Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois

Research memo

Matter: Witnessing a death remotely

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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.

Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois

Question presented. A parent watches over FaceTime or a Ring camera feed, in real time, as the defendant driver's negligence causes a crash that kills the parent's minor child. The parent is miles away and in no physical danger. Can the parent state a claim for negligent infliction of emotional distress under Illinois's zone-of-physical-danger rule for bystanders, or under a direct-victim theory? And what limits do Illinois courts place on extending the rule by analogy?

Short answer. Almost certainly not in the circuit court or the appellate court as the law now stands.

- **Bystander theory.** The bystander rule requires two things that a remote viewer cannot plead. The parent must have been close enough to the accident to face a high risk of physical impact, and the parent must have feared for the parent's own safety. Illinois courts deny recovery even to family members who were physically present and watched a relative's injury but were not themselves endangered. A parent miles away is further from the zone than those plaintiffs were.
- **Real-time perception does not help.** Vivid, simultaneous perception of the event and a close family relationship were features of the test the Supreme Court did not adopt when it created the rule.
- **Direct-victim theory.** This fails because a direct victim must still allege a contemporaneous physical injury or impact, and the parent's distress derives from injury to someone else.
- **No lower court can extend the rule.** Only the Illinois Supreme Court can modify its own rule.
- **The realistic path.** Plead the count to preserve the issue for the Supreme Court if the client wants to pursue it. Plead physical illness concretely. Recover the parent's grief, sorrow, and mental suffering under the Wrongful Death Act, which expressly allows those damages to next of kin.

Statutes and rules. The law-library text below is unofficial and must be checked against the official source.

- **Wrongful Death Act 740 ILCS 180/2(a).** The index holds the version in force from 2023-08-11 to today. It provides that the jury may award "damages for grief, sorrow, and mental suffering" to the surviving spouse and next of kin 740 ILCS 180/2(a).
    - The 2023 amendment added punitive damages and by its terms applies to actions filed on or after its effective date.
    - The index records an earlier change effective 2007-05-31. An appellate decision in the packet dates the grief language to a 2007 amendment *Rivas v. Benny's Prime Chophouse, LLC*, 2025 IL App (1st) 242044, ¶ 100.

    - The hypothetical gives no date of death. For any death and filing after August 11, 2023, the text quoted governs. For earlier occurrences, verify which version applies; the index does not decide retroactivity.

- **Survival Act 755 ILCS 5/27-6.** The child's own claim survives because the section preserves "actions to recover damages, including punitive damages when applicable, for an injury to the person (except slander and libel)" 755 ILCS 5/27-6. This is the version in force from 2023-08-11.
- **Section 2-615(a).** It authorizes a motion asking that a pleading "be stricken because substantially insufficient in law, or that the action be dismissed" 735 ILCS 5/2-615(a). The index records no change to this text.
- **Leave to appeal Ill. S. Ct. R. 315(a).** Among the reasons the Supreme Court considers on a petition for leave to appeal is "the general importance of the question presented" Ill. S. Ct. R. 315(a). The index flags the version history as uncertain; verify before relying on it.

Propositions.

1. Before 1983, Illinois denied recovery for negligently caused emotional distress, to direct victims and bystanders alike, unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983).
2. The Supreme Court replaced that rule for bystanders with the zone-of-physical-danger rule, under which "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress" *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983).
3. The rule does not require a physical impact at the time of the negligent act, but it requires that the bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact" *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983).
4. The bystander must also show physical injury or illness resulting from the emotional distress caused by the defendant's negligence *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983).
5. The Supreme Court has since stated that "the impact rule remains the law for direct victims of a defendant's negligence, whereas bystanders' claims are now governed by the zone-of-danger rule" *Cochran v. Securitas Security Systems USA Inc.*, 2017 IL 121200, ¶ 15.
6. In the case that adopted the rule, the court remanded because the complaint did not show the plaintiff's position on the escalator, whether he was endangered, or whether he had reasonable fear for his own safety *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983).
7. The appellate panel in that case had relied on the plaintiff's nearness to the scene, the direct emotional impact of witnessing the accident, and the close relationship between plaintiff and victim, which the Supreme Court described as factors similar

to an out-of-state foreseeability test, and the Supreme Court instead adopted the zone-of-physical-danger rule *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983).

8. The Supreme Court later stated that "Rickey stated nothing regarding foreseeability" *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995).
9. The Supreme Court has held that the zone-of-danger rule was adopted only for bystander cases and that the adopting court "was solely concerned with defining the parameters of bystander recovery" *Corgan v. Muehling*, 143 Ill. 2d 296 (1991).
10. In the same opinion, the Supreme Court quoted a dissenting appellate opinion describing the zone of danger as encircling the accident, so that a person is within it when "sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself" *Corgan v. Muehling*, 143 Ill. 2d 296 (1991).
11. The Fourth District quoted that description and applied it *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992).
12. The Supreme Court has explained that the plaintiffs in its bystander cases were bystanders because their distress "resulted from their having witnessed or observed the physically harmful effects of the defendant's negligence on a close relative" *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995).
13. The Supreme Court treated a husband as a bystander, not a direct victim, where there was no evidence he greatly feared for his safety beyond the distress he experienced from his wife's accident *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995).
14. The First District affirmed dismissal of a wife's bystander claim where she watched from the grandstands as her husband in the infield went without prompt medical help, because "There was certainly no risk of physical impact to her" *Maness v. Santa Fe Park Enterprises., Inc.*, 298 Ill. App. 3d 1014 (1st Dist. 1998).
15. The Second District held that a bystander's action "arises only when he shows that his emotional distress arose from fear for his own well-being" *Alexander v. DePaepe*, 148 Ill. App. 3d 831 (2d Dist. 1986).
16. The Second District held that the zone-of-danger rule did not widen the class of plaintiffs "so greatly as to include plaintiffs whose stress arises from watching another's injury or suffering" *Alexander v. DePaepe*, 148 Ill. App. 3d 831 (2d Dist. 1986).
17. The First District applied a Second District holding that the zone-of-danger rule allows recovery only for reasonable fear for one's own safety, not fear for the safety of a third person, and held the parents had not pleaded the elements *Seef v. Sutkus*, 205 Ill. App. 3d 312 (1st Dist. 1990).
18. The Second District has quoted the rule that "the proper focus is on whether plaintiff was in proximity to the danger, not whether he witnessed an accident to a third person" *Robbins v. Kass*, 163 Ill. App. 3d 927 (2d Dist. 1987).
19. The Third District held that a plaintiff who did not allege she witnessed the defendants' acts or was placed in a zone of physical danger was not a bystander within the zone *Leonard v. Kurtz*, 234 Ill. App. 3d 553 (3d Dist. 1992).

20. The First District, describing an earlier decision, noted that a wife and daughter who unexpectedly found the decedent dead in his hospital room could not have shown they were in a zone of physical danger *Koeller v. Cook County*, 180 Ill. App. 3d 425 (1st Dist. 1989).
21. The Second District held that minors with no memory of the collision could not have sustained emotional distress from being in the zone of physical danger *Turner v. Williams*, 326 Ill. App. 3d 541 (2d Dist. 2001).
22. The Second District held that a sister stated a bystander claim where she was less than 50 feet from the collision, in the direct path of the boat, and feared the boat would hit her too *Borcia v. Hatyina*, 2015 IL App (2d) 140559, ¶¶ 11, 45.
23. The Fourth District held a grandson within the zone where he had been shocked when he grabbed his grandfather and, by remaining near the body, risked further shocks, burns, or smoke inhalation *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992).
24. The First District held a decedent within the zone where the cab "actually lurched forward near decedent" during the driver's altercation *Jarka v. Yellow Cab Co.*, 265 Ill. App. 3d 366 (1st Dist. 1994).
25. An allegation that the plaintiff suffered "serious injury and illness and psychological damage" adequately pleads physical injury under the bystander rule *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992).
26. The Third District held that "It is not enough to simply equate physical injury or illness with emotional distress" and that the plaintiff must allege causation between the physical injury or illness and the distress *Leonard v. Kurtz*, 234 Ill. App. 3d 553 (3d Dist. 1992).
27. The Second District held that crying, sleeplessness, increased migraine headaches, and upset feelings, without medical attention, did not satisfy the physical-consequences requirement *Robbins v. Kass*, 163 Ill. App. 3d 927 (2d Dist. 1987).
28. The Supreme Court held that expert testimony "is not required to support a claim for negligent infliction of emotional distress" *Thornton v. Garcini*, 237 Ill. 2d 100 (2009).
29. The Supreme Court held that "Corgan did not eliminate the need for a direct victim to allege and prove a contemporaneous physical injury or impact," and that contrary statements in an earlier opinion were obiter dictum *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 42.
30. The Supreme Court held that a direct victim's pleading must include "an allegation of a contemporaneous physical injury or impact" *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 44.
31. The First District held that physically manifested emotional distress is not the physical injury the impact rule requires, and that "Plaintiffs cannot bootstrap the requirements for bystander liability to sustain their direct victim claim" *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 80.
32. The Third District held that a widow whose distress was "a derivative consequence" of negligence directed at her husband's remains was not a direct victim *Leonard v. Kurtz*, 234 Ill. App. 3d 553 (3d Dist. 1992).
33. The Supreme Court has held that "the zone-of-danger rule applies only in cases

where the plaintiff's theory of liability is the negligent infliction of emotional distress," not where a tort has already been committed against the plaintiff and distress is an element of damages *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 113.

34. The Supreme Court has stated that "it alone can overrule and modify its previous opinion" and that the appellate court could recommend that the Supreme Court "revisit our holding in the case, but it could not overrule it" *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 61.
35. The Supreme Court has held that "The appellate court lacks authority to overrule decisions of this court, which are binding on all lower courts" *People v. Artis*, 232 Ill. 2d 156, 5 (2009).
36. The Second District rejected an invitation to relax the zone-of-danger rule's physical-consequences requirement because "it is axiomatic that the appellate court lacks the authority to overrule or modify decisions of the supreme court" *Robbins v. Kass*, 163 Ill. App. 3d 927 (2d Dist. 1987).
37. The First District has held that when the Supreme Court has declared the law, "only that court may modify or overrule its previous decisions, and all lower courts are bound to follow that precedent" *Babic v. Village of Lincolnwood*, 2022 IL App (1st) 210929, ¶ 12.
38. Before the zone-of-danger rule, the Fourth District declined to recognize negligent infliction of distress caused solely by witnessing harm to another, holding that recognition "must come from the supreme court of this State" *Carlinville National Bank v. Rhoads*, 63 Ill. App. 3d 502 (4th Dist. 1978).
39. The First District has held that loss of society and grief and sorrow are distinct compensable components of pecuniary injury under the Wrongful Death Act after its 2007 amendment *Rivas v. Benny's Prime Chophouse, LLC*, 2025 IL App (1st) 242044, ¶ 100.
40. A wrongful death action "addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death" *Carter v. SSC Odin Operating Company*, 2012 IL 113204, ¶ 34.
41. The Supreme Court declined to recognize a common-law action for destruction of the family unit because its differences from the statutory action were "not sufficiently significant to warrant recognition of a new remedy" *Knierim v. Izzo*, 22 Ill. 2d 73 (1961).
42. The Supreme Court has described an earlier holding that a surviving spouse may not seek loss of consortium under both the Wrongful Death Act and the common law *Glenn v. Johnson*, 198 Ill. 2d 575 (2002).
43. The First District has held that the Wrongful Death Act "provides the exclusive remedy available when death occurs as a result of tortious conduct" *Lawler v. University of Chicago Medical Center*, 2016 IL App (1st) 143189, ¶ 21.
44. The First District has rejected a blanket bar on recovery to prevent double recovery, holding that the trial court should discern between injuries already compensated and those not yet redressed *Cruz v. Illinois Masonic Medical Center*, 271 Ill. App. 3d 383 (1st Dist. 1995).

45. On a section 2-615 motion, the question is whether the allegations, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action, but the court does not admit conclusions unsupported by specific facts *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 28.

Analysis

I1. Whether the zone requires physical presence within the area of physical risk.

The rule is spatial and self-regarding: the plaintiff must be in a zone of physical danger and fear for his own safety (Propositions 2–4).

- **The Supreme Court's own descriptions.** The court describes the zone as defined by "such proximity to the accident" that the plaintiff faced a high risk of physical impact *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983). It has quoted, and an appellate court has applied, the description of a zone that "encircles" the accident, with risk "emanating from the accident itself" *Corgan v. Muehling*, 143 Ill. 2d 296 (1991) *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992).
- **The remand in the founding case.** The remand turned on the boy's position on the escalator and whether he was endangered *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983). Physical location, not perception, was the open question.
- **Our facts.** A parent watching on a phone or camera feed miles away faces no risk of physical impact from the crash and has no occasion to fear for the parent's own safety.

No passage in the packet frames the zone flexibly enough to reach a person outside the physical area of risk.

- **The closest analogies are adverse.** Each involves a plaintiff who saw the harm, was physically nearer than our parent, and still lost:
    - the wife in the grandstands who watched her husband in the infield *Maness v. Santa Fe Park Enterprises., Inc.*, 298 Ill. App. 3d 1014 (1st Dist. 1998);
    - the plaintiff whose claim rested on witnessing injury to her companion and on the loss of the relationship *Alexander v. DePaepe*, 148 Ill. App. 3d 831 (2d Dist. 1986);
    - parents who feared for their child but not themselves *Seef v. Sutkus*, 205 Ill. App. 3d 312 (1st Dist. 1990).
- **The parent is a fortiori.** If physical presence without physical risk fails, a viewer who is not present at all is further from the zone.
- **Successful plaintiffs share one fact our client lacks.** Each was physically endangered: in the boat's path *Borcia v. Hatyina*, 2015 IL App (2d) 140559, ¶ 11, beside an electrified body after being shocked *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992), near a lurching cab *Jarka v. Yellow Cab Co.*, 265 Ill. App. 3d 366 (1st Dist. 1994).

Factual variant: the Ring camera at home. If the crash occurs at or near the parent's home while the parent is inside, the analysis changes from a legal bar to a pleading question. Recall that the remand in the founding case turned on the plaintiff's location and whether he was endangered *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983). If the parent was close enough to face a high risk of impact (for example, a vehicle leaving the road toward the house) and feared for the parent's own safety, those facts should be pleaded specifically *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 28. A parent at home but far from the crash's path stands where the grandstand plaintiff stood *Maness v. Santa Fe Park Enterprises., Inc.*, 298 Ill. App. 3d 1014 (1st Dist. 1998).

I2. The foreseeability factors and real-time perception.

The parent's best intuitive argument is that live video is the functional equivalent of watching from the curb: simultaneous, sensory, unmistakable. That argument maps onto the appellate panel's factors in the founding case: nearness, direct emotional impact from witnessing, and close relationship. The Supreme Court described those factors as similar to an out-of-state foreseeability test and adopted the zone-of-physical-danger rule instead *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983). It later confirmed that its rule "stated nothing regarding foreseeability" *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995).

Two passages close off the argument that vivid witnessing alone suffices:

- the Supreme Court's explanation that its bystander plaintiffs were those who "witnessed or observed" harm to a relative *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995), combined with its insistence on fear for one's own safety *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995);
- the appellate statement that the zone-of-danger rule did not reach "plaintiffs whose stress arises from watching another's injury or suffering" *Alexander v. DePaepe*, 148 Ill. App. 3d 831 (2d Dist. 1986).

The analogy therefore runs against us. The feature that makes the remote-viewing case sympathetic, contemporaneous perception of a loved one's death, is the feature Illinois declined to make sufficient.

I3. Telephone, video, camera, or other remote perception.

The packet contains no Illinois decision addressing perception by telephone, video call, livestream, or security camera. The nearest decisions involve plaintiffs who:

- arrived afterward and found the decedent *Koeller v. Cook County*, 180 Ill. App. 3d 425 (1st Dist. 1989);
- did not witness the acts at all *Leonard v. Kurtz*, 234 Ill. App. 3d 553 (3d Dist. 1992);
- could not remember the collision *Turner v. Williams*, 326 Ill. App. 3d 541 (2d Dist. 2001).

Each lost on the zone element, not on perception. That is the point: Illinois cases turn on physical danger to the plaintiff, so the mode of perception has never been the deciding

variable.

The packet also contains a nineteenth-century decision, under the since-abandoned impact rule, quoting an earlier case that denied recovery for fright from a quarrel heard but not seen *Braun v. Craven*, 175 Ill. 401 (1898). That decision is historical only. Its impact rule was replaced for bystanders *Cochran v. Securitas Security Systems USA Inc.*, 2017 IL 121200, ¶ 15. It should not be cited as current authority on remote perception.

I4. Physical injury or illness.

This element is satisfiable but must be pleaded with facts:

- A general allegation of "serious injury and illness" has been held adequate *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992).
- Equating illness with distress is not enough *Leonard v. Kurtz*, 234 Ill. App. 3d 553 (3d Dist. 1992).
- Transitory symptoms without treatment have been held insufficient on a developed record *Robbins v. Kass*, 163 Ill. App. 3d 927 (2d Dist. 1987).
- Allegations of continued medical and psychological treatment supported a bystander claim *Borcia v. Hatyina*, 2015 IL App (2d) 140559, ¶ 45.
- Expert testimony is not required to prove a negligent-infliction claim *Thornton v. Garcini*, 237 Ill. 2d 100 (2009). The packet's passage arose on a claim the trial evidence tied to the defendant's delay rather than to a relative's death *Thornton v. Garcini*, 237 Ill. 2d 100 (2009), and the packet does not show whether the court addressed the bystander physical-illness element itself.

This element is not the obstacle; the zone is. Pleading physical illness well preserves the claim for review but cannot cure the missing zone.

I5. The direct-victim theory.

The direct-victim path fails for two independent reasons.

- **No impact.** A direct victim must allege a contemporaneous physical injury or impact *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 44. Statements suggesting otherwise were dicta *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 42. The parent suffered no impact. Physically manifested distress does not substitute, and the First District has refused to let plaintiffs "bootstrap" bystander elements into a direct-victim claim *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 80.
- **Derivative distress.** The parent's distress derives from injury to the child. The Supreme Court classifies distress from witnessing harm to a close relative as the bystander paradigm *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995). The Third District held that distress that is "a derivative consequence" of negligence aimed elsewhere does not make the plaintiff a direct victim *Leonard v. Kurtz*, 234 Ill. App. 3d 553 (3d Dist. 1992).

Older appellate statements that a direct victim need allege only ordinary negligence

elements *Doe v. Noe*, 293 Ill. App. 3d 1099 (1st Dist. 1997) must be read with the later Supreme Court holding that the impact rule still governs direct victims *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 44.

The alternative route in the Supreme Court's later decisions does not open a path either. Those decisions allow emotional distress as damages where a different tort has been committed against the plaintiff *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 113 *Cochran v. Securitas Security Systems USA Inc.*, 2017 IL 121200, ¶ 23. Here the driver committed no independent tort against the parent. The parent's statutory remedy for the death is the Wrongful Death Act (I6).

I6. Wrongful Death Act grief damages.

- **The grief remedy.** The Act expressly allows "damages for grief, sorrow, and mental suffering" to next of kin 740 ILCS 180/2(a). Those damages are distinct from loss of society *Rivas v. Benny's Prime Chophouse, LLC*, 2025 IL App (1st) 242044, ¶ 100. The wrongful death action compensates the next of kin's own injury from the loss *Carter v. SSC Odin Operating Company*, 2012 IL 113204, ¶ 34.
- **The parent's status.** For a minor child with no spouse or children, the parents should be next of kin. The packet's decisions on next-of-kin status concern different families, so confirm under the intestacy rules.
- **The policy argument cuts against extension.** The Supreme Court has declined to recognize a common-law death remedy whose differences from the statutory action were not significant enough to warrant a new remedy *Knierim v. Izzo*, 22 Ill. 2d 73 (1961). It has described an earlier refusal to allow consortium under both the Act and the common law *Glenn v. Johnson*, 198 Ill. 2d 575 (2002). The First District has called the Act the exclusive remedy when death results from tortious conduct *Lawler v. University of Chicago Medical Center*, 2016 IL App (1st) 143189, ¶ 21. A defendant will argue that a remote-witness negligent-infliction claim seeks the same grief the Act already compensates.
- **The response.** A negligent-infliction claim compensates the parent's own physical illness from the trauma of witnessing, not grief for the loss. Courts address overlap by separating compensated from uncompensated injury rather than by barring the claim outright *Cruz v. Illinois Masonic Medical Center*, 271 Ill. App. 3d 383 (1st Dist. 1995). That response has force only once the claim exists, which the zone rule prevents.
- **Practical point.** The experience of watching the death in real time is likely relevant to the grief and mental-suffering award under the Act. The packet does not address that evidentiary question.

I7. Authority to extend the rule.

The circuit court is bound by the Supreme Court and by published First District decisions applying the rule *Maness v. Santa Fe Park Enterprises., Inc.*, 298 Ill. App. 3d 1014 (1st Dist. 1998) *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 80. The appellate court likewise cannot modify the Supreme Court's rule *People v. Artis*, 232 Ill. 2d 156, 5

(2009) *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 61 *Babic v. Village of Lincolnwood*, 2022 IL App (1st) 210929, ¶ 12. When plaintiffs asked an appellate court to relax this very rule, it refused because only the Supreme Court can do so *Robbins v. Kass*, 163 Ill. App. 3d 927 (2d Dist. 1987). The same answer was given, before the zone-of-danger rule existed, to a plaintiff seeking recovery for witnessing harm to another *Carlinville National Bank v. Rhoads*, 63 Ill. App. 3d 502 (4th Dist. 1978).

The appropriate posture is candor:

- plead the count;
- acknowledge that existing law forecloses it in the lower courts;
- argue for modification in good faith, preserving the issue for a petition for leave to appeal on the ground of "the general importance of the question presented" Ill. S. Ct. R. 315(a).

Two dissents in the packet supply policy language for that argument, and they must be cited as dissents:

- one Supreme Court dissent called the bystander/direct-victim line, as applied to a husband seated beside his wife when she was killed, "an arbitrary and hollow distinction" *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995);
- another described the impact and zone rules as devices "to keep the door from opening wide" *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230 (1987).

Splits and adverse authority

- **Bystander zone requirement.** No district split appears in the packet. The First, Second, Third, and Fourth Districts all require physical proximity creating a high risk of impact and fear for one's own safety *Maness v. Santa Fe Park Enterprises., Inc.*, 298 Ill. App. 3d 1014 (1st Dist. 1998) *Alexander v. DePaepe*, 148 Ill. App. 3d 831 (2d Dist. 1986) *Leonard v. Kurtz*, 234 Ill. App. 3d 553 (3d Dist. 1992) *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992).
- **Binding First District authority to confront:**
  - the grandstand decision *Maness v. Santa Fe Park Enterprises., Inc.*, 298 Ill. App. 3d 1014 (1st Dist. 1998);
  - the fear-for-a-third-person decision *Seef v. Sutkus*, 205 Ill. App. 3d 312 (1st Dist. 1990);
  - the bootstrapping decision *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 80.
- **Binding Supreme Court authority to confront:**
  - the rule itself *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983);
  - the impact requirement for direct victims *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 44;

- the hierarchy decisions *People v. Artis*, 232 Ill. 2d 156, 5 (2009) *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 61.

- **Resolved historical splits (do not rely on the superseded side):**

  - Whether the zone rule governs direct victims: some First and Second District decisions applied it to direct victims *Koeller v. Cook County*, 180 Ill. App. 3d 425 (1st Dist. 1989) *Robbins v. Kass*, 163 Ill. App. 3d 927 (2d Dist. 1987). Others did not *Corgan v. Muehling*, 167 Ill. App. 3d 1093 (1st Dist. 1988) *Allen v. Otis Elevator Co.*, 206 Ill. App. 3d 173 (1st Dist. 1990). The Supreme Court resolved this by confining the zone rule to bystanders *Corgan v. Muehling*, 143 Ill. 2d 296 (1991).
  - Whether direct victims must show physical manifestation: some decisions required it for direct victims *Goldberg v. Ruskin*, 128 Ill. App. 3d 1029 (1st Dist. 1984) *Henry v. St. John's Hospital*, 159 Ill. App. 3d 716 (4th Dist. 1987). The Supreme Court held it was not required *Corgan v. Muehling*, 143 Ill. 2d 296 (1991).
  - Whether the Supreme Court abolished the impact rule for direct victims: its earlier opinion said so *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337 (1995). Its later opinion held that statement was dicta and that the impact rule remains *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 42.

  In each case, the superseded side should be cited only for propositions the Supreme Court did not reject.

Gaps

- The packet contains no Illinois decision addressing perception by telephone, video call, livestream, or security camera, and no decision considering whether real-time remote perception could satisfy or substitute for physical proximity.
- Out-of-state authority on virtual or remote presence was not searched and is outside the index.
- The Supreme Court's affirmance in the fear-for-a-third-person case was not read.
- Several recent decisions citing the governing cases were not read, including a 2026 Supreme Court decision citing the strict-liability bystander case and 2026 First District decisions citing the bystander cases. Any of these could refine the rule.
- Intentional infliction of emotional distress, which might be available against an intoxicated or reckless driver, was not researched, including whether presence at the scene is required for distress from conduct directed at a family member.
- The packet does not address whether a driver could owe a non-present parent a duty under the general duty analysis, which bears on the direct-victim theory.
- No decision squarely addresses whether a negligent-infliction award to a parent would duplicate Wrongful Death Act grief damages for the same death.
- No decision addresses whether evidence of the parent's real-time witnessing is admissible to prove grief and mental suffering under the Act.

- The pre-2023 and pre-2007 text of the Wrongful Death Act is not in the packet, nor is the text of the public acts that amended it.

Table of authorities

Cases

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Blumenthal v. Brewer, 2016 IL 118781	6, 11, 12
Borcia v. Hatyina, 2015 IL App (2d) 140559	5, 7, 9
Braun v. Craven, 175 Ill. 401 (1898)	9
Carlinville National Bank v. Rhoads, 63 Ill. App. 3d 502 (4th Dist. 1978)	6, 11
Carter v. SSC Odin Operating Company, 2012 IL 113204	6, 10
Clark v. Children's Memorial Hospital, 2011 IL 108656	6, 10
Cochran v. Securitas Security Systems USA Inc., 2017 IL 121200	3, 9, 10
Corgan v. Muehling, 143 Ill. 2d 296 (1991)	4, 7, 12
Corgan v. Muehling, 167 Ill. App. 3d 1093 (1st Dist. 1988)	12
Cruz v. Illinois Masonic Medical Center, 271 Ill. App. 3d 383 (1st Dist. 1995)	6, 10
Doe v. Noe, 293 Ill. App. 3d 1099 (1st Dist. 1997)	10
Glenn v. Johnson, 198 Ill. 2d 575 (2002)	6, 10
Goldberg v. Ruskin, 128 Ill. App. 3d 1029 (1st Dist. 1984)	12
Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992)	4, 5, 7, 9, 11
Henry v. St. John's Hospital, 159 Ill. App. 3d 716 (4th Dist. 1987)	12
Jarka v. Yellow Cab Co., 265 Ill. App. 3d 366 (1st Dist. 1994)	5, 7
Knierim v. Izzo, 22 Ill. 2d 73 (1961)	6, 10
Koeller v. Cook County, 180 Ill. App. 3d 425 (1st Dist. 1989)	5, 8, 12
Lawler v. University of Chicago Medical Center, 2016 IL App (1st) 143189	6, 10
Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992)	4, 5, 8, 9, 11
Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998)	4, 7, 8, 10, 11
Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995)	4, 8, 9, 11, 12
People v. Artis, 232 Ill. 2d 156 (2009)	6, 10, 12
Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983)	3, 4, 7, 8, 11
Rivas v. Benny's Prime Chophouse, LLC, 2025 IL App (1st) 242044	2, 6, 10

Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987)	4, 5, 6, 9, 11, 12
Schweihs v. Chase Home Finance, LLC, 2016 IL 120041	5, 9, 10, 11, 12
Seef v. Sutkus, 205 Ill. App. 3d 312 (1st Dist. 1990)	4, 7, 11
Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230 (1987)	11
Thornton v. Garcini, 237 Ill. 2d 100 (2009)	5, 9
Turner v. Williams, 326 Ill. App. 3d 541 (2d Dist. 2001)	5, 8

Statutes

735 ILCS 5/2-615 — Motions with respect to pleadings	3
740 ILCS 180/2 — (a) Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, and punitive damages when applicable, to the surviving spouse and next of kin of such deceased person. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly	2, 10
755 ILCS 5/27-6 — Actions which survive	3

Rules

Ill. S. Ct. R. 315 — Leave to Appeal From the Appellate Court to the Supreme Court	3, 11

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 **35** decisions in **120** citations, and **4** 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: 46, each matched word for word inside the passage it cites.

Paragraph pins (¶): 33, 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; 87 citation(s) of reporter-era decisions carry no pin.

Rule 23 orders cited: none.

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

- Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995): declined to follow by Schweihs v. Chase Home Finance, LLC, 2015 IL App (1st) 140683
- Corgan v. Muehling, 143 Ill. 2d 296 (1991): overruled by Thornton v. Garcini; overruled by Thornton v. Garcini, 237 Ill. 2d 100
- Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230 (1987): overruled by Clark v. Children's Memorial Hospital, 2011 IL 108656; overruled by Cochran v. Securitas Security Systems USA Inc., 2017 IL 121200

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

Support check (a model's judgment, not a verification): of 97 cited sentences, 75 rated supports, 17 partly, 0 does not support, 5 not rated.

Review: every one of the 97 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 644cd5dea696086fcdc29783c67ae70286a47a8398715eba44fe2d6e47babb26
Built: 2026-11-01 11:02:29 · citation check: 0 red, 90 yellow

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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 2026-11-01.

Issue	Found by search	Named	From citations	Candidates
[I1] Whether Rickey's zone of danger requires physical presence within the area of physical risk	340	6	85	426
[I2] Rickey's rejection of the Dillon foreseeability test and its sensory-observation factors	338	6	82	421
[I3] Witnessing by telephone, video, camera, or other remote means as bystander perception	396	6	96	493
[I4] Physical injury or illness resulting from emotional distress as a bystander element	400	6	85	486
[I5] Direct-victim negligent infliction theory: duty owed to the parent and the impact rule	370	6	88	459
[I6] Wrongful Death Act grief damages as the parent's existing remedy and policy counterweight	441	6	67	510
[I7] Lower courts' authority to extend or modify Rickey by analogy	311	8	118	432

What was read

1,996 distinct candidate decisions were on the reading list. A local model read **104** of them (a quick read of the passages the searches matched), best first, stopping at the best 40 per issue, and gave **84** a full read, every paragraph, in 286 parts. It offered 1,434 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	28	24	86%
11–25	43	33	77%
26–50	33	26	79%

Statutes and rules

Provision	In force on	Version	Changed after that date
725 ILCS 5/112A-3 — Definitions	2026-11-01	2018-06-29 to 2027-01-01	P.A. 104-754, eff. 2027-01-01
740 ILCS 21/10 — Definitions	2026-11-01	2025-08-15 to today	no change recorded
745 ILCS 10/3-109 — (a) Neither a local public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity	2026-11-01	1996-06-28 to today	no change recorded
820 ILCS 270/1 — No person shall participate in a public performance or exhibition, or in a private exercise preparatory thereto, on a trapeze, tightrope, wire, rings, ropes, poles, or other aerial apparatus which requires skill, timing or balance and which creates a substantial risk to himself or others of serious injury by a fall from a height in excess of 20 feet, unless a safety net or other safety device of similar purpose and construction is placed between such person and the ground in such manner as to arrest or cushion his fall and minimize the risk of such injury	2026-11-01	earliest held to today	no change recorded

745 ILCS 10/5-106 — Except for willful or wanton conduct, neither a local public entity, nor a public employee acting within the scope of his employment, is liable for an injury caused by the negligent operation of a motor vehicle or firefighting or rescue equipment, when responding to an emergency call, including transportation of a person to a medical facility	2026-11-01	earliest held to today	no change recorded
625 ILCS 45/6-1 — Collisions, accidents, and casualties; reports	2026-11-01	2021-08-20 to today	no change recorded
Ill. R. Prof'l Conduct (2010) R. supreme-court-order-m.r.-3140 — Supreme Court Order M.R. 3140	2026-11-01	2010-01-01 to today	no change recorded
625 ILCS 5/11-501.6 — Driver involvement in personal injury or fatal motor vehicle crash; chemical test	2026-11-01	2023-07-01 to today	no change recorded
320 ILCS 20/15 — Fatality review teams	2026-11-01	2025-01-01 to 2027-01-01	P.A. 104-742, eff. 2027-01-01
Ill. S. Ct. R. 224 — Discovery Before Suit to Identify Responsible Persons and Entities	2026-11-01	2018-01-01 to today	no change recorded
750 ILCS 60/103 — Definitions	2026-11-01	2013-01-25 to 2027-01-01	P.A. 104-754, eff. 2027-01-01
735 ILCS 5/2-615 — Motions with respect to pleadings (cited)	2026-11-01	earliest held to today	no change recorded
20 ILCS 1305/1-17 — Inspector General	2026-11-01	2026-08-21 to 2027-01-01	P.A. 104-669, eff. 2027-01-01
725 ILCS 5/106B-5 — Testimony by a victim who is a child or a person with a moderate, severe, or profound intellectual disability or a person affected by a developmental disability	2026-11-01	2026-01-01 to 2027-01-01	P.A. 104-760, eff. 2027-01-01
745 ILCS 10/6-106 — (a) Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addiction or from failing to prescribe for mental or physical illness or addiction	2026-11-01	earliest held to today	no change recorded
745 ILCS 48/10 — Definitions	2026-11-01	1999-08-20 to today	no change recorded

740 ILCS 180/2 — (a) Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, and punitive damages when applicable, to the surviving spouse and next of kin of such deceased person. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly (cited)	2026-11-01	2023-08-11 to today	no change recorded
725 ILCS 120/4.5 — Procedures to implement the rights of crime victims	2026-11-01	2026-08-21 to today	no change recorded
820 ILCS 305/5 — Damages; minors; third-party liability	2026-11-01	2019-05-17 to today	no change recorded

740 ILCS 180/1 — Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, including punitive damages when applicable, in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, including punitive damages when applicable, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly	2026-11-01	2023-08-11 to today	no change recorded
755 ILCS 5/27-6 — Actions which survive (cited)	2026-11-01	2023-08-11 to today	no change recorded
820 ILCS 305/7 — The amount of compensation which shall be paid for an accidental injury to the employee resulting in death is:	2026-11-01	2026-08-07 to today	no change recorded
735 ILCS 5/2-1008 — Abatement; change of interest or liability; substitution of parties	2026-11-01	1997-07-14 to today	no change recorded
820 ILCS 315/3 — Duty death benefit	2026-11-01	2023-06-07 to today	no change recorded
740 ILCS 45/2 — Definitions	2026-11-01	2026-08-21 to 2027-01-01	P.A. 104-563, eff. 2027-01-01
Ill. S. Ct. R. 315 — Leave to Appeal From the Appellate Court to the Supreme Court (cited)	2026-11-01	2018-04-01 to today	no change recorded
Ill. S. Ct. R. 201 — General Discovery Provisions	2026-11-01	2023-03-17 to today	no change recorded
Ill. S. Ct. R. 318 — General Rules Governing All Appeals from the Appellate Court to the Supreme Court	2026-11-01	2020-10-01 to today	no change recorded
Ill. S. Ct. R. 415 — Regulation of Discovery	2026-11-01	2020-10-23 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. **Wrongful Death Act .** The index holds the version in force from 2023-08-11 to today. It provides that the jury may award "damages for grief, sorrow, and mental suffering" to the surviving spouse and next of kin . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree

740 ILCS 180/2 (statute or rule; its text follows the decisions)

2. The index records an earlier change effective 2007-05-31. An appellate decision in the packet dates the grief language to a 2007 amendment . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says the legislature amended the Act in 2007 to add grief, sorrow and mental suffering damages; the index date is not from the passage but is not attributed to it.)

Rivas v. Benny's Prime Chophouse, LLC, 2025 IL App (1st) 242044, ¶ 100: ¶ 100 In 2007, however, the legislature amended the Wrongful Death Act to expressly include "damages for grief, sorrow, and mental suffering" as "pecuniary injuries" that were covered by the statute. Compare 740 ILCS 180/2(a) (West 2006), with 740 ILCS 180/2(a) (West 2008). Thus, under the law in effect at the time of the decedent's trial, grief and sorrow were permissible components of the damages award. As the law is clear that "loss of society" and "grief and sorrow" are distinct components of compensable pecuniary injury under the Wrongful Death Act, we cannot find that the trial court's separation of these components in determining the damages award in the instant case constituted an abuse of discretion.

3. **Survival Act .** The child's own claim survives because the section preserves "actions to recover damages, including punitive damages when applicable, for an injury to the person (except slander and libel)" . This is the version in force from 2023-08-11. [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree

755 ILCS 5/27-6 (statute or rule; its text follows the decisions)

4. **Section 2-615(a).** It authorizes a motion asking that a pleading "be stricken because substantially insufficient in law, or that the action be dismissed" . The index records no change to this text. [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree

735 ILCS 5/2-615 (statute or rule; its text follows the decisions)

5. **Leave to appeal .** Among the reasons the Supreme Court considers on a petition for leave to appeal is "the general importance of the question presented" . The index flags the version history as uncertain; verify before relying on it. [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree

Ill. S. Ct. R. 315 (statute or rule; its text follows the decisions)

6. Before 1983, Illinois denied recovery for negligently caused emotional distress, to direct victims and bystanders alike, unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage states recovery was consistently denied to direct victims and bystanders absent contemporaneous physical injury or impact.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: In this State recovery for negligently caused emotional distress suffered by the direct victim or by a bystander who witnesses the injury of another has been consistently denied unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff. Braun v. Craven (1898), 175 Ill. 401; Carlinville National Bank v. Rhoads (1978), 63 Ill. App. 3d 502; Kaiserman v. Bright (1978), 61 Ill. App. 3d 67; Neuberg v. Michael Reese Hospital & Medical Center (1978), 60 Ill. App. 3d 679.

7. The Supreme Court replaced that rule for bystanders with the zone-of-physical-danger rule, under which "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage substitutes the zone-of-physical-danger rule for the impact rule in bystander cases; the quote is verbatim.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, e.g., Niederman v. Brodsky (1970), 436 Pa. Super. 401, 261 A.2d 84; Owens v. Childrens Memorial Hospital (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); Robb v. Pennsylvania R.R. Co. (Del. 1965), 210 A.2d 709; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Tobin v. Grossman (1969), 24 N.Y.2d 609, 249 N.E.2d 419; Whetham v. Bismarck Hospital (N.D. 1972), 197 N.W.2d 678; Shelton v. Russell Pipe & Boundary Co. (Tenn. 1978), 570 S.W.2d 861; Guilmette v. Alexander (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. Dailey v. LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Fournell v. Usher Pest Control Co. (1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment c (1965).

8. The rule does not require a physical impact at the time of the negligent act, but it requires that the bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says no impact at the time is required but proximity creating a high risk of impact is; the quote is verbatim.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, e.g., Niederman v. Brodsky (1970), 436 Pa. Super. 401, 261 A.2d 84; Owens v. Childrens Memorial Hospital (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); Robb v. Pennsylvania R.R. Co. (Del. 1965), 210 A.2d 709; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Tobin v. Grossman (1969), 24 N.Y.2d 609, 249 N.E.2d 419; Whetham v. Bismarck Hospital (N.D. 1972), 197 N.W.2d 678; Shelton v. Russell Pipe & Boundary Co. (Tenn. 1978), 570 S.W.2d 861; Guilmette v. Alexander (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. Dailey v. LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Fournell v. Usher Pest Control Co. (1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment c (1965).

9. The bystander must also show physical injury or illness resulting from the emotional distress caused by the defendant's negligence . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says the bystander must show physical injury or illness resulting from the distress.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, e.g., Niederman v. Brodsky (1970), 436 Pa. Super. 401, 261 A.2d 84; Owens v. Childrens Memorial Hospital (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); Robb v. Pennsylvania R.R. Co. (Del. 1965), 210 A.2d 709; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Tobin v. Grossman (1969), 24 N.Y.2d 609, 249 N.E.2d 419; Whetham v. Bismarck Hospital (N.D. 1972), 197 N.W.2d 678; Shelton v. Russell Pipe & Boundary Co. (Tenn. 1978), 570 S.W.2d 861; Guilmette v. Alexander (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. Dailey v. LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Fournell v. Usher Pest Control Co. (1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment c (1965).

10. The Supreme Court has since stated that "the impact rule remains the law for direct victims of a defendant's negligence, whereas bystanders' claims are now governed by the zone-of-danger rule" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim; the court is restating its earlier clarification in Schweihs.)

Cochran v. Securitas Security Systems USA Inc., 2017 IL 121200, ¶ 15: ¶ 15 Thus, Mensinger never expressly decided whether a claim for tortious interference with the right to possess a corpse may be stated absent allegations of wilful and wanton misconduct. Just as importantly, to the extent that

Mensinger discussed that question at all, it did so in the context of a rule that this court has since refined and clarified. When Mensinger was decided, the settled rule in Illinois was that, absent a contemporaneous physical impact or injury to the plaintiff, there could be no recovery for negligently caused emotional distress. See, e.g., Chicago Consolidated Traction Co. v. Schritter, 222 Ill. 364, 368 (1906); Braun v. Craven, 175 Ill. 401, 420 (1898). This rule applied with equal force both to the direct victims of a defendant's negligence and to bystanders who witnessed the injury of another. See Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 550 (1983). In 1983, however, this court abandoned the so-called "impact rule" in favor of the zone-of-danger rule for cases involving bystanders. Id. at 555. Under the zone-of-danger rule: "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander [in addition] must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." Id. Although some confusion subsequently ensued as to whether Rickey eliminated the impact rule for direct victims as well as for bystanders, this court has since clarified that the impact rule remains the law for direct victims of a defendant's negligence, whereas bystanders' claims are now governed by the zone-of-danger rule. Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 42.

11. In the case that adopted the rule, the court remanded because the complaint did not show the plaintiff's position on the escalator, whether he was endangered, or whether he had reasonable fear for his own safety . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says the court did not know the plaintiff's position, whether he was endangered, or whether he feared for himself; the surrounding paragraphs allow repleading and remand.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: Though the appellate court appeared to regard the case as one involving solely emotional distress, the complaint here did allege resultant physical manifestations. Also, the complaint states simply that the plaintiff and his brother were descending on the escalator and that the brother's clothing became entangled in the mechanism of the escalator. We do not know the plaintiff's position or location on the escalator at the time and whether he was endangered by the claimed negligence; we do not know whether he had reasonable fear for his own safety, causing emotional distress.

12. The appellate panel in that case had relied on the plaintiff's nearness to the scene, the direct emotional impact of witnessing the accident, and the close relationship between plaintiff and victim, which the Supreme Court described as factors similar to an out-of-state foreseeability test, and the Supreme Court instead adopted the zone-of-physical-danger rule . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Passage lists the panel's three factors and calls them similar to Dillon; calling Dillon a 'foreseeability test' is the memo's gloss, not the passage's words.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: The conclusion of the appellate court panel that the complaint here stated a cause of action was grounded on these factors: (1) the minor plaintiff was near the scene at the time of the accident; (2) there was a direct emotional impact when he witnessed the accident; and (3) the plaintiff and the victim were close relatives. The standard suggested by the court contains factors similar to those set out in Dillon v. Legg (1968), 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72. In that case, however, which the appellate panel, inter alia, refers to, the court stated: "[W]e deal here with a case in which plaintiff suffered a shock which resulted

in physical injury and we confine our ruling to that case." (68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80.) It appears from the opinion of the appellate court that the panel treated the complaint as one in which damages were sought solely for "emotional distress," and that it would allow recovery for emotional disturbance or distress alone.

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, e.g., Niederman v. Brodsky (1970), 436 Pa. Super. 401, 261 A.2d 84; Owens v. Childrens Memorial Hospital (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); Robb v. Pennsylvania R.R. Co. (Del. 1965), 210 A.2d 709; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Tobin v. Grossman (1969), 24 N.Y.2d 609, 249 N.E.2d 419; Whetham v. Bismarck Hospital (N.D. 1972), 197 N.W.2d 678; Shelton v. Russell Pipe & Boundary Co. (Tenn. 1978), 570 S.W.2d 861; Guilmette v. Alexander (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. Dailey v. LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Fournell v. Usher Pest Control Co. (1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment c (1965).

13. The Supreme Court later stated that "Rickey stated nothing regarding foreseeability" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim; the court is describing its earlier decision.)

Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995), no ¶ number: In Rickey, 98 Ill. 2d 546, this court held, in the case of a bystander, that a recovery for emotional distress would be permitted in the case of negligent conduct without a requirement that the plaintiff show a contemporaneous injury or impact. (Cf. Braun v. Craven (1898), 175 Ill. 401 (establishing the impact rule).) In place of the impact rule, Rickey adopted the zone-of-physical-danger rule which had been applied by a majority of jurisdictions considering the matter. Under Rickey's new rule, a bystander in a zone of physical danger, who reasonably feared for his own safety because of the defendant's negligence, was allowed to recover for physical injury or illness which manifested as a result of emotional distress. Although plaintiff argues otherwise, Rickey stated nothing regarding foreseeability.

14. The Supreme Court has held that the zone-of-danger rule was adopted only for bystander cases and that the adopting court "was solely concerned with defining the parameters of bystander recovery" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage holds the substitution was intended only for bystander cases; the quote is verbatim.)

Corgan v. Muehling, 143 Ill. 2d 296 (1991), no ¶ number: Defendants contentions are, however, misplaced. Although use of the word "substitute" implies replacement of the impact rule with the zone-of-physical-danger rule, a closer reading of Rickey reveals that such a substitution was intended only in bystander cases. As one court explained: "The facts of Rickey are those of a typical bystander case and the court uses the word 'bystander' throughout the opinion. In particular, the court expressly puts the issue and the holding in the context of bystander recovery." (McAdams v. Eli Lilly & Co. (N.D. Ill. 1986), 638 F. Supp. 1173, 1177.) Rickey, therefore, abandoned the impact rule as it applied to bystanders and adopted the zone-of-physical-danger rule as the standard under which they can recover damages for

negligent infliction of emotional distress. Rickey did not, however, define the scope of negligent infliction of emotional distress as it applies to direct victims. The court in Rickey was solely concerned with defining the parameters of bystander recovery.

15. In the same opinion, the Supreme Court quoted a dissenting appellate opinion describing the zone of danger as encircling the accident, so that a person is within it when "sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage quotes Justice Linn's appellate dissent describing a zone that encircles the accident; the quote is verbatim.)

Corgan v. Muehling, 143 Ill. 2d 296 (1991), no ¶ number: "The distinction between a direct victim and a bystander is more than just a play on semantics ***. In Rickey, the supreme court created a cut-off point beyond which a defendant owes no duty, and beyond which, therefore, the defendant is no longer liable for any injuries inflicted. *** [A] defendant owes a duty to only those persons who suffer emotional distress (and accompanying physical manifestations) as a result of being within the 'zone of danger' created by a negligently caused accident. This zone of danger, because it is ereated by the accident, encircles it; hence, the accident is, in effect, the 'nucleus' of the surrounding zone of danger. A person is within an accident's zone of danger (and able to seek recovery under Rickey) when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself." (Emphasis in original.) Lewis, 139 Ill. App. 3d at 639-40 (Linn, J., dissenting).

16. The Fourth District quoted that description and applied it . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (This passage only quotes the description; the application to the facts is in a different passage (C028.5) that is not cited here.)

Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992), no ¶ number: 'The distinction between a direct victim and a bystander is more than just a play on semantics ***. *** [A] defendant owes a duty to only those persons who suffer emotional distress (and accompanying physical manifestations) as a result of being within the "zone of danger" created by a negligently caused accident. This zone of danger, because it is created by the accident, encircles it; hence, the accident is, in effect, the "nucleus" of the surrounding zone of danger. A person is within an accident's zone of danger (and able to seek recovery under Rickey) when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself' " (Emphasis in original.)

17. The Supreme Court has explained that the plaintiffs in its bystander cases were bystanders because their distress "resulted from their having witnessed or observed the physically harmful effects of the defendant's negligence on a close relative" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage identifies its two earlier cases as bystander cases in which distress came from witnessing harm to a close relative; the quote is verbatim.)

Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995), no ¶ number: Nonetheless, it is clear that David's proofs at trial showed him to be a bystander and not a direct victim as that distinction is recognized under Illinois law. (See Rickey, 98 Ill. 2d 546 (bystander case); Siemieniec v. Lutheran General Hospital (1987), 117 Ill. 2d 230 (bystander case); cf. Corgan v. Muehling, 143 Ill. 2d 296 (direct victim case).) In Rickey and Siemieniec, the plaintiffs' alleged emotional distress resulted from their having witnessed or observed the physically harmful effects of the defendant's negligence on a close relative. In Corgan, the plaintiff's emotional distress was the direct consequence of the defendant's

negligent conduct; the plaintiff's emotional distress did not result from injury to another.

18. The Supreme Court treated a husband as a bystander, not a direct victim, where there was no evidence he greatly feared for his safety beyond the distress he experienced from his wife's accident . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage finds no evidence the husband greatly feared for his own safety and treats the case as a bystander case.)

Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995), no ¶ number: David's evidence here did not show that he suffered emotional distress as an independent or direct consequence of the failure of F&B's bellhousing. There was no evidence that he greatly feared for his safety beyond that experienced as a result of his wife's accident. We conclude that this case represents a bystander case, despite David's arguments urging expansion beyond these facts. Thus, we confine our inquiry to whether the elimination of the contemporaneous injury or impact requirement for bystander recovery for emotional distress in the area of negligence meaningfully translates into an elimination of the element of physical harm for a bystander's recovery for emotional distress under strict liability theory.

19. The First District affirmed dismissal of a wife's bystander claim where she watched from the grandstands as her husband in the infield went without prompt medical help, because "There was certainly no risk of physical impact to her" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Passage holds the count failed all three elements (zone, fear for own safety, physical illness); the memo presents lack of impact risk as the sole reason, and 'affirmed dismissal' is not stated in this passage.)

Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998), no ¶ number: A bystander, such as plaintiff, cannot recover for negligent infliction of emotional distress unless she establishes that: (1) she was in the "zone of danger"; (2) she had a reasonable fear for her own safety; and (3) she suffered physical injury or illness resulting from the alleged emotional distress. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Count II fails to allege any of these requisite elements. In order to be in the "zone of danger" a bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to [her] of physical impact." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5. Here plaintiff alleges that she was in the grandstands when she witnessed defendants' negligent failure to provide prompt medical assistance to her husband, who was in the infield of the track. There was certainly no risk of physical impact to her. Moreover, count II fails to allege that plaintiff had a reasonable fear for her own safety or that she suffered any physical injury or illness.

20. The Second District held that a bystander's action "arises only when he shows that his emotional distress arose from fear for his own well-being" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim and is the court's own statement of the rule.)

Alexander v. DePaepe, 148 Ill. App. 3d 831 (2d Dist. 1986), no ¶ number: It is abundantly clear that Rickey does not support a cause of action for negligent infliction of emotional distress based only on witnessing injury to a direct victim. The bystander's action arises only when he shows that his emotional distress arose from fear for his own well-being.

21. The Second District held that the zone-of-danger rule did not widen the class of plaintiffs "so greatly as to include plaintiffs whose stress arises from watching another's

injury or suffering" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says the founding decision did not widen the scope to plaintiffs whose stress arises from watching another's injury.)

> **Alexander v. DePaepe, 148 Ill. App. 3d 831 (2d Dist. 1986)**, no ¶ number: While a bystander's claim arises out of a fact situation in which there is a direct injury to another person, such a claim is not a consequence of the other person's injury. Nor are the bystander's injuries caused by the other person's injuries. Rickey, rather than creating a new cause of action, merely extended an existing cause of action beyond those bystanders who actually suffered some physical impact to those bystanders who were put at great risk by defendant's negligence. While the case expanded the scope of potential plaintiffs in negligent infliction of emotional distress actions, it did not widen the scope so greatly as to include plaintiffs whose stress arises from watching another's injury or suffering.

22. The First District applied a Second District holding that the zone-of-danger rule allows recovery only for reasonable fear for one's own safety, not fear for the safety of a third person, and held the parents had not pleaded the elements . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (C042.2 describes the Robbins fear-for-third-person rule; C042.1 holds the Seefs did not plead fear for their own safety. Robbins's district is from packet metadata, not the passage.)

> **Seef v. Sutkus, 205 Ill. App. 3d 312 (1st Dist. 1990)**, no ¶ number: The Seefs' complaint alleges facts very similar in relevant detail to those of Robbins. In that case, plaintiffs sued a hospital after their baby was stillborn while the parents waited for hospital personnel to return to their room and help them. The court denied recovery for negligent infliction of emotional distress on the basis that the zone-of-danger rule allows recovery only if plaintiffs suffer a reasonable fear for their own safety, not if they simply fear for the safety of a third person. Robbins, 163 111. App. 3d at 930.

> **Seef v. Sutkus, 205 Ill. App. 3d 312 (1st Dist. 1990)**, no ¶ number: The Robbins court did not treat the mother and child as a single entity. Nor did that court determine that the mother was, ipso facto, in the same zone of danger as her unborn child. Similarly, in this case, plaintiffs have not pleaded that Mrs. Seef feared for her own safety within a zone of danger. Thus, like the plaintiffs in Robbins, the Seefs did not plead the elements of negligent infliction of emotional distress.

23. The Second District has quoted the rule that "the proper focus is on whether plaintiff was in proximity to the danger, not whether he witnessed an accident to a third person" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage quotes Courtney for the proximity-not-witnessing focus. The same quote also applies the zone rule to direct victims, a point later superseded.)

> **Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987)**, no ¶ number: "Notwithstanding the supreme court's reference to the plaintiff in Rickey as a 'bystander,' it has been correctly observed that 'the nature of the zone-of-physical-danger rule is such that it allows recovery only to direct victims of negligence, because recovery.must be predicated on a reasonable fear for one's own safety.' [Citation.] Under the zone-of-physical-danger standard, the proper focus is on whether plaintiff was in proximity to the danger, not whether he witnessed an accident to a third person. [Citation.] Accordingly, we reject plaintiff's argument that the requirements for recovery under Rickey do not apply to direct victims of negligence." (Courtney, 149 Ill. App. 3d at 402-03.)

24. The Third District held that a plaintiff who did not allege she witnessed the defendants' acts or was placed in a zone of physical danger was not a bystander within the zone . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress

in Illinois] · reviewer: agree · model: supports (Passage holds that a plaintiff who did not allege witnessing or zone placement was not a bystander within the zone.)

> **Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992)**, no ¶ number: Here, plaintiff did not allege that she witnessed any of defendants' alleged acts or omissions, or that she was placed in a zone of physical danger which caused her to fear for her own personal safety. Therefore, we find the plaintiff's allegations are insufficient to establish that she was a bystander within the zone of physical danger.

25. The First District, describing an earlier decision, noted that a wife and daughter who unexpectedly found the decedent dead in his hospital room could not have shown they were in a zone of physical danger . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage is a parenthetical describing Johnston on exactly these facts.)

> **Koeller v. Cook County, 180 Ill. App. 3d 425 (1st Dist. 1989)**, no ¶ number: The holding in Courtney comports with numerous other decisions applying the standard set out in Rickey. E.g., Johnston v. St. Anne's Hospital West, Inc. (1986), 146 Ill. App. 3d 763, 497 N.E.2d 408 (complaint properly dismissed for failure to state a cause of action for negligent infliction of emotional distress where plaintiffs, decedent's wife and daughter, could not have shown that they were in a zone of physical danger causing them reasonable fear for their own safety where the hospital failed to promptly inform them of the decedent's death and they unexpectedly found him dead in his hospital room); Lewis v. Westinghouse Electric Corp. (1985), 139 Ill. App. 3d 634, 487 N.E.2d 1071 (to state a cause of action under the zone of physical danger rule, the plaintiff, whether bystander or direct victim, must have been in such proximity to the accident that there was a high risk of physical impact so as to cause her reasonable fear for her own safety and plaintiff must also show a physical injury or illness resulting from the emotional distress for which recovery is sought); Gihring v. Butcher (1985), 138 Ill. App. 3d 976, 487 N.E.2d 75 (the zone of physical danger rule requiring a showing that defendant's negligence placed plaintiff in reasonable fear for her own safety precluded plaintiff's action against her husband's former medical and psychiatric physicians for negligent infliction of emotional distress arising after the plaintiff found her husband dead in their garage as a result of suicide); see also Hammond, v. Lane (1987), 162 Ill. App. 3d 17, 516 N.E.2d 470 (plaintiff who did not allege that she was in a zone of danger and had reasonable fear for her personal safety failed to state a cause of action for negligent infliction of emotional distress resulting in physical illness or injury from alleged sexual contacts by her psychiatrist).

26. The Second District held that minors with no memory of the collision could not have sustained emotional distress from being in the zone of physical danger . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says the minors had no memory of the collision and so could not have sustained distress from being in the zone; they were also direct victims.)

> **Turner v. Williams, 326 Ill. App. 3d 541 (2d Dist. 2001)**, no ¶ number: Since the minor plaintiffs were directly injured in the automobile collision and have no memory of the collision, all damages they sustained were a consequence of their own injuries. As persons directly injured as a result of the alleged negligent actions of defendants in colliding with the vehicle driven by Jack Wong, the minor plaintiffs are precluded from recovering damages under the zone of danger rule enunciated in Rickey. See Corgan v. Muehling, 143 Ill. 2d 296 (1991) (holding that the Rickey zone of danger test does not apply to plaintiffs that are directly injured and are not merely bystanders). Although it has been held that a plaintiff who is both a direct victim and a bystander can recover for both elements of damage in separate counts, plaintiffs are precluded from doing so in this case. Both minor plaintiffs have no memory of the collision and, therefore, could not have sustained emotional distress from being in the zone of physical danger in the collision. See Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (1992). Furthermore, plaintiffs' complaint does not allege the negligent infliction of emotional distress.

27. The Second District held that a sister stated a bystander claim where she was less than 50 feet from the collision, in the direct path of the boat, and feared the boat would hit her too . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (C016.2 gives the alleged facts (under 50 feet, in the boat's path, feared being hit); C016.6 restates the pleading, and the next paragraph holds it sufficient.)

> **Borcia v. Hatyina, 2015 IL App (2d) 140559**, ¶ 11: ¶ 11 With respect to count VII, related to Erin, plaintiffs alleged that Antonio and Erin were riding on the same inflatable tube. When Antonio fell off of the tube, Erin was in close proximity to him. She observed Hatyina strike and kill her brother with the boat. Erin was less than 50 feet from the collision and in the direct path of the boat, and she feared that the boat was going to hit her too.
>
> **Borcia v. Hatyina, 2015 IL App (2d) 140559**, ¶ 45: ¶ 45 The pleadings allege that Erin was a bystander to, not a direct victim of, Melbourn's alleged negligence. Plaintiffs' complaint alleged that Melbourn's conduct of encouraging Hatyina to operate the boat at unsafe speeds while in a severely intoxicated state caused Erin to be in a zone of physical danger during the accident wherein she reasonably feared for her own safety, given the proximity to her brother on the lake and right after witnessing Hatyina's boat strike and kill her brother. Plaintiffs' complaint also alleged that, by being in the zone of physical danger, Erin suffered physical injury and emotional distress, which resulted in the need for continued medical and psychological treatment and counseling.

28. The Fourth District held a grandson within the zone where he had been shocked when he grabbed his grandfather and, by remaining near the body, risked further shocks, burns, or smoke inhalation . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage finds Todd in the zone because of the prior shock and the risk of further shocks, burns or smoke inhalation.)

> **Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992)**, no ¶ number: Todd was clearly in such proximity to the accident that there was a high risk of physical impact. Todd had already been shocked when he grabbed his grandfather, and by remaining near the body, a chance existed of subsequent shocks from the electricity as well as burns or smoke inhalation from the flames. Moreover, Todd could reasonably fear for his own safety given the unpredictable nature of electricity and fire. Paragraphs 19 and 20 alleged Todd feared electrocution, which established a fear for his own safety.

29. The First District held a decedent within the zone where the cab "actually lurched forward near decedent" during the driver's altercation . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage finds the decedent in the zone; the quote is verbatim.)

> **Jarka v. Yellow Cab Co., 265 Ill. App. 3d 366 (1st Dist. 1994)**, no ¶ number: It is possible for a person to be both a direct victim and a bystander. (Hayes v. Illinois Power Co. (1992), 225 Ill. App. 3d 819, 825, 587 N.E.2d 559.) Mrs. Jarka testified that as she was seated in the cab, the cabdriver ordered her out, yelled obscenities, and attempted to push her luggage out of the cab. Decedent abandoned his intention to enter the cab and attempted to help Mrs. Jarka to extricate herself from the cab. There is evidence that the cab actually lurched forward near decedent as the cabdriver got out of the cab swearing and yelling at the starter. It was reasonable for decedent to fear for his own safety as the result of the cabdriver's conduct towards Mrs. Jarka. Decedent's efforts to rescue Mrs. Jarka involved risk to himself. A bystander who is in the zone of physical danger and who, because of defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. (Rickey v. Chicago Transit Authority (1983), 98 Ill. 2d 546, 457 N.E.2d 1.) The decedent was in the zone of physical danger and the evidence supports a reasonable inference that decedent feared for his safety and that he was endangered as the result of defendant's negligent

conduct.

30. An allegation that the plaintiff suffered "serious injury and illness and psychological damage" adequately pleads physical injury under the bystander rule . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage holds that this allegation adequately states physical injury.)

Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992), no ¶ number: Finally, the court concluded Todd failed to adequately plead physical injury resulting from the emotional distress. Paragraph 22 alleged that Todd suffered "serious injury and illness and psychological damage." This adequately states physical injury. The distinction between "serious injury and illness" and "psychological damage" indicates that "serious injury or illness" is physical in nature and "psychological damage" is the emotional distress.

31. The Third District held that "It is not enough to simply equate physical injury or illness with emotional distress" and that the plaintiff must allege causation between the physical injury or illness and the distress . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim, and the passage requires causation to be alleged.)

Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992), no ¶ number: We find that the allegations of defendants' negligence in plaintiff's amended complaints clearly fail to meet the requirements of Rickey. Plaintiff does not allege that she suffered any physical injury or illness. Plaintiff's complaints allege that she "sustained severe injuries in that she suffered great pain and anguish and severe emotional distress." Plaintiff's allegation merely concludes that she suffered emotional distress. Rickey requires an allegation that plaintiff suffered physical injury or illness as a result of the emotional distress. It is not enough to simply equate physical injury or illness with emotional distress. Plaintiff must allege the causation between her physical injury or illness and the emotional distress which was caused by defendants' negligence. Even if the plaintiff could demonstrate that she suffered "physical injury or illness resulting from emotional distress" (Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5), she failed to allege that she was "in a zone of physical danger and *** [defendants' negligence put her in] reasonable fear for [her] own safety." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5.

32. The Second District held that crying, sleeplessness, increased migraine headaches, and upset feelings, without medical attention, did not satisfy the physical-consequences requirement . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage agrees these manifestations, with no medical attention, were insufficient; the court assumed endangerment without deciding it.)

Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987), no ¶ number: As to whether Sharon Robbins was endangered by the defendants' negligence, we assume without deciding that she was, because, regardless, Sharon in our opinion is not entitled to recover for the negligent infliction of emotional distress because the physical manifestations of her emotional distress were insufficient to warrant recovery. The complaint alleged that Sharon suffered severe and permanent injuries and also great mental pain and suffering. The depositions of Sharon and Joel Robbins revealed that Sharon's physical manifestations were crying, sleeplessness, increased migraine headaches and becoming upset when she viewed pregnant women. Sharon did not seek or receive medical attention. The trial court found these manifestations were insufficient to satisfy the physical consequences requirement established in Rickey. We agree.

33. The Supreme Court held that expert testimony "is not required to support a claim for negligent infliction of emotional distress" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim holding language.)

> **Thornton v. Garcini, 237 Ill. 2d 100 (2009),** no ¶ number: Defendant argues that Hiscott v. Peters, 324 Ill. App. 3d 114 (2001), supports his argument that a plaintiff cannot prove a negligent infliction of emotional distress claim without expert testimony. In Hiscott, the plaintiffs sought to recover for negligent infliction of emotional distress allegedly resulting from an automobile accident but did not present medical proof of emotional distress. Hiscott held that the plaintiffs failed to support their claim of emotional distress with expert medical proof. Hiscott, 324 Ill. App. 3d at 126. Hiscott concluded that this court's statement in Corgan "that it 'has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress' (Corgan, 143 Ill. 2d at 312)" does not mean "that all plaintiffs involved in personal injury actions may seek damages for negligently inflicted emotional distress without medically verifiable proof." Hiscott, 324 Ill. App. 3d at 126. The appellate court concluded that the plaintiffs' testimony "more appropriately [fell] under the definition of 'loss of a normal life' " than emotional distress. Hiscott, 324 Ill. App. 3d at 127. We determine that the court in Hiscott misread the holding in Corgan. Accordingly, we overrule the portions of Hiscott limiting Corgan to its facts and requiring all claims for severe emotional distress to be supported by expert medical proof. See Hiscott, 324 Ill. App. 3d at 126. We hold that expert testimony, while it may assist the jury, is not required to support a claim for negligent infliction of emotional distress.

34. The Supreme Court held that "Corgan did not eliminate the need for a direct victim to allege and prove a contemporaneous physical injury or impact," and that contrary statements in an earlier opinion were obiter dictum . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim, and the passage finds the Pasquale statements to be obiter dictum.)

> **Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 42**: ¶ 42 This court wrote in Pasquale that Corgan had "eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress on a theory of negligence." Pasquale, 166 Ill. 2d at 346. In fact, as previously stated, in Corgan, this court addressed whether a direct victim of negligent infliction of emotional distress had to allege that she suffered a physical symptom of her emotional distress. Corgan, 143 Ill. 2d at 308; see Brogan v. Mitchell International, Inc., 181 Ill. 2d 178, 184-85 (1998). This court held that she did not. Corgan, 143 Ill. 2d at 312. Corgan did not address the impact rule, and in fact there was no question in that case that the plaintiff had suffered a physical impact, as her claim rested on allegations of sexual relations with her therapist. Id. at 300. Thus, Corgan did not eliminate the need for a direct victim to allege and prove a contemporaneous physical injury or impact. Id. at 304, 312; Braun, 175 Ill. at 420; Kapoulas, 11 F.3d at 1382. Further, Pasquale concerned a cause of action based on strict liability, and its mischaracterization of Corgan's holding was not a factor in the issue on appeal in Pasquale. Therefore, we find that this court's statements in Pasquale that Corgan eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress are obiter dictum and thus are not binding authority or precedent.

35. The Supreme Court held that a direct victim's pleading must include "an allegation of a contemporaneous physical injury or impact" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim from ¶ 44.)

> **Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 44**: ¶ 44 As previously determined, the pleading requirements for a direct victim's recovery for negligently inflicted emotional distress include

an allegation of a contemporaneous physical injury or impact. Therefore, since plaintiff did not include an allegation of a physical impact, as a direct victim, she failed to allege a cause of action for negligent infliction of emotional distress. Thus, we conclude that the negligent infliction of emotional distress count of her complaint was properly dismissed.

36. The First District held that physically manifested emotional distress is not the physical injury the impact rule requires, and that "Plaintiffs cannot bootstrap the requirements for bystander liability to sustain their direct victim claim" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage rejects physically manifested distress as the impact rule's physical injury; the quote is verbatim.)

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549, ¶ 80: ¶ 80 On appeal, plaintiffs essentially concede they did not suffer a physical impact or injury, but they maintain that their physical manifestations of emotional distress are sufficient to support a negligent infliction of emotional distress claim for direct victim liability under the present state of Illinois law. Plaintiffs are confused. Plaintiffs need not, but nonetheless do allege that they suffered from physical symptoms or, in other words, manifestations of emotional distress like “depression, anxiety, weight gain, insomnia, headaches, stomach pains, chest pain, fatigue, muscle spasms,” etc. See Schweihs, 2016 IL 120041, ¶ 42. Meanwhile, plaintiffs as direct victims are required to but do not allege any physical injury or impact that was contemporaneous with (and thus necessarily distinct from) their emotional distress. Id. ¶¶ 42-44. In short, there is no direct victim in this case, since none of the plaintiffs suffered a physical impact or injury from defendants’ allegedly negligent acts. Plaintiffs cannot bootstrap the requirements for bystander liability to sustain their direct victim claim. In other words, plaintiffs’ contention that their physically manifested emotional distress is a “physical injury” of the kind required by the impact rule, is not supported by Schweihs, 2016 IL 120041, ¶ 44. Rather, in Schweihs, the Illinois Supreme Court affirmed the dismissal of a negligent infliction of emotional distress claim where the plaintiff alleged that she suffered physical symptoms of emotional distress but “did not plead any physical contact.” Id. ¶¶ 19, 43-44. Schweihs also emphasized that in its prior case, Corgan, there was no question that the plaintiff was a direct victim because she had “suffered a physical impact,” since “her claim rested on allegations of sexual relations with her therapist.” Id. ¶¶ 34, 42. Contrary to plaintiffs’ contention otherwise, physical contact of some sort is absolutely necessary to sustain a direct victim negligent infliction of emotional distress action.

37. The Third District held that a widow whose distress was "a derivative consequence" of negligence directed at her husband's remains was not a direct victim . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage finds the widow's distress was a derivative consequence and that reliance on Corgan was misplaced; it also notes no direct contact.)

Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992), no ¶ number: We find that the facts in the instant appeal are dramatically different from the facts in Corgan. In Corgan, the plaintiff sued the defendant because of the malpractice which he performed directly upon her. Here, the plaintiff can only claim that her emotional distress was a derivative consequence of the allegedly negligent acts performed upon her deceased husband’s remains. We note that the alleged acts of negligence clearly were not performed by the defendants directly upon the plaintiff. There was no direct contact between the plaintiff and defendants. Therefore, we find the plaintiff’s reliance on Corgan is misplaced.

38. The Supreme Court has held that "the zone-of-danger rule applies only in cases where the plaintiff's theory of liability is the negligent infliction of emotional distress,"

not where a tort has already been committed against the plaintiff and distress is an element of damages . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote and paraphrase match ¶ 113.)

> **Clark v. Children's Memorial Hospital, 2011 IL 108656, ¶ 113**: ¶ 113 In light of these considerations, we conclude that we erred in Siemieniec in applying the zone-of-danger rule to wrongful-birth plaintiffs' claims for emotional distress. We overrule Siemieniec on this point, and specifically hold that the zone-of-danger rule applies only in cases where the plaintiff's theory of liability is the negligent infliction of emotional distress. It does not apply where, as in a wrongful-birth case, a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort.

39. The Supreme Court has stated that "it alone can overrule and modify its previous opinion" and that the appellate court could recommend that the Supreme Court "revisit our holding in the case, but it could not overrule it" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Both quoted phrases appear verbatim; the first is the court quoting Price.)

> **Blumenthal v. Brewer, 2016 IL 118781, ¶ 61**: ¶ 61 As explained supra, our decision in Hewitt did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits. Hewitt clearly declared the law on the very issue in this case. Yet, the appellate court in this case declined to follow our ruling, despite the facts being almost identical to Hewitt. This was improper. Under the doctrine of stare decisis, when this court "has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." (Emphasis in original.) (Internal quotation marks omitted.) Price v. Philip Morris, Inc., 2015 IL 117687, ¶ 38. The appellate court had no authority to depart from our decision. It could question Hewitt and recommend that we revisit our holding in the case, but it could not overrule it.

40. The Supreme Court has held that "The appellate court lacks authority to overrule decisions of this court, which are binding on all lower courts" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim.)

> **People v. Artis, 232 Ill. 2d 156 (2009), p. 5**: We reject defendant's forfeiture and estoppel arguments. It is well settled that where the appellate court reverses the judgment of the trial court, and the appellee in that court brings the case to this court as appellant, that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if the issues were not raised before the appellate court. Gallagher v. Lenart, 226 Ill. 2d 208, 232 (2007). In addition, we note that the one-act, one-crime doctrine was established by this court in King. The appellate court lacks authority to overrule decisions of this court, which are binding on all lower courts. See Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 551-52 (1983). Thus, presentation of an argument by the State in the appellate court urging the abandonment of the one-act, one-crime doctrine would have been futile. Under these circumstances, we decline to find that the State is barred by forfeiture or estoppel from arguing that this court should abandon the King doctrine.

41. The Second District rejected an invitation to relax the zone-of-danger rule's physical-consequences requirement because "it is axiomatic that the appellate court lacks the authority to overrule or modify decisions of the supreme court" . [Remote Witness

to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage rejects the invitation to drop the physical-consequences requirement; the quote is verbatim.)

> **Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987)**, no ¶ number: We, of course, must reject plaintiffs' invitation, regardless of our views on the matter, because it is axiomatic that the appellate court lacks the authority to overrule or modify decisions of the supreme court. (Rickey, 98 Ill. 2d at 551-52; see Courtney, 149 Ill. App. 3d at 400.) The physical consequences requirement was clearly and unequivocally established by our supreme court in Rickey and reiterated in the supreme court's recent decision in Siemieniec. We are duty bound to follow controlling decisions of the supreme court and do so here. Abandonment of the physical consequences requirement is a matter reserved for the supreme court.

42. The First District has held that when the Supreme Court has declared the law, "only that court may modify or overrule its previous decisions, and all lower courts are bound to follow that precedent" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim.)

> **Babic v. Village of Lincolnwood, 2022 IL App (1st) 210929**, ¶ 12: ¶ 12 While plaintiff acknowledges that this is the current state of the law, she asks us to "modify the interpretation" of section 3-102(a) to reflect that a municipality has a duty to users who are either intended or permitted users, not both, where there is a condition on its property that is dangerous for ordinary travel. This we cannot do, however, regardless of the merits of any of plaintiff's arguments. It is well settled that, when the supreme court has declared law on any point, only that court may modify or overrule its previous decisions, and all lower courts are bound to follow that precedent. See, e.g., In re Marriage of Budorick, 2020 IL App (1st) 190994, ¶ 86; Doyle v. Hood, 2018 IL App (2d) 171041, ¶ 35; Rosewood Care Center, Inc. v. Caterpillar, Inc., 366 Ill. App. 3d 730, 734 (2006); Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 551 (1983). Accordingly, in order for the Village to have had a duty to Denis in the present case, Denis must have been both an intended and a permitted user of the road on which he was injured, and we need not discuss plaintiff's arguments suggesting a different interpretation of section 3-102(a).

43. Before the zone-of-danger rule, the Fourth District declined to recognize negligent infliction of distress caused solely by witnessing harm to another, holding that recognition "must come from the supreme court of this State" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage declines to recognize a cause of action for distress from witnessing peril or harm to another; the quote is verbatim.)

> **Carlinville National Bank v. Rhoads, 63 Ill. App. 3d 502 (4th Dist. 1978)**, no ¶ number: Clearly, the well-established Illinois view has been to deny recovery for negligently inflicted mental distress unless it arises from and is directly connected with some contemporaneous physical injury. Plaintiff urges this court to now recognize in Illinois a cause of action for the negligent infliction of mental distress not arising from a contemporaneous physical injury but caused solely as the result of witnessing peril or harm to another. Plaintiff argues that the modern trend of decisions in other States and leading tort authorities support such recovery where the factual elements in the instant case are present. While we note that resulting emotional disturbance can be as severe and as certain whether it be caused by an intentional act or by a negligent act, we are bound by decisions of the Illinois Supreme Court. (Agricultural Transportation Association v. Carpentier (1953), 2 Ill. 2d 19, 27, 116 N.E.2d 863, 867; People v. Spahr (1978), 56 Ill. App. 3d 434, 438, 371 N.E.2d 1261, 1264.) Since not all of the members of this panel are motivated to a change in the principle controlling this case, and since the entire panel recognizes and desires to respect our lack of authority to overrule decisions of the supreme court, we conclude that any recognition of negligent infliction of mental distress as a separate tort must come

from the supreme court of this State. Accordingly, the circuit court's dismissal of counts V, VI, and IX of plaintiff's complaint is affirmed.

44. The First District has held that loss of society and grief and sorrow are distinct compensable components of pecuniary injury under the Wrongful Death Act after its 2007 amendment . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says loss of society and grief and sorrow are distinct compensable components after the 2007 amendment.)

Rivas v. Benny's Prime Chophouse, LLC, 2025 IL App (1st) 242044, ¶ 100: ¶ 100 In 2007, however, the legislature amended the Wrongful Death Act to expressly include "damages for grief, sorrow, and mental suffering" as "pecuniary injuries" that were covered by the statute. Compare 740 ILCS 180/2(a) (West 2006), with 740 ILCS 180/2(a) (West 2008). Thus, under the law in effect at the time of the decedent's trial, grief and sorrow were permissible components of the damages award. As the law is clear that "loss of society" and "grief and sorrow" are distinct components of compensable pecuniary injury under the Wrongful Death Act, we cannot find that the trial court's separation of these components in determining the damages award in the instant case constituted an abuse of discretion.

45. A wrongful death action "addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim; the court is quoting Wyness.)

Carter v. SSC Odin Operating Company, 2012 IL 113204, ¶ 34: ¶ 34 A wrongful-death action is perhaps best understood when contrasted with an action under our so-called "Survival Act," now section 27-6 of the Probate Act of 1975. 755 ILCS 5/27-6 (West 2006). The Survival Act allows an action (such as a claim under the Nursing Home Care Act) to survive the death of the injured person. Vincent v. Alden-Park Strathmoor, Inc., 241 Ill. 2d 495, 503 (2011); National Bank of Bloomington v. Norfolk & Western Ry. Co., 73 Ill. 2d 160, 172 (1978). Whereas the Wrongful Death Act created a new cause of action that does not accrue until death, the Survival Act simply allows a representative of the decedent to maintain those statutory or common law actions that had already accrued to the decedent prior to death. Wyness v. Armstrong World Industries, Inc., 131 Ill. 2d 403, 410-12 (1989). In other words: "A survival action allows for recovery of damages for injury sustained by the deceased up to the time of death; a wrongful death action covers the time after death and addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death." Id. at 410. With this background we turn to defendant's arguments.

46. The Supreme Court declined to recognize a common-law action for destruction of the family unit because its differences from the statutory action were "not sufficiently significant to warrant recognition of a new remedy" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (The refusal described was in Hall v. Gillins, recounted in this passage; the memo reads as if the cited decision itself made that holding.)

Knierim v. Izzo, 22 Ill. 2d 73 (1961), no ¶ number: In Hall v. Gillins, 13 Ill.2d 26, a widow and minor child by his next friend sought to maintain an action under the common law for deprivation of support, companionship, guidance, advice, love and affection of the deceased husband-father. We there pointed out (p. 31) : "The gap between the 'damages for destruction of the family unit' that plaintiffs claim, and the 'just compensation with reference to the pecuniary injuries resulting from such death' that the statute allows, is not so wide as the words used would suggest. The term 'pecuniary injuries' has received an interpretation that is broad enough to include most of the items of damage that are claimed

by the plaintiffs in this case." We concluded that the differences between the common-law death action sought to be maintained and the action that is available under the Wrongful Death Act were not sufficiently significant to warrant recognition of a new remedy.

47. The Supreme Court has described an earlier holding that a surviving spouse may not seek loss of consortium under both the Wrongful Death Act and the common law . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage's parenthetical describes Knierim's holding on that point.)

Glenn v. Johnson, 198 Ill. 2d 575 (2002), no ¶ number: The identity of the personal representative who filed the complaint is irrelevant since the representative is merely a nominal party acting on behalf of the true beneficial plaintiffs, who include Glenn in this case. See Wilbon v. D.F. Bast Co., 73 Ill. 2d 58, 68 (1978); VanMeter v. Goldfarb, 317 Ill. 620, 622 (1925); In re Estate of Fields, 588 S.W.2d 50, 53 (Mo. App. 1979) (applying Illinois law). Thus, requiring Glenn to file an amendment to the original complaint for loss of consortium in her individual capacity would be unnecessarily duplicative and have no substantive effect on the cause of action. See Knierim, 22 Ill. 2d at 82-83 (holding that a surviving spouse may not seek damages for loss of consortium under both the Wrongful Death Act and the common law since the differences between the two counts are not sufficiently significant).

48. The First District has held that the Wrongful Death Act "provides the exclusive remedy available when death occurs as a result of tortious conduct" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Quote is verbatim, but it is a background remark citing Murphy in a limitations case, not a holding on exclusivity against other claims.)

Lawler v. University of Chicago Medical Center, 2016 IL App (1st) 143189, ¶ 21: ¶ 21 In short, the Wrongful Death Act provides the exclusive remedy available when death occurs as a result of tortious conduct. Murphy, 56 Ill. 2d at 426. In Wyness, a wrongful death action, the defendants argued that the two-year statute of limitations for personal injury actions should have started running before the decedent's death because the plaintiff knew of the decedent's injuries and the cause of those injuries before death. Our supreme court disagreed, explaining: "The 'injury' which opens the door to initiation of a personal injury suit *** is not the same 'injury' which opens the door to a wrongful death suit. Though both actions require an individual to have been harmed in some way through the actions of another, this injury at the hands of another is not the sole thread which weaves the fabric undergirding both causes of action. A wrongful death action can only be instituted for the benefit of the next of kin who have suffered an 'injury' because a family member has died when that family member's death resulted from an injury wrongfully caused by another. [Citation.] The precipitating 'injury' for the plaintiffs in a wrongful death action, unlike the injury in a personal injury action, is the death; that the death must also be the result of a wrongfully caused injury suffered by the deceased at the hands of another does not alter the analysis. The wrongful injury suffered by the deceased is the distinguishing characteristic of the particular death." (Emphasis added.) Wyness, 131 Ill. 2d at 414-15.

49. The First District has rejected a blanket bar on recovery to prevent double recovery, holding that the trial court should discern between injuries already compensated and those not yet redressed . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage rejects a blanket approach and has the trial court separate compensated from uncompensated injuries.)

Cruz v. Illinois Masonic Medical Center, 271 Ill. App. 3d 383 (1st Dist. 1995), no ¶ number: By submitting this issue to the determination of the trial court, a balance is achieved between the legitimate concern of double recovery, and the widely recognized and accepted belief that a decedent's

spouse and next of kin suffer separate, distinct, and recoverable damages due to the death of their loved one. Such a balance is vastly more appealing, and just, than yielding to defendants' unwarranted fear of double recovery by responding with a "blanket approach" to bar recovery. Equity demands that the trial court be allowed to discern between wrongfully caused injuries which have been compensated, and those which have yet to be redressed.

50. On a section 2-615 motion, the question is whether the allegations, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action, but the court does not admit conclusions unsupported by specific facts . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage states the section 2-615 standard and says conclusions unsupported by specific facts are not admitted.)

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549, ¶ 28: ¶ 28 In reviewing the merits of the instant appeal, we note that motions to dismiss pursuant to sections 2-615 and 2-619 admit all well-pleaded facts together with all reasonable inferences that can be gleaned from those facts. Spillyards v. Abboud, 278 Ill. App. 3d 663, 668 (1996). They do not, however, admit conclusions of law or conclusions of fact unsupported by allegations of specific fact upon which those conclusions rest. Id. A motion to dismiss pursuant to section 2-615 attacks the legal sufficiency of the complaint, and the essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. Cochran v. Securitas Security Services USA, Inc., 2017 IL 121200, ¶ 11. A section 2-619 motion, on the other hand, raises defects or defenses that negate plaintiff's cause of action completely or refute crucial conclusions of law or conclusions of material fact that are unsupported by allegations of specific fact. In re Estate of Shelton, 2017 IL 121199, ¶ 21 (under section 2-619(a)(9), a defendant is entitled to a dismissal if " 'the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim' " (quoting 735 ILCS 5/2-619(a)(9) (West 2010))); Spillyards, 278 Ill. App. 3d at 668. In ruling on a section 2-619 motion, this court may consider all pleadings, supporting documents, and discovery documents, construed in favor of the nonmoving party. Shelton, 2017 IL 121199, ¶ 21; Spillyards, 278 Ill. App. 3d at 668.

51. **The Supreme Court's own descriptions.** The court describes the zone as defined by "such proximity to the accident" that the plaintiff faced a high risk of physical impact . It has quoted, and an appellate court has applied, the description of a zone that "encircles" the accident, with risk "emanating from the accident itself" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (The proximity quote is supported. The 'encircles' description comes from a quoted appellate dissent, and the cited Fourth District passage only quotes it; the application is in a passage not cited.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, e.g., Niederman v. Brodsky (1970), 436 Pa. Super. 401, 261 A.2d 84; Owens v. Childrens Memorial Hospital (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); Robb v. Pennsylvania R.R. Co. (Del. 1965), 210 A.2d 709; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Tobin v. Grossman (1969), 24 N.Y.2d 609, 249 N.E.2d 419; Whetham v. Bismarck Hospital (N.D. 1972), 197 N.W.2d 678; Shelton v. Russell Pipe & Boundary Co. (Tenn. 1978), 570 S.W.2d 861; Guilmette v. Alexander (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a

physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. Dailey v. LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Fournell v. Usher Pest Control Co. (1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment c (1965).

Corgan v. Muehling, 143 Ill. 2d 296 (1991), no ¶ number: "The distinction between a direct victim and a bystander is more than just a play on semantics ***. In Rickey, the supreme court created a cut-off point beyond which a defendant owes no duty, and beyond which, therefore, the defendant is no longer liable for any injuries inflicted. *** [A] defendant owes a duty to only those persons who suffer emotional distress (and accompanying physical manifestations) as a result of being within the 'zone of danger' created by a negligently caused accident. This zone of danger, because it is ereated by the accident, encircles it; hence, the accident is, in effect, the 'nucleus' of the surrounding zone of danger. A person is within an accident's zone of danger (and able to seek recovery under Rickey) when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself." (Emphasis in original.) Lewis, 139 Ill. App. 3d at 639-40 (Linn, J., dissenting).

Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992), no ¶ number: 'The distinction between a direct victim and a bystander is more than just a play on semantics ***. *** [A] defendant owes a duty to only those persons who suffer emotional distress (and accompanying physical manifestations) as a result of being within the "zone of danger" created by a negligently caused accident. This zone of danger, because it is created by the accident, encircles it; hence, the accident is, in effect, the "nucleus" of the surrounding zone of danger. A person is within an accident's zone of danger (and able to seek recovery under Rickey) when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself' " (Emphasis in original.)

52. **The remand in the founding case.** The remand turned on the boy's position on the escalator and whether he was endangered . Physical location, not perception, was the open question. [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage names position, endangerment and reasonable fear as the unknowns; the 'not perception' remark is fair inference since he did witness it.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: Though the appellate court appeared to regard the case as one involving solely emotional distress, the complaint here did allege resultant physical manifestations. Also, the complaint states simply that the plaintiff and his brother were descending on the escalator and that the brother's clothing became entangled in the mechanism of the escalator. We do not know the plaintiff's position or location on the escalator at the time and whether he was endangered by the claimed negligence; we do not know whether he had reasonable fear for his own safety, causing emotional distress.

53. the wife in the grandstands who watched her husband in the infield ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage gives the grandstand and infield facts.)

Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998), no ¶ number: A bystander, such as plaintiff, cannot recover for negligent infliction of emotional distress unless she establishes that: (1) she was in the "zone of danger"; (2) she had a reasonable fear for her own safety; and (3) she suffered physical injury or illness resulting from the alleged emotional distress. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Count II fails to allege any of these requisite elements. In order to be in the "zone of danger" a bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to

[her] of physical impact." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5. Here plaintiff alleges that she was in the grandstands when she witnessed defendants' negligent failure to provide prompt medical assistance to her husband, who was in the infield of the track. There was certainly no risk of physical impact to her. Moreover, count II fails to allege that plaintiff had a reasonable fear for her own safety or that she suffered any physical injury or illness.

54. the plaintiff whose claim rested on witnessing injury to her companion and on the loss of the relationship ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Passage shows the claim rested on witnessing injury to Mr. Carroll and loss of the relationship, but never calls him her 'companion' or says how near she was.)

Alexander v. DePaepe, 148 Ill. App. 3d 831 (2d Dist. 1986), no ¶ number: Plaintiff in the instant case pleaded that she has and will experience physical illness resulting from emotional distress negligently caused by defendant as a consequence of "[pjlaintiff witnessing the injury to Mr. Carroll; and [pjlaintiff being forever deprived of any continued or further relationship with Mr. Carroll." Plaintiff nowhere pleaded that her emotional distress rose from fear for her own safety or from being put at high risk of physical impact. Thus, under Rickey, plaintiff's complaint did not adequately state a cause of action.

55. parents who feared for their child but not themselves . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Passage says only that the Seefs did not plead fear for their own safety; that they feared for their child is inferred from the Robbins analogy in another paragraph.)

Seef v. Sutkus, 205 Ill. App. 3d 312 (1st Dist. 1990), no ¶ number: The Robbins court did not treat the mother and child as a single entity. Nor did that court determine that the mother was, ipso facto, in the same zone of danger as her unborn child. Similarly, in this case, plaintiffs have not pleaded that Mrs. Seef feared for her own safety within a zone of danger. Thus, like the plaintiffs in Robbins, the Seefs did not plead the elements of negligent infliction of emotional distress.

56. **Successful plaintiffs share one fact our client lacks.** Each was physically endangered: in the boat's path , beside an electrified body after being shocked , near a lurching cab . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Each passage shows physical endangerment: the boat's path (as alleged), prior shock and further risk, and the lurching cab.)

Borcia v. Hatyina, 2015 IL App (2d) 140559, ¶ 11: ¶ 11 With respect to count VII, related to Erin, plaintiffs alleged that Antonio and Erin were riding on the same inflatable tube. When Antonio fell off of the tube, Erin was in close proximity to him. She observed Hatyina strike and kill her brother with the boat. Erin was less than 50 feet from the collision and in the direct path of the boat, and she feared that the boat was going to hit her too.

Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992), no ¶ number: Todd was clearly in such proximity to the accident that there was a high risk of physical impact. Todd had already been shocked when he grabbed his grandfather, and by remaining near the body, a chance existed of subsequent shocks from the electricity as well as burns or smoke inhalation from the flames. Moreover, Todd could reasonably fear for his own safety given the unpredictable nature of electricity and fire. Paragraphs 19 and 20 alleged Todd feared electrocution, which established a fear for his own safety.

Jarka v. Yellow Cab Co., 265 Ill. App. 3d 366 (1st Dist. 1994), no ¶ number: It is possible for a person to be both a direct victim and a bystander. (Hayes v. Illinois Power Co. (1992), 225 Ill. App. 3d

819, 825, 587 N.E.2d 559.) Mrs. Jarka testified that as she was seated in the cab, the cabdriver ordered her out, yelled obscenities, and attempted to push her luggage out of the cab. Decedent abandoned his intention to enter the cab and attempted to help Mrs. Jarka to extricate herself from the cab. There is evidence that the cab actually lurched forward near decedent as the cabdriver got out of the cab swearing and yelling at the starter. It was reasonable for decedent to fear for his own safety as the result of the cabdriver's conduct towards Mrs. Jarka. Decedent's efforts to rescue Mrs. Jarka involved risk to himself. A bystander who is in the zone of physical danger and who, because of defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. (Rickey v. Chicago Transit Authority (1983), 98 Ill. 2d 546, 457 N.E.2d 1.) The decedent was in the zone of physical danger and the evidence supports a reasonable inference that decedent feared for his safety and that he was endangered as the result of defendant's negligent conduct.

57. Recall that the remand in the founding case turned on the plaintiff's location and whether he was endangered . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage identifies position or location and endangerment as unknown.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: Though the appellate court appeared to regard the case as one involving solely emotional distress, the complaint here did allege resultant physical manifestations. Also, the complaint states simply that the plaintiff and his brother were descending on the escalator and that the brother's clothing became entangled in the mechanism of the escalator. We do not know the plaintiff's position or location on the escalator at the time and whether he was endangered by the claimed negligence; we do not know whether he had reasonable fear for his own safety, causing emotional distress.

58. If the parent was close enough to face a high risk of impact (for example, a vehicle leaving the road toward the house) and feared for the parent's own safety, those facts should be pleaded specifically . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says conclusions unsupported by specific facts are not admitted, which supports pleading specific facts; the house example is the memo's own.)

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549, ¶ 28: ¶ 28 In reviewing the merits of the instant appeal, we note that motions to dismiss pursuant to sections 2-615 and 2-619 admit all well-pleaded facts together with all reasonable inferences that can be gleaned from those facts. Spillyards v. Abboud, 278 Ill. App. 3d 663, 668 (1996). They do not, however, admit conclusions of law or conclusions of fact unsupported by allegations of specific fact upon which those conclusions rest. Id. A motion to dismiss pursuant to section 2-615 attacks the legal sufficiency of the complaint, and the essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. Cochran v. Securitas Security Services USA, Inc., 2017 IL 121200, ¶ 11. A section 2-619 motion, on the other hand, raises defects or defenses that negate plaintiff's cause of action completely or refute crucial conclusions of law or conclusions of material fact that are unsupported by allegations of specific fact. In re Estate of Shelton, 2017 IL 121199, ¶ 21 (under section 2-619(a)(9), a defendant is entitled to a dismissal if " 'the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim' " (quoting 735 ILCS 5/2-619(a)(9) (West 2010))); Spillyards, 278 Ill. App. 3d at 668. In ruling on a section 2-619 motion, this court may consider all pleadings, supporting documents, and discovery documents, construed in favor of the nonmoving party. Shelton, 2017 IL 121199, ¶ 21; Spillyards, 278 Ill. App. 3d at 668.

59. A parent at home but far from the crash's path stands where the grandstand plaintiff stood . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Analogy only; the passage supplies the base facts (grandstand plaintiff, no risk of impact).)

> **Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998)**, no ¶ number: A bystander, such as plaintiff, cannot recover for negligent infliction of emotional distress unless she establishes that: (1) she was in the "zone of danger"; (2) she had a reasonable fear for her own safety; and (3) she suffered physical injury or illness resulting from the alleged emotional distress. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Count II fails to allege any of these requisite elements. In order to be in the "zone of danger" a bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to [her] of physical impact." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5. Here plaintiff alleges that she was in the grandstands when she witnessed defendants' negligent failure to provide prompt medical assistance to her husband, who was in the infield of the track. There was certainly no risk of physical impact to her. Moreover, count II fails to allege that plaintiff had a reasonable fear for her own safety or that she suffered any physical injury or illness.

60. The Supreme Court described those factors as similar to an out-of-state foreseeability test and adopted the zone-of-physical-danger rule instead . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Passage says the factors are similar to those in Dillon; 'foreseeability test' is the memo's characterization.)

> **Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983)**, no ¶ number: The conclusion of the appellate court panel that the complaint here stated a cause of action was grounded on these factors: (1) the minor plaintiff was near the scene at the time of the accident; (2) there was a direct emotional impact when he witnessed the accident; and (3) the plaintiff and the victim were close relatives. The standard suggested by the court contains factors similar to those set out in Dillon v. Legg (1968), 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72. In that case, however, which the appellate panel, inter alia, refers to, the court stated: "[W]e deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case." (68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80.) It appears from the opinion of the appellate court that the panel treated the complaint as one in which damages were sought solely for "emotional distress," and that it would allow recovery for emotional disturbance or distress alone.
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> **Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983)**, no ¶ number: The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, e.g., Niederman v. Brodsky (1970), 436 Pa. Super. 401, 261 A.2d 84; Owens v. Childrens Memorial Hospital (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); Robb v. Pennsylvania R.R. Co. (Del. 1965), 210 A.2d 709; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Tobin v. Grossman (1969), 24 N.Y.2d 609, 249 N.E.2d 419; Whetham v. Bismarck Hospital (N.D. 1972), 197 N.W.2d 678; Shelton v. Russell Pipe & Boundary Co. (Tenn. 1978), 570 S.W.2d 861; Guilmette v. Alexander (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. Dailey v. LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Fournell v. Usher Pest Control Co.

(1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment c (1965).

61. It later confirmed that its rule "stated nothing regarding foreseeability" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim.)

> **Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995)**, no ¶ number: In Rickey, 98 Ill. 2d 546, this court held, in the case of a bystander, that a recovery for emotional distress would be permitted in the case of negligent conduct without a requirement that the plaintiff show a contemporaneous injury or impact. (Cf. Braun v. Craven (1898), 175 Ill. 401 (establishing the impact rule).) In place of the impact rule, Rickey adopted the zone-of-physical-danger rule which had been applied by a majority of jurisdictions considering the matter. Under Rickey's new rule, a bystander in a zone of physical danger, who reasonably feared for his own safety because of the defendant's negligence, was allowed to recover for physical injury or illness which manifested as a result of emotional distress. Although plaintiff argues otherwise, Rickey stated nothing regarding foreseeability.

62. the Supreme Court's explanation that its bystander plaintiffs were those who "witnessed or observed" harm to a relative , combined with its insistence on fear for one's own safety ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (The 'witnessed or observed' quote is supported, but C008.7 only notes a lack of evidence of fear for his own safety while classifying the case; calling that an 'insistence' overstates it.)

> **Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995)**, no ¶ number: Nonetheless, it is clear that David's proofs at trial showed him to be a bystander and not a direct victim as that distinction is recognized under Illinois law. (See Rickey, 98 Ill. 2d 546 (bystander case); Siemieniec v. Lutheran General Hospital (1987), 117 Ill. 2d 230 (bystander case); cf. Corgan v. Muehling, 143 Ill. 2d 296 (direct victim case).) In Rickey and Siemieniec, the plaintiffs' alleged emotional distress resulted from their having witnessed or observed the physically harmful effects of the defendant's negligence on a close relative. In Corgan, the plaintiff's emotional distress was the direct consequence of the defendant's negligent conduct; the plaintiff's emotional distress did not result from injury to another.
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> **Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995)**, no ¶ number: David's evidence here did not show that he suffered emotional distress as an independent or direct consequence of the failure of F&B's bellhousing. There was no evidence that he greatly feared for his safety beyond that experienced as a result of his wife's accident. We conclude that this case represents a bystander case, despite David's arguments urging expansion beyond these facts. Thus, we confine our inquiry to whether the elimination of the contemporaneous injury or impact requirement for bystander recovery for emotional distress in the area of negligence meaningfully translates into an elimination of the element of physical harm for a bystander's recovery for emotional distress under strict liability theory.

63. the appellate statement that the zone-of-danger rule did not reach "plaintiffs whose stress arises from watching another's injury or suffering" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Quote is verbatim.)

> **Alexander v. DePaepe, 148 Ill. App. 3d 831 (2d Dist. 1986)**, no ¶ number: While a bystander's claim arises out of a fact situation in which there is a direct injury to another person, such a claim is not a consequence of the other person's injury. Nor are the bystander's injuries caused by the other person's injuries. Rickey, rather than creating a new cause of action, merely extended an existing cause of action beyond those bystanders who actually suffered some physical impact to those bystanders who were put at great risk by defendant's negligence. While the case expanded the scope of potential plaintiffs in

negligent infliction of emotional distress actions, it did not widen the scope so greatly as to include plaintiffs whose stress arises from watching another's injury or suffering.

64. arrived afterward and found the decedent ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage describes Johnston, where the wife and daughter unexpectedly found the decedent dead.)

Koeller v. Cook County, 180 Ill. App. 3d 425 (1st Dist. 1989), no ¶ number: The holding in Courtney comports with numerous other decisions applying the standard set out in Rickey. E.g., Johnston v. St. Anne's Hospital West, Inc. (1986), 146 Ill. App. 3d 763, 497 N.E.2d 408 (complaint properly dismissed for failure to state a cause of action for negligent infliction of emotional distress where plaintiffs, decedent's wife and daughter, could not have shown that they were in a zone of physical danger causing them reasonable fear for their own safety where the hospital failed to promptly inform them of the decedent's death and they unexpectedly found him dead in his hospital room); Lewis v. Westinghouse Electric Corp. (1985), 139 Ill. App. 3d 634, 487 N.E.2d 1071 (to state a cause of action under the zone of physical danger rule, the plaintiff, whether bystander or direct victim, must have been in such proximity to the accident that there was a high risk of physical impact so as to cause her reasonable fear for her own safety and plaintiff must also show a physical injury or illness resulting from the emotional distress for which recovery is sought); Gihring v. Butcher (1985), 138 Ill. App. 3d 976, 487 N.E.2d 75 (the zone of physical danger rule requiring a showing that defendant's negligence placed plaintiff in reasonable fear for her own safety precluded plaintiff's action against her husband's former medical and psychiatric physicians for negligent infliction of emotional distress arising after the plaintiff found her husband dead in their garage as a result of suicide); see also Hammond, v. Lane (1987), 162 Ill. App. 3d 17, 516 N.E.2d 470 (plaintiff who did not allege that she was in a zone of danger and had reasonable fear for her personal safety failed to state a cause of action for negligent infliction of emotional distress resulting in physical illness or injury from alleged sexual contacts by her psychiatrist).

65. did not witness the acts at all ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage notes the plaintiff did not allege she witnessed the acts.)

Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992), no ¶ number: Here, plaintiff did not allege that she witnessed any of defendants' alleged acts or omissions, or that she was placed in a zone of physical danger which caused her to fear for her own personal safety. Therefore, we find the plaintiff's allegations are insufficient to establish that she was a bystander within the zone of physical danger.

66. could not remember the collision . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (The minors had no memory, but they were occupants directly injured in the collision, not remote or after-the-fact perceivers, so they fit the memo's list poorly.)

Turner v. Williams, 326 Ill. App. 3d 541 (2d Dist. 2001), no ¶ number: Since the minor plaintiffs were directly injured in the automobile collision and have no memory of the collision, all damages they sustained were a consequence of their own injuries. As persons directly injured as a result of the alleged negligent actions of defendants in colliding with the vehicle driven by Jack Wong, the minor plaintiffs are precluded from recovering damages under the zone of danger rule enunciated in Rickey. See Corgan v. Muehling, 143 Ill. 2d 296 (1991) (holding that the Rickey zone of danger test does not apply to plaintiffs that are directly injured and are not merely bystanders). Although it has been held that a plaintiff who is both a direct victim and a bystander can recover for both elements of damage in separate counts, plaintiffs are precluded from doing so in this case. Both minor plaintiffs have no memory of the collision and, therefore, could not have sustained emotional distress from being in the zone of physical danger in the collision. See Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (1992).

Furthermore, plaintiffs' complaint does not allege the negligent infliction of emotional distress.

67. The packet also contains a nineteenth-century decision, under the since-abandoned impact rule, quoting an earlier case that denied recovery for fright from a quarrel heard but not seen . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage quotes Phillips v. Dickerson denying liability for fright from a quarrel out of sight but within hearing.)

Braun v. Craven, 175 Ill. 401 (1898), no ¶ number: In Phillips v. Dickerson, 85 Ill. 11, it was said (p. 13): "From the evidence it must be taken that the cause of this premature birth was the fear growing out of the "violence of the defendant. The question is, whether such a result was such a natural and proximate consequence of defendant's conduct as to make him liable therefor. * ■ * * The plaintiff sues, here, for the effect of a frig'ht which she received by reason of a quarrel between others. I,t took place between the defendant and the husband and boy, alone, outside of the house, upon the porch, out of the presence and out of the sig'ht of the plaintiff, although in her hearing', she being in bed in a room some five or six feet from where the difficulty occurred, but the evidence does not show that the defendant knew the latter fact or condition of the plaintiff. * * * The result complained of was not such a consequence as, in the ordinary course of things, would flow from defendant's conduct. He had no reason to apprehend that what took place between himself and Phillips, the husband, and the boy, alone, would occasion danger to some third person who was not present, through frig'ht. The injury in question not being one which the defendant could reasonably be expected to-anticipate as likely to ensue from his conduct, we cannot regard it as the natural consequence thereof, for which defendant is legally responsible."

68. Its impact rule was replaced for bystanders . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says the impact rule was abandoned in favor of the zone-of-danger rule for bystanders.)

Cochran v. Securitas Security Systems USA Inc., 2017 IL 121200, ¶ 15: ¶ 15 Thus, Mensinger never expressly decided whether a claim for tortious interference with the right to possess a corpse may be stated absent allegations of wilful and wanton misconduct. Just as importantly, to the extent that Mensinger discussed that question at all, it did so in the context of a rule that this court has since refined and clarified. When Mensinger was decided, the settled rule in Illinois was that, absent a contemporaneous physical impact or injury to the plaintiff, there could be no recovery for negligently caused emotional distress. See, e.g., Chicago Consolidated Traction Co. v. Schritter, 222 Ill. 364, 368 (1906); Braun v. Craven, 175 Ill. 401, 420 (1898). This rule applied with equal force both to the direct victims of a defendant's negligence and to bystanders who witnessed the injury of another. See Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 550 (1983). In 1983, however, this court abandoned the so-called "impact rule" in favor of the zone-of-danger rule for cases involving bystanders. Id. at 555. Under the zone-of-danger rule: "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander [in addition] must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." Id. Although some confusion subsequently ensued as to whether Rickey eliminated the impact rule for direct victims as well as for bystanders, this court has since clarified that the impact rule remains the law for direct victims of a defendant's negligence, whereas bystanders' claims are now governed by the zone-of-danger rule. Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 42.

69. A general allegation of "serious injury and illness" has been held adequate . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage holds that 'serious injury and illness' adequately pleads physical injury.)

> **Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992)**, no ¶ number: Finally, the court concluded Todd failed to adequately plead physical injury resulting from the emotional distress. Paragraph 22 alleged that Todd suffered "serious injury and illness and psychological damage." This adequately states physical injury. The distinction between "serious injury and illness" and "psychological damage" indicates that "serious injury or illness" is physical in nature and "psychological damage" is the emotional distress.

70. Equating illness with distress is not enough . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage says it is not enough to equate physical injury or illness with emotional distress.)

> **Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992)**, no ¶ number: We find that the allegations of defendants' negligence in plaintiff's amended complaints clearly fail to meet the requirements of Rickey. Plaintiff does not allege that she suffered any physical injury or illness. Plaintiff's complaints allege that she "sustained severe injuries in that she suffered great pain and anguish and severe emotional distress." Plaintiff's allegation merely concludes that she suffered emotional distress. Rickey requires an allegation that plaintiff suffered physical injury or illness as a result of the emotional distress. It is not enough to simply equate physical injury or illness with emotional distress. Plaintiff must allege the causation between her physical injury or illness and the emotional distress which was caused by defendants' negligence. Even if the plaintiff could demonstrate that she suffered "physical injury or illness resulting from emotional distress" (Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5), she failed to allege that she was "in a zone of physical danger and *** [defendants' negligence put her in] reasonable fear for [her] own safety." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5.

71. Transitory symptoms without treatment have been held insufficient on a developed record . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Passage lists crying, sleeplessness, migraines and no medical attention, found on depositions; 'transitory' is the memo's label, and endangerment was only assumed.)

> **Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987)**, no ¶ number: As to whether Sharon Robbins was endangered by the defendants' negligence, we assume without deciding that she was, because, regardless, Sharon in our opinion is not entitled to recover for the negligent infliction of emotional distress because the physical manifestations of her emotional distress were insufficient to warrant recovery. The complaint alleged that Sharon suffered severe and permanent injuries and also great mental pain and suffering. The depositions of Sharon and Joel Robbins revealed that Sharon's physical manifestations were crying, sleeplessness, increased migraine headaches and becoming upset when she viewed pregnant women. Sharon did not seek or receive medical attention. The trial court found these manifestations were insufficient to satisfy the physical consequences requirement established in Rickey. We agree.

72. Allegations of continued medical and psychological treatment supported a bystander claim . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage shows allegations of continued medical and psychological treatment in a pleading the court found sufficient.)

> **Borcia v. Hatyina, 2015 IL App (2d) 140559**, ¶ 45: ¶ 45 The pleadings allege that Erin was a bystander to, not a direct victim of, Melbourn's alleged negligence. Plaintiffs' complaint alleged that

Melbourn's conduct of encouraging Hatyina to operate the boat at unsafe speeds while in a severely intoxicated state caused Erin to be in a zone of physical danger during the accident wherein she reasonably feared for her own safety, given the proximity to her brother on the lake and right after witnessing Hatyina's boat strike and kill her brother. Plaintiffs' complaint also alleged that, by being in the zone of physical danger, Erin suffered physical injury and emotional distress, which resulted in the need for continued medical and psychological treatment and counseling.

73. Expert testimony is not required to prove a negligent-infliction claim . The packet's passage arose on a claim the trial evidence tied to the defendant's delay rather than to a relative's death , and the packet does not show whether the court addressed the bystander physical-illness element itself. [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (C006.2 holds expert testimony is not required; C006.4 ties the distress to the delay, not the death.)

Thornton v. Garcini, 237 Ill. 2d 100 (2009), no ¶ number: Defendant argues that Hiscott v. Peters, 324 Ill. App. 3d 114 (2001), supports his argument that a plaintiff cannot prove a negligent infliction of emotional distress claim without expert testimony. In Hiscott, the plaintiffs sought to recover for negligent infliction of emotional distress allegedly resulting from an automobile accident but did not present medical proof of emotional distress. Hiscott held that the plaintiffs failed to support their claim of emotional distress with expert medical proof. Hiscott, 324 Ill. App. 3d at 126. Hiscott concluded that this court's statement in Corgan "that it 'has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress' (Corgan, 143 Ill. 2d at 312)" does not mean "that all plaintiffs involved in personal injury actions may seek damages for negligently inflicted emotional distress without medically verifiable proof." Hiscott, 324 Ill. App. 3d at 126. The appellate court concluded that the plaintiffs' testimony "more appropriately [fell] under the definition of 'loss of a normal life' " than emotional distress. Hiscott, 324 Ill. App. 3d at 127. We determine that the court in Hiscott misread the holding in Corgan. Accordingly, we overrule the portions of Hiscott limiting Corgan to its facts and requiring all claims for severe emotional distress to be supported by expert medical proof. See Hiscott, 324 Ill. App. 3d at 126. We hold that expert testimony, while it may assist the jury, is not required to support a claim for negligent infliction of emotional distress.

Thornton v. Garcini, 237 Ill. 2d 100 (2009), no ¶ number: Here, plaintiff's testimony established that the emotional distress she experienced derived directly from defendant's delay in delivering the deceased infant and not from the death of her child. Plaintiff testified that she was depressed, and could not eat, or sleep. She could only think about laying there for an hour and 10 minutes, and there was nothing she could do but "sit there like that with my baby." She further testified that she has these thoughts "[a]ll the time" and she has had thoughts of suicide because "[i]t was so horrible" and "I'm always reminded of that hour and ten minutes that I sat there with him."

74. **No impact.** A direct victim must allege a contemporaneous physical injury or impact . Statements suggesting otherwise were dicta . The parent suffered no impact. Physically manifested distress does not substitute, and the First District has refused to let plaintiffs "bootstrap" bystander elements into a direct-victim claim . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Each point matches: the impact requirement, the Pasquale statements as dicta, and the bootstrapping rejection.)

Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 44: ¶ 44 As previously determined, the pleading requirements for a direct victim's recovery for negligently inflicted emotional distress include an allegation of a contemporaneous physical injury or impact. Therefore, since plaintiff did not include an allegation of a physical impact, as a direct victim, she failed to allege a cause of action for negligent infliction of emotional distress. Thus, we conclude that the negligent infliction of emotional distress

count of her complaint was properly dismissed.

Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 42: ¶ 42 This court wrote in Pasquale that Corgan had "eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress on a theory of negligence." Pasquale, 166 Ill. 2d at 346. In fact, as previously stated, in Corgan, this court addressed whether a direct victim of negligent infliction of emotional distress had to allege that she suffered a physical symptom of her emotional distress. Corgan, 143 Ill. 2d at 308; see Brogan v. Mitchell International, Inc., 181 Ill. 2d 178, 184-85 (1998). This court held that she did not. Corgan, 143 Ill. 2d at 312. Corgan did not address the impact rule, and in fact there was no question in that case that the plaintiff had suffered a physical impact, as her claim rested on allegations of sexual relations with her therapist. Id. at 300. Thus, Corgan did not eliminate the need for a direct victim to allege and prove a contemporaneous physical injury or impact. Id. at 304, 312; Braun, 175 Ill. at 420; Kapoulas, 11 F.3d at 1382. Further, Pasquale concerned a cause of action based on strict liability, and its mischaracterization of Corgan's holding was not a factor in the issue on appeal in Pasquale. Therefore, we find that this court's statements in Pasquale that Corgan eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress are obiter dictum and thus are not binding authority or precedent.

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549, ¶ 80: ¶ 80 On appeal, plaintiffs essentially concede they did not suffer a physical impact or injury, but they maintain that their physical manifestations of emotional distress are sufficient to support a negligent infliction of emotional distress claim for direct victim liability under the present state of Illinois law. Plaintiffs are confused. Plaintiffs need not, but nonetheless do allege that they suffered from physical symptoms or, in other words, manifestations of emotional distress like "depression, anxiety, weight gain, insomnia, headaches, stomach pains, chest pain, fatigue, muscle spasms," etc. See Schweihs, 2016 IL 120041, ¶ 42. Meanwhile, plaintiffs as direct victims are required to but do not allege any physical injury or impact that was contemporaneous with (and thus necessarily distinct from) their emotional distress. Id. ¶¶ 42-44. In short, there is no direct victim in this case, since none of the plaintiffs suffered a physical impact or injury from defendants' allegedly negligent acts. Plaintiffs cannot bootstrap the requirements for bystander liability to sustain their direct victim claim. In other words, plaintiffs' contention that their physically manifested emotional distress is a "physical injury" of the kind required by the impact rule, is not supported by Schweihs, 2016 IL 120041, ¶ 44. Rather, in Schweihs, the Illinois Supreme Court affirmed the dismissal of a negligent infliction of emotional distress claim where the plaintiff alleged that she suffered physical symptoms of emotional distress but "did not plead any physical contact." Id. ¶¶ 19, 43-44. Schweihs also emphasized that in its prior case, Corgan, there was no question that the plaintiff was a direct victim because she had "suffered a physical impact," since "her claim rested on allegations of sexual relations with her therapist." Id. ¶¶ 34, 42. Contrary to plaintiffs' contention otherwise, physical contact of some sort is absolutely necessary to sustain a direct victim negligent infliction of emotional distress action.

75. **Derivative distress.** The parent's distress derives from injury to the child. The Supreme Court classifies distress from witnessing harm to a close relative as the bystander paradigm . The Third District held that distress that is "a derivative consequence" of negligence aimed elsewhere does not make the plaintiff a direct victim . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Pasquale classifies witnessing harm to a relative as a bystander case; Leonard rejects direct-victim status for derivative distress (also noting no impact or contact).)

Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995), no ¶ number: Nonetheless, it is clear that David's proofs at trial showed him to be a bystander and not a direct victim as that distinction is recognized under Illinois law. (See Rickey, 98 Ill. 2d 546 (bystander case); Siemieniec v. Lutheran General Hospital (1987), 117 Ill. 2d 230 (bystander case); cf. Corgan v. Muehling, 143 Ill. 2d 296 (direct victim case).) In Rickey and Siemieniec, the plaintiffs' alleged emotional distress resulted from

their having witnessed or observed the physically harmful effects of the defendant's negligence on a close relative. In Corgan, the plaintiff's emotional distress was the direct consequence of the defendant's negligent conduct; the plaintiff's emotional distress did not result from injury to another.

Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992), no ¶ number: We find that the facts in the instant appeal are dramatically different from the facts in Corgan. In Corgan, the plaintiff sued the defendant because of the malpractice which he performed directly upon her. Here, the plaintiff can only claim that her emotional distress was a derivative consequence of the allegedly negligent acts performed upon her deceased husband's remains. We note that the alleged acts of negligence clearly were not performed by the defendants directly upon the plaintiff. There was no direct contact between the plaintiff and defendants. Therefore, we find the plaintiff's reliance on Corgan is misplaced.

76. Older appellate statements that a direct victim need allege only ordinary negligence elements must be read with the later Supreme Court holding that the impact rule still governs direct victims . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Doe v. Noe states the ordinary-negligence-elements rule; Schweihs requires impact for direct victims.)

Doe v. Noe, 293 Ill. App. 3d 1099 (1st Dist. 1997), no ¶ number: To state a cause of action for the negligent infliction of emotional distress, a direct victim (as distinguished from a bystander) needs only allege the same elements as any other cause of action based on negligence. Corgan v. Muehling, 143 Ill. 2d 296, 306 (1991) (held that a patient plaintiff can allege a cause of action for negligent infliction of emotional distress against her psychotherapist for his having sexual relations with her). A negligence complaint, "to be legally sufficient, must set out facts that establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." Corgan, 143 Ill. 2d at 306. To recover for negligent infliction of emotional distress, an allegation of physical injury, illness, manifestation, or symptoms as a result of the emotional distress is not required. Corgan, 143 Ill. 2d at 308-12; Doe v. Roe, 289 Ill. App. 3d 116 (1997); Campbell v. A.C. Equipment Services Corp., 242 Ill. App. 3d 707, 714 (1993). For purposes of the second certified question, the elements of duty and breach of duty are assumed.

Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 44: ¶ 44 As previously determined, the pleading requirements for a direct victim's recovery for negligently inflicted emotional distress include an allegation of a contemporaneous physical injury or impact. Therefore, since plaintiff did not include an allegation of a physical impact, as a direct victim, she failed to allege a cause of action for negligent infliction of emotional distress. Thus, we conclude that the negligent infliction of emotional distress count of her complaint was properly dismissed.

77. Those decisions allow emotional distress as damages where a different tort has been committed against the plaintiff . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Both passages say the zone rule does not apply where a tort was committed against the plaintiff and distress is an element of its damages.)

Clark v. Children's Memorial Hospital, 2011 IL 108656, ¶ 113: ¶ 113 In light of these considerations, we conclude that we erred in Siemieniec in applying the zone-of-danger rule to wrongful-birth plaintiffs' claims for emotional distress. We overrule Siemieniec on this point, and specifically hold that the zone-of-danger rule applies only in cases where the plaintiff's theory of liability is the negligent infliction of emotional distress. It does not apply where, as in a wrongful-birth case, a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort.

Cochran v. Securitas Security Systems USA Inc., 2017 IL 121200, ¶ 23: ¶ 23 In light of Clark, the

critical question in the case before us is not whether plaintiff's third amended complaint alleges facts showing that she herself either suffered a contemporaneous injury or falls within the zone-of-danger rule. Rather, the critical question is whether the theory of liability set forth in that complaint is NIED or, as in a wrongful birth case, some other tort for which emotional distress is simply an element of plaintiff's damages. This is because if plaintiff's claim falls into the latter of these categories, there is no principled reason to disallow the recovery of emotional distress damages upon proof of ordinary negligence. This court has never held that wilful and wanton misconduct is an essential prerequisite for the recovery of emotional distress damages in cases involving interference with the right to possess a corpse, and in fact Clark would presume exactly the opposite.

78. **The grief remedy.** The Act expressly allows "damages for grief, sorrow, and mental suffering" to next of kin . Those damages are distinct from loss of society . The wrongful death action compensates the next of kin's own injury from the loss . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Rivas says grief is distinct from loss of society; Carter, quoting Wyness, says the action addresses the next of kin's injury from the loss.)

740 ILCS 180/2 (statute or rule; its text follows the decisions)

Rivas v. Benny's Prime Chophouse, LLC, 2025 IL App (1st) 242044, ¶ 100: ¶ 100 In 2007, however, the legislature amended the Wrongful Death Act to expressly include "damages for grief, sorrow, and mental suffering" as "pecuniary injuries" that were covered by the statute. Compare 740 ILCS 180/2(a) (West 2006), with 740 ILCS 180/2(a) (West 2008). Thus, under the law in effect at the time of the decedent's trial, grief and sorrow were permissible components of the damages award. As the law is clear that "loss of society" and "grief and sorrow" are distinct components of compensable pecuniary injury under the Wrongful Death Act, we cannot find that the trial court's separation of these components in determining the damages award in the instant case constituted an abuse of discretion.

Carter v. SSC Odin Operating Company, 2012 IL 113204, ¶ 34: ¶ 34 A wrongful-death action is perhaps best understood when contrasted with an action under our so-called "Survival Act," now section 27-6 of the Probate Act of 1975. 755 ILCS 5/27-6 (West 2006). The Survival Act allows an action (such as a claim under the Nursing Home Care Act) to survive the death of the injured person. Vincent v. Alden-Park Strathmoor, Inc., 241 Ill. 2d 495, 503 (2011); National Bank of Bloomington v. Norfolk & Western Ry. Co., 73 Ill. 2d 160, 172 (1978). Whereas the Wrongful Death Act created a new cause of action that does not accrue until death, the Survival Act simply allows a representative of the decedent to maintain those statutory or common law actions that had already accrued to the decedent prior to death. Wyness v. Armstrong World Industries, Inc., 131 Ill. 2d 403, 410-12 (1989). In other words: "A survival action allows for recovery of damages for injury sustained by the deceased up to the time of death; a wrongful death action covers the time after death and addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death." Id. at 410. With this background we turn to defendant's arguments.

79. **The policy argument cuts against extension.** The Supreme Court has declined to recognize a common-law death remedy whose differences from the statutory action were not significant enough to warrant a new remedy . It has described an earlier refusal to allow consortium under both the Act and the common law . The First District has called the Act the exclusive remedy when death results from tortious conduct . A defendant will argue that a remote-witness negligent-infliction claim seeks the same grief the Act already compensates. [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Knierim recounts Hall; Glenn describes Knierim's consortium holding; Lawler states the exclusive-remedy line (in passing). The last

sentence is argument.)

Knierim v. Izzo, 22 Ill. 2d 73 (1961), no ¶ number: In Hall v. Gillins, 13 Ill.2d 26, a widow and minor child by his next friend sought to maintain an action under the common law for deprivation of support, companionship, guidance, advice, love and affection of the deceased husband-father. We there pointed out (p. 31) : “The gap between the 'damages for destruction of the family unit’ that plaintiffs claim, and the ‘just compensation with reference to the pecuniary injuries resulting from such death’ that the statute allows, is not so wide as the words used would suggest. The term ‘pecuniary injuries’ has received an interpretation that is broad enough to include most of the items of damage that are claimed by the plaintiffs in this case.” We concluded that the differences between the common-law death action sought to be maintained and the action that is available under the Wrongful Death Act were not sufficiently significant to warrant recognition of a new remedy.

Glenn v. Johnson, 198 Ill. 2d 575 (2002), no ¶ number: The identity of the personal representative who filed the complaint is irrelevant since the representative is merely a nominal party acting on behalf of the true beneficial plaintiffs, who include Glenn in this case. See Wilbon v. D.F. Bast Co., 73 Ill. 2d 58, 68 (1978); VanMeter v. Goldfarb, 317 Ill. 620, 622 (1925); In re Estate of Fields, 588 S.W.2d 50, 53 (Mo. App. 1979) (applying Illinois law). Thus, requiring Glenn to file an amendment to the original complaint for loss of consortium in her individual capacity would be unnecessarily duplicative and have no substantive effect on the cause of action. See Knierim, 22 Ill. 2d at 82-83 (holding that a surviving spouse may not seek damages for loss of consortium under both the Wrongful Death Act and the common law since the differences between the two counts are not sufficiently significant).

Lawler v. University of Chicago Medical Center, 2016 IL App (1st) 143189, ¶ 21: ¶ 21 In short, the Wrongful Death Act provides the exclusive remedy available when death occurs as a result of tortious conduct. Murphy, 56 Ill. 2d at 426. In Wyness, a wrongful death action, the defendants argued that the two-year statute of limitations for personal injury actions should have started running before the decedent’s death because the plaintiff knew of the decedent’s injuries and the cause of those injuries before death. Our supreme court disagreed, explaining: “The ‘injury’ which opens the door to initiation of a personal injury suit *** is not the same ‘injury’ which opens the door to a wrongful death suit. Though both actions require an individual to have been harmed in some way through the actions of another, this injury at the hands of another is not the sole thread which weaves the fabric undergirding both causes of action. A wrongful death action can only be instituted for the benefit of the next of kin who have suffered an ‘injury’ because a family member has died when that family member’s death resulted from an injury wrongfully caused by another. [Citation.] The precipitating ‘injury’ for the plaintiffs in a wrongful death action, unlike the injury in a personal injury action, is the death; that the death must also be the result of a wrongfully caused injury suffered by the deceased at the hands of another does not alter the analysis. The wrongful injury suffered by the deceased is the distinguishing characteristic of the particular death.” (Emphasis added.) Wyness, 131 Ill. 2d at 414-15.

80. **The response.** A negligent-infliction claim compensates the parent's own physical illness from the trauma of witnessing, not grief for the loss. Courts address overlap by separating compensated from uncompensated injury rather than by barring the claim outright . That response has force only once the claim exists, which the zone rule prevents. [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Cruz addresses overlap between a wrongful death claim and the decedent's settled personal injury claim; extending it to a parent's NIED claim, as a statement about 'courts' generally, goes beyond the passage.)

Cruz v. Illinois Masonic Medical Center, 271 Ill. App. 3d 383 (1st Dist. 1995), no ¶ number: By submitting this issue to the determination of the trial court, a balance is achieved between the legitimate concern of double recovery, and the widely recognized and accepted belief that a decedent’s spouse and next of kin suffer separate, distinct, and recoverable damages due to the death of their loved one. Such a balance is vastly more appealing, and just, than yielding to defendants’ unwarranted fear of

double recovery by responding with a "blanket approach" to bar recovery. Equity demands that the trial court be allowed to discern between wrongfully caused injuries which have been compensated, and those which have yet to be redressed.

81. The circuit court is bound by the Supreme Court and by published First District decisions applying the rule . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Neither passage states the binding-effect rule; Benton applies the direct-victim impact rule, not the bystander rule.)

Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998), no ¶ number: A bystander, such as plaintiff, cannot recover for negligent infliction of emotional distress unless she establishes that: (1) she was in the "zone of danger"; (2) she had a reasonable fear for her own safety; and (3) she suffered physical injury or illness resulting from the alleged emotional distress. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Count II fails to allege any of these requisite elements. In order to be in the "zone of danger" a bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to [her] of physical impact." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5. Here plaintiff alleges that she was in the grandstands when she witnessed defendants' negligent failure to provide prompt medical assistance to her husband, who was in the infield of the track. There was certainly no risk of physical impact to her. Moreover, count II fails to allege that plaintiff had a reasonable fear for her own safety or that she suffered any physical injury or illness.

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549, ¶ 80: ¶ 80 On appeal, plaintiffs essentially concede they did not suffer a physical impact or injury, but they maintain that their physical manifestations of emotional distress are sufficient to support a negligent infliction of emotional distress claim for direct victim liability under the present state of Illinois law. Plaintiffs are confused. Plaintiffs need not, but nonetheless do allege that they suffered from physical symptoms or, in other words, manifestations of emotional distress like "depression, anxiety, weight gain, insomnia, headaches, stomach pains, chest pain, fatigue, muscle spasms," etc. See Schweihs, 2016 IL 120041, ¶ 42. Meanwhile, plaintiffs as direct victims are required to but do not allege any physical injury or impact that was contemporaneous with (and thus necessarily distinct from) their emotional distress. Id. ¶¶ 42-44. In short, there is no direct victim in this case, since none of the plaintiffs suffered a physical impact or injury from defendants' allegedly negligent acts. Plaintiffs cannot bootstrap the requirements for bystander liability to sustain their direct victim claim. In other words, plaintiffs' contention that their physically manifested emotional distress is a "physical injury" of the kind required by the impact rule, is not supported by Schweihs, 2016 IL 120041, ¶ 44. Rather, in Schweihs, the Illinois Supreme Court affirmed the dismissal of a negligent infliction of emotional distress claim where the plaintiff alleged that she suffered physical symptoms of emotional distress but "did not plead any physical contact." Id. ¶¶ 19, 43-44. Schweihs also emphasized that in its prior case, Corgan, there was no question that the plaintiff was a direct victim because she had "suffered a physical impact," since "her claim rested on allegations of sexual relations with her therapist." Id. ¶¶ 34, 42. Contrary to plaintiffs' contention otherwise, physical contact of some sort is absolutely necessary to sustain a direct victim negligent infliction of emotional distress action.

82. The appellate court likewise cannot modify the Supreme Court's rule . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (All three passages say lower courts cannot overrule or modify Supreme Court decisions.)

People v. Artis, 232 Ill. 2d 156 (2009), p. 5: We reject defendant's forfeiture and estoppel arguments. It is well settled that where the appellate court reverses the judgment of the trial court, and the appellee in that court brings the case to this court as appellant, that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if the issues were not raised before the appellate court. Gallagher v. Lenart, 226 Ill. 2d 208, 232 (2007). In addition, we note that

the one-act, one-crime doctrine was established by this court in King. The appellate court lacks authority to overrule decisions of this court, which are binding on all lower courts. See Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 551-52 (1983). Thus, presentation of an argument by the State in the appellate court urging the abandonment of the one-act, one-crime doctrine would have been futile. Under these circumstances, we decline to find that the State is barred by forfeiture or estoppel from arguing that this court should abandon the King doctrine.

Blumenthal v. Brewer, 2016 IL 118781, ¶ 61: ¶ 61 As explained supra, our decision in Hewitt did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits. Hewitt clearly declared the law on the very issue in this case. Yet, the appellate court in this case declined to follow our ruling, despite the facts being almost identical to Hewitt. This was improper. Under the doctrine of stare decisis, when this court "has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." (Emphasis in original.) (Internal quotation marks omitted.) Price v. Philip Morris, Inc., 2015 IL 117687, ¶ 38. The appellate court had no authority to depart from our decision. It could question Hewitt and recommend that we revisit our holding in the case, but it could not overrule it.

Babic v. Village of Lincolnwood, 2022 IL App (1st) 210929, ¶ 12: ¶ 12 While plaintiff acknowledges that this is the current state of the law, she asks us to "modify the interpretation" of section 3-102(a) to reflect that a municipality has a duty to users who are either intended or permitted users, not both, where there is a condition on its property that is dangerous for ordinary travel. This we cannot do, however, regardless of the merits of any of plaintiff's arguments. It is well settled that, when the supreme court has declared law on any point, only that court may modify or overrule its previous decisions, and all lower courts are bound to follow that precedent. See, e.g., In re Marriage of Budorick, 2020 IL App (1st) 190994, ¶ 86; Doyle v. Hood, 2018 IL App (2d) 171041, ¶ 35; Rosewood Care Center, Inc. v. Caterpillar, Inc., 366 Ill. App. 3d 730, 734 (2006); Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 551 (1983). Accordingly, in order for the Village to have had a duty to Denis in the present case, Denis must have been both an intended and a permitted user of the road on which he was injured, and we need not discuss plaintiff's arguments suggesting a different interpretation of section 3-102(a).

83. When plaintiffs asked an appellate court to relax this very rule, it refused because only the Supreme Court can do so . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage rejects relaxing the zone rule's physical-consequences requirement because it is reserved to the Supreme Court.)

Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987), no ¶ number: We, of course, must reject plaintiffs' invitation, regardless of our views on the matter, because it is axiomatic that the appellate court lacks the authority to overrule or modify decisions of the supreme court. (Rickey, 98 Ill. 2d at 551-52; see Courtney, 149 Ill. App. 3d at 400.) The physical consequences requirement was clearly and unequivocally established by our supreme court in Rickey and reiterated in the supreme court's recent decision in Siemieniec. We are duty bound to follow controlling decisions of the supreme court and do so here. Abandonment of the physical consequences requirement is a matter reserved for the supreme court.

84. The same answer was given, before the zone-of-danger rule existed, to a plaintiff seeking recovery for witnessing harm to another . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Pre-1983 passage refuses to recognize distress from witnessing harm to another, deferring to the Supreme Court.)

Carlinville National Bank v. Rhoads, 63 Ill. App. 3d 502 (4th Dist. 1978), no ¶ number: Clearly, the

well-established Illinois view has been to deny recovery for negligently inflicted mental distress unless it arises from and is directly connected with some contemporaneous physical injury. Plaintiff urges this court to now recognize in Illinois a cause of action for the negligent infliction of mental distress not arising from a contemporaneous physical injury but caused solely as the result of witnessing peril or harm to another. Plaintiff argues that the modern trend of decisions in other States and leading tort authorities support such recovery where the factual elements in the instant case are present. While we note that resulting emotional disturbance can be as severe and as certain whether it be caused by an intentional act or by a negligent act, we are bound by decisions of the Illinois Supreme Court. (Agricultural Transportation Association v. Carpentier (1953), 2 Ill. 2d 19, 27, 116 N.E.2d 863, 867; People v. Spahr (1978), 56 Ill. App. 3d 434, 438, 371 N.E.2d 1261, 1264.) Since not all of the members of this panel are motivated to a change in the principle controlling this case, and since the entire panel recognizes and desires to respect our lack of authority to overrule decisions of the supreme court, we conclude that any recognition of negligent infliction of mental distress as a separate tort must come from the supreme court of this State. Accordingly, the circuit court's dismissal of counts V, VI, and IX of plaintiff's complaint is affirmed.

85. argue for modification in good faith, preserving the issue for a petition for leave to appeal on the ground of "the general importance of the question presented" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree

Ill. S. Ct. R. 315 (statute or rule; its text follows the decisions)

86. one Supreme Court dissent called the bystander/direct-victim line, as applied to a husband seated beside his wife when she was killed, "an arbitrary and hollow distinction" ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (The dissent's 'arbitrary and hollow distinction' is aimed at denying emotional distress damages under strict liability, not at the bystander/direct-victim line itself.)

Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995), no ¶ number, dissent: David has shown that he was in the zone of physical danger; that due to the failure of the defendant's defective bellhousing he had a reasonable fear for his own safety; that he has suffered from severe emotional distress; and that he was in such proximity to the accident that there was a high risk to him of physical impact. (See Rickey, 98 Ill. 2d 546; Corgan, 143 Ill. 2d 296.) David was sitting next to his wife as she was partially decapitated. In fact parts of her body struck him. He touched her face and head, and then carried her to the ambulance knowing that she was dead. David has alleged many of the traumatic neuroses noted in Corgan. (Corgan, 143 Ill. 2d at 311.) Considering the facts of this case, David has suffered severe injuries as a result of witnessing his wife's violent death. The majority's position creates an arbitrary and hollow distinction, unsupportable in light of the development of the law of emotional distress damages. I would hold that the trial court should have instructed the jury on David's claim for emotional distress damages. Accordingly, I respectfully dissent.

87. another described the impact and zone rules as devices "to keep the door from opening wide" . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Dissent describes the impact and zone rules as developed 'to keep the door from opening wide'; correctly labeled as a dissent.)

Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230 (1987), no ¶ number, dissent: Part III of the majority opinion refuses any recovery for the parents' emotional distress based on the zone-of-danger rule articulated in Rickey v. Chicago Transit Authority (1983), 98 Ill. 2d 546. The Rickey rule, formulated in the context of bystander cases, should not govern in situations like this one in which the

parents are not bystanders either by chance or because of relationship, but the actual victims of the defendants' negligence. The majority has in fact held that the parents are the only victims here. The majority says that the plaintiffs have afforded no reason to broaden Rickey to cases in which those suffering emotional distress are not threatened with physical impact. But neither has the majority advanced any suggestion as to why the general tort rule - that injuries proximately caused by the negligent conduct of one who has a duty to the victim are compensable - should not apply here. The old "impact" rule and the more recent "zone-of-danger" rule are theories that have developed to keep the door from opening wide in instances where recovery is sought for injuries which are emotional and not physical.

88. **Bystander zone requirement.** No district split appears in the packet. The First, Second, Third, and Fourth Districts all require physical proximity creating a high risk of impact and fear for one's own safety . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Not every cited passage states both elements: the Second District passage speaks only of fear for own well-being, and the Fourth District passage only of proximity. 'No split' is an inference from absence.)

Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998), no ¶ number: A bystander, such as plaintiff, cannot recover for negligent infliction of emotional distress unless she establishes that: (1) she was in the "zone of danger"; (2) she had a reasonable fear for her own safety; and (3) she suffered physical injury or illness resulting from the alleged emotional distress. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Count II fails to allege any of these requisite elements. In order to be in the "zone of danger" a bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to [her] of physical impact." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5. Here plaintiff alleges that she was in the grandstands when she witnessed defendants' negligent failure to provide prompt medical assistance to her husband, who was in the infield of the track. There was certainly no risk of physical impact to her. Moreover, count II fails to allege that plaintiff had a reasonable fear for her own safety or that she suffered any physical injury or illness.

Alexander v. DePaepe, 148 Ill. App. 3d 831 (2d Dist. 1986), no ¶ number: It is abundantly clear that Rickey does not support a cause of action for negligent infliction of emotional distress based only on witnessing injury to a direct victim. The bystander's action arises only when he shows that his emotional distress arose from fear for his own well-being.

Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992), no ¶ number: Here, plaintiff did not allege that she witnessed any of defendants' alleged acts or omissions, or that she was placed in a zone of physical danger which caused her to fear for her own personal safety. Therefore, we find the plaintiff's allegations are insufficient to establish that she was a bystander within the zone of physical danger.

Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992), no ¶ number: 'The distinction between a direct victim and a bystander is more than just a play on semantics ***. *** [A] defendant owes a duty to only those persons who suffer emotional distress (and accompanying physical manifestations) as a result of being within the "zone of danger" created by a negligently caused accident. This zone of danger, because it is created by the accident, encircles it; hence, the accident is, in effect, the "nucleus" of the surrounding zone of danger. A person is within an accident's zone of danger (and able to seek recovery under Rickey) when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself' " (Emphasis in original.)

89. the grandstand decision ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage is the grandstand decision.)

Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998), no ¶ number: A bystander, such as plaintiff, cannot recover for negligent infliction of emotional distress unless she establishes that: (1) she was in the "zone of danger"; (2) she had a reasonable fear for her own safety; and (3) she suffered physical injury or illness resulting from the alleged emotional distress. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Count II fails to allege any of these requisite elements. In order to be in the "zone of danger" a bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to [her] of physical impact." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5. Here plaintiff alleges that she was in the grandstands when she witnessed defendants' negligent failure to provide prompt medical assistance to her husband, who was in the infield of the track. There was certainly no risk of physical impact to her. Moreover, count II fails to allege that plaintiff had a reasonable fear for her own safety or that she suffered any physical injury or illness.

90. the fear-for-a-third-person decision ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage holds the Seefs did not plead fear for their own safety, applying the Robbins fear-for-third-person rule.)

Seef v. Sutkus, 205 Ill. App. 3d 312 (1st Dist. 1990), no ¶ number: The Robbins court did not treat the mother and child as a single entity. Nor did that court determine that the mother was, ipso facto, in the same zone of danger as her unborn child. Similarly, in this case, plaintiffs have not pleaded that Mrs. Seef feared for her own safety within a zone of danger. Thus, like the plaintiffs in Robbins, the Seefs did not plead the elements of negligent infliction of emotional distress.

91. the bootstrapping decision . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage contains the bootstrapping holding.)

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549, ¶ 80: ¶ 80 On appeal, plaintiffs essentially concede they did not suffer a physical impact or injury, but they maintain that their physical manifestations of emotional distress are sufficient to support a negligent infliction of emotional distress claim for direct victim liability under the present state of Illinois law. Plaintiffs are confused. Plaintiffs need not, but nonetheless do allege that they suffered from physical symptoms or, in other words, manifestations of emotional distress like "depression, anxiety, weight gain, insomnia, headaches, stomach pains, chest pain, fatigue, muscle spasms," etc. See Schweihs, 2016 IL 120041, ¶ 42. Meanwhile, plaintiffs as direct victims are required to but do not allege any physical injury or impact that was contemporaneous with (and thus necessarily distinct from) their emotional distress. Id. ¶¶ 42-44. In short, there is no direct victim in this case, since none of the plaintiffs suffered a physical impact or injury from defendants' allegedly negligent acts. Plaintiffs cannot bootstrap the requirements for bystander liability to sustain their direct victim claim. In other words, plaintiffs' contention that their physically manifested emotional distress is a "physical injury" of the kind required by the impact rule, is not supported by Schweihs, 2016 IL 120041, ¶ 44. Rather, in Schweihs, the Illinois Supreme Court affirmed the dismissal of a negligent infliction of emotional distress claim where the plaintiff alleged that she suffered physical symptoms of emotional distress but "did not plead any physical contact." Id. ¶¶ 19, 43-44. Schweihs also emphasized that in its prior case, Corgan, there was no question that the plaintiff was a direct victim because she had "suffered a physical impact," since "her claim rested on allegations of sexual relations with her therapist." Id. ¶¶ 34, 42. Contrary to plaintiffs' contention otherwise, physical contact of some sort is absolutely necessary to sustain a direct victim negligent infliction of emotional distress action.

92. the rule itself ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage states the rule.)

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983), no ¶ number: The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, e.g., Niederman v. Brodsky (1970), 436 Pa. Super. 401, 261 A.2d 84; Owens v. Childrens Memorial Hospital (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); Robb v. Pennsylvania R.R. Co. (Del. 1965), 210 A.2d 709; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Tobin v. Grossman (1969), 24 N.Y.2d 609, 249 N.E.2d 419; Whetham v. Bismarck Hospital (N.D. 1972), 197 N.W.2d 678; Shelton v. Russell Pipe & Boundary Co. (Tenn. 1978), 570 S.W.2d 861; Guilmette v. Alexander (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. Dailey v. LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; Stadler v. Cross (Minn. 1980), 295 N.W.2d 552; Fournell v. Usher Pest Control Co. (1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment c (1965).

93. the impact requirement for direct victims ; [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Passage states the impact requirement for direct victims.)

Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 44: ¶ 44 As previously determined, the pleading requirements for a direct victim's recovery for negligently inflicted emotional distress include an allegation of a contemporaneous physical injury or impact. Therefore, since plaintiff did not include an allegation of a physical impact, as a direct victim, she failed to allege a cause of action for negligent infliction of emotional distress. Thus, we conclude that the negligent infliction of emotional distress count of her complaint was properly dismissed.

94. the hierarchy decisions . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Both passages state the binding-hierarchy rule.)

People v. Artis, 232 Ill. 2d 156 (2009), p. 5: We reject defendant's forfeiture and estoppel arguments. It is well settled that where the appellate court reverses the judgment of the trial court, and the appellee in that court brings the case to this court as appellant, that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if the issues were not raised before the appellate court. Gallagher v. Lenart, 226 Ill. 2d 208, 232 (2007). In addition, we note that the one-act, one-crime doctrine was established by this court in King. The appellate court lacks authority to overrule decisions of this court, which are binding on all lower courts. See Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 551-52 (1983). Thus, presentation of an argument by the State in the appellate court urging the abandonment of the one-act, one-crime doctrine would have been futile. Under these circumstances, we decline to find that the State is barred by forfeiture or estoppel from arguing that this court should abandon the King doctrine.

Blumenthal v. Brewer, 2016 IL 118781, ¶ 61: ¶ 61 As explained supra, our decision in Hewitt did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits. Hewitt clearly declared the law on the very issue in this case. Yet, the appellate court in this case declined to follow our ruling, despite the facts being almost identical to Hewitt. This was improper. Under the doctrine of stare decisis, when this court "has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are

bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." (Emphasis in original.) (Internal quotation marks omitted.) Price v. Philip Morris, Inc., 2015 IL 117687, ¶ 38. The appellate court had no authority to depart from our decision. It could question Hewitt and recommend that we revisit our holding in the case, but it could not overrule it.

95. Whether the zone rule governs direct victims: some First and Second District decisions applied it to direct victims . Others did not . The Supreme Court resolved this by confining the zone rule to bystanders . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Koeller and Robbins follow Courtney applying the zone rule to direct victims; Corgan (app.) and Allen reject that; Corgan (Sup. Ct.) confines the rule to bystanders.)

Koeller v. Cook County, 180 Ill. App. 3d 425 (1st Dist. 1989), no ¶ number: Applying the rule enunciated in Rickey, the appellate court in Courtney held that in order to state a cause of action for negligent infliction of emotional distress under the "zone of physical danger" test, the plaintiff was required to show that she was within a zone of physical danger; that she experienced reasonable fear for her own safety and that physical illness or injury resulted from the emotional distress caused by defendant's negligence. As noted by the court, however, the plaintiff in Courtney did not allege, nor did she contend on appeal, that she was within a zone of physical danger causing her to fear for her own safety or that she suffered physical injury or illness as a result of the emotional distress she suffered upon learning that her husband's body had decomposed. The court disagreed with plaintiff's argument that the requirements for recovery under Rickey do not apply to direct victims of negligence. The court stated that the focus of that standard is on whether the plaintiff was in proximity to the danger, and held, in response to the question of law certified on appeal, "that Illinois does not recognize a cause of action for emotional distress arising from the negligent mishandling of a corpse." Courtney, 149 Ill. App. 3d at 403.

Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987), no ¶ number: "Notwithstanding the supreme court's reference to the plaintiff in Rickey as a 'bystander,' it has been correctly observed that 'the nature of the zone-of-physical-danger rule is such that it allows recovery only to direct victims of negligence, because recovery.must be predicated on a reasonable fear for one's own safety.' [Citation.] Under the zone-of-physical-danger standard, the proper focus is on whether plaintiff was in proximity to the danger, not whether he witnessed an accident to a third person. [Citation.] Accordingly, we reject plaintiff's argument that the requirements for recovery under Rickey do not apply to direct victims of negligence." (Courtney, 149 Ill. App. 3d at 402-03.)

Corgan v. Muehling, 167 Ill. App. 3d 1093 (1st Dist. 1988), no ¶ number: Therefore, in the absence of a decision by our supreme court which mandates a clearly different result, and supported by the law of our own appellate court and other jurisdictions, we hold that the zone of danger rule enunciated in Rickey has no application in this case, which involves a direct victim of negligence. Instead, we analyze this direct victim case under the same standards as any other negligence action, as was done by this court in both Horak and Wogelius.

Allen v. Otis Elevator Co., 206 Ill. App. 3d 173 (1st Dist. 1990), no ¶ number: The strained results produced by courts applying the zone-of-physical-danger test to direct victims render support for our conclusion that the test was intended to apply solely to bystander situations. As many courts have realized, the rule's proximity requirements are fashioned for bystander cases and cannot be applied to direct victims without distortions. (McAdams, 638 F. Supp. 1173; Corgan, 167 Ill. App. 3d 1093, 522 N.E.2d 153; Lewis, 139 Ill. App. 3d at 638 (Linn, J., dissenting).) In Hammond v. Lane (1987), 162 Ill. App. 3d 17, 515 N.E.2d 828, for example, the court concluded that plaintiff, who alleged that the doctor who had been treating her for psychiatric disorders was professionally negligent in having sexual contact with her, did not state a cause of action because she did not allege that she was in the zone of danger and had reasonable fear for her safety. In Lewis (139 Ill. App. 3d 634, 487 N.E.2d 107), the court concluded that plaintiff, who herself was trapped inside the malfunctioned elevator, had not

proven that she was in the zone of danger. The proximity test is not logically applied to victims who are directly involved in the very accident or mishap producing the risk.

Corgan v. Muehling, 143 Ill. 2d 296 (1991), no ¶ number: Defendants contentions are, however, misplaced. Although use of the word "substitute" implies replacement of the impact rule with the zone-of-physical-danger rule, a closer reading of Rickey reveals that such a substitution was intended only in bystander cases. As one court explained: "The facts of Rickey are those of a typical bystander case and the court uses the word 'bystander' throughout the opinion. In particular, the court expressly puts the issue and the holding in the context of bystander recovery." (McAdams v. Eli Lilly & Co. (N.D. Ill. 1986), 638 F. Supp. 1173, 1177.) Rickey, therefore, abandoned the impact rule as it applied to bystanders and adopted the zone-of-physical-danger rule as the standard under which they can recover damages for negligent infliction of emotional distress. Rickey did not, however, define the scope of negligent infliction of emotional distress as it applies to direct victims. The court in Rickey was solely concerned with defining the parameters of bystander recovery.

96. Whether direct victims must show physical manifestation: some decisions required it for direct victims . The Supreme Court held it was not required . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: partly (Goldberg and Corgan support the point, but the cited Henry passage only describes Goldberg; Henry's own direct-victim holding is in an uncited paragraph.)

Goldberg v. Ruskin, 128 Ill. App. 3d 1029 (1st Dist. 1984), no ¶ number: While our supreme court in Rickey eliminated the requirement of contemporaneous physical injury , or impact, it gave no indication that it intended that a plaintiff, whether the direct victim of negligence or a bystander, should be able to recover damages for negligently caused emotional distress where the emotional distress is not accompanied by physical injury or illness. From our reading of the opinion in Rickey, we believe that physical injury or illness must be established in order for a plaintiff to recover for negligently caused emotional distress, regardless of whether the plaintiff was the direct victim or a bystander. As noted, Mr. and Mrs. Goldberg do not allege that they suffered any physical injury or illness.

Henry v. St. John's Hospital, 159 Ill. App. 3d 716 (4th Dist. 1987), no ¶ number: In Goldberg v. Ruskin (1984), 128 Ill. App. 3d 1029, 1043, 471 N.E.2d 530, 539, parents of a child born with Tay-Sachs disease brought a medical negligence action against their physicians. Their complaint alleging emotional distress was dismissed. The Goldbergs did not allege any physical illness or injury caused by their emotional distress. The court noted that while Rickey eliminated the impact rule, "it gave no indication that it intended that a plaintiff, whether the direct victim of negligence or a bystander, should be able to recover damages for negligently caused emotional distress where the emotional distress is not accompanied by physical injury or illness." The court held that a physical manifestation of the emotional distress must occur whether the plaintiff was the direct victim or a bystander of the negligent act.

Corgan v. Muehling, 143 Ill. 2d 296 (1991), no ¶ number: In the 30 years since Knierim, this court has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress. Furthermore, the women and men of the mental health care field have made significant improvements in the diagnosis, description and treatment of emotional distress. Therefore, this court finds that the trial court acted properly in not dismissing the plaintiff's cause of action for failure to allege physical symptoms of emotional distress.

97. Whether the Supreme Court abolished the impact rule for direct victims: its earlier opinion said so . Its later opinion held that statement was dicta and that the impact rule remains . [Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois] · reviewer: agree · model: supports (Pasquale says Corgan extended elimination of the impact rule to direct victims; Schweihs holds that statement was dicta.)

Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995), no ¶ number: In Corgan, 143 Ill. 2d 296, this court made clear that Rickey's zone-of-physical-danger rule applied only to bystanders. Corgan, however, extended Rickey's elimination of the impact rule to instances where plaintiffs were the direct victims, of the negligent conduct and suffered emotional distress injury.

Schweihs v. Chase Home Finance, LLC, 2016 IL 120041, ¶ 42: ¶ 42 This court wrote in Pasquale that Corgan had "eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress on a theory of negligence." Pasquale, 166 Ill. 2d at 346. In fact, as previously stated, in Corgan, this court addressed whether a direct victim of negligent infliction of emotional distress had to allege that she suffered a physical symptom of her emotional distress. Corgan, 143 Ill. 2d at 308; see Brogan v. Mitchell International, Inc., 181 Ill. 2d 178, 184-85 (1998). This court held that she did not. Corgan, 143 Ill. 2d at 312. Corgan did not address the impact rule, and in fact there was no question in that case that the plaintiff had suffered a physical impact, as her claim rested on allegations of sexual relations with her therapist. Id. at 300. Thus, Corgan did not eliminate the need for a direct victim to allege and prove a contemporaneous physical injury or impact. Id. at 304, 312; Braun, 175 Ill. at 420; Kapoulas, 11 F.3d at 1382. Further, Pasquale concerned a cause of action based on strict liability, and its mischaracterization of Corgan's holding was not a factor in the issue on appeal in Pasquale. Therefore, we find that this court's statements in Pasquale that Corgan eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress are obiter dictum and thus are not binding authority or precedent.

Alexander v. DePaepe, 148 Ill. App. 3d 831 (2d Dist. 1986)

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

Ill. App. Ct., 2d Dist. · filed 1986-10-29 · Reporter opinion
Published opinion

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- memo p. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C035.3
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BETH ALEXANDER, Plaintiff-Appellant, v. ROBERT J. DePAEPE, Defendant-Appellee.

Second District No. 2—85—0607

Opinion filed October 29, 1986.

James F. Carlson and J. Douglas Durham, both of Rivkin, Radley, Dunne & Bayh, of Chicago, for appellant.

H. Anne McKee, D. Kendall Griffith, and Mark Conrad, all of Hinshaw, Culbertson, Moelmann, Hoban & Fuller, of Chicago, for appellee.

JUSTICE HOPF delivered the opinion of the court:

This is an appeal from an order of the trial court of McHenry County dismissing the second count of plaintiff's complaint, which sought damages for negligent infliction of emotional distress. Plaintiff, Beth Alexander, contends that the trial court erred in finding that a family relationship is an element of a cause of action based on negligent infliction of emotional distress and in construing certain of plaintiff's allegations as seeking damages for loss of consortium.

On July 11, 1981, plaintiff was a passenger in a car driven by her fiance, Arthur Carroll. The Carroll auto collided with a car driven by defendant, Robert J. DePaepe. Mr. Carroll died and Alexander sustained personal injuries as a result of the collision.

Subsequently, Alexander filed a lawsuit against DePaepe, alleging that he was negligent in operating his automobile. Count I of plaintiff's second amended complaint alleges an action for personal injuries to herself. Count II alleges injury from emotional distress negligently caused by defendant. The complaint asserts that plaintiff suffers physical illness from the emotional distress experienced as a result of witnessing the fatal injuries to her fiance in the collision and the emotional distress of being deprived of a future relationship with Carroll.

Defendant's motion to strike count II of plaintiff's second amended complaint, pursuant to section 2—615 of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2—615), was granted by the trial court. In a memorandum opinion the court below found that the damages sought by plaintiff for deprivation of her future relationship with Carroll were identical to those which would be sought in an action for loss of consortium. Since plaintiff and decedent were not married at the time of the accident, the court held that plaintiff could not recover for loss of consortium. The trial court also found that plaintiff's allegation that she suffered emotional distress upon witnessing the injury to her fiance would not support any recovery since

she was not a close family relative of the deceased.

Plaintiff filed a motion asking the court to reconsider its memorandum opinion. After hearing arguments on the motion, the trial court entered an order denying plaintiff's motion to reconsider and dismissing with prejudice count II of the second amended complaint. Plaintiff then filed this timely appeal.

The ultimate matter we must decide is whether plaintiff's count II states a cause of action for the negligent infliction of emotional distress which can withstand a motion to dismiss. For purposes of ruling on a motion to dismiss, all well-pleaded facts must be taken as true (*Goldberg v. Ruskin* (1984), 128 Ill. App. 3d 1029, 1032-33, 471 N.E.2d 530) and all reasonable inferences must be drawn in favor of the plaintiff. (*Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d 634, 638, 487 N.E.2d 1071 (Linn, J., dissenting).) Moreover, a complaint should not be dismissed for failure to state a cause of action unless it clearly appears that no set of facts could be proved under the pleadings which would entitle plaintiff to relief. (139 Ill. App. 3d 634, 638, 487 N.E.2d 1071 (Linn, J., dissenting).) With these principles in mind, we will examine plaintiff's count II allegations.

Count II of plaintiff's complaint asserts that plaintiff suffered emotional distress from seeing her fiance injured and from losing her relationship with him. Until recently there would have been no question that these allegations could not support recovery by plaintiff. Under the well-established and long-followed "impact rule" in Illinois, there must have been a contemporaneous physical injury or impact to plaintiff to permit recovery for emotional distress. (*Braun v. Craven* (1898), 175 Ill. 401, 51 N.E. 657; *Carlinville National Bank v. Rhoads* (1978), 63 Ill. App. 3d 502, 380 N.E.2d 63.) The rule applied to both direct victims of defendant's negligence and bystanders who witnessed the injury of another. *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 550, 457 N.E.2d 1.

However, in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1, our supreme court reconsidered the impact rule and concluded that recovery for negligently inflicted emotional distress should not be determined solely on whether or not there was a contemporaneous physical impact on the plaintiff. In *Rickey* an eight-year-old plaintiff watched as his five-year-old brother choked and stopped breathing after the scarf he wore became entangled in the mechanism of an escalator. Plaintiff sought damages for emotional distress but alleged neither that he had suffered any physical impact nor that he was in danger of harm. The *Rickey* court abandoned the impact rule and substituted the "zone of physical danger" rule which

had been adopted in the majority of jurisdictions which had considered the question of recovery by a bystander for emotional distress.

The *Rickey* court explained that the new rule requires that the bystander must have been in such proximity to the accident which injured the direct victim that there was a high risk to himself of physical impact. The court also stressed that such a bystander must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence.

[redacted] Plaintiff attempts to persuade this court that the case before it is controlled by *Rickey* and insists that the trial court erroneously imposed an element on plaintiff's cause of action that *Rickey* does not require. Plaintiff's argument reveals a basic misunderstanding of *Rickey*.

More specifically, while plaintiff agrees that count II of her complaint seeks recovery by her as a bystander, she misconstrues the basis for a bystander's claim as set forth in *Rickey*. Plaintiff asserts in her brief: "In a bystander setting, such as here, the plaintiff is not the direct victim of the defendant's negligence, but suffers actionable injuries *as a consequence of the injury caused to another person* by defendant's negligence." (Emphasis added.) Plaintiff also states that a bystander's injury is "created by the injury to another as allowed by *Rickey*," and contends that: "This new cause of action concerns the injury of a plaintiff bystander proximately caused by negligence resulting initially in injury to another person." Plaintiff's assertions appear to reflect a belief that *Rickey* created a cause of action for plaintiffs who suffer emotional distress solely as a result of witnessing an injury to another party. This belief is misplaced and is the underlying cause of plaintiff's confusion.

While a bystander's claim arises out of a fact situation in which there is a direct injury to another person, such a claim is not a consequence of the other person's injury. Nor are the bystander's injuries caused by the other person's injuries. *Rickey*, rather than creating a new cause of action, merely extended an existing cause of action beyond those bystanders who actually suffered some physical impact to those bystanders who were put at great risk by defendant's negligence. While the case expanded the scope of potential plaintiffs in negligent infliction of emotional distress actions, it did not widen the scope so greatly as to include plaintiffs whose stress arises from watching another's injury or suffering.

There is nothing in *Rickey* to intimate that merely witnessing the injury to another party will sustain an action based on emotional distress. If anything, *Rickey* denied this premise. There was no dispute

in that case that the plaintiff saw his younger brother's clothing getting caught in the escalator mechanism and saw his brother choking and unable to breathe. These facts were not enough to warrant relief. After enunciating the new rule applicable to negligent infliction of emotional distress actions, the court remanded the case, noting that the complaint did not indicate whether plaintiff himself was endangered by the claimed negligence. The court added: "We do not know whether he had reasonable fear for his own safety, causing emotional distress." *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 556, 457 N.E.2d 1.

It is abundantly clear that *Rickey* does not support a cause of action for negligent infliction of emotional distress based only on witnessing injury to a direct victim. The bystander's action arises only when he shows that his emotional distress arose from fear for his own well-being.

Plaintiff in the instant case pleaded that she has and will experience physical illness resulting from emotional distress negligently caused by defendant as a consequence of "[p]laintiff witnessing the injury to Mr. Carroll; and [p]laintiff being forever deprived of any continued or further relationship with Mr. Carroll." Plaintiff nowhere pleaded that her emotional distress rose from fear for her own safety or from being put at high risk of physical impact. Thus, under *Rickey*, plaintiff's complaint did not adequately state a cause of action.

The above conclusion is reinforced by *Gihring v. Butcher* (1985), 138 Ill. App. 3d 976, 487 N.E.2d 75, where plaintiff alleged that her husband had committed suicide as a result of medical malpractice and that she had suffered emotional distress from finding her husband dead. On appeal plaintiff urged that the test adopted in *Rickey* was merely intended to ensure that recovery for negligent infliction of emotional distress was limited to foreseeable distress accompanied by definite damages. She contended that her distress was foreseeable. The *Gihring* court rejected plaintiff's interpretation of the *Rickey* test. The court stated that *Rickey* requires the plaintiff to allege that defendant's negligence put plaintiff in reasonable fear for her own personal safety in order to successfully plead a cause of action for negligent infliction of emotional distress. Since plaintiff had not so pleaded, the dismissal of her action was affirmed.

[redacted] Plaintiff's assertions that the trial court erred in finding that an allegation of a family relationship between plaintiff and the direct victim is required in bystander emotional distress actions need not be addressed by this court. Nor is it necessary for us to resolve the question of whether the trial court erred in construing a portion

of the complaint as an action for loss of consortium. As already shown, plaintiff failed to state a cause of action by failing to meet the requirements of *Rickey*. It is well settled that a reviewing court is not bound by the reasons given by the trial court for its judgment. (*Citizens Utilities Co. v. O'Connor* (1984), 121 Ill. App. 3d 533, 459 N.E.2d 682.) The lower court judgment may be sustained upon any ground warranted in the record, regardless of whether it was relied on by the trial court. (*Material Service Corp. v. Department of Revenue* (1983), 98 Ill. 2d 382, 387, 457 N.E.2d 9.) The reasons given by a trial court for an order, or the findings on which an order is based, are not material if the order is correct. (*Board of Managers v. Chase Manhattan Bank* (1983), 116 Ill. App. 3d 690, 452 N.E.2d 382.) In the case at hand no set of facts could be proved by plaintiff under the pleadings which would entitle her to relief. Therefore, the trial court correctly ordered the dismissal of count II of the complaint regardless of the correctness of the reasons given by the trial court for its order.

Accordingly, the order of the trial court of McHenry County is affirmed.

Affirmed.

UNVERZAGT and SCHNAKE, JJ., concur.

LAKE STATES ENGINEERING CORPORATION, Plaintiff and Counterdefendant-Appellee, v. ONE NAPERVILLE CORPORATION, Defendant and Counterplaintiff-Appellee (Testing Service Corporation *et al.*, Counterdefendants-Appellees; Lake States Engineering Corporation, Third-Party Plaintiff-Appellee; Testing Service Corporation, Third-Party Defendant-Appellee; Colonial, Inc., Intervenor-Appellant).

Second District No. 85—0682

Opinion filed October 20, 1986.

