No. 128468

In the

Supreme Court of Illinois

JAMIE LICHTER,

Plaintiff-Appellee,

v.

KIMBERLY PORTER CARROLL, as Special Representative of the Estate of DONALD CHRISTOPHER, deceased,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-20-0828.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 18 L 000696.
The Honorable **John H. Ehrlich**, Judge Presiding.

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLEE JAMIE LICHTER

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ISSUES PRESENTED FOR REVIEW

1. Was the Appellate Court correct in holding that the legislature intended to permit filing under 735 ILCS 5/13-209(b)(2) when no letters of office had been filed and/or a personal representative was already appointed to facilitate litigation and reduce costs?
2. Was the Appellate Court correct in holding Section 13-209(b)(2) could be applied to this case, where Plaintiff met the requirements?
3. Was the Appellate Court correct in holding *Relf v. Shatayeva*, 2013 IL 114925, 998 N.E.2d 18 is distinguishable, where in *Relf* there was a personal representative appointed that prohibited the plaintiff from appointing a special representative?

STATEMENT OF FACTS

On February 27, 2016, Jamie Lichter was injured in a car accident caused by Donald Christopher in a rear-end collision. Prior to filing of the lawsuit December 8, 2017, Plaintiff sent a demand to Donald Christopher's insurance company, but unfortunately no settlement was reached.

On January 19, 2018, Plaintiff filed suit against Donald Christopher. (C13-18). Plaintiff attempted to make service on the following dates:

- February 20, 2018 via Sheriff; (C277)
- March 17, 2018 via Sheriff; (C32, C278)
- March 31, 2018 via Process Server; (C47)

On March 31, 2018, Plaintiff learned that Donald Christopher had died. The Process Server reported "Per Maureen Christopher, (wide) RESIDENT, a brown-haired white female contact approx, over 65 years of age, 5'4"-5'6" tall and weighing 120-140 lbs with glasses; defendant passed away 6/12/17.subject deceased." (C47).

Donald Christopher did not leave an estate. As such on April 23, 2018, Plaintiff filed a Motion to Appoint a Special Representative, non pro tunc, pursuant to 735 ILCS 5/2-1008(b). (C 49-55).

On April 30, 2018, the trial court granted Plaintiff's motion, wherein the order specifically stated: "Plaintiff granted leave to file amended complaint appointing special representative Kimberly Porter-Carroll pursuant to 735 ILCS 5/2-1008(b)." (C 70).

On May 22, 2018, the amended complaint was filed and served on the special representative Kimberly Porter-Carroll – the representative. (C 75-79). On May 23, 2018, Special Representative Kimberly Porter-Carroll signed a "NOTICE AND

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT". (C 80-81).

On August 22, 2018, Plaintiff sent a copy of the complaint and order of the Court for Defendant's insurance company to appear. (C 271).

Because no one continued to appear on behalf of the Defendant, the Court considered default. Entering of default was continued on various dates (August 20, September 24, 2018, October 15, 2018, and December 11, 2018), with the trial court extending the time for which Defendant to appear or otherwise plead. (C 85, C 86, C 87, C88).

On January 4, 2019, Defense Counsel for Donald Christopher's insurance company, appeared on behalf of Defendants. (C 97-C 99).

Since coming into the case, Defendant, represented by the insurance company's counsel, participated in the case, including the following:

- Answered the Complaint (C94-C96)
- Served Plaintiff with Discovery (C120)
- Subpoenaed Records (C144-147);
- Filed a Motion for Rule to Show Cause (C139-140)
- Took the deposition of Plaintiff
- Appeared at the deposition of Officer Kenny; and
- Filed a Motion to Dismiss. (C168-191).

Trial was scheduled for April 21, 2020. (C 127). Defense Counsel unequivocally admitted that they waited two years until bringing the Motion to Dismiss in order to prevent curing (C 246).

At no time did Defendant seek to substitute the special representative. Yet on March 3, 2020, Defendant filed a Motion to Dismiss with Prejudice, arguing that a personal representative should have been appointed and not a special representative. (C168—191). Plaintiff filed a response. (C 248-279). Due to the pandemic, no hearing took place.

On June 4, 2020, the court granted the Motion to Dismiss, but the court's opinion was not circulated to counsels for both parties until July 16, 2020. (C 297—305).

On July 22, 2020, Plaintiff sought leave to file a late notice of appeal. (C 309-325). The First District Court granted Plaintiff's request for filing a late notice of appeal on July 29, 2020. (C 308).

On March 31, 2022, the First District Court reversed the Trial Court. (A1-16). The First District held that the court's decision dismissing the personal-injury claim was not proper because no defect in the naming of the special representative was found that would warrant dismissal of the case, as no estate had been opened in decedent's name; no letters of office had been issued; no personal representative had been named; and plaintiff was thus well within her rights to elect the option of moving the court presiding over the lawsuit to appoint a special representative under 735 ILCS 5/13-209(b)(2). *Lichter v. Carroll*, 2022 IL App (1st) 200828 (A1-A17)

On June 6, 2022, Defendant filed a petition for leave to appeal to the Illinois Supreme Court.

On September 28, 2022, the Illinois Supreme Court granted Defendant's petition.

On November 2, 2022, Appellant-Defendant filed its Supplemental Brief filed Following Acceptance of Petition for Leave to Appeal Pursuant to IL. Sup. Ct. R. 315.

ARGUMENT

I. The Appellate Court correctly held that the legislature intended to permit filing under 735 ILCS 5/13-209(b)(2) when no letters of office had been filed and/or a personal representative was already appointed to facilitate litigation and reduce costs.

When construing a statute, the court's primary objective is to ascertain and give effect to the legislature's intent. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶ 24, 129 N.E.3d 1197, 1204 (A143-153). The rules of statutory construction which require amendments to be construed together with the original acts, and require that provisions of amendatory and amended acts be harmonized, if possible, so as to give effect to each and leave no clause of either inoperative. *People ex rel. Mathes v. Foster,* 67 Ill. 2d 496, 502, 367 N.E.2d 1320, 1323 (1977).

Looking at 735 ILCS 5/13-209 as a whole, the legislature provided rules on appointments of legal representative where there is a death of a party. Section 209(a) applies where there is a death of the Plaintiff. Section 209(b) applies where there is a death of the Defendant. Section 209(c) applies where there is death of the Defendant unknown to the Plaintiff and a personal representative was already appointed (like in *Relf*).

Section 13-209 was amended in 1997. Attached in Appendix page A76 is the Statute for 1996, and in Appendix page A77 is the Statute as Amended in 1997. This amendment provided relief to Plaintiff's bar, by providing an alternative to probate – eliminating the time and expense of opening a probate estate. At the same time, the amendment specifically also provided relief to the Defense, restricting recovery to the limits of insurance proceeds.

In 1997, the legislature amended to include the following:

> (b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:
> (1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;
>
> (2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

That same year, the legislature also amended 735 ILCS 5/2-1008. Attached in Appendix page A78 is the Statute for 1996, and in Appendix page A79 is the Statute as Amended in 1997. According to the Amendment Notes, "[t]he 1997 amendment by P.A. 90-111, effective July 14, 1997, in subsection (b), in the introductory language, added "as follows" at the end; added subdivisions (b)(1) and (b)(2); and in subsection (b) deleted the third and fourth paragraphs regarding the appointment of an administrator by the court." The language of 2-1008 tracks that of 13-209:

> (b) *Death.* If a party to an action dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion as follows…
>
> (2) If a person against whom an action has been brought dies, and the cause of action survives and is not otherwise barred, his or her personal representative shall be substituted as a party. If no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person bringing an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

The legislature's amendments to Section 2-1008(b)(2) and Section 13/209(b)(2) are consistent and show clear intent to provide the option for Plaintiff to appoint a special representative, where a personal representative was not already appointed.

Attached to this Response is the March 13, 1997 Debate before the House of Representative on HB297. As explained by Representative Lang on March 13, 1997:

> Thank you, Mr. Speaker, Ladies and Gentlemen. House Bill 297 is a Bill that came to us from the probate division of the Circuit Court of Cook County. This would amend the Illinois Code of Civil procedure by allowing the court to appoint a special representative to replace a decedent to prosecute a cause of action under a given set of circumstances. There was no opposition to this in committee, in fact I think it went out on the Attendance Roll Call, and I would ask your support….
>
> This would allow a judge to substitute a special representative if either party dies while the case is pending in court. Because of that no one would have to go to the probate court, this would allow the judge in a civil case to appoint such a special representative…
>
> This has nothing to do with who the decedent wants, because this is not a probate matter. This covers the situation where someone in litigation, a party, dies during the case, and all the parties then want to continue to proceed with the case. Rather than open a probate estate and cost a lot of time, of attorneys and fees and costs, this would enable the court to appoint someone so that this civil case could continue. (A66-A67).

Also attached is the transcript of the presentation of HB297 and questioning of the Bill's sponsors, the ISBA and Representative Lang before the House Judiciary Committee. (A192-193). The affidavit of Attorney John R. Wienold, who obtained the audio from the House of Representatives Clerk, Tina Pierce, and had it transcribed is a part of the appendix attached hereto. (A194-194).

Charles Winkler, who presented and explained the amendment adding, for the first time, the option to appoint a special representative for the deceased in order to avoid probate and protect all interested parties at the same time. Mr. Winkler made it crystal clear that the legislative purpose of the Bill was to allow the trial court to appoint a special

representative to defend the action while not requiring a probate estate to be opened, so long as letters of office had not been issued. Mr. Winkler specifically addressed the fact situation in *Relf* where, a probate estate had already been opened and a personal representative had already been appointed. If a personal representative was already there, he explained, "Well simply this, you wouldn't need to use this [HB297 adding the special representative provision] if there was somebody in probate appointed. You just go ahead and serve [sue] that person so that person could commence the case."

Mr. Winkler then explained that when a defendant has died, like in *Lichter*, no estate has been opened, and the action against the decedent survives, like here, the amendment provides that without opening an estate in probate, the action can proceed against the special representative. Plaintiff herein strongly suggests that explanation of the sponsors of the Bill and the legislature's unanimous approval of the Bill as explained, should be given strong consideration as evidence of legislative intent in support of the plaintiff herein. The factual and procedural situation herein is precisely what the legislation intended in adopting the special representative amendment thereby allowing Plaintiff to do exactly what he did.

This Court has consistently held that the legislative intent has expressed by the sponsors and proponents of a bill in debates and hearings are strong and valuable aids which should be used to avoid absurd, impractical, and unjust results. (see *Avincula v. United Blood Services*, 176 Ill. 2d 1, 19; *Nowak v. City of Country Club Hills*, 2011 IL 111832 (2011) at ¶ 14-16; *Richards v. Vaca*, 2021 IL App. (2d) 210 at ¶ 10). To hold that the plaintiff herein was required to go to the probate court, when the clear intent and language of the amendment was to avoid probate, would truly cause an unjust result and

deprive the plaintiff of his day in court and determination of his case on the merits.

The legislative intent was clear, to allow ease of filing and prevent unnecessary costs. The amendment was not intended to be used by Defense Counsel as a shield, as it was done in this case. The purpose is consistent with the principles of our judicial system –that cases are decided on the basis of the substantive rights of the litigants. *Norman A. Koglin Assocs. v. Valenz Oro, Inc.*, 176 Ill. 2d 385, 395, 680 N.E.2d 283, 288 (1997)

II. The Appellate Court correctly held Section 13-209(b)(2) could be applied to this case, where Plaintiff met the requirements.

Appellant argues the option of 209(b)(2) was not available where a Plaintiff filed a case against a Defendant who Plaintiff did not know was deceased. As the Illinois First District Court has articulated in this case, 209(b)(2) does not have limiting instructions. "When the statutory language is plain and unambiguous, the courts may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law." *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶ 24, 129 N.E.3d 1197, 1204 (A143-153)

A. The First and Second District have found that the intent of the legislature was to give broad application to Section 209(b)(2).

In the Second District's case *Richards v. Vaca*, 2021 IL App (2d) 210270, ¶ 1 (A136-142), the 2nd District Court of Appeals found that 735 ILCS 5/13-209(b)(2) allowed for the appointment of a special representative in a case where plaintiff filed a complaint naming a deceased person as the defendant, even after the running of the limitations period.

In *Richards*, plaintiff filed a complaint against a deceased Defendant. After the statute of limitations, plaintiff sought leave to appoint a special representative under 209(b)(2). The Second District stated that a trial court may appoint a special representative

after the expiration of the applicable limitations period, "If no estate is opened, subsection (b)(2) sets forth a procedure where the trial court can appoint someone, a special representative instead of having to require a probate appointed personal representative… Regardless, of whether §13-209(b)(2) alters the timeframe during which an action may be instituted, it provides for appointment of a special representative, *which allows a plaintiff to proceed against a deceased defendant.*" (Emphasis added). *Richards v Vaca*, at ¶ 18. The court held that "The legislature did not allow for a special representative to be appointed to do nothing …Given the subject matter of the rest of the statute, *it is obvious that the special representative exists to defend a lawsuit*. See *Land v. Board of Educ.*, 202 Ill. 2d at 422, 269 Ill. Dec 452, 781 N.E.2d 249 (A80-95) (Holding that parts of a statute must be read *in pari materia*)." (Emphasis added). *Richards*, at ¶ 15.

Significantly, in *Richards*, the court recognized what plaintiff asserts herein: that Section 13-209 is ambiguous. Thus, it would make sense to look to what the legislature intended when the HB 297 amendment adding the provision for appointment of a special representative was unanimously adopted and signed into law. As set forth herein, it grants the trial court the power to appoint a special representative to defend (or prosecute) an action where the party is deceased, the action survives, and no letters of office have issued. The tort and probate sections of the ISBA jointly proposed the amendment to address the issue of what happens when a person, who can sue or be sued, dies. The overriding consideration of those two sections of the bar, working together, was to make it easier, more predictable for litigants to start, and hopefully finish, the process without having to go to probate court if they do not want to.

If there is an ambiguity in the statute, it should be resolved in favor of allowing the parties to have their day in court, avoid probate and avoid an unintended or unjust result. *Richards v Vaca*, at ¶ 21.

B. There is no dispute that Plaintiff complied with 2-209(b)(2). Any argument to the contrary was waived.

Similarly, it was appropriate for a special representative to be appointed in this matter. The only distinction between *Richards* and *Lichter* is that in *Lichter*, plaintiff was unaware of the death of the Defendant. But the procedure was the same – where Plaintiff appointed the special representative after the filing of the lawsuit.

The conditions of 13-209(b)(2) are met when (1) the person died before the expiration of the statute of limitations, (2) the cause of action survived and is not otherwise barred; and (3) no letters of office had been filed. The First District Court found Appellee in this case met all three elements of 13-209(b)(2). The First District Court held "the actions plaintiff took squarely tracked the language of paragraph (2) of subsection (b)."

Moreover, the First District Court held that:

> It is undisputed that the "person against whom an action may be brought"—Christopher—"die[d] before the expiration of the time limited for the commencement thereof." *Id.* §13-209(b). There is no dispute that "the cause of action survive[d]" and as "not otherwise barred." *Id.* The opening provisions of subsection (b) were clearly satisfied. ¶ 25 As for subsection (b)(2), it is likewise undisputed that "no petition ha[d] been filed for letters of office for the deceased's estate." *Id.* § 13-209(b)(2). Thus, "upon the motion of a person entitled to bring [the] action"—plaintiff—the trial court properly "appoint[ed] a special representative for the deceased party for the purposes of defending the action." *Id.*

As the First District found Defendant did not once argue that Plaintiff did not comply with 209(b)(2). Defendant's argument instead was that 209(c) applied. In its Petition for Leave to Appeal before this Court, Defendant for the first time argued Plaintiff

did not comply with 209(b)(2) because, "There was no notice given here to Donald Christopher's legatees when Plaintiff appointed her legal counsel's employee as special administrator." Parties may not raise arguments for the first time on appeal. *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 429, 764 N.E.2d 35, 41 (2002)(the Supreme Court rejected arguments raised for the first time on a Petition for Leave to Appeal).

Furthermore, and as articulated in Plaintiff's Reply before the First District, Defendant was represented by its own Counsel. Defendant's rights were protected. Under 209(b)(2), Plaintiff's claim is limited to insurance proceeds. On January 4, 2019, Defense Counsel for Donald Christopher's insurance company, appeared on behalf of Defendants. (C 97-C 99).

Since coming into the case, Defendant, represented by the insurance company's counsel, participated in the case, including the following:

- Answered the Complaint (C94-C96)
- Served Plaintiff with Discovery (C120)
- Subpoenaed Records (C144-147)
- Filed a Motion for Rule to Show Cause (C139-140)
- Took the deposition of Plaintiff
- Appeared at the deposition of Officer Kenny; and
- Filed a Motion to Dismiss. (C168-191).

Trial was scheduled for April 21, 2020. (C 127).

Defense Counsel stated in no uncertain terms that they knowingly waited and objected to the special representative after the two-year statute in Section 13-209(c) had

expired. (C279). Defense Counsel purposefully wasted the judiciary's time and resources in litigating a case, knowing full well it would pursue a form over substance victory.

As the trial court recognized:

> [Defendant] State Farm is not an entirely innocent party in this controversy. It is not lost on this court that State Farm took the appellate court's adverse opinion in *Relf* to the Supreme Court and obtained a reversal. Armed with its knowledge of section 13-209, State Farm's attorney could have telephoned the plaintiffs' attorney within the two-year window afforded by section 13- 209(c)(4), cleared up the error, and gotten this case onto the proper procedural track. (C305).

Defendant's conduct is the very definition of "unclean hands." The doctrine of unclean hands precludes a party who has been guilty of misconduct, fraud or bad faith, connected to the matter in the litigation, from receiving any relief from a court of equity. *O'Brien v. Cacciatore*, 227 Ill. App. 3d 836, 846 (1st Dist. 1992). To determine whether a party acted with unclean hands, the court must look to the intent of that party. *Thomson Learning, Inc. v. Olympia Properties, LLC*, 365 Ill. App. 3d 621, 634 (2nd Dist. 2006).

It has been held that a court should "not condone the gamesmanship utilized by contemnors in their effort to gain an advantage for their client." *People v. Buckley*, 164 Ill. App. 3d 407, 414 (2nd Dist. 1987). The judicial process should promote truth-seeking in the courts, rather than gamesmanship, "to protect the integrity of the judicial system." *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 19 (1st Dist March 23, 2012)(A175-191).

Moreover, Defendant, through its own counsel, submitted to the jurisdiction. A party can submit to subject-matter jurisdiction through actively participating, without objection. It is referred to as the revestment doctrine. *Lowenthal v. McDonald*, 367 Ill. App. 3d 919, 924-25 (1st Dist. 2006). The revestment doctrine applies when (1) the parties actively participate in proceedings, without objection, and (2) the proceedings are inconsistent with the merits of the prior judgment … *Lowenthal v. McDonald*, 367 Ill. App.

3d 919, 924-25 (1st Dist. 2006). In *People v. Montiel*, 365 Ill. App. 3d 601, 605, 851 N.E.2d 725 (2006), this court held that "it is not *consent* but *active participation* that revests jurisdiction." Defendant did actively participate in this case, after an order appointing Plaintiff as special representative. This active participation revested the case.

According to the Rules of Professional Conduct, "a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service." (Article III, Illinois Rules of Professional Conduct - Preamble, Number 7). A lawyer must not "engage in conduct that is prejudicial to the administration of justice." (Article III, Illinois Rules of Professional Conduct, Section 8.4(d)).

However, in this case, Defendant did not seek to litigate on the merits and basis of evidence. Instead, Defendant knowingly waited, inappropriately creating costs and utilizing the resources of the court. That is not justice, but tactical gamesmanship. The court, the parties and the profession are not served by rewarding such behavior.

III. The Appellate Court correctly held *Relf v. Shatayeva*, 2013 IL 114925, 998 N.E.2d 18 (A112-135) is distinguishable, where in *Relf* there was a personal representative appointed that prohibited the plaintiff from appointing a special representative.

Citing *Relf v. Shatayeva*, 2013 IL 114925, ¶ 34, 998 N.E.2d 18, Defendant argues that Plaintiff was required to serve the personal representative under 209(c), where one had not been appointed. However, if you look at the plain language of 209(c), 209(c) has very limited application.

> (c) If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the

> commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:
>
> (1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.
>
> (2) The party proceeds with reasonable diligence to serve process upon the personal representative.
>
> (3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.
>
> (4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.

The legislature requires that "all … terms and conditions are met". These include that there must have been letters of office and an appointed personal representative. It predisposes that an estate had already been open for the deceased, and letters of office had been issued. The 1997 amendment, however, did not impact those cases where a deceased Defendant already had in place a Personal Representative.

Relf is fact specific, and distinguishable. The facts are as follows:

Plaintiff was involved in a car accident in February 2008. In February of 2010, just as the two-year statute of limitations for personal injury actions was about to expire, plaintiff filed an action against Mr. Grand Pre. Mr. Grand Pre was the sole defendant named in the complaint.

At the time the complaint was filed, however, Mr. Grand Pre was actually deceased. He had passed away on April 25, 2008, shortly after the accident. The record shows that a paid death notice giving the circumstances of Mr. Grand Pre's death was published in the Chicago Tribune on April 30, 2008. The record further shows that probate proceedings involving his estate were initiated in the circuit court of Cook County in August of 2008.

Mr. Grand Pre's will was admitted to probate in September of 2008 and, at the same time, letters of office were issued to his son, Gary, to serve as independent administrator of Mr. Grand Pre's estate. These were all matters of public record.

After the complaint was filed in February 2010, the sheriff failed to effectuate service of process on Mr. Grand Pre, who was dead. Still not realizing that Mr. Grand Pre was deceased, plaintiff then sought and was granted leave to have a special process server appointed to attempt service on him. The special process server discovered that Mr. Grand Pre was no longer living and conveyed that information to plaintiff on May 17, 2010.

On September 24, 2010, plaintiff asked the court to take notice of Mr. Grand Pre's death, to appoint a "special administrator" for the purposes of defending plaintiff's action against him, and to grant plaintiff leave to file an amended complaint. Plaintiff proposed that Natasha Shatayeva, an employee/legal assistant of her lawyer, be appointed to serve "as the Special Administrator of the Estate of Mr. Grand Pre, deceased." Shatayeva was the attorney's secretary. The Motion was granted.

Defendant filed a Motion to Dismiss, under 735 ILC 5/2-619 and 735 ILCS 5/13-209. The trial court granted the Motion, which was upheld by the Supreme Court. The difference between subsection (b)(2) and (c) is based on whether letters of office had been issued prior to the filing of the case. Where letters of office have been filed, a personal representative is appointed under subsection (c). Where letters of office have not been filed, a special representative is appointed under subsection (b)(2).

As the Supreme Court held: "'Special representatives' are referenced only with respect to situations where 'no petition for letters of office for the decedent's estate has been filed.' … In all other situations, which by inference must be whenever petitions for

letters of office *have* been filed, the statute refers to 'representatives' or 'personal representatives.'" *Relf v. Shatayeva*, 2013 IL 114925, ¶ 34, 998 N.E.2d 18

The Court held that plaintiff could have appointed a represented under (b)(1) or (b)(2). However, the Court held subsection (b) could not apply. The Court held an action could not be brought under (b)(1), because it was long past six months of Grand Pre's death. The Court held that letters of office had been enter, prohibiting a case being brought under (b)(2).

> In this case, a petition for letters of office for Mr. Grand Pre's estate had been filed and a personal representative, Mr. Grand Pre's son, Gary, had been appointed by the circuit. As between the foregoing provisions, section 13-209(b)(1) rather than section 13-209(b)(2) was therefore the relevant provision. Under that statute, plaintiff could have preserved her claims arising from the collision involving Mr. Grand Pre, had she known of Grand Pre's death, by bringing the action against the personal representative appointed by the court in the probate proceeding and doing so within six months of Mr. Grand Pre's death. But plaintiff did neither of those things. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 15, 998 N.E.2d 18

The Court in *Relf* held that subsection (c) applied in *Relf*, because letters of office had been issued at the time that Plaintiff had commence the action. The Court specifically held in its conclusion:

> [W]e hold that plaintiff's substitution of her lawyer's secretary as "special administrator" in place of Mr. Grand Pre following expiration of the statute of limitations did not operate to preserve her otherwise invalid cause of action against him. Because an estate had already been opened for Mr. Grand Pre and letters of office had issued to his executor, section 13-209(c) required that plaintiff commence the action against the executor, as Mr. Grand Pre's "personal representative," upon learning of Mr. Grand Pre's death. …. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 60, 998 N.E.2d 18

Unlike *Relf*, no probate had been open prior to the filing of the lawsuit by the family. There were no letters of office filed. Because no letters were issued, it was proper for a special representative to be named under 13-209(b)(2). Any additional commentary on the matter was *Obiter dictum* not essential to the outcome of the case, is not an integral part of

the opinion, and is generally not binding authority or precedent within the *stare decisis* rule making *Relf* inapplicable to these facts. *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 277, 334 Ill. Dec. 824, 917 N.E.2d 899 (2009)

Since, in the instant case, a probate estate had not been opened and a personal representative had not been appointed, the plaintiff was well within his rights to elect to have the trial court appoint a special representative under 209(b)(2) to defend. Since no personal representative existed, the facts herein align perfectly with the language and legislative intent of 209(b)(2) allowing the plaintiff to avoid probate and proceed against the special representative in the trial court. Therefore, *Relf* is inapplicable because a personal representative had already been appointed and a special representative was therefore unnecessary. The Appellate Court correctly interpreted and applied §209(b)(2). Its decision should be affirmed.

CONCLUSION

For reasons stated herein Appellee-Plaintiff respectfully requests that this Honorable Court affirm the First District Appellate Court, and/or such other relief as may be deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney for the Plaintiff-Appellee, Jamie Lichter, hereby certified that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in Rule 341(d) cover, the 341(h)(1) table of contacts and statements of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under 342(a) is nineteen (19) pages.

/s/ Yao O. Dinizulu
Yao O. Dinizulu

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2022 IL App (1st) 200828

THIRD DIVISION
March 31, 2022

No. 1-20-0828

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMIE LICHTER, Plaintiff-Appellant, v. KIMBERLY PORTER CARROLL as Special Representative of the Estate of Donald Christopher, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. 18 L 696 Honorable John H. Ehrlich Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Burke concurred in the judgment and opinion.

OPINION

¶ 1 Approximately two years after a car accident, plaintiff Jamie Lichter filed a personal-injury claim against Donald Christopher. At the time she filed the complaint, plaintiff did not know that Christopher had died. After learning of his death, she filed a motion to appoint a special representative for Christopher's estate to defend the lawsuit.

¶ 2 Two years into the lawsuit, the special representative moved to dismiss the action, claiming that state law required plaintiff to sue Christopher's *personal* representative, not his *special* representative. And since the repose period for suing his personal representative had passed, the case was time-barred. The circuit court reluctantly agreed and dismissed the action,

believing that the disposition was controlled by the decision of our supreme court in *Relf v. Shatayeva*, 2013 IL 114925. We find *Relf* distinguishable and hold that plaintiff sued the correct party. We reverse the dismissal of the action and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On February 27, 2016, the vehicle Donald Christopher was driving rear-ended the vehicle of Jamie Lichter "with great force" while he was trying to merge onto Interstate 294. On January 19, 2018, she filed a personal-injury suit against Christopher, within the two-year limitations period for a personal-injury suit. See 735 ILCS 5/13-202 (West 2016) (action for personal injury must be filed "within 2 years next after the cause of action accrued"); *Doe v. Hastert*, 2019 IL App (2d) 180250, ¶ 28.

¶ 5 Unbeknownst to plaintiff, Christopher had died in June 2017, about fifteen months after the accident and before the lawsuit was filed. No letters of office were ever issued to open an estate on Christopher's behalf.

¶ 6 In April 2018, plaintiff moved the trial court to appoint a special representative, namely Kimberly Porter-Carroll, to defend the action on Christopher's behalf. Plaintiff indicated in her motion that her investigation revealed that an estate had not been opened for Christopher. The court granted the motion, appointing Porter-Carroll as special representative to replace Christopher as defendant. Ultimately, an attorney for Christopher's insurer, State Farm, entered an appearance on behalf of the special representative.

¶ 7 Over the next two years of litigation, the parties engaged in written and oral discovery, including at least two depositions. A trial was scheduled for April 2020, though it was then postponed indefinitely due to the COVID-19 pandemic.

¶ 8 In early March 2020, however, defendant moved to dismiss the complaint with prejudice. Defendant argued that, under section 13-209 of the Code of Civil Procedure, plaintiff had been required to sue the *personal* representative of Christopher's estate, not a *special* representative. See 735 ILCS 5/13-209 (West 2016). And because suits against personal representatives must be filed no later than two years after the running of the limitations period (*id.* § 13-209(c)(4)), and the two-year anniversary of the expiration of the limitations period was February 27, 2020, it was now too late, in March 2020, to cure the mistake; the suit was incurably time-barred.

¶ 9 Plaintiff responded that she properly sued a special representative; that any error was a misnomer subject to cure; that she should be permitted to amend the complaint and relate it back to the timely-filed complaint; and that defendant engaged in gamesmanship and should not be rewarded for sitting on its hands for two years' worth of litigation, only to seek dismissal after two years beyond the limitations period had come and gone.

¶ 10 The circuit court was sympathetic, noting that "State Farm is not an entirely innocent party in this controversy," as State Farm had litigated the *Relf* decision and knew it well, but sat back and waited until two years had run beyond the limitations period before moving to dismiss. Noting that the law did not require "professional courtesy," however, the court agreed with State Farm that *Relf* controlled the disposition. Though the court found the discussion in *Relf* to be "questionable" insofar as it applied to the facts of this case, it ultimately concluded that *Relf*'s reasoning precluded any outcome other than dismissal.

¶ 11 While the court issued its dismissal on June 4, 2020, it was not circulated to the parties until June 16, 2020, after the 30-day limit to appeal. We granted leave to file a late notice of appeal.

¶ 12 ANALYSIS

¶ 13 This appeal requires us to construe subsections (b) and (c) of section 13-209 of the Code of Civil Procedure, which govern the procedure when a defendant or potential defendant dies before the expiration of the applicable limitations period. See *id.* § 13-209(b), (c). It is a question of law we review *de novo*, owing no deference to the trial court's interpretation of the statute. *Relf*, 2013 IL 114925, ¶ 21.

¶ 14 Before we examine the details of the language, we provide some context. As the supreme court explained in *Relf*, section 13-209 addresses two different types of representatives that may be appointed in the stead of a deceased defendant. One is a "personal representative," who is appointed after an estate is opened in a probate action and letters of office are issued naming that personal representative. See *id.* ¶¶ 34-38. The term "personal representative" can be broken down further into two categories—executors named in the decedent's will, or administrators, appointed when the decedent died without a will or without a surviving executor—but they all share the common trait of requiring the issuance of letters of office. *Id.* ¶ 33. Section 13-209 uses the umbrella term "personal representative." *Id.* ¶ 33.

¶ 15 Then there are "special representatives." A special representative is not appointed for the purpose of settling an estate writ large; a special representative, as the term suggests, is appointed for the limited purpose of representing the decedent's estate in a particular proceeding where no personal representative has been named. *Id.* ¶ 34. That last detail is important—a special representative is named only when an estate has not been opened, no letters of office have been issued, and no personal representative has been named. *Id.* Were it otherwise, the special representative's role would be redundant; she would be performing the same function—representing the estate—as the personal representative. *Id.* ¶ 54. The terms "personal

representative" and "special representative" are thus not interchangeable. *Id.* ¶ 35. They are, in fact, mutually exclusive.

¶ 16 Before 1997, section 13-209 only mentioned "personal representatives." *Id.*; see 735 ILCS 5/13-209 (West 1996). Subsection (c) governed the appointment of a personal representative in the specific instance when the plaintiff did not discover the defendant's death until after the limitations period had run. *Relf*, 2013 IL 114925, ¶ 27; 735 ILCS 5/13-209(c) (West 1996). Subsection (b) covered the situation where the plaintiff knew of the defendant's death before filing suit or, at a minimum, before the limitations period expired. *Relf*, 2013 IL 114925, ¶ 27; 735 ILCS 5/13-209(b) (West 1996).

¶ 17 Though subsections (b) and (c) differed in some respects, generally speaking, if a defendant died before the limitations period expired, the plaintiff was required to name the personal representative as a defendant in the stead of the deceased individual defendant. *Relf*, 2013 IL 114925, ¶ 35. If an estate had been opened, that task would be simple enough; the plaintiff would identify the estate's personal representative through court records and name that personal representative in the lawsuit. *Id.* ¶ 56. If, however, an estate had *not* been opened, and thus no personal representative had been named, the plaintiff would be required to open the estate *herself* under the Probate Act of 1975, seeking the appointment of a personal representative to defend the estate in the lawsuit. See, *e.g.*, 755 ILCS 5/9-3(i), (j), 13-1 (West 2016).

¶ 18 In 1997, the General Assembly amended section 13-209, providing a more efficient and streamlined option for plaintiffs in the event that no letters of office had been issued and, thus, no personal representative had been named for the deceased defendant. Rather than requiring that a plaintiff file a probate action to open the estate and have a *personal* representative appointed to

represent the interests of the deceased defendant, the plaintiff could simply move the court presiding over the lawsuit to appoint a "special representative" for the limited purpose of defending that lawsuit only. *Relf*, 2013 IL 114925, ¶ 35; see Pub. Act 90-111, § 5 (eff. July 14, 1997) (amending 735 ILCS 5/13-209). The sponsor of the 1997 amendment explained that the purpose was to avoid the additional time and cost of opening a probate action just to litigate a single lawsuit: "[N]o one would have to go to probate court, this would allow the judge in a civil case to appoint such a representative." 90th Ill. Gen. Assem., House Proceedings, Mar. 13, 1997, at 49 (statements of Rep. Lang). "Rather than open a probate estate and expend a lot of time, attorney fees, and costs, this would enable the court to appoint someone so that this civil case could continue." Ill. Gen. Assem., House Proceedings, Mar. 13, 1997, at 50 (statements of Rep. Lang).

¶ 19 This 1997 amendment was placed into a new paragraph (2) of subsection (b) of section 13-209. See Pub. Act 90-111, § 5 (eff. July 14, 1997) (amending 735 ILCS 5/13-209). So whereas section 13-209 previously had provided for two different scenarios in which a personal representative could be appointed—one in subsection (b) and one in subsection (c)—the amendment provided for the two different circumstances in which a *personal* representative could be appointed in subsections (b)(1) and (c), with the option of a *special* representative now provided for in subsection (b)(2). *Id.*; see 735 ILCS 5/13-209 (West 1998).

¶ 20 With that background in mind, we consider subsection (b) of the statute, with the reminder that plaintiff argues that this action is governed by subsection (b)(2):

> "(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;

(2) *if no petition has been filed for letters of office for the deceased's estate*, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs *and without opening an estate*, may appoint a *special representative* for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims." (Emphases added.) 735 ILCS 5/13-209(b) (West 2016).

¶ 21 Plaintiff finds subsection (b)(2) applicable because no petition for letters of office was ever filed for Christopher's estate, and thus it was proper for the court, on plaintiff's motion, to appoint a "special representative." *Id.* § 13-209(b)(2).

¶ 22 Defendant, on the other hand, argues that the matter falls within the purview of subsection (c), which reads as follows:

"(c) If a party commences an action against a deceased person *whose death is unknown to the party before the expiration of the time limited for the commencement thereof*, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's *personal representative* if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." (Emphases added.) *Id.* § 13-209(c).

¶ 23 Defendant's argument is that plaintiff did not know of Christopher's death until after the expiration of the limitations period—that much is undisputed—and thus she was required to sue a *personal* representative, not a special representative, of Christopher's estate, per subsection (c). And because paragraph 4 of subsection (c) contains a repose period, providing that in no event may a personal representative be sued more than two years after the expiration of the limitations period (*id.* § 13-209(c)(4)), plaintiff's action was subject to dismissal on February 28, 2020, two years after the limitations period expired. Thus, when defendant moved for dismissal in March 2020, dismissal with prejudice was the only recourse.

¶ 24 We first note that the actions plaintiff took squarely tracked the language of paragraph (2) of subsection (b). It is undisputed that the "person against whom an action may be brought"—Christopher—"die[d] before the expiration of the time limited for the commencement

thereof." *Id.* §13-209(b). There is no dispute that "the cause of action survive[d]" and was "not otherwise barred." *Id.* The opening provisions of subsection (b) were clearly satisfied.

¶ 25 As for subsection (b)(2), it is likewise undisputed that "no petition ha[d] been filed for letters of office for the deceased's estate." *Id.* § 13-209(b)(2). Thus, "upon the motion of a person entitled to bring [the] action"—plaintiff—the trial court properly "appoint[ed] a special representative for the deceased party for the purposes of defending the action." *Id.*

¶ 26 Defendant at no time disputes that plaintiff's actions complied with subsection (b)(2). Instead, defendant argues, not without support, that subsection (c) was plaintiff's exclusive remedy because the opening language of subsection (c) more specifically applies. That is, subsection (c) applies when "a party commences an action against a deceased person *whose death is unknown to the party before the expiration of the time limited for the commencement thereof*." (Emphasis added.) *Id.* § 13-209(c).

¶ 27 It is, indeed, undisputed that plaintiff did not learn of Christopher's death until after the expiration of the limitations period. In defendant's view, then, plaintiff's exclusive recourse was to follow the dictates of subsection (c), which provides that "the action may be commenced against the deceased person's *personal* representative" if certain criteria are satisfied. (Emphasis added.) *Id.* And plaintiff did not meet the last of those criteria—she did not sue the personal representative within two years of the running of the limitations period. *Id.* § 13-209(c)(4).

¶ 28 But nothing in the language of subsection (c) suggests that a plaintiff must name the *personal representative* when the option of appointing a special representative is available under subsection (b)(2)—that is, when no estate has been opened and no personal representative has yet been named. We read subsection (c) as differing from subsection (b)(1), based on the timing

of when the plaintiff discovered the defendant's death. We do not read subsection (c) as having any bearing on the effect of subsection (b)(2), which stands separate and apart.

¶ 29 Defendant's argument is based on language in *Relf*, 2013 IL 114925, which the trial court found controlling, too. We turn to that decision now.

¶ 30 Relf was injured in a car accident and sued the decedent to recover damages for personal injuries she suffered. *Id.* ¶ 1. She was unaware that the decedent had died, much less that "his will had been admitted to probate, and letters of office had been issued" to the decedent's son to serve as the personal representative of the estate. *Id.* Upon learning of the decedent's death, and without notice to the estate, Relf successfully moved for the appointment of a secretary in her lawyer's office as " 'special administrator' " to defend the lawsuit. *Id.*

¶ 31 The supreme court held that defendant was required to sue the personal representative of the estate—the decedent's son. Relf had argued that a "special administrator" sufficed, but the supreme court noted that the term "special administrator" "is not used anywhere in section 13-209." *Id.* ¶ 42. The court recognized that the term "special *representative*" appeared in section 13-209 and might be considered roughly "equivalent" to a special administrator, but that fact did not assist Relf, as the portions of section 13-209 that concerned the appointment of personal representatives was entirely distinct from those governing special representatives. *Id.* ¶ 35.

¶ 32 Indeed, the court went to great lengths to emphasize that personal and special representatives are not interchangeable. *Id.* Personal representatives are appointed through the issuance of letters of office to settle an estate, while special representatives are appointed for specific purposes when no letters of office have been issued. See, *e.g.*, *id.* ¶ 34 (" 'Special representatives' are referenced only with respect to situations where 'no petition for letters of office for the decedent's estate has been filed.' "); *id.* ¶ 36 ("a 'personal representative' means

one appointed pursuant to a petition for issuance of letters of office"); *id.* ¶ 37 (" 'personal representative' as used in section 13-209 was intended by the legislature to refer specifically to individuals appointed to settle and distribute a decedent's estate pursuant to a petition for issuance of letters of office"); *id.* ¶ 45 ("a 'personal representative' refers specifically to an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office"). The court's discussion of the 1997 amendment that added the appointment of "special representatives" to section 13-209 underscored this point. *Id.* ¶ 35.

¶ 33 Thus, even if Relf were correct that her motion to appoint a "special administrator" were akin to the appointment of a "special representative" under section 13-209, her argument still failed, because Relf had no right to appoint a special representative once letters of office had issued and a personal representative was named. *Id.* ¶ 45. The supreme court explained why the law did not allow the appointment of a special representative once a personal representative had been named pursuant to the issuance of letters of office:

> "Having two separate individuals attempting to operate simultaneously and independently on behalf of the same decedent poses obvious problems for the prompt, efficient and final settlement of the decedent's affairs. Moreover, Illinois law is clear that a testator has the right to designate by will who shall act as his personal representative, and a court may not ignore his directions and appoint someone else to act in that capacity. Where, as here, the testator has designated such a representative, the appointment of another party to serve as special administrator impermissibly infringes on that right and is not allowed." *Id.* ¶ 52.

¶ 34 The lesson we take from *Relf* is that if letters of office have issued, and thus a personal representative is appointed, that personal representative *must* be the party sued by a plaintiff.

Suing a special representative or a "special administrator" (in the case of *Relf*) is insufficient if an estate has been opened, letters of office have issued, and a personal representative is named.

¶ 35 Defendant does not dispute the distinction between a personal representative and a special representative. Defendant points, instead, to the general discussion of section 13-209 at the outset of the supreme court's analysis. In initially breaking down section 13-209, the court wrote:

> "Subsection (b) sets forth the basic procedures and time requirements that must be followed in situations where a person against whom an action may be filed dies before the limitations period runs out, the action survives the person's death, and it is not otherwise barred. If no petition has been filed for letters of office for the decedent's estate, the court may appoint a 'special representative' for the deceased party for the purposes of defending the action. 735 ILCS 5/13-209(b)(2) (West 2010). Otherwise, *i.e.,* if a petition *has* been filed for letters of office for the decedent's estate, an action may be commenced against the "personal representative" appointed by the court. 735 ILCS 5/13-209(b)(1) (West 2010).
>
> *The provisions of section 13-209(b) presuppose that the plaintiff is aware of the defendant's death at the time he or she commences the action. A separate set of requirements apply where, as in this case, the defendant's death is not known to plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff commences the action against the deceased defendant directly. This scenario is governed by section 13-209(c)* [citation]. Assuming that the cause of action survives the defendant's death and is not otherwise barred, section 13-209(c) permits a plaintiff to

> preserve his or her cause of action by substituting the deceased person's 'personal representative' as the defendant." (Emphases in original and added.) *Id.* ¶¶ 26-27.

¶ 36 Focusing on that italicized language, defendant says that subsection (b)(2) cannot apply here, because in the supreme court's own words, subsection (b) "presuppose[s] that the plaintiff is aware of the defendant's death at the time he or she commences the action." *Id.* ¶ 27. And plaintiff here, of course, was *not* aware of Christopher's death until long after she filed suit. Thus, in defendant's view, subsection (b) is inapplicable, leaving only subsection (c)—which requires that a *personal* representative be sued, even if one does not currently exist.

¶ 37 If defendant is right, then *Relf* stands for the proposition that, if a plaintiff does not learn of a defendant's death until after the limitations period has expired, that plaintiff must open an estate, get a personal representative appointed, and sue that personal representative. The new option of suing a special representative, created in 1997 for situations where no estate has been opened, would be strictly limited, in defendant's mind, to situations where the plaintiff knows of the defendant's death before the limitations period has expired. The trial court read *Relf* that way, too, though the trial court found that interpretation of subsection (b) "troubling."

¶ 38 We do not read *Relf* as holding anything so extreme. First, that supposed bright-line rule defendant posits was clearly not the holding in *Relf*. Again, the supreme court held that if an estate *has* been opened and a personal representative *has* been appointed, that personal representative must be the party sued in lieu of the deceased defendant. Second and more to the point, the supreme court's general discussion of subsections (b) and (c) must be placed in context. Defendant ignores that, as we already noted, both subsections (b) and (c) contain provisions regarding suits against personal representatives—more specifically, subsections (b)(1) and (c)—and it was necessary for the supreme court to determine which of those two applied.

Again, the supreme court found that the specifically-worded subsection (c) covered the instance when the plaintiff first learns of the defendant's death after the limitations period has expired, and thus, by extension, the more generally-worded subsection (b)(1) covers all other scenarios. *Id.* ¶ 27.

¶ 39 We do not read that portion of *Relf* as referring in any way to the very different (and, in *Relf*, factually inapplicable) provision of subsection (b)(2), governing the appointment of a special representative if letters of office have not been issued. The supreme court could not have been more emphatic in explaining the differences between a special and personal representative.

¶ 40 Nor, for that matter, would it have made sense for the supreme court to be referring to subsection (b)(2) in that discussion because, unlike the contrast in language between subsections (b)(1) and (c), the language of subsection (b)(2) says nothing about the timing of when the plaintiff discovers the defendant's death:

> "(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:
>
> ***
>
> (2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action." 735 ILCS 5/13-209(b)(2) (West 2016).

¶ 41 Unlike the contrast between subsections (b)(1) and (c), which could not possibly apply at the same time—else one of them would be superfluous—there is nothing in the language of

subsection (b)(2) placing a limit on the circumstances in which a plaintiff may avail herself of the streamlined option of asking the court presiding over the lawsuit to appoint a special representative, when no personal representative has been named.

¶ 42 Indeed, to place such a limit on subsection (b)(2) would be contrary to its very purpose. As the language makes clear and as the House sponsor stated on the House floor, the purpose of subsection (b)(2) is to provide a less costly, more efficient, and streamlined option to a plaintiff when an estate has not already been opened and a personal representative has not already been named for the deceased defendant. Rather than force the plaintiff to file a probate action to open an estate solely for the purpose of litigating this one lawsuit, the plaintiff may simply ask the court presiding over the lawsuit to appoint a special representative for this special purpose. We can think of no reason, nor does the language admit of any, why that option should only be available, as defendant claims, when the plaintiff knows that the defendant has died before the limitations period has run.

¶ 43 We thus find nothing in the language of subsection (b)(2), nor in its purpose, to indicate that it applies only if the plaintiff knows of the defendant's death before the limitations period runs. Just as the supreme court in *Relf* noted in repeatedly and emphatically distinguishing between personal representatives and special representatives, we find that subsection (b)(2) stands apart from subsections (b)(1) and (c), which must be read together because they both cover the issue of naming a personal representative.

¶ 44 In sum, the facts of *Relf* are obviously distinguishable, and so too is its holding. *Relf* held that, if a personal representative has been named, that personal representative must be named in the lawsuit. There, letters of office had been issued, and a personal representative had been named, so Relf was required to name the personal representative in the lawsuit. And because

Relf did not learn of the defendant's death until after the limitations period had run, subsection (c) of section 13-209, rather than subsection (b)(1), governed.

¶ 45 *Relf* did *not* hold that a personal representative must be named even if no estate has been opened, and no personal representative named. Subsection (b)(2), which governs when no letters of office have been issued and no personal representative has been named, was surely included in the overall discussion of section 13-209 in *Relf* but played no role in its holding, other than the fact that *Relf* repeatedly made it clear that subsection (b)(2) was not applicable under the facts of that case.

¶ 46 Here, it is undisputed that no estate had been opened in Christopher's name. No letters of office had been issued. No personal representative had been named. Plaintiff was thus well within her rights to elect the option of moving the court presiding over this lawsuit to appoint a special representative under subsection (b)(2) of section 13-209. She took that very step. We find no defect in the naming of that special representative that would warrant dismissal of this case.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court is reversed. The cause is remanded with directions to reinstate the lawsuit and for any further proceedings.

¶ 49 Reversed and remanded with directions.

No. 1-20-0828

Cite as:	*Lichter v. Carroll*, 2022 IL App (1st) 200828
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-L-696; the Hon. John H. Ehrlich, Judge, presiding.
Attorneys for Appellant:	Yao O. Dinizulu, of Dinizulu Law Group, Ltd., of Chicago, for appellant.
Attorneys for Appellee:	Bruce Farrel Dorn & Associates, of Chicago (Ellen J. O'Rourke and Jean M. Bradley, of counsel), for appellee.

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Speaker Granberg: "The House will come to order. The Members shall be in their seats. We will be led in prayer today by the Reverend Gary McCants. Reverend McCants is with the Allen Chapel AME Church of Alton. Reverend McCants is the guest of Speaker Mike Madigan. The guests in the Gallery may wish to rise for the invocation. Reverend McCants."

Reverend McCants: "May we please bow our hearts. Blessed and happy is the man who does not walk in the counsel of the ungodly, nor stand in the way of sinners, nor sit in the seat of the scornful, but his delight is in the law of the Lord, and in it does he meditate both day and night, and he shall be like a tree that's planted by the rivers of waters that brings forth this fruit in its season. Its leaves shall not wither and whatsoever he does shall prosper. Lord, as we come into Your presence this day, we approach You with this thought in mind, we come to give You honor and thanks, for You are giving us yet another opportunity to come into Your presence. We come seeking Your blessing on this House and all who work in it. We reach out and extend our condolences to those Members who have lost loved ones recently and to those who have loved ones who are ill. We pray that each Member of this House will prosper today and may Your will be done in their lives. Despite the contentiousness of the issues they may face, allow their hearts and minds to be focused on You. And finally, You said in Your word that if we keep our state of mind on You, You will keep us in perfect peace. This is the seed we plant today in Your dear Son's name we pray, Amen."

Speaker Granberg: "We will be led in the Pledge of Allegiance by Representative Wirsing."

Wirsing - et al: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands,

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one nation under God, indivisible, with liberty and justice for all."

Speaker Granberg: "Roll Call for Attendance. The Gentleman from Kendall, Representative Cross."

Cross: "Yes, I am from Kendall, Mr. Speaker. Thanks for recognizing me. There's some question about whether I'm a Gentleman or not. And thanks, Representative Durkin, for pointing that out. Representative Deuchler and Representative Black. Deuchler and Black are both excused, if the record would so reflect. Thank you, Mr. Speaker."

Speaker Granberg: "Thank you, Mr. Gentleman. Representative Hannig."

Hannig: "Yes, thank you, Mr. Speaker. Would the record reflect that Representative McGuire and Representative Holbrook are excused today?"

Speaker Granberg: "Thank you. There being 114 Members present, the House has a quorum. The House is now convened. Mr. Clerk."

Clerk Bolin: "Committee Reports. Representative Giles, Chairman from the Committee on State Government Administration, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 486, House Bill 695, House Bill 820, House Bill 908, House Bill 909, House Bill 1169, House Bill 1253 and House Bill 1293; 'do pass as amended Short Debate' House Bill 25, House Bill 672, House Bill 729, House Bill 910, House Bill 968, House Bill 1074 and House Bill 1105; 'do pass Standard Debate' House Bill 498; 'be adopted' Floor Amendment #2 to House Bill 135. Representative Saviano, Chairman from the Committee on Registration and Regulation, to which the following Bills and Resolutions were referred,

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action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 955 and House Bill 1041; 'do pass as amended Short Debate' House Bill 244, House Bill 411, House Bill 1214, and House Bill 1215; 'do pass Standard Debate' House Bill 370, and House Bill 1185; 'do pass Consent Calendar' House Bill 1126. Representative Stroger, Chairman from the Committee on Local Government, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 688; 'do pass as amended Short Debate' House Bill 674 and House Bill 768; 'do pass Standard Debate' House Bill 1009; 'do pass Consent Calendar' House Bill 1007. Representative Schakowsky, Chairman from the Committee on Labor and Commerce, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 1337; 'do pass Standard Debate' House Bill 735, House Bill 1063, and House Bill 1088; 'be adopted Short Debate' House Resolution #17. Representative Dart, Chairman from the Committee on Judiciary 1 Civil Law, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 149, House Bill 977, House Bill 1042, House Bill 1233 and House Bill 1286; 'do pass as amended Short Debate' House Bill 46, House Bill 615 and House Bill 1151; 'do pass Standard Debate' House Bill 319, House Bill 927 and House Bill 1262; 'do pass as amended Standard Debate' House Bill 61, House Bill 164 and House Bill 628. Representative Pugh, Chairman from the Committee on Human Services, to which the

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following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 611, House Bill 619, House Bill 797, House Bill 862, House Bill 1001, House Bill 1080, House Bill 1241, House Bill 1279, House Bill 1300, House Bill 1319 and House Bill 1344; 'do pass as amended Short Debate' House Bill 1342; 'do pass Standard Debate' House Bill 442, House Bill 505, House Bill 609, House Bill 957, House Bill 993, House Bill 1008, and House Bill 1205. Representative Erwin, Chairman from the Committee on Higher Education, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 940 and House Bill 1323; 'do pass as amended Short Debate' House Bill 923; 'do pass Consent Calendar' House Bill 1180 and House Bill 1197. Representative Novak, Chairman from the Committee on Energy and Environment, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 260; 'do pass as amended Short Debate' House Bill 470 and House Bill 1271; 'do pass Standard Debate' House Bill 258. Representative Phelps, Chairman from the Committee on Elementary and Secondary Education, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 18, House Bill 740, House Bill 741, House Bill 752 and House Bill 1005; 'do pass as amended Short Debate' House Bill 159; 'do pass Standard Debate' House Bill 742; 'do pass Consent Calendar' House Bill 1112. Representative

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Schoenberg, Chairman from the Committee on Appropriations General Services, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 351 and House Bill 415."

Speaker Granberg: "On page 2 of the Calendar House Bills Second Reading. House Bill 29, Representative Dart. Out of the record. House Bill 63, Representative Dart. Out of the Record. House Bill 87, Representative Dart. On the Order of Dart, House Bill 97. Read the Bill, Mr. Clerk."

Clerk Bolin: "House Bill 97, a Bill for an Act to Amend the Children and Family Services Act. Amendment #1 was adopted in committee. No Floor Amendments have been recommended for adoption. No Motions filed. Second Reading of this House Bill."

Speaker Granberg: "Third Reading. House Bill 111, Representative Gash. Representative Gash, do you wish to move the Bill to Third?"

Gash: "I just have an announcement. I would like to invite the Members if they would like to join us in honor of Representative Judy Erwin's birthday, we have cake over here."

Speaker Granberg: "Representative Gash, do you wish to move your Bill to Third Reading?"

Gash: "No."

Speaker Granberg: "Out of the record, Mr. Clerk. Representative Gash, how old is Representative Erwin? Thank you. 124 (sic-House Bill), Representative Black. Out of the record. House Bill 152. House Bill 152, Representative Fritchey do you wish to move the Bill to Third, Sir? Out of the record. House Bill 135, Representative Gash. Representative Gash. Out of the record. House Bill 153,

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Representative Wood, do you wish to have your Bill called? Out of the record. House Bill 161, Representative Mautino. Is Representative Mautino in the chamber? Out of the record. House Bill 168, Representative Lang. Out of the record. House Bill 175, Representative Lang. Out of the record. House Bill 177, Representative Lang. Out of the record. Back to House Bill 161. Mr. Clerk, read the Bill."

Clerk Bolin: "House Bill 161, a Bill for an Act that amends the Illinois Insurance Code. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Floor Amendments have been recommended for adoption. No Motions filed."

Speaker Granberg: "Representative Mautino, does Representative Deering have any Amendments for your Bill? Third Reading. House Bill 201, Representative Moore, Andrea Moore. Representative, do you wish to have your Bill moved to Third Reading? Out of the record. House Bill 271, Representative Bugielski. Representative Bugielski, do you wish to...Out of the record. House Bill 382, Representative Roskam. Representative Roskam, would you like to move your Bill to Third Reading, Sir? House Bill 382. Read the Bill, Mr. Clerk."

