SURVEY OF ILLINOIS LAW: CIVIL PROCEDURE

Timothy J. Chorvat and Christine P. Benavente*

I. INTRODUCTION

In this survey, we discuss a number of important civil practice and procedure cases that Illinois courts decided in late 2008 and in 2009. We also discuss recent amendments to the Supreme Court Rules that apply to civil practice issues.

The cases we consider do not introduce any startling innovations in civil practice law, although they advance a number of facets of the law. They also illustrate the serious, even case-dispositive, consequences that can follow from a failure to comply fully with the Code of Civil Procedure (the "Code") and the Supreme Court Rules (the "Rules").

II. ILLINOIS SUPREME COURT DECISIONS

A. Notice of Appeal

1. People v. Laugharn[1]

Section 2-1401[2] of the Code provides relief from final judgments if the petitioner is able to show by a preponderance of evidence that newly discovered information, if presented at the trial, would have resulted in a different outcome.[3] In *People v. Laugharn*, the Illinois Supreme Court held that the circuit court's *sua sponte* dismissal of the defendant's *pro se* section 2-1401 petition was premature because the dismissal occurred before the 30-day period to answer or otherwise plead had expired.[4]

In 1996, the defendant, Mildred Laugharn, had been convicted and sentenced to 28 years of incarceration for the murder of her husband.[5] The defendant filed a petition for post-conviction relief under the Post-Conviction

---

* Mr. Chorvat is a partner and Ms. Benavente is an associate with Jenner & Block LLP in Chicago.

1. People v. Laugharn, 233 Ill. 2d 318, 909 N.E.2d 802 (2009).
2. 735 ILL. COMP. STAT. ANN. 5/2-1401 (West 2004).
3. People v. Vincent, 226 Ill. 2d 1, 7–8, 871 N.E.2d 17, 22 (2007).
4. *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805.
5. *Id.* at 320, 909 N.E.2d at 803.

Hearing Act.[6] That petition was dismissed in 1999.[7] On August 24, 2004, the defendant filed a *pro se* petition for post-judgment relief under section 2-1401 of the Code.[8] In her post-judgment petition, the defendant asserted that, since her earlier appeal, she had discovered new evidence that had been withheld or unknown during trial.[9]

On September 2, 2004, the circuit court *sua sponte* dismissed the section 2-1401 petition as untimely, stating "that the petition was filed far beyond the two-year limitation as required in 735 ILCS 5/2-1401(c) and therefore the petition is dismissed."[10] A section 2-1401 petition provides relief from a final judgment after 30 days of its entry if the petitioner proves certain elements by a preponderance of evidence.[11] A section 2-1401 petition must be filed within two years after the entry of the final order, but the statute provides an exception to the two-year period for legal disability, duress, or fraudulent concealment.[12]

The appellate court affirmed the *sua sponte* dismissal based on the circuit court's inherent authority to control its docket.[13] The defendant filed a petition for leave to appeal.[14] The Illinois Supreme Court denied the defendant's petition and ordered the appellate court to reconsider its decision in light of the court's recent opinion in *People v. Vincent*.[15] On remand, the appellate court concluded that *Vincent* did not alter the case's outcome and affirmed its original decision.[16]

On a renewed appeal, the Illinois Supreme Court undertook a *de novo* review and held the circuit court's dismissal of the defendant's section 2-1401 petition was premature.[17] The supreme court's decision is significant for two principal reasons: (1) it highlights the notice requirements in a section 2-1401 petition; and (2) it clarifies the boundaries of a lower court's *sua sponte* dismissal power in section 2-1401 petitions.

In holding that the circuit court's dismissal of the section 2-1401 petition had been premature, the supreme court emphasized that the petition was

---

6. *Id.* (citing 725 ILL. COMP. STAT. ANN. 5/122-1 (West 1998)).
7. *Laugharn*, 233 Ill. 2d at 320, 909 N.E.2d at 803.
8. *Id.*
9. *Id.* at 320, 909 N.E.2d at 804.
10. *Id.* at 321, 909 N.E.2d at 804.
11. 735 ILL. COMP. STAT. 5/2-1401(c) (2008).
12. *Id.*
13. *Laugharn*, 233 Ill. 2d at 321, 909 N.E.2d at 804.
14. *Id.*
15. *Id.* at 320, 909 N.E.2d at 803 (citing People v. Vincent, 226 Ill. 2d 1, 871 N.E.2d 17 (2007)).
16. *Laugharn*, 233 Ill. 2d at 320, 909 N.E.2d at 803.
17. *Id.* at 322–24, 909 N.E.2d at 804–05.

dismissed only seven days after it had been filed.[18] The supreme court observed that the State was entitled to notice of the filing under section 2-1401.[19] Rule 106, which sets out notice procedures for section 2-1401 petitions, instructs litigants to follow Rule 105.[20] Rule 105 states, in part, that the responding party must "file[ ] an answer or otherwise file[ ] an appearance in the office of the clerk of the court within 30 days after service . . . ."[21] The court reasoned that by dismissing the section 2-1401 petition after only seven days, the trial court "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead."[22]

The supreme court distinguished its prior opinion in *Vincent*.[23] In *Vincent*, the Illinois Supreme Court affirmed a circuit court's *sua sponte* dismissal of the defendant's section 2-1401 petition.[24] The *Vincent* court held, *inter alia*, that responsive pleadings are not required in section 2-1401 proceedings any more than they are required in other civil proceedings.[25] In *Laugharn*, the supreme court stated that the petition in *Vincent* had been ripe for adjudication because the well-pleaded facts were admitted at the time of the dismissal.[26] The court clarified that although *Vincent* allowed for the *sua sponte* dismissal of a section 2-1401 petition, it did not support a dismissal before the time to answer or otherwise plead has expired.[27] Accordingly, the supreme court vacated the dismissal and remanded the case for further review.[28]

2. Keener v. City of Herrin[29]

An appellant must file a notice of appeal within 30 days after the entry of a final judgment.[30] However, section 2-1401 of the Code provides relief from a final judgment after 30 days of its entry if the petitioner proves certain elements by a preponderance of evidence.[31] In *Keener v. City of Herrin*, the

18. *Id.* at 323, 909 N.E.2d at 805.
19. *Id.*
20. ILL. SUP. CT. R. 106.
21. ILL. SUP. CT. R. 105(a).
22. *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805.
23. *Id.*
24. People v. Vincent, 226 Ill. 2d 1, 9, 871 N.E.2d 17, 24 (2007).
25. *Id.*
26. *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805.
27. *Id.* at 323, 909 N.E.2d at 805 (citing *Vincent*, 226 Ill. 2d at 10, 871 N.E.2d at 24).
28. *Laugharn*, 233 Ill. 2d at 324, 909 N.E.2d at 805.
29. Keener v. City of Herrin, 235 Ill. 2d 338, 919 N.E.2d 913 (2009).
30. *See* ILL. SUP. CT. R. 303 (governing jury trials); 735 ILL. COMP. STAT. 5/2-1203(a) (2002) (governing bench trials).
31. 735 ILL. COMP. STAT. 5/2-1401(c) (2008).

Illinois Supreme Court held that a plaintiff's motion to reconsider filed more than 30 days after the suit had been dismissed did not constitute a proper section 2-1401 petition, and that the circuit court lacked jurisdiction to consider the motion.[32]

The plaintiff, Jennifer Keener, brought suit individually and as personal representative of the decedent against the City of Herrin, alleging willful and wanton misconduct.[33] The plaintiff's daughter had been killed shortly after being released from police custody, where she had been held on a charge of unlawful consumption of alcohol by a minor.[34] Asserting government immunity, the defendant filed a motion to dismiss.[35] On September 13, 2005, the motion to dismiss was granted.[36] The court's docket includes an entry indicating that the judicial secretary was to send a copy of the order to the attorneys of record.[37] However, the attorneys alleged that they were not notified of the order.[38]

On April 17, 2006, seven months later, the plaintiff filed a response to the defendant's motion to dismiss.[39] Subsequently, the plaintiff learned that the defendant's motion to dismiss had been granted.[40] On August 17, 2006, the plaintiff filed a "motion to reconsider."[41] In her August 17, 2006 filing, the plaintiff requested section 2-1401 relief based on the fact that her attorneys did not receive notice of the September 13, 2005 order.[42] According to the docket, the circuit court reviewed the motion to reconsider on August 25, 2006, and again granted the defendant's motion to dismiss.[43]

On August 28, 2006, the defendant filed a special appearance and objected to the circuit court's jurisdiction.[44] The defendant asserted that the plaintiff's motion to reconsider was time-barred, therefore the court lacked jurisdiction to consider it.[45] The defendant further argued that the plaintiff had a duty to follow the case, and the fact that she lacked notice of its dismissal did not toll the time to file an appeal.[46] In a September 5, 2006 docket entry, the

---

32. *Keener*, 235 Ill. 2d at 350, 919 N.E.2d at 920.
33. *Id.* at 340, 919 N.E.2d at 915.
34. *Id*.
35. *Id.* at 341, 919 N.E.2d at 915.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 341–42, 919 N.E.2d at 915.
43. *Id.* at 342, 919 N.E.2d at 916.
44. *Id.*
45. *Id.*
46. *Id.* at 342–43, 919 N.E.2d at 916.

circuit court noted the defendant's special appearance and reaffirmed its August 25, 2006 ruling granting the defendant's motion to dismiss.[47] On September 18, 2006, the plaintiff filed a notice of appeal.[48]

The appellate court found that it had jurisdiction over the plaintiff's appeal of the August 25, 2006 order dismissing the case.[49] The appellate court reversed in part and remanded the case for trial.[50] The appellate court examined and distinguished two supreme court cases: *Granite City Lodge No. 272, Loyal Order of the Moose v. City of Granite City*;[51] and *Mitchell v. Fiat-Allis, Inc.*[52] In *Granite City*, the supreme court held that a party's lack of actual notice of the case's disposal did not toll the time period for filing a notice of appeal.[53] *Granite City* further held that the parties did not need to possess actual notice of the dismissal if "the order appealed from [is] expressed publicly[,] in words, and at the situs of the proceeding."[54] The appellate court in *Keener* distinguished *Granite City* by stating that in this case, unlike in *Granite City*, the plaintiff appealed a final judgment and filed a section 2-1401 petition.[55]