Allen v. Otis Elevator Co., 206 Ill. App. 3d 173 (1st Dist. 1990)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1990-09-28 · Reporter opinion
Published opinion

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- memo p. 12 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C043.1

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JAMES J. ALLEN *et al.*, Plaintiffs-Appellees, v. OTIS ELEVATOR COMPANY, Defendant-Appellant (John Hancock Mutual Life Insurance Company, Defendant).

First District (1st Division) No. 1—88—2630

Opinion filed September 28, 1990.—Rehearing denied December 19, 1990.

[redacted]

McKenna, Storer, Rowe, White & Farrug, of Chicago (James P. DeNardo, Perry C. Rocco, and Christine L. Olson, of counsel), for appellant.

Cantwell & Balonick, of Chicago (Peter A. Cantwell and Stephen F. Boulton, of counsel), for appellees.

PRESIDING JUSTICE BUCKLEY delivered the opinion of the court:

Otis Elevator Company (defendant) appeals from a $5,000 jury award to each of the plaintiffs James Allen, his wife, Helen, and their daughter, Mary, in their action alleging negligent infliction of emotional distress. Defendant requests that a judgment notwithstanding the verdict be entered on the ground that plaintiffs have failed to prove a negligent infliction of emotional distress cause of action as a matter of law. Defendant alternatively requests that a new trial be granted due to prejudicial rulings on the submission of jury instructions and the admission of certain testimony, or that a new trial be granted on the issue of damages alone on the ground that the jury award is excessive and against the manifest weight of the evidence. We need not address the issue raised on defendant's new trial request because we find a judgment notwithstanding the verdict must be entered.

The evidence adduced at trial reveals the following. At approximately 11 p.m. on January 22, 1977, plaintiffs, who were heavily clothed, entered the John Hancock Center in Chicago, Illinois, where they boarded an elevator with 15 or 20 other passengers destined for the 95th and 96th floors. Prior to reaching the 95th floor, the elevator "stopped and dropped" "four to six to eight feet," causing James to be thrown against fellow passengers and Helen and Mary to be

thrown against the walls of the elevator. When the elevator came to a halt, James pushed the elevator's emergency alarm bell button. A voice answered and informed the passengers that their needs would be attended to.

Plaintiffs described the conditions in the elevator at the time. Air circulation in the car was poor because of a closed circulation fan. The passengers could not move or sit down due to the limited amount of space in the elevator. The elevator became so hot that people were soaked in perspiration and began removing their clothing.

After approximately 15 minutes without any outside contact, James rang the alarm bell again. A voice replied that "someone was coming over from Water Tower" to free the passengers. James requested that the person on the intercom keep in contact with them, but a long period of time lapsed without any outside contact. In response to an "S.O.S." signal that James rang out on the alarm bell, an impatient voice informed the passengers as to the futility of ringing the alarm bell. Outside communication was thereafter cut off. The passengers unsuccessfully attempted to open the escape hatch on top of the elevator and the doors of the elevator. A gun that one passenger carried in a holster was exposed during these actions, causing the plaintiffs to fear that the man might panic and start shooting.

William Valleau, the second mechanic for the Hancock building, and Jerome Camp, a Hancock building engineer, located the stalled elevator and rescued the passengers at approximately 1 a.m. by opening the escape hatch and lowering a ladder into the elevator. The passengers climbed onto the top of the elevator and slid along the elevator's roof to an open hallway door leading to one of the building's floors. The passengers could observe the black "abyss" of the empty adjoining elevator shaft. Valleau subsequently replaced an "open" F4C ¾ fuse and returned the elevator to service.

Witnesses explained the following regarding malfunctioned elevators. When incidents of elevator malfunction occur, a time ticket is prepared by the repair mechanic and a report is submitted to him. If a mechanic is needed on weekends, the "first" mechanic is contacted, and if he does not respond, the "second" mechanic is notified. The elevator car could not actually drop. When the fuse "opened," power to the brake of the elevator would have been lost, but the elevator car "would have had a controlled stop, regenerative power through the circuit," and the elevator would have stopped approximately 30 to 40 seconds, or three to four floors, later following

the opening of the fuse.

Plaintiffs described the injuries they incurred as a result of the incident. When James walks into an elevator he gets excited and a "little clammy," "wondering if [the] elevator is going to go up or *** down." He has exited elevators prior to their departure where he believes malfunctions are likely, such as when there is a delay in the closing of the elevator doors. James admitted that he has never received any medical treatment as a result of the incident, including treatment from a psychiatrist or counselor. He has not been prevented from attending work as a result of the incident. Subsequent to the elevator incident, he and his wife purchased a condominium on the fifth floor of a building and used the elevator regularly.

Helen was unable to sleep the night of the incident. She had never feared the use of elevators prior to the incident, but now sometimes exits a crowded elevator. Her palms now start to get moist and she has a feeling of distress when she is in an elevator. She exits an elevator if the elevator doors do not immediately close correctly or if she feels the elevator is not operating properly. On occasion, she has exited the elevator in her building and has instead walked up to her residence.

Helen dislikes flying in airplanes, but admitted that she did not care to fly before the incident. She admitted that she has not received medical treatment or psychological counselling. She observed no change in James as a result of the incident, but her daughter, Mary, is "extremely nervous" "[w]hen she gets on a plane."

Mary now has a fear of flying, fear of crowds, and fear of heights. She avoids the use of elevators whenever possible, especially when an elevator is crowded or malfunctioning. Mary admitted she took elevators at work after the incident. She is afraid to travel in an airplane because "[i]t reminds [her] of when [she] was in the elevator, basically of being closed in and having people around [her], close by, being up high." While on airplanes, her stomach churns, her palms become sweaty and she becomes very nervous. Immediately following the incident, she cried every time she was on an airplane and avoided flying whenever possible. She is unable to enjoy trips or vacations which require air travel and has avoided using airplanes as a means of transportation.

Crowds cause Mary to feel frightened and her eating and sleeping habits and her choice of housing and employment have been affected. A factor in her job selection in California was that the office was on a first floor, and she will not live in a building requiring the use of an elevator. Mary admitted that she has not received any med-

ical or psychological treatment as a consequence of the elevator incident, nor has the incident prevented her from attending work.

Addressing the defendant's contention on appeal that a judgment notwithstanding the verdict should have been entered in its favor, defendant contends that plaintiffs have failed to meet the legal predicate to recovery for injuries incurred as a result of a negligently inflicted emotional distress. The legal standard applicable to this issue and its requirements are the subject of the dispute on appeal, as well as the subject of much confusion among Illinois courts.

Historically, Illinois courts adhered to the rule announced in *Braun v. Craven* (1898), 175 Ill. 401, 51 N.E. 657, to limit recovery for negligently inflicted emotional distress to situations where the plaintiff suffered a contemporaneous physical impact as the result of defendant's negligence. (*E.g., Cutright v. City National Bank* (1980), 88 Ill. App. 3d 742, 410 N.E.2d 1142; *Carlinville National Bank v. Rhoads* (1978), 63 Ill. App. 3d 502, 380 N.E.2d 63; *Owens v. Chicago Telephone Co.* (1910), 159 Ill. App. 80.) In *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1, the Illinois Supreme Court adopted a standard enabling a victim of a negligent act or omission who had not suffered a contemporaneous physical impact to plead a cause of action for negligent infliction of emotional distress. This standard, known as the zone-of-physical-danger rule, allows the plaintiff to recover for physical injury or illness as a result of the emotional distress caused by the defendant's negligence when the plaintiff is in such proximity to the impact to have reasonable fear for his own safety. *Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5.

Since *Rickey*, courts have disputed whether the zone-of-physical-danger rule has replaced the impact rule as the standard to be applied in all negligent infliction of emotional distress causes of action, or whether the rule acts conjunctively with the impact rule to be applied solely in bystander situations. (Compare *Siemieniec v. Lutheran General Hospital* (1985), 134 Ill. App. 3d 823, 480 N.E.2d 1227, *aff'd in part, rev'd in part* (1987), 117 Ill. 2d 230, 512 N.E.2d 691; *Corgan v. Muehling* (1988), 167 Ill. App. 3d 1093, 522 N.E.2d 153, *appeal allowed* (1988), 122 Ill. 2d 572, 530 N.E.2d 242; *McAdams v. Eli Lilly & Co.* (N.D. Ill. 1986), 638 F. Supp. 1173, 1178 (courts finding zone-of-physical-danger rule to apply only to bystander situations), with *Hammond v. Lane* (1987), 162 Ill. App. 3d 17, 515 N.E.2d 828; *Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d 634, 487 N.E.2d 1071; *Robbins v. Kass* (1987), 163 Ill. App. 3d 927, 516 N.E.2d 1023; *Goldberg v. Ruskin* (1984), 128 Ill. App. 3d 1029, 471 N.E.2d 530, *aff'd in part* (1986), 113 Ill. 2d 482, 499 N.E.2d 406

(courts finding *Rickey* to have abolished the impact rule); see also Note, *Rickey v. Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois*, 17 J. Mar. L. Rev. 563 (1984)) (interpreting *Rickey* as allowing a direct victim to recover emotional distress under both the impact rule and the zone-of-physical-danger rule).[1]

The controversy in Illinois appellate courts has arisen due to the absence in the *Rickey* opinion of any indication as to whether the court was adopting a conjunctive test or abolishing the impact rule. *Rickey*'s language suggests that the court was substituting a test to be applied solely in bystander situations. Throughout the opinion, the court refers to the bystander and limits its discussion to the bystander. The court framed the issue before it as "whether a bystander *** may recover damages for emotional distress," and it announced its new standard as one "which has been adopted in the majority of jurisdictions where *this question of recovery by a bystander* for emotional distress has been examined." (Emphasis added.) *Rickey*, 98 Ill. 2d at 549, 555, 457 N.E.2d at 2, 5.

The above language, together with the historical context of the case, leads us to conclude that the impact rule remains a viable test in Illinois. Before the announcement of the impact rule in *Braun*, Illinois courts had long restricted recovery for emotional distress or emotional pain in simple negligence cases to that traceable to, or directly flowing from, a bodily injury immediately inflicted by the defendant's negligence. (*Indianapolis & St. Louis R.R. Co. v. Stables* (1872), 62 Ill. 313; *Hannibal & St. Joseph R.R. Co. v. Martin* (1884), 111 Ill. 219; *City of Chicago v. McLean* (1890), 133 Ill. 148, 24 N.E. 527; *Chicago, Burlington & Quincy R.R. Co. v. Hines* (1892), 45 Ill. App. 299.) The *Braun* court followed this restrictive view of recovery for negligently inflicted emotional distress when it limited recovery for a physical injury resulting from mental anguish or fright due to the defendant's verbal assault upon the plaintiff. The

[1]Defendant argues that the supreme court's recent decision in *Siemieniec v. Lutheran Hospital* (1987), 117 Ill. 2d 230, 512 N.E.2d 691, establishes that *Rickey* abandoned the impact rule in all negligent infliction of emotional distress cases. The opinion, however, has no express language to this effect, and its language suggests that the court viewed the case before it as a bystander situation. Moreover, the court did not refute the appellate court's position in that case that *Rickey* is a "limited exception" to the impact rule. See *Siemieniec*, 134 Ill. App. 3d at 830, 480 N.E.2d at 1232; see also *Siemieniec*, 117 Ill. 2d at 268, 512 N.E.2d at 711 (Simon, J., specially concurring) (disputing *Rickey's* application on the ground that the plaintiffs were actual victims not bystanders); *Corgan v. Muehling* (1988), 167 Ill. App. 3d 1093, 522 N.E.2d 153.

court focused on a proximate cause analysis and concluded that such injuries were unforeseeable absent a contemporaneous physical impact. *Braun*, 175 Ill. 401, 51 N.E. 657.

The *Rickey* decision followed years of adherence by Illinois courts to *Braun*, which had resulted in the elimination of claims by persons who were direct victims of negligence but did not suffer an impact and by bystanders who witnessed the consequences of defendant's negligence to another. (*E.g.*, *McCullough v. Orcutt* (1957), 14 Ill. App. 2d 513, 145 N.E.2d 109 (recovery denied for miscarriage suffered when witnessing husband's injuries sustained in an automobile accident); *Rosenberg v. Packerland Packing Co.* (1977), 55 Ill. App. 3d 959, 370 N.E.2d 1235 (recovery denied to driver of car who suffered mental injury when a truck driver drove within two feet of vehicle for a long span of time at speeds up to 80 miles per hour).) Because of the harsh consequences of the rule, the rule was subject to much criticism among commentators. See Reidy, *Negligent Infliction of Emotion Distress in Illinois: Living in the Past, Suffering in the Present*, 30 De Paul L. Rev. 295 (1980).

When viewing *Rickey* in this historical context, it is logical to conclude that, by prefacing its holding on the "bystander" situation, the court intended to expand a defendant's duty resulting from *Braun*'s proximate cause analysis to injuries suffered by bystanders in specified circumstances. Thus, where bystanders are involved, the zone-of-physical-danger rule is substituted for the impact rule, whereas, where a plaintiff is a direct victim of a negligent act—one personally involved in the mishap—the impact rule remains.[2]

; memo p. 12

The strained results produced by courts applying the zone-of-physical-danger test to direct victims render support for our conclusion that the test was intended to apply solely to bystander situations. As many courts have realized, the rule's proximity requirements are fashioned for bystander cases and cannot be applied to direct victims without distortions. (*McAdams*, 638 F. Supp. 1173; *Corgan*, 167 Ill. App. 3d 1093, 522 N.E.2d 153; *Lewis*, 139 Ill. App. 3d at 638 (Linn, J., dissenting).) In *Hammond v. Lane* (1987), 162 Ill. App. 3d 17, 515 N.E.2d 828, for example, the court concluded that plaintiff, who alleged that the doctor who had been treat-

[2]We acknowledge that direct victims of negligence who do not suffer a contemporaneous physical impact still may not recover under the impact rule. (But see *Corgan*, 167 Ill. App. 3d at 1102, 522 N.E.2d at 159, *appeal allowed* (1988), 122 Ill. 2d 572, 530 N.E.2d 242.) We do not address the policy considerations of this issue, however, because we are without authority to overrule or modify the supreme court's decision in *Braun*. See *Rickey*, 98 Ill. 2d at 551-52, 457 N.E.2d at 3.

ing her for psychiatric disorders was professionally negligent in having sexual contact with her, did not state a cause of action because she did not allege that she was in the zone of danger and had reasonable fear for her safety. In *Lewis* (139 Ill. App. 3d 634, 487 N.E.2d 107), the court concluded that plaintiff, who herself was trapped inside the malfunctioned elevator, had not proven that she was in the zone of danger. The proximity test is not logically applied to victims who are directly involved in the very accident or mishap producing the risk.

Accordingly, the appropriate rule to apply in the case at bar is the impact rule. Plaintiffs, by being trapped inside the malfunctioned elevator, were direct victims of defendant's negligence. In applying the impact rule to the instant circumstances, it is evident that plaintiff's presence within the vehicle producing the accident obviates any plausible argument of the absence of a contemporaneous physical impact. Nonetheless, more perplexing questions arise regarding the injuries compensable once a contemporaneous physical impact is shown.

Plaintiffs argue that the impact requirement is a minor evidentiary hurdle that need not have a causal link to the emotional injuries. Plaintiffs, however, do not further expound upon what emotional injuries may be recovered under the rule. Defendant, relying on its position that the zone-of-physical-danger standard applies, has not addressed the requirements of the impact rule.

The court in *Braun*, when it denied the plaintiff recovery for her alleged physical injuries due to the absence of a contemporaneous physical impact, did not specifically address the question of what emotional injuries are compensable once a physical impact is shown. Few Illinois appellate courts since *Braun* have addressed the issue. After reviewing *Braun* and its progeny, we conclude that the impact rule allows a plaintiff who has suffered a contemporaneous physical injury or impact to recover for physical injuries resulting from emotional distress caused by defendant's negligence.

In *Rosenberg v. Packerland Packing Co.* (1977), 55 Ill. App. 3d 959, 962, 370 N.E.2d 1235, 1238, where the plaintiffs alleged that a truck driver caused them emotional distress by driving within a few feet of their vehicle at speeds up to 80 miles per hour, the court recognized two requirements of the impact rule when it found that plaintiffs failed to state a cause of action under *Braun* "since they failed to allege any bodily injury *and* since there was no physical impact between the vehicle or upon the plaintiffs' persons." (Emphasis added.) (55 Ill. App. 3d at 962, 370 N.E.2d at 1238.) It is noteworthy

that other courts since *Braun* which have denied recovery based upon the absence of a physical impact have emphasized that the plaintiffs had alleged physical injuries as a result of emotional distress. *E.g., Benza v. Shulman Air Freight* (1977), 46 Ill. App. 3d 521, 361 N.E.2d 91; *Carlinville*, 63 Ill. App. 3d 502, 380 N.E.2d 63.

The court in *Cutright v. City National Bank* (1980), 88 Ill. App. 3d 742, 410 N.E.2d 1142, suggests a further requirement that the mental disturbance be causally connected to a physical injury. In a factual situation somewhat similar to the case at bar, the court denied the plaintiff recovery for her claims of psychological disorders on the ground that the mental disturbance did not "arise from" or was not "directly connected with some contemporaneous physical injury." (*Cutright*, 88 Ill. App. 3d at 743, 410 N.E.2d at 1143.) The court relied on *Carlinville National Bank v. Rhoads* (1978), 63 Ill. App. 3d 502, 380 N.E.2d 63, a case decided before *Rickey* involving the court's application of the impact rule to a bystander situation. The plaintiff there sought to recover for physical manifestations of emotional injuries resulting from witnessing her husband's death in an automobile accident. The court's referral to a connection to a contemporaneous physical injury could be viewed as an attempt to explain the then existing law denying causes of action for mental distress arising "solely as the result of witnessing peril or harm to another." (*Carlinville*, 63 Ill. App. 3d at 505, 380 N.E.2d at 66.) In setting forth Illinois case law in the area, the court treated as separate scenarios the negligent acts alleged in *Braun* and those involving a negligent infliction of an immediate physical injury, where courts have specifically restricted recovery to the mental anguish directly connected to bodily injury. *Carlinville*, 63 Ill. App. 3d at 503, 380 N.E.2d at 65.

While the *Braun* opinion also sets forth case law regarding emotional injuries in simple negligence cases, *Braun* confronted a somewhat different situation where permanent bodily harm was alleged, but it was the secondary result of defendant's negligence in that it resulted from emotional distress caused by the defendant's negligence. In concluding on policy grounds that recovery in such circumstances could not be had absent a contemporaneous physical impact, the court's proximate cause analysis focused on foreseeable and fraudulent claims. The landmark decision on which the court relied, *Victorian Rys. Commissionors v. Coultas* (Eng. 1888), 13 App. Cas. 222, did not embrace a requirement that the emotional consequences result from a physical injury. Thus, *Braun* provided a cut-off point for liability for physical injuries resulting from emotional distress in-

flicted by defendant's negligence rather than articulating a requirement that the emotional disturbances constituting physical injury be causally linked to a bodily injury or impact.

The supreme court's discussion of the impact rule in *Rickey* lends support for this conclusion since it lacks any mention of a requirement of a causal connection between physical injuries and the impact. Furthermore, it would be illogical for the court to allow a bystander to an accident to recover physical injuries resulting from emotional distress under the zone-of-physical-danger rule, but deny a person directly involved in the mishap recovery for the same injuries because of the absence of a causal connection to a bodily injury.

Finally, we address whether plaintiffs have presented sufficient evidence to show physical injury or illness as a result of the emotional distress they suffered. Relying on the language in *Rickey*, plaintiffs argue that they have demonstrated permanent behavioral disorders which are sufficient physical manifestations of emotional distress to entitle them to recovery.

The plaintiff in *Rickey* alleged that his emotional distress became manifest in physical injury, including "definite functional, emotional, psychiatric and behavioral disorders, extreme depression, prolonged and continuing mental disturbances, inability to attend school and engage in gainful employment and to engage in his usual and customary affairs." (*Rickey*, 98 Ill. 2d at 550, 457 N.E.2d at 2.) While the court indicated that the physical injury requirement may be satisfied by physical manifestations of emotional distress, it did not rule that the alleged conditions satisfied the requirement. (See *Robbins*, 163 Ill. App. 3d at 933, 516 N.E.2d at 1027; 17 J. Marshall L. Rev. at 574 n.42 (stating that the court's reliance on the Restatement (Second) of Torts in *Rickey* suggests that the physical manifestations alleged in *Rickey* may not be recoverable).) The court stated that the facts of the case could not be precisely determined since the complaint was drawn with the wrong standard in mind. It also noted that the appellate court had improperly treated the case as one involving solely emotional distress where the complaint alleged physical manifestations. (*Rickey*, 98 Ill. 2d at 554-56, 457 N.E.2d at 4-5.) The court remanded the case for further proceedings without further comment on the sufficiency of the allegations.

We note that many jurisdictions have struggled with the determination of what conditions or symptoms qualify as the requisite injury, illness or other physical consequence to recover in negligent infliction of emotional distress cases. (See W. Keeton, Prosser & Keeton on Torts §54, at 364 (5th ed. 1984); see also *William v. Baker* (D.C.

1990), 572 A.2d 1062 (and cases cited therein).) The Restatement (Second) of Torts suggests no liability for transitory, nonrecurring physical phenomena where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm, but that long-continued physical phenomena, such as nausea or headaches, or long-continued mental disturbance, such as repeated hysterical attacks or mental aberration, may amount to physical illness. Restatement (Second) of Torts, §436A, comment c (1965).

It is evident from the few cases cited to us by the parties that the physical manifestation requirement has been relatively unexplored by Illinois courts. In *Robbins* (163 Ill. App. 3d 927, 516 N.E.2d 1023), the court concluded that the physical illness or injury requirement indicates a desire to permit compensation only in cases involving serious emotional distress. It found the manifestations suffered by the plaintiff for which she did not receive medical treatment—including crying, sleeplessness, increased migraine headaches and becoming upset when viewing pregnant women—to be insufficient to satisfy the physical consequences requirement. The court, in *Rahn v. Gerdts* (1983), 119 Ill. App. 3d 781, 455 N.E.2d 807, did not directly address the issue, but stated that the *Rickey* standard supported the plaintiff's cause of action where the complaint alleged that the plaintiff had been admitted to the hospital and treated for severe depression, anxiety and nervousness.

We need not examine further into what conditions or symptoms qualify as the requisite physical manifestations to amount to physical injury or illness because we are convinced that the manifestations to which plaintiffs have testified are not the substantial mental disturbance intended to satisfy the physical consequences requirement. Plaintiffs here suffer continued distress, nervousness and sweaty palms when on elevators, have fears of heights or crowds, and, although they have taken elevators and airplanes since the incident, they have taken some actions to avoid taking elevators or using airplanes as a means of transportation. None of the plaintiffs sought medical or psychological treatment as a result of the incident. We agree with the *Robbins* court that the physical illness or injury requirement indicates a desire to permit compensation only in cases involving serious emotional disturbance.

To allow recovery for the manifestations shown here would be inconsistent with Illinois' historical reluctance to allow recovery for emotional injuries in negligent infliction of emotional distress cases. Moreover, as recognized in *Robbins*, it would be anomalous to refuse recovery in intentional infliction of emotional distress actions for in-

juries such as continued nervousness, sleeplessness and fear of nightmares due to a lack of severity of the injuries (see *Swanson v. Swanson* (1970), 121 Ill. App. 2d 182, 257 N.E.2d 194), but to allow recovery in negligent infliction of emotional distress actions for the similar conditions suffered by plaintiffs here.

Accordingly, because the physical manifestations suffered by plaintiffs are insufficient to satisfy the impact rule's physical injury requirement, a judgment notwithstanding the verdict should have been entered.

Reversed.

O'CONNOR and MANNING, JJ., concur.

GILLIS ASSOCIATED INDUSTRIES, INC., Plaintiff-Appellee, v. CARI-ALL, INC., *et al.*, Defendants-Appellants.

First District (1st Division) No. 1—90—0164

Opinion filed September 28, 1990.—Rehearing denied December 21, 1990.—Modified opinion filed December 31, 1990.

Babic v. Village of Lincolnwood, 2022 IL App (1st) 210929

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 2022-06-16 · Opinion
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- memo p. 11 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 12: passage C015.1

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Appellate Court

Babic v. Village of Lincolnwood, 2022 IL App (1st) 210929

Appellate Court Caption	JELENA BABIC, Individually and as Mother and Next Friend of Denis Hodzic, a Minor, Plaintiff-Appellant, v. THE VILLAGE OF LINCOLNWOOD, a Municipal Corporation, Defendant-Appellee.
District & No.	First District, Fourth Division No. 1-21-0929
Filed	June 16, 2022
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 19-L-002834; the Hon. Christopher E. Lawler, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Sofia Zneimer, of Zneimer & Zneimer, P.C., of Chicago, for appellant. Patrick H. O'Connor and Michael R. Hartigan, of Hartigan & O'Connor P.C., of Chicago, for appellee.
Panel	PRESIDING JUSTICE REYES delivered the judgment of the court, with opinion. Justices Rochford and Martin concurred in the judgment and opinion.

OPINION

¶ 1 Denis Hodzic (Denis), a sixth-grade boy,[1] was riding his bicycle on a residential street near his home in Lincolnwood when he encountered a sinkhole, causing his bicycle to flip and breaking his wrist in the process. Plaintiff Jelena[2] Babic (plaintiff) filed a lawsuit against the defendant Village of Lincolnwood (Village), seeking damages for Denis's injuries. The Village filed a motion for summary judgment, claiming that Denis was not an intended user of the street on which he was injured and, therefore, the Village owed him no duty of reasonable care. The circuit court granted the motion for summary judgment, and plaintiff appeals. For the reasons set forth below, we affirm.

¶ 2 BACKGROUND

¶ 3 The facts in the instant case are largely undisputed. On June 4, 2018, Denis was riding a bicycle southbound on Kilpatrick Avenue near the intersection of Kilpatrick Avenue and Estes Avenue. His family had recently moved into the neighborhood, and Denis was riding his bicycle to familiarize himself with the area. When he approached the intersection, the front tire of his bicycle encountered a sinkhole in the street and he fell from his bicycle; in his deposition, Denis estimated that the sinkhole was oval-shaped and approximately one foot wide, one foot long, and two feet deep.[3] There is no dispute that Kilpatrick Avenue does not include any bicycle lanes or signage, but Denis testified in his deposition that none of the streets he rode in the area had sidewalks that were suitable for riding.[4] The fall resulted in Denis breaking his wrist, which required surgery to correct.

¶ 4 On March 15, 2019, plaintiff filed a complaint against the Village, alleging that the Village had negligently maintained the street, causing Denis's injuries. The Village filed an answer and affirmative defenses, alleging that it owed no duty to Denis under section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102 (West 2018)).

¶ 5 The parties engaged in discovery, after which the Village filed a motion for summary judgment. The Village argued that section 3-102 of the Tort Immunity Act expressly limited a municipality's duty of care to maintain property for uses that were both intended and permitted and that a bicyclist such as Denis was not an intended user of a municipal street. Consequently, the Village claimed that it owed no duty to Denis. In response, plaintiff claimed that there was

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[1]Denis's birthdate does not appear in the record on appeal. At the time of his deposition, he was 13 years old, so he would have been either 11 or 12 at the time of the accident at issue in the instant appeal.

[2]We note that plaintiff's first name is spelled several different ways throughout the record on appeal. We use the spelling she provided during her deposition.

[3]The sinkhole was filled within two days of the accident, and the only photographs contained in the record on appeal display an already-patched roadway.

[4]Photographs contained in the record on appeal show that there appears to be a sidewalk on the west side of Kilpatrick Avenue north of Estes Avenue, but the sidewalk ends at the intersection of Kilpatrick Avenue and Estes Avenue. There also appears to be narrow concrete strips running directly along the curbside of Kilpatrick and Estes Avenues, which the Village's chief of police termed "coachwalks."

a question of fact as to whether Denis was an intended user of the street and further claimed that section 3-102 should not be interpreted to bar Denis's claim.

¶ 6 On July 8, 2021, the circuit court granted the Village's motion for summary judgment, finding that there was no evidence that the Village intended for bicyclists to use the portion of the road where Denis encountered the sinkhole. As Denis was not both a permitted and intended user of the road, the circuit court found that the Village owed him no duty of care and, consequently, granted summary judgment in favor of the Village. Plaintiff timely filed a notice of appeal, and this appeal follows.

¶ 7 ANALYSIS

¶ 8 On appeal, plaintiff contends that the circuit court erred in granting summary judgment in favor of the Village, arguing that section 3-102 of the Tort Immunity Act does not bar Denis's claims. A circuit court is permitted to grant summary judgment only 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 2018). The circuit court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a circuit court's decision to grant a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 9 Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Id.* However, mere speculation, conjecture, or guess is insufficient to withstand summary judgment. *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). The party moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The movant may meet his burden of proof either by affirmatively demonstrating that some element of the case must be resolved in his favor or by establishing that there is an absence of evidence to support the nonmoving party's case. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The purpose of summary judgment is not to try an issue of fact but to determine whether a triable issue of fact exists. *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (citing *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). We may affirm on any basis appearing in the record, whether or not the circuit court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 10 In this case, the circuit court's grant of summary judgment was based on its determination that the Village owed no duty to Denis based on section 3-102 of the Tort Immunity Act. To properly state a cause of action for negligence, a plaintiff must establish that the defendant owed a duty of care, the defendant breached that duty, and the plaintiff suffered an injury proximately caused by the breach. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992). The question of whether a duty of care exists is a question of law to be determined by the court. *Id.*

¶ 11 Local public entities have a common-law duty to maintain public property in a reasonably safe condition. *Monson v. City of Danville*, 2018 IL 122486, ¶ 24. This duty has been codified in section 3-102(a) of the Tort Immunity Act, which limits a local public entity's duty to maintain its property. *Id.*; *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 158 (1995). Section 3-102(a) provides that a local public entity

> "has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used." 745 ILCS 10/3-102(a) (West 2018).

Thus, a municipality has a duty under section 3-102(a) only to users who are both intended and permitted users of the property under the control of the municipality. *Vaughn*, 166 Ill. 2d at 160; *Boub v. Township of Wayne*, 183 Ill. 2d 520, 524 (1998).

¶ 12 While plaintiff acknowledges that this is the current state of the law, she asks us to "modify the interpretation" of section 3-102(a) to reflect that a municipality has a duty to users who are *either* intended *or* permitted users, not both, where there is a condition on its property that is dangerous for ordinary travel. This we cannot do, however, regardless of the merits of any of plaintiff's arguments. It is well settled that, when the supreme court has declared law on any point, only that court may modify or overrule its previous decisions, and all lower courts are bound to follow that precedent. See, *e.g.*, *In re Marriage of Budorick*, 2020 IL App (1st) 190994, ¶ 86; *Doyle v. Hood*, 2018 IL App (2d) 171041, ¶ 35; *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 366 Ill. App. 3d 730, 734 (2006); *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 551 (1983). Accordingly, in order for the Village to have had a duty to Denis in the present case, Denis must have been both an intended and a permitted user of the road on which he was injured, and we need not discuss plaintiff's arguments suggesting a different interpretation of section 3-102(a).

↩ memo p. 6, 11

¶ 13 Our supreme court has recognized that an intended user of property is, by definition, also a permitted user; however, the converse is not always true, as a permitted user of property is not necessarily an intended user. *Boub*, 183 Ill. 2d at 524. In order to determine the intended use of the property at issue, a court looks to the nature of the property itself. *Wojdyla*, 148 Ill. 2d at 426; *Boub*, 183 Ill. 2d at 525. Moreover, in determining intent, it is the intent of the municipality that is at issue, not the user. *Boub*, 183 Ill. 2d at 525.

¶ 14 In *Boub*, our supreme court considered whether a bicyclist may be considered an intended user of a road and explained that, to determine the municipality's intent, "it is necessary to look at pavement markings, signs, and other physical manifestations of the intended use of the property." *Id.* at 528. Thus, a bicyclist was considered to be an intended user in *Cole v. City of East Peoria*, 201 Ill. App. 3d 756, 761 (1990), where a white line painted four feet from the curb indicated an intent that the area be used by bicyclists and pedestrians, not simply those driving automobiles. Similarly, in *Alave v. City of Chicago*, 2022 IL App (1st) 210812, this court recently found that the presence of Divvy bicycle rental stations indicated that the city intended for nearby streets to be used by bicyclists. By contrast, where there were no markings, road signs, or other affirmative indications of intent, courts have found that bicyclists are not intended users of public roadways. See *Boub*, 183 Ill. 2d at 535-36; *Latimer v. Chicago Park District*, 323 Ill. App. 3d 466, 473 (2001); *Berz v. City of Evanston*, 2013 IL App (1st) 123763, ¶ 14. We note that plaintiff argues that the *Boub* court's holding that bicyclists generally are not intended users of roads violates bicyclists' due process rights by depriving them of their liberty interests in the municipality's duty to them. Plaintiff, however, did not raise this argument below, so consequently cannot raise it for the first time on appeal. See *Susman v. North Star Trust Co.*, 2015 IL App (1st) 142789, ¶ 41 (issues not raised in the circuit court may not be raised for the first time on appeal, including constitutional issues). More

importantly, as noted, we are bound to follow the supreme court's precedent, and therefore, we need not address this argument further.

¶ 15 Here, there is no dispute that the area in question did not have any road markings, signs, or other indications that bicyclists were intended to use the roadway. Consequently, in the absence of such affirmative manifestations of intent, the circuit court properly found that Denis was only a permitted—not intended—user of the street and, therefore, the Village did not owe him a duty under section 3-102(a) of the Tort Immunity Act. See *Boub*, 183 Ill. 2d at 536.

¶ 16 Plaintiff proffers several factors which she contends establishes that bicyclists were intended users of the Village's streets, none of which we find persuasive. First, plaintiff claims that the Village's municipal ordinances provide that bicyclists are intended users of the area of the streets near curbs.[5] A municipality's ordinances may be used to determine who are intended users of its property. See, *e.g.*, *Latimer*, 323 Ill. App. 3d at 470-72 (discussing Chicago Municipal Code); *Brooks v. City of Peoria*, 305 Ill. App. 3d 806, 810-12 (1999) (discussing City of Peoria Code). Here, article 3 of the Village's Traffic Code addresses bicyclists. See Lincolnwood Municipal Code § 7-3-1 *et seq.* (adopted Dec. 6, 2011). However, other than bicycle paths, the provisions of article 3 do not specifically identify areas in which bicyclists are intended to ride. Unlike other municipal ordinances, the provisions of article 3 do not prohibit the riding of bicycles on sidewalks and, indeed, anticipate that bicyclists may ride on sidewalks by providing that when they do, they must yield the right-of-way to pedestrians and give audible signals before passing them. Compare Lincolnwood Municipal Code § 7-3-15 (adopted Dec. 6, 2011), with Chicago Municipal Code § 9-52-020 (amended Apr. 10, 2019) (prohibiting persons aged 12 or older from riding on sidewalks). The provisions of article 3 also anticipate that bicyclists may ride on the streets, provided that bicyclists ride "as near to the right-hand side of the street or roadway as practicable" when doing so (Lincolnwood Municipal Code § 7-3-9(A) (adopted Dec. 6, 2011)), and furthermore, the bicyclists riding on the streets are subject to the same rights and duties as drivers of motor vehicles (*id.* § 7-3-6). The provisions of article 3, however, additionally provide that "[w]henever a usable path for bicycles has been provided adjacent to a street or roadway, bicycle riders shall use such path and shall not use the street or roadway." *Id.* § 7-3-9(C). Thus, under the Village's ordinances, bicyclists (1) must use a "usable path for bicycles" when available and otherwise (2) may ride in the street or on the sidewalk.

¶ 17 Contrary to plaintiff's claims, we cannot find that the ordinances of the Village that regulate riding in the streets mean that the Village intended for bicyclists to ride in the street. Courts have regularly found that similar language is insufficient to establish that bicyclists are intended users of streets or roadways. For instance, in *Boub*, our supreme court found that language in the Illinois Vehicle Code providing that a bicyclist was subjected to the same rights and duties applicable to the driver of a vehicle was "entirely consistent" with a conclusion that bicyclists were permitted, not intended, users of roads. *Boub*, 183 Ill. 2d at 529-30 (discussing

[5]We note that plaintiff raises this argument for the first time in her reply brief, so it has been forfeited on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (points not argued in the appellant's brief are forfeited and shall not be raised in the reply brief, at oral argument, or in a petition for rehearing); *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 253 (2010) (points not argued in the appellant's brief are forfeited). However, since this argument intertwines with other issues properly raised by plaintiff, we choose to consider it, especially since the Village addresses the argument in its own brief.

section 11-1502 of the Illinois Vehicle Code (625 ILCS 5/11-1502 (West 1996))). Similarly, in *Latimer*, this court found that a provision of the Chicago Municipal Code directing bicyclists to ride as near as practicable to the righthand side of a roadway did not establish that bicyclists were intended users of the roadways. *Latimer*, 323 Ill. App. 3d at 472 (discussing Chicago Municipal Code § 9-52-040(c) (added July 12, 1990)). There is nothing differentiating the Village's ordinances at issue here from these types of statutes and ordinances which compels us to reach a different result.

¶ 18 Plaintiff further claims that the Village's ordinances manifest an intent that bicyclists ride in the street through a broad definition of "vehicle." In several places, the Village defines a "street" as "[t]hat portion of a public or private right-of-way having a weight-bearing surface that affords a primary means of vehicular access to abutting properties." Lincolnwood Municipal Code § 15-2.02 (amended Mar. 17, 2011) (zoning rules); Lincolnwood Municipal Code § 16-1-2 (adopted Dec. 6, 2011) (subdivision regulations). In article 3 of the Traffic Code, the Village defines a "bicycle" as "[a] vehicle propelled by human power upon which any person may ride, having at least two tandem wheels either of which is at least 20 inches in diameter." Lincolnwood Municipal Code § 7-3-1 (adopted Dec. 6, 2011). Thus, since a bicycle is a "vehicle," plaintiff claims that streets are intended for bicycles, as well as automobiles.

¶ 19 Plaintiff's argument, however, places too great a weight on the use of the word "vehicle" in the definition of a bicycle. We note that the Illinois Vehicle Code, which has been expressly adopted by the Village (see Lincolnwood Municipal Code § 7-1-1 (amended Nov. 7, 2017)), defines a "bicycle" as "[e]very device propelled by human power upon which any person may ride, having two tandem wheels except scooters and similar devices." 625 ILCS 5/1-106 (West 2018). The Illinois Vehicle Code also specifically excludes "devices moved by human power" from its definition of a "vehicle." *Id.* § 1-217. Additionally, article 3 of the Village's Traffic Code refers to "vehicles" in several other contexts that make clear that bicycles are not included in that definition. For instance, section 7-3-6 provides that every person riding a bicycle shall be granted all of the rights and shall be subject to all of the duties applicable "to the driver of a vehicle." Lincolnwood Municipal Code § 7-3-6 (adopted Dec. 6, 2011). Similarly, section 7-3-7 provides that any person operating a bicycle shall obey the instructions of traffic-control devices "applicable to vehicles." *Id.* § 7-3-7(A). If a bicycle were already considered a "vehicle," there would be no need to specify that rules applicable to vehicles apply to bicycles, as well. Accordingly, we cannot find that the Village's use of the word "vehicle" in defining a bicycle indicates that bicyclists are intended users of its streets.

¶ 20 Next, plaintiff claims that courts have carved out a "safe harbor" where a pedestrian is owed a duty when walking in a street or alley, such as when throwing out trash or reaching a legally parked automobile. See, *e.g.*, *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 620 (2010) (a pedestrian was an intended user of an alley where she was required to place her trash); *Torres v. City of Chicago*, 218 Ill. App. 3d 89, 91 (1991) (a pedestrian was an intended user of the immediate area around his parked vehicle for ingress and egress). Plaintiff contends that Denis was riding his bicycle near the curb, where he was directed to ride by the Village's ordinance, and that, therefore, he was within a " 'safe zone' " of the street in which he was an intended user. This argument, however, is a circular one—plaintiff's claim relies on the assumption that Denis is an intended user so long as he uses the street near the curb, which is the very proposition she is attempting to establish. Furthermore, plaintiff has not provided, nor have we discovered, any cases in which the mere fact that a bicyclist was riding along the curb

transformed the bicyclist into an intended user of the street. Indeed, as noted, the *Latimer* court expressly found that a requirement that bicyclists ride as close to the right-hand side of the roadway as possible did not transform a bicyclist into an intended user of the roadway, reasoning that the fact that the municipality regulated permitted uses did not transform the permitted uses into intended ones. *Latimer*, 323 Ill. App. 3d at 472; see also *Olena v. City of Chicago*, 2022 IL App (1st) 210342-U, ¶ 26 (finding unpersuasive the claim that use of the street was necessary to reach marked bicycle routes). While we recognize that the *Alave* court recently found that necessity dictated the use of streets near Divvy bicycle rental stations, that holding was based largely on the fact that the City of Chicago had approved a network of bicycle rental stations throughout the city, and the logical corollary that the city must have intended those bicycles to be ridden on the nearby streets. See *Alave*, 2022 IL App (1st) 210812, ¶ 41. The instant case, however, contains no such manifestation of intent, and therefore, we cannot find that necessity transformed Denis into an intended user of the street.

¶ 21 Finally, plaintiff contends that Denis's status as a minor affords him extra protection when determining whether the Village owed him a duty. Plaintiff claims that minors are not expected to know municipal ordinances and may be intended users even where adults would not be. Our supreme court has made clear, however, that it is the intent of the municipality, not the intent of the particular person using the property, that determines whether the municipality owes a duty under section 3-102(a). *Wojdyla*, 148 Ill. 2d at 425-26; *Boub*, 183 Ill. 2d at 525. Thus, whether a particular individual is aware of the municipality's ordinance is not a determinative factor as to whether someone is an intended user of the property, and the cases cited by plaintiff do not suggest otherwise. In *Ramirez v. City of Chicago*, 2019 IL App (1st) 180841, ¶ 17, we merely noted that the fact that a plaintiff violated an ordinance generally precluded him from being an intended and permitted user of the property but that this rule was not automatic. The plaintiff in that case was not a minor, and we made no findings as to the effect of minority on a municipality's duty. While *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶¶ 55-57, did involve a minor, in that case we found that the 13-year-old plaintiff was an intended user of a playground that was technically designated for use by individuals under 12, but our holding was based on the fact that there were no signs or notices announcing an age limit, and there was no way that a user would have otherwise known of such an age limit. Here, there is no claim that Denis was violating an ordinance, either knowingly or unknowingly, so neither of the cases cited by plaintiff suggest that Denis should have been treated as an intended user even where an adult bicyclist would not. Accordingly, we cannot find that Denis's age transformed him into an intended user of the street.

¶ 22 In the case at hand, there is no dispute that Denis was a permitted user of the street on which he was riding his bicycle at the time of his injury. It is well settled, however, that a bicyclist is an intended user of a street only where the municipality has demonstrated its intent through road signs, markings, or other manifestations of intent. See *Boub*, 183 Ill. 2d at 535-36. Here, no such manifestations of intent are present and, therefore, the circuit court properly granted summary judgment in the Village's favor, as the Village did not owe Denis a duty of care. While we recognize that such a result may seem harsh with respect to a specific individual such as Denis, the Tort Immunity Act represents our legislature's attempt to serve the public as a whole, and our supreme court has made clear that whether a municipality owes a duty depends on the nature of the property, not on the particular individual involved. See *Vaughn*, 166 Ill. 2d at 162-63 (whether a particular use of property was permitted and intended is

determined by looking to the nature of the property itself).

¶ 23 CONCLUSION

¶ 24 For the reasons set forth above, the circuit court's grant of summary judgment is affirmed where the Village did not owe Denis a duty of care under section 3-102(a) of the Tort Immunity Act.

¶ 25 Affirmed.

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 2020-06-30 · 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. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 80: passage C002.10
- memo p. 7 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 28: passage C002.3
- memo p. 8 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 28: passage C002.3
- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 80: passage C002.10
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 80: passage C002.10
- memo p. 11 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 80: passage C002.10

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Illinois Official Reports

Appellate Court

Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549

Appellate Court Caption

DEVONA D. BENTON and FRANK JACKSON, Individually and on Behalf of Their Minor Child, J.B.; ROBERT S. BUFFORD JR., Individually and on Behalf of His Minor Child, C.B.; DAROLD BUTLER SR. and DONITA BRUCE, Individually and on Behalf of Their Minor Child, D.B.; VENISA BEASLEY-GREEN and CHRISTOPHER GREEN, Individually and on Behalf of Their Minor Child, B.G.; CARLTON A. HONDRAS II and SHEREE HONDRAS, Individually and on Behalf of Their Minor Child, C.H.; JERRY F. HOUSTON and MYRTLE HOUSTON, Individually and on Behalf of Their Minor Child, J.H.; EDWARD HOWARD III and CALANDRA HOWARD, Individually and on Behalf of Their Minor Child, E.H.; LINDA SNEED HARRIS, Individually and on Behalf of Her Minor Child, M.J.; NEDRA JONES and ALVIN JONES, Individually and on Behalf of Their Minor Child, P.J.; TAMMY KING and EDDIE KING SR., Individually and on Behalf of Their Minor Child, E.K.; PRENTISS LUSTER and DARLENE LUSTER, Individually and on Behalf of Their Minor Child, P.L.; SANJA E. NOBLE, Individually and on Behalf of Her Minor Child, L.N.; and CLAUDIA HARVEY, Individually and on Behalf of Her Minor Child, D.R., Plaintiffs-Appellants, v. LITTLE LEAGUE BASEBALL, INCORPORATED; JACKIE ROBINSON WEST LITTLE LEAGUE, INC., an Illinois Not-for-Profit Corporation; BILL HALEY, Individually and as Agent and/or Employee of Jackie Robinson West Little League, Inc.; ANNIE HALEY, Individually and as Agent and/or Employee of Jackie Robinson West Little League, Inc.; EVERGREEN PARK ATHLETIC ASSOCIATION, an Illinois Not-for-Profit Corporation; CHRIS JANES, Individually and as Agent and/or Employee of Evergreen Park Athletic Association; ESPN, INC., a Delaware Corporation; and STEPHEN A. SMITH, Individually and as Agent of ESPN, Inc., Defendants-Appellees.

District & No.

First District, Second Division
No. 1-19-0549

Filed	June 30, 2020
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 16-L-1428; the Hon. John H. Ehrlich, Judge, presiding.
Judgment	Affirmed in part and reversed in part.
Counsel on Appeal	James A. Karamanis, Kenneth A. Nazarian, and Emily A. Herbick, of Barney & Karamanis, LLP, of Chicago, for appellants. Scott T. Schutte, Tedd M. Warden, and Tyler Zmick, of Morgan, Lewis & Bockius LLP, of Chicago, for appellee Little League Baseball, Inc. Brian A. Sher and Demetria L. Hamilton, of Bryan Cave Leighton Paisner LLP, of Chicago, and Nathan E. Siegel, of Davis Wright Tremaine LLP, of Washington, D.C., for appellees ESPN, Inc., and Stephen A. Smith. Melinda S. Kollross and Paul V. Esposito, of Clausen Miller P.C., of Chicago, for appellees Jackie Robinson West Little League, Inc., Bill Haley, and Annie Haley. No brief filed for other appellees.
Panel	JUSTICE LAVIN delivered the judgment of the court, with opinion. Justices Pucinski and Coghlan concurred in the judgment and opinion.

OPINION

¶ 1 In August 2014, Jackie Robinson West, an all African-American baseball team from the south side of Chicago, won the United States Little League World Series (World Series) title. This event aired nationally on ESPN to much acclaim, causing these 10-, 11-, and 12-year-old "South Siders" to become national media darlings before a tragic confluence of events led to the players being stripped of their title some six months later in February 2015, amid allegations of residency rule violations.

¶ 2 This appeal arises out of a lawsuit filed by the Jackie Robinson West parents/guardians, individually and on behalf of their 13 minor children, against Little League Baseball, Inc. (Little League), the team's corporate entity Jackie Robinson West Little League, Inc. (Jackie Robinson West, Inc.[1]), team president Annie Haley and team treasurer Bill Haley (collectively, the Haleys), as well as ESPN, Inc., and its employee Stephen A. Smith (ESPN/Smith), among others. Several counts were also individually filed by team manager and head coach Darold Butler (Coach Butler), who is also a parent. The suit included claims for breach of implied contract, promissory estoppel, defamation, intentional and negligent infliction of emotional distress, false light, and civil conspiracy. The Jackie Robinson West players also sought to be reinstated as champions. As to the second-amended complaint, the trial court dismissed with prejudice all counts filed by the parents on their own behalf and several counts filed on the children's behalf. The court, however, denied motions to dismiss claims for breach of implied contract (count I) and promissory estoppel (count II), and intentional infliction of emotional distress (counts VI and VIII), which were filed on behalf the children.

¶ 3 This interlocutory appeal followed with Little League, Jackie Robinson West, Inc./the Haleys, and ESPN/Smith filing briefs in response. For the reasons delineated below, we affirm the trial court's judgment dismissing the various counts but hold that reinstatement of the championship title remains a viable remedy as to counts I and II.

¶ 4 I. BACKGROUND

¶ 5 The following facts are gleaned from the pleadings, motions, exhibits, and orders that precede this appeal. Little League is a not-for-profit corporation providing international youth baseball and softball programs for players ages 4 to 18. To participate, players of the correct age must live within or attend school within certain geographical boundaries designated annually by each local league. Jackie Robinson West, Inc., with players emanating from the south side of Chicago, was just one of these locally chartered teams and had gained approval from Little League in late April 2014. Although such teams form annually, the Jackie Robinson West team is a storied South Side league, dating as far back as the 1980s. In support of the 2014 charter, Jackie Robinson West, Inc., submitted the requisite boundary map to Illinois Little League District 4 (District 4), since each local league was to determine its own boundaries. Plaintiffs alleged in their second-amended complaint that District 4 then emailed the map to the next organizational tier, Little League's central regional office in Indianapolis, Indiana. In addition to the Jackie Robinson West team, District 4 supervised three other Chicago-area little league teams.

¶ 6 The Jackie Robinson West team began its regular baseball season in May 2014 and concluded a month later. Only certain players then participated in the post-season tournaments. With help from Coach Butler, Jackie Robinson West created a formidable team of 13 all-star players. Subject to great fanfare and media coverage, this team won regional and state championships, and in August 2014, the World Series. The team then competed internationally but ultimately lost to a South Korean team. ESPN televised certain tournaments, including the World Series. This was reportedly the most watched little league series ever on that network.

¶ 7 Up to this point, there was no question that Jackie Robinson West was a legitimate team

[1]Jackie Robinson West, Inc., is the corporate entity and appellee in this case but colloquially the Jackie Robinson West team, as well.

under Little League's guidelines, having advanced and won the World Series fair and square. That view, however, would soon become cloudy. In September 2014, Chris Janes, the vice president of a rival suburban league, approached Little League and protested the Jackie Robinson West players' eligibility based on their residency.[2]

¶ 8 To understand this protest, and by way of background, it is worth noting that before participating in regional tournaments in July, Coach Butler created a binder containing the Jackie Robinson West children's birth certificates, residency documents, and a boundary map dated May 1, 2014.[3] This binder served as supporting documentation for the requisite "Tournament Team Eligibility Affidavit," meant to ensure that the 13 players were qualified under Little League rules to play for Jackie Robinson West. The affidavit lists the players by name, identifies their residences/schools, and states that the residences/schools listed for each player had to be inside the boundaries defined by the submitted map. Significantly, this photocopied tournament map was the same as that attached to the team's original charter and signed by team president Haley and Little League district administrator Michael Kelley. This simple boundary map provided a black-line graphic of the north, south, east, and west borders and appeared to plot the players' corresponding residences/schools within the boundaries.

¶ 9 The parties do not dispute that the addresses listed in the affidavit under each of the players' names were correct. Little League, however, maintains "the actual addresses were outside the eligible borders for players." In other words, not all of the 13 players resided within the team's identified boundaries. It is this detail that allegedly fell through the cracks and rendered the Jackie Robinson West team reportedly ineligible to compete.

¶ 10 In spite of this discrepancy, the affidavit contains various signatures by officials from Jackie Robinson West, Inc., and Little League, guaranteeing the accuracy of the information contained therein. For example, Coach Butler, president Haley, and district administrator Kelley signed the affidavit in July 2014. Little League regional tournament director Nina Johnson also certified the affidavit as being accurate in July 2014.

¶ 11 Plaintiffs presented this eligibility affidavit for review to the "Tournament Director" at each of their post-season tournaments, including at the World Series.[4] Additionally, the affidavit stated that if the tournament committee, which league guidelines vested with sole authority over tournaments, deemed any player ineligible due to residency problems, the team could forfeit the tournament game and be removed from play.[5] It could also result in removal

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[2]Plaintiffs originally named Janes and his little league organization, Evergreen Park Athletic Association, as defendants in this lawsuit, but they have since been dismissed from the suit.

[3]Little League attached the eligibility affidavit and a version of the original charter map to their motion to dismiss the second-amended complaint.

[4]Plaintiffs allege the eligibility affidavit that was certified by the "District Administrator" (Kelley) was presented to the "Tournament Director" before the Illinois District Four Tournament (July 3-4, 2014), the Illinois Section Three Tournament (July 14-21), the Illinois State Championship (July 22-27), the Great Lakes Regional Tournament (July 31-August 9), and the Little League World Series Tournament (August 10-23). Plaintiffs did not attach an eligibility affidavit to their second-amended complaint. From the aforementioned affidavit that is included in the record on appeal, it appears that there was only one eligibility affidavit, and each of the directors of these tournaments signed and dated it before or at the time of the tournament play.

[5]The tournament committee, located at Little League headquarters in Williamsport, Virginia, was not the authority responsible for the regular season.

of personnel from league activities.

¶ 12 It apparently was this residency rule that Janes focused on in his protest. In response, Little League "conducted an investigation and determined the Tournament Affidavit addresses were correct." Plaintiffs, however, maintain that as of September and October, other Little League officials and the team's corporate personnel knew something was up. Plaintiffs maintain that regional tournament director Johnson and another Little League official had notified team treasurer Haley by e-mail that several players were ineligible because they lived outside the identified boundaries. Plaintiffs allege that, despite this knowledge, none of the defendants took any steps to inform Jackie Robinson West parents and players of the team's eligibility problems. Rather, defendants allegedly chose to conceal or ignore these problems during and/or after tournament play. Alternatively, plaintiffs maintain that Little League found the team had no residency problems during the tournament. Little League countered that the review process for tournaments did not include verifying the accuracy of boundaries or ensuring the addresses fell within the boundaries. Yet, Little League also stated that district administrator Kelley was responsible for verifying the boundaries and the plotting of players' addresses within those boundaries.

¶ 13 Even in the face of the eligibility doubts, the players, not knowing any better, accepted an invitation to the White House, where they met former President Barack Obama. That fall, the players attended a Major League Baseball World Series game. The international president and CEO of Little League was present at both of these events.

¶ 14 While plaintiffs claim they "believe" the players were all eligible and within the acceptable boundaries, plaintiffs likewise acknowledge that in December 2014, team treasurer Haley tried to correct any eligibility problems by "expanding" the boundary map. In other words, he attempted to retroactively absorb territory from the other little leagues (presumably within District 4), so that the ineligible children now lived within the map's newly drawn boundaries. On the heels of these actions, a second investigation conducted by Little League in response to increased media pressure revealed the above-stated eligibility problems with the team's map. According to Little League, Jackie Robinson West officials and district administrator Kelley submitted a backdated map that attempted to retroactively change the team's boundaries and correct the residential eligibility issue. Thus, it was in December 2014 that Little League higher-ups apparently became aware of any alleged fraud involving the maps.

¶ 15 Consequently, on February 11, 2015, Little League issued a news release that it was vacating and revoking the Jackie Robinson West team's regional and national championship titles.[6] The release stated that both Jackie Robinson West, Inc., and district administrator Kelley had "knowingly violated Little League International Rules and Regulations by placing players on [the Jackie Robinson West team] who did not qualify to play because they lived outside the team's boundaries." They were specifically accused of using a falsified boundary map for their 2014 tournament. According to the release, Stephen D. Keener, Little League international president and CEO, stated that, upon review, "it became clear that" team officials and district administrator Kelley "signed documents to make players eligible who should not have been." According to the release, these matters only came to the attention of the tournament officials in January 2015, "when local league officials confirmed that they had direct knowledge of this rule violation, but never reported it to Little League International, as

[6]The full news release is appended to this opinion.

is common with local league operations." The release announced that as a result of these deceptions, Coach Butler had been suspended from Little League activity, district administrator Kelley had been removed from his position, and the team had been placed on probation. Notably, the release did not specifically direct any comments at the Jackie Robinson West parents.

¶ 16 The first TV news programs to report on the stripping of the team's title was ESPN's *First Take*, a segment wherein commentators Smith and his co-anchor Skip Bayless debate the sports news of the day.[7] Just hours after Little League issued its news release on February 11, *First Take* began its segment with that breaking news story. *First Take* host Cari Champion summarized the Little League news release set forth above and then showed a clip from an interview with Keener, who commented that the decision was necessary to maintain Little League's integrity. Keener, however, added that no one should blame the players, who appeared not to know of the rule violations.

¶ 17 Champion then turned to Smith for his reaction, and Smith opined:

> "I'm in pain over this one, to be quite honest with you, because of those kids. They're innocent in all of this by all accounts. They were of age, they came together as a team, they just went out there and they compete and *** you see these stories and they just resonates [*sic*] with you in such a profoundly positive way and the adults screw it up because of, you know, starving for notoriety, starving for recognition, starving to win and willing to sell kids dreams out in order to pull it off."

Smith added that this was only the third time something like this had happened in Little League.

¶ 18 Smith then addressed Bayless:

> "[L]et's put their names out here. You [got a] team manager by the name of Darold Butler suspended from any little league activity. Good. We've got Michael Kell[e]y, Illinois District 4 administrator removed from his position. Good. Hopefully it will be permanently because this is completely and utterly unnecessary."

¶ 19 Smith continued his commentary, stating:

> "[A]nd let me also add what really resonates to me and what makes this hurt even more *** This is called the Jackie Robinson West Team. Jackie Robinson, as renowned a figure in sports annuls as ever there was, responsible for integrating major league baseball in 1947, an iconic and revered, [deified] figure in our community and in American history. You have his name attached to this because it's Jackie Robinson West, ok? First all African American team to win the championship and this is how you did it. Just disgraceful."

Smith stated, "thank God the kids really had nothing to do with this," as they were just victims. He concluded, however, that "[a] bunch of adults and parents who knew better *** decided to do this. Pox on all of their houses. They should all be ashamed of themselves."

¶ 20 In response, Bayless noted that he had repeatedly seen Coach Butler's face during the World Series. Smith then stated:

> "I'd like to see it again *** Let's get a picture of Darold Butler. Since you want to sit there and throw kids in to the wind like this this. If this was somebody else—if it was a professional athlete, if one of these kids had gotten in trouble or something like

[7]A printed version of the ESPN news segment is appended to this opinion.

that, we'd put their face up. Let's put Darold Butler and Michael Kell[e]y's face up on national television. Treat it like the mug shot it deserves to be treated like. How about that?"

¶ 21 Bayless then asked Smith whether any kids on the team knew "they were crossing boundaries that they weren't supposed to cross?" Bayless said:

> "Again, the parents were saying 'do it,' the manager's saying 'do it' but you['re] sending such a bad message to kids, surely some of the kids—they know the rules, they knew they weren't in this district."

In reply, Smith stated:

> "Usually in the case of kids, you don't necessarily know ***, but the adults knew, the parents knew, the coach, the administrator—they knew, and they did it anyway hoping that folks would never find out while they got their 15 minutes of fame. They didn't think about the kids. They thought about themselves. The parents *** have to prove where they live. So what I'm saying to you is that there's been some falsified documentation—or something going on here because you knowingly engaged in deceit—So you can have your kid play ineligibly. Inexcusable."

¶ 22 The segment concluded with Champion stating it is "unfortunate that the children have to pay for these adult mistakes." She then proceeded into the next segment about the Dallas Cowboys. Notably, Smith never identified Coach Butler as a parent during this news program. Likewise, he never singled out any other parents by name.

¶ 23 Exactly a year later, plaintiffs filed suit on February 11, 2016. At issue is their 22-count second-amended complaint, alleging breach of contract, promissory estoppel, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, false light, and civil conspiracy. Plaintiffs alleged, in the main, that Little League and Jackie Robinson West, Inc./the Haleys knew of the potential eligibility problems in the fall of 2014 or before, but covered up these facts to gain profit and notoriety on the backs of the parents and their children, to their emotional and economic detriment. In addition, plaintiffs alleged that those defendants knew or should have known that the players were not qualified under the rules and regulations, and yet, up the entire chain of command, they failed to enforce the Little League rules and regulations to the detriment of both the parents and players. Plaintiffs also alleged that ESPN/Smith, in reporting on the matter, falsely accused the parents of participating in the cheating scandal or cover-up, thereby defaming them. Coach Butler added that ESPN/Smith went so far as to suggest he had committed a crime, which was also defamatory.

¶ 24 In response, Little League and ESPN/Smith filed separate motions to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (see 735 ILCS 5/2-619.1 (West 2016)). Jackie Robinson West, Inc./the Haleys filed a motion to dismiss under section 2-615 of the Code (see 735 ILCS 5/2-615 (West 2016)). At a hearing, the trial court carefully considered the counts in the complaint and entered detailed oral findings, which comprised its order. The court dismissed with prejudice counts III-V, alleging defamation; counts VII and IX-XI, alleging intentional infliction of emotional distress as to the parents; counts XII-XVIII, alleging negligent infliction of emotional distress; counts XIX-XXI, alleging false light; and count XXII, alleging civil conspiracy.

¶ 25 The court denied dismissal of counts VI and VIII, alleging intentional infliction of emotional distress as to the children, as well as count I, alleging breach of implied contract,

and count II, alleging promissory estoppel, which were also filed on behalf of the children. Notwithstanding the ruling on counts I and II, the court held that reinstatement of the championship title was not an available remedy under the facts alleged.

¶ 26 Accordingly, the court dismissed with prejudice all counts relating to the parents and ESPN/Smith and only some relating to the children. The present case was then severed from that of the children, which remained pending in the trial court under a different and consolidated trial court number, No. 18 L 00178. The court then entered an order finding there was no just reason to delay appealing the dismissed counts, and plaintiffs appealed pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 27 II. ANALYSIS

¶ 28 In reviewing the merits of the instant appeal, we note that motions to dismiss pursuant to sections 2-615 and 2-619 admit all well-pleaded facts together with all reasonable inferences that can be gleaned from those facts. *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 668 (1996). They do not, however, admit conclusions of law or conclusions of fact unsupported by allegations of specific fact upon which those conclusions rest. *Id.* A motion to dismiss pursuant to section 2-615 attacks the legal sufficiency of the complaint, and the essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11. A section 2-619 motion, on the other hand, raises defects or defenses that negate plaintiff's cause of action completely or refute crucial conclusions of law or conclusions of material fact that are unsupported by allegations of specific fact. *In re Estate of Shelton*, 2017 IL 121199, ¶ 21 (under section 2-619(a)(9), a defendant is entitled to a dismissal if " 'the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim' " (quoting 735 ILCS 5/2-619(a)(9) (West 2010))); *Spillyards*, 278 Ill. App. 3d at 668. In ruling on a section 2-619 motion, this court may consider all pleadings, supporting documents, and discovery documents, construed in favor of the nonmoving party. *Shelton*, 2017 IL 121199, ¶ 21; *Spillyards*, 278 Ill. App. 3d at 668.

↩ memo p. 7, 8

¶ 29 Nonetheless, we review dismissal under either section *de novo*, and this requires no deference to the trial court's reasoning. *Spillyards*, 278 Ill. App. 3d at 668; see also *Shelton*, 2017 IL 121199, ¶ 21; *Cochran*, 2017 IL 121200, ¶ 11. We can thus affirm on any basis present in the record. *Nesby v. Country Mutual Insurance Co.*, 346 Ill. App. 3d 564, 566 (2004). The focus on review is whether a genuine issue of material fact should have precluded dismissal or, absent such issue of fact, whether dismissal is proper as a matter of law. *Spillyards*, 278 Ill. App. 3d at 668. As we review this case, we examine the parties' various contentions on appeal while addressing each of the counts of the second-amended complaint in chronological order. As we do so, we specify which of the plaintiffs (the parents, players, or Coach Butler) filed the counts against which of the defendants (Little League, Jackie Robinson West, Inc./the Haleys, and ESPN/Smith).

¶ 30 A. Standing and the Remedy of Reinstating the Championship Title

¶ 31 Plaintiffs first argue that the trial court erroneously deprived them of the remedy of reinstating the 2014 championship title under counts I and II of the second-amended complaint.

They argue specific performance in the form of reinstatement is the only remedy that would make them whole again, and as such, there is no adequate legal remedy.

¶ 32 Defendant Little League does not dispute that reinstatement of the championship title is a possible remedy but argues that plaintiffs lack standing to pursue such relief. Little League raised this argument in its motion to dismiss filed under section 2-619(a)(9) of the Code. See *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004) (noting, such an "affirmative matter" may properly be challenged through a motion to dismiss under that statute). As such, it was then, and is now, Little League's burden to plead and prove that plaintiffs lack standing. See *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 16. For the reasons to follow, Little League fails in that endeavor.

¶ 33 The standing doctrine permits consideration of only those disputes that are truly adversarial and capable of resolution by judicial decision. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 488 (1988). The doctrine thus ensures that issues are raised only by parties having a real interest in the outcome of the controversy. *In re Estate of Schumann*, 2016 IL App (4th) 150844, ¶ 15. In Illinois, standing is defined as some injury in fact to a legally recognized interest. *Greer*, 122 Ill. 2d at 492; *Martini v. Netsch*, 272 Ill. App. 3d 693, 695 (1995). More precisely, the claimed injury, whether actual or threatened, must be distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by granting the requested relief. *Greer*, 122 Ill. 2d at 492-93. The decision as to standing can depend on the issue involved, the nature of the relief sought, and whether the party asserting standing will thereby benefit. *Martini*, 272 Ill. App. 3d at 695.

¶ 34 Although Little League maintains that plaintiffs have failed to demonstrate a legally recognized interest at stake, we find the allegations in the complaint contradict that contention. See *id.* (noting that we look to the allegations in the complaint to determine whether the plaintiff has standing to sue). In count I, plaintiffs, the Jackie Robinson West players, by and through their parents, sued Little League for breach of an implied contract in fact, which is a cause of action where an agreement is arrived at by consideration of the parties' acts and conduct. *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 20 (2009). Such a contract arises not by express agreement but, rather, by a promissory expression which may be inferred from the facts and circumstances which show an intent to be bound. *Century 21 Castles by King, Ltd. v. First National Bank of Western Springs*, 170 Ill. App. 3d 544, 549 (1988). The players alleged that Little League represented it would abide by its rules and regulations (as would plaintiffs), and in exchange, the parents paid dues, and their children played through the regular season and tournaments. The players alleged that Little League failed to follow its own rules and regulations, and it was this breach of the implied contract that led the parents/players to forfeit their paid dues, time, and the ultimate 2014 tournament title. See *McLaughlin*, 2011 IL App (1st) 101849, ¶ 18 (generally, for purposes of determining whether standing exists, "only a party to a contract, or one in privity with a party, may sue on a contract"). Specifically, Little League failed to abide by its rules and regulations when it did not identify eligibility protests before the World Series or submit the matter to the tournament committee.

¶ 35 Taking these allegations as true, as we must at this stage, we conclude they set forth a legally recognized interest against foul play by Little League with regard to its own rules and regulations, given the parents and players' investment of time and money in the organization. The breach was distinct, palpable, and fairly traceable to Little League's alleged failure to

follow its own rules regarding verifying eligibility and/or reporting problems. The players suffered a distinct injury in fact by the stripping of their hard-won championship title, which would be redressed by reinstating the championship title. The allegations thus were sufficient to establish appropriate standing for plaintiffs to raise the claim.

¶ 36 We reach the same conclusion as to count II, where the Jackie Robinson West players, by and through their parents, alleged promissory estoppel. This requires that they prove (1) the defendant made an unambiguous promise to the plaintiff, (2) the plaintiff relied on such promise, (3) the plaintiff's reliance was expected and foreseeable by the defendants, and (4) the plaintiff relied on the promise to its detriment. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009). Promissory estoppel is an available cause of action in the absence of a contract. *Id.* at 52. The players similarly alleged that Little League made a promise to abide by its rules and regulations and that the players relied on that promise to their own detriment. For the same reasons as stated above, we conclude plaintiffs established an injury in fact to a legally recognized interest.

¶ 37 In reaching these conclusions, we reject Little League's conclusory assertion that the "legally recognized interest" in the championship title resides only in the corporate entity of Jackie Robinson West, Inc. Little League argues rather confusingly that plaintiffs have no legally recognized interest and, thus, lack standing because they have no ownership interests in the team or the championship title (since Little League claims Jackie Robinson West, Inc., was the corporate entity that won the title). At the same time, Little League acknowledges that standing may exist regardless of "ownership," so long as the complainant has a legally recognized interest. With that concession, Little League defeats its own argument, which appears completely out of left field and offers this court little clarity.

¶ 38 Moreover, Little League's argument that only Jackie Robinson West, Inc., as a not-for-profit corporate entity, could file the claims on behalf of the parents/players must be rejected for several additional reasons. First, Little League has neglected to address the doctrine of associational standing, through which a not-for-profit organization may assert the legal rights of its members in certain circumstances. See *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 740 (2008). There are three requirements for associational standing, including (1) where the organization's members would otherwise have standing to sue in their own right, (2) where the interests it seeks to protect are germane to the organization's purpose, and (3) where neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.*

¶ 39 Yet, contrary to Illinois Supreme Court Rule 341(h)(7), (i) (eff. May 25, 2018), Little League has failed to cite any legal authority for its propositions and has failed to develop its argument as to why that not-for-profit corporation is better suited to file the complaint than the players/parents that comprise the team, without which the corporate entity of Jackie Robinson West, Inc., would be but an empty shell, and there would be no championship title. See *id.* (requiring the argument to contain the contentions of the appellee with citation to the authorities and the record relied on, and points not argued are forfeited). A reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments; it is not merely a repository into which parties may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate. See *Atlas v. Mayer Hoffman McCann, P.C.*, 2019 IL App (1st) 180939, ¶ 33. Given that it is Little League's burden to establish a lack of standing, it has demonstrably failed.

¶ 40 We conclude that plaintiffs alleged an injury in fact to a legally recognized interest. Based on this determination, we hold that specific performance in the form of reinstatement of the championship title is a possible equitable remedy, at least at this stage in the proceedings, where we take the allegations in the complaint as true. See *Continental Casualty Co. v. Commonwealth Edison Co.*, 286 Ill. App. 3d 572, 578-79 (1997) (the relief available to a plaintiff is derived from the substance of the claim before it); *Koehler v. The Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 75 (specific performance is not available as of right but rests in the trial court's sound discretion based on all of the facts and circumstances in evidence). It has been long established that a court will not grant equitable relief if the plaintiff has an adequate remedy at law. *Horwitz v. Sonnenschein Nath & Rosenthal*, 2018 IL App (1st) 161909, ¶ 31. The absence of an adequate remedy at law is not an element of an equitable claim but rather a condition precedent to seeking equity itself. *Id.* The parties thus should have the opportunity to argue whether a legal remedy would be clear, practical, and sufficient to make the plaintiffs whole, and if not, whether specific performance as set forth is appropriate. See *id.* ¶¶ 35-36, 41.

¶ 41 B. Defamation

¶ 42 Plaintiffs next contend that the trial court erred in dismissing counts III, IV, and V, alleging defamation against ESPN and its reporter, Smith. Plaintiffs argue that during the February 11, 2015, sports news broadcast, Smith made false statements of fact about the Jackie Robinson West parents and Coach Butler regarding the team's alleged eligibility problems. To state a cause of action for defamation, 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 the publication caused damages. *Hadley v. Doe*, 2015 IL 118000, ¶ 30. A defamatory statement is one that harms a person's reputation because it lowers the person in the eyes of others or deters them from associating with that person. *Tuite v. Corbitt*, 224 Ill. 2d 490, 501 (2006).

¶ 43 There are two different types of defamatory statements, those that are *per se* and those that are *per quod*. A statement is defamatory *per se* if its harm is obvious and apparent on its face. *Hadley*, 2015 IL 118000, ¶ 30; *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10-11 (1992). There are five categories of such statements, only one of which is relevant to this appeal, and that includes words that impute the commission of a criminal offense. *Id.* Under that category, generally the crime must be an indictable one involving moral turpitude, with death or imprisonment as punishment. *Dobias v. Oak Park & River Forest High School District 200*, 2016 IL App (1st) 152205, ¶ 87. If a defamatory statement is actionable *per se*, the plaintiff need not plead or prove actual damage to his reputation to recover. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996). Rather, those statements that fall in the actionable *per se* categories are considered so obviously and materially harmful to the plaintiff that injury to his or her reputation may be presumed. *Id.* A statement will not be actionable *per se*, however, if the words, when considered in context and given their natural, obvious meaning, are reasonably capable of an innocent interpretation or construction. *Tuite*, 224 Ill. 2d at 502; *Bryson*, 174 Ill. 2d at 90. By contrast, a defamation *per quod* claim is appropriate either (1) where the defamatory character of a statement is not apparent on its face and extrinsic evidence is necessary to demonstrate its injurious meaning or (2) where a statement is defamatory on its face but does not fall into the five categories of statements that are actionable

per se. *Bryson*, 174 Ill. 2d at 103. A plaintiff bringing a *per quod* claim must also plead and prove special damages, *i.e.*, "actual damage of a pecuniary nature," in order to recover. *Id.* at 87-88, 103.

¶ 44 In this case, plaintiffs alleged both forms of defamation against ESPN and Smith. In particular, in count III, the Jackie Robinson West parents asserted that during the broadcast, ESPN/Smith committed defamation *per quod* when Smith erroneously charged them with submitting "falsified documentation" to Little League and knowingly engaging in deceit so their kids could "play ineligibly." The parents specifically pointed to Smith's comment, "A bunch of adults and parents who knew better—parents who knew better decided to do this. Pox on all their houses. They should all be ashamed of themselves." According to the parents, this also suggested they were responsible for the lost title. In count IV, Coach Butler asserted that ESPN/Smith committed defamation *per se* when Smith stated that Coach Butler's image should be treated like a mug shot, and in doing so, Smith falsely suggested that he had committed the crime of fraud (which is the first category in a defamation *per se* action). As to count V, which Coach Butler brought against ESPN/Smith, Coach Butler set forth essentially the same allegations, only under defamation *per quod*.

¶ 45 In dismissing these counts, the trial court found first and foremost that Smith's statements were nonactionable opinion and rhetorical hyperbole protected by the first amendment. ESPN/Smith now focus on this point in response to plaintiffs' arguments on appeal.

¶ 46 The first amendment may protect a statement of opinion in limited circumstances, including, as in this case, where the cause of action is brought by private individuals against a media defendant. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 399 (2008). Under what is a restrictive test, however, a defamatory statement is entitled to first amendment protection only if it *cannot* be reasonably interpreted as stating actual fact. *Id.* at 398; *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 581 (2006). This is because a false factual assertion can be just as defamatory when couched within an apparent opinion or rhetorical hyperbole. *Solaia Technology*, 221 Ill. 2d at 581. Statements made as insinuation, allusion, irony, or question also may be considered just as defamatory as direct factual assertions. *Id.* As the United States Supreme Court noted in its seminal case, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990), "the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' " Thus, to determine whether a statement consists of opinion or fact, we must examine, from the perspective of an ordinary viewer, whether (1) the statement has a precise and readily understood meaning, (2) the statement is verifiable, and (3) the statement's literary or social context signals that it has factual content. *Imperial Apparel*, 227 Ill. 2d at 398. Courts consider the totality of the circumstances on a case by case basis, but place emphasis on whether the statement is capable of objective verification. *Rose v. Hollinger International, Inc.*, 383 Ill. App. 3d 8, 13 (2008). If the statement is factual, and it is false, it is actionable. *Solaia Technology*, 221 Ill. 2d at 582. Whether a statement is a factual assertion that could give rise to a defamation claim is a question of law for the court. *Imperial Apparel*, 227 Ill. 2d at 398.

¶ 47 Before addressing the merits, we first observe that plaintiffs have failed to meaningfully differentiate the defamation *per quod* counts (III and V) from the defamation *per se* count (V). Rather, they seem to lump all the defamatory counts into one on appeal even though they are very distinct. They also do not specify how count III, brought by the parents, qualifies as defamation *per quod*. From the reply brief, plaintiffs appear to clarify that Smith charged the

parents as criminals (a *per se* category), but extrinsic evidence would be needed to prove their identities, since Smith never specifically named them. See *Bryson*, 174 Ill. 2d at 103 (defining a *per quod* action); see also *Moore v. Streit*, 181 Ill. App. 3d 587, 597 (1989) (noting, a statement that does not name an individual is not injurious to that person on its face, and so special damages must be pleaded with particularity). But see *Missner v. Clifford*, 393 Ill. App. 3d 751, 768 (2009) (when the defamed group is sufficiently small and the words may reasonably be understood to have personal reference and application to any member of the group, that group member is defamed as an individual); *cf. Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶ 13 (noting that on appeal, the plaintiff had pointed to "extrinsic facts" from his complaint to support his defamation *per quod* claim). Additionally, Coach Butler's status as a parent was never mentioned in the program, and thus, plaintiffs improperly conflate statements about Coach Butler with statements about the parents. This court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments; it is not merely a repository into which parties may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); see *Atlas*, 2019 IL App (1st) 180939, ¶ 33. To the extent any arguments remain unclear as to the specific counts, we hold it against plaintiffs as the appellants.

¶ 48 Returning to the substantive arguments, we analyze whether Smith's statements were precise, readily understandable, and verifiable. However, we first examine the social context in which the statements arose and whether that signaled factual content. As ESPN notes, the broadcast at issue was indeed a point-counterpoint commentary on the sports news of the day; as such, it was inherently meant to offer opinion and analysis. This much is clear from the opening, where the broadcaster Champion announced the "breaking news" that Little League stripped the team of its championship and suspended Coach Butler because Jackie Robinson West, Inc., "knowingly violated rules and regulations by placing players on their team who did not qualify to play because they lived outside the team's boundaries." Following comments by Little League's president, wherein he noted the children's innocence, Champion turned to Smith for his reaction.

¶ 49 Smith then offered various strongly stated, emphatic, and sometimes bombastic personal views, including "I'm in pain over this one *** because of those kids." He stated that the Jackie Robinson West children's story "just resonates with you in such a profoundly positive way," but "the adults screw it up because of, you know, starving for notoriety, starving for recognition, starving to win and willing to sell kids dreams out in order to pull it off." Smith thereby vilified the adults involved in the matter—opining emphatically that it is "good" that Coach Butler and district administrator Kelley were suspended—and exonerated the children, while also noting that the identity of the team's namesake, the renowned African American baseball player, Jackie Robinson, "makes this hurt even more." Smith's cohost, Bayless, also makes a few comments throughout. Thus, the exchange here is typical of most sports commentary, in that it is "marked not only by spontaneity, but by the often exaggerated and uncareful exchange of vehemently held opinions." *Hunter v. Hartman*, 545 N.W.2d 699, 709 (Minn. App. Ct. 1996).

¶ 50 Nonetheless, interspersed throughout the commentary are various factual statements. Smith noted, for example, that Little League had existed for 75 years, and a scenario like "this" had only happened three times, with other problems being "over-aged players participating,"

from the Philippines and the Bronx. Smith also noted that Jackie Robinson was a renowned sports figure who was responsible for integrating major league baseball. A reasonable viewer could hardly consider these statements mere opinion or hyperbole. Rather, they are statements of verifiable fact.

¶ 51 It is against this backdrop that Smith again asserted the innocence of the children but then assigned guilt to "[a] bunch of adults and parents who knew better—parents who knew better decided to do this. Pox on all their houses. They should be ashamed of themselves." After noting the children earned their White House meeting, Bayless observed that he saw Coach Butler many times on national television during the tournaments and that he "knows his face." In an exaggerated manner, Smith then stated, "I'd like to see it again," and "Let's get a picture of Darold Butler *** Since you want to sit there and throw kids in to the wind like this." Smith ultimately suggested placing Butler and Kelley's "face up on national television," and asserted, "Treat it like the mug shot it deserves to be treated like." Bayless then queried whether the kids knew they were "crossing boundaries they weren't supposed to cross," to which Smith responded "the adults knew, the parents knew, the coach, the administrator—they knew, and they did it anyway hoping that folks would never find out while they got their 15 minutes of fame. They didn't think about the kids." Smith ends the program noting, "The parents *** have to prove where they live. So what I'm saying to you is that there's been some falsified documentation—*or something going on here* because you knowingly engaged in deceit—So you can have your kid play ineligibly. Inexcusable." (Emphasis added.)

¶ 52 Plaintiffs now argue that, according to the commentary cited immediately above, Smith stated in a precise, readily understood, and verifiable manner that both the team's parents and Coach Butler were "criminals" and that it can be implied they committed "criminal forgery and fraud." Plaintiffs therefore argue that Smith's commentary cannot be considered mere protectable opinion.

¶ 53 We cannot agree. From this, no ordinary viewer would believe Smith had charged the parents and Coach Butler with the commission of a criminal offense. See *Dobias*, 2016 IL App (1st) 152205, ¶ 93 (the relevant inquiry is whether an alleged defamatory statement " 'fairly impute[s] the commission of a crime' in the eyes of the reasonable reader" (quoting *Kirchner v. Green*, 294 Ill. App. 3d 672, 680 (1998))); see also *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (characterization of a developer's negotiating position as "blackmail" was not defamatory and, under the circumstances, did not suggest commission of a crime); *cf. Van Horne v. Muller*, 185 Ill. 2d 299, 308 (1999) (sustaining defamation *per se* for imputing a crime against a motion to dismiss, where the complaint alleged the defendant radio host had participated in publishing an allegedly false story, which imputed that the plaintiff, a former football player, had physically threatened and assaulted another). First, while most viewers would find falsifying documents or knowingly engaging in deceit in a little league tournament amounted to plain and simple rule breaking or cheating, they would not make the logical leap that it amounted to an indictable offense landing any party in criminal court. Thus, apart from whether Smith's accusations amounted to assertions of fact, they did not amount to assertions of fact as to a crime. We find that "[b]ehavior of this nature is neither unusual nor unexpected from parents and coaches in amateur athletics," and Smith's comments were confined to the context of children's sports. *Green v. Rogers*, 234 Ill. 2d 478, 502 (2009).

¶ 54 We thus find plaintiffs' reliance on *Kumaran v. Brotman*, 247 Ill. App. 3d 216 (1993), misplaced. There, this court reversed the dismissal of the plaintiff's defamation claim after

concluding that the newspaper statements at issue could be found to impute a crime, given that the article accused the plaintiff of "working a scam" by filing numerous fraudulent lawsuits. *Id.* at 219. The court noted that filing frequent, unwarranted lawsuits to procure financial settlements from opposing litigants could be considered a criminal misdemeanor. Here, cheating in children's sports is a far cry from cheating the judicial system.

¶ 55 Second, much of the commentary consisted of exaggerated phrases, hyperbole, imprecise factual statements, or supportable interpretations of the news at hand. For example, no reasonable viewer would conclude Smith really wished a "pox" on the parents' houses. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/pox (last visited June 23, 2020) [https://perma.cc/6T8F-CEU5] (defining "pox" as a "disastrous evil," such as a plague or curse). Nor would a reasonable viewer conclude Smith wished to emblazon Coach Butler's face on television as in a mug shot, especially since Smith and ESPN could have easily done that. His comment was the equivalent of saying "it's just criminal what coach Butler did," but no reasonable viewer would understand that to mean Coach Butler actually committed a crime. The mug shot comment was another way of expressing pointed exasperation and was clearly made for dramatic effect to contrast the adults with the innocent children.

¶ 56 Likewise, immediately after the comment charging the parents with falsifying documentation, Smith acknowledged that "something" was "going on here," implying that he did not know exactly what and that he was speculating. See *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 452 (2000) ("the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law"). It is also unclear what documents he was referring to, making it hard to prove or disprove the assertion. His statement that "the parents who knew better decided to do *this*" (emphasis added) is similarly imprecise and speculative, as it long preceded the falsified documentation assertion. What exactly did the parents know better? And, what exactly did the parents decide to do? An ordinary viewer would not know. From this and for most of the commentary, it appears Smith was surmising that if the corporate entity of Jackie Robinson West, Inc., knew of eligibility problems, as set forth in the press release, then surely the parents had to know of the problems as well.[8] This was his spin and his take on the news of the day. In that sense, his commentary could also be characterized as supportable interpretation of the events. Overall, Smith's language, viewed in context, trends more towards nonactionable opinion than accurate and verifiable fact. His comments consisted of the very kind of "loose, figurative language" and exaggerated phrases of rhetorical hyperbole protected by the first amendment. See *Imperial Apparel*, 227 Ill. 2d at 397; see also *Moriarty v. Greene*, 315 Ill. App. 3d 225, 236 (2000) (a nonactionable opinion under a defamation *per se* analysis remains nonactionable under a defamation *per quod* analysis).

¶ 57 Plaintiffs nonetheless argue that Smith's comments falsely "painted them as villains to the masses" and, thus, impeached their integrity and reputation. Notably, the Little League press release *does not* ascribe any fault to the team's parents individually or as a group (a matter we discuss in more depth later). While it makes mention of Coach Butler, the release does not identify him as a parent.

[8]Notably, plaintiffs do not dispute that the corporate entity, including the Haleys, knew of eligibility issues, as that is one of the main allegations in their complaint.

¶ 58 One can only imagine the shame these accusations on national television would inspire in the parents and children, especially if false. To that extent, Smith's commentary and interpretation of the breaking news of the day, at least given the information presented in this appeal, seems loose and careless. Nonetheless, plaintiffs still have not made clear from their complaint or on appeal how accusations of cheating at a children's sport amount to actionable defamation, especially when none of the parents were singled out by name and Coach Butler was never identified as a parent.

¶ 59 Finally, even if Smith's statements that the parents knew of eligibility problems and also falsified documents were objectively verifiable facts constituting defamation *per quod*, as plaintiffs allege in count III, we agree with the trial court that plaintiffs still have not adequately identified damages. As stated, a *per quod* action requires allegations of specific facts establishing the plaintiffs' special damages. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 416 (1996). General allegations—like damage to an individual's health or reputation, economic loss, and emotional distress—are insufficient to support an action *per quod*. *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 733 (1990). Here, plaintiffs' count III alleged that Smith's statements irreparably "tarnished" their reputations and caused emotional and economic damage and that the damage was "quantifiable" through "lost economic opportunities, family dissension, and lost jobs." Vague allegations like those are not sufficient. See *Anderson*, 172 Ill. 2d at 416-17 (noting allegations that the plaintiff " 'has been damaged monetarily by losing gainful employment and wages' " and that she " 'has suffered great mental pain and anguish and incurred great expense for the treatment thereof' " were insufficient); *Schaffer*, 196 Ill. App. 3d at 733 (same); *cf. Tunca v. Painter*, 2012 IL App (1st) 093384, ¶¶ 62-63 (finding that the plaintiff-doctor pleaded special damages for a *per quod* action, where he identified the decrease of income and drop in referrals, and thus lost patients, and he specified the actual dollar amount of financial loss following the defamatory statements). Plaintiffs also have not sufficiently tied the claim of lost economic opportunities, jobs, or family dissension to Smith's momentary commentary, as opposed any other news coverage of the matter. See *Hardiman v. Aslam*, 2019 IL App (1st) 173196, ¶¶ 27-28; see also *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 16 (affirming dismissal of *per quod* claim where there was no causal connection between the allegedly defamatory statement and special damages); *Maag v. Illinois Coal for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 853 (2006) (noting that the plaintiff judicial candidate failed to identify any voter who would have voted for the candidate but failed to do so because of the allegedly defamatory flyer).

¶ 60 In light of the foregoing, count V, also a claim for defamation *per quod*, suffers a similar fate. There, Coach Butler asserted that Smith's statements irreparably "tarnished" his reputation and caused emotional and economic damage, "specifically by his lost job, lost opportunities for book and movie contracts, and lost reputation." Plaintiffs did not identify what job Coach Butler had. If it was his volunteer job as a little league coach, he had already been suspended from that prior to Smith's comments. Additionally, plaintiffs did not specify what particular book or movie contracts were available to Coach Butler prior to the broadcast. The allegations also fail to support the conclusion that Smith's comments, rather than the press release by Little League and other media attention, caused the losses that Coach Butler claims. See *Hardiman*, 2019 IL App (1st) 173196, ¶¶ 27-28.

¶ 61 As to count IV, Coach Butler's *per se* defamation claim, there was no need to plead special damages. However, the action fails for the reasons stated above, insofar as Smith's mug shot

comment was protected by the first amendment as opinion and rhetorical hyperbole. No other complained-of comment could be construed as defamatory *per se*. For all the reasons stated, plaintiffs' contentions as to counts III, IV, and V must fail.

¶ 62 C. Intentional Infliction of Emotional Distress

¶ 63 We turn next to plaintiffs' contentions involving intentional infliction of emotional distress, a tort first recognized in *Knierim v. Izzo*, 22 Ill. 2d 73, 87 (1961), where a widow was permitted to maintain such an action against the person who killed her husband. The parents contend that the trial court erred in dismissing counts VII and IX-XI against Little League, Jackie Robinson West, Inc./the Haleys, and ESPN/Smith.

¶ 64 To establish intentional infliction of emotional distress, first the conduct involved must be truly extreme and outrageous. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 50. Second, the actor must intend that his conduct inflict severe emotional distress or know that there is a high probability that his conduct will cause severe emotional distress. *Id.* Third, the conduct must cause severe emotional distress in the victim. *Id.* Illinois case law makes clear that the standard is high; the tort does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or trivialities. *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 89-90 (1976); *Lewis v. School District #70*, 523 F.3d 730, 747 (7th Cir. 2008) ("This standard is quite high."); see also *Tobias v. Winkler*, 156 Ill. App. 3d 886, 897 (1987) (finding that the tort is narrowly construed and remains difficult to prove). It is not enough that the defendant acted with a tortious or even criminal intent, that he intended to inflict emotional distress, or that his conduct could be characterized by malice. *Lundy v. City of Calumet City*, 209 Ill. App. 3d 790, 793 (1991). Rather, liability only attaches "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" and where the distress, when measured by its intensity and duration, is so severe that no reasonable man could be expected to endure it. Restatement (Second) of Torts § 46 cmt. d, at 73 & cmt. j, at 77-78 (1965); *Schweihs*, 2016 IL 120041, ¶ 51; see also *Doe v. Calumet City*, 161 Ill. 2d 374, 392 (1994), *overruled on other grounds by DeSmet v. County of Rock Island*, 219 Ill. 2d 497 (2006) (stating that conduct reaches that level where "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " (Internal quotation marks omitted.)). Given this high standard, a complaint alleging the intentional infliction of emotional distress must be more specific and detailed than normally permissible in pleading a tort action. *Welsh v. Commonwealth Edison Co.*, 306 Ill. App. 3d 148, 155 (1999).

¶ 65 There is no bright-line rule about what satisfies the extreme and outrageous conduct; it is judged by an objective standard, based on all the facts and circumstances of an individual case. *Doe*, 161 Ill. 2d at 392; *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 745 (2000). Relevant factors include (1) whether the defendant holds a position of authority over the plaintiff, abuses that authority, or maintains power to affect the plaintiff's interests; (2) whether the defendant reasonably believed his objective was legitimate; and (3) whether the defendant was aware the plaintiff could be particularly susceptible to emotional distress. *Kolegas*, 154 Ill. 2d at 21; *McGrath v. Fahey*, 126 Ill. 2d 78, 86-90 (1988). Notably, the more control that a defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous, particularly when the alleged conduct involves a threat to exercise that

authority or power to the plaintiff's detriment. *McGrath*, 126 Ill. 2d at 86-87.

¶ 66 As to count VII and count IX, the parents alleged that Little League and Jackie Robinson West, Inc./the Haleys actively concealed the purported eligibility problems, which enabled the team to advance and win the championship title so the defendants could gain media notoriety and financial gain. The parents added that Little League failed to comply with its own rules and then unceremoniously stripped the children of their championship without giving the parents the opportunity to challenge the matter. They maintain all of this constituted extreme and outrageous behavior on the part of Little League and Jackie Robinson West, Inc./the Haleys, given the power those entities and individuals held over the parents.

¶ 67 We cannot agree. We first question the level of authority or power that Little League and Jackie Robinson West, Inc./the Haleys could wield over the parents. Typical examples of individuals who exercise power or authority over a plaintiff include police officers, school authorities, landlords, and creditors. *Id.* at 87; see, *e.g.*, *Doe*, 161 Ill. 2d at 393-95 (finding extreme and outrageous conduct where a police officer was rude and demeaning to a sexual assault victim outside her home and refused to break down her door, while an intruder raped her daughter, due to the officer's fear of liability for property damage). Little League and Jackie Robinson West, Inc., however, are not-for-profit corporations in which the parents voluntarily submitted their children to participate via paid dues and their children's time. For their kids to play, the parents had to submit their children's birth certificates and residency documents to—none other than one of the other parents—Coach Butler. Additionally, there is no allegation that the parents did not have access to the Little League rule book, notwithstanding that Little League ultimately controlled any disputes. Thus, the parents were not parties lacking agency or entirely dependent on Little League or the Jackie Robinson West, Inc./the Haleys. Rather, the allegations show that the parents were autonomous adults with equal capacity to evaluate eligibility matters under the rule book, with one of their own spearheading the team. Plus, there is no indication that Little League or Jackie Robinson West, Inc./the Haleys coerced, threatened, or subjected the parents to a recurring pattern of abusive contact. See *Rudis v. National College of Education*, 191 Ill. App. 3d 1009, 1014 (1989); *cf. Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 275-76 (2003) (finding extreme and outrageous conduct due to a pattern of spousal abuse involving over a decade of verbal insults, humiliation, restricted movement, and physical injury, which caused depression and post-traumatic stress disorder); *Pavilon v. Kaferly*, 204 Ill. App. 3d 235, 245-47 (1990) (upholding claim where employer, knowing plaintiff was susceptible to emotional distress, offered her money for sexual favors, fired her after she refused, and after he fired her, threatened to kill her, rape her, and challenge her child custody rights, and attempted to disrupt her new employment relationship). Little League and Jackie Robinson West, Inc./the Haleys thus did not maintain the position of power or control that the parents claim.

¶ 68 In addition, the allegations do not otherwise show that the actions of Little League or Jackie Robinson West, Inc./the Haleys were extreme and outrageous. According to the complaint, Little League was not presented with eligibility complaints until after the tournament titles were already won, a fact that plaintiffs conceded. This contradicts plaintiffs' sweeping theory that Little League actively concealed any eligibility problems to profit from the team's championship win (a basis for their allegation of extreme and outrageous conduct). Although the players attended the White House and a Major League Baseball World Series game after their win, plaintiffs have not delineated how this would enable Little League or Jackie

Robinson West, Inc./the Haleys to profit financially. See *Anderson*, 172 Ill. 2d at 408 (stating that conclusory allegations unsupported by specific facts are not sufficient to survive dismissal). While plaintiffs alleged that Little League profited by then entering into a deal with ESPN, by this logic, Little League should have further concealed any eligibility problems and never revealed them. Moreover, as the trial court pointed out, the allegations do not show that the parents had special vulnerabilities or were particularly susceptible to emotional pain. *Cf. Kolegas*, 154 Ill. 2d at 22-23 (finding extreme and outrageous conduct where the defendants knew the plaintiffs who suffered a disease were susceptible to emotional pain).

¶ 69 Even assuming that Little League and Jackie Robinson West, Inc./the Haleys concealed eligibility problems, declined to follow the rules, and wielded some authority over the parents, the conduct alleged was not so extreme and outrageous that it surpassed all bounds of decency as to the parents. See *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶¶ 27-28 (and cases cited therein); *Welsh*, 306 Ill. App. 3d at 155. Given our objective standard, these facts did "not transform conduct which otherwise amounts to no more than insults or indignities into extreme and outrageous conduct." *Rudis*, 191 Ill. App. 3d at 1014. Conduct may be discriminatory, blameworthy, highly inappropriate, and reprehensible, but that does not make it actionable as intentional infliction of emotional distress. See *Van Stan v. Fancy Colours & Co.*, 125 F.3d 563, 568-69 (7th Cir. 1997); see also *Lundy*, 209 Ill. App. 3d at 792 (affirming the dismissal of an emotional distress claim, where the plaintiff-police officers alleged that the defendant stripped them of their badges and guns, made public statements asserting they manipulated their psychological tests or suffered from mental illness, cloaked those statements as official findings in an official order, and purposely sent the order to plaintiffs unsealed and through other officers). If in the little league sports world, disciplinary action, personality conflicts, and terminations could give rise to a cause of action for intentional infliction of emotional distress, then nearly every parent, player, or coach would have a cause of action. See *Welsh*, 306 Ill. App. 3d at 154; see, *e.g.*, *Warren v. United States Specialty Sports Ass'n*, 2006 OK CIV APP 78, 138 P.3d 580 (holding that the tournament director's decision to require a kids' baseball team to forfeit a game, and possibly the state championship, due to an official complaint was not so extreme and outrageous as to constitute intentional infliction of emotional distress). Simply put, plaintiffs have not met the high burden for setting forth their claim.

¶ 70 We reach a similar outcome with respect to plaintiffs' action for intentional infliction of emotional distress against ESPN/Smith. As in their defamation claim, the parents alleged in count X that Smith falsely accused them of falsifying documents and knowingly engaging in deceit and fraud, a matter which Smith then broadcast on national television. The parents alleged that, as a result of this extreme and outrageous conduct, they suffered severe emotional distress. In count XI, Coach Butler also maintained that he suffered severe emotional distress as a result of the mug shot comment. Plaintiffs now rely on *Kolegas*, cited above, in arguing against the dismissal of those counts.

¶ 71 In *Kolegas*, a radio station aired an advertisement paid for by the plaintiff Kolegas for his festival benefiting a foundation for neurofibromatosis, or Elephant Man's disease. Following this, Kolegas appeared in an on-air interview with the two disc jockeys to promote the festival, identifying the cause it benefited. In response to their query, Kolegas stated that his wife and 5-year-old son, also plaintiffs, had the disease. At that point, the radio hosts hung up on Kolegas, then disparaged the festival, and implied that Kolegas' wife was so hideous that no one would marry her except under duress. The hosts also broadcast statements implying that

Kolegas' wife and young child had deformed heads. The supreme court reversed the trial court's dismissal of the emotional distress claim, concluding that the conduct was extreme and outrageous. The court first noted "the power of the media cannot be denied" and reasoned that the radio hosts spouted their falsehoods over the media channels, even as the plaintiff lacked access to rebut the claims. *Kolegas*, 154 Ill. 2d at 22. The court thus concluded that the hosts abused their power over the plaintiffs. The court also reasoned that the hosts had to know that the plaintiffs would be particularly susceptible to emotional distress given their aforementioned disease. The court thus held the pleadings sufficiently alleged the radio hosts' comments were intolerable in a civilized society.

¶ 72 Plaintiffs argue that, as in *Kolegas*, ESPN/Smith held disproportionate power as media and abused their authority to the plaintiffs' emotional detriment. We cannot agree. We find *Kolegas* distinguishable in several important respects. First, while ESPN/Smith undeniably wield the power of the media, the plaintiffs, as parents, were not simply bystanders lacking access to rebut the claims. As stated in their own complaint, the Jackie Robinson West team's story had been widely publicized through various media channels leading up to the complained-of commentary. One of those articles is attached to plaintiffs' complaint. In December 2014, the Chicago Tribune reported on the alleged eligibility scandal and noted that several Jackie Robinson West parents absolutely denied any wrongdoing. For example, one player's father said he and the other parents had "nothing to hide" and that he had acted in the best interests of his son and family. The father stated he would never do anything to embarrass his family or the team. Thus, although ESPN/Smith clearly maintained greater power as a media channel, we cannot say the plaintiffs lacked access to rebut the claims, as was the case in *Kolegas*.

¶ 73 More importantly, ESPN/Smith never named the parents individually on air or identified and then disparaged any particular physical impairment (like the Elephant Man's disease) that would reasonably cause extreme emotional distress. The plaintiffs thus have not identified that they were particularly susceptible to severe emotional distress, unlike in *Kolegas*. Additionally, in *Kolegas*, the supreme court upheld the plaintiffs' actions for defamation *per se* and false light. Here, even assuming Smith stated falsehoods about the parents, implying they cheated, still we cannot say this would cause extreme emotional distress for the same reasons discussed immediately above. We return to the fact that this was a voluntary little league team, and it is certainly a reasonable expectation in the public sports world that cheating accusations will arise and be publicly aired. Even assuming the accusations are false, they cannot lead to an emotional distress claim under the present circumstances involving adult parents who had previously been the subject of publicity and had no identifiable susceptibility to emotional distress.

¶ 74 For the reasons stated, we conclude that the trial court did not err in dismissing counts VII, IX, X, and XI, relating to the parents' intentional infliction of emotional distress cause of action. No reasonable fact finder would find the complained-of conduct was extreme or outrageous. *Cf. McGrath*, 126 Ill. 2d at 92 (noting if a jury could conclude that defendant's alleged conduct was outrageous, then the emotional distress count may survive a motion to dismiss).

¶ 75 D. Negligent Infliction of Emotional Distress

¶ 76 Plaintiffs next contend the trial court erred in dismissing counts XII-XVIII, all relating to negligent infliction of emotional distress.[9] Generally, to state a claim for negligent infliction of emotional distress, a plaintiff must allege the traditional elements of negligence, which are duty, breach, causation, and damages. *Schweihs*, 2016 IL 120041, ¶ 31; see also *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 703 (7th Cir. 2009). For such claims, Illinois courts separate "bystanders" from "direct victims." See *Corgan v. Muehling*, 143 Ill. 2d 296, 304-05 (1991) (recognizing the different tests applicable to bystanders and direct victims).

¶ 77 Under the "impact rule," a direct victim can recover damages if he suffered emotional distress and a contemporaneous physical injury or impact, requiring actual physical contact of some sort. *Schweihs*, 2016 IL 120041, ¶¶ 31, 38. Our supreme court in *Schweihs*, 2016 IL 120041, ¶¶ 33-43, has reaffirmed that where, as here, plaintiffs allege that they were the direct victims of the defendants' negligent infliction of emotional distress, they must satisfy the "impact rule." See also *Cochran*, 2017 IL 121200, ¶ 15; *Lewis*, 561 F.3d at 703. A direct victim, moreover, need not allege that he suffered physical manifestations from the emotional distress (like those noted immediately below in *Rickey*, for example) as a prerequisite to recovery; emotional injuries stemming from the physical impact or injury alone will suffice. *Schweihs*, 2016 IL 120041, ¶¶ 33, 42 (citing *Corgan*, 143 Ill. 2d at 312); *Lewis*, 561 F.3d at 703.

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[9]As set forth, this case comes before us via Rule 304(a), which applies where a final judgment in a case involving multiple parties or multiple claims disposes of at least one, but not all, of such parties or claims. Jackie Robinson West, Inc./the Haleys now contend counts XIV (for negligent infliction of emotional distress) and XXII (for civil conspiracy), which were filed on behalf of the players, must be dismissed for lack jurisdiction. They maintain that these counts "arise out of the same operative facts" as count VIII (for intentional infliction of emotional distress), also filed on behalf of the players, which remains pending before the trial court. Citing *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 27, Jackie Robinson West, Inc./the Haleys assert that "where one claim based on the same operative facts is stated differently in multiple counts, the dismissal of fewer than all counts is not a final judgment as to the party's claims as required by Rule 304(a)."

This court, in an earlier order, denied their motion raising the same argument. We once again reject it, finding Jackie Robinson West, Inc./the Haleys' reliance on *Blumenthal* is misplaced. *Blumenthal* involved the division of property between an unmarried couple that had split. There, the dismissed counterclaim, which was appealed through Rule 304(a), "sought precisely the same thing as the underlying cause of action asserted by Blumenthal: division of the value of the parties' Chicago home." *Id.* ¶ 26. Thus, in that case, dismissing the counterclaim did not dispose of "the entire controversy or a separate part thereof," which is what makes an order final and thus appealable. *Id.* ¶¶ 23, 27. This case does not involve domestic relations, marriage, or the division of property, which create their own distinct jurisdictional challenges. See *In re Marriage of Teymour*, 2017 IL App (1st) 161091. Moreover, as our analysis reveals, each of the causes of action remain separate and distinct, requiring different elements. Although they seek similar remedies, the causes of action are not so related that they can be deemed part of a single claim for relief. See *In re Marriage of Best*, 228 Ill. 2d 107, 115 (2008); see also *Rice v. Burnley*, 230 Ill. App. 3d 987, 991 (1992) (noting that an order disposes of a separate branch of a controversy when the grounds for recovery under the various counts arise from different common law doctrines or when different elements are required to recover under different theories). As such, the ruling on counts XIV and XXII disposed of a distinct part of the controversy and was final for the purposes of the present appeal.

¶ 78 In contrast, bystanders may recover if they are in the zone of physical danger and, because of the defendant's negligence, have reasonable fear for their own safety. *Schweihs*, 2016 IL 120041, ¶ 32. The bystander need not have a physical impact or injury at the time of the negligent act, but must have been in " 'such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact.' " *Id.* (quoting *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555 (1983)). Therefore, a bystander must show physical injury or illness resulting from the emotional distress caused by the defendant's negligence. *Id.* For example, in *Rickey*, wherein the supreme court adopted the "zone-of-physical-danger rule" for bystander recovery, the plaintiff was an eight-year-old boy who witnessed his five-year-old brother choke and have substantial breathing problems after getting his clothing entangled in a subway escalator. *Rickey*, 98 Ill. 2d at 549. Our supreme court held that the eight-year-old plaintiff could sustain his action (through his parent) for bystander negligent infliction of emotional distress, with an opportunity to replead, where he alleged severe emotional distress and psychiatric trauma that was accompanied by physical symptoms like severe depression and an inability to attend school.

¶ 79 Here, plaintiffs—the Jackie Robinson West players, by and through their parents, and the parents—alleged direct victim negligent infliction of emotional distress against Little League, Jackie Robinson West, Inc./Haleys, and also ESPN/Smith in counts XII-XVII; in count XVIII, Coach Butler alleged the same cause of action against ESPN/Smith. In the various iterations, plaintiffs alleged that due to the defendants' negligent conduct in handling and revoking the little league championship title, plaintiffs suffered from emotional distress and physical manifestations requiring psychological treatment. The emotional distress included depression, anxiety, fear of being in public, feelings of extreme degradation and hopelessness, loss of concentration, and suicidal ideation. Physical manifestations included headaches, nausea, hypertension, muscle spasms, and stomach pain, chest pain, insomnia, and fatigue. The trial court dismissed all counts relating to negligent infliction of emotional distress, finding that "a physical injury to *someone*" (emphasis added) at the very least was required but entirely lacking in the present case and that plaintiffs could not rest their claim on "emotional injuries" alone. Plaintiffs now challenge that determination.

¶ 80 On appeal, plaintiffs essentially concede they did not suffer a physical impact or injury, but they maintain that their physical manifestations of emotional distress are sufficient to support a negligent infliction of emotional distress claim for direct victim liability under the present state of Illinois law. Plaintiffs are confused. Plaintiffs need not, but nonetheless do allege that they suffered from physical symptoms or, in other words, manifestations of emotional distress like "depression, anxiety, weight gain, insomnia, headaches, stomach pains, chest pain, fatigue, muscle spasms," etc. See *Schweihs*, 2016 IL 120041, ¶ 42. Meanwhile, plaintiffs as direct victims are *required* to but do not allege any physical injury or impact that was contemporaneous with (and thus necessarily distinct from) their emotional distress. *Id.* ¶¶ 42-44. In short, there is no direct victim in this case, since none of the plaintiffs suffered a physical impact or injury from defendants' allegedly negligent acts. Plaintiffs cannot bootstrap the requirements for bystander liability to sustain their direct victim claim. In other words, plaintiffs' contention that their physically manifested emotional distress is a "physical injury" of the kind required by the impact rule, is not supported by *Schweihs*, 2016 IL 120041, ¶ 44. Rather, in *Schweihs*, the Illinois Supreme Court affirmed the dismissal of a negligent infliction of emotional distress claim where the plaintiff alleged that she suffered physical symptoms of

↩ memo p. 5, 9, 10, 11

emotional distress but "did not plead any physical contact." *Id.* ¶¶ 19, 43-44. *Schweihs* also emphasized that in its prior case, *Corgan*, there was no question that the plaintiff was a direct victim because she had "suffered a physical impact," since "her claim rested on allegations of sexual relations with her therapist." *Id.* ¶¶ 34, 42. Contrary to plaintiffs' contention otherwise, physical contact of some sort is absolutely necessary to sustain a direct victim negligent infliction of emotional distress action.

¶ 81 As adroitly stated in *Manley v. Law*, 889 F.3d 885, 892 (7th Cir. 2018), "Illinois does not create a freestanding legal guarantee of present enjoyment of emotional well-being. Instead, it protects people from certain negligent and intentional actions that injure them. [Citation.] Any legal protection of emotional well-being is contingent on tort doctrines." Plaintiffs have not succeeded in their tort. We therefore agree with the trial court that because plaintiffs have not alleged that defendants' conduct caused any physical injury or impact, they have not stated a cause of action for direct victim negligent infliction of emotional distress. Having found this, we need not address the parties' additional arguments about the element of duty. Accordingly, counts XII-XVIII, alleging negligent infliction of emotional distress, must be dismissed.

¶ 82 E. False Light Invasion of Privacy

¶ 83 Plaintiffs next contend that they sufficiently pleaded a false light invasion of privacy cause of action against Little League and ESPN/Smith in counts XIX, XX, and XXI. The tort of false light invasion of privacy protects a person's interest in being let alone from false publicity. *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 331 (1999). Three elements are required to satisfy such a cause of action: (1) the plaintiffs were placed in a false light before the public as a result of the defendants' actions, (2) the false light in which the plaintiffs were placed would be highly offensive to a reasonable person, and (3) the defendants acted with actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether the statements were true or false. *Kolegas*, 154 Ill. 2d at 17-18. Additionally, if a false light invasion of privacy claim is based on statements that are not defamatory *per se*, a plaintiff must allege with particularity that he suffered special damages. *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 17; *Schaffer*, 196 Ill. App. 3d at 736. In other words, special damages must be pled in cases where the claim for false light invasion of privacy is based on language where the defamatory meaning can be established only by reference to extrinsic facts. *Schaffer*, 196 Ill. App. 3d at 736.

¶ 84 Here, in count XIX, the parents alleged that Little League painted them in a false light in the February 11, 2015, press release, which announced that Little League was vacating and thereby revoking the Jackie Robinson West team's regional and national championship titles. In their complaint, the parents pointed to several excerpts in the release, including that the tournament committee had decided that "Jackie Robinson West Little League and Illinois District 4 Administrator knowingly violated Little League International Rules and Regulations by placing players on their team who did not qualify to play because they lived outside the team's boundaries." The release also stated:

> "Jackie Robinson West Little League used a falsified boundary map for their 2014 tournament, and that Jackie Robinson West Little League officials met with other leagues in Illinois District 4 to try to get the territory they wrongfully claimed was theirs for their 2014 tournament. The decision [by Little League International] is based on

> falsifying documents and illegally expanding boundaries to include residences that would verify the players' eligibility."

In the release, Keener added that it was "unfortunate that the actions of adults have led to this outcome."

¶ 85 In the complaint, the parents alleged these excerpts referred to them "by proxy" and implied they had falsified documents, intentionally deceived Little League and the public, and placed their own interests above those of their children for publicity. The parents alleged these false statements thereby imputed they had committed "fraudulent, criminal offenses." The statements portrayed them in a false light, they were highly offensive to a reasonable person, and Little League acted in reckless disregard for the truth.

¶ 86 Plaintiffs now argue they sufficiently pleaded a false light cause of action. To bolster their argument, they maintain the excerpts also constituted defamation *per se*, notwithstanding that the parents *never* filed a defamation action against Little League.

¶ 87 While it is not necessary to be defamed to maintain a false light claim, the similarities between the two causes of action may make certain restrictions and limitations equally applicable, such as the innocent construction rule. *Moriarty*, 315 Ill. App. 3d at 237. Under that rule, a statement that is defamatory *per se* is not actionable if it is reasonably capable of an innocent construction. *Id.* at 231. Here, when reading the identified statements within the press release as a whole, with the words given their natural and obvious meaning, as we must, we cannot countenance plaintiffs' contention that the statements in the press release refer to or implicate the Jackie Robinson West parents. Rather, the release directly identifies the guilty parties as Jackie Robinson West officials, district administrator Kelley, and Coach Butler. In particular, it reports Keener as stating that during the review, " 'it became clear that both Jackie Robinson West officials and District Administrator, Mike Kell[e]y signed documents to make players eligible who should not have been.' " The release never identifies Coach Butler as a parent, and only generically refers to "parents." The last paragraph, for example, states that Little League "will continue to work with its volunteers, parents, and players to ensure" it remains "the premier youth sports organization in the world."

¶ 88 As such, even viewing the allegations of the complaint in a light most favorable to the parents, the statements in the release are not defamatory *per se*, but rather are subject to the innocent construction rule. Since there were no false statements directed at the parents, they cannot sustain their false light action. See *Kapotas v. Better Government Ass'n*, 2015 IL App (1st) 140534, ¶ 75 (noting that if the plaintiff fails to state a defamation *per se* cause of action, a count alleging false light invasion of privacy based on the allegedly inherently defamatory statements must fail, as well). Moreover, as set forth above, we do not believe the average reader would equate cheating at little league with an indictable crime. Plaintiffs also do not argue extrinsic evidence would aid their false light action, nor did they plead any special damages. See *Green*, 234 Ill. 2d at 495; *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 17; *Schaffer*, 196 Ill. App. 3d at 736.

¶ 89 As to count XX, the parents sued ESPN/Smith for false light invasion of privacy, and as to count XXI, Coach Butler sued ESPN/Smith for the same cause of action. Those counts, however, are premised on the same allegedly false statements that formed the basis of plaintiffs' defamation claims against ESPN/Smith. They must be dismissed for the same reasons the defamation counts were dismissed. We have already found that most statements Smith made about the parents and Coach Butler were protected opinion and thus cannot form

the basis of a false light claim. See *Moriarty*, 315 Ill. App. 3d at 237 (noting that protected opinion forecloses a false light claim). In addition, plaintiffs failed to allege any special damages in counts XX or XXI, which forecloses any false light claim requiring extrinsic evidence. The trial court therefore correctly dismissed counts XIX-XXI.

¶ 90 F. Civil Conspiracy

¶ 91 Plaintiffs next contend they alleged sufficient facts to state a cause of action for civil conspiracy, which is an intentional tort wherein two or more people knowingly and voluntarily participate in a common scheme to commit either an unlawful act or a lawful act in an unlawful manner. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999). To state a cause of action for civil conspiracy, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement, as well as an injury caused by the defendant. *Lewis v. Lead Industries Ass'n*, 2020 IL 124107, ¶ 20; *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 927 (2010). The agreement is a " 'necessary and important element' " of the claim. *McClure*, 188 Ill. 2d at 133 (quoting *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62 (1994)). Mere knowledge of the fraudulent or illegal actions of another is insufficient. *Id.* at 134. Rather, a defendant is liable as a conspirator only where he understands the general objectives of the conspiratorial scheme, accepts them, and agrees (explicitly or implicitly) to help further those objectives. *Id.*

¶ 92 While direct proof of an agreement for civil conspiracy is rare, a plaintiff still must allege sufficient facts to sustain a cause of action. *Farwell v. Senior Services Associates, Inc.*, 2012 IL App (2d) 110669, ¶ 22. Conclusory allegations that the defendants agreed to achieve some illicit purpose and the mere characterization of a combination of acts as a conspiracy are insufficient to withstand a motion to dismiss. *Id.*; *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23 (1998).

¶ 93 In this case, all plaintiffs alleged in count XXII that Little League and Jackie Robinson West, Inc./the Haleys, via various e-mail communications, conspired to conceal the claimed eligibility problems in order to benefit from the team's notoriety and success. Plaintiffs asserted that the claimed eligibility problems were first reported by Janes in September or October 2014, but left unaddressed for months thereafter. This was because Little League and Jackie Robinson West, Inc., "always intended to strip" the players of their championship title, acting recklessly towards them and their parents. Plaintiffs alleged this concealment was done to inflict emotional distress on plaintiffs and cast them in a false light.

¶ 94 This count suffers from a number of deficiencies, the principal one being the absence of facts showing that there was an actual agreement among these defendants. There are no specific factual allegations that each of the defendants understood the general objectives of the conspiratorial scheme and accepted them by acting in furtherance of those objectives. Plaintiffs, instead, simply assert, in a conclusory fashion, the existence of a conspiracy, with proof being that the defendants emailed one another. Again, this mere characterization of acts by the defendants as a conspiracy is insufficient to withstand a motion to dismiss. See *Buckner*, 182 Ill. 2d at 23; see also *Reuter*, 397 Ill. App. 3d at 928. Likewise, plaintiffs are less than clear as to what "unlawful act" the defendants aimed to achieve. We do not believe concealment of a matter for the sake of notoriety or generally acting recklessly towards someone's well-being can be characterized as unlawful. Moreover, as set forth above, we have already found insufficient the allegations that defendants intentionally or negligently inflicted emotional

distress on the plaintiffs (respectively, counts VII, IX-XI, and XII-XVIII) or painted them in a false light (counts XIX-XXI).[10] Because plaintiffs have failed to prove the existence of these underlying independent tort actions, they cannot prove the existence of conspiracies for those actions. See *Lewis*, 2020 IL 124107, ¶ 54; *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 499 (1998). For all these reasons, count XXII was properly dismissed.

¶ 95 III. CONCLUSION

¶ 96 Based on the foregoing, we affirm the judgment of the trial court dismissing counts III-V, alleging defamation; counts VII and IX-XI, alleging intentional infliction of emotional distress as to the parents; counts XII-XVIII, alleging negligent infliction of emotional distress; counts XIX-XXI, alleging false light invasion of privacy; and count XXII, alleging civil conspiracy. As set forth, we reverse the trial court's judgment as to counts I and II, respectively alleging breach of implied contract and promissory estoppel, insofar as we hold reinstatement of the championship title is a possible remedy. Thus, this ruling should be taken into consideration as the children's case proceeds before the trial court in case No. 18 L 00178.

¶ 97 Affirmed in part and reversed in part.

[10]As set forth, the trial court did not dismiss counts VI and VIII, alleging that Little League and, Jackie Robinson West, Inc./the Haleys, intentionally inflicted emotional distress on the team's players. While these counts could still theoretically support the civil conspiracy cause of action, as noted, count XXII remains deficient for other reasons.

LITTLE LEAGUE® INTERNATIONAL FINDS JACKIE ROBINSON WEST LITTLE LEAGUE VIOLATED RULES AND REGULATIONS

Print

Suspensions Handed Out, U.S. Championship Title Revoked, Special District Advisor To Be Named

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February 11, 2015

After an extensive review of the operations of Jackie Robinson West Little League and Illinois District 4, the Little League International Charter/Tournament Committee has determined that the Jackie Robinson West Little League and Illinois District 4 Administrator knowingly violated Little League International Rules and Regulations by placing players on their team who did not qualify to play because they lived outside the team's boundaries.

The Charter/Tournament Committee has decided to vacate the league's wins from the 2014 Little League Baseball® International Tournament, including its Great Lakes Regional and United States Championships, and suspend team manager, Darold Butler, from Little League activity. Illinois District 4 Administrator, Michael Kelly, has also been removed from his position. Jackie Robinson West Little League has been placed on probation with its tournament privileges suspended until such a time that new leadership in the positions of President, Anne Haley, and Treasurer, Bill Haley, have been elected or appointed, and that the league is fully compliant with all Little League International Regulations.

Little League International found that Jackie Robinson West Little League used a falsified boundary map for their 2014 tournament, and that Jackie Robinson West Little League officials met with other leagues in Illinois District 4 to try to get the territory they wrongfully claimed was theirs for their 2014 tournament.

"For more than 75 years, Little League has been an organization where fair play is valued over the importance of wins and losses," said Mr. Stephen D. Keener, Little League International President and CEO. "This is a heartbreaking decision. What these players accomplished on the field and the memories and lessons they have learned during the Little League World Series tournament is something the kids can be proud of, but it is unfortunate that the actions of adults have led to this outcome. As our Little League operations staff learned of the many issues and actions that occurred over the course of 2014 and prior, as painful as this is, we feel it a necessary decision to maintain the integrity of the Little League program. No team can be allowed to attempt to strengthen its team by putting players on

their roster that live outside their boundaries."

TIMELINE

In September 2014, following the conclusion of the Little League Baseball World Series, a league official from a neighboring district in Illinois first expressed concerns pertaining to players' residencies to the attention of the Little League Central Region staff in Indianapolis, Ind. At the end of October, that local league official then provided additional documentation to support his allegations. Little League International operations staff fully reviewed the allegation and information. Using age and residency/school attendance and boundary documentation provided to Little League International by Jackie Robinson West Little League and verified by the District Administrator, Little League International determined the players' eligibility based on all of the information that had been provided at that time. In mid-December, during this process, however, Little League began to learn of multiple issues with boundary maps and operational process with multiple leagues in Illinois District 4. In an effort to be fair to all the leagues in Illinois District 4, Little League International began organizing one-on-one, private meetings with leagues in the district where they could discuss their concerns and work on preparing for the 2015 season. In early January, through a media report, Little League first learned of a league within Illinois District 4 alleging misconduct by Jackie Robinson West Little League.

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On January 31, Little League International officials held meetings with Illinois District 4 officials and the leagues in the district. During these meetings, Little League International learned of several operational issues within the entire District that have occurred over the course of many years under different leadership at the District level. These issues are spread amongst leagues throughout the district and include a breakdown in communication of roles and responsibilities among District and league leadership and misunderstandings in multiple league boundaries. Various local league officials confirmed that the boundary issues stem from a boundary map redrafting process that started prior to the 2013 season and includes maps that were agreed upon amongst all the leagues, but had never been properly submitted to Little League International through the official process. Little League International also learned that Jackie Robinson West Little League knowingly expanded its boundaries to include territory that belonged to other leagues in the district without approval from the other leagues or the Little League International Charter Committee, as stated in Little League's Official Regulations and Playing Rules. Little League International also found that Jackie Robinson West Little League used a falsified boundary map for their 2014 tournament, and that Jackie Robinson West Little League officials met with other leagues in Illinois District 4 to try to get the territory they wrongfully claimed was theirs for their 2014 tournament. The decision is based on falsifying documents and illegally expanding boundaries to include residences that would verify the players' eligibility.

"Little League takes these matters very seriously and has spent countless hours gathering information about the many issues facing Jackie Robinson West Little League and Illinois District 4," said Mr. Keener. "During our review, it became clear that both Jackie Robinson West officials and District Administrator, Mike Kelly signed documents to make players eligible who should not have been."

Within Little League's operational structure, it is the District Administrator's responsibility to verify player eligibility based on documents supporting participation, age, and residency/school enrollment that are signed by the League President, League Player Agent, and Team Manager. Those signatures and documents are then reviewed at every level of the tournament, based on the District Administrator's initial verification. During tournament play, if any league has a question about player eligibility on an opposing team, they are encouraged to file an official protest, which is reviewed by the Little League International Tournament Committee. At no point during the 2014 regular season, tournament season, or since allegations of misconduct began to be reported, has Little League International been contacted by a league in Illinois District 4 about the use of illegal players within the Jackie Robinson West Little League. It wasn't until the meetings in January, 2015 that local league officials confirmed that they had direct knowledge of this rule violation, but never reported it to Little League International, as is common with local league operations.

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"Little League relies heavily on the commitment of principled volunteers to serve as a system of checks and balances in preparation of and throughout Little League International Tournament Play," said Mr. Keener. "Unfortunately, no allegations against Jackie Robinson West Little League were made until well after the tournament ended, contributing to the difficulty of resolving these many complex issues. As an organization, Little League has faced issues similar to this in the past, and we felt that we must take the appropriate action set by that precedent."

This is the third time in the 68-year history of the Little League Baseball World Series that punitive actions have led to vacating wins from a league – first in 1992 with the disqualification of Zamboanga (Philippines) City Little League and again in 2001 with Rolando Paulino Little League from Bronx, N.Y.

By default, the 2014 championships vacated by Jackie Robinson West Little League will be given to the other finalists in those games, with Mountain Ridge Little League (Las Vegas, Nev.) handed the 2014 United States Little League Baseball World Series Championship; New Albany (Ind.) Little League handed the 2014 Great Lakes Regional Little League Baseball Championship; Tri-Cities Little League (West Dundee, Ill.) given the 2014 Illinois State Little League Baseball Championship; Lansing (Ill.) Little League handed the 2014 Illinois Section 3 Little League Baseball Championship; and Rosemoor Little League (Chicago) given the 2014 Illinois District 4 Little League Baseball Championship.

"Little League is committed to helping all of our volunteers in more than 80 countries provide positive baseball and softball experiences for children in more than 7,000 communities," said Mr. Keener. "As there are many issues to resolve within Illinois District 4, our operations staff is committed to working with local volunteers to ensure that all the leagues in the district are operated fairly and under full compliance of Little League International's rules and regulations and that the children in the Chicago area have a meaningful Little League experience in 2015 and beyond."

Little League operations staff will be appointing a special advisor to Illinois District 4. The advisor will be veteran District Administrator with knowledge of the Chicago area. The Little League operations staff and the special advisor will work with

Illinois District 4 Officials and league leadership to ensure all operations and boundary issues fully comply with Little League International rules and regulations and properly communicated through the appropriate channels with the Little League Charter Committee, at which point, Jackie Robinson West Little League's probation will be lifted.

Little League International is committed to providing the best youth baseball and softball experience in the world, and will continue to work with its volunteers, parents, and players to ensure that Little League remains the premier youth sports organization in the world.

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TRANSCRIPT
ESPN FIRST TAKE CHICAGO'S JACKIE ROBINSON WEST
VACATES LITTLE LEAGUE WORLD SERIES 2014 WIN

Cari Champion: Breaking news: After an extensive review of operations of the Jackie Robinson West Little League, Little League International has determined that they knowingly violated rules and regulations by placing players on their team who did not qualify to play because they lived outside the team's boundaries. The Little League tournament committee has decided to vacate all wins from the 2014 Little League Baseball World Series for that team including its Great Lakes regional and United States championships and suspended team manager, Darold Butler from Little League activity. Let's listen to the president speak on this situation.

Little League Pres.: We had to do this. We had no choice. We have to maintain the integrity of the Little League program. Certainly no one should cast any blame, any aspersions on the children who participated on this team. To the best of our knowledge, they had no knowledge that they were doing anything wrong and they were just kids out playing baseball which is obviously the way it should be. They were celebrated for that by many many organizations, many people and so what were most concerned about today is it's going to be hard on these kids and that's the part that breaks our hearts.

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Cari Champion: Well that's-well, it's well said, Stephen A, the children have to pay for adult mistakes, what's your reaction to this?

Stephen A. Smith: I'm in pain over this one, to be quite honest with you, because of those kids. They're innocent in all of this by all accounts. They were of age, they came together as a team, they just went out there and they compete and obviously Mo'ne Davis we loved her, we loved what we saw from her and what have you and the people bring stuff like that up and you see these stories and they just resonates with you in such a profoundly positive way and the adults screw it up because of, you know, starving for notoriety, starving for recognition, starving to win and willing to sell kids dreams out in order to pull it off. If there can be good news taken from this it's a couple of things: Number one, this Little League has existed for 75 years, this is only the third time it has happened where they've had to take a move of this measure. Two other times would be primarily due to over-aged players participating, one from the Philippines, another one from the Bronx with, you know, I forgot the-

Skip Bayless: Almonte?

Stephen A. Smith: Almonte. That's it, Danny Almonte. He was over age. This is the third time this has happened. It doesn't happen every day. It doesn't happen every other year for crying out loud. It's rare. Number two, let's put their names out here. You gotta team manager by the name of Darold Butler suspended from any little league activity. Good. We've got Michael Kelly, Illinois District 4 administrator removed from his position. Good. Hopefully it will be permanently because this is completely and utterly unnecessary. You know-and let me also add what really

resonates to me and what makes this hurt even more Skip. This is called the Jackie Robinson West Team. Jackie Robinson, as renowned a figure in sports annuls as ever there was, responsible for integrating major league baseball in 1947, an iconic and revered, ideafied figure in our community and in American history. You have his name attached to this because it's Jackie Robinson West, ok? First all African American team to win the championship and this is how you did it. Just disgraceful.

Skip Bayless: It is.

Stephen A. Smith: It's a shame and the only thing we have to be thankful-thank god the kids really had nothing to do with this. They're victims in all of this just as much as anybody else. A bunch of adults and parents who knew better-parents who knew better decided to do this. Pox on all of their houses. They should all be ashamed of themselves.

Skip Bayless: So starting with Darold Butler, they shamed the name of Jackie Robinson.

Stephen A. Smith: Yes, they did.

Skip Bayless: And here we have another fractured fairy tale to deal with because it was a fairy tale. These kids got honored by President Obama at the White House—

Cari Champion: I know.

Skip Bayless: - and I still don't have any problem with that-

Cari Champion: No.

Skip Bayless: -because they earned that.

Stephen A. Smith: They earned that.

Cari Champion: Yea, they did.

Skip Bayless: And yet, if only there a way to keep the adults out of the kids' game. This is downside to televising on, national TV, a kids game because the adults know that the adults can become, at least for 15 minutes, famous, right?

Stephen A. Smith: That's right.

Skip Bayless: About 15 minutes, you're gonna be famous. I knew-I wasn't sure what his name was, but I saw Darold Butler a lot on national TV during that run, right?

Cari Champion: Yes.

Skip Bayless: I know his face.

Stephen A. Smith: I'd like to see it again.

Skip Bayless: Yea, maybe we should show it again.

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Stephen A. Smith: Let's get a picture of Darold Butler.

Skip Bayless: Fair enough. Alright.

Stephen A. Smith: Since you want to sit there and throw kids in to the wind like this this. If this was somebody else-if it was a professional athlete, if one of these kids had gotten in trouble or something like that, we'd put their face up. Let's put Darold Butler and Michael Kelly's face up on national television. Treat it like the mug shot it deserves to be treated like. How about that?

Skip Bayless: This story also says that there were other local league officials in Chicago who knew of these violations but did not speak up. I guess you can't condemn them for that. But they knew and they didn't speak up until they had to when they got questioned by officials from the larger Little League organization. So in the end, what I hate the most about this Stephen A, is that-help me out here-do you think some of these kids knew that they were-they were crossing boundaries they weren't supposed to cross? Again the parents were saying "do it," the manager's saying "do it" but your sending such a bad message to kids, surely some of the kids-they know the rules, they knew they weren't in this district.

Cari Champion: Yea, but they don't know any better-

Skip Bayless: They don't know any better.

Cari Champion: -because they're kids.

Skip Bayless: So mom or dad or Darold Butler says "it's ok, it's ok, this is just the way we're gonna do this, we're gonna get this done, we need to go win this, we're the Jackie Robinson, blah blah blah-you know?

Stephen A. Smith: Usually-

Skip Bayless: It's a bad message.

Stephen A. Smith: Usually in the case of kids, you don't necessarily know. You might suspect, but then somebody says, you know, "no, we're taking care of that it's ok," and you move on because you a kid, because you a kid, but the adults knew, the parents knew, the coach, the administrator-they knew, and they did it anyway hoping that folks would never find out while they got their 15 minutes of fame. They didn't think about the kids. They thought about themselves. The parents-the parents have to prove a Little League place Skip-parents have to prove where they live. So what I'm saying to you is that there's been some falsified documentation-

Cari Champion: Sure

Stephen A. Smith: - or something going on here because you knowingly engaged in deceit-

Skip Bayless: You did.

Stephen A. Smith: So you can have your kid play ineligibly. Inexcusable.

Cari Champion: Alright.

Stephen A. Smith: Inexcusable.

Cari Champion: Point of order, Jackie Robinson West is the 3rd all African American team.

Stephen A. Smith: Yes.

Cari Champion: We leave it there, again, it is unfortunate that the children have to pay for these adult mistakes.

Stephen A. Smith: Ok.

Cari Champion: Coming up next we switch gears, Dez or Demarco or both? What should the Cowboys do this offseason? That's a tough question but the gentlemen have the answers. We'll return in just a few moments.

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Blumenthal v. Brewer, 2016 IL 118781

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

Ill. Supreme Court · filed 2016-08-18 · Opinion
Supreme Court

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Supreme Court

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***Blumenthal v. Brewer*, 2016 IL 118781**

Caption in Supreme Court:	JANE E. BLUMENTHAL, Appellant, v. EILEEN M. BREWER, Appellee.
Docket No.	118781
Filed Rehearing denied	August 18, 2016 October 20, 2016
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. Leroy K. Martin, Judge, presiding.
Judgment	Appellate court judgment vacated in part and reversed in part. Circuit court judgment affirmed.
Counsel on Appeal	Reuben A. Bernick, of Chicago, for appellant. Angelika Kuehn, of Oak Park, and Catherine Sakimura, Shannon P. Minter, Amy Whalen, and Jaime Huling Delaye, all *pro hac vice* and all of San Francisco, California, for appellee. Camilla B. Taylor and John A. Knight, of Chicago, and Nancy D. Polikoff, of Washington, D.C., for *amici curiae* American Civil Liberties Union of Illinois *et al*.

Justices

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

Chief Justice Garman and Justices Freeman, Thomas, and Kilbride concurred in the judgment and opinion.

Justice Theis concurred in part and dissented in part, with opinion, joined by Justice Burke.

Justice Theis dissented upon denial of rehearing, with opinion, joined by Justice Burke.

OPINION

¶ 1 In this case we are called on to consider the continued viability and applicability of our decision in *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979), which held that Illinois public policy, as set forth in this State's statutory prohibition against common-law marriage, precludes unmarried cohabitants from bringing claims against one another to enforce mutual property rights where the rights asserted are rooted in a marriage-like relationship between the parties.

¶ 2 The issue has arisen here in the context of an action brought by Dr. Jane E. Blumenthal for partition of the family home she shared and jointly owned with Judge Eileen M. Brewer. The couple had maintained a long-term, domestic relationship and raised a family together but had never married. Blumenthal sought partition of the residence when the relationship ended and she moved out.

¶ 3 The partition action itself presented no question under *Hewitt*. The problem arose when Brewer counterclaimed for various common-law remedies, including sole title to the home as well as an interest in Blumenthal's ownership share in a medical group so that the couple's overall assets would be equalized now that the couple had ended their relationship. Blumenthal moved to dismiss, asserting that the various counts of the counterclaim should fail as a matter of law under *Hewitt*, which rejected a woman's suit to divide assets she accumulated with a man during a long-term relationship in which they lived together and had three children together but never married. The circuit court agreed, and the counterclaim was dismissed in full.

¶ 4 The underlying partition action between Blumenthal and Brewer proceeded to final judgment. No appeal was or has been taken from that judgment. While the partition proceeding was following its course, however, Brewer pursued an appeal of the dismissal of her counterclaim pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), arguing that *Hewitt* should be rejected and should not bar any of the relief she sought.

¶ 5 The appellate court agreed with Brewer's position. It rebuffed *Hewitt*'s holding as outmoded and ill-considered, undertook its own public policy analysis, and held that the public policy of prohibiting unmarried domestic partners from bringing common-law claims against one another no longer exists in current law. Accordingly, it vacated the circuit court's dismissal of Brewer's counterclaim and remanded the matter to the circuit court to consider additional arguments raised by the parties. 2014 IL App (1st) 132250, ¶ 40.

¶ 6 This court allowed Blumenthal's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2013). We also granted the American Civil Liberties Union of Illinois and Lambda Legal Defense and Education Fund, Inc., leave to file a friend of the court brief in support of Brewer. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). For the reasons that follow, we now vacate in part and reverse in part the judgment of the appellate court and affirm the judgment of the circuit court.

¶ 7 BACKGROUND

¶ 8 This litigation began in 2010 when Blumenthal filed her verified complaint for partition pursuant to section 17-101 of the Code of Civil Procedure (735 ILCS 5/17-101 *et seq*. (West 2012)) in the circuit court of Cook County. The portion of the partition action relevant here was directed at the parties' South Kimbark residence (hereinafter sometimes referred to as the Chicago home), which Blumenthal jointly owned with Brewer, who had been her domestic partner since approximately 1981. Blumenthal's complaint requested that "a fair division and partition of [the] property be made between the parties *** according to their respective rights and interests." The complaint further requested, in the alternative, that if the property could not be divided without manifest injustice to the parties in interest, then it should be sold by or under direction of the court, with the proceeds of the sale to be divided among the parties "according to their respective rights or interests in such proceeds as ascertained and declared" by the court.

¶ 9 Brewer's counterclaim, which is the focus of this appeal, was premised on the couple's domestic relationship, which Brewer characterized as "identical in every essential way to that of a married couple." As finally amended, the counterclaim contained five counts. Counts I, II, IV, and V all pertained directly to the disposition of the parties' home in the underlying partition action. Specifically, they sought to guide the court with respect to how the party's respective rights and interests in that property should be ascertained and valued and how the property should be divided. Count I sought imposition of a constructive trust based on unjust enrichment. Count II argued that the house should be divided based on principles of equitable division. Count IV asserted that in allocating the value of the house, the court should factor in amounts expended by Brewer to maintain it after a certain date. Invoking principles of *quantum meruit*, count V claimed that apportionment of the home's value should take into account the value of Brewer's time in making sure the property was adequately secured, maintained, and repaired. Count III sought a constructive trust over the annual net earnings or the sale of Blumenthal's share of her medical practice, or in the alternative, restitution of funds that Blumenthal used from the couple's joint account to purchase the medical practice.

¶ 10 In the circuit court, Blumenthal successfully argued that all counts of Brewer's counterclaim were barred as a matter of law by this court's decision in *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979). As noted earlier, *Hewitt* held that Illinois public policy, as set forth in this state's statutory prohibition against common-law marriage, precludes knowingly unmarried cohabitants from bringing claims against one another to enforce mutual property rights where those rights are rooted in a marriage-like relationship between the parties.

¶ 11 On appeal to the appellate court, Brewer contended that dramatic shifts in public policy had rendered this court's decision in *Hewitt* obsolete and that *Hewitt* no longer represented an accurate view of how Illinois law should treat such a claim today. Brewer contended that at

the time *Hewitt* was decided, it was public policy to treat unmarried relationships as illicit but in the decades since *Hewitt*, the Illinois legislature had repealed the criminal prohibition on nonmarital cohabitation, prohibited differential treatment of marital and nonmarital children, adopted no-fault divorce, established civil unions for both opposite-sex and same-sex partners, and extended other significant protections to nonmarital families. Thus, Brewer maintained that in light of these profound changes, *Hewitt*'s restriction on common-law claims being brought by unmarried partners has been implicitly overruled and that continued application of *Hewitt* would directly contravene the current policy of this state.

¶ 12 Blumenthal responded that *Hewitt* was not based on a legislative policy to stigmatize or penalize cohabitants for their relationship but was instead based on a statute that abolished common-law marriage in this jurisdiction and is now known as section 214 of the Illinois Marriage and Dissolution of Marriage Act (Marriage and Dissolution Act) (750 ILCS 5/214 (West 2010) ("Common law marriages contracted in this State after June 30, 1905 are invalid.")). Blumenthal contended that *Hewitt* remains good law because it gives effect to Illinois's ongoing public policy that individuals acting privately by themselves cannot create a marriage relationship and that the government must be involved in the creation of that bond. In Blumenthal's view, reversing the circuit court's dismissal order would require the appellate court to overrule *Hewitt* and its progeny, something it had no authority to do, and, in effect, resurrect common-law marriage in Illinois.

¶ 13 In a detailed discussion, the appellate court found some merit in both parties' arguments but ultimately agreed with Brewer's claims, finding that the primary basis for the result in *Hewitt* "ceased to exist." 2014 IL App (1st) 132250, ¶¶ 18, 25. To support its claim that *Hewitt* is now obsolete, the appellate court adopted Brewer's list of post-*Hewitt* policy changes and laws that relate to property rights of married or unmarried couples. *Id.* ¶¶ 30, 33-34. In particular, the appellate court gave considerable weight to the fact that in the decades since *Hewitt* was decided, the Illinois legislature has repealed the criminal prohibition on nonmarital cohabitation, prohibited differential treatment of marital and nonmarital children, adopted no-fault divorce, established civil unions for both opposite-sex and same-sex partners, and extended other significant protections to nonmarital families. *Id.* ¶¶ 23-27, 33-34.

¶ 14 The appellate court also disagreed with the policy finding in *Hewitt*, arguing that *Hewitt* "may have the contrary effect [of discouraging cohabitation and encouraging marriage because] refusing to hear claims between unmarried cohabitants creates an incentive for some to not marry." *Id.* ¶ 32. Thus, the appellate court believed that "[a] cohabitant who by happenstance or design takes possession or title to jointly acquired assets is able to retain them without consequence when their 'financially vulnerable' counterpart is turned away by the courts." *Id.*

¶ 15 Finding that *Hewitt*'s common-law ban was misplaced, the appellate court determined that Brewer's counterclaim was not an attempt to retroactively redefine the parties' relation in order to claim the benefits of a legal marriage, but rather a claim to have similar common-law property rights as others that were not in a cohabiting, unmarried relationship. *Id.* ¶ 38. Accordingly, the appellate court vacated the circuit court's *Hewitt*-based dismissal of the counterclaim and remanded the matter to the circuit court to consider additional arguments raised by the parties. *Id.* ¶ 40.

¶ 16 We will discuss the remaining relevant facts of this case within our discussion.

¶ 17 ANALYSIS

¶ 18 Blumenthal's central argument on this appeal is that the circuit court's order dismissing Brewer's counterclaim was proper and should not have been disturbed because it was mandated by this court's decision in *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979), and the prohibition against common-law marriage set forth in section 214 of the Marriage and Dissolution Act (750 ILCS 5/214 (West 2010)). Blumenthal asserts that in reversing the circuit court and remanding for further proceedings, the appellate court misread *Hewitt*, improperly reinstated common-law marriage in contravention of Illinois law, and usurped public policy determinations that properly belong to the legislature. Blumenthal also criticizes the appellate court's decision for improperly extending principles of unjust enrichment.

¶ 19 In undertaking our review, we begin by noting that the circuit court's rejection of Brewer's counterclaim was made in the context of a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). Such motions challenge the legal sufficiency of a pleading based on defects apparent on its face. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. In ruling on a section 2-615 motion, a court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Beacham v. Walker*, 231 Ill. 2d 51, 57-58 (2008). It is well understood that the critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. Such orders granting motions to dismiss under section 2-615 are reviewed *de novo*. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34.

¶ 20 Counterclaim Counts I, II, IV, and V

¶ 21 As a preliminary matter, Blumenthal contends the issue of whether counts I, II, IV, and V of Brewer's counterclaim are viable under *Hewitt* should not have been addressed by the appellate court and is not properly before us. We agree. As to those four counts, the appellate court's judgment is fatally flawed for two fundamental reasons unrelated to *Hewitt*.

¶ 22 First, the appellate court lacked jurisdiction to entertain the appeal from dismissal of those counts. The Illinois Constitution confers on the appellate court jurisdiction to hear appeals from all final judgments entered in the circuit court. See Ill. Const. 1970, art. VI, § 6 (providing that appeals "from final judgments of a Circuit Court are a matter of right to the Appellate Court"). The constitution also grants this court the right to "provide by rule for appeals to the Appellate Court from other than final judgments." *Id.* Accordingly, absent a supreme court rule, the appellate court is without jurisdiction to review judgments, orders, or decrees that are not final. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 9.

¶ 23 The ruling at issue here was brought before the appellate court based on Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), which authorizes appeals from final judgments that do not dispose of an entire proceeding "if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." An order or judgment is considered to be final and appealable for purposes of this rule if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on

the entire controversy or a separate part thereof. *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008). The purpose of the rule is " 'to discourage piecemeal appeals in the absence of a just reason and to remove the uncertainty which existed when a final judgment was entered on fewer than all of the matters in controversy.' " *Id.* (quoting *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990)).

¶ 24 Although the circuit court in this case made the written finding required by Rule 304(a), that finding is not dispositive. By its terms, Rule 304(a) applies only to final judgments or orders. The special finding contemplated by the rule will make a final order appealable, but it can have no effect on a nonfinal order. *Kellerman v. Crowe*, 119 Ill. 2d 111, 115 (1987). If the order is in fact not final, inclusion of the special finding in the trial court's order cannot confer appellate jurisdiction. *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 14.

¶ 25 The circuit court's action dismissing counts I, II, IV, and V of Brewer's counterclaim did not qualify as a final judgment or order. As mentioned above, to be considered final and appealable for purposes of Rule 304(a), a judgment or order must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court only has to proceed with execution of the judgment. *Kellerman*, 119 Ill. 2d at 115. While the order need not dispose of all the issues presented by the pleadings, it must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof. *Id.* The circuit court's dismissal of counts I, II, IV, and V did not meet that requirement.

¶ 26 Counts I, II, IV, and V arose from the same set of operative facts and sought precisely the same thing as the underlying cause of action asserted by Blumenthal: division of the value of the parties' Chicago home. Rather than being distinct and separate from Blumenthal's action, these counts merely advanced different analytical approaches for determining how the home or its proceeds should be allocated between the parties. They were, in effect, different iterations of the very same claim. When they were dismissed, the ultimate question—how the value of the residence should be split—remained unresolved. The dismissal served only to narrow the criteria applicable to that decision.

¶ 27 Although we have found no cases directly on point, our appellate court has recognized that where one claim based on the same operative facts is stated differently in multiple counts, the dismissal of fewer than all counts is not a final judgment as to any of the party's claims as required by Rule 304(a). See *Davis v. Loftus*, 334 Ill. App. 3d 761, 766 (2002). Similarly, we have held that where an order disposes only of certain issues relating to the same basic claim, such a ruling is not subject to review under Rule 304(a). To the contrary, permitting separate appeals of such orders promotes precisely the type of piecemeal appeals Rule 304(a) was designed to discourage. See *In re Marriage of Leopando*, 96 Ill. 2d 114, 119-20 (1983). Based on this reasoning, the portion of the circuit court's order dismissing counts I, II, IV, and V of Brewer's counterclaim was not appealable under Rule 304(a).

¶ 28 Second, even if the appellate court had jurisdiction to review the dismissal of counts I, II, IV, and V, its resolution of the appeal was improper and cannot stand. As discussed, the appellate court's conclusion that the circuit court erred in dismissing those counts was predicated on its repudiation of this court's decision in *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979). The appellate court's rejection of *Hewitt* was tantamount to overruling that decision. However, overruling a decision by the Illinois Supreme Court is an action the appellate court

has no authority to take. *People v. Artis*, 232 Ill. 2d 156, 164 (2009) ("The appellate court lacks authority to overrule decisions of this court, which are binding on all lower courts."). While the appellate court was free to question *Hewitt* and recommend that we revisit our holding in the case, under the judicial system created by the Illinois Constitution, it could not, itself, declare that one of our decisions was no longer controlling authority. As we have recently explained,

> "The judicial article of the Illinois Constitution of 1970, like its predecessor in the constitution of 1870, creates a three-tiered court system, with the appellate court sitting in review of the circuit courts, and the supreme court sitting in review of the appellate and circuit courts. Ill. Const. 1970, art. VI. A fundamental principle flows from this hierarchical structure: 'Where the Supreme Court has declared the law on any point, *it alone can overrule and modify its previous opinion*, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases.' " (Emphasis in original.) *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 38 (quoting *Agricultural Transportation Ass'n v. Carpentier*, 2 Ill. 2d 19, 27 (1953)).

¶ 29 Accordingly, even if the appellate court disagreed with *Hewitt*, it remained bound by that decision and should have left it to this court to reassess the decision's validity.

¶ 30 Because the appellate court's reversal of the dismissal of counts I, II, IV, and V of Brewer's counterclaim was predicated on the exercise of jurisdiction it did not possess and the repudiation of legal precedent it had no authority to overrule, we would normally be inclined to simply vacate its ruling as to those counts and remand to the circuit court for further proceedings. In this case, however, a remand would serve no purpose. That is so because while Brewer was pursuing this appeal, she and Blumenthal continued to litigate the underlying partition action. The matter of how the home should be divided has now been finally determined by the circuit court.

¶ 31 Initially, Brewer recognized that resolution of the underlying partition action could affect her counterclaim and therefore moved for a stay of the proceedings on the partition until appeal of the dismissal of her counterclaim was resolved. Although the circuit court denied the stay, it indicated that the question of a stay could be revisited if Brewer posted an appeal bond. From the record, it appears that Brewer elected not to exercise that option. Instead, the partition action proceeded to trial on the merits in August 2014.

¶ 32 The partition trial was conducted over a three-day period. In the course of the trial, testimony was presented regarding when the home was purchased, who contributed to the earnest money and down payment for the purchase, which of the parties and their children lived in the home and when, the cost of upkeep and repairs and who paid those costs, how and when certain other personal and real property was divided by the parties, the disposition of inheritances Brewer received from her parents, and how Brewer and Blumenthal handled their respective finances, including joint investment accounts. The court heard the circumstances of the parties' breakup; listened to analyses of real estate values and market conditions in the neighborhood; and received evidence regarding the parties' income taxes and the source and amounts of mortgage payments, insurance, utilities and taxes on the property. The circuit court then took the matter under advisement.

¶ 33 On October 9, 2014, the circuit court reconvened to share its findings with the parties. After dealing with some minor issues regarding various items of personal property, including photographs and skis, the court turned to the issue of the home. It concluded that the parties had held the property as tenants in common; that its current market value was $1 million; that Blumenthal had paid the earnest money and down payment for the purchase of the home, an amount which totaled $235,000; and that Blumenthal was entitled to return of that sum.

¶ 34 Subtracting the $235,000 from the home's $1 million value left $765,000. The court held that this sum should be split evenly between the parties, giving each of them a claim to $382,500 of the home's value. The court further held, however, that this distribution was subject to various adjustments. Noting that this had been a romantic domestic relationship that had gone sour, the court rejected Blumenthal's argument that Brewer should have to pay her rent for the time she remained in the home after Blumenthal decided to move out. At the same time, the court thought it inappropriate to compensate Brewer for the value of the work she did on the home herself. On the other hand, the court opined that Brewer should receive credits for mortgage payments, taxes, and insurance, as well as for various maintenance and repair expenses incurred by her that were necessary for the home's proper upkeep. The court computed these credits to total $151,700.55, which it believed should be deducted from Blumenthal's $382,500 share of the home's net value after subtraction of the down payment and earnest money, and added to Brewer's share. This left Blumenthal with $230,799.45 of what the court referred to as the home's "equity" and Brewer with $534,200.55. Finally, the court indicated that it would give Brewer the option of buying out Blumenthal's share of the Chicago home. If Brewer declined to exercise that option, the property would be put on the market and sold. A written order to that effect was entered by the court after the hearing concluded.

¶ 35 Neither party appealed. Instead, Brewer elected to buy out Blumenthal's share in accordance with the valuations made by the circuit court. According to public records of which we can take judicial notice, Blumenthal and Blumenthal's civil union partner issued a quitclaim deed to Brewer in January 2015. Brewer subsequently conveyed her interest in the home to a trust.

¶ 36 Because no appeal was taken from the court's judgment setting the value of the home and allocating the home's equity between the parties and because the property has now been conveyed in a manner chosen by the parties in accordance with the court's judgment, Brewer's arguments regarding the legal sufficiency of counts I, II, IV, and V of her counterclaims have been rendered moot. A matter becomes moot on review when, because of events occurring after the appeal was filed, there is no longer an actual controversy or the reviewing court cannot grant the complaining party effectual relief. *In re Marriage of Donald B.*, 2014 IL 115463, ¶ 23. Such is the case here.

¶ 37 Whatever our view might be of the merits of Brewer's legal theories on which counts I, II, IV, and V of her counterclaim are based, the outcome of the case would not change. As noted earlier, those theories were all directed at how the value of the home should be divided. That division has now been made and is final. Brewer obtained financing, the trust she established now owns the house, and Blumenthal has been paid for her interest in it. The deal is done. The object of the controversy has been settled.

¶ 38 Brewer has suggested that the matter is not moot because if we ruled in her favor, the circuit court could undo its final judgment, set aside the partition, and consider anew how the value of the home should be divided. Pressed at oral arguments, Brewer did not explain (and we still do not see) how this could possibly be so.

¶ 39 The finality of the judgment in the underlying partition action was not affected by Brewer's election to seek review of the dismissal of her counterclaim by means of Rule 304(a). Had Brewer wanted to avoid that result and defer final resolution of how the value of the home should be allocated until the viability of her alternate theories was resolved, she could have immediately appealed the circuit court's denial of her motion to stay the underlying case. Under established Illinois law, the denial of a stay of trial court proceedings is treated as a denial of a request for a preliminary injunction and is appealable as a matter of right under Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010). See, *e.g.*, *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶¶ 32-33; *Estate of Bass v. Katten*, 375 Ill. App. 3d 62, 69-70 (2007).

¶ 40 In addition, and more importantly, if Brewer believed that the circuit court's subsequent ruling disposing of the home was legally deficient for failing to take into account the theories advanced in her counterclaim, she could have appealed the circuit court's final judgment in the underlying case pursuant to Illinois Supreme Court Rules 301 and 303 (Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015)). She did not do that either. Rather, she accepted the circuit court's partition ruling, bought out Blumenthal's share of the property for the amount specified by the court, and continued to reside there, as the court gave her the option of doing.

¶ 41 Having pursued this strategy, Brewer would be foreclosed from pursuing counts I, II, IV, and V of her counterclaim even if we agreed that those counts should not have been dismissed based on *Hewitt*. Because the partition action proceeded to final judgment and no appeal from that judgment was taken, reinstatement of counts I, II, IV, and V of the counterclaim would be tantamount to permitting Brewer to proceed with a new and separate action with respect to division of the home's value. That is impermissible.

¶ 42 Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). A cause of action is defined by the facts which give rise to a right to relief. *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 10. " '[S]eparate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief.' " *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 46 (quoting *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d at 311). These principles extend to claims arising from the same operative facts as the plaintiff's claim that were or could have been raised by the defendant, and it has been held that *res judicata* bars a subsequent action if successful prosecution of that action would, in effect, nullify the judgment entered in the original action. See *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523, 530-31 (2005). That, of course, is precisely what would happen if the appellate court's reinstatement of counts I, II, IV, and V were upheld by this court and Brewer ultimately prevailed.

¶ 43 Moreover, even if resuscitation of counts I, II, IV, and V of the counterclaim were viewed as a mere continuation of the same proceeding rather than commencement of a new action, revisiting the merits of those counts would still be foreclosed. As previously indicated, Brewer could have sought an immediate appeal of the circuit court's denial of her request for a stay of the partition action or filed an appeal from the circuit court's judgment finally disposing of the partition action on the merits. She did neither. Instead, Brewer permitted that judgment to stand unchallenged, accepted the court's division of the home's value, and purchased Blumenthal's interest in the property in accordance with the circuit court's ruling. Where, as here, a party fails to challenge a legal decision when it has the opportunity to do so, that decision, as a general rule, becomes "the law of the case for future stages of the same litigation, and [that party is] deemed to have waived the right to challenge that decision at a later time. [Citations.]" (Internal quotation marks omitted.) *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 547 (1997). The law-of-the-case doctrine bars relitigation of issues of both law and fact. *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8. Similarly, it is well established that if a party proceeds to trial and voluntarily accepts the benefit of a judgment in his or her favor with respect to the disposition of property, that party is precluded from later challenging that judgment, including sufficiency of the property's valuation. See *County of Cook v. Malysa*, 39 Ill. 2d 376, 379 (1968). Brewer, therefore, is precluded from further litigating the disposition of the parties' home. Accordingly, the appellate court should not have entertained her appeal from the dismissal of counts I, II, IV, and V of her counterclaim, and its ruling as to the viability of those counts must be vacated.

¶ 44 Counterclaim Count III

¶ 45 Unlike counts I, II, IV, and V, count III of Brewer's counterclaim asserts a separate and distinct claim that does not concern the partition or value of the Chicago home. Instead, count III requests that the court impose a "Constructive Trust on Blumenthal's Medical Practice to Remedy Unjust Enrichment Or, in the Alternative, for Restitution." Therefore, the portion of the circuit court's order dismissing count III of Brewer's counterclaim was final and appealable under Rule 304(a). See *Kellerman v. Crowe*, 119 Ill. 2d 111, 115 (1987).

¶ 46 According to count III, "[t]hroughout the course of their relationship, Brewer and Blumenthal commingled their savings and investments." It was the funds from this joint account that went toward the purchase of Blumenthal's ownership interest in her medical practice group, Gynecologic Specialists of Northwestern, S.C. (GSN). Brewer contends that she allowed Blumenthal to use their joint account for this investment with the reasonable understanding and expectation that she, Brewer, would continue to benefit from the earnings derived from GSN. Once the couple ended their relationship in 2008, these financial benefits ceased, and Blumenthal retained the entire interest in the medical group, thereby keeping all of the earnings from the medical practice. Based on these allegations, Brewer claims that Blumenthal is unjustly enriched. Therefore, Brewer requests that this court create a constructive trust from Blumenthal's share of the annual net earnings of the medical group or any portion of the proceeds from any sale of Blumenthal's interest in the group that was attributable to Brewer's earnings or inheritance during their relationship and that this court award her the annual net earnings of GSN attributable to her as well as award her this portion of the proceeds from any sale of Blumenthal's interest in GSN.

¶ 47 " 'A constructive trust is one raised by operation of law as distinguished from a trust created by express agreement between the settlor and the trustee.' " *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988) (quoting *Perry v. Wyeth*, 25 Ill. 2d 250, 253 (1962)). A constructive trust is an equitable remedy, which may be imposed where the person in possession of the property would be unjustly enriched if he or she were permitted to retain that property. *In re Liquidation of Security Casualty Co.*, 127 Ill. 2d 434, 447 (1989). The sole duty of the constructive trustee is to transfer title and possession of the wrongfully acquired property to the beneficiary. *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291, 299 (2000).

¶ 48 Blumenthal argues that the Medical Corporation Act (805 ILCS 15/1 *et seq.* (West 2010)) and the Medical Practice Act of 1987 (225 ILCS 60/1 *et seq.* (West 2010)) prohibit Brewer, a licensed attorney, from being a beneficiary of a constructive trust created on her ownership interest in GSN, unless Brewer is also a licensed doctor. Under the Medical Corporation Act, anyone who is not licensed pursuant to the Medical Practice Act is prohibited from having any part in the "ownership, management, or control" of a medical corporation. 805 ILCS 15/13 (West 2010). In addition, fee-splitting arrangements between a licensed medical doctor and a nonlicensed medical doctor are likewise prohibited under the Medical Practice Act. 225 ILCS 60/22.2 (West 2010).

¶ 49 Brewer's counterclaim explains that GSN is an Illinois corporation that characterizes itself as an all-woman practice of experienced physicians dedicated to providing comprehensive health care to women. Blumenthal is licensed under the Medical Corporation Act as a medical doctor, which allowed her to be one of the six owners of GSN. The statutory rule is clear: As an owner of the medical group, Blumenthal is prohibited from transferring any of her ownership interest or any proceeds from a sale of her interest in GSN to a nonlicensed medical doctor. These prohibitions are similar to the prohibitions of a lawyer forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law (Ill. R. Prof'l Conduct (2010) R. 5.4(b) (eff. Jan. 1, 2010)) or the prohibition of sharing legal fees with a nonlawyer (Ill. R. Prof'l Conduct (2010) R. 5.4(a) (eff. Jan. 1, 2010)). Because Brewer is not a licensed medical doctor, transferring title and possession of Blumenthal's interest in GSN through a constructive trust to Brewer is unattainable due to the prohibitions of the Medical Corporation Act and the Medical Practice Act.

¶ 50 In the alternative, Brewer requests the common-law remedy of restitution for an undisclosed amount of funds she deposited into the couple's joint account since the year 2000, which was used to purchase Blumenthal's ownership interest in GSN. Brewer raises the same arguments she made before the appellate court, which ruled in her favor, permitting her to bring common-law remedies against Blumenthal. Therefore, Brewer requests this court uphold the appellate court's review of the longstanding public policy in Illinois barring unmarried, cohabiting partners from seeking common-law property rights if the claims are not independent from the parties' relationship.

¶ 51 To understand Illinois's public policy concerning the common-law rights of unmarried, cohabiting couples, we must begin with a review of the history in Illinois concerning the matter—a history the parties and *amici* have extensively outlined in their briefs. One thing is certain as argued in the briefs: Illinois's statutory prohibition of common-law marriage and

this court's prior decision in *Hewitt* are imperative to resolving the issue before this court. We therefore turn to that matter.

¶ 52 Common-law marriages are invalid in Illinois and have been since the early part of the last century. The prohibition is statutory and unequivocal. Section 214 of the Marriage and Dissolution Act (750 ILCS 5/214 (West 2010)) expressly provides that "[c]ommon law marriages contracted in this State after June 30, 1905 are invalid."

¶ 53 Prior to this legislative enactment, the doctrine of common-law marriage was a judicially sanctioned alternative to formal marriage. *People v. Shaw*, 259 Ill. 544, 548 (1913). In *Hewitt*, decided in 1979, this court undertook an extensive and in-depth public policy analysis with respect to the statutory change by which common-law marriages were abolished.

¶ 54 At issue in *Hewitt* was whether public policy barred the granting of common-law relief to plaintiff Victoria Hewitt, who was in a cohabiting, marriage-like relationship with the defendant, Robert Hewitt. *Hewitt*, 77 Ill. 2d at 52. Victoria and Robert commenced their relationship in 1960, while they were attending college in Iowa. *Id.* at 53. After Victoria became pregnant, Robert proclaimed to Victoria "that they were husband and wife and would live as such, no formal ceremony being necessary, and that he would 'share his life, his future, his earnings and his property' with her." *Id.* The parties immediately began holding themselves out as a married couple. *Id.* Relying on Robert's promises, Victoria began to assist in paying for Robert's education and establishing a dental practice, helping him earn more than $80,000 annually and accumulate large amounts of property, owned either jointly with Victoria or separately. *Id.* at 53-54.