Clerk Bolin: "House Bill 382, a Bill for an Act concerning abortions. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments have been recommended for adoption. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 383, Representative Cowlishaw. Representative Cowlishaw. Is the Lady in the chamber? Out of the record. House Bill 496, Representative Turner. Representative Turner. Representative Art Turner. Read the Bill, Mr. Clerk."

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Clerk Bolin: "House Bill 496, a Bill for an Act to amend the Illinois Economic Opportunity Act. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Floor Amendments have been recommended for adoption. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 522, Representative Bugielski. Representative Bugielski, do you wish to move this Bill to Third Reading? Out of the record. Representative Bugielski on 562, do you wish that one taken out of the record as well? Out of the record. House Bill 578, Representative McAuliffe. Representative McAuliffe. Read the Bill, Mr. Clerk."

Clerk Bolin: "House Bill 578, a Bill for an Act to amend the Illinois Public Labor Relations Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments have been recommended for adoption. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 596, Representative Zickus. Anne, do you wish to call the Bill, move it to Third? Out of the record. House Bill 651, Representative Poe. Representative Poe. Read the Bill, Mr. Clerk."

Clerk Bolin: "House Bill 651, a Bill for an Act to amend the Criminal Code of 1961. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Floor Amendments have been recommended for adoption. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 655, Representative Smith. Representative Smith, do you wish to have your Bill moved to Third Reading? Mr. Clerk, read the Bill."

Clerk Bolin: "House Bill 655, a Bill for an Act to amend the Illinois Occupational Therapy Practice Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments have been recommended for adoption. No Motions

filed."

Speaker Granberg: "Third Reading. On the Order of House Bills Third Reading, on page 14 of the Calendar appears House Bill 844. The Gentleman from Washington, Representative Deering, do you wish to call your Bill, Sir?"

Deering: "Thank you, Mr. Speaker and Ladies and Gentlemen of the House..."

Speaker Granberg: "Representative, Representative. Read the Bill, Mr. Clerk."

Clerk Bolin: "House Bill 844, a Bill for an Act concerning rental vehicles. Third Reading of this House Bill."

Speaker Granberg: "Ladies and Gentlemen, we are on the Order of House Bills- Third Reading. Third Reading. Could you give the Gentleman some attention please? Could we clear the aisles? Could we clear the aisles please? Representative Deering."

Deering: "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. House Bill 844 is the Illinois Renters Financial Responsibility and Protection Act. It addresses a problem that's faced the car rental industry since 1989, when the prior statute was changed. This problem also affects car dealerships throughout Illinois and the tour and transportation industry as well. This Bill repeals a $200 limit on negligent renters liability for damage they've caused to a rental car. In addition, this Bill will permit operators to offer a collision damage waiver to rental customers under strictly regulated circumstances. Only two states, Illinois and New York, have this law. Forty-five states have rejected these restrictions. Whatever abuses may have existed before have been addressed in this Bill, it is friendly to Illinois business and consumers. Importantly, this Bill has been endorsed by the Federal

Trade Commission, as a proconsumer, procompetition Bill. It was drafted with input with the Consumer Protection division of the Illinois Attorney General's office, as well as the Illinois Department of Insurance. It's universally supported by the car rental industry, auto dealers, Chrysler, GM, and Ford, the Hotel Association, and the Travel and Tourism Association. I am sponsoring this Bill because I believe it will help reduce rental rates, increase rental agency competition and opportunities and the availability of rental cars, encourage safer driving, and positively affect the tourism and travel industry here in Illinois. Under the current law, we find ourselves in a situation where Illinois citizens who rent cars and drive carefully and responsibly are subsidizing the carelessness of drivers who cause accidents. In particular, the carelessness of out-of-state business travelers and tourists are being subsidized by Illinois rental agency and citizens. The Bill provisions include: allowing a rental agency to recover only from renters who are actually at fault, those individuals who cause damage to the rental cars themselves, allowing the rental agency to recover only actual and reasonable damages, prohibiting agencies from collecting damages in multiple sources, requiring the agency to take all reasonable steps to mitigate or reduce their damages, entitling the renter to receive an estimate before the claim is paid, providing limited, strictly regulated circumstances under which a renter may be offered a CDW to reduce the renters risk and also capping the amount a agency may charge for a CDW, again that's a collision damage waiver. Illinois Rental Agencies are good corporate citizens, they employ more than 11 thousand Illinois residents. They purchase more than 70 thousand

cars annually from Illinois dealers. Rental agencies rent to nearly 2 million Illinois citizens annually. They pay more than $85 million per year in state and local taxes. Auto dealers add significantly to this. It's time to remove this law. Dealers and rental agencies are not asking for a handout, they only want the same protections you and I expect out of our property. It might be said that the insurance industry is against this Bill, but I have letters from insurance agents that are in support of this legislation. I think this is a good Bill for Illinois consumers. We, as consumers, pay for coverage in our existing insurance premium base, so we are already covered. I will now like to yield my time to Representative Art Tenhouse."

Speaker Granberg: "The Gentleman from Adams, Representative Tenhouse. Representative Tenhouse, this Bill is on the Order of Short Debate. Proceed, Representative Tenhouse. The Gentleman from Bureau, Representative Mautino. Go ahead, Sir."

Mautino: "Yes, according to appropriate rule, I would ask that this Bill be removed from Short Debate."

Speaker Granberg: "So acknowledged. Representative Tenhouse."

Tenhouse: "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. I'm not going to take up much time, but let's just get down to the bottom line with this issue. That issue is fairness. There are two states in the country who continue to have this type of an antiquated law, two states, New York and Illinois. And for those of us who live on the boundary of this state, we look at this continually as we see more and more of our rental car agencies moving across the river to Missouri or Iowa or Kentucky, because it's much more lucrative. The bottom line is someone's going to

have to pay the tab on this. And realistically what's happening right now is you're trying to absorb it through the costs that are passed on to us as consumers. Under the current situation, realistically we have to charge, or there are higher charges for rental cars in Illinois as opposed to our neighboring states. This argument that this is going to create a unusual situation with other insurance companies, that's bunk. Forty-eight states are already doing what we're trying to do with this Bill. So don't let the red herring come forth here and bite you on this issue. Look at it and think about it in terms of fairness as far as competition. I also have several letters here that I could read from different insurance agents and different insurance companies throughout this state who are very supportive of House Bill 844. This is not a 100% issue, but certainly in the case of fairness, I would urge the Members of both sides of the aisle to vote favorably on House Bill 844."

Speaker Granberg: "The Gentleman from Lake, Representative Churchill."

Churchill: "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. Will the Gentleman yield?"

Speaker Granberg: "He indicates he will. Proceed."

Churchill: "Representative Deering, how long has this issue been debated here in the Legislature?"

Deering: "Representative, you know even better than I, that this has been an issue that has been around for approximately five, five and a half years."

Churchill: "Was the law ever the way you seek it to be, before? Did we ever make a change? Did we change to make it what it is now?"

Deering: "This is very similar to last year's proposal."

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Churchill: "Okay. But I guess what I'm trying to get at was, when we impose the law the way it is now, did we do that in the last five years?"

Deering: "If my information is correct, I think it was in 1989, I believe 1989."

Churchill: "Okay. So you're seeking to go back to the law the way it was before 1989?"

Deering: "We're not going back to what the law was prior to 1989. In 1989, this $200 cost or $200 liability was placed on the renter, the customer of a car rented from a rental agency. If they went out and totaled a car, if it was a brand new car that had a sticker price of $30 thousand, they paid $200 and walked away. And that's what the Bill, as I understand, in 1989 did. This removes that liability and goes after the renter."

Churchill: "Alright. So it does, it changes it back. Before, the person that rented the car was liable for any damage, then we changed the law in 1989 and they were only liable up to $200. And now if your Bill passes and is signed into law then the renter of the car would be liable for all damage to the car again. Is that not correct?"

Deering: "That's correct."

Churchill: "Okay. So, I'm a consumer and I walk in to rent a car. Today when I walk in to rent that car, I have the law on my side that says that if I go out and I have an accident the most that I would have to pay to cover the cost of fixing that car is $200. But then if we pass the law that you have on the board right now, if I'm that same consumer and I go out and have a car accident, then I'm liable for all costs of fixing that car. Is that not right?"

Deering: "You are liable. This piece of legislation gives the

rental agency the option of #1, coming after you for the cost of damage to that car, coming after you or your insurance, or #2, this piece of legislation allows you to purchase a collision damage waiver which removes all responsibility from you as the renter of that car, and the rental agencies will then cover the cost."

Churchill: "So how much will that be? You got some idea of what it's going to be like on the street?"

Deering: "I think it's on a sliding scale, anywhere from seven and nine dollars. I believe it's capped at nine dollars per day."

Churchill: "Alright, so you're saying for a minimal amount of six, seven, eight, nine dollars a day, then the rental car company will cover the loss and you don't have to cover it?"

Deering: "That is correct."

Churchill: "So it's a little bit more expensive, but you can buy the insurance for it. That's what you're saying?"

Deering: "I'm sorry, I didn't hear you, Representative."

Churchill: "It's a little bit more expensive to rent the car, but then the risk of you having to pay money is taken away from you?"

Deering: "Now the industry believes that the rental rate will go down. And we looked at comparisons from other states in committee testimony, and other states, even our neighboring states, are substantially cheaper than the car rental rates here in Illinois."

Churchill: "Okay, thank you. No further questions."

Speaker Granberg: "The Gentleman from Bureau, Representative Mautino."

Mautino: "Thank you. A couple of questions of the Sponsor. Currently, it's my understanding that we have negotiations

under way that are going to continue when this goes to the Senate."

Deering: "It's my understanding that if this Bill passes today and goes to the Senate, ongoing negotiations will proceed."

Mautino: "Okay, and with those most likely, the Bill that will carry those negotiations is 224. Are you, as I am now, under that understanding?"

Deering: "Well, it can either be any number of Bills I guess, Representative, we can amend anything that will be amenable."

Mautino: "Representative, I'll tell you what, I do have some concerns on your Bill, and therefore I will not be voting for it. But I understand that the negotiations have been going on and we may end up with some agreement on this process, and I hope that's so. Just a quick question on this Bill. Going back to 1989, can you tell me why this happened? Why do we have a $200 cap anyway, in the law?" I can help you with the answer."

Deering: "I understand it was an issue to then, the then Attorney General, and the argument, as you know as well as I, neither one of us was here then, the argument was good for the consumers, but we found out that in fact, it's not good for the consumers."

Mautino: "So, they may find out that on their credit card they get a Bill for 14, 15 hundred, $20 thousand at that time, and then all of a sudden we decided that was anti-consumer, so we would put these protections in place, and your Bill has many protections. So, I look forward to the negotiations, and I know that this does not affect third party liability at all. This is strictly collision damage waiver. Correct?"

Deering: "That is correct."

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Mautino: "Okay, that's an issue for a different day."

Deering: "That is correct."

Speaker Granberg: "Anything further, Representative? The Gentleman from McLean, Representative Brady."

Brady: "Thank you, Mr. Speaker. Will the Sponsor yield?"

Speaker Granberg: "He indicates he will. Proceed."

Brady: "Representative, the original legislation enacted in 1988, can you tell me who supported and proposed that legislation and why?"

Deering: "It's my understanding that it was consumer groups and the Attorney General's office, and I believe the rental car agencies themselves, and the Sponsor, I believe, was former Representative Preston."

Brady: "Do you why the rental car agencies would have supported this legislation in 1988 and now are opposed?"

Deering: "I can't answer that, Representative. I don't know."

Brady: "Do you know of the financial impact this will have on the people who rent the cars, auto premiums?"

Deering: "Yes, Representative, I believe it's going to be a savings in their pocketbook, and if it's good for the consumers, then I'm for it."

Brady: "Representative, my question is, will this have an adverse effect on the renters, the individual who's renting the cars, automobile insurance?"

Deering: "It shouldn't have an effect on the insurance. Individuals are now, as I understand it and have documented letters in my file, states that it is the policy of several insurance agencies in the state that they automatically charge you, the consumer, a premium for uninsured motorists and for rental car protection. So, you know, I don't know, unless the insurance industry is going to decide to increase their rates because of this, but I don't see why

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that would happen when the rates are there now, and they're not getting hammered on this legislation now. And this legislation does not mandate any more increased costs to the insurance agency. I mean, other than what you're already paying for as a consumer."

Brady: "Representative, I don't sit on the Transportation Committee, I sit on the committee...I guess my question was, was there any testimony by the insurance industry that this would dramatically increase individual auto rates, auto insurance rates?"

Deering: "No one testified to that effect in the industry. But as I understand it, and I'm drawing on secondhand information, it was purported 1hat when this law was changed in 1989 that it was a pro-consumer Bill and the insurance rates would go down, and to my knowledge and the information I received, the insurance rates didn't decline any."

Brady: "Representative, if this legislation were to become law, and I am renting a car and I total that car out, who's going to determine how much my insurance company will pay?"

Deering: "Well, okay, it all depends on #1, if your current insurance, the insurance that you're paying an annual premium on, will cover that, depends if you chose to purchase the collision damage waiver."

Brady: "If I didn't choose the collision damage waiver, who's going to determine the exact amount, or the value of the damage?"

Deering: "Well, you're going to be able to go and have an estimate done. The estimate will, you will have the opportunity as a consumer to look over the estimate before the car rental agency turns it in."

Brady: "Who makes...what if I decide, that no that car isn't

worth $20 thousand, it's only worth 10?"

Deering: "I'm sorry, Representative, I couldn't hear the question. When Representative McPike was in the Chair, he kept a little bit more order in here."

Brady: "Representative, my question is, if you rent a car from Avis, and for some reason while you're driving that car you get in a automobile accident, you are found to be negligent, you're safe and were uninjured, but Avis now determines that that car is totaled. They are arguing that the value of that car, the damage you caused to them was $20 thousand. You or your insurance company think it was only $10 thousand. Or let's say it's Enterprise, is the car rental company, who's going to determine, who makes the final decision on that loss?"

Deering: "This legislation spells out that if you didn't have insurance coverage from the policy that you carry, and you know as well as I do, Representative, everyone in Illinois is mandated to carry some type of insurance, whether that's happening or not, but if you didn't have coverage and you didn't purchase the collision damage waiver then you would be liable for the actual cost of the damage."

Brady: "Who determines what the actual cost of the damage is?"

Deering: "It's just like an estimate situation under today's law. You have an automobile accident, you go get two estimates, it's considered whichever one is the least of the two would be the actual damage. That's what you would be liable for. So I'm assuming it would be an insurance adjuster that would make that decision."

Brady: "My insurance adjustor or your insurance adjustor in the case of your accident?"

Deering: "They always work together is my understanding and been my experience."

Brady: "They always work together. There's never any disputes. Okay. Representative, are there any other states that have limits on this, or do they all just leave it wide open?"

Deering: "The only other state that has a current law as we do today is New York. I believe this legislation is almost similar to the other 48 states that have the same type of situation."

Brady: "And they all have unlimited exposure to the renter's policy?"

Deering: "Yes."

Brady: "Representative, is it your intention to pass this legislation today and see it passed in the Senate under its current language?"

Deering: "My intention is to pass this Bill out of the House today and have it go to the Senate. And as Representative Mautino said, there are still ongoing negotiations happening so if there is some sort of agreement in the transition period, we're always amenable to put an Amendment on another Bill or on this Bill to try to work out the differences, but my intent is to pass this Bill to the Senate today."

Brady: "But it's also your intention to continue working on negotiating this Bill along with the Senate?"

Deering: "Yes."

Brady: "Thank you very much."

Speaker Granberg: "Thank you. The Gentleman from Cook, Representative Moore."

Moore, E.: "Thank you very much, Mr. Speaker, Ladies and Gentlemen of the House. Mr. Deering, perhaps you probably have already answered this question. My question deals with the liability. Who is the owner of this particular car or the rental car? Will that go towards that person

that will be renting the car or the person leasing the car, in dealing with the liability aspect of it?"

Deering: "I'm sorry, the first part of the question was who is the owner of the automobile?"

Moore, E.: "Right. When you talk about liability, who would be responsible. In case I have an accident and I'm driving one of these vehicles, perhaps you've already answered the question, but what happens if I lease a car and I'm driving this particular leased car and I have an accident, I perhaps maim someone very severely, who would be responsible for that? Will that go toward the rental person, or would that go toward the person leasing the car, or renting the car, in dealing with the liability aspect of the insurance?"

Deering: "If you purchase the collision damage waiver covers the cost of the accident or liability or the cost of damage to the car, but if you personally injure somebody, a third party liability, this Bill does not address that, and there potentially be a litigation filed that could be coming after you."

Moore, E.: "I'm sorry, Representative, I didn't hear your question, your statement to the question."

Speaker Granberg: "Ladies and Gentlemen, give the Gentleman some order please."

Deering: "Representative, if you rent a car, you have the opportunity to purchase a collision damage waiver, if this Bill passes and becomes law. If you purchase the collision damage waiver and have an accident, you don't pay a dime, the car rental agency covers the cost of that accident, that liability. But also if you purchase a collision damage waiver and then you have an accident and injure a third party, this Bill does not address third party

liability and you could, yourself, and your insurance company be brought into litigative action, because this Bill does not address that. That would be between you and your insurance company. This Bill just covers the liability to the damage of a rental car."

Moore, E.: "Alright. That's why I was asking that question. It appears that...it seems like in that particular instance, it seems like the coverage should belong to the person who really owns the car, and that would be the leasing company because they own the car, and not that person who's renting the car. So does the liability follow the person or does it follow the car?"

Deering: "The liability follows the person."

Moore, E.: "Thank you very much, Representative."

Speaker Granberg: "Anything further? The Gentleman from Madison, Representative Stephens."

Stephens: "Well thank you, Mr. Speaker. I hope that everyone is paying attention to the debate. I hope that everyone's considered this legislation before today, because some things have come up in debate that have probably unintentionally been misrepresented. I wouldn't think that anyone would misrepresent it on purpose, but me go back to the argument that insurance rates are going to go up. It's quite simply not the case. First of all, rates didn't come down when the current law went into effect in 1989. Rental cars comprise about 80% of the 1% of the 8 million registrations in Illinois. Accidents caused by renters are statically insignificant as compared to the 8 million registered vehicles for which premiums are collected. So there's no relationship between this legislation and insurance rates going up, it's just not the case. I would further like to state that the evidence is showing that

dozens of rental operators in your area, no matter where you live in Illinois, there is a rental operator that has gone out of business because of the effect of the 1989 change in the law. For instance, in 1988 there were 53 companies listed in the Chicago yellow pages. Today 62% of those same companies are no longer listed. In Bloomington, there was a 54% decline, in Decatur a 38% decline, and in Champaign a 52% decline. And I can go on. I can certainly tell the Southwestern Illinois legislative contingent that this drastically affects our areas of Madison, St. Clair County. And without going on and on about this, I seriously urge a 'yes' vote, whether there are going to be more negotiations or not. This Bill should stand on its own. We should pass this legislation. It's the right thing to do, it's right for the consumer, it's right for automobile renters, and it's right for small business. Vote 'yes'."

Speaker Granberg: "The Gentleman from Cook, Representative Lang."

Lang: "Thank you, Mr. Speaker, Ladies and Gentlemen. I rise in strong support of House Bill 844. When you take a look at the facts and you see that when you see that Illinois and New York have the highest cost in the nation to rent a vehicle, and that we're the only two states that need this change in the law, it's clear that this is a consumer Bill. When the Attorney General of the State of Illinois and the Federal Trade Commission tell us that this is a consumer Bill, I think we should believe them. The fact is that many will say that because of this collision damage waiver that up front it looks like a greater cost for consumers, but that's not true because most of us are covered under our own auto policies for this and we won't need that. And if we can lower the cost for the car rental companies, it's

clear that the cost to rent a vehicle should come down so that Illinois becomes in the average of the cost to rent the car in the country. Why should we be near the top? And so this is a good consumer Bill, and I would recommend your 'aye' votes."

Speaker Granberg: "Thank you. The Gentleman from Winnebago, Representative Winters."

Winters: "Thank you, Mr. Sponsor...Mr. Chairman (sic - Speaker). Will the Sponsor yield?"

Speaker Granberg: "He indicates he will. Proceed."

Winters: "Yes, Representative Deering, I had one question about the previous legislation that's been introduced. I wanted to see if there's a provision in this one. I understand that in the past rental car companies would sometimes include in their charges a loss of use provision. If the car may not be in use for a week or two weeks or three weeks while it is being repaired, they would then charge an insurance company or a consumer for the avoided rental that they could have earned during that time. Is that part of this Bill?"

Deering: "That is no longer a portion of this Bill. It's been removed and it's been at the request of the rental car agencies."

Winters: "Well, I certainly thank you. I think that is a very sound provision of your legislation. I think that was an area that was certainly open to abuse, I'm not claiming that it was widely done. But I certainly thank you for including that provision."

Deering: "Thank you."

Speaker Granberg: "The Gentleman from Effingham, Representative Hartke, did you wish to be recognized? The Gentleman from Boone, Representative Wait."

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Wait: "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. I just want to lend my support to this Bill. This Bill did come to the Transportation Committee and what we learned in the Transportation Committee was that 65% of the renters who rent cars in the State of Illinois are from outside Illinois. A lot of times they come here, cause accidents and then they want to leave here and the total responsibility is $200. This puts the responsibility on us where it should be on those who actually are causing the accidents. So, would stand in strong support of this Bill. It's a consumer Bill to help the people. Thank you."

Speaker Granberg: "Anything further? If not, the Gentleman from Washington, Representative Deering, to close."

Deering: "Thank you, Mr. Speaker. I think we heard a lot of debate on this issue. I think it's a, I think it's been good debates, strictly to the issue of the legislation. As some of the previous speakers have stated, it's good consumer legislation, it removes from liability and it preaches responsibility. If you rent a car and you have a accident with that car and wreck it, you should be liable for it, or you have the option to purchase the collision damage waiver, which is good consumer legislation. I just respectfully ask for an 'aye' vote."

Speaker Granberg: "The Gentleman from Washington, Representative Deering, moves for the passage of House Bill 844. All those in favor shall vote 'aye'; all opposed shall vote 'no'. The roll is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Mr. Clerk, take the record. On this matter, there are 86 'aye' votes, 19 'no' votes, 9 voting 'present'. This Bill, having received a Constitutional Majority, is hereby declared passed. On the Order of House Bills Third Reading on page

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11 of the Calendar, House Bill 107. Representative Mulligan, do you wish to bring that Bill back to Second Reading for purposes of an Amendment?"

Mulligan: "Thank you, Mr. Speaker. Yes, I do."

Speaker Granberg: "Return the Bill to Second Reading, Mr. Clerk. House Bills- Second Reading, appears House Bill 748. Representative Wait, do you wish to move the Bill, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 748, a Bill for an Act amending the Illinois Vehicle Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 775, Representative Ronen, do you wish to call the Bill, Ma'am? Representative Ronen. Is the Lady in the chamber? Out of the record. House Bill 776, Representative Currie. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 776, a Bill for an Act amending the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal note and the state mandates note that were requested on the Bill have been filed."

Speaker Granberg: "Third Reading. House Bill 775. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 775, a Bill for an Act amending the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The notes that were requested on this Bill have been filed."

Speaker Granberg: "Third Reading. House Bill 779, Representative Flowers. Representative Flowers, do you wish to move your Bill to Third Reading, Ma'am? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 779, a Bill for an Act to amend the

Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The notes that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 780, Representative Hannig. Representative Hannig. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 780, a Bill for an Act amending the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The notes that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 781, Representative Currie, do you wish to move the Bill, Ma'am? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 781, a Bill for an Act amending the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The notes that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 782, Representative Currie, likewise. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 782, a Bill for an Act amending the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal note and the state mandates note that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 783, Representative Schakowsky. Congresswoman Schakowsky. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 783, a Bill for an Act to amend the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal note and the state mandates note that were requested have been filed."

Speaker Granberg: "House Bill 784, Representative Schakowsky.

Third Reading, 783. House Bill 784, Representative Schakowsky. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 784, a Bill for an Act to amend the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal note and state mandates note that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 785, Representative Currie. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 785, a Bill for an Act to amend the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal note and the state mandates note that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 824, Representative Smith. Representative Smith, do you wish to move the Bill to Third Reading, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 824, a Bill for an Act amending the Counties Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The notes that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 906, Representative Erwin. Representative Erwin, do you wish to move? Out of the record. House Bill 959, Representative Lang. Do you wish to move the Bill to Third Reading, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 959, a Bill for an Act in relation to State Loans. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The notes that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 965, Representative Lang. Out of the record. House Bill 1006, Representative

Cross. On the Order of Cross. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1006, a Bill for an Act concerning land transfer. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 1051, Representative Brunsvold. Representative Brunsvold, do you wish to have your Bill moved to Third Reading, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1051, a Bill for an Act amending the Hunter Interference Prohibition Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The Notes that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 29, Representative Dart. Is Representative Dart in the Chamber? Representative Tom Dart. Out of the record. Supplemental Calendar announcements."

Clerk Rossi: "Supplemental Calendar #1 is being distributed."

Speaker Granberg: "On Supplemental Calendar #1 appears House Bill 25. Representative Durkin, would you wish to have that Bill moved to Third Reading, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 25, a Bill for an Act amending the rights of Crime Victims and Witnesses Act. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Motions have been filed. No Floor Amendments."

Speaker Granberg: "Third Reading. House Bill 149, Representative Davis, do you wish to move that Bill to Third Reading, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 149, a Bill for an Act amending the Illinois Vehicle Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal

note and the correctional budget and impact note that were requested have been filed."

Speaker Granberg: "House Bill. Third Reading. House Bill 258. House Bill 258, Representative Novak, do you wish to move the Bill to Third? Read the Bill, Mr. Clerk. Out of the record. House Bill 260, Representative Novak. Out of the record. House Bill 351, Representative Lindner. Representative Lindner. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 351, a Bill for an Act concerning Appropriation Bills. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 370, Representative Saviano. Representative Saviano. Out of the record. House Bill 674, Representative Black. Representative Ryder asks leave to handle the Bill for Representative Black. Is there leave? No objection, leave is granted. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 674, a Bill for an Act amending the Animal Control Act. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Motions have been filed. No Floor Amendments."

Speaker Granberg: "Third Reading. House Bill 688, Representative Black. Representative Ryder requests leave to handle the Bill for Representative Black. Is there leave? No objection, leave being granted. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 688, a Bill for an Act amending the Fire Protection District Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 735, Representative Schakowsky. Do you wish to call the Bill? Out of the

record. House Bill 768, Representative Capparelli. Out of the record. House Bill 797, Representative O'Brien. Representative O'Brien, would you like to move your Bill to Third Reading? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 797, a Bill for an Act in relation to Care Facilities. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. A fiscal note and a state mandates note were requested and have been filed."

Speaker Granberg: "Third Reading. House Bill 820, Representative Durkin. Representative Durkin, would you wish to move your Bill to Third Reading, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 820, a Bill for an Act amending the Illinois Fire Protection Training Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. Representative Schakowsky on House Bill 862. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 862, a Bill for an Act amending the Department of Human Services Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The notes that were requested on the Bill have been filed."

Speaker Granberg: "Third Reading. House Bill 923, Representative Winkel. Is Representative Winkel in the chamber? Out of the record. House Bill 940, Representative Hannig. Do you wish to move the Bill to Third, Representative, 940? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 940, a Bill for an Act amending the Higher Education Student Assistance Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed. A state debt impact note was requested and has been filed."

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Speaker Granberg: "Third Reading. House Bill 955, Representative Saviano. Representative Saviano in the chamber. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 955, a Bill for an Act amending the Funeral Directors and embalmers Licensing Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 1001, Representative Phelps. Representative Phelps, do you wish to move the Bill, Sir? Out of the record. Read the Bill, Mr. Clerk, 1001."

Clerk Rossi: "House Bill 1001, a Bill for an Act amending the Department of Human Services Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. A fiscal note and a state mandates note that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 1005, Representative Biggert. Representative Judy Biggert. Would the Lady wish to move her Bill? Out of the record. House Bill 1008, Representative Schoenberg. Would the Gentleman wish to move his Bill to Third Reading? 1008, Representative. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1008, a Bill for an Act amending the Abused and Neglected Long-Term Facility Resident Reporting Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal note and the state mandates note that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 1063, Representative Phelps. Representative Phelps on 1063. Representative Phelps, do you wish to move your Bill? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1063, a Bill for an Act amending the

Illinois Public Labor Relations Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The fiscal note that was requested has been filed."

Speaker Granberg: "Third Reading. House Bill 1009, Representative Woolard. Representative Woolard, did you wish to move 1009 to Third Reading? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1009, a Bill for an Act concerning the enclosure of private swimming pools. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. The state mandates note and the home rule note that were requested have been filed."

Speaker Granberg: "Third Reading. House Bill 1105, Representative Mitchell. Representative Mitchell, do you wish to have your Bill called? Representative Jerry Mitchell. Gentleman in the chamber? Out of the record. House Bill 1169, Representative Rutherford. Representative Rutherford, do you wish to move your Bill 1169, Representative? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1169, a Bill for an Act concerning the Secretary of State. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 1185, Representative Burke. Do you wish to move your Bill to Third Reading, Sir, 1185? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1185, a Bill for an Act amending the Naprapathic Practice Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 1214,

Representative Saviano. Out of the record. House Bill 1214, Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1214, a Bill for an Act to create the Real Estate Appraiser Licensing Act. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Motions have been filed. No Floor Amendments."

Speaker Granberg: "Third Reading. House Bill 1215, Representative Saviano. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1215, a Bill for an Act amending the Private Detective, Private Alarm, Private Security and Locksmith Act. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Motions have been filed. No Floor Amendments."

Speaker Granberg: "Third Reading. House Bill 1233, Representative Wait. Representative Ron Wait. The Gentleman in the chamber? Out of the record. House Bill 1279, Representative Leitch. Representative Leitch, would you like to move your Bill to Third Reading, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1279, a Bill for an Act amending the Illinois Public Aid Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 1300, Representative Skinner. Representative Skinner. Representative Skinner. Representative Skinner, do you wish to move your Bill? Out of the record. House Bill 1319, Representative McAuliffe. Do you wish to move your Bill, Sir? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1319, a Bill for an Act concerning the Department of Human Services. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No

Motions filed."

Speaker Granberg: "Third Reading. House Bill 1337, Representative Poe. Representative Poe, do you wish to move your Bill? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1337, a Bill for an Act concerning child support. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed."

Speaker Granberg: "Third Reading. House Bill 1342, Representative Bost. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1342, a Bill for an Act amending the Department of Human Services Act. Second Reading of this House Bill. Amendment #1 was adopted in committee. No Motions have been filed No Floor Amendments."

Speaker Granberg: "Third Reading. House Bill 1344, Representative Meyer. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1344, a Bill for an Act amending the Emergency Medical Services Systems Act. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments No Motions filed."

Speaker Granberg: "Third Reading. On the Daily Calendar on page 14, appears House Bill 709. Representative Moore, I believe you requested to have that Bill called. The Lady from Lake, do you wish to have that Bill called, Representative?"

Moore, A.: "Yes, thank you, Mr. Speaker."

Speaker Granberg: "Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 709, a Bill for an Act in relation to taxes. Third Reading of this House Bill."

Speaker Granberg: "The Representative from Lake, Representative Moore. Ladies and Gentlemen, Third Reading. Representative Moore on the Bill."

Moore, A.: "Thank you, Mr. Speaker. This amends the Gas Revenue

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Tax Act, and it permits tax payments to be filed by electronic funds transfer. It empowers the Department of Revenue to adopt the rules for implementing the electronic funds transfer program. I'd be happy to answer any questions."

Speaker Granberg: "The Lady moves for the passage of House Bill 709. On that question, are there any questions on House Bill 709? The Gentleman from Cook, Representative Lang."

Lang: "Bear with me a second there, Speaker."

Speaker Granberg: "She indicates she will. Proceed."

Lang: "Thank you. Representative, in committee were there any people in opposition to this Bill?"

Moore, A.: "No, Representative. There's no fiscal impact to the state or local governments, and there is no known opposition to the Bill."

Lang: "Is there any unknown opposition to the Bill?"

Moore, A.: "Certainly not."

Lang: "Oh, okay. When people say there's no known opposition, I just always wonder what that means. So the Bankers Association is in favor of this Bill?"

Moore, A.: "Well, I'd hate to speak for them."

Lang: "So you don't know."

Moore, A.: "Right."

Lang: "How about the community bankers?"

Moore, A.: "I'm not aware of that either, but they usually favor electronic funds transfers."

Lang: "So you got a Bill that affects their industry, but you don't know how they feel about it?"

Moore, A.: "Well, I think that they've had ample opportunity to review this, and this is usually the type of thing that they favor."

Lang: "But you don't know this time?"

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Moore, A.: "No."

Lang: "Well, since you're so sure about your Bill, I'm going to support it."

Moore, A.: "Thank you."

Speaker Granberg: "Representative, nothing further? The Lady from Lake to close."

Moore, A.: "Utilities that are liable for an array of different taxes and are interested in payment of their liabilities through a system that entails less paper work and promotes greater efficiency. There will be no fiscal impact to the state or local governments, and I would appreciate a 'aye' vote."

Speaker Granberg: "Thank you. The Lady from Lake moves for the passage of House Bill 709. All in favor shall vote 'aye'; all opposed shall vote 'no'. The Roll Call is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? On this matter there are 112 'aye' votes, 0 voting 'no', 0 voting 'present'. This Bill, having received a Constitutional Majority, is hereby declared passed. House Bills - Second Reading. House Bill 1253, Representative Mautino, do you wish to call the Bill? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 1253, a Bill for an Act amending the Illinois Vehicle Code. Second Reading of this House Bill. No Committee Amendments. No Floor Amendments. No Motions filed. A state mandates note has been requested on the Bill and has not been filed."

Speaker Granberg: "Hold the Bill on Second Reading. House Bills Third Reading. House Bill 8, Representative Moffitt. Representative Moffitt, do you wish to call that Bill? Out of the record. House Bill 28, Representative Dart. Is the Gentleman in the chamber? House Bill 31, Representative

Steve Davis. Do you wish to call the Bill, Sir? Out of the record. House Bill 78. Out of the record. House Bill 108, Representative Hannig. Do you wish to call that Bill on Third Reading, Sir? Out of the record. House Bill 109, out of the record. House Bill 169, Representative Lang, do you wish to call the Bill? Out of the record. House Bill 170, Representative Lang. Out of the record. House Bill 174, Representative Lang. Out of the record. House Bill 196, Representative Hannig. 196. Out of the record. House Bill 198, Representative Hannig. Out of the record. House Bill 214, Representative Brunsvold. Representative Brunsvold, do you wish to call the Bill? 214, Representative Brunsvold. Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 214, a Bill for an Act amending the Emergency Medical Services System Act. Third Reading of this House Bill."

Speaker Granberg: "Representative Brunsvold. Out of the record. House Bill 216, Representative Brunsvold. Out of the record. 221 (sic-House Bill), Representative Capparelli. Out of the record. House Bill 223, Representative Mautino. 223, Representative Mautino. Out of the record. House Bill 224, Representative Mautino. Out of the record. House Bill 242, Representative Pankau. Representative Pankau, do you wish to call your Bill on Third Reading, Ma'am? Read the Bill, Mr. Clerk."

Clerk Rossi: "House Bill 242, a Bill for an Act amending the Regional Transportation Authority Act. Third Reading of this House Bill."

Speaker Granberg: "Representative Pankau."

Pankau: "Thank you, Mr. Speaker and Members of the General Assembly. 242 (sic-House Bill) would allow a new, not so new idea, an idea that's been around, but it would allow it

to happen. It would allow bicycles to be transported on commuter rail trains. Now at first the Metra, who was the only opposition, was very much against this. And when they came, we talked. And with the Amendment that's now on the Bill they are neutral on this Bill. And I know of no opposition to this Bill. What the Amendment does is it pushes back the effective date to July 1, 1999. It also allows Metra to put in place whatever rules and regulations it needs to safely accommodate the bicycle and the passenger, to protect the safety and conveyance of the passengers. It also replaces 'may' with 'shall'. And I think that's about it. So with that and with the Amendment on it, with no known opposition, I ask for passage of House Bill 242. It won't happen tomorrow, but it will happen in our future."

Speaker Granberg: "On House Bill 242, the Representative from Effingham, Mr. Hartke."

Hartke: "Thank you very much, Mr. Speaker. Will the Sponsor yield?"

Speaker Granberg: "She indicates she will. Proceed."

Hartke: "Representative Pankau, does this preempt Home Rule, or the authority of the RTA to do this now?"

Pankau: "No, Representative Hartke. In fact, the original wordings were, 'the Regional Transportation Authority', the RTA, and that was changed in the Amendment to the Commuter Rail Board, which is only Metra. So it only affects them and it doesn't affect any Home Rule anything."

Hartke: "Why can't RTA do it?"

Pankau: "RTA said that if it was the total amount that that would also include the overhead trains, what are those called, the..."

Hartke: "The el."

Pankau: "The el, yes."

Hartke: "I'm not from that area, you know, but I know what that is."

Pankau: "I'm sorry."

Speaker Granberg: "They have a lot of those in Effingham."

Pankau: "And the intent of the Bill was not to have people hoist their bikes up the steps to the el, ride around the el with bicycles. The intent is to allow people from the suburbs to take their bikes, go down, ride around the lake front, or people from the city to take their bikes, go out to the suburbs, maybe ride around the prairie path and get back home. So that's the intent of the Bill."

Hartke: "Now just how much demand is there for this in the collar county areas?"

Pankau: "I'm sorry."

Hartke: "How much demand is there going to be for this bicycle racks and so forth that are going to be put on these trains?"

Pankau: "Who knows? It's really an unknown figure. I think probably Metra will put something in place, maybe just as a trial in the beginning. They were concerned about like maybe only doing it on weekends, which is fine because this language allows them to put any and all restrictions on it. So maybe we can just sort of..."

Hartke: "So let's assume, let's assume that Metra makes the rules, right? And that's what you're agreeing then to do."

Pankau: "Right."

Hartke: "What if they say that we're going to accommodate all these bike riders between the hours of 1:00 and 5:00 a.m.?"

Pankau: "Then those are the rules."

Hartke: "Between 1:00 and 5:00 a.m."

Pankau: "It will be awfully dark when you're out there riding

your bike."

Hartke: "Yeah, it certainly would be. But you just agreed to allow Metra, maybe to do something that they really don't want to do, but you're requiring them to do it. Correct?"

Pankau: "What I'm allowing them to do is to put the rules and regulations in place to help to run the program."

Hartke: "Any rules they want, that's what it says in here. They can write the rules."

Pankau: "That's what it says. They can write the rules."

Hartke: "Okay."

Pankau: "However, they are now in a mode of cooperation. So when you're in a mode of cooperation, then you usually don't try to tick people off."

Hartke: "Okay. The legislation says that they 'shall' allow bicycles to be placed on commuter trains. So that's not permissive."

Pankau: "It says 'may'. But the Amendment says 'may'. The original said 'shall', but the Amendment says 'may'."

Hartke: "Okay, I stand corrected on that. Now, in committee it was discussed on the cost of maybe providing the racks necessary to, to hold these bikes and keep them in place. Do you remember what the cost was that you might be incurring in this piece of legislation?"

Pankau: "I think the Gentleman from Metra testified something like $400 thousand. And there were several of the committee members that felt that maybe they should get that contract, because they thought they could do it for a whole lot less."

Hartke: "I think It was the Chairman of the committee that suggested that we build these racks in Southern Illinois. It would be a whole lot cheaper. But ugly as it may,... how do you even begin to justify to make this cost

effective for a few people who may want to take their bikes on the commuter rail to get downtown to ride in the park between 1:00 and 5:00 a.m. in the morning, maybe. Has Metra or you taken a survey of the demand that we need on this? Any idea what the demand would be?"

Pankau: "There's no idea about the demand because we haven't done it here. We have different cars on the Metra system then they do in most other parts of the country, except for California. We have the double deckers. In most other places, they just have the single cars so you don't have to go up the steps to get into the main part. This is already done on the East Coast; it's already done on the West Coast in some places. And I think based on that and the fact that they have two years leave time, they can certainly look at what the demand is in other places and adjust their program accordingly. I suspect it will start out very small at the beginning, and if there's demand it'll grow."

Hartke: "Okay, so let's say that some morning I show up at the commuter rail, and I had my bike and I was going to ride down North Shore Drive and the car only holds maybe 50 or 60 bikes and there are 84 of us standing there with our bikes."

Pankau: "Then 34 of you lose until the next train."

Hartke: "Thirty-four lose. I can see it right now on the train station platform, bikers just fighting like whatever to get their bikes on this rack. What do you think the cost will be to increase? Will there be another fare? What is the fare for a passenger to ride from your location to downtown?"

Pankau: "From. Itasca... downtown, since I just did it on Monday for the Mass Transit hearing, I think it was seven dollars round trip."

Hartke: "Seven dollars, and..."

Pankau: "Round trip."

Hartke: "And how many people can you fit in a car, people, I mean on your train. Both decks, upper and lower."

Pankau: "I don't know. Seventy, 50, I don't know. Two sides, two people, I don't know what, 10, 40, and what there's two rows up above, let's say 60."

Hartke: "Sixty. Would you double deck the bikes too?"

Pankau: "No. But what an idea that someone has suggested was, particularly on weekends, you might be able to take the backs, which already do flip over, and flip them down and just like now they have coat hooks that come out of the wall, you might have a brace or a bracket or something like that that would come out of the wall just on certain times. You could take your bike, put your bike up there, take the chain, take the lock, lock the thing up, you go sit down on a, you know, on a seat. When you get off, you take the thing off and then you go."

Hartke: "So if this bike rack took up the same proportion and space as an individual who would be riding the train, then the fare would be double. You'd buy a ticket for your bike and for yourself."

Pankau: "And allowing Metra to do that would allow them to also increase the fare for the additional bike. That's in the Bill."

Hartke: "Well, Representative Pankau, do you anticipate that there will be a Senator that will pick this Bill up, or are we wasting our time here today?"

Pankau: "Oh, I already know of a Senator that will pick this up."

Hartke: "Oh, you do?"

Pankau: "Senator Parker."

Hartke: "Could you share that with us?"

Pankau: "Senator Parker."

Hartke: "Senator Parker. She lives in your neighborhood?

Pankau: "No."

Hartke: "Oh we're going to do it all the way up to Lake County now the same, the same system because she's had demand from her area that we need this."

Pankau: "Senator Parker, before she became a Senator, used to be on the RTA board. I believe she lives Northfield, Glenview."

Hartke: "Okay. Do you, do you ride a bike?"

Pankau: "Do I ride a bike? On occasion. Have I ridden a bike in the past? Representative Hartke, yes I have."

Hartke: "Thank you very much. I have no further questions."

Speaker Granberg: "Anything further? The Lady from Cook, Representative Erwin."

Erwin: "Thank you, Mr. Speaker. Representative Pankau did a great job during that interrogation. I'm not sure why you had to be so badly interrogated, but I rise in very strong support of this Bill. You know, we, in the last two years I think, appropriated, what was it, Representative Hartke, about $9 million for Amtrak downstate to make sure that downstate trains could run between communities. In addition to that, last year Representative Black was successful in increasing out of the general revenue fund the state contribution for downstate mass transit districts, which was great. They've been very successful at attracting transportation dollars downstate. The truth of the matter is, that in the six county region where we do have the RTA and Metra, we have a densely populated area, many people ride their bikes to and from work, to and from train stations, to the train station and then maybe at the other end, ride their bike to an office building. In

places all over the country, and indeed the world, transportation authorities have figured out how to accommodate bicycles. Yes, the riders have to pay an extra fare, we are not asking here for anything untoward or uncostly. I think Representative Pankau's Bill has given Metra the opportunity for planning time. There are studies both nationally and internationally that they can refer to. This should not, in fact, really need a piece of legislation. The fact is that we should have been able to just encourage our public mass transit system to just plan for this and do it. This will be an encouragement for you folks in the suburbs who want to come downtown and do the lake front bike path, or for indeed, city folks who want to be able to get to the Cook County forest preserve district, that we don't necessarily have access to if you don't own a car. So I think this is a great piece of legislation. I will tell you that in the city there are lots of bicyclists who are writing and calling on this Bill and are very very encouraged. So I encourage a very strong 'aye' vote."

Speaker Granberg: "Anything further? The Gentleman from Cook, Representative Lang."

Lang: "Thank you. Will the Sponsor yield?"

Speaker Granberg: "She indicates she will. Proceed."

Lang: "Representative, there's been some comment that this is a great Bill. I'm not so sure, so I have some questions. Doesn't the RTA have the authority to allow this now without our imposing our will upon them?"

Pankau: "The RTA, this is not prohibited by the RTA, nor is it allowed by the RTA. Everything is silent on it."

Lang: "But whatever happened to the notion of local control? Isn't the RTA a local board that should be allowed to make this determination for themself?"

Pankau: "I believe the RTA is a regional board."

Lang: "Well okay, that's why it's called the Regional Transportation Authority. But the question is, don't they have the authority to do this now?"

Pankau: "I'm not sure if they have the authority. They might be able to. They haven't, I think that's more the point."

Lang: "Well, Representative, you're a champion of local control on the floor of this House. I've heard you make umpteen speeches about how important local control is to you, and how Springfield should get out of the lives of locals or regionals. Why do we need to do this? Why don't we just send a strong letter to the RTA and urge them to allow bike riders to bring their bikes up on the train?"

Pankau: "I think many people, as individuals and also as associations, have indeed written strong letters, and it hasn't really gotten very far. This also, this puts in place a goal, a time and a method by which they can develop the program. In other words, we're making partners out of people instead of making them adversaries. I think that's a good thing."

Lang: "Doesn't Metra oppose this Bill?"

Pankau: "No. With the Amendment they are neutral."

Lang: "What change did the Amendment make, Representative?"

Pankau: "The Amendment moves the effective date back two years to 1999, July 1, 1999 so that there's ample opportunity, either through federal money, such as the ISTEA money which is coming up for renewal this year, for them to look for sources of funding. It also allows them to negotiate and put in place rules and regulations, and in essence develop the program in a cooperative effort. It doesn't mandate it, it makes it permissive so that people will start to work together as opposed to having something descended, or

placed upon them."

Lang: "So with the Amendment this is not a mandate as the original Bill reads? This is now permissive?"

Pankau: "That is correct. It is permissive and allows people to work together, as opposed to saying 'thou shalt'."

Lang: "All right. So apparently I don't have the Amendment in here. So the original Bill says that they 'shall' allow bikes on the train. Your Amendment doesn't say 'shall'?"

Pankau: "That is correct. It says 'may'."

Lang: "Thank you."

Speaker Granberg: "Anything further? The Lady from DuPage to close."

Pankau: "Mr. Speaker and fellow Members, I ask for support on 242."

Speaker Granberg: "The Lady from DuPage moves for the passage of House Bill 242. On that question all in favor shall vote 'aye'; all opposed shall vote 'nay'. The voting is open. Have all voted who wish? Have all voted who wish? Representative Novak indicates... Mr. Clerk, take the record. On this matter, on this matter, there are 114 'aye' votes, 0 voting 'nay', 0 voting 'present'. This Bill, having received the Constitutional Majority, is hereby declared passed. Supplemental Calendar, House Bill 1253, Representative Mautino. Read the Bill, Mr. Clerk. Read the Bill."

Clerk Bolin: "House Bill 1253, a Bill for an Act to amend the Illinois Vehicle Code. No Committee Amendments. No Floor Amendments have been recommended for adoption. No Motions filed. Second Reading of this House Bill."

Speaker Granberg: "Representative Clayton. Are you withdrawing your request for a Fiscal Note, Ma'am?"

Clayton: "The fiscal note has been filed. The State Mandates Act

I would withdraw."

Speaker Granberg: "The Lady is withdrawing her request for a State Mandates Act. Acknowledged. Third Reading. The Gentleman from Champaign, Representative Johnson."

Johnson, Tim: "I just want to commend as a point of personal privilege, the Chair on its evenhandedness. Also commend both sides of the aisle for that spirited thorough discussion on a Bill that got 115 'yes' votes. So congratulations to everybody on a Friday afternoon on a bipartisan spirit of thorough good government."

Speaker Granberg: "Thursday?"

Johnson, Tim: "Thursday, that's right."

Speaker Granberg: "Thank you, Representative. House Bill 248, Representative Hartke, do you wish to call that Bill to Third Reading? Out of the record. House Bill 265, Representative Hartke. Out of the record. House Bill 279, Representative Novak, do you wish to call the Bill? Out of the record. 282 (sic-House Bill), Representative Woolard. Out of the record. 283 (sic-House Bill), Representative Woolard, do you wish to call the Bill? Out of the record. 284(sic-House Bill), Representative Woolard. Out of the record. 285 (sic-House Bill), Representative Woolard. Out of the record. House Bill 287, Representative Cross. Read the Bill, Mr. Clerk. On the Order of Cross."

Cross: "I think this is going to take about three hours of debate, if that's okay, Mr. Speaker."

Speaker Granberg: "That's fine, Representative, for you."

Cross: "I'm hoping I get Representative Johnson to support me with the debate. But this is a fairly simple Bill and I'm not aware of any opposition..."

Speaker Granberg: "Representative Cross, for a moment... Read the Bill, Mr. Clerk."

STATE OF ILLINOIS
90TH GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
TRANSCRIPTION DEBATE

32nd Legislative Day March 13, 1997

Clerk Bolin: "House Bill 287, a Bill for an Act in relation to suspension of driver's licenses of certain minors. Third Reading of this Bill."

Cross: "I would appreciate a 'yes' vote."

Speaker Granberg: "The Gentleman moves for the passage of House Bill 287. On that matter, is there any question? The Gentleman from Cook, Representative Lang."

Lang: "Thank you. Will the Sponsor yield?"

Speaker Granberg: "He indicates he will. Proceed."

Lang: "Representative, your discussion of this Bill and explanation was almost as scintillating as the one a couple of years ago on the tort reform, but I think you should at least... "

Cross: "Thank you, Mr. Lang."

Lang: "If you would at least tell us what this Bill does, I think we'd all be better off, Sir."

Cross: "Thank you. And I think it's a fair question, Representative Lang. This is a fairly simple concept, the one we ran through the Judiciary Committee and amended as a result of some questions in Judiciary. It merely allows a judge, when he's got juveniles in front of him that are either truant or delinquent, in whatever scenario he may have them in front of the court, it gives a judge the power to suspend a driver's license up to the age of 18. He can do it for whatever, he or she can suspend for whatever period of time they want but not later than age 18. I don't know of any opposition. There was a suggestion from a local circuit judge in my hometown, that said 'Tom', the judge said, 'this is one area where we have a hammer over juveniles, and I', he said, 'this is the one way I think we can have some effect on them.'"

Lang: "Representative, I think I support where you're going, but

let me just ask you a Constitutional question. I know we don't concern ourselves too much with the Constitution around here, but the Supreme Court of the United States recently said, 'You cannot take drivers licenses away from sex offenders because it's unconstitutional, because there's no nexus between being a sex offender and driving'. Aren't you in the same place here?"

Cross: "Representative, a valid question. And there are scenarios where we have crossed that, or have created that nexus, for instance between dead beat dads who fail to pay child support, and we, as a result, are suspending their driver's license. So, if we've got that nexus I think in this situation we perhaps have the same nexus. At least that's my interpretation."

Lang: "Well, Representative, I'm going to vote for your Bill because I support it. I just want to pass on to you that maybe there's a way to change this in the Senate to clear up this Constitutionality issue. I think we have a problem here, but I'm going to support your Bill."

Cross: "Thank you."

Speaker Granberg: "The Gentleman moves for the passage of House Bill 287. On that Motion, all in favor shall vote 'aye'; all opposed shall vote 'no'. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Mr. Clerk, take the record. On this matter there being 113 voting 'aye', 0 voting 'no', 0 voting 'present'. This Bill, having received the Constitutional Majority, is hereby declared passed. House Bill 289, Representative Scott. Out of the record. House Bill 291, Representative Lang. Do you wish to call the Bill? Out of the record? House Bill 297, Representative Lang. Read the Bill, Mr. Clerk."

STATE OF ILLINOIS
90TH GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
TRANSCRIPTION DEBATE

32nd Legislative Day March 13, 1997

Clerk Bolin: "House Bill 297, a Bill for an Act to amend the Code of Civil Procedure. Third Reading of this House Bill."

Speaker Granberg: "Proceed."

Lang: "Thank you, Mr. Speaker, Ladies and Gentlemen. House Bill 297 is a Bill that came to us from the probate division of the Circuit Court of Cook County. This would amend the Illinois Code of Civil procedure by allowing the court to appoint a special representative to replace a decedent to prosecute a cause of action under a given set of circumstances. There was no opposition to this in committee, in fact I think it went out on the Attendance Roll Call, and I would ask your support."

Speaker Granberg: "On this Motion are there any questions? The Gentleman from Lake, Representative Churchill."

Churchill: "Thank you, Mr. Speaker. Will the Gentleman yield?"

Speaker Granberg: "He indicates he will. Proceed."

Churchill: "Representative Lang, how does the court know who to appoint if there's been no probate?"

Lang: "This would allow a judge to substitute a special representative if either party dies while the case is pending in court. Because of that no one would have to go to the probate court, this would allow the judge in a civil case to appoint such a special representative."

Churchill: "But how do they know who represents the decedent? I mean if somebody dies, that person may have already said, 'I want so and so to represent me as my personal representative in a probate proceedings'."

Lang: "Well, I'm not quite sure I understand your question, Representative. This has nothing to do with who the decedent wants, because this is not a probate matter. This covers the situation where someone in litigation, a party, dies during the case, and all the parties then want to

continue to proceed with the case. Rather than open a probate estate and cost a lot of time, of attorneys and fees and costs, this would enable the court to appoint someone so that this civil case could continue."

Churchill: "Okay, so let's say that party 'X' is the plaintiff seeking monetary damages, and the plaintiff, sole plaintiff dies at that point, the court can appoint any representative?"

Lang: "Well, there's a list in the Bill of the criteria under which the court could do this. So the court would have to refer to that criteria which you could read as easily as I could read to you."

Churchill: "Okay, so but does it have any relationship, does it bear any relationship to the people who would be appointed as representative under a probate proceedings?"

Lang: "It is, it is modeled after the Probate Act. It just simply is something that can be done in the civil case so you don't have to go to the probate courts."

Churchill: "All right. So if there is a judgement issued, and some money is paid or pursuant to a settlement, how do we know who the money goes to, if there's no probate proceeding? You've established no errors, you haven't set out a time period for..."

Lang: "Well, this wouldn't necessarily mean that the probate court would not have to help with the distribution of the funds should the plaintiff prevail. This simply means that you would not have to open the probate estate to continue the civil case, so that you don't have to spend the time, the cost, the attorneys' fees to go through that process, and delay the civil case while you go about the business of opening the probate case. Later, a probate estate may have to be opened if the plaintiff would prevail, if you'd have

a question about how the monies should be distributed."

Churchill: "Then if the probate estate is open at that point, the civil case is still going on? Does the representative of the probate estate become the new party in a lawsuit?"

