a financial interest in the insured's dying as soon as possible because an early death minimizes the amount of premiums the beneficiary would pay, and money received in the present is more valuable than money received in the future. *Ohio National Life Assurance Corp. v. Davis*, 803 F.3d 904, 907-08 (7th Cir. 2015). "So the requirement of consent protects the prospective insured; he is unlikely to consent to someone becoming the beneficiary if he suspects that person of wanting to shorten his life." *Id.* at 908. Courts are also "concerned with the unseemliness of gambling on when a person will die" (*id.*), which is referred to as wager policies. Consequently, one must have an interest, financial or otherwise, in the life of the insured rather than in his early death before one can take out a life insurance policy on a person. *Grigsby v. Russell*, 222 U.S. 149, 155 (1911).

¶ 36 As discussed above (*supra* ¶ 22), by providing in section 224.1 that employers have an insurable interest in the lives of their employees, the legislature recognized the benefits of COLI coverage to both employers and employees. Nevertheless, the legislature addressed the insurable interest concerns regarding STOLI coverage and wager policies among employers and their employees by including in section 224.1 the requirement that an employer shall not retaliate in any manner against an employee or a retired employee for refusing to consent to be insured. Specifically, the legislature subjected the employer's insurable interest in a current or retired employee's life to the requirements of obtaining the employee's consent and not retaliating against the employee in any way if she refuses to give her consent. As discussed above (*supra* ¶ 21), this concern of protecting employees from STOLI coverage and wager policies is reflected in the floor debates prior to section 224.1's enactment.

¶ 37 We conclude that plaintiff is a member of the class for whose benefit the Insurance Code was enacted. When viewed as a whole, it is clear that the Insurance Code was primarily designed to promote the public welfare and protect the interests of the insureds (and prospective insureds) by regulating the insurance industry to ensure fair practices in the sale of insurance products. Furthermore, the protections afforded employees as prospective insureds under section 224.1 of the Insurance Code are not incidental to the Code's overall purpose. *Cf. Marque Medicos Fullerton, LLC v. Zurich American Insurance Co.*, 2017 IL App (1st) 160756, ¶ 60 (providers of medical services to employees for work-related injuries were not members of the class benefitted by the statute because the statute's purpose was to protect employees by providing them with prompt and equitable compensation for their injuries and any benefit the providers received regarding payment obligations was at most incidental and provided solely in an effort to serve the goal of complete and prompt compensation for employees).

¶ 38 2. Plaintiff's Injury

¶ 39 Next, we consider whether plaintiff's injury is one the statute was designed to prevent. While section 224.1 specifically prohibits retaliating against an employee who refuses to consent to be insured by her employer, the statute's broad purpose is to protect the public by

regulating the insurance industry to ensure fair practices. Just as employees, as members of the Illinois public, are part of the class for whom the statute was primarily enacted to benefit, it is clear that the Insurance Code is designed generally to prevent members of the public from being coerced or duped into applying for life insurance coverage without their consent. As discussed above (*supra* ¶ 35), the prevention of STOLI coverage and wager policies has long been a concern in the regulation of insurance practices. Accordingly, we conclude that employers coercing employees to agree to COLI coverage or else face some form of retaliation, including discharge, is an injury the Insurance Code was designed to prevent.

¶ 40 3. Consistency

¶ 41 We next consider the third factor: whether a private right of action is consistent with the underlying purpose of the Insurance Code. *Pilotto v. Urban Outfitters West, L.L.C.*, 2017 IL App (1st) 160844, ¶ 26. Consistency with the underlying purpose of a statute includes ensuring that such a private right "would not adversely affect any other provision within it." *Id.* ¶ 27.

¶ 42 Plaintiff argues that implying a private right of action regarding section 224.1 would not undermine the operation of the statute, but rather would facilitate redress for violations of the statute. Defendant, however, argues that implying a private right of action for an employee is not consistent with the Insurance Code's underlying purpose of regulating the insurance industry because the Insurance Code gives the director of the Department of Insurance "broad enforcement powers" since the director "is charged with the rights, powers and duties appertaining to the enforcement and execution of all the insurance laws of this State." 215 ILCS 5/401 (West 2020).

¶ 43 "Cases where a private right of action has been found inconsistent with the purpose of a statute generally have involved situations where such a right would impede the operation of the statute in some way." *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill. App. 3d 946, 952 (2001). For example, in *Metzger*, 209 Ill. 2d at 39, the court found that an implied private right of action for a government whistleblower reprimanded after reporting statutory violations was inconsistent with the Personnel Code (20 ILCS 415/1 *et seq.* (West 2002)). Specifically, the underlying purpose of the statute was to ensure government employee competency, and in ensuring such competency, the statute protected employees who reported such violations from unjust retaliation. *Metzger*, 209 Ill. 2d at 37-38. To carry out this purpose, the statute outlined procedures for the State to review whether an employee who was reprimanded after reporting a violation was unjustly disciplined. *Id.* at 39. The court found that implying a private right of action would have been inconsistent with the express procedures for carrying out the underlying purpose of the statute because it would have stripped the State of its independent authority to determine whether the reprimand was retaliation or appropriate management and would have given that authority to the courts instead. *Id.*

¶ 44 Similarly, in *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 686 (2010), the Livestock Act gave citizens the ability to provide some input through informational meetings but ultimately gave the Department of Agriculture discretion to determine compliance with the Act, as required before construction of a livestock facility could commence. See 510 ILCS 77/12.1 (West 2008). The Act left inspections and violation determinations to the department and provided that producers would be subject to fines or orders to cease operations for violations of the Act. Moreover, the Act did not preempt other common law causes of action such as nuisance. The court held that implying a private right of

action would strongly undermine the department's authority, contrary to the legislature's intent. *Bos*, 406 Ill. App. 3d at 686 ("Where broad discretion is given to an agency, it negates the implication that there was legislative intent to create a private right of action." (Internal quotation marks omitted.)).

¶ 45 In contrast, in *Fiumetto*, 321 Ill. App. 3d at 953, where a former employee alleged that she was terminated for filing a claim for temporary unemployment benefits, the court found that a private right of action for retaliatory discharge was consistent with the Unemployment Insurance Act (820 ILCS 405/100 *et seq.* (West 1996)). The court found that the purpose of the remedial statute was to lessen the burden of unemployment on unemployed workers and "a private right of action would both benefit those that the statute was enacted to protect and dissuade employers from interfering with employees attempting to seek benefits under [the statute]." *Fiumetto*, 321 Ill. App. 3d at 952.

¶ 46 The case before us is similar to *Fiumetto* and distinguishable from *Metzger* and *Bos*. Similar to *Fiumetto*, a private right of action under section 224.1 of the Insurance Code would both benefit those employees that the statute was enacted to protect and dissuade employers from coercing employees who wish to exercise their right to refuse to consent to COLI coverage. Furthermore, providing an implied right of action for employees against their employers would not deprive the Department of Insurance of its independent ability to regulate the insurance industry for the benefit of the public and prevent unfair practices in the purchase and sale of insurance. Unlike the Personnel Code at issue in *Metzger*, the Insurance Code does not contain express outlined procedures for the director to review whether claims of retaliation were appropriate management decisions. *Cf. Metzger*, 209 Ill. 2d at 39. And unlike the Livestock Act at issue in *Bos*, the Insurance Code does not expressly outline a framework that leaves section 224.1 violation determinations solely to the discretion of the director of the Department of Insurance. *Cf. Bos*, 406 Ill. App. 3d at 686.

¶ 47 Accordingly, we hold that a private right of action is consistent with the underlying purpose of the Insurance Code.

¶ 48 4. Necessity

¶ 49 Finally, we examine whether implying a private right of action is necessary to provide an adequate remedy for violations of the Insurance Code. The Illinois Supreme Court has implied a private right of action under a statute "only in cases where the statute would be ineffective, as a practical matter, unless such an action were implied." *Fisher*, 188 Ill. 2d at 464.

¶ 50 Plaintiff argues that this court should imply a private right of action because the potential penalty for violating section 224.1 is not adequate to ensure compliance with the statute. Specifically, reporting an employer's retaliatory action to the director of the Department of Insurance provides neither compensation nor an adequate remedy to an injured employee, makes compliance with section 224.1 unlikely, and renders ineffective the requirement of no retaliation, which is crucial to protect the element of the employee's valid consent to COLI coverage.

¶ 51 Defendant argues that a private right of action is not necessary because the legislature has provided an adequate statutory framework to encourage the reporting of violations and punish retaliation and any other violations of the Insurance Code. Specifically, the director of the Department of Insurance "is charged with the rights, powers and duties appertaining to the enforcement and execution of all the insurance laws of this State." 215 ILCS 5/401 (West

2020). Those powers include conducting investigations "to determine whether any person has violated any provision of such insurance laws" and instituting actions necessary for the enforcement of the Insurance Code or of any order or action made or taken by the director under the Insurance Code. *Id.* The director is authorized to subpoena and examine witnesses and documents related to investigations and hearings provided for by the Insurance Code. *Id.* § 403. Additionally, companies or persons who willfully or repeatedly violate the Insurance Code or any rule or regulation promulgated by the director must forfeit to the State of Illinois a civil penalty not to exceed $2000. *Id.* § 403A(1). The Insurance Code includes a catchall penalty provision indicating that

> "[a]ny person who violates any of the provisions of this Code, or fails to comply with any duty imposed upon him or it by any provision of this law, for which violation or failure no penalty is elsewhere provided by the laws of this State, shall be guilty of a petty offense." *Id.* § 446.

¶ 52 Defendant argues that plaintiff may not like the way enforcement of the Insurance Code is structured because it does not expressly grant her the right to recover monetary damages, but her focus on a right to compensation for her injuries is not appropriate under the private right of action analysis of the fourth factor, which focuses instead on whether adequate remedies are provided to make compliance with section 224.1 of the Insurance Code likely. See *Metzger*, 209 Ill. 2d at 41 (the plaintiff could not satisfy the fourth factor of the implied private right of action analysis based on the expressed outlined procedures of the Personnel Code that encouraged the reporting of violations and ensured the effectiveness of the statute by preventing and punishing violations).

¶ 53 Defendant relies extensively on *Fisher*, 188 Ill. 2d 455, and *Metzger*, 209 Ill. 2d 30, to support its position. However, we find those cases distinguishable concerning the fourth factor analysis.

¶ 54 In *Fisher*, 188 Ill. 2d at 460, the court concluded that section 3-608 of the Nursing Home Care Act (210 ILCS 45/3-608 (West 1996)) did not imply a private right of action to nursing home employees who were harassed and discharged after providing information during an investigation concerning the death of a resident. Regarding the fourth factor necessity of an adequate remedy analysis, the court stated that the residents, who had a private right of action under the statute, and their friends and families would monitor the conditions at the facilities and thereby deter violations of the statute. *Fisher*, 188 Ill. 2d at 465. Furthermore, the comprehensive statutory scheme gave the Illinois Department of Public Health numerous sanctions and remedies to punish statutory violations, including fines that accumulated for each day a violation existed, license revocations and suspensions, fines of up to $10,000 for intentionally failing to correct certain types of violations or impeding any investigation or enforcement action, and fines of up to $10,000 for any retaliation against a nursing home employee. *Id.* at 465-67.

¶ 55 In *Metzger*, 209 Ill. 2d at 45, the court concluded that the whistleblower statute in the Personnel Code (20 ILCS 415/19c.1 (West 2002)) did not imply a private right of action for state employees who suffer retaliatory action for reporting wrongdoing by other state employees. The court ruled that implying a private right of action for state employees was not necessary to achieve the statutory purpose of encouraging honesty and candor among state employees because the Personnel Code expressly provided sufficient sanctions and remedies for violations of its provisions, including (1) "an administrative process through the Civil

Service Commission for both discipline and protection of state employees," (2) "judicial review of the Civil Service Commission's administrative decisions," (3) "authority for the Director of Central Management Services to institute and maintain any action or proceeding to secure compliance with the Personnel Code and its implementing rules and orders," and (4) "demotion, suspension, or discharge," and "criminal penalties for violation of any provision of the Personnel Code." *Metzger*, 209 Ill. 2d at 40-41.

¶ 56 Unlike the Nursing Home Care Act at issue in *Fisher* and the Personnel Code at issue in *Metzger*, the Insurance Code at issue here does not contain a multitude of express sanctions and remedies to ensure compliance with section 224.1. One purpose of section 224.1 is to ensure that employees are free of coercion when deciding to consent to COLI coverage and implying a private right of action for employees who are retaliated against if they do not consent to this insurance coverage is necessary to achieve that purpose.

¶ 57 In *Rodgers v. St. Mary's Hospital of Decatur*, 149 Ill. 2d 302, 308 (1992), the court determined that the plaintiff was a member of the class for whose benefit the X-Ray Retention Act (X-Ray Act) (210 ILCS 90/0.01 *et seq.* (West 2000)) was enacted and that the plaintiff's injury, loss of evidence to support his medical malpractice claim, was one the X-Ray Act was designed to prevent. The court noted that the X-Ray Act provided no specific administrative remedy for a violation of the Act. *Rodgers*, 149 Ill. 2d at 308-09. The court further noted that administrative remedies would not provide an adequate remedy to those injured by violations of the X-Ray Act and that the threat of liability was an efficient method of enforcing the regulation. *Id.* at 309. Accordingly, the court concluded that a private right of action was necessary to provide an adequate remedy for violations of the Act and that it was consistent with the underlying purpose of the Act. *Id.*

¶ 58 Like the X-Ray Act at issue in *Rodgers*, the Insurance Code does not expressly provide sanctions and remedies for violations of section 224.1. As stated above (*supra* ¶ 51), the Insurance Code provides authority for the director to conduct investigations and hearings to determine whether any person has violated any provision of Illinois's insurance laws. 215 ILCS 5/401 (West 2020). This provision, however, is not sufficient to enable employees to freely exercise their choice to consent to COLI coverage and prevent and punish retaliatory action against employees who refuse to consent. A violation of the Insurance Code is a petty offense, which is punishable by a fine of $75 to $1000 (730 ILCS 5/5-4.5-75(a) (West 2020)) and is "any offense for which a sentence of imprisonment is not an authorized disposition" (*id.* § 5-1-17). These penalties are too minimal to serve as a deterrent and assure compliance with section 224.1. ↩ memo p. 4, 9

¶ 59 Given the Insurance Code's overarching objective to promote the public welfare and protect the interests of insureds and prospective insureds by ensuring fair practices in the sale of insurance products, eliminating coercion or misinformation in the purchase and sale of COLI coverage is an integral part of that goal. The type of workplace coercion alleged in this case would be difficult to police. When an employee is discharged in violation of section 224.1 for refusing to consent to COLI coverage, the other employees who do not want to consent to this coverage will observe any minimal penalty imposed by the director of the Department of Insurance and resign themselves to signing their employer's consent form instead of facing the loss of their job and income, like their hapless former employee. Keeping employers honest and fair in the purchase and sale of COLI coverage depends on the ability of the employees to seek meaningful redress if they suffer retaliation for refusing to consent. Those employees,

however, are unlikely to exercise the right to refuse COLI coverage unless they are assured that they will not be the target of retribution by their employers.

¶ 60 The importance of true and voluntary consent to allowing a third-party beneficiary to purchase a life insurance policy on a person is necessary to avoid the harm of wager policies or situations similar to STOLI coverage. The importance of protecting the employees' voluntary consent in a COLI situation was recognized by the General Assembly when it enacted section 224.1 of the Insurance Code. Relegating discharged employees to lodging a consumer complaint with the director of the Department of Insurance—who does not have the power to impose significant sanctions on an offending employer, order the employee's reinstatement or award the employee damages—is not sufficient to achieve the General Assembly's purposes. As a result, employees will simply resign themselves to succumbing to their employer's will and apply for life insurance coverage the employees do not want. For all practical purposes, the safeguard against any retaliation promised to employees by section 224.1 of the Insurance Code will be rendered meaningless.

¶ 61 In *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 185 (1978), which recognized a common law cause of action for retaliatory discharge based on the Workers' Compensation Act, the Illinois Supreme Court wrote:

> "The imposition of a small fine, enuring to the benefit of the State, does nothing to alleviate the plight of those employees who are threatened with retaliation and forgo their rights, or those who lose their jobs when they proceed to file claims under the Act." *Id.*

These considerations apply with equal force here.

¶ 62 Protecting the Illinois public from retaliation in the workplace for exercising their right to reject COLI coverage is a matter of ongoing concern for the General Assembly. While the General Assembly acknowledges the benefits of the use of COLI coverage in the workplace, it limited the legality of this coverage to the requirements that the employee must voluntarily consent and cannot face any retaliation for refusing to consent. We conclude that implying a private right of action for retaliatory discharge in violation of section 224.1 of the Insurance Code is necessary to provide an adequate remedy because the statutory requirements of voluntary employee consent and no retaliation for a refusal to consent would be ineffective unless such an action is implied.

↩ memo p. 4, 9

¶ 63 For the foregoing reasons, we conclude that plaintiff is entitled to assert a private right of action to recover damages for the injuries she sustained as a result of defendant's alleged violation of section 224.1 of the Insurance Code. Plaintiff was a member of the class for whose benefit the statute was enacted, the retaliation she allegedly suffered was one the statute was designed to prevent, a private right of action is consistent with the underlying purpose of the statute, and implying a private right of action is necessary to provide an adequate remedy for violation of section 224.1.

¶ 64 III. CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court that granted defendant's motion to dismiss plaintiff's common law retaliatory discharge claim. However, we reverse the trial court's dismissal of plaintiff's implied private right of action retaliatory

discharge claim under section 224.1 of the Insurance Code.

¶ 66 Affirmed in part and reversed in part.

¶ 67 Cause remanded.

Crowley v. Empire Fire & Marine Insurance Co., 2019 IL App (2d) 180752

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 2d Dist. (the forum's district) · filed 2019-06-18 · Opinion
Published opinion

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Where the memo cites it

- memo p. 5 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 20: passage C024.1
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 20: passage C024.1
- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 20: passage C024.1

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Appellate Court

***Crowley v. Empire Fire & Marine Insurance Co.*, 2019 IL App (2d) 180752**

Appellate Court Caption	BARBARA CROWLEY, Individually and as Special Administrator of the Estate of Robert T. Crowley, Deceased, Plaintiff-Appellee, v. EMPIRE FIRE AND MARINE INSURANCE COMPANY; ENTERPRISE LEASING COMPANY OF CHICAGO, LLC; ENTERPRISE HOLDINGS, INC.; and THOMAS BRUEN, Defendants (Empire Fire and Marine Insurance Company, Defendant-Appellant).
District & No.	Second District Docket No. 2-18-0752
Filed	June 18, 2019
Decision Under Review	Appeal from the Circuit Court of De Kalb County, No. 17-MR-305; the Hon. William P. Brady, Judge, presiding.
Judgment	Reversed.
Counsel on Appeal	Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, of Chicago (Brian A. O'Gallagher and Nicole M. Miller, of counsel), for appellant. Peter C. Morse, of Morse Bolduc & Dinos, LLC, and Thomas Tuohy, of Tuohy Law Offices, both of Chicago, and Jack Slingerland, of Slingerland & Clark, P.C., of Sycamore, for appellee.

Panel JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment and opinion.

OPINION

¶ 1 This case concerns whether an exclusion in a *supplemental* insurance policy that Empire Fire and Marine Insurance Company (Empire) issued to John Bruen was unenforceable as a matter of public policy. The exclusion applied if the insured was under the influence of alcohol or drugs. The circuit court of De Kalb County determined that the intoxication exclusion was unenforceable and therefore entered summary judgment in favor of the plaintiff, Barbara Crowley. Empire appeals from the trial court's order. We reverse.

¶ 2 I. BACKGROUND

¶ 3 On June 12, 2015, John Bruen rented a 2015 Volkswagen Jetta from Enterprise. He purchased "full coverage" insurance, which included "Supplemental Liability Protection" (SLP or excess policy). The insurance was provided by Empire. The insurance policy provided coverage through a surety bond in the amount of $100,000, with the potential for an additional $900,000 of excess liability coverage. The SLP policy included an exclusion that the insurance did not apply to a loss where the insured was under the influence of alcohol or drugs. The rental agreement listed Thomas Bruen as an additional authorized driver of the rental car.

¶ 4 On June 13, 2015, Thomas Bruen, while driving the rental car, was involved in a motor vehicle accident that killed Robert Crowley and injured his wife Barbara Crowley. Thomas Bruen had marijuana, cocaine, and opiates in his system at the time of the accident, and he was subsequently convicted of aggravated driving under the influence of drugs (625 ILCS 5/11-501(d)(1)(C), (F) (West 2014)).

¶ 5 On May 1, 2017, Barbara Crowley filed a personal-injury complaint against Thomas Bruen. She alleged that Thomas Bruen's negligent operation of the rental car caused the accident and the resulting injuries to her and her late husband.

¶ 6 On September 29, 2017, Barbara Crowley filed a complaint against Enterprise Leasing Company of Chicago, LLC, and Enterprise Holdings, Inc. (Enterprise defendants), as well as Empire, seeking a declaration that the Empire excess policy provided coverage for the claims that she had asserted against Thomas Bruen in the underlying case.

¶ 7 On January 16, 2018, Crowley filed a motion for a judgment on the pleadings against Empire. She argued that Empire was obligated to provide coverage based on its insurance contract with John Bruen. She asserted that the intoxication exclusion in the Empire policy was void because it was contrary to Illinois public policy.

¶ 8 On February 23, 2018, Empire filed a motion for summary judgment on Crowley's action. Empire argued that, based on the language of the insurance contract, Thomas Bruen was not entitled to coverage because he was intoxicated at the time of the accident. Empire insisted that the insurance contract was neither ambiguous nor against public policy.

¶ 9 On July 18, 2018, the trial court denied Empire's motion for summary judgment and indicated that it would treat Crowley's motion for judgment on the pleadings as a motion for summary judgment.

¶ 10 On August 15, 2018, the trial court granted Crowley's motion for summary judgment. Relying on *Hertz Corp. v. Garrott*, 238 Ill. App. 3d 231 (1992), the trial court found that the intoxication exclusion in Empire's SLP policy was unenforceable as against public policy and that the Empire policy provided an additional $900,000 of excess coverage. The trial court also granted Crowley's motion to nonsuit the Enterprise defendants and found that its order resolved all matters in controversy between the parties. Empire thereafter filed a timely notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 The issue on appeal is whether the trial court erred in granting summary judgment to Crowley. Appellate review of a summary judgment ruling is *de novo*. *AUI Construction Group, LLC v. Vaessen*, 2016 IL App (2d) 160009, ¶ 16. 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 2016). The interpretation of an insurance policy and the coverage provided are questions of law that are appropriate for resolution through summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). The policy should be enforced as written unless the policy provision in question is ambiguous or contravenes public policy. *Safeway Insurance Co. v. Hadary*, 2016 IL App (1st) 132554-B, ¶ 21; *Pahn v. State Farm Mutual Automobile Insurance Co.*, 291 Ill. App. 3d 343, 345 (1997).

¶ 13 Here, Crowley does not argue that the intoxication exclusion barring coverage to Thomas Bruen is ambiguous. Rather, she contends that the exclusion is unenforceable because it contravenes public policy. The Illinois General Assembly declared it to be the public policy of this state that owners and operators of motor vehicles carry primary liability insurance coverage when it passed the Illinois Safety and Family Financial Responsibility Law (Financial Responsibility Law) (625 ILCS 5/7-601(a) (West 2016)), requiring each motorist to have minimum liability insurance coverage regardless of fault. See *Nelson v. Artley*, 2015 IL 118058, ¶ 14. When a statute exists for the protection of the public, it cannot be overridden through private contractual terms. *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 129 (2005). One reason for this rule is that "the members of the public to be protected are not and, of course, could not be made parties to any such contract." *American Country Insurance Co. v. Wilcoxon*, 127 Ill. 2d 230, 241 (1989). Where liability coverage is mandated by statute, a contractual provision in an insurance policy that conflicts with the statute will be deemed void. *Progressive*, 215 Ill. 2d at 129. When we assess whether a statutory provision prevails over a contractual provision, however, we must keep in mind that parties generally have freedom to contract as they desire. *Id.* Our supreme court has reasoned:

> "The freedom of parties to make their own agreements, on the one hand, and their obligation to honor statutory requirements, on the other, may sometimes conflict. These values, however, are not antithetical. Both serve the interests of the public. Just as public policy demands adherence to statutory requirements, it is in the public's

interest that persons not be unnecessarily restricted in their freedom to make their own contracts." *Id.*

¶ 14 Accordingly, courts use sparingly the power to declare a contractual provision void as against public policy. *Id.* A contractual provision will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy or unless it is manifestly injurious to the public welfare. *Id.* at 129-30. Such a determination depends upon the particular facts and circumstances of each case. *Id.* at 130.

¶ 15 Both parties point to two cases in which the Illinois Appellate Court has analyzed the interplay between public policy and insurance contracts: *Garrott* and *Fogel v. Enterprise Leasing Co. of Chicago*, 353 Ill. App. 3d 165 (2004). Crowley argues that this case is analogous to *Garrott* while Empire argues that this case is analogous to *Fogel*.

¶ 16 In *Garrott*, Angelique Garrott rented an automobile from Hertz. *Garrott*, 238 Ill. App. 3d at 233. The rental agreement indicated that liability protection (which was included in the cost of renting the vehicle) was $100,000 per person, $300,000 per accident for bodily injury, and $25,000 for property damage. *Id.* at 237. Angelique declined to purchase any liability insurance supplement. *Id.* at 236. The day after Angelique rented the vehicle, her husband, Rodney, was involved in an automobile accident. *Id.* at 233. As a result of the accident, Hertz was sued. *Id.* Hertz filed a declaratory action, asking the trial court to find that it owed no liability coverage to Angelique because Rodney (1) was not authorized under the contract to drive the vehicle and (2) violated the contract by driving while intoxicated. *Id.* The trial court found that Hertz's contractual obligation to provide liability coverage was voided by Rodney's intoxication. *Id.* at 234.

¶ 17 The appellate court reversed, finding that the exclusionary clause in the insurance contract was void as against public policy. *Id.* at 240. In so holding, the appellate court quoted with approval a Delaware Supreme Court opinion that invalidated a similar intoxication exclusion:

> " '[T]he fixing of penalties for antisocial conduct is, in the first instance, a governmental responsibility through legislative response. The Delaware General Assembly has expressly determined the consequences which result from a conviction of driving under the influence. These sanctions include the criminal penalties of fine and/or imprisonment [citation] and license revocation through administrative action [citation]. We do not believe that the General Assembly, in addition to the imposition of these substantial penalties, also intended, by implication, to work a forfeiture of insurance protection purchased in conformity with State law.' " *Id.* at 238-39 (quoting *Bass v. Horizon Assurance Co.* 562 A.2d 1194, 1197 (Del. 1989)).

¶ 18 The *Garrott* court opined that, as in the Delaware case, a car rental company (a private entity) could not, in the name of public policy, impose a sanction upon private citizens for driving while intoxicated, "when such sanctions work a hardship upon the general public and, at the same time, benefit the rental agency and/or its insurer." *Id.* at 239. The appellate court additionally rejected Hertz's argument that the court should lower the amount of the insurance that Hertz was obligated to provide to the statutory minimum of $50,000. *Id.* The appellate court explained that it would not reform the contract because if Hertz "wanted to provide liability protection at a level that would merely satisfy the minimum requirement under the statute, it was free to have done so." *Id.*

¶ 19 Turning to the second case, in *Fogel*, the driver was in an accident while driving a vehicle rented from Enterprise. *Fogel*, 353 Ill. App. 3d at 168. The driver had purchased supplemental liability coverage. *Id.* The 18-year-old driver was able to rent a car because he misrepresented his age as 22. *Id.* Enterprise would not rent to anyone younger than 21. *Id.* After the accident, Enterprise sought to rescind its contract with the driver and deny him insurance. *Id.* at 169-70. The victims of the accident sued Enterprise, arguing that (1) Enterprise could not rescind its contract and (2) public policy required that the contract, including the supplemental liability policy, be enforced. *Id.* at 171-73. On review, the appellate court rejected those arguments. *Id.* at 175. In rejecting the public policy argument that Enterprise could not rescind the contract once the rights of an innocent third party had vested, the appellate court stated:

> "[W]e do not find Fogel's position persuasive. The cases cited by Fogel concern state laws for mandatory liability insurance. In these cases, courts have held that mandatory insurance statutes have abrogated the insurance company's right to rescind the policy with regard to claims of persons not involved in making the misrepresentation. In other words, the public policy underlying mandatory insurance statutes requires that insurance companies cannot rescind the contract and preclude an innocent third party from coverage benefits. The rationale in these cases is that mandatory insurance statutes were enacted to protect the public from financial hardship and these laws have transformed what was a private contract into a quasi-public obligation. The public policy argument is that where a state mandates liability insurance in order to protect the public, the risk of a misrepresentation made by the applicant is borne by the insurer and not an innocent third party.
>
> In this case, however, Fogel's public policy argument fails because we are not addressing mandatory liability coverage. *** Here, the case involves a private contract entered into between Enterprise and [the driver]. The supplemental liability protection [(SLP)] was a part of that contract. The SLP was not required under state law with the purpose of protecting the public from financial hardship. Thus we find Fogel's public policy argument unavailing." (Emphasis omitted.) *Id.* at 174.

¶ 20 *Fogel* is more analogous to the instant case because the insurance policy at issue is an excess policy. We consider this to be an important distinction when considering public policy relating to insurance. As noted earlier, by passing the Financial Responsibility Law requiring each motorist to have minimum liability insurance coverage regardless of fault, the Illinois General Assembly declared it to be the public policy of this state that owners and operators of motor vehicles carry primary liability insurance coverage. See *Nelson*, 2015 IL 118058, ¶ 14. However, the Financial Responsibility Law does not mandate that excess or supplemental liability insurance coverage be obtained once the mandated minimum level of insurance has been met. *Id.* ("The law does not, however, require that the full amount of any loss be covered. Rather, it mandates only certain minimum levels of coverage."). Additionally, no Illinois statute precludes an intoxication exclusion in an excess or supplemental liability policy. See *Progressive*, 215 Ill. 2d at 138 ("[T]he *** Financial Responsibility Law clearly contemplates that exclusions may be included in policies and that those exclusions will be upheld."). As such, Empire's denial of excess or supplemental coverage to Thomas Bruen based on his violation of the insurance contract does not violate public policy.

↩ memo p. 5, 11, 13

¶ 21 In so ruling, we note that the distinction the *Fogel* court drew between mandatory insurance and supplemental insurance regarding public policy concerns is consistent with the way that other courts have analyzed the issue.[1] See *T.H.E. Insurance Co. v. Dollar Rent-A-Car Systems, Inc.*, 900 So. 2d 694, 696 (Fla. Dist. Ct. App. 2005) (public policy dictates against mandating excess liability insurance coverage when an exclusion for losses that stem from intoxication is clearly spelled out); *Philadelphia Indemnity Insurance Co. v. Carco Rentals, Inc.*, 923 F. Supp. 1143, 1153 (W.D. Ark. 1996) (intoxication exclusion in supplemental liability policy does not violate Arkansas public policy because the supplemental liability coverage is purely voluntary and is not designed to comply with minimum financial responsibility laws).

¶ 22 Crowley argues that *Fogel* is distinguishable because the underlying contract in that case was void, as it was fraudulently entered into. Because John Bruen entered into a valid contract with Empire, she insists that *Fogel* has no relevance here. We do not believe it to be significant whether a driver's insurance coverage is negated because of a misrepresentation in the rental contract (as in *Fogel*) or limited by operation of a policy exclusion (as in the case here). Rather, what is relevant is that *Fogel* involved an excess policy and *Garrott* did not.[2] The *Fogel* court drew this same distinction when it held that the public policy rationale in *Garrott* did not apply because that case did not concern insurance coverage that was not required by state law. *Fogel*, 353 Ill. App. 3d at 174.

¶ 23 We also reject Crowley's argument that, based on *Garrott*, we should find the intoxication exclusion void as against public policy because enforcing the exclusion would "work a hardship upon the general public and, at the same time, benefit the rental agency and/or its insurer." *Garrott*, 238 Ill. App. 3d at 239. We decline to extend *Garrott* to the facts of this case. Adopting Crowley's argument would essentially void any insurance exclusion if that exclusion has the effect of harming an innocent third party. Our supreme court has specifically rejected that argument, stating:

> "We observed [in *Progressive*] that the legislature could have barred [auto] insurers from excluding certain risks from coverage, but did not do so, and concluded that the legislature must have intended that coverage exclusions may be included in liability policies ***. [Citation.]
>
> *** We recognize that, depending upon the circumstances of a particular case, *** any exclusion[ ] may result in no insurance coverage from which injured third parties may be compensated. Such coverage gaps, however, implicate policy concerns

[1]We recognize that it is well established that, where the public policy of Illinois may be found in this state's constitution, statutes, and judicial decisions, the public policies of other states are not persuasive. *State Farm Mutual Automobile Insurance Co. v. Collins*, 258 Ill. App. 3d 1, 4 (1994). Nothing, however, bars this court from adopting sound reasoning. We need not ignore persuasive reasoning in nonprecedential decisions any more than persuasive reasoning in a learned treatise or anywhere else. *People ex rel. Webb v. Wortham*, 2018 IL App (2d) 170445, ¶ 27.

[2]Crowley mischaracterizes the policy in *Garrott* as an excess policy because it provided greater coverage than was mandated by statute. An excess policy is different from a primary policy because it does not provide coverage until the coverage provided by the primary policy has been exhausted. See *United States Fidelity & Guaranty Co. v. Continental Casualty Co.*, 198 Ill. App. 3d 950, 955 (1990). The fact that a primary policy provides greater coverage than is mandated by statute does not convert a primary policy into an excess policy. See *id.*

that are properly considered by the legislature, not this court." *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 445 (2010).

¶ 24 Further, we are unpersuaded by Crowley's argument that Empire's excess insurance policy is illusory (and therefore unenforceable) because it excludes coverage for all accidents arising from criminal acts. Crowley insists that, if the exclusion is upheld, Empire would never have to provide coverage because all accidents are premised on criminal acts. Our supreme court has rejected a similar argument, asserting that a court "need not speculate as to the myriad of other factual scenarios to which the exclusion might apply." *Id.* at 440. Based on the specific facts of this case, Empire's intoxication exclusion in the excess policy is enforceable.

¶ 25 We also reject Crowley's argument that the intoxication exclusion should be unenforceable because it was in small print on the reverse side of the rental agreement and neither John nor Thomas Bruen was provided with a copy of the Empire policy. As Empire points out, Crowley forfeited this issue by not raising it before the trial court. *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8 ("It is well-settled law in Illinois that issues, theories, or arguments not raised in the trial court are forfeited and may not be raised for the first time on appeal."). Even overlooking forfeiture, however, whether the exclusion was in small print is irrelevant to whether the exclusion violates public policy.

¶ 26 Finally, we find Crowley's reliance on *Maryland Casualty Co. v. Iowa National Mutual Insurance Co.*, 54 Ill. 2d 333 (1973), to be misplaced. Crowley argues that *Maryland Casualty* stands for the proposition that the owner of an automobile may not cause a permissive user to lose liability coverage by placing restrictions on the use of the vehicle. She therefore insists that no insurance exclusions applied to Thomas Bruen because "[o]nce the initial permission has been granted, no limitations may be placed upon the driver. Any deviations are immaterial. Any use is permissible."

¶ 27 In *Maryland Casualty*, at issue was whether the insurance company had to provide coverage for someone who had permission to drive the vehicle but had not received that permission from the named insured. *Id.* at 336. The *Maryland Casualty* court did not address whether the exclusions that applied to the named insured also applied to anyone whom the insured gave permission to drive the vehicle. However, the supreme court addressed that issue in *Progressive* and held that an exclusion that applied to the named insured also applied to anyone whom the insured permitted to drive the vehicle. *Progressive*, 215 Ill. 2d at 134. Thus, *Progressive* specifically refutes Crowley's argument.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, the judgment of the circuit court of De Kalb County is reversed.

¶ 30 Reversed.

Daniel v. Drury Hotels Co., LLC, 2024 IL App (5th) 230090-U

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 5th Dist. · filed 2024-09-16 · Rule 23 order
Rule 23 order: persuasive only (Rule 23(e)(1))

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 12 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 21: passage C095.1

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NOTICE
Decision filed 09/16/24. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2024 IL App (5th) 230090-U

NO. 5-23-0090

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

KARL DANIEL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 22-MR-231
	)	
DRURY HOTELS COMPANY, LLC,	)	Honorable
	)	Julie K. Katz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and McHaney concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in not dismissing the petitioner's petition for discovery filed pursuant to Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018) where the petitioner already knew the identity of a potential defendant who may be responsible for his alleged injuries.

¶ 2 The petitioner, Karl Daniel, commenced the underlying action to ascertain the identities of those responsible for the personal injuries he suffered after a slip and fall on premises owned by the respondent, Drury Hotels Company, LLC. On November 14, 2022, the petitioner filed a petition for discovery pursuant to Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018), naming the respondent as the entity in possession of information that would identify the potential defendants responsible for his personal injuries. The instant appeal arises from the circuit court's order of February 8, 2023, denying the respondent's motion to dismiss filed pursuant to section 2-615 of

the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020)), finding that the petitioner was entitled to certain discovery. For the following reasons, we reverse.[1]

¶ 3 I. BACKGROUND

¶ 4 On November 14, 2022, the petitioner filed a petition for discovery pursuant to Rule 224, which indicated that, on February 5, 2022, the petitioner was a patron and customer of the Drury Inn and Suites (Drury Inn) located at 12 Ludwig Drive in Fairview Heights, Illinois. While walking on the premises, the petitioner slipped and fell on a frozen substance caused by either an unnatural accumulation of ice, snow, or other substance or a natural cause aggravated by the property owner. As a result of this slip and fall, the petitioner suffered personal injuries.

¶ 5 The petitioner brought this Rule 224 petition to ascertain the identities of those who may be responsible for his injuries. Specifically, the petitioner sought the following identifying information from the respondent: (1) the names and addresses of all individuals or entities doing business as Drury Inn at that location as of the time of the occurrence; (2) the names and addresses of all employees of that Drury Inn on the date of the incident; (3) the names and addresses of all current employees of that Drury Inn; (4) the names and addresses of all owners of that Drury Inn on the date of the occurrence; (5) the current names and addresses of all owners of that Drury Inn; (6) the names and addresses of all individuals and entities that provided snow or ice removal

[1]We note that the petitioner has failed to file an appellee's brief. There are three distinct, discretionary options a reviewing court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record. *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009). In this case, the record is simple, and the claimed errors are such that we can easily decide them without the aid of the appellee's brief.

services to that Drury Inn from November 1, 2021, through February 5, 2022; (7) the names and addresses of all individuals and entities that provided salting services to that Drury Inn from November 1, 2021, through February 5, 2022; (8) the names and addresses of all individuals and entities that provided maintenance, repairs, or alterations to the pavement at that Drury Inn during the five years prior to the date of the incident; and (9) the names of all individuals, businesses, and entities that have not otherwise been identified that had an interest in that Drury Inn at the time of the incident and their interest in the premises. The petition requested that the circuit court enter an order requiring the respondent to produce the requested information and to allow the petitioner to use all available discovery means to obtain this information.

¶ 6 On December 15, 2022, the respondent filed a motion to dismiss the petition pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2020)) as well as a supporting memorandum of law. In the motion, the respondent contended that Rule 224 was limited to ascertaining the identity of one individual or entity who may be responsible for the petitioner's damages. The respondent argued that the petitioner could not use Rule 224 to conduct pre-suit discovery when he was already aware of the identity of at least one potential defendant, the respondent; he was aware that the respondent was the manager and operator of the premises where he was allegedly injured. Instead, the petitioner was required to file suit against the known defendant and utilize the standard discovery process to ascertain the identity of other potential defendants. In the memorandum, the respondent contended that the petitioner had exceeded the scope and intent of Rule 224 by seeking the identities of nine separate categories of other persons or entities, including current and former employees, and the Rule 224 petition constituted an unwarranted fishing expedition.

¶ 7 On December 27, 2022, the petitioner filed a response to the motion to dismiss, in which he disagreed with the respondent's argument that Rule 224 discovery was not permitted when a petitioner knew the name of at least one potential defendant. The petitioner contended that he was not seeking any information about liability or responsibility. Instead, he only sought information that would identify certain businesses and individuals. Moreover, the petitioner indicated that he had already contacted the respondent's counsel and offered to limit the Rule 224 discovery even further to only the identification of persons or entities that provided snow removal, ice removal, or salting services during a specific four-month period.

¶ 8 On February 8, 2023, the trial court held a hearing on the motion to dismiss. During the hearing, the court indicated that there was a conflicting line of cases as to whether a petitioner was prohibited from filing a Rule 224 action when the identity of one defendant was known. The court then indicated that it would follow *Beale v. EdgeMark Financial Corp.*, 279 Ill. App. 3d 242 (1996), which permitted a Rule 224 action for discovery despite petitioner already having knowledge of the identities of some individuals who may be liable. That same day, the circuit court entered a written order, denying the motion to dismiss and ordering discovery related to the identity of persons or entities that provided snow removal, ice removal, or salting services within four months of the incident. The respondent appeals.

¶ 9 II. ANALYSIS

¶ 10 The sole issue on appeal is whether the trial court erred in denying the respondent's motion to dismiss and permitting the Rule 224 action for certain discovery.

¶ 11 A motion to dismiss filed under section 2-615 challenges the legal sufficiency of the complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). The relevant question is whether the facts alleged in the complaint, viewed in the light

most favorable to petitioner, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25. A court should dismiss a claim pursuant to section 2-615 when it is clearly apparent that no set of facts can be proven that will entitle plaintiff to recovery. *Marshall*, 222 Ill. 2d at 429. We review the court's ruling on a section 2-615 motion to dismiss *de novo*. *Id.*

¶ 12 Also, in general, this court reviews a trial court's ruling on a Rule 224 petition under an abuse of discretion standard. *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 709 (2010). However, where a trial court's exercise of discretion relies upon a conclusion of law, our review is *de novo*. *Id.* at 710.

¶ 13 Illinois Supreme Court Rule 224(a)(1)(i) (eff. Jan. 1, 2018) provides that "[a] person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery." Rule 224(a)(1)(ii) further provides that the verified petition seeking such discovery must set forth the reason the discovery is necessary, and the nature of the discovery sought. Ill. S. Ct. R. 224(a)(1)(ii) (eff. Jan. 1, 2018). An order granting the petition should limit discovery to the identification of responsible persons and entities. *Id.*

¶ 14 The plain language of Rule 224 permits a petitioner to engage in discovery to ascertain the identity of persons or entities who may be responsible in damages. *Ingram v. Angela Intili, M.D., Ltd.*, 2022 IL App (1st) 210656, ¶ 13. It is "not intended to permit a party to engage in a wide-ranging, vague, and speculative quest to determine whether a cause of action actually exists." *Id.* Thus, discovery pursuant to Rule 224 is limited to ascertaining the identity of potential defendants. *Malmberg v. Smith*, 241 Ill. App. 3d 428, 432 (1993). Once the identity of a potential defendant

has been ascertained, the purpose of the rule has been accomplished, and the action should be dismissed. *Roth v. St. Elizabeth's Hospital*, 241 Ill. App. 3d 407, 413 (1993). A Rule 224 petition is inapplicable when the identity of any potential defendant is already known. *Maxon*, 402 Ill. App. 3d at 710. Once a potential defendant's identity is learned, a petitioner can then file a case and use the discovery provisions of the Illinois Supreme Court rules or of the Code to conduct full discovery of those named as respondents-in-discovery to determine who was responsible. *Ingram*, 2022 IL App (1st) 210656, ¶ 13.

¶ 15 However, emphasis should not be placed on identity alone but on the entire phrase used in Rule 224: "identity of one who may be responsible." Ill. S. Ct. R. 224(a)(1)(i) (eff. Jan. 1, 2018); *Beale*, 279 Ill. App. 3d at 252. To determine those who may be responsible, petitioner must be able to identify "those individuals or entities who stand in the universe of potential defendants." *Beale*, 279 Ill. App. 3d at 252. If there is a sufficient connection to the injury by an individual or entity so as to place such individual or entity within the universe of potential defendants, petitioner may not seek further discovery pertaining to any actual wrongdoing. *Id.* "However, where the known connection to the injury is remote and does little or nothing to limit or define the universe of potential defendants, the petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." *Id.* at 252-53.

¶ 16 Here, in his petition seeking Rule 224 discovery, the petitioner indicated that he was a patron and customer of the Drury Inn on February 5, 2022, when he was walking on the premises and slipped and fell on a frozen substance caused by either an unnatural accumulation of ice, snow,

or other substance, or a natural cause aggravated by the premise owner that resulted in him suffering personal injuries. The respondent was the manager and operator of the premises.

¶ 17 In seeking Rule 224 discovery, the petitioner did not dispute that he knew the identity of a potential defendant, the respondent, but he argued that Rule 224 discovery was necessary to determine the identity of the individual or entity who provided snow removal and/or salting services to the Drury Inn on the date in the question. The petitioner argued that, if the accident was the result of the person or entity providing snow removal and/or salting services, then Drury Inn might not be liable for his injuries. Relying on a footnote in *Beale*, the trial court found that knowledge of the identity of one potential defendant did not preclude Rule 224 discovery to ascertain the identity of other potential defendants. In making this decision, the court acknowledged that there were cases that supported the respondent's position, but the court found *Beale* more well-reasoned and, thus, followed it. The court also noted that the petitioner had limited his inquiry to learning the identities of potential defendants.

¶ 18 *Beale* involved an alleged insider trading scheme of EdgeMark stock. *Id.* at 246-47. Although petitioner knew the identity of stock purchasers and that some of them were insiders, petitioner sought to discover which stock purchasers had access to insider information. *Id.* at 253. In finding that the request did not exceed the scope of Rule 224, the First District Appellate Court concluded that petitioner's knowledge of the names of individuals who acquired stock in EdgeMark immediately before the public announcement, without more, did little if anything to define or narrow the universe of potential defendants from the general members of the stock-purchasing public. *Id.* The court, thus, concluded that a reasonable interpretation of Rule 224 would permit the trial court some latitude of discretion under its provisions to allow discovery of

certain additional facts pertaining to the relationship between the stock purchasers and the corporate insiders to further define and narrow the universe of potential defendants. *Id.*

¶ 19 The relevant footnote in *Beale* that the trial court here relied on in making its decision stated as follows:

> "EdgeMark relies on language in *Roth v. St. Elizabeth's Hospital*, 241 Ill. App. 3d 407 *** (1993), that the Rule 224 petition was factually inappropriate because the petitioner admittedly knew the names of several individuals involved in the decedent's medical care. In reliance on that language, EdgeMark argues that Beale was not entitled to utilize Rule 224 because he knew the identity of some defendants and had filed a federal lawsuit against them which was pending at the time the trial court ruled upon Beale's Rule 224 petition. We disagree. As discussed in the text of this opinion, *Roth* did not hold that Rule 224 discovery is not permitted where the petitioner knows the name of a potential defendant. In fact, the court recognized that the petitioner was permitted access by way of her Rule 224 petition to the name of an additional doctor who acted as a consultant. See 241 Ill. App. 3d at 419 ***. *Roth* held that Rule 224 discovery is not permissible where the petitioner knows the names and certain other information that establishes the potentiality for liability. In *Roth*, the petitioner knew the names of the doctors as well as their liability potential in the fact that they had rendered medical care to the decedent. The petitioner's Rule 224 petition was denied because it sought specific information concerning actual liability." *Id.* at 251 n.3.

¶ 20 Thus, on occasion, the identification of a potential defendant may require more than simply a name. *Gaynor v. Burlington Northern & Santa Fe Ry.*, 322 Ill. App. 3d 288, 294 (2001). In those instances, "discovery under Rule 224 is not limited to the petitioner's ascertainment of a name only. However, even under *Beale*, knowledge of the connection of an individual to the injury involved will preclude further discovery under the rule." *Id.*

¶ 21 Even under *Beale*, which has expanded the discovery permitted under Rule 224, we ↩ memo p. 12 conclude that the petitioner here is not permitted to proceed with Rule 224 discovery since he already knows the identity of a potential defendant who may be responsible for his alleged injuries. The purpose of a Rule 224 action is to ascertain "the identity of one who *may* be responsible in damages." (Emphasis added.) Ill. S. Ct. R. 224(a)(1)(i) (eff. Jan. 1, 2018). The petitioner was allegedly injured while on the respondent's premises. It was undisputed that, when the petitioner

filed his Rule 224 petition, he knew the identity of the manager and operator of the property where his alleged injury occurred. Thus, the connection between his alleged injury and the identity of a potential defendant is already known and not remote.

¶ 22 As stated above, it is well established that, once the identity of a potential defendant has been ascertained, the purpose of the rule has been accomplished, and the action should be dismissed. *Roth*, 241 Ill. App. 3d at 413. Thus, we conclude that the trial court abused its discretion when it ordered the discovery sought by the petitioner in the Rule 224 action. To obtain additional discovery, the petitioner may now utilize either the respondents-in-discovery statute of the Code (735 ILCS 5/2-402 (West 2020)) or the general discovery provisions of the Illinois Supreme Court rules.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, the order entered by the circuit court of St. Clair County is reversed, and the petition is dismissed.

¶ 25 Order reversed.

Dent v. Constellation NewEnergy, Inc., 2022 IL 126795

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. Supreme Court · filed 2022-04-21 · Opinion
Supreme Court

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 23: passage C045.4
- memo p. 7 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 23: passage C045.4
- memo p. 12 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 23: passage C045.4
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Illinois Official Reports

Supreme Court

***Dent v. Constellation NewEnergy, Inc.*, 2022 IL 126795**

Caption in Supreme Court:	RICHARD L. DENT *et al.*, Appellees, v. CONSTELLATION NEWENERGY, INC., *et al.*, Appellants.
Docket No.	126795
Filed Rehearing denied	April 21, 2022 September 26, 2022
Decision Under Review	Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Patricia O'Brien-Sheahan, Judge, presiding.
Judgment	Appellate court judgment reversed. Circuit court judgment affirmed.
Counsel on Appeal	J. Timothy Eaton and Jonathan B. Amarilio, of Taft Stettinius & Hollister LLP, of Chicago, for appellants. Paul G. Neilan, of Law Offices of Paul G. Neilan, P.C., of Highland Park, for appellees.

John J. Hamill and Pamela Begaj Loutos, of DLA Piper LLP (US), Sharmili Majmudar, of Women Employed, and Ameri Klafeta, of Roger Baldwin Foundation of ACLU, Inc., all of Chicago, Courtney Saleski and Danielle T. Morrison, of DLA Piper LLP (US), of Philadelphia, Pennsylvania, and Sunu Chandy and Elizabeth Tang, of National Women's Law Center, of Washington D.C., for *amici curiae* Women Employed *et al.*

Justices

JUSTICE MICHAEL J. BURKE delivered the judgment of the court, with opinion.

Justices Theis, Overstreet, and Carter concurred in the judgment and opinion.

Justice Garman dissented, with opinion, joined by Justice Neville.

Justice Neville dissented upon denial of rehearing, without opinion.

Chief Justice Anne M. Burke took no part in the decision.

OPINION

¶ 1 Petitioners, Richard L. Dent and RLD Resources, LLC (RLD), filed an Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018) petition seeking disclosure from respondents, Constellation NewEnergy, Inc.; CNE Gas Supply, LLC; Constellation Energy Gas Choice, LLC; and Constellation NewEnergy-Gas Division, LLC. Petitioners sought the names and addresses of three unidentified individuals who might be responsible in damages to petitioners, alleging that those individuals publicized false and defamatory statements about Dent that caused respondents to terminate their contractual relationships with petitioners. The Cook County circuit court dismissed the petition with prejudice. The Appellate Court, First District, reversed and remanded. 2020 IL App (1st) 191652.

¶ 2 BACKGROUND

¶ 3 Petitioners were party to several energy supply and marketing contracts with respondents. Petitioners were independent contractors, and the contracts were terminable at will. On October 18, 2018, respondents informed petitioners that they were terminating the at-will consulting agreements with petitioners.

¶ 4 On March 18, 2019, petitioners filed a verified petition under Rule 224. The petition alleged as follows. On September 14, 2018, Grace Speights and Theo McKinney III, two attorneys representing respondents, visited Dent at RLD's offices. The attorneys told Dent that certain allegations had been made against him. The allegations arose from a Senior-Pro Tour golf outing sponsored by respondents in July 2018. Dent was a guest at a pregolf party at the Shedd Aquarium in Chicago, Illinois. A woman at the event alleged that Dent groped her. The same woman also alleged that, at a similar event in Philadelphia, Pennsylvania, in June 2016,

Dent told her she had "a butt like a sister." Dent asked who had made the allegations, but the attorneys refused to name her. Petitioners therefore identified the woman as "Person A."

¶ 5 The attorneys also told Dent that, at the same July 2018 golf outing, a gentleman observed Dent collecting his golf outing materials at the Marriott Hotel in Chicago. The gentleman described Dent as drunk and disorderly when picking up his materials. The attorneys refused to identify the gentleman, so the petition described him as "Person B."

¶ 6 At the September 14, 2018, meeting, Dent told the attorneys that the allegations against him were completely false. The attorneys informed Dent that respondents would be reviewing their contractual arrangements with petitioners in light of the allegations. On or about October 1, 2018, petitioners received a letter from respondents terminating all contracts between petitioners and respondents going forward.

¶ 7 The Rule 224 petition also included exhibit B, a letter respondents' counsel sent to petitioners' counsel on December 19, 2018, responding to petitioners' claim that respondents had impugned Dent's name and reputation. The December 19, 2018, letter stated that Dent had been the subject of an investigation by a third party hired by respondents to investigate reports that Dent had engaged in "grossly inappropriate behavior during the 2016 and 2018 Pro-Am Tournament events." The letter stated that respondents' attorneys met with Dent to allow Dent to provide his recollection of the events in question. The letter noted that Dent had denied the allegations but that the investigators determined that Dent's denials were not credible and that the reports accurately described behaviors that were in violation of respondents' "code of business conduct, completely outside the norms of socially acceptable behavior, and demeaning to Constellation employees." The letter also stated that respondents had not disclosed the findings of the investigation to any third party, aside from privileged communications with respondents' attorneys. The letter concluded that any claim that respondents had impugned Dent's name and reputation was frivolous, given respondents' legal obligation to investigate the allegations and the protected nature of the findings of the investigation.

¶ 8 Petitioners' Rule 224 petition alleged that respondents refused to identify the third party hired to investigate the claims against Dent, so the petition referred to the third party as "Person C." The petition asserted that, on information and belief, Person C investigated the claims made against Dent prior to respondents' issuance of the October 1, 2018, termination notice. The petition also alleged that, on information and belief, Person C published or republished to respondents the statements of Person A and Person B concerning Dent.

¶ 9 The petition then alleged that the statements published by Persons A, B, and C were (1) made as statements of fact, (2) false, and (3) not privileged. The statements published by Persons A, B, and C imputed acts of moral turpitude and impugned Dent's character, reputation, and good name. Further, respondents admitted in the December 19, 2018, correspondence that the statements published by Persons A, B, and C concerning Dent were both the cause in fact and the proximate cause of respondents' termination of all contractual relationships with petitioners. Petitioners alleged that Persons A, B, and C might be responsible in damages to them and that petitioners wished to engage in discovery for the sole purpose of ascertaining the identities and whereabouts of Persons A, B, and C. The discovery sought by petitioners was necessary because respondents refused to provide petitioners with the identities and addresses of Persons A, B, and C.

¶ 10 Respondents moved to dismiss the Rule 224 petition pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). Respondents argued that the petition was substantially insufficient because the petition sought discovery in support of a prospective lawsuit for defamation but the allegedly defamatory statements were, as a matter of law, protected by qualified privilege. In addition, petitioners did not, and could not, allege facts sufficient to overcome that privilege. For that reason, the discovery sought by petitioners was not necessary to pursue a cognizable claim, as required under Rule 224.

¶ 11 The trial court dismissed the Rule 224 petition with prejudice. In issuing its ruling, the trial court *sua sponte* ruled that Rule 224 is satisfied when a petitioner has identified someone who may be sued. In this case, petitioners knew the identities of respondents and their attorneys, so petitioners had identified someone who may be sued. The trial court cited *Low Cost Movers, Inc. v. Craigslist, Inc.*, 2015 IL App (1st) 143955, in support of its ruling.

¶ 12 The court in *Low Cost Movers* held that a Rule 224 petition may be dismissed if the identity of a potential defendant is already known to the petitioner. *Id.* ¶ 16. The *Low Cost Movers* court explained that "Rule 224 is not intended to permit a party to engage in a wide-ranging, vague, and speculative quest to determine whether a cause of action actually exists." *Id.* ¶ 17. Nor could Rule 224 discovery continue "until the identity of the party that engaged in the 'wrongdoing' coincides with petitioner's causes of action." *Id.*

¶ 13 Based upon *Low Cost Movers*, the trial court stated that the respondents might be liable for damages to petitioners, so a Rule 224 petition was an inappropriate vehicle for petitioners to attempt to learn the names of other, unidentified individuals.

¶ 14 Petitioners filed a motion to reconsider the dismissal of their Rule 224 petition. Petitioners argued the trial court erred in finding that they knew the identity of a potential defendant. Petitioners noted that respondents were not the publishers of the allegedly defamatory statements about Dent. Rather, respondents were the third parties to whom Persons A, B, and C published their allegedly defamatory statements. Consequently, no cause of action for defamation could lie against respondents. In addition, no cause of action for breach of contract would lie against respondents because respondents could terminate at-will contracts for any reason. Consequently, any cause of action would lie solely against Persons A, B, and C. In contrast to the *Low Cost Movers* case, no one who engaged in the wrongful conduct alleged—the defamation of Dent—had been identified. The circuit court thus erred in dismissing the Rule 224 petition with prejudice.

¶ 15 The circuit court denied petitioners' motion to reconsider. The circuit court stated that claims against respondents were not limited to those elaborated upon in the underlying petition. Further, the damages alleged in the petition were based upon the termination of contracts. The circuit court characterized the issue before it as whether petitioners had identified any of the persons or entities who may be the cause of those terminations. The circuit court stated that "Rule 224 has a specific, narrow purpose that allows a petitioner to obtain the identity of a potential defendant when the petitioner lacks knowledge of *anyone* who *may* be liable in damages." (Emphases in original.) The circuit court concluded that petitioners had knowledge of an individual or entity that might be liable in damages to them and, thus, claims were available to petitioners whether petitioners pursued claims for defamation or otherwise.

¶ 16 The appellate court reversed and remanded. 2020 IL App (1st) 191652. The appellate court held that the circuit court abused its discretion when it *sua sponte* dismissed the petition with

prejudice based upon its determination that petitioners knew the identity of respondents and their attorneys. *Id.* ¶ 28. The appellate court stated that, under the facts alleged by petitioners, respondents and their attorneys were not " 'individuals or entities who stand in the universe of potential defendants' responsible in damages for defamation or breach of contract." *Id.* (quoting *Beale v. EdgeMark Financial Corp.*, 279 Ill. App. 3d 242, 252 (1996)). Respondents were not the entity or individuals who made the allegedly false and defamatory statements about Dent's conduct. Respondents were merely participants in the subsequent investigation of the allegedly defamatory statements that caused respondents to terminate petitioners' at-will contracts. *Id.* Petitioners met the requirements of Rule 224 in alleging that Persons A and B made false, defamatory statements about Dent and then published those statements to Person C and that Person C reported the defamatory statements to respondents, who then terminated their at-will contracts with petitioners. *Id.*

¶ 17 The appellate court then addressed the sufficiency of the Rule 224 petition. Petitioners argued that their Rule 224 petition sufficiently alleged all the required elements of a defamation claim against Persons A, B, and C. *Id.* ¶ 36. Petitioners noted that they alleged that the statements about Dent were defamatory because they imputed to Dent acts of moral turpitude and impugned his character, good name, and reputation; the statements were completely false, were made as statements of fact, and were not privileged; and the statements caused respondents to terminate several contracts with petitioners, who suffered damages as a result. *Id.*

¶ 18 Respondents denied that petitioners had stated a claim for defamation, so the discovery sought by petitioners was not necessary for purposes of Rule 224. *Id.* ¶ 38. Respondents claimed that the alleged defamatory statements were all qualifiedly privileged and that petitioners failed to overcome that privilege by pleading sufficient facts to demonstrate that the privilege was abused. *Id.* Respondents asserted that Person A's statements were qualifiedly privileged as statements by a victim of sexual harassment to an investigator hired by her employer. *Id.* Person B's statements were qualifiedly privileged because he was a witness in the sexual harassment investigation. Person B told the investigator his observations of Dent at the same July 2018 golf outing where one of the alleged incidents of harassment occurred. *Id.* The statements of Person C, the investigator hired by respondents, were qualifiedly privileged as relating to the findings of the sexual harassment investigation. *Id.*

¶ 19 In addressing respondents' argument, the appellate court first observed that, to determine whether petitioners satisfied Rule 224's necessity requirement, the court must evaluate whether petitioners presented sufficient allegations of a defamation claim to withstand a section 2-615 motion to dismiss. *Id.* ¶ 41. The appellate court concluded that the Rule 224 petition did present sufficient allegations of a defamation claim to withstand a section 2-615 motion to dismiss. *Id.* ¶ 47. The appellate court then rejected respondents' claim that the allegedly defamatory statements were protected by a qualified privilege for statements made in the reporting and investigation of sexual harassment in the workplace. *Id.* ¶ 42. The appellate court held that the defense of qualified privilege is an affirmative defense, which should not be considered in resolving a section 2-615 motion to dismiss. *Id.* ¶ 44. For that reason, the appellate court reversed the circuit court's dismissal with prejudice of the Rule 224 petition. *Id.* ¶ 49.

¶ 20 This court subsequently allowed respondents' petition for leave to appeal. Ill. S. Ct. R. 315 (eff. Oct. 1, 2020). We also allowed a joint *amicus* brief in support of respondents' position by

Women Employed, the American Civil Liberties Union of Illinois, the National Women's Law Center, and 28 additional organizations. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

¶ 21 ANALYSIS

¶ 22 The primary issue in this appeal is whether the appellate court erred in holding that a court cannot consider qualified privilege in resolving a section 2-615 motion to dismiss a Rule 224 petition.

¶ 23 Rule 224 provides a means to identify potential defendants prior to the commencement of a lawsuit. Ill. S. Ct. R. 224(a)(1)(i) (eff. Jan. 1, 2018). Rule 224 allows a party to initiate discovery by filing a verified petition. Ill. S. Ct. R. 224(a)(1)(ii) (eff. Jan. 1, 2018). The rule states that the

> "petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery." *Id.*

An order allowing a Rule 224 petition "will limit discovery to the identification of responsible persons and entities." Ill. S. Ct. R. 224, Committee Comments (adopted Aug. 1, 1989).

↩ memo p. 6, 7, 12

¶ 24 Under Rule 224, the unidentified individual or entity does not bear the burden of demonstrating that the discovery request does not satisfy the rule. *Doe v. Catholic Diocese of Rockford*, 2015 IL App (2d) 140618, ¶ 16. The petitioner bears the burden of showing that his proposed complaint supports a cause of action, even if the unidentified individual or entity does not challenge the request. *Id.* Rule 224 is intended to assist a petitioner in identifying a currently unidentified party who might be liable. *Id.* In order to employ Rule 224, however, the petitioner must demonstrate that the proposed identification is necessary. *Id.*

¶ 25 To determine whether a petitioner has satisfied Rule 224's necessity requirement in a claim for defamation, a court must evaluate whether the petitioner presented sufficient allegations to overcome a section 2-615 motion to dismiss. *Hadley v. Doe*, 2015 IL 118000, ¶ 26. A section 2-615 motion tests the legal sufficiency of the complaint, asking whether the allegations of the complaint, construed in the light most favorable to the petitioner, state sufficient facts to establish a cause of action upon which relief may be granted. *Id.* ¶ 29. A court will consider all facts apparent from the face of the complaint, including any attached exhibits. *Id.* A complaint should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Id.* The standard of review is *de novo*. *Id.*

¶ 26 To state a claim for defamation, a plaintiff must allege facts showing that (1) the defendant made a false statement about the plaintiff, (2) the defendant made an unprivileged publication of that statement to a third party, and (3) the publication caused damages. *Id.* ¶ 30. As noted, respondents challenged petitioners' Rule 224 petition on the basis that the alleged defamatory statements were subject to qualified privilege and that petitioners failed to overcome that privilege by pleading sufficient facts to demonstrate abuse of that privilege. The appellate court declined to consider that argument, finding that "[p]rivilege is an affirmative defense that may be susceptible to resolution by a motion for summary judgment or a motion to dismiss under section 2-619 of the Code [citations], but privilege should not be considered when resolving a section 2-615 motion to dismiss." 2020 IL App (1st) 191652, ¶ 44. The appellate court thus

held that petitioners' Rule 224 allegations were "sufficient to withstand dismissal under a section 2-615 analysis, which does not consider affirmative defenses like the alleged existence of a qualified privilege." *Id.* ¶ 47.

¶ 27 Respondents challenge the appellate court's finding in this court, arguing first that a defamation claim is subject to dismissal under section 2-615 when the petition pleads facts establishing a qualified privilege. In the alternative, respondents ask this court to find that a Rule 224 respondent may file a motion to dismiss under section 2-619 if affirmative matter is needed to establish the qualified privilege.

¶ 28 We need not consider respondents' argument concerning section 2-619, because we find that respondents can raise qualified privilege in their section 2-615 motion. As respondents argue, this court has held that an "affirmative *defense* may be raised in a section 2-615 motion where the defense is 'established by the facts apparent on the face of the complaint' and no other facts alleged in the complaint negate the defense. 3 R. Michael, Illinois Practice § 27.2, at 492 (1989)." (Emphasis in original.) *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 292 (2010). As stated, all facts apparent from the face of the complaint must be considered, including any attached exhibits. *Hadley*, 2015 IL 118000, ¶ 29.

¶ 29 Exhibit B to the Rule 224 petition is the letter from respondents' counsel to petitioners' counsel, dated December 19, 2018. That letter stated, in pertinent part:

> "Mr. Dent has been the subject of an investigation conducted by a third-party hired by Constellation to investigate reports that Mr. Dent engaged in grossly inappropriate behavior during the 2016 and 2018 Pro-Am Tournament events where Mr. Dent was a guest of Constellation. The reports regarding Mr. Dent's behavior include among other things that Mr. Dent engaged in an inappropriate and unwanted touching of a Constellation employee and that Mr. Dent made unwelcome comments of a sexual nature to a Constellation employee. As you note in the PGN [(petitioners' counsel)] October Letter, on September 14, 2018, there was a meeting between Richard L. Dent, Grace Speights, Theos McKinney and Timothy W. Wright. That meeting was to allow Mr. Dent an opportunity to provide his recollection of the events described above. The law requires Constellation to investigate reports of such behavior and the EEOC directs employers to conduct effective investigations. Although Mr. Dent denied the allegations, his denials were not credible and the investigation concluded that the reports accurately described behaviors that were, at a minimum, in violation of Exelon's code of business conduct, completely outside the norms of socially acceptable behavior, and demeaning to Constellation employees. To date, neither Exelon nor Constellation has disclosed the findings of the investigation to any third-party, other than in privileged communications with its lawyers. Given Constellation's legal obligation to investigate such allegations and the protected nature of its findings, any claim that Constellation has 'impugn[ed] Mr. Dent's … name and reputation' is frivolous."

¶ 30 Qualified privilege in Illinois defamation law is based on a policy of protecting honest communications of misinformation in certain favored circumstances in order to facilitate the availability of correct information. *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24 (1993). A privileged communication is one that might be defamatory and actionable except for the occasion on which, or the circumstances under which, it is made. *Id.*

Qualified privilege enhances a defamation plaintiff's burden of proof. *Id.* In the absence of qualified privilege, a plaintiff need only show that the defendant acted with negligence in making the defamatory statements in order to prevail. *Id.* Once a defendant establishes a qualified privilege, however, a plaintiff must show " ' "a direct intention to injure another, or *** a reckless disregard of [the defamed party's] rights and of the consequences that may result to him." ' [Citation.]" *Id.* at 30. Stated otherwise, "an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." *Id.*

¶ 31 This court has adopted the approach of the Restatement (Second) of Torts to determine whether a qualified privilege exists. *Id.* at 28-29. Under that approach, conditionally privileged occasions are divided into three classes. *Id.* at 29. Those classes are:

> " '(1) situations in which some interest of the person who publishes the defamatory matter is involved
>
> (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved
>
> (3) situations in which a recognized interest of the public is concerned.' (S. Harper, F. James & O. Gray, The Law of Torts § 5.25, at 216 (2d ed. 1986)." *Id.*

¶ 32 In addressing a claim of qualified privilege in the context of a defamation claim arising from allegations of sexual harassment, our appellate court has concluded that the three interests set forth above were implicated. *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 402 (1999). The plaintiff in *Vickers* filed suit against Abbott Laboratories and certain employees alleging defamation and other claims, based upon an Abbott investigation into allegations that the plaintiff exhibited sexually harassing behavior. *Id.* at 395-96. The circuit court granted the defendants' motion for summary judgment and dismissed the plaintiff's suit with prejudice. *Id.* at 396. The plaintiff appealed, arguing, *inter alia*, that the circuit court erred in entering summary judgment on the plaintiff's claim for defamation because no qualified privilege existed and, if it did exist, the defendants abused it. *Id.*

¶ 33 The appellate court held that the communications at issue were conditionally privileged based upon the three interests. *Id.* at 402. First, the female defendants had an interest in stopping harassment and abuse by the plaintiff. *Id.* Second, the employer and its agents had an interest in investigating the employees' concerns and taking action to prevent further harassment. *Id.* Third, there was a definite general public interest in eradicating sexual harassment in the workplace. *Id.*

¶ 34 The *Vickers* court also noted that a United States Supreme Court case, *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998), had made clear that there is a compelling interest in ridding workplaces of sexual harassment. *Id.* The *Faragher* Court noted that the Code of Federal Regulations specifically obliged employers to " 'take all steps necessary to prevent sexual harassment from occurring' " (*id.* (quoting 29 C.F.R. § 1604.11(f) (1997)) and "to establish a complaint procedure 'designed to encourage victims of harassment to come forward' " (*id.* (quoting Policy Guidance on Current Issues of Sexual Harassment, U.S. Equal Emp. Opportunity Comm'n (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment [https://perma.cc/26TR-CWAN])). *Vickers* concluded that the qualified privilege in the defamation context promotes the social policy

recognized in *Faragher* and "provides protection for the victims, witnesses and investigators of sexual harassment." *Vickers*, 308 Ill. App. 3d at 402. *Vickers* explained that, if "no privilege existed, then victims of harassment and companies with a goal of preventing harassment would be 'handcuffed' by a fear of defamation liability." *Id.*

¶ 35 We agree with the *Vickers* court that a qualified privilege exists in cases alleging defamation in the context of workplace sexual harassment allegations. Petitioners' Rule 224 petition, including exhibit B to the petition, establishes that respondents hired Person C to investigate sexual harassment claims concerning Dent's behavior when Dent was respondents' guest at their 2016 and 2018 Pro-Am golf tournaments. Exhibit B states that the behavior included, "among other things," that Dent engaged in an "inappropriate and unwanted touching" of respondents' employee. Exhibit B also states that the law required respondents to "investigate reports of such behavior and the EEOC directs employers to conduct effective investigations." The statements of Persons A and B were part of Person C's investigation into those claims. We agree with respondents that the Rule 224 petition and exhibit B thus raise an affirmative defense of qualified privilege as to Persons A, B, and C, as the statements at issue were made in the context of respondents' investigation of Dent's alleged sexual harassment of respondents' employee.

¶ 36 Petitioners claim that no qualified privilege applied to Person B, however, because the Rule 224 petition does not allege that Person B was an employee of respondents or that Person B was a witness to any sexual harassment by Dent. The petition alleges only that Person B saw Dent acting "drunk and disorderly" at the Marriott Hotel. Further, exhibit B does not mention Person B at all.

¶ 37 Although there are no allegations that Person B witnessed any sexual harassment on the part of Dent, it is clear from the Rule 224 petition that Person B's statement was made as part of Person C's investigation of the allegations of sexual harassment. Further, although Person B's statements were not expressly referenced in exhibit B, exhibit B does state that Dent's behavior included, "among other things," that Dent engaged in sexual harassment. Person B's statements would fall within the "among other things" reference. In any event, because Person B's statements were made in connection with the investigation of the sexual harassment claims, those statements also fell within the qualified privilege surrounding that investigation. The qualified privilege protects the *investigation* of sexual harassment claims. An investigation might cast a broad net in investigating and interviewing witnesses in order to gather information concerning those claims. Person B's report to Person C was made as part of Person C's investigation of the sexual harassment claims. Person B should not lose his privilege based solely upon the content of his report to the investigator. To hold otherwise might deter individuals from participating in investigations of sexual harassment. For that reason, we find that Person B, as well as Persons A and C, was protected by the qualified privilege for investigation of workplace sexual harassment claims.

¶ 38 As noted, once a party has demonstrated a qualified privilege, the plaintiff must show an abuse of that privilege, which consists of any reckless act showing a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties. Petitioners assert that their Rule 224 petition "states facts sufficient to show the actual malice" of Persons A and B and "overcame any qualified privilege pertaining" to Persons A and B. Petitioners note that their

Rule 224 petition alleges that the statements of Person A and Person B "were completely false" and that the fact that Person A and Person B had knowledge of the falsity of her statements about Dent is obvious and incontrovertible from the face of the Rule 224 petition. According to petitioners, Dent's averment in the verified petition, that the statements published by Person A and Person B were false, defeats any qualified privilege.

¶ 39 We disagree. Allowing a conclusory denial to overcome qualified privilege would, in essence, eviscerate the privilege. The allegations of the petition, including exhibit B, fail to establish any reckless act showing a disregard for Dent's rights. Construing the allegations of the Rule 224 petition, including the attached exhibits, in the light most favorable to petitioner, we find that there is no set of facts which would show an abuse of the qualified privilege with regard to the statements of Persons A, B, and C. For that reason, we find that the appellate court erred in refusing to consider the affirmative defense of qualified privilege with regard to Persons A, B, and C. Because qualified privilege applied to the allegations against Persons A, B, and C, the appellate court erred in finding that the allegations in the Rule 224 petition were sufficient to withstand dismissal under a section 2-615 analysis.

¶ 40 The dissent disagrees that respondents can raise qualified privilege in their section 2-615 motion to dismiss. The dissent contends that, without the identity of the publisher, a Rule 224 petitioner cannot allege facts demonstrating that the publisher directly intended to injure him or acted with reckless disregard for the petitioner's rights and of the resulting consequences to the petitioner. The dissent states that the factual allegations necessary to overcome qualified privilege focus on the intent and actions of the publisher, which presuppose that the Rule 224 petitioner knows the identity of the publisher.

¶ 41 Under the circumstances of this case, however, petitioners did not need to know the identity of the publisher in order to allege facts sufficient to overcome qualified privilege. Exhibit B to the Rule 224 petition establishes that respondents' attorneys met with Dent on September 14, 2018, "to allow Mr. Dent an opportunity to provide his recollection of the events described" by Persons A and B. Although petitioners did not know the identity of Persons A and B, petitioners had enough information concerning the specific events and the circumstances described by Persons A and B to assert more than a bare allegation that the statements published by Persons A, B, and C were "false" and "not privileged." Petitioners had enough information to allege facts showing why those allegations were false, particularly given that the alleged conduct occurred at public events, with a large number of guests present.

¶ 42 The dissent also distinguishes the decision in *Hadley v. Doe* and the two appellate court cases that the *Hadley* court found persuasive—*Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704 (2010), and *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386. The dissent points out that *Hadley* and the appellate court decisions it relied upon involved anonymous speech that was argued to be constitutionally protected by the first amendment and did not involve qualified privilege. The dissent again maintains that the showings and concomitant factual allegations necessary to overcome qualified privilege in this case presuppose that the Rule 224 petitioner knows the identity of the publisher.

¶ 43 We do not find *Hadley*, *Maxon*, and *Stone* to be so limited. In fact, the *Stone* court expressly stated that, "[w]hile the *Maxon* court correctly found that this standard protects an anonymous individual's constitutional rights in the context of a defamation claim, we add *that the appropriateness of this standard is not limited to speech-based claims*." (Emphasis added.)

Stone, 2011 IL App (1st) 093386, ¶ 18. *Hadley* found the reasoning of the *Maxon* and *Stone* courts to be persuasive and thus held that, to "ascertain whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate a defamation complaint to determine whether it will withstand a section 2-615 motion to dismiss." *Hadley*, 2015 IL 118000, ¶ 27. We do not read *Hadley* as limiting its holding to first amendment defamation cases.

¶ 44 Finally, the dissent claims that our opinion effectively elevates what is supposed to be a qualified privilege into an absolute privilege, because "there is no realistic way for a Rule 224 petitioner to sufficiently allege that the publishers of the allegedly defamatory statements directly intended to injure him or acted with reckless disregard for the petitioner's rights and of the resulting consequences to the petitioner." *Infra* ¶ 70. The dissent states that Dent did not know his accuser, the witnesses, or the evidence against him. *Infra* ¶ 72.

¶ 45 This is incorrect. Although Dent did not know his accuser or the witness, Dent did know that he was accused of groping a woman at a large gathering on the patio of the Shedd Aquarium and that he was drunk and disorderly while picking up his golf materials at the Marriott Hotel. In petitioners' Rule 224 petition, they allege that Dent was one of a "large number" of guests at the events where the alleged conduct occurred. Nonetheless, Dent did not allege any facts showing that respondents failed to investigate the truth of the matter, for example, by interviewing other guests, nor did Dent allege that other guests at the event could verify that he was not drunk or disorderly and did not otherwise exhibit grossly inappropriate behavior. Under these circumstances, we find that petitioner's bare allegations that the statements of Person A and Person B "were completely false" is not sufficient to defeat the qualified privilege in this case.

¶ 46 In summary, then, we find that the appellate court erred in holding that a section 2-615 motion to dismiss cannot consider affirmative defenses apparent on the face of the petition, such as the existence of qualified privilege. We further find that the existence of qualified privilege on the part of Persons A, B, and C was apparent from the face of the petition and that respondents, having raised nothing more than a conclusory denial, failed to sufficiently allege an abuse of that privilege. For that reason, we find that the Rule 224 petition should be dismissed in its entirety based upon qualified privilege.

¶ 47 CONCLUSION

¶ 48 For all the foregoing reasons, the judgment of the appellate court, which reversed the judgment of the circuit court, is reversed. The Rule 224 petition is dismissed with prejudice, pursuant to section 2-615.

¶ 49 Appellate court judgment reversed.

¶ 50 Circuit court judgment affirmed.

¶ 51 JUSTICE GARMAN, dissenting:

¶ 52 I respectfully dissent for the following reasons. First, I disagree that, in this context, respondents can raise qualified privilege in their motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). Second, I believe that the majority erroneously accepts respondents' somewhat obscured representation that a qualified privilege protects not only statements but also identity. Finally, I am concerned that the

majority opinion essentially treats the qualified privilege as an absolute privilege, which in turn endows a private company and its third-party investigators with quasi-judicial status and impermissibly deprives a class of individuals of the ability to restore their reputations following investigations that arguably lack procedural safeguards.

¶ 53 To begin, the majority opinion avoids a meaningful analysis of whether respondents can raise qualified privilege in their section 2-615 motion to dismiss. The majority simply concludes this is permissible where an affirmative defense is established by the facts apparent on the face of the complaint and where the defense is not negated by any other facts in the complaint. For this proposition the majority cites *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 292 (2010). See *supra* ¶ 28.

¶ 54 At issue in *McGinnis* was whether a home remodeling contractor who violated section 15 of the Home Repair and Remodeling Act (815 ILCS 513/15 (West 2006)) could nevertheless enforce an oral contract or recover in *quantum meruit* against a homeowner who refused to pay for a completed home remodeling project. *McGinnis*, 238 Ill. 2d at 286. Section 15 of that act stated that, " '[p]rior to initiating home repair or remodeling work for over $1,000, a person engaged in the business of home repair or remodeling shall furnish to the customer for signature a written contract or work order.' " *Id.* (quoting 815 ILCS 513/15 (West 2006)). The complaint in part alleged that the plaintiff construction company entered into an oral contract with the defendants to complete a remodeling project for the sum of $187,000. *Id.* at 287. The defendants subsequently asked for modifications, which raised the cost of the project to roughly $500,000. *Id.* at 287-88. Ultimately, the defendants refused to pay a substantial amount, and the plaintiff filed a three-count complaint against the defendants. *Id.* at 288.

¶ 55 Relevant here, count II of the complaint alleged a breach of contract. *Id.* The defendants filed a section 2-615 motion to dismiss. *Id.* As to count II, defendants asserted that the oral contract between the parties was in violation of Illinois law, *i.e.*, section 15 of the Home Repair and Remodeling Act, and thus was not enforceable. *Id.* at 289. At the time plaintiff filed its complaint, section 15 additionally stated that it was " 'unlawful' " to engage in home remodeling prior to " 'obtaining a signed contract or work order over $1,000.' " *Id.* (quoting 815 ILCS 513/30 (West 2006)). The defendants observed that the complaint itself alleged that the contract was not in writing and was for work totaling over $1000. *Id.*

¶ 56 The *McGinnis* court first noted that "[a] section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Id.* at 291 (citing *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009)). The plaintiff asserted that the motion to dismiss instead should have been brought under section 2-619(a)(9) because it raised an affirmative defense. *Id.* In response to this argument, the *McGinnis* court explained:

> "section 2-619(a)(9) speaks in terms of affirmative *matter*, not affirmative *defenses*: 'If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit: *** (9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.' 735 ILCS 5/2-619(a)(9) (West 2006). An affirmative *defense* may be raised in a section 2-615 motion where the defense is 'established by the facts apparent on the face of the complaint' and no other facts alleged in the complaint negate the defense." (Emphases in original.) *Id.* at 291-92 (quoting 3 Richard A. Michael, Illinois Practice § 27.2, at 492 (1989)).

Critically, the *McGinnis* court explained that "the factual basis of defendants' affirmative defense is found in *plaintiff's own allegations that the remodeling contract was oral and was for work totaling more than $1,000*." (Emphasis added.) *Id.* at 292. Accordingly, the plaintiff's *own complaint* admitted facts that established the defendant's affirmative defense.[1]

¶ 57 Here, we have vastly different circumstances. Unlike in *McGinnis*, petitioners represent that they do not know the identities of the allegedly responsible parties—thus leading to petitioners filing the instant petition pursuant to Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018). I do not disagree with the majority recognizing that statements made in the context of a workplace sexual harassment investigation are subject to a qualified privilege. However, as described in more detail below, I am troubled by the majority's lack of concern regarding how a party seeking to sue for defamation in this context is realistically expected to allege concrete facts to overcome the qualified privilege. Under the majority's holding, a Rule 224 petitioner—who does not know the identity of the publisher—must allege facts demonstrating that the publisher directly intended to injure him or acted with reckless disregard for the petitioner's rights and of the resulting consequences to the petitioner. See *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 30 (1993) (noting that "an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties"). Yet, in the Rule 224 context, " 'the focus is on identity and not on the determination of the responsibility of those identified.' " *Kamelgard v. American College of Surgeons*, 385 Ill. App. 3d 675, 685 (2008) (quoting *Roth v. St. Elizabeth's Hospital*, 241 Ill. App. 3d 407, 414 (1993)). However, the majority opinion necessarily requires petitioners to establish the responsibility of Persons A, B, and C.

¶ 58 Here, not only do petitioners not know the identities of Persons A and B, but exhibit B to the Rule 224 petition—the letter from respondents' counsel to petitioners' counsel—states that "neither Exelon nor Constellation has disclosed the findings of the investigation to any third-party, other than in privileged communications with its lawyers." Though this statement goes to whether the publication was limited to the proper parties, it also demonstrates that the only context petitioners have for attempting to overcome the qualified privilege with factual allegations is petitioners' attendance at two presumably very large outings in 2016 and 2018. Exhibit B and the complaint establish that the third-party investigators met one time with Richard Dent to allow him "an opportunity to provide his recollection of the events."

¶ 59 In their briefs, respondents also cite *Hadley v. Doe*, 2015 IL 118000, in support of their argument that presuit discovery is unnecessary where the underlying defamation claim is subject to dismissal under section 2-615 because Dent's Rule 224 petition failed to allege facts to overcome the qualified privilege. In *Hadley*, this court found persuasive two lower courts' conclusions that, in ascertaining "whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate a defamation complaint to determine whether it will

[1]Respondents also cite several appellate court cases in support of their argument that an Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018) petitioner must overcome the qualified privilege at issue. In every case, the defamation plaintiff knew the identities of the defendants. See *Pompa v. Swanson*, 2013 IL App (2d) 120911, ¶¶ 30-31; *Dobias v. Oak Park & River Forest High School District 200*, 2016 IL App (1st) 152205, ¶ 1; *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 1.

withstand a section 2-615 motion to dismiss." *Id.* ¶ 27. The *Hadley* appellate court likewise relied on those two cases and held that,

> " '[i]n ordering the disclosure of a potential defendant's identity pursuant to Rule 224, a court must balance the potential plaintiff's right to redress for unprotected defamatory language against the danger of setting a standard for disclosure that is so low that it effectively chills or eliminates the right to speak anonymously and fails to adequately protect the chosen anonymity of those engaging in nondefamatory public discourse.' " *Id.* ¶ 26 (quoting *Hadley v. Doe*, 2014 IL App (2d) 130489, ¶ 17).

However, *Hadley* and the appellate court decisions it relied upon dealt with a different scenario. It was necessary to show that the allegations could withstand a motion to dismiss under section 2-615 so as "to protect any first amendment interest possessed by the online commentator to engage in nondefamatory, anonymous speech." *Id.* ¶ 9. In *Hadley*, the defendant anonymously posted defamatory statements in the comments section of a newspaper website. *Id.* ¶ 1. The *Hadley* court rejected the defendant's argument that the statements were not actionable because they were reasonably capable of an innocent construction. See *id.* ¶¶ 31-42. Instead, the comments "conveyed the idea that Hadley was a pedophile or had engaged in sexual acts with children and, thus, had committed criminal conduct." *Id.* ¶ 37. No qualified privilege was at issue in *Hadley*.

¶ 60 Furthermore, the two appellate court cases relied upon by *Hadley* likewise involved anonymous speech that was argued to be constitutionally protected by the first amendment. See *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 706 (2010); *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶¶ 17-18, 26 (observing that "our supreme court has recognized that there are three types of actions in which an allegedly defamatory statement has been held to be protected by the first amendment in the absence of a showing that the statement is *factual*: (1) actions brought by public officials; (2) actions brought by public figures; and (3) actions brought against media defendants by private individuals" (emphasis in original)). The main thrust of this inquiry necessarily focuses on the contents of the statements themselves. See *Stone*, 2011 IL App (1st) 093386, ¶ 26; see also *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 398 (2008) (explaining that "[t]he test for determining whether a statement is protected from defamation claims under the first amendment is whether it can reasonably be interpreted as stating actual fact" and noting that the courts consider "(1) whether the statement has a precise and readily understood meaning, (2) whether the statement is verifiable, and (3) whether the statement's literary or social context signals that it has factual content").

¶ 61 By contrast, to overcome a qualified privilege in the instant context, a Rule 224 petitioner would have to allege facts showing that the publisher directly intended to injure him or acted with reckless disregard for the petitioner's rights and of the resulting consequences to the petitioner. See *Kuwik*, 156 Ill. 2d at 30. These showings and concomitant factual allegations instead focus on the *intent and actions of the publisher*—which presuppose that the Rule 224 petitioner knows the identity of the publisher.

¶ 62 The appellate court case of *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, aptly illustrates, among other things, how knowing the identity of alleged publishers of defamatory statements enables the Rule 224 petitioner to overcome a qualified privilege by sufficiently alleging facts that go to the publishers' intent and actions. There, the plaintiff sued several

individual defendants and Northwestern University for either defamation or conspiracy to defame by "formally presenting to the Northwestern internal inquiry committee allegations that Mauvais-Jarvis submitted inaccurate data for publication in a scientific paper." *Id.* ¶ 1. The plaintiff appealed from the circuit court's dismissal of the defamation counts due to the court's finding that the statements were protected by absolute privilege. *Id.*

¶ 63 On appeal, the appellate court noted at the outset that, because Northwestern University "receives federal funding for biomedical and behavioral research[,] it is governed by a complex set of federal regulations with respect to investigating research misconduct." *Id.* ¶ 3. Of note, "the regulations impose[d] conditions of strict confidentiality on allegations of research misconduct." *Id.* ¶ 13 (providing that " '[d]isclosure of the identity of respondents and complainants in research misconduct proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective and fair research misconduct proceeding, and as allowed by law' " (quoting 42 C.F.R. § 93.108(a) (2005))). Furthermore, the regulation limited disclosure of records or other evidence from which research subjects could be identified to " 'those who have a need to know to carry out a research misconduct proceeding.' " *Id.* (quoting 42 C.F.R. § 93.108(b) (2005)). Northwestern University's own policy and procedures closely mirrored the federal regulations. *Id.* ¶¶ 15-16.