In *Mitchell*, the supreme court held that it lacked jurisdiction over the defendant's section 2-1401 petition.[56] In that case, the circuit court had granted the defendant's section 2-1401 petition and, after granting the petition, reentered judgment for the plaintiff.[57] The defendant appealed the judgment and the plaintiff cross-appealed the circuit court's grant of the section 2-1401 petition.[58] The supreme court held that it lacked jurisdiction over the reentered judgment because the section 2-1401 petition had been granted erroneously.[59] The court reasoned that "relief under section 2-1401 is inappropriate where the

47. *Id.* at 343, 919 N.E.2d at 916.
48. *Id.*
49. Keener v. City of Herrin, 385 Ill. App. 3d 545, 548, 895 N.E.2d 1141, 1145–46 (5th Dist. 2008).
50. *Id.* at 545, 895 N.E.2d at 1143.
51. Granite City Lodge No. 272, Loyal Order of the Moose v. City of Granite City, 141 Ill. 2d 122, 126–27, 565 N.E.2d 929, 931 (1990).
52. Mitchell v. Fiat-Allis, Inc., 158 Ill. 2d 143, 632 N.E.2d 1010 (1994).
53. *Keener*, 385 Ill. App. 3d at 549, 895 N.E.2d at 1147 (citing *Granite City*, 141 Ill. 2d at 126–27, 565 N.E.2d at 931).
54. *Granite City*, 141 Ill. 2d at 123, 565 N.E.2d at 929.
55. Keener v. City of Herrin, 235 Ill. 2d 338, 344, 919 N.E.2d 913, 916 (2009).
56. *Keener*, 385 Ill. App. 3d at 550, 895 N.E.2d at 1148 (citing *Mitchell*, 158 Ill. 2d at 147, 632 N.E.2d at 1012).
57. *Keener*, 385 Ill. App. 3d at 550, 895 N.E.2d at 1148 (citing *Mitchell*, 158 Ill. 2d at 147, 632 N.E.2d at 1012).
58. *Keener*, 385 Ill. App. 3d at 550, 895 N.E.2d at 1148 (citing *Mitchell*, 158 Ill. 2d at 147, 632 N.E.2d at 1011).
59. *Keener*, 385 Ill. App. 3d at 550, 895 N.E.2d at 1148 (citing *Mitchell*, 158 Ill. 2d at 147, 632 N.E.2d at 1012).

party seeking relief is simply requesting that the same order be reentered in order to restart the time to file a notice of appeal."[60] The Supreme Court stated the fact that a party lacked notice of a final judgment is insufficient to vacate an order under a section 2-1401 petition.[61]

The appellate court in *Keener* distinguished *Mitchell*.[62] The appellate court stated that, unlike in *Mitchell*, the sole basis of the plaintiff's section 2-1401 petition was not a lack of notice in the entry of the order.[63] Instead, in *Keener*, the plaintiff petitioned to have the court deny the defendant's motion to dismiss.[64] The appellate court further distinguished *Mitchell* by pointing out that unlike in *Mitchell*, the defendant did not file a cross-appeal of the circuit court's order granting the plaintiff's section 2-1401 petition.[65] The appellate court stated that the August 25, 2006 docket entry contained two separate orders.[66] Although the circuit court never referred specifically to section 2-1401, the appellate court determined that the circuit court granted the plaintiff's section 2-1401 petition in one order and dismissed the plaintiff's complaint in a separate order.[67] The appellate court explained that because the defendant did not appeal the circuit court's ruling on the section 2-1401 petition, it lacked jurisdiction to decide whether the circuit court erred in its decision.[68]

In *Keener*, the Illinois Supreme Court vacated the appellate court's decision and dismissed the action, holding that the circuit court lacked jurisdiction to rule on August 25, 2006.[69] The court further held that the plaintiff's September 18, 2006 notice of appeal was untimely and did not confer jurisdiction on the appellate court.[70]

The supreme court initially addressed whether the plaintiff's motion to reconsider was timely.[71] An appellant must file a notice of appeal within 30 days after the entry of a final judgment.[72] The supreme court held that the

---

60. *Keener*, 385 Ill. App. 3d at 550, 895 N.E.2d at 1148 (citing *Mitchell*, 158 Ill. 2d at 149, 632 N.E.2d at 1012).
61. *Keener*, 385 Ill. App. 3d at 550, 895 N.E.2d at 1148 (citing *Mitchell*, 158 Ill. 2d at 149, 632 N.E.2d at 1012).
62. *Keener*, 385 Ill. App. 3d at 550, 895 N.E.2d at 1148.
63. Keener v. City of Herrin, 235 Ill. 2d 338, 344, 919 N.E.2d 913, 917 (2009).
64. *Id.* at 345, 919 N.E.2d at 917.
65. *Id.*
66. *Keener*, 385 Ill. App. 3d at 552, 895 N.E.2d at 1149.
67. *Id.*
68. *Id.*
69. *Keener*, 235 Ill. 2d at 345–46, 919 N.E.2d at 917–18.
70. *Id.* at 346, 919 N.E.2d at 918.
71. *Id.* at 346–47, 919 N.E.2d at 918.
72. ILL. SUP. CT. R. 303 (governing jury trials); 735 ILL. COMP. STAT. 5/2-1203(a) (2002) (governing bench trials).

plaintiff's August 17, 2006, motion to reconsider was not timely.[73] The court observed that because the September 13, 2005 order granting the defendant's motion to dismiss was a final order, the plaintiff had 30 days from September 13, 2005 to file her motion.[74] Because the plaintiff's motion was filed over 30 days later, it was time-barred.[75] The court further stated that, under *Mitchell*, counsel had a duty to monitor the docket to ensure a timely appeal.[76]

The supreme court then considered whether the plaintiff's "motion to reconsider" could be construed as a section 2-1401 petition.[77] The court held that the plaintiff's motion could not be considered a section 2-1401 petition.[78] The court pointed to its recent decision in *People v. Laugharn*,[79] which laid out the notice requirements of a section 2-1401 petition.[80] The court reasoned that in *Keener*, neither the plaintiff nor the circuit court made any attempt to comply with the requirements of section 2-1401.[81] The supreme court found that there was no evidence that the defendant was served with process for a section 2-1401 petition, and that personal jurisdiction cannot be secured without proper service of process.[82] Furthermore, the court observed that the circuit court failed to comply with the procedural requirements of a section 2-1401 petition because it granted the motion before the 30-day window to answer or otherwise plead had expired.[83]

The supreme court emphasized that the circuit court did not mention a section 2-1401 petition in its ruling.[84] The Court observed that the circuit court had stated that "a motion to reconsider" was "reviewed" and granted, but the circuit court failed to discuss the basis for its review.[85]

In conclusion, the court reiterated that section 2-1401 petitions are to be used for newly discovered evidence that would alter the outcome of the case.[86] The plaintiff's motion, which was based on the same evidence as its earlier motion to dismiss, could not be considered a section 2-1401 petition.[87]

---

73. *Keener*, 235 Ill. 2d at 348, 919 N.E.2d at 919.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* (citing People v. Laugharn, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805, (2009)).
80. *Keener*, 235 Ill. 2d at 348, 919 N.E.2d at 919.
81. *Id.* (citing 735 ILL. COMP. STAT. 5/2-1401) (2008)).
82. *Keener*, 235 Ill. 2d at 349, 919 N.E.2d at 919.
83. *Id.* (citing 735 ILL. COMP. STAT. 5/2-1401) (2008)).
84. *Keener*, 235 Ill. 2d at 349, 919 N.E.2d at 919.
85. *Id.* at 349, 919 N.E.2d at 919–20.
86. *Id.* at 349–50, 919 N.E.2d at 920.
87. *Id.* at 350, 919 N.E.2d at 920.

3. Secura Insurance Co. v. Illinois Farmers Insurance Co.[88]

Supreme Court Rule 12(b)(3), which sets forth notice of appeal requirements for proof of service by mail, provides that an appellant must state the time and place of the mailing in a certificate by its attorney or an affidavit of the person who deposited the mailing.[89] In *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, the Illinois Supreme Court held that the appellate court lacked jurisdiction to hear the plaintiff's appeal because the notice of appeal failed to attach a certificate of the attorney or an attesting affidavit as required by Rule 12(b)(3), and therefore was not timely filed pursuant to Rule 303.[90]

This case arose out of an automobile accident between Vincent Henehan and Daniel Dill, an employee of B & A Automotive acting within the scope of his employment.[91] B & A Automotive maintained a commercial liability policy with Secura Insurance Company ("Secura").[92] Dill's vehicle was insured by Farmers Insurance Company ("Farmers").[93] Henehan subsequently filed suit for damages against both employee Dill and employer B & A Automotive.[94] Dill was voluntarily dismissed from the suit and Secura, on behalf of B & A Automotive, settled with Henehan for $1 million.[95]

Secura then sought a declaratory judgment against Farmers, arguing that Farmers' policy obligated it to defend and indemnify B & A Automotive.[96] Both parties filed motions for summary judgment.[97] On March 17, 2006, the trial court granted Farmers' summary judgment motion and denied Secura's summary judgment motion, finding that Farmers had no duty to defend or indemnify B & A Automotive.[98] Secura filed a motion to reconsider.[99] On May 17, 2006, the trial court denied Secura's motion to reconsider.[100]

---

88. Secura Ins. Co. v. Ill. Farmers Ins. Co., 232 Ill. 2d 209, 902 N.E.2d 662 (2009).
89. ILL. SUP. CT. R. 12(b).
90. *Secura*, 232 Ill. 2d at 211, 902 N.E.2d at 663.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 210, 902 N.E.2d at 663.
97. *Id.*
98. *Id.* at 212, 902 N.E.2d at 664.
99. *Id.*
100. *Id.*

Secura appealed the trial court's May 17, 2006 decision denying its motion for reconsideration.[101] Secura filed a notice of appeal by mail, but it did not include a certificate by its attorney or an affidavit that indicated the date of filing with the circuit court clerk.[102] The circuit court received Secura's notice of appeal on June 20, 2006, after the due date.[103] Farmers filed a motion to dismiss the appeal, arguing that the appellate court lacked jurisdiction because Secura's notice of appeal was untimely.[104] The appellate court initially granted the motion, but later vacated its decision.[105] The appellate court allowed Secura to supplement the record and show timely notice of appeal with a cover letter dated June 16, 2006 that Secura submitted to the circuit court.[106] The appellate court concluded that it had jurisdiction because Secura's error was harmless and Farmers was not prejudiced.[107] The appellate court proceeded to consider the case on the merits and ruled in favor of Secura.[108]