Lang: "Yes, they can be substituted. But that probate estate would not be open during that civil case, that's the whole point of this. So that probate case would not have to be open until that civil case was completed. Perhaps the plaintiff has died but the plaintiff loses, there would be no need to open the probate case."

Churchill: "In my example where the plaintiff was the decedent, and was seeking monetary damages, there may be a need to open a probate estate anyway because he may have other assets."

Lang: "There may be but not necessarily. Perhaps... Perhaps the recovery would be less than the amount necessary and it would pass through a small estate affidavit, perhaps you still don't need to open an estate. So this saves the parties in that civil case time and trouble and effort and fees, and also contributes to the smooth administration of justice because that civil case would not have to be interrupted."

Churchill: "Okay, I think I just have one more question, and that is if a probate case is open and a personal representative is appointed and that is somebody that a judge would appoint after listening to an heirship in determining who should be the proper person to come in, is there an automatic right for that personal representative to then succeed the person that's been appointed in the civil case? Or could that person that's been appointed in the civil case object?"

Lang: "On the Motion, on a Motion the court may substitute, but

is not required to. So the court would make that determination."

Churchill: "Okay, thank you. No further questions."

Speaker Granberg: "Thank you. Any further questions? No further questions? The Gentleman from Logan, Representative Turner."

Turner, J.: "Thank you, Mr. Speaker. Will the Sponsor yield?"

Speaker Granberg: "He indicates he will. Proceed."

Turner, J.: "Representative Lang, I notice that your Bill does not apply to actions pending under the Wrongful Death Act. Why is that excluded?"

Lang: "I'm not sure I heard the question, Representative. It's not a question you asked in committee, I might add, so it must be one you just came up with, but I didn't hear it."

Turner, J.: "Well, Representative Lang, sometimes we come up with questions after committee. Your Bill says this paragraph does not apply to actions pending under the Wrongful Death Act. Why not?"

Lang: "I'm not sure I can answer your question. This was drafted by a judge in Cook County. I did not ask him why he excluded that. He's an expert in probate, this is his area. He must have good reason for doing this."

Turner, J.: "Are you asking the Members of the House to vote for the Bill, even though you don't know why that language is in it?"

Lang: "No, I'm asking for the Members of the House to vote for a Bill that I do know the language in, I just can't answer the question you asked, Representative."

Turner, J.: "Who can answer my question as to this Bill, Representative Lang?"

Lang: "I didn't hear your question."

Turner, J.: "Who can answer my inquiry?"

Lang: "Well, we could put you in touch with the Judge that came to me with this piece of legislation."

Turner, J.: "I'm not sure everyone wants to stay here today to wait till I call the judge and make contact with the judge. Is there anyone there, I know you don't like for Members to use staff, but maybe you could avail yourself of your staff and answer that question."

Lang: "I'm not sure staff knows the answer to this particular question, Representative, but thank you for asking."

Turner, J.: "Thank you, Mr. Speaker."

Speaker Granberg: "The Gentleman...Anything further? The Gentleman from Cook moves for the passage of House Bill 297. All in favor shall vote 'aye'; opposed 'no''. The Roll Call is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? On this question, there are...Mr. Clerk, take the record. On this question there are 114 'ayes', 0 voting 'no', 0 voting 'present'. This Bill, having received the Constitutional Majority, is hereby declared passed. Representative Lawfer."

Lawfer: "Thank you, Mr. Chairman (sic - Speaker). I would like to present House Resolution #59 for consideration of this Body."

Speaker Granberg: "I think the Gentleman moves to discharge the appropriate committee and have that Resolution go directly to the House Floor. Any objection? No objection, all in favor say 'aye'. The 'ayes' have it. Now to the Resolution, Representative."

Lawfer: "Thank you, Mr. Chairman (sic - Speaker). House Resolution 59 designates the week of March 16th as National Agriculture week and March 20th as National Agriculture Day. Remember Illinois is gifted with some of the richest

agriculture resources in the world, with over 28 million acres of farm land. This makes Illinois to be recognized as a world supplier of food and fiber. Each American farmer produces enough food and fiber for 129 people, 97 in the United States and 32 abroad. This is a reliable, abundant, safe and wholesome food. Americans spend only 11% of their disposable income on food, earning enough to pay for their annual food supply by February the 10th of each year. Because of the livestock and grain production, we make up 1/4 of all the exports of the United States. Along with that we protect our natural resources. American agriculture and Illinois agriculture is an important part of life. In Illinois contributing nearly $50 billion to the State of Illinois economy, employing nearly 900 thousand people with approximately 14 hundred companies producing food. Illinois is top in its production of national scale and production and agriculture, and agriculture processing. Therefore, I ask, am honored to be Cosponsor and have Sponsored with this Resolution, Representative Woolard, Representative Noland, Representative Wirsing, and Representative Hartke. And I would move approval of this Resolution in recognition of the agriculture industry in the State of Illinois."

Speaker Granberg: "Thank you, Representative. The Gentleman moves for the adoption of House Resolution 59. All in favor say 'aye'; opposed 'no'. The 'ayes' have it, the Resolution is adopted. Thank you, Representative Lawfer. Mr. Clerk, Adjournment Resolution."

Clerk Rossi: "House Resolution (sic - House Joint Resolution) #17, offered by Representative Currie.

'RESOLVED, BY THE HOUSE OF REPRESENTATIVES OF THE NINETIETH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE SENATE

CONCURRING HEREIN, that when the House of Representatives adjourns on Thursday, March 13, 1997, it stands adjourned until Tuesday, March 18, 1997 at 12:30 p.m., and when the Senate adjourns on Thursday, March 13, 1997, it stands adjourned until Friday, March 14, 1997; and when it adjourns on that day, it stands adjourned until Monday, March 17, 1997 at 12:00 o'clock noon; and when it adjourns on that day, it stands adjourned until Tuesday, March 18, 1997.'"

Speaker Granberg: "Allowing Perfunctory time for the Clerk, the Representative from Cook, Representative Currie, now moves that the House stand adjourned until the hour of 12:30, on March 18. All in favor shall say 'aye'; opposed 'nay'. The 'ayes' have it; the House is adjourned."

Clerk Rossi: "The House Perfunctory Session will come to order. Committee Reports. Representative Gash, Chairman from the Committee on Jud. 2 Criminal Law, to which the following Bills and Resolutions were referred, action taken on March 13, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bills 710, House Bill 722, House Bill 744, House Bill 1090, House Bill 1139, House Bill 1200, House Bill 1219, House Bill 1315, House Bill 1373, House Bill 1408, and House Bill 1424; 'do pass as amended Short Debate' House Bills 44, House Bill 157, House Bill 395, House Bill 561, House Bill 592, House Bill 763, House Bill 1363, House Bill 1433; 'do pass Standard Debate' House Bills 245, House Bill 1356, and House Bill 1365, 'do pass Consent Calendar' House Bills 1015, House Bill 1208, House Bill 1257, House Bill 1322, and House Bill 1369. Representative Lyons, Acting Chairman from the Committee on Aging, to which the following Bills and Resolutions were referred, action taken on March 13,

STATE OF ILLINOIS
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1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bills 861, and House Bill 1228. Representative Steve Davis, Chairman from the Committee on Veteran's Affairs, to which the following Bills and Resolutions were referred, action taken on March 13, 1997, reported the same back with the following recommendation/s: 'do pass Consent Calendar' House Bills 1210, and House Bill 1318. Representative Murphy, Chairman from the Committee on Personnel and Pensions, to which the following Bills and Resolutions were referred, action taken on March 13, 1997, reported the same back with the following recommendation/s: 'do pass as amended Short Debate' House Bills 345, and House Bill 488. Representative Lopez, Chairman from the Committee on Consumer Protection, to which the following Bills and Resolutions were referred, action taken on March 12, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bill 207; 'do pass as amended Short Debate' House Bill 597, and House Bill 1142. Introductions of Resolutions. House Resolution 70, offered by Representative Flowers, is assigned to the Rules Committee."

Clerk Rossi: "Introduction - First Reading of Senate Bills. Senate Bill 31, offered by Representative Moffitt, a Bill for an Act relating to school buses, amending named Acts. Senate Bill 66, offered by Representative Mitchell, a Bill for an Act to amend the School Code. Senate Bill 69, offered by Representative Mitchell, a Bill for an Act in relation to school technology. Senate Bill 83, offered by Representative Parke, a Bill for an Act concerning income tax check offs. Senate Bill 113, offered by Representative Stephens, a Bill for an Act to amend the Illinois Vehicle

Code. Senate Bill 166, offered by Representative Novak, a Bill for an Act to amend the Child Passenger Protection Act. Senate Bill 232, offered by Representative Stephens, a Bill for an Act to amend the Criminal Code. Senate Bill 233, offered by Representative Stephens, a Bill for an Act concerning vehicles, amending named Acts. Senate Bill 234, offered by Representative Lawfer, a Bill for an Act concerning hospital district directors. Senate Bill 247, offered by Representative Winters, a Bill for an Act to amend the Lead Poisoning Prevention Act. Senate Bill 279, offered by Representative Scott, a Bill for an Act to amend 'AN ACT in relation to certain land', Public Act. Senate Bill 301, offered by Representative Hartke, a Bill for an Act to amend the Regional Transportation Authority Act. Senate Bill 370, offered by Representative Winters, a Bill for an Act to amend the Retailers' Occupation Tax Act. Senate Bill 396, offered by Representative Beaubien, a Bill for an Act to amend the Illinois Income Tax Act. Senate Bill 463, offered by Representative Erwin, a Bill for an Act to amend the Illinois Vehicle Code. Senate Bill 536, offered by Representative Joe Lyons, a Bill for an Act to amend the State Salary and Annuity Withholding Act. Senate Bill 698, offered by Representative Schoenberg, a Bill for an Act to amend the Illinois Public Aid Code. Senate Bill 797, offered by Representative Churchill, a Bill for an Act to amend the Illinois Aeronautics Act. First Reading of these Senate Bills. Senate Bill 538, offered by Representative Lang, a Bill for an Act to amend the Illinois Credit Union Act. First Reading of these Senate Bills."

Clerk Bolin: "Committee Reports. Representative Eugene Moore, Chairman from the Committee on Revenue, to which the

following Bills and Resolutions were referred, action taken on March 13, 1997, reported the same back with the following recommendation/s: 'do pass Short Debate' House Bills 19, House Bill 20, House Bill 27, House Bill 45, House Bill 104, House Bill 167, House Bill 270, House Bill 521, House Bill 526, House Bill 572, House Bill 601, House Bill 631, House Bill 687, House Bill 883, House Bill 884, House Bill 1040, House Bill 1119, House Bill 1121, House Bill 1283, House Bill 1334, House Bill 1425, House Bill 1427, Senate Bill 51; 'do pass as amended Short Debate' House Bills 9, House Bill 318, House Bill 581, House Bill 585, House Bill 599, House Bill 605, House Bill 623, House Bill 847, House Bill 1116, House Bill 1118. Introduction - First Reading of Bills. Senate Bill 427, offered by Representative Dart, a Bill for an Act to amend the Illinois Marriage and Dissolution of Marriage Act. Senate Bill 619, offered by Representative Dart, a Bill for an Act to amend the Adoption Act. Senate Bill 946, offered by Representative Dart, a Bill for an Act to amend the Nursing Home Care Act. First Reading of these Senate Bills."

Clerk Bolin: "Having no further business, the House Perfunctory Session will stand adjourned. The House will reconvene in regular Session on Tuesday, March 18, at 12:30 p.m."

Document: 1996 735 ILCS 5/13-209

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ILLINOIS COMPILED STATUTES ANNOTATED > CHAPTER 735. CIVIL PROCEDURE > CODE OF CIVIL PROCEDURE > ARTICLE XIII. LIMITATIONS > PART 2. PERSONAL ACTIONS

ILCS 5/13-209. Death of party

Sec. 13-209. Death of party. (a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his or her representative before the expiration of that time, or within one year from his or her death whichever date is the later.

(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death.

(c) If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.

History

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 110, para. 13-209]

Source:

P.A. 86-793; 86-815; 86-1028.

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1997 735 ILCS 5/13-209

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ILLINOIS COMPILED STATUTES ANNOTATED > CHAPTER 735. CIVIL PROCEDURE > CODE OF CIVIL PROCEDURE > ARTICLE XIII. LIMITATIONS > PART 2. PERSONAL ACTIONS

ILCS 5/13-209. Death of party

Sec. 13-209. Death of party. (a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives:

(1) an action may be commenced by his or her representative before the expiration of that time, or within one year from his or her death whichever date is the later;

(2) if no petition for letters of office for the decedent's estate has been filed, the court may appoint a special representative for the deceased for the purpose of prosecuting the action. The appointment shall be on verified motion of any party who appears entitled to participate in the deceased's estate, reciting the names and last known addresses of all known heirs and the legatees and executor named in any will that has been filed. The court's determination that a person appears entitled to participate in the deceased's estate shall be solely for purposes of this Section and not determinative of rights in final disposition. Within 90 days after appointment, the special representative shall notify the heirs and legatees of the following information by mail: that an appointment has been made, the court in which the case was filed, the caption of the case, and a description of the nature of the case. The special representative shall publish notice to unknown heirs and legatees as provided in the Probate Act of 1975 [755 ILCS 5/1-1 et seq.]. If a will is filed within 90 days after the appointment of the special representative, the same notice shall be given to any additional executors and legatees named in the will. At any time that an estate is opened with a representative other than the special representative, the court may upon motion substitute the representative for the special representative. In this case, the court shall allow disbursements and fees of the special representative and his or her attorney as a claim against any proceeds received. The proceeds of any judgment or settlement shall be distributed under the provisions of the Probate Act of 1975 [755 ILCS 5/1-1 et seq.].

(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;

(2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

(c) If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.

History

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 110, para. 13-209]

Source:

P.A. 86-793; 86-815; 86-1028; 90-111, § 5.

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ILLINOIS COMPILED STATUTES ANNOTATED > CHAPTER 735. CIVIL PROCEDURE > CODE OF CIVIL PROCEDURE > ARTICLE II. CIVIL PRACTICE > PART 10. PRE-TRIAL STEPS

ILCS 5/2-1008. Abatement -- Change of interest or liability -- Subst tution of parties

Sec. 2-1008. Abatement -- Change of interest or liability -- Substitution of parties. (a) Change of interest or liability. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be before the court, or that any person already a party be made party in another capacity, the action does not abate, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without a change in the title of the cause.

(b) Death. If a party to an action dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion. If a motion to substitute is not filed within 90 days after the death is suggested of record, the action may be dismissed as to the deceased party.

If the death of a party to a personal action is suggested of record and no petition for letters of office for his or her estate has been filed, the court, upon motion 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. If a legal representative is appointed for the estate before judgment is entered, and his or her appointment is suggested of record in the action, the court shall order that the representative be substituted for the special administrator.

If a judgment is entered or the action is settled in favor of the special administrator, he or she shall distribute the proceeds as provided by law, except that if proceeds in excess of $1,000 are distributable to a minor or person under legal disability, the court shall allow disbursements and fees to the special administrator and his or her attorney and the balance shall be administered and distributed under the supervision of the probate division of the court.

In the event of the death of a party in an action in which the right sought to be enforced survives only as to the remaining parties to the action, the action does not abate. The death shall be suggested of record and the action shall proceed in favor of or against the remaining parties.

No action brought for the use of another abates by reason of the death of the plaintiff whose name is used but may be maintained by the party for whose use it was brought in his or her own name upon suggesting the death of record and the entry of an order of substitution.

(c) Legal disability. If a party is declared to be a person under legal disability, that fact shall be suggested of record and the prosecution or defense shall be maintained by his or her representative, guardian ad litem or next friend, as may be appropriate.

(d) Trustees; public officers. If any trustee or any public officer ceases to hold the trust or office and that fact is suggested of record, the action shall proceed in favor of or against his or her successor.

(e) Service of process. Parties against whom relief is sought, substituted under subsection (a) hereof, shall be brought in by service of process. Service of process on parties substituted under subsections (b), (c), and (d) hereof is not required, but notice shall be given as the court may direct.

History

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 110, para. 2-1008]

Source:

P.A. 83-707.

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1997 735 ILCS 5/2-1008

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ILLINOIS COMPILED STATUTES ANNOTATED > CHAPTER 735. CIVIL PROCEDURE > CODE OF CIVIL PROCEDURE > ARTICLE II. CIVIL PRACTICE > PART 10. PRE-TRIAL STEPS

ILCS 5/2-1008. Abatement; change of interest or liability; substitution of parties

Sec. 2-1008. Abatement; change of interest or liability; substitution of parties. (a) *Change of interest or liability.* If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be before the court, or that any person already a party be made party in another capacity, the action does not abate, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without a change in the title of the cause.

(b) ***Death.*** If a party to an action dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion as follows:

(1) If no petition for letters of office for the decedent's estate has been filed, the court may appoint a special representative for the deceased for the purpose of prosecuting the action. The appointment shall be on verified motion of any party who appears entitled to participate in the deceased's estate, reciting the names and last known addresses of all known heirs and the legatees and executor named in any will that has been filed. The court's determination that a person appears entitled to participate in the deceased's estate shall be solely for purposes of this Section and not determinative of rights in final disposition. Within 90 days after appointment, the special representative shall notify the heirs and legatees of the following information by mail: that an appointment has been made, the court in which the case was filed, the caption of the case, and a description of the nature of the case. The special representative shall publish notice to unknown heirs and legatees as provided in the Probate Act of 1975 [755 ILCS 5/1-1 et seq.]. If a will is filed within 90 days after the appointment of the special representative, the same notice shall be given to any additional executors and legatees named in the will. At any time that an estate is opened with a representative other than the special representative, the court may upon motion substitute the representative for the special representative. In this case, the court shall allow disbursements and fees of the special representative and his or her attorney as a claim against any proceeds received. The proceeds of any judgment or settlement shall be distributed under the provisions of the Probate Act of 1975 [755 ILCS 5/1-1 et seq.]. This paragraph (1) does not apply to actions pending under the Wrongful Death Act [740 ILCS 180/0.01 et seq.].

(2) If a person against whom an action has been brought dies, and the cause of action survives and is not otherwise barred, his or her personal representative shall be substituted as a party. If no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person bringing an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

If a motion to substitute is not filed within 90 days after the death is suggested of record, the action may be dismissed as to the deceased party.

In the event of the death of a party in an action in which the right sought to be enforced survives only as to the remaining parties to the action, the action does not abate. The death shall be suggested of record and the action shall proceed in favor of or against the remaining parties.

No action brought for the use of another abates by reason of the death of the plaintiff whose name is used but may be maintained by the party for whose use it was brought in his or her own name upon suggesting the death of record and the entry of an order of substitution.

(c) ***Legal disability.*** If a party is declared to be a person under legal disability, that fact shall be suggested of record and the prosecution or defense shall be maintained by his or her representative, guardian ad litem or next friend, as may be appropriate.

(d) ***Trustees; public officers.*** If any trustee or any public officer ceases to hold the trust or office and that fact is suggested of record, the action shall proceed in favor of or against his or her successor.

(e) ***Service of process.*** Parties against whom relief is sought, substituted under subsection (a) hereof, shall be brought in by service of process. Service of process on parties substituted under subsections (b), (c), and (d) hereof is not required, but notice shall be given as the court may direct.

History

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 110, para. 2-1008]

Source:

P.A. 83-707; 90-111, § 5.

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Land v. Bd. of Educ.

Supreme Court of Illinois

November 21, 2002, Opinion Filed

Docket No. 92837

Reporter
202 Ill. 2d 414 *; 781 N.E.2d 249 **; 2002 Ill. LEXIS 959 ***; 269 Ill. Dec. 452 ****

MAURICE LAND et al., Appellees, v. THE BOARD OF EDUCATION OF THE CITY OF CHICAGO et al., Appellants.

Prior History: [*1]** *Land v. Bd. of Educ., 325 Ill. App. 3d 294, 259 Ill. Dec. 49, 757 N.E.2d 912 (App. Ct. 1st Dist. 2001)*.

Disposition: Appellate court's judgment was affirmed, in part, reversed, in part, and cause was remanded.

Core Terms

layoff, delegate, teachers, appellate court, summary judgment, laid off, promulgate, legislative intent, circuit court, vested, notice, powers, layoff, reassignment, Dictionary, ambiguous, employees, seniority, removal, tenured teacher, Black's Law, appointment, terminate, attendance, authorizes, provisions, permanent, recommendations, certifications, plaintiffs'

Case Summary

Procedural Posture
Appellee public school teachers sought a writ of mandamus in the circuit court ordering their reinstatement, a declaration that appellant board of education's layoff policy was invalid, and a permanent injunction restraining the board from terminating their employment. The circuit court granted the board's summary judgment motion. The Illinois Court of Appeals reversed and remanded. The board appealed.

Overview

The teachers were all tenured when the board honorably terminated them by a letter from the human resources director for the municipal public schools. The teachers claimed that, because of the language of *105 Ill. Comp. Stat. Ann. 5/34-18* (West 1996) and *105 Ill. Comp. Stat. Ann. 5/34-85* (West 1998), their layoffs were entirely unlawful and void. The supreme court found that the statutes did not exempt tenured teachers from layoff. Further, the Illinois Legislature did not intend to prohibit delegation of the authority to make layoffs to anyone other than principals, indeed, there was express statutory authorization of delegation to the general superintendent and attorney. However, the case had to be remanded to the circuit court for further fact finding to determine whether the board properly delegated responsibility for making any or all of the determinations required by its enacted policy, and, if so, whether the party to whom authority was delegated acted in accordance with the policy.

Outcome
The judgment was reversed in part, as to the appellate court holding that the board could not delegate its authority to make layoffs; the judgment was affirmed in part, as to the order remanding the matter to the circuit court for further fact finding.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN1[] **Standards of Review, De Novo Review**

In an appeal from a grant of summary judgment, review is de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Entitlement as Matter of Law, Appropriateness**

The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. Summary judgment is proper where pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *735 Ill. Comp. Stat. Ann. 5/2-1005(c)* (West 2000).

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Standards of Review, De Novo Review**

Questions of statutory interpretation are reviewed de novo.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

In interpreting a statute, a court's primary goal is to ascertain the intent of the Illinois Legislature. The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. When the plain language of the statute is clear and unambiguous, the legislative intent that is discernable from this language must prevail, and no resort to other tools of statutory construction is necessary.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN5[] **Legislation, Interpretation**

Under the doctrine of construction of in pari materia, two legislative acts that address the same subject are considered with reference to one another, so that they may be given harmonious effect. Sections of the same statute should also be considered in pari materia, and each section should be construed with every other part or section of the statute to produce a harmonious whole. The doctrine is consistent with the acknowledgment that one of the fundamental principles of statutory construction is to view all of the provisions of a statute as a whole. Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of a statute so that, if

possible, no term is rendered superfluous or meaningless. Further, courts presume that the Illinois Legislature, when it enacted the statute, did not intend absurdity, inconvenience, or injustice.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > Faculty & Staff > Personnel Actions > General Overview

HN6[] Elementary & Secondary School Boards, Authority of School Boards

105 Ill. Comp. Stat. Ann. 5/34-1 et seq. (West 1998), the Illinois School Code, applies to cities of over 500,000 inhabitants. *105 Ill. Comp. Stat. Ann. 5/34-8.1* (West 1998) describes the powers and duties of school principals; *105 Ill. Comp. Stat. 5/34-18* (West 1998) describes the powers of boards of education; and *105 Ill. Comp. Stat. Ann. 5/34-84* and *5/34-85* (West 1998) govern the appointment and promotion of teachers and the removal of teachers for cause, respectively.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > Faculty & Staff > Personnel Actions > Reductions in Force

HN7[] Elementary & Secondary School Boards, Authority of School Boards

The 1995 amendments to *105 Ill. Comp. Stat. Ann. 5/34-18(31)* (West 1998) added several new enumerated powers to *section 34-18*, including the power, except as otherwise provided by Article 34 of the Illinois School Code, to: promulgate rules establishing procedures governing the layoff or reduction in force of employees and the recall of such employees, including, but not be limited to, criteria for such layoffs, reductions in force or recall rights of such employees and the weight to be given to any particular criterion. Such criteria shall take into account factors including, but not be limited to, qualifications, certifications, experience, performance ratings or evaluations, and any other factors relating to an employee's job performance.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > Faculty & Staff > Faculty & Staff Evaluations > General Overview

Education Law > Faculty & Staff > Personnel Actions > General Overview

Education Law > Faculty & Staff > Personnel Actions > Reductions in Force

HN8[] Elementary & Secondary School Boards, Authority of School Boards

The powers and duties of school principals are set out in *section 34-8.1* of the Illinois School Code, *105 Ill. Comp. Stat. Ann. 5/34-8.1* (West 1998). The responsibilities of a principal include the duty to direct, supervise, evaluate, and suspend or discipline teachers, but the right to employ, discharge, and layoff shall be vested solely with the Board of Education. The principal, however, may make recommendations to the board regarding the employment, discharge, or layoff of any individual. *105 Ill. Comp. Stat. Ann. 5/34-8.1* (West 1998).

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > Faculty & Staff > Personnel Actions > Reductions in Force

HN9[] Elementary & Secondary School Boards, Authority of School Boards

105 Ill. Comp. Stat. Ann. 5/34-84 (West 1998) governs the appointment and promotion of teachers. Following completion of a probationary period, appointments of teachers shall become permanent, subject to removal for cause in the manner provided by *105 Ill. Comp. Stat. Ann. 5/34-85* (West 1998). Under *section 34-85*, no permanent teacher shall be removed except for cause. Written notice of charges and specifications and a hearing, with the right of review, are provided for.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN10 **Rule Application & Interpretation, Binding Effect**

The Illinois Legislature gives boards of education the authority to formulate and implement its own rules and procedures regarding layoffs rather than binding the board to a legislatively mandated procedure.

Civil Procedure > Appeals > Standards of Review > General Overview

HN11 **Appeals, Standards of Review**

The Illinois Supreme Court may not reverse a portion of an appellate court's judgment merely because the parties are in agreement that the appellate court erred. The Supreme Court must examine the issue for itself.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN12 **Legislation, Interpretation**

A statute is ambiguous if it is susceptible to two equally reasonable and conflicting interpretations. Only if the statutory language is ambiguous may a court consider extrinsic aids for construction, such as legislative history, to determine legislative intent. In the absence of ambiguity, a court must rely on the plain and ordinary meaning of the words chosen by the Illinois Legislature. Further, where the language of a statute is clear and unambiguous, a court must give it effect as written, without reading into it exceptions, limitations, or conditions that the Legislature did not express.

Governments > Legislation > Interpretation

HN13 **Legislation, Interpretation**

To "promulgate" is to declare or announce publicly; to proclaim, or to put (a law or decree) into force or effect.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN14 **Elementary & Secondary School Boards, Authority of School Boards**

See *105 Ill. Comp. Stat. Ann. 5/34-8.1* (West 1998).

Governments > Legislation > Interpretation

HN15 **Legislation, Interpretation**

A right is a power or privilege to which one is entitled, but such entitlement does not preclude the delegation of that power or privilege to another.

Governments > Legislation > Interpretation

HN16[] **Legislation, Interpretation**

A "vested right" is a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. One could not delegate a right or privilege to another unless one was vested with the right in the first place.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN17[] **Elementary & Secondary School Boards, Authority of School Boards**

A principal shall fill positions by appointment as provided in *105 Ill. Comp. Stat. Ann. 5/34-8.1* (West 1998) and may make recommendations to a board of education regarding the employment, discharge, or layoff of any individual.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN18[] **Elementary & Secondary School Boards, Authority of School Boards**

Reading *105 Ill. Comp. Stat. Ann. 5/34-8.1* (West 1998) as whole, it is clear that a board of education is prohibited from delegating the responsibility for making layoffs to principals. The 17 paragraphs of *section 34-8.1* not only define the powers and duties of principals, but also describe in detail the relationship between principals and the board.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN19[] **Elementary & Secondary School Boards, Authority of School Boards**

105 Ill. Comp. Stat. Ann. 5/34-8.1 (West 1996) is clear and unambiguous-the determinations of whether layoffs are necessary and who will be laid off may not be made by principals. The role of principals is purely advisory.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN20[] **Elementary & Secondary School Boards, Authority of School Boards**

105 Ill. Comp. Stat. Ann. 5/34-18(31) (West 1996) authorizes a board of education to establish criteria for layoffs that include, but are not limited to, qualifications, certifications, experience, performance ratings or evaluations, and any other factors relating to an employee's job performance.

Governments > Legislation > Interpretation

HN21[] **Legislation, Interpretation**

When the Illinois Legislature enacts an official title or heading to accompany a statutory provision, that title or heading is considered only as a short-hand reference to the general subject matter involved in that statutory section, and cannot limit the plain meaning of the text. Such official headings or titles are of use only when they shed light on some ambiguous word or phrase within the text; they cannot undo or limit that which the text makes plain.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN22[] **Elementary & Secondary School Boards, Authority of School Boards**

105 Ill. Comp. Stat. Ann. 5/34-8.1 (West 1996)

deals with the powers and duties of principals, and the relationship of principals to a board of education, but does not otherwise limit the powers of the board provided for in *105 Ill. Comp. Stat. Ann. 5/34-18* (West 1996).

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN23 **Elementary & Secondary School Boards, Authority of School Boards**

105 Ill. Comp. Stat. Ann. 5/34-8.1 (West 1996) is not intended to impose a limitation on the power of a board of education to delegate its layoff authority.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Governments > State & Territorial Governments > Elections

HN24 **Elementary & Secondary School Boards, Authority of School Boards**

105 Ill. Comp. Stat. Ann. 5/34-19 (West 1998) is entitled "By-laws, rules and regulations; business transacted at regular meetings; voting; records" and provides, in pertinent part, that notwithstanding any other provision in this Article or in the Illinois School Code, a board of education may delegate to the general superintendent or to the attorney the authorities granted to the board in the School Code. The delegation provision also requires that appropriate oversight procedures be established, and lists six nondelegable functions.

Governments > Legislation > Interpretation

HN25 **Legislation, Interpretation**

Courts should not, under the guise of statutory construction, add requirements or impose limitations that are inconsistent with the plain meaning of an enactment.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN26 **Summary Judgment, Motions for Summary Judgment**

Although summary judgment aids in the expeditious disposition of a lawsuit, it is a drastic measure and should be granted only if a moving party's right to judgment is clear and free from doubt. A motion for summary judgment does not ask a court to try a question of fact, but to determine if a question of material fact exists that would preclude the entry of judgment as a matter of law. Thus, although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment. If the party moving for summary judgment supplies

facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opponent cannot rest on his pleadings to create a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN27[] **Summary Judgment, Entitlement as Matter of Law**

An appellate court must view the record in the light most favorable to the nonmoving party at summary judgment. *735 Ill. Comp. Stat. Ann. 5/2-1005(c)* (West 2000).

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN28[] **Elementary & Secondary School Boards, Authority of School Boards**

105 Ill. Comp. Stat. Ann. 5/34-18(31) (West 1998) authorizes a board of education to promulgate rules establishing procedures for layoffs.

Governments > Legislation > Interpretation

HN29[] **Legislation, Interpretation**

A "procedure" is a specific method or course of action.

Governments > Legislation > Interpretation

HN30[] **Legislation, Interpretation**

A "policy" states the general principles by which a government is guided in its management of public affairs.

Counsel: For Board of Education of the City of Chicago, APPELLANT: David D. Brown, Norman H. Hirsch, Jenner & Block LLC, Chicago, IL.

For Maurice Land, APPELLEE: Frederick S. Rhine, Gessler Hughes Socol Piers Resnick & Dym, Chicago, IL.

For OTHER: Lawrence A. Poltrock, Witwer, Poltrock & Giampietro, Chicago, IL.

Judges: JUSTICE GARMAN

Opinion by: GARMAN

Opinion

[*417] **[****455]** **[**252]** JUSTICE GARMAN delivered the opinion of the court:

The five plaintiffs are among 138 tenured public school teachers whose employment by the Board of Education of the City of Chicago (Board) was "honorably terminated" on January 22, 1999. Defendants are the Board itself, its individual members, and several officers of the Chicago public schools. After they were laid off from their teaching positions, plaintiffs filed a complaint in the circuit court of Cook County seeking a writ of *mandamus* ordering their reinstatement, a declaration **[*418]** that the Board's layoff policy was invalid under *sections 34-84* and *34-85* of the School Code (*105 ILCS 5/34-84*, *34-85* (West 1998)), and a permanent injunction restraining the **[***2]** Board from terminating their employment. The parties filed cross-motions for summary judgment and the circuit court granted defendants' motion. The appellate court reversed and remanded. *325 Ill. App. 3d 294, 757 N.E.2d 912*. We granted leave to appeal pursuant to Rule 315 (177 Ill. 2d R. 315) to determine whether the Board may delegate its authority to lay off employees. We reverse that portion of the judgment

of the appellate court holding that the Board may not delegate its authority to make layoffs (*325 Ill. App. 3d at 307*), but affirm the order remanding this matter to the circuit court for further fact finding (*325 Ill. App. 3d at 311*).

BACKGROUND

Following the enactment of amendments to the School Code in 1995, the Board first adopted and later, in 1997, amended a "Policy Regarding Reassignment and Layoff of Regularly Certified and Appointed Teachers." Section 1 of the policy permits reassignment or layoff of teachers, *inter alia*, "whenever an attendance center is closed, there is a drop in enrollment, [or] the educational focus of the attendance center is changed." Section 2A of the amended policy applies when such a change requires the removal **[***3]** of some but not all teachers, as in the present case:

> "In Attendance Centers/Programs That Are Not Subject to Reconstitution. If changes in an attendance center or program require the removal of some but not all teachers, teachers with appropriate certifications will be selected for retention based on seniority. Provisionals, Day-to-Day substitutes, Cadre substitutes, FTBs and Probationary teachers within the attendance center or program will be removed before any regularly certified and appointed teachers with the appropriate certification is **[**253]** **[****456]** [*sic*] removed, in that order. Within each group, system-wide seniority shall be the determining factor."

[*419] According to the affidavit of Xiomara C. Metcalfe, director of Chicago public schools bureau of recruitment and substitute services, department of human resources, each of the five plaintiffs "became subject to reassignment for one of the reasons within the scope of the applicable Board policy" and was "selected for reassignment" based on seniority, as required by the policy. Metcalfe's statements are, for the most part, in the passive voice-the plaintiffs "were selected," they "were notified," and they "became" reassigned until, eventually, **[***4]** they "were honorably discharged." She did not explain on what basis plaintiffs became subject to reassignment, who determined that layoffs would be necessary as a result of a change in an attendance center or program, or who made the selection based on seniority. According to Metcalfe, plaintiff Land's layoff was in accordance with the 1995 version of the policy, which provided for laying off a reassigned teacher who did not obtain a permanent position within 20 months of reassignment. The other four plaintiffs were laid off in accordance with the 1997 amended policy, which provided for a layoff after 10 months if the teacher had not secured a permanent position.

The record contains copies of a form letter sent to all five plaintiffs on January 6, 1999, informing them that they would be laid off and honorably terminated as of January 22, 1999, in accordance with the policy. These letters were signed by one of the defendants, Carlos Ponce, the director of the department of human resources for the Chicago public schools. In addition, the affidavit of plaintiff Land states that he was informed of his impending termination by the principal of the school at which he taught.

Plaintiffs' **[***5]** complaint claimed that the layoff policy violates those sections of the School Code that permit the removal of tenured teachers only for cause and only after **[*420]** notice and a hearing. See *105 ILCS 5/34-84*, *34-85* (West 1998). In effect, the plaintiffs' position was that the 1995 amendments to the School Code did not give the Board the authority to lay off tenured teachers. Even if the Board is empowered to lay off tenured teachers, they argued, that power cannot be delegated and, in particular, the power cannot be delegated to school principals. Because the Board did not expressly decide to terminate each of the plaintiffs, they asserted that their terminations were void. Plaintiffs also acknowledged that their removal was "accomplished by" the policy quoted above, but claimed that none of the triggering events or conditions had occurred and that their

layoffs were, therefore, unauthorized.

After the circuit court denied the Board's motion to dismiss, plaintiffs moved for summary judgment on the basis that each of these claims could be decided as a matter of law. The Board responded with its own summary judgment motion in which it argued that tenured teachers **[***6]** may be laid off; the policy does not exceed the authority granted to the Board by the legislature; and the record demonstrated that plaintiffs were laid off in accordance with the policy. After a hearing, the circuit court denied plaintiffs' motion for summary judgment and granted defendants' motion.

Plaintiffs appealed. The appellate court rejected plaintiffs' argument that teachers are not subject to layoff, holding that the layoff provision (*105 ILCS 5/34-18(31)* (West 1998)), and the removal provision (*105 ILCS 5/34-85* (West 1998)), are "entirely separate statutory provisions" that can both be given effect without conflict. **[**254] [****457]** *325 Ill. App. 3d at 304*. The appellate court further found that the Board had the statutory authority to promulgate a layoff policy and that the policy is "clear and unambiguous." *325 Ill. App. 3d at 305*. Because plaintiffs failed to present any competent evidence to support their assertion **[*421]** that the Board did not follow its own policy, the appellate court found this claim waived. *325 Ill. App. 3d at 306*.

The appellate court did address plaintiffs' claim that the **[***7]** Board improperly delegated its layoff authority to individual school principals. After concluding that the legislature gave the Board exclusive authority to determine layoffs, and that the authority may not be delegated at all (*325 Ill. App. 3d at 307*), the appellate court determined that remand was necessary to resolve a disputed issue of material fact-who made the determination that these five plaintiffs would be laid off (*325 Ill. App. 3d at 308*).

ANALYSIS

HN1[⬆] In an appeal from the grant of summary judgment, review is *de novo*. *Crum & Forster Managers Corp. v. Resolution Trust Corp., 156 Ill. 2d 384, 390, 189 Ill. Dec. 756, 620 N.E.2d 1073 (1993)*. ***HN2***[⬆] The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511, 517, 190 Ill. Dec. 758, 622 N.E.2d 788 (1993)*. Summary judgment is proper where pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter **[***8]** of law. *735 ILCS 5/2-1005(c)* (West 2000).

This case also presents ***HN3***[⬆] questions of statutory interpretation, which are reviewed *de novo*. *Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 503, 247 Ill. Dec. 473, 732 N.E.2d 528 (2000)*. ***HN4***[⬆] In interpreting a statute, a court's primary goal is to ascertain the intent of the legislature. *Paris v. Feder, 179 Ill. 2d 173, 177, 227 Ill. Dec. 800, 688 N.E.2d 137 (1997)*. "The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning." *Paris, 179 Ill. 2d at 177*. When the plain language of the statute is clear and unambiguous, the legislative intent **[*422]** that is discernable from this language must prevail, and no resort to other tools of statutory construction is necessary. *Paris, 179 Ill. 2d at 177*.

The appellate court, in its effort to give effect to all of the relevant sections of the School Code, invoked the doctrine of *in pari materia*. *325 Ill. App. 3d at 307*. ***HN5***[⬆] Under this doctrine of construction, two legislative acts that address the same subject **[***9]** are considered with reference to one another, so that they may be given harmonious effect. See *United Citizens of Chicago & Illinois v. Coalition to Let the People Decide in 1989, 125 Ill. 2d 332, 339, 531 N.E.2d 802 (1988)*. This court has previously held that sections of the same statute should also be considered *in pari*

materia, and that each section should be construed with every other part or section of the statute to produce a harmonious whole. *Sulser v. Country Mutual Insurance Co., 147 Ill. 2d 548, 555, 169 Ill. Dec. 254, 591 N.E.2d 427 (1992)*. The doctrine is consistent with our acknowledgment that one of the fundamental principles **[**255] [****458]** of statutory construction is to view all of the provisions of a statute as a whole. *Michigan Avenue National Bank, 191 Ill. 2d at 504*. Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute so that, if possible, no term is rendered superfluous or meaningless. *Michigan Avenue National Bank, 191 Ill. 2d at 504*; *In re Marriage of Kates, 198 Ill. 2d 156, 163, 260 Ill. Dec. 309, 761 N.E.2d 153 (2001)*. Further, we **[***10]** presume that the legislature, when it enacted the statute, did not intend absurdity, inconvenience, or injustice. *Michigan Avenue National Bank, 191 Ill. 2d at 504*.

This dispute is governed by ***HN6***[↑] article 34 of the School Code, which applies to cities of over 500,000 inhabitants. *105 ILCS 5/34-1 et seq*. (West 1998). The sections of article 34 that are relevant to the present case include *section 34-8.1*, which describes the powers and duties of school principals (*105 ILCS 5/34-8.1* (West 1998)); *section [*423] 34-18*, which describes the powers of the Board (*105 ILCS 5/34-18* (West 1998)); and *sections 34-84* and *34-85*, which govern the appointment and promotion of teachers and the removal of teachers for cause, respectively (*105 ILCS 5/34-84*, *34-85* (West 1998)).

Section 34-18 is entitled "Powers of the board." Prior to the 1995 amendments, this section contained 29 enumerated powers as well as a "catch-all" provision authorizing the Board to exercise all other powers "requisite or proper for the maintenance and the development of a public school system, not **[***11]** inconsistent with the other provisions of this Article or provisions of this Code." *105 ILCS 5/34-18* (West 1994). Layoffs were not mentioned in this section, but were addressed in *section 34-84*, which concerns the appointment and promotion of teachers. *105 ILCS 5/34-84* (West 1994). The 1995 amendments deleted the language regarding layoffs from *section 34-84* and ***HN7***[↑] added several new enumerated powers to *section 34-18*, including the power, "except as otherwise provided by this Article," to:

> "promulgate rules establishing procedures governing the layoff or reduction in force of employees and the recall of such employees, including, but not be limited to, criteria for such layoffs, reductions in force or recall rights of such employees and the weight to be given to any particular criterion. Such criteria shall take into account factors including, but not be limited to, qualifications, certifications, experience, performance ratings or evaluations, and any other factors relating to an employee's job performance[.]" *105 ILCS 5/34-18(31)* (West 1998).

HN8[↑] The powers and duties of school principals are set **[***12]** out in *section 34-8.1* of the School Code (*105 ILCS 5/34-8.1* (West 1998)). The responsibilities of a principal include the duty to "direct, supervise, evaluate, and suspend *** [or] discipline" teachers, but the "right to employ, discharge, and layoff shall be vested solely with the board." The principal, however, "may make recommendations to the board regarding the employment, **[*424]** discharge, or layoff of any individual." *105 ILCS 5/34-8.1* (West 1998).

HN9[↑] *Section 34-84* governs the appointment and promotion of teachers. Following completion of a probationary period, "appointments of teachers shall become permanent, subject to removal for cause in the manner provided by *Section 34-85*." *105 ILCS 5/34-84* (West 1998). Under *section 34-85*, no permanent teacher shall be removed "except for cause." Written notice of charges and specifications and a **[**256] [****459]** hearing, with the right of review, are provided for. *105 ILCS 5/34-85* (West 1998).

A. Board's Authority to Lay Off Tenured Teachers

Before the circuit court and the appellate court, the plaintiffs claimed that because the Board's **[***13]** layoff power is limited by the "except as otherwise provided" language of *section 34-18*, and because *section 34-85* provides "otherwise," their layoffs are entirely unlawful and void. The appellate court formulated the issue as "whether the legislature intended *sections 34-84* and *34-85* to be exceptions to the layoff provision provided in 34-18(31)." *325 Ill. App. 3d at 303*.

We agree with the appellate court's conclusion that these two separate statutory provisions may both be given effect without violating the plain language of the statute or ignoring legislative intent. The Board had the power to lay off tenured teachers prior to the 1995 amendments. Indeed, it has long been established that among the unenumerated powers of the Board was the authority "to lay off employees in good faith for lack of work or purposes of economy." *Perlin v. Board of Education of the City of Chicago, 86 Ill. App. 3d 108, 112, 41 Ill. Dec. 294, 407 N.E.2d 792 (1980)* (citing *Kennedy v. City of Joliet, 380 Ill. 15, 41 N.E.2d 957 (1942)*, *Thomas v. City of Chicago, 273 Ill. 479, 113 N.E. 140 (1916)*, and *Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N.E. 797 (1905)*). **[***14]** Prior to 1995, limits on that power were set out in *section 34-84*, which permitted the Board, under certain circumstances, to **[*425]** designate teachers as "reserve teachers" (see *105 ILCS 5/34-1.1* (West 1994)) and to honorably terminate such teachers from service after 25 months (*105 ILCS 5/34-84* (West 1994)). The 1995 amendments did not eliminate or reduce this power. Instead, by deleting the layoff provision from *section 34-84* and adding *section 34-18(31)*, ***HN10***[↑] the legislature gave the Board the authority to formulate and implement its own rules and procedures regarding layoffs rather than binding the Board to a legislatively mandated procedure. We, therefore, affirm that portion of the appellate court judgment holding that *sections 34-84* and *34-85* do not exempt tenured teachers from layoff.

B. Board's Ability to Delegate the Authority to Make Layoffs

In the circuit court and the appellate court, plaintiffs also argued that while *section 34-18(31)* permits the Board to promulgate a procedure for determining layoffs, it does not permit the Board to delegate to others the responsibility for implementing that procedure. Based primarily **[***15]** on the provision that the "right to employ, discharge, and layoff shall be vested solely with the board," found in *section 34-8.1* (*105 ILCS 5/34-8.1* (West 1998)), the appellate court agreed. *325 Ill. App. 3d at 306-08*. Before this court, the parties now agree that the Board may not only promulgate a procedure for determining layoffs, but may also delegate the authority for implementing that procedure. Nevertheless, ***HN11***[↑] we may not reverse this portion of the appellate court's judgment merely because the parties are in agreement that the appellate court erred. We must examine the issue ourselves.

The appellate court based its conclusion that the authority to make layoffs may not be delegated on "the statute's unequivocal language." *325 Ill. App. 3d at 307*. In an earlier case, however, a different panel of the same appellate district found this language ambiguous. See **[*426]** *Chicago School Reform Board of Trustees v. Illinois Educational Labor Relations Board, 309 Ill. App. 3d 88, 100, 242 Ill. Dec. 397, 721 N.E.2d 676 (1999)* **[**257]** **[****460]** (finding *section 34-8.1* ambiguous and interpreting it to mean that the Board "may delegate a nonexclusive **[***16]** power, such as the power to suspend," but may not delegate its "absolute authority").

HN12[↑] A statute is ambiguous if it is susceptible to two equally reasonable and conflicting interpretations. *People v. Whitney, 188 Ill. 2d 91, 98, 241 Ill. Dec. 770, 720 N.E.2d 225 (1999)*. Only if the statutory language is ambiguous may we consider extrinsic aids for construction, such as legislative history, to determine legislative intent. In the absence of ambiguity, we must rely on the plain and ordinary meaning of the words chosen by

the legislature. *Whitney, 188 Ill. 2d at 97-98*. Further, where the language of a statute is clear and unambiguous, a court must give it effect as written, without reading into it exceptions, limitations, or conditions that the legislature did not express. *Davis v. Toshiba Machine Co., America, 186 Ill. 2d 181, 184-85, 237 Ill. Dec. 769, 710 N.E.2d 399 (1999)*.

We agree with the appellate court that *section 34-8.1* is unambiguous and that resort to extrinsic aids of construction is not appropriate. We do, however, conclude that the appellate court read more into this provision than its plain language justifies. Our conclusion **[***17]** necessarily overrules the *Chicago School Reform* court's finding of ambiguity.

The Board argues that *section 34-18(31)*, by empowering the Board to "promulgate rules establishing procedures governing *** layoff[s]" (*105 ILCS 5/34-18(31)* (West 1998)), expresses a legislative intent that such rules are "obviously for the use of [the board's] administrators." In keeping with this reading of *section 34-18(31)*, the policy states in its introductory sentence: "The Chief Executive Officer recommends adoption of the following policy for use by the Board and administrators."

[*427] ***HN13***[⬆] To "promulgate" is to "declare or announce publicly; to proclaim," or to "put (a law or decree) into force or effect." Black's Law Dictionary 1231 (7th ed. 1999). There is nothing inherent in the act of promulgating rules or procedures that suggests someone other than the one announcing the rules will implement them. The Board could promulgate rules and procedures either as a means of instructing its agents or employees to whom the task will be delegated, or as a means of giving notice to affected parties of the procedures and criteria that it intends to apply. By enacting this provision **[***18]** authorizing the Board to promulgate rules, the legislature simply did not speak to the matter of delegating authority for layoffs. We conclude that *section 34-18(31)*, standing alone, does not reveal either a legislative intent that the Board may delegate responsibility for carrying out the layoff policy or the opposite intent.

The appellate court then looked to the language of *section 34-8.1*: ***HN14***[⬆] "The right to employ, discharge, and layoff shall be vested solely with the board." *105 ILCS 5/34-8.1* (West 1998). Relying on dictionary definitions of the words "vested" and "right," the appellate court concluded that the Board alone is allowed to make layoffs and, thus, cannot implement a policy delegating this authority. These words, however, need not be read so narrowly. ***HN15***[⬆] A right is a power or privilege to which one is entitled (*325 Ill. App. 3d at 307*; see also Black's Law Dictionary 1323 (7th ed. 1999) (defining "right" as a "power, privilege, or immunity secured to a person by law")), but such entitlement does not preclude the delegation of that power or privilege to another. The appellate court also looked to an earlier edition of Black's Law **[***19]** Dictionary **[**258]** **[****461]** for the definition of "vested" and found " 'giving the rights of absolute ownership.' " *325 Ill. App. 3d at 307*, quoting Black's Law Dictionary 1563 (6th ed. 1990). Black's, however, defines ***HN16***[⬆] a "vested right" **[*428]** as a "right that so completely and definitely belongs to a person that it cannot be impaired or taken away *without the person's consent*." (Emphasis added.) Black's Law Dictionary 1324 (7th ed. 1999). One could not delegate a right or privilege to another unless one was "vested" with the right in the first place. For example, a stockholder possesses the exclusive right to vote his or her shares, but may delegate that right by granting a proxy to another. A property owner is vested with the right to exclude others from his property by virtue of ownership in fee simple, but may delegate that right to another by granting a lease. Giving the words in this sentence their plain and ordinary meaning, we can conclude only that the Board has the exclusive power to employ, discharge, or lay off employees. *Section 34-8.1*, however, does not address the ability of the Board to delegate any of this responsibility, with

one exception.

The language at issue ("The right **[***20]** to employ, discharge, and layoff shall be vested solely with the board") is contained in section 34-8.1, which is the provision that defines the powers and duties of principals. This sentence is immediately followed by: HN17[↑] "The principal shall fill positions by appointment as provided in this Section and may make recommendations to the board regarding the employment, discharge, or layoff of any individual." 105 ILCS 5/34-8.1 (West 1998). Thus, plaintiffs assert, the "vested solely" language is intended to describe the role of a principal vis-a-vis the Board. As between the principal and the Board, the Board has the sole authority to lay off employees; the principal's role is entirely advisory.

HN18[↑] Reading section 34-8.1 as whole, it is clear that the Board is prohibited from delegating the responsibility for making layoffs to principals. The 17 paragraphs of section 34-8.1 not only define the powers and duties of principals, but also describe in detail the relationship **[*429]** between principals and the Board. For example, the engineer in charge is "under the direction of and subject to the authority of" the principal, while the Board "shall" establish a system of **[***21]** semiannual evaluations by which the principal will evaluate the performance of the engineer in charge. Similar provisions apply to the principal's supervision of the food service manager. Each principal must hold a valid administrative certificate, but the Board may impose additional qualifications. With regard to layoffs, the Board has the sole right to make them, but the principal "may make recommendations to the board." 105 ILCS 5/34-8.1 (West 1996). HN19[↑] This section is clear and unambiguous-the determinations of whether layoffs are necessary and who will be laid off may not be made by principals. The role of principals is purely advisory.

This reading is consistent with the language of HN20[↑] section 34-18(31), which authorizes the Board to establish criteria for layoffs that include, but are not limited to, "qualifications, certifications, experience, performance ratings or evaluations, and any other factors relating to an employee's job performance." 105 ILCS 5/34-18(31) (West 1996). The Board chose to rely entirely on seniority as the basis for determining who would be laid off. If it were to adopt a policy under which job performance **[***22]** is a consideration, the input of the principals would be quite relevant. Under such a policy, however, the principal could **[**259]** **[****462]** only recommend, not decide, who should be laid off.

Our reading of section 34-8.1 is also supported by its title, "Principals." HN21[↑] "When the legislature enacts an official title or heading to accompany a statutory provision, that title or heading is considered only as a 'short-hand reference to the general subject matter involved' in that statutory section, and 'cannot limit the plain meaning of the text.' " Michigan Avenue National Bank, 191 **[*430]** Ill. 2d at 505-06, quoting Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528-29, 91 L. Ed. 1646, 1652, 67 S. Ct. 1387, 1391 (1947). Such official headings or titles are of use " 'only when they shed light on some ambiguous word or phrase' " within the text; they " 'cannot undo or limit that which the text makes plain.' " Michigan Avenue National Bank, 191 Ill. 2d at 506, quoting Brotherhood of R.R. Trainmen, 331 U.S. at 529, 91 L. Ed. at 1652, 67 S. Ct. at 1392.

In this case, we do not find the provision ambiguous so our consideration **[***23]** of the title or heading is not for the purpose of undoing or limiting the text. Rather, we find section 34-8.1 to be silent on the question of the Board's ability to delegate layoff decisionmaking, other than with respect to principals. The title "Principals" is, however, consistent with our conclusion that HN22[↑] section 34-8.1 deals with the powers and duties of principals, and the relationship of principals to the Board, but does not otherwise limit the powers of the Board provided for in section 34-18.

We conclude that HN23[↑] section 34-8.1 is not intended to impose a limitation on the power of the Board to delegate its layoff authority. If that had been the intent of the legislature, this language would have been moved in 1995 when other language affecting layoffs was deleted from section 34-84 and added to section 34-18. The continued presence of these words in section 34-8.1 is a clear indication of legislative intent that this language is a limit only on the role of principals. Although we agree with plaintiffs that the plain language of section 34-8.1 prohibits delegation of the authority to make layoffs to principals, we must still decide whether the Board may delegate this authority **[***24]** to anyone other than a principal.

The Board offers five separate arguments in support of its claim that it may delegate layoff authority. First, when the legislature intends to prohibit delegation of the **[*431]** Board's authority, it does so expressly, as in section 34-19 of the School Code. See 105 ILCS 5/34-19 (West 1998). Second, when the legislature intends for the Board to take action on a given matter, it makes that requirement explicit. See 105 ILCS 5/34-18 (West 1998) (various subsections provide that the Board "shall" carry out certain duties and "may" perform others); 105 ILCS 5/34-85 (West 1998) (providing that, after a hearing, the Board "shall make a decision as to whether the teacher or principal shall be dismissed"). Third, the case law has recognized that delegation of the Board's powers is permissible. Fourth, legislative history demonstrates intent to permit delegation. And fifth, policy considerations weigh in favor of permitting delegation. We find the Board's first argument dispositive and, therefore, need not address the remaining arguments.

The Board's first argument is that an **[***25]** entirely separate section of the School Code authorizes the delegation of layoff authority. HN24[↑] Section 34-19 is entitled "By-laws, rules and regulations; business transacted at regular meetings; voting; records" and provides, in pertinent part, that "[n]otwithstanding any other provision in this Article or in the School Code, **[**260]** **[****463]** the board may delegate to the general superintendent or to the attorney the authorities granted to the board in the School Code." 105 ILCS 5/34-19 (West 1998). The delegation provision also requires that "appropriate oversight procedures" be established, and lists six nondelegable functions, none of which are relevant in this case.