¶ 64 Nevertheless, the plaintiff knew the identities of at least a few individuals who had accused him of research misconduct. *Id.* ¶ 27. This was because Northwestern's office of research integrity had sent the plaintiff a letter notifying him of who had accused him of the misconduct. *Id.* After an inquiry committee reviewed the allegations and interviewed witnesses, it issued a final report unanimously concluding that the charges were not credible and did not merit a full investigation. *Id.* However, a second inquiry committee was thereafter convened after it became apparent that other data contained in a manuscript was inaccurate. *Id.* ¶ 28. The committee concluded that sufficient evidence was presented to warrant a full investigation into the charges, and the plaintiff filed suit. *Id.*

¶ 65 The appellate court in *Mauvais-Jarvis* analyzed in detail whether the circuit court had properly held that the statements made by certain individuals were absolutely rather than conditionally privileged. *Id.* ¶¶ 65-103. As the court noted, "[w]here absolute privilege is granted, no cause of action for defamation lies against the person making the statement even if it is made with malice." *Id.* ¶ 71 (citing *Starnes v. International Harvester Co.*, 141 Ill. App. 3d 652, 653-54 (1986)); see also *id.* (stating that " '[a]n absolute privilege provides a complete immunity from civil action even though the statements were made with malice because public policy favors the free and unhindered flow of such information' " (quoting *Zych v. Tucker*, 363 Ill. App. 3d 831, 834 (2006))). The court explained that the category of defamatory statements protected by absolute privilege is very narrow and "has generally been limited to legislative, judicial and some quasi-judicial proceedings and 'other acts of State,' including 'communications made in the discharge of a duty under express authority of law.' " *Id.* ¶ 74 (quoting *Busch v. Bates*, 323 Ill. App. 3d 823, 833 (2001)).

¶ 66 After rejecting several cases cited in support of respondents' argument that the statements were absolutely privileged, the *Mauvais-Jarvis* appellate court noted that it had not discovered "any Illinois case that has found a quasi-judicial proceeding or a 'necessarily preliminary' step toward one in a proceeding before a private entity (which the parties concede[d] Northwestern is) rather than one involving a governmental agency or another type of state actor." *Id.* ¶ 91.

The court noted that, even if a private entity could be considered a quasi-judicial entity, Northwestern's office of research integrity lacked the requisite powers necessary to act as such an entity. See *id.* ¶¶ 92-97. The court observed that "jurisdictions that have explicitly addressed the applicability of absolute privilege to university research misconduct proceedings have refused to define such proceedings as quasi-judicial, noting *that they lack the requisite procedural safeguards to protect those accused of research misconduct*." (Emphasis added.) *Id.* ¶ 96 (citing *Arroyo v. Rosen*, 648 A.2d 1074, 1077-78 (Md. Ct. Spec. App. 1994) (holding that statements were not absolutely privileged because the complaint commencing the investigatory committee's proceedings was not made under oath, the proceedings were not public, the witnesses were not sworn under oath nor subject to cross-examination, and no discovery was available)).

¶ 67 Still, the defendants in *Mauvais-Jarvis* maintained that public policy warranted application of absolute privilege,

> "because society has a vital interest in the soundness of scientific research and because the 'need for protection is greater in the educational setting where the subject of the complaint—the educator—is in a position of authority over the student, so fear of retaliation presents a potential obstacle to open airing of grievances.' " *Id.* ¶ 98.

Again, the court rejected this attempt by the respondents to extend absolute privilege to their statements. *Id.* The court noted that Northwestern's policies, which were modeled after the federal regulations, "recognize[d] the need for and str[uck] a balance between protecting complainants and whistleblowers." *Id.* ¶ 99. Furthermore, the court explained that "[p]ublic policy is *** better served by the rule of qualified privilege, since it encourages open communications on matters of research misconduct while not shielding the use of such communications for an individual's malicious purposes." *Id.*

¶ 68 Finally, the *Mauvais-Jarvis* appellate court considered whether the allegedly defamatory statements in that case were protected by qualified privilege. *Id.* ¶ 101. Because the defendants did not alternatively argue that the statements were protected by qualified privilege, the court noted that it had no basis upon which to determine that they were protected by qualified privilege. *Id.* ¶ 103. Still, the court held that the complaint set forth detailed allegations of ill will and malice by the three defendants subject to the defamation count. *Id.* The complaint alleged that one defendant had acted in retaliation for being fired by the plaintiff and the other two defendants acted in reprisal after the plaintiff sought redress with Northwestern's provost and accused its office of research integrity of violating his rights under its policies and federal regulations. *Id.* Accordingly, the court reversed the circuit court's dismissal of the plaintiff's defamation claims and allowed the case to proceed to discovery. *Id.*

¶ 69 The *Mauvais-Jarvis* case—though dealing with a different type of internal investigation—illuminates several facets of the instant case. First, the case demonstrates how knowledge of one's accusers enables a Rule 224 petitioner to sufficiently allege facts to overcome the qualified privilege. For example, the plaintiff alleged that one of the complainants had retaliated against him because he had terminated her employment after documenting what he dubbed "substandard performance in the laboratory" and mistakes she had made with respect to the manuscript at issue. See *id.* ¶¶ 33-35. She also allegedly had threatened to destroy his career. *Id.* ¶ 35. Obviously, knowledge of one's accuser enables a petitioner to draw upon his

or her experience in dealing with that individual, which necessarily informs the question of whether the accuser had acted with malice or reckless disregard. See *Kuwik*, 156 Ill. 2d at 30.

¶ 70 Because the majority buys into the respondents' representations that accusers and witnesses in a sexual harassment investigation are entitled to anonymity even outside the company's internal investigation, the majority effectively elevates what is supposed to be a qualified privilege to an absolute privilege. Unless we presume that a Rule 224 petitioner in this context did what he or she was accused of, already knows who the accusers and witnesses are, or has a verifiable alibi, there is no realistic way for a Rule 224 petitioner to sufficiently allege that the publishers of the allegedly defamatory statements directly intended to injure him or acted with reckless disregard for the petitioner's rights and of the resulting consequences to the petitioner. See *id.*; see also *Mauvais-Jarvis*, 2013 IL App (1st) 120070, ¶ 71 (explaining that a defamation defendant's malice or motive in making a defamatory statement is irrelevant where an absolute privilege applies). This is an alarming notion when one considers that this setup will easily enable false reporting of sexual misconduct.

¶ 71 For example, if several employees would like to get their supervisor fired, they could simply concoct a story that the supervisor inappropriately touched Employee A and maintain a consistent description of the event. Maybe Employee A resents the supervisor for criticizing her work product. Perhaps Employee B knows that, if the supervisor is fired, he or she will receive a promotion and thus has sufficient motive. Such behavior will be emboldened where the employees know that their identities will remain confidential not only in the workplace investigation but even if the supervisor tries to sue for defamation because the supervisor will not be able to sufficiently plead around the qualified privilege. Though I make clear that I do not cast doubt upon the believability of accusers and victims of sexual harassment or the findings of internal sexual harassment investigations—I will not vote in favor of a holding that makes it impossible for a class of individuals to seek relief from what may very possibly be an unjustified injury to their reputation.

¶ 72 Unlike in *Mauvais-Jarvis*, where the appellate court detailed the numerous federal regulations and policies that were aimed at ensuring some semblance of procedural safeguards for the accused, here, we have no idea of the depth and breadth of the investigation undertaken by the third-party investigators in this case or about the specifics of Exelon's own workplace policies or investigation procedures. We do know that Dent knew not his accuser, the witnesses, or the evidence against him, nor did he have an ability to confront or cross-examine the accuser or witnesses. See *Mauvais-Jarvis*, 2013 IL App (1st) 120070, ¶ 97. Yet, the effect of elevating the qualified privilege to an absolute privilege also effectively treats Constellation and its third-party investigators as though they are a quasi-judicial body. See *id.* ¶ 92. I am not content depriving potential defamation plaintiffs who do not know the identities of their accusers or witnesses, nor the evidence against them, of the ability to fight for their reputations by placing them in a position where they must allege sufficient facts to establish malice or reckless acts against shadows.

¶ 73 Nor do I believe that barring consideration of qualified privilege in a section 2-615 motion will inhibit employers' interest in ridding the workplace of sexual harassment by handcuffing victims, witnesses, and investigators by a fear of defamation *liability*.[2] See *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 402 (1999). That is what the qualified privilege guards against—statements made in the course of a sexual harassment investigation will not be actionable *unless the defamation plaintiff can meet his heightened burden of proof*. See *Kuwik*, 156 Ill. 2d at 24. Were it not for the qualified privilege, the defamation plaintiff would only have to show that the statements were negligently made. *Id.* The qualified privilege assures participants that they will not be unnecessarily subjected to defamation *liability*—not that they will not be sued for defamation. Furthermore, we have been provided with zero authority to support the idea that accusers and witnesses partaking in a private company's sexual harassment investigation are legally entitled to have their identities remain confidential once before a judicial forum. In the one case cited by respondents dealing with such a sexual harassment investigation, the defamation plaintiff knew the identities of the accuser(s) and the witness(es). See *Vickers*, 308 Ill. App. 3d at 395-96. Certainly, companies and their third-party investigators must abide by various rules in undertaking their investigations into workplace sexual harassment claims and must undertake to protect witnesses' identities or may themselves be subject to liability. Of critical distinction is the fact that the publisher's identity is confidential by virtue of a private corporation's internal investigatory procedures and related rules—not due to the qualified privilege itself or constitutional protection. Accordingly, I disagree with the majority's statement that "[a]llowing a conclusory denial to overcome qualified privilege would, in essence, eviscerate the privilege." *Supra* ¶ 39. The statement assumes that a qualified privilege goes to identity rather than a defamation plaintiff's heightened burden.

¶ 74 Because the publishers' identities are kept confidential by virtue of a private company's and their third-party investigators' obligations in the sexual harassment investigation context—I do not believe that a Rule 224 petitioner must allege sufficient facts establishing that the publishers abused the qualified privilege to meet the rule's necessity requirement. This is because, for all practical purposes, this is next to impossible, such that it deprives an individual of the ability to attempt to restore his reputation. A section 2-615 motion to dismiss should not be granted "*unless it is clearly apparent that no set of facts can be proved* that would entitle the plaintiff to recovery." (Emphasis added.) *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). It is not clearly apparent that petitioners could not prove any set of facts demonstrating that the statements are not qualifiedly privileged where petitioners are without

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[2]In their brief, respondents assert that

> "[t]he appellate court's decision, if upheld, would strongly undermine the State's policy against sexual harassment by making it effectively impossible for employers to ensure victims and witnesses that their identities will be kept confidential. *** The use of Rule 224 to compel disclosure of their identities to the harasser, so as to enable a *retaliatory* defamation claim, will only increase that reluctance and hamper employers' ability to address sexual harassment in the workplace." (Emphasis added.)

Again, respondents ask this court to accept without question the conclusion that the third-party investigation produced a correct finding or that accusers and witnesses are entitled to blanket anonymity.

requisite knowledge of the publishers' intents and actions. See *Kuwik*, 156 Ill. 2d at 30. This is circular and self-defeating. As a result, it is unsurprising that petitioners only set forth conclusory allegations in support of their claim for defamation. See *Colson v. Stieg*, 86 Ill. App. 3d 993, 998 (1980) (noting that "bare allegations of knowledge of falsity without underlying supporting facts are not legally sufficient" to overcome a qualified privilege in a case where the plaintiff knew the identity of the defendant); *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 56 (holding that the plaintiffs failed to sufficiently plead malice in a case where the plaintiffs knew the identity of the defendant). Accordingly, I believe that the majority prematurely holds that the statements of Persons A, B, and C are qualifiedly privileged. I express no opinion on the underlying merits of petitioners' defamation claim. For these reasons, I respectfully dissent.

¶ 75 JUSTICE NEVILLE joins in this dissent.

¶ 76 CHIEF JUSTICE ANNE M. BURKE took no part in the consideration or decision of this case.

Doe v. Catholic Diocese, 2015 IL App (2d) 140618

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 2d Dist. (the forum's district) · filed 2015-09-04 · Opinion
Published opinion

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Where the memo cites it

- memo p. 7 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 16: passage C080.3
- memo p. 12 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 16: passage C080.3

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Illinois Official Reports

Appellate Court

***Doe v. Catholic Diocese of Rockford*, 2015 IL App (2d) 140618**

Appellate Court Caption	JAIME DOE, on Behalf of J. Doe, a Minor, Petitioner-Appellee, v. THE CATHOLIC DIOCESE OF ROCKFORD and JOHN DOE, Respondents-Appellants.
District & No.	Second District Docket No. 2-14-0618
Filed	September 4, 2015
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 14-MR-57; the Hon. David R. Akemann, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Joshua G. Vincent, Kimberly A. Jansen (argued), Gregory T. Snyder, and Jennifer L. Johnson, all of Hinshaw & Culbertson LLP, of Chicago, for appellants. Philip J. Piscopo (argued), Peter M. Storm, and Stephen M. Cooper, all of Cooper, Storm & Piscopo, of Geneva, for appellee.
Panel	JUSTICE BIRKETT delivered the judgment of the court, with opinion. Justices Hutchinson and Zenoff concurred in the judgment and opinion.

OPINION

¶ 1 Respondents, the Catholic Diocese of Rockford and John Doe, appeal the judgment of the circuit court of Kane County granting the petition pursuant to Illinois Supreme Court Rule 224 (eff. May 30, 2008)[1] of petitioner, Jaime Doe, seeking the identity of the writer of an allegedly defamatory letter concerning her son, J. Doe. Respondents argue that petitioner's Rule 224 petition was insufficiently pleaded and that, even if the petition were sufficient, disclosure is prohibited under the clergy-penitent privilege, codified at section 8-803 of the Code of Civil Procedure (Code) (735 ILCS 5/8-803 (West 2012)). We affirm.

¶ 2 I. BACKGROUND

¶ 3 We summarize the pertinent facts in the record. John Doe (Doe) is a pastor of a parish located in Kane County and within the Catholic Diocese of Rockford. Petitioner and her son both are members of Doe's parish. In September or October 2013, an unidentified individual wrote a letter containing the statements at issue here. The writer delivered the letter to Doe "in his capacity as pastor of the parish." The letter allegedly contained defamatory statements about petitioner's son.

¶ 4 On January 23, 2014, petitioner filed a petition pursuant to Rule 224, seeking an order requiring respondents to produce a copy of the letter and the identity of the writer. Petitioner alleged that the letter "as described by [respondents] contained several false allegations against [her son]," namely, "that J. Doe engaged in a sexual touching against another minor child, who is not the child of the [writer]," "that a parent of J. Doe admitted the improper sexual contact," "that J. Doe was older and larger than the other child," and "that J. Doe threatened the other child with harm if the other child told anybody about the touching." Petitioner expressly sought to proceed under a theory of defamation *per se*. She alleged that the allegations concerning her son were false. According to petitioner, as a result of the letter, her son became "isolated and ostracized in the community, including the parish community."

¶ 5 Respondents received leave to notify the writer that the petition had been filed and that the trial court had issued orders regarding anonymity and sealing the record. The writer has neither appeared nor participated in the proceedings.

¶ 6 Next, respondents moved to dismiss the petition. Respondents argued that the petition did not allege sufficient facts to state a claim of defamation. Respondents raised a number of claims outside of the four corners of the petition, including a claim that the clergy-penitent privilege applied to bar any disclosure of the information sought in the petition. In support of this claim, respondents included Doe's affidavit, along with documents from the Diocese addressing sexual misconduct and reporting as well as standards of behavior applicable to Diocesan employees and volunteers.

[1]The purpose of Rule 224 is to allow a petitioner to learn the identity of one who may be liable in damages. Ill. S. Ct. R. 224, Committee Comments (Aug. 1, 1989).

¶ 7 In his affidavit, Doe averred that the writer "sought consultation and advice about Church law, ethics and policy pertaining to [the writer's] roles as a parishioner and a volunteer in the parish with responsibility for monitoring children." Doe further averred that his role as pastor included guiding the parishioners in spiritual matters and providing counseling and direction about canon law, religious law and policy, and the Catholic faith. Doe also averred that church law required him to keep the confidentiality of requests for counseling and direction.

¶ 8 Petitioner filed a reply, generally controverting respondents' arguments. Petitioner included in her reply, as an exhibit, a copy of correspondence sent to her by respondents' attorney. Based on that correspondence, petitioner argued that respondents viewed the letter as an accusation against J. Doe of sexual misconduct, necessitating an investigation of the incident pursuant to the Diocese's sexual misconduct standards. Additionally, petitioner attached an affidavit from her attorney describing how respondents portrayed to petitioner the contents of the letter. Specifically, according to petitioner's counsel, respondents described the letter as relating an incident that involved "more than just two boys checking each other out" (internal quotation marks omitted). Instead, respondents revealed that the letter specifically stated that J. Doe "touched and fondled another boy's private parts." Further, petitioner offered to submit an amended petition including more detailed allegations of conduct from the letter, if the trial court deemed it necessary.

¶ 9 The trial court granted petitioner's petition in part, ordering respondents to disclose only the identity of the writer of the letter. The trial court held that petitioner "met her discovery burden" because "[h]er proposed defamation claim would survive a section 2-615 [(735 ILCS 5/2-615 (West 2012))] motion to dismiss." The trial court reasoned that the "complained-of statement [was] not reasonably capable of an innocent construction, and it [could] be reasonably construed as a factual assertion." The trial court rejected respondents' contention that, in addition to surviving a motion to dismiss pursuant to section 2-615 of the Code, it must also survive a motion to dismiss raising affirmative matters pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). Respondents timely appeal.

¶ 10 II. ANALYSIS

¶ 11 On appeal, respondents argue that the trial court erred in granting the petition. Respondents contend that the petition was not sufficient to survive a motion to dismiss pursuant to section 2-615. Alternatively, respondents contend that the clergy-penitent privilege precludes the disclosure of the writer's identity. We address each contention in turn.

¶ 12 Before we turn to respondents' contentions on appeal, we first address petitioner's motion for leave to amend the pleadings, which we took with the case. Petitioner requests that, pursuant to Illinois Supreme Court Rule 362 (eff. Feb. 1, 1994), she be granted leave to amend her petition to conform the petition to the record. Petitioner argues that all of the information she seeks to add to the petition was within the various papers filed in the trial court. Petitioner further argues that such an amendment would not prejudice respondents. Respondents contend that an amendment is improper because it would not cure the petition's defects and, in any event, they would be prejudiced because petitioner argued the additional information only in her reply, so respondents did not have an opportunity to directly respond below. We have carefully considered the parties' arguments and we deny petitioner's motion for leave to amend.

¶ 13 A. Sufficiency of Petition

¶ 14 Respondents initially contend that the petition was not sufficiently pleaded. This argument requires that we consider the text of Rule 224 and the standards under which a Rule 224 petition is reviewed.

¶ 15 Rule 224 states, pertinently:

> "(i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.
>
> (ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons and entities and where a deposition is sought will specify the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person and the time and place of the deposition." Ill. S. Ct. R. 224(a)(1) (eff. May 30, 2008).

¶ 16 Under Rule 224, the unidentified individual or entity does not bear the burden of demonstrating that the discovery request does not satisfy the rule; rather, it is the petitioner who bears the burden of showing that his or her proposed complaint supports a cause of action, even if the unidentified individual or entity does not challenge the request. *Hadley v. Subscriber Doe*, 2014 IL App (2d) 130489, ¶ 12, *aff'd*, 2015 IL 118000. This is because Rule 224 is intended to assist a petitioner in identifying a currently unidentified party who might be liable; however, to employ the rule, the petitioner must demonstrate that the proposed identification is necessary. *Hadley v. Subscriber Doe*, 2015 IL 118000, ¶ 25. ↩ memo p. 7, 12

¶ 17 In order to show the necessity of the identification, the petitioner must demonstrate that a potential defamation claim against the unidentified individual or entity would survive a section 2-615 motion to dismiss. *Id.* ¶ 27. A section 2-615 motion to dismiss is concerned with the legal sufficiency of a complaint, posing the question of whether the allegations of that complaint, viewed in the light most favorable to the plaintiff, state a claim on which relief may be granted. *Id.* ¶ 29. We review *de novo* the trial court's decision on a section 2-615 motion to dismiss. *Id.*

¶ 18 In order to state a claim of defamation, a plaintiff must plead facts demonstrating that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of the subject statement to a third party, and that the publication caused damages to the plaintiff. *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 24. A statement is defamatory if it harms an individual's reputation by lowering the individual in the eyes of the community or if it deters the community from associating with the individual. *Id.* Defamation can be either defamation *per se* or defamation *per quod*. *Id.*

¶ 19 A statement is defamatory *per se* if its harm is apparent and obvious on its face. *Id.* ¶ 25. When a statement is defamatory *per se*, a plaintiff need not plead actual damage to his or her

reputation, because the statement is deemed to be so obviously and materially harmful that injury to the plaintiff's reputation is presumed. *Id.* However, because a claim of defamation *per se* relieves a plaintiff of the obligation to prove actual damages, it must be pleaded with a heightened level of precision and particularity. *Id.* Illinois recognizes five categories of statements that are defamatory *per se*: (1) words imputing the commission of a criminal offense; (2) words imputing an infection with a loathsome communicable disease; (3) words imputing an individual's inability to perform his employment duties or a lack of integrity in performing those duties; (4) words imputing a lack of ability in an individual's profession or prejudicing an individual in his or her profession; and (5) words imputing an individual's engagement in fornication or adultery. *Id.* In this case, petitioner contends that the writer's statements fall within the first and last categories. With these principles in mind, we turn to respondents' contentions.

¶ 20 Respondents argue that petitioner did not sufficiently plead facts that demonstrated a defamation claim against the writer. Respondents contend that, because the issue is whether petitioner's claim would survive a section 2-615 motion to dismiss, we are limited to the four corners of the petition. Further, respondents contend that petitioner failed to sufficiently allege statements that are defamatory *per se*. We address respondents' contentions in turn.

¶ 21 1. Scope of Review

¶ 22 Respondents' initial contention is that we are limited to the four corners of the petition in our review. We agree. Before our supreme court decided *Hadley*, there might have been some room for debate, but that door has been closed by *Hadley*, 2015 IL 118000, ¶¶ 27, 29. Our supreme court held that section 2-615 standards apply to the consideration of a Rule 224 petition. *Id.* ¶ 27. More specifically, when conducting a section 2-615 analysis, the court is limited to considering "[a]ll facts apparent from the face of the complaint, including any attached exhibits." *Id.* ¶ 29. Thus, we agree with respondents and limit our consideration to the four corners of the petition.

¶ 23 2. Precision and Particularity of Defamation Claim

¶ 24 Under a section 2-615 analysis, the court accepts as true all well-pleaded facts, as well as any reasonable inferences that arise from them. *Borcia v. Hatyina*, 2015 IL App (2d) 140559, ¶ 20. The court does not, however, accept as true conclusions that are unsupported by specific facts. *Id.* The court construes the cause of action liberally in the plaintiff's favor and should not dismiss it unless it is apparent that no set of facts can be proved that would entitle the plaintiff to a judgment in his or her favor. *Id.*

¶ 25 In the petition, petitioner alleged that the writer made false statements against J. Doe and that, in September or October 2013, the allegedly defamatory letter was published to John Doe. Petitioner alleged that she requested a copy of the letter but that respondents refused to provide it.

¶ 26 Petitioner alleged that respondents "described" to her the contents of the letter and that the statements regarding J. Doe were false. According to petitioner, the pertinent statements in the letter included: (1) "that J. Doe engaged in a sexual touching against another minor child, who is not the child of the [writer]"; (2) "a parent of J. Doe admitted the improper sexual contact"; (3) "J. Doe was older and larger than the other child"; and (4) "J. Doe threatened the other child

with harm if the other child told anybody about the touching." According to petitioner, J. Doe became "isolated and ostracized in the community, including the parish community."

¶ 27 Petitioner thus alleged a claim of defamation *per se*, alleging that the writer accused J. Doe of adultery or fornication and the commission of a crime. The allegations recounting the allegedly defamatory statements are not to be read independently of each other; rather, they are to be read as a whole (along with the other allegations in the petition). See *Lloyd v. County of Du Page*, 303 Ill. App. 3d 544, 552 (1999) (consideration of a complaint subject to a section 2-615 motion to dismiss "requires an examination of the complaint as a whole, not its distinct parts"). In our view, these allegations are sufficiently precise and particular to survive a section 2-615 analysis of the defamation claim.

¶ 28 Specifically, petitioner alleged that the writer stated, falsely, that J. Doe performed a "sexual touching." One of J. Doe's parents purportedly admitted that the "sexual touching" was indeed "improper sexual contact" and the contact was "against another minor child." J. Doe threatened the other child in order to prevent that child from revealing the contact between them. Additionally, petitioner alleged that the writer published the false statements to Doe and that, as a result, J. Doe experienced "isolat[ion] and osctraciz[ation]" in his relevant communities. We believe that these allegations are sufficient to pass muster under a section 2-615 analysis.

¶ 29 Respondents rely on *Green v. Rogers*, 234 Ill. 2d 478 (2009), in support of their contention that petitioner failed to plead with precision and particularity the facts supporting her defamation claim against the writer. In *Green*, the plaintiff alleged, on information and belief, that the defendant made statements about the plaintiff, including that the plaintiff " 'exhibited a long pattern of misconduct with children' " and had " 'abused players, coaches, and umpires' " in the Clarendon Hills Little League. *Id.* at 493. Our supreme court noted that a defamation claim must be pleaded with "specific precision and particularity so as to permit both initial judicial review[2] and the formulation of an answer and potential affirmative defenses." *Id.* at 492.

¶ 30 The *Green* court held that the complaint did not "set forth a precise and particular account of the statements that [the] defendant allegedly made"; rather, the allegations "set forth only a summary of the types of statements that [the] plaintiff may or may not have a reason to believe [the] defendant made." *Id.* at 493. The court noted that the allegations were "completely devoid of any specifics, such as what type of misconduct [the] plaintiff exhibited; the nature of any alleged 'abuse'; or how that abuse manifested itself in relation to players, coaches and umpires." *Id.* Because the complaint left many questions unaddressed–like whether the alleged abuse was verbal, physical, or a combination, or whether the alleged misconduct was " 'not acceptable for [the little league's] coaches' " under league rules or some other standard–the court had "no way of assessing whether [the] defendant's words were defamatory *per se*." *Id.* at 493-94.

¶ 31 *Green* is distinguishable, but this does not mean that we cannot draw some guidance from it, particularly regarding the initial judicial review of the allegedly defamatory statements. The *Green* court was also concerned with the defendant's ability to understand the allegedly

[2]"Initial judicial review" might be a somewhat opaque phrase. In its context in *Green*, it meant that the plaintiff must plead specific conduct to allow the court to assess, as with a section 2-615 motion, whether the words are defamatory. It is in this sense that we use the phrase in the following paragraphs.

defamatory words used, formulate an answer to the allegations, and develop any applicable affirmative defenses. *Id.* at 492. That circumstance is not present in this case; rather, petitioner is attempting to identify a potential defendant. Accordingly, the defendant's ability to formulate an answer and affirmative defenses is not yet in issue. Instead, the issue is whether petitioner has sufficient facts on hand to eventually draft a viable claim against the as-yet-unidentified defendant. Thus, we believe that the portion of *Green* devoted to the consideration of whether the precision and particularity of a complaint is sufficient to allow a defendant to formulate an answer and affirmative defenses is simply inapposite to the consideration of the sufficiency of allegations against an as-yet-unidentified defendant in a Rule 224 petition.

¶ 32 That leaves the former of the *Green* court's concerns, permitting initial judicial review of the defamatory content of the allegations. *Id.* We believe that *Green* is not inapposite in the initial-judicial-review context, although it is factually distinct. In *Green*, the plaintiff was fully aware of the identity of the defendant; here, petitioner knows only that the writer of the letter has connections with Doe's parish. In both *Green* and this case, the allegations of defamation are made through information and belief. However, here, petitioner notes that she was apprised of the letter and its content, because it was "described by [respondents]" to her. In *Green*, by contrast, there was no indication as to how the plaintiff learned about the allegedly defamatory statements. Thus, the record here is not so "devoid of specifics" as to prevent the sort of initial judicial review contemplated in *Green*.

¶ 33 In *Green*, the court believed that there were many unknown aspects concerning the type of conduct that the plaintiff purportedly performed. *Id.* at 493-94. Here, petitioner described that the writer averred that J. Doe "engaged in a sexual touching against another minor child." This averment informs the reader that J. Doe is a minor, that he touched another minor in a sexual fashion, and that it was "against" this child, leading to an inference that there was an element of coercion or lack of consent. Petitioner further alleged that the writer averred that one of J. Doe's parents "admitted the improper sexual contact." The phrase "improper sexual contact" confirms the inference that the sexual touching was not harmless, but was overtly sexual and against the mores of society. This is further confirmed by petitioner's allegation that the writer averred that J. Doe "threatened the other child with harm if the other child told anybody about the touching." This implies that J. Doe knew that the sexual touching was wrong and that he faced definite negative consequences if the other child revealed the touching to anybody. While it is true that petitioner did not describe the precise nature of the alleged touching, we can reasonably infer (especially as we view the factual allegations in the light most favorable to petitioner under section 2-615) that it was not the innocent explorations of two minors "playing doctor"; rather, in light of the purported threat and parental admission of "improper sexual contact," we believe that the clear import of the alleged statements is that J. Doe engaged in some form of knowing conduct that was nonconsensual and overtly sexual. We further believe that this is enough to fall under the rubric of "fornication" for purposes of defamation *per se*. See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 93-94 (1996) (the term "slut" was sufficiently specific to refer to the plaintiff's sexual activities without requiring a detailed description of those activities). Thus, we hold that, unlike in *Green*, the description of the allegedly defamatory statements was sufficiently precise and particular to allow the trial court to perform an initial judicial review.

¶ 34 Respondents argue that, as in *Green*, the phrase "sexual touching" is imprecise and does not adequately describe the specific conduct to which the writer was referring. We reject the contention. The allegations are to be viewed as a whole and not distinctly. *Lloyd*, 303 Ill. App. 3d at 552 (consideration of a complaint subject to a section 2-615 motion to dismiss "requires an examination of the complaint as a whole, not its distinct parts"). Moreover, viewing all of the allegations together makes clear that petitioner means that the writer averred that J. Doe committed an improper sexual act against the other, younger, child. This is sufficient.

¶ 35 Respondents complain that the allegation that the writer described J. Doe as "older and larger" than the other child is still too imprecise to pass muster, because "[t]here is no way of knowing the ages or sizes of the children." Again, we view this allegation in light of all of the allegations, especially in light of the allegation that the writer averred that J. Doe had threatened the other child with harm if the other child revealed the touching to anyone. This implies that J. Doe was in a position, being both older and larger than the other child, to enforce his threat of harm. Additionally, it underscores the wrongful nature of the conduct, because if J. Doe and the other child were only "playing doctor," a threat of harm to prevent disclosure would have been unnecessary and unlikely. Finally, respondents complain that "[t]here is no way of knowing what 'harm' J. Doe purportedly was said to have 'threatened' if the other child told anybody about the 'touching.' " Respondents suggest that the threatened "harm" could be as innocuous as a threat to no longer be friends. Like the precise nature of the sexual touching, however, the precise harm is immaterial. The point of the allegation is that, in order to coerce the other child into silence, J. Doe threatened that some negative action would occur if the child disclosed the conduct. This leads to the inferences expressed above and confirms that the conduct averred by the writer was more than simple innocent exploration. Accordingly, we reject respondents' contentions about the imprecision of the allegations of the allegedly defamatory statements.

¶ 36 Respondents also take issue with the description of the "factual basis informing" petitioner's information and belief regarding the contents of the letter. We find that, in totality, the petition alleges circumstances adequate to allow initial judicial review and to suggest that petitioner can state a viable claim against the writer. Respondents attempt to analogize petitioner's allegations to those of the plaintiff in *Green*. This analogy fails because in *Green* the plaintiff offered no information as to how he arrived at his information and belief regarding the defendant's allegedly defamatory statements; by contrast, here, petitioner alleged that the writer's letter was described to her. We find this sufficiently distinguishing to render misplaced respondents' reliance on *Green*. Accordingly, for the preceding reasons, we reject respondents' contention that petitioner did not allege a claim of defamation with sufficient precision and particularity to pass muster under section 2-615.

¶ 37 3. Defamatory *Per Se* Statements

¶ 38 Respondents next contend that petitioner did not sufficiently allege that the statements made by the writer were defamatory *per se*. As noted above, among the categories of defamation *per se* are statements imputing the commission of a crime and statements imputing fornication or adultery. *Hadley*, 2014 IL App (2d) 130489, ¶ 20. Respondents argue that the statements fall into neither of these categories. We disagree.

¶ 39 Respondents first focus on the defamation *per se* category of fornication or adultery. Respondents contend that there is nothing in petitioner's allegations indicating that the writer

accused J. Doe of sexual intercourse with the other child. Respondents further argue that, because the fornication-or-adultery category was added by statute to the tort of defamation *per se* (see 740 ILCS 145/1 (West 2012)), the statute, which was adopted in derogation of the common law, must be strictly construed. Respondents conclude that, because petitioner has not expressly alleged a statement accusing J. Doe of fornication, she has failed to adequately plead a defamatory *per se* statement within the fornication-or-adultery category. We disagree.

¶ 40 We note that our supreme court in *Bryson* held that the allegation that the plaintiff was a " 'slut' " implied that the plaintiff was " 'unchaste,' " so that the defendants falsely accused the plaintiff of fornication. *Bryson*, 174 Ill. 2d at 90. The court reasoned that, in the context of the allegedly defamatory article, the term "slut" was intended to describe the plaintiff's sexual proclivities. *Id.* at 93-94. The court was untroubled by the lack of a precise description of what sort of activities the plaintiff was accused of engaging in. *Id.* at 90, 93-94. Similarly, albeit in the imputation-of-a-crime context, our supreme court in *Hadley* was untroubled that the alleged defamer did not expressly state that the plaintiff was a pedophile or had actually molested children. *Hadley*, 2015 IL 118000, ¶ 37. The natural effect of the words used, along with their context, conveyed the idea that the plaintiff was a pedophile or had engaged in sexual acts with children.

¶ 41 Here, petitioner related that respondents informed her that the writer accused J. Doe of a "sexual touching," and that it was "improper sexual contact." We believe that these words, given their context, are sufficient to impute activities akin to those found to be implied by the defendants' use of the word "slut" in *Bryson*. We have discussed above that the allegations, read together, paint a picture of nonconsensual sexual activity that J. Doe forced upon the younger, smaller child. We believe that these alleged statements are sufficient to fall under the fornication-or-adultery category in the same way as the use of the word "slut" in *Bryson*.[3]

¶ 42 Respondents turn to the Slander and Libel Act (740 ILCS 145/1 (West 2012)) for their next argument. Section 1 of the Slander and Libel Act provides, pertinently: "If any person shall falsely use, utter or publish words, which in their common acceptance, shall amount to charge any person with having been guilty of fornication ***, such words so spoken shall be deemed actionable, and he shall be deemed guilty of slander." *Id.* Respondents argue that "unchastity" and "sexual misconduct" are not within the terms of section 1 of the Slander and Libel Act (*id.*), and so a statement imputing "unchastity" or "sexual misconduct" cannot constitute a defamatory *per se* statement. We disagree. While respondents are correct that section 1 does not contain the words "unchastity" or "sexual misconduct," we do not believe that this lack forecloses our holding. We note that *Bryson* expressly analyzed section 1 of the Slander and Libel Act. *Bryson*, 174 Ill. 2d at 89. The court expressly held that the use of the term " 'slut' " implied that the plaintiff was " 'unchaste,' " so that the "defendants' statements [fell] within this statutorily created category of statements that are considered actionable *per se*." *Id.* at 90.

[3]We also note that respondents' attorney characterized the contact referred to in the letter as a fondling of the genitals. While we do not consider the attorney's letter in determining the sufficiency of the allegations in the Rule 224 petition pursuant to a section 2-615 analysis, we mention this characterization as a sort of reasonability check. This type of conduct clearly falls within the fornication-or-adultery category of defamation *per se*. Additionally, this information was included in petitioner's offer of proof supporting a proposed amended petition. While the original petition was sufficiently specific and properly alleged defamation *per se*, we note that the additions proposed by petitioner further convince us that our construction of the alleged statements is, in fact, appropriate.

Further, the court deemed that "slut" described the plaintiff's sexual proclivities, not that it necessarily meant that she had engaged in fornication or sexual intercourse on a specific date and time at a specific place with specific individuals. *Id.* at 93-94.

¶ 43 Likewise here. Respondents related to petitioner that the writer's letter accused J. Doe of engaging in a "sexual touching" that constituted "improper sexual contact." This activity is clearly akin to the type of sexual conduct about which a statement is actionable, as approved by *Bryson*. Accordingly, we reject respondents' contention.

¶ 44 The *Bryson* court then considered whether the defendants' words were capable of an innocent construction. *Id.* at 90-96. The innocent-construction rule renders an allegedly defamatory statement nonactionable if it is reasonably capable of an innocent construction. *Hadley*, 2015 IL 118000, ¶ 31. In applying the innocent-construction rule, the court must give the allegedly defamatory words their natural and obvious meaning and interpret them as they appear to have been used and according to the idea they were intended to convey to the recipient. *Id.* Because the context of the statement is important to understanding its meaning, the court must consider the allegedly defamatory words in the context of the entire communication. *Hadley*, 2014 IL App (2d) 130489, ¶ 23. The innocent-construction rule does not require the court to strain to find an unnatural and innocent meaning for a statement when a defamatory meaning is far more reasonable. *Hadley*, 2015 IL 118000, ¶ 32.

¶ 45 As noted above, we cannot conclude that the writer's allegedly defamatory statements are subject to an innocent construction. Although a "sexual touching" could mean only that the two children were engaging in normal, consensual exploration, we note that the writer further stated that J. Doe's parent "admitted" that the conduct amounted to "improper sexual contact." This takes the conduct out of the realm of innocent sexual exploration. Further, the fact that the writer accused J. Doe of attempting to intimidate the other child into silence through a threat of harm suggests that the activity both was known by J. Doe to be improper and was even nonconsensual. Accordingly, we do not believe that the statements attributed to the writer can be innocently construed. Thus, we conclude that petitioner has alleged defamatory *per se* statements under the fornication-or-adultery category.

¶ 46 While our conclusion that petitioner alleged defamatory *per se* statements means that we do not need to consider whether she also alleged a defamatory *per se* statement under the commission-of-a-crime category, we choose to address the parties' arguments on this ground as an additional and alternate basis for our holding. For a statement to constitute defamation *per se* as imputing the commission of a crime, the crime must be an indictable one, involving moral turpitude and punishable by death or imprisonment rather than by fine. *Jacobson v. Gimbel*, 2013 IL App (2d) 120478, ¶ 27. While the allegedly defamatory words need not meet the pleading requirements of an indictment, the words must fairly impute the commission of a crime. *Id.* The innocent-construction rule also applies to whether an allegedly defamatory statement imputes the commission of a crime. *Id.* ¶ 28. Respondents contend that the alleged statements about "sexual touching" and "improper sexual contact" fail to impute the commission of a crime.

¶ 47 At oral argument, we indicated our concern as to whether the alleged statement that "J. Doe threatened the other child with harm if the other child told anybody about the touching" constituted the imputation of the commission of a crime. In the trial court, neither party addressed whether this statement imputed the commission of a crime. We directed the parties, on our own motion, to present supplemental briefing regarding the adequacy of the petition on

the issue of defamation *per se* by imputation of a crime, specifically, the offense of intimidation. The parties each submitted the requested supplemental brief. Respondents argued that we should not consider whether petitioner alleged that the writer imputed the offense of intimidation. Therefore, upon reflection, we will not further address the issue.

¶ 48 Next, we turn to the imputation of the commission of a sexual offense. Respondents contend that the remaining allegations are insufficient to demonstrate that the writer was imputing to J. Doe the commission of criminal sexual abuse or any other sexual offense. "A person commits criminal sexual abuse if that person: (1) commits an act of sexual conduct by the use of force or threat of force ***." 720 ILCS 5/11-1.50(a) (West 2012). In turn:

> " 'Sexual conduct' means any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2012).

Respondents argue that there is no statement that J. Doe was committing the "sexual conduct" for the purpose of sexual gratification or arousal. Respondents further argue that there is no allegation that the other child was under 13 years of age. We reject respondents' arguments.

¶ 49 We have noted that there is no possible innocent construction of the allegedly defamatory statements. With that starting position, we note that respondents are essentially arguing that, in order to make a claim of defamation *per se* based on the imputation of the commission of a crime, even though it is based on statements in a letter to which respondents have denied petitioner access, petitioner would have to allege that the writer included all of the elements of the relevant crime. We note that this is not the standard; rather, the standard is only that the statements must fairly impute the commission of a crime. We believe that the terms "sexual touching" and "improper sexual contact," along with other language in the statements, fairly suggest that the writer accused J. Doe of committing a criminal sexual act with the other child, especially in light of the fact that J. Doe threatened the other child with harm to prevent the disclosure of the conduct. We disagree with respondents that petitioner needed to allege the ages of the children involved, especially in light of the fact that petitioner is trying to preserve the anonymity of both J. Doe and the other child in these pleadings. Identifying them by age would serve only to lessen that anonymity and, because this case involves a parish community, would risk actual exposure of the children's identities beyond what has likely already occurred through the inevitable rumors that have likely accompanied the conduct, the publication of the letter, and this action. Accordingly, we reject respondents' contentions and hold that petitioner adequately pleaded that the writer's allegedly defamatory statements imputed the commission of a crime. Based on this holding, we need not consider the parties' arguments concerning affidavits and exhibits beyond the four corners of the petition.

¶ 50 B. Clergy-Penitent Privilege

¶ 51 Respondents next contend that the clergy-penitent privilege should bar the disclosure of the writer's identity. Strictly speaking, privilege is an affirmative defense (*Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677, ¶ 15 (privilege is an affirmative defense susceptible to resolution via a section 2-619 (735 ILCS 5/2-619 (West 2012)) motion to dismiss)), which should not be considered when resolving a section 2-615 motion to dismiss (*Becker v. Zellner*, 292 Ill. App. 3d 116, 122 (1997) (generally, "affirmative defenses may not be raised in a

section 2-615 motion")). See also *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 712 (2010) (an affirmative defense is not considered under a section 2-615 analysis). However, pursuant to section 2-619, respondents argued below that, if the trial court determined that the Rule 224 petition adequately stated a claim of defamation, the affirmative defense of clergy-penitent privilege would nevertheless defeat the petition. While respondents did not clearly denominate their motion to dismiss as a section 2-619.1 combined motion (735 ILCS 5/2-619.1 (West 2012) (allowing for the promulgation of sections 2-615 and 2-619 motions to dismiss in the same motion so long as they are clearly separate)), they otherwise complied with the requirements of a section 2-619.1 combined motion, so we may and we will consider their contentions on the clergy-penitent privilege.

¶ 52 Section 8-803 of the Code codifies the clergy-penitent privilege:

> "A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor." 735 ILCS 5/8-803 (West 2012).

¶ 53 In order to properly invoke an evidentiary privilege, the party asserting the privilege must establish all of the privilege's necessary elements. *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 94. The clergy-penitent privilege "extends only to information that an individual conveys in the course of making an admission or confession to a clergy member in his capacity as spiritual counselor." *People v. Campobello*, 348 Ill. App. 3d 619, 634 (2004). This court has noted that a clergy member's "professional character" is no broader than his or her role as a "spiritual advisor" under section 8-803. *Id.* This is demonstrated through a close reading of section 8-803. The first clause of section 8-803 accords protection to any "confession" or "admission" made to a clergy member "in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of [the] religious body or of the religion which [the clergy member] professes." 735 ILCS 5/8-803 (West 2012). Even though "professional character" and "spiritual advisor" are linked disjunctively, the requirement that a "confession" or "admission" to the clergy member be made "in the course of the discipline" applies to all confessions and admissions received by the clergy member. *Id.*; *Campobello*, 348 Ill. App. 3d at 634.

¶ 54 In this clause, "course of the discipline" is the crucial phrase: "the 'discipline' referred to in section 8-803 is limited to the set of dictates binding a clergy member to receive from an individual an 'admission' or 'confession' for the purpose of spiritually counseling or consoling the individual." *Campobello*, 348 Ill. App. 3d at 635. Thus, to qualify for preclusion under the clergy-penitent privilege and section 8-803, "a communication must be an admission or confession (1) made for the purpose of receiving spiritual counsel or consolation (2) to a clergy member whose religion requires him to receive admissions or confessions for the purpose of providing spiritual counsel or consolation." *Id.*

¶ 55 Last, the final clause of section 8-803 prevents the compelled disclosure of "any information" the clergy member has obtained "in such professional character or as such spiritual advisor." 735 ILCS 5/8-803 (West 2012). "The inclusion of 'such' is a

reincorporation of the preceding definition of 'professional character' and 'spiritual advisor,' which as we have noted, is qualified by the phrase 'in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which [the clergy member] professes.' " *Campobello*, 348 Ill. App. 3d at 635-36. "Any information" given in the course of a confession or admission for the purpose of receiving spiritual counseling or consolation falls under the clergy-penitent privilege. *Id.* at 636. The privilege, however, extends only to a confession or admission made in confidence. *Id.* With these principles in mind, we turn to respondents' contentions.

¶ 56 In this case, the writer wrote a letter to Doe outlining certain alleged improper sexual conduct, committed several years previously, by J. Doe. The writer sought guidance in how to handle the situation. The writer was a volunteer for a religious-education program conducted by the parish and had the responsibility of monitoring the children in the program. In our view, at least on the present record, the statements in issue are simply not of the character of a confession or admission for which the writer was seeking spiritual guidance. Rather, they are outlining a potential source of risk for the parish and the children if J. Doe were to repeat such conduct while participating in the educational program offered by the parish. This is fundamentally not a matter of conscience for the writer; rather it is a matter of risk management for the writer as an agent of the parish and a guardian of children. Accordingly, we hold that the clergy-penitent privilege is simply inapplicable.

¶ 57 Respondents first contend that petitioner admitted that the writer published the allegedly defamatory statements to Doe "in his capacity as pastor of the parish." Respondents conclude that petitioner has conceded that the communication was made to Doe in his professional character or as a spiritual advisor under section 8-803. We disagree. The position of pastor of a parish includes significant bureaucratic responsibilities for overseeing the various programs run by the parish and the diocese. "In his capacity as pastor of the parish" could refer to both Doe's duties to provide spiritual counseling and consolation as well as his administrative and bureaucratic duties to oversee the running of the parish. We cannot say that petitioner actually conceded that the communication was delivered to Doe in his role as a spiritual advisor.

¶ 58 Respondents attached Doe's affidavit, in which he averred that his position required him to "provide spiritual consolation and consultation as well as moral and ethical direction." Doe further averred that, if he identified the writer, it would breach the rules of the church and "breach the confidence of a parishioner and volunteer who sought consolation and guidance." What respondents omit, however, is that the writer was a volunteer with a responsibility, within a specific program of religious instruction, to monitor the children participating in that program. Thus, the allegedly defamatory statements are more clearly seen as a request for guidance in conducting the program and discharging the writer's responsibility than as a request for consolation or counseling over a matter of conscience. In other words, the request for guidance was for the purpose of minimizing the risk to the parish and the children, rather than seeking spiritual instruction. We do not believe that the clergy-penitent privilege extends to bureaucratic and administrative purposes. See *id.* (the privilege extends to confessions or admissions). Here, the writer explained the background of one of the children under his or her supervision and asked for guidance in handling the problems posed by this background; the writer did not make a confession or admission.

¶ 59 Respondents argue that, in effect, requiring a confession or admission effectively takes communication about the acts of third persons outside of the clergy-penitent privilege, and that

such a holding contravenes *Snyder v. Poplett*, 98 Ill. App. 3d 359, 363 (1981). We disagree. The plain language of the statute applies to "a confession or admission." 735 ILCS 5/8-803 (West 2012). Here, we discern neither a confession nor an admission; rather, the writer's statements are accusative, accusing J. Doe of certain improper sexual conduct. As a result, they fall outside of the *Snyder* court's refusal to create a blanket exception to the privilege for communications relating to the acts of third persons instead of to the individual making the communication.

¶ 60 Respondents note that, similarly, *Campobello* does not limit statements under the clergy-penitent privilege to those regarding the communicant's own conduct. See *Campobello*, 348 Ill. App. 3d at 636. We do not disagree. *Campobello* does not limit the statements to the communicant's own conduct, but the statements are still limited to those that are confessional. *Id.* at 635. If the statement is not of such character, then it is, by statutory definition, outside of the clergy-penitent privilege. See 735 ILCS 5/8-803 (West 2012) (prohibiting the disclosure of "a confession or admission made to [the clergy member] in his or her professional character or as a spiritual advisor"). Here, the writer sought guidance not for a spiritual matter or a matter of conscience but in the writer's capacity as a volunteer with the responsibility of monitoring the participants in one of the parish's religious-education programs. It is not the fact that the statements concerned a third party, but the fact that the statements were not a confession or admission, that takes them outside of the privilege. Accordingly, respondents' argument is inapposite.

¶ 61 Respondents note petitioner's concession that Doe, in his affidavit, averred that the writer's letter was sent for the purpose of seeking spiritual counsel. Doe did indeed make such a conclusion. However, this conclusion is not borne out by the factual averments in the affidavit, especially when considered with the allegations in the petition. Accordingly, while petitioner might have been constrained to concede that Doe averred the writer's purpose, that concession is of no significance, because it amounts to conceding that Doe said what he said. Accordingly, we attribute no weight to the concession or to respondents' argument on that point.

¶ 62 For the foregoing reasons, then, we hold that the clergy-penitent privilege does not apply under the facts so far elicited in this case. Accordingly, the trial court did not err in compelling the disclosure of the writer's identity. We note that respondents did not raise on appeal any of the other arguments they advanced below. Accordingly, we need not address them.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 65 Affirmed.

Gaynor v. Burlington Northern & Santa Fe Railway, 322 Ill. App. 3d 288 (5th Dist. 2001)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 5th Dist. · filed 2001-05-24 · Reporter opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 7 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C091.4
- memo p. 12 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C091.4
- memo p. 14 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C091.4

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Gaynor v. Burlington Northern & Santa Fe Railway

322 Ill. App. 3d 288 · Appellate Court · Filed 2001-05-24 · Reporter opinion · Published appellate opinion: binds circuit courts; persuasive to other appellate panels

Syllabus

Prepared by the reporter, not part of the court's opinion.

JOHN GAYNOR, Petitioner-Appellee, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY, Respondent-Appellant. Fifth District No. 5 - 99-0680 Opinion filed May 24, 2001. Richard F. Nash, of Brasher Law Firm, L.C., of St. Louis, Missouri, for appellant. Eric D. Jackstadt, of Granite City, for appellee.

Opinion

PRESIDING JUSTICE CHAPMAN

delivered the opinion of the court:

Burlington Northern and Santa Fe Railway (respondent) appeals from an October 14, 1999, order entered in Madison County circuit court granting a Supreme Court Rule 224 (134 111. 2d R. 224) petition for presuit discovery. The issues presented for review are whether the petitioner's verified petition for discovery exceeded the scope of Illinois Supreme Court Rule 224, whether the trial court abused its discretion in granting the Rule 224 petition, and whether a cause of action exists under the Right of Publicity Act (765 ILCS 1075/1 et seq. (West 1998)) against IPSA International. We reverse.

I. Jurisdiction

Before addressing the merits of the instant appeal, we must first address this court's jurisdiction to hear it. Jurisdiction can be neither stipulated to nor waived by the parties (Provident Life & Accident Insurance Co. v. Smith, 266 Ill. App. 3d 705, 639 N.E.2d 627 (1994)), and this court must determine sua sponte whether jurisdiction exists (Salemi v. Klein Construction Co., 266 Ill. App. 3d 110, 639 N.E.2d 629 (1994)). It is necessary to first determine whether the trial court order granting a Rule 224 petition for discovery is a final and appealable order pursuant to Illinois Supreme Court Rule 301 (155 Ill. 2d R. 301). Because the filing of a Rule 224 petition creates an independent action for discovery (134 Ill. 2d R. 224) and an order entered on a Rule 224 petition finally adjudicates the rights of the parties and terminates the litigation, appellate jurisdiction exists. See F.H.

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Prince & Co. v. Towers Financial Corp., 266 Ill. App. 3d 977, 640 N.E.2d 1313 (1994); Anest v. Bailey, 265 Ill. App. 3d 58, 637 N.E.2d 1209 (1994).

II. Facts

As noted above, the instant appeal raises issues concerning the scope of allowable discovery under Supreme Court Rule 224. On August 31, 1999, several employees of respondent allegedly reported to the company that they were ill and, therefore, would not be reporting to work that day. As a result of what respondent considered an unusual number of employees calling in sick, the company hired an investigative service to perform surveillance and videotape a particular golf outing that it suspected the allegedly sick employees might attend.

On September 23, 1999, John Gaynor (petitioner) filed a verified petition for discovery under Supreme Court Rule 224. In his petition, petitioner stated that respondent hired an entity known as IPSA International to provide certain investigative services on August 31, 1999, and that IPSA International recorded several hours of videotape. Petitioner gained access to a videotape with an IPSA International label. Since petitioner viewed only three minutes of the videotape, he does not know the frequency at which or the duration for which his image was recorded or the identity and affiliation of those who performed such surveillance.

On September 23, 1999, petitioner filed a separate suit against IPSA International for damages allegedly arising from this incident. That suit, which was filed the same day as the petition under Supreme Court Rule 224 was filed, was pending in the circuit court of Madison County, Illinois, at the time this appeal was commenced:

In his Rule 224 petition, petitioner sought (1) the name and address of every firm retained by respondent to perform surveillance at or near the Arlington Golf Club on August 31, 1999, (2) the name, address, and employment affiliation of every individual who performed surveillance at or near the Arlington Golf Club on August 31, 1999, (3) all contracts or other documents referencing a relationship between respondent and IPSA International and any other firm or individuals connected with surveillance performed at the request of respondent at or near the Arlington Golf Club on August 31, 1999, and (4) all photographs, motion pictures, or video and audio recordings resulting from surveillance performed at the request of respondent at or near the Arlington Golf Club on August 31, 1999. Petitioner alleged that the information requested in the petition was necessary to determine who might be liable to him for damages under the Right of Publicity Act.

The trial court, after a hearing on the petition, granted petitioner's verified petition for discovery and ordered respondent to produce the materials requested in the petition. Respondent appealed. Respondent then filed, and the trial court granted, a motion to stay the trial court's order to produce the discovery, pending this appeal.

III. Rule 224

Supreme Court Rule 224(a)(1) (134 111. 2d R. 224(a)) provides as follows:

"(i) A person or entity who wishes to engage in discovery for the sole purpose of

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ascertaining the identity of one who may be responsible in damages may file an independent action for discovery.

(ii) *** The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons ***." 134 Ill. 2d R 224(a)(1).

IV Cases

The scope of Rule 224 has been addressed by the Illinois Appellate Court several times. In Guertin v. Guertin, the appellate court limited the rule's application to situations where the identity of the defendant was unknown. Guertin v. Guertin, 204 Ill. App. 3d 527, 561 N.E.2d 1339 (1990). In that case, the petitioner sought to depose the sister-in-law of a testator who purchased certificates of deposit that constituted the bulk of the testator's net worth. The sister-in-law was also a joint tenant in the certificates of deposit. The petitioner speculated that the sister-in-law had exercised undue influence over the testator. The appellate court reversed the trial court and vacated a civil contempt citation issued when the sister-in-law refused to appear for the deposition. The court found that the trial court had no authority under common law, the Code of Civil Procedure, or the supreme court rules to order the deposition. Rule 224 was found inapplicable because the identity of the defendant was already known.

In Shutes v. Fowler, 223 Ill. App. 3d 342, 584 N.E.2d 920 (1991), the appellate court upheld the constitutionality of Rule 224 and, in responding to challenges of the rule's constitutionality on vagueness grounds, noted that discovery under the rule was limited to discovering the identities of potential defendants. The court affirmed the trial court order requiring the petitioner's employer to disclose the identities of other companies that were known to be involved at the construction site where the petitioner was injured.

The next cases to address the scope of Rule 224 were Roth v. St. Elizabeth's Hospital, 241 Ill. App. 3d 407, 607 N.E.2d 1356 (1993), and Malmberg v. Smith, 241 Ill. App. 3d 428, 607 N.E.2d 1370 (1993). In Roth, the petitioner sought the production of medical records and the depositions of the respondent doctor who rendered care to the petitioner's decedent. The petitioner argued that broad discovery should be allowed to determine who might be responsible in damages. In reversing the contempt citation, Roth concluded that Rule 224 allowed a search for identity, not responsibility. The language of Rule 224 limits discovery under it to the identity of those who may be responsible in damages. 134 111. 2d R. 224(a)(i). Relying on the language of Rule 224 and the committee comments that follow, Roth held that it was abundantly clear that "one who may be responsible" (134 Ill. 2d R. 224) means a "potential defendant" and that the order should limit discovery to the identification of defendants. Roth, 241 Ill. App. 3d at 414-15, 607 N.E.2d at 1361. In addition, Roth stated that the rule is not intended to replace the general discovery provisions contained in Supreme Court Rule 201 (134 Ill. 2d R. 201).

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Roth also agreed with the observation in Shutes that Rule 224 is intended to supplement section 2 - 402 of the Code of Civil Procedure (735 ILCS 5/2 - 402 (West 1998)), the respondent-in-discovery statute, which allows for the full discovery of named respondents once a lawsuit is filed against at least one known defendant. Roth, 241 Ill. App. 3d at 416, 607 N:E.2d at 1362. Once the identity of such a person or entity has been ascertained, the purpose of Rule 224 has been achieved and the action should be dismissed.

In Malmberg, an employee of the Illinois Department of Transportation filed a petition to compel the Department to disclose the identity of an informant and the contents of the informant's statement, which accused the employee of using illegal substances. The petitioner knew the identity of the potential libel defendant, a coemployee, and knew that the coemployee had accused the petitioner of illegal drug use while on duty. Relying on the decisions in Guertin, Shutes, and Roth, Malmberg held that Rule 224 was inapplicable because the identity of the potential defendant was already known.

The latest appellate court case to examine the scope of Rule 224 was Beale v. EdgeMark Financial Corp., 279 Ill. App. 3d 242, 664 N.E.2d 302 (1996). In Beale, the petitioner pledged EdgeMark Financial Corp. (EdgeMark) stock as collateral for loans from two different lending institutions. The petitioner alleged that the pledged stock was sold by the lending institutions at a time the directors of the lending institution had reason to believe that the sale of EdgeMark was imminent. The petitioner further alleged that the National Association of Securities Dealers, Inc. (NASD), wrote to EdgeMark's president and asked EdgeMark to identify whether certain persons listed in an attached letter had any type of affiliation with EdgeMark or its officers, which could make them privy to nonpublic information concerning the business activities of EdgeMark. This letter, with the attached list of names and addresses of 36 individuals or married couples, was included as an exhibit to the Rule 224 petition. The petition, among other things, sought the discovery of all information provided by EdgeMark in response to the NASD letter. After the trial court granted this discovery, EdgeMark moved to modify the court's order, seeking to limit that discovery to only the names of the persons identified by EdgeMark in its response to the NASD letter. The trial court later denied EdgeMark's motion, after an in camera review of EdgeMark's response to the NASD letter. EdgeMark appealed and the First District affirmed the trial court's order allowing the discovery of all information provided to NASD in EdgeMark's response to the same.

In examining Roth, Malmberg, and Guertin, Beale noted that none of those cases precluded discovery solely on the basis of the petitioner's knowledge of a name only, but in those cases the connection of each individual to the injury involved was known, and therefore, each was already identified as someone who might be responsible. The court held, "[W]here the known connection to the injury is remote and does little or nothing to limit or define the universe of potential defendants, the petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." Beale, 279 Ill. App. 3d at 252-53, 664 N.E.2d at 308. The court remarked that it is the trial judge who is to determine the extent of the above inquiry on a case-by-case basis, and the court instructed that a petition which sought to establish actual

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liability rather than the potential for liability should be denied. Beale, 279 Ill. App. 3d at 253, 664 N.E.2d at 308. After an in camera review by the appellate court of EdgeMark's response to the NASD letter, the court found that the document did not disclose specific facts of insider trading or any actual acts of wrongdoing. Beale, 279 Ill. App. 3d at 253, 664 N.E.2d at 309.

V Analysis

In the instant appeal, respondent argues that petitioner's verified petition for discovery exceeded the scope of Rule 224 and that, therefore, the trial court abused its discretion in granting the petition and ordering respondent to provide the materials requested. Respondent contends that the identity of two potential defendants - respondent and IPSA International - were known to petitioner, as he has alleged in his petition that respondent hired IPSA International to provide investigative services. In addition, respondent indicates that petitioner has already filed suit against IPSA International for damages allegedly arising out of this incident and remains in a position to file a suit against respondent. Relying on Roth v. St. Elizabeth's Hospital, 241 Ill. App. 3d 407, 607 N.E.2d 1356 (1993), respondent argues that because the identities of potential defendants are known, petitioner can use the general rules of discovery to determine responsibility. Respondent contends that although in Beale the court ordered the respondent to disclose a document though the document contained information and facts beyond the identity of potential defendants, the court did so only to assist the petitioner's search for potential defendants and emphasized that a search for actual liability is not to be allowed. Respondent also argues that no Illinois court has so interpreted Rule 224 as to allow for a search for the identity of additional plaintiffs.

Petitioner argues that his discovery request in this action does not exceed the authority of Supreme Court Rule 224. Relying on Beale and its discussion of Roth, petitioner argues that even though a petitioner seeking Rule 224 discovery knows the name of one or more potential defendants and even when a suit has been filed against one or more defendants, a petitioner is not precluded from Rule 224 discovery. Petitioner contends that seeking the disclosure of both the name or names of the firms and individuals which respondent hired to perform surveillance and the production of documents regarding any such relationship is not an attempt to establish actual liability.

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Rule 224's use is appropriate in situations where a plaintiff has suffered injury but does not know the identity of one from whom recovery may be sought. In such cases, there is a genuine need and, if the expiration of the statute of limitations is near, an urgent need to identify potential defendants so that a plaintiff is not without redress for the injury suffered. This scenario is a stark contrast to the case presented here, in which petitioner filed a verified petition seeking presuit discovery under Rule 224 and contemporaneously filed suit alleging injury arising out of the same incident. Petitioner's reliance on Roth and Beale is misplaced. Roth held that once the identity of those who may be responsible in damages has been ascertained, the purpose of the rule has been accomplished and the action should be dismissed. The petitioner in Roth argued that he should be allowed to engage in broad discovery in order to determine "the identity of one who may be

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responsible in damages" (emphasis added) (134 Ill. 2d R. 224), though it was clear, as it is here, that counsel already knew the identities of some who might be responsible in damages. Ascertaining identity is the only use for a Rule 224 action. Though Beale may have expanded the discovery available under Rule 224 somewhat, that expansion is not unlimited.

Beale held that, on occasion, the identification of a defendant may require more than simply a name and that, on those occasions, discovery under Rule 224 is not limited to the petitioner's ascertainment of a name only. However, even under Beale, knowledge of the connection of an individual to the injury involved will preclude further discovery under the rule. In Malmberg, it was the petitioner's knowledge that the respondent had made allegedly false statements about his drug use. In Roth, it was the petitioner's knowledge of the identities of many of those who might be responsible for the decedent's treatment. In Guertin, it was the petitioner's knowledge of facts that the respondent had allegedly exercised undue influence over a testator. In the instant appeal it is petitioner's knowledge that respondent hired IPSA International to perform surveillance, that his image was recorded without his consent by IPSA International while it performed such surveillance, and that the recordings were conveyed to respondent. Petitioner has knowledge of the connection of his alleged injury under the Right of Publicity Act to the potential defendants (respondent and IPSA International). The connection between petitioner's alleged injury and the identity of potential defendants already known is not remote. Therefore, petitioner has no need for additional connecting facts to further refine the universe of defendants having potential liability. To obtain additional discovery, petitioner may now utilize either the respondents-in-discovery statute of the Illinois Code of Civil Procedure (735 ILCS 5/2 - 402 (West 1998)) or the general discovery provisions of the Illinois Supreme Court rules (134 Ill. 2d R. 201 et seq.).

In this case, petitioner went far beyond anything authorized by Beale and sought not only the identities of additional defendants but also the identities of other potential plaintiffs. At a hearing on the petition, petitioner argued that Rule 224 and its reference to those responsible should also be read as allowing him to obtain the identity of additional plaintiffs. Petitioner argued before the trial court that he believed it imperative, due to the transient nature of videotape, that he should be entitled to see who else is on the videotape and to what extent their presence on the tape may be a basis for other causes of action. On appeal, petitioner suggests that where a petitioner suspects that the rights of others, as well as his own, have been violated by another, it is a legitimate and prudent exercise for the court's discretion to order steps which identify other claimants arising out of the same act. On rebuttal at the hearing, petitioner argued that he did not think it would be a radical departure from the case law in existence to allow for the identification of potential plaintiffs when the information sought is so ethereal and transient in nature.

We agree with respondent's observation that no Illinois court has held Rule 224 to authorize a search for the identity of additional plaintiffs. To determine the identity of those who may have a cause of action requires an inquiry into facts that may give an individual or entity a right to seek redress for a wrongful act by a potential defendant. Torcasso v. Standard Outdoor Sales, Inc., 157 Ill. 2d 484, 626 N.E.2d 225 (1993). Such a

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search is not within the purview of Rule 224. Though Beale holds that Rule 224 may allow the discovery of additional connecting facts to further refine the universe of defendants having potential liability, it does so as a means of discovering the identity of those who may be hable and only so long as the attempted discovery does not seek to delve into any actual details of wrongdoing.

The transient or elusive nature of a medium that is the subject of discovery may be of genuine concern to a party in litigation; however, that circumstance is not particularly relevant in this case. Even if it were, there are other methods available to protect the videotape. Supreme Court Rule 201(b)(1) allows a party to obtain full disclosure regarding any relevant matter, even where the discovery relates to the claim or defense of the party seeking disclosure. 134 Ill. 2d R. 201(b)(1). In addition, discovery may be initiated after all defendants have appeared or are required to appear, or it may be initiated earlier with leave of court. 134 Ill. 2d R. 201(d); Yuretich v. Sole, 259 Ill. App. 3d 311, 317, 631 N.E.2d 767, 772 (1994). Because petitioner has already filed suit against IPSA International, he has the opportunity, with leave of the court, to discover and protect the videotape under Rule 201, which eliminates any necessity for using Rule 224 because of the transient or ethereal nature of the medium sought.

The trial court's order granting the discovery provided as follows: "Rule 224 says [']the identity of those persons who may be responsible in damages.['] The question is[,] [Djamages for what[?] The only way the petitioner can find that out is to see the tape." The trial judge asked the wrong question. "Damages for what?" is not what the rule seeks to determine through presuit discovery; it is the identity of those persons who may be responsible in damages. The comments that follow the rule state, "The order allowing the petition will limit discovery to the identification of responsible persons and entities." 134 111. 2d R. 224, Committee Comments, at 189. The rule does not provide for the discovery of the identification of the injury or wrong that may have caused the damages or the identity of others who may have been injured by the conduct.

In the instant case, the identity of potential defendants and the close connection of such defendants to the injury alleged were known to petitioner at the time the Rule 224 petition was filed. On the same day that this Rule 224 petition was filed, petitioner filed an action against a known defendant. For further discovery, petitioner has had the ability to utilize the Code of Civil Procedure, namely, section 2 - 402 (735 ILCS 5/2 - 402) (West 1998)) and the general discovery provisions of the supreme court rules (134 Ill. 2d R. 201 et seq.). It is clear that the discovery sought in this action greatly exceeds the scope of Rule 224. The trial court order did not limit the discovery to the identification of responsible persons and entities; rather, it endorsed a search for actual liability. The trial court abused its discretion when it ordered the discovery sought in the petition.

For the foregoing reasons, the order entered by the circuit court of Madison County is reversed, and the petition is dismissed.

Due to our finding that the petition exceeds the scope of Rule 224, we need not decide whether a cause of action exists under the Right of Publicity Act.

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Order reversed.

WELCH and HOPKINS, JJ., concur.

Haddick v. Valor Insurance, 198 Ill. 2d 409 (2001)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. Supreme Court · filed 2001-11-21 · Reporter opinion
Supreme Court

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Haddick v. Valor Insurance

198 Ill. 2d 409 · Supreme Court · Filed 2001-11-21 · Reporter opinion · Binding on all Illinois courts

Syllabus

Prepared by the reporter, not part of the court's opinion.

(No. 90226. ELLA HADDICK, Special Adm'r of the Estate of James Griffith, Appellee, v. VALOR INSURANCE, Appellant. Opinion filed November 21, 2001. Rehearing denied February 4, 2002. James E Newman and James E Felafas, of Newman & Felafas, of Chicago, for appellant. Goldfine & Bowles, EC., of Peoria (William K. Brown, of counsel), for appellee. Richard L. Rumsey, Ltd., of Chicago (Barry G. Doyle, of counsel), for amicus curiae Illinois Trial Lawyers Association.

Opinion

JUSTICE GARMAN

delivered the opinion of the court:

The issue in this case is at what point in time does an insurance provider's duty to settle arise. Plaintiff, Ella Haddick, as the special administrator of the estate of James Griffith, filed a single-count complaint against defendant, Valor Insurance, alleging that defendant acted in bad faith by failing to settle a claim against its policyholder within the policy limits. The trial court granted defendant's section 2 - 615 motion to dismiss the complaint and the appellate court reversed. We consider all well-pleaded facts contained in the allegations of the complaint and the exhibits attached thereto.

BACKGROUND

On May 6, 1996, James Griffith and Larry Woodley, Jr., were involved in a single-car accident, which resulted in Griffith's death. According to the police report, Woodley owned the vehicle and was driving the vehicle at the time of the accident. Shortly after the accident, the men were transported to separate hospitals. The reporting officer attempted to speak with Woodley at the hospital, but he was unresponsive. At the request of the officer, an emergency room doctor woke Woodley to ask who was driving the vehicle. Woodley responded that he was driving. After detecting an odor of alcohol, the officer issued Woodley a ticket for driving under the influence. On May 13, 1996, Woodley informed the same officer that he did not remember the accident and did not know who

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had been driving the vehicle.

Woodley had liability coverage through defendant of $20,000 per person. On August 13, 1996, the attorney for the decedent's estate wrote defendant, informing the insurer that the decedent had incurred medical bills totaling $82,544.80 as a result of the accident. After the attorney made a demand for settlement, defendant responded by letter dated August 22, 1996, that it would discuss settlement after it received a copy of the police report. On November 1, 1996, defendant wrote to the attorney acknowledging receipt of the police report and indicating that an investigation was still pending to ascertain the actual driver of the vehicle. According to defendant, Woodley was still unable to recall the accident; therefore, upon completion of the police investigation, defendant would determine its position and a possible resolution of the claim.

On March 7, 1997, plaintiff, decedent's mother, was named as the special administrator of his estate. By letter of the same date, she presented to defendant her claim against Woodley for wrongful death. Plaintiff demanded that defendant settle the claim for the policy limits within 14 days of receipt of the letter, otherwise she would "no longer settle [the] claim within the policy limits." Defendant responded that the settlement demand was premature and that it was still investigating to determine who was driving the vehicle. Plaintiff subsequently extended the settlement deadline to April 7, 1997. When defendant did not offer to settle by the requested date, plaintiff informed defendant by letter dated April 9, 1997, that she had filed a wrongful death suit and had "no intention of settling the case at this time."

Approximately one year later, defendant offered to settle the case for the policy limits. Plaintiff refused this offer. The trial court entered summary judgment in plaintiffs favor on the issue of liability and, after trial, entered a judgment in the amount of $150,924.80.

Following the judgment, Woodley assigned all claims against his insurer to plaintiff, who then filed the present action. Plaintiff alleged that defendant acted in bad faith by failing to settle her claim against Woodley within the policy limits. Pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1998)), the trial court dismissed the complaint, finding that defendant had no duty under Illinois law to settle the claim prior to suit being filed and that plaintiff could not maintain a bad-faith claim once she withdrew her policy demand.

On review, the appellate court reversed. Citing Cernocky v. Indemnity Insurance Co. of North America, 69 Ill. App. 2d 196, 207-08 (1966), the court concluded that the duty to settle is created by the "conception of the insurance contract" (315 Ill. App. 3d 752, 756) because the policyholder relinquishes his right to negotiate settlement on his own behalf when he enters into the contract. "Thus, the same threat exists to the policyholder that the insurer will wrongly refuse to settle within the policy limits and a judgment will be entered against him in excess of the policy whether the third party attempted to negotiate a settlement prior to or after filing suit." 315 Ill. App. 3d at 757. Further, noting that many insurance contracts specifically provide for a duty to settle both before and after a suit is filed, the court opined that if it affirmed the trial court's blanket holding, "such a ruling could retroactively limit the duties of an insurer to a policyholder, which were bargained

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for in the insurance contract." 315 Ill. App. 3d at 757. Finally, the court held that plaintiff could maintain her cause of action for bad faith even though she revoked her offer to settle within the policy limits. 315 Ill. App. 3d at 759.

We granted defendant's petition for leave to appeal (177 Ill. 2d R 315(a)) and allowed the Illinois Trial Lawyers Association to file an amicus curiae brief in support of plaintiff (155 Ill. 2d R 345).

ANALYSIS

A section 2 - 615 motion to dismiss challenges the legal sufficiency of a complaint. Upon review, all well-pleaded facts in the complaint are taken as true. Facts apparent from the face of the pleadings, including the exhibits attached thereto, may be considered. Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A., 186 Ill. 2d 472, 491-92 (1999). The reviewing court determines whether the allegations of the complaint, when interpreted in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief can be granted. A cause of action will not be dismissed unless it is clear that the plaintiff cannot prove any set of facts entitling her to relief. Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc., 186 Ill. 2d 419, 424 (1999). We review a dismissal pursuant to section 2-615 de novo. Neade v. Portes, 193 Ill. 2d 433, 439 (2000).

This court has recognized that an insurance provider has a duty to act in good faith in responding to settlement offers. Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513, 526 (1996), citing Krutsinger v. Illinois Casualty Co., 10 Ill. 2d 518, 527 (1957). If the insurer breaches this duty, it may be liable for the entire judgment against its insured, including any amount in excess of policy limits. Cramer, 174 Ill. 2d at 526; Mid-America Bank & Trust Co. v. Commercial Union Insurance Co., 224 Ill. App. 3d 1083, 1087 (1992); 14 Couch on Insurance § 203:12 (3d rev. ed. 1999).

An insurer derives the authority to engage in settlement negotiations from the language of the insurance contract. Generally, such language gives the insurer the right to "make such investigation, negotiation, and settlement of any claim or suit as it deems expedient." 14 Couch § 203:7. Therefore, the basis for the duty to settle is the insurer's exclusive control over settlement negotiations and defense of litigation. See Cernocky, 69 Ill. App. 2d at 207; see also Cramer, 174 Ill. 2d at 526 (policyholder relinquishes defense of suit); 14 Couch § 203:13 (insurer controls settlement negotiations). This exclusive control, however, necessarily results in a conflict of interest between the insurance provider and its insured. We explained in Cramer that:

"In the typical 'duty to settle' case, the third party has sued the policyholder for an amount in excess of the policy limits but has offered to settle the claim against the policyholder for an amount equal to or less than those policy limits.

In this circumstance, the insurer may have an incentive to decline the settlement offer and proceed to trial. The insurer may believe that it can win a verdict in its favor. In contrast, the policyholder may prefer to settle within the policy limits and avoid the risk of trial. The insurer may ignore the policyholder's interest and decline to settle." Cramer, 174 Ill.

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2d at 525-26.

In such cases, the insurance contract itself does not provide a remedy to the insured faced with a judgment in excess of policy limits; therefore, the law imposes upon the insurer the duty to settle in good faith. See Cramer, 174 Ill. 2d at 526.

Defendant relies upon language from Cramer, including the statement that "[t]he 'duty to settle' arises because the policyholder has relinquished defense of the suit to the insurer" (Cramer, 174 Ill. 2d at 526), to argue that the duty to settle derives from the duty to defend and, thus, does not arise until a lawsuit is filed. Defendant also cites Krutsinger, 10 Ill. 2d at 527, in which we noted that an insurer who undertakes defense of a suit against the policyholder, where the damages sought are in excess of policy limits, cannot arbitrarily refuse a settlement offer within the policy limits. Defendant's argument is unpersuasive. In Cramer, this court considered whether a plaintiff could pursue a common law fraud action against his insurer arising from the purported cancellation of his insurance policy. Krutsinger involved a suit against an insurance company for failure to satisfy judgments against its insured. Neither case stands for the proposition that the duty to settle arises only after the filing of a lawsuit.

Plaintiff, on the other hand, argues that the duty to settle arises from the "conception of the insurance contract," i.e., from the time the insurer and its insured enter into the policy. We also reject this argument.

When damages sought by a third party against the insured do not exceed policy limits, " 'the question of whether the claim be compromised or settled, or the manner in which it shall be defended, is a matter of no concern to the insured.' " Olympia Fields Country Club v. Bankers Indemnity Insurance Co., 325 Ill. App. 649, 670-71 (1945), quoting Hilker v. Western Automobile Insurance Co., 204 Wis. 1, 14, 235 N.W. 413, 414 (1931). In such an instance, the insured is not at risk for personal liability. However, the insured becomes concerned with personal liability once a claim arises in which there is a reasonable probability that the insured will be found liable for an excess judgment. In this instance, the insurer must take the insured's settlement interests into consideration. See Cernocky, 69 Ill. App. 2d at 206; Casualty Insurance Co. v. Town & Country Pre-School Nursery, Inc., 147 Ill. App. 3d 567, 569 (1986); Adduci v. Vigilant Insurance Co., 98 Ill. App. 3d 472, 475 (1981); Olympia Fields, 325 Ill. App. at 670, quoting Hilker, 204 Wis. at 13-14, 235 N.W. at 414.

For example, in Adduci, the First District of the appellate court addressed whether the plaintiffs, assignees of the insured, alleged sufficient facts in their amended complaint to state a cause of action against an insurer for bad faith refusal to settle. The court noted that to state a cause of action for bad faith, the plaintiffs must allege that the duty to settle arose; the insurer breached the duty; and the breach caused injury to the insured. With respect to duty, the court found that the complaint alleged sufficient facts to establish the existence of the insurer's duty in that it alleged that the insurer was aware of the almost certain liability of the insured and that recovery in excess of policy limits was likely. Adduci, 98 Ill. App. 3d at 476. Although the court in Adduci was not faced with the question we address in the case at bar, we find Adduci helpful to our analysis.

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To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations (Adduci, 98 Ill. App. 3d at 478; Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 356 (1975); Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 253 (1963)), this duty also does not arise until a third party demands settlement within policy limits.

Having established when the duty to settle arises, we turn now to the facts of this case as alleged in plaintiff's complaint. Woodley's policy provides that defendant "may make such investigation and settlement of any claim or suit as it deems expedient." At the time of plaintiff's March 7, 1997, settlement demand for the policy limits, defendant was aware that decedent's medical bills were in excess of $80,000. This amount clearly exceeded Woodley's $20,000 liability coverage. In addition, defendant possessed the police report, which indicated that Woodley had informed an emergency room doctor that he had been driving the vehicle at the time of the accident. Defendant was further aware that Woodley owned the vehicle. Although Woodley subsequently informed a police officer that he could not remember who was driving the vehicle at the time of the accident, we must interpret the facts in the light most favorable to plaintiff. Additionally, in automobile injury cases, proof of ownership raises a presumption that the owner of the vehicle was in control of the vehicle at the time of the accident. Robinson v. Workman, 9 Ill. 2d 420, 427 (1956); Tolefree v. March, 99 Ill. App. 3d 1011, 1014 (1981). Since Woodley was unable to recall the accident at the time of plaintiffs settlement demand, he would have been unable to rebut this presumption.

We conclude that these facts allege a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against Woodley. Plaintiff demanded settlement on March 7, 1997. Therefore, the allegations are sufficient to allege the existence of the duty to settle in good faith on that date.

Finally, the trial court, without explanation, held that plaintiff could not maintain her bad-faith claim because she withdrew her demand for settlement within policy limits. We disagree. Once the duty of the insurer to settle arises, the next question is whether the insurer breached that duty. Plaintiff alleged in her complaint that on March 7, 1997, she demanded that defendant settle her claim for the policy limits of $20,000 within 14 days of receipt of the demand. Defendant responded that the demand was premature and that it was still investigating to determine the driver of the vehicle. Plaintiff extended the time for settlement to April 7, 1997. Defendant failed to respond to this extension; consequently, plaintiff withdrew her offer and filed suit. Thus, plaintiff allowed defendant about one month to settle the claim and approximately 11 months to investigate the accident. Defendant did not offer to settle for the policy limits until April 1, 1998, almost one year after plaintiff withdrew her settlement demand. We conclude that these facts, along with

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others alleged in the complaint, are sufficient to allege a breach of the duty to settle in good faith.

Whether defendant did, in fact, act in bad faith by failing to settle plaintiffs claim within her unilaterally imposed deadline, is, of course, a question for the finder of fact. We express no view with respect to defendant's actions. Our decision today affirms the appellate court's holding, but rejects its blanket conclusion that the duty to settle arises from the "conception of the insurance contract." We conclude that an insurance provider's duty to settle arises once a third-party claimant has made a demand for settlement of a claim within policy limits and, at the time of the demand, there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against its insured. For these reasons we affirm the judgment of the appellate court, which reversed the judgment of the circuit court and remanded the cause for further proceedings.

Appellate court judgment affirmed.

There is an exception to this general rule where the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed policy limits. Adduci, 98 Ill. App. 3d at 478.

We conclude that defendant's duty to settle may have arisen at this time rather than as a result of decedent's attorney's initial demand for settlement. The specific date of the initial demand is unclear from the complaint and the attached exhibits. It is discernible, however, that the demand was made sometime prior to August 22, 1996. Plaintiff has not alleged facts sufficient to establish the existence of a duty to settle prior to that time. According to the record, plaintiff did not make a subsequent settlement demand until March 7, 1997. Since the insurer is not required to initiate settlement negotiations, the duty to settle could not have arisen until the demand of March 7, 1997.

Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350 (1st Dist. 1975)

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Ill. App. Ct., 1st Dist. · filed 1975-10-10 · Reporter opinion
Published opinion

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- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C071.2
- memo p. 12 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C071.2
- memo p. 14 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C071.2

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be incarcerated, even without favorable parole consideration. When there is a substantial spread between the minimum and the maximum of a sentence the inmate in the institution can be directed toward academic or vocational training, and favorable prospective parole consideration operates as quite a catalyst. The existence of a substantial spread between the minimum and the maximum ensures the availability to the defendant of supervision after incarceration. The principle of indeterminacy of sentence necessarily leaves to the professionals in the behavioral sciences the determination of the optimum date for release. The court, in fixing the maximum, determines the total length of possible incarceration." 117 Ill.App.2d 344, 350.

The defendant was 49 years old at the time of sentencing. The sentence of the defendant is therefore reduced to a minimum of 33 years and a maximum of 100 years.

Judgment affirmed as modified.

EBERSPACHER and G. J. MORAN, JJ., concur.

[redacted]

JOHN THOMAS KAVANAUGH, Plaintiff-Appellee, *v.* INTERSTATE FIRE AND CASUALTY COMPANY *et al.*, Defendants-Appellants.

First District (5th Division) No. 59541

[redacted] *Rehearing denied February 11, 1976.*

Opinion filed October 10, 1975.

[redacted]

[redacted]

Lord, Bissell & Brook, of Chicago (Richard E. Mueller and Hugh C. Griffin, of counsel), for appellant Interstate Fire and Casualty Co.

Menk, Johnson & Bishop, of Chicago (John C. Menk, of counsel), for appellant Royal Indemnity Co.

Leonard M. Ring, of Chicago, for appellee.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Defendants appeal from a judgment for plaintiff (hereinafter Kavanaugh) in the amount of $20,000 representing Kavanaugh's excess liability above his combined insurance policy limits. Defendant, Royal Indemnity Company (Royal), also appeals from a separate judgment of $25,000 in punitive damages in Kavanaugh's favor. Both defendants contend that the trial court erred when it did not grant a directed verdict or a judgment *n.o.v.* since Kavanaugh's evidence did not prove that defendants breached any duty owed him under their insurance policies. Royal additionally contends that the court erred when it: (1) refused to withdraw Kavanaugh's willful and wanton count from the jury's consideration, (2) allowed Kavanaugh to admit Royal's balance sheet in evidence, (3) commented during the direct examination of one of Royal's witnesses, and (4) admitted the testimony of Kavanaugh's expert witness.

Interstate additionally contends that the trial court erred when it: (1) imposed a duty upon the insurance company to settle within the policy limits when there was no opportunity to settle, (2) found that it caused Kavanaugh's loss, (3) allowed Kavanaugh to amend his complaint at trial and gave certain prejudicial instructions based upon those

amendments, and (4) restricted their cross-examination and refused to admit certain documentary evidence.

In September, 1965, prior to the instant action, Kavanaugh had been a codefendant in a suit brought by Carol Sheehan in the United States District Court for the Northern District of Illinois, Eastern Division. (*Carol Sheehan v. Verne F. Dennis, et al.*, No. 62 C 588.) Sheehan was the injured passenger in Kavanaugh's automobile when it collided from behind with a truck on the East-West Tollway on August 9, 1961. At the time of the collision the truck was itself being towed by another codefendant's tractor. The Sheehan suit alleged negligence on the part of the trucking and towing companies, and willful and wanton conduct on the part of Kavanaugh in violation of the Illinois Guest Statute. Sheehan was represented at trial by her attorney, James Dooley.

At the time of the collision, Kavanaugh had personal liability insurance coverage with Royal covering losses to one person in the amount of $10,000. In addition to this primary coverage, Kavanaugh also had $15,000 excess coverage from Interstate. Under the terms of its policy, Royal's counsel, Donn Johnson, represented Kavanaugh in the Sheehan case. While Interstate did not represent Kavanaugh in that case, the record discloses that its attorney, Clark King, was aware of the progress of the trial.

The jury in the bifurcated Sheehan case returned a finding of liability against Kavanaugh alone on September 30, 1965. On October 4, 1965, the jury assessed damages against Kavanaugh in the amount of $45,000, thus exposing Kavanaugh to personal liability for $20,000 in excess of his combined insurance coverage.

On November 2, 1967, Kavanaugh commenced the instant suit in the circuit court of Cook County against Interstate alone. It went to trial on his amended complaint against both Royal and Interstate. In Count I of his amended complaint Kavanaugh alleged that Royal knew or should have known that Sheehan's claims exceeded the $10,000 policy limit; that it was Royal's duty to attempt to settle the claim within policy limits; that Royal's attorney wrongfully represented Kavanaugh's coverage to be only $10,000 to Sheehan's attorney, Dooley, and then refused to settle for more than $7,500 despite Dooley's offer to settle for $10,000; that both Royal and Interstate tendered $25,000 in settlement after the finding on Kavanaugh's liability and before the $45,000 damages verdict was returned, but Sheehan refused to settle; that Royal's failure to settle was deliberate, willful and arbitrary in breach of its obligation to Kavanaugh. In Count II of his amended complaint, Kavanaugh alleged that Interstate knew or should have known that Sheehan's claims ex-

ceeded the policy limits; that it was Interstate's duty to settle this claim on Kavanaugh's behalf within policy limits; that Interstate's liability arose on September 30, 1965, when Royal tendered the full amount of its primary coverage in open court, but Interstate failed to accept or otherwise respond to a settlement; that Interstate's failure to tender its $15,000 limit prior to a finding on liability was deliberate, willful and arbitrary entitling Kavanaugh to punitive and exemplary damages. In both counts Kavanaugh prayed for $20,000 in actual damages and $250,000 in punitive damages.

Royal filed a motion to dismiss Kavanaugh's amended complaint on the grounds that Kavanaugh's loss was occasioned by Interstate's, not Royal's, refusal to tender; that punitive damages were unprecedented; and that no cause of action was stated. Royal's motion was denied on November 6, 1970.

Interstate's answer denied that Sheehan offered to settle the case for $25,000 at any time and that it had breached its legal or contractual duties.

The following pertinent evidence was adduced at trial.