The Illinois Supreme Court vacated the appellate court's judgment, holding that the appellate court lacked jurisdiction over the appeal.[109] The supreme court began its analysis by noting that "the timely filing of a notice of appeal is both jurisdictional and mandatory."[110] Under Rule 303(a)(1), Secura had 30 days to file its notice of appeal from "the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions."[111]

A party can file a notice of appeal by mail pursuant to Rule 373.[112] Under Rule 373, mailed filings received after their due date are considered to

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 213, 902 N.E.2d at 664.
109. *Id.* at 217, 902 N.E.2d at 667.
110. *Id.* at 213, 902 N.E.2d at 664.
111. ILL. SUP. CT. R. 303(a)(1).
112. ILL. SUP. CT. R. 373. (*See* Harrisburg-Raleigh Airport Auth., 126 Ill. 2d 326, 341–42, 533 N.E.2d 1072, 1078 (1989) (discussing that "the pro-mailing policy of Rule 373 should be applied to the filing of a notice of appeal under 303(a)" because notice of appeal is closely related to the appellate process.)

be filed at the time of mailing.[113] Rule 373 requires the mailing party to show proof of mailing pursuant to Rule 12(b)(3).[114] Rule 12(b) states, in part:

> (b) Manner of Proof. Service is proved:
> (1) by written acknowledgment signed by the person served;
> (2) in case of service by personal delivery, by certificate of the attorney, or affidavit of a person, other than an attorney, who made delivery;
> (3) in case of service by mail, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail, stating the time and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid; or . . . .[115]

The circuit court did not receive the plaintiff's notice of appeal within 30 days of the judgment.[116] As a result, the issue before the supreme court was whether plaintiff's mailing complied with Rule 12(b)(3).[117] Secura did not provide a certificate or an affidavit of mailing.[118] Secura argued that its cover letter fulfilled the requirements of Rule 12.[119] In response, Farmers asserted that the cover letter did not constitute compliance with Rule 12 because a court would be unable to ascertain the timeliness of the notice of appeal from the cover letter.[120]

The supreme court agreed with Farmers, stating that the letter did not comply with the proof of mailing requirements of Rule 12 because "[t]he letter does not contain an affidavit or a certificate and nothing is *certified* or *sworn to*. The cover letter contains only a date, which, at best, indicates that it may have been mailed on that date."[121] Accordingly, Secura had failed to comply

---

113. ILL. SUP. CT. R. 373 (stating"[u]nless received after the due date, the time of filing records, briefs or other papers required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing . . . shall be deemed the time of filing. Proof of mailing . . . shall be as provided in Rule 12(b)(3). This rule also applies to the notice of appeal filed in the trial court.").
114. *Id.*
115. ILL. SUP. CT. R. 12(b).
116. Secura Ins. Co. v. Ill. Farmers Ins. Co., 232 Ill. 2d 209, 214, 902 N.E.2d 662, 665 (2009).
117. *Id.* at 214, 902 N.E.2d at 665.
118. *Id.* at 215, 902 N.E.2d at 665.
119. *Id.* at 216, 902 N.E.2d at 666.
120. *Id.*
121. *Id.*

with the time requirements of Rule 303 because its filing lacked a certificate by its attorney or an affidavit of the person who deposited the mailing.[122]

The court further determined that the "Notice of Filing" served on opposing counsel did not establish that the notice of appeal was timely filed.[123] The supreme court reasoned that the "Notice of Filing" did not state that the notice of appeal was mailed to the court on the due date.[124]

In *Secura*, the supreme court firmly signaled that Illinois courts enforce strict compliance with Rule 303 and Rule 12(b)(3).[125] The court stated that a failure to abide by the Rule is more than an issue of form.[126] Indeed, the court held, without proof of the mailing, an appellate court lacks jurisdiction to consider an appeal at all.[127]

B. Statute of Limitations

1. Landis v. Marc Realty, L.L.C.[128]

Section 13-202 of the Code places a two-year statute of limitations on actions that impose a statutory penalty.[129] In *Landis v. Marc Realty, L.L.C.*, the Illinois Supreme Court held that Section 5-12-080(f) of the Chicago Residential Landlord and Tenant Ordinance (the "RLTO") provides for a statutory penalty, so that claims under that provision must be asserted within section 13-202's two-year limit.[130]

The plaintiffs, Ken and Ana Landis, entered into a lease with the defendant, Marc Realty, L.L.C., and tendered an $8,400 security deposit.[131] The plaintiffs were released from their lease before the lease-term ended and the landlord agreed to return their security deposit.[132] More than four years

---

122. *Id.* at 216, 902 N.E.2d at 667.
123. *Id.* at 217, 902 N.E.2d at 666.
124. *Id.* at 216–17, 902 N.E.2d at 666.
125. *Id.* at 217, 902 N.E.2d at 666.
126. *Id.* at 216–17, 902 N.E.2d at 666 (distinguishing Curtis v. Pekin Ins. Co., 105 Ill. App. 3d 561, 434 N.E.2d 555 (4th Dist. 1982), and Kimbrough v. Sullivan, 131 Ill. App. 2d 313, 266 N.E.2d 717 (1st Dist. 1971), which dealt with typographical errors and defects in proof of service).
127. *Secura*, 232 Ill. 2d at 217, 902 N.E.2d at 666.
128. Landis v. Marc Realty, L.L.C., 235 Ill. 2d 1, 919 N.E.2d 300 (2009).
129. 735 ILL. COMP. STAT. 5/13-202 (2004).
130. *Landis*, 235 Ill. 2d at 3, 919 N.E.2d at 301 (Kilbride, J., and Karmeier, J., dissenting) (reasoning that the legislature did not intend municipal ordinances to be considered statutes under section 13-202. According to the dissent, "[t]he term 'statutory penalty' must be construed according to its meaning in 1874, when the term was added to the predecessor to section 13-202. In 1874, the term 'ordinance' was not interchangeable or synonymous with the term 'statute'").
131. *Id*. at 4, 919 N.E.2d at 302.
132. *Id.*

after being released from their lease, the plaintiffs brought suit against Marc Realty and Elliott Weiner, alleging that the defendants violated sections 5-12-080(c) and (d) of the RLTO by failing to return the security deposit and applicable interest.[133] The plaintiffs further asserted that they were entitled to collect damages under subsection (f) of the RLTO.[134] Section 5-12-080(f) states that "[i]f the landlord or landlord's agent fails to comply with any provision of Section[s] 5-12-080(a)-(e), the tenant *shall be awarded damages* in an amount equal to two times the security deposit, plus interest at a rate determined in accordance with Section 5-12-081."[135]

The defendants moved to dismiss the complaint as untimely under section 13-202 of the Code.[136] Section 13-202 provides: "[a]ctions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a *statutory penalty* . . . shall be commenced within 2 years next after the cause of action accrued . . . ."[137] In response, the plaintiffs contended that section 13-202 of the Code was inapplicable to subsection (f) of section 5-12-080 because subsection (f) does not impose a "statutory penalty."[138] Rather, the plaintiffs argued that their claims were governed either by the five-year limitations period in section 13-205[139] or the ten-year period for an action to enforce a written contract under section 13-206.[140] The circuit court held that the two-year statute of limitations under section 13-202 applied and dismissed the plaintiffs' complaint.[141] The appellate court affirmed.[142]

The Illinois Supreme Court affirmed the appellate court and held that section 13-202's two-year statute of limitations applied.[143] In reaching its decision, the court analyzed the meaning of "statutory penalty" under section 13-202.[144]

First, the court considered whether an ordinance is a "statute" under section 13-202 of the Code.[145] The supreme court confronted a split of

---

133. *Id.* at 5, 919 N.E.2d at 302–03 (citing CHICAGO, IL., RESIDENTIAL LANDLORD TENANT ACT § 5-12-080 (1997)).
134. *Landis*, 235 Ill. 2d at 5, 919 N.E.2d at 302-03 (citing CHICAGO, IL., RESIDENTIAL LANDLORD TENANT ACT § 5-12-080 (1997)).
135. CHICAGO, IL., RESIDENTIAL LANDLORD TENANT ACT § 5-12-080 (1997) (emphasis added).
136. *Landis*, at 6, 919 N.E.2d at 303.
137. *Id.* (citing 735 ILL. COMP. STAT. 5/13-202 (2004) (emphasis added by court)).
138. *Landis*, at 6, 919 N.E.2d at 303.
139. 735 ILL. COMP. STAT. 5/13-205 (2004).
140. *Landis*, at 6, 919 N.E.2d at 303 (citing 735 ILL. COMP. STAT. 5/13-206 (2004)).
141. *Landis*, at 6, 919 N.E.2d at 303.
142. *Id.*
143. *Id.* at 15, 919 N.E.2d at 308.
144. *Id.* at 6, 919 N.E.2d at 303.
145. *Id.*

authority in the appellate court districts and conflicting dictionary definitions.[146] Those clashing interpretations led the court to conclude that the word "statutory" was ambiguous.[147] To resolve that ambiguity and uncover the drafters' intent, the supreme court looked to general legislative construction principles.[148]

The supreme court concluded that the legislature intended for a municipal ordinance to be considered a "statute" under section 13-202 of the Code.[149] The court started with the general principle that a legislative writing should be given its fullest meaning.[150] The court reasoned that the fullest meaning of the word "statute" would encompass municipal ordinances within its definition.[151] The court then considered the consequences of an alternative interpretation.[152] The supreme court stressed that "[t]o allow a plaintiff an additional three years to file a claim based on a municipal ordinance would . . . elevate municipal law over State law."[153] The court reasoned that the legislature did not intend the unequal result that would occur if municipal ordinances employed a five-year limitations period while state statutes imposed a two-year period.[154]

Second, the supreme court examined the definition of "penalty."[155] The court applied factors that it had promulgated in an earlier statutory penalty case, *McDonald's Corp. v. Levine*.[156] In *McDonald's*, the supreme court held that a statutory penalty must: (1) "impose automatic liability for a violation of its terms"; (2) set forth a predetermined amount of damages; and (3) impose damages without regard to the actual damages suffered by the plaintiff.[157]

The Illinois Supreme Court in *Landis* concluded that section 5-12-080(f) imposed a penalty.[158] The court analyzed the language of subsection (f), which states that the "tenant shall be awarded damages in an amount equal to two times the security deposit."[159] The court reasoned that, because subsection (f) uses the word "shall," it imposes an automatic and mandatory requirement.[160]

---

146. *Id.* at 7, 919 N.E.2d at 303.
147. *Id.* at 11, 919 N.E.2d at 306.
148. *Id.* at 11–12, 919 N.E.2d at 306.
149. *Id.* at 12, 919 N.E.2d at 306–07.
150. *Id.* at 11, 919 N.E.2d at 306.
151. *Id.* at 11–12, 919 N.E.2d at 306.
152. *Id.* at 12, 919 N.E.2d at 306.
153. *Id.* (internal quotations omitted).
154. *Id.*
155. *Id.* at 12, 919 N.E.2d at 307.
156. McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 475 (2nd Dist. 1982).
157. *Id.* at 738, 439 N.E.2d at 480.
158. *Landis*, 235 Ill. 2d at 13, 919 N.E.2d at 307.
159. *Id. (*citing CHICAGO, IL., RESIDENTIAL LANDLORD TENANT ACT § 5-12-080 (1997)).
160. *Landis*, 235 Ill. 2d at 13, 919 N.E.2d at 307.