¶ 55 After several years together, the relationship became sour, and Victoria filed for divorce, which the circuit court dismissed because the parties were never married. *Id.* at 52. Victoria filed an amended complaint that sought an equitable one-half share of the parties' assets, based upon theories of implied contract, constructive trust, and unjust enrichment, which resulted from their "family relationship." *Id.* at 53. The circuit court dismissed the amended complaint, "finding that Illinois law and public policy require such claims to be based on a valid marriage." *Id.* at 54.

¶ 56 The appellate court reversed, giving considerable weight to the fact that the parties had held themselves out as a couple for over 15 years and lived "a most conventional, respectable and ordinary family life." *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 863 (1978). The appellate court noted that the "single flaw" of Robert's and Victoria's relationship was the lack of a valid marriage. *Id.* The appellate court concluded that Victoria should not be denied relief based on public policy grounds. *Id.* at 867, 869. Adopting the reasoning of the "widely publicized" case of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), the appellate court held that the amended complaint stated a cause of action on an express oral contract. *Hewitt*, 62 Ill. App. at 868. In *Marvin*, Michelle Marvin and actor Lee Marvin cohabited for seven years before Michelle sought, by way of a contract action, to enforce Lee's oral promise that they would share earnings and property for life. *Marvin*, 557 P.2d at 110. In resolving her claim for one-half the property accumulated in defendant's name during that period, the California court held that nonmarital cohabitants should be treated "as any other persons" and that contracts between them are valid and enforceable so long as they are not solely and

exclusively based on sexual services, *i.e.*, prostitution. *Id.* at 116. Consequently, the appellate court reversed and remanded the case. *Hewitt*, 62 Ill. App. 3d at 869.

¶ 57 On appeal to this court, we unanimously reversed the appellate court's decision. *Hewitt*, 77 Ill. 2d at 66. Addressing the issue of whether the granting of common-law relief to the plaintiff, an unmarried cohabitant, was barred by public policy, we began by acknowledging that:

> "The issue of unmarried cohabitants' mutual property rights *** cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties to such relationships. There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage." *Id.* at 57-58.

¶ 58 In our view, the legislature intended marriage to be the only legally protected family relationship under Illinois law, and permitting unmarried partners to enforce mutual property rights might "encourage formation of such relationships and weaken marriage as the foundation of our family-based society." *Id.* at 58. This court was concerned that permitting such claims might raise questions about support, inheritance rights, and custody of nonmarital children.[1] *Id.* We noted that the situation between the unmarried couple was "not the kind of arm's length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind." *Id.* at 61. Because the question concerned changing the law governing the rights of parties in the delicate area of marriage-like relationships, which involves evaluations of sociological data and alternatives, this court decided that the underlying issue was best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field. *Id.* Accordingly, this court held that Victoria's claims were "unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants." *Id.* at 66. We reasoned that an opposite outcome of judicially recognizing mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would effectively reinstate common-law marriage and violate the public policy of this state since 1905, when the legislature abolished common-law marriage. *Id.* at 65-66.

¶ 59 Notably, based on our understanding of the public policy in Illinois and the legislative prohibition of common-law marriage, we emphatically rejected the holding in *Marvin* on

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[1]The *Hewitt* court also questioned and considered the history of whether granting legal rights to cohabiting adults would encourage "what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships," which could weaken the institution of marriage. *Hewitt*, 77 Ill. 2d at 58. Today, this court does not share the same concern or characterization of domestic partners who cohabit, nor do we condone such comparisons. Nonetheless, as explained herein, a thorough reading of *Hewitt* makes clear that the core reasoning and ultimate holding of the case did not rely nor was dependent on the morality of cohabiting adults.

which the appellate court relied. *Id.* In doing so, we found that provisions of the Marriage and Dissolution Act—retaining fault as grounds for dissolution of marriage and allowing an unmarried person to acquire the rights of a legal spouse only if he or she goes through a marriage ceremony and cohabits with another in the good-faith belief that he is validly married—indicated the public policy and the judgment of the legislature disfavoring private contractual alternatives to marriage or the grant of property rights to unmarried cohabitants. *Id.* at 64. In rejecting Victoria's public policy arguments, this court recognized that cohabitation by the unmarried parties may not prevent them from forming valid contracts about independent matters, for which sexual relations do not form part of the consideration and do not closely resemble those arising from conventional marriages. *Id.* at 59. However, that was not the type of claim Victoria brought; thus, her claim failed.

¶ 60 The facts of the present case are almost indistinguishable from *Hewitt*, except, in this case, the parties were in a same-sex relationship. During the course of their long-term, domestic relationship, Brewer alleges that she and Blumenthal had a relationship that was "identical in every essential way to that of a married couple." Although the parties were not legally married, they acted like a married couple and held themselves out as such. For example, the former domestic partners exchanged rings as a symbol of their commitment to each other, executed wills and trusts, each naming the other as the sole beneficiary of her assets, and appointed each other as fiduciary for financial and medical decision making. Blumenthal and Brewer also began to commingle their personal and financial assets, which allowed them to purchase investment property as well as the Chicago home where they raised their three children. Much like in *Hewitt*, Brewer alleges that she contributed to Blumenthal's purchase of an ownership interest in the medical group GSN, helping Blumenthal earn the majority of income for the parties and "thereby guaranteeing the family's financial security." Because Blumenthal was able to earn a high income, Brewer was able to devote more time to raising the couple's children and to attend to other domestic duties. Once Blumenthal's and Brewer's relationship ended, Brewer, like Victoria Hewitt, brought suit seeking various common-law remedies to equalize their assets and receive an interest in Blumenthal's business.

¶ 61 As explained *supra*, our decision in *Hewitt* did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits. *Hewitt* clearly declared the law on the very issue in this case. Yet, the appellate court in this case declined to follow our ruling, despite the facts being almost identical to *Hewitt*. This was improper. Under the doctrine of *stare decisis*, when this court "has declared the law on any point, *it alone can overrule and modify its previous opinion*, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." (Emphasis in original.) (Internal quotation marks omitted.) *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 38. The appellate court had no authority to depart from our decision. It could question *Hewitt* and recommend that we revisit our holding in the case, but it could not overrule it. ↩ memo p. 6, 11, 12

¶ 62 The appellate court was also ill-advised to adopt the reasoning in *Marvin* (2014 IL App (1st) 132250, ¶ 31), given that in *Hewitt* we unquestionably rejected *Marvin*. *Hewitt*, 77 Ill. 2d at 65-66. Determining that the legislature deliberately declined to follow the reasoning in *Marvin*, this court noted that during the time *Marvin* was being decided the Illinois

legislature adopted the civil-law concept of the putative spouse, which involves a situation where a person goes through a marriage ceremony and cohabits with another in the good-faith belief that he or she is validly married. *Id.* at 64. Once the putative spouse learns that the marriage is not valid, his status as a putative spouse terminates because "common law marriages are expressly excluded." *Id.* This enactment was essential to *Hewitt*'s holding because it provided specific evidence of the General Assembly's intent to depart from *Marvin*'s pure contract theory. In light of our legislative review, we felt judicial policy making in this area to be inappropriate in light of the "recent and unmistakeable legislative judgment disfavoring the grant of mutual property rights to knowingly unmarried cohabitants." *Id.* It was our judgment that granting relief under the facts of the case would be contrary to the legislative intent at the time and would have the practical effect of reinstating common-law marriage in Illinois. *Id.* at 65.

¶ 63 When considering the property rights of unmarried cohabitants, our view of *Hewitt*'s holding has not changed. As in *Hewitt*, the issue before this court cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties in such marriage-like relationships. *Id.* at 57-58. These questions undoubtedly involve some of the most fundamental policy concerns in our society. Permitting such claims, as sought by Brewer, would not only impact the institution of marriage but also raise questions pertaining to other family-related issues. See *id.* at 58. Moreover, Brewer's argument that her relationship with Blumenthal should not be viewed differently from others who cohabit, like roommates or siblings living together, ignores the fact that their relationship—which lasted almost three decades and involved raising three children—*was* different from other forms of cohabitation. Brewer herself identified in her counterclaim that her relationship with Blumenthal was not that of roommates or siblings living together but was "identical in every essential way to that of a married couple."

¶ 64 Because rejection of *Hewitt* is essential to her counterclaim, Brewer requests that we revisit the decision and overrule it. The rationale, analysis, or distinctions that can be drawn from the following appellate court cases are helpful in explaining why we reject Brewer's invitation to overrule *Hewitt* and hold that it remains good law.

¶ 65 Shortly after *Hewitt* was decided, in *Spafford v. Coats*, 118 Ill. App. 3d 566 (1983), a decision not mentioned by the appellate court below, plaintiff Donna Spafford filed a complaint against defendant Richard Coats for the creation of a constructive trust, alleging that she purchased or paid the down payment from her own funds for various vehicles. *Id.* at 568. The problem, however, was that the vehicles purchased by Spafford were titled in Coats's name because insurance premiums would be less. *Id.* Spafford and Coats were never married, but they cohabited for more than six years. *Id.* at 568-69. Using *Hewitt* as the basis for its decision, the circuit court directed a verdict in favor of Coats, finding that Spafford failed to state a cause of action. *Id.* at 569-70.

¶ 66 On review, the appellate court reversed, holding that in this particular situation, the nonmarital, cohabiting relationship did not preclude equitable relief on the vehicles purchased primarily by Spafford but titled in Coats's name. *Id.* at 572-73. The *Spafford* court distinguished the case from *Hewitt*, finding that plaintiff's claims were based on evidence that she furnished substantially all of the consideration for the purchase of several vehicles that defendant retained. *Id.* at 572. Instead, the appellate court found Spafford's claims were

substantially independent of the nonmarital relationship between the parties and not based on rights arising from their cohabitation, *i.e.*, Spafford had actually paid for the motor vehicles herself. *Id.* Because Spafford's claims had an economic basis independent of the nonmarital, cohabiting relationship, she was permitted to recover those independent contributions. *Id.* at 572-73.

¶ 67 The appellate court in *Ayala v. Fox*, 206 Ill. App. 3d 538 (1990), was faced with a similar situation as in *Spafford*. Anita Ayala and Lawrence Fox began their long-term relationship in 1976. *Id.* at 539. At Fox's suggestion, they obtained a $48,000 loan to build a home. *Id.* Fox promised Ayala that title to the property would be transferred to them as joint tenants and that Ayala would receive one-half of the equity in the property if they stopped residing together. *Id.* For three years, Ayala made the majority of the loan, tax, and insurance payments; for the next seven years, Ayala and Fox jointly made the payments. *Id.* During the relationship, Fox never transferred title to the couple as joint tenants, nor did he pay Ayala half of the equity in the property. *Id.* Rather, he placed the property in a land trust and kept personal property purchased with the parties' joint funds during the cohabitation. *Id.* After the parties ended their relationship, Ayala filed suit for a one-half interest in the realty and half of the personal property. *Id.* Dismissing the complaint, the circuit court found that *Hewitt* barred claims based on property disputes between cohabitants. *Id.* at 540.

¶ 68 The appellate court affirmed, holding that Ayala was not entitled to an interest in the property because she was seeking recovery based on rights "closely resembling those arising from a conventional marriage," namely an equitable interest in the "marital" residence. *Id.* at 541. The appellate court distinguished the facts of its case from *Spafford*, finding Ayala's claim was intimately related to her nonmarital cohabitation with Fox and, therefore, *Hewitt* barred plaintiff's claims for equitable relief. *Id.* at 541-42.

¶ 69 *Hewitt*'s rationale was also pivotal in *Costa v. Oliven* (365 Ill. App. 3d 244, 245 (2006), *appeal denied*, 221 Ill. 2d 633 (2006) (table)), which involved a case where plaintiff Eugene Costa sued defendant Catherine Oliven, with whom he had lived for 24 years in a " 'quasi-marital' relationship, with 'all the indicia of a marital type relationship, including love, trust, mutual responsibilities and intimacy.' " In this case, Costa alleged that he assumed the role of stay-at-home dad, nurturing and home-schooling their daughter and routinely performing all of the usual activities associated with maintaining an efficient household in order to enable the defendant to work full time. *Id.* In addition, he alleged that during their years together, Oliven took sole title to almost every asset and possession that was acquired through the couple's joint efforts and labor. *Id.* Based on these allegations, Costa requested the imposition of a constructive trust upon real, personal, and intellectual property owned by Oliven as well as an accounting of all income and assets in Oliven's possession and an award of punitive damages in the amount of $250,000. *Id.* at 245-46. Oliven moved to dismiss plaintiff's claims, arguing that his claims were unenforceable based on section 214 of the Marriage and Dissolution Act (750 ILCS 5/214 (West 2004)), which prohibits common-law marriage, and based on this court's decision in *Hewitt*. *Costa*, 365 Ill. App. 3d at 246. Following the holding in *Hewitt*, the appellate court affirmed the circuit court's dismissal of Costa's complaint, noting that until the legislature enacted changes, this type of complaint would continue to fail. *Id.*

¶ 70 We find that the facts of the case before us today are not only factually similar to *Hewitt* but also similar to *Ayala* and *Costa*. According to Brewer's counterclaim, one of the ways Blumenthal and Brewer's domestic relationship was identical to that of a married couple was, among other things, their decision to "commingle[ ] their personal property and their finances." Beginning around the year 2000, Blumenthal and Brewer, like the parties in *Ayala*, pooled their assets and finances, which were used to make purchases including the arrangement to purchase an ownership interest in GSN. According to Brewer, these purchases were made for the benefit of providing the "family's financial security" and to allow Brewer to devote a substantial amount of her time raising the couple's children. The decision between Blumenthal and Brewer to commingle their finances and use those joint funds to make property and financial investments demonstrates that the funds were economically dependent on the parties' marriage-like relationship.

¶ 71 For about eight years, Brewer never objected to the arrangement, nor does the counterclaim allege that she tried to earmark or record which funds of hers were going specifically toward the purchase of GSN, as if she were a business partner. This was unquestionably because Blumenthal and Brewer wanted to live like a married couple. Both parties voluntarily contributed to the joint account because that is typical of a married couple. The parties' arrangement was made possible because Brewer, like the plaintiff in *Costa*, agreed to forgo advancing her own legal career in order for Blumenthal to pursue entrepreneurial endeavors including the purchase of an ownership interest in GSN. Indeed, Brewer is correct in labeling Blumenthal's and her purchase of GSN as an investment. But it was an investment for the family, which included Blumenthal, Brewer, and their children. It was not an investment between business partners. Nor was it the kind of arm's length bargain envisioned by traditional contract principles. Rather, the arrangement to use the parties' commingled funds was an arrangement of a fundamentally different kind, which, like the arrangement in *Ayala* and *Costa*, is intimately related and dependent on Brewer's marriage-like relationship with Blumenthal.

¶ 72 Additionally, Brewer's claim for restitution in count III is distinguishable from *Spafford*. Unlike the plaintiff in *Spafford*, Brewer does not allege that she contributed substantially all of the funds for the purchase of GSN. In fact, Brewer's counterclaim does not provide a specific amount of funds she contributed to Blumenthal's ownership interest in GSN, nor does Brewer allege that she and Blumenthal somehow attempted to keep their contributions separate. Rather, the purchase came after many years of the former domestic partners living together, raising a family, and depositing funds in their joint account as well as making certain family purchases out of the joint account. It is undeniable that the purchase of Blumenthal's ownership interest in GSN was dependent on the parties' relationship, because the purchase was made for the family's financial security. That was not the situation in *Spafford*.

¶ 73 While we acknowledge that restitution may be a remedy available to a party who has cohabited with another (see *Hewitt*, 77 Ill. 2d at 55-56), that is not the circumstance concerning Brewer's restitution claim in count III of her counterclaim. We find that Brewer failed to make a showing that count III of her counterclaim has an independent economic basis apart from the parties' relationship. The joint account used by Blumenthal and Brewer to purchase an ownership interest in GSN was dependent on their desire to live in a marriage-like relationship and make purchases out of this account to better their family

situation. Therefore, the purchase of Blumenthal's ownership interest in GSN from the joint account is intimately related to the parties' relationship. Our decision in *Hewitt* bars such relief if the claim is not independent from the parties' living in a marriage-like relationship for the reason it contravenes the public policy, implicit in the statutory scheme of the Marriage and Dissolution Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants. *Id.* at 66.

¶ 74 Next, Brewer respectfully asks this court to affirm the appellate court's decision, which held in her favor that former cohabitants, who live outside the bonds of marriage but live in a marriage-like relationship, may bring common-law property claims. Central to Brewer's argument are various post-*Hewitt* legislative enactments in Illinois, which she claims indicate that the state's public policy has shifted dramatically in regards to unmarried couples and their children. According to Brewer, the following legislative enactments reveal that the application of *Hewitt* is no longer justified and that the state's evolving public policy now contradicts *Hewitt*'s rule. We disagree.

¶ 75 Since this court's decision in *Hewitt*, the General Assembly has enacted, repealed, and amended numerous family-related statutes. In 1984, the legislature adopted a no-fault ground of divorce based on irreconcilable differences to the Illinois Marriage and Dissolution of Marriage Act. Pub. Act 83-954 (eff. July 1, 1984) (codified at 750 ILCS 5/401(a)(2) (West 2012)). Then in 1985, the Illinois Parentage Act of 1984 provided that "[t]he parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents." Pub. Act 83-1372 (eff. July 1, 1985) (codified at 750 ILCS 45/3 (West 2012)). Additionally, since *Hewitt*, there has been an amendment to the Probate Act of 1975 extending intestate inheritance rights to children of unmarried parents (Pub. Act 80-1429 (eff. Sept. 12, 1978) (codified at 755 ILCS 5/2-2 (West 2012))) and a similar amendment to the Illinois Pension Code, which indicates that children born to unmarried parents are entitled to the same survivor's benefits as other children (Pub. Act 84-1028 (eff. Nov. 18, 1985) (codified at 40 ILCS 5/1-104.2 (West 2012))). Further, Illinois also recognizes the rights of unmarried couples (and individuals) to adopt children. Pub. Act 96-328 (eff. Aug. 11, 2009) (codified at 750 ILCS 50/2 (West 2010)). In 2011, the legislature enacted the Illinois Religious Freedom and Civil Union Act, gave legal status to civil unions, and made such status available to both opposite-sex and same-sex couples. Pub. Act 96-1513 (eff. June 1, 2011) (adding 750 ILCS 75/1 *et seq.* (West 2010)). As of 2014, under the Religious Freedom and Marriage Fairness Act, same-sex couples are now able to marry in Illinois. Pub. Act 98-597 (eff. June 1, 2014) (adding 750 ILCS 80/1 *et seq.* (West 2014)). More recently, the Parentage Act of 1984 was repealed (in its entirety) by the 2015 enactment of Public Act 99-85, which replaced it with the Illinois Parentage Act of 2015. 750 ILCS 45/1 *et seq.* (West 2014) (repealed by Pub. Act 99-85 (eff. Jan. 1, 2016) (adding 750 ILCS 46/101 *et seq.*)). In addition, the Marriage and Dissolution Act, which incorporates the statute prohibiting common-law marriages, underwent a major overhaul this year. Pub. Act 99-90 (eff. Jan. 1, 2016) (amending 750 ILCS 5/101 *et seq.* (West 2014)).

¶ 76 These post-*Hewitt* amendments demonstrate that the legislature knows how to alter family-related statutes and does not hesitate to do so when and if it believes public policy so requires. Nothing in these post-*Hewitt* changes, however, can be interpreted as evincing an intention by the legislature to change the public policy concerning the situation presently before this court. To the contrary, the claim that our legislature is moving toward granting

additional property rights to unmarried cohabitants in derogation of the prohibition against common-law marriage is flatly contradicted by the undeniable fact that for almost four decades since *Hewitt*, and despite all of these numerous changes to other family-related statutes, the statutory prohibition against common-law marriage set forth in section 214 of the Marriage and Dissolution Act (750 ILCS 5/214 (West 2014)) has remained completely untouched and unqualified. That is so even though this court in *Hewitt* explicitly deferred any policy change to the legislature. *Hewitt*, 77 Ill. 2d at 66 (When deciding complex public-policy considerations, such " 'questions are appropriately within the province of the legislature, and *** if there is to be a change in the law of this State on this matter, it is for the legislature and not the courts to bring about that change.' " (quoting *Mogged v. Mogged*, 55 Ill. 2d 221, 225 (1973))).

¶ 77 It is well understood that when the legislature chooses not to amend a statute to reverse a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent. *Wakulich v. Mraz*, 203 Ill. 2d 223, 233 (2003) (quoting *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 49-50 (1998)). Based on this principle, we can presume that the legislature has acquiesced in *Hewitt*'s judicial interpretation of the statute prohibiting marriage-like rights to those outside of marriage. If this court were to recognize the legal status desired by Brewer, we would infringe on the duty of the legislature to set policy in the area of domestic relations. As mentioned in *Hewitt*, the legislative branch is far better suited to declare public policy in the domestic relations field due to its superior investigative and fact-finding facilities, as declaring public policy requires evaluation of sociological data and alternatives. Therefore, we do not find a compelling reason to reverse course now and depart from our earlier legislative interpretation, especially in light of almost two score years of legislative inaction on the matter.

¶ 78 Brewer's argument that we should recognize new public policy justifications to support her counterclaim is further undermined by the fact that all of the public policy changes to which she cites resulted not from judicial action but from the legislature. In each example, it was the legislature, not the courts, that determined what Illinois public policy was (or was not) to be.

¶ 79 We also reject Brewer's argument that changes in law since *Hewitt* demonstrate that the "legislature no longer considers withholding protection from nonmarital families to be a legitimate means of advancing the state's interest in marriage." To the contrary, this court finds that the current legislative and judicial trend is to uphold the institution of marriage. Most notably, within the past year, the United States Supreme Court in *Obergefell v. Hodges*, 576 U.S. ___, ___, 135 S. Ct. 2584, 2604-05 (2015), held that same-sex couples cannot be denied the right to marry. In doing so, the Court found that "new insights [from the developments in the institution of marriage over the past centuries] have strengthened, not weakened, the institution of marriage." *Id.* at ___, 135 S. Ct. at 2596. For the institution of marriage has been a keystone of our social order and "remains a building block of our national community." *Id.* at ___, 135 S. Ct. at 2601. Accordingly, the Court invalidated any state legislation prohibiting same-sex marriage because excluding same-sex couples from marriage would be excluding them "from one of civilization's oldest institutions." *Id.* at ___, 135 S. Ct. at 2608.

¶ 80 While the United States Supreme Court has made clear that "[t]he Constitution *** does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex" (*id.* at ___, 135 S. Ct. at 2607), nothing in that holding can fairly be construed as requiring states to confer on non-married, same-sex couples common-law rights or remedies not shared by similarly situated non-married couples of the opposite sex. Legislatures may, of course, decide that matters of public policy do warrant special consideration for non-married, same-sex couples under certain circumstances, notwithstanding the fact that the institution of marriage is available to all couples equally. What is important for the purposes of this discussion is that the balancing of the relevant public policy considerations is for the legislature, not the courts. Indeed, now that the centrality of the marriage has been recognized as a fundamental right for all, it is perhaps more imperative than before that we leave it to the legislative branch to determine whether and under what circumstances a change in the public policy governing the rights of parties in nonmarital relationships is necessary.

¶ 81 It is well settled that the policy of the Marriage and Dissolution Act gives the state a strong continuing interest in the institution of marriage and the ability to prevent marriage from becoming in effect a private contract terminable at will, by disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants. See *Hewitt*, 77 Ill. 2d at 65-66. As explained in *Hewitt*, such policy was set forth by the enactment of section 214 of the Marriage and Dissolution Act. Ill. Rev. Stat. 1979, ch. 40, ¶ 214 (codified at 750 ILCS 5/214 (West 2010)). Until the legislature sees fit to change our interpretation of the public policy in Illinois, under the circumstances of this case, Brewer's claim for restitution is prohibited, as it contravenes the public policy implicit in the Marriage and Dissolution Act.

¶ 82 Lastly, we note that Brewer, the supporting *amici*, and the partial dissent cite to numerous cases from our sister state courts and other secondary sources that support Brewer's public policy arguments. However, decisions from other state courts and secondary sources are not binding on this court and, in this particular situation, are unpersuasive for the reason they do not adequately consider the deeply rooted public policy in Illinois. *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904, ¶ 55 (citing *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 489 (1989)). Additionally, it should be noted that these cases and secondary sources were written prior to, and therefore did not consider, the fundamental change the United States Supreme Court decision in *Obergefell* had on legal rights of same-sex partners.

¶ 83 Due Process and Equal Protection Claims

¶ 84 The determination that the trial court did not err in dismissing Brewer's counterclaim does not end this appeal, for Brewer argues that the continued application of *Hewitt*'s rule would violate the Illinois and federal constitutional guarantees of due process and equal protection. See U.S. Const., amend. XIV, § 1; Ill. Const. 1970, art. I, §§ 2, 12. Brewer claims that *Hewitt*'s rule preventing unmarried domestic partners the ability to bring common-law claims available to all other persons, solely because they are in a marriage-like relationship, does not rationally advance a legitimate governmental purpose and that it deliberately seeks to penalize unmarried partners for exercising their constitutionally protected right to enter into an intimate relationship. Although the appellate court did not address this issue, the issue

has been raised and fully briefed by both parties. Therefore, we will address this issue on appeal. *Chavda v. Wolak*, 188 Ill. 2d 394, 400 (1999).

¶ 85 We disagree with Brewer's claim that *Hewitt*'s holding denies unmarried domestic partners the ability to bring common-law claims solely because they are in an intimate relationship with another. See *supra* ¶¶ 65-73. This court's decision in *Hewitt* only disallows unmarried cohabitants who live in a marriage-like relationship from accessing, under the guise of an implied contract, the rights and protections specified in the Marriage and Dissolution Act. In other words, individuals can enter into an intimate relationship, but the relationship itself cannot form the basis to bring common-law claims. Thus, *Hewitt*'s holding does not prevent or penalize unmarried partners from entering into intimate relationships. Rather, it acknowledges the legislative intent to provide certain rights and benefits to those who participate in the institution of marriage.

¶ 86 The State's interest in the creation, regulation, and dissolution of the marriage relationship is beyond question. Over one hundred years ago, the United States Supreme Court in *Maynard v. Hill*, 125 U.S. 190, 211 (1888), recognized that marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress." Throughout history, states have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. See *Obergefell*, 576 U.S. at ___, 135 S. Ct. at 2601. In *Williams v. North Carolina*, 317 U.S. 287, 298 (1942), the Court noted that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." This is so because "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2691 (2013) (quoting *Williams*, 317 U.S. at 298). In enacting the Marriage and Dissolution Act (Pub. Act 80-923 (eff. Oct. 1, 1977) (codified at 750 ILCS 5/101 *et seq.* (West 2014))), the Illinois legislature has shown its rightful interest in defining and regulating domestic relationships.

¶ 87 Since marriage is a legal relationship that all individuals may or may not enter into, Illinois does not act irrationally or discriminatorily in refusing to grant benefits and protections under the Marriage and Dissolution Act to those who do not participate in the institution of marriage. As noted in *Hewitt* and the line of cases that follow its holding, unmarried individuals may make express or implied contracts with one another, and such contracts will be enforceable if they are not based on a relationship indistinguishable from marriage. Indeed, *Hewitt* did nothing more than effectuate the policy established by the legislature to prevent knowingly unmarried cohabitants from evading the statutory abolition of common-law marriage under section 214 of the Marriage and Dissolution Act (750 ILCS 5/214 (West 2010)) by employing theories of implied contract to achieve the same result that would occur if common-law marriage were recognized. We, therefore, reject Brewer's claims.

¶ 88 CONCLUSION

¶ 89 For the foregoing reasons, the appellate court should not have considered Brewer's appeal with respect to that portion of the circuit court's order disposing of counts I, II, IV,

and V of Brewer's counterclaim, and it erred when it reversed and remanded the cause with respect to count III of Brewer's counterclaim. The judgment of the appellate court is therefore vacated in part and reversed in part. The judgment of the circuit court dismissing Brewer's counterclaim in full is affirmed.

¶ 90 Appellate court judgment vacated in part and reversed in part.

¶ 91 Circuit court judgment affirmed.

¶ 92 JUSTICE THEIS, concurring in part and dissenting in part:

¶ 93 I agree with the majority's disposition of counts I, II, IV, and V of Judge Brewer's counterclaim against Dr. Blumenthal. I further agree with the majority's holding that count III of the counterclaim cannot proceed on a constructive trust theory. I disagree with the majority's holding that count III cannot proceed on a restitution theory.

¶ 94 The trial court dismissed Brewer's amended complaint in its entirety because it felt bound to *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979). The appellate court did not feel similarly bound, but, as the majority notes, that court should have followed that case. *Supra* ¶ 61 (quoting *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 38). The central question for us to decide here is whether we should do so.

¶ 95 The doctrine of *stare decisis* is not an inexorable command (*Chicago Bar Ass'n v. Illinois State Board of Elections*, 161 Ill. 2d 502, 510 (1994)), and this court will depart from it and discard a prior case when there is good cause to do so (*Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 304 (1982)). Good cause exists when an earlier ruling has proven to be unworkable or poorly reasoned. *People v. Sharpe*, 216 Ill. 2d 481, 520 (2005) (citing *People v. Jones*, 207 Ill. 2d 122, 134 (2003)); see *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (stating that "any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained" (internal quotation marks omitted)). In my view, there is good cause to overrule *Hewitt*. The court's decision in that case was clouded by an inappropriate and moralistic view of domestic partners who cohabit and founded upon legal principles that have changed significantly.

¶ 96 According to the majority, *Hewitt* "did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits." *Supra* ¶ 61. In fact, *Hewitt* did much more. It etched into the Illinois Reports the arcane view that domestic partners who choose to cohabit, but not marry, are engaged in "illicit" or "meretricious" behavior at odds with foundational values of "our family-based society." *Hewitt*, 77 Ill. 2d at 58. "Meretricious" means "of or relating to a prostitute" (Webster's Third New International Dictionary 1413 (1986)), so this court labeled such people as prostitutes.

¶ 97 The majority's attempt to distance itself from *Hewitt*'s sweeping and near-defamatory statement is unconvincing. Though the majority assures that "this court does not share the same concern or characterization of domestic partners who cohabit, nor do we condone such comparisons" (*supra* ¶ 58 n.1), its disavowal of *Hewitt* is literally subtextual, occurring only

in a footnote. Elsewhere, the majority borrows troubling language from that case. In *Hewitt*, the court stated that "the situation" between the parties was "not the kind of arm's length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind." *Hewitt*, 77 Ill. 2d at 61. Here, the majority states that the parties' investment into Blumenthal's medical practice was not "the kind of arm's length bargain envisioned by traditional contract principles," but rather "an arrangement of a fundamentally different kind, which *** is intimately related and dependent on Brewer's marriage-like relationship with Blumenthal." *Supra* ¶ 71. The majority cleverly tries to cloak the real meaning of *Hewitt*, but what makes these "arrangements" fundamentally different is the same for the *Hewitt* court and the majority.

¶ 98 To state uncategorically that "our view of *Hewitt*'s holding has not changed" (*supra* ¶ 63) and insist that "it remains good law" (*supra* ¶ 64) is to reaffirm an oddly myopic and moralistic view of cohabitation. The majority assertion that *Hewitt*'s "core reasoning and ultimate holding *** did not rely nor was dependent on the morality of cohabiting adults" (*supra* ¶ 58 n.1) is plainly incorrect because the court's discussion of the role of the legislature in setting public policy on domestic relations and the prohibition of common-law marriage comes as an even-if afterthought. See *Hewitt*, 77 Ill. 2d at 60. Insulating the institution of marriage from the "changing mores of our society" was the clear impetus for our holding in that case. *Id.* at 58.

¶ 99 To begin its analysis, the *Hewitt* court discussed at length the so-called rule of illegality. The court quoted the first Restatement of Contracts, which stated, " 'A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal.' " *Hewitt*, 77 Ill. 2d at 59 (quoting Restatement of Contracts § 589 (1932)). And the court cited the well-known contract law treatise by Arthur Corbin, the reporter of the First Restatement, as further support for the traditional rule. *Id.* (citing 6A Arthur Linton Corbin, Corbin on Contracts § 1476 (1962)). The *Hewitt* court acknowledged that "cohabitation by the parties may not prevent them from forming valid contracts about independent matters, for which it is said the sexual relations do not form part of the consideration" (*id.*), but rejected the "real thrust" of the argument that the rule of illegality should be abandoned (*id.* at 60). The court decried "the naivete *** involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity." *Id.*

¶ 100 *Hewitt*'s support for the rule of illegality has disappeared. In 1979, Illinois still criminalized cohabitation. See Ill. Rev. Stat. 1961, ch. 38, ¶ 11-8 (a "person who cohabits *** commits fornication if the behavior is open and notorious"). The *Hewitt* court did not cite that statute, but quoted *Wallace v. Rappleye*, 103 Ill. 229, 249 (1882), which held, " 'An agreement in consideration of future illicit cohabitation between the [parties] is void.' " *Hewitt*, 77 Ill. 2d at 58-59. When the prohibition against cohabitation was repealed in 1990 (see Pub. Act 86-490 (eff. Jan. 1, 1990) (codified at 720 ILCS 5/11-40 (West 2010))), *Wallace* was, in effect, superseded.

¶ 101 The Second Restatement of Contracts, which was completed in 1979 and published in 1981, deleted the section of the First Restatement quoted in *Hewitt* and ceased to define all bargains between people in intimate relationships as illegal. The section of the Corbin treatise

cited in *Hewitt* has been dropped in the current version. Today, the treatise recognizes that cohabiting adults are a family and notes, "The courts' treatment of contracts entered into by cohabiting parties evolved in the last part of the twentieth century and is clear evidence of how the courts' view of what might be against public policy varies with changes in society's views." 15 Grace McLane Giesel, Corbin on Contracts § 81.4, at 205 (Joseph M. Perillo ed., rev. ed. 2003) (hereinafter Corbin). According to the treatise, courts across the country no longer perceive a conflict between the public policies of protecting and encouraging marriage and discouraging any exchange of sexual activity for value and enforcing agreements between former cohabitants. Corbin, *supra*, § 81.4, at 207-08.

¶ 102 The treatise also refers to the landmark "palimony" case of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (*en banc*), remarking:

> "Whereas cases decided [prior to] *Marvin* may have presumed that the sexual relationship was the substance of the agreement, cases after *Marvin* seem to presume that the relationship is not the substance of the agreement. These cases are not concerned that the agreement exists in the context of a sexual relationship, but rather are concerned only if the contract's 'primary' reason is sexual relations for value." Corbin, *supra*, § 81.4, at 219.

Brewer and the *amici* supporting her cite many of those cases, but the majority declines to follow them because they are not binding authority and "do not adequately consider the deeply rooted public policy in Illinois." *Supra* ¶ 82. That policy, presumably, is the one mentioned earlier by the majority that individuals acting privately cannot create marriage-like benefits without the involvement of the State. *Supra* ¶ 61. According to the majority, that policy is embodied in prohibition of common-law marriage that "has remained completely untouched and unqualified" in the nearly four decades since *Hewitt*. *Supra* ¶ 76.

¶ 103 Obviously, Illinois's common-law marriage ban is still in effect. See 750 ILCS 5/214 (West 2010). Parallel statutes are in effect across the country,[2] but only Georgia and Louisiana have rulings similar to *Hewitt*. See *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983). Courts in a vast majority of the remaining states, as well as the District of Columbia, that have chosen not to recognize common-law marriages also have chosen to recognize claims between former domestic partners like Blumenthal and Brewer. See, *e.g.*, *Bishop v. Clark*, 54 P.3d 804 (Alaska 2002); *Cook v. Cook*, 691 P.2d 664 (Ariz. 1984); *Bramlett v. Selman*, 597 S.W.2d 80 (Ark. 1980); *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Boland v. Catalano*, 521 A.2d 142 (Conn. 1987); *Mason v. Rostad*, 476 A.2d 662 (D.C. 1984); *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); *Simmons v. Samulewicz*, 304 P.3d 648 (Haw. Ct. App. 2013); *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. Ct. App. 1980); *Donovan v. Scuderi*, 443 A.2d 121 (Md. Ct. Spec. App. 1982); *Wilcox v. Trautz*, 693 N.E.2d 141 (Mass. 1998); *Featherston v. Steinhoff*, 575 N.W.2d 6 (Mich. Ct. App. 1997); *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983); *Cates v. Swain*, No. 2010-CT-01939-SCT, 2013 WL 1831783 (Miss. May 2, 2013); *Hudson v. DeLonjay*, 732 S.W.2d 922 (Mo. Ct. App. 1987); *Kinkenon v. Hue*, 301

[2]According to the National Conference of State Legislatures, only Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, and Texas still recognize common-law marriage. *Common Law Marriage by State*, National Conference of State Legislatures, http://www.ncsl.org/research/human-services/common- law-marriage.aspx (updated Aug. 4, 2014).

N.W.2d 77 (Neb. 1981); *Hay v. Hay*, 678 P.2d 672 (Nev. 1984); *Dominguez v. Cruz*, 617 P.2d 1322 (N.M. Ct. App. 1980); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980); *Collins v. Davis*, 315 S.E.2d 759 (N.C. Ct. App. 1984), *aff'd per curiam*, 321 S.E.2d 892 (N.C. 1984); *McKechnie v. Berg*, 667 N.W.2d 628 (N.D. 2003); *Beal v. Beal*, 577 P.2d 507 (Or. 1978) (*en banc*); *Knauer v. Knauer*, 470 A.2d 553 (Pa. Super. Ct. 1983); *Bracken v. Bracken*, 217 N.W. 192 (S.D. 1927); *Leek v. Powell*, 884 S.W.2d 118 (Tenn. Ct. App. 1994); *Belcher v. Kirkwood*, 383 S.E.2d 729 (Va. 1989); *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984) (*en banc*); *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987); *Kinnison v. Kinnison*, 627 P.2d 594 (Wy. 1981).

¶ 104 The recognition of claims between domestic partners has not revived the doctrine of common-law marriage in jurisdictions that have abolished it. See Principles of the Law of Family Dissolution § 6.01 cmt. a (2002) (hereinafter Principles). That is, "the history of common law marriage in this country" (*Hewitt*, 77 Ill. 2d at 64)—or, more precisely, its widespread prohibition—has not prevented courts across the country from allowing such claims to proceed. See *Glasgo*, 410 N.E.2d at 1330 ("We do not find that recognition of a claim for a declaration of property rights in specific property to be a claim which reinstates common law marriages."); *Hay*, 678 P.2d at 674 ("We hasten to point out that Nevada does not recognize common law marriage. [Citation.] We recognize that the state has a strong public policy interest in encouraging legal marriage. We do not, however, believe that policy is well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions."); *Goode*, 396 S.E.2d at 438 ("This Court *** recognizes that the state has a strong policy interest in encouraging legally valid marriages. [Citation.] However, we *** also recognize that this policy must not defeat a person's equitable interests, nor a person's rights based upon a valid agreement, expressed or implied."); *Kinnison*, 627 P.2d at 595 ("While repeatedly rejecting the doctrine of common-law marriage, this court has never held, however, that the fact that a man and a woman live together out of wedlock and engage in a sexual relationship in any way invalidates agreements between them or, because of the relationship, renders them incapable of contracting with one another."); see also *Boland*, 521 A.2d at 145; *Wilcox*, 693 N.E.2d at 146; *Hudson*, 732 S.W.2d at 926; *Dominguez*, 617 P.2d at 1322-23; *Knauer*, 470 A.2d at 564.

¶ 105 In light of this wave of authority, the Restatement (Third) of Restitution and Unjust Enrichment now contains a new section that provides former domestic partners with an avenue "to prevent unjust enrichment upon the dissolution of the relationship." Restatement (Third) of Restitution and Unjust Enrichment § 28(1) (2011).

¶ 106 Illinois is a clear outlier on this issue. See Principles, *supra*, § 6.03, Reporter's Notes, cmt. b ("Although *Hewitt* is not entirely isolated [citation] its approach is distinctly a minority view, and has been explicitly rejected by many courts ***."). *Hewitt* must be overruled because it is outmoded and out of touch with contemporary experience and opinions on cohabitation.

¶ 107 Additionally, *Hewitt* must be overruled because the legal landscape that formed the background for our decision has changed significantly. The *Hewitt* court was puzzled by the impact that recognizing claims arising from the relationships of unmarried cohabitants would have on society. *Hewitt*, 77 Ill. 2d at 58. Specifically, the court queried, "[W]hat of the

children born of such relationships? What are their support and inheritance rights and by what standards are custody questions resolved? What of the sociological and psychological effects upon them of that type of environment?" *Id.* That court was the same one that decided *Jarrett v. Jarrett*, 78 Ill. 2d 337, 345 (1979), which affirmed a trial court ruling transferring custody of three children to their father because their mother was cohabiting with another man. Four years later in *In re Marriage of Thompson*, 96 Ill. 2d 67, 78 (1983), the court changed course and held that, in Illinois, there is no "conclusive presumption that, because a custodial parent cohabits with a member of the opposite sex, the child is harmed." See also *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1055 (1996) ("the clear import of the *Thompson* opinion is that Illinois courts should not adopt absolute rules that require a change in custody based on conduct of the custodial parent that does not impact the children"). Unmarried couples may now adopt children. See 750 ILCS 50/2 (West 2010).

¶ 108 As for support and inheritance, the Probate Act of 1975 was amended in 1978 to extend intestate inheritance rights to children of unmarried parents. See Pub. Act 80-1429 (eff. Sept. 12, 1978) (codified at 755 ILCS 5/2-2 (West 2010)). Similarly, the Illinois Pension Code was amended in 1985 to extend survivor benefits to such children. See Pub. Act 84-1028 (eff. Nov. 18, 1995) (codified at 40 ILCS 5/1-104.2 (West 2010)). And the Illinois Parentage Act of 1984, which also went into effect in 1985, specifically provided that "[t]he parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents." Pub. Act 83-1372 (eff. July 1, 1985) (codified at 750 ILCS 45/3 (West 2010)). That statute has since been repealed and replaced by the Illinois Parentage Act of 2015. 750 ILCS 46 *et seq.* (West Supp. 2015).

¶ 109 To bolster its holding, *Hewitt* relied upon Illinois's rejection of so-called no-fault divorce. See *Hewitt*, 77 Ill. 2d at 63 (citing Ill. Rev. Stat. 1977, ch. 40, ¶ 401). The court took the legislature's decision to retain fault grounds for divorce as a "significantly stronger promarriage policy" that reaffirmed "the traditional doctrine that marriage is a civil contract between three parties[:]the husband, the wife[,] and the State" and prevented "the marriage relation from becoming in effect a private contract terminable at will." *Hewitt*, 77 Ill. 2d at 63-64.

¶ 110 The Marriage and Dissolution of Marriage Act was amended in 1984, and since then Illinois has had no-fault divorce. See 750 ILCS 5/401(a)(2) (West 2010); see also *Karbin v. Karbin*, 2012 IL 112815, ¶ 39 (stating that the no-fault divorce provisions of the Act signaled a shift in policy that "reflected a dissatisfaction with the traditional requirements of proving fault to obtain a divorce" and "allowed people to part with dignity" (internal quotation marks omitted)). And the Illinois Uniform Premarital Agreement Act was enacted in 1990. See 750 ILCS 10/1 *et seq.* (West 2010); see also *In re Marriage of Barnes*, 324 Ill. App. 3d 514, 517 (2001) (indicating that, historically, premarital agreements that limited spousal maintenance or distributed property upon divorce were invalidated on public policy grounds because they were said to be conducive to divorce, but it is now "clear that there is no longer any general public policy opposed to agreements contemplating divorce"). Those statutes answer the *Hewitt* court's concern about "the marriage relation *** becoming in effect a private contract terminable at will." *Hewitt*, 77 Ill. 2d at 64.

¶ 111 Notably, *Hewitt*'s paternalistic reference to only opposite-gender marriages has been superseded by the Religious Freedom and Marriage Fairness Act (Pub. Act 98-597 (eff. June

1, 2014) (adding, *inter alia*, 750 ILCS 80/5 (West Supp. 2013))), which provides "same-sex and different-sex couples and their children equal access to the status, benefits, protections, rights, and responsibilities of civil marriage." The legislature, in an earlier statute, extended the rights and burdens of marriage to domestic partners who enter civil unions (see 750 ILCS 75/1 *et seq*. (West 2010)), and many public and private employers provide benefits to domestic partners who cohabit.

¶ 112 The majority, however, refuses to give these statutory amendments much weight. According to the majority, "[t]hese post-*Hewitt* amendments demonstrate that the legislature knows how to alter family-related statutes and does not hesitate to do so when and if it believes public policy so requires." *Supra* ¶ 76. The implication is that, in light of the many statutory changes since *Hewitt*, the legislature's silence on the rights of cohabitants somehow indicates its rejection of claims like those brought by Brewer. I interpret that silence differently. Simply because the legislature has taken some action in the domestic relations arena does not mean that this court cannot act as well. See *In re Parentage of M.J.*, 203 Ill. 2d 526, 540 (2003). The legislature is undoubtedly well equipped to declare public policy on domestic relations. *Hewitt*, 77 Ill. 2d at 61, 66; *supra* ¶ 77. Courts, however, are better equipped than the legislature to help parties divide joint assets using familiar legal and equitable rules. See *Watts*, 405 N.W.2d at 311 ("Courts have traditionally developed principles of contract and property law through the case-by-case method of the common law. While ultimately the legislature may resolve the problems raised by unmarried cohabiting parties, we are not persuaded that the court should refrain from resolving such disputes until the legislature gives us direction.").

¶ 113 For more than a century and a half, Illinois courts have adjudicated property disputes between family members. See, *e.g.*, *Miller v. Miller*, 16 Ill. 296, 298-99 (1855); *Collar v. Patterson*, 137 Ill. 403, 407 (1891); *Heffron v. Brown*, 155 Ill. 322, 326 (1895); *Finch v. Green*, 225 Ill. 304, 312 (1907); *Legate v. Legate*, 249 Ill. 359, 364 (1911). Generally, courts have held that, when people live together in a family setting, contributions between them are presumed gratuitous and not compensable absent an express or implied contract. See *In re Estate of Milborn*, 122 Ill. App. 3d 688, 692 (1984) ("The rule rests on the idea of mutual dependence between those who are members of one immediate family ***." (Emphasis omitted.)). Thus, seen in the light of established Illinois law, claims like Brewer's claim are nothing new.

¶ 114 More importantly, claims like Brewer's claim do not implicate the Marriage and Dissolution of Marriage Act and, thus, do not undermine the public policy of Illinois, as expressed in the prohibition of common-law marriage, that individuals themselves cannot create marriage-like benefits. See *supra* ¶ 61. Although the parties had what the majority terms a "marriage-like relationship" (*supra* ¶ 1), Brewer does not seek "marriage-like benefits" (*supra* ¶ 61) or "marriage-like rights" (*supra* ¶ 77) in count III. She simply asks to bring the same common-law claims available to other people. She should be allowed to do so. The fact that Brewer and Blumenthal were once domestic partners should be no impediment. See *Mason*, 476 A.2d at 666 ("the position that the courts will not participate in resolving the disputes in accordance with general principles of law and, thus, will leave the parties to their own devices, to be unrealistic and unresponsive to social need"); *Salzman v. Bachrach*, 996 P.2d 1263, 1268-69 (Colo. 2000) (*en banc*) ("cohabitation and sexual relations alone do not suspend contract and equity principles"). Admittedly, such claims may

be difficult to plead and prove (see Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 Fam. L.Q. 309, 321 (2008)), but that is a matter for the trial court.

¶ 115 *Hewitt*'s flaws, both linguistic and legal, have become more apparent with time. Our holding there is a court-made rule that this court should overrule. I believe that count III of Brewer's amended complaint should be remanded for the trial court to determine whether she has pleaded a cognizable cause of action. For these reasons, I dissent.

¶ 116 JUSTICE BURKE joins in this partial concurrence, partial dissent.

DISSENT UPON DENIAL OF REHEARING

¶ 117 JUSTICE THEIS, dissenting upon denial of rehearing:

¶ 118 I continue to believe that the majority was wrong to reaffirm *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979). That case should be overruled, and Brewer should be allowed to pursue her restitution claim for the reasons that I stated in my dissent. *Supra* ¶ 96 (Theis, J., concurring in part and dissenting in part, joined by Burke, J.). Further, this court should grant rehearing because the majority mischaracterized Brewer's restitution claim and ignored a key aspect of her constitutional challenge.

¶ 119 The majority opinion rejected that challenge, explaining that *Hewitt*

> "disallows unmarried cohabitants who live in a marriage-like relationship from accessing, under the guise of an implied contract, the rights and protections specified in the Marriage and Dissolution Act. In other words, individuals can enter into an intimate relationship, but the relationship itself cannot form the basis to bring common-law claims." *Supra* ¶ 85.

According to the majority, "*Hewitt* did nothing more than effectuate the policy established by the legislature to prevent knowingly unmarried cohabitants from evading the statutory abolition of common-law marriage *** by employing theories of implied contract to achieve the same result that would occur if common-law marriage were recognized." *Supra* ¶ 87. The majority then concluded that because "marriage is a legal relationship that all individuals may or may not enter into, Illinois does not act irrationally or discriminatorily in refusing to grant benefits and protections under the Marriage and Dissolution Act to those who do not participate in the institution of marriage." *Supra* ¶ 87.

¶ 120 That conclusion is suspect for two reasons. First, the majority mischaracterized Brewer's restitution claim. The majority intimated that Brewer makes a claim under the Illinois Marriage and Dissolution of Marriage Act. She does not. As I stated in my dissent,

> "[C]laims like Brewer's claim do not implicate the Marriage and Dissolution of Marriage Act and, thus, do not undermine the public policy of Illinois, as expressed in the prohibition of common-law marriage, that individuals themselves cannot create marriage-like benefits. See *supra* ¶ 61. Although the parties had what the majority terms a 'marriage-like relationship' (*supra* ¶ 1), Brewer does not seek 'marriage-like benefits' (*supra* ¶ 61) or 'marriage-like rights' (*supra* ¶ 77) in count III. She simply asks to bring the same common-law claims available to other people." *Supra* ¶ 114.

Brewer has not employed an implied contract theory to achieve the same result that she would obtain under section 503 of the Marriage and Dissolution of Marriage Act (750 ILCS 5/503 (West 2014)). She has employed an equitable theory to achieve a just result. Claims like Brewer's claim have long been recognized in Illinois. *Supra* ¶ 113 (Theis, J., concurring in part and dissenting in part, joined by Burke, J.).

¶ 121 Second, the majority ignored the key aspect of Brewer's constitutional challenge. In her response brief, Brewer asserted that applying *Hewitt* to bar her restitution claim would violate due process and equal protection because our holding in that case effectively penalizes unmarried domestic partners who cohabitate for exercising their right to an intimate relationship, as recognized by the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Consequently, *Hewitt*'s holding is not rationally related to a legitimate governmental interest. Brewer added that it would be "particularly irrational" to expand *Hewitt* from its fact context of opposite-sex domestic partners who could have married, but chose not to do so, to the fact context here of same-sex domestic partners who could not have married. According to Brewer, she and Blumenthal "did not choose not to marry; they were barred from it" by a law, like those declared unconstitutional in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), that has since been repealed and replaced.

¶ 122 The majority overlooked that point, relying on a false version of history in which all Illinoisans could marry as the justification for its application of *Hewitt*. Of course, it is not irrational or discriminatory to deny the protections of the Act's dissolution provisions to persons who never used its marriage provisions. A question remains whether it is irrational and discriminatory to deny the protections of the common law to persons who never could have used the marriage provisions because of their sexual orientation.

¶ 123 The majority assumed that all domestic partners who cohabitate are the same. They are not. Some domestic partners have always enjoyed the right to marry and consequently have always had the option of exercising that right and resorting to the Marriage and Dissolution of Marriage Act in the event of divorce. Others have not always enjoyed that right and have not always been able to resort to the Act. Until Illinois extended the Act to domestic partners who enter civil unions in 2010, all domestic partners who cohabitated without marrying did so knowingly, but not all of them did so willingly. During the entire 26 years that Brewer and Blumenthal were together, marriage was not a legal relationship for them.

¶ 124 In her rehearing petition, Brewer contends that the majority's adherence to *Hewitt* repeated and compounded unconstitutional discrimination against same-sex domestic partners by barring Brewer's restitution claim simply because she did not do what the law prevented her from doing. According to Brewer, "it is irrational to prevent same-sex couples from marrying and, at the same time, exclude them from common law property protections on the ground that, if they wished to have any property protections, they should have married." Brewer asserts that application of *Hewitt* to same-sex domestic partners who separated before they could legally marry creates "an untenable double bind" because it "conditions an important right—the ability to seek an equitable division of property when a relationship ends—on marriage, and then applies that restriction even to couples [who] were legally barred from marriage during the entire duration of their relationship, and even though that legal prohibition has now been ruled unconstitutional by the U.S. Supreme Court."

¶ 125 That double bind and its accompanying constitutional issues are a result of the majority's flawed reasoning. The majority stated that *Hewitt* "did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits." *Supra* ¶ 61. Again, Brewer does not seek marriage-like benefits. It defies logic, however, to insist that Brewer could not create marriage-like benefits without state involvement when she could not have created a marriage with state involvement. Indeed, the state refused to be involved because Illinois did not allow same-sex marriage while she and Blumenthal were together. The parties' relationship may have been identical in every essential way to that of a married couple (*supra* ¶ 63), but those similarities did not create a legal marriage.

¶ 126 The problems created by the majority opinion could be easily solved by discarding *Hewitt* as an outmoded and unfair rule for all domestic partners. Short of that, rehearing should be allowed to consider not the majority's version of Brewer's constitutional challenge, but her actual argument that *Hewitt*'s rule, as applied to same-sex domestic partners like herself and Blumenthal, whose relationships ended before they were permitted to marry in Illinois, violates due process and equal protection. I dissent from the denial of rehearing.

¶ 127 JUSTICE BURKE joins in this dissent upon denial of rehearing.

Borcia v. Hatyina, 2015 IL App (2d) 140559

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

Ill. App. Ct., 2d Dist. · filed 2015-04-14 · Opinion
Published opinion

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Where the memo cites it

- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶¶ 11, 45: passages C016.2, C016.6
- memo p. 7 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 11: passage C016.2
- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 45: passage C016.6

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Appellate Court

***Borcia v. Hatyina*, 2015 IL App (2d) 140559**

Appellate Court Caption	MARGARET BORCIA, as Special Administrator of the Estate of Antonio Borcia, Deceased; ERIN BORCIA, a Minor, Through Her Mother and Next Friend, Margaret Borcia; JOSEPH BORCIA, a Minor, Through His Mother and Next Friend, Margaret Borcia; KALEIGH BORCIA; and JAMES BORCIA, Plaintiffs-Appellants, v. DAVID HATYINA, SPRING LAKE MARINA, LTD., and FOX WATERWAY AGENCY, Defendants (Renee Melbourn, Defendant-Appellee).
District & No.	Second District Docket No. 2-14-0559
Filed	April 14, 2015
Decision Under Review	Appeal from the Circuit Court of Lake County, No. 12-L-961; the Hon. James R. Murphy, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	J. Matthew Dudley, of Dudley & Lake, LLC, and Mark J. Vogg, of Law Offices of Mark J. Vogg, both of Libertyville, for appellants. Guy M. Conti and Mark B. Ruda, both of Condon & Cook, LLC, of Chicago, for appellee.

Panel JUSTICE HUTCHINSON delivered the judgment of the court, with opinion.
Justices Hudson and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiffs, Margaret Borcia, as special administrator of the estate of Antonio Borcia, deceased, Erin and Joseph Borcia, minors, through their mother and next friend, Margaret Borcia, Kaeleigh Borcia, and James Borcia, filed personal-injury and wrongful-death actions against defendants, David Hatyina, Renee Melbourn, Spring Lake Marina, Ltd., and Fox Waterway Agency, for damages they sustained in a boating accident, which claimed the life of 10-year-old Antonio Borcia. Plaintiffs appeal from the trial court's dismissal with prejudice of their second amended complaint against Melbourn. The trial court found that plaintiffs failed to state claims for wrongful death based on an "in-concert" theory of liability and the negligent infliction of emotional distress, and it then dismissed the counts against Melbourn pursuant to section 2-615 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2012)). Melbourn is the only defendant involved in this appeal. For the following reasons, we reverse and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 On December 13, 2012, plaintiffs filed a 10-count complaint against Hatyina and Melbourn. This appeal concerns counts VI and VII, directed against Melbourn. Count VI attempted to allege a claim for wrongful death based on an in-concert theory of liability. Count VII attempted to allege a claim for negligent infliction of emotional distress. As amended, plaintiffs' complaint reflected the following allegations, which are taken as true for purposes of this appeal (see *Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 28 (2004)).

¶ 4 On July 28, 2012, Hatyina was operating a 29-foot cigarette boat named "Purple Haze" on Petite Lake in Lake Villa; Melbourn was a passenger in the boat. James Borcia was operating a pontoon boat, and Antonio and Erin were riding in inflatable tubes being towed by the pontoon boat. While being towed, Antonio fell off the tube and was floating on the water. Antonio was wearing a red personal floatation device and waving both of his arms above his head so others could see him in the water.

¶ 5 During this time, Hatyina had been consuming alcohol and cocaine. Hatyina was impaired by the alcohol and cocaine and was operating the boat at speeds in excess of 40 miles per hour. Hatyina struck Antonio with the boat. Antonio suffered severe injuries that resulted in his death on July 28.

¶ 6 Melbourn resided with and had a romantic relationship with Hatyina for several years. Melbourn knew that Hatyina had a history of drug and alcohol abuse and dependency. On or prior to July 28, 2012, Melbourn contributed money to purchase alcohol and cocaine that she and Hatyina would consume.

¶ 7 On July 28, 2012, Melbourn, after contributing money to purchase and purchasing cocaine, provided Hatyina with cocaine while they were both occupying the cigarette boat. While on the boat, Melbourn consumed cocaine and observed Hatyina consume cocaine.

Melbourn provided Hatyina with numerous alcoholic beverages and consumed alcohol with Hatyina while they were both on the boat. Prior to the boating accident, Melbourn observed Hatyina become obviously impaired by his consumption of alcohol and cocaine, as shown by his slurred speech, bloodshot eyes, and erratic behavior. Melbourn continued to provide alcohol and cocaine to Hatyina while he was operating the boat. Melbourn knew that providing Hatyina with and encouraging his consumption of alcohol and cocaine would result in his intoxication and further impair his ability to safely operate the boat.

¶ 8 Plaintiffs further alleged that Melbourn had a duty to exercise reasonable care so as to not proximately cause injury to other persons who were also using the lake.

¶ 9 Plaintiffs alleged that Melbourn, after providing both alcohol and cocaine to Hatyina in amounts that made him obviously impaired, verbally encouraged Hatyina to drive the boat at speeds in excess of 40 miles per hour and in an otherwise reckless and dangerous manner while on the lake near other boaters, swimmers, and people being pulled on tubes.

¶ 10 With respect to count VI, plaintiffs alleged that Melbourn breached her duty and was negligent in one or more of the following respects:

> "Violated section 5-16(E) [of the Boat Registration and Safety Act (625 ILCS 45/5-16(E) (West 2012))] in that she verbally encouraged the unsafe operation of the boat at speeds in excess of 40 miles per hour by Hatyina while he was under the influence of alcohol, cocaine, or a combination;
>
> Substantially assisted and/or encouraged *** Hatyina to operate said watercraft under the influence of alcohol, cocaine, or a combination thereof, when she knew or should have known consumption of alcohol and/or cocaine while operating said watercraft was negligent and careless, so as to compromise the safety of other occupants of the 'Chain of Lakes'; and
>
> Acted in concert with *** Hatyina in that she actively participated in his consumption of alcohol and cocaine which caused him to become intoxicated while operating the aforementioned watercraft while impaired so as to compromise the safety of others on the 'Chain of Lakes.' "

¶ 11 With respect to count VII, related to Erin, plaintiffs alleged that Antonio and Erin were riding on the same inflatable tube. When Antonio fell off of the tube, Erin was in close proximity to him. She observed Hatyina strike and kill her brother with the boat. Erin was less than 50 feet from the collision and in the direct path of the boat, and she feared that the boat was going to hit her too. ↩ memo p. 5, 7

¶ 12 Plaintiffs alleged that Melbourn created an unreasonable risk of causing bodily harm or emotional trauma to Erin. As a direct and proximate result of Melbourn's negligence, Erin suffered physical injury and emotional distress, which resulted in the need for continued medical and psychological treatment and counseling.

¶ 13 On October 3, 2013, Melbourn filed a motion to dismiss counts VI and VII pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). The trial court granted the motion. The trial court stated, "[t]he common purchase of [cocaine] and alcohol and consuming those on the boat and acting in concert, right now there's insufficient allegations of fact to allege that and right now there appears to be no duty to decedent under the cases. I think you need to bring those allegations as much as you can within the cases cited *** where the encouragement is not just tantamount to encouraging you to go faster by the

purchase of drugs and alcohol and co-consuming those with the defendant *** but there has to be something additional. I think that's what those cases say ***."

¶ 14 On January 29, 2014, plaintiffs filed a second amended complaint, and, in count VI, attempted to assert a claim under the Wrongful Death Act (740 ILCS 180/1 *et seq*. (West 2012)), based on a duty imposed by section 876 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 876 (1979)). In count VII, plaintiffs attempted to renew the claim for negligent infliction of emotional distress, based on Erin's presence in the zone of physical danger.

¶ 15 On February 19, 2014, Melbourn filed a motion to dismiss pursuant to section 2-615 of the Code. The parties fully briefed the issue, and the trial court conducted a hearing on April 25, 2014.

¶ 16 On May 8, 2014, the trial court granted Melbourn's motion to dismiss, with prejudice. As to count VI, the court found that plaintiffs had "alleged insufficient facts to establish 'substantial assistance or encouragement' for establishing a duty by Melbourn to attach under section 876 of the Restatement (Second) of Torts." The trial court further found that the only facts plaintiffs alleged were that "defendant Melbourn provided and consumed alcohol and drugs with defendant Hatyina." The trial court determined that there was no section 876 liability on the facts alleged.

¶ 17 The trial court also dismissed count VII on the basis that, "[i]f there is no duty on Count VI, there is also no duty on Count VII." The trial court did not address Melbourn's other argument, that plaintiffs did not plead sufficient facts to place Erin in the "zone of physical danger."

¶ 18 Plaintiffs filed a timely notice of appeal.

¶ 19 II. ANALYSIS

¶ 20 As noted above, the trial court granted Melbourn's section 2-615 motion to dismiss and dismissed counts VI and VII of plaintiffs' complaint with prejudice. A motion to dismiss brought pursuant to section 2-615 attacks the legal sufficiency of the complaint. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). When ruling on such a motion, the court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. *Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 28 (2004). The merits of the case, at this point, are not yet considered. See *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 19. However, a court cannot accept as true mere conclusions unsupported by specific facts. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The court is to construe the complaint liberally and should not dismiss it unless it is clearly apparent from the pleadings that "no set of facts can be proved which would entitle *** plaintiff[s] to recover." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61. We review *de novo* an order granting a section 2-615 motion to dismiss. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006).

¶ 21 Illinois is a fact-pleading state. *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 767 (2007). This means that, although pleadings are to be liberally construed and formal

or technical allegations are not necessary, a complaint must, nevertheless, contain facts to state a cause of action. *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 720 (2004). The complaint is deficient when it fails to allege the facts necessary for a plaintiff to recover. See *Doe v. Chicago Board of Education*, 339 Ill. App. 3d 848, 853 (2003). "But it is a rule of pleading long established, that a pleader is not required to set out his evidence. To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *Board of Education of the Kankakee School District No. III v. Kankakee Federation of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970).

¶ 22 With these principles in mind, we will review the trial court's section 2-615 dismissal of count VI and count VII of plaintiffs' second amended complaint.

¶ 23 Count VI of plaintiffs' complaint sought relief based on an in-concert theory of liability. Section 876 of the Restatement (Second) of Torts provides a basis upon which a party, who is injured from the tortious conduct of a second party, may seek relief in the event that a duty from a third party is found to exist. See Restatement (Second) of Torts § 876 cmt. d (1979). This is a recognized cause of action in Illinois. See *Simmons v. Homatas*, 236 Ill. 2d 459 (2010); *Sanke v. Bechina*, 216 Ill. App. 3d 962 (1991).

¶ 24 The ultimate facts required to be pleaded for a general cause of action based on common-law negligence are the existence of a duty owed by the defendant to the plaintiff, the breach of that duty, and the injury proximately caused by that breach. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990). Unless a duty is owed, there can be no recovery in tort for negligence. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992). Whether a duty exists is a question of law for the court to decide and is reviewed *de novo*. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010).

¶ 25 For a cause of action based on an in-concert theory of liability, section 876 of the Restatement (Second) of Torts provides in pertinent part:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> ***
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself[.]" Restatement (Second) of Torts § 876 (1979).

¶ 26 Section 876 of the Restatement (Second) of Torts becomes operative when "harm result[s] *** from the tortious conduct of another." See Restatement (Second) of Torts § 876 cmt. d (1979). Comment d states:

> "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act. *** [The rule] likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act."

¶ 27 In the present case, plaintiffs contend that the trial court erred when it dismissed count VI after finding that they had not alleged sufficient facts to trigger liability under section 876 of

the Restatement (Second) of Torts. Plaintiffs' complaint alleged that Melbourn assisted and encouraged Hatyina in operating his boat while intoxicated. Plaintiffs argue that this allegation alone was sufficient to withstand a dismissal motion; however, plaintiffs argue that they presented additional allegations to ensure that their pleadings were sufficient. Plaintiffs further alleged that Melbourn bought the alcohol and cocaine used by Hatyina, consumed alcohol and cocaine with Hatyina on the boat and while Hatyina was driving the boat, and encouraged Hatyina to continue to operate the boat, at an unsafe speed, despite his overt signs of impairment, including slurred speech and bloodshot eyes.

¶ 28 Melbourn counters that the only well-pleaded fact plaintiffs alleged in their attempt to impose a duty was that she provided intoxicating substances to Hatyina, which cannot serve as a basis of liability. Melbourn asserts that the other allegations are either surplusage or conclusions, which cannot be considered, and that plaintiffs thus failed to allege any specific facts that trigger liability under section 876 of the Restatement (Second) of Torts.

¶ 29 Both parties discuss a number of cases dealing with in-concert liability under section 876 of the Restatement (Second) of Torts, but two are particularly instructive: one from our supreme court, *Simmons v. Homatas*, 236 Ill. 2d 459 (2010), and one from our appellate district, *Sanke v. Bechina*, 216 Ill. App. 3d 962 (1991).

¶ 30 In *Simmons*, the decedents were fatally injured due to intoxicated driving by Homatas, who had been a patron at a strip club that was not a dramshop but allowed customers to consume alcohol while on the premises. *Simmons*, 236 Ill. 2d at 461. The plaintiffs filed a cause of action alleging that the operator of the club, On Stage, negligently encouraged Homatas to consume alcoholic beverages until he became intoxicated and then required him to drive off the premises, causing the collision that killed the plaintiffs' decedents. *Id.* The plaintiffs further alleged that the club "knew or should have known" that Homatas was intoxicated and leaving the premises by driving a vehicle in that inebriated state. *Id.* at 465.

¶ 31 The supreme court determined that On Stage could be held liable to the plaintiffs, not as a result of any provision of alcohol, but as a result of the encouragement of or assistance in tortious conduct. A duty toward the plaintiffs' decedents arose because On Stage "took on the burden of determining whether Homatas was dangerously intoxicated when club employees discovered him vomiting in the restroom, a likely result of his intoxication. On Stage, on its own initiative, made this determination and expelled Homatas from the club." *Id.* at 475. The employees had told the valet service to bring Homatas's car to the front door. When the car arrived, the employees opened the door and told Homatas to leave. Our supreme court found that the plaintiffs' complaint sufficiently stated a cause of action for common-law negligence under section 876 of the Restatement (Second) of Torts. *Id.* at 478. The court stated that "On Stage acquired a duty not to encourage and assist Homatas in the tortious conduct of driving while intoxicated" and "that the Dramshop Act does not preempt plaintiffs' common law claims in this case, and does not preclude imposing a duty of care on On Stage." *Id.* at 475.

¶ 32 In *Sanke*, the parents of a passenger killed in a car accident sued the driver and another passenger under negligent-driving and concert-of-action theories respectively. *Sanke*, 216 Ill. App. 3d at 963. In the front seat were the driver and a passenger; in the backseat were the decedent and another passenger. The plaintiffs asserted that the defendant (front seat) passenger was a contributing tortfeasor whose encouragement of the negligent driving constituted substantial assistance and was a proximate cause of their daughter's death. The

trial court dismissed the complaint against the passenger for failure to state a cause of action, holding that liability for the negligent act of a driver did not attach against a person other than the driver, unless that person was the vehicle's owner or had the right to control the vehicle. In reversing and remanding, this court held that the passenger could be held liable, not under a duty to control the driver's actions, but under a duty to control his own behavior. We found that the facts of the case fell squarely within the definition of joint concerted tortious activity as defined under section 876 of the Restatement (Second) of Torts. We concluded that the determination of whether the passenger's conduct constituted substantial encouragement was a jury question. *Id.* at 971-72.

¶ 33 In both *Simmons* and *Sanke*, the pleadings alleged affirmative conduct on the defendant's part that amounted to an assertion of undetermined "substantial assistance or encouragement" of another person, which increased the risk of harm to that person and to others. In the present case, therefore, we consider whether, taken as true, plaintiffs' allegations, as well as any reasonable inferences that arise from them (*Doe*, 213 Ill. 2d at 28), construed in the light most favorable to plaintiffs (*Sheffler*, 2011 IL 110166, ¶ 61), are sufficient to establish a cause of action for in-concert liability under section 876 of the Restatement (Second) of Torts.

¶ 34 We conclude that plaintiffs have sufficiently pleaded a cause of action for in-concert liability under section 876 of the Restatement (Second) of Torts. Plaintiffs' complaint alleged that Hatyina and Melbourn were in Hatyina's boat on July 28, 2012; we may infer that no others were present in the boat to report on the specific interactions between them. Plaintiffs' complaint alleged that Hatyina and Melbourn were consuming alcoholic beverages and cocaine and that Hatyina became obviously impaired. Plaintiffs' complaint alleged that Hatyina and Melbourn went for a boat ride, and Hatyina was operating the craft. Pursuant to section 2-615 of the Code, we may reasonably infer that, in addition to Hatyina's boat, there were other watercraft on the lake, including a pontoon boat that James was operating. The pleadings reflect, and we may infer, that other watercraft, swimmers, and people using equipment were occupying and using the lake for their enjoyment. Hatyina's boat reached speeds in excess of 40 miles per hour. Given Hatyina's degree of intoxication and impairment, we may infer that the speed and conditions under which he was operating the boat were unsafe for them and any other individual on the lake at that time. Plaintiffs alleged that Melbourn encouraged Hatyina's continued conduct of operating the boat at an unsafe speed in his significantly impaired state. We may infer that Melbourn's encouragement served as an affirmative act, leading Hatyina to continue operating the boat in an unsafe manner. Plaintiffs pleaded that Melbourn owed them a duty to protect them at the lake from Hatyina's actions when she knew or should have known of his impairment and of his decision to operate the boat at an unsafe speed. Through the pleadings and the reasonable inferences therefrom, plaintiffs have sufficiently pleaded allegations reflecting that Melbourn was a contributing tortfeasor whose encouragement of Hatyina's negligent conduct in operating the boat constituted substantial assistance and was a proximate cause of Antonio's death. Accordingly, the trial court erred when it found otherwise.

¶ 35 Melbourn relies on *Charles v. Seigfried*, 165 Ill. 2d 482 (1995), in support of her argument that liability should be precluded for injuries arising from another's intoxication. Melbourn's reliance on *Charles* is misplaced; we need not present a discussion of its inapplicability, as the *Simmons* court has previously done so. See *Simmons*, 236 Ill. 2d at

467-73. As the *Simmons* court expressed, "[a]lthough one does not have a duty to prevent the criminal acts of a third party, one does have a duty to refrain from assisting and encouraging such tortious conduct." *Id.* at 476. We decline to depart from the rationale and holding of *Simmons*.

¶ 36 Melbourn argues that plaintiffs failed to allege any specific facts to trigger liability. However, unlike a complaint for common-law fraud, which "must allege, with specificity and particularity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made" (*Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996)), there is no such specificity requirement for the cause of action presented here.

¶ 37 Rather, the purpose of pleadings is to present, define, and narrow the issues and limit the proof needed at trial. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 307 (1981). Pleadings are intended not to erect barriers to a trial on the merits but instead to remove them and facilitate the trial. *Id.* The object of pleadings is to produce an issue asserted by one side and denied by the other so that a trial can determine the actual truth. *Id.* at 307-08 (citing *Fleshner v. Copeland*, 13 Ill. 2d 72, 77 (1958)). In determining whether a cause of action has been stated, we must consider the whole complaint, rather than taking a myopic view of a disconnected part. *Stenwall v. Bergstrom*, 398 Ill. 377, 383 (1947).

¶ 38 The degree of specificity required to sufficiently plead a cause of action in any case is difficult to determine and is dependent upon the individual circumstances of each case. For example, in *Simmons*, there were a number of employees at the club who observed Homatas's state of impairment, and then a number of employees who assisted Homatas in retrieving his vehicle, placing him in the driver's seat, and directing him to drive. See *Simmons*, 236 Ill. 2d at 475-78. In *Sanke*, there were four individuals in one vehicle: Sanke (in the backseat), Schwartz (driving), Bechina (in the front passenger seat), and another individual (in the backseat with Sanke). In both *Simmons* and *Sanke*, there were various witnesses who observed, heard, or were otherwise present when the defendants were allegedly acting in concert with the tortfeasors. In the present case, there were only two individuals in the boat that killed Antonio Borcia: Melbourn and Hatyina, and no other known sensory witness during the relevant time period. Because in *Simmons* and *Sanke* there were more individuals who witnessed, participated in, or survived the accidents, there were more opportunities to obtain more specific factual allegations than in the present case. Plaintiffs in the present case should not be foreclosed from bringing a cause of action based on an in-concert theory of liability against Melbourn due to a lack of sensory witnesses other than the two individuals in the boat that killed Antonio. To hold otherwise would be contrary to justice and the purpose of section 2-615 of the Code. See *Fahner*, 88 Ill. 2d at 307.

¶ 39 Although Melbourn characterizes plaintiffs' allegations as "conclusions," it is clear that most are presented as inferences from the pleaded facts. Black's Law Dictionary defines "inference" as "[a] conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 793 (8th ed. 2004). Black's Law Dictionary defines a "legal conclusion" as "[a] statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result." *Id.* at 912. Therefore, despite Melbourn's assertion that the only well-pleaded fact was that she provided intoxicating substances to Hatyina, plaintiffs presented allegations with proper inferences sufficient to survive a section 2-615 dismissal motion. Plaintiffs will still bear the burden of proof with

respect to the elements of their claim (see 740 ILCS 180/0.01 *et seq.* (West 2012)); our holding today recognizes only the sufficiency of plaintiffs' allegations *vis-à-vis* the in-concert theory of liability under section 876 of the Restatement (Second) of Torts.

¶ 40 In so holding, we recognize, as our supreme court did in *Simmons*, that the provision of intoxicating substances to another does not, in and of itself, establish in-concert liability. See *Simmons*, 236 Ill. 2d at 471-73. We also recognize, as we did in *Sanke*, that the assistance or participation by a defendant might be so slight that the defendant is not ultimately liable for the act of the other. See *Sanke*, 216 Ill. App. 3d at 965-66. However, a section 2-615 motion does not require plaintiffs to prove their case at this juncture, and plaintiffs' allegations are sufficient to show that liability might attach. Thus, we need not, and should not, decide at this stage of the litigation whether any inaction (such as failing to warn Hatyina or plaintiffs) or action (such as telling Hatyina to stay parked in the marina) breached a duty.

¶ 41 With respect to count VII, plaintiffs contend that the trial court erred when it granted Melbourn's motion to dismiss. Plaintiffs argue that they pleaded sufficient facts regarding Erin's presence in the zone of danger to survive dismissal. We agree.

¶ 42 Having determined that plaintiffs' complaint sufficiently alleged that liability might attach to Melbourn, we need review only whether the remaining allegations of count VII state a cause of action for negligent infliction of emotional distress pertaining to Erin.

¶ 43 Negligent infliction of emotional distress is a recognized cause of action in Illinois. See *Seitz v. Vogler*, 289 Ill. App. 3d 1029 (1997). To state a cause of action for negligent infliction of emotional distress, a plaintiff must allege facts establishing that she suffered a direct impact that caused emotional distress (see *Corgan v. Muehling*, 143 Ill. 2d 296, 312 (1991)) or that she was a bystander in a zone of physical danger that caused her to fear for her own safety and that she suffered physical injury or illness as a result of her emotional distress (see *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555 (1983)). To have been within the "zone of physical danger," the plaintiff must have been "in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact." *Id.*

¶ 44 "Basically, under [the zone-of-physical-danger rule] a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, [in addition], must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." *Id.*; see also *Seitz*, 289 Ill. App. 3d at 1042 (holding that the plaintiff sufficiently pleaded a cause of action for negligent infliction of emotional distress; in a boating accident she was both a direct victim (who was physically injured) and a bystander (with respect to the death of her husband and the injury and threat of injury to her children)).

¶ 45 The pleadings allege that Erin was a bystander to, not a direct victim of, Melbourn's alleged negligence. Plaintiffs' complaint alleged that Melbourn's conduct of encouraging Hatyina to operate the boat at unsafe speeds while in a severely intoxicated state caused Erin to be in a zone of physical danger during the accident wherein she reasonably feared for her own safety, given the proximity to her brother on the lake and right after witnessing

↩ memo p. 5, 9

Hatyina's boat strike and kill her brother. Plaintiffs' complaint also alleged that, by being in the zone of physical danger, Erin suffered physical injury and emotional distress, which resulted in the need for continued medical and psychological treatment and counseling.

¶ 46 Again, the question is whether plaintiffs adequately pleaded a cause of action for negligent infliction of emotional distress as a bystander. Under the above principles, we find that they did. Accordingly, we hold that the trial court erred when it dismissed count VII of plaintiffs' complaint.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we reverse the judgment of the circuit court of Lake County and remand for further proceedings consistent with this opinion.

¶ 49 Reversed and remanded.

Braun v. Craven, 175 Ill. 401 (1898)

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

Ill. Supreme Court · filed 1898-10-24 · Reporter opinion
Supreme Court

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- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C012.5

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An examination of this record discloses no errors of law, and the facts having been settled by the judgment of the Appellate Court, that judgment affirming the judgment of the superior court of Cook county is affirmed.

Judgment affirmed.

EMMA BRAUN

v.

THOMAS CRAVEN.

Opinion filed October 24, 1898.

1. DAMAGES—*proximate damages defined.* Proximate damages are such as are the ordinary and natural results of the defendant's negligent acts of commission or omission, and such as might reasonably be anticipated would flow therefrom.

2. NEGLIGENCE—*law regards only proximate results of negligent acts.* The law regards only the direct and proximate results of the negligent acts of a party as creating a liability against him.

3. SAME—*no liability exists for negligent acts resulting in mere fright or terror.* No liability exists for negligent acts which occasion fright or terror, unaccompanied by physical injury, even though a nervous shock and subsequent illness result, where the acts of negligence are not of such a character as might reasonably be expected to have the effect produced.

Craven v. *Braun*, 73 Ill. App. 189, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JAMES GOGGIN, Judge, presiding.

The appellant sued appellee in an action on the case and filed her declaration, which contained four counts. The first count alleges that the plaintiff was living at the home of Julia Soper, in Evanston; that the defendant then and there entered the said house, and it then and there became and was the duty of the said defendant to conduct and demean himself in an orderly and peaceable manner,

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175 401
79a 509

175 401
82a 463

175 401
98a 542

175 401
s100a 483
101a 674

175 401
d108a 192
109a 536

175 401
110a 106

175 401
112a 870

and to announce or give notice and warning of his approach to and into said house and to the presence of the plaintiff, yet the defendant, wholly disregarding his duty in that behalf, neglected and wholly failed to announce his entry to the said house to the plaintiff or any other occupant thereof, but wrongfully and willfully then and there entered therein unbidden, and then and there stealthily, and without warning or announcement, entered the presence of the plaintiff, greatly surprising and shocking her; that the defendant then and there demeaned himself in the presence of the plaintiff in a violent and boisterous manner, using towards her violent, abusive and threatening language, greatly frightening, terrifying and shocking her, whereby she sustained a severe and permanent shock to her nervous system and mind, and otherwise sustained great and permanent bodily harm and injury, and became and was sick, sore and disordered, and so remained thence hitherto, during all which time she suffered, and still does and will ever suffer, great pain. The second and third counts are substantially like the first. The fourth count alleges the plaintiff was in a bed-room in a certain dwelling, which dwelling was the home and residence of the plaintiff, and then alleges the facts substantially as set forth in the first count. A general demurrer to the declaration was interposed and overruled, and a plea of general issue was filed.

The evidence showed that appellant lived with her sister, who was a tenant of appellee. Appellee went to the house to collect rent. His conduct, actions and language while there are alleged to have been so negligent that they caused the injury to appellant, by fright and mental shock, which resulted in serious physical impairment. The actions and language of appellee which are the basis of this suit are given by appellant and her witnesses substantially as follows:

When appellee entered the house, his tenant, the sister of appellant, was having her household goods removed

therefrom. Appellant testified as to what took place, as follows: "I was up-stairs in my bed-room, sitting on the floor. Something made me look up, and Mr. Craven (appellee) waved his arms and shouted. He seemed so big. I was flat on the floor. He said: 'What are you doing here? I forbid you moving. If you attempt to move I will have a constable here in five minutes. I refuse to take possession of these premises.' I was so frightened I was paralyzed with fear. I could not speak or move."

The brother of appellant testified: "I remember the day that we moved from Benson avenue down to Clark and Halsted streets. I saw the defendant at our home on that day. When I first saw him he was standing just inside the bed-room door where my sister, Mrs. Braun, was,—on the second floor. That bed-room was the northwest room. I heard him before I saw him. I heard him say: 'Here! what are you doing? Don't you move. I refuse to take possession of these premises. I will have an officer here in five minutes to stop these goods.' These words were spoken in a very loud and angry tone of voice. I was just out of sight, at the end of the hall, when he said, 'Here! what are you doing? Don't you move,' and then I came toward him to see what was the matter, not knowing what it was, and the rest of it I heard as he stood over her. She was sitting on the floor. As he was speaking these words he was swinging his arms and gesticulating very wildly. On hearing these words uttered by the defendant I hurried to the front end of the hall and saw him standing in the door. I went clear up to him. He was standing very close to my sister—clear up to her—right by her side. She was sitting flat on the floor. He was close enough to have touched her with his hands if he had so desired to. I should say close up to her—not six inches from her. Upon my going up there to where the defendant was I said, 'Here, what is the trouble here? What do you want?' He turned to me and said: 'I refuse to take possession of these premises. I will have

an officer here in five minutes to stop these goods.' When he said these words he was still close by my sister. I tried to stop him, and said, 'What is the matter?' and he turned around and went downstairs as hard as he could go. He had a long, dark or black—very dark—ulster, or storm-coat ulster I should say, and a black slouch hat, pair of overshoes or rubbers, or something of that sort. I did not hear him approach my sister's room or go up those stairs."

An expressman, Steen, testified: "He (defendant) told me to stop loading the goods. He opened the middle door and walked very fast right up the stairs. He did not ring the bell. He wore rubbers and made no noise going up. He went into the room where the plaintiff (Mrs. Braun) was, and said: 'What are you doing here? I will have an officer here to stop these goods.' He spoke at the top of his voice. He was angry. He stood in the doorway when he did this. Plaintiff was on her knees, packing. Her brother came in the room and asked what was the matter. Defendant threw up his hands two or three times and then went down stairs." Another expressman, Schell, testified that he heard a little loud talking up-stairs,—so loud that a man could hear it down to the first floor. No other witness for plaintiff in the trial court testified to any other acts or conduct as causing the alleged injury. Much additional evidence as to the effect of fright in causing injury was before the jury.

A verdict was returned by the jury in favor of the plaintiff, appellant here, and her damage was assessed at $9000. A motion for a new trial and a motion in arrest of judgment were both overruled and judgment was entered on the verdict. The defendant, the appellee here, sued out a writ of error from the Appellate Court for the First District to review that judgment, and by the latter court the judgment of the superior court of Cook county was reversed without remanding the cause, the Appellate Court holding, under the pleading and facts appear-

ing in the record, there was no right of recovery. From that judgment of reversal the plaintiff in the trial court, who was defendant in error in the Appellate Court, prosecutes this appeal.

WILLIAM PRENTISS, RUSSELL M. WING, and JAMES HECKMAN, for appellant.

PLINY B. SMITH, and MORTON V. GILBERT, for appellee.

MR. JUSTICE PHILLIPS delivered the opinion of the court:

The declaration in this case charges appellee with negligence in approaching the room where appellant was, and in so speaking and acting in her presence as to cause her injury. This constitutes the entire allegation on which a recovery is sought under the various counts of this declaration.

In addition to the evidence above recited it is disclosed that appellee claimed there was rent due him, and he entered the house for the purpose of collecting the same before the tenant's goods should be removed therefrom. Under this state of facts it is necessary to determine whether the language of the appellee, his manner of entering the house and his acts therein are such as can be held to constitute negligence, and whether the injury sustained by appellant was such as might have been foreseen, or was such a natural and probable consequence, under the surrounding circumstances, as might reasonably have been anticipated as the probable result of such acts and language.

The principle is, damages which are recoverable for negligence must be such as are the natural and reasonable results of defendant's acts, and the consequences must be such as, in the ordinary course of things, would flow from the acts and could be reasonably anticipated

as a result thereof. Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence, and such as are usual and might have been reasonably expected. Remote damages are such as are the unusual and unexpected result, not reasonably to be anticipated from an accidental or unusual combination of circumstances,—a result beyond and over which the negligent party has no control. The law regards only the direct and proximate results of negligent acts as creating a liability against a defendant. Here, appellee approached the house and entered the same, the door being ajar. So far as the averments of this declaration are concerned he lawfully entered the house for the purpose of collecting rent. He passed noiselessly (because of wearing overshoes) up the stairs and along the hall, approached the door of the only room he saw occupied, and used the language and made the gestures testified to by the plaintiff's witnesses without impact with plaintiff's person. He then turned and left the room and went hurriedly to the office of the justice of the peace. These acts could not, in the ordinary course of things, have been reasonably anticipated to cause a diseased condition of appellant,—to create in her a seriously diseased condition. Appellee might have reasonably anticipated that his acts would cause excitement, or even fright; but fright and excitement so seldom result in a practically incurable disease that from the ordinary experience of mankind such a result could not have been expected. The evidence for plaintiff was, that by reason of the excitement and fright a condition of chorea, or St. Vitus dance, was produced. This is shown to be a diseased physical condition resulting from mental suffering, superinduced by excitement and fright, unattended by injury to the person resulting from impact. Under the pleadings in this case mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and ges-

tures would not be actionable. This would introduce and incorporate in the law a new element of damage,—a new cause of action,—by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. From such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law, and no statute gives it.

In *Wyman* v. *Leavitt*, 71 Me. 227, it was said: "We have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain action; and the fact that no such case exists and that no elementary writer asserts such doctrine is a strong argument against it. * * * If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the train's leaving a track, could maintain an action against the company."

In *G., C. & S. F. Ry. Co.* v. *Trott*, 86 Tex. 12, plaintiff recovered damages for negligence of the railway company whereby his team was frightened and broke his wagon, putting him in fear and fright as to his personal safety, and causing him great mental suffering, vexation and anxiety of mind. The jury were instructed that if plaintiff was frightened and put in fear of his personal safety, and was caused mental pain or anxiety, they should allow him reasonable compensation therefor. Two questions were certified to the Supreme Court for decision, viz.: "First, in an action for damages based upon tortious and negligent conduct of a defendant, where the wrongful act caused damages to plaintiff's property but no physical injury to plaintiff, is mental suffering an element of actual damages? Second, can actual damages be recovered for mental suffering where there is no physical injury, no injury to property, nor other element of actual

damages?" The court said: "We are of the opinion that these questions should be answered in the negative. So far as we have been able to discover, all the cases involving the question of the right to recover for fright alone are in accordance with that holding."

In *Indianapolis and St. Louis Railroad Co.* v. *Stables*, 62 Ill. 313, it was said (p. 320): "We cannot readily understand how there can be pain without mental suffering. It is a mental emotion arising from a physical injury. It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury unless the mind is overpowered and consciousness is destroyed. The mental anguish which would not be proper to be considered is, where it is not connected with the bodily injury but was caused by some mental conception not arising from the physical injury."

In *City of Chicago* v. *McLean*, 133 Ill. 148, it was said (p. 153): "Any mental anguish which may not have been connected with the bodily injury, but caused by some conception arising from a different source, could not properly have been taken into consideration by the jury."

In *Canning* v. *Williamstown*, 1 Cush. 452, it was said: "The argument for the defendants assumes that the plaintiff sustained no injury in his person, within the meaning of the statute, but merely incurred risk and peril, which caused fright and mental suffering. If such were the fact the verdict would be contrary to law. But we must suppose that the jury, under the instructions given to them, found that the plaintiff received an injury in his person, —a bodily injury,—and that they did not return their verdict for damages sustained by mere mental suffering caused by the risk and peril which he incurred, and though that bodily injury may have been very small, yet it was a ground of action within the statute and caused mental suffering to the plaintiff. That suffering was a part of the injury, for which he was entitled to damages."

In *Keyes* v. *Minneapolis and St. Louis Railway Co.* 36 Minn. 290, it was said: "The mental distress and anxiety which may be proved in actions for personal injuries is confined to such as is connected with the bodily injury and is fairly and reasonably the plain consequence of such injury. The mental anguish, like physical pain, to be taken into consideration in such cases is confined to such as is endured by the plaintiff in consequence of a personal injury to himself."

In *Alsop* v. *Alsop*, 5 H. & N. 534, Pollock, C. B., said: "We are all of the opinion that the defendant is entitled to judgment. There is no precedent for any such special damage as that laid in this declaration being made a ground of action, so as to render words actionable which otherwise would not be so. We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply and what a dangerous use might be made of it. In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds, illness might be said to have arisen by the wrong sustained by the plaintiff. * * * This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action."

Renner v. *Canfield*, 36 Minn. 90, was a case where the defendant and a companion were driving along the highway in front of plaintiff's premises when a dog belonging to plaintiff's father attacked the dog of the defendant's companion. Defendant sprang from the wagon with his gun, whereupon the dog fled toward's plaintiff's premises, and as it ran defendant fired at and killed it. Plaintiff's wife was standing at the pump near the house and saw the defendant shoot. She was in a delicate state of health, and her nerves being very sensitive owing to her pregnancy, she was startled and frightened so that she

suffered a miscarriage and her health was seriously affected. Her fright was caused, or at least aggravated, by the mistaken impression that the defendant aimed his gun towards her. For the damages resulting from this injury the plaintiff brought his action. It was said: "The court did, however, expressly instruct the jury that the shooting of this dog by defendant was unlawful. He also instructed them that a person is liable for all the consequences which flow, naturally and directly, from his acts, and then left it to them to decide, as a question of fact, whether the injuries to plaintiff's wife were the natural result of defendant's acts. From this the jury could, and naturally would, understand that the defendant might be liable in this action from the mere fact that the killing of the dog was unlawful. We think a verdict for the plaintiff could not be sustained on such theory of the case. It is elementary that a man is liable only for the proximate or immediate and direct results of his acts. In strict logic it may be said that he who is the cause of loss should be responsible for all the losses, whether proximate or remote, which followed from his acts; but in practical workings of society any such rule would be impracticable and unjust, and therefore the law looks only to direct and proximate results; or, as the rule is sometimes stated, whoever does a wrongful act is answerable for the consequences that may ensue in the ordinary and natural course of events. There can be no fixed rule upon the subject that can be applied to all cases. Much must depend upon the circumstances of each particular case. But in this case it is very clear to us that the killing of this dog was in no sense the proximate cause of the injury to the plaintiff's wife. The act itself was not a tort of any kind against plaintiff, as the dog was not his property. The injury to the woman would have been presumably the same whether the killing of the dog was lawful or unlawful, and whether the defendant had fired at the dog or at a bird in the air. If the acts of the defendant amounted

to any tort which, in any possible view of the case, could be held to be the proximate result of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates, by fright or otherwise. We are by no means prepared to say that upon the evidence a verdict for the plaintiff could be sustained even upon that ground."

In *Scheffer* v. *W. S. R. R. Co.* 105 U. S. 249, an action was brought to recover damages for the death of Scheffer. The deceased was injured by the negligence of the railroad company, and his injuries were of so severe a character that insanity resulted, and while in that condition he committed suicide. It was said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was * * * a new cause and sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of death through the previous stages of mental aberration, physical suffering and eight months of disease and medical treatment, to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that great first cause, least understood, in which the train of all causation ends. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of the final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes intervening between the act which injured him and his death."

In *Haile* v. *T. & P. Ry. Co.* 9 C. C. A. 134, it was said: "According to the great current of modern medical authorities insanity is a disease,—a disease of the mind,—the existence of which is a question of fact to be proved

just as much as the possible existence of any other disease. * * * While the defendant, as a common carrier, had reason to anticipate that an accident would cause physical injury and would produce fright and excitement, it had no reason to anticipate that the latter would result in a permanent injury, as, a disease of the mind, or any other disease that might be caused by excitement, exposure and hardship sometimes incident to travel. If the disease was not likely to result from the accident, and was not one which the defendant could have reasonably foreseen in the light of the attending circumstances, then the accident was not the proximate cause. The defendant had no reason to anticipate that the result of an accident on its road would so operate on Haile's mind as to produce disease,—the disease of insanity,—any more than that the exposure and hardship he suffered would produce grippe, pneumonia or any other disease. He sustained no bodily injury by the accident, so far as the petition shows; but it caused a shock and an excitement, which, under his peculiar mental and physical condition at the time, resulted in his insanity. The defendant owed him the duty to carry him safely,—not injure his person by force or violence. It owed him no duty to protect him from fright, excitement, or from any hardship that he might subsequently suffer because of the unfortunate accident."

In *Ewing* v. *P., C., C. & St. L. R. R. Co.* 147 Pa. St. 40, it was said: "It is plain from the plaintiff's statement of her case, that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as accident cases will be greatly enlarged, for in every case of a collision on a railroad the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for 'fright' to which they have been

subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge. Negligence constitutes no cause of action unless it expresses or establishes some breach of duty. What duty did the company owe this plaintiff? It owed her the duty not to injure her person by force or violence,—in other words, not to do that which, if committed by an individual, would amount to an assault upon her person; but it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause. The true rule on this subject is as follows: 'In determining what is the proximate cause, the true rule is that the injury must be the natural and probable consequence as, under the surrounding circumstances of the case, might and ought to have been seen by the wrongdoer as likely to flow from his act,' etc. Tested by this rule we regard the injury as too remote. We know of no well considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. * * * We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of or accompanied by a personal injury, and have no application to the case in hand."

In *Mitchell* v. *Rochester Railway Co.* 151 N. Y. 107, it was said: "While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal

injury. (Many cases cited.) If it be admitted that no recovery can be had for the fright occasioned by the negligence of another, it is somewhat difficult to understand how the defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury; if not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical result of the respondent's concession would seem to be, not only that no recovery can be had for the mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be open for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the

result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated and over which the defendant had no control, and hence her damages are too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury."

In *Victorian Railway Comrs.* v. *Coultas*, L. R. 13 App. Cas. 222, it was said: "The rule of English law as to the damages which are recoverable for negligence is stated by the master of the rolls in *The Notting Hill*, (1) 9 P. D. 105, —a case of negligent collision. It is, that the damages must be the natural and reasonable result of the defendant's act,—such a consequence as in the ordinary course of things would flow from the act. * * * According to the evidence of the female plaintiff, her fright was caused by seeing the train approaching and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a mental or nervous shock, cannot, under such circumstances, their lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock there might be a claim for damages on account of mental injury. The difficulty which often exists, in case of alleged physical injuries, of determining whether they were caused by the negligent act would be greatly increased and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English courts in which, upon such facts as were proved

in this case, damages were recovered. * * * It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their lordships decline to establish such precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that impact is necessary, that judgment should have been for the defendants."

In *Phillips* v. *Dickerson*, 85 Ill. 11, it was said (p. 13): "From the evidence it must be taken that the cause of this premature birth was the fear growing out of the violence of the defendant. The question is, whether such a result was such a natural and proximate consequence of defendant's conduct as to make him liable therefor. * * * The plaintiff sues, here, for the effect of a fright which she received by reason of a quarrel between others. It took place between the defendant and the husband and boy, alone, outside of the house, upon the porch, out of the presence and out of the sight of the plaintiff, although in her hearing, she being in bed in a room some five or six feet from where the difficulty occurred, but the evidence does not show that the defendant knew the latter fact or condition of the plaintiff. * * * The result complained of was not such a consequence as, in the ordinary course of things, would flow from defendant's conduct. He had no reason to apprehend that what took place between himself and Phillips, the husband, and the boy, alone, would occasion danger to some third person who was not present, through fright. The injury in question not being one which the defendant could reasonably be expected to anticipate as likely to ensue from his conduct, we cannot regard it as the natural consequence thereof, for which defendant is legally responsible."

In *Fent* v. *Toledo, Peoria and Warsaw Railway Co.* 59 Ill. 349, it was said, quoting from Mr. Parsons (p. 351): "It is, that every defendant shall be held liable for all of those

consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen and was therefore under no moral obligation to take into consideration." And the court continued: "We are disposed to regard this explanation of the rule as clearer, and capable of more precise application, than any other we have met with in our examination of this subject, and it is in substantial accord with what is said by Pollack, C. B., in *Higby* v. *Hewett*, 5 Exch. 240."

In *Derry* v. *Fletner*, 118 Mass. 131, it was said: "The true inquiry is, whether the injury sustained was such as, according to the common experience, in the usual course of events might reasonably be anticipated."

In *Hoag* v. *Lake Shore and Michigan Southern Railroad Co.* 85 Pa. St. 293, it was said: "In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, —such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his acts."

In *C., St. P., M. & O. R. R. Co.* v. *Elliott*, 55 Fed. Rep. 950, it was said: "An injury that is the natural and probable consequence of an act of negligence is actionable, but an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable."

Appellant relies upon *Bell* v. *Great Northern Railroad Co.* 26 L. R. Ire. 432, and *Purcell* v. *St. Paul City Railway Co.* 48 Minn. 134. Both of these cases fully sustain the contention of appellant that where sudden terror occasions a nervous shock, resulting from a negligent act without impact or physical contact, by which the mind is affected, which may press on the health and affect the physical organization, a cause of action for negligence results. These cases have the approval of Mr. Beavan in his work

on Negligence, (vol. 1, pp. 76-84,) and of Mr. Sedgwick in his work on Damages, (8th ed. sec. 861.)

The *Purcell case* arose on a demurrer to the complaint, and it was conceded that the effect of a wrongful act or of negligence on the mind alone will not furnish ground of action. The entire discussion was confined to the question whether the defendant's negligence was the proximate cause of the injury, and whether, if the fright was a natural consequence thereof and caused the nervous shock and consequent illness, the negligence was actionable. While it is the duty of a carrier to anticipate that an accident or appearance of great danger will produce fright and excitement, and that an accident will cause physical injury, it could not be anticipated that a disease of the mind would result, and unless such anticipation could be had in the light of the attending surroundings it would not constitute the proximate cause of the injury, under the great weight of authority. In the *Purcell case*, fright may have been the natural consequence of the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright may have caused the nervous shock and consequent illness of the plaintiff, as held by the Supreme Court of Minnesota, yet if it could not have been reasonably anticipated as a result of the fright it would not be the proximate cause of her injuries. The question of the reasonable anticipation of the injury as a result of the fright is entirely disregarded in that case, and causes it to be in conflict with the weight of authority, because it absolutely disregards this principle.

In the *Bell case* an instruction was approved which read as follows: "That if great fright was, in their opinion, a reasonable and natural consequence of the circumstances in which the defendant had placed Mary Bell, and she was actually put in great fright by these circumstances, and if injury to her health was, in their opinion, a reasonable and natural consequence of such great fright and was actually occasioned thereby, damages for such

injury would not be too remote, and might be given for them if they found for the plaintiff." It was objected that the instruction was erroneous unless the fright was accompanied by physical injury, but it was held the objection was not well founded; that a nervous shock was to be considered as a bodily injury, and if such bodily injury might be a natural consequence of fright, it was an element of damages for which a recovery might be had; that as the negligence caused fright, if the fright contemporaneously caused physical injury the damage could not be too remote. This case, like the *Purcell case*, bases the right of recovery solely on the fact that negligence may cause physical injury, and hence the damage could not be too remote.

The courts in the above cases seem to have lost sight of the only safeguard against imposition in cases arising from negligence, and that is the elementary rule that before a plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act and reasonably to be anticipated as a result. Two trains might be passing on a double track road, one carrying passengers and the other freight, and at the moment when the engine of the freight train is immediately opposite a passenger car it might become necessary to sound a whistle, whose effect might be to startle and greatly frighten a nervous person in the passenger car, and the fact that a whistle unexpectedly sounded would be calculated to startle and frighten a nervous person, and that such fright might produce a nervous shock that would cause physical injury, under the principle announced in the *Purcell* and *Bell cases*, *supra*, would authorize a recovery. That could only be done under the authority of those cases by absolutely ignoring the principle that the injury might be reasonably anticipated as the result of the act, and where it cannot be so anticipated the result is too remote. These cases are discussed by Beavan and Sedgwick without laying sufficient stress on this principle.

In our opinion these authorities, so much relied on by counsel for appellant, are not only against the great weight of authority, but are not sustainable on principle. Appellee, in this case, was on the premises to collect rent, as he lawfully might, without any knowledge of the nervous condition of appellant, and it cannot be said that his manner, language or gestures, or declared purpose of preventing the removal of the household effects of his tenants, were naturally and reasonably calculated to, or that it might be anticipated they would, produce the peculiar injury sustained by the appellant. It could not have been reasonably anticipated by the appellee that any injury therefrom could reasonably have resulted. The action is purely one of negligence, and if appellee could be held liable under this evidence, then any person who might so speak or act as to cause a stranger of peculiar sensibility passing by to sustain a nervous shock productive of serious injury might be held liable. Thus, one whose very existence was unknown to the party guilty of so speaking and acting would be given a right of recovery. Terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability.

On the ground of public policy alone, having reference to the dangerous use to be made of such cause of action, we hold that a liability cannot exist consequent on mere fright or terror which superinduces nervous shock.

The Appellate Court held the language of the appellee, as disclosed by the evidence, was not such as could be held to constitute negligence, and that the injury sustained by appellant could not, according to common experience, be reasonably anticipated to result from such actions and language. We concur in that view, and the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

Carlinville National Bank v. Rhoads, 63 Ill. App. 3d 502 (4th Dist. 1978)

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

Ill. App. Ct., 4th Dist. · filed 1978-09-01 · Reporter opinion
Published opinion

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- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C046.3
- memo p. 11 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C046.3

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THE CARLINVILLE NATIONAL BANK, Ex'r of the Estate of Harold W. Stephenson, Deceased, *et al.*, Plaintiffs, *v.* KENT Y. RHOADS *et al.*, Defendants-Appellees.—(LUCILE STEPHENSON, Plaintiff-Appellant.)

Fourth District No. 14775

Opinion filed September 1, 1978.—Rehearing denied September 19, 1978.

Phelps, Carmody & Kasten, of Carlinville (Carl E. Kasten, of counsel), for appellant.

Stuart Dobbs, of Denby, Dobbs & Meno, of Carlinville, for appellees.

Mr. JUSTICE REARDON delivered the opinion of the court:

The plaintiff-appellant, Lucile Stephenson, appeals the dismissal by the Circuit Court of Macoupin County on November 16, 1977, of counts V, VI, and IX of her amended complaint seeking compensatory damages for emotional distress and psychiatric trauma sustained by her as a result of witnessing her husband's death allegedly caused by the negligence of the defendant, Kent Y. Rhoads, an agent of the other named defendants.

In the complaint, plaintiff alleged that on August 14, 1976, her husband, Harold W. Stephenson, was driving their automobile in which she was a passenger on a blacktop north of Macoupin Station, Illinois, when it was struck by an oncoming truck driven by defendant Rhoads, an agent of defendant M. C. Transfer Company, Inc. The complaint further states that as a result of the collision, Harold Stephenson was instantly killed,

and the plaintiff was physically injured. In count III of the complaint, which is still pending, plaintiff seeks to recover for those physical injuries and for the mental trauma directly related to those injuries.

In counts V, VI, and IX, plaintiff alleged that immediately prior to the crash, she saw the truck driven by defendant Rhoads cross the center line and collide into their vehicle. Immediately after the crash, plaintiff alleged that she tried to communicate with her husband and discovered that he was lying over the steering wheel and was dead. As a proximate result thereof, plaintiff alleged in these counts that she sustained severe mental pain, fright, shock, depression, instability, nervous tension, and experienced physical manifestations of this emotional distress including dizziness, chest discomfort, anxiety attacks, insomnia, and frequent awakenings. Additionally, plaintiff alleged that she incurred large psychiatric costs and hospital costs for two lengthy hospital stays for psychiatric treatment and will have to incur psychiatric treatment in the future.

The issue presented on appeal is whether a cause of action should be recognized in favor of the plaintiff for negligent infliction of mental distress caused as a result of witnessing, as a passenger in the same car, her husband's death in an automobile collision.

■■ It is well settled in Illinois that a motion to dismiss a complaint, like a common law demurrer, admits facts well pleaded for the purpose only of determining whether, as a matter of law, those facts pleaded state a claim upon which relief may be granted. (*O'Fallon Development Co. v. Ring* (1967), 37 Ill. 2d 84, 88, 224 N.E.2d 782, 784; *Hubbard v. Aetna Insurance Co.* (1976), 37 Ill. App. 3d 666, 669, 347 N.E.2d 396, 399.) The standard of review on appeal is similarly whether the complaint alleged facts which sufficiently state a cause of action. *Psyhogios v. Village of Skokie* (1972), 4 Ill. App. 3d 186, 191, 280 N.E.2d 552.

■■ Illinois has long followed the view that there can be no recovery for negligent infliction of mental distress in the absence of some contemporaneous physical impact. In *Braun v. Craven* (1898), 175 Ill. 401, 420, 51 N.E. 657, the supreme court held that no liability exists for negligent acts which occasion fright or terror where there has been no accompanying physical impact, even if nervous shock, which constitutes a physical injury, follows.

On the other hand, where the defendant's negligence inflicts an immediate physical injury, such as a broken leg, it is well settled that Illinois courts will allow recovery for the mental disturbance accompanying the injury. (*City of Chicago v. McLean* (1890), 133 Ill. 148, 153, 24 N.E. 527; *Budek v. City of Chicago* (1935), 279 Ill. App. 410, 427; *Horan v. Klein's-Sheridan, Inc.* (1965), 62 Ill. App. 2d 455, 460, 211 N.E.2d 116.) These decisions, however, have specifically restricted recovery to the mental anguish directly connected to the bodily injury. As

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the court stated in *McLean*, "Any mental anguish, which may not have been connected with the bodily injury, but caused by some conception arising from a different source, could not properly have been taken into consideration by the jury." 133 Ill. 148, 153, 24 N.E. 527.

Where the emotional disturbance and its consequences are caused by distress at some peril or harm or another, Illinois courts have also denied recovery. In *Phillips v. Dickerson* (1877), 85 Ill. 11, a married woman who heard but did not see a quarrel between her husband and the defendant, sued to recover damages for a miscarriage caused by her fright. The supreme court held that there could be no recovery by the woman for miscarriage or for emotional disturbance suffered by her when no physical contact with the defendant was involved, because such damages were too remote, and they could not be regarded as the natural and proximate consequence of the defendant's conduct. In *Duncan v. Martin's Restaurant, Inc.* (1952), 347 Ill. App. 183, 190, 106 N.E.2d 731, the pregnant plaintiff became ill after eating food served at the defendant restaurant. Three days after the meal she gave birth to a premature baby which died. The court held that she could recover for pain and mental anguish caused as a consequence of her injuries, but not for the purely sentimental mental anguish caused by the child's death.

In *McCullough v. Orcutt* (1957), 14 Ill. App. 2d 513, 145 N.E.2d 109, a wife suffered shock, strain, and anxiety, and became so emotionally upset that she miscarried and gave birth to a stillborn child as a result of injuries her plaintiff husband sustained outside her presence in a collision while a passenger in the defendant's automobile. The court held that it was reversible error to admit testimony concerning the wife's emotional disturbance in the absence of contemporaneous physical injury. In *Corey v. Hiberly* (7th Cir. 1965), 346 F.2d 368, a fireman died of coronary occlusion while in the act of preparing to fight a fire negligently started by the defendant. The court there held that the Illinois fireman's wife could not recover damages from the defendant for emotional disturbance as a result of the death because she suffered no contemporaneous physical injury. In all of these cases, however, the peril or harm occurred outside the plaintiff's presence.

Recent appellate decisions have followed the position taken in *Braun* that there can be no recovery for the negligent infliction of mental distress in the absence of contemporaneous physical impact. In *Benza v. Shulman Air Freight* (1977), 46 Ill. App. 3d 521, 361 N.E.2d 91, plaintiff appealed the trial court's dismissal of his complaint which alleged that defendants negligently allowed their vehicle to cross the center line almost striking plaintiff's oncoming vehicle. As a result of this, and abusive language used by defendants, plaintiff alleged that she suffered both physical and emotional injury. Plaintiff argued that the supreme court's decision in *Knierim v. Izzo* (1961), 22 Ill. 2d 73, 174 N.E.2d 157, which recognized the

intentional infliction of emotional distress as a separate tort, specifically rejected arguments which were the basis of the *Braun* decision so that *Braun* had in effect been overruled. The court in *Benza*, however, rejected plaintiff's argument and held that it was duty bound to follow the ruling expressed in *Braun*. The court stated: "* * * we have neither the authority nor the inclination to overrule decisions of the Supreme Court of Illinois. Such action, in our opinion, is exclusively within the prerogative of the highest court of Illinois." 46 Ill. App. 3d 521, 525, 361 N.E.2d 91.

In *Rosenberg v. Packerland Packing Co.* (1977), 55 Ill. App. 3d 959, 370 N.E.2d 1235, the trial court dismissed count I of plaintiffs' complaint which alleged negligent infliction of mental distress caused as a result of defendant's negligence in hiring an unstable driver who made repeated passes at the rear of plaintiffs' car on an interstate highway as if he were going to strike the plaintiffs' vehicle. The appellate court, citing *Braun* and *Benza*, stated that "[p]laintiffs failed to state a cause of action under count I for the negligent infliction of severe emotional distress since they failed to allege bodily injury and since there was no physical impact between the vehicles or upon the plaintiffs' persons." 55 Ill. App. 3d 959, 962, 370 N.E.2d 1235, 1238.

Clearly, the well-established Illinois view has been to deny recovery for negligently inflicted mental distress unless it arises from and is directly connected with some contemporaneous physical injury. Plaintiff urges this court to now recognize in Illinois a cause of action for the negligent infliction of mental distress not arising from a contemporaneous physical injury but caused solely as the result of witnessing peril or harm to another. Plaintiff argues that the modern trend of decisions in other States and leading tort authorities support such recovery where the factual elements in the instant case are present. While we note that resulting emotional disturbance can be as severe and as certain whether it be caused by an intentional act or by a negligent act, we are bound by decisions of the Illinois Supreme Court. (*Agricultural Transportation Association v. Carpentier* (1953), 2 Ill. 2d 19, 27, 116 N.E.2d 863, 867; *People v. Spahr* (1978), 56 Ill. App. 3d 434, 438, 371 N.E.2d 1261, 1264.) Since not all of the members of this panel are motivated to a change in the principle controlling this case, and since the entire panel recognizes and desires to respect our lack of authority to overrule decisions of the supreme court, we conclude that any recognition of negligent infliction of mental distress as a separate tort must come from the supreme court of this State. Accordingly, the circuit court's dismissal of counts V, VI, and IX of plaintiff's complaint is affirmed.

Affirmed.

GREEN, P. J., and MILLS, J., concur.

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Carter v. SSC Odin Operating Company, 2012 IL 113204

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

Ill. Supreme Court · filed 2012-09-20 · Opinion
Supreme Court

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- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 34: passage C055.1
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 34: passage C055.1

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ILLINOIS OFFICIAL REPORTS

Supreme Court

***Carter v. SSC Odin Operating Co.,* 2012 IL 113204**

Caption in Supreme Court:	SUE CARTER, Special Adm'r of the Estate of Joyce Gott, Deceased, Appellee, v. SSC ODIN OPERATING COMPANY, LLC, d/b/a Odin Healthcare Center, Appellant.
Docket No.	113204
Filed	September 20, 2012
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.*)	A wrongful death claim for the death of a nursing home resident did not accrue until she died and was not governed by an arbitration agreement that she had signed, but the Federal Arbitration Act was applicable and arbitration could be compelled under the agreement as to claims for negligence and statutory violations occurring while she lived.
Decision Under Review	Appeal from the Appellate Court for the Fifth District; heard in that court on appeal from the Circuit Court of Marion County, the Hon. David L. Sauer, Judge, presiding.
Judgment	Affirmed in part and reversed in part. Cause remanded.

Counsel on Appeal	W. Jeffrey Muskopf and Mark R. Feldhaus, of Lashly & Baer, P.C., of St. Louis, Missouri, and Malcolm J. Harkins III, and James F. Segroves, of Proskauer Rose, LLP, of Washington, D.C., for appellant. Staci M. Yandle, of O'Fallon, for appellee.
Justices	JUSTICE THEIS delivered the judgment of the court, with opinion. Chief Justice Kilbride and Justices Thomas, Garman, and Burke concurred in the judgment and opinion. Justices Freeman and Karmeier took no part in this decision.

OPINION

¶ 1 This appeal involves an arbitration agreement between plaintiff's decedent and defendant nursing home. At issue is whether the arbitration agreement is enforceable and, if so, whether plaintiff can be compelled to arbitrate a wrongful-death claim against defendant. The appellate court ruled in favor of plaintiff, holding that the arbitration agreement is unenforceable based on a lack of mutuality of obligation, and that the wrongful-death claim is not subject to arbitration in any event. 2011 IL App (5th) 070392-B, ¶¶ 29, 34. The appellate court thus affirmed the trial court's denial of defendant's motion to compel arbitration. *Id.* ¶ 36.

¶ 2 For the reasons that follow, we affirm in part and reverse in part the judgment of the appellate court, and remand to the trial court for further proceedings.

¶ 3 BACKGROUND

¶ 4 Plaintiff, Sue Carter, as the special administrator of the estate of Joyce Gott, deceased, filed a complaint in the circuit court of Marion County against defendant, SSC Odin Operating Company, LLC, that does business as Odin Healthcare Center, a nursing home located in Odin, Illinois. Gott was a resident of the nursing home for a two-month period during 2005, and again in early 2006 until her death on January 31, 2006. In count I, a survival action (755 ILCS 5/27-6 (West 2006)), plaintiff alleged that defendant violated the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2006)) and, as a result, Gott sustained personal injury including gastrointestinal bleeding, anemia, and respiratory failure. In count II, a claim under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2006)), plaintiff sought damages for injuries sustained by Gott's heirs resulting from Gott's wrongful death.

¶ 5 Defendant filed a motion to compel arbitration, relying on two identical arbitration agreements executed at the time of Gott's 2005 and 2006 nursing home admissions. The

2005 agreement was signed by plaintiff as Gott's "Legal Representative." The 2006 agreement was signed by Gott herself. The parties agreed that, with respect to claims where the amount in controversy is at least $200,000,

> "they shall submit to binding arbitration all disputes against each other and their representatives, affiliates, governing bodies, agents and employees arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Illinois law were violated; any disputes relating to the payment or non-payment for the Resident's care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement."

¶ 6 The parties also agreed that defendant would pay the fees of the arbitrators; defendant would pay up to $5,000 of the resident's attorney fees and costs in claims against defendant; the resident would have the right to choose the location of the arbitration; and the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) (FAA) would govern the agreements.

¶ 7 After briefing, and without an evidentiary hearing, the trial court denied defendant's motion to compel arbitration. The trial court ruled that the agreements were unenforceable because they violated Illinois public policy and lacked mutuality of obligation; the wrongful-death claim was not arbitrable; and the agreements did not evince a transaction involving commerce within the meaning of the FAA. Defendant appealed. The appellate court affirmed the denial of defendant's motion to compel arbitration. *Carter v. SSC Odin Operating Co.*, 381 Ill. App. 3d 717 (2008).

¶ 8 The appellate court examined Illinois public policy as set forth in sections 3-606 and 3-607 of the Nursing Home Care Act, which provide that any waiver by a resident, or his legal representative, of the right to commence an action under the Nursing Home Care Act, or to a jury trial of such action, shall be "null and void." 210 ILCS 45/3-606, 3-607 (West 2006). The appellate court held that these antiwaiver provisions present a legitimate state law contract defense to the arbitration agreements that is not preempted by the FAA. *Carter*, 381 Ill. App. 3d at 722-23. We allowed defendant's petition for leave to appeal and reversed the judgment of the appellate court. *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30 (2010). We held that the antiwaiver provisions of sections 3-606 and 3-607 of the Nursing Home Care Act are the functional equivalent of antiarbitration legislation, which is preempted by the FAA and Supreme Court precedent. *Id.* at 48-49 (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)). We remanded the cause to the appellate court for consideration and resolution of the remaining issues on appeal. *Id.* at 51.

¶ 9 On remand, the appellate court again affirmed the trial court's denial of defendant's motion to compel arbitration. 2011 IL App (5th) 070392-B, ¶ 1. The appellate court first held

that the arbitration agreements evince a transaction involving interstate commerce, rendering them subject to the FAA. *Id.* ¶ 21. The appellate court next held, over a dissent, that defendant's promise to arbitrate was illusory, and that the arbitration agreements were thus unenforceable for lack of mutuality of obligation. *Id.* ¶ 29. The appellate majority explained:

> "By excluding all claims but those $200,000 and greater from the requirements of the arbitration agreement, the defendant essentially ensured that none of its claims against Joyce [Gott] would have to be arbitrated under the terms of the agreement. Instead, only Joyce's claims for personal injuries due to the defendant's improper or inadequate care would ever have to be arbitrated under the agreements. The defendant cannot offer any realistic scenario where the amount in controversy in disputes relating to the nonpayment of Joyce's care would equal or exceed $200,000. The arbitration agreements, therefore, do not contain mutually binding promises to arbitrate, but only a unilateral obligation on the part of Joyce to arbitrate her personal injury claims. The agreements, therefore, are not enforceable." *Id.*

The dissenting justice would not have found defendant's promise to arbitrate to be illusory, noting that a claim against a nursing home resident in excess of $200,000 could arise where, for example, the resident intentionally or unintentionally started a fire causing damage to the nursing home. *Id.* ¶¶ 40-41 (Spomer, J., concurring in part and dissenting in part).

¶ 10 The appellate court unanimously held, however, that even if the arbitration agreements are enforceable, plaintiff cannot be compelled to arbitrate the wrongful-death claim because plaintiff did not sign the arbitration agreement in her individual capacity. *Id.* ¶ 34. The appellate court disagreed with defendant that the "derivative" nature of a wrongful-death claim required a different result. *Id.* ¶¶ 33-34.

¶ 11 We allowed defendant's petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. Feb. 26, 2010).

¶ 12 ANALYSIS

¶ 13 I. Standard of Review

¶ 14 The facts relevant to defendant's motion to compel arbitration are not in dispute, and the trial court's decision denying defendant's motion was based on purely legal issues: (1) the enforceability of the arbitration agreement, and (2) the arbitrability of the wrongful-death claim, which raises issues of statutory construction. Accordingly, our review proceeds *de novo*. See *Royal Indemnity Co. v. Chicago Hospital Risk Pooling Program*, 372 Ill. App. 3d 104, 107 (2007); *Carter*, 237 Ill. 2d at 39.

¶ 15 II. Mutuality of Obligation

¶ 16 The appellate court held that the arbitration agreements at issue here "evidence a transaction involving interstate commerce" and are thus governed by the FAA. 2011 IL App (5th) 070392-B, ¶¶ 16-21. Plaintiff did not seek review of that issue before this court. Thus, we will proceed from the premise that, as held by the appellate court and expressly stated in the arbitration agreements, the FAA governs the agreements.

¶ 17 Originally adopted in 1925, the FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the FAA provides in relevant part that:

> "A written provision in *** a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction *** shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." (Emphasis added.) 9 U.S.C. § 2 (2012).

¶ 18 Thus, an arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability, without contravening section 2. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). An arbitration agreement may not be invalidated, however, by a state law applicable *only* to arbitration agreements. *Id.*

¶ 19 Here, the state law contract defense on which the appellate court relied when it invalidated the arbitration agreements is a lack of mutuality of obligation. According to the appellate court, defendant's promise to arbitrate is illusory based on the $200,000 arbitration floor, rendering the arbitration agreements unenforceable for lack of a mutual promise to arbitrate. 2011 IL App (5th) 070392-B, ¶ 29.

¶ 20 "An illusory promise appears to be a promise, but on closer examination reveals that the promisor has not promised to do anything." *W.E. Erickson Construction, Inc. v. Chicago Title Insurance Co.*, 266 Ill. App. 3d 905, 909 (1994). Although defendant disputes that its obligation to arbitrate its claims against Gott is illusory, defendant's principal argument before this court is that mutuality of obligation is not essential to the validity of the arbitration agreements because Gott's promise to arbitrate is supported by other consideration. In other words, according to defendant, a lack of mutual promises to arbitrate will not destroy the validity of the arbitration agreements.

¶ 21 The concept of "mutuality of obligation" is intimately tied to the concept of "consideration." As this court explained:

> "While consideration is essential to the validity of a contract, mutuality of obligation is not. Where there is no other consideration for a contract the mutual promises of the parties constitute the consideration, and these promises must be binding on both parties or the contract falls for want of consideration, but where there is any other consideration for the contract mutuality of obligation is not essential." *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 108 (1921).

Accord *S.J. Groves & Sons Co. v. State of Illinois*, 93 Ill. 2d 397, 403-04 (1982), *overruled on other grounds by Rossetti Contracting Co. v. Court of Claims*, 109 Ill. 2d 72, 79 (1985); *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 488 (1997). See also Restatement (Second) of Contracts § 79 (1981) ("If the requirement of consideration is met, there is no additional requirement of *** 'mutuality of obligation.' "); 3 Richard A. Lord, Williston on Contracts § 7:14, at 326-30 (4th ed. 2008) (mutuality of obligation is "simply an awkward way of stating that there must be a valid consideration").

¶ 22 These principles apply equally to arbitration agreements as they do to other types of contracts. In *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20 (2005), for example, the appellate court was presented with a challenge to an arbitration agreement similar to the challenge in the instant case. There, the plaintiff claimed that the defendant's promise to arbitrate was illusory, thus rendering the arbitration agreement unenforceable for lack of mutuality of obligation. *Vassilkovska* observed that mutuality of obligation is "nothing more than a proxy for consideration," and that the court would review the plaintiff's lack-of-mutuality challenge in terms of whether consideration existed for the parties' agreement to arbitrate. *Vassilkovska*, 358 Ill. App. 3d at 25 n.2. In *Vassilkovska*, however, the *only* consideration that could have supported the plaintiff's promise to arbitrate was the defendant's reciprocal promise, which the appellate court held was illusory. *Id.* at 29. Here, defendant argues that other consideration, apart from its own promise to arbitrate, supports Gott's promise to arbitrate her disputes with defendant. If defendant is correct that other consideration exists, we need not decide whether defendant's promise to arbitrate is illusory.

¶ 23 "Consideration" is the "bargained-for exchange of promises or performances, and may consist of a promise, an act or a forbearance." *McInerney*, 176 Ill. 2d at 487 (citing Restatement (Second) of Contracts § 71 (1981)). "Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract." *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977). See also *Lipkin v. Koren*, 392 Ill. 400, 406 (1946) (consideration "consists of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other"). Thus, the enforceability of Gott's promise to arbitrate, rather than to litigate, her claims against defendant is dependent upon whether defendant suffered a detriment, or Gott received a benefit, in exchange for that promise. See *Vassilkovska*, 358 Ill. App. 3d at 26.

¶ 24 Principles of contract law do not require that the values Gott and defendant exchanged be equivalent. *Ryan v. Hamilton*, 205 Ill. 191, 197 (1903); *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d 226, 230 (2009). See also Restatement (Second) of Contracts § 79 (1981) ("[i]f the requirement of consideration is met, there is no additional requirement of *** equivalence in the values exchanged"); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) (observing that "state courts have concluded that an arbitration clause need not be supported by equivalent obligations"). Moreover, we will not inquire into the adequacy of the consideration to support a contract. *Gallagher v. Lenart*, 226 Ill. 2d 208, 243 (2007); *Ryan*, 205 Ill. at 197. "[A]dequacy of the consideration is within the exclusive dominion of the parties where they contract freely and without fraud." *Id.* at 198. See also 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, Corbin on Contracts § 6.1, at 207 (rev. ed. 1995) (to the extent courts use the term mutuality of obligation to require something tending toward equivalence of obligation, this is " 'simply a species of the forbidden inquiry into the adequacy of consideration' " (quoting *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (Minn. 1983))).

¶ 25 Defendant contends that, apart from its own promise to arbitrate, Gott's promise to arbitrate is supported by the following consideration: defendant's promise to pay the

arbitrators' fees[1]; defendant's promise to pay $5,000 of Gott's attorney fees and costs in any action against defendant; and Gott's right to choose the location of the arbitration. In her brief before this court, plaintiff does not address defendant's contention that the foregoing provisions supply the consideration supporting Gott's promise to arbitrate. At oral argument, plaintiff addressed only the attorney fee provision in the arbitration agreement, noting that under the Nursing Home Care Act defendant is already required to pay attorney fees to a resident whose rights (as specified in part 1 of article II of the Act) are violated. See 210 ILCS 45/3-602 (West 2006). Thus, plaintiff argued that defendant's promise to pay $5,000 of Gott's attorney fees is no consideration. We disagree.

¶ 26 Under the Nursing Home Care Act, Gott would only be entitled to attorney fees if she prevailed in a claim against defendant. Under the arbitration agreements, however, Gott is entitled to a portion of her attorney fees even if defendant prevails. The contractual fee provision thus supplements the statutory fee provision, constituting a benefit to Gott and a detriment to defendant. Similarly, defendant's promise to pay the arbitrators' fees, and Gott's right to choose the location of the arbitration, each also constitute a benefit to Gott and a detriment to defendant.

¶ 27 Based on these contract provisions, we conclude that Gott's promise to arbitrate, even if not met with a reciprocal promise to arbitrate by defendant, is nonetheless supported by consideration. Thus, we hold, contrary to the appellate court judgment, that the arbitration agreements are enforceable. The state law contract defense of lack of mutuality of obligation is not available under the facts of this case.

¶ 28 In light of this holding, we necessarily consider defendant's further argument that the appellate court erred in holding that plaintiff is not required to arbitrate the wrongful-death claim.

¶ 29 III. Wrongful-Death Action

¶ 30 The appellate court held that because plaintiff signed the agreement as Gott's legal representative, and not in her individual capacity or on her own behalf as a potential wrongful-death plaintiff, the arbitration agreement is not binding upon her with regard to the wrongful-death claim. 2011 IL App (5th) 070392-B, ¶ 34. As the appellate court succinctly stated, plaintiff "is not a party to the agreements." *Id.* ¶ 32. Thus, the appellate court's holding is based on a basic principle of contract law. See *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

¶ 31 Defendant does not dispute that plaintiff signed the agreement only on behalf of Gott, and conceded at oral argument that nonsignatories to a contract are typically not bound. Defendant, nonetheless, urges us to reverse the appellate court judgment, contending that the court's holding is based on a misunderstanding of the Wrongful Death Act. According to defendant, a wrongful-death action is an asset of the decedent's estate that the decedent can

[1]The arbitration agreements require that disputes be settled by a panel of three arbitrators.

limit during her lifetime. In this case, defendant continues, the decedent limited the forum in which the action could be heard. Defendant further argues that a wrongful-death action is derivative of, and thus limited to, what a decedent's cause of action against the defendant would have been had the decedent lived, and if the decedent's cause of action against the defendant would have been subject to arbitration, the wrongful-death claim against the defendant is likewise subject to arbitration. For these reasons, defendant contends that its motion to compel arbitration should have been granted. Because defendant's arguments focus on the nature of a wrongful-death action, we begin our analysis with an overview of the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2006)).

¶ 32 At common law, no cause of action existed to recover damages for the wrongful death of another, and a cause of action abated at the death of the injured party. *Williams v. Manchester*, 228 Ill. 2d 404, 418 (2008). Thus, " 'it was cheaper for the defendant to kill the plaintiff than to injure him.' " *Id.* (quoting Prosser & Keeton on Torts § 127, at 945 (W. Page Keeton *et al.* eds., 5th ed. 1984)). In 1853, however, the legislature adopted the Injuries Act (1853 Ill. Laws 97), now known as the Wrongful Death Act, creating a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of the death of the injured person. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 612 (1956).

¶ 33 Section 1 of the Act provides in relevant part:

> "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages ***." 740 ILCS 180/1 (West 2006).

Although section 2 provides that every wrongful-death action shall be brought by and in the names of the "personal representatives" of the deceased, the action is filed for the "exclusive benefit of the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2 (West 2006). Thus, the personal representative in a wrongful-death claim is "merely a nominal party to this action, effectively filing suit as a statutory trustee on behalf of the surviving spouse and next of kin, who are the true parties in interest." *Glenn v. Johnson*, 198 Ill. 2d 575, 583 (2002). See also *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 361 (1995) (statutory requirement that wrongful-death action be brought by and in the name of the personal representative serves to avoid a multiplicity of suits by the next of kin, and ensures that the interests of all the beneficiaries are protected).

¶ 34 A wrongful-death action is perhaps best understood when contrasted with an action under our so-called "Survival Act," now section 27-6 of the Probate Act of 1975. 755 ILCS 5/27-6 (West 2006). The Survival Act allows an action (such as a claim under the Nursing Home Care Act) to survive the death of the injured person. *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 503 (2011); *National Bank of Bloomington v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 160, 172 (1978). Whereas the Wrongful Death Act created a new cause of action that does not accrue until death, the Survival Act simply allows a representative of the decedent to maintain those statutory or common law actions that had already accrued to the

↩ memo p. 6, 10

decedent prior to death. *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 410-12 (1989). In other words:

> "A survival action allows for recovery of damages for injury sustained by the deceased up to the time of death; a wrongful death action covers the time after death and addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death." *Id.* at 410.

With this background we turn to defendant's arguments.

¶ 35 *Section 2.1 of the Wrongful Death Act*

¶ 36 Defendant directs our attention to section 2.1 of the Wrongful Death Act, which describes a wrongful-death action as an "asset" of the decedent's estate. 740 ILCS 180/2.1 (West 2006). Section 2.1 provides in pertinent part:

> "In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs or legatees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action." 740 ILCS 180/2.1 (West 2006).

Based on this provision, defendant argues that the wrongful-death action plaintiff filed against it is an asset of Gott's estate that Gott could and did limit when she entered into the arbitration agreement. Plaintiff counters that a wrongful-death action does not belong to the decedent, noting that the proceeds of a wrongful-death action do not pass through the decedent's estate.

¶ 37 When construing a statute, the primary objective is to ascertain and give effect to the intent of the legislature, the language of the statute being the best indicator of such intent. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Words and phrases should not be considered in isolation. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 41. Rather, the language in each section of the statute must be examined in light of the statute as a whole (*id.*), which is construed in conjunction with other statutes touching on the same or related subjects (*In re B.L.S.*, 202 Ill. 2d 510, 515 (2002)). Legislative intent may be ascertained not only by examining the statutory language, but by considering the reason and necessity for the law, the evils to be remedied, and the objects and purposes to be obtained. *People v. Lucas*, 231 Ill. 2d 169, 176 (2008).

¶ 38 Applying these principles in the present case, we observe that although section 2.1 plainly refers to a wrongful-death action as an "asset of the deceased estate" (740 ILCS 180/2.1 (West 2006)), the legislature does not treat a wrongful-death action like other assets of the deceased's estate. Pursuant to the Probate Act, assets of a deceased's estate are subject to the claims of creditors and chargeable with the expenses of estate administration. 755 ILCS 5/18-14 (West 2006). With respect to a testate estate, assets of a deceased's estate are distributed in accordance with the deceased's will (755 ILCS 5/4-13 (West 2006)), and in the case of an intestate estate, according to the rules of descent and distribution (755 ILCS 5/2-1 (West

2006)). These rules generally provide that an intestate estate is distributed one-half to the surviving spouse and one-half to the decedent's descendants *per stirpes*. *Id.*

¶ 39 Under the Wrongful Death Act, however, amounts recovered in a wrongful-death action are not made subject to the provisions of the Probate Act. Rather, such amounts shall be distributed "to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person." 740 ILCS 180/2 (West 2006).

¶ 40 The import of the distribution provision in the Wrongful Death Act was recognized by this court just a few short years after the Act's adoption. At that time, the Act provided that amounts recovered "shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate." 1853 Ill. Laws 97, § 2. We observed:

> "The legislature intended that the money recovered should not be treated as a part of the estate of the deceased. They designed to exclude creditors from any benefit of it, and to prevent its passing by virtue of any provisions of the will of the deceased. The personal representative brings the action, not in right of the estate, but as trustee for those who had a more or less direct pecuniary interest in the continuance of the life of the deceased, and who had some claims, at least, upon his or her natural love and affection." *City of Chicago v. Major*, 18 Ill. 349, 358 (1857).

Although the Wrongful Death Act has undergone various amendments during its long history, this court's observation that the "legislature intended the money recovered should not be treated as a part of the estate of the deceased" remains true today by virtue of the Act's express directive, set forth in section 2, regarding distribution of amounts recovered under the Act.

¶ 41 Our analysis of the issue before this court is also informed by this court's opinion in *McDaniel v. Bullard*, 34 Ill. 2d 487 (1966). There we held that a pending action under the Wrongful Death Act does not abate upon the beneficiary's death, but is subject to the provisions of the Survival Act. *McDaniel*, 34 Ill. 2d at 490-91. Thus, under *McDaniel*, the right to receive wrongful-death benefits is an asset of the estates of the next of kin, should they die; it is not an asset of the estate of the decedent who is the subject of the wrongful-death action. *National Bank of Bloomington v. Podgorski*, 57 Ill. App. 3d 265, 267 (1978). *McDaniel* is consistent with our observation in *Major*, quoted above, that the "personal representative brings the action, *not in right of the estate*, but as trustee for those who had a more or less direct pecuniary interest in the continuance of the life of the deceased." (Emphasis added.) *Major*, 18 Ill. at 358.

¶ 42 We conclude that a wrongful-death action is not a true asset of the deceased's estate. That said, we are constrained to give effect to the statutory language in section 2.1. See *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 77 ("statute should be construed, if possible, so that no word is rendered meaningless or superfluous"). We find guidance in our appellate court's opinion in *In re Estate of Savio*, 388 Ill. App. 3d 242 (2009). There the appellate court considered whether an estate could be reopened following the discovery, after

additional autopsies of the decedent, of a wrongful-death action. The former executor of the decedent's estate, who was also the decedent's ex-husband, objected, arguing in relevant part that a wrongful-death action is not an asset of the decedent's estate and, therefore, the estate could not be reopened. See 755 ILCS 5/24-9 (West 2006) (providing that decedent's estate may be reopened "to permit the administration of a newly discovered asset").

¶ 43 To determine whether the wrongful-death action was an asset of the decedent's estate, the appellate court considered wrongful-death law in Illinois, including section 2.1 of the Wrongful Death Act, on which defendant here relies. The appellate court stated:

> "It is clear that under Illinois law, a wrongful death claim may only be brought by the personal representative of the decedent. See 740 ILCS 180/2 (West 2006); *Pasquale*, 166 Ill. 2d at 361 ***. Moreover, section 2.1 of the Wrongful Death Act specifically references a cause of action for wrongful death as being an asset of the decedent's estate. See 740 ILCS 180/2.1 (West 2006). *** The distinction to be made here is one of purpose. A wrongful death claim is not an asset of a decedent's estate for the purpose of whether it may be used to satisfy the claims of creditors of the estate. See *Berard v. Eagle Air Helicopter, Inc.*, 257 Ill. App. 3d 778, 781 *** (1994). However, a newly discovered wrongful death claim is an asset of a decedent's estate for the purpose of whether the estate may be reopened under section 24-9 [of the Probate Act] ***. See 740 ILCS 180/2.1 (West 2006). Therefore, we affirm the portion of the trial court's ruling granting the petition to reopen Savio's estate." *Savio*, 388 Ill. App. 3d at 248-49.

¶ 44 We agree with the *Savio* opinion that whether a wrongful-death action is an "asset of the deceased estate" (740 ILCS 180/2.1 (West 2006)) is a matter of "purpose." The language in section 2.1 of the Wrongful Death Act, and the language in the statute as a whole, does not evince an intent by the legislature to treat a wrongful-death action as an asset of the deceased's estate for the purpose defendant urges, *i.e.*, to allow the deceased to control the forum and manner in which a wrongful-death claim—in which the deceased has no interest—is determined. Rather, the statutory language indicates that the "asset" label adopted by the legislature is intended to facilitate the filing and prosecution of a wrongful-death claim. See also *In re Estate of Fields*, 588 S.W.2d 50, 54 n.2 (Mo. Ct. App. 1979) (applying Illinois law and observing that the reference in section 2.1 to a wrongful-death action as an estate asset is "simply legislative shorthand or acknowledgment of the procedural legal fiction that, after death, an administrator can be appointed only if there is an estate subject to possible administration," but "substantively the [wrongful-death] action is not a general asset of the decedent's estate").

¶ 45 To the extent the parties' arguments suggest that an ambiguity exists in section 2.1, we will consider legislative history. See *In re D.D.*, 196 Ill. 2d 405, 419 (2001) (noting that only when the meaning of an enactment cannot be ascertained from the language may a court resort to other aids for construction). Section 2.1 was adopted in 1977. Pub. Act 80-752 (eff. Sept. 16, 1977). Although this section was enlarged over the years, the language at issue here has remained intact since its adoption. Compare 740 ILCS 180/2.1 (West 2006), with Pub. Act 80-752 (eff. Sept. 16, 1977). The legislative history indicates that the intent of this new provision was to "make it more convenient" to bring a wrongful-death action, and "cut the

red tape" by permitting a court to appoint a special administrator who could prosecute the action without opening an estate. 80th Ill. Gen. Assem., House Proceedings, May 3, 1977, at 142 (statements of Representative Beatty). Representative Beatty's statements reinforce our conclusion that the legislature denominated a wrongful-death action an "asset of the deceased estate" for the primary purpose of facilitating the filing and prosecution of such an action.

¶ 46 For the foregoing reasons, we reject defendant's argument that the wrongful-death action filed by plaintiff is an asset of Gott's estate that she could limit via the arbitration agreement.

¶ 47 *Derivative Nature of Wrongful-Death Action*

¶ 48 In urging this court to hold that the wrongful-death action is subject to arbitration, defendant also relies on the so-called "derivative" nature of a wrongful-death action.

¶ 49 Liability under section 1 of the Wrongful Death Act "depends upon the condition that the deceased, at the time of his death, had he continued to live, would have had a right of action against the same person or persons for the injuries sustained." *Biddy v. Blue Bird Air Service*, 374 Ill. 506, 513-14 (1940). Accord *Varelis v. Northwestern Memorial Hospital*, 167 Ill. 2d 449, 454 (1995); *Williams*, 228 Ill. 2d at 421. If the deceased had no right of action at the time of his or her death, then the deceased's personal representative has no right of action under the Wrongful Death Act. *Id.*; *Biddy*, 374 Ill. at 514. In this sense, a wrongful-death action is said to be "derivative" of the decedent's rights. *Varelis*, 167 Ill. 2d at 454. The early case of *Mooney v. City of Chicago*, 239 Ill. 414 (1909), is illustrative.

¶ 50 In *Mooney*, the decedent, Edward Dillon, was injured while driving a wagon for his employer when the wagon hit a pothole. Dillon settled his personal injury action with his employer, releasing him from all liability. Following Dillon's death, allegedly from those injuries, the administrator of Dillon's estate filed a wrongful-death action against the city for maintaining the streets in a dangerous condition. The appellate court expressed the opinion that the release executed by Dillon had no relation to the case and was erroneously admitted into evidence. *Mooney*, 239 Ill. at 422. We disagreed, explaining that the administrator's right to maintain an action under the statute was dependent upon Dillon's right to sue the city at the time of his death, but "if Dillon had released the cause of action the statute does not confer upon his administrator any right to sue." *Id.* at 423. See also *Varelis*, 167 Ill. 2d at 456 (following *Mooney* and holding that a wrongful-death action could not be pursued where the decedent, during his lifetime, obtained a judgment in a personal injury action based on the same occurrence).

¶ 51 Although cases like *Mooney* and *Varelis* involve instances where the decedent's personal injury claim was settled in some manner during his lifetime, no legal significance attaches to the particular reason why a decedent's claim would have been barred had he or she lived. If the decedent could not have maintained a personal injury action at the time of death, then no wrongful-death action can be maintained based on that injury and the death that ensued. *Id.* at 460.

¶ 52 Defendant argues that just as a decedent's settlement of a personal injury action constitutes a complete bar to a wrongful-death action based on the same occurrence, Gott's

agreement to arbitrate disputes with defendant limits the wrongful-death action in the same manner. Defendant relies on case law from several of our sister states generally holding that because a wrongful-death action is derivative of the decedent's personal injury action, a wrongful-death action is subject to an arbitration agreement entered by the decedent. See *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 646-47 (Tex. 2009) (collecting cases).

¶ 53 Plaintiff argues that the derivative nature of a wrongful-death action does not mean that she is subject to any and all contractual limitations—such as an agreement to arbitrate—that are applicable to the decedent. See *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008) (rejecting argument that because decedent is master of his personal injury action he may, by contract, expose his unwilling heirs to any imaginable defense to their wrongful-death action). Plaintiff further responds that, as a nonparty to the arbitration agreements, she cannot be made to arbitrate the wrongful-death action, which does not belong to Gott's estate. See *Finney v. National Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006) (holding that decedent's daughter, who was a nonparty to the arbitration agreement, did not stand in the shoes of the decedent with respect to a wrongful-death action because such action did not belong to the decedent or decedent's estate).

¶ 54 Defendant overstates the significance of the derivative nature of a wrongful-death action. Although a wrongful-death action is dependent upon the decedent's entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court's case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement.

¶ 55 Arbitration is a "creature of contract" (*Board of Managers of the Courtyards at the Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 74 (1998)), and under basic principles of contract law, only parties to the arbitration contract may compel arbitration or be compelled to arbitrate (*Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 331 (7th Cir. 1995); *Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 640 (1986)). The FAA's policy favoring arbitration does not alter these principles. As the Supreme Court has stated:

> "The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.' *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). *** 'Arbitration under the [FAA] is a matter of consent, not coercion.' *Id.*, at 479. *** It goes without saying that a contract cannot bind a nonparty." *Waffle House*, 534 U.S. at 293-94.

See also *Grundstad v. Ritt*, 106 F.3d 201, 205 n.5 (7th Cir. 1997) ("the federal policy favoring arbitration applies to issues concerning the scope of an arbitration agreement entered into consensually by contracting parties; it does not serve to extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place" (emphasis omitted) (citing *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994)).

¶ 56 In the present case, although the arbitration agreements purport to bind not only Gott, but also her "successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives,

including the personal representative or executor of *** her estate," no dispute exists that the only parties to the agreements are Gott and defendant. Although plaintiff signed the 2005 arbitration agreement, she did so only as Gott's legal representative. Accordingly, plaintiff is bound to arbitrate only to the extent that plaintiff is acting in Gott's stead.

¶ 57 For purposes of count I of the complaint, which alleges a violation of the Nursing Home Care Act by defendant pursuant to our survival statute, plaintiff is bound to arbitrate that claim, which had already accrued to Gott prior to death and which is brought for the benefit of Gott's estate. For purposes of count II, the wrongful-death action, plaintiff is not acting in Gott's stead. As already discussed, a wrongful-death action does not accrue until death and is not brought for the benefit of the decedent's estate, but for the next of kin who are the true parties in interest. Plaintiff, as Gott's personal representative in the wrongful-death action, is merely a nominal party, effectively filing suit as a statutory trustee on behalf of the next of kin. See *Glenn*, 198 Ill. 2d at 583. Plaintiff is not prosecuting the wrongful-death claim on behalf of Gott, and thus plaintiff is not bound by Gott's agreement to arbitrate for purposes of this cause of action.

¶ 58 Defendant's reliance on the Supreme Court's recent decision in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201 (2012) (*per curiam*), as a basis for compelling arbitration of the wrongful-death claim, is misplaced. *Marmet* involved three negligence suits against nursing homes in West Virginia. In each case a family member of the deceased patient signed an agreement that contained an arbitration clause. The West Virginia Supreme Court held that the FAA does not preempt that state's public policy against predispute arbitration agreements that apply to personal injury or wrongful-death claims against nursing homes, and thus, the arbitration clauses would not be enforced. *Id.* at ___, 132 S. Ct. at 1203. In two of the cases, the West Virginia court proposed an alternative holding, namely, that the arbitration clauses were unconscionable. *Id.* at ___, 132 S. Ct. at 1204.

¶ 59 The Supreme Court vacated the West Virginia decision. *Id.* at ___, 132 S. Ct. at 1202. Noting that the FAA's text includes no exception for personal injury or wrongful-death claims, the Supreme Court held that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Id.* at ___, 132 S. Ct. at 1203-04. Unclear as to the extent the West Virginia court's alternative holding was influenced by its invalid, categorical antiarbitration rule, the Supreme Court remanded the case so that the West Virginia court could consider whether the arbitration clauses were unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA. *Id.* at ___, 132 S. Ct. at 1204.

¶ 60 Our holding in the present case that plaintiff, as a nonparty to the arbitration agreements, cannot be compelled to arbitrate a wrongful-death claim that does not belong to the decedent is not contrary to *Marmet*. Our holding, unlike the West Virginia court's holding, is not based on a categorical antiarbitration rule; it is based on common law principles governing all contracts. *Marmet* recognized the significance of common law contract defenses when it returned that case to the West Virginia court to consider the validity of the arbitration clauses

under that state's common law. Moreover, *Marmet* noted that the FAA " 'requires courts to enforce the bargain *of the parties* to arbitrate.' " (Emphasis added.) *Id.* at ___, 132 S. Ct. at 1203 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Plaintiff here is not a party to the bargain to arbitrate.

¶ 61 We agree with the decision of the courts below that plaintiff cannot be compelled to arbitrate the wrongful-death claim against defendant.

¶ 62 CONCLUSION

¶ 63 For the reasons stated, we affirm in part and reverse in part the judgment of the appellate court, and remand this cause to the trial court for further proceedings.

¶ 64 Affirmed in part and reversed in part.

¶ 65 Cause remanded.

Clark v. Children's Memorial Hospital, 2011 IL 108656

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

Ill. Supreme Court · filed 2011-05-06 · Opinion
Supreme Court

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Where the memo cites it

- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 113: passage C001.5
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 113: passage C001.5

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ILLINOIS OFFICIAL REPORTS

Supreme Court

***Clark v. Children's Memorial Hospital*, 2011 IL 108656**

Caption in Supreme Court:	AMY CLARK *et al.*, Appellees, v. THE CHILDREN'S MEMORIAL HOSPITAL *et al.*, Appellants.
Docket No.	108656
Filed	May 6, 2011
Rehearing denied	September 26, 2011
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.*)	Where parents asserted the tort of wrongful birth, their claim for the expenses of caring for their disabled child after he reached the age of majority was properly dismissed because the common law and statutes of Illinois do not require parents to support their children after they reach the age of majority; and, because the supreme court concluded here that the zone-of-danger test should not apply to plaintiffs who seek compensation for emotional distress as an element of damages for the tort of wrongful birth, the plaintiffs should be allowed, on remand, to amend their pleadings after they had initially sought damages for negligent infliction of emotional distress under the zone-of-danger rule.
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. Thomas L. Hogan, Judge, presiding.
Judgment	Judgment affirmed in part and reversed in part; cause remanded.

Counsel on Appeal

Gary Feinerman and Andrianna Kastanek, of Sidley Austin LLP, and Pamela L. Gellen and Deborah M.R. O'Brien, of Lowis & Gellen LLP, all of Chicago, for appellants.

Christopher T. Hurley, Mark McKenna and Evan M. Smola, of Hurley McKenna & Mertz, P.C., of Chicago, for appellees.

Thaddeus J. Nodzenski and Mark D. Deaton, of Naperville, for *amicus curiae* Illinois Hospital Association.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, of Chicago (Michael L. Vittori and Melissa A. Murphy-Petros, of counsel), for *amicus curiae* Fertility Centers of Illinois, S.C.

Mark D. Prince and Andrew W. Wilson, of Marion, for *amicus curiae* Illinois Trial Lawyers Association.

Justices

JUSTICE GARMAN delivered the judgment of the court, with opinion.

Chief Justice Kilbride and Justices Thomas, Karmeier, Burke, and Theis concurred in the judgment and opinion.

Justice Freeman concurred in part and dissented in part, with opinion.

OPINION

¶ 1 Plaintiffs, Amy and Jeff Clark, individually and on behalf of their minor son, Timothy, filed a 16-count complaint against several defendants. Their claims included wrongful birth and negligent infliction of emotional distress. The circuit court of Cook County ruled that the damages available in a wrongful-birth action do not include the extraordinary costs of caring for a disabled child after he reaches the age of majority. The circuit court also dismissed plaintiffs' claim for negligent infliction of emotional distress. Having already reached a settlement with other defendants, plaintiffs voluntarily dismissed the remaining counts against the remaining defendants, Children's Memorial Hospital and Dr. Barbara Burton, and the circuit court dismissed the case with prejudice.

¶ 2 The appellate court held that plaintiff parents in a wrongful-birth case may recover

damages for the cost of caring for their dependent,[1] disabled, adult child and that the plaintiffs in this case had adequately pleaded a cause of action for negligent infliction of emotional distress. 391 Ill. App. 3d 321. Defendants filed a petition for leave to appeal pursuant to Supreme Court Rule 315 (Ill. S. Ct. R. 315 (eff. Oct. 15, 2007)), which we allowed. We also allowed Fertility Centers of Illinois, S.C., the Illinois Hospital Association, and the Illinois Trial Lawyers Association to file briefs as *amici curiae* pursuant to Supreme Court Rule 345 (Ill. S. Ct. R. 345 (eff. Dec. 6, 2005)).

¶ 3 For the reasons that follow, we affirm the judgment of the appellate court in part and reverse in part.

¶ 4 BACKGROUND

¶ 5 Plaintiffs Amy and Jeff Clark filed suit against Paul Wong, M.D., Rush University Medical Center (Rush), Baylor University Medical Center (Baylor), and Quest Diagnostics Clinical Laboratories (Quest), alleging various theories of liability in connection with the birth of their son, Timothy, who has Angelman Syndrome.[2] They later added Children's Memorial Hospital (Children's Memorial) and Barbara Burton, M.D., as defendants. Their amended complaint alleged that Burton negligently failed to inform plaintiffs of test results revealing that their first son, Brandon, suffered from Angelman Syndrome due to a UBE3A genetic mutation, and that they would not have conceived Timothy had she provided them with accurate information regarding the risk of giving birth to another child with the same condition.

¶ 6 According to the complaint, Brandon, who was born in 1997, began exhibiting developmental delays when he was about 15 months old. In 2000, plaintiffs sought genetic testing and counseling from Dr. Wong, a geneticist at Rush, to determine whether Brandon suffered from Angelman Syndrome, a condition that may be, but is not always, caused by an inherited gene mutation. Dr. Wong ordered a genetic sequencing test, which was performed by Baylor on a blood sample drawn by Quest. Dr. Wong later reported to the plaintiffs that Brandon's condition was "clinical" in nature and was not caused by a genetic abnormality.

¶ 7 Nevertheless, before conceiving another child, Amy sought a second opinion from Dr. Burton, a geneticist at Children's Memorial, to determine if Brandon suffered from Angelman Syndrome due to the UBE3A gene mutation. In 2001, without first obtaining the results of the gene sequencing test performed at Baylor or ordering another test, Dr. Burton informed Amy that all known genetic mechanisms that might have caused Angelman

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[1]The parties refer to a "disabled, unemancipated adult child." Because emancipation applies to minors (see 750 ILCS 30/1 *et seq.* (West 2006)), and not to adults, we will use the more precise term "dependent" to refer to an adult who is incapable of self-support due to a mental or physical disability.

[2]Angelman Syndrome is a congenital condition of faulty body development marked by growth deficiency, mental retardation, eye disorders, jerky arm movements, and gait resembling that of a puppet. 1 Attorneys' Dictionary of Medicine A-351 (2005).

Syndrome in Brandon had been ruled out.

¶ 8 The information provided to the plaintiffs by Drs. Wong and Burton, however, was incorrect. Baylor's genetic sequencing analysis of Brandon's DNA indicated that he suffered from Angelman Syndrome due to a truncating mutation of the UBE3A gene. If further testing had been ordered based on this result, it would have revealed whether the mutation was *de novo* or hereditary, that is, whether it was a random occurrence in Brandon's genes or an inherited mutation.

¶ 9 Lacking accurate and complete information and relying on Dr. Burton's conclusion that all known mechanisms for identifying the UBE3A gene mutation linked to Angelman Syndrome ruled out the mutation as the cause of Brandon's condition, the Clarks conceived another child.

¶ 10 In March 2002, Amy gave birth to Timothy. In June 2002, she observed that Timothy exhibited jerky and unpredictable motor movements, among other symptoms similar to Brandon's.

¶ 11 On September 30, 2002, after repeated unsuccessful attempts to obtain the results of the UBE3A sequencing analysis from Dr. Wong, Amy contacted Baylor to request a copy of the report. The Baylor staff member to whom she spoke explained that because testing was performed under contract with the requesting physician, test results were released only to the physician, not to the patient. However, the staff member also mentioned that the results of Brandon's genetic sequencing test were "abnormal."

¶ 12 The report, which was eventually obtained through the efforts of counsel, concluded that Brandon's UBE3A gene was truncated and that further testing was needed to determine if Amy was a carrier of the abnormal gene. Dr. Burton acknowledged that later testing has revealed that Timothy's mutation was inherited from Amy and that had she obtained the test result from Baylor, she would have counseled plaintiffs differently.

¶ 13 Timothy, like his brother Brandon, was diagnosed with Angelman Syndrome.

¶ 14 In September 2003, plaintiffs filed their initial wrongful-birth complaint, which was amended several times. The first amended complaint, filed on September 7, 2004, added Dr. Burton and Children's Memorial as defendants. Plaintiffs later voluntarily dismissed Baylor and reached settlements with Wong, Rush, and Quest.

¶ 15 In 2006, Dr. Burton and Children's Memorial–by then the only remaining defendants–moved for summary judgment on the ground that plaintiffs failed to bring suit against them within the two-year limitations period set forth in section 13-212 of the Code of Civil Procedure (735 ILCS 5/13-212 (West 2006)). The circuit court denied the motion, reasoning, in part, that there was "at least a question of fact" as to when the statute was triggered and the limitations period began to run.

¶ 16 Plaintiffs subsequently filed their third amended complaint in 2008, seeking damages for wrongful birth consisting of the extraordinary costs of caring for Timothy during his minority, the extraordinary costs of caring for him after he reaches the age of majority, and his lost wages. In support of their claim for the extraordinary costs of caring for Timothy during his majority, plaintiffs alleged that Timothy "is and always will be mentally disabled," that Angelman Syndrome is a "permanent genetic disorder with no chance of ever being

cured," and that Timothy has "no chance of leading an independent life as an adult or being emancipated." Plaintiffs further alleged that, as a disabled adult, Timothy "will not be able to care for himself in any way and will require substantial sums of money to sustain his life." As a result, plaintiffs "will continue to care for Timothy *** into his majority and will be legally liable for some or all of these costs because Timothy will never be emancipated."

¶ 17 Plaintiffs also sought damages for the separate tort of negligent infliction of emotional distress.

¶ 18 The circuit court ruled that plaintiffs could recover damages for the extraordinary costs of caring for Timothy during his minority, but could not recover damages for the extraordinary costs of caring for him after he reaches the age of majority. Pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)), the court dismissed those portions of plaintiffs' third amended complaint alleging negligent infliction of emotional distress and those counts seeking damages for Timothy's lost wages and the extraordinary medical expenses of caring for him during his majority. Because the only remaining claim, that seeking damages for the extraordinary expenses of caring for Timothy during his minority, would have been completely offset by the previous settlement with other defendants, plaintiffs voluntarily dismissed this claim. The circuit court dismissed the case with prejudice, stating there was no just reason to delay enforcement or appeal.

¶ 19 The appellate court affirmed in part and reversed in part, and remanded for further proceedings. 391 Ill. App. 3d 321. The court reversed the circuit court's dismissal of the counts seeking postmajority damages and the counts alleging negligent infliction of emotional distress. However, the appellate court affirmed the dismissal of the counts seeking damages for lost wages. According to the court, any recovery for lost wages would be duplicative of the damages for the extraordinary costs of caring for Timothy during his majority. The appellate court also declined to consider defendants' alternative argument that the dismissal of plaintiffs' complaint should be affirmed on statute of limitations grounds.

¶ 20 ANALYSIS

¶ 21 A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)) challenges the legal sufficiency of the complaint by alleging defects on the face of the complaint. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). In ruling on a section 2-615 motion, we accept as true all well-pleaded facts in the complaint and all reasonable inferences therefrom. *Vitro*, 209 Ill. 2d at 81. The critical inquiry is whether the allegations of the complaint, when construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003); *Vitro*, 209 Ill. 2d at 81. We review an order granting a section 2-615 motion to dismiss *de novo*. *Wakulich*, 203 Ill. 2d at 228; *Vitro*, 209 Ill. 2d at 81.

¶ 22 In *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230, 258 (1987), this court recognized that the parents of a child born with a genetic or congenital disorder have a cause of action in tort if, but for the defendant's negligence in testing or counseling as to the risk of giving birth to a child with such a condition, they would have avoided conception or terminated the pregnancy. In *Siemienic*, the remedies sought by the plaintiff parents of a child

born with hemophilia, a bleeding disorder, included the extraordinary medical and other expenses involved in caring for the child during his minority and damages for their emotional anguish and suffering. *Id.* at 253.

¶ 23 This court allowed recovery of damages for "the extraordinary expenses–medical, hospital, institutional, educational and otherwise–which are necessary to properly manage and treat the congenital or genetic disorder," noting that the plaintiff parents were seeking to recover only such expenses as would be incurred prior to the child's reaching the age of majority. *Id.* at 260. This court also held that the parents could not recover damages for their emotional distress as an "element in the calculation of damages" for wrongful birth (*id.* at 261), because they could not state a claim for negligent infliction of emotional distress under the "zone-of-danger rule" (*id.* at 262-63).

¶ 24 Two issues raised by the defendants in this appeal involve the remedies available to successful plaintiffs in a wrongful-birth action. The first question–whether the parents may recover damages for the extraordinary expenses of caring for the disabled child after he reaches the age of majority–was not answered in *Siemieniec* because the parents in that case did not allege their child suffered from a condition that would cause him to be financially dependent as an adult. In the present case, the parents have alleged that their child's condition will make it impossible for him to be self-supporting as an adult. The second question–whether the parents may recover damages for emotional distress caused by the defendants' negligence–was answered in *Siemieniec* in the negative. Defendants also ask this court to review the circuit court's ruling on their motion for summary judgment based on the statute of limitations, which the appellate court did not consider.

¶ 25 A. Damages for Costs of Care Beyond Age of Majority

¶ 26 The circuit court ruled that while the plaintiff parents in a wrongful-birth action may recover damages for the extraordinary costs of caring for their child during his minority, they may not recover damages for such costs after he reaches the age of majority. The appellate court reversed, holding that postmajority expenses are recoverable damages that compensate parents for the "costs they will incur for caring for their disabled child." 391 Ill. App. 3d at 330. In reaching this conclusion, the appellate court noted that in a dissolution proceeding, "support obligations for an unemancipated, disabled child over the age of majority" are determined on a case-by-case basis and thus found no basis for "automatically forclos[ing] damages in a wrongful birth case for the extraordinary costs of caring [for] and supporting an unemancipated, disabled child beyond the age of majority." *Id.* at 329. The concurring justice explained that public policy favors imposing these costs on the tortfeasor, rather than on the parents or the taxpayers, and suggested that if this assumption regarding public policy is incorrect, the error will be corrected through the legal or the political process. *Id.* at 333 (Gallagher, J., specially concurring).

¶ 27 Before this court, defendants argue that because parents have no legal obligation to support a child beyond the age of majority, parents in a wrongful-birth suit may not recover damages for postmajority expenses.

¶ 28 Plaintiffs assert four separate bases for allowing such damages. First, they argue that they

may be held liable for Timothy's postmajority expenses under Illinois common law and, as a result, they may recover damages from the tortfeasor whose negligence resulted in their liability. Second, they argue that Illinois statutory law supports the same result. Third, they rely on decisions from other jurisdictions allowing plaintiff parents in wrongful-birth cases to recover postmajority expenses as an element of damages and urge this court to follow the reasoning of these cases. Fourth, they assert that the public policy of the State of Illinois supports holding the tortfeasor responsible for these foreseeable costs.