James Dooley

He is the attorney who represented Carol Sheehan in the personal injury suit against Kavanaugh. He summarized the circumstances of the accident as they appeared from the depositions of witnesses including the statement of Sheehan that Kavanaugh was only going 60 miles per hour and that she had not remonstrated him for improper driving. Sheehan suffered multiple lacerations on her face, a compound fracture of the left elbow joint, a compound fracture of the right femur, and injury to one clavicle. She lost $13,000-$21,000 in earnings and her medical expenses as of the time of trial were over $11,000. He first discussed a settlement with Royal's attorney, Donn Johnson, in July, 1965. Johnson stated that Kavanaugh only had a policy for $10,000 with Royal. When he asked why Royal would not pay on the policy, Johnson said he could only pay $8,500. A second offer to settle was made at the pretrial conference. At that time, he demanded $60,000 from all defendants to settle the case. After some discussion, the $60,000 offer was rejected. However, Royal did offer its $10,000 limit in open court on September 29, 1965, but its offer did not include Interstate's $15,000 limit as Johnson was unable to communicate with them. On cross-examination, he stated that he "stood on sixty" as a settlement figure once the case went to trial.

John Thomas Kavanaugh

He is the insured plaintiff in the instant action. He first told Johnson about the $15,000 excess coverage in August, 1964. Although he dis-

cussed the possibility of settling the Sheehan case with Johnson, he never specifically directed Johnson to offer the $10,000 Royal policy limit. Interstate had no representative present at these settlement discussions.

Clark King, Jr.

He is the attorney who represented Interstate in the Sheehan case. Interstate first received notice of the accident in August, 1964. He recommended that Interstate reserve $14,000 to $16,000 to cover their possible obligation in the suit. He spoke to Johnson six to twelve times before trial, but he never heard a settlement offer of less than $60,000 from Dooley. After the court denied Kavanaugh's motion for a directed verdict and the day before the Sheehan case went to the jury on the liability issue, Johnson told him that Royal would offer their $10,000 primary policy limits. The next day the jury found Kavanaugh liable and within 48 hours Interstate offered its $15,000. The issue of damages was not tried until several days later. He explained that after the court refused to direct a verdict in favor of Kavanaugh, he still felt that since this was a guest case and other defendants might be found liable, he would await the jury's verdict before tendering the policy limits. He also stated that Interstate's $15,000 limit was not offered earlier because it would not settle the case in light of Dooley's trial demand of $75,000.

Donn Johnson

He is the attorney who represented Kavanaugh in the Sheehan case on behalf of Royal. Carol Sheehan gave an explicit statement to his investigator that there was absolutely nothing wrong with Kavanaugh's driving on the night of the accident. Given the lesser standard of care under the guest statute and Sheehan's exonerating statement he felt that Kavanaugh would succeed on a motion for directed verdict at the close of all the evidence. He first told Dooley of the excess coverage at the pretrial conference. He discussed the Royal policy and settlement with Dooley in July, 1964, outside the Federal Building. He did so again in the corridor outside the courtroom after his motion for directed verdict was denied. At the second conference Dooley refused to settle for Royal's $10,000 limit and added that he would not settle "even if you give me the full twenty-five thousand dollars." He formally tendered Royal's $10,000 in open court on September 29, 1965, and the $25,000 combined coverage, at Interstate's request, on October 1, 1965. Kavanaugh never demanded that he offer to settle for the Royal's limits. He stated that Victor Cassato, an associate who represented his firm at a 1962 deposition, never told of an alleged offer to settle for $10,000 from an associate in Dooley's firm.

On cross-examination he could not remember the specific date of the discussion outside the Federal Building.

Leonel Hatch

He is the attorney who represented Kavanaugh's codefendants, Safeway Truck Lines and Robert Lees, in the Sheehan case. He confirmed that Dooley's offers to settle with all defendants were in the amounts of $60,000 at the pretrial conference and $75,000 during the trial. Prior to the selection of the Sheehan jury, there was an indication that Kavanaugh had $25,000 in coverage available.

James Dooley recalled by Kavanaugh

He denied having any settlement conversation with Johnson in the corridor outside the courtroom. He first learned of the excess policy on September 29, 1965, when Johnson tendered Royal's limits in open court. He never refused to settle for the full $25,000.

At the close of all the evidence, Kavanaugh moved to file a second amended complaint to conform the pleadings to the proof. Instead of an allegation that defendants failed to accept a Sheehan offer to settle for $25,000, Kavanaugh alleged that both defendants failed to offer their policy limits before Kavanaugh was found liable. Defendants moved for a mistrial on the ground that the new allegation substantially changed the theory of the case to defendants' immediate and irreparable harm. The trial court denied the motion and instructed the jury under the new allegations.

On July 19, 1972, judgment was entered on the jury verdict in favor of Kavanaugh and against both defendants for $20,000 plus interest, and against Royal alone for $25,000 punitive damages. Defendants post-trial motion praying, *inter alia*, for judgment *n.o.v.* was denied and this appeal followed.

OPINION

Defendants first contend that the trial court erred when it failed to grant both Royal's and Interstate's motion for judgment *n.o.v.* They argue that Illinois law imposes no absolute duty upon an insurer to offer its policy limits in order to effect a settlement.

We must view all the evidence in its aspect most favorable to Kavanaugh in considering whether a judgment *n.o.v.* should have been granted and determine that the evidence so overwhelmingly favors the defendant that no contrary verdict could ever stand. (*Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 229 N.E.2d 504.) When viewed in this light we must assume that Johnson did not disclose the excess coverage until the in-court offer to settle after the denial of his motion for a directed verdict, that Royal's first offer to settle for its full $10,000 limit did not occur until that same time, and that Interstate's first offer to settle for its full $15,000 limit came within 48 hours after the judgment on liability, but before the final judgment on damages.

Numerous decisions by this court and the Seventh Circuit Court of Appeals recognize the principle that an insurer must act as a fiduciary to its insured and may not act negligently nor in bad faith towards the best interests of the insured. (*Olympia Fields Country Club v. Bankers Indemnity Insurance Co.*, 325 Ill.App. 649, 60 N.E.2d 896; *Ballard v. Citizens Cas. Co.* (7th Cir. 1952), 196 F.2d 96.) Nonetheless, an insurer's refusal to settle within policy limits does not render it liable *per se* to its insured. *Powell v. Prudence Mutual Casualty Co.*, 88 Ill.App.2d 343, 232 N.E.2d 155.

In the instant case, Kavanaugh's proof and the allegations in his second amended complaint were based upon the theory that defendants had a legal duty to offer their policy limits before Kavanaugh was found liable. Even when we view the facts to show that the first offers to settle for the policy limits occurred late in the trial proceedings, we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case. As this court has stated in *Oda v. Highway Insurance Co.*, 44 Ill.App.2d 235, 253, 194 N.E.2d 489, 499, "[t]o impose such a duty upon it would be to put it at a negotiating disadvantage not imposed on any other litigant." Illinois law does not demand that an insurer must settle within policy limits without exception or else invariably suffer the consequences of an excess liability judgment for breach of its fiduciary duty.

There is a well-recognized exception to the general principle when the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed the coverage. Thus, in *Bailey v. Prudence Mutual Casualty Co.* (7th Cir. 1970), 429 F.2d 1388, defendant acted in bad faith when it failed to settle within its policy limits on four separate occasions, told plaintiff not to retain private counsel, and failed to advise plaintiff of the adverse verdict and the statutory time to appeal. Similarly, in *Smiley v. Manchester Insurance & Indemnity Co.*, 13 Ill.App.3d 809, 301 N.E.2d 19, and in *Cernocky v. Indemnity Insurance Co.*, 69 Ill.App.2d 196, 216 N.E.2d 198, the insureds made numerous demands upon the insurers to accept offers to settle within the policy limits when the probability of favorable liability findings were minimal. The insurers' failures to settle were held to be negligent and bad faith breaches of their duty to the insured.

The exception clearly does not apply to the facts in the instant case. Here, the issue of liability was not clear cut. Kavanaugh was subject to a low degree of care under the Illinois guest statute whereas his co-defendants were charged with simple negligence, thus favoring his probability of success. Moreover, Johnson possessed a statement from the claimant Sheehan exonerating Kavanaugh from any charge of speed-

ing and admitting that she had never questioned his ability to control the automobile on the night of the accident. Trial attorneys are not endowed with the gift of prophecy so as to be able to predict the precise outcome of personal injury litigation. Nor does the mere fact that the insurance company was unsuccessful in the trial of a case show that their defense was made in bad faith. See *Ballard v. Citizens Cas. Co.* (7th Cir. 1952), 196 F.2d 96.

In addition, when Royal's motion for a directed verdict was denied, Johnson offered Royal's limits. Likewise, when King received Johnson's report that the motion had been denied and that Royal had offered its limits, he authorized Johnson within 48 hours to offer Interstate's full limits also.* The fact that the jury returned an adverse verdict on the liability issue in the interim between Royal's offer and Interstate's offer does not belie the evidence which shows that King acted reasonably in adding Interstate's limits to Royal's pending settlement offer. Therefore, we hold that neither Royal, through Johnson, nor Interstate, through King, were negligent or in bad faith before offering their policy limits.

In light of our decision the order denying the defendants' motion for judgment *n.o.v.* is reversed and the cause is remanded with directions to enter judgments *n.o.v.* in favor of defendants.

Reversed and remanded with directions.

BARRETT, P. J., and DRUCKER, J., concur.

CAROL ANNE CHODZKO, Plaintiff-Respondent-Appellant, *v.* THADDEUS L. CHODZKO, Defendant—(JOHN C. SETECKA, Intervening Petitioner-Appellee).

First District (4th Division) No. 60059

Opinion filed December 17, 1975.—Rehearing denied January 26, 1976.

* Interstate's excess coverage policy provided that "[l]iability under this policy shall not attach unless and until the primary insurers have admitted liability for the primary limit or limits, or unless or until the assured has, by final judgment, been adjudged to pay a sum which exceeds such primary limit or limits."

Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 2021-06-30 · Opinion
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- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 27: passage C022.3
- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶¶ 24, 27: passages C022.1, C022.3
- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 24: passage C022.1
- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶¶ 55, 56: passages C022.6, C022.7
- memo p. 4 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 44: passage C022.4
- memo p. 4 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 50: passage C022.5
- memo p. 8 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 25: passage C022.2
- memo p. 8 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 25: passage C022.2
- memo p. 8 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶¶ 25, 27: passages C022.2, C022.3
- memo p. 8 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶¶ 24, 27: passages C022.1, C022.3
- memo p. 8 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 24: passage C022.1
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶¶ 55, 56: passages C022.6, C022.7
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 44: passage C022.4
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 50: passage C022.5
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- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 24: passage C022.1
- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 55: passage C022.6

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Kim v. State Farm Mutual Automobile Insurance Co., 2021 IL App (1st) 200135

Appellate Court Caption	PENNY KIM, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and STATE FARM FIRE AND CASUALTY COMPANY, Defendants-Appellees.
District & No.	First District, Fourth Division No. 1-20-0135
Filed	June 30, 2021
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 15-CH-8655; the Hon. Caroline K. Moreland, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Kent D. Sinson and Lisa K. Lange, of Sinson Law Group, of Chicago, for appellant. Joseph A. Cancila Jr., James P. Gaughan, and Allison N. Siebeneck, of Riley Safer Holmes & Cancila LLP, of Chicago, for appellees.
Panel	JUSTICE LAMPKIN delivered the judgment of the court, with opinion. Justices Reyes and Martin concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Penny Kim's amended complaint against defendants State Farm Mutual Automobile Insurance Company (State Farm Mutual) and State Farm Fire and Casualty Company (State Farm Fire) (collectively, State Farm) sought class certification for individuals with personal injury claims arising from motor vehicle collisions and damages from State Farm's alleged misrepresentations about or concealment of excess, or "umbrella," insurance policies. Kim also alleged against State Farm claims of insurance code violations, common law and statutory fraud, negligent misrepresentation, and attorney fees and costs.

¶ 2 The circuit court granted summary judgment in favor of State Farm and against Kim, (1) ruling that insurers were not required to disclose the existence of an umbrella insurance policy in response to a demand under the insurance statutory provision at issue and (2) denying Kim's motion for additional discovery.

¶ 3 On appeal, Kim argues that (1) the circuit court misapplied the statutory provision regarding the disclosure of insurance coverage, (2) she presented sufficient evidence in support of her claims of fraud and negligent misrepresentation to show that State Farm made actionable false representations and omissions to conceal its insured's policy limits, (3) she was entitled to attorney fees and costs based on State Farm's vexatious and unreasonable actions, and (4) she was entitled to discovery on all her claims and class issues.

¶ 4 For the reasons that follow, we affirm the judgment of the circuit court.[1]

¶ 5 I. BACKGROUND

¶ 6 This case arises from a brief series of communications in May 2012 between State Farm and Kim's counsel, Kent Sinson, following an automobile accident involving Kim and State Farm's insured, Elizabeth Swann. At no time did State Farm communicate directly with Kim.

¶ 7 On May 9, 2012, four days before Kim filed her personal injury lawsuit against Swann, Sinson wrote to State Farm claim representative Connie O'Connor and made the following demand: "Pursuant to 215 ILCS 5/143.24(b), please disclose your insured's policy limits." O'Connor responded in May 2012, identifying Swann's bodily injury automobile coverage of $100,000 per person and $300,000 per accident. Upon receiving O'Connor's disclosure, Sinson contacted O'Connor and "confronted her," stating that he had a hard time believing that Swann would live in the wealthiest suburb in the Chicagoland area and not have an umbrella policy, the premium on which usually runs about $300-$400 per year.

¶ 8 On May 21, 2012, Sinson again wrote to O'Connor to clarify that when he originally asked for disclosure of Swann's policy limits, he meant to request disclosure of any policy potentially applicable to Swann's accident with Kim. On May 24, 2012, claim representative Marco Ruvalcaba sent sworn, written confirmation disclosing that Swann was insured under an umbrella policy with a $1 million limit for liability coverage. Ruvalcaba copied the law firm representing Swann in Kim's personal injury suit on this disclosure. Thus, within weeks of Kim filing her personal injury lawsuit against Swann and before Swann was required to

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

respond to the complaint, Kim knew the coverage limits for both Swann's auto policy and the umbrella policy.

¶ 9 Kim served Swann with interrogatories and production requests that demanded disclosure of, among other things, all insurance policies potentially applicable to the accident. Swann responded in August 2012 by disclosing her husband's auto policy but not her umbrella policy. Kim and her counsel knew this was incorrect, given State Farm's prior disclosure of the existence and limits of the umbrella policy. Sinson immediately moved for sanctions, identifying the existence of the umbrella policy and the incorrect nature of the interrogatory response.[2] Swann promptly corrected her answers within 30 days, on September 14, 2012, to include the umbrella policy.

¶ 10 In December 2012, Swann was deposed. She explained that when she originally answered Kim's interrogatories, she was aware of her umbrella policy but did not realize it was relevant to the personal injury case because she mistakenly believed it provided coverage only for "act of God kinds of things" related to her homeowners insurance. She also stated that she did not discuss her policy limits, coverages, or the existence of an umbrella policy with any State Farm personnel prior to answering the interrogatories. Swann's counsel also stated on the record that the error was his fault and he failed to list the umbrella policy in the initial discovery response.

¶ 11 In April 2013, Kim amended her complaint against Swann to add State Farm Mutual as a defendant and assert proposed class claims against it regarding the disclosure of the umbrella policy.

¶ 12 In June 2013, Kim made an initial settlement demand for the combined policy limits of $1.1 million. Swann produced copies of both her State Farm Mutual auto insurance policy and her State Farm Fire umbrella policy, with the relevant declaration pages, by September 2013. Kim voluntarily dismissed her personal injury suit against Swann in April 2017. In April 2018, Kim settled her bodily injury claims against Swann in exchange for payment of the combined coverage limits of $1.1 million, releasing all claims "without reliance upon any statement or representation of the released parties or her representatives."

¶ 13 State Farm Mutual moved to dismiss the claims against it, but the circuit court denied that motion on December 22, 2014. The court concluded that the issues raised in State Farm Mutual's motion could be "revisit[ed] *** on a summary judgment."

¶ 14 In March 2015, State Farm responded to Kim's interrogatories and requests for production. State Farm objected to Kim's discovery requests on the grounds that, among other things, they improperly sought class-wide, company-wide, and nationwide merits discovery on a range of topics either unlimited in timeframe or dating back to 1988. In May 2015, Kim's asserted class claims against State Farm Mutual were severed and transferred to the chancery division of the circuit court of Cook County. In September 2015, Kim filed a fourth amended complaint, which raised three claims against State Farm Mutual: count I for common law fraud, count II for violation of section 143.24b of the Illinois Insurance Code (215 ILCS 5/143.24b (West 2010)), and count III for violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2010)).

¶ 15 Shortly thereafter, Kim responded to State Farm's interrogatories. She did not answer when she became aware of Swann's umbrella policy, citing the attorney-client privilege. She also

[2]This motion was unresolved and rendered moot when Kim later voluntarily dismissed her suit against Swann in April 2017.

did not identify any action that she personally took based on a mistaken belief about the existence of the umbrella policy or quantify her alleged damages for emotional distress or the "time value of money." However, she admitted that her attorney's knowledge regarding the existence and limits of Swann's umbrella policy was properly imputed to her.

¶ 16 In November 2016, this case was stayed pending resolution of the appeal in Demarco v. CC Services, Inc., No. 14-CH-10416 (Cir. Ct. Cook County, May 12, 2015), which raised the same issue of whether a demand under section 143.24b of the Insurance Code requires the disclosure of any umbrella policy. The circuit court's dismissal order in Demarco was affirmed in an unpublished order on March 24, 2017. See *Demarco v. CC Services, Inc.*, 2017 IL App (1st) 152933-U. Though Kim was free to resume proceedings against State Farm at that time, she took no action for more than six months.

¶ 17 In December 2017, State Farm Mutual moved for summary judgment on all three counts of the fourth amended complaint. In response, Kim filed a motion under Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) for additional discovery. In May 2018, Kim requested leave to file a corrected fourth amended complaint, which contained two additional claims—count IV for negligent misrepresentation and count V for attorney fees and costs under section 155 of the Insurance Code (215 ILCS 5/155 (West 2010))—and added State Farm Fire as a defendant. State Farm Mutual opposed the motion and renewed its motion for summary judgment in July 2018. After extensive briefing, the court granted Kim's motion for leave, and Kim filed her corrected fourth amended complaint in November 2018. The court allowed State Farm leave to supplement its pending summary judgment motion to address these new claims, and State Farm did so in December 2018.

¶ 18 On June 5, 2019, the court denied Kim's Rule 191 motion for additional discovery. Thereafter, the court denied various pending motions for leave to submit overlength briefs and instructed the parties to re-brief the summary judgment motion in compliance with the page limits set by local rule. By October 2019, State Farm's summary judgment motion was fully briefed, and the matter was provisionally set for oral argument on January 8, 2020. On January 2, 2020, the court granted State Farm's motion for summary judgment on the papers. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Kim argues that State Farm was not entitled to summary judgment because (1) the circuit court misapplied the law regarding the disclosure of insurance coverage and (2) she presented sufficient evidence to support claims of fraud and negligent misrepresentation. She also argues that she was entitled to (3) attorney fees and costs under the Insurance Code and (4) discovery on all her claims and class issues.

¶ 21 A trial court's order granting summary judgment is reviewed *de novo*. *Seitz-Partridge v. Loyola University of Chicago*, 409 Ill. App. 3d 76, 82 (2011); see also *Thomas v. Weatherguard Construction Co.*, 2018 IL App (1st) 171238, ¶ 63 (under *de novo* review, the reviewing court performs the same analysis the trial court would perform). A defendant is entitled to summary judgment where the pleadings, depositions, admissions, and affidavits in the record—even when viewed in the light most favorable to the plaintiff—show that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law. *Seitz-Partridge*, 409 Ill. App. 3d at 82; *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 228 (2007). If the plaintiff fails to establish triable fact issues as to her asserted claims,

the court must enter summary judgment in favor of the defendant. *Salerno v. Innovative Surveillance Technology, Inc.*, 402 Ill. App. 3d 490, 497 (2010).

¶ 22 A. Disclosure of Insurance Coverage

¶ 23 Kim argues that State Farm violated section 143.24b of the Insurance Code by failing to disclose Swann's umbrella policy in response to Sinson's May 9, 2012, letter. Kim argues that the trial court misapplied the law and State Farm engaged in "judge shopping" to obtain a favorable outcome.

¶ 24 This claim presents a question of law—*i.e.*, whether section 143.24b of the Insurance Code requires disclosure of an umbrella policy as a "private personal passenger automobile liability insurance policy." We review *de novo* both questions of law and issues of statutory construction. *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 127-28 (2005); *Best Buy Stores, L.P. v. Department of Revenue*, 2020 IL App (1st) 191680, ¶ 17. When construing a statute, the court attempts to ascertain and give effect to the intent of the legislature, which "is best determined from the plain and ordinary meaning of the language used in the statute." *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 24. "When the statutory language is plain and unambiguous, we may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law." *Id.* Only when a statute is ambiguous may a court look beyond its express language and rely on "extrinsic aids," such as legislative history. *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶¶ 11, 13. ↩ memo p. 3, 8, 13

¶ 25 Section 143.24b provides: ↩ memo p. 8

> "Any insurer insuring any person or entity against damages arising out of a vehicular accident shall disclose the dollar amount of liability coverage *under the insured's personal private automobile liability insurance policy* upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records." (Emphasis added.) 215 ILCS 5/143.24b (West 2010).

¶ 26 State Farm argues that, as an initial matter, Kim's disclosure demand was deficient under the terms of the statute because it was not sent by certified mail, did not describe Kim's injuries, did not enclose medical records, and did not state the medical expenses that Kim had incurred for accident-related treatment. Nevertheless, State Farm contends that its disclosure provided to Kim's counsel satisfied the requirements of section 143.24b.

¶ 27 The plain and unambiguous language of section 143.24b requires disclosure of potentially available coverage under "personal private passenger automobile liability insurance polic[ies]." *Id.* Contrary to Kim's argument on appeal, the title of that section does not broadly refer to "liability coverage" but more narrowly refers to the "[d]isclosure of dollar amount of *automobile* liability coverage." (Emphasis added.) *Id.* It is well settled in Illinois that a personal automobile insurance policy is not the same as an umbrella policy. In *Hartbarger v. Country Mutual Insurance Co.*, 107 Ill. App. 3d 391, 394 (1982), the plaintiff argued that an umbrella policy was an automobile policy and thus was required to provide uninsured motorist coverage under the Insurance Code. This court rejected that position, holding that "an umbrella liability ↩ memo p. 3, 8, 13

policy is entirely different from an automobile policy." *Id.* at 396. This court quoted approvingly a decision from the Alabama Supreme Court, which stated:

> " 'Automobile liability policies and motor vehicle liability policies insure against the risk of loss through the operation of specific automobiles. An umbrella policy, on the other hand, is fundamentally excess insurance designed to protect against a catastrophic loss. Before an umbrella policy is issued, a primary policy (the "underlying policy") must be in existence ***. *** The umbrella policy issued by Trinity Universal is an inherently different type of insurance from an automobile or motor vehicle liability policy ***.' " *Id.* at 395 (quoting *Trinity Universal Insurance Co. v. Metzger*, 360 So. 2d 960, 962 (Ala. 1978)).

See also *Mei Pang v. Farmers Insurance Group*, 2014 IL App (1st) 123204, ¶ 11 ("[i]n Illinois, umbrella policies and primary auto policies are distinct" and an "umbrella policy does not provide the same type of coverage as an automobile policy"); 215 ILCS 5/143.13 (West 2010) (" '[p]olicy of automobile insurance' " defined separately from " '[a]ll other policies of personal lines' ").

¶ 28 Moreover, Kim's interpretation of section 143.24b has been rejected by courts interpreting the Illinois statute. In *Roppo v. Travelers Commercial Insurance Co.*, 869 F.3d 568, 595 (7th Cir. 2017), the Seventh Circuit affirmed the federal district court's dismissal of the same nondisclosure claim at issue here as baseless because umbrella policies are not automobile policies and section 143.24b could not reasonably be construed to encompass umbrella policies based on the plain language of the statute, which defined a "policy of automobile insurance" as distinct from other types of liability insurance.

¶ 29 Kim also argues that State Farm engaged in "judge shopping" to seek reconsideration of a prior circuit court judge's December 2014 ruling, which denied State Farm's motion to dismiss. The record, however, refutes this argument.

¶ 30 In 2014, this case was pending in the law division of the circuit court of Cook County and included both personal injury claims against State Farm's insured, Elizabeth Swann, and asserted class claims against State Farm Mutual. By March 2015, after the court had denied State Farm Mutual's motion to dismiss, the personal injury claim against Swann was nearly ready for trial, while discovery was only beginning with respect to Kim's class claims. Swann therefore moved to sever Kim's personal injury claim against her from the asserted class claims to allow the personal injury claim to proceed to trial. State Farm Mutual did not oppose that request. In the event the court granted the severance motion, State Farm Mutual asked that it transfer the severed class claims to the Chancery Division under General Order 1.2 of the Circuit Court of Cook County (Cook County Cir. Ct. G.O. 1.2 (Aug. 1, 1996)). The Law Division court granted both motions. State Farm did not ask the Chancery Division court to reconsider the December 2014 ruling on its motions to dismiss. Rather, the arguments in State Farm's denied motion to dismiss were properly revisited under the appropriate legal standard in the context of State Farm's motion for summary judgment.

¶ 31 We conclude that the circuit court properly granted summary judgment in favor of State Farm on Kim's claim, under section 143.24b of the Insurance Code, that State Farm failed to disclose Swann's insurance coverage.

¶ 32 B. Fraud and Negligent Misrepresentation

¶ 33 1. Common Law and Statutory Fraud

¶ 34 To prevail on a claim for fraudulent misrepresentation, a plaintiff must establish the following elements: (1) a false statement of material fact, (2) known or believed to be false by the person making it, (3) an intent to induce the plaintiff to act, (4) action by the plaintiff in justifiable reliance on the truth of the statement, and (5) damage to the plaintiff resulting from such reliance. *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 36. Similarly, a cause of action under the Consumer Fraud Act requires a plaintiff to demonstrate (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, and (3) the occurrence of the deception during a course of conduct involving trade or commerce. *Id.* (citing *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 62).

¶ 35 To demonstrate a triable claim for common law or statutory fraud, Kim must present evidence sufficient to support the inference that State Farm made a false or misleading statement or omission of material fact. See *id.* Before the circuit court, Kim asserted that the underlying act forming the basis for her fraud claims was State Farm's alleged failure to disclose the existence of the umbrella policy in the May 16, 2012, confirmation of coverage letter to Kim's attorney. Kim's common law and statutory fraud claims are tethered to her section 143.24b claim—which, as discussed above, does not as a matter of law require disclosure of excess umbrella insurance. Thus, Kim's fraud claims fail for the same reason.

¶ 36 On appeal, Kim argues that the alleged underlying misrepresentation by defendants includes the initial, incorrect interrogatory response provided by Swann. Kim contends that this is appropriate because an alleged misrepresentation must be evaluated based upon the "entirety of the circumstances," such that "inconsistent" representations may sustain a cause of action for fraud. The record establishes, however, that the circumstances surrounding that discovery response cannot support a cause of action for fraud. State Farm promptly informed Kim of the umbrella policy as soon as her attorney clarified that he was requesting the information. Defendants made this disclosure three months before Swann provided her inaccurate interrogatory response, which omitted the umbrella policy and which she promptly corrected to disclose the umbrella policy upon realizing the error. Thus, despite the prolonged litigation surrounding Swann's discovery responses, the fact remains that Kim was already aware of the umbrella policy—and the total combined policy limits available under Swann's liability coverages—within two weeks of filing suit. The actions by her counsel confirm that there was no confusion about the existence and limits of the umbrella policy. Specifically, in response to Swann's omission of the umbrella policy in her discovery responses, Kim's counsel immediately moved for sanctions, without even first conferring with Swann's counsel, stating that those responses were wrong for not identifying the umbrella policy.

¶ 37 Furthermore, none of the supposedly inconsistent representations identified by Kim were actually made by State Farm. Contrary to Kim's assertions, statements made by Swann or her counsel in discovery cannot be attributed to State Farm, which was not a party to the litigation at the time and did not sign or verify those discovery responses. Kim's reliance on *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231 (1957), to support her position that the insurance company and the defendant in an auto case are one and the same, is misplaced. In *Fisher*, the court ruled that a defendant insured must disclose the existence of liability insurance in response to discovery requests. *Id.* at 238-39. The court concluded that the insured must disclose any relevant insurance policies under the Illinois discovery rules. *Id.* at 239. The opinion neither

discussed agency principles, nor suggested that an insurer has discovery obligations in an action against its insured, to which action the insurer is not a party. Illinois courts recognize that agency does not result from a mere insurer/insured relationship, and an attorney's duty is to his client, not the insurer, regardless of how his fees are paid. See *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 164 (2004) (parties to a contract are not each other's fiduciaries); *Apex Mutual Insurance Co. v. Christner*, 99 Ill. App. 2d 153, 171-72 (1968) (attorney's duty is to client-insured, even when insurer pays fees).

¶ 38 In addition, any statements made in the personal injury suit are protected by the litigation privilege. It is well established that statements made in the course of judicial proceedings are absolutely privileged and "[t]here is no civil cause of action for misconduct which occurred in prior litigation." (Internal quotation marks omitted.) *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶¶ 27-28 (affirming dismissal of claims against attorneys based on discovery violations, failure to disclose evidence, concealment of evidence, and misrepresentations in underlying litigation). This is true regardless of the individual's subjective motivation. *Id.* ¶ 30 ("As stated, motives and diligence before taking the challenged actions are irrelevant for purposes of the litigation privilege."); *Scarpelli v. McDermott Will & Emery LLP*, 2018 IL App (1st) 170874, ¶¶ 30-31 (the privilege immunizes statements and conduct and "an attorney's motives are irrelevant with respect to the applicability of the privilege, as is the reasonableness or unreasonableness of his conduct"); *Kim v. Hoseney*, 545 F. App'x 521, 522 (7th Cir. 2013) (recognizing absolute privilege under Illinois law against claims of fraud or intentional misrepresentations "for statements, no matter how reckless or dishonest" in judicial proceedings). When courts instruct parties to "attempt to redress injuries from misconduct in judicial proceedings in the same litigation," they contemplate that the parties will do so using traditional motion practice and sanctions procedures—not by pursuing litigation against a new party. See *Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677, ¶ 19 (describing such a process). Here, Kim immediately moved for sanctions upon receipt of Swann's inaccurate discovery response in the personal injury action but then elected to abandon this remedy in favor of settling her claims against Swann.

¶ 39 Moreover, contrary to Kim's argument on appeal, State Farm has not waived the protection of the litigation privilege. Illinois law is clear that an affirmative defense raised for the first time in a motion for summary judgment "is timely and may be considered even if not raised in defendant's answer." *Salazar v. State Farm Mutual Automobile Insurance Co.*, 191 Ill. App. 3d 871, 876 (1989). According to the record, Kim never pled a discernible fraud claim against State Farm based on Swann's discovery responses; rather, Kim specifically alleged that any misrepresentation of coverage limits by the tortfeasor in a discovery response subjects that tortfeasor to sanctions. Only during the course of the original summary judgment briefing did Kim suggest she was pursuing an independent fraud claim based on Swann's discovery response, and State Farm properly raised the litigation privilege at that time. See, *e.g.*, *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 378-79 (2003) (denying motion to strike argument raised for the first time on reply in answer to argument advanced by moving party); see also *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (waiver rule is one of administrative convenience rather than a jurisdictional bar); accord *People v. Lann*, 261 Ill. App. 3d 456, 466 (1994).

¶ 40 Kim's common law and statutory fraud claims also fail to establish that State Farm deceived her with a material misrepresentation or omission. See *Freedberg*, 2012 IL App (1st)

110938, ¶ 36. For common law fraud, Kim must demonstrate that she relied on this deception to her detriment, while under the Consumer Fraud Act, she must establish that she sustained damages due to the misrepresentation. *Id.* Kim, however, identifies no deception because State Farm promptly disclosed the umbrella policy in response to counsel's request for clarification. Additionally, the cases cited by Kim arose in different states with different legal obligations and different procedural postures. See, *e.g.*, *Merritt v. State Farm Mutual Automobile Insurance Co.*, 544 S.E.2d 180, 182 (Ga. Ct. App. 2000) (Georgia statute specifically required insurers to disclose the existence of excess or umbrella coverage); *Pipkins v. State Farm Mutual Automobile Insurance Co.*, No. 16-83-SDD-EWD, 2016 WL 6518654, *4 (M.D. La. Aug. 17, 2016) (plaintiffs alleged that State Farm Mutual knowingly misrepresented " 'pertinent facts or insurance policy provisions relating to any coverages at issue,' " in violation of a Louisiana statute (emphasis omitted)); *Earl v. State Farm Mutual Automobile Insurance Co.*, 91 N.E.3d 1066, 1069 (Ind. Ct. App. 2018) (umbrella policy was not disclosed until after the jury returned a verdict at trial). None of these cases is probative of any deception here, where Illinois law is clear that insurers are not required to disclose umbrella policies under section 143.24b and State Farm promptly disclosed Swann's umbrella policy within two weeks of the filing of the personal injury lawsuit when specifically requested.

¶ 41 Further, the record precludes any inference that Kim was injured in reliance on a mistaken belief that Swann had only $100,000 in available insurance coverage related to the accident. In her discovery responses, Kim failed to identify a single specific action that she personally took based on such a mistaken belief. Moreover, Kim agreed that her attorney's knowledge was imputed to her, and the record shows that her attorney was not confused about the umbrella policy. See *Morris v. Margulis*, 197 Ill. 2d 28, 37 (2001) (submitting an affidavit inconsistent with a party's prior testimony does not create a disputed fact sufficient to survive summary judgment).

¶ 42 According to the record, Kim ultimately received the full coverage limits under Swann's automobile insurance policy ($100,000) and umbrella policy ($1 million). Nonetheless, Kim claims damages for emotional distress and the "time value of money." However, Kim did not disclose any basis for any emotional distress or the "time value of money" damages in her discovery responses and relied instead on her and her attorney's affidavits submitted in response to State Farm's summary judgment motion. But those affidavits are improper to the extent that they are inconsistent with Kim's discovery responses. See *id.*; *Xeniotis v. Satko*, 2014 IL App (1st) 131068, ¶ 70 (striking inconsistent affidavit as a change in testimony). Further, Kim identifies no Illinois law recognizing the "time value of money" as an independent theory of damages. Moreover, there was no delay here where State Farm informed Kim of the umbrella policy within two weeks of the filing of the personal injury lawsuit.

¶ 43 Kim also claims damages based on emotional distress, but this claim fails as a matter of law. Damages for fraud must be pecuniary in nature, for "the tort of common-law fraud is primarily addressed to the invasion of economic interests." *Giammanco v. Giammanco*, 253 Ill. App. 3d 750, 761 (1993); see also *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 469 (2006) ("Although some cases have extended this rule to include those things 'which the law recognizes as of pecuniary value,' a plaintiff's damages to support a claim of fraud must nevertheless be 'material,' and may not consist solely of emotional harm."). "A fraud action does not afford a remedy for harm to one's pride" or other emotional harm.

Giammanco, 253 Ill. App. 3d at 762; see also *Cangemi*, 364 Ill. App. 3d at 469-70 (citing cases).

¶ 44 Kim also lacks standing to sue under the Consumer Fraud Act. A plaintiff seeking to sue under the Consumer Fraud Act must either be a consumer or satisfy the "consumer nexus" test, which requires the plaintiff to have suffered damages resulting from conduct directed toward the market or which otherwise implicates consumer protection concerns. *Bank One Milwaukee v. Sanchez*, 336 Ill. App. 3d 319, 321-22 (2003). Kim, however, is a third-party beneficiary of an insurance policy issued by a defendant, and courts interpreting Illinois law have consistently rejected this theory of standing. See *McCarter v. State Farm Mutual Automobile Insurance Co.*, 130 Ill. App. 3d 97, 101 (1985) (holding third-party claimant under insurance policy was not a consumer under the Consumer Fraud Act); *Roppo v. The Travelers Cos.*, 100 F. Supp. 3d 636, 651 (N.D. Ill. 2015) (rejecting consumer nexus theory in similar case). Kim's reliance on *Elder v. Coronet Insurance Co.*, 201 Ill. App. 3d 733, 749 (1990), to support her argument for expanding the Consumer Fraud Act's scope is misplaced. *Elder*, as a matter involving a first-party claim by an insured against his own insurer, distinguished itself from *McCarter*, which involved a third-party claimant. *Id.* The other authorities cited by Kim do not address the issue of standing under the Consumer Fraud Act or even any claim under it. Rather, each of those cases involved a declaratory judgment action brought by the third-party claimant against an insurer. See, *e.g.*, *State Farm Fire & Casualty Co. v. Perez*, 387 Ill. App. 3d 549 (2008); *Holmes v. Federal Insurance Co.*, 353 Ill. App. 1062 (2004); *Reagor v. Travelers Insurance Co.*, 92 Ill. App. 3d 99 (1980); *M.F.A. Mutual Insurance Co. v. Cheek*, 34 Ill. App. 3d 209 (1975).

↩ memo p. 4, 9

¶ 45 Further, Kim's theory does not satisfy the "consumer nexus" (or "consumer-at- large") test. Illinois courts have long held that the application of the Consumer Fraud Act is limited to deception "in the course of trade or commerce." As defined by the statute, "[t]he terms 'trade' and 'commerce' mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated." 815 ILCS 505/1(f) (West 2010). The mere fact that a defendant is a business that engages in commerce is insufficient to satisfy this element. In *Continental Assurance Co. v. Commonwealth Edison Co.*, 194 Ill. App. 3d 1085, 1093 (1990), the court concluded that although the Consumer Fraud Act is to be liberally construed, it could not reasonably be interpreted to include the type of fraud alleged by shareholders in the context of a stock redemption because the redemption of shares of stock did not constitute either any type of "advertising" or "offering for sale," or a "sale" or "distribution" of property as those terms are used in the Consumer Fraud Act. See also *Mosier v. Village of Holiday Hills*, 2019 IL App (2d) 180681, ¶ 20 (affirming dismissal of Consumer Fraud Act claim against village based on issuance of building permits because "[t]he Village did not advertise or offer anything for sale or sell anything").

¶ 46 Illinois courts have long recognized that a business may maintain a cause of action under the Consumer Fraud Act even when it was not a consumer of the defendant's goods, so long as "the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns." *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 534 (1989). In *Sanchez*, the court extended the "consumer nexus" test to an individual. 336 Ill. App. 3d at 323-24. But in that case, the plaintiff alleged that the defendant forged her signature to bind her "to a commercial transaction through a

fraudulent act." *Id.* at 324. The court thus had "little trouble concluding" that those allegations implicated consumer protection concerns. *Id.* The same cannot be said here, where Kim failed to allege any wrong conduct by State Farm that impacted consumers. See *Roppo*, 100 F. Supp. 3d at 651, *aff'd*, 869 F.3d 568.

¶ 47 We conclude that the circuit court properly granted summary judgment in favor of State Farm on Kim's claims of common law and statutory fraud.

¶ 48 2. Negligent Misrepresentation

¶ 49 In Illinois, the tort of negligent misrepresentation is a narrow and limited exception to the *Moorman* doctrine (*Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982)), which generally bars a tort recovery for a purely economic loss. *Fox Associates, Inc. v. Robert Half International, Inc.*, 334 Ill. App. 3d 90, 94 (2002). The claim requires proof of

> "(1) a false statement of material fact, (2) carelessness or negligence in ascertaining the truth of the statement by the [speaker], (3) an intention to induce the other party to act, (4) action by the other party in reliance ***, and (5) damage to the other party resulting from such reliance, (6) when the party making the statement is under a duty to communicate accurate information." *Id.*

For the reasons discussed above, Kim cannot identify any false statement made by State Farm, let alone any negligent action taken to induce reliance.

¶ 50 In addition, a negligent misrepresentation claim may only be brought against a defendant who is "in the business of supplying information for the guidance of others in their business dealings" and provided untrue information to the plaintiff. *Id.* at 95. The sale of insurance policies is not the sale of "information," as contemplated under this exception. See *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, 218 Ill. 2d 326, 341 (2006); see also *Gondeck v. A Clear Title & Escrow Exchange, LLC*, 47 F. Supp. 3d 729, 749 (N.D. Ill. 2014) ("An insurance policy is 'a noninformational product' for purposes of the economic loss doctrine."). Moreover, defendants were not otherwise "in the business" of providing information to Kim to guide her business dealings, especially given the adverse nature of their relationship and the fact that Kim was not a State Farm policyholder. Nor can Kim establish any of the other elements of this tort based on the uncontroverted record, which shows there was no actionable misstatement or omission, reliance, or injury. See *Freedberg*, 2012 IL App (1st) 110938, ¶ 36 (no recovery for negligent misrepresentation absent proof plaintiff relied on misstatement to her detriment); *Fox Associates, Inc.*, 334 Ill. App. 3d at 94-96.

↩ memo p. 4, 9

¶ 51 Further, the Illinois Supreme Court has rejected the notion that a plaintiff may seek damages for emotional distress based upon this exception to the *Moorman* doctrine. In *Brogan v. Mitchell International, Inc.*, 181 Ill. 2d 178, 185 (1998), the court recognized that "[t]here exists no broad duty to avoid misrepresentations that cause only emotional harm." The court emphasized the "limited nature" of liability for negligent misrepresentation, which "serves to preserve the proper sphere of contractual-based recovery and prevents the creation of tort liability which could unduly impede the flow of communication in society." *Id.*

¶ 52 We conclude that the trial court did not err in granting summary judgment to State Farm on Kim's claim for negligent misrepresentation.

¶ 53 C. Attorney Fees and Costs

¶ 54 Kim argues that she is entitled to attorney fees and costs under Section 155 of the Insurance Code based on State Farm's alleged "bad faith" or "unreasonable and vexatious acts constituting improper claims practices." Specifically, Kim contends that State Farm engaged in bad faith by allegedly failing to disclose the existence of Swann's umbrella policy limits. This claim is fatally deficient as a matter of law.

¶ 55 Section 155 permits a cause of action when "there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable." 215 ILCS 5/155(1) (West 2010). Binding Illinois Supreme Court precedent holds that penalties under section 155 are only available to the insured, not to third parties who are strangers to the policy.[3] See *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458, 466 (1990) (dismissing plaintiff's third-party claim under section 155); *Stamps v. Caldwell*, 133 Ill. App. 2d 524, 528 (1971) (same); *Roppo*, 100 F. Supp. 3d at 652 ("the remedy embodied in section 155 of the Insurance Code does not extend to third parties"). ↩ memo p. 3, 9, 13

¶ 56 We conclude that the circuit court properly granted summary judgment in State Farm's favor with respect to Kim's claim for section 155 fees and costs. ↩ memo p. 3, 9

¶ 57 D. Rule 191(b) Motion for Further Discovery

¶ 58 When a party contends that she needs to conduct discovery before responding to a motion for summary judgment, the party must submit an affidavit that satisfies the requirements of Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013). A court's decision to deny discovery requested under Rule 191(b) is a discovery ruling and will not be reversed absent an abuse of discretion. *Jordan v. Knafel*, 378 Ill. App. 3d 219, 235 (2007). A trial court abuses its discretion only when " 'no reasonable person would take the view adopted by the trial court.' " *Janda v. United States Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 96 (quoting *Foley v. Fletcher*, 361 Ill. App. 3d 39, 46 (2005)).

¶ 59 Discovery is not warranted under Rule 191(b) where the issues raised by a motion for summary judgment are questions of law, not of disputed fact. See *Kittleson v. United Parcel Service, Inc.*, 162 Ill. App. 3d 966, 968-69 (1987). A party invoking Rule 191(b) must show that the evidence he or she intends to secure will be sufficient to demonstrate a genuine fact issue pertinent to the pending motion for summary judgment. See *Meudt v. Travelers Insurance Co.*, 57 Ill. App. 3d 286, 291-92 (1978). Discovery is properly denied if a movant does not sufficiently describe the evidence he or she anticipates obtaining through the discovery sought, as Rule 191(b) is not intended to authorize "a 'fishing expedition.' " *Janda*, 2011 IL App (1st) 103552, ¶ 98. A movant also must demonstrate that discovery is the only vehicle for obtaining the facts he or she needs to oppose summary judgment. See Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

[3]The authorities cited by plaintiff do not contradict this conclusion. See *Loyola University Medical Center v. Med Care HMO*, 180 Ill. App. 3d 471 (1989) (allowing section 155 claim by assignee medical provider); *Garcia v. Lovellette*, 265 Ill. App. 3d 724 (1994) (allowing section 155 claim by passenger defined as an insured under the terms of the policy). Neither of these cases involved a third-party claim.

¶ 60 Kim's Rule 191 motion failed all of these tests. First, the court's January 7, 2020, ruling granted State Farm's summary judgment motion exclusively on purely legal grounds. And second, Kim's Rule 191(b) affidavits fail to support her claim for more discovery.

¶ 61 The court's January 7, 2020, ruling—granting summary judgment in favor of State Farm on issues of law—shows that no discovery could have changed those rulings and further discovery would have been futile. As discussed above, Kim failed to show that she was deceived, that she relied on any statement from State Farm, or that she sustained any cognizable damages arising from State Farm's alleged conduct. These were elements of her claims that were within her own knowledge and control. And Kim admitted she was never misled about the existence of Swann's umbrella policy and sustained no resulting injury. There was no question that Kim could have posed to anyone else that would have told her more about what she personally knew, what she personally believed, what she personally did, or what injuries she personally claimed to have suffered. See *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, 281 Ill. App. 3d 1080, 1089 (1996) (affirming trial court's denial of Rule 191(b) motion where plaintiff failed to demonstrate how any further discovery would support its case). As a result, Kim failed to demonstrate that additional discovery would have created a genuine issue of fact pertinent to State Farm's summary judgment motion.

¶ 62 Rule 191(b) requires a party seeking discovery in the face of a summary judgment motion to state with specificity what discovery is needed, what the party believes the discovery will reveal, and the basis for the party's belief that the requested discovery will produce the party's sought-after proofs. *Janda*, 2011 IL App (1st) 103552, ¶ 98; *Meudt*, 57 Ill. App. 3d at 291-92. Kim's affidavit did none of these things. Far from being specific, Kim sought extensive class-wide discovery, including responses to over 70 requests for production spanning a 31-year timeframe; production of every automobile insurance claim file in which a person living in Illinois was injured by an allegedly liable driver who was insured by State Farm at the time and also had an umbrella policy as of the date of the accident; and the depositions of at least seven individuals, including State Farm adjusters O'Connor and Ruvalcaba, State Farm agent Dan Catanzara, State Farm executive Phil Supple, a State Farm corporate representative, Swann (who was already deposed about her discovery response in the personal injury suit), and Swann's attorney.

¶ 63 Kim did not demonstrate that this discovery was necessary to allow her to meaningfully oppose summary judgment on her claims. Kim had already identified the communications underlying her fraud claims—*i.e.*, her counsel's May 2012 communications with State Farm and Swann's August 2012 interrogatory response in her personal injury suit. There is no dispute about the occurrence of those communications, when they occurred, or what was said in each. Nor could Kim contend that she needed discovery from State Farm regarding her attorney's communications with State Farm, whether she was deceived, whether she acted in reliance on an incorrect belief regarding Swann's available insurance coverage, or any injuries she claimed to have sustained as a result. In short, Kim does not and cannot demonstrate entitlement to conduct any further discovery in this matter. See *Meudt*, 57 Ill. App. 3d at 291-92; *Emerson Electric*, 281 Ill. App. 3d at 1089.

¶ 64 Kim also mischaracterizes State Farm's summary judgment motion as a "*Celotex*-type" motion that unfairly raises a premature attack on her inability to muster the proofs she needs. A "*Celotex*-type" motion is one in which a defendant seeks summary judgment based on the plaintiff's lack of proofs regarding matters outside the plaintiff's control and knowledge. *Jiotis*

v. Burr Ridge Park District, 2014 IL App (2d) 121293, ¶¶ 23, 25-28, 44-47 (Rule 191 discovery properly allowed early in action, despite defendant's submission of its own affidavits denying allegations of complaint; plaintiff identified deponents and gave bases for relief regarding what specific testimony those individuals would provide as to information beyond the plaintiff's control). Here, in contrast, State Farm relied on information Kim supplied in discovery and her own admissions about matters fully within her knowledge that defeated her claims.

¶ 65 We conclude that the circuit court properly denied Kim's Rule 191(b) motion for further discovery.

¶ 66 III. CONCLUSION

¶ 67 For the foregoing reasons, we affirm the judgment of the circuit court, which granted State Farm's motion for summary judgment and denied Kim's motion for further discovery.

¶ 68 Affirmed.

Maxon v. Ottawa Publishing Co., 402 Ill. App. 3d 704 (3d Dist. 2010)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 3d Dist. · filed 2010-06-01 · Opinion
Published opinion

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Where the memo cites it

- memo p. 7 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 8: passage C090.2
- memo p. 12 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 8: passage C090.2
- memo p. 14 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 8: passage C090.2

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No. 3--08--0805

Filed June 1, 2010

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2010

DONALD MAXON and JANET MAXON,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit
Petitioners-Appellants,	)	La Salle County, Illinois
	)	
v.	)	No. 08--MR--125
	)	
OTTAWA PUBLISHING COMPANY,	)	
a Delaware Limited Liability Company,	)	Honorable
	)	Eugene P. Daugherity
Respondent-Appellee.	)	Judge, Presiding

PRESIDING JUSTICE HOLDRIDGE delivered the opinion of the court:

Petitioners, Donald and Janet Maxon (the Maxons), appeal from an order of the circuit court of La Salle County dismissing their amended petition for discovery pursuant to Supreme Court Rule 224 (134 Ill. 2d R. 224). The amended petition sought disclosure from respondent Ottawa Publishing Company (Ottawa Publishing) of identifying information concerning the persons responsible for certain comments posted on Ottawa Publishing's Web site, which the Maxons alleged were defamatory. Ottawa Publishing resisted the petition, arguing that the poster's anonymity was constitutionally protected. Ottawa Publishing maintained that, in accordance with a growing trend in other jurisdictions, trial courts in Illinois must take extra steps to protect the anonymity of internet posters. See Dendrite International, Inc. v. Doe No. 3, 342 N.J. Super. 134, 775 A.2d 756 (App. 2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005). The

trial court adopted the analysis articulated in Dendrite and Cahill and dismissed the amended petition, finding that the Maxons had failed to establish that the statements at issue were defamatory. On appeal, the Maxons argue that the dismissal of their petition should be reversed because: (1) the trial court erred in subjecting their petition to the heightened degree of scrutiny required under Dendrite and Cahill; and (2) the trial court erred in finding that the allegedly defamatory statements were not defamatory as a matter of law.

FACTS

Ottawa Publishing publishes The Times, a daily newspaper for general circulation in and around Ottawa, Illinois, as well as an online Internet version of the same newspaper at its web site, MyWebTimes.com (MyWebTimes). Unlike traditional letters to the editor, which must be chosen for publication by the editorial staff of a newspaper, readers of the Internet version may anonymously post comments to a comments section following each article published on the website. Any individual may post his or her unedited comments on MyWebTimes after they complete an online registration. This registration process requires that each person who wishes to post comments establish a unique "screen name" (usually, but not necessarily, a pseudonym), a password for the screen name, and a valid e-mail address so that Ottawa Publishing can communicate with that person individually. Ottawa Publishing does not require or retain additional information such as name, address or telephone number from registered participants, nor does it seek to verify that the e-mail address remains valid after the account is activated. Thus, the only identifying information that Ottawa Publishing had was an e-mail address purported to be a valid means of contacting the anonymous poster.

On March 20, 2008, Ottawa Publishing published an article on MyWebTimes titled: "OTTAWA: Commissioners favor B&B additions, changes." The subject of the article, which generally reported on the Ottawa Planning Commission's consideration of a proposed ordinance to allow bed and breakfast (B&B) establishments to operate in residential areas, precipitated numerous comments by readers. The article did not mention the plaintiffs by name.

One Internet poster, using the screen name "Mary1955" posted:

> "Money under the table???????????"

Another poster, "FabFive from Ottawa" (FabFive), later posted:

> "Way to pass the buck Plan Commission!! You have dragged this garbage out for over a YEAR now and despite having the majority tell you to NOT change the ordinance you suggest the exact opposite! How dare you! How dare you waste the time of the townspeople who have attended EVERY single one of these meetings to speak out against any changes!! But hey, you don't have the final word so just pass the buck and waste even MORE TIME. How much is Don and Janet from another Planet paying you for your betrayal???? Must be a pretty penny to rollover and play dead for that holy roller...IF this gets anywhere NEAR being passed in favor for the Maxon CULT, you can bet your BRIBED BEHINDS there will be a mass exodus of homeowners from this town...who will you tax then if noone [sic] lives here?" (Emphasis in original.)

On April 17, 2008, Ottawa Publishing published a letter to the editor on MyWebTimes titled "Precedent will be set by changing B&B ordinance!" This letter did not mention the

plaintiffs by name. Again, readers published numerous comments online about the issue. FabFive posted:

> "Here's another tidbit to consider folks, Ann brought up how it is possible that the Maxon's [sic] would take the B&B and turn it into some non [sic] for profit church business. Well as it is the Maxon's [sic] plan for the addition were to include a LARGE meeting room...Now since when did a B&B require a meeting room?
>
> The Maxon's [sic] haven't played this straight from the day they filed it. The OPC has not played it straight from any of the meetings regarding this. The plan should never had been pushed to the Town Council when several members of the OPC were not even present to vote on it in the new terms that the BRIBED members had created...And now noone [sic] wants to get caught actually voting on it. This has become a hot potato and the music is about to stop. So who gets burned? The MANY people who have spoken out AGAINST these changes, or the FEW individuals who are behind it?"

On the same day, "birdie1" posted: "FabFive: The bribe has continued since you were last on!!"

On June 9, 2008, the Maxons filed a "Petition for Discovery Before Suit to Identify Responsible Persons and Entities" pursuant to Supreme Court Rule 224, seeking, inter alia, an order requiring Ottawa Publishing to disclose the "name, address, phone number, e-mail address

or other account information used to establish their blog[1] 'identity,' the password used for access to the blog, or other identifying information" for "FabFive" and "birdie1." The petition did not identify the purportedly defamatory comments or indicate that the Maxons had made any effort to notify "FabFive" or "birdie1" that they were seeking information regarding their identity.

On August 28, 2008, Ottawa Publishing filed a motion to oppose the petition. Attached to the motion was the affidavit of John Newby, publisher of The Times, which stated that he had sent an e-mail to the e-mail addresses on file for "FabFive" and "birdie1" to give notice of the Maxons' petition to each poster. As a result of this notice, "birdie1" retained an attorney who was granted leave to intervene. "[B]irdie1" was permitted to appear under a fictitious name. "FabFive" never appeared. After a hearing on August 29, 2008, the court granted the Maxons' motion to amend the petition to include the purportedly defamatory statements.

On September 8, 2008, the Maxons filed an amended petition setting forth the allegedly defamatory statements made by "FabFive" and "Mary1955" (the plaintiffs subsequently withdrew the allegations regarding "Mary1955") and Susan Wren (whom plaintiffs came to believe was "birdie1"). Ottawa Publishing filed a motion to dismiss the amended petition, and the Maxons filed a written response.

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[1] "Blog" is short for "web log," which is generally defined as a frequently updated Web site consisting of personal observations, excerpts from other sources or, more generally, an online journal or diary. Quixtar, Inc. v. Signature Management Team, LLC., 566 F. Supp. 2d 1205, 1212 (D. Nev. 2008). In the instant matter however, the word "blog" refers to the Internet comments posted on MyWebTimes.com.

Following oral arguments, the trial court dismissed the amended petition. In so doing, the court noted that no Illinois case law addressed the question of what degree of analysis was required to grant a Rule 224 petition seeking the identity of anonymous Internet posters alleged to have committed the tort of defamation. The parties proffered several cases from other jurisdictions addressing similar questions. The trial court adopted the analysis articulated in Dendrite and Cahill, which requires that a petitioner seeking the disclosure of an anonymous Internet poster must show that: (1) the anonymous poster has been notified of the potential claim so they may have the opportunity to appear; (2) the petitioners have set forth the exact statements that have been purportedly made by the anonymous person; and (3) the allegations meet a prima facie standard and are able to withstand a hypothetical motion for summary judgment as if brought by one of the potential defendants, at least with regard to elements that are within the petitioner's knowledge. Dendrite, 342 N.J. Super. At 146, 775 A.2d at 764. The trial court noted that the goal in applying the Dendrite-Cahill test was to balance the rights of a person not to be defamed with the first-amendment, free-speech rights of anonymous posters.

Applying the Dendrite-Cahill test, the trial court found that the Maxons had not satisfied the hypothetical summary judgment test because the literary and social context of the statements rendered them nonactionable opinions as a matter of law. See Hopewell v. Vitullo, 299 Ill. App. 3d 513 (1998). The Maxons thereafter appealed.[2]

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[2] Amicus curiae briefs were filed on behalf of Ottawa Publishing Company by Citizen Media Law Project, Gannett Co., Inc., Hearst Corporation, Illinois Press Association, Online Publishers Association, Public Citizen, Reporters Committee for Freedom of the Press, and Tribune Company.

ANALYSIS

1. Standard of Review

At issue is whether the trial court erred in denying the plaintiffs' petition pursuant to Supreme Court Rule 224. The parties disagree as to the applicable standard of review. Generally, this court reviews a trial court's ruling on a Rule 224 petition under an abuse of discretion standard. Kamelgard v. American College of Surgeons, 385 Ill. App. 3d 675, 684 (2008); Gaynor v. Burlington Northern & Santa Fe Ry., 322 Ill. App. 3d 288, 289 (2001). Ottawa Publishing contends that our review should be in accordance with this deferential standard. The Maxons maintain that the appropriate standard of review is de novo. While a trial court may exercise discretion in granting or denying a petition under Supreme Court Rule 224, it is well settled that a trial court must exercise its discretion within the bounds of the law. People v. Williams, 188 Ill. 2d 365, 369 (1999). Where a trial court's exercise of discretion relies upon a conclusion of law, our review is de novo. Williams, 188 Ill. 2d at 369; DiCosola v. Bowman, 342 Ill. App. 3d 530, 534 (2003). Here, the trial court's decision to subject the Maxons' petition to the Dendrite-Cahill test, and its conclusion that the allegedly defamatory statements were nonactionable opinions, were both matters of law which we will review de novo.

2. Supreme Court Rule 224

The specific issue to be decided herein is whether the trial court erred in denying the Maxons' Rule 224 petition. The general problem to be addressed is whether the trial court, in addressing the urgent need to identify a potential defendant so that all injured parties may have redress for injuries suffered protected by Rule 224 (Gaynor, 322 Ill. App. 3d at 294), must also consider the constitutional protections afforded anonymous free speech. In other words, does

allegedly defamatory speech enjoy any constitutional protections, such as the right to speak anonymously? Contrary to Ottawa Publishing and the amici, who would have us begin our inquiry with a discussion of the constitutional protections of anonymous speech, a clear understanding of the purpose and scope of Rule 224 is essential before we can address whether the trial court correctly ruled on the Maxons' petition. Rule 224 reads, in relevant part:

> "(i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.
>
> (ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition *** shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons ***." 134 Ill. 2d R. 224(a)(1)(i), (a)(1)(ii).

A trial court may grant or deny a petition under Rule 224 in the exercise of its discretion. ↩ memo p. 7, 12, 14 Gaynor, 322 Ill. App. 3d at 291. A petition under Rule 224 must be verified and is inapplicable to any case where the identity of any potential defendant is already known. Guertin v. Guertin, 204 Ill. App. 3d 527, 532 (1990) (Rule 224 did not authorize trial court to order deposition of decedent's surviving joint tenants to explore possible claim of undue influence where the petition was unverified and the petitioner already knew the identity of all potential defendants). A

hearing must be held before the court can grant or deny a Rule 224 petition in order to prevent "fishing expeditions." Kamelgard, 385 Ill. App. 3d at 686; Beale v. EdgeMark Financial Corp., 279 Ill. App. 3d 242, 254 (1996); Shutes v. Fowler, 223 Ill. App. 3d 342, 345 (1991). The use of a Rule 224 petition is limited to discovery of the identity of a potential defendant. Roth v. St. Elizabeth's Hospital, 241 Ill. App. 3d 407, 414-15 (1993); Malmberg v. Smith, 241 Ill. App. 3d 428 (1993) (it was error to grant a Rule 224 petition where identity of potential defendant was already known).

Thus, the jurisprudence of Rule 224 tells us that trial courts in Illinois possess sufficient tools and discretion to protect any anonymous individual from any improper inquiry into his or her identity. The protections offered by Rule 224 are significant. First, the petition must be verified. Second, the petition must state the reason the proposed discovery is necessary. Third, the discovery is limited to the identity of one who may be responsible in damages to the petitioner. Fourth, and most importantly, the trial court must hold a hearing at which it must determine that the unidentified person is "one who may be responsible in damages" to the petitioner. Thus, where a trial court must rule upon a petition to disclose the identity of any anonymous potential defamation defendant pursuant to Rule 224, the court must insure that the petition: (1) is verified; (2) states with particularity facts that would establish a cause of action for defamation; (3) seeks only the identity of the potential defendant and no other information necessary to establish the cause of action of defamation; and (4) is subjected to a hearing at which the court determines that the petition sufficiently states a cause of action for defamation against the unnamed potential defendant, i.e., the unidentified person is one who is responsible in

damages to the petitioner. If a trial court considers a Rule 224 petition in accordance with these guidelines, we are convinced that all rights of the potential defendant are protected.[3]

Moreover, trial courts have a readily available mechanism to determine whether the petition sufficiently states a cause of action against the potential defendant in section 2-615 of the Code of Civil Procdure (735 ILCS 5/2-615 (West 2006)). A section 2-615 motion attacks the legal sufficiency of the complaint. Such a motion does not raise affirmative factual defenses but alleges only defects on the face of the complaint. Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 86 (1996). A court considering whether to grant or deny a motion to dismiss pursuant to section 2-615 must determine whether the complaint alone has stated sufficient facts to establish a cause of action upon which relief may be granted. Green v. Rogers, 234 Ill. 2d 478, 491 (2009); Bryson, 174 Ill. 2d at 91 (in ruling on a section 2-615 motion, a trial court may consider only the allegations of the complaint and may not consider any other material).

We note that, as in the instant matter, when the potential complaint at issue in a Rule 224 petition concerns a cause of action for defamation, subjecting the petition to section 2-615 analysis is particularly compelling, as courts routinely address section 2-615 motions in defamation litigation where a plaintiff must overcome first-amendment protections as part of the prima facie case. Green v. Rogers, 234 Ill. 2d 478, 489 (2009); Solaia Technology, LLC v.

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[3] An affirmative defense of privilege would require a responsive pleading from the defendant and thus would not be appropriately addressed under section 2-615 of the Code. However, privilege is not a matter of constitutional protection and, thus, is not at issue here. See Cukier v. American Medical Ass'n, 259 Ill. App. 3d 159, 166 (1994) (Rule 224 petition denied where respondent raised statutory reporter's privilege).

Specialty Publishing Co., 221 Ill. 2d 558, 581 (2006); Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 393-99 (2008); Bryson,174 Ill. 2d at 84. These decisions illustrate that our trial courts routinely address the sufficiency of complaints for defamation by reviewing the factual allegations in the complaint alone. Moreover, these cases also illustrate that constitutional protections are considered as part of the prima facie case, and the plaintiff must plead facts to establish that the allegedly defamatory statements are not constitutionally protected. We therefore hold that subjecting a Rule 224 petition to the same level of scrutiny afforded the sufficiency of a complaint pursuant to section 2-615 will address any constitutional concerns arising from disclosing the identity of any potential defendant.

3. Constitutional Anonymity

Ottawa Publishing and the amici maintain that the anonymity of Internet speakers implicates important constitutional concerns, requiring a court to balance the rights of the speaker to anonymity against the rights of a would-be plaintiff. They posit that, in keeping with the long tradition of protecting anonymous speech and ensuring that free comments must be protected, we should impose additional requirements on a Rule 224 petitioner beyond those discussed above.

There is no question that certain types of anonymous speech are constitutionally protected. However, it is overly broad to assert that anonymous speech, in and of itself, warrants constitutional protection. See Talley v. California, 362 U.S. 60, 4 L. Ed. 2d 559, 80 S. Ct. 536 (1960) (invalidating, as unconstitutional prior restraint, local ordinance requiring handbills to provide name of distributors); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995) (same for state statute prohibiting the distribution of anonymous

campaign literature); Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 142 L. Ed. 2d 599, 119 S. Ct. 636 (1999) (same for state statute requiring election initiative petition circulators to wear identification badges, but approving statute requiring circulators to file as a public record an identifying affidavit that revealed their names and other personal information); Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 153 L. Ed. 2d 205, 122 S. Ct. 2080 (2002) (same for local ordinance that required canvassers, solicitors, merchants, and others going onto private property to provide identification in order to obtain a permit). We find nothing in these cases to support the proposition that anonymous Internet speakers enjoy a higher degree of protection from claims of defamation than the private individual who has a cause of action against him for defamation. It is well settled that private individuals and their reputations are more deserving of protection against defamation than public officials or public figures. Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

Moreover, given that there is no constitutional right to defame, we find no need for the additional procedural requirements articulated in the Dendrite-Cahill test. Ottawa Publishing suggests that we adopt the requirements articulated in these cases: (1) the petitioner must undertake reasonable efforts to notify the anonymous posters that they are the subject of a subpoena seeking their identity; (2) the petitioner must specify the exact statement alleged to constitute the actionable speech; (3) the court must evaluate whether the complaint states a viable legal claim against the anonymous potential defendants; (4) the petitioner must produce sufficient evidence supporting each element of its claim on a prima facie basis; and (5) the court must then balance the potential defendant's first-amendment right of anonymous speech against

the strength of the plaintiff's prima facie case and the need for disclosure of the anonymous potential defendant's identity. Dendrite, 342 N.J. Super. at 141-42, 775 A.2d at 760-61. The Cahill court refined the Dendrite requirements, permitting disclosure of an anonymous Internet poster's identity when the petitioner: (1) undertakes efforts to provide notice to the anonymous poster and withholds action to allow a reasonable opportunity to respond; and (2) supports his or her defamation claim with facts sufficient to defeat a hypothetical motion for summary judgment. Cahill, 884 A.2d at 460-61. The Cahill court viewed its "summary judgment" standard as virtually identical to the Dendrite requirement that a plaintiff produce evidence to support each element of its claim on a prima facie basis. Cahill, 884 A.2d at 463.

We find that the requirements articulated in Dendrite and Cahill add nothing to the protections provided by our previous analysis of the jurisprudence of Rule 224 and section 2-615 of the Code. As to the requirement that the petitioner undertake efforts to give notice to the potential defendant, we note that in the instant case, all potential defendants received some degree of notice by Ottawa Publishing. Moreover, a petition under Rule 224 will be denied if the petitioner knows the identity of the prospective defendant. Thus, the trial court may, in its discretion, require either the petitioner or the subject of the petition to provide whatever notice would be in its power to provide. The second Dendrite requirement, that the petition must specify the exact statement alleged to constitute the actionable speech, is met by the Rule 224 requirement that the petition must be verified and must state with particularity facts that would establish a cause of action for defamation, i.e. the reason the proposed discovery is necessary. Likewise, the third Dendrite requirement, that the court evaluate whether the complaint states a viable legal claim against the anonymous potential defendant is essentially the same as the Rule

224 requirement that a petition must be subjected to a hearing at which the court determines that the petition states all the elements of the cause of action for defamation.

We acknowledge that the Dendrite requirement that the court balance the potential defendant's first-amendment right of anonymous speech against the strength of the plaintiff's prima facie case and the need for disclosure of the anonymous potential defendant's identity goes beyond our requirements for Rule 224. However, once the court has determined that the prima facie case has been met by the petitioner, he has made out a valid claim for damages and has a right to expect a remedy. Likewise, once the petitioner has made out a prima facie case for defamation, the potential defendant has no first-amendment right to balance against the petitioner's right to seek redress for damage to his reputation, as it is well settled that there is no first-amendment right to defame. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985); Cahill v. John Doe - Number One, 879 A.2d 943, 950 (Del. Super. 2005).

Likewise, we reject the claim that the Maxons' petition must by subjected to a hypothetical motion for summary judgment as suggested in Dendrite and Doe v. Cahill. Illinois is a fact-pleading jurisdiction that requires a plaintiff to present a legally and factually sufficient complaint. Cwikla v. Sheir, 345 Ill. App. 3d 23, 25 (2003). Thus, in this jurisdiction, unlike notice pleading jurisdictions, if a complaint can survive a motion to dismiss, it is legally and factually sufficient and should be answered.

4. Defamation

We must now determine whether the trial court erred in finding that the Maxons did not state a claim for defamation. To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. Solaia Technology, 221 Ill. 2d at 579. A statement is defamatory per se if its harm is obvious and apparent on its face. Owen v. Carr, 113 Ill. 2d 273, 277 (1986). Words that impute a person has committed a crime are considered defamatory per se. Bryson, 174 Ill. 2d at 88. However, a statement that is defamatory per se is not actionable if it is reasonably capable of an innocent construction. Bryson, 174 Ill. 2d at 90. Moreover, if a statement is defamatory per se, and is not subject to an innocent construction, it still may not be actionable if it is an expression of opinion. As our supreme court recently noted:

> "However, there is no artificial distinction between opinion and fact: a false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole. [Citations.] Indeed, '[i]t is well established that statements made in the form of insinuation, allusion, irony, or question, may be considered as defamatory as positive and direct assertions of fact.' [Citation.] Similarly, '[a] defendant cannot escape liability for defamatory factual assertions simply by claiming that the statements were a form of ridicule, humor or sarcasm.' [Citation.] The test is restrictive: a defamatory statement is constitutionally protected

only if it cannot be reasonably interpreted as stating actual fact."

Solaia, 221 Ill. 2d at 581.

In determining whether a statement is merely an opinion and thus not subject to a cause of action for defamation as a matter of law, courts must take several considerations into account: "whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content." Solaia, 221 Ill. 2d at 581; Hopewell v. Vitullo, 299 Ill. App. 3d 513, 518-19 (1998).

In the instant matter, the trial court announced that it was following the Hopewell criteria and determined that: (1) the statements that the Maxons had bribed members of the planning commission imputed the commission of a crime; (2) the statements were precise, readily understood, and verifiable; (3) however, their literary and social context signaled that the speaker intended them to be opinions and not statements of fact. As to this third finding, the court held, as matter of law, that the context of the bribery allegation and the fact that it was published on an Internet forum made it clear that the statements were nothing more than conjecture and surmise and a statement of a subjective theory (that the only possible way the planning commission could have rendered its decision was through bribery).

We disagree. We find nothing in the content or the forum to indicate that the allegations that the Maxons bribed a public official could not reasonably be interpreted as stating an actual fact. Solaia, 221 Ill. 2d at 581. Statements that someone has committed bribery in order to obtain a favorable ruling on a zoning matter are, unlike calling someone a "world class crook," "a traitor," or characterizing a negotiating position as "blackmail," not generally taken as mere hyperbole. Moreover, unless we are prepared to hold as a matter of law that nothing published

on the Internet is capable of being interpreted as factual, the mere fact that the allegedly defamatory statement is published on the Internet does not render it hyperbole. We are not prepared to do so. Reviewing the trial court's finding de novo, we find that the Maxons have stated cause of action for defamation sufficient to warrant the anonymous individuals to come forward and answer a complaint. The statements that the Maxons bribed certain officials in order to obtain approval for their zoning request are not mere statements of opinion. The mere fact that a statement of fact is couched in the rhetorical hyperbole of an opinion does not render it nonactionable. The test is whether the statement can be reasonably interpreted as stating actual fact. Solaia, 221 Ill. 2d at 581. Here, the statements that the Maxons could only have received a positive result from the permit process by bribery can be reasonably interpreted as stating actual fact. The posts pointed out that the vote by the Commission was subject to unexplained delay, that the Maxons' request to rezone their property was approved even though the Maxons' proposed structure did not suite the purpose of a bed and breakfast ("since when did a B&B require a meeting room"), and that the proposal was changed at the last minute and the vote took place when several members of the Commission were not present. These statements clearly go beyond rhetorical hyperbole and opinion. We find that the statements purport to be factual allegations of bribery by the Maxons and must be answered.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of La Salle County is reversed. The matter is remanded for entry of an order granting the petition for disclosure pursuant to Rule 224.

Reversed and remanded with directions.

McDADE, J., concurs.

JUSTICE SCHMIDT, dissenting:

It is well established that anonymous speech is protected by the first amendment. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 200, 142 L. Ed. 2d 599, 614-15, 119 S. Ct. 636, 646 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 131 L. Ed. 2d 426, 446, 115 S. Ct. 1511, 1524 (1995); *Talley v. California*, 362 U.S. 60, 65, 4 L. Ed. 2d 559, 563, 80 S. Ct. 536, 539 (1960); *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1089 (C.D. Ill. 2001); *Doe v. 2TheMart.com.Inc.,* 140 F. Supp. 2d 1088 (2001). The United States Supreme Court in *McIntrye* stated, "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342, 131 L. Ed. 2d at 436, 115 S. Ct. at 1516.

The majority state that they can find no case law to support the proposition that "anonymous Internet speakers enjoy a higher degree of protection from claims of defamation than the private individual who has a cause of action against him for defamation." Slip op. at 12. This conclusion, however, misses the point. The protection of the anonymity of speech is a separate issue from the defamatory nature of the speech. In other words, no one suggests that an anonymous speaker deserves a higher degree of protection from claims of defamation than an individual whose identity is known. Rather, it is the anonymity itself that is equally worthy of protection.

Illinois recognized the right to speak anonymously in *People v. White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987). In *White*, the supreme court struck down a provision of the election

code that required the name and address of a distributor to be printed on certain political pamphlets. The Illinois Supreme Court explained that, "Anonymous political literature was a key weapon in the arsenal of colonial patriots, and '[e]ven the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.'" *White*, 116 Ill. 2d at 176, quoting *Talley v. California*, 362 U.S. at 65, 4 L. Ed. 2d at 563, 80 S. Ct. at 539. Anonymous pamphlets, leaflets, brochures and books have played an important role in the progress of mankind. *Talley*, 362 U.S. at 64, 4 L. Ed. 2d at 563, 80 S. Ct. at 539. The Internet is simply a modern-day leaflet (with some obvious differences not relevant to our discussion here).

First amendment protections extend to speech via the Internet. See *Reno v. American Civil Liberties Union,* 521 U.S. 844, 885, 138 L. Ed. 2d 874, 906, 117 S. Ct. 2329, 2351 (1997); *Dendrite International, Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (App. 2001). The ability to speak anonymously through the Internet allows for diverse exchange of ideas. The *Dendrite* court explained that the need to provide injured parties with a forum in which they may seek redress for grievances must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. Specifically, the court noted:

> "People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits

> persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." *Dendrite*, 342 N.J. Super at 151, 775 A.2d at 767.

I disagree with the majority that the application of Supreme Court Rule 224 (134 Ill. 2d R. 224), coupled with a section 2--615 (735 ILCS 5/2--615 (West 2006)) analysis, provides the same protection to anonymous free speech as the *Dendrite-Cahill* test. The majority states, "a court considering whether to grant or deny a motion to dismiss pursuant to section 2-615 must determine whether the complaint alone has stated sufficient facts to establish a cause of action upon which relief may be granted." Slip op. at 10. Fact pleading is insufficient to address the problem. Fact pleading has simply not eliminated frivolous lawsuits in Illinois. Plaintiffs routinely plead "facts" which later cannot be proven. If "facts" are pled that lead to the discovery of the speaker's identity, and then these facts cannot later be proven, the harm to anonymous speech is a *fait accompli*. Granting the previously anonymous speaker summary judgment would not undo the prior harm: disclosure of the speaker's identity.

I would adopt the *Dendrite-Cahill* test and find that the circuit court below correctly applied it. As set forth above, this four-part test places the burden on a petitioner to demonstrate

that the purported underlying defamation claim could successfully withstand a defendant's motion for summary judgment. *Cahill*, 884 A.2d at 462-63. Ensuring that a petitioner can maintain a defamation case, as a matter of law, before ordering disclosure of identifying information of anonymous Internet commentators sufficiently balances one's right to speak anonymously against protecting another from defamation. As the Arizona Supreme Court concluded, requiring the plaintiff to demonstrate that it would survive a motion for summary judgment "furthers the goal of compelling identification of anonymous internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech." *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 111, 170 P.3d 712, 720 (App. 2007).

Application of the *Dendrite-Cahill* test adds a crucial extra layer of protection to anonymous speech, beyond that proposed by the majority. The additional procedural requirements articulated in the *Dendrite-Cahill* test are not designed to protect defamatory anonymous speech. Rather, they are designed to protect the identity of those participating in nonactionable anonymous speech. Once an anonymous speaker's identity is revealed, it cannot be "unrevealed."

Clearly, the right to speak anonymously is not absolute. The majority correctly observes that there is no constitutional right to defame and that words that impute a person has committed a crime are considered to be defamatory *per se.* Slip op. at 15, citing *Bryson*, 174 Ill. 2d at 88. However, even though a statement may fit into a defamatory *per se* category, it still may be constitutionally protected if it cannot reasonably be interpreted as stating actual fact. *Hopewell*, 299 Ill. App. 3d at 518.

From a review of the record, I also agree with the circuit court's finding that the context of the bribery allegations at issue, and the fact they were published on an Internet forum, make it clear that the statements are nothing more than conjecture, surmise, and a statement of subjective theory. There is no suggestion that the blogger knew how the permit process worked or had any substantial evidence that a crime was committed. In light of the statement's social context, no reasonable person would interpret this to be a statement of fact. *Hopewell*, 299 Ill. App. 3d at 518. Any reasonable person would construe the words for what they were: the venting of one's spleen by someone disgruntled by the decision of a local body politic.

For the foregoing reasons, I respectfully dissent.

Mazrim v. Decatur Memorial Hospital, 2022 IL App (4th) 210474

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Ill. App. Ct., 4th Dist. · filed 2022-06-17 · Opinion
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Mazrim v. Decatur Memorial Hospital, 2022 IL App (4th) 210474

Appellate Court Caption	LEIGH MAZRIM, as Parent and Legal Guardian of G.M., Petitioner-Appellee, v. DECATUR MEMORIAL HOSPITAL and THE DEPARTMENT OF CORRECTIONS, Respondents (Decatur Memorial Hospital, Respondent-Appellant).
District & No.	Fourth District No. 4-21-0474
Filed	June 17, 2022
Decision Under Review	Appeal from the Circuit Court of Sangamon County, No. 21-MR-869; the Hon. Jennifer M. Ascher, Judge, presiding.
Judgment	Affirmed in part and reversed in part. Cause remanded with directions.
Counsel on Appeal	William A. Davis, of Brown, Hay & Stephens, LLP, of Springfield, for appellant. Benjamin M. Sgro and Gregory P. Sgro, of Sgro, Hanrahan, Durr & Rabin, LLP, of Springfield, for appellee.

Panel JUSTICE HOLDER WHITE delivered the judgment of the court, with opinion.
Justices DeArmond and Turner concurred in the judgment and opinion.

OPINION

¶ 1 Respondent, Decatur Memorial Hospital, appeals the judgment of the circuit court granting petitioner, Leigh Mazrim, as parent and legal guardian of G.M., her petition for discovery pursuant to Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018), which allowed petitioner to "conduct discovery to identify those individuals and entities who are potentially responsible in damages pursuant to a [*sic*] Supreme Court Rule 224, which necessitates the production of the prenatal care records of Amanda McGuire while pregnant with [G.M.]"

¶ 2 On appeal, respondent argues the circuit court erred in granting the petition for discovery. Respondent maintains that allowing petitioner's discovery request for information not related to identification so petitioner can determine how the individuals named in the requested medical records could be liable was improper where the records sought were those of G.M.'s biological mother while G.M. was *in utero* and the biological mother did not consent to the release of the records. Specifically, respondent asserts the circuit court abused its discretion by failing to limit the scope of discovery to ascertaining identity only as required by Rule 224. We affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On June 29, 2021, petitioner filed a petition for discovery pursuant to Rule 224, naming both Decatur Memorial Hospital and the Department of Corrections as respondents. Petitioner provided that on October 12, 2019, G.M. was born to Amanda McGuire at Decatur Memorial Hospital. Petitioner alleged that, during birth, G.M. sustained birth-related injuries as a result of negligent prenatal care of Amanda McGuire and negligent treatment surrounding the labor and delivery of G.M. Petitioner further asserted Amanda McGuire received prenatal care and treatment while she was pregnant with G.M. and incarcerated at Logan Correctional Center. On March 16, 2021, the circuit court in Sangamon County entered a judgment of adoption naming petitioner and Michael T. Mazrim as parents and legal guardians of G.M.

¶ 5 Through the petition for discovery, petitioner sought leave to discover the "prenatal care medical records of Amanda McGuire up to the time of [G.M.'s] delivery." Petitioner provided,

> "Illinois courts have ruled that the prenatal care records bearing the name of the mother during the period that her child was *in utero* are, for all purposes, the medical records of her child. *El-Amin v. Dempsey*, 329 Ill. App. 3d 800, 809, 768 N.E.2d 344, 352 (2002)."

Petitioner argued,

> "Discovery pursuant to Illinois Supreme Court Rule 224 is necessary to determine liability, as well as to identify the potential defendants to be named in a civil action who may possess any liability for the injuries sustained by [G.M.] as a result of the

prenatal care received by Amanda McGuire while she was *in utero*, as well as the labor and delivery surrounding her birth."

Petitioner stated she sought "said discovery for the sole purpose of ascertaining the identity of potential defendants responsible for damages in the above-referenced incident."

¶ 6 On June 30, 2021, the petition and a summons were personally served upon both Decatur Memorial Hospital and the Department of Corrections. The summons provided, "If you wish to contest the entry of such Order [of Discovery], you must appear at this Hearing on July 19, 2021, at 9:00 a.m." On July 19, 2021, petitioner and the Department of Corrections appeared at the hearing on petitioner's petition for discovery. Decatur Memorial Hospital did not appear at the hearing, file a response to petitioner's petition, or otherwise enter an appearance.

¶ 7 Following the July 19, 2021, hearing, the circuit court granted petitioner's petition for discovery. On July 20, 2021, the court entered a written order requiring Decatur Memorial Hospital and the Department of Corrections to comply with petitioner's discovery requests and issued an "Agreed Qualified HIPAA Protective Order" to maintain the confidentiality of Amanda McGuire's medical records. Specifically, the court ordered that "[a]ny and all communications, documents, and reports relating to the prenatal care of Amanda McGuire during her pregnancy with [G.M.] shall be considered within the scope of Petitioner's allowable discovery requests, to which Respondents are hereby compelled to respond within the time allotted in this Order." The court also directed the circuit clerk to seal the case file, which "shall not be accessible without leave of court." Subsequently, petitioner issued interrogatories and requests to produce to both Decatur Memorial Hospital and the Department of Corrections seeking disclosure of, among other things, medical records related to the prenatal care of Amanda McGuire.

¶ 8 On July 29, 2021, respondent filed a motion to reconsider asking the circuit court to reconsider its order and dismiss petitioner's petition for discovery, asserting, in part, the petition and discovery order were outside the scope of discovery allowed under Rule 224. In the motion to reconsider, respondent explained no appearance was made on its behalf at the July 19, 2021, hearing on petitioner's petition for discovery due to an administrative error. Respondent attached to its motion a June 2, 2021, letter from petitioner's attorney to respondent, asking it to preserve evidence related to Amanda McGuire's and G.M.'s care. In the letter, petitioner identified, by name, 17 treating clinicians involved in the care of Amanda McGuire and G.M. On August 9, 2021, petitioner filed a response to respondent's motion to reconsider. On August 11, 2021, respondent filed a response to petitioner's response to motion to reconsider or, in the alternative, motion to vacate order.

¶ 9 On August 12, 2021, the circuit court held a hearing on respondent's motion to reconsider. At the start of the hearing, the circuit court granted respondent's motion to reconsider and vacated its July 20, 2021, order. Next, the court allowed the parties to argue the issues in respondent's motion to reconsider. Petitioner asserted she sought the prenatal medical records of Amanda McGuire while G.M. was *in utero* by submitting a request for the records and attaching an authorization signed by petitioner. According to petitioner, respondent denied the records request because Amanda McGuire did not consent or sign a release. Petitioner provided Amanda McGuire was "[nowhere] to be found." Thus, petitioner now sought the medical records under Rule 224. Specifically, petitioner stated, "We are simply looking for the documents that are necessary to discover those who potentially are liable—are responsible in damages." Petitioner provided she did not "have the information to determine who is

potentially responsible, despite having names because of that threshold for a medical malpractice action." Respondent argued the records sought by petitioner were outside the scope of what is allowed under Rule 224. Respondent stated, "What is allowed under [Rule] 224 and the case law is identification of those who may be responsible."

¶ 10 Ultimately, the circuit court determined that pursuant to *El-Amin v. Dempsey*, 329 Ill. App. 3d 800, 768 N.E.2d 344 (2002), the prenatal care records of Amanda McGuire during the period G.M. was *in utero* were, for all purposes, the medical records of G.M. Thus, the court determined petitioner, as legal guardian of G.M., had no other way to obtain the records than to file a petition under Rule 224. The court reinstated its order based on *Beale v. EdgeMark Financial Corp.*, 279 Ill. App. 3d 242, 664 N.E.2d 302 (1996). Specifically, the court relied on the following quote from *Beale*:

> "Thus, a reasonable interpretation of Rule 224 would permit the trial judge some latitude of discretion under its provisions to allow discovery of certain additional facts pertaining to the relationship between the stock purchasers and the corporate insiders to further define and narrow the universe of potential defendants. The rule would not allow, however, further discovery of specific facts of wrongdoing." *Id.* at 253.

Ultimately, the court stated,

> "I still find in favor of [petitioner] pursuant to the case law in *Beale*. The records will be disclosed, as I previously ordered with respect to the protections that I ordered, and the reason for my ruling is [G.M.'s] inability to get the records in any other manner. I appreciate, that under [Rule] 224, the records do more than just identify, but pursuant to *Beale*, I do feel as though they permit [G.M.] and her family to identify who is responsible rather than just identify, as [petitioner] stated, who was in the room."

¶ 11 On August 19, 2021, the circuit court entered a written order reinstating its July 20, 2021, order permitting petitioner "to conduct discovery to identify those individuals and entities who are potentially responsible in damages pursuant to a [*sic*] Supreme Court Rule 224, which necessitates the production of the prenatal care records of Amanda McGuire while pregnant with [G.M.]"

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, respondent argues the circuit court abused its discretion in granting petitioner's petition for discovery where it failed to limit the scope of petitioner's discovery to ascertaining identity as required by Rule 224. Petitioner argues if this court finds Amanda McGuire's prenatal care medical records for the time G.M. was *in utero* are G.M.'s medical records to which she is entitled, then this appeal is moot. In the alternative, petitioner argues the circuit court's order complied with Rule 224 and the court did not err in relying on *Beale*.

¶ 15 We initially note, we are of the opinion that the requisite medical records are discoverable under both (1) *El-Amin*, 329 Ill. App. 3d at 809, where the medical records of the biological mother during the period her child was *in utero* were, for all purposes, the medical records of the child and (2) Rule 224, where petitioner seeks discovery to ascertain the identity of one who may be responsible in damages.

¶ 16 We find the prenatal care medical records of Amanda McGuire are discoverable pursuant to *El-Amin*, 329 Ill. App. 3d at 809, because Amanda McGuire's medical records during the

period when G.M. was *in utero* are, for all purposes, the medical records of G.M. In *El-Amin*, the appellate court found, as a practical matter, it would be impossible for anyone to obtain the child's medical records—separate from the mother's medical records—for the time the child was *in utero*. *Id.* Therefore, the court held that "the prenatal care records bearing the name of [the biological mother] during the period that her son was *in utero* are, for all purposes, the medical records of her son." *Id.*

¶ 17 Here, as in *El-Amin*, Amanda McGuire's medical records cannot be separated from G.M.'s medical records for the time G.M. was *in utero*. Therefore, because the medical records were also G.M.'s medical records, respondent does not need Amanda McGuire's consent to release the records to G.M.'s legal guardian. Accordingly, petitioner, as legal guardian of G.M., is entitled to discovery of G.M.'s medical records while *in utero* up until the time of G.M.'s delivery.

¶ 18 We also find G.M.'s medical records are discoverable pursuant to Rule 224, where petitioner seeks discovery to ascertain the identity of one who may be responsible for G.M.'s injuries following her birth.

¶ 19 Respondent argues the circuit court's order granting petitioner's Rule 224 petition was far too broad and did not limit the scope of discovery to solely allow petitioner to ascertain the identity of individuals who may be responsible in damages where the court authorized the release of "[a]ny and all communication, documents, and reports relating to the prenatal care of Amanda McGuire during her pregnancy with [G.M.]" Moreover, respondent argues petitioner was already aware of the identity of multiple clinicians involved in the care of Amanda McGuire during her delivery of G.M., as evidenced by a June 2021 letter sent by petitioner to respondent, requesting the preservation of medical records.