Additionally, the court reasoned that the inclusion of a damages formula, like the one enumerated in subsection (f), did not mean that the ordinance was not penal.[161] Therefore, the Illinois Supreme Court held "that subsection (f) of section 5-12-080 is a 'statutory penalty' under section 13-202 and, thus, is subject to the two-year statute of limitations."[162]

2. Doe v. Diocese of Dallas et al.[163]

In *Landgraf v. USI Film Products*, the United States Supreme Court set out the steps for determining whether a statute applies retroactively.[164] The Illinois Supreme Court applied that approach in *Doe v. Diocese of Dallas*, and held that once a claim is time-barred it cannot be revived through subsequent legislative action without offending the due process clause of the Illinois Constitution.[165]

In 2003, the plaintiff brought, *inter alia*, a personal injury claim, based on childhood sexual abuse, against Catholic priest Kenneth Roberts, the Diocese of Dallas, the Diocese of Belleville, and the Archdiocese of St. Louis.[166] The plaintiff alleged that the abuse had occurred in 1984 when he was 14 years old.[167] However, the plaintiff did not discuss the abuse with anyone until 1998, after he left his job and sought psychological treatment.[168] Defendant Roberts filed a motion to dismiss under section 2-619(a)[169] arguing, among other things, that the plaintiff's suit had been filed after the statute of limitations period had expired under the 1994 version of section 13-202.2 of the Code.[170]

The parties agreed that the statute of limitations began to run in 1998 when the plaintiff suffered psychological problems and sought treatment, but

---

161. *Id.* at 14, 919 N.E.2d at 307.
162. *Id.* at 15, 919 N.E.2d at 308. *Landis* also clarified its ruling in *City of Peoria v. Toft*, 215 Ill. App. 3d 440, 574 N.E.2d 1334 (3rd Dist. 1991). In *Toft*, the appellate court held that section 13-202 did not apply to a municipal parking ordinance fine because "the legislature's use of the phrase 'statutory penalty' [did] not evince an intent to encompass fines or other penalties exacted for violations of local laws." In *Landis*, the Supreme Court clarified that *Toft* had never addressed "whether a statute applies to an action by a private individual pursuant to a municipal ordinance." *Landis*, 235 Ill. 2d at 8, 12, 919 N.E.2d at 304, 306.
163. Doe v. Diocese of Dallas, 234 Ill. 2d 393, 917 N.E.2d 475 (2009).
164. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).
165. *Diocese of Dallas*, 234 Ill. 2d at 407–09, 917 N.E.2d at 483–84.
166. *Id.* at 399, 917 N.E.2d at 479.
167. *Id.* at 397, 917 N.E.2d at 478.
168. *Id.* at 397–98, 917 N.E.2d at 478.
169. 735 ILL. COMP. STAT. 5/2-619(a) (2006).
170. *Diocese of Dallas*, 234 Ill. 2d at 400, 917 N.E.2d at 479.

they disputed which version of section 13-202.2 applied.[171] The plaintiff argued that the 2003 amended version of section 13-202.2 applied retroactively, so that his complaint was timely filed.[172] Under the 2003 version of section 13-202.2, a claimant can file an action for personal injury based on sexual abuse within ten years of turning 18 or within five years of the time the claimant discovers or should have discovered both that they were sexually abused and that their injury was caused by the abuse.[173]

Defendant Roberts argued that the plaintiff's claims were governed by the 1994 version of section 13-202.2.[174] Under the 1994 statute, actions for personal injury based on sexual abuse while a minor must be commenced within two years from the time the claimant discovers or reasonably should have discovered the childhood sexual abuse.[175] Further, Roberts argued that the 2003 version could not be applied without violating the due process clause of the Illinois Constitution.[176]

The circuit court held that the 2003 amended version of section 13-202.2 of the Code could not be applied to revive the plaintiff's claims and dismissed the suit with prejudice.[177] The appellate court reversed, holding that the legislature intended for the 2003 amendment of section 13-202.2 to apply retroactively.[178] The Illinois Supreme Court reversed the appellate court and affirmed the circuit court's dismissal of the plaintiff's case with prejudice.[179] The supreme court reasoned that although the legislature intended the 2003 amendment of section 13-202.2 to apply retroactively, to do so would violate the due process clause of the Illinois Constitution.[180]

Doe v. Diocese of Dallas is significant for three main reasons. First, the supreme court's opinion set forth the analysis that courts must apply to determine when amendments to the Code apply retroactively.[181] Second, the court analyzed the due process clause of the Illinois Constitution and reiterated that a statute of limitations gives defendants a vested right to bar a later action.[182] Third, it clarified that the supreme court's decision in *Commonwealth Edison Co. v. Will County Collector* did not alter the vested

171. *Id.* at 400, 917 N.E.2d at 480.
172. *Id.* at 401, 917 N.E.2d at 480.
173. 735 ILL. COMP. STAT. 5/13-202.2(b) (2006).
174. *Diocese of Dallas*, 234 Ill. 2d at 400–01, 917 N.E.2d at 479–80.
175. 735 ILL. COMP. STAT. 5/13-202.2(b) (1994).
176. *Diocese of Dallas*, 234 Ill. 2d at 401–02, 917 N.E.2d at 480.
177. *Id.* at 403, 917 N.E.2d at 481.
178. *Id.*
179. *Id.* at 404–05, 917 N.E.2d at 482.
180. *Id.* at 407, 917 N.E.2d at 483.
181. *See id.* at 405, 917 N.E.2d at 482.
182. *See id.* at 407, 917 N.E.2d at 483.

rights analysis used to decide whether a due process violation has occurred.[183] Also, the court stated that the statute of limitations in section 13-202.2 is an affirmative defense and does not bear on the court's jurisdiction.[184]

First, the court set forth the rule to determine whether section 13-202.2 applied retroactively.[185] The Illinois Supreme Court adopted the approach the United States Supreme Court had used in *Landgraf v. USI Film Products*.[186] In *Landgraf*, the threshold step for determining whether a statute applies retroactively is "whether the legislature has expressly prescribed the temporal reach of a statute."[187] If a statute contains express language regarding the dates of its applicability, then the legislature's intent as expressed in that language must be carried out in the absence of a constitutional prohibition.[188]

Elaborating on its retroactivity analysis, the Illinois Supreme Court cited section 4 of the Statute on Statutes.[189] The supreme court stated "[w]e have held that section 4 is a clear legislative directive as to the temporal reach of statutory amendments and repeals when none is otherwise specified: those that are procedural may be applied retroactively, while those that are substantive may not."[190] Thus, the supreme court concluded that Illinois courts should apply only the threshold step of the *Landgraf* test because unless the legislature expressly sets out the effect of an amendment, section 4 of the Statute on Statutes governs.[191]

In *Doe*, the supreme court held that the legislature expressly stated its intention that the 2003 amendment to section 13-202.2 apply retroactively.[192] The court pointed to language in section 13-202.2(e) that states that the amendment was "not limited to situations where the events giving rise to the cause of action took place after the amendment's effective date."[193] Therefore, the court determined that the 2003 amended version of section 13-202.2 should govern unless the amendment would violate the due process clause of the Illinois Constitution.[194]

---

183. See *id.* at 411, 917 N.E.2d at 485 (citing Commonwealth Edison Co. v. Will Cnty. Collector, 196 Ill. 2d 27, 33, 749 N.E.2d 964, 968 (2001)).
184. *Diocese of Dallas*, 234 Ill. 2d at 413–14, 917 N.E.2d at 487.
185. *Id.* at 405, 917 N.E.2d at 482.
186. *Id.* (citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).
187. *Diocese of Dallas*, 234 Ill. 2d at 405, 917 N.E.2d at 482 (citing *Landgraf* 511 U.S. at 280).
188. *Diocese of Dallas*, 234 Ill. 2d at 405, 917 N.E.2d at 482 (citing *Landgraf* 511 U.S. at 280).
189. *Diocese of Dallas*, 234 Ill. 2d at 405, 917 N.E.2d at 483 (citing 5 ILL. COMP. STAT. 70/4 (1998)).
190. *Diocese of Dallas*, 234 Ill. 2d at 406, 917 N.E.2d at 483 (citing Caveney v. Bower, 207 Ill. 2d 82, 92, 797 N.E.2d 596, 602 (2003)).
191. *Diocese of Dallas*, 234 Ill. 2d at 406–07, 917 N.E.2d at 483.
192. *Id.* at 407, 917 N.E.2d at 483.
193. *Id.* at 407, 917 N.E.2d at 483 (citing 735 ILL. COMP. STAT. 5/13-202.2 (2006)).
194. *Diocese of Dallas*, 234 Ill. 2d at 407, 917 N.E.2d at 483.