HN25[↑] "Courts should not, under the guise of statutory construction, add requirements or impose limitations that are inconsistent with the plain meaning of the enactment." Nottage v. Jeka, 172 Ill. 2d 386, 392, 217 Ill. Dec. 298, 667 N.E.2d 91 (1996). The holding of the appellate court is in direct conflict with section 34-19, which expressly authorizes the Board to delegate all but six enumerated functions to either the general superintendent or the attorney.

[*432] In sum, we find no language in any **[***26]** applicable provision of the School Code that indicates the legislature's intent to prohibit delegation of the authority to make layoffs to anyone other than principals, and we find express authorization of delegation to the general superintendent and attorney. We reverse that portion of the appellate court's judgment holding that the Board is entirely prohibited from delegating its layoff authority. On the record before us, we need not determine whether the authority may be delegated to officers or administrators other than the general superintendent and attorney.

C. Necessity for Remand

HN26[↑] Although summary judgment aids in the expeditious disposition of a lawsuit, it is a drastic measure and should be granted only if the moving party's right to judgment is clear and free from doubt. Traveler's Insurance Co. v. Eljer Manufacturing, Inc., 197 Ill. 2d 278, 292, 258 Ill. Dec. 792, 757 N.E.2d 481 (2001). A motion for summary judgment does not ask the court to try a question of fact, but to determine if a question of material fact exists that would preclude the entry of

judgment as a matter of law. *Gilbert, 156 Ill. 2d at 517*. Thus, although the nonmoving **[***27]** party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority, 172 Ill. 2d 243, 256, 216 Ill. Dec. 689, 665 N.E.2d 1246 (1996)*. "If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opponent cannot rest on his pleadings to create a genuine issue of material fact." *Harrison v. Hardin County Community Unit School District No. 1, 197 Ill. 2d 466, 470, 259 Ill. Dec. 440, 758 N.E.2d 848 (2001)*.

The appellate court found that summary judgment for the Board was improper and that remand would be necessary to determine who laid off the plaintiffs. *325 Ill. App. 3d at 308*. Although the parties now agree that some **[*433]** delegation of layoff authority is permissible, they disagree on the need for remand. The Board argues that it promulgated a "self-executing" policy, properly delegated authority to carry out the policy, and laid off the plaintiffs in accordance with the policy. Therefore, the Board **[***28]** claims, no further fact finding is required. We disagree.

The record before the circuit court when it granted summary judgment in favor of the Board included the pleadings, the Board's policy, the layoff notice letters signed by Ponce, the Metcalfe affidavit, and the Land affidavit in which he stated that his principal notified him of his impending layoff. ***HN27***[⬆] We must view the record **[**261]** **[****464]** in the light most favorable to the nonmoving party. *735 ILCS 5/2-1005(c)* (West 2000).

HN28[⬆] *Section 34-18(31)* authorizes the Board to promulgate "rules establishing procedures" for layoffs. *105 ILCS 5/34-18(31)* (West 1998). ***HN29***[⬆] A procedure is a "specific method or course of action." Black's Law Dictionary 1221 (7th ed. 1999). ***HN30***[⬆] A policy states the "general principles by which a government is guided in its management of public affairs." Black's Law Dictionary 1178 (7th ed. 1999). Both the title and the content of the document promulgated by the Board reveal it to be a policy, not a procedure.

The policy specifies events that may trigger layoffs, but does not reveal who will determine whether a triggering event has occurred and whether, as a result of that **[***29]** event, layoffs are necessary. The policy adopts a strict rule of seniority as the basis for layoffs, thus removing all discretion at this stage, but does not identify the person or office responsible for making the seniority determination. The policy also contains a notice provision, but does not reveal who issues the layoff notice, or who decides when such notice will issue. In fact, almost the entire policy is written in the passive voice: a program "is closed"; an educational focus "is changed"; teachers **[*434]** "are selected" for layoff based on seniority; if unable to secure a permanent position, the teacher "shall be laid off" and "shall be notified" of the layoff at least 14 days in advance.

In sum, the Board's bare assertion that it followed its own policy does not resolve the question of whether the layoff authority was delegated and, if so, to whom. Plaintiffs have produced evidence that the layoff notices were issued by the director of the department of human resources and that at least one school principal was aware of an impending layoff before written notice was given, but have not produced evidence that the layoff authority was delegated improperly. Such information, if it **[***30]** exists, is in the possession of the Board. Viewing the record in the light most favorable to the plaintiffs, summary judgment for the Board is inappropriate. We remand this matter to the circuit court for further fact finding to determine whether the Board properly delegated responsibility for making any or all of the determinations required by its policy and, if so, whether the party to whom authority was delegated acted in accordance with the policy.

Appellate court judgment affirmed in part and

reversed in part; circuit court judgment reversed; cause remanded.

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People v. Eppinger

Supreme Court of Illinois

February 22, 2013, Opinion Filed

Docket No. 114121

Reporter
2013 IL 114121 *; 984 N.E.2d 475 **; 2013 Ill. LEXIS 270 ***; 368 Ill. Dec. 529 ****; 2013 WL 652994

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. DOMINICK EPPINGER, Appellee.

Prior History: Appeal from the Appellate Court Third District.

People v. Eppinger, 2012 IL App (3d) 100577-U, 2012 Ill. App. Unpub. LEXIS 450 (2012)

Disposition: [*1]** Appellate court judgment reversed. Circuit court judgment affirmed.

Core Terms

trial court, proceedings, absentia, in-custody, bail, appellate court, custody, appointment of counsel, appointed, waived, public defender, defendant's absence, right to counsel, holding cell, escaped, pro se, admonishment, courtroom, morning, jumps, legislative history, statutory language, trial date, willfully, witnesses, rights, fails, legislative intent, state constitution, standby counsel

Case Summary

Procedural Posture
Defendant was convicted of attempted murder, aggravated battery with a firearm, two counts of armed robbery, and unlawful possession of a firearm by a felon, and was sentenced to 95 years' imprisonment. The Illinois Court of Appeals reversed and remanded for a new trial. The State appealed.

Overview
Defendant argued that the trial court properly remanded for a new trial because he was statutorily entitled to appointment of counsel, i.e., once defendant decided not to participate in his trial by refusing to leave his holding cell, the circuit court had no choice, pursuant to *725 ILCS 5/115-4.1*, but to appoint counsel before proceeding with the trial. The supreme court disagreed and held that *725 ILCS 5/115-4.1* was inapplicable to in-custody defendants. Accordingly, the trial court was not statutorily required to appoint a third public defender and continue the trial date simply because defendant, after waiving his right to counsel, decided to waive also his right to be present by refusing to leave his holding cell. In other words, express statutory authority was not a prerequisite to trial in absentia. Defendant made no constitutionally based argument that required appointment of counsel in the face of a valid waiver of that right. Instead, defendant's claim of error was based entirely on *725 ILCS 5/115-4.1*, which was inapplicable under the facts of the case.

Outcome
The judgment of the court of appeals was reversed. The judgment of the circuit court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of

Review > Plain Error > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN1[] Plain Error, Burdens of Proof

The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider plain errors or defects affecting substantial rights although they were not brought to the attention of the trial court. *Ill. Sup. Ct. R. 615(a)*. Plain-error review is appropriate under either of two circumstances: (1) when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) when a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. In order to obtain relief, the defendant must demonstrate not only that a clear or obvious error occurred, but that the error was a structural error. If defendant fails to meet his burden of persuasion on each of these propositions, the procedural default will be honored. The first step in the analysis is to determine whether an error occurred.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Governments > Legislation > Interpretation

HN2[] De Novo Review, Conclusions of Law

An appellate court's primary objective in construing a statute is to ascertain and give effect to the intent of the legislature, bearing in mind that the best evidence of such intent is the statutory language, given its plain and ordinary meaning. In addition to the statutory language, legislative intent can be ascertained from consideration of the statute in its entirety, its nature and object, and the consequences of construing it one way or the other. Where the statutory language is clear and unambiguous, the appellate court will apply the statute as written. If, however, the statutory language admits of more than one reasonable construction and is thus ambiguous, the appellate court will consider extrinsic aids to construction. Because statutory construction is an issue of law, review proceeds de novo.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Bail Jumping & Failure to Appear > General Overview

Criminal Law & Procedure > Trials > General Overview

HN3[] Obstruction of Administration of Justice, Bail Jumping & Failure to Appear

See *725 ILCS 5/115-4.1(a)* (2010).

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Bail Jumping & Failure to Appear > General Overview

Criminal Law & Procedure > Trials > General Overview

HN4[] Criminal Process, Right to Confrontation

See *725 ILCS 5/113-4(e)* (2010).

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Bail Jumping &

Failure to Appear > General Overview

Criminal Law & Procedure > Trials > General Overview

HN5 **Obstruction of Administration of Justice, Bail Jumping & Failure to Appear**

725 ILCS 5/115-4.1(a) (2010) directs how a court should proceed where a defendant, properly admonished pursuant to *725 ILCS 5/113-4(e)* (2010), willfully absents himself from trial.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Governments > Legislation > Interpretation

HN6 **Appeals, Standards of Review**

Where a statute is ambiguous, an appellate court may look beyond the statutory language and consider extrinsic aids to construction in order to ascertain legislative intent. One such extrinsic aid is legislative history.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Bail Jumping & Failure to Appear > General Overview

HN7 **Obstruction of Administration of Justice, Bail Jumping & Failure to Appear**

725 ILCS 5/115-4.1(a) (2010) is inapplicable to in-custody defendants.

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Bail Jumping & Failure to Appear > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

HN8 **Fundamental Rights, Criminal Process**

The right of a defendant to be present at all stages of his trial exists as a constitutional right independent of *725 ILCS 5/115-4.1(a)* (2010), *U.S. Const. amend. VI*, and *Ill. Const. art. I, § 8*, and, therefore, a defendant may waive that right independent of the statute. In other words, express statutory authority is not a prerequisite to trial in absentia. A trial, of course, must proceed within the confines of the federal and state constitutions.

Syllabus

The trial *in absentia* statute was not applicable and there was no plain error calling for a new trial where an accused who had been dissatisfied with his first two public defenders waived his right to counsel and elected to proceed *pro se*, but asked for new counsel when it was time for jury selection and, when this was refused, remained in his cell and did not participate in the *voir dire*.

Counsel: For People State of Illinois, APPELLANT: Mr. Robert M. Hansen, Staff Attorney, Ottawa, IL; Ms. Retha Stotts, Ms. Erica Seyburn, Assistant Attorneys General, Chicago, IL; State's Attorney Peoria County, Peoria, IL.

For Dominick Eppinger, APPELLEE: Mr. Fletcher P. Hamill, Assistant Appellate Defender, Elgin, IL; State Appellate Defender Ottawa, Ottawa, IL.

Judges: JUSTICE THEIS delivered the judgment of the court, with opinion. Chief Justice Kilbride and Justices Thomas, Garman, and Karmeier concurred in the judgment and opinion. Justice Burke dissented, with opinion, joined by Justice Freeman.

Opinion by: THEIS

Opinion

[*P1] **[****530]** **[**476]** Following a jury trial in the circuit court of Peoria County, defendant Dominick Eppinger was found guilty of attempted murder, aggravated battery with a firearm, two counts of armed robbery, and **[****531]** **[**477]** unlawful possession of a firearm by a felon, and was sentenced to 95 years' imprisonment. The appellate court reversed and remanded for a new trial. *2012 IL App (3d) 100577-U*. The principal issue in this appeal is whether the trial court violated *section 115-4.1(a)* of the Code of Criminal Procedure of 1963 (Code) (*725 ILCS 5/115-4.1(a)* (West 2010)) (sometimes referred to as the trial *in absentia* statute) when, following the refusal of defendant *pro se* to leave his holding cell and participate in his trial, the court conducted *voir dire* without first appointing counsel to represent defendant.

[*P2] For the reasons discussed below, we hold that *section 115-4.1(a)* of the Code is inapplicable under **[***2]** the facts of this case, and thus the trial court did not violate the statute. Accordingly, we reverse the judgment of the appellate court.

[*P3] BACKGROUND

[*P4] On December 9, 2008, the Peoria County grand jury entered a multicount indictment against defendant in connection with an armed robbery earlier that month during which one of the victims was shot multiple times, sustaining permanent injuries. Defendant entered a plea of not guilty, and the trial court appointed the public defender to represent him. Defense counsel filed a motion to suppress defendant's oral statements to police, including a videotaped statement in which defendant admitted his participation in the armed robbery and shooting. The jury trial, originally set for March 9, 2009, was continued to June 8, 2009. After an evidentiary hearing, the trial court denied defense counsel's suppression motion. Defendant thereafter requested the appointment of a different public defender, who would keep him better informed and represent him "a little bit better." Defense counsel stated that communication with her client had "broken down." The trial court granted the request for appointment of new counsel and continued the trial date to **[***3]** August 24, 2009.

[*P5] Defendant's new public defender filed a motion to suppress the identification of defendant during a photographic lineup. Before that motion could be heard, on August 18, 2009, six days before trial, defendant requested that he be allowed to proceed *pro se*. Defendant stated that he felt he could defend himself "better than the public defender can." After admonishing defendant about the difficulties of self-representation and the possible penalties he faced, the trial court granted defendant's request, finding defendant knowingly and voluntarily waived his right to counsel. On defendant's motion, the jury trial was continued to October 19, 2009.

[*P6] On September 11, 2009, the case was up for review and tender of discovery to defendant. The court noted, on the record, that defendant was "creating quite a ruckus in the bullpen" and that the court could hear defendant pounding. The court later cautioned defendant that although he had a right to represent himself, if he disrupted the proceedings, he could be removed, and the trial would proceed without him.

[*P7] Defendant elected not to proceed on the motion to suppress identification that his former public defender filed, and instead **[***4]** filed a series of *pro se* motions challenging the photographic lineup. Of necessity, the trial date was continued to January 11, 2010. Following an evidentiary hearing on December 10, 2009, the trial court denied defendant's motions. As to the January 11, 2010, trial, upon questioning by the trial court, defendant stated several times that he was ready for trial. Defendant further stated that he would **[****532]** **[**478]** not be calling any witnesses

and a pretrial conference was unnecessary.

[*P8] On December 12, 2009, defendant sent a letter to the trial judge requesting, *inter alia*, appointment of standby counsel. At a hearing five days later, defendant indicated his continued desire to represent himself at trial, and that he was requesting standby counsel to ensure he would follow the correct procedure and that none of his rights would be violated. The trial court denied defendant's request. Defendant again indicated he was ready for trial.

[*P9] On December 26, 2009, defendant wrote a letter to the trial judge regarding a discovery matter which the court took up on January 5, 2010. At that time, the court also covered the particulars of how the trial would proceed, advising defendant that jury selection would **[***5]** begin the afternoon of January 11, 2010. Defendant agreed with the trial court that the jury would be told that counsel was available to defendant, and defendant chose to represent himself. Defendant also agreed to make a list of questions he would like the jurors to be asked.

[*P10] Six days later, on the morning of trial, defendant changed course. Defendant advised the court that he no longer wished to represent himself and requested appointment of counsel. The State objected, arguing that defendant's request was simply a delay tactic. Defendant interjected: "I'm not representing myself. I don't care—I don't care what she [the assistant State's Attorney] say[s]. I'm not going to trial by myself. I won't do it." The trial court agreed with the State that defendant's request for appointment of counsel was made for the purpose of delay and denied that request. The court addressed defendant:

> "I don't think anything has changed. You made an intelligent and knowing waiver of your right to counsel. You've been through two public defenders. You refused to cooperate with them. You asked to represent yourself. You were allowed to do so after questioning. You insisted on representing yourself at every **[***6]** court appearance. We gave you an opportunity to say that you did not want to represent yourself. You insisted on going forward even as of last Wednesday when we were in court. The fact of the matter is I think today it's simply for the purpose of delay that you ask for an attorney. There is nothing in the record to indicate that you're going to cooperate with an attorney. You have a—you had a right to an attorney. Attorneys were appointed for you. You chose to give up that right. You made that decision after lengthy questioning by me, and at this point I still believe that this is just for the purpose of delay, and your request now for appointment of counsel will be denied."

The following colloquy then took place:

> "THE DEFENDANT: I ain't going to trial.
>
> THE COURT: Well, this trial is going to start at 1:15.
>
> THE DEFENDANT: I ain't doing it.
>
> THE COURT: How do you choose—are you going to choose not to participate?
>
> THE DEFENDANT: I'm not participating, man.
>
> THE COURT: You've previously been advised that trial could be held in your absence.
>
> * * *
>
> THE DEFENDANT: I'm not going to trial, man.
>
> THE COURT: I'm going to have you brought back out here at 1:15. We'll go through questioning again and—
>
> **[****533]** **[**479]** THE DEFENDANT: **[***7]** I don't want to talk to you no more.
>
> THE COURT: And you can choose to participate or choose not to.
>
> THE DEFENDANT: I'm not participating.
>
> THE COURT: You are not participating at this point?
>
> THE DEFENDANT: I'm not participating.
>
> THE COURT: All right. We'll revisit this at 1:15.
>
> * * *
>
> THE COURT: *** For the record, Mr. Eppinger has chosen to leave the courtroom,

even though he's in custody. He does not—he just walked to the holding cell."

When the court reconvened at 1:17 p.m., defendant was not present. The record reflects that prior to the start of jury selection, the following exchange occurred:

"THE COURT: *** We're ready to begin jury selection. The Court has handed clothes that Mr. Eppinger's mother brought this morning to the guard, and it's the report of the guard from the Peoria County Sheriff's Department that Mr. Eppinger refused the clothes and has refused to come into the courtroom; is that correct?

THE DEPUTY: That is so correct.

THE COURT: All right. That is consistent with his statements earlier this morning and his refusal to visit with his mother when the Court made that available to her and to him at mid morning this morning. The Court during a break was going to clear the courtroom **[***8]** and allow Mr. Eppinger's mother, Miss Causey, to visit with him. He refused that visit as well.

So with that in mind then, Miss Hoos [assistant State's Attorney], ready to proceed?

MS. HOOS: Yes, Judge. I'm ready to proceed. Are we even going to bring him out before we start jury selection just to ask him?

THE COURT: Well, I don't want him to have to be forcibly brought out, so—

MS. HOOS: Okay.

THE COURT: I'll ask the guard if you will please go back in and—and tell him that he's to be brought—he's to come into court and—and answer if he wishes to participate, okay? If you'll just say that—just bring him in. I don't know—but I don't want you to use physical force to have to do so. If he refuses, just come back out here and report, all right?

THE DEPUTY: Yes, sir.

(Pause.)

THE DEPUTY: He refused to come out.

THE COURT: All right. Can you tell me what he said?

THE DEPUTY: He says, 'I'm not going back into that courtroom. That's bullshit.'"

[*P11] The court then proceeded with jury selection, advising the venire that defendant made a choice to represent himself, and made a choice that day not to participate in the proceedings. The trial court instructed the venire that the principles of law regarding **[***9]** the State's burden of proof, the presumption of innocence, and defendant's decision whether to testify applied notwithstanding defendant's absence. After the newly selected jury was dismissed for the day, the court again took up the matter of defendant's participation in his trial:

"THE COURT: I'm going to sign an order that has Mr. Eppinger brought to court tomorrow morning. We'll make another attempt to see if he wants to be **[****534]** **[**480]** clothed in the clothing that his mother brought for him and participate.

It looks to me like—is there a further report from the Sheriff's Department?

THE DEPUTY: Yes. When I went back just before we started picking jurors, I let him know we were picking jurors and asked him again if he did want to come out to participate, and he refused, and he said he will refuse to come to court tomorrow.

THE COURT: All right. Well, I'm just going to make a record that he will be brought to court, but I don't expect anybody to have to forcibly or physically remove him from a cell to be brought to court or forcibly or physically remove him from any holding cell at the courthouse to be brought into the courtroom."

[*P12] The following morning, defendant was present in the courtroom, dressed **[***10]** for trial. The court advised defendant that the jury had been selected, and that the jury was told that defendant had chosen to represent himself and also had chosen not to participate. Defendant stated that he still felt he needed counsel, but was choosing to participate and was ready to proceed.

[*P13] The State's evidence included testimony

from four of the victims, each of whom identified defendant as the person who had robbed him or her at gunpoint before shooting one of the victims multiple times. The State also played for the jury a video recording of defendant's confession. Defendant called no witnesses and did not testify, but he made an opening statement, cross-examined the State's witnesses, and made a closing argument. The jury found defendant guilty of attempted murder, aggravated battery with a firearm (which merged with the attempted murder), two counts of armed robbery, and unlawful possession of a firearm by a felon.

[*P14] The trial court granted defendant's request and appointed the public defender to represent defendant posttrial. Although the public defender filed a posttrial motion, defendant filed his own motion for a new trial, which he insisted on arguing. Defendant explained: **[***11]** "I didn't want nobody to argue. I want to argue myself. I just needed an attorney after my sentencing to put in for my appeal." After argument on both motions, the trial court denied relief. The trial court subsequently sentenced defendant, who had two prior felony convictions, to an aggregate term of 95 years' imprisonment.

[*P15] On appeal, defendant raised a single issue. Defendant claimed that the trial court violated *section 115-4.1(a)* of the Code by conducting *voir dire* in his absence without the presence of any counsel representing him. Because defendant failed to raise this issue in the trial court, defendant sought review under the plain-error doctrine, arguing that the trial court's alleged error affected his substantial rights. The appellate court agreed with defendant and reversed and remanded for a new trial. *2012 IL App (3d) 100577-U, ¶ 27*. The appellate court held that *section 115-4.1(a)* of the Code requires that counsel be appointed to represent a defendant before trial *in absentia* may proceed, and that *section 115-4.1(a)* applies even where a defendant has waived his right to counsel and chooses to remain in his holding cell rather than appear for trial. *Id. ¶¶ 17, 20*. The **[***12]** appellate court declined to follow *People v. Reisinger, 106 Ill. App. 3d 148, 435 N.E.2d 860, 62 Ill. Dec. 62 (1982)*, which, under similar circumstances, held that *section 115-4.1(a)* did not apply to an in-custody defendant. *Id. ¶¶ 19-20*. The appellate court further held that the trial court's purported violation of the statute constituted structural error in **[****535]** **[**481]** that defendant was denied a fair trial by an impartial jury. *Id. ¶ 25*.

[*P16] We allowed the State's petition for leave to appeal. *Ill. S. Ct. R. 315* (eff. Feb. 26, 2010).

[*P17] ANALYSIS

[*P18] ***HN1***[⬆] The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider "[p]lain errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court." *Ill. S. Ct. R. 615(a)*. See also *People v. Herron, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 294 Ill. Dec. 55 (2005)*. Plain-error review is appropriate under either of two circumstances: (1) when "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error"; or (2) when "a clear or obvious error occurred and that error is so serious that it affected the fairness **[***13]** of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 312 Ill. Dec. 338 (2007)*.

[*P19] Defendant here proceeded in the appellate court under the second prong of the plain-error doctrine. In order to obtain relief, defendant must demonstrate not only that a clear or obvious error occurred (*In re M.W., 232 Ill. 2d 408, 431, 905 N.E.2d 757, 328 Ill. Dec. 868 (2009)*), but that the error was a structural error (*People v. Thompson, 238 Ill. 2d 598, 613-14, 939 N.E.2d 403, 345 Ill.*

Dec. 560 (2010)). If defendant fails to meet his burden of persuasion on each of these propositions, the procedural default will be honored. People v. Lovejoy, 235 Ill. 2d 97, 148, 919 N.E.2d 843, 335 Ill. Dec. 818 (2009). The first step in our analysis is to determine whether an error occurred. Thompson, 238 Ill. 2d at 613; M.W., 232 Ill. 2d at 431.

[*P20] Defendant's claim of error centers on the court's purported failure to appoint counsel to represent him at trial. As to this claim of error, we note that defendant did not argue in the appellate court, and does not argue here, that the trial court erred by denying his request for standby counsel some three weeks before trial, or by denying his request for appointment of a third public **[***14]** defender on the morning of trial. Nor does defendant argue that he was entitled to appointment of counsel as a matter of state or federal constitutional law. Indeed, defendant does not claim that his waiver of his constitutional right to counsel was invalid for any reason. Rather, defendant argues only that he was statutorily entitled to appointment of counsel, *i.e.*, once defendant decided not to participate in his trial by refusing to leave his holding cell, the court had no choice, pursuant to *section 115-4.1(a)* of the Code, but to appoint counsel before proceeding with the trial. Whether the trial court violated *section 115-4.1(a)* devolves into an issue of statutory construction.

[*P21] HN2[↑] Our primary objective in construing a statute is to ascertain and give effect to the intent of the legislature, bearing in mind that the best evidence of such intent is the statutory language, given its plain and ordinary meaning. People v. Baskerville, 2012 IL 111056, ¶ 18. In addition to the statutory language, legislative intent can be ascertained from consideration of the statute in its entirety, its nature and object, and the consequences of construing it one way or the other. Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp., 2011 IL 111611, ¶ 45. **[****536]** **[**482]** **[***15]** Where the statutory language is clear and unambiguous, we will apply the statute as written. Nowak v. City of Country Club Hills, 2011 IL 111838, ¶ 11. If, however, the statutory language admits of more than one reasonable construction and is thus ambiguous, we will consider extrinsic aids to construction. Id. Because statutory construction is an issue of law, our review proceeds *de novo*. Baskerville, 2012 IL 111056, ¶ 18.

[*P22] *Section 115-4.1(a)* of the Code states in its entirety:

> HN3[↑] "Absence of defendant. (a) When a defendant after arrest and an initial court appearance for a non-capital felony or a misdemeanor, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that the defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant. Absence of a defendant as specified in this Section shall not be a bar to indictment of a defendant, return of information against a defendant, or arraignment of a defendant for the charge for which bail has been granted. If a defendant fails to appear at arraignment, the court may enter a plea of 'not guilty' on his behalf. If a defendant absents **[***16]** himself before trial on a capital felony, trial may proceed as specified in this Section provided that the State certifies that it will not seek a death sentence following conviction. Trial in the defendant's absence shall be by jury unless the defendant had previously waived trial by jury. The absent defendant must be represented by retained or appointed counsel. The court, at the conclusion of all of the proceedings, may order the clerk of the circuit court to pay counsel such sum as the court deems reasonable, from any bond monies which were posted by the defendant with the clerk, after the clerk has first deducted all court costs. If trial had previously commenced in the presence of the defendant and the defendant willfully absents himself for two successive court days, the court shall proceed to trial. All procedural rights guaranteed by the United

States Constitution, Constitution of the State of Illinois, statutes of the State of Illinois, and rules of court shall apply to the proceedings the same as if the defendant were present in court and had not either forfeited his bail bond or escaped from custody. The court may set the case for a trial which may be conducted under this **[***17]** Section despite the failure of the defendant to appear at the hearing at which the trial date is set. When such trial date is set the clerk shall send to the defendant, by certified mail at his last known address indicated on his bond slip, notice of the new date which has been set for trial. Such notification shall be required when the defendant was not personally present in open court at the time when the case was set for trial." *725 ILCS 5/115-4.1(a)* (West 2010).

[*P23] In *People v. Ramirez, 214 Ill. 2d 176, 183, 824 N.E.2d 232, 291 Ill. Dec. 656 (2005)*, we determined that *section 115-4.1(a)* is the second part of a larger statutory scheme, the first part of which is found in *section 113-4(e)* of the Code (*725 ILCS 5/113-4(e)* (West 2010)). *Section 113-4(e)* provides:

> ***HN4***[↑] "If a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could **[****537]** **[**483]** proceed in his absence." *725 ILCS 5/113-4(e)* (West 2010).

Reading these provisions together, we concluded that **[***18]** ***HN5***[↑] *section 115-4.1(a)* directs how a court should proceed where a defendant, properly admonished pursuant to *section 113-4(e)*, willfully absents himself from trial. *Ramirez, 214 Ill. 2d at 183*.

[*P24] This court has had occasion to consider the meaning of certain discrete provisions of this statutory scheme. See, *e.g., People v. Phillips, 242 Ill. 2d 189, 199, 950 N.E.2d 1126, 351 Ill. Dec. 298 (2011)* (interpreting *section 113-4(e)*'s admonishment requirement in light of the warning, regarding trial *in absentia*, contained on the back of a bail bond slip); *Ramirez, 214 Ill. 2d at 183* (interpreting *section 115-4.1(a)*'s requirement that the clerk notify an absent defendant of the trial date by certified mail); *People v. Garner, 147 Ill. 2d 467, 475-76, 590 N.E.2d 470, 168 Ill. Dec. 833 (1992)* (interpreting *section 113-4(e)*'s admonishment with respect to experienced criminals); *People v. Partee, 125 Ill. 2d 24, 41, 530 N.E.2d 460, 125 Ill. Dec. 302 (1988)* (interpreting *section 113-4(e)*'s admonishment with respect to a defendant who absconds during trial); *People v. Maya, 105 Ill. 2d 281, 287, 473 N.E.2d 1287, 85 Ill. Dec. 482 (1985)* (interpreting *section 115-4.1(a)*'s provision for payment of defense counsel fees from forfeited bail bond monies). But this court has not had occasion to address whether *section 115-4.1(a)* applies to an in-custody **[***19]** defendant who proceeds *pro se*, after waiving the right to counsel, and who refuses to participate in his own trial, thus also waiving his right to be present. Although the State and defendant both rely on what they claim is the plain language of the statute, they disagree as to which language is controlling. The parties' divergent views as to the proper reading of the statute, as well as the current disagreement between the appellate court order in this case and the appellate court's opinion in *Reisinger*, are indicative of a lack of clarity in the statutory scheme.

[*P25] The State focuses on the statutory language which seemingly excludes in-custody defendants. The State notes that the admonishments in *section 113-4(e)* are expressly framed in terms of a defendant who either "escapes from custody or is released on bond and fails to appear" (*725 ILCS 5/113-4(e)* (West 2010)), and that *section 115-4.1(a)* contains similar language: "All procedural rights guaranteed by the United States Constitution, Constitution of the State of Illinois, statutes of the State of Illinois, and rules of court shall apply to the

proceedings the same as if the defendant were present in court and *had not either forfeited* ***[***20]*** *his bail bond or escaped from custody*." (Emphasis added.) *725 ILCS 5/115-4.1(a)* (West 2010). The State posits that this terminology "does not encompass in-custody defendants: a defendant in custody has no bond to 'forfeit,' has not 'escaped,' and is not 'absent'—he is in custody, whether in his courthouse holding cell or in the courtroom itself."

[*P26] The State maintains that limiting the statute's applicability in this fashion is consistent with its purpose: guaranteeing the fairness of proceedings conducted in a defendant's absence where the defendant's waiver of his right to be present at trial must be inferred from his failure to appear. The State argues that no uncertainty exists and no such inference need be made where, as here, the defendant is in custody and has made a valid waiver of his right to be present and his right to counsel.

[*P27] The State's construction of the statute finds support in our appellate court's **[****538]** **[**484]** opinion in *People v. Reisinger, 106 Ill. App. 3d 148, 435 N.E.2d 860, 62 Ill. Dec. 62 (1982)*, which the appellate court here declined to follow. In *Reisinger*, the in-custody defendant, who was represented by private counsel and then successive public defenders, elected to proceed *pro se*. On the day of trial, **[***21]** unhappy with the court's decision to defer ruling on one of his *pro se* motions, the defendant refused to participate. After forcibly being brought back into the courtroom, the defendant voluntarily waived his right to be present and refused to have the public defender, who had been appointed as standby counsel, represent him. Trial proceeded in the absence of both defendant and standby counsel, and a jury found defendant guilty of theft.

[*P28] On appeal, the defendant argued, *inter alia*, that *section 115-4.1(a)* contains an absolute prohibition against trials in absentia when the defendant is not represented by counsel. The appellate court disagreed, holding that the defendant's absence from trial did not fit within the circumstances contemplated by the statute. *Reisinger, 106 Ill. App. 3d at 153*. The appellate court discussed the defendant's right to counsel:

> "The defendant had retained counsel[,] and two appointed public defenders represented him in the instant case before he elected to proceed *pro se*. He was obviously aware of his right to counsel and right to represent himself. He exhibited a fair amount of legal sophistication and used every opportunity to enforce his rights. When it **[***22]** became apparent to the defendant that his trial would commence, he demanded both his own absence and the dismissal of his standby counsel. The record establishes that the defendant deliberately and knowingly exploited his right to counsel *** and consciously sought delay. As the Illinois Supreme Court recently observed[,] the right of representation 'may not be employed as a weapon to indefinitely thwart the administration of justice or to otherwise embarrass the effective prosecution of crime.' (*People v. Myles (1981), 86 Ill. 2d 260, 268, 427 N.E.2d 59, 55 Ill. Dec. 939*, ***.)" *Id*.

[*P29] *Reisinger* is the only published opinion to consider the applicability of the appointment of counsel provision in *section 115-4.1(a)* to in-custody defendants and has gone unchallenged for the past three decades.[1] Although defendant concedes that "*Reisinger* stands for the proposition that the judge was not required to appoint counsel in this case," he argues that *Reisinger* is contrary to the plain language of the statute. According to defendant, the scope and applicability of *section 115-4.1(a)* is not controlled by the reference in that section, or in *section 113-4(e)*, to defendants who have escaped from custody or forfeited their bail. **[***23]** Rather, defendant maintains that the

[1] The appellate court's decision in the present case, though parting company with *Reisinger*, was filed as an order, rather than an opinion, and is not precedential. See *Ill. S. Ct. R. 23* (eff. July 1, 2011).

controlling language is found in the initial sentence of *section 115-4.1(a)*: "When a defendant after arrest and an initial court appearance for a non-capital felony or a misdemeanor, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that the defendant is *willfully avoiding trial*, the court may commence trial in the absence of the defendant." (Emphasis added.) *725 ILCS 5/115-4.1(a)* (West 2010). Based on this language, defendant maintains that *section 115-4.1(a)* applies, without limitation, any time a defendant is "willfully **[****539]** **[**485]** avoiding trial" even where, as here, the defendant is in custody but refuses to leave his holding cell. Defendant further argues that the statute expressly requires that "[t]he absent defendant must be represented by retained or appointed counsel" (*id.*), and that the statute makes no exception for a defendant who has previously waived the right to counsel. Finally, defendant argues that policy considerations favor an interpretation of the statute requiring appointment of counsel in all trials *in absentia*, notwithstanding a previous waiver of counsel, **[***24]** because "a trial with no representation of one of its parties is the antithesis of our adversarial system."

[*P30] Defendant's reading of the statute finds at least some support in appellate court opinions which, although not involving in-custody defendants, have spoken in absolute terms of the need for representation at trial of an absent defendant. In *People v. Gargani, 371 Ill. App. 3d 729, 736, 863 N.E.2d 762, 309 Ill. Dec. 130 (2007)*, for example, the appellate court held that the statute's command that the absent defendant "must" be represented by counsel is a mandatory obligation. See also *People v. McCombs, 372 Ill. App. 3d 967, 971-72, 866 N.E.2d 1200, 310 Ill. Dec. 598 (2007)* (holding that the appointment of counsel provision in *section 115-4.1(a)* applies notwithstanding a prior waiver of counsel). Defendant's reading of the statute is also consistent with "our traditional distrust of trials *in absentia*." *Garner, 147 Ill. 2d at 483*.

[*P31] Our job of ascertaining legislative intent is not an easy one where, as here, the statute is not a model of clarity, **[***25]** and the reading of the statute advocated by the State and defendant each has merit, *i.e.*, both readings find some support in the statutory language and case law. Taking into account the consequences of construing the statute one way or the other does not bring us any closer to discerning legislative intent. Although defendant's expansive construction has the benefit of a bright-line rule applicable to all defendants who are tried *in absentia*, it would permit an in-custody defendant to manipulate his right to counsel and benefit from his own delay tactics. Under defendant's reading, the trial court in the instant case would have been required to appoint a third public defender and continue the trial date while new counsel prepared for trial, with no assurance that defendant would cooperate with this public defender, and even though defendant claims no error from the court's denial of his request to appoint counsel on the morning of trial. The State's less expansive construction would produce a different anomaly: an in-custody defendant who waives counsel and then escapes would be entitled to appointment of counsel before trial *in absentia*, but an in-custody defendant who waives counsel **[***26]** and refuses to leave his holding cell would not be entitled to appointment of counsel. The State's construction, however, would prevent manipulation of the right to counsel; in-custody *pro se* defendants would not gain an advantage from their voluntary absence.

[*P32] We conclude that both interpretations of *section 115-4.1(a)* are reasonable, albeit for different reasons, and that the statute is thus ambiguous. *Nowak, 2011 IL 111838, ¶ 11*. ***HN6***[↑] In such cases, we may look beyond the statutory language and consider extrinsic aids to construction in order to ascertain legislative intent. *Id.* One such extrinsic aid is legislative history. *County of Du Page v. Illinois Labor Relations Board, 231 Ill. 2d 593, 604, 900 N.E.2d 1095, 326 Ill. Dec. 848 (2008)*.

[*P33] This court has already considered the legislative history of *section 113-4(e)* of the Code, which contains the admonishment **[****540]** **[**486]** provision, and has recognized that its primary purpose "is to prevent 'bail jumping' and to promote the speedy satisfaction of judgment." *Garner, 147 Ill. 2d at 481* (citing 81st Ill. Gen. Assem., House Proceedings, May 25, 1979, at 151 (statements of Representative Kosinski), at 153 (statements of Representative McAuliffe)). As discussed below, *section 115-4.1(a)* **[***27]** shares the same purpose.

[*P34] *Section 115-4.1* was first added to the Code in 1971. Pub. Act 77-1446 (eff. Sept. 2, 1971). As originally adopted, the single-paragraph statute addressed only the situation where, after trial commences, a defendant "willfully absents himself from court for a period of 2 successive days." *Id.* The statute provided that the absence of such defendant "shall not operate as a bar to concluding the trial." *Id.*

[*P35] In 1979, with the adoption of Public Act 81-1066, the legislature expanded *section 115-4.1*. Pub. Act 81-1066 (eff. Sept. 26, 1979). Although the legislature would twice more amend *section 115-4.1* to bring it to its present form (see Pub. Act 84-945 (eff. Sept. 25, 1985); Pub. Act 90-787 (eff. Aug. 14, 1998)), the legislature's 1979 amendment added the language on which the parties here primarily rely. The 1979 amendment also added the corresponding admonishment provision to *section 113-4* of the Code. Pub. Act 81-1066 (eff. Sept. 26, 1979).

[*P36] The legislative history of Public Act 81-1066, which began life as House Bill 295, reveals that the legislature's intent was to address the problem of bail jumpers. As explained by one of the bill's sponsors:

> "House Bill 265 **[***28]** is the Bill that's aimed at bail jumpers. *** It's [*sic*] intention within Constitutional limitations is to get those people who deliberately jump bail to escape prosecution. It's Constitutional[ly] designed to give them every prerogative if they have cause for such bail jumping. But it's [*sic*] intention [is] to get at people such as the people we've experienced in our county who on posting twenty-five hundred dollars in cash on an aggravated rape and armed robbery, then deliberately jump bail and are not heard of because they feel with overwhelming evidence twenty-five hundred dollars is a cheap fee to pay for escaping a jail sentence. This was particularly evident in the 'Herrara' case, an alledged [*sic*] dope smuggler from Mexico in Chicago to whom they say one hundred thousand dollar[s] has no concern to permit him to jump bail and return to Mexico." 81st Ill. Gen. Assem., House Proceedings, May 25, 1979, at 151 (statements of Representative Kosinski).

Representative Kosinski elaborated:

> "This [bill] merely says that if a man deliberately, I repeat, deliberately jumps bail to escape the state's prosecution, the trial can proceed without him. *** [I]t is the intention of the Sponsors **[***29]** of this Bill *** [t]o insure that for a few paltry dollars, a man does not escape justice." 81st Ill. Gen. Assem., House Proceedings, May 25, 1979, at 155-56 (statements of Representative Kosinski).

Another representative who spoke in support of the bill noted that when a defendant jumps bail, by the time he or she is apprehended, witnesses may be dead or may have moved, and that the bill would allow trial to proceed while witnesses are still available. 81st Ill. Gen. Assem., House Proceedings, May 25, 1979, at 153 (statements of Representative McAuliffe). Representative Katz voiced similar concerns, focusing on a perceived unfairness in the then-existing statute:

> **[****541]** **[**487]** "If the only right involved were the right of the defendant, it would be very easy simply to vote 'no'. The fact is that there is also the right of the victim to the crime. You have the situation where the defendant has an incentive to jump bail. When

> he jumps bail, then it is a matter of time until all the state's evidence has been lost[,] *** the witnesses have disappeared, the victim of the crime is no longer there and so *** the present law gives an incentive to the bail jumper, an incentive that works contrary to fairness **[***30]** to the victim of the crime." 81st Ill. Gen. Assem., House Proceedings, May 25, 1979, at 157 (statements of Representative Katz).

[*P37] The legislative debates in the Senate similarly reflect that House Bill 265 was "designed to correct a problem *** with bail jumpers." 81st Ill. Gen. Assem., Senate Proceedings, June 27, 1979, at 219 (statements of Senator Sangmeister). Senator Sangmeister explained:

> "[A] person can be picked up on an offense, post even a huge bail, particularly in the drug cases, and at that time, skip out of bail. And at that time under the present law, unless a trial has commenced, there is no way you can try that person. So if he comes back in, commits the same crime again, he's picked up again and arrested, but he can also make bond again because he has not been tried. This particular bill, if it becomes law, will enable the ... prosecution to go forward and ... and try this person and there are plenty of safeguards in the bill. For example, if he's requested a jury trial, he's going to get a jury trial. He has to be represented by council [sic]. All of his constitutional rights are absolutely preserved. But in the end, if there is a ... a determination of guilt, the **[***31]** next time that person comes back in the jurisdiction and is arrested, he can be picked up *** and confined rather than again making bail." *Id.* at 220.

[*P38] The legislative history of Public Act 81-1066, when considered in tandem with the statutory language, demonstrates that the General Assembly intended to target the problems of disappearing witnesses and stale evidence where prosecution is suspended indefinitely because the defendant jumps bail before trial even commences. Nothing in the debates suggests that the legislature intended to address the entirely different problems that arise where a defendant, who is in custody, essentially boycotts his or her own trial. Although such conduct may delay the trial in the short run or disrupt the court's docket temporarily, it does not raise the specter that trial may be delayed indefinitely, which was the impetus for the legislature's adoption of Public Act 81-1066.

[*P39] We note, moreover, that nothing in the legislative history suggests that the General Assembly intended the statute generally, or its appointment-of-counsel provision specifically, to be used by in-custody defendants as a sword to delay trial, or that the legislature intended to remove **[***32]** the trial judge's discretion when faced with an eleventh-hour request for appointment of counsel. Rather, the debates as a whole reveal that the General Assembly wanted to remove any benefit to a defendant who flouts the criminal justice system by jumping bail.

[*P40] Based on the language in *section 115-4.1(a)*, as well as the related admonishments in *section 113-4(e)*, considered in light of the legislative history, we hold that ***HN7***[⬆] *section 115-4.1(a)* is inapplicable to in-custody defendants. Accordingly, the trial court here was not statutorily required to appoint a third public defender and continue the trial date simply because defendant, after waiving his right to counsel, **[****542]** **[**488]** decided to waive also his right to be present by refusing to leave his holding cell.

[*P41] We reject defendant's argument that if *section 115-4.1(a)* does not apply in this case, then the court could not have proceeded with *voir dire* in defendant's absence because no other statute authorizes trial *in absentia*. The fact that the statute regulates trial *in absentia* in certain cases does not mean that trial in absentia *is prohibited* in all other cases. ***HN8***[⬆] The right of a defendant to be present at all stages of his trial exists as a **[***33]** constitutional right independent of *section*

115-4.1(a) of the Code (*U.S. Const., amend. VI*; *Ill. Const. 1970, art. I, § 8*), and, therefore, a defendant may waive that right—as defendant did here—independent of the statute. In other words, express statutory authority is not a prerequisite to trial *in absentia*. A trial, of course, must proceed within the confines of our federal and state constitutions. Defendant, however, makes no constitutionally based argument that would require appointment of counsel in the face of a valid waiver of that right. Instead, defendant's claim of error is based entirely on *section 115-4.1(a)* of the Code, which we have held is inapplicable under the facts of this case.

[*P42] Because defendant's only claim of error fails, defendant cannot succeed on his claim of plain error. Accordingly, defendant is not entitled to a new trial.

[*P43] CONCLUSION

[*P44] For the reasons stated, we reverse the judgment of the appellate court that reversed defendant's convictions and remanded for a new trial, and affirm the judgment of the trial court.

[*P45] Appellate court judgment reversed.

[*P46] Circuit court judgment affirmed.

Dissent by: BURKE

Dissent

[*P47] JUSTICE BURKE, dissenting:

[*P48] *Section 115-4.1(a)* of the Code of Criminal Procedure **[***34]** (Code) (*725 ILCS 5/115-4.1(a)* (West 2010)) provides that an attorney must be appointed to represent a defendant who is tried *in absentia*. The majority today holds that this requirement does not apply to a *pro se* defendant who refuses to leave his holding cell and participate in his trial. I disagree with this conclusion and therefore dissent.

[*P49] The majority initially finds that the language of *section 115-4.1(a)* is ambiguous. According to the majority, the statute does not clearly state whether it applies only to those defendants who have escaped from custody or have been released on bond and fail to appear for trial, or whether it may also apply to an in-custody defendant. *Supra* ¶ 32. Relying on legislators' statements during the floor debates indicating that the statute was intended to address the problem of defendants who jump bail, the majority concludes that *section 115-4.1(a)* is inapplicable to defendants who remain in custody. *Supra* ¶¶ 36-40.

[*P50] While I agree with the majority that the statute is ambiguous, I disagree that the legislative history resolves the ambiguity. Throughout the legislative debates, the legislators repeatedly refer to the problem of bail jumping and indicate **[***35]** that the statute was intended to provide a mechanism, within constitutional limits, to try a defendant who jumps bail in his or her absence. Nowhere in the debates do the legislators say, however, that the legislation was intended to apply *exclusively* to bail jumpers. Still unresolved then is the **[****543]** **[**489]** issue raised by defendant in this appeal—whether the statute applies to an in-custody defendant who refuses to leave his holding cell. That issue was never raised during the legislative debates. "Not every silence is pregnant." *State of Illinois, Department of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)*. We cannot infer from the legislators' mere silence in this instance that the statute was not intended to apply to an in-custody defendant.

[*P51] Because the legislative history does not resolve the question at hand, principles of statutory interpretation may be employed to decide the issue. When interpreting an ambiguous statute, we may consider the consequences which would result from construing the statute one way or the other. *Solon v. Midwest Medical Records Ass'n, 236 Ill. 2d 433, 441, 925 N.E.2d 1113, 338 Ill. Dec. 907 (2010)*. In doing so, we presume that the legislature, in enacting the statute, did not intend **[***36]** absurd,

inconvenient, or unjust results. *In re Detention of Powell, 217 Ill. 2d 123, 135, 839 N.E.2d 1008, 298 Ill. Dec. 361 (2005)*.

[*P52] *Section 115-4.1(a)* provides that, "[w]hen a defendant after arrest and an initial court appearance for a non-capital felony or a misdemeanor, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that the defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant." *725 ILCS 5/115-4.1(a)* (West 2010). The statute requires that trial in the absence of the defendant "shall be by jury unless the defendant had previously waived trial by jury," and that "[t]he absent defendant must be represented by retained or appointed counsel." *Id*. It also provides that "[a]ll procedural rights guaranteed by the United States Constitution, Constitution of the State of Illinois, statutes of the State of Illinois, and rules of court shall apply to the proceedings the same as if the defendant were present in court and had not either forfeited his bail bond or escaped from custody." *Id*.

[*P53] This court has held that the legislature's intention in enacting *section 115-4.1(a)* was "to provide for a trial *in* ***[***37]*** *absentia*, within constitutional limits, if a defendant wilfully and without justification absented himself from trial" (*People v. Maya, 105 Ill. 2d 281, 285, 473 N.E.2d 1287, 85 Ill. Dec. 482 (1985)*), and to "set[ ] forth the circumstances in which a trial *in absentia* may be conducted" (*People v. Smith, 188 Ill. 2d 335, 341, 721 N.E.2d 553, 242 Ill. Dec. 274 (1999)*). We also have said that "[s]ection *115-4.1* provides for trial *in absentia*. It does not create a kangaroo court. *** [T]he defendant who is absent from trial, even willfully, retains some of the procedural rights of a present defendant." *People v. Partee, 125 Ill. 2d 24, 31, 530 N.E.2d 460, 125 Ill. Dec. 302 (1988)*. Thus, the legislature specifically included necessary safeguards in the statute in order to protect the absent defendant's important constitutional and statutory rights. See *People v. Ramirez, 214 Ill. 2d 176, 184, 824 N.E.2d 232, 291 Ill. Dec. 656 (2005)*.

[*P54] In addition, our appellate court has held that the appointment-of-counsel provision in *section 115-4.1(a)* is a mandatory prerequisite to conducting a trial in defendant's absence and that the failure to appoint counsel for a defendant before trying him *in absentia* is reversible error. *People v. Gargani, 371 Ill. App. 3d 729, 736, 863 N.E.2d 762, 309 Ill. Dec. 130 (2007)*. Further, our appellate court has held that even where a defendant **[***38]** had previously waived his right to an attorney, the statute entitles the defendant to the appointment of counsel before being tried *in absentia*. *People v. McCombs, 372 Ill. App. 3d 967, 972, **[****544]** 866 N.E.2d 1200, **[**490]** 310 Ill. Dec. 598 (2007)*.

[*P55] Given this background, the majority's reading of the statute is unreasonable. Under the majority's interpretation of *section 115-4.1(a)*, a defendant who has invoked his right of self-representation prior to being released on bond and who fails to appear on his trial date would be entitled to appointment of counsel before a trial could be held in his absence, while an in-custody defendant who invokes his right of self-representation and refuses to leave his cell would not be entitled to appointment of counsel. In other words, the majority has concluded that the legislature intended to afford *greater* protections to those defendants who jump bail than those who remain in-custody. This cannot possibly be correct.

[*P56] Moreover, this court has held that a trial at which neither the defendant nor defense counsel is present is unconstitutional. *People v. Davis, 39 Ill. 2d 325, 331, 235 N.E.2d 634 (1968)* (citing *Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)*; *Partee, 125 Ill. 2d at 39*; *People v. Barraza, 193 Ill. App. 3d 655, 660, 550 N.E.2d 59, 140 Ill. Dec. 577 (1990)* **[***39]** ("The role of the defendant's attorney in the *in absentia* proceedings is crucial to insure that they are conducted with due regard for the defendant's rights. In fact, the

presence of counsel for the defendant is essential to make such proceedings constitutional." (citing *Davis, 39 Ill. 2d at 329-31*)). Presumably, the legislature was aware of the constitutional restrictions on trials *in absentia* in the absence of defense counsel when it enacted *section 115-4.1(a)*. Thus, it is reasonable to assume that the legislature intended the statute to apply to *any* defendant who is absent from trial, including one who refuses to leave the holding cell.

[*P57] The majority expresses concern that an in-custody defendant might use the appointment-of-counsel provision in *section 115-4.1(a)* to obstruct the proceedings and cause delay. However, by refusing to enter the courtroom and participate in his trial defendant waived his right to represent himself. See, *e.g.*, *Faretta v. California, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)* (a trial judge may terminate self-representation if a defendant "deliberately engages in serious and obstructionist misconduct" and may appoint standby counsel, even over defendant's objection, **[***40]** to be available to represent the defendant in the event that termination of the defendant's self-representation is necessary). There is no reason, therefore, why the judge could not have appointed counsel to represent defendant and continued on with the proceedings. See also, *e.g.*, *Mayberry v. Pennsylvania, 400 U.S. 455, 468, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971)* (Burger, C.J., concurring) ("A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself.").

[*P58] To be sure, appointing counsel might have occasioned further delay. But consider the consequence of holding that the legislature did not intend for the statute to apply to in-custody defendants because there might be some delay. Such a holding would mean that the legislature intended for a criminal trial to go forward with no defense counsel present, no defendant present, and the jurors placed in front of a completely one-sided, "kangaroo court." *Partee, 125 Ill. 2d at 31*. Again, in my view, there is no possibility that this is what the General Assembly intended.

[*P59] **[****545]** **[**491]** The legislature, in enacting *section 115-4.1(a)*, intended **[***41]** to safeguard the constitutional rights of a defendant who is tried *in absentia*, thus ensuring the fairness of the trial proceedings. The statute explicitly provides that the defendant *must* be represented by retained or appointed counsel. Construing the statute to exclude in-custody defendants leads to absurd results: that the legislature intended to afford greater protections to those defendants who jump bail than those who remain in custody, and that the legislature intended for criminal trials to be conducted in "kangaroo courts." I cannot reasonably conclude that the legislature intended those results. Accordingly, I would hold that the legislature intended for the constitutional protections in *section 115-4.1(a)* to apply any time a defendant is tried *in absentia*, including those instances when the defendant is in custody.

[*P60] JUSTICE FREEMAN joins in this dissent.

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Relf v. Shatayeva

Supreme Court of Illinois

October 18, 2013, Opinion Filed

Docket No. 114925

Reporter
2013 IL 114925 *; 998 N.E.2d 18 **; 2013 Ill. LEXIS 1356 ***; 375 Ill. Dec. 726 ****; 2013 WL 5674833

SANDRA RELF, Appellee, v. NATASHA SHATAYEVA, as Special Adm'r of the Estate of Joseph Grand Pre, Jr., Appellant.

Prior History: *Relf v. Shatayeva, 2012 IL App (1st) 112071, 975 N.E.2d 1204, 2012 Ill. App. LEXIS 637, 363 Ill. Dec. 895 (2012)*

Disposition: [*1]** Appellate court judgment reversed. Circuit court judgment affirmed.

Core Terms

personal representative, appointed, special administrator, cause of action, letters, special representative, deceased, circuit court, issuance of a letter, commencement of the action, Probate, expired, reasonable diligence, substituting, limitations period, amended complaint, statute of limitations, decedent's estate, no petition, opened, appellate court, the will, circumstances, conditions, provisions, dead, liability insurance, commencement, distribute, expiration of time

Case Summary

Overview

HOLDINGS: [1]-The motorist sued the driver before limitations ran and proceeded against him because she did not yet know the driver had died a year and 10 months earlier, and it was not until several months after limitations had expired that she learned of the driver's death, such that *735 ILCS 5/13-209(c)* (2010) controlled; [2]-A petition for issuance of letters of office was filed by the driver's son and letters were granted to him, such that he was the personal representative under *§ 13-209(c)*; [3]-Because the driver's estate had been opened and letters of office had been issued, *§ 13-209(c)* required the motorist to commence her action against the executor as the driver's personal representative upon learning of his death; [4]-The substitution of the motorist's lawyer's secretary as "special administrator" did not preserve the motorist's otherwise invalid and untimely cause.

Outcome

Appellate court's judgment reversed, circuit court's judgment affirmed.