¶ 20 Petitioner argues respondent forfeited this argument where it contested the entry of the circuit court's order granting petitioner's Rule 224 petition for the first time in a motion to reconsider. While we find petitioner's forfeiture argument is well taken, we elect to exercise our discretion and consider the merits of respondent's argument. See *People v. Rajner*, 2021 IL App (4th) 180505, ¶ 23 (" '[F]orfeiture is a limitation on the parties, not the court, and we may exercise our discretion to review an otherwise forfeited issue.' " (quoting *People v. Curry*, 2018 IL App (1st) 152616, ¶ 36, 100 N.E.3d 482)). We do so in this instance because the circuit court and the parties addressed the issue during the hearing on respondent's motion to reconsider.

¶ 21 The filing of a petition pursuant to Rule 224(a)(1), creates an independent action for discovery to identify a party that may be responsible in damages. Ill. S. Ct. R. 224(a)(1) (eff. Jan. 1, 2018). Specifically, Rule 224(a)(1) provides, in relevant part, as follows:

> "(i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.
>
> (ii) *** The order allowing the petition will limit discovery to the identification of responsible persons and entities ***." *Id.*

The committee comments that follow the rule state, "This rule provides a tool by which a person or entity may, with leave of court, compel limited discovery before filing a lawsuit in an effort to determine the identity of one who may be liable in damages." Ill. S. Ct. R. 224, Committee Comments (adopted Aug. 1, 1989).

¶ 22 "Involvement of the trial court protects against abuses of the discovery process and guards against ' "fishing expeditions." ' " *Low Cost Movers, Inc. v. Craigslist, Inc.*, 2015 IL App (1st) 143955, ¶ 12, 45 N.E.3d 357 (quoting *Shutes v. Fowler*, 223 Ill. App. 3d 342, 345, 584 N.E.2d 920, 923 (1991)). This court reviews the circuit court's ruling pursuant to Rule 224 for an abuse of discretion. *Dent v. Constellation NewEnergy, Inc.*, 2020 IL App (1st) 191652, ¶ 22, 175 N.E.3d 742 (citing *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 709, 929 N.E.2d 666, 710 (2010)).

¶ 23 Based on the plain language of Rule 224, we find G.M.'s medical records while *in utero* are discoverable but subject to redaction. When looking at the wording of Rule 224, we find the language of the rule quite broad. While the outcome of a petition for discovery is to ascertain the identity of one who may be responsible in damages, absent in the rule is any language limiting the method, means, or source from which one may seek to determine the identity of one who may be responsible in damages. Specifically, a person engaging in discovery may need to seek evidence showing more than just a name or a task performed by a person to ascertain the identity of one who may be responsible in damages.

¶ 24 Here, petitioner sought to engage in discovery to ascertain the identity of one who may be responsible for G.M.'s injuries following her birth. We find a letter containing a list of names fails to provide petitioner with sufficient information to ascertain the identity of who may be responsible in damages. We also find *Beale* instructive.

¶ 25 In *Beale*, the petitioner filed a Rule 224 petition for presuit discovery that went beyond the names and addresses of people who could have been responsible in damages. *Beale*, 279 Ill. App. 3d at 244. "[T]he trial court granted [the] petitioner's discovery request and ordered the respondent to turn over a document that, in the court's opinion, would identify certain persons who could be responsible in damages to the petitioner." *Id.* at 245. The appellate court affirmed, finding the trial court did not abuse its discretion in granting the petitioner's request for discovery under Rule 224. *Id.* at 253-54. The appellate court determined the "[p]etitioner's knowledge of the names of individuals or couples who acquired stock in EdgeMark immediately before the public announcement, without more, does little if anything to define or narrow the universe of potential defendants from the general members of the stock-purchasing public." *Id.* at 253. The court found, "[w]ithout information concerning the existence of relationships or affiliations between the named individuals and EdgeMark's officers or directors or representatives, any claim of insider trading would have been entirely speculative and baseless." *Id.*

¶ 26 The *Beale* court held, "Where the petitioner is apprised of a sufficient connection to the injury by an individual or entity so as to place such individual or entity within the universe of potential defendants, the petitioner may not seek further discovery of facts pertaining to any actual wrongdoing." *Id.* at 252. ↩ memo p. 7, 12, 14

> "However, where the known connection to the injury is remote and does little or nothing to limit or define the universe of potential defendants, the petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability so long as the attempted discovery does not seek to delve into any actual details of wrongdoing." *Id.* at 252-53.

The court further provided, "The extent of this permissible inquiry must be determined by the trial judge on a case-by-case basis and in consideration of the cause of action alleged." *Id.* at 253.

¶ 27 In *Gaynor v. Burlington Northern & Santa Fe Ry.*, 322 Ill. App. 3d 288, 294, 750 N.E.2d 307, 312 (2001), the appellate court further described the *Beale* court's explanation of discovery available under Rule 224 as follows,

> "*Beale* held that, on occasion, the identification of a defendant may require more than simply a name and that, on those occasions, discovery under Rule 224 is not limited to the petitioner's ascertainment of a name only. However, even under *Beale*, knowledge of the connection of an individual to the injury involved will preclude further discovery under the rule."

¶ 28 Here, petitioner did not know the potential connection between the named clinicians and what role, if any, the named clinicians may have played in relation to G.M.'s birth injures. Petitioner sought connecting factors through discovery of the medical records to find potential liability, not actual details of wrongdoing. Accordingly, we find that while the circuit court did not abuse its discretion when it granted discovery of G.M.'s medical records, petitioner's interrogatories exceeded the scope of Rule 224. Therefore, under the circumstances of this case, we find petitioner is entitled only to limited discovery of G.M.'s medical records to find a potential connection in liability.

¶ 29 At oral argument, petitioner argued that if this court allowed the discovery of G.M.'s medical records subject to redaction, she would not seek other discovery. Therefore, based on our resolution and the petitioner's position during oral argument, we find petitioner is only entitled to discovery of G.M.'s medical records and the medical records are to be reviewed by the circuit court during an *in camera* inspection and redacted to remove any information not "ascertaining the identity of one who may be responsible in damages." Accordingly, we reverse the circuit court's order granting petitioner broad discovery through interrogatories and remand for the defendant to release the records to the circuit court, who shall review G.M.'s medical records, make any necessary redactions, and then order the respondent to turn over the medical records (with any redactions) to the petitioner.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm in part, reverse in part, and remand with directions.

¶ 32 Affirmed in part and reversed in part.

¶ 33 Cause remanded with directions.

O'Neill v. Gallant Insurance, 329 Ill. App. 3d 1166 (5th Dist. 2002)

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Ill. App. Ct., 5th Dist. · filed 2002-04-23 · Reporter opinion
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O'Neill v. Gallant Insurance, 329 Ill. App. 3d 1166 (5th Dist. 2002)

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O'Neill v. Gallant Insurance

329 Ill. App. 3d 1166 · Appellate Court · Filed 2002-04-23 · Reporter opinion · Published appellate opinion: binds circuit courts; persuasive to other appellate panels

Syllabus

Prepared by the reporter, not part of the court's opinion.

MARGUERITE A. O'NEILL, Plaintiff-Appellee, v. GALLANT INSURANCE COMPANY, Defendant-Appellant. Fifth District No. 5-00-0505 Opinion filed April 23, 2002. Edward J. Kionka, of Carbondale, and Alvin R. Becker, of Beermann, Swerdlove, Woloshin, Barezky, Becker, Genin & London, of Chicago, for appellant. David L. Antognoli, of Hopkins, Goldenberg, PC., of Edwardsville, for ap-pellee.

Opinion

JUSTICE KUEHN

delivered the opinion of the court:

In this case, an insurance company took its small stake in the outcome of a personal-injury claim, $20,000 worth of liability coverage purchased by one of its customers, and transformed it into a multimillion-dollar judgment against the carrier. For reasons that are not entirely clear, John Moss, executive vice president of Warrior Insurance Group, the person primarily responsible for this action, bypassed a chance to settle an insured's obvious liability for catastrophic personal injuries, and to do so within the insurance policy limits. His decision turned $20,000 worth of contractual duty into a $3,010,063 judgment for a bad-faith refusal to settle within the policy limits.

This remarkable wizardry had its origins on October 31, 1996. On that Halloween day, a Gallant Insurance Company customer named Christine Narvaez drove her insured automobile onto the parking lot of a busy Granite City supermarket. Christine had her two-year-old grandchild with her. The youngster was riding, unconstrained, in a booster seat. Christine saw a friend and decided to stop for a brief chat. She parked and exited the car, leaving the keys in the ignition and the motor running. Thus, circumstances awaited the mischief that her unattended two-year-old grandchild could glean from being left alone in a car with its engine running.

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Gallant Insurance Company's insured played quite a Halloween trick on shoppers in the vicinity of her car. The trick treated Marguerite O'Neill to lifelong confinement in a nursing home. It only took a moment for Christine's little nipper to crawl behind the wheel, slip the car into gear, and set it into motion. As the car rolled out of control, it collided with two other cars and two pedestrians. Mrs. O'Neill was the most severely damaged victim of Christine's negligence.

Mrs. O'Neill was in her eighties and could not physically evade the slow-moving car as it approached her. The insured's vehicle pinned her between it and another car and slowly crushed her trapped body. Mrs. O'Neill was pried loose and airlifted to St. Louis University Hospital Trauma Center, where she spent the next month in the intensive care unit. Her body suffered a crushed hip, a broken arm, four cracked ribs, and two fractured fingers. She lost more than 40% of her blood supply as a result of internal bleeding. The blood loss triggered respiratory shock. Mrs. O'Neill was given a tracheotomy and was placed on a respirator for 24 days.

The accident had lasting consequences. It deprived Mrs. O'Neill of the ability to live life independently of others. It placed her into a nursing home, where she remains to this day.

Gallant Insurance Company (Gallant) insured Christine with the statutory minimum amount of coverage against liability arising out of the operation of her car. Consequently, there was only $20,000 worth of coverage to address the catastrophic damages that Christine's negligence wrought. Not including her other damages, Mrs. O'Neill's medical bills amounted to $105,000.

Mrs. O'Neill's attorney demanded the policy limits in settlement of her claim. He offered a complete release from liability for Christine, provided that Gallant would promptly tender its check for Christine's $20,000 liability coverage. Gallant was given 30 days to decide. Confronted with a case of obvious liability with potential damages far in excess of the policy limits, Gallant did not dignify the demand with a response. The 30 days passed and Gallant remained silent. It did not try to negotiate. It did not attempt a counteroffer. It did not even tell Christine that the elderly lady that she hurt was willing to forego a personal judgment for more than the amount with which Christine was insured. Gallant simply ignored the offer to settle, and a window of opportunity to protect its customer from an excess judgment closed. Moss bypassed the chance to authorize the payment of the coverage that Christine had purchased from Gallant. As a result of his decision, Christine suffered a large excess judgment. Gallant's refusal to even respond to an invitation for settlement occurred under baffling circumstances.

Gallant's initial adjuster noted in the claims diary that Christine was clearly negligent and that Gallant was responsible for the damages that she caused. His opinion was reviewed by an immediate supervisor and a claims director, and both concurred in his liability evaluation. Based upon that opinion, Gallant paid the two property-damage claims that stemmed from the accident. When Mrs. O'Neill registered her claim through a lawyer, the claim was forwarded to a more seasoned adjuster. She examined her younger counterpart's work, conducted her own independent investigation of the claim, and before a demand was even made, recommended the payment of the $20,000 policy limits. A claims manager

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reviewed this recommendation. She wrote to Moss and conveyed her opinion that the policy limits should be tendered.

Gallant did not have a claims department. It was one of two subsidiaries of Warrior Insurance Group, the company that handled all claims. Moss was the executive vice president of Warrior Insurance Group (Warrior). None of Warrior's 12 claims adjusters had the authority to settle a claim for $20,000. Warrior's two claims directors lacked such authority. Even Warrior's claims manager could not authorize a $20,000 settlement. Only Moss and Warrior's chief executive officer could authorize any Gallant settlement payment in excess of $15,000.

Warrior's claims manager, someone with a decidedly conservative approach to the settlement of automobile liability claims, wrote and advised Moss that the tender of the policy limits was a necessary step "in order to make sure that the policyholder's interests were treated with equal weight as the company's interests."

Moss also heard from the lawyers Gallant hired to defend against Mrs. O'Neill's lawsuit. At the time, Gallant so valued their work that it had the firm handling 500 active files, all on a flat-fee billing basis. Two weeks prior to the settlement demand's expiration, those lawyers wrote to Moss with an evaluation and a recommendation. Christine's lawyers told him that liability was clear. They also told him that the verdict potential on that obvious liability rested within a dollar range 15 to 30 times the amount of coverage. Two weeks before the chance to settle within the policy limits was forever lost, Christine's lawyers urged Moss to tender those limits. In their professional judgment, it was clearly the prudent thing to do.

Moss decided to reject everyone's advice. His decision to disregard the adjusters' opinions, the director's opinion, his claims manager's opinion, and Christine's lawyers' opinions occurred without explanation or notation in the claims diary. Much later, at the trial of this case, Moss's testimony, the linchpin of the defense against the bad-faith claim, revealed the reason behind the decision. Moss actually testified, under oath, that he believed in good faith that Christine was not liable for anyone's injuries.

Almost a year after the demand to settle for the policy limits had expired, and only a few days before the trial on the underlying personal-injury action was to begin, Moss decided to authorize an offer of $20,000 in order to settle the case. By that time, Mrs. O'Neill had no interest in accepting such an offer. She had incurred more than $3,000 in costs readying the case for a trial, and there was no offer to defray them. Mrs. O'Neill's economic losses as a result of the accident had nearly doubled since the demand expired, and her contingency-fee structure had also increased. On the eve of trial, Mrs. O'Neill was intent on seeing what kind of an award a jury would return. Hopefully, Christine would personally satisfy the amount by which the jury's award might exceed Christine's insurance coverage.

Moss preferred a last-minute offer of the policy limits to a jury test of his good-faith belief that liability was lacking. Unfortunately, he made the decision to forego his belief too late. The chance to obtain a release in return for $20,000 had come and gone.

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A few days after Mrs. O'Neill's refusal of Gallant's offer, a jury found for her and against Christine and awarded $731,063 in damages. The verdict came as no surprise to anyone in Gallant who was ever entrusted with the task of evaluating the claim. We are not even sure that it surprised Moss. Gallant's lawyers asked him to send a $20,000 company check, and he complied, before the verdict was even returned. Christine owed Mrs. O'Neill $711,063. The only reason that she owed it was her carrier's decision not to meet the demand for the policy limits. Moss's good-faith belief that there was no liability on Christine's part proved to be misplaced. The mistake resulted in Christine's financial ruin.

A supplementary action was commenced in order to enforce the judgment against Christine. Her potential claim against Gallant for its failure to settle Mrs. O'Neill's claim within the policy limits was assigned to Mrs. O'Neill, who then brought this lawsuit against Gallant. The case was tried to a jury. The jury found in Mrs. O'Neill's favor and awarded actual damages in the sum of $710,063 and punitive damages in the sum of $2.3 million. Interest was also awarded.

A significant part of the evidence presented against Gallant consisted of the pattern of conduct engaged in by Gallant over the five years leading up to this bad-faith action. Mrs. O'Neill presented 44 known cases where Gallant's Illinois customers suffered excess judgments after Gallant passed up the opportunity to settle within the policy limits. Most of the excess judgments occurred on John Moss's watch. The dollar amount by which the excess judgments exceeded policy limits totaled $10,849,313. This staggering total was accumulated through jury awards on automobile accident cases, a class of personal injury generally known for miserly jury verdicts. All but $449,313 of this amount was awarded after Moss took over control of the settlement process in June of 1997.

Gallant argues that the jury's verdict, based upon the finding that Gallant acted in bad faith in its handling of Mrs. O'Neill's claim, is contrary to the manifest weight of the evidence. This is a question that we review with deference to the jury. Its findings will not be overturned unless they are "manifestly erroneous." Fritzsche v. Union Pacific R.R. Co., 303 Ill. App. 3d 276, 287, 707 N.E.2d 721, 729 (1999).

Where an insurer is pursued for its refusal to settle a claim, "bad faith" lies in an insurer's failure to give at least equal consideration to the insured's interests when the insurer arrives at a decision on whether to settle the claim. See Mid-America Bank & Trust Co. v. Commercial Union Insurance Co., 224 Ill. App. 3d 1083, 1087, 587 N.E.2d 81, 84 (1992). This is precisely the standard set forth by Donna Hedl, Warrior's claims manager, when she wrote Moss and gave her opinion of how Mrs. O'Neill's claim should be handled. She wrote that the policy limits should be tendered "in order to make sure that the policyholder's interests were treated with equal weight as the company's interests." Her admission, standing alone, provides ample evidence of bad faith. However, there was other evidence of bad faith to support the jury's verdict.

We have identified seven factors pertinent to the assessment of bad faith, and every one of them supports this jury's verdict.

I

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The advice of the insurance company's own adjusters is a factor to be considered. See Phelan v. State Farm Mutual Automobile Insurance Co., 114 Ill. App. 3d 96, 104-05, 448 N.E.2d 579, 585 (1983).

Moss, Gallant's decision-maker and the only one authorized to advance a settlement offer in this case, was urged by every level of claims department employee to tender the policy limits. The claim's initial adjuster, his supervisor, and a claims director all concurred in their evaluation of the insured's liability. As a consequence, Gallant paid the property-damage claims in full within 30 days of the occurrence.

The next adjuster who reviewed the file concurred in the conclusions already reached by three other claims department employees. She recommended the payment of the policy limits before Mrs. O'Neill even made a demand. Her supervisor, the claims manager, also recommended the payment of the policy limits. Her recommendation was particularly damaging to Gallant.

Donna Hedl had adjusted claims for Gallant and other nonstandard insurance companies for more than 25 years. Historically, she conceded the payment of claims grudgingly. She subscribed to the conservative philosophy that no claim should be paid absent clear negligence on the part of the insured. Moss had to admit at the trial that he appreciated how she employed this philosophy and that she served the company well. He found her to be a most able and competent adjuster. This left little to offer in support of why he would not follow her advice and tender the policy limits.

II

A refusal to negotiate is a factor to be considered. Cernocky v. Indemnity Insurance Co. of North America, 69 Ill. App. 2d 196, 208, 216 N.E.2d 198, 205 (1966).

Mrs. O'Neill's attorney wrote to Gallant with a firm offer to settle for $20,000. Gallant did not respond. It did not make a counteroffer, request more time to evaluate the demand, or even dignify the attempt to settle with the courtesy of an answer. Donna Hedl admitted that a timely response to a policy-limits demand, even if it is a rejection of the demand, is of critical importance. It keeps open the lines of communication toward compromise and settlement.

III

The advice of defense counsel is a factor to be considered. Olympia Fields Country Club v. Bankers Indemnity Insurance Co., 325 Ill. App. 649, 674-75, 60 N.E.2d 896, 906-07 (1945).

At a time when Mrs. O'Neill's policy-limits demand remained open, Christine's lawyers advised Moss of their professional opinion that Christine would be held civilly liable for Mrs. O'Neill's damages. The lawyers whom Gallant hired to champion Christine's defense gave Moss this evaluation, together with their estimate that the verdict range would likely fall between $300,000 and $600,000. Christine's lawyers urged a settlement for the policy limits two weeks before Mrs. O'Neill's offer expired. The attorneys would later increase the verdict potential to an amount in excess of $1 million. The notice of a verdict potential of

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more than 50 times the policy limits did not prompt Gallant to initiate negotiations or to tender the policy limits.

IV

Communication with the insured, keeping her fully aware of the claimant's willingness to settle for the amount of coverage, is a factor to be considered. Bailey v. Prudence Mutual Casualty Co., 429 F.2d 1388, 1390 (7th Cir. 1970).

Here, Gallant and the attorneys Gallant hired never bothered telling Christine that Mrs. O'Neill was willing to settle for her policy limits, until months after the offer expired. When defense counsel belatedly advised Christine of the settlement offer, the substance of the offer was not conveyed, and Christine was misled by being told that the company was still evaluating the demand. The demand had expired. There was nothing to evaluate. Moss decided not to respond to the demand, despite everyone's advice to meet it.

Gallant did not give its policyholder an opportunity to protect herself. Its failure to timely communicate with its customer and its false statements when it did communicate signal bad faith. Bailey, 429 F.2d at 1390.

V

An inadequate investigation and defense is a factor to be considered. Ballard v. Citizens Casualty Co. of New York, 196 F.2d 96, 102 (7th Cir. 1952).

Here, the complaint in Mrs. O'Neill's lawsuit against Christine alleged that the insured failed to use an adequate child restraint system. If Christine had any defense to the lawsuit, it was predicated upon the reasonableness of her belief that the booster seat that her grandchild was sitting in was sufficient to restrain the child while she left him unattended in a car with the engine running. The booster seat was a critical piece of evidence.

It should have been clear to Gallant, if it believed in such a defense, that the failure to produce the booster seat at the trial invited a strong inference that the insured either knew or should have known that the booster seat was entirely inadequate to restrain the child. Notwithstanding, Gallant never inspected the booster seat, never photographed the seat, and never warned Christine to preserve the booster seat for use as evidence at the trial. Gallant's neglect had two consequences: Christine disposed of the booster seat and, because she was unable to produce the seat, the jury received the missing-evidence instruction in the underlying case.

After their assessment of clear liability and massive verdict potential and after Moss's refusal to follow their recommendation based upon that assessment, Christine's lawyers formulated a discovery plan. They proposed taking the deposition of 13 potential witnesses. One of the reasons was their stated desire to minimize the predicted excess verdict. Apparently, Gallant did not consider that goal very important. Only two depositions were authorized.

VI

A substantial prospect of an adverse verdict is a factor to be considered. Phelan, 114 Ill.

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App. 3d at 104, 448 N.E.2d at 585.

The odds of a jury rejecting Mrs. O'Neill's claim were astronomical. Everyone knew the score. From Gallant's most novice adjuster up the chain of command to a seasoned veteran of 25 years, everyone predicted that Christine would lose and that the verdict would top the coverage. Defense counsel knew what was going to happen. They predicted it. Everyone, save Moss, got it right. It took the jury only 40 minutes to deliberate to a verdict and award Mrs. O'Neill $731,063.

VII

The potential for damages to exceed the policy limits is a factor to be considered. Mid-America Bank & Trust Co., 224 Ill. App. 3d at 1087, 587 N.E.2d at 84.

Gallant knew from the lawyers it hired to protect Christine's interests that the verdict potential was, at a minimum, 15 times the amount of insurance protection. The medical bills alone were more than five times that protection. The decision to reject the chance to settle a claim of this magnitude signals bad faith. memo p. 6, 11

Gallant tries to shield its decision to forego the settlement offer with its decision to file and pursue a motion for summary judgment. It points out that after the motion was denied, it offered the policy limits. This facade of good faith is belied by the lawyers Gallant hired to protect Christine's interests. Christine's lawyers, the same ones who urged Moss to protect her by tendering the policy limits, had absolutely no faith in the prospects of prevailing on the summary judgment motion. From the moment that it was filed, they believed that it would fail, as indeed it did.

The filing of a motion that lacked merit did not insulate Moss from the unreasonable decision to ignore everyone's opinion and allow a settlement offer to expire without a response. If it did, insurance companies would acquire free license to play roulette with their customers' money, even in cases where circumstances compel the immediate payment of insurance proceeds in order to protect those customers. The filing of a summary judgment motion in lieu of meeting a demand that everyone in the company deemed valid is precisely the sort of gambling with an insured's money that the doctrine of bad faith was designed to prevent.

In the final analysis, Gallant's argument rests upon Moss's self-serving testimony that he acted in good faith when he rejected the chance to settle, because he believed that Christine was not liable. The jury obviously found him less than credible. It had good reason. Moss's professed belief flew in the face of everyone who ever evaluated this case, and there were many. Three Gallant adjusters believed that Christine was liable. A Gallant claims director believed that Christine was hable. Gallant's sole claims manager, who had been evaluating liability in automobile accident claims for 25 years and who denied all claims in the absence of clear negligence, believed that Christine was hable. Everyone in the law firm that Gallant hired, a firm entrusted to handle more than 500 active claims for Gallant, believed that Christine was liable. And the 12 people Gallant selected to determine liability at the trial believed that Christine was liable. Without a great deal of experience in such matters, they decided that issue and fixed the amount of damages in

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less than an hour of deliberation.

Despite Moss's professed belief, Gallant had promptly paid the lesser claims of people hurt because of Christine's negligence. Despite Moss's professed belief, he tried to pay all of the coverage on the eve of the trial. And last but not least, despite Moss's professed belief, after the verdict was returned, Gallant paid its $20,000, closed its file, and walked away. Moss would not authorize an appeal of the liability question. Christine was left to fend for herself and somehow mount an appeal of the $710,063 excess judgment on her own.

The jury's finding of bad faith was not against the manifest weight of the evidence.

We turn to the question of whether punitive damages can be awarded for an insurance company's bad-faith refusal to settle. We hold that they can.

Gallant assails the award of punitive damages, with a multifaceted argument that those damages are contrary to the law and to the evidence.

Issues of law are reviewed de nova. Statler v. Catalano, 293 Ill. App. 3d 483, 486, 691 N.E.2d 384, 386 (1997), relying on Davis v. Temple, 284 Ill. App. 3d 983, 989, 673 N.E.2d 737, 741 (1996).

Gallant notes that no Illinois case has ever authorized common law punitive damages against an insurance carrier based upon a bad-faith refusal to settle a third party's liability claim. There are other jurisdictions that have allowed punitive damages in certain cases where the insurance company's bad faith was particularly egregious. Cain v. State Farm Mutual Automobile Insurance Co., 47 Cal. App. 3d 783, 121 Cal. Rptr. 200 (1975); Campbell v. Government Employees Insurance Co., 306 So. 2d 525 (Fla. 1974); Newport v. USAA, 2000 Okla. 59, 11 P.3d 190 (2000); Shamblin v. Nationwide Mutual Insurance Co., 396 S.E.2d 766 (W. Va. 1990). We think that where the insurer's conduct exceeds mere negligence and, like here, demonstrates to a jury's satisfaction that the refusal to settle within policy limits was engaged in with utter indifference and reckless disregard for its policyholder's financial welfare, punitive damages can be awarded.

Although punitive damages are not the law's favorite, Illinois has traditionally authorized the recovery of punitive damages in tort cases involving intentional misconduct or a breach of fiduciary duty. Cirrincione v. Johnson, 184 Ill. 2d 109, 114, 703 N.E.2d 67, 70 (1998). "Illinois courts are not hesitant to award punitive damages in cases where there has been a flagrant breach of fiduciary responsibility." Central Bank-Granite City v. Ziaee, 188 Ill. App. 3d 936, 947, 544 N.E.2d 1121, 1128 (1989).

Gallant cites to numerous cases where, in varying contexts, courts have held that no fiduciary relationship exists between an insurer and an insured. See, e.g., Brase v. Loempker, 267 Ill. App. 3d 415, 642 N.E.2d 202 (1994). However, when a liability insurance company employs policy terms that obtain the irrevocable power to determine whether an offer to compromise a personal-injury claim will be accepted or rejected, it creates a fiduciary relationship between it and the insured with resulting duties that grow out of that relationship. Cernocky, 69 Ill. App. 2d at 207-08, 216 N.E.2d at 204, relying on Ballard, 196 F.2d at 102; see also Douglas v. Allied American Insurance, 312 Ill. App. 3d

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535, 543, 727 N.E.2d 376, 382 (2000) (“An insurance company has a fiduciary duty to defend its insured and to consider the insured’s interest”).

Gallant’s policy terms vested it with exclusive control over Mrs. O’Neill’s claim and the defense against her lawsuit. Gallant reserved the right to hire the policyholder’s lawyer. It also retained the absolute discretion to determine whether a settlement offer should be accepted or rejected. The policy terms rendered the policyholder helpless in the absence of Gallant’s good faith. As was demonstrated by the staggering excess judgment total under Moss’s command, in the absence of good faith, Gallant’s policyholders confronted significant risks of personal exposure.

“ 1 “Under policies like those here involved, the insurer and the insured owe to each other the duty to exercise the utmost good faith. While the insurance company, in determining whether to accept or reject an offer of compromise, may properly give consideration to its own interests, it must, in good faith, give at least equal consideration to the interests of the insured[,] and if it fails so to do[,] it acts in bad faith.” ’ ” Cernocky, 69 Ill. App. 2d at 208, 216 N.E.2d at 204-05, quoting Ballard, 196 F.2d at 102, quoting American Fidelity & Casualty Co. v. G.A. Nichols Co., 173 F.2d 830, 832 (10th Cir. 1949).

Courts must offer vigilant protection to those who find themselves in a position of vulnerability in a fiduciary relationship. See Central Bank-Granite City v. Ziaee, 188 Ill. App. 3d 936, 544 N.E.2d 1121 (1989) (elderly); National Bank of Monticello v. Doss, 141 Ill. App. 3d 1065, 491 N.E.2d 106 (1986) (mentally limited).

Gallant insures mostly high-risk drivers. Illinois requires those high-risk drivers to obtain liability coverage in order to drive. Consequently, they pay dearly to acquire liability coverage and, almost universally, purchase only the statutory minimum. For the most part, Gallant’s customer base represents a class of driver extremely vulnerable to insurance practices performed in bad faith and contrary to an insured’s interests. This was certainly the case here. Christine had certain known mental health problems and was hardly well-to-do. She could not afford to hire her own attorney to protect her from her fiduciary. Based upon Gallant’s treatment, she could have used private counsel. Such assistance might have set Gallant right when it wrote to inform Christine that it would defend her under a reservation of rights - when Gallant falsely claimed that it did not have to provide coverage. Such assistance might have set Gallant right when it failed to respond to the settlement demand and, thereafter, falsely claimed that it was still evaluating the demand. Finally, independent counsel might have suggested to Moss that his faith in a lack of liability, and his refusal to pay because of it, carried a duty to defend the liability question on appeal. Counsel might have made Moss understand that under the circumstances of his claimed decision-making, he could not simply walk away from the adverse verdict by tendering the amount of coverage. His oversight of Christine’s interests was still in play.

In a case like this one, we think that punitive damages for a bad-faith refusal to settle are appropriate and warranted. After all, punitive damages are designed to deter misconduct. Hopefully, the availability of punitive damages can provide some degree of deterrent against unscrupulous insurers who would otherwise take advantage of customers and abuse their fiduciary relationship in order to promote their own economic self-interest.

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Gallant needed to be told through the award of punitive damages that it had to stop its common practice of ignoring policy-limit demands in serious cases where liability was clear-cut. It had to be punished for a pattern of misconduct that exposed its policyholders to more than $10 million in excess judgments.

Gallant complains about the penal nature of the compensatory damages and likens them to an award of punitive damages for the intentional infliction of emotional distress. See Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). The analogy is flawed. Intentional and outrageous conduct is an essential element of intentional infliction of emotional distress, making punitive damages unavailable as an element of recovery. Here, the actual damages awarded were not punitive in nature. They represented the damages actually sustained as a result of Gallant's misconduct. The misconduct being punished was not a necessary element in proof of the committed tort.

Gallant raises section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 1998)) and argues that it preempts common law liability for punitive damages for a wrongful refusal to settle. See Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513, 675 N.E.2d 897 (1996). While the Illinois Supreme Court has held that section 155 preempts punitive damages in first-party-insurance-benefit-denial cases, it has also carefully differentiated first-party claims from cases where insurers wrongfully refuse to settle third-party claims. For first-party insurance claims, the General Assembly created a statutory penalty to supplement the policyholder's breach-of-contract remedy. However, a policyholder with excess liability as a result of his insurer's wrongful refusal to settle with a third party has no contractual or statutory remedy. We believe that the supreme court had in mind cases like this one when it noted that section 155 does not preempt a claim of insurer misconduct based upon a separate and independent tort. Cramer, 174 Ill. 2d at 531, 675 N.E.2d at 905-06.

Gallant challenges the evidence of wrongdoing and contends that it did not establish the kind of misconduct that calls for a punitive-damages award. A jury enjoys wide latitude in deciding whether a defendant's misconduct is sufficiently egregious to warrant the imposition of punitive damages. Cirrincione, 184 Ill. 2d at 116, 703 N.E.2d at 71. We will not disturb a finding of liability for punitive damages unless it is against the manifest weight of the evidence. Cirrincione, 184 Ill. 2d at 115, 703 N.E.2d at 70.

We need not belabor the evidence of bad faith that supports punitive damages. Suffice it to say, there was ample evidence from which a jury could reasonably infer that Gallant deliberately chose to gamble with Christine's financial security, in the hope of merely delaying the payment of minimal policy limits. It would have been quite reasonable for jurors to conclude that Gallant threw Christine's financial future to the wind for the small amount of revenue it could derive from its $20,000 before a judgment could be rendered. Of course, jurors could have also reásonably inferred from the evidence that the nontender of money until the eve of the trial was a calculated design, widespread in its application and utilized on numerous claims where it was obvious that the coverage would ultimately have to be paid. By exposing a lot of its customers to excess judgments in order to delay the payment of valid third-party claims, Gallant could amass considerable revenue. Hence,

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jurors possessed evidence from which they could reasonably conclude that corporate greed motivated Gallant's breach of fiduciary duty and that its greed was pervasive - that Gallant routinely betrayed its customers' interests by deliberate design.

At a minimum, based upon the evidence presented, the jury was entitled to believe that Gallant's conduct showed an utter indifference and a reckless disregard for its policyholder's financial welfare and that Gallant breached a fiduciary duty to factor that welfare into its decision-making. Such a finding surpasses the threshold for the imposition of punitive damages. Home Savings & Loan Ass'n of Joliet v. Schneider, 108 Ill. 2d 277, 284, 483 N.E.2d 1225, 1228 (1985).

Gallant's argument relies heavily upon Moss's self-serving claim of good faith, a claim that the jury obviously refused to believe. Indeed, it seems fairly possible that the jury's view of that testimony added to its understanding of why punitive damages were appropriate and warranted. We reiterate some of the sound reasons why the jury chose not to credit Moss's testimony. Obviously, for Moss to harbor a genuine belief that Christine was not liable, he had to conclude that a number of valued employees' views were wrong and further conclude that the lawyers hired to defend the case tendered an evaluation unworthy of belief.

During his testimony at the bad-faith trial, Moss claimed that he believed that Christine would prevail as a matter of law and that is why he rejected the demand to settle for the policy limits. However, the claims diary did not contain a contemporaneous entry of this evaluation, to support his decision when it was made. The absence of a contemporaneous notation of Moss's position was at odds with Gallant's policy to require a written record of all evaluations in the claims diary. It was also at odds with Department of Insurance regulations.

The only notation of Moss's thought process that was contemporaneous with the decision to ignore the policy-limits demand contradicted his ultimate claim of good faith based upon a belief in the absence of liability.

Just two days after Moss rejected Donna Hedl's settlement recommendation, defense counsel memorialized a conversation with Moss. Moss was not interested in having defense counsel file for summary judgment. He was not interested in testing liability. He did not even mention or discuss a contrarian view that the claim lacked merit. Moss was solely interested in settlement. However, he wanted Mrs. O'Neill's underinsured-motorist coverage to pay for Christine's negligence, rather than Gallant.

The memorandum recorded that Moss wanted counsel to research whether a change in the law would allow Mrs. O'Neill to pursue underinsured-motorist coverage even though she did not recover the full policy limits from the underinsured negligent driver. Moss wanted to foist compensation for Mrs. O'Neill's injuries onto her own carrier. His strategy harbored the obvious belief that Mrs. O'Neill's carrier would be willing to recognize the existence of liability. Moss was interested in the research because, if the law had changed to allow for it, the availability of underinsurance, in Moss's words, "might enable us to bargain for a lesser amount with plaintiffs counsel than full policy in this matter." When Moss suggested

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this settlement strategy, he fully understood that no underinsured-motorist carrier was going to pay money in the absence of liability on the part of Christine.

Thus, the documentation of Moss's contemporaneous thought process demonstrated a desire to engage in conduct inconsistent with a genuine belief that Christine would prevail as a matter of law. However, the desired conduct was entirely consistent with the reason punitive damages were being sought. Gallant was pursuing a possible settlement of the claim in a way that kept its interests paramount, and it gambled its insured's interest in a policy-limits settlement on a preposterous strategy designed to shift its responsibilities onto another insurance company.

Moss also claimed that he never altered his belief that the insured had an absolute defense to liability. Thus, according to Moss, the trial court committed error in the underlying case by submitting the claim to the jury and refusing to set aside an erroneous verdict. However, Moss refused to authorize an appeal. Again, his actions were inconsistent with a genuine belief that Christine would prevail as a matter of law.

We find that an award of punitive damages is supported by the evidence. The jury's award is not manifestly erroneous.

Finally, Gallant argues that the punitive-damages award is grossly excessive, unreasonable, unwarranted by the evidence, and a violation of due process.

We review the determination on a challenge to the size of a punitive-damages award de nova. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436, 149 L. Ed. 2d 674, 687, 121 S. Ct. 1678, 1685-86 (2001). The constitutionality of such an award depends upon its size. Fundamental fairness embodied in due process prohibits "grossly excessive" punitive damages. BMW of North America, Inc. v. Gore, 517 U.S. 559, 574, 134 L. Ed. 2d 809, 825-26, 116 S. Ct. 1589, 1598 (1996). The United States Supreme Court has established three criteria to consider when determining whether an award of punitive damages is "grossly excessive": "the degree of reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." BMW of North America, Inc., 517 U.S. at 575, 134 L. Ed. 2d at 826, 116 S. Ct. at 1598-99.

We must side with Mrs. O'Neill and against Gallant on the extent to which the evidence established the existence of reprehensible conduct on the part of Christine's insurance provider. If the term "reprehensible" means shameful, i.e., conduct deserving of severe reproach, Gallant's treatment of Christine, and others who bought insurance from it, was truly reprehensible.

We can start with Gallant's treatment of Christine, who suffered from a mental illness and who totally lacked financial resources. Christine was completely dependent upon Gallant for help in handling her exposure to financial ruin. It hired the lawyers to champion her defense. It employed a team of professional adjusters and an experienced claims manager. It had the money to pay for a complete release from liability. It possessed the means to protect Christine's financial future.

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Gallant also possessed the experience to know that if Christine was found liable, the injuries that she caused meant certain bankruptcy for her, given her meager policy limits. It also possessed the experience to understand that, in terms of Christine's predicament, a policy-limits demand was "God-sent."

Despite its duty to exercise "utmost good faith" and its fiduciary role over a vulnerable customer's financial future, Gallant initiated its handling of Christine's claim with a spurious attempt to flatly disclaim coverage. Christine's fiduciary set the tone of their relationship in a letter in which it advised Christine that her delay in forwarding paperwork relieved it of its obligation to provide coverage. Although the purpose of this false claim is unclear, it had to inflict fear and mental anguish over a lack of protection.

Gallant refused to use the tools at its disposal to protect Christine's financial future. It consciously failed to respond to, much less meet, a policy-limits settlement demand. Its decision to forego settlement was made in the face of urging from various Warrior adjusters, supervisors, and directors, in addition to its highly experienced claims manager, to settle the claim for the policy limits. The claims manager for Warrior, and hence for Gallant, admitted in writing that if Gallant did not settle for the policy limits, it would not be fulfilling its fiduciary role by giving Christine's interests equal weight in the settlement process. Christine's lawyers urged Gallant to settle for the policy limits. They warned of clear liability and the likely prospect of a massive excess judgment. They also wanted to take 13 depositions in a stated effort to minimize the excess judgment that they predicted Christine would face in the absence of a settlement. Christine's attorney fees were fixed, and the depositions did not mean additional attorney fees for Gallant. Nonetheless, Gallant would not authorize the effort to minimize Christine's risk. The only reason Gallant would not authorize the recommended action on Christine's behalf had to be the cost of a court reporter.

When the predicted excess judgment arrived, Gallant threw its policy limits at the problem that its misconduct caused, and it refused to authorize an appeal despite its purported devout belief in a lack of legal liability.

In assessing the degree of reprehensibility, we think it fair to conclude that Gallant blatantly ignored its policyholder's financial security and did virtually nothing to protect her, despite a golden opportunity to do so. Its decision to bypass a settlement of Mrs. O'Neill's claim for the payment of $20,000 is inexplicable. Its conduct toward Christine was shameful. Its explanation for the misconduct only compounded it.

However, the conduct that the jury punished was conduct that extended beyond the handling of Christine's case. The jury learned that Gallant's treatment of Christine was but the tip of the iceberg. Below the surface lay a host of excess judgments occurring under similar circumstances. Moss routinely withheld Gallant's money in cases where legitimate claims could have been settled for customers' policy limits. Gallant's misconduct went far beyond the mismanagement of its fiduciary duty in one isolated case where it should have settled a claim.

Gallant's view of its fiduciary responsibility to Christine was a view that it shared with its

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other customers. Gallant policyholders suffered more than $10 million in excess judgments, the result of numerous lawsuits where policy-limit demands were cavalierly ignored. There is a pattern to Gallant's misconduct that pervades its handling of third-party claims.

In presenting other examples of Gallant's claims practices, Mrs. O'Neill focused on one verdict in particular, to show the jury just how shameful Gallant's treatment of an insured could be. The verdict in Crumer v. Riddle was rendered over a year after the verdict that underlies this case and painfully demonstrates how Gallant followed a blueprint for bad faith in the process by which it exercised its power over settlements.

Mrs. Crumer was also an elderly woman. She was also a pedestrian struck by a driver insured by Gallant. Gallant's driver admitted that he was going too fast. Witnesses testified that his car was "actually airborne" when it came over the hill that obscured Mrs. Crumer, who was crossing the road far below the hill's crest. Because of the excessive speed, Gallant's insured driver was unable to bring his car to a stop, and he struck Mrs. Crumer.

Liability was clear. All that Gallant had to determine was whether the damages were severe enough to warrant the payment of its $20,000 worth of coverage.

Mrs. Crumer had both legs amputated as a result of the accident and incurred $360,476.52 in medical bills prior to the trial. Riddle, Gallant's insured, had $20,000 worth of coverage with Gallant and $50,000 worth of coverage with another carrier. Mrs. Crumer's attorney offered to settle for Gallant's policy limits eight months prior to the trial. The other carrier agreed to pay its $50,000 policy limits. Gallant failed to respond prior to the expiration of the offer, which remained open for 35 days. Riddle suffered an excess verdict of approximately $1.9 million.

Gallant conducted its business in a manner that was totally insensitive to the risks facing its policyholders. Its misconduct was clearly reprehensible enough to commend serious punishment. The $2.3 million in punitive damages provided a fitting measure of punishment for Gallant's routine transformation of policy-limits settlement demands into massive excess judgments for its policyholders.

The second consideration in the determination of an award's excessiveness is the disparity between the harm actually suffered and the sum of punitive damages. Here, that disparity is not excessive. Gallant's misconduct caused Christine to suffer a $710,063 excess judgment. The punitive damages were only slightly higher than triple the actual damages. This proportion of actual damages to punitive damages is not out of line with cases that have found punitive-damages awards constitutional. See Ford v. Herman, 316 Ill. App. 3d 726, 733-35, 737 N.E.2d 332, 339-40 (2000) (punitive damages 75 times higher than compensatory damages); Pickering v. Owens-Corning Fiberglas Corp., 265 Ill. App. 3d 806, 827, 638 N.E.2d 1127, 1141 (1994) (punitive damages 25 times higher than compensatory damages); Ciampi v. Ogden Chrysler Plymouth, Inc., 262 Ill. App. 3d 94, 112-13, 634 N.E.2d 448, 462 (1994) (punitive damages 20 times higher than compensatory damages).

Finally, the jury's award is in line with punishment meted out in comparable cases. Gallant had fair warning that an abuse of fiduciary duty had potentially grave consequences. See,

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e.g., National Bank of Monticello, 141 Ill. App. 3d 1065, 491 N.E.2d 106 (compensatory damages of $500,000 and $2 million in punitive damages).

The punitive-damages award did not approach the percentage of net worth awarded in other cases where misconduct amounted to a breach of fiduciary duty. According to Gallant's annual report to the Illinois Department of Insurance, Gallant had a net worth exceeding $25 million as of December 31, 1998. Moss actually testified, under oath, that Gallant's financial report to the Department of Insurance substantially overstated its net worth. Indeed, Gallant tenders argument on appeal based upon the "real" net worth of Gallant rather than the one reported to Illinois's insurance regulators and considered by the jury in its assessment of damage. We think that the jury was entitled to base its assessment of damage upon the net worth that Gallant wanted to show the Department of Insurance. Based upon that net worth, the punitive-damages award was less than 10% of the company's value. Given the ratio of punitive damages to net worth in comparable breach-of-fiduciary-duty cases, the measure of punishment could have been far worse. See National Bank of Monticello, 141 Ill. App. 3d at 1074, 491 N.E.2d at 111-12.

We find that the punitive-damages award was not grossly excessive. The jury's award of $2.3 million to punish Gallant for its misconduct did not deprive Gallant of due process under the fourteenth amendment.

Finally, during supplementary proceedings, a judge had to compel Christine to assign her claim against Gallant to Mrs. O'Neill. Gallant argues that the order compelling Christine to assign her claims was invalid. Its argument finds support in the precedent of this court. Roundtree v. Barringer, 92 Ill. App. 3d 903, 906, 416 N.E.2d 675, 677 (1981).

More than two decades ago, we prohibited, as a matter of public policy, involuntary assignments of bad-faith-settlement actions. Roundtree, 92 Ill. App. 3d at 906, 416 N.E.2d at 677. We carved this exception out of clear statutory language to the contrary. Other panels of our court were quick to examine the public policy concerns expressed by Justice Kasserman. A host of justices flatly rejected the notion that public policy should trump the clear statutory authority provided under section 2 - 1402(c)(5) of the Code of Civil Procedure (735 ILCS 5/2 - 1402(c)(5) (West 1998)). Phelan, 114 Ill. App. 3d at 102, 448 N.E.2d at 583; Nicholson v. St. Anne Lanes, Inc., 158 Ill. App. 3d 838, 840-42, 512 N.E.2d 127, 128-29 (1987).

The validation of compulsory assignments of bad-faith-settlement claims set forth in Phelan v. State Farm Mutual Automobile Insurance Co. has had almost two decades to test the fears that motivated our limitation of that class of involuntary assignments. Justices Kasserman, Karns, and Jones worried about "fishing expeditions by judgment creditors" that "could lead to champerty and an overburdening of the courts with specious lawsuits." Roundtree, 92 Ill. App. 3d at 906, 416 N.E.2d at 677. This past trepidation has proven ungrounded over the passage of time. Today, we have no reason to harbor such concerns. Accordingly, we side with the statutory language that authorizes the compulsory assignment of choses in actions, and we hold that courts may exercise their statutory power to enforce judgments by involuntary assignments in all cases, including bad-faith-settlement claims.

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For the reasons stated, we affirm.

Affirmed.

RARICK and WELCH, JJ., concur.

The defendant in this suit, Gallant Insurance Company, is a part of the Warrior Insurance Group. In the companies' hierarchies, John Moss oversees certain Gallant Insurance Company departments. Further details about the relationship of the two companies are included later in the body of this opinion.

The amount of damages awarded by the jury in the original negligence case against Gallant's insured was $711,063. That verdict was the foundation for this subsequent bad-faith case against Gallant. In this case, the jury returned a verdict for actual damages in the amount of $710,063. The record does not reflect, and counsel for the parties do not offer, any explanation for the $1,000 discrepancy.

Crumer v. Riddle, No. 01-L-173, was also filed in Madison County.

People ex rel. Terry v. Fisher, 12 Ill. 2d 231 (1957)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. Supreme Court · filed 1957-09-20 · Reporter opinion
Supreme Court

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Where the memo cites it

- memo p. 4 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C020.4
- memo p. 4 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C020.1
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(No. 34411.—[redacted]

THE PEOPLE *ex rel.* Alveston Terry, Petitioner, *vs.* HARRY M. FISHER, Judge of the Circuit Court, Respondent.

Opinion filed September 20, 1957—Rehearing denied Nov. 19, 1957.

[redacted]

HOUSE, J., dissenting.

[redacted]

HINSHAW, CULBERTSON, MOELMANN & HOBAN, of Chicago, (OSWELL G. TREADWAY, of counsel,) for petitioner.

BENJAMIN S. ADAMOWSKI, State's Attorney, of Chicago, (L. LOUIS KARTON, and FRANCIS X. RILEY, of counsel,) for respondent.

Mr. JUSTICE BRISTOW delivered the opinion of the court:

This is an original petition for *mandamus* on relation of Alveston Terry, the defendant in a personal injury suit pending in the circuit court of Cook County before the Honorable Harry M. Fisher, respondent herein, to compel respondent to expunge from the record of the personal injury cause certain orders requiring petitioner to answer discovery interrogatories respecting the existence and amount of his liability insurance.

The cause presents the single issue of whether, under the Civil Practice Act and Rules promulgated pursuant thereto, a defendant can be compelled to answer discovery

interrogatories respecting the existence and amount of any liability insurance.

Petitioner contends that the circuit court exceeded its authority under the Civil Practice Act and Rules in requiring petitioner to respond to the said interrogatories, and that *mandamus* should issue to compel the respondent to expunge the void orders. Respondent, however, argues that the orders are within the scope of the Rules and constitute a proper part of the record.

The relevant section of the Civil Practice Act, section 58(1), (Ill. Rev. Stat. 1955, chap. 110, par. 58(1),) provides that, "Discovery, admissions of fact and of genuineness of documents and answers to interrogatories shall be in accordance with rules." Supreme Court Rule 19—11, relating to interrogatories, provides that they may be served within the same time and under the same circumstances as depositions may be taken, and Rule 19—4 defines the scope of examination on deposition. This latter Rule provides: "Upon a discovery deposition, the deponent may be examined regarding any matter, not privileged, relating to the merits of the matter in litigation, whether it relates to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any documents or tangible things and the identity and location of persons having knowledge of relevant facts."

With reference to the particular interrogatories involved herein, since the Illinois courts have not yet determined whether the existence and amount of defendant's insurance is discoverable under our Rules, a chronological review of the decisions and reasoning of the courts of other jurisdictions on this issue may be helpful.

In *Goheen* v. *Goheen*, 9 N. J. Misc. 507, 154 Atl. 393, the first case presenting this question, the New Jersey court, in 1933, without reference to any practice act, denied such interrogatories on the ground that they did not constitute

material and competent evidence. In 1933 the Michigan court in *Layton* v. *Cregan & Mallory Co.* 263 Mich. 30, 248 N.W. 539, held that plaintiff was entitled to the production of defendant's insurance policy, since it might be relevant to the issue of disputed ownership of the automobile which collided with plaintiff's car. The court neither discussed the *Goheen case,* nor any rule of civil practice.

The California court in 1937, in *Demaree* v. *Superior Court,* 10 Cal.2d 99, 73 P.2d 605, held that the provisions of defendant's insurance policy were germane to the petitioner's cause and material to their anticipated action against the insurance company "when and if brought," and that a sufficient basis was laid for the request for such information in the proceeding to perpetuate testimony.

In 1948 a Federal court in New York, in *Orgel* v. *McCurdy,* 8 F.R.D. 585, held that under Federal Rule 26(b) plaintiff could examine defendant before trial on the matter of liability insurance, since it was not necessary to establish the admissibility of the testimony, but only that the information was relevant to the subject matter of the pending action. Rule 26(b) provides: "* * * deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

The *Orgel case* was cited by the Federal district court in Tennessee in 1951 in *Brackett* v. *Woodall Products, Inc.,* 12 F.R.D. 4, where it was held that plaintiff could examine defendant's liability insurance policy under Federal Rules

34 and 26(b), on the ground that from the tenor and purpose of Federal and State legislation affecting liability insurance for the benefit of injured persons, such policies are relevant to the subject matter of pending actions growing out of accidents. The court stated: "The court finds that it is material to the plaintiffs in the preparation of their cases for trial that they be given an opportunity to inspect, and, if desired to copy, the liability insurance policy, as the policy provisions may afford the plaintiffs a right of which they would otherwise not be able to avail themselves."

However, the following year, 1952, the Federal district court in Pennsylvania, disagreed with the interpretation of the Federal Rules in the *Brackett case,* and held that, although information need not be admissible in evidence to be discoverable, nevertheless, the insurance information could not be elicited on the ground that whatever advantage plaintiff might gain from the discovery of insurance had nothing to do with the presentation of the case at trial. (*McClure* v. *Boeger,* 105 F. Supp. 12.) The court stated: "Every argument that could be made in favor of requiring the disclosure could also be made in favor of compelling defendant in any civil case to furnish plaintiff with full information as to his financial resources."

The same result was decreed by the Federal court in 1955 in *McNelley* v. *Perry,* 18 F.R.D. 360, where it was reasoned that since the insurance interrogatories could not be used in the trial, or lead to information which could be used in the trial, they were not proper.

Conflicting conclusions are also apparent in the State court decisions between 1951 and 1957. The California court in 1951, in *Superior Ins. Co.* v. *Superior Court,* 37 Cal.2d 749, 235 P.2d 833, reaffirmed its prior decision in the *Demaree case,* permitting plaintiff to elicit from defendant data respecting his liability insurance, and ordering the production of the policy itself.

The court rejected the arguments, also interposed by petitioner herein, that the production of the insurance policy would result in unreasonable search and seizure in violation of the constitution; and that knowledge of the policy limits would provide an undue and oppressive advantage in settlement negotiations. In that connection the court noted that whether such knowledge would benefit plaintiff or defendant depended upon the relationship between the seriousness of the injuries and the amount of insurance coverage. The court also explained that since a liability policy involves a contractual relation which is for the benefit of persons who might be negligently injured by the insured, the existence of the policy is not a matter for the sole knowledge of the named insured and the insurance carrier. Consequently, requiring the production of the policy in no way infringed the sanctity of a private contract.

A contrary ruling was made by the Nevada court in 1952 in *State ex rel. Allen* v. *District Court*, 69 Nev. 196, 245 P.2d 999, in a similar proceeding to perpetuate testimony.

In 1954 the Kentucky court, in a contempt proceeding for defendant's failure to answer whether or not he was insured in a pretrial examination, held that the question of insurance was relevant to a pretrial deposition, and within the spirit and meaning of rules identical to the Federal Rules 26-34. (*Maddox* v. *Grauman*, 265 S.W.2d 939.) The court noted first that "the question of relevancy is more loosely construed upon pretrial examination than at the trial," and that "the Rule requires only relevancy to the subject matter involved in the action." The court then reasoned that since the standard automobile liability insurance policy provides that persons injured by the negligence of the assured may institute proceedings against the carrier if a judgment against the assured is returned unsatisfied, consequently if the insurance is relevant after plaintiff prevails it is also relevant while the action pends. The insur-

ance data was also deemed relevant by the court on the ground that the insurance company is in fact one of the real parties in interest, in that it ordinarily investigates, employs counsel, and assumes control over the litigation involving its insured.

This reasoning was rejected by the Minnesota court, in 1955, in construing identical practice rules, also patterned after the Federal Rules. *Jeppesen* v. *Swanson,* 243 Minn. 547, 68 N.W.2d 649.

The dissenting opinion in the *Jeppesen case* pointed out that insofar as the discovery of insurance would abet settlements, it would be consistent with the ultimate objective of discovery, which is the just, speedy and inexpensive determination of litigation; that it would be patently unrealistic to say that insurance is irrelevant when, under the standard form of automobile liability policy, the insurer is virtually substituted as a party defendant.

Most recently, in *Bean* v. *Best,* 80 N.W.2d 565, the South Dakota court held that under rules patterned after the Federal Rules prior to the 1946 amendment, discovery could not be extended beyond matters admissible in evidence.

In determining the applicability of these decisions we are mindful of the obligation of this court to give these discovery rules an interpretation consistent with their avowed purpose. They were adopted as procedural tools to effectuate the prompt and just disposition of litigation, by educating the parties in advance of trial as to the real value of their claims and defenses. As noted by legal scholars, those rules will suffice for present needs if lawyers and judges will use them with an understanding of that purpose. (50 N.U. L. Rev. 628, Discovery and Depositions, Fitzpatrick and Goff.) Thus, to construe the language of Rule 19—4 "related to the merits of the matter in litigation" to refer only to isolated legal concepts such as negligence, proximate cause, and damages, divorced from

the realities of litigation, would not be using this new tool "with an understanding of its purpose."

In the light of this approach, we must reject at once as authority those cases limiting pretrial discovery to matters admissible in evidence (*Goheen* v. *Goheen*, and *Bean* v. *Best*) as being contrary to both the terms and intent of the Rule. We do not imply that answers to interrogatories can be brought to the attention of the jury.

There is a plausible ring to the argument in the *McClure* and *Jeppesen cases* that if the existence and amount of liability insurance must be disclosed, logic demands that every defendant must be required to disclose his financial resources. That argument is advanced in this case. But in our opinion it is answered by the statutory provisions that confer an interest in such a policy on every member of the public that is negligently injured, and by the unique characteristics of a liability insurance policy.

Section 388 of the Insurance Code (Ill. Rev. Stat. 1955, chap. 73, par. 1000,) requires certain standard provisions to be included in liability policies affording injured persons a right of action against the insurer if execution against the insured is returned unsatisfied; section 58(k) of the Motor Vehicle Act (Ill. Rev. Stat. 1955, chap. 95½, par. 58k,) provides certain minimum liability insurance coverage for motor vehicles; and section 16 of the Truck Act (Ill. Rev. Stat. 1953, chap. 95½, par. 253,) requires motor carriers to have specified liability insurance policies before permits may be issued. Moreover, we have construed section 388 of the Insurance Code to be declarative of the public policy of this State to protect persons injured by the negligent operation of motor vehicles, and as conferring rights which cannot be defeated after the accident by the concerted action of the insured and the insurer. (*Scott* v. *Freeport Motor Casualty Co.* 392 Ill. 332.) It is clear that the legislature, by virtue of the fore-

going enactment, has placed liability insurance in a category distinct from the insured's other assets so far as persons injured by the negligent operation of his motor vehicle are concerned.

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Thus, under our statutes, as in California, liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of insured's motor vehicle. (*Superior Ins. Co.* v. *Superior Court*, 235 P.2d 833.) Therefore, we find more cogent the reasoning of the courts in the *Brackett* and *Maddox cases*, cited by respondent, that such statutory requirements render insurance policies relevant to the litigation against the insured defendant, in that they apprise injured plaintiffs of rights in the matter of litigation of which they might not otherwise avail themselves. It is not inconceivable that a plaintiff with serious injuries would settle a substantial judgment against a defendant of modest means for a fractional sum, simply because he had no knowledge of any additional rights against the insurer. Thus, to deprive an injured party from learning of his rights against an insurer would, in effect, nullify the benevolent purpose of such statutes, and permit insurance companies to avoid their statutory obligation.

Unlike other assets, a liability insurance policy exists for the single purpose of satisfying the liability that it covers. It has no other function and no other value. Litigation is a practical business. The litigant sues to recover money and is not interested in a paper judgment that cannot be collected. The presence or absence of liability insurance is frequently the controlling factor in determining the manner in which a case is prepared for trial. That there will be actual rather than nominal recovery conditions every aspect of preparation for the trial of these cases,—investgators, doctors, photographers and even the taking of depositions. Ordinarily a plaintiff has many

sources of inquiry by means of which he can appraise the likelihood that the judgment he seeks will be enforceable. In the case of an insurance policy, however, all the customary channels are cut off. Even if he knows the identity of the insurance company and may know its financial standing, it does not help him, for the company is responsible only within the limits of the policy it has issued.

In determining whether liability insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, "Judges need not be more naive than other men." Inasmuch as the insurance company is virtually substituted as a party, (*Maddox* v. *Grauman*, 265 S.W.2d 939; dissent in *Jeppesen* v. *Swanson*, 243 Minn. 547, 68 N.W.2d 649, 658,) as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business. This aspect is most significant in terms of effective judicial administration in coping with today's congested dockets which are largely attributable to the increasing volume of personal injury litigation.

↩ memo p. 4, 10

On the basis of this analysis, it is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be "related to the merits of the matter in litigation," as provided in Civil Practice Rules 19—11 and 19—4, since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for, and afford a sounder basis for the settlement of disputes. We believe that such

↩ memo p. 4, 10, 13

a construction is in accordance with the intention of the framers of the amended Rules to give a broader scope to the practice of discovery and thereby enable attorneys to better prepare and evaluate their cases.

Therefore, the orders of the circuit court of Cook County requiring petitioner to answer the interrogatories in the personal injury proceeding were within the scope of the Civil Practice Rules, and in no way exceeded the jurisdiction of that court. Nor did those orders, issued pursuant to a proper exercise of a procedural rule in a civil case, infringe petitioner's constitutional rights against unreasonable search and seizure, (*Demaree* v. *Superior Court,* 10 Cal.2d 99, 73 P.2d 605; *Superior Ins. Co.* v. *Superior Court,* 37 Cal.2d 749, 235 P.2d 833,) or any other constitutional guarantee. The petition for *mandamus* to compel respondent to expunge the orders should therefore be denied.

Writ denied.

Mr. JUSTICE HOUSE, dissenting.

[redacted]

(Nos. 34364-5-6 Cons.—[redacted]

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, *vs.* MATILDA H. SCHALLERER, EXRX., *et al.*, Appellees.

Opinion filed September 20, 1957—Rehearing denied Nov. 19, 1957.

[redacted]

Powell v. American Service Insurance Co., 2014 IL App (1st) 123643

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Ill. App. Ct., 1st Dist. · filed 2014-02-18 · Opinion
Published opinion

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- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 36: passage C040.7
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 36: passage C040.7

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Illinois Official Reports

Appellate Court

***Powell v. American Service Insurance Co.*, 2014 IL App (1st) 123643**

Appellate Court Caption	RANDY POWELL, Plaintiff-Appellant, v. AMERICAN SERVICE INSURANCE COMPANY, an Illinois Insurance Corporation, Defendant-Appellee.
District & No.	First District, First Division Docket No. 1-12-3643
Filed	February 18, 2014
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	In an action arising from an automobile accident that occurred when plaintiff was making a U-turn in front of a vehicle operated by defendant's insured and the insured crashed into plaintiff's vehicle, the trial court properly dismissed plaintiff's second amended complaint against the insurer, as the assignee of the insured's rights, alleging that her insurer acted in bad faith by failing to settle plaintiff's claim within the $20,000 policy limits, since plaintiff failed to allege a reasonable probability that defendant's insured would be found liable for plaintiff's injuries, especially when plaintiff made no allegations that he was making a proper U-turn pursuant to the requirements of section 11-802(a) of the Illinois Vehicle Code, including the requirement that the U-turn be made "in safety and without interfering with other traffic."
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 11-L-9770; the Hon. Frank Castiglione, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Cohn & Cohn, of Chicago (Charles A. Cohn and Erwin Cohn, of counsel), for appellant. Sanchez Daniels & Hoffman, of Chicago (John J. Piegore and Brian H. Sanchez, of counsel), for appellee.

Panel JUSTICE DELORT delivered the judgment of the court, with opinion. Justices Hoffman and Cunningham concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Randy Powell appeals from the dismissal with prejudice of his second amended complaint against defendant, American Service Insurance Company (ASI). The circuit court found that plaintiff failed to state a claim for bad-faith failure to settle within policy limits and dismissed the complaint pursuant to section 2-615 (735 ILCS 5/2-615 (West 2010)) of the Illinois Code of Civil Procedure. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On February 7, 2001, plaintiff allegedly sustained injuries in an automobile accident in Mundelein, Illinois, involving ASI's insured, Katie Linares. Plaintiff sued Linares in Lake County, claiming that she negligently operated her motor vehicle. ASI defended Linares in accordance with the terms of her automobile liability policy, which had an indemnity limit of only $20,000 per person. On June 5, 2006, plaintiff's counsel made a demand for settlement for the $20,000 policy limit. ASI rejected the settlement offer.

¶ 4 The case proceeded to trial. A jury found Linares 60% at fault and plaintiff 40% at fault for the accident. The jury awarded plaintiff a net verdict of $47,951.15 plus costs. After trial, Linares assigned her rights under the policy to plaintiff, who then filed his initial complaint for bad faith against ASI on September 16, 2011.

¶ 5 The circuit court dismissed plaintiff's original and first amended complaints, both with leave to replead. On August 9, 2012, plaintiff filed a second amended complaint, in which he alleged:

> "6. Based on information known to the defendant, American Service, at and prior to the transmission of the above described letter [requesting settlement for the policy limits], including the deposition testimony in the prior action of Randy Powell and of Katie Linares, both taken on December 18, 2002, facts were readily apparent that the principal proximate cause of the accident causing injury to the then plaintiff, Randy Powell, was the failure of the then defendant, Katie Linares, to keep a proper lookout for the vehicle driven by Powell. Specifically, Linares was operating her vehicle on northbound Medline Drive, a private street or corporate driveway in Mundelein, Illinois, behind the van being operated by Powell, saw him make a left turn attempting to make a U-turn and stopping in front of the Linares vehicle either perpendicular or at a northwest angle to the northbound roadway, and, rather than apply her brakes or attempt to veer behind the van driven by Powell, veered directly into the van striking it broadside with a strong impact.

> 7. As a result of the aforementioned facts, the defendant, American Service, was on notice, at and prior to the transmission of the above described letter, that its insured failed to see and properly react to what was obvious in front of her and probable operation of her vehicle at excessive speed and that there was a reasonable probability of a finding of at least 50 percent fault against its insured, Linares.
>
> 8. Based on the information known to defendant, American Service, at and prior to the transmission of the above described letter, the defendant, American Service, was aware that there was a worker's compensation lien for worker's compensation benefits paid to and for the benefit of Powell arising from the accident that was the basis of the prior action, in excess of $74,000.00 of which there were medical charges then in excess of $23,000.00, which facts created a reasonable probability that recovery of Powell at trial would be in excess of the $20,000.00 policy limit of the policy issued by American Service to Linares."

¶ 6 Plaintiff alleged that ASI had a reasonable opportunity to settle plaintiff's claim against Linares within the policy limits. He also alleged ASI's failure to settle within the policy limits constituted bad faith because ASI: (1) refused to participate in settlement negotiations or alternatively refused to participate in settlement negotiations in good faith; (2) refused settlement offers made by plaintiff to settle his claim within the policy limits; (3) failed to advise Linares of the settlement offer; and (4) failed to keep the interests of Linares equal to its own. Plaintiff sought a total of $40,449.43 in damages, which was the remainder of the $27,915.15 judgment after the policy limit was subtracted, plus postjudgment interest and costs.

¶ 7 ASI moved to dismiss the second amended complaint, arguing that plaintiff failed to plead sufficient facts to show a reasonable probability that Linares was at least 50% at fault. ASI also asserted plaintiff failed to plead sufficient facts demonstrating a reasonable probability of damages in excess of the policy limits.

¶ 8 The circuit court concluded that plaintiff failed to plead facts showing a reasonable probability of recovery in excess of the policy limits. Noting that this was plaintiff's third attempt to plead, the court stated:

> "A reasonable person certainly could have viewed the facts and concluded that, no, we decided not to tender the policy because on liability we have an excellent chance of winning and would be a case of zero. *** While the facts may or may not have been decided that way by the trier of fact, I don't find they were unreasonable in their assessment of the case at the time."

¶ 9 The circuit court granted ASI's motion to dismiss with prejudice. Plaintiff timely appeals.

¶ 10 ANALYSIS

¶ 11 Plaintiff argues that his second amended complaint adequately alleged facts to establish a claim for bad-faith failure to settle. According to plaintiff, the term "reasonable probability" as contemplated by our supreme court in the key case of *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001), does not require pleaded facts showing "an extremely strong probability of a verdict for the plaintiff." Plaintiff notes that no Illinois authority has defined "reasonable probability" in the context of a bad-faith pleading, but asserts his second amended complaint

contains sufficiently detailed allegations "as to what American Service knew or should have known [as] to the liability of its insured in causing the accident and what its anticipated damages would be."

¶ 12 Standard of Review

¶ 13 The question presented by a section 2-615 motion to dismiss is whether sufficient facts have been pled in the complaint which, if proved, would entitle the plaintiff to relief. *Thornton v. Shah*, 333 Ill. App. 3d 1011, 1020 (2002). All well-pleaded facts in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *Indeck North American Power Fund, L.P. v. Norweb PLC*, 316 Ill. App. 3d 416, 430 (2000). A complaint can be dismissed under section 2-615 only when it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief (*Casualty Insurance Co. v. Hill Mechanical Group*, 323 Ill. App. 3d 1028, 1033 (2001)), and where the circuit court can determine the relative rights of the parties solely from the pleadings (*Thornton*, 333 Ill. App. 3d at 1020). "A plaintiff cannot rely simply upon conclusions of law or fact unsupported by specific factual allegations." *Johnson v. Matrix Financial Services Corp.*, 354 Ill. App. 3d 684, 688 (2004). We review the dismissal of a complaint pursuant to section 2-615 *de novo*. *Haddick*, 198 Ill. 2d at 414.

¶ 14 Illinois Recognizes Insurers Have Good-Faith Duty to Settle

¶ 15 Illinois courts have recognized that insurers have a duty to act in good faith when responding to settlement offers. *Id*. According to our supreme court:

> "The 'duty to settle' arises because the policyholder has relinquished defense of the suit to the insurer. The policyholder depends upon the insurer to conduct the defense properly. In these cases, the policyholder has no contractual remedy because the policy does not specifically define the liability insurer's duty when responding to settlement offers. The duty was imposed to deal with the specific problem of claim settlement abuses by liability insurers where the policyholder has no contractual remedy." *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 526 (1996).

¶ 16 This case involves a third-party claim against the insurer to recover damages in excess of the policy limits following an offer to settle the underlying claim against the policyholder for an amount equal to the policy limits. Under these circumstances, " 'the insurer may have an incentive to decline the settlement offer and proceed to trial. The insurer may believe that it can win a verdict in its favor. In contrast, the policyholder may prefer to settle within the policy limits and avoid the risk of trial. The insurer may ignore the policyholder's interest and decline to settle.' " *Haddick*, 198 Ill. 2d at 415 (quoting *Cramer*, 174 Ill. 2d at 525-26).

¶ 17 Pleading Standard for Bad-Faith Cases in Illinois

¶ 18 In *Haddick*, our supreme court set forth the elements required to establish a bad-faith claim. To sustain a cause of action for bad faith, the plaintiff must allege: (1) the duty to settle arose; (2) the insurer breached the duty; and (3) the breach caused injury to the insured. *Haddick*, 198 Ill. 2d at 416. A plaintiff must allege sufficient facts to demonstrate the existence of the duty to settle in good faith. *Id*. at 417. A sufficient pleading of facts to establish this duty

includes "when a claim has been made against the insured and there is a reasonable probability of recovery in excess of the policy limits and a reasonable probability of a finding of liability against the insured." *Id*. The duty does not arise until a third party demands settlement within policy limits, which occurred here. *Id*.

¶ 19 The bad-faith claim in *Haddick* also arose from an automobile accident. There, James Griffith and Larry Woodley, Jr., were involved in a single-vehicle accident that resulted in Griffith's death. A police report showed that Woodley owned the vehicle and was driving it at the time of the accident. A police officer investigating the accident located Woodley at the hospital. Woodley told the officer that he was driving. After detecting an odor of alcohol on Woodley's breath, the officer issued him a ticket for driving under the influence. Within a week of the accident, Woodley informed the same officer that he did not remember the accident and did not know who had been driving the vehicle.

¶ 20 Woodley had liability coverage through the defendant insurance company of $20,000 per person. The attorney for the decedent's estate notified the defendant that the decedent incurred medical bills totaling $82,544.80 as a result of the accident. After the attorney for the decedent's estate made a demand for settlement, the defendant responded that it would discuss settlement once it received a copy of the police report. Thereafter, the defendant sent correspondence to the attorney acknowledging receipt of the police report, but holding off settlement discussion because an investigation was still pending to ascertain the actual driver of the vehicle.

¶ 21 The decedent's mother filed a wrongful death claim against Woodley. She demanded settlement for policy limits within 14 days of receipt of the demand letter. The defendant responded that the settlement demand was premature due to the continuing investigation of the accident. The plaintiff extended the deadline, but the defendant did not settle by the requested date. One year after the accident, the defendant offered to settle the case for the policy limits, which the plaintiff then refused. The circuit court granted summary judgment in favor of the plaintiff and entered a judgment in the amount of $150,924.80. Woodley then assigned all claims against his insurer to the plaintiff.

¶ 22 The plaintiff filed a bad-faith claim against the defendant, alleging that the defendant failed to settle her claim against Woodley within the policy limits. The circuit court dismissed the plaintiff's complaint pursuant to section 2-615, finding that the defendant had no duty to settle the claim prior to suit being filed and that the plaintiff could not maintain a bad-faith claim once she withdrew her demand for policy limits.

¶ 23 The *Haddick* court found that, at the time the plaintiff demanded the policy limits, the defendant was aware the decedent's medical bills exceeded the $20,000 liability coverage. *Id*. at 417-18. The defendant knew that Woodley owned the vehicle. The defendant also was aware that the police report showed Woodley had informed an emergency room doctor that he had been driving the vehicle at the time of the accident. Even though Woodley later stated he could not remember who was driving the vehicle, the supreme court noted that proof of ownership raises a presumption that the owner of the vehicle was in control of it at the time of the accident. *Id*. at 418. According to the supreme court, because Woodley was unable to recall the accident at the time of the plaintiff's settlement demand, he would have been unable to rebut the presumption.

¶ 24 The *Haddick* court concluded that the facts alleged by the plaintiff demonstrated a reasonable probability of recovery in excess of the policy limits and a reasonable probability of a finding of liability against Woodley. *Id*. The plaintiff sufficiently alleged the existence of the duty to settle in good faith when she made her settlement demand. *Id*.

¶ 25 Pleading a Bad-Faith Claim Following *Haddick*

¶ 26 Although *Haddick* has been consistently followed in a number of cases, none of them have addressed the stringency level of the pleading standard required to survive a section 2-615 motion to dismiss a complaint alleging bad faith by a third party. See, *e.g.*, *SwedishAmerican Hospital Ass'n of Rockford v. Illinois Medical Inter-Insurance Exchange*, 395 Ill. App. 3d 80, 105 (2009) (reversing summary judgment in favor of defendant insurer because genuine issue of material fact remained as to probability of adverse finding of liability for breach of duty to settle); *O'Neill v. Gallant Insurance Co.*, 329 Ill. App. 3d 1166, 1175 (2002) (affirming jury verdict finding insurer acted in bad faith where the odds of a jury rejecting the plaintiff's claim "were astronomical" and defense counsel knew the jury verdict would exceed coverage); *U.S. Fire Insurance Co. v. Zurich Insurance Co.*, 329 Ill. App. 3d 987, 1003 (2002) (in a declaratory judgment action, the excess insurance carrier failed to allege sufficient facts under section 2-615 to establish breach of duty to settle by the primary carrier). Our courts have not further expounded upon what constitutes a sufficient pleading of "a reasonable probability" as it relates to recovery in excess of the policy limits or a finding of liability against the insured in a third-party action. We examine the second amended complaint with this in mind.

¶ 27 Sufficiency of Facts Alleged in Second Amended Complaint

¶ 28 Plaintiff argues he sufficiently alleged a reasonable probability of recovery in excess of the policy limits. He also asserts the second amended complaint sufficiently pleads ultimate facts demonstrating a reasonable probability of liability and the manner in which ASI became aware of this liability.[1] We address these arguments in turn.

¶ 29 Reasonable Probability of Recovery in Excess of Policy Limits

¶ 30 In paragraph 8 of the second amended complaint, plaintiff alleged, "[b]ased on the information known to defendant," ASI "was aware" of a worker's compensation lien and medical bills exceeding the $20,000 policy limits. According to plaintiff, this awareness was enough to establish a reasonable probability that recovery would be in excess of the policy limits.

¶ 31 Problematically, plaintiff alleges ASI "was aware," but does not elaborate *how* or *when* ASI became aware of the potential for damages to exceed the policy limits. In contrast, the facts in *Haddick* show the attorney for the decedent's estate sent the defendant insurer a letter delineating the amount of medical bills before the demand for settlement. In this case, the second amended complaint does not make clear at what point ASI became aware that the

[1]In his opening brief, plaintiff repeatedly argues he also alleged sufficient facts to establish breach of duty to settle in his first amended complaint. We reject plaintiff's attempt to argue the dismissal of the first amended complaint because the circuit court granted plaintiff leave to replead and plaintiff never appealed that dismissal order.

damages could exceed the policy limits and, instead, simply concludes ASI "was aware that there was a worker's compensation lien for worker's compensation benefits paid to and for the benefit of Powell arising from the accident that was the basis of the prior action, in excess of $74,000.00 of which there were medical charges then in excess of $23,000.00."

¶ 32 Despite these deficiencies, we must take all well-pleaded facts as true and all reasonable inferences from those facts are drawn in favor of plaintiff. *Haddick*, 198 Ill. 2d at 414. Interpreting that ASI "was aware" of the potential for damages to exceed policy limits, as we must, we find plaintiff sufficiently pled facts to establish a reasonable probability of recovery in excess of the policy limits.

¶ 33 Reasonable Probability of Liability

¶ 34 Next, plaintiff claims paragraph 6 of his second amended complaint properly alleges a reasonable probability of a finding of liability against ASI. According to plaintiff, "[t]he evidence as to what specifically American Service knew and when it knew it is for discovery and trial, with the finder of fact deciding if the facts known to American Service created a 'reasonable probability' of recovery." Plaintiff argues that the circuit court usurped the role of trier of fact by summarily dismissing the second amended complaint.

¶ 35 A review of plaintiff's second amended complaint, and specifically paragraphs 6 and 7, belies his contention. The allegations at issue are both vague and conclusory at best. Plaintiff pled he made a U-turn in front of Linares' vehicle and that Linares, "rather than apply her brakes or attempt to veer behind the van driven by [plaintiff], veered directly into the van striking it broadside with a strong impact." Plaintiff alleged Linares "failed to see and properly react to what was obvious in front of her."

¶ 36 The "reasonable probability" standard set forth in *Haddick* requires pleading facts that demonstrate liability is "probable," as opposed to merely "possible." *Haddick*, 198 Ill. 2d at 417. In other words, we read *Haddick* as requiring the pleading of facts which show that liability is at least more likely than not, but not necessarily a certainty. ↩ memo p. 6, 11

¶ 37 The facts in *Kavanaugh v. Interstate Fire & Casualty Co.*, 35 Ill. App. 3d 350 (1975), are demonstrative, as that case also involves an automobile accident where liability was less than certain. There, the plaintiff's automobile collided with a truck. At the time of the collision, the plaintiff had personal liability insurance coverage of $10,000 per person with one of the defendants, Royal Indemnity Company (Royal). The plaintiff also had $15,000 in excess coverage with the other defendant, Interstate Fire and Casualty Company (Interstate). The plaintiff's passenger, Carol Sheehan, brought the initial personal injury action in federal court against the plaintiff. A jury returned a liability finding against the plaintiff in the amount of $45,000, which was $20,000 in excess of his combined insurance coverage. The plaintiff thereafter commenced a suit against Royal and Interstate claiming breach of the duty to settle. The plaintiff alleged that both of the defendants failed to offer their policy limits before he was found liable in the Sheehan case. A jury found in favor of the plaintiff and against both Royal and Interstate for $20,000 plus interest, and against Royal alone for $25,000 in punitive damages.

¶ 38 On appeal, the defendants argued the circuit court erred by failing to grant their motion for judgment *n.o.v.* The reviewing court noted that the allegations in the plaintiff's second

amended complaint "were based upon the theory that defendants had a legal duty to offer their policy limits before [the plaintiff] was found liable." *Id.* at 356. The court also noted a well-recognized exception to the general principle when the probability of an adverse finding of liability is great and the amount of probable damages would greatly exceed the coverage. *Id.* The court found that exception did not apply to the facts of the case because "the issue of liability was not clear cut." *Id*. The plaintiff was subject to a low degree of care under the so-called Illinois "Guest Statute" for automobile passengers (Ill. Rev. Stat. 1975, ch. 95½, ¶ 10-201 (now 625 ILCS 5/10-201 (West 2010))), which heightened his probability of success when compared to the trucking codefendants. *Kavanaugh*, 35 Ill. App. 3d at 356. In addition, Sheehan exonerated the plaintiff in a statement, admitting she never questioned his ability to control the vehicle on the night of the accident. The *Kavanaugh* court reversed the circuit court's decision to deny the defendants' motion for judgment *n.o.v.* and remanded with directions to enter judgment *n.o.v.* in favor of the defendants. *Id.* at 357.

¶ 39 Here, section 11-802(a) of the Illinois Vehicle Code (625 ILCS 5/11-802(a) (West 2010)) provides that "[t]he driver of any vehicle shall not turn such vehicle so as to proceed in the opposite direction unless such movement can be made in safety and without interfering with other traffic." Subsection (b) states that "[n]o vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to or near the crest of a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within 500 feet." 625 ILCS 5/11-802(b) (West 2010).

¶ 40 Given the nature of the accident, and plaintiff's admission that he made a (potentially illegal) U-turn in front of Linares' vehicle, we cannot conclude plaintiff sufficiently pled facts demonstrating a reasonable probability of liability against Linares. Plaintiff did not allege he made the U-turn "in safety and without interfering with other traffic." We also do not know from the facts as pled whether plaintiff made the U-turn on a road that had a curve or crest which would have prevented Linares from seeing him prior to impact. Plaintiff simply concludes in his second amended complaint that Linares "failed to see and properly react to what was obvious in front of her." However, the facts as pled do not support what was alleged to be "obvious." "Trial attorneys are not endowed with the gift of prophecy so as to be able to predict the precise outcome of personal injury litigation." *Kavanaugh*, 35 Ill. App. 3d at 357. Furthermore, the mere fact that the insurance company was unsuccessful in the trial of a case does not show that its defense was made in bad faith. *Id*.

¶ 41 We find plaintiff's claim was properly dismissed because of his failure to plead the necessary elements of a bad-faith claim. In particular, the complaint does not plead sufficient facts to establish a reasonable *probability*, as opposed to possibility, of liability in the underlying case.

¶ 42 We also reject plaintiff's attempt to argue a reasonable probability of liability existed because of the jury's comparative liability finding above 50% in the underlying case. The *Haddick* court made clear that the reasonable probability standard applies at the time of the settlement demand because this is when the duty to settle arises. *Haddick*, 198 Ill. 2d at 417.

¶ 43 Finally, we conclude by our *de novo* review of the record that the circuit court did not usurp the trier of fact when it dismissed plaintiff's second amended complaint. Plaintiff simply failed to plead the necessary facts to establish his claim for bad faith after being given three

opportunities to do so.

¶ 44 CONCLUSION

¶ 45 The circuit court properly dismissed plaintiff's second amended complaint pursuant to section 2-615 of the Code of Civil Procedure. Plaintiff's second amended complaint failed to allege sufficient facts establishing a duty to settle the underlying claim.

¶ 46 Affirmed.

Power Dry of Chicago, Inc. v. Bean, 2022 IL App (2d) 210043

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 2d Dist. (the forum's district) · filed 2022-02-28 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 49: passage C002.4
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 49: passage C002.4
- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 49: passage C002.4

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Power Dry of Chicago, Inc. v. Bean, 2022 IL App (2d) 210043

Appellate Court Caption	POWER DRY OF CHICAGO, INC., d/b/a Chicago Water and Fire Restoration, Plaintiff-Appellant, v. MATTHEW BEAN; MAURISSA BEAN; RAYMOND D. BEAN; LUTHERAN MUTUAL FIRE INSURANCE COMPANY; L.J. SHAW & COMPANY; CALIBER HOME LOANS, INC.; and UNKNOWN NECESSARY PARTIES, Defendants-Appellees.
District & No.	Second District No. 2-21-0043
Filed	February 28, 2022
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 20-CH-250; the Hon. James R. Murphy, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Fitzgerald T. Bramwell, of Chicago, for appellant. James J. Ryan, of Jendryk, Hamer & Begley, LLC, of Wheaton, for appellees Matthew Bean and Maurissa Bean. Janella L. Barbrow and Mark T. Schmidt, of Schmidt & Barbrow, P.C., of Wheaton, for appellees Lutheran Mutual Fire Insurance Company and L.J. Shaw & Company.

Simon M. Feng, of Perkins Coie LLP, of Los Angeles, California, for appellee Caliber Home Loans, Inc.

No brief filed for other appellee.

Panel JUSTICE HUTCHINSON delivered the judgment of the court, with opinion.
Justices Birkett and Brennan concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Power Dry of Chicago, Inc., doing business as Chicago Water and Fire Restoration (CWFR), appeals from the trial court's dismissal of counts I through VII of its first amended complaint against defendants, Matthew Bean, Maurissa Bean, Raymond D. Bean, Lutheran Mutual Fire Insurance Company (Lutheran Mutual), L.J. Shaw & Company (LJ Shaw), Caliber Home Loans, Inc. (Caliber), and unknown necessary parties. The trial court granted the dismissal pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2018)) after finding that CWFR was acting as an unlicensed public adjuster in violation of both the Public Adjusters Law (215 ILCS 5/1501 *et seq.* (West 2018)) and the public insurance adjusters and registered firms statute (adjusters and firms statute) (215 ILCS 5/512.51 to 512.64 (West 2018)) of the Illinois Insurance Code, rendering void and invalid its contract assigning it rights to the Lutheran Mutual insurance policy held by the Beans. For the reasons that follow, we affirm the trial court's dismissal.

¶ 2 I. BACKGROUND

¶ 3 On or about March 2, 2020, a fire occurred at the home of defendants Matthew and Maurissa Bean. Maurissa engaged CWFR regarding mitigation and reconstruction services. Maurissa, on behalf of Matthew, executed a "Mitigation & Repair Work Authorization" (the contract) with CWFR. The authorization contains a section titled "Price of Work and Terms of Payment," which states, in pertinent part, as follows:

> "The initial price for the Work will be the Xactimate Invoice calculated using the Xactimate software by [CWFR]. The pricing published by Xactimate is considered a normal and customary guide in the restoration and insurance industry."

The contract also contains a section titled "Insurance Matters and Direct Pay Authorization," which states, in full, as follows:

> "The Xactimate invoice will be submitted by [CWFR] or Customer to the insurer of the Customer. Customer will assign all rights and benefits to its insurance payments for the loss to [CWFR] in order to expedite payments and fulfillment of this Contract."

Following the execution of the contract, CWFR performed mitigation work to the Bean home and completed that work on March 9, 2020. CWFR then secured a verbal commitment from the Beans to perform reconstruction work on the home. CWFR prepared a reconstruction

estimate for the Beans reflecting the services necessary to return the home to its condition before the fire.

¶ 4 Using Xactimate software, CWFR invoiced the Beans $12,764.39 for mitigation services and filed a claim with Lutheran Mutual, Matthew's insurer. LJ Shaw was engaged by Lutheran Mutual to adjust CWFR's claim. Lutheran Mutual and LJ Shaw informed CWFR that no consideration would be given to any information provided by CWFR in evaluation of liability. Additionally, CWFR was informed by Lutheran Mutual and LJ Shaw that it could take any action deemed necessary if displeased with LJ Shaw's adjustment of the claim.

¶ 5 LJ Shaw adjusted the claim to $4389.64. The record presented to this court does not explain how LJ Shaw arrived at this figure. On March 23, 2020, CWFR offered to reduce its invoice to $9139.31, using a revised Xactimate estimate. Ultimately, no agreement was reached, and the Beans decided to look for another company for reconstruction work on their home.

¶ 6 On March 24, 2020, CWFR filed a claim for mechanic's lien against the Bean property. The claim stated that "[CWFR] entered into a contract with *** Matthew Bean **** to perform water mitigation for the *** real property of a value of and for the sum of $12,764.39." Pursuant to an obligation under its insurance policy, Lutheran Mutual issued a payment of $4389.64 to Matthew. Matthew then issued that payment to CWFR.

¶ 7 CWFR filed an eight-count complaint against the Beans, Lutheran Mutual, LJ Shaw, and Caliber Home Loans, Inc. (Caliber).[1] Count I was directed at the Beans and Caliber, seeking foreclosure on the mechanic's lien, pursuant to the Mechanics Lien Act (770 ILCS 60/0.01 *et seq.* (West 2018)), in the amount of $4795.56. That amount represented the revised invoice of $9139.20 minus the $4389.64 payment by Matthew. Count II alleged breach of contract against the Beans and sought damages for $4749.56. Count III asserted a claim for *quantum meruit*, again seeking $4749.56 in damages.