Second, the supreme court analyzed whether applying the 2003 amended version of section 13-202.2 offended the due process clause of the Illinois Constitution.[195] The supreme court held that applying the 2003 amendment to section 13-202.2 in *Doe* would violate the Illinois Constitution.[196] The supreme court stated that "once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action. That right cannot be taken away by the legislature without offending the due process protections of our state's constitution."[197] In *Doe*, the plaintiff's suit was time-barred under the 1994 version of section 13-202.2 when the plaintiff filed suit.[198] As a result, the defendants had a vested right to invoke the statute of limitations at the time the plaintiff's suit was filed.[199] Therefore, the 2003 amended version of section 13-202.2 could not be applied to the plaintiff's claims without violating the due process clause of the Illinois Constitution.[200]

Third, the supreme court clarified its decision in *Commonwealth Edison* by stating that *Commonwealth Edison* did not alter the analysis for determining whether a vested right invoked the due process provisions of the Illinois Constitution.[201] In *Commonwealth Edison*, the court adopted the *Landgraf* test to determine whether a legislative amendment to tax levies should be applied retroactively.[202] In doing so, the court focused on the legislative intent analysis portion of the *Landgraf* test.[203] In *Doe*, the supreme court stated that although *Commonwealth Edison* emphasized the importance of examining the legislature's intent when approaching retroactivity issues, it did not change the standards for determining the infringement of vested rights under the due process clause of the Illinois Constitution.[204] Similarly, *Commonwealth Edison* did not overrule the established law in Illinois that "once a claim is time-barred, it cannot be revived through subsequent

195. *Id.*
196. *Id.* at 407, 917 N.E.2d at 483.
197. *Id.* at 407, 917 N.E.2d at 484 (quoting M.E.H. v. L.H., 177 Ill. 2d 207, 214–15, 685 N.E.2d 335, 339 (1997)).
198. *Diocese of Dallas*, 234 Ill. 2d at 402, 917 N.E.2d at 480.
199. *Id.*
200. *Id.*
201. *Id.* at 411–12, 917 N.E.2d at 485–86.
202. *Id.* at 411, 917 N.E.2d at 486 (citing Commonwealth Edison Co. v. Will Cnty. Collector, 196 Ill. 2d 27, 33, 749 N.E.2d at 968) (2001)).
203. *Diocese of Dallas*, 234 Ill. 2d at 411, 917 N.E.2d at 486 (citing *Commonwealth Edison*, 196 Ill. 2d at 33, 749 N.E.2d at 968).
204. *Diocese of Dallas*, 234 Ill. 2d at 411–12, 917 N.E.2d at 485–86.

legislative action without offending the due process protections of our state's constitution."[205]

C. Statute of Repose

1. Wackrow v. Niemi[206]

Section 13-214.3 of the Code imposes a six-year statute of repose on legal malpractice claims based in tort or contract.[207] Section 13-214.3(d) of the Code creates an exception to the six-year statute of repose in attorney malpractice actions if the alleged injury occurs upon the death of the person for whom services were rendered.[208] In *Wackrow v. Niemi*, the Illinois Supreme Court held that an amendment to the client's trust that gave rise to a legal malpractice claim was an injury that occurred upon the death of the client, therefore section 13-214.3(d) of the Code applied.[209]

Prior to his death, James Woods amended his living trust so as to leave his residence, or the sum of $300,000 if his residence was sold prior to his death, to his sister, Marie Wackrow.[210] On October 23, 2002, letters of office were issued and the decedent's will was admitted to probate.[211] On October 24, 2003, the probate court denied Wackrow's claim against the estate of her brother for his house or $300,000.[212]

In December 2004, Wackrow filed a legal malpractice suit against the attorney who executed the amendment, Frederick Niemi.[213] The plaintiff alleged that Niemi failed to exercise reasonable care in executing an amendment to the decedent's trust.[214] The defendant filed a motion to dismiss under section 2-619(a)(5),[215] asserting that the complaint was untimely.[216] The circuit court dismissed the plaintiff's complaint as time-barred under section

205. *Id.* at 411–12, 917 N.E.2d at 486 (citing M.E.H. v. L.H., 117 Ill. 2d 207, 214–15, 685 N.E.2d 335, 339) (1997)).
206. Wackrow v. Niemi, 231 Ill. 2d 418, 899 N.E.2d 273 (2008).
207. 735 ILL. COMP. STAT. 5/13-214.3 (1994).
208. *Id.*
209. *Wackrow*, 231 Ill. 2d at 425, 899 N.E.2d at 278.
210. *Id.* at 420, 899 N.E.2d at 275.
211. *Id.*
212. *Id.* at 420–21, 899 N.E.2d at 275–76.
213. *Id.* at 421, 899 N.E.2d at 275–76.
214. *Id.* at 421, 899 N.E.2d at 276.
215. 735 ILL. COMP. STAT. 5/2-619(a)(5) (2008).
216. *Wackrow*, 231 Ill. 2d at 421, 899 N.E.2d at 276.

13-214.3(d) of the Code and the appellate court affirmed.[217] The Illinois Supreme Court affirmed.[218]

The supreme court began its opinion by examining the plain language of section 13-214.3.[219] Section 13-214.3(b) of the Code requires a claimant to file a legal malpractice claim based on tort or contract within two years from the time the claimant knew or reasonably should have known of the injury.[220] However, section 13-214.3 provides an exception, which states in relevant part:

> (c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.
>
> (d) When the injury caused by the act or omission *does not occur until the death of the person* for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975.[221]

The supreme court looked to its holding in *Petersen v. Wallach*, which applied section 13-214.3(d) of the Code.[222] In *Petersen*, the Illinois Supreme Court held that section 13-214.3(d) applied to all cases where the "alleged injury caused by the attorney's act or omission does not occur until the death of the person for whom the professional services were rendered."[223] The *Petersen* Court went on to explain that under section 13-214.3(d), a plaintiff has two years to bring a malpractice claim.[224] However, if letters of office are issued or the will is admitted to probate, then the action is governed instead by the Probate Act's time limitations.[225] Under the Probate Act, a claimant has

---

217. *Id.*
218. *Id.* at 429, 899 N.E.2d at 280.
219. *Id.* at 421, 899 N.E.2d at 276.
220. 735 ILL. COMP. STAT. 5/13-214.3 (1994).
221. *Id.* (emphasis added).
222. Petersen v. Wallach, 198 Ill. 2d 439, 764 N.E.2d 19 (2002).
223. *Id.* at 445, 764 N.E.2d at 23.
224. *Wackrow*, 231 Ill. 2d at 424, 899 N.E.2d at 277 (citing *Petersen*, 198 Ill. 2d at 445, 764 N.E.2d at 23).
225. *Wackrow*, 231 Ill. 2d at 424, 899 N.E.2d at 277 (citing *Petersen*, 198 Ill. 2d at 445, 764 N.E.2d at 23).

six months after a will is admitted to probate to file a petition contesting the will's validity.[226]

In *Wackrow*, the supreme court determined that the dispositive issue was whether the injury that resulted in this malpractice suit occurred upon the death of the attorney's client.[227] The court held that the injury that gave rise to the malpractice suit did not occur until Woods' death.[228] The court reasoned that the amendment had been executed during the client's life and could be revoked before the client's death.[229] Accordingly, the supreme court held that section 13-214.3(d) applied to the plaintiff's claim and she had two years to file her complaint, unless letters of office were issued or the will was admitted to probate.[230] In fact, the will was admitted to probate and letters of office were issued.[231] As a result, and because the plaintiff did not comply with the six-month time-frame for contesting a will under the Probate Act, her claim was barred.[232]

The supreme court stressed that section 13-214.3(d)'s exception to the six year statute of repose period for attorney malpractice actions applies *instead of* the two-year statute of limitations and six year statute of repose, and not in addition to those provisions.[233] The supreme court cited the appellate court's decision in *Poullette v. Silverstein*, which stated "[n]othing in the statute conditions the application of subsection (d) on whether the repose period in subsection (c) has expired."[234]

The plaintiff argued that as a third-party beneficiary, she was a recipient of the attorney's services and, because she is still alive, section 13-214.3(d) does not apply.[235] The supreme court rejected the plaintiff's argument, reiterating that section 13-214.3(d) applies to "the death of the *person for whom the professional services were rendered*."[236] Further, the supreme court stated that under the plaintiff's reasoning no injury against an estate would occur until the death of the intended beneficiary.[237]

Although *Wackrow* dealt specifically with 13-214.3(d), the court's opinion also discussed the general policy differences between a statute of

---

226. *Wackrow*, 231 Ill. 2d at 424, 899 N.E.2d at 277 (citing 755 ILL. COMP. STAT. 5/8-1(a) (1994)).
227. *Wackrow*, 231 Ill. 2d at 424, 899 N.E.2d at 277–78.
228. *Id.* at 425, 899 N.E.2d at 278.
229. *Id.*
230. *Id.* at 427–28, 899 N.E.2d at 279.
231. *Id.* at 428, 899 N.E.2d at 279.
232. *Id.* at 427–28, 899 N.E.2d at 279–80 (citing 755 ILL. COMP. STAT. 5/8-1(a) (1994)).
233. *Wackrow*, 231 Ill. 2d at 427–28, 899 N.E.2d at 279–80.
234. *Id.* (citing Poulette v. Silverstein, 328 Ill. App. 3d 791, 795, 767 N.E.2d 477, 480 (1st Dist. 2002)).
235. *Wackrow*, 231 Ill. 2d at 425, 899 N.E.2d at 278.
236. *Id.* (quoting 735 ILL. COMP. STAT. 5/13-214.3 (1994) (emphasis added)).
237. *Wackrow*, 231 Ill. 2d at 426, 899 N.E.2d at 279.

repose and a statute of limitations.[238] The supreme court explained that unlike a statute of limitations, a statute of repose "is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his cause of action."[239] In *Wackrow*, the Court enforced the policy that underlies statutes of repose, that to provide a concrete period of time during which a plaintiff must bring any malpractice suit.[240]

D. Joint Liability

1. Ready v. United/Goedecke Services, Inc.[241]

Section 2-1117 of the Code provides for apportionment of fault in assessing tort damages in cases involving multiple defendants.[242] In *Ready v. United/Goedecke Services, Inc.*, the Illinois Supreme Court held in a plurality decision, that section 2-1117 of the Code "does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit."[243] Justice Freeman wrote the plurality opinion.[244] Justice Fitzgerald and Justice Burke concurred in the judgment and opinion, and Justice Kilbride specially concurred with the opinion.[245] Justice Garman and Justice Karmeier dissented and Justice Thomas took no part in the consideration or decision of this case.[246]

In 1999, the plaintiff's husband was killed while working as a maintenance mechanic for his employer Midwest Generation, L.L.C. ("Midwest").[247] The plaintiff brought a wrongful-death suit, as administrator of her husband's estate, against contractor BMW Constructors, Inc., ("BMW") and subcontractor United/Goedecke Services ("United").[248] The defendants filed third-party claims against Midwest.[249] Subsequently, the plaintiff reached a good-faith settlement with BMW and Midwest for $1.113 million and proceeded to trial against United.[250]

---

238. *Id.* at 426, 899 N.E.2d at 278.
239. *Id.* (quoting Mega v. Holy Cross Hosp., 111 Ill. 2d 416, 422, 490 N.E.2d 665, 668 (1986)).
240. See *Wackrow*, 231 Ill. 2d at 426, 899 N.E.2d at 279.
241. Ready v. United/Goedecke Serv., Inc., 232 Ill. 2d 369, 905 N.E.2d 725 (2008).
242. 735 ILL. COMP. STAT. 5/2-1117 (1986).
243. *Ready*, 232 Ill. 2d at 384, 905 N.E.2d at 735.
244. *Id.* at 371, 905 N.E.2d at 727.
245. *Id.* at 385, 905 N.E.2d at 735. Justice Kilbride specially concurred, reasoning that based on the statute as a whole, section 2-1117 does not permit allocation of fault to defendants that settled.
246. *Id.* at 385–86, 905 N.E.2d at 735.
247. *Id.* at 371–72, 905 N.E.2d at 727.
248. *Id.* at 372, 905 N.E.2d at 727.
249. *Id.*
250. *Id.* at 373, 905 N.E.2d at 728.