¶ 29 We begin our analysis with the fundamental premise of tort law–that of just compensation for any loss or injury proximately caused by the tortfeasor. See *Siemieniec*, 117 Ill. 2d at 259. Damages are recoverable to the extent necessary to place the injured party in the position he would have occupied if the wrong had not been committed. *Genslinger v. New Illinois Athletic Club of Chicago*, 339 Ill. 426, 443 (1930). See also *Wilson v. The Hoffman Group, Inc*., 131 Ill. 2d 308, 321 (1989) (stating that it is well settled under our precedent that "[t]he purpose of compensatory tort damages is to compensate the plaintiff for his injuries, not to punish defendants or bestow a windfall upon plaintiffs"); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 406 (1997) ("[t]here is universal agreement that the compensatory goal of tort law requires that an injured plaintiff be made whole"); Restatement (Second) of Torts § 903, cmt. a, at 453-54 (1979) ("compensatory damages are designed to place [a plaintiff] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed").

¶ 30 Thus, the plaintiffs' ability to recover damages for the extraordinary expenses of caring for their son after he reaches the age of majority depends on whether parents have an obligation under Illinois law to support a disabled, dependent adult child. If they have no such obligation, these expenses are not legal harms suffered by the parents, despite their commitment to care for their son throughout his life and their willingness to assume these costs voluntarily.

¶ 31 The appellate court recognized this requirement, noting that for parents to recover from a tortfeasor for their child's medical expenses, "they must be legally liable for the charges, and the basis for such liability must exist prior to the creation of the charges and not arise due to a voluntary assumption of financial responsibility after the fact." 391 Ill. App. 3d at 328 (citing *Tully v. Cuddy*, 139 Ill. App. 3d 697, 699 (1985)). The question for this court, therefore, is whether Illinois law imposes such an obligation.

¶ 32 1. *Common Law*

¶ 33 The generally accepted common law rule is that parents have no obligation to support their adult children. *People v. Hill*, 163 Ill. 186, 189 (1896) ("The duty of parents to provide for the maintenance of their children is a principle of natural law; but the common law does not, like the civil law, fully enforce this mere moral obligation, but simply goes to the extent of requiring parents to support their offspring until they attain the age of maturity.").

¶ 34 Plaintiffs assert that the common law of Illinois recognizes an exception to this general rule for the support of an adult child who is physically or mentally incapacitated and incapable of supporting himself. We find, however, that the history of our common law

reveals that the generally accepted common law rule is the law of Illinois, with specific, narrow exceptions that have since been codified by statute.

¶ 35 According to plaintiffs, the earliest reported Illinois decision discussing the issue of postmajority support is *Plaster v. Plaster*, 47 Ill. 290 (1868). Twelve years after the wife obtained a divorce on the grounds of desertion, she sought support for the son, who had been three years old at the time of the divorce and for whom the father had not, in the intervening years, provided any financial support. This court said that "[a]fter the boy became able to earn a support, in whole or in part, the father was not bound to maintain him in idleness, but only to contribute and pay for such portion as the child could not earn by reasonable effort." *Id.* at 293. Because the record did not reveal the boy's situation, "it would be proper to ascertain what the boy has been capable of earning for his own support, and if that would have been insufficient, then the remainder which was necessary should be ascertained and allowed." *Id.* Further, "[i]f the boy has attained an age that he is capable of supporting himself," the court would not require the father to contribute to his support. *Id.* at 294. If, however, "from physical debility and impaired health, the boy is unable to earn a livelihood, and must depend upon others for support, who should more naturally contribute to that end than his father?" *Id.*

¶ 36 The issue in *Plaster* was not whether a parent is obliged to support a disabled adult child. The issue was whether the mother, who had originally been awarded custody of the son, but no support, could return to court years later seeking a support order. This court ruled that the child, then in his teens, was entitled to support from his father to the extent that he was unable to support himself. The court noted that if he were incapable of supporting himself, his father should do so. The decision made no mention of what obligation either parent might have had once the child reached the age of majority. *Plaster*, therefore, offers little support for plaintiffs' position.

¶ 37 Plaintiffs also rely on *Freestate v. Freestate*, 244 Ill. App. 166 (1927), in which the appellate court was asked to determine whether a divorced father could be ordered to pay support for a 23-year-old invalid daughter. Although this appellate court decision has no binding authority in the trial court because it was filed before 1935 (see *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 95 (1996)), it is of historical interest. The couple had divorced when the daughter was 13 and custody was given to the mother. No provision for child support was made at that time. *Freestate*, 244 Ill. App. at 167. The mother returned to court 10 years later, seeking support for the now-adult daughter. The appellate court ruled that the trial court had jurisdiction in the matter and had the authority to enter a support order despite the daughter's age. The court cited cases from the court of appeals of Kentucky (*Crain v. Mallone*, 113 S.W. 67 (Ky. 1908)) and the Supreme Court of Vermont (*Rowell v. Town of Vershire*, 19 A. 990 (Vt. 1890)) as a basis for concluding that the "natural, as well as the legal, obligation" is the same whether the child is an infant or an adult child who is "helpless and incapable of making his support." *Freestate*, 244 Ill. App. at 169-70.

¶ 38 *Freestate* was cited in a more recent case, *Strom v. Strom*, 13 Ill. App. 2d 354 (1957). The parents divorced when their daughter was three years old. She was subsequently stricken with polio, although the opinion does not state that she was disabled as a result. Ten years after the divorce, at which time she would have been 15, the mother sought an increase in

child support and reimbursement of various expenditures. *Id.* at 358. She also asked that the father be ordered to pay the reasonable expenses of a college education for the girl. The trial court denied this relief on the basis that it lacked jurisdiction. The appellate court examined cases from Illinois and other states and found nothing in the Divorce Act to specifically preclude an order providing for a child's education beyond the age of majority. *Id.* at 362. In the end, the court concluded that "[w]here such care and education are necessary to equip the child for adult life and where the financial circumstances of the father are entirely adequate to meet such requirements, equity can and should continue its jurisdiction." *Id.* at 364. The court observed that "[o]ne of the fundamental rules is that a court of equity having taken jurisdiction will retain it for all purposes and do complete justice between the parties." *Id.* at 367.

¶ 39 The *Strom* court rejected the reasoning of *Rife v. Rife*, 272 Ill. App. 404 (1933), that "by necessary implication" the Divorce Act did not permit an award of support beyond the child's minority. *Strom*, at 363 (citing *Rife*, 272 Ill. App. at 410). In *Rife*, the father appealed from an order that he continue to pay support for a 20-year-old daughter who had graduated from high school and from a business school but who, because she was "frail," could not secure employment. *Rife*, 272 Ill. App. at 406. Referring to the Divorce Act, the appellate court stated that the "rule is well established and generally recognized that the only authority a court of chancery has to provide for the care and support of children is the power granted under the terms of this statute, and that its power is limited by implication to the custody, support and care of minor children." *Id.* at 408. Further, the rule "is also well recognized that in the absence of a proceeding for divorce, a court of equity has no jurisdiction either as to the custody or support of children." *Id.* Thus, the court reversed that portion of the judgment awarding support for the adult daughter. *Id.* at 413.

¶ 40 In *Freestate* and in *Strom*, the appellate court allowed the trial court to exercise its equitable power to order a noncustodial father to contribute to the support of his adult child either because he was disabled or because she desired a college education. These cases do not stand for the general proposition that all parents, married or divorced, have an obligation to support an adult disabled child or to pay for a child's college education. They suggest, at most, that once parents submit to the jurisdiction of the court by obtaining a divorce, the court has discretion to order postmajority support in limited circumstances. Even this narrow principle, however, was not universally accepted, as demonstrated by the decision in *Rife*. In any event, subsequent legislative enactments have rendered these cases of little value in answering the question at bar.

¶ 41 We conclude that the common law as developed in cases through the late 1950s was in conflict regarding the obligation of parents to support a disabled adult child and that cases in which such support was awarded were limited to those in which a custodial parent sought support from a noncustodial parent following a divorce. In the middle of the last century, the issue became more and more one of statutory law.

¶ 42 2. *Statutory Law*

¶ 43 A statutory exception to the generally accepted common law rule was made by the

Paupers Act of 1874, which provided that parents had the legal duty to support a child who was a "poor person *** unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause." Ill. Rev. Stat. 1874, ch. 107, § 1.

¶ 44 This statute was repealed in 1949, coincident with enactment of the Illinois Public Aid Code, which initially imposed a duty of support of adult children "in need and unable to earn a livelihood in consequence of any unavoidable cause." 1949 Ill. Laws 418, § 4-2. See Ill. Rev. Stat. 1955, ch. 23, ¶ 436-12; Ill. Rev. Stat. 1965, ch. 23, ¶ 112 (providing that "parents are severally liable for the support of any child *** 18 years of age or over whenever such child is unable to maintain himself and is, or is likely to become, a public charge").

¶ 45 This parental duty was substantially narrowed in 1967, when the Public Aid Code was amended to provide that parents were obligated to support an adult child over the age of 21 only if that child was blind or permanently disabled and two conditions were met. The child must have been "continuously dependent, in whole or in part, upon one or both of his parents" and he must have "continuously resided in the home of a parent" except for certain exempted temporary absences. 1967 Ill. Laws 2328, § 1.

¶ 46 Subsequent amendment of the Public Aid Code in 1969 eliminated any duty of parental support of nonminor children, even those who are disabled. Ill. Rev. Stat. 1969, ch. 23, ¶ 10-2.

¶ 47 The Public Aid Code presently provides that "parents are severally liable for the support of any child under age 18, and for any child aged 18 who is attending high school, until that child graduates from high school, or attains the age of 19, whichever is earlier." 305 ILCS 5/10-2 (West 2006).

¶ 48 Thus, although the legislature for a time imposed a parental support obligation to support dependent adult children, it abandoned that policy decades ago.

¶ 49 Other statutes are consistent with the generally accepted common law rule of no parental duty of support. Under the Mental Health and Developmental Disabilities Code, "responsible relatives" of a recipient of services from the Department of Mental Health "shall be liable for medical costs," excluding "service charges incurred by a child after the child reaches the age of majority." 405 ILCS 5/5-105, 5-115 (West 2006).

¶ 50 The Family Expense Act is a codification and expansion of common law doctrine of necessaries, under which a wife or minor child could obtain necessary goods or services on credit and the husband or father was liable, based on his duty to support his family. See, *e.g.*, *Hunt v. Thompson*, 4 Ill. 179, 180 (1840) ("[A] parent is under an obligation to provide for the maintenance of his infant children, is a principle of natural law; and it is upon this natural obligation alone that the duty of a parent to provide his infant children with the necessaries of life rests."); *Phillips v. Dodds*, 371 Ill. App. 3d 549, 551-52 (2007) (explaining that the Family Expense Act defines "family expenses" more broadly than mere "necessaries"). Under this statute, "[t]he expenses of the family *** shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." 750 ILCS 65/15(a)(1) (West 2006).

¶ 51 Judicial decisions interpreting this statute have consistently interpreted it as imposing an obligation on parents only until their child attains his majority. See, *e.g.*, *Proctor Hospital*

v. Taylor, 279 Ill. App. 3d 624, 628 (1996) ("[O]nce a child reaches the age of majority, the parents' responsibility to support the child ceases, and the parents may no longer be held liable for these expenses under the Expense Statute."); *Pfeil v. Weerde*, 152 Ill. App. 3d 759, 761 (1987) (holding that mother may not recover damages for her voluntary payment of medical expenses of 19-year-old daughter who lived at home; stating that "it is manifest that a parent is not liable under the [family expense] statute for expenses an adult child incurs"). See also *Sapp v. Johnston*, 15 Ill. App. 3d 119, 123-24 (1973) (father not liable for medical expenses of adult son under Public Aid Code, family expense statute, or the common law).

¶ 52 We note that we have found no reported cases construing the Family Expense Act that involve an adult child who was incapable of self-support due to a disability. However, nothing in the language of the statute suggests that it should be interpreted differently if the adult child were not capable of self-support. Excluding disabled adult children from the scope of the Family Expense Act is also consistent with the Public Aid Code and other statutory enactments.

¶ 53 Plaintiffs point to only one statute under which the parents of a disabled adult child may be required to contribute to his support–section 513 of the Illinois Marriage and Dissolution of Marriage Act, which is entitled "Support for Non-minor Children and Educational Expenses." 750 ILCS 5/513 (West 2006). Section 513(a)(1) of this statute provided the basis for the appellate court's conclusion:

> "(a) The court may award sums of money out of the property and income of either or both parties or the estate of a deceased parent, as equity may require, for the support of the child or children of the parties who have attained majority in the following instances:
>
> (1) When the child is mentally or physically disabled and not otherwise emancipated, an application for support may be made before or after the child has attained majority." 750 ILCS 5/513(a)(1) (West 2006).

¶ 54 The appellate court concluded in the present case that this statutory language "reflects the legislative intent that the trial court consider the unique challenges and needs of mentally and physically disabled children on a case-by-case basis in determining whether to award moneys for the support thereof into their majority." 391 Ill. App. 3d at 329. The court saw "no cause why a different set of rules should apply here, in a nondissolution proceeding." *Id.*

¶ 55 We do see a reason to apply a specific statutory rule in the context of a dissolution and a general common law rule in the context of determining damages for a common law tort. An examination of the history of section 513 is in order.

¶ 56 In 1967, the General Assembly amended what was then called the Divorce Act, adding the following language:

> "The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, education, custody and support of the children, as shall appear reasonable and proper and the court has jurisdiction after such children have attained majority age to order payments for their support for educational purposes *only*." (Emphasis added.) 1967 Ill. Laws 3446, approved August 31, 1967 (codified at Ill. Rev. Stat. ch. 40, ¶ 19).

¶ 57 By expressly limiting the circumstances under which a court may order support after a child of divorced parents has "attained majority age," this statute abrogated any existing equitable doctrine that allowed courts to order support for adult children for any purpose other than education. Thus, *Freestate* and *Strom* were legislatively overruled. To the extent that *Plaster* provided any authority for imposing a postmajority support obligation, it was also rendered obsolete.

¶ 58 Then, in 1977, the General Assembly enacted the Illinois Marriage and Dissolution of Marriage Act. Section 513(a)(1), which was quoted by the appellate court's opinion, was added. Section 513(a)(2), which the appellate court did not reference, provides, in pertinent part:

> "(2) The court may also make provision for the educational expenses of the child or children of the parties, whether of minor or majority age, and an application for educational expenses may be made before or after the child has attained majority, or after the death of either parent. The authority under this Section to make provision for educational expenses extends not only to periods of college education or professional or other training after graduation from high school, but also to any period during which the child of the parties is still attending high school, even though he or she attained the age of 19." 750 ILCS 5/513(a)(2) (West 2006).

Further:

> "(b) In making awards under paragraph (1) or (2) of subsection (a), or pursuant to a petition or motion to decrease, modify, or terminate any such award, the court shall consider all relevant factors that appear reasonable and necessary, including:
>
> (1) The financial resources of both parents.
>
> (2) The standard of living the child would have enjoyed had the marriage not been dissolved.
>
> (3) The financial resources of the child.
>
> (4) The child's academic performance." 750 ILCS 5/513(b) (West 2006).

¶ 59 By enacting these provisions, the legislature expressly adopted two exceptions to the general rule of no parental obligation for the support of adult children. This statute, in effect, reinstates the equitable power of the court to do what was done in *Freestate* and *Strom*. See, *e.g.*, *In re Marriage of Raski*, 64 Ill. App. 3d 629, 632 (1978) (noting common law rule that parents' liability for child support terminates at the child's majority, with "certain statutory exceptions" found in the recently enacted Marriage and Dissolution of Marriage Act).

¶ 60 We conclude for several reasons that the history of section 513, viewed in light of the other legislative enactments discussed above, reveals that Illinois law does not impose an obligation on married parents to support a disabled child beyond the age of majority.

¶ 61 First, in light of the contrary provisions of the Public Aid Code, the Family Expense Act, and other statutes, section 513 standing alone does not reveal an overarching legislative policy to abrogate in other contexts the long-standing common law rule of no parental obligation to support an adult child. Rather, by adopting the two exceptions set out in section 513 in 1977, the legislature demonstrated its ability and intent to carve out exceptions to the

general rule when it desires to do so. It could impose a support obligation on the parents of disabled adult children in other contexts such as the Public Aid Code, the Family Expense Act, or the Mental Health and Developmental Disabilities Code, but has not chosen to do so.

¶ 62 Second, the clear intent of sections 513(a)(1) and (a)(2) is to provide the child of divorced parents who is unable to support himself due to a disability or who seeks higher education with the standard of living he would have enjoyed had his family remained intact. See *In re Marriage of Kuhn*, 221 Ill. App. 3d 1, 3-4 (1991) (stating that the purpose of section 513 "is to protect the interests of children whose parents have decided to dissolve their marriages"). Thus, in an intact family, the parents are free to decide, for their own reasons, whether they are willing or able to support an adult child, whatever his circumstances. See *id.*

¶ 63 Plaintiffs' brief notes that they are presently separated and could, at some future date, divorce, and one of them might seek support for Brandon and Timothy from the other under section 513(a)(1). This would be an application of the statute in the manner the legislature intended–to preserve, as much as possible, the benefits of an intact family for the children of divorce. However, if plaintiffs were to recover damages for Timothy's postmajority support and then divorce, these funds would be marital property, subject to division. Their expressed intent to place any such funds in a trust for Timothy is admirable, but is not something the court could order them to do.

¶ 64 Third, section 513 invokes the court's equitable powers. The child of divorced parents who seeks postmajority support due to a disability or to attend college is not entitled to receive such support. The court may, at its discretion and in the exercise of its equitable powers, impose a support obligation on either or both parents when such an obligation would not otherwise exist. In contrast, the issue in the present case is not whether, as a matter of equity, the court has the discretion to award damages to these parents for their child's postmajority expenses. This is an action in tort where the plaintiff parents must prove that they are entitled–as a matter of law–to the damages sought because they represent a cost for which they are legally responsible.

¶ 65 Finally, placing such significance on section 513 and ignoring the other statutes that limit parental responsibility to the support of minor children would lead to unintended results. For example, if this court were to hold in the present case that the plaintiff parents in a wrongful-birth action have a legal obligation to support their child after the age of majority, will that child have a claim on his parents' estate to the disadvantage of nondisabled siblings? And if the defendant is unable to pay the judgment and files for bankruptcy, will the parents be liable for the child's lifetime support? What if the damages awarded to the parents prove to be insufficient and are consumed by the time the child reaches the age of majority? Are his parents legally responsible for his future support? Or will parents who have a potential wrongful-birth claim against a negligent health care provider forgo bringing suit so that they may avoid having this new obligation thrust upon them?

¶ 66 We cannot foresee all of the potential effects that may flow from a decision by this court that section 513 creates a parental obligation of lifetime support of disabled children, even if the parents remain married to each other. Any effort on our part to limit application of such

a holding to those families in which the parents have obtained a judgment in a wrongful-birth action would be doomed to failure.

¶ 67 If the legislature prefers a different result that would place the burden of support on the tortfeasor rather than on the parents or the taxpayers, it could do so. Absent such legislative guidance, however, we conclude that under the common law and statutes of Illinois, parents are not obligated to support a child after he reaches the age of majority, even if he is unable to support himself, unless ordered to do so pursuant to section 513 of the Marriage and Dissolution of Marriage Act.

¶ 68 3. *Case Law From Other States*

¶ 69 Defendants cite numerous cases from other states and argue that the "weight of authority" favors deciding this issue on the basis of whether state law imposes a general legal obligation of postmajority support on parents of disabled adult children. Because Illinois law does not impose such a legal obligation, defendants argue that we should follow the reasoning of these cases and conclude that postmajority damages may not be recovered in this case.

¶ 70 Plaintiffs also offer several decisions in wrongful-birth cases from our sister states and urge us to adopt a judge-made exception to the general rule of no duty of postmajority support in the context of a wrongful-birth claim.

¶ 71 We see no need to summarize here all of the cited case law from other states because our decision in *Siemieniec* provides the necessary framework. As plaintiffs note, we cited several cases from other states, noting that these states allow plaintiff parents in wrongful-birth actions to recover "the extraordinary costs incurred as a result of the child's affliction *after* the child has reached the age of majority" because "[t]hese courts reason that, under the common law, where a child is incapable of supporting himself because of physical or emotional disabilities, the parents' obligation to support continues beyond the child's age of majority." (Emphasis in original.) *Siemieniec*, 117 Ill. 2d at 260. By implication, we were suggesting that when the common law imposes a support obligation on parents, damages for postmajority support are recoverable in a wrongful-birth action. Conversely, where the common law does not impose such an obligation, such damages may not be recovered.

¶ 72 This is consistent with defendants' argument that, in general, in states that "impose a statutory or common law obligation on parents to care for dependent adult children, wrongful birth plaintiffs may recover postmajority expenses as damages." See, *e.g.*, *Viccaro v. Milunsky*, 551 N.E.2d 8, 11 (Mass. 1990) (parents are liable under state law for "the support of an adult child if the child is physically or mentally impaired and incapable of supporting himself"). However, in states where state law establishes that a parent has no postmajority duty of support, even to a disabled child, wrongful-birth plaintiffs cannot recover such damages. See, *e.g.*, *Bani-Esraili v. Lerman*, 505 N.E.2d 947, 948 (N.Y. 1987) (denying damages for postmajority expenses in wrongful-birth case on basis that state statutes establish that "a parent has no legal obligation to continue the support of a child after majority").

¶ 73 The case law from other states supports the framework we suggested in *Siemieniec*. If the common law and statutory law of this state make a plaintiff legally responsible for payment

of certain expenses, the tortfeasor who caused the harm is liable for those expenses. If the common law and statutory law of this state do not impose such an obligation on a plaintiff, the tortfeasor cannot be held liable for expenses that the plaintiff elects, but is not legally obligated, to incur.

¶ 74 Because the common law and statutes of the State of Illinois do not require the plaintiff parents to support their child after he reaches the age of majority, they may not recover his extraordinary postmajority expenses as an element of their damages. However, they argue that public policy justifies a departure from the general rule.

¶ 75 4. *Public Policy*

¶ 76 Defendants argue that the public policy of this state is clear that outside the context of divorce, where postmajority support is limited to two contexts and is in the discretion of the court, parents are under no legal obligation to support an adult child. Thus, they assert, because the plaintiff parents in a wrongful-birth action are not legally obligated to support a child who will be unable to support himself as an adult, the tortfeasor whose negligence caused them to decide to conceive the child or to continue the pregnancy cannot be said to have caused the parents to bear this expense. Defendants also argue that imposing these costs on providers of genetic and prenatal testing and counseling services would discourage the development and provision of genetic services and would create an anomaly in Illinois tort law where parents may recover damages in a wrongful-birth action that are not available to the child in a wrongful-life claim.

¶ 77 Plaintiffs argue that the public policy of the state is expressed in the Illinois Constitution of 1970 and in the "central purpose" of tort law to hold a tortfeasor responsible for foreseeable results of his negligence.

¶ 78 The appellate court did not base its holding on public policy. However, the concurring justice wrote *in toto*:

> "I write to concur with the majority and to make one succinct point: We believe very simply that it is the public policy of this State to allow parents of a permanently disabled child to allege and prove damages for the costs of caring for the child after reaching majority. The parents have a right to allege and seek to prove an action against tortfeasors, rather than have to assume personally the costs of providing for the child's lifelong needs. Moreover, we believe it is preferable for the alleged tortfeasors to pay these costs, if found liable, than for the taxpayers to be required to assist in paying them.
>
> In short, if there is a tortfeasor, that person should bear the burden he, she or it caused rather than the parents or society. If we are incorrect about our assumption regarding the State's public policy, it will be remedied through the legal or political process. Before that occurs, we think the approach we have chosen is a rational one." 391 Ill. App. 3d at 333 (Gallagher, J., specially concurring).

¶ 79 This brief statement does not offer any authority in support of the author's opinion about what is or should be the public policy of the State of Illinois. However, this court has noted on more than one occasion that when we determine that our answer to a question of law must

be based, in whole or in part, on public policy, it is not our role to make such policy. Rather, we "discern the public policy of the state of Illinois as expressed in the constitution, statutes, and long-standing case law." *In re Estate of Feinberg*, 235 Ill. 2d 256, 265 (2009) (citing *O'Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill. 2d 333, 341 (1989)).

¶ 80 Article I, section 12, of the state constitution, known as the "open courts provision" or the "certain remedies clause," provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Ill. Const. 1970, art. I, § 12.

¶ 81 Prior to the adoption of the new constitution in 1970, the open courts provision read: "Every person *ought to* find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay." (Emphasis added.) Ill. Const. 1870, art. II, § 19.

¶ 82 Despite the change in wording from "ought to" to "shall," this court has held that this provision is merely an expression of philosophy and does not mandate that a certain remedy be provided in any specific form. *Segers v. Industrial Comm'n*, 191 Ill. 2d 421, 435 (2000). The provision requires only that there be some remedy for an alleged wrong. *Berlin v. Nathan*, 64 Ill. App. 3d 940, 950 (1978) (stating that section 12 of the new constitution "like its predecessor," article II, section 19, of the 1870 constitution, "is an expression of a philosophy and not a mandate that a 'certain remedy' be provided in any specific form" (internal quotation marks omitted) and that "[s]o long as some remedy for the alleged wrong exists, section 12 does not mandate recognition of any new remedy").

¶ 83 Plaintiffs have a remedy for the alleged wrong done to them by defendants–an action for wrongful birth, recognized as a matter of common law by this court in *Siemieniec*. The open courts provision of our state constitution requires no more than this. The types of damages available in such an action are determined by the basic premise of tort law, which we also discussed in *Siemieniec*:

> "The general rule of damages in a tort action is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or should not have been foreseen by him, provided the particular damages are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as might reasonably have been anticipated. Remote, contingent, or speculative damages do not fall within this general rule. (See D. Dobbs, Remedies sec. 3.1 (1973); C. McCormick, Damages sec. 137 (1935).)" *Siemieniec*, 117 Ill. 2d at 259.

¶ 84 Thus, the plaintiff parents in that case were entitled to recover the damages that flowed from the defendants' breach of duty, "that is, only the extraordinary expenses that are attendant to the care and treatment of the afflicted child," and not "the expenses associated with the raising of a normal, healthy child." *Id.*

¶ 85 In effect, we were articulating the fundamental premise of tort law, which is part of the long-standing public policy of this state, that a tortfeasor is to be held liable for the harm that he causes, no more and no less. Because the plaintiff parents intended to conceive and bear a child and did so, it could not be said that the costs of child-rearing in general were caused

by the defendant's negligence. Thus, we limited the parents' recovery to "the extraordinary expenses" they would incur raising a child with hemophilia. *Id.* at 260.

¶ 86 In the present case, the defendants have not caused the parents to be responsible for supporting Timothy after he reaches the age of majority. This is a burden that the parents intend to accept voluntarily. Their willingness to do so cannot overcome the fundamental premise that the defendant has not caused them to bear this burden.

¶ 87 In addition, if we were to hold wrongful-birth defendants liable to parents for the child's postmajority expenses, we would obscure the distinction we made in *Siemieniec* between wrongful birth and wrongful life, a distinction that the legislature has not seen fit to alter.

¶ 88 A child who is born with a genetic or congenital condition does not have a cause of action in this state against a health care provider whose breach of the standard of care "precluded an informed parental decision to avoid his conception or birth." *Id.* at 236. His life, while burdened by his condition, is "as a matter of law, always preferable to nonlife." *Id.* at 239-40. We therefore rejected the premise that the child has "the right to prove, if he can, what his unusual condition will cost when he reaches majority." *Id.* at 241.

¶ 89 In the ordinary medical negligence case alleging a prenatal or neonatal injury, the child's claim is that but for the defendant's negligence, he would have been born healthy. See *Id*. For example, in *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895 (2007), the defendant hospital was found liable to the infant and his parents for failing to diagnose and treat the newborn's hypoglycemia. The appellate court stated that because parents are responsible for the medical expenses of their minor children, the common law "gives parents a cause of action against a tortfeasor who, by injuring their child, caused them to incur the medical expenses." *Id.* at 922. In this case, however, the parents' recovery was reduced by 30% based on their contributory negligence.

¶ 90 In *Bauer*, it was undisputed that because of the effects of the missed diagnosis and delayed treatment, the child would never be self-supporting. *Id.* at 903-04. In an effort to reduce the amount of damages for postmajority expenses by the amount of the parents' contributory negligence, the hospital argued on appeal that the parents would be obligated to support him even after the age of majority and that, therefore, the damages for his future caretaking and medical expenses belonged to the parents, not to the child. *Id.* at 922-23. The appellate court disagreed, stating that the defendants "are responsible for the costs of [the child's] postmajority caretaking and medical expenses, which were caused by their negligence." *Id.* at 923. Thus, these damages belonged to the child and were recoverable in his cause of action and the damages awarded to him could not be reduced by his parents' contributory negligence. *Id.*

¶ 91 The distinction between claims for wrongful life, medical negligence causing injury to a child, and wrongful birth illustrates the public policy of this state with regard to damages in tort. The injured plaintiff is to be made whole and the defendant is to be held responsible for all harm proximately caused by his negligence.

¶ 92 In the wrongful-life context, there is no cause of action because the child, while burdened, cannot be said to have suffered a legal wrong. *Siemieniec*, 117 Ill. 2d at 246. In the medical negligence context, costs incurred during the injured child's minority are damages

to the parents while costs incurred after the age of majority are damages to the child himself. *Bauer*, 377 Ill. App. 3d at 923. In the wrongful-birth context, the nature of the harm is not that the defendant caused the child's condition, but that the defendant deprived the parents of the opportunity to make an informed decision. The defendant is liable for all harms proximately caused to the plaintiff parents, which does not include any expenditures they voluntarily make for the support of their child as an adult.

¶ 93 We conclude that based on our constitution, statutes, and common law, the public policy of the State of Illinois favors preserving this distinction.

¶ 94 We turn to the question of damages for emotional distress.

¶ 95 B. Damages for Emotional Distress

¶ 96 Defendants next argue that the appellate court erred in holding that plaintiffs stated a cognizable claim for negligent infliction of emotional distress. According to defendants, the appellate court's decision runs counter to *Siemieniec*, which rejected the plaintiffs' claim for emotional distress damages.

¶ 97 This court in *Siemieniec*, in assessing the plaintiffs' emotional distress claim, applied the zone-of-danger rule articulated in *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983). Prior to *Rickey*, recovery for negligently inflicted emotional distress was denied unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff. *Rickey*, 98 Ill. 2d at 550. *Rickey* replaced this "impact rule" with the zone-of-danger rule.

> "Basically, under [the zone-of-danger rule] a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander [in addition] must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." *Rickey*, 98 Ill. 2d at 555.

¶ 98 *Siemieniec* applied this rule and concluded the plaintiffs could not satisfy it because there were "no allegations in the complaint from which it can be said that the defendants' alleged negligence in any way endangered the parents of the impaired child." *Siemieniec*, 117 Ill. 2d at 261.

¶ 99 Plaintiffs argue that their claim for negligent infliction of emotional distress should not have been dismissed because they adequately pleaded facts that, if taken as true, meet the zone-of-danger test. Specifically, they claim that they are physically endangered when caring for Timothy. He is unable to control his upper body and as a result will strike and "head butt" his mother. Older individuals with Angelman Syndrome often exhibit violent behavior that can cause injury to themselves or others. Thus, as Timothy becomes larger and stronger, instances of physical injury to his parents are likely to become more serious. His parents assert that as a result of being in this zone of danger as they care for their disabled son and for other reasons, they suffer severe emotional distress and that their distress is a foreseeable

consequence of defendants' negligence.

¶ 100 In the alternative, plaintiffs urge us to either (1) determine that because they are the "direct victims" of the tort of wrongful birth, they are not bystanders and should not be held to the zone-of-danger rule when they claim damages for their emotional distress or (2) overrule this portion of *Siemieniec* by recognizing an exception to the zone-of-danger rule when wrongful-birth plaintiffs also plead negligent infliction of emotional distress.

¶ 101 Defendants, in their reply brief, ask that the portion of the plaintiffs' brief arguing that they are "direct victims" of the tort of wrongful birth be stricken because they did not make this argument in the appellate court. We conclude that because they properly preserved the issue of their ability to recover damages for emotional distress in the appellate court, they may offer an alternative argument in support of that issue as appellees in this court. For reasons that follow, we agree with plaintiffs that they have stated a claim for emotional distress damages as direct victims of the tort of wrongful birth.

¶ 102 Plaintiffs' second alternative argument implicates *stare decisis* principles. The doctrine of *stare decisis* expresses the policy of the courts to stand by precedents and not to disturb settled points. *People v. Colon*, 225 Ill. 2d 125, 145 (2007); *Vitro*, 209 Ill. 2d at 81; *Wakulich*, 203 Ill. 2d at 230. In other words, a question once deliberately examined and decided should be considered as settled and closed to further argument, so that the law will not change erratically, but will develop in a principled, intelligible fashion. *Colon*, 225 Ill. 2d at 146.

¶ 103 *Stare decisis*, however, is not an inexorable command. *Vitro*, 209 Ill. 2d at 82; *Colon*, 225 Ill. 2d at 146. "While adherence to the doctrine of *stare decisis* is important to the stability of the law, *** when doubts are raised in the minds of the court as to the correctness of its decision, it is its duty to re-examine the question involved in the case." *Doggett v. North American Life Insurance Co. of Chicago*, 396 Ill. 354, 360-61 (1947). If it is clear the court has made a mistake, it will not decline to correct it, even if the mistake has been reasserted and acquiesced in for many years. *Colon*, 225 Ill. 2d at 146. Nevertheless, this court will not depart from precedent merely because it might have decided otherwise if the question were a new one. *Vitro*, 209 Ill. 2d at 82; *Colon*, 225 Ill. 2d at 146. Moreover, any departure from *stare decisis* must be specially justified, and prior decisions should not be overruled absent good cause or compelling reasons. *Vitro*, 209 Ill. 2d at 82; *Colon*, 225 Ill. 2d at 146. In general, a settled rule of law that does not contravene a statute or constitutional principle should be followed unless doing so is likely to result in serious detriment prejudicial to public interests. *Colon*, 225 Ill. 2d at 146; *Vitro*, 209 Ill. 2d at 82. Good cause to depart from *stare decisis* also exists when governing decisions are unworkable or badly reasoned. *People v. Sharpe*, 216 Ill. 2d 481, 520 (2005); *Colon*, 225 Ill. 2d at 146.

¶ 104 With these principles in mind, we address plaintiffs' contention that *Siemieniec*'s application of the zone-of-danger rule in a wrongful-birth case is error.

¶ 105 As previously noted, the zone-of-danger rule was designed for a different type of case, where the plaintiff's theory of liability is the negligent infliction of emotional distress. *Rickey*, the source of this rule, exemplifies such a case. The plaintiff, Robert, who was eight years old, was on a descending escalator with his five-year-old brother, Richard, when

Richard's clothing became entangled in the mechanism, choking him. Richard could not breathe for "a substantial period of time." *Rickey*, 98 Ill. 2d at 549. Robert, who apparently suffered no impact or injury, alleged emotional distress as a result of witnessing the accident that severely injured his brother.

¶ 106 In such cases, where the claim of emotional distress is freestanding and not anchored to any other tort against the plaintiff, courts have applied special restrictions such as the zone-of-danger rule because of concerns regarding the possibility of fraudulent claims or frivolous litigation. See *Rickey*, 98 Ill. 2d at 555.

¶ 107 However, these special restrictions have no logical bearing on a wrongful-birth claim, where a tort has already been committed against the parents. Wrongful-birth plaintiffs do not assert a freestanding emotional distress claim, but merely assert emotional distress as an element of damages for a personal tort. "For these reasons, the physical manifestation and zone-of-danger rules offer no occasion to reject mental distress damages in wrongful birth cases any more than they would do so in the case of libel or invasion of privacy." 2 Dan B. Dobbs, Law of Remedies § 8.2, at 414 (2d ed. 1993).

¶ 108 In *Siemieniec*, the plaintiffs clearly saw their emotional harm claim in this light. They sought damages for emotional distress as "a natural and foreseeable consequence of the injury they sustained," a consequence which "should be included as an essential element in the calculation of damages." *Siemieniec*, 117 Ill. 2d at 260-61.

¶ 109 However, in addressing this claim, this court apparently viewed it as a separate theory of tort liability–a freestanding claim of negligent infliction of emotional distress– rather than as an element of damages flowing from the wrongful-birth tort itself. A possible explanation for this may lie in the questions certified by the circuit court, which appeared to treat the parents' claim for emotional distress as a separate tort. However, whatever the source of the misunderstanding, this was error.

¶ 110 Our error and similar errors by the courts of other states have drawn sharp criticism. See 2 Dan B. Dobbs, Law of Remedies § 8.2, at 414 n.21 (2d ed. 1993) (citing *Siemieniec* and other wrongful-birth cases that have denied emotional distress damages altogether, adding that "[i]n some authorities the distinction between emotional distress as *damages* and emotional distress as a freestanding *tort* seems to have been overlooked" (emphasis in original)).

¶ 111 The nature of the error is evident when one considers that damages for emotional distress are available to prevailing plaintiffs in cases involving other personal torts such as defamation (see, *e.g.*, *Slovinski v. Elliott*, 237 Ill. 2d 51 (2010)); conversion (see, *e.g.*, *Cruthis v. Firstar Bank, N.A.*, 354 Ill. App. 3d 1122 (2004)); and misappropriation of identity (see, *e.g.*, *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815 (2003)). See also 2 Dan B. Dobbs, Law of Remedies § 8.2, at 413-14 (2d ed. 1993) ("When it comes to mental or emotional distress, the usual rule allows free recovery of emotional distress damages to any victim of a personal tort.").

¶ 112 Thus, in the wrongful-birth context, the Florida Supreme Court rejected application of the state's "impact doctrine," a hybrid of the impact and zone-of-danger approaches, to wrongful-birth cases. "[W]e are not certain that the impact doctrine ever was intended to be

applied to a tort such as wrongful birth." *Kush v. Lloyd*, 616 So. 2d 415, 422 (Fla. 1992). The court noted that such an approach should not be applied "where emotional damages are an additional 'parasitic' consequence of conduct that itself is a freestanding tort apart from any emotional injury." *Kush*, 616 So. 2d at 422. The court added that the impact doctrine "also generally is inapplicable to recognized torts in which damages often are predominately [*sic*] emotional, such as defamation or invasion of privacy." *Kush*, 616 So. 2d at 422. The court stated:

> "There can be little doubt that emotional injury is more likely to occur when negligent medical advice leads parents to give birth to a severely impaired child than if someone wrongfully calls them liars, accuses them of unchastity, or subjects them to any other similar defamation. A defamation may have little effect, may not be believed, might be ignored, or could be reversed by trial publicity. But the fact of a child's serious congenital deformity may have a profound effect, cannot be ignored, and at least in this case is irreversible. Indeed, these parents went to considerable lengths to avoid the precise injury they now have suffered. We conclude that public policy requires that the impact doctrine not be applied within the context of wrongful birth claims." *Kush*, 616 So. 2d at 422-23.

See also *Greco v. United States*, 893 P.2d 345, 351 n.10 (Nev. 1995) (the plaintiff "seeks to recover for a *direct* and personal injury, not because of mental distress occasioned by an injury to [her child]" (emphasis in original)); *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982) (concluding plaintiffs' emotional distress was "direct result of wrongful conduct"; "it would be wholly unrealistic to say that the [plaintiffs] were mere witnesses to the consequences of the tortious conduct involved in this case") (cited with approval in *Rich v. Foye*, 976 A.2d 819, 828 (Conn. Super. Ct. 2007)); *Keel v. Banach*, 624 So. 2d 1022, 1030 (Ala. 1993) (jury could conclude that defendants, in failing to inform mother of possibility of giving birth to child with severe congenital abnormalities, "directly deprived her and, derivatively, her husband, of the option to accept or reject a parental relationship with the child and thus caused them to experience mental and emotional anguish upon their realization that they had given birth to a child afflicted with severe multiple congenital abnormalities").

¶ 113 In light of these considerations, we conclude that we erred in *Siemieniec* in applying the zone-of-danger rule to wrongful-birth plaintiffs' claims for emotional distress. We overrule *Siemieniec* on this point, and specifically hold that the zone-of-danger rule applies only in cases where the plaintiff's theory of liability is the negligent infliction of emotional distress. It does not apply where, as in a wrongful-birth case, a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort. ↩ memo p. 6, 10

¶ 114 We note that plaintiffs, in drafting their complaint, fashioned their pleadings to meet the zone-of-danger test. Because we now reject that test, plaintiffs should be allowed, on remand to the circuit court, to amend their pleadings accordingly.

¶ 115 C. Statute of Limitations

¶ 116 Defendants maintain that the circuit court's order of dismissal can be affirmed on other

grounds and, thus, that remand for consideration of plaintiffs' claim for emotional distress damages is not necessary. Specifically, they argue the appellate court erred in declining to consider their statute of limitations defense as an alternate ground for affirming the circuit court's judgment.

¶ 117 As previously noted, in 2006, while plaintiffs' first amended complaint was pending, defendants moved for summary judgment on the ground that plaintiffs failed to bring suit against them within the two-year limitations period set forth in section 13-212 of the Code of Civil Procedure (735 ILCS 5/13-212 (West 2006)). The circuit court denied the motion, reasoning, in part, that there was "at least a question of fact" as to when the statute was triggered and the limitations period began to run. Subsequently, in 2008, the circuit court entered the order at issue in this case, dismissing plaintiffs' third amended complaint with prejudice pursuant to section 2-615 of the Code. Defendants raised the statute of limitations issue in the appellate court, but the question was not addressed in the appellate court's opinion. Defendants included the issue as one of the "points relied upon in seeking review" in their petition for leave to appeal.

¶ 118 Plaintiffs argue initially that defendants' statute of limitations defense is not properly before this court. Plaintiffs note that defendants raised this defense in the circuit court on a motion for summary judgment, which was denied. Plaintiffs cite the general rule that the denial of a motion for summary judgment is not a final order and is therefore not appealable. According to plaintiffs, the only issue on appeal is the circuit court's dismissal of their complaint under section 2-615.

¶ 119 Ordinarily, the denial of summary judgment is not appealable, because such an order is interlocutory in nature. However, we have recognized an exception to this rule in certain circumstances, as when the parties have filed cross-motions for summary judgment and one party's motion is granted and the other party's denied. Because the order disposes of all issues in the case, review of the denial of summary judgment may be had. *In re Estate of Funk*, 221 Ill. 2d 30, 85 (2006). Our appellate court has similarly concluded that the propriety of the denial may be considered if the case is properly before a reviewing court from a final judgment and no trial or hearing has been conducted. *DePluzer v. Village of Winnetka*, 265 Ill. App. 3d 1061, 1064 (1994); *La Salle National Bank v. Malik*, 302 Ill. App. 3d 236, 247 (1999).

¶ 120 Here, the circuit court's order dismissing plaintiffs' third amended complaint with prejudice was final and appealable. Because the circuit court's order disposed of all issues in the case, and because defendants have properly preserved the issue at each stage of this litigation, we reject plaintiffs' argument that defendants' statute of limitations defense is not properly before us and, in the interest of judicial economy, we review the issue. For the reasons that follow, we hold that the circuit court correctly found that there existed a question of material fact that precluded entry of summary judgment.

¶ 121 Section 13-212 provides, in pertinent part, that any tort action arising out of patient care against a physician or hospital must be brought within "2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known" of the injury. 735 ILCS 5/13-212(a) (West 2006). Under the discovery rule, "a cause of action accrues, and

the limitations period begins to run, when the party seeking relief knows or reasonably should know of an injury and that it was wrongfully caused." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 285 (2003).

¶ 122 In the case at bar, defendants argue that plaintiffs knew or reasonably should have known of their claim against defendants well before September 7, 2002. According to defendants, the date of discovery thus was more than two years before September 7, 2004, the date plaintiffs sued defendants, and plaintiffs' claim therefore was time-barred under section 13-212. Plaintiffs counter that the discovery date was September 30, 2002, when Amy first learned that the result of Brandon's UBE3A sequence analysis was "abnormal." According to plaintiffs, this was "the earliest [they] could possibly have discovered their cause of action." Plaintiffs argue the date defendants were sued, September 7, 2004, thus came within the two-year limitations period.

¶ 123 As noted, the circuit court denied defendants' motion, reasoning, in part, that there was "at least a question of fact" as to when the statute of limitations was triggered and the two-year period began to run. Our review of the record persuades us the circuit court was correct. "The time at which a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a question of fact." *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994). Thus, summary judgment in this case would be appropriate only if the undisputed facts allow for only one conclusion: that more than two years elapsed between the time which the Clarks knew or should have known of their injury and the date on which they filed their lawsuit. See *id.* Because there was a disputed question of material fact as to when the Clarks knew or reasonably should have known of their injury, the circuit court correctly denied defendants' motion for summary judgment. See *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-63 (2007).

¶ 124 III. CONCLUSION

¶ 125 In sum, we affirm the judgment of the appellate court reversing the circuit court's dismissal of plaintiffs' claims for negligent infliction of emotional distress. We reverse that portion of the appellate court's judgment holding that plaintiffs may recover damages for the postmajority expenses of caring for their son. We also affirm the circuit court's denial of defendants' motion seeking summary judgment under section 13-212. The cause is remanded to the circuit court of Cook County for further proceedings in consonance with this opinion.

¶ 126 Judgment affirmed in part and reversed in part;

¶ 127 cause remanded.

¶ 128 JUSTICE FREEMAN, concurring in part and dissenting in part:

¶ 129 While I agree with part of today's decision (*supra* ¶ 92), I do not agree with the court's conclusion that the Clarks cannot recover extraordinary medical expenses in this case. Whether a parent is legally obligated to support a child past the age of 18 is irrelevant to deciding whether a negligent doctor should be liable for postmajority damages. The only

relevant concern is whether tort law generally should allow for parents who have been the victims of clear negligence, as in this case, to recover the medical expenses generated for the expenses they voluntarily will assume in order to continue to care for their disabled child. I agree with the authority that says that parents like the Clarks are entitled to all extraordinary medical and educational costs for the child's life expectancy as a consequence of defendants' negligence. I therefore respectfully dissent from that portion of today's opinion.

¶ 130 I

¶ 131 The court stresses today that the damage issue is a matter for the legislature. The legislature may or may not take up the court's invitation, but the reasons given in the opinion are not any reason to do so. The United States Supreme Court has observed that "[p]erhaps no field of the law comes closer to the lives of so many families in this country than does the law of negligence." *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 73 (1943). Negligence law is, by tradition, a matter for the judiciary. Indeed, this court's recognition in *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230 (1987), of a claim for medical malpractice in genetic counseling involved the application of the doctrine of negligence. The determination of the scope of the common law doctrine of negligence is within this court's province. "[J]udges rather than legislatures usually define what counts as a tort and how compensation is to be measured." 1 Dan B. Dobbs, The Law of Torts § 1 (2001). See also *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348 (1977). If this court has the authority to recognize the claim in the first instance, it likewise has the authority to determine its character.

¶ 132 That is, in fact, what this court did in *Siemieniec*. Some courts have criticized the "extraordinary costs rule," adopted by this court in *Siemieniec*, *i.e.*, parents in so-called "wrongful birth" cases recover only the extraordinary medical and educational costs attributable to the birth defect, and not the ordinary costs associated with child-rearing. The criticism stems from the fact that the rule "departs from traditional principles of tort damages." *Smith v. Cote*, 513 A.2d 341, 349 (N.H. 1986). The rule "represents an application in a tort context of the expectancy rule of damages employed in a breach of contract case." *Id.* While some courts have not allowed damages on account of this (see, *e.g.*, *Rieck v. Medical Protective Co.*, 219 N.W.2d 242 (Wis. 1974)), other courts have, noting that it is within the power of the judiciary to shape the law of negligence in order to do justice between parties. See *Smith*, 513 A.2d at 349 (noting need to find a rule that will protect defendants as well as will compensate parents); see also Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 Ala. L. Rev. 327 (2004) (suggesting that the application of the expectancy rule, without more, results in undercompensation to the victims of this form of malpractice).

¶ 133 Today, we pick up where *Siemieniec* left off: What is the extent of the extraordinary medical and educational costs attributable to the birth defect that can be recovered in these cases?[3] While this court in *Siemieniec* acknowledged one popular rationale to use to answer

[3]It bears noting that since this court's decision in *Siemieniec*, the General Assembly has not enacted any specific legislation in this area. This inaction stands in stark contrast to action taken by

the question by pointing to the minority/majority analysis, it is not the only rationale to develop in this area in the 23 years since *Siemieniec* was decided.

¶ 134 The injury complained of is the alleged failure of defendants to properly inform the Clarks that their eldest son's Angelman Syndrome was the result of a genetic defect passed through his mother and therefore was not an accident of nature. Had the Clarks been accurately informed of this fact by defendants, it would have weighed in their decision whether to exercise their constitutional right to use contraceptives in order to limit the size of their family. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Importantly, this constitutional right protects a "distinctively personal interest" because it "involves profound moral and personal issues" that only the patient can make. *Canesi v. Wilson*, 730 A.2d 895 (N.J. 1999). Thus, the injury in this particular form of medical malpractice is the parents' lost opportunity to make the personal decision in weighing the consequences of whether to give birth to a child who might have permanently disabling physical and mental birth defects. The damage sustained is all the foreseeable consequences proximately caused by that injury.

¶ 135 In analyzing this claim, it is important to keep in mind that the alleged cause of action is based on the failure to inform the Clarks of the fact that their eldest son's Angelman Syndrome was genetically caused and of the consequences resulting from conception in light of that knowledge. What is being claimed, then, is that the medical providers, through their negligence, deprived the Clarks of the right to accept or reject a parental relationship, as they would define that relationship. *Smith*, 513 A.2d at 348. Generally, the deprivation of that right by the negligent misconduct of another has been held to create a cause of action in the parents. *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981); *Naccash v. Burger*, 290 S.E.2d 825, 830 (Va. 1982).

¶ 136 Importantly, the Clarks sought genetic counseling because they were already the parents of one child with Angelman Syndrome. They knew that an additional child diagnosed with Angelman Syndrome would never be able to care for himself in any way at any age. They knew that another pregnancy which led to the birth of another child with Angelman Syndrome would have serious consequences, not just on that child, but on them and their eldest son. Such a person would require a lifetime of extraordinary medical expenses and would need extraordinary care in order to tend to his or her daily needs. This is precisely why the Clarks sought genetic counseling. Defendants' negligence served to deprive the Clarks of an informed choice of whether they wished to undertake the heavy obligations in rearing a second child with such a debilitating condition. See Wolf Wolfensberger & Frank J. Menolascino, *A Theoretical Framework for the Management of Parents of the Mentally Retarded*, in Psychiatric Approaches to Mental Retardation 475 (Menolascino ed. 1970). Had the Clarks received accurate medical information in a timely fashion, they might have concluded that the life of a future child, even one with Angelman Syndrome, was worth the cost of assuming the associated burdens and expenditures, but this is unlikely since the point

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legislators in other states, which have enacted statutes specifically prohibiting claims for wrongful birth. Note, *The Right to Recovery for Emotional Distress Arising From a Claim for Wrongful Birth*, 32 Am. J. Trial Advoc. 143, 157 & n.108 (2008).

of genetic counseling was to avoid the possibility. Nevertheless, some individuals "confronted by tragedy respond magnificently and become exemplary parents [while] others do not. See, *e.g.*, *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. Ct. App. 1978) in which the parents subsequently put their mongoloid child up for adoption." *Schroeder v. Perkel*, 432 A.2d at 845 (Handler, J., concurring in part, dissenting in part). But the real injury to the Clarks was being deprived of the ability to weigh the pros and cons of having to rear a second child who will eventually become an adult dependent.[4]

¶ 137 The Clarks' injury does not cease to exist nor do the consequences of it disappear the day Timothy turns 18. Timothy will never become emancipated; he will never be able to care for himself. The Clarks therefore bear the additional burden of knowing that Timothy will never be able to make for himself any of the decisions needed for his day-to-day care and survival, and will not be able to look after his own best interests. It has been recognized that when parents are denied the opportunity to make the decision denied here, important personal interests are impaired, including the interest in preserving personal autonomy with respect to their family. *Smith*, 513 A.2d at 348.[5]

¶ 138 As the Seventh Circuit Court of Appeals has recognized, cases such as this one, termed "wrongful birth" actions,"[6] sound in negligence and are "little different from an ordinary medical malpractice action." *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981). As such, it involves a "failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiffs." *Id.* It is a recognized principle of tort law to afford compensation for injuries sustained by one person as the result of the conduct of another. W. Page Keeton, Prosser and Keeton on Torts § 2, at 6 (5th ed. 1984). Illinois courts have recognized that when seeking to restore a plaintiff to the wholeness plaintiff had before the commission of a tort, specific damages rules should not be inflexibly applied if substantial justice would not be accomplished. *Wolf v. Bueser*, 279 Ill. App. 3d 217 (1996). A defendant is liable for all reasonably anticipated injuries resulting from a wrongful act. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525 (1996).

¶ 139 It was foreseeable that as a result of defendants' negligence, the Clarks, a couple of child-

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[4]Illinois law defines a "dependent" as a person who is "unable to maintain himself and is likely to become a public charge." 755 ILCS 5/1-2.06 (West 2008).

[5]In my view, Timothy suffers injury, too, not from being given life or even from being born with a disabling impairment, but rather from being part of a family unit that, due to defendants' negligence, was unprepared, be it financially or emotionally or both, to deal with the *consequences* stemming from his birth.

[6]The terms "wrongful life," "wrongful birth" and "wrongful pregnancy" (also termed "wrongful conception") are seen by some as "a play on the statutory tort of 'wrongful death.' " Alexander M. Capron, *Tort Liability in Genetic Counseling*, 79 Col. L. Rev. 618, 634 n.62 (1979). The use of such terms, however, has only "spawn[ed] confusion" (*id.*), the effect of which has "distort[ed] or impair[ed] judicial vision." *Greco v. United States*, 893 P.2d 345, 348 n.5 (1995). See also *Viccaro v. Milunsky*, 551 N.E.2d 8, 9 n.3 (Mass. 1990).

bearing age, would conceive a second child who would incur lifelong medical expenses. All of the consequences that the Clarks sought to avoid in fact did come to pass here. They conceived and had a second son who suffers from the same incurable disease that his brother has. The disease will prevent him from taking care of himself in any way. Having not been given the choice, prior to Timothy's conception, of voluntarily assuming the burdens of having a second son with Angelman Syndrome, the Clarks have alleged that they will continue to care for Timothy's care "into his majority." This means more than voluntarily paying Timothy's extraordinary medical and educational expenses. It demonstrates the Clarks' intent to have a say in the care and nurture of their impaired son. It means they will not abandon him and are committed to caring for his best interests. This is significant in assessing the consequences of defendants' negligence.

¶ 140 It is beyond question that Timothy's condition will not improve once he achieves the age of majority. He will still have Angelman Syndrome. Timothy's condition will not magically disappear after the age of 18. Thus, decisions made by his parents during his minority will affect what happens to him after the age of 18. As an example, suppose the Clarks are presented with, during Timothy's minority, a medical treatment plan that will continue past the age of majority and is in Timothy's best interests to undertake? Are the Clarks foreclosed from acting in a certain way because they will not be able, financially, to continue the treatment once Timothy reaches the age of 18? More to the point, if Timothy is to be made a ward of the state, will the Clarks lose their ability to make decisions for Timothy that they, as his blood relatives, believe are in his best interests? The Clarks find themselves in this conundrum as the direct result of defendants' negligence to them, and it constitutes a further legal injury to them. The Clarks should not be concerned about where the money will come from in the future when making Timothy's medical decisions during his minority. The only way to compensate for this injury is to allow the Clarks to recover the extraordinary medical and educational costs for however long Timothy is expected to live.

¶ 141 It is for this reason that the court's minority/postmajority analysis is a faulty premise. Initially, it completely overlooks the fact that the parents of a minor disabled child are free to give up the child for adoption or otherwise terminate their legal, parental obligation. Unless specific steps are taken to secure the funds in trust, parents are free to use the funds in ways that often are not in the best interests of the child. See *Greco v. United States*, 893 P.2d 345, 352 (Nev. 1995); *Arche v. United States*, 798 P.2d 477, 486 (Kan. 1990). Secondly, it overlooks the fact, noted above, that no material difference in the condition will occur at the age of majority. The Florida Supreme Court recognized this and, as a result, held that a parents' claim for extraordinary damages is not dependent "on any *future* parental duty owed *** after [the child] reaches majority." (Emphasis in original.) *Kush v. Lloyd*, 616 So. 2d 415, 424 (Fla. 1992). Such a rule best preserves the parents' *present* role as "guardians of the best interests of an impaired child." *Id.* It bears repeating that the parents would not be faced with these types of critical-care decisions had the defendants not withheld material

information that they were dutybound to give to them.[7]

¶ 142 The normal measure of damages for the commission of a tort is all damages that are the proximate result of the tortfeasor's negligence. Timothy's birth and *all* extraordinary expenses resulting from it were the proximate result of defendant's negligence. Put another way, but for defendants' breach of duty to properly advise the Clarks, they would not have been put in the position they now are in: having a second child with Angelman Syndrome who will never be able to care for himself and will never become emancipated and for whom they will need to make critical decisions for the future. Had the Clarks been given the right to decide, with accurate information, whether to risk conception, they would have weighed not only how that decision would affect that second child, but also how a second child would affect their current family, both in terms of financial and emotional commitments. The only way to compensate them fully and fairly is to allow them to recover the extraordinary medical and educational costs that Timothy will need for the duration of his life expectancy. Such an award satisfies the purpose of tort damages because it serves to compensate the victims, deter negligence, and encourage due care. See *Siemieniec*, 117 Ill. 2d at 258. In my view, the Clarks should be allowed to recover all extraordinary expenses caused by the impairing condition for the duration of the child's life expectancy. Justice strongly favors this recognition, and I can find no countervailing policy to hold otherwise.

¶ 143 One final observation needs to be made with respect to how such extraordinary damages should be managed. Given the procedural posture of this case, we have no way of knowing how long Timothy will live. He may not survive his minority. Any award made in these types of cases should be placed in a reversionary trust, whether the reward be one limited to the minority of the child or, as I suggest, for the lifetime of the child, however long it is proven at trial to be. Under such a trust, the money would be disbursed as needed to pay for the costs of the impaired person. Upon death, the remainder, if any, would be returned to the defendant. This merits attention for two primary reasons. First, it assures the impaired individual will be adequately cared for and, secondly, it assures that, if the impaired individual dies before reaching majority or the age of his life expectancy, the parents do not receive a windfall. The use of such trusts have been cited with approval by other courts. See *Robak v. United States*, 503 F. Supp. 982 (N.D. Ill. 1980); *Kush*, 616 So. 2d at 424.

¶ 144 II

¶ 145 Rather than undertake an analysis that assesses the true nature of the injury suffered by the Clarks and its consequences, the court employs a contradictory statutory analysis to hold that the parents cannot recover extraordinary expenses incurred past the age of majority. The primary statute relied upon is a provision from the Public Aid Code which obligates parents

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[7]Other courts have noted that by recognizing the parents' right to recover all extraordinary medical and educational costs for the child's lifetime in the parents' cause of action, they need not address the more difficult questions posed by wrongful-life causes of action since any reward to the child would be duplicative of that given to the parents. See *Rich v. Foye*, 976 A.2d 819 (Conn. 2007); *Smith*, 513 A.2d at 354.

to pay for only the support of a child under 18 years old. Essentially, because the Clarks are, as one court has described, "free to bid their children a fiscal farewell at age 18" (*Childers v. Childers*, 552 P.2d 83, 85 (Wash. App. 1976)), they cannot be held legally responsible for any of the extraordinary medical expenses necessary for Timothy's care past the age of majority and thus cannot recover such damages from defendants.

¶ 146 I do not see how this section of the Public Aid Code applies here. Those parents who receive state aid are required to reimburse the state for such services. To the extent that Timothy may ultimately receive benefits from state aid agencies, such agencies are empowered to seek reasonable compensation from beneficiaries who have sufficient financial means. In any event, as I demonstrated above, defendants' liability to the Clarks is not dependent upon the parents' liability for the expenses, but on the parents' status as Timothy's guardians.[8]

¶ 147 Parenthetically, I note that in determining the Public Aid Code applies in this case, the court asks, in one of its many "what if" questions: "will that child have a claim on his parents' estate to the disadvantage of nondisabled siblings?" *Supra* ¶ 65. In fact, the child would have a claim, not over the "parents' estate," but on the surviving parent's estate under the Probate Act because Timothy is a dependent under the Act. See 755 ILCS 5/5-15-2 (West 2008).

¶ 148 Indeed, the court's view of section 10-2 of the Public Aid Code renders its construction of section 513 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/513 (West 2006)) contradictory at best and unconstitutional at worst. The court acknowledges that under this statute, parents may be required to provide support for a disabled adult child. Section 513(a)(1), which the appellate court below relied on in concluding wrongful-birth plaintiffs could recover postmajority damages, provides:

> "(a) The court may award sums of money out of the property and income of either or both parties or the estate of a deceased parent, as equity may require, for the support of the child or children of the parties who have attained majority in the

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[8]While the Public Aid Code speaks of parental liability ending at the age of 18, other statutes reveal that the General Assembly's view of the parental obligation is not static. Section 12-21 of the Criminal Code of 1961, for example, imposes criminal liability for failure to provide proper care for a disabled person. 720 ILCS 5/12-21 (West 2008). Moreover, under the federal Health Care Reform Bill, Congress has required that parents keep their dependent children on their insurance policies for ages that go beyond 18. Illinois has already enacted legislation which implements the Congressional mandate. 215 ILCS 5/356z.12 (West 2008). These divergent expressions of legislative intent in this area further underscore the fallacy in analyzing the damages question in terms of minority/majority. Tending to family members who are unable to take care of themselves has long been seen as exemplary in the eyes of both Congress and the General Assembly. In Illinois, the parents of a disabled person who are the person's custodial caretakers are entitled to make a claim against the estate of such a person under the Probate Act. 755 ILCS 5/18-1.1 (West 2008). Those who provide care for disabled adults are entitled to federal and State tax breaks. 26 U.S.C. §§ 22, 152. These types of provisions demonstrate a public policy that supports, not deters, family unity in dealing with disease and aging.

following instances:

> (1) When the child is mentally or physically disabled and not otherwise emancipated, an application for support may be made before or after the child has attained majority." 750 ILCS 5/513(a)(1) (West 2006).

The court today concludes that section 513(a)(1), as well as section 513(a)(2), which deals with postmajority educational expenses, do not apply beyond the divorce context, stating:

> "[T]he clear intent of sections 513(a)(1) and (a)(2) is to provide the child of divorced parents who is unable to support himself due to a disability or who seeks higher education with the standard of living he would have enjoyed had his family remained intact." *Supra* ¶ 62.

However, if there is, as the court asserts, no postmajority support obligation for both parents, under the Public Aid Code, *i.e.*, an intact family situation, then there can be no such obligation in the divorce situation. Divorce proceedings cannot create a greater obligation on the parents individually than there was originally. Moreover, if divorced parents may be required to provide support which married parents have no obligation to provide, this presents serious, potential constitutional questions concerning both equal protection and due process.

¶ 149 The court goes on to state:

> "Plaintiffs' brief notes that they are presently separated and could, at some future date, divorce, and one of them might seek support for Brandon and Timothy from the other under section 513(a)(1). This would be an application of the statute in the manner the legislature intended–to preserve, as much as possible, the benefits of an intact family for the children of divorce." *Supra* ¶ 63.

This construction of section 513 is such that the court seems to be encouraging divorce as the way around its ruling. The court's construction of the statute actually encourages a divorce in such situations. The suggestion, callous as it is in the face of the tragedy this family has endured, unsurprisingly contravenes the legislative intent behind the Marriage Act. Specifically, our General Assembly has directed that the provisions of the Marriage Act are to be "liberally construed and applied to promote its underlying purposes," which include "strengthen[ing] and preserv[ing] the integrity of marriage and safeguard[ing] family relationships." 750 ILCS 5/102(2) (West 2006).

¶ 150 III

¶ 151 In discussing the issue of damages in cases such as this, more than one court has noted that "law is more than an exercise in logic and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice." *Procanik by Procanik v. Cillo*, 478 A.2d 762 (N.J. 1984); *Turpin v. Sortini*, 643 P.2d 954, 965 (Cal. 1982). If the state of the law in Illinois is, in fact, what the court holds it to be, then it may be high time that this court reconsider its refusal, in *Siemieniec* to recognize so-called "wrongful-life" claims.

¶ 152 In explaining its rejection of wrongful life, the court noted that most courts in other jurisdictions had reached the same result. One reason is the general unwillingness to hold that

a child can recover damages for achieving life:

> "The threshold problem has been the assertion by the infant plaintiffs not that they should not have been born without defects, but that they should not have been born at all. The essence of the infant's cause of action is that the negligent conduct of the defendants deprived the child's mother from obtaining an abortion which would have terminated its existence. [Believing] that human life, no matter how burdened, is, as a matter of law, always preferable to nonlife, the courts have been reluctant to find that the infant has suffered a legally cognizable injury by being born with a congenital or genetic impairment as opposed to not being born at all." *Siemieniec*, 117 Ill. 2d at 239-40.

A related problem is the difficulty of measuring appropriate damages, which involves a calculation "dependent upon the relative benefits of an impaired life to no life at all, '[a] comparison the law is not equipped to make.' " *Id*. at 240 (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978)).

¶ 153 This court also emphasized "the preciousness and sanctity of human life" as a basis for rejecting wrongful-life claims. It agreed with those courts which "have reasoned that recognizing a duty to the unborn child to prevent his birth with defects represents a 'disavowal' of the sanctity of life. Such a disavowal of life offends society's deeply rooted belief that life, in whatever condition, is more precious than nonexistence." *Siemieniec*, 117 Ill. 2d at 250. The court quoted the Supreme Court of Idaho:

> "Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious." *Blake v. Cruz*, 698 P.2d 315, 322 (Idaho 1984) (quoted in *Siemieniec*, 117 Ill. 2d at 250).

Pointing to Illinois' "strong public policy of preserving the sanctity of human life," the court stated: "To recognize that [a child] has a fundamental right not to be born would thus undermine this legislatively expressed policy favoring childbirth over abortion." *Siemieniec*, 117 Ill. 2d at 249.

¶ 154 This policy regarding the sanctity of human life remains in effect in Illinois. *Siemieniec* has not been overruled on this point. However, a "high regard for the sanctity of life," however noble sounding on paper, means nothing if it not honored in "real life." A court that embraces this as its public policy should not ignore the needs of the living nor should it allow those who are negligent to rely on the public to foot the bill when a child born as a result of that negligence reaches the age of majority. The Clarks' complaint alleges, in support of their claim for postmajority damages:

> "Timothy *** is and always will be mentally disabled. Angelman Syndrome is a permanent genetic disorder with no chance of ever being cured. Timothy *** has no chance of leading an independent life as an adult or being emancipated. As such, Timothy *** is now a disabled minor and after he turns 18 he will be a disabled adult. As a disabled adult, Timothy *** will not be able to care for himself in any

way and will require substantial sums of money to sustain his life."

The court holds today that the Clarks may not recover any of these "substantial sums" from defendants. As a result, they will be left to shoulder these expenses on their own, or, more likely, will be forced to place Timothy in the care of the state, possibly away from his family. Either way, the effect on Timothy's quality of life, already burdened with severe disabilities, undoubtedly will be negative. Ironically, this unfortunate result arises, in large part, from *Siemieniec*'s regard for the sanctity of human life, an important basis for rejecting wrongful-life claims. But placing Timothy and his parents in such a predicament hardly demonstrates a high regard for the preciousness and sanctity of human life. Nor does it further the purpose of "protecting, preserving and improving the quality of human existence" (*Blake*, 698 P.2d at 322). If such a predicament is the inevitable result of *Siemieniec*'s rejection of wrongful life, perhaps this decision should be re-examined.

¶ 155 As one legal commentator has recognized, the above scenario

> "may leave the real victim, the newly emancipated disabled person with little or no ability to earn even minimal wages, without compensation, relegating him to a state institution despite the possibility that he could lead an independent life with sufficient financial resources. Thus, recognizing wrongful birth but not wrongful life may seriously undercompensate for the damages caused by the malpractice, shifting the financial responsibility onto the taxpayers when parental responsibility ceases upon emancipation." Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 Ala. L. Rev. 327, 367-68 (2004).

Justice Gallagher, writing separately in the appellate court, made a similar point, though couched in terms of a wrongful-birth action rather than one for wrongful life. The appellate court, of course, was bound to follow *Siemieniec*'s rejection of wrongful life.

> "We believe very simply that it is the public policy of this State to allow parents of a permanently disabled child to allege and prove damages for the costs of caring for the child after reaching majority. The parents have a right to allege and seek to prove an action against tortfeasors, rather than have to assume personally the costs of providing for the child's lifelong needs. Moreover, we believe it is preferable for the alleged tortfeasors to pay these costs if found liable, than for the taxpayers to be required to assist in paying them." 391 Ill. App. 3d at 333 (Gallagher, J., specially concurring).

As I noted at the outset of this opinion, the court stresses the need for legislative action in this area. It is my belief that legislative action is necessary in light of the court's analysis of the injury and its attendant damages in cases such as this. It is my sincere hope that the General Assembly will look into this area of the law and provide the necessary redress for future plaintiffs who are put into the situation the Clarks find themselves in through no fault of their own.

¶ 156 I have suggested in Part I of this opinion a judicious way to compensate plaintiffs that is compatible with normal tort principles. This includes the use of a reversionary trust that would ensure both justice as well as fairness to all involved: the victimized parents, the victimized child, and the tortfeasor. Nothing in today's opinion indicates that my suggestions

contravene in any way any public policy of this state. Although the medical profession may have let down the Clarks, Illinois' legal system need not be allowed to do the same.

¶ 157 In sum, I would allow the Clarks to recover as damages for negligence in this medical malpractice action all extraordinary expenses for Timothy's care in his lifetime. I base this not on any legal duty of the parents to support Timothy past majority, but on the parents' status as his current guardians to provide for his care.

¶ 158 I do agree with the court's decision to overrule that portion of *Siemieniec* which erroneously applied the so-called "zone of danger" rule to defeat claims for emotional distress arising from negligence in genetic testing. I agree that the rationale used in *Siemieniec* was inapplicable to the negligence at issue in this case and join in that portion of today's opinion. Ironically, the court relies strongly on *Kush v. Lloyd*, the same Florida Supreme Court case that I rely on in answering the damages question. I believe *Kush*, which addressed facts remarkably similar to those here, is well reasoned on all of the complex issues presented in these types of medical malpractice cases. I also agree with the court's resolution of the statute of limitations issue. Accordingly, I join in that portion of today's opinion as well.

Cochran v. Securitas Security Systems USA Inc., 2017 IL 121200

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- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 15: passage C004.3
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 23: passage C004.2

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Illinois Official Reports

Supreme Court

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***Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200**

Caption in Supreme Court:	DONNA COCHRAN, Appellee, v. SECURITAS SECURITY SERVICES USA, INC., Appellant.
Docket No.	121200
Filed	September 21, 2017
Decision Under Review	Appeal from the Appellate Court for the Fourth District; heard in that court on appeal from the Circuit Court of Sangamon County, the Hon. Peter C. Cavanagh, Judge, presiding.
Judgment	Appellate court judgment affirmed. Cause remanded.
Counsel on Appeal	Hugh C. Griffin and Brittany L. Nelson, of Hall Prangle & Schoonveld, LLC, and Anthony R. Rutkowski, of Rutkowski Law Group, P.C., both of Chicago, for appellant. David V. Dorris, and Amelia S. Buragas, of Dorris Law Firm, P.C., of Bloomington, for appellee. Stephen Phalen, of Chicago, for *amicus curiae* Illinois Trial Lawyers Association.

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 The issue in this case is whether a plaintiff bringing a cause of action for tortious interference with the right to possess a corpse must allege facts showing that such interference resulted from the defendant security company's wilful and wanton misconduct. For the reasons that follow, we hold that no such allegations are necessary and that recovery in such cases is permissible upon a showing of ordinary negligence.

¶ 2 BACKGROUND

¶ 3 This appeal arises from an order granting defendant's combined motion to dismiss plaintiff's third amended complaint, brought pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). We therefore take the following facts from that complaint and accept them as true for purposes of our review. See *Wackrow v. Niemi*, 231 Ill. 2d 418, 420 (2008).

¶ 4 On September 12, 2010, Walter Andrew Cochran died in his home at the age of 39. On September 14, 2010, Walter's body was transported to the Moultrie County morgue, where the coroner was unable to determine the cause of Walter's death. Later that same day, Walter's body was transferred to Memorial Medical Center in Springfield (Memorial) for a full autopsy. Upon arrival at Memorial, Walter's body was received by employees of defendant, Securitas Security Services, USA, Inc. Defendant is a private security firm that had contracted with Memorial to provide certain security services at the hospital, including the receiving, tracking, and releasing of bodies processed by Memorial's morgue. Upon receiving Walter's body at the morgue, defendant's employees placed it in a Ziegler case, which is a closed steel case used to store severely decomposed remains. Defendant's employees did not place a visible identification tag on Walter's body, nor did they affix an identification label to the Ziegler case containing Walter's body. Defendant's employees also erroneously recorded in the morgue's logbook that the body contained in the Ziegler case was that of a man named William Carroll. Two days later, on September 16, 2010, representatives from Butler Funeral Home (Butler) arrived at Memorial's morgue to collect William Carroll's body. Relying solely on the erroneous logbook entry, and without conducting any visual inspection of the body, defendant's employees provided Butler with Walter's body, rather than with William Carroll's body. Before the error could be discovered, Butler left Memorial with Walter's body and had it cremated. As a result, no autopsy was ever performed on Walter's body, and no cause of death was ever determined.

¶ 5 Plaintiff, Donna Cochran, is Walter's mother. In September 2012, acting both in her individual capacity and as the independent administrator of Walter's estate, plaintiff brought a seven-count complaint against defendant, Memorial, and Butler for various claims relating to the wrongful cremation of Walter's body. In June 2015, after settling her claims with both

Memorial and Butler, plaintiff filed a third amended complaint against defendant alleging one count of tortious interference with plaintiff's right to possess Walter's body. According to the third amended complaint, defendant and its employees had a duty not to interfere with plaintiff's right to possess and make appropriate disposition of Walter's body. Plaintiff alleged that defendant and its employees breached this duty by, among other things, failing to follow industry standards and hospital policies governing the identification and processing of dead bodies, failing to maintain an accurate log of the identity and location of bodies in the Memorial morgue, relying solely on an inaccurate logbook when releasing the body to Butler, releasing to Butler a body that lacked an identification tag, releasing to Butler a body that did not match the description of the body being claimed, and releasing to Butler the wrong body. Plaintiff further alleged that, as a proximate result of these acts and omissions, she experienced and suffered severe emotional distress, mental suffering, embarrassment, humiliation, and financial losses.

¶ 6 In July 2015, defendant filed a section 2-619.1 combined motion to dismiss the third amended complaint. The combined motion first sought dismissal under section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)) on the grounds that plaintiff "ignore[d] both the facts known to her and her counsel at the time of the filing of her pleading in violation of Illinois Supreme Court Rule 137 and the pleading requirements of a cause of action for interference with the right to possession of the body of a decedent under Illinois law." More specifically, defendant's motion argued that, at the time she filed the third amended complaint, plaintiff knew that (1) Memorial was the only entity that was legally authorized to release Walter's body to Butler, (2) Memorial bore sole legal responsibility for establishing procedures for the handling and release of bodies in its morgue, (3) defendant had no legal authority to release a body from Memorial's morgue, (4) defendant did not physically remove or transport Walter's body from the Memorial morgue, (5) Butler erroneously signed for Walter's body at the Memorial morgue, (6) Butler erroneously removed Walter's body from the Memorial morgue, and (7) Butler erroneously cremated Walter's body after erroneously removing it from the morgue. The motion next sought dismissal under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) on the grounds that plaintiff failed to allege sufficient facts showing that (1) defendant owed a duty to plaintiff, (2) defendant's conduct was wilful and wanton, (3) defendant's conduct was a proximate cause of plaintiff's claimed damages, and (4) emotional distress damages are recoverable in this type of case. Following a hearing, the circuit court of Sangamon County granted defendant's motion and dismissed the third amended complaint with prejudice. In doing so, the court explained that dismissal was warranted under section 2-615 because plaintiff "failed to plead sufficient facts to support the allegation of duty owed by the Defendant *** to the Plaintiff" and under section 2-619 because "there *** is no set of facts by which the Plaintiff may demonstrate" such a duty.

¶ 7 Plaintiff appealed, and the appellate court reversed. 2016 IL App (4th) 150791. The appellate court first held that the trial court erred in granting the section 2-619 portion of defendant's motion to dismiss both because it was not supported by the requisite affidavits and because it was effectively a section 2-615 motion to dismiss, in that it attacked the legal sufficiency of plaintiff's claim instead of raising an affirmative defense to that claim. *Id.* ¶¶ 24, 27. The appellate court then held that the trial court also erred in granting the section 2-615 portion of plaintiff's motion to dismiss. Specifically, the appellate court rejected defendant's argument that, in order to state a claim for tortious interference with the right to

possess a corpse, a plaintiff must plead specific facts demonstrating that the defendant's misconduct was wilful and wanton. Rather, the appellate court explained, the emerging standard is that such a claim may be brought on an allegation of ordinary negligence, which plaintiff's third amended complaint adequately set forth. *Id.* ¶¶ 52, 61. Accordingly, the appellate court reversed the trial court's judgment dismissing plaintiff's third amended complaint and remanded the cause for further proceedings. *Id.* ¶¶ 53, 63.

¶ 8 We granted defendant's petition for leave to appeal (Ill. S. Ct. R. 315 (eff. Mar. 15, 2016)).

¶ 9 DISCUSSION

¶ 10 Though defendant moved to dismiss plaintiff's third amended complaint under both section 2-615 and section 2-619 of the Code, it now defends only the section 2-615 portion of its motion, insisting that "there is no need for this Court to address the section 2-619 motion." Accordingly, we confine our analysis to section 2-615.

¶ 11 A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. In ruling on such a motion, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. *Id.* The essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Id.* A cause of action should not be dismissed under section 2-615 unless it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id.* Our review of an order granting a section 2-615 motion to dismiss is *de novo*. *Id.*

¶ 12 Plaintiff's third amended complaint alleges one count of tortious interference with the right to possess Walter's corpse. This cause of action has a settled place in Illinois law, and it rests upon the principle that "while in the ordinary sense, there is no property right in a dead body, a right of possession of a decedent's remains devolves upon the next of kin in order to make appropriate disposition thereof, whether by burial or otherwise." *Leno v. St. Joseph Hospital*, 55 Ill. 2d 114, 117 (1973). For more than a century, Illinois courts have recognized that interference with this right is an actionable wrong and that the plaintiff in such cases is entitled to recover damages for the mental suffering that is proximately caused by the defendant's misconduct. See *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 14; *Rekosh v. Parks*, 316 Ill. App. 3d 58, 68 (2000); *Kelso v. Watson*, 204 Ill. App. 3d 727, 731 (1990); *Hearon v. City of Chicago*, 157 Ill. App. 3d 633, 637 (1987); *Courtney v. St. Joseph Hospital*, 149 Ill. App. 3d 397, 398 (1986); *Mensinger v. O'Hara*, 189 Ill. App. 48, 55 (1914).

¶ 13 The question in this case is whether, to state a cause of action, a plaintiff alleging tortious interference with the right to possess a corpse must allege facts showing that the defendant's misconduct was wilful and wanton. Historically, this has been considered the case in Illinois, and our appellate court routinely treats the wilful and wanton standard as settled law. See, *e.g.*, *Drakeford*, 2013 IL App (1st) 111366, ¶ 14; *Rekosh*, 316 Ill. App. 3d at 68; *Kelso*, 204 Ill. App. 3d at 731; *Hearon*, 157 Ill. App. 3d at 637; *Courtney*, 149 Ill. App. 3d at 398. The curious thing about this is that, with one notable exception,[1] each of these decisions relies either directly or

[1]See *Courtney*, 149 Ill. App. 3d 397 (discussed *infra* ¶¶ 17-21).

indirectly upon *Mensinger* as the source of the wilful and wanton standard, despite the fact that *Mensinger* expressly declined to adopt that standard in this context. Indeed, it is not too much to say that the establishment of the wilful and wanton standard in this context results less from reasoned analysis than it does from unexamined assumption and mere repetition. And as we shall see, while such an assumption may have made sense in 1914, it no longer enjoys any foundation in Illinois jurisprudence.

¶ 14 In *Mensinger*, the plaintiff brought an action against undertakers who were charged with preparing his deceased wife's remains for burial. *Mensinger*, 189 Ill. App. at 49. He alleged the defendants had wrongfully and unlawfully removed his wife's hair, rendering her body unfit to be viewed and causing him to suffer greatly, both in mind and in body. *Id.* at 49-50. The circuit court dismissed the plaintiff's complaint, and he appealed. *Id.* at 49. In reversing the circuit court, the *Mensinger* court found that:

> "The decided weight of authority in this country supports the proposition that while a dead body is not considered as property, in the ordinary, technical sense in which that word is usually employed, yet the law does recognize a right, somewhat akin, perhaps, to a property right, arising out of the duty of the nearest relatives of the deceased to bury their dead, which authorizes and requires them to take possession and control of the dead body for the purpose of giving it a decent burial." *Id.* at 53-54.

Examining similar cases from other jurisdictions, the court also found that "[t]he greater weight of authority" permitted a cause of action for solely mental suffering based on "any wilful or wanton infringement" of that legal right. *Id.* at 54. It noted that, in several of the cases it relied upon, "doubt [was] expressed as to whether a recovery may be had for mental suffering, alone, in the absence of any allegation or proof of wilful or wanton misconduct," *i.e.*, when only ordinary negligence is alleged. *Id.* In any event, the *Mensinger* court ultimately did not need to resolve that question because "the averments of [the plaintiff's complaint in that case] amount to a charge of wilful misconduct on the part of the defendants" and that the circuit court therefore erred in granting the defendants' motion to dismiss. *Id.* at 51-52, 57.

¶ 15 Thus, *Mensinger* never expressly decided whether a claim for tortious interference with the right to possess a corpse may be stated absent allegations of wilful and wanton misconduct. Just as importantly, to the extent that *Mensinger* discussed that question at all, it did so in the context of a rule that this court has since refined and clarified. When *Mensinger* was decided, the settled rule in Illinois was that, absent a contemporaneous physical impact or injury to the plaintiff, there could be no recovery for negligently caused emotional distress. See, *e.g.*, *Chicago Consolidated Traction Co. v. Schritter*, 222 Ill. 364, 368 (1906); *Braun v. Craven*, 175 Ill. 401, 420 (1898). This rule applied with equal force both to the direct victims of a defendant's negligence and to bystanders who witnessed the injury of another. See *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 550 (1983). In 1983, however, this court abandoned the so-called "impact rule" in favor of the zone-of-danger rule for cases involving bystanders. *Id.* at 555. Under the zone-of-danger rule:

↩ memo p. 3, 9

> "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct

victim was physically injured that there was a high risk to him of physical impact. The bystander [in addition] must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." *Id.*

Although some confusion subsequently ensued as to whether *Rickey* eliminated the impact rule for direct victims as well as for bystanders, this court has since clarified that the impact rule remains the law for direct victims of a defendant's negligence, whereas bystanders' claims are now governed by the zone-of-danger rule. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 42.

¶ 16 By 1983, then, the law in Illinois was that, in order to recover damages for the negligent infliction of emotional distress (NIED), a direct victim of the defendant's negligence must allege and prove a contemporaneous physical injury or impact, whereas a bystander must allege and prove that he or she falls within the zone-of-danger rule. In time, however, these rules came to be understood not just as the rules governing the recovery of damages in NIED cases but also as the rules governing the recovery of emotional distress damages in *all* negligence cases. For example, in *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230 (1987), the parents of a child born with hemophilia brought a wrongful birth action against their doctors and hospital. *Id.* at 233. By way of remedy, the parents sought damages both for the resulting medical expenses and for their own emotional distress. *Id.* One of the issues in *Siemieniec* was whether the parents could recover emotional distress damages in this context. In holding that they could not, this court explained that, "under the holding of *Rickey*, before a plaintiff can recover for negligently caused emotional distress, he must have, himself, been endangered by the negligence, and he must have suffered physical injury or illness as a result of the emotional distress caused by the defendant's negligence." *Id.* at 261. The court then applied the zone-of-danger rule and determined that "[t]here are no allegations in the complaint from which it can be said that the defendants' alleged negligence in any way endangered the parents of the impaired child" or "that the parents have or will suffer any physical injury or illness resulting from the emotional distress allegedly caused by defendants' negligence." *Id.* Accordingly, the court held that the parents in *Siemieniec* "have no cause of action for the emotional distress negligently inflicted by the defendants." *Id.* at 262-63.

¶ 17 In similar fashion, and perhaps more to the point, our appellate court reluctantly applied the zone-of-danger rule to bar the recovery of emotional distress damages in a case involving the cause of action at issue in the case before us, tortious interference with the right to possess a corpse. In *Courtney*, 149 Ill. App. 3d at 397, the refrigeration unit in the defendant's morgue malfunctioned, causing the body of the plaintiff's deceased husband to decompose. *Id.* The plaintiff sued, alleging that the defendant was negligent in failing to preserve her husband's body in a condition suitable for an open casket wake and funeral. *Id.* In bringing the action, the plaintiff acknowledged that she was seeking damages solely for " 'emotional anguish' " that did not result in physical injury or illness. *Id.* at 397-98. Nevertheless, the plaintiff argued that her cause of action should be allowed to proceed because "she was the direct victim of the defendant's alleged negligence, not a bystander, and the injury she sustained (emotional distress) was foreseeable." *Id.* at 401. The defendant moved to dismiss the plaintiff's complaint on the grounds that it failed to state a cause of action, and the trial court denied that motion. *Id.* at 398. The trial court then certified for interlocutory review the question of whether Illinois recognizes a cause of action for emotional distress arising from the negligent mishandling of a corpse. *Id.*

¶ 18 In analyzing the certified question, the appellate court began by citing *Mensinger* for the settled rule that interference with the next of kin's right to possess and make appropriate disposition of a loved one's remains is an actionable wrong and that the plaintiff in such cases is entitled to recover damages for the resulting mental suffering. *Id.* However, unlike the other courts that have since addressed this question, the *Courtney* court did not then simply assert that *Mensinger* mandates a wilful and wanton standard in such cases. Rather, the *Courtney* court correctly emphasized that *Mensinger* "expressly declined to decide whether recovery may be had for mental suffering alone, in the absence of any allegation of proof of wilful or wanton misconduct." *Id.* This observation then freed the court to examine the question for itself in the first instance.

¶ 19 The initial portion of the *Courtney* court's discussion begins with *Rickey*'s reminder that courts " 'generally have been reluctant to allow recovery for purely mental or emotional distress' " and that the reasons for this include " 'that the door would be opened for fraudulent claims, that damages would be difficult to ascertain and measure, that emotional injuries are hardly foreseeable and that frivolous litigation would be encouraged.' " *Id.* at 399 (quoting *Rickey*, 98 Ill. 2d at 555). That being said, the *Courtney* court "seriously question[ed] whether these apprehensions are well founded where the mishandling of a corpse is concerned." *Id.* In support, the *Courtney* court first observed that numerous courts and authorities had by then recognized that recovery for the mishandling of a corpse may be had upon a showing of ordinary negligence. The authorities included both the Restatement (Second) of Torts and Prosser and Keeton on the Law of Torts, the latter of which specifically notes that the mishandling of a corpse creates " 'an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.' " *Id.* (quoting Prosser and Keeton on the Law of Torts § 54, at 362 (W. Page Keeton *et al.* eds., 5th ed. 1984)). The *Courtney* court expressed its full agreement with Prosser and Keeton on this point and stated explicitly that it "[did] not believe that recognizing a cause of action for the negligent mishandling of a corpse would open the door for fraudulent claims or encourage frivolous litigation." *Id.* at 400. Accordingly, the *Courtney* court concluded the initial portion of its analysis by stating that "[w]ere we writing on a clean slate, we would be inclined to permit the complaint in this case to stand." *Id.*

¶ 20 In the very next sentence, however, the *Courtney* court stressed that it was *not* writing on a clean slate and that it "believe[d] that recognition of plaintiff's cause of action is foreclosed by our supreme court's decision in *Rickey*." *Id.* According to the *Courtney* court, the rule that emerged from *Rickey* was that "[w]here there is no contemporaneous physical injury to or impact on him, a plaintiff seeking damages for the negligent infliction of emotional distress must allege both that he was in a zone of physical danger causing him to fear for his own safety and that he suffered physical injury or illness as a result of his emotional distress." *Id.* at 403. Moreover, the court explained that this rule applies with equal force whether the plaintiff is a direct victim of the defendant's negligence or merely a bystander. *Id.* at 402. At that point, and just as this court would do less than a year later in *Siemieniec*, the *Courtney* court concluded that the zone-of-danger rule was the appropriate metric for assessing the sufficiency of the plaintiff's complaint, despite the fact that the plaintiff had not brought a claim for NIED. Not surprisingly, the *Courtney* court found that the plaintiff had failed to state a claim in that "[s]he has not alleged that she was placed within a zone of physical danger causing her to fear for her own safety when she discovered that her husband's body had decomposed and could not be

viewed," nor "has she claimed that she suffered physical injury or illness as a result of her emotional distress." *Id.* In the end, the *Courtney* court answered the certified question in the negative, stating that "Illinois does not recognize a cause of action for emotional distress arising from the negligent mishandling of a corpse." *Id.* at 403.

¶ 21 In both *Siemieniec* and *Courtney*, we see a similar dynamic at work. In both cases, the courts equated the rules governing the recovery of damages in NIED cases with the rules governing the recovery of emotional distress damages in *all* negligence cases. The result was that the recovery of emotional distress damages effectively was barred for any negligence plaintiff who neither suffered a contemporaneous injury nor satisfied the zone-of-danger rule, regardless of the tort that was actually pleaded. It is therefore not surprising that courts would continue to disallow causes of action for emotional distress arising from the negligent mishandling of a corpse, as the plaintiffs in such cases almost by definition will have neither suffered a contemporaneous injury nor satisfied the zone-of-danger rule.

¶ 22 This is where things remained until 2011, when this court revisited this area of the law and concluded that things had gone badly astray. In *Clark v. Children's Memorial Hospital*, 2011 IL 108656, the question again arose whether parents in a wrongful birth case may recover damages for their resulting emotional distress. This time, the court held that they could. In doing so, the court explained that our previous conclusion to the contrary in *Siemieniec* resulted from faulty reasoning. Specifically, the court explained that

> "the zone-of-danger rule applies only in cases where the plaintiff's theory of liability is the negligent infliction of emotional distress. It does not apply where, as in a wrongful-birth case, a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort." *Id.* ¶ 113.

By way of example of the first type of case, the court pointed to *Rickey*, where the plaintiff was an eight-year-old boy who witnessed an accident that severely injured his younger brother but who himself did not suffer any physical impact or injury. *Id.* ¶ 105. The court explained that, "[i]n such cases, where the claim of emotional distress is freestanding and not anchored to any other tort against the plaintiff, courts have applied special restrictions such as the zone-of-danger rule because of concerns regarding the possibility of fraudulent claims or frivolous litigation." *Id.* ¶ 106. By contrast, "these special restrictions have no logical bearing on a wrongful-birth claim, where a tort has already been committed against the parents." *Id.* ¶ 107. This is because "[w]rongful-birth plaintiffs do not assert a freestanding emotional distress claim, but merely assert emotional distress as an element of damages for a personal tort." *Id.* Such was the case in *Siemieniec*, where "the plaintiffs clearly saw their emotional harm claim in this light" and "sought damages for emotional distress as 'a natural and foreseeable consequence of the injury they sustained,' a consequence which 'should be included as an essential element in the calculation of damages.' " *Id.* ¶ 108 (quoting *Siemieniec*, 117 Ill. 2d at 260-61). To then drive this point home, the court pointed out that "damages for emotional distress are available to prevailing plaintiffs in cases involving other personal torts," including defamation, conversion, and misappropriation of identity. *Id.* ¶ 111. This, of course, could not be the case if *Siemieniec* was correct and emotional distress damages were recoverable only in cases where the plaintiff either suffered a contemporaneous injury or satisfied the zone-of-danger rule. Accordingly, the court concluded that it "erred in *Siemieniec*

in applying the zone-of-danger rule to wrongful-birth parents' claims," and it therefore "overrule[d] *Siemieniec* on this point." *Id.* ¶ 113.

¶ 23 In light of *Clark*, the critical question in the case before us is not whether plaintiff's third amended complaint alleges facts showing that she herself either suffered a contemporaneous injury or falls within the zone-of-danger rule. Rather, the critical question is whether the theory of liability set forth in that complaint is NIED or, as in a wrongful birth case, some other tort for which emotional distress is simply an element of plaintiff's damages. This is because if plaintiff's claim falls into the latter of these categories, there is no principled reason to disallow the recovery of emotional distress damages upon proof of ordinary negligence. This court has never held that wilful and wanton misconduct is an essential prerequisite for the recovery of emotional distress damages in cases involving interference with the right to possess a corpse, and in fact *Clark* would presume exactly the opposite. ↩ memo p. 10

¶ 24 With that in mind, we can state with complete confidence that, just as with the wrongful birth claim in *Clark*, plaintiff's claim here falls into the category of cases in which "a tort has already been committed against the plaintiffs and they assert emotional distress damages as an element of damages for that tort." *Id.* Plaintiff's third amended complaint alleges one count of interference with the right to possess Walter's remains. As we already have discussed, interference with the right to possess a decedent's remains is a distinct and independent tort that has a settled place in Illinois jurisprudence. It arises from the next of kin's common-law right to possess and make appropriate disposition of a decedent's remains and from the correlative duty not to interfere wrongfully with that right. And while the plaintiff in such cases is entitled to recover damages for the mental suffering that is proximately caused by the defendant's misconduct, the actionable wrong in such cases is the interference with the plaintiff's right to possess the decedent's remains, *not* the infliction of the resulting mental distress. In this sense, tortious interference with the right to possess a corpse is analogous to wrongful birth, where the infliction of emotional distress is not *itself* the wrong that was committed but rather is part and parcel of the damage *that results from* the wrong that was committed. Accordingly, just as we have concluded that parents in a wrongful birth case may recover damages for the resulting emotional distress, we likewise conclude that such damages are recoverable in cases involving negligent interference with the right to possess a corpse.

¶ 25 In reaching this result, we note that today's decision brings Illinois into conformity with what has emerged both as the blackletter standard and as the majority rule among courts that have addressed this issue directly. As the appellate court below correctly recognized, while section 868 of the first Restatement of Torts suggested that the recovery of emotional distress damages in cases like this required proof of wilful and wanton misconduct (Restatement of Torts § 868 (1939)), the second restatement now makes clear that such recovery is available upon proof of ordinary negligence:

> "One who intentionally, recklessly or *negligently* removes, withholds, mutilates or operates upon the body of a dead person or *prevents its proper interment or cremation* is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." (Emphases added.) Restatement (Second) of Torts § 868 (1979).

This point is reiterated in the comments to section 868, which stress that "[t]he rule stated in this Section applies not only to an intentional interference with the body itself or with its proper

burial or cremation, but also to an interference that is reckless or merely negligent." Restatement (Second) of Torts § 868 cmt. d (1979). In similar fashion, the most recent edition of Prosser and Keeton on Torts explains the following with respect to claims involving the mishandling of a corpse:

> "[T]he traditional rule has denied recovery for mere negligence, without circumstances of aggravation. There are by now, however, a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like, without such circumstances of aggravation. What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. *** Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery." Prosser and Keeton on the Law of Torts § 54, at 362 (W. Page Keeton *et al.* eds., 5th ed. 1984).

As for the series of cases that now allow the recovery of emotional distress damages in cases involving negligent interference with the right to possess a corpse, we direct the reader to the appellate court's opinion below, which contains an expansive citation to relevant decisions from 22 separate jurisdictions, which citation we need not reproduce here. 2016 IL App (4th) 150791, ¶ 51.

¶ 26 The only question that remains, then, is whether plaintiff's third amended complaint states a claim for which relief may be granted. After reviewing the allegations of that complaint, we conclude that it does. In relevant part, plaintiff's third amended complaint alleges that, as Walter's mother and next of kin, plaintiff had a right to possess and make appropriate disposition of Walter's remains. Plaintiff alleges further that, following Walter's death, Walter's body was delivered to the Memorial morgue, where defendant's employees were responsible for receiving it, ensuring that an accurate identity tag was placed visibly upon it, correctly logging its identity and location in the morgue, and ensuring that it was released only to the correct funeral home. Plaintiff then alleges that, in this capacity, defendant and its employees had a duty not to interfere with plaintiff's right to possess Walter's remains, which duty they breached in no less than the six following ways:

> (1) failing to follow hospital policies governing the identification and processing of dead bodies in the morgue,
>
> (2) failing to keep an accurate log that correctly recorded the identity and location of bodies in the Memorial morgue,
>
> (3) violating hospital and industry standards by releasing the wrong body to representatives of a funeral home,
>
> (4) violating hospital and industry standards by releasing a misidentified body to representatives of a funeral home,
>
> (5) releasing a body to representatives of a funeral home when they knew or should have known that the body did not match the description of the body to be transported, and
>
> (6) violating hospital and industry standards by relying entirely on an erroneous logbook entry to confirm the identity of a body in the morgue.

Finally, plaintiff alleges that, as a proximate result of defendant's acts and omissions, plaintiff experienced and suffered severe emotional distress, mental suffering, embarrassment,

humiliation, and financial losses, all of which were the foreseeable consequence of defendant's negligence. In short, plaintiff's third amended complaint properly alleges a legally cognizable duty, a breach of that duty by defendant, and injuries proximately caused by that breach. Taking these well-pleaded facts as true, we conclude that plaintiff's third amended complaint states a claim for tortious interference with the right to possess a corpse. The trial court therefore erred in granting defendant's section 2-615 motion to dismiss.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the appellate court and remand the cause to the circuit court for further proceedings consistent with this opinion.

¶ 29 Appellate court judgment affirmed.

¶ 30 Cause remanded.

Corgan v. Muehling, 143 Ill. 2d 296 (1991)

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

Ill. Supreme Court · filed 1991-05-30 · Reporter opinion
Supreme Court

Treatment in the index: overruled by Thornton v. Garcini; overruled by Thornton v. Garcini, 237 Ill. 2d 100. Check it in a citator before filing.

Where the memo cites it

- memo p. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C009.2
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cause it would be dangerous to operate without a protective guard. Rodney's testimony, thus, conformed to Wilhelm's deposition testimony in 1986, in which he stated that he thought the auger was hazardous without a protective device. Since Henry's claim for contribution against Wilhelm essentially is based on Wilhelm's negligent use of the auger without a protective guard, and this was at issue in 1986, we believe that Henry had a previous opportunity to file its third-party complaint for contribution. Therefore, we do not think the trial court abused its discretion in denying Henry's motion.

Accordingly, we reverse the decision of the appellate court, and affirm the decision of the trial court.

Appellate court reversed;
circuit court affirmed.

JUSTICES CALVO and HEIPLE took no part in the consideration or decision of this case.

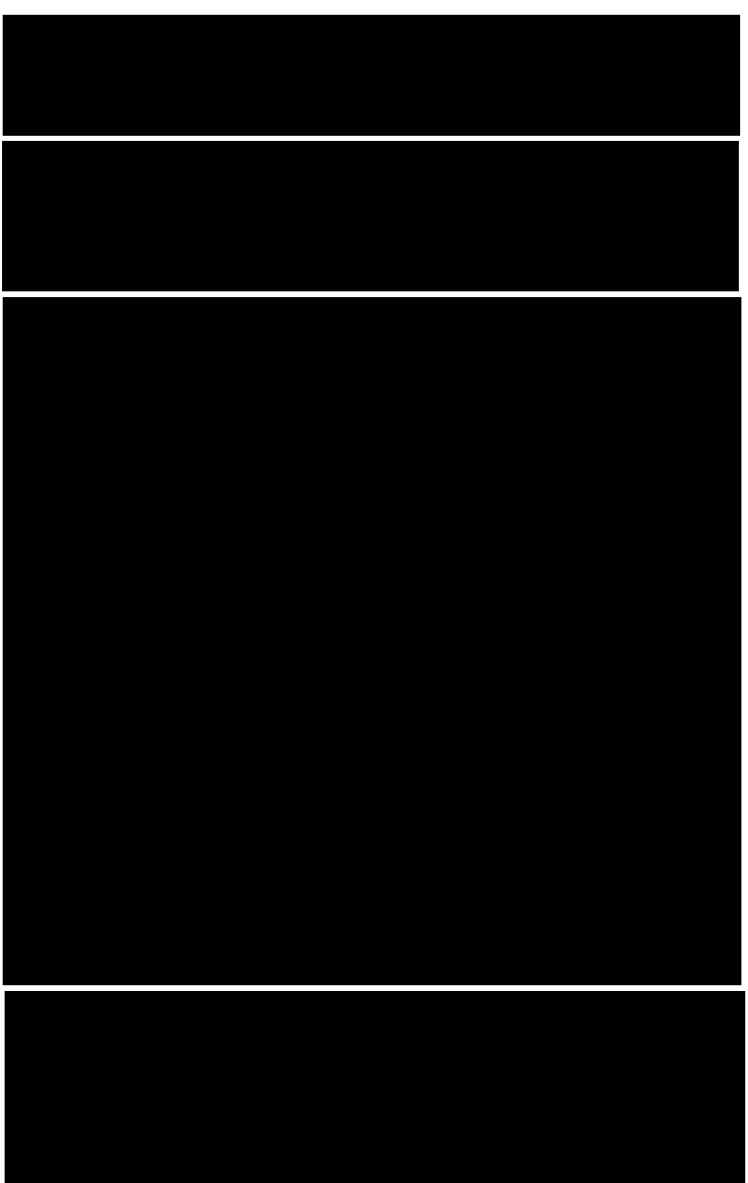
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(No. 67123.—[redacted]

PENELOPE CORGAN, Appellee, v. CONRAD MUEHLING, Appellant.

Opinion filed May 30, 1991.

[redacted]



[redacted]

BILANDIC, J., took no part.

MILLER, C.J., specially concurring.

HEIPLE, J., dissenting.

[redacted]

Wildman, Harrold, Allen & Dixon, of Chicago (Douglas L. Prochnow and Gary E. Dyal, of counsel), for appellant.

Michael L. Bolos, of Shorewood, for appellee.

John C. Wunsch and Corboy & Demetrio (Todd A. Smith, of counsel), all of Chicago, for *amicus curiae* Illinois Trial Lawyers Association.

JUSTICE MORAN delivered the opinion of the court:

Plaintiff, Penelope Corgan, filed this tort action in the circuit court of Cook County against defendant, Con-

rad Muehling. Defendant filed a motion to dismiss counts I, III and IV of plaintiff's third-amended complaint, hereinafter referred to as the complaint (Ill. Rev. Stat. 1981, ch. 110, par. 2—615). The circuit court dismissed count IV, refused to dismiss counts I and III and certified the following questions for appellate review (134 Ill. 2d R. 308):

> "1. Whether *Rickey v. Chicago Transit Authority* [(1983), 98 Ill. 2d 546], bars recovery for emotional damages under Count I of the plaintiff's [complaint] against a psychologist for negligence.
>
> 2. Whether *Rickey* *** bars recovery for emotional damages under Count III of the plaintiff's [complaint] against a psychologist for negligence."

The appellate court affirmed the circuit court in part, holding that *Rickey* does not bar plaintiff from recovering damages under counts I and III. The appellate court also vacated the circuit court's dismissal of count IV, holding that the Psychologist Registration Act (the Act) (Ill. Rev. Stat. 1981, ch. 111, par. 5301 *et seq.*) implicitly permits plaintiff to maintain a private right of action for nuisance. (167 Ill. App. 3d 1093.) This court granted defendant's petition for leave to appeal (134 Ill. 2d R. 315) and allowed the Illinois Trial Lawyers Association to file an *amicus curiae* brief in support of plaintiff. 134 Ill. 2d R. 345.

The issues presented for review are whether: (1) direct victims must set forth the pleading requirements established in *Rickey* when stating a cause of action for negligent infliction of emotional distress; and (2) the Act permits plaintiff to maintain a private right of action for nuisance.

As our review of this case is limited to the sufficiency of plaintiff's complaint, all well-pled facts must be accepted as true. (*Scott & Fetzer Co. v. Montgomery Ward & Co.* (1986), 112 Ill. 2d 378, 387.) Plaintiff alleged the

following facts in her four-count complaint. She alleged that defendant publicly held himself out as a registered psychologist, that she came under his professional care in March 1979, and that she ended her professional relationship with him in October 1980.

She further alleged that between March 1979 and October 1980, defendant repeatedly engaged in sexual intercourse with her "under the guise of therapy." Plaintiff also alleged that defendant's conduct caused and still causes her to experience "fear, shame, humiliation and guilt." Moreover, that defendant's conduct compelled her "to undergo more intensive and extensive psychotherapeutic care and counseling."

Count I, entitled "PSYCHOLOGICAL MALPRACTICE," alleged that defendant owed plaintiff "a duty to possess and exercise the skill, knowledge and expertise which would have been exercised by reasonably well qualified psychologists in like circumstances." Count I further alleged that defendant breached this duty by: (1) undertaking psychological care of female patients when he knew from past experience that he was incapable of maintaining appropriate professional objectivity; (2) failing "to establish and maintain an appropriate and proper therapeutic milieu"; (3) failing to recognize and deal with the evolving psychotherapeutic phenomenon of transference and countertransference; (4) permitting his relationship with plaintiff to become a vehicle for the "resolution of his own psychosexual infirmities"; (5) failing to consult with other qualified psychologists or psychiatrists when he realized that his relationship with plaintiff was adverse to her psychological well-being; and (6) failing to refer plaintiff to another qualified psychologist or psychiatrist when he knew or should have known that his therapy was adverse to her psychological well-being.

Count II is not at issue in this appeal, as it involved another party with whom plaintiff settled. Count III, en-

titled "WILLFUL AND WANTON MISCONDUCT," alleged that defendant owed plaintiff "a duty to refrain from willful abuse of his professional relationship" with her. Count III further alleged that defendant breached this duty and demonstrated "a conscious indifference and reckless disregard for [p]laintiff" by repeatedly engaging "in sexual intercourse with her under the guise of therapy."

Count IV, entitled "NUISANCE," alleged that the Act requires psychologists to register with the State and that defendant never so registered. Count IV further alleged that defendant was, therefore, a "public nuisance" pursuant to section 26 of the Act, because he "represent[ed] himself as a psychologist" and rendered "psychological services without having in effect a currently valid certificate." Ill. Rev. Stat. 1981, ch. 111, par. 5327.

In his motion to dismiss counts I, III and IV, defendant: (1) characterized count I as a cause of action for negligent infliction of emotional distress and argued that it should be dismissed because plaintiff failed to set forth the pleading requirements established in *Rickey*; (2) characterized count III as a cause of action for intentional infliction of emotional distress and argued that it should be dismissed for failure to state a cause of action because plaintiff failed to set forth the pleading requirements established in *Knierim v. Izzo* (1961), 22 Ill. 2d 73; and (3) argued that count IV should be dismissed because the Act does not expressly provide a private right of action for nuisance.

In her response to defendant's motion to dismiss, plaintiff argued that defendant mischaracterized count III. She explained that count III stated a cause of action for negligence rather than intentional infliction of emotional distress, because "[w]illfull [*sic*] and wanton misconduct is an aggravated form of negligence." The circuit court then dismissed count IV, refused to dismiss

counts I and III and certified the related questions for appellate review.

The appellate court determined that count I was "in essence for negligence" and that count III was "basically an action for negligence, since *** willful and wanton misconduct is an aggravated form of negligence." (167 Ill. App. 3d at 1096.) Upon concluding that both counts I and III stated a cause of action for negligent infliction of emotional distress, the appellate court affirmed the circuit court in part, holding that *Rickey* did not bar plaintiff from recovering damages under counts I and III. The appellate court reasoned that *Rickey* had no application to plaintiff's case because she was the direct victim of alleged negligent conduct, whereas the *Rickey* plaintiff was a bystander who witnessed a negligent act involving the defendant and the direct victim. Moreover, the appellate court determined that direct victims only need to set forth the elements of negligence—duty, breach, causation and damages—when stating a cause of action for negligent infliction of emotional distress. 167 Ill. App. 3d at 1102.

The appellate court also vacated the circuit court's dismissal of count IV, holding that the Act implicitly permits plaintiff to maintain a private right of action for nuisance. The appellate court reasoned that plaintiff was a member of the class for whose benefit the Act was enacted, that implication of a private right of action was consistent with the purpose of the Act, that the Act was designed to prevent plaintiff's injury, and that implication of a private right of action was necessary to provide plaintiff with an adequate remedy for defendant's violation of the Act. 167 Ill. App. 3d at 1104.

The first issue presented for review is whether direct victims must set forth the pleading requirements established in *Rickey* when stating a cause of action for negligent infliction of emotional distress.

Prior to this court's decision in *Rickey*, Illinois courts were guided by the impact rule when determining whether direct victims and bystanders could recover damages for negligent infliction of emotional distress. (See *Braun v. Craven* (1898), 175 Ill. 401.) The impact rule permitted both direct victims and bystanders to recover damages, if they suffered: (1) emotional distress; and (2) "a contemporaneous physical injury or impact." *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 553.

In *Rickey*, this court disavowed the impact rule, stating:

> "The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a *bystander* for emotional distress has been examined. [Citations.] That standard has been described as the zone-of-physical-danger rule. Basically, under it a *bystander* who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the *bystander* suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The *bystander*, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." (Emphasis added.) *Rickey*, 98 Ill. 2d at 555.

Defendant argues that this court abandoned the impact rule in *Rickey* and adopted the zone-of-physical-danger rule as the standard under which all plaintiffs can recover for negligent infliction of emotional distress. In reliance on his interpretation of *Rickey*, defendant contends that plaintiff failed to state a cause of action for

negligent infliction of emotional distress. He reasons that she failed to allege that she: (1) was within the zone of physical danger; (2) reasonably feared for her own safety because of his negligence; and (3) suffered physical injury or illness. Defendant further contends that counts I and III must, therefore, be dismissed.

Defendants contentions are, however, misplaced. Although use of the word "substitute" implies replacement of the *impact* rule with the *zone-of-physical-danger* rule, a closer reading of *Rickey* reveals that such a substitution was intended only in bystander cases. As one court explained: "The facts of *Rickey* are those of a typical bystander case and the court uses the word 'bystander' throughout the opinion. In particular, the court expressly puts the issue and the holding in the context of bystander recovery." (*McAdams v. Eli Lilly & Co.* (N.D. Ill. 1986), 638 F. Supp. 1173, 1177.) *Rickey*, therefore, abandoned the impact rule as it applied to bystanders and adopted the zone-of-physical-danger rule as the standard under which they can recover damages for negligent infliction of emotional distress. *Rickey* did not, however, define the scope of negligent infliction of emotional distress as it applies to direct victims. The court in *Rickey* was solely concerned with defining the parameters of *bystander* recovery.

Four years after *Rickey*, the court had the opportunity to reexamine the right to recover damages for negligent infliction of emotional distress in *Siemieniec v. Lutheran General Hospital* (1987), 117 Ill. 2d 230. In *Siemieniec*, the parents of a child born with hemophilia sought to recover damages for negligent infliction of emotional distress on the basis that they would have aborted the child had the defendants provided an accurate genetic diagnosis. The court determined that the parents failed to state a cause of action for negligent infliction of emotional distress, because their complaint

failed to allege the three zone-of-physical-danger rule requirements. *Siemieniec*, 117 Ill. 2d at 261-62.

Defendant argues that the court completely abandoned the impact rule in *Rickey* and, thereby, expanded the zone-of-physical-danger rule to include direct victims. (See *Siemieniec*, 117 Ill. 2d at 261-62; *Robbins v. Kass* (1987), 163 Ill. App. 3d 927; *Poole v. Alpha Therapeutic Corp.* (N.D. Ill. 1988), 698 F. Supp. 1367, 1372; but see *Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d 634, 638-43 (Linn, J., dissenting); *McAdams v. Eli Lilly & Co.* (N.D. Ill. 1986), 638 F. Supp. 1173.) In reliance on his interpretation of *Siemieniec*, defendant contends that plaintiff failed to state a cause of action for negligent infliction of emotional distress and that counts I and III must, therefore, be dismissed.

Defendant's contentions are, however, misplaced. Both the facts in *Siemieniec* and application of the zone-of-physical-danger rule to those facts indicate that the majority likened the parents to bystanders who were witnessing the effects of hemophilia on their child. Furthermore, the *Siemieniec* majority's mere failure to address the direct-victim/bystander distinction does not amount to expansion of the zone-of-physical-danger rule to include direct victims.

Moreover, the zone-of-physical-danger rule is patently inapplicable to direct victims. As Justice Linn so aptly stated:

> "The distinction between a direct victim and a bystander is more than just a play on semantics ***. In *Rickey*, the supreme court created a cut-off point beyond which a defendant owes no duty, and beyond which, therefore, the defendant is no longer liable for any injuries inflicted. *** [A] defendant owes a duty to only those persons who suffer emotional distress (and accompanying physical manifestations) as a result of being within the 'zone of danger' created by a negligently caused accident. This zone of danger, because it is cre-

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> ated by the accident, encircles it; hence, the accident is, in effect, the 'nucleus' of the surrounding zone of danger. A person is within an accident's zone of danger (and able to seek recovery under *Rickey*) when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating *from the accident itself.*" (Emphasis in original.) *Lewis*, 139 Ill. App. 3d at 639-40 (Linn, J., dissenting).

Siemieniec, therefore, simply applied the zone-of-danger rule to a bystander case, as the parents suffered emotional distress because of their child's disease. Thus, this court has yet to determine the pleading requirements for a plaintiff who has directly suffered emotional distress due to a psychotherapist's negligence. Clearly, the *Rickey* zone-of-danger test does not apply to the instant case, as the plaintiff was a direct victim and not a bystander.

The essential question is whether the plaintiff properly alleged negligence on the part of the defendant. This court has held:

> "A complaint for negligence, to be legally sufficient, must set out facts that establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. [Citations.] The determination of whether a duty exists—whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff—is an issue of law to be determined by the court." (*Kirk v. Michael Reese Hospital & Medical Center* (1987), 117 Ill. 2d 507, 525.)

In determining whether to impose a duty upon a defendant, a court will look at various policy considerations, such as the likelihood of harm, the gravity of the injury, the burden of guarding against the injury, and the relationship between the parties. See *Horak v. Biris* (1985), 130 Ill. App. 3d 140, 145.

We find that the facts alleged in this case, if proved, sufficiently establish that the defendant owed a duty to the plaintiff that should be enforced. In her complaint, the plaintiff alleges: that the defendant held himself out as a qualified psychologist, able to render counseling and advice; that she went to the defendant for the purpose of obtaining such counseling and advice; that the defendant was, within the meaning of professional due care, negligent by having sexual relations with her during the course of her treatment; and that the defendant failed to recognize or properly deal with the psychotherapeutic phenomenon of transference and countertransference.

The appellate court has previously examined a factually similar case, and held that the nature of the therapist-patient relationship gives rise to duty on behalf of the therapist to refrain from activity which carries with it a foreseeable, and unreasonable, risk of causing emotional or mental harm to the patient. (*Horak*, 130 Ill. App. 3d at 145.) The court stated:

> "The 'transference phenomenon' *** has been defined in psychiatric practice as 'a phenomenon *** by which the patient transfers feelings toward everyone else to the doctor, who then must react with a proper response, the countertransference, in order to avoid emotional involvement and assist the patient in overcoming problems.' (*Aetna Life & Casualty Co. v. McCabe* (E.D. Pa. 1983), 556 F. Supp. 1342, 1346.) The mishandling of this phenomenon, which generally results in sexual relations or involvement between the psychiatrist or therapist and the patient, has uniformly been considered as malpractice or gross negligence in other jurisdictions, whether the sexual relations were prescribed by the doctor as part of the therapy, or occurred outside the scope of treatment." (*Horak*, 130 Ill. App. 3d at 146.)

Accordingly, in *Horak*, the court held that allegations that a social worker mishandled the transference phenomenon were sufficient to show a breach of a duty of

care. *Horak*, 130 Ill. App. 3d at 146; see also *Simmons v. United States* (9th Cir. 1986), 805 F.2d 1363; *Cotton v. Kambly* (1980), 101 Mich. App. 537, 300 N.W.2d 627; *Roy v. Hartogs* (1976), 85 Misc. 2d 891, 381 N.Y.S.2d 587; *Omer v. Edgren* (1984), 38 Wash. App. 376, 685 P.2d 635 (concluding that sexual relations between psychologists, psychiatrists, psychotherapists and social workers and their clients raise a jury question as to the therapist's malpractice); see generally LeBoeuf, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 Harv. Women's L.J. 83 (1988).

The legislature also appears to have recognized such a duty in a recently enacted statute entitled the Sexual Exploitation in Psychotherapy Act (Ill. Rev. Stat. 1989, ch. 70, par. 801 *et seq.*). Basically, that statute provides that a patient has a cause of action against a psychotherapist for "injury" caused by sexual contact with a psychotherapist. A patient may recover damages from a psychotherapist who is found liable for sexual exploitation. The statute applies only to causes of action arising on, or after, its January 1, 1989, effective date, and therefore is not applicable to this case. Ill. Rev. Stat. 1989, ch. 70, par. 807.

Having determined that the *Rickey* rule does not apply, and that the plaintiff can allege a cause of action for negligent infliction of emotional distress as a direct victim of defendant's psychological malpractice, a question remains as to whether the complaint should be dismissed because the plaintiff did not allege that she suffered a physical injury or illness as a result of her emotional distress. The appellate court found that such a requirement was not necessary to plead the cause of action in this case (167 Ill. App. 3d at 1102). Furthermore, the issue of whether or not there should be a physical manifestation requirement for claims of emotional distress has deeply divided the courts of our sister States. See Comment,

Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress, 33 Vill. L. Rev. 781, 801-02 (1988) (hereinafter Comment, *Negligent Infliction*).

There are essentially three reasons why courts have held that a cause of action for negligent infliction of emotional distress will not be allowed absent proof of physical symptom: (1) that emotional distress is inherently difficult to prove and therefore the physical manifestation requirement provides objective evidence; (2) that, in the absence of guarantees of trustworthiness provided by bodily harm, the emotional distress can be too easily feigned or imagined; and (3) where the defendant's conduct has been merely negligent, without an attempt to harm, his fault is not so great that he should be required to compensate for a purely mental disturbance. See, *e.g.*, *Payton v. Abbott Labs* (1982), 386 Mass. 540, 552-53, 437 N.E.2d 171, 178-79; *Reilly v. United States* (R.I. 1988), 547 A.2d 894, 896-98; *Meracle v. Children's Service Society* (1989), 149 Wis. 2d 19, 28-29, 437 N.W.2d 532, 535 (rule exists because of fear of flooding courts with fraudulent claims, and exposing defendants to potentially unlimited liability for emotional disturbance); see Restatement (Second) of Torts §436A (1965).

An increasing number of courts have rejected the physical manifestation of emotional distress requirement. The reasoning of this school of thought is aptly stated by the Texas Supreme Court:

> "The requirement [of physical manifestation of emotional distress] is overinclusive because it permits recovery for mental anguish when the suffering accompanies or results in any physical impairment, regardless of how trivial the injury. More importantly, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims they could prove if permitted

> to do so. *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 929, 616 P.2d 813, 820, 167 Cal. Rptr. 831, 838 (1980).
>
> Additionally, the requirement is defective because it 'encourages extravagant pleading and distorted testimony.' *Id.* To continue requiring proof of physical injury when mental suffering may be equally recognizable standing alone would force 'victim[s] to exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress she endured.' " *St. Elizabeth Hospital v. Garrard* (Tex. 1987), 730 S.W.2d 649, 652, quoting Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1059 (1936).

See also *Taylor v. Baptist Medical Center, Inc.* (Ala. 1981), 400 So. 2d 369; *Rodrigues v. State* (1970), 52 Haw. 156, 472 P.2d 509; *Rowe v. Bennett* (Me. 1986), 514 A.2d 802; *Johnson v. Supersave Markets, Inc.* (1984), 211 Mont. 465, 686 P.2d 209; *James v. Lieb* (1985), 221 Neb. 47, 375 N.W.2d 109; *Gates v. Richardson* (Wyo. 1986), 719 P.2d 193; see generally Comment, *Negligent Infliction,* at 802 n.119 (comprehensive list of jurisdictions that follow this rule).

Scientific research has provided modern society with a detailed and scientific understanding of the human mind. These developments have been cogently analyzed by the Hawaiian Supreme Court in *Leong v. Takasaki* (1974), 55 Haw. 398, 520 P.2d 758. In *Leong*, the court noted that there are two responses to traumatic stimuli: primary and secondary. The primary response is an immediate, automatic and instinctive response designed to protect the individual from harm. It is exemplified by emotional responses such as fear, anger, grief, and shock, and is generally short in duration and subjective in nature. *Leong*, 55 Haw. at 411-12, 520 P.2d at 766.

The secondary responses, which may be characterized as traumatic neuroses, are longer lasting reactions that are caused by a person's inability to cope adequately with a traumatic event. This response often is divided into three frequently occurring forms of neurosis: (1) the anxiety reaction, which produces severe tension and can result in nervousness, weight loss, stomach pains, emotional fatigue, weakness, headaches, backaches, a sense of impending doom, irritability, or indecision; (2) conversion reaction, which converts consciously disowned impulses into paralysis, loss of hearing or sight, muscle spasms, or other physiological symptoms which cannot be explained by physical impairments; and (3) hypochondrias reaction, characterized by an overconcern with health, and a fear of illness. *Leong*, 55 Haw. at 412, 520 P.2d at 767.

Clearly, when a primary response is coupled with a secondary one (which would include physical symptoms), damages can be established with a sense of objectivity. However, lack of precision is not a justifiable reason to preclude recovery, as expert witnesses such as psychiatrists, psychologists and social workers are fully capable of providing the jury with an analysis of a plaintiff's emotional injuries. The emotional distress of the primary response is no less real than the distress that is coupled with the physical manifestation of the secondary response and should not be distinguishable at law.

This line of reasoning is fully compatible with this court's findings regarding the tort of intentional infliction of emotional distress under Illinois law. In *Knierim v. Izzo* (1961), 22 Ill. 2d 73, this court found that a plaintiff need not allege physical injury to recover for intentional infliction of emotional distress. The court noted:

> "The stronger emotions when sufficiently aroused do produce symptoms that are visible to the professional eye and we can expect much more help from the men of sci-

> ence in the future. [Citation.] In addition, jurors from their own experience will be able to determine whether *** conduct results in severe emotional disturbance." *Knierim*, 22 Ill. 2d at 85.

In the 30 years since *Knierim*, this court has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress. Furthermore, the women and men of the mental health care field have made significant improvements in the diagnosis, description and treatment of emotional distress. Therefore, this court finds that the trial court acted properly in not dismissing the plaintiff's cause of action for failure to allege physical symptoms of emotional distress.

The second issue presented for review is whether the Act permits plaintiff to maintain a private right of action for nuisance.

Section 26 of the Act provides in pertinent part:

> "It is hereby declared to be a public nuisance for any person to represent himself as a psychologist or that the services he renders are psychological services without having in effect a currently valid certificate as defined in this Act. The Director or the State's attorney of the county in which such nuisance has occurred may file a complaint in the circuit court in the name of the people of the State of Illinois perpetually to enjoin such person from performing such unlawful acts." Ill. Rev. Stat. 1981, ch. 111, par. 5327.

It is readily apparent that section 26 of the Act does not expressly authorize individuals to bring a private right of action for nuisance. Plaintiff, however, argues that a private right of action should be implied, because the remedies specified in section 26 afford insufficient relief to those injured by violation of the statute.

Implication of a private right of action is appropriate only if: (1) plaintiff is a member of the class for whose benefit the Act was enacted; (2) it is consistent with the underlying purpose of the Act; (3) plaintiff's injury is one

the Act was designed to prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act. (See *Sawyer Realty Group, Inc. v. Jarvis Corp.* (1982), 89 Ill. 2d 379, 391.) Consideration of these factors supports implication of a private cause of action here.

As far as the first element is concerned, the Act was enacted to protect the public by prohibiting individuals from practicing or attempting to practice psychology without a valid certificate of registration. (Ill. Rev. Stat. 1981, ch. 111, par. 5301 *et seq.*) Plaintiff is certainly a member of the public and is, therefore, a member of the class for whose benefit the Act was enacted. Moreover, she was once the patient of defendant, an individual who allegedly practiced psychology without a valid certificate of registration.

As far as the second element is concerned, the underlying purpose of the Act is to protect the public by prohibiting individuals from practicing or attempting to practice psychology without a valid certificate of registration. (Ill. Rev. Stat. 1981, ch. 111, par. 5301 *et seq.*) The plaintiff was clearly within the class of persons the statute was designed to protect. In addition, the injury she suffered at the hands of an unqualified practitioner was within the range of injuries the statute was designed to prevent.

This court has held that "[w]hen a statute is enacted for the protection of a particular class of individuals, a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned therein." (*Heimgaertner v. Benjamin Electric Manufacturing Co.* (1955), 6 Ill. 2d 152, 155.) The plaintiff analogizes the instant case to *Sawyer Realty Group, Inc. v. Jarvis Corp.* (1982), 89 Ill. 2d 379. In *Sawyer*, this court implied a private cause of action under the Real Estate Brokers and Salesmen License Act (Ill. Rev. Stat. 1977, ch. 111, par. 5701 *et seq.*), allowing

a civil remedy for damages against real estate brokers who engaged in deceptive and fraudulent practices in violation of the Act. In many respects, the Psychologist Registration Act is very similar to the statute at issue in *Sawyer*, in that: both acts are comprehensive licensing and registration schemes designed to protect the public from unqualified and incompetent practitioners; both acts set forth standards for qualification for a certificate of registration, and empower the Department of Professional Regulation to make and enforce regulations in connection with the issuance, revocation and suspension of a certificate of registration; and both acts give private individuals an opportunity to initiate a departmental investigation by filing a complaint. *Sawyer*, 89 Ill. 2d at 390 (citing Ill. Rev. Stat. 1977, ch. 111, par. 5733(b), and Ill. Rev. Stat. 1981, ch. 111, pars. 5317, 5319).

Unlike the statute involved in *Sawyer*, the Psychologist Registration Act does not authorize private individuals who are harmed by violation of the statute to seek any form of civil relief. However, nothing in the statute suggests that the legislature intended to limit the available remedies to those administrative or criminal measures specifically enumerated within the Act. As in *Sawyer*, the implication of a private right of action is within the scope of the Psychologist Registration Act and is therefore consistent with its purpose. It is clearly shown that the the implication of a private right is consistent with the underlying purpose of the Act, and that the injury to the plaintiff was of the type the Act tried to prevent. Thus, the plaintiff has met the second and third parts of the *Sawyer* test.

The fourth part of the *Sawyer* test is whether implication of a civil private right of action is necessary to provide an adequate remedy at law. (*Sawyer*, 89 Ill. 2d at 391.) A civil private right of action for compensatory damages is necessary to uphold and implement the pub-

lic policy behind section 26 of the Psychologist Registration Act, to protect the public from persons who are incompetent and unqualified to render psychological services. See, *e.g., Kelsay v. Motorola, Inc.* (1978), 74 Ill. 2d 172 (private right of action for retaliatory discharge of an employee who filed a workers' compensation claim is necessary to effectuate the purposes of the Workers' Compensation Act).

It is unlikely that patients, injured by unqualified and unregistered psychologists, will initiate or pursue their complaints through the administrative or criminal justice system without a potential for a tangible reward. A private right of action under the Psychologist Registration Act is the only way that an aggrieved plaintiff can be made whole, when a defendant fails to comply with the provisions of the Act. Because an implied private right of action is consistent with the purpose of the Psychologist Registration Act and is necessary to achieve its aim, we conclude that the appellate court properly reversed the circuit court's dismissal of count IV of the plaintiff's complaint.

For the foregoing reasons, the judgment of the appellate court is affirmed.

Affirmed.

JUSTICE BILANDIC took no part in the consideration or decision of this case.

CHIEF JUSTICE MILLER, specially concurring:

I concur in the judgment of the court.

According to the third-amended complaint, the plaintiff sought treatment from the defendant, who held himself out as a licensed psychologist, and the two subsequently engaged in sexual activity during the course of the therapy. The plaintiff alleges that the sexual relationship developed for a variety of reasons connected to the

treatment. The complaint in the present case is thus anchored in a specific factual milieu: that the sexual conduct forming the basis for the plaintiff's action was the consequence of what is alleged to be the therapist's negligent, or willful and wanton, rendition of professional services. It is the therapist-patient relationship that defines the duty in the case at bar.

The defendant makes no challenge to the established principle that a patient who claims injury resulting from sexual activity with a psychotherapist may state a cause of action for professional malpractice. As demonstrated in the *amicus* brief submitted in behalf of the plaintiff, sexual contact between a therapist and a patient during the course of treatment has been universally condemned by the courts and by the psychotherapeutic profession.

With respect to that portion of the third-amended complaint alleging psychotherapeutic malpractice, it should be noted that the only question before us, and the only one resolved by today's decision, is the question certified by the trial judge: whether this court's earlier opinion in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, bars recovery of damages for emotional distress in the limited set of circumstances alleged here. We have, in the present case, answered that question in the negative. It seems somewhat incongruous, however, to characterize such behavior as negligent or willful and wanton. It is perhaps more accurately described as exploitation, the term adopted by the General Assembly in its recent legislation recognizing a cause of action for sexual misconduct committed by psychotherapists against patients as a consequence of the professional treatment (see Ill. Rev. Stat. 1989, ch. 70, pars. 801 through 807), and I would apply that designation, rather than the labels "negligent" or "willful and wanton," in describing the basis for the plaintiff's cause of action.

JUSTICE HEIPLE, dissenting:

This is a malpractice case against an unlicensed clinical psychologist. The gist of the malpractice claim is that during the so-called course of treatment, a sexual relationship developed between the "patient" and the "psychologist." The "treatment" began in March of 1979 and continued until October of 1980. During this period of time, the plaintiff and the defendant repeatedly engaged in mutually agreeable sexual intercourse. The plaintiff now claims that this sexual relationship disturbed her psychological well-being. She would like the defendant to pay her damages of $3.75 million.

This is not a proper claim for malpractice. It should not be recognized in law. There is no suggestion that the plaintiff in this case was a minor, was mentally retarded or was under any other legal disability. She knew what she was doing and did it.

At the moment the sexual relationship began, the treatment relationship ended. From that time forward, the plaintiff and the defendant were engaged in a frolic, a mutually agreeable detour from any recognized or accepted treatment regimen. To hold the defendant legally liable under such conditions is to countenance a legal form of extortion or blackmail. The law should not permit it. The complaint should be dismissed. Even if such a claim were to be recognized, the attempt to fit this type of claim into a negligence or willful and wanton format is wholly misplaced. There is no allegation that the parties fell off a bed or injured any part of the plaintiff's anatomy. The plaintiff, having willingly engaged in a frolic, now seeks to use the legal system as a tool for a shakedown.

Accordingly, I dissent.

Corgan v. Muehling, 167 Ill. App. 3d 1093 (1st Dist. 1988)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1988-03-08 · Reporter opinion
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- memo p. 12 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C031.3

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to any settlements during its case in chief, we believe that defendant's instruction number 5 was correctly refused.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

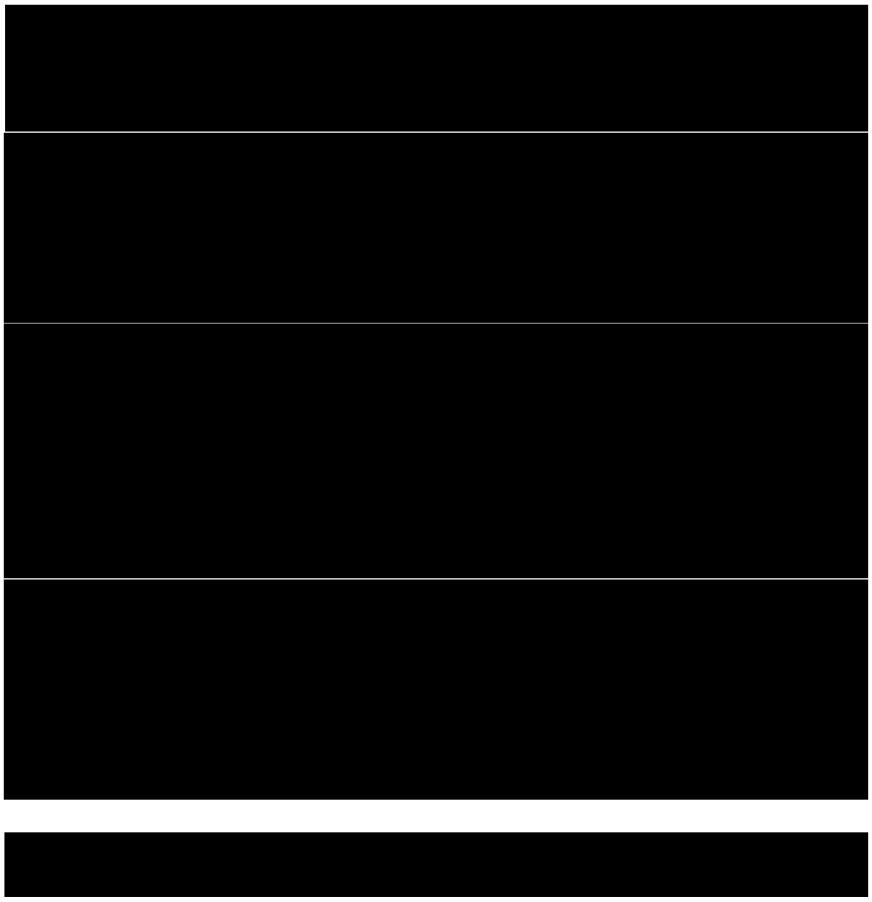
Affirmed.

CAMPBELL, P.J., and MANNING, J., concur.

PENELOPE CORGAN, Plaintiff-Appellant, v. CONRAD MUEHLING *et al.*, Defendants-Appellees.

First District (2nd Division) No. 86—2202

Opinion filed March 8, 1988.—Rehearing denied April 26, 1988.



Michael L. Bolos, Ltd., of Chicago (Michael L. Bolos, of counsel), for appellant.

Wildman, Harrold, Allen & Dixon, of Chicago (Douglas L. Prochnow and Gary E. Dyal, of counsel), for appellee Conrad Muehling.

Cassiday, Schade & Gloor, of Chicago (Michael J. Morrissey, Michael J. Gallagher, Jean M. Golden, and Martha A. Pagliari, of counsel), for appellee R. J. Rodriguez.

JUSTICE SCARIANO delivered the opinion of the court:

In March of 1979, Penelope Corgan came under the psychological care of Conrad Muehling. She alleges in count I of her complaint that

he conducted her treatment negligently, was negligent in having sexual relations with her during this treatment, and "negligently failed either to recognize the evolution of the psychotherapeutic phenomenon of transference and counter-transference or deal appropriately with such evolving phenomenon," all of which caused her emotional trauma. Corgan contends that Muehling was not registered as a psychologist, but was able to practice psychology by having codefendant R. J. Rodriguez, M.D., a psychiatrist, submit Muehling's bills to insurance companies, including plaintiff's, for payment in Rodriguez' name. She averred that Muehling's actions caused her "to experience fear, shame, humiliation, and guilt and as a further result been compelled to undergo more intensive and extensive psychotherapeutic care and counseling." In count III she avers that the same damages were the result of Muehling's willful and wanton misconduct.

In count II Corgan maintains Rodriguez knew that Muehling was "not a registered psychologist in Illinois by virtue of Muehling's failure to have completed the requisite educational requirements for registration" and that Rodriguez had a consultant relationship with Muehling and "billings for Muehling's services were submitted under Rodriguez' name in cases in which consultations had been had." She asserts that by reason of the foregoing Rodriguez was negligent in his supervision of Muehling and in failing "to warn plaintiff of Muehling's proclivities." In count IV she claims that Corgan has a private right of action for nuisance because of Muehling's failure to register in Illinois as a psychologist. Corgan unsuccessfully attempted to add a count V, wherein she alleges a conspiracy between Muehling and Rodriguez which helped create the situation that caused her injuries.

This appeal is taken from those orders of the trial court which dismissed counts II and IV of the plaintiff's third amended complaint pursuant to section 2—615 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2—615) and denied her leave to add supplemental count V to the complaint. Pursuant to Supreme Court Rule 308(a) (107 Ill. 2d R. 308(a)), the trial judge certified the related questions of whether *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1, bars Corgan from recovering for emotional damages under counts I and II. This certification is the basis of Muehling's cross-appeal. We have granted Corgan permission to withdraw her appeal as to count II and proposed count V, pursuant to a settlement agreement with Rodriguez. Accordingly, Rodriguez is no longer a party to this appeal.

COUNTS I, III

A. INTRODUCTION

[redacted] In count I, as noted above, Corgan charges Muehling with malpractice. Malpractice is a form of negligence (*Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418, 328 N.E.2d 301; Illinois Pattern Jury Instructions, Civil, No. 105.01 (2d ed. 1971)), thus the first count is in essence for negligence. Therefore, the elements of a malpractice action are the same as for any other negligence case. *Borowski*, 60 Ill. 2d at 423.

•[redacted] Furthermore, the parties agree that count III, wherein Corgan alleges willful and wanton misconduct, also is basically an action for negligence, since this court has held that willful and wanton misconduct is an aggravated form of negligence. (*Alley v. Champion* (1979), 75 Ill. App. 3d 878, 882, 394 N.E.2d 735.) Count III is *not* for the intentional infliction of emotional distress; indeed, Corgan does not contend otherwise. While we must accept all well-pleaded facts as true (*Rinck v. Palos Hills Consolidated High School District No. 230* (1979), 82 Ill. App. 3d 856, 863, 403 N.E.2d 470), Corgan does not plead the elements that constitute intentional infliction of emotional distress. (See, *e.g.*, *Knierim v. Izzo* (1961), 22 Ill. 2d 73, 174 N.E.2d 157.) She does not allege that Muehling's actions were calculated to cause severe emotional distress; rather, among other allegations, she claims that he was acting solely for his own sexual gratification. Since Muehling held himself out as a psychologist, he will be held to the same standard of care as if he were indeed a psychologist. *Williams v. Piontkowski* (1949), 337 Ill. App. 101, 84 N.E.2d 843; *Matthei v. Wooley* (1897), 69 Ill. App. 654.

B. THE RICKEY CASE

Simply and briefly, the questions certified by the circuit court in this case are whether counts I and III of Corgan's third amended complaint are barred by *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1. In *Rickey*, the plaintiff was attempting to recover damages for the emotional distress he allegedly suffered as a result of the CTA's negligence when he saw his brother being injured on an escalator. (*Rickey*, 98 Ill. 2d at 548.) The Illinois Supreme Court, in a unanimous opinion, framed the issue in the following manner: "The underlying question is, of course, whether any person who suffers emotional distress can recover, but the question here specifi-

cally is whether a bystander at the injury of another who, generally under the decisions, is a close relative of the bystander can recover." *Rickey*, 98 Ill. 2d at 553.

The court then discussed the "impact rule," the governing law in Illinois at that time, which required physical impact or injury in order for a plaintiff to recover in an action for the negligent infliction of emotional distress. The *Rickey* court noted that this requirement had been frequently satisfied by trivial contacts, and that consequently the impact rule had fallen into disfavor. (*Rickey*, 98 Ill. 2d at 553.) The court also recognized that although recovery for emotional distress should not be determined solely on the basis of whether there was any physical impact visited upon the plaintiff, the appellate court went too far in adopting a standard which "would permit recovery for emotional disturbance alone." (*Rickey*, 98 Ill. 2d at 554, citing approvingly Restatement (Second) of Torts §436A (1965).) Our supreme court acknowledged that courts were hesitant in allowing recovery for purely emotional injuries and explained such unwillingness as follows: "[C]ourts have given as reasons for this reluctance apprehensions that the door would be opened for fraudulent claims, that damages would be difficult to ascertain and measure, that emotional injuries are hardly foreseeable and that frivolous litigation would be encouraged." *Rickey*, 98 Ill. 2d at 555.

The court then proceeded to announce its holding:

> "The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of *recovery by a bystander* for emotional distress has been examined. [Citations.] That standard has been described as the zone-of-physical-danger rule. Basically, under it a *bystander who is in a zone of physical danger* and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. *** *The bystander*, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." (Emphasis added.) (*Rickey*, 98 Ill. 2d at 555.)

Accordingly, the supreme court remanded the cause because the complaint did allege physical manifestations, and it was unclear whether the plaintiff was endangered by the alleged negligence and had a reasonable fear for his own safety. *Rickey*, 98 Ill. 2d at 556.

C. THERAPIST-PATIENT SEXUAL CONTACT

We have long been aware that plaintiffs in other States have successfully maintained malpractice actions against their psychologist, psychiatrist, or social worker, predicated primarily on the therapist's alleged sexual contact with his patient. The leading case is from the State of New York, wherein the plaintiff alleged that she "was induced to have sexual intercourse with the defendant as part of her prescribed therapy," and was as a result "so emotionally and mentally injured that she was required to seek hospitalization on two occasions during 1971." (*Roy v. Hartogs* (1976), 381 N.Y.S.2d 587, 588, 85 Misc. 2d 891.) The court in *Roy* upheld the trial court's award of damages to the plaintiff, justifying its holding as follows: "By alleging that his client's mental and emotional status was adversely affected by this deceptive and damaging treatment, plaintiff's counsel asserted a viable cause of action ***." *Roy*, 381 N.Y.S.2d at 588, 85 Misc. 2d at 892.

The court of appeals in our sister State of Michigan, relying on *Roy*, held that allegations analogous to those in *Roy* were sufficient to state a cause of action for psychiatrist malpractice. (*Cotton v. Kambly* (1980), 101 Mich. App. 537, 300 N.W.2d 627.) In a somewhat similar case, a court in one of our southern jurisdictions held that the plaintiff's allegations that a psychiatrist had sexual relations with a patient's wife was "sufficient to permit the jury to pass upon the issue of whether malpractice occurred." *Mazza v. Huffaker* (1983), 61 N.C. App. 170, 178, 300 S.E.2d 833, 838.

The United States Court of Appeals has upheld an award for a plaintiff who alleged that the individual treating her psychiatric problems had committed malpractice by having sexual intercourse with her. (*Simmons v. United States* (9th Cir. 1986), 805 F.2d 1363.) The plaintiff contended that her therapist, employed by the United States as a social worker in the Indian Health Service, was guilty of malpractice which had caused her to attempt suicide. A doctor who gave psychiatric counseling to Simmons subsequent to her having terminated consultation with the social worker "stated that her counselor's misconduct was the cause of her psychological problems and that her problems were due essentially to his inappropriate response to the normal 'transference phenomenon' in therapy." *Simmons*, 805 F.2d at 1364.

The court, in a unanimous opinion, proceeded to analyze the plaintiff's malpractice claim. It said that "[t]ransference is the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist." (*Simmons*, 805 F.2d at 1364.) The court went

on to explain that transference is crucial to the therapeutic process and that "[t]he proper therapeutic response is countertransference, a reaction which avoids emotional involvement and assists the patient in overcoming problems." (*Simmons*, 805 F.2d at 1365.) The court described as follows the legal consequences of a counselor's failure to properly manage the transference phenomenon: "When the therapist mishandles transference and becomes sexually involved with a patient, medical authorities are nearly unanimous in considering such conduct to be malpractice. [Citations.]" (*Simmons*, 805 F.2d at 1365.) Moreover, it recognized that "[c]ourts have uniformly regarded mishandling of transference as malpractice or gross negligence. [Citations.]" *Simmons*, 805 F.2d at 1365-66.

In a malpractice action in the State of Washington, the plaintiff alleged that she had a sexual relationship with her psychiatrist which "was the direct and proximate cause of damages to the plaintiff, including humiliation, mental anguish, shock, outrage, depression, inconvenience, medical expenses, loss of wages, marital difficulties and general deterioration of emotional well being." (*Omer v. Edgren* (1984), 38 Wash. App. 376, 377, 685 P.2d 635, 636.) The trial court granted summary judgment to the therapist, but the appellate court reversed, holding that there was sufficient evidence for a finder of fact to determine that the defendant had committed malpractice.

The court concluded by addressing the doctor's contention that his patient had not been damaged. It noted that the plaintiff "testified in her deposition she suffered no loss with respect to medical expenses, lost earnings, or marital difficulties," but that she "claimed general as well as special damages." (*Omer*, 38 Wash. App. at 381, 685 P.2d at 638.) The court, although cognizant of the difficulty articulated in *Rickey* of proving damages of this nature, nevertheless held that this problem in itself was not enough to bar the plaintiff from recovery because "[i]njury flowing from the alleged relationship, though difficult to prove, may be as real as that type of injury which can be proven with mathematical certainty." *Omer*, 38 Wash. App. at 381, 685 P.2d at 638.

D. THE APPLICATION OF RICKEY

The reasoning in *Rickey*, a case involving injuries alleged to have been sustained by a bystander to an accident, seems to some authorities to be just as compelling in cases in which the plaintiff is the direct victim of the negligence. (See, *e.g.*, *Hammond v. Lane* (1987), 162 Ill. App. 3d 17, 515 N.E.2d 828; *Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d 634, 487 N.E.2d 107; Note, *Rickey v.*

Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois, 17 J. Mar. L. Rev. 563 (1984).) The supreme court's most recent pronouncement on the issue of the negligent infliction of emotional distress is *Siemieniec v. Lutheran General Hospital* (1987), 117 Ill. 2d 230, 512 N.E.2d 691, which involved claims for wrongful birth and wrongful life, as well as for the negligent infliction of emotional distress. In regard to the count for the negligent infliction of emotional distress, a majority of the court held:

> "There are no allegations in the complaint from which it can be said that the defendants' alleged negligence in any way endangered the parents of the impaired child. It is also not alleged that the parents have or will suffer any physical injury or illness resulting from the emotional distress allegedly caused by defendants' negligence." (*Siemieniec*, 117 Ill. 2d at 261.)

Accordingly, *Siemieniec* and *Rickey* can be distinguished from the case *sub judice* because both involved bystanders, while here we are concerned with a direct victim of the alleged negligence.

The scope of the holding in *Rickey* is thoroughly discussed in both the majority and dissenting opinions in the First District case of *Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d 634, 487 N.E.2d 107. The majority in *Lewis* stated that the zone of danger test also applies to direct victims of negligence, emphasizing the *Rickey* court's statement of the issue of the case in general terms. (*Lewis*, 139 Ill. App. 3d at 637.) Accordingly, the court held that the plaintiff had not stated a valid claim for negligent infliction of emotional distress for injuries arising out of his being trapped in an elevator for forty minutes. In his dissent in *Lewis*, Justice Linn stated that "a reading of the *Rickey* opinion discloses that being in a 'high risk of physical impact' is a requirement imposed upon a bystander and not a direct victim ***." (*Lewis*, 139 Ill. App. 3d at 639 (Linn, J., dissenting).) Based on his interpretation of *Rickey*, he concluded that, "A direct victim such as Lewis is not required to allege that she was subjected to a high risk of physical impact because she was involved in the very accident producing that risk." *Lewis*, 139 Ill. App. 3d at 640 (Linn, J., dissenting).

In a recent First District case, the court held that *Rickey* applied to the direct victim of a psychologist's negligence in handling the transference phenomenon and in having sexual relations with his patient, although it was suggested in a specially concurring opinion that *Rickey* does not apply in cases involving direct victims. (*Hammond v. Lane* (1987), 162 Ill. App. 3d 17.) In a case concerning legal malprac-

tice, the Appellate Court for the Third District applied *Rickey*, although the court did not expressly state that *Rickey* applies to direct victims of negligence. (*Maere v. Churchill* (1983), 116 Ill. App. 3d 939, 944, 452 N.E.2d 694.) An in-depth analysis of *Rickey* also concludes that *Rickey* applies to direct victims of negligence. Note, *Rickey v. Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois*, 17 J. Mar. L. Rev. 563 (1984).

This viewpoint, as noted previously, is not unanimous. (*McAdams v. Eli Lilly & Co.* (N.D. Ill. 1986), 638 F. Supp. 1173, 1178; *Lewis*, 139 Ill. App. 3d at 638 (Linn, J., dissenting).) In *McAdams*, the plaintiff alleged in her complaint that she had anatomical deformities because her mother ingested diethylstilbestrol (DES) during pregnancy, and that as a result she had been subjected to an increased risk of cancer. The plaintiff contended that her fear of cancer caused her emotional distress. In the following passage, the court explained its refusal to employ the zone of danger test: "The constant theme from *Braun* [*Braun v. Craven* (1898) 175 Ill. 401, 51 N.E. 657] through *Rickey* and its progeny is that Illinois courts will compensate genuine mental suffering by applying a rule which also sifts out frivolous claims. *** The requirements of the *Rickey* zone of danger rule, fashioned for a bystander case, cannot be applied here without contortions." *McAdams*, 638 F. Supp. at 1178.

As we have shown, there is considerable controversy and confusion over whether the zone of danger test should be used in cases involving direct victims of negligence. It is clear, however, that *Rickey* does not become inapplicable solely because a case involves a malpractice claim. *Gihring v. Butcher* (1985), 138 Ill. App. 3d 976, 979, 487 N.E.2d 75; accord *Siemieniec*, 117 Ill. 2d at 261.

In a social worker malpractice case the Second District did not even deem it necessary to mention *Rickey*. (*Horak v. Biris* (1985), 130 Ill. App. 3d 140, 474 N.E.2d 13.) The court concluded that the plaintiff had pleaded a valid cause of action for the negligent infliction of emotional distress. (*Horak*, 130 Ill. App. 3d at 147.) In another social worker malpractice action, this court held that the applicable test is the one used in any negligence case. (*Wogelius v. Dallas* (1987), 152 Ill. App. 3d 614, 504 N.E.2d 791.) The court in *Wogelius* held that "a plaintiff must plead: (1) that defendant owed a duty to plaintiff, (2) that defendant failed to perform or breached that duty, (3) that the breach was the proximate cause of plaintiff's injuries, and (4) damages." (152 Ill. App. 3d at 622; accord *Siemieniec*, 117 Ill. 2d at 270 (Simon, J., dissenting).) We perceive no reason why the approach used

by this court in the social worker malpractice cases of *Horak* and *Wogelius* should not be applied equally in psychologist malpractice cases such as the instant one. Moreover, the reasoning of the opinions in both *Horak* and *Wogelius* is more compelling than that of the *Lane* opinion, which inexplicably requires a plaintiff to demonstrate that she was in the zone of danger.

[redacted] We believe that the application of the *Rickey* test in cases involving direct victims of malpractice is inappropriate and can result only, as was pointed out in *McAdams* and in the dissent to *Lewis*, in reasoning which can at best be characterized as tortuous. Our conclusion is supported by the decisions of courts in other jurisdictions which have awarded damages to plaintiffs who have had sexual relations with their therapists, although these plaintiffs have not alleged that they were physically injured. As we have seen, the Washington court in *Omer* directly addressed this concern, concluding that the plaintiff nevertheless deserved compensation. Moreover, were we to hold to the contrary, it would be hopelessly difficult for individuals to plead an action for psychologist malpractice which results only in emotional distress, for it seems incongruous to the point of absurdity that in cases involving malpractice by psychologists a victim should be required to demonstrate that he or she was put in fear of *physical* injury. Nor can there be any rational justification for our courts to mandate that in order to qualify for damages in a psychologist or social worker malpractice case a patient exhibit physical manifestations of his or her emotional trauma suffered at the hand of therapists who are qualified to minister to their needs only in cases of mental or emotional malaise, especially since, as the *Omer* court points out, such an injury, "though difficult to prove, may be as real as that type of injury which can be proven with mathematical certainty." (*Omer*, 38 Wash. App. at 381, 685 P.2d at 638.) We do not glean from *Rickey* any overarching unitary theory that would apply to the case at bar.

[redacted] Therefore, in the absence of a decision by our supreme court which mandates a clearly different result, and supported by the law of our own appellate court and other jurisdictions, we hold that the zone of danger rule enunciated in *Rickey* has no application in this case, which involves a direct victim of negligence. Instead, we analyze this direct victim case under the same standards as any other negligence action, as was done by this court in both *Horak* and *Wogelius*.

COUNT IV

[redacted] Corgan alleges that Muehling was not registered as a psychologist in Illinois; nor is there any evidence in the record as to whether

he was licensed in any jurisdiction. Individuals who hold themselves out as psychologists but do not register under the Psychologist Registration Act (Ill. Rev. Stat. 1981, ch. 111, par. 5327) clearly are public nuisances. The Act provides:

> "It is hereby declared to be a public nuisance for any person to represent himself as a psychologist or that the services he renders are psychological services without having in effect a currently valid certificate as defined in this Act. The Director or the State's attorney of the county in which such nuisance has occurred may file a complaint in the circuit court in the name of the people of the State of Illinois perpetually to enjoin such person from performing such unlawful acts." Ill. Rev. Stat. 1981, ch. 111, par. 5327.

The parties agree that the statute does not explicitly provide for a private right of action for nuisance. Corgan contends, however, that there is an implied right of action in nuisance for a person's failure to register under the Act. This court has described the standards for implying private rights of action from statutory law as follows:

> "Where it is consistent with the underlying purpose of a statute and necessary to achieve its aim, a private right of action can be implied. (*Sawyer Realty Group, Inc. v. Jarvis Corp.* (1982), 89 Ill. 2d 379, 386.) In the analysis of whether a private right of action may be maintained, these questions are material: (1) Were plaintiffs members of the class for whose benefit the statute was enacted; (2) is implication of a private right consistent with the underlying purpose of the Act; (3) is plaintiff's injury one the statute was designed to prevent; (4) is implication of a civil private right of action necessary to provide an adequate remedy for violations of the Act. 89 Ill. 2d 379, 391." *Rhodes v. Mill Race Inn, Inc.* (1984), 126 Ill. App. 3d 1024, 1026, 467 N.E.2d 915.

The first three requirements are incontestably satisfied in the instant case. The public nuisance section of the Psychologist Registration Act was designed to protect members of the public from suffering mental or emotional injuries at the hands of unauthorized practitioners. Therefore, implication of a private right of action is consistent with the purpose of the Act.

The last criterion of the test for implying rights of action in cases of the type now before this court is a paraphrase of the Restatement (Second) of Torts requirement that the individual suffer an injury different in kind from that of the general public. (See Restatement (Second) of Torts §821C (1977).) Certainly Corgan's alleged

psychological or emotional injuries were different from those of the general public. Moreover, the remedy provided for by the statute does not adequately compensate Corgan for her injuries; the injunctive remedy of the Act prevents further injuries, but does not compensate for those already suffered at the hands of unqualified psychologists.

The issue of whether there is an implied right of action in nuisance is controlled by the decision of our supreme court in *Sawyer Realty Group, Inc. v. Jarvis Corp.* (1982), 89 Ill. 2d 379, 432 N.E.2d 849. In that case the court inferred a private right of action against unregistered stockbrokers from the Brokers Licensing Act (Ill. Rev. Stat. 1977, ch. 111, par. 5701 *et seq.*), which provided for injunctions but no remedy for individuals who had already sustained injuries. The *Sawyer* court's conclusion is equally descriptive of the issue in the case *sub judice*:

> "The sanctions provided for in the Brokers Licensing Act are of no help to the plaintiffs here. The express remedies available to the Sawyer Realty Group are inadequate to redress the injuries the plaintiffs have sustained.
>
> The plaintiffs were members of the class for whose benefit the statute was enacted. Implication of a private right is consistent with the underlying purpose of the Act. The plaintiffs' injury is one the statute was designed to prevent. Implication of a civil private right of action for compensatory damages under the Brokers Licensing Act is necessary to provide an adequate remedy for self-serving, deceptive and fraudulent practices of brokers and salesmen that the Act seeks to prevent. Given these circumstances we recognize an implied private right of action for damages." (*Sawyer*, 89 Ill. 2d at 391.)

Accordingly, we hold that Corgan has a private right of action for nuisance derived from the Psychologist Registration Act. Ill. Rev. Stat. 1981, ch. 111, par. 5327.

In conclusion, we hold that counts I, III, and IV of the complaint state valid causes of action. Accordingly, we affirm as to counts I and III, and vacate as to count IV.

Affirmed in part; vacated in part and remanded.

HARTMAN, P.J., and BILANDIC, J., concur.

Cruz v. Illinois Masonic Medical Center, 271 Ill. App. 3d 383 (1st Dist. 1995)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1995-03-21 · Reporter opinion
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- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C065.3
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C065.3

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CONCETTA F. CRUZ, Adm'r of the Estate of James Cruz, Deceased, Plaintiff-Appellant, v. ILLINOIS MASONIC MEDICAL CENTER *et al.*, Defendants-Appellees.

First District (2nd Division) No. 1—94—0617

Opinion filed March 21, 1995.



Susan E. Loggans & Associates, P.C., of Chicago (Susan E. Loggans, of counsel), for appellant.

Sachnoff & Weaver, Ltd. (Brian D. Roche and Joel M. Neuman, of counsel), and Joan M. Lebow, of Illinois Masonic Medical Center, both of Chicago, for appellees.

PRESIDING JUSTICE SCARIANO delivered the opinion of the court:

On July 23, 1990, James Cruz was injured in an automobile accident and taken to defendant Illinois Masonic Medical Center where,

after being injected with Nacuron, he went into full cardiac and respiratory arrest and had to be revived by a defibrillator. Mr. Cruz regained consciousness about nine days later but remained in a "vegetable state" until his death on April 23, 1993.

Before his death, however, on February 21, 1991, plaintiff, individually and as guardian of her husband's estate, filed an action (Cruz I) against defendants, which included claims based on negligence, *res ipsa loquitur*, and loss of her consortium. On April 29, 1992, the parties settled the case for $2.5 million,[1] plaintiff agreeing both individually and as guardian "not to further prosecute or again sue" defendants for damages arising out of the incidents complained of in the Cruz I litigation.

On May 20, 1992, the parties stipulated to a dismissal of the case with prejudice, and the trial court entered an order to that effect. Thereafter, pursuant to the provisions of Circuit Court of Cook County Rule 6.4, the probate court approved the settlement and ordered that from the net amount thereof a "permanent budget for [their] care and support" be created in order to provide that the Cruz children[2] and plaintiff as an individual receive monthly payments of $2,750 and $2,000, respectively.

On May 10, 1993, plaintiff, as administrator of her deceased husband's estate, filed a wrongful death action (Cruz II) against defendants. Defendants moved to dismiss plaintiff's complaint (735 ILCS 5/2—619 (West 1992)), arguing that because the decedent had already settled his cause of action against them while he was still living, plaintiff's wrongful death action was barred as a matter of law pursuant to section 1 of the Wrongful Death Act (the Act)[3] (740 ILCS 180/1 (West 1992)). The trial judge agreed with defendants, and on January 21, 1994, he dismissed plaintiff's second amended complaint with prejudice. This appeal followed.

Defendants' motion to dismiss admits all facts well pleaded in plaintiff's complaint; we thus apply a *de novo* standard in reviewing the issues raised on appeal; in any event, the parties raise only ques-

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[1]Although unclear in the record, at oral argument on appeal, plaintiff explained that the settlement was comprised of 80% for Mr. Cruz and 20% for loss of her consortium.

[2]At the time of the settlement plaintiff and Mr. Cruz had two children, a son age 9, and a daughter age 12.

[3]Plaintiff's complaint in Cruz II, in addition to containing a wrongful death count, included survival and *res ipsa loquitur* counts. Plaintiff's second amended complaint, in response to defendant's motion to dismiss, omitted the survival count. The *res ipsa loquitur* count was not addressed on appeal.

tions of law. *Toombs v. City of Champaign* (1993), 245 Ill. App. 3d 580, 583, 615 N.E.2d 50, 51 (*de novo* standard applied on review of a motion to dismiss ruling); *Ranquist v. Stackler* (1977), 55 Ill. App. 3d 545, 550, 370 N.E.2d 1198, 1202 (statutory construction raises question of law requiring application of *de novo* standard of review); *International Insurance Co. v. Sargent & Lundy* (1993), 242 Ill. App. 3d 614, 622-23, 609 N.E.2d 842, 848 (whether language of release is clear and explicit is a matter of law).

We first address the issue of whether a decedent's settlement, prior to his death, of his personal action against a negligent defendant forecloses, pursuant to section 1 of the Act (740 ILCS 180/1 (West 1992)), the subsequent bringing of a wrongful death action in behalf of the decedent's spouse and next of kin when the suit is based on the same negligent acts of that defendant.[4] We hold that it does not.

Section 1 of the Act reads:

> "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to [a] felony." 740 ILCS 180/1 (West 1992).[5]

Defendants assert that the "if death had not ensued" language of section 1 has been interpreted to create a condition precedent to

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[4]See Restatement (Second) at Judgments § 46 (1982), discussing the majority and minority views on this issue and citing the authorities on both sides.

[5]Section 2 of the Act further provides:

> "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.
>
> * * *
>
> Every such action shall be commenced within 2 years after the death of such person ***." 740 ILCS 180/2 (West 1993).

bringing a wrongful death action, *i.e.*, that the action may be brought only if the decedent has not recovered, during his lifetime, for personal injury arising from the same conduct alleged to have caused his death. Defendants rely on *Wyness v. Armstrong World Industries, Inc.* (1989), 131 Ill. 2d 403, 411, 546 N.E.2d 568, 572, *Biddy v. Blue Bird Air Service* (1940), 374 Ill. 506, 514, 30 N.E.2d 14, 18, *Little v. Blue Goose Motor Coach Co.* (1931), 346 Ill. 266, 271, 178 N.E. 496, 498, *Mooney v. City of Chicago* (1909), 239 Ill. 414, 423, 88 N.E.194, 196, and *Kessinger v. Grefco, Inc.* (1993), 251 Ill. App. 3d 980, 987, 623 N.E.2d 946, 950, *appeal denied* (1994), 154 Ill. 2d 561, 631 N.E.2d 709.