¶ 8 Counts IV and V were directed against Lutheran Mutual. Count IV was for breach of contract and alleged that CWFR's contract with Matthew contained a valid assignment of benefits of his rights to Lutheran Mutual's issued insurance policy, making CWFR a third-party beneficiary to the policy and entitled to $4749.56 in damages. Count V was for bad faith under section 155 of the Insurance Code (215 ILCS 5/155 (West 2018)) and alleged Lutheran Mutual to be

> "vexatious and unreasonable because *** (i) there is no *bona fide* coverage dispute, (ii) Lutheran Mutual and its adjuster would not even speak with CWFR until after CWFR sent a demand letter, (iii) after Lutheran Mutual received CWFR's demand letter, Lutheran Mutual and its adjuster refused to consider any information provided by CWFR, suggesting that it did not process the claim in good faith."

CWFR sought damages in count V pursuant to section 155(1)(a)-(c) of the Insurance Code (215 ILCS 5/155(1)(a)-(c) (West 2018)).

[1]CWFR filed its original complaint on April 12, 2020. Following a disclaimer in interest by Cherry Creek Mortgage, Mortgage Electronic Registrations Systems, Inc. (MERS), was joined in the first amended complaint on August 17, 2020. On September 30, 2020, MERS's motion to substitute Caliber was granted. All allegations raised in CWFR's original complaint are identical to those raised in its first amended complaint.

¶ 9 CWFR directed counts VI and VII against LJ Shaw for tortious interference with prospective business advantage and tortious interference with contract, respectively. CWFR alleged in each count that

> "LJ Shaw purposefully interfered with CWFR's relationship with Mr. and Ms. Bean by ignoring CWFR's communications and leaving the Bean family in such a state of uncertainty that they decided not to have CWFR perform the reconstruction."

Both counts sought $4426, representing CWFR's anticipated profit from reconstruction work on the Bean property.

¶ 10 Regarding count VIII of the complaint,[2] CWFR attached a screenshot of a March 23, 2020, review Maurissa posted to the Better Business Bureau's website, in which she describes her experience and frustration with CWFR as follows:

> "In March of 2020, we had a fire in our home. The rep from CWFR came to our home and scanned all the areas where there was fire damage and said that we would need everything removed and sanitized. We did not receive a quote until the work was done (Deceiving) and he assured us that our insurance would cover all costs and CWFR would deal directly with the insurance company. *** We had contacted the insurance company telling them about CWFR cleaning our home and the adjuster came out as well as CWFR to argue over the estimate *** that was later given after the work was done. I told him that he could deal directly with CWFR, and CWFR has yet to contact the adjuster about the work and coming to an agreement about the work that has been done. I have been in constant contact with CWFR. They misrepresented that insurance would cover any and all work, and he never provided a quote beforehand[.] [H]ad we known that cost and that we may be responsible for thousands of dollars *** we would never have agreed to the amount of work and equipment ***."

CWFR responded to Maurissa's post on the website, but the screenshot attachment cut off the response after only a couple of sentences.

¶ 11 The Beans and Caliber both filed motions to dismiss CWFR's complaint, pursuant to section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2018)) of the Code, while Lutheran Mutual and LJ Shaw filed a motion to dismiss pursuant to sections 2-619(a)(2) and 2-619(a)(9) (735 ILCS 5/2-619(a)(2), (9) (West 2018)).[3] All motions argued that CWFR's contract with Matthew was void and barred under the Insurance Code. All defendants alleged that CWFR, although not licensed as a public adjustor, held itself out to be in the business of claims adjusting and acted in claims adjusting activities with the Beans as defined by both the Public Adjusters Law (215 ILCS 5/1501 *et seq.* (West 2018)) and the adjusters and firms statute (215 ILCS 5/512.51 to 512.64 (West 2018))[4] of the Insurance Code, rendering the contract void

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[2]Count VIII for defamation against Maurissa was not raised in the defendants' section 2-619 motions to dismiss and remains pending as of this appeal.

[3]The Beans' motion to dismiss was titled "Motion To Strike Counts I, II and III Of Plaintiff's Complaint," as those counts were the only three directed at the Beans collectively.

[4]Article XXXI¾ (sections 512.51 through 512.64) of the Insurance Code was repealed by Public Act 102-135 (eff. July 23, 2021). However, the provision relevant to this appeal was effective at all times during the underlying proceedings, making its strictures applicable to this case. Any change should not be applied retroactively because the repeal was a substantive change, not a procedural one. See *Perry v. Department of Financial & Professional Regulation*, 2018 IL 122349, ¶ 43.

and invalid. Without a valid and enforceable contract, defendants argued, counts I to VII were deficient as a matter of law and must be dismissed.

¶ 12 The motion to dismiss filed by the Beans contained a recitation of e-mail communications between Maurissa and CWFR as evidence of CWFR's engagement in adjusting the insurance claim for the Beans. An affidavit from Maurissa authenticating the e-mails was attached to the motion. On March 3, 2020, at 1:19 p.m., Maurissa sent an e-mail inquiry to CWFR's operations assistant, Samantha Drake, which read:

> "Can you please explain the way [CWFR] gets paid from the insurance company and the financial part and the 65% payment down[?] This is so my husband has it in writing for his own information and to better understand coming from you."

Drake responded to Maurissa's e-mail at 1:27 p.m. on March 3, 2020, as follows:

> "We will be using the 3D scans that were taken of your home to write an estimate to restore your home back to pre-loss condition. Once the repair estimate is complete we will send a copy to you via email and submit the estimate directly to Lutheran Mutual. We work with your insurance company to reach an agreed price on the scopes so that when we do move forward with the rebuild, you are only financially responsible for your deductible. After an agreement has been reached with Lutheran Mutual, we can schedule you with one of our Reconstruction Project Managers, who will come out to your home to go over the estimate in detail, discuss all material selections, have you sign the necessary paperwork, and give you an exact timeline for the work as he will be scheduling the crews to come out and perform the repairs. Your project manager will need to collect a 65% deposit based off the agreed upon estimate before any work can begin, however typically at this time you will have already been provided payment by Lutheran Mutual. The remainder of the funds will be collected once the project is complete. If you would like to provide us with a copy of the scope that Lutheran Mutual wrote based off their inspection of your home, we find that this tends to help expedite the agreement process as we are able to pinpoint any major discrepancies and negotiate on your behalf to reconcile ***."

At 1:37 p.m. on March 3, 2020, Maurissa responded to Drake with the following e-mail:

> "If we do not have the 65% to put down then do we just wait for the insurance check to come? The remainder of the funds will be collected once the project is complete, [i]s this an extra charge to us? Saying your quote is [$]12,000 and the 65% is [$]7800.00 would then the balance of the check go to [CWFR]? How does all the clean up services [*sic*] work as far as paying for that or does the clean up go straight to the insurance to be paid out[?]"

At 1:55 p.m. on March 3, 2020, Drake answered Maurissa with the following:

> "If the reconstruction estimate that has been agreed upon between [CWFR] and Lutheran Mutual totals $12,000, you will be issued a check that is equal to that amount, less your deductible. Meaning if your deductible is $1,000, the check would total $11,000. You are correct in that the Project Manager would need to collect a 65% deposit total to $7,800 (based off of the agreed upon $12,000). The remainder of the funds equal to $4,200 (includes your deductible) would then be collected when the repair project is completed, there is no extra charge for this.

If you have not received the check for the reconstruction portion of the work by the time a Project Manager comes out to meet with you, we would collect the 65% when you do receive the funds from Lutheran Mutual, but the work would not be scheduled until the payment is collected.

The mitigation invoice will be finalized within 5-7 business days of the final equipment pick up and submitted to Lutheran Mutual. Any discrepancies will be negotiated by our In House Mitigation Estimator and when an agreement has been reached, payment is typically issued directly to our company as it is for services rendered. If your insurance company plans to issue payment to you, they typically discuss this prior to sending the funds."

At 3:42 p.m. on March 3, 2020, Maurissa e-mailed CWFR accounts receivable manager, Danielle Stricker, with the following question:

"Does the insurance cover the complete rebuild or do we have to pay anything out of pocket besides the deductible? I thought you may know this because your [*sic*] on the accounting side."

On March 4, 2020, at 8:29 a.m., Stricker answered Maurissa as follows:

"Okay so the mitigation side (fire clean up) we bill after *** the work is complete and negotiate with the insurance company to come to a mutual agreement. The reconstruction side (replacing anything that was removed) is sent to insurance prior to the rebuild work beginning. We do this so that we are in agreement with price and scope before the work is completed, leaving only the deductible as the out-of-pocket expense ***."

Maurissa then e-mailed Drake at 2:21 p.m. on March 4, 2020, as follows:

"I spoke with [Matthew] and we are going to move ahead with your services. Do you know what is going to be included in the estimate?"

Drake then e-mailed Maurissa at 2:48 p.m. on March 4, 2020, with the following information:

"Our reconstruction estimates are written to restore you[r] home to pre-loss condition, so anything that was effected [*sic*] by the loss and subsequently demoed during mitigation will be included in our scope to be repaired. A Reconstruction Project Manager will be scheduled to meet you at your home once the rebuild estimate is submitted and then approved by Lutheran Mutual, he will go over all material selections at this time. As we discussed previously, the reconstruction estimate will be completed and sent to both you and Lutheran Mutual by end of day tomorrow, March 5."

On March 9, 2020, at 9:11 a.m., Maurissa forwarded to Drake an e-mail received from LJ Shaw adjuster, Paul VanDerHeyden, that read:

"We have estimated the replacement cost value at $5,882.48 and after application of depreciation of $528.57[.] Your actual cash value loss is $5,353.91 and after application of your $1000 deductible, the settlement check issued will be in the amount of $4,353.91 ***."

At 10:03 a.m. on March 9, 2020, Drake acknowledged receipt of the LJ Shaw e-mail and informed Maurissa that the information would be forwarded to "Estimator Derrick" for review. Derrick "will then be pinpointing any major discrepancies and reaching out to adjuster Paul

[of LJ Shaw] to negotiate and reconcile." At 6:12 p.m. on March 9, 2020, Maurissa e-mailed Derrick and Stricker the following:

> "Do you know how much our mitigation was[?] We were never given a quote prior to your services and have not been told completely that our insurance would cover all the cost. LJ Shaw (adjuster) told us he was not going with [CWFR] quote nor was he willing to work with your company and most likely not answer your phone calls or emails. We just don't want to be in a position that the amount was offered from the insurance company just to cover the mitigation and *** left with not having our house fixed and left with the disarray [w]e are living in. We were also promised by many departments [that] all we will have to pay is our deductible. We feel very left in the dark and confused. We just want to make sure our home will be left in prefire condition as promised not given false information from your company."

Stricker responded on March 10, 2020, at 8:29 a.m. as follows:

> "The mitigation cost is not finalized yet but I can tell you that if this is the answer your carrier is giving you, you might want to ask for a different adjuster or the current adjuster's supervisor. [LJ Shaw] doesn't seem to be handling this claim in good faith. We are estimating work that needs to be completed to get your home back to pre-loss condition and if [LJ Shaw] is that far apart from us, something is wrong. Perhaps ask how much your coverage limits are? If coverage limits are above our amounts, there is no reason that [LJ Shaw] shouldn't be able and willing to work with us to get to a mutual agreement. We will know more once the mitigation amount is finalized and Derrick looks at [LJ Shaw's] estimate. In the meantime, find out the coverage limits for this loss/policy coverage."

Maurissa wrote an e-mail to Stricker on March 10, 2020, at 8:39 a.m. that read as follows:

> "We cannot ask for a different adjuster because [VanDerHeyden] is the president of the company. I have tried to talk with Lutheran Mutual, however they circle me back to LJ Shaw. As far as finding out the coverage limits, isn't that the job of [CWFR]?"

At 8:40 a.m. on March 10, 2020, Stricker responded as follows:

> "The insured would need to get that information from the insurance company. When it comes to super specific policy details, carriers typically won't give a third party that information. We obviously know this a covered loss."

After Maurissa exchanged e-mails with Stricker and an operations manager at CWFR regarding her concerns about insurance coverage versus the costs charged by CWFR, she received the following e-mail from Blake Veldman, production manager with CWFR, at 5:28 p.m. on March 11, 2020:

> "When it comes to insurance claims, the policy holder is mostly responsible for 2 things: quick action, and their deductible. Meaning, once an occurrence has happened that causes significant damage to the home, the policy holder must quickly stop the source of the damage, mitigate it from spreading any further, and then cover a portion of the costs. As far as my review of your file has shown, you've lived up to your requirements thus far.
>
> That leaves your insurance company responsible for indemnifying you of any 'fair and reasonable' costs associated with the loss, minus the above-mentioned deductible, in order to get the home back to pre-loss condition. I put quotes on that because there

> are occasions where a contractor and an insurance company may have different opinions on fair and reasonable. That is generally where I, or someone on my team, come in. It's not all that uncommon for 2 people to view the same loss differently. In these instances, it is standard for the adjuster to review a contractors invoice and mark a few things that he/she may consider unnecessary or 'overkill' as they say. We would then either justify our decision and supply supporting documentation, from our continuing education on industry norms, or forfeit/alter those charges to come to an agreement with the adjuster.
>
> I have personally worked with LJ Shaw on numerous claims, and I cannot think of an instance where we couldn't come to an agreement that appeased all parties involved. I have confidence that your file will be no different. Our office will work with the adjuster on getting our representative onsite at the same time to make this happen ***."

¶ 13 CWFR filed separate responses to the Beans and to Lutheran Mutual and LJ Shaw. In its response to the Beans, CWFR argued that it was not engaged in public adjusting services but only the mitigation and reconstruction services it contracted with Maurissa to perform. CWFR's response to Lutheran Mutual and LJ Shaw argued that the assignment of rights in the contract was permitted under Illinois law. Further, CWFR argued that it was acting as a beneficiary under the Beans' insurance policy with Lutheran Mutual and not as a public adjuster.

¶ 14 The Beans filed a reply in support of their motion to dismiss wherein they argued that CWFR's contract was void *ab initio* under the adjusters and firms statute (215 ILCS 5/512.53(c) (West 2018)) because CWFR did not possess a public adjuster's license. The reply further argued that CWFR's actions were within the purview of adjusting an insurance claim because it was representing the Beans with Lutheran Mutual for compensation (the assignment of insurance proceeds under the Beans' policy) as contemplated by the adjusters and firms statute. The Beans attached CWFR's Xactimate estimate, which listed the "Claim Rep" as "General Executive Adjuster." The "Estimator" listed on the Xactimate estimate was "Vinnie Guaderrama." In the attached "Mitigation Cost Estimate," CWFR stated that it "engages in the mitigation and repair process of damaged structures, both in providing insurance adjustment estimates and in executing repair services requested by Property Owners."

¶ 15 Lutheran Mutual and LJ Shaw filed a supplemental memorandum in support of their motion to dismiss, further arguing that CWFR was not merely "trading for its own account" but rather acting as a public adjuster. Additional documents were attached to the memorandum, including a March 18, 2020, e-mail from Guaderrama to Maurissa. The signature line to Guaderrama's e-mail included "Illinois Public Adjuster License No. 018068229." CWFR's admission to Lutheran Mutual and LJ Shaw's request to admit "[t]hat [CWFR] did not have a license to act as a public adjuster within the State of Illinois during the period beginning January 1, 2020, and ending June 30, 2020" was also attached to the memorandum.

¶ 16 CWFR subsequently filed a surreply to Lutheran Mutual and LJ Shaw's motion to dismiss, contending that new arguments had been raised that CWFR could not have anticipated. The surreply argued that Maurissa executed a valid assignment to CWFR of the Beans' right to insurance benefits and that it was not acting as a public adjuster.

¶ 17 Lutheran Mutual and LJ Shaw supplemented the materials supporting their motion to dismiss with CWFR's full response to Maurissa's March 23, 2020, Better Business Bureau review. CWFR responded to the review on March 27, 2020, as follows:

"Mitigation is an emergency service. As such, it is industry standard for a contractor to first complete (quickly) the necessary work and to send an invoice afterwards. (To understand the nature of our work, an analogy may be helpful. When, for example, a person goes to the emergency room, the treating doctors perform all necessary emergency medical services and then bill the patient's insurance afterward. This is not to say that we perform services as critical as emergency medical services; rather, it is to demonstrate the nature of the billing.) Our invoices are created by a highly trained employee with certifications in the industry and many years of experience. Moreover, pricing is calculated using industry standard Xactimate software. You were made aware of how we priced our service before we began our work. Our Project Managers are trained to identify whether losses are covered by insurance policies. Your loss was a 'covered loss.' That your insurance carrier failed to pay for your loss according to the policy, or to provide funds appropriately, is not something within our control. However, as I believe we have demonstrated, we advocated for you to receive the coverage you paid for. Moreover, we do, in fact, work directly (and successfully) with many insurance companies. *** As to us not being in contact with your insurance, that is completely inaccurate. Once we sent our invoice to them and you, you told us that your adjuster had told you he 'did not want to work with us and would not be taking our calls.' As a policy holder, you have the right to choose your own vendor. If an insurance adjuster refuses to work with your chosen contractor to indemnify you, that is highly problematic. After your adjuster refused to work with us, we had our attorney send your adjuster and your insurance carrier a demand letter. (This is a great example of how we were advocating for you.) *** It is never our intention to mislead anyone and we do not believe that we have misled anyone in this case. We do not believe we mispresented 'that insurance would cover any and all work.' Rather, all we can do is determine if your loss is covered or not. In this case we correctly determined that your loss was a 'covered loss.' If your insurance company failed to indemnify you according to your policy, THEY are the ones with whom you should take issue. *** The real issue you are facing is that your insurance carrier [is] not fulfilling its obligations under your policy for which you pay your insurance premiums."

¶ 18 Following oral argument, the trial court entered an order on January 6, 2021, stating:

> [T]he Section 2-619 Motions of Lutheran Mutual, L.J. Shaw, of Matthew and Maurissa, and of Caliber be and are granted, and this Honorable Court grants the relief sought by those motions, and dismisses the claims, complaints, and causes of actions identified in Counts I through VII, inclusive, of the Plaintiff's First Amended Complaint with prejudice."

The trial court found that there was no just reason for delay of CWFR's appeal. CWFR filed this timely appeal.

¶ 19 II. ANALYSIS

¶ 20 This appeal boils down to one essential question for this court to answer: do the pleadings and supporting documents illustrate that CWFR was engaged in public adjusting without a license to render its contract with the Beans void *ab initio* under the strictures of the Public Adjusters Law and the adjusters and firms statute of the Insurance Code? We will address this

question and the answer's effect on each claim in CWFR's amended complaint *vis-à-vis* each defendant in turn.

¶ 21 Our standard of review of a motion to dismiss under section 2-619 of the Code is *de novo. Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569 (2002). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Id.* at 569-70.

¶ 22 A section 2-619 proceeding permits a dismissal after the trial court considers issues of law or easily proved issues of fact. *Id.* at 570. Section 2-619(a)(9), as asserted by defendants in the present case, allows dismissal when "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2018). The term "affirmative matter" as used in section 2-619(a)(9) has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Krilich*, 334 Ill. App. 3d at 570.

¶ 23 In ruling on a motion to dismiss under section 2-619(a)(9), the trial court may consider pleadings, depositions, and affidavits supporting a defendant's assertion of an affirmative matter, if such a matter is not apparent on the face of the complaint. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). The burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is " 'unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Id.* (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993)). The plaintiff may establish this by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2018). "If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed." *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶ 24 The question on appeal is " 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " (Internal quotation marks omitted.) *Krilich*, 334 Ill. App. 3d at 570 (quoting *Zedella v. Gibson*, 165 Ill. 2d 181, 185-86 (1995)).

¶ 25 CWFR argues that, once Maurissa assigned to it her rights and benefits in the Beans' Lutheran Mutual insurance policy, it was acting not as a public adjuster within the meaning of the Insurance Code when it negotiated payment for mitigation work on the Beans' home but as a policyholder attempting to assert its rights after proper assignment under the policy.

¶ 26 Within its brief presented to this court, and articulated more explicitly during appellate oral argument, CWFR avers that it was attempting to obtain payment for its own account for mitigation services already rendered and only discussing the scope of reconstruction services it was under contract to perform for the Beans. Therefore, CWFR argues, its conduct does not meet the statutory definition of "public adjuster."

¶ 27 Before we can discuss whether CWFR was acting as a public adjuster, we must clarify that its contract with Matthew was not separated into two contracts: one for mitigation and another for reconstruction. Rather, the contract was a "Mitigation & Repair Work Authorization," and the "Scope of Work" articulated in the contract reads as follows:

> "Each of Customer and [CWFR] hereby agree to the terms and conditions of this *Mitigation and Repair Work Authorization* ***, as further described will document damages, perform 3D scanning, obtain moisture readings, remove affected materials, disinfect, install and remove equipment and repair affected areas *** and such services shall include without limitation, *mitigation and repair services* set forth in the Xactimate invoice created by [CWFR] *** plus any other agreed upon material or services by the Customer and [CWFR] as set forth in any change order *** or other document, and all such contracts are hereby incorporated into this Contract ***. (Emphases added.)

In its amended complaint to foreclose the mechanics lien, as well as in its brief to this court, CWFR states that it

> "provides mitigation and reconstruction services to customers who have experienced damage following a fire at their property. Mitigation services are emergency services designed to prevent further damage following a loss. In the case of a fire loss, mitigation services include applying odor counteractants, cleaning and removing (as appropriate) affected surfaces, HEPA vacuuming, and running hydroxyl generators and air scrubbers. *Reconstruction work, in the case of* a *fire loss, involves repairing the damage* caused by the fire and returning the property to its pre-loss condition." (Emphasis added.)

¶ 28 Traditional contract interpretation principles in Illinois require that

> " 'an agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)).

This approach is sometimes referred to as the "four corners" rule. *Id.* In applying this rule, a court initially looks to the language of a contract alone. *Id.* If the language of the contract is facially unambiguous, then the contract is interpreted by the court as a matter of law, without the use of parol evidence. *Id.* Parol evidence may be used only to aid the court to resolve an ambiguity when the language of the contract is susceptible to more than one meaning. *Id.* at 462-63.

¶ 29 We can find no ambiguity in the language of the contract between CWFR and Matthew. Indeed, CWFR does not argue that there is any such ambiguity. Instead, CWFR argues that the plain language of the contract describing the scope of work does not concern public adjusting. Further, during oral argument, CWFR asked this court to interpret its actions under the contract as strictly an attempt to collect for the mitigation work that it had already completed. Our supreme court has stated:

> " 'When parties sign a memorandum expressing all the terms essential to a complete agreement they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing.' " *Id.* at 464 (quoting *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 106 (1921)).

We do not view the contract as divisible agreements for mitigation and reconstruction. We will interpret it as a unified agreement, applying the "four corners" rule, and not in the separate, piecemeal fashion CWFR prefers.

¶ 30 The Insurance Code contains two provisions relevant to this issue in the present appeal, the Public Adjusters Law (215 ILCS 5/1501 *et seq.* (West 2018)) and the adjusters and firms statute (215 ILCS 5/512.51 (West 2018)). Section 1510 of the Public Adjusters Law defines "Public Adjuster" as

> "any person who, for compensation or any other thing of value on behalf of the insured:
>
> (i) acts or aids, solely in relation to first party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured in adjusting a claim for loss or damage covered by an insurance contract;
>
> (ii) advertises for employment as a public adjuster of insurance claims or solicits business or represents himself or herself to the public as a public adjuster of first party insurance claims for losses or damages arising out of policies of insurance that insure real or personal property; or
>
> (iii) directly or indirectly solicits business, investigates or adjusts losses, or advises an insured about first party claims for losses or damages arising out of policies of insurance that insure real or personal property for another person engaged in the business of adjusting losses or damages covered by an insurance policy for the insured." 215 ILCS 5/1510 (West 2018).

Similarly, section 512.52(a) of the adjusters and firms statute defines adjusting insurance claims as

> "representing an insured with an insurer for compensation, and while representing that insured either negotiating values, damages, or depreciation, or applying the loss circumstances to insurance policy provisions." 215 ILCS 5/512.52(a) (West 2018).

Section 1515(a) of the Public Adjusters Law states that

> "[a] person shall not act, advertise, solicit, or hold himself out as a public adjuster or to be in the business of adjusting insurance claims in this State, nor attempt to obtain a contract for public adjusting services, unless the person is licensed as a public adjuster in accordance with this Article." 215 ILCS 5/1515(a) (West 2018).

Section 512.53(a) of the adjusters and firms statute provides that

> "[n]o person may engage in the business of adjusting insurance claims, nor advertise, solicit or hold himself out to be in the business of adjusting insurance claims, solicit or hold himself out to be a Public Insurance Adjuster, nor attempt to obtain a contract for Public Adjusting services, unless licensed or registered in accordance with the provisions of this Article." 215 ILCS 5/512.53(a) (West 2018).

Section 1605 of the Public Adjusters Law states that

> "[a]ny person who acts as or holds himself out to be a public adjuster without holding a valid and current license to do so is hereby declared to be inimical to the public welfare and to constitute a public nuisance." 215 ILCS 5/1605 (West 2018).

Section 1610 of the Public Adjusters Law provides that

"[i]n addition to any other penalty set forth in this Article, any person violating Section 1605 of this Code shall be guilty of a Class A misdemeanor." 215 ILCS 5/1610 (West 2018).

Section 512.53(b) of the adjusters and firms statute provides that

"[i]n addition to any other penalty set forth in this Article, any person violating paragraph (a) of this Section shall be guilty of a Class A misdemeanor." 215 ILCS 5/512.53(b) (West 2018).

Section 512.53(c) of the adjusters and firms statute provides that

"[a]ll contracts entered into by any person violating subsection (a) of this Section are void and invalid." 215 ILCS 5/512.53(c) (West 2018).

¶ 31 Before further examining CWFR's actions under the language of the Insurance Code, it is important to reiterate here that the e-mails attached to the Beans' motion to dismiss pursuant to section 2-619(a)(9) of the Code were authenticated by an affidavit from Maurissa in accordance with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). There is nothing in the record to indicate that CWFR challenged or objected to the affidavit in any way. CWFR admitted in an amended response to a request to admit that the e-mails were "true, correct, and genuine copies of e-mail [*sic*] sent by CWFR to Maurissa." In the context of ruling on a motion to dismiss under section 2-619, when supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the facts stated therein are deemed admitted. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). As such, Maurissa's affidavit authenticating the e-mails exchanged between herself and CWFR must be taken as true.

¶ 32 We hold that the record presented shows that CWFR was acting as a public adjuster as defined in both section 1510 of the Public Adjusters Law and section 512.52(a) of the adjusters and firms statute. See *supra* ¶ 27. Regarding Maurissa's question as to how CWFR is paid by Lutheran Mutual, Drake answered via the e-mail from March 3, 2020, at 1:27 p.m., that, in pertinent part

"[o]nce the repair estimate is complete we will send a copy to you via e-mail and submit the estimate directly to Lutheran Mutual. *We work with your insurance company to reach an agreed price on the scopes so that when we do move forward with the rebuild, you are only financially responsible for your deductible*." (Emphasis added.)

Drake, in that same e-mail, told Maurissa, in pertinent part:

"If you would like to provide us with a copy of the scope that Lutheran Mutual wrote based off their inspection of your home, we find that this tends to help expedite the agreement process as we are able to pinpoint any major discrepancies and *negotiate on your behalf to reconcile*." (Emphasis added.)

When Maurissa asked CWFR's Stricker on March 3, 2020, at 3:42 p.m. if the Beans would "have to pay anything out of pocket besides the deductible," Stricker responded on March 4, 2020, at 8:29 a.m. as follows:

"Okay so the mitigation side (fire clean up) *we bill after *** the work is complete and negotiate with the insurance company to come to a mutual agreement.* The reconstruction side (replacing anything that was removed) is sent to insurance prior to the rebuild work beginning. *We do this so that we are in agreement with price and*

scope before the work is completed, leaving only the deductible as the out-of-pocket expense." (Emphases added.)

In addressing Maurissa's concerns about insurance coverage versus the costs charged by CWFR, she received the following from Veldman, production manager with CWFR, at 5:28 p.m. on March 11, 2020. Pertinent here:

"*That leaves your insurance company responsible for indemnifying you of any 'fair and reasonable' costs associated with the loss, minus the above-mentioned deductible*, in order to get the home back to pre-loss condition. I put quotes on that because there are occasions where a contractor and an insurance company may have different opinions on fair and reasonable. That is generally where I, or someone on my team, come in. It's not all that uncommon for 2 people to view the same loss differently. In these instances, it is standard for the adjuster to review a contractors invoice and mark a few things that he/she may consider unnecessary or 'overkill' as they say. *We would then either justify our decision and supply supporting documentation*, from our continuing education on industry norms, or *forfeit/alter those charges to come to an agreement with the adjuster*." (Emphases added.)

The e-mails above confirm that CWFR was acting in relation to a first party insurance claim on behalf of the Beans, as opposed to a policyholder attempting to assert its own rights under the policy. Such acts are defined as those of a "public adjuster" in section 1510 of the Public Adjusters Law. See 215 ILCS 5/1510 (West 2018). Additionally, the record and CWFR's own pleadings show that it was engaged in these actions in exchange for the assignment of the Beans' rights under the Lutheran Mutual policy. In other words, its acts as a public adjuster were done "for compensation or any other thing of value on behalf of the insured." 215 ILCS 5/1510 (West 2018).

¶ 33 In addition to the e-mails referenced above (*supra* ¶¶ 31-32), CWFR negotiated values and damages on behalf of the Beans. In her March 3, 2020, 1:55 p.m. e-mail to Maurissa answering her concerns as to how CWFR's mitigation services would be paid for, Drake responded, in pertinent part:

"*The mitigation invoice will be finalized within 5-7 business days of the final equipment pick up and submitted to Lutheran Mutual. Any discrepancies will be negotiated by our In House Mitigation Estimator* and when an agreement has been reached, payment is typically issued directly to our company as it is for services rendered." (Emphasis added.)

After acknowledging to Maurissa CWFR's receipt of a forwarded e-mail from LJ Shaw, Drake wrote to her on March 9, 2020, at 10:03 a.m. that "Estimator Derrick" would review and

"*will then be pinpointing any major discrepancies and reaching out to adjuster Paul* [(of LJ Shaw)] *to negotiate and reconcile*." (Emphasis added.)

Stricker responded on March 11, 2020, at 4:41 p.m. to Maurissa's concerns about paying over and above the Beans' deductible with:

"*There is coverage for the loss, we just need to get to a mutual agreement with your carrier as what that amount is*." (Emphasis added.)

Returning to Veldman's March 11, 2020, e-mail to Maurissa at 5:28 p.m., he attempted to alleviate her concerns regarding the discrepancy between CWFR's mitigation invoice and LJ Shaw's assessment of the claim with:

> "I have personally worked with LJ Shaw on numerous claims, and I cannot think of an instance where we couldn't come to an agreement that appeased all parties involved. I have confidence that your file will be no different. *Our office will work with the adjuster on getting our representative onsite at the same time to make this happen*." (Emphasis added.)

CWFR's own words in these e-mail exchanges depict what section 512.52(a) of the adjusters and firms statute defines as adjusting insurance claims. CWFR explicitly and continually reiterates that it was representing the Beans with an insurer for compensation (see *supra* ¶ 30) and, while engaged in the representation, negotiating values and damages. See 215 ILCS 5/512.52(a) (West 2018).

¶ 34 Further illustrating CWFR's actions as a public adjuster within the definition in section 512.52(a) of the adjusters and firms statute, Stricker responded to Maurissa's concern regarding paying over and above the Beans' deductible with:

> "The mitigation cost is not finalized yet but *I can tell you that if this is the answer your carrier is giving you, you might want to ask for a different adjuster or the current adjuster's supervisor. [LJ Shaw] doesn't seem to be handling this claim in good faith*. We are estimating work that needs to be completed to get your home back to pre-loss condition and *if [LJ Shaw] is that far apart from us, something is wrong. Perhaps ask how much your coverage limits are? If coverage limits are above our amounts, there is no reason that [LJ Shaw] shouldn't be able and willing to work with us to get to a mutual agreement*. We will know more once the mitigation amount is finalized and Derrick looks at [LJ Shaw's] estimate. *In the meantime, find out the coverage limits for this loss/policy coverage*." (Emphases added.)

After Maurissa asked why CWFR could not assess the Beans' insurance coverage limits, Stricker responded at 8:40 a.m. on March 10, 2020, with:

> "When it comes to super specific policy details, carriers typically won't give a third party that information. *We obviously know this a covered loss*." (Emphasis added.)

Again, CWFR is explicitly acting as a public adjuster per section 512.52(a) of the adjusters and firms statute by "applying the loss circumstances to insurance policy provisions." 215 ILCS 5/512.52(a) (West 2018). In addition to all the e-mail exchanges articulated above, CWFR's Xactimate estimate listed "Vinnie Guaderrama" as the "Claim Rep" and "General Executive Adjuster." Guaderrama sent Maurissa an e-mail with the signature line claiming him to be in possession of "Illinois Public Adjuster License No. 018068229."

¶ 35 There is no question that CWFR was acting as a public adjuster within the definitions in the relevant parts of the Insurance Code. We now must examine the effect of CWFR's actions as a public adjuster on the contract with the Beans, as well as the assignment of rights to the Beans' insurance policy.

¶ 36 CWFR admitted in the underlying proceedings that it did not possess a valid Illinois public adjusters license at all times relevant to this matter. That fact combined with its actions described above within the definition of a public adjuster under the relevant parts of the Insurance Code would place CWFR in violation of section 1515(a) of the Public Adjusters Law as well as section 512.53(a) of the adjusters and firms statute. See 215 ILCS 5/1515(a) (West 2018); see also 215 ILCS 5/512.53(a) (West 2018). Further, violation of these sections

of the Insurance Code renders its contract with Matthew "void and invalid." See 215 ILCS 5/512.53(c) (West 2018).

¶ 37 " 'In Illinois, when a statute declares that it shall be unlawful to perform an act and imposes a penalty for its violation, contracts for the performance of an act are void and incapable of enforcement.' " *Aste v. Metropolitan Life Insurance Co.*, 312 Ill. App. 3d 972, 980 (2000) (quoting *Broverman v. City of Taylorville*, 64 Ill. App. 3d 522, 526 (1978)).

> " 'As a general rule courts will not enforce a contract involving a party who does not have a license called for by legislation that expressly prohibits the carrying on of the particular activity without a license where the legislation was enacted for the protection of the public, not as a revenue measure.' " *Id.* (quoting *Ransburg v. Haase*, 224 Ill. App. 3d 681, 684-85 (1992)).

¶ 38 In *Aste*, the plaintiff-executor sued the defendant-securities salesperson (Williams), alleging breach of fiduciary duty, constructive fraud, and negligence related to financial dealings with the decedent. *Id.* at 974. The plaintiff's complaint averred that Williams contacted the decedent for the purpose of selling investment products offered by the defendants Metropolitan Life Insurance Company and MetLife Securities (MetLife). *Id.* Williams could not assist the decedent with a transfer of assets to MetLife from another company without the participation of a registered securities salesperson (Dooley) from MetLife, as he did not possess such a securities license. *Id.*

¶ 39 Williams contacted the decedent to solicit her use of MetLife's estate planning services. *Id.* at 975. Williams prepared an estate analysis report for the decedent, and Dooley executed a MetLife "customer profile" form that stated her investment and tax objectives. *Id.* Dooley was not registered as a securities salesperson at the time the "customer profile" was executed. *Id.* After Dooley transferred $212,000 from the decedent's Merrill Lynch federal securities trust to various accounts at MetLife, Williams received a loan from the decedent to open a tavern. *Id.* The decedent gave Williams a $70,000 loan to start the business, followed by three additional checks for $55,000, $55,000, and 27,000. *Id.* The plaintiff's suit was based on these transactions. However, the trial court granted Metropolitan Life Insurance Company and MetLife's motion to compel arbitration based on an arbitration clause contained in the "customer profile" executed by the decedent and MetLife. *Id.*

¶ 40 On appeal, the *Aste* court found that the "customer profile" was executed by Dooley when he was not registered to sell securities under the Illinois Securities Law of 1953 (Securities Law) (815 ILCS 5/1 *et seq.* (West 1992)). The court reasoned that the legislative intent of the Securities Law was the " 'protection of the public from unscrupulous stock promoters' " and " '[r]egistration with *** the Secretary of State is the primary safeguard.' " *Aste*, 312 Ill. App. 3d at 976 (quoting *Martin v. Orvis Brothers & Co.*, 25 Ill. App. 3d 238, 244-45 (1974)). The law also contained a provision wherein it was a violation for a person to " 'act as a *** salesperson *** unless registered as such.' " *Id.* at 977 (quoting 815 ILCS 5/12(C) (West 1992)). Violation of that provision was characterized by the law as " 'a Class A misdemeanor.' " *Id.* (quoting 815 ILCS 5/14(A) (West 1992)). In reversing the trial court's order compelling arbitration, the *Aste* court found that the "customer profile" was not a valid contract and declared it void because Dooley's lack of registration as a securities salesperson was a violation of the Securities Law and held:

> "[T]he customer profile which contains the arbitration agreement is an integral part of the solicitation effort of the salesperson which the Securities Law seeks to regulate

through its registration requirements. Thus, to the extent that the salesperson who procured the customer profile was not registered (or lacked a license) the product of his solicitation, including the customer profile which he obtained, cannot be recognized." *Id.* at 982.

¶ 41 Returning to the present case and examining the statutory language as recited above (*supra* ¶ 30), both section 1515(a) of the Public Adjusters Law and section 512.53(a) of the adjusters and firms statute forbid engaging in the business of adjusting or holding oneself out to be in the business of adjusting insurance claims without a valid license. See 215 ILCS 5/1515(a) (West 2018); see also 215 ILCS 5/512.53(a) (West 2018). Based on our foregoing analysis, we conclude that CWFR was in violation of both statutes.

¶ 42 CWFR's contract with Matthew is not a valid contract for the same reasons articulated in *Aste*. Both statutes at issue here express a public policy requiring any person engaged in adjusting public insurance claims to have the proper license in order to protect the public. Indeed, both statutes contain provisions making their violation a Class A misdemeanor. 215 ILCS 5/1610 (West 2018); 215 ILCS 5/512.53(b) (West 2018). The very language in the Public Adjusters Law declaring a violation of section 1515(a) "to be inimical to the public welfare and to constitute a public nuisance" (215 ILCS 5/1605 (West 2018)) indicates such a legislative intent. Further, the plain language of section 512.53(c) of the adjusters and firms statute renders contracts entered by a person in violation of the law "void and invalid." 215 ILCS 5/512.53(c) (West 2018). Therefore, we hold that CWFR's contract with Matthew, and the resulting assignment of rights to the Lutheran Mutual policy, to be void, invalid, and unenforceable.

¶ 43 We now move on to our analysis of the effect the invalid contract and assignment has on CWFR's claims in counts I to VII of its amended complaint.

¶ 44 Count I of CWFR's complaint, directed at the Beans and Caliber, sought foreclosure on the mechanic's lien pursuant to the Mechanics Lien Act (770 ILCS 60/0.01 *et seq.* (West 2018)). The Mechanics Lien Act assumes a valid contract exists between the parties. See 770 ILCS 60/11(a) (West 2018). Therefore, the legal capacity to foreclose a mechanic's lien depends upon the validity of the lien. *G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.*, 355 Ill. App. 3d 428, 433 (2005) (citing *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill. 2d 51 (1964)). The lien, in turn, " 'must be based upon a valid contract, and in its absence the lien is unenforceable.' " *Id.* (quoting *Paddock*, 32 Ill. 2d at 53).

¶ 45 Without a valid contract, the CWFR's mechanic's lien is unenforceable. As such, the trial court's dismissal of count I of the amended complaint pursuant to section 2-619(a)(9) of the Code was not in error.

¶ 46 Count II alleged breach of contract against the Beans. Again, having found that the contract between CWFR and the Beans was void and invalid, a claim for breach of that void and invalid contract must also fail.

¶ 47 Count III asserted a claim of *quantum meruit* against the Beans. However, CWFR's engagement as an unlicensed public adjuster is "inimical to the public welfare and *** a public nuisance." 215 ILCS 5/1605 (West 2018). The invalidity of a contract precludes obtaining relief on a *quantum meruit* theory when the invalidity was due to a violation of public policy. See *First National Bank of Springfield v. Malpractice Research, Inc.*, 179 Ill. 2d 353, 366 (1997). As CWFR's contract with Matthew is void per the relevant sections of the Insurance Code for, amongst other things, being against public policy, its *quantum meruit* claim is of no merit.

¶ 48 Count IV, directed against Lutheran Mutual, also fails. Because there was no valid assignment of benefits under the policy from Matthew to CWFR, CWFR cannot maintain a breach of contract action against Lutheran Mutual. The dismissal of count IV was not error.

¶ 49 Similarly, without a valid assignment of benefits under the policy, the asserted claim in count V for bad faith under section 155(1)(a)-(c) of the Insurance Code against Lutheran Mutual was also properly dismissed. Section 155(1) of the Insurance Code provides: ↩ memo p. 3, 9, 13

> "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;
>
> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155(1)(a)-(c) (West 2018).

The remedy embodied in section 155 of the Insurance Code extends only to the party insured and policy assignees. *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458, 466 (1990). The remedy in section 155 of the Insurance Code does not extend to third parties. *Id.* Again, without a valid assignment of benefits under the policy, CWFR has no claim under section 155 of the Insurance Code. There was no error in dismissing count V of the complaint.

¶ 50 We now come to count VI, against LJ Shaw for tortious interference with prospective business advantage. To prevail on such a claim, a plaintiff must prove (1) its reasonable expectation of entering into a valid business relationship, (2) the defendant's knowledge of the plaintiff's expectancy, (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship, and (4) damages to the plaintiff resulting from such interference. *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 511 (1991). Here, CWFR cannot overcome the first element to maintain this cause of action.

¶ 51 It is axiomatic that CWFR could not have a reasonable expectation of entering a valid business relationship based on a void and invalid contract when the contract's invalidity renders it "inimical to the public welfare" (215 ILCS 5/1605 (West 2018)) and CWFR is potentially criminally responsible for engaging in unlicensed public adjusting. Count VI of the amended complaint was properly dismissed by the trial court.

¶ 52 Count VII asserted a claim of tortious interference with contract against LJ Shaw. The elements of such a claim are (1) the existence of a valid and enforceable contract between the plaintiff and another, (2) the defendant's awareness of this contractual relation, (3) the defendant's intentional and unjustified inducement of a breach of the contract, (4) a subsequent breach by the other, caused by the defendant's wrongful conduct, and (5) damages. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 154-55 (1989). It is once again the first element of the claim that CWFR cannot overcome. As we have discussed to great

length, no valid and enforceable contract existed between CWFR and any other defendant. Count VII was properly dismissed.

¶ 53 Before summarizing our holding, we must address CWFR's argument that it should have been permitted to depose Maurissa for the purpose of eliciting her understanding that CWFR was not serving as her public adjuster. Attached to CWFR's response to defendants' motions to dismiss was a declaration of Trevor Madera, operations manager for CWFR, wherein he avers:

> "Were CWFR to depose [Maurissa], it suspects she would confirm that CWFR personnel never provided—or attempted to provide—public adjusting services to her. CWFR further suspects [Maurissa] would acknowledge that she never heard or saw CWFR personnel negotiate, attempt to negotiate, or promise to negotiate with Lutheran Mutual or LJ Shaw for any account other than CWFR's own account."

CWFR claims here that it was reversible error for the trial court not to permit CWFR to procure Maurissa's testimony through deposition before ultimately dismissing counts I through VII of its amended complaint. We disagree.

¶ 54 Rule 191 requires that affidavits must be made on personal knowledge; set forth with particularity the facts upon which the claim, counterclaim, or defense is based; and shall not consist of conclusions but of facts admissible in evidence. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013). "[W]here the averments made in a plaintiff's affidavit are premised upon information and belief, they are insufficient as against positive averments of facts made in an opposing defendant's affidavit." *Luciano v. Waubonsee Community College*, 245 Ill. App. 3d 1077, 1084 (1993).

¶ 55 CWFR established the validity of the e-mails in its amended response to a request to admit. It admitted that the e-mails were "true, correct, and genuine copies of e-mail [*sic*] sent by CWFR to Maurissa." Maurissa's unchallenged affidavit also established the validity of the e-mails. Madera's declaration does not dispute the validity of the e-mails but asserts that CWFR "suspects" Maurissa would testify that she did not believe it to be her public adjuster. Madera's declaration of his suspicions as to what Maurissa would testify to is insufficient to contradict the established validity of the e-mails and Maurissa's affidavit. In any event, the record is devoid of the trial court's refusal to permit the deposition of Maurissa. It is further devoid of any notice or motion from CWFR seeking to take her deposition.

¶ 56 To summarize, defendants established that CWFR was engaged in unlicensed public adjusting through the submitted e-mails and unchallenged affidavit of Maurissa, raising an affirmative matter under section 2-619(a)(9) of the Code to negate the claims alleged in counts I through VII of CWFR's amended complaint. In response, CWFR failed to establish that the affirmative matter required the resolution of any issue of material fact. The trial court's dismissal of counts I through VII of CWFR's amended complaint was not in error.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the judgment of the circuit court of Kane County dismissing counts I through VII of CWFR's amended complaint pursuant to section 2-619(a)(9) of the Code.

¶ 59 Affirmed.

Pratt v. Andrews, 164 Ill. App. 3d 606 (1st Dist. 1987)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 1987-11-05 · Reporter opinion
Published opinion

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- memo p. 7 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C101.4
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- memo p. 10 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C101.4
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CHARLES E. PRATT, Plaintiff-Appellant, v. RONDELL J. ANDREWS *et al.*, Defendants-Appellees.

First District (4th Division) No. 85—3596

Opinion filed November 5, 1987.—Rehearing denied January 6, 1988.

Craig M. Armstrong, of Armstrong, Surin & Engels, of Ottawa, for appellant.

Pretzel & Stouffer, Chartered, of Chicago, for appellees.

PRESIDING JUSTICE McMORROW delivered the opinion of the court:

Plaintiff Charles Pratt (Pratt) appeals from the order of the circuit court of Cook County that dismissed the second count of his amended complaint. The dismissed count sought damages from defendant Express Freight Lines, Inc. (Express Freight), on the theory that Pratt was a third-party beneficiary to Express Freight's lease agreement with Rondell Andrews (Andrews) regarding Andrews' operation of a tractor and semitrailer. Andrews had driven the semi in an allegedly negligent manner, causing Pratt to sustain personal injuries. We affirm.

BACKGROUND

According to the well-pleaded allegations in Pratt's complaint as ultimately amended, Pratt sustained personal injuries on March 19, 1980, when the tractor and semitrailer he was operating on a highway in Hammond, Indiana, was struck by a semi being driven by Andrews. Andrews was operating the vehicle under a lease agreement with Ex-

press Freight and under the authority of Express Freight's Interstate Commerce Commission (ICC) permit. At the time, Express Freight was an authorized carrier pursuant to Federal regulations. See 49 C.F.R. §1057.2(a) (1986).

After any tort liability that could be asserted against Express Freight or Andrews had been barred by the two-year statute of limitations, Pratt filed his complaint, in which he maintained that because of ICC regulations, Express Freight was required to clearly specify in its lease with Andrews that Express Freight had a legal obligation to maintain insurance coverage for the protection of the public. (49 C.F.R. §1057.12(k) (1986).) Pratt also claimed that Express Freight's lease was required to state Express Freight's obligation "to be completely responsible for the operation and proper maintenance" of the semi which Andrews had been operating.

Pratt asserted that he was a third-party beneficiary of the lease between Andrews and Express Freight. He argued that if Andrews were not covered by Express Freight's insurance, then Express Freight breached the lease agreement by failing to obtain insurance. He also argued that Express Freight breached the lease by "failing to assume complete responsibility and control of the vehicle being operated by Andrews" and by "failing to properly maintain the equipment."

Express Freight filed a motion to dismiss the count of the complaint directed to it, relying upon section 2—615 of the Illinois Code of Civil Procedure. (Ill. Rev. Stat. 1985, ch. 110, par. 2—615.) In this motion, Express Freight asserted that at the time of the accident, Andrews was the owner and driver of the semitrailer vehicle. According to Express Freight, Andrews had leased the vehicle to Express Freight for a trip to deliver various goods. Express Freight was therefore the lessee of the vehicle, and Andrews was the driver. Thus, under pertinent Federal regulations, Andrews was the owner/trip lessor and Express Freight was the trip lessee. Express Freight argued that under Federal regulations, it was obligated, as trip lessee, to maintain insurance coverage for its benefit and the benefit of the public, but not for the benefit of Andrews, the owner/trip lessor. See 49 C.F.R. §§1057.11, 1057.12 (1986).

Express Freight also maintained that Pratt was attempting to circumvent his own error. It claimed that Pratt could have filed a tort action for bodily injuries against Express Freight, or Andrews as employee of Express Freight, within two years after the accident occurred. In fact, Express Freight argued, Express Freight had insurance coverage to defend and be indemnified for any judgment

resulting from such a lawsuit. Express Freight further argued that even if the lease agreement required that it be generally liable for any operation of the semi, Pratt was not an intended beneficiary of the lease. Finally, Express Freight asserted that Pratt's action against Express Freight was premature because Express Freight had filed a declaratory judgment action to determine the extent of its insurance coverage and that the declaratory judgment action was still pending and unresolved. Express Freight also argues that Pratt's action was premature because judgment had not been entered in the personal injury suit Pratt filed against Andrews.

Following briefing and argument, the trial court allowed the motion and dismissed the count with prejudice, finding no just reason to delay enforcement of or appeal from the order. The trial court's order did not specify the basis for its allowance of Express Freight's motion to dismiss. Pratt's timely appeal followed.

OPINION

On appeal, Pratt contends that count II of his amended complaint stated a claim that Express Freight breached its lease agreement with Andrews, and that Pratt, as a third-party beneficiary, is entitled to damages for injuries he sustained as a result of Express Freight's breach. Specifically, Pratt asserts that the lease agreement obligated Express Freight to obtain liability insurance covering Andrews as an insured. Pratt claims that Express Freight's duty to obtain such insurance arises by virtue of ICC regulations.

Express Freight responds that it was not required to obtain liability insurance in which Andrews would be specified as an insured. We agree. ICC regulations do not require Express Freight to procure such insurance. Instead, an ICC-certified carrier must obtain an insurance policy which is "sufficient to pay *** for each final judgment against the *carrier* for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles" under the carrier's permit. (Emphasis added.) (49 U.S.C. §10927(a)(1) (1986); see also 49 C.F.R. §1043.1(a) (1986).) Also, a "motor carrier *** that uses motor vehicles not owned by it to transport property under an arrangement with another party [must] *** obtain liability and cargo insurance on [the vehicles]." (49 U.S.C. §11107(a)(3) (1986).) A motor carrier/lessee is also required to "have control of and be responsible for operating those [leased] motor vehicles." (49 U.S.C. §11107(a)(4) (1986).) Consequently, a lease between a carrier and a driver must provide that the carrier has "exclusive possession, control and use of the equipment for the duration of the lease" and that the

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carrier "assume[s] complete responsibility for the operation of the equipment" during the lease. 49 C.F.R. §1057.12(c) (1986).

These ICC regulations do not require that the carrier obtain liability insurance in which a driver is specified as a named insured. As the court observed in *American General Fire & Casualty Co. v. Truck Insurance Exchange* (D. Kan. 1987), 660 F. Supp. 557, 568, "[A]ll the relevant federal statutes and regulations speak in terms of insurance covering final judgments obtained against the carriers. Since Congress has decided to impose liability on motor carriers for any negligent operation, maintenance or use of vehicles under the carriers' permits, it is not improper for the insurer to require that the carrier be made a party to the action in order to protect their interests." 660 F. Supp. at 568.

The court further reasoned that although "[t]he effect of federal law is to make [the driver] a 'statutory' employee of [the carrier] [citation], [the driver's] employee status does not mean that he was or should have been an insured under the [carrier's] policy. *** Since the carrier has 'complete responsibility for the operation of the equipment' during the lease, 49 U.S.C. sec. 11107(a)(4), 49 C.F.R. sec. 1057.12(c), an injured party always has recourse against the carrier for negligent maintenance and/or operation of the carrier's vehicles" (660 F. Supp. at 567), and the motor carrier/lessee fulfills its statutory obligation when it "obtain[s] an insurance policy to cover 'each final judgment against the carrier' " in accordance with 49 U.S.C. section 10927 and 49 C.F.R. section 1043.1(a). (660 F. Supp. at 567.) Thus, the court concluded, "The public is protected without requiring that the carrier also insure all its drivers." 660 F. Supp. at 567.

Based upon this analysis, we determine that ICC regulations do not obligate Express Freight to obtain liability insurance in which Andrews would be specified as a named insured. We also hold that Pratt has no standing to litigate the insurance coverage extended to Andrews or Express Freight. (See *Batteast v. Argonaut Insurance Co.* (1983), 118 Ill. App. 3d 4, 454 N.E.2d 706.) Consequently, count II of Pratt's amended complaint was properly dismissed for failure to state a claim for which relief could be granted.

Pratt argues that *Reagor v. Travelers Insurance Co.* (1980), 92 Ill. App. 3d 99, 415 N.E.2d 512, and *Gothberg v. Nemerovski* (1965), 58 Ill. App. 2d 372, 208 N.E.2d 12, support his theory that he is an intended beneficiary of Express Freight's lease agreement with Andrews. Both decisions are distinguishable from the case at bar, however.

In *Reagor*, the court held that an injured person is deemed to

have an interest in the adjudication of insurance coverage disputes and is a necessary party to a declaratory judgment action regarding the coverage provided by the policy. Pratt does not seek a declaratory judgment regarding the scope of coverage provided by Express Freight's insurance policy; *Reagor* is therefore inapposite.

Gothberg is also distinguishable, since its holding is premised on distinct public policy considerations regarding automobile liability insurance policies. The policy at issue here is not for automobile liability insurance, and *Gothberg* is not controlling or persuasive authority with respect to Pratt's contention.

Based upon these considerations, we find count II was properly dismissed for failure to state a claim. As a result, the order of the circuit court of Cook County is affirmed.

Affirmed.

LINN and JOHNSON, JJ., concur.

CARL H. KLEHM *et al.*, d/b/a The Charles Klehm & Son Nursery, Plaintiffs, v. GRECIAN CHALET, LTD., *et al.*, Defendants (Bank of Palatine, Counterplaintiff-Appellant; Pyrgos, Ltd., *et al.*, Counterdefendants-Appellees).

First District (4th Division) No. 86—2755

Opinion filed November 12, 1987.—Rehearing denied January 25, 1988.

Schal Bovis, Inc. v. Casualty Insurance, 314 Ill. App. 3d 562 (1st Dist. 1999)

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Ill. App. Ct., 1st Dist. · filed 1999-05-21 · Reporter opinion
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Schal Bovis, Inc. v. Casualty Insurance

314 Ill. App. 3d 562 · Appellate Court · Filed 1999-05-21 · Reporter opinion · Published appellate opinion: binds circuit courts; persuasive to other appellate panels

Syllabus

Prepared by the reporter, not part of the court's opinion.

SCHAL BOVIS, INC., et al., Plaintiffs-Appellants, v. CASUALTY INSURANCE COMPANY et al., Defendants-Appellees. First District (6th Division) No. 1-96-2968 Opinion filed May 21, 1999. Rehearing denied August 1, 2000. Williams & Montgomery, Ltd., of Chicago (Barry L. Kroll, David E. Neumeister, James K. Horstman, and Lloyd E. Williams, Jr., of counsel), for. appellants. Querrey & Harrow, Ltd., of Chicago (Michael Resis and Rosalyn M. Golden, of counsel), for appellee Casualty Insurance Company. Johnson & Bell, Ltd., of Chicago (Scott W Hoyne and Mary R. Kennedy, of counsel), for appellee American States Insurance Company. Canel, Davis & King, of Chicago (Jay A. Canel and Leslie E Notaro, of counsel), for appellee Wausau Insurance Company. Beermann, Swerdlove, Woloshin, Barezky, Becker, Genin & London, of Chicago (Alvin R. Becker and Timothy M. Kelly, of counsel), for Great American Insurance Company.

Opinion

JUSTICE ZWICK

delivered the opinion of the court:

Plaintiffs Schal Bovis, Inc. (Shal), Buck 123 Partnership (Buck) and Northbrook Property & Casualty Company (Northbrook) filed their original complaint for declaratory judgment and other relief on March 3, 1995. The complaint was in seven counts. Counts I through V were based on defendants Casualty Insurance Company’s (Casualty) and American States Insurance Company’s (American States) alleged wrongful refusal to defend and indemnify Schal and Buck in an underlying tort action. Counts VI and VII were based on defendants Wausau Insurance Company’s (Wausau) and Great American Insurance Company’s (Great American) alleged tortious failure to settle the underlying action within their available limits of primary coverage, causing plaintiff Northbrook, an alleged excess insurer, to incur

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liability following a jury verdict.

Each count was based on the same underlying facts. On June 9, 1989, an accident occurred giving rise to an action in the circuit court titled Keegan v. Schal Associates, Inc., No. 89 L 13702 (the Keegan action). The Keegan action arose out of events that occurred during construction of a building at 515 North State Street in Chicago. Buck owned the site and Schal was the general contractor. Both were insured by Northbrook.

Various parties were subsequently added to the action. The Ozark Companies, a subcontractor, was insured by Wausau. Ranken Steel and R.S. Erectors, also subcontractors, were insured by Great American. Alcan-United Forming, a subcontractor, was insured by American States. Buck and Schal were made additional insureds on each of these subcontractors' policies.

Schal and Buck tendered their defense in the Keegan action to each of the subcontractors' insurers, defendants Wausau, Great American, Casualty and American States. Wausau and Great American accepted the tender. Casualty initially acknowledged its defense obligation, but withdrew before trial. American States denied the tender.

According to the plaintiffs' complaint, Wausau evaluated the "verdict potential" of the Keegan action at over $2 million. It refused, however, to contribute its policy limit of $1 million toward a proposed total settlement of $2 million. Great American was also alleged to have had an opportunity to contribute its $1 million policy limit toward a proposal to settle the case, but declined to do so.

A jury verdict of $2,892,500 was returned in Keegan's favor and judgment was entered thereon. Wausau contributed $1,049,583 and Great American contributed $1 million. Northbrook contributed the remaining $842,916.67. Casualty and American States paid nothing.

Plaintiffs subsequently brought their action to recover the $842,916.67 paid by Northbrook, as well as other declaratory relief. Only counts I, V, VI and VII are at issue in this appeal.

In count I, Schal and Buck alleged that American States and Casualty were contractually obligated to indemnify them up to their respective policy limits for all amounts assessed as damages against Schal and Buck in the underlying action, but that Casualty and American States had wrongfully refused to make any payment in accordance with the provisions of the respective policies. Schal and Buck requested that the court find and adjudge that Casualty and American States had breached their contracts with Schal and Buck for all amounts that Northbrook paid in settlement of the underlying action.

In count Y, brought by all three plaintiffs, it was alleged that Casualty's and American States' refusal to indemnify the plaintiffs was vexatious and unreasonable under the terms of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 1994)).

Counts VI and VII, brought by Northbrook and Schal against Wausau and Great American, alleged that Wausau and Great American negligently failed to settle the underlying action by contributing a sum of money less than their respective policy limits toward a proposed

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$2 million settlement; that by refusing to settle, the named defendants exposed Schal, Buck and Northbrook to a verdict in excess of the primary policy limits; and that this caused Northbrook to incur $842,916.67 in damages which it paid in satisfaction of the judgment. The plaintiffs further alleged that Schal was forced to incur an $842,916.67 reduction in the aggregate limits of its Northbrook policy as a result of that payment. Schal and Northbrook in count VI sought a judgment in their favor in the full amount paid in settlement of the underlying action and subsequent reduction of the aggregate limit under the Northbrook policy, whereas count VII alleged that the refusal of Great American and Wausau to settle within the $1 million limits of their respective primary policies was in bad faith.

All defendants filed motions to dismiss the case pursuant to section 2 - 615 of the Code of Civil Procedure (735 ILCS 5/2 - 615 (West 1994)). On April 10, 1996, the trial court granted American States' and Casualty's motion for judgment on the pleadings as to counts I and V The court also granted Wausau's and Great American's motion to dismiss counts VI and VII of the complaint with prejudice. The court stayed counts II, III and IV pending resolution of the appeal of the Keegan action. Finally, the court made a finding that its rulings on counts I, V, VI and VII were immediately appealable pursuant to Supreme Court Rule 304(a) (155 111. 2d R. 304(a)).

Plaintiffs thereafter filed a motion asking the court to reconsider its rulings. Included with that motion was an amended complaint. On August 2, 1996, the trial court denied the motion but modified its prior ruling, sua sponte, such that the dismissal of counts I and V was made "without prejudice" as to Schal and Buck, and the dismissal of counts VI and VII was entered "without prejudice" as to Schal. The dismissal of counts VI and VII remained with prejudice as to North-brook. In so ruling, the trial court reasoned that Schal and Buck had no standing to bring an action against the defendants in that their excess insurer, Northbrook, had fully satisfied the Keegan judgment. The court also ruled against Northbrook in finding no duty running from a primary insurer to its insured's excess insurer. The court found that it was unnecessary to consider the amended complaint as its rulings had rendered any proposed amendment, which simply added more detailed factual allegations, "moot." Plaintiffs filed their notice of appeal from the April 10, 1996, and August 2, 1996, orders on August 13, 1996.

"WITHOUT PREJUDICE"

Defendants Casualty and American States initially challenge Schal's and Buck's standing to bring counts I and V They argue this court does not have jurisdiction to consider Schal's and Buck's claims with respect to these counts because, even though the court made a specific finding that its decision to dismiss counts I, V, VI and VII were "final and appealable," the court also made a specific written finding that the rulings with regard to Schal and Buck were entered "without prejudice." Casualty and American States argue that the "without prejudice" language necessarily means that the court's decision on these issues was not "final." A final judgment is a requirement for appealability under Supreme Court Rule 304(a). City of Evanston v. Paden, 221 Ill. App. 3d 1003, 1006, 583 N.E.2d 47 (1991). Wausau makes the same claim with regard to the court's dismissal "without

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prejudice" of Schal's counts VI and VII.

The record shows that the trial court's decision to dismiss several of the counts "without prejudice" resulted solely from its determination that Schal and Buck could not allege that they had suffered any legally cognizable damages, in that they had also alleged that their excess carrier, Northbrook, had fully paid the judgment against them. The court changed its ruling to being "without prejudice" only when it was pointed out that the Northbrook excess policy limit had been reduced by Northbrook's payment on the judgment, meaning that should either Schal or Buck need to make additional claims on the Northbrook policy, the coverage available under that policy would be reduced. The court reasoned that, although Schal and Buck could not claim to have suffered "damages" after the judgment in the Keegan action had been paid, a subsequent claim on the policy could exhaust the policy limitation, in which case Schal and Buck would have suffered the requisite harm.

In Boonstra v. City of Chicago, 214 Ill. App. 3d 379, 574 N.E.2d 689 (1991), this court stated:

"The appealability of an order is determined by its substance rather than its form. Where a dismissal is based upon a determination that the complaint is not sufficient to state a cause of action, the order is final and appealable by its nature. Thus, an order of dismissal for failure to state a cause of action which is not followed by a request to amend is a final, appealable order and does not require a specific declaration by the plaintiff that he wishes to stand on the complaint. In addition, an order is not deprived of finality merely because it does not include the words 'with prejudice.' [Citation.]" Boonstra, 214 Ill. App. 3d at 385.

Other decisions have similarly concluded that it is the substance of the trial court's order that determines whether it is final, not whether the court has used any particular language. See, e.g., In re Estate of Hopkins, 214 Ill. App. 3d 427, 574 N.E.2d 230 (1991); Schuster Equipment Co. v. Design Electric Services, Inc., 197 Ill. App. 3d 566, 554 N.E.2d 1097 (1990).

Because the effect of a dismissal order is determined by its substance, and not by the incantation of any particular magic words, a trial court's description of a final judgment as being "without prejudice" is of no greater logical effect than a trial court's statement that a nonfinal dismissal judgment is "with prejudice." In each instance, whether the trial court's dismissal order is final (and thereby appeal-able under Rule 304(a)) or is not final (and, therefore, not appealable) is a function not of its words, but of its effect. Thus, if the dismissal is because of a deficiency that could be cured by simple technical amendment, the order is not the subject of appeal. On the other hand, if the dismissal is because, as here, of a perceived substantive legal deficiency (e.g., that the plaintiffs have not sustained damages as a matter of law and, therefore, lack standing to sue), the dismissal order is final. Accordingly, the question of whether insureds such as Schal and Buck may maintain a cause of action to recover payments owed to them under an insurance contract, but ultimately paid to them by an excess carrier, has been finally decided by the trial court. The inclusion of the words "without prejudice" in the trial court's orders does not deprive us of jurisdiction under Supreme Court Rule 304(a).

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ENTRY OF JUDGMENT AS LEGAL DAMAGES

We also conclude that an entry of judgment against Schal and Buck constitutes sufficient damages, in and of itself, to sustain the causes of action alleged. Illinois law has long taken a liberal view of the extent of damages that must be alleged in order for a plaintiff to bring a cause of action in our courts and, accordingly, has recognized that the entry of judgment against an insured constitutes sufficient damages to permit the insured to maintain an action against its primary insurer. As one court has stated, "the rule of damages is that incurrence is equivalent to outlay." Smiley v. Manchester Insurance & Indemnity Co., 13 Ill. App. 3d 809, 814, 301 N.E.2d 19 (1973). This is so whether or not funds are available to pay the judgment. Browning v. Heritage Insurance Co., 33 Ill. App. 3d 943, 338 N.E.2d 912 (1975); Wolfberg v. Prudence Mutual Casualty Co., 98 Ill. App. 2d 190, 240 N.E.2d 176 (1968). If defendants wish to argue that Schal and Buck should receive no compensation because they have been fully reimbursed by their excess carrier, they may do so at trial.

The defendants have cited Ludwig Music House, Inc. v. State Farm Mutual Automobile Insurance Co., 108 Ill. App. 2d 27, 246 N.E.2d 473 (1969), and Childress v. State Farm Mutual Automobile Insurance Co., 97 Ill. App. 2d 112, 239 N.E.2d 492 (1968), for the proposition that when a plaintiff is fully reimbursed by one insurer, he or she can bring no cause of action against another insurer. We note, however, that the plaintiff in Ludwig Music House did not have a judgment entered against her. This fact distinguishes that case. To the extent that Childress is inconsistent with our holding, we decline to follow it.

DIMINUTION OF INSURANCE COVERAGE AS CONSTITUTING DAMAGES

In addition to the fact that the entry of a judgment against Schal and Buck is, in and of itself, sufficient injury allow them to pursue a claim against their insurers, we note that the defendants' actions as alleged in the complaint, if true, caused Schal and Buck the loss of insurance protection that would have otherwise been available to them. Clearly, a policy of insurance is a valuable asset. It follows that when an excess insurer makes a payment on the insured's behalf that would have been unnecessary had a primary insurer not acted tortiously, the primary insurer should be liable for the diminution of the insurance policy's value. Even assuming that Schal and Buck did not fortify their diminished Northbrook policy with additional insurance, the fact that Schal and Buck were compelled to bear additional risk of loss is, in our view, sufficient legal injury to confer standing to sue. The measure of damages that Shal and Northbrook should be awarded for this loss, if any, is a matter for the trial court to determine as a question of fact.

APPROPRIATENESS OF RULE 304(a) FINDINGS

Defendant Wausau raises the additional argument that we are without jurisdiction over counts VI and VII because the trial court improperly found no just reason to delay enforcement or appeal of its order. Wausau notes that such a Rule 304(a) finding is appropriate only where the finding of the trial court disposes of the rights of the parties on either the entire controversy or on some definite separate branch thereof. See Arachnid, Inc. v. Beall, 210 Ill. App. 3d 1096, 569 N.E.2d 1273 (1991); Rice v. Burnley, 230 Ill. App.

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3d 987, 596 N.E.2d 105 (1992). To determine whether an order has disposed of a separate branch of a controversy, one looks to see if the bases of recovery of the counts which are dismissed are distinct from those that are left standing. Rice, 230 Ill. App. 3d at 991. At oral argument Wausau argued that the trial court acted "improvidently" in allowing Schal and Buck to proceed on appeal because Wausau had brought counterclaims against Schal and Buck which were pending in the trial court at the time Rule 304(a) certification was granted.

Although the existence of counterclaims on the same or similar issue is, indeed, one of the factors the trial court should consider against granting Rule 304(a) relief, it is not the only consideration. See Waters v. Reingold, 278 Ill. App. 3d 647, 663 N.E.2d 126 (1996) (drawing parallels between factors considered under Rule 54(b) of the Federal Rules of Civil Procedure). Instead, the decision to grant or deny Rule 304(a) relief is best left to the sound discretion of the trial court, which must determine whether, in its view, allowing an immediate appeal would have the effect of expediting the resolution of the controversy, be fair to the parties and conserve judicial resources. See Diggs v. Suburban Medical Center, 191 Ill. App. 3d 828, 835, 548 N.E.2d 373 (1989). The standard of review is whether the trial court abused its discretion in granting Rule 304(a) relief. After considering the proper standard of review, we find no abuse of the court's discretion.

PRIMARY INSURER'S DUTY OF GOOD FAITH TOWARD AN EXCESS CARRIER

Having determined that Schal and Buck have alleged sufficient legal injury to avoid dismissal on section 2 - 615 grounds and that the trial court did not abuse its discretion in certifying this appeal under Supreme Court Rule 304(a), we turn to Northbrook's claim that it has alleged a viable cause of action in counts VI and VII. Northbrook claimed in its complaint that Wausau and Great American owed a duty to Schal to settle the Keegan action within their respective policy limits and that Northbrook is thereby entitled to bring a cause of action against Wausau and Great American under subordination principles. The trial court found no such cause of action existed in Illinois in dismissing counts VI and VII. Northbrook maintains that it may maintain a cause of action against Wausau and Great American for an alleged breach of a "duty to settle" the Keegan action within the primary policy limits when given the opportunity to do so because it paid the excess portion of the Keegan judgment on behalf of Schal.

A motion to dismiss pursuant to section 2 - 615 "challenges only the legal sufficiency of the complaint and admits the truth of all well-pleaded factual allegations." Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 407, 667 N.E.2d 1296 (1996). Under a section 2 - 615 motion, the question is whether the complaint alleges sufficient facts entitling plaintiff to relief. Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 86, 672 N.E.2d 1207 (1996). The trial court's decision to grant section 2 - 615 relief is made as a matter of law. Consequently, our review is de novo. Cree Development Corp. v. Mid-America Advertising Co., 294 Ill. App. 3d 324, 329-30, 689 N.E.2d 1148 (1997).

Counts VI and VII of plaintiffs' complaint allege that (1) Wausau and Great American owed a duty to Northbrook and Schal to act reasonably in settling a claim within their respective policy limits, (2) Wausau and Great America breached that duty by failing to contribute a

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sum equal their policy limits to a proposed settlement of $2 million, and (3) Wausau's and Great American's negligent and/or bad-faith conduct proximately caused damages in the amount of $842,916.67, the amount paid in excess of the primary policy limits, which North-brook paid on Schal's and Buck's behalf.

The trial court determined that these allegations, even if sufficiently pled, would not establish a valid claim because, under Illinois law, a primary insurer has no duty toward an excess carrier. We reject the trial court's conclusion, however, since an excess insurer is subrogated to the rights of its insured when forced to pay a claim. Aetna Casualty & Surety Co. v. Coronet Insurance Co., 44 Ill. App. 3d 744, 358 N.E.2d 914 (1976). See also Ranger Insurance Co. v. Home Indemnity Co., 714 F. Supp. 956 (N.D. Ill. 1989); California Union Insurance Co. v. Liberty Mutual Insurance Co., 920 F. Supp. 908, 918-19 (N.D. Ill. 1996) (predicting that Illinois state courts would permit an action by an excess insurer against a primary insurer for tortious failure to settle within the primary policy limits based upon equitable subrogation). Because an insured in Illinois may bring a cause of action against its carrier for negligent or bad-faith refusal to settle (see Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513, 675 N.E.2d 897 (1996); Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027, 393 N.E.2d 718 (1979); Smiley v. Manchester Insurance & Indemnity Co., 13 Ill. App. 3d 809, 301 N.E.2d 19 (1973)), it follows logically that an excess carrier must be allowed to bring a similar cause of action against its insured's primary carrier. This is because, by purchasing excess coverage, the insured has effectively substituted the excess insurer for itself. Cf. Hartford Accident & Indemnity Co. v. Aetna Casualty & Surety Co., 164 Ariz. 286, 792 P.2d 749 (1990).

Moreover, even absent subrogation principles, we find that there is a duty that runs from Wausau and Great American to North-brook to act reasonably and in good faith in attempting to settle claims within their respective policy limits. The leading case finding such a duty is Transit Casualty Co. v. Spink Corp., 94 Cal. App. 3d 124, 156 Cal. Rptr. 360 (1979), which recognized a three-way relationship between the policyholder, the primary insurer and the excess insurer. This relationship creates reciprocal duties of care in the conduct of settlement negotiations; when a claim threatens to exceed the primary coverage, the reasonable foreseeability that the claim may reach the excess policy creates a three-way duty of care to act reasonably and in good faith in settling meritorious claims within the policy limits. The insured, primary carrier and excess carriers must therefore act reasonably and in good faith toward one another in considering the others' interests in negotiating a settlement. Transit Casualty Co., 94 Cal. App. 3d at 133, 156 Cal. Rptr. at 366. Our decision in this regard cannot be characterized as surprising, in that several other jurisdictions have followed Transit Casualty Co. and have recognized such a duty (see, e.g., Hartford Accident & Indemnity Co. v. Michigan Mutual Insurance Co., 61 N.Y.2d 569, 574, 463 N.E.2d 608, 610, 475 N.Y.S.2d 267, 269 (1984); Estate of Penn v. Amalgamated General Agencies, 148 N.J. Super. 419, 424, 372 A.2d 1124, 1127 (1977); Vencill v. Continental Casualty Co., 433 F. Supp. 1371 (S.D. W. Va. 1977)). Additionally, while federal courts do not bind our state courts in such matters, we note that at least two federal decisions have predicted that Illinois would recognize such a duty. American Centennial Insurance Co. v. American Home Assurance Co., 729 F. Supp. 1228, 1231-32

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(N.D. Ill. 1990); Ranger Insurance Co. v. Home Indemnity Co., 714 F. Supp. 956 (N.D. Ill. 1989).

Great American, in arguing against the imposition of a duty upon primary insurers to settle claims within their policy limits when it is reasonable to do so, claims that excess carriers include within their costs of doing business the possibility that a primary carrier might not settle a claim in good faith when given the opportunity at or near the policy limitation simply because there is no profit in doing so. The risk of this, according to Great American, is simply one of the costs associated with the "profitable excess insurance business." Even if this were so, however, which we doubt, we do not believe it is in the public interest to permit primary carriers to negligently or in bad faith refuse to settle claims. The recognition in Illinois of a cause of action by the excess carrier against the primary carrier promotes judicial economy because it has the effect of encouraging fair and reasonable settlements. In weighing the likelihood of injury to the excess carrier, the magnitude of the burden of guarding against that injury, and the consequences of placing the burden of negotiating in good faith upon a primary insurer, we find that the duty suggested by the plaintiffs exists in Illinois. See Kirk v. Michael Reese Hospital & Medical Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987) (discussing relevant factors in determining whether legal duty exists). Otherwise, as plaintiffs have argued, a primary insurer would have no incentive to enter into a reasonable settlement of the case when its expected liability approaches the limits of its policy. A cause of action in favor of the excess carrier is therefore in the public interest as the settlement of good-faith disputes at or near the amount of an expected judgment will be promoted, with the consequence of less litigation over disputes that logically should not be litigated, as well as the result of lower insurance premiums for excess coverage.

ALLEGED PLEADING DEFECTS

We next address Great American's argument that we should affirm the trial court's dismissal of Northbrook's and Schal's counts VI and VII because those counts failed to allege facts giving rise to a duty to settle. In addition, Great American argues that count VII of the complaint failed to allege facts giving rise to a cause of action for bad faith.

Initially, Great American claims the complaint alleges no facts concerning the likelihood of a finding of liability in the Keegan action and no facts indicating that the amount of the probable recovery in that action would exceed the total coverage available to Schal to settle the case. It argues that, although the trial court did not dismiss plaintiffs' complaints on this ground, a reviewing court should affirm the dismissal of a complaint on any legally valid grounds appearing in the record, citing Beckman v. Freeman United Coal Mining Co., 123 Ill. 2d 281, 527 N.E.2d 303 (1988).

We agree that the initial complaint has failed to allege a duty on the part of Wausau and Great American to settle. The complaint emphasized that Wausau evaluated the verdict potential of the Keegan case at more than $2 million and that Great American had the opportunity to settle for less than its $1 million limit. Without any allegation as to the likelihood of a finding of liability, however, the evaluation of potential damages is meaningless. This is because even if the case had a verdict potential of $3 million, the

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parties should not be expected to settle the case for $2 million if the party claiming injury had only a 5% chance of prevailing on liability. It is the expected liability that a defendant and/or its carrier must assess in deciding whether it is reasonable to go to trial or whether settlement should be pursued. The allegation that the verdict potential of the Keegan action was $2 million would be sufficient only if insurers were subject to strict liability for excess judgments, which they clearly are not.

Great American also argues that we should reject plaintiffs' counts VI and VII because they failed to allege that the total amount of available primary coverage was insufficient to reimburse Schal and North-brook for the costs of satisfying the Keegan judgment. Great American notes that plaintiffs' complaint alleged that there were four primary carriers that had written primary coverage which, together, would have covered the entire liability plaintiffs had incurred in the Keegan action. They claim it would be unfair to require a primary insurer to anticipate that one of its co-insurers might fail to meet its coverage obligations prior to judgment, so that it should be necessary for a plaintiff who wishes to bring a cause of action such as that suggested to allege that the total amount of primary coverage was known to the defendant to be insufficient. Thus, they argue that even if there is a duty on a primary carrier to give consideration to an excess carrier's potential exposure, that duty is not triggered if there is sufficient primary coverage from other insurers to fully satisfy the judgment.

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We reject Great American's contention in this regard. Our holding today only requires that a primary insurer estimate in good faith the expected verdict of the litigation threatening its insured and offer that amount in support of a proposed settlement - at least to the extent consistent with the terms of its policy. The existence of other insurance is simply not relevant to the primary insurer's duty to offer its support to a settlement when it is reasonable to do so.

Lastly, Great American argues that Schal and Northbrook have failed to allege facts in counts VI and VII giving rise to a claim for negligence or bad faith. Illinois is a fact-pleading state in which plaintiffs are required to set out facts giving rise to their causes of action. Teter v. Clemens, 112 Ill. 2d 252, 492 N.E.2d 1340 (1986). Although well-pleaded facts are taken as true for the purposes of a motion to dismiss, plaintiffs must allege facts supporting all of the elements of their claims; notice pleading, conclusions of law, and conclusions of fact are insufficient. Knox College v. Celotex Corp., 88 Ill. 2d 407, 430 N.E.2d 976 (1981).

A complaint for bad faith sounds in tort and is subject to all of the requirements of a traditional negligence complaint. See Adduci v. Vigilant Insurance Co., 98 Ill. App. 3d 472, 424 N.E.2d 645 (1981). In general, the law does not impose a duty on insurance companies to settle cases within policy limits, and the fact that the company is unsuccessful in the trial of a particular case does not show bad faith; the duty to settle arises only where the probability of an adverse finding on liability is great and where the amount of the probable recovery would greatly exceed coverage. Kavanaugh v. Interstate Fire & Casualty Co., 35 Ill. App. 3d 350, 342 N.E.2d 116 (1975).

In alleging negligence, Schal and Northbrook made the following conclusionary claim:

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"Wausau and Great American breached said duty by refusing to effect such a settlement and, by negligently doing so, exposed Schal and Buck and the Northbrook policy to a verdict in excess of the primary policy limits."

The count alleging "bad faith," as opposed to "negligence," merely substituted the word "knowingly" for the word "negligently." Courts routinely find such type of conclusionary characterizations as being insufficient. See Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518-19, 547 N.E.2d 733 (1989) (facts alleged do not rise to wilful and wanton misconduct); Teter, 112 Ill. 2d at 258 (facts failed to show how grandparents were negligent in allowing grandchild to come into possession of a pellet gun); Knox College, 88 Ill. 2d at 427-28 (facts alleged do not show with sufficient specificity how defendant breached contract).

There are abundant examples in the case law of facts giving rise to breach of duty similar to the one plaintiffs have attempted to allege: refusal to reveal policy limits, refusal to negotiate, rejection of the recommendation of the insured's attorney regarding settlement, and failure to advise the insured of settlement negotiations, to name a few. See Mid-America Bank & Trust Co. v. Commercial Union Insurance Co., 224 Ill. App. 3d 1083, 587 N.E.2d 81 (1992); Smiley v. Manchester Insurance & Indemnity Co., 13 Ill. App. 3d 809, 301 N.E.2d 19 (1973); Cernocky v. Indemnity Insurance Co., 69 Ill. App. 2d 196, 216 N.E.2d 198 (1966). No such facts were alleged in the complaint here at issue. Accordingly, we agree that plaintiffs' complaint failed to allege sufficient facts to make out the cause of action alleged.

Finally, although we agree with Great American that the plaintiffs' complaint was factually insufficient, we disagree with Great American that these defects require that we affirm the trial court's dismissal with prejudice. In Beckman, the supreme court affirmed the trial court and remanded the case with directions that the cause be dismissed with prejudice because the court determined that the plaintiff could not, on remand, allege facts that would sustain the cause of action alleged. Beckman, 123 Ill. 2d at 288. Unlike in Beckman, we cannot say that if plaintiffs were given the fair opportunity to do so, they could never make out factual allegations which, if proved, would establish negligence or bad faith on the part of Great American and Wausau in refusing to settle the Keegan action. Neither can we assume that the trial court denied amendment of the complaint as a matter of discretion, as the court expressly declined to even consider plaintiffs' first attempt to amend. Cf. Teter, 112 Ill. 2d at 260-61. Accordingly, we decline, to follow Great American's invitation to affirm the trial court in alternative grounds. Instead, we remand the case for further proceedings as is consistent with this opinion.

In sum, we hold that plaintiffs Schal and Buck have alleged sufficient injury to confer standing to sue, despite the trial court's order which stated that Schal's and Buck's claims were dismissed "without prejudice." In addition, we find that plaintiffs have alleged a legally sufficient cause of action in claiming that defendants Great American and Wausau, either negligently or unreasonably and in bad faith, refused to offer to pay their respective policy limits toward the settlement of the case. We agree, however, that the original complaint, as filed, failed to make sufficient factual allegations requiring Great American

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and Wausau to offer to settle the Keegan action in that the complaint did not (1) allege that the estimated expected value of the Keegan judgment exceeded the respective defendant's policy limits, and (2) allege sufficient facts showing how Great American and Wausau were negligent or acted in bad faith. Because the trial court dismissed the counts at issue on specific grounds unrelated to these pleading defects and failed to consider plaintiffs' amended complaint, we reverse the trial court's orders and remand the matter with instructions to allow plaintiffs to amend.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the case is remanded with instructions.

Reversed and remanded with instructions.

CAMPBELL, P.J., and QUINN, J., concur.

The issue of how best to compensate Schal and Buck should they prove their case at trial is not a simple one. Schal and Buck argue that Great American and Wausau should make compensation to them by making payment of the entire amount Northbrook paid on Schal's and Buck's behalf in the Keegan action, $842,916.67. Northbrook, plaintiffs claim, would then have a lien on these funds and the ultimate payment to Northbrook of this money by Schal and Buck would have the effect of resetting the limitation on the North-brook excess policy. We note, however, that Schal and Buck might be more directly compensated for their loss of coverage, assuming no additional claims were made on the policy and that it has since expired, by simply paying to them the pro rata share of whatever policy premiums were paid to North-brook for the excess coverage.

Scroggins v. Allstate Insurance, 74 Ill. App. 3d 1027 (1st Dist. 1979)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 1979-08-07 · Reporter opinion
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Where the memo cites it

- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C070.4
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C070.4
- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C070.4

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From this reasoning, it follows that the trial court erred in granting judgment to American at the close of National's case, and I would reverse and remand for further proceedings.

MICHAEL SCROGGINS *et al.*, Plaintiffs-Appellants, *v.* ALLSTATE INSURANCE COMPANY, Defendant-Appellee.—(ANASTASIOS KARABATSOS *et al.*, Defendants.)

First District (2nd Division) No. 77-1941

Opinion filed August 7, 1979.



Heller and Morris, and Schwartzberg, Barnett and Cohen, both of Chicago (Benjamin H. Cohen and Hugh J. Schwartzberg, of counsel), for appellants.

Hinshaw, Culbertson, Moelmann, Hoban and Fuller of Chicago (D. Kendall Griffith, Jill B. Berkeley, and Stephen R. Swofford, of counsel), for appellee.

Mr. PRESIDING JUSTICE STAMOS delivered the opinion of the court:

Plaintiffs, Michael Scroggins and Catherine Russo, brought this action to recover damages for injuries allegedly incurred when they were struck by an automobile. Counts I through III of plaintiffs' complaint named as defendants Anastasios Karabatsos, the driver of the vehicle, and Kyriakos Karabatsos, his father. Count IV of the complaint was directed against the individual defendants' insurer, defendant Allstate Insurance Company (Allstate); it sought damages for Allstate's allegedly wrongful refusal to negotiate in good faith with plaintiffs, as claimants against Allstate's insureds.

On Allstate's motion, the circuit court of Cook County dismissed count IV, finding that there was no just reason to delay enforcement of or appeal from the order. Plaintiffs appeal from this dismissal, contending that Allstate's alleged breach of its duty to negotiate in good faith with plaintiffs gives rise to a cause of action on their behalf.

In more detail, plaintiffs' complaint alleged that the driver of the vehicle which struck them was proceeding down a street when he saw

someone he knew crossing the street in mid-block. The driver allegedly increased his speed and aimed his car at his acquaintance, not intending to hit her, but just "goofing off." However, when he swerved to avoid the pedestrian, he lost control of his vehicle and collided with plaintiffs, who were standing across the street. Counts I through III of the complaint alleged negligence and wilful and wanton conduct on the part of the driver and his father, for whom the driver was allegedly acting as agent.

Count IV of the complaint alleged that Allstate insured the driver and his father up to a liability limit of $50,000 per occurrence and $100,000 for more than one occurrence. Allstate acknowledged coverage, opened a claim file, and requested information regarding plaintiffs' special damages. Plaintiffs' attorneys eventually responded by requesting that Allstate review its file for the purpose of making a settlement offer. Plaintiffs enclosed copies of statements by the driver and the pedestrian. In addition, plaintiff Scroggins submitted "special damages items" amounting to approximately $1150, while those submitted by plaintiff Russo came to about $13,000. Plaintiffs demanded $25,000 for Scroggins and the policy limits of $50,000 for Russo. Plaintiffs asserted that based upon those facts, the witness' statements, and the medical reports and bills, all "reasonable minds of prudent insurers" would evaluate Russo's claim as exceeding the policy limits ($50,000) and Scroggins' claim as exceeding $1000. However, Allstate offered Russo only $20,000 and Scroggins only $1000. Plaintiffs essentially asserted that this constituted an intentional breach of duty on the part of Allstate to negotiate in good faith with plaintiffs, as claimants against Allstate's insureds. Plaintiffs alleged that they were damaged in that Scroggins was embarrassed because of his inability to pay medical expenses, plaintiffs were forced to file a lawsuit and incur the attendant expense, and plaintiffs had suffered great emotional and mental distress, whereupon plaintiffs sought compensatory and punitive damages.

[redacted] The issue is whether, on the facts alleged, plaintiffs have stated a cause of action against Allstate. Because liability insurance policies ordinarily leave to the insurer the decision whether to settle a claim against the insured, it is generally held that this gives rise to a duty on the part of the insurer to give some consideration to the insured's interest in an action where recovery may otherwise exceed the policy limits. (See Annot., 60 A.L.R.3d 1190, 1192 (1974).) Accordingly, in Illinois there is imposed upon the insurer a duty, part of the implied-in-law duty of good faith and fair dealing arising out of the insurance relation, to give to the insured's interests consideration at least equal to that of its own in such a case. (*Cernocky v. Indemnity Insurance Co. of North America* (1966), 69 Ill. App. 2d 196, 207, 216 N.E.2d 198; see *Ballard v. Citizens Cas. Co.* (7th Cir. 1952), 196 F.2d 96; *Olympia Fields Country Club v. Bankers*

Indemnity Insurance Co. (1945), 325 Ill. App. 649, 60 N.E.2d 896.) If the insurance company instead commits conduct constituting fraud, negligence, or bad faith in refusing to settle a case within policy limits, it may be liable for the full amount of a judgment obtained against its insured, irrespective of its policy limits. (*DeGraw v. State Security Insurance Co.* (1976), 40 Ill. App. 3d 26, 37-38, 351 N.E.2d 302; *Cernocky v. Indemnity Insurance Co. of North America* (1966), 69 Ill. App. 2d 196, 204-08, 216 N.E.2d 198; see generally 44 Am. Jur. 2d *Insurance* §§1530-32 (1969); 7A J. Appleman, Insurance Law and Practice §§4711-13 (1962); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136 (1954); other authorities collected in 6 Am. Jur. Proof of Facts 2d, at 248-50 (1975), at 25-26 (1978 supp.).) The fact of the entry of the excess judgment against the insured itself constitutes the damage that permits the insured to recover for breach of the duty owed. *Wolfberg v. Prudence Mutual Casualty Co.* (1968), 98 Ill. App. 2d 190, 240 N.E.2d 176; see Annot., 63 A.L.R.3d 627 (1975).