At the trial, the circuit court did not allow United to present evidence related to the defendants who had settled, or to list those defendants on the verdict form.[251] The circuit court also refused to instruct the jury on United's sole proximate cause defense.[252] The jury found United liable for negligence and awarded the plaintiff $14.23 million.[253] The circuit court reduced the verdict by the settlement amount paid by BMW and Midwest, and deducted a further amount for the decedent's comparative negligence.[254] The circuit court then found that, under section 2-1117 of the Code, United was jointly and severally liable with BMW and Midwest and was responsible for paying the verdict that remained after the settlement amounts and comparative negligence amounts were deducted.[255]

The appellate court affirmed in part and reversed in part and remanded the case for a new trial as to liability.[256] The appellate court concluded that the circuit court should have allowed the settled defendants to be included on the verdict form so that the jury could apportion fault among the defendants.[257] The appellate court further held that evidence relating to the fault of BMW and Midwest was admissible.[258] Finally, the appellate court affirmed the damage award.[259]

On further appeal, the supreme court in a plurality decision addressed three issues. First, the plurality analyzed whether settled defendants are "defendants sued by the plaintiff" under section 2-1117 of the Code.[260] Second, the plurality examined whether the appellate court erred in affirming the damages award.[261] Third, the plurality discussed whether the appellate court erred in finding that United waived its right to challenge the damages award.[262] The plurality affirmed the damages award, but reversed as to the remaining issues.[263] The plurality held that the term "defendants sued by plaintiff" in section 2-1117 did not include settled tortfeasors.[264] Thus, the jury

---

251. *Id.*
252. *Id.* at 384, 905 N.E.2d at 734.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 373–74, 905 N.E.2d at 728.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 374, 905 N.E.2d at 728.
261. *Id.* at 383–84, 905 N.E.2d at 734.
262. *Id.* at 384, 905 N.E.2d at 734.
263. *Id.* at 385, 905 N.E.2d at 735.
264. *Id.* at 383, 905 N.E.2d at 734.

was not required to apportion fault among the settled defendants.[265] The plurality remanded the case for a determination on whether the circuit court should have instructed the jury on United's sole proximate cause defense.[266]

First, the plurality addressed whether settled defendants are "defendants sued by the plaintiff" under section 2-1117 of the Code.[267] The Supreme Court determined that the 1986 version of section 2-1117, the version in place when the accident occurred, provided the governing law.[268] Section 2-1117 titled "Joint liability" states in part:

> Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the *defendants sued by the plaintiff*, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the *defendants sued by the plaintiff*, and any third party defendants who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages.[269]

According to the plurality, the issue was whether the legislature intended for settled tortfeasors to be considered "defendants sued by the plaintiff" within the meaning of section 2-1117 of the Code.[270] After determining that the plain language of the statute was ambiguous, the plurality focused on two rules of construction.[271]

[The plurality began by applying the canon of construction that "where a legislature amends a statute after it is judicially construed, it is presumed that the legislature accepted the court's interpretation."[272]] In 1995, the Fifth District held in *Blake v. Hy Ho Restaurant Inc.* that defendants who settled were not "defendants sued by the plaintiff" under section 2-1117.[273] In 2003, the legislature amended section 2-1117, but did not alter the language of section 2-1117 that *Blake* addressed.[274] In *Ready*, the plurality found that the legislature's decision not to amend section 2-1117 in its 2003 amendments, after the judicial construction, amounted to an acceptance of that court's

---

265. *Id.*
266. *Id.*
267. *Id.* at 374, 905 N.E.2d at 728.
268. *Id.* at 374, 905 N.E.2d at 729.
269. 735 ILL. COMP. STAT. 5/2-1117 (1986) (emphasis added).
270. *Ready*, 232 Ill. 2d at 382, 905 N.E.2d at 728.
271. *Id.* at 376–80, 905 N.E.2d at 730–31.
272. *Id.* at 380, 905 N.E.2d at 731–32.
273. Blake v. Hy Ho Rest., Inc., 273 Ill. App. 3d 372, 376, 652 N.E.2d 807, 810 (5th Dist. 1995).
274. *Ready*, 232 Ill. 2d at 380, 905 N.E.2d at 732.

interpretation.[275] The plurality reasoned that, if the legislature intended for settled defendants to be included in apportionment of fault under section 2-1117, then it would have amended section 2-1117 after *Blake* was decided.[276]

Next, the plurality employed the principle that statutory amendments are presumed to be intended to change the law.[277] In 1995, the legislature amended section 2-1116 of the Code, titled "Limitations on recovery in tort actions; fault."[278] The amended version of section 2-1116(b) included settled defendants in the definition of "tortfeasor."[279] The amended version of section 2-1116 later was held unconstitutional, so section 2-1116 reverted back to the law adopted prior to the amendment.[280] The *Ready* plurality found that the legislature's decision in 1995 to enumerate that "tortfeasor" encompassed settled defendants shows that prior to the amendment settled defendants were not included in the apportionment of fault.[281] Therefore, the plurality concluded that the 1995 amendments showed that settled defendants were not intended to be included in the appointment of fault under the 1986 statute.[282]

Second, the plurality considered United's claim that the appellate court erred in affirming the damages award.[283] The plurality concluded that because it reversed the appellate court on the liability issue, United no longer had a basis to challenge the damage award.[284]

Third, the plurality addressed whether United had forfeited its right to challenge the damages amount.[285] The plurality concluded that it was unable to address the issue because United had failed to comply with Rule 318(c).[286] Rule 318(c) requires parties to submit copies of material appellate briefs to the Supreme Court.[287] Because the briefs that the appellate court relied on were not part of the record before the Supreme Court, the plurality was unable to address the issue.[288] The plurality affirmed the damages award.[289]

---

275. *Id.*
276. *Id.*
277. *Id.*
278. 735 ILL. COMP. STAT 5/2-1116 (2008).
279. Pub. Act 89-7, eff. March 9, 1995.
280. *Ready*, 232 Ill. 2d at 381, 905 N.E.2d at 732.
281. *Id.* at 381–82, 905 N.E.2d at 733.
282. *Id.* at 382, 905 N.E.2d at 733.
283. *Id.* at 383–84, 905 N.E.2d at 734.
284. *Id.* at 384, 905 N.E.2d at 734.
285. *Id.*
286. *Id.*
287. ILL. SUP. CT. R. 318(c).
288. *Ready*, 232 Ill. 2d at 385, 905 N.E.2d at 734.
289. *Id.*

In dissent, Justice Garman focused on three aspects of the plurality's opinion. First, Justice Garman discussed that the plain meaning of the statute required the Court to find that settled defendants were "defendants sued by the plaintiff."[290] Second, Justice Garman challenged the plurality's use of canons of construction to determine the meaning of section 2-1117.[291] Third, Justice Garman examined the impact that the plurality's decision will have on the settlement calculations made by plaintiffs and multi-party defendants.[292]

First, the dissent discussed the plain meaning of section 2-1117.[293] According to Justice Garman, the phrase "defendants sued by the plaintiff" clearly referred to every person or entity sued by the plaintiff in the lawsuit, including those who had settled earlier.[294] The dissent reasoned that the basic rules of grammar and the definition of the term "sued" unambiguously established the plain meaning of the statute.[295]

Second, the dissent expressed great concern over the plurality's application of canons of legislative construction.[296] The dissent stated that the plurality's decision to look beyond the plain meaning of the statute put the Court at risk of "legislating from the bench."[297] The dissent examined the plurality's use of the principle that "where the legislature amends the statute after it has been judicially construed, it may be presumed that the legislature acquiesces in the court's construction."[298] The dissent argued that the plurality erroneously assumed that the legislature was aware of cases like *Blake*, even while ignoring other cases that the legislature could have potentially relied upon.[299] For example, the dissent pointed to *Unzicker v. Kraft Food Ingredients Corp.*[300] In *Unzicker*, the Supreme Court addressed whether an employer immune from liability under the Workers' Compensation Act was a third-party defendant who "could have been sued by the plaintiff."[301] The *Unzicker* Court noted that if "the legislature intended to use language that would exclude employers, we believe that it would have simply put in

290. *Id.* at 391, 905 N.E.2d at 738 (Karmeier, J., and Garman, J., dissenting).
291. *Id.* at 395-96, 905 N.E.2d at 740.
292. *Id.* at 404-05, 905 N.E.2d at 746.
293. *Id.* at 390, 905 N.E.2d at 737.
294. *Id.* at 394, 905 N.E.2d at 739–40.
295. *Id.*
296. *Id.* at 404, 905 N.E.2d at 745.
297. *Id.*
298. *Id.* at 395, 905 N.E.2d at 740.
299. *Id.* at 397–403, 905 N.E.2d at 741–45.
300. *Id.* at 397, 905 N.E.2d at 745 (citing Unzicker v. Kraft Food Ingredients Corp., 203 Ill. 2d 64, 783 N.E.2d 1024 (2002)).
301. *Ready*, 232 Ill. 2d at 398, 905 N.E.2d at 742 (citing *Unzicker*, 203 Ill. 2d at 69, 783 N.E.2d at 1028).

language specifically excluding employers."[302] Then, in 2003, the legislature amended section 2-1117 of the Code by adding the phase "except the plaintiff's employer."[303] Thus, according to the dissent, the plurality in *Ready* mistakenly assumed that the 2003 amendment contemplated *Blake*, when it specifically addressed *Unzicker*.[304]

The dissent also took issue with the plurality's use of the principle that statutory amendments are presumed to be intended to change the law.[305] The dissent observed that if the plurality found section 2-1117 to be ambiguous, it could not assume that the 1995 amendment was intended to change the statute.[306] Rather, the proper canon of construction would have been to interpret the amendment as a clarification of the statute.[307]

Third, the dissent asserted three reasons why the plurality's holding is adverse to the legislative goal of section 2-1117, which is to protect tortfeasors who have minimal fault from excessive liability.[308] First, the dissent warned that where juries do not consider the fault of all the defendants, they may allocate greater fault to the plaintiff.[309] Justice Garman reasoned that, if the jury in *Ready* had considered the fault of all three defendants, then it might have allocated more fault among the defendants and perhaps would have found that the plaintiff had less fault.