Since the above-mentioned cases were decided, however, this court has twice answered the question we confront in this case in the negative. *Dettman-Brunsfeld v. Szanto* (1994), 267 Ill. App. 3d 1050, 642 N.E.2d 809; *Varelis v. Northwestern Memorial Hospital* (1994), 266 Ill. App. 3d 578, 640 N.E.2d 17, *appeal allowed* (1994), 158 Ill. 2d 584.

In *Varelis*, plaintiffs Theodora, a widow, and James Varelis, the administrator of the decedent's estate, filed a wrongful death action against the defendant after Theodora and the decedent (her late husband), during his lifetime, had recovered damages resulting from the same medical malpractice which the plaintiffs alleged caused his death.[6] (*Varelis*, 266 Ill. App. 3d at 580, 640 N.E.2d at 18.) Reversing the trial court's dismissal of the action, the appellate court rejected the defendant's contention, similar to that of defendants here, that the language of section 1 of the Act, as well as Illinois case law interpreting that section, barred the suit. The court explained that the argument advanced by the defendant failed to distinguish between the separate and distinct damages recoverable under a wrongful death action and those awarded in a survival action, stating:

> "A personal injury action is *** appropriately equated with a survival action. A survival action is brought after the death of an injured person by a representative of his estate in order to adjudicate those statutory and/or common law actions which had already accrued to the *decedent* prior to his death. [Citation.] In other words, a survival action allows for recovery of damages for injury sustained by the *decedent* up to the time of death. [Citation.] In contrast, a wrongful death action allows the decedent's

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Mr. Cruz died on April 23, 1993, and on May 10, 1993, plaintiff filed her wrongful death claim.

[6]The jury awarded her husband $2,248,434 as damages for personal injury, and Theodora $573,500 as damages for loss of consortium. *Varelis*, 266 Ill. App. 3d at 580, 640 N.E.2d at 18.

> *next of kin* to recover damages for their loss based on the wrongful actions of another which were committed against the decedent. [Citation.] Thus, a wrongful death action's damages do not accrue until after the death of the injured person and addresses the injury suffered by the next of kin due to the loss of the decedent, as opposed to the damages in a survival action which accrue during the decedent's lifetime and address the injuries personally suffered by the decedent prior to [his] death. [Citation.] Hence, the precipitating 'injury' for plaintiffs in a wrongful death action, unlike in a personal injury action, is death." (Emphasis in original.) *Varelis*, 266 Ill. App. 3d at 581-82, 640 N.E.2d at 19.

Similarly, in *Dettman-Brunsfeld*, the decedent, in the suit she brought to a conclusion before she died, was awarded $1,250,000[7] after the jury found that the defendant's medical treatment of her was negligent. Following the decedent's death, the administrator of her estate filed a wrongful death claim against the defendant seeking pecuniary damages in behalf of the decedent's mother and two sisters, one of whom was the administrator, for loss of society damages alleged to have been caused by the defendant's same negligent treatment. (*Dettman-Brunsfeld*, 267 Ill. App. 3d at 1051-52, 642 N.E.2d at 810.) The trial court granted the defendant's section 2—619 motion to dismiss the action, stating that " 'the language of [section 1 of the Act] is so clear that it really doesn't leave much room for doubt.' " (*Dettman-Brunsfeld*, 267 Ill. App. 3d at 1052, 642 N.E.2d at 810.) Relying heavily on *Varelis*, the appellate court disagreed and reversed the lower court's dismissal. *Dettman-Brunsfeld*, 267 Ill. App. 3d at 1053, 642 N.E.2d at 811.

We agree particularly with Justice Egan's specially concurring opinion in *Dettman-Brunsfeld*:

> "[T]he statement of *Mooney* that there is only one cause of action no longer represents the view of the Illinois Supreme Court. In support of its holding that there was only one cause of action, the *Mooney* court cited *Holton v. Daly* (1882), 106 Ill. 131. But *Holton* was expressly overruled by the supreme court in *Murphy v. Martin Oil Co.* (1974), 56 Ill. 2d 423, 431, 308 N.E.2d 583. In *Murphy*, the supreme court held that the heirs of a decedent could maintain a survival action *and* a wrongful death action." (Emphasis in original.) *Dettman-Brunsfeld*, 267 Ill. App. 3d at 1057, 642 N.E.2d at 813-14 (Egan, P.J., specially concurring).

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[7]Because she was found to be comparatively negligent, her damage award was reduced by 40% to $750,000. *Dettman-Brunsfeld*, 267 Ill. App. 3d at 1051, 642 N.E.2d at 810.

We note that in *Wyness*, the court was deciding an issue involving the two-year filing provision of the Act, *i.e.*, section 2, not section 1, of the Act; thus, it is not directly on point here. (*Wyness*, 131 Ill. 2d at 406, 546 N.E.2d at 569.) Moreover, in reaching its decision in *Wyness*, the supreme court, unmistakably cognizant of its holding in *Mooney*, clearly distinguished between the type of damages recoverable in a survival action and those that can be awarded in a wrongful death action, a distinction which, because the court virtually, if not conclusively, equated survival damages with personal injury damages, supports our conclusion here. (*Wyness*, 131 Ill. 2d at 410-11, 546 N.E.2d at 571.) Consequently, the conclusion is ineluctable, for "[t]he precipitating 'injury' for the plaintiffs in a wrongful death action, unlike the injury in a personal injury action, is the death; that the death must also be the result of a wrongfully caused injury suffered by the deceased at the hands of another does not alter the analysis." *Wyness*, 131 Ill. 2d at 414-15, 546 N.E.2d at 573.

Therefore, since a survival action and a wrongful death action are not mutually exclusive, both may not only be simultaneously maintained against a defendant, but recovery under one is not an absolute bar to recovery under the other. (See *Murphy v. Martin Oil Co.* (1974), 56 Ill. 2d 423, 431, 308 N.E.2d 583, 586; *Ellig v. Delnor Community Hospital* (1992), 237 Ill. App. 3d 396, 401, 603 N.E.2d 1203, 1206-07; Illinois Pattern Jury Instructions, Civil, No. 31.00 (3d ed. 1993) (hereinafter IPI Civil 3d No. 31.00).) The force of reason dictates, therefore, that since a personal injury action is "appropriately equated with a survival action" (*Dettman-Brunsfeld*, 267 Ill. App. 3d at 1054, 642 N.E.2d at 812, citing *Varelis*, 266 Ill. App. 3d at 581, 640 N.E.2d at 19), a personal injury action cannot, accordingly, be mutually exclusive of a wrongful death action. Such reasoning becomes all the more forceful when one considers that the predominant, if not the sole, purpose of the Act is to compensate the surviving spouse and next of kin for the pecuniary injuries *they* sustain because of the decedent's death. *In re Estate of Finley* (1992), 151 Ill. 2d 95, 101, 601 N.E.2d 699, 701; see also 740 ILCS 180/2 (West 1992).

Defendants fear that the same damages comprehended in the settlement of Cruz I may be required to be paid out again in the wrongful death action, thus resulting in a "double recovery." They overlook, however, that a decedent's spouse and next of kin are in no way legally entitled to share in the decedent's personal injury award and that, therefore, the potential for "double recovery"[8] exists only when the prospective beneficiary of an award in a wrongful death

[8]Defendants seem to suggest that an order of the probate court entered

case has previously recovered damages he or she personally suffered at the hands of the defendant.[9]

We note that this issue was squarely addressed in *Varelis*, where the defendant argued that it would be "fundamentally unfair" to allow the plaintiffs to maintain a wrongful death action because it had already satisfied the decedent's personal injury award, which included damages based on loss of consortium and loss of services. (*Varelis*, 266 Ill. App. 3d at 584, 640 N.E.2d at 21.) *Varelis* observed that such a concern could be adequately addressed by the defendant's availing itself of the affirmative defense of collateral estoppel, which would bar plaintiff's being awarded damages already litigated in the personal injury action.[10] (*Varelis*, 266 Ill. App. 3d at 584, 640 N.E.2d at 21; see also *Dettman-Brunsfeld*, 267 Ill. App. 3d at 1055, 642 N.E.2d at 812.) We agree.

Whether the decedent's prior action resulted in a settlement or a judgment, the more equitable approach to avoid overlapping

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in an estate for a person certified as being in a "vegetable state," providing for a monthly income to his spouse and children, payable from the proceeds of a settlement of the disabled person's personal injury action, as was done in this case, is support for their argument that they would be subject to being required to duplicate their payment of damages in the instant wrongful death action. Significantly, defendants cite no authority that would sustain their position, reason enough to reject a totally meritless argument. 134 Ill. 2d R. 341(e)(7); *Sohaey v. Van Cura* (1992), 240 Ill. App. 3d 266, 273, 607 N.E.2d 253, 275; *Chicago Title & Trust Co. v. Weiss* (1992), 238 Ill. App. 3d 921, 927, 605 N.E.2d 1092, 1097; *Sementa v. Tylman* (1992), 230 Ill. App. 3d 701, 706, 595 N.E.2d 688, 692.

[9]The potential for the greatest overlap of damages exists between a decedent's recovery for loss of future wages and a wrongful death plaintiff's subsequent claim for support where the support derives wholly or in part from such wages. See *Sea-Land Services, Inc. v. Gaudet* (1974), 414 U.S. 573, 603 n.11, 39 L. Ed. 2d 9, 31 n.11, 94 S. Ct. 806, 824 n.11 (Powell, J., dissenting, joined by Stewart, C.J., and Rehnquist, J.).

[10]In most of the States which hold that the wrongful death statute creates a cause of action in favor of the beneficiaries that is independent of the decedent's claim for his injuries, the defense of collateral estoppel precludes relitigating the defendant's liability (or absence thereof). (See Restatement (Second) Judgments § 46, Comment c, at 19 (1982).) "In any event, double recovery of damages is not permitted. In some jurisdictions this is done by defining the measures of recovery in the respective actions in mutually exclusive terms. In others, where the measures of damage overlap, the beneficiaries are precluded from seeking items of damage recoverable by the decedent in his action." Restatement (Second) of Judgments § 46, Comment c, at 19 (1982).

recovery is to submit to the determination of the trial court the issue of exactly what damages were recovered in such prior action and by whom.[11] See *Gaudet v. Sea-Land Services, Inc.* (5th Cir. 1972), 463 F.2d 1331, 1333 n.1, *aff'd* (1974), 414 U.S. 573, 39 L. Ed. 2d 9, 94 S. Ct. 806 (but the Supreme Court apparently rejected this approach and instead advanced a theory of "trusteeship," which has been justly criticized, see Restatement (Second) of Judgments § 46, Reporter's Notes, at 22 (1982)).[12]

By submitting this issue to the determination of the trial court, a balance is achieved between the legitimate concern of double recovery, and the widely recognized and accepted belief that a decedent's spouse and next of kin suffer separate, distinct, and recoverable damages[13] due to the death of their loved one. Such a balance is vastly more appealing, and just, than yielding to defendants'

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[11]Such a determination requires close attention to the measurement of damages, and is currently required when both a survival action and a wrongful death action are simultaneously maintained against a defendant. (See IPI Civil 3d No. 31.00.) Of course, the task is made easier when the judgment in the prior case is itemized; indeed, section 2—1109 (735 ILCS 5/2—1109 (West 1992)) requires such itemization in jury cases.

[12]Addressing this issue of "double recovery," the Restatement (Second) of Judgments states:

> "A more practical [approach] is to require differentiation among the items of damage in the [decedent's] own action and, to the extent that does not clarify what is left for recovery by the beneficiaries, to limit the latter to items of damage not assertable in the personal injury action." Restatement (Second) of Judgments § 46, Reporter's Notes, at 22 (1982).

[13]"[T]he trend in *** more recent decisions under the [Act] has been to expand the scope of pecuniary injury to encompass nonmonetary losses" (*Bullard v. Barnes* (1984), 102 Ill. 2d 505, 514, 468 N.E.2d 1228, 1232), *i.e.*, loss of society, which IPI Civil 3d No. 31.11 defines as "the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection." For example, in determining damages, a jury (in addition to funeral expenses and loss of support) may consider evidence of the decedent's: (1) felicity, care, attention, and guidance to family members (*Allendorf v. Elgin, Joliet & Eastern Ry. Co.* (1956), 8 Ill. 2d 164, 179, 133 N.E.2d 288, 295); (2) personal services rendered around the home (*Allendorf*, 8 Ill. 2d at 179, 133 N.E. 2d at 295 (father's loss of services recoverable); *Dodson v. Richter* (1962), 34 Ill. App. 2d 22, 28, 180 N.E.2d 505, 508 (housewife's loss of services recoverable)); and (3) marital services, companionship, happiness and sexual intercourse (*Malfeo v. Larson* (1990), 208 Ill. App. 3d 418, 425, 567 N.E.2d 364, 369).

unwarranted fear of double recovery by responding with a "blanket approach" to bar recovery. Equity demands that the trial court be allowed to discern between wrongfully caused injuries which have been compensated, and those which have yet to be redressed.

Therefore, we hold that plaintiff's wrongful death cause of action was not foreclosed simply because her husband, prior to his death, settled his personal injury action against defendants.

Next, unlike the plaintiffs in *Varelis* and *Dettman-Brunsfeld*, here, coupled with the settlement reached in Cruz I, plaintiff executed a release in her individual capacity as well as in her capacity as her husband's legal guardian. Consequently, we must address whether that release foreclosed the bringing of the instant wrongful death action.

Although any recovery under the Act is for the exclusive benefit of the surviving spouse and next of kin (*Forthenberry v. Franciscan Sisters Health Care Corp.* (1987), 156 Ill. App. 3d 634, 637, 509 N.E.2d 166, 168; 740 ILCS 180/2 (West 1992)), the decedent's personal representative possesses the *sole* right of action and the right to control the litigation. (*Johnson v. Libertyville* (1986), 150 Ill. App. 3d 971, 973, 502 N.E.2d 474, 476; 740 ILCS 180/2 (West 1992).) Furthermore, the law of contracts governs releases, the applicable principles of which are plain and simple: the parties' intent must be ascertained according to the words of the agreement and the circumstances surrounding its execution; a release will not be construed to release claims not within the contemplation or legal authority of the parties; where a release is clear and explicit, the court will enforce it as written; and whether a release is clear and explicit is a matter of law. *International Insurance Co.*, 242 Ill. App. 3d at 622-23, 609 N.E.2d at 848.

Accordingly, this court must examine the release at issue, the pertinent language of which reads:

> "Know all men by these premises that plaintiffs, Concetta Francesca Cruz, Individually and as Guardian of the Estate of James Cruz, a disabled person *** hereby release, acquit, discharge and covenant on behalf of James Cruz, a disabled person, themselves and their heirs, legal representatives, and assigns not to further prosecute or again sue [defendants] *** for any injuries allegedly developed in the future by the Cruz', [*sic*] not to prosecute same for any past, present, or future damages, lost wages or other expenses incurred by the Cruz' [*sic*] as a result of the alleged negligence [in Cruz I]."

[redacted]

As the above language plainly indicates, plaintiff entered into the release as an "Individual[ ] and as Guardian of the Estate of James Cruz," and in signing it, she was not, nor could she have been, acting as James Cruz' personal representative; and she was not, nor could she have been, acting on behalf of any of his next of kin.[14] Therefore, while the release may bar whatever recovery may have been based on the damages suffered by plaintiff as an individual,[15] it does not, nor could it, bar recovery based on damages suffered by the decedent's next of kin[16] as a result of Mr. Cruz's death. As we have noted above, the circuit court is the proper forum to sort out and bar those damages that could result in a double recovery.

For all of the aforementioned reasons, we reverse the judgment of the trial court and remand this cause for further proceedings consistent with the views expressed herein.

Reversed and remanded.

HARTMAN and McCORMICK, JJ., concur.

[redacted]

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM HEIRENS, Defendant-Appellant.

First District (3rd Division) No. 1—90—2240

[redacted]

Opinion filed March 15, 1995.

[redacted]

[14]For the purposes of the Act, the phrase "next of kin" refers to those blood relatives of the decedent in existence at the time of the decedent's death that would take his property if he died intestate. *In re Estate of Finley* (1992), 151 Ill. 2d 95, 101, 601 N.E.2d 699, 701.

[15]These usually include pain and suffering, medical expenses, property damage, disability, and loss of earnings. See IPI Civil 3d Nos. 30.04, 31.10, Comment.

[16]These are referred to in footnote 14.

Doe v. Noe, 293 Ill. App. 3d 1099 (1st Dist. 1997)

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Ill. App. Ct., 1st Dist. (the forum's district) · filed 1997-12-26 · Reporter opinion
Published opinion

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Doe v. Noe, 293 Ill. App. 3d 1099 (1st Dist. 1997)

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Doe v. Noe

293 Ill. App. 3d 1099 · Appellate Court · Filed 1997-12-26 · 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.

JANE DOE et al., Plaintiffs-Appellants and Cross-Appellees, v. JOHN NOE No. 1, as the Ex'r of the Estate of John Noe No. 2, Deceased, et al., Defendants-Appellees and Cross-Appellants (Noe No. 5, Medical Center et al., Defendants-Appellees). First District (6th Division) Nos. 1-96-3791, 1-96-3855 cons. Opinion filed December 26, 1997. Jeffrey M. Goldberg and Lawrence R Kream, both of Jeffrey M. Goldberg & Associates, Ltd., of Chicago, for appellants. Cassiday, Schade & Gloor (Rudolf G. Schade, Jennifer A. Keller, Carolyn Quinn, and Mark D. Wilson, of counsel), and Fedota & Rocca, P.C. (Brian C. Rocca and Mark J. Smith, of counsel), both of Chicago, for appellees.

Opinion

PRESIDING JUSTICE GREIMAN

delivered the opinion of the court:

Plaintiffs Jane Doe (Jane) and her husband John Doe (John) appeal the dismissal of 14 counts in their 18-count second amended complaint, asserting several causes of action premised on the underlying allegation that Jane had been exposed to the human immunodeficiency virus (HIV) during two gynecological surgeries by John Noe No. 2 (hereinafter Surgeon), i.e., the doctor who performed the surgeries and was HIV positive at the time of the surgeries and subsequently died of acquired immune deficiency syndrome (AIDS).

The crux of plaintiffs' complaint is that Surgeon knew that he was HIV positive when he performed two surgeries on Jane, that he failed to disclose his HIV condition to plaintiffs before the surgeries, and that the surgeries exposed Jane to HIV, which is the precursor of AIDS.

In their second amended complaint, plaintiffs directed various claims against the following defendants: (1) Surgeon (John Noe No. 2), the doctor, now deceased, who performed the

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two surgeries on Jane, and Executor (John Noe No. 1), the executor of the estate of Surgeon; (2) Corporation (Noe No. 3, S.C.), a professional corporation in which Surgeon allegedly was an employee or agent; (3) Partner (John Noe No. 4, M.D.), a medical doctor who allegedly was Surgeon's partner; and (4) Hospital (Noe No. 5, Medical Center and Noe No. 6, Practice Center), the hospital where the surgeries were performed and the health maintenance organization affiliated with the hospital.

On appeal, plaintiffs contest the dismissal of the counts asserting claims for battery, lack of informed consent, intentional infliction of emotional distress, negligent infliction of emotional distress, conspiracy, and loss of consortium (counts I through XIV).

On cross-appeal, we address the trial court's decision to allow the claims directed against Surgeon and Corporation based on negligent infliction of emotional distress upon Jane (counts XV and XVI) and derivative claims of loss of consortium for John (counts XVII and XVIII). In addition, we answer two certified questions relating to these four counts.

The two certified questions are:

"(a) "Whether an HIV positive physician has a duty to disclose his or her HIV status to a patient when seeking the patient's consent to perform an invasive medical procedure which exposes the patient to the risk of HIV transmission; and

(b) If such a duty exists, does a cause of action for the negligent infliction of mental distress exist where there is no allegation of actual HIV transmission during the course of the procedure?"

We answer each certified question in the affirmative and then determine whether plaintiff's second amended complaint states causes of action for: (1) battery and loss of consortium arising out of battery (counts I through IV); (2) lack of informed consent and loss of consortium arising out of a lack of informed consent (counts V through VIII); (3) intentional infliction of emotional distress (count X); (4) negligent infliction of emotional distress and loss of consortium arising out of negligent infliction of emotional distress (counts XI through XIV); and (5) conspiracy (count IX).

In addition, plaintiffs contend that the trial court erred in dismissing Partner under section 2 - 1010 of the Illinois Code of Civil Procedure, which allows for the dismissal of a party who avers that he or she was not involved in the alleged occurrence (735 ILCS 5/2- 1010 (West 1992)).

Surgeon performed two gynecological surgeries on Jane: a fractional dilation and curettage (D&C) and a polypectomy on May 13, 1992, and another polypectomy on March 26, 1993. In April 1994, plaintiffs filed their original complaint. On October 27,1994, plaintiffs filed their first amended complaint, which asserted 14 counts based on various theories of liability:

COUNT DEFENDANTS CAUSE OF ACTION

I Surgeon Battery on Jane for performing the surgery in May 1992

II Surgeon Loss of consortium for John based on the surgery in May 1992

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III Surgeon Battery on Jane for performing the surgery in March 1993

IV Surgeon Loss of consortium for John based on the surgery in March 1993

V Surgeon Lack of informed consent for Jane for the surgery in May 1992

VI Surgeon Loss of consortium for John based on lack of informed consent for the surgery in May 1992

VII Surgeon Lack of informed consent for Jane for the surgery in March 1993

VIII Surgeon Loss of consortium for John based on lack of informed consent for the surgery in March 1993

IX Surgeon, Partner and Corporation Conspiracy

X All Defendants Intentional infliction of emotional distress upon Jane by their failure to disclose the HIV status of Surgeon and the material risk of transmission of the HIV infection to her

XI Hospital, Partner and Corporation Negligent infliction of emotional distress upon Jane by their refusal to answer Jane's inquiries as to whether Surgeon's death was HIV related and whether Jane had been exposed to the HIV virus by Surgeon

XII Hospital, Partner and Corporation Loss of consortium for John based upon count XI

XIII Hospital, Partner and Corporation Negligent infliction of emotional distress upon Jane based on their duty to Jane to know the HIV status of Surgeon and to advise Jane of his HIV infection in advance of the performance of the invasive surgical procedure

XIV Hospital, Partner and Corporation Loss of consortium for John based upon count XIII.

Surgeon, Partner and Corporation filed a motion to dismiss plaintiff's first amended complaint pursuant to section 2 - 615, among other sections, of the Illinois Code of Civil Procedure (735 ILCS 5/2- 615 (West 1992)). These defendants asserted that plaintiffs pleaded insufficient facts, unrecognized duties in law, and unrecognized damages in law. Defendants argued that plaintiffs' allegations of Surgeon's HIV status and of the knowledge of Partner and Corporation of Surgeon's HIV status were unfounded assumptions and conclusions without any factual support. They further asserted that Illinois law does not recognize a duty on the part of Partner and Corporation to know the HIV status of Surgeon and does not recognize a duty on the part of Surgeon, Partner, or Corporation to inform Jane of Surgeon's HIV condition prior to any medical treatment. These defendants further argued that plaintiff has no recognized damages in law because she did not allege actual exposure to the virus.

These defendants also challenged plaintiffs' first amended complaint under sections 2 - 619 and 2 - 622 (735 ILCS 5/2 - 619, 2 - 622 (West 1992)), arguing that the affidavit from the health professional was insufficient, conclusory and failed to identify with specificity the reasons and basis for the health care professional's determination that there is a reasonable and meritorious cause.

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The Hospital filed a separate motion to dismiss on similar grounds under sections 2 - 615, 2 - 619, and 2 - 622 of the Illinois Code of Civil Procedure. Partner also moved for dismissal pursuant to section 2 - 1010 on the grounds that he never provided medical treatment of any kind to Jane and they never had a doctor-patient relationship.

On October 11, 1995, the trial court dismissed all of the counts, some with prejudice and some with leave to replead. The trial court also issued a memorandum opinion and order, granting defendants' motions to dismiss under section 2 - 615. The trial court found, in relevant part, that Surgeon had a duty to "disclose any and all risks imposed by his HIV status prior to performing any invasive procedure on" Jane and that Partner had no duty to plaintiffs because he had no involvement in Jane's care under section 2 - 1010.

On July 22, 1996, plaintiffs filed their second amended complaint, including the same 14 counts from the first amended complaint and adding 4 more counts (counts XV through XVIII) that were directed against Surgeon and Corporation and based on negligent infliction of emotional distress:

COUNT DEFENDANTS CAUSE OF ACTION

XV Surgeon and Corporation Negligent infliction of emotional distress upon Jane as to the May 1992 surgery for failure to disclose Surgeon's HIV status, the material risks of transmission of HIV infection during surgery, available alternative treatment, or alternative physicians to perform surgery

XVI Surgeon and Corporation Negligent infliction of emotional distress upon Jane as to the March 1993 surgery for failure to disclose the same information as stated in count XV

XVII Surgeon and Corporation Loss of consortium for John based on count XV

XVIII Surgeon and Corporation Loss of consortium for John based on count XVI.

Surgeon, Partner and Corporation filed a motion to dismiss plaintiffs' second amended complaint based on the same arguments they advanced in their motion to dismiss the first amended complaint. The Hospital filed a separate motion to dismiss by incorporating by reference its previously filed motion to dismiss the first amended complaint.

On October 21, 1996, the trial court dismissed with prejudice counts I through XIV. At the hearing on the motions to dismiss plaintiffs' second amended complaint, the trial court reiterated and adopted its reasoning on counts I through XIV as expressed in its memorandum opinion and order dismissing the same counts in plaintiffs' first amended complaint. Regarding counts XV through XVIII (negligent infliction of emotional distress), the trial court denied Surgeon and Corporation's motion to dismiss and further propounded two questions of law for review in accordance with Supreme Court Rule 308 (155 Ill. 2d R. 308).

Plaintiffs appealed the dismissal of counts I through XIV (No. 1 - 96-3791). Under Rule 308, Surgeon and Corporation filed leave to appeal the trial court's denial of their motion to dismiss counts XV through XVIII and to consider the two certified questions posed by the trial court (No. 1 - 96-3855). This court granted their Rule 308 petition and

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consolidated the appeals.

The first certified question asks this court to decide "[w]hether an HIV positive physician has a duty to disclose his or her HIV status to a patient when seeking the patient's consent to perform an invasive medical procedure which exposes the patient to the risk of HIV transmission." The trial court found that such a duty to disclose exists as a matter of law and we agree.

"A duty is an obligation to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm." Mt. Zion State Bank & Trust v. Consolidated Communications, Inc., 169 Ill. 2d 110, 116 (1995); O'Hara v. Holy Cross Hospital, 137 Ill. 2d 332, 337 (1990). Both the existence and the scope of a duty are questions of law to be determined by the court. Cullotta v. Cullotta, 287 Ill. App. 3d 967, 973 (1997), citing O'Hara, 137 Ill. 2d at 337.

To resolve whether a duty exists, a court must determine whether there is a relationship between the parties requiring that a legal obligation be imposed upon one for the benefit of the other. Rhodes v. Illinois Central Gulf R.R., 172 Ill. 2d 213, 227 (1996); Bucheleres v. Chicago Park District, 171 Ill. 2d 435, 445 (1996); Kirk v. Michael Reese Hospital & Medical Center, 117 Ill. 2d 507, 525 (1987).

It is well established that the relationship between a physician and patient imposes certain duties and obligations on the part of the physician, including the duty to disclose information. "[T]he physician-patient relationship does create an affirmative duty to disclose facts." Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 1040 (1984), aff'd in part, 113 Ill. 2d 482 (1986).

A physician's duty to disclose is incorporated and defined in the doctrine of informed consent. "A physician has a duty to inform patients of the foreseeable risks and results of a given surgical procedure, and the reasonable alternatives to such procedure." Weekly v. Solomon, 156 Ill. App. 3d 1011, 1016 (1987); Hansbrough v. Kosyak, 141 Ill. App. 3d 538, 551 (1986) (same duty); see also Whittaker v. Honegger, 284 Ill. App. 3d 739, 742 (1996) ("foreseeability of harm, in connection with a duty, is not a magical concept that ignores common sense").

The highest court in Maryland was presented with virtually the same question now certified to us: "whether a surgeon infected with the ADDS virus has a legal duty to inform patients of that condition before operating on them." Faya v. Almaraz, 329 Md. 435, 438, 620 A.2d 327, 328 (1993). The Faya court found that such a legal duty existed. Faya, 329 Md. at 448, 620 A.2d at 333.

In Faya, the defendant surgeon performed breast surgeries on the two female plaintiffs at a time when he knew he was HIV positive. Faya, 329 Md. at 440, 620 A.2d at 329. Each plaintiff filed separate lawsuits alleging various wrongful acts on the part of the surgeon. The gist of their complaints was that the surgeon "acted wrongfully in operating on the two women without first telling them that he was HIV-positive (and, later, ill from AIDS proper) and that Hopkins [the Hospital] was culpable for permitting him to do so." Faya, 329 Md. at 441, 620 A.2d at 330. The plaintiffs contended that by undergoing their

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operations without knowing of the surgeon's illness, they were exposed to a hazard to which they would not have Consented, i.e., a risk of AIDS attendant upon invasive surgery. Faya, 329 Md. at 441-42, 620 A.2d at 330. The trial court dismissed the plaintiffs' complaint, intermediate appellate review was bypassed, and the case proceeded to the Court of Appeals, the highest court in Maryland. Faya, 329 Md. at 443, 620 A.2d at 330-31.

The Faya court explained in detail the nature of the virus, its transmission from one person to another, and its causation of AIDS, an invariably fatal disease. The Faya court further acknowledged studies, reports, and literature examining these issues in the medical setting. Faya, 329 Md. at 438-39, 440-51, 620 A.2d at 328-29, 331-33. In its discussion of the concept of legal duty, the Faya court observed that "legal scholars have long agreed that the seriousness of potential harm, as well as its probability, contributes to a duty to prevent it." (Emphasis in original.) Faya, 329 Md. at 449, 620 A.2d at 333. Considering all of the medical information and the fundamental principles of a legal duty, the Faya court concluded:

"Under the allegations of the appellants' complaints, taken as true, it was foreseeable that [the surgeon] might transmit the AIDS virus to his patients during invasive surgery. Thus, we are unable to say, as a matter of law, that [the surgeon] owed no duty to the appellants, either to refrain from performing the surgery or to warn them of his condition." Faya, 329 Md. at 448, 620 A.2d at 333.

In light of this holding, the Faya court reversed the trial court's dismissal of the plaintiffs' complaint as to both the surgeon and the hospital. Faya, 329 Md. at 461, 620 A.2d at 339.

We find that the decision in Faya is persuasive and comports with our already well-established general principles of duty and our particular doctrine of informed consent. Accordingly, we answer the first certified question in the affirmative and hold that a physician should disclose his or her HIV-positive status to a patient who is going to submit to an invasive surgery.

Having found that a physician has a duty to disclose in the first certified question, we reach the second certified question that asks: "If such a duty exists, does a cause of action for the negligent infliction of mental distress exist where there is no allegation of actual HIV transmission during the course of the procedure?"

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To state a cause of action for the negligent infliction of emotional distress, a direct victim (as distinguished from a bystander) needs only allege the same elements as any other cause of action based on negligence. Corgan v. Muehling, 143 Ill. 2d 296, 306 (1991) (held that a patient plaintiff can allege a cause of action for negligent infliction of emotional distress against her psychotherapist for his having sexual relations with her). A negligence complaint, "to be legally sufficient, must set out facts that establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." Corgan, 143 Ill. 2d at 306. To recover for negligent infliction of emotional distress, an allegation of physical injury, illness, manifestation, or symptoms as a result of the emotional distress is not required. Corgan, 143 Ill. 2d at 308-12; Doe v. Roe,

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289 Ill. App. 3d 116 (1997); Campbell v. A.C. Equipment Services Corp., 242 Ill. App. 3d 707, 714 (1993). For purposes of the second certified question, the elements of duty and breach of duty are assumed.

In Faya, the case that found a duty to disclose, the Maryland court also addressed a question similar to the second certified question now before us: "whether these are legally compensable injuries where the appellants have not alleged in their complaints an actual transmission of the HIV virus into their bodies during the surgical procedures." Faya, 329 Md. at 451, 620 A.2d at 334. Although their complaints did not specifically allege a claim of negligent infliction of emotional distress, the plaintiffs alleged several other causes of action, including negligent failure to obtain the patients' informed consent. Faya, 329 Md. at 441, 620 A.2d at 330. The plaintiffs pleaded that as a result of the surgeon's breach of duty to disclose, they were put in fear of having contracted HIV and, due to the derivative consequences of that fear, they suffered emotional and mental distress, headaches, sleeplessness, and the pain and expense associated with repeated blood tests. Faya, 329 Md. at 451, 620 A.2d at 334.

The Faya court concluded that "even though the averments of the complaints did not identify any actual channel of transmission of the AIDS virus," the plaintiffs could still recover damages. Faya, 329 Md. at 455, 620 A.2d at 336-37. The court, however, limited the time period for which recovery was possible to the "reasonable window of anxiety," i.e., the time between when the plaintiffs learned of the surgeon's illness and when the plaintiffs received their HIV-negative results. Faya, 329 Md. at 455-56, 620 A.2d at 337; accord Williamson v. Waldman, 150 N.J. 232, 696 A.2d 14 (1997); Tischler v. Dimenna, 160 Misc. 2d 525, 609 N.Y.S.2d 1002 (1994).

Four Illinois cases have addressed the issue of whether a plaintiff can state a cause of action based on the possible transmission of HIV in a medical setting. First, in Doe v. Surgicare of Joliet, Inc., 268 Ill. App. 3d 793 (1994), a contaminated needle was used to administer anesthetic during surgery and the court affirmed the section 2 - 615 dismissal of the plaintiffs' counts alleging negligent infliction of emotional distress, finding no legally cognizable claim as a matter of law. Two months after undergoing surgery, the plaintiff was informed that during her surgery, a medical technician stuck himself or herself with a needle and used the same needle to administer anesthetic to plaintiff. The medical technician refused to submit to an AIDS test and there was no allegation that the technician was HIV positive or had AIDS. Due to her exposure to the contaminated needle, plaintiff had to undergo AIDS testing. The court found that plaintiff "suffered a physical impact upon being stuck with an unsterile needle by defendant's medical technician." Surgicare, 268 Ill. App. 3d at 796. The court, however, held that absent actual exposure to the virus, plaintiffs' claim was too speculative to recognize:

"If a suit for damages is based solely upon plaintiff's fear of acquiring AIDS, but there is no allegation of an actual exposure to the virus, a legally compensable claim cannot be recognized. *** Recovery in this situation should be based on the likelihood of contracting AIDS, not the fear that it could have happened, but did not." Surgicare, 268 Ill. App. 3d at 798-99.

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Second, in Doe v. Northwestern University, 289 Ill. App. 3d 39 (1997), pet. for leave to appeal allowed, 175 Ill. 2d 525 (1997), the plaintiffs' complaint was dismissed, finding no legally cognizable damages. After receiving dental treatment, the plaintiffs were informed that an unnamed dental student who had provided treatment was infected with HIV. Plaintiffs filed complaints, alleging multiple causes of action, but they did not allege that any of them ever tested positive for HIV. The majority in Northwestern adopted this standard: "plaintiffs who fear that they have contracted AIDS because of a defendant's negligence should recover damages for the time in which they reasonably feared a substantial, medically verifiable possibility of contracting AIDS." Northwestern, 289 Ill. App. 3d at 48-49. Under this standard, the plaintiffs are required "to present evidence that they knew facts that showed a substantial, medically verifiable possibility of contracting the feared disease." Northwestern, 289 Ill. App. 3d at 50. The court concluded that the plaintiffs did not suffer legally cognizable damages because they never faced a medically verified, substantial risk of contracting HIV, noting that the plaintiffs did not allege that any dental student bled during their treatment and that the likelihood of infection was extremely low. Northwestern, 289 Ill. App. 3d at 50-51.

Third, in Majca v. Beekil, 289 Ill. App. 3d 760 (1997), pet. for leave to appeal allowed, 175 Ill. 2d 529 (1997) (consolidated with Northwestern), the court affirmed summary judgment for the defendants where the plaintiff had cut her hand on a used scalpel while disposing of the trash in a medical office. The court held that any reasonable fear that plaintiff had about acquiring AIDS was not compensable because she had already tested negative for HIV before she learned that the subject physician had AIDS.

Fourth, in Natale v. Gottlieb Memorial Hospital, 292 Ill. App. 3d 512 (1997), the plaintiff had been invaded by a contaminated scope during a colonoscopy and filed a complaint against the surgeon and the hospital. Plaintiff conceded that his only claims were for emotional distress damages. The court allowed plaintiff's complaint to withstand a section 2 - 615 dismissal because the language in the complaint alleged actual exposure to HIV.

Under Surgicare, an allegation of actual exposure to the virus is required. Under Northwestern and Majca, the plaintiff must face a particularly substantial risk of HIV infection to state a cause of action and the fear, even though reasonable, of the possibility of contracting AIDS is not sufficient to be compensable. Notwithstanding the high standards proposed in these Illinois cases, we believe that the Faya opinion is more persuasive in allowing plaintiffs to state a cause of action absent an allegation of any actual channel of transmission of the AIDS virus and in restricting the recovery of damages to the time between learning of the surgeon's illness and receiving their HIV-negative results, i.e., the reasonable window of anxiety. Accordingly, we answer the second certified question in the affirmative and find that a cause of action for the negligent infliction of mental distress exists even where there is no allegation of actual HIV transmission during the course of the procedure.

Furthermore, we find Surgicare and Majca factually distinguishable from the present case. In Surgicare, the plaintiffs did not allege that the technician who used the contaminated needle was HIV positive or had AIDS and could not make such an allegation because the

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technician refused to submit to an AIDS test. In Majca, the plaintiff received negative HIV test results before she first learned that the doctor had died of AIDS.

We recognize that our decision is at odds with the standards propounded in Northwestern and Majca by the majority and the special concurrence. We believe, however, that either standard would discourage notification to a person who may have been exposed to HIV because there would be no reason for such disclosure if no liability obtained in the future. On the other hand, the rationale in Faya for allowing liability within the reasonable window of anxiety provides a reason to disclose the possibility of HIV transmission to avoid liability.

In the present case, the trial court dismissed 14 counts of plaintiffs' second amended complaint under section 2 - 615. On appeal, this court applies a de nova standard of review where the trial court dismisses a complaint under section 2 - 615. Brown Leasing, Inc. v. Stone, 284 Ill. App. 3d 1035, 1044 (1996).

The question presented by a section 2 - 615 motion to dismiss for failure to state a cause of action is whether sufficient facts are contained in the pleadings which, if established, would entitle the plaintiff to relief. Wright v. City of Danville, 174 Ill. 2d 391, 398 (1996). Thus, the only question on appeal is whether the dismissed counts stated a cause of action upon which the plaintiffs can recover. Brown Leasing, 284 Ill. App. 3d at 1044; Majumdar v. Lurie, 274 Ill. App. 3d 267, 268 (1995).

BATTERY (Counts I through IV)

First, plaintiffs contend that Surgeon's performance of the surgeries constituted a battery because his failure to reveal that he was HIV positive vitiated the presurgery consent given by plaintiff and, in turn, his performance of the surgeries amounted to harmful and offensive contact. We disagree.

Under Illinois law, a claim for battery requires a lack of consent for a touching. See Bernesak v. Catholic Bishop of Chicago, 87 Ill. App. 3d 681, 688 (1980). In contrast, a claim alleging a failure to disclose potential risks of an agreed treatment is a medical negligence cause of action based on lack of informed consent. Mink v. University of Chicago, 460 F. Supp. 713, 717 (N.D. Ill. 1978) (discusses the distinction); Northwestern, 289 Ill. App. 3d at 44. In Northwestern, this court held that the plaintiffs could not recover for battery where they consented to the dental procedures that were performed but did not know about the risks associated with the procedures because the dentist was HIV positive. Northwestern University, 289 Ill. App. 3d at 44.

Plaintiffs cannot state a cause of action for battery. The law distinguishes between a total lack of consent for the contested act (battery) and the lack of informed consent (negligence). There is no dispute that Jane consented to the surgeries and that Surgeon performed the same procedures to which Jane consented. Like the plaintiffs in Northwestern, the only contested element of the surgery is the unknown risk involved because the physician was HIV positive. Accordingly, we affirm the dismissal of the counts for battery and for the derivative loss of consortium alleged by John (counts I through IV).

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INFORMED CONSENT (Counts V through VII)

Next, plaintiffs alleged causes of action premised on the doctrine of informed consent. "To succeed in a malpractice action based on the doctrine of informed consent, the plaintiff must plead and ultimately prove four essential elements: (1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was injured by the proposed treatment." Coryell v. Smith, 274 Ill. App. 3d 543, 546 (1995). "An unrevealed risk that should have been made known must materialize, for otherwise the omission, however unpardonable, is legally without consequence." Canterbury v. Spence, 464 F.2d 772, 790 (D.D.C. 1972).

As we previously held in our answer to the first certified question, Surgeon had a duty to disclose his HIV-positive status to Jane before the operations. However, plaintiffs' second amended complaint fails to plead the requisite injury from this unrevealed risk, i.e., the transmission of the HIV infection to Jane during the surgeries. Thus, we affirm the dismissal of the claims for informed consent and the derivative loss of consortium (counts V through VII).

CONSPIRACY (Count IX)

The next count in the complaint (count IX) is directed against Surgeon, Partner and Corporation and appears, in part, to allege an agreement to commit a battery upon Jane by its allegations of "the physical touching" by Surgeon that "was harmful, offensive, and unauthorized." To the extent the count is based on a conspiracy to commit a battery, it was properly dismissed as the battery count was properly dismissed.

This count also alleges that they (Surgeon, Partner and Corporation) "knowingly conspired and agreed among themselves to not reveal the HIV status of [Surgeon] so as to gain consent to care and treatment that the plaintiff would otherwise decline." A civil conspiracy "consists of a combination of two or more persons for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means." Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 62 (1994). The gist of plaintiffs' conspiracy count appears to be that the "lawful act" was the surgeries, but the "unlawful means" was the failure to disclose Surgeon's HIV-positive status. The duty to disclose risks to a patient, however, rests exclusively with the doctor in a physician-patient relationship. No independent duty is imposed upon others. Accordingly, no conspiracy can be stated and we affirm the dismissal of this conspiracy count (count IX).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (Count X)

The next count (count X) is directed against all defendants by Jane for intentional infliction of emotional distress. Three elements are required to establish the tort of intentional infliction of emotional distress: "(1) the defendant's conduct was truly extreme and outrageous; (2) the defendant either intended that his conduct inflict severe emotional distress, or knew that there was at least a high probability that his conduct would cause severe emotional distress; and (3) the defendant's conduct did in fact cause severe

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emotional distress.” Sutherland v. Illinois Bell, 254 Ill. App. 3d 983, 994 (1993). " 'The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.’ ” Campbell, 242 Ill. App. 3d at 713, quoting McGrath v. Fahey, 126 Ill. 2d 78, 86 (1988), quoting Restatement (Second) of Torts § 46, Comment j, at 77-78 (1965).

In their second amended complaint, plaintiffs premise this cause of action on the specific allegations that each defendant, respectively (the Hospital, Corporation, Partner, and Surgeon), "owed a duty to the plaintiff JANE DOE, to know the HIV status of [Surgeon], and to advise plaintiff of his HIV infection in advance of the performance of the invasive surgical procedure.” (Emphasis added.) No such duty "to know” exists. Thus, we affirm the dismissal of count X.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (Counts XI through XIV)

The next four counts (counts XI through XIV) allege negligent infliction of emotional distress counts against Hospital, Partner and Corporation based on their alleged refusal to answer Jane’s question as to the cause of Surgeon’s death, their duty to know the HIV status of Surgeon, and their duty to advise Jane of Surgeon’s HIV infection before surgery. The trial court dismissed these counts based on the AIDS Confidentiality Act, which precludes disclosure of the HIV status of a person. 410 ILCS 305/9 (West 1992).

As we found in the previous count alleging intentional infliction of emotional distress (count X), there is no independent duty on the part of the Hospital, Partner or Corporation to know the HIV status of Surgeon. Thus, we affirm the dismissal of counts XI through XIV.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (Counts XV through XVIII)

The remaining four counts (counts XV through XVIII) are directed against Surgeon and Corporation alleging negligent infliction of emotional distress premised on informed consent and the failure to disclose Surgeon’s HIV-positive status. These counts were not dismissed by the trial court and were the subject of the two certified questions. We affirm the trial court’s decision to deny the dismissal of these counts for the reasons stated in our discussion of the two certified questions. We also observe that the derivative claims for loss of consortium for John are particularly appropriate here given the very real restriction on a marital relationship when one party may have HIV.

In conclusion, we answer both certified questions in the affirmative, finding that a physician has a duty to disclose his or her HIV-positive status to a patient when seeking the patient’s consent to perform an invasive medical procedure which exposes the patient to the risk of HIV transmission and that a cause of action for the negligent infliction of mental distress exists where there is no allegation of actual HIV transmission during the course of the procedure. We affirm the dismissal of counts I through XIV and the denial of dismissal of counts XV through XVIII. In addition, we need not address the trial court’s dismissal of Partner under section 2 - 1010 because the counts that remain are not directed against Partner.

Certified questions answered and judgment affirmed.

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THEIS and QUINN, JJ., concur.

Glenn v. Johnson, 198 Ill. 2d 575 (2002)

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

Ill. Supreme Court · filed 2002-01-25 · Reporter opinion
Supreme Court

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- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C056.3
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C056.3

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Glenn v. Johnson, 198 Ill. 2d 575 (2002)

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Glenn v. Johnson

198 Ill. 2d 575 · Supreme Court · Filed 2002-01-25 · Reporter opinion · Binding on all Illinois courts

Syllabus

Prepared by the reporter, not part of the court's opinion.

(No. 91305. MARY ANN GLENN, Adm'r of the Estate of William E. Glenn, Deceased, Appellee, v. HERSCHEL JOHNSON, Appellant. Opinion filed January 25, 2002. HARRISON, C.J., took no part. Thomas A. LeChien and Richard W. Thompson, both of Belleville, for appellant. Alvin C. Paulson and Garrett E Hoerner, of Becker, Paulson & Hoerner, PC., of Belleville, for appellee.

Opinion

JUSTICE KILBRIDE

delivered the opinion of the court:

This case involves the distribution and allocation of funds received in a third-party settlement pursuant to a wrongful-death action brought by the decedent's personal representative. We are asked to consider: (1) the effect that an employer's right to reimbursement from third-party settlements under the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2000)) has on the allocation of attorney fees, (2) the employer's credit for future benefit payments under the Act, and the distribution of the funds, as well as (3) the propriety of allocating a portion of the funds for loss of consortium where the surviving spouse has not filed an individual claim.

After reviewing the parties' arguments, we hold that there is insufficient evidence in the record to support a proper analysis on the merits of these questions. Thus, we reverse the judgments of the appellate court and the circuit court of St. Clair County and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

In 1996, the decedent, William E. Glenn, was killed while working for his employer, Herschel Johnson, when the John Deere tractor he was operating overturned. Johnson subsequently began paying workers' compensation benefits pursuant to the Act (820 ILCS 305/1 et seq. (West 2000)).

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As special administratrix of the estate, the decedent's wife, Mary Ann Glenn (Glenn), filed a complaint under the Wrongful Death Act (740 ILCS 180/1, 2 (West 1996)) against several defendants, including Johnson, Herschel Johnson Real Estate and Development Corporation (development company), and John Deere Company (John Deere). The development company settled the case for $25,000. Johnson agreed that this settlement would not be subject to his statutory right as the decedent's employer to a workers' compensation reimbursement lien (lien). See 820 ILCS 305/5(b) (West 2000).

Later, the case against John Deere was settled for $225,000, and Glenn filed a petition as special administratrix to approve the settlement. She subsequently petitioned the probate court to be appointed the guardian of the estate and person of her minor son. Next, Johnson intervened in the proceedings to assert his lien against the settlement proceeds. Glenn subsequently filed a petition nominating herself as the decedent's independent administratrix under article 28 of the Probate Act of 1975 (755 ILCS 5/28 - 1 et seq. (West 2000)), and a petition seeking approval and distribution of the settlement. The probate court granted letters of administration and appointed Glenn independent administratrix. Glenn's probate court case and wrongful-death action were consolidated, and Glenn was appointed the guardian of the estate and person of her minor son for purposes of the litigation.

The parties agreed that Johnson could seek a lien only on the $225,000 settlement obtained from John Deere. After hearing the parties' arguments, the trial court calculated the amount of Johnson's lien using the following method. First, it deducted approximately one-third, or $74,992.50, of the settlement for the plaintiffs private contractual attorney fee, and $24,776.68 for costs. This left a net settlement recovery of $125,230.82. Next, the court found that Johnson was entitled to a $51,000 workers' compensation lien, apparently based on the workers' compensation benefits he had already paid. The court then determined that Johnson was responsible for 40.7% of the total costs, or $10,084.15, because $51,000 was 40.7% of the net settlement recovery. The trial court also charged Johnson with an additional 25% of his $51,000 lien as the mandatory 25% attorney fee provided in the Act (see 820 ILCS 305/5(b) (West 2000)). These deductions left Johnson with a net reimbursement lien of $28,165.85.

The trial court next ordered that Glenn and her minor son share the remaining $84,314.97 from the settlement. The court allocated half this amount, or $42,157.49, to Glenn for her loss of consortium, society, and companionship and the other half to her minor son. Since awards for loss of consortium are not subject to an employer's lien under the Act, Johnson was eligible for a credit toward his future benefit payments for only the $42,157.49 allocated to the minor child. The trial court then determined that Johnson was entitled to a moratorium period of 146.44 weeks ($42,157.49 $287.89 per week = 146.44 weeks) on future payments since he was making benefit payments of $287.89 per week. He was, however, required to make weekly payments of $71.97 on the 25% statutory attorney fee during this period.

The appellate court affirmed, but modified the trial court's judgment. 319 Ill. App. 3d 625. The court found that the trial court erred by awarding fees for both one-third of the full

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settlement under the plaintiffs private fee agreement and 25% of the employer's lien under the statutory fee provisions in the Act (820 ILCS 305/5 (b) (West 2000)). 319 Ill. App. 3d at 631. The court stated that the total attorney fees should be limited to one-third of the $225,000 settlement, or $75,000, and that the employer's share of this amount should be 25% of its $51,000 lien, or $12,750. The appellate court also reduced Johnson's share of the costs from 40.7% to 23% because his $51,000 lien represented only 23% of the $225,000 settlement. 319 Ill. App. 3d at 631-32.

The appellate court also rejected Johnson's argument that the trial court erred by allocating half of the net recovery for Glenn's loss of consortium. 319 Ill. App. 3d at 632. The court found that the pleadings and transcripts adequately demonstrated that this claim was made in the original complaint Glenn filed, even though it was not set out as a separate count. In a footnote, the court stated that even though the statute of limitations had run on Glenn's consortium claim at the time of the settlement, it believed that the "relation back" doctrine would have permitted her to amend "her complaint" to separate out this claim. 319 Ill. App. 3d at 632 n.1.

The appellate court then recalculated the net recovery for purposes of the lien calculation to be $92,671.96 by subtracting from the $225,000 settlement Johnson's net lien recovery of $32,551.36, total attorney fees of $75,000, and costs of $24,776.68. It allocated half of this net recovery ($46,335.98) for loss of consortium. This yielded a moratorium period on benefit payments of 160.95 weeks ($46,335.98 -*■ $287.89 per week = 160.95 weeks). During this time, Johnson was still obligated to pay $71.97 per week for his share of the attorney fees. 319 Ill. App. 3d at 634. Johnson filed a petition for leave to appeal, and this court granted the petition. 177 Ill. 2d R. 315(a).

ANALYSIS

The parties in this case present three issues for consideration by this court: (1) the proper allocation of attorney fees when an employer seeks reimbursement of amounts payable under the Act from a third-party settlement; (2) the availability of an employer's credit for future workers' compensation benefit payments; and (3) the propriety of allocating a portion of a third-party settlement for loss of consortium where the decedent's spouse did not file a complaint as an individual.

I. Calculation of Attorney Fees

Johnson claims that the appellate court erred by calculating his statutory 25% share of the plaintiffs attorney fees as 25% of the attorney's private contractual fee of 33V3% of the gross settlement. He contends that the calculation is controlled by our holding in In re Estate of Dierkes, 191 Ill. 2d 326, 331-32 (2000). In Dierkes, this court held that where the employer's lien is greater than the third-party settlement, the Act limits attorney fees to 25% of the settlement amount, regardless of the amount stated in the fee agreement. Dierkes, 191 Ill. 2d at 335.

We note that in Dierkes the parties agreed that the net present value of the workers' compensation benefits due far exceeded the settlement amount. Dierkes, 191 Ill. 2d at 329. Here, no evidence was taken regarding the net present value of Johnson's payment

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obligation. The trial court apparently determined Johnson's share of attorney fees based solely on the arguments presented by the parties' counsel and took no testimony and admitted no evidence at the hearing. Without any basis for determining the net present value of Johnson's future benefit payments, the trial court could not properly determine the applicability of Dierkes. Thus, we reverse the judgments of the trial court and the appellate court and remand the cause to the trial court for a determination of the net present value of Johnson's liability for workers' compensation benefit payments. After making this determination, the trial court should consider the applicability of Dierkes and recalculate Johnson's share of the attorney fees.

II. Employer's Credit for Future Benefit Payments

Johnson next argues that he is entitled to recover the entire settlement from John Deere because his liability under the Act exceeds the settlement amount. See Dierkes, 191 Ill. 2d at 333. He contends that the appellate court erred by merely awarding him a $51,000 lien against the settlement, representing only past benefits paid, without any credit for his future payment obligation.

An employer may seek from any third-party recovery both a lien for workers' compensation benefits already paid and a credit for future payments owed pursuant to section 5(b) of the Act (820 ILCS 305/5(b) (West 2000)). Zuber v. Illinois Power Co., 135 Ill. 2d 407, 411 (1990). This court has recognized the crucial role that the reimbursement of an employer from any third-party recovery plays in the overall scheme of the Act. Dierkes, 191 Ill. 2d at 331-34. Reimbursement serves to balance the interests and rights of the employer and the employee in the settlement funds. It allows employers to recoup " 'so much of the negligence recovery as is necessary to reimburse it for its compensation outlay, and to give the employee the excess,' " while providing the employee with fuller compensation for actual damages than is available under the Act alone. Dierkes, 191 Ill. 2d at 332, quoting 6 A. Larson & L. Larson, Larson's Workers' Compensation Laws § 110.02, at 110 - 3 to 110 - 4 (1999).

Here, the trial court set the amount of Johnson's recovery without the benefit of any evidence admitted at the hearing. We have already determined that this cause must be remanded for a new hearing on the net present value of Johnson's payment obligation and the recalculation of his share of the attorney fees pursuant to Dierkes. This change will inevitably alter the other calculations relevant to the trial court's determination of Johnson's recovery from the settlement, requiring the court to perform its analysis again. Thus, on remand, we additionally direct the trial court to reevaluate Johnson's right to a credit for future payments consistent with this court's decisions in Dierkes, 191 Ill. 2d 326, and Zuber, 135 Ill. 2d 407.

III. Damages for Loss of Consortium

Finally, Johnson claims that the appellate court improperly allowed damages for loss of consortium due to its erroneous belief that the decedent's wife could have amended the original complaint to add a new claim for loss of consortium in her individual capacity. Johnson contends that, while acknowledging that the statute of limitations had expired on

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this claim, the appellate court incorrectly believed that an amendment would have been allowed because it would have "related back" to the original filing, making it a change "of form and not of substance." 319 Ill. App. 3d at 632 n.1.

Johnson maintains, however, that since Glenn had not previously filed a complaint in her individual capacity, appending an individual claim for loss of consortium to the original complaint would have added a separate claim by a new party. Under these circumstances, the amendment could not have related back to the original complaint. See McGinnis v. A.R. Abrams, Inc., 141 Ill. App. 3d 417 (1986).

We believe that the relation back doctrine is irrelevant in this case. The Wrongful Death Act (740 ILCS 180/2 (West 1996)) states: "Every [wrongful-death] action shall be brought by and in the names of the personal representatives of such deceased person, and, *** except as otherwise hereinafter provided ***." (Emphasis added.) Thus, to recover damages under the Wrongful Death Act, the decedent's personal representative must filé the cause of action alleging wrongful death. Pasquale v. Speed Products Engineering, 166 Ill. 2d 337, 360-61 (1995). The personal representative is merely a nominal party to this action, effectively filing suit as a statutory trustee on behalf of the surviving spouse and next of kin, who are the true parties in interest. VanMeter v. Goldfarb, 317 Ill. 620, 622 (1925); In re Estate of Fields, 588 S.W.2d 50, 53 (Mo. App. 1979) (applying Illinois law).

In addition, the Wrongful Death Act provides that "the amount recovered in every [wrongful-death] action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person ***." (Emphasis added.) 740 ILCS 180/2 (West 1996). This provision is designed "to compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death." Elliott v. Willis, 92 Ill. 2d 530, 540 (1982). See also Knierim v. Izzo, 22 Ill. 2d 73, 82 (1961); Hall v. Gillins, 13 Ill. 2d 26, 30 (1958). This court has recognized loss of consortium as a compensable "pecuniary injury" under the Wrongful Death Act. Elliott, 92 Ill. 2d at 540.

Here, the decedent's personal representative is the administratrix of his estate, Glenn. As the decedent's personal representative, Glenn properly filed a cause of action under the Wrongful Death Act alleging, inter alia, that due to the decedent's death his next of kin "have sustained other pecuniary damage, including loss of his love, companionship, society, affection, guidance, comfort and consortium." This allegation undeniably sought damages for loss of consortium on behalf of the decedent's surviving spouse. As the surviving spouse, Glenn was a real party in interest in the original complaint. Thus, the amount recovered for loss of consortium is for her exclusive benefit and not subject to the workers' compensation lien of the decedent's employer. See Page v. Hibbard, 119 Ill. 2d 41, 47-48 (1987).

The identity of the personal representative who filed the complaint is irrelevant since the representative is merely a nominal party acting on behalf of the true beneficial plaintiffs, who include Glenn in this case. See Wilbon v. D.F. Bast Co., 73 Ill. 2d 58, 68 (1978); VanMeter v. Goldfarb, 317 Ill. 620, 622 (1925); In re Estate of Fields, 588 S.W.2d 50, 53 (Mo. App. 1979) (applying Illinois law). Thus, requiring Glenn to file an amendment to the original complaint for loss of consortium in her individual capacity would be unnecessarily

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duplicative and have no substantive effect on the cause of action. See Knierim, 22 Ill. 2d at 82-83 (holding that a surviving spouse may not seek damages for loss of consortium under both the Wrongful Death Act and the common law since the differences between the two counts are not sufficiently significant).

Moreover, only the decedent's personal representative is permitted to file a claim under the Wrongful Death Act. The statute does not authorize the filing of individual causes of action. 740 ILCS 180/2 (West 1996) ("Every such action shall be brought by and in the names of the personal representatives of' the decedent (emphases added)). See also Hall, 13 Ill. 2d at 30 (recognizing that the requirement of a single action filed on behalf of the beneficial plaintiffs avoids multiple lawsuits); Johnson v. Village of Libertyville, 150 Ill. App. 3d 971, 974 (1986) (noting that the Wrongful Death Act does not create any individual right to sue). In the context of the wrongful-death action filed in the instant case, it would be futile to require Glenn to file an additional claim as an individual to protect her interests under the Wrongful Death Act as the decedent's surviving spouse.

Finally, we note that the settlement in this case did not apportion the award between the two beneficiaries. Although trial courts have the authority to allocate settlement proceeds among competing claims (see Bart v. Union Oil Co., 236 Ill. App. 3d 964, 966 (1992)), such determinations must be made based on adequate factual support (see Fret v. Tepper, 248 Ill. App. 3d 320, 328 (1993)). In addition, the Wrongful Death Act requires the trial judge to "conduct a hearing to determine the degree of dependency of each beneficiary upon the decedent" prior to calculating the damages to be awarded to each beneficiary. 740 ILCS 180/2 (West 1996). Our review of the record in this case reveals that no such hearing was held and that the trial court had virtually no basis for allocating the settlement proceeds between Glenn's claim and the claim of her minor son. The only facts in the record that are relevant to this determination may be gleaned from comments made during counsel's arguments at the hearing. These comments reveal that Glenn is a registered nurse and that the decedent was apparently working only part-time, earning relatively low wages, at the time of his death.

Due to this dearth of evidence, the trial court had no basis in the record to support any allocation of the settlement. Thus, we reverse the judgments of the appellate and trial courts and remand the cause for further evidentiary proceedings on the proper allocation of the settlement proceeds. On remand, the trial court should allocate the settlement proceeds fairly and reasonably in light of the entire settlement and taking into account that Johnson's lien does not attach to Glenn's loss of consortium award as well as the importance of protecting Johnson's lien rights under section 5(b) of the Workers' Compensation Act. See Page, 119 Ill. 2d at 47-48; Bart, 236 Ill. App. 3d at 966.

CONCLUSION

In sum, we hold that the trial court did not have a sufficient evidentiary basis to issue an order allocating a portion of the plaintiffs attorney fees to Johnson, setting the amount of Johnson's lien and credit for future benefit payments, and allocating the settlement between the claims of Glenn and her minor son. On remand, the trial court should hear all the evidence necessary to enter reasoned decisions on each of these issues.

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The judgments of the appellate court and the trial court are reversed, and the cause is remanded to the circuit court of St. Clair County for further proceedings consistent with this opinion.

Appellate court judgment reversed; circuit court judgment reversed; cause remanded with directions.

CHIEF JUSTICE HARRISON took no part in the consideration or decision of this case.

The trial court apparently calculated this value by subtracting Johnson's $28,165.85 lien and the 25% statutory attorney fee of $12,750 from the net settlement recovery of $125,230.82.

Goldberg v. Ruskin, 128 Ill. App. 3d 1029 (1st Dist. 1984)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1984-09-12 · Reporter opinion
Published opinion

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- memo p. 12 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C044.1

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JEFFREY GOLDBERG, a Minor, by Michael Goldberg *et al.*, his Parents and Next Friends, *et al.*, Plaintiffs-Appellants, v. STEPHEN B. RUSKIN *et al.*, Defendants-Appellees.

First District (3rd Division) Nos. 81—1450, 81—1962 cons.

Opinion filed September 12, 1984.—Modified on denial of rehearing December 19, 1984.

[redacted]

RIZZI, P.J., dissenting.

[redacted]

Albert F. Hofeld, Ltd., and William J. Harte, Ltd., both of Chicago, for appellants.

Hinshaw, Culbertson, Moelmann, Hoban & Fuller, of Chicago (Patrick D. Halligan, of counsel), for appellees.

JUSTICE WHITE delivered the opinion of the court:

Plaintiffs, Michael Goldberg, Nancy Goldberg, his wife, and Jeffrey Goldberg, their son,[1] instituted this medical malpractice action against

[1]The record shows that Jeffrey Goldberg has died, and that this court appointed Michael Goldberg as special administrator of the estate of Jeffrey Goldberg for the purpose of prosecuting this action.

defendants, Stephen B. Ruskin and Strauss Surgical Group, Assoc., S.C. The Goldbergs' amended complaint attempts to set forth two causes of action. The first, a claim for damages based upon "wrongful life," was asserted by Michael and Nancy Goldberg on behalf of Jeffrey. The second, a claim for "wrongful birth" by the parents, sought compensation for injuries suffered by them in their own right.

According to the factual allegations set forth in the amended complaint, Ruskin is a licensed physician and surgeon in the State of Illinois specializing in obstetrics and gynecology, and on or prior to April 6, 1978, he practiced medicine as an employee of Strauss Medical Group. For a period of approximately nine months prior to Jeffrey Goldberg's birth on April 6, 1978, Jeffrey and Nancy Goldberg, his mother, were under the care of defendants. Jeffrey was born with Tay-Sachs disease. Plaintiffs allege that: at all relevant times, defendants had knowledge of Tay-Sachs disease, a devastating and terminal disease affecting infants; defendants knew that the disease has no known treatment and that it afflicts the offspring of Jewish parents at a "higher rate"; defendants knew that a simple testing procedure existed and was in general use within the medical community to determine whether a baby would be born with Tay-Sachs disease; and if the tests had been performed and revealed that Jeffrey would be born with the disease, and Michael and Nancy Goldberg had been informed by defendants of this fact, they would have caused the child to be aborted, which was their unqualified right under the law. Plaintiffs further allege that defendants were guilty of one or more of the following negligent acts or omissions: that they failed to inform Michael and Nancy Goldberg during pregnancy of the risk of Tay-Sachs disease; that they failed to impart to Michael and Nancy Goldberg the knowledge and choice to engage in the simple testing procedure; and that they failed to engage in said testing procedure.[2]

[2]Tay-Sachs disease is a fatal, progressive, degenerative disease of the nervous system which occurs primarily in Jewish infants of eastern European ancestry. A diseased child appears normal at birth, but at four to six months of age, the child's central nervous system begins to degenerate, and he suffers eventual blindness, deafness, paralysis, seizures, and mental retardation. His life expectancy is two to four years. Only in the circumstance where both parents are carriers of the Tay-Sachs trait will there be a great likelihood of the presence of the disease in their offspring. The carrier is not affected by the disease, but if both parents are carriers, the probability that their child will have the disease is one in four. There is a blood test to identify carriers of the Tay-Sachs trait. If tests show that both parents are carriers, a further test known as amniocentesis can be performed to determine whether the fetus is afflicted with the disease. See *Naccash v. Burger* (1982), 223 Va. 406, 409-10, 290 S.E.2d 825, 827; *Howard v. Lecher* (1977), 42 N.Y.2d 109, 114, 397 N.Y.S.2d 363, 366, 366 N.E.2d 64, 67 (Cooke, J., dissenting).

Jeffrey Goldberg, through his parents, alleged, as a part of his wrongful life claim, that as a direct and proximate result of the negligent conduct of defendants, he "was born with Tay-Sachs disease and has suffered and will continue to suffer loss of motor function, loss of sensory function, blindness, deafness, pain, disability and numerous other injuries resulting in damages of a personal, permanent and pecuniary nature and finally certain death." He sought damages in an amount in excess of $15,000.

Michael and Nancy Goldberg allege, as a part of their wrongful birth claim, that as a direct and proximate result of defendants' negligence, they have become obligated "to pay large sums of money for doctor and hospital bills and other physical treatment for the care and treatment of Jeffrey," and they "have suffered *** immeasurable emotional distress in the seeing and caring for their child, while he loses motor function, sensory function, sight, hearing, becomes disabled and suffers numerous other injuries resulting in damages of a personal, permanent and pecuniary nature and finally certain death." They also seek damages in an amount in excess of $15,000.

Upon defendants' motion to strike and dismiss the amended complaint, the circuit court entered an order dismissing Jeffrey Goldberg's cause of action for wrongful life. In this order, the circuit court also certified two questions relating to the parents' cause of action for wrongful life as "questions of law as to which there is a substantial ground for difference of opinion" and found that "an immediate appeal of this order may materially advance the ultimate termination of the litigation." These questions are: (1) "Does a cause of action exist in Illinois on behalf of parents for damages in the form of the costs of increased medical, hospital and physical care rendered to a child born with an inherited disease ***?" and (2) "Do the parents *** have a cause of action for their own emotional distress as the result of seeing and caring for their child while his physical condition degenerates into certain death?"

Plaintiffs appeal from the circuit court's judgment dismissing Jeffrey Goldberg's cause of action for wrongful life, and this court allowed defendants' petition for leave to appeal the interlocutory part of the circuit court's order.

At the outset, it is important to emphasize the posture in which this case is now before this court. The question presented for review is not whether plaintiffs should ultimately prevail in this litigation, but rather whether the amended complaint states cognizable causes of action. (See *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 408, 413 N.Y.S.2d 895, 898, 386 N.E.2d 807, 810.) Since our review is limited to

an evaluation of the sufficiency of the amended complaint, we must accept as true all well-pleaded facts. (See *Ostendorf v. International Harvester Co.* (1982), 89 Ill. 2d 273, 280, 433 N.E.2d 253, 256; *Wilczynski v. Goodman* (1979), 73 Ill. App. 3d 51, 54, 391 N.E.2d 479, 482.) Accordingly, we accept as true, without expressing any opinion as to defendants' liability, the allegations that defendants failed to inform Jeffrey's parents of the risk of Tay-Sachs disease and the testing procedure therefor, and that had they been accurately informed, they would have undergone the necessary tests,[3] the results of which would have precipitated a decision on their part to terminate the pregnancy.

Before addressing other contentions of the parties concerning the validity of plaintiffs' claims for wrongful life and wrongful birth, we address the defendants' argument that this court should not recognize such causes of action in tort because "the creation of novel torts should be left to the legislature." A similar argument was rejected in *Naccash v. Burger* (1982), 223 Va. 406, 413, 290 S.E.2d 825, 829. The Virginia Supreme Court, in recognizing the existence of a cause of action in favor of parents for the wrongful birth of a child born with Tay-Sachs disease, observed that the determination of the scope of the common law doctrine of negligence is within the province of the judiciary. The court stated:

> "whether a cause of action exists for the wrongs complained of and the damages sought here is a question that should be determined, in our opinion, according to traditional tort principles. Only a novel twist in the medical setting differentiates the present situation from the ordinary malpractice action. Hence, *** we believe we need not defer to the legislature, ***." 223 Va. 406, 413, 290 S.E.2d 825, 829.

We agree with the reasoning of *Naccash*. To the extent that recognition of causes of action for wrongful life or wrongful birth would merely be an extension of existing principles of tort law to new factual situations, we can and should recognize them. (See *Speck v. Finegold* (1981), 497 Pa. 77, 83, 439 A.2d 110, 113; *cf. Cockrum v. Baumgartner* (1983), 95 Ill. 2d 193, 196, 447 N.E.2d 385, *cert. denied* (1983), 464 U.S. 346, 78 L. Ed. 2d 139, 104 S. Ct. 149 (recognizing a limited cause of action for wrongful birth by the parents of a healthy child).) Accordingly, we examine the purported medical malpractice causes of action pleaded in the amended complaint to determine

[3]In their amended complaint, plaintiffs did not specifically plead that they would have undergone the tests. Such an allegation, in our opinion, is implicit in the allegations of proximate cause.

whether each sets forth the existence of a duty, a breach of that duty and injury proximately resulting from the breach. See *Cunis v. Brennan* (1974), 56 Ill. 2d 372, 374, 308 N.E.2d 617, 618.

WRONGFUL LIFE

In the purported cause of action for wrongful life, plaintiff Jeffrey Goldberg, through his parents, alleged, in effect, that as a result of the defendants' negligence he was not aborted, but rather was born to experience the pain and suffering attributable to Tay-Sachs disease. He did not allege that any negligence of the defendants caused his disease or that there was anything that the defendants could have done to alter the effects of the disease. See *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 771, 233 N.W.2d 372, 374-75.

The Illinois Appellate Court addressed the issue of wrongful life in *Zepeda v. Zepeda* (1963), 41 Ill. App. 2d 240, 190 N.E.2d 849. In that case, an illegitimate son brought an action in tort against his father for causing him to be born illegitimate. The appellate court affirmed the dismissal of the son's complaint, stating:

> "Recognition of the plaintiff's claim means creation of a new tort: a cause of action for wrongful life. The legal implications of such a tort are vast, the social impact could be staggering. ***
>
> *** What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; ***." (41 Ill. App. 2d 240, 259-60, 190 N.E.2d 849, 858.)

The cause of action asserted on behalf of Jeffrey Goldberg is clearly distinguishable from an action by an illegitimate, but healthy child. *Zepeda*, therefore, is not dispositive of Jeffrey's wrongful life claim.

Wrongful life actions by unhealthy children like Jeffrey have been received with little favor by courts in this country. Among the courts refusing to recognize an action for wrongful life are the highest courts of New York and Wisconsin. (*Becker v. Schwartz* (1978), 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807; *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 233 N.W.2d 372; see also *Berman v. Allen* (1979), 80 N.J. 421, 404 A.2d 8.) The supreme courts of Washington and California, however, have recognized that a child may maintain a limited action for wrongful life to recover the extraordinary expenses necessary to treat his hereditary ailment. (*Harbeson v. Parke-Davis,*

Inc. (1983), 98 Wash. 2d 460, 656 P.2d 483; *Turpin v. Sortini* (1982), 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337.) The latter courts would not permit such a child to recover for pain and suffering or other general damages. *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 482, 656 P.2d 483, 496; *Turpin v. Sortini* (1982), 31 Cal. 3d 220, 234-35, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346.

There are two major obstacles to a claim by an abnormal child for wrongful life. First, it is impossible to determine whether the child has suffered an injury in being born impaired rather than not being born. (*Turpin v. Sortini* (1982), 31 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346.) In other words, it does not appear that the child has suffered any legally cognizable injury. (*Berman v. Allen* (1979), 80 N.J. 421, 428-29, 404 A.2d 8, 12; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 411, 413 N.Y.S.2d 895, 900, 386 N.E.2d 807, 812.) The injury which Jeffrey allegedly suffered as a result of defendants' alleged negligence is that he was born with Tay-Sachs disease rather than not being born at all. The New York Court of Appeals aptly summarized the dilemma faced by a court when it is confronted with a claim for such damages:

> "Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?" 46 N.Y.2d 401, 411, 413 N.Y.S.2d 895, 900, 386 N.E.2d 807, 812.

The second obstacle is difficulty in the measure of damages. The primary purpose of tort law is to compensate plaintiffs for the injuries they have suffered wrongfully at the hands of others, and damages for negligence are ordinarily computed by comparing the condition plaintiff would have been in but for the tort with plaintiff's impaired condition as a result of the wrong. (*Berman v. Allen* (1979), 80 N.J. 421, 427, 404 A.2d 8, 11-12.) In a cause of action seeking recovery for wrongful life, the trier of fact would be required "to measure the difference in value between life in an impaired condition and 'the utter void of nonexistence.' " (*Berman v. Allen* (1979), 80 N.J. 421, 427, 404

A.2d 8, 12.) Such a computation is "a task that is beyond mortals, whether judges or jurors." *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 482, 656 P.2d 483, 496.

It is argued on Jeffrey's behalf that difficulty in measuring damages is not a ground for denying recovery. We agree that a court should be reluctant to deny the validity of a cause of action solely because damages are difficult to ascertain. (*Berman v. Allen* (1979), 80 N.J. 421, 428, 386 A.2d 8, 12.) However, the problem in causes of action for wrongful life is not simply the fixing of damages for a conceded injury. (*Turpin v. Sortini* (1982), 31 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346.) As already stated, it is impossible to determine whether an infant such as Jeffrey has suffered an injury by being born with an ailment as opposed to not being born at all. In our opinion, these two factors, the apparent absence of any legally cognizable injury and the impossibility of making the comparison required by a compensatory remedy, militate against recognition of an action by an infant such as Jeffrey to recover damages for the pain and suffering he endures as a result of being born with a hereditary ailment.

Accordingly, assuming that defendants owed a duty to Jeffrey *in utero* to inform his parents of the risk of Tay-Sachs disease and the testing procedure for the disease (*cf. Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, 353, 367 N.E.2d 1250, 1253 (holding that viability is no longer a criterion to a common law action for pre-natal injuries)), and that the defendants' breach of that duty was the proximate cause of his birth, Jeffrey nevertheless failed to state a cause of action for wrongful life.

As noted, the supreme court of Washington in *Harbeson* and the supreme court of California in *Turpin* recognized a cause of action by a child for wrongful life to recover the extraordinary expenses necessary to treat his hereditary ailment. These courts assert that it would be "illogical and anomalous" to permit wrongful birth actions by parents to recover the costs of a child's medical care, but to refuse to recognize a similar cause of action by the child. (*Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 479, 656 P.2d 483, 495; *Turpin v. Sortini* (1982), 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348.) They also observe that damages for such extraordinary expenses are both certain and readily measurable. (*Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 482, 656 P.2d 483, 496-97; *Turpin v. Sortini* (1982), 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348.) We, however, need not decide whether to recognize such a limited cause of action for wrongful life. In his cause of action for wrongful life, Jeffrey sought to recover damages for the pain and suffering

caused by his disease. He did not seek to recover the extraordinary expenses to be incurred during his lifetime as a result of his ailment. The absence of any reference to such expenses as injury in the allegations of Jeffrey's claim for wrongful life clearly supports a conclusion that Jeffrey did not seek such damages, especially since his parents, in their claim for wrongful birth, specifically allege that they have been injured in that they have incurred medical expenses on behalf of their child.[4]

WRONGFUL BIRTH

The cause of action by Jeffrey's parents for damages presents different considerations. They allege, in effect, that they were tortiously injured because they were deprived of the option of making a meaningful decision as to whether to abort. (*Berman v. Allen* (1979), 80 N.J. 421, 430-31, 404 A.2d 8, 13.) Like the claim on behalf of Jeffrey for wrongful life, his parents do not allege that any negligence of defendants caused his disease or that there was anything that the defendants could have done to alter the effect of the disease. Several courts have recognized a cause of action for wrongful birth by the parents of a child suffering from birth defects. (*Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 656 P.2d 483; *Naccash v. Burger* (1982), 223 Va. 406, 290 S.E.2d 825; *Speck v. Finegold* (1981), 497 Pa. 77, 439 A.2d 110; *Berman v. Allen* (1979), 80 N.J. 421, 404 A.2d 8; *Becker v. Schwartz* (1978), 46 N.Y. 2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807; *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 233 N.W.2d 372; *Jacobs v. Theimer* (Tex. 1975), 519 S.W.2d 846.

The Illinois Supreme Court addressed the question of wrongful birth in *Cockrum v. Baumgartner* (1983), 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied* (1983), 464 U.S. 846, 78 L. Ed. 2d 139, 104 S. Ct. 149. In *Cockrum*, the supreme court considered two medical malpractice suits. In both cases, the plaintiffs alleged that but for the negligence of the defendants each of the female plaintiffs would not have borne a child. One case alleged that a vasectomy had been negligently

[4]In *Turpin*, the California Supreme Court stated that a child and her parents cannot both recover the same expenses, and that where a parent seeks to recover for expenses, a child's separate claim for expenses applies, as a practical matter, only to expenses incurred after the age of majority. (*Turpin v. Sortini* (1982), 31 Cal. 3d 220, 237 n.11, 643 P.2d 954, 965 n.11, 182 Cal. Rptr. 337, 348 n.11; see *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 479-80, 656 P.2d 483, 495.) Since Jeffrey has died, and we recognize that his parents have a claim for expenses incurred as a result of his ailment, as a practical matter, there is no need to recognize a limited cause of action on Jeffrey's behalf for wrongful life.

performed; the other alleged negligence in failing to determine that the female plaintiff was pregnant. The court noted that there was "no indication that the children are other than normal and healthy" (95 Ill. 2d 193, 196, 447 N.E.2d 385, 387), and held that the costs of rearing a normal and healthy child cannot be recovered as damages to the parents (95 Ill. 2d 193, 200, 477 N.E.2d 385, 389). In reaching this conclusion the supreme court recognized the existence of a cause of action for wrongful birth against a physician where it is alleged that because of a doctor's negligence the plaintiff conceived or gave birth, and that in such actions plaintiffs may recover for the pain of childbirth, the time lost in having the child and the medical expenses incurred. (95 Ill. 2d 193, 196, 447 N.E.2d 385, 387.) In refusing to permit recovery of damages for the costs of rearing a normal and healthy child, the court relied on the following reasons: (1) "the speculative nature of the damages"; (2) "concern for the child who will learn that his existence was unwanted and that his parents sued to have the person who made his existence possible provide for his support"; (3) "requiring the payment of rearing costs would impose an unreasonable burden upon a defendant *** because it would permit the plaintiffs to enjoy the benefits of parenthood, while shifting all of the expenses to the defendant [and because] that burden *** is out of proportion to the fault involved"; (4) "allowing such damages would open the door to various false claims and fraud"; and (5) "the birth of a normal healthy child [cannot] be judged to be an injury to the parents." 95 Ill. 2d 193, 198-200, 447 N.E.2d 385, 388.

[redacted] The parents' claim here is distinguishable from the claims in *Cockrum* for wrongful conception and for failure to diagnose a pregnancy. In wrongful conception and wrongful diagnosis cases, "the essence of the wrong for which compensation is sought is the birth of a healthy and normal—albeit, unplanned—child." (*Becker v. Schwartz* (1978), 46 N.Y.2d 401, 410, 413 N.Y.S.2d 895, 899, 386 N.E.2d 807, 811.) Here, the parents' "claims are premised upon the birth of a fully intended but abnormal child for whom extraordinary care and treatment is required." (46 N.Y.2d 401, 410, 413 N.Y.S.2d 895, 899, 386 N.E.2d 807, 811.) The reasons for denying the costs of rearing a normal and healthy child should not prevent the parents of an abnormal child who establish liability from recovering expenses reasonably necessary for the care and treatment of their child's physical impairment. (See *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 775, 233 N.W.2d 372, 376-77; *Jacobs v. Theimer* (Tex. 1975), 519 S.W.2d 846, 849-50.) In reaching this conclusion, we note that the amount of extraordinary expenses for care and treatment are certain and readily

ascertainable. Moreover, if liability is established, requiring the payment of such extraordinary costs would not impose a burden on physicians that is out of proportion with the fault involved.

Mr. and Mrs. Goldberg have alleged the existence of a duty on the part of the defendants to inform them of the risk of Tay-Sachs disease and of the availability of a testing procedure for the disease and that the breach of that duty was the proximate cause of the birth of Jeffrey. Unlike the cause of action brought on behalf of Jeffrey for wrongful life, the parents' cause of action, as we have noted, does allege ascertainable damages: the pecuniary expenses which they have borne for the care and treatment of their infant.[5] (*Becker v. Schwartz* (1978), 46 N.Y.2d 401, 412, 413 N.Y.S.2d 895, 901, 386 N.E.2d 807, 813.) Assuming these factual allegations of the parents' cause of action for wrongful birth to be true, as we must at this stage of the proceedings, "it can be said in traditional tort language that but for the defendants' breach of their duty to advise plaintiffs, the latter would not have been required to assume these obligations." (*Becker v. Schwartz* (1978), 46 N.Y.2d 401, 412-13, 413 N.Y.S.2d 895, 901, 386 N.E.2d 807, 813.) Accordingly, we hold that Mr. and Mrs. Goldberg have stated a cause of action in tort for wrongful birth. This holding is consistent with the holdings of several courts which permit the parents of impaired children to maintain actions for wrongful birth to recover medical and other expenses reasonably necessary for the care and treatment of the impairment. *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 477, 656 P.2d 483, 494; *Naccash v. Burger* (1982), 223 Va. 406, 414, 290 S.E.2d 825, 830; *Schroeder v. Perkel* (1981), 87 N.J. 53, 68-69, 432 A.2d 834, 841-42; *Speck v. Finegold* (1981), 497 Pa. 77, 79, 439 A.2d 110, 111; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 412-13, 413 N.Y.S.2d 895, 901; 386 N.E.2d 807, 813; *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 776, 233 N.W.2d 372, 377; *Jacobs v. Theimer* (1975), 519 S.W.2d 846, 850.

Defendants argue, however, that a physician has no duty to suggest a eugenic abortion and that the physician-patient relationship does not create an affirmative duty to disclose facts. The only duty that the defendants would impose upon a physician is a duty to honestly answer questions and to give the physical, medical and surgical care he is asked to give. They also argue that nondisclosure of information should not be defined as a breach of duty. We cannot accept these arguments. First, Mr. and Mrs. Goldberg do not allege that a physician has a duty

[5]We address the issue of damages for the alleged emotional distress suffered by the parents later in this opinion.

to suggest an abortion. The parents' position is that they had a right to prevent the birth of Jeffrey and that defendants had a duty to disclose the medical information necessary for the exercise of that right. (See *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 472, 656 P.2d 483, 488.) They allege that defendants breached that duty by failure to impart information concerning the risk of Tay-Sachs disease and the availability of a testing procedure, not by failure to suggest an abortion.

We also believe that the physician-patient relationship does create an affirmative duty to disclose facts. Such a relationship is based upon the theory that the "physician is learned, skilled and experienced in subjects of vital importance to the patient but about which the patient knows little or nothing." (*Howard v. Lecher* (1977), 42 N.Y.2d 109, 114, 397 N.Y.S.2d 363, 366, 366 N.E.2d 64, 67 (Cooke, J., dissenting); 61 Am. Jur. 2d *Physicians, Surgeons, & Other Healers* secs. 167, 229 (1981).) The nature of this relationship gives rise to a duty of the physician to care for and advise the patient in accordance with proper medical practice. (*Howard v. Lecher* (1977), 42 N.Y.2d 109, 114, 397 N.Y.S.2d 363, 366, 366 N.E.2d 64, 67 (Cooke, J., dissenting).) We conclude that the allegations of Jeffrey's parents sufficiently pleaded the existence of a duty of defendants to disclose facts. Assuming a duty to disclose facts, nondisclosure of those facts would be a breach of that duty. In our opinion, the allegations of a breach of duty are sufficient. In reaching these conclusions we observe that other States have held that the failure to advise parents of the risks of abnormality or of the availability of tests to detect abnormality can be the basis of a cause of action for wrongful birth. *Berman v. Allen* (1979), 80 N.J. 421, 404 A.2d 8; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807.

Defendants also argue that the parents' action, insofar as it seeks damages for costs of extraordinary care for Jeffrey, should be dismissed because it is a derivative claim. They contend that since Jeffrey cannot establish a good cause of action, the parents' cause of action for these costs must also be dismissed. We disagree. The short answer to this argument is that the claim of Mr. and Mrs. Goldberg for their son's medical expenses is based on their own independent claim, not one that is derivative from Jeffrey. In *Schroeder*, the Supreme Court of New Jersey stated: "Parents have a right of their own either to accept or reject a parental relationship, and the deprivation of that right by the negligent misconduct of another creates a cause of action in the parents." (87 N.J. 53, 66, 432 A.2d 834, 840.) Similarly, in *Becker*, the Court of Appeals of New York stated:

> "The fact that plaintiffs' wrongful life claims brought on behalf of their infants do not state legally cognizable causes of action inasmuch as they fail to allege ascertainable damages in no way affects the validity of plaintiffs' claims for pecuniary loss. Plaintiffs state causes of action in their own right predicated upon a breach of duty flowing from defendants to themselves, as prospective parents, resulting in damage to plaintiffs for which compensation may be readily fixed. [Citations]." (46 N.Y.2d 401, 413, 413 N.Y.S.2d 895, 901, 386 N.E.2d 807, 813.)

The argument that the parents' claim is derivative from that of the child must be rejected.

In a related argument, defendants contend that Mr. and Mrs. Goldberg's claims for costs of caring for Jeffrey should be denied because they would require that the law of negligence be extended to protect economic interests. They rely on *Moorman Manufacturing Co. v. National Tank Co.* (1982), 91 Ill. 2d 69, 86, 435 N.E.2d 443, 451, and the rule stated therein that purely economic interests are not entitled to protection against mere negligence. The court defined "economic loss" as " 'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property ***' (citation) as well as 'the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.' (citation)." (91 Ill. 2d 69, 82, 435 N.E.2d 443, 449.) The extraordinary costs of caring for Jeffrey do not fall within this definition of economic loss, and we decline the defendants' invitation to extend the application of this rule of law to cover actions for wrongful birth.

Defendants also argue that Mr. and Mrs. Goldberg do not allege causation adequately. Their first argument in this regard is that the parents failed to plead that facts withheld from them were objectively material. They rely on *Green v. Hussey* (1970), 127 Ill. App. 3d 174, 262 N.E.2d 156, and *Miceikis v. Field* (1976), 37 Ill. App. 3d 763, 347 N.E.2d 320, to support this argument. Initially, we observe that both cases involve the doctrine of informed consent, a doctrine not involved in the instant case, and that neither case states that a plaintiff must plead materiality. Moreover, we believe the question of the materiality of the facts withheld is subsumed within the issue of whether defendants were under a duty to disclose facts, and we have already held that Mr. and Mrs. Goldberg have adequately alleged the existence of a duty flowing from defendants to them. Defendants' second argument is that failure to disclose facts has no legal consequences if eu-

genic abortion is not legally available. Defendants rely on medical authority concerning the testing procedure for Tay-Sachs disease and contend that the testing procedure would not be completed until a time when eugenic abortion may not be legally available in Illinois. The parents contend that there is medical authority suggesting that the testing procedure can be completed at an earlier time. We observe that the parents pleaded the availability of a legal abortion, and we believe that this was sufficient at this stage of the litigation.

Defendants further argue that proximate causation does not appear in the facts alleged by Mr. and Mrs. Goldberg. First, they contend that any consequences of nondisclosure are indirect. They argue: "Though plaintiffs *** allege that they would have undergone tests and would have procured an abortion, the likelihood of such behavior is questionable. *** Parental decision is an intervening cause." Mr. and Mrs. Goldberg allege that if they had been informed that Jeffrey would be born with Tay-Sachs disease, they would have obtained an abortion. At this stage of the pleadings, we must accept this allegation as true. Moreover, to accept defendants' argument, we would have to reject decisions from other States permitting a cause of action for wrongful birth where defendants have negligently failed to inform parents of the availability of tests to detect abnormalities in fetuses, thereby depriving the parents of the option of deciding whether to abort. (See *Berman v. Allen* (1979), 80 N.J. 421, 404 A.2d 8; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807.) This we are unwilling to do. Secondly, defendants argue that since Tay-Sachs disease is rare, fairness requires that we not recognize a cause of action by Mr. and Mrs. Goldberg for wrongful birth. Assuming that the parents establish the existence of a duty to disclose facts, and that breach of that duty was the cause in fact of the extraordinary expenses they incurred for the care and treatment of Jeffrey's impairment, we can see no reason why defendants should not be held legally responsible for the expenses. See *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 476, 656 P.2d 483, 493.

The remaining issue is whether the parents may recover for the alleged emotional distress they suffered as the result of seeing and caring for their child while his condition degenerated into certain death. Mr. and Mrs. Goldberg allege that their emotional distress was a direct and proximate result of the defendants' negligence; however, they do not allege that they suffered any physical injury or illness that caused or was caused by the emotional distress.

The law in Illinois regarding recovery for negligently caused emotional distress has been altered by our supreme court's decision in

Rickey v. Chicago Transit Authority (1983), 98 Ill. 2d 546, 457 N.E.2d 1. Prior to *Rickey*, the "impact rule" governed the question of recovery for emotional distress in Illinois. Under the rule, recovery for negligently caused emotional distress suffered by the direct victim or by a bystander who witnessed the injury of another was denied unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff. (*Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 550, 457 N.E.2d 1, 2; *Braun v. Craven* (1898), 175 Ill. 401, 420, 51 N.E. 657, 664.) In *Rickey*, our supreme court abandoned the impact rule. (98 Ill. 2d 546, 554, 457 N.E.2d 1, 4.) The court also adopted the "zone of physical danger rule," which provides that "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress." (98 Ill. 2d 546, 555, 457 N.E.2d 1, 5.) The court stated: "The bystander *** must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5.

[redacted] While our supreme court in *Rickey* eliminated the requirement of contemporaneous physical injury or impact, it gave no indication that it intended that a plaintiff, whether the direct victim of negligence or a bystander, should be able to recover damages for negligently caused emotional distress where the emotional distress is not accompanied by physical injury or illness. From our reading of the opinion in *Rickey*, we believe that physical injury or illness must be established in order for a plaintiff to recover for negligently caused emotional distress, regardless of whether the plaintiff was the direct victim or a bystander. As noted, Mr. and Mrs. Goldberg do not allege that they suffered any physical injury or illness.

← memo p. 12

In *Rickey* the court stated: "The standard we adopt here shall be applied to this case and to all cases not finally adjudicated. *** We judge that under the circumstances the plaintiff here should be permitted to plead again. What the facts of the occurrence here were cannot be precisely determined from the complaint, which of course was not drawn with the standard in mind that we announce today." (98 Ill. 2d 546, 556.) As indicated earlier, this case is before us on an interlocutory appeal from orders entered on defendants' motions directed to the legal sufficiency of the amended complaint and has not been finally adjudicated. Like the complaint in *Rickey*, the amended complaint here was not drawn with the *Rickey* standard in mind, and plaintiffs should be allowed to replead.

CONCLUSION

In summation, we hold that: (1) Michael and Nancy Goldberg failed to state a cause of action on behalf of Jeffrey for wrongful life; (2) they, as parents, stated a cause of action for the wrongful birth of Jeffrey for the recovery of expenses reasonably necessary for the care and treatment of Jeffrey's physical impairment; and (3) they should be given an opportunity to plead facts which would entitle them to recover damages for emotional distress under the standards set forth in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1. For the aforementioned reasons, the judgment of the circuit court of Cook County in favor of defendants on count I of the amended complaint is affirmed, and the cause is remanded for further proceedings consistent with this opinion.

Affirmed and remanded.

O'CONNOR, J., concurs.

RIZZI, P.J., dissenting:

I disagree with the majority's analysis of the issues presented in this case and I disagree with the majority's conclusion as to count I of the amended complaint. I also disagree with the majority's treatment of certified question 2. I would reverse the dismissal and judgment entered in favor of defendants on count I. I would also reverse the order striking paragraph 11 of count II and give plaintiffs leave to plead paragraph 11 again to take into account the answer to certified question 2 as shall be stated herein. I believe this case should be remanded for further proceedings consistent with this opinion.

As to count I, the majority's analysis and conclusion are untenable for several reasons. First, the majority wrongfully assumes that count I is a claim for the wrongful life of Jeffrey Goldberg. In fact, plaintiff is not seeking to recover for wrongful life and, contrary to the majority's analysis, plaintiff does not endow his cause of action with great social issues involving wrongful life. Rather, as he is entitled under our existing law, plaintiff is merely seeking redress for pain and suffering caused by defendants' negligence.[7]

The error made by the majority comes to the fore by a simple examination of the amended complaint. Count I does not allege a recov-

[7]Specifically, count I states that Jeffrey Goldberg suffered "loss of motor function, loss of sensory function, blindness, deafness, pain, disability and numerous other injuries" resulting from defendants' negligence.

ery for wrongful life, and the term "wrongful life" does not appear anywhere in the amended complaint. Count I is merely a survival action (Ill. Rev. Stat. 1983, ch. 110½, par. 27—6) to recover for pain and suffering caused by defendants' negligence. As such, it should be treated like any other survival action, *i.e.*, the tortfeasors should be made to compensate the decedent's estate for the pain and suffering endured by the decedent. Plainly, the majority is wrong in pasting a wrongful life label on plaintiff's claim and then contending that it fails because a party cannot recover for a wrongful life claim. Since plaintiff is not seeking damages for wrongful life, the majority's contention is simply argument by epithet rather than logic or reason.

Next, the majority's conclusion that Jeffrey Goldberg did not suffer any injury as a result of defendants' negligence is plainly untenable. On this point, the majority totally ignores reality and adopts instead an ontological precept that a child is better off enduring real pain and suffering than the child would have been had the child not been born at all. In reaching its conclusion, the majority overlooks the fact that judges must deal with reality and not metaphysical concepts. Metaphysics is a subject that is best left to the theologians and the philosophers and others similarly inclined. Here, the sober reality with which we, as judges, must come to grips is that Jeffrey Goldberg endured immense pain and suffering that he would not have had to endure had defendants not been negligent. To hold that he was not injured as a result of defendants' negligence not only shunts reality but also imposes a cruel hoax upon the people involved in these tragic circumstances. I find the majority's conclusion indefensible.

The majority also wrongfully concludes that count I should be barred because of the "difficulty in the measure of damages." In count I, plaintiff is seeking damages solely for pain and suffering, which are traditional elements of damages in a tort case. Thus, the only uncertainty here is the amount of damages and not whether damages resulted at all.

It would be a travesty of justice to deny any recovery to an injured party solely because the tort is of a nature that the amount of damages cannot be determined with exactitude. To deny any recovery for that reason would relieve the tortfeasor from having to make redress for his wrongful conduct at the expense of the injured party. Thus, in such cases it is sufficient for recovery if the evidence shows the extent of the damages by reasonable inference, albeit not with absolute certainty. The tortfeasor has no justifiable complaint with such a prescript since the risk of uncertainty should be rightfully borne by the person who causes the suffering, rather than the person who endures the suffering.

Difficulty in the ascertainment of the exact amount of damages should not preclude recovery.

To support its position, the majority states: "The primary purpose of tort law is to compensate plaintiffs for the injuries they have suffered wrongfully at the hands of others, and damages for negligence are ordinarily computed by comparing the condition plaintiff would have been in but for the tort with plaintiff's impaired condition as a result of the wrong. *** In a cause of action seeking recovery for wrongful life, the trier of fact would be required 'to measure the difference in value between life in an impaired condition and "the utter void of nonexistence." ' " The majority also states: "Such a computation is 'a task that is beyond mortals, whether judges or jurors.' " Here again, the majority simply fails to appreciate that count I is not "a cause of action seeking recovery for wrongful life." In count I, plaintiff is merely seeking to recover damages for pain and suffering. As in any other negligence case, the trier of fact would only be required to compare pain and suffering versus no pain and suffering to measure the amount of damages. Plainly, the task of the trier of fact would be no more difficult in this instance than it would be in any other negligence case. Certainly, the trier of fact would have a less difficult task in measuring damages in the present case than the trier of fact had in *Jones v. Karraker* (1983), 98 Ill. 2d 487, 457 N.E.2d 23, where the court affirmed a verdict in favor of the plaintiff in a wrongful death action in which the decedent died *en ventre sa mere*.

In its opinion, the majority analyzes many cases which discuss the creation of a new cause of action for wrongful life. Plainly, these cases are not analogous to the present case, because here plaintiff is suing to recover solely for pain and suffering resulting from a negligent breach of duty, and the existence of the duty to the child is conceded by the majority. Recognition of plaintiff's claim here does not mean the creation of a new tort or a cause of action for wrongful life. In addition, all of the cases relied upon by the majority involve attempts to recover for "wrongful life," a term which does not even appear in the amended complaint here. Moreover, the cases relied upon by the majority are from other jurisdictions. I do not believe that Illinois needs to walk in the shadow of other jurisdictions, but rather, I believe that Illinois should adumbrate the path of American jurisprudence. Thus, I am neither persuaded nor governed by the cases relied upon by the majority.

The only other matter relating to count I that needs to be discussed involves the sufficiency of the factual allegations to establish a duty on the part of defendants. Here, I agree with the majority that the factual allegations in the amended complaint sufficiently allege the existence

of a duty on the part of defendants to have informed Nancy and Michael Goldberg of the risk of Tay-Sachs and the availability of testing procedures for the disease.[8] In my opinion, this duty that was owed by defendants to Nancy and Michael Goldberg logically extended to Jeffrey Goldberg. (*Cf. Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, 367 N.E.2d 1250.) This latter point is conceded by the majority.

For the reasons stated, I do not agree with the majority that count I fails to state a cause of action. I believe that the trial court erred in dismissing count I and entering judgment in favor of defendants on that count.

I next address the interlocutory appeal from the order striking paragraph 11 of count II.[9] Since the interlocutory appeal is being taken pursuant to Supreme Court Rule 308, the only matters that are before us are the two questions certified by the trial court and how the answers to the two questions affect the striking of paragraph 11. (See *Getto v. City of Chicago* (1981), 92 Ill. App. 3d 1045, 1048, 416 N.E.2d 1110, 1112-13; Ill. Ann. Stat., ch. 110A, par. 308, Committee Comments, at 452, Supp. to Historical and Practice Notes, at 453 (Smith-Hurd 1969-1983 Supp.).) The two questions that were certified are stated as follows:

> "(1) Does a cause of action exist in Illinois on behalf of parents for damages in the form of the costs of increased medical, hospital and physical care rendered to a child born with an inherited disease when the parents have also alleged that: defendant is an obstetrician who attended the mother; defendant knew or should have known the parents were possible carriers of the inheritable trait; tests exist to screen parents for the trait and other tests exist to test unborn infants for the disease; minimally competent obstetricians in practice disclose risks of the disease and disclose existence of the tests and perform the tests; the defendant did not disclose the risk of disease and did not disclose the tests and did not do the tests; had defendant disclosed the risks and tests,

[8]When genetic defects are suspected by a physician, testing procedures that may be considered include amniocentesis and the more recently developed chorionic villi sampling. See Van, *New test checks for birth defects*, Chicago Tribune, Oct. 13, 1983, Tempo, at 1.

[9]Paragraph 11 of count II states: "As a direct and proximate result of the aforesaid careless and negligent conduct of the defendants, and each of them, plaintiffs, Michael and Nancy Goldberg, have suffered and will continue to suffer immeasurable emotional distress in the seeing and caring for their child, while he loses motor function, sensory function, sight, hearing, becomes disabled and suffers numerous other injuries resulting in damages of a personal, permanent and pecuniary nature and finally certain death."

the parents would have ordered them; the tests would have shown that the fetus was diseased; the mother would have aborted the fetus; by virtue of abortion the parents would have avoided the costs alleged as damages.

(2) Do the parents under the same allegation have a cause of action for their own emotional distress incurred as the result of seeing and caring for their child while his physical condition degenerates into certain death."

I agree with the majority that the answer to question 1 is in the affirmative. I wish to add, however, that for minor children the cause of action that is described in question 1 rightfully belongs to the parents and not to the child. (See *Kennedy v. Kiss* (1980), 89 Ill. App. 3d 890, 894-95, 412 N.E.2d 624, 628.) Thus, the fact that Jeffrey Goldberg died on March 10, 1981, does not affect the parents' cause of action.

The gist of question 2 is whether a plaintiff may recover for emotional distress caused by a defendant's negligence. In answering this question, it is important to note that the trial court entered its order and certified the question on June 11, 1981. In 1983, the supreme court decided *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1. In *Rickey*, the supreme court expounded on the issue presented here and held that a plaintiff may recover for emotional distress caused by a defendant's negligence if the plaintiff shows "physical injury or illness as a result of the emotional distress caused by the defendant's negligence."[10] (98 Ill. 2d 546, 555, 457 N.E.2d 1, 5.) Thus, I believe that the answer to the second question is in the affirmative if the parents show physical injury or illness as a result of the emotional distress caused by defendants' negligence.[11]

[10]Under *Rickey*, if the plaintiff was a bystander at an accident in which another person was physically injured, then in order for the plaintiff to recover for his own emotional distress, he must also "have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact." (98 Ill. 2d 546, 555, 457 N.E.2d 1, 5.) In the present case, this principle is not applicable since plaintiffs in count II, Michael and Nancy Goldberg, are not attempting to recover as bystanders to an accident. Here, the negligence alleged in count II is defendants' "failure to inform" plaintiffs. This negligence flows directly from defendants to plaintiffs. Thus, if plaintiffs are able to show physical injury or illness as well as emotional distress resulting from defendants' negligence, they should be able to recover for both elements of damages just as they would in any other negligence case where the negligence is direct.

[11]I do not consider this conditional requirement to recover for emotional distress an undue burden since medicine has now advanced to the stage where there is substantial evidence available to establish that emotional distress and physical injury or illness are generally matters in consort. See, for example: Effects of distress on the heart (Crisp & Queenan, *Myocardial Infarction and the Emotional Climate*, 1(8377) The Lancet 616

In addition, in *Rickey*, the court stated: "The standard we adopt here shall be applied to this case and to all cases not finally adjudicated. [Citation.] We judge that under the circumstances the plaintiff here should be permitted to plead again." (98 Ill. 2d 546, 556, 457 N.E.2d 1, 5.) Here, since the standard adopted by the supreme court in *Rickey* is applicable, but the trial court entered its order and struck paragraph 11 before *Rickey* was decided, I believe that plaintiffs should be permitted to plead paragraph 11 again to take into account the answer to certified question 2. Substantial justice demands that plaintiffs be given this opportunity.

Accordingly, I would reverse the dismissal and judgment entered in favor of defendants on count I of the amended complaint. I would also answer the two questions that were certified by the trial court as I have stated herein. In addition, I would reverse the order striking paragraph 11 of count II and permit plaintiffs to plead paragraph 11 again to take into account the answer to certified question 2. I believe this case should be remanded for further proceedings consistent with this opinion.

ADDENDUM

This dissent was filed before the majority opinion was modified to its present form. The modification in the majority opinion relates to the majority's treatment of and conclusion as to certified question 2.

(March 17, 1984)); abnormalities in immune function caused by emotional distress (Riscalla, *The Influence of Psychological Factors on the Immune System*, 9(3) Medical Hypotheses 331 (September 1982)); relationship between severe emotional distress and ulcers (Peters & Richardson, *Stressful Life Events, Acid, Hypersecretion, and Ulcer Disease* 84(1) Gastroenterology 114 (1983)); psychological stress and certain muscle pain and illness (Moody, Kemper, Okeson, Calhoun & Packer, *Recent Life Changes and Myofascial Pain Syndrome*, 48(3) Journal of Prosthetic Dentistry 328 (September 1982)); emotional stress and multiple sclerosis (Warren, Greenhill & Warren, *Emotional Stress and The Development of Multiple Sclerosis: Case-control Evidence of a Relationship*, 35 Journal of Chronic Diseases 821 (1982)); biological responses to stress (Bridges, *The Physiology and Biochemistry of Stress: Some Practical Aspects*, 226 The Practitioner 1575 (September 1982)); the effects of stress upon the nervous system (Trimble & Wilson-Barnett, *Neuropsychiatric Aspects of Stress*, 226 The Practitioner 1580 (September 1982)).

Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (4th Dist. 1992)

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Ill. App. Ct., 4th Dist. · filed 1992-01-30 · Reporter opinion
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- memo p. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C028.4
- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C028.5
- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C028.1
- memo p. 7 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C028.4
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Defendant attempts to break this issue into a two-step analysis. There is no need for a bifurcated analysis. The entire incident was the result of a single stop. The stop was justified. The officer's talking to defendant is not a further, unwarranted intrusion, as defendant argues. It just naturally follows that once it was determined that defendant had a valid license-applied-for form displayed, the officer would approach the defendant, explain the reason for the stop, apologize, and advise defendant he was free to leave. In so doing, any observations the officer made may form the basis of probable cause to arrest the defendant for a reason totally unrelated to the stop. As a result, the denial of defendant's petition to rescind the summary suspension is not against the manifest weight of the evidence.

The judgment of the circuit court of Macoupin County is affirmed.

Affirmed.

STEIGMANN and LUND, JJ., concur.

MARY LaVERNE HAYES, as Ex'r of the Estate of John W. Hayes, Deceased, *et al.*, Plaintiffs-Appellants, v. ILLINOIS POWER COMPANY, Defendant-Appellee.

Fourth District No. 4—91—0372

Opinion filed January 30, 1992.

[redacted]

[redacted]

Stephen R. Myers, of Clinton, for appellants.

Arnold F. Blockman and Jerome P. Lyke, both of Hatch, Blockman, McPheters, Fehrenbacher & Lyke, of Champaign, for appellee.

JUSTICE McCULLOUGH delivered the opinion of the court:

On April 24, 1991, the circuit court of Piatt County dismissed amended counts VI, VII, and VIII of plaintiffs' complaint for negligent and intentional infliction of emotional distress. The court dismissed count VI finding it was duplicative of count V since count V alleged an injury for which emotional distress could be compensated. Counts VII and VIII were dismissed because the facts alleged did not show the "extreme and outrageous conduct" necessary to support a cause of action for the intentional infliction of emotional distress. Plaintiffs contend (1) counts V and VI are not duplicative as they allege two separate causes of action and (2) counts VII and VIII adequately plead the tort of intentional infliction of emotional distress. We reverse in part and affirm in part.

On May 14, 1989, John W. Hayes (decedent) was operating a plow on his farm in Piatt County. Decedent's plow became entangled with a guy wire attached to one of defendant's utility poles. As decedent attempted to untangle the guy wire from the plow, the guy wire became slack and came into direct contact with an uninsulated 7,200-volt transmission wire at the top of the utility pole. The guy wire became electrically charged and decedent was instantly electrocuted.

Plaintiff Todd Hayes (Todd), decedent's grandson, was also plowing in a field near decedent. Todd saw his grandfather being electrocuted, went over to him and reached out for him. A current of electricity passed through decedent to Todd, causing him to be thrown back from decedent's body. Todd received severe burns and a shock to his nervous system.

Plaintiff Jack Hayes (Jack), decedent's son, learned of the occurrence and rushed to the scene of the accident. Jack was restrained by individuals at the scene from coming into contact with decedent. Electricity continued to flow through decedent's body for a period in excess of 45 minutes, thereby causing the body to be engulfed in flames. Thereafter, defendant shut off the electricity running through the guy

wire. As Jack watched, firemen on the scene extinguished the flames about and on the body of decedent.

An eight-count complaint was filed by Mary LaVerne Hayes, as executor of decedent's estate, and Todd and Jack Hayes, individually. After defendant's motion to dismiss was partially granted, plaintiffs filed their first-amended counts III, VI, VII and VIII. Only count V of the original complaint and amended counts VI, VII, and VIII of the amended complaint are relevant to this appeal.

Count V of the original complaint was brought by Todd and alleged that defendant was negligent in failing to properly insulate, ground, and mark the guy wire. Todd sought damages for his physical injuries and pain and suffering. Amended count VI, brought by Todd, alleged the negligent infliction of emotional distress, and amended count VII, also brought by Todd, alleged the intentional infliction of emotional distress. Count VIII, brought by Jack, alleged the intentional infliction of severe emotional distress.

On defendant's motion, the court dismissed, with prejudice, amended counts VI, VII, and VIII of plaintiffs' complaint. The court found count VI was duplicative of count V in that count V alleged an injury to Todd for which emotional distress could be compensated. The court further found count VI did not adequately plead that Todd suffered physical injury or illness as a result of the emotional distress nor did it adequately plead Todd suffered emotional distress due to fear for his own safety. The court found the facts alleged in count VII did not show the "extreme and outrageous conduct" necessary to support a cause of action for intentional infliction of emotional distress. Finally, the court found the facts alleged in count VIII also failed to show the "extreme and outrageous conduct" necessary to support a cause of action for the intentional infliction of emotional distress.

Because we are reviewing the trial court's decision to dismiss a cause of action under section 2—615 of the Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, par. 2—615), we must determine whether the complaint, when viewed in the light most favorable to the plaintiff, alleges facts sufficient to establish a cause of action upon which relief may be granted. In making this determination, we must take all well-pleaded facts in the challenged pleading as true, while conclusions of law contained in the challenged pleading will not be taken as true, unless supported by specific factual allegations. (*Ziemba v. Mierzwa* (1991), 142 Ill. 2d 42, 566 N.E.2d 1365.) In reviewing the grant of a motion to dismiss, all well-pleaded facts must be taken as true, as well as all reasonable inferences which may be

drawn therefrom. *Wait v. First Midwest Bank/Danville* (1986), 142 Ill. App. 3d 703, 491 N.E.2d 795.

[redacted] Prior to 1983, Illinois courts adhered to the "impact rule" in cases of negligent infliction of emotional distress. Under this rule, recovery for negligently caused emotional distress suffered by a direct victim or bystander who witnessed the injury of another was consistently denied unless accompanied by a contemporaneous physical injury or impact to the plaintiff. (*Braun v. Craven* (1898), 175 Ill. 401, 51 N.E. 657.) In *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1, the supreme court adopted a new standard for determining whether bystanders should be allowed to recover for negligently inflicted emotional distress. The court stated:

> "That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence." (*Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5.)

In that case, the plaintiff was an eight-year-old boy who witnessed his five-year-old brother nearly being choked to death when part of his clothing became entangled in the base of an escalator operated by defendant. The court, after adopting the above as the new standard, held the plaintiff could file an amended complaint to comport with the new standard.

In *Siemieniec v. Lutheran General Hospital* (1987), 117 Ill. 2d 230, 512 N.E.2d 691, the parents of a child born with hemophilia sought damages for their emotional distress caused by the defendant's allegedly negligent genetic counseling. The plaintiffs asserted they would have aborted the child had they known he would be born with this disease, and defendants had failed to accurately advise them of the risk of the child being born a hemophiliac. The supreme court held the plaintiffs had no cause of action for negligent infliction of emotional distress since their complaint failed to allege that they were endangered by defendant's negligence and failed to allege they had suffered or would suffer any physical injuries or illness resulting from

the emotional distress allegedly caused by defendant's negligence. *Siemieniec*, 117 Ill. 2d at 261, 512 N.E.2d at 707.

[redacted] Finally, most recently in *Corgan v. Muehling* (1991), 143 Ill. 2d 296, 574 N.E.2d 602, the plaintiff sought damages for her emotional distress caused by the defendant's conduct in convincing her to engage in sexual intercourse with him under the guise of therapy. At the time of the sexual relationship, defendant held himself out to be a registered psychologist and plaintiff was under his professional care. The supreme court stated the substitution of the zone-of-physical-danger rule for the impact rule in *Rickey* applies only as to bystanders.

> "*Rickey*, therefore, abandoned the impact rule as it applied to bystanders and adopted the zone-of-physical-danger rule as the standard under which they can recover damages for negligent infliction of emotional distress. *Rickey* did not, however, define the scope of negligent infliction of emotional distress as it applies to direct victims. The court in *Rickey* was solely concerned with defining the parameters of *bystander* recovery.
>
> * * *
>
> 'The distinction between a direct victim and a bystander is more than just a play on semantics ***. *** [A] defendant owes a duty to only those persons who suffer emotional distress (and accompanying physical manifestations) as a result of being within the "zone of danger" created by a negligently caused accident. This zone of danger, because it is created by the accident, encircles it; hence, the accident is, in effect, the "nucleus" of the surrounding zone of danger. A person is within an accident's zone of danger (and able to seek recovery under *Rickey*) when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating *from the accident itself*.' " (Emphasis in original.)
>
> (*Corgan*, 143 Ill. 2d at 304-06, 574 N.E.2d at 605-06, quoting *Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d 634, 639-40, 487 N.E.2d 1071, 1074-75 (Linn, J., dissenting).)

The court concluded the *Rickey* zone-of-danger test did not apply because plaintiff was a direct victim and not a bystander. The court further concluded the trial court acted properly in not dismissing plaintiff's cause of action for failure to allege physical symptoms of emotional distress, noting it "[had] not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress." *Corgan*, 143 Ill. 2d at 312, 574 N.E.2d at 609.

[redacted] Todd contends he was both a direct victim and a bystander and thus seeks compensation for two separate and distinct injuries. Todd claims he suffered emotional distress as a result of the direct injuries he received and also suffered emotional distress from being in the zone of physical danger near his grandfather. Defendant contends Todd is a direct victim rather than a bystander because he received a physical injury and impact at the scene when he grabbed decedent. As such, he need only plead the elements of negligence, and any emotional distress caused by the allegedly negligent conduct of defendant would be compensable under the "pain and suffering" allegations in count V of the complaint.

The court in *Corgan* clearly stated *Rickey* applied only to bystanders and that direct victims only need to allege the elements of negligence. Here, Todd is both a direct victim and a bystander: he is a direct victim because he suffered physical injuries when he came into contact with decedent; he is also a bystander because he subsequently regained consciousness and remained in the zone of physical danger near decedent. He therefore may properly allege a claim for the pain and suffering he incurred as a direct victim of defendant's negligence (count V); and also a separate claim, as a bystander, for the negligent infliction of emotional distress which resulted from his being in the zone of physical danger near the decedent (count VI). Therefore, counts V and VI are not duplicative, but allege separate causes of action.

Furthermore, count VI adequately pleads the elements necessary for a cause of action in negligent infliction of emotional distress. Under *Rickey*, before a plaintiff can recover for negligently caused emotional distress, he himself must have been endangered by the negligence, and he must have suffered physical injury or illness as a result of the emotional distress caused by defendant's negligence. *Siemieniec*, 117 Ill. 2d at 261, 512 N.E.2d at 707.

Amended count VI of the complaint, in pertinent part, states:

> "17. That during the time after Plaintiff was shocked and during the time that Plaintiff was forced to stand by and observe his Grandfather as above-described, the Plaintiff remained in close proximity to his Grandfather who was in contact with an energized guy wire.
>
> 18. That because of his proximity to his Grandfather during this time, the Plaintiff was in continuous danger of obtaining additional electrical shocks.
>
> 19. That the Plaintiff was in fear that he could become electrocuted while he was in close proximity to his Grandfather.

20. That the Plaintiff feared that he could become electrocuted if he again attempted to free his Grandfather from the energized guy wire.

21. That as a direct and proximate result of the negligence of the Defendant, the Plaintiff suffered extreme emotional distress.

22. That as a direct and proximate result of the emotional distress caused by the Defendant's negligence, the Plaintiff has sustained serious injury and illness and psychological damage."

Todd was clearly in such proximity to the accident that there was a high risk of physical impact. Todd had already been shocked when he grabbed his grandfather, and by remaining near the body, a chance existed of subsequent shocks from the electricity as well as burns or smoke inhalation from the flames. Moreover, Todd could reasonably fear for his own safety given the unpredictable nature of electricity and fire. Paragraphs 19 and 20 alleged Todd feared electrocution, which established a fear for his own safety.

Finally, the court concluded Todd failed to adequately plead physical injury resulting from the emotional distress. Paragraph 22 alleged that Todd suffered "serious injury and illness and psychological damage." This adequately states physical injury. The distinction between "serious injury and illness" and "psychological damage" indicates that "serious injury or illness" is physical in nature and "psychological damage" is the emotional distress.

[redacted] Plaintiffs also contend they adequately pleaded a cause of action for the intentional infliction of emotional distress. The elements of the tort for intentional infliction of emotional distress are (1) extreme and outrageous conduct, (2) intent by the defendant to cause or a reckless disregard of the probability of causing emotional distress, (3) severe or extreme emotional distress suffered by the plaintiff, and (4) an actual and proximate causation of emotional distress by the defendant's outrageous conduct. (*Tobias v. Winkler* (1987), 156 Ill. App. 3d 886, 509 N.E.2d 1050.)

> "[T]he conduct must be extreme and outrageous. The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions or trivialities. 'It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in

> character, and so extreme in degree, as to go beyond all possible bounds of decency ***.' Restatement (Second) of Torts, sec. 46, comment d (1965)." (*Public Finance Corp. v. Davis* (1976), 66 Ill. 2d 85, 89-90, 360 N.E.2d 765, 767.)

Whether certain conduct can be characterized as extreme and outrageous so as to support a cause of action for the tort of intentional infliction of emotional distress necessarily depends on the facts of each case. *Tobias*, 156 Ill. App. 3d at 897, 509 N.E.2d at 1057.

Counts VII and VIII of plaintiffs' amended complaint contain numerous allegations relating to the manner in which defendant insulated, marked and maintained the guy wire and transmission poles. Paragraph 28 of the complaint states that the course of conduct taken by defendant was extreme and outrageous, exceeding all grounds usually tolerated by a person of ordinary sensibilities. Paragraph 29 alleges defendant intended to inflict severe emotional distress upon the plaintiff or acted recklessly in deliberate disregard of a high degree of probability that emotional distress would result. Paragraph 30 alleges that as a direct and proximate result of defendant's extreme and outrageous conduct, Todd suffered severe, permanent emotional distress. Count VIII contains the further allegation that Jack stood by and watched his father's body in flames for a period of time in excess of 45 minutes and watched the firemen extinguish the fire about decedent's body.

The court properly concluded plaintiffs' amended complaint did not state a cause of action for the intentional infliction of emotional distress. The conduct alleged by plaintiffs is neither extreme nor outrageous. At most, defendant's failure to properly ground and insulate the guy wire constitutes negligence. It is only the result of that negligence, *i.e.*, the burning of decedent's body, which can be characterized as extreme and outrageous.

Accordingly, for the foregoing reasons, we reverse the dismissal of count VI of plaintiffs' amended complaint and remand with directions to reinstate that count. We affirm the dismissal of counts VII and VIII of plaintiffs' amended complaint.

Affirmed in part; reversed in part and remanded with directions.

GREEN, P.J., and KNECHT, J., concur.

Henry v. St. John's Hospital, 159 Ill. App. 3d 716 (4th Dist. 1987)

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controlled substances deemed to constitute one act in *People v. Manning* (1978), 71 Ill. 2d 132, 374 N.E.2d 200.

The judgments appealed are affirmed.

Affirmed.

SPITZ, P.J., and LUND, J., concur.

JANE HENRY, Plaintiff-Appellant, v. ST. JOHN'S HOSPITAL *et al.*, Defendants-Appellees (Breon Laboratories, Inc., *et al.*, Defendants).

Fourth District No. 4—86—0656

Opinion filed August 18, 1987.

Ellen A. Dauber, of Cook, Shevlin & Keefe, Ltd., of Belleville, for appellant.

Richard J. Wilderson, of Graham & Graham, of Springfield, for appellees.

JUSTICE McCULLOUGH delivered the opinion of the court:

Plaintiff appeals a trial court order dismissing counts X, XII, and XIV of her fifth-amended complaint. The trial court found plaintiff

failed to state a cause of action for negligent infliction of emotional distress.

We affirm.

In reviewing the sufficiency of a complaint, all properly pleaded facts are accepted as true. (*Knox College v. Celotex Corp.* (1985), 88 Ill. 2d 407, 430 N.E.2d 976; *Gihring v. Butcher* (1985), 138 Ill. App. 3d 976, 487 N.E.2d 75; *Goldberg v. Ruskin* (1984), 128 Ill. App. 3d 1029, 471 N.E.2d 530.) In count X, plaintiff alleged that on August 17, 1982, she was admitted to St. John's Hospital in labor. One of the hospital employees injected her with Marcaine for paracervical analgesia. Plaintiff's fetus suffered hypoxia and bradycardia while *in utero*, and suffered brain damage. Plaintiff alleged St. John's Hospital negligently: used Marcaine, when it was not recommended; administered an unauthorized second paracervical block to plaintiff; and injected the drug in an unsafe manner. As a result of the alleged negligence, plaintiff received Marcaine, which caused her fetus injuries. As a result of the injuries to her fetus, plaintiff sustained pain and mental anguish.

In count XII, plaintiff alleged Dr. Shari Fitzgerald, an employee of St. John's Hospital, administered Marcaine to plaintiff while she was in labor. Fitzgerald was negligent in injecting Marcaine for the paracervical block, administering an unauthorized second paracervical block, and administering the block in an inappropriate manner and amount. As a result of the negligence, plaintiff's fetus suffered injuries while *in utero* which caused plaintiff great pain and mental anguish.

In count XIV, plaintiff alleged that Dr. O'Hern, her treating physician, negligently prescribed Marcaine for paracervical analgesia. As a result, plaintiff received Marcaine, her fetus was injured while *in utero*, and plaintiff sustained great pain and mental anguish.

In *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1, the court adopted the zone-of-physical-danger standard to determine when a person could recover damages for emotional distress caused by negligent injury to another. Plaintiff in *Rickey* saw his younger brother's clothing become entangled in an escalator and witnessed the resultant injury. He alleged that he suffered psychological trauma and emotional distress which manifested itself in severe depression, behavioral disorders, inability to attend school, and inability to obtain gainful employment. The *Rickey* court held that a bystander who is in the zone of physical danger and who has a reasonable fear for his own safety has a right of action for physical illness or injury resulting from the emotional distress. The bystander must

show a physical injury or illness resulting from the emotional distress.

In *Goldberg v. Ruskin* (1984), 128 Ill. App. 3d 1029, 1043, 471 N.E.2d 530, 539, parents of a child born with Tay-Sachs disease brought a medical negligence action against their physicians. Their complaint alleging emotional distress was dismissed. The Goldbergs did not allege any physical illness or injury caused by their emotional distress. The court noted that while *Rickey* eliminated the impact rule, "it gave no indication that it intended that a plaintiff, whether the direct victim of negligence or a bystander, should be able to recover damages for negligently caused emotional distress where the emotional distress is not accompanied by physical injury or illness." The court held that a physical manifestation of the emotional distress must occur whether the plaintiff was the direct victim or a bystander of the negligent act.

Plaintiff argues that *Rickey* only applies to bystanders and she was a direct victim of defendants' negligence. She contends that she need not, therefore, establish any physical manifestation of the emotional distress, relying on *Braun v. Craven* (1898), 175 Ill. 401, 51 N.E. 657. The *Braun* court enunciated the impact rule, which the *Rickey* court rejected. We note that the plaintiff in *Braun* alleged that she became physically sick, sore, and disordered as a result of the emotional trauma. In the instant case, plaintiff did not allege any physical manifestation of her emotional distress. The complaint was, therefore, properly dismissed. *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1; *Goldberg v. Ruskin* (1984), 128 Ill. App. 3d 1029, 471 N.E.2d 530.

For the above reasons, we affirm the trial court.

Affirmed.

SPITZ, P.J., and GREEN, J., concur.

Jarka v. Yellow Cab Co., 265 Ill. App. 3d 366 (1st Dist. 1994)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1994-06-28 · Reporter opinion
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sentence for murder was 40 years' imprisonment. (Ill. Rev. Stat. 1985, ch. 38, par. 1005—8—1(a)(1).) While Public Act 85—902, which increased the maximum sentence for murder to 60 years' imprisonment, was on the books the year the offense was committed, it did not become effective until January 1, 1988, three months after the shooting in this case. Thus, the trial court's statement as to the sentence it could impose, other than sentencing defendant to life in prison, leads us to conclude that the trial court may have erroneously considered the new maximum sentence as a reference for its decision to sentence defendant to 40 years' imprisonment. (See *People v. Eddington* (1979), 77 Ill. 2d 41, 48, 394 N.E.2d 1185.) We are compelled, therefore, to remand this case to the circuit court for a reconsideration of defendant's sentence.

Defendant's final contention is that the trial court abused its discretion in sentencing him to 40 years' imprisonment, arguing that the sentence is excessive and was made without regard to his rehabilitative potential. We need not address this issue since we have determined that this case should be remanded to the circuit court for a new sentencing hearing.

Affirmed and remanded.

HARTMAN and SCARIANO, JJ., concur.

VERONICA JARKA, Ex'r of the Estate of Robert J. Jarka, Deceased, Plaintiff-Appellee, v. YELLOW CAB COMPANY, Defendant-Appellant.

First District (2nd Division) No. 1—91—1977

Opinion filed June 28, 1994.

[redacted]

Jesmer & Harris and David A. Novoselsky & Associates, both of Chicago (David A. Novoselsky, of counsel), for appellant.

Rothschild, Barry & Myers, of Chicago, for appellee.

JUSTICE McCORMICK delivered the opinion of the court:

This is an appeal from a money judgment, entered on a jury verdict in favor of plaintiff Veronica Jarka, executor of the estate of Robert J. Jarka, deceased, against defendant Yellow Cab Company. The judgment is for damages sustained by plaintiff as the result of defendant's negligent infliction of emotional distress. Defendant contends that the trial court erred (1) by permitting plaintiff to file an amended complaint at trial; and (2) by entering judgment for plaintiff in the absence of proof of negligence. Plaintiff cross-appeals, contending that the trial court erred by permitting the issue of decedent's comparative negligence to be presented to the jury. We affirm the judgment of the trial court in that the trial court properly exercised its discretion by permitting plaintiff to file an amended complaint at trial, plaintiff did in fact prove the negligent infliction of emotional distress and the issue of decedent's comparative negligence was properly submitted to the jury.

On November 26, 1984, Veronica Jarka and her husband, decedent Robert J. Jarka, flew into O'Hare Airport. They intended to take a cab from the airport to their final destination. Because of decedent's heart condition, Mrs. Jarka carried, in addition to a purse, their 27-inch piece of luggage and a carry-on bag. Decedent carried nothing but his top coat.

As they were walking towards a cab line, a yellow cab pulled up alongside of the Jarkas and the cabdriver motioned for them to enter the cab. Decedent opened the door and Mrs. Jarka put the carry-on bag on the seat and pulled the luggage into the cab onto the hump. Mrs. Jarka was partially seated in the back seat, pulling the luggage in, when the cabdriver turned around and told her to get out and started cursing at her. He shook his fist at her and used foul language. He kept telling her to get out and that she was not getting out fast enough. Mrs. Jarka threw her purse and bag on the sidewalk, and as she was pulling her luggage out, the cabdriver gave it a shove. The luggage got hooked onto the handle of the door and was torn. Decedent tried to move the luggage and told the cabdriver to watch his tongue because a lady was present. After decedent got the luggage

out, as Mrs. Jarka was half in and half out of the cab, the cab started to move and decedent grabbed Mrs. Jarka's hand. Mrs. Jarka reached down to get her purse and the cab pulled away. Decedent's legs staggered and as he fell backwards, his head struck the pavement and began to bleed. Decedent was transported to Resurrection Hospital, where he was pronounced dead.

At the time of the incident, cabs in the terminal areas of the airport were required to receive tickets from a central dispatch area. A dispatcher sent them from the central area to the various receiving areas as needed. The cabdriver who picked up the Jarkas had circumvented the system and had no authority to take the Jarkas as passengers. As Mrs. Jarka and decedent were entering the yellow cab, dispatchers Steve Kirshenbaum and Dale Diliberto approached the cab.

Kirshenbaum testified that he had words with the cabdriver about the ticket and the cabdriver got out of the cab arguing. The cabdriver swore and yelled at him. When the cabdriver got out of the cab, the cab lurched forward a foot or two. Kirshenbaum yelled at the cabdriver to get back into the cab and stop it because there were customers near the cab. The rear door was open and Kirshenbaum could see decedent across the cab. Decedent was pulling the suitcase out when he raised an index finger in the air, got a very strange look and fell back on the sidewalk. The cab left at that point and Kirshenbaum told Diliberto to call an ambulance. Kirshenbaum and Diliberto both testified that they did not believe that the cab struck decedent.

Dr. Mitra Kalelkar, the deputy medical examiner for Cook County who performed the autopsy on decedent, testified that decedent's heart was markedly enlarged and decedent had severe coronary artery disease and diffuse subcardiac fibrosis. Dr. Kalelkar saw no evidence of external trauma to decedent's stomach, but she saw evidence of trauma to his head. Decedent had either one or two heart attacks substantially before the fatal arrhythmia. Dr. Kalelkar explained that decedent developed an arrhythmia, in which his heart fluttered so quickly that it failed to pump blood, and that arrhythmia caused his death. In Dr. Kalelkar's opinion, decedent's arteriosclerotic cardiovascular disease, which was a natural cause of death, led to his fatal arrhythmia. Decedent's death certificate listed arteriosclerotic cardiovascular disease as the cause of death.

Dr. Richard F. Kehoe testified that, in his opinion, the incident with the yellow cab caused decedent's death. He testified that decedent had a "constellation of cardiac findings" and any significant additional stress could have precipitated the fatal cardiac arrhythmia.

By stipulation of the parties, the discovery deposition of Dr. David Wilber was read into evidence as an evidence deposition. At his deposition, Dr. Wilber testified that he had a file on the case and had written a summary letter on July 14, 1989. Since the report, his opinions had not changed. He agreed with Dr. Kehoe's statement that the events at O'Hare Airport played a role in precipitating decedent's cardiac arrhythmia. However, he felt that any number of life stresses could have produced similar kinds of events. He believed that the events described by Mrs. Jarka were the final push in precipitating the fatal arrhythmia. In his opinion, any sort of significant exertion, such as carrying his suitcase up a couple of escalators or flights of stairs would have been sufficient to cause the onset of the attack. Dr. Wilber stated that he was surprised that a man with decedent's medical history went on a long trip. The incident at the airport could have produced a flow of adrenaline which would sensitize the heart to develop arrhythmias. Dr. Wilber believed that if decedent had not taken that cab, he would not have experienced the fatal arrhythmia at that time.

The jury returned a verdict in favor of plaintiff finding that her damages totalled $139,000. The jury found decedent to be 10% negligent and reduced the amount of recoverable damages to $125,100. Pursuant to special interrogatories, the jury found that the cab in question was owned and operated by Yellow Cab Company of Chicago, and found that decedent had not been struck by the door of the cab.

Defendant initially contends that the trial court erred by permitting plaintiff to file an amended complaint on the day of trial. Plaintiff's original complaint, alleging that decedent died as the result of injuries sustained when he was struck by a yellow cab, was both a wrongful death action and a survival action. The amended complaint contained additional allegations of negligent entrustment, improper solicitation and the negligent infliction of emotional distress. The amended complaint alleged that decedent died as the result of injuries sustained from being struck by a yellow cab or, alternatively, that he died as the result of injuries sustained from the negligent infliction of emotional distress. Specifically, defendant argues that the amended complaint altered both the nature and the quality of proof required in defense of the original complaint. Defendant's argument is that it was prejudiced and that plaintiff failed to offer a good reason for the failure to file the amended complaint prior to trial.

•1 It is within the sound discretion of the trial court to permit an amendment to a pleading any time before final judgment. Generally

the trial court's decision will not be disturbed absent an abuse of discretion. The test of whether that discretion has been properly exercised is whether the amendment furthers the ends of justice. (*DiBenedetto v. County of Du Page* (1986), 141 Ill. App. 3d 675, 681, 491 N.E.2d 13.) Factors to be considered in this decision include whether surprise or prejudice to the nonpleading party would result from the amendment. (*Bresland v. Ideal Roller & Graphics Co.* (1986), 150 Ill. App. 3d 445, 451, 501 N.E.2d 830.) When facts sought to be alleged on the eve of or during trial are known to the party at the time of original pleading and no good reason is offered for their not having been filed at that time, leave to amend is properly denied. (*Carlisle v. Harp* (1990), 200 Ill. App. 3d 908, 915, 558 N.E.2d 318.) This is particularly true where the amendment would alter the nature and quality of proof required to defend. *Lake County Forest Preserve District v. Frecska* (1980), 85 Ill. App. 3d 610, 617, 407 N.E.2d 137.

The notion that decedent was struck by the yellow cab is fostered only by the observations of Mrs. Jarka. At trial she testified that the door of the yellow cab "glanced" across decedent's stomach. Hence, the initial theory of plaintiff's case was that decedent was struck by the yellow cab. This observation was contradicted by eyewitnesses and the objective medical findings and opinions of all the doctors who testified. It is understandable that under the emotional circumstances of the incident, Mrs. Jarka may not have achieved absolute detached reflection.

In a report dated October 31, 1988, plaintiff's expert, Dr. Kehoe, indicated that decedent was not struck by the cab door, but the incident did lead to his heart failure. A copy of this report was furnished to defendant. In September 1990 defendant deposed Dr. Kehoe. In October 1990 defendant's expert, Dr. Wilber, was deposed by defendant. Dr. Wilber's deposition indicated that the incident with the cab was the "final push" in precipitating decedent's fatal cardiac arrest.

•2 The original complaint alleged that after inviting plaintiff and decedent to be passengers in the cab, the cabdriver refused to take them to their destination, swore at them, ordered them out of the cab and threw their baggage to the pavement. Notwithstanding plaintiff's failure to file an amended complaint prior to April 1991, the nature of the claim for emotional distress was obvious and should have been known to defendant at the time Dr. Kehoe's report of October 31, 1988, was received. Defendant deposed Dr. Kehoe in September 1990 and its own expert, Dr. Wilber, in October 1990. Both experts opined that decedent was not struck by the cab door and that the incident led to decedent's heart failure or was the final push. These factors

pointed indisputably in the direction of emotional distress as a cause of action.

We note that defendant requested neither a continuance nor an opportunity to conduct further discovery when plaintiff filed the amended complaint. To deny plaintiff an opportunity to assert a claim for emotional distress is tantamount to denying plaintiff the right to pursue relief flowing from decedent's death. The trial court properly exercised its discretion in favor of allowing an amended complaint when doing so furthered the ends of justice. (*Bowman v. County of Lake* (1963), 29 Ill. 2d 268, 281, 193 N.E.2d 833.) We find no abuse of discretion by the trial court in permitting the filing of the amended complaint at the time of trial.

•3 Defendant next contends that the trial court erred when it entered judgment for plaintiff on the jury's verdict. It is defendant's position that plaintiff did not prove a claim for the negligent infliction of emotional distress in that assuming decedent to be a direct victim, plaintiff must show that decedent suffered emotional distress and either a contemporaneous physical injury or a contemporaneous physical impact. Noting that the jury in a special interrogatory found that the decedent was not struck by the cab door (thus no contemporaneous impact), defendant argues that there was no evidence of a contemporaneous physical injury.

The requirement that a direct victim incur a contemporaneous impact or suffer a contemporaneous physical injury is in the disjunctive. Only one or the other is required, not both. Defendant's contention that plaintiff did not establish that decedent sustained a contemporaneous physical injury belies the commonsense meaning of the record. The trial court instructed the jury to return a verdict in favor of plaintiff if the jury found all of the following: Defendant was negligent; decedent was endangered by defendant's negligence; defendant's negligence was the proximate cause of decedent's death and decedent suffered physical injury and death from emotional distress caused by defendant's negligence. Pursuant to this instruction, the jury returned a verdict in favor of plaintiff.

Notwithstanding the jury's finding that decedent suffered a physical injury and death, defendant argues that plaintiff failed to establish a physical injury. Implied in defendant's theory of the case is the notion that a search of the record would reveal that there is no evidence that decedent suffered a physical injury. To the contrary, there is ample evidence in the record that decedent suffered a physical injury. Those factors responding to decedent's besieged heart constitute a physical injury resulting in decedent's death. There is controverted testimony as to whether the cause of death was inflicted

emotional distress or a natural cause. Dr. Kehoe, plaintiff's expert, and Dr. Wilber, defendant's expert, respectively testified that the incident with the cabdriver caused or precipitated decedent's death. A contrary opinion was offered by Dr. Kalelkar, who performed an autopsy. Dr. Kalelkar concluded that decedent died from arteriosclerotic cardiovascular disease, which was a natural cause of death.

Findings of fact by the trier of fact will not be disturbed unless they are against the manifest weight of the evidence. (*Greater Peoria Sanitary & Sewage Disposal District v. Hermann* (1987), 153 Ill. App. 3d 398, 402, 505 N.E.2d 769.) In *Sohaey v. Van Cura* (1992), 240 Ill. App. 3d 266, 276, 607 N.E.2d 253, *aff'd* (1994), 158 Ill. 2d 375, the court stated:

> "A jury verdict is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the findings of the jury are unreasonable, arbitrary, and not based on the evidence. [Citation.] A jury verdict will only be reversed when the evidence, viewed most favorably to the prevailing party, nevertheless so overwhelmingly favors the appellant that no contrary verdict could ever stand. [Citation.] In a jury trial, it is the function of the jury, not an appellate court, to determine both the disputed and undisputed facts of the case and to draw from those facts the reasonable inferences they support. [Citation.] An appellate court may not set aside a jury verdict merely because the jury could have drawn different inferences and conclusions."

Here we find that the jury verdict, relative to a physical injury, was supported by reasonable inferences and conclusions drawn from the evidence.

We note that after the judgment in the case at bar, our supreme court in *Corgan v. Muehling* (1991), 143 Ill. 2d 296, 309-12, 574 N.E.2d 602, held that there is no requirement that a direct victim allege a physical injury or illness. Accordingly, direct victims of negligently inflicted emotional distress are now on the same footing as intentional victims of emotional distress and may recover for mental anguish unaccompanied by physical manifestations of injury.

•4 Defendant next contends that plaintiff did not sustain the requirement for recovery for negligent infliction of emotional distress as a bystander. Defendant's argument is that as a bystander, plaintiff must prove that decedent was endangered and suffered a physical injury or illness. We have already found that plaintiff proved that decedent suffered a physical injury. We find no validity in defendant's contention that the cabdriver's altercation was restricted to Mrs. Jarka and did not endanger decedent.

It is possible for a person to be both a direct victim and a by-

stander. (*Hayes v. Illinois Power Co.* (1992), 225 Ill. App. 3d 819, 825, 587 N.E.2d 559.) Mrs. Jarka testified that as she was seated in the cab, the cabdriver ordered her out, yelled obscenities, and attempted to push her luggage out of the cab. Decedent abandoned his intention to enter the cab and attempted to help Mrs. Jarka to extricate herself from the cab. There is evidence that the cab actually lurched forward near decedent as the cabdriver got out of the cab swearing and yelling at the starter. It was reasonable for decedent to fear for his own safety as the result of the cabdriver's conduct towards Mrs. Jarka. Decedent's efforts to rescue Mrs. Jarka involved risk to himself. A bystander who is in the zone of physical danger and who, because of defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. (*Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1.) The decedent was in the zone of physical danger and the evidence supports a reasonable inference that decedent feared for his safety and that he was endangered as the result of defendant's negligent conduct.

Defendant argues that the cabdriver's conduct was not sufficiently outrageous to support the verdict. Liability for emotional distress does not extend to mere insult, annoyances, petty oppression or trivialities. *Public Finance Corp. v. Davis* (1976), 66 Ill. 2d 85, 89-90, 360 N.E.2d 765.

●5 The trial court, during the instruction conference, considered the conduct of the cabdriver in this case to be outrageous. The trial court said:

> "[O]ne version of the evidence here that I've heard and looked at the way the jury might view it is this elderly lady is threatened right in front of her husband. I mean *** that's an outrageous thing to do to somebody ***. [The cabdriver] threatened, *** with a fist[,] an elderly lady like this. I mean, that's just really outrageous if the jury believes that now.
>
> Just think about it. I mean, you're talking here about a woman in her 60's, and [the cabdriver was] shaking his fist at her [and] swearing at her."

We adopt the view of the trial court and find that under the facts and circumstances of this case the cabdriver's conduct was outrageous.

●6 Plaintiff contends in her cross-appeal that the trial court erred in permitting the issue of decedent's comparative negligence to be submitted to the jury. Defendant's theory of contributory negligence is that decedent, aware of his heart condition and the accompanying physical handicap, negligently attempted to remove and carry

luggage and proximately caused his own death. Defendant's theory of decedent's contributory negligence, albeit contradicted by some of the evidence, is supported by the record for the purpose of submitting this issue to the jury. The decedent had a long history of significant heart problems and had been released from a hospital only eight or nine days before his death. Prior to the incident with the cabdriver, Mrs. Jarka handled the luggage because of decedent's heart condition. During the incident, decedent attempted to remove the luggage from the cab and pick it up from the ground. Dr. Wilber testified that decedent's struggle with the luggage was an additional burden that "could have played a role in [decedent's] heart attack."

A litigant is entitled to have the jury instructed on the issues presented, the legal principles to be applied and the facts that must be proved to support a verdict. An instruction is justified if it is supported by some evidence in the record. (*Gaskin v. Goldwasser* (1988), 166 Ill. App. 3d 996, 1009, 520 N.E.2d 1085.) Since, in the present case, there was some evidence to support defendant's theory of decedent's negligence, it was proper to submit the issue to the jury.

We are mindful that, during the incident, decedent became enmeshed in an incident totally precipitated by the cabdriver's outrageous conduct and decedent suffered emotional distress in a situation that demanded an immediate response without time for sober reflection. Nevertheless, decedent was required to exercise that degree of care that a reasonably prudent person would use for his own safety under like circumstances. (*Beeler v. Chem-Lawn Corp.* (1989), 183 Ill. App. 3d 648, 654, 539 N.E.2d 290.) A jury's finding on the issue of comparative negligence will not be set aside on review absent a finding that the verdict is against the manifest weight of the evidence. (*Healy v. Bearco Management, Inc.* (1991), 216 Ill. App. 3d 945, 955, 576 N.E.2d 1195.) There is no issue raised as to the manifest weight of the evidence of the finding that decedent was contributorily negligent.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

DiVITO, P.J., and HARTMAN, J., concur.

Knierim v. Izzo, 22 Ill. 2d 73 (1961)

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

Ill. Supreme Court · filed 1961-03-29 · Reporter 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 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C040.9
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C040.9

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which he did not have at the time of trial and which, by the exercise of reasonable diligence, could not have been available at the trial. This the petition has wholly failed to do.

The judgment of the criminal court of Cook County is, therefore, affirmed.

Judgment affirmed.

[redacted]

(No. 35663. [redacted]

LILLIAN C. KNIERIM *et al.*, Appellants, *vs.* THOMAS A. IZZO *et al.*, Appellees.

Opinion filed March 29, 1961.—Rehearing denied May 17, 1961.

[redacted]

[redacted]

[redacted]

HUGH M. MATCHETT, JOHN P. BURITA, WILLIAM J. CALLAHAN, EDWARD L. HILTON, DAVID F. MATCHETT, JR., IRWIN PANTER, FRANK E. O'REILLY, and TOM L. YATES, all of Chicago, for appellants.

HINSHAW, CULBERTSON, MOELMANN & HOBAN, of Chicago, (OSWELL G. TREADWAY, of counsel,) for appellees Philip E. Baade *et al.*, and HALFPENNY, HAHN & RYAN, and MCKINLEY & PRICE, (HAROLD T. HALFPENNY, JAMES F. FLANAGAN, MARY M. SHAW, LOUIS DENNEN, and PAUL E. PRICE, of counsel,) all of Chicago, for other appellees.

Mr. JUSTICE HOUSE delivered the opinion of the court:

Six cases were consolidated by the superior court of Cook County because each involved the liability of tavern operators and owners of tavern premises under sections 12 and 14 of article VI of the Liquor Control Act (Ill. Rev. Stat. 1957, chap. 43, pars. 131 and 135), and the common law. Three of the cases raise the further question of the liability of such defendants under the Wrongful Death Act. (Ill. Rev. Stat. 1957, chap. 70, pars. 1 and 2.) The trial court dismissed certain counts from each of the six complaints on the ground that they did not state a cause of action and found as to certain of them that there was no just reason for delaying enforcement or appeal. A fairly debatable constitutional question was presented by each of the six cases and was passed upon by the trial court in its judgments of dismissal.

The counts which are here for review are as follows: I, II, III, IV and VI in Knierim *et al.*, v. Izzo *et al.*; I and III in Thompson *et al.*, v. Baade *et al.*; II in Lillie *et al.*, v. McNulty *et al.*; V, VI, VII, VIII, IX, X, XI, and XII in Finley *et al.*, v. Dakin Liquors, Inc., *et al.*; II in Rogers *et al.*, v. The Tiffin Angler's Club *et al.*; III and IV in Coleman *et al.*, v. Albrecht *et al.* The substantive issues presented by these counts do not require a discussion of the allegations of fact giving rise to them. Accordingly we turn directly to a consideration of the specific legal problems presented.

An issue presented by many of the counts is whether, in addition to the remedy provided in section 14 of article VI of the Liquor Control Act, there exists one or both of the following remedies: (1) a civil action for violation of section 12 of article VI of the Liquor Control Act, which prohibits the sale, gift or delivery of alcoholic liquor "to any intoxicated person or to any person known * * * to be an habitual drunkard, spendthrift, insane, mentally ill, mentally deficient or in need of mental treatment," (2) a

common-law action against a tavern operator who supplies intoxicating liquor to a person when the supplier knows the consumer has no volition with regard to consuming the intoxicant, therefore causing his intoxication or further intoxication and resulting in injury to the consumer or a third party. This precise question, together with the same arguments as are here advanced, was presented to us in the case of *Cunningham* v. *Brown, ante,* p. 23. We pointed out in that case that the original Dram Shop Act created a remedy unknown to the common law; that the only civil remedy under the act is contained in section 14; and that we are not required by section 19 of article II of our constitution to recognize a remedy which the legislature has already created even though the statutory remedy be limited as to recoverable damages. Our holding in the *Cunningham case* that section 14 of article VI of the Liquor Control Act provides the only remedy against tavern operators and owners of tavern premises for injuries to person, property or means of support by an intoxicated person or in consequence of intoxication, is therefore dispositive of this first question.

Counts VI, VII, VIII, IX and X of the Finley complaint, counts III and IV of the Coleman complaint, count II of the Rogers complaint, and count II of the Lillie complaint were properly dismissed because each of them purported to state a cause of action against defendant tavern operators under the common law or for violating section 12 of article VI of the Liquor Control Act. Counts III and IV of the Knierim complaint were properly dismissed as to the defendant tavern operators for the same reason. Count III of the Thompson complaint is based in part on section 14 of article VI of the Liquor Control Act, and in part on a purported common-law liability of the defendant tavern operators. The count totally disregards the provisions of section 33 of the Civil Practice Act, (Ill. Rev. Stat. 1957, chap. 110, par. 33,) and defendants' objection

that it consists "of a multiplicity of allegations which are unrelated and which place an impossible burden on these defendants as far as answering" is well taken. It was also properly dismissed.

The next question is whether an action can be maintained under the Wrongful Death Act against tavern operators and owners of tavern premises for death caused by an intoxicated person or in consequence of intoxication. It should be noted that the Wrongful Death Act is not a survival statute, (*Holton* v. *Daly*, 106 Ill. 131,) as plaintiffs seem to believe. The action created by that act is a new one for the pecuniary loss which the widow and next of kin may have sustained by reason of the death of the injured person. (*Nudd* v. *Matsoukas*, 7 Ill.2d 608.) Thus, the mere fact that the decedent may have been able to maintain an action under the Liquor Control Act, if he had lived, does not give his administrator such an action.

Although both the Wrongful Death Act and the Liquor Control Act provide that an administrator may maintain an action, the persons entitled to recovery, the measure of damages, the bases of liability and the maximum recovery are not the same under the two acts. The persons entitled to recovery under the Wrongful Death Act are the widow and next of kin (*Nudd* v. *Matsoukas*, 7 Ill.2d 608); the measure of damages is the pecuniary loss suffered by such beneficiaries, (Ill. Rev. Stat. 1957, chap. 70, par. 2,) and when the kinsman are lineal a presumption of pecuniary loss obtains, from the relationship alone, sufficient to sustain a verdict and judgment awarding substantial damages, without proof of actual loss (*Wilcox* v. *Bierd*, 330 Ill. 571); the action is based on the wrongful act of the defendant (*Clarke* v. *Storchak*, 384 Ill. 564); and the maximum recovery for the class of beneficiaries is $30,000. (Ill. Rev. Stat. 1957, chap. 70, par. 2.) Under the Liquor Control Act persons who were in fact receiving support from the decedent are entitled to recovery. Thus, although a sister

may not be the next of kin she may recover for her loss of support (*Nagle* v. *Keller*, 237 Ill. 431), and a parent who is the next of kin may be denied recovery when he has lost no support. (*Howlett* v. *Doglio*, 402 Ill. 311.) The presumption of loss existing under the Wrongful Death Act when the beneficiaries are lineal kinsmen does not exist under the Liquor Control Act (*Howlett* v. *Doglio*, 402 Ill. 311); the defendant's liability is not based on fault (*Osborn* v. *Leuffgen*, 381 Ill. 295); and the maximum recovery for the class of beneficiaries is $20,000. (Ill. Rev. Stat. 1957, chap. 43, par. 135.) Because of these and other distinctions between the two acts we have held that the two acts are separate and distinct and that the nature and amount of damages provided for in the Liquor Control Act are not to be limited (*O'Connor* v. *Rathje*, 368 Ill. 83) or expanded (*Howlett* v. *Doglio*, 402 Ill. 311) by the provisions of the Wrongful Death Act.

The Liquor Control Act creates a right of action in the personal representative of the deceased for the exclusive benefit of the person or persons injured in their means of support and limits the amount recoverable in such an action to $20,000. A comparison of the two acts reveals that the General Assembly did not contemplate that the Wrongful Death Act should supplant or supplement the remedy it carefully created and limited. We hold therefore that the Liquor Control Act provides the only remedy against tavern operators and owners of tavern premises for any death caused by an intoxicated person or in consequence of intoxication.

Count I of the Thompson complaint and count XII of the Finley complaint were properly dismissed because each of them purported to state a cause of action against defendant tavern operators under the Wrongful Death Act. Counts I and II of the Knierim complaint were properly dismissed as to the defendant tavern operators for the same reason.

The substantive issue raised by count VI of the Knierim complaint is whether mental disturbance not resulting in any physical injury or disability constitutes an injury to person within the meaning of section 14 of article VI of the Liquor Control Act. This court at an early date held that mental anguish, disgrace, and loss of society do not constitute an injury to person within the meaning of the act. (*Albrecht* v. *Walker*, 73 Ill. 69; *Freese* v. *Tripp*, 70 Ill. 496), and this appears to be the rule in other States with similar statutes. (Annot., 6 A.L.R.2d 798.) If we were to hold that mental disturbance now constitutes an injury to person, we would be doing what the legislature has not seen fit to do in the numerous amendments to the act since 1874 when the *Freese* decision was rendered. This court cannot, under the guise of statutory construction, enlarge the classification of actionable injuries under the act. (*Howlett* v. *Doglio*, 402 Ill. 311.) The count in question was properly dismissed.

The question raised by count XI of the Finley complaint is whether a widow can maintain an action for damage to her property under the Liquor Control Act because she has depleted her own funds to support herself and her daughter during a period when her husband was habitually intoxicated and did not provide support for them. The widow in this situation may have been damaged in property but the cause of her damage is the absence of support by her husband. Her cause of action, if any, is for injury to means of support. The count must be treated therefore as an action for loss of support and not as damage to property. So regarded, the cause of action attempted to be stated in count XI is no more than a repetition of that stated in count II of the same complaint, which is still pending in the trial court.

Several other questions regarding the liability of tavern operators and owners of tavern premises under section 14 of article VI of the Liquor Control Act are raised in plain-

tiffs' brief, but we deem it unnecessary to discuss them in view of the fact that each of the counts was properly dismissed as to such defendants for the reasons just given and a discussion of the other questions would make this opinion unduly long. There remains, however, the question of whether counts I, II, III and IV of the Knierim complaint were properly dismissed as to defendant Izzo.

The Knierim complaint alleges that Izzo while intoxicated, murdered the plaintiff's husband. In counts I and II, which were brought under the Wrongful Death Act, he is named as a defendant together with certain tavern operators. We are of the opinion that a cause of action is stated as against Izzo in these counts and the trial court erred in dismissing the counts as to him.

In counts III and IV Izzo is again named as a party defendant together with certain tavern operators. The two counts, as far as Izzo is concerned, are identical. Damages are sought under each count for loss of consortium and great mental anguish. We turn first to the question of whether a widow can maintain an action for her loss of consortium against a defendant who wrongfully caused the death of her husband.

In *Dini* v. *Naiditch*, 20 Ill.2d 406, this court held that the complaint of a wife seeking damages for the loss of consortium of her husband due to the injuries he sustained as a result of a defendant's negligence, properly sets forth a basis of liability which the law will recognize. The holding was premised on a recognition that the conjugal interest of the wife is entitled to protection and that, except as to loss of support, damages to the conjugal interest by negligent injury to the husband would not be recovered in an action by the husband. The basic reason for granting such relief, therefore, was the protection of the husband-wife relationship (20 Ill.2d 406, 430), which the husband's action for personal injuries does not afford.

The basic reason expressed in the *Dini case* is lacking,

however, when an action can be maintained under the Wrongful Death Act. An action under the act is not a survival of the action the decedent would have had for his injuries (*Holton* v. *Daly*, 106 Ill. 131), but is a new cause of action for the pecuniary loss which the widow and next of kin may have sustained by reason of the death of the injured person. (*Nudd* v. *Matsoukas*, 7 Ill.2d 608.) If the act provided for a survival of the action the decedent would have had for his injuries, the situation would be like that presented in the *Dini case*. However, the new cause of action provided by the act affords protection to the family unit particularly when the beneficial plaintiffs are the widow and lineal kinsmen. Indeed, when they are the beneficial plaintiffs, a presumption of pecuniary loss obtains, from the relationship alone, sufficient to sustain a verdict and judgment awarding substantial damages, without proof of actual loss. *Wilcox* v. *Bierd*, 330 Ill. 571; *Dukeman* v. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 237 Ill. 104; *Grace & Hyde Co.* v. *Strong*, 224 Ill. 630.

In *Hall* v. *Gillins*, 13 Ill.2d 26, a widow and minor child by his next friend sought to maintain an action under the common law for deprivation of support, companionship, guidance, advice, love and affection of the deceased husband-father. We there pointed out (p. 31): "The gap between the 'damages for destruction of the family unit' that plaintiffs claim, and the 'just compensation with reference to the pecuniary injuries resulting from such death' that the statute allows, is not so wide as the words used would suggest. The term 'pecuniary injuries' has received an interpretation that is broad enough to include most of the items of damage that are claimed by the plaintiffs in this case." We concluded that the differences between the common-law death action sought to be maintained and the action that is available under the Wrongful Death Act were not sufficiently significant to warrant recognition of a new remedy.

We hold that the differences between an action for

loss of consortium resulting from the death of a husband and an action for pecuniary loss under the Wrongful Death Act are not sufficiently significant to warrant us recognizing the action for loss of consortium as an additional remedy available to the widow.

This leads us to the question of whether a widow can maintain an action against the murderer of her husband for "great mental anguish" and "nervous exhaustion" that resulted from the defendant's threat to her that he would kill her husband and the fulfillment of the threat. It is not alleged that the mental disturbance and nervous exhaustion has caused any physical injury or disability but appears to be an oppressive and undesirable disturbance of her mental tranquility.

Our attention has been directed to the fact that in 1947 section 46 of the Restatement of Torts, (Restatement of the Law, 1948 Supp., Torts, § 46,) was amended to recognize the intentional causing of severe emotional distress as a separate tort, and approve recovery for the emotional distress itself, as well as bodily harm resulting from it. We are asked to recognize this action which has been described as a "new tort." See Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874.

It is a basic concept in the law that one who intentionally harms another without excuse is liable for the harm. (See *Aikens* v. *State of Wisconsin*, 195 U.S. 194, 49 L. ed. 154.) This concept has not, however, until recently, been applied in cases where the harm caused to an individual was mental suffering. (See Seavey, Torts, Annual Survey of American Law, (1958,) 489; 52 Am. Jur., Torts, sec. 45 and cases cited; Annot. 15 A.L.R.2d 108.) The various reasons advanced for the reluctance to redress mental disturbance have received critical analysis and been rejected by many writers, (see *e.g.*, Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497; Magruder, Mental and Emotional Disturbance in the Law of Torts, 49

Harv. L. Rev. 1033; Wade, Tort Liability for Abusive and Insulting Language, 4 Vand. L. Rev. 63,) and an increasing number of courts now recognize the intentional infliction of severe emotional distress as a separate tort. (See *Savage* v. *Boies*, 77 Ariz. 355, 272 P.2d 349; *Wilson* v. *Wilkins*, 181 Ark. 137, 25 S.W.2d 428; *State Rubbish Collector Ass'n* v. *Siliznoff*, 38 Cal.2d 330, 240 P.2d 282; *Curnett* v. *Wolf*, 244 Iowa 683, 57 N.W.2d 915; *LaSalle Extension University* v. *Fogarty*, 126 Neb. 457, 253 N.W. 424; *Mitran* v. *Williamson*, 197 N.Y.S.2d 689.) In view of the many conflicting precedents, it is not feasible to review the cases individually, and we will only evaluate the reasons given in support of recognition or denial of the action.

One of the principal grounds given for denial is that mental disturbance cannot be measured in terms of money. (See *Lynch* v. *Knight*, 11 Eng. Reprint 854; *Mitchell* v. *Rochester Railway Co.* 151 N.Y. 107, 45 N.E. 354.) It is equally difficult, however, to compute the money value of pain and suffering for which damages are allowed by juries each day in personal injury actions, and mental suffering has been recognized in this State as an element of compensable damage in actions for defamation (*Adams* v. *Smith*, 58 Ill. 417; *Cook* v. *East Shore Newspapers, Inc.* 327 Ill. App. 559), for malicious prosecution in aggravated cases (*Merriman* v. *Merriman*, 290 Ill. App. 139), and for assault. (*Johnson* v. *Lamm*, 156 Ill. App. 287.) The fact that damages are allowed for mental suffering in other tort actions does not prove that any scientific standard for measuring such damages exists, but it does detract from the cogency of the argument for denying the action.

Another reason frequently advanced in denying the right of action is that mental consequences are too evanescent, intangible and peculiar for the law to deal with them. (*Braun* v. *Craven*, 175 Ill. 401; *Mitchell* v. *Rochester Railway Co.* 151 N.Y. 107.) The Georgia court on one occasion stated: "The law leaves feeling to be helped and vindicated

by the tremendous force of sympathy. * * * The civil law is a practical business system dealing with what is tangible, and does not undertake to redress psychological injuries." (*Chapman* v. *Telegraph Co.* 88 Ga. 763, 772, 15 S.E. 901.) In the past thirty years, however, psychosomatic medicine has supplied us with many facts about the nature of man's emotions and its bodily effects, (See Smith, Relation of Emotions to Injury and Disease, Legal Liability for Psychic Stimuli, 30 Va. L. Rev. (1944) 193,) and this argument is losing its effectiveness.

It has also been said that the allowance of such an action would open the door to fictitious claims. (*Braun* v. *Craven,* 175 Ill. 401; *Mitchell* v. *Rochester Railway Co.* 151 N.Y. 107; *Spade* v. *Lynn & Boston Railroad Co.* 168 Mass. 285, 43 N.E. 88.) It has not been suggested that every emotional upset should constitute the basis of an action. Indiscriminate allowance of actions for mental anguish would encourage neurotic overreactions to trivial hurts, and the law should aim to toughen the psyche of the citizen rather than pamper it. But a line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility.

The stronger emotions when sufficiently aroused do produce symptoms that are visible to the professional eye and we can expect much more help from the men of science in the future. (See Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497.) In addition, jurors from their own experience will be able to determine whether outrageous conduct results in severe emotional disturbance.

Another barrier to allowance of such an action has been the recognition that mental consequences vary greatly with the individual. (*Braun* v. *Craven,* 175 Ill. 401; *Mitchell* v. *Rochester Railway Co.* 151 N.Y. 107; *Chittick* v. *Philadelphia Rapid Transit Co.* 224 Pa. 13, 73 Atl. 4.) Again, it has not been suggested that all words or conduct intended

to cause emotional disturbance will constitute the basis of the action merely because severe emotional distress or consequent bodily injury has resulted.