Because the duty, though implied in law, arises out of the insurance contract relationship (*Brown v. State Farm Mutual Automobile Insurance Association* (1971), 1 Ill. App. 3d 47, 50-51, 272 N.E.2d 261; *Cernocky v. Indemnity Insurance Co. of North America* (1966), 69 Ill. App. 2d 196, 206-07, 216 N.E.2d 198), it is clear that the duty is owed to the insured, such that in appropriate circumstances constituting a breach of that duty, the insured may sue his insurer for damages resulting from the insurer's wrongful failure to settle a claim against him. (Annot., 60 A.L.R.3d 1190, 1192-93 (1974); see other authorities cited above.) However, the question arises whether, and under what circumstances, a third party injured by the insured may bring such an action against the insured's liability insurer. See generally Annot., 63 A.L.R.3d 677 (1975).

Where the insured's claim for wrongful failure to settle is assignable (see generally Annot., 12 A.L.R.3d 1158 (1967)), as in Illinois (*Brown v. State Farm Mutual Automobile Insurance Association* (1971), 1 Ill. App. 3d 47, 272 N.E.2d 261), a third-party claimant who has obtained an excess judgment against the insured may acquire and prosecute the insured's claim by virtue of an assignment. (See *Browning v. Heritage Insurance Co.* (1975), 33 Ill. App. 3d 943, 948, 338 N.E.2d 912; *Smiley v. Manchester Insurance & Indemnity Co.* (1973), 13 Ill. App. 3d 809, 301 N.E.2d 19.) Similarly, depending upon the particular language of a jurisdiction's garnishment statute (see generally Annot., 60 A.L.R.3d 1190 (1974)), a judgment creditor of an insured may be able to bring a garnishment action against the insurer, although it has been held that such an action does not lie under the applicable statute in Illinois. (*Powell v. Prudence Mutual Casualty Co.* (1967), 88 Ill. App. 2d 343, 232 N.E.2d 155.) In either case, it is clear that the claim asserted by the injured third party is

predicated upon an alleged breach of the duty owed by the insurer to its insured. See *Browning v. Heritage Insurance Co.* (1975), 33 Ill. App. 3d 943, 948, 338 N.E.2d 912; *Powell v. Prudence Mutual Casualty Co.* (1967), 88 Ill. App. 2d 343, 232 N.E.2d 155.

[redacted] In the instant case, however, plaintiffs are suing in their own right, as third-party claimants against the insured, for the insurer's allegedly wrongful refusal to settle their claim. Even assuming arguendo that they have adequately alleged a breach of the duty of good faith and fair dealing on the part of the insurer, that duty is one which the insurer owes to its insured, not to third parties. (*Yelm v. Country Mutual Insurance Co.* (1970), 123 Ill. App. 2d 401, 404, 259 N.E.2d 83.) Yet it is elementary that in an action founded on a breach of duty, the plaintiff must allege facts showing a breach of a duty owed to him. (*E.g., Browning v. Heritage Insurance Co.* (1975), 33 Ill. App. 3d 943, 947-48, 338 N.E.2d 912.) Thus, the rule in Illinois and nearly all jurisdictions is that in the absence of statutory or contractual language sanctioning a direct action, an injured third party has no action against the insurer for breach of the duty to exercise good faith or due care by virtue of his standing as judgment creditor of the insured. (*Yelm v. Country Mutual Insurance Co.* (1970), 123 Ill. App. 2d 401, 259 N.E.2d 83; accord, *e.g., Murphy v. Allstate Insurance Co.* (1976), 17 Cal. 3d 937, 941-42, 553 P.2d 584, 132 Cal. Rptr. 424; see Annot., 63 A.L.R.3d 677, 682, and cases cited at 686 (1975).) For the same reason, because the duty is intended to benefit the insured and not third parties, actions by injured claimants founded on third party beneficiary principles have not been permitted. *E.g., Murphy v. Allstate Insurance Co.* (1976), 17 Cal. 3d 937, 943-44, 553 P.2d 584, 132 Cal. Rptr. 424; *Bennett v. Slater* (1972), 154 Ind. App. 67, 289 N.E.2d 144; Annot., 63 A.L.R.3d 677, 682-83, 701 *et seq.* (1975).

In addition to the absence of any duty owed to third parties by the insurer, courts have relied on the absence of damages in refusing to permit direct actions against insurers by judgment creditors of the insured. (*Yelm v. Country Mutual Insurance Co.* (1970), 123 Ill. App. 2d 401, 404, 259 N.E.2d 83; *Bennett v. Slater* (1972), 154 Ind. App. 67, 289 N.E.2d 144; *Pringle v. Robertson* (1970), 258 Or. 389, 393, 465 P.2d 223, *adhered to on rehearing* (1971), 258 Or. 394, 483 P.2d 814; other cases cited in Annot., 63 A.L.R.3d 677, 688-89 (1975).) As has often been noted, the injured claimant usually benefits from a wrongful refusal to settle, since instead of receiving an award near or below the policy limits, he stands to obtain a judgment exceeding policy coverage. *E.g., Murphy v. Allstate Insurance Co.* (1976), 17 Cal. 3d 937, 941, 553 P.2d 584, 132 Cal. Rptr. 424.

[redacted] If these principles apply to bar direct actions against insurers by third parties who have already obtained a judgment in excess of policy limits

against the insured, they clearly apply to bar plaintiffs, who are at best potential judgment creditors, from bringing the instant action against Allstate. Indeed, since no excess judgment has yet been rendered against the insured, it remains speculative whether the alleged breach of duty will ever result in the injury that normally gives rise to an action for breach of the duty. (See generally *Wolfberg v. Prudence Mutual Casualty Co.* (1968), 98 Ill. App. 2d 190, 240 N.E.2d 176.) Plaintiffs have cited, and we have found, no case in the country permitting a direct action against an insurer by a third-party claimant at this stage of litigation, in the absence of statutory or contractual sanction of such an action. Neither have plaintiffs shown that the necessity for such an action outweighs the potential difficulties Allstate has argued are likely to ensue, such as the possibility that insurers will effectively be coerced into settling where their liability has not and may never be established. If plaintiffs do recover an excess judgment against Allstate's insureds, and if they obtain by assignment any claim the insureds might have against Allstate, perhaps then they may have an action against Allstate. But under the case law discussed above, they clearly have no standing to bring such an action now.

The question remains whether the enactment of certain statutes in Illinois has created a duty which plaintiffs can presently enforce in their own right. In 1967, the General Assembly added section 154.1 to the Illinois Insurance Code (Ill. Rev. Stat. 1967, ch. 73, par. 766.1). That section authorized the Director of Insurance to investigate and hold hearings on improper claims practices by insurers. Upon a finding that an insurance company was "habitually and without just cause engaging in a general business practice of unreasonable delay or refusing to settle claims * * *, and that a proceeding * * * would be in the interest of the public," the Director was instructed to order the company to cease and desist and was empowered to suspend the company's certificate of authority for up to 30 days. In addition, at about the same time the General Assembly amended section 424 of the Illinois Insurance Code to define the same conduct as an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. (Ill. Rev. Stat. 1967, ch. 73, par. 1031.) Upon the same findings that prohibited conduct had been committed and that a proceeding would be in the public interest (Ill. Rev. Stat. 1967, ch. 73, par. 1033), after hearing, the Director was directed to issue a cease-and-desist order.

In 1972, the General Assembly enacted additional provisions relating to improper claims practices. One new section of the Illinois Insurance Code, section 154.3, provided in part:

"Any of the following acts by a[n insurance] company, if

committed without just cause and performed with such frequency as to indicate a general business practice, constitute improper claims practices:

* * *

d.) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear; * * *." (Ill. Rev. Stat. 1975, ch. 73, par. 766.3.)

After a hearing and a finding, the Director was similarly directed to order the offending company to cease and desist and was authorized to suspend the company's certificate for up to 30 days. Ill. Rev. Stat. 1975, ch. 73, par. 766.4.

These provisions remained in effect until September 22, 1977, when Public Act 80-926 became effective. That amendment to the Illinois Insurance Code repealed sections 154.1 through 154.4 (Ill. Rev. Stat. 1975, ch. 73, pars. 766.1 through 766.4) and replaced them with sections 154.5 through 154.8 (Ill. Rev. Stat. 1977, ch. 73, pars. 766.5 through 766.8). Section 154.5 provides that it is an improper claims practice:

"* * * to commit any of the acts contained in Section 154.6 if:

"(a) It is committed knowingly in violation of this Act or any rules promulgated hereunder; or

(b) It has been committed with such frequency to indicate a persistent tendency to engage in that type of conduct."

Section 154.6 retains as improper claims practices all those acts that were prohibited under the former sections, including "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear." (Ill. Rev. Stat. 1977, ch. 73, par. 766.6(d).) Section 154.6 also lists additional proscribed acts and provides that any of the enumerated acts by an insurance company, "if committed without just cause and in violation of Section 154.5, constitutes an improper claims practice." Sections 154.7 and 154.8 provide for administrative enforcement by the Director in the same manner as the sections they replaced. Public Act 80-926 also harmonized section 424(4) of the Illinois Insurance Code (Ill. Rev. Stat. 1977, ch. 73, par. 1031(4)) to define as unfair methods of competition "[e]ngaging in any of the acts or practices defined in or prohibited by Sections 154.5 through 154.8 of the 'Illinois Insurance Code'."

Plaintiffs contend that these sections impose a statutory duty on insurers to negotiate in good faith where liability has become reasonably clear, such that Allstate's alleged breach of that duty should give rise to a private right of action on plaintiffs' behalf, though the Insurance Code provides only for enforcement by the Director. Plaintiffs further argue

that under new section 154.5(a), one act committed knowingly in violation of the sections or rules promulgated thereunder constitutes an improper claims practice.

Allstate points out that at the time plaintiffs' purported claim arose and the time their complaint was filed (April 14, 1977), section 154.5 was not yet in existence or effect. Rather, under then existing section 154.3 a finding of an improper claims practice required that the acts be committed "with such frequency as to indicate a general business practice," thus militating against implication of an action for a single refusal to settle. Allstate further argues *inter alia* that a private right of action in plaintiffs' behalf should not lie under the statute in any event, since plaintiffs are not members of the class for whose especial benefit the statute was enacted.

This court recently had occasion to discuss and apply the principles relating to the implication of private rights of action for breach of statutory duties. (See *Sherman v. Field Clinic* (Docket No. 78-1578, June 19, 1979, slip op. at 10-11), 74 Ill. App. 3d 21, 29, 392 N.E.2d 154, 160, and cases cited therein.) Even assuming arguendo that plaintiffs may invoke the later statute, and even assuming plaintiffs have adequately alleged a breach of a statutory duty on the part of the insurer to negotiate in good faith where liability is reasonably clear, they have once again failed to establish that the breach is of a duty running to them. Put another way, they have failed to establish that they fall within the class of persons the statute is designed to protect (*Sherman v. Field Clinic*, slip op. at 10); that is, " 'the class for whose *especial* benefit the statute was enacted.' " (*Cort v. Ash* (1975), 422 U.S. 66, 78, 45 L. Ed. 2d 26, 36, 95 S. Ct. 2080, 2088 (emphasis in original).) Rather, the statute would appear to have been enacted for the benefit of the insured, analogous to the common law duty discussed above (see 4 Restatement (Second) of Torts §874A, comments *f* and *i* (1979)), as well as to provide an administrative enforcement mechanism for the benefit of the public at large. See Ill. Rev. Stat. 1977, ch. 73, par. 766.7 (Director must find that enforcement would be in the public interest).

One basis for plaintiffs' contention that the statute was designed to protect them lies in a rule promulgated by the Director of Insurance under the Act, Rule 9.19(5)(H) (improper claims practices), which provides: "The [insurance] company shall affirm or deny liability on first or *third* party claims within a reasonable time, * * *." (Emphasis supplied.) While we agree that the statute and rule are apparently intended to cover third-party as well as first-party claims, plaintiffs' argument fails to recognize that the insurer's duty has always run to its insured in either context. (See generally *Austero v. National Casualty Co.* (1978), 84 Cal. App. 3d 1, 148 Cal. Rptr. 653, 670.) An example of the third

party claimant situation is *Browning v. Heritage Insurance Co.* (1975), 33 Ill. App. 3d 943, 338 N.E.2d 912, in which the liability insurer allegedly wrongfully refused to settle a claim by a third party against its insured, resulting in the entry of an excess judgment against its insured. This constituted a breach of duty owed to the insured, for which the injured party was able to sue only by virtue of an assignment of the insured's cause of action. In contrast, first party situations typically arise in a casualty insurance context, where the insured and the claimant are the same. An example is *Silberg v. California Life Insurance Co.* (1974), 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711, 716-17, involving a health insurance claim, in which the court held that the same implied duty of good faith and fair dealing that runs to the insured in third-party situations enured to the benefit of first-party-claimant-insureds. In either context, the duty has always been construed as running to the insured, and thus plaintiffs' contention in this regard is without merit.

Plaintiffs also cite and rely on the recent case of *Royal Globe Ins. Co. v. Superior Court* (1979), 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842, in which the California Supreme Court held, by a 4-3 majority, that a third-party claimant could sue an insurer for violation of a section of California's Unfair Practices Act (Cal: Ins. Code Ann. §790.03(h)(5) (West 1979 Supp.)) that proscribes exactly the same conduct as section 154.6(d) of our Illinois Insurance Code, set out above. (Ill. Rev. Stat. 1977, ch. 73, par. 766.6(d).) However, with all due respect, we cannot find that decision persuasive here.

First of all, one important basis for the court's decision in *Royal Globe* was that an accompanying section of California's Unfair Practices Act provided that a cease-and-desist order issued under the Act "would not in any way relieve or absolve" the insurer "from civil liability * * * under the laws of this State arising out of the methods, acts or practices found unfair or deceptive." (Cal. Ins. Code Ann. §790.09 (West 1972).) The *Royal Globe* court stressed the fact that the word "other" had originally preceded the phrase "laws of this State," but had been eliminated, thus opening the door to the possibility of civil liability under the Act itself. In contrast, the only comparable provision in our Illinois Insurance Code preserves the word "other" and addresses itself only to "liability under any *other* laws of this State." (Emphasis added.) (Ill. Rev. Stat. 1977, ch. 73, par. 1035(3).) Thus, whatever the merit of this ground of decision, if any (see *Royal Globe Insurance Co. v. Superior Court* (1979), 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842, 850 (Richardson, J., dissenting)), it is not present here. Rather, enforcement of our act has specifically been delegated only to the Director of Insurance, on whose specialized expertise enforcement of the act depends. *Cf. Holloway v. Bristol-Myers Corp.* (D.C. Cir. 1973, 485 F.2d 986 (FTC Act).

Next, and more important, we note that three years before the 4-3 decision by the California Supreme Court in *Royal Globe*, in a decision we have already cited, the same court *unanimously* held that the insurer's duty to settle runs to the insured and not to third-party claimants. (*Murphy v. Allstate Insurance Co.* (1976), 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424.) In view of that holding, as an intermediate California appellate court remarked in a decision following *Murphy* but preceding *Royal Globe*, it would be "rather a startling proposition" to hold that a statutory enactment of the duty to settle somehow extended it to third-party claimants. (*Scheuch v. Western World Insurance Co.* (1978), 82 Cal. App. 3d 31, 145 Cal. Rptr. 294, 297; see also *Royal Globe Insurance Co. v. Superior Court* (1979), 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842, 850 (Richardson, J., dissenting).) Nevertheless, without purporting to disapprove its decision in *Murphy*, this is what the *Royal Globe* majority did. The only other apparent basis for its decision is that some of the other unfair practices enumerated in the California statute refer to both claimants and insureds. As we have pointed out above, the duty to settle has always been construed as running only to the insured, whether in first- or third-party claimant situations. While other unfair practices defined in the statute may refer to claimants, we believe that a more explicit legislative intent to extend the duty to settle to third-party claimants should be required where imposition of such a duty would be in derogation of so much common law. As Justice Richardson states in his dissent in *Royal Globe*:

> "If, as the majority asserts, the Legislature had intended to change the course of [the] law 180 degrees and thereafter to impose upon carriers civil liability to injured third persons for failing to settle claims against their insured, then surely much more direct and precise language would have been selected." (*Royal Globe Ins. Co. v. Superior Court* (1979), 23 Cal. 3d 880, 896, 592 P.2d 329, 340, 153 Cal. Rptr. 842, 853.)

Neither can the fact that the legislature has increasingly broadened the duties imposed on insurers in the Insurance Code justify quasilegislative extension of those duties, and creation of new duties, by the judiciary. Accordingly, plaintiffs' arguments would more properly be addressed to the legislature.

Allstate points out that section 155 of the Illinois Insurance Code (Ill. Rev. Stat. 1977, ch. 73, par. 767), which immediately follows but is not a part of the Illinois improper claims practices sections (Ill. Rev. Stat. 1977, ch. 73, pars. 766.5 through 766.8), provides for attorneys' fees in actions "for an unreasonable delay in settling a claim." Yet this statute, too, has been construed as protecting only insured parties, and not extending to third-party claimants. (*Stamps v. Caldwell* (1971), 133 Ill. App. 2d 524,

528, 273 N.E.2d 489.) Allstate further notes that in Illinois, "entertaining direct action suits is contrary to a firmly-fixed public policy" (*Marchlik v. Coronet Insurance Co.* (1968), 40 Ill. 2d 327, 332, 239 N.E.2d 799), and the legislative bases for the court's finding to that effect remain standing today, militating against the imposition of an implied right of action by third parties for breach of any statutory duty imposed by the Insurance Code. (See, *e.g.*, section 388 of the Illinois Insurance Code (Ill. Rev. Stat. 1977, ch. 73, par. 1000), construed in *Marchlik* and *Pohlman v. Universal Mutual Casualty Co.* (1957), 12 Ill. App. 2d 153, 138 N.E.2d 848.) Allstate goes on to raise other problems that would potentially ensue from recognition of plaintiffs' proposed cause of action, but it suffices to say that plaintiffs have failed to allege a breach of any duty owed to them, the existence of any injury resulting therefrom, or a basis for the judicial imposition of such a duty. The trial court properly dismissed count IV of plaintiffs' complaint for failing to state a cause of action against Allstate.

Accordingly the judgment of the circuit court of Cook County is affirmed.

Affirmed.

DOWNING and PERLIN, JJ., concur.

[redacted]

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, *v.* JAMES JOHNSON, Defendant-Appellant.

First District (4th Division) No. 77-1827

[redacted]

Opinion filed July 19, 1979.

[redacted]

SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange, 395 Ill. App. 3d 80 (2d Dist. 2009)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 2d Dist. (the forum's district) · filed 2009-09-18 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 6 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 28: passage C043.6
- memo p. 12 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 28: passage C043.6

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SWEDISHAMERICAN HOSPITAL ASSOCIATION OF ROCKFORD and SARI INSURANCE COMPANY, Individually and as Subrogees and Assignees of Bruce Hecht,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiffs-Appellants,	)	
v.	)	No. 03--L--406
ILLINOIS STATE MEDICAL INTER-INSURANCE EXCHANGE,	)	Honorable Ronald L. Pirrello,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the opinion of the court:

Plaintiffs, SwedishAmerican Hospital Association of Rockford (Hospital) and Sari Insurance Company, individually and as subrogees of Dr. Bruce Hecht, appeal the trial court order that granted summary judgment in favor of defendant, Illinois State Medical Inter-Insurance Exchange (ISMIE). On appeal, plaintiffs argue that the trial court erred in determining that the "no action" clause in defendant's insurance policy was enforceable and barred plaintiffs' recovery under the policy. ISMIE relied on the no-action provision when it refused to contribute its policy limit toward a settlement agreement that plaintiffs entered in a medical-malpractice lawsuit that was filed against them. Plaintiffs argue that ISMIE breached its good-faith duty to settle the medical-malpractice lawsuit and cannot rely on the no-action provision in its policy. We affirm in part, reverse in part, and remand.

I. BACKGROUND

This case stems from an underlying medical-malpractice lawsuit filed by the family of an infant that was treated by Dr. Hecht at the Hospital in Winnebago County. The lawsuit was filed under No. 95--L--91 as Tripp v. SwedishAmerican Hospital and Bruce Hecht. We refer to this as the Tripp suit. Dr. Hecht joined the Hospital on June 1, 1993. In December 1993, Dr. Hecht treated an infant, Wanique Tripp, for cardiac problems. Dr. Hecht performed a cardiac biopsy on the child in December 1993 that allegedly resulted in the child's disabling and disfiguring spastic quadriparesis. The Tripp lawsuit was filed against the Hospital and Dr. Hecht in March 1995 and alleged that Dr. Hecht was negligent and that the Hospital was vicariously liable for his negligence. The case was tendered to ISMIE, which accepted and defended Dr. Hecht without a reservation of rights. ISMIE provided $1 million coverage for Dr. Hecht, the Hospital self-insured $1.5 million for itself and its employees, and Sari provided a $25 million excess policy, covering the Hospital and its employees. Greg Snyder represented Dr. Hecht; ISMIE paid for Snyder's services. The Hospital was defended by separate counsel, David Faulkner. Additionally, ISMIE advised Dr. Hecht to seek private counsel to advise him separately, which he did when he hired Paul Cicero.

After extensive discovery, the case settled on May 15, 2003, for $5 million. However, ISMIE refused to participate in the settlement and refused to pay on its $1 million policy. The structured settlement agreement stated that the Hospital and its insurer agreed to pay $3 million immediately and the remaining $2 million in a periodic payment plan. In exchange, the Tripp lawsuit against the Hospital and Dr. Hecht would be dismissed with prejudice. The trial court approved the settlement agreement on June 11, 2003. On July 28, 2003, Dr. Hecht assigned to the Hospital and Sari his right to recover the $1 million from ISMIE. In the assignment agreement, Dr. Hecht denied the allegations

in the Tripp lawsuit and stated that he tendered his defense to ISMIE. ISMIE assigned defense counsel to represent Dr. Hecht. After discovery was substantially completed, Dr. Hecht determined that it would be in his best interests to settle the litigation. ISMIE refused to contribute or participate in the settlement agreement. Dr. Hecht was required by the Hospital and Sari policies to cooperate with them in the subrogation of any payment made under their plans on his behalf.

On October 27, 2003, plaintiffs filed suit against ISMIE, seeking recovery of the $1 million ISMIE policy limit. The amended complaint alleged ISMIE's lack of good faith under various theories: two counts of Dr. Hecht's right to select coverage; one count of equitable contribution; one count of reimbursement; one count of unjust enrichment; and one count of quantum meruit. We delineate these counts in greater detail later in this opinion. On June 12, 2006, plaintiffs filed a motion for summary judgment pursuant to section 2--1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2--1005 (West 2006)). Plaintiffs argued that the undisputed facts demonstrated that ISMIE had an obligation to contribute to the settlement of the Tripp lawsuit and failed to fulfill that obligation. They also claimed that ISMIE was liable for costs under section 155 of the Illinois Insurance Code (215 ILCS 5/155(1) (West 2002)). In support of its motion, plaintiffs attached multiple documents, which we describe as follows.

An affidavit from Richard Walsh, chief operating officer of the Hospital, provided that he authorized the settlement for both the Hospital and Dr. Hecht. The Hospital purchased the ISMIE policy to provide primary coverage for Dr. Hecht. ISMIE acknowledged that its policy provided primary coverage for Dr. Hecht, and it defended him without a reservation of rights. The evidence in the Tripp lawsuit indicated that there was a high probability that a verdict would result against Dr. Hecht and that it would greatly exceed the $1 million ISMIE policy limit.

Answers to plaintiffs' interrogatories were also attached to the motion. ISMIE admitted that it defended Dr. Hecht without a reservation of rights but denied that there was a reasonable probability of a verdict against Dr. Hecht. ISMIE admitted that in early 2003 Dr. Hecht demanded settlement, but it denied that it was required to pursue settlement on his behalf. ISMIE admitted that plaintiffs settled for the release of Dr. Hecht and the Hospital, but it stated that it had insufficient knowledge to determine what was paid for Dr. Hecht's and the Hospital's release individually.

A portion of Jennifer Temple's deposition was attached as an exhibit. Temple, ISMIE's claims manager, testified that normally if a hospital were sued under a vicarious-liability theory, the hospital's insurance would pay after the doctor's limits were exhausted. She admitted that ISMIE agreed to pay first dollar in the event of a verdict against Dr. Hecht. Temple recommended that the suit be defended and acknowledged that Dr. Hecht wanted to defend the suit, but she admitted that she had noted that the Hospital was under pressure to settle from its excess carrier (Sari). In Temple's notes from 2002, she indicated that she felt the chance of prevailing in front of a jury of laypeople was 50/50 at best because of the technical medical issues involved. In front of a jury of doctors, Dr. Hecht would have a 95% chance of prevailing. She stated in her notes that she was "very worried about the potential exposure," and that a verdict would likely be in the millions of dollars. Temple wrote that from ISMIE's perspective, its $1 million was gone whether the case was tried or settled, because a verdict or a settlement would likely be more than $1 million. She wrote, "[t]herefore, by trying this case, we have a chance to theoretically 'win back' our $1mil." Temple wrote this in summary of her conversation with Dr. Hecht advising him of ISMIE's position that the case was medically defensible but that he should consult with private counsel as he would have concerns of liability beyond ISMIE's $1 million. She admitted that after Dr. Hecht discussed the case with private

counsel, he wanted to settle the case and that Temple agreed to recommend to the physician review committee that the case should be settled. In her report to the physician review committee, Temple admitted that there were problems with the defense of Dr. Hecht, including that he was a "loose cannon" at times and that the plaintiff would make a sympathetic witness.

On November 13, 2002, the physician review committee decided that the case should be tried. Temple attended the meeting and recalled that they considered Dr. Hecht's desire to settle but that the physicians believed it was a defensible case. Temple admitted that defense counsel conducted one-day focus groups, which all ended in verdicts against Dr. Hecht. Temple acknowledged that defense counsel did the best it could given the fact that they condensed what would have taken three weeks into one day. However, ISMIE believed that its expert was a stronger witness and that over three weeks' time, jurors would understand the technical medical issues involved. The average verdict from the focus groups was $20 million. Later, Temple received a letter from Dr. Hecht in which he expressed concern about having to close his office for three weeks for a trial and that he would prefer not to do that. Although Temple believed that Dr. Hecht wanted to defend the case, she admitted that in April 2003 correspondence she indicated that Dr. Hecht wanted to settle because he was concerned about his exposure and that a large verdict could bankrupt his medical practice. Temple testified that ISMIE was not concerned about Dr. Hecht's concerns but also that ISMIE was not making its decision based on its financial interests. According to Temple, if ISMIE felt it had a medically defensible case, it would try the case "regardless of any financial considerations to the company."

Temple admitted that the Hospital could not settle only on its own behalf but would also have to settle on Dr. Hecht's behalf because its policy covered the doctor and it was being sued solely

based on vicarious liability. The Hospital invited Temple to attend a mediation with the plaintiff in the Tripp matter, and Temple attended though she had no settlement authority. The plaintiff had demanded $9 million. Temple acknowledged that she knew the resulting settlement agreement had released Dr. Hecht from liability.

A portion of Daniel Saunders' deposition contained the following. Saunders, ISMIE's claims vice president, testified that he was aware that the Hospital was a codefendant in the Tripp lawsuit and that the Hospital was being sued under a vicarious-liability theory. He acknowledged that ISMIE agreed not to seek contribution from the Hospital until ISMIE's policy limits were exhausted in the event that a settlement or a verdict exceeded those limits. While he admitted that he did not think it was unreasonable for the Hospital to settle the case, ISMIE's physician review committee recommended that it proceed to trial because it felt that it could win. Karen Tellers, an ISMIE claims manager, testified that she acknowledged in a memo that the ISMIE policy would pay first dollar since the Hospital had been named only on a vicarious-liability theory. She admitted that she and Temple agreed that the lawsuit against Dr. Hecht, while medically defensible, had a high verdict potential. She admitted that after Dr. Hecht indicated that he wanted to settle the case, she and Temple recommended to the physician review committee that the case be settled. Tellers also admitted that Dr. Hecht could be a poor witness because of his uncontrollable animosity towards the plaintiff's attorney. When the Hospital asked ISMIE to tender the policy so that it could settle the case, Tellers noted that ISMIE would defend the case.

A letter from Temple, dated December 21, 2001, and addressed to Faulkner, stated that the letter was confirming that "ISMIE will agree to pay the first dollar in any verdict awarded the plaintiff up to Dr. Hecht's policy limits." Plaintiffs also attached Temple's memo to the physician review

committee dated October 25, 2002, in which she requested review because Dr. Hecht requested that ISMIE settle the case. Her letter stated that the plaintiff was a sympathetic witness and that Dr. Hecht was a "loose cannon." She wrote that while the case was medically defensible, there was a high verdict exposure. Temple's recommendation for the claims department for ISMIE stated:

> "Dr. Hecht has asked that this case be placed in settlement posture on his behalf. Given the potential verdict exposure and the risk to Dr. Hecht's practice, defense counsel and the claims department also recommend that settlement be considered."

Copies of claims notes are attached that indicate that in November 2002, Dr. Hecht wanted the case to settle and was concerned about the verdict potential as he now owned his own practice. He was also concerned about the publicity of the case. Another note dated December 5, 2002, also indicated that Dr. Hecht desired settlement. Again, a note in March 2003 indicated that Dr. Hecht was having his personal attorney send a letter demanding settlement and that plaintiffs were likely going to demand settlement also. Temple indicated that the case was medically defensible but she was concerned about whether the jury would be able to understand the medicine involved and about Dr. Hecht's composure. On April 1, 2003, Temple wrote that she spoke with Dr. Hecht and he was very concerned about the high verdict potential, wanted the case settled, and was concerned about losing his practice if the case were lost at trial. Temple agreed to attend the mediation but would not have any authority to settle. However, her objective was to listen to the parties' positions and ISMIE could decide how to proceed after the mediation. Temple then wrote:

> "This morning we finally received a letter from the hospital confirming that they also insure Dr. Hecht. This places us in a more favorable position. Given this confirmation, they cannot settle this case without protecting the interests of Dr. Hecht. As such, they would not

be able to settle the case on their own and then we proceed to trial with only our $1m policy and even more exposure."

After the mediation, Temple wrote on April 3, 2003, that the case was not resolved and that the plaintiff demanded $9 million. She wrote that if "the hospital is confident that ISMIE's $1m must be tendered, then they can settle the entire case now and attempt to resolve their differences with ISMIE after the fact."

An affidavit from Faulkner stated that ISMIE never raised an objection to his negotiations that led to the settlement. Faulkner believed the case should be settled and wrote Temple an extensive letter indicating his reasons for his belief, including the focus group feedback, the fact that Dr. Hecht did not perform the cardiac biopsy on earlier occasions when the infant was seen with similar symptoms, and that there was some evidence that the biopsy would not have changed the course of treatment, was unnecessary, and could have been performed at another time. The average damages award was $20 million. A copy of Faulkner's letter to Temple was attached as an exhibit to his affidavit, along with the focus group data. The focus group data demonstrated that many of the mock jurors found Dr. Hecht to be an unfavorable witness, felt that the biopsy did not need to be performed at a time when the patient was in such bad cardiac distress, and felt the doctor was in a rush to perform the biopsy. The damages that the jurors provided on an individual basis ranged from $0 to $75 million. After deliberations, one jury awarded $32 million and another awarded $12 million.

A letter from Dr. Hecht's private counsel, Paul Cicero, dated March 26, 2003, and addressed to Temple, indicated Dr. Hecht's desire to settle the matter and demanded that ISMIE tender its policy for settlement. A letter from Greg Snyder, Dr. Hecht's counsel paid by ISMIE, dated March 24, 2003, and addressed to Temple, also indicated that Dr. Hecht wished to settle the matter. A letter

from Richard Walsh dated April 3, 2003, reiterated the Hospital's and Sari's request that ISMIE settle and tender the policy because they strongly believed that damages would be awarded and would be far greater than $1 million. Walsh cited to the factors that justified settlement: the catastrophic nature of the infant's injuries, the feedback from two focus groups that found in favor of the infant, the focus groups' negative reaction to Dr. Hecht, the focus groups' beliefs that the biopsy did not need to be performed at the time it was done, that ISMIE's expert was not the strongest witness, and that the plaintiff's attorney was one of the top 10 litigators in the country and known for obtaining multimillion dollar verdicts. Walsh stated that under Illinois law, the primary insurer has a duty to its insured and its excess insurers to act in good faith and that ISMIE's failure to settle, in hopes of saving $1 million but at the potential expense of the other insurers, was a breach of that duty.

A portion of the deposition of Dr. Richard Friedman was attached to plaintiffs' motion. Dr. Friedman acknowledged that the cardiac biopsy would not have altered the course of treatment for Wanique. Wanique was being treated for active myocarditis. There was no firm diagnosis as to the etiology of her cardiomyopathy, so the biopsy would have assisted the treating physician in determining whether Wanique's condition was an active inflammatory process or whether the heart was severely damaged to the point where other therapeutic options needed to be considered. Typically, five to seven biopsies are needed to obtain a diagnosis when a patient presents with cardiomyopathy. This was the first biopsy performed on Wanique. The biopsy was negative, but Dr. Friedman acknowledged that even if it came back positive for active myocarditis, the treatment Wanique was receiving would have been the same. In most cases, after an episode of myocarditis, cardiac function returns to normal. When Wanique was discharged, her cardiac function had returned to normal. Dr. Friedman could not be certain whether Wanique had myocarditis.

A portion of Dr. Hecht's deposition was attached. Dr. Hecht explained that before the biopsy, he did not know if Wanique had an active inflammation in the heart muscle. The negative biopsy told him that there was no active inflammation in the heart and that improvement in active inflammation was not the reason for the improvement in the size of Wanique's heart, which was enlarged at the time of her admission. The reason for the improvement in her heart size was the medications that he was administering to improve the force of the heart contractions. Dr. Hecht admitted that the prednisone that Wanique was receiving upon admission on December 13 also could have improved myocarditis, if Wanique had that condition upon admission. Dr. Hecht admitted that he could have waited a few days after December 21 to perform the biopsy.

On April 4, 2003, attorneys for the Tripp plaintiff, the Hospital, and Dr. Hecht appeared in court to present it with their settlement agreement. The Hospital and Sari would pay the plaintiff $5 million but reserved their rights against ISMIE. A letter from the Hospital's counsel dated September 8, 2003, and addressed to ISMIE requested that ISMIE contribute $1 million toward the settlement and stated that if it refused, the Hospital would file suit. ISMIE responded by letter dated September 16, 2003, in which it stated that it maintained a defense posture and refused to contribute toward the settlement.

Finally, plaintiffs attached copies of the physician services agreement and the relevant policies, which we will discuss in greater detail when needed in our analysis. The physician review committee recommendations are also contained in the record by reference in various claims notes. The committee recommended that the case be defended and not settled on October 8, 1997, February 13, 2002, November 13, 2002, and again on September 10, 2003, after the settlement agreement was reached. However, it is unclear whether there was a dispute between Dr. Hecht and ISMIE

preceding the 1997 and February 2002 referrals to the physician review committee, as the claims letters are not contained in the record.

On June 14, 2006, ISMIE filed a cross-motion for summary judgment, making multiple arguments as to why it was not required to contribute. First, ISMIE argued that plaintiffs' claim violated the no-action provision of ISMIE's policy, which provided that no action could be brought against ISMIE unless there was either a judgment after a trial or a written agreement with ISMIE. Second, ISMIE claimed that its provision regarding disputes to settle prohibited plaintiffs' recovery, because that provision required ISMIE to have disputes settled by its physician committee. In this case, the committee recommended proceeding to trial. Third, ISMIE argued that the payments made by plaintiffs were voluntary payments that ISMIE did not authorize and thus was not required to contribute toward, as its policy provided that the insured shall not voluntarily make any payment, assume any obligation, or incur any expense. Fourth, ISMIE argued that plaintiffs could not prove the necessary elements of a contribution claim, because they could not prove that Dr. Hecht was negligent. Fifth, Dr. Hecht was not covered by the Hospital and Sari policies, because they excluded coverage for "personal acts or omissions involving a Medical Incident," and Dr. Hecht had personally performed the cardiac biopsy. Sixth, the payments made in the settlement were on behalf of the Hospital and not Dr. Hecht, because the payments were not stated to be made on behalf of Dr. Hecht. Seventh, because the Hospital policy provided $1.5 million of primary coverage, the Hospital was not injured by ISMIE's failure to pay. Finally, Dr. Hecht had no claim to assign since ISMIE did not violate its contract with Dr. Hecht.

On August 29, 2006, the trial court heard the parties' arguments and continued the matter so it could consider the motions. During arguments, plaintiffs presented their theory that ISMIE

breached its good-faith duty to settle and thus was required under its policy to pay the $1 million toward the settlement that plaintiffs eventually effectuated on their own. Plaintiffs argued that ISMIE could not rely on its no-action clause when it had breached its duty to settle. Plaintiffs further argued that ISMIE's conduct in failing to settle violated section 155 of the Insurance Code. ISMIE made much of the same arguments it makes on appeal in its defense. For example, ISMIE argues that in all of the cases where an insurer was held to have breached a duty to settle, the insurer also breached its duty to defend. ISMIE had defended Dr. Hecht from the beginning and had never denied coverage, and thus, ISMIE could not be forced to pay a settlement to which it never agreed. ISMIE also pointed out in its argument that this was not a claim for bad-faith refusal to settle, because Dr. Hecht had no such claim and therefore such a claim could not be subrogated or assigned. ISMIE then asked the court, "if Your Honor thinks that there is not a question of fact, if that issue were relevant, we would ask leave to file a sur-reply that lays out the facts that show the alternative facts that have to be considered" because ISMIE had not responded to plaintiffs' factual allegations as to why the case should have settled. After several continuances, the trial court issued the following memorandum of its decision on January 7, 2008:

> "I have read the cases I wished to read and have studied the arguments of the parties.
>
> My primary finding is that the so called 'no action' provision of the policy controls for the reasons elucidated in [ISMIE's] brief. Additionally, I concur with [ISMIE's] argument that contribution does not lie because liability has not been unequivocally established by trial or agreement of the parties. I also believe that the additional language of the policy denies obligation to reimburse payment made, even if shown to be on behalf of the doctor if done so involuntarily.

For these reasons and others not articulated by the Court, I find for the Defendant, ISMIE, and ask [counsel] to draft the order."

Inexplicably, on March 25, 2008, the trial court issued another memorandum, which provided in relevant part:

"I have read the cases I was unable to get to originally, most specifically the case of Royal Globe Insurance v. Aetna. I have been through the briefs and my notes of the oral arguments several times and have come to the conclusion that the defendant must prevail on the cross motions for summary judgment.

I believe the 'No Action' provision of the policy controls and is enforceable. It states that no action may lie until the insured's obligation is finally determined by judgment after trial or by a written contract between the parties. Neither of these has occurred. ISMIE steadfastly and perhaps stubbornly clung to its defensive posture throughout the process.

In order for the hospital to prevail under these circumstances they must prove all facts necessary to claimant's recovery in the underlying case against the insured. They have not done this.

Where contract language controls the rights of the parties there is no occasion to enforce equity."

On February 14, 2008, plaintiffs timely appealed the grant of summary judgment in favor of ISMIE.

II. ANALYSIS

Initially, we admonish plaintiffs that a statement of facts should be void of argument per Supreme Court Rule 341(h)(6) (210 Ill. 2d R. 341(h)(6)). Much of plaintiffs' facts violates Rule 341(h)(6) and contains argument. We strike and ignore those portions of plaintiffs' facts. Moving

on to the merits, plaintiffs make several arguments on appeal. First, plaintiffs argue that ISMIE's $1 million policy was purchased by the Hospital to cover the first $1 million of the Hospital's $1.5 million self-insured limit. On that premise, plaintiffs argue that the Hospital is entitled to recover ISMIE's $1 million: (1) based on the principle of equitable contribution because both the Hospital plan and the ISMIE plan covered Dr. Hecht; (2) because of the subrogation provision in the Hospital's policy; (3) based on the principles of unjust enrichment; and (4) based on quantum meruit. Plaintiffs further argue that ISMIE's position is erroneous because: (1) plaintiffs' payments were not voluntary; and (2) neither the no-action provision nor its other-policy provisions defeat plaintiffs' claims against ISMIE, because ISMIE breached its good-faith duty to settle. Plaintiffs argue that if we do not believe that the ISMIE policy covered $1 million of the Hospital's $1.5 million self-insured limit, then Sari is entitled to recover from ISMIE on theories of equitable and contractual subrogation, horizontal exhaustion, unjust enrichment, and quantum meruit. Further, plaintiffs' payments were not voluntary and the no-action and other-policy provisions do not defeat Sari's claims against ISMIE, because ISMIE breached its good-faith duty to settle. Finally, plaintiffs argue that ISMIE owes interest on the $1 million from the date the amount became due under section 2 of the Interest Act (815 ILCS 205/2 (West 2006)), and costs and other relief under section 155 of the Insurance Code.

A motion for summary judgment is properly granted when the pleadings, depositions, admissions, and affidavits on file establish that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2--1005(c) (West 2006); Chatham Foot Specialists, P.C. v. Health Care Service Corp., 216 Ill. 2d 366, 376 (2005). When ruling on a motion for summary judgment, the court has a duty to construe the evidence in the light most favorable to the nonmoving party and strictly against the movant. Chatham Foot, 216 Ill. 2d at 376. Summary

judgment is a drastic measure of disposing of litigation and should be granted only if the movant's right to judgment is clear and free from doubt. Chatham Foot, 216 Ill. 2d at 376. Our review of summary judgment rulings is de novo. Chatham Foot, 216 Ill. 2d at 376.

A. The Hospital's Equitable Contribution Claim

The logical place to begin our analysis is deciding whether ISMIE's policy covered $1 million of the Hospital's self-insured $1.5 million plan, as plaintiffs argue. If ISMIE's policy was not covering $1 million of the Hospital's self-retained $1.5 million limit, the Hospital was not injured by ISMIE's failure to contribute, because, regardless of ISMIE's payment, the Hospital would have owed $1.5 million toward the $5 million settlement, not $500,000 as it contends. The Hospital policy, known as the SwedishAmerican Hospital Association Hospital Professional Liability and Comprehensive General Liability Self-Insurance Plan Claims Made Coverage (hereafter the SIR policy), provided $1.5 million for professional liability coverage for the Hospital and its employees.

An insurance policy is a contract and its construction is a question of law, which we review de novo. Barth v. State Farm Fire & Casualty Co., 228 Ill. 2d 163, 174 (2008). If the words used in the contract are unambiguous, we must give them their plain and ordinary meaning. Barth, 228 Ill. 2d at 174. When a contract is unambiguous, courts must not consider any evidence beyond the four corners of the contract when construing the contract. Allstate Insurance Co. v. Amato, 372 Ill. App. 3d 139, 143 (2007). In this case, neither the SIR policy nor the ISMIE policy contains any provision that indicates that the first $1 million of the SIR limit was to be paid by the ISMIE policy. Neither the Hospital nor ISMIE refers to any policy addendum that otherwise suggests that the SIR policy was truly providing only $500,000 of coverage. In fact, the SIR policy defines a "covered party" as "any employed physician *** while acting within the scope of their duties *** provided that

the physician shall maintain in full force and effect Physicians' Professional Liability insurance for limits of not less than $1,000,000 each medical incident/$3,000,000 aggregate. These limits may be self-insured and maintained by the Named Cover Party or insurance may be purchased with respect to all or part of these limits." This provision does not indicate that the purchased policy was somehow meant to reduce the limit provided in the SIR policy to $500,000. The SIR policy clearly provides that regardless of the number of covered parties or claims made, the SIR liability limit was $1.5 million for each medical incident. Because the policies are unambiguous on this point, we need not and must not consider any evidence beyond the policies. Thus, we reject the Hospital's argument that ISMIE's policy was intended to cover the first $1 million of the SIR policy's self-insured limit and that the Hospital overpaid $1 million toward the settlement. In doing so, we reject count III of the complaint, which alleged equitable contribution, as the Hospital was not harmed by ISMIE's failure to contribute $1 million toward the settlement.[1] See Home Insurance Co. v. Cincinnati Insurance Co., 213 Ill. 2d 307, 316 (2004) ("Contribution as it pertains to insurance law is an equitable principle arising among coinsurers which permits one insurer who has paid the entire loss, or greater than its share of the loss, to be reimbursed from other insurers who are also liable for the same loss"). Therefore, the trial court properly granted summary judgment in favor of ISMIE as to count III of the complaint. We now turn to the remainder of the claims.

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[1]On July 15, 2009, plaintiffs moved to cite Federal Insurance Co. v. Binney & Smith, Inc., No. 1--08--0843 (June 30, 2009), in support of their position that Dr. Hecht need not prove that he was actually negligent. This motion went unopposed. We grant plaintiffs' motion. Since we affirm summary judgment on the contribution claim, we will consider Federal Insurance where relevant in the remainder of our analysis.

B. The Policies

The Sari policy covered the Hospital and its employees, providing excess coverage up to $25 million, and contained the standard provision requiring that all primary insurance limits be exhausted prior to any excess payments being made. The policy specifically covered "any employed physician of the named insured while acting within the scope of their duties for the named insured."

The ISMIE policy listed Dr. Hecht as a named insured and the Hospital as a certificate holder of the policy, as it is undisputed that the Hospital purchased the policy for Dr. Hecht in the amount of $1 million. According to the policy:

> "The Exchange will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as **damages** because of any claim or claims first made against the insured during the **policy period** because of **personal injury** arising out of the rendering of or failure to render, on or after the **retroactive date, professional services** in the practice of the **named insured's** profession as a physician:
>
> (1) by the **named insured,** or
>
> (2) by any person for whose acts or omissions the **named insured** is legally responsible subject to the terms, conditions, exclusions and limits contained in this policy." (Emphases in original.)

The conditions of the ISMIE policy contained the following provision under the section relating to the insured's duties in the event of a personal-injury claim or suit:

> "(d) The Exchange will not settle any claim or **suit** without having first obtained the written consent of the **named insured**. If the **named insured** and the Exchange are in disagreement as to whether or not a claim or **suit** should be settled or defended, either party

may request that the matter be submitted to a committee of physician members of the Exchange whose decision regarding disposition of the claim or **suit** shall be binding." (Emphases in original.)

The no-action provision provided in relevant part:

"No action shall lie against the Exchange unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Exchange."

The SIR policy insured the Hospital and its employees while acting within the scope of their duties for the Hospital, up to $1.5 million. The policy did not apply to "liability of a Covered Party, if an individual, for such Covered Party's personal acts or omissions involving a Medical Incident."

C. The Complaint

In their complaint, plaintiffs alleged in their facts that under the circumstances, ISMIE had a duty to pursue settlement on Dr. Hecht's behalf in the Tripp lawsuit and to offer an amount, up to and including the full $1 million limit of the policy, in an attempt to settle. Plaintiffs further alleged in the facts of the complaint that the settlement was a reasonable sum given the likelihood that Dr. Hecht would be found liable and the likelihood that a jury would award very high damages.

The causes of action posed in the complaint include plaintiffs' claim, as Dr. Hecht's assignees, of their right to select coverage (count I of the complaint). The right-to-select-coverage claim alleged that: (1) the amount paid to the Tripp plaintiff was reasonable and paid on the basis that it was reasonably likely that Dr. Hecht would be found liable in the lawsuit; (2) Dr. Hecht rightfully selected

ISMIE's coverage to apply the first $1 million of the settlement amount; (3) ISMIE was obligated to pay the $1 million; and (4) as Dr. Hecht's assignees, plaintiffs were entitled to recover the $1 million. Similarly, plaintiffs alleged the same facts to support count II, which was based on plaintiffs' right as subrogees of Dr. Hecht. In count IV, Sari alleged the same facts to support its claim that ISMIE owed the $1 million under the doctrines of horizontal exhaustion, as recognized in Missouri Pacific R.R. Co. v. International Insurance Co., 288 Ill. App. 3d 69 (1997), and reimbursement, as provided in Schal Bovis, Inc. v. Casualty Insurance Co., 315 Ill. App. 3d 353 (2000) (Schal Bovis II).[2] In count V, plaintiffs alleged that they were entitled to recovery for unjust enrichment because ISMIE was enjoying the benefit of the settlement without making payment. In count VI, plaintiffs alleged that they were entitled to recovery based on quantum meruit because ISMIE was enjoying the benefit of the settlement without objecting to entry of the settlement. Plaintiffs argue that the provisions raised by ISMIE in its defense are inapplicable where ISMIE has breached its good-faith duty to settle.

Typically, breach of a good-faith duty to settle is a tort claim that arises from a contractual obligation.[3] Chandler v. American Fire & Casualty Insurance Co., 377 Ill. App. 3d 253, 255 (2007) ("Any bad-faith failure to settle would be a tort arising from this contractual obligation"); Schal Bovis I, 314 Ill. App. 3d at 574 ("A complaint for bad faith sounds in tort and is subject to all of the

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[2]We refer to this case as Schal Bovis II to distinguish it from Schal Bovis v. Casualty Insurance Co., 314 Ill. App. 3d 562 (1999) (Schal Bovis I) for the sake of clarity.

[3]On July 17, 2009, ISMIE moved for leave to cite to Schal Bovis I and McLean v. Rockford Country Club, 352 Ill. App. 3d 229 (2004), for its position that plaintiffs failed to plead a tort claim for breach of a good-faith duty to settle, which motion went unopposed. We grant the motion.

requirements of a traditional negligence complaint"). However, plaintiffs admitted during oral arguments that they intentionally did not plead a tortious breach of a good-faith duty to settle the claim and were not seeking tort damages. Rather, they merely sought the $1 million owed under the ISMIE contract by pleading other causes of action, including equitable subrogation, and alleging the necessary facts to support its claim that ISMIE breached its good-faith duty to settle under the contract. Plaintiffs' method of pleading is not barred, as courts have also recognized the good-faith duty as one implied in the insurance contract and capable of being raised in claims such as equitable subrogation. See Twin City Fire Insurance Co. v. Country Mutual Insurance Co., 23 F.3d 1175, 1181 (7th Cir. 1994); Liberty Mutual Insurance Co. v. American Home Assurance Co., 348 F. Supp. 2d 940, 960-61 (N.D. Ill. 2004). Thus, we limit our review to plaintiffs' contractual claims as pleaded.

D. Effect of No-Action Provision

We first address ISMIE's defense that its no-action provision is enforceable because ISMIE did not breach its duty to defend Dr. Hecht.[4] In granting summary judgment for ISMIE, the trial

[4]Plaintiffs state in their brief that ISMIE waived its right to rely on its no-action provision because it neither asserted it in a reservation of rights against Dr. Hecht nor pleaded it as an affirmative defense. We reject plaintiffs' argument, as ISMIE raised the no-action provision in its motion for summary judgment, and further, we cannot say that plaintiffs would be surprised by ISMIE's reliance on a provision in the very contract that plaintiffs are attempting to enforce. See 735 ILCS 5/2--613(d) (West 2008) (facts constituting an affirmative defense must be plainly set forth in the answer or reply if such defense, if not expressly stated, would take the opposite party by surprise). Further, because a motion for summary judgment may be filed at any time, even prior to filing an

court essentially accepted ISMIE's position that the no-action provision barred plaintiffs' recovery regardless of whether it acted in bad faith (or perhaps the trial court determined that ISMIE acted in good faith, without discussing or mentioning the issue). The purpose of a no-action provision is to protect the insurer from collusive or overly generous or unnecessary settlement by the insured at the expense of the insurance carrier. De Luxe Motor Stages of Illinois, Inc. v. Hartford Accident & Indemnity Co., 88 Ill. App. 2d 188, 193 (1967). "It is, however, unfair to the insured to enforce the clause against him when the insurer has erroneously refused to perform the insurance contract." De Luxe, 88 Ill. App. 2d at 193. While in De Luxe the insurer had refused to defend and thus breached the insurance contract by failing to defend where coverage was provided, it follows that it would be unfair to enforce the no-action clause against the insured where the insurer has similarly breached the contract by breaching the duty to settle. In fact, the supreme court has stated that "[a]n insurer who undertakes the defense of a suit against the insured, where the damages sought are in excess of policy limits, cannot arbitrarily refuse a settlement within policy limits," and in such circumstances, the "insured may effect a reasonable settlement himself without breaching any conditions of the policy." Krutsinger v. Illinois Casualty Co., 10 Ill. 2d 518, 527 (1957); see Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513, 526 (1996) (recognizing that claim for breach of good-faith duty to settle arises where insurer refuses to settle third-party liability claim on behalf of insured and may be liable for the full amount of a judgment regardless of policy limits); cf. Charter Oak Fire Insurance Co. v. Color Converting Industries Co., 45 F.3d 1170 (7th Cir. 1995) (finding insurer's delay in settling did not amount to a breach of good-faith duty, because insurer was merely still investigating claim, was

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answer, an affirmative defense raised in such a motion may be considered even if not raised in the answer. Salazar v. State Farm Mutual Automobile Insurance Co., 191 Ill. App. 3d 871, 876 (1989).

not exposing insured to an excess judgment, and thus the insured's payment in settlement constituted a voluntary payment).

As there is no Illinois case directly on point, plaintiffs rely on Fireman's Fund Insurance Co. v. Security Insurance Co. of Hartford, 72 N.J. 63, 75, 367 A.2d 864, 870 (1976), in support of its position that the no-action clause should not protect ISMIE where the parties settled the case when ISMIE breached its good-faith duty to settle. In Fireman's Fund, Security Insurance had issued a $50,000 professional-malpractice insurance policy for a law firm, and Fireman's Fund had issued an excess policy for $250,000. Fireman's Fund, 72 N.J. at 67, 367 A.2d at 866. Both insurers had hired a single attorney to defend the law firm after a malpractice lawsuit was filed against it. Shortly before that malpractice lawsuit was to come to trial, the plaintiffs had offered to settle for $147,000. Fireman's Fund, 72 N.J. at 67-68, 367 A.2d at 866. Security Insurance refused to settle or to contribute its $50,000 toward the settlement despite the request of its insured, Fireman's Fund, and the trial attorney it had hired. Fireman's Fund, 72 N.J. at 68, 367 A.2d at 866. Fireman's Fund and the insured eventually settled the matter for $135,000, and Fireman's Fund, as assignee of the insured, filed an action seeking recovery of the $50,000 from Security Insurance, which it alleged acted in bad faith in refusing to settle. Fireman's Fund, 72 N.J. at 68, 367 A.2d at 866. Security Insurance made no challenge to the finding that it had acted in bad faith in refusing to settle. The record showed that it knew that an adverse verdict would have exceeded $400,000 and possibly reached $542,000. It had further refused to settle despite the recommendation of its own retained attorney, its claims manager, and the insured. Fireman's Fund, 72 N.J. at 69, 367 A.2d at 867.

Security Insurance did, however, raise its no-action provision in its defense. The court stated that while the right to control settlements is reserved to the insurer and an important provision in the

insurance contract, that right is forfeited when the insurer "violates its own contractual obligation to the insured." Fireman's Fund, 72 N.J. at 71, 367 A.2d at 868. The court acknowledged Security Insurance's argument that it had fully defended its insured and could not be said to have breached its contract, but pointed out that an implied covenant of good faith and fair dealing is embodied in every contract and that an insurer is bound to comply with such covenants before relying on the powers reserved to it by the language of the contract. Fireman's Fund, 72 N.J. at 72, 367 A.2d at 869. Because Security Insurance had breached an implied good-faith duty, its insured was free to protect its own interest in minimizing a potential liability in excess of the policy limit by agreeing to a reasonable good-faith settlement and by recovering the policy limit from Security Insurance. Fireman's Fund, 72 N.J. at 73, 367 A.2d at 869.

The court went on to explain the consequences of a breach of a good-faith duty to settle, acknowledging that the consequences differ depending upon the circumstances. For instance, if, at the time the settlement offer is being considered, the potential award is within the policy limits, then there is no reason to deprive the insurer--the only one at that point bearing a monetary risk--of its absolute right to control the litigation. Fireman's Fund, 72 N.J. at 74, 367 A.2d at 870. In that situation, even if the insured believes the insurer is acting in bad faith, it is appropriate to hold that the insured has no alternative but to await trial, and if it results in a judgment in excess of the policy limits, then to institute an action against the insurer to recover the amount by which the judgment exceeded the proposed settlement amount. Fireman's Fund, 72 N.J. at 74-75, 367 A.2d at 870. If the circumstances at the time of settlement establish that the potential loss and the proposed settlement by far exceed, as they did in Fireman's Fund, the limits of the policy, the insured need not await the outcome of the trial and may proceed to make a prudent settlement. Fireman's Fund, 72

N.J. at 74, 367 A.2d at 870. Then, upon proof of the insurer's breach of its good-faith duty to settle, it may recover the amount of the policy limits from the insurer. Fireman's Fund, 72 N.J. at 74, 367 A.2d at 870.

The dissent in Fireman's Fund criticized the majority's holding, arguing that the insured receives protection under existing law because if the insurer's gamble by going to trial leads to an adverse judgment, the insurer would be liable for any excess judgment upon a bad-faith claim. If the insurer wins at trial, the insured reaps that benefit along with the insurer. Thus, the dissent believed that the majority's decision to allow an insured to settle without the consent of the insurer was bad public policy because it allows an insured to decide that an insurer is acting in bad faith at a time when neither the insured nor the insurer can be certain of the outcome. Fireman's Fund, 72 N.J. at 83, 367 A.2d at 875 (Clifford, J., dissenting, joined by Mountain and Conford, JJ.). The dissent argued that effective administration of liability insurance requires the insurer's complete control over the negotiation and litigation, and the majority's holding could lead to claimants playing off insurers against insureds. Fireman's Fund, 72 N.J. at 84, 367 A.2d at 876 (Clifford, J., dissenting, joined by Mountain and Conford, JJ.). The dissent further saw problems with the insured's ability to establish its damages when it did not allow the case to be tried and result in a judgment in excess of the $50,000 policy limit. The insured, by settling on its own, precluded the possibility of either (1) a later settlement by the insurer; (2) a judgment for less than the policy limit; (3) a judgment in favor of the insured; or (4) a judgment for more than the policy limit for which the insurer would have had to pay as a matter of law assuming it acted in bad faith in refusing to settle. Fireman's Fund, 72 N.J. at 86-87, 367 A.2d at 877 (Clifford, J., dissenting, joined by Mountain and Conford, JJ.).

We find other cases outside of this jurisdiction also helpful. In Crawford v. Infinity Insurance Co., 139 F. Supp. 2d 1226, 1228-29 (D. Wyo. 2001), an insured settled an auto-accident claim with the plaintiff for $700,000, after his insurer, which agreed to settle for the $15,000 policy limit, refused to actually pay. When the insured sued, Infinity relied on its no-action clause, arguing that it precluded the insured from recovering the policy limit, and the trial court held that the no-action clause would not be enforced if Infinity acted in bad faith or breached its duty to defend. The case proceeded to a jury trial, and the jury verdict was entered in favor of the insured, finding that Infinity had acted in bad faith by failing to defend and by failing to settle the claim within the policy limit. Crawford, 139 F. Supp. 2d at 1229. Infinity, like ISMIE, objected to the rule that the no-action provision was ineffective where the insurer breached its good-faith duty to settle and the settlement was reasonable and made in good faith, and Infinity argued that the no-action provision should be deemed ineffective only where the insurer unjustifiably refused to defend a suit. Crawford, 139 F. Supp. 2d at 1231. The court rejected Infinity's claim, citing cases in New York and Nebraska, which acknowledged that insurers may breach their duty of good faith in ways other than refusing to defend. Crawford, 139 F. Supp. 2d at 1231. The court held that under Wyoming law, an insured may enter into a reasonable settlement where the insurer acted with bad faith in failing to settle a claim within policy limits, and the court went on to uphold the jury's verdict. Crawford, 139 F. Supp. 2d at 1231-32.

Similarly, in Rupp v. Transcontinental Insurance Co., No. 2:07--CV--333--7C--PMW (D. Utah August 6, 2008), the primary insurers refused to settle a personal-injury action against an insured for $6 million when it knew that an adverse judgment was likely to exceed $10 million. Eventually, the insured and the excess carrier settled with the plaintiff for $8 million, and the insured

filed suit against the primary insurers to recover the policy limits, which totaled nearly $4 million. Rupp, slip op. at 7. The primary insurers raised the no-action provision in their defense, but the court rejected that argument. Rupp, slip op. at 49. The court held that "an insured facing the significant likelihood of an excess judgment is not required to take the case to trial before a cause of action for bad faith accrues." Rupp, slip op. at 54.

We find the rationale in Fireman's Fund, Crawford, and Rupp persuasive and based on sound reasoning that is consistent with Illinois law and policy. Here, it would be unfair to enforce the no-action provision against Dr. Hecht for securing a reasonable settlement if ISMIE breached its good-faith duty to settle and exposed Dr. Hecht to liability exceeding the policy limits, despite the case not having been tried and despite ISMIE's initial fulfillment of its duty to defend. Breach of the good-faith duty to settle is considered by other jurisdictions, and we agree, to be an extension of the duty to defend. See Rupp, slip op. at 53; Isadore Rosen & Sons, Inc. v. Security Mutual Insurance Co., 31 N.Y.2d 342, 348, 291 N.E.2d 380, 382, 339 N.Y.S.2d 97, 101-02 (1972).

The cases upon which ISMIE relies are distinguishable. For instance, in Piper v. State Farm Mutual Automobile Insurance Co., 1 Ill. App. 2d 1 (1953), there was no allegation that the insurer had breached a good-faith duty to settle or defend when the court enforced the no-action provision against the insured. In Burkart v. Toraason, 107 Ill. App. 3d 92, 93 (1982), the issue before the court was whether the no-action provision, which stated that no action could be brought against the insurer unless the amount of the loss had been fixed by a court of last resort after trial or by agreement of the parties, precluded recovery until appellate review of the judgment had been exhausted. In Allstate Insurance Co. v. United Services Automobile Ass'n, 249 Va. 9, 13, 452 S.E.2d 859, 861-62 (1995), the court upheld Allstate's no-action provision against USAA after USAA settled a negligence action

against an insured that both carriers had insured on a primary basis. While Allstate had refused to settle or contribute toward the settlement, the court noted that Allstate may have owed its insured a common-law duty to protect her against the threat of a judgment in excess of its policy limits, and the insured was not contending that Allstate breached that duty. Allstate, 249 Va. at 13, 452 S.E.2d at 861. The court's holding was limited in that the court did not analyze whether Allstate owed to USAA or its insured a good-faith duty to settle or whether it breached that duty when it enforced the no-action provision. Allstate, 249 Va. at 13, 452 S.E.2d at 861. Accordingly, ISMIE's cases do not address the narrow issue presented in this case and are inapplicable. Therefore, the no-action provision may be rendered unenforceable if plaintiffs establish that ISMIE breached its good-faith duty to settle.

E. Good-Faith Duty

Plaintiffs' argument in their motion for summary judgment and on appeal regarding a good-faith duty to settle is entangled in the various counts alleged against ISMIE and undermines the applicability of the no-action clause, which the trial court based its judgment upon.[5] We first will address count I, the enforcement of Dr. Hecht's right to select coverage by Dr. Hecht's assignees. Regarding the duty owed to Dr. Hecht, ISMIE argues that plaintiffs failed to offer any evidence that Dr. Hecht suffered an injury, and thus, he had no claim against ISMIE to assign. ISMIE argues that

[5]When asked to whom ISMIE owed its good-faith duty to settle, counsel for plaintiffs responded that it owed the duty only to Dr. Hecht and not to the Hospital or Sari. Our review is therefore limited only to the duty owed to Dr. Hecht, the insured, which plaintiffs raise as assignees and subrogees.

Dr. Hecht suffered no loss because plaintiffs paid all of the loss and he did not assume any personal liability.

An insurance provider has a duty to act in good faith in responding to settlement offers. Haddick v. Valor Insurance, 198 Ill. 2d 409, 414 (2001). If the insurer breaches this duty owed to its insured, it may be liable for the entire judgment against its insured, including any amount in excess of policy limits. Haddick, 198 Ill. 2d at 414. The basis for the duty to settle is the insurer's exclusive control over settlement negotiations and defense of litigation. Haddick, 198 Ill. 2d at 414. "This exclusive control, however, necessarily results in a conflict of interest between the insurance provider and its insured." Haddick, 198 Ill. 2d at 415. Because of the conflict, the insurer may have an incentive to decline a settlement offer and proceed to trial, believing that it may win, when the insured would prefer to settle within policy limits and avoid the risk of trial. Haddick, 198 Ill. 2d at 415. "In such cases, the insurance contract itself does not provide a remedy to the insured faced with a judgment in excess of policy limits; therefore, the law imposes upon the insurer the duty to settle in good faith." Haddick, 198 Ill. 2d at 415.

When a third party seeks damages that exceed policy limits, the insured necessarily becomes concerned with personal liability when there is a reasonable probability that the insured will be found liable for an excess judgment. Haddick, 198 Ill. 2d at 416. At that point, the insurer must take the insured's settlement interests into consideration. Haddick, 198 Ill. 2d at 416. To sustain a cause of action for bad faith, the plaintiff must allege that: (1) the duty to settle arose; (2) the insurer breached the duty; and (3) the breach caused injury to the insured. Haddick, 198 Ill. 2d at 416. The duty of an insurer arises when there is a reasonable probability of recovery in excess of policy limits and there is a reasonable likelihood of a finding of liability against the insured. Central Illinois Public Service

↩ memo p. 6, 12

Co. v. Agricultural Insurance Co., 378 Ill. App. 3d 728, 737 (2008). In determining whether there was bad faith, the court will consider factors such as the existence of an offer by the plaintiff to settle within the policy limits, a refusal to negotiate, the advice of defense counsel, the prospect of an adverse verdict, and the potential for damages in excess of the policy limits. Central Illinois, 378 Ill. App. 3d at 737. Generally, an insurer is not required to initiate settlement negotiations unless the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed policy limits. Haddick, 198 Ill. 2d at 417 n.1. The fact that an excess judgment was entered against the insured constitutes the damage that permits the insured to recover for the breach of the duty owed. Scroggins v. Allstate Insurance Co., 74 Ill. App. 3d 1027, 1030 (1979). Whether an insurer has acted in bad faith by failing to settle a claim is a question of fact for the fact finder. Haddick, 198 Ill. 2d at 419. When the insurer arbitrarily refuses to settle within policy limits, the insured may effect a reasonable settlement himself without breaching any conditions of the policy. Krutsinger, 10 Ill. 2d at 527.

As assignees of Dr. Hecht in count I of the complaint (enforcement of Dr. Hecht's right to select coverage), plaintiffs have no greater or lesser rights than the doctor. ISMIE argues that Dr. Hecht has not been injured by ISMIE's failure to contribute $1 million toward the settlement, because there was no judgment or settlement in excess of his policies and he has paid nothing out of pocket. In addition to ISMIE's argument that the no-action provision should be enforced when ISMIE did not fail to defend Dr. Hecht, ISMIE argues that Dr. Hecht was not damaged. At oral argument, ISMIE argued that had it proceeded to trial, lost, and been found to have acted in bad faith in refusing to settle, then Dr. Hecht could have established damages. But, because Dr. Hecht chose to settle without ISMIE's consent, he could not now force ISMIE to pay against its will. While a judgment

after trial is certainly good evidence of damages, it is not the only evidence the court will accept in a bad-faith action against the insurer. Rupp, slip op. at 51. Plaintiffs still must establish that the duty to settle arose, meaning that there was a reasonable probability that Dr. Hecht would be found liable and that there was a reasonable probability that Dr. Hecht would be personally liable for an excess judgment, and they must establish that the settlement agreement was reasonable and entered into in good faith.

The case ISMIE relies on, National Union Fire Insurance Co. v. Continental Illinois Corp., 673 F. Supp. 267 (N.D. Ill. 1987), does not support its argument. In National Union, the insurers refused to accept a $68 million settlement of a securities-litigation claim. The Federal Deposit Insurance Corporation (FDIC), as assignee of Continental Illinois, proceeded to settle the matter for $88 million, and then sought recovery from the insurers for failing to accept the lower proposed settlement. National Union, 673 F. Supp. at 269, 272. FDIC sought to recover damages through an assignment of rights to seek indemnification in two ways: (1) a claim within the policy limits; and (2) a claim for an amount in excess of the policy limits. National Union, 673 F. Supp. at 269. We find National Union distinguishable because it addressed only the second argument posed by FDIC. National Union, 673 F. Supp. at 269-70. In this case, plaintiffs seek only the $1 million policy limit from ISMIE and not a sum in excess of the policy limit, and a closer reading of National Union, in fact, supports plaintiffs. The court in National Union, in distinguishing that FDIC was seeking indemnity in excess of the policy limits from its claim seeking enforcement up to the policy limits, stated that ordinarily enforcement of settlement agreements against insurers that breached their good-faith duty to settle involved only the policy limits. National Union, 673 F. Supp. at 274, citing Fireman's Fund, 72 N.J. at 73, 367 A.2d at 869 (stating breach of an insurer's covenant to exercise

good faith in considering an offer to settle leaves the insured free to protect his own interest by agreeing to a reasonable good-faith settlement and then, on proof of the insurer's default, to recover from it the amount of its policy limits); Evans v. Continental Casualty Co., 40 Wash. 2d 614, 245 P.2d 470, 479 (1952) (finding that insured may recover amounts paid, up to policy limits, where insurer was guilty of bad faith in failing to settle a claim, if settlement procured by insured was reasonable and made in good faith). Here, plaintiffs are not seeking excess damages, and such damages are immaterial because plaintiffs have precluded excess damages by taking actions to mitigate such damages. Therefore, we reject ISMIE's claim that, because Dr. Hecht suffered no personal damages in excess of the ISMIE policy limit, he would be unable to recover the policy limit if ISMIE breached its good-faith duty to settle.

The question remains whether ISMIE breached a good-faith duty to settle and that question is one of fact. Haddick, 198 Ill. 2d at 419. Whether it was likely that Dr. Hecht would be found liable and whether the amount of potential damages exposed Dr. Hecht to personal liability remain disputed material issues of fact based on the record before us. While ISMIE argues that it does not have to pay where plaintiffs have not proven that Dr. Hecht was negligent in the underlying action, the basis of ISMIE's argument is incorrect. Plaintiffs need not establish actual liability to the party with whom Dr. Hecht settled but only that he settled in reasonable anticipation of liability. Federal Insurance, slip op. at 7. The determination of whether Dr. Hecht's anticipation of liability was reasonable would depend on the quality and quantity of proof that Dr. Hecht would expect to be presented against him in the underlying action. The burden of demonstrating the reasonableness of his anticipation of liability would rest on Dr. Hecht, the insured, since he was the party who agreed to settle. Federal Insurance, slip op. at 4. While the record contains evidence that the probability of

an adverse finding against Dr. Hecht was high and that a potential jury award would be in the multimillion dollar range, the record also contains conflicting testimony and documents, in which Temple and the physician review committee believed the case was medically defensible. Further, the range of potential jury awards in the record was wide ($0 to $65 million). When such material issues of fact are presented, summary judgment is inappropriate. Accordingly, summary judgment should not have been granted in favor of ISMIE as to count I (enforcement of Dr. Hecht's right to select coverage).

Moving on to count II (enforcement of Dr. Hecht's right to select coverage by subrogee), we find summary judgment was inappropriate for the same reasons stated for count I. A claim for equitable or contractual subrogation requires the following elements: (1) the defendant carrier must be primarily liable to the insured for a loss under an insurance policy; (2) the plaintiff carrier must be secondarily liable to the insured for the same loss under its policy; and (3) the plaintiff carrier must have discharged its liability to the insured and at the same time extinguished the liability of the defendant carrier. Home Insurance Co. v. Cincinnati Insurance Co., 213 Ill. 2d 307, 323 (2004). Plaintiffs cannot establish the first element of their subrogation claim unless they establish that ISMIE breached its good-faith duty to settle owed to its insured. Accordingly, summary judgment should not have been granted as to count II, because whether ISMIE breached its good-faith duty to settle involves material issues of fact.

In count IV, Sari claimed that ISMIE owed the $1 million under the doctrines of horizontal exhaustion, as recognized in Missouri Pacific, and reimbursement, as provided in Schal Bovis II. Under Illinois law, all underlying coverage must be exhausted before excess coverage may be reached. Missouri Pacific, 288 Ill. App. 3d at 81. This principle, known as "horizontal exhaustion,"

is required because excess coverage carries a smaller premium than primary coverage, due to the lesser risk insured. Missouri Pacific, 288 Ill. App. 3d at 81. Here, there is no dispute that ISMIE and the Hospital provided primary coverage and that Sari provided excess coverage. Sari then pled that it was entitled to reimbursement as provided in Schal Bovis II because of ISMIE's failure to contribute its $1 million to the settlement. Sari failed to expound on how Schal Bovis II applies to its theory of reimbursement in its complaint or in its brief. Instead, in its brief, Sari makes the same argument that it made regarding its equitable-subrogation claim in count II. We presume the citation to Schal Bovis II was for the proposition that an excess insurer may seek reimbursement where it has been determined that the primary insurer was required to pay on behalf of its insured and where the excess insurer overpaid because such primary limits were not yet exhausted. Schal Bovis II, 315 Ill. App. 3d at 364. Whether ISMIE was required to pay has not yet been determined and depends upon resolution of the factual questions pertaining to whether ISMIE breached its good-faith duty to settle. Accordingly, count IV and Sari's citation to boilerplate holdings regarding horizontal exhaustion and reimbursement do not help this court in determining whether ISMIE was required to pay at all. Whether ISMIE was required to pay depends upon whether it breached its good-faith duty to settle on behalf of Dr. Hecht. Therefore, summary judgment was inappropriate as to count IV to the extent that count IV is a reiteration of the equitable-subrogation claim in count II.

F. ISMIE's Defenses

In addition to its no-action clause defense, ISMIE raised other arguments that, if accepted, preclude plaintiffs' recovery as a matter of law. First, ISMIE argues that the contract provision relating to the physician review committee was controlling, and, thus, summary judgment was appropriate. The physician review committee provision stated that if there was a dispute between

ISMIE and the insured regarding whether to settle, either party could request review by the physician review committee and the committee's recommendation was binding. Here, the physician review committee recommended against settling, and ISMIE argued that the recommendation was binding. However, we are not convinced that this provision of the contract was properly triggered. Dr. Hecht, Paul Cicero (Dr. Hecht's private counsel), Greg Snyder (Dr. Hecht's counsel paid by ISMIE), the Hospital and its counsel, and Temple (in her letter requesting the committee review the case in 2002) recommended that the case be settled because of the potential for a high damages award, among other problems with the defense (Dr. Hecht's ability as a witness, certain facts, the technical nature of the suit, sympathetic plaintiff, notoriety of plaintiff's counsel). If Temple, an agent of ISMIE, agreed to recommend settlement, then it appears there was no disagreement between ISMIE and Dr. Hecht, and therefore, the provision was not triggered. However, there are other documents in the form of claims notes that indicated ISMIE believed the case was medically defensible. Again, whether this provision was properly triggered when there is a dispute in the facts is not an appropriate question to be resolved by summary judgment. Thus, the defense should be presented to the trier of fact upon remand. With that being said, we note that even if this provision was triggered, this provision does not relieve ISMIE of its good-faith duty to settle, as the good-faith duty is to be determined in a court of law, not by a panel of physicians.

Second, ISMIE argues that plaintiffs' $5 million settlement payment was voluntary, thereby precluding them from recovering as subrogees. ISMIE argues that plaintiffs' payments were voluntary because their policies afforded no coverage for the incident. ISMIE argues that their policies do not cover "personal acts" of the doctor, and the doctor "personally performed" the cardiac biopsy. We find this argument to be disingenuous, as normally "personal acts" are those acts

performed outside of the scope of employment. Dr. Hecht was clearly acting within the scope of his employment. Further, plaintiffs did not dispute that their policies provided coverage for Dr. Hecht's conduct, and we give great deference to the parties' interpretation of their contracts because the parties are in the best position to know what was intended by the language employed. Barney v. Unity Paving, Inc., 266 Ill. App. 3d 13, 18 (1994). Even if the exclusion for personal acts was ambiguous, any ambiguity is construed against the drafter of the policy and in favor of coverage, and therefore, we reject ISMIE's argument that the Hospital and Sari policies did not provide coverage for Dr. Hecht's conduct in the Tripp matter. West Bend Mutual Insurance Co. v. Rosemont Exposition Services Inc., 378 Ill. App. 3d 478, 486 (2007).

G. Unjust Enrichment and Quantum Meruit Claims

Counts V and VI are the final claims that plaintiffs alleged and were based on theories of unjust enrichment and quantum meruit, respectively. When a person obtains money to which he is not entitled, under circumstances such that in equity and good conscience he ought not to retain it, a constructive trust may be imposed to avoid unjust enrichment. Smithberg v. Illinois Municipal Retirement Fund, 192 Ill. 2d 291, 299 (2000). However, unjust enrichment is based on an implied contract, and it does not apply where there is a specific contract that governs the relationships of the parties. People ex rel. Hartigan v. E&E Hauling Inc., 153 Ill. 2d 473, 497 (1992). Thus, summary judgment on the unjust-enrichment count was proper as a matter of law.

We similarly affirm summary judgment on the quantum meruit claim because in order to establish the elements of quantum meruit a plaintiff is required to establish that no contract existed addressing the parties' relationship. Chicago Hospital Risk Pooling Program v. Illinois State Medical

Inter-Insurance Exchange, 325 Ill. App. 3d 970, 983 (2001), citing Canal & Hale, Ltd. v. Tobin, 304 Ill. App. 3d 906, 913 (1999).

H. Interest and Costs

If ISMIE owed the money, plaintiffs would be entitled to prejudgment interest under the Interest Act (815 ILCS 205/2 (West 2002)). The existence of a good-faith defense to the suit between plaintiffs and ISMIE does not preclude an award of prejudgment interest, and courts have granted prejudgment interest in disputes involving two insurance companies. Liberty Mutual Insurance Co. v. Westfield Insurance Co., 301 Ill. App. 3d 49, 55 (1998). Therefore, this issue should be addressed upon remand and resolution of the issues discussed herein.

Section 155 of the Insurance Code (215 ILCS 5/155(1) (West 2002)) provides:

> "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 25% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $25,000;

(c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action."

In determining whether section 155 sanctions should be imposed, the trial court must consider the totality of the circumstances. Golden Rule Insurance Co. v. Schwartz, 203 Ill. 2d 456, 469 (2003). Here, the trial court did not make a finding on this issue, and therefore, this issue is remanded for further consideration.

III. CONCLUSION

In conclusion, we reject the Hospital's claim that the ISMIE policy intended to cover $1 million of the $1.5 million SIR limit and, thus, affirm summary judgment in favor of ISMIE as to count III (equitable contribution). We also affirm summary judgment in favor of ISMIE as to counts V and VI (unjust enrichment and quantum meruit). We reverse and remand as to counts I, II, and IV, for resolution by the fact finder of the material issues of fact identified in this opinion. Further, upon remand, the trial court shall address interest and costs pursuant to the Interest Act and section 155 of the Insurance Code.

_____Affirmed in part and reversed in part; cause remanded.

McLAREN and BURKE, JJ., concur.

Thounsavath v. State Farm Mutual Automobile Insurance Co., 2018 IL 122558

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. Supreme Court · filed 2018-03-22 · Opinion
Supreme Court

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- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 48: passage C012.2

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***Thounsavath v. State Farm Mutual Automobile Insurance Co.*, 2018 IL 122558**

Caption in Supreme Court:	PHOUNGEUN THOUNSAVATH, Appellee, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant.
Docket No.	122558
Filed	March 22, 2018
Decision Under Review	Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Kathleen M. Pantle, Judge, presiding.
Judgment	Appellate court judgment affirmed.
Counsel on Appeal	Frank C. Stevens, of Taylor Miller LLC, of Chicago, for appellant. Eric J. Parker, of Stotis & Baird Chtrd., of Chicago, for appellee.
Justices	JUSTICE THOMAS delivered the judgment of the court, with opinion. Chief Justice Karmeier and Justices Freeman, Kilbride, Garman, Burke, and Theis concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Phoungeun Thounsavath sought underinsured motorist coverage from defendant, State Farm Mutual Automobile Insurance Company (State Farm), stemming from an automobile accident that occurred while she was a passenger in a vehicle driven by Clinton Evans. State Farm denied plaintiff's claim for underinsured motorist coverage based upon a driver exclusion endorsement in plaintiff's automobile liability insurance policies with State Farm. The driver exclusion endorsement named Clinton Evans as an excluded driver.

¶ 2 Both parties filed complaints for declaratory judgment. On cross-motions for summary judgment, the trial court granted summary judgment in favor of plaintiff. The appellate court affirmed. 2017 IL App (1st) 161334. This court allowed State Farm's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2017).

¶ 3 BACKGROUND

¶ 4 State Farm issued two policies of motor vehicle insurance to plaintiff. One policy insured a 1998 Pontiac Grand Am, and one policy insured a 2004 Pontiac GTO. Each policy provided liability, uninsured motorist, and underinsured motorist coverage in the amounts of $100,000 per person and $300,000 per accident. Both policies contained a "Driver Exclusion Endorsement" that excluded Clinton M. Evans. Driver exclusion endorsements are also referred to as named driver exclusions. Specifically, the driver exclusion endorsement provided:

> "IT IS AGREED *WE* SHALL NOT BE LIABLE AND NO LIABILITY OR OBLIGATION OF ANY KIND SHALL ATTACH TO *US* FOR *BODILY INJURY*, *LOSS* OR DAMAGE UNDER ANY OF THE COVERAGES OF THIS POLICY WHILE ANY MOTOR VEHICLE IS OPERATED BY: CLINTON M. EVANS." (Emphases in original.)

¶ 5 On June 17, 2012, plaintiff was a passenger in a 2007 Hyundai automobile that was owned and operated by Clinton Evans when Evans's vehicle was involved in an accident with another automobile. Plaintiff was injured in the accident. Plaintiff made a claim for damages against Clinton Evans for her personal injuries. Evans's insurer, American Access Insurance Company, paid plaintiff's claim in the amount of $20,000, the policy limit. Plaintiff then filed a claim for underinsured motorist coverage with State Farm for the June 17, 2012, accident. State Farm denied plaintiff's claim based upon the driver exclusion endorsement.

¶ 6 Plaintiff subsequently filed a complaint for declaratory judgment in the circuit court of Cook County, seeking a declaration that she was entitled to underinsured motorist coverage under her State Farm policies. Plaintiff alleged that she purchased automobile insurance policies from State Farm that included underinsured motor vehicle coverage for bodily injury. Plaintiff noted that she was involved in a motor vehicle accident while a passenger in a vehicle owned by Clinton Evans and sustained over $30,000 in medical bills related to the accident. Clinton Evans was at fault for the accident, and his insurer tendered the full policy limits of $20,000 to plaintiff. Plaintiff then sought to recover pursuant to the underinsured motorist coverage of her State Farm policies, but State Farm denied the claim, citing the named driver exclusion stating that Clinton Evans was an excluded driver. Plaintiff asserted that section 143a-2 of the Illinois Insurance Code (215 ILCS 5/143a-2 (West 2012)) required all policies of

insurance to provide underinsured motorist coverage to the named insured, so that State Farm's denial of plaintiff's underinsured motorist coverage violated the statute, as well as Illinois public policy. Plaintiff therefore sought a declaration that State Farm must provide her with underinsured motorist coverage under her State Farm policies.

¶ 7 State Farm filed an answer to plaintiff's complaint for declaratory judgment, denying that section 143a-2 of the Insurance Code required all policies of insurance to provide underinsured motorist coverage to the named insured. State Farm also filed a counterclaim for declaratory judgment, noting that it had issued two policies of automobile insurance to plaintiff. Both policies contained a driver exclusion endorsement, signed by plaintiff, which excluded coverage for bodily injury, loss, or damage under the policies while any motor vehicle is operated by Clinton Evans. State Farm denied that either of plaintiff's automobile insurance policies provided underinsured motorist coverage for the June 17, 2012, accident because all coverages were excluded while Clinton Evans operated any motor vehicle. State Farm sought a declaratory judgment in its favor declaring that there was no underinsured motorist coverage available to plaintiff under either policy for the June 17, 2012, accident, that State Farm had no duty to arbitrate any claim for underinsured motorist coverage made by plaintiff under either policy, and that there was no coverage of any kind available to plaintiff under either policy for the accident of June 17, 2012.

¶ 8 The circuit court ordered both parties to file cross-motions for summary judgment. State Farm filed a motion for summary judgment, arguing that the driver exclusion endorsement in both automobile policies issued to plaintiff did not violate the Insurance Code or the public policy of the state of Illinois. The circuit court denied State Farm's motion for summary judgment. Plaintiff then filed her motion for summary judgment, which the circuit court granted.

¶ 9 State Farm appealed, arguing that its driver exclusion endorsement did not violate section 143a-2 of the Insurance Code or Illinois public policy. The appellate court affirmed the circuit court. 2017 IL App (1st) 161334.

¶ 10 The appellate court noted that, under section 7-601(a) of the Illinois Safety and Family Financial Responsibility Law (Financial Responsibility Law) (625 ILCS 5/7-601(a) (West 2012)), a part of the Illinois Vehicle Code (Vehicle Code), no one may operate a motor vehicle or allow a vehicle to be operated without obtaining sufficient insurance. 2017 IL App (1st) 161334, ¶ 16. In addition, sections 143a and 143a-2 of the Insurance Code (215 ILCS 5/143a, 143a-2 (West 2012)) require automobile liability insurance policies to include uninsured and underinsured motorist coverage. 2017 IL App (1st) 161334, ¶ 17. The appellate court acknowledged that, in general, named driver exclusions in automobile liability insurance policies are permitted in Illinois. *Id.* ¶ 22. However, the cases cited by State Farm in support of its named driver exclusion were distinguishable, as the named driver exclusions in those cases were enforced as to parties other than the named insured. *Id.* ¶ 23.

¶ 11 The appellate court stated that the issue in this case was whether the named driver exclusion violated Illinois's mandatory insurance requirements and public policy where the exclusion barred coverage for the named insured. Although none of the cases cited by either party addressed that precise issue, the appellate court found the analysis in *American Access Casualty Co. v. Reyes*, 2013 IL 115601, to be instructive.

¶ 12 The issue in *Reyes* was whether an automobile liability policy could exclude the only named insured and owner of the vehicle without violating public policy. *Reyes* noted that the plain and unambiguous language of section 7-317(b)(2) of the Vehicle Code (625 ILCS 5/7-317(b)(2) (West 2010)) mandated that an automobile liability policy cover the "person named therein." *Reyes*, 2013 IL 115601, ¶ 11. Because Reyes was the only person "named therein," Reyes could not be excluded from coverage through a contractual provision. *Id.*

¶ 13 Similar to *Reyes*, the appellate court held that a named driver exclusion in an insured's automobile liability insurance policy that bars liability, uninsured, or underinsured coverage for the named insured violates Illinois's mandatory insurance requirements and Illinois public policy. 2017 IL App (1st) 161334, ¶ 34. Accordingly, the appellate court held that the named driver exclusion endorsements in plaintiff's automobile liability policies with State Farm were not enforceable against plaintiff, the named insured.

¶ 14 ANALYSIS

¶ 15 As noted, this case was decided based upon the parties' motions for summary judgment. Summary judgment motions are governed by section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)). Pursuant to section 2-1005, summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* The construction of the terms of an insurance policy and whether the insurance policy comports with statutory requirements present questions of law that are properly decided on a motion for summary judgment. *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 399 (2010).

¶ 16 The granting of a summary judgment motion is subject to *de novo* review. *Id.* at 399-400. In addition, the determination of whether a provision in a contract, insurance policy, or other agreement is invalid because it violates public policy also presents a question of law, which is reviewed *de novo*. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 54 (2011).