Second, the dissent concluded that the plurality's holding will discourage plaintiffs from settling with defendants who have minimal fault.[310] Justice Garman asserted that under the plurality's decision, a minimally responsible defendant could be kept in the litigation because of his or her "deep pockets."[311] This minimally responsible defendant would not be able to present evidence of the settled defendant's fault and could be liable for the entire judgment after the settlement amounts are deducted.[312]

Third, Justice Garman observed that the plurality's holding may prevent a settled defendant from having his share of liability determined at the time of judgment.[313] As a result, the dissent contends that the plurality's scheme is unworkable when a defendant settles in the middle of a trial because the

---

302. *Unzicker*, 203 Ill. 2d at 78, 783 N.E.2d at 1033.
303. *Ready*, 232 Ill. 2d at 399, 905 N.E.2d at 742 (citing Pub. Act 93-12, § 5, eff. June 4, 2003).
304. *Ready*, 232 Ill. 2d at 400, 905 N.E.2d at 743.
305. *Id.* at 397, 905 N.E.2d at 741.
306. *Id.*
307. *Id.* at 398, 905 N.E.2d at 741.
308. *Id.* at 405, 905 N.E.2d at 746.
309. *Id.* at 406, 905 N.E.2d at 746.
310. *Id.* at 406–07, 905 N.E.2d at 746.
311. *Id.*
312. *Id.*
313. *Id.* at 407, 905 N.E.2d at 746–77.

plurality offered no guidance on whether the trial should continue in that instance.[314]

E. Justiciability: The Mootness Doctrine

1. Morr-Fitz, Inc., et al v. Blagojevich[315]

In *Abbott Laboratories v. Gardner*, the United States Supreme Court set out factors that courts should consider in deciding whether a claim is ripe for review.[316] The Illinois Supreme Court applied that standard in *Morr-Fitz, Inc. v. Blagojevich* to hold that a declaratory judgment action met the test for ripeness.[317]

In April 2005, Governor Rod Blagojevich amended the Illinois Administrative Code by filing an "Emergency Rule" (the "Rule").[318] Under section (j) of the Rule, pharmacies were required to dispense Plan B contraception, also known as the "morning-after pill," to patients with a valid prescription.[319] The Rule also required that if the pharmacy did not carry the Plan B contraception, the pharmacy was required to order it at the patient's request.[320] The Governor issued a press release stating he would "vigorously defend" the Rule.[321]

The plaintiffs, two licensed pharmacists and three corporations that owned and operated Illinois pharmacies, sued public officials and the State Board of Pharmacy seeking a declaratory judgment that the Rule was invalid.[322] The plaintiffs' nine-count complaint alleged, *inter alia*, that the Rule violated the Illinois Religious Freedom Restoration Act and the First Amendment of the United States Constitution.[323] The defendants filed a motion to dismiss pursuant to section 2-619 of the Code.[324] The defendants argued that the plaintiffs lacked standing, that the case was not ripe for review,

---

314. *Id.*
315. Morr-Fitz, Inc., et al v. Blagojevich, 231 Ill. 2d 474, 901 N.E.2d 373 (2008).
316. Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967).
317. *Morr-Fitz, Inc.*, 231 Ill. 2d at 504–05, 901 N.E.2d at 392–93.
318. ILL. ADMIN. CODE tit. 68, §§ 1330.91(j) (2005).
319. ILL. ADMIN. CODE tit. 68, §§ 1330.91(j)(1), (j)(2).
320. *Id.*
321. *Morr-Fitz, Inc.*, 231 Ill. 2d at 482, 901 N.E.2d at 380 (citing Press Release, Governor Blagojevich (April 13, 2005)).
322. *Morr-Fitz, Inc.*, 231 Ill. 2d at 477, 901 N.E.2d at 376.
323. *Id.* at 477–78, 901 N.E.2d at 376–78 (citing 775 ILL. COMP. STAT. 35/1 *et seq*. (2004); U.S. CONST. amend 1).
324. *Morr-Fitz, Inc.*, 231 Ill. 2d at 483, 901 N.E.2d at 380 (citing 735 ILL. COMP. STAT. 5/2-619 (2004)).

and that the plaintiffs had failed to exhaust their administrative remedies.[325] The circuit court agreed with the defendants and dismissed the complaint.[326]

Applying the ripeness standards set forth in *Abbott Laboratories*, the appellate court affirmed.[327] In *Abbott Laboratories*, the Supreme Court set forth two factors for a reviewing court to consider when determining whether a claim is ripe for review: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[328] The appellate court held that the plaintiffs did not satisfy the hardship prong because they failed to show that the Rule was likely to be enforced against them.[329]

The plaintiffs filed a petition for rehearing in the appellate court.[330] In their petition, the plaintiffs attached affidavits stating that, since the Rule went into effect, they had received more than fifteen requests for Plan B contraceptives.[331] The affidavits further stated that the chilling effect of the Rule caused one plaintiff's pharmacy to close.[332] The appellate court denied the plaintiffs' petition for rehearing.[333]

The plaintiffs appealed to the Illinois Supreme Court.[334] After the parties briefed the issues before the supreme court, the Governor amended the Rule.[335] Under the amended version of the Rule, a retail pharmacy was required to "use its best efforts" to maintain a stock of Plan B contraception.[336] The amended version also permitted pharmacists to object to the dispensing of emergency contraception, but required each pharmacy to have a pharmacist on duty that could distribute emergency contraception.[337]

The supreme court reversed the appellate court and remanded the case, holding that the plaintiffs' claims were ripe for review and that the plaintiffs were not required to exhaust their administrative remedies.[338] The court reasoned that the plaintiffs' claims were ripe for review because they met the

---

325. *Morr-Fitz, Inc.*, 231 Ill. 2d at 478, 901 N.E.2d at 378.
326. *Id.*
327. *Id.* at 478–83, 901 N.E.2d at 378–81 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149) (1967)).
328. *Abbott Labs.*, 387 U.S. at 149.
329. *Morr-Fitz, Inc.*, 231 Ill. 2d. at 483, 901 N.E.2d at 381.
330. *Id.* at 484–85, 901 N.E.2d at 381.
331. *Id.*
332. *Id.* at 484–85, 901 N.E.2d at 381–82.
333. *Id.* at 485, 901 N.E.2d at 382.
334. *Id.* at 487, 901 N.E.2d at 382.
335. *Id.* at 484–85, 901 N.E.2d at 382.
336. ILL. ADMIN. CODE tit. 68 § 1330.91(j)(2) (amended by 32 Ill. Reg. 7116, eff. April 16, 2008).
337. *Id.*
338. *Morr-Fitz, Inc.*, 231 Ill. 2d at 504, 901 N.E.2d at 392–93 (Freeman, J. and Burke, J., dissenting because the plaintiffs failed to exhaust their administrative remedies and did not qualify for any of the exceptions to the exhaustion of remedies doctrine. The dissent did not discuss the ripeness issue.).

Abbott Laboratories' ripeness test.[339] The court found that the plaintiffs met the first *Abbott Laboratories*' ripeness requirement that claims be fit for judicial review, because the plaintiffs' claims required the court to determine whether the Rule violated state and federal laws.[340] Also, the plaintiffs met the second requirement, sufficient hardship, because the Rule required them to change their day-to-day operations by mandating that they stock and dispense Plan B contraceptives.[341] Further, the plaintiffs would suffer hardship without judicial review because if the plaintiffs failed to dispense Plan B contraceptives they would face harsh sanctions.[342] Additionally, the court reasoned that the plaintiffs were not required to exhaust their administrative remedies because (1) the plaintiffs brought a facial challenge under the First Amendment, (2) the administrative remedies were inadequate and futile, and (3) administrative expertise was not needed in this case.[343]

The supreme court's ruling is significant in several respects. First, the court explained how the ripeness doctrine related to the issue of standing in a declaratory judgment setting.[344] Second, *Morr-Fitz, Inc.* analyzed the ripeness standards set forth in *Abbott Laboratories*.[345] Third, the supreme court's opinion illustrated how a First Amendment claim can bolster a ripeness argument.[346] Fourth, the court in *Morr-Fitz, Inc.* set out exceptions to the general rule that litigants are required to exhaust their administrative remedies before coming to court.[347]

First, the court explained the relationship between the ripeness doctrine and the standing doctrine in the context of an administrative action.[348] The supreme court noted that the threshold issue in a declaratory judgment action is whether the plaintiff has standing.[349] The court stated that in the context of an administrative action a court must consider ripeness as a component of justiciability.[350] The court explained that where ripeness is an issue the more

339. *Id.* at 491, 901 N.E.2d at 385.
340. *Id.* at 491–92, 901 N.E.2d at 385 (citing Minn. Citizens Concerned for Life v. Fed. Election Comm'n, 113 F.3d 129, 132 (8th Cir. 1997)).
341. *Morr-Fitz, Inc.*, 231 Ill. 2d at 492–93, 901 N.E.2d at 386.
342. *Id.*
343. *Id.* at 499, 901 N.E.2d at 390 (citing Canel v. Topinka, 212 Ill. 2d 311, 321, 818 N.E.2d 311, 319 (2004)).
344. *Morr-Fitz, Inc.*, 231 Ill. 2d at 489, 901 N.E.2d at 384.
345. *See id.* at 493–95, 901 N.E.2d at 386–87.
346. *See id.* at 495, 901 N.E.2d at 387.
347. *Id.* at 231 Ill. 2d at 495, 901 N.E.2d at 387.
348. *Morr-Fitz, Inc.*, 231 Ill. 2d at 495, 901 N.E.2d at 387.
349. *Id.*
350. *Id.*

stringent ripeness test will encompass the standing requirements.[351] Therefore, the court in *Morr-Fitz, Inc.* focused on whether the suit was ripe for review, because its determination on that issue would lead to a resolution of the standing issue.[352]