The conduct in the recent case of *Slocum* v. *Food Fair Stores of Florida, Inc.*, 100 So.2d 396, sharply contrasts with that involved in this case and illustrates the point. There a customer in defendant's store inquired of an employee as to the price of an item. He replied: "If you want to know the price, you'll have to find out the best way you can * * * you stink to me." Thereafter plaintiff brought an action for mental suffering and an ensuing heart attack and aggravation of pre-existing heart disease, allegedly caused by the insulting language. On appeal the order dismissing the complaint was affirmed on the ground that the employee's conduct was not actionable although it was intentional and allegedly caused bodily injury.

In commenting on this aspect of the case the Florida court made what we believe is a fair statement of the standard of conduct to be applied in such an action. " * * * it is uniformly agreed that the determination of whether words or conduct are actionable in character is to be made on an objective rather than subjective standard, from common acceptation. The unwarranted intrusion must be calculated to cause 'severe emotional distress' to a person of ordinary sensibilities, in the absence of special knowledge or notice. There is no inclination to include all instances of mere vulgarities, obviously intended as meaningless abusive expressions."

The "reasonable man" seems to be well known to jurors and we expect that they will also be acquainted with the "man of ordinary sensibilities." Whether the aggressive invasion of mental equanimity is unwarranted or unprovoked, whether it is calculated to cause severe emotional disturbance in the person of ordinary sensibilities, and whether there was special knowledge or notice are all questions that will depend on the particular facts of each case.

We are confident, however, that the trial judges in this State will not permit litigation to enter the field of trivialities and mere bad manners.

Consequently, we must agree with those jurists and critics who find that the reasons advanced in the cases for denying an action for the intentional infliction of severe emotional distress have for the most part been added to support a predetermined conclusion dictated by history and the fear of extending liability. (Prosser, Torts 2d ed., sec. 176; 20 Mich. L. Rev. 497; 49 Harv. L. Rev. 1033; *State Rubbish Collector Ass'n* v. *Siliznoff*, 38 Cal.2d 330, 240 P.2d 282; *Curnett* v. *Wolf*, 244 Iowa 683, 57 N.W.2d 915; *Mitran* v. *Williamson*, 197 N.Y.S.2d 689). Messrs. Warren and Brandeis, in their now famous article, The Right to Privacy, 4 Harv. L. Rev. 193, candidly illustrate the vast strides the common law has made since the days when it gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. They point out that the intense intellectual and emotional life which has come with the advance of civilization has made it clear that only a part of the pain, pleasure, and profit of life lies in physical things.

We conclude that peace of mind is an interest of sufficient importance to receive protection from the law against intentional invasion of the kind here involved. We hold therefore that the allegations that defendant intentionally caused severe emotional disturbance and nervous exhaustion by his threat to murder plaintiff's husband and the fulfillment of the threat states a cause of action.

There remains the question of whether a request for punitive damages in such an action is proper. Whether punitive damages may be assessed in a particular case is properly a question of law. (*Smith* v. *Hill*, 12 Ill.2d 588.) Generally such damages may be recovered in cases where the wrongful act complained of is characterized by wantonness, malice, oppression or circumstances of aggravation. (*Eshelman* v. *Rawalt*, 298 Ill. 192.) The alleged conduct

of the defendant in intentionally causing the severe emotional disturbance is characterized by these elements. Indeed it is the outrageous nature of his conduct that forms the basis for the action.

We believe, nevertheless, that punitive damages cannot be sanctioned as an additional recovery in such an action. Since the outrageous quality of the defendant's conduct forms the basis of the action, the rendition of compensatory damages will be sufficiently punitive.

We hold that as to Izzo the trial court should have stricken only those portions of counts III and IV that related to loss of consortium and punitive damages and that it erred in dismissing the counts as to him.

For the reasons hereinbefore given that portion of the judgment dismissing counts I, II, III and IV of the Knierim complaint as to Izzo is reversed and the cause as to him is remanded; in all other respects the judgments of the superior court of Cook County are affirmed.

Affirmed in part, and
reversed and remanded in part.

[redacted]

(No. 36185 [redacted]

THE PEOPLE EX REL. A. C. HILLISON, County Collector, Appellant, *vs.* CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Appellee.

Opinion filed March 29, 1961.—Rehearing denied May 17, 1961.

[redacted]

Koeller v. Cook County, 180 Ill. App. 3d 425 (1st Dist. 1989)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1989-03-09 · Reporter opinion
Published opinion

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Where the memo cites it

- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C030.4
- memo p. 8 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C030.4
- memo p. 12 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C030.1

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U.S. at 502, 96 L. Ed. 2d at 448, 107 S. Ct. at 2532), there is no basis to conclude here that the trial court was unduly influenced by the evidence of victim impact in sentencing defendant. See *People v. Crews* (1988), 122 Ill. 2d 266, 288, 522 N.E.2d 167 (trial judge did not rely on victim impact evidence in sentencing defendant to death).

Defendant finally argues that the trial court abused its discretion in sentencing her to seven years' imprisonment because the trial court did not give adequate weight to defendant's history, character, and potential for rehabilitation. The trial court could have sentenced defendant from 4 to 15 years' imprisonment (Ill. Rev. Stat. 1985, ch. 38, par. 1005—8—1(a)(4)), and so her sentence is within the permissible range. Because defendant received a mid-range sentence, we do not see the basis for defendant's argument that it is apparent that the trial court failed to consider defendant's limited education, youth and abusive social background. We cannot say that the trial court abused its discretion in imposing its sentence. *People v. Perruquet* (1977), 68 Ill. 2d 149, 156, 368 N.E.2d 882.

The judgment of the circuit court is affirmed.

Judgment affirmed.

JOHNSON and McMORROW, JJ., concur.

DOROTHY KOELLER, Plaintiff-Appellant, v. COOK COUNTY *et al.*, Defendants-Appellees.

First District (4th Division) No. 1—87—2116

Opinion filed March 9, 1989.

[redacted]

Law Offices of John D. Parrilli, of Chicago, for appellant.

Richard M. Daley, State's Attorney, of Chicago (John Cherry, Myra J. Brown, and Wayne R. Braverman, Assistant State's Attorneys, of counsel), for appellees.

JUSTICE McMORROW delivered the opinion of the court:

Plaintiff, Dorothy Koeller, appeals from summary judgment for defendants, Cook County (the County) and the Cook County deputy chief medical examiner, Dr. Edmund Donoghue, in an action seeking recovery for mental anguish she suffered as a result of the allegedly negligent, reckless and wilful and wanton acts and omissions of defendants in their handling of the body of her deceased brother, David Koeller. The remaining named defendant, the City of Chicago, is not a party to this appeal. We affirm.

Twenty people, including plaintiff's brother, David Koeller, died as the result of a fire in an apartment building at 5523 N. Kenmore Avenue in Chicago on March 14, 1981. The bodies of the victims were transported to the Cook County medical examiner's office by members of the Chicago police department. A body assigned the number 81—323 was tentatively identified in a police report as being that of "Donald Koelleck," which was the name on a prescription medicine vial found in a pocket of the deceased's clothing. The police officers who transported the body to the morgue showed the vial to a morgue attendant and then placed it in the body bag containing body 81—323. Dr. Donoghue did not see or request access to the police report to aid in the identifications of any of the fire victims, nor did he know about or ever receive the vial mentioned in the report which, apparently, was lost. He was, however, in possession of a list of the names of the tenants of the apartment building. Although body 81—323 was partially burned, including mild burning over the face, the burning was not severe enough to interfere with visual identification or fingerprinting.

An investigator from the medical examiner's office contacted the Koeller family two days after the fire to inform them that it appeared from the tenant list that a person named David or Donald

Koeller may have been one of the victims of the fire. However, a few days later, the investigator telephoned Daniel Koeller, a brother of the plaintiff and the deceased, and told Daniel that "they didn't believe it was David."

On March 16, 1981, a security guard who in 1980 had shot Donald Koeller, David's twin brother, viewed body 81—323 and stated that it was not that of Donald Koeller. This conclusion was consistent with the physical examination of the body, which revealed no gunshot wounds.

On March 15, Ronald Zimney received a call from a friend who reported to him that his brother, Lee Zimney, had been in the apartment building on the night of the fire. On March 18, Ronald and his wife, Gail, looked at photographs and television monitor films of the four yet-unidentified victims. Ronald and Gail both agreed that body 81—323 was that of Lee Zimney. Gail also viewed the body and stated that although the burns made identification difficult, she believed, from the size, build and facial features, that it was the body of her brother-in-law. The Zimneys also supplied Dr. Donoghue with a description of Lee Zimney and his dental records. Dr. Donoghue compared Lee Zimney's dental X rays with those taken of body 81—323 and found them to be similar. Later that same day, after being informed of the Zimneys' identification of the body, Dr. Pavlik, chief of forensic odontology at the medical examiner's officer, also made a comparison of the X rays and concurred with Dr. Donoghue's preliminary finding that they matched.

On the basis of the Zimneys' identification of the body as being that of Lee Zimney and the similarities in the dental X rays, as well as the lack of any conflicting identification evidence—such as fingerprints, the taking of which is normally the responsibility of the police, or any personal effects found on or with the deceased—Dr. Donoghue authorized the release of the body to the Zimneys. The body was cremated and interred on March 19, 1981, by the Zimney family.

Almost one year later, the police report tentatively identifying body 81—323 as "Donald Koelleck" on the basis of the medicine vial was brought to the attention of Dr. Donoghue. Plaintiff was contacted and thereafter came to the medical examiner's office to view photographs of all the victims of the fire. She identified the photograph of body 81—323 as being that of her brother, David Koeller. After further examination by a second forensic odontologist, it was determined that the dental X rays of body 81—323 did not match those of Lee Zimney. Dr. Donoghue also contacted the Zimneys to in-

form them of the misidentification. After a reexamination of the photographs she viewed in March 1981, Gail Zimney still believed the photograph of body 81—323 to be that of Lee Zimney. In March 1982, the remains of David Koeller were exhumed and given to the Koeller family.

On June 28, 1982, plaintiff filed a three-count complaint against defendants. In her complaint, as subsequently amended, plaintiff alleged that defendants had negligently, recklessly and wilfully and wantonly failed to make a proper identification of the body of her brother; failed to take all steps necessary to keep and maintain the body in a condition suitable for a proper burial; failed to deliver the body to her in substantially the same condition it had been received; failed to do whatever was necessary to insure that the body would be maintained in as good a condition as it was when received; failed to deliver the body to her despite her repeated requests for it; denied her the opportunity to make a positive identification of the body; interfered with her efforts to arrange a proper and decent burial of the body; and allowed her brother's misidentified body to be cremated against her wishes. The complaint further alleged that she suffered extreme mental anguish as a proximate result of defendants' acts and omissions in the handling and disposition of her brother's body.

Defendants filed a motion to dismiss plaintiff's complaint on the ground that on March 25, 1982, plaintiff's father, David's next of kin, had signed a release holding defendants harmless for any damages arising from the misidentification, incorrect release and cremation of David Koeller's body. In response thereto, plaintiff argued that the release had been procured by fraud and coercion while her father was under severe duress; that the fraudulently obtained release did not bind David's estate or other family members; that she had since been appointed administratrix of David's estate; and the suit was brought by her as the decedent's sister "for negligent infliction of severe mental distress."

Defendants thereafter withdrew their motion to dismiss on the basis of the release and, on December 16, 1986, filed a joint motion for summary judgment on the grounds that they were immune from liability under sections 2—109 and 2—201, as well as section 2—202, of the Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. 1985, ch. 85, pars. 2—109, 2—201, 2—202) (the Tort Immunity Act). Defendants also asserted as a basis for dismissal that an estate is not entitled to relief for wrongful interference with a corpse or for emotional harm that may have resulted

from any allegedly unauthorized act relating to a corpse.

In her response to the motion for summary judgment, plaintiff argued that the immunity sections relied upon by defendants did not apply to the acts and omissions alleged in her complaint. Plaintiff also stated that although she was identified in the caption of the complaint as administratrix of the estate, the suit was not brought by her in that capacity but, rather, on her own behalf as the decedent's sister.

On January 26, 1987, defendants filed a reply to plaintiff's response to the motions for summary judgment reasserting the applicability of the Tort Immunity Act to the instant case. Citing *Courtney v. St. Joseph Hospital* (1986), 149 Ill. App. 3d 397, 500 N.E.2d 703, which had been decided less than three months earlier, defendants also moved for dismissal on the ground that Illinois does not recognize a cause of action for emotional distress arising from the negligent mishandling of a corpse.

Following a hearing on June 3, 1987, the trial court found that defendants were immune from liability under sections 2—201 and 2—109 of the Tort Immunity Act, which provide, respectively: "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury *** when acting in the exercise of such discretion even though abused" (Ill. Rev. Stat. 1985, ch. 85, par. 2—201); and that "[a] local public entity is not liable for an injury resulting from an act or omission of its employees where the employee is not liable" (Ill. Rev. Stat. 1985, ch. 85, par. 2—109). The trial court granted defendants' motions for summary judgment and dismissed plaintiff's complaint. This appeal followed.

Plaintiff contends that the trial court erred in ruling that the defendants were immune from liability under sections 2—201 and 2—109 of the Tort Immunity Act. Plaintiff argues that the duties of the County and Dr. Donoghue with respect to the handling and disposition of corpses received by the medical examiner's officer are not discretionary functions but, rather, are "ministerial" or "operational" duties which are not immunized by the Tort Immunity Act.

However, it is not necessary to reach this issue since we conclude that plaintiff's complaint failed to state a cause of action in the first instance and, therefore, was properly dismissed. We recognize that this was not the basis upon which the trial court granted judgment for defendants and dismissed plaintiff's complaint. However, as the supreme court stated in *Material Service Corp. v. Department of Revenue* (1983), 98 Ill. 2d 382, 457 N.E.2d 9:

"It is the judgment and not what else may have been said by the lower court that is on appeal to the court of review. [Citations.] The reviewing court is not bound to accept the reasons given by the trial court for its judgment [citation], and the judgment may be sustained upon any ground warranted, regardless of whether it was relied on by the trial court and regardless of whether the reason given by the trial court was correct." 98 Ill. 2d at 387.

As noted above, in their reply to plaintiff's memorandum in opposition to their motion for summary judgment, defendants cited to and briefly argued the applicability of *Courtney v. St. Joseph Hospital* (1986), 149 Ill. App. 3d 397, 500 N.E.2d 703, *appeal denied* (1987), 114 Ill. 2d 544, to the instant case. Nevertheless, the only issue reached at the hearing was whether the Tort Immunity Act afforded defendants immunity for the acts and omissions alleged by plaintiff. However, we find that the holding in *Courtney* is applicable to the instant case and must be addressed.

In *Courtney*, the plaintiff-widow filed a complaint alleging that she suffered severe emotional distress resulting from the defendant-hospital's negligent failure to preserve the body of her deceased husband in a condition suitable for an open-casket wake. According to the complaint, the body had decomposed after the refrigeration unit in the hospital morgue malfunctioned. This court permitted an interlocutory appeal pursuant to Supreme Court Rule 308 (107 Ill. 2d R. 308) to decide the question certified by the trial court following its denial of the defendant's motion to dismiss. The question accepted for discretionary review was "whether Illinois recognizes a cause of action for emotional distress arising from the negligent mishandling of a corpse." The *Courtney* court held that *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1, was dispositive of that question.

In *Rickey*, the eight-year-old plaintiff sought damages for the emotional distress he suffered as a result of witnessing the near-strangulation of his five-year-old brother by an article of clothing which had become entangled in the mechanism of a CTA escalator. In its review of plaintiff's claim, the supreme court first noted that under the long-standing "impact rule" applied in Illinois, "recovery for negligently caused emotional distress suffered by the direct victim or by a bystander who witnesses the injury of another has been consistently denied unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff." (98 Ill. 2d at 550.) Following a discussion of the reasons a large number of jurisdictions have aban-

doned the "impact rule," the court announced a new standard which would henceforth be applied in Illinois. The supreme court defined that standard, generally known as the "zone of physical danger rule," as follows:

> "[A] bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact." 98 Ill. 2d at 555.

Applying the rule enunciated in *Rickey*, the appellate court in *Courtney* held that in order to state a cause of action for negligent infliction of emotional distress under the "zone of physical danger" test, the plaintiff was required to show that she was within a zone of physical danger; that she experienced reasonable fear for her own safety and that physical illness or injury resulted from the emotional distress caused by defendant's negligence. As noted by the court, however, the plaintiff in *Courtney* did not allege, nor did she contend on appeal, that she was within a zone of physical danger causing her to fear for her own safety or that she suffered physical injury or illness as a result of the emotional distress she suffered upon learning that her husband's body had decomposed. The court disagreed with plaintiff's argument that the requirements for recovery under *Rickey* do not apply to direct victims of negligence. The court stated that the focus of that standard is on whether the plaintiff was in proximity to the danger, and held, in response to the question of law certified on appeal, "that Illinois does not recognize a cause of action for emotional distress arising from the negligent mishandling of a corpse." *Courtney*, 149 Ill. App. 3d at 403.

The holding in *Courtney* comports with numerous other decisions applying the standard set out in *Rickey*. *E.g.*, *Johnston v. St. Anne's Hospital West, Inc.* (1986), 146 Ill. App. 3d 763, 497 N.E.2d 408 (complaint properly dismissed for failure to state a cause of action for negligent infliction of emotional distress where plaintiffs, decedent's wife and daughter, could not have shown that they were in a zone of physical danger causing them reasonable fear for their own safety where the hospital failed to promptly inform them of the decedent's death and they unexpectedly found him dead in his hospital room); *Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d

634, 487 N.E.2d 1071 (to state a cause of action under the zone of physical danger rule, the plaintiff, whether bystander *or* direct victim, must have been in such proximity to the accident that there was a high risk of physical impact so as to cause her reasonable fear for her own safety and plaintiff must also show a physical injury or illness resulting from the emotional distress for which recovery is sought); *Gihring v. Butcher* (1985), 138 Ill. App. 3d 976, 487 N.E.2d 75 (the zone of physical danger rule requiring a showing that defendant's negligence placed plaintiff in reasonable fear for her own safety precluded plaintiff's action against her husband's former medical and psychiatric physicians for negligent infliction of emotional distress arising after the plaintiff found her husband dead in their garage as a result of suicide); see also *Hammond v. Lane* (1987), 162 Ill. App. 3d 17, 516 N.E.2d 470 (plaintiff who did not allege that she was in a zone of danger and had reasonable fear for her personal safety failed to state a cause of action for negligent infliction of emotional distress resulting in physical illness or injury from alleged sexual contacts by her psychiatrist).

[redacted] Here, as in *Courtney*, plaintiff seeks damages for the emotional distress she suffered as a result of defendants' allegedly negligent misidentification and mishandling of her deceased brother's body. Just as in *Courtney*, however, plaintiff did not allege any physical injury or illness resulting from the emotional distress; neither did she plead, nor could the facts presented possibly support a contention, that she witnessed any accident or injury to her brother or that she was in such proximity to the negligent acts and omissions as to be in a zone of physical danger causing her to experience reasonable fear for her own safety. To the contrary, the pleadings, depositions, and affidavits in the record categorically and undeniably establish that the decedent's death took place before, and was completely unrelated to, the acts and omissions complained of and that those acts and omissions occurred almost a year before she became aware of them. (*Cf. Johnston v. St. Anne's Hospital West, Inc.* (1986), 146 Ill. App. 3d 763, 497 N.E.2d 408 (plaintiffs who did not witness any accident or injury to decedent could not show that they were in a zone of physical danger causing them to fear for their own safety); see also *Hearon v. City of Chicago* (1987), 157 Ill. App. 3d 633, 510 N.E.2d 1192.) In summary, we conclude that plaintiff's complaint purports to state a cause of action for the infliction of emotional distress arising from the negligent mishandling of a corpse. Because, under the analysis of the supreme court in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1, Illinois does not rec-

ognize such an action (*Courtney v. St. Joseph Hospital* (1986), 149 Ill. App. 3d 397, 500 N.E.2d 703), the complaint was properly dismissed.

The inclusion of the count in plaintiff's complaint alleging that the County recklessly and wilfully and wantonly[1] committed the acts and omissions alleged in plaintiff's complaint does not alter our conclusion that the complaint was properly dismissed.

The tort of *intentional* infliction of emotional distress was first recognized in Illinois in *Knierim v. Izzo* (1961), 22 Ill. 2d 73, 174 N.E.2d 157, as an exception to the long-standing rule that a plaintiff may not recover for emotional distress unless he/she was physically injured by the defendant's conduct. Fifteen years later, in *Public Finance Corp. v. Davis* (1976), 66 Ill. 2d 85, 360 N.E.2d 765, the supreme court additionally recognized the existence of a cause of action for severe emotional distress caused by *reckless* conduct. The court held that to sustain an action for either intentional *or* reckless infliction of emotional distress: (1) the conduct giving rise to it must be so outrageous in character and so extreme in nature as to go beyond all possible bounds of decency; (2) the emotional distress was so severe that no reasonable person could be expected to endure it; and (3) despite a high probability that such severe emotional distress will follow, the actor goes ahead with the conduct in conscious disregard of that probability. (66 Ill. 2d at 89-90.) See generally McCarthy, *Illinois Law in Distress: The "Zone of Danger" and "Physical Injury" Rules in Emotional Distress Litigation*, 19 J. Marshall L. Rev. 17 (1985).

In *Hearon v. City of Chicago* (1987), 157 Ill. App. 3d 633, 510 N.E.2d 1192, we applied these tests in reviewing the sufficiency of a complaint presenting a factual situation strikingly similar to the one at bar. In that case, the plaintiff-widow filed a complaint against the City of Chicago, Cook County and various doctors, police officers and funeral directors for actions relating to the death, autopsy, and burial by the defendants of the body of her husband, who was found stabbed to death. The plaintiff learned of his death four months later and was then asked by the doctors to identify the exhumed body. In her complaint, plaintiff contended that the failure of the county doctors and officers to notify her of her husband's death even though they knew or should have known his identity from papers found on the body, the unnecessarily extensive autopsy performed by them,

[1]The terms "reckless" and "wilful and wanton" are considered legal equivalents. *Hearon v. City of Chicago* (1987), 157 Ill. App. 3d 633, 637, 510 N.E.2d 1192.

their disposition of the body, and their request that she view the body without warning her of its condition were all done in conscious disregard of and with utter indifference to her rights, and that she suffered severe emotional distress as a result thereof. The appellate court found that the facts presented did not reasonably support the conclusions: that defendants' conduct was so outrageous in character or extreme in nature as to have been beyond all possible bounds of decency; that the distress she suffered was so severe that no reasonable person could be expected to endure it; that defendants knew that severe emotional distress was certain or substantially certain to result from acts they performed five months earlier; or that they continued to act in the face of a high degree of probability that severe emotional distress would ultimately occur. Consequently, the court held that plaintiff had failed to satisfy the threshold elements necessary to bring an action to recover for the infliction of emotional distress. (157 Ill. App. 3d at 636.) The facts in the instant case compel the same conclusion.

Plaintiff argues in her brief that the defendants committed a "series of errors, *** beginning with the loss of evidence that would have identified the body, that culminated in the unauthorized cremation of Koeller's body" and that "the reckless and sloppy practice of the Morgue in this case could easily be considered wilful and wanton misconduct." We note that by Dr. Donoghue's own admission, the process used to identify body 81—323 was flawed and mistakes occurred. The medicine vial found in decedent's pocket was lost by an unknown person sometime after the body was first brought in and placed on the floor of the morgue; the police report on which body 81—323 was tentatively identified as "Donald Koelleck" was not requested to aid in identifying the victims; fingerprints were not taken from the body; David Koeller was named as a building occupant on a tenant list provided to the medical examiner's office; and the postmortem dental X rays were incorrectly determined to match those of Lee Zimney.

However, it is also uncontroverted that decedent's body was one of approximately 19 others brought into the medical examiner's office within a matter of hours after the fire in the apartment building; that photographs and dental X rays were taken of the body; that, although later advised otherwise, the Koeller family was notified within two days of the possibility that a family member was one of the victims; that a security guard who viewed the body concluded that it was not that of Donald Koeller, the decedent's twin brother; that the name on the lost medicine vial was not the decedent's name;

that Dr. Donoghue did ask the Zimneys to bring in whatever identifying records they had of Lee Zimney; that there were some similarities between the dental X rays; and that the Zimneys affirmatively identified body 81—323 to be that of their relative, Lee Zimney, a belief held by Gail Zimney even after the misidentification was discovered.

The facts adduced in this case provide no reasonable support for a finding that the County's conduct in the midst of its response to a mass tragedy was so outrageous or extreme as to go beyond all possible bounds of decency, or that the County knew there was a high probability that emotional distress would occur as a result of the acts and omissions of its employees, but that the actors nevertheless proceeded in conscious disregard of that probability. Indeed, the allegations directed against the County in count I of plaintiff's complaint alleging reckless and wilful and wanton conduct are verbatim restatements of those in counts II and III alleging negligence by the County and Dr. Donoghue. Merely inserting the words "reckless" and "wilful and wanton" in place of "careless" and "negligent" without supporting factual allegations is not sufficient to state a cause of action for reckless infliction of emotional distress. (*Cf. Neuberg v. Michael Reese Hospital & Medical Center* (1978), 60 Ill. App. 3d 679, 377 N.E.2d 215 (allegations of reckless and wilful and wanton misconduct in a complaint filed by the parents of two boys who developed cancer several years after being treated with radiation before such treatment was linked with thyroid cancer without allegations that defendants committed the acts with the intent to inflict severe emotional distress or that they knew that severe emotional distress was certain or substantially certain to result were insufficient, and failed to state a cause of action for the infliction of emotional distress).) In summary, we conclude that plaintiff has failed to state a cause of action for reckless or wilful and wanton infliction of emotional distress and that the trial court correctly, albeit for other reasons, ruled in favor of defendants and dismissed plaintiff's complaint.

For the reasons stated, the order dismissing plaintiff's complaint is affirmed.

Affirmed.

JIGANTI, P.J., and LINN, J., concur.

Lawler v. University of Chicago Medical Center, 2016 IL App (1st) 143189

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 2016-03-25 · Opinion
Published opinion

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Where the memo cites it

- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 21: passage C060.1
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 21: passage C060.1

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Appellate Court



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***Lawler v. The University of Chicago Medical Center*, 2016 IL App (1st) 143189**

Appellate Court Caption	SHERI LAWLER, Executor of the Estate of Jill Prusak, Deceased, Plaintiff-Appellant, v. THE UNIVERSITY OF CHICAGO MEDICAL CENTER, a Corporation, THE UNIVERSITY OF CHICAGO HOSPITALS AND HEALTH SYSTEM, THE UNIVERSITY OF CHICAGO PHYSICIANS GROUP, THE UNIVERSITY OF CHICAGO HOSPITALS, UNIVERSITY RETINA AND MACULA ASSOCIATES, P.C., RAMA D. JAGER, M.D., ADVOCATE CHRIST HOSPITAL AND MEDICAL CENTER, a Corporation, and ADVOCATE CHRIST MEDICAL CENTER, a Corporation, Defendants-Appellees (Advocate Health and Hospitals Corporation, a Corporation, Advocate Health Care Network, a Corporation, Advocate Health Centers, Inc., a Corporation, Advocate Professional Group, S.C., a Corporation, Advocate Christ Hospital Health Partners, a Corporation, Advocate South Suburban Hospital, a Corporation, Advocate Health Partners, a Corporation, Advocate Medical Group, a Corporation, Advocate Christ Medical Group, a Corporation, Advocate Christ Hospital Physician Partners, and Advocate Health Care, Defendants).
District & No.	First District, Sixth Division Docket No. 1-14-3189
Filed	March 25, 2016
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 11-L-8152; the Hon. Daniel T. Gillespie, Judge, presiding.

Judgment	Reversed and remanded.
Counsel on Appeal	Clifford Law Offices, P.C., of Chicago (Keith Hebeisen, Sarah F. King, and Robert P. Sheridan, of counsel), for appellant. Pretzel & Stouffer, Chtrd., of Chicago (Robert Marc Chemers, Daniel B. Mills, and Scott L. Howie, of counsel), for appellees University Retina & Macula Associates, P.C., and Rama D. Jager. Cassiday Schade LLP, of Chicago (Rudolph G. Schade, Jr., Julie Teuscher, and Matthew A. Eliaser, of counsel), for appellees Advocate Christ Hospital and Medical Center and Advocate Christ Medical Center. Stamos & Trucco LLP, of Chicago (Michael T. Trucco, Julie N. Howie, and Megan T. Hughes, of counsel), for other appellees.
Panel	JUSTICE DELORT delivered the judgment of the court, with opinion. Justices Hoffman and Hall concurred in the judgment and opinion.

OPINION

¶ 1 This appeal concerns an issue of first impression in Illinois regarding the interplay of three statutes. We must determine whether the medical malpractice statute of repose (735 ILCS 5/13-212(a) (West 2010)) bars the application of the relation back doctrine (735 ILCS 5/2-616(b) (West 2010)) for purposes of adding a claim to an existing case under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2010)). We hold that the relation back doctrine applies so the wrongful death action is not barred.

¶ 2 BACKGROUND

¶ 3 On August 4, 2011, Jill Prusak, the decedent in this case, filed a medical malpractice cause of action within both the two-year statute of limitations and four-year statute of repose under section 13-212(a). Prusak filed a two-count complaint against defendants, The University of Chicago Medical Center, The University of Chicago Hospitals and Health System, The University of Chicago Physicians Group, The University of Chicago Hospitals (collectively, the University of Chicago defendants), University Retina and Macula Associates, P.C., Dr. Rama Jager, Advocate Christ Hospital and Medical Center, and Advocate Christ Medical Center (collectively, the Christ Hospital defendants), and other medical providers who have

since been dismissed from the case.[1] Prusak alleged that Dr. Jager misdiagnosed her macular pathology and that this misdiagnosis led to defendants' failure to recognize central nervous system lymphoma. Count I alleged negligence against the University of Chicago defendants and asserted that Dr. Jager was an agent or apparent agent of the University of Chicago defendants. Count II made the same allegations with respect to the Advocate defendants and the Christ Hospital defendants. In both counts, Prusak specifically alleged:

> "From November 5, 2007 through July of 2009, and at all times mentioned herein, Defendant, JAGER, was negligent in the following ways:
>
> a) Failed to order appropriate diagnostic testing on November 5th, 2007 for a patient with bilateral metamorphopsia and visual acuity that could not be corrected to normal levels in either eyes;
>
> b) Failed to diagnose macular pathology[;] and
>
> c) Failed to perform appropriate medical evaluation of a 47 year old patient with macular pathology and no known systemic illness."

Prusak also alleged that she "neither knew or should have known her injury and that it may have been wrongfully caused before August 7, 2009, when a brain biopsy was performed and this case is brought within two (2) years of the date of said discovery."

¶ 4 Defendants each filed answers to Prusak's complaint by April 20, 2012. A period of discovery followed during which Prusak answered defendants' interrogatories on August 16, 2012. In response to the question asking Prusak to describe each and every personal injury, condition, and symptom of ill-being sustained as a result of the occurrence alleged in her complaint, she described reoccurrences of both lymphoma (second brain tumor) and ocular lymphoma.

¶ 5 Prusak died on November 24, 2013, after the expiration of the four-year statute of repose. On March 11, 2014, the trial court granted Prusak's daughter, Sheri Lawler, leave to file an amended complaint, substituting herself as party plaintiff and as the executor of Prusak's estate.

¶ 6 Lawler filed a four-count first amended complaint on April 11, 2014. Two of the counts alleged claims under the Survival Act (survival statute) (755 ILCS 5/27-6 (West 2010)) for injuries suffered by Prusak prior to her death. The other two counts sounded in wrongful death. The amended complaint identified Prusak's survivors as Lawler; Charles Allen Boswell, Jr., Prusak's brother; and Charles Allen Boswell, Sr., her father. All four counts alleged the same acts of negligence and operative facts as the original complaint.

¶ 7 On May 9, 2014, the University of Chicago defendants filed an answer to count II, the survival claim, and moved to dismiss count I, the wrongful death claim, pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2010)). The University of Chicago defendants argued that the medical malpractice statute of repose (section 13-212(a)) barred

[1]By agreed order, the parties stipulated to the voluntary dismissal of certain defendants under section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2010)), including Advocate Health and Hospitals Corporation, Advocate Health Care Network, Advocate Health Centers, Inc., Advocate Professional Group, S.C., Advocate Christ Hospital Health Partners, Advocate South Suburban Hospital, Advocate Health Partners, Advocate Medical Group, Advocate Christ Medical Group, Advocate Christ Hospital Physician Partners, and Advocate Health Care (collectively, the Advocate defendants).

Lawler's wrongful death claim. Defendants Dr. Jager and University Retina and Macula Associates filed a similar motion to dismiss on May 29, 2014. The remaining defendants also argued that Prusak's brother and father were not proper beneficiaries under the Wrongful Death Act and moved to strike the allegations concerning the pecuniary loss to those individuals.[2]

¶ 8 On September 17, 2014, after briefing and argument, the trial court entered a written order granting defendants' motions to dismiss count I (wrongful death) of the amended complaint with prejudice. The court found that the wrongful death claims were only valid "if the deceased was not time-barred to bring the action at the time of his or her death." The court stated that because the wrongful death claims were added in the amended complaint in April 2014, more than four years after the date of the last medical treatment in July 2009, the claims were barred by the statute of repose, "unless the Court finds that Plaintiff's wrongful death claim relates back to her original medical negligence claim." The court held that the relation back doctrine did not apply to this case "because there is no precedent, as shown from the absence of medical malpractice cases where courts allowed plaintiffs to file a claim after the four-year period expired." The trial court noted our supreme court's decision in *Hayes v. Mercy Hospital & Medical Center*, 136 Ill. 2d 450 (1990), which discussed the General Assembly's efforts to curb medical insurance premiums from increasing by artificially limiting the potential liability that physicians and medical personnel might face for the care they provided to patients. The court therefore concluded that Lawler's wrongful death claim was a new action barred by the four-year statute of repose. The order was made final and appealable under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 9 The trial court entered subsequent *nunc pro tunc* orders on October 2, 2014 and October 17, 2014 to add count III of the amended complaint to the original dismissal order and clarify that the dismissal order also applied to the Christ Hospital defendants, University Retina and Macula Associates, and Dr. Jager. The *nunc pro tunc* orders also included Rule 304(a) language. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Lawler argues that under a correct interpretation of the relevant statutes, a wrongful death action can relate back to the original complaint even after more than four years have elapsed since the last date of the alleged negligent medical treatment. She notes that Prusak's original complaint was timely filed and that the alleged negligent transactions in the original and amended complaint are completely identical. Lawler argues that the relation back doctrine should apply because the original claims supplied defendants with the information necessary to prepare their defense to the amended claims.

[2]Whether Prusak's brother and father are proper beneficiaries under the Wrongful Death Act is not at issue in this appeal. Lawler agrees in her opening brief that the issue is not before this court because the trial court, in dismissing the wrongful death counts in their entirety, declined to grant the alternative relief defendants sought; however, the trial court indicated that defendants' position on this issue was correct. Lawler states that she "is persuaded that the Defendants' position with respect to the father and brother is probably meritorious, and in the event of reversal and remand will undertake to cure the situation voluntarily."

¶ 12 Defendants respond that the trial court correctly dismissed the wrongful death counts in the amended complaint because they were separate and distinct causes of action than those in the existing action and, therefore, did not relate back to the original complaint. Defendants contend that the relation back doctrine is not an exception to the medical malpractice statute of repose. They rely on the language and purpose of the statute of repose and the doctrine that the more specific statute should govern over the more general relation back statute. They also argue that the statute of repose controls because it is substantive and not procedural and, therefore, takes precedence over the relation back statute.

¶ 13 Standard of Review and Statutory Interpretation

¶ 14 We review whether the trial court erred in dismissing Lawler's wrongful death claims pursuant to section 2-619(a)(5) of the Code, which provides that a defendant may file a motion for dismissal if "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). We review this dismissal *de novo*. See *O'Toole v. Chicago Zoological Society*, 2015 IL 118254, ¶ 16.

¶ 15 The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent, and the plain language of the statute is the best indication of that intent. *Acme Markets, Inc. v. Callanan*, 236 Ill. 2d 29, 37-38 (2009). "The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning." *Roselle Police Pension Board v. Village of Roselle*, 232 Ill. 2d 546, 552 (2009). "The statute should be evaluated as a whole, with each provision construed in connection with every other section." *Id*. When statutory language is clear and unambiguous, we enforce it as written without reading into it exceptions, conditions, or limitations not expressed by the legislature. *Martin v. Office of the State's Attorney*, 2011 IL App (1st) 102718, ¶ 10.

¶ 16 "However, when the plain language of one statute apparently conflicts with the plain language of another statute, we must resort to other means in determining the legislature's intent. Where two statutes conflict, we will attempt to construe them together, *in pari materia*, where such an interpretation is reasonable." *Moore v. Green*, 219 Ill. 2d 470, 479 (2006) (citing *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311-12 (2001)). We must presume that the legislature did not intend to create absurd, inconvenient, or unjust results. *Price v. Phillip Morris, Inc.*, 2015 IL 117687, ¶ 30; *State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 541 (1992). "Further, in determining legislative intent, we may consider the purpose and necessity for the law as well as the consequences that would result from interpreting the statute in one way or another." *Price*, 2015 IL 117687, ¶ 30 (citing *People v. Gaytan*, 2015 IL 116223, ¶ 23). The interpretation of a statute is reviewed *de novo*. *Id*.

¶ 17 This case presents a classic clash of apparently conflicting statutes which requires us to assess each relevant statute to ensure they operate together consistently with their legislative purposes. We now review each of the pertinent statutes and the legislature's intent as interpreted by Illinois courts.

¶ 18 Wrongful Death Act

¶ 19 No cause of action for wrongful death existed at common law. *Moon v. Rhode*, 2015 IL App (3d) 130613, ¶ 16. First enacted in 1853, the Wrongful Death Act created a new cause of action to compensate a decedent's survivors. *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 413 (1989). In contrast, "[p]ersonal injury actions were born of the common

(judge-made) law and are susceptible to changes by the judiciary." *Moon*, 2015 IL App (3d) 130613, ¶ 16. At common law, the personal injury action died with the decedent. *Id*. The survival statute (755 ILCS 5/27-6 (West 2010)), also a creature of the legislature enacted in 1872, allows for recovery of damages the injured party could have recovered, had she survived. *Moon*, 2015 IL App (3d) 130613, ¶ 16; see also *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 426 (1974). The Wrongful Death Act and survival statute are conceptually distinct in that one relates to an action arising upon wrongful death while the other relates to a right of action for personal injury arising during the life of the injured person. *Murphy*, 56 Ill. 2d at 431. However, our supreme court has noted that "[n]ot every death is recompensable." *Wyness*, 131 Ill. 2d at 413. Illinois courts have long held that, in a wrongful death action, "the cause of action is the wrongful act, neglect or default causing death, and not merely the death itself." (Internal quotation marks omitted.) *Id*. at 415.

¶ 20 The pertinent provisions of the Wrongful Death Act state:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would, *if death had not ensued*, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." (Emphasis added.) 740 ILCS 180/1 (West 2010).

In addition, section 2 of the Wrongful Death Act states:

> "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person.
>
> * * *
>
> Every such action shall be commenced within 2 years after the death of such person ***." 740 ILCS 180/2 (West 2010).

¶ 21 In short, the Wrongful Death Act provides the exclusive remedy available when death occurs as a result of tortious conduct. *Murphy*, 56 Ill. 2d at 426. In *Wyness*, a wrongful death action, the defendants argued that the two-year statute of limitations for personal injury actions should have started running *before* the decedent's death because the plaintiff knew of the decedent's injuries and the cause of those injuries before death. Our supreme court disagreed, explaining: ↩ memo p. 6, 10

> "The 'injury' which opens the door to initiation of a personal injury suit *** is not the same 'injury' which opens the door to a wrongful death suit. Though both actions require an individual to have been harmed in some way through the actions of another, this injury at the hands of another is not the sole thread which weaves the fabric undergirding both causes of action. A wrongful death action can only be instituted for the benefit of the next of kin who have suffered an 'injury' because a family member

has died when that family member's death resulted from an injury wrongfully caused by another. [Citation.] The precipitating 'injury' for the plaintiffs in a wrongful death action, unlike the injury in a personal injury action, is the death; that the death must also be the result of a wrongfully caused injury suffered by the deceased at the hands of another does not alter the analysis. *The wrongful injury suffered by the deceased is the distinguishing characteristic of the particular death*." (Emphasis added.) *Wyness*, 131 Ill. 2d at 414-15.

¶ 22 The supreme court in *Wyness* explained that the decedent's beneficiaries suffered a pecuniary injury by reason of the decedent's death. The decedent, however, was the person who suffered the actual physical injury which led to the death. With respect to that physical injury, the beneficiaries are said to step into the shoes of the decedent. In *Kessinger v. Grefco, Inc.*, 251 Ill. App. 3d 980, 987-88 (1993), the court described the relationship this way:

> "Although courts recognize the wrongful death action as an independent cause of action which does not arise until after death, the action is derivative of the injury to the decedent and is grounded on the same wrongful act of defendant whether it was prosecuted by the injured party during his lifetime or by a representative of the estate. The remedy depends upon the existence, in the decedent, at the time of his death, of a right of action to recovery for such injury." *Id.*

¶ 23 A wrongful death action will lie where the deceased had a claim that was not time-barred on or before his death. See *O'Brien v. O'Donoghue*, 292 Ill. App. 3d 699, 703 (1997); *Kessinger*, 251 Ill. App. 3d at 986; *Wolfe v. Westlake Community Hospital*, 173 Ill. App. 3d 608, 612 (1988); *Fountas v. Breed*, 118 Ill. App. 3d 669, 674 (1983). The Wrongful Death Act requires a plaintiff to sue within two years from the time of death (740 ILCS 180/2 (West 2010)). However, because the plaintiff's rights are derivative of those which the decedent himself possessed, that time may be impacted by other limitations provisions, which may supersede the wrongful death statute and recast the time in which the action may be brought. An example includes the limitations provisions for medical malpractice claims (735 ILCS 5/13-212(a) (West 2010)), which we review next.

¶ 24 The Limitations for Filing a Medical Negligence Claim

¶ 25 Section 13-212(a) of the Code establishes limitation and repose periods for filing medical malpractice actions against medical providers. First enacted on September 12, 1975, and adopted as part of "An Act to revise the law in relation to medical malpractice" (Pub. Act 79-960 (eff. Nov. 11, 1975)), the section states:

> "Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." 735 ILCS 5/13-212(a) (West 2010).

See also *Anderson v. Wagner*, 79 Ill. 2d 295 (1979) (providing a comprehensive history and explanation of the enactment of the medical malpractice statute of repose).

¶ 26 In *Hayes*, a case in which defendants here strongly rely, our supreme court explained the legislature enacted the medical malpractice repose period as part of its response to a "medical malpractice insurance crisis" created by " 'the increasing reluctance of insurance companies to write medical malpractice insurance policies and the dramatic rise in premiums demanded by those companies which continued to issue policies.' " *Hayes*, 136 Ill. 2d at 457 (quoting *Anderson*, 79 Ill. 2d at 301).

¶ 27 In *Hayes*, the supreme court determined whether the four-year statute of repose in section 13-212(a) applied to third-party contribution actions brought against a doctor by the defendants in an underlying negligence action. The *Hayes* court held that the application of the repose period in section 13-212(a) was not limited to a direct action by the injured party. *Id*. at 456-57. The court agreed that an action of contribution need not be predicated on the same theory of recovery as that asserted by the plaintiff in the underlying action. *Id*. at 457. Indeed, " 'the basis for a contributor's obligation rests on his liability in tort to the injured party [citation],' even if the plaintiff in the direct action did not assert the theory of liability on which the third-party action relies." *Id*. (quoting *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 118 Ill. 2d 447, 462 (1987)).

¶ 28 The supreme court's plain reading of the statute led it to conclude that "the medical malpractice statute of repose bars any action after the period of repose seeking damages against a physician or other enumerated health-care provider for injury or death arising out of patient care, whether at law or in equity." *Id*. at 456. "Because a suit for contribution against the insured for damages arising out of patient care exposes insurance companies to the same liability as if the patient were to have brought a direct action against the insured, we believe that the term 'or otherwise' in the medical malpractice statute of repose includes actions for contribution against a physician for injuries arising out of patient care." *Id.* at 458. The supreme court believed inclusion of the term "or otherwise," following more restrictive language, indicated the legislature intended the term to be all-inclusive and that its inclusion "demonstrates the General Assembly's desire at the time it originally enacted the statute to limit a physician's exposure to liability for damages for injury or death arising out of patient care under all theories of liability, whether then existing or not." *Id*. at 458-59.

¶ 29 *Hayes* is distinguishable from this case for one simple, but crucial, basis. The supreme court did not consider the relation back doctrine and, therefore, did not have the opportunity to consider the issue presented here.

¶ 30 Relation Back Doctrine

¶ 31 The relation back statute provides:

> "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time *under any statute* or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some

> fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2010).

¶ 32 In *Zeh v. Wheeler*, 111 Ill. 2d 266, 269 (1986), the plaintiff amended her complaint to change the address of the location where she allegedly was injured. The trial court granted the defendants' motion to dismiss because the amendment stated a new and different cause of action which did not arise out of the same transaction or occurrence set forth in the original complaint. *Id*. at 269-70. The parties agreed that the plaintiff's amended complaint was barred by the applicable personal injury statute of limitations unless the amendment related back to the date of the filing of the original complaint.

¶ 33 The *Zeh* court affirmed the dismissal of the plaintiff's amended complaint and, significantly for the purposes of this case, noted that section 2-616(b) no longer required that the original and amended pleadings state the same cause of action. *Id*. at 272-73. The court explained:

> "In 1933, the legislature replaced amended section 39 of the former practice act with section 46 of the Civil Practice Act. The 1933 amendment omitted the words 'and is substantially the same as' so that amendments could be made if the matter introduced by the amended pleading 'grew out of the same transaction or occurrence set up in the original pleading.' (Ill. Rev. Stat. 1939, ch. 110, par. 46(2).) The 1933 Civil Practice Act thus shifted from the common law requirements as set out in *Carlin v. City of Chicago* (1914), 262 Ill. 564, that the original pleading technically state a cause of action and that the amended pleading set up the same cause of action as the original pleading to a test of identity of transaction or occurrence. [Citation.] The legislative change was based on the rationale that 'a defendant has not been prejudiced so long as his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.' " *Id*. (quoting *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965)).

The supreme court specifically noted that "a defendant should not be required to defend against stale claims of which he had no notice or knowledge." *Id*. at 274.

¶ 34 The *Zeh* court further explained that "the legislature's reason for this change was its belief that defendants would not be prejudiced by the addition of claims so long as they were given the facts that form the basis of the claim asserted against them prior to the end of the limitations period." *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2002) (citing *Zeh*, 111 Ill. 2d at 273). "This emphasis on the identity of the occurrence rather than the identity of the cause of action still provides protection to defendants because, as long as they are aware of the occurrence or transaction that is the basis of the claim, they can be prepared to defend against that claim, whatever theory is advanced." *Id*. (citing *Zeh*, 111 Ill. 2d at 279). Thus, the critical inquiry becomes " 'whether there is enough in the original description to indicate that plaintiff is not attempting to slip in an entirely distinct claim in violation of the spirit of the limitations act.' " *Simmons*, 32 Ill. 2d at 497 (quoting Oliver L. McCaskill, Illinois Civil Practice Act Annotated 126-27 (Supp. 1936)).

¶ 35 The *Zeh* court concluded that, because maintaining a stairway at one location involved different conduct by different persons at a different time and a different place from maintaining a stairway at another location, changing the address would involve two different locations and, therefore, two different occurrences, which did not relate back to the original pleading. *Zeh*, 111 Ill. 2d at 275. In contrast, simply changing a word in an address from "Street" to "place" would relate back because it constituted two different descriptions of the same occurrence or locality. (Internal quotation marks omitted.) *Id*. at 276-77.

¶ 36 Relevant to this case, the *Zeh* court, quoting a United States Supreme Court decision, stated that " '[t]here is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.' " *Id*. at 280 (quoting *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574, 581 (1945)). With these statutes and legislative history in mind, we now turn to the merits of this case.

¶ 37 Application of the Relation Back Doctrine to the Statute of Repose

¶ 38 Defendants argue that a host of substantive and procedural differences exist between Lawler's wrongful death claims and the survival claims she is pursuing in Prusak's name. Defendants assert that, because Lawler's wrongful death claims constitute distinct causes of action from the survival claims, even though the underlying facts are the same, the addition of the wrongful death claims to the amended complaint should be regarded as a new suit commenced on the date the amended complaint was filed more than four years after the last act of alleged medical malpractice and, therefore, outside the repose period.

¶ 39 One case defendants cite, *Durham v. Michael Reese Hospital Foundation*, 254 Ill. App. 3d 492 (1993), determined whether the four-year medical malpractice statute of repose or the two-year Wrongful Death Act statute of limitations applied to a medical malpractice case where the alleged malpractice caused the decedent's death. Relying on *Hayes*, the *Durham* court found that section 13-212(a) of the Code controlled and, therefore, barred the plaintiff's action because more than four years elapsed from the date of the alleged negligent treatment of the decedent until the complaint's filing. *Id*. at 495.

¶ 40 *Durham* is inapposite as the decedent did not file his own medical malpractice claim prior to his death, and the original cause of action in that case was filed after the expiration of the four-year repose period. And like in *Hayes*, the parties in *Durham* did not raise the application of the relation back doctrine.

¶ 41 Defendants also rely upon *Real v. Kim*, 112 Ill. App. 3d 427 (1983), in which the plaintiff, as special administrator of decedent's estate, filed an action under the then Wrongful Death Act and survival statute (Ill. Rev. Stat. 1979, ch. 70, ¶ 1 *et seq.*; ch. 110½, ¶ 27-6), alleging medical malpractice. *Real*, 112 Ill. App. 3d at 428. The trial court dismissed the case as time-barred by section 21.1 of the Limitations Act (Ill. Rev. Stat. 1979, ch. 83, ¶ 22.1 (now codified at 735 ILCS 5/13-212(a) (West 2010)). *Real*, 112 Ill. App. 3d at 428-29. The decedent received a medical evaluation on April 13, 1976, which produced normal test results. The plaintiff alleged that this diagnosis was incorrect because proper interpretation would have disclosed the presence of an abnormality. *Id*. at 429. In June 1979, the decedent was diagnosed as having brain cancer. The decedent died on August 9, 1980. The plaintiff filed the complaint on June 19, 1981. *Id*. at 430.

¶ 42 The *Real* court held that section 21.1 barred the survival action because the four-year limitations period began to run from the date of the alleged acts of negligence–April 13, 1976. *Id*. at 430. As to the wrongful death claim, the court noted that the plaintiff misapprehended the distinction between the two-year limitations period under section 2 of the Wrongful Death Act and "the fact that there is no liability under the Act unless the condition precedent specified by section 1 has been fulfilled." *Id*. at 432. "The plain language of section 1 provides that there will be no liability under the Wrongful Death Act unless the decedent *could have maintained an action for damages 'if death had not ensued*' [citation], and the supreme court has consistently acknowledged and given effect to this unambiguous provision." (Emphasis added.) *Id*. (quoting Ill. Rev. Stat. 1979, ch. 70, ¶ 1 (now codified at 740 ILCS 180/1 (West 2010))). " 'One condition upon which the statutory liability depends is that the deceased had a right of recovery for the injuries at the time of his death, and there is no right in the administrator to maintain an action unless the deceased had the right to sue at the time of his death.' " *Id*. at 433 (quoting *Mooney v. City of Chicago*, 239 Ill. 414, 423 (1909)).

¶ 43 At the time death occurred in *Real*, the four-year repose period of section 21.1 of the Limitations Act (Ill. Rev. Stat. 1979, ch. 83, ¶ 21.1) barred the decedent from maintaining an action for the conduct which allegedly caused his death. *Real*, 112 Ill. App. 3d at 434. "It necessarily follows that section 1 of the Wrongful Death Act precludes plaintiff from bringing a wrongful death action for the same alleged malpractice." *Id*.

¶ 44 In this case, at the time of Prusak's death, section 13-212(a) would not have precluded her from maintaining an action for the conduct which allegedly caused her death because here, unlike the decedent in *Real*, Prusak had *already* filed a cause of action for medical negligence. If Prusak had not filed a medical malpractice action prior to her death, the four-year repose period would have already expired, preventing Lawler from seeking a wrongful death claim under the *Real* decision. Accordingly, based on the holding in *Real*, section 1 of the Wrongful Death Act should not preclude Lawler from bringing a wrongful death claim for the same alleged malpractice because Prusak could have maintained a cause of action for damages " 'if death had not ensued.' " *Id*. at 432 (quoting Ill. Rev. Stat. 1979, ch. 70, ¶ 1 (now codified at 740 ILCS 180/1 (West 2010))).

¶ 45 Similarly, defendant's reliance on cases such as *Wolfe*, *O'Brien*, and *Limer v. Lyman*, 220 Ill. App. 3d 1036 (1991), is not well placed because those cases did not involve the relation back doctrine.

¶ 46 In contrast to *Durham*, *Real*, *O'Brien*, and *Limer*, this case does not involve an original action newly filed after the expiration of the statute of repose, but a case that was active at the time of the decedent's death and filed within the four-year repose period. This case involves the filing of an amendment to an action that was timely filed and pending when the decedent died. This distinguishing characteristic triggers the relation back doctrine, which provides that a pleading may be amended before final judgment under certain circumstances. This section "is remedial in nature and should be applied liberally to favor hearing a plaintiff's claim." *Avakian*, 328 Ill. App. 3d at 154 (citing *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 106 (1996)). "Thus, plaintiffs are not to be barred from having the merits heard because of technical rules of pleading, and courts are to elevate issues of substance over form." *Id*. "Medical malpractice plaintiffs, in particular, are afforded every reasonable opportunity to establish a case, and to this end, amendments to pleadings are liberally allowed to enable the

action to be heard on the merits rather than brought to an end because of procedural technicalities." *Id*.

¶ 47 The plaintiff in *Sompolski v. Miller*, 239 Ill. App. 3d 1087 (1992), appealed from the trial court's dismissal of her wrongful death claim stemming from a car accident that occurred on December 10, 1985. The decedent sued the defendant for personal injuries on April 9, 1986. *Id*. at 1088. The decedent died on November 14, 1988. Seven months later, the plaintiff moved to substitute herself for the decedent and to appear in a representative capacity for him in the personal injury suit filed against the defendant. On September 27, 1991, more than two years after the decedent's death, the plaintiff filed an amended complaint that included an additional count for damages relating to the decedent's wrongful death. *Id*.

¶ 48 The *Sompolski* court reversed the trial court and ruled that the wrongful death claim related back to the original personal injury claim filed by the decedent. *Id*. at 1094. The court found the wrongful death claim was not barred by the two-year statute of limitations for personal injury claims. *Id*. According to the court, "the additional wrongful death claim filed by plaintiff arose from the same transaction or occurrence as that at issue in [the decedent's] original complaint, *i.e.*, the December 1985 automobile accident." *Id*. at 1091.

¶ 49 Citing *Zeh*, the *Sompolski* court stated that "[t]he right to amend does not depend on whether the cause of action set out in the amendment is substantially the same as that stated in the original pleading, but depends on whether the amendment relates back to the occurrence set out in the original pleading." *Id*. at 1090 (citing *Zeh*, 111 Ill. 2d at 272-73). "As long as the defendant has been apprised of the essential information necessary to prepare a defense, an amended complaint will be deemed to relate back to the original pleading [citation], and a defendant is not prejudiced by allowance of an amendment 'so long as his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.' " *Id*. at 1090-91 (quoting *Simmons*, 32 Ill. 2d at 495). Furthermore, "the liberal provisions of section 2-616(b) apply regardless of whether the claims at issue are governed by a statute of limitations or a prescription that limits the right to bring suit." *Id*. at 1091 (citing *Simmons*, 32 Ill. 2d at 494). The court concluded that the plaintiff's wrongful death suit was not an attempt to " 'slip in an entirely distinct claim,' but was instead an effort to recover full damages for the injuries [the decedent] sustained as a result of the defendant's alleged negligence in the December 1985 automobile accident." *Id*. at 1091-92.

¶ 50 Defendants argue *Sompolski* is inapplicable to this case because it did not involve a medical malpractice claim or the application of the four-year statute of repose. Defendants assert the legislature treated medical malpractice cases differently from the other kinds of cases because it recognized that medical malpractice cases are uniquely susceptible to long-tail liability and pose special hazards to the public.

¶ 51 Although *Sompolski* did not involve a medical malpractice action, the court's focus was on whether the wrongful death claim was based on the same occurrence as that alleged in the original complaint filed by the decedent. The *Sompolski* court specifically found the amended claims and original claims sounded in negligence and made the same allegations respecting the defendant's alleged liability for the decedent's injuries. *Id*. at 1092.

¶ 52 This is directly analogous to the case before us. Prusak timely filed her original complaint within both the two-year statute of limitations and four-year statute of repose in medical malpractice actions. She alleged in her complaint that defendants failed, among other things, to diagnose her macular pathology. Prusak answered defendants' interrogatories to apprise them

of her medical condition, a reoccurrence of both lymphoma and ocular lymphoma. After Prusak died, Lawler filed her amended complaint after the statutorily mandated time allotted to file a wrongful death action, just as in *Sompolski*. Like *Sompolski*, the wrongful death claims in this case arose from the same transaction or occurrence described in Prusak's original complaint and defendants were advised of the essential facts necessary to prepare their defense. Defendants have not shown how they will be prejudiced by the allowance of Lawler's amended complaint, especially considering their attention was directed, within the statutory time prescribed, to the facts that form the basis of the claims asserted against them. *Id*. at 1091; *Simmons*, 32 Ill. 2d at 495. Lawler's amended complaint is not based on a new set of facts. This conclusion is bolstered by the liberal provisions of section 2-616(b), which apply "regardless of whether the claims at issue are governed by a statute of limitations or a prescription that limits the right to bring suit." *Sompolski*, 239 Ill. App. 3d at 1091 (citing *Simmons*, 32 Ill. 2d at 494).

¶ 53 The above-described principles regarding the relation back doctrine also apply in medical malpractice cases. See, *e.g.*, *Cammon v. West Suburban Hospital Medical Center*, 301 Ill. App. 3d 939, 947 (1998) (newly added allegations against the defendant hospital concerning the failure to achieve adequate hemostasis related back because the original complaint had charged a doctor with failing to achieve adequate hemostasis following the procedure).

¶ 54 The relation back doctrine has been frequently applied to permit an amended complaint against the defendant medical providers when they had received adequate notice of the same operative facts leading to the alleged medical negligence stated in an earlier, timely filed complaint. See *Castro v. Bellucci*, 338 Ill. App. 3d 386, 394-95 (2003) (finding amended complaint related back because the defendant hospital was informed in the second-amended complaint, filed before the expiration of the medical malpractice statutes of limitation and repose, of the plaintiff's claim that symptoms of a predictive stroke were misdiagnosed); *Avakian*, 328 Ill. App. 3d at 157-58 (holding that the defendants received adequate notice from the timely filed earlier complaints that the plaintiff was alleging damages as a result of adverse effects from a prescription); *McArthur v. St. Mary's Hospital of Decatur*, 307 Ill. App. 3d 329, 335 (1999) (finding that the amended complaint related back to the timely filed original complaint because it directed attention to facts concerning the reading of sonograms and X-rays).

¶ 55 We briefly address defendants' additional arguments that certain principles of statutory construction call for the statute of repose to control over the relation back doctrine and Wrongful Death Act. Defendants argue that the statute of repose controls because it is more specific than the wrongful death and relation back statutes. Defendants also assert the statute of repose controls because it is substantive, unlike the procedural amendments statute containing the relation back provision.

¶ 56 We need not employ these principles of statutory construction because the statutory language is clear and unambiguous. Accordingly, the statutes must be applied as written, without resort to extrinsic aids of statutory construction. *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). We are enforcing the pertinent language of the Wrongful Death Act, the medical malpractice statute of repose, and the relation back doctrine as written without imposing limitations not expressed by the legislature upon them. Section 2-616(b) of the Code specifically states, "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time *under any statute* or contract prescribing or limiting the

time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed ***." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2010). Applying this specific language to the medical malpractice statute of repose allows Lawler to maintain the amended complaint alleging wrongful death. This interpretation does not create absurd, inconvenient, or unjust results, because the proposed amended complaint, as compared with the earlier, timely filed complaint, "show[s] that the events alleged were close in time and subject matter and led to the same injury." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 360 (2008).

¶ 57 CONCLUSION

¶ 58 For these reasons, we reverse the judgment of the trial court and remand for further proceedings.

¶ 59 Reversed and remanded.

Leonard v. Kurtz, 234 Ill. App. 3d 553 (3d Dist. 1992)

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

Ill. App. Ct., 3d Dist. · filed 1992-09-22 · Reporter opinion
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- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C041.2
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NATALIE LEONARD, Petitioner-Appellant, v. KARL KURTZ *et al.*, Respondents-Appellees.

Third District No. 3—91—0948

Opinion filed September 22, 1992.

Laird M. Ozmon, of Laird M. Ozmon, Ltd., of Joliet (James P. Stevenson, of counsel), for appellant.

Matyas & Norris, of Chicago (Patrick Norris, of counsel), for appellee Park Crematory, Inc.

Stefanich, McGarry, Wols & Okrei, of Joliet (Roman R. Okrei, of counsel), for appellee Gerald Dames.

Miles P. Cahill, of Modesto, Reynolds & McDermott, of Wheaton, for other appellees.

JUSTICE McCUSKEY delivered the opinion of the court:

The trial court dismissed various negligence counts alleged in plaintiff's amended complaint. We granted leave to appeal pursuant to Supreme Court Rule 308 (134 Ill. 2d R. 308) to consider the following two questions of law:

> "1. In a wrongful cremation cause of action, is the surviving spouse (or relatives) a bystander pursuant to *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1 and therefore subject to the zone of danger rule for resulting emotional distress?
>
> 2. In a wrongful cremation cause of action, is the surviving spouse (or relatives) a direct victim and thus an exception to the *Rickey* zone of danger rule as was the patient in *Corgan v. Muehling* (1991), 143 Ill. 2d 296, 574 N.E.2d 602 and thus not subject to the *Rickey* zone of danger rule for resulting emotional distress?"

In plaintiff's lawsuit for wrongful cremation of her husband's remains, we find the plaintiff was not a bystander or a direct victim of defendants' alleged negligence. Therefore, we affirm the trial court.

Plaintiff alleged in her amended complaint that she was the surviving spouse of Wilfred Leonard. As the lawful custodian of his remains, she employed defendants Karl Kurtz, Kurtz Memorial Chapel, Ltd., Kurtz Ambulance Service, Inc., and Kurtz Paramedic Service, Inc., to transport her husband's remains to defendants Gerald Dames and Gerald Dames and Sons Funeral Home.

The defendant Park Crematory, Inc., obtained possession of Mr. Leonard's remains and cremated them. Plaintiff did not authorize or desire the cremation of her husband's remains. Plaintiff was 70 years old and was raised and schooled in the Roman Catholic faith. She is a deeply religious person who believes that cremation is not a proper religious means for disposing of the remains of a human body.

Plaintiff alleged that defendants owed her a duty to use ordinary care to safeguard her husband's remains against unauthorized cremation. Plaintiff further alleged that the defendants were negligent in: (1) permitting the remains to be cremated without her approval; (2) failing to perform a proper identification of decedent's remains prior to cremation; and (3) failing to safeguard decedent's remains to prevent unauthorized cremation.

Plaintiff additionally alleged in her amended complaints that defendants Kurtz and Dames, who are licensed funeral directors, attempted to coerce her into signing a cremation consent form by

threatening to keep her husband's cremated remains. Plaintiff also claimed that they offered her free funeral services for his remains if she would sign the cremation consent form.

Plaintiff alleged that as a result of all of the defendants' acts, she "sustained severe injuries in that she suffered great pain and anguish and severe emotional distress."

Prior to 1983, Illinois courts applied the "impact rule" in cases of negligent infliction of emotional distress. Our supreme court in *Braun v. Craven* (1898), 175 Ill. 401, 51 N.E. 657, ruled that a plaintiff could not recover for physical injury that developed because of emotional distress *unless* he received either physical injury or some impact to his person at the occurrence of the tort. (*Braun*, 175 Ill. at 413, 51 N.E. at 661-62.) Under this rule, recovery for negligently caused emotional distress suffered by a direct victim or bystander who witnessed the injury of another was consistently denied unless accompanied by a contemporaneous physical injury or impact to the plaintiff. *Hayes v. Illinois Power Co.* (1992), 225 Ill. App. 3d 819, 823, 587 N.E.2d 559, 561.

In 1983, our supreme court adopted the zone of physical danger rule as an exception to the physical impact requirement. The zone of physical danger rule allows a bystander to an accident to plead a cause of action for negligent infliction of emotional distress. (*Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5.) The zone of physical danger rule requires that a plaintiff must have been endangered by the defendant's negligence and must have suffered physical injury or illness as a result of the emotional distress caused by the negligence. *Siemieniec v. Lutheran General Hospital* (1987), 117 Ill. 2d 230, 261, 512 N.E.2d 691, 707.

We note that under the supreme court's analysis in *Rickey*, Illinois courts have not previously allowed a cause of action for emotional distress based on the negligent mishandling of a corpse. *Koeller v. Cook County* (1989), 180 Ill. App. 3d 425, 535 N.E.2d 1118; *Courtney v. St. Joseph Hospital* (1986), 149 Ill. App. 3d 397, 500 N.E.2d 703.

[redacted] We find that the allegations of defendants' negligence in plaintiff's amended complaints clearly fail to meet the requirements of *Rickey*. Plaintiff does *not* allege that she suffered any physical injury or illness. Plaintiff's complaints allege that she "sustained severe injuries in that she suffered great pain and anguish and severe emotional distress." Plaintiff's allegation merely concludes that she suffered emotional distress. *Rickey* requires an allegation that plaintiff suffered physical injury or illness as a result of the emotional distress. It is not enough to simply equate physical injury or illness with emo-

memo p. 5, 9

tional distress. Plaintiff must allege the causation between her physical injury or illness and the emotional distress which was caused by defendants' negligence. Even if the plaintiff could demonstrate that she suffered "physical injury or illness resulting from emotional distress" (*Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5), she failed to allege that she was "in a zone of physical danger and *** [defendants' negligence put her in] reasonable fear for [her] own safety." *Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5.

Here, plaintiff did *not* allege that she witnessed any of defendants' alleged acts or omissions, *or* that she was placed in a zone of physical danger which caused her to fear for her own personal safety. Therefore, we find the plaintiff's allegations are insufficient to establish that she was a bystander within the zone of physical danger.

The second question which we are asked to address is whether the surviving spouse in a wrongful cremation action is a direct victim under *Corgan v. Muehling* (1991), 143 Ill. 2d 296, 574 N.E.2d 602. Plaintiff argues that she was a direct victim of defendants' alleged negligence. We disagree.

The plaintiff in *Corgan* sought damages for emotional distress caused by her therapist's exploitation when he convinced her to engage in sexual relations under the guise of therapy. Our supreme court in *Corgan* found that the plaintiff had stated a cause of action for negligence. (*Corgan*, 143 Ill. 2d at 308, 574 N.E.2d at 607.) The plaintiff correctly notes that the supreme court in *Corgan* clarified *Rickey* when it determined that the zone of physical danger rule applied only to bystanders and not to direct victims. (*Corgan*, 143 Ill. 2d at 304-06, 574 N.E.2d at 605-06; *Hayes*, 225 Ill. App. 3d at 824, 587 N.E.2d at 562.) Plaintiff argues that she is a direct victim of defendants' negligence just like the plaintiff in *Corgan*. Therefore, plaintiff argues that the zone of physical danger rule pertaining to bystanders does not apply in this appeal.

[redacted] Plaintiff contends that she is a direct victim because the mishandling of her husband's remains constituted a tort committed directly upon her. We disagree. We find that there is no contemporaneous physical injury to the plaintiff which is sufficient to make her a direct victim. Plaintiff also argues that for no other reason than that she is the surviving spouse, she must be a direct victim of a wrongful cremation. We also disagree.

We find that the facts in the instant appeal are dramatically different from the facts in *Corgan*. In *Corgan*, the plaintiff sued the defendant because of the malpractice which he performed directly upon her. Here, the plaintiff can only claim that her emotional dis-

tress was a derivative consequence of the allegedly negligent acts performed upon her deceased husband's remains. We note that the alleged acts of negligence clearly were not performed by the defendants directly upon the plaintiff. There was no direct contact between the plaintiff and defendants. Therefore, we find the plaintiff's reliance on *Corgan* is misplaced.

For the reasons indicated, the judgment of the circuit court of Will County which dismissed various negligence counts alleged in plaintiff's amended complaint is affirmed.

Affirmed.

SLATER and STOUDER, JJ., concur.

OFFICE MATES 5, NORTH SHORE, INC., Plaintiff-Appellant, v. ANNE HAZEN *et al.*, Defendants-Appellees.

First District (1st Division) No. 1—91—0284

Opinion filed August 3, 1992.—Rehearing denied September 30, 1992.

Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1998-08-27 · Reporter opinion
Published opinion

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Maness v. Santa Fe Park Enterprises., Inc., 298 Ill. App. 3d 1014 (1st Dist. 1998)

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Maness v. Santa Fe Park Enterprises., Inc.

298 Ill. App. 3d 1014 · Appellate Court · Filed 1998-08-27 · 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.

LEANNE MANESS, Indiv. and as Special Adm'r of the Estate of Edward L. Maness, Deceased, Plaintiff-Appellant, v. SANTA FE PARK ENTERPRISES, INC., d/b/a Santa Fe Speedway, et al., Defendants-Appellees. First District (4th Division) No. 1-96-4215 Opinion filed August 27, 1998. Helen W. Mehok, of Chicago (Helen W. Mehok and Mary A. Mazuk, of counsel), for appellant. Clausen Miller, PC., of Chicago (James T. Ferrini, Richard G. Howser, Jerome C. Studer, and Melinda S. Kollross, of counsel), for appellees.

Opinion

JUSTICE McNAMARA

delivered the opinion of the court:

Plaintiff's decedent, Edward L. Maness (Maness), suffered an ultimately fatal heart attack while participating in a stock car race at Santa Fe Speedway (Santa Fe) on July 10, 1993. Plaintiff, Leanne Maness (plaintiff), filed suit individually and as special administrator of the estate of her husband, seeking damages as a result of Edward's death. On October 23, 1996, the trial court granted the motion of defendants, Santa Fe Enterprises, Inc., d/b/a Santa Fe Speedway, and National Association for Stock Car Auto Racing, Inc. (NASCAR) (defendants), to dismiss plaintiff's second amended complaint with prejudice. Plaintiff appeals that order. We affirm. The relevant facts are as follows.

On July 10, 1993, Maness participated in an auto race at defendants' race track. At the time Maness was 51 years old and had been racing stock cars for many years. During the race Maness suffered an ultimately fatal heart attack. Maness died on July 11, 1993. Plaintiff was named special administrator of her husband's estate.

Prior to participating in the July 10, 1993, race, Maness signed three releases/waivers of liability expressly agreeing to release, waive, and discharge defendants from all liability for his injury or death whether caused by the negligence or gross negligence of defendants or

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otherwise.

In April 1993, Maness applied for NASCAR membership and a NASCAR license in order to participate in NASCAR-sponsored racing events. In exchange for becoming a member and receiving a NASCAR license Maness paid a $65 fee and signed a "Release and Waiver of Liability and Indemnity Agreement," which provided in pertinent part that Maness:

"1. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoter, participants, racing association, sanctioning organization or any subdivision thereof, track operator, track owner, *** from all liability to the undersigned, his/ her personal representatives, assigns, heirs and next of kin for any and all loss or damage, and any claim or demands therefore on account of the 'releasees' or otherwise while the undersigned is in or upon the restricted area, and/or competing, officiating in, observing, working for, or for any purpose participating in the EVENT(S);

2. HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the 'releasees' and each of them for any loss, liability, damage, or cost they may incur due to the presence of the undersigned in or upon the restricted area or in any way competing, officiating, observing, or working for, or for any purpose participating in the EVENT (S) and whether caused by the negligence or gross negligence of the 'releasees' or otherwise.

3. HEREBY ASSUMES FULL RESPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence or gross negligence of 'releasees' or otherwise while in or upon the restricted area and/or while competing, officiating, observing, or working for or for any purpose participating in the EVENT(S)."

Prior to the July 10, 1993, race, Maness also signed a competitor permit, which contained a release and waiver of liability agreement identical to that contained in the NASCAR membership application. Maness signed this release in consideration for being allowed to compete in the race.

Moreover, on July 10, 1993, Maness paid a fee and obtained a pit permit, which allowed him to enter the pit area at the race track and to compete in the races being held that evening. The pit permit contained the following release agreement, which Maness signed:

"I hereby release speedway owner, operator, promoter, sanctioning body and any other person or persons connected with the racemeet for which this Pit Permit has been issued from all liability for personal injury or property damage whether arising from claims of negligence, gross negligence or any other cause, while preparing, practicing, qualifying or participating in or attending said race-meet."

On July 6, 1995, plaintiff, individually and as special administrator of her husband's estate, filed a two-count complaint against defendants. Count I, sounding in negligence/ wrongful death, alleged that defendants negligently delayed providing medical assistance to Maness, causing his heart attack to become "irreversible" and resulting in his death. Count II was brought by plaintiff individually and alleged infliction of mental distress. The

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trial court granted defendants' motion to dismiss and granted plaintiff leave to file her first amended complaint.

Plaintiffs first amended complaint set forth expanded versions of the two counts contained in the original complaint. Count I sounded in negligence, alleging that Maness was participating in a race when his car struck the track's outside wall and rolled to a stop in the track's infield; that Maness gave no hand signal to indicate that he was not in need of medical aid; that defendants negligently failed to immediately stop the race and dispatch medical personnel; that defendants did not dispatch medical personnel until the next race event was completed; that as a proximate result of this negligence Maness's heart attack "went unattended for a protracted amount of time so that it became irreversible"; and that the "danger of not being promptly sent medical assistance was not foreseeable because Maness "had a reasonable expectation that he would receive prompt medical attention." Count II attempted to state a cause of action for "extreme and outrageous misconduct" alleging:

"19. That the plaintiff, Leanne Maness, was the wife of Edward L. Maness; she was present in the grandstands of the defendants' track; she saw that her husband needed help; she saw no movement in his car; she saw no signal from him indicating that he was all right; she saw his pit crew pleading for someone to go help; she heard others asking officials to send help; she ran to the starter's gate to go help her husband; defendants' employees stopped her; defendants' employees heard her yells, screams and crying; and she observed the defendants' employees refusing to allow a registered nurse from going to her husband's assistance.

20. That the defendants ignored all entreaties for help, refused to allow others to help and observed plaintiff's anguish resulting therefrom.

21. That as a direct and proximate result of the aforesaid extreme and outrageous misconduct of defendants' agents, servants and employees, the plaintiff, Leanne Maness, sustained severe and permanent mental and emotional trauma and shock."

The trial court granted defendants' motion to dismiss the first amended complaint with prejudice on July 11, 1996. The court found count I to be barred by the releases signed by Maness, which "were clearly intended to cover any and all risk of death due to the negligence or gross negligence of the defendants." Count II was dismissed for failure to state a cause of action, as Illinois law does not recognize the tort of "outrageous misconduct" and the facts alleged were insufficient to state a cause of action for intentional or negligent infliction of emotional distress. The court granted plaintiff leave to file her second amended complaint.

On July 31, 1996, plaintiff filed a four-count second amended complaint. Counts I and II were repled from the first amended complaint to preserve them for appeal. Count III alleged the breach of an implied in fact contract between defendants and Maness under which defendants were required to provide "reasonably prompt emergency medical personnel to aid plaintiff's decedent in the event that he became injured or ill." Count IV alleged that defendants intentionally failed to promptly provide medical assistance to

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Maness. Defendants moved to dismiss counts I and II in accord with the court's July 11, 1996, order; to dismiss count III under section 2 - 619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2 - 619 (West 1996)) as barred by the releases signed by Maness; and to dismiss count IV under section 2 - 615 of the Code (735 ILCS 5/2 - 615 (West 1996)) on statute of limitations grounds and for failure to state a cause of action.

On October 23, 1996, the trial court granted defendants' motion to dismiss plaintiffs second amended complaint with prejudice. Counts I and II were dismissed for the reasons stated in the court's July 11, 1996, order. Count III was dismissed based upon the releases signed by Maness, which the court found to clearly absolve defendants from liability for negligent and grossly negligent acts. The court found that no implied contract to provide prompt medical assistance could coexist with these express waivers of liability. Count IV was dismissed for failure to state a cause of action. Plaintiff appeals from this order.

On appeal plaintiff contends that: (1) the trial court erred in ruling that the releases signed by Maness defeated plaintiffs claim for defendants' negligent failure to promptly provide medical assistance; (2) the trial court erred in dismissing count II because it stated a valid, recognized cause of action for outrageous misconduct; (3) the trial court erred in dismissing count III because it stated a valid cause of action for breach of an implied in fact contract; and (4) the trial court erred in dismissing count IY which pled a cause of action for intentionally withholding medical assistance.

Plaintiff first contends that the trial court erred in ruling that the releases signed by Maness defeated her claim for defendants' negligent failure to promptly provide medical assistance to Maness. Specifically, plaintiff contends that the delay in providing medical treatment during Maness' heart attack was not the type of risk that ordinarily accompanies auto racing and therefore was not covered by the signed releases. We disagree.

In general, exculpatory contracts, such as the releases signed by Maness, are valid and enforceable in Illinois as long as they are not violative of public policy and there is not a unique relationship between the parties such as common carrier/passenger or employer/ employee, which militates against enforcement of the agreement. Lohman v. Morris, 146 Ill. App. 3d 457, 497 N.E.2d 143 (1986); Harris v. Walker, 119 Ill. 2d 542, 519 N.E.2d 917 (1988). Our courts have consistently held that exculpatory contracts, such as the releases signed by Maness, bar negligence claims in the auto racing context. Schlessman v. Henson, 83 Ill. 2d 82, 413 N.E.2d 1252 (1980); Koch v. Spalding, 174 Ill. App. 3d 692, 529 N.E.2d 19 (1988); Morrow v. Auto Championship Racing Ass'n, 8 Ill. App. 3d 682, 291 N.E.2d 30 (1972); Rudolph v. Santa Fe Park Enterprises, Inc., 122 Ill. App. 3d 372, 461 N.E.2d 622 (1984); Lohman, 146 Ill. App. 3d at 461, 497 N.E.2d at 145.

The releases signed by Maness contain broad exculpatory language that clearly releases defendants from all liability for personal injury or death resulting from their negligence, including their alleged delay in providing prompt medical assistance to Maness. The decision in Schlessman is instructive on this point. Mr. Schlessman was injured while participating in a stock car race when a portion of the track collapsed, causing his car to crash. Before participating in the race, Schlessman signed a broad release releasing defendants from "all liability" to him "whether caused by the negligence of Releasees or

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otherwise" while he was in the restricted area. Plaintiff argued that the occurrence was not within the terms of the release. In holding plaintiff's negligence claim against the track owner barred by the release the court stated:

"The release in question was designed to encompass all claims against defendant based on its negligence, even though the precise cause of the accident may have been extraordinary. The very nature of the parties' activity requires this result, absent contrary legislation." (Emphasis added.) Schlessman, 83 Ill. 2d at 86, 413 N.E.2d at 1254.

Maness signed three similarly broad releases releasing defendants from "any and all loss or damage, and any claim or demands therefore on account of the 'releasees' or otherwise" and from "all liability for personal injury or property damage whether arising from claims of negligence, gross negligence, or any other cause." Maness expressly assumed "full responsibility for ANY RISK OF BODILY INJURY, DEATH, or PROPERTY DAMAGE due to the negligence or gross negligence of 'releasees' or otherwise." As in Schlessman, these releases were clearly designed to cover all claims against defendants based on their negligence, including their alleged negligent delay in providing medical assistance to Maness.

Plaintiff attempts to circumvent the application of these releases by arguing that the releases do not bar her negligence claim because the risk faced by Maness (a delay in providing medical treatment during Maness' heart attack) was not the type of risk that ordinarily accompanies auto racing and was not foreseeable to Maness. We reject this argument.

The risk of requiring medical attention during a race is one that ordinarily accompanies the dangerous sport of auto racing. Plaintiff admitted as much in her pleadings. Paragraph 21 of count I states: "Plaintiff's decedent had a reasonable expectation that he would receive prompt medical attention under the circumstances as aforesaid." Incidents requiring medical attention are common at racetracks. Maness, as an experienced racer, expected prompt and adequate medical care at every race. Likewise, he should have expected that negligence on the part of defendants regarding the medical care provided was possible and could result in serious injury or death to participants in the race.

The fact that Maness could not foresee the exact circumstances necessitating prompt medical assistance is irrelevant. As our supreme court noted in Schlessman:

"[A] myriad of factors, which are either obvious or unknown, may singly or in combination result in unexpected and freakish racing accidents. Experienced race drivers, such as plaintiff, are obviously aware of such occurrences and the risks attendant to the sport of auto racing. The parties may not have contemplated the precise occurrence which resulted in plaintiffs accident, but this does not render the exculpatory clause inoperable. In adopting the broad language employed in the agreement, it seems reasonable to conclude that the parties contemplated the similarly broad range of accidents which occur in auto racing." (Emphasis added.) Schlessman, 83 Ill. 2d at 86, 413 N.E.2d at 1254.

Defendants' reliance on Simpson v. Byron Dragway, Inc., 210 111. App. 3d 639, 569 N.E.2d 579 (1991), is misplaced. The driver in Simpson was killed when his race car struck

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a deer that had run onto the racetrack. The court held that the risk of an animal running onto the racetrack was not the type of risk that ordinarily accompanied the sport of auto racing. Therefore the incident was not covered by the release signed by plaintiff.

The risk of requiring medical attention during a race, unlike the risk of hitting a stray deer that has wandered onto a racetrack, is one that ordinarily accompanies auto racing as evidenced by plaintiff's admission that Maness had a reasonable expectation of receiving prompt medical attention. Maness accepted this risk and agreed to exculpate defendants from any alleged negligence in connection with it when he executed the broad releases expressly releasing defendants from all liability for personal injury and death arising from any negligence on their part.

Plaintiffs argument that the releases do not apply because Maness was no longer participating in the event at the time of defendants' alleged delay in sending medical assistance is untenable. The release and waiver of liability agreement and the competitor permit signed by Maness specifically state that defendants are released from liability for their negligent and grossly negligent acts "while the undersigned is in or upon the restricted area." The definition of restricted area expressly includes the infield where Maness sat in his car during defendants' alleged delay in providing medical assistance. The releases apply to defendants' conduct and the trial court did not err in finding count I barred by them.

Plaintiff next contends that the trial court erred in dismissing count II because it states a valid, recognized cause of action for outrageous misconduct. We disagree.

Relying on Doe v. Calumet City, 161 Ill. 2d 374, 641 N.E.2d 498 (1994), plaintiff contends that Illinois courts recognize a tort for outrageous misconduct. However, the opinion in Doe makes it clear that outrageous misconduct is one element of the tort of intentional infliction of emotional distress, not a separate and distinct tort. Doe, 161 Ill. 2d at 392, 641 N.E.2d at 506. Count II does not state a cause of action as Illinois courts do not recognize a cause of action for outrageous misconduct. Nor does plaintiff state a cause of action for intentional or negligent infliction of emotional distress.

A bystander, such as plaintiff, cannot recover for negligent infliction of emotional distress unless she establishes that: (1) she was in the "zone of danger"; (2) she had a reasonable fear for her own safety; and (3) she suffered physical injury or illness resulting from the alleged emotional distress. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Count II fails to allege any of these requisite elements. In order to be in the "zone of danger" a bystander "must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to [her] of physical impact." Rickey, 98 Ill. 2d at 555, 457 N.E.2d at 5. Here plaintiff alleges that she was in the grandstands when she witnessed defendants' negligent failure to provide prompt medical assistance to her husband, who was in the infield of the track. There was certainly no risk of physical impact to her. Moreover, count II fails to allege that plaintiff had a reasonable fear for her own safety or that she suffered any physical injury or illness.

To state a cause of action for intentional infliction of emotional distress one must establish

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that: (1) defendant's conduct was extreme and outrageous; (2) defendant intended that his conduct inflict severe emotional distress or knew there was a high probability that his conduct would cause severe emotional distress; and (3) defendant's conduct in fact caused severe emotional distress. Doe, 161 Ill. 2d at 392, 641 N.E.2d at 506. Count II fails to allege that defendants intended their conduct to inflict severe emotional distress or that they knew there was a high probability that it would.

We find that the trial court did not err in dismissing count II for failure to state a cause of action.

Plaintiff next contends that the trial court erred in dismissing count III because it stated a valid cause of action for breach of an implied in fact contract. Specifically, plaintiff contends that defendants accepted Maness' money and agreed to provide him with their services and facilities for racing, including two ambulances with emergency personnel. According to plaintiff, these circumstances gave rise to an implied in fact contract between defendants and Maness requiring defendants to provide prompt medical attention to Maness in the event that he became injured or ill.

Plaintiff's contention flies in the face of the general principles of contract law. The law is clear that an implied contract cannot coexist with an express contract on the same subject. Zadrozny v. City Colleges of Chicago, 220 Ill. App. 3d 290, 581 N.E.2d 44 (1991); Stone v. City of Areola, 181 Ill. App. 3d 513, 536 N.E.2d 1329 (1989); Gadsby v. Health Insurance Administration, Inc., 168 Ill. App. 3d 460, 522 N.E.2d 865 (1988); Board of Directors of Carriage Way Property Owners Ass'n v. Western National Bank, 139 Ill. App. 3d 542, 487 N.E.2d 974 (1985); Industrial Lift Truck Service Corp. v. Mitsubishi International Corp., 104 Ill. App. 3d 357, 432 N.E.2d 999 (1982).

In the case sub judice there are three express contracts in the form of the releases signed by Maness which expressly relieve defendants from liability for all negligent and grossly negligent acts. These express contracts negate the existence of any implied in fact contract. We reject plaintiffs contention that the alleged implied in fact contract merely supplements the express written contracts. Plaintiffs interpretation, that defendants impliedly agreed to provide Maness with medical care and to be responsible for the failure to do so, is directly contrary to the express terms of the written releases, which indicate defendants' intention tó be free from all responsibility for any harm that might come to Maness in connection with the race. Allowing this cause of action to stand would enable plaintiff to sue for damages on an implied duty when that very duty had been expressly waived by Maness. Plaintiff cannot resort to quasi-contractual theories to shift Maness' contractually assumed risk of injury or death resulting from defendants' negligence or gross negligence. Industrial Lift Truck Service Corp. v. Mitsubishi International Corp., 104 Ill. App. 3d 357, 432 N.E.2d 999 (1982).

Plaintiff makes three arguments as to why defendants should not be able to rely on the releases signed by Maness. We reject all three. Plaintiff first argues that defendants cannot avail themselves of the benefit of the releases because they did not perform their obligations under the contract. This argument is not supported by the record. Maness released defendants from all liability for injury or death resulting from defendants'

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negligence or otherwise in exchange for defendants' permission to enter the restricted areas and participate in the stock car races. Defendants fulfilled their contractual obligations by allowing Maness to enter the restricted areas and participate in the July 10, 1993, race and therefore are entitled to enforce Maness' release.

Plaintiffs second argument is that the foreseeability rule espoused in Simpson v. Byron Dragway, Inc., 210 Ill. App. 3d 639, 569 N.E.2d 579 (1991), prevents defendants from using the releases as a defense. We have already rejected this argument above.

Plaintiffs third argument is that the doctrine of equitable estoppel bars defendants use of the releases. Estoppel must be pled to be available (Estes Co. v. Employers Mutual Casualty Co., 79 Ill. 2d 228, 402 N.E.2d 613 (1980); Meier v. Aetna Life & Casualty Standard Fire Insurance Co., 149 Ill. App. 3d 932, 500 N.E.2d 1096 (1986); Chicago Budget Rent-A-Car Corp. v. Maj, 5 Ill. App. 3d 265, 282 N.E.2d 155 (1972)) and cannot be raised for the first time an appeal (People ex rel. Skinner v. Graham, 170 Ill. App. 3d 417, 524 N.E.2d 642 (1988)). Plaintiff did not plead estoppel below. Indeed, plaintiff relies on several facts that were never pled, such as "defendants knew that they would not send assistance to decedent that"; "defendants knew decedent would rely on them to provide emergency medical assistance in the event of injury or illness"; and "decedent signed the releases because he believed the defendants would send emergency medical assistance," to support her claim of equitable estoppel. A required element of equitable estoppel is that the party against whom the estoppel is alleged must have had knowledge at the time the representations were made that the representations were untrue. Vaughn v. Speaker, 126 Ill. 2d 150, 162, 533 N.E.2d 885, 890 (1988). Yet, there is no allegation in the second amended complaint that defendants knew that they would not send aid to Maness that night.

We find that the trial court correctly dismissed count III as the three express written contracts entered into between Maness and defendants negate the existence of any implied contract and release defendants from any liability to plaintiff.

Finally, plaintiff contends that the trial court erred in dismissing count TV, which pled a cause of action for intentionally withholding medical assistance. We disagree.

Count IV is little more than a restatement of plaintiffs previously dismissed negligence count with the addition of the word "intentionally." The mere addition of the words "intentionally" or "wilfully, and wantonly" to the factual allegations used in plaintiff's negligence claim is insufficient to support a cause of action for intentional tort. Harkcom v. East Texas Motor Freight Lines, Inc., 104 Ill. App. 3d 780, 433 N.E.2d 291 (1982); Holtz v. Amax Zinc Co., 165 Ill. App. 3d 578, 519 N.E.2d 54 (1988). Conclusory allegations or mere characterizations of alleged acts as intentional or wilful and wanton are insufficient. Dowd & Dowd, Ltd. v. Gleason, 284 Ill. App. 3d 915, 672 N.E.2d 854 (1996); Winfrey v. Chicago Park District, 274 Ill. App. 3d 939, 654 N.E.2d 508 (1995).

Furthermore, in order to state a claim for intentional misconduct the plaintiff must allege that the defendant committed the act with the intent to cause harm or with "substantial certainty" that harm would result. Wells v. IFR Engineering Co., 247 Ill. App. 3d 43, 617

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N.E.2d 204 (1993). Plaintiff failed to allege either that defendants intended to harm Maness or that defendants acted with "substantial certainty" that harm would result. The only intentional act alleged is the intentional withholding of medical care. It is simply not enough to allege that defendants intentionally failed to stop the race and dispatch emergency medical personnel and intentionally failed to send a tow truck. Wells, 247 Ill. App. 3d at 45-46, 617 N.E.2d at 205. Plaintiff must also allege defendants' intention to harm Maness. She did not.

The two cases relied on by plaintiff, Siemieniec v. Lutheran Gen eral Hospital, 117 Ill. 2d 230, 512 N.E.2d 691 (1987), and Sutton v. Overcash, 251 Ill. App. 3d 737, 623 N.E.2d 820 (1993), are inapposite as they address the proper measure of damages in a tort action, not the intent element required to state a cause of action for intentional tort. We find that the trial court did not err in dismissing count IV for failure to state a cause of action.

Accordingly, for the reasons set forth above, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

CERDA, EJ., and SOUTH, J., concur.

Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995)

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

Ill. Supreme Court · filed 1995-08-10 · Reporter opinion
Supreme Court

Treatment in the index: declined to follow by Schweihs v. Chase Home Finance, LLC, 2015 IL App (1st) 140683. Check it in a citator before filing.

Where the memo cites it

- memo p. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.5
- memo p. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.4
- memo p. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.7
- memo p. 8 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.5
- memo p. 8 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.4
- memo p. 8 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.7
- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.4
- memo p. 11 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.10
- memo p. 12 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C008.9

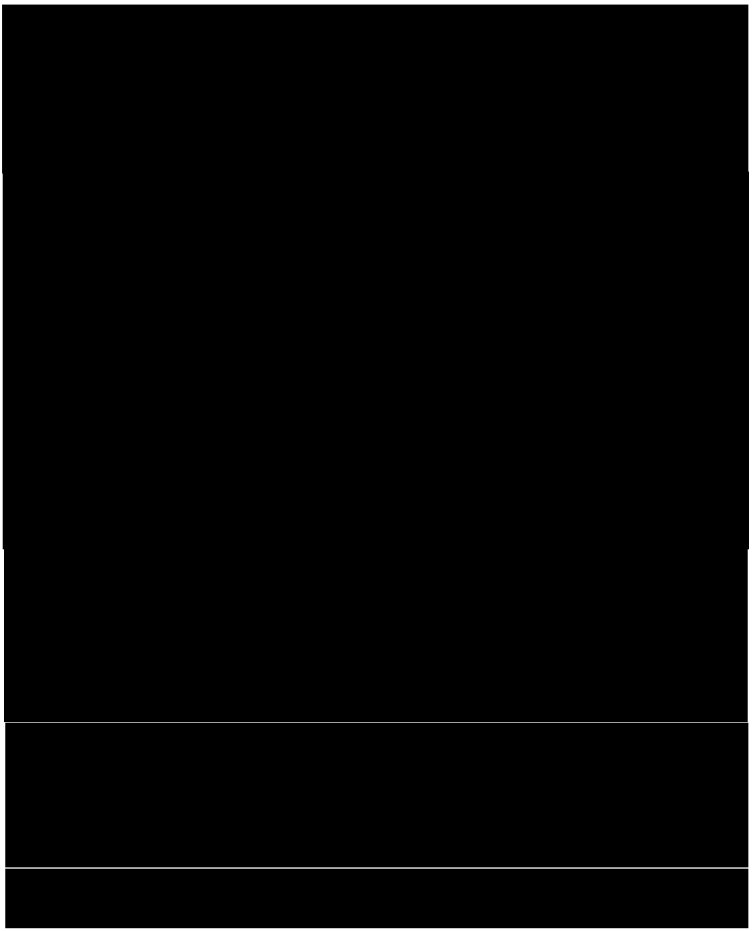
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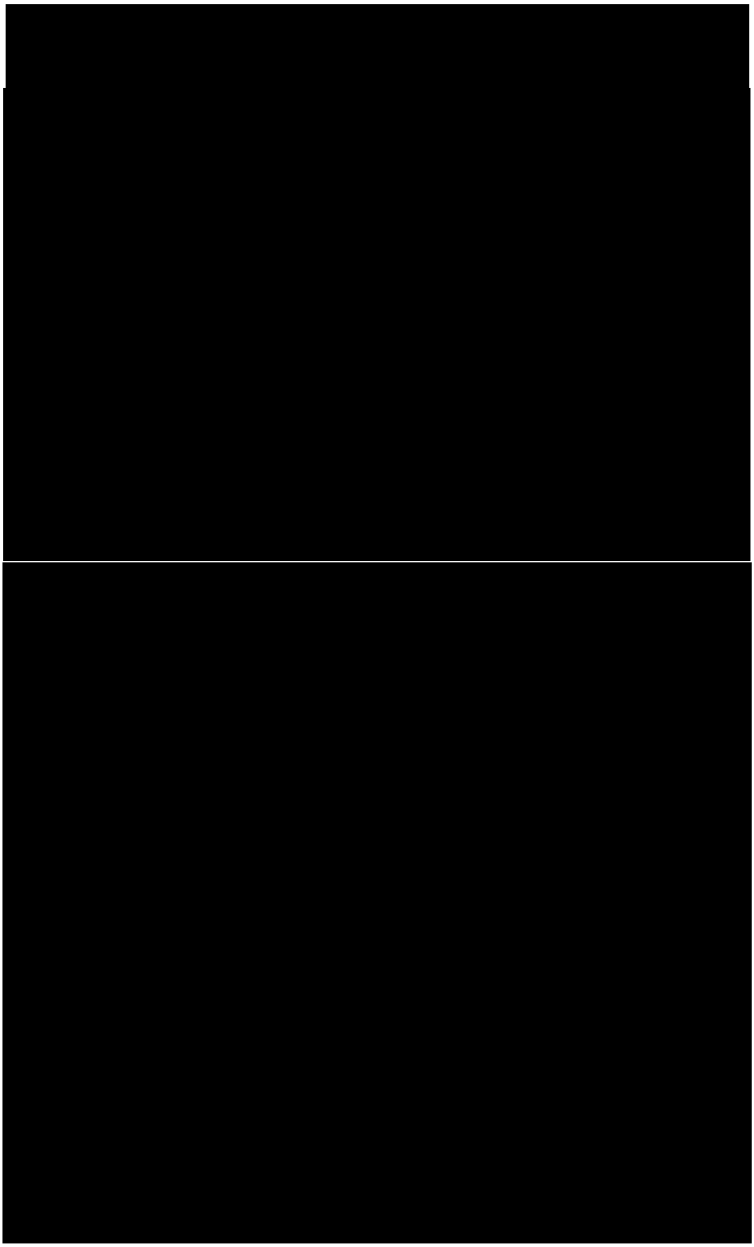
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(No. 76360

DAVID R. PASQUALE, Adm'r of the Estate of Diane K. Pasquale, Deceased, for the Benefit of Samantha Pasquale, Appellant, v. SPEED PRODUCTS ENGINEERING *et al.* (F&B Manufacturing Company, Appellee).

Opinion filed August 10, 1995.





McMORROW, J., joined by HARRISON, J., dissenting.

Leonard M. Ring & Associates, P.C. (William J. Jovan, Leonard M. Ring and Leslie J. Rosen, of counsel), and Paul P. Biebel, Jr., of Altheimer & Gray, all of Chicago, for appellant.

John W. Bell and Charles P. Rantis, of Johnson & Bell, Ltd., of Chicago (Thomas H. Fegan and Mindy Kallus, of counsel), for appellee.

Womick & Associates, Chtd., of Carbondale (John P. Womick, of counsel), for *amicus curiae* Illinois Trial Lawyers Association.

JUSTICE FREEMAN delivered the opinion of the court:

Plaintiff, David R. Pasquale, as administrator of Diane K. Pasquale's estate, brought a wrongful-death action against Great Lakes Dragway and Speed Products Engineering in the circuit court of Cook County for the benefit of Samantha Pasquale, the surviving next of kin, and himself (David), the surviving spouse. Wesley Law, acting as the special administrator of the estate of Raymond Law, deceased, joined in bringing the action as coplaintiff. Prior to trial, plaintiff settled with Great Lakes Dragway (Great Lakes) in the valued amount of $861,789. The case proceeded to trial on plaintiff's fourth-amended complaint and on cross-claims for contribution by the two remaining defendants. The complaint alleged, *inter alia*, a wrongful-death action sound-

ing in strict liability against joint tortfeasors Speed Products Engineering (Speed) and F&B Manufacturing Company (F&B) in benefit of Samantha (count I), and a separate wrongful-death action sounding in strict liability against Speed alone in benefit of David (count II). After the parties rested, the trial court refused to instruct the jury on a separate claim by plaintiff, as an individual, against Speed, seeking recovery for emotional distress based on a theory of strict liability (count III). The refusal, in effect, granted Speed a directed verdict on that count.

Jury verdict of $1.5 million was subsequently returned against Speed and F&B for the benefit of Samantha, and a separate jury verdict of $150,000 was returned against Speed for the benefit of David. The trial court entered two judgments, *nunc pro tunc*, on the two verdicts.

During post-trial proceedings, the court denied F&B's motion for judgment notwithstanding the verdict in favor of Samantha, but granted its request for a setoff of the settlement amount. The trial court directed a setoff of $430,894.50 against the judgment in benefit of Samantha. The trial court additionally denied plaintiff's motion for a new trial on damages and reinstatement of count III.

F&B subsequently appealed the trial court's denial of the motion for judgment notwithstanding the verdict as well as the setoff application. Plaintiff, as administrator and individually, cross-appealed the sufficiency of the damages and the grant of directed verdict in favor of Speed. The appellate court affirmed the trial court's rulings, with the exception of the ruling applying the setoff. The appellate court determined that the trial court should have entered one wrongful-death judgment on the two separate verdicts for Samantha and David, and then applied a setoff of $861,789, the full amount of

the Great Lakes settlement, against that portion of the judgment, $1.5 million, for which F&B and Speed were jointly and severally liable. The appellate court reversed and remanded with directions to that effect. (252 Ill. App. 3d 724.) Presiding Justice Jiganti dissented, regarding the directed setoff application. Plaintiff's petition for a rehearing and alternative request for certificate of importance were later denied.

We granted plaintiff's petition for leave to appeal (145 Ill. 2d R. 315), allowed F&B's request for cross-relief (145 Ill. 2d R. 315(g)), and permitted the filing of an *amicus curiae* brief in support of plaintiff (134 Ill. 2d R. 345(a)). For reasons which follow, we now affirm the judgment of the trial court in directing a verdict in Speed's favor on plaintiff's individual action for emotional distress and denying F&B's motion for judgment notwithstanding the verdict in benefit of Samantha. We also affirm that part of the trial court's judgment granting a setoff of $430,894.50 against the judgment in Samantha's benefit.

ISSUES

The issues on appeal are whether the trial court erred by (1) allowing directed verdict in favor of Speed on David's claim for emotional distress brought under a theory of strict liability; (2) denying F&B's motion for judgment notwithstanding the verdict; and (3) allocating the wrongful-death settlement to the claims of individual beneficiaries and applying setoffs against those beneficiaries' individual recoveries.

FACTUAL BACKGROUND

On May 27, 1979, Burgess Clayton Harris, a professional race car driver, was driving his top fuel race car at Great Lakes Dragway when an unknown failure in the car's driveline caused the engine's speed to greatly accelerate. As the engine's speed accelerated, the clutch

assembly's rotations also accelerated to the point where the assembly flew completely apart. The intact clutch parts burst out of a bellhousing or containment device in which they were enclosed and flew through the air into the crowd of spectators. One of the clutch parts struck Diane Pasquale in the head, killing her. David Pasquale, Diane's husband, was seated next to her at the time.

Evidence at trial would later reveal that the driveline failure did not cause the accident; such failures happen with frequency due to the amount of power produced by race car engines. Expert testimony was also presented that the accident was caused by the bellhousing's failure to contain the clutch parts. Undisputed expert testimony was presented that steel used in the bellhousing, when tested, yielded a low level of tensile and impact strength, meaning that the material was very brittle. Furthermore, the type of fractures to the container's surface also indicated that the material was brittle. The material did not meet specifications established by the Speed Equipment Manufacturer's Association, an organization which has developed performance specifications and testing procedures for race car parts in order to provide greater safety for drivers and spectators.

The chassis of Harris' car was built by Peek Brothers (Peek), which purchased the bellhousing from Speed on January 12, 1978. Speed was a well-known distributor of race car parts. Speed's owner at the time of the accident was David Russell. Speed did not manufacture any of the parts it sold; it merely operated out of a single room and employed only two non-highly technically skilled employees. Peek ordered the bellhousing or "high gear can" from Speed's catalogue.

Roy Fjastad, the prior owner of Speed, originally contracted with F&B to manufacture the cans. Russell

subsequently acquired the company, but continued the practice of ordering the cans from F&B in the same manner as Fjastad. F&B, at the time of trial, was the largest hydroforming company in the world. Hydroforming is the process by which a flat metal plate is stretched to form a desired shape through the use of a die and a diaphragm which exerts pressure on the metal causing it to stretch. F&B was engaged in the manufacture and assembly of certain products, including, but not limited to, designing, engineering and testing. F&B represented itself in at least one trade journal as capable of providing complete technical engineering and development services with over 20 years' experience.

This opinion will present additional facts as the discussion warrants.

DISCUSSION

I

David's Claim for Emotional Distress Based on Theory of Strict Liability

Count III of the fourth-amended complaint was an action by David, as an individual, solely against Speed, and sought damages for emotional distress under a theory of strict products liability. Count III alleged:

> "As a proximate result of DIANE K. PASQUALE being struck with great force by one of said clutch parts her bone marrow, blood, and brain matter did strike Plaintiff DAVID R. PASQUALE with great force on his face and other parts of his body causing marks which remained for several weeks. As a proximate result of said impact and occurrence Plaintiff experienced and will experience severe suffering, mental anguish and emotional distress, lost and will lose great earnings and profits, had [*sic*] has expended and will expend great expenses for medical care and treatment."

Speed subsequently filed a motion for summary judgment which was granted by the trial court. The trial

court ruled that damages for emotional distress were not recoverable under a strict products liability theory.

At trial, evidence established that David and Diane were in the stands at Great Lakes Dragway watching the auto race. David testified that when a race car took off, he heard a noise. Then something which felt like a handful of sand hit the side of his face. David looked over at Diane and saw that she was sitting upright, but was falling over towards him. According to David, Diane's brains and blood were "all over the place." The entire interior of Diane's head, including the backs of her eyeballs, was exposed to David's sight. After he placed the top of Diane's head back in place, he felt her face for a while, then picked her up and carried her down the stands to a waiting ambulance. David then became sick and went into shock. David was aware that Diane was dead as he carried her.

David testified that after Diane's death, he became a "basket case." He could not work, lost weight, was eventually fired from his job and had a difficult time finding work later. He also testified that he was "miserable, lonely and depressed" and still suffered bad dreams by the time of trial.

At the close of the evidence, the trial court denied plaintiff's request for a jury instruction on David's individual claim for emotional distress, thereby granting Speed, in effect, a directed verdict on count III. Plaintiff cross-appealed from that ruling. The appellate court affirmed on the basis that this court's decision in *Woodill v. Parke-Davis & Co.* (1980), 79 Ill. 2d 26, foreclosed consideration on the merits.

On appeal, F&B responds in support of affirming the trial court's ruling because Speed, the only defendant named in count III, is now in bankruptcy and has not appeared or filed a brief. This court denied F&B's motion to dismiss this issue from the appeal on the basis of

mootness. F&B now responds to avoid any potential prejudice to itself.

Plaintiff acknowledges that *Woodill* refused to recognize a cause of action in strict products liability for emotional distress and mental anguish. Plaintiff contends, however, that *Woodill* was based on then-existing law which limited recovery for emotional distress injury to instances of intentionally tortious conduct. (See *Knierim v. Izzo* (1961), 22 Ill. 2d 73.) Plaintiff argues that this limitation of "nonimpact cases" to the area of intentional tort liability was subsequently extinguished in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, and now such a recovery is permitted in negligence cases. Plaintiff argues that because the requirement of a contemporaneous physical injury or impact was extinguished in *Rickey* and formed the limiting concept in *Woodill*, there is no longer good reason to deny recovery for emotional distress based on strict products liability. (See *Woodill v. Parke Davis & Co.* (1978), 58 Ill. App. 3d 349, 355 (relying on "physical harm" requirement in section 402A of the Restatement (Second) of Torts (1965)).) Plaintiff characterizes *Rickey* as emphasizing the element of foreseeability in negligence actions, and notes that foreseeability is also a "cornerstone" of liability based on strict liability theory.

Defendant responds by correctly pointing out that plaintiff refers to himself as a "bystander," as was the plaintiff in *Rickey*. Defendant argues that plaintiff may not benefit from any potential expansion of *Rickey* because he did not, in the first instance, sufficiently plead or prove himself to have been a bystander.

Plaintiff, however, does not limit his *arguments* for allowing recovery for emotional distress under strict products liability theory to instances of bystanders. Plaintiff claims that he was both a direct victim of defendant's conduct as well as a bystander who wit-

nessed its effects upon another. (See *Jarka v. Yellow Cab Co.* (1994), 265 Ill. App. 3d 366.) Thus, according to plaintiff, the relevant inquiry is whether the absence of a contemporaneous impact or injury requirement for emotional distress recovery in negligence actions, for either direct victims or bystanders (*Rickey*, 98 Ill. 2d at 550, 554-55), means the allowance of an emotional distress recovery based on strict products liability. The parties thus initially dispute the relevant inquiry here.

We believe that plaintiff's arguments for extending strict liability are broad and not logically dependent on whether he was a direct victim or a bystander. Nor does his argument for expanding strict liability depend solely on *Rickey*. Although not cited by plaintiff, and decided after *Rickey*, *Corgan v. Muehling* (1991), 143 Ill. 2d 296, eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress on a theory of negligence. The rule plaintiff challenges is the requirement of a "physical harm" for recovery under strict liability (Restatement (Second) of Torts § 402A (1965)); his status as either a direct victim or bystander is immaterial to that broad challenge.

Nonetheless, it is clear that David's proofs at trial showed him to be a bystander and not a direct victim as that distinction is recognized under Illinois law. (See *Rickey*, 98 Ill. 2d 546 (bystander case); *Siemieniec v. Lutheran General Hospital* (1987), 117 Ill. 2d 230 (bystander case); *cf. Corgan v. Muehling*, 143 Ill. 2d 296 (direct victim case).) In *Rickey* and *Siemieniec*, the plaintiffs' alleged emotional distress resulted from their having witnessed or observed the physically harmful effects of the defendant's negligence on a close relative. In *Corgan*, the plaintiff's emotional distress was the direct consequence of the defendant's negligent conduct; the plaintiff's emotional distress did not result from injury to another.

↩ memo p. 4, 8, 9

David's evidence here did not show that he suffered emotional distress as an independent or direct consequence of the failure of F&B's bellhousing. There was no evidence that he greatly feared for his safety beyond that experienced as a result of his wife's accident. We conclude that this case represents a bystander case, despite David's arguments urging expansion beyond these facts. Thus, we confine our inquiry to whether the elimination of the contemporaneous injury or impact requirement for bystander recovery for emotional distress in the area of negligence meaningfully translates into an elimination of the element of physical harm for a bystander's recovery for emotional distress under strict liability theory.

In *Suvada v. White Motor Co.* (1965), 32 Ill. 2d 612, strict lability for unreasonably dangerous products was established as Illinois law, and the court adopted section 402A of the Restatement (Second) of Torts. In *Woodill*, this court agreed with and adopted the appellate court's decision that "strict liability should not be extended to include recovery for [a] plaintiff['s] emotional distress and mental anguish." (*Woodill*, 79 Ill. 2d at 38.) The appellate court reached its decision by relying on section 402A of the Restatement (Second) of Torts, which provides that " '[o]ne who sells any product in a defective condition unreasonably dangerous to user or consumer or to his property is subject to liability for *physical harm* thereby caused to the ultimate user or consumer ***.' " (Emphasis in original.) (See *Woodill*, 58 Ill. App. 3d at 355, quoting Restatement (Second) of Torts § 402A(1) (1965).) The appellate decision additionally recognized that, in Illinois, recovery for emotional distress had been traditionally limited to intentionally inflicted injury. *Knierim*, 22 Ill. 2d 73.

In *Rickey*, 98 Ill. 2d 546, this court held, in the case of a bystander, that a recovery for emotional distress

would be permitted in the case of negligent conduct without a requirement that the plaintiff show a contemporaneous injury or impact. (*Cf. Braun v. Craven* (1898), 175 Ill. 401 (establishing the impact rule).) In place of the impact rule, *Rickey* adopted the zone-of-physical-danger rule which had been applied by a majority of jurisdictions considering the matter. Under *Rickey*'s new rule, a bystander in a zone of physical danger, who reasonably feared for his own safety because of the defendant's negligence, was allowed to recover for physical injury or illness which manifested as a result of emotional distress. Although plaintiff argues otherwise, *Rickey* stated nothing regarding foreseeability.

In *Corgan*, 143 Ill. 2d 296, this court made clear that *Rickey*'s zone-of-physical-danger rule applied only to bystanders. *Corgan*, however, extended *Rickey*'s elimination of the impact rule to instances where plaintiffs were the direct victims of the negligent conduct and suffered emotional distress injury.

↩ memo p. 12

While *Rickey* and *Corgan* expanded recovery in the area of negligence, they did not change the law that there exists in Illinois no recovery for emotional distress under a theory of strict liability. In fact, a fair reading of *Rickey* conveys that that particular state of the law was implicitly endorsed. (See *Rickey*, 98 Ill. 2d 546.) Neither has plaintiff cited any Illinois appellate court decisions recognizing a strict liability cause of action, nor has he argued that the public interest is prejudiced by the absence of such a cause of action. Plaintiff urges only that courts in other jurisdictions allow such recovery and so should we.

With the exception of only a few cases (*Walker v. Clark Equipment Co.* (Iowa 1982), 320 N.W.2d 561; *Shepard v. Superior Court* (1977), 76 Cal. App. 3d 16, 142 Cal. Rptr. 612), the authorities cited by plaintiff appear to only concern emotional distress recovery under a

negligence theory (*In re Air Crash Disaster Near Cerritos, Cal.* (9th Cir. 1992), 967 F.2d 1421; *Pearsall v. Emhart Industries, Inc.* (E.D. Penn. 1984), 599 F. Supp. 207; *Masaki v. General Motors Corp.* (1989), 71 Haw. 1, 780 P.2d 566; *Waid v. Ford Motor Co.* (1984), 125 N.H. 640, 484 A.2d 1152); emotional distress recovery by the ultimate user or consumer of a product, rather than a bystander (*Jackson v. Johns-Mannville Sales Corp.* (5th Cir. 1986), 781 F.2d 394; *Kearney v. Phillips Industries, Inc.* (D. Conn. 1989), 708 F. Supp. 479; *Kately v. Wilkinson* (1984), 148 Cal. App. 3d 576, 195 Cal. Rptr. 902); or emotional distress recovery by a plaintiff who was a direct victim in addition to being a bystander (*Walters v. Mintec/International* (3d Cir. 1985), 758 F.2d 73).

When a rule of law has once been settled, contravening no statute or constitutional principles, such rule ought to be followed under the doctrine of *stare decisis* unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interest. (*Maki v. Frelk* (1968), 40 Ill. 2d 193; see also *Heimgaertner v. Benjamin Electric Manufacturing Co.* (1955), 6 Ill. 2d 152.) While these tenets cannot be so rigid as to incapacitate a court in its duty to develop the law, we do not perceive that the needs of our society have so changed or that injustice results from the rule at issue here such that it requires reevaluation. (See *People v. Gersch* (1990), 135 Ill. 2d 384, 396; *cf. Alvis v. Ribar* (1981), 85 Ill. 2d 1, 24.) Neither do we believe that the changes wrought by *Rickey* and its progeny, *Corgan*, the elimination of the impact rule in the area of negligence, support a similar change in Illinois at this time in the area of strict liability.

As discussed by the dissent in *Shepard v. Superior Court* (1977), 76 Cal. App. 3d 16, 142 Cal. Rptr. 612, there is significant reason not to extend a recovery for emotional distress based on fault liability to the realm of strict liability:

> "[T]he fault of a defendant is an indispensable element of duty of care in an action brought for the infliction of emotional distress, and that in the absence of fault or other culpable conduct a defendant may not be rendered liable for this particular harm. To put it another way, it means that in an action instituted for causing emotional trauma, the liability of a defendant is premised plainly and directly on the presence or absence of defendant's fault. Since the doctrine of strict liability is not founded upon fault or culpable conduct, a defendant manufacturer should not be held liable under the doctrine for the special harm of inflicting emotional distress upon a plaintiff." (*Shepard*, 76 Cal. App. 3d at 26, 142 Cal. Rptr. at 618-19 (Kane, J., dissenting).)

Consequently, we decline to reexamine the established rule that a physical harm is required to state a bystander's cause of action and recovery based on strict liability.

Although David alternatively claimed that he "incurred a physical impact" when he was struck by his wife's body parts, causing marks on his body for several weeks, we agree that the evidence at trial did not establish that he suffered "physical harm" as that element is commonly understood. We thus conclude that the trial court did not err in refusing to instruct the jury on damages for emotional distress, thereby, in effect, directing a verdict in favor of Speed against David on count III.

II

Denial of Judgment for F&B Notwithstanding the Verdict in Favor of Samantha

Plaintiff's fourth-amended complaint alleged that, at the time the bellhousing left the control of F&B and Speed, it was unreasonably dangerous because it was of inadequate strength. Plaintiff alleged that the bellhousing was of inadequate strength to contain the clutch parts in that the strength of its steel was inadequate, was of poor quality, had not been performance tested, and the sidewall of the container was less than one-fourth of an inch thick.

At the close of plaintiff's case and at the close of all the evidence, F&B moved for a directed verdict. After the jury returned a verdict against F&B and Speed in benefit of Samantha, F&B moved for judgment notwithstanding the verdict. F&B contended at trial and contends on this appeal that as a matter of law it was not liable to plaintiff. F&B rests its contention on the recognized contract-specifications defense. (See *Hunt v. Blasius* (1978), 74 Ill. 2d 203.) F&B asserts that the evidence established that it did not design the can which it manufactured for Speed and, thus, can avail itself of the defense.

"An independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow. If the contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them." (*Hunt*, 74 Ill. 2d at 209.) Nonetheless, a component part manufacturer can be held strictly liable where the assembler made no substantial change in the part and the injury is directly attributable to a defect in the component part. (*Thomas v. Kaiser Agricultural Chemicals* (1980), 81 Ill. 2d 206.) This rule obtains regardless of whether the defect in the component causes it to malfunction or the design of the component renders it faulty. See *Thomas*, 81 Ill. 2d 206.

Judgment verdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. (*Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494.) Further, judgment *n.o.v.* is improper where reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. *Wade v. City of Chicago Heights* (1991), 216 Ill. App. 3d 418.

At trial, concerning the issue of the can's design, F&B presented evidence that Speed originally supplied it with a "scale" drawing of the can. Purchase orders from this period reflect that the cans were also originally made out of aluminum. While Speed later directed F&B to change the material from aluminum to one-fourth-inch hot rolled steel, an F&B employee testified that the change from aluminum was never explained to F&B. Speed did not, however, specify that F&B use any particular grade of steel in the manufacture of the can. Thus, F&B selected the particular grade of steel it used based on what was available at local steel supply warehouses. In doing so, F&B purchased from a number of different steel suppliers.

According to F&B's evidence, Speed at some point also directed F&B to place three bosses on the cans. Certain changes regarding the height and diameter of the can were made by Speed and communicated to F&B. According to F&B, Speed never explained that the cans were used to contain clutch housings and assemblies. Russell, Speed's most recent owner, testified that he, himself, never told F&B that the cans were sold as clutch containers, nor did he ask F&B for the blueprint of the can or the material specifications. According to F&B, most of its customers did not explain the end use of their products.

Plaintiff's evidence disputed that F&B did not participate in the can's design or was ignorant of the can's intended use. Plaintiff relied on testimony by Charles Coakley, a highly skilled F&B employee, that the alleged "scale" drawing supplied by Speed looked to him as if it had been drawn by a high school draftsman. According to Coakley, the drawing looked like those brought in by many of F&B's customers. Coakley testified that customers ordinarily came to F&B, made sketches of what they wanted, and F&B would work

from the sketch until they developed it and produced a final drawing. Coakley also admitted that he made some changes to Speed's drawing, which were evidenced by his initialling on the drawing as to the height on the bosses and the can's diameter. Coakley insisted, however, that the changes were Speed's idea, not his, and that paperwork in the file would reflect this fact. Coakley, however, did not bring the papers to court which would support this testimony. Coakley additionally testified that he knew that Speed's bellhousing was almost identical to a part F&B was manufacturing for another company, Race Car Specialty.

Plaintiff's experts testified that the selection of materials is a part of the design of a product. They testified that knowledge of the material is requisite to the design process, and that selection of the material is dependent on the intended use. They testified also that the drawing provided by Speed to F&B was not sufficiently detailed for F&B to fabricate the can. One expert testified that based on the configuration of the product, in his opinion, F&B knew or should have known of the can's intended use.

Consideration of the aforementioned rules with this evidence directs that this was not a case for judgment *n.o.v.* The evidence was conflicting as to whether F&B or Speed alone designed the can. Based on the evidence, reasonable minds could have concluded that F&B participated in designing the can and that the can was in an unreasonably dangerous condition when it left F&B's control. There was sufficient evidence for the jury to reasonably conclude that Speed did not provide adequate specifications for F&B to have merely followed Speed's directions in manufacturing the can. There was also evidence that, even assuming F&B merely complied with Speed's directions, the grade of steel selected by F&B was defective in failing to withstand the pressure

of the exploding clutch parts. In this regard, the jury could also reasonably infer, based on the evidence, that F&B knew of the can's intended use. Positive direct testimony may be contradicted and discredited by circumstantial evidence, discrepancies, omissions, or inherent improbability of the testimony itself. *Lobravico v. Checker Taxi Co.* (1967), 84 Ill. App. 2d 20.

Furthermore, the cases cited by F&B are distinguishable. In *Hunt*, summary judgment was granted for the fabricator, but *uncontroverted* evidence established that the fabricator constructed and installed the product in *strict conformity* to specifications supplied, and the plaintiff did not allege that the specifications were flawed. (*Hunt*, 74 Ill. 2d 209.) In the present case, in contrast, there could be no strict conformity to Speed's unsophisticated drawing, and F&B also selected the steel which proved to be inadequate to the can's intended use, of which F&B might have reasonably known. *Loos v. American Energy Savers, Inc.* (1988), 168 Ill. App. 3d 558, like *Hunt*, also concerned a case of summary judgment in favor of the fabricator which was decided, unlike the present case, on the basis of uncontradicted or conceded evidence as to compliance with specifications. Finally, *Woods v. Graham Engineering Corp.* (1989), 183 Ill. App. 3d 337, concerned a ruling in favor of the component manufacturer based on the existence of an intervening cause which relieved the manufacturer of liability. The unrefuted evidence in the present case established that none of the modifications to the bellhousing which occurred after it left F&B's control bore on why it failed, causing the accident.

We conclude that when all of the evidence is viewed in the aspect most favorable to plaintiff, it does not so overwhelmingly favor F&B as not to permit a contrary verdict from standing. (See *Pedrick*, 37 Ill. 2d 494.) The trial court did not err in denying F&B's motion for judg-

ment notwithstanding the verdict in benefit of Samantha.

III

Setoff Application

The following background will assist in understanding the parties' contentions.

Plaintiff's third-amended complaint in this matter was filed in April 1981, and sought a wrongful-death recovery based in strict products liability on behalf of Samantha and David against Great Lakes and Speed. Wesley Law was named as co-plaintiff in the complaint.

In February 1988, Speed filed a third-party complaint seeking contribution from F&B. Approximately two years later, plaintiff entered into a release and settlement agreement with Great Lakes on behalf of both Samantha and David. According to the stated terms of the agreement, Great Lakes was released from all claims by David, both individually and as administrator of Diane's estate in exchange for a sum valued at $861,789. Great Lakes was also released by Law for the amount of $100,000. The trial court found the settlement to be in good faith and, after a hearing, determined that Samantha and David's respective percentages of dependency were 50% as provided for under the Wrongful Death Act (Act). (See Ill. Rev. Stat. 1979, ch. 70, par. 2.) The entire settlement was then distributed by the trial court to David and Samantha so that each of them received $430,894.50. No part of the settlement was allocated to any type of claim other than wrongful death.

In September 1990, plaintiff filed a fourth-amended complaint naming Speed and F&B as defendants. Because the two-year statutory limitations period for commencing wrongful-death actions had expired as to David against F&B, but was tolled as to Samantha due to her minority, the complaint stated two separate

wrongful-death actions: count I for Samantha against F&B and Speed, jointly and severally, and count II for David against Speed alone. Counts IV and V stated survival and wrongful-death actions against Speed by co-plaintiff Law. Count III was subsequently dismissed and was discussed previously in this opinion.

F&B did not object to plaintiff's pleading two separate wrongful-death actions. The case proceeded to trial against F&B and Speed on the plaintiff's several wrongful-death and survival claims.

At trial, the parties recognized that a single wrongful-death verdict would not suffice. The trial court thus instructed the jury, without objection by F&B, that the rights of each plaintiff were separate and distinct, that Samantha and David brought separate actions, and that they were each the real party in interest with regard to the assessment of damages in each action. The trial court also directed the jury that, if it found liability, it should separately assess Samantha's and David's damages and return separate verdicts for them, that the verdict in benefit of Samantha should be in a single sum against both F&B and Speed, that the verdict in benefit of David should be against Speed only, and that each verdict should be based on the pecuniary losses that each of them individually suffered as a result of Diane's death. At no time did F&B object to these instructions or to the use of separate jury forms for counts I and II.

Pursuant to the provided forms, the jury returned the following verdicts:

"VERDICT FORM I-A

As to the claim of the plaintiff, David Pasquale, for the benefit of Samantha Pasquale, we, the jury find in favor of the plaintiff and against the defendants, F&B Manufacturing Company and Speed Products Engineering and assess plaintiff's damages in the sum of $1,500,000.00."

"VERDICT FORM II-A

As to the claims of the plaintiff, David Pasquale, as Administrator of the Estate of Diana Pasquale, for the benefit of himself, we, the jury, find in favor of the plaintiff and against the defendant, Speed Products Engineering and assess plaintiff's damages in the sum of $150,000.00."

The jury also returned a verdict of $500,000 in favor of Wesley Law. F&B did not object to the three separate verdicts. Shortly thereafter, the trial court entered separate judgments, *nunc pro tunc*, on the several verdicts. F&B did not object to entry of these separate judgments.

F&B subsequently filed a post-trial motion for judgment notwithstanding the verdict which requested, in the alternative, a setoff of $961,789 against what it termed "the total jury verdict" of $2,150,000. This latter amount was comprised, apparently, of the separate verdicts for Samantha, David and Law. More specifically, F&B requested that $861,789 be set off against the "jury verdict for Samantha Pasquale and David Pasquale." F&B additionally recommended that $100,000, paid in the Great Lakes settlement to Law, be applied as a setoff to the verdict in his favor against Speed.

The trial court denied F&B's motion, but granted a setoff of $430,894.50, representing that part of the settlement distributed to Samantha, against the judgment against F&B and Speed in Samantha's benefit. The trial court found that the amount distributed to David, also $430,894.50, acted as a setoff against the judgment against Speed for his benefit. After application of these setoffs, F&B and Speed remained jointly and severally liable for $1,069,105.50 on Samantha's claim; Speed's obligation on David's claim was fully satisfied.

On appeal, F&B argued that the $1.5 million judgment against it should have been reduced to $788,211 by a setoff of the entire settlement amount of $861,789. The appellate court agreed. According to the court, the

plain language of the Contribution Act provides that the "consideration" paid by Great Lakes for the settlement reduced the recovery against F&B "on *any* claim against it." (Emphasis in original.) (252 Ill. App. 3d at 733; see Ill. Rev. Stat. 1979, ch. 70, par. 302(c).) The court further reasoned that, although the case was necessarily presented to the jury as two separate and distinct actions against Speed because David's claim against F&B was barred, there existed, nonetheless, a single cause of action by Samantha and David against Speed. In support of its reasoning, the court relied on authorities holding that the Wrongful Death Act creates no individual right of action in its beneficiaries.

The appellate court found that the trial court should have combined the two separate verdicts for Samantha and David into a single judgment. "[T]hen the trial court should have granted a setoff of $861,789 against the joint portion of the judgment, leaving a total amount owed on the combined judgment of $788,211, for which F&B and Speed would be jointly and severally liable for $638,211 and Speed only would be liable for the remaining $150,000." (252 Ill. App. 3d at 733-34.) The appellate court accordingly remanded for the trial court to combine the two verdicts into a single judgment, and "grant F&B a setoff of $861,789 against the $1.5 million portion of the judgment for which it stands jointly and severally liable." The court directed that the remaining sums were to be distributed pursuant to section 2 of the Wrongful Death Act (Ill. Rev. Stat. 1991, ch. 70, par. 2), "taking into consideration the sums David already received pursuant to the order distributing the proceeds of the settlement." 252 Ill. App. 3d at 734.

In summary, according to the logic of the appellate court, the following setoff calculations should have resulted at the trial level:

Step One:	$1,500,000	- verdict against Speed/F&B for Samantha
	+ 150,000	- verdict against Speed for David
	= $1,650,000	- combined into one judgment
Step Two:	$1,500,000	- "joint portion" of combined judgment for which Speed/F&B stand jointly and severally liable
reduced by	$ 861,789	- amount of settlement for benefit of Samantha and David
	= $638,211	- remaining amount of combined judgment for which F&B stand jointly and severally liable
	$ 150,000	- remaining amount of combined judgment for which Speed alone stands liable—no setoff applied.

The parties dispute the correctness of the trial and appellate court's setoff applications. Plaintiff claims that the trial court's application was correct. Relying on *Nudd v. Matsoukas* (1956), 7 Ill. 2d 608, plaintiff contends that judgments under the Wrongful Death Act are not considered indivisible, and that according to *Wilbon v. D.F. Bast Co.* (1978), 73 Ill. 2d 58, under the Act individual rights are now recognized as belonging to the deceased's beneficiaries.

In contrast, F&B claims that the appellate court's resolution of setoff was correct. Relying on *Hazel v. Hoopeston-Danville Motor Bus Co.* (1923), 310 Ill. 38, F&B contends that there are no separate verdicts for the individual beneficiaries in wrongful-death actions. Therefore, there should only have been one verdict rendered for the benefit of both Samantha and David against which the entire settlement should have been set off. F&B also contends that the Wrongful Death Act does not create an individual right in a beneficiary to bring the suit (see *Rodgers v. Consolidated R.R. Corp.* (1985), 136 Ill. App. 3d 191). Rather, the right of action

accrues to the administrator, not to the beneficiary (see *Addison v. Health & Hospital Governing Comm'n* (1977), 56 Ill. App. 3d 533), who must bring a single action on behalf of the class beneficiaries to avoid multiple lawsuits. See *Hall v. Gillins* (1958), 13 Ill. 2d 26.

The Wrongful Death Act provides in pertinent part:

> "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and *** the amount recovered *** shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and *** the jury may give *** damages *** with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin ***." Ill. Rev. Stat. 1979, ch. 70, par. 2.

The Wrongful Death Act permits a recovery for the death of an individual by wrongful act, neglect, or default, where none existed at common law. (*Wilson v. Tromly* (1949), 404 Ill. 307, 310.) The absence of a satisfactory justification for the common law rule against such an action has been extensively discussed, however, by this court. (See *Wilbon*, 73 Ill. 2d at 61-66; *Hall v. Gillins* (1958), 13 Ill. 2d 26, 28-29.) Nevertheless, the Act is viewed, traditionally, as creating the cause of action, which must be brought in the name of the representative, for the pecuniary losses which a surviving spouse and next of kin may have sustained by reason of the death of the injured person. (See *Li Petri v. Turner Construction Co.* (1967), 36 Ill. 2d 597; *Hall*, 13 Ill. 2d at 28; *Nudd*, 7 Ill. 2d at 612; *In re Estate of Edwards* (1982), 106 Ill. App. 3d 635, 638.) The purpose of the Act is to provide such compensation. (See *Knierim v. Izzo* (1961), 22 Ill. 2d 73.) "The statute alone is the source of the right to sue," and "the act should be strictly construed." (*Wilson*, 404 Ill. at 310.) Construction of the Act, however, should not be so technical as to defeat the intention of the Act or the beneficial results thereof when all material provisions have been complied with. See *McDavid v. Fiscar* (1951), 342 Ill. App. 673.

Because the action is viewed as a creature of statute, its conditions of liability proscribe the right of action itself and not merely the remedy alone. One such condition of liability is the time limitation period during which a wrongful-death action must be brought. (Ill. Rev. Stat. 1979, ch. 70, par. 2 (two-year limitation period); see *Wilson*, 404 Ill. at 310; *Bruce v. Halterman-Flynn* (1987), 162 Ill. App. 3d 248, 250-51.) Similarly, the bringing of the suit in the name of the personal representative has been held to be a condition precedent to the right to recover damages. See *Friend v. Alton R.R. Co.* (1936), 283 Ill. App. 366.

The personal representative must bring a single action on behalf of the class beneficiaries to avoid multiple lawsuits. *Hall*, 13 Ill. 2d at 30; see also *Pruitt v. Jockisch* (1992), 228 Ill. App. 3d 295 (requirement that action be brought by representative serves dual purpose of ensuring that interests of all beneficiaries are protected and of avoiding multiplicity of actions).

However, that the right of action in wrongful-death accrues to, and suit must be brought by, a representative does not answer whether the intended beneficiaries are also significantly entitled under the Act. Nor does the fact that a single wrongful-death action is required to be brought to avoid multiple lawsuits answer whether and to what extent individual beneficial recoveries are allowed under the Act to accommodate other purposes. These dual, related themes (the significance as well as the separability of beneficial rights) are resolved upon review of case law pertaining to certain defenses under the Act.

F&B cites to *Hazel v. Hoopeston-Danville Motor Bus Co.*, 310 Ill. 38, which concerned whether the contributory negligence of one beneficiary acted as a defense to bar a wrongful-death action brought by the representative on behalf of that beneficiary and other non-

negligent beneficiaries. Relying principally on the notion that there existed a single, inseparable cause of action for recovery in a single gross amount, the *Hazel* court held that the action was completely barred.

According to *Hazel*, while the contributory negligence of a beneficiary barred the action, rather than that of the plaintiff representative (see *VanMeter v. Goldfarb* (1925), 317 Ill. 620, 622 (right of action is one for benefit of next-of-kin, or real party in interest)), the single-action requirement meant that the beneficiaries possessed but a single, indivisible right to recover. (See also *Rost v. F.H. Noble & Co.* (1925), 316 Ill. 357.) *Nudd*, 7 Ill. 2d 608, revisited the issue and decided otherwise.

In *Nudd*, the court referred to the then most recent amendment of the Act, which had become effective after the cause arose. (Ill. Rev. Stat. 1955, ch. 70, par. 2 ("it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries").) The court concluded the amendment demonstrated that the concept of the indivisibility of a wrongful-death judgment, which formed the cornerstone of *Hazel*, was "fictitious rather than real." (*Nudd*, 7 Ill. 2d at 615.) Relying on that conclusion as well as additional authorities, *Nudd* held that the contributory negligence of the beneficiary did not bar the action, but only precluded his particular right to recover for pecuniary loss. *Nudd* thus made clear that the beneficiaries' right of recovery was separable where one of the beneficiaries proved to be contributorily negligent. (See also Ill. Rev. Stat. 1979, ch. 70, par. 2 ("the amount of damages given shall not include any compensation with reference to the pecuniary injuries resulting from such death, to such contributorily negligent person or persons"); *Sheley v. Guy* (1975), 29 Ill. App. 3d 361, 366.) *Nudd* also specifically overruled *Hazel v. Hoopeston-Danville Motor Bus Co.* and other

cited cases insofar as they were inconsistent with the decision. See *Nudd*, 7 Ill. 2d at 616.

Nudd, nonetheless, allowed that it was the real party in interest's contributory negligence, the beneficiary's, rather than the plaintiff personal representative's, which was significant for purposes of the defense. See also *Knierim v. Izzo* (1961), 22 Ill. 2d 73, 78 ("[t]he persons *entitled to recovery* under the Wrongful Death Act are the widow and next of kin" (emphasis added) and the new cause of action affords protection to the family unit particularly when the "beneficial plaintiffs" are the widow and lineal kinsmen); *cf. Strong v. Hodges* (1951), 344 Ill. App. 306 (release by sole Wrongful Death Act beneficiary barred action by administrator).

In *Wilbon*, 73 Ill. 2d 58, the court addressed whether the intended beneficiaries' minority tolled the Act's two-year limitation period. (See Ill. Rev. Stat. 1979, ch. 70, par. 2.) The *Wilbon* court found that, although the limitations period was a condition precedent to the existence of the statutorily created right, the legislature, in enacting the limitations provision, intended to incorporate within it certain well-recognized common law exceptions regarding the status of minority. *Wilbon* thus held that a beneficiary's minority tolled the two-year limitations period. (*Cf. Dachs v. Louis A. Weiss Memorial Hospital* (1987), 156 Ill. App. 3d 465, 468 (minor beneficiaries' interests in wrongful-death claims toll limitations period in medical malpractice statute).) According to *Wilbon*, a then recently enacted amendment to the Act, which provided that a beneficiary's minority tolled the two-year limitations period (Ill. Rev. Stat. 1977, ch. 70, par. 2), merely stated the law as it already existed.

In reaching its decision, the *Wilbon* court addressed both the significance of the beneficial interests as well as the interests' potential separability. The *Wilbon* court

referred to the Act's history, which demonstrated that "although the action is to be brought 'by and in the names of the personal representatives of such deceased person,' the legislative intent is that the claims are those of the individual beneficiaries." (*Wilbon*, 73 Ill. 2d at 68-70; *Foster v. Kanuri* (1992), 241 Ill. App. 3d 677, 681; see also *In re Estate of Faught* (1983), 111 Ill. App. 3d 1043, 1045 (emphasizing that while real parties in interest are the surviving spouse and next of kin, action is to be brought by personal representative).) The *Wilbon* court further noted that the contributory negligence of one beneficiary "serve[d] to bar only his claim," and that a beneficiary's ultimate recovery after distribution was made on an individualized basis. *Wilbon*, 73 Ill. 2d at 69.

The *Wilbon* court also referred to the fact that the legislature had rejected amending the Act to allow the minority of the *personal representative* to toll the limitations period. The adopted amendment, instead, allowed a *beneficiary's* minority to toll the period. See also *Flores v. St. Mary of Nazareth Hospital* (1986), 149 Ill. App. 3d 371 (holding that minor beneficiaries' claims against additionally named defendants were not barred by running of two-year limitations period); *Gaudette v. Webb* (1972), 362 Mass. 60, 284 N.E.2d 222 (beneficiaries' minority tolled the running of two-year limitations period as to their right to recover through representative just as if their right of action were direct).

On this point, the cases on which F&B relies do little to advance its position. *Addison*, decided prior to *Wilbon*, concerned whether a minor beneficiary in a wrongful-death action against a governmental entity was obligated to timely comply with the one-year notice requirement in the Governmental Tort Immunity Act. Finding *Fanio v. John W. Breslin Co.* (1972), 51 Ill. 2d 366, dispositive, *Addison* held that the minor beneficiary was obligated. *Addison* reasoned that, since the

burden of bringing the suit was imposed on the plaintiff representative, that party's failure to comply, rather than the beneficiary's, barred the action. (See *Fanio*, 51 Ill. 2d at 368-69 (commenting that the reasons inherent in removing minors from the scope of Governmental Tort Immunity Act notice and limitations requirements were totally lacking in the wrongful-death action where a representative brings the suit).) *Wilbon*, however, later called that reasoning into question. *Cf. Girman v. County of Cook* (1981), 103 Ill. App. 3d 897 (rejecting *Addison* on similar facts and, instead, following *Wilbon*).

Rodgers, 136 Ill. App. 3d 191, also relied on by F&B, merely applies the correlative of the rule that the right of action accrues to the representative, that is, a beneficiary possesses no individual right to bring his or her own suit. The *Hazel* decision, as mentioned previously, was overruled with respect to the notion that the wrongful-death action is one which is indivisible. See *Nudd*, 7 Ill. 2d at 616.

Courts in other jurisdictions, in deciding whether a beneficiary's minority tolled the limitations period, have expressly relied on the concept that each wrongful-death beneficiary has an independent and separate right to recovery. In *Cross v. Pacific Gas & Electric Co.* (1964), 60 Cal. 2d 690, 388 P.2d 353, 36 Cal. Rptr. 321, the court stated that, although the recovery is in the form of a "lump sum," the *amount* is determined in accordance with the various beneficiaries' separate interests in the deceased's life and the loss suffered by each by reason of the death. Therefore, each beneficiary was to be regarded as having a personal and separate cause of action. Since that concept supported the settled rule that the contributory negligence of one beneficiary barred his recovery, but not that of others (see *Nudd*, 7 Ill. 2d 608), *Cross* held that the running of the limitations period against adult heirs did not affect the rights of minor heirs.

Parker v. Chrysler Motors Corp. (1972), 88 Nev. 560, 502 P.2d 111, reasoned and held similarly. The *Parker* court pointed out that the Nevada wrongful-death statute did not create a joint cause of action, that the thrust of the statute was merely to have all beneficiaries joined in one action, and the mere fact that the judgment was to be in a lump sum did not destroy the separability of the beneficial interests, since either the beneficiaries or the court might apportion the award. *Parker* held that a defense good against the claim of one heir was not fatal to the others and, thus, the running of the limitations period did not bar the rights of the minor beneficiaries. See also *Hun v. Center Properties* (1981), 63 Haw. 273, 279, 626 P.2d 182, 187; *Switzer v. Reynolds* (Utah 1980), 606 P.2d 244; *cf. Hogan v. Herman* (1980), 101 Idaho 893, 898, 623 P.2d 900, 905 (Bistline, J., specially concurring).

While F&B is correct in asserting that the right of action for a wrongful death accrues to the personal representative, our review convinces us that the Act's beneficiaries yet possess a distinct, but complementary, right of recovery. Furthermore, we conclude that the logical implication which follows from the allowance of minority tolling and the operation of contributory negligence as but a partial bar to recovery is that the beneficiaries' rights to recovery in such instances are separate and divisible.

Further, where the beneficiaries' rights to recovery are separate due to the operation of minority tolling in the face of time-barred adult beneficiary claims, that separation is substantive under the Act, rather than merely procedural. In the case of a limitations period in a statute, such as the Act, which creates a substantive right unknown to the common law and in which time is made an inherent element of the right, such a time period is more than an ordinary statute of limitations: it is

a condition of the liability itself and not of the remedy alone. Such a provision is a condition precedent and as such may extinguish the cause of action itself. Such a provision goes to subject matter jurisdiction and is not merely mandatory. See *Fredman Brothers Furniture Co. v. Department of Revenue* (1985), 109 Ill. 2d 202, 209; *Haakanson v. Wakefield Seafoods, Inc.* (Alaska 1979), 600 P.2d 1087, 1091 (discussing traditional view that wrongful-death limitations period is limitation on the right not the remedy and therefore not subject to disabilities tolling ordinary limitations).

Thus, in instances, as in the present case, where the limitations period precludes an adult beneficiary's claim against a particular defendant, that beneficiary's very cause of action against that defendant is nonexistent. Certainly then, it is clear that a minor beneficiary's claim against that same defendant, which survives the bar, cannot constitute *substantively* the same claim as that of the adult beneficiary against any other party defendant. Here, the fact that the liability owed the minor is also shared by one such other party defendant results in no contrary outcome. Speed's shared liability with F&B in benefit of Samantha was joint and several and, therefore, substantively indivisible. We therefore disagree with the appellate court. (252 Ill. App. 3d at 733.) Speed's liability to Samantha did not constitute Speed's liability to David. Accordingly, we conclude that the wrongful-death claim brought by the plaintiff representative in benefit of Samantha was a separate claim from that brought for the benefit of David.

Our inquiry, however, is not yet completed. We must consider these separate claims in the context of setoff under the Contribution Among Joint Tortfeasors Act (Ill. Rev. Stat. 1979, ch. 70, par. 301 *et seq.*).

Section 2(c) of the Contribution Act provides that when a settlement release is given in good faith to one

tortfeasor liable in wrongful death, it does not discharge the liability of any of the other tortfeasors for the same wrongful death, but reduces "the recovery" on any claim against them to the extent of the amount stated in the release or actually paid for it. (See Ill. Rev. Stat. 1979, ch. 70, par. 302(c).) Section 2(c) reflects the long-recognized principle in Illinois that a plaintiff shall have only one satisfaction for an injury. (See *Dial v. City of O'Fallon* (1980), 81 Ill. 2d 548, 558.) A double recovery is a result which is condemned and is exactly what section 2(c) of the Contribution Act was intended to prevent. *Wilson v. The Hoffman Group, Inc.* (1989), 131 Ill. 2d 308, 321-22; *Popovich v. Ram Pipe & Supply Co.* (1980), 82 Ill. 2d 203, 208.

The provision reflects as well the public policy of protecting the financial interests of nonsettling parties in a settlement. (*Wilson*, 131 Ill. 2d at 322.) Allowing setoff ensures that a nonsettling party will not be required to pay more than its *pro rata* share of the shared liability.

Thus, under section 2(c), it has been held that a settlement between one tortfeasor and the plaintiff will result in an equal setoff in amount against the recovery a nonsettling tortfeasor receives. (See *Patch v. Glover* (1993), 248 Ill. App. 3d 562; *Higginbottom v. Pillsbury Co.* (1992), 232 Ill. App. 3d 240; *Nguyen v. Tilwalli* (1986), 144 Ill. App. 3d 968; *cf. Dial v. City of O'Fallon*, 81 Ill. 2d at 558 (confirming the previously recognized common law right to a setoff).) Further, a nonsettling defendant may claim as a setoff any amount which the plaintiff recovered in a prior settlement with settling defendants, even if the resultant judgment is thereby reduced to zero dollars. See *Foster v. Kanuri* (1992), 241 Ill. App. 3d 677; *Nguyen*, 144 Ill. App. 3d at 973.

Under section 2(c), while a nonsettling tortfeasor might seek to utilize the entire amount of a prior settle-

ment as a setoff, the only amounts that may normally be applied are those which compensated for the same injury or wrongful death for which the tortfeasor was ultimately found liable. (See *Patton v. Carbondale Clinic, S.C.* (1994), 161 Ill. 2d 357, 366.) The determination as to which of several claims a settlement award should be attributed to is considered a matter within the trial court's discretion. (See *Gramse v. Royal Crest Enterprises, Inc.* (1981), 100 Ill. App. 3d 100; see also *Dick v. Gursoy* (1984), 124 Ill. App. 3d 185, 189a-89b (supplemental opinion).) The Contribution Act permits contribution (or setoff) where co-tortfeasors are concurrent or successive as long as the "same injury" or wrongful death is involved. (See *Nguyen*, 144 Ill. App. 3d at 971-72; *Giordano v. Morgan* (1990), 197 Ill. App. 3d 543, 550.) Generally, the party seeking the setoff bears the burden of proving what portion of a prior settlement was allocated or is attributable to the claim for which he is liable. (See *Kipnis v. Meltzer* (1993), 253 Ill. App. 3d 67 (nonsettling tortfeasor denied setoff of entire settlement amount for failure to establish what portion of settlement was attributable to claim for which it found liable).) This court, however, has found that where a plaintiff recovers for several injuries in a previous lawsuit and fails to apportion damages accordingly, a subsequent defendant may be relieved of this burden. See *Patton*, 161 Ill. 2d at 370.

The Contribution Act, however, provides little guidance as to what constitutes the "same injury." (*Giordano*, 197 Ill. App. 3d at 550 ("in order for contribution [or setoff] to lie, at least some type of culpable conduct must exist which contributed to plaintiff's injuries").) It is clear, however, that the entire amount of a settlement which compensated for a single indivisible injury can be set off against a recovery based on that injury, notwithstanding the plaintiff's assertion of two distinct

theories of recovery. (See *Hall v. Archer-Daniels-Midland Co.* (1988), 122 Ill. 2d 448, 459.) It is also clear that a setoff is inappropriate where sought to be applied against a recovery for injuries "separate and distinct" from those for which the plaintiff was already compensated through settlement. See *Patton*, 161 Ill. 2d at 366, citing *Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418, 431-32.

Thus, in *Barkei v. Delnor Hospital* (1990), 207 Ill. App. 3d 255, 266-67, where a pretrial settlement compensated plaintiffs for bodily injuries, medical expenses and loss of society, setoff was found to only have been appropriate to the extent that the settlement compensated plaintiffs for medical expenses, which was the sole basis of the nonsettling tortfeasor's liability. Similarly, in *Eaton v. Jackson* (1984), 128 Ill. App. 3d 893, a setoff against a recovery for the plaintiff husband's personal injuries was limited to that part of the settlement attributed by the trial court to his claim, to the exclusion of that part attributed to the plaintiff wife's loss-of-consortium claim. (*Cf. Patch v. Glover* (1993), 248 Ill. App. 3d 562 (remanding for a setoff limited to that portion of settlement allocable only to wrongful-death claim).) Also, where a particular element of damages (ongoing and future loss of wife's services and consortium) partially comprises a wrongful-death settlement, and that element is subsequently eliminated from the ultimate total damage award, a rational setoff of those damages is impossible if the particular damage element is unallocable within the settlement. See *Dolan v. Gawlicki* (1994), 256 Ill. App. 3d 153, 157.

On the issue of allocation of settlement proceeds, *Foster v. Kanuri* (1992), 241 Ill. App. 3d 677, cited by F&B, is somewhat unclear. In *Foster*, the plaintiff's complaint alleged both wrongful-death and survival claims against several defendants. Prior to trial, two of the defendants settled with the plaintiff. The trial court

entered a good-faith finding regarding the settlement and determined the two beneficiaries' percentages of dependency under the Wrongful Death Act. Presumably, the court also distributed the proceeds accordingly. The jury subsequently returned a verdict which included damages for both the two beneficiaries' wrongful-death claims and the survival claim. The nonsettling defendant sought to set off the entire amount of the prior settlements against the verdict. The trial court, however, both limited the setoff to that portion of the prior settlements attributable to the wrongful-death claims and applied the allocated settlement amounts as setoff to the beneficiaries' distinguishable recoveries. The appellate court reversed. Despite that there appears little indication that the prior settlement included both the wrongful-death and survival claims, the appellate court spoke approvingly of allowing the defendant to set off the entire settlement (*Foster*, 241 Ill. App. 3d at 680-81). The appellate court then remanded for a re-allocation of the settlement in accordance with the separate nature of the initially alleged claims. While *Foster* spoke to settlement allocation in the case of distinct causes of action, it offered no opinion concerning allocation and setoff in the case of timely and barred wrongful-death claims. We believe that defendant may draw little support from *Foster*.

In the present case, by virtue of the operation of minority tolling, there was not a single and indivisible wrongful-death action such that the individual beneficiaries' pecuniary injuries were inseparable for purposes of setoff. (*Cf. Klier v. Siegel* (1990), 200 Ill. App. 3d 121, 127.) The limitation which barred a claim for David against F&B goes to subject matter jurisdiction, affecting not merely the remedy, but the right of action itself. Based on *Nudd*, *Wilbon*, and the Act's minority tolling provision, we conclude that a wrongful-death claim

which is barred as untimely where brought for an adult beneficiary, but tolled where brought for a minor beneficiary, is a separate and distinct claim from that brought solely for the adult. Therefore, the claim against F&B and Speed in benefit of Samantha (count I) was substantively separate and distinct from the claim asserted against Speed in benefit of David (count II). Because of the minority tolling and the consequent joint and several joinder, the case at trial involved two separate and distinct claims, only one of which was successfully asserted against F&B.

Although the Great Lakes settlement was unallocated by the parties themselves, it was obviously intended to compensate both Samantha and David for their respective claims for pecuniary loss. Under the Contribution Act, F&B was entitled to a setoff reducing its liability because it was also obvious that the Great Lakes settlement extinguished liability for the same injury (pecuniary losses suffered by Samantha) for which F&B owed a recovery. However, because F&B's request for a setoff necessarily rests on the premise that it paid more than its *pro rata* share of the shared liability for Samantha's injury, F&B bore the burden of establishing how much of the Great Lakes settlement was intended to compensate for her loss. (See *Barkei*, 207 Ill. App. 3d 255; *Kipnis*, 253 Ill. App. 3d 67; see also *Houser v. Witt* (1982), 111 Ill. App. 3d 123, 125.) This is not a case like *Patton* where the defendant was not a party to the suit underlying the prior settlement. In the absence of such proof, the trial court reasonably considered that its determination of Samantha's and David's percentages of dependency supported an allocation of the settlement between their respective claims. See *Bart v. Union Oil Co.* (1992), 236 Ill. App. 3d 964, 966 (trial court has discretionary authority in allocating settlement amount between various claims); see also *In re Estate of Flake*

(1985), 137 Ill. App. 3d 535, 536 (division of an award in a wrongful-death action is left to discretion of trial court).

Moreover, the trial court's dependency determination did not control the allocation of the settlement so much as it reflected merely the obvious: that because there were two family member claimants, it was reasonable that half of the settlement was intended by Great Lakes to compensate Samantha and half was intended for David. Regardless of any disparity between Samantha's and David's later recoveries as a result of trial, we cannot say that based on this record the trial court abused its discretion by allocating the settlement with reference to the beneficiaries' equally shared dependency.

Considering that reasonable allocation and the fact that two separate claims resulted in verdicts reflecting assessments of Samantha's and David's individual pecuniary losses, the trial court correctly declined to set off the entire settlement and limited F&B's setoff to Samantha's part only. (See *Johnson v. Belleville Radiologists, Ltd.* (1991), 221 Ill. App. 3d 100 (amounts apportioned to separate claims in settlement agreement should not operate as single setoff against verdict based on separate claims).) It is manifest that David's part of the settlement did not extinguish Great Lakes' potential liability for the same pecuniary injury for which F&B was found liable.

Furthermore, the trial court's setoff application will not result in a double recovery for Samantha and David. Like any other plaintiffs seeking tort damages, Samantha and David were compensated by Great Lakes for their respective claims. The jury subsequently returned verdicts in their favor against certain defendants, which were reduced by amounts paid to them by other potentially liable parties. F&B's problem with the

trial court setoff is not so much that Samantha will recover twice. F&B's problem is that Speed's minimal liability to David was fully satisfied, and no part of the larger settlement attributable to David's claim can be used to offset F&B's shared liability with Speed to Samantha. This sort of disparity results, however, in every tort action with distinct and separate claims where prior settlements are disproportionate to the eventual jury verdicts. However, in such cases, a settlement in contemplation of one claim is simply not available to offset recovery on an entirely different claim and a plaintiff is not considered to have received a double recovery.

In contrast to the trial court here, the appellate court first stated that the two separate verdicts for Samantha and David must be combined into one judgment ($1.65 million), but then it paradoxically directed setoff of the entire settlement amount against only that portion of the judgment for which F&B and Speed were jointly and severally liable ($1.5 million). The appellate court apparently interpreted the Contribution Act to provide literally that any setoff reduce the recovery on any claim to which *all* the nonsettling tortfeasors were exposed. (See Ill. Rev. Stat. 1991, ch. 70, par. 302(c) ("reduces the recovery on any claim against the others").) As a result, the entire settlement, including that which reasonably extinguished Great Lakes' liability to David, would be applied against a recovery to which David was substantively barred.

Also, no part of the settlement utilized to extinguish David's claim would then be available for setoff against the separate verdict for David's benefit against Speed. F&B would thus not only be enabled to obtain a reduction of its liability by virtue of settlement amounts paid for claims to which it was not exposed, but it would also be unfairly advantaged at Speed's expense. Therefore, to the extent that the appellate court held that the set-

off of the entire settlement was to be applied against the joint and several liability of F&B and Speed to Samantha, we conclude that the determination was incorrect.

In summary, we agree with the plaintiff that Samantha is entitled under the Contribution Act to realize her full recovery despite application of setoff. (See Ill. Rev. Stat. 1979, ch. 70, par. 304.) We conclude that the trial court appropriately allocated Samantha's share of the settlement and correctly applied a setoff against the recovery which was in her benefit only. We conclude also that the trial court correctly set off the recovery due David by Speed.

CONCLUSION

We affirm the appellate court's determination that the trial court properly directed a verdict in Speed's favor and denied F&B's motion for judgment notwithstanding the verdict. We reverse that part of the appellate court's decision concerning the application of the prior settlement as a setoff against the wrongful-death recovery and the subsequent remand to the trial court. The judgment of the circuit court is affirmed.

Appellate court affirmed in part
and reversed in part;
circuit court affirmed.

JUSTICE McMORROW, dissenting:

I disagree with the majority's conclusion that a plaintiff-bystander should not be allowed to recover damages for emotional distress injuries in a strict product liability cause of action. The majority's position lacks logic and leads to arbitrary results. The majority allows plaintiffs who seek recovery for emotional distress injuries under a negligence theory to recover for emotional injuries, yet denies plaintiffs suing under a strict liability theory recovery for emotional injuries. Further, the evolution of Illinois case law in the direc-

tion of compensating plaintiffs for emotional distress damages supports the allowance of recovery in strict liability causes of action. Finally, the policy considerations that justify the imposition of strict liability on sellers and manufacturers of defective products, and the rationale for compensating victims who suffer emotional injuries in negligence actions favor the position that emotional distress damages should be compensable in strict liability actions. For these reasons, I respectfully dissent.

In Illinois, a plaintiff can recover damages for emotional distress injuries in a negligence action. (See *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546; *Corgan v. Meuhling* (1991), 143 Ill. 2d 296.) However, our courts have declined to permit recovery for emotional distress damages in actions based on strict liability. (*Woodill v. Parke Davis & Co.* (1980), 79 Ill. 2d 26; *Rahn v. Gerdts* (1983), 119 Ill. App. 3d 781.) Logically, it is difficult to reconcile these two positions.

To sustain a cause of action in negligence, a plaintiff must prove that the defendant owed a duty to the plaintiff, a breach of that duty and an injury proximately caused by the breach. (*Ward v. K mart Corp.* (1990), 136 Ill. 2d 132, 140.) In a strict product liability action, plaintiffs "must prove that their injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control." *Suvada v. White Motor Co.* (1965), 32 Ill. 2d 612, 623.

One of the key differences between negligence actions and strict liability actions is that in a strict liability action the plaintiff need not prove negligent conduct on the part of the defendant. (See *Suvada*, 32 Ill. 2d at 623.) In other words, the element of "fault" or unreasonable conduct necessary in negligence actions

need not be proved in actions based on a theory of strict liability. (W. Keeton, Prosser & Keeton on Torts § 75, at 536-38 (5th ed. 1984).) Both negligence and strict tort liability law share the common purpose of compensating persons injured at the hand of another. However, the elimination of the fault element in strict liability claims bears upon the *liability* aspect of tort claims, and does not logically alter or diminish the personal injury damages to which the plaintiff is entitled.

The law of products liability in Illinois mandates that if a defendant manufactures and puts into commerce a product in an unreasonably dangerous condition, and if that product causes injury to a consumer, that defendant may be held liable for such personal injuries. (*Suvada*, 32 Ill. 2d 612.) It is arbitrary and illogical to maintain that such a defendant must compensate the injured person for only physical injuries, but not injuries from emotional trauma. The allowance of recovery for severe emotional distress damages to a plaintiff-bystander whose lawsuit is based on a negligence theory is inconsistent with denial of recovery for the same severe emotional distress injuries in a lawsuit based on a strict product liability theory. The injuries in both causes of action may be identical, the defendant's conduct which supports liability in both causes of action may be identical, and the defendant's duty to the plaintiff may also be identical. The difference in theories of liability does not justify a difference in the allowance of certain compensable damages. Oratorically questioning, what valid basis, and none has been offered by the majority (the majority's arguments relate to "liability" or fault issues) nor *Woodill* nor the Restatement, is there for treating plaintiff's injuries differently in these two causes of action?

The progression of Illinois case law toward permitting plaintiffs to recover damages for emotional distress

supports the allowance of recovery for emotional distress injuries in strict liability cases. For example, in *Knierim v. Izzo* (1961), 22 Ill. 2d 73, this court ruled that a plaintiff need not allege physical injury or symptoms in order to maintain an action for intentional infliction of emotional distress. The court reasoned that "[t]he stronger emotions when sufficiently aroused do produce symptoms that are visible to the professional eye and *** jurors from their own experience will be able to determine whether outrageous conduct results in severe emotional disturbance." (*Knierim*, 22 Ill. 2d at 85.) In *Rickey*, 98 Ill. 2d 546, this court eliminated the requirement of a contemporaneous injury or impact as a prerequisite to recovery for negligently caused emotional distress. More recently, this court in *Corgan* held that the victim of a defendant's negligence need not allege physical symptoms or injuries to recover damages for emotional distress, noting that "[i]n the 30 years since *Knierim*, this court has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress." (*Corgan*, 143 Ill. 2d at 312.) The law recognizes that people may suffer both physical and emotional injuries. It is inequitable to make compensation for emotional distress injuries dependent on the theory upon which the plaintiff establishes the defendant's liability. In light of this precedent, allowing plaintiffs to recover damages for such injuries in strict liability actions is a logical and salutary extension of Illinois law.

The majority relies primarily on section 402A of the Restatement and the 1980 case of *Woodill v. Parke Davis & Co.* to deny recovery for emotional distress damages. In *Woodill,* this court summarily adopted the decision of the appellate court to conclude that emotional distress damages could not be recovered in a strict liability action. (*Woodill*, 79 Ill. 2d at 38.) The appellate court in *Woodill* reasoned that because the Restatement "pro-

vides that '[o]ne who sells any product in a defective condition unreasonably dangerous to user or consumer or to his property is subject to liability for *physical harm* thereby caused to the ultimate user or consumer ***' " no cause of action existed in strict liability for emotional distress damages. (Emphasis in original.) (*Woodill v. Parke Davis & Co.* (1978), 58 Ill. App. 3d 349, 355, quoting Restatement (Second) of Torts § 402A (1965).) The court also noted that "at present, Illinois recognizes no such action." *Woodill*, 58 Ill. App. 3d at 355.

Woodill, the only precedent of this court which supports the majority's conclusion that no action for emotional injuries exists based on a strict liability theory, sets forth no analysis, rationale or logic to explain its position. Further, *Woodill* was decided when Illinois only allowed recovery for intentional infliction of emotional distress. Since *Woodill*, Illinois law has progressed to allow recovery for emotional injuries based on negligent conduct. (See *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546.) Both *Woodill* and the majority adopt section 402A of the Restatement which states that a plaintiff suing under a strict product liability theory can recover for "physical harm" caused. However, the Restatement also fails to offer an analysis explaining the reasons that victims should not be allowed to recover for emotional injuries in strict product liability actions. (See Restatement (Second) of Torts § 402A (1965).) Neither *Woodill* nor the Restatement offers a logical analysis because, as previously discussed, there is no logical justification for reducing the injuries for which a plaintiff may recover simply because plaintiff's burden of proving liability has been eased due to public policy concerns.