LexisNexis® Headnotes

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Appointment

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Claims Against & By

HN1[] **Substitution, Death of Party**

Under *735 ILCS 5/13-209(b)(1)* (2010), if an estate

has been opened for the decedent and a personal representative has been appointed by the court, the action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within six months after the person's death. *735 ILCS 5/13-209(b)(1)* (2010), If, on the other hand, no petition has been filed for letters of office for the deceased's estate, then *735 ILCS 5/13-209(b)(2)* (2010), the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

***HN2*[] Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss under *735 ILCS 5/2-619* (2010) admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

***HN3*[] Standards of Review, De Novo Review**

In reviewing whether a cause of action is untimely, the appellate court is not bound by the conclusions of either the circuit or the appellate court. Whether a cause of action was properly dismissed under *735 ILCS 5/2-619(a)(5)* (2010) based on the statute of limitations is a matter the appellate court reviews de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

***HN4*[] Standards of Review, De Novo Review**

Statutory construction presents a question of law. The appellate court's review is de novo.

Civil Procedure > Parties > Substitution > Death of Party

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

***HN5*[] Substitution, Death of Party**

Under the common law of Illinois, a dead person is a nonexistent entity and cannot be a party to a suit. If a person is already dead when an action is asserted against him or her, the proceedings will not invoke the trial court's jurisdiction, and any judgment entered in the case will be a nullity.

Governments > Legislation > Interpretation

***HN6*[] Legislation, Interpretation**

The primary goal in construing a statute is to ascertain and give effect to the legislature's intent. The best indication of that intent is the language of the statute. In construing that language, words and phrases should not be considered in isolation. Rather, the language in each section of the statute must be examined in light of the statute as a whole,

which is construed in conjunction with other statutes touching on the same or related subjects.

Governments > Legislation > Interpretation

Governments > Legislation > Statute of Limitations > Time Limitations

HN7 **Legislation, Interpretation**

Statutes of limitation, like other statutes, must be construed in the light of their objectives. The basic policy of such statutes is to afford a defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible.

Civil Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > Administrators

Governments > Legislation > Statute of Limitations > Time Limitations

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > Appointment

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > Claims Against & By

HN8 **Substitution, Death of Party**

Where the deceased party is the defendant, 735 ILCS 5/13-209(b) or (c) (2010) come into play. Section 13-209(b) sets forth the basic procedures and time requirements that must be followed in situations where a person against whom an action may be filed dies before the limitations period runs out, the action survives the person's death, and it is not otherwise barred. If no petition has been filed for letters of office for the decedent's estate, the court may appoint a special representative for the deceased party for the purposes of defending the action. 735 ILCS 5/13-209(b)(2) (2010). Otherwise, that is, if a petition has been filed for letters of office for the decedent's estate, an action may be commenced against the personal representative appointed by the court. 735 ILCS 5/13-209(b)(1) (2010).

Civil Procedure > Parties > Substitution > Death of Party

Governments > Legislation > Statute of Limitations > Time Limitations

HN9 **Substitution, Death of Party**

The provisions of section 735 ILCS 5/13-209(b) (2010) presuppose that the plaintiff is aware of the defendant's death at the time he or she commences the action. A separate set of requirements apply where the defendant's death is not known to plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff commences the action against the deceased defendant directly. This scenario is governed by § 13-209(c).

Civil Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > Claims Against & By

HN10 **Substitution, Death of Party**

Assuming that the cause of action survives the defendant's death and is not otherwise barred, 735 ILCS 5/13-209(c) (2010) permits a plaintiff to preserve his or her cause of action by substituting

the deceased person's personal representative as the defendant. However, that option is subject to certain conditions. The plaintiff must proceed with reasonable diligence in both moving the court for leave to file an amended complaint, substituting the personal representative as defendant, *§ 13-209(c)(1)*, and serving process upon the personal representative, *§ 13-209(c)(2)*. If process is served more than six months after issuance of letters of office to the personal representative, the liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance. *735 ILCS 5/13-209(c)(3)* (2010). Moreover, in no event can a party commence an action under this § 5/13-209(c) unless a personal representative is appointed and an amended complaint is filed within two years of the time limited for the commencement of the original action. *735 ILCS 5/13-209(c)(4)* (2010).

Civil
Procedure > Parties > Substitution > Death of Party

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Substitution, Death of Party**

735 ILCS 5/13-209(c) (2010) deals specifically and unambiguously with the situation where a party has commenced an action against a deceased person and that person's death is unknown to the party before the statute of limitations expires.

Civil
Procedure > Parties > Substitution > Death of Party

Governments > Legislation > Interpretation

HN12[] **Substitution, Death of Party**

The reasonable diligence expressly required by the legislature with respect to some actions under *735 ILCS 5/13-209(c)* (2010) is notably absent with respect to knowledge of a defendant's death. That being so, the court cannot rewrite the statute to add such a provision. Where a statutory enactment is clear and unambiguous, a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express.

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > General Overview

HN13[] **Substitution, Death of Party**

The Code of Civil Procedure does not define the term "personal representative" for purposes of *735 ILCS 5/13-209*. It is therefore appropriate for the court to consult a dictionary to determine its plain meaning. In its most general sense, personal representative refers to any a person who manages the legal affairs of another because of incapacity or death. In the particular case of persons who have died leaving estates which must be settled and distributed, personal representative encompasses both of two basic categories of individuals: executors, who are named in the decedent's will, and administrators, who are appointed where the decedent is intestate or else left a will but has no executor.

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > Administrators

Estate, Gift & Trust

Law > ... > Probate > Personal Representatives > Appointment

HN14 **Substitution, Death of Party**

Under the Probate Act of 1975, executors and administrators share a common trait. They are both officers of the court to whom letters of office are issued. In the case of executors, these are letters testamentary. *755 ILCS 5/6-8* (2010). In the case of administrators, they are letters of administration. *755 ILCS 5/9-2* (2010). The Probate Act also recognizes administrator to collect as a type of representative in addition to executors and administrators. *755 ILCS 5/1-2.15* (2010). These differ from regular administrators (*755 ILCS 5/10-1 et seq.* (2010)), but also require issuance of letters of office. *755 ILCS 5/10-1* (2010). Issuance of letters of office would therefore appear to be a hallmark of personal representatives as that term is commonly understood when applied to situations involving estates which must be settled and distributed following a person's death. The terminology employed by the General Assembly in *735 ILCS 5/13-209* (2010) is consistent with this usage.

Civil Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > General Overview

Governments > Legislation > Interpretation

HN15 **Substitution, Death of Party**

In setting forth the requirements which must be followed in order to preserve a cause of action when a party by or against whom the action might be brought dies before the otherwise applicable limitations period has expired, *735 ILCS 5/13-209* (West 2010) distinguishes between representatives or personal representatives, on the one hand, and special representatives, on the other. Where the legislature has employed certain language in one part of a statute and different language in another, the court may assume different meanings were intended and the difference in meaning here is apparent. Special representatives are referenced only with respect to situations where no petition for letters of office for the decedent's estate has been filed. *735 ILCS 5/13-209(a)(2)*, *(b)(2)* (2010). In all other situations, which by inference must be whenever petitions for letters of office have been filed, the statute refers to representatives or personal representatives.

Civil Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > General Overview

Governments > Legislation > Interpretation

HN16 **Substitution, Death of Party**

The references to special representatives were all added at the same time through Ill. Laws 90-111, and in each instance, the new provisions allowing appointment of special representatives to bring or defend against actions were preceded by the conditional clauses if no petition for letters of office for the decedent's estate has been filed (*735 ILCS 5/13-209(a)(2)* (2010)) and if no petition has been filed for letters of office for the deceased's estate (*735 ILCS 5/13-209(b)(2)* (2010)). By adding the new term "special representative" and expressly limiting use of special representatives to situations where no petition for letters of office had been filed, the General Assembly must have understood the preexisting statutory term personal representatives as referring to individuals to whom letters of office had been issued. No other interpretation of the statutory change is tenable.

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Claims Against & By

HN17[] **Substitution, Death of Party**

That a "personal representative" means one appointed pursuant to a petition for issuance of letters of office is confirmed by 735 ILCS 5/13-209(c) (2010). That subsection affords litigants an opportunity to save an otherwise time-barred claim where they have sued a deceased person whose death was unknown to them before expiration of the applicable statute of limitations. To avail themselves of this opportunity, however, litigants must proceed with reasonable diligence to serve process upon the personal representative (§ 13-209(c)(2)) and if process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance (§ 13-209(c)(3)). If personal representative was not intended by the legislature to refer specifically to an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office, whether as an executor or as an administrator, using the time when letters of office issued as a point of demarcation regarding the scope of the estate's liability would serve no purpose.

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Appointment

HN18[] **Substitution, Death of Party**

That personal representative as used in 735 ILCS 5/13-209 (2010) was intended by the legislature to refer specifically to individuals appointed to settle and distribute a decedent's estate pursuant to a petition for issuance of letters of office is also consistent with how the term is used in 735 ILCS 5/2-1008(b) (2010), which deals with the related question of what happens when a party to an action dies after suit has been filed. There, as in 735 ILCS 5/13-209, the term special representative is used when referring to individuals appointed by the court in situations where no petition for letters of office for the decedent's estate has been filed. 735 ILCS 5/2-1008(b)(1), (b)(2) (2010). Where a petition for letters of office has been filed, the relevant entity is the personal representative, just as it is under 735 ILCS 5/13-209. 735 ILCS 5/2-1008(b)(2) (2010).

Civil
Procedure > Parties > Substitution > General Overview

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Appointment

HN19[] **Parties, Substitution**

That a personal representative refers to someone appointed pursuant to a petition for letters of office while special representative designates someone appointed by the court in situations where no petition for letters of office for the decedent's estate has been filed is further supported by the fact that 735 ILCS 5/2-1008(b) (2010) includes an express provision for substituting the personal representative for the special representative at any time that an estate is opened with a representative other than the special representative. 735 ILCS 5/2-1008(b)(1) (2010). If the terms "personal representatives" and "special representatives" were synonymous and freely interchangeable, this provision would make no sense.

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Claims Against & By

Governments > Legislation > Interpretation

Real Property Law > Title Quality > Adverse Claim Actions > Ejectment

HN20 **Substitution, Death of Party**

When construing statutes, it is appropriate to consider similar and related enactments, though not strictly in pari materia. The court must presume that several statutes relating to the same subject are governed by one spirit and a single policy, and that the legislature intended the several statutes to be consistent and harmonious. Accordingly, the court believes that *735 ILCS 5/2-1008(b)* (2010) supports the court's interpretation of *735 ILCS 5/13-209(c)* (2010). So, too, does *735 ILCS 5/6-139* (2010). That statute deals with the death of the plaintiff in an action for ejectment. It is clear from the text of the law that when it refers to the decedent's personal representatives, it means individuals to whom letters of office have been granted by the court under the Probate Act. The court knows that is what it means because the granting of letters of office to them is one of the things that must be demonstrated in order for a personal representatives to step into the shoes of a plaintiff in ejectment who dies after issue joined or judgment entered therein. *735 ILCS 5/6-139* (2010).

Civil
Procedure > Parties > Substitution > Death of Party

HN21 **Substitution, Death of Party**

735 ILCS 5/2-1008(b) applies where a party dies while a case is already pending. It may not be used where a defendant dies before the action is instituted.

Civil
Procedure > Parties > Substitution > Death of Party

Governments > Courts > Judicial Precedent

HN22 **Substitution, Death of Party**

In Gaddy v. Schulte, a panel of the Fifth District of the Appellate Court did sanction the use of *735 ILCS 5/2-1008* for appointment of a special administrator to defend an action where the alleged tortfeasor died before the action was instituted and indicated that a person could qualify as a personal representative under *735 ILCS 5/13-209* (2010) even though letters of office had not issued to that person under the Probate Act. Gaddy has not been followed by the courts of Illinois and it is incorrect on both counts.

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > Administrators

HN23 **Substitution, Death of Party**

A special administrator appointed under the former version of *735 ILCS 5/2-1008(b)* to defend against an action was not the equivalent of an administrator appointed pursuant to a petition for issuance of letters of office under the Probate Act. No letters of office were issued to a special administrator, and special administrators had no authority to distribute assets of a decedent's estate. In the parlance of the current statute, they were therefore equivalent to special representatives, not personal representatives. Accordingly, appointment of a

special administrator would not operate to trigger the provisions of *735 ILCS 5/13-209* permitting actions against an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office, that is, personal representatives.

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Appointment

HN24 **Substitution, Death of Party**

Under 735 ILCS *§ 13-209(c)* (2010), as throughout the statutory scheme enacted by the legislature, a personal representative refers specifically to an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office.

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > Administrators

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > General Overview

HN25 **Intestate Succession, Administrators**

A common thread in all of the foregoing provisions is that appointment of a special administrator is appropriate only where action or inaction by the personal representative designated by the decedent may be adverse to the interests of the decedent's estate.

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > Administrators

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > General Overview

HN26 **Intestate Succession, Administrators**

Having two separate individuals attempting to operate simultaneously and independently on behalf of the same decedent poses obvious problems for the prompt, efficient and final settlement of the decedent's affairs. Moreover, Illinois law is clear that a testator has the right to designate by will who shall act as his personal representative, and a court may not ignore his directions and appoint someone else to act in that capacity. Where the testator has designated such a representative, the appointment of another party to serve as special administrator impermissibly infringes on that right and is not allowed. Indeed, in addressing this problem in the context of the Wrongful Death Act (*740 ILCS 180/2.1* (2010)), courts have concluded that appointment of a special administrator after a petition for issuance of letters of office has been filed is void.

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > Administrators

HN27 **Intestate Succession, Administrators**

The Probate Act expressly and unequivocally holds that the person appointed special administrator under this Act may not be selected upon the recommendation of any person having an interest adverse to the person represented by the special administrator or by the attorney for the adverse party. *755 ILCS 5/27-5* (2010).

Civil
Procedure > Parties > Substitution > Death of Party

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Claims Against & By

HN28 **Substitution, Death of Party**

The claim "I tried" is not sufficient under the governing statute. While *735 ILCS 5/13-209* (2010) may impose no duty of reasonable diligence to discover a defendant tortfeasor's death in the first instance, it clearly and unequivocally requires reasonable diligence by a plaintiff after learning of the death, including reasonable diligence in moving to file an amended complaint substituting the personal representative as defendant (*§ 13-209(c)(1)*) and serving him or her with process (*§ 13-209(c)(2)*). Implicit in both those obligations is the duty to use reasonable diligence in identifying the personal representative.

Governments > Courts > Authority to Adjudicate

Governments > Legislation > Statute of Limitations > Time Limitations

HN29 **Courts, Authority to Adjudicate**

The court simply has no authority to rewrite the Code of Civil Procedure to allow a plaintiff to amend a pleading after the statute of limitations had run. It is no answer to say that the issue is simply a matter of procedure. Even though procedural in nature, a statute of limitations, if properly asserted by one entitled to its protection, is a bar to an action. It is a legislatively determined deadline for commencing an action against one who otherwise might be legally indebted to a plaintiff. The court may not effectively eviscerate a valid statute of limitations.

Syllabus

After an automobile accident defendant died and plaintiff, unaware of this, was unable to obtain service in the timely action, the statutory two-year extension of the limitation period if a decedent's personal representative is substituted as defendant was not available where plaintiff used the unauthorized procedure of successfully asking the circuit court to appoint an employee of plaintiff's attorney as "special administrator"—limitations dismissal upheld.

Counsel: For Natasha Shatayeva, Appellant: Ms. Ellen J. O'Rourke, Bruce Farrel Dorn & Associates, Chicago, IL; Ms. Jean M. Bradley, Bruce Farrel Dorn & Associates, Chicago, IL.

For Sandra Relf, Appellee: Mr. Adam S. Goldfarb, Mr. David B. Nemeroff, Nemeroff Law Officess, Ltd., Chicago, IL.

Amicus Curiae for Illinois Trial Lawyers Association: Ms. Cynthia S. Kisser, Lawrence H. Hyman & Association, Chicago, IL.

Judges: JUSTICE KARMEIER delivered the judgment of the court, with opinion. Justices Freeman, Thomas, Garman, Burke, and Theis concurred in the judgment and opinion. Chief Justice Kilbride dissented, with opinion.

Opinion by: KARMEIER

Opinion

[*P1] [**728] [**20]** Plaintiff, Sandra Relf, brought an action against Joseph Grand Pre, Jr., in the circuit court of Cook County to recover damages for personal injuries she sustained in a motor vehicle accident. At the time plaintiff filed her action, Mr. Grand Pre was deceased, his will had been admitted to probate, and letters of office had been issued to his son to serve as independent administrator of his estate. Claiming she was not aware of Mr. Grand Pre's death when she filed suit, and without notice to the estate, the independent administrator, or Grand Pre's heirs and legatees, plaintiff subsequently sought and was granted

permission to have a secretary in her attorney's office appointed as "special administrator" to defend Mr. Grand Pre's estate against her claims.

[*P2] Substitution of the "special administrator" did not occur until after the two-year limitations period for personal injury actions had expired. The "special **[***2]** administrator" therefore moved to dismiss plaintiff's cause of action as time-barred under *section 2-619* of the Code of Civil Procedure (*735 ILCS 5/2-619* (West 2010)). The circuit court found the "special administrator's" motion to be meritorious and dismissed, rejecting plaintiff's arguments **[****729]** **[**21]** that the action should be deemed timely under the provisions of *section 13-209* of the Code of Civil Procedure (*735 ILCS 5/13-209* (West 2010)) which govern the procedures to be followed where a person against whom a cause of action may be brought is deceased. The appellate court reversed and remanded to the circuit court for further proceedings. *2012 IL App (1st) 112071, 975 N.E.2d 1204, 363 Ill. Dec. 895*. We granted defendant leave to appeal (*Ill. S. Ct. R. 315* (eff. May 1, 2013)) and allowed the Illinois Trial Lawyers Association to file a brief *amicus curiae* pursuant to *Illinois Supreme Court Rule 345* (*Ill. S. Ct. R. 345* (eff. Sept. 20, 2010)). For the reasons that follow, we now reverse the appellate court's judgment and affirm the judgment of the circuit court.

[*P3] BACKGROUND

[*P4] The motor vehicle accident which gave rise to this litigation occurred in February of 2008. In February of 2010, just as the twoyear statute of limitations **[***3]** for personal injury actions (*735 ILCS 5/13-202* (West 2010)) was about to expire, plaintiff filed this action against Mr. Grand Pre in the circuit court of Cook County to recover damages for the injuries she sustained in the accident.

[*P5] Mr. Grand Pre was the sole defendant named in the complaint. At the time the complaint was filed, however, Mr. Grand Pre was actually deceased. He had passed away on April 25, 2008, shortly after the accident.

[*P6] The record shows that a paid death notice giving the circumstances of Mr. Grand Pre's death was published in the Chicago Tribune on April 30, 2008. The record further shows that probate proceedings involving his estate were initiated in the circuit court of Cook County in August of 2008. Mr. Grand Pre's will was admitted to probate in September of 2008 and, at the same time, letters of office were issued to his son, Gary, to serve as independent administrator of Mr. Grand Pre's estate. These were all matters of public record.

[*P7] The sheriff failed to effectuate service of process on Mr. Grand Pre, who, as we have just noted, was dead. Still not realizing that Mr. Grand Pre was deceased, plaintiff then sought and was granted leave to have a special process **[***4]** server appointed to attempt service on him. The special process server quickly discovered that Mr. Grand Pre was no longer living and conveyed that information to plaintiff on May 17, 2010. Plaintiff took no immediate corrective action in response to the special process server's news, and on May 24, 2010, the circuit court dismissed plaintiff's cause of action for lack of diligence in attempting to effectuate service.[1] Because plaintiff's failure to exercise diligence occurred after the governing limitations period had expired, the dismissal was with prejudice. *Ill. S. Ct. R. 103(b)* (eff. July 1, 2007).

[*P8] On September 24, 2010, plaintiff asked the circuit court to set aside its order dismissing the case for lack of diligence. In a separate motion filed the same day, plaintiff also asked the court to take notice of Mr. Grand Pre's death, to appoint a "special administrator" for the purposes of defending plaintiff's action against him, and to grant plaintiff leave to file an amended complaint.

[1] At this point in the proceedings, it appears that the circuit court did not know the reason Grand Pre had not been served, only that service had not been accomplished.

[*P9] In support of her request for **[***5]** a "special administrator," plaintiff asserted that she had not learned of Mr. Grand Pre's death until receiving notice of it from the special process server and that **[****730]** **[**22]** she was unaware as to whether "any personal representative has been appointed by the Estate of [Mr. Grand Pre]." Plaintiff proposed that Natasha Shatayeva, an employee/legal assistant of her lawyer, be appointed to serve "as the Special Administrator of the Estate of [Mr. Grand Pre], deceased." Shatayeva was the attorney's secretary.

[*P10] Following a hearing, the circuit court granted all of plaintiff's requests. It vacated the dismissal and reinstated the action, "spread [Mr. Grand Pre's] death of record, appointed Natasha Shatayeva "as the Special Administrator of the Estate of [Mr. Grand Pre], deceased," and granted plaintiff leave to file an amended complaint, which plaintiff promptly did. The circuit court's order appointing Shatayeva as "special administrator" gave no statutory basis for that action and none was set forth in plaintiff's motion.

[*P11] Once Shatayeva was designated by the court to represent Mr. Grand Pre's estate, she moved to dismiss plaintiff's cause of action pursuant to *Supreme Court Rule 103(b)* (*Ill. S. Ct. R. 103(b)* **[***6]** (eff. July 1, 2007)) on the grounds that plaintiff had "failed to take substantive efforts to serve Defendant with the lawsuit timely [*sic*]" and that she, Shatayeva, was not served "until on or about October 7, 2010, over seven months after the statute of limitation [had run]." That motion was denied by the court in February of 2011. Thereafter, plaintiff was allowed to file a second amended complaint correcting an error in her previous pleadings regarding Mr. Grand Pre's name.

[*P12] Plaintiff's second amended complaint was filed in March of 2011. Shatayeva responded by filing a motion to dismiss pursuant to *section 2-619* of the Code of Civil Procedure (*735 ILCS 5/2-619* (West 2010)), on the grounds that plaintiff's cause of action was not commenced within the time limited by law. Although plaintiff's original complaint was filed in the circuit court just within the twoyear limitation period for actions for damages for an injury to the person (*735 ILCS 5/13-202* (West 2010)), that complaint, as we have discussed, was directed against Mr. Grand Pre himself even though he had already been dead for approximately a year and 10 months. Shatayeva argued that under Illinois law, a dead person is **[***7]** a nonexistent entity and cannot be a party to a lawsuit. Correspondingly, a lawsuit instituted against a person who is already dead at the time the suit is filed is a nullity and void *ab initio*. Shatayeva asserted that the complaint naming Mr. Grand Pre therefore could not operate to preserve plaintiff's claims arising from the February 2008 accident.

[*P13] Shatayeva further argued that the General Assembly has provided litigants with a mechanism for bringing a cause of action where, as here, a person against whom an action may be brought dies before expiration of the time limit for commencement of that action, and the cause of action survives and is not otherwise barred. Shatayeva asserted, however, that plaintiff failed to follow the statutory requirements in this case.

[*P14] ***HN1***[↑] Under *section 13-209(b)(1)* of the Code of Civil Procedure (*735 ILCS 5/13-209(b)(1)* (West 2010)), if an estate has been opened for the decedent and a personal representative has been appointed by the court, the "action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death." If, on the other hand, **[***8]** "no petition has been filed for letters of office for the deceased's estate," then under *section 13-209(b)(2)* of the Code of Civil Procedure (*735 ILCS 5/13-209(b)(2)* (West **[****731]** **[**23]** 2010)), "the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may

appoint a special representative for the deceased party for the purposes of defending the action."

[*P15] In this case, a petition for letters of office for Mr. Grand Pre's estate had been filed and a personal representative, Mr. Grand Pre's son, Gary, had been appointed by the circuit. As between the foregoing provisions, *section 13-209(b)(1)* rather than *section 13-209(b)(2)* was therefore the relevant provision. Under that statute, plaintiff could have preserved her claims arising from the collision involving Mr. Grand Pre, had she known of Grand Pre's death, by bringing the action against the personal representative appointed by the court in the probate proceeding and doing so within six months of Mr. Grand Pre's death. But plaintiff did neither of those things. Shatayeva therefore asserted that *section 13-209(b)(1)* could not be applied **[***9]** here.

[*P16] Shatayeva further argued that the legislature has provided an additional safe harbor to aid plaintiffs where, as is claimed by plaintiff's counsel to be the situation here, the action is brought directly against the deceased person and the plaintiff does not learn that the defendant is actually dead until the limitations period has expired. In such circumstances, and assuming the cause of action survives and is not otherwise barred, *section 13-209(c)* of the Code of Civil Procedure (*735 ILCS 5/13-209(c)* (West 2010)) allows the plaintiff to proceed directly against the personal representative, notwithstanding the fact that the claims would otherwise be untimely. That option, however, is subject to four conditions. The plaintiff must proceed "with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant." *735 ILCS 5/13-209(c)(1)* (West 2010). The plaintiff must also proceed "with reasonable diligence to serve process upon the personal representative." *735 ILCS 5/13-209(c)(2)* (West 2010). If process is served more than six months after issuance of letters of office to the personal representative, the "liability **[***10]** of the estate is limited as to recovery to the extent the estate is protected by liability insurance." *735 ILCS 5/13-209(c)(3)* (West 2010). Finally, "[i]n no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." *735 ILCS 5/13-209(c)(4)* (West 2010).

[*P17] Although a personal representative had been appointed in the matter before us in September of 2008, plaintiff never moved the court to have that personal representative substituted as a defendant and never attempted service on that personal representative. Instead, the plaintiff arranged to have one of her attorney's employees, his secretary, appointed "special administrator." Shatayeva asserted that where, as here, a personal representative has already been appointed in probate proceedings, appointment of a separate special representative for the deceased party is improper. Accordingly, Shatayeva asserted, the pleadings naming her as a party are impermissible and should be stricken and the case should be dismissed as time-barred.

[*P18] The circuit court found Shatayeva's arguments **[***11]** to be meritorious and granted her motion to dismiss. The appellate court reversed and remanded. *2012 IL App (1st) 112071, 975 N.E.2d 1204, 363 Ill. Dec. 895*. It held that because plaintiff was unaware of Mr. Grand Pre's death at the time she filed her complaint, *section 13-209(c)* of the Code of Civil Procedure **[****732]** **[**24]** was the governing provision in this case and that *section 13-209(b)* was inapplicable. *2012 IL App (1st) 112071, ¶¶ 23-25, 975 N.E.2d 1204, 363 Ill. Dec. 895*. It further held that plaintiff's actions in securing the appointment of Shatayeva as "special administrator" when and how she did satisfied the requirements of *section 13-209(c)* (*2012 IL App (1st) 112071, ¶ 26, 975 N.E.2d 1204, 363 Ill. Dec. 895)* and were sufficient to preserve the viability of plaintiff's otherwise untimely cause of action. It therefore reversed and remanded for further proceedings. This appeal followed.

[*P19] ANALYSIS

[*P20] This case was decided by the circuit court on a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). ***HN2***[↑] A motion to dismiss under section 2-619 admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga, 223 Ill. 2d 49, 59, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006)*. Here, **[***12]** the contention was that the action was not commenced within the time limited by law. 735 ILCS 5/2-619(a)(5) (West 2010).

[*P21] ***HN3***[↑] In reviewing whether a cause of action is untimely, we are not bound by the conclusions of either the circuit or the appellate court. Whether a cause of action was properly dismissed under section 2-619(a)(5) of the Code of Civil Procedure based on the statute of limitations is a matter we review *de novo*. *Ferguson v. City of Chicago, 213 Ill. 2d 94, 99, 820 N.E.2d 455, 289 Ill. Dec. 679 (2004)*. In addition, whether plaintiff's cause of action was timely in this case turns on how the provisions of section 13-209 should be interpreted. ***HN4***[↑] Statutory construction presents a question of law. Our review is *de novo* for this reason as well. *Township of Jubilee v. State of Illinois, 2011 IL 111447, ¶ 23, 960 N.E.2d 550, 355 Ill. Dec. 668*.

[*P22] We begin our review with the obvious and unfortunate reality that the actual alleged tortfeasor, Mr. Grand Pre, is no longer with us. He died shortly after the motor vehicle accident which gave rise to this case, and was long dead by the time plaintiff filed her initial complaint in February of 2010. ***HN5***[↑] Under the common law of Illinois, a dead person is a nonexistent entity and cannot be a party to a suit. *Volkmar v. State Farm Mutual Automobile Insurance Co., 104 Ill. App. 3d 149, 151, 432 N.E.2d 1149, 60 Ill. Dec. 250 (1982)*. **[***13]** If a person is already dead when an action is asserted against him or her, the proceedings will not invoke the trial court's jurisdiction, and any judgment entered in the case will be a nullity. *Danforth v. Danforth, 111 Ill. 236, 240 (1884)*; *Bricker v. Borah, 127 Ill. App. 3d 722, 724, 469 N.E.2d 241, 82 Ill. Dec. 707 (1984)*. For these reasons, plaintiff's initial complaint naming Mr. Grand Pre as the defendant did not operate to preserve plaintiff's claims arising from her collision with Mr. Grand Pre's vehicle in February of 2008. Those claims remain viable if and only if plaintiff's subsequent action in substituting Shatayeva as the defendant, which did not occur until the normal two-year limitations period for personal injury actions had already expired, operated to preserve plaintiff's otherwise untimely cause of action.

[*P23] The parties agree that resolution of this question rests squarely on the construction and application of section 13-209 of the Code of Civil Procedure (735 ILCS 5/13-209 (West 2010)). The principles governing our construction of statutes are well established. ***HN6***[↑] The primary goal in construing a statute is to ascertain and give effect to the legislature's intent. The best indication of that intent **[***14]** is the language of the statute. *Wilkins v. Williams, [****733] [**25] 2013 IL 114310, ¶ 14, 991 N.E.2d 308, 372 Ill. Dec. 1*. In construing that language, words and phrases should not be considered in isolation. Rather, the language in each section of the statute must be examined in light of the statute as a whole, which is construed in conjunction with other statutes touching on the same or related subjects. *Carter v. SSC Odin Operating Co., 2012 IL 113204, ¶ 37, 976 N.E.2d 344, 364 Ill. Dec. 66*.

[*P24] Section 13-209 appears in article XIII of the Code of Civil Procedure (735 ILCS 5/13-101 et seq. (West 2010)), which deals with limitations on actions. ***HN7***[↑] Statutes of limitation, like other statutes, must be construed in the light of their objectives. The basic policy of such statutes is to afford a defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible. *Geneva Construction Co. v. Martin Transfer & Storage*

Co., 4 Ill. 2d 273, 289-90, 122 N.E.2d 540 (1954). The General Assembly has recognized, however, that injustice might result when a party by or against whom a cause of action might be brought dies before the otherwise applicable limitations period has expired. It is that problem to which section 13-209 is **[***15]** addressed.

[*P25] Section 13-209 is divided into three sections. Subsection (a) (735 ILCS 5/13-209(a) (West 2010)) governs when and how a case may proceed where the party who dies prior to expiration of the limitations period is the plaintiff, a situation not present here. **HN8**[↑] Where the deceased party is the defendant, subsections (b) (735 ILCS 5/13-209(b) (West 2010)) or (c) (735 ILCS 5/13-209(c) (West 2010)) come into play.

[*P26] Subsection (b) sets forth the basic procedures and time requirements that must be followed in situations where a person against whom an action may be filed dies before the limitations period runs out, the action survives the person's death, and it is not otherwise barred. If no petition has been filed for letters of office for the decedent's estate, the court may appoint a "special representative" for the deceased party for the purposes of defending the action. 735 ILCS 5/13-209(b)(2) (West 2010). Otherwise, *i.e.*, if a petition *has* been filed for letters of office for the decedent's estate, an action may be commenced against the "personal representative" appointed by the court. 735 ILCS 5/13-209(b)(1) (West 2010).

[*P27] **HN9**[↑] The provisions of section 13-209(b) presuppose that the plaintiff **[***16]** is aware of the defendant's death at the time he or she commences the action. A separate set of requirements apply where, as in this case, the defendant's death is not known to plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff commences the action against the deceased defendant directly. This scenario is governed by section 13-209(c) (735 ILCS 5/13-209(c) (West 2010)). **HN10**[↑] Assuming that the cause of action survives the defendant's death and is not otherwise barred, section 13-209(c) permits a plaintiff to preserve his or her cause of action by substituting the deceased person's "personal representative" as the defendant. As set forth earlier in this opinion, however, that option is subject to certain conditions. The plaintiff must proceed with reasonable diligence in both "mov[ing] the court for leave to file an amended complaint, substituting the personal representative as defendant" (735 ILCS 5/13-209(c)(1) (West 2010)) and "serv[ing] process upon the personal representative" (735 ILCS 5/13-209(c)(2) (West 2010)). If process is served more than six months after issuance of letters of office to the personal representative, "the liability of **[***17]** the estate is limited as to recovery to the extent the estate is protected by liability insurance." **[****734]** **[**26]** 735 ILCS 5/13-209(c)(3) (West 2010). Moreover, "[i]n no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." 735 ILCS 5/13-209(c)(4) (West 2010).

[*P28] The appellate court here concluded that section 13-209(c) (735 ILCS 5/13-209(c) (West 2010)) governs this case. We believe this conclusion is well founded. **HN11**[↑] Section 13-209(c) deals specifically and unambiguously with the situation where a party has commenced an action against a deceased person and that person's death is unknown to the party before the statute of limitations expires. Augustus v. Estate of Somers, 278 Ill. App. 3d 90, 98, 662 N.E.2d 138, 214 Ill. Dec. 784 (1996). That is precisely the situation before us here. Plaintiff sued Mr. Grand Pre before the two-year limitations period for personal injury actions had run out, though just barely, and proceeded against him directly because she did not yet know that he had died a year and 10 months earlier. It was not until several months after the statute **[***18]** of limitations had expired that she became aware of his death. Section 13-209(c) therefore controls. See Walker v. Ware, 2013 IL App (1st) 122364, ¶ 20, 988 N.E.2d 209, 370 Ill.

Dec. 433.

[*P29] Why plaintiff was not yet aware of Mr. Grand Pre's death when she filed suit is unclear. The record shows that a paid death notice had been published in the newspaper, that probate proceedings had commenced, and that information regarding Mr. Grand Pre's death and the related probate proceedings was readily available through the circuit clerk's office and online. But whether plaintiff *should* have known of Mr. Grand Pre's death is not the question. Under the express terms of *section 13-209(c)*, the issue is simply whether Mr. Grand Pre's death was unknown to plaintiff. ***HN12***[↑] The reasonable diligence expressly required by the legislature with respect to some actions under *section 13-209(c)* is notably absent with respect to knowledge of a defendant's death. That being so, we cannot rewrite the statute to add such a provision. Where a statutory enactment is clear and unambiguous, a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature **[***19]** did not express. *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc., 158 Ill. 2d 76, 83, 630 N.E.2d 820, 196 Ill. Dec. 655 (1994)*.

[*P30] We turn then to the central issue in this case: whether plaintiff's actions once she did learn of Mr. Grand Pre's death complied with the conditions required by *section 13-209(c)*. If those conditions were not satisfied, the circuit court was correct to conclude that *section 13-209(c)* could not be invoked by plaintiff in aid of her otherwise invalid and untimely cause of action. If the statute's conditions were met, as the appellate court believed, plaintiff's cause of action remains viable and the circuit court should not have dismissed it.

[*P31] There is no dispute that plaintiff's cause of action falls within the category of cases covered by *section 13-209(c)* in that it was commenced "against a deceased person whose death [was] unknown to [the plaintiff] before the expiration of the time limited for the commencement thereof, and the cause of action survive[d], and is not otherwise barred." *735 ILCS 5/13-209(c)* (West 2010). Nor is there any dispute that plaintiff therefore had the right to commence an action against Mr. Grand Pre's "personal representative," subject to the **[***20]** various specific conditions set forth in *section 13-209(c)*, including that she proceed with reasonable diligence "to move **[****735]** **[**27]** the court for leave to file an amended complaint, substituting the personal representative as defendant" (*735 ILCS 5/13-209(c)(1)* (West 2010)) and "to serve process upon the personal representative" (*735 ILCS 5/13-209(c)(2)* (West 2010)). The real question in this case is whether Shatayeva qualifies as a "personal representative" within the meaning of the statute. We believe that she does not.

[*P32] ***HN13***[↑] The Code of Civil Procedure does not define the term "personal representative" for purposes of *section 13-209*. It is therefore appropriate for us to consult a dictionary to determine its plain meaning. *People v. Perry, 224 Ill. 2d 312, 330, 864 N.E.2d 196, 309 Ill. Dec. 330 (2007)*. In its most general sense, "personal representative" refers to any "[a] person who manages the legal affairs of another because of incapacity or death." Black's Law Dictionary 1416 (9th ed. 2009). In the particular case of persons who have died leaving estates which must be settled and distributed, the situation before us here, "personal representative" encompasses both of two basic categories of individuals: executors, who are named **[***21]** in the decedent's will, and administrators, who are appointed where the decedent is intestate or else left a will but has no executor. *Id*. at 1416-17; 33 C.J.S. *Executors and Administrators* § 3 (2009); *Hayden v. Wheeler, 33 Ill. 2d 110, 112, 210 N.E.2d 495 (1965)*; *Johnson v. Van Epps, 110 Ill. 551, 559-60 (1884)*.

[*P33] The rules governing executors and administrators are set forth in the Probate Act of 1975 (*755 ILCS 5/1-1 et seq*. (West 2010)). ***HN14***[↑] Under the Act, executors and administrators share a common trait. They are both officers of the

court to whom letters of office are issued. In the case of executors, these are letters testamentary. *755 ILCS 5/6-8* (West 2010). In the case of administrators, they are letters of administration. *755 ILCS 5/9-2* (West 2010). The Probate Act also recognizes "administrator to collect" as a type of representative in addition to executors and administrators. *755 ILCS 5/1-2.15* (West 2010) . These differ from regular administrators (see *755 ILCS 5/10-1 et seq*. (West 2010)), but also require issuance of letters of office. See *755 ILCS 5/10-1* (West 2010). Issuance of letters of office would therefore appear to be a hallmark of "personal representatives" as that term is commonly **[***22]** understood when applied to situations involving estates which must be settled and distributed following a person's death.

[*P34] The terminology employed by the General Assembly in *section 13-209* of the Code of Civil Procedure (*735 ILCS 5/13-209* (West 2010)) is consistent with this usage. ***HN15***[⬆] In setting forth the requirements which must be followed in order to preserve a cause of action when a party by or against whom the action might be brought dies before the otherwise applicable limitations period has expired, *section 13-209* of the Code of Civil Procedure (*735 ILCS 5/13-209* (West 2010)) distinguishes between "representatives" or "personal representatives," on the one hand, and "special representatives," on the other. Where the legislature has employed certain language in one part of a statute and different language in another, we may assume different meanings were intended (*State Bank of Cherry v. CGB Enterprises, Inc., 2013 IL 113836, ¶ 56, 984 N.E.2d 449, 368 Ill. Dec. 503)*, and the difference in meaning here is apparent. "Special representatives" are referenced only with respect to situations where "no petition for letters of office for the decedent's estate has been filed." See *735 ILCS 5/13-209(a)(2)*, *(b)(2)* (West 2010). **[***23]** In all other situations, which by inference must be whenever petitions for letters of office *have* been filed, the statute refers to "representatives" **[****736]** **[**28]** or "personal representatives."

[*P35] Plaintiff would have us treat "personal representatives" and "special representatives" as interchangeable, but her approach is incompatible with the history of *section 13-209*. Prior to its amendment by Public Act 90-111 in 1997, *section 13-209* only made provision for actions by or against "personal representatives." See *735 ILCS 5/13-209(a)*, *(b)*, *(c)* (West 1996). No mention was made of "special representatives." ***HN16***[⬆] The references to "special representatives" were all added at the same time through Public Act 90-111, and in each instance, the new provisions allowing appointment of "special representatives" to bring or defend against actions were preceded by the conditional clauses "if no petition for letters of office for the decedent's estate has been filed" (*735 ILCS 5/13-209(a)(2)* (West 2010)) and "if no petition has been filed for letters of office for the deceased's estate" (*735 ILCS 5/13-209(b)(2)* (West 2010)). By adding the new term "special representative" and expressly limiting use of "special **[***24]** representatives" to situations where no petition for letters of office had been filed, the General Assembly must have understood the preexisting statutory term "personal representatives" as referring to individuals to whom letters of office had been issued. No other interpretation of the statutory change is tenable.

[*P36] ***HN17***[⬆] That a "personal representative" means one appointed pursuant to a petition for issuance of letters of office is confirmed by *section 13-209(c)* (*735 ILCS 5/13-209(c)* (West 2010)), the specific provision governing this case. As noted earlier in this opinion, that subsection affords litigants an opportunity to save an otherwise time-barred claim where they have sued a deceased person whose death was unknown to them before expiration of the applicable statute of limitations. To avail themselves of this opportunity, however, litigants must "proceed[ ] with reasonable diligence to serve process upon the personal representative" (*735 ILCS 5/13-209(c)(2)* (West 2010)) and "[i]f process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is

protected by liability insurance" (735 ILCS 5/13-209(c)(3) **[***25]** (West 2010)). If "personal representative" was not intended by the legislature to refer specifically to an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office, whether as an executor or as an administrator, using the time when letters of office issued as a point of demarcation regarding the scope of the estate's liability would serve no purpose.

[*P37] HN18[↑] That "personal representative" as used in section 13-209 was intended by the legislature to refer specifically to individuals appointed to settle and distribute a decedent's estate pursuant to a petition for issuance of letters of office is also consistent with how the term is used in section 2-1008(b) of the Code of Civil Procedure (735 ILCS 5/2-1008(b) (West 2010)), which deals with the related question of what happens when a party to an action dies after suit has been filed. There, as in section 13-209, the term "special representative" is used when referring to individuals appointed by the court in situations where no petition for letters of office for the decedent's estate has been filed. 735 ILCS 5/2-1008(b)(1), (b)(2) (West 2010). Where a petition for letters of office has **[***26]** been filed, the relevant entity is the "personal representative," just as it is under section 13-209. See 735 ILCS 5/2-1008(b)(2) (West 2010).

[*P38] HN19[↑] That a "personal representative" refers to someone appointed pursuant to a **[****737]** **[**29]** petition for letters of office while "special representative" designates someone appointed by the court in situations where no petition for letters of office for the decedent's estate has been filed is further supported by the fact that section 2-1008(b) includes an express provision for substituting the personal representative for the special representative "[a]t any time that an estate is opened with a representative other than the special representative." 735 ILCS 5/2-1008(b)(1) (West 2010). If the terms "personal representatives" and "special representatives" were synonymous and freely interchangeable, this provision would make no sense.

[*P39] HN20[↑] When construing statutes, it is appropriate to consider similar and related enactments, though not strictly *in pari materia*. We must presume that several statutes relating to the same subject are governed by one spirit and a single policy, and that the legislature intended the several statutes to be consistent and harmonious. Wade v. City of North Chicago Police Pension Board, 226 Ill. 2d 485, 511-12, 877 N.E.2d 1101, 315 Ill. Dec. 772 (2007). **[***27]** Accordingly, we believe that section 2-1008(b) of the Code of Civil Procedure (735 ILCS 5/2-1008(b) (West 2010)) supports our interpretation of section 13-209(c).

[*P40] So, too, does section 6-139 of the Code of Civil Procedure (735 ILCS 5/6-139 (West 2010)). That statute deals with the death of the plaintiff in an action for ejectment. It is clear from the text of the law that when it refers to "the decedent's personal representatives," it means individuals to whom letters of office have been granted by the court under the Probate Act. We know that is what it means because "the granting of letters of office to them" is one of the things that must be demonstrated in order for a personal representatives to step into the shoes of a "plaintiff in ejectment [who] dies after issue joined or judgment entered therein." 735 ILCS 5/6-139 (West 2010).

[*P41] In this case, a petition for issuance of letters of office was filed pursuant to the Probate Act, but it was filed by Mr. Grand Pre's son, and it was the son to whom the letters of office were granted. Mr. Grand Pre's son was therefore his "personal representative" under section 13-209(c) of the Code of Civil Procedure (735 ILCS 5/13-209(c) (West 2010)). **[***28]** Shatayeva was not. Shatayeva did not seek and was not granted either letters testamentary or letters of administration to settle and distribute Mr. Grand Pre's estate. She was merely appointed at plaintiff's request to serve as "special administrator."

[*P42] Why plaintiff referred to Shatayeva's appointment using the term "special administrator" is unclear. She cited no statutory authority for that request in her motion, and the term is not used anywhere in *section 13-209*. It may be because plaintiff was thinking in terms of an earlier verison of *section 2-1008(b)*. We surmise this because *section 2-1008(b)* deals with a related problem, as we have already noted, and prior to its amendment in 1997, it used the term "special administrator" when referring to an individual appointed in cases where no petition for issuance of letters of office had been issued (*735 ILCS 5/2-1008(b)* (West 1996)), instead of the current phrase, "special representative."

[*P43] As previously discussed, *section 2-1008(b)* itself can have no direct application here. ***HN21***[⬆] It applies where a party dies while a case is already pending. It may not be used where, as in this case, a defendant dies before the action is instituted. *Greene v. Helis, 252 Ill. App. 3d 957, 961, 625 N.E.2d 162, 192 Ill. Dec. 202 (1993)*; **[***29]** **[****738]** **[**30]** *Sepeda v. LaBarre, 303 Ill. App. 3d 595, 598, 708 N.E.2d 804, 237 Ill. Dec. 1 (1999)*.[2]

[*P44] While *section 2-1008(b)* is not directly applicable, case law construing the previous version of the law confirms our interpretation of the law. ***HN23***[⬆] A "special administrator" appointed under the former version of *section 2-1008(b)* of the Code of Civil Procedure to defend against an action was not the equivalent of an administrator appointed pursuant to a petition for issuance of letters of office under the Probate Act. *Hannah v. Gilbert, 207 Ill. App. 3d 87, 90, 565 N.E.2d 295, 152 Ill. Dec. 53 (1990)*. No letters of office were issued to **[***30]** a "special administrator," and "special administrators" had no authority to distribute assets of a decedent's estate. *Id.* In the parlance of the current statute, they were therefore equivalent to "special representatives," not "personal representatives." Accordingly, appointment of a "special administrator" would not operate to trigger the provisions of *section 13-209* of the Code of Civil Procedure permitting actions against an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office, *i.e.*, personal representatives. See *Greene v. Helis, 252 Ill. App. 3d at 961*; *Lindsey v. Special Administrator of the Estate of Phillips, 219 Ill. App. 3d 372, 376, 579 N.E.2d 445, 161 Ill. Dec. 897 (1991)*; *Bricker v. Borah, 127 Ill. App. 3d 722, 725, 469 N.E.2d 241, 82 Ill. Dec. 707 (1984)*.

[*P45] In *Keller v. Walker, 319 Ill. App. 3d 67, 744 N.E.2d 381, 253 Ill. Dec. 99 (2001)*, a panel of the Third District of the Appellate Court did conclude that the plaintiffs in a personal injury action could satisfy the requirements of *section 13-209(c)* by seeking appointment of a special administrator in a case where the alleged tortfeasor had died without a will and no estate had been opened. In reaching that conclusion, however, the court did not recognize, consider **[***31]** or discuss the significance of *section 13-209(c)*'s use of the term "personal representative"; that a special administrator would only qualify as a "special representative," not a "personal representative"; or that ***HN24***[⬆] under *section 13-209(c)*, as throughout the statutory scheme enacted by our legislature, a "personal representative" refers specifically to an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office. There is no indication in *Keller* that these problems were even raised. The decision is therefore of no value in the resolution of this case. See *Village of Lake in the Hills v. Laidlaw Waste Systems, Inc., 160 Ill. App. 3d 427,*

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[2] ***HN22***[⬆] *Gaddy v. Schulte, 278 Ill. App. 3d 488, 663 N.E.2d 119, 215 Ill. Dec. 369 (1996)*, a panel of the Fifth District of the Appellate Court did sanction the use of *section 2-1008* of the Code of Civil Procedure for appointment of a "special administrator" to defend an action where the alleged tortfeasor died before the action was instituted and indicated that a person could qualify as a personal representative under *section 13-209* (*735 ILCS 5/13-209* (West 2010)) even though letters of office had not issued to that person under the Probate Act. *Gaddy* has not been followed by the courts of Illinois and for the reasons discussed in this opinion, it is incorrect on both counts.

431, 513 N.E.2d 598, 112 Ill. Dec. 184 (1987) (no precedent established on points neither argued nor discussed in an opinion). *Keller* is also inapposite because, of course, an estate had been opened in this case, a petition for issuance of letters of office had been filed and a personal representative had been appointed long before plaintiff first instituted her cause of action.[3]

[*P46] **[****739]** **[**31]** Under the plain language of *section 13-209(c)*, plaintiff was obligated to proceed against Mr. Grand Pre's duly appointed personal representative, substituting him as the defendant, once she learned of Mr. Grand Pre's death if she wished to preserve her otherwise invalid cause of action. She did not. Instead, as we have noted, she elected to have her lawyer's secretary appointed "special administrator" and sued her instead. Under these circumstances, the circuit court was correct when it concluded that *section 13-209(c)* could not properly be invoked by plaintiff to preserve her otherwise untimely cause of action.

[*P47] Practitioners familiar with trusts and estates will recognize that the Probate Act itself makes provision for appointment of special administrators under limited circumstances. They will also recognize, however, that those provisions are of no use **[***33]** to plaintiff here and therefore cannot alter the outcome of this case.

[*P48] *Section 8-1(e)* of the Act (*755 ILCS 5/8-1(e)* (West 2010)) authorizes appointment of a special administrator to defend a proceeding to contest the validity of a will or prosecute an appeal from a judgment in a will contest case if the decedent's representative fails or refuses to do so or if there is no representative to act when the contest is brought. Similarly, *section 8-2(e)* of the Act (*755 ILCS 5/8-2(e)* (West 2010)) authorizes appointment of a special administrator to defend a proceeding to probate a will or prosecute an appeal where admission of a will to probate has been denied if the decedent's representative fails or refuses to do so when ordered by the court or if there is no representative then acting. Those circumstances are clearly not present in this case. There is no will contest, admission of the will to probate was not denied, a representative for defendant was already in place, and there is no indication that the representative failed or refused to undertake any of his obligations.

[*P49] The Probate Act also allows appointment of a special administrator to represent the estate in a proceeding for issuance **[***34]** of a citation on behalf of the estate in cases where a person is believed "(1) to have concealed, converted or embezzled or to have in his possession or control any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) to have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise" (*755 ILCS 5/16-1(a)* (West 2010)), and decedent's personal representative is the respondent in the case (*755 ILCS 5/16-1(c)* (West 2010)). Again, however, these circumstances are not present here. This is not a citation proceeding on behalf of the estate, and the personal representative named by Mr. Grand Pre, his son, is not a respondent.

[*P50] Finally, *section 18-8* of the Act (*755 ILCS 5/18-8* (West 2010)) calls for appointment of a special administrator in cases where the decedent's representative or the representative's attorney has a claim against the estate. This situation is not before us either. The claim here is not being pressed by **[***35]** Mr. Grand Pre's personal representative, or by an attorney for his personal representative.

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[3] *Minikon v. Escobedo, 324 Ill. App. 3d 1073, 756 N.E.2d 302, 258 Ill. Dec. 320 (2001)*, another appellate decision involving *section 13-209(c)*, concerned the relationship between that statute **[***32]** and *2-616(d)* of the Code of Civil Procedure (*735 ILCS 5/2-616(d)* (West 2010)) and whether plaintiff had met *section 13-209(c)*'s due diligence requirements. No issue was raised as to whether a "special administrator" qualified as a "personal representative" and it is distinguishable from this case for the same reasons that *Keller* is.

[*P51] **[****740]** **[**32]** We note, moreover, that *HN25*[] a common thread in all of the foregoing provisions is that appointment of a special administrator is appropriate only where action or inaction by the personal representative designated by the decedent may be adverse to the interests of the decedent's estate. Plaintiff has not cited any cases permitting the appointment of a special administrator to protect the interests of a decedent's estate where, as here, an estate is already opened, letters of office have already issued to an executor to settle and distribute the estate, the executor has undertaken his responsibilities and no conflict of interest is alleged.

[*P52] The absence of authority for appointment of a separate special administrator under such circumstances is not difficult to explain. *HN26*[] Having two separate individuals attempting to operate simultaneously and independently on behalf of the same decedent poses obvious problems for the prompt, efficient and final settlement of the decedent's affairs. Moreover, Illinois law is clear that a testator has the right to designate by will who shall act as his personal representative, **[***36]** and a court may not ignore his directions and appoint someone else to act in that capacity. Where, as here, the testator has designated such a representative, the appointment of another party to serve as special administrator impermissibly infringes on that right and is not allowed. See *In re Estate of Faught, 111 Ill. App. 3d 1043, 1045, 445 N.E.2d 54, 67 Ill. Dec. 762 (1983)*. Indeed, in addressing this problem in the context of the Wrongful Death Act (*740 ILCS 180/2.1* (West 2010)), courts have concluded that appointment of a special administrator after a petition for issuance of letters of office has been filed is void. *Cushing v. Greyhound Lines, Inc., 2012 IL App (1st) 100768, ¶¶ 104-05, 965 N.E.2d 1215, 358 Ill. Dec. 736*.

[*P53] Plaintiff urges us to adopt a "no harm, no foul" approach and sanction what she attempted to do on the grounds that there would be no prejudice to Mr. Grand Pre's estate from multiple representatives because she is not seeking recovery from Shatayeva beyond amounts for which the estate is protected by liability insurance. A threshold problem with this argument is that we have no basis for evaluating it. While plaintiff may perceive no prejudice to the estate, her interests are inherently antithetical to its, and the estate may **[***37]** very well have a different view. Unfortunately, we do not know what the personal representative of the estate or the heirs or legatees think because none of them were ever notified of this litigation or Shatayeva's appointment to defend against it.

[*P54] The intrinsic conflict between plaintiff's interests and those of the estate is problematic for another reason as well. *HN27*[] The Probate Act expressly and unequivocally holds that "[t]he person appointed *** special administrator under this Act may not be selected upon the recommendation of any person having an interest adverse to the person represented by the *** special administrator or by the attorney for the adverse party." *755 ILCS 5/27-5* (West 2010). Under this provision, appointment of Shatayeva would have been improper even if there were some basis for appointment of a special administrator, for her selection was based entirely on the recommendation of the attorney for plaintiff, who was clearly an adverse party.

[*P55] It is true, of course, that Shatayeva's appointment was not predicated on the Probate Act. As noted earlier, we do not know what it was based on because no statutory basis for the appointment was stated in the motion seeking **[***38]** her appointment or in the order granting it, and, in **[****741]** **[**33]** any case, none of the circumstances under which the Probate Act authorizes appointment of a special administrator are present here. Even though the Probate Act is not directly controlling, however, the soundness of the principles underlying the foregoing provision is unassailable and further undermines the propriety of the procedure followed in appointing Shatayeva.