¶ 17 An insurance policy is a contract, so the rules applicable to contract interpretation govern the interpretation of an insurance policy. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). A court's primary function is to ascertain and give effect to the intention of the parties, as expressed in the policy language. *Id.* If the insurance policy terms are clear and unambiguous, they must be enforced as written, unless doing so would violate public policy. *Schultz*, 237 Ill. 2d at 400. The public policy of this state is reflected in its constitution, statutes, and judicial decisions. *Id.* If the terms of an insurance contract conflict with a statute, those terms are void and unenforceable. *Id.* Terms of an insurance policy also cannot circumvent the underlying purpose of a statute in force at the time the policy is issued. *Id.*

¶ 18 With some exceptions not at issue in this case, section 7-601(a) of the Financial Responsibility Law requires liability insurance coverage for all motor vehicles designed to be used on a public highway. 625 ILCS 5/7-601(a) (West 2012). The liability insurance policy must provide certain minimum liability amounts. Those amounts, both currently and at the time of the accident at issue in this case, are $20,000 for bodily injury or death to one person as a result of any one accident, $40,000 for bodily injury or death of all persons as a result of any one accident, and $15,000 for damage to the property of others as the result of any one accident. See *id.* §§ 7-203, 7-317(b)(3). The liability insurance policy must also comply with

specific coverage requirements, insuring not only the persons named in the policy but also "any other person using or responsible for the use" of the subject vehicle with the express or implied permission of the insured. *Id.* § 7-317(b)(2). The main purpose of the mandatory liability insurance requirement is to protect the public by securing payment of their damages. *Reyes*, 2013 IL 115601, ¶ 8.

¶ 19 In addition to motor vehicle liability insurance coverage, the Insurance Code requires automobile liability insurance policies to also include uninsured motorist coverage. 215 ILCS 5/143a (West 2012). If the limits for the insured's liability coverage exceed the minimum amounts required by law, the uninsured motorist provisions must provide the same higher coverage amounts unless the excess amount is specifically rejected by the insured. *Id.* § 143a-2(1). The uninsured motorist coverage must extend to all who are insured under the policy's liability provisions. *Schultz*, 237 Ill. 2d at 403.

¶ 20 If the insured's uninsured motorist coverage limit exceeds the minimum liability limit required by the Financial Responsibility Law, the policy must also include underinsured motorist coverage in an amount equal to the uninsured motorist coverage. 215 ILCS 5/143a-2(4) (West 2012). As with uninsured motorist coverage, the underinsured motorist coverage must extend to all those who are insured under the policy's liability provisions. *Schultz*, 237 Ill. 2d at 401. In contrast to the uninsured motorist provision, the underinsured motorist provision does not include a right of rejection.

¶ 21 As noted, in this case plaintiff was injured in an automobile accident while a passenger in Clinton Evans's automobile. Plaintiff sought to recover underinsured motorist benefits pursuant to her automobile liability policies with State Farm because the policy limits in Clinton Evans's automobile liability insurance policy were not sufficient to compensate plaintiff for her injuries. As in the lower courts, State Farm claims that plaintiff is not entitled to recover under her policies because Clinton Evans was excluded from coverage under the driver exclusion endorsement in plaintiff's policies. State Farm argues that named driver exclusions are permitted in Illinois and that plaintiff knew when she signed the driver exclusion endorsements in her policies that State Farm would not pay any liability of any kind, under any coverage, when Clinton Evans operated any automobile. Accordingly, State Farm maintains that plaintiff is not entitled to recover underinsured benefits under her policies with State Farm.

¶ 22 State Farm is correct that, in general, named driver exclusions are permitted in Illinois. *Reyes*, 2013 IL 115601, ¶ 15. We also agree with State Farm that it was entitled to identify Clinton Evans as an individual for whom it would not provide insurance coverage. However, Clinton Evans is not seeking insurance coverage from State Farm under plaintiff's policies. It is plaintiff who is attempting to collect under her policies with State Farm.

¶ 23 In finding that the exclusion in this case was unenforceable against plaintiff, the appellate court found the *Reyes* decision to be instructive. State Farm distinguishes this case from *Reyes* on the basis that the exclusion in *Reyes* was directed at the sole named insured and owner, an exclusion which conflicted with the plain language of section 7-317(b)(2) of the Financial Responsibility Law. In contrast to *Reyes*, plaintiff in this case, the sole named insured and owner, was not excluded from liability coverage for her operation of any vehicle. State Farm also notes that *Reyes* dealt only with liability coverage, while plaintiff's claim here is for underinsured motorist coverage. Finally, State Farm observes that *Reyes* did not hold that a

named driver exclusion *per se* violates the Financial Responsibility Law. Accordingly, State Farm argues that the appellate court erred in relying on *Reyes* to find the driver exclusion endorsement in this case unenforceable.

¶ 24 State Farm's focus in distinguishing *Reyes* is misplaced. The appellate court discussed *Reyes* because it found the analysis in *Reyes* instructive. That analysis addressed whether an exclusion directed to a mandatory statutory provision was enforceable. Whether an exclusion directed to a mandatory statutory provision is enforceable is also at issue in this case, albeit in the context of underinsured motorist coverage rather than liability coverage.

¶ 25 The main purpose of the mandatory liability insurance requirement is "to protect the public by securing payment of their damages." *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 129 (2005). To further that end, the legislature requires uninsured motorist coverage to place the policyholder in substantially the same position he would occupy if the tortfeasor had the minimum liability insurance required by the Financial Responsibility Law. *Rosen*, 242 Ill. 2d at 57. Thus, while mandatory liability insurance attempts to ensure that all drivers carry at least $20,000 of bodily injury coverage, mandatory uninsured motorist coverage protects a driver who has complied with the liability coverage requirement when she is injured by a driver who has not. *Id.* at 68. Moreover, the legislative purpose of underinsured motorist coverage is the same as that of uninsured motorist coverage, which is " 'to place the insured in the same position he would have occupied if the tortfeasor had carried adequate insurance.' " *Id.* at 57 (quoting *Sulser v. Country Mutual Insurance Co.*, 147 Ill. 2d 548, 555 (1992)). If the tortfeasor is insured, but for an amount less than the claimant has bargained for and paid for with her own insurer, mandatory underinsured motorist coverage in an amount equal to her uninsured motorist coverage ensures that the claimant will still be compensated up to the limits of her own uninsured motorist policy. *Id.* at 69.

¶ 26 Therefore, under Illinois law, liability, uninsured motorist, and underinsured motorist coverage are " 'inextricably linked.' " *Id.* at 58 (quoting *Schultz*, 237 Ill. 2d at 404). Liability, uninsured motorist, and underinsured motorist coverages all "serve the same underlying public policy: ensuring adequate compensation for damages and injuries sustained in motor vehicle accidents." *Id.*

¶ 27 The court in *State Farm Mutual Automobile Insurance Co. v. Villicana*, 181 Ill. 2d 436, 444-45 (1998), recognized that "[b]oth the underinsured and uninsured motor vehicle provisions contemplate that consumers will select the total 'package' of coverage, *i.e.*, liability, uninsured and underinsured, in amounts they *themselves* deem adequate for their own protection." (Emphasis in original.) Thus, underinsured motorist coverage protects the insured from the risk that a negligent driver of another vehicle "(i) will cause injury to the insured *** and (ii) will have inadequate liability coverage to compensate the injuries caused by his or her negligence." *Id.* at 445. Underinsured motorist coverage guarantees the protection of an injured insured against the possibility that a tortfeasor, over whom the insured has no control, purchases inadequate amounts of liability coverage. *Id.*

¶ 28 That is exactly the situation in the instant case. Plaintiff purchased liability, uninsured motorist, and underinsured motorist coverage in an amount she deemed adequate for her own protection. Plaintiff had no control over the amount of liability insurance coverage that Clinton Evans purchased for his own vehicle. The liability insurance coverage that Clinton Evans

purchased for his own vehicle was inadequate, so plaintiff sought the protection of the underinsured motorist coverage that she purchased from State Farm.

¶ 29 State Farm argues, however, that because plaintiff signed the driver exclusion endorsement naming Clinton Evans, plaintiff was precluded from recovering underinsured motorist coverage for an accident where Clinton Evans was the tortfeasor. State Farm claims that plaintiff was free to make her own contract with State Farm and chose to sign a contract with a driver exclusion endorsement naming Clinton Evans. State Farm also argues that plaintiff did have control over Evans and his decision to purchase minimal liability coverage because plaintiff had control over her choice to ride as a passenger in Evans's vehicle or in any vehicle operated by Evans.

¶ 30 An insurance policy is a contract, but the terms of an insurance contract must comport with the statutory requirements in effect when the policy is issued. *Schultz*, 237 Ill. 2d at 408. Insurers have no right to depart from valid statutory requirements in their policies. *Id.* Therefore, the fact that plaintiff signed the driver exclusion endorsement is not dispositive. We must determine whether that exclusion is consistent with the relevant statutes and underlying purpose of the statutes.

¶ 31 Neither the statute nor the case law places any restriction on the right of the parties to an insurance contract to agree on which persons are to be the "insureds" under an automobile insurance policy. *Heritage Insurance Co. of America v. Phelan*, 59 Ill. 2d 389, 395 (1974). However, once a person qualifies as an insured for purposes of the policy's bodily injury liability provisions, she must be treated as an insured for purposes of uninsured and underinsured motorist coverage as well. *Schultz*, 237 Ill. 2d at 404. Consequently, just as the governing statutes prohibit an insurance company from directly or indirectly denying uninsured motorist coverage to someone who qualifies as an insured for purposes of liability coverage, the statutes prohibit companies from directly or indirectly denying underinsured coverage to such a person when the basic liability coverage exceeds the statutory minimum. *Id.*

¶ 32 In this case, State Farm and plaintiff agreed that Clinton Evans was not an "insured" under plaintiff's automobile liability insurance policies. However, the parties agreed that plaintiff was an insured. Once plaintiff was designated an "insured" under her policies with State Farm, then, State Farm was prohibited from either directly or indirectly denying her underinsured motorist coverage.

¶ 33 Section 143a of the Insurance Code is plain and unambiguous in mandating that each policy must contain the specified uninsured motorist coverage. *Squire v. Economy Fire & Casualty Co.*, 69 Ill. 2d 167, 176 (1977). *Squire* recognized that the public policy of this state concerning uninsured motorist coverage is that no automobile liability insurance policy shall be issued unless coverage is provided therein against damages caused by uninsured motorists. *Id.* The "statutory coverage is mandatory, and it may not be whittled away by an unduly restrictive definition." (Internal quotation marks omitted.) *Barnes v. Powell*, 49 Ill. 2d 449, 453 (1971). In addition, section 143a-2 of the Insurance Code is plain and unambiguous in mandating that where uninsured motorist coverage in a policy exceeds the limits set forth in section 7-203 of the Financial Responsibility Law (625 ILCS 5/7-203 (West 2012)), each policy must include underinsured motorist coverage in an amount equal to the total amount of uninsured motorist coverage. 215 ILCS 5/143a-2(4) (West 2012).

¶ 34 In this case, plaintiff and State Farm contracted for liability insurance in the amounts of $100,000 per person and $300,000 per accident, which exceeded the minimum statutory limits. Pursuant to section 143a of the Insurance Code, State Farm was required to include uninsured motorist coverage in those amounts in plaintiff's policies unless plaintiff specifically rejected the higher coverage amounts. Plaintiff did not reject the higher coverage amounts. Accordingly, section 143a-2 required plaintiff's policies to also include underinsured motorist coverage in amounts equal to her uninsured motorist coverage. The uninsured and underinsured amounts are mandated by statute.

¶ 35 Because the underinsured motorist coverage was mandated by statute, State Farm's driver exclusion endorsement could not exclude that coverage through a contractual provision. Under the facts of this case, application of the driver exclusion to bar plaintiff, the named insured, from recovering underinsured motorist coverage pursuant to her policies with State Farm violates section 143a-2(4) and, therefore, public policy.

¶ 36 In so holding, we note that the cases cited by State Farm in support of its position are distinguishable from the instant case. For example, in *Phelan*, 59 Ill. 2d 389, the court held that the excluded driver was not an insured under his father's policy, so that the excluded driver could not collect uninsured motorist coverage pursuant to that policy. *Phelan* would be controlling if it was Evans, the excluded driver, seeking to recover under plaintiff's policies with State Farm. *Phelan*, however, is inapposite under the facts of this case. Here, it is the named insured, and not the excluded driver, who is seeking underinsured motorist coverage.

¶ 37 State Farm also relies on *Rockford Mutual Insurance Co. v. Economy Fire & Casualty Co.*, 217 Ill. App. 3d 181 (1991). In that case, a passenger was killed while riding in a vehicle driven by an excluded driver. When the insurer of the vehicle driven by the excluded driver denied coverage for the death of the passenger based upon the named driver exclusion, the mother of the passenger sought uninsured motorist benefits pursuant to her own automobile insurance policy. The mother's insurer filed a complaint for declaratory judgment, claiming that, to the extent the named driver exclusion barred uninsured motorist coverage with respect to the passenger, the exclusion violated the public policy of section 143a and was unenforceable and void. *Id.* at 183-84.

¶ 38 The appellate court disagreed, noting that if a passenger is injured while riding in an uninsured vehicle, the passenger must look to his own policy for recovery under its uninsured motorist provision. *Id.* at 187. The court explained that it did not violate public policy to recognize the named driver exclusion endorsement, which rendered an otherwise insured vehicle uninsured, because the intention and purpose of section 143a was to provide recovery for insureds under their own uninsured motorist provisions. *Id.*

¶ 39 State Farm cites *Rockford Mutual* in support of its claim that enforcing its named driver exclusion does not violate the public policy of section 143a-2. *Rockford Mutual*, however, actually supports plaintiff's position in this case. As discussed, *Rockford Mutual* held that if a passenger is injured while riding in an uninsured vehicle, the passenger must look to his own policy for recovery under its uninsured motorist provision. *Id.* Like section 143a concerning uninsured motorist coverage, the intention and purpose of section 143a-2 is to provide recovery for insureds under their own underinsured motorist provisions. Here, plaintiff was injured while a passenger in a vehicle that was underinsured. Plaintiff therefore sought recovery under her own policy under its underinsured motorist provision.

¶ 40 State Farm also claims that the decisions in *Villicana*, 181 Ill. 2d 436, and *Fuoss v. Auto Owners (Mutual) Insurance Co.*, 118 Ill. 2d 430 (1987), support its argument that policy exclusions do not become unenforceable merely because the named insured is the person seeking the coverage. Those decisions, however, also are inapposite.

¶ 41 In *Villicana*, the insured had two separate policies insuring two vehicles, one of which had higher policy limits than the other. The insured's daughter was injured while riding as a passenger in the vehicle insured with lower limits. Because the damages incurred by the insured's daughter exceeded the amounts she recovered from the driver of her father's car and from the liability policy on that car, she filed a claim for underinsured benefits pursuant to the policy insuring her father's other vehicle. That policy contained a "family car exclusion." The family car exclusion prevented an automobile, which is furnished for the regular use of the insured, the insured's spouse, or any relative who lives with the insured, from being deemed an underinsured motor vehicle. The issue before the court was whether an underinsurance policy could exclude benefits to a family member who is injured in a different family automobile. *Villicana*, 181 Ill. 2d at 438-41.

¶ 42 *Villicana* held that, under the circumstances of the case, the exclusion could be enforced. *Id.* at 441. The court noted that the underinsured motorist statute was enacted to afford consumers the means with which they could protect themselves from the choices of other drivers over whom they had no control. In the case before it, the amount of liability and underinsured coverage selected for the vehicle involved in the accident was within the control of the insured, who chose lower limits for that vehicle than for his other vehicle. *Id.* at 446-47.

¶ 43 Here, in contrast, plaintiff had no control over the amount of liability insurance purchased by Clinton Evans for his own vehicle. As plaintiff observes, the law allows State Farm to refuse liability coverage to Clinton Evans, and once Evans was named as an excluded driver in plaintiff's policies, plaintiff was obligated to make sure that Evans did not drive her vehicles. The accident in this case did not occur while Evans was driving one of plaintiff's vehicles. The accident occurred when plaintiff was riding as a passenger in Evans's vehicle.

¶ 44 The named driver exclusion did not prevent Clinton Evans from driving his own, separately insured vehicle. The Financial Responsibility Law required Evans to obtain liability insurance in at least minimum liability amounts, which he did. Although State Farm argues that plaintiff had control over choosing whether to ride as a passenger in Clinton Evans's vehicle, we do not read the underinsured motorist statute as requiring an insured to determine a driver's limits of liability coverage before riding in his vehicle in order to recover underinsurance benefits.

¶ 45 *Fuoss* also is distinguishable from this case. The insured in that case purchased liability coverage in the amounts of $25,000 per person and $50,000 per accident and uninsured motorist coverage in the amount of $15,000 per person and $30,000 per accident. The insurer, however, failed to offer the insured underinsured motorist coverage.[1] The insured was injured in an automobile accident and settled with the tortfeasor for $100,000, the maximum amount payable under the tortfeasor's liability policy. The insured then sued his insurer, asking the

[1]The statute in effect at the time of the *Fuoss* decision stated that when an offer of uninsured motorist coverage was made to the insured, that offer should also include an offer of underinsured motorist coverage. See Ill. Rev. Stat. 1981, ch. 73, ¶ 755a-2(3).

court to reform his original insurance policy to include sufficient amounts of underinsured motorist coverage to compensate him for all the damages from the accident, which he claimed exceeded the $100,000 that he recovered from the tortfeasor. *Fuoss*, 118 Ill. 2d at 431-32.

¶ 46 The *Fuoss* court noted that section 143a-2(4) provided that an insured may elect to purchase limits of underinsured motorist coverage in an amount up to the uninsured motorist coverage on the insured vehicle, which under the insured's policy was $15,000 per person and $30,000 per accident. *Id.* at 433-34. Even if the insured's policy was reformed to increase his uninsured motorist coverage to the amount of his bodily injury liability limits, and thereby also increase his underinsured motorist coverage, that amount would be $25,000 per person and $50,000 per accident, less than the $100,000 that the insured received from the tortfeasor. *Id.* The court found the insured's claim that he would have purchased a sufficient amount of underinsurance to cover his loss, had the insurance been offered, was too speculative. *Id.* The court stated that permitting the insured to choose underinsured motorist coverage after the fact, in an amount greater than he originally selected for bodily injury liability coverage, would be " 'repugnant to our system of justice' " because the insured would be providing more protection for himself than he was willing to extend to the general public. *Id.* at 435 (quoting *Fuoss v. Auto Owners (Mutual) Insurance Co.*, 148 Ill. App. 3d 526, 535 (1986)).

¶ 47 State Farm suggests that plaintiff in this case is attempting to secure more protection for herself than she was willing to extend to the general public when she agreed to and signed the named driver exclusion. This is incorrect. The accident in this case happened while Clinton Evans was driving his own vehicle, insured under his own policy. If a member of the general public was injured in an accident with Clinton Evans, he or she could recover from Evans under Evans's liability policy. If that individual's underinsured motorist policy provided higher limits than Evans's liability policy, they could seek underinsured motorist coverage under their policy, as plaintiff is doing in this case. A member of the general public has the same right as plaintiff to obtain higher limits of underinsured motorist coverage from their insurer.

¶ 48 None of the cases cited by State Farm support its claim that the driver exclusion endorsement in plaintiff's policies could deny plaintiff underinsured motorist coverage under the facts of this case. Section 143a mandates that every automobile liability insurance policy provide uninsured motorist coverage in at least the minimal amounts required under the Vehicle Code. If the insured's uninsured motorist coverage limit exceeds the minimum liability limit required by the Financial Responsibility Law, as plaintiff's did, section 143a-2 mandates that the policy also include underinsured motorist coverage in an amount equal to the uninsured motorist coverage. Because section 143a-2 mandated that plaintiff's policy include underinsured motorist coverage, excluding plaintiff from underinsured motorist coverage through a contractual provision violates section 143a-2 and, therefore, public policy, under the facts of this case. The driver exclusion endorsement in plaintiff's policies with State Farm was not enforceable to exclude underinsured motorist coverage to plaintiff for the June 17, 2012, accident. Accordingly, the appellate court properly affirmed the trial court's order granting summary judgment in favor of plaintiff on her complaint for declaratory judgment. ↩ memo p. 9

¶ 49 CONCLUSION

¶ 50 For all the foregoing reasons, we affirm the judgment of the appellate court, which affirmed the trial court's order denying State Farm's motion for summary judgment and granting plaintiff's motion for summary judgment.

¶ 51 Appellate court judgment affirmed.

Worley v. Fender, 2017 IL App (5th) 160110

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 5th Dist. · filed 2017-05-15 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 35: passage C025.1
- memo p. 8 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 35: passage C025.1
- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 35: passage C025.1

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***Worley v. Fender*, 2017 IL App (5th) 160110**

Appellate Court Caption	MICHAEL BRUCE WORLEY, Plaintiff-Appellee and Cross-Appellant, v. P. JEAN FENDER, DAVIS & SONS OIL COMPANY, STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY, and FEDERATED MUTUAL INSURANCE COMPANY, Defendants (Federated Mutual Insurance Company, Defendant-Appellant and Cross-Appellee).
District & No.	Fifth District Docket No. 5-16-0110
Rule 23 order filed	March 16, 2017
Motion to publish granted	May 15, 2017
Opinion filed	May 15, 2017
Decision Under Review	Appeal from the Circuit Court of Wayne County, No. 12-L-3; the Hon. Larry D. Dunn, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Daniel G. Hasenstab and John P. Cunningham, of Brown & James, P.C., of Belleville, for appellant. William P. Gavin and Catherine E. Gavin, of Gavin Law Firm, of Belleville, for appellee.

Panel JUSTICE GOLDENHERSH delivered the judgment of the court, with opinion.
Justices Chapman and Cates concurred in the judgment and opinion.

OPINION

¶ 1 BACKGROUND

¶ 2 This appeal arises from a dispute regarding underinsured motorist coverage. Plaintiff, Michael B. Worley, sustained serious injuries in an automobile accident on May 12, 2011, when he collided with a vehicle operated by P. Jean Fender. At the time of the accident, plaintiff was operating a 2005 Freightliner FLD132 box truck during the course and scope of his employment with Davis & Sons Oil Company (Davis & Sons). Davis & Sons owned the box truck. Fender caused the accident by failing to stop at a stop sign and yield to the vehicle plaintiff was driving.

¶ 3 After the accident, plaintiff filed a personal injury claim against Fender. Fender's automobile was covered by an automobile liability insurance policy issued by State Auto Property & Casualty Insurance Company (State Auto). State Auto offered the $100,000 limits of Fender's policy to plaintiff in exchange for a release of all causes of action plaintiff had against Fender as a result of the accident. Plaintiff accepted State Auto's offer, and State Auto tendered $100,000 to plaintiff.

¶ 4 Plaintiff also made a claim against Davis & Sons' commercial automobile insurance policy (policy) issued by defendant, Federated Mutual Insurance Company, which covered the vehicle plaintiff was driving at the time of the accident. The policy was initially issued to Davis & Sons in April 2004 and was subsequently renewed each year thereafter through the date of the accident. At the time of the accident, the policy stated it was effective from April 1, 2011, to April 1, 2012. With respect to coverage, the policy provided bodily injury liability limits of $1 million. It further provided underinsured motorist coverage limits of $500,000 for directors, partners, officers, or owners of the named insured and family members who qualified as insureds. The policy provided underinsured motorist coverage limits of $40,000 for any other person who qualified as an insured. Defendant denied plaintiff's demands for underinsured motorist benefits on grounds that the limits of the policy's underinsured motorist coverage for plaintiff was $40,000 and plaintiff had already received $100,000 from Fender's policy.

¶ 5 Initially, plaintiff filed a four-count complaint against defendants Fender, Davis & Sons, and State Auto. Counts III and IV of the original complaint were settled and dismissed, and Fender and State Auto were also dismissed.

¶ 6 Defendant subsequently removed this case to the United States District Court for the Southern District of Illinois. While the case was in federal court, plaintiff filed a two-count first amended complaint that remains the subject of this appeal. The first count sought declaratory relief and a reformation of defendant's policy so that it provided underinsured motorist coverage and benefits to plaintiff with limits of $1 million rather than $40,000. Specifically, plaintiff argued the underinsured motorist limits had to be reformed to match the policy's bodily injury liability limits of $1 million because Davis & Sons did not effectively reject the policy's bodily injury liability limits. Plaintiff further alleged that the structure of the policy,

which included step-down underinsured motorist limits for different classes of insureds, violated Illinois law and public policy because the terms restricted the limits of coverage based solely on an insured's status at the time of a loss. Plaintiff also sought that defendant be required to participate in binding arbitration with plaintiff. The second count alleged defendant's failure to acknowledge plaintiff's claim for underinsured motorist benefits under the policy with reasonable promptness was "vexatious and unreasonable and constitute[d] an improper claims practice" under section 154.6 of the Illinois Insurance Code (215 ILCS 5/154.6 (West 2010)). Plaintiff sought money damages and attorney fees.

¶ 7 On May 19, 2014, after this case was remanded by the federal court to Wayne County, plaintiff filed a motion for summary judgment on count I of plaintiff's first amended complaint. On June 10, 2014, defendant filed a motion for summary judgment on both counts of plaintiff's first amended complaint asserting plaintiff was not an "underinsured motorist" as defined by the policy because the limits available under Fender's policy ($100,000) exceeded the underinsured motorist limits available to plaintiff under the policy at issue ($40,000). As plaintiff had already received an amount ($100,000) in excess of the limits available to plaintiff under the policy ($40,000), defendant argued no underinsured motorist coverage was available to plaintiff.

¶ 8 A hearing on the cross-motions was held on July 23, 2014. On November 10, 2015, the trial court entered an order, which granted partial summary judgment in favor of plaintiff on the first count and granted summary judgment in favor of defendant on the second count. With respect to count I, the court granted plaintiff's request that the policy be reformed to provide underinsured motorist coverage limits equal to the policy's bodily injury liability limit of $1 million but rejected plaintiff's argument that the structure of the policy's underinsured motorist coverage was void under Illinois law. The court further determined no arbitration was required concerning plaintiff's underinsured motorist claim. Regarding count II, the court concluded there was no vexatious and unreasonable delay on the part of defendant.

¶ 9 Defendant subsequently filed a motion to reconsider, which was denied. Defendant then timely filed a notice of appeal, and plaintiff timely filed a notice of cross-appeal.

¶ 10 ANALYSIS

¶ 11 Defendant's first contention on appeal alleges the trial court's order granting partial summary judgment in favor of plaintiff on count I of plaintiff's first amended complaint should be reversed. Specifically, defendant alleges the trial court erred in finding Davis & Sons did not effectively reject the policy's liability limits of $1 million or effectively select underinsured motorist limits that were lower than $1 million.

¶ 12 The standard of review for a summary judgment is *de novo*. *Clayton v. Millers First Insurance Cos.*, 384 Ill. App. 3d 429, 431, 892 N.E.2d 613, 615 (2008). Similarly, the construction of an insurance policy is a question of law which is also reviewed *de novo*. *Clayton*, 384 Ill. App. 3d at 431, 892 N.E.2d at 615.

¶ 13 The primary goal when interpreting an insurance policy is to give effect to the intent of the parties as expressed in the agreement. *DeSaga v. West Bend Mutual Insurance Co.*, 391 Ill. App. 3d 1062, 1066, 910 N.E.2d 159, 163 (2009). Where the terms of an insurance policy are clear and unambiguous, they must be given their plain and ordinary meaning and enforced as written. *DeSaga*, 391 Ill. App. 3d at 1066, 910 N.E.2d at 163. It is well settled that insurance policies are to be liberally construed in favor of the insured and in favor of coverage. *DeSaga*,

391 Ill. App. 3d at 1066, 910 N.E.2d at 164. Any ambiguity in the language of a policy must be resolved against the insurer that drafted the policy. *DeSaga*, 391 Ill. App. 3d at 1066, 910 N.E.2d at 164. Moreover, any policy provision that limits or excludes coverage must be construed liberally in favor of the insured and against the insurer. *DeSaga*, 391 Ill. App. 3d at 1066, 910 N.E.2d at 164.

¶ 14 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Clayton*, 384 Ill. App. 3d at 431, 892 N.E.2d at 615 (quoting 735 ILCS 5/2-1005(c) (West 2004)). Summary judgment is a drastic remedy which should be allowed only where the right of the moving party is clear and free from doubt. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291, 730 N.E.2d 1119, 1127 (2000). As a reviewing court, we may affirm a grant of summary judgment on any basis appearing in the record, whether or not the trial court relied on that basis and even if the trial court's reasoning was incorrect. *Bank Financial, FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 40, 36 N.E.3d 421.

¶ 15 In this case, it is undisputed that the policy is governed by section 143a-2 of the Illinois Insurance Code (Code) (215 ILCS 5/143a-2 (West 2008)). However, the parties dispute which version of section 143a-2 applies to the policy in question: (1) the version in effect at the time the policy was originally issued in 2004 or (2) the amended version, effective July 16, 2004, in effect at the time of the accident. Plaintiff argues the version in effect at the time the policy was originally issued should govern while defendant contends the amended version in effect at the time of the accident should govern. For the following reasons, we conclude Davis & Sons' ineffective rejection of the policy's bodily injury liability limits/selection of underinsured motorist limits lower than the liability limits contravenes either statute and, therefore, supports a finding of partial summary judgment in favor of plaintiff on count I of plaintiff's first amended complaint.

¶ 16 In order to reflect the changes made by the 2004 amendment to section 143a-2, the trial court cited the amended version in its order but placed a strike through the words/provisions removed by the amendment and made bold, italicized, and underlined the words/provisions added by the amendment. We will cite to the public act amending the statute, striking through the words/provisions removed by the amendment and italicizing the words/provisions added by the amendment. In relevant part, section 143a-2 provides:

> "(1) Additional uninsured motor vehicle coverage. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be renewed or delivered or issued for delivery in this State with respect to any motor vehicle designed for use on public highways and required to be registered in this State unless uninsured motorist coverage as required in Section 143a of this Code is included in an amount equal to the insured's bodily injury liability limits unless specifically rejected by the insured *as provided in paragraph (2) of this Section*. Each insurance company providing the coverage must provide applicants with a brief description of the coverage and advise them of their right to reject the coverage in excess of the limits set forth in Section 7-203 of The Illinois Vehicle Code. The provisions of this amendatory Act of 1990 apply to policies of insurance applied for after June 30, 1991.

(2) Right of rejection of additional uninsured motorist coverage. *Any named insured or applicant* ~~After June 30, 1991, every application for motor vehicle coverage must contain a space for indicating the rejection of additional uninsured motorist coverage. No rejection of that coverage may be effective unless the applicant signs or initials the indication of rejection. The applicant~~ may reject additional uninsured motorist coverage in excess of the limits set forth in Section 7-203 of the Illinois Vehicle Code *by making a written request for limits of uninsured motorist coverage which are less than bodily injury liability limits or a written rejection of limits in excess of those required by law. This election or rejection shall be binding on all persons insured under the policy*. In those cases~~, including policies first issued before July 1, 1991,~~ where the insured has elected to purchase limits of uninsured motorist coverage which are less than bodily injury liability limits or to reject limits in excess of those required by law, the insurer need not provide in any renewal, reinstatement, reissuance, substitute, amended, replacement or supplementary policy, coverage in excess of that elected by the insured in connection with a policy previously issued to such insured by the same insurer unless the insured subsequently makes a written request for such coverage.

(3) The original *document* ~~application~~ indicating the applicant's selection of uninsured motorist coverage limits shall constitute sufficient evidence of the applicant's selection of uninsured motorist coverage limits ~~and shall be binding on all persons insured under the policy~~. For purposes of this Section any reproduction of the *document* ~~application~~ by means of photograph, photostat, microfiche, computerized optical imaging process, or other similar process or means of reproduction shall be deemed the equivalent of the original *document* ~~application~~.

(4) For the purpose of this Code the term 'underinsured motor vehicle' means a motor vehicle whose ownership, maintenance or use has resulted in bodily injury or death of the insured, as defined in the policy, and for which the sum of the limits of liability under all bodily injury liability insurance policies or under bonds or other security required to be maintained under Illinois law applicable to the driver or to the person or organization legally responsible for such vehicle and applicable to the vehicle, is less than the limits for underinsured coverage provided the insured as defined in the policy at the time of the accident. The limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered under the applicable bodily injury insurance policies, bonds or other security maintained on the underinsured motor vehicle." Pub. Act 93-762, § 5 (eff. July 16, 2004) (amending 215 ILCS 5/143a-2(1)-(4)).

¶ 17 A careful reading of the above provisions indicates that both the preamended and amended version of the statute require insurers to include in each automobile liability policy underinsured motorist coverage equal to the bodily injury liability limits of the policy unless specifically rejected by the insured. In this case, Davis & Sons was the named insured. Thus, the policy at issue was required to include underinsured motorist coverage equal to the policy's bodily injury liability limits of $1 million unless specifically rejected by Davis & Sons.

¶ 18 After careful review of the record in its entirety, we find no evidence that indicates Davis & Sons made an effective rejection of the policy's bodily injury liability limits or selection of underinsured motorist limits lower than the bodily injury liability limits. In order to make the

rejection of bodily injury liability limits effective, the preamended version of section 143a-2 required the policy's application to contain a space for indicating such rejection, which was ineffective unless the applicant signed or initialed the indication of rejection. 215 ILCS 5/143a-2 (West 2002). Here, Davis & Sons did not complete an application for the policy, and we find no evidence that a named insured, applicant, or any other individual authorized by Davis & Sons signed or initialed a specific rejection/selection of the policy's lower underinsured motorist limits of $40,000 for the category plaintiff fell into as an employee of Davis & Sons ("any other persons qualifying as 'insureds' ").

¶ 19 Further, the amendment to the statute and subsequent yearly renewals of the policy do not lend support to defendant's position that Davis & Sons effectively rejected the liability limits or selected lower underinsured motorist limits. The amended version of section 143a-2 provides that a named insured or applicant may effectively reject a policy's liability limits by making a written request for limits of underinsured motorist coverage which are less than the bodily injury liability limits or a written rejection of limits in excess of those required by law. 215 ILCS 5/143a-2 (West 2008). Here, we find no evidence that a named insured, applicant, or any other person authorized by Davis & Sons made a written request for underinsured motorist limits less than the bodily injury liability limits. Thus, under both the preamended and amended version of section 143a-2, we find no evidence that Davis & Sons made an effective rejection of the policy's bodily injury liability limits or a selection of lower underinsured motorist limits.

¶ 20 Moreover, the record indicates that neither Todd Davis, the president of Davis & Sons, nor his wife Susan Davis, the secretary at Davis & Sons, were made aware of the option to reject the policy's bodily injury liability limits/select lower underinsured motorist limits until after plaintiff's accident. The record shows Davis & Sons never discussed this option with defendant after the policy was issued. Although the policy was subsequently renewed yearly after the original policy was issued and after the amendment to the statute took effect, Davis & Sons never made a calculated, knowing rejection of liability limits or selection of lower underinsured motorist limits, regardless of what version of the statute was in effect. In either circumstance, defendant failed to assure its insured made a knowing rejection/selection regarding underinsured motorist coverage.

¶ 21 Defendant bears the burden to show it complied with section 143a-2 regarding its insured's rejection of the policy's bodily injury liability limits/selection of lower underinsured motorist limits. For the reasons above, we cannot conclude defendant has met its burden. Accordingly, the trial court appropriately granted partial summary judgment in favor of plaintiff on count I of plaintiff's first amended complaint and properly reformed the policy to provide coverage limits for plaintiff's underinsured motorist claim equal to the policy's bodily injury liability limits of $1 million.

¶ 22 Defendant relies on a document entitled "Illinois Commercial Auto Coverage Option Form" in support of its assertion that Davis & Sons effectively rejected the policy's bodily injury liability limits/selected underinsured motorist limits lower than the policy's liability limits. The first page of this option form from which defendant relies states:

> "Uninsured Motorists and Underinsured Motorists coverage, unless otherwise provided in your policy, pays for bodily injury damages to you, members of your family who live with you, and other people riding in your car who are injured by: (1) an uninsured motorists, (2) a hit-and-run motorist, or (3) an insured motorist who does not

have enough liability insurance to pay for bodily injury damages to any insured person. These coverages, unless otherwise provided in your policy, protect you and your family members who live with you while riding in any vehicle or while a pedestrian.

Illinois law requires that automobile liability policies include Uninsured Motorists and Underinsured Motorists coverage at limits equal to the Bodily Injury Liability limits in your policy unless you select a lower limit.

Please indicate your desired option below, sign and date this form and promptly return."

¶ 23 Below these provisions, the coverage form provides two columns of limit options. In these columns, an "x" is marked in a $500,000 box under the limit for directors, officers, partners, or owners of the named insured and family members who qualify as insured. There is also an "x" marked in a $40,000 box under the limit for any other person who qualifies as an insured. Next to these limit columns are unknown initials dated "4/04." Although these initials are unknown, the record indicates they are the initials of an employee of defendant. The only known handwriting on this page of the coverage form is that of Mark Niebrugge, an agent of defendant who acquired Davis & Sons' business and worked on Davis & Sons' account, whose printing is shown on the blanks at the top of the option form. Finally, on what is purported to be the second page of the option form is Todd Davis's signature dated "4/16/04."

¶ 24 After careful consideration, we cannot conclude this option form is sufficient evidence that Davis & Sons effectively rejected the policy's bodily injury liability limits or effectively selected lower underinsured motorist limits. There is nothing on the first page of the coverage form, where the alleged rejection is marked, which indicates Davis & Sons made such a rejection. As we previously stated, the initials next to the checked box of $40,000 in the "limit options" section of the coverage form, which defendant contends limits plaintiff's underinsured motorist coverage to $40,000, are not the initials of any person or employee of Davis & Sons. Rather, they are the initials of an individual employed by defendant. Thus, the alleged rejection defendant points to was not initialed by the insured as required by the preamended version of section 143a-2. 215 ILCS 5/143a-2 (West 2002). With regard to the amended version of section 143a-2, this was not a written request for lower underinsured motorist coverage made by the insured or applicant as required by statute. 215 ILCS 5/143a-2 (West 2008).

¶ 25 Regarding Todd Davis's signature dated April 16, 2004, on what is purported to be the second page of the option form, we cannot conclude this was a specific rejection of liability limits or selection of lower underinsured motorist limits. We find no affirmation that Todd Davis's signature indicates a specific rejection/selection concerning underinsured motorist coverage. The record indicates Todd Davis does not recall ever discussing this option form with defendant before signing the line on what is purported to be the second page of the coverage form, and as we previously indicate, Todd Davis was not made aware that different levels of underinsured motorist limits for his employees were available until after plaintiff's accident. For these reasons, we reject defendant's argument.

¶ 26 We next address the trial court's finding that no arbitration is required concerning plaintiff's underinsured motorist claim. Although this issue is not addressed by plaintiff in his brief, defendant contends the trial court's determination should be affirmed. We agree.

¶ 27 In *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 949 N.E.2d 639 (2011), our supreme court held that the statute mandating underinsured motorist coverage does not require arbitration. As our supreme court explained:

> "Despite the interrelatedness of uninsured-motorist and underinsured-motorist coverages, relevant differences exist between the statutory mandates. The Illinois Insurance Code requires that 'any dispute with respect to the coverage and the amount of damages' under an uninsured-motorist policy must be submitted for arbitration. 215 ILCS 5/143a(1) (West 2006). *** However, the statutory provision mandating underinsured-motorist coverage has never required a similar arbitration agreement. Indeed, the underinsured-motorist statute has never required arbitration of any kind." *Rosen*, 242 Ill. 2d at 58-59, 949 N.E.2d at 646-47.

¶ 28 In light of the foregoing, we agree with the trial court's finding that no arbitration is required regarding plaintiff's underinsured motorist claim. We need not further address this issue.

¶ 29 The next issue raised by defendant contends the trial court properly granted summary judgment in favor of defendant on count II of plaintiff's first amended complaint which sought attorney fees and money damages. In count II of his first amended complaint, plaintiff alleged defendant's failure to acknowledge his underinsured motorist claim constituted a vexatious and unreasonable delay in violation of section 154.6 of the Code (215 ILCS 5/154.6 (West 2010)). For the following reasons, we agree with the trial court's determination that defendant's conduct was not vexatious or unreasonable.

¶ 30 The question of vexatious and unreasonable delay is a factual one which must be based on an assessment of the totality of the circumstances. *Norman v. American National Fire Insurance Co.*, 198 Ill. App. 3d 269, 304, 555 N.E.2d 1087, 1110 (1990). There is no single factor that is controlling in determining whether a delay is vexatious or unreasonable. *Norman*, 198 Ill. App. 3d at 304, 555 N.E.2d at 1110. Rather, it is the attitude of the insurer which must be examined. *Norman*, 198 Ill. App. 3d at 304, 555 N.E.2d at 1110. Where there is a *bona fide* dispute regarding coverage, depending on the circumstances, a delay in settling the claim may not violate the statute providing a penalty for an insurer's vexatious and unreasonable action or delay. *Millers Mutual Insurance Ass'n of Illinois v. House*, 286 Ill. App. 3d 378, 387, 675 N.E.2d 1037, 1043 (1997). A reviewing court will not disturb a trial court's determination regarding whether an insurer's action and delay is vexatious and unreasonable absent an abuse of discretion. *Millers Mutual Insurance Ass'n of Illinois*, 286 Ill. App. 3d at 387, 675 N.E.2d at 1043.

¶ 31 Here, we conclude there was a *bona fide* coverage dispute regarding plaintiff's underinsured motorist claim which has presented legal and factual issues regarding coverage. Further, as we discuss throughout this opinion, both parties have raised legitimate questions regarding the changing law with respect to the effective rejection/selection of underinsured motorist limits. For these reasons, we conclude defendant's failure to acknowledge plaintiff's underinsured motorist claim and delay was not vexatious or unreasonable.

¶ 32 Finally, on cross-appeal, plaintiff argues the trial court erred in granting summary judgment in favor of defendant on count II of plaintiff's first amended complaint because the step-down limits of the policy violate Illinois public policy and section 143.13a of the Code (215 ILCS 5/143.13a (West 2008)). Specifically, plaintiff asserts the alleged selection of lower step-down underinsured motorist limits ($500,000 for directors, partners, officers, or owners

of Davis & Sons or a family member who qualified as an insured, and $40,000 for any other person who qualified as an insured) is void because the limits are based solely on status. Before we address plaintiff's argument, we reiterate that a reviewing court applies a *de novo* standard of review to an entry of summary judgment. *Clayton*, 384 Ill. App. 3d at 431, 892 N.E.2d at 615.

¶ 33 As we previously discussed, a court's primary objective in construing an insurance policy is to ascertain and give effect to the intention of the parties as expressed in the agreement. *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 400, 930 N.E.2d 943, 948 (2010). Where the terms of an insurance policy are clear and unambiguous, they must be enforced as written unless doing so would violate public policy. *Schultz*, 237 Ill. 2d at 400, 930 N.E.2d at 948. The public policy of this state is reflected in its constitution, statutes, and judicial decisions. *Schultz*, 237 Ill. 2d at 400, 930 N.E.2d at 948. Policy terms that conflict with a statute are void and unenforceable. *Schultz*, 237 Ill. 2d at 400, 930 N.E.2d at 948.

¶ 34 Our supreme court has acknowledged the legislature's amendment to section 143.13a of the Code, effective January 1, 2008, and its intent to prohibit step-down limits based on status in policies covering private passenger automobiles. 215 ILCS 5/143.13a (West 2008); *Schultz*, 237 Ill. 2d at 408, 930 N.E.2d at 953. In relevant part, section 143.13a provides:

> "Coverage for permissive drivers. Any policy of private passenger automobile insurance must provide the same limits of bodily injury liability, property damage liability, uninsured and underinsured motorist bodily injury, and medical payments coverage to all persons insured under that policy, whether or not an insured person is a named insured or permissive user under the policy. If the policy insures more than one private passenger automobile, the limits available to the permissive user shall be the limits associated with the vehicle used by the permissive user when the loss occurs." 215 ILCS 5/143.13a (West 2008).

¶ 35 We conclude the box truck plaintiff was driving at the time of the accident was not a "private passenger automobile" within the meaning of section 143.13a of the Code. 215 ILCS 5/143.13a (West 2008). For this reason, the step-down limits of the policy at issue do not violate Illinois law or public policy. ↩ memo p. 3, 8, 13

¶ 36 The policy at issue in this case is a commercial automobile liability policy covering vehicles of a company, namely Davis & Sons. Todd Davis, the president of Davis & Sons, described the vehicle that was driven by plaintiff and involved in the accident as a box truck owned by Davis & Sons used exclusively for transporting goods related to the business of Davis & Sons. Todd Davis further described the truck as containing a separate cargo area walled off from the cab. He also stated the truck's cab had only one seat which was used by the driver, and there were no other passenger seats in the cab.

¶ 37 "A court should not depart from the plain language of a statute by reading into it exceptions, limitations, or conditions that the legislature did not intend." *McFatridge v. Madigan*, 2013 IL 113676, ¶ 18, 989 N.E.2d 165. For the above reasons, we find the commercial policy in question is not a "policy of private passenger automobile insurance" under section 143.13a of the Code. 215 ILCS 5/143.13a (West 2008). Accordingly, because the statutory prohibition does not apply to this policy, we conclude the step-down limits do not contravene Illinois law or public policy.

¶ 38 CONCLUSION

¶ 39 For the aforementioned reasons, we affirm the judgment of the circuit court of Wayne County.

¶ 40 Affirmed.

Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458 (1990)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. Supreme Court · filed 1990-01-24 · Reporter opinion
Supreme Court

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Where the memo cites it

- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C033.3
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C033.3
- memo p. 13 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · no pin: passage C033.3

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(Nos. 68218, 68219 cons.—[redacted]

ESIDA YASSIN, a Minor, by Sofia Yassin, her mother and next friend, Appellant and Cross-Appellee, v. CERTIFIED GROCERS OF ILLINOIS, INC., *et al.* (Mizyed-Yassin Corporation, Appellee and Cross-Appellant; Zurich American Insurance Company, Appellee and Cross-Appellant; American Guaranty Insurance Company, Appellee and Cross-Appellant).

Opinion filed January 24, 1990.

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STAMOS, J., took no part.

[redacted]

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Milton M. Blumenthal, of Milton M. Blumenthal & Associates, of Chicago (Sidney Z. Karasik, of counsel), for appellant and cross-appellee.

French, Rogers, Kezelis & Kominiarek, P.C., of Chicago (Kendal A. Crooks, John P. Prusik and Russell P. Veldenz, of counsel), for appellees and cross-appellants.

CHIEF JUSTICE MORAN delivered the opinion of the court:

Plaintiff, Esida Yassin, a minor, by Sofia Yassin, her mother and next friend, filed a personal injury action in the circuit court of Cook County against, among others, Mizyed-Yassin Corporation (Mizyed-Yassin). Plaintiff's personal injury action proceeded to trial and, on October 29, 1983, the jury returned a verdict against Mizyed-Yassin and awarded plaintiff $300,000 in compensatory damages.

Plaintiff appealed the $300,000 judgment entered in her favor and argued, among other things, that the judgment was inadequate. The appellate court affirmed the judgment (150 Ill. App. 3d 1052) and this court denied plaintiff's petition for leave to appeal.

Plaintiff then filed a garnishment action, which is the subject of the instant appeal, in the circuit court of Cook County against Mizyed-Yassin, Zurich American Insurance Company (Zurich American) and American Guaranty Insurance Company (American Guaranty), hereinafter collectively referred to as defendants. Plaintiff filed the garnishment action in order to recover the $300,000 judgment entered in her favor in the prior personal injury action plus 9% interest per annum from the date of that judgment pursuant to section 2—1303 of the Illinois Code of Civil Procedure (Code) (Ill. Rev. Stat. 1985, ch. 110, par. 2—1303).

Shortly thereafter, Mizyed-Yassin filed a motion to tender judgment which sought to limit the amount of interest plaintiff would receive pursuant to section 2—1303 of the Code. Plaintiff filed a response to Mizyed-Yassin's

motion and a countermotion. Plaintiff's countermotion sought: (1) to recover an additional 5% interest per annum pursuant to section 2 of the Illinois Interest Act (Interest Act) (Ill. Rev. Stat. 1985, ch. 17, par. 6402); (2) to recover attorney fees and other costs pursuant to section 155 of the Illinois Insurance Code (Insurance Code) (Ill. Rev. Stat. 1985, ch. 73, par. 767); and (3) to impose sanctions pursuant to section 2—611 of the Code (Ill. Rev. Stat. 1987, ch. 110, par. 2—611). The circuit court denied both Mizyed-Yassin's motion and plaintiff's countermotion. Plaintiff appealed and defendants cross-appealed.

On appeal, the appellate court affirmed in part and reversed in part. In affirming the circuit court, the appellate court held that: (1) plaintiff was entitled to 9% interest per annum from the date of the judgment pursuant to section 2—1303 of the Code; (2) plaintiff was not entitled to 5% interest per annum pursuant to section 2 of the Interest Act; and (3) plaintiff was not entitled to attorney fees and other costs pursuant to section 155 of the Insurance Code. In reversing the circuit court, the appellate court held that sanctions may have been warranted pursuant to section 2—611 of the Code and, therefore, remanded the matter to the circuit court for further proceedings. (178 Ill. App. 3d 498.) This court granted both plaintiff's and defendants' petitions for leave to appeal (107 Ill. 2d R. 315) and consolidated them on appeal.

The issues presented for review are: (1) whether the appellate court erred in holding that plaintiff was entitled to 9% interest per annum from the date of the judgment pursuant to section 2—1303 of the Code; (2) whether the appellate court erred in holding that plaintiff was not entitled to 5% interest per annum pursuant to section 2 of the Interest Act; (3) whether the appellate court erred in holding that plaintiff was not entitled

to attorney fees and other costs pursuant to section 155 of the Insurance Code; and (4) whether the appellate court erred in holding that sanctions may have been warranted pursuant to section 2—611 of the Code.

The first issue presented for review is whether the appellate court erred in holding that plaintiff was entitled to 9% interest per annum from the date of the judgment pursuant to section 2—1303 of the Code. Section 2—1303 of the Code provides in part:

> "Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied ***. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment." Ill. Rev. Stat. 1985, ch. 110, par. 2—1303.

Section 2—1303 of the Code entitles an appealing judgment creditor to draw interest on the judgment during the pendency of the appeal. (See *Pinkstaff v. Pennsylvania R.R. Co.* (1964), 31 Ill. 2d 518, 524 (construing Ill. Rev. Stat. 1963, ch. 74, par. 3, which preceded section 2—1303 of the Code).) However, an appealing judgment creditor's right to draw interest on the judgment during the pendency of the appeal stops if, pursuant to section 2—1303 of the Code, the judgment debtor tenders payment of the judgment, costs and interest accrued on the judgment to the date of tender. (Ill. Rev. Stat. 1985, ch. 110, par. 2—1303; *Pinkstaff*, 31 Ill. 2d at 524.) Similarly, an appealing judgment creditor's right to draw interest on the judgment during the pendency of the appeal stops if the judgment debtor offers to tender payment of the judgment, costs and interest accrued on

the judgment to the date of tender and the judgment creditor rejects the offer. *Casciola v. Gardner* (1981), 101 Ill. App. 3d 852, 855-56; *Needy v. Sparks* (1979), 74 Ill. App. 3d 914, 918.

Defendants contend that Mizyed-Yassin, the judgment debtor, offered to tender payment of the policy limits in satisfaction of the judgment on November 28, 1983, January 31, 1984, and December 15, 1986; that plaintiff, the judgment creditor, rejected each of the offers; and, as a result, that plaintiff's right to draw interest on the judgment during the pendency of her appeal stopped. Accordingly, we must determine whether Mizyed-Yassin's alleged offers to tender payment of the policy limits were legally sufficient offers of the judgment, costs and interest accrued on the judgment to the date of tender.

The first alleged offer to tender payment of the policy limits occurred on November 28, 1983, when Mizyed-Yassin filed a motion to strike part of the judgment order relating to costs. The motion provided in part:

> "d) That the entire limit of said policy, to wit: $300,000.00, was tendered by the attorneys for Mizyed-Yassin Corporation in open court in settlement or covenant in March of 1983 and said tender was rejected by plaintiffs through their attorney. *That said tender continues to remain open.*" (Emphasis added.)

On January 26, 1984, Mizyed-Yassin filed a motion for direction which sought, among other things:

> A. *An order denying the payment of interest on *** said Judgment[ ],* ***;
>
> * * *
>
> E. *That the Court declare that no interest on said judgment[ ] is due and owing this defendant.*" (Emphasis added.)

Five days later, on January 31, 1984, the second alleged offer to tender payment of the policy limits occurred

during a hearing on Mizyed-Yassin's motion for direction. The transcript of that hearing provides in part:

> "[MIZYED-YASSIN'S ATTORNEY]: *** *We are asking the court to hold there is not interest on this judgment* ***.
>
> * * *
>
> [MIZYED-YASSIN'S ATTORNEY]: *We have been ready, willing and able to pay since March of 1988.*
>
> * * *
>
> [MIZYED-YASSIN'S ATTORNEY]: *** *We are not willing to pay interest.*" (Emphasis added.)

The final alleged offer to tender payment of the policy limits occurred on December 15, 1986, when defendants' attorney sent a letter to plaintiff's attorney. The letter provided in part:

> "As you are aware, the Zurich Insurance Company has stood ready to pay its entire limits since March of 1983 to dispose of the matter. *That remains their position.*" (Emphasis added.)

It is readily apparent from reviewing the record that Mizyed-Yassin offered to tender payment of the policy limits and costs; *they, however, never offered to tender, or intended to tender, payment of interest accrued on the judgment to the date of tender*. Consequently, the offers to tender payment of the policy limits and costs were not legally sufficient offers. Therefore, plaintiff's statutory right to draw interest on the judgment during the pendency of her appeal did not stop and she is entitled to 9% interest per annum from the date of the judgment pursuant to section 2—1303.

The second issue presented for review is whether the appellate court erred in holding that plaintiff was not entitled to 5% interest per annum pursuant to section 2 of the Interest Act. Section 2 of the Interest Act provides in part:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum *** on money withheld by an unreasonable and vexatious delay of payment." Ill. Rev. Stat. 1985, ch. 17, par. 6402.

Plaintiff contends that she is entitled to 5% interest per annum pursuant to section 2 of the Interest Act in addition to the 9% interest per annum pursuant to section 2—1303 of the Code. Plaintiff's contention is based on her belief that section 2 of the Interest Act is a "penalty" provision and that defendants should be penalized for their "unreasonable and vexatious delay" in paying the judgment, costs and interest on the judgment.

Plaintiff has not cited to any relevant case law in support of her contention that section 2 of the Interest Act is a "penalty" provision. Instead, plaintiff cites to *People ex rel. Barclay v. West Chicago Park Commissioners* (1941), 308 Ill. App. 622, and argues that the *Barclay* court "appears" to have awarded interest pursuant to both the predecessor to section 2 of the Interest Act and the predecessor to section 2—1303 of the Code. *Barclay* does not stand for that proposition. Indeed, the *Barclay* court only awarded interest pursuant to the predecessor to section 2 of the Interest Act. *Barclay*, 308 Ill. App. at 632.

The third issue presented for review is whether the appellate court erred in holding that plaintiff was not entitled to attorney fees and other costs pursuant to section 155 of the Insurance Code. Section 155 of the Insurance Code provides in part:

> "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney

> fees, other costs, plus an amount not to exceed any one of the following amounts: ***." Ill. Rev. Stat. 1985, ch. 73, par. 767.

As a general rule, the remedy embodied in section 155 of the Insurance Code extends only to the party insured (*Stamps v. Caldwell* (1971), 133 Ill. App. 2d 524, 528) and policy assignees (see *Loyola University Medical Center v. Med Care HMO* (1989), 180 Ill. App. 3d 471; *Aabye v. Security-Connecticut Life Insurance Co.* (N.D. Ill. 1984), 586 F. Supp. 5). Therefore, the remedy embodied in section 155 of the Insurance Code does not extend to third parties. See *Loyola*, 180 Ill. App. 3d 471; *Robertson v. Travelers Insurance Co.* (1981), 100 Ill. App. 3d 845; *Scroggins v. Allstate Insurance Co.* (1979), 74 Ill. App. 3d 1027; *Stamps*, 133 Ill. App. 2d 524.

Plaintiff contends that she is entitled to attorney fees and costs pursuant to section 155 of the Insurance Code, because defendants "unreasonably and vexatiously" delayed paying the judgment, costs and interest on the judgment. Plaintiff's contention is, however, misplaced, because Mizyed-Yassin is the insured party and it has not made an assignment of its policy. Consequently, plaintiff is a third party and the remedy embodied in section 155 of the Insurance Code does not extend to her. Therefore, plaintiff is not entitled to attorney fees and other costs pursuant to section 155 of the Insurance Code.

The final issue presented for review is whether the appellate court erred in holding that sanctions may have been warranted pursuant to section 2—611 of the Code. Section 2—611 of the Code provides in part:

> "Every *** motion *** shall be signed by at least one attorney of record in his individual name, whose address shall be stated. *** The signature of an attorney *** constitutes a certificate by him that he has read the *** motion ***; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well

> grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a *** motion *** is signed in violation of this Section, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the *** motion ***, including a reasonable attorney's fee." Ill. Rev. Stat. 1987, ch. 110, par. 2—611.

One purpose of section 2—611 of the Code is to penalize litigants who make frivolous motions. (See *In re Estate of Wernick* (1989), 127 Ill. 2d 61, 77.) As a penalty provision, section 2—611 of the Code must be strictly construed and the decision whether to impose sanctions "is within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion." (*Wernick*, 127 Ill. 2d at 77-78.) Furthermore, the party seeking to impose sanctions pursuant to section 2—611 of the Code has the burden of proving that its opponent made a frivolous motion. (*Wernick*, 127 Ill. 2d at 77.) Plaintiff contends that sanctions should be imposed pursuant to section 2—611 of the Code, because Mizyed-Yassin's May 13, 1987, motion to tender judgment seeks the same relief as its January 26, 1984, motion for direction and is, therefore, a frivolous motion.

The motion for direction and the motion to tender judgment are similar; however, the former sought to waive plaintiff's right to interest while the latter sought to limit the amount of interest plaintiff would receive. Accordingly, the motions did not request the same relief.

More importantly, during the January 31, 1984, hearing on the motion for direction, the circuit court orally refused Mizyed-Yassin's request to waive interest. How-

ever, the circuit court's February 4, 1984, written order did not incorporate its oral refusal to waive interest. It is well settled that a court's oral ruling is not effective unless memorialized in a written order. (*Ahn Brothers, Inc. v. Buttitta* (1986), 143 Ill. App. 3d 688, 690-91.) Consequently, the interest issue was never effectively resolved. In light of the foregoing, the motion to tender judgment was not frivolous. Therefore, sanctions are not warranted pursuant to section 2—611 of the Code. Moreover, we note that section 2—611 of the Code was preempted by new Supreme Court Rule 137 effective August 1, 1989 (see Official Reports Advance Sheet No. 13, June 28, 1989, R. 137, Committee Comments). Plaintiff's motion for sanctions was heard and determined by the trial court under the 1987 version of the Code. Since the constitutionality of section 2—611 of the Code was not raised on appeal, we need not address it and, therefore, express no opinion on the matter.

For the reasons stated above, the judgment of the appellate court is affirmed in part and reversed in part and the judgment of the circuit court is affirmed.

Appellate court affirmed in part and reversed in part; circuit court affirmed.

JUSTICE STAMOS took no part in the consideration or decision of this case.

Zagorski v. Allstate Insurance Co., 2016 IL App (5th) 140056

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 5th Dist. · filed 2016-05-16 · Opinion
Published opinion

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Where the memo cites it

- memo p. 5 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 22: passage C039.7
- memo p. 5 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 39: passage C039.6
- memo p. 10 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 22: passage C039.7
- memo p. 11 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · ¶ 39: passage C039.6

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Zagorski v. Allstate Insurance Co., 2016 IL App (5th) 140056

Appellate Court Caption	VALENTINE ZAGORSKI and CHRISTINA ZAGORSKI, Plaintiffs-Appellees, v. ALLSTATE INSURANCE COMPANY, Defendant-Appellant (Robert L. Brady, Contemnor-Appellant).
District & No.	Fifth District Docket No. 5-14-0056
Filed	May 16, 2016
Decision Under Review	Appeal from the Circuit Court of St. Clair County, No. 10-L-148; the Hon. Lloyd A. Cueto and the Hon. Andrew J. Gleeson, Judges, presiding.
Judgment	Affirmed in part, reversed in part, vacated in part and remanded with directions.
Counsel on Appeal	Robert L. Brady, of Brown & James, P.C., of St. Louis, Missouri, for appellants. John H. Leskera, of Collinsville, for appellees.
Panel	JUSTICE CATES delivered the judgment of the court, with opinion. Justices Welch and Goldenhersh concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiffs, Valentine Zagorski and Christina Zagorski, filed an action in the circuit court of St. Clair County, against the defendant, Allstate Insurance Company (Allstate), alleging a vexatious breach of contract and common-law fraud in the handling of their homeowners' insurance claim. At the request of Allstate, and its attorney, Robert Brady, the circuit court held Brady in civil contempt for refusing to comply with a discovery order. The court also imposed a fine of $25 per day, which was stayed pending appeal. Allstate and Brady appeal the contempt order and the underlying discovery order. They contend that the circuit court erred in requiring them to answer interrogatories which seek information that is irrelevant to the plaintiffs' action or protected by a statutory privilege. For reasons that follow, we vacate the contempt order and monetary sanction, we affirm in part and reverse in part the underlying discovery order, and we remand this case with directions.

¶ 2 BACKGROUND AND PROCEDURAL HISTORY

¶ 3 On August 21, 2009, the plaintiffs purchased a homeowners' insurance policy from Allstate to cover their home in Fairview Heights, Illinois. Five days later, the plaintiffs' home was damaged by a fire. The plaintiffs filed a claim with Allstate, and their claim was assigned to Allstate's Special Investigation Unit.

¶ 4 On September 6, 2009, Theresa Robinson, an adjuster with the Special Investigation Unit, contacted the plaintiffs and obtained a recorded statement from each of them. On that same date, Robinson sent a letter to the plaintiffs to inform them of their responsibilities during the claims process. Enclosed with the letter was a form entitled, "Sworn Statement in Proof of Loss." Robinson instructed the plaintiffs to complete the form and return it to Allstate, signed and notarized, within 60 days. Shortly thereafter, Allstate requested sworn statements from both plaintiffs. On September 12, 2009, Allstate's attorney, Robert Brady, separately questioned each plaintiff, under oath, for more than an hour. Then, in a letter dated January 5, 2010, Robinson notified the plaintiffs that the investigation had concluded, and that Allstate had denied the claim based upon its determination that the plaintiffs had intentionally set the fire.

¶ 5 On March 29, 2010, the plaintiffs filed a complaint against Allstate in the circuit court of St. Clair County. The third amended complaint is at issue. In count I of the third amended complaint, the plaintiffs allege that Allstate breached its duties under the homeowners' insurance contract in that it vexatiously and unreasonably denied the plaintiffs' claim for insurance benefits following their fire loss. They seek contractual damages, as well as statutory penalties and attorney fees under section 155 of the Illinois Insurance Code (Code) (215 ILCS 5/155 (West 2010)). In count II, the plaintiffs assert a claim for common-law fraud, alleging that Allstate's agent, Theresa Robinson, knowingly made false statements during the claims-handling process for the purpose of inducing the plaintiffs to act in reliance on her statements, that the plaintiffs acted in reliance on her statements, and that the plaintiffs were thereby damaged.

¶ 6 On August 27, 2010, the plaintiffs served their initial interrogatories and requests for production on Allstate. The plaintiffs inquired about Allstate's claims practices, including the following interrogatories which are at issue in this appeal:

"12. During the last five years has any Illinois court assessed attorney's fees, costs, penalties, or fines against Allstate pursuant to 215 ILCS 5/155? If so, state the following:

a. the case name, number and jurisdiction;

b. the amount of the fees, costs, penalties or fines; and

c. whether the fees, costs, penalties or fines were a result of denial of a fire loss claim.

13. During the last five years has Defendant been sued in Illinois by any insured alleging Defendant failed to pay a fire loss claim? If so, state:

a. the case name, number, and jurisdiction;

b. the date the case was filed;

c. the attorneys of record;

d. whether the case was tried or settled; and

e. the amount of any settlement or jury verdict.

14. Did Defendant have a policy manual or other documents for handling fire loss claims in effect at the time of the fire? If so, identify the document.

15. During the last five years have any of Defendant's insureds made any claim with the Illinois Department of Insurance alleging improper claims practices regarding a fire loss claim? If so, please state:

a. the name and address of each claimant;

b. the date each claim was filed; and

c. the disposition of each claim."

¶ 7 On October 6, 2010, Allstate responded with objections to certain questions in the initial set of interrogatories. The stated grounds for objection to interrogatories 12, 13, 14, and 15 are identical, and are as follows:

"Objection. Defendant objects on the grounds that this interrogatory is over-broad, unduly burdensome, harassing, seeks information which is irrelevant and not calculated to lead to the discovery of admissible evidence, and seeks information protected by the work-product and attorney-client privileges."

¶ 8 On October 14, 2010, the plaintiffs filed a motion to compel Allstate to answer their interrogatories. A few weeks later, Allstate filed a motion to dismiss the plaintiffs' complaint. Both motions were scheduled for hearing on November 23, 2010, but neither was heard that day. The judge who had been presiding over the case, Michael O'Malley, retired in December 2010, and the case was assigned to Judge Lloyd Cueto in January 2011. In March 2011, the plaintiffs were granted leave to file an amended complaint, rendering Allstate's motion to dismiss moot. In April 2011, Allstate served the plaintiffs with a duplicate set of objections to the initial set of interrogatories. Based on the record and docket entries, there was little activity involving the court during the next 12 months.

¶ 9 On May 17, 2012, the plaintiffs filed a motion to compel the deposition of Allstate's attorney, Robert Brady. The plaintiffs argued that the deposition was proper and necessary because Brady had actively participated in Allstate's investigation of their fire claim, and may have information relevant to whether Allstate had engaged in improper claims practices. The plaintiffs also filed a motion for an *in camera* inspection of Allstate's claims log.

Allstate had previously refused to produce that portion of its claims log containing entries and notes made after the date the plaintiffs' suit was filed, claiming privilege. Allstate did not, however, prepare a privilege log in support of its claim of privilege.

¶ 10 The plaintiffs' motions were called for hearing on June 28, 2012. After considering the arguments of the parties, the court denied the plaintiffs' motion to compel Brady's deposition, but granted the plaintiffs leave to present interrogatories directed at Brady. The court indicated that plaintiffs could discover nonprivileged information regarding Brady's involvement with the claims investigation, such as the date he was first retained and his hourly rate of pay. After conducting an *in camera* inspection of Allstate's claims log, the court sustained Allstate's objections to all entries made after the date that the plaintiffs filed their lawsuit. The court did, however, direct Allstate to identify an expert whose name appeared in the claims log, but who had not been previously disclosed to the plaintiffs.

¶ 11 Shortly after the hearing, the plaintiffs served the following supplemental interrogatories on Allstate:

> "1. State the following regarding Robert Brady's involvement in the subject fire claim:
>
> a. the date he was first consulted;
>
> b. the person who first consulted him;
>
> c. the number of times and dates he talked with Theresa Robinson;
>
> d. the number of letters or emails sent to and received from Theresa Robinson and the dates of such communications;
>
> e. the hourly rate at which he billed for his services;
>
> f. the total bill to date for work he performed;
>
> 2. State the following regarding any attorney or paralegal at Brown & James other than Robert Brady that had any involvement in the subject fire claim:
>
> a. the date he or she was first consulted;
>
> b. the person who first consulted him or her;
>
> c. the number of times and dates he or she talked with Theresa Robinson;
>
> d. the number of letters or emails sent to and received from Theresa Robinson and the dates of such communications;
>
> e. the hourly rate at which he or she billed for services;
>
> 3. State the following regarding Allstate's referral of fire cases or fire claims to Brown & James which were handled by attorney Robert Brady during the three year period prior the August 26, 2009 fire to present:
>
> a. the number of fire claims or cases sent and the year the claim or case was sent;
>
> b. the number of those claims or cases sent by Theresa Robinson and the year sent;
>
> c. the amount that Brown & James was paid by Allstate for legal services on cases or claims handled by Robert Brady and the year the amounts were paid.
>
> 4. State the following regarding any case James Brady tried to verdict where Allstate was the Defendant:
>
> a. the name of the case, case number, and venue;

b. whether a verdict was rendered for Allstate or for the Plaintiff;

c. the year in which the case was tried."

¶ 12 On July 25, 2012, Allstate responded with objections to the plaintiffs' supplemental interrogatories. In a preface to its objections, Allstate acknowledged that the court had permitted the plaintiffs to make a limited inquiry into Brady's participation in the claims-handling process, but then asserted that the ruling was erroneous. Allstate objected to each supplemental interrogatory on grounds that the requested information was protected by the attorney-client privilege and irrelevant to the subject matter of the underlying complaint.

¶ 13 Allstate's objections to the plaintiffs' supplemental interrogatories and the plaintiffs' motion to compel answers to their initial interrogatories, numbers 12 through 15, were called for hearing on September 5, 2012. After considering the arguments of counsel, Judge Cueto ruled as follows:

> "Defendant's objections to plaintiffs' supplemental interrogatories regarding Bob Brady are overruled, however with respect to Rog 1(d), and 2(d), defendant does not have to disclose the dates of communications. Objection to Int. 4 is overruled, but plaintiff will not be allowed to ask follow up about the details of the trials, beyond what is allowed here.
>
> Objections to Interrogs. 12, 13, 14, and 15, are called & heard. Plaintiff is allowed to discover the number of times in the last five years that (a) Allstate has been cited by the Illinois Dept. of Insurance for vexatious delay or improper claims practices, or (b) that an Illinois court has awarded statutory penalties for vexatious refusal against Allstate. The remaining objections are sustained.
>
> Allstate is ordered to produce its procedure manual for handling fire loss claims in effect at the time of plaintiffs' claim, if any. Defendant may have a protective order entered."

¶ 14 On January 29, 2013, almost five months later, and without having complied with the court's rulings, Allstate filed a motion to reconsider the September 5, 2012, discovery order. The record shows that the motion was presented to Judge Andrew Gleeson because Judge Cueto had retired. On February 20, 2013, Judge Gleeson heard arguments and denied the motion. A status conference was scheduled for May 13, 2013. By the time of that conference, Allstate still had not complied with the discovery order. Following the conference, Judge Gleeson again entered an order directing Allstate to comply with the September 5, 2012, discovery order, within 30 days.

¶ 15 On June 12, 2013, Allstate and Brady jointly filed a "Motion for Contempt For Purposes of Facilitating Appellate Review of the Court's September 5, 2012 Discovery Order." Therein, Allstate and Brady indicated that they would stand on their previous objections to the plaintiffs' initial interrogatories and supplemental interrogatories. They argued that the discovery requests at issue were irrelevant to the subject matter of the litigation; that the discovery requests at issue were overly broad, unduly burdensome, and harassing; and that the interrogatories concerning Brady and his law firm sought information protected by the attorney-client privilege. They asked the court to enter a "friendly" contempt order against Brady for the sole purpose of facilitating appellate review of the September 5, 2012, discovery order.

¶ 16 The motion was called for hearing on June 25, 2013. During the proceedings, the court expressed some irritation with the request for a "friendly" contempt order. The court asked what was so unique about this discovery order that it should be subject to interlocutory review. Allstate's attorney, Brady, replied that he had never before been ordered to produce attorney-client-privilege information in a first-party property arson case. The plaintiffs' attorney countered that this was a simple discovery matter, and asked the court to impose sanctions against Allstate pursuant to Illinois Supreme Court Rule 219 (eff. July 1, 2002). After considering the arguments, the court asked counsel to present proposed orders, and took Allstate's motion under advisement.

¶ 17 On January 3, 2014, the court entered an order holding Brady in civil contempt for his refusal to comply with the discovery order of September 5, 2012, and for purposes of facilitating appellate review. The court imposed a fine of $25 per day on Brady, but then stayed the sanction pending an appeal of the order. The court specifically found that Allstate and Brady did not act with contumacious disregard for the court's authority.

¶ 18 ANALYSIS

¶ 19 Allstate and Brady filed this interlocutory appeal to challenge the propriety of the contempt order and the underlying discovery order. Allstate and Brady contend that the trial court abused its discretion in permitting the plaintiffs to discover the number of times in the last five years that Allstate (a) was cited by the Illinois Department of Insurance for vexatious delay or improper claims practices, or (b) was ordered by an Illinois court to pay statutory penalties for vexatious conduct. They argue that the information is not relevant to any matter at issue in the plaintiffs' case. Allstate and Brady also contend that the trial court abused its discretion in permitting plaintiffs to discover information regarding Brady's involvement in the fire loss investigation. They argue that the information is irrelevant to any matter at issue and is protected by attorney-client privilege.

¶ 20 *Standards of Review*

¶ 21 Discovery orders are not final orders, and they are not generally appealable. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69, 755 N.E.2d 1, 8 (2001). The correctness of a discovery order may be tested within an appeal of a contempt sanction. *Norskog*, 197 Ill. 2d at 69, 755 N.E.2d at 8. When an individual appeals a contempt sanction that was imposed for violating a discovery order, the contempt order is final and appealable, and a review of the contempt order necessarily requires a review of the discovery order upon which it is based. *Norskog*, 197 Ill. 2d at 69, 755 N.E.2d at 8. A trial court's rulings on discovery matters are generally reviewed for a manifest abuse of discretion. *Norskog*, 197 Ill. 2d at 70, 755 N.E.2d at 9. If, however, the facts are uncontroverted and the issue is the trial court's application of the law to the facts, or the issue involves the applicability of a statutory privilege, the standard of review is *de novo*. *Norskog*, 197 Ill. 2d at 70-71, 755 N.E.2d at 9.

¶ 22 Illinois Supreme Court Rule 201(b)(1) addresses the scope of pretrial discovery, and provides that unless otherwise stated in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter of the pending action, whether it relates to a claim or defense. Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). Rule 201(b)(1) is founded on the basic premise that the object of discovery is the expeditious and final determination of controversies in accordance with the substantive rights of the parties. *Owen*

↩ memo p. 5, 10

v. Mann, 105 Ill. 2d 525, 530, 475 N.E.2d 886, 890 (1985); *Monier v. Chamberlain*, 35 Ill. 2d 351, 357, 221 N.E.2d 410, 415 (1966). Great latitude is allowed in the scope of discovery, and the concept of relevance for purposes of discovery is broader than the concept of relevance for purposes of admissibility at trial. *TTX Co. v. Whitley*, 295 Ill. App. 3d 548, 556, 692 N.E.2d 790, 796 (1998). Evidence is relevant for trial purposes if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See Ill. R. Evid. 401 (eff. Jan. 1, 2011). In contrast, relevance for discovery purposes includes not only that which is admissible at trial, but also that which leads to admissible evidence. *Whitley*, 295 Ill. App. 3d at 557, 692 N.E.2d at 797. With these principles in mind, we first consider whether the requested discovery is germane to any theory of the case or any defense.

¶ 23 *Interrogatories 12 - 15: The Plaintiffs' Theories*

¶ 24 As previously noted, the plaintiffs asserted two theories of liability in their third amended complaint, breach of contract and common-law fraud. In the fraud claim, the plaintiffs allege that Allstate's agent knowingly made false statements of material fact during the claims process for the purpose of inducing them to act in reliance on the statements, that they acted in reliance on those statements, and were thereby damaged. In the breach of contract claim, plaintiffs allege that Allstate vexatiously and unreasonably denied payment of insurance benefits to the plaintiffs in breach of its duties and obligations under the homeowners' insurance contract for which they seek contractual damages and statutory penalties under section 155 of the Code.

¶ 25 Section 155 provides an extracontractual remedy to policyholders when an insurer's action in handling a claim is vexatious and unreasonable. 215 ILCS 5/155 (West 2010); *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 518-22, 675 N.E.2d 897, 900-02 (1996). This extracontractual remedy is intended to make suits by policyholders economically feasible and to punish insurance companies for misconduct. *Cramer*, 174 Ill. 2d at 520, 675 N.E.2d at 901. The key question raised in a section 155 claim is whether the conduct of the insurance company was vexatious and unreasonable. *O'Connor v. Country Mutual Insurance Co.*, 2013 IL App (3d) 110870, ¶ 13, 999 N.E.2d 705; *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 681, 734 N.E.2d 144, 151 (2000). In considering this question, a court must consider the totality of the circumstances, including the insurer's duties under the insurance contract, the insurer's attitude and motivation for denying or delaying payment of the claim, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of his or her property. *McGee*, 315 Ill. App. 3d at 681, 734 N.E.2d at 151.

¶ 26 At various points during the litigation, the parties have suggested that section 154.6 of the Code (215 ILCS 5/154.6 (West 2010)) may provide guidance as to whether an insurer's conduct is vexatious and unreasonable. Section 154.6 identifies several acts that could constitute improper claims practices by an insurer, provided that one or more of the acts were committed knowingly and without just cause, and with a frequency indicating a persistent propensity to engage in that type of conduct. 215 ILCS 5/154.5, 154.6 (West 2010). Section 154.6 is a regulatory provision that comes within the purview of the State Director of Insurance. 215 ILCS 5/154.7, 154.8 (West 2010). It does not provide a policyholder with a private remedy or cause of action for an insurer's improper claims practice. *Area Erectors*,

Inc. v. Travelers Property Casualty Co. of America, 2012 IL App (1st) 111764, ¶ 30, 981 N.E.2d 1120. That said, after careful consideration of the acts described in section 154.6, we find that some of the acts are illustrative of conduct by an insurer that may give rise to a remedy for vexatious or unreasonable conduct under section 155. Accordingly, we conclude that when determining whether an insurer's conduct in a given case is vexatious and unreasonable under the totality of the circumstances, a court may properly consider actions identified as improper claims practices under section 154.6 as relevant to, but not dispositive of, a section 155 claim.

¶ 27 To illustrate this point, we note that engaging in activity that results in a disproportionate number of meritorious complaints against an insurer made to the Illinois Department of Insurance and engaging in activity which results in a disproportionate number of lawsuits by claimants against an insurer are among the acts in section 154.6 that may constitute improper claims practices. 215 ILCS 5/154.6(f), (g) (West 2010). In this case, we believe that the plaintiffs could properly ask whether, within the five-year period preceding their fire loss, Allstate had ever been cited by the Director of Insurance for improper claims practices arising under subsections 154.6(f) and (g) of the Code, because these subjects are relevant to the plaintiffs' claims for breach of contract, section 155 penalties, and fraud.

¶ 28 *Interrogatories 12 - 15: The Trial Court's Rulings*

¶ 29 Having identified the issues raised by the plaintiffs' pleadings, we now consider Allstate's objections to interrogatories 12 through 15, and the trial court's rulings on those objections. The complete text of the September 5, 2012, discovery order was set forth earlier in this decision. The portion that is pertinent to this discussion is restated here:

> "Objections to Interrogs. 12, 13, 14, and 15, are called & heard. Plaintiff is allowed to discover the number of times in the last five years that (a) Allstate has been cited by the Illinois Dept. of Insurance for vexatious delay or improper claims practices, or (b) that an Illinois court has awarded statutory penalties for vexatious refusal against Allstate. The remaining objections are sustained.
>
> Allstate is ordered to produce its procedure manual for handling fire loss claims in effect at the time of plaintiffs' claim, if any. Defendant may have a protective order entered."

After reviewing this section of the discovery order, it is fair to say that there are some inconsistencies and ambiguities which make the rulings unclear. There is no transcript of proceedings in the record, and so we are left to sort out the rulings with little information about the trial court's true intention.

¶ 30 Initially, we will consider interrogatories 12 and 15 because the trial court recrafted these two interrogatories as parts (a) and (b) in the above section of the discovery order. Allstate objected to interrogatories 12 and 15 on grounds that the questions were overly broad, unduly burdensome, and sought information that was irrelevant to any issue. Allstate also claimed that the information was protected under the work-product privilege and the attorney-client privilege. According to the record, the trial court did not specifically rule on each basis for Allstate's objections to interrogatories 12 and 15, but instead, reframed the questions posed in those interrogatories. This created two ambiguities. First, according to the ruling, the plaintiffs were permitted to discover the number of times in the last five years that Allstate has been cited by the Illinois Department of Insurance for vexatious delay or improper claims

practices, *or* the number of times in the last five years that an Illinois court has awarded statutory penalties for vexatious refusal against Allstate. The word "or" is ordinarily used as an exclusive disjunction, meaning one or the other, but not both. If "or" is read as an exclusive disjunction, then the ruling requires the plaintiffs to choose whether to inquire about citations issued by the Director of Insurance or about statutory penalties imposed by Illinois courts, but not both. In this case, however, both topics are relevant for discovery purposes, and we find no rationale for requiring the plaintiffs to choose one over the other. Next, we note that the trial court's version of interrogatories 12 and 15 does not address the subparts posed in these interrogatories. When the court recrafted these questions, it neither mentioned nor ruled on the relevance of the subparts in interrogatories 12 and 15. After reviewing the record, we find that the information requested in interrogatories 12 and 15, including the subparts, is relevant for discovery purposes. Therefore, we find that Allstate's relevance objections to interrogatories 12 and 15 are without merit and should have been overruled.

¶ 31 After reviewing the record, we find that Allstate's objections to interrogatories 12 and 15 are without merit and should have been overruled. As previously noted, the trial court's rulings on Allstate's objections, and its rationale for those rulings, are not clear. Therefore, for the sake of clarity, we vacate that portion of the discovery order in which the trial court recrafted interrogatories 12 and 15. This case will be remanded to the circuit court, and upon remand, we direct the circuit court to order Allstate to answer interrogatories 12 and 15, including all subparts, within 30 days from the date of the appellate court's mandate, and to further order that no extensions will be granted.

¶ 32 We next consider the trial court's rulings as to interrogatory 13. Interrogatory 13 asks whether during the last five years, any insureds have filed actions in Illinois against Allstate for alleged failure to pay a fire loss claim. Allstate objected on grounds that the interrogatory was overly broad and unduly burdensome, that the information sought was irrelevant, and that it was protected by the work-product and attorney-client privileges. There is nothing in the record indicating that Allstate attempted to defend on any of these grounds, other than relevance. Based on our interpretation of the discovery order, the trial court sustained all of the grounds for Allstate's objection. After reviewing the record, we find that for discovery purposes, interrogatory 13 seeks information relevant to each theory of the plaintiffs' case. Further, Allstate has not shown that the request was overbroad or that providing an answer would be unduly burdensome. Allstate did not submit a privilege log, and it has not otherwise shown that the requested information is protected under the work-product privilege or the attorney-client privilege. After reviewing the record, we find that the trial court abused its discretion in sustaining Allstate's objections to interrogatory 13, and we vacate that order. Upon remand, the circuit court is directed to order Allstate to answer interrogatory 13, including all subparts, within 30 days from the date of the appellate court's mandate, and to further order that no extensions will be granted.

¶ 33 We next consider the trial court's rulings regarding interrogatory 14. Interrogatory 14 asks whether Allstate had a policy manual or any other documents for handling fire loss claims at the time of the plaintiffs' loss. Again, Allstate objected on all of the same grounds as stated in the other three interrogatories. Again, we find no indication that Allstate intended to defend on any of the grounds claimed except relevance. Based upon our reading of the discovery order, the court sustained all objections to interrogatory 14, but then ordered

Allstate to produce the fire loss procedure manual. Allstate produced a manual, but did not produce any other documents regarding its fire loss claims-handling procedures. After reviewing the record, we find that the information sought in interrogatory 14 is relevant to the plaintiffs' theories of the case and that the trial court erred in sustaining Allstate's grounds for objections. For clarity's sake, we affirm that portion of the order requiring Allstate to produce its procedure manual, and we vacate that portion of the order sustaining Allstate's objections to interrogatory 14. Upon remand, the circuit court is directed to order Allstate to answer interrogatory 14, including identifying any other documents, guidelines, checklists, and procedure manuals regarding the handling of fire loss claims that were in effect at the time of the plaintiffs' loss, within 30 days from the date of the appellate court's mandate, and to further order that no extensions will be granted.

¶ 34 To this point in this decision, we have gone through the tedious process of reviewing each interrogatory, each stated ground for objection, and each ruling at issue. During that process, we noted that Allstate had raised the identical grounds for objection as to interrogatories 12, 13, 14, and 15, and we found no indication that Allstate defended any of these stated grounds, except for relevance. As a result, we believe it appropriate and necessary to comment on this tendency of civil litigators, both plaintiffs' counsel and defendants' counsel, to tender stock, formulaic objections to discovery requests, and then, when the objections are called for hearing, to completely abandon those grounds without consequence. In too many cases, counsel propound objections to discovery requests, followed by a litany of grounds, without any intent or means to defend them. The apparent willingness of opposing counsel and trial courts to accept this tactical approach as "status quo" fuels an already strong temptation to make stock, frivolous objections to discovery requests. This interferes with the efficient and expeditious administration of the pending case, and negatively impacts the other cases on the court's docket.

¶ 35 Our discovery rules provide procedural tools to educate the parties in advance of trial about the merits of their claims and defenses and to promote the prompt and just disposition of litigation. When an objection to a discovery request is based on relevance, the party seeking the discovery has the obligation to establish how the discovery requested is relevant. When an objection is based on attorney-client privilege or work-product privilege, the objecting party has the burden to specifically identify the privilege, and must submit a privilege log describing the nature of the documents, communications, or things not produced, and the exact privilege being claimed. Ill. S. Ct. R. 201(n) (eff. July 1, 2014). When the objection is based on the grounds that the interrogatory is overly broad, unduly burdensome, or harassing, once again, it is the objecting party that has the obligation to offer an adequate defense to the grounds claimed.

¶ 36 In our view, an attorney abuses the discovery process when he or she asserts a litany of grounds for objection to discovery without any intention or any ability to defend those grounds. In the face of discovery abuses, it is incumbent upon the opposing party to promptly request relief, and it is incumbent upon the trial court to consider the request, and, where indicated, to issue orders that will discourage further abuse. Before ruling on such a request, the trial court considers whether there is a good faith basis for the objection having been interposed. The court must determine whether the objecting party has set forth a colorable claim of privilege or whether the objector has made an adequate showing that compiling the requested information would require substantial expense, labor, or disruption of business.

¶ 37 Our supreme court rules provide trial courts with a variety of sanctions to encourage compliance with, and discourage abuse of, the discovery process. Supreme Court Rule 201(c) authorizes the trial court to supervise discovery and to issue protective orders. Ill. S. Ct. R. 201(c) (eff. July 1, 2014). Supreme Court Rule 219 provides consequences for refusal to comply with discovery rules and orders, including the barring of evidence, the striking of pleadings, and the entry of a judgment. Ill. S. Ct. R. 219 (eff. July 1, 2002). Supreme Court Rule 137 authorizes the court to impose sanctions on a party or attorney who files a pleading that is not well grounded in fact or law, or that is interposed for an improper purpose. Ill. S. Ct. R. 137 (eff. July 1, 2013). When a trial court is presented with a motion to rule on objections or discovery matters, the court must promptly rule on those matters. The failure to issue a ruling, and where appropriate, to impose sanctions, constitutes an abuse of the court's discretion, and an abdication of its authority and responsibility.

¶ 38 We openly acknowledge that the foregoing conversation regarding the roles of the parties regarding discovery disputes is a remedial primer rather than a new declaration. But, given the manner in which discovery has proceeded in the case before us, we believe it was necessary.

¶ 39 Though decades old, the admonitions by our supreme court echo loudly here. Discovery is not a tactical game. *Williams v. A.E. Staley Manufacturing Co.*, 83 Ill. 2d 559, 566, 416 N.E.2d 252, 256 (1981). "Discovery is intended as, and should be, a cooperative undertaking by counsel and the parties, conducted largely without court intervention, for the purpose of ascertaining the merits of the case and thus promoting either a fair settlement or a fair trial." *Williams*, 83 Ill. 2d at 566, 416 N.E.2d at 256. Truthful disclosure is the object of all discovery procedures. *Buehler v. Whalen*, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1977). Stock objections and fractional disclosures render our discovery rules and procedures meaningless. *Buehler*, 70 Ill. 2d at 67, 374 N.E.2d at 467. Such tactics delay the search for truth, waste judicial resources, and should not be condoned by the parties or the trial court. We hope that this will serve as an admonition that asserting an objection followed by a litany of hollow grounds, without the intention or means to defend those grounds, is an abuse of the discovery process that may warrant sanctions. In addition, litigants are reminded that a bald objection preserves nothing for review.

↩ memo p. 5, 11

¶ 40 *Allstate's Objections and the Court's Ruling on Supplemental Interrogatories*

¶ 41 We now consider the portion of the September 5, 2012, discovery order pertaining to the plaintiffs' supplemental interrogatories 1 through 4. Interrogatories 1 through 4 seek information regarding the involvement of Allstate's attorney, Robert Brady, in the investigation of the plaintiffs' claim and other insurance claims during the three-year period prior to the date of the plaintiffs' loss. It is undisputed that Brady's questioning of the plaintiffs is relevant and discoverable. According to the record, the transcripts from Brady's examinations of the plaintiffs have already been produced to the plaintiffs. After reviewing the specific allegations in the plaintiffs' complaint, we find that the plaintiffs have failed to show that the other information requested in their supplemental interrogatories is relevant or will lead to the discovery of information relevant to their stated theories of the case. Therefore, we find that the trial court erred in overruling Allstate's relevance objections to the supplemental interrogatories, and we vacate those rulings.