Additionally, the policy considerations that justify the imposition of strict liability on sellers and manufacturers of defective products support the proposition that

such defendants should be held liable for both physical and emotional injuries caused by their products. "[I]t seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present *** in cases involving motor vehicles and other products ***." (*Suvada*, 32 Ill. 2d at 619.) Strict product liability law also seeks to deter the sale of unsafe products and compensate injured victims. (Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 Tenn. L. Rev. 1043, 1058 (1994).) In *Corgan*, this court stated in unqualified terms that emotional injuries are very real injuries, which are discernable by juries. (*Corgan*, 143 Ill. 2d at 311-12.) In light of this court's recognition of the realties of emotional distress in *Corgan*, emotional trauma such as that alleged in the case at bar is an "injury" to a person to the same extent as a broken bone, a laceration or an injured back. Illinois has placed the burden of paying for injuries caused by defective products on the enterprises that place such products in the marketplace, and the law recognizes that a person may suffer from both physical and emotional injuries. It is inequitable to make compensation for such injuries dependent on the theory upon which the plaintiff establishes the defendant's liability.

David has shown that he was in the zone of physical danger; that due to the failure of the defendant's defective bellhousing he had a reasonable fear for his own safety; that he has suffered from severe emotional distress; and that he was in such proximity to the accident that there was a high risk to him of physical impact. (See *Rickey*, 98 Ill. 2d 546; *Corgan*, 143 Ill. 2d 296.) David was sitting next to his wife as she was

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partially decapitated. In fact parts of her body struck him. He touched her face and head, and then carried her to the ambulance knowing that she was dead. David has alleged many of the traumatic neuroses noted in *Corgan*. (*Corgan*, 143 Ill. 2d at 311.) Considering the facts of this case, David has suffered severe injuries as a result of witnessing his wife's violent death. The majority's position creates an arbitrary and hollow distinction, unsupportable in light of the development of the law of emotional distress damages. I would hold that the trial court should have instructed the jury on David's claim for emotional distress damages. Accordingly, I respectfully dissent.

JUSTICE HARRISON joins in this dissent.

[redacted]

(No. 73572[redacted]

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ANTHONY GUEST, Appellant.

Opinion filed May 18, 1995.—Rehearing denied October 2, 1995.

[redacted]

People v. Artis, 232 Ill. 2d 156 (2009)

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

Ill. Supreme Court · filed 2009-01-23 · Opinion
Supreme Court

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- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · 5: passage C073.1
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · 5: passage C073.1
- memo p. 12 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · 5: passage C073.1

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Docket No. 105751.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. MAURICE A. ARTIS, Appellee.

Opinion filed January 23, 2009.

JUSTICE GARMAN delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justices Freeman, Thomas, Kilbride, Karmeier, and Burke concurred in the judgment and opinion.

OPINION

The issues in this appeal are whether this court should abandon the one-act, one-crime doctrine of *People v. King*, 66 Ill. 2d 551 (1977), and if not, whether the State should be allowed to exercise its prosecutorial discretion on appeal to choose which conviction should survive and which should be vacated, where both offenses are of the same legislative classification.

BACKGROUND

In September 2003, defendant, Maurice A. Artis, entered a plea of guilty in the circuit court of Will County to two counts of aggravated criminal sexual assault, perpetrated during the course of residential burglary and home invasion (720 ILCS 5/12–14(a)(4) (West 2002)), and one count each of home invasion (720 ILCS

5/12–11(a)(2) (West 2002)), residential burglary (720 ILCS 5/19–3(a) (West 2002)), and unlawful restraint (720 ILCS 5/10–3(a) (West 2002)).

The State's factual basis for the guilty plea was that in the early morning hours of April 1, 2003, defendant broke into the home of A.W. When A.W. confronted defendant, he demanded that she give him $100, which she did. Stating that $100 was not enough, defendant forced A.W. into her bedroom, where he sexually assaulted her. He then tied her to a chair, but she was able to free her hands and call 9-1-1.

The trial court sentenced defendant to concurrent terms of 20 years' imprisonment on the aggravated criminal sexual assault convictions, to be served consecutively to concurrent terms of 15 years for home invasion, 12 years for residential burglary, and an extended-term sentence of 6 years for unlawful restraint. Defendant filed postplea motions, which were denied. The appellate court affirmed defendant's convictions for aggravated criminal sexual assault based on home invasion, and his convictions for residential burglary and unlawful restraint. The court vacated the convictions for aggravated criminal sexual assault based on residential burglary and for home invasion. The court also vacated the extended-term sentence for unlawful restraint and reduced the sentence to the maximum nonextended term of three years. 377 Ill. App. 3d 216.

In the appellate court, defendant argued for the first time that the conviction for aggravated criminal sexual assault based on residential burglary should be vacated because it was based upon the same act of penetration as the sexual assault conviction based on home invasion. Defendant reasoned that the latter conviction was the more serious and, thus, under the one-act, one-crime doctrine, the conviction based upon residential burglary should be vacated. Defendant also argued that his conviction for home invasion should be vacated as a lesser-included offense of aggravated criminal sexual assault committed during the course of home invasion. The State conceded before the appellate court that one of the sexual assault convictions should be vacated based on one-act, one-crime principles; however, the State argued that the sexual assault conviction based upon residential burglary was the more serious conviction and that, in any case, the

State should be allowed to elect which conviction should be vacated, based upon prosecutorial discretion.

The appellate court rejected the State's argument as to the relative seriousness of the sexual assault convictions, noting that (1) home invasion is a Class X offense with a possible sentencing range of 6 to 30 years, whereas residential burglary is a Class 1 offense with a possible sentence of 4 to 15 years, and (2) the elements of the offense of home invasion, as compared with those of residential burglary, demonstrate that home invasion is a more serious offense than residential burglary. The court concluded, based upon existing case law, that the State lacked prosecutorial discretion to elect to vacate what the court viewed as the more serious charge. 377 Ill. App. 3d at 221. We allowed the State's petition for leave to appeal. 210 Ill. 2d R. 315.

ANALYSIS

I. Standard of Review

Where, as here, the issues raised are ones purely of law, our review is *de novo*. *People v. Daniels*, 187 Ill. 2d 301, 307 (1999).

II. One-Act, One-Crime Doctrine

The one-act, one-crime doctrine was articulated by this court in *People v. King*, 66 Ill. 2d 551 (1977) as follows:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *King*, 66 Ill. 2d at 566.

The State argues that this court should abolish the one-act, one-crime doctrine because the rationale for the doctrine no longer exists. That rationale, according to the State, is found in this court's decision in *People v. Schlenger*, 13 Ill. 2d 63 (1958). There, the defendant was convicted of one count of armed robbery and one count of grand larceny. Both charges arose from a taking of money from the same person at the same place and time. The defendant entered pleas of guilty to both counts and received concurrent sentences. On appeal, the defendant argued that he should have been convicted of only one crime, that of armed robbery, and that the sentence for grand larceny was void. He argued that the additional sentence was prejudicial because it might adversely impact his opportunity for parole. This court observed that, based on its prior decisions, it would normally hold that, while the sentence for grand larceny was unnecessary and superfluous, the two sentences must run concurrently and would therefore not be prejudicial. Noting that the question presented was one of first impression, this court relied on three decisions from the state of Indiana in agreeing with the defendant that the second conviction would be prejudicial to his chances for parole. *Schlenger*, 13 Ill. 2d at 66-67.

Prior to *Schlenger*, this court had consistently held that a defendant was not prejudiced by multiple convictions and concurrent sentences for offenses committed during the same transaction. *King*, 66 Ill. 2d at 560. This court noted in *King* that the result in *Schlenger* was "predicated solely" on the defendant's argument in that case that multiple convictions arising from a single act might adversely affect his chances for parole. *King*, 66 Ill. 2d at 564. The State points out that the General Assembly abolished parole for all felons sentenced after February 1, 1978, and replaced it with mandatory supervised release, the length of which is determined according to the class of the offense or by the specific offense itself. 730 ILCS 5/5–8–1(d) (West 2002). With the exception of those prisoners serving a term of natural life imprisonment, prisoners now must serve the full term of their sentences, less time credit for good behavior. 730 ILCS 5/3–3–3(c) (West 2002). Thus, according to the State, since the rationale for the doctrine no longer exists, it has outlived its usefulness and should be "jettisoned."

The State also argues that (1) the doctrine is not constitutionally mandated; (2) it interferes with the trial court's sentencing discretion; (3) applicable statutes authorize multiple concurrent convictions and sentences arising out of the same conduct when that conduct establishes more than one offense; (4) the doctrine produces confusing results and is not amenable to consistent application; and (5) it consumes resources that are better spent elsewhere in the criminal justice system.

Defendant, on the other hand, argues that the doctrine is sound and that the State has failed to show it should be abandoned under the principles of *stare decisis*. He further argues that the doctrine is rooted in principles of double jeopardy, is reasonable and workable in practice, and protects the substantial rights of defendants.

Initially, we address defendant's argument that the State has forfeited its contention that the one-act, one-crime doctrine should be abandoned by conceding in the appellate court that one of defendant's convictions for aggravated criminal sexual assault must be vacated under one-act, one-crime principles. In the alternative, defendant argues that the State should be estopped from urging the abandonment of the *King* rule because of its tacit agreement in the appellate court that *King* is still good law.

The State argues that, as the appellee in the appellate court, it may make any argument supported by the record to sustain the trial court's judgment. Since the trial court imposed sentence on each of defendant's convictions for aggravated criminal sexual assault, according to the State, its argument in favor of abrogating the *King* doctrine supports that judgment.

We reject defendant's forfeiture and estoppel arguments. It is well settled that where the appellate court reverses the judgment of the trial court, and the appellee in that court brings the case to this court as appellant, that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if the issues were not raised before the appellate court. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). In addition, we note that the one-act, one-crime doctrine was established by this court in *King*. The appellate court lacks authority to overrule decisions of this court, which are binding on all lower courts. See *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 551-52 (1983). Thus, presentation of an argument by

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the State in the appellate court urging the abandonment of the one-act, one-crime doctrine would have been futile. Under these circumstances, we decline to find that the State is barred by forfeiture or estoppel from arguing that this court should abandon the *King* doctrine.

Turning to the merits, we agree with the State that the *King* doctrine is not constitutionally mandated. Its genesis in *Schlenger*, as this court acknowledged in *King*, was to prevent prisoners from being prejudiced in their parole opportunities by multiple convictions and sentences carved from a single physical act. Citing *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), *King* noted that multiple convictions and consecutive sentences have been permitted against claims of double jeopardy where offenses are based on a single act but require proof of different facts. *King*, 66 Ill. 2d at 565. Further, this court has noted that the one-act, one-crime rule has never been viewed as a rule of constitutional dimension. *People v. Henry*, 204 Ill. 2d 267, 290 (2003).

This court reaffirmed and clarified the *King* rule in *People v. Rodriguez*, 169 Ill. 2d 183 (1996). The court there noted that, under *King*, a court first must determine whether a defendant's conduct consists of one act or several acts. Multiple convictions are improper if they are based on precisely the same physical act. If the defendant's conduct is based on more than one physical act, a court must then determine whether any of the offenses are lesser-included offenses. If they are, then multiple convictions are improper. Notably, in *Rodriguez*, the State argued that this court should abandon the *King* doctrine. The court summarily declined the State's suggestion. *Rodriguez*, 169 Ill. 2d at 186. *Rodriguez* also extended the *King* doctrine to consecutive sentences, noting that, although *King* spoke in terms of multiple convictions and concurrent sentences, the legislature had amended section 5–8–4(a) of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5–8–4(a) (West 2002)) to mandate consecutive sentences in certain cases. Thus, the court stated that the *King* doctrine applied to those cases as well. *Rodriguez*, 169 Ill. 2d at 187.

Although the genesis of the one-act, one-crime doctrine arose from concerns about adverse effects on parole opportunities, the fact that parole has been abolished does not inevitably lead to the

conclusion that the doctrine should be abandoned. In the two decades since *King* was decided, this court has had occasion to address the impact of a one-act, one-crime violation on a defendant, quite apart from any effect on parole. In so doing, this court has found a one-act, one-crime violation to qualify for review under the second prong of the plain-error rule. Under that portion of the rule, a court may disregard forfeiture where a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The second prong of the plain-error rule is "invoked only in those exceptional circumstances where, despite the absence of objection, application of the rule is necessary to preserve the integrity and reputation of the judicial process." *People v. Harvey*, 211 Ill. 2d 368, 387 (2004).

In *People v. Davis*, 156 Ill. 2d 149 (1993), the defendant was convicted of unlawful possession of cannabis and unlawful possession with intent to deliver cannabis. The trial court imposed a single sentence. No appeal was taken and the defendant did not raise any issue of an improper conviction in his postconviction petition. The trial court denied his petition following an evidentiary hearing. The appellate court found the conviction for unlawful possession of cannabis to be a lesser-included offense of unlawful possession with intent to deliver and determined that the conviction for the lesser offense was void. The court remanded to the trial court with instructions to vacate the judgment for the lesser-included offense. This court held that the improper conviction was voidable and that the defendant had not preserved a claim of error as to that conviction. The court further noted that the plain-error rule may not be invoked to save procedurally defaulted claims in postconviction proceedings. However, regardless of the defendant's forfeiture, this court exercised its supervisory authority, stating:

> "Despite our conclusion that defendant has waived the improper-conviction issue, in the exercise of our supervisory authority, we vacate defendant's conviction on the lesser offense of possession. We do so out of an awareness that the effects of the improper conviction are not confined to this trial and sentence. Defendant may be subject to future prejudice as a result of the improper convictions. In the unfortunate event

> of a future encounter with the criminal justice system, the improper conviction could likely affect decisions with respect to the setting of bond and sentencing, as well as parole opportunities. This is so regardless of whether an improper sentence has also been imposed. Significantly, the improper conviction appears on defendant's presentence investigation report as well as on the court's record sheet.
>
> Because of the prejudicial effect on defendant, we vacate the erroneous conviction and sentence of unlawful possession of cannabis. Further, as we are unable to discern what portion of defendant's sentence impermissibly pertains to the lesser offense, we remand this cause to the trial court for resentencing." *Davis*, 156 Ill. 2d at 160.

Though *Davis* involved convictions for a greater- and a lesser-included offense, the same rationale has been applied where a defendant was convicted of two non-lesser-included offenses that were based upon a single physical act. For example, in *Harvey*, defendant Barefield was charged with four counts of unlawful possession of four stolen motor vehicles and one count of aggravated possession of the same four stolen vehicles. Barefield was convicted of all five counts and received concurrent sentences on each conviction. On appeal, Barefield argued, *inter alia*, that his four convictions for simple possession of the motor vehicles should be vacated because those offenses were based on the same physical act that formed the basis for the aggravated possession conviction. The appellate court found that Barefield had forfeited the issue and that, in any event, there was no one-act, one-crime violation, noting that the two statutes at issue specifically stated that a conviction under either statute would not be deemed to constitute a lesser-included offense of the other. *Harvey*, 211 Ill. 2d at 377.

In addressing Barefield's one-act, one-crime argument, this court agreed with the appellate court that Barefield had forfeited the issue because he had raised it for the first time on appeal. Nonetheless, the court observed that plain errors affecting substantial rights may be reviewed on appeal, despite forfeiture. The court further noted that "an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial

process, thus satisfying the second prong of the plain error rule." *Harvey*, 211 Ill. 2d at 389.

This court has also applied the *King* doctrine in a juvenile case. In *In re W.C.*, 167 Ill. 2d 307 (1995), the minor was adjudicated delinquent on two counts of first degree murder of one victim, based on accountability; the trial court committed him to the juvenile division of the Department of Corrections for an indeterminate period. The trial court merged the two counts into one finding of delinquency and imposed only one sentence. One of the minor's arguments when his appeal reached this court was that it was fundamentally unjust to allow the record to reflect that he was accountable for two murders. This court reached the issue despite the minor's forfeiture of his argument. The court noted that, although only one finding of delinquency was made and one sentence imposed, the dispositional order incorrectly reflected two offenses of first degree murder. This court agreed with the State that any possible prejudice to the minor in the event of any future juvenile or criminal proceeding could be averted by resort to the record, which showed that only one murder was committed. However, "in the interests of justice and judicial economy" and to "avoid the possibility of future confusion or adverse effect to respondent," this court modified the dispositional order to reflect that the minor's commitment was based on a single offense of first degree murder. *In re W.C.*, 167 Ill. 2d at 342-43.

In light of this court's treatment of one-act, one-crime violations as adversely affecting the integrity of the judicial process under the second prong of the plain-error rule, we decline to abandon the *King* doctrine. Accordingly, we find it unnecessary to address the State's other arguments for the rule's abrogation.

III. Prosecutorial Discretion

The State argues that if this court determines not to abandon the one-act, one-crime doctrine, the State should be permitted to exercise prosecutorial discretion to elect which of defendant's aggravated criminal sexual assault convictions should survive. The State notes that the appellate court has, in some cases, allowed the State the discretion to choose the surviving conviction where the multiple

offenses have the same legislative classification. The State urges this court to adopt this rule, describing it as a corollary of (1) prosecutorial discretion to nol-pros a charge and (2) the discretion granted the State to frame the number of charges for one-act, one-crime purposes. The State wishes to retain defendant's conviction for aggravated criminal sexual assault based on residential burglary and have his sexual assault conviction based upon home invasion vacated, along with the lesser-included offense of residential burglary.

Defendant, on the other hand, argues that the State's request to exercise its prosecutorial discretion to vacate the more serious offense is contrary to established law. Rather, he argues, the State's discretion should be limited to those situations in which it is not possible to determine which offense is the most serious. Defendant argues that the appellate court correctly looked to the aggravating factors of home invasion and residential burglary for the purpose of determining which of the aggravated criminal sexual assault offenses is the most serious.

A *nolle prosequi* is the formal entry of record of a prosecuting attorney of his or her unwillingness to prosecute a case. *People v. Norris*, 214 Ill. 2d 92, 104 (2005). The appellate court has held that the power of the prosecutor to nol-pros a charge extends throughout the trial proceedings up until sentence is imposed. See *People v. Williams*, 315 Ill. App. 3d 22, 30 (2000); *People v. Olson*, 128 Ill. App. 3d 560, 562 (1984); *People v. Baes*, 94 Ill. App. 3d 741, 746 (1981). As stated previously, some appellate cases have allowed the State to use its prosecutorial discretion even on appeal to choose the surviving conviction in one-act, one-crime situations. The State notes that the term "prosecution" is defined in the Criminal Code as "all legal proceedings by which a person's liability for an offense is determined, commencing with the return of the indictment or the issuance of the information, and including the final disposition of the case upon appeal." 720 ILCS 5/2–16 (West 2002).

This court has "always held" that under the one-act, one-crime doctrine, sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). Accordingly, we first address the question of whether the seriousness of the offense of aggravated criminal sexual assault is properly determined by the aggravating factor for the

offense. The State argues that when a defendant is convicted of multiple counts of aggravated criminal sexual assault, it has the prosecutorial discretion to choose which conviction survives because the crimes are all Class X felonies and therefore of equal severity.

In determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense. See *People v. Duszkewycz*, 27 Ill. 2d 257, 261 (1963) (comparing the respective range of penalties for rape and incest and determining that rape, which carried the longer possible sentence, was the more serious offense). In doing so, a court relies on the plain language of the statutes to determine which offense is more serious; common sense dictates that the General Assembly would mandate greater punishment for offenses it deems more serious. *Lee*, 213 Ill. 2d at 228. Where the offenses provide for identical punishments, this court has remanded to the trial court to determine which convictions should be retained. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997). However, in situations where the degree of the offenses and their sentencing classifications are identical, this court has also considered which of the convictions has the more culpable mental state. In *People v. Mack*, 105 Ill. 2d 103 (1984), *vacated on other grounds*, 479 U.S. 1074, 94 L. Ed. 2d 127, 107 S. Ct. 1266 (1987), the defendant was convicted of first degree murder for the killing of one person, based on (1) intentionally and knowingly shooting the victim, (2) shooting the victim knowing that the shooting created a strong probability of death or great bodily harm, and (3) shooting the victim while committing the forcible felony of armed robbery. Noting that the maximum punishment for all three offenses was death, this court looked to the mental states involved and determined that the intentional and knowing conviction was the more serious because it required a more culpable mental state than the others. *Mack*, 105 Ill. 2d at 137.

The appellate court in the instant case used the aggravating factors of residential burglary and home invasion to determine which of defendant's aggravated criminal sexual assault convictions would survive, concluding that the aggravating factor of home invasion involved a more culpable mental state than residential burglary. 377 Ill. App. 3d at 220-21. This court has not used aggravating factors to determine which of multiple aggravated criminal sexual assault

convictions based upon a single physical act is the most serious. For example, the offenses in *Garcia* were based upon multiple counts of aggravated criminal sexual assault, some premised on personal culpability of the defendants and others based on accountability for the actions of others. The charges were variously based on several distinct aggravating factors, including (1) using a dangerous weapon, (2) causing the victim bodily harm, (3) threatening the victim's life, (4) endangering the victim's life, and (5) committing the sexual assault in the course of committing another felony (armed robbery). Noting that there was no way to determine the most serious conviction because none of the convictions involved a more or less culpable mental state, this court remanded to the trial court to determine which of the convictions should be retained. *Garcia*, 179 Ill. 2d at 71-72.

We conclude that we should continue to adhere to *Garcia* and hold that where there are multiple convictions for aggravated criminal sexual assault based upon the same physical act, none of the offenses are more serious than any other. As the *Garcia* court stated, it is not possible to tell which is the more serious offense because none of the offenses involve a more culpable or less culpable state. In that event, rather than remanding to the trial court to determine which conviction must be vacated, the State would like to make that decision.

In the appellate court, the State relied on four appellate court cases to support its argument that it should be allowed to use its prosecutorial discretion in cases where multiple offenses have the same legislative classification. In *People v. Schultz*, 73 Ill. App. 3d 379 (1979), the defendant was convicted of multiple offenses against three persons. The State conceded on appeal that some of the offenses should be vacated under the one-act, one-crime doctrine. The appellate court, without elaboration, allowed the State to pursue certain offenses and cease prosecution on other offenses. There is no indication in the appellate court's decision that the defendant raised any objection to this procedure. *Schultz*, 73 Ill. App. 3d at 382.

In *People v. Rayford*, 104 Ill. App. 3d 124, 126 (1982), the appellate court, without discussion, allowed the State to choose which of two Class X felonies it would pursue on appeal.

People v. Eubanks, 279 Ill. App. 3d 949, 963 (1996), relied on a decision of this court, *People v. Holman*, 103 Ill. 2d 133 (1984), in

allowing the State to choose which of three convictions for aggravated criminal sexual assault should be retained. *People v. McColler*, 363 Ill. App. 3d 81 (2005), relied on *Eubanks* in allowing the State to elect which of the defendant's convictions for attempt (aggravated criminal sexual assault) should be retained. The State elected to retain the conviction that was based on displaying a knife, rather than the conviction based on home invasion. The appellate court noted the general rule that sentence should be imposed on the most serious offense and it agreed that the conviction chosen by the State to be retained was the most serious. The court distinguished this court's decision in *Garcia*, which remanded to the trial court to decide which of the defendant's three aggravated criminal sexual assault convictions should be retained, noting that, in *Garcia*, there was no way to determine which offense was the more serious. In contrast, the appellate court noted that this court in *Rodriguez*, 169 Ill. 2d at 190, determined that aggravated criminal sexual assault based on display of a dangerous weapon was a more serious offense than the same offense based on home invasion. Accordingly, the *McColler* court found it unnecessary to remand to the trial court. *McColler*, 363 Ill. App. 3d at 91-92.

The *McColler* court's reading of *Rodriguez* was mistaken. In *Rodriguez*, the defendant was charged with eight counts of aggravated criminal sexual assault, one count of home invasion, and two counts of intimidation. Some of the sexual assault counts were based on the defendant's displaying or threatening to use a dangerous weapon and others were based on the defendant's committing the offense during a home invasion. The jury returned three general verdicts of guilty, one for each offense. The appellate court affirmed the defendant's convictions for aggravated criminal sexual assault and intimidation, but vacated the home invasion conviction as a lesser-included offense of aggravated criminal sexual assault. *Rodriguez*, 169 Ill. 2d at 185. On appeal to this court, the State argued that the appellate court misapplied the *King* doctrine. This court determined that the two offenses were based on separate acts, although a common act–threatening the victim with a gun–was a part of both offenses. In addition, the court noted that the appellate court had erroneously assumed that, since the defendant was convicted of home invasion, the jury's general verdict on the sexual assault offense applied only

to the counts based on home invasion. This court found that assumption to be erroneous because a general verdict of guilty is presumed to be based on any good count of the indictment to which the proof is applicable. Based on these principles, this court observed that the defendant was equally guilty of each count of aggravated criminal sexual assault. Further, the court stated its assumption that the defendant was convicted of aggravated criminal sexual assault based on the more serious offense of displaying or threatening to use a dangerous weapon. Home invasion is not a lesser-included offense of that offense. Thus, the defendant was properly convicted of both offenses. *Rodriguez*, 169 Ill. 2d at 190-91.

It is apparent from a reading of *Rodriguez* that it was not this court's intent to state or imply that the severity of convictions for aggravated criminal sexual assault for one-act, one-crime purposes may be determined by looking at their aggravating factors. The reference to the aggravating factors was made in the context of addressing the appellate court's belief that the defendant must have been convicted only of aggravated criminal sexual assault based on home invasion. Further, we note that this court's decision in *Garcia* was filed more than a year after *Rodriguez* was decided.

The State also relies on *Holman*, where the defendant was convicted of four counts of intentional murder and three counts of felony murder, all involving one victim. On appeal to this court, the parties agreed that three of the four convictions for intentional murder must be vacated, as well as two of the felony murder convictions based on burglary. The defendant argued that the remaining felony murder conviction based on armed robbery should be vacated and the remaining intentional murder conviction retained. The State disagreed, arguing that the felony murder conviction should stand because the aggravating factor on which the State relied in seeking the death penalty was that the murder took place in the course of an armed robbery. This court acknowledged that the cause would have to be remanded for a new sentencing hearing and that because any of the murder convictions might support a death sentence under the facts of the case, the State had the right to elect which of the convictions should be retained. *Holman*, 103 Ill. 2d at 158-59.

The appellate court in the instant case distinguished the above cases, noting that *Holman* involved a remand for a new sentencing

hearing and this court wanted the State to have the ability to elect which convictions should be retained. The court also noted that there was no discussion in *Eubanks* as to whether the vacated conviction involved the more serious charge and the *McColler* court concluded that it was in fact vacating the conviction on the less serious offense. Instead, the appellate court noted, in the instant case, the State wanted to vacate the more serious conviction. The court concluded that under the relevant case law, the State lacked discretion to do so. 377 Ill. App. 3d at 221. Instead, the court relied in part on *People v. Daniels*, 331 Ill. App. 3d 380, 386 (2002), where the court vacated a conviction for aggravated criminal sexual assault based on display of a dangerous weapon as requiring a less culpable mental state than the same offense based on bodily harm to the victim. At the time *Daniels* was decided, the penalties for both offenses were the same.

The State argues that the appellate court erred in distinguishing this court's decision in *Holman*. However, *Holman* does not support the State's position. All four of the defendant's murder convictions in that case were equally serious in that they each would support a sentence of death. Because of this court's disposition of other issues in the case, it was necessary to remand to the trial court for a new sentencing hearing. Thus, this court determined that the State should have the right on remand to elect which of the murder convictions should be retained. *Holman*, 103 Ill. 2d at 159.

Holman does not stand for the proposition that the State should be allowed to exercise its prosecutorial discretion whenever a one-act, one-crime violation occurs and it cannot be determined which of the offenses is the more serious. Rather, the *Holman* court's decision to allow the State to decide on remand which conviction should be retained is consistent with the notion that the power of the prosecutor to nol-pros a charge extends throughout the trial proceedings up until the time sentence is imposed. The new sentencing hearing would be part of those proceedings.

The State argues that it would be unfair to it to allow defendant to "circumvent the People's discretion not to proceed on counts in the trial court because there, defendant did not object to judgment being entered on those crimes." However, defendant did not circumvent the State's discretion; rather, the State chose not to exercise its discretion in the trial court. The record of defendant's guilty plea proceeding

shows that the prosecutor acknowledged that both counts of aggravated criminal sexual assault were based on a single physical act and that sentence should be imposed on only one count. In fact, prior to allowing his client to plead guilty, defendant's trial counsel sought and received the prosecutor's concession that, although defendant would plead guilty to both counts, sentence should be imposed on only one of the sexual assault convictions. Instead, at the sentencing hearing, the prosecutor requested that concurrent sentences be imposed on both counts. The fact that defense counsel failed to bring the matter to the trial court's attention at the sentencing hearing did not prevent the State from using its power of *nolle prosequi* in the trial court.

We conclude that the better course is to continue to adhere to the principle that when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination.

IV. Supervisory Authority

In the alternative, the State requests that this court use its supervisory authority to reinstate defendant's conviction for aggravated criminal sexual assault based on residential burglary and remand for resentencing on both sexual assault convictions because the two sexual assaults were based upon different acts. The State admits that it forfeited this argument because it conceded in the appellate court and in its petition for leave to appeal to this court that one of defendant's convictions for aggravated criminal sexual assault should be vacated under one-act, one-crime principles. The State argues, however, that this court's supervisory authority may override its procedural default.

The State has indeed forfeited this argument. In the appellate court, the State conceded that, under the one-act, one-crime doctrine, one of defendant's sexual assault convictions must be vacated. Further, in its petition for leave to appeal to this court, the State did not argue that the convictions were based upon different acts. Its arguments were that the appellate court erred in not allowing the State to exercise its prosecutorial discretion to choose the surviving sexual assault conviction and that this court should abandon the one-act,

one-crime rule. We note that the rules of forfeiture in criminal proceedings are applicable to the State as well as to the defendant. *People v. Williams*, 193 Ill. 2d 306, 347 (2000).

In support of its argument for the exercise of this court's supervisory authority, the State cites *People v. Normand*, 215 Ill. 2d 539 (2005). However, the State's reliance on that case is misplaced. *Normand* involved a prosecution for possession of child pornography. The statutory definition of "child" included depictions of a person who appeared to be under the age of 18. While the defendant's appeal was pending in the appellate court, this court filed its decision in *People v. Alexander*, 204 Ill. 2d 472 (2003), in which we held unconstitutional the "appears to be" language in the definition of "child" in the statute. The defendant in *Normand* argued before this court that the trial court had erroneously relied on that statutory definition and that the State had failed to prove that the children depicted in the photographs were real. The State argued that the defendant had forfeited this argument by not raising the issue in the trial court. This court declined to find forfeiture because the *Alexander* decision was not filed until well after the defendant's trial had concluded. *Normand*, 215 Ill. 2d at 543-44.

Here, the State had the opportunity to argue to the appellate court that there was no one-act, one-crime violation and that defendant was properly convicted of both sexual assault offenses. Instead, the State chose to concede that one of defendant's convictions must be vacated under one-act, one-crime principles. Further, the State failed to raise the issue in its petition for leave to appeal. We find no basis for ignoring the State's forfeiture or for exercising our supervisory authority under these circumstances.

CONCLUSION

We decline the State's request to abandon the one-act, one-crime doctrine. We hold that the appellate court erred in finding defendant's aggravated criminal sexual assault conviction based on home invasion to be the more serious offense and in vacating the sexual assault conviction based on residential burglary. We remand this cause to the trial court for a determination as to which sexual assault conviction will be retained and for resentencing in accordance with

section 5–8–4 of the Corrections Code (730 ILCS 5/5–8–4 (West 2002)). We affirm the remainder of the appellate court's judgment.

Appellate court judgment affirmed in part and reversed in part; cause remanded.

Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983)

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

Ill. Supreme Court · filed 1983-06-17 · Reporter opinion
Supreme Court

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Where the memo cites it

- memo p. 3 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C011.1
- memo p. 3 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C011.3
- memo p. 3 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C011.3
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that the defendant show a systematic exclusion of blacks from the jury in case after case. I question whether the defendant can ever meet this burden, since only the prosecutor has access to the information needed to prove systematic exclusion. The defendant is black. The prosecutor here excluded virtually the entire group of black jurors. As I stated in *People v. Gosberry* (1983), 93 Ill. 2d 544, 549 (Simon, J., dissenting), this procedure violates the defendant's rights under the State and Federal constitutions to a jury trial—and to equal protection of the laws.

For the above reasons, although I concur in the conclusion that the defendant should receive a new sentencing hearing, I also believe he should receive a new trial.

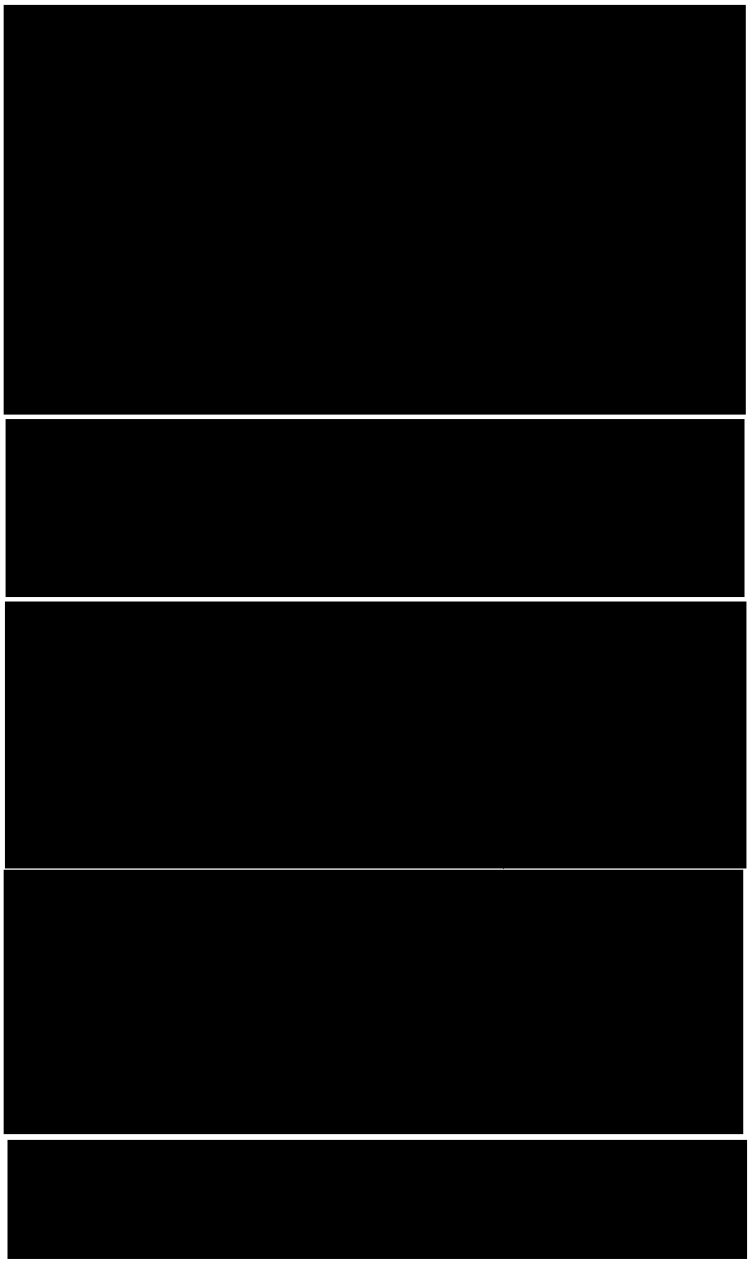
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(Nos. 55962, 55963 cons.—[redacted]

ROBERT RICKEY, a Minor, Appellee, v. CHICAGO TRANSIT AUTHORITY *et al.* Appellants.

Opinion filed June 17, 1983.

[redacted]



[redacted]

French, Rogers, Kezelis & Kominiarek, P.C., of Chicago (Richard G. French, Dorothy F. French and Charles W. Planek, of counsel), for appellant United States Elevator Company.

Norman J. Barry and Daniel Cummings, of Chicago (Rothschild, Barry & Myers, of counsel), for appellant Chicago Transit Authority.

James J. Reidy, Ltd., of Chicago (James J. Reidy, William A. Murphy, Gerald M. Chapman, and Donna A. Reidy, of counsel), for appellee.

JUSTICE WARD delivered the opinion of the court:

Robert Rickey, a minor, brought an action by his mother and next friend, Janet Rickey, to recover damages for emotional distress allegedly suffered when he viewed an accidental injury to his brother, Richard, who, with Robert, was standing on a descending escalator. The complaint sought recovery from defendants Chicago Transit Authority (CTA), Midland Elevator Company (Midland Elevator) and United States Elevator Company (United States Elevator) upon the theory of negligence, and from defendant Otis Elevator Company (Otis Elevator) upon the theory of strict product liability. The escalator involved here had been designed, manufactured, and sold to the CTA by Otis Elevator. Midland Elevator had contracted to inspect and repair the CTA's escalators. Midland Elevator had been merged with United States Elevator in 1971. The circuit court of Cook County held that there is no cause of action for emotional distress caused by the negligence of another,

absent a contemporaneous physical impact upon the bystander-plaintiff, or for emotional distress under a strict product liability theory, and granted the defendants' motion to dismiss the complaint with prejudice. The appellate court affirmed the dismissal of the complaint as to defendant Otis Elevator, but reversed the judgment as to the other defendants and remanded the cause to the circuit court. (101 Ill. App. 3d 439.) The appellate court denied applications by the CTA and United States Elevator for a certificate of importance to this court under our Rule 316 (73 Ill. 2d R. 316). We granted and consolidated the petitions for leave to appeal of the CTA and of United States Elevator (73 Ill. 2d R. 315).

The question presented by the appellate court's judgment is whether a bystander who did not suffer physical injury or impact at the time of the occurrence may recover damages for emotional distress which resulted from witnessing an injury to his brother caused by the defendants' negligence.

On February 12, 1972, Robert, who was then eight years old, and Richard, then five years old, were descending on a subway escalator owned and operated by the CTA. Part of Richard's clothing became entangled in the mechanism at the base of the escalator, and he was choked and could not breathe for a substantial period of time. A comatose condition resulted, and Richard remained in a coma as of February 11, 1980, when the complaint here was filed. The complaint stated that he will be permanently confined to a nursing-care facility. The accident occurred in the presence of and was witnessed by Robert. The complaint did not allege that he suffered any impact or injury at the time and did not allege that he was in danger of harm.

The complaint alleged that, as a result of witnessing the accident and injury to his brother, Robert sustained severe mental and emotional distress and psychiatric trauma. It

alleged that the emotional distress became manifest in physical injury, including "definite functional, emotional, psychiatric and behavorial disorders, extreme depression, prolonged and continuing mental disturbances, inability to attend school and engage in gainful employment and to engage in his usual and customary affairs."

→ memo p. 3

In this State recovery for negligently caused emotional distress suffered by the direct victim or by a bystander who witnesses the injury of another has been consistently denied unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff. *Braun v. Craven* (1898), 175 Ill. 401; *Carlinville National Bank v. Rhoads* (1978), 63 Ill. App. 3d 502; *Kaiserman v. Bright* (1978), 61 Ill. App. 3d 67; *Neuberg v. Michael Reese Hospital & Medical Center* (1978), 60 Ill. App. 3d 679.

The appellate court panel here noted that this court in *Knierim v. Izzo* (1961), 22 Ill. 2d 73, recognized that even without contemporaneous physical impact or injury there may be a recovery for intentionally inflicted emotional distress. It is obvious that in *Knierim v. Izzo*, however, the circumstances were sharply dissimilar from those here. In that case there was an intentional infliction of emotional distress, not simply mental distress caused by another's negligence. Too, the intentional conduct of the defendant was extreme and outrageous. This court said that "it is the outrageous nature of [the defendant's] conduct that forms the basis for the action." (22 Ill. 2d 73, 88; see also *Public Finance Corp. v. Davis* (1976), 66 Ill. 2d 85 (another "outrageous" tort decision) and Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939).) It is clear that *Izzo* cannot be applied to the circumstances here. (See Restatement (Second) of Torts sec. 46, comment *d* (1965).) The appellate court itself noted that "[t]he plaintiff does not claim that the injuries of which he complains were caused by an intentional act on the part of the defendants." 101 Ill. App. 3d 439, 440.

The defendants contend that the appellate court panel attempted to overrule this court's long-standing holding in *Braun v. Craven* (1898), 175 Ill. 401, where it was decided that a plaintiff complaining of emotional distress cannot recover unless he suffered a physical injury or impact. They say that the nature of our court system requires that law established by this court's decision be followed when the question decided arises again before a court. If precedent is not judicially respected, the uniformity and stability of decision, which is essential to the proper administration of justice, will be destroyed. The appellate court panel usurped the function of this court, it is said, and created a conflict in appellate court decisions. *Beagley v. Andel* (1978), 58 Ill. App. 3d 588, is cited. There the appellate court properly observed: "It is fundamental that appellate courts are without authority to overrule the supreme court or to modify its decisions." 58 Ill. App. 3d 588, 591.

The appellate court panel here acknowledged that in this State recovery has been consistently barred unless there was a contemporaneous physical injury or impact suffered by the plaintiff. It noted too: "The appellate court has repeatedly followed the *Braun* decision. [Citations.]" (101 Ill. App. 3d 439, 440.) The panel observed that the defendants asserted that it "lack[ed] authority to award relief *** [and was] duty bound" to follow the decision of this court in *Braun v. Craven*. (101 Ill. App. 3d 439, 441.) The panel responded that ordinarily it would be improper for the appellate court to deviate from the decisions of this court, but the panel said: "However, the subsequent history of the impact rule and the development of the law in areas dealing with mental distress convince us that a reevaluation of the rule is proper." (101 Ill. App. 3d 439, 441.) It appears to be accepted that there was a drafting by the panel of a new standard for cases of this character. See 1 J. Dooley, Torts sec. 15.10, at 44 (1982 Supp.), where the interpretation of the panel's holding is: "The Illinois

appellate court has abandoned the impact rule in favor of a Dillon-like rule for negligent infliction of emotional injury."

Gilliam v. Stewart (Fla. 1974), 291 So. 2d 593, is a case with remarkable resemblance to what we are considering here. There the District Court of Appeal of Florida appeared openly to overrule or attempt to overrule the holding of the Supreme Court of Florida that in the absence of impact no recovery could be had by one suffering physical injury resulting from emotional distress induced by another's negligent conduct. The supreme court, in affirming its adherence to the requirement of injury or impact, said that only it could overrule its own decisions. It observed that while one should not necessarily infer that its decisions were always correct, the system did provide for the uniform operation of law throughout Florida. The court noted that if the parties had not elected to take *certiorari,* the decision of the District Court of Appeal would have become final and would have created a decision contrary to others within the State's body of law on the question. The court approved the observation of a dissenting judge that if the impact doctrine was to be abandoned the change should be made by the Supreme Court of Florida.

Here the appellate court panel denied motions by the CTA and by United States Elevator for the issuance of a certificate of importance. Had petitions for leave to appeal not been filed, the opinion of the panel would have stood without challenge and in contradiction to what the panel itself noted, namely, the consistent following of the *Braun* decision by the appellate court.

The significance of *stare decisis et non quieta movere* does not require extended discussion here.

There is a broad range of opinion as to whether recovery should be permitted in the case of negligent infliction of emotional distress. In Annot., 64 A.L.R.2d 100, 103 (1959), the observation appears: "The case law in the field here treated is in an almost unparalleled state of confusion

***."

The underlying question is, of course, whether any person who suffers emotional distress can recover, but the question here specifically is whether a bystander at the injury of another who, generally under the decisions, is a close relative of the bystander can recover.

In a number of jurisdictions the so-called "impact rule" still governs the question of recovery for emotional distress. In those jurisdictions, which, as stated, has included Illinois, there must have been a contemporaneous physical injury or impact to permit recovery by a bystander. See, *e.g., Hartford v. Max Rouse & Sons Northwest* (1980), 100 Idaho 840, 606 P.2d 944; *Claycomb v. Eichles* (Fla. App. 1981), 399 So. 2d 1050; *Howard v. Bloodworth* (1976), 137 Ga. App. 478, 224 S.E.2d 122.

The impact rule was at one time followed in the majority of jurisdictions. Today it is clear that most jurisdictions no longer require contemporaneous physical impact or injury for a cause of action for emotional distress. A significant reason for its loss of adherents was that courts quickly began to find that the impact requirement had been met through minor physical contacts which in reality were insignificant and played trivial or no part in causing harm to the plaintiff. The requirement of "impact" often became purely formal, and it was satisfied by a slight jolt or jar (*Louisville & Nashville R.R. Co. v. Roberts* (1925), 207 Ky. 310, 269 S.W. 333); or "any degree of physical impact, however slight" (*Zelinsky v. Chimies* (1961), 196 Pa. Super. 312, 318, 175 A.2d 351, 354); or even dust in the eye (*Porter v. Delaware, L. & W.R. Co.* (1906), 73 N.J.L. 405, 63 A. 860). Illustrating that the impact rule suffers continuing losses in its following, the Supreme Court of Missouri this year in *Bass v. Nooney Co.* (Mo. 1983), 646 S.W.2d 765, abandoned the impact requirement. Also, the Supreme Court of Ohio in 1983, through its opinion in *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St. 3d 131,

447 N.E.2d 109, announced its departure from the rule. We, too, consider that the question of recovery for emotional distress caused by another's negligence should not be determined solely on whether there was a contemporaneous physical impact upon the plaintiff.

The conclusion of the appellate court panel that the complaint here stated a cause of action was grounded on these factors: (1) the minor plaintiff was near the scene at the time of the accident; (2) there was a direct emotional impact when he witnessed the accident; and (3) the plaintiff and the victim were close relatives. The standard suggested by the court contains factors similar to those set out in *Dillon v. Legg* (1968), 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72. In that case, however, which the appellate panel, *inter alia*, refers to, the court stated: "[W]e deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case." (68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80.) It appears from the opinion of the appellate court that the panel treated the complaint as one in which damages were sought solely for "emotional distress," and that it would allow recovery for emotional disturbance or distress alone.

Were the view of the appellate court here to be accepted we consider that we would be adopting a standard that is too vaguely defined to serve as a yardstick for courts to apply, and one that is excessively broad in that it would permit recovery for emotional disturbance alone. Illustrative of apprehensions felt at following so broad a rule of recovery, the Restatement (Second) of Torts states:

> "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." Restatement (Second) of Torts sec. 436A,

at 461 (1965).

Courts generally have been reluctant to allow recovery for purely mental or emotional distress. Although other courts have challenged these fears, courts have given as reasons for this reluctance apprehensions that the door would be opened for fraudulent claims, that damages would be difficult to ascertain and measure, that emotional injuries are hardly foreseeable and that frivolous litigation would be encouraged.

The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. (See, *e.g.*, *Niederman v. Brodsky* (1970), 436 Pa. Super. 401, 261 A.2d 84; *Owens v. Childrens Memorial Hospital* (8th Cir. 1973), 480 F.2d 465 (applying Nebraska law); *Robb v. Pennsylvania R.R. Co.* (Del. 1965), 210 A.2d 709; *Stadler v. Cross* (Minn. 1980), 295 N.W.2d 552; *Tobin v. Grossman* (1969), 24 N.Y.2d 609, 249 N.E.2d 419; *Whetham v. Bismarck Hospital* (N.D. 1972), 197 N.W.2d 678; *Shelton v. Russell Pipe & Boundary Co.* (Tenn. 1978), 570 S.W.2d 861; *Guilmette v. Alexander* (1969), 128 Vt. 116, 259 A.2d 21.) That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. *Dailey v.*

↩ memo p. 3, 4, 7, 8, 11

LaCroix (1970), 384 Mich. 4, 179 N.W.2d 390; *Stadler v. Cross* (Minn. 1980), 295 N.W.2d 552; *Fournell v. Usher Pest Control Co.* (1981), 208 Neb. 684, 385 N.W.2d 605; Restatement (Second) of Torts sec. 436A, comment *c* (1965).

The standard we adopt here shall be applied to this case and to all cases not finally adjudicated. (See *Elliott v. Willis* (1982), 92 Ill. 2d 530, 545.) We judge that under the circumstances the plaintiff here should be permitted to plead again. What the facts of the occurrence here were cannot be precisely determined from the complaint, which of course was not drawn with the standard in mind that we announce today.

Though the appellate court appeared to regard the case as one involving solely emotional distress, the complaint here did allege resultant physical manifestations. Also, the complaint states simply that the plaintiff and his brother were descending on the escalator and that the brother's clothing became entangled in the mechanism of the escalator. We do not know the plaintiff's position or location on the escalator at the time and whether he was endangered by the claimed negligence; we do not know whether he had reasonable fear for his own safety, causing emotional distress.

For the reasons given here, the judgment of the appellate court is affirmed and the cause is remanded to the circuit court of Cook County for proceedings not inconsistent with this opinion.

Affirmed and remanded.

Rivas v. Benny’s Prime Chophouse, LLC, 2025 IL App (1st) 242044

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 2025-09-30 · Opinion
Published opinion

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- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 100: passage C051.1
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 100: passage C051.1

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Rivas v. Benny's Prime Chophouse, LLC, 2025 IL App (1st) 242044

Appellate Court Caption	LUZ RIVAS, Individually and as Representative of Decedent's Estate and Independent Administrator of the Estate of Angel Rivas, Plaintiff-Appellee, v. BENNY'S PRIME CHOPHOUSE, LLC, d/b/a Benny's Chophouse, d/b/a Benny's Chophouse LLC, Defendant-Appellant.
District & No.	First District, Third District No. 1-24-2044
Filed	September 30, 2025
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 2024-L-0587; the Hon. Thomas M. Cushing, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Steven C. Wolf, Lee A. Laudicina, and Siri Arends Graham, of Best, Vanderlaan & Harrington, of Chicago, for appellant. Elizabeth A. Kaveny, of Kaveny + Kroll, LLC, and Colleen L. Murphy and Richard J. Grossman, of Steinberg, Burtker & Grossman Ltd., both of Chicago, for appellee.
Panel	JUSTICE REYES delivered the judgment of the court, with opinion. Presiding Justice Martin and Justice Lampkin concurred in the judgment and opinion.

OPINION

¶ 1 Decedent Angel Rivas was employed as a busboy at a restaurant owned by defendant Benny's Prime Chophouse, LLC, when he died of anaphylactic shock after eating a meal provided by the restaurant, which he was unaware contained seafood, to which he was allergic. Plaintiff Luz Rivas, the decedent's wife and the independent administrator of his estate, filed a lawsuit in the circuit court of Cook County, alleging that defendant was negligent in its food safety practices. After a bench trial, judgment was entered in her favor but, on appeal, the matter was reversed and remanded for a new trial based on the improper admission of evidence. After a new bench trial before a different judge, judgment was again entered in favor of plaintiff. Defendant now appeals, contending that (1) the trial court should have granted its motion for a directed finding, (2) the trial court made a number of errors concerning the admission of evidence and other trial matters, (3) the damages award was excessive, and (4) the decedent was more than 50% at fault for his death. For the reasons set forth below, we affirm.

¶ 2 BACKGROUND

¶ 3 *Decedent's Death*

¶ 4 The evidence at trial established the following. The decedent, who was originally from Ecuador before moving to the United States in the 1980s, was 43 years old at the time of his demise. While Spanish was his first language, according to plaintiff, he spoke "good English" and had no difficulty reading or understanding it. He and plaintiff had been married for approximately 20 years and had four children, ranging in age from 17 years to 4 months old; the oldest child had special needs and required around-the-clock care, which was provided by plaintiff. The decedent was generally in good health but was allergic to seafood. He informed plaintiff that if he ingested seafood, "[h]e gets red and [has] an allerg[ic] reaction." As a result, plaintiff never cooked seafood in the home, and she never observed the decedent eating seafood.

¶ 5 For almost 20 years, the decedent worked six days a week as a busboy during the dinner shift at a local steakhouse. During his time there, he befriended another employee, Alfonso Villegas, who worked as a manager. One day in 2009, Villegas brought ceviche to work and offered some to the decedent, who declined, informing Villegas that he was allergic. This was the only time throughout the years that they knew each other that the decedent had indicated that he was allergic to seafood.

¶ 6 In spring 2010, Villegas informed the decedent that he was planning on working as a line cook at a new restaurant—defendant's restaurant. The decedent, who had an infant child, decided to take a second job working the lunch shift at the restaurant to supplement his income. The decedent began as a busboy at defendant's restaurant, which opened in April 2010, while Villegas worked as a line cook and "supervisor," assisting in translating for the Spanish-speaking kitchen staff and busboys.

¶ 7 The restaurant offered its employees an optional free "family meal," which was a staff-only meal made from leftover ingredients from that day's service. The meal was available to any staff members after their shift had ended and they had clocked out. On April 5, 2010, Villegas and Juan Padilla, another line cook, prepared shrimp scampi as the family meal. Villegas observed the decedent in line for the meal and warned him that the meal contained

seafood, so he should not eat it due to his allergy. As a result of Villegas's warning, the decedent did not eat the meal and instead ate a sandwich prepared for him by Villegas. Villegas testified that the decedent had not asked to be warned about the presence of seafood, but Villegas did so simply due to noticing him in line and happening to remember his allergy.

¶ 8 One week later, on April 12, 2010, the family meal again contained seafood—pasta with a lobster bisque sauce and chopped clams. Villegas and Padilla placed the food in a bowl for the employees to serve themselves and returned to their duties; there was no label on the bowl, and Villegas testified that the only way to tell what was in the meal was to taste it, but also added that the smell of the food would indicate that it contained seafood. Several minutes later, when Villegas passed by the area, he noticed the decedent standing in line for seconds and informed him that the meal contained seafood. While Villegas knew that the decedent had been working earlier that day, he had "no clue" whether the decedent was still present when the family meal was served.

¶ 9 Villegas asked the decedent if he needed Benadryl[1] and offered to take him to the hospital, but the decedent declined both. Instead, he washed his hands and rinsed out his mouth. Padilla overheard the conversation and asked the decedent why he had not informed anyone of his allergy, and he responded, "it's my own fault for not asking" whether the meal contained seafood. The decedent was discovered 5 to 10 minutes later in another room, where he had collapsed from anaphylactic shock. The decedent was taken to the hospital; plaintiff received a phone call at 2:45 p.m., informing her of the incident, and the decedent ultimately died at the hospital. An autopsy revealed that his cause of death was anaphylaxis due to ingestion of shellfish.

¶ 10 *Prior Litigation*

¶ 11 As a result of the decedent's death, plaintiff filed a workers' compensation claim, which was denied by defendant. She then filed a multicount lawsuit in the circuit court of Cook County (case No. 2012 L 003805) on April 10, 2012, alleging that defendant was negligent in its food safety practices and in its failure to warn the decedent of the presence of seafood in the family meal. She also subsequently filed an application for adjustment of claim, in the alternative, before the Workers' Compensation Commission (case No. 13 WC 009925). The circuit court case was stayed on May 12, 2015, pending resolution of plaintiff's workers' compensation claim. The case was removed from the stay calendar at plaintiff's request on November 8, 2017, and was renumbered (case No. 2017 L 11400). That case was voluntarily dismissed on September 11, 2019, and plaintiff refiled her complaint (case No. 2020 L 008455) on August 10, 2020.

¶ 12 During discovery, defendant deposed Barry Parsons, plaintiff's expert with respect to defendant's duties under the law. During the deposition, Parsons was asked about his knowledge of Illinois state or municipal statutes or ordinances concerning the preparation and service of food. He was unable to cite any specific statutes or ordinances but cited to federal authority—specifically, certain portions of the 2005 federal Food and Drug Administration

[1]Villegas was not asked, nor did he testify about, why he believed Benadryl would alleviate the decedent's potential allergic reaction. We note, however, that the medical examiner testified that Benadryl "is not the treatment of choice for anaphylaxis" and would not have saved the decedent's life alone.

Food Code (FDA Food Code).[2] At trial, however, Parsons cited to a different chapter of the FDA Food Code concerning the matter, which was permitted over defendant's objection. The trial court ultimately found in favor of plaintiff, with damages of approximately $8.2 million, which was reduced to approximately $4.5 million due to the trial court's finding that the decedent was 45% at fault.

¶ 13 Defendant appealed, and a different panel of this court reversed, finding that Parsons should not have been permitted to testify about the undisclosed portions of the FDA Food Code. See *Rivas v. Benny's Prime Chophouse LLC*, 2023 IL App (1st) 221901-U. The matter was remanded to the circuit court for a new trial, and the case was renumbered (case No. 2024 L 0587) and assigned to a different judge on remand.

¶ 14 *Instant Litigation*

¶ 15 On remand, plaintiff amended her complaint, and the operative complaint at trial consisted of three counts: (1) a survival action for negligence, (2) a wrongful death action for negligence, and (3) "judicial estoppel" as a bar to any argument concerning the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010)). The negligence counts alleged, in essence, that defendant was negligent (1) in failing to prepare and serve food in a reasonably safe condition, (2) in failing to maintain adequate policies and protocols concerning food safety and allergies, and (3) in failing to warn employees—including the decedent—about the presence of seafood in the family meal or to prepare an alternate meal for those with allergies.

¶ 16 In response to plaintiff's complaint, defendant raised three affirmative defenses. Defendant first alleged that the decedent's level of contributory fault exceeded 50%, meaning that plaintiff was barred from recovery. Defendant also alleged that the decedent's failure to mitigate damages by accepting the offers of medical care immediately following his ingestion of the seafood "permitted the Plaintiff's damages to increase substantially," so defendant should not be liable for those damages. Finally, defendant alleged that the Workers' Compensation Act provided the exclusive remedy for plaintiff's claim.

¶ 17 Prior to trial, the parties filed several pretrial motions. As relevant to the instant appeal, plaintiff filed a motion to bar defendant from asserting its workers' compensation defense based on judicial estoppel or, in the alternative, to strike the defense. Plaintiff contended that the defense was inappropriate where defendant had continued to refuse to pay any workers' compensation benefits to the decedent's family and defendant's workers' compensation attorney had indicated that the decedent's death had not occurred in the course of his employment. Defendant, in turn, filed a motion to bar any argument that Villegas's knowledge of the decedent's allergy should be imputed to defendant, as it maintained that Villegas had learned that fact through a prior relationship with the decedent and such an argument would be both inappropriate and highly prejudicial. The trial court denied both motions but indicated

[2]We note that the FDA Food Code is not an enacted statutory scheme but is instead a model periodically published by the federal Food and Drug Administration, which "assists food control jurisdictions at all levels of government by providing them with a scientifically sound technical and legal basis for regulating the retail and food service segment of the industry." *FDA Food Code*, U.S. Food & Drug Admin., https://www.fda.gov/food/retail-food-protection/fda-food-code (last visited Oct. 1, 2025) [https://perma.cc/44UC-YWSZ].

that it would take the issues raised in plaintiff's motion with the case, and the matter proceeded to a bench trial.

¶ 18 During trial, Villegas was asked about his training and testified that his position as a line cook at defendant's restaurant was the first time he had ever worked as a cook. He had not been trained in any allergen policies or how to prevent any allergic incidents and was not aware of anyone at the restaurant who was a certified sanitation manager. Villegas testified that he did not communicate his knowledge of the decedent's allergy to anyone when working at the restaurant, as "I didn't know that I was supposed to communicate to anybody about it." Plaintiff's counsel asked, over defendant's objection, whether "the reason why you didn't communicate your knowledge about his allergy to the other people in the kitchen [was] because you were never trained about how to prevent allergen incidents," and Villegas confirmed that was true. Counsel later again asked, over defendant's objection, "[i]f you had knowledge about allergen training, what, if anything, would you have done about communicating to the other staff?" Villegas responded that "it would have been way different," specifying that "[w]e would have put a sign on the top of the food, top of the shelf." Finally, counsel asked, over defendant's objection, "[i]f there was a Chicago Board of Health rule that required labels of bulk food for self-service, what, if anything, would you have done to comply with that?" Villegas responded, "We would label the food and wouldn't be here."

¶ 19 Villegas also testified that family meals were commonly offered at restaurants. At the steakhouse where he previously worked, the family meal took the form of any lunch or dinner specials that the restaurant had failed to sell, which were placed on a cart for employees to eat. If an employee had an allergy, they would be given something else to eat.

¶ 20 Padilla similarly testified that, while he had worked as a cook at several restaurants since 1997, he had never received training in handling food allergies prior to the decedent's death. He further testified that, in his experience, he had never seen anyone label the contents of a family meal.

¶ 21 The parties also presented the testimony of two experts concerning the duties of a restaurant with respect to food safety. Barry Parsons, plaintiff's food safety expert, testified that there was no formal allergen training at defendant's restaurant at the time of the decedent's death in 2010 and that any informal policy arose merely from the cooks' habits in making separate meals for specific individuals who they knew had allergies, which was wholly inadequate to ensure the safety of defendant's employees.

¶ 22 Parsons testified that the practice of serving the family meal by placing it in a bowl or pan for the employees to help themselves would be considered to be providing bulk food for self-service under the law. He further opined that, to a reasonable degree of food safety certainty, defendant's actions were not in compliance with industry standards and chapter 2 of the FDA Food Code. Parsons testified that defendant did not have a "person in charge," or certified food safety individual, as required by the FDA Food Code and by industry standards and that, if it had, the decedent's death could have been prevented. Parsons further testified that the industry standards for communication about allergens required either labeling of the food dishes or the presence of an attendant.

¶ 23 On cross-examination, Parsons admitted that Illinois had not adopted the FDA Food Code until 2017 but testified that portions of it, including the requirement for a person in charge, were adopted prior to that time through training materials and that industry standards also required training about food allergies. Parsons also admitted that defendant had an allergen

policy in place for defendant's customers but testified that there was no such policy in place for defendant's employees. Parsons testified that the FDA Food Code referred to "consumers" and that "[w]e're all consumers. *** You have to protect everybody."

¶ 24 Jeff Nelken, defendant's food safety expert, testified via an evidence deposition that, in 2010, there were "no established standards" concerning the exposure of either restaurant customers or employees to allergens. Nelken further testified that the procedures and policies used by defendant at the time "were very simple and very basic and were designed primarily for the guests that were coming into the restaurant." Nelken opined that, to a reasonable degree of certainty, "everyone did the appropriate actions to be taken," and that "[t]here isn't anything that they could have done that they didn't do," other than the decedent making his allergy known to his coworkers.

¶ 25 On cross-examination, Nelken admitted that there were food safety certifications available at the time and that the federal Food and Drug Administration had certain recommended standards, which he characterized as "suggestions," testifying that "[t]hese are not standards." Nelken further testified that the provision of the FDA Food Code that required labeling of bulk food for self-service did not apply to the situation in which a family meal was served to restaurant employees and applied to food manufacturing and food processing.

¶ 26 Finally, the parties stipulated that the decedent's medical bills totaled $8,553; his funeral expenses totaled $5,827; his lost wages were $23,446 per year; and the life expectancy of a 43-year-old man was an additional 38.1 years.

¶ 27 At the end of trial, defendant filed a motion for a directed finding with respect to its affirmative defense concerning the Workers' Compensation Act, contending that the statute provided the exclusive remedy for plaintiff's claim and that the complaint must therefore be dismissed in its entirety.

¶ 28 On September 30, 2024, the trial court entered a 15-page written order concerning the trial and defendant's motion for directed finding. First, the trial court found that plaintiff had met her burden of proving that defendant acted negligently, proximately causing the decedent's death. The trial court found that defendant's employee and agent, Villegas, was aware of the decedent's allergy but nevertheless served a meal containing seafood without informing anyone of the presence of seafood or displaying a label or card with such information. The trial court noted that displaying a sign would have been "a simple, inexpensive, effective way to prevent an allergic reaction and death" and was a technique recommended by industry authorities. The trial court found that "failure to follow that simple and virtually free precaution is failure to act reasonably under the circumstances, especially when balanced against the potential harm it would have addressed: a deadly anaphylactic reaction."

¶ 29 The trial court further found that having a person stationed near the serving bowl to warn of allergies would have been an acceptable alternative, as either approach would have informed the decedent of the allergen in the meal without needing to seek out Villegas. The trial court also found that Villegas's failure to inform anyone else of the decedent's allergy was unreasonable, since others were involved in the preparation of the family meal. The trial court observed that the decedent's death

> "illustrates the need for a more formal, intentional policy, such as labeling dishes with seafood or stationing a person at the serving line to advise employees. Relying on a busboy to determine who prepared the meal, locate that person, and ask about the

ingredients was impractical and dangerous, especially in a new restaurant where most employees did not yet know each other."

¶ 30 The trial court noted that, while Villegas's knowledge of the decedent's allergy was undisputed, "that knowledge is not essential" for the finding of negligence. The trial court found that "[t]he credible testimony of Mr. Parsons establishes a reasonable restaurant in 2010 should have labeled food being served in bulk, including this meal. That obligation was not dependent on any specific knowledge about an employee's allergy." Thus, the trial court found that Villegas's knowledge of the decedent's allergy and his conduct in setting out the meal without labeling it "fortifies the finding" of defendant's negligence. The trial court similarly found that the expert testimony "fortif[ied]" the conclusion that defendant was negligent, as both food experts testified that the restaurant industry, through its safety training arm, was aware of the need to have people trained in food safety present in restaurants.

¶ 31 The trial court also found "ample evidence in the record, direct and circumstantial, that the Defendant's negligence proximately caused [the decedent's] death." Specifically, the trial court pointed to the stipulation that the decedent died of anaphylaxis after consuming seafood, which was corroborated by medical testimony, and plaintiff's testimony that the decedent was careful to avoid seafood, which was corroborated by Villegas. The trial court found that "if notified the pasta contained seafood [the decedent] likely would have chosen not to eat it." Accordingly, the trial court found that plaintiff had satisfied its burden of establishing defendant's negligence.

¶ 32 The trial court next found that defendant had satisfied its burden of establishing its affirmative defense of contributory negligence, as the evidence demonstrated that the decedent's negligence was a proximate cause of his injuries. The trial court found that "[a] reasonable person with an allergy to seafood would determine whether food he planned to eat contained seafood before eating." The trial court pointed to Padilla's testimony, which "succinctly stated" that the decedent's death could have been avoided if defendant had identified the food as seafood or if the decedent had investigated the meal's contents before he ate. The trial court, however, nevertheless found that "[t]he fact remains, [defendant] was a member of an industry that knew the importance of having a system in place to prevent accidental ingestion and death. The risk was enhanced in this instance by the fact that there was no seafood visible in the meal." After finding that the decedent's "relatively benign reaction to prior exposure to seafood is a mitigating factor, albeit a minor one, on the issue of his own responsibility for his injuries and death," the trial court determined that the percentage of negligence attributable to the decedent was 40%.

¶ 33 With respect to defendant's affirmative defense concerning failure to mitigate damages, the trial court found that defendant had not made any argument or presented any evidence concerning the defense, so there was no evidence that the decedent's failure to seek immediate medical care was a proximate cause of any of his injuries.

¶ 34 Finally, the trial court addressed the applicability of the Workers' Compensation Act. The trial court first found that the count in plaintiff's complaint seeking to bar defendant's argument based on estoppel failed to state a cause of action and, accordingly, struck that count of the complaint. Next, the trial court denied defendant's motion for directed finding and further found that defendant had not satisfied its burden of proof as to its affirmative defense.

¶ 35 The trial court found that the decedent's injury and death did not arise out of his employment, nor did it occur in the course of his employment. The trial court observed that

the meal was optional, was served after the employees had finished their work and had clocked out, and was not part of employee compensation. The trial court also found that nothing about the decedent's employment exposed him to a greater risk than a member of the public, as the risk of injury from consuming seafood was personal to him. Accordingly, the trial court found that defendant had failed to meet its burden to prove its affirmative defense by a preponderance of the evidence and further found that "[i]t follows that the defendant's motion for directed finding also must be denied."

¶ 36 The trial court also briefly addressed plaintiff's contention that defendant was estopped from raising its argument due to the position it had taken in the workers' compensation proceedings, finding that it was "unpersuaded" by defendant's suggestion that "the denial of the workers' compensation claim was an insurer's tactic the court should disregard." The trial court found that defendant rejected the workers' compensation claim, denying the injuries arose out of or in the course of employment, and had obtained a benefit by not paying any benefits to date. The trial court found that this "further support[s] this court's finding that defendant has failed to meet its burden on its Third Affirmative Defense. In the alternative, the court finds the evidence proves the inapplicability of the exclusive remedy provisions of" the Workers' Compensation Act.

¶ 37 The trial court then calculated the damages award, finding in favor of plaintiff in the amount of $8,064,380, which consisted of itemized damages for (1) lost money, benefits, goods, and services ($314,380); (2) pain and suffering ($250,000); (3) grief and sorrow ($3.2 million); and (4) loss of society, which was further itemized for plaintiff ($300,000) and each of the decedent's four children ($1 million each). After reducing the total damages by the percentage of the decedent's contributory negligence, the trial court awarded plaintiff a total of $4,838,628, plus costs and prejudgment interest.

¶ 38 Plaintiff subsequently filed a motion for costs and prejudgment interest, contending that she was entitled to costs of $389.31 for filing fees and $943,332.54 in prejudgment interest. Defendant objected to the request for prejudgment interest, claiming that the statute providing for prejudgment interest was unconstitutional. On October 24, 2024, the trial court amended its judgment order, awarding plaintiff the costs and prejudgment interest she had sought, resulting in a total judgment amount of $5,782,349.85. This appeal follows.

¶ 39 ANALYSIS

¶ 40 On appeal, defendant contends that (1) the trial court should have granted its motion for a directed finding, based on its affirmative defense concerning the Workers' Compensation Act; (2) the trial court made a number of errors concerning the admission of evidence and other trial matters; (3) the damages award was excessive; and (4) the decedent was more than 50% at fault for his death. We consider each argument in turn.

¶ 41 *Workers' Compensation Act*

¶ 42 Defendant first contends that the trial court erred in denying its motion for a directed finding on its affirmative defense concerning the Workers' Compensation Act. As an initial matter, plaintiff contends that defendant has waived this argument by not filing its motion for a directed finding at the close of plaintiff's case. Section 2-1110 of the Code of Civil Procedure provides that, in a bench trial, "at the close of plaintiff's case," the defendant may move for a finding in its favor. 735 ILCS 5/2-1110 (West 2024). If the trial court denies the motion and

the defendant proceeds to submit evidence in support of its defense, "the motion is waived." *Id.*; see *Pancoe v. Singh*, 376 Ill. App. 3d 900, 909 (2007). Plaintiff claims that, since defendant's motion was presented at the close of *all* the evidence, not at the close of plaintiff's case, defendant has waived its motion.

¶ 43 In this case, defendant presented the live testimony of only one witness, Padilla, as its expert's testimony was presented via an evidence deposition. By agreement of the parties, Padilla was called out of order, testifying while plaintiff was still presenting her case in chief. At the close of plaintiff's case, then, all live testimony had concluded, and the only remaining part of the case was two exhibits submitted by defendant—one consisting of the evidence deposition and one consisting of plaintiff's application before the Workers' Compensation Commission—both of which were admitted without objection. The trial court asked defense counsel whether the defense rested, and counsel indicated that it did, but then "backpedal[ed] a bit," indicating that "I do have the motion that we've discussed. I have it now. I can present it to the Court. Your Honor indicated that he was going to give Counsel a couple days to file a response brief." Copies of a motion for directed finding, as well as plaintiff's response to the motion, are contained in the record on appeal.

¶ 44 Based on the facts of this case, we cannot find that defendant waived its motion for a directed finding. The witnesses were called out of order by agreement, meaning that it would not have been possible for defendant to present its motion prior to submitting any evidence in its own case. There was also no objection by plaintiff to defendant's motion, nor did the trial court raise any concerns, and the record suggests that the parties contemplated defendant filing such a motion. Thus, we find defendant's motion properly before us on appeal.

¶ 45 In ruling on a motion for a directed finding, the trial court engages in a two-prong analysis. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). First, the trial court determines, as a matter of law, whether the plaintiff has presented a *prima facie* case by proffering some evidence on every element essential to the cause of action. *Id.* If so, then the trial court proceeds to the second prong, which requires the trial court to weigh the evidence, including determining the credibility of the witnesses, and drawing reasonable inferences therefrom. *Id.* at 275-76; see 735 ILCS 5/2-1110 (West 2024). If, after doing so, there remains sufficient evidence to establish the plaintiff's *prima facie* case, the motion should be denied. *Cryns*, 203 Ill. 2d at 276. If, however, the evidence warrants a finding in the defendant's favor, the motion should be granted, and the trial court should enter a judgment dismissing the action. *Id.* Where the trial court rules on the motion under the first prong, it constitutes a question of law and is reviewed *de novo*. *Id.* at 275. Where, however, the trial court rules on the motion under the second prong, the trial court's findings will not be reversed unless they are contrary to the manifest weight of the evidence. *Id.* at 276.

¶ 46 In this case, the trial court's approach in ruling on defendant's motion for a directed finding was unusual. Instead of the typical situation in which a defendant's motion for a directed finding is ruled on immediately upon the close of the plaintiff's case, here, the trial court ruled on the motion at the same time as it ruled on the merits of the entire case. Indeed, in its analysis, the trial court considered the merits of defendant's affirmative defense based on all of the trial evidence, then found that "[i]t follows that the defendant's motion for directed finding also must be denied." We observe, however, that in ruling on a motion for a directed finding, the trial court is limited to considering only the evidence presented by the plaintiff, and therefore, the trial court here should not have considered the out-of-order testimony presented by

defendant or the exhibits it later offered into evidence. See *Friedman v. Safe Security Services, Inc.*, 328 Ill. App. 3d 37, 50-51 (2002); *Century-National Insurance Co. v. Tracy*, 316 Ill. App. 3d 639, 645 (2000). While not urged by defendant in this case, the consideration of a defendant's out-of-order evidence in ruling on a motion for directed finding has been found to be reversible error in other circumstances. See *Century-National Insurance*, 316 Ill. App. 3d at 645-46 (reversing a grant of the defendants' motion for directed finding where the trial court considered the testimony of the defendants' witness).

¶ 47 Here, we cannot find that the trial court's atypical approach was problematic under the circumstances of this case, primarily due to the fact that the trial court rejected the affirmative defense on its merits. The trial court's ruling on the merits of a defendant's affirmative defense generally encompasses more evidence than its ruling on a motion for a directed finding, as, by definition, the motion for a directed finding occurs before the defendant has presented its case in chief. See 735 ILCS 5/2-1110 (West 2024). Thus, if the trial court finds that a defendant has failed to prove its affirmative defense even after considering the defendant's evidence, it necessarily follows that the trial court would reach the same result when considering only the plaintiff's evidence in the context of a motion for directed finding. In other words, if the trial court properly found that defendant had failed to establish its affirmative defense on its merits, its denial of the motion for directed finding would also be proper. Consequently, we proceed to review the propriety of the trial court's ruling on the merits of defendant's affirmative defense in light of all of the evidence presented at trial.

¶ 48 In reviewing a trial court's judgment after a bench trial, we defer to the trial court's factual findings unless they are against the manifest weight of the evidence. *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. A factual finding is against the manifest weight of the evidence " 'when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence.' "[3] *Id.* (quoting *Samour, Inc. v. Board of Election Commissioners of Chicago*, 224 Ill. 2d 530, 544 (2007)).

¶ 49 In its affirmative defense, defendant contended that plaintiff's civil action was barred by the Workers' Compensation Act (Act). The Act "provides the exclusive remedy for employees to recover from their employers following accidental workplace injuries." *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 464 (2010); see 820 ILCS 305/5(a), 11 (West 2010). The statute bars an employee from bringing a common law cause of action against his employer unless the employee proves (1) that the injury was not accidental, (2) that the injury did not arise out of his employment, (3) that the injury was not received during the course of employment, or (4) that the injury was not compensable under the Act. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 463 (1990). In this case, defendant's claims center around the second and third exceptions.

¶ 50 The questions of whether an individual's injuries arose out of and occurred in the course of employment are generally questions of fact, which rely on an assessment of the testimony and evidence presented by the parties. *Tazewell County v. Illinois Workers' Compensation Comm'n*, 2025 IL App (4th) 230754WC, ¶ 22. As such, we review the factfinder's

[3]As noted, a ruling on a motion for directed finding based on the second prong is also reviewed under a manifest weight of the evidence standard. See *Cryns*, 203 Ill. 2d at 276. Thus, the only difference in the analysis of the two rulings is whether the evidence presented during defendant's case in chief is considered.

determination under a manifest weight of the evidence standard. *Id.* In doing so, the test "is not whether the reviewing court or any other tribunal might reach the opposite conclusion on the same evidence, but whether there was sufficient factual evidence in the record to support" the decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Accordingly, we proceed to consider whether there was sufficient factual evidence to support the trial court's determinations on the applicability of either exception.

¶ 51 Arising Out of Employment

¶ 52 Defendant first claims that plaintiff was barred from pursuing a civil action where the decedent's injury arose out of his employment. The requirement that an injury "arise out of" an employee's employment " 'is primarily concerned with causal connection.' " *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848, ¶ 36 (quoting *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003)). " 'To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.' " *Id.* (quoting *Sisbro*, 207 Ill. 2d at 203). A risk is "incidental to the employment" when "it belongs to or is connected with what the employee has to do in fulfilling his or her job duties." *Id.* (citing *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987)).

¶ 53 Our supreme court has identified three categories into which an employee's risk may fall: " '(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics.' " *Id.* ¶ 38 (quoting *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (2000)). The first category of risks includes the "obvious" types of work-related injury, such as tripping on a defect on the employer's premises or performing a work-related task which contributes to the risk of falling, and are deemed to arise out of the employee's employment. *Id.* ¶ 40. The second category of risks " 'include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee, and injuries caused by personal enemies and are generally noncompensable.' " *Id.* ¶ 42 (quoting *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162-63). An exception, however, applies where " 'the work place conditions significantly contribute to the injury or expose the employee to an added or increased risk of injury.' " *Id.* (quoting *Rodin v. Industrial Comm'n*, 316 Ill. App. 3d 1224, 1229 (2000)). Finally, the third category of risks includes injuries such as " 'stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes.' " *Id.* ¶ 44 (quoting *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163). Injuries caused by neutral risks generally do not arise out of employment unless the employee was exposed to the risk to a greater degree than the general public. *Id.* " 'Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public.' " *Id.* (quoting *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011)).

¶ 54 In this case, the trial court identified the "risk" to which the decedent was exposed to be the "risk of injury due to consumption of seafood." As such, it classified the risk as a personal risk or, "at best[,] a neutral risk" and found that the decedent's injuries did not arise out of his employment. We cannot find that this determination was against the manifest weight of the

evidence. See *id.* ¶ 30 (the question of whether an injury arises out of an employee's employment typically presents a question of fact).

¶ 55 The only case cited by the trial court, identified by the parties, or discovered in our own research which concerns an employee's allergic reaction is *Rodin*, 316 Ill. App. 3d 1224. In that case, an employee of a subcontractor was directed by his employer to attend a lunch hosted by the general contractor as a representative of the subcontractor. *Id.* at 1225. During the lunch, the employee ate something which later triggered an allergic reaction, sending him to the hospital. *Id.* at 1225-26. The employee was denied workers' compensation benefits due to the finding that the injury did not arise out of his employment and, on review, the appellate court agreed. *Id.* at 1227.

¶ 56 In categorizing the type of risk, the *Rodin* court found that "[t]he risk of an allergic reaction to wholesome food was not a risk inherent in the claimant's employment as a foreman of an electrical contractor. Consequently, the risk is not an employment risk or one distinctly associated with his employment." *Id.* at 1228-29. The *Rodin* court further found that "[n]either can it be said that it is totally neutral or void of personal characteristics. In this case, the risk to which the claimant was exposed was one personal to him." *Id.* at 1229. The appellate court noted that, where the risk was a personal one, the question of whether it arose out of the employee's employment was determined by "whether he was exposed to a risk greater than that to which the general public is exposed." *Id.*

¶ 57 The *Rodin* court observed that nothing suggested that the food which caused the allergic reaction was unfit for consumption or posed any risk to the general public. *Id.* Instead, the court found that "[t]he risk that the claimant might have an allergic reaction to food containing preservatives is unrelated to his employment and is a risk to which he would have been equally exposed apart from his work." *Id.* As such, the injury was not compensable. *Id.* The *Rodin* court further observed that

> "[t]he fact that the claimant would not have consumed the food that caused his reaction had he not been ordered to attend the *** luncheon does not, standing alone, mandate a finding that his allergic reaction arose out of his employment, as Illinois has never adopted the positional risk doctrine." *Id.*

¶ 58 Based on the reasoning in *Rodin*, we cannot find that it was against the manifest weight of the evidence for the trial court in this case to have found that the decedent's injury did not arise out of his employment at the restaurant. As in *Rodin*, the risk of an allergic reaction from eating otherwise untainted food was a risk that was personal to the decedent and was not inherent in his duties as a busboy. The decedent's job duties required clearing tables and setting them in preparation for customers; he was not required to sample or otherwise eat the food served by the restaurant. To the extent that he did eat the food, the food that was served as part of the family meal was from the same inventory that was served to the customers—indeed, the family meal was primarily composed of leftover food from the service. Thus, the decedent was not exposed to any greater risk than the general public by virtue of his employment. Accordingly, the trial court's determination that the decedent's injury did not arise out of his employment was not against the manifest weight of the evidence.

¶ 59 We do not find persuasive defendant's contention that the "risk" at issue was "serving unlabeled food without warning employees." This argument conflates the alleged *negligent conduct* with the risk of injury. Defendant, however, cites no authority for the proposition that the risk to which an employee is exposed must be the result of negligence. To the contrary, in

order to effectuate the purpose of the Act—to provide financial protection to workers for accidental injuries—the Act imposes liability on an employer without fault. *Meerbrey*, 139 Ill. 2d at 462. There is no requirement in the Act that a compensable injury must result from an employment-related risk caused by the employer's negligence, and there are countless cases in which an employee is injured in a manner which is not the result of any wrongdoing on the part of his employer. We also observe that, in this case, if the decedent had not been allergic to seafood, "serving unlabeled food without warning employees" would not have caused him any injury whatsoever. The risk to which he was exposed was the risk of eating a food to which he was allergic—a risk which, as we have explained, was one wholly personal to him and one to which he would have been equally exposed apart from his work.

¶ 60 Course of Employment

¶ 61 Defendant also claims that plaintiff was barred from pursuing a civil action where the decedent's injury occurred during the course of his employment. The requirement that injury occur "in the course of" the employee's employment "refers to the time, place, and circumstances of the injury." *McAllister*, 2020 IL 124848, ¶ 34 (citing *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366-67 (1977)). " 'A compensable injury occurs "in the course of" employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment.' " *Id.* (quoting *Wise v. Industrial Comm'n*, 54 Ill. 2d 138, 142 (1973)).

¶ 62 If an injury occurs "within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or doing something incidental thereto," the injury is deemed to have occurred in the course of employment. *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 338 (1980) (citing *Segler v. Industrial Comm'n*, 81 Ill. 2d 125, 128 (1980)). Our supreme court has extended this rule to include injuries sustained during an employee's lunch break while still on the employer's premises, reasoning that the act of procuring lunch is reasonably incidental to the employment. *Id.* at 339; see *County of Cook v. Industrial Comm'n*, 165 Ill. App. 3d 1005, 1008 (1988).

¶ 63 In this case, the trial court found that the decedent's injury did not occur during the course of his employment, as the decedent had completed his work for the day and was eating an optional meal provided by defendant. We cannot find that this determination was against the manifest weight of the evidence. See *Wise*, 54 Ill. 2d at 142 (the questions of whether an injury arises out of and in the course of an employee's employment are typically questions of fact).

¶ 64 While defendant attempts to analogize the instant case to the "lunch hour" cases, we cannot find that this case involves the same type of situation. In "lunch hour" cases, our supreme court has indicated that "the most critical factor in determining whether the accident arose out of and in the course of employment is the location of the occurrence." *Eagle Discount*, 82 Ill. 2d at 339. Thus, where the employee sustains an injury on a lunch break while on the employer's premises, "the act of procuring lunch has been held to be reasonably incidental to the employment." *Id.* In addition, our supreme court has explained that eating is deemed to be an act of personal comfort, so the "personal comfort" doctrine applies to lunchtime injuries. *Id.* Under that doctrine, "the course of employment is not considered broken by certain acts relating to the personal comfort of the employee." *Id.* In other words, in finding that lunchtime injuries may occur in the course of employment, our supreme court has focused on (1) the

place of the injury and (2) the type of action causing the injury. Under either theory, the employee is considered to be engaged in a continuous course of employment which is not broken by a brief respite to eat or engage in certain other activities.

¶ 65 Here, by contrast, the decedent's "course of employment" had ended for the day—his shift was over, and he had clocked out. While defendant suggests that the family meal was still considered to be in the course of the decedent's employment since defendant was aware of the provision of the meal, defendant fails to cite any authority finding such a result *where the employee's shift had ended*. *Eagle Discount* certainly does not stand for such a proposition, as under either the "lunch hour" or "personal comfort" doctrine, the injury occurs during a "break" during the workday. See *id.* at 339-40. While we recognize that, for instance, walking through a parking lot before or after the shift may be considered to be in the course of employment (see, *e.g.*, *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572, 575 (1999)), defendant has not cited any authority providing that voluntarily remaining on the premises after the end of an employee's shift to take advantage of an optional meal provided by the employer may be interpreted the same way. We therefore cannot find that it was against the manifest weight of the evidence for the trial court to have determined that the decedent's injury did not occur in the course of his employment.

¶ 66 Judicial Estoppel

¶ 67 As a final matter with respect to defendant's affirmative defense, defendant contends that the trial court erred in finding that defendant was judicially estopped from arguing that the Act barred the civil action. In her complaint, plaintiff had included a count alleging that defendant should be judicially estopped from relying on the Act, based on the representations of defendant's workers' compensation counsel. In its order following trial, the trial court struck that count of the complaint for failure to state a cause of action. The trial court nevertheless addressed the issue, as plaintiff had also raised it in a pretrial motion *in limine*, agreeing with plaintiff that defendant had taken a position as to the applicability of the Act during the workers' compensation proceedings that was inconsistent with the position it was taking during the civil action and that defendant received a benefit from that position. Specifically, the trial court observed that defendant had rejected plaintiff's workers' compensation claim, denying that the injuries arose out of or occurred in the course of employment, and had obtained a benefit by not paying any benefits under the Act. The trial court found that this "further support[s] this court's finding that defendant has failed to meet its burden on its Third Affirmative Defense. In the alternative, the court finds the evidence proves the inapplicability of the exclusive remedy provisions of" the Act.

¶ 68 As noted, we have determined that it was not against the manifest weight of the evidence for the trial court to find that the decedent's injury did not arise out of or occur in the course of his employment. These findings were made after thoroughly considering defendant's evidence and arguments. Thus, even if the trial court's statements could be interpreted as a finding that judicial estoppel applied, the trial court nevertheless considered the defendant's defense in full—exactly as defendant wished—and its findings were amply supported by the evidence. Accordingly, we have no need to further consider defendant's arguments concerning the applicability of judicial estoppel in this case.

¶ 69 *Trial Errors*

¶ 70 The next set of issues raised by defendant on appeal all concern alleged errors made during trial. Specifically, defendant contends that the trial court erred by (1) imputing Villegas's knowledge of the decedent's allergy to defendant, (2) allowing witnesses to testify to speculative potential conduct, and (3) admitting an "incomplete, inapplicable, and prejudicial" portion of the FDA Food Code into evidence.

¶ 71 Villegas's Knowledge

¶ 72 Defendant first claims that the trial court erred by imputing Villegas's knowledge of the decedent's allergy to defendant. A company such as defendant is an artificial legal entity, and the only knowledge which it can be said to have is that which is imputed to it under the principles of agency law. *Campen v. Executive House Hotel, Inc.*, 105 Ill. App. 3d 576, 585-86 (1982); see *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 589 (2009) (generally, the knowledge of an agent is imputed to his principal). "Thus, knowledge which a corporate agent receives while acting within the scope of his or her agency is imputed to the corporation if the knowledge concerns a matter within the scope of the agent's authority." *Campen*, 105 Ill. App. 3d at 586 (citing *United Disposal & Recovery Co. v. Industrial Comm'n*, 291 Ill. 480, 485 (1920)).

¶ 73 In this case, defendant does not dispute that Villegas was defendant's agent and does not dispute that Villegas was aware of the decedent's allergy.[4] Instead, defendant claims that, since the source of that knowledge was a preexisting relationship, it was not "receive[d] while acting within the scope of his or her agency" (*id.*) and therefore could not properly be imputed to defendant. We do not find this argument persuasive.

¶ 74 Knowledge that was gained prior to employment may be imputed to an employer under certain circumstances, "for instance, where it is clear that the information or knowledge obtained by the employee at a prior time is so precise and definite that it must be present in the employee's mind at a later time." *Carrizales v. Rheem Manufacturing Co.*, 226 Ill. App. 3d 20, 45-46 (1991); see *Greer v. Carter Oil Co.*, 373 Ill. 168, 172 (1940). In this case, the record clearly establishes that the fact of the decedent's allergy was "so precise and definite" (*Carrizales*, 226 Ill. App. 3d at 46) that it was present in Villegas's mind even after beginning his employment at defendant's restaurant. Only a few days after the restaurant opened, Villegas independently recalled the decedent's allergy when serving the family meal containing shrimp scampi. In addition, on the day of the decedent's allergic reaction, Villegas immediately reacted to the decedent's having eaten the family meal, further demonstrating that he recalled the decedent's allergy. Thus, we can find no error in the trial court's determination that, under the circumstances of this case, Villegas's knowledge of the decedent's allergy could properly be imputed to defendant, despite the fact that he acquired that knowledge prior to his employment at defendant's restaurant.

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[4]We observe that, for these purposes, it is irrelevant whether Villegas acted in a supervisory capacity with respect to the decedent, as knowledge held by coworkers about another coworker is still imputed to the employer. See *Bryant v. Livigni*, 250 Ill. App. 3d 303, 309 (1993) ("[W]hether the agent obtaining the knowledge is in a subordinate or a superior position in the corporation, that knowledge is still chargeable to the corporation if the information concerns a matter within the scope of the agent's authority.").

¶ 75 While not discussed by the parties, we also observe that the Restatement (Third) of Agency discusses the principle that notice of a fact that an agent knows is generally imputed to the principal if knowledge of the fact is material to the agent's duties to the principal. Restatement (Third) of Agency § 5.03 (2006). At least two justices of our supreme court have cited section 5.03 with approval as representing the rules of agency law. See *In re Dar. C.*, 2011 IL 111083, ¶ 141 (Burke, J., specially concurring, joined by Freeman, J.). The comments to section 5.03 make clear that the imputation of the agent's knowledge is appropriate "regardless of how the agent came to know the fact or to have reason to know it." Restatement (Third) of Agency § 5.03 cmt. e (2006). So long as the agent is aware of the fact at the time he takes authorized action on behalf of the principal and the fact is material to the agent's duties to the principal,

> "notice of the fact is imputed to the principal although the agent learned the fact prior to the agent's relationship with the principal, whether through formal education, prior work, or otherwise. Likewise, notice is imputed to the principal of material facts that an agent learns casually or through experiences in the agent's life separate from work." *Id.*

This provides additional support to our determination that the trial court's imputation of Villegas's knowledge to defendant was wholly appropriate in this case.

¶ 76 Speculative Testimony

¶ 77 Defendant next contends that the trial court erred in permitting Villegas and Padilla to provide improper speculative testimony. The admission of evidence is within the sound discretion of the trial court, and we will not disturb such decisions on review absent a clear abuse of discretion. *Gill v. Foster*, 157 Ill. 2d 304, 312-13 (1993). "[A] trial court abuses its discretion only if it acts arbitrarily without the employment of conscientious judgment, exceeds the bounds of reason and disregards recognized principles of law, or if no reasonable person would take the position adopted by the trial court." *Campbell v. Autenrieb*, 2018 IL App (5th) 170148, ¶ 26.

¶ 78 A lay witness may express an opinion in a case so long as that opinion is based on the witness's personal observations, is one that a person is generally capable of making, and is helpful to a clear understanding of the issue at hand. *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 44; *Zoerner v. Iwan*, 250 Ill. App. 3d 576, 581 (1993). However, "[i]f the basis of the opinion includes so many varying or uncertain factors that the lay witness is required to guess or surmise in order to reach an opinion, the opinion is objectionable as speculation or conjecture." (Internal quotation marks omitted.) *Rose v. Mercedes-Benz U.S.A., LLC*, 378 Ill. App. 3d 615, 625 (2007); *Walker v. Dart*, 2015 IL App (1st) 140087, ¶ 38.

¶ 79 In this case, defendant contends that Villegas and Padilla were permitted to engage in improper speculation when they testified that they would have placed a sign near the serving bowl had they known it was required and that, in that case, the decedent likely would not have ingested the food. As an initial matter, we agree with plaintiff that defendant has forfeited any objection to Padilla's testimony by failing to object at trial. See *Simmons v. Garces*, 198 Ill. 2d 541, 567 (2002) (where counsel failed to timely object, the objections to the admission of evidence were forfeited). We also observe that, with respect to Padilla, defense counsel engaged in the same type of allegedly objectionable questioning on redirect examination, so defendant cannot now claim prejudice from this line of questioning.

¶ 80 With respect to Villegas, defendant claims that he improperly speculated as to what he would have done had he known that food labels were required for the family meal and further speculated what the decedent would have done in response. After examining Villegas's testimony, we cannot find that the trial court's admission of such evidence was an abuse of discretion.

¶ 81 First, to the extent that defendant contends that Villegas's testimony violated the plaintiff's own motions *in limine*, we cannot find this to serve as a basis for reversal. A ruling on a motion *in limine* is an interlocutory order that remains subject to reconsideration by the trial court throughout the trial. *Reid v. Sledge*, 224 Ill. App. 3d 817, 822 (1992). Thus, even where a trial court grants a motion *in limine*, "[t]he court reserves the right to change its mind as the trial unfolds and as the context becomes clearer for the evidence in question." *County of Peoria v. Couture*, 2022 IL App (3d) 210091, ¶ 86; see *McHale v. Kiswani Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 36 (no error in permitting witness to testify despite previous grant of motion *in limine*).

¶ 82 Additionally, it is clear that Villegas's testimony was based on his own personal knowledge and his personal experience working in a kitchen. While there were no official allergen policies in place at the time of the decedent's injury, Villegas testified that he is now a certified sanitation manager, meaning that he has greater knowledge of proper food safety practices than he did at the time at issue. Defendant is correct that a party's actions cannot be judged in hindsight but must be viewed based on the circumstances at the time. See *Williams v. Elkin*, 239 Ill. App. 3d 1094, 1097-98 (1992). We cannot find, however, that it was improper speculation for Villegas to use his regular kitchen practices and experiences to testify about whether he would have employed those same practices in this case had he been aware of them at the time. We also observe that the questions posed to him by plaintiff's counsel were straightforward and did not require guessing or conjecture, further lessening any potential impropriety.

¶ 83 We also reject defendant's suggestion that Villegas was asked to opine that the decedent would not have consumed the seafood if it had been labeled. Defendant identifies three pages of the trial transcript in which it contends that the objectionable questioning occurred. In each question on those pages, however, plaintiff's counsel asked Villegas "what would *you* have done" (emphasis added) differently if he had received allergen training. Counsel never asked Villegas to opine as to what *the decedent* would have done in response, and the only testimony even arguably suggesting anything about the decedent's actions was Villegas's testimony that "it would have been way different" and "we wouldn't be here." We therefore cannot find that the trial court's admission of this testimony constituted an abuse of discretion.

¶ 84 FDA Food Code

¶ 85 The final alleged trial error identified by defendant concerns the trial court's admission of an "incomplete, inapplicable, and prejudicial" portion of the FDA Food Code. As noted, the testimony of defendant's food safety expert was done via evidence deposition, which occurred on June 21, 2019, in connection with the parties' first trial. As part of that deposition, plaintiff's counsel used the FDA Food Code—specifically, the portion of the model code which later served as the basis for reversal of the judgment in the first trial. The provision included as a deposition exhibit, however, did not contain the entirety of the provision but was a truncated version. When the deposition was admitted during the retrial, defense counsel did not include

the exhibits to the deposition, so plaintiff's counsel sought to admit the deposition exhibit into evidence at the end of trial. Defense counsel objected, indicating that the provision was not the complete version but was truncated, so the complete version should be admitted instead.

¶ 86 Counsel and the trial court then engaged in the following discussion:

> "THE COURT: Hold on. When he gave his deposition, is the paper that you're holding in your hand the document that was marked Exhibit—what's it called?
>
> PLAINTIFF'S COUNSEL: 4.
>
> THE COURT: 4?
>
> DEFENSE COUNSEL: Yeah, I presume it was, Judge. I don't recall, but I presume it was.
>
> THE COURT: So we're not going to change the exhibits that were used at the evidence dep. Exhibit 4 was an exhibit that was used in the evidence dep. It would be attached to the transcript. I will receive it because that's what was used. I'm not—the transcript is submitted in its entirety, including the exhibits that were used."

¶ 87 Defense counsel continued to object, arguing that exhibits were not admitted into evidence during a deposition but were admitted by the trial court. Defense counsel maintained that the provision should not be admitted into evidence "because it misrepresents the statute." The trial court responded:

> "Very good. So we'll attach it to the transcript, submit it to the Court, and if, in fact, this is a document that the Appellate Court already said can't be considered, I won't consider it. But if there was an exhibit to the transcript, it should be submitted. I'm not admitting it in evidence. I'm not going to admit it in evidence, but it should be submitted along with the transcript."

¶ 88 Defendant now contends that the trial court erred in admitting the deposition exhibit. The record reveals, however, that the trial court never admitted the challenged provision into evidence but included it in the record solely for the sake of having a complete record of the expert's deposition. We find no error in this action. To the extent that defendant's challenge may be interpreted as a challenge to the substantive use of the provision in the cross-examination of the expert, that argument has been forfeited on appeal, as it was not raised below. See *Simmons*, 198 Ill. 2d at 567.

¶ 89 *Damages*

¶ 90 Defendant next raises several issues concerning the damages award. Specifically, defendant contends that (1) the damages award was excessive and (2) the award of prejudgment interest is unconstitutional.

¶ 91 Excessive Award

¶ 92 Defendant first contends that the trial court's damages award was excessive. In reviewing a trial court's damages award after a bench trial, the standard of review is whether the judgment is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. "[I]n overturning a damage award, a reviewing court must find that the trial judge either ignored the evidence or that its measure of damages was erroneous as a matter of law." *Id.* (citing *MBC, Inc. v. Space Center Minnesota, Inc.*, 177 Ill. App. 3d 226, 234 (1988)). A trial court's award of damages will not be found to be against the manifest

weight of the evidence "if there is an adequate basis in the record to support the trial court's determination of damages." *Id.*

¶ 93 In this case, defendant claims that the trial court's damages award was excessive where it contained duplicative damages and failed to properly distribute damages among each of the decedent's surviving kin. Defendant's claims revolve around the award of damages under the Wrongful Death Act (740 ILCS 180/2 (West 2024)). The Wrongful Death Act provides that the amount recovered in any wrongful death action "shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person." *Id.* § 2(a). The factfinder in such an action "may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, and punitive damages when applicable, to the surviving spouse and next of kin of such deceased person." *Id.*

¶ 94 In this case, the trial court found in favor of plaintiff in the amount of $8,064,380, which consisted of itemized damages for (1) lost money, benefits, goods, and services ($314,380); (2) pain and suffering ($250,000); (3) grief and sorrow ($3.2 million); and (4) loss of society, which was further itemized for plaintiff ($300,000) and each of the decedent's four children ($1 million each). Defendant first claims that the trial court erred in awarding damages separately for each of these line items.

¶ 95 Defendant submitted a proposed verdict form to the trial court, which would have itemized damages for (1) medical expenses, (2) funeral expenses, (3) the decedent's pain and suffering, and (4) "Loss of Society." He contends that by separating out damages for grief and sorrow from the damages for loss of society, the trial court awarded duplicative damages, resulting in a double recovery. We do not find this argument persuasive.

¶ 96 First, to the extent that defendant suggests that the trial court was bound by his proffered verdict form since plaintiff did not provide one of her own, we observe that the instant case involves a bench trial, not a jury trial. Defendant cites no authority obligating the trial court to use a particular verdict form in such a case. The trial court indicated that it would consider defendant's proposed form in determining "whether to use them or to forego those as I write my written ruling on the case." We can find no error in the trial court's conduct in doing so.

¶ 97 Additionally, we can find no error in the trial court's separation of grief and sorrow from loss of society. Defendant cites no authority suggesting that it is improper to award damages for both, either separately or together.[5] Indeed, as he observes, the pattern jury instructions list the two separately. See Illinois Pattern Jury Instructions, Civil, No. 31.04 (approved June 18, 2021).

¶ 98 Defendant's argument conflates "pecuniary injury" under the Wrongful Death Act with "loss of society." This, however, does not represent an accurate interpretation of the law. "Pecuniary injury" under the statute is a broad term which encompasses a number of aspects. See *id.* (including the "loss of money, benefits, good, services" as examples of pecuniary losses); see also *Passafiume v. Jurak*, 2024 IL 129761, ¶ 47 (noting that "pecuniary injuries"

[5]Defendant cites one case, *Holaves v. Cardiovascular Institute at OSF, LLC*, 2018 IL App (2d) 170573-U, in support of his argument. That case, however, is an unpublished order filed prior to January 1, 2021, so it may not be cited in this court, even as persuasive authority. See Ill. S. Ct. R. 23(e)(1) (eff. June 3, 2025). In any event, even if it was properly before us, that case provides no support for defendant's position that grief and sorrow and loss of society are duplicative.

are broadly interpreted and include damages for the loss of material services). Our courts have found that "pecuniary injuries" under the Wrongful Death Act include the loss of society. See, *e.g.*, *Watson v. South Shore Nursing & Rehabilitation Center, LLC*, 2012 IL App (1st) 103730, ¶ 34.

¶ 99 Loss of society includes the recognition of such concepts as counsel, comfort, and " 'love, companionship, and affection.' " *Id.* ¶ 35 (quoting *Turner v. Williams*, 326 Ill. App. 3d 541, 548 (2001)). Historically, however, loss of society did not include grief and sorrow and, consequently, such damages were not recoverable in a wrongful death action. *Id.*; *Turner*, 326 Ill. App. 3d at 548; see *Elliott v. Willis*, 92 Ill. 2d 530, 539 (1982) (distinguishing between loss of society and bereavement in permitting the former and not the latter as damages in a wrongful death action).

¶ 100 In 2007, however, the legislature amended the Wrongful Death Act to expressly include "damages for grief, sorrow, and mental suffering" as "pecuniary injuries" that were covered by the statute. Compare 740 ILCS 180/2(a) (West 2006), with 740 ILCS 180/2(a) (West 2008). Thus, under the law in effect at the time of the decedent's trial, grief and sorrow were permissible components of the damages award. As the law is clear that "loss of society" and "grief and sorrow" are distinct components of compensable pecuniary injury under the Wrongful Death Act, we cannot find that the trial court's separation of these components in determining the damages award in the instant case constituted an abuse of discretion. ↩ memo p. 2, 6, 10

¶ 101 We are similarly unpersuaded by defendant's contention that the trial court improperly apportioned the loss of society damages among plaintiff and the children. The Wrongful Death Act provides that the damages in a wrongful death action

> "shall be distributed by the court in which the cause is heard *** to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person." 740 ILCS 180/2(b) (West 2024).

The statute further instructs that "[t]he trial judge shall conduct a hearing to determine the degree of dependency of each beneficiary upon the decedent. The trial judge shall calculate the amount of damages to be awarded each beneficiary, taking into account any reduction arising from either the decedent's or the beneficiary's contributory fault." *Id.* § 2(i).

¶ 102 In this case, the trial court included an apportionment of loss of society damages in its damages award and determined that each of the children suffered the same amount of damages. Defendant contends that this violated the statute, as the trial court did not hold a separate dependency hearing. We observe, however, that the trial court's order did not calculate the amount of damages to be awarded to each beneficiary. Instead, the trial court found that the amount of damages each child *incurred for loss of society* was $1 million. This is a slightly different calculation. The total judgment award consisted of more than simply loss of society damages, including damages for (1) lost money, benefits, goods, and services; (2) pain and suffering; (3) grief and sorrow; and (4) costs and prejudgment interest. The dependency hearing and subsequent apportionment concerns the total judgment award, not simply the subset concerning loss of society damages. See *McHale*, 2015 IL App (1st) 132625, ¶ 108 n.9 (improper verdict form submitted to the jury included separate lines for apportionment of all aspects of wrongful death damages to each beneficiary). As such, we cannot find that the trial court erred in determining the extent of each child's loss of society damages in calculating the

total damages award.

¶ 103 Prejudgment Interest

¶ 104 Defendant also challenges the trial court's award of prejudgment interest, contending that the prejudgment interest statute is unconstitutional. We, however, agree with plaintiff that defendant has forfeited this argument on appeal. Defendant's argument in its opening brief is one paragraph long, cites a single case, and indicates that "[a]dditional bases for the unconstitutionality of the award are identified in Defendant's Response to Plaintiff's Motion for Prejudgment Interest and incorporated herein." After plaintiff raised the issue of forfeiture in her response brief, defendant's reply brief simply indicated that the case it relied on was properly cited and that the "constitutionality of the prejudgment interest statute has not been decided by the Illinois Supreme Court and Defendant is within its right to preserve their right to raise it."

¶ 105 "[A] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented." (Internal quotation marks omitted.) *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52. As such, issues must be fully briefed and argued to be considered. *Id.* Defendant's "arguments" in this case do not engage with any of the numerous cases concerning the constitutionality of the prejudgment interest statute. We further agree with plaintiff that the single case defendant does cite—*Cotton v. Coccaro*, 2023 IL App (1st) 220788—is cited in an arguably misleading way, as defendant cites only a portion of the defendant's argument in that case and does not even include the fact that *Cotton* ultimately found the statute constitutional. Defendant's "incorporat[ion]" of its arguments below does not remedy the deficiencies in its argument on appeal. Other courts have found challenges to the prejudgment interest statute forfeited when the arguments on the issue were similarly underdeveloped. See *Wilcox v. Advocate Condell Medical Center*, 2024 IL App (1st) 230355, ¶ 119; *Ramirez v. Carobene*, 2025 IL App (1st) 240203, ¶ 47. Consequently, we find defendant's argument to be forfeited and have no need to consider it further.

¶ 106 *Contributory Negligence*

¶ 107 The final issue raised by defendant on appeal concerns the apportionment of fault. The trial court found that 40% of the decedent's injury could be attributed to the decedent's own conduct, while the remaining 60% of the injury was attributable to defendant's negligence. On appeal, defendant contends that the trial court's failure to find defendant more than 50% at fault was against the manifest weight of the evidence.

¶ 108 A person is contributorily negligent "when he or she acts without the degree of care that a reasonably prudent person would have used for his or her own safety under like circumstances and such action is a proximate cause of his or her injury." *Cooke v. Maxum Sports Bar & Grill, Ltd.*, 2018 IL App (2d) 170249, ¶ 93 (citing *Logan v. U.S. Bank*, 2016 IL App (1st) 152549, ¶ 20). A trial court's finding of contributory negligence will not be disturbed unless it is against the manifest weight of the evidence. *Id.*

¶ 109 In this case, the trial court found the decedent to be contributorily negligent, as it found that a reasonable person with an allergy to seafood would have investigated whether a meal contained seafood prior to ingesting it. While it determined that the decedent's fault was slightly mitigated by the fact that his prior exposure to seafood had led to "relatively benign"

reactions, it nevertheless found that the decedent bore at least some responsibility for his own death.

¶ 110 Defendant does not challenge the trial court's findings as to the decedent's negligence but contends that the proportion of fault attributed to the decedent should have been greater, as the evidence established that his proportion of fault was greater than defendant's. Defendant's arguments are primarily based on challenging the strength of the evidence of its own negligence, namely by claiming that the trial court's findings were based on "inapplicable standards and inadmissible evidence." We note that the trial court is "in a superior position to observe the witnesses' testimony, to judge their credibility, and to determine the weight their testimony and other evidence should receive." *Id.* Thus, to the extent that defendant asks us to reweigh the evidence, we decline to do so.

¶ 111 We further observe that, with respect to defendant's challenges to the trial court's reliance on the Villegas's testimony, we have rejected his arguments earlier in this decision, in affirming the admission of his testimony and in affirming the trial court's imputation of his knowledge to defendant. See *supra* ¶¶ 71-83.

¶ 112 The remainder of defendant's arguments concern the trial court's reliance on Parsons, plaintiff's food expert. Defendant claims that Parsons relied on inapplicable standards, making reliance on his testimony unreasonable. As an initial matter, we note that defendant never challenged Parsons's qualifications as a food safety expert, and there is no dispute that Parsons was permitted to testify as an expert on the issue of food safety. Defendant is, however, correct that an expert's opinion is only as valid as the basis underlying that opinion. See *Inman v. Howe Freightways, Inc.*, 2019 IL App (1st) 172459, ¶ 163; *Petraski v. Thedos*, 382 Ill. App. 3d 22, 28 (2008).

¶ 113 In this case, Parsons testified extensively about the bases for his opinions, including both general industry standards and, more specifically, the FDA Food Code and ServSafe, a food safety training program which was in effect at the time of the decedent's injury. While defendant disagrees with Parsons's interpretation of the cited provisions, naturally suggesting that his own expert's testimony should be afforded more weight, we find that Parsons's opinions were adequately supported and that the trial court was therefore permitted to give those opinions the weight it determined they should be afforded.

¶ 114 Defendant is correct that the trial court made a reference to Parsons testifying that defendant "violated [the] Chicago Board of Health Rules and Regulations Pertaining to Bulk Foods," which appears to be technically inaccurate. While the regulations were part of the evidence in this case, as the trial court took judicial notice of them, Parsons did not specifically cite to them but cited more generally to the applicable law and industry standards. We cannot find, however, that the trial court's single-paragraph reference to the regulations in the "Summary of Evidence" section of its 15-page opinion serves to lessen the trial court's overall analysis and findings concerning the level of defendant's culpability. Accordingly, we cannot find that it was against the manifest weight of the evidence for the trial court to determine that defendant's level of fault was greater than the decedent's.

¶ 115 CONCLUSION

¶ 116 The trial court's judgment is affirmed in its entirety. First, the Workers' Compensation Act did not bar plaintiff from filing a civil action. Second, the trial court's rulings concerning the admission of evidence and other trial matters were proper. Third, the damages award was not

excessive. Finally, the trial court's finding that the decedent was 40% at fault for his injury was not against the manifest weight of the evidence.

¶ 117 Affirmed.

Robbins v. Kass, 163 Ill. App. 3d 927 (2d Dist. 1987)

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

Ill. App. Ct., 2d Dist. · filed 1987-12-09 · Reporter opinion
Published opinion

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- memo p. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C034.4
- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C034.6
- memo p. 6 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C034.2
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terclaim on those issues, is reversed. The matter is remanded for retrial of all issues, other than disclosure, which are suggested by the Illinois consumer protection statutes or the Illinois Credit Union Act.

Affirmed in part, reversed in part, and remanded.

LINDBERG, P.J., and WOODWARD, J., concur.

SHARON ROBBINS *et al.*, Plaintiffs-Appellants, v. MARTIN KASS *et al.*, Defendants-Appellees.

Second District No. 2—87—0221

Opinion filed December 9, 1987.

[redacted]

Anesi, Ozmon & Lewin & Associates, Ltd., of Chicago (Curt N. Rodin, of counsel), for appellant.

Kathryn A. Spalding and D. Kendall Griffith, both of Hinshaw, Culbertson, Moelmann, Hoban & Fuller, of Chicago, and James H. Pluymert, of Hinshaw, Culbertson, Moelmann, Hoban & Fuller, of Waukegan (Nancy G. Lischer, of counsel), for appellee Highland Park Hospital.

James A. Christman and Ruth E. VanDemark, both of Wildman, Harrold, Allen & Dixon, of Chicago (Steven L. Larson, of counsel), for other appellees.

JUSTICE DUNN delivered the opinion of the court:

In their fourth amended complaint, plaintiffs Sharon Robbins and Joel Robbins, individually and as special administrator of the estate of Baby Robbins, sought damages from defendants, Highland Park Hospital, Dr. Kass and Dr. Loeff, for the negligent infliction of emotional distress and the wrongful death of their stillborn baby. Highland Park Hospital moved for summary judgment and was subsequently joined by Drs. Kass and Loeff. After a hearing on the summary judgment motions, the trial court ruled in favor of defendants on all counts. On appeal, plaintiffs contend the trial court erred in applying the zone-of-physical-danger rule adopted in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546.

The pleadings and depositions filed in support of defendants' summary judgment motions reveal the following. In July 1983, Sharon

Robbins experienced bleeding problems associated with her pregnancy. Sharon contacted Dr. Loeff and remained under his care throughout the pregnancy. When the bleeding persisted, Sharon was advised by Dr. Loeff that the chances of the baby's surviving were slim. On September 10, Sharon felt contractions and proceeded with her husband, Joel, and a friend, Pam Spritz, to Highland Park Hospital. At the hospital, Dr. Loeff's partner, Dr. Kass, visited with the Robbinses for approximately 10 minutes. He discussed transferring Sharon to a hospital equipped with a neonatal center in order to increase the chances of the baby's survival. A short time later, Dr. Kass advised the Robbinses the neonatal units of the other hospitals would not accept them because the pregnancy was not far enough along. Thereafter, a nurse checked on Sharon and then left the room. Some 20 minutes later, Sharon felt the baby coming. Joel went out into the hallway on several occasions in an effort to obtain assistance. No one responded, and the stillbirth occurred in the presence of Joel and Pam Spritz. Five to ten minutes later, Dr. Parsavand arrived, delivered the placenta, and removed the stillborn baby from between Sharon's legs.

Dr. Kass had left the hospital before the delivery. Some time after the delivery Dr. Loeff arrived. Dr. Loeff told the Robbinses they should have had assistance, although it probably would not have made a difference. Sharon remained in the hospital for three days. Other than the loss of blood, she suffered no other physical problems after the birth of the baby. Sharon did not seek medical treatment for any resulting emotional pain or distress. However, she constantly thought about the incident, she cried on numerous occasions as a result of the incident, and her migraine headaches increased in frequency from one every three or four months to one every month. Joel added that Sharon experienced sleeplessness and became upset when she saw pregnant women. Joel experienced bouts of crying and aggravation of a stomach disorder following the incident. Joel explained the incident affected his "state of mind" more than his physical well-being.

Plaintiffs' expert, Dr. John Masterson, stated in deposition that the nursing staff deviated from the normal standard of care by failing to provide indicated care to Sharon Robbins during her stay in the maternity ward and by failing to monitor or respond to requests for assistance. Dr. Masterson was critical of Dr. Kass' departure from the hospital on account of the possibility that emergency surgery might have been required, and Dr. Kass' failure to see that a blood transfusion was implemented. Dr. Masterson also criticized Dr. Loeff for not being present and for failing to provide an adequate backup doctor. Despite these deviations, Masterson admitted the baby would not

have survived even if a physician had been present and proper care had been administered. Masterson added that no physical harm resulted to Sharon as a result of the conduct of the hospital and treating physicians.

In its written order ruling in favor of defendants, the trial court specifically found the physical manifestations suffered by Sharon and Joel Robbins were insufficient to satisfy the physical injury or illness requirement of the zone-of-physical-danger rule adopted in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546.

[redacted] Plaintiffs first contend the trial court erred in applying *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, because the plaintiffs were not bystanders, as was the plaintiff in *Rickey*; rather, they were direct victims of the negligent acts. This identical argument was raised and rejected in *Courtney v. St. Joseph Hospital* (1986), 149 Ill. App. 3d 397. The court stated:

> "Notwithstanding the supreme court's reference to the plaintiff in *Rickey* as a 'bystander,' it has been correctly observed that 'the nature of the zone-of-physical-danger rule is such that it allows recovery only to direct victims of negligence, because recovery must be predicated on a reasonable fear for one's own safety.' [Citation.] Under the zone-of-physical-danger standard, the proper focus is on whether plaintiff was in proximity to the danger, not whether he witnessed an accident to a third person. [Citation.] Accordingly, we reject plaintiff's argument that the requirements for recovery under *Rickey* do not apply to direct victims of negligence." (*Courtney*, 149 Ill. App. 3d at 402-03.)

As recognized by the majority in *Lewis v. Westinghouse Electric Corp.* (1985), 139 Ill. App. 3d 634, 637-38, there is no longer a need to distinguish between whether a plaintiff is a direct victim or a bystander.

In addition to the appellate court decisions mentioned, the supreme court's recent decision in *Siemieniec v. Lutheran General Hospital* (1987), 117 Ill. 2d 230, seems to foreclose plaintiffs' assertion. The Siemieniecs sought, *inter alia*, damages for the emotional distress they suffered as a consequence of the "wrongful birth" of their hemophilic son. A misdiagnosis by the Siemieniecs' doctor regarding their chances of bearing a hemophilic child was the basis for the claims advanced. In resolving the Siemieniecs' claim for damages for their emotional distress, the supreme court addressed the issue in terms of the right of a "plaintiff" to recover for negligently inflicted emotional distress. After commenting that it had recently reexamined its position with regard to recovery for emotional distress and there-

after setting out the rule adopted in *Rickey*, the court stated:

> "Thus, under the holding of *Rickey*, before a plaintiff can recover for negligently caused emotional distress, he must have, himself, been endangered by the negligence, and he must have suffered physical injury or illness as a result of the emotional distress caused by the defendant's negligence." (*Siemieniec*, 117 Ill. 2d at 261.)

Although not specifically mentioned, it is evident the supreme court contemplated application of the zone-of-physical-danger rule to all claims involving negligently inflicted emotional distress, for the court later stated:

> "In *Rickey*, this court thoroughly analyzed the law in relation to negligently inflicted emotional distress. After doing so, this court changed its previous adherence to the impact rule and adopted what it perceived as the standard applied in a majority of the jurisdictions where the question has been examined. [Citation.] *Rickey* thus brought the law of this State on the issue in question into conformity with the majority position." (*Siemieniec*, 117 Ill. 2d at 262.)

Indeed, the Siemieniecs, like the Robbinses, were not bystanders; rather, they were actual or direct victims of the alleged negligence. It is noteworthy that Justice Simon dissented in *Siemieniec* in part on grounds the *Rickey* rule should not be applied to actual victims. *Siemieniec*, 117 Ill. 2d at 269-71 (Simon, J., dissenting).

In light of *Siemieniec* and the aforementioned decisions of the appellate court, the zone-of-physical-danger rule was correctly relied on by the trial court as the applicable rule of law. We note finally that requests to establish a medical malpractice exception to the *Rickey* rule have been uniformly rejected. See *Johnston v. St. Anne's Hospital West, Inc.* (1986), 146 Ill. App. 3d 763; *Gihring v. Butcher* (1985), 138 Ill. App. 3d 976.

[redacted] Plaintiffs next assert the "physical consequences" requirement of the zone-of-physical-danger rule adopted in *Rickey* is arbitrary and should be eliminated. Plaintiffs are referring to the requirement that the aggrieved party show a resulting physical injury or illness in order to recover for the negligent infliction of emotional distress. (*Siemieniec*, 117 Ill. 2d at 261; *Rickey*, 98 Ill. 2d at 555.) It is plaintiffs' contention that in circumstances such as those present here, recovery should be allowed for emotional distress without requiring the presence of resulting physical consequences. Plaintiffs request this court to carve out an exception to the *Rickey* rule for cases, such as this one, where the genuineness of the emotional harm

is beyond question. Relying on two out-of-State cases (*Taylor v. Baptist Medical Center, Inc.* (Ala. 1981), 400 So. 2d 369, and *Molien v. Kaiser Foundation Hospitals* (1980), 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831), plaintiffs urge this court to "open its eyes" to the particular circumstances of this case and allow recovery.

We, of course, must reject plaintiffs' invitation, regardless of our views on the matter, because it is axiomatic that the appellate court lacks the authority to overrule or modify decisions of the supreme court. (*Rickey*, 98 Ill. 2d at 551-52; see *Courtney*, 149 Ill. App. 3d at 400.) The physical consequences requirement was clearly and unequivocally established by our supreme court in *Rickey* and reiterated in the supreme court's recent decision in *Siemieniec*. We are duty bound to follow controlling decisions of the supreme court and do so here. Abandonment of the physical consequences requirement is a matter reserved for the supreme court.

[redacted] Alternatively, plaintiffs contend the trial court erred in finding as a matter of law that plaintiffs' physical manifestations did not constitute sufficient physical consequences of emotional distress to warrant recovery. To be entitled to recovery for the negligent infliction of emotional distress, the aggrieved party must establish: (1) that he or she was endangered by the defendant's negligence; and (2) physical injury or illness as a result of the emotional distress caused by the defendant's negligence. (*Siemieniec*, 117 Ill. 2d at 261.) Plaintiffs' argument presupposes compliance with the first prong, *i.e.*, that they were in a zone of physical danger (high risk of physical impact) and they had reasonable fears for their own safety as a result of the defendants' negligence. (*Rickey*, 98 Ill. 2d at 555.) This assumption by plaintiffs is clearly ill-founded in Joel Robbins' case. Certainly, Joel Robbins was at no time in any danger of physical injury and had no reason to fear for his own safety on account of the alleged negligence of the hospital and the treating physicians. (See *Johnston*, 146 Ill. App. 3d 763; *Gihring*, 138 Ill. App. 3d 976.) Absent presence in a zone of physical danger, recovery for the negligent infliction of emotional distress is precluded. We therefore need not address the argument raised by plaintiffs as it relates to Joel Robbins.

[redacted] As to whether Sharon Robbins was endangered by the defendants' negligence, we assume without deciding that she was, because, regardless, Sharon in our opinion is not entitled to recover for the negligent infliction of emotional distress because the physical manifestations of her emotional distress were insufficient to warrant recovery. The complaint alleged that Sharon suffered severe and permanent injuries and also great mental pain and suffering. The deposi-

tions of Sharon and Joel Robbins revealed that Sharon's physical manifestations were crying, sleeplessness, increased migraine headaches and becoming upset when she viewed pregnant women. Sharon did not seek or receive medical attention. The trial court found these manifestations were insufficient to satisfy the physical consequences requirement established in *Rickey*. We agree.

Illinois case law interpreting or discussing the physical injury or illness requirement of negligent infliction of emotional distress has not been called to our attention by the parties and has not been uncovered by our research. The cases relied on by the parties do not directly address the question at hand. In *Rickey*, the court merely set out the allegation of the complaint relating to physical consequences without further comment. (*Rickey*, 98 Ill. 2d at 549-50.) In *Lewis*, a woman trapped in an elevator for 40 minutes suffered, *inter alia*, an aggravation of a preexisting condition. In finding that the woman had failed to state a cause of action for the negligent infliction of emotional distress, the court noted that the defendant's conduct must cause distress to a person of ordinary sensibilities. The court had previously determined that the woman was not of ordinary sensibilities because of her preexisting heart condition. The court's comment, however, was directed toward the first prong of *Rickey*, *i.e.*, whether the plaintiff had a reasonable fear for her own safety, rather than the extent of the physical consequences required by *Rickey's* second prong. (*Lewis*, 139 Ill. App. 3d at 637.) In *Knierim v. Izzo* (1961), 22 Ill. 2d 73, the supreme court held for the first time that the intentional infliction of emotional distress stated an independent cause of action in Illinois. To recover, the plaintiff is required to show "severe emotional disturbance." (*Knierim*, 22 Ill. 2d at 85-86.) In *Swanson v. Swanson* (1970), 121 Ill. App. 2d 182, the plaintiff suffered nervousness, many sleepless nights and the fear of nightmares as a consequence of defendant's intentional conduct. Plaintiff did not receive or seek medical aid for his condition. The court held these consequences did not establish a severe emotional disturbance as required by *Knierim*. (*Swanson*, 121 Ill. App. 2d at 185-86.) Finally, in *Horak v. Biris* (1985), 130 Ill. App. 3d 140, this court found a cause of action existed for social worker malpractice, but only briefly, and without any relevance to the case at bar, discussed damages. *Horak*, 130 Ill. App. 3d at 147.

Although none of these cases address the precise question at hand, *Swanson* does provide some guidance. If nervousness, sleeplessness and the fear of nightmares are insufficient to show a "severe emotional disturbance" in the intentional infliction of emotional dis-

tress context, it would not seem crying, sleeplessness, increased migraine headaches and upset feelings would suffice in a case where the defendant acted negligently, rather than intentionally. Although the standards are different, the physical illness or injury requirement indicates a desire to permit compensation only in cases involving severe or serious emotional distress. The physical manifestations suffered by Sharon Robbins reveal that she does not fit into this category of plaintiffs.

We find support for our conclusion in *Cosgrove v. Beymer* (D. Del. 1965), 244 F. Supp. 824. In *Cosgrove*, a plaintiff within the zone of physical danger of an automobile accident was denied compensation for the occasional nightmares, the nervousness she experienced when driving, and the fact she became upset when discussing the accident. The court concluded plaintiff could not recover damages because of the lack of bodily injury or sickness following the emotional disturbance. The court pointed out the rule denying recovery for emotional disturbance only included such disturbances as fright, nervous shock, and grief. The court found recovery for these disturbances was precluded even though accompanied by physical manifestations such as dizziness, mild headaches, nervousness, and the like. *Cosgrove*, 244 F. Supp. at 826.

In the present case, the physical manifestations suffered by Sharon Robbins are simply not that serious or unusual. No medical treatment was sought or received. The sleeplessness, crying, increased migraine headaches and upset feelings arguably would have resulted regardless of whether or not medical personnel were present at the time of the stillbirth. Indeed, Sharon's physical and emotional reaction would seem typical of any parent involved in the delivery of a stillborn baby. In sum, the physical consequences sustained by Sharon Robbins do not establish sufficient physical injury or illness to warrant recovery for the negligent infliction of emotional distress.

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.

HOPF and WOODWARD, JJ., concur.

Schweihs v. Chase Home Finance, LLC, 2016 IL 120041

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

Ill. Supreme Court · filed 2016-12-15 · Opinion
Supreme Court

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- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 42: passage C005.1
- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 44: passage C005.7
- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 44: passage C005.7
- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 42: passage C005.1
- memo p. 10 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · ¶ 44: passage C005.7
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***Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041**

Caption in Supreme Court:	MELINDA SCHWEIHS, Appellant, v. CHASE HOME FINANCE, LLC, *et al.*, Appellees.
Docket No.	120041
Filed Rehearing denied	December 15, 2016 March 27, 2017
Decision Under Review	Appeal from the Appellate Court of the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Daniel Lynch, Judge, presiding.
Judgment	Appellate court judgment affirmed. Cause remanded to the circuit court for further proceedings consistent with this opinion.
Counsel on Appeal	Edward T. Joyce, Jennifer L. Doherty, and Joan M. Mannix, all of Chicago, for appellant. Jeffrey S. Pavlovich and Gerard C. Fosco, of Leahy, Eisenberg & Fraenkel, Ltd., of Joliet, for appellees Safeguard Properties, Inc., Todd Gonsalez, and Edilfonso Centeno.

Edward J. Lesniak, Susan M. Horner, and Daniel Klapman, of Burke, Warren, MacKay & Serritella, P.C., of Chicago, for appellee Chase Home Finance, LLC.

R. Sean Hocking, of Craig & Craig, LLC, of Mattoon, for *amicus curiae* Illinois Association of Defense Trial Counsel.

Justices

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Chief Justice Karmeier and Justices Thomas, Kilbride, Burke, and Theis concurred in the judgment and opinion.

Justice Garman specially concurred, with opinion.

OPINION

¶ 1 This tort case arose out of foreclosure proceedings involving plaintiff Melinda Schweihs's home. Plaintiff sued defendants Chase Home Finance, LLC (Chase), Safeguard Properties, Inc. (Safeguard), Todd Gonsalez, and Edilfonso Centeno for numerous torts, including emotional distress, as a result of Gonsalez and Centeno entering her home. Her emotional distress claims, which are at issue here, were dismissed by the circuit court, and the appellate court affirmed. 2015 IL App (1st) 140683. This court allowed plaintiff's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. Jan. 1, 2015). For the following reasons, we affirm the judgment of the appellate court.

¶ 2 I. BACKGROUND

¶ 3 In 1997, plaintiff executed a note secured by a mortgage for a home located in Northbrook, Illinois. Chase owned the mortgage. The mortgage contained a provision granting Chase the right, in the event of a default by plaintiff, to enter onto the property to make repairs. The provision reads as follows:

> "7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property *** then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorney's fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so."

¶ 4 Plaintiff defaulted on the mortgage in 2007. Chase filed a complaint to foreclose the mortgage against her and obtained a judgment of foreclosure on May 25, 2010. Plaintiff had the right to possession of her home until the redemption period expired on August 25, 2010.

¶ 5 To protect its interest in properties, Chase contracts with outside companies to provide property inspections and preservation services. Safeguard is one of those companies that provide national property monitoring and preservation services for residential properties in foreclosure. Safeguard's employees do not physically perform the inspections or render preservation services. Instead, Safeguard employs "Client Account Representatives" (CARs) who coordinate with local vendors, with whom Safeguard contracts. These local vendors, in turn, perform the inspections and preservation services.

¶ 6 On June 17, 2010, Safeguard's inspections department received a report from one of its vendors that plaintiff's property was vacant. Based on the report, a Safeguard CAR placed an "initial secure" order with A1 Builders, a local contractor that performs the property inspection services for which Safeguard contracted. An "initial secure" order may require a vendor to secure access to the property by changing one of the locks on the premises and to "winterize" the house by turning off the utilities. A1 in turn hires subcontractors, who perform the work orders. Gonsalez and Centeno worked as A1 subcontractors.

¶ 7 On June 22, 2010, Gonsalez and Centeno arrived at plaintiff's property to carry out the "initial secure" order. They were required to determine the occupancy status of the property before proceeding with the order. The order instructed them not to do any work if the property was occupied.

¶ 8 Gonsalez testified during his discovery deposition that he and Centeno conducted a visual inspection of the property. He observed that the grass on the property was uncut and the trees were overgrown. Gonsalez knocked on the front door but did not receive an answer. He also checked the gas meter and the water spout and determined that both utilities were turned off. He further observed a "for sale" sign at the property, along with a dumpster and a car parked in the driveway.

¶ 9 Gonsalez spoke with a neighbor who lived across the street from plaintiff's home. Gonsalez testified that the neighbor told him that the house was not occupied but a woman would come and go on occasion. She also said that there were no lights on at plaintiff's home at night. She did not recognize the car in plaintiff's driveway. She also informed him that there was a school down the street and that people from the school would park there knowing it was a vacant property.

¶ 10 Centeno testified during his discovery deposition that he did not talk with any neighbors but that he recalled that Gonsalez told him the neighbor stated that "they come and go. And sometimes they leave their vehicle there."

¶ 11 After speaking with the neighbor, Gonsalez again knocked on plaintiff's front door, without a response. Gonsalez and Centeno spent in excess of 45 minutes determining if the house was occupied. They also entered the backyard through a latched gate of the home's six-foot security fence. Gonsalez testified that he saw boxes piled on top of each other and garbage and debris on the floor, observing these through sliding glass doors. Gonsalez then contacted management at A1 Builders, relaying the abovementioned information. He was told to proceed with the work order.

¶ 12 To secure the premises, Gonsalez had to remove one of the secondary locks on the property. He removed the lock to the back door. Because of the boxes and debris blocking the entrance, Gonsalez could only open the door about a foot and had to climb over them to enter the home. Centeno remained at the back door and never entered the home. Once in the home, Gonsalez testified that he was confronted by a woman. Both parties were startled, and plaintiff stated that she wanted them out of her house and she was calling her lawyer. Gonsalez responded he was with the mortgage company and asked her to come to the front door to speak with him. Gonsalez then left and went around to the front and knocked on the front door, but plaintiff did not answer. Gonsalez and Centeno then waited for the arrival of the police.

¶ 13 At the time Gonsalez and Centeno arrived at plaintiff's home, she was a 58- year-old single woman who was living alone. Plaintiff testified during her discovery deposition that her home was in foreclosure; however, she anticipated selling her home while it was still in the redemption period. Plaintiff testified that when she placed the house for sale, she informed the realtor that the realtor was to accompany anybody that came to the property. She also testified that she was not showing the interior of the house because of the "mess" and "stuff everywhere" in piles and in boxes. She described herself as a "packrat" and testified she was in the process of packing her belongings, which were in disarray.

¶ 14 Plaintiff heard knocking on the front door while she was in the basement; however, she was on the phone and did not respond. After the phone call, plaintiff went to the second floor of her home to continue packing. She stated that she heard the flap drop on the metal mailbox attached to her house, at which time she looked out a second-floor window. Plaintiff testified that she saw two men standing in her driveway, along with a green truck facing the street, without any markings except for a "Harley" decal on the back window. Plaintiff thought that they may have been potential buyers looking at the house, and she decided to continue to pack.

¶ 15 A short time later, plaintiff heard noises coming from the back of the house. She went downstairs to identify the noise and encountered Gonsalez in the family room. She testified that Gonsalez was not wearing a uniform but was in street clothes with tattoos exposed. Centeno was in the open back doorway. Plaintiff testified that she spoke first and asked, "Who are you and what are you doing in my home?" Plaintiff testified that one of them told her in a "forceful way" that Chase had sent them to secure and winterize the house and that she needed to come outside to talk with them. She told them to leave and immediately called her attorney and the police. She stayed on the phone with the police dispatcher until the police arrived. The police investigated, speaking with plaintiff, Gonsalez, Centeno, and the neighbor with whom Gonsalez had spoken. No arrests were made. Gonsalez offered to replace the back-door lock with a new lock and key, but plaintiff declined.

¶ 16 Plaintiff testified that after the incident she was afraid while in her home and fearful that she may be attacked. On the same day of the incident, plaintiff went to the hospital because she "didn't feel right." Subsequently, she sought treatment, therapy, and medication from multiple doctors for issues with sleeping, post-traumatic stress, anxiety, and depression. Plaintiff stated that she felt anxiety when approaching her home and that at times she stayed in hotels because of her fear of subsequent break-ins. She was inhibited from packing and preparing her home for sale because of this fear. Additionally, she alleged that she sought temporary leave from her employment due to the incident but that her request was denied and she was instead terminated.

¶ 17 In October 2010, plaintiff filed a five-count complaint against defendants alleging trespass, negligent trespass, private nuisance, intentional infliction of emotional distress, and negligence. Extensive discovery and motion practice ensued. Defendants filed motions for summary judgment as to each of plaintiff's counts. On February 4, 2014, the circuit court heard argument on the motions, and plaintiff filed a motion for leave to amend the negligence count to negligent infliction of emotional distress.

¶ 18 On February 6, 2014, the court granted defendants' motions for summary judgment with respect to plaintiff's claims for private nuisance and intentional infliction of emotional distress. It denied defendants' motions with respect to the claims for trespass and negligent trespass, and those claims are still pending in the circuit court. The court also granted plaintiff's motion for leave to amend. It then dismissed the negligent infliction of emotional distress claim, as amended, pursuant to section 2-615 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615 (West 2014). Finally, the court made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was "no just reason for delaying either enforcement or appeal or both." Thereafter, plaintiff filed a timely notice of appeal.

¶ 19 A divided appellate court affirmed, first addressing the negligent infliction of emotional distress claim. The court noted the two types of victims in emotional distress cases: bystanders and direct victims. It determined that plaintiff was a direct victim and must allege "some physical impact" from defendants' conduct. The court found that because she did not plead any physical contact, she could not establish a claim for negligent infliction of emotional distress and that count was properly dismissed. It further noted that its conclusion was consistent with this court's holdings in *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555 (1983); *Corgan v. Muehling*, 143 Ill. 2d 296, 304 (1991); and *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 346-47 (1995). The court did acknowledge however, that certain language in *Pasquale* mischaracterized the holding in *Corgan*, which has led to some confusion in the courts. It concluded that the language in *Pasquale* was *obiter dictum* and not binding. 2015 IL App (1st) 140683.

¶ 20 The appellate court next addressed plaintiff's intentional infliction of emotional distress claim, finding that summary judgment was proper as a matter of law because plaintiff could not establish that defendants' conduct was "extreme and outrageous."

¶ 21 Justice Harris dissented regarding the negligent infliction of emotional distress claim, stating that the majority was wrong in continuing to require physical impact in claims for negligent infliction of emotional distress for direct victims. 2015 IL App (1st) 140683, ¶ 49 (Harris, J., dissenting).

¶ 22 We granted plaintiff's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. Jan. 1, 2015). We also granted the Illinois Association of Defense Trial Counsel leave to submit an *amicus curiae* brief in support of defendants. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). We affirm the judgment of the appellate court.

¶ 23 II. ANALYSIS

¶ 24 On appeal, plaintiff argues that her claims for negligent infliction of emotional distress and intentional infliction of emotional distress should not have been dismissed. We first address plaintiff's claim for negligent infliction of emotional distress.

¶ 25 A. Negligent Infliction of Emotional Distress

¶ 26 Plaintiff contends that her claim for negligent infliction of emotional distress should not have been dismissed pursuant to section 2-615 of the Code because the controlling precedent of this court establishes that physical impact is not a required element of a claim for negligent infliction of emotional distress by a direct victim.

¶ 27 A motion to dismiss under section 2-615 of the Code challenges only the legal sufficiency of the complaint. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. The critical inquiry is whether the allegations of the complaint, when considered in a light favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id.* All well-pled facts in the complaint must be taken as true, but conclusions of law will not be taken as true unless supported by specific factual allegations. *Id.* Review of the dismissal of a complaint under section 2-615 of the Code is *de novo*. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47.

¶ 28 Plaintiff first argues that decisions of this court make clear that Illinois, like other jurisdictions, has abandoned the impact rule. Plaintiff relies on this court's decision in *Corgan*, which she claims established that a direct victim need only properly allege the accepted elements of a negligence claim, including an emotional or psychological injury but without the necessity of also proving a secondary physical impact or injury. Plaintiff further claims that this court reaffirmed that principle in *Pasquale*.

¶ 29 Plaintiff also argues that the appellate court majority misinterpreted *Corgan* and *Pasquale* and should not have disregarded language in *Pasquale* as *obiter dictum*. The language stated that *Corgan* had "eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress based on a theory of negligence." *Pasquale*, 166 Ill. 2d at 346. This court reiterated similar statements two more times in *Pasquale*. *Id.* at 348-49. Plaintiff maintains that this court's statements in *Pasquale* were entirely consistent with its decision in *Corgan*. Plaintiff argues that, in accordance with our prior decisions, we should not depart from settled precedent, which eliminated the contemporaneous physical impact or injury requirement for direct victims.

¶ 30 Defendants and *amicus* contend that the impact rule is still the law in Illinois when a direct victim pleads negligent infliction of emotional distress.

¶ 31 To address plaintiff's claim, we set forth this court's history of the impact rule and claims for negligent infliction of emotional distress. Generally, to state a claim for negligent infliction of emotional distress, a plaintiff must allege the traditional elements of negligence: duty, breach, causation, and damages. *Corgan*, 143 Ill. 2d at 306. And until this court's decision in *Rickey*, all plaintiffs were also required to allege a contemporaneous physical injury or impact. *Braun v. Craven*, 175 Ill. 401, 419-20 (1898). This was known as the "impact rule." Under the impact rule, a plaintiff could recover damages if he suffered (1) emotional distress and (2) " 'a contemporaneous physical injury or impact.' " *Corgan*, 143 Ill. 2d at 303 (quoting *Rickey*, 98 Ill. 2d at 553). Prior to *Rickey*, there was no distinction between a direct victim and a bystander in negligent infliction of emotional distress cases. Subsequently, in *Rickey*, this court drew such a distinction.

¶ 32 In *Rickey*, an eight-year-old boy witnessed his five-year-old brother's clothing become entangled in a subway escalator mechanism, resulting in the younger brother being choked and unable to breathe for a substantial period of time. *Rickey*, 98 Ill. 2d at 549. The eight-year-old boy brought an action through his mother against numerous defendants, alleging that as a result

of witnessing the accident to his brother, he sustained severe mental and emotional distress and psychiatric trauma. *Id.* The complaint alleged that the emotional distress manifested in physical injury, including "definite functional, emotional, psychiatric and behavioral disorders, extreme depression, prolonged and continuing mental disturbances, [and] inability to attend school." *Id.* at 550. This court adopted the "zone-of-physical-danger rule" for bystanders who allege negligent infliction of emotional distress. *Id.* at 555. Under the zone-of-physical-danger rule, "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress." *Id.* The rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in "such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact." *Id.* Therefore, this court held that a bystander must show physical injury or illness as a result of the emotional distress, caused by the defendant's negligence and not a contemporaneous physical injury or impact. *Id.*

¶ 33 Subsequently, in *Corgan*, the plaintiff, who was a patient of a man who held himself out to be a licensed psychologist, sued the man for emotional damages because, under the guise of therapy, he sexually exploited her. *Corgan*, 143 Ill. 2d at 300. The plaintiff alleged that the defendant's conduct caused and still caused her to experience fear, shame, humiliation, and guilt. *Id.* She also alleged that the defendant's conduct compelled her to undergo more intensive and extensive psychotherapeutic care and counseling. *Id.* The circuit court certified questions for the appellate court, and the precise issue in *Corgan* was whether "as a direct victim of defendant's psychological malpractice, a question remains as to whether the complaint should be dismissed because the plaintiff did not allege that she suffered a physical injury or illness as a result of her emotional distress." *Id.* at 308. This court held that the requirement that the plaintiff allege a physical symptom as a result of the emotional distress caused by the defendant's negligence did not apply to direct victim cases. *Id.* at 312.

¶ 34 Also, in *Corgan*, this court made it clear that *Rickey* did not define the scope of negligent infliction of emotional distress as it applies to direct victims. *Id.* at 304. *Corgan* was a direct victim case, and the patient satisfied the impact rule; on multiple occasions, the psychologist had sexual relations with her. *Id.* at 300. Thus, *Corgan* is an example of the continued application of the impact rule in direct victim cases.

¶ 35 Moreover, in *Corgan*, the special concurrence clarified "that the only question before us, and the only one resolved by today's decision, is the question certified by the trial judge: whether this court's earlier opinion in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, bars recovery of damages for emotional distress in the limited set of circumstances alleged here. We have, in the present case, answered that question in the negative." *Corgan*, 143 Ill. 2d at 316 (Miller, C.J., specially concurring).

¶ 36 Also of note is the case of *Pasquale*, 166 Ill. 2d at 339-40, where the husband of a spectator at a drag race, who was killed when she was struck by flying debris resulting from the failure of a clutch mechanism on a race car, brought an action against the race track, the manufacturer of the engine housing, and the distributor of the engine parts. When the mechanism failed, the plaintiff's wife was struck by the flying debris, and the plaintiff was then struck by his wife's body parts. *Id.* at 343. The complaint alleged a cause of action for a wrongful death sounding in

strict liability. *Id.* Although the plaintiff maintained that he was both a bystander and a direct victim, this court found that the plaintiff was a bystander because his emotional distress was not caused by being struck with flying debris. *Id.* at 347.

¶ 37 Therefore, in *Pasquale*, this court confined its inquiry to "whether the elimination of the contemporaneous injury or impact requirement for bystander recovery for emotional distress in the area of negligence meaningfully translate[d] into an elimination of the element of physical harm for a bystander's recovery for emotional distress under strict liability theory." *Id.* This court determined that it did not and declined to reexamine the established rule that physical harm is required to state a bystander's cause of action and recovery based on strict liability. *Id.* at 349-50.

¶ 38 This precedent makes clear that a direct victim's claims for negligent infliction of emotional distress must include an allegation of contemporaneous physical injury or impact. To the extent plaintiff argues that *Corgan* eliminated the impact rule for direct victims, a careful reading of *Rickey*, *Corgan*, and *Pasquale* indicates that this court did not eliminate the impact rule for negligent infliction of emotional distress claims brought by direct victims.

¶ 39 Additionally, defendants have brought to our attention numerous appellate court decisions that have analyzed the elements necessary for a direct victim to plead negligent infliction of emotional distress and have correctly applied this precedent. See *Borcia v. Hatyina*, 2015 IL App (2d) 140559, ¶¶ 43-44 (observing that a cause of action for negligent infliction of emotional distress requires a plaintiff to allege facts establishing that she suffered a direct impact that caused emotional distress or that she was a bystander in a zone of physical danger that caused her to fear for her own safety and that she suffered physical injury or illness as a result of her emotional distress); see also *Doe v. Northwestern University*, 289 Ill. App. 3d 39, 47 (1997) (stating that Illinois courts permit a "plaintiff who has suffered a physical impact and injury due to a defendant's negligence [to] recover for emotional distress that the injury directly causes"); *Majca v. Beekil*, 289 Ill. App. 3d 760, 762-63 (1997) (same); *Doe v. Surgicare of Joliet, Inc.*, 268 Ill. App. 3d 793, 796 (1994) (holding that the plaintiff qualified as a direct victim due to the physical impact he suffered and acknowledging the requirement that the physical impact be contemporaneous with the occurrence); *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819, 825 (1992) (holding that the plaintiff was a direct victim because he was electrocuted as a result of coming into contact with decedent who had been electrocuted); *Leonard v. Kurtz*, 234 Ill. App. 3d 553, 555-56 (1992) (finding there was no contemporaneous physical injury to the plaintiff sufficient to make her a direct victim).

¶ 40 Furthermore, consistent with our understanding of *Rickey*, *Corgan*, *Pasquale*, and Illinois tort law, federal district courts applying Illinois law have held on several occasions that the impact rule applies to direct victims. See *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 703 (7th Cir. 2009) (observing that a direct victim of alleged negligent infliction of emotional distress must satisfy the "impact" rule); *Cleveland v. Rotman*, 297 F.3d 569, 574 (7th Cir. 2002) (stating that Illinois follows the "impact rule," which allows a plaintiff to recover for negligent infliction of emotional distress only if the distress is directly and causally related to a physical injury); *Kapoulas v. Williams Insurance Agency, Inc.*, 11 F.3d 1380, 1382 (7th Cir. 1993) (recognizing that when a direct victim claims emotional distress, the impact rule still applies).

¶ 41 Moreover, we agree with the appellate court's characterization of certain language referring to *Corgan*, in *Pasquale*, as *obiter dictum*. We note that to evaluate the precedential effect of this court's pronouncements concerning the impact rule, we must preliminarily examine general rules governing judicial statements. *Cates v. Cates*, 156 Ill. 2d 76, 79-80 (1993). The term "*dictum*" is generally used as an abbreviation of *obiter dictum*, which means a remark or opinion uttered by the way. *Id.* at 80; *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 277-78 (2009). Such an expression or opinion as a general rule is not binding as authority or precedent within the *stare decisis* rule. *Cates*, 156 Ill. 2d at 80. On the other hand, an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*. *People v. Palmer*, 104 Ill. 2d 340, 345-46 (1984) (indicating that precedential scope of decision is limited to facts before the court); see *Scovill Manufacturing Co. v. Cassidy*, 275 Ill. 462, 470 (1916); *Rhoads v. Chicago & Alton R.R. Co.*, 227 Ill. 328, 337 (1907); *Law v. Grommes*, 158 Ill. 492, 494 (1895); *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (stating that "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

¶ 42 This court wrote in *Pasquale* that *Corgan* had "eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress on a theory of negligence." *Pasquale*, 166 Ill. 2d at 346. In fact, as previously stated, in *Corgan*, this court addressed whether a direct victim of negligent infliction of emotional distress had to allege that she suffered a physical symptom of her emotional distress. *Corgan*, 143 Ill. 2d at 308; see *Brogan v. Mitchell International, Inc.*, 181 Ill. 2d 178, 184-85 (1998). This court held that she did not. *Corgan*, 143 Ill. 2d at 312. *Corgan* did not address the impact rule, and in fact there was no question in that case that the plaintiff had suffered a physical impact, as her claim rested on allegations of sexual relations with her therapist. *Id.* at 300. Thus, *Corgan* did not eliminate the need for a direct victim to allege and prove a contemporaneous physical injury or impact. *Id.* at 304, 312; *Braun*, 175 Ill. at 420; *Kapoulas*, 11 F.3d at 1382. Further, *Pasquale* concerned a cause of action based on strict liability, and its mischaracterization of *Corgan*'s holding was not a factor in the issue on appeal in *Pasquale*. Therefore, we find that this court's statements in *Pasquale* that *Corgan* eliminated the contemporaneous injury or impact requirement for a direct victim's recovery for emotional distress are *obiter dictum* and thus are not binding authority or precedent. ↩ memo p. 5, 9, 12

¶ 43 Now we turn to the allegations in plaintiff's amended complaint to determine whether they are sufficient to state a cause of action for negligent infliction of emotional distress and thus survive a motion to dismiss under section 2-615 of the Code. Plaintiff alleges that Chase and Safeguard had a duty to use reasonable care in training their employees, agents, and contractors and that Chase breached its duty by failing to properly train and supervise its employees, agents, and contractors regarding how to determine whether a property is abandoned and how to proceed when they are uncertain as to whether a property is abandoned. Also, it is alleged that defendants had a duty to use reasonable care not to interfere with plaintiff's right and interest in the private use and enjoyment of her home and that defendants breached this duty of care by "(a) negligently determining that the property was 'vacant,' " "(b) negligently entering a report that labeled the property as 'first time vacancy,' "

"(c) negligently employing a system that permits an 'initial secure' work order to be placed and carried out without first obtaining a court order finding that [p]laintiff had 'abandoned' the property as required by both 735 ILCS 5/15-1603[1] and the Judgment of Foreclosure order," "(d) negligently instructing *** Gonsalez and Centeno to carry out the 'initial secure' work order when it was clear that the property was neither vacant nor abandoned" and "(e) negligently carrying out the 'initial secure' work order even though it was clear that the property was neither vacant nor abandoned." Finally, plaintiff sought damages for the injuries sustained by her as a direct and proximate result of defendants' actions.

¶ 44 As previously determined, the pleading requirements for a direct victim's recovery for negligently inflicted emotional distress include an allegation of a contemporaneous physical injury or impact. Therefore, since plaintiff did not include an allegation of a physical impact, as a direct victim, she failed to allege a cause of action for negligent infliction of emotional distress. Thus, we conclude that the negligent infliction of emotional distress count of her complaint was properly dismissed. ↩ memo p. 5, 9, 10, 11

¶ 45 B. Intentional Infliction of Emotional Distress

¶ 46 Initially, we respond to defendants' argument that plaintiff has forfeited review of her intentional infliction of emotional distress claim. Defendants point out that plaintiff's November 4, 2015, petition for leave to appeal sought review of both her negligent infliction of emotional distress claim and intentional infliction of emotional distress claim. However, this court denied the petition in its entirety, and plaintiff filed a motion to reconsider on February 1, 2016. Defendants maintain that, because plaintiff solely referenced her negligent infliction of emotional distress claim and so limited her motion, she has forfeited further review of her intentional infliction of emotional distress claim. We disagree. In this court's order dated February 23, 2016, plaintiff's motion for reconsideration was allowed. The order of January 20, 2016, denying the petition for leave to appeal was vacated, and the petition for leave to appeal was allowed. Thus, the court allowed the petition in its entirety, and plaintiff has not forfeited review of her claim for intentional infliction of emotional distress. Ill. S. Ct. R. 315 (eff. Jan. 1, 2015); *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 152 (2004).

¶ 47 We now address plaintiff's contention that it was improper to grant summary judgment on her intentional infliction of emotional distress claim because there was a question of fact as to whether Gonsalez and Centeno's conduct was extreme and outrageous.

¶ 48 Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Id.* In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case and must construe them strictly against the movant and liberally in

[1]Section 15-1603 of the Code allows a court to shorten the redemption period if the court finds that the property has been abandoned. 735 ILCS 5/15-1603 (West 2014).

favor of the opponent. *Id.* In appeals from summary judgment rulings, we conduct a *de novo* review. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992)).

¶ 49 In Illinois, the tort of intentional infliction of emotional distress was first recognized in *Knierim v. Izzo*, 22 Ill. 2d 73, 87 (1961), in which a widow was permitted to maintain such an action against the person who had killed her husband. It was not until 1976, however, that this court (relying on Restatement (Second) of Torts § 46 (1965)) outlined the requirements for the tort. *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 90 (1976).

¶ 50 First, the conduct involved must be truly extreme and outrageous. Second, the actor must either intend that his conduct inflict severe emotional distress or know that there is at least a high probability that his conduct will cause severe emotional distress. Third, the conduct must in fact cause severe emotional distress. *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988) (citing *Public Finance*, 66 Ill. 2d at 90).

¶ 51 It is clear that the tort "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Restatement (Second) of Torts § 46 cmt. d, at 73 (1965); *McGrath*, 126 Ill. 2d at 86. "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 cmt. d, at 73 (1965); *Public Finance*, 66 Ill. 2d at 90. "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining the severity." Restatement (Second) of Torts § 46 cmt. j, at 77-78 (1965); *McGrath*, 126 Ill. 2d at 86; *Public Finance*, 66 Ill. 2d at 90.

¶ 52 Several factors have been identified that should be considered in determining whether a defendant's conduct may be deemed outrageous. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 21 (1992). The extreme and outrageous nature of the conduct may arise from the defendant's abuse of some position that gives him authority over the plaintiff or the power to affect the plaintiff's interests. *Id.* (citing *McGrath*, 126 Ill. 2d at 86-87). A factor to be considered is also the reasonableness of a defendant's belief that his objective is legitimate. *McGrath*, 126 Ill. 2d at 89. Another factor to be considered is the defendant's awareness that the plaintiff is particularly susceptible to emotional distress. *Kolegas*, 154 Ill. 2d at 21 (citing *McGrath*, 126 Ill. 2d at 89-90). Those factors are to be considered in light of all of the facts and circumstances in a particular case, and the presence or absence of any of these factors is not necessarily critical to a cause of action for intentional infliction of emotional distress. *McGrath*, 126 Ill. 2d at 90. The outrageousness of a defendant's conduct must be determined in view of all the facts and circumstances pled and proved in a particular case. *Id.*

¶ 53 Specifically, plaintiff argues that the conduct of Gonsalez and Centeno was extreme and outrageous because (a) breaking into someone's locked home constitutes extreme and outrageous conduct and (b) there was no justification for the forcible break-in by those defendants.

¶ 54 Here, we find that the conduct of Gonsalez and Centeno did not rise to the level of extreme and outrageous. We observe that the record reveals that Gonsalez and Centeno conducted an investigation to determine whether the house was occupied. While there were signs that the house was not abandoned, such as the presence of the dumpster and a vehicle, Gonsalez inquired into the nature of the vehicle and was told that different people were parking there. Gonsalez did indeed find that the gas was turned off, boxes were piled on top of each other haphazardly and blocked the back door entrance to the property, and debris and garbage littered the interior. After 45 minutes of inspection, which included knocking on the door, observing the property, and talking with neighbors, Gonsalez received permission to proceed with the "initial secure" order. By removing one secondary lock on the premises, defendants were securing the property for entrance for repairs, not taking possession of the property for residential purposes.

¶ 55 We acknowledge that under Illinois law, the sanctity of the home and the inherent right to be free from intrusion are important principles of law. See, *e.g.*, Ill. Const. 1970, art. I, § 6. However, we note that plaintiff was aware that her property was in foreclosure and was in the redemption period. Moreover, knowing the legal status of her right to possession, she ignored the knocking on her door after observing two men and a van in her driveway. Her actions prevented Gonsalez and Centeno from introducing themselves and explaining their presence on the property. Further, once Gonsalez and Centeno found the property was occupied, they left the home and waited for the police. The interaction was not extreme or outrageous, and therefore, we decline to accept plaintiff's argument that defendants' entry into her home was sufficient, in and of itself, to be extreme and outrageous conduct.

¶ 56 We are not persuaded by plaintiff's contentions to the contrary. Plaintiff contends that by entering her home, defendants were taking possession. Plaintiff claims that, absent a court order finding that she had abandoned her home, defendants had no right to break in and seek to take possession. Plaintiff argues that, under Illinois mortgage foreclosure law, "the redemption period shall end on the date 30 days after the date the judgment of foreclosure is entered if the court finds that the mortgaged real estate has been abandoned." 735 ILCS 5/15-1603(b)(4) (West 2014). She further argues that foreclosure law regarding the "right to possession" establishes that a mortgagee is not entitled to possession of a mortgagor's home without a court order. 735 ILCS 5/15-1701 (West 2014). She maintains that, absent a court order granting Chase the right to enter the property, defendants had no right to enter her home.

¶ 57 We find plaintiff's reliance on foreclosure law unconvincing. As noted by the appellate court, there is a substantial difference between the right to possession for residential purposes, which these statutes address, and the contractual right to enter to make repairs. Contrary to plaintiff's argument that defendants had no legal justification for their entry into the property, plaintiff signed a note with the mortgage that contained a provision designated "protection of lender's rights in the property," which allowed Chase to enter the property to make repairs if plaintiff fell into default. "It is a rule universally recognized that a written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs it." *Vargas v. Esquire, Inc.*, 166 F.2d 651, 654 (7th Cir. 1948). In the absence of fraud, which must be proved by clear and convincing evidence (*Bundesen v. Lewis*, 368 Ill. 623, 636-37 (1938)), a man in possession of all his faculties who signs a contract cannot relieve himself from the obligations of the contract by saying he did not know or understand what it contained (*Upton v. Tribilcock*, 91

U.S. 45, 50 (1875)). A person is presumed to know those things that reasonable diligence on his part would bring to his attention. *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, ¶ 14 (recognizing that the act of signing legally signifies that the individual had an opportunity to become familiar with and comprehend the terms of the document he or she signed); *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 43 ("One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by the execution of a written agreement." (Internal quotation marks omitted.)); *Vargas*, 166 F.2d at 654.

¶ 58 Moreover, the judgment of foreclosure obtained by Chase stated that "[i]n order to protect and preserve the mortgaged real estate, it has or may also become necessary for [Chase] to pay fire and other hazard insurance premiums on the real estate or to make such repairs to the real estate as may reasonably be deemed necessary for the proper preservation thereof." Therefore, we find that Chase had the right to enter the property to make reasonable repairs for the preservation of the property. Although plaintiff argues that the house was not in need of repairs, she does not explain how defendants were to know or determine that.

¶ 59 In addition, we note that Safeguard's order instructed the subcontractors not to enter if the property was occupied and Gonsalez and Centeno undertook efforts attempting to determine the occupancy of the house for over 45 minutes. Furthermore, the evidence reveals that Gonsalez and Centeno were only instructed to change one secondary lock, which they attempted to do. We fail to see how removing one secondary lock to allow access to Chase for preservation services equates to taking possession of the property for residential purposes.

¶ 60 In sum, we cannot disagree with the appellate court that there may have been a better and more commonsense way to determine if the property was occupied. However, based upon this record in the context of mortgage foreclosure proceedings, it cannot be said that the entry, after which defendants left and never returned, is conduct so extreme and outrageous that it goes beyond all possible bounds of decency.

¶ 61 Therefore, since there is no question of fact as to whether the conduct of Gonsalez and Centeno could be deemed extreme and outrageous, summary judgment against plaintiff on her intentional infliction of emotional distress claim was proper. Our disposition renders unnecessary any discussion of the agency arguments raised by the parties. See, *e.g.*, *Standard Mutual Insurance*, 2013 IL 114617, ¶ 35.

¶ 62 III. CONCLUSION

¶ 63 We conclude that the appellate court's holding that plaintiff has no cause of action for negligent infliction of emotional distress is affirmed. The appellate court's granting of summary judgment in favor of defendants with regard to plaintiff's intentional infliction of emotional distress claim is also affirmed.

¶ 64 Appellate court judgment affirmed.

¶ 65 Cause remanded to the circuit court for further proceedings consistent with this opinion.

¶ 66 JUSTICE GARMAN, specially concurring:

¶ 67 I agree that under our long-standing precedents, the impact rule continues to apply to claims of negligent infliction of emotional distress (NIED). I write separately to note that the

basis for this court's holding in *Corgan v. Muehling*, 143 Ill. 2d 296 (1991), upon which our opinion relies, was rejected, at least in part, by our decision in *Clark v. Children's Memorial Hospital*, 2011 IL 108656, and to make a clear distinction between a claim of NIED and a claim of liability for negligence or other personal tort in which the act or omission of the defendant caused emotional distress for which damages may be recovered.

¶ 68 In *Corgan*, a former patient sued an unregistered psychologist for what she characterized in her count I as "PSYCHOLOGICAL MALPRACTICE" after he engaged in sexual intercourse with her "under the guise of therapy," causing her severe psychological symptoms requiring extensive treatment. *Corgan*, 143 Ill. 2d at 300. Her count III alleged that defendant breached his duty to her by his " 'conscious indifference and reckless disregard' " for her well-being by repeatedly engaging in " 'sexual intercourse with her under the guise of therapy.' " *Id.* at 301. Thus, both counts I and III sounded in negligence, specifically, professional malpractice.

¶ 69 In his motion to dismiss, the defendant inaccurately characterized count I as a claim of NIED and count III as a claim of intentional infliction of emotional distress (IIED). *Id.* She responded that count III stated a claim for negligence, not IIED. In response to defendant's motion to dismiss both counts, the circuit court certified the two questions for interlocutory review, asking whether this court's holding in *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546 (1983), barred her claims of emotional distress. *Corgan*, 143 Ill. 2d at 301-02.

¶ 70 Although the appellate court stated that count I was " 'in essence for negligence' " and that count II "was 'basically an action for negligence' " (*id.* at 302), the appellate court nevertheless treated both counts as claims of NIED. The appellate court concluded that *Rickey* was not applicable to her claims of NIED because she was a "direct victim" of the defendant's alleged negligent conduct rather than a bystander. *Id.*

¶ 71 After allowing the defendant's petition for leave to appeal, this court formulated the issue as whether "direct victims must set forth the pleading requirements established in *Rickey* when stating a cause of action for negligent infliction of emotional distress." *Id.* It answered the question in the negative, distinguishing between direct victim NIED cases and bystander NIED cases, which require that the plaintiff be in the zone of danger. *Id.* at 304. After observing that "the zone-of-physical-danger rule is patently inapplicable to direct victims" (*id.* at 305), this court also rejected any additional requirement that the NIED plaintiff plead and prove that the emotional distress caused by the defendant's negligence caused physical symptoms (*id.* at 312).