[*P56] Plaintiff asks us to excuse her failure to discover that an estate had already been opened for Mr. Grand Pre on the grounds that her attorney did make some effort to check the court records, and was unsuccessful. Exactly what inquiries the attorney actually made, however, are never described. They could not have been significant, for, as counsel for Shatayeva points out, information regarding the estate and the appointment of Grand Pre's son as independent administrator was readily available through the Cook County circuit clerk's office and online. In any case, ***HN28***[↑] the claim "I tried" is not sufficient under the governing statute. While *section 13-209* may impose no duty of reasonable diligence to discover a defendant tortfeasor's death in the first instance, it clearly and **[***39]** unequivocally requires reasonable diligence by a plaintiff after learning of the death, including reasonable diligence in moving to file an amended complaint substituting the personal representative as defendant (*735 ILCS 5/13-209(c)(1)* (West 2010)) and serving him or her with process (*735 ILCS 5/13-209(c)(2)* (West 2010)). Implicit in both those obligations is the duty to use reasonable diligence in identifying the personal representative. Based on the scant record before us, plaintiff's efforts here fell short of that standard.

[*P57] We note, moreover, that even if plaintiff's delay in discovering the existence of the estate were excusable, that still would not justify her failure to then proceed as *section 13-209(c)* requires. Plaintiff had ample opportunity to properly comply with that statute after learning that an estate was already open, a petition for issuance of letters of office had been filed, and an independent administrator had been appointed and was already in place. Plaintiff's failure to substitute the correct party following Mr. Grand Pre's death was brought to her attention no later than March of 2011, when Shatayeva moved to dismiss. Although the original limitations period **[***40]** on plaintiff's claims had expired the previous year, *section 13-209(c)(4)* (*735 ILCS 5/13-209(c)(4)* (West 2010)) gave her up to two additional years beyond the expiration date to proceed against the personal representative, assuming the other requirements of *section 13-209* were satisfied. Nothing in the record before us indicates that requiring plaintiff to substitute the existing personal representative for Shatayeva, the "special administrator," would have disadvantaged plaintiff in any way. She simply elected not to do so.

[*P58] Now, unfortunately for plaintiff, it is too late. The extra two-year window afforded by *section 13-209(c)(4)* has closed. To excuse plaintiff's failure to comply with the requirements of *section 13-209(c)* and allow her to substitute the personal representative at this point would require us to do something which ***HN29***[↑] we simply have no authority to do: rewrite the Code of Civil Procedure to allow a plaintiff to amend a pleading after the statute of limitations had run. See *Augustus v. Estate of Somers, 278 Ill. App. 3d 90, 99, 662 N.E.2d 138, 214 Ill. Dec. 784 (1996)*. It is no answer to say that the issue here is simply a matter of procedure. "[E]ven though procedural in nature, a statute of limitations, **[***41]** if properly asserted by one entitled to its protection, is a bar to an action. It is a legislatively determined **[****742]** **[**34]** deadline for commencing an action against one who otherwise might be legally indebted to a plaintiff. This court may not *** effectively eviscerate a valid statute of limitations." *Vaughn v. Speaker, 126 Ill. 2d 150, 161, 533 N.E.2d 885, 127 Ill. Dec. 803 (1988)*.

[*P59] CONCLUSION

[*P60] For the foregoing reasons, we hold that plaintiff's substitution of her lawyer's secretary as "special administrator" in place of Mr. Grand Pre following expiration of the statute of limitations did not operate to preserve her otherwise invalid cause of action against him. Because an estate had already been opened for Mr. Grand Pre and letters of office had issued to his executor, *section 13-209(c)* required that plaintiff commence the action against the executor, as Mr. Grand Pre's "personal

representative," upon learning of Mr. Grand Pre's death. Plaintiff had ample time to exercise that option, but did not. Her cause of action was therefore properly dismissed by the circuit court, and the appellate court erred when it reversed and remanded for further proceedings. Accordingly, the judgment of the appellate court is reversed and the circuit **[***42]** court's judgment dismissing plaintiff's cause of action is affirmed.

[*P61] Appellate court judgment reversed.

[*P62] Circuit court judgment affirmed.

Dissent by: KILBRIDE

Dissent

[*P63] CHIEF JUSTICE KILBRIDE, dissenting:

[*P64] While I agree with the majority's conclusion that *subsection (c) of section 13-209* applies to this case, I respectfully dissent from the majority opinion. I disagree with the majority's conclusion that plaintiff did not comply with *subsection (c)* of the applicable statute. In fact, that was never an issue raised or argued in this case. Notably, defendant conceded that plaintiff complied with the requirements of *section 13-209(c)* of the Code of Civil Procedure (*735 ILCS 5/13-209(c)* (West 2010)).

[*P65] In reviewing a statute, our objective "is to ascertain and give effect to the intent of the legislature." *Gaffney v. Board of Trustees of the Orland Fire Protection District, 2012 IL 110012, ¶ 56, 969 N.E.2d 359, 360 Ill. Dec. 549*. In doing so, we must consider the plain and ordinary meaning of the language of the statute. *Gaffney, 2012 IL 110012, ¶ 56, 969 N.E.2d 359, 360 Ill. Dec. 549*. "We will not depart from the plain statutory language by reading into it exceptions, limitations, or conditions that conflict with the expressed intent of the legislature." *Gaffney, 2012 IL 110012, ¶ 56, 969 N.E.2d 359, 360 Ill. Dec. 549*. **[***43]** Further, we will not utilize extrinsic aids of statutory interpretation unless the statutory language is unclear or ambiguous. *Gaffney, 2012 IL 110012, ¶ 56, 969 N.E.2d 359, 360 Ill. Dec. 549*.

[*P66] *Section 13-209* of the Code of Civil Procedure specifically addresses the situation involving the death of a party. *735 ILCS 5/13-209* (West 2010). *Section 13-209* contains three subsections, *(a)*, *(b)*, and *(c)*. *735 ILCS 5/13-209* (West 2010). *Subsection (a)* addresses when "a person entitled to bring an action dies." *735 ILCS 5/13-209(a)* (West 2010). *Subsection (a)* is not applicable in this case.

[*P67] *Subsection (b) of section 13-209* provides, in relevant part:

> "(b) If a person against whom an action may be brought dies before the expiration of the time limited for the **[****743]** **[**35]** commencement thereof, and the cause of action survives, and is not otherwise barred:
>
> (1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;
>
> (2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees **[***44]** as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims." *735 ILCS 5/13-209(b)* (West 2010).

[*P68] Defendant argued below, and in this court,

that *subsection (b) of section 13-209* is applicable in this case because Mr. Grand Pre died before the expiration of the statute of limitations. However, the plaintiff did not learn of Mr. Grand Pre's death until after she filed her cause of action. Accordingly, I agree with the majority that "[t]he provisions of *section 13-209(b)* presuppose that the plaintiff is aware of the defendant's death at the time he or she commences the action," and is, therefore, not applicable when the defendant's death is unknown to the plaintiff. *Supra* ¶ 27. I also agree with the majority that *subsection (c) of section 13-209* is applicable in this case.

[*P69] *Subsection (c) of section 13-209* provides:

> "(c) **[***45]** If a party commences an action against a deceased person *whose death is unknown to the party* before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:
>
> (1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.
>
> (2) The party proceeds with reasonable diligence to serve process upon the personal representative.
>
> (3) If process is served more than 6 months after the issuance of letters office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.
>
> (4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." (Emphases added.) *735 ILCS 5/13-209(c)* (West 2010).

[*P70] *Subsection (c) of section 13-209* specifically addresses situations when **[***46]** a plaintiff is unaware, at the time of filing the action, that a named defendant is dead. *Section 13-209(c)* allows a plaintiff to proceed against a deceased person's personal representative if the plaintiff, at the time of the filing of the original complaint, did not know about the deceased's death. *Subsection (c)* makes no reference to whether an estate is open or closed. Rather, the focus is on the plaintiff's knowledge.

[*P71] **[****744]** **[**36]** I would hold that the circuit court erred in granting defendant's *section 2-619* motion to dismiss because plaintiff properly proceeded under *section 13-209(c)* of the Code. The plain language of *subsection (c)* states "[i]f a party commences an action against a deceased person *whose death is unknown to the party* before the expiration of the time limited for the commencement thereof." (Emphases added.) *735 ILCS 5/13-209(c)* (West 2010). In this case, plaintiff did not know of decedent's death until after she filed her cause of action. This is not disputed by the majority.

[*P72] While I agree with the majority's conclusion that *subsection (c) of section 13-209* applies to this case, I believe the majority misapplies *subsection (c)*. Plaintiff alleged, and defendant does not dispute, **[***47]** that she followed the requirements of *section 13-209(c)(1) through (4)* of the Code once she learned of Mr. Grand Pre's death. *735 ILCS 5/13-209(c)(1)-(4)* (West 2010). Specifically, plaintiff was unaware of decedent's death when she commenced the action. Plaintiff moved diligently to substitute a personal representative. She moved diligently to serve a personal representative. The decedent and his estate are protected by liability insurance. The personal representative was served within two years of the time limited for commencement of the action.

[*P73] The majority determines that Shatayeva does not qualify as a "personal representative" within the meaning of *subsection (c)*, even though

it admits that "[t]he Code of Civil Procedure does not define the term 'personal representative' for purposes of *section 13-209*." Clearly, plaintiff used reasonable diligence to have a personal representative appointed and substituted for Mr. Grand Pre. Her mistake in misnaming the personal representative as "special representative" or "special administrator" should not result in a loss of her cause of action. Rather, now that plaintiff is aware an estate was opened for Mr. Grand Pre, plaintiff should be **[***48]** allowed to substitute the independent administrator of the estate for Shatayeva as Mr. Grand Pre's personal representative in this action. I would note that the estate is not prejudiced by allowing plaintiff to proceed because the liability of the estate is limited to the extent the estate is protected by liability insurance.

[*P74] It is clear that the legislature enacted *section 13-209(c)* specifically to address situations when a plaintiff is unaware, at the time of filing a cause of action, that a named defendant is deceased. Accordingly, I would hold that plaintiff properly proceeded under *section 13-209(c)* of the Code and the circuit court erred when it granted defendant's *section 2-619* motion to dismiss. I would, therefore, affirm the appellate court's judgment.

[*P75] For the foregoing reasons, I respectfully dissent.

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Richards v. Vaca

Appellate Court of Illinois, Second District

December 17, 2021, Opinion Filed

No. 2-21-0270

Reporter
2021 IL App (2d) 210270 *; 196 N.E.3d 585 **; 2021 Ill. App. LEXIS 686 ***

ALYCE L. RICHARDS, Plaintiff-Appellee, v. KIMBERLY VACA, as Special Representative of Joshua T. Wilson, Deceased, Defendant-Appellant.

Prior History: [*1]** Appeal from the Circuit Court of Boone County. No. 20-L-9. Honorable Ronald A. Barch, Judge, Presiding.

Core Terms

appointment, special representative, limitations period, expiration, personal representative, questions, trial court, absurd, applicable statute of limitation, deceased

Case Summary

Overview

HOLDINGS: [1]-The court found that *735 ILCS 5/13-209(b)(2)* (2020) allowed for the appointment of a special representative after the running of the limitations period where plaintiff filed a complaint naming a deceased person as the defendant; [2]-The time limitation contained in *§ 13-209(b)(1)* applied when a special representative was appointed pursuant to subsection (b)(2).

Outcome

Certified questions answered in the affirmative.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN1 **Standards of Review, De Novo Review**

When construing a statute, a court's primary task is to ascertain and give effect to the intent of the legislature. Where the court can determine the intent of the legislature from such plain language, it will give it effect without resorting to further interpretive aids. However, if a statute is ambiguous, the court may consider external aids of construction. Sections of the same statute should be considered in pari materia, and each section should be construed with every other part or section of the statute to produce a harmonious whole. Moreover, in ascertaining the legislature's intent, the appellate court has a duty to avoid a construction of the statute that would defeat the statute's purpose or yield an absurd or unjust result. Review is de novo.

Civil Procedure > Parties > Substitution > Death of Party

Governments > Courts > Authority to Adjudicate

HN2 **Substitution, Death of Party**

A complaint directed against a dead person is a

nullity: If a person is already dead when an action is asserted against him or her, the proceedings will not invoke the trial court's jurisdiction, and any judgment entered in the case will be a nullity.

Governments > Legislation > Statute of Limitations > Time Limitations

HN3[] **Statute of Limitations, Time Limitations**

Personal-injury actions must be commenced within two years of when they accrued. 735 ILCS 5/13-202 (2020).

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

Courts avoid interpretations which would render part of a statute meaningless or void.

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > Appointment

Governments > Legislation > Statute of Limitations > Time Limitations

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > Claims Against & By

HN5[] **Personal Representatives, Appointment**

735 ILCS 5/13-209(b)(1) (2020) establishes a right to institute an action against the personal representative of an estate and imposes a time limitation (the time set by the applicable statute of limitations or within six months of the defendant's death, whichever occurs later). If an estate has been opened, the plaintiff may proceed against the personal representative. If no estate is open, § 13-209(b)(2) sets forth a procedure where the trial court can appoint someone to take the place of a personal representative-namely, a special representative.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

A statute should not be construed in a manner that renders any portion of it meaningless.

Civil Procedure > Parties > Substitution > Death of Party

HN7[] **Substitution, Death of Party**

Regardless of whether 735 ILCS 5/13-209(b)(2) (2020) alters the time frame during which an action may be instituted, it provides for the appointment of a special representative, which allows a plaintiff to proceed against a deceased defendant.

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Representatives

Governments > Legislation > Statute of Limitations > Time Limitations

HN8[] **Representative Capacity, Representatives**

The time limitation contained in 735 ILCS 5/13-209(b)(1) (2020) applies when a special representative is appointed pursuant to subsection (b)(2). The special representative simply takes the place of the personal representative and the case proceeds accordingly (subject, of course, to the other conditions set forth in subsection (b)(2)).

Estate, Gift & Trust
Law > ... > Probate > Personal Representatives > Appointment

Governments > Legislation > Statute of Limitations > Time Limitations

HN9[] **Personal Representatives, Appointment**

A court may appoint a special representative after the expiration of the applicable limitations period. Since the special representative takes the place of the personal representative, such an appointment, if it happens after the limitations period, must occur within six months of the defendant's death.

Counsel: Nick Papastratakos, of Hilbert & Power, Ltd., of Chicago, for appellant.

Nathan J. Noble, of Nathan J. Noble, P.C., of Belvidere, for appellee.

Judges: JUSTICE HUDSON delivered the judgment of the court, with opinion. Justices Hutchinson and Jorgensen concurred in the judgment and opinion.

Opinion by: HUDSON

Opinion

[586]** JUSTICE HUDSON delivered the judgment of the court, with opinion.

Justices Hutchinson and Jorgensen concurred in the judgment and opinion.

[*P1] I. INTRODUCTION

[*P2] Defendant Kimberley Vaca, as appointed special representative of decedent, Joshua T. Wilson, sought interlocutory review pursuant to *Illinois Supreme Court Rule 308(a)* (eff. Oct. 1, 2019), requesting leave to present two certified questions. We granted defendant's request. We now answer those questions and remand.

[*P3] II. BACKGROUND

[*P4] The instant case arises out of an automobile accident that occurred on May 11, 2018. Plaintiff, Alyce L. Richards, was injured. Decedent died that day. On May 6, 2020, five days before the running of the statute of limitations, plaintiff filed a complaint alleging that the injuries she received in that automobile accident were caused by decedent's negligence. **[***2]** Plaintiff was aware that decedent was deceased when the complaint was filed. Wilson was named as the only defendant. No letters of office had been issued regarding decedent's personal estate.

[*P5] On May 20, 2020, plaintiff moved to appoint a "special administrator" in accordance with *section 2-1008(b)* of the Code of Civil Procedure (Code) (*735 ILCS 5/2-1008(b)* (West 2020)). The trial court granted this motion on June 5, 2020, appointing attorney Charles Popp. On July 10, 2020, Popp moved to substitute Vaca for Popp as "special representative".

[*P6] On July 31, 2020, decedent's attorneys filed a motion to dismiss pursuant to **[**587]** *section 2-619* of the Code (*735 ILCS 5/2-619* (West 2020)). The motion asserted that plaintiff failed to commence this action within the time allowed (two years as a personal-injury action (*735 ILCS 5/13-202* (West 2020))) and that consequently it was time-barred.

[*P7] On October 9, 2020, plaintiff filed a motion to vacate defendant's appointment and a motion to appoint a special representative pursuant to *section 13-209(b)(2)* of the Code (*735 ILCS 5/13-209(b)(2)* (West 2020)). Decedent's attorneys opposed only the latter motion, arguing that *section 13-209(b)(2)* did not allow the appointment of a special representative after the applicable limitations period had expired.

[*P8] Following supplemental briefing by the

parties, the **[***3]** trial court issued a "Memorandum of Decision and Order." The trial court first determined that the complaint filed by plaintiff on May 6, 2020, was a legal nullity, as it named only a dead person as a defendant. The court then examined *section 13-209* of the Code (*735 ILCS 5/13-209* (West 2020)). It concluded that plaintiff was entitled to the appointment of a special representative despite the running of the limitations period. It rejected decedent's attorneys construction of *section 13-209(b)(2)*, finding that, if it did not allow for such an appointment, the section would be meaningless and that absurd results would follow.

[*P9] Defendant then sought interlocutory review, and the trial court certified the following two questions:

> "1. Whether when a potential defendant dies prior to the expiration of the applicable statute of limitations, and the Plaintiff, although aware of that person's death, names the decedent in a case prior to the expiration of the applicable statute of limitations, can the Plaintiff rely on *735 ILCS 5/13-209(b)(2)* to appoint a special representative after the statutory period has expired and thus pursue litigation against the decedent's liability insurance proceeds; and
>
> 2. If the answer to Question 1 is in the affirmative, must the special **[***4]** representative appointed under *735 ILCS 5/13-209(b)(2)*, be appointed within six months of the decedent's death[?]"

We now turn to these questions.

[*P10] III. ANALYSIS

[*P11] First, we will address whether *section 13-209(b)(2)* of the Code (*735 ILCS 5/13-209(b)(2)* (West 2020)) allows for the appointment of a special representative after the running of the limitations period where a plaintiff files a complaint naming a deceased person as the defendant. ***HN1***[↑] When construing a statute, a court's primary task is to ascertain and give effect to the intent of the legislature. *People v. Roberts, 214 Ill. 2d 106, 116, 824 N.E.2d 250, 291 Ill. Dec. 674 (2005)*. Where we can determine the intent of the legislature from such plain language, we will give it effect without resorting to further interpretive aids. *Metzger v. DaRosa, 209 Ill. 2d 30, 35, 805 N.E.2d 1165, 282 Ill. Dec. 148 (2004)*. However, if a statute is ambiguous, we may consider external aids of construction. *Poris v. Lake Holiday Property Owners Ass'n*, 2013 IL 113907, ¶ 47, 983 N.E.2d 993, 368 Ill. Dec. 189. Our supreme court has held that "sections of the same statute should *** be considered *in pari materia*, and that each section should be construed with every other part or section of the statute to produce a harmonious whole." *Land v. Board of Education of the City of Chicago, 202 Ill. 2d 414, 422, 781 N.E.2d 249, 269 Ill. Dec. 452 (2002)*. Moreover, "[i]n ascertaining the legislature's intent, this court has a duty to avoid a construction of the statute that would defeat the statute's purpose or yield an absurd or unjust result." *People v. Latona, **[**588]** 184 Ill. 2d 260, 269, 703 N.E.2d 901, 234 Ill. Dec. 801 (1998)*. Review is *de novo*. *Roberts, 214 Ill. 2d at 116*.

[*P12] ***HN2***[↑] As a preliminary matter, defendant **[***5]** correctly points out that a complaint directed against a dead person is a nullity: "If a person is already dead when an action is asserted against him or her, the proceedings will not invoke the trial court's jurisdiction, and any judgment entered in the case will be a nullity." *Relf v. Shatayeva*, 2013 IL 114925, ¶ 22, 998 N.E.2d 18, 375 Ill. Dec. 726 (citing *Danforth v. Danforth*, 111 Ill. 236, 240 (1884) and *Bricker v. Borah, 127 Ill. App. 3d 722, 724, 469 N.E.2d 241, 82 Ill. Dec. 707 (1984)*). Defendant notes that the applicable statute of limitations provides that ***HN3***[↑] personal-injury actions must be commenced within two years of when they accrued. *735 ILCS 5/13-202* (West 2020). Here, plaintiff filed her initial, defective complaint before the limitations period expired, but did not seek the appointment of a

special representative until after the limitations period passed.

[*P13] Plaintiff contends, and the trial court agreed, that *section 13-209(b)(2)* allows for a special representative to be appointed after the running of the limitations period, thus saving the cause of action. This section, along with other portions of the statute that will become pertinent to this discussion, provides as follows:

> "(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:
>
> (1) an action may be commenced against **[***6]** his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;
>
> (2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this *paragraph (2)*, the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims. *735 ILCS 5/13-209(b)* (West 2020).

[*P14] Plaintiff first argues that *subsection (b)(2)* contains no language limiting its application to the period prior to the running of the limitations period. Conversely, defendant asserts that the subsection includes no language that would allow this appointment to occur after the limitations period passed. Both parties reference the principle that a court may not read into a statute any conditions, limitations, **[***7]** or exceptions that do not appear in its plain language. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc., 238 Ill. 2d 455, 461, 939 N.E.2d 487, 345 Ill. Dec. 644 (2010)*. Defendant further contends that, in other subsections of *section 13-209*, where the legislature intended to extend the applicable limitations period, it clearly expressed its intent. For example, *subsection (b)(1)* states that an action may be commenced "within 6 months after the person's death." *735 ILCS 5/13-209(b)(1)* (West 2020). Plaintiff contends that the other subsections of *section 13-209* provide little guidance, as they mirror sections of the *Probate Act of 1975 (Probate Act) (755 ILCS 5/1-1 et seq.* **[**589]** (West 2020)) concerning bringing claims against a decedent's estate (plaintiff specifically points to *sections 18-3* and *18-12* (*755 ILCS 5/18-3*, *18-12* (West 2020))). Plaintiff points out that *subsection (b)(2)* has no counterpart in the Probate Act. We fail to see how this would affect how the legislature would express its intent in drafting *section 13-209*. That is, regardless of whether *subsection (b)(2)* had a counterpart in the Probate Act, the legislature still could have expressed its intent regarding creating an exception to the applicable statute of limitations, as it did in the other subsections, if it, in fact, intended such an exception.

[*P15] Indeed, both parties are able to find support for their positions in the text of the statute. This is because the statute is ambiguous. It is certainly true that *subsection (b)(1)* contains an **[***8]** express time limit for the commencement of an action while *subsection (b)(2)* does not. It is also true that *subsection (b)(1)* sets forth a right to commence an action while *subsection (b)(2)* does not. *Subsection (b)(1)* begins with the phrase, "an action may be commenced against" (*735 ILCS 5/13-209(b)(1)* (West 2020)); *subsection (b)(2)* contains no comparable language. Thus, read literally, if no personal representative exists, a court has unlimited time to appoint a special representative, but the special representative may not be sued. This surely cannot be what the

legislature intended. See *Bowman v. Ottney*, 2015 IL 119000, ¶ 17, 400 Ill. Dec. 640, 48 N.E.3d 1080 ("Moreover, we will avoid a construction that would defeat the statute's purpose or yield absurd or unjust results."). The legislature did not allow for a special representative to be appointed to do nothing. ***HN4***[⬆] The appointment of a special representative must serve some purpose. *Cf.* *Gay v. Dunlap, 279 Ill. App. 3d 140, 147, 664 N.E.2d 88, 215 Ill. Dec. 691 (1996)* ("Courts avoid interpretations which would render part of a statute meaningless or void."). Given the subject matter of the rest of the statute, it is obvious that the special representative exists to defend a lawsuit. See *Land, 202 Ill. 2d at 422* (holding that parts of a statute must be read *in pari materia*).

[*P16] We further note that, if we read the two subsections as alternatives, another questionable consequence follows. Under *subsection (b)(1)*, an action must be **[***9]** commenced within the limitations period or within six months of the defendant's death. On the other hand, *subsection (b)(2)* contains no such limitation, so an action could be instituted in perpetuity. We perceive no reason why such disparate results should follow based on whether a personal representative or a special representative were involved in an action. Again, we must "presume that the legislature did not intend absurd, inconvenient, or unjust consequences." *Solon v. Midwest Medical Records Ass'n, 236 Ill. 2d 433, 441, 925 N.E.2d 1113, 338 Ill. Dec. 907 (2010)*.

[*P17] Conversely, if we read the two subsections as complementary rather than as setting forth two distinct alternatives, no such absurdities follow. ***HN5***[⬆] That is, *subsection (b)(1)* establishes a right to institute an action against the personal representative of an estate and imposes a time limitation (the time set by the applicable statute of limitations or within six months of the defendant's death, whichever occurs later). If an estate has been opened, the plaintiff may proceed against the personal representative. If no estate is open, *subsection (b)(2)* sets forth a procedure where the trial court can appoint someone to take the place of a personal representative-namely, a special representative. This construction avoids all of the absurdities set forth above.

[*P18] **[**590]** We also note that **[***10]** this construction addresses the trial court's concern that construing *subsection (b)(2)* as not allowing for an appointment of a special representative after the running of the limitations period would render that section meaningless. ***HN6***[⬆] It is axiomatic that a statute should not be construed in a manner that renders any portion of it meaningless. *Einstein v. Nijim, 358 Ill. App. 3d 263, 268, 831 N.E.2d 50, 294 Ill. Dec. 527 (2005)*. The trial court reasoned that, if a plaintiff had to file a complaint and seek the appointment of a special representative prior to the expiration of the ordinary statute of limitations, *section 13-209* would serve no purpose. We disagree. ***HN7***[⬆] Regardless of whether *section 13-209(b)(2)* alters the time frame during which an action may be instituted, it provides for the appointment of a special representative, which allows a plaintiff to proceed against a deceased defendant.

[*P19] ***HN8***[⬆] As for the second certified question, we hold that the time limitation contained in *subsection (b)(1)* applies when a special representative is appointed pursuant to *subsection (b)(2)*. As we construe the statute, the special representative simply takes the place of the personal representative and the case proceeds accordingly (subject, of course, to the other conditions set forth in *subsection (b)(2)*).

[*P20] IV. CONCLUSION

[*P21] Accordingly, we answer both certified questions in the affirmative. **[***11]** ***HN9***[⬆] Regarding the first question, a court may appoint a special representative after the expiration of the applicable limitations period. As for the second question, since the special representative takes the place of the personal representative, such an

appointment, if it happens after the limitations period, must occur within six months of the defendant's death.

[*P22] Having answered both certified questions, we remand this case.

[*P23] Certified questions answered; cause remanded.

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Rosenbach v. Six Flags Entm't Corp.

Supreme Court of Illinois

January 25, 2019, Opinion Filed

(Docket No. 123186)

Reporter
2019 IL 123186 *; 129 N.E.3d 1197 **; 2019 Ill. LEXIS 7 ***; 432 Ill. Dec. 654 ****

STACY ROSENBACH, as Mother and Next Friend of Alexander Rosenbach, Appellant, v. SIX FLAGS ENTERTAINMENT CORPORATION et al., Appellees.

Prior History: *Rosenbach v. Six Flags Entm't Corp., 2017 IL App (2d) 170317, 2017 Ill. App. LEXIS 812 (Dec. 21, 2017)*

Disposition: Cause remanded.

Core Terms

biometric, identifiers, collected, aggrieved, private entity, fingerprints, defendants', appellate court, actual damage, customer, rights, circuit court, liquidated damages, provisions, scan, injunctive relief, disclosure, purposes, season, stored, private right of action, aggrieved person, attorney's fees, adverse effect, amusement park, compromised, Dictionary, injunction, thumbprint, alleges

Case Summary

Overview

HOLDINGS: [1]-With regard to the Biometric Information Privacy Act, *740 ILCS 14/1 et seq. (2016)*, when a private entity fails to comply with one of the requirements of *740 ILCS 14/15 (2016)*, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach; [2]-Consistent with the authority the Court cited, such a person or customer would clearly be "aggrieved" within the meaning of *740 ILCS 14/20 (2016)* and entitled to seek recovery under that provision; [3]-No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action.

Outcome

The judgment of the appellate court was reversed, and the cause was remanded to the circuit court for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 **Standards of Review, De Novo Review**

Where an appeal concerns questions of law certified by the circuit court pursuant to *Ill. Sup. Ct. R. 308 (eff. Jan. 1, 2016)*, review is de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2 **Standards of Review, De Novo Review**

De novo review is appropriate where the appeal arose in the context of an order denying a *735 ILCS 5/2-615 (2016)* motion to dismiss and its resolution turns on a question of statutory interpretation.

Civil Rights Law > Protection of Rights > Privacy Rights

Governments > Legislation > Statutory Remedies & Rights

HN3 **Protection of Rights, Privacy Rights**

Section 15 of the Biometric Information Privacy Act, *740 ILCS 14/1 et seq. (2016)*, imposes on private entities various obligations regarding the collection, retention, disclosure, and destruction of biometric identifiers and biometric information. These provisions are enforceable through private rights of action. Specifically, *§ 20* of the Act provides that any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party.

Governments > Legislation > Interpretation

HN4 **Legislation, Interpretation**

When construing a statute, the Court's primary objective is to ascertain and give effect to the legislature's intent. That intent is best determined from the plain and ordinary meaning of the language used in the statute. When the statutory language is plain and unambiguous, the Court may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may the Court add provisions not found in the law.

Civil Rights Law > Protection of Rights > Privacy Rights

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

HN5 **Protection of Rights, Privacy Rights**

Separate acts with separate purposes need not, after all, define similar terms in the same way. Rather, the same word may mean one thing in one statute and something different in another, dependent upon the connection in which the word is used, the object or purpose of the statute, and the consequences which probably will result from the proposed construction. Accepted principles of statutory construction, however, compel the conclusion that a person need not have sustained actual damage beyond violation of his or her rights under the Biometric Information Privacy Act, *740 ILCS 14/1 et seq. (2016)*, in order to bring an action under it.

Governments > Legislation > Interpretation

HN6 **Legislation, Interpretation**

Where a statutory term is not defined, the Court assumes the legislature intended for it to have its popularly understood meaning. Likewise, if a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate that established meaning into the law.

Civil Rights Law > Protection of Rights > Privacy Rights

Governments > Legislation > Statutory Remedies & Rights

HN7 **Protection of Rights, Privacy Rights**

More than a century ago, the Court held that to be aggrieved simply "means having a substantial grievance; a denial of some personal or property right." A person who suffers actual damages as the result of the violation of his or her rights would

meet this definition of course, but sustaining such damages is not necessary to qualify as "aggrieved." Rather, "a person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment." This understanding of the term has been repeated frequently by Illinois courts and was embedded in our jurisprudence when the Biometric Information Privacy Act, *740 ILCS 14/1 et seq. (2016)*, was adopted. The Court must presume that the legislature was aware of that precedent and acted accordingly. The foregoing understanding of the term is also consistent with standard definitions of "aggrieved" found in dictionaries, which the Court may consult when attempting to ascertain the plain and ordinary meaning of a statutory term where the term has not been specifically defined by the legislature.This is therefore the meaning the Court believes the legislature intended here.

Civil Rights Law > Protection of Rights > Privacy Rights

Governments > Legislation > Statutory Remedies & Rights

HN8[] **Protection of Rights, Privacy Rights**

Through the Biometric Information Privacy Act, *740 ILCS 14/1 et seq. (2016)*, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information. The duties imposed on private entities by *§ 15* of the Act (*740 ILCS 14/15 (2016)*) regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right. Accordingly, when a private entity fails to comply with one of *§ 15* of the Act's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach. Consistent (with the authority cited above), such a person or customer would clearly be "aggrieved" within the meaning of *§ 20* of the Act (*740 ILCS 14/20 (2016)*) and entitled to seek recovery under that provision. No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action.

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

Departing from the plain and unambiguous language of the law, reading into the statute conditions or limitations the legislature did not express, and interpreting the law in a way that is inconsistent with the objectives and purposes the legislature sought to achieve, of course, is something the Court may not and will not do.

Judges: **[***1]** CHIEF JUSTICE KARMEIER delivered the judgment of the court, with opinion. Justices Thomas, Kilbride, Garman, Burke, Theis, and Neville concurred in the judgment and opinion.

Opinion by: KARMEIER

Opinion

[*P1] **[****656]** **[**1199]** The *Biometric Information Privacy Act (Act)* (*740 ILCS 14/1 et seq.* (West 2016)) imposes numerous restrictions on how private entities collect, retain, disclose and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of hand or face geometry, or biometric information. Under the Act, any person "aggrieved" by a violation of its provisions "shall have a right of action *** against an offending party" and "may recover for each violation" the greater of liquidated damages or actual damages, **[**1200]** **[****657]** reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems

appropriate. *Id.* *§ 20*. The central issue in this case, which reached the appellate court by means of a permissive interlocutory appeal pursuant to *Illinois Supreme Court Rule 308* (eff. Jan. 1, 2016), is whether one qualifies as an "aggrieved" person and may seek liquidated damages and injunctive relief pursuant to the Act if he or she has not alleged some actual injury or adverse effect, beyond violation of his or her rights under the **[***2]** statute. The appellate court answered this question in the negative. In its view, "a plaintiff who alleges only a technical violation of the statute without alleging *some* injury or adverse effect is not an aggrieved person" within the meaning of the law. (Emphasis in original.) *2017 IL App (2d) 170317, ¶ 23*. We granted leave to appeal (*Ill. S. Ct. R. 315(a)* (eff. Nov. 1, 2017)) and now reverse and remand to the circuit court for further proceedings.

[*P2] BACKGROUND

[*P3] The question the appellate court was asked to consider in this case arose in the context of a motion to dismiss pursuant to *section 2-615* of the Code of Civil Procedure (Code) (*735 ILCS 5/2-615* (West 2016)). We therefore take the following well-pleaded facts from the complaint and accept them as true for purposes of our review. *Cochran v. Securitas Security Services USA, Inc., 2017 IL 121200, ¶ 11, 419 Ill. Dec. 374, 93 N.E.3d 493*.

[*P4] Six Flags Entertainment Corporation and its subsidiary Great America LLC own and operate the Six Flags Great America amusement park in Gurnee, Illinois. Defendants sell repeat-entry passes to the park. Since at least 2014, defendants have used a fingerprinting process when issuing those passes. As alleged by the complaint, their system "scans pass holders' fingerprints; collects, records and stores 'biometric' identifiers and information gleaned from the fingerprints; and then stores that data in order **[***3]** to quickly verify customer identities upon subsequent visits by having customers scan their fingerprints to enter the theme park." According to the complaint, "[t]his makes entry into the park faster and more seamless, maximizes the time pass holders are in the park spending money, and eliminates lost revenue due to fraud or park entry with someone else's pass."

[*P5] In May or June 2014, while the fingerprinting system was in operation, Stacy Rosenbach's 14-year-old son, Alexander, visited defendants' amusement park on a school field trip. In anticipation of that visit, Rosenbach had purchased a season pass for him online. Rosenbach paid for the pass and provided personal information about Alexander, but he had to complete the sign-up process in person once he arrived at the amusement park.

[*P6] The process involved two steps. First, Alexander went to a security checkpoint, where he was asked to scan his thumb into defendants' biometric data capture system. After that, he was directed to a nearby administrative building, where he obtained a season pass card. The card and his thumbprint, when used together, enabled him to gain access as a season pass holder.

[*P7] Upon returning home from defendants' **[***4]** amusement park, Alexander was asked by Rosenbach for the booklet or paperwork he had been given in connection with his new season pass. In response, Alexander advised her that defendants did "it all by fingerprint now" and that no paperwork had been provided.

[*P8] The complaint alleges that this was the first time Rosenbach learned that Alexander's fingerprints were used as part of **[**1201]** **[****658]** defendants' season pass system. Neither Alexander, who was a minor, nor Rosenbach, his mother, were informed in writing or in any other way of the specific purpose and length of term for which his fingerprint had been collected. Neither of them signed any written release regarding taking of the fingerprint, and neither of them consented in writing "to the collection, storage, use sale, lease, dissemination, disclosure, redisclosure, or trade of, or for [defendants] to otherwise profit from, Alexander's

thumbprint or associated biometric identifiers or information."

[*P9] The school field trip was Alexander's last visit to the amusement park. Although he has not returned there since, defendants have retained his biometric identifiers and information. They have not publicly disclosed what was done with the information **[***5]** or how long it will be kept, nor do they have any "written policy made available to the public that discloses [defendants'] retention schedule or guidelines for retaining and then permanently destroying biometric identifiers and biometric information."

[*P10] In response to the foregoing events, Rosenbach, acting in her capacity as mother and next friend of Alexander (see *755 ILCS 5/11-13(d)* (West 2016)), brought this action on his behalf in the circuit court of Lake County.[1] The action seeks redress for Alexander, individually and on behalf of all other similarly situated persons, under the Act (*740 ILCS 14/1 et seq.* (West 2016)), which, as noted at the outset of this opinion, provides that any person "aggrieved" by a violation of the Act's provisions "shall have a right of action *** against an offending party" and "may recover for each violation" the greater of liquidated damages or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate (*id.* *§ 20*).

[*P11] The complaint, as amended, is in three counts. Count I seeks damages on the grounds that defendants violated *section 15(b)* of the Act (*id.* *§ 15(b)*) by (1) collecting, capturing, storing, or obtaining biometric identifiers and biometric **[***6]** information from Alexander and other members of the proposed class without informing them or their legally authorized representatives in writing that the information was being collected or stored; (2) not informing them in writing of the specific purposes for which defendants were collecting the information or for how long they would keep and use it; and (3) not obtaining a written release executed by Alexander, his mother, or members of the class before collecting the information. Count II requests injunctive relief under the Act to compel defendants to make disclosures pursuant to the Act's requirements and to prohibit them from violating the Act going forward. Count III asserts a common-law action for unjust enrichment.

[*P12] Defendants sought dismissal of Rosenbach's action under both *sections 2-615* and *2-619* of the Code (*735 ILCS 5/2-615*, *2-619* (West 2016)) in a combined motion filed pursuant to *section 2-619.1* (*id.* *§ 2-619.1*). As grounds for their motion, defendants asserted that one of the named defendants **[**1202]** **[****659]** had no relation to the facts alleged, that plaintiff had suffered no actual or threatened injury and therefore lacked standing to sue, and that plaintiff's complaint failed to state a cause of action for violation of the Act or for unjust enrichment. **[***7]**

[*P13] Following a hearing, and proceeding only under *section 2-615* of the Code, the circuit court denied the motion as to counts I and II, which sought damages and injunctive relief under the Act, but granted the motion as to count III, the unjust enrichment claim, and dismissed that claim with prejudice.

[*P14] Defendants sought interlocutory review of the circuit court's ruling under *Illinois Supreme Court Rule 308* (eff. Jan. 1, 2016) on the grounds that it involved a question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. The following two questions of law were identified by

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[1] Although Stacy Rosenbach has been referred to as the plaintiff in these proceedings, that is not technically accurate. Alexander is the plaintiff. Rosenbach is his next friend. A next friend of a minor is not a party to the litigation but simply represents the real party, who, as a minor, lacks capacity to sue in his or her own name. See *Blue v. People, 223 Ill. App. 3d 594, 596, 585 N.E.2d 625, 165 Ill. Dec. 894 (1992)*. During oral argument, counsel for Rosenbach confirmed that she appears here solely on behalf of her son and asserts no claim for herself.

the circuit court:

> (1) "[w]hether an individual is an aggrieved person under *§20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20*, and may seek statutory liquidated damages authorized under *§20(1)* of the Act when the only injury he alleges is a violation of *§l5(b)* of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by *§15(b)* of the Act," and
>
> (2) "[w]hether an individual is an aggrieved person under *§20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20* **[***8]** , and may seek injunctive relief authorized under *§20(4)* of the Act, when the only injury he alleges is a violation of *§15(b)* of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by *§15(b)* of the Act."

[*P15] The appellate court granted review of the circuit court's order and answered both certified questions in the negative. In its view, a plaintiff is not "aggrieved" within the meaning of the Act and may not pursue either damages or injunctive relief under the Act based solely on a defendant's violation of the statute. Additional injury or adverse effect must be alleged. The injury or adverse effect need not be pecuniary, the appellate court held, but it must be more than a "technical violation of the Act." *2017 IL App (2d) 170317, ¶ 28*.

[*P16] Rosenbach petitioned this court for leave to appeal. *Ill. S. Ct. R. 315* (eff. Nov. 1, 2017). We allowed her petition and subsequently permitted friend of the court briefs to be filed in support of her position by the Electronic Privacy Information Center and by a consortium of groups including the American Civil Liberties Union, the Center for Democracy **[***9]** and Technology, and the Electronic Frontier Foundation. See *Ill. S. Ct. R. 345* (eff. Sept. 20, 2010). The court also permitted the Restaurant Law Center and Illinois Restaurant Association, the Internet Association, and the Illinois Chamber of Commerce to file friend of the court briefs in support of defendants.

[*P17] ANALYSIS

[*P18] Because ***HN1***[↑] this appeal concerns questions of law certified by the circuit court pursuant to *Illinois Supreme Court Rule 308* (eff. Jan. 1, 2016), our review is *de novo*. *Rozsavolgyi v. City of Aurora, 2017 IL 121048, ¶ 21, 421 Ill. Dec. 881, 102 N.E.3d 162*. ***HN2***[↑] *De novo* review is also appropriate because the appeal arose in the context of an order denying a *section 2-615* **[**1203]** **[****660]** motion to dismiss (*Marshall v. Burger King Corp., 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 305 Ill. Dec. 897 (2006)*) and its resolution turns on a question of statutory interpretation (*Eads v. Heritage Enterprises, Inc., 204 Ill. 2d 92, 96, 787 N.E.2d 771, 272 Ill. Dec. 585 (2003)*).

[*P19] The Biometric Privacy Information Act (*740 ILCS 14/1 et seq.* (West 2016)), on which counts I and II of Rosenbach's complaint are founded, was enacted in 2008 to help regulate "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." *Id. § 5(g)*. The Act defines "biometric identifier" to mean "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id. § 10*. "Biometric information" means "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier **[***10]** used to identify an individual." *Id.* It is undisputed that the thumbprint collected by defendants from Rosenbach's son, Alexander, when they processed his season pass constituted a biometric identifier subject to the Act's provisions and that the electronically stored version of his thumbprint constituted biometric information within the

meaning of the law.

[*P20] HN3[↑] Section 15 of the Act (*id.* § 15) imposes on private entities such as defendants various obligations regarding the collection, retention, disclosure, and destruction of biometric indentifiers and biometric information. Among these is the following:

> "(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:
>
> (1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receives a written **[***11]** release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative." *Id.* § 15(b).

[*P21] These provisions are enforceable through private rights of action. Specifically, section 20 of the Act provides that "[a]ny person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party." *Id.* § 20. Section 20 further provides that

> "[a] prevailing party may recover for each violation:
>
> (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;
>
> (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;
>
> (3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and
>
> (4) other relief, including an injunction, as the State or federal court may deem appropriate." *Id.*

[*P22] As noted earlier in this opinion, Rosenbach's complaint alleges that defendants violated the provisions of section 15 of the Act when it collected her son's thumbprint without **[***12]** first following the statutorily **[**1204]** **[****661]** prescribed protocol. For the purposes of this appeal, the existence of those violations is not contested. The basis for defendants' current challenge is that no other type of injury or damage to Rosenbach's son has been alleged. Rosenbach seeks redress on her son's behalf and on behalf of a class of similarly situated individuals based solely on defendants' failure to comply with the statute's requirements. In defendants' view, that is not sufficient. They contend that an individual must have sustained some actual injury or harm, apart from the statutory violation itself, in order to sue under the Act. According to defendants, violation of the statute, without more, is not actionable.

[*P23] While the appellate court in this case found defendants' argument persuasive, a different district of the appellate court subsequently rejected the identical argument in Sekura v. Krishna Schaumburg Tan, Inc., 2018 IL App (1st) 180175, 426 Ill. Dec. 158, 115 N.E.3d 1080. We reject it as well, as a recent federal district court decision correctly reasoned we might do. In re Facebook Biometric Information Privacy Litigation, 326 F.R.D. 535, 545-47 (N.D. Cal. 2018).

[*P24] We begin our analysis with basic principles of statutory construction. HN4[↑] When construing a statute, our primary objective is to ascertain and give effect to the legislature's intent. That intent is best determined **[***13]** from the

plain and ordinary meaning of the language used in the statute. When the statutory language is plain and unambiguous, we may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law. *Acme Markets, Inc. v. Callanan, 236 Ill. 2d 29, 37-38, 923 N.E.2d 718, 337 Ill. Dec. 867 (2009)*.

[*P25] Defendants read the Act as evincing an intention by the legislature to limit a plaintiff's right to bring a cause of action to circumstances where he or she has sustained some actual damage, beyond violation of the rights conferred by the statute, as the result of the defendant's conduct. This construction is untenable. When the General Assembly has wanted to impose such a requirement in other situations, it has made that intention clear. *Section 10a(a)* of the *Consumer Fraud and Deceptive Business Practices Act* (*815 ILCS 505/10a(a)* (West 2016)) is an example. To bring a private right of action under that law, actual damage to the plaintiff must be alleged. *Oliveira v. Amoco Oil Co., 201 Ill. 2d 134, 149, 776 N.E.2d 151, 267 Ill. Dec. 14 (2002)*; *Haywood v. Massage Envy Franchising, LLC, 887 F.3d 329, 333 (7th Cir. 2018)*.

[*P26] In contrast is the *AIDS Confidentiality Act* (*410 ILCS 305/1 et seq.* (West 2016)). There, the legislature authorized private rights of action for monetary relief, attorney fees, and such other relief as the court may deem appropriate, including an injunction, by any person "aggrieved" **[***14]** by a violation of the statute or a regulation promulgated under the statute. *Id. § 13*. Proof of actual damages is not required in order to recover. *Doe v. Chand, 335 Ill. App. 3d 809, 822, 781 N.E.2d 340, 269 Ill. Dec. 543 (2002)*.

[*P27] *Section 20* of the Act (*740 ILCS 14/20* (West 2016)), the provision that creates the private right of action on which Rosenbach's cause of action is premised, clearly follows the latter model. In terms that parallel the AIDS Confidentiality Act, it provides simply that "[a]ny person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party." *Id.*

[*P28] **[**1205]** **[****662]** Admittedly, this parallel, while instructive (*Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, ¶ 25, 998 N.E.2d 1227, 376 Ill. Dec. 294)*, is not dispositive. ***HN5***[↑] Separate acts with separate purposes need not, after all, define similar terms in the same way. Rather, "'the same word may mean one thing in one statute and something different in another, dependent upon the connection in which the word is used, the object or purpose of the statute, and the consequences which probably will result from the proposed construction. [Citations.]'" *People v. Ligon, 2016 IL 118023, ¶ 26, 400 Ill. Dec. 367, 48 N.E.3d 654* (quoting *Mack v. Seaman, 113 Ill. App. 3d 151, 154, 446 N.E.2d 1217, 68 Ill. Dec. 820 (1983)*). Accepted principles of statutory construction, however, compel the conclusion that a person need not have sustained actual damage beyond violation of his or her **[***15]** rights under the Act in order to bring an action under it.

[*P29] As with the AIDS Confidentiality Act, the Act does not contain its own definition of what it means to be "aggrieved" by a violation of the law. ***HN6***[↑] Where, as here, a statutory term is not defined, we assume the legislature intended for it to have its popularly understood meaning. Likewise, if a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate that established meaning into the law. *People v. Johnson, 2013 IL 114639, ¶ 9, 995 N.E.2d 986, 374 Ill. Dec. 489*. Applying these canons of construction, it is clear that defendants' challenge to Rosenbach's right to bring suit on behalf of her son is meritless.

[*P30] ***HN7***[↑] More than a century ago, our court held that to be aggrieved simply "means having a substantial grievance; a denial of some personal or property right." *Glos v. People, 259 Ill. 332, 340, 102 N.E. 763 (1913)*. A person who

suffers actual damages as the result of the violation of his or her rights would meet this definition of course, but sustaining such damages is not necessary to qualify as "aggrieved." Rather, "[a] person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of *or* his pecuniary interest is directly affected by the decree or judgment." **[***16]** (Emphasis added.) *Id.*

[*P31] This understanding of the term has been repeated frequently by Illinois courts and was embedded in our jurisprudence when the Act was adopted. See *American Surety Co. v. Jones, 384 Ill. 222, 229-30, 51 N.E.2d 122 (1943)*; *In re Estate of Hinshaw, 19 Ill. App. 2d 239, 255, 153 N.E.2d 422 (1958)*; *In re Estate of Harmston, 10 Ill. App. 3d 882, 885, 295 N.E.2d 66 (1973)*; *Greeling v. Abendroth, 351 Ill. App. 3d 658, 662, 813 N.E.2d 768, 286 Ill. Dec. 292 (2004)*. We must presume that the legislature was aware of that precedent and acted accordingly. See *People v. Cole, 2017 IL 120997, ¶ 30, 422 Ill. Dec. 758, 104 N.E.3d 325*.

[*P32] The foregoing understanding of the term is also consistent with standard definitions of "aggrieved" found in dictionaries, which we may consult when attempting to ascertain the plain and ordinary meaning of a statutory term where, as here, the term has not been specifically defined by the legislature. *In re M.I., 2016 IL 120232, ¶ 26, 412 Ill. Dec. 901, 77 N.E.3d 69*. Merriam-Webster's Collegiate Dictionary, for example, defines aggrieved as "suffering from an infringement or denial of legal rights." Merriam-Webster's Collegiate Dictionary 25 (11th ed. 2006). Similarly, the leading definition given in Black's Law Dictionary is "having legal rights that are adversely affected." Black's Law Dictionary 77 (9th ed. 2009). This is therefore the meaning we believe the legislature intended here.

[*P33] [1206] [****663]** Based upon this construction, the appellate court's response to the certified questions was incorrect. ***HN8***[⬆] Through the Act, our General Assembly has codified that individuals possess a right to privacy **[***17]** in and control over their biometric identifiers and biometric information. See *Patel v. Facebook Inc., 290 F. Supp. 3d 948, 953 (N.D. Cal. 2018)*. The duties imposed on private entities by *section 15* of the Act (*740 ILCS 14/15* (West 2016)) regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right. Accordingly, when a private entity fails to comply with one of *section 15*'s requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach. Consistent with the authority cited above, such a person or customer would clearly be "aggrieved" within the meaning of *section 20* of the Act (*id. § 20*) and entitled to seek recovery under that provision. No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action.

[*P34] In reaching a contrary conclusion, the appellate court characterized violations of the law, standing alone, as merely "technical" in nature. *2017 IL App (2d) 170317, ¶ 23*. Such a characterization, however, misapprehends the nature of the harm our legislature is attempting **[***18]** to combat through this legislation. The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent. *Patel, 290 F. Supp. 3d at 953*. These procedural protections "are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual's unique biometric identifiers—identifiers that cannot be changed if compromised or misused." *Id. at 954*. When a private entity fails to adhere to the statutory procedures, as defendants are alleged to have done here, "the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the

Illinois legislature sought to prevent is then realized." *Id.* This is no mere "technicality." The injury is real and significant.

[*P35] This construction of the law is supported by the General Assembly's stated assessment of the risks posed by the growing use of biometrics by businesses and the difficulty in providing meaningful recourse once a person's biometric identifiers or biometric information has been compromised. In enacting the law, the General Assembly expressly noted that

> "[b]iometrics **[***19]** are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions." *740 ILCS 14/5(c)* (West 2016).

The situation is particularly concerning, in the legislature's judgment, because "[t]he full ramifications of biometric technology are not fully known." *Id.* *§ 5(f)*.

[*P36] The strategy adopted by the General Assembly through enactment of the Act is to try to head off such problems before they occur. It does this in two ways. The first is by imposing safeguards to insure that individuals' and customers' privacy rights in their biometric identifiers and **[**1207]** **[****664]** biometric information are properly honored and protected to begin with, before they are or can be compromised. The second is by subjecting private entities who fail to follow the statute's requirements to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses "for each violation" **[***20]** of the law (*id.* *§ 20*) whether or not actual damages, beyond violation of the law's provisions, can be shown.

[*P37] The second of these two aspects of the law is as integral to implementation of the legislature's objectives as the first. Other than the private right of action authorized in *section 20* of the Act, no other enforcement mechanism is available. It is clear that the legislature intended for this provision to have substantial force. When private entities face liability for failure to comply with the law's requirements without requiring affected individuals or customers to show some injury beyond violation of their statutory rights, those entities have the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone. Compliance should not be difficult; whatever expenses a business might incur to meet the law's requirements are likely to be insignificant compared to the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded; and the public welfare, security, and safety will be advanced. That is the point of the law. To require individuals to wait until they have sustained some compensable **[***21]** injury beyond violation of their statutory rights before they may seek recourse, as defendants urge, would be completely antithetical to the Act's preventative and deterrent purposes.

[*P38] In sum, defendants' contention that redress under the Act should be limited to those who can plead and prove that they sustained some actual injury or damage beyond infringement of the rights afforded them under the law would require that we disregard the commonly understood and accepted meaning of the term "aggrieved," ***HN9***[⬆] depart from the plain and, we believe, unambiguous language of the law, read into the statute conditions or limitations the legislature did not express, and interpret the law in a way that is inconsistent with the objectives and purposes the legislature sought to achieve. That, of course, is something we may not and will not do. *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc., 158 Ill. 2d 76, 83, 630 N.E.2d 820, 196 Ill. Dec. 655 (1994)*; *Exelon Corp. v. Department of Revenue, 234 Ill. 2d 266, 275, 917 N.E.2d 899, 334 Ill. Dec. 824 (2009)*.

[*P39] CONCLUSION

[*P40] For the foregoing reasons, we hold that the questions of law certified by the circuit court must be answered in the affirmative. Contrary to the appellate court's view, an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an "aggrieved" person and be entitled **[***22]** to seek liquidated damages and injunctive relief pursuant to the Act. The judgment of the appellate court is therefore reversed, and the cause is remanded to the circuit court for further proceedings.

[*P41] Certified questions answered.

[*P42] Appellate court judgment reversed.

[*P43] Cause remanded.

End of Document

Sandholm v. Kuecker

Supreme Court of Illinois

January 20, 2012, Opinion Filed

Docket No. 111443

Reporter
2012 IL 111443 *; 962 N.E.2d 418 **; 2012 Ill. LEXIS 33 ***; 356 Ill. Dec. 733 ****; 40 Media L. Rep. 1209

STEVE SANDHOLM, Appellant, v. RICHARD KUECKER et al., Appellees.

Subsequent History: As Corrected February 21, 2012.

Prior History: Appeal from the Appellate Court for the Second District.

Sandholm v. Kuecker, 405 Ill. App. 3d 835, 942 N.E.2d 544, 2010 Ill. App. LEXIS 1095, 347 Ill. Dec. 341 (Ill. App. Ct. 2d Dist., 2010)

Disposition: [*1]** Appellate court judgment reversed; circuit court judgment reversed; cause remanded.