Second, *Morr-Fitz, Inc.* analyzed the ripeness standards set forth in *Abbott Laboratories*.[353] To determine ripeness, the Court in *Abbott Laboratories* evaluated (1) "whether the issues are fit for judicial decision and (2) the hardship to the parties of withholding judicial consideration."[354] In *Abbott Laboratories*, the plaintiff drug companies sought a declaratory judgment as to the validity of an agency's interpretation of a statute.[355] The agency's interpretation would have required the plaintiffs to change their labels at significant costs.[356] The United States Supreme Court held that the claims were ripe for review because the regulations had a direct and immediate impact on the plaintiffs.[357] The United States Supreme Court reasoned that the plaintiffs demonstrated sufficient hardship because "the regulation [was] directed at them in particular; it require[d] them to make significant changes in their everyday business practices; if they fail[ed] to observe the Commissioner's rule they [would be] quite clearly exposed to the imposition of strong sanctions."[358]

In *Morr-Fitz, Inc.*, the Illinois Supreme Court applied the *Abbott Laboratories* test.[359] Addressing the first prong of the ripeness test, the supreme court held that the plaintiffs' claims were fit for judicial review because the claims required the court to determine whether the Rule violated state and federal laws.[360]

The Illinois Supreme Court held that the plaintiffs met the sufficient hardship prong for ripeness as well.[361] The Court stressed that the Rule required the plaintiffs to act in a concrete way by mandating that they stock

---

351. *Id.* at 489–90, 901 N.E.2d at 384.
352. *Id.*
353. *See id.* at 493–95, 901 N.E.2d at 386–87.
354. *Morr-Fitz, Inc.*, 231 Ill. 2d at 490, 901 N.E.2d at 384 (citing Abbott Labs v. Gardner, 387 U.S. 136, 149) (1967)).
355. *Abbott Labs*, 387 U.S. at 152–53.
356. *Id.*
357. *Id.*
358. *Id.* at 154.
359. *Morr-Fitz, Inc.*, 231 Ill. 2d at 491, 901 N.E.2d at 385.
360. *Id.* at 491–92, 901 N.E.2d at 385 (citing Minn. Citizens Concerned for Life v. Fed. Election Comm'n, 113 F.3d 129, 132) (8th Cir. 1997) (stating "[f]itness for judicial decision means, most often, that the issue is legal rather than factual.")).
361. *Morr-Fitz, Inc.*, 231 Ill. 2d at 492–93, 901 N.E.2d at 385–86.

and dispense Plan B contraception.[362] Thus, as in *Abbott Laboratories*, the law required the plaintiffs to significantly change their business practices by requiring them to stock and dispense Plan B.[363] The Illinois Supreme Court was persuaded by the plaintiffs' affidavits, which stated that since the Rule went into effect, their pharmacies had received more than fifteen requests for Plan B contraceptives.[364] The court reasoned that because the plaintiffs were faced with the dilemma of either complying with the regulation and suffering great business costs, or receiving harsh penalties for non-compliance, the plaintiffs demonstrated sufficient hardship.[365] Therefore, the plaintiffs' claims were appropriate for judicial review.[366]

Third, the supreme court noted that a First Amendment claim can bolster a ripeness argument.[367] In *Morr-Fitz, Inc.*, the plaintiffs asserted that the Rule chilled their First Amendment rights.[368] The supreme court stated that First Amendment claims, like the plaintiffs', relax the ripeness standards of *Abbott Laboratories*.[369] The court also noted that other jurisdictions have held that plaintiffs who assert First Amendment claims meet the ripeness test because they can show that they suffer not just harm, but irreparable harm.[370]

Fourth, the Illinois Supreme Court considered the defendants' argument that the plaintiffs were required to exhaust their administrative remedies before going to court.[371] The supreme court listed the exceptions to the exhaustion requirement, noting that the exhaustion of administrative remedies doctrine does not apply where a party alleges that a law is unconstitutional on its face.[372] Beyond that, a party does not need to exhaust administrative remedies when (1) those remedies are inadequate or futile, (2) administrative expertise is not needed, or (3) exhaustion of administrative remedies would cause the party to endure a long administrative process resulting in irreparable harm.[373]

---

362. *Id.* at 492–93, 901 N.E.2d at 386.
363. *Id.*
364. *Id.* at 494, 901 N.E.2d at 387.
365. *Id.* at 494, 901 N.E.2d at 386.
366. *Id.*
367. *See id.* at 495, 901 N.E.2d at 387.
368. *Morr-Fitz, Inc.*, 231 Ill. 2d at 494–95, 901 N.E.2d at 387.
369. *Id.* at 494, 901 N.E.2d at 387.
370. *Id.* at 494–95, 901 N.E.2d at 387 (citing Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007) ("finding the First Amendment claims of pharmacists and pharmacies were ripe and granting a preliminary injunction because of the likelihood of success on the merits and the possibility of irreparable injury.")).
371. *See Morr-Fitz, Inc.*, 231 Ill. 2d at 495, 901 N.E.2d at 387.
372. *Morr-Fitz, Inc.*, 231 Ill. 2d at 498, 901 N.E.2d at 389.
373. *Id.* at 499, 901 N.E.2d at 390 (citing Canel v. Topinka, 212 Ill. 2d 311, 321, 818 N.E.2d 311, 319 (2004)).

The court held that the plaintiffs were not required to exhaust administrative remedies.[374] The court reasoned that, by alleging that the Rule was motivated by a desire to compel persons to dispense contraception in violation of their religious beliefs, the plaintiffs brought a First Amendment facial challenge.[375] As a result, the exhaustion of remedies doctrine was inapplicable to the plaintiffs' claim.[376] Further, the supreme court found that it would be futile for the plaintiffs to exhaust their administrative remedies because the Governor stated that the Rule would be "vigorously enforced."[377] Also, because the plaintiffs' claims involved questions of law, administrative expertise was not needed.[378]

2. In re Alfred H.H.[379]

The mootness doctrine has many recognized exceptions, including for cases involving the public interest, circumstances that are capable of repetition yet avoiding review, and situations involving significant collateral consequences.[380] The public interest exception applies when: "(1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question."[381] The exception for circumstances that are capable of repetition yet avoiding review applies when a litigant can show that: (1) the duration of the action is too short to be fully litigated prior to its cessation; and (2) there is a reasonable expectation that the party asserting the exception will be subject to the same action in the future.[382] Finally, the collateral consequences exception applies when a plaintiff "suffered, or [is] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision."[383] In *In re Alfred H.H.*, the Illinois Supreme Court held that the claim of a respondent who alleged that the trial court lacked sufficient evidence to commit him to a

374. *Morr-Fitz, Inc.*, 231 Ill. 2d at 497–98, 901 N.E.2d at 389
375. *Id.* at 499, 901 N.E.2d at 389.
376. *Id.* at 497–98, 901 N.E.2d at 389.
377. *Id.* at 501, 901 N.E.2d at 391.
378. *Id.* at 504, 901 N.E.2d at 392.
379. *In re* Alfred H.H., 233 Ill. 2d 345, 910 N.E.2d 74 (2009).
380. *See Alfred H.H.*, 233 Ill. 2d at 356–61, 910 N.E.2d at 80–3.
381. *Alfred H.H.*, 231 Ill. 2d at 355, 910 N.E.2d at 80 (citing People ex rel. Wallace v. Labrenz, 411 Ill. 618, 622, 104 N.E.2d 769, 772 (1952)).
382. *Alfred H.H.*, 233 Ill. 2d at 359, 910 N.E.2d at 82 (quoting *In re* Barbara H., 183 Ill. 2d 482, 491, 702 N.E.2d 555, 559 (1998) (internal quotations omitted)).
383. *Alfred H.H.*, 233 Ill. 2d at 361, 910 N.E.2d at 83 (quoting Spencer v. Kemna, 523 U.S. 1, 7 (1998) (internal citations omitted)).

mental health center was moot.[384] In doing so, the supreme court emphasized that courts evaluate mootness exceptions on a case-by-case basis and consider "all the applicable exceptions in light of the relevant facts and legal claims raised in the appeal."[385]

The respondent, Alfred H.H., had a history of mental health treatment and previously had been convicted of murder.[386] The respondent was committed based on threats he made to bank employees and subsequent interviews he had with a police officer and a psychiatrist.[387] The trial court conducted a commitment hearing and, on May 11, 2007, entered an order involuntarily committing the respondent to a mental health facility.[388] The order committed the respondent for a period of 90 days or less.[389] The respondent appealed his commitment order, arguing that there was insufficient evidence to warrant his commitment.[390] Before that appeal could be heard, the respondent was discharged.[391] On March 11, 2008, the appellate court dismissed the respondent's appeal as moot.[392]

The Illinois Supreme Court affirmed the appellate court's dismissal, though on different grounds, holding that the respondent's case did not fall into any recognized mootness exception.[393] The court began by noting that the underlying case ordinarily would be considered moot because the commitment order expired after 90 days and therefore could not bind the respondent.[394] Thus, the issue before the supreme court was whether an exception to the mootness doctrine applied that would allow the appellate court to consider the respondent's claim that the evidence against him was insufficient.[395]

On appeal to the supreme court, the respondent argued that five exceptions to the mootness doctrine applied: (1) the "*per se* exception" under the Mental Health and Development Disabilities Code (the "Mental Health Code"); (2) the public interest exception; (3) the capable-of-repetition-yet-avoiding-review exception; (4) the collateral consequences exception; and (5) an exception based on general policy considerations.[396] The Illinois Supreme

384. *Alfred H.H.*, 233 Ill. 2d at 365, 910 N.E.2d at 85.
385. *Id.*
386. *Id.* at 348, 910 N.E.2d at 76.
387. *Id.* at 348–49, 910 N.E.2d at 76–77.
388. *Id.*
389. *Id.*
390. *Id.* at 350, 910 N.E.2d at 77.
391. *Id.*
392. *Id.*