¶ 42 *The Contempt Order and Monetary Sanction*

¶ 43 Allstate and Brady have asked that the contempt order and monetary sanction be vacated. As noted previously, the correctness of a discovery order may be tested through contempt proceedings. *Norskog*, 197 Ill. 2d at 69, 755 N.E.2d at 8. The record reflects that Allstate and Brady requested the contempt order for the purpose of testing the correctness of the discovery order. The trial court initially balked at Allstate's request for a "friendly" contempt order, questioning whether there was anything extraordinary about the discovery order, but eventually issued a contempt order and sanction. After reviewing this record, we share the trial court's initial sense of impatience and irritation with Allstate's challenges to the September 5, 2012, discovery order. We recognize that there are discovery orders which present unique or unsettled questions of law requiring interlocutory review, but the September 5, 2012, discovery order is not one of them. Nevertheless, we will not disturb the court's finding that Brady and Allstate did not act in contumacious disregard of its orders. Accordingly, the order of contempt and the monetary sanction are hereby vacated.

¶ 44 CONCLUSION

¶ 45 In summary, Allstate's objections to interrogatories 12, 13, 14, and 15 are overruled, and Allstate's relevance objections to supplemental interrogatories 1, 2, 3, and 4 are sustained. Upon remand, the circuit court is directed to order Allstate to answer interrogatories 12, 13, 14, and 15, in their entirety, including all subparts, within 30 days from the date of the appellate court's mandate, and to further order that no extensions will be granted.

¶ 46 For the reasons stated, the contempt order and monetary sanction are hereby vacated, the September 5, 2012, discovery order is affirmed in part, reversed in part, and vacated in part, and the cause is remanded for proceedings consistent with this opinion.

¶ 47 Affirmed in part, reversed in part, vacated in part and remanded with directions.

Zurich American Insurance Co. v. Key Cartage, Inc., 386 Ill. App. 3d 1 (1st Dist. 2008)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. App. Ct., 1st Dist. · filed 2008-09-30 · Opinion
Published opinion

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 14 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 29: passage C008.3

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THIRD DIVISION
September 30, 2008

1-07-1807

ZURICH AMERICAN INSURANCE COMPANY,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	Cook County.
	)	
KEY CARTAGE, INC., an Illinois Corporation, WEST BEND MUTUAL INSURANCE COMPANY, a Wisconsin Corporation, TERRY G. WASHINGTON and SEVALA SALKIC, as Special Administrator of the Estate of Enes Salkic, Deceased,	)	Honorable
	)	Dorothy Kirie Kinnaird,
Defendants-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the opinion of the court:

Defendants West Bend Mutual Insurance Company (West Bend), Key Cartage, Inc. (Key), and Terry G. Washington appeal from an order of the circuit court of Cook County granting summary judgment in favor of plaintiff, Zurich American Insurance Company (Zurich), in a declaratory judgment action brought by Zurich to determine insurance coverage. The underlying litigation, a wrongful death action arising from a fatal truck accident, was brought by the estate of Enes Salkic against West Bend's insureds, Key and Washington. The circuit court found that West Bend owes the primary duty to defend and indemnify Key and Washington in the underlying litigation. On appeal, we determine whether the circuit court properly granted summary judgment

in favor of Zurich and against West Bend. Within this determination, as a matter of first impression, we decide whether section 7-317(b)(2) of the Illinois Vehicle Code (625 ILCS 5/7-317(b)(2) (West 2006)) applies to insurance policies issued to commercial truckers. For the following reasons, we reverse the decision of the circuit court.

I. BACKGROUND

This insurance coverage action has its origins in a motor vehicle accident that occurred on October 31, 2002, and resulted in the death of Enes Salkic. At the time of the fatal truck accident, Washington, an employee of Key, operated the truck. On December 8, 2003, Sevala Salkic, as special administrator of the estate of Enes Salkic, filed suit in the circuit court of Cook County against Key, Washington and Rose Cartage Services, Inc. (Rose), alleging that Washington's negligent operation of a tractor trailer caused the accident. The underlying plaintiff later amended her complaint to add Franklin Truck Group, Inc. (Franklin), as a defendant. The underlying plaintiff seeks damages in excess of $50,000.

At the time of the accident, Key, Rose and Franklin were all part of a family-run business. Key is an Illinois corporation with its principal place of business located in Highland, Indiana. Key is a trucking company owned by Sharon and Corrie Frank. Essentially, Key operates as a "carrier-for-hire." Key specializes in hauling heavy oils and asphalt.

Rose is an Illinois corporation with its principal place of business located in Lansing, Illinois. Rose is a trucking company owned by David Bult, the brother of Sharon Frank. Like Key, Rose operates as a "carrier-for-hire." Rose primarily hauls salt, limestone and other material necessitating dump trucks. Sharon Frank managed the day-to-day operations of both Key and Rose. Her duties

included the leasing of equipment and the procuring of insurance coverage for equipment used by both Key and Rose.

Franklin is an Illinois corporation with its principal place of business located in Lansing, Illinois. Franklin, owned by Sharon and Corrie Frank, is an equipment company that leases semitrailer trucks to other companies. Franklin owned the truck involved in the underlying accident. In April 1997, Franklin leased the truck, a 1997 Kenworth semitrailer tractor, to Rose.

In the April 1997 lease agreement, Franklin agreed to give Rose exclusive use, possession and control of the subject truck. Franklin, as lessor, agreed that "while the [truck] was being operated for [the lessee, Rose], it shall be used exclusively in the business and service of [Rose] in compliance with all applicable rules, regulations, instructions and tariffs applicable to [Rose]." Franklin also agreed to furnish drivers to operate the equipment in question and warranted that those drivers would be competent and qualified. Rose agreed that, during the term of the lease, "the said vehicle equipment while being operated for [Rose], shall be solely and exclusively under the direction and control of [Rose] who shall assume full common carrier responsibility to shippers and the general public for loss or damage to cargo transported in such motor vehicle equipment and for the operations of such motor vehicle equipment."

In addition, Franklin agreed that, during the term of the lease, it would obtain and maintain, at its own cost, extensions of its public liability and property damage insurance in such companies and in such amounts as approved by Rose. Furthermore, Franklin agreed to indemnify and "save harmless" Rose against legal liability for any loss resulting from injury or death of such operating personnel and any loss or damage to persons or property resulting from negligence, incompetence

or dishonesty of any such operating personnel. The lease agreement also stated that Franklin "agrees that [Rose] shall not be liable for any loss or damage to or destruction of said leased vehicle and releases [Rose] from and against any claim or demand arising therefrom." Finally, the lease agreement stated that "[t]he operations to be conducted under this lease are limited to transportation performable under the certificates of public convenience and necessity in I.C.C. Docket Number MC-156863."

The subject truck was scheduled on Zurich policy number TRK2725644-00, issued to Rose, and effective August 24, 2002 through August 24, 2003. The Truckers Coverage Form provides for "Who Is An Insured" as follows:

> "a. You for any covered 'auto'.[1]
>
> b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow except:
>
> (1) The owner or anyone else from whom you hire or borrow a covered 'private passenger type auto'.
>
> (2) Your 'employee' or agent if the covered 'auto' is a 'private passenger type auto' and is owned by that 'employee' or agent or a member of his or her household.
>
> (3) Someone using a covered 'auto' while he or she is working in a business of selling, servicing, repairing, parking or storing 'autos' unless that business is yours.
>
> (4) Anyone other than your 'employees', partners (if you are a partnership), members (if you are a limited liability company), a lessee or borrower or any of their 'employees',

[1] The policy defines "auto" as a land motor vehicle, trailer or semitrailer designed for travel on public roads.

while moving property to or from a covered 'auto'.

(5) A partner (if you are a partnership), or a member (if you are a limited liability company), for a covered 'private passenger type auto' owned by him or her or a member of his or her household.

c. The owner or anyone else from whom you hire or borrow a covered 'auto' that is a 'trailer' [including a semitrailer] while the 'trailer' is connected to another covered 'auto' that is a power unit, or, if not connected:

(1) Is being used exclusively in your business as a 'trucker';[2] and

(2) Is being used pursuant to operating rights granted to you by a public authority.

d. The owner or anyone else from whom you hire or borrow a covered 'auto' that is not a 'trailer' while the covered 'auto':

(1) Is being used exclusive in your business as a 'trucker'; and

(2) Is being used pursuant to operating rights granted to you by a public authority.

e. Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability."

The Zurich policy also provides that "none of the following is an 'insured'":

"a. Any 'trucker' or his or her agents or 'employees', other than you and your 'employees':

(1) If the 'trucker' is subject to motor carrier insurance requirements and meets them by a means other than 'auto' liability insurance.

---

[2] The policy defines "trucker" as "any person or organization engaged in the business of transporting property by 'auto' for hire."

> (2) If the 'trucker' is not insured for hired 'autos' under an 'auto' liability insurance form that insures on a primary basis the owners of the 'autos' and their agents and 'employees' while the 'autos' are being used exclusively in the 'truckers' business and pursuant to operating rights granted to the 'trucker' by a public authority."

Zurich has alleged throughout the course of its declaratory judgment action that section a(2) of this portion of the policy is a reciprocal coverage provision that bars omnibus coverage to Key and Washington.

The Zurich policy also includes an endorsement for an additional insured "as required by contract/agreement," although Franklin was not specifically listed on the schedule. Another endorsement, entitled, "Hired Autos Specified As Covered Autos You Own," included "all hired autos under long-term contract," although, again, Franklin was not specifically listed on the schedule. There was no specific mention of Franklin as an insured in the entire Zurich policy. Zurich defended Rose and Franklin in the underlying litigation pursuant to its policy.

Key was insured by West Bend under policy number CPC0292437 04 and an umbrella policy under policy number CPC0292438, effective June 1, 2002, through June 1, 2003. The truck involved in the accident was not scheduled on either of the West Bend policies.

In October 2002, Key had completed its asphalt hauling season and sought additional work during what was typically considered to be a slow period for construction. Key entered into an oral agreement to haul garbage for Navajo Transport (Navajo). Navajo had a central staging area where it would bring all the trash from its route trucks, transfer the trash into trash-hauling trailers, and then retain carrier-for-hire trucking companies to pull their trailers to various landfills. Key hired Washington as one of its drivers approximately two weeks before the accident. At the time of the

accident, Washington was driving the truck that struck the decedent's automobile. Key had borrowed the truck from Rose.

By deposition, Corrie Frank testified regarding the usage of the truck on the date of the accident:

> "What we had is we had the leased Freightliners hauling asphalt and they had a higher fifth wheel than what we could use.
>
> The assets we had available to us was with the Kenworths that had the lower profile fifth wheels and they also are equipped with hydraulics.
>
> That unit [the subject truck] was just employed for a short period of time to go ahead and employ this [Navajo garbage hauling assignment]. The long term to this thing was to put the tractors back with Rose Cartage, because that's where we used the hydraulics, for the dump trucks. And then we'd go out there and lease from PacLease or Penske the proper units that have -- would have probably the correct fifth wheel setup that doesn't have hydraulics that we see out there because the units are used as a tipper to go into the landfill.
>
> So the overall effect was that this was a two-term -- it was emergent -- it was an emergency or an on-the-spot thing because we had to do something immediately to employ the proper equipment.
>
> And then in the long term if this was going to work out then

we could have still leased other equipment to fit the need for that."

In short, the truck that was leased by Franklin to Rose was borrowed by Key to haul waste on the date of the accident. According to Corrie Frank, the truck was to be returned to Rose had the accident not occurred.

Sharon Frank testified by deposition that Rose did not receive any economic benefit from Key's oral agreement with Navajo to haul waste. She stated, "[a]ny time that truck rolled Franklin benefitted unless, of course, we didn't get paid for it. But at any time the truck rolled in theory it was performing service for which it would be paid and of course, that would ultimately benefit Franklin." She further explained that "the whole way that the system was set up was that the equipment owners in the end saw the income realized." Although Key used the truck, Franklin bought the fuel, paid maintenance and "whatever else came up." Key's signage and Illinois Commerce Commission (ICC) placards were on the truck at the time of the accident so that shippers could identify Key as the operator of the truck.[3]

The affidavit of Sharon Frank stated that Key never paid Franklin for use of the truck involved in the accident. The affidavit also stated that, "[b]ecause the tractor involved in the Salkic accident was scheduled on the Zurich policy, it was [her] expectation that the Zurich policy would provide primary coverage to Key for the Salkic lawsuit." In addition, the affidavit stated that "[i]t was Franklin Truck Group's understanding that Franklin Truck Group was an additional insured on

[3] Under section 18c-4701(1) and (2) of the Illinois Vehicle Code (625 ILCS 5/18c-4701(1), (2) (West 2006)), Key's placards and ICC registration constituted its operating rights by a public authority.

the Zurich policy issued to Rose Cartage based upon the 'LESSOR-ADDITIONAL INSURED AND LOSS PAYEE' endorsement and the 'HIRED AUTOS SPECIFIED AS COVERED AUTOS YOU OWN' endorsements of the Zurich policy."

An April 28, 2003, coverage opinion letter from West Bend's counsel to West Bend's senior claim representative stated that West Bend "will have a primary duty to defend and indemnify Key Cartage, Inc., as well as its driver, Terry Washington. Zurich's policy will also serve as a co-primary policy with your policy, and you will split all defense and indemnity obligations." West Bend's counsel pointed out "a unique situation" because of the fact that West Bend issued a commercial auto coverage form to Key, whereas Zurich issued a trucker's coverage form to Rose. Each form has a different "other insurance clause." West Bend's counsel noted the language from Zurich's "other insurance clause" provides excess coverage for any covered "auto" while hired or borrowed from another trucker. West Bend's "other insurance clause" provides excess coverage for any covered "auto" not owned by Key. Because the policies contain "mutually repugnant other insurance clauses" where the insurers are claiming to be excess carriers, the "other insurance" clauses from both policies essentially "cancel each other out." West Bend's counsel stated for this reason, Zurich and West Bend are co-primary insurers.

Zurich initially filed its complaint for declaratory judgment on February 5, 2004, against Key, West Bend, Washington and Salkic. On November 12, 2004, Zurich filed its first amended complaint for declaratory judgment, in which it asserted that its policy requires reciprocal coverage for the owners of vehicles it insures in exchange for coverage under its policy. Zurich noted that, under the West Bend policy , a party other than Key or its employees is covered only while that party

is using a covered auto. Zurich asserted that, because Rose was not using the vehicle at the time of the accident, the West Bend policy does not provide reciprocal coverage and, therefore, Zurich was precluded from coverage of Key and Washington as insureds for the underlying accident.

West Bend counterclaimed, arguing that, because Key and Washington were using the subject truck, which Rose had hired and given permission for Key to use, Key and Washington qualify as insureds under Zurich's policy section providing, "Who Is An Insured." West Bend also contended that Zurich's reciprocal coverage provision violates Illinois public policy requiring the insurer of a vehicle to provide primary insurance to the permissive user of said vehicle. West Bend requested that the circuit court enter a declaratory judgment that Zurich owes a primary duty to defend and indemnify Key and Washington.

On October 31, 2005, Franklin and Rose were both voluntarily dismissed from the underlying action.

On June 27, 2006, counsel for West Bend entered into a stipulation agreement, which stated that West Bend has not reserved its rights to deny coverage for the underlying action and is providing a defense to Key and Washington. West Bend acknowledged its duty to indemnify Key and Washington for any judgment entered against them in the underlying action subject to the limits of liability in the West Bend policy. West Bend entered into the stipulation agreement without prejudice to its contention that Zurich owes the primary duty to defend and indemnify Key and Washington.

On July 7, 2006, Zurich moved for summary judgment on all claims with respect to its first amended complaint for declaratory judgment and against defendants on all claims as set forth in their

amended counterclaims. West Bend, Key and Washington filed a cross-motion for summary judgment on August 2, 2006.

On October 26, 2007, the circuit court conducted a hearing on the parties' cross-motions for summary judgment. Initially, the parties agreed that there were no facts in dispute that would prevent the court from deciding the cross-motions. Counsel for Zurich stated that there was a provision within the lease agreement between Franklin and Rose that required Rose to provide insurance to Franklin. Counsel for Zurich stated that, "pursuant to an additional insured endorsement on the back of the Zurich policy there is an argument that Franklin qualified as an insured under the Zurich policy." Counsel for Zurich agreed that Sharon Frank did not procure insurance specifically for Franklin.

Zurich argued that its reciprocal coverage provision does not violate Illinois public policy. Zurich contended that the Illinois Supreme Court's holding in State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group, 182 Ill. 2d 240 (1998), that a liability policy issued to the owner of a vehicle must provide omnibus coverage to permissive drivers, was limited in scope to the portion of the Illinois Vehicle Code encompassing the Safety and Family Financial Responsibility Law (625 ILCS 5/7-100 et seq. (West 2006)) (Family Responsibility Law). Zurich also argued that section 7-601(b)(2) of the Illinois Vehicle Code (625 ILCS 5/7-601(b)(2) (West 2006)), includes an exception to the requirement to provide omnibus coverage for "vehicles required to file proof of liability insurance with the Illinois Commerce Commission."

The circuit court asked Zurich's counsel if there was Illinois authority that determined whether the omnibus coverage requirement applies to the Illinois Commercial Transportation Law

(625 ILCS 5/18c-1101, et seq. (West 2006)). Counsel for Zurich replied, "no," and stated that West Bend gave far too expansive of an interpretation of the Universal Underwriters case. Zurich argued that the Commercial Transportation Law, which governs trucks, is administered independently of the Family Responsibility Law and, therefore, is a completely independent statutory scheme.

The circuit court next questioned Zurich with respect to its reciprocal coverage provision. The court stated:

> "[C]an you tell me what in the world in the Zurich's policy this Subsection (a)(2) means? That is written so obtusely. I had to read it back and forth a zillion times. What does that mean?"

Zurich explained that the reciprocal coverage provision says that any trucker, in this case, Key, who fails to insure the owner of the truck, in this case, Franklin, on a primary basis and who is using the truck for their exclusive use and pursuant to operating rights granted by the ICC must provide reciprocal coverage to Franklin. Without reciprocal coverage provided by Key to Franklin, Zurich is precluded from primary coverage for West Bend's insureds.

West Bend responded that, although no Illinois courts have addressed whether the omnibus coverage requirement applies to commercial transportation vehicles, the Illinois Appellate Court, Fourth District, in Pekin Insurance Co. v. Fidelity & Guaranty Insurance Co., 357 Ill. App. 3d 891 (2005), held that a business exclusion for coverage of a permissive user in the business of selling, servicing, repairing, parking, or storing autos violated Illinois public policy. West Bend pointed out that the Pekin Insurance case involved a tow truck towing a commercial van. In regard to whether Zurich's reciprocal coverage provision is ambiguous, West Bend asserted that the cases Zurich cited

in support of its argument that the provision is unambiguous were not applicable because they did not consider the validity or ambiguity of that provision.

Zurich replied with respect to the holding in Universal Underwriters that "in the context of what the court was addressing, it is an awful big stretch to suggest that they were ruling on this grand basis that this provision was going to govern everything within the context of the vehicle code because that is not what is before the court." Zurich also argued that Pekin Insurance was not applicable because that case involved a tow truck covered by an automobile insurance policy rather than a commercial truck insurance policy.

On June 5, 2007, the circuit court entered summary judgment in favor of Zurich on its first amended complaint for declaratory judgment and in favor of Zurich on West Bend's counterclaim and defendants' cross-motion for summary judgment. The court found:

> "(a) the 'reciprocal coverage' provision in Zurich's policy is valid and unambiguous;
>
> (b) since West Bend's policy does not provide reciprocal coverage to Franklin or Rose Cartage, no coverage is afforded for Key Cartage or Washington under the Zurich policy;
>
> (c) at the time of the accident, the truck in question was in the 'exclusive use' of Key Cartage and being used pursuant to the 'operating rights' granted to Key Cartage by a 'public authority,' here the Illinois

Commerce Commission pursuant to 625 ILCS 5/18c-4701(1) and (2); and

(d) Zurich's policy does not violate public policy of the State of Illinois, and neither section 5/7-317(b)(2) [(625 ILCS 5/7-317(b)(2) (West 2006))] nor section 5/7-601(a) of the Family Responsibility Law apply to Franklin, Rose Cartage or Key Cartage which were operating at the time of the accident under the jurisdiction of the Illinois Commerce Commission and governed by the Illinois Commercial Transportation Law. 625 ILCS 5/18c-1101, et seq."

Defendants timely appeal.

II. ANALYSIS

Defendants argue on appeal that: (1) Zurich's reciprocal coverage provision is unenforceable because it violates Illinois public policy; (2) section 7-601(b)(2) of the Illinois Vehicle Code does not exempt insurance policies issued for commercial vehicles from the omnibus coverage requirement; (3) Illinois authority supports the extension of omnibus coverage under Section 7-317(b)(2) to West Bend's insureds, Key and Washington; and (4) Zurich's reciprocal coverage provision cannot be enforced because it is ambiguous. Defendants request that this court reverse the circuit court's entry of summary judgment in favor of Zurich and enter summary judgment in favor of defendants or, alternatively, reverse the circuit court's judgment in favor of Zurich and remand

this cause to the circuit court with directions to enter summary judgment in favor of defendants.

Zurich responds that the circuit court did not err by granting summary judgment in Zurich's favor. Zurich asserts that its reciprocal coverage provision does not violate Illinois public policy. Zurich argues that commercial trucking, specifically, "motor carriers of property," are governed by a separate and distinct regulatory scheme under the Commercial Transportation Law. Zurich contends that section 7-601(b)(2) of the Family Responsibility Law specifically provides that vehicles required to file proof of liability insurance with the ICC are exempt from the requirements of section 7-317(b)(2) and instead are governed by the Commercial Transportation Law. In addition, Zurich asserts that the circuit court properly ruled that the reciprocal coverage provision is unambiguous, valid and enforceable.

A. Standard of Review

Summary judgment is granted properly where the pleadings, depositions, admissions and affidavits, which are construed strictly against the moving party and liberally in favor of the opponent (RLI Insurance Co. v. Illinois National Insurance Co., 335 Ill. App. 3d 633, 643 (2002)), show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). Summary judgment is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. Travelers Insurance Co. v. Eljer Manufacturing, Inc., 197 Ill. 2d 278, 292 (2001); Spirit of Excellence, Ltd. v. Intercargo Insurance Co., 334 Ill. App. 3d 136, 144-45 (2002). Reversal of summary judgment is warranted if, on review, a material issue of fact or an inaccurate interpretation of the law exists. Spirit of Excellence, 334 Ill. App. 3d at 145. Summary judgment

and statutory construction matters are reviewed de novo. Midstate Siding & Window Co. v. Rogers, 204 Ill. 2d 314, 319 (2003); Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 102 (1992).

B. Enforceability of Zurich's Reciprocal Coverage Provision Pursuant to Illinois Public Policy

Defendants assert Zurich's argument that its reciprocal coverage provision is not subject to the omnibus coverage requirement found in section 7-317(b)(2) is based upon a misinterpretation of section 7-601(b)(2). Defendants point out that there is no dispute that policies of insurance issued to commercial truckers such as Rose and Key are subject to the insurance provisions contained in the ICC. Defendants argue that the Illinois Supreme Court on two occasions has ruled that the omnibus coverage requirement of section 7-317(b)(2) applies throughout the Illinois Vehicle Code. Defendants contend that the omnibus coverage requirement of section 7-317(b)(2) applies to the insurance provisions pursuant to the Commercial Transportation Law, which is part of the Illinois Vehicle Code.

Zurich responds that the public policy concern regarding a permissive user of a motor vehicle, who may borrow a vehicle and cause injury or damage to others, simply does not exist in the intrastate trucking context. Zurich argues that defendants' arguments are based upon the wrong statutory scheme and should be rejected. Zurich contends that the Commercial Transportation Law, not the Family Responsibility Law, governs operation of intrastate motor carriers of property such as Key and Rose. Zurich asserts that, because Rose and Key were required to file proof of liability insurance with the ICC in order to obtain the necessary registration numbers to operate on public roadways as carriers of property for hire, the Commercial Transportation Law governs this dispute.

The supreme court in Universal Underwriters was the first to address the scope of section 7-317(b)(2). The question before the Universal Underwriters court was "whether a car dealer's garage insurance policy covers the liability of a separately insured customer who is involved in an accident while test-driving one of the dealer's vehicles." Universal Underwriters, 182 Ill. 2d at 241. During a test-drive, the customer, Rodney Luckhart, negligently collided with another vehicle owned by Vivian Carter, but operated by Raun Calinee. Luckhart had automobile liability coverage under a policy issued by the plaintiff, which paid a total of $9,092.15 to Carter and Calinee for personal injuries and property damage from the accident. The car dealership, Joyce Pontiac, was insured under a garage policy issued by the defendant. The plaintiff sought reimbursement for the accident from the defendant, alleging that the defendant's policy afforded primary coverage to Luckhart while test-driving Joyce Pontiac's vehicle. The defendant argued that a test-driver was only "required by law" to be insured if the test-driver did not have a liability insurance policy.

Initially, the Universal Underwriters court noted the language included in section 7-317(a) that defines the term "motor vehicle liability policy" and section 7-317(b)(2) as follows:

> " '§ 7-317 "Motor vehicle liability policy" defined. (a) Certification. -- A "motor vehicle liability policy", *as that term is used in this Act*, means an "owner's policy" or an "operator's policy" of liability insurance, certified as provided in Section 7-315 or Section 7-316 as proof of financial responsibility for the future ***.
>
> (b) Owner's Policy. -- Such owner's policy of liability insurance:
>
> ***
>
> 2. Shall insure the person named therein and *any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured*.' " (Emphasis added and in original.) Universal Underwriters, 182 Ill. 2d at 244, quoting

625 ILCS 5/7-317(West 2006).

The court then noted that the definition in section 7-317(a) appears in article III of chapter 7 of the Illinois Vehicle Code, "which requires that certain motorists submit proof of financial responsibility for the future as a condition of enjoying driving privileges." Universal Underwriters, 182 Ill. 2d at 244-45. The defendant argued that section 3-317's omnibus clause only applies to liability policies used as proof of future responsibility in accordance with article III of chapter 7.

The supreme court disagreed, stating that the statutory definition of "motor vehicle liability policy" applied to the term as it is " 'used in this Act.' " Universal Underwriters, 182 Ill. 2d at 245. "*The word 'Act,' in turn, refers to the Illinois Vehicle Code, unless the context clearly indicates another meaning.*" (Emphasis added.) Universal Underwriters, 182 Ill. 2d at 245. The court held that "the definition set forth in section 7-317 applies throughout the [Illinois Vehicle] Code and thus applies to the mandatory insurance requirement set forth in section 7-601(a)." Universal Underwriters, 182 Ill. 2d at 245.

The defendant in Universal Underwriters also argued that it was excused from the requirements of section 7-317 under a statutory exemption for " 'vehicles complying with laws which require them to be insured in amounts meeting or exceeding the minimum amounts required under [section 7-601]' " 182 Ill. 2d at 245, quoting 625 ILCS 5/7-601(b)(6) (West 1996). The supreme court stated that the exemption which the defendant referred to applies only when the insurance required by law provides the type of coverage required under the mandatory insurance statute. The court ruled that "the insurance must contain an omnibus clause insuring those driving a vehicle with the owner's permission." Universal Underwriters, 182 Ill. 2d at 245-46. The court

stated that the defendant's policy must cover Luckhart's liability as a permissive user regardless of whether the exemption under section 7-601(b)(6) of the Family Responsibility Law applies. Finally, the court stated that, even assuming the defendant was correct in its interpretation of the language in its policy, to give effect to that language would violate Illinois public policy. Universal Underwriters, 182 Ill. 2d at 246.

Pertinent to this case, the defendant in Universal Underwriters also argued that, to the extent its policy covered Luckhart, the policy only provided excess coverage after other insurance covering Luckhart was exhausted. The supreme court stated, "pursuant to custom in the insurance industry, primary liability is generally placed on the insurer of the owner of an automobile rather than on the insurer of the operator." Universal Underwriters, 182 Ill. 2d at 246.

The supreme court in State Farm Mutual Automobile Insurance Co. v. Smith, 197 Ill. 2d 369 (2001) held that an automobile business exclusion violated Section 7-317(b)(2) of the Illinois Vehicle Code and, therefore, Illinois public policy, because it precluded coverage of any person driving the owner's vehicle with the express or implied permission of the owner. The policy exclusion at issue in Smith provided as follows

> 'THERE IS NO COVERAGE:
>
> 1. WHILE ANY VEHICLE INSURED UNDER THIS SECTION IS:
>
> * * *
>
> b. BEING REPAIRED, SERVICED OR USED BY ANY PERSON EMPLOYED OR ENGAGED IN ANY WAY IN A CAR BUSINESS.'

197 Ill. 2d at 372-73. The term "car business" was defined as "a business or job where the purpose is to sell, lease, repair, service, transport, store or park land motor vehicles or trailers." Smith, 197 Ill. 2d at 373.

The underlying incident in Smith involved a valet parking service. Maurice Barnes, accompanied by Ruby Smith, drove his vehicle to Harrah's Casino Cruises-Joliet. Barnes gave his vehicle to Harrah's valet service for parking. When Barnes and Smith left the casino, the valet driver employed by Harrah's, Jeremy Fisher, retrieved Barnes' automobile. Smith alleged that, as she entered the passenger door, the vehicle rolled backwards, striking her and knocking her to the ground, causing injury. Fisher and Harrah's tendered their defense to Barnes' insurer, State Farm Mutual Automobile Insurance Company (State Farm). State Farm refused the tender and filed a declaratory judgment action arguing that it had no duty to defend or indemnify Fisher or Harrah's based upon its automobile business exclusion clause, as quoted above.

The circuit court held that the automobile business exclusion applied and that State Farm had no duty to defend or indemnify Fisher or Harrah's. The appellate court held that the automobile business exclusion violated Illinois public policy and, therefore, was unenforceable. The supreme court agreed with the appellate court and explained:

> "Section 7-317(b)(2) is clear. It mandates that a motor vehicle liability policy, or a liability insurance policy, cover the named insured and any other person using the vehicle with the named insured's permission. [Citations.] When a vehicle owner gives his vehicle to a person engaged in an automobile

> business, the owner is also giving that person the express or implied permission to use the vehicle. Therefore, a provision written into an insurance policy that excludes coverage for persons engaged in an automobile business necessarily excludes coverage for persons who are using an insured's vehicle with the insured's express or implied permission. The exclusion thus violates section 7-317(b)(2) of the Illinois Vehicle Code." Smith, 197 Ill. 2d at 374.

The supreme court's holding, however, was limited to only the automobile business exclusion from the policy, stating "[t]he permissibility of other possible policy exclusions is not before us today, and we express no opinion as to any other exclusion." Smith, 197 Ill. 2d at 379.

Following the decision in Smith, the Fourth District addressed whether a business exclusion of liability coverage for a permissive user was void as against public policy. See Pekin Insurance, 357 Ill. App. 3d at 904-05. In Pekin Insurance, a business van owned by Sanfilippo and Sons, Inc. (Sanfilippo) and insured by the defendant, Fidelity and Guaranty Insurance Company (Fidelity) broke down. The driver called for a tow and Brown's Vehicle Inspection (Brown's Towing), a business owned by Larrie Brown, responded with a tow truck insured by the plaintiff, Pekin Insurance Company (Pekin). The tow truck driver hitched the delivery van and proceeded to drive toward Quincy, Illinois. During the trip, the van broke free, crossed into oncoming traffic, and injured the driver and passenger of an oncoming vehicle. The injured driver and passenger sued Larrie Brown, both individually and as Brown's Towing, the tow truck driver, Sanfilippo and the delivery van

driver. Pekin brought a declaratory judgment action against Fidelity, seeking a declaration that Fidelity owed a duty to defend Brown's Towing and its driver and that Pekin owed no duty to defend the delivery van owner and its driver. The circuit court granted judgment on the pleadings that Fidelity's policy provided no coverage for Brown's Towing and the tow truck driver and that Pekin breached its duty to defend Sanfilippo and its driver.

The business exclusion provision in Fidelity's policy provided an exclusion from coverage for " '[s]omeone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking[,] or storing "autos" unless that business is yours.' " Pekin Insurance, 357 Ill. App. 3d at 904. The Pekin Insurance court found that the business exclusion applied to Brown's Towing. The Pekin Insurance court compared the Fidelity business exclusion with the relevant insurance provision from Smith and found that the Fidelity exclusion violates public policy. The court stated:

> "The fact that tow trucks are required to carry their own insurance [under 625 ILCS 5/12-606(d) (West 2006)] does not mean that towed vehicles should be allowed to except tow trucks from their coverage. The policy of protecting the public is best served by having both the tow truck's policy and the towed vehicle's policy as available insurance." Pekin Insurance, 357 Ill. App. 3d at 904.

The court held that, because Fidelity's business exclusion violates public policy as stated in State Farm, the circuit court improperly denied Pekin judgment on the pleadings as to this claim. Pekin Insurance, 357 Ill. App. 3d at 904-05.

Pekin also claimed that it owed no duty to defend or indemnify anyone because Brown's Towing and its driver "deselected" their coverage under the Pekin policy and "targeted" the Fidelity policy, which was similar to the claim in John Burns Construction Co. v. Indiana Insurance Co., 189 Ill. 2d 570 (2000). The Pekin Insurance court found that allowing Brown's Towing and its driver to "deselect" their statutory Pekin policy and target the Fidelity policy violates Illinois public policy. The court stated:

> "Insurance is mandatory for tow trucks on public highways in order to protect the public from damage arising from the use of tow trucks. To allow the owner of a policy mandated by this statute [(625 ILCS 5/12-606(d) (West 2006))] to deselect that coverage in favor of the coverage of the vehicle it tows would render the statute and its purpose virtually meaningless." Pekin Insurance, 357 Ill. App. 3d at 902.

The court distinguished the facts of John Burns, where the contractor was named on both policies and both insurers were primary carriers. In Pekin Insurance, Brown's Towing and its driver were not named insureds or additional insureds on the Fidelity policy, but were omnibus insured. 357 Ill. App. 3d at 902-03. The Pekin Insurance court did not specifically refer to section 7-317(b)(2) in this portion of the opinion, but revisited the fact that Fidelity's policy required omnibus coverage under section 7-317(b)(2) when discussing and comparing the holding in Smith. In sum, the Pekin Insurance court considered that insurance policies for tow trucks, which require mandatory insurance under Section 12-606(d) of the Illinois Vehicle Code, also require omnibus coverage pursuant to

section 7-317(b)(2).

Another recent supreme court decision, State Farm Mutual Automobile Insurance Co. v. Illinois Farmers Insurance Co., 226 Ill. 2d 395 (2007), determined whether a "step-down" provision, which reduces the policy limits for permissive users, was violative of Illinois public policy pursuant to section 7-317(b)(2). Unlike Universal Underwriters, Smith and Pekin Insurance, the supreme court did not consider whether the pertinent step-down provision violated section 7-317(b)(2) for precluding coverage to permissive users. Instead, the Illinois Farmers court considered whether a permissive user required an equal amount of coverage as provided to the named insured.

The court in Illinois Farmers reiterated its holding in Universal Underwriters that an omnibus clause "must be read into every liability insurance policy." 226 Ill. 2d at 402. The court also stated that liability insurance required by section 7-601 of the Illinois Vehicle Code must comply with the requirements of section 7-317(b)(2). The court held, however, that nothing in the pertinent statutory language required a liability policy providing the named insured with coverage in excess of the statutory minimum pursuant to section 7-203 of the Illinois Vehicle Code (625 ILCS 5/7-203 (West 2006)) to provide the same level of coverage to permissive users. Illinois Farmers, 226 Ill. 2d at 403-04.

In Progressive Universal Insurance Co. v. Liberty Mutual Fire Insurance Co., 215 Ill. 2d 121 (2005), Shirley Abbinante owned a vehicle insured under a policy issued by the plaintiff, Progressive Universal Insurance Company (Progressive). Abbinante allowed her son, Ronald, to use the insured vehicle to deliver pizzas for his employer, Casale Pizza, Inc. Ronald was compensated by a flat fee for each pizza he delivered. During one of his deliveries, he struck a pedestrian, who sustained

severe injuries. Progressive's policy contained a " 'food delivery exclusion,' " which precluded coverage for bodily injury or property damage while an insured vehicle was "'being used to carry persons or property for compensation for a fee, including, but not limited to, delivery of *** food, or any other products.'" The supreme court determined whether Progressive had a duty to defend and indemnify Ronald in the underlying action.

The defendant, Liberty Mutual Fire Insurance Company (Liberty Mutual), argued that the food exclusion violated public policy because it conflicted with section 7-317(b)(2). Liberty Mutual contended that, because Ronald was using the vehicle with his mother's express permission at the time he struck the pedestrian, section 7-317(b)(2) required Progressive to defend and indemnify Ronald in the underlying litigation.

Once again, the supreme court reiterated that the omnibus clause as required by statute "must be read into every such policy." Progressive, 215 Ill. 2d at 128. The court noted the principal purpose of this state's mandatory liability insurance requirement is to protect the public by securing payment of their damages. The court further explained Illinois public policy on this issue:

> "It is axiomatic that a statute that exists for protection of the public cannot be rewritten through a private limiting agreement. One reason for that rule is that 'the members of the public to be protected are not and, of course, could not be made parties to any such contract.' [Citation.] In accordance with these principals, a statute's requirements cannot be avoided through contractual provisions. Where liability coverage is mandated by the state's financial

> responsibility law, a provision in an insurance policy that conflicts with the law will be deemed void. The statute will continue to control." Progressive, 215 Ill. 2d at 129.

The supreme court stated that whether a contractual agreement is void as against public policy "ultimately depends on the particular facts and circumstances of each case." Progressive, 215 Ill. 2d at 133. The court distinguished the facts in Smith, in which the business exclusion applied only to permissive users. The exclusion in Smith meant that conduct which would be covered if undertaken by the insured would not be covered if undertaken by someone who was using the vehicle with the insured's permission. In comparison, the food delivery exclusion in Progressive provided that no one was exempt. The food delivery exclusion applied with equal force to the named insured, Shirley Abbinante, and the permissive user, Ronald. The court stated, "[b]ecause the exclusion in Progressive's policy does not differentiate between the insured and those using the vehicle with the insured's permission, there is no possibility, as there was in Smith, that liability insurance coverage afforded the insured would also not be extended to permissive users of the vehicle." Progressive, 215 Ill. 2d at 134. The court held that the "food delivery exclusion" did not conflict with Section 7-317(b)(2) and, therefore, did not violate public policy.

In sum, the above cases show that: (1) section 7-317(b)(2) requiring omnibus coverage applies to the entire Illinois Vehicle Code; and (2) an insurance provision violates section 7-317(b)(2) and, therefore, Illinois public policy, if it provides coverage to the named insured and precludes coverage to an express or implied permissive user.

There is no Illinois authority that has determined whether section 7-317(b)(2) applies to

commercial truck liability coverage under the Commercial Transportation Law. Section 7-317(b)(2) does not include any specific language limiting omnibus coverage to passenger vehicles.

Zurich argues that section 7-317(b)(2) does not apply to the Commercial Transportation Law because Key and Rose were both required to file proof of liability insurance with the I.C.C. in order to operate on public roadways, thereby fulfilling the purpose of this state's mandatory liability insurance requirement to protect the public from damage arising from the use of commercial trucks. Zurich asserts that section 7-601(b)(2) expressly excludes carriers of intrastate or interstate property from the mandatory insurance requirement in section 7-601(a). These statutes provide in pertinent part:

> § 7-601. Required liability insurance policy.
> (a) No person shall operate, register or maintain registration of, and no owner shall permit another person to operate, register or maintain registration of, a motor vehicle designed to be used on a public highway unless the motor vehicle is covered by a liability insurance policy.
> * **
> (b) The following vehicles are exempt from the requirements of this Section:
> ***
> (2) vehicles required to file proof of liability insurance with the Illinois Commerce Commission. 625 ILCS 5/7-601 (West 2006).

Zurich's argument that Section 7-317(b)(2) does not apply because of the exemption in section 7-601(b)(2) is misplaced. As noted above, the defendant in Universal Underwriters also argued that it was excused from the requirements of section 7-317(b)(2) under a statutory exemption pursuant to section 7-601(b)(6) of the Illinois Vehicle Code, which applies to "other vehicles complying with laws which require them to be insured in amounts meeting or exceeding the

minimum amounts required under [section 7-601]." The court in Universal Underwriters ruled that "the insurance must contain an omnibus clause insuring those driving a vehicle with the owner's permission." Universal Underwriters, 182 Ill. 2d at 245-46. The court stated that the defendant's policy must cover the liability of Luckhart, the test-driver, as a permissive user regardless of whether the exemption under section 7-601(b)(6) applies.

Accordingly, we follow the supreme court's decision in Universal Underwriters and its progeny to require the application of omnibus coverage pursuant to section 7-317(b)(2) to Zurich's Reciprocal Coverage provision. We find that section 7-601(b)(2) does not exempt insurance policies issued for commercial vehicles from the omnibus coverage requirement pursuant to section 7-317(b)(2). Illinois authority and public policy support this finding.

The supreme court's public policy analysis in Illinois Farmers is applicable. The court stated that "[t]he legislature is vested with the power to enact the laws and if the legislation as enacted 'seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to the court.' " Illinois Farmers, 226 Ill. 2d at 413-14, quoting People v. Garner, 147 Ill. 2d 467, 475-76 (1992). The court noted new legislation with an effective date of January 1, 2008, which mandates that " 'any policy of private passenger automobile insurance must provide the same limits of *** coverage to all persons insured under that policy, whether or not an insured person is a named insured or permissive user under the policy.' " Illinois Farmers, 226 Ill. 2d at 414, quoting Pub. Act 95-395, eff. January 1, 2008 (now 215 ILCS 5/143.13a (West Supp. 2007)). Finally, the court stated, "when the legislature intends different types of coverage in excess of the minimum statutory requirements mandated by section 7-203 of the Illinois Safety and Family

Financial Responsibility Law to be the same, it chooses plain, unambiguous language to indicate its intent. It has now done so, effective January 1, 2008." Illinois Farmers, 226 Ill. 2d at 414.

In this case, the unambiguous language of section 7-317(b)(2) provides that an owner shall insure "any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7-317 (West 2006). If the legislature intended to limit the mandatory omnibus coverage requirement solely to passenger vehicles, it would have chosen plain, unambiguous language to indicate its intent.

Furthermore, Illinois public policy requiring omnibus coverage for all motor vehicle liability policies is reflected in the Illinois Vehicle Code (625 ILCS 5/100 et seq. (West 2006)). Both Rose and Key were businesses engaged in commercial trucking operations, as governed by the Commercial Transportation Law (625 ILCS 5/18c-1101 et seq. (West 2006)), which is within the Illinois Vehicle Code. The Commercial Transportation Law requires all motor carriers of property to maintain liability insurance (625 ILCS 5/18c-4901 (West 2006)). Although the Commercial Transportation Law provides no specific language requiring omnibus coverage for commercial truckers, the supreme court has interpreted that section 7-317(b)(2) must be read into every liability policy. Illinois Farmers, 226 Ill. 2d at 402.

As a matter of public safety, Illinois public policy warrants mandatory omnibus coverage for ↩ memo p. 14 commercial truckers that should not be limited by private agreement. See Progressive, 215 Ill. 2d at 129-30 ("[a]n agreement will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy or unless it is manifestly injurious to the public welfare"). If we were to accept

Zurich's argument that section 7-317(b)(2) does not apply to commercial truckers, persons injured by permissive drivers of commercial trucks would be unable to secure payment of their damages, in violation of public policy. See Smith, 197 Ill. 2d at 376 (noting the principal purpose of mandatory automobile liability insurance is to protect the public by securing payment of their damages). Protection of the public is best served by requiring omnibus insurance because the legislature "intended to insure that the common and often unavoidable practice of entrusting one's vehicle to someone else does not foreclose an injured party from obtaining payment for otherwise covered losses resulting from operation of the vehicle." Progressive, 215 Ill. 2d at 137. The supreme court has held that section 7-317(b)(2) applies throughout the Vehicle Code (Progressive, 215 Ill. 2d at 128; Universal Underwriters, 182 Ill. 2d at 245) and there is no statutory language precluding commercial truckers from the omnibus insurance requirement in the statute. Accordingly, we find that section 7-317(b)(2) applies to insurance policies for commercial truckers issued pursuant to section 18c-4901 and, for the purposes of this case, to Zurich's reciprocal coverage provision.

In this case, because Zurich's reciprocal coverage provision precludes omnibus coverage for Key and Washington, the reciprocal coverage provision violates section 7-317(b)(2) and, therefore, Illinois public policy. Smith, 197 Ill. 2d at 372 ("insurance policy provisions that conflict with a statute are void"). Accordingly, we find that the circuit court erred by granting summary judgment in favor of Zurich on this issue.

C. Enforceability of Zurich's Reciprocal Coverage Provision On The Issue Of Ambiguity

Defendants' second ground for arguing that Zurich's reciprocal coverage provision is

unenforceable is based on their contention that the provision is ambiguous. In light of our finding that Zurich's reciprocal coverage provision is violative of section 7-317(b)(2) and, therefore, void (Progressive, 215 Ill. 2d at 129; Smith, 197 Ill. 2d at 372), we need not reach the issue of whether the Reciprocal Coverage provision is ambiguous.

III. CONCLUSION

In conclusion, the circuit court erred by granting summary judgment in favor of Zurich and against West Bend. As a matter of first impression, we hold that section 7-317(b)(2) of the Illinois Vehicle Code applies to insurance policies issued to commercial truckers. In addition, we find that Zurich's reciprocal coverage provision violated section 7-317(b)(2) and, therefore, is void as against Illinois public policy. This cause is reversed and remanded with directions to reverse summary judgment in favor of Zurich and enter summary judgment in favor of defendants.

Reversed and cause remanded with directions.

THEIS and CUNNINGHAM, JJ., concur.

Zurich American Insurance Company v. Key Cartage, Inc., 236 Ill. 2d 117 (2009)

Cover page added by BlackAcre Research. The decision follows, with the passages the memo cites highlighted.

Ill. Supreme Court · filed 2009-10-29 · Opinion
Supreme Court

Treatment in the index: no red or yellow treatment recorded. Check it in a citator before filing.

Where the memo cites it

- memo p. 3 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 8: passage C015.3
- memo p. 7 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 10: passage C015.4
- memo p. 9 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 8: passage C015.3
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- memo p. 14 · Pre-Suit Disclosure and Discovery of Commercial Motor Carrier Liability Limits in Illinois · 6, 8: passages C015.2, C015.3

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Docket No. 107472.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

ZURICH AMERICAN INSURANCE COMPANY, Appellant, v. KEY CARTAGE, INC., *et al.* Appellees.

Opinion filed October 29, 2009.

JUSTICE BURKE delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justices Freeman, Thomas, and Kilbride concurred in the judgment and opinion.

Justice Garman specially concurred, with opinion, joined by Justice Karmeier.

OPINION

In this insurance coverage dispute we are asked to determine whether a "reciprocal coverage" provision found in a commercial trucking insurance policy violates the public policy requiring insurance coverage for permissive users of vehicles set forth in section 7–317(b)(2) of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7–317(b)(2) (West 2006)). For the reasons which follow, we hold that it does not.

Background

This case has its origins in a lawsuit filed by the estate of Enis Salkic against a commercial truck driver and the driver's employer, Key Cartage, Inc. (Key Cartage). The lawsuit alleged that in October of 2002, the truck driver struck and killed Enis Salkic while Salkic was parked on the shoulder of Interstate 55 near Dwight, Illinois.

The truck involved in the accident was owned by another company, Franklin Truck Group, Inc. (Franklin Truck), and was under a long-term lease to Rose Cartage Services, Inc. (Rose Cartage). Shortly before the accident, Key Cartage (whose owners are related to the owner of Rose Cartage) borrowed the truck from Rose Cartage for use in a new line of business.

Key Cartage and its driver were insured under a policy issued by defendant, West Bend Mutual Insurance, Inc. (West Bend). The truck itself was scheduled on a policy issued by the plaintiff, Zurich American Insurance Company (Zurich), to Rose Cartage. After the underlying lawsuit was filed, a dispute arose between West Bend and Zurich regarding coverage for the accident. West Bend provided a defense to Key Cartage and its driver, but asserted that Zurich had the primary duty to defend because Key Cartage and the driver were permissive users of the truck insured under the Zurich policy. Zurich disagreed and, in February of 2004, filed a complaint for declaratory judgment, seeking a declaration that it owed no coverage for Key Cartage or its driver.

In its complaint, Zurich acknowledged that, as a general matter, the policy issued to Rose Cartage insured permissive users of Rose Cartage's trucks. However, Zurich contended that coverage was precluded in this case based on a "reciprocal coverage" provision in the policy. According to Zurich, in order for Key Cartage and its driver to be insured under Rose Cartage's policy, the reciprocal coverage clause required that Rose Cartage be covered under the West Bend policy. Because the West Bend policy did not cover Rose Cartage, Zurich maintained that it was not obligated to defend Key Cartage and its driver in the underlying lawsuit.

West Bend filed an answer and counterclaim for declaratory judgment. In its counterclaim, West Bend did not dispute that its policy did not provide coverage to Rose Cartage. However, West Bend maintained that Zurich's reciprocal coverage provision violated

Illinois public policy requiring the insurer of a vehicle to provide omnibus coverage, *i.e.*, primary insurance to a permissive user of the vehicle. West Bend sought a declaration that Zurich owed a primary duty to defend and indemnify Key and Washington. The circuit court, after a hearing on the parties' cross-motions for summary judgment, entered judgment in favor of Zurich.

The appellate court reversed and remanded. 386 Ill. App. 3d 1. The appellate court acknowledged that Rose Cartage was a "motor carrier of property" governed by the Illinois Commercial Transportation Law (625 ILCS 5/18c–1101 *et seq*. (West 2006)) and that, while the Commercial Transportation Law requires all motor carriers of property to have liability insurance (625 ILCS 5/18c–4901 (West 2006)), it contains no language requiring omnibus coverage for commercial truckers.

However, the appellate court also noted that section 7–317(b)(2) of the Illinois Safety and Family Financial Responsibility Law (Financial Responsibility Law) (625 ILCS 5/7–100 *et seq*. (West 2006)) provides that a motor vehicle liability policy "shall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." Relying on *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240 (1998), the appellate court concluded that section 7–317(b)(2)'s requirement of omnibus coverage applies to the entire Illinois Vehicle Code, including the Commercial Transportation Law. Accordingly, the appellate court determined that Zurich's policy was required to insure permissive users. Further, because Zurich's reciprocal coverage provision precluded omnibus coverage for Key Cartage and its driver, the appellate court concluded that the provision violated the public policy set forth in section 7–317(b)(2) and, therefore, was void and unenforceable. We granted Zurich's petition for leave to appeal. 210 Ill. 2d R. 315(a).

Analysis

In addition to contending that Zurich's reciprocal coverage provision is void as against public policy, West Bend also argues, as an alternative contention in support of the appellate court's judgment, that the reciprocal coverage provision is unenforceable because it is

ambiguous. Because it is appropriate to first determine what the reciprocal coverage provision means before determining whether it is void as against public policy, we address this contention first.

The Zurich policy issued to Rose Cartage contains a general grant of coverage to permissive users. The policy defines "Who Is An Insured" as follows:

> "a. You for any covered 'auto'.
>
> b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow ***."

However, the reciprocal coverage provision provides that the following are not insured:

> "a. Any 'trucker' or his or her agents or 'employees', other than you and your 'employees':
>
> ***
>
> (2) If the 'trucker' is not insured for hired 'autos' under an 'auto' liability insurance form that insures on a primary basis the owners of the 'autos' and their agents and 'employees' while the 'autos' are being used exclusively in the 'truckers' business and pursuant to operating rights granted to the 'trucker' by a public authority."

West Bend does not dispute the general meaning of this provision: the Zurich policy does not provide coverage to other truckers, such as Key Cartage, for the trucker's use of equipment borrowed from the named insured, in this case Rose Cartage, unless the trucker provides primary coverage to the owner and its agent, which in this case is Franklin Truck and Rose Cartage. In arguing that the reciprocal coverage provision is ambiguous, West Bend instead focuses on the phrase "exclusively in the 'truckers' business."

West Bend notes that, at the time of the accident, Key Cartage had only temporarily borrowed the truck from Rose Cartage in order to explore a new line of business and, further, that the truck remained under lease to Rose Cartage and was subject to being returned. Under these facts, West Bend contends that it is reasonable to say that the truck was not being used "exclusively in [Key Cartage's] business." West Bend notes that policy language which is susceptible to more than one reasonable meaning is considered ambiguous and is construed against the insurer. *Gillen v. State Farm Mutual*

Automobile Insurance Co., 215 Ill. 2d 381, 393 (2005). West Bend reasons, therefore, that as applied in this case, the reciprocal coverage provision should be construed against Zurich. We disagree.

It is undisputed that Rose Cartage had no say in how the borrowed truck was being used by Key Cartage, and that Rose Cartage derived no economic benefit from the truck while it was under Key Cartage's control. In addition, identification placards required by the Illinois Commerce Commission (see 625 ILCS 5/18c–4701 (West 2006)) and belonging to Key Cartage were displayed on the truck and Key Cartage's name was permanently painted on the door of the truck at the time of the accident. In the plain and ordinary sense of the term, the truck was being used in Key Cartage's business at the time of the accident. And, simply because the truck would at some point have been returned to Rose Cartage, it does not follow that the truck was being used in anything other than Key Cartage's business. We conclude that the reciprocal coverage provision is unambiguous as applied to the facts of this case, that the borrowed truck was being used exclusively in Key Cartage's business as that phrase is used in the Zurich policy and, consequently, that the reciprocal coverage provision works to preclude coverage for Key Cartage and its driver.

Having determined the meaning of the reciprocal coverage provision, we now consider the principal issue raised in this appeal: whether that provision violates the public policy of omnibus coverage required under section 7–317(b)(2) of the Financial Responsibility Law. As noted, the appellate court concluded that it did, based primarily on *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240 (1998).

At issue in *Universal* was whether a garage insurance policy issued by Universal Underwriters Group (Universal) to a car dealership was required to provide omnibus coverage to a customer who was test driving one of the dealer's cars. Addressing this issue, this court noted that section 7–601(a) of the Financial Responsibility Law (625 ILCS 5/7–601(a) (West 2006)) imposes a mandatory liability insurance requirement on motor vehicles in Illinois, but does not specify whether an omnibus provision is required. We noted, however, that section 7–317(b)(2) of the Financial Responsibility Law defines a motor vehicle liability policy as one which "shall insure the person named therein and any other person using or

responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7–317(b)(2) (West 2006). We then concluded that section 7–317(b)(2) applies to section 7–601, explaining:

> "the statutory definition [of a motor vehicle liability policy] appears in article III of chapter 7 of the [Illinois Vehicle] Code, which requires that certain motorists submit proof of financial responsibility for the future as a condition of enjoying driving privileges. See generally 625 ILCS 5/7–301 through 7–329 (West 1996). Universal argues that the section 7–317's omnibus clause requirement only applies to liability policies used as proof of future responsibility in accordance with article III of chapter 7. We disagree. Under section 7–317, the statutory definition of 'motor vehicle liability policy' applies to that term as it is 'used in this Act.' The word 'Act,' in turn, refers to the Illinois Vehicle Code, unless the context clearly indicates another meaning. 625 ILCS 5/1–101.1 (West 1996). Accordingly the definition set forth in section 7–317 applies throughout the Code and thus applies to the mandatory insurance requirement set forth in section 7–601(a)." *Universal*, 182 Ill. 2d at 244-45.

Universal argued that the car dealership was exempt from section 7–601(a) pursuant to section 7–601(b)(6) (625 ILCS 5/7–601(b)(6) (West 1996)) and was instead subject to a mandatory insurance requirement imposed under a portion of the Illinois Vehicle Code that governed the licensing of new vehicle dealers (see 625 ILCS 5/5–101(b)(6) (West 1996)). Thus, according to Universal, the car dealership policy was not subject to the omnibus requirement. We rejected this contention, finding that, "regardless of whether the exemption" in section 7–601(b)(6) applied, the policy was required to have an omnibus provision. *Universal*, 182 Ill. 2d at 246. In other words, it was irrelevant whether the mandatory insurance requirement for car dealerships was viewed as stemming from section 7–601 or section 5–101(b)(6), because the omnibus requirement in section 7–317(b)(2) applied to both statutes.

The appellate court below read *Universal* as requiring that section 7–317(b)(2) be applied to commercial trucking insurance policies mandated by the Commercial Transportation Law. This is too broad

↩ memo p. 14

a reading of the opinion. *Universal* never discussed commercial trucking insurance policies or considered the interplay between section 7–317(b)(2) and the Commercial Transportation Law. Further, our reasoning in *Universal* expressly rejects an overly broad application of the opinion. As we explained in *Universal*, section 7–317(b)(2)'s omnibus requirement is part of the statutory definition of "motor vehicle liability policy," found in section 7–317. This statutory definition applies to the term "motor vehicle liability policy" as it is "used in this Act." In turn, the word "Act," under the definition provided by the Illinois Vehicle Code (625 ILCS 5/1–101.1 (West 1996)), means the entire Illinois Vehicle Code, "*unless the context clearly indicates another meaning*." (Emphasis added.) *Universal*, 182 Ill. 2d at 245. Thus, in determining whether the word "Act" in section 7–317 refers to other provisions of the Vehicle Code, and, therefore, whether the omnibus requirement of section 7–317(b)(2) applies to those provisions, each case must be judged on its own facts.

From a review of the statutory context at issue in this case, it is apparent that the word "Act," as used in section 7–317, cannot refer to the Commercial Trucking Law. If it did, a conflict would arise between section 7–317(b)(3) of the Financial Responsibility Law and section 18c–4902 of the Commercial Transportation Law (625 ILCS 5/18c–4902 (West 2006)). Section 7–317(b)(3) of the Financial Responsibility Law sets forth specific policy limits that must be adopted for motor vehicle liability insurance policies regulated under section 7–317. If the word "Act" in section 7–317 referred to the Commercial Transportation Law, then this provision would apply to motor vehicle liability policies issued pursuant to that law as well. However, section 18c–4902 of the Commercial Transportation Law expressly provides that the Illinois Commerce Commission "shall prescribe the amounts of insurance" necessary for insurance policies issued to motor carriers of property in the state of Illinois.

Similarly, if the word "Act" as used in section 7–317 referred to the Commercial Transportation Law, a conflict would arise involving section 7–317(g). Section 7–317(g) provides that the Illinois Department of Insurance has final approval of motor vehicle liability insurance policies regulated under section 7–317. If the word "Act" included the Commercial Transportation Law, then this provision also

would apply to commercial trucking liability policies. Again, however, section 18c–4902 of the Commercial Transportation Law provides that the Illinois Commerce Commission has the final say in regulating insurance requirements for motor carriers of property in Illinois.

Finally, other irregularities would occur if the word "Act" were read to include the Commercial Transportation Law. For example, section 7–317(l) states that an insurance carrier who has issued a motor vehicle liability policy as defined in section 7–317 shall file a certificate with the Secretary of State, if the insured so requests, showing that such a policy has been issued. However, the Secretary of State plays no role in the regulation of commercial trucking liability policies under the Commercial Transportation Law. See 625 ILCS 5/18c–4902 (West 2006).

West Bend does not contend that the foregoing contradictions and inconsistencies do not exist, but maintains that any inconsistencies can be resolved under principles of statutory construction. This contention misses the point. In construing legislation we presume that the legislature did not intend absurd, inconvenient, or unjust results. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003). The existence of the inconsistencies, by themselves, establishes that the legislature could not have intended for the term "Act" in section 7–317 to include the Commercial Transportation Law. Accordingly, we conclude that the definition of motor vehicle liability insurance policies set forth in section 7–317, including the omnibus requirement in section 7–317(b)(2), does not apply to commercial truckers regulated under the Commercial Transportation Law. ↩ memo p. 3, 9, 10, 13, 14

In holding that Zurich's reciprocal coverage provision was void as against public policy, the appellate court also expressed concern about public safety, stating:

> "If we were to accept Zurich's argument that section 7–317(b)(2) does not apply to commercial truckers, persons injured by permissive drivers of commercial trucks would be unable to secure payment of their damages, in violation of public policy." 386 Ill. App. 3d at 20.

This concern is unfounded. The reciprocal coverage provision only excludes certain "truckers," specifically, those using a truck at the time of the accident "pursuant to operating rights granted to the

'trucker' by a public authority." Under Illinois law, a trucker only has the right to operate in this state if the appropriate insurance requirements have been met. 625 ILCS 5/18c–4402(b), 18c–4901 (West 2006). Thus, in Illinois, an uninsured trucker is not operating pursuant to rights granted by the state and, therefore, does not fall within the terms of the reciprocal coverage provision. Accordingly, because only those truckers who have their own insurance are excluded under the reciprocal coverage provision, the provision does not present any risk that an innocent victim will be left without recourse.

Conclusion

For the foregoing reasons, the judgment of the appellate court is reversed. The judgment of the circuit court is affirmed and the cause remanded to that court for further proceedings consistent with this opinion.

Appellate court judgment reversed;
circuit court judgment affirmed;
cause remanded.

JUSTICE GARMAN, specially concurring:

I agree with the majority that the insurance policy at issue is unambiguous and that the reciprocal coverage provision works to preclude coverage for Key Cartage. I further agree that the reciprocal coverage provision does not violate the public policy of the State of Illinois. However, because I consider it unnecessary to reexamine whether the word "Act" as used in section 7–317 applies to the entire Vehicle Code, I must specially concur.

The majority opinion relies on distinguishing *Universal Underwriters* by determining that although the word "Act" applies to the entire Vehicle Code, it does not apply to the Commercial Transportation Law. The majority concludes "Act" cannot apply to that law because it would create inconsistencies that arise to absurd, inconvenient or unjust results. Slip op. at 8. I consider it unnecessary to address this question, because even if we were to assume that the word "Act" applies throughout the Vehicle Code, including the

Commercial Transportation Law, this does not change the result in this case.

Given the definition of "motor vehicle liability policy" as set forth in section 7–317, and the mandate contained in section 7–601 of the Safety and Family Financial Responsibility Law, *all* operators of a motor vehicle generally are required to carry a "liability insurance policy,"[1] which under 7–317 must include an omnibus clause, unless the operator falls under any of the listed exemptions in section 7–601. However, even if an operator or vehicle qualifies for an exemption under section 7–601, it may nonetheless be required by some other statute to carry a "motor vehicle liability policy" or "liability insurance policy."

Based on the record, it is evident that the vehicle insured by Zurich falls under the exemption in section 7–601(b)(2). Under the plain language of section 7–601(b)(2), "vehicles required to file proof of liability insurance with the Illinois Commerce Commission" are exempt from being covered under a motor vehicle liability policy. There is no dispute that the vehicle involved in this accident, as it was used in commercial trucking, was required to file proof of liability insurance with the Illinois Commerce Commission. The Safety and Family Financial Responsibility Law therefore cannot be the source of an omnibus clause requirement. Thus, the vehicle's insurance policy need only contain an omnibus clause if another statute within the Vehicle Code requires commercial truckers and their vehicles to be covered by a motor vehicle liability policy.

The statute applicable to commercial truckers, which is the source of the requirement that commercial trucks file proof of insurance with the Illinois Commerce Commission, is the Commercial Transportation Law. Through the Commission's rules, this statute heavily regulates the trucking industry within Illinois. Regarding

↩ memo p. 7, 10, 13

[1]Although this is not the exact phrase used in section 7–317, "liability insurance policy" and "motor vehicle liability policy" appear to have been used interchangeably, and we have interpreted the terms as synonymous. *Universal Underwriters*, 182 Ill. 2d at 244 (using the phrase "liability insurance policy" after referencing the definition of "motor vehicle liability policy"). The phrase "liability insurance policy" is also used within the Safety and Family Financial Responsibility Law's provision mandating insurance coverage.

insurance coverage, the Commercial Transportation Law requires that before a trucking registration may be issued, the carrier must have complied with Illinois Commerce Commission regulations regarding proof of insurance. 625 ILCS 5/18c–4402 (West 2006). The Commission regulations on insurance have adopted the federal regulations governing interstate motor carriers of property. 92 Ill. Adm. Code §1425.30. Setting aside the question whether it would be appropriate to assign our legislature's definitions of "motor vehicle liability policy" or "liability insurance" to the agency responsible for adopting the federal regulations, the regulations lack any reference to those phrases. There is, therefore, no requirement anywhere within the Commercial Transportation Law or the Commission's regulations that requires commercial truckers to be covered under a "motor vehicle liability policy" or a "liability insurance policy," and, consequently, no requirement that insurance policies issued to commercial truckers must contain an omnibus clause. Simply put, the critical term at issue, defined in section 7–317, is not "used in this Act" with respect to the Commercial Transportation Law.

This conclusion accords with common sense. As the majority opinion notes, the Commercial Transportation Law gives final approval of insurance policies to the Illinois Commerce Commission. Slip op. at 7-8. Section 77–601(b)(2), which, as noted above, exempts vehicles required to file proof of insurance with the Commission, is a further indication that the legislature intended the Commission to be the sole regulator of commercial trucking insurance requirements.

This case is readily distinguishable from *Universal Underwriters*. As the majority notes, at issue in that case was a garage insurance policy issued to a car dealership. A person test-driving one of the dealership's vehicles collided with another vehicle, injuring its driver. *Universal Underwriters*, 182 Ill. 2d at 241. In defending the case, the dealership and its insurer, Universal Underwriters, made an argument similar to what Zurich raises here. The insurance company argued that the policy covering the dealership's vehicles did not need to be covered by a policy that included an omnibus clause because it fell under 7–601(b)(6). That provision exempted other " 'vehicles complying with laws which require them to be insured in amounts meeting or exceeding the minimum amounts required under [this Section].' " *Universal Underwriters*, 182 Ill. 2d at 245, quoting 625 ILCS 5/7–601(b)(6) (West 2006).

The dealership claimed that section 7–601(b)(6) applied because, as a dealership, it was subject to regulation under article I of chapter 5 of the Vehicle Code. 625 ILCS 5/5–101(b)(6) (West 1996). That provision requires dealerships to have minimum insurance coverage greater than the minimum coverage required by section 7–601.

We disagreed with the insurance company, holding that the policy was indeed required to have an omnibus clause. Under section 5–101(b)(6), dealerships are required in general to carry a "liability insurance policy" that includes such minimum coverage. Thus, although the dealership was not required to have an omnibus clause in its policies under section 7–601, because section 5–101(b)(6) nonetheless required it to have a "liability insurance policy," that policy must necessarily fit section 7–317's definition of "liability insurance policy" and include an omnibus clause. As the majority notes, we stated in *Universal Underwriters* that regardless of whether the exemption in 7–601(b)(6) applied, the policy was required to have an omnibus clause.

As discussed above, the Commercial Transportation Law imposes no such requirements on vehicles required to file proof of insurance with the Commission. Thus, unlike in *Universal Underwriters*, in this case the question whether an exemption applies is relevant to determining the result. The vehicle insured by Zurich, having qualified for the exemption listed in section 7–601(b)(2), is not required by any other statute to be covered by a "motor vehicle liability" and therefore need not be covered by an insurance policy which includes an omnibus clause. For that reason, the reciprocal clause contained in Zurich's policy, which contains an exception to its permissive user provisions, does not violate the public policy of Illinois.

In summary, I do not find it necessary to reexamine whether the word "Act" in section 7–317 applies to the entire Vehicle Code, as we did in *Universal Underwriters*. However, although I disagree with the majority's analysis, I concur in the judgment that the lack of an omnibus clause in Zurich's insurance policy does not violate the public policy of Illinois.

JUSTICE KARMEIER joins in this special concurrence.

Unofficial text; verify against the official source before filing.

215 ILCS 5/143.13

Definition of terms used in Sections 143.11 through 143.24

Unofficial text; verify against the official source before filing. Unofficial text (ILGA). Verify against the official source before filing.

Version in force on 2026-10-31: from 2001-06-28 to today.

(215 ILCS 5/143.13) (from Ch. 73, par. 755.13) Sec. 143.13. Definition of terms used in Sections 143.11 through 143.24.

(a) "Policy of automobile insurance" means a policy delivered or issued for delivery in this State, insuring a natural person as named insured or one or more related individuals resident of the same household and under which the insured vehicles therein designated are motor vehicles of the private passenger, station wagon, or any other 4-wheeled motor vehicle with a load capacity of 1500 pounds or less which is not used in the occupation, profession or business of the insured or not used as a public or livery conveyance for passengers nor rented to others. Policy of automobile insurance shall also mean a named non-owner's automobile policy.

Policy of automobile insurance does not apply to policies of automobile insurance issued under the Illinois Automobile Insurance Plan, to any policy covering garages, automobile sales agencies, repair shops, service stations or public parking place operation hazards. "Policy of automobile insurance" does not include a policy, binder, or application for which the applicant gives or has given for the initial premium a check or credit card charge that is subsequently dishonored for payment, unless the check or credit card charge was dishonored through no fault of the payor.

(b) "Policy of fire and extended coverage insurance" means a policy delivered or issued for delivery in this State, that includes but is not limited to, the perils of fire and extended coverage, and covers real property used principally for residential purposes up to and including a 4 family dwelling or any household or personal property that is usual or incidental to the occupancy to any premises used for residential purposes.

(c) "All other policies of personal lines" means any other policy of insurance issued to a natural person for personal or family protection.

(d) "Renewal" or "to renew" means (1) any change to an entire line of business in accordance with subsection b-5 of Section 143.17 and (2) the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term; however, any successive policies issued by the same insurer to the same insured, for the same or similar coverage, shall be considered a renewal policy.

Any policy with a policy period or term of less than 6 months or any policy with no fixed expiration date shall be considered as if written for successive policy periods or terms of 6

Unofficial text; verify against the official source before filing.

months for the purpose of "renewal" or "to renew" as defined in this paragraph (d) and for the purpose of any non-renewal notice required by Section 143.17 of this Code.

(e) "Nonpayment of premium" means failure of the named insured to discharge, when due, any of his obligations in connection with the payment of premiums or any installment of such premium that is payable directly to the insurer or to its agent. Premium shall mean the premium that is due for an individual policy which shall not include any membership dues or other consideration required to be a member of any organization in order to be eligible for such policy. The term "nonpayment of premium" does not include a check, credit card charge, or money order that an applicant gives or has given to any person for the initial premium payment for a policy, binder, or application and that is subsequently dishonored for payment, and any policy, binder, or application in connection therewith is void and of no effect and not subject to the cancellation provisions of this Code.

(f) "A policy delivered or issued for delivery in this State" shall include but not be limited to all binders of insurance, whether written or oral, and all applications bound for future delivery by a duly licensed resident agent. A written binder of insurance issued for a term of 60 days or less, which contains on its face a specific inception and expiration date and which a copy has been furnished to the insured, shall not be subject to the non-renewal requirements of Section 143.17 of this Code.

(g) "Cancellation" or "cancelled" means the termination of a policy by an insurer prior to the expiration date of the policy. A policy of automobile or fire and extended coverage insurance which expires by its own terms on the policy expiration date unless advance premiums are received by the insurer for succeeding policy periods shall not be considered "cancelled" or a "cancellation" effected by the insurer in the event such premiums are not paid on or before the policy expiration date.

(h) "Commercial excess and umbrella liability policy" means a policy written over one or more underlying policies for an insured:

(1) that has at least 25 full-time employees at the time the commercial excess and

umbrella liability policy is written and procures the insurance of any risk or risks, other than life, accident and health, and annuity contracts, as described in clauses (a) and (b) of Class 1 of Section 4 and clause (a) of Class 2 of Section 4, by use of the services of a full-time employee acting as an insurance manager or buyer; or

(2) whose aggregate annual premiums for all property and casualty insurance on all risks

is at least $50,000.

Source note: (Source: P.A. 91-552, eff. 8-14-99; 91-597, eff. 1-1-00; 92-16, eff. 6-28-01.)

Changes after 2026-10-31

No change after this date is recorded in the index.

215 ILCS 5/143.24b

Any insurer insuring any person or entity against damages arising out of a vehicular crash shall disclose the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records. The disclosure shall be confidential and available only to the claimant, his attorney and personnel in the office of the attorney entitled to access to the claimant's files. The insurer shall forward the information to the party requesting it by certified mail, return receipt requested, within 30 days of receipt of the request

Unofficial text; verify against the official source before filing. Unofficial text (ILGA). Verify against the official source before filing.

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(215 ILCS 5/143.24b) (from Ch. 73, par. 755.24b) Sec. 143.24b. Any insurer insuring any person or entity against damages arising out of a vehicular crash shall disclose the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records. The disclosure shall be confidential and available only to the claimant, his attorney and personnel in the office of the attorney entitled to access to the claimant's files. The insurer shall forward the information to the party requesting it by certified mail, return receipt requested, within 30 days of receipt of the request.

Source note: (Source: P.A. 102-982, eff. 7-1-23.)

Changes after 2026-10-31

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

215 ILCS 5/154.6

Acts constituting improper claims practice

Unofficial text; verify against the official source before filing. Unofficial text (ILGA). Verify against the official source before filing.

Version in force on 2026-10-31: from 2022-07-01 to today.

(215 ILCS 5/154.6) (from Ch. 73, par. 766.6) Sec. 154.6. Acts constituting improper claims practice.

Any of the following acts by a company, if committed without just cause and in violation of Section 154.5, constitutes an improper claims practice:

(a) Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;

(b) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

(c) Failing to adopt and implement reasonable standards for the prompt investigations and settlement of claims arising under its policies;

(d) Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

(e) Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

(f) Engaging in activity which results in a disproportionate number of meritorious complaints against the insurer received by the Insurance Department;

(g) Engaging in activity which results in a disproportionate number of lawsuits to be filed against the insurer or its insureds by claimants;

(h) Refusing to pay claims without conducting a reasonable investigation based on all available information;

(i) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(j) Attempting to settle a claim for less than the amount to which a reasonable person would believe the claimant was entitled, by reference to written or printed advertising material accompanying or made part of an application or establishing unreasonable caps or limits on paint or materials when estimating vehicle repairs;

(k) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

(l) Making a claims payment to a policyholder or beneficiary omitting the coverage under which each payment is being made;

Unofficial text; verify against the official source before filing.

(m) Delaying the investigation or payment of claims by requiring an insured, a claimant, or the physicians of either to submit a preliminary claim report and then requiring subsequent submission of formal proof of loss forms, resulting in the duplication of verification;

(n) Failing in the case of the denial of a claim or the offer of a compromise settlement to promptly provide a reasonable and accurate explanation of the basis in the insurance policy or applicable law for such denial or compromise settlement;

(o) Failing to provide forms necessary to present claims within 15 working days of a request with such explanations as are necessary to use them effectively;

(p) Failing to adopt and implement reasonable standards to verify that a repairer designated by the insurance company to provide an estimate, perform repairs, or engage in any other service in connection with an insured loss on a vehicle is duly licensed under Section 5-301 of the Illinois Vehicle Code;

(q) Failing to provide as a persistent tendency a notification on any written estimate prepared by an insurance company in connection with an insured loss that Illinois law requires that vehicle repairers must be licensed in accordance with Section 5-301 of the Illinois Vehicle Code;

(r) Failing to pay the replacement vehicle use or occupation tax, title, and transfer fees required by Section 154.9 of this Code;

(s) Engaging in any other acts which are in substance equivalent to any of the foregoing.

Source note: (Source: P.A. 102-69, eff. 7-1-22.)

Changes after 2026-10-31

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

625 ILCS 5/7-601

Required liability insurance policy

Unofficial text; verify against the official source before filing. Unofficial text (ILGA). Verify against the official source before filing.

Version in force on 2026-10-31: from 2019-01-01 to 2027-01-01.

(625 ILCS 5/7-601) (from Ch. 95 1/2, par. 7-601) (Text of Section before amendment by P.A. 104-854) Sec. 7-601. Required liability insurance policy.

(a) No person shall operate, register or maintain registration of, and no owner shall permit another person to operate, register or maintain registration of, a motor vehicle designed to be used on a public highway in this State unless the motor vehicle is covered by a liability insurance policy.

The insurance policy shall be issued in amounts no less than the minimum amounts set for bodily injury or death and for destruction of property under Section 7-203 of this Code, and shall be issued in accordance with the requirements of Sections 143a and 143a-2 of the Illinois Insurance Code, as amended. No insurer other than an insurer authorized to do business in this State shall issue a policy pursuant to this Section for any vehicle subject to registration under this Code. Nothing herein shall deprive an insurer of any policy defense available at common law.

(b) The following vehicles are exempt from the requirements of this Section:

(1) vehicles subject to the provisions of Chapters 8

or 18a, Article III or Section 7-609 of Chapter 7, or Sections 12-606 or 12-707.01 of Chapter 12 of this Code;

(2) vehicles required to file proof of liability

insurance with the Illinois Commerce Commission;

(3) vehicles covered by a certificate of

self-insurance under Section 7-502 of this Code;

(4) vehicles owned by the United States, the State of

Illinois, or any political subdivision, municipality or local mass transit district;

(5) implements of husbandry;

(6) other vehicles complying with laws which require

them to be insured in amounts meeting or exceeding the minimum amounts required under this Section; and

(7) inoperable or stored vehicles that are not

operated, as defined by rules and regulations of the Secretary.

Unofficial text; verify against the official source before filing.

(c) Every employee of a State agency, as that term is defined in the Illinois State Auditing Act, who is assigned a specific vehicle owned or leased by the State on an ongoing basis shall provide the certification described in this Section annually to the director or chief executive officer of his or her agency.

The certification shall affirm that the employee is duly licensed to drive the assigned vehicle and that (i) the employee has liability insurance coverage extending to the employee when the assigned vehicle is used for other than official State business, or (ii) the employee has filed a bond with the Secretary of State as proof of financial responsibility, in an amount equal to, or in excess of the requirements stated within this Section. Upon request of the agency director or chief executive officer, the employee shall present evidence to support the certification.

The certification shall be provided during the period July 1 through July 31 of each calendar year, or within 30 days of any new assignment of a vehicle on an ongoing basis, whichever is later.

The employee's authorization to use the assigned vehicle shall automatically be rescinded upon:

(1) the revocation or suspension of the license

required to drive the assigned vehicle;

(2) the cancellation or termination for any reason of

the automobile liability insurance coverage as required in item (c)(i); or

(3) the termination of the bond filed with the

Secretary of State.

All State employees providing the required certification shall immediately notify the agency director or chief executive officer in the event any of these actions occur.

All peace officers employed by a State agency who are primarily responsible for prevention and detection of crime and the enforcement of the criminal, traffic, or highway laws of this State, and prohibited by agency rule or policy to use an assigned vehicle owned or leased by the State for regular personal or off-duty use, are exempt from the requirements of this Section.

(d) No person shall operate a motor vehicle registered in another state upon the highways of this State unless the vehicle is covered by a liability insurance policy. The operator of the vehicle shall carry within the vehicle evidence of the insurance.

Source note: (Source: P.A. 100-202, eff. 1-1-18; 100-828, eff. 1-1-19.)

Changes after 2026-10-31

- P.A. 104-854, eff. 2027-01-01

Unofficial text; verify against the official source before filing.

Ill. R. Evid. 411

Liability Insurance

Unofficial text; verify against the official source before filing. Rule text as posted by the Illinois Supreme Court (unofficial copy). Verify against the court's current version before filing.

Version in force on 2026-10-31: from 2011-01-01 to today.

Reporter of

Decisions

Rule 411. 14:45:43 -05'00'

LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Source note: Adopted September 27, 2010, eff. January 1, 2011.

Changes after 2026-10-31

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

Ill. S. Ct. R. 201

General Discovery Provisions

Unofficial text; verify against the official source before filing. Rule text as posted by the Illinois Supreme Court (unofficial copy). Verify against the court's current version before filing.

Version in force on 2026-10-31: from 2023-03-17 to today (version uncertain).

Reporter of

Decisions

Rule 201. General Discovery Provisions

(a) Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral examination or written questions, written interrogatories to parties, discovery of documents, objects or tangible things, inspection of real estate, requests to admit and physical and mental examination of persons. Duplication of discovery methods to obtain the same information and discovery requests that are disproportionate in terms of burden or expense should be avoided.

(b) Scope of Discovery.

(1) Full Disclosure Required. Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts. The word “documents,” as used in Part E of Article II, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communications and electronically stored information as defined in Rule 201(b)(4).

(2) Privilege and Work Product. All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney. The court may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney’s fee, in such manner as is just.

(3) Consultant. A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means.

(4) Electronically Stored Information. (“ESI”) shall include any writings, drawings, graphs,

Unofficial text; verify against the official source before filing.

charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

(c) Prevention of Abuse.

(1) Protective Orders. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.

(2) Supervision of Discovery. Upon the motion of any party or witness, on notice to all parties, or on its own initiative without notice, the court may supervise all or any part of any discovery procedure.

(3) Proportionality. When making an order under this Section, the court may determine

whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(d) Time Discovery May Be Initiated. Prior to the time all defendants have appeared or are required to appear, no discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown.

(e) Sequence of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not operate to delay any other party’s discovery.

(f) Diligence in Discovery. The trial of a case shall not be delayed to permit discovery unless due diligence is shown.

(g) Discovery in Small Claims. Discovery in small claims cases is subject to Rule 287.

(h) Discovery in Ordinance Violation Cases. In suits for violation of municipal ordinances where the penalty is a fine only no discovery procedure shall be used prior to trial except by leave of court.

(i) Stipulations. If the parties so stipulate, discovery may take place before any person, for any purpose, at any time or place, and in any manner.

(j) Effect of Discovery Disclosure. Disclosure of any matter obtained by discovery is not conclusive, but may be contradicted by other evidence.

(k) Reasonable Attempt to Resolve Differences Required. The parties shall facilitate discovery under these rules and shall make reasonable attempts to resolve differences over discovery. Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing

Unofficial text; verify against the official source before filing.

counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences.

(l) Discovery Pursuant to Personal Jurisdiction Motion.

(1) While a motion filed under section 2-301 of the Code of Civil Procedure is pending, a party may obtain discovery only on the issue of the court's jurisdiction over the person of the defendant unless: (a) otherwise agreed by the parties; or (b) ordered by the court upon a showing of good cause by the party seeking the discovery that specific discovery is required on other issues.

(2) An objecting party's participation in a hearing regarding discovery, or in discovery as allowed by this rule, shall not constitute a waiver of that party's objection to the court's jurisdiction over the person of the objecting party.

(m) Filing Materials with the Clerk of the Circuit Court. No discovery may be filed with the clerk of the circuit court except by order of court or when authorized by Supreme Court Rule. Local rules shall not require the filing of discovery. Any party serving discovery shall file a

certificate of service of discovery document. Service of discovery shall be made in the manner provided for service of documents in Rule 11.

(n) Claims of Privilege. When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.

(o) Filing of Discovery Requests to Nonparties. Notwithstanding the foregoing, a copy of any discovery request under these rules to any nonparty shall be filed with the clerk in accord with Rule 104(b).

(p) Asserting Privilege or Work Product Following Discovery Disclosure. If information inadvertently produced in discovery is subject to a claim of privilege or of work-product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must also preserve the information until the claim is resolved.

Source note: Amended effective September 1, 1974; amended September 29, 1978, effective November 1, 1978; amended January 5, 1981, effective February 1, 1981; amended May 28, 1982, effective July 1, 1982; amended June 19, 1989, effective August 1, 1989; amended June 1, 1995, effective January 1, 1996; amended March 28, 2002, effective July 1, 2002; amended Oct. 24, 2012, effective Jan. 1, 2013; amended Nov. 28, 2012, eff. Jan. 1, 2013; amended May 29, 2014, eff. July 1, 2014; corrected July 30, 2014, nunc pro tunc to May 29, 2014; amended Mar. 17, 2023, eff. immediately. amended to adopt the practice followed in the

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Federal courts since 1970, permitting all parties to proceed with discovery simultaneously unless the court orders otherwise. While empirical studies conducted preliminary to the proposals for amendment of the Federal discovery rules adopted in 1970 indicate that both defendants and plaintiffs are so often dilatory in beginning their discovery that a race for priority does not occur very frequently, affording a priority based on first notice in some cases can result in postponing the other parties' discovery for a very long time. (See Advisory Committee Note to Fed. R. Civ. P. 26.) In most cases it appears more efficient to permit each party to proceed with its discovery, whether by deposition or otherwise, unless in the interests of justice

Changes after 2026-10-31

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

Ill. S. Ct. R. 214

Discovery of Documents, Objects, and Tangible Things--Inspection of Real Estate

Unofficial text; verify against the official source before filing. Rule text as posted by the Illinois Supreme Court (unofficial copy). Verify against the court's current version before filing.

Version in force on 2026-10-31: from 2018-07-01 to today.

Rule 214. Discovery of Documents, Objects, and Tangible Things-Inspection of Real Estate

(a) Any party may by written request direct any other party to produce for inspection, copying, reproduction photographing, testing or sampling specified documents, including electronically stored information as defined under Rule 201(b)(4), objects or tangible things, or to permit access to real estate for the purpose of making surface or subsurface inspections or surveys or photographs, or tests or taking samples, or to disclose information calculated to lead to the discovery of the whereabouts of any of these items, whenever the nature, contents, or condition of such documents, objects, tangible things, or real estate is relevant to the subject matter of the action. The request shall specify a reasonable time, which shall not be less than 28 days after service of the request except by agreement or by order of court, and the place and manner of making the inspection and performing the related acts.

(b) With regard to electronically stored information as defined in Rule 201(b)(4), if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(c) One copy of the request shall be served on all other parties entitled to notice. A party served with the written request shall (1) identify all materials in the party’s possession responsive to the request and copy or provide reasonable opportunity for copying or inspections. Production of documents shall be as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, or (2) serve upon the party so requesting written objections on the ground that the request is improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be complied with. A party may object to a request on the basis that the burden or expense of producing the requested materials would be disproportionate to the likely benefit, in light of the factors set out in Rule 201(c)(3). Any objection to the request or the refusal to respond shall be heard by the court upon prompt notice and motion of the party submitting the request. If the party claims that the item is not in his or her possession or control or that he or she does not have information calculated to lead to the discovery of its whereabouts, the party may be ordered to submit to examination in open court or by deposition regarding such claim. The producing party shall furnish an affidavit stating whether the production is complete in accordance with the request. Copies of identifications, objections and affidavits of completeness shall be served on all parties entitled to notice.

Unofficial text; verify against the official source before filing.

(d) A party has a duty to seasonably supplement any prior response to the extent of documents, objects or tangible things which subsequently come into that party's possession or control or become known to that party.

(e) This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon real estate.

Source note: Amended June 28, 1974, effective September 1, 1974; amended October 1, 1976, effective November 15, 1976; amended June 1, 1995, effective January 1, 1996; amended May 29, 2014, eff. July 1, 2014; amended June 8, 2018, eff. July 1, 2018.

Changes after 2026-10-31

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

Ill. S. Ct. R. 224

Discovery Before Suit to Identify Responsible Persons and Entities

Unofficial text; verify against the official source before filing. Rule text as posted by the Illinois Supreme Court (unofficial copy). Verify against the court's current version before filing.

Version in force on 2026-10-31: from 2018-01-01 to today.

Reporter of

Decisions

Rule 224. Discovery Before Suit to Identify Responsible Persons and Entities

(a) Procedure.

(1) Petition.

(i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.

(ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons and entities and where a deposition is sought will specify the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person and the time and place of the deposition.

(2) Summons and Service. The petitioner shall serve upon the respondent or respondents a copy of the petition together with a summons that is prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article II Forms Appendix.

(b) Expiration and Sanctions. Unless extended for good cause, the order automatically expires 60 days after issuance. The sanctions available under Supreme Court Rule 219 may be utilized by a party initiating an action for discovery under this rule or by a respondent who is the subject of discovery under this rule.

(c) Expenses of Complying. The reasonable expenses of complying with the requirements of the Order of Discovery shall be borne by the person or entity seeking the discovery.

Source note: Adopted June 19, 1989, effective August 1, 1989; amended May 30, 2008, effective immediately; amended Dec. 29, 2017, eff. Jan. 1, 2018. New Rule 224 was adopted effective August 1, 1989. This rule provides a tool by which a person or entity may, with leave of court, compel limited discovery before filing a

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lawsuit in an effort to determine the identity of one who may be liable in damages. The rule is not intended to modify in any way any other rights secured or responsibilities imposed by law. It provides a mechanism for plaintiffs to ascertain the identity of potential defendants in a variety of civil cases, including Structural Work Act, products liability, malpractice and negligence claims. The rule will be of particular benefit in industrial accident cases where the parties responsible may be known to the plaintiff's employer, which may immunize itself from suit. The rule facilitates the identification of potential defendants through discovery depositions or through any of the other discovery tools

Changes after 2026-10-31

No change after this date is recorded in the index.