Core Terms

lawsuit, defendants', motion to dismiss, attorney's fees, circuit court, right of petition, defamation, immunized, constitutional right, genuinely, meritless, moving party, school board, aimed, site, chill, citizen participation, anti-SLAPP, players, counts, petitioning activity, athletic director, prevailing, suits, public participation, government action, basketball coach, procuring, damages, Sports

Case Summary

Procedural Posture

Plaintiff, a high school basketball coach, challenged a judgment from the appellate court (Illinois), which affirmed the circuit court's dismissal pursuant to the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008), of defamation and other tort claims against defendants, individuals who had petitioned the school board to remove the coach and local media that had published their criticisms. The circuit court awarded statutory attorney fees.

Overview

The petition to remove the coach asserted that he had been abusive toward players. The school board considered the petition and initially voted to retain the coach, but it removed him after further criticisms were published in the local media. The court noted that the motions to dismiss should have been filed under *735 ILCS 5/2-619(a)(9)* (2008), rather than *735 ILCS 5/2-615* (2008), and treated them as if they had been so filed. After considering the public policy expressed in *735 ILCS 110/5* (2008), the court concluded that the coach's lawsuit was not a SLAPP under the definitions in *735 ILCS 110/10* (2008), 110/15 (2008) because the lawsuit was not solely based on, related to, or in response to acts in furtherance of the rights of petition and speech. The coach sought to recover damages for personal harm to his reputation, not to stifle political expression. Thus, the burden of proof never shifted to the coach under *735 ILCS 110/20(c)* (2008). Although that ruling made the attorney fees issue moot, the court addressed the issue under the public interest exception and interpreted *735 ILCS 110/25* (2008) to include only those fees specifically incurred in connection with

the motion.

Outcome

The court reversed the judgments of the appellate court and the circuit court. The court remanded to the circuit court for further proceedings.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

See *735 ILCS 110/5* (2008).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

See *735 ILCS 110/15* (2008).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN3[] **Defenses, Demurrers & Objections, Motions to Dismiss**

See *735 ILCS 110/10* (2008).

Civil Procedure > Discovery & Disclosure > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] **Civil Procedure, Discovery & Disclosure**

When a motion to dismiss is filed pursuant to the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008), a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent. *735 ILCS 110/20(a)* (2008). Discovery is suspended pending a decision on the motion. § 20(b). However, discovery may be taken, upon leave of court for good cause shown, on the issue of whether the movants' acts are not immunized from, or are not in furtherance of acts immunized from, liability by this act.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN5[] **Defenses, Demurrers & Objections, Motions to Dismiss**

See *735 ILCS 110/20(c)* (2008).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic

Lawsuits Against Public Participation

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN6[] Defenses, Demurrers & Objections, Motions to Dismiss

735 ILCS 110/25 (2008) provides that the court shall award a moving party who prevails in a motion under the Citizen Participation Act, 735 ILCS 110/1 et seq. (2008), reasonable attorney's fees and costs incurred in connection with the motion.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Governments > Legislation > Interpretation

HN7[] Defenses, Demurrers & Objections, Motions to Dismiss

735 ILCS 110/30(b) (2008) provides that the Citizen Participation Act, 735 ILCS 110/1 et seq. (2008), shall be construed liberally to effectuate its purposes and intent fully.

Governments > Legislation > Interpretation

HN8[] Legislation, Interpretation

In construing a statute, a court bears in mind the familiar principles of statutory construction. The court's primary objective is to ascertain and give effect to the intent of the legislature. The most reliable indicator of the legislative intent is the language of the statute, which should be given its plain and ordinary meaning. All provisions of a statute should be viewed as a whole. Accordingly, words and phrases should be interpreted in light of other relevant provisions of the statute and should not be construed in isolation. The court also presumes, in interpreting the meaning of the statutory language, that the legislature did not intend absurdity, inconvenience, or injustice.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN9[] Standards of Review, De Novo Review

Appellate review of an issue of statutory interpretation is de novo.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN10[] Defenses, Demurrers & Objections, Motions to Dismiss

If a plaintiff's intent in bringing suit is to recover damages for alleged defamation and not to stifle or chill the defendants' rights of petition, speech, association, or participation in government, the suit is not a SLAPP and does not fall under the purview of the Citizen Participation Act, 735 ILCS 110/1 et seq. (2008). Looking at the statute in its entirety, it is clear that the legislation is aimed at discouraging and eliminating meritless, retaliatory SLAPPs, as they traditionally have been defined.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN11[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In deciding whether a lawsuit should be dismissed pursuant to the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008), a court must first determine whether the suit is the type of suit the act was intended to address. Under § 15 of the act (*735 ILCS 110/15* (2008)), a claim is subject to dismissal where it is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government. This description of a claim subject to the act must not be construed in isolation but in the context of the purposes described in the public policy section. One of the act's stated purposes is to establish an efficient process for identification and adjudication of SLAPPs. *735 ILCS 110/5* (2008). In the service of that goal, the act describes a SLAPP suit as one which chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. The act further identifies a SLAPP as an abuse of the judicial process which can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN12[] **Defenses, Demurrers & Objections, Motions to Dismiss**

The description of a SLAPP in *735 ILCS 110/5* (2008) mirrors the traditional definition of a SLAPP as a meritless lawsuit intended to chill participation in government through delay, expense, and distraction. Indeed, the purpose of the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008), is to give relief, including monetary relief, to citizens who have been victimized by meritless, retaliatory SLAPP lawsuits because of their act or acts made in furtherance of the constitutional rights to petition, speech, association, and participation in government. In light of the clear legislative intent expressed in the statute to subject only meritless, retaliatory SLAPP suits to dismissal, the phrase "based on, relates to, or is in response to" in *735 ILCS 110/15* (2008) means solely based on, relating to, or in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN13[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of the defendants, the lawsuit is not solely based on the defendants' rights of petition, speech, association, or participation in government. In that case, the suit would not be subject to dismissal under the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008). It is clear from the express language of the act that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute.

Governments > Courts > Common Law

HN14[] **Courts, Common Law**

The legislature has the inherent power to repeal or change the common law and may do away with all

or part of it.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN15[] **Defenses, Demurrers & Objections, Motions to Dismiss**

The sham exception states that acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome. *735 ILCS 110/15* (2008). The sham exception tests the genuineness of the defendants' acts; it says nothing about the merits of the plaintiff's lawsuit.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN16[] **Defenses, Demurrers & Objections, Affirmative Defenses**

A motion to dismiss filed under *735 ILCS 5/2-615* (2008) challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint. A motion to dismiss based on the immunity conferred by the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008), however, is more appropriately raised in a *735 ILCS 5/2-619(a)(9)* (2008) motion, which allows for dismissal when the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN17[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Immunity from tort liability pursuant to statute is an affirmative matter properly raised in a *735 ILCS 5/2-619* (2008) motion to dismiss.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN18[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss under *735 ILCS 5/2-619(a)* (2008) admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim. When ruling on the motion, the court should construe the pleadings and supporting documents in the light most favorable to the nonmoving party. The court must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that may reasonably be drawn in the plaintiff's favor.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN19[] **Standards of Review, De Novo Review**

The question on appeal from a dismissal under 735 ILCS 5/2-619(a) (2008) is whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. Review is de novo.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Evidence > Burdens of Proof > Burden Shifting

HN20[] Defenses, Demurrers & Objections, Motions to Dismiss

735 ILCS 110/15 (2008) requires the moving party to demonstrate that the plaintiff's complaint is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government. If the moving party has met his or her burden of proof, the burden then shifts to the responding party to produce clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability under the Citizen Participation Act, 735 ILCS 110/1 et seq. (2008). 735 ILCS 110/20(c) (2008).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN21[] Appeals, Reviewability of Lower Court Decisions

The allowance of one party's petition for leave to appeal brings before the appellate court the other party's requests for cross-relief.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Governments > Legislation > Interpretation

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN22[] Basis of Recovery, American Rule

Illinois follows the American rule, which prohibits prevailing parties from recovering their attorney fees from the losing party, absent express statutory or contractual provisions. Accordingly, statutes which allow for such fees must be strictly construed as they are in derogation of the common law.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Governments > Legislation > Interpretation

HN23[] Basis of Recovery, Statutory Awards

Although 735 ILCS 110/30(b) (2008) provides that the Citizen Participation Act, 735 ILCS 110/1 et seq. (2008), shall be construed liberally to effectuate its purposes and intent fully, this statement of construction applies to the substantive provisions of the act and not to the fee-shifting provision in 735 ILCS 110/25 (2008).

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN24[] **Basis of Recovery, Statutory Awards**

The language in *735 ILCS 110/25* (2008) is unambiguous and supports only one interpretation. Attorney fees incurred in connection with a motion to dismiss filed under the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008), include only those fees which can specifically be delineated as incurred in connection with the motion.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN25[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Nowhere in the Citizen Participation Act, *735 ILCS 110/1 et seq.* (2008), does it state that the circuit court loses jurisdiction when it fails to rule on a motion to dismiss within 90 days of its filing. There is no support for a contention that the circuit court's jurisdiction is dependent upon compliance with the 90-day time limit in the act.

Syllabus

Defamation defendants who succeeded in having plaintiff ousted from his public school coaching position were not entitled to have his suit against them dismissed as a SLAPP where they did not show that it was directed solely at their petitioning activities, as opposed to genuinely seeking tort recovery.

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For Richard Kuecker, Ardis Kuecker, APPELLEES: Ms. Magen J. Mertes, Mr. James W. Mertes, Mertes & Mertes, P.C., Sterling, IL.

For State of Illinois, APPELLEE: Mr. Michael A. Scodro, Solicitor General, Chicago, IL; Mr. Clifford W. Berlow, Office of the Attorney General, Chicago, IL.

For NRG Media LLC, Al Knickrehm, APPELLEE: Mr. Michael R. Lieber, Ice Miller, LLP, Chicago, IL.

For Michael Venier, APPELLEE: Mr. Jeffrey J. Zucchi, Clark, Justen, Zucchi & Frost, Ltd., Rockford, IL.

For Glenn Hughes, Mary Mahan-Deatherage, David Deets, Robert Shomaker, Neil Petersen, APPELLEE: Ms. Linda A. Giesen, Dixon & Giesen Law Offices, Dixon, IL.

For ACLU, IPA, IBA, & PPP (all amici), AMICUS CURIAE: Ms. Leah R. Bruno, Ms. Kristen C. Rodriguez, SNR Denton US LLP, Chicago, IL.

For American Civil Liberties Union of Illinois, AMICUS CURIAE: Mr. Harvey Grossman, Mr. Adam Schwartz, Roger Baldwin Foundation of ACLU, Inc., Chicago, IL.

For Illinois Press Association, Illinois Broadcasters Association, AMICUS CURIAE: Mr. Donald M. Craven, Donald M. Craven, P.C., Springfield, IL.

Judges: JUSTICE BURKE delivered the judgment of the court, with opinion. Chief Justice Kilbride and Justices Freeman, Thomas, Garman, Karmeier, and Theis concurred in the judgment and opinion.

Opinion by: BURKE

Opinion

[*P1] [**737] [**422]** At issue in this appeal is the applicability of the Citizen Participation Act

(Act) (*735 ILCS 110/1 et seq*. (West 2008)), commonly referred to as the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, to a lawsuit alleging intentional torts based on alleged statements by the defendants attacking the plaintiff's reputation. The circuit court dismissed plaintiff's lawsuit in its entirety, finding defendants immune from liability under the Act. The appellate court affirmed. *405 Ill. App. 3d 835, 942 N.E.2d 544, 347 Ill. Dec. 341*. For the reasons that follow, we reverse the judgments of the appellate and circuit courts and remand the cause to the circuit court for further proceedings consistent with this opinion.

[*P2] BACKGROUND

[*P3] The plaintiff, Steve Sandholm, filed his initial complaint in the circuit court of Lee County on April 25, 2008. Plaintiff subsequently filed three amended complaints, alleging multiple counts of defamation *per se*, **[***2]** false light invasion of privacy, civil conspiracy to intentionally interfere with prospective business advantage, and slander *per se*, against defendants, Richard Kuecker, Ardis Kuecker, Glen Hughes, Michael Venier, Al Knickrehm, Tim Oliver, Dan Burke, David Deets, Mary Mahan-Deatherage, NRG Media, LLC, Greg Deatherage, Neil Petersen, and Robert Shomaker. Plaintiff's second amended complaint alleged the following facts.

[*P4] Plaintiff was hired as the head basketball coach at Dixon High School beginning with the 1999-2000 school year. In the 2003-2004 school year, he was assigned the additional position of the school's athletic director. Plaintiff received positive **[****738]** **[**423]** evaluations of his job performance during his entire tenure at Dixon High School.

[*P5] In February 2008, defendants began a campaign to have plaintiff removed as basketball coach and athletic and activities director due to their disagreement with his coaching style. Plaintiff alleged that defendants made multiple false and defamatory statements in various media as part of their campaign. Defendants Richard and Ardis Kuecker, Hughes, Venier, Oliver, Burke, Deets and Mahan-Deatherage formed a group called the "Save Dixon Sports Committee" **[***3]** and established a Web site called savedixonsports.com.

[*P6] Richard Kuecker posted a letter on the Web site titled "Hostages in the Gym," dated February 28, which stated that plaintiff badgered and humiliated players and that his conduct was excessively abusive and constituted bullying. On March 8 and again on March 10, Greg Deatherage published the "Hostages in the Gym" letter on the Northern Illinois Sports Beat Web site.

[*P7] On February 28 and 29, Shomaker sent e-mails to school board member Carolyn Brechon, stating that plaintiff had "ruined things for everyone," and that "many people tell me that [plaintiff's] half time speeches are so profanity laced that they want to leave the locker room."

[*P8] On March 11, Venier sent an email to Dixon school board member James Hey, stating similar comments about plaintiff's bullying and abuse of players. On March 14, Richard Kuecker sent an email to Matt Trowbridge, a reporter for the Rockford Register Star, stating that plaintiff's abusive behavior was the same as bullying; that "we were held hostage for three years"; and that plaintiff was a bad coach and an embarrassment to the community.

[*P9] On March 19, defendants presented a petition to the Dixon school **[***4]** board, a copy of which was posted on the savedixonsports.com Web site. The petition stated that plaintiff abused his position of influence, exhibited a lack of positive character traits, criticized players in a way that amounted to abuse and bullying, and made demands "bordering on slavery." The petition also stated that no one, either "in-house" or "out-of-house," wanted to do business with plaintiff in his position as athletic director at Dixon High School; that plaintiff had alienated himself from all youth athletic feeder programs; and that plaintiff had

"worn out his welcome in far too many circles to continue to do the complete and successful job you pay him to do." After considering the petition, the school board voted on March 19 to retain plaintiff in his positions of athletic director and head basketball coach.

[*P10] On March 21, Venier, Richard Kuecker, Hughes, and Knickrehm appeared on WIXN Radio, AM 1460 (owned by defendant NRG Media, LLC), at the request of Knickrehm, general manager of the radio station, to discuss their dissatisfaction with the school board's decision. During the broadcast, defendants stated that plaintiff was performing adversely in his job as athletic director, **[***5]** that he was an embarrassment to the community, that no one wanted to do business with him, and that business owners were finding it harder to support the sports program at Dixon High School. The broadcast was posted on the savedixonsports.com Web site for republication to persons viewing the Web site from March 24 to April 10, and from April 22 to April 26. Also posted to the Web site was a "public service announcement," which was broadcast on WIXN radio. In the announcement, Venier stated that the school board had "failed miserably"; Oliver stated that plaintiff had been "getting away with this for years"; and Mahan-Deatherage stated that the problem **[****739] [**424]** "goes across all athletics" and was an embarrassing situation.

[*P11] On March 21, Petersen, a former school board member, sent a letter to the school board stating that the proposed code of conduct was a "slap in the face" and that it should be directed at plaintiff "who continually demonstrates undesirable behavior and a total lack of respect for anyone." He stated further that the funding from corporate and business entities to support extracurricular programs was in jeopardy and may evaporate.

[*P12] On several occasions in March and April 2008, **[***6]** Deatherage published comments about plaintiff on the Northern Illinois Sports Beat Web site and on the saukvalleynews.com Web site, including calling plaintiff a "psycho nut who talks in circles and is only coaching for his glory." Deatherage also commented that plaintiff, in his role as athletic director, was spending the sports money on the varsity basketball program to the detriment of other sports programs at Dixon High School.

[*P13] On March 26, 2008, Ardis Kuecker posted a letter to the editor on the saukvalleynews.com Web site, questioning whether the new athletic code of conduct would force plaintiff "to stop his utilization of verbal abuse, emotional abuse, bullying and belittling—all aimed toward his players, as well as power conflicts with his fellow coaches."

[*P14] On April 10, the members of the Save Dixon Sports Committee sent a letter to Doug Lee, president of the Dixon school board. The letter stated that for nine years, plaintiff "tore down his players to the point of humiliation"; that the situation was akin to a "classic abuse situation" in which the abuser "tells them he loves them"; that parents and players felt they could not speak up for fear of retaliation by the coach **[***7]** against the players; and that plaintiff was the "exact opposite" of what an athletic director should be. On the same day, defendants posted on their Web site an open letter to the school board containing the same or similar statements about plaintiff. Also on April 10, Shomaker sent a letter to school board member Carolyn Brechon, stating that plaintiff had threatened his son, Eric.

[*P15] On April 12, Hughes sent a letter to all members of the Dixon school board, in which he stated that plaintiff's bullying, berating, and degrading of his players, threats against them, and his "slave/dog treatment of [assistant basketball coach] John Empen" should not be tolerated, and that "evil succeeds when good people do nothing."

[*P16] On April 16, an article was published in the Rockford Register Star, in which several defendants made comments about plaintiff. Richard Kuecker stated that plaintiff "tore down" players,

told them "they're no good," belittled them, "got in their face," and shook his finger at them. Hughes stated that plaintiff had blackmailed his son, Scott, by threatening to give a bad scouting report to a college if Scott did not stop criticizing plaintiff to outsiders.

[*P17] On April 23, the Dixon **[***8]** school board voted to remove plaintiff from his position as basketball coach but retained him as the school's athletic director.

[*P18] On April 24, an article was published in the Dixon Gazette and on saukvalleynews.com in which Mahan-Deatherage made the following statement: "Why does there have to be an instance of where someone is shoved and pushed? Why can't all these instances of abuse over 10 years *** isn't that enough to fire him?"

[*P19] In May or June 2008, Shomaker met with three officers of the Junior Dukes Football Program and told them that plaintiff had treated student athletes **[****740]** **[**425]** badly and used foul or profane language toward students.

[*P20] Counts I through XII alleged defamation *per se* against all defendants except Petersen. Plaintiff alleged that defendants' false and defamatory statements imputed an inability to perform and/or a want of integrity in the discharge of his duties as basketball coach and athletic director; prejudiced his ability to perform his job duties; falsely imputed that plaintiff had engaged in criminal activity; and caused presumed damages to his reputation. Counts XIII through XXII, as well as count XVI, alleged false light invasion of privacy against all defendants **[***9]** except Petersen and Ardis Kuecker. These counts alleged that defendants' derogatory and false statements placed him in a false light before the public and were made with actual malice or with reckless disregard of the truth or falsity of the statements. Count XXIII alleged civil conspiracy to interfere with prospective business advantage against all defendants except Petersen, based on the fact that plaintiff had a reasonable expectancy to enter into a valid business relationship with the Dixon School District to continue his employment as head boys basketball coach through the 2010-2011 school year. Finally, counts XXIV and XXV alleged that Petersen's actions as an individual constituted slander *per se* and intentional interference with prospective business advantage.

[*P21] Following the filing of plaintiff's second amended complaint, defendants filed separate motions to dismiss pursuant to *section 2-615* of the Code of Civil Procedure (*735 ILCS 5/2-615* (West 2008)). Defendants contended, among other things, that the second amended complaint constituted a SLAPP specifically prohibited by the Act. The Act applies to "any motion to dispose of a claim in a judicial proceeding on the grounds **[***10]** that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." *735 ILCS 110/15* (West 2008). The Act immunizes from liability "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government ***, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." *735 ILCS 110/15* (West 2008).

[*P22] In response to the dismissal motions, plaintiff filed a responsive pleading arguing that defendants' actions were not "in furtherance of the constitutional rights to petition," and, even if they were, that such actions were "not genuinely aimed at procuring favorable government action, result or outcome." On the date of the hearing on the motions to dismiss, plaintiff filed an additional written response. He argued that the Act is unconstitutional as applied to him as well as to all public employees in the state. Plaintiff based his constitutional arguments on *article I, section 12, of the Illinois Constitution* (*Ill. Const. 1970, art. I, § 12*), **[***11]** which guarantees a right to a legal remedy for all injuries or wrongs received to a person's privacy or reputation, and *article I, section*

6 (Ill. Const. 1970, art. I, § 6), which grants individuals the right to be free from invasions of privacy. The circuit court delayed the hearing to allow defendants to respond to plaintiff's constitutional arguments.

[*P23] Following the hearing, the circuit court issued a memorandum opinion and order dismissing plaintiff's second amended complaint in its entirety, finding defendants immune from all claims pursuant to the Act. The court did not reach the remaining grounds raised in defendants' motions to dismiss.

[*P24] [**741] [**426]** Prior to the circuit court's decision, plaintiff filed a motion for leave to file his third amended complaint, which added additional allegations in count X and an additional count XXVI for false light invasion of privacy against Shomaker. The circuit court allowed leave to file the third amended complaint only as to counts X and XXVI, finding that the remaining counts were identical to those alleged in the second amended complaint. The circuit court subsequently dismissed counts X and XXVI of plaintiff's third amended complaint on the grounds **[***12]** that the Act barred the claims alleged in those counts.

[*P25] In response to defendants' collective motion for attorney fees, the circuit court awarded fees to defendants pursuant to section 25 of the Act (735 ILCS 110/25 (West 2008)), in the total amount of $54,500.78, divided into four separate amounts for the various attorneys. The court limited the award only to those fees which could be specifically verified as connected to work done on the motion under the Act.

[*P26] Plaintiff appealed the dismissal of his complaints. Defendants, with the exception of Venier, filed cross-appeals seeking expansion of the attorney fee awards to include those fees associated with the entire defense.

[*P27] The appellate court affirmed. 405 Ill. App. 3d 835, 942 N.E.2d 544, 347 Ill. Dec. 341. The court held that the Act "alters existing defamation law by providing a new, qualified privilege for any defamatory statements communicated in furtherance of one's right to petition, speak, assemble, or otherwise participate in government *** even with actual malice." Id. at 851, 855. The court acknowledged that, under its construction, "the Act is broad, changing the landscape of defamation law"; however, the court held that it is the duty of the legislature, **[***13]** not the courts, to rewrite the statute. Id. at 855.

[*P28] As applied to the facts, the court found that dismissal of plaintiff's claims was proper. The court found that defendants' acts were "genuinely aimed at procuring favorable government action, result, or outcome" because reasonable persons could expect the school board to change its initial decision to retain plaintiff after defendants' campaign placed public pressure on the board. Id. at 862-63. The school board decision was a "government process" under the plain language of the Act. Thus, defendants were acting in furtherance of their rights to participate in government with the goal to obtain favorable government action. Id. at 864. The court further held it was "undisputed that plaintiff's lawsuit was based on or in response to defendants' 'acts in furtherance.'" *Id.*

[*P29] The court next rejected plaintiff's constitutional arguments. With regard to the right to a remedy under article I, section 12, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 12), the court held that the right to remedy clause is an expression of philosophy rather than a mandate for a specific remedy. Id. at 851. In the context of the Act, the court **[***14]** held, the legislature properly exercised its inherent power to repeal or change the common law by granting a qualified privilege for speech made in the exercise of the right to participate in government. Id. at 852. The court found plaintiff's equal protection argument to be equally unavailing. The court disagreed with the plaintiff that the Act places public employees in a special category because the Act applies, on its face, to *any* moving party whose alleged acts were in **[****742]** **[**427]** furtherance of the moving

party's rights to petition, speak, assemble, or otherwise participate in government. *Id*. Finally, the court affirmed the award of attorney fees by the circuit court, limited to those fees associated with the motion to dismiss on grounds based on the Act. *Id. at 869*.

[*P30] This court allowed plaintiff's petition for leave to appeal. *Ill. S. Ct. R. 315* (eff. Feb. 26, 2010). We granted leave to the State to intervene in the cause as an intervenor-appellee, and we allowed the American Civil Liberties Union of Illinois, the Illinois Press Association, the Illinois Broadcasters Association, and the Public Participation Project to submit an *amicus curiae* brief in support of defendants.

[*P31] ANALYSIS

[*P32] I. Citizen **[***15]** Participation Act

[*P33] In August 2007, Illinois joined more than 20 other states[1] in enacting anti-SLAPP legislation, in the form of the Citizen Participation Act (*735 ILCS 110/1 et seq*. (West 2008)). The term "SLAPP" was coined by two professors at the University of Denver, George W. Pring and Penelope Canan, who conducted the seminal study on this type of lawsuit. George W. Pring & Penelope Canan, "*Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937 (1992). "SLAPPs, or 'Strategic Lawsuits Against Public Participation,' are lawsuits aimed at preventing citizens from exercising their political rights or punishing those who have done so." *Wright Development Group, LLC v. Walsh, 238 Ill. 2d 620, 630, 939 N.E.2d 389, 345 Ill. Dec. 546 (2010)* (citing generally Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988)). "SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation." *Walsh, 238 Ill. 2d at 630* (citing *735 ILCS 110/5* (West 2008)). The paradigm SLAPP suit is "one filed by developers, unhappy with public protest over **[***16]** a proposed development, filed against leading critics in order to silence criticism of the proposed development." *Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 525 (N.D. Ill. 1990)*. A SLAPP is "based upon nothing more than defendants' exercise of their right, under the *first amendment*, to petition the government for a redress of grievances." *Hogan, 740 F. Supp. at 525*.

[*P34] SLAPPs are, by definition, meritless. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 396 (1993). Plaintiffs in SLAPP suits do not intend to win but rather to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction. *Id*. at 403-05. "In fact, defendants win eighty to ninety percent of all SLAPP suits litigated on the merits." *Id*. at 406. While the case is being litigated in the courts, however, defendants are forced to expend funds on litigation costs and attorney fees and may be discouraged from continuing their protest **[***17]** activities. *Id*. at 404-06.

[*P35] "The idea is that the SLAPP plaintiff's goals are achieved through the ancillary effects of the lawsuit itself on the defendant, not through an adjudication on the merits. Therefore, the plaintiff's choice of what cause of action to plead matters little." Mark J. Sobczak, Comment, *SLAPPed in Illinois: The* ***[****743]*** ***[**428]*** *Scope and Applicability of the Illinois Citizen Participation Act*, *28 N. Ill. U. L. Rev. 559, 561 (2008)*. SLAPPs "masquerade as ordinary lawsuits" and may include myriad causes of action, including defamation, interference with contractual rights or prospective economic advantage, and malicious prosecution. Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its*

[1] See Mark J. Sobczak, Comment, SLAPPed in *Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, *28 N. Ill. U. L. Rev. 559, 559-60, 576 n.149 (2008)*.

Operation and Scope, 33 Loy. L.A. L. Rev. 801, 804-05 (2000). Because winning is not a SLAPP plaintiff's primary motivation, the existing safeguards to prevent meritless claims from prevailing were seen as inadequate, prompting many states to enact anti-SLAPP legislation. *Id. at 805*. These statutory schemes commonly provide for expedited judicial review, summary dismissal, and recovery of attorney fees for the party who has been "SLAPPed." *Id.*

[*P36] These characteristics **[***18]** of SLAPPs are reflected in the language of the Act, particularly *section 5*, which sets forth the public policy considerations underlying the legislation:

> *HN1*[↑] "*§ 5*. Public Policy. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.
>
> Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and **[***19]** communicate with government. There has been a disturbing increase in lawsuits termed 'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs' as they are popularly called.
> The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.
>
> It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants." *735 ILCS 110/5* (West 2008).

[*P37] *Section 15* of the Act describes the type of motion to which the Act applies:

> *HN2*[↑] "This Act applies to any motion **[***20]** to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights **[****744]** **[**429]** of petition, speech, association, or to otherwise participate in government.
>
> Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." *735 ILCS 110/15* (West 2008).

[*P38] A *HN3*[↑] "claim" under the Act includes "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury." *735 ILCS 110/10* (West 2008). "Government" is defined as "a branch, department, agency, instrumentality, official, employee, agent,

or other person acting under color of law of the United States, a state, a subdivision of a state, or another public authority including the electorate." *Id.*

[*P39] *HN4*[↑] When a motion to dismiss is filed pursuant to the Act, "a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent." *735 ILCS 110/20(a)* **[***21]** (West 2008). Discovery is suspended pending a decision on the motion. *735 ILCS 110/20(b)* (West 2008). However, "discovery may be taken, upon leave of court for good cause shown, on the issue of whether the movants [sic] acts are not immunized from, or are not in furtherance of acts immunized from, liability by this Act." *Id.* *HN5*[↑] "The court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act." *735 ILCS 110/20(c)* (West 2008).

[*P40] *HN6*[↑] *Section 25* provides that the court "shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs incurred in connection with the motion." *735 ILCS 110/25* (West 2008). *HN7*[↑] *Section 30(b)* provides that the Act "shall be construed liberally to effectuate its purposes and intent fully." *735 ILCS 110/30(b)* (West 2008).

[*P41] *HN8*[↑] In construing the statute, we bear in mind the familiar principles of statutory construction. Our primary objective is to ascertain and give effect to the intent of the legislature. *Solon v. Midwest Medical Records Ass'n, 236 Ill. 2d 433, 440, 925 N.E.2d 1113, 338 Ill. Dec. 907 (2010)*. **[***22]** The most reliable indicator of the legislative intent is the language of the statute, which should be given its plain and ordinary meaning. *Id.* All provisions of a statute should be viewed as a whole. Accordingly, words and phrases should be interpreted in light of other relevant provisions of the statute and should not be construed in isolation. *DeLuna v. Burciaga, 223 Ill. 2d 49, 60, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006)*. We also presume, in interpreting the meaning of the statutory language, that the legislature did not intend absurdity, inconvenience, or injustice. *Id.* *HN9*[↑] Our review of an issue of statutory interpretation is *de novo*. *Lee v. John Deere Insurance Co., 208 Ill. 2d 38, 43, 802 N.E.2d 774, 280 Ill. Dec. 523 (2003)*.

[*P42] Plaintiff argues that the Act is intended to apply only to actions based *solely* on the defendants' petitioning activities and does not immunize defamation or other intentional torts. In other words, *HN10*[↑] if the plaintiff's intent in bringing suit is to recover damages for alleged defamation and not to stifle or chill defendants' rights of petition, speech, association, or participation in government, it is not a SLAPP and does not fall under the purview of the Act. We agree. Looking at the statute in its entirety, it is clear that **[***23]** the legislation is aimed at discouraging and eliminating meritless, retaliatory SLAPPs, as they traditionally have been defined.

[*P43] **[****745]** **[**430]** *HN11*[↑] In deciding whether a lawsuit should be dismissed pursuant to the Act, a court must first determine whether the suit is the type of suit the Act was intended to address. Under *section 15*, a claim is subject to dismissal where it is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." *735 ILCS 110/15* (West 2008). This description of a claim subject to the Act must not be construed in isolation but in the context of the purposes described in the public policy section. One of the Act's stated purposes is to "establish an efficient process for identification and adjudication of SLAPPs." *735 ILCS 110/5* (West 2008). In the service of that goal, the Act describes a SLAPP suit as one which "chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights." *Id.* The Act further identifies

a SLAPP as an "abuse of the judicial process" which "can **[***24]** and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs." *Id.*

[*P44] ***HN12***[↑] The description of a SLAPP in *section 5* mirrors the traditional definition of a SLAPP as a meritless lawsuit intended to chill participation in government through delay, expense, and distraction. Indeed, this court has recognized that the "purpose of the Act is to give relief, including monetary relief, to citizens who have been victimized by *meritless, retaliatory* SLAPP lawsuits because of their 'act or acts' made 'in furtherance of the constitutional rights to petition, speech, association, and participation in government.'" (Emphasis added.) *Walsh, 238 Ill. 2d at 633* (quoting *735 ILCS 110/15* (West 2008)).

[*P45] In light of the clear legislative intent expressed in the statute to subject only meritless, retaliatory SLAPP suits to dismissal, we construe the phrase "based on, relates to, or is in response to" in *section 15* to mean *solely* based on, relating to, or in response to "any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." *735 ILCS 110/15* **[***25]** (West 2008). Stated another way, ***HN13***[↑] where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on defendants's rights of petition, speech, association, or participation in government. In that case, the suit would not be subject to dismissal under the Act. It is clear from the express language of the Act that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute.

[*P46] The Massachusetts Supreme Court reached a similar conclusion in interpreting that state's anti-SLAPP law. See *Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 691 N.E.2d 935 (Mass. 1998)*. The Massachusetts anti-SLAPP statute provides, in part:

> "In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are *based on* said party's exercise of its right to petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall **[***26]** grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any **[****746]** **[**431]** reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Emphasis added.) *Mass. Gen. Laws ch. 231, § 59H* (1994).

[*P47] The court held that, "[d]espite the apparent purpose of the anti-SLAPP statute to dispose expeditiously of meritless lawsuits that may chill petitioning activity, the statutory language fails to track and implement such an objective." *Duracraft Corp., 691 N.E.2d at 943*. Accordingly, the court adopted a construction of "'based on' that would exclude motions brought against meritorious claims with a substantial basis other than or in addition to the petitioning activities implicated." *Id.* The court held that "[t]he special movant who 'asserts' protection for its petitioning activities would have to make a threshold showing through the pleadings and affidavits **[***27]** that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Id.* Imposing this requirement on special movants under the statute would, according to the court, "serve to distinguish

meritless from meritorious claims, as was intended by the Legislature." *Id.*

[*P48] Our construction of the phrase "based on, relates to, or is in response to," in *section 15* similarly allows a court to identify meritless SLAPP suits subject to the Act. This interpretation also serves to ameliorate the "particular danger inherent in anti-SLAPP statutes *** that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs' own rights to seek redress from the courts for injuries suffered." Mark J. Sobczak, Comment, *SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, *28 N. Ill. U. L. Rev. 559, 575 (2008)*.

[*P49] Furthermore, construing the Act to apply only to meritless SLAPPs accords with another express goal in *section 5*: "to strike a balance between the rights of persons to file lawsuits **[***28]** for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government." *735 ILCS 110/5* (West 2008). The Act's intent to "strike a balance" recognizes that a solution to the problem of SLAPPs must not compromise either the defendants' constitutional rights of free speech and petition, or plaintiff's constitutional right of access to the courts to seek a remedy for damage to reputation. See John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 397-98 (1993) ("Plaintiffs must be able to bring suits with reasonable merit and defendants must be protected from entirely frivolous intimidation suits designed to chill legitimate participation in public affairs.").

[*P50] We believe that, had the legislature intended to radically alter the common law by imposing a qualified privilege on defamation within the process of petitioning the government, it would have explicitly stated its intent to do so. See *In re D.F., 208 Ill. 2d 223, 235, 802 N.E.2d 800, 280 Ill. Dec. 549 (2003)*. The legislative history of the Act further supports our conclusion that the legislature intended to target only meritless, retaliatory SLAPPs and **[***29]** did not intend to establish a new absolute or qualified privilege for defamation. The sponsor of the bill in the Senate, Senator Cullerton, stated that the bill was intended to "address the concern that certain **[****747]** **[**432]** lawsuits that could be filed that significantly would chill and diminish citizen participation in government or voluntary public service or the exercise of those constitutional rights." 95th Ill. Gen. Assem., Senate Proceedings, April 20, 2007, at 15 (statements of Senator Cullerton). Senator Cullerton then gave an example of the type of suit targeted by the bill:

> "[L]et's say a community organization makes recommendations to a local alderman concerning zoning changes. They just give advice, then the party that might not agree with that decision, the vote of the alderman, they—that person, that landowner would file a lawsuit, not just against the municipality, but also against the community organization that gave the advice. Even though all they were doing was giving advice to their elected officials. So, that's what the purpose of the bill is." 95th Ill. Gen. Assem., Senate Proceedings, April 20, 2007, at 15-16 (statements of Senator Cullerton).

The House sponsor, Representative **[***30]** Franks, also described a scenario as an example of a SLAPP:

> "I can tell you in my county, it'd be in the Village of Richmond, there was [*sic*] two (2) gentlemen running for trustees who were ... who won but they were sued by a developer, threatened with bankruptcy, not being able to pay their legal fees, even though the ... the developer's lawsuit was thrown out on three (3) separate occasions and that would stop the type of abuse." 95th Ill. Gen. Assem., House Proceedings, May 31, 2007, at 58 (statements of Representative Franks).

[*P51] The legislators' statements further support our interpretation that the Act was aimed solely at traditional, meritless SLAPPs. There was no discussion in the legislative debates about establishing a new privilege for defamation. We recognize that ***HN14***[↑] the legislature has the inherent power to repeal or change the common law and may do away with all or part of it. See, *e.g.*, *Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 519-20, 732 N.E.2d 528, 247 Ill. Dec. 473 (2000)* ("passage of the Tort Immunity Act constituted an exercise of the General Assembly of its broad power to determine whether a statute that restricts or alters an existing remedy is reasonably necessary to promote **[***31]** the general welfare"). We simply do not believe that, in enacting the anti-SLAPP statute, the legislature intended to abolish an individual's right to seek redress for defamation or other intentional torts, whenever the tortious acts are in furtherance of the tortfeasor's rights of petition, speech, association, or participation in government. Dismissal of a lawsuit pursuant to the Act is a drastic and extraordinary remedy. Not only is a suit subject to cursory dismissal within 90 days of the motion being filed, but the plaintiff is prohibited from conducting discovery, except through leave of court, and is required to pay defendant's attorney fees incurred in connection with the motion. In light of the severe penalties imposed on a plaintiff under the Act, we will not read into the statute an intent to establish a new, qualified privilege absent an explicit statement of such intent.

[*P52] Several of the defendants concede that the Act applies only to meritless lawsuits, but they argue that the so-called "sham exception" set forth in the second clause of *section 15* is sufficient to separate SLAPPs from meritorious suits. ***HN15***[↑] This exception states that "[a]cts in furtherance of the constitutional **[***32]** rights to petition, speech, association, and participation in government are immune from liability, *regardless of intent or purpose, except when not genuinely aimed at procuring favorable* ***[****748] [**433]*** *government action, result, or outcome*." (Emphasis added.) *735 ILCS 110/15* (West 2008). Defendants argue that, where petitioning activities are genuinely aimed at procuring a favorable governmental result, a plaintiff's lawsuit for alleged defamation occurring in the course of petitioning is, by definition, without merit. Defendants' argument is unpersuasive.

[*P53] The sham exception tests the genuineness of the *defendants*' acts; it says nothing about the merits of the plaintiff's lawsuit. It is entirely possible that defendants could spread malicious lies about an individual while in the course of genuinely petitioning the government for a favorable result. For instance, in the case at bar, plaintiff alleges that defendants defamed him by making statements that plaintiff abused children, did not get along with colleagues, and performed poorly at his job. Assuming these statements constitute actionable defamation, it does not follow that defendants were not *genuinely* attempting to achieve a favorable governmental **[***33]** result by pressuring the school board into firing the plaintiff.[2] If a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts and, thus, does not constitute a SLAPP, it is irrelevant whether the defendants' actions were "genuinely aimed at procuring favorable government action, result, or outcome." Thus, plaintiff's suit would not be subject to dismissal under the Act.

[*P54] Turning to the merits in the case at bar, at issue is whether plaintiff's complaint should have been dismissed pursuant to the Act. At the outset, we note that all of the motions to dismiss in this case were filed under *section 2-615* of the Code of Civil Procedure (*735 ILCS 5/2-615* (West 2008)). ***HN16***[↑] A *section 2-615* motion to dismiss challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint. *Board of Directors of Bloomfield Club Recreation Ass'n v. The Hoffman Group, Inc., 186*

[2] Plaintiff does not argue in this court that defendants' acts were not "genuinely aimed at procuring favorable government action, result, or outcome."

Ill. 2d 419, 423, 712 N.E.2d 330, 238 Ill. Dec. 608 (1999). A motion to dismiss based on the immunity conferred by the Act, however, is more **[***34]** appropriately raised in a *section 2-619(a)(9)* motion, which allows for dismissal when the claim asserted against the defendant is "barred by other affirmative matter avoiding the legal effect of or defeating the claim" (*735 ILCS 5/2-619(a)(9)* (West 2008)). *Wright Development Group, LLC v. Walsh, 238 Ill. 2d 620, 641, 939 N.E.2d 389, 345 Ill. Dec. 546 (2010)* (Freeman, J., specially concurring, joined by Thomas and Burke, JJ.). ***HN17***[↑] Immunity from tort liability pursuant to statute is an affirmative matter properly raised in a *section 2-619* motion to dismiss. See, *e.g.*, *Van Meter v. Darien Park District, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 Ill. Dec. 555 (2003)* (construing *section 2-201* of the Local Governmental and Governmental Employees Tort Immunity Act (*745 ILCS 10/2-201* (West 1994)). Since plaintiff has not been prejudiced by the motions to dismiss having been filed under *section 2-615*, we will treat the parts of the motions asserting immunity under the Act as if they had been filed under *section 2-619(a)(9)*. *See Wallace v. Smyth, 203 Ill. 2d 441, 447, 786 N.E.2d 980, 272 Ill. Dec. 146 (2002)*; *Gouge v. Central Illinois Public Service Co., 144 Ill. 2d 535, 541-42, 582 N.E.2d 108, 163 Ill. Dec. 842 (1991)*.

[*P55] ***HN18***[↑] A motion to dismiss under *section 2-619(a)* admits the legal sufficiency of the plaintiff's claim but asserts certain **[***35]** defects or defenses outside the pleadings **[****749]** **[**434]** which defeat the claim. *Wallace, 203 Ill. 2d at 447*. When ruling on the motion, the court should construe the pleadings and supporting documents in the light most favorable to the nonmoving party. *Czarobski v. Lata, 227 Ill. 2d 364, 369, 882 N.E.2d 536, 317 Ill. Dec. 656 (2008)*. The court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor. *Morr-Fitz, Inc. v Blagojevich, 231 Ill. 2d 474, 488, 901 N.E.2d 373, 327 Ill. Dec. 45 (2008)*. ***HN19***[↑] The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge, 156 Ill. 2d 112, 116-17, 619 N.E.2d 732, 189 Ill. Dec. 31 (1993)*. Our review is *de novo*. *Id*.

[*P56] The procedure set forth in the Act provides the proper framework for our analysis. ***HN20***[↑] *Section 15* requires the moving party to demonstrate that the plaintiff's complaint is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." *735 ILCS 110/15* (West **[***36]** 2008); *Walsh, 238 Ill. 2d at 635*. If the moving party has met his or her burden of proof, the burden then shifts to the responding party to produce "clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability" under the Act. *735 ILCS 110/20(c)* (West 2008); *Walsh, 238 Ill. 2d at 636-37*. Thus, defendants had the initial burden of proving that plaintiff's lawsuit was solely "based on, relate[d] to, or in response to" their acts in furtherance of their rights of petition, speech or association, or to participate in government. Only if defendants have met their burden does the plaintiff have to provide clear and convincing evidence that defendants' acts are not immunized from liability under the Act.

[*P57] We conclude, based on the parties' pleadings, that plaintiff's lawsuit was not solely based on, related to, or in response to the acts of defendants in furtherance of the rights of petition and speech. Plaintiff's suit does not resemble in any way a strategic lawsuit intended to chill participation in government or to stifle political expression. It is apparent that the true goal of plaintiff's claims is **[***37]** not to interfere with and burden defendants' free speech and petition rights, but to seek damages for the personal harm to his reputation from defendants' alleged defamatory and tortious acts. Defendants have not met their burden of showing that plaintiff's suit was based

solely on their petitioning activities.

[*P58] We emphasize that we express no opinion on the actual merits of plaintiff's causes of action. We simply hold that plaintiff's lawsuit is not a SLAPP within the meaning of the Act and, thus, is not subject to dismissal on that basis. Upon remand, the circuit court should consider any remaining bases for dismissal raised by defendants, including that defendants' statements constitute protected opinion, that the statements are protected under the fair reporting privilege, and that plaintiff's complaint failed to adequately plead the required elements, including actual malice.

[*P59] II. Constitutional Issues

[*P60] Plaintiff further contends that the Act as a whole is unconstitutional under various provisions of the United States and Illinois Constitutions. See *Ill. Const. 1970, art. I, § 12* (right to remedy **[****750]** **[**435]** and justice); *Ill. Const. 1970, art. I, § 4* (freedom of speech); *Ill. Const. 1970, art. I, § 5* **[***38]** (right to apply for redress of grievances); *Ill. Const. 1970, art. I, § 6* (right to be secure against unreasonable invasions of privacy); *Ill. Const. 1970, art. I, § 2* (due process and equal protection); *U.S. Const., amend. XIV* (due process and equal protection). All of plaintiff's arguments alleging that the Act is unconstitutional are based on the assumption that the Act establishes a privilege for defendants who engage in defamatory acts in the process of petitioning the government. Because we hold that the legislature did not intend to establish such a privilege, we do not find the statute unconstitutional under any of the grounds raised by plaintiff.

[*P61] III. Attorney Fees

[*P62] Defendants, with the exception of Venier, appeal that part of the appellate court's judgment affirming the circuit court's award of attorney fees. This claim was raised in a cross-appeal to the appellate court. Jurisdiction in this court is pursuant to *Supreme Court Rule 318(a)* (*Ill. S. Ct. R. 318(a)* (eff. Jan. 1, 1967)). *Poindexter v. State ex rel. Department of Human Services, 229 Ill. 2d 194, 205 n.4, 890 N.E.2d 410, 321 Ill. Dec. 688 (2008)* ***HN21***[↑] (allowance of one party's petition for leave to appeal brings before this court the other party's requests **[***39]** for cross-relief).

[*P63] Because we are reversing the appellate court's judgment affirming the dismissal of plaintiff's complaints under the Act, our resolution of the attorney fee issue will not affect the parties to this case. Therefore, the issue is moot. However, we will address the issue under the public interest exception to the mootness doctrine because the question is of a public nature in that any individual or legal entity in the state may be subject to the Act; the issue is likely to recur in future cases; and a definitive decision by this court will provide guidance to the lower courts in deciding which attorney fees are appropriate under the Act. *See Goodman v. Ward, 241 Ill. 2d 398, 404-05, 948 N.E.2d 580, 350 Ill. Dec. 300 (2011)*.

[*P64] Turning to the merits, ***HN22***[↑] Illinois follows the "American rule," which prohibits prevailing parties from recovering their attorney fees from the losing party, absent express statutory or contractual provisions. *Morris B. Chapman & Associates, Ltd. v. Kitzman, 193 Ill. 2d 560, 572, 739 N.E.2d 1263, 251 Ill. Dec. 141 (2000)*. Accordingly, statutes which allow for such fees must be strictly construed as they are in derogation of the common law. *Carson Pirie Scott & Co. v. State of Illinois Department of Employment Security, 131 Ill. 2d 23, 49, 544 N.E.2d 772, 136 Ill. Dec. 86 (1989)*. **[***40]** ***HN23***[↑] Although the statute provides that "[t]his Act shall be construed liberally to effectuate its purposes and intent fully" (*735 ILCS 110/30(b)* (West 2008)), this statement of construction applies to the substantive provisions of the Act and not to the fee-shifting provision in *section 25*. This issue involves the interpretation of a statute and, thus, is subject to *de novo* review. *DeLuna v. Burciaga, 223 Ill. 2d 49, 59, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006)*.

[*P65] *Section 25* of the Act provides: "The court shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs incurred in connection with the motion." *735 ILCS 110/25* (West 2008). In an apparent misreading of the plain language of the statute, defendants contend that the phrase "incurred in connection with the motion" does not mean solely in connection with the motion filed under the Act. Rather, they interpret the phrase to mean that prevailing movants are entitled to attorney fees incurred in connection with the entire **[****751]** **[**436]** defense, including attacking the allegations on the face of the complaint and raising other defenses and privileges unrelated to the Act. They base their argument on the statute's definition of a "motion," which **[***41]** includes "any motion to dismiss, for summary judgment, or to strike, or any other judicial pleading filed to dispose of a judicial claim." *735 ILCS 110/10* (West 2008). In our view, ***HN24***[↑] the language in *section 25* is unambiguous and supports only one interpretation. Attorney fees "incurred in connection with the motion" include only those fees which can specifically be delineated as incurred in connection with the motion to dismiss filed under the Act.

[*P66] Defendants' reliance on *Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*, to support their position on the fee issue, is misplaced. There, the United States Supreme Court interpreted *42 U.S.C. § 1988*, which provides that in federal civil rights actions, '"the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.'" *Id. at 426* (quoting *42 U.S.C. § 1988*). The Court held that, where a plaintiff presents several claims for relief in the same lawsuit, and only some of the claims for relief are successful, attorney fees may be allowed for all claims involving a common core of facts or based on related legal theories. *Id. at 434-35*. The fee-shifting statute in the instant **[***42]** case obviously differs from the statute in *Hensley*, in that it specifically provides that only fees "incurred in connection with the motion" filed under the Act are allowed to a prevailing movant. Therefore, any fees incurred which are not specifically connected to the motion to dismiss pursuant to the Act are not allowed.

[*P67] We note further that plaintiff presents an argument in his reply brief challenging the jurisdiction of the circuit court to award fees under the statute.[3] He argues that the circuit court lost jurisdiction to dismiss his complaints and to award attorney fees to defendants when it ruled on the motions to dismiss more than 90 days after the motions were filed. See *735 ILCS 110/20(a)* (West 2008) ("On the filing of any motion as described in *Section 15*, a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent."). Plaintiff asserts that the circuit court's failure to comply with the 90-day requirement caused it to lose jurisdiction of the case. The argument lacks merit. ***HN25***[↑] Nowhere in the Act does it state that the circuit court loses jurisdiction when it fails to rule on a motion to dismiss within 90 days of its **[***43]** filing. There is no other support for plaintiff's conclusion that the circuit court's jurisdiction is dependent upon compliance with the 90-day time limit in the Act. Moreover, plaintiff himself was responsible for the delay in this case by filing a last-minute responsive pleading on the date of the hearing on the dismissal motions. Accordingly, we reject plaintiff's jurisdictional challenge to the circuit court's rulings.

[*P68] CONCLUSION

[*P69] For the foregoing reasons, the judgments of the appellate court and the circuit court are reversed, and the cause is **[****752]** **[**437]** remanded to the circuit court for further

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[3] Plaintiff first raised the jurisdictional argument in his motion for reconsideration in the trial court but did not raise it in the appellate court. Nevertheless, a lack of subject matter jurisdiction may be raised at any time, in any court, either directly or collaterally. *Fredman Brothers Furniture Co. v. Department of Revenue, 109 Ill. 2d 202, 215, 486 N.E.2d 893, 93 Ill. Dec. 360 (1985)*.

proceedings consistent with this opinion.

[*P70] Appellate court judgment reversed;

[*P71] circuit court judgment reversed;

[*P72] cause remanded.

End of Document

Smeilis v. Lipkis

Appellate Court of Illinois, First District, Sixth Division

March 23, 2012, Decided

No. 1-10-3385

Reporter
2012 IL App (1st) 103385 *; 967 N.E.2d 892 **; 2012 Ill. App. LEXIS 207 ***; 359 Ill. Dec. 862 ****

KATHLEEN SMEILIS and WILLARD SMEILIS, Plaintiffs-Appellants, v. EVAN LIPKIS and EVAN LIPKIS, M.D., S.C., Defendants-Appellees.

Subsequent History: Appeal denied by *Smeilis v. Lipkis, 2012 Ill. LEXIS 1085 (Ill., Sept. 26, 2012)*

Prior History: [*1]** Appeal from the Circuit Court of Cook County. No. 07 L 011345. The Honorable Irwin Solganick, Judge Presiding.

Disposition: Affirmed.

Core Terms

judicial estoppel, plaintiffs', settlement, neurological, circuit court, surgery, permanent, doctrine of judicial estoppel, medical negligence, opinion testimony, expert opinion, assertions, inconsistent position, majority opinion, proximate cause, deposition, injuries, trier of fact, disabled, parties, theory of liability, expert witness, nursing home, benefits, binding, patient, cases, novo, pain, lower extremity

Case Summary

Procedural Posture

Plaintiffs, a patient and her husband, refiled a medical negligence complaint against defendants, a doctor and his corporate entity. The Circuit Court of Cook County (Illinois) ruled that judicial estoppel barred the claims the dismissed the refiled complaint under *735 ILCS 5/2-619(a)(9)* (2010). The patient and her husband appealed.

Overview

In the original complaint filed in 2001, the patient and her husband alleged that she developed a progressive neurological condition that was not timely diagnosed and treated. They settled with a nursing home and hospital, leaving only the doctor and his entity as defendants. On the eve of trial in 2007, the patient and her husband voluntarily dismissed the complaint, then refiled within 30 days. The trial court ruled that judicial estoppel barred the claims in 2007 and dismissed the complaint that was refiled. On appeal, the court affirmed. The patient and her husband sought to replace the opinion of their 2001 expert with the opinion of another expert retained in 2007. They adopted a new view of the facts in order recover against the doctor. This was the manipulation that judicial estoppel was meant to prevent, and plaintiffs could not shield themselves from the finding that two inconsistent positions were taken in 2001 and 2007. The court was not persuaded that judicial estoppel was not applicable just because inconsistent positions were espoused by medical expert witnesses instead of by plaintiffs.

Outcome

The court affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN1[] **Estoppel, Judicial Estoppel**

The doctrine of judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding. The principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events. The purpose of judicial estoppel is to promote truth-seeking in the courts, rather than gamesmanship; its aim is to protect the integrity of the judicial system, not necessarily the litigants. Judicial estoppel is flexible and not reducible to a formula.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Evidence > Burdens of Proof > Clear & Convincing Proof

HN2[] **Estoppel, Judicial Estoppel**

Generally, five requirements must be shown to apply judicial estoppel. The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) with the intent that the trier of fact accept the facts alleged as true, and (5) have succeeded in the first proceeding and received some benefit from it. A party seeking to establish judicial estoppel must prove each requirement by clear and convincing evidence. Case law requires clear and unequivocal evidence of judicial estoppel.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Standards of Review, Abuse of Discretion**

Generally, motions to dismiss are subject to a de novo standard of review. A circuit court's decision to apply the doctrine of judicial estoppel typically falls within the sound discretion of the circuit court.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN4[] **Standards of Review, Abuse of Discretion**

When a trial judge bases his decision solely on the same cold record that is before the court of review, it is difficult to see why any deference should be afforded to that decision. Only when the trial court actually engages in an exercise of discretion should the abuse of discretion standard apply. The de novo standard of review applies to the grant of a motion to dismiss.

Healthcare Law > ... > Actions Against Facilities > Standards of Care > Expert Testimony

Torts > Malpractice & Professional Liability > Healthcare Providers

HN5[] **Standards of Care, Expert Testimony**

The central issue in a medical-malpractice action is the standard of care against which a doctor's negligence is judged. A deviation from the standard of care constitutes professional negligence, which must be proved by expert testimony. In fact, absent an expert witness qualified to give standard of care testimony, the malpractice suit is subject to dismissal.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN6[] **Estoppel, Judicial Estoppel**

Judicial estoppel is designed to promote the truth and to protect the integrity of the court system.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN7[] **Estoppel, Judicial Estoppel**

The purpose of judicial estoppel is to promote the truth and to protect the integrity of the court system by preventing litigants from deliberating shifting positions to suit the exigencies of the moment.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN8[] **Estoppel, Judicial Estoppel**

The concern addressed by the doctrine of judicial estoppel is the taking of inconsistent positions, not with which position is truthful. Judicial estoppel precludes a contradictory position without examining the truth of either statement.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN9[] **Estoppel, Judicial Estoppel**

Judicial estoppel is a common law doctrine. It is flexible and not reducible to a pat formula. Not every requirement of the doctrine noted in prior decisions will necessarily apply under the circumstances of a particular case. The technical requirement of an oath is discarded when its requirement is illogical. This is especially true when strict application of a requirement would frustrate the public policy underlying the application of the doctrine.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN10[] **Summary Judgment, Entitlement as Matter of Law**

Sometimes a settlement sidesteps the issue in the first case, so that neither side prevails on a particular contested issue. Persons who triumph by inducing their opponents to surrender have prevailed as surely as the persons who induce the judge to grant summary judgment.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN11[] **Estoppel, Judicial Estoppel**

The doctrine of judicial estoppel requires that the party sought to be estopped have obtained a favorable judgment or settlement.

Syllabus

In an action for the neurological injuries plaintiff suffered as a result of the alleged delay in the surgical treatment of her *cauda equina* syndrome, the trial court properly applied judicial estoppel in

dismissing plaintiff's refiled complaint against the physician who treated her while she was at a nursing home, since plaintiff's original complaint against the hospital and physicians who initially cared for her there and the nursing home and the physician named in the refiled complaint was dismissed pursuant to settlements with all defendants, except the physician named in the refiled complaint, and the refiled complaint alleged the underpinning of a theory of liability that was at odds with the factual underpinning of the theory of liability asserted in the original complaint.

Counsel: For PLAINTIFFS-APPELLANTS: William F. Martin, Philip Davidson, Hilfman & Martin, P.C., Chicago, Illinois.

For DEFENDANTS-APPELLEES: James K. Horstman, Melissa H. Dakich, Cray Huber Horstman Heil & VanAusdal LLC, Chicago, Illinois.

Judges: JUSTICE GARCIA delivered the judgment of the court, with opinion. Justice Lampkin concurred in the judgment and opinion. Presiding Justice R. Gordon dissented, with opinion. case.

Opinion by: GARCIA

Opinion

[*P1] [895] [****865]** The circuit court applied judicial estoppel to the plaintiffs' claims in a refiled medical negligence complaint and dismissed the complaint with prejudice. In the original complaint filed in 2001, the plaintiffs, Kathleen Smeilis and Willis Smeilis, wife and husband, alleged that Kathleen developed a progressive neurological condition while she was a patient at Glenbrook Hospital, which the hospital doctors failed to timely diagnose and treat. According to the plaintiffs' proximate cause expert, Kathleen needed to undergo corrective surgery by August 10, 1999, to avoid permanent injury. On August 12, 1999, Kathleen was released from the hospital and transferred to a nursing home. At the nursing home, Kathleen was under the care of Dr. Evan Lipkis. The plaintiffs settled with the hospital for $3 million and the nursing home for $200,000, leaving only Dr. Lipkis and his corporate entity **[***2]** as defendants. On the eve of trial in 2007, the plaintiffs voluntarily dismissed the complaint against the defendants. The plaintiffs refiled the complaint within 30 days. The plaintiffs' new proximate cause expert witness opined that Kathleen suffered the permanent neurological damage between August 14 and 18, 1999, while she was a patient at the nursing home and under the care of Dr. Lipkis. The new medical expert opined that the hospital defendants that settled with the plaintiffs were not negligent in their care of Kathleen and that fault laid with Dr. Lipkis. The circuit court ruled judicial estoppel barred the 2007 claims and dismissed the refiled complaint. We affirm.

[*P2] BACKGROUND

[*P3] Kathleen Smeilis sustained permanent injuries in August 1999 as a result of a medical condition called *cauda equina* syndrome (CES). CES is a condition in which a group of nerves that extend out of the lower spine become compressed when something, such as a herniated disk, places pressure on them. It can result in neurological damage, including decreased motor function, loss of bladder and bowel control, and pain or numbness in the lower extremities. When a patient develops CES, doctors consider it an **[***3]** emergency. A delay in performing corrective surgery results in permanent neurological damage.

[*P4] On August 7, 1999, Kathleen arrived at the emergency room at Glenbrook Hospital (Glenbrook) complaining of extreme pain in her lower back. Kathleen brought with her an MRI film of her back taken on July 19, 1999, which revealed that she had spinal stenosis secondary to a broad-based disc protrusion and nerve root compression. Following admission, Kathleen was **[**896]**

[**866]** placed under the care of several doctors specializing in internal medicine, including attending physicians and resident doctors.

[*P5] On August 9, a Glenbrook doctor administered an epidural injection to relieve Kathleen's lower back pain. Following the injection, her symptoms got worse. Kathleen complained of persistent pain and numbness in her lower back and lower extremities. At one point, when she attempted to get out of bed, her pain was so severe that she could not stand; she required assistance to use the bathroom.

[*P6] On August 12, a Glenbrook doctor determined that Kathleen's function in the lower extremities was appropriate and observed no evidence of problems with her bowel or bladder. Based on these findings, Glenbrook discharged Kathleen **[***4]** to Abington Nursing Home (Abington) for rehabilitative treatment. At Abington, Kathleen was placed under the care of Dr. Lipkis. The nursing home records reveal that Dr. Lipkis did not examine Kathleen until August 14, two days after her admission.

[*P7] During the night of August 12 at Abington, a nurse discovered that Kathleen was having difficulty urinating. The nurse notified Dr. Lipkis, who ordered a catheter or Lasix to provide relief. The next morning on August 13, Kathleen complained of severe calf pain. Upon being informed, Dr. Lipkis opined that the problem was sciatica, which we understand to generally refer to lower back and leg pain caused by compression of the sciatica nerve. On August 14, Dr. Lipkis examined Kathleen for the first time. His examination notes provide limited documentation; nonetheless, Dr. Lipkis testified at his deposition that his evaluation found Kathleen not to display any neurological abnormality.

[*P8] On August 15, Kathleen complained of constipation. This continued into the following day when Kathleen again complained of urination problems. Dr. Lipkis ordered that Kathleen receive a catheter. Kathleen continued to complain of constipation and urination problems. **[***5]** Dr. Lipkis evaluated her again on August 18. At this time, Dr. Lipkis concluded that Kathleen had signs of spinal cord compression, including lack of sphincter control. He made a notation of this loss of control in the medical record, with a notation that Kathleen had sphincter control on August 14.

[*P9] On August 18, Dr. Lipkis transferred Kathleen back to Glenbrook. From there, she was transferred to Evanston Hospital, where she underwent immediate surgery to correct the CES. The surgery corrected the problem but, due to the delay in diagnosis, Kathleen suffered permanent neurological damage. As a consequence, she has weakness in her lower extremities and uses a walker; she also has decreased bladder and bowel function; she suffered a loss of sexual function and has problems with reflexes and motor strength.

[*P10] In 2001, the plaintiffs filed their negligence suit against Glenbrook, the treating doctors at Glenbrook, Abington, Dr. Lipkis, and the corresponding corporate entities of the defendants. The 2001 complaint alleged that Kathleen's injuries were proximately caused by the defendants' delay in diagnosing her CES. The parties engaged in discovery.

[*P11] The plaintiffs retained as one of their **[***6]** experts Dr. Gary Skaletsky, a neurosurgeon, who testified in his deposition that CES patients require immediate surgery to avoid permanent damage. Following the development of CES, there is a small window of time for surgery to be performed for a CES patient to regain full neurological function. Dr. Skaletsky opined that on August 10, Kathleen was **[**897]** **[****867]** "an urgent surgical candidate." Dr. Skaletsky testified that had surgery been performed on August 10, Kathleen would likely have "significantly more" neurological function. He specifically testified that had the surgery been performed on or after August 11, when Kathleen first experienced an inability to stand, her condition would likely not be any better than her present condition. We set out Dr.

Skaletsky's pertinent deposition testimony.

> "If she had surgery on the 10th, I believe that she would be significantly more functional neurologically. More likely than not she would have some weakness of her flexors and extensors of the feet. She might have some numbness of the lower extremities.
>
> Had the surgery waited until the 11th when it was indicated she could not stand next to the bedside to go to the bathroom, I think it is likely that her **[***7]** neurological condition would not be much changed from what it is today."

[*P12] Following the conclusion of discovery, all the defendants, except Dr. Lipkis and his corporate entity, settled with the plaintiffs. The plaintiffs received $3 million from Glenbrook and $200,000 from Abington. The plaintiffs voluntarily dismissed the remainder of their complaint against Dr. Lipkis on September 27, 2007.

[*P13] On October 17, 2007, the plaintiffs filed a new complaint against Dr. Lipkis and his corporation. The 2007 complaint alleged that Dr. Lipkis was the proximate cause of Kathleen's injuries. The plaintiffs gave notice of a new expert witness, Dr. Andrew Chenelle, a neurologist. The plaintiffs retained the same experts on internal medicine that were deposed in the 2001 action. The defendants filed notice of their intent to call Dr. Skaletsky, the plaintiffs' neurological expert from the 2001 action.

[*P14] At his discovery deposition, Dr. Chenelle disagreed with many of the opinions that Dr. Skaletsky gave during his deposition. Dr. Chenelle testified that surgery on August 14, 1999, or even several days later, would have left Kathleen in a better condition than her current state. Dr. Chenelle did not "fault" **[***8]** the doctors at Glenbrook for discharging Kathleen when they did or for failing to perform emergency CES surgery on Kathleen before her transfer to Abington. Dr. Chenelle opined that the Glenbrook defendants did not deviate from the standard of care in their treatment of Kathleen. Dr. Chenelle grounded his opinion on Dr. Lipkis's initial examination on August 14, in which he determined that Kathleen had no neurological abnormality; Dr. Chenelle "assumed" this conclusion was accurate. He testified that he worked off this assumption but never stated whether he agreed with Dr. Lipkis's conclusion.

[*P15] During pretrial proceedings, the circuit court denied the plaintiffs' motion to strike the defendants' affirmative defense of judicial estoppel. Instead, the court converted the defendants' affirmative defense motion into a motion to dismiss the complaint, which it then set for a hearing. Upon consideration of the arguments, the circuit court concluded that the plaintiffs' claims in their 2007 complaint were barred by judicial estoppel and dismissed the complaint with prejudice pursuant to *section 2-619(a)(9) of the Illinois Code of Civil Procedure* (*735 ILCS 5/2-619(a)(9)* (West 2010)). The plaintiffs **[***9]** appeal.

[*P16] ANALYSIS

[*P17] The plaintiffs make three challenges to the circuit court's ruling that judicial estoppel barred the plaintiffs' complaint: (1) expert opinions cannot be barred by judicial estoppel; (2) the plaintiffs made no assertions during the 2001 **[**898]** **[****868]** proceeding when no trial ensued to bind them in the 2007 proceeding; and (3) no showing was made that the settlements in the 2001 suit came about because of Dr. Skaletsky's opinion testimony to establish the plaintiffs "benefitted" from an earlier inconsistent position for the purpose of applying judicial estoppel.

[*P18] The defendants respond that it is undeniable that the plaintiffs' 2001 and 2007 complaints alleged two wholly inconsistent theories of liability. In the 2001 complaint, the plaintiffs alleged the CES developed at Glenbrook Hospital, in accord with Dr. Skaletsky's deposition testimony regarding the necessity of surgery before August 11, 1999, to have avoided Kathleen's extant neurological injuries. In the 2007 complaint, Dr.

Chennelle, the plaintiffs' new expert witness, contended that Kathleen did not develop CES until after she was transferred to the nursing home and placed under the care of the defendants on August 12. **[***10]** The defendants assert the circuit court correctly applied judicial estoppel to bar the plaintiffs' claims under the new factual underpinning of the 2007 complaint, grounded on Dr. Chenelle's expert opinion, which was wholly at odds with the factual underpinning of the theory asserted in the 2001 complaint, grounded on Dr. Skaletsky's expert opinion.

[*P19] *HN1*[] The doctrine of judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding. *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi, 342 Ill. App. 3d 453, 460, 795 N.E.2d 779, 277 Ill. Dec. 111 (2003)*. "The principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp., 910 F.2d 1540, 1547 (7th Cir. 1990)*. The purpose of judicial estoppel is to promote truth-seeking in the courts, rather than gamesmanship; its aim is to protect the integrity of the judicial system, not necessarily the litigants. *Barack Ferrazzano, 342 Ill. App. 3d at 460*. "[J]udicial estoppel is flexible and not reducible to a formula." **[***11]** *Bidani v. Lewis, 285 Ill. App. 3d 545, 550, 675 N.E.2d 647, 221 Ill. Dec. 452 (1996)*.

[*P20] *HN2*[] Generally, five requirements must be shown to apply judicial estoppel. The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) with the intent that the trier of fact accept the facts alleged as true, and (5) have succeeded in the first proceeding and received some benefit from it. *Barack Ferrazzano, 342 Ill. App. 3d at 460*. A party seeking to establish judicial estoppel must prove each requirement by clear and convincing evidence. *Boelkes v. Harlem Consolidated School District No. 122, 363 Ill. App. 3d 551, 554, 842 N.E.2d 790, 299 Ill. Dec. 753 (2006)* (citing *Geddes v. Mill Creek Country Club, Inc., 196 Ill. 2d 302, 314, 751 N.E.2d 1150, 256 Ill. Dec. 313 (2001)* (requiring "clear and unequivocal" evidence of judicial estoppel)).

[*P21] Standard of Review

[*P22] *HN3*[] Generally, motions to dismiss are subject to a *de novo* standard of review. *DeLuna v. Burciaga, 223 Ill. 2d 49, 59, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006)*. A circuit court's decision to apply the doctrine of judicial estoppel typically falls within the sound discretion of the circuit court. *Barack Ferrazzano, 342 Ill. App. 3d at 459*. In *Barack Ferrazzano*, this court applied an abuse of discretion **[***12]** standard to **[**899]** **[****869]** the application of judicial estoppel, while we applied *de novo* review to the grant of summary judgment. *Id. at 459*.

[*P23] In the instant case, we elect to apply the same standard of *de novo* review to the grant of the motion to dismiss and to the application of judicial estoppel because the two issues are inseparable. If judicial estoppel was correctly applied, the granting of the motion to dismiss would necessarily follow. The inverse is equally true. We note that the circuit court judge who dismissed the plaintiffs' 2007 complaint was not the circuit court judge who presided over the 2001 litigation. The record reveals the judge's decision to apply judicial estoppel rested solely on his comparison of matters spread of record in the 2007 proceeding and matters spread of record in the 2001 proceeding. *HN4*[] "When a trial judge bases his decision solely on the same 'cold' record that is before the court of review, it is difficult to see why any deference should be afforded to that decision." *Toland v. Davis, 295 Ill. App. 3d 652, 654, 693 N.E.2d 1196, 230 Ill. Dec. 445 (1998)*. It appears the circuit court judge concluded that as a matter of law judicial estoppel applied. See *Redmond v. Socha, 216 Ill. 2d 622,*

634, 837 N.E.2d 883, 297 Ill. Dec. 432 (2005) **[***13]** (only when the trial court actually engages in an exercise of discretion should the abuse of discretion standard apply). Also, the *de novo* standard of review, which applies to the grant of a motion to dismiss, enables us to give full consideration to the plaintiffs' arguments regarding the application of judicial estoppel.

[*P24] Opinion Testimony

[*P25] The plaintiffs first argue that "opinion testimony in general, and medical opinion testimony in particular, are not subject to the application of the doctrine of judicial estoppel." The plaintiffs urge that judicial estoppel applies only to facts and hence cannot apply to the opinion testimony of an expert. In a related contention, the plaintiffs assert that judicial estoppel is limited to assertions of a "party," which would render judicial estoppel inapplicable to the testimony of an expert witness. We address the arguments together.

[*P26] The plaintiffs are correct that authority exists that casts doubt on the application of judicial estoppel to opinion testimony. See *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co., 259 Ill. App. 3d 836, 635 N.E.2d 485, 200 Ill. Dec. 146 (1994)*; *Department of Transportation v. Grawe, 113 Ill. App. 3d 336, 447 N.E.2d 467, 69 Ill. Dec. 250 (1983)*. As we explain below, we find the **[***14]** instant case distinguishable from those cases. The salient difference in this case is reflected in the trial court proceedings. The plaintiffs could have elected to pursue the case against the defendants under their discovery disclosures in the 2001 complaint, yet elected not to.[1] The crux of the plaintiffs' 2007 case rested on the opinion of Dr. Chenelle, which placed principal, if not exclusive, blame on Dr. Lipkis.

[*P27] In the 2001 complaint, the plaintiffs relied on the opinion espoused by Dr. Skaletsky to place principal responsibility on the Glenbrook doctors. According to Dr. **[**900]** **[****870]** Skaletsky's opinion, by August 12, **[***15]** when Kathleen was transferred to Abington and placed under the care of Dr. Lipkis, Kathleen had suffered the permanent and irreversible injuries for which she received compensation in the settlements with Glenbrook and Abington.

[*P28] The 2007 complaint, by necessity, alleged that only Dr. Lipkis was the proximate cause of Kathleen's injuries. To proceed against Dr. Lipkis, as the only remaining physician, the plaintiffs necessarily rejected the position espoused by Dr. Skaletsky's expert testimony that Kathleen suffered her permanent injuries on or before August 10, 1999, in favor of the position now espoused by Dr. Chenelle that Kathleen's permanent injuries did not occur until on or after August 14, 1999, when she was under Dr. Lipkis's care.

[*P29] The undeniable circumstance of the plaintiffs' offering conflicting medical opinions upon which they separately grounded different liability theories drives our decision not to follow the strict requirements for the application of judicial estoppel doctrine advanced by the cases, *Ceres Terminals* and *Grawe*, cited by the plaintiffs. Neither our research nor apparently that of the parties has disclosed the application of judicial estoppel in the context **[***16]** of a medical negligence case, making this a case of first impression. It may well be that medical negligence cases compel greater flexibility in the doctrine of judicial estoppel than has been recognized to date in other contexts. We discuss both *Ceres Terminals* and *Grawe* to explain where the analysis in this case diverges on the application of judicial estoppel to opinion testimony of a nonparty witness.

[1] The reason the plaintiffs elected not to litigate their claims against the instant defendants under the 2001 complaint seems clear. Under the 2001 theory of liability, Kathleen developed CES while a patient at Glenbrook. Under this theory, the plaintiffs would recover against the defendants only if they damaged the plaintiffs beyond the $3,200,000 the codefendants paid in settlements. See *Graham v. Northwestern Memorial Hospital, 2012 IL App (1st) 102609, ¶ 12* (trial court reduced plaintiff's $250,000 jury award to zero in light of a greater settlement with a codefendant).

[*P30] In *Ceres Terminals*, the landlord and business tenant disputed the fair market rental value of property used to determine the lease rate in a commercial lease. *Ceres Terminals, 259 Ill. App. 3d at 844*. At trial, the landlord presented the testimony of professional appraisers to establish the valuation of the property. *Id. at 844-45*. The circuit court rejected the business tenant's contention that judicial estoppel barred the appraiser's testimony based on the landlord's submission of a lower valuation amount in an earlier property tax assessment proceeding. *Id. at 849*. This court rejected the same contention by the business tenant on appeal. *Id. at 851-52*. In explaining our decision, we concluded that judicial estoppel did not apply to the sort of valuation opinion at issue in *Ceres* ***[***17]*** *Terminals*. *Id.* The appraiser's "representation was an *opinion* on the market value of the property, not a representation of a fact." (Emphasis in original.) *Id. at 851*. "The estimation of a property's fair market valuation is by its very nature an opinion, not a representation of fact." *Id. at 852*. We noted that "representations on matters of opinion are insufficient to support the invocation of the doctrine of judicial estoppel." *Id. at 851-52*.

[*P31] The opinion testimony at issue in this case is of a different type than the opinion testimony involved in *Ceres Terminals*. This case involves an action for medical negligence. ***HN5***[⬆] "The central issue in a medical-malpractice action is the standard of care against which a doctor's negligence is judged." *Curi v. Murphy, 366 Ill. App. 3d 1188, 1199, 852 N.E.2d 401, 304 Ill. Dec. 151 (2006)*. A deviation from the standard of care constitutes professional negligence, which must be *proved by expert testimony*. *Borowski v. Von Solbrig, 60 Ill. 2d 418, 423, 328 N.E.2d 301 (1975)*. In fact, absent an expert witness qualified **[**901]** **[****871]** to give standard of care testimony, the malpractice suit is subject to dismissal. See *McWilliams v. Dettore, 387 Ill. App. 3d 833, 841, 901 N.E.2d 1023, 327 Ill. Dec. 290 (2009)* (where plaintiffs' medical expert was not qualified **[***18]** to testify against defendant doctor, the circuit court properly granted motion to dismiss).

[*P32] In *Ceres Terminals*, the property valuation opinion testimony was offered to prove a factual dispute in the context of a declaratory judgment to declare the commercial lease expired. *Ceres Terminals, 259 Ill. App. 3d at 839*. Here, the 2007 expert opinion was offered not merely to resolve a factual dispute between the parties; Dr. Chenelle's opinion testimony provided an essential element of the plaintiffs' cause of action alleging medical negligence, a distinction we conclude takes this medical negligence case out of the holding in *Ceres Terminals* regarding the application of judicial estoppel to opinion testimony.

[*P33] In the instant case, the plaintiffs sought to replace the opinion of their original 2001 medical expert with the opinion of the medical expert they retained in 2007. The plaintiffs adopted a wholly new view of the facts in order to recover against the sole remaining physician. Had the plaintiffs taken the position they take now against Dr. Lipkis, that he is solely at fault for Kathleen's current condition, in their 2001 complaint, it is reasonable to conclude that they would not have **[***19]** received the $3 million settlement from Glenbrook Hospital. Nor can there be any doubt that Dr. Chenelle's expert opinion was offered to convince the eventual trier of fact that Dr. Lipkis should be found wholly responsible for Kathleen's current neurological state. This was the only purpose and intended effect of Dr. Chenelle's exert opinion. See *Barack Ferrazzano, 342 Ill. App. 3d at 462* ("Defendants' submission of plaintiff's detailed legal and expense billing could have had only the purpose and intended effect of persuading the *** arbitration panel to accept plaintiff's affidavit as true and, based upon the truth and accuracy of its submission, that the arbitration panel would grant the remedy requested."). This is precisely the sort of manipulation of the court system that judicial estoppel is designed to prevent. *Bidani, 285 Ill. App. 3d at 550* ***HN6***[⬆] (judicial estoppel is "designed to promote the truth and to protect the integrity of the court system"). The circuit court judge concluded as much: "I did not find this a difficult issue to resolve in my own mind."

[*P34] In this medical negligence case, where proof of causation rests on the opinion of an expert, the instant plaintiffs may not **[***20]** shield themselves, for purposes of the application of judicial estoppel, from the irrefutable finding that two factually inconsistent positions were taken in the 2001 and 2007 complaints based on the contention that the inconsistent positions were those of their experts, not of the plaintiffs personally. We find no basis to disagree with the circuit court that judicial estoppel applied in the instant case to protect the courts. See *Ceres Terminals, 259 Ill. App. 3d at 850*. Thus, unlike *Ceres Terminals*, we are unpersuaded that judicial estoppel is rendered inapplicable merely because the inconsistent positions clearly taken by the plaintiffs were espoused by medical expert witnesses rather than directly by the plaintiffs. The plaintiffs are not rendered immune from judicial estoppel merely because they retained a new medical expert witness who took a view of their case at odds with the view the plaintiffs espoused through their prior expert, **[**902]** **[****872]** Dr. Skaletsky, in the 2001 litigation that ended in substantial settlements.

[*P35] Nor is the circuit court's decision in this case at odds with the holding in *Grawe*. In *Grawe*, a worker employed by the Department of Transportation suffered a heart attack; **[***21]** he filed a claim with the Illinois Industrial Commission seeking workers' compensation benefits. *Grawe, 113 Ill. App. 3d at 338*. At a hearing before an arbitrator, the worker submitted into evidence statements by his doctors that he was "'totally disabled *at the present time*.'" (Emphasis in original.) *Id. at 342*. The arbitrator awarded benefits, finding that the worker was disabled and "wholly and permanently" incapable of working. *Id*. Over a year after the hearing, the worker underwent bypass surgery. *Id. at 338*. His physician sent a letter to the Department of Transportation stating that the worker was fit to return to his job. *Id*. The worker applied to "be reinstated to his position as a highway maintainer with the Department," which the Civil Service Commission granted. *Id*. In its appeal, the Department argued that the worker was estopped from asserting that he was able to perform his duties because he had already collected benefits on the basis of being "permanently disabled." *Id. at 341*.

[*P36] The *Grawe* court rejected the urging of the Department to apply judicial estoppel regarding the worker's claim that he was now physically able to do his prior work. *Id. at 343*. The court distinguished **[***22]** a similar case, *Department of Transportation v. Coe, 112 Ill. App. 3d 506, 445 N.E.2d 506, 68 Ill. Dec. 58 (1983)*, where the court upheld the application of judicial estoppel. *Grawe, 113 Ill. App. 3d at 342*. In *Grawe*, the worker himself never claimed before the Industrial Commission to be permanently disabled. *Id. at 342-43*. The majority rejected the Department's contention that statements from the worker's doctor should be binding on the worker. The court noted that the statements of the doctor were qualified: "'[T]he patient is totally disabled *at the present time* and the length of his disability is undeterminable *at this time*.'" (Emphasis in original.) *Id. at 342*. Neither statement constituted "an explicit statement that Grawe is permanently disabled." *Id*. The majority's examination of the record also compelled its conclusion that the settlement agreement adopted by the Industrial Commission, which superceded the arbitrator's finding of permanent disability, did not contain a "position" by Grawe that was inconsistent with the position he took before the Civil Service Commission in light of the Department's estoppel claim. *Id. at 342-43*. "The gravamen of the Department's equitable estoppel argument is that Grawe **[***23]** should have notified the Department of his coronary bypass operation prior to settling his claim against the Department, and that by failing to do so, Grawe misled the Department into believing that he was permanently incapacitated from performing his duties as a highway maintainer at the time of the settlement." *Id. at 343*. The court rejected the Department's logic and concluded judicial estoppel did not apply. *Id. at 343*. Notably, it appears the majority declined to bind Grawe to the statements

of his doctors because the statements were opinions; the dissent, however, would have applied "judicial estoppel" to bar Grawe's claim for reinstatement. *Id. at 345* **[**903]** **[****873]** (Trapp, J., dissenting).

[*P37] We find no reason to disagree with the decision in *Grawe*. Unlike in *Grawe*, where the worker's health improved following bypass surgery, there has been no change in the circumstances from 2001 to 2007 in the instant case. Rather, the change occurred only in the plaintiffs' theory of liability. We conclude that neither *Grawe* nor *Ceres Terminals* is at odds with the circuit court's application of judicial estoppel in this case.

[*P38] The plaintiffs have alleged that Dr. Lipkis was the proximate cause of Kathleen's **[***24]** injuries, and they sought to establish that fact the only way they could — through Dr. Chenelle's expert opinion. While clearly a proffered opinion, it is an opinion on behalf of the plaintiffs that the plaintiffs wish to have ultimately accepted by the trier of fact, much as the plaintiffs would have asked the jury to accept Dr. Skaletsky's opinion had the 2001 complaint gone to trial. We do not hesitate to conclude that Dr. Chenelle's opinion was, from the plaintiffs' perspective, a "representation of fact" of the proximate cause of Kathleen's neurological damage. *Cf. Ceres Terminals, 259 Ill. App. 3d at 851-52*.

[*P39] It is also clear that had a trial ensued based on the 2007 complaint, the jury would have been presented with opinions from Dr. Chenelle and Dr. Skaletsky, on opposite sides of the proximate cause issue, each of whom had at some point offered support to the claims of the plaintiffs. It is likely the jury would have been informed or at least been able to infer that the plaintiffs first placed principal liability on Glenbrook based on the expert opinion of Dr. Skaletsky; relying now on the expert opinion of Dr. Chenelle, the plaintiffs would seek to place principal liability **[***25]** on Dr. Lipkis. It is fair to say that the contrary claims would be seen by the jury as a cynical manipulation of the court system in an effort to benefit the plaintiffs under a theory different from the one that resulted in settlements of $3,200,000. ***HN7***[↑] The purpose of judicial estoppel is "to promote the truth and to protect the integrity of the court system by preventing litigants from deliberating shifting positions to suit the exigencies of the moment." (Internal quotations marks omitted.) *Barack Ferrazzano, 342 Ill. App. 3d at 460*. We agree with the circuit court that, as a matter of law, protecting the integrity of the court system compelled the application of judicial estoppel to the plaintiffs' claims in their 2007 complaint.

[*P40] The opinion testimony at issue in this case is precisely the sort that stands for a representation of fact, as plainly urged by the plaintiffs in this medical malpractice case; the medical opinion testimony is substantially different from the fair market valuation of property at issue in *Ceres Terminals* to take this case out of its cautionary language that "representations on matters of opinion are insufficient to support the invocation of the doctrine of **[***26]** judicial estoppel." *Ceres Terminals, 259 Ill. App. 3d at 851-52*.

[*P41] We reject the plaintiffs' overarching contention that either separately or in combination, the three arguments urged persuade against the application of judicial estoppel in the context of this medical malpractice case.

[*P42] Binding Assertions

[*P43] The plaintiffs maintain that judicial estoppel is precluded where the 2001 proceeding ended with the settlements because "[n]o evidence or testimony was presented to the court regarding the parties' settlements" to permit a court to determine **[**904]** **[****874]** the binding assertions underlying the settlements. To support this claim, the plaintiffs observe that the "opinions in this case were made in different depositions in the different actions." The plaintiffs also argue that the opinions of Dr. Skatelsky and Dr. Chenelle are not totally inconsistent and thus cannot support the

application of judicial estoppel. According to the plaintiffs, the expert opinions "include[d] elements of agreement and disagreement. For instance, both experts testified that *cauda equina* syndrome presents a neurological emergency, that the sooner the surgery the better the outcome for the patient, and that Kathleen's bowel **[***27]** and bladder deficits occurred in or became progressively worse at the Abington."

[*P44] In the 2001 litigation, Dr. Skaletsky stated that Kathleen had to undergo emergency surgery on or before August 10, 1999, to have "significantly more" neurological function than she has now. He stated that by August 14, it was too late for surgery to make any difference in Kathleen's condition. In direct contradiction to the opinion offered by the plaintiffs through Dr. Skaletsky, the plaintiffs now offer Dr. Chenelle's testimony that Kathleen had not yet displayed neurological symptoms on August 14 and therefore she was a candidate for emergency CES surgery for a few days after that date. To deflect the claim that they have changed their position, the plaintiffs assert Dr. Chenelle's testimony is based on the reasonable assumption that Dr. Lipkis was correct when he claimed that Kathleen's August 14 examination revealed no neurological abnormalities, which Dr. Lipkis testified to during his deposition in the 2001 litigation.

[*P45] *HN8*[↑] The concern addressed by the doctrine of judicial estoppel is the taking of inconsistent positions, not with which position is truthful. *Bidani, 285 Ill. App. 3d at 550* ("judicial **[***28]** estoppel precludes a contradictory position without examining the truth of either statement"). Dr. Lipkis's testimony did not change from the 2001 complaint to the 2007 complaint. It is the plaintiffs' position that has changed. Under their 2001 liability theory premised on Dr. Skaletsky's opinion, the plaintiffs necessarily claimed that the examination on August 12 by the Glenbrook defendants, showing Kathleen's function in the lower extremities was appropriate, was inaccurate. In so contending, the plaintiffs necessarily took the position that Dr. Lipkis's examination on August 14, showing no neurological abnormalities, was equally inaccurate. The plaintiffs now necessarily take the position that both examinations were accurate to support their contention that the CES developed after August 14, while Kathleen was under the care of Dr. Lipkis.

[*P46] *HN9*[↑] Judicial estoppel is a common law doctrine. It is flexible and not reducible to a pat formula. *Bidani, 285 Ill. App. 3d at 550*. Not every requirement of the doctrine noted in prior decisions will necessarily apply under the circumstances of a particular case. See *Barack Ferrazzano, 342 Ill. App. 3d at 465 n.8* (technical requirement of an oath **[***29]** discarded when its requirement is illogical). This is especially true when strict application of a requirement would frustrate the public policy underlying the application of the doctrine.

[*P47] The plaintiffs' facile claim that Dr. Chenelle's opinion was contrary to Dr. Skaletsky's opinion merely because Dr. Chenelle "assumed" the accuracy of the August 14 examination by Dr. Lipkis does not entitle the plaintiffs to a second bite at the negligence apple. In our judgment, it matters not that the plaintiffs can point to **[**905]** **[****875]** Dr. Lipkis's August 14 examination to support their new theory of liability. Our decision is driven by the inconsistent positions undeniably taken by the plaintiffs in the 2001 litigation and 2007 litigation. In the 2001 litigation, the plaintiffs necessarily asserted that the August 12 examination by Glenbrook (and implicitly the August 14 examination by Dr. Lipkis) was negligently performed given Dr. Skaletsky's opinion that Kathleen was "an urgent surgical candidate" on August 10. In the 2007 litigation, the plaintiffs now assert that the August 14 examination by Dr. Lipkis was competently performed.

[*P48] Thus, given the conflicting expert opinions offered by the plaintiffs, **[***30]** this case is indistinguishable from the situation of an adept litigant arguing one proposition in the original suit

and then seeking to persuade a trier of fact that a contrary proposition should be taken as true in a later suit. The plaintiffs may not urge that CES occurred no later than August 10, in the 2001 lawsuit, benefit under that proposition, only to then urge that CES occurred on or after August 14, in order to receive a benefit under the 2007 complaint against the only remaining physician. The plaintiffs may not shield themselves from judicial estoppel merely because the assertions, plainly made by the experts on the plaintiffs' behalf, never arose during the course of a trial.

[*P49] We reject the plaintiffs' argument that no binding assertions were made in the 2001 litigation to preclude the application of judicial estoppel regarding the plaintiffs' claims in their 2007 complaint.

[*P50] Benefit

[*P51] Lastly, the plaintiffs argue that before the circuit court could find that they received a "benefit" from the 2001 litigation, there must be a showing that the settlements came about from Dr. Skaletsky's proximate cause opinion. The plaintiffs contend judicial estoppel is inapplicable where **[***31]** no "evidence" was introduced as to the foundation for the settlements. "[The plaintiffs] dispute that any particular fact, opinion, testimony, or proposition was the basis of their settlement with the hospital defendants. There is absolutely no evidence of any reason or reasons the parties settled. *** As such, the defendants have failed to prove by clear and convincing evidence that the plaintiffs received any particular benefits from Dr. Skaletsky's opinions."

[*P52] As we concluded above, the plaintiffs took two factually inconsistent positions in the 2001 litigation and the 2007 litigation with the intent that the respective trier of fact would accept the plaintiffs' position before it as true. The plaintiffs now contend there must exist "evidence" that the settlements the plaintiffs received came about through Dr. Skaletsky's opinion they offered in the 2001 litigation before their claims in the 2007 litigation can be barred by judicial estoppel. According to the plaintiffs, without such evidence, no showing can be made that they "benefitted" under the doctrine of judicial estoppel. We disagree.

[*P53] The court's concern under the doctrine of judicial estoppel is with inconsistent positions **[***32]** taken by the plaintiffs, not with the truthfulness of either position. *Bidani, 285 Ill. App. 3d at 550* ("judicial estoppel precludes a contradictory position without examining the truth of either statement"). Not surprisingly, the plaintiffs do not cite a single case that holds that an evidentiary link must be proved between the undeniable benefit the plaintiffs received and the acknowledged inconsistent opinion given by Dr. Skaletsky in the 2001 litigation. To quote *Bidani*, the plaintiffs are "overstating the requirement." *Bidani, 285 Ill. **[**906]** **[****876]** App. 3d at 552*.

[*P54] In *Bidani*, judicial estoppel was applied even in the absence of a concrete benefit to the party that was estopped. In that case, the circuit court entered summary judgment to the defendants when it was proved that Dr. Bidani had "testified that he had no interest in businesses in a prior lawsuit and now claims in this suit that he does have an interest in the same businesses." *Id. at 547*. The prior lawsuit concerned proceedings in his dissolution of marriage in which he denied having ownership in any undisclosed businesses. Dr. Bidani did not disclose ownership in the businesses during the dissolution proceedings that were the subject **[***33]** of the litigation from which he appealed. Against the argument "that he did not receive any benefit from his position in the divorce proceeding" (*id. at 552*), we upheld the application of judicial estoppel based on the "trial court [having] approved the settlement agreement and entered final judgment without including Dr. Bidani's alleged interests in those companies" (*id. at 553*). We quoted approvingly from a federal case: ***HN10***[⬆] "'Sometimes a settlement sidesteps

the issue in the first case, so that neither side prevails on a particular contested issue. *** Persons who triumph by inducing their opponents to surrender have "prevailed" as surely as the persons who induce the judge to grant summary judgment.'" *Id. at 553* (quoting *Kale v. Obuchowski, 985 F.2d 360, 362 (7th Cir. 1993)*.

[*P55] We need say nothing more than the plaintiffs as a matter of common sense and law benefitted from their claims in the 2001 litigation.

[*P56] The plaintiffs also argue that no determination can be made that they intended the trier of fact to accept as true any assertions made in the 2001 case because no evidence was ever presented to the trier of fact. In essence, this argument is a revival of the claim that no binding **[***34]** assertions were made because the case did not go to trial. A rejected argument cast anew is no more persuasive. We add to our conclusions *supra* that the plaintiffs filed notice with the circuit court that they intended to use Dr. Skaletsky as an expert witness on proximate cause in the 2001 litigation. They presented him at the deposition to give his opinions under oath. If, as the plaintiffs now intimate, they may not have intended for the trier of fact to accept Dr. Skaletsky's assertions as true, it is difficult to comprehend why they retained him as an expert witness.

[*P57] In the absence of authority that stands for the proposition the plaintiffs urge before us regarding the clear benefit they received, we remain persuaded that all the requirements under the doctrine of judicial estoppel were established in this case. To be clear, we have no doubt that without Dr. Skaletsky's opinion that Kathleen had to undergo emergency surgery on or before August 10, 1999, to have "significantly more" neurological function than she has now, the plaintiffs would not have received settlements of $3,200,000. See *McNamara v. City of Chicago, 138 F.3d 1219, 1225 (7th Cir. 1998)* ***HN11***[↑] ("The doctrine of judicial **[***35]** estoppel requires *** that the party sought to be estopped have obtained a favorable judgment or *settlement* ***." (Emphasis added.))

[*P58] We strongly reject the bald contention that a showing must be made of the "reasons the parties settled" before the plaintiffs can be found to have received a benefit from the inconsistent positions taken **[**907]** **[****877]** in the 2001 and 2007 lawsuits to trigger judicial estoppel.

[*P59] Defendants' Claim of *Res Judicata*

[*P60] The defendants offer *res judicata* as another basis to affirm the circuit court's decision to dismiss the 2007 complaint. The plaintiffs assert this contention was forfeited when the defendants failed to raise this argument before the circuit court. Because we affirm the judgment of the circuit court and follow its reasoning, we do not examine the viability of the *res judicata* argument.

[*P61] CONCLUSION

[*P62] Under our *de novo* review and limited to the context of this medical negligence case, we conclude the circuit court correctly applied judicial estoppel to dismiss the plaintiffs' refiled complaint in 2007 that asserted a factual underpinning of the theory of liability that was at odds with the factual underpinning of the liability theory the plaintiffs asserted in their **[***36]** original complaint, which ended in substantial settlements. Of course, if the application of judicial estoppel was subject to review under an abuse of discretion standard, our decision would be the same. We affirm.

[*P63] Affirmed.

Dissent by: ROBERT E. GORDON

Dissent

[*P64] PRESIDING JUSTICE ROBERT E. GORDON, dissenting:

[*P65] I must respectfully dissent for several reasons. First, since the two complaints are essentially the same with respect to this defendant, I cannot find judicial estoppel.

[*P66] The majority does not discuss the allegations in the complaints against this defendant. Dr. Lipkis is a defendant in the first complaint, which alleges that his wrongful conduct occurred between August 12 and August 18, 1999. The second complaint against Dr. Lipkis makes essentially the same allegations, namely, that he failed to diagnose plaintiff's condition during this same time period. As a matter of fact, the two complaints are essentially the same as to Dr. Lipkis.

[*P67] The Background section of the majority opinion offers facts, but without a source for those facts. Since the first suit never reached a trial, no factfinder ever found what the facts are.

[*P68] Second, the majority sets out the five requirements for judicial estoppel (majority **[***37]** opinion, at ¶ 20), but does not discuss all five. When a doctrine has five requirements, we can reverse if one is missing but, to affirm, we need to analyze all five. The majority finds that de novo review applies (majority opinion, at ¶¶ 22-23), but then affirms without reviewing de novo all five.

[*P69] Third, the fifth requirement is not satisfied. As the majority observes, the fifth requirement is that the party succeeded in the first proceeding and received some benefit from it (majority opinion, at ¶ 20). This is a two-part requirement that requires both: success in a judicial proceeding, as well as some benefit. However, other than dicta from two decades-old federal cases, the majority offers no case law to support its assumption that the fact of a settlement between private parties, by itself, qualifies as success in a judicial proceeding (majority opinion, at ¶¶ 54, 57). For example, in *Bidani*, which the majority discusses extensively (majority opinion, at ¶¶ 53-55), there was more than a simple settlement. The trial court entered both a judgement of dissolution of marriage, as well as an agreed order. *Bidani, 285 Ill. **[**908]** **[****878]** App. 3d at 549*.

[*P70] While judicial estoppel serves to prevent a party **[***38]** from "'[h]oodwinking a court,'" there is no evidence that a court was hoodwinked here. *Bidani, 285 Ill. App. 3d at 553*, quoting *Kale, 985 F.2d at 361* (this is the first part of the quote provided by the majority at ¶ 54). The best argument that can be made along these lines is that plaintiff somehow hoodwinked the well-represented hospitals and doctors into settling. However, where the trial court has not issued any judgment, I fail to see how a court was hoodwinked. *Cf. Goodman v. Hanson, 408 Ill. App. 3d 285, 300, 945 N.E.2d 1255, 349 Ill. Dec. 103 (2011)* ("dismissal does not operate as a final judgment on the merits for purposes of *res judicata*, because 'an agreed order is not a judicial determination of parties' rights'"), *quoting Kandalepas v. Economou, 269 Ill. App. 3d 245, 252, 645 N.E.2d 543, 206 Ill. Dec. 538 (1994)*; *Currie v. Wisconsin Central, Ltd., 961 N.E.2d 296, 356 Ill. Dec. 200, 2011 IL App (1st) 103095, ¶ 29*.

[*P71] Fourth, although the majority, in essence, gives the settlement agreements preclusive effect, the majority fails to discuss any statements actually made in the agreements, because there are none that are relevant here. The settlement agreements do not indicate that they are based on representations made by the agents of any party. They do not contain any admissions, **[***39]** or factual or legal findings. *Moy v. Ng, 371 Ill. App. 3d 957, 963, 864 N.E.2d 752, 309 Ill. Dec. 511 (2007)* (even agreed orders do not create judicial estoppel where they contain no admissions or findings of law or fact). These agreements are completely consistent with plaintiff's current position.

[*P72] Fifth, the agreements do not support the majority's bald assertion that one prior expert's opinion in a multi-expert case *must have* caused these settlements. Parties settle for many reasons other than the opinion of a single expert in a multi-expert case: to avoid adverse publicity; to curtail litigation that can have such mounting costs that a

win can seem like a loss; to gain a certain and fixed cost; or because of lost medical records, such as those lost by the defendants in this case. However, the majority baldly asserts that "we have no doubt" that the opinion of one prior expert caused the settlement (majority opinion, ¶ 57).

[*P73] The majority also cites *Bidani* for the proposition that there does not have to be "an evidentiary link" between the statement and its benefit (majority opinion, ¶ 53). *Bidani* does not say that, and it does not stand for that. In fact, it stands for just the opposite. In *Bidani*, a husband in a **[***40]** divorce proceeding swore under oath during a court proceeding that he did not have an interest in certain companies. *Bidani, 285 Ill. App. 3d at 548*. The divorce judge then entered an agreed order and a final dissolution of marriage which did not include the husband's interest in those companies. *Bidani, 285 Ill. App. 3d at 553*. Then, in a second and unrelated action, the husband filed suit, now claiming ownership and profit interests in those same companies. *Bidani, 285 Ill. App. 3d at 553*. The trial court in the second suit entered summary judgment based on the judicial estoppel created by the husband's own sworn statements in the first action. *Bidani, 285 Ill. App. 3d at 547*. The appellate court held that, even though the divorce judge had not made a formal "judicial decision" that the husband lacked an interest in the companies, the appellate **[**909]** **[****879]** court could nonetheless find a direct link between the husband's sworn statement claiming no interest and the divorce judge's decision not to include that interest in the final judgment of dissolution. *Bidani, 285 Ill. App. 3d at 553*. Because the appellate court found that the judgment was the "result" of the statement, the appellate court **[***41]** affirmed the use of judicial estoppel. *Bidani, 285 Ill. App. 3d at 553*. By contrast, in the case at bar, it is unlikely that the hospital settled solely due to the anticipated testimony of one expert in a multi-expert case, particularly when the hospital had ready — not one, not two, but — five dueling experts of its own. As stated above, it is far more likely that the hospital settled: to avoid adverse publicity; to curtail litigation; to gain a certain and fixed cost; or because of the medical records apparently lost by the settling defendants.

[*P74] Sixth, the majority overlooks the fact that a complaint may be amended at any time and often is. As discovery progresses, and new evidence emerges, and parties are dismissed, the complaint is often amended to conform to the evidence. The irony here is that, if plaintiff had simply filed an amended complaint in the same suit rather than dismissing and refiling, there would have been no judicial estoppel argument, and we would have reviewed the issue in the context of whether the trial court had erred in allowing or denying the filing of the amended complaint. In the case at bar, the trial court's order dismissing the other defendants specifically **[***42]** "ordered that this matter will continue as to EVAN LIPKIS, M.D. and EVAN L. LIPKIS, M.D., S.C." Since this defendant was named in the first suit and the theory of liability has never changed as to that defendant, our case is different from those cases in which a party brings suit against one defendant, reaches a settlement, and then files a complaint with whole new allegations against a whole new party. This complaint has essentially the same allegations against the same party.

[*P75] Seventh, the majority states that it could not find a single case applying judicial estoppel in a medical negligence case, and concludes that this is a reason "not to follow the strict requirements for the application of judicial estoppel doctrine advanced by the cases" (majority opinion, at ¶ 29). I must respectfully differ. If none of our colleagues have seen fit to use this doctrine as a bar in a medical negligence case, then this is a reason for us to hesitate to use it as a bar and, at the very least, to apply its requirements strictly — not loosely, as the majority holds.

[*P76] Eighth, this is a failure-to-diagnose case. Plaintiffs' first expert found that all the defendants failed to diagnose. After the other **[***43]** defendants settled out, plaintiff retained a

new expert who found the failure was primarily the failure of the remaining defendant. We can take judicial notice of the fact that, in medical negligence cases, after some defendants have settled out, plaintiffs often retain new experts. If we find judicial estoppel in this context, we will change the way medical negligence law is practiced. That is why neither the majority nor defendant can find a case which supports their use of judicial estoppel in this context. *Bidani, 285 Ill. App. 3d at 550* (even when all five factors of the judicial estoppel doctrine are satisfied, a court should apply the doctrine "cautiously" and "only when not to do so would result in an injustice").

[*P77] For these reasons, I must respectfully dissent.

End of Document

House Bill 297

With me today I have Chuck Winkler who will explain the bill to you. Let's do it the fast, simple way.

Thank you for giving me the opportunity to address you regarding this bill. Basically, what we are proposing here is not a substantive change in the law. What we are asking you to do is to allow an easier way to commence a law action when a person is deceased. And we believe that this legislation will accomplish that, that it is not only a time saver but a money saver and a less burden on the court system. And let me tell you why.

Actually the bill is in two parts. We are talking about amending the Code of Civil Procedure Section 52108 and Section 513209, I'm going to start with 513209, now the present law allows a filing of an action where a plaintiff or defendant is deceased. The action survives. Now the present law is silent as to the mechanics of appointing someone to commence the action when someone is dead. The procedure that's now involved is to go into a probate proceeding and ask the court to appoint an administrator or an executor. That is a separate action, a separate filing fee and another matter that is set in the system that doesn't have to be there. And this amendment takes care of that by simply doing this. It gives a judge the power to appoint a special representative upon a motion filed by someone who says look, my client is dead or the defendant is dead, judge please appoint someone so we can go ahead and file and the court will do that and the safeguards that are in the probate act are in this amendment. The person who is appointed is compelled to give notice to the heirs and legatees that he or she has been appointed and what the case is about and give them an opportunity if they wish to come in and be the party in the case.

Section 52108, the existing law where you have an action pending, Plaintiff is alive, Defendant is alive, one of those parties dies, provides exactly what I am telling you is taking place in 513209 with the additional safeguards of the probate act. Meaning, that if in the existing law where the case is pending both parties are alive, one dies, the judge then upon substituting the special representative will mandate that the representative notify the heirs and legatees what has happened. So simply what we are asking you to do is to allow us, those of us in the civil arena so to speak, to save some time, save money, and not throw another case into the court system, it is not necessary. We have as proponents of this Jim Collins of the Illinois Trial Lawyers Association, Chuck Winkler Attorney at law and Dan Houlihan, Legislative Counsel ISBA. No opponents listed.

[Unknown person 1 asking question] Thank you, Representative Lang is this the result of any case that has come up or any factual situation or is this something from the bar association.

No I don't know of any case I can point to specifically, but as a matter of practice the attorneys that are involved in civil litigation are confronted from time to time with a situation where one of the potential parties to the litigation is deceased and we are now at a point where the statute of limitations is just about there. Now if you go into the probate proceedings to appoint someone in order to go forward with the case, the time element involved here may cause an expiration of the statute and therefore defeat the case. What we are doing is really saying look, let's make it easier get things moving through the system efficiently, timely and without the cost that is presently involved but we have to go to a separate division of the court and ask a judge to start a separate case so to speak with the appointment of someone who can either commence the action or someone who can defend the action.

[Unknown person 1] Well wouldn't it be true that usually the representative that is in the probate court would know that this action was going to take place or that somebody has died?

[Lang] Well, simply this, you wouldn't need this if there was somebody in the probate division appointed, you just go ahead and serve that person or that person could commence the case....

[Unknown person 1] That's not quite.... let's say somebody that is involved in this is in the hospital and is supposedly will be terminal so there is somebody that's dealing with this person, I guess I am looking to get to the factual situation where this would arise, that this would be known in probate.

[Lang] Well, really it is not known in probate until some action takes place in probate. You have a person, say who is terminal, that person can be sued, that person can sue. That person is in being, in existence. What we are talking about is where someone has died. How do you get that started in a civil matter and this bill addresses that to simplify the procedure and yet give all the safeguards that do exist under the Probate Act and that's what it does.

[Unknown person 2] Let me point out this is a joint proposal from both the tort law and probate law sections of the state bar association, it is not intended to affect substantive rights, simply to facilitate litigation and reduce costs.

Motion to pass Representative Lang 1100. House Bill 297 will be forwarded out to the floor.

IN THE ILLINOIS SUPREME COURT

JAMIE LICHTER, Plaintiff-Appellee, vs. KIMBERLY PORTER CARROLL, Illinois as Special Administrator of the Estate of DONALD CHRISTOPHER, Deceased, Defendant-Appellant.	)	On Appeal from the Illinois Appellate Court, First District No. 1-20-0828 There heard on appeal from the Circuit Court of Cook County, County Department, Law Division No. 2018 L 00696 The Honorable John H. Ehrlich, Judge Presiding.

AFFIDAVIT OF JOHN R. WIENOLD

John R. Wienold, being first duly sworn, upon oath deposes and states as follows:

1) That I have read the contents of the attached motion and the same are true and correct to the best of my knowledge.

2) That on April 30, 2021, while working on the matter of *Cross v. Ochsenschlager*, No. 2-21-0330 in the Appellate Court of Illinois, a case concerning the same issue as in the case at bar. I contacted the legislative service in Springfield, Illinois and spoke with a clerk at that location who then directed me to another person, based upon the number and age of the statute, who then directed me to Archives. I then called Archives and the person there directed me to the phone number for the House Committee Clerk's Office. I spoke with one of the clerks at that time and she indicated that she would research whether a recording of the proceedings in the House Judiciary Committee existed and that she would get back to me. On Monday, May 3, 2021, I again called the clerk's office and spoke with another clerk, Tina Pierce, and after having given her the number of the house bill HB-297, she researched whether proceedings before the House Judiciary Committee had been recorded and she then indicated they were. She then agreed to forward on to me a copy of that audio, which had not been transcribed.

3) That thereafter, on May 3, 2021, I listened to and reviewed the audio recording, and

our offices subsequently transcribed the audio recording.

4) That based upon my listening and review of the audio recording, it is my understanding that representative Lang was a presenter and sponsor of the bill before the House Judiciary Committee and that he presented attorney Charles Winkler as a witness who testified with regard to the drafting of the bill, the purpose of the bill and answered questions by the committee pertaining to the bill.

5) That one or two unidentified House Judiciary Committee members questioned Mr. Winkler about the bill, its purpose and the reason for a Trial Court appointing a special representative when a potential plaintiff or defendant became deceased and the fact that under those circumstances the special representative would be appointed by the Trial Court to avoid the necessity, expense, and additional judicial burden on the court system of going through a separate filing in the Probate Court and opening an estate.

6) I have listened to the audio version and have read a transcribed copy of the proceedings of February 19, 1997 and to my knowledge the transcription accurately recites what the audio recording provided.

7) That Ms. Tina Pierce, by email, forwarded me a copy of the February 19, 1997 audio of the hearing and presentation of the HB-297 which was attached to the transmittal email. A copy of the email and the audio hearing and presentation is attached as *Exhibit 1*.

Further this deponent sayeth not.

John R. Wienold

SUBSCRIBED TO AND SWORN
to before me this 30th day of
November, 2022.

NOTARY PUBLIC

OFFICIAL SEAL
DARLENE C OLSON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 05/12/2026

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

JAMIE LICHTER, *Plaintiff-Appellee,* v. KIMBERLY PORTER CARROLL, as Special Representative of the Estate of DONALD CHRISTOPHER, Deceased, *Defendant-Appellant.*	)	No. 128468

The undersigned, being first duly sworn, deposes and states that on January 4, 2023, there was electronically filed and served upon the Clerk of the above court the Brief and Supplemental Appendix of Appellee. On January 4, 2023, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Ellen J. O'Rourke
Jean M. Bradley
Yvonne M. Kaminski & Associates
home.law-kaminski@statefarm.com
ellen.orourke.gc7h@statefarm.com

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Yao O. Dinizulu
Yao O. Dinizulu

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Yao O. Dinizulu
Yao O. Dinizulu