¶ 72 In reaching this holding, this court discussed *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230 (1987), in which the parents of a child born with hemophilia sued for wrongful birth and sought damages, including compensation for their resulting emotional distress. In that case, this court's analysis treated the parents as if they were "bystanders who were witnessing the effects of hemophilia" (*Corgan*, 143 Ill. 2d at 305) and said that they failed to state a claim for NIED because they failed to allege that they were in the zone of danger. *Siemieniec*, 117 Ill. 2d at 261-62. Thus, "the *Siemieniec* majority's mere failure to address the direct-victim/ bystander distinction [did] not amount to expansion of the zone-of-physical-danger rule to include direct victims." *Corgan*, 143 Ill. 2d at 305.

¶ 73 In *Clark*, this court expressly overruled *Siemieniec*, not on the basis of the distinction between a direct victim and a bystander, but on the basis of a distinction between the tort of NIED and the tort of negligence where the plaintiff seeks damages for emotional distress.

¶ 74 The parents in *Clark* claimed wrongful birth due to negligent genetic testing and counseling, alleging that they would not have conceived another child had the defendants provided them with accurate information about the risk of giving birth to a second child with a serious genetic abnormality. *Clark*, 2011 IL 108656, ¶ 5. The damages sought in the wrongful birth count included "the extraordinary costs of caring for [the child] during his minority" (*id.* ¶ 16) but not damages for the emotional distress they experienced as a result of the burden of raising a second severely disabled child. To recover damages for the emotional distress caused by the conduct of the defendants, they pleaded a separate count of NIED. *Id.* ¶ 17.

¶ 75 The appellate court reversed the circuit court's dismissal of the parents' NIED count, stating that "[i]n contrast to *Siemieniec*, plaintiffs in the present case have pleaded they are subject to physical pain, exhaustion, and emotional distress from caring for their son ***; they are subject to 'hitting, biting, and physical trauma' while caring for [him]; and they are thus within the zone-of-physical-danger caused by defendants' alleged negligence." *Clark v. Children's Memorial Hospital*, 391 Ill. App. 3d 321, 332 (2009). Thus, the appellate court held, the parents "adequately pleaded that they fall within the zone-of-physical-danger rule and therefore have stated a cause of action for negligent infliction of emotional distress." *Id.*

¶ 76 The defendants argued before this court that the appellate court's ruling was in conflict with *Siemieniec*. *Clark*, 2011 IL 108656, ¶ 96. We distinguished between a claim of NIED and a claim of professional negligence in which compensatory damages include compensation for emotional distress, explaining that "[w]here the claim of emotional distress is freestanding and not anchored to any other tort against the plaintiff, courts have applied special restrictions *** because of concerns regarding the possibility of fraudulent claims or frivolous litigation." *Id.* ¶ 106 (citing *Rickey*, 98 Ill. 2d at 555). Such special restrictions include the requirement of a contemporaneous physical impact or injury when the plaintiff claims to be a direct victim of NIED (*supra* ¶¶ 31, 38) and the requirement that the plaintiff be in the zone of physical danger in a bystander NIED claim (*Rickey*, 98 Ill. 2d at 550).

¶ 77 We acknowledged contributing to this misunderstanding in *Siemieniec* when we viewed damages sought for emotional distress in a professional negligence claim as a claim of NIED. *Clark*, 2011 IL 108656, ¶ 109. Further, we noted that:

> "[t]he nature of the error [of denying recovery of damages for emotional distress] is evident when one considers that damages for emotional distress are available to prevailing plaintiffs in cases involving other personal torts such as defamation (see, *e.g.*, *Slovinski v. Elliott*, 237 Ill. 2d 51 (2010)); conversion (see, *e.g.*, *Cruthis v. Firstar Bank, N.A.*, 354 Ill. App. 3d 1122 (2004)); and misappropriation of identity (see, *e.g.*, *Petty v. Chrysler Corp*., 343 Ill. App. 3d 815 (2003)). See also 2 Dan B. Dobbs, Law of Remedies § 8.2, at 413-14 (2d ed. 1993) ('When it comes to mental or emotional distress, the usual rule allows free recovery of emotional distress damages to any victim of a personal tort.')." *Id.* ¶ 111.

¶ 78 Thus, we expressly overruled *Siemieniec*, stating that the zone-of-danger rule "applies only in cases where the plaintiff's theory of liability is the negligent infliction of emotional distress. It does not apply where *** a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort." *Id.* ¶ 113.

¶ 79 Like *Siemieniec*, *Corgan* was not really an NIED case. The plaintiff pleaded negligence, specifically professional malpractice, which resulted in emotional distress. *Corgan*, 143 Ill. 2d

at 300. Indeed, Chief Justice Miller specially concurred in *Corgan*, making just this point. *Id.* at 315 (Miller, C.J., specially concurring). He would have treated the case as an ordinary negligence/malpractice case, which is where the court eventually arrived in *Clark*, 20 years later. He noted that the duty at issue was the duty imposed by the therapist-patient relationship. *Id.* at 316. Notably, the majority in *Corgan* also concluded that the defendant, as a treating psychologist, owed a duty to the plaintiff and that he breached that duty by having sexual relations with her during the course of treatment. *Id.* at 307 (majority opinion). Such a breach of such a duty is grounds for finding negligence—even if damages are claimed for emotional distress.

¶ 80 In light of our reasoning in *Clark* and the majority opinion in the present case, it should be clear that when a plaintiff claims NIED, she must allege a contemporaneous physical impact or injury as a direct result of the defendant's conduct or else that she was a bystander in the zone of physical danger. If, however, she states a claim for a tort other than NIED, no such additional pleading requirement applies.

¶ 81 In the present case, while the plaintiff cannot state a claim for NIED in the absence of a contemporaneous physical impact or injury directly resulting from the defendants' entry into her home, her other claims are still pending in the circuit court. Whether any of these claims succeeds, whether damages for emotional distress are available for the particular claim, and whether she proves her entitlement to such damages remain to be seen.

Seef v. Sutkus, 205 Ill. App. 3d 312 (1st Dist. 1990)

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

Ill. App. Ct., 1st Dist. (the forum's district) · filed 1990-10-12 · 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. 4 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passages C042.2, C042.1
- memo p. 7 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C042.1
- memo p. 11 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C042.1

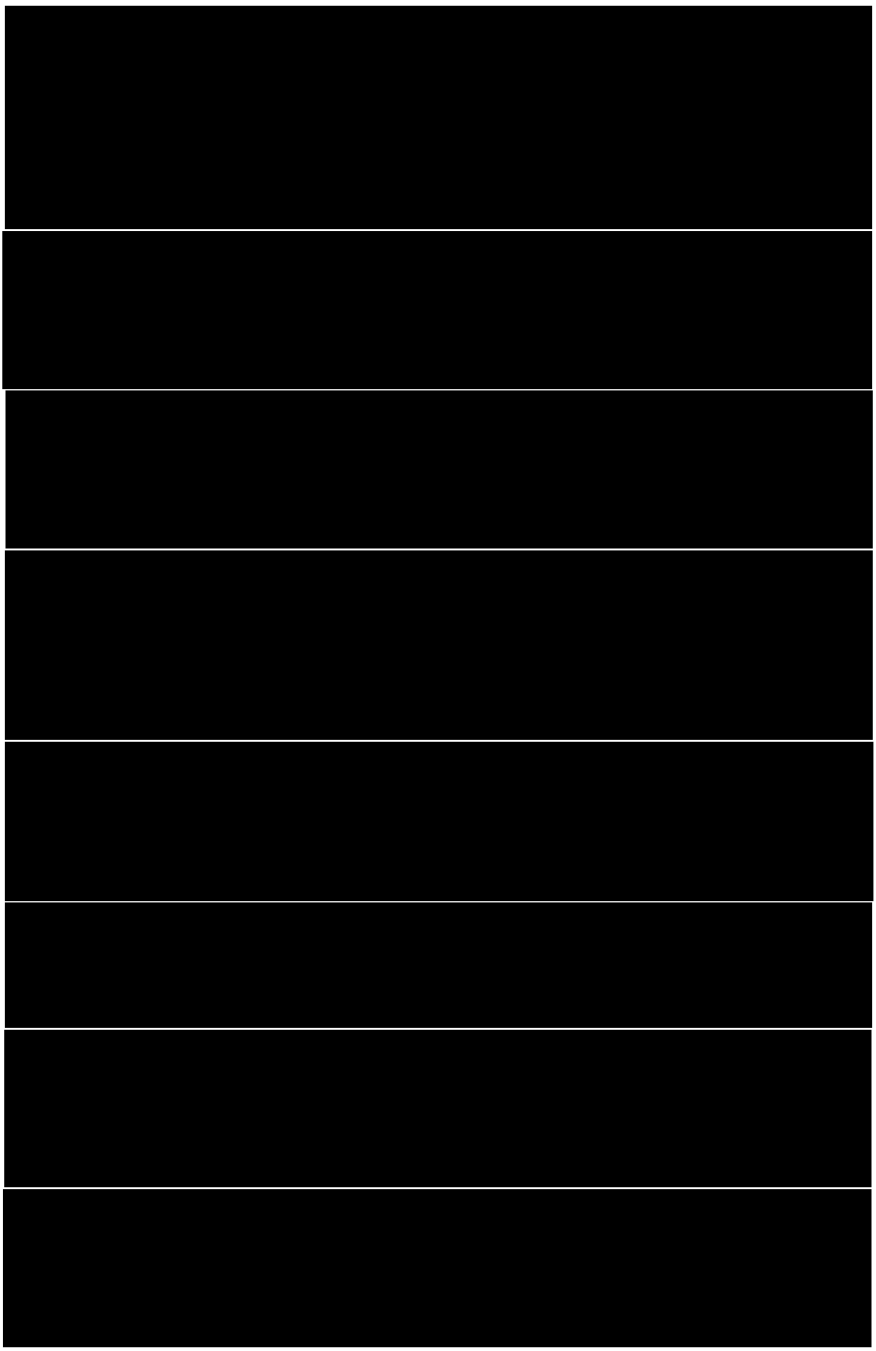
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MARILEE SEEF *et al.*, Plaintiffs-Appellants, v. FRANK SUTKUS *et al.*, Defendants-Appellees.

First District (6th Division) Nos. 1—88—1835, 1—88—3180 cons.

Opinion filed October 12, 1990.



[redacted]

Michael W. Rathsack, of Chicago (Philip F. Maher and Stephen E. McLean, of counsel), for appellants.

Hinshaw, Culbertson, Moelmann, Hoban & Fuller, of Chicago (D. Kendall Griffith, Diane Cernivivo, and Gerald Haberkorn, of counsel), for appellees.

JUSTICE RAKOWSKI delivered the opinion of the court:

This medical malpractice action arises from the stillbirth of an allegedly viable fetus. Plaintiffs Marilee and Michael Seef, parents of Baby Boy Seef, filed suit against defendants Frank Sutkus, M.D., and Ingalls Memorial Hospital, alleging that the death was caused by negligent failure to monitor the condition of the fetus and timely perform a caesarean section. The amended complaint sought recovery as follows:

(1) On behalf of Marilee Seef, alleging negligent infliction of emotional distress arising from the death of her viable fetus (counts I and II).

(2) On behalf of Michael Seef, for loss of his wife's consortium as a result of her emotional distress (counts III and IV).

(3) On behalf of the estate of Baby Boy Seef, alleging medical malpractice and seeking, as part of the damages claimed, compensation for the parents' loss of the fetus' companionship and society (counts V and VI).

Defendants moved for dismissal of the amended complaint pursuant to section 2—615 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2—615). On May 9, 1988, the circuit court dis-

missed counts I through IV and struck those portions of counts V and VI (the wrongful death claim) that sought damages for parental loss of society. Plaintiffs later voluntarily dismissed the remaining portions of the wrongful death counts.

The issues presented on appeal are: (1) whether plaintiffs' amended complaint stated a cause of action for negligent infliction of emotional distress when it did not plead that Mrs. Seef ever feared for her own safety as a result of defendants' negligence, and (2) whether, in a wrongful death action, plaintiffs can claim damages for loss of society of an unborn child. We affirm on the first issue and reverse and remand on the second.

The facts alleged in the complaint are that Marilee Seef was under the care of defendant Sutkus during her pregnancy. On June 9, 1980, Mrs. Seef, 38 weeks pregnant, was admitted to defendant Ingalls Memorial Hospital. At the time of admission to Ingalls, Mrs. Seef complained to Sutkus and to hospital personnel about "changes in the activities and responses of her fetus." At that time, Baby Boy Seef was capable of separate and independent life. Defendants failed to monitor the condition of this unborn child and delayed in performing the caesarean section which would have saved his life. He died on June 10, 1980.

On November 16, 1981, Michael Seef was appointed special administrator of the estate of Baby Boy Seef. In that capacity, he filed a wrongful death action which claimed, among other things, that, as a result of the death of their child, he and his wife sustained damages for the loss of the society of Baby Boy Seef.

The trial court dismissed counts I and II for negligent infliction of emotional distress to Mrs. Seef because the complaint did not plead that she had been within the zone of danger and in fear for her own safety. The court also dismissed counts III and IV, which were derivative counts for loss of consortium suffered by Mr. Seef.

In striking those portions of counts V and VI (the wrongful death claim) that sought recovery for parental loss of society, the court followed the one Illinois case exactly on point at that time, *Hunt v. Chettri* (1987), 158 Ill. App. 3d 76, 510 N.E.2d 1324, *appeal denied* (1987), 116 Ill. 2d 555, 515 N.E.2d 108, from the fifth district.

When a court reviews a motion to dismiss on the pleadings, it must accept all well-pleaded facts as true and should not grant the motion unless it is clear that no set of facts can be proved which would entitle the plaintiff to relief. *Ogle v. Fuiten* (1984), 102 Ill. 2d 356, 360-61, 466 N.E.2d 224.

I

The plaintiffs first contend that the trial court erred in dismissing counts I and II (and the derivative counts III and IV) on the ground that plaintiffs did not state a cause of action for negligent infliction of emotional distress when they failed to plead that Mrs. Seef was ever in the zone of danger for injury as a result of defendants' negligence. We disagree.

[redacted] For an action in negligence, a plaintiff must plead that: (1) the defendant owed a duty to that particular plaintiff; (2) the defendant breached this duty; (3) the defendant's breach was the proximate cause of injuries to the plaintiff; and (4) these injuries caused damages. (*Horak v. Biris* (1985), 130 Ill. App. 3d 140, 144-45, 474 N.E.2d 13.) Courts generally have been reluctant to allow recovery for a plaintiff who suffered purely mental or emotional distress because such injuries are not easily foreseeable. (*Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 555, 457 N.E.2d 1.) Thus, historically, plaintiffs with a cause of action for the negligent infliction of emotional distress had to plead some contemporaneous physical injury or impact to themselves. *Rickey*, 98 Ill. 2d at 553.

[redacted] In *Rickey*, the Illinois Supreme Court eliminated the impact requirement and substituted a zone-of-danger rule to define the parties to whom the defendant might owe a duty. (*Rickey*, 98 Ill. 2d at 555.) Under this rule, "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress." (*Rickey*, 98 Ill. 2d at 555.) Thus, for negligent infliction of emotional distress, a plaintiff must now plead that either (1) he suffered direct impact or (2) he was in a zone of danger that caused him to fear for his own safety and further that he suffered physical injury or illness as a result of his emotional distress. *Courtney v. St. Joseph Hospital* (1986), 149 Ill. App. 3d 397, 403, 500 N.E.2d 703.

[redacted] Parents of an unborn child are not *ipso facto* in the zone of danger for negligence involving that child. (*Siemieniec v. Lutheran General Hospital* (1987), 117 Ill. 2d 230, 260-62, 512 N.E.2d 691.) Illinois courts have found parents outside the zone of danger when negligent genetic counselling results in the birth of a hemophiliac child (*Siemieniec*, 117 Ill. 2d at 260-62); when hospital personnel allow a newborn to fall off a delivery table (*Villamil v. Elmhurst Memorial Hospital* (1988), 175 Ill. App. 3d 668, 670-72, 529 N.E.2d 1181); and when negligence is a factor in the delivery of a stillborn child (*Hunt* (1987), 158 Ill. App. 3d at 79-80; *Robbins v. Kass* (1987),

163 Ill. App. 3d 927, 930-32, 516 N.E.2d 1023).

On appeal the Seefs contend that they have pled a cause of action for negligent infliction of emotional distress. First, they allege that Mrs. Seef did suffer direct contemporaneous injury because she was still carrying Baby Boy Seef and, since she and her child were a single entity, she was also subject to any treatment he did or did not receive. Second, they claim that the zone-of-danger test does not apply because Mrs. Seef was herself a direct victim of the malpractice, not a bystander. Third, they assert that the zone-of-danger test is satisfied because of the inherently close relation between mother and unborn child.

To support their contention, the Seefs rely on *Corgan v. Muehling* (1988), 167 Ill. App. 3d 1093, 522 N.E.2d 153, and *Hunt*. However, the *Corgan* court decided the zone-of-danger test did not apply when a therapist had engaged in sexual relations with a patient because the plaintiff was suing directly for malpractice against herself, not for emotional distress over the treatment accorded a third party. (*Corgan*, 167 Ill. App. 3d at 1102.) Furthermore, the *Hunt* court stated that the unusual facts of that case may not fall into the zone-of-physical-danger rule contemplated in *Rickey* and then denied recovery for the parents of an unborn child. *Hunt*, 158 Ill. App. 3d at 80.

The Seefs' complaint alleges facts very similar in relevant detail to those of *Robbins*. In that case, plaintiffs sued a hospital after their baby was stillborn while the parents waited for hospital personnel to return to their room and help them. The court denied recovery for negligent infliction of emotional distress on the basis that the zone-of-danger rule allows recovery only if plaintiffs suffer a reasonable fear for their own safety, not if they simply fear for the safety of a third person. *Robbins*, 163 Ill. App. 3d at 930.

The *Robbins* court did not treat the mother and child as a single entity. Nor did that court determine that the mother was, *ipso facto*, in the same zone of danger as her unborn child. Similarly, in this case, plaintiffs have not pleaded that Mrs. Seef feared for her own safety within a zone of danger. Thus, like the plaintiffs in *Robbins*, the Seefs did not plead the elements of negligent infliction of emotional distress.

[redacted] Furthermore, plaintiffs have not pleaded any facts showing a direct injury to Mrs. Seef which could form an alternative to damages based on indirect harm through the death of Baby Boy Seef. See *Dralle v. Ruder* (1988), 124 Ill. 2d 61, 72-74, 529 N.E.2d 209.

For these reasons, we affirm the decision of the trial court in dis-

missing counts I and II, and the derivative counts III and IV, for failure to state a cause of action.

II

Plaintiffs also contend that the trial court erred in dismissing those portions of counts V and VI which claimed loss of society due to the wrongful death of a viable unborn child.

Under the Illinois Wrongful Death Act:

> "The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default." (Ill. Rev. Stat. 1987, ch. 70, par. 2.2.)

The Act also provides that "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." Ill. Rev. Stat. 1987, ch. 70, par. 2.

●8 Courts have defined the meaning of pecuniary to include marital companionship, parental care, instruction, and many other aspects of family relationships. (*Elliott v. Willis* (1982), 92 Ill. 2d 530, 535-41, 442 N.E.2d 163.) The term does not, however, extend to the grief or mental anguish that family members suffer after a wrongful death. *Elliott*, 92 Ill. 2d at 539.

Illinois law has not fully delineated the bases for awarding damages for a wrongful death when a child dies before birth. (Ill. Rev. Stat. 1987, ch. 70, par. 1 *et seq.*) In *Chrisafogeorgis v. Brandenberg* (1973), 55 Ill. 2d 368, 304 N.E.2d 88, the Illinois Supreme Court found a cause of action for the wrongful death of a viable child born dead as a result of injuries negligently inflicted *en ventre sa mere*. In *Jones v. Karraker* (1983), 98 Ill. 2d 487, 489-92, 457 N.E.2d 23, the court found that a rebuttable presumption of substantial pecuniary loss was sufficient to support pecuniary damages for the death of a viable fetus, but the court did not specify if those damages included loss of society. In *Bullard v. Barnes* (1984), 102 Ill. 2d 505, 512-18, 468 N.E.2d 1228, the court held that the typical family experience no longer supports the presumption of loss of future earnings at the death of a minor child; instead, courts should presume loss of society. That court held further that defendants could rebut this presumption with evidence that a parent and child were estranged. (*Bullard*, 102 Ill. 2d at 517.) In *Ballweg v. Springfield* (1986), 114 Ill. 2d 107, 118-21, 499 N.E.2d 1373, the court allowed a presumption of damages

for loss of society of an adult child. None of these decisions, however, indicate just when parents begin to enjoy the society of a child or suffer a loss of that society after wrongful death.

Plaintiffs assert that the *Chrisafogeorgis* court drew the proper line for damages in 1973 when it first held that there is a cause of action for the wrongful death of a viable child *en ventre sa mere*. (*Chrisafogeorgis*, 55 Ill. 2d at 374-75.) Since that decision, the 1980 amendment to the Wrongful Death Act extends the cause of action to any fetal death without limiting action to a viable fetus and without specifying the kinds of damages available at stages of fetal development. Ill. Rev. Stat. 1987, ch. 70, par. 2.2.

The relevant facts in this appeal are undisputed. Plaintiffs' complaint alleges that defendants' negligence caused the death of Baby Boy Seef before his birth. Thus, the question on appeal is whether we can affirm as a matter of law that damages under the Wrongful Death Act do not include loss of society for a viable, unborn fetus.

The trial court did so rule, relying on *Hunt v. Chettri*, a fifth district opinion. One Federal case has also followed *Hunt*, *Denham v. Burlington Northern R.R. Co.* (N.D. Ill. 1988), 699 F. Supp. 1253. *Denham* did not provide any reasoning in support of its decision. It simply followed *Hunt*. Recently, however, the first district has allowed parents of an unborn child to claim damages for loss of society in *Smith v. Mercy Hospital & Medical Center* (1990), 203 Ill. App. 3d 465.

We have carefully considered both *Hunt* and *Smith*, and we agree with the result reached in *Smith*. In so doing we are not unmindful of the reasoning set forth in *Hunt*. However, we do believe for the following reasons that *Smith* is more in accord with the supreme court pronouncements in *Chrisafogeorgis* and the 1980 amendment to the Wrongful Death Act.

The *Hunt* court defined " 'society' " as a term that " 'embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.' " *Hunt*, 158 Ill. App. 3d at 78, quoting *Sea-Land Services, Inc. v. Gaudet* (1974), 414 U.S. 573, 585, 39 L. Ed. 2d 9, 21, 94 S. Ct. 806, 815.

Following *Bullard*, the court asserted that a presumption of damages for loss of society can be defeated by evidence of estrangement. (*Hunt*, 158 Ill. App. 3d at 78, citing *Bullard*, 102 Ill. 2d at 517.) This use of evidence, the court reasoned, presumes the existence of a tangible relationship.

The court reasoned further that " '[w]hen children are wrongfully

killed, the parents' investment *** in affection, guidance, security and love is destroyed. Society recognizes the destruction of that value whether a child is a minor or an adult.' " (*Hunt*, 158 Ill. App. 3d at 79, quoting *Ballweg*, 114 Ill. 2d at 120.) When an unborn child dies, however, "no guidance, love, affection or security has been exchanged." (*Hunt*, 158 Ill. App. 3d at 79.) Therefore, the court continued, allowing damages for an unborn child would be tantamount to compensating for mental anguish, which is prohibited under Illinois law in wrongful death cases (*Hunt*, 158 Ill. App. 3d at 79, citing *Bullard*, 102 Ill. 2d at 514-15; *Elliott*, 92 Ill. 2d at 539).

The court acknowledged that the loss suffered by parents could be virtually identical when a child is stillborn or dies immediately after birth. Nevertheless, the court held that the point to begin measuring loss-of-society damages is with bonding at birth, when, in the court's view, a mutual relationship begins. *Hunt*, 158 Ill. App. 3d at 79.

To support this ruling, the *Hunt* court first stated it failed "to see how a defendant could produce evidence establishing that a parent and an unborn child were estranged." (158 Ill. App. 3d at 78.) The court's inability to see evidence of estrangement may arise because in most instances such evidence does not exist. While we agree that it may be difficult to prove that a mother was estranged from her unborn child, we fail to see how this fact either leads to the conclusion that no tangible relationship ever existed or somehow dictates a consequent inability to bring a cause of action based on that relationship. *Chrisafogeorgis* (55 Ill. 2d at 372), held that "[t]he right to bring an action is clearly distinguishable from the ability to prove the facts. The first cannot be denied because the second may not exist." Certainly it follows from this statement that a cause of action should not be denied because of the defendant's inability to prove facts which could defeat the claim.

The *Hunt* court conceded the existence of a relationship between parents and a *newborn* child. (158 Ill. App. 3d at 79.) Yet the problems of proving estrangement are just as severe in that instance as in the case of an unborn. Moreover, there are arguments available to defendant besides the presence of estrangement. A defendant could show, among other things, that a pregnant woman had endangered the unborn child through alcohol or drug abuse, or simply neglecting her own health. As *Smith* notes:

> "[A] rebuttable presumption of pecuniary injuries does not necessarily guarantee recovery. It does, however, appropriately shift the burden of coming forward with proof that the dam-

ages are minimal or nonexistent onto the party who created the uncertainty surrounding the damages by causing the wrongful death." *Smith*, 203 Ill. App. 3d at 477, citing *Flynn v. Vancil* (1968), 41 Ill. 2d 236, 242 N.E.2d 237.

The *Hunt* court also relies on the special concurrence in *Bullard* (102 Ill. 2d at 521). In that case, Justice Clark argued that the loss-of-society presumption should be extended to the parents of adult children. In support of this he stated the parents of the 17-year-old "could reasonably anticipate receiving advice, companionship and assistance" and that "[t]his presumption is equally valid for adult *** children." The supreme court later held in favor of this presumption for the loss of adult children in *Ballweg* (114 Ill. 2d at 118-20). The *Hunt* court said that parents of an unborn child could not make such a claim. We agree. But neither could the parents of a newborn. And yet, under existing law, loss of society for the newborn is not only allowed, but presumed. The *Smith* court notes further that loss-of-society damages compensate plaintiffs for their future loss, not for their past enjoyment. *Smith*, 203 Ill. App. 3d at 473.

Next, *Hunt* held that recognition for loss of society is dependent on "the relationship of parent and child. In the death of an unborn fetus, no guidance, love, affection or security has been exchanged." (158 Ill. App. 3d at 79.) The *Hunt* court therefore concluded that any award to the parents of an unborn could only be for mental anguish or bereavement, which are not elements of loss of society. This reasoning presupposes that a child has no society with his parents *in utero* but acquires society suddenly through "the initial bonding which takes place at birth." (158 Ill. App. 3d at 79.) Thus, one minute distinguishes the fetus who does not exchange society with his parents from the child who does. While, this may be true, other courts have noted that this distinction can lead to " 'bizarre results. Suppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other?' " *Chrisafogeorgis*, 55 Ill. 2d at 374, quoting *Stidam v. Ashmore* (1959), 109 Ohio App. 431, 434, 167 N.E.2d 106, 108.

We therefore cannot agree that as a matter of law a child does not develop any love or affection for his parents during the months before birth, but develops these feelings toward both immediately afterwards. While we agree that there would be differences between how an unborn may relate to a mother as opposed to a father, we believe in both instances that the existence and extent of these

relationships are properly questions of fact requiring medical expertise and should not be decided as a matter of law.

[redacted] Finally, *Hunt* would measure the loss experienced by the parents according to the "length, intensity and quality of the parent-child relationship" and states that "birth is [the] proper point ***, to begin to measure the loss of a child's society." (*Hunt*, 158 Ill. App. 3d at 29.) We believe that at best this is properly characterized as an unproven factual question. Long before birth parents may soothe, comfort, and even talk to their child. How or even if the child relates to these actions will determine whether or not society exists from child to parent. We do not believe that these questions should be decided as a matter of law without giving plaintiffs the opportunity to present evidence. It may very well be that plaintiffs will be unable to garner such evidence and defendant will be entitled to summary judgment. It could also be that conflicting evidence will be produced and the issue will then be a question for the trier of fact. Further, if the child's capacity for bonding and society depends on social development, then one might argue that no society exists for a child who dies after birth but before meeting his father. If society depends on physical maturation, then one might argue that a nearly full-term child who dies just before birth, as the infant did here, has a greater capacity for society than a six- or seven-month-old fetus who survives birth but dies soon after. We are not prepared to rule on such factual issues as a matter of law.

For the reasons stated, the judgment of the trial court is affirmed on counts I through IV and reversed and remanded on counts V and VI.

Judgment affirmed in part and reversed in part.

LaPORTA, P.J., and McNAMARA, J., concur.

Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230 (1987)

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

Ill. Supreme Court · filed 1987-08-17 · Reporter opinion
Supreme Court

Treatment in the index: overruled by Clark v. Children's Memorial Hospital, 2011 IL 108656; overruled by Cochran v. Securitas Security Systems USA Inc., 2017 IL 121200. Check it in a citator before filing.

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- memo p. 11 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C010.3

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(No. 62251.—[redacted]

JANICE L. SIEMIENIEC *et al.*, Appellees, v. LUTHERAN GENERAL HOSPITAL *et al.* (Lutheran General Hospital *et al.*, Appellants).

Opinion filed August 17, 1987.

[redacted]

CLARK, C.J., took no part.

GOLDENHERSH, J., took no part in Part III.

WARD, J., concurring as to Parts I and III and dissenting as to Part II.

MILLER, J., specially concurring as to Parts I and II.

SIMON, J., specially concurring as to Part II and dissenting as to Parts I and III.

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Cassiday, Schade & Gloor, of Chicago (Rudolf G. Schade, Jr., and John P. Stansbury, of counsel), for appellant Lutheran General Hospital.

Lord, Bissell & Brook, of Chicago (Harold L. Jacobson, Patricia J. Foltz and Hugh C. Griffin, of counsel), for appellant Michael Reese Hospital.

Kenneth L. Cunniff and Patrick J. Rocks, Jr., of Chicago, for appellees.

JUSTICE RYAN delivered the decision of the court and the following opinion. In the decision of the court, JUSTICE MORAN joins in Parts I, II and III; JUSTICE MILLER specially concurs in Parts I and II and joins in Part III; JUSTICE WARD concurs in Parts I and III; JUSTICE GOLDENHERSH joins in Parts I and II; and JUSTICE SIMON specially concurs in Part II:

This Cook County medical malpractice action involves interrelated issues dealing with the rights of parents and children to recover damages against health-care providers for what are commonly known as "wrongful birth" and "wrongful life" causes of action.

Janice Siemieniec conceived a child in February 1980. Mrs. Siemieniec's family history revealed that two of her deceased cousins had been afflicted with hemophilia. For purposes of general and descriptive information only, hemophilia is a genetic disorder caused by the deficiency or inactivity of coagulation factors needed for blood clotting. The hemophilias include both hemophilia A, or "classic hemophilia," in which the patient's plasma is deficient in factor VIII clotting activity, and hemophilia B, or "Christmas Disease," in which the patient's plasma is deficient in factor IX coagulation activity. Both types are

transmitted as a sex-linked recessive trait on the X chromosome. The usual familial pattern shows that only males are affected, that these individuals are related only via their mothers, and that their mothers are unaffected. See Bachman, *Recognition of Congenital Bleeding Disorders*, in Hemophilia (D. Green ed. 1973); A. Bloom, The Hemophilias 5-9 (1982); Kasper, *Hematologic Care*, in Comprehensive Management of Hemophilia 3-6 (D. Boone ed. 1976).

Concerned with a possible occurrence of this inherited coagulation disorder in her already conceived child, Mrs. Siemieniec, during the first trimester of her pregnancy, sought genetic counseling at Lutheran General Hospital to determine the likelihood of this contingency. Dr. Carol Booth, the director of the Department of Genetics at Lutheran General, advised Mrs. Siemieniec of the availability of prenatal genetic diagnostic tests (amniocentesis and fetal blood sampling) to determine the risk of her child being afflicted with hemophilia. Mrs. Siemieniec purportedly informed Dr. Booth of her desire to terminate the pregnancy by abortion if there was a substantial risk of her bearing a hemophilic child.

Dr. Booth referred Mrs. Siemieniec to Dr. Juan Chediak, a staff physician in the Division of Hematology/Oncology at Michael Reese Hospital. Dr. Chediak supplied Mrs. Siemieniec with similar information regarding genetic diagnostic and prenatal testing procedures. Dr. Chediak also promised to check on whether Mrs. Siemieniec's cousins were registered hemophiliacs and to examine her deceased cousin's death certificate.

Two weeks later, Dr. Chediak sent a letter to Dr. Booth opining that the risk of Mrs. Siemieniec being a carrier of classic hemophilia was "very low." Dr. Booth then sent a copy of this letter to Mrs. Siemieniec. Based upon this information, the Siemienics exercised a conscious choice to proceed with the pregnancy. As a result,

Adam Siemieniec was born on October 17, 1980, and after a bleeding episode, was diagnosed as a hemophiliac of the B type (Christmas Disease).

On the basis of these facts, Thomas and Janice Siemieniec, on their own behalf and on behalf of their son, Adam, filed a four-count complaint in the circuit court of Cook County against Dr. Booth, Dr. Chediak, Lutheran General Hospital, and Michael Reese Hospital. The complaint alleged that, as a direct and proximate result of the negligent diagnosis by the defendants and their failure to accurately advise Mrs. Siemieniec of the risk of the child's being born a hemophiliac, Adam Siemieniec was not aborted, to his personal injury and to the financial injury of his parents. The complaint sought damages for the extraordinary medical expenses the Siemieniecs will incur in caring for and treating Adam's hemophilic condition during his minority, for the extraordinary expenses Adam will incur for the care and treatment of his impaired physical condition after he reaches majority, and for the alleged emotional distress and mental anguish sustained by the Siemieniecs attendant to the raising and caring of a hemophiliac.

The circuit court denied the respective motions to dismiss filed by the defendants. Recognizing, however, that issues of law were present as to which there were substantial grounds for difference of opinion, the circuit court certified for appellate review three questions: (1) whether the child has a cause of action on his own behalf for extraordinary medical expenses during the age of majority; (2) whether the parents have a cause of action for the extraordinary medical expenses of the hemophilic child during his minority; and (3) whether the parents have a cause of action for negligent infliction of emotional distress.

The appellate court answered the first certified question in the affirmative: Adam has a cause of action in his

own behalf for extraordinary medical expenses during his majority. (134 Ill. App. 3d 823, 831-32.) The appellate court also answered the second certified question in the affirmative: Adam's parents have a cause of action to recover extraordinary medical expenses during his minority. (134 Ill. App. 3d 823, 826-30.) Finally, in answer to certified question No. 3, the appellate court held that, "absent allegations and proof of intentional and outrageous conduct, or that [Adam's parents] were at a high risk to themselves of physical impact resulting in their physical injury or illness by reason of the emotional distress caused by a defendant's negligence, [Adam's parents] have no cause of action for emotional distress damages." (134 Ill. App. 3d 823, 831.) We allowed the defendants' petition for leave to appeal pursuant to our Rule 315 (94 Ill. 2d R. 315).

We emphasize at the outset the procedural posture in which this case is now before this court. The question presented for review is not whether the plaintiffs should ultimately prevail in this litigation, but rather, more narrowly, whether the complaint states legally cognizable causes of action. Since our review is limited to an evaluation of the sufficiency of the complaint, we must accept as true all well-pleaded facts. (See *Ostendorf v. International Harvester Co.* (1982), 89 Ill. 2d 273, 280; *Sierens v. Clausen* (1975), 60 Ill. 2d 585, 589; *O'Fallon Development Co. v. Ring* (1967), 37 Ill. 2d 84, 88.) Accordingly, we accept, without expressing any opinion as to the defendants' liability, the allegations that the defendants failed to adequately inform Mrs. Siemieniec about various types of hemophilia, for one of which, the type with which Adam is afflicted, Christmas Disease, there is no reliable test; failed to inquire adequately into Mrs. Siemieniec's own medical and health background; and failed to obtain the death certificate of Mrs. Siemieniec's cousin, which would have disclosed that he had a factor

IX clotting disorder, the same as Adam. We further accept the allegation that if Mrs. Siemieniec had been accurately advised of the chances that her already conceived child would be afflicted with hemophilia, then she would have terminated the pregnancy by abortion.

We turn now to the issues before us, whether actions for wrongful life and wrongful birth should be recognized in Illinois. The terms "wrongful life" and "wrongful birth" have been applied to a wide variety of medical malpractice actions brought by parents or by infants for damages growing out of unexpected or unwanted birth, or out of birth under conditions of disability or disadvantage. Because the courts and the commentators have been less than precise in their utilization of these terms, the legal and theoretical distinctions between the torts often have been blurred. Hence, thoughtful analysis of the validity of wrongful birth and wrongful life as emerging legal concepts requires, in the first instance, a clear understanding of the alleged wrong upon which the cause of action is predicated.

"Wrongful birth" refers to the claim for relief of parents who allege they would have avoided conception or terminated the pregnancy by abortion but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child. The underlying premise is that prudent medical care would have detected the risk of a congenital or hereditary genetic disorder either prior to conception or during pregnancy. As a proximate result of this negligently performed or omitted genetic counseling or prenatal testing, the parents were foreclosed from making an informed decision whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate the same. See Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14

Fam. L.Q. 15, 16-17 (1980); Comment, *Damages For Wrongful Birth and Wrongful Pregnancy in Illinois*, 15 Loy. U. Chi. L.J. 799, 799-800 (1984); Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 Marq. L. Rev. 611, 621-23 (1980); Comment, *"Wrongful Life": The Right Not to be Born*, 54 Tul. L. Rev. 480, 484-85 (1980); see generally 1 Dooley, Modern Tort Law sec. 14.06 (1982).

The corresponding action by or on behalf of an infant who suffers from a genetic or congenital disorder is denominated one for "wrongful life." The child claims that the physician or other health-care provider: (1) failed to accurately perform genetic screening tests prior to conception or to correctly inform the prospective parents of the hereditary nature of certain genetic disorders; (2) failed to accurately advise, counsel, or test his parents during pregnancy concerning genetic or teratogenic risks associated with childbirth suggested by maternal age, physical condition, family medical history, or other circumstances particular to the parents; or (3) failed to perform a surgical procedure intended to prevent the birth of a congenitally or genetically defective child. In a wrongful life case, the child does not assert that the negligence of the defendants caused his inherited or congenital abnormality, that the defendants could have done anything that would have decreased the possibility that he would be born with such defects, or that he ever had a chance to be normal. The essence of the child's claim is that the medical professional's breach of the applicable standard of care precluded an informed parental decision to avoid his conception or birth. But for this negligence, the child allegedly would not have been born to experience the pain and suffering attributable to his affliction. See DeVries & Rifkin, *Wrongful Life, Wrongful Birth, and Wrongful Pregnancy: Judicial Divergence in the Birth-Related Torts*, 20 Forum 207, 211 (1985); Rogers,

Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling & Prenatal Testing, 33 S.C. L. Rev. 713, 715-16 (1982); Comment, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. Cal. L. Rev. 477 n.2 (1982); Comment, *Wrongful Life: A Misconceived Tort*, 15 U.C. Davis L. Rev. 447, 450 n.13 (1981); Note, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 Wm. & Mary L. Rev. 125 (1978); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 Yale L.J. 1488, 1500-02 (1978); see generally Am. Jur. 2d New Topic Service, *Right to Die; Wrongful Life* sec. 63 (1979 & Supp. 1986).

To be distinguished from the actions before us are those in which recovery is sought for what is appropriately labeled "wrongful conception or pregnancy." Liability is based either on the physician's negligence in performing a sterilization procedure or an abortion or the pharmacist's or pharmaceutical manufacturer's negligence in preparing or dispensing a contraceptive prescription. The essence of the wrong for which compensation is sought in some cases is the birth of a healthy and normal—albeit, unplanned and unwanted—child. See W. Prosser & W. Keaton, Torts sec. 55, at 372-73 (5th ed. 1984); Hampton, *The Continuing Debate Over the Recoverability of the Costs of Child-Rearing in "Wrongful Conception" Cases: Searching for Appropriate Judicial Guidelines*, 20 Fam. L.Q. 45, 47-48 (1986); Holt, *Wrongful Pregnancy*, 33 S.C. L. Rev. 759, 763-92 (1982); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. Miami L. Rev. 1409, 1410-19 (1977); Robertson, *Civil Liability Arising From "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 Am. J.L. & Med. 131, 132-35 (1978); see generally Annot., 83 A.L.R.3d 15 (1978).

Part I. Child's Claim for "Wrongful Life"

Having defined the scope of our inquiry, we first consider the action on behalf of the son, Adam, for the extraordinary medical expenses which he expects to incur after reaching his majority. Although the cause of action at issue has attracted a special name—"wrongful life"—Adam's basic contention is that his action is simply one form of the familiar medical or professional malpractice action. The gist of Adam's claim is that he has suffered harm or damage as a result of the defendants' negligent performance of their professional tasks, and that, as a consequence, he is entitled to recover the extraordinary expenses associated with his disability under generally applicable common law tort principles.

The overwhelming majority of jurisdictions, including Illinois, have rejected claims for relief brought by or on behalf of genetically or congenitally impaired children against medical professionals whose negligent failure to predict or to diagnose their congenital or genetic disease was allegedly the proximate cause of their birth and having to live in an impaired condition. See, *e.g., Phillips v. United States* (D.S.C. 1980), 508 F. Supp. 537 (applying South Carolina law) (Down's syndrome); *Moores v. Lucas* (Fla. App. 1981), 405 So. 2d 1022 (Larsen's syndrome); *Blake v. Cruz* (1984), 108 Idaho 253, 698 P.2d 315 (congenital rubella syndrome); *Goldberg v. Ruskin* (1986), 113 Ill. 2d 482 (Tay-Sachs disease); *Bruggeman v. Schimke* (Kan. 1986), 718 P.2d 635 (Down's syndrome); *Strohmaier v. Associates in Obstetrics & Gynecology, P.C.* (1982), 122 Mich. App. 116, 332 N.W.2d 432 (congenital rubella syndrome); *Azzolino v. Dingfelder* (1985), 315 N.C. 103, 337 S.E.2d 528 (Down's syndrome); *Smith v. Cote* (1986), 128 N.H. 231, 513 A.2d 341 (congenital rubella syndrome); *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 386 N.E.2d 807 (Down's syndrome and polycystic

kidney disease); *Ellis v. Sherman* (1986), 512 Pa. 14, 515 A.2d 1327 (congenital neurofibromatosis); *Nelson v. Krusen* (Tex. 1984), 678 S.W.2d 918 (Duchenne muscular dystrophy); *James G. v. Caserta* (W. Va. 1985), 332 S.E.2d 872 (Down's syndrome); *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 233 N.W.2d 372 (congenital rubella syndrome); see also *Elliott v. Brown* (Ala. 1978), 361 So. 2d 546 (wrongful life claim on behalf of a seriously deformed child born following a negligently performed vasectomy dismissed for failure to state a legally cognizable cause of action); *Miller v. Du Hart* (Mo. App. 1982), 637 S.W.2d 183 (wrongful life claim of a child born after a negligently performed bilateral tubal ligation dismissed for failure to state a legally cognizable cause of action); *Beardsley v. Wierdsma* (Wyo. 1982), 650 P.2d 288 (wrongful life claim on behalf of a child born after an unsuccessful tubal ligation dismissed for failure to state a legally cognizable cause of action). But see *Turpin v. Sortini* (1982), 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337; *Continental Casualty Co. v. Empire Casualty Co.* (Colo. App. 1985), 713 P.2d 384; *Procanik v. Cillo* (1984), 97 N.J. 339, 478 A.2d 755; *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 656 P.2d 483.

The systematic rejection of wrongful life claims rests upon two intimately related grounds. The first ground is the courts' unwillingness to hold that a child can recover damages for achieving life. The threshold problem has been the assertion by the infant plaintiffs not that they should not have been born without defects, but that they should not have been born at all. The essence of the infant's cause of action is that the negligent conduct of the defendants deprived the child's mother from obtaining an abortion which would have terminated its existence. Resting on the belief that human life, no matter how burdened, is, as a matter of law, always preferable to

nonlife, the courts have been reluctant to find that the infant has suffered a legally cognizable injury by being born with a congenital or genetic impairment as opposed to not being born at all. See *Elliott v. Brown* (Ala. 1978), 361 So. 2d 546, 547-48; *Blake v. Cruz* (1985), 108 Idaho 253, 260, 698 P.2d 315, 322; *Bruggeman v. Schimke* (Kan. 1986), 718 P.2d 635, 640-42; *Smith v. Cote* (1986), 128 N.H. 231, 248, 513 A.2d 341, 352; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812; *Azzolino v. Dingfelder* (1985), 315 N.C. 103, 110, 337 S.E.2d 528, 533; *Ellis v. Sherman* (1986), 512 Pa. 14, 19, 515 A.2d 1327, 1329.

The second basis relied upon by those courts refusing to recognize a cause of action for wrongful life is the difficulty, if not impossibility, of measuring appropriate damages. The traditional tort remedy is compensatory in nature. The basic rule of tort compensation is that the plaintiff be put in the position that he would have been in absent the defendant's negligence. The damages recoverable on behalf of a child for wrongful life are limited to those necessary to restore the child to the position he would have occupied were it not for the alleged malpractice of the physician or other health-care provider. In a wrongful life case, there is no allegation that but for the defendant's negligence the child would have had a healthy, unimpaired life. Instead, the claim is that without the defendants' negligence, the child never would have been born. Thus, the cause of action involves a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all, "[a] comparison the law is not equipped to make." *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812; see *Moores v. Lucas* (Fla. Dist. App. 1981), 405 So. 2d 1022, 1025; *Strohmaier v. Associates in Obstetrics & Gynecology, P.C.* (1982), 122 Mich. App. 116, 120-22, 332 N.W.2d 432, 434-35; *Nelson v. Krusen*

(Tex. 1984), 678 S.W.2d 918, 924-25; *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 773, 233 N.W.2d 372, 375-76.

In holding that Adam has a cause of action in his own behalf for the extraordinary medical expenses during his majority, the appellate court in this case emphasized that the "action articulated on Adam's behalf claims a real rather than a theoretical injury. It is definable by recognized tort standards and seeks recompense only for extraordinary expenses, not damages for being born impaired as against the value of not being born at all. (See, *e.g., Procanik v. Cillo* (1984), 97 N.J. 339, 478 A.2d 755.) Adam's complaint does not require ontological discussion; merely the right to prove, if he can, what his unusual condition will cost when he reaches majority." (134 Ill. App. 3d 823, 834.) Citing *Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, for the proposition that an infant has a right to be free from injuries foreseeably caused by a breach of duty to the child's mother, the appellate court concluded that "the health care providers involved in the present case could have reasonably foreseen that [Adam's] life would be impaired by being born with hemophilia, at least to the extent of requiring extraordinary treatment with concomitant expenses." 134 Ill. App. 3d 823, 833.

The basic fallacy of the appellate court's analysis is that it ignores the essential nature of the defendants' alleged wrong and obscures a critical difference between wrongful life actions and the ordinary prenatal-injury case. In an ordinary prenatal-injury case, if the defendant had not been negligent, then the child would have been born healthy. (See *Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348 (recognizing a cause of action on behalf of a child who suffered severe prenatal injuries as a result of defendants' negligent administration of an Rh-positive blood transfusion to her Rh-negative mother

nine years prior to the child's conception); see also Annot., 91 A.L.R.3d 316 (1979).) In the present case, by contrast, the undisputable tragic fact is that Adam never had a chance to be born as a whole, functional human being without hemophilia. It is alleged that if the defendants would have performed their tasks properly, then an abortion would have been procured. However, in such an event, Adam never would have come into existence. Because children with genetic disorders such as Adam are impaired from the moment of conception, it is impossible for them to have a fundamental right to be born as whole individuals. Hence, the only alternative to their suffering, and the standard against which their compensation must be determined, is nonexistence. (See Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 4 Wash. U.L.Q. 919, 934 (1979); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 Duke L.J. 1401, 1444; Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 Va. L. Rev. 405, 440 (1983).) Recognition of a cause of action for wrongful life in this case would therefore require this court to find that Adam had an interest in avoiding his own birth, *i.e.*, that there is a fundamental legal right not to be born when birth would necessarily entail a life of hardship. (See Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 Marq. L. Rev. 611, 620 (1980).) Such a finding, however, would essentially require us to possess the divine ability to determine what defects should prevent an embryo from being allowed life so that denial of the opportunity to terminate the existence of such a defective child in embryo supports a cause of action. See *Goldberg v. Ruskin* (1986), 113 Ill. 2d 482, 489 ("The argument that the child was in some meaningful sense harmed by

being born and would have been better off not being born suggests that there is a perspective, apart from our life and world, from which one can stand and say that he finds nonexistence preferable to existence").

The New York Court of Appeals in *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 386 N.E.2d 807, aptly summarized the dilemma faced by a court when it is confronted with a claim by a physically or mentally impaired child that he sustained injury in being born with a congenital or genetic ailment as opposed to not being born at all.

> "Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?" 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812.

Elliott v. Brown (Ala. 1978), 361 So. 2d 546, *Smith v. Cote* (1986), 128 N.H. 231, 513 A.2d 341, and *Ellis v. Sherman* (1986), 512 Pa. 14, 515 A.2d 1327, are also cases in which the courts discussed the basis for the unwillingness to find that a defective child had sustained a legally cognizable injury in being born with physical deformities as opposed to not being born at all.

In rejecting the wrongful life claim of a seriously deformed child born following a negligently performed vasectomy, the Supreme Court of Alabama in *Elliott* observed:

> "Upon what legal foundation is the court to determine that it is better not to have been born than to be born with deformities? If the court permitted this type of cause of action, then what criteria would be used to determine the degree of deformity necessary to state a claim for relief. We decline to pronounce judgment in the imponderable area of nonexistence." (*Elliott v. Brown* (Ala. 1978), 361 So. 2d 546, 548.)

In *Smith*, the New Hampshire Supreme Court, in denying the wrongful life claim of a child born with congenital rubella syndrome, couched this dilemma in terms of public policy:

> "[C]ompelling policy reasons militate against recognition of wrongful life claims. The first such reason is our conviction that the courts of this State should not become involved in deciding whether a given person's life is or is not worthwhile. As one commentator has written, '[i]f plaintiff prevails, the result is a formal judicial declaration that it would have been better if plaintiff had not been born.' Kelley, [*Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 4 Wash. U.L.Q. 919, 942 (1979)]." (*Smith v. Cote* (1986), 128 N.H. 231, 248, 513 A.2d 341, 352.)

In holding that a child born with a virulent form of neurofibromatosis had no cause of action for the alleged injury of his birth, the Supreme Court of Pennsylvania, in *Ellis*, reasoned:

> "It cannot escape our judicial notice that many diseased and deformed persons live contented lives and make significant social and personal contributions. Were we to recognize the child's claim that it was injured by being denied nonexistence, we would be required to speculate that this child, unlike other similarly situated persons, would be unable to derive any significant meaning, pleasure or satisfaction from its life, and therefore, that its *life* is of such minimal benefit as to constitute an injury. Because we have no way of knowing what opportunities will be available to this child or how the child will

respond to life in general, we cannot say how the child's pain and suffering will compare to the benefits of its life, and thus, we cannot determine that its life constitutes an injury." (Emphasis in original.) *Ellis v. Sherman* (1986), 512 Pa. 14, 19, 515 A.2d 1327, 1329.

The insurmountable line-drawing problems courts will face in determining the level of impairment that warrants recovery has led one commentator to recommend nonrecognition of wrongful life claims:

"Line-drawing problems arise in considering what level of impairment a court will find serious enough to compel recovery. The weak facts in *Turpin* [*Turpin v. Sortini* (1982), 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337], the leading California wrongful life decision, indicate that concern about line-drawing is not unwarranted. The related concern, that courts may be faced with numerous frivolous claims, also has some merit; any number of adverse circumstances could, from the infant's point of view, constitute a wrongful life. For example, being born to a particular race, to a poor family, or with brown eyes could cause an infant to claim that his or her life was wrongfully conceived. The mere possibility that frivolous claims may be brought, however, is not a strong argument against recognizing wrongful life claims.

If the child's point of view is not determinative, and an objective, reasonable person standard is applied in deciding to award wrongful life damages, frivolous claims may no longer be a problem, but line-drawing still comes into play. *Judges and juries will have to determine the degree of impairment that renders a child's nonexistence preferable to existence. Not only will such a judgment be unpalatable, but persons making this judgment can look only to their own feelings or fears of being handicapped in deciding the merits of the claim.* This may reinforce prejudicial judgments that certain handicapped plaintiffs always deserve compensation, while healthy infants born in other adverse circumstances never deserve legal compensation for their birth." (Emphasis added.) Comment, *The*

Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View, 31 U.C.L.A. L. Rev. 473, 498-99 (1983).

Because no right not to be born, even into a life of hardship, has ever been recognized in our judicial system, Adam Siemieniec has suffered no legally cognizable injury by being brought into existence afflicted with hemophilia. Adam, nevertheless, urges us to follow the supreme courts of California, New Jersey, and Washington, which have permitted children to pursue wrongful life actions limited to the recovery of special damages attributable to the extraordinary medical expenses expected to be incurred during the child's lifetime in the management, treatment, and care of congenital or genetic ailments. (See *Turpin v. Sortini* (1982), 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (hereditary deafness); *Procanik v. Cillo* (1984), 97 N.J. 339, 478 A.2d 755 (congenital rubella syndrome); *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 656 P.2d 483 (fetal hydantoin syndrome).) We are not persuaded, however, by the reasoning of these courts.

In *Turpin*, the California Supreme Court, in denying general damages for pain and suffering resulting from the failure to diagnose a hereditary deafness, reasoned "(1) it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born, and (2) even if it were possible to overcome the first hurdle, it would be impossible to assess general damages in any fair, nonspeculative manner." (*Turpin v. Sortini* (1982), 32 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346.) In awarding special damages, however, the *Turpin* court ignored the reasoning that prevented an award of general damages. The problem of establishing the fact of injury was simply passed over, and all discussion focused on the nonspeculative nature of a recovery for extraordinary medical expenses. See

Comment, *Wrongful Life: A Legislative Solution to Negligent Genetic Counseling*, 18 U.S.F. L. Rev. 77, 98 (1983) ("[a]n award which denies general damages because they are 'impossible to determine' and at the same time permits special damages for the same tort is inconsistent"); Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 Cal. L. Rev. 1278, 1292 (1983) ("No wrongful life plaintiff, even with severe defects, can prove she has suffered harm, and the obstacle is not merely that damage calculations are speculative. The court acknowledged this fact, yet reached an inconsistent result").

Similarly, in *Harbeson*, the Washington Supreme Court acknowledged that "[t]he most controversial element of the [wrongful life] analysis in other jurisdictions has been injury and the extent of damages" and conceded that "measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors." (*Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 482, 656 P.2d 483, 496.) The *Harbeson* court, nevertheless, proceeded to a discussion of the calculation of special damages, without explaining how the difficulty in determining the existence of the element of injury had been overcome. See Note, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis*, 58 Wash. L. Rev. 649, 677-78 (1983) ("[T]he court's logic does not support its conclusions. It failed to demonstrate that birth with defects is an injury to the child").

Like California and Washington, the New Jersey Supreme Court in *Procanik*, in denying general damages for failure to diagnose congenital rubella syndrome, recognized that "[t]he crux of the problem is that there is no rational way to measure non-existence or to compare non-existence with the pain and suffering of [the child's] impaired existence." (*Procanik v. Cillo* (1984), 97 N.J.

339, 353, 478 A.2d 755, 763.) The *Procanik* court, however, awarded special damages. It reasoned: "Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction." 97 N.J. 339, 353, 478 A.2d 755, 763.

Although the California, Washington, and New Jersey decisions allowed limited recovery while failing to establish the logical basis for the wrongful life action—the existence of harm or injury to the impaired child—this court is unwilling to discard the requirement of a legally cognizable injury in a negligence medical malpractice case. (See *Purtill v. Hess* (1986), 111 Ill. 2d 229, 241-42; *Walski v. Tiesenga* (1978), 72 Ill. 2d 249, 256; *Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418, 423.) As Justice Robertson cogently observed in his concurring opinion in *Nelson v. Krusen* (Tex. 1984), 678 S.W.2d 918, 930, "[a] court should not *** discard established principles of tort law sub silentio in an attempt to reach a 'right' result. Close examination of the California and Washington opinions reveals such an unexplained gap in the decisional reasoning." We therefore conclude that Adam's claim for relief for the extraordinary medical expenses which he expects to incur during his majority is not actionable because the alleged negligent conduct complained of, even if true, does not give rise to an injury cognizable at law.

In addition to the apparent absence of any legally cognizable injury, public policy considerations preclude this court from allowing an infant such as Adam to recover damages for the extraordinary medical expenses incurred as a result of being born with a congenital or genetic disorder. As noted earlier, the basis of Adam's claim is that the defendants failed to accurately advise

his parents of the risks of his being born with hemophilia, and that their inaccurate report that his mother would give birth to a normal male child induced her to carry to term instead of aborting the fetus, resulting in his birth with a hemophilic condition that will require special treatment throughout his lifetime.

Section 1 of the Illinois Abortion Law of 1975 (Ill. Rev. Stat. 1985, ch. 38, par. 81—21 *et seq.*) evinces Illinois' strong public policy of preserving the sanctity of human life, even in its imperfect state:

> "It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois [does] solemnly declare and find[,] in reaffirmation of the *longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.* Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible *only* because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated." (Emphasis added.) (Ill. Rev. Stat. 1985, ch. 38, par. 81—21.)

To recognize that Adam has a fundamental right not to be born would thus undermine this legislatively expressed policy favoring childbirth over abortion.

A number of courts have relied on "the preciousness and sanctity of human life" in refusing to recognize wrongful life as a legally cognizable cause of action. These courts have reasoned that recognizing a duty to the unborn child to prevent his birth with defects represents a "disavowal" of the sanctity of life. Such a disavowal of life offends society's deeply rooted belief that life, in whatever condition, is more precious than nonexistence. This policy consideration was expressed with some sentimentality by the Supreme Court of Idaho, in *Blake v. Cruz* (1984), 108 Idaho 253, 618 P.2d 315:

> "Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious. The fact that Dessie Blake will live in a severely disabled condition is unquestionably a tragedy; nevertheless, we agree *** that 'life—whether experienced with or without a major physical handicap—is more precious than non-life.' *** Thus, because Dessie Blake has suffered no legally cognizable wrong by being born, she has no cause of action." (108 Idaho 253, 260, 698 P.2d 315, 322.)

Similarly, in *Bruggeman v. Schimke* (Kan. 1986), 718 P.2d 635, 642, the Supreme Court of Kansas explained:

> "We are convinced that an action for wrongful life should not be judicially recognized in Kansas. It has long been a fundamental principle of our law that human life is precious. Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious, and worthy of protection. A legal right not to be born—to be dead, rather than to be alive with deformities—is a theory completely contradictory to our law."

Likewise, in *Elliott v. Brown* (Ala. 1978), 361 So. 2d 546, 548, the Supreme Court of Alabama reasoned:

"Fundamental to the recognition of such a cause of action is the notion that the defendant has violated some legal right of plaintiff's and as a result she has suffered injury. However, a legal right not to be born is alien to the public policy of this State to protect and preserve human life. The right of women in certain cases to have abortions does not alter the policy."

Finally, in *Berman v. Allan* (1979), 80 N.J. 421, 404 A.2d 8, overruled in part in *Procanik v. Cillo* (1984), 97 N.J. 339, 478 A.2d 755, the New Jersey Supreme Court stated:

"No man is perfect. Each of us suffers from some ailments or defects, whether major or minor, which make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than those of others whose defects are less pervasive or less severe.

*** Notwithstanding her affliction with Down's Syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure—emotions which are truly the essence of life and which are far more valuable than the suffering she may endure. To rule otherwise would require us to disavow the basic assumption upon which our society is based. This we cannot do." 80 N.J. 421, 430, 404 A.2d 8, 13.

We find the reasoning of these courts persuasive. Though we sympathize with the unfortunate situation in which Adam finds himself, the public policy of this State to protect and to preserve the sanctity of all human life, as expressed in section 1 of the Illinois Abortion Law of 1975, militates against the judgment that an individual life is so wretched that one would have been better off not to exist. We therefore hold that claims for relief for the wrongful life of congenitally or genetically defective children should not be recognized in this State absent clear legislative guidance.

As evidenced by the numerous literary efforts cited above, wrongful life claims have stimulated considerable debate in the legal community. (See 3 Damages in Tort Actions (Matthew Bender) Bibliography (1986) for an exhaustive list of scholarly commentary.) Although the commentators are split on the appropriateness of wrongful life actions, we are persuaded by the reasoning of those writers who oppose judicial recognition of claims for wrongful life. (See, *e.g.*, Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 4 Wash. U.L.Q. 919, 934-42 (1979); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 Duke L.J. 1401, 1439-45; Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 Marq. L. Rev. 611, 612-21 (1979); Comment, *Wrongful Life: A Misconceived Tort*, 15 U.C. Davis L. Rev. 447, 458-64; Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 U.C.L.A. L. Rev. 473, 492-500 (1981); Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 Cal. L. Rev. 1278, 1286-96 (1983); Note, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis*, 58 Wash. L. Rev. 649, 659-76 (1983); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 Yale L.J. 1488, 1500-02 (1978). For commentary arguing that courts should uphold wrongful life claims, see generally Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 Duq. L. Rev. 857 (1980); Wagner, *Wrongful Life: Is Denial of This Cause of Action Consistent With Current Tort Law?*, 1983 Med. Trial Tech. Q. 137; Note, *Wrongful Life—A Tort Whose Time Has Come*, 2 Am. J. Trial Advoc. 107 (1978); Note, *Wrongful Life: A Modern Claim Which Conforms to the*

Traditional Tort Framework, 20 Wm. & Mary L. Rev. 125 (1978).) Accordingly, the lower courts erred in denying the defendants' motion to dismiss Adam's claim for relief for the extraordinary expenses he will incur in managing and treating his hemophilic condition after he reaches majority.

Part II. Parents' Claim for "Wrongful Birth"

We next consider the claim for relief on behalf of Thomas and Janice Siemieniec. As in the case of their child, the Siemieniecs do not assert that the defendants either caused Adam's inherited genetic disorder or increased the risk that Adam, if born, would be afflicted with hemophilia. Rather, they allege that they were tortiously injured because Mrs. Siemieniec was deprived of the option of making an informed and meaningful decision either to abort the already existing and defective fetus, a decision which, at least during the first trimester of pregnancy, is not subject to State interference, or to give birth to a potentially genetically defective child. In essence, they claim that Adam's birth was wrongful. In *Cockrum v. Baumgartner* (1983), 95 Ill. 2d 193, this court held that the costs of rearing a normal, healthy child cannot be recovered as damages to the parents in wrongful pregnancy actions. Therefore, in this case only two items of damages are requested by the Siemieniecs to redress their allegedly tortious injury: (1) the extraordinary medical and related expenses that will be incurred in order to properly manage and treat Adam's hemophilic condition during his minority; and (2) compensation for the emotional anguish and suffering that has been and will continue to be experienced on account of Adam's hereditary affliction.

The defendants, in response, assert three reasons why this court should not recognize the tort of wrongful birth. First, contrary to the Siemieniecs' contention, nei-

ther wrongful birth nor wrongful life claims can be analyzed in terms of the traditional tort framework. In a negligence medical malpractice case, the burden is on the plaintiff to prove the following elements of a cause of action: the proper standard of care against which the defendant physician's conduct is measured; an unskilled or negligent failure to comply with the applicable standard; and a *resulting injury* proximately caused by the physician's want of skill or care. (*Purtill v. Hess* (1986), 111 Ill. 2d 229, 241-42; *Walski v. Tiesenga* (1978), 72 Ill. 2d 249, 256; *Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418, 423.) A claim for wrongful life by the child for having been born in an impaired condition is predicated upon the assumption that life itself is an injury. The parents' claim for wrongful birth rests upon the injury to the mother by virtue of the physician's or other healthcare provider's negligence, resulting in the mother's being deprived of the right to make an informed choice either to prevent the child's conception or to terminate the child's life by abortion. Thus, the defendants argue, in wrongful life and wrongful birth cases the injury complained of is life itself. In either case, however, in order to support such a claim this court would have to conclude that life, even with severe defects, can be an injury. The defendants find compelling the view of the Supreme Court of North Carolina in a case rejecting the parents' claim for wrongful birth:

> "We again assume *arguendo* that the defendants owed the plaintiffs a duty and that they breached that duty. The issue of whether the breach of duty was the proximate cause of the 'injury' to the plaintiff parents is more problematic, since even the plaintiffs acknowledge that the fetus which was to be Michael Azzolino was in existence and already genetically defective at the time the defendants first came into contact with the plaintiffs. We also assume *arguendo*, however, that the birth of Michael

Azzolino was the proximate result of the defendants' negligence.

Courts which purport to analyze wrongful birth claims in terms of 'traditional' tort analysis are able to proceed to this point but no further before their 'traditional' analysis leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into *entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law. Far from being 'traditional' tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction. We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury." (Emphasis in original.) *Azzolino v. Dingfelder* (1985), 315 N.C. 103, 110-11, 337 S.E.2d 528, 533-34.

As a second argument, the defendants claim that the Siemieniecs' cause of action is premised on the claimed denial of their opportunity to terminate the life of their child while he was an embryo. Therefore, the defendants argue, the only damages the Siemieniecs allege they have suffered arise, if at all, from their alleged failure to prognosticate probable hemophilia in the Siemieniecs' unborn child, which would have led to abortion of the already existing and genetically defective fetus. Public policy reasons, the defendants assert, prevent this court from allowing tort damages for the denial of the opportunity to take an embryonic life. No case cited by the Siemieniecs involves a public policy statement such as the strong condemnation of abortion and support of the right to life as expressed in section 1 of the Illinois Abortion Law of 1975 (Ill. Rev. Stat. 1985, ch. 38, par. 81—21), quoted earlier in this opinion. Although the right of a woman to seek an abortion free from State interference is constitutionally protected during the first trimester of her pregnancy (*Thornburgh v. American*

College of Obstetricians & Gynecologists (1986), 476 U.S. 747, 759, 90 L. Ed. 2d 779, 793, 106 S. Ct. 2169, 2178; *Roe v. Wade* (1973), 410 U.S. 113, 164-65, 35 L. Ed. 2d 147, 183-84, 93 S. Ct. 705, 732-33), the defendants maintain that to ignore a public policy which deems precious even potential life while yet in the womb would be a flagrant misuse of this court's role as a tribunal designed to implement societal values and not to create them.

Finally, the defendants find support for their position in this court's earlier decision of *Cockrum v. Baumgartner* (1983), 95 Ill. 2d 193. While that case involved the extent of damages that may be recovered in a negligence action based on a "wrongful pregnancy," the defendants assert that *Cockrum* is noteworthy for its extensive public policy analysis. In holding that the costs of rearing a normal, healthy child cannot be recovered as damages to the parents, this court reasoned:

> "One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values the benefit of life should *not* be outweighed by the expense of supporting it. *Respect for life and the righps proceeding from it are at the heart of our legal system and, broader still, our civilization.*" (Emphasis added.) (95 Ill. 2d 193, 200-01.)

Allowing tort damages here for the deprivation of the opportunity to accept or to reject the consequence of a pregnancy, the defendants claim, would be inconsistent with this court's pro-life position in *Cockrum* and with the strong public policy statement in our abortion law.

The courts which have considered wrongful birth claims have been almost unanimous in their recognition of a cause of action against a physician or other health-care provider where it is alleged that but for the defendants' negligence the parents would have terminated the congenitally or genetically defective fetus by abortion.

See, *e.g., Robak v. United States* (7th Cir. 1981), 658 F.2d 471 (applying Alabama law); *Phillips v. United States* (D.S.C. 1981), 544 F. Supp. 508 (applying South Carolina law); *Gildiner v. Thomas Jefferson University Hospital* (E.D. Pa. 1978), 451 F. Supp. 692 (applying Pennsylvania law); *Moores v. Lucas* (Fla. App. 1981), 405 So. 2d 1022; *Blake v. Cruz* (1984), 108 Idaho 253, 698 P.2d 315; *Eisbrenner v. Stanley* (1981), 106 Mich. App. 357, 308 N.W.2d 209; *Smith v. Cote* (1986), 128 N.H. 231, 513 A.2d 341; *Schroeder v. Perkel* (1981), 87 N.J. 52, 432 A.2d 834; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 386 N.E.2d 807; *Speck v. Finegold* (1981), 497 Pa. 76, 439 A.2d 110; *Jacobs v. Theimer* (Tex. 1975), 519 S.W.2d 846; *Naccash v. Burger* (Va. 1982), 290 S.E.2d 825; *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 656 P.2d 483; *James G. v. Caserta* (W. Va. 1985), 332 S.E.2d 872; *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 233 N.W.2d 372. But see *Azzolino v. Dingfelder* (1985), 315 N.C. 103, 337 S.E.2d 528.

Judicial acceptance of wrongful birth as a legally cognizable cause of action is premised on a number of recurrent rationales. Many courts have accepted wrongful birth as a cause of action on the theory that it is a logical and necessary extension of existing principles of tort law. (*E.g., Eisbrenner v. Stanley* (1981), 106 Mich. App. 357, 366-67, 308 N.W.2d 209, 213; *Schroeder v. Perkel* (1981), 87 N.J. 53, 62, 432 A.2d 834, 838; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 412-13, 386 N.E.2d 807, 813; *Naccash v. Burger* (Va. 1982), 290 S.E.2d 825, 829; *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 466-67, 656 P.2d 483, 488; *James G. v. Caserta* (W. Va. 1985), 332 S.E.2d 872, 882.) Some courts have recognized the cause of action because of the expanding ability of medical technology to accurately detect and predict genetic or other congenital abnormalities before conception or birth. Imposing liability on individual phy-

sicians or other health-care providers, these courts say, vindicates the societal interest in reducing and preventing the incidence of such defects. (*E.g., Blake v. Cruz* (1984), 108 Idaho 253, 256, 698 P.2d 315, 318.) Other courts have expressed concern that refusing to recognize this cause of action would frustrate the fundamental policies of tort law: to compensate the victim; to deter negligence; and to encourage due care. (*E.g., Robak v. United States* (7th Cir. 1981), 658 F.2d 471, 476 (applying Alabama law); *Phillips v. United States* (D.S.C. 1981), 508 F. Supp. 544, 550 (applying South Carolina law); *Gildiner v. Thomas Jefferson University Hospital* (E.D. Pa. 1978), 451 F. Supp. 692, 696 (applying Pennsylvania law); *Smith v. Cote* (1986), 128 N.H. 231, 243, 513 A.2d 341, 348.) A few courts have also stated that refusal to recognize wrongful birth claims would impermissibly burden the constitutional rights involved in conception, procreation, and other familial decisions. *E.g., Speck v. Finegold* (1981), 497 Pa. 77, 84-85, 439 A.2d 110, 114; *Jacobs v. Theimer* (Tex. 1975), 519 S.W.2d 846, 848.

Although the arguments of the defendants set out above are compelling, the great weight of authority to the contrary forces us to agree with the majority of the courts and the legal commentators and to hold that an action for the wrongful birth of a genetically or congenitally defective child may be maintained by the parents of such child.

We must next decide what elements of damages may be recovered by the parents. While the jurisdictions that have reached the merits of the wrongful birth controversy are almost unanimous in their recognition of the cause of action, they are not in agreement on how to assess damages. The complex legal, moral, philosophical, and social issues raised by wrongful birth claims have resulted in a widely divergent judicial treatment of dam-

ages. See Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time For a New Framework*, 22 J. Fam. L. 677, 690-700 (1983-84); Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. Rev. 713, 739-52 (1982); Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 Fam. L.Q. 15, 33-37 (1980); see generally Note, *Damages: Recovery of Damages in Actions for Wrongful Birth, Wrongful Life and Wrongful Conception*, 23 Washburn L.J. 309 (1984).

The general rule of damages in a tort action is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or should not have been foreseen by him, provided the particular damages are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as might reasonably have been anticipated. Remote, contingent, or speculative damages do not fall within this general rule. (See D. Dobbs, Remedies sec. 3.1 (1973); C. McCormick, Damages sec. 137 (1935).) However, "few if any jurisdictions appear ready to apply this traditional rule of damages with full vigor in wrongful birth cases." *Azzolino v. Dingfelder* (1985), 315 N.C. 103, 112, 337 S.E.2d 528, 534.

Most courts which have recognized a cause of action in the parents for wrongful birth have found a breach of duty by the physician in depriving the parents of the opportunity to accept or to reject the continuance of the pregnancy. The damages that are generally allowed are those which the courts found flow from this breach of duty, that is, only the extraordinary expenses that are attendant to the care and treatment of the afflicted child, and do not include the expenses associated with the raising of a normal, healthy child. (See, *e.g., Moores*

v. Lucas (Fla. App. 1981), 405 So. 2d 1022; *Schroeder v. Perkel* (1981), 87 N.J. 52, 432 A.2d 834; *Becker v. Schwartz* (1978), 46 N.Y.2d 401, 386 N.E.2d 807; *Jacobs v. Theimer* (Tex. 1975), 519 S.W.2d 846; *Naccash v. Burger* (Va. 1982), 290 S.E.2d 825; *Dumer v. St. Michael's Hospital* (1975), 69 Wis. 2d 766, 233 N.W.2d 372.) Some courts have also permitted parents to recover in their wrongful birth action the extraordinary costs incurred as a result of the child's affliction *after* the child has reached the age of majority. These courts reason that, under the common law, where a child is incapable of supporting himself because of physical or emotional disabilities, the parents' obligation to support continues beyond the child's age of majority. See *Phillips v. United States* (D.S.C. 1983), 575 F. Supp. 1309, 1317 (applying South Carolina law); *Blake v. Cruz* (1984), 108 Idaho 253, 258-59, 698 P.2d 315, 320-21; *Smith v. Cote* (1986), 128 N.H. 231, 245, 513 A.2d 341, 350; *James G. v. Caserta* (W. Va. 1985), 332 S.E.2d 872, 882-83.

Although the question of damages has presented a difficult and troublesome problem to those courts which have considered wrongful birth claims, we align ourselves with the majority of jurisdictions which have limited the parents' recovery of damages to the extraordinary expenses—medical, hospital, institutional, educational and otherwise—which are necessary to properly manage and treat the congenital or genetic disorder. We emphasize that the plaintiffs here seek to recover only those extraordinary expenses that will be incurred *prior* to the child's reaching his majority.

Part III. Parents' Claim for Emotional Distress

In addition to seeking compensation for the extraordinary expenses they will sustain in managing and treating Adam's hemophilia, the Siemieniecs ask for damages for their emotional distress, which they claim are a natu-

ral and foreseeable consequence of the injury they sustained, and hence should be included as an essential element in the calculation of damages.

This court has recently reexamined its position with regard to recovery for emotional distress. (See *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546.) In that case, this court abandoned its previous adherence to the so-called "impact" rule and adopted what is referred to as the zone-of-danger rule. As stated in *Rickey*, this rule holds:

> "Basically, under [the zone-of-danger rule] a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence. (*Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 555.)

Thus, under the holding of *Rickey*, before a plaintiff can recover for negligently caused emotional distress, he must have, himself, been endangered by the negligence, and he must have suffered physical injury or illness as a result of the emotional distress caused by the defendant's negligence.

There are no allegations in the complaint from which it can be said that the defendants' alleged negligence in any way endangered the parents of the impaired child. It is also not alleged that the parents have or will suffer any physical injury or illness resulting from the emotional distress allegedly caused by defendants' negligence. The appellate court in this case applied the

Rickey test and held that absent allegations and proof of an intentional and outrageous conduct (see *Knierim v. Izzo* (1961), 22 Ill. 2d 73), or that the parents were at high risk to themselves which resulted in their physical injury or illness by reason of emotional distress caused by defendants' negligence, they have no cause of action for emotional distress damages. (134 Ill. App. 3d 823, 831.) The Siemieniecs acknowledge the limitation of the *Rickey* holding, but urge us to expand that holding to allow recovery here as a step in the continuing "development of emotional distress tort law in Illinois." In *Rickey*, this court thoroughly analyzed the law in relation to negligently inflicted emotional distress. After doing so, this court changed its previous adherence to the impact rule and adopted what it perceived as the standard applied in a majority of the jurisdictions where the question has been examined. (*Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 555.) *Rickey* thus brought the law of this State on the issue in question into conformity with the majority position. The Siemieniecs, however, provided us with no reason to further expand the right to recover for negligently inflicted emotional distress.

For the foregoing reasons, the judgment of the appellate court holding that Adam Siemieniec has a cause of action on his own behalf for the extraordinary expenses he will incur in managing and treating his hemophilic condition after he reaches majority is reversed, and upon remand to the circuit court of Cook County, the court is instructed to dismiss this claim for relief. The appellate court's judgment holding that Thomas and Janice Siemieniec have a cause of action for the extraordinary expenses they will incur in managing and treating Adam's hemophilic condition during his minority is affirmed. The appellate court's judgment holding that Thomas and Janice Siemieniec have no cause of action for the emo-

tional distress negligently inflicted by the defendants is affirmed. The cause is remanded to the circuit court of Cook County for further proceedings consistent with the holdings of this opinion.

Appellate court affirmed in part and reversed in part; cause remanded, with directions.

CHIEF JUSTICE CLARK took no part in the consideration or decision of this case.

JUSTICE GOLDENHERSH joins in Parts I and II and took no part in Part III of the decision.

JUSTICE WARD concurs as to Parts I and III and dissents as to Part II of the decision:

Adam, who is now six years old, was born a hemophiliac. As the majority states, the complaint of his parents is that because of the defendants' negligence in not correctly judging the chances of his being afflicted with hemophilia, Adam was born to them and not aborted, to his personal injury and to their financial and emotional injury. The majority follows the decisions in the majority of jurisdictions, including our own, and holds that Adam cannot recover on a wrongful life claim. The rationale in denying, as the majority recognizes, is that the core of the infant's claim is that, though the negligence of the defendants prevented the mother from obtaining an abortion which would have terminated the child's existence, human life, though burdened with injury, is as a matter of law always preferable to nonexistence. A second basis for rejecting the claim for wrongful life is the difficulty or impossibility of determining damages. There is no station from which one can compare the condition of life with handicaps, with a state of nonexistence. Who can judge that no life at all is better than a life that is impaired.

Having rejected the claim of Adam for "wrongful life," the majority then proceeds inconsistently, I consider, and expediently to hold that the parents have a cause of action for "wrongful birth." The majority accepts the allegation of Mrs. Siemieniec that had she been accurately advised of the risk that her conceived child would be born a hemophiliac, she then would have terminated the pregnancy by abortion. The parents contend that they were tortiously injured because Mrs. Siemieniec was deprived of the option of making an informed decision either to abort the existing fetus or to give birth to what was potentially a genetically defective child. The majority states that "in essence, they [the parents] claim that Adam's birth was wrongful"—that it would have been better for them had Adam never been born. In terms of seeking recovery in tort, Adam's being born was the resulting injury. I agree with the defendants' contention that the claim for a cause of action for wrongful birth is postulated on the assumption that life itself is an injury. The Supreme Court of North Carolina, in rejecting a claim of parents for wrongful birth, correctly observed that in order to allow recovery for wrongful birth a court must hold "that the existence of a human life can constitute an injury cognizable at law." *Azzolino v. Dingfelder* (1985), 315 N.C. 103, 337 S.E.2d 528, 533-34.

In the parents' claim of a cause of action, as in Adam's claim, we are weighing life against nonlife. The parents, too, say in effect that nonlife would have been a value and that life is an injury. I see only expediency to explain the holding for the parents.

In *Cockrum v. Baumgartner* (1983), 95 Ill. 2d 193, this court considered claims of medical negligence based on "wrongful pregnancy" and held that the costs of rearing a normal child cannot be considered damages to the parents. I wrote for the court in that case and be-

lieve that the defendants may correctly cite it for the principle that holding that the birth of a child is a compensable injury offends fundamental values our civilization and culture attach to human life. What this court said in *Cockrum* earlier applies to today's holding of the majority that Adam's being born gave rise to a right of the parents to recover damages:

> "One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization." 95 Ill. 2d 193, 200-01.

One cannot pass over how painful to parents and child alike an action by parents must be. Parents will show that they did not want the child in his condition and that he would have been aborted had it not been for the professional inattentiveness of a physician or other medical person. Had they known, he never would have been. It is public policy obviously to encourage love and harmony in family relationships. Public policy which in importance transcends individual disputes will hardly be served by lawsuits of this character.

Circumstances in cases like these are tragic, but for the reasons given I must respectfully dissent from the majority's holding in Part II that the parents can recover for wrongful birth. I concur, however, in the disposition by the majority in Parts I and III.

JUSTICE MILLER specially concurs as to Parts I and II and joins in Part III of the decision:

I concur in the decision of the court. As the main opinion demonstrates, the minor's "wrongful life" action seeking special damages must fail because he cannot es-

tablish a legally cognizable injury. I agree with the decision that the minor's parents here suffered a legally cognizable injury and therefore should be allowed to pursue their "wrongful birth" action to recover the extraordinary expenses associated with their child's ailment, but that the parents' separate claim for damages for the negligent infliction of emotional distress is insufficient under *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546.

Because the parties' contentions in this appeal are adequately answered under those principles of tort law, I do not believe that it is necessary, or even helpful, to introduce the abortion controversy into the proceedings here. I therefore see no reason to rely on the Illinois Abortion Law of 1975 (Ill. Rev. Stat. 1985, ch. 38, pars. 81—21 through 81—35) or to attempt to discover a "pro-life" character to any of the prior decisions of this court in deciding the issues here.

For these reasons, I do not join in that portion of the opinion that looks to the Abortion Law as a source of public policy in this case, nor do I join in attempting to categorize any of the prior decisions of this court as "pro-life" or "pro-choice." An analysis of the opinion demonstrates that neither inquiry is necessary to a resolution of the issues presented here.

JUSTICE SIMON specially concurs as to Part II and dissents as to Parts I and III of the decision:

I agree with the conclusion reached in Part II of the majority opinion that the parents may maintain an action for wrongful birth. I do not subscribe, however, to the majority's baffling statements characterizing the defendants' arguments opposing recognition of the wrongful birth tort as "compelling" and saying that the only reason for the decision is that "the great weight of authority to the contrary forces us to agree with the ma-

jority of courts and the legal commentators" (117 Ill. 2d at 258). Obviously, the decisions of courts of other jurisdictions may persuade but cannot coerce us, and this court would abdicate its solemn duty if we merely deferred to the wisdom of other judges. As I see it, there is no basis for the quandary the majority perceives itself to be in—confronted by what it regards as compelling arguments on one side and the great weight of authority on the other. The wrongful birth action involves classic malpractice: the doctor's negligence deprives the parents of their ability to make an informed choice that they have a legal right to make, and, as a result, the parents sustain actual damages. This is the foundation for the decisions of other courts, and there is no reason why the majority should accept it so grudgingly, thereby conveying the impression that it would have preferred to reach the opposite result.

While I concur in the result reached in Part II, I believe that Parts I and III of the majority opinion are wholly in error. In Part I, the majority extends its holding in *Goldberg v. Ruskin* (1986), 113 Ill. 2d 482, to bar special damages as well as general damages for wrongful life. Although *Goldberg* strictly confined itself to the question of general damages, this extension was predictable because the court reasoned there that a child suffers no legally cognizable injury by being born. I continue to disagree for the reasons so eloquently and soundly stated by Chief Justice Clark in his dissenting opinion in *Goldberg*, by Justice Rizzi in his dissenting opinion in the appellate court in the same case (*Goldberg v. Ruskin* (1984), 128 Ill. App. 3d 1029, 1044 (Rizzi, P.J., dissenting)) and by Justice Hartman in his opinion for the appellate court in this case.

The court is not, however, content to rely on *Goldberg*, but instead insists on injecting as well a purported public policy contained in section 1 of the Illinois Abor-

tion Law of 1975 (Ill. Rev. Stat. 1985, ch. 38, par. 81—21). That statute does not, in my opinion, reflect any valid, subsisting policy of the State of Illinois. The act itself recognizes that the prohibition of abortion except when necessary to preserve the life of the mother is at best the "former policy" of the State (Ill. Rev. Stat. 1985, ch. 38, par. 81—21) and that the United States Constitution, as interpreted by the Supreme Court in *Roe v. Wade* (1973), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, has displaced this policy. The legislature's attempt to proclaim a once and (perhaps) future policy which is not and cannot be the current public policy is an exercise in futility. To my mind the legislature has no authority to enact statements of reversionary policy, which, of course, would not bind future legislatures.

The majority's emphasis on a sentence in the statute announcing that the unborn child is, from the time of conception, a "human being *** [and] therefore, a legal person for purposes of the *** right to life" is also misplaced. In *Akron v. Akron Center for Reproductive Health* (1983), 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481, a city ordinance required physicians to obtain the "informed consent" of all women seeking abortions by telling them, *inter alia*, that "the unborn child is a human life from the moment of conception." The Supreme Court struck down the requirement because it was "inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions." (462 U.S. 416, 444, 76 L. Ed. 2d 687, 712, 103 S. Ct. 2481, 2500.) The Illinois Abortion Law suffers the same defect. The majority apparently believes that the declaration that the unborn child is a legal person can be wrenched from its context and properly used as a reason to reject the tort of wrongful life, but this ignores the explicit language of the provision which states that the fetus is a legal per-

son "for purposes of the *** right to life." Since the pronouncement is ineffectual with respect to the subject explicitly addressed—abortion—I do not see how it can have greater impact on the independent question of the tort of wrongful life. Contrary to the majority opinion, the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), precludes any all-encompassing State policy "favoring childbirth over abortion" (117 Ill. 2d at 249), and thus the court cannot properly justify its decision by reference to the Illinois Abortion Law.

Reliance on the Illinois Abortion Law to deny a cause of action for wrongful life is disingenuous since the argument has equal force with respect to the parents' claim for wrongful birth, which the majority sustains. The majority offers no distinction, simply failing to explain why the Illinois Abortion Law is relevant to bar a suit for wrongful life but not wrongful birth. The gravamen of the injury under the majority's wrongful birth theory is that the defendants negligently deprived the parents of the opportunity to choose abortion. But if our public policy is truly "pro-life," why should we allow a cause of action for this brand of medical practice? Under the majority's reading of our public policy, we should instead pat the defendant doctors on the back for their work in frustrating a choice of abortion. The fact is that no such public policy exists, and the Illinois Abortion Law has no more persuasive effect on the question of wrongful life than it does on wrongful birth.

Part III of the majority opinion refuses any recovery for the parents' emotional distress based on the zone-of-danger rule articulated in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546. The *Rickey* rule, formulated in the context of bystander cases, should not govern in situations like this one in which the parents are not bystanders either by chance or because of relationship, but the actual victims of the defendants' negli-

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gence. The majority has in fact held that the parents are the *only* victims here. The majority says that the plaintiffs have afforded no reason to broaden *Rickey* to cases in which those suffering emotional distress are not threatened with physical impact. But neither has the majority advanced any suggestion as to why the general tort rule—that injuries proximately caused by the negligent conduct of one who has a duty to the victim are compensable—should not apply here. The old "impact" rule and the more recent "zone-of-danger" rule are theories that have developed to keep the door from opening wide in instances where recovery is sought for injuries which are emotional and not physical.

In *Rickey* this court noted that opponents of recovery for emotional distress justify guarding the door by pointing to the possibility of fraudulent or frivolous litigation, the difficulty of measuring damages, and the supposition that emotional injuries are not foreseeable. (98 Ill. 2d 546, 555.) Whatever force these considerations may have in the typical hit-and-run or accidental injury case, they are irrelevant here. There can be little danger of fraudulent or frivolous claims that a physician failed to adequately investigate or advise parents of the risk that their child would be born with a serious congenital illness. And I think it is patently foreseeable that birth of a child so afflicted, after the parents based the decision not to abort on the doctor's inaccurate assurance that the risk was very low, could result in emotional trauma to the parents. The measurement of damages for this type of emotional distress is no more difficult than in cases where the emotional distress has been intentionally inflicted or negligently inflicted on a person within the zone of physical danger. In both of the latter situations, the law of this State permits recovery. (*Knierim v. Izzo* (1961), 22 Ill. 2d 73; *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546.) "[C]ourts have come to recog-

nize that mental and emotional distress is just as 'real' as physical pain, and that its valuation is no more difficult" (*Berman v. Allen* (1979), 80 N.J. 421, 433, 404 A.2d 8, 15) and have therefore permitted parents to recover for emotional distress caused by wrongful birth (80 N.J. 421, 404 A.2d 8; *Naccash v. Burger* (1982), 223 Va. 406, 290 S.E.2d 825; *Harbeson v. Parke-Davis, Inc.* (1983), 98 Wash. 2d 460, 656 P.2d 483). The focus should be on injuries directly flowing from the defendants' negligence, and I see no reason to apply the artificial *Rickey* limitation in these circumstances instead of allowing the plaintiffs to prove emotional distress.

[redacted]

(No. 59058.—[redacted]

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. PAUL S. ERICKSON, Appellant.

Opinion filed April 2, 1987.—Modified on denial of rehearing October 5, 1987.

[redacted]

Thornton v. Garcini, 237 Ill. 2d 100 (2009)

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

Ill. Supreme Court · filed 2009-10-29 · Reporter 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. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C006.2
- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C006.2
- memo p. 9 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C006.4

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prescribed periods of mandatory supervised release, or the possibility of probation. To the extent that *Martinez* is inconsistent with our holding today, it is overruled.

CONCLUSION

We find that defendant had no legitimate expectation of privacy in Thomas's vehicle, and the police officers' actions did not escalate the stop of defendant into a warrantless arrest. Thus, the trial court properly denied defendant's motions to quash arrest and suppress evidence. With respect to defendant's one-act, one-crime argument, we hold that aggravated unlawful use of a weapon is a more serious offense than unlawful possession of a weapon by a felon, and defendant's conviction for unlawful possession of a weapon by a felon must therefore be vacated.

For the reasons stated, we affirm the judgment of the appellate court.

Affirmed.

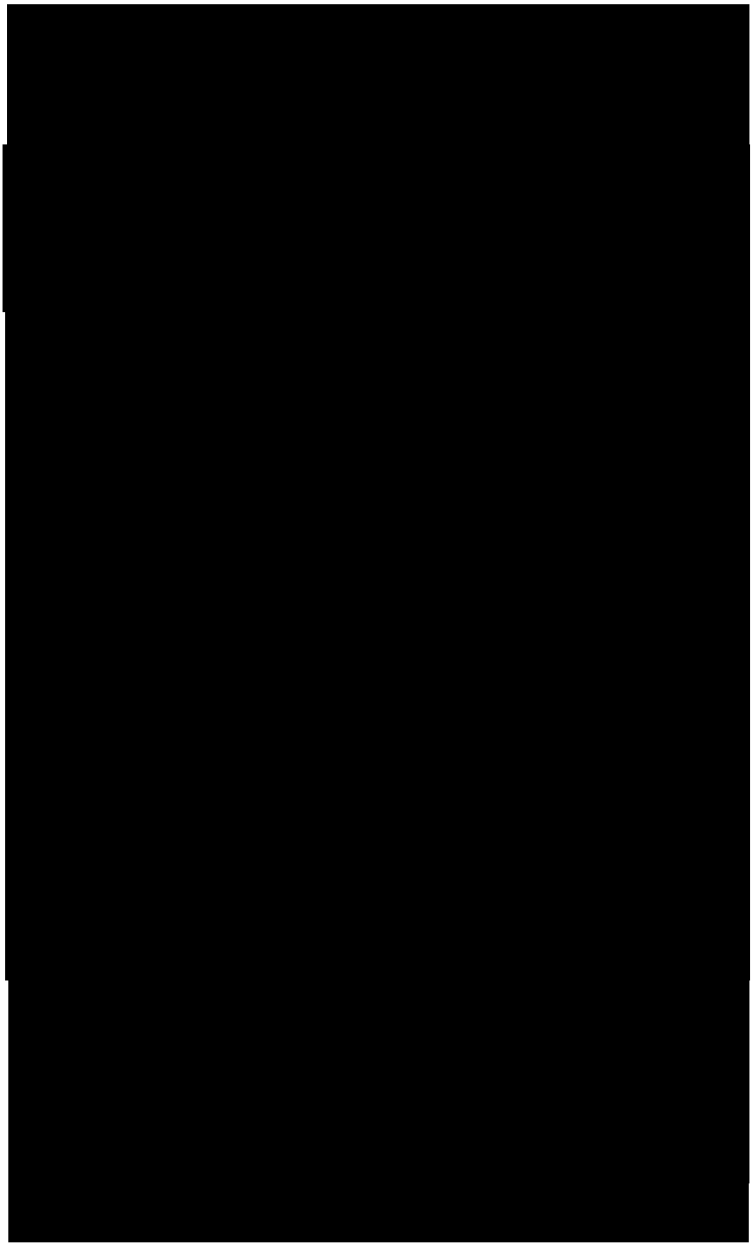
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(No. 107028.—[redacted]

TONI THORNTON, Indiv. and as Special Adm'r of the Estate of Jason Anthony Ebner, Deceased, Appellee, v. FRANCISCO J. GARCINI, M.D., Appellant.

Opinion filed October 29, 2009.—Modified upon denial of rehearing April 22, 2010.

[redacted]



[redacted]

[redacted]

Robert R. Gorbold and Pamela Davis Gorcowski, of Kavanagh Grumley & Gorbold LLC, of Joliet, for appellant.

E. Kent Ayers, Kent F. Slater and John M. Spesia, of Spesia, Ayers & Ardaugh, of Joliet, for appellee.

Leslie J. Rosen, of Chicago, for *amicus curiae* Illinois Trial Lawyers' Association.

JUSTICE KILBRIDE delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justices Freeman, Thomas, Garman, Karmeier, and Burke concurred in the judgment and opinion.

OPINION

The primary issue we address in this appeal is whether expert testimony is required to prove negligent infliction of emotional distress. Defendant, Dr. Francisco Garcini, appeals from the second trial of a medical negligence claim. In that action, plaintiff, Toni Thornton, individually and as special administrator of the estate of her deceased infant son, sought damages for her son's death and compensation for negligent infliction of emotional distress. At the first trial, the jury found in

favor of defendant. Plaintiff appealed, and the appellate court granted plaintiff a new trial. *Thornton v. Garcini*, 364 Ill. App. 3d 612 (2006).

On retrial, the jury found in favor of defendant on plaintiff's wrongful-death and survival claims, but in favor of plaintiff on her negligent infliction of emotional distress claim. The appellate court affirmed. 382 Ill. App. 3d. 813.

We allowed defendant's petition for leave to appeal. 210 Ill. 2d R. 315. We now affirm the judgment of the appellate court.

I. BACKGROUND

On August 28, 2000, plaintiff's son, Jason Anthony, was born prematurely in a breech position, at an approximate gestational age of 24 weeks. During childbirth, Jason's head became stuck in his mother's vagina, with the rest of his body outside the vagina. The infant died when the nurses at the hospital were unable to complete the delivery. Defendant arrived at the hospital an hour and 10 minutes later.

Plaintiff, as administrator of Jason's estate, brought an action for medical negligence against defendant, Silver Cross Hospital, and individual nurses. Plaintiff's suit contained wrongful-death and survival claims. Her suit also included an individual claim for intentional infliction of emotional distress, claiming she suffered emotional distress from the delivery.

At the first trial, the jury found in favor of defendant and the nurses on the wrongful-death and survival claims and the intentional infliction of emotional distress claim. On the intentional infliction of emotional distress claim against the hospital, the jury found for plaintiff and awarded her $175,000. Plaintiff filed posttrial motions against all the defendants. During the pendency of these motions, the hospital and nurses entered into a release of claims and satisfaction of judgment upon payment of

$175,000. The trial court later denied the posttrial motion against defendant.

Plaintiff appealed only the judgment in favor of defendant. The appellate court reversed and granted plaintiff a new trial. *Thornton*, 364 Ill. App. 3d 612.

At the second trial, defendant testified he was plaintiff's obstetrician. At 6:35 a.m. on the day of delivery, defendant was called at his home and advised that plaintiff was having contractions. He gave certain orders. The infant partially delivered in a breech position 35 minutes later, at 7:10 a.m. Nurses were present for the delivery, but no physician was present. The infant became entrapped at the neck during the delivery. Defendant instructed the nurses not to deliver the infant unless it could be done easily, because of a risk of decapitation. The nurses were unable to deliver the infant, and he died before defendant left his home. Plaintiff waited over an hour, with the deceased infant partially delivered, until defendant arrived to complete the delivery.

Plaintiff testified about her emotional state from laying in a hospital bed for over an hour with the infant partially delivered. Plaintiff stated she was depressed, and could not eat, or sleep. She could only think about laying there for an hour and 10 minutes, and there was nothing she could do but "sit there like that with my baby." She further testified that she has these thoughts "[a]ll the time" and she has had thoughts of suicide because "[i]t was so horrible" and "I'm always reminded of that hour and ten minutes that I sat there with him."

The infant's father and plaintiff's mother testified to the effect the infant's death and the circumstances of the delivery had on plaintiff. No expert witness testimony was presented on plaintiff's claim for emotional distress.

Plaintiff amended her complaint to conform to the proofs and submitted a negligent infliction of emotional distress claim to the jury. She only submitted her

negligent infliction of emotional distress claim to the jury. Plaintiff did not submit her intentional infliction of emotional distress claim to the jury.

The jury found in favor of defendant on the wrongful-death and survival claims and for plaintiff on the negligent infliction of emotional distress claim. The jury award plaintiff $700,000 in damages.

Defendant filed a posttrial motion seeking a judgment notwithstanding the verdict, arguing that plaintiff failed to prove negligent infliction of emotional distress with expert testimony. Defendant's motion also sought a judgment notwithstanding the verdict based on the single recovery rule, and a setoff of the settlement paid by the hospital. The trial court denied defendant's posttrial motion. The appellate court affirmed. 382 Ill. App. 3d 813.

II. ANALYSIS

A. Judgment Notwithstanding the Verdict

Defendant contends he is entitled to a judgment notwithstanding the verdict based on plaintiff's failure to produce expert testimony on the cause of her emotional distress. Specifically, defendant argues that plaintiff failed to adduce expert testimony to establish that her emotional distress was caused by the delay in delivering the deceased infant.

Plaintiff argues that defendant forfeited or waived his right to object to the verdict for negligent infliction of emotional distress by failing to object to the jury instructions and to the competence of the lay witnesses who testified about emotional distress.

We disagree with plaintiff that defendant has forfeited this issue. A defendant must object to an error at trial and include it in a written posttrial motion to preserve an issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The record indicates defendant repeatedly maintained in the trial court that plaintiff failed to

present competent proof of causation for her emotional distress claim, absent expert testimony. Defendant moved for a directed verdict both at the close of plaintiff's case and at the close of all the evidence. In his trial arguments, defendant raised the issue of whether plaintiff presented sufficient evidence as a matter of law to submit the emotional distress issue to the jury. Accordingly, we determine defendant did not forfeit or waive this issue.

We review *de novo* a trial court's ruling on a motion for judgment notwithstanding the verdict. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999). Additionally, whether expert testimony is required to establish negligent infliction of emotional distress is an issue of law, subject to *de novo* review. See *Woods v. Cole*, 181 Ill. 2d 512, 516 (1998). A motion for judgment notwithstanding the verdict should only be granted when the evidence and inferences, viewed in the light most favorable to the nonmoving party, "so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992).

Defendant argues that under this court's decision in *Corgan v. Muehling*, 143 Ill. 2d 296 (1991), claims for negligent infliction of emotional distress must be proven by expert testimony to ensure that any verdict for emotional distress is supported by competent evidence. Conversely, plaintiff contends that *Corgan* does not require expert testimony to establish emotional distress.

In *Corgan*, the plaintiff brought an action for psychological malpractice alleging the defendant therapist violated his duties when he engaged in sexual relations with her under the guise of therapy. This court examined the issue of whether a plaintiff must allege physical symptoms to support a claim for emotional distress. In rejecting such a requirement, we stated:

> "[L]ack of precision is not a justifiable reason to preclude recovery, as expert witnesses such as psychiatrists,

> psychologists and social workers are fully capable of providing the jury with an analysis of a plaintiff's emotional injuries. ***
>
> ***
>
> *** [T]his court has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress. Furthermore, the women and men of the mental health care field have made significant improvements in the diagnosis, description and treatment of emotional distress." *Corgan*, 143 Ill. 2d at 311-12.

In reaching our conclusion that a plaintiff need not allege physical symptoms of emotional distress, this court quoted *Knierim v. Izzo*, 22 Ill. 2d 73 (1961):

> " 'The stronger emotions when sufficiently aroused do produce symptoms that are visible to the professional eye and we can expect much more help from the men of science in the future. [Citation.] In addition, jurors from their own experience will be able to determine whether *** conduct results in severe emotional disturbance.' " *Corgan*, 143 Ill. 2d at 311-12, quoting *Knierim*, 22 Ill. 2d at 85.

We agree with plaintiff that *Corgan* does not require expert testimony to establish emotional distress. The absence of medical testimony does not preclude recovery for emotional distress. Rather, "[t]he existence or nonexistence of medical testimony goes to the weight of the evidence but does not prevent this issue from being submitted to the jury." *Clark v. Owens-Brockway Glass Container, Inc.*, 297 Ill. App. 3d 694, 701 (1998).

Defendant argues that *Hiscott v. Peters*, 324 Ill. App. 3d 114 (2001), supports his argument that a plaintiff cannot prove a negligent infliction of emotional distress claim without expert testimony. In *Hiscott*, the plaintiffs sought to recover for negligent infliction of emotional distress allegedly resulting from an automobile accident but did not present medical proof of emotional distress. *Hiscott* held that the plaintiffs failed to support their claim of emotional distress with expert medical proof. *Hiscott*, 324 Ill. App. 3d at 126. *Hiscott* concluded that

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this court's statement in *Corgan* "that it 'has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress' (*Corgan*, 143 Ill. 2d at 312)" does not mean "that all plaintiffs involved in personal injury actions may seek damages for negligently inflicted emotional distress without medically verifiable proof." *Hiscott*, 324 Ill. App. 3d at 126. The appellate court concluded that the plaintiffs' testimony "more appropriately [fell] under the definition of 'loss of a normal life' " than emotional distress. *Hiscott*, 324 Ill. App. 3d at 127. We determine that the court in *Hiscott* misread the holding in *Corgan*. Accordingly, we overrule the portions of *Hiscott* limiting *Corgan* to its facts and requiring all claims for severe emotional distress to be supported by expert medical proof. See *Hiscott*, 324 Ill. App. 3d at 126. We hold that expert testimony, while it may assist the jury, is not required to support a claim for negligent infliction of emotional distress.

This court's recent decision in *People v. Hudson*, 228 Ill. 2d 181 (2008), further supports our conclusion. In *Hudson*, the trial court allowed a 16-year-old victim of a home invasion to present lay testimony to establish her psychological trauma. On appeal, the defendant argued that expert testimony was required to establish psychological harm. This court held that "jurors could reasonably find, without the assistance of expert testimony, that the circumstances of the offense were such as to cause psychological injury to a 16-year-old girl." *Hudson*, 228 Ill. 2d at 199. *Hudson* did recognize, however, that expert testimony may be required in some cases to prove psychological injury, but it was unnecessary given the facts of that case.

We believe the circumstances of this case are similar to those in *Hudson*. Based on personal experience alone, the jury could reasonably find that the circumstances of this case caused plaintiff emotional distress. Plaintiff

explicitly testified on her experience of having the deceased infant protrude from her body for over an hour while awaiting Dr. Garcini's arrival. Plaintiff, the infant's father, and plaintiff's mother all testified about plaintiff's behavior and emotional state following the event. The record sufficiently established that plaintiff suffered emotional distress.

Defendant also contends expert proof of causation is necessary when there is more than one possible cause of the emotional distress "to ensure that the recovery is only for compensable emotional injuries proximately caused by the event for which defendant was found liable, and not for grief suffered, or other emotional distress resulting from other causes for which defendant is not liable." According to defendant, causation is at issue here when plaintiff simultaneously lost her infant and suffered a traumatic event by having the infant protruding from her body until defendant's arrival. Defendant surmises that expert testimony would have established whether the delay in delivering the deceased infant caused the entire emotional injury, as opposed to the death of the infant.

Here, plaintiff's testimony established that the emotional distress she experienced derived directly from defendant's delay in delivering the deceased infant and not from the death of her child. Plaintiff testified that she was depressed, and could not eat, or sleep. She could only think about laying there for an hour and 10 minutes, and there was nothing she could do but "sit there like that with my baby." She further testified that she has these thoughts "[a]ll the time" and she has had thoughts of suicide because "[i]t was so horrible" and "I'm always reminded of that hour and ten minutes that I sat there with him."

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Viewing the evidence in the light most favorable to the plaintiff as we must here, the trial testimony

established that she suffered emotional distress because of defendant's delay in delivering the deceased baby. We cannot say that the evidence so overwhelmingly favored defendant that no contrary verdict could ever stand. *Maple*, 151 Ill. 2d at 453. Accordingly, we hold defendant is not entitled to a judgment notwithstanding the verdict due to the lack of expert testimony on the issue of plaintiff's emotional distress.

In the alternative, defendant argues he is entitled to a judgment notwithstanding the verdict because the verdict against him violates the single-recovery rule. Defendant also argues that if the single-recovery rule is inapplicable in this case, that he is entitled to a setoff for the amount paid to plaintiff by the hospital.

We first address defendant's argument that the single-recovery rule prohibits plaintiff from seeking recovery from him for emotional distress. According to defendant, plaintiff suffered a single emotional distress injury. The jury in the first trial determined the amount of plaintiff's damages for that injury, and plaintiff accepted full payment in satisfaction of the judgment amount against the hospital. Defendant contends that the single-recovery rule prohibits plaintiff from seeking a second recovery from him for the same emotional distress injury.

Again, our standard of review for a trial court's ruling on a motion for judgment notwithstanding the verdict is *de novo*. *McClure*, 188 Ill. 2d at 132. Generally, obtaining a judgment against one tortfeasor will not bar a plaintiff from bringing claims against any other tortfeasors. *Saichek v. Lupa*, 204 Ill. 2d 127, 137 (2003). A plaintiff may, however, receive only one full compensation for his or her injuries, and double recovery for the same injury is not allowed. *Saichek*, 204 Ill. 2d at 137. "The initial judgment, however, will normally serve as a limit on the plaintiff's entitlement to redress." *Saichek*, 204 Ill. 2d at 137.

Plaintiff argues the appellate court correctly found that defendant failed to preserve this issue by raising it for the first time in a posttrial motion. We agree with plaintiff that defendant has forfeited his right to claim the single-recovery rule prohibits plaintiff from seeking damages from defendant for emotional distress.

Defendant did not claim the single-recovery rule until he filed his posttrial motion. The basis for defendant's claim, however, arose at the end of the first trial. Defendant had multiple opportunities to raise this theory before the second trial concluded: (1) as an affirmative defense in the second trial; (2) through pretrial motions *in limine* in the second trial; (3) by filing a motion for directed verdict in the second trial; and (4) during the jury instruction conference in the second trial. Due to defendant's failure to raise this issue before the entry of the verdict after the second trial, plaintiff had no notice or opportunity during trial to defend against defendant's claim. Thus, defendant forfeited his right to assert the single-recovery rule by raising this issue for the first time in his posttrial motion. See *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560 (2009).

Finally, we address defendant's argument that he is entitled to a setoff in the amount paid by the hospital to plaintiff. We held in our original opinion that defendant forfeited his setoff claim by raising it for the first time in his posttrial motion. Relying on *MidAmerica Bank*, we reasoned that section 2—608 of the Code of Civil Procedure (735 ILCS 5/2—608 (West 2002)) required a setoff claim to be raised as a cross-claim in the defendant's answer. Upon consideration of defendant's petition for rehearing, we are persuaded that a modification to this court's opinion is necessary.

In his petition for rehearing, defendant argues that this court improperly concluded that he forfeited his claim for a setoff and urges this court to address the is-

sue on the merits. According to defendant, a defendant's request for setoff to reflect amounts paid by settling defendants is in the nature of an enforcement action and a setoff that is not a counterclaim to be evaluated by the trier of fact may be brought at any time. See *Star Charters v. Figueroa*, 192 Ill. 2d 47, 48-49 (2000). In *Star Charters*, this court held that a motion for setoff may be brought after trial, as it is in the nature of an enforcement action and does not arise as a result of the trial.

The term "setoff" is used in two distinct ways. In one sense, a setoff " 'refers to the situations when a defendant has a distinct cause of action against the same plaintiff who filed suit against him' and is subsumed procedurally under the concept of counterclaim." *Matsushita Electric Corp. of America v. Home Indemnity Co.*, 907 F. Supp. 1193, 1198 (N.D. Ill. 1995), quoting *Hentze v. Unverfehrt*, 237 Ill. App. 3d 606, 612 (1992). Applying this meaning, a setoff may refer to a situation when the defendant claims that the *plaintiff* has done something that results in a reduction in the defendant's damages. When a defendant pursues this type of setoff, the claim must be raised in the pleadings. See *MidAmerica Bank*, 232 Ill. 2d at 574-75.

In another sense, however, the term "setoff" may refer to a defendant's request for a reduction of the damage award because a *third party* has already compensated the plaintiff for the same injury. This occurs, for example, when a codefendant who would be liable for contribution settles with the plaintiff. This type of setoff may be raised at any time. See *Star Charters*, 192 Ill. 2d 47.

In this case, defendant did not have a cause of action against plaintiff. Rather, defendant sought a reduction in damages because a third party settled with plaintiff. Thus, defendant's setoff request constitutes an enforcement action rather than a counterclaim. Pursuant to *Star Charters*, defendant's claim for a setoff was not

forfeited simply because it was not raised in the pleadings. Accordingly, we now address defendant's claim that he is entitled to a setoff in the amount paid by the hospital to plaintiff.

Defendant argues that this case is analogous to *Saichek v. Lupa*, 204 Ill. 2d 127 (2003), and that he is entitled to a setoff of the full $175,000 paid by the hospital. Relying on *Saichek*, defendant contends the payment was in satisfaction of the judgment for plaintiff's emotional damages rendered against the hospital in the first trial and was not a settlement. We conclude that *Saichek* is readily distinguishable.

In *Saichek*, a default judgment was entered against one of two defendants, and the plaintiff brought nonwage garnishment proceedings to collect the default judgment. No appeal was taken. The defendant's insurance carrier paid the judgment, and the parties entered into a "Satisfaction Release of Judgment" releasing the judgment against only the insured and the carrier while expressly retaining the pending cause against the second defendant. Defendant here argues that some language in the *Saichek* agreement is similar to language in the instant agreement. He fails to recognize the significance of additional language in the agreement stating that the document broadly released and discharged the hospital, the individual nurses, "and any other employees, officers, agents, personal representatives, assignee and any other persons or firms who are or might be liable from all claims, demands or rights of action which [Toni Thornton, individually and as special administrator of the estate of Jason Ebner, deceased,] or any of us, or any person or firm acting or claiming to act in my behalf, now have or might ever have, because of loss or expense, injuries or damages to person or property, both known or unknown, resulting or to result from any hospital care on or about August 28, 2000 at any facility operated by

Silver Cross Hospital wherein the undersigned claimant asserts negligence, malpractice or other malfeasances on the part of Silver Cross Hospital, its agents, employees, officers or representatives." The agreement also stated that the "[p]ayment shall be the full, final and complete satisfaction of any and all claims, judgments, or causes of action as between said Plaintiff and Silver Cross Hospital." Moreover, the parties "SPECIFICALLY UNDERSTOOD AND AGREED that this *settlement* is FULL, COMPLETE AND FOREVER FINAL, *but is NOT to be construed as an admission of any legal liability* for any of the consequences of the aforesaid incident, on the part of any of the persons and firms thereby released." (Emphases added.) Those provisions are inconsistent with the conclusion that the agreement was a purely satisfaction of judgment and not a settlement.

Moreover, the facts underlying the agreements in the two cases are far different. Here, the parties entered into the settlement agreement while posttrial litigation was still ongoing. The parties' settlement agreement released multiple claims against both the hospital and the nurses, and no judgment against the nurses had even been entered. In contrast, the agreement in *Saichek* did not release any unresolved claims. Instead, the agreement acknowledged only that the judgment had been satisfied. In addition, *Saichek* reviewed the dismissal of the plaintiff's lawsuit against the second defendant, not the propriety of a setoff after the entry of judgment in that case. Accordingly, we reject defendant's contention that *Saichek* supports his position that the agreement here was a mere satisfaction of the judgment, justifying a setoff of the full payment received by plaintiff, and not a settlement, requiring an allocation of the settlement proceeds.

The determination of whether a defendant is entitled to a setoff is a question of law and, therefore, subject to

de novo review. *Board of Trustees of Community College District No. 508 v. Coopers & Lybrand*, 208 Ill. 2d 259, 266 (2003). Where, as here, the setoff is in the nature of an enforcement action, the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/0.01 *et seq.* (West 2002)) controls. Section 2(c) of the Contribution Act provides:

> "When 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 or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death 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, or in the amount of the consideration actually paid for it, whichever is greater." 740 ILCS 100/2(c) (West 2002).

Section 2(c) is intended to prevent double recovery. *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 368 (1995). Section 2(c) also "ensures that a nonsettling party will not be required to pay more than its *pro rata* share of the shared liability." *Pasquale*, 166 Ill. 2d at 368. Generally, a nonsettling party seeking a setoff bears the burden of proving what portion of a prior settlement was allocated or attributable to its share of the liability. *Pasquale*, 166 Ill. 2d at 369.

Here, plaintiff's $175,000 settlement with the hospital specifically provided that plaintiff was not settling her claims against defendant. The settlement was not merely for damages sought by Toni Thornton, individually, but also for damages sought by Toni Thornton, as special administrator of the estate of Jason Ebner, deceased. In addition, it released a variety of claims against the hospital as well as against the individual nurses who had not been found liable prior to settlement. The judgment against defendant in the second trial, however, was only for Toni's individual claim of negligent infliction of emotional distress.

Defendant argues that he need not establish the proper allocation of the settlement proceeds under the rationale in *Patton v. Carbondale Clinic, S.C.*, 161 Ill. 2d 357 (1994). We reject that argument because *Patton* involved a defendant who was not a party to the case underlying the settlement, unlike defendant here, making its rationale inapplicable. Defendant also contends he is entitled to a setoff of the full settlement amount but admits he has failed to offer any proof of the proper allocation based on his share of the liability. Given the multiple parties, injuries, and claims settled in plaintiff's agreement with the hospital, the allocation of the full settlement proceeds to set off defendant's liability for only the negligent infliction of emotional distress cannot be justified in the absence of any supporting proof. No independent judicial determination of the proper allocation is possible. Accordingly, we hold that the trial court properly denied defendant's request for a setoff.

III. CONCLUSION

We hold that expert testimony is not required to support a claim for negligent infliction of emotional distress. We further hold that defendant has forfeited the single-recovery rule and is not entitled to a setoff. We therefore affirm the judgment of the appellate court.

Affirmed.

Turner v. Williams, 326 Ill. App. 3d 541 (2d Dist. 2001)

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

Ill. App. Ct., 2d Dist. · filed 2001-12-17 · Reporter opinion
Published opinion

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Where the memo cites it

- memo p. 5 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C020.1
- memo p. 8 · Remote Witness to a Child's Fatal Crash: Bystander Negligent Infliction of Emotional Distress in Illinois · no pin: passage C020.1

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Turner v. Williams, 326 Ill. App. 3d 541 (2d Dist. 2001)

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Turner v. Williams

326 Ill. App. 3d 541 · Appellate Court · Filed 2001-12-17 · 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.

LINDA L. TURNER, Indiv. and as Guardian of Brian Wong et al., Minors, Plaintiffs-Appellees, v. LARRY L. WILLIAMS et al., Defendants-Appellants. Second District No. 2 - 00-1438 Opinion filed December 17, 2001. James T. Ferrini, Edward M. Kay, and Melissa A. Murphy-Petros, all of Clausen Miller P.C., of Chicago, and Thomas H. Ryerson, of Clausen Miller P.C., of Wheaton, for appellants. T. Patrick Rice, of Rice & Mathys, of Wheaton, for appellees.

Opinion

JUSTICE McLAREN

delivered the opinion of the court:

In this automobile collision case, defendants, Larry Williams and C.R. England & Sons, Inc., appeal the judgment entered on the jury's verdict in favor of plaintiff, Linda L. Turner, individually and as guardian of Brian Wong and Kevin Wong, minors, in the amount of $5,863,115.15. On appeal, defendants contend that the trial court erred in (1) failing to consolidate a related wrongful death action; (2) instructing the jury on loss of a normal life as an element of damages; and (3) excluding the testimony of defendants' accident reconstruction expert. Defendants seek the reversal of the jury's verdict and a new trial or, alternatively, a judgment notwithstanding the verdict, a new trial on damages, or a remittur in the amount of $3,700,000. We reverse and remand for a new trial.

On June 7, 1998, Brian Wong, age 15, and Kevin Wong, age 13, were passengers in a Mazda van driven by their father, Jack Wong. Mr. Wong was traveling westbound on Route 38, or Roosevelt Road. While attempting to make a left turn at the intersection of Route 38 and Fabyan Parkway in West Chicago, the van was struck by a semi-tractor trailer driven by defendant Larry Williams and owned by C.R. England & Sons. Jack Wong died in the collision. Brian Wong and Kevin Wong were severely injured. They have no memory of the collision.

On August 31, 1998, Linda L. Turner, as guardian of Brian Wong and Kevin Wong, filed a

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negligence action against defendants, Williams and C.R. England & Sons. Although the record does not reflect that the estate of Jack Wong was ever a party to the suit, the trial court approved the minor plaintiffs' petition for settlement on September 24, 1998. The plaintiffs entered into a settlement with the automobile insurance carrier for Jack Wong, not the estate of Jack Wong, for the policy limits of $200,000, with $100,000 being awarded to each minor plaintiff.

On April 28, 2000, Yok Tsun Gong, the administrator of the estate of Jack Wong, filed a separate wrongful death action arising from the sáme automobile collision against defendants, Williams and C.R. England & Sons. Since plaintiffs Brian Wong and Kevin Wong were the sole heirs of their father, Jack Wong, the wrongful death action sought to compensate plaintiffs for damages sustained as a result of the death of their father.

On May 23, 2000, defendants moved to consolidate the wrongful death action with the negligence action brought on plaintiffs' behalf. They argued that allowing the actions to proceed separately would allow plaintiffs to split their cause of action and essentially obtain a double recovery for the same injury. The trial court denied the motion to consolidate.

Prior to trial, defendants filed a motion in limine to bar plaintiffs from introducing evidence of emotional damage sustained by the minor plaintiffs as a result of the death of their father and other evidence concerning damages available under the Wrongful Death Act (740 ILCS 180/0.01 et seq. (West 2000)). The motion asserted that the minor plaintiffs could not be compensated in the negligence action for emotional damage sustained in the automobile collision due to the death of their father because it is not an element of their claim for negligence. The motion was denied.

Plaintiffs filed a motion in limine to exclude the testimony of defendants' accident reconstruction expert, Wesley Grimes. The motion asserted that the testimony of Mr. Grimes should be barred because there was an inadequate foundation to support his testimony. The motion was granted, and Mr. Grimes was barred from testifying at trial.

The case proceeded to trial. In their case in chief, plaintiffs called five eyewitnesses to the collision and numerous damage witnesses, including five treating physicians, a treating psychology clinician, two treating speech pathologists, and two guidance counselors at plaintiffs' school. Defendants called two physicians who conducted independent medical examinations on plaintiffs in their case in chief.

The trial court instructed the jury on loss of a normal life as an element of damages, among other things. The jury entered a verdict in favor of Brian Wong and against defendants in the amount of $2,480,000, itemized as follows: $1,500,000 for loss of a normal life; $30,000 for disfigurement; $600,000 for past pain and suffering; and $350,000 for future pain and suffering. The jury entered a verdict in favor of Kevin Wong in the amount of $3,390,000, itemized as follows: $2,200,000 for loss of a normal life; $40,000 for disfigurement; $800,000 for past pain and suffering; and $350,000 for future pain and suffering. A verdict in favor of Linda Turner was returned in the amount of $193,115.15, which reflected medical expenses paid for Brian Wong and Kevin Wong.

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The jury answered a special interrogatory that apportioned negligence at 60% for defendants Williams and C.R. England and 40% for Jack Wong. Since Jack Wong was not a party to the suit, the special interrogatory was given to test the jury's verdict against defendants' theory that Jack Wong was the sole proximate cause of the collision.

Judgment was entered on the jury's verdict in the amount of $5,863,115.15; that amount provided for a setoff against the verdict in favor of each minor plaintiff in the amount of $100,000 each, which reflected the settlement reached with Jack Wong's insurance carrier prior to trial. Following the denial of defendants' posttrial motion, they filed a notice of appeal.

I. CONSOLIDATION

Defendants first contend that the trial court erred in failing to consolidate the wrongful death action filed on behalf of Jack Wong, deceased, with the negligence action filed on behalf of the minor plaintiffs. Defendants contend that, since plaintiffs in the present action were allowed to introduce evidence concerning the emotional damage sustained by the minor plaintiffs due to their father's death in the collision and to argue that they should be compensated for such grief, the failure to consolidate the two cases was prejudicial in that it allows for a double recovery for these damages in both suits.

Defendants claim that this issue should be decided under the de novo standard of review through a res judicata analysis, which indicates that plaintiffs impermissibly split the wrongful death action from the negligence action by filing two separate suits. We disagree. The issue of res judicata is not determinative of the issue of whether the two causes of action should have been consolidated.

In all of the cases cited by defendants, the doctrine of res judicata was used defensively and a second, subsequent cause of action was barred due to the resolution of an earlier cause of action involving the same parties and the same issues. See, e.g., People ex rel. Burris v. Progressive Land Developers, Inc., 151 Ill. 2d 285 (1992); River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290 (1998); Marvel of Illinois, Inc. v. Marvel Contaminant Control Industries, Inc., 318 Ill. App. 3d 856 (2001); Marshall v. Mayflower, Inc., 817 F. Supp. 922 (D.C. Kan. 1993). None of the cases cited by defendants address the issue of the trial court's failure to consolidate two cases arising from the same occurrence that were pending simultaneously.

Section 2 - 1006 of the Code of Civil Procedure provides for the consolidation of actions pending in the same court "as an aid to convenience, whenever it can be done without prejudice to a substantial right." 735 ILCS 5/2 - 1006 (West 2000). The trial court has broad discretion in determining the propriety of consolidation. Horn v. Rincker, 84 Ill. 2d 139, 147 (1981). Its decision will not be overturned on review absent a finding of an abuse of discretion. Anderson v. Anchor Organization for Health Maintenance, 274 Ill. App. 3d 1001 (1995).

Consolidation has three different applications: (1) where several actions are pending involving substantially the same subject matter, the court may stay proceedings in all but one and see whether the disposition of the one action may settle the others, thereby

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avoiding multiple trials on the same issue; (2) where several actions involve an inquiry into the same event in its general aspects, the actions may be tried together, but with separate docket entries, verdicts, and judgments, the consolidation being limited to a joint trial; and (3) where several actions are pending that might have been brought as a single action, the cases may be merged into one action, thereby losing their individual identity, to be disposed of in one suit. Ad-Ex, Inc. v. City of Chicago, 247 Ill. App. 3d 97 (1993). Where separate causes are of the same nature, involve the same or like issues and depend largely upon the same evidence, as in the third example noted above, consolidation is not an abuse of discretion. Peck v. Peck, 16 Ill. 2d 268, 275 (1959).

The negligence action brought on behalf of the minor plaintiffs and the wrongful death action involve the same automobile collision. The resolution of both cases depends on the same evidence on liability. In both cases, plaintiffs will present evidence to establish that defendants were negligent in colliding with the vehicle driven by Jack Wong carrying the minor Wong children as passengers. Thus, the only issues that differ in the two cases are the amount of damages and the apportionment of liability.

According to the itemized verdict, the minor plaintiffs were compensated for the following elements of damage: loss of a normal life, disfigurement, pain and suffering experienced, and pain and suffering reasonably certain to be experienced in the future. According to the verdict form, plaintiffs were not compensated for emotional distress experienced under the "zone of physical danger" test enunciated in Rickey v. Chicago Transit Authority, 98 Ill. 2d 546 (1983). Under this rule, a bystander must be in the zone of physical danger to the direct victim created by a defendant's negligent conduct, have a reasonable fear for his own safety based on a high risk to him of physical impact, and show physical injury or illness as a result of the emotional distress caused by the defendant's negligence.

Nevertheless, the trial court allowed plaintiffs to introduce evidence concerning the emotional distress suffered by the minor plaintiffs resulting from the death of their father. Although the minor plaintiffs did not remember the collision itself, and therefore could not have suffered emotional anguish stemming from memories of the collision, the record reflects that the treating health care providers testified that the minors experienced grief and related emotional difficulties due to the loss of their father. Brian Wong's treating psychology clinician related behavioral problems due to cognitive deficits and feelings of complicated grief over the loss of his father. The therapist testified of a therapy program designed to cope with grief reactions. In addition, both minors testified of their feelings of loss over the death of their father. In closing argument, plaintiffs' counsel asked the jury to compensate the minor plaintiffs for the pain and suffering experienced due to the death of their father, including the grief, sadness, and emotional damages associated with losing their father in a "collision that should not have occurred," the fact- that they "never got to say good-bye," and "the death of the father, the sadness and the grief."

Since the minor plaintiffs were directly injured in the automobile collision and have no memory of the collision, all damages they sustained were a consequence of their own injuries. As persons directly injured as a result of the alleged negligent actions of defendants in colliding with the vehicle driven by Jack Wong, the minor plaintiffs are

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precluded from recovering damages under the zone of danger rule enunciated in Rickey. See Corgan v. Muehling, 143 Ill. 2d 296 (1991) (holding that the Rickey zone of danger test does not apply to plaintiffs that are directly injured and are not merely bystanders). Although it has been held that a plaintiff who is both a direct victim and a bystander can recover for both elements of damage in separate counts, plaintiffs are precluded from doing so in this case. Both minor plaintiffs have no memory of the collision and, therefore, could not have sustained emotional distress from being in the zone of physical danger in the collision. See Hayes v. Illinois Power Co., 225 Ill. App. 3d 819 (1992). Furthermore, plaintiffs' complaint does not allege the negligent infliction of emotional distress.

Under the Wrongful Death Act (740 ILCS 180/0.01 et seq. (West 2000)), the minor plaintiffs, as the sole surviving heirs or next of kin of Jack Wong, are entitled to recover for the pecuniary losses incurred as a result of the death, including money, benefits, goods, services, and society. Although those damages do not include grief or mental anguish resulting from the death, damages for loss of society are recoverable* which include the deprivation of love, companionship, and affection from the deceased person. Seef v. Sutkus, 205 Ill. App. 3d 312, 318 (1990). Although bereavement itself is not directly recoverable as an element of damage, testimony concerning beareavement is relevant to a claim for loss of society. Uhr v. Lutheran General Hospital, 226 Ill. App. 3d 236 (1992). It is not relevant to the negligence claim without evidence that plaintiffs remembered the collision.

The fact that plaintiffs had no memory of the collision is significant. Contrary to plaintiffs' argument that plaintiffs will experience grief and sadness "every time they look in the mirror and they see the scars," without any memory of the collision, the only emotional injury plaintiffs could have suffered did not stem from feelings related to the facts of the collision itself. Instead, evidence was presented to establish that plaintiffs sustained emotional injury as a result of the death of their father. However, this evidence was not relevant to the damages sustained by plaintiffs. This evidence is relevant to the damages sustained by the minor plaintiffs in the unconsolidated wrongful death suit.

Both the wrongful death and the negligence actions involve the same issues concerning liability Plaintiffs' counsel acknowledged this fact at the hearing on the motion to consolidate, indicating that "[ejverything is the same except in this case we're talking about damages to the two boys versus the wrongful death of the father." Although the damages sustained by the minor plaintiffs from their own injuries (resulting in the negligence suit) and from the death of their father (resulting in the wrongful death suit) are not identical, the evidence presented on the damages in the negligence suit improperly overlapped with the evidence that will be presented on the damages in the wrongful death suit. By trying the two suits separately, and assuming the proper consideration of evidence in the wrongful death suit, it is apparent that a double recovery on the damages for pain and suffering in the negligence suit and loss of society in the wrongful death suit would arise.

In denying the motion to consolidate, the trial court expressed concern that continuing the scheduled trial date on the negligence suit to allow the two suits to be consolidated for

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trial would interrupt the plaintiffs' school year. The court was also concerned that consolidating the two cases would require the jury to "have too much on its plate." With respect to defendants' contention that the failure to consolidate would increase the potential for double recovery, the court indicated that the jury instructions would protect the interests of defendants.

Here, the negligence and wrongful death causes of action depend largely on the same evidence, including that on damages. In our view, the limiting instruction that was given - that the jury not consider "the loss of society due to the death of Jack Wong" or "the relationship between either Brian Wong or Kevin Wong and their father" in awarding damages for past and future pain and suffering- confuses, rather than clarifies, the issues. Loss of society is not an element of damage in the negligence claim, and, therefore, evidence of such damage was not relevant. The prejudicial effect of the jury's verdict in this case, as well as the virtual certainty for a double recovery on damages given the evidence presented at trial, indicates that the two causes of action should have been consolidated for trial. The trial court's denial of the motion to consolidate was an abuse of discretion. Therefore, we reverse the trial court's order denying defendants' motion to consolidate. We also reverse the judgment entered on the jury's verdict and remand the cause to the trial court for a new trial on all issues to be conducted as a consolidated trial on both the negligence and wrongful death causes of action.

II. JURY INSTRUCTION - LOSS OF A NORMAL LIFE

In conjunction with its assertion that the trial court erred in failing to consolidate the wrongful death action with the negligence action, defendants assert that the trial court erred in giving the jury an instruction on loss of a normal life rather than disability.

Contrary to plaintiffs' contention that this issue has been waived on appeal for failure to object at the instruction conference, the record is clear that an objection to the term "loss of a normal life" in lieu of disability was raised and that the instruction was given over this objection. Further, the issue was raised in defendants' posttrial motion. The failure of defendants to tender an alternate instruction on disability does not result in the waiver of this issue either. At the instruction conference, the trial court indicated that it was plaintiffs' option to use either the term "disability" or "loss of a normal life" as the damage instruction. Under these circumstances, the failure to tender an alternate instruction on disability does not result in the waiver of this issue on appeal. Therefore, we will consider the issue of whether the trial court erred in giving the loss of a normal life instruction rather than the disability instruction.

The plaintiff has the right to have the jury clearly and fairly instructed on any theory supported by the evidence. To justify an instruction, some evidence in the record must support the theory. The trial court has discretion in determining what issues are raised by the evidence. Leonardi v. Loyola University, 168 Ill. 2d 83, 100 (1995). Giving or denying a jury instruction is also within the trial court's discretion. A new trial will be granted because of improper jury instructions only where the party has suffered serious prejudice from the offending instruction. Thompson v. MCA Distributing, Music Corp. of America, 257 Ill. App. 3d 988, 991 (1994). In determining the adequacy of jury instructions, this

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court considers whether, considering the instructions as a whole, the jury was fairly, fully, and comprehensively informed as to the relevant principles. Campbell v. Wagner, 303 Ill. App. 3d 609, 611 (1999).

Defendants claim that under Tornabene v. Paramedic Services of Illinois, Inc., 314 Ill. App. 3d 494 (2000), the use of the loss of a normal life instruction rather than the disability instruction is contrary to Illinois law and that the trial court's use of this instruction warrants a new trial. The Tornabene court relied on the prior case of Torres v. Irving Press Inc., 303 Ill. App. 3d 151 (1999), which disapproved of the use of the term "loss of a normal life" in the damage instruction. The Tornabene court rejected the rationale of Smith v. City of Evanston, 260 Ill. App. 3d 925 (1994), which, in determining that the trial court erred in giving the loss of a normal life instruction, held that the term "loss of a normal life" more accurately described the evidence. The court's holding in Torres was based on the comments to IPI Civil (1995) No. 30.04, the disability instruction, which recommended the use of the pattern instruction on disability rather than a nonpattern instruction on loss of a normal life (Illinois Pattern Jury Instructions, Civil, No. 30.04 (1995)) (hereinafter IPI Civil (1995)).

Since Smith, Torres, and Tornabene were decided, the 2000 edition of the Illinois Pattern Jury Instructions was published. Illinois Pattern Jury Instructions, Civil (2000). Included in this new edition is an instruction that gives disability or loss of a normal life as alternatives. Illinois Pattern Jury Instructions, Civil, No. 30.04.01 (2000) (hereinafter IPI Civil (2000)). The Notes on Use to IPI Civil (2000) No. 30.04.01 indicate that the term "loss of a normal life" can be used rather than "disability" if the trial court determines that Smith is applicable and that "loss of a normal life" more accurately describes the element of damages claimed and would be less confusing to the jury. IPI Civil (2000) No. 30.04.01, Notes on Use.

The addition of instruction IPI Civil (2000) No. 30.04.01, which allows either loss of a normal life or disability to be given as an instruction, depending on the nature of the evidence at trial, illustrates that the use of an instruction on loss of a normal life is not contrary to Illinois law. Indeed, loss of a normal life has been recognized by this court as an element of compensable damage. Zuder v. Gibson, 288 Ill. App. 3d 329 (1997); see also Hiscott v. Peters, 324 Ill. App. 3d 114, 127 (2001) .

Here, however, the trial court gave plaintiffs the option of choosing either disability or loss of a normal life. It does not appear that any consideration was given as to which term more accurately described the damages or whether the holding of Smith was applicable.

Since we have already determined that error occurred that warrants a new, consolidated trial, we have no occasion to determine whether the trial court erred in giving the loss of a normal life instruction rather than the disability instruction. On remand, however, the trial court is directed to consider the tendered instruction in light of the "Notes on Use" and "Comment" sections to IPI Civil (2000) No. 30.04.01.

If the trial court determines that loss of a normal life more accurately portrays the evidence presented at trial and utilizes this alternative, IPI Civil (2000) No. 30.04.02

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should also be given, which defines the term “loss of a normal life.”

III. EXPERT’S TESTIMONY

Defendants next contend that the trial court erred in excluding the testimony of their retained opinion witness, Wesley Grimes. Mr. Grimes is an accident reconstructionist. Based on two computer programs and his own calculations, Mr. Grimes was to testify that defendant Williams was traveling 26 to 30 miles per hour at impact and 33.5 miles per hour plus or minus 10% before braking; that Jack Wong was traveling between 18 to 22 miles per hour at impact; that defendant Williams was between 150 to 242 feet from the point of impact when Wong moved and braking began; and that defendant Williams had approximately 3 to 4 seconds to react to the movement of Mr. Wong. Based on these findings, Mr. Grimes was to testify that the cause of the collision was the Wong vehicle’s turning in front of defendants’ vehicle.

Plaintiffs filed a motion in limine to bar the testimony of Mr. Grimes. The motion ásserted that the testimony of Mr. Grimes was speculative and not in compliance with Wilson v. Clark, 84 Ill. 2d 186 (1981).

The trial court granted the motion and barred Mr. Grimes from testifying. The basis for the court’s ruling, however, was not Wilson v. Clark. Instead, the court excluded the testimony of Mr. Grimes for the following reasons: there was sufficient eyewitness testimony regarding the speed of the vehicles and an expert’s testimony was not needed in these areas; there was insufficient foundation for the computer-generated evidence under the Frye standard; the opinions lacked sufficient foundation because they did not take into account the color of the traffic lights at the point of impact; the opinions lacked sufficient foundation because the witness did not know the starting point of the vehicle and the markings on the roadway; and the disclosures of Mr. Grimes’s opinions required by Supreme Court Rules 213(f) and (g) (177 Ill. 2d Rs. 213(f), (g)) did not state that his computer programs were “reliable.”

Generally, the opinion testimony of an expert is admissible if the expert is qualified by knowledge, skill, experience, training, or education in a field that has “at least a modicum of reliability” and the testimony would assist the jury in understanding the evidence. Wiegman v. Hitch-Inn Post of Libertyville, Inc., 308 Ill. App. 3d 789, 799 (1999). However, an expert’s opinion is only as valid as the reasons for the opinion. Soto v. Gaytan, 313 Ill. App. 3d 137 (2000). Thus, the party calling an expert witness must lay a foundation sufficient to establish that the information upon which the expert bases his opinion is reliable. Hiscott, 324 Ill. App. 3d at 122. For reconstruction testimony to be admissible, there must be sufficient data about the accident in evidence to provide a reasonable basis for the expert’s opinion. Hiscott, 324 Ill. App. 3d at 123. The admission of an expert’s testimony lies with the sound discretion of the trial court. Wiegman, 308 Ill. App. 3d at 799. The trial court’s ruling regarding the admissibility of an expert’s opinion will be reversed when the error was prejudicial or the result of the trial was materially affected. Hiscott, 324 Ill. App. 3d at 122.

The trial court’s determination that the testimony of Mr. Grimes should be barred because

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there was sufficient evidence from the eyewitnesses concerning the speed of the vehicles was an abuse of discretion. The existence of eyewitness testimony is not a conclusive factor in determining whether accident reconstruction testimony is admissible. Watkins v. Schmitt, 172 Ill. 2d 193, 206 (1996). Instead, the court must determine whether, in addition to eyewitness testimony, an expert's reconstruction testimony would assist the jury in understanding scientific principles and enable it to make factual determinations. Watkins, 172 Il. 2d at 205.

Here, there were five eyewitnesses to the occurrence, including defendant Williams. The witnesses each viewed the occurrence from different vantage points. However, the testimony from each of these witnesses concerning the speed of defendant Williams and Jack Wong prior to and at impact was contradictory. One witness estimated defendant's speed at 45 miles per hour. Defendant estimated his speed as 40 miles per hour prior to applying his brakes and 35 to 40 miles per hour after braking. The remaining witnesses either could not estimate speed or could do so only with vague descriptive terms such as "pretty fast" or "rather fast." Additionally, each witness saw defendants' vehicle at different points in time and at different distances from the crash site.

In our view, the testimony from the eyewitnesses was sufficiently confusing that the testimony of Mr. Grimes concerning the estimated speeds would assist the jury in sorting through the evidence presented and determine how the collision likely occurred. Mr. Grimes was to testify not only on estimated speeds but also on the amount of time defendant had to react. This issue could have been of import to the jury in understanding the testimony of the eyewitnesses that described the conditions such as speed and distance. See Ketchum v. Dura-Bond, Concrete, Inc., 179 Ill. App. 3d 820 (1989).

Likewise, the trial court abused its discretion in excluding the testimony of Mr. Grimes because the computer-generated data used in formulating his opinions did not satisfy the standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In Illinois, the admission of scientific evidence is strictly governed by the standard enunciated in Frye. People v. Eyler, 133 Ill. 2d 173, 211 (1989); see also People v. Miller, 173 Ill. 2d 167 (1996) (declining to adopt the Daubert test (Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)) in place of the Frye test in Illinois). Simply stated, the Frye rule allows for the admission of evidence when the scientific principle that forms the basis of evidence has achieved general acceptance in the evidence's particular field. Frye, 293 F. at 1014.

The issue of whether the computer programs utilized by Mr. Grimes in forming his opinions are reliable is not a Frye issue. The Frye standard is utilized to test novel scientific evidence with no prior history of reliability. The use of accident reconstruction testimony is not novel. In the offer of proof made concerning the proposed testimony of Mr. Grimes, he testified that the computer programs used, EDCRASH and EDSMAC4, are "widely used and accepted in the field of crash analysis."

Although Mr. Grimes' proposed testimony concerning the reliability of the computer programs and their use and acceptance in the field of accident reconstruction was not referenced in defendants' answers to Supreme Court Rule 213 interrogatories, we do not

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believe that such omission warrants the exclusion of his testimony. Although a Frye hearing is not mandated, it is required in situations when the evidence at issue is not commonly recognized in the scientific field in which it belongs. Donaldson v. Central Illinois Public Service Co., 313 Ill. App. 3d 1061, 1070 (2000). Any issue plaintiffs had concerning the testimony of Mr. Grimes and the Frye standard should have been addressed in a Frye hearing prior to trial. Since Supreme Court Rule 213 requires the disclosure of opinions intended to be expressed by a proposed expert at trial (177 Ill. 2d R. 213), it does not encompass the disclosure of testimony that would have been elicited had a Frye hearing been conducted prior to trial. The manner in which courts have utilized the Frye standard to test the reliability of proposed opinion testimony prior to trial leads us to conclude it was not intended to serve as the basis for the exclusion of a witness via a typical motion in limine brought and heard on the eve of trial without an evidentiary hearing.

Moreover, plaintiffs' motion in limine, which sought to exclude Mr. Grimes from testifying, asserted that his testimony was without foundation because he did not input information extracted from the depositions in the computer programs and did not use certain information such as the color of the lights. In our view, the information used or not used by Mr. Grimes was not a sufficient basis to bar his testimony. This issue could have been adequately brought to light before the jury on cross-examination. Mr. Grimes utilized information admitted in evidence to formulate his opinions. The fact that the information was then submitted to a computer does not render it without sufficient foundation.

For these reasons, we determine that the trial court abused its discretion in barring the testimony of Mr. Grimes. On remand, Mr. Grimes should be allowed to testify.

The judgment of the circuit court of Du Page County is reversed. The cause is remanded for a new trial on all issues with directions to consolidate Gong v. Williams, Du Page County circuit court No. 00- L - 431, for retrial.

Reversed and remanded.

GEIGER and CALLUM, JJ, concur.

Unofficial text; verify against the official source before filing.

735 ILCS 5/2-615

Motions with respect to pleadings

Unofficial text; verify against the official source before filing. Unofficial text (ILGA). Verify against the official source before filing.

Version in force on 2026-11-01: from before the earliest change the index records to today.

(735 ILCS 5/2-615) (from Ch. 110, par. 2-615) Sec. 2-615. Motions with respect to pleadings.

(a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

(b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

(c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered.

(d) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.

(e) Any party may seasonably move for judgment on the pleadings.

Source note: (Source: P.A. 82-280.)

Changes after 2026-11-01

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

740 ILCS 180/2

(a) Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, and punitive damages when applicable, to the surviving spouse and next of kin of such deceased person. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly

Unofficial text; verify against the official source before filing. Unofficial text (ILGA). Verify against the official source before filing.

Version in force on 2026-11-01: from 2023-08-11 to today.

(740 ILCS 180/2) (from Ch. 70, par. 2) Sec. 2. (a) Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, and punitive damages when applicable, to the surviving spouse and next of kin of such deceased person. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly.

(b) The amount recovered in any such action shall be distributed by the court in which the cause is heard or, in the case of an agreed settlement, by the circuit court, to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the

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deceased person.

(c) Where the deceased person left no surviving spouse or next of kin entitled to recovery, the damages shall, subject to the following limitations inure, to the exclusive benefit of the following persons, or any one or more of them:

(1) to the person or persons furnishing hospitalization or hospital services in connection with the last illness or injury of the deceased person, not exceeding $450;

(2) to the person or persons furnishing medical or surgical services in connection with such last illness or injury, not exceeding $450;

(3) to the personal representatives, as such, for the costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee. In any such case the measure of damages to be recovered shall be the total of the reasonable value of such hospitalization or hospital service, medical and surgical services, funeral expenses, and such costs and expenses of administration, including attorney fees, not exceeding the foregoing limitations for each class of such expenses and not exceeding $900 plus a reasonable attorney's fee.

(d) Except as otherwise provided in subsection (e) of this Section, every such action shall be commenced within 2 years after the death of such person but an action against a defendant arising from a crime committed by the defendant in whose name an escrow account was established under the "Criminal Victims' Escrow Account Act" shall be commenced within 2 years after the establishment of such account.

(e) An action may be brought within 5 years after the date of the death if the death is the result of violent intentional conduct or within one year after the final disposition of the criminal case if the defendant is charged with:

(1) first degree murder under Section 9-1 of the Criminal Code of 2012;

(2) intentional homicide of an unborn child under Section 9-1.2 of the Criminal Code of 2012;

(3) second degree murder under Section 9-2 of the Criminal Code of 2012;

(4) voluntary manslaughter of an unborn child under Section 9-2.1 of the Criminal Code of 2012;

(5) involuntary manslaughter or reckless homicide under Section 9-3 of the Criminal Code of 2012;

(6) involuntary manslaughter or reckless homicide of an unborn child under Section 9-3.2 of the Criminal Code of 2012; or

(7) drug-induced homicide under Section 9-3.3 of the Criminal Code of 2012.

This subsection extends the statute of limitations only against the individual who allegedly committed a violent intentional act or was the defendant charged with a crime listed in this subsection. It does not extend the statute of limitations against any other person or entity. The changes to this Section made by this amendatory Act of the 99th General Assembly apply to causes of action arising on or after the effective date of this amendatory Act of the 99th General Assembly.

(f) For the purposes of this Section 2, next of kin includes an adopting parent and an adopted child, and they shall be treated as a natural parent and a natural child, respectively. However, if a person entitled to recover benefits under this Act, is, at the time the cause of action accrued, within the age of 18 years, he or she may cause such action to be brought within 2 years after attainment of the age of 18.

(g) In any such action to recover damages, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries on behalf of whom the action is brought, but the amount of damages given shall be reduced in the following manner.

(h) The trier of fact shall first determine the decedent's contributory fault in accordance with Sections 2-1116 and 2-1107.1 of the Code of Civil Procedure. Recovery of damages shall be barred or diminished accordingly. The trier of fact shall then determine the contributory fault, if any, of each beneficiary on behalf of whom the action was brought:

(1) Where the trier of fact finds that the contributory fault of a beneficiary on whose

behalf the action is brought is not more than 50% of the proximate cause of the wrongful death of the decedent, then the damages allowed to that beneficiary shall be diminished in proportion to the contributory fault attributed to that beneficiary. The amount of the reduction shall not be payable by any defendant.

(2) Where the trier of fact finds that the contributory fault of a beneficiary on whose

behalf the action is brought is more than 50% of the proximate cause of the wrongful death of the decedent, then the beneficiary shall be barred from recovering damages and the amount of damages which would have been payable to that beneficiary, but for the beneficiary's contributory fault, shall not inure to the benefit of the remaining beneficiaries and shall not be payable by any defendant.

(i) The trial judge shall conduct a hearing to determine the degree of dependency of each beneficiary upon the decedent. The trial judge shall calculate the amount of damages to be awarded each beneficiary, taking into account any reduction arising from either the decedent's or the beneficiary's contributory fault.

(j) This amendatory Act of the 91st General Assembly applies to all actions pending on or filed after the effective date of this amendatory Act.

(k) This amendatory Act of the 95th General Assembly applies to causes of actions accruing on or after its effective date.

Source note: (Source: P.A. 103-514, eff. 8-11-23.)

Unofficial text; verify against the official source before filing.

Changes after 2026-11-01

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

755 ILCS 5/27-6

Actions which survive

Unofficial text; verify against the official source before filing. Unofficial text (ILGA). Verify against the official source before filing.

Version in force on 2026-11-01: from 2023-08-11 to today.

(755 ILCS 5/27-6) (from Ch. 110 1/2, par. 27-6) Sec. 27-6. Actions which survive.

In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages, including punitive damages when applicable, for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 6-21 of the Liquor Control Act of 1934 . Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity.

Source note: (Source: P.A. 103-514, eff. 8-11-23.)

Changes after 2026-11-01

No change after this date is recorded in the index.

Unofficial text; verify against the official source before filing.

Ill. S. Ct. R. 315

Leave to Appeal From the Appellate Court to the Supreme Court

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 2026-11-01: from 2018-04-01 to today (version uncertain).

by Reporter of

Decisions

Rule 315. Leave to Appeal From the Appellate Court to the Supreme Court

(a) Petition for Leave to Appeal; Grounds. Except as provided below for appeals from the Illinois Workers' Compensation Commission division of the Appellate Court, a petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

No petition for leave to appeal from a judgment of the five-judge panel of the Appellate Court designated to hear and decide cases involving review of Illinois Workers' Compensation Commission orders shall be filed, unless two or more judges of that panel join in a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court. A motion asking that such a statement be filed may be filed as a prayer for alternative relief in a petition for rehearing, but must, in any event, be filed within the time allowed for filing a petition for rehearing.

(b) Time.

(1) Published Decisions. Unless a timely petition for rehearing is filed in the Appellate Court, a party seeking leave to appeal must file the petition for leave in the Supreme Court within 35 days after the entry of such judgment. If a timely petition for rehearing is filed, the party seeking review must file the petition for leave to appeal within 35 days after the entry of the order denying the petition for rehearing or, if a modified decision is issued upon denial of rehearing, from the entry of the modified decision. If a petition is granted, the petition for leave to appeal must be filed within 35 days of the entry of the judgment on rehearing. The Supreme Court, or a judge thereof, on motion, may extend the time for petitioning for leave to appeal, but such motions are not favored and will be allowed only in the most extreme and compelling circumstances. The filing of a corrected opinion by the Appellate Court where no petition for rehearing was filed does not extend the time for a

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party to file a petition for leave to appeal.

(2) Rule 23 Orders. The time for filing a petition for leave to appeal a Rule 23 order shall be the same as for published opinions unless a timely motion to publish has been filed in the Appellate Court pursuant to Rule 23(f). If the Appellate Court grants the motion to publish, the party seeking review must file the petition for leave to appeal within 35 days after the filing of the opinion. If the Appellate Court denies the motion to publish, the party seeking review must file the petition for leave to appeal within 35 days after entry of the order denying the motion to publish. The filing of a Rule 23(f) publication motion shall not invalidate a previously filed petition for leave to appeal. The clerk of the Appellate Court shall promptly transmit notice of the filing of a Rule 23(f) publication motion and its disposition to the clerk of the Supreme Court in any case in which a petition for leave to appeal is filed, irrespective of whether the motion to publish precedes or follows the filing of a petition for leave to appeal.

(c) Contents. The petition for leave to appeal shall contain, in the following order:

(1) a prayer for leave to appeal;

(2) a statement of the date upon which the judgment was entered; whether a petition for rehearing was filed and, if so, the date of the denial of the petition or the date of the judgment on rehearing;

(3) a statement of the points relied upon in asking the Supreme Court to review the judgment of the Appellate Court;

(4) a fair and accurate statement of the facts, which shall contain the facts necessary to an understanding of the case, without argument or comment, with appropriate references to the pages of the record on appeal, in the format as set forth in the Stand ards and Requirements for Electronic Filing the Record on Appeal.

(5) a short argument (including appropriate authorities) stating why review by the Supreme Court is warranted and why the decision of the Appellate Court should be reversed or modified;

and

(6) an appendix which shall include the opinion or order of the Appellate Court and any documents from the record which are deemed necessary to the consideration of the petition.

(d) Format; Service; Filing. The petition shall otherwise be prepared, served, and filed in accordance with the requirements for briefs as set forth in Rules 341 through 343, except that it shall be limited to 20 pages or, alternatively, 6,000 words, excluding any items identified as excluded from the length limitation in Rule 341(b)(1).

(e) Records. The clerk of the Supreme Court shall transmit notice of the filing of the petition to the clerk of the Appellate Court, who, upon request of the clerk of the Supreme Court made either before or after the petition is acted upon, shall transmit to the clerk of the Supreme Court the record on appeal that was filed in the Appellate Court and the

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certified Appellate Court record.

(f) Answer. The respondent need not but may file an answer, with proof of service, within 21 days after the expiration of the time for the filing of the petition, or within such further time as the Supreme Court or a judge thereof may grant. An answer shall set forth reasons why the petition should not be granted, and shall conform, to the extent appropriate, to the form specified in this rule for the petition, omitting the items (1), (2), (3), (4) and (6) set forth in paragraph (c) except to the extent that correction of the petition is considered necessary. The answer shall be prepared, served, and filed in accordance with the requirements for briefs except that it shall be limited to 20 pages or, alternatively, 6,000 words, excluding any items identified as excluded from the length limitation in Rule 341(b)(1). No reply to the answer shall be filed. If the respondent does not file an answer or otherwise appear but wants notice of the disposition of the petition for leave to appeal, a request for such notice should be submitted to the clerk in Springfield.

(g) Transmittal of Trial Court Record if Petition Is Granted. If the petition is granted, upon notice from the clerk of the Supreme Court the clerk of the Appellate Court shall transmit to the Supreme Court the record on appeal that was filed in the Appellate Court and the Appellate Court record, unless already filed in the Supreme Court.

(h) Briefs Other Than in Child Custody, Delinquent Minor, and Pretrial Release Cases. If leave to appeal is allowed, the appellant may allow his or her petition for leave to appeal to stand

as the brief of appellant, or may file a brief. Within 14 days after the date on which leave to appeal was allowed, appellant shall serve on all counsel of record a notice of election to allow the petition for leave to appeal to stand as the brief of appellant, or to file an additional brief, and within the same time shall file the notice with the clerk of the Supreme Court. If appellant elects to allow the petition for leave to appeal to stand as his or her brief, appellant shall file with the notice a complete table of contents, with page references, of the record on appeal and a statement of the applicable standard of review for each issue, with citation to authority, in accordance with Rule 341(h)(3). If appellant elects to file an additional brief, it shall be filed within 35 days from the date on which leave to appeal was allowed. Motions to extend the time for filing an additional brief are not favored and will be allowed only in the most extreme and compelling circumstances.

The appellee may allow his or her answer to the petition for leave to appeal to stand as the brief of appellee, or may file a brief. If the appellant has elected to allow the petition for leave to appeal to stand as the brief of appellant, within 14 days after the due date of appellant's notice the appellee shall serve on all counsel of record a notice of election to let the answer stand as the brief of appellee, or to file a brief, and within the same time shall file the notice with the clerk of the Supreme Court. If the appellee elects to file a brief, such brief shall be filed within 35 days of the due date of appellant's notice of election to let the petition for leave to appeal stand as the brief of appellant.

If the appellant has elected to file an additional brief, within 14 days after the due date of appellant's brief the appellee shall serve on all counsel of record a notice of election to let

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his or her answer stand as the brief of appellee, or to file an additional brief, and within the same time shall file a copy of the notice with the clerk of the Supreme Court. If appellee elects to file an additional brief it shall be filed within 35 days of the due date of appellant's brief.

If an appellee files a brief and that brief does not contain arguments in support of cross-relief , the appellant may file a reply brief within 14 days of the due date of appellee's brief. If the brief of appellee contains arguments in support of cross-relief, the appellant may file a combined reply brief and response to the appellee's request for cross-relief within 35 days of the due date of appellee's brief, and the appellee may file a reply brief confined strictly to the appellant's arguments in opposition to the appellee's request for cross-relief within 14 days of the due date of appellant's combined brief. If the brief of the appellee contains arguments in support of cross-relief, the cover of the appellee's brief shall be captioned: "Brief of Appellee. Cross-Relief Requested," the cover of the appellant's combined reply brief and response to the appellee's request for cross-relief shall be captioned "Appellant's Reply Brief and Response to Request for Cross-Relief," and the cover of the appellee's reply in support of its request for cross-relief shall be captioned "Appellee's Reply in Support of Request for Cross-Relief."

Briefs, pleadings and other documents filed with the Supreme Court in cases covered by this rule shall, to the extent appropriate, conform to Rules 341 through 343. If the brief of appellee contains arguments in support of cross-relief, then the length limitations for cross-appeals in Rule 341(b)(1) shall apply to the briefing in the case.

In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or

appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(i) Child custody cases.

(1) Special caption. A petition for leave to appeal in a child custody or allocation of parental responsibilities or relocation of emancipated minors case, as defined in Rule 311, and any notice, motion, or pleading related thereto, shall include the following statement in bold type on the top of the front page: THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).

(2) Briefs. The requirements of paragraph (h) above shall apply in all respects, except:

(a) the appellant's notice of election shall be due within 7 days after the date on which the leave to appeal was allowed;

(b) if the appellant elects to file an additional brief, it shall be filed within 21 days from the date on which leave to appeal was allowed;

(c) if the appellant has elected to allow the petition for leave to appeal to stand as the brief of the appellant, the appellee's notice of election is due within 7 days of the due date of

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appellant's notice of election, or if the appellant has elected to file an add itional brief, the appellee's notice of election is due within 7 days after the due date of appellant's brief;

(d) if the appellee elects to file an additional brief, it shall be filed within 21 days of the due date of appellant's notice of election to let the petition for leave to appeal stand as the brief of the appellant, or if the appellant elected to file an additional brief, the appellee's additional brief shall be filed within 21 days of the due date of appellant's brief;

(e) if the appellee has elected to file an additional brief, the appellant's reply brief shall be due within 7 days of the due date of the appellee's brief; and (f) if cross-relief was requested, appellee's reply brief shall be due within 7 days of the due date of the appellant's reply brief.

(3) Extensions of Time Disfavored. Requests for extensions of time are disfavored and shall be granted only for compelling circumstances.

(j) Delinquent minor cases.

(1) Special Caption. A petition for leave to appeal in a delinquent minor case, as provided for in Rule 660A, and any notice, motion, or pleadings related thereto, shall include the following statement in bold type on the top of the front page: THIS APPEAL INVOLVES A DELINQUENT MINOR PROCEEDING UNDER THE JUVENILE COURT ACT.

(2) Briefs. The requirements of paragraph (h) above shall apply in all respects, except:

(a) the appellant's notice of election shall be due within 7 days after the date on which the leave to appeal was allowed;

(b) if the appellant elects to file an additional brief, it shall be filed within 28 days from the date on which leave to appeal was allowed;

(c) if the appellant has elected to allow the petition for leave to appeal to stand as the brief of the appellant, the appellee's notice of election is due within 7 days of the due date of the appellant's notice of election, or if the appellant has elected to file an additional brief, the appellee's notice of election is due within 7 days after the due date of the appellant's brief;

(d) if the appellee elects to file an additional brief, it shall be filed within 28 days of the due date of the appellant's notice of election to let the petition for leave to appeal stand as brief of appellant, or if the appellant elected to file an additional brief, the appellee's additional brief shall be filed within 28 days of the due date of the appellant's brief;

(e) if the appellee has elected to file an additional brief, the appellant's reply brief shall be due within 7 days of the due date of the appellee's brief; and (f) if cross-relief was requested, the appellee's reply brief shall be due within 7 days of the due date of the appellant's reply brief.

(3) Extensions of Time Disfavored. Requests for extensions of time are disfavored and shall be granted only for compelling circumstances.

(k) Pretrial release cases.

Unofficial text; verify against the official source before filing.

(1) Special caption. A petition for leave to appeal in a pretrial release case under article 110 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-1 et seq.), and any notice, motion, or pleading related thereto, shall include the following statement in bold type on the top of the front page: THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 604(h).

(2) Briefs. The requirements of paragraph (h) above shall apply in all respects, except:

(a) the appellant's notice of election shall be due within 7 days after the date on which the leave to appeal was allowed;

(b) if the appellant elects to file an additional brief, it shall be filed within 21 days from the date on which leave to appeal was allowed;

(c) if the appellant has elected to allow the petition for leave to appeal to stand as the brief of the appellant, the appellee's notice of election is due within 7 days of the due date of appellant's notice of election, or if the appellant has elected to file an additional brief, the appellee's notice of election is due within 7 days after the due date of appellant's brief;

(d) if the appellee elects to file an additional brief, it shall be filed within 21 days of the due date of appellant's notice of election to let the petition for leave to appeal stand as the brief of the appellant, or if the appellant elected to file an additional brief, the appellee's additional brief shall be filed within 21 days of the due date of appellant's brief;

(e) if the appellee has elected to file an additional brief, the appellant's reply brief shall be due within 7 days of the due date of the appellee's brief; and (f) if cross-relief was requested, appellee's reply brief shall be due within 7 days of the due date of the appellant's reply brief.

(3) Extensions of Time Disfavored. Requests for extensions of time are disfavored and shall be granted only for compelling circumstances.

(l) Oral Argument. Oral argument may be requested as provided in Rule 352(a).

immediately; amended June 22, 2017, eff. July 1, 2017; amended June 28, 2017, eff. July 1, 2017;

3, 2018, eff. July 1, 2018; amended Sept. 26, 2019, eff. Oct. 1, 2019; amended Sept. 30, 2020, eff. Oct.

1, 2020; amended Sept. 29, 2021, eff. Oct. 1, 2021; amended Dec. 7, 2023, eff. immediately.

Source note: Amended effective November 30, 1972; amended effective September 1, 1974; amended October 1, 1976, effective November 15, 1976; amended September 29, 1978, effective November 1, 1978; amended July 30, 1979, effective October 15, 1979; amended February 19, 1982, effective April 1, 1982; amended May 28, 1982, effective July 1, 1982; amended February 1, 1984, effective February 1, 1984, with Justice Moran dissenting (see Yellow Cab Co. v. Jones (1985), 108 Ill. 2d 330, 342); amended April 27, 1984, effective July 1, 1984; amended February 21, 1986, effective August 1, 1986; amended February 27, 1987, effective April 1, 1987; amended April 7, 1993, effective June 1, 1993; amended December 17, 1993, effective February 1, 1994; amended September 23, 1996, effective immediately; amended September 22, 1997, effective October 1, 1997; amended March 19, 2003, effective May 1, 2003; amended December 5, 2003, effective immediately;

Unofficial text; verify against the official source before filing.

amended October 15, 2004, effective January 1, 2005; amended February 10, 2006, effective July 1, 2006; amended May 24, 2006, effective September 1, 2006; amended August 15, 2006, effective immediately; amended October 2, 2006, effective immediately; amended September 25, 2007, effective October 15, 2007; amended February 26, 2010, effective immediately; amended Mar. 15, 2013, eff. May 1, 2013; amended May 23, 2013, eff. July 1, 2013; amended Dec. 11, 2014, eff. Jan. 1, 2015; amended Mar. 15, 2016, eff. amended Sept. 15, 2017, eff. Nov. 1, 2017; amended Mar. 21, 2018, eff. Apr. 1, 2018; amended Apr.

Changes after 2026-11-01

No change after this date is recorded in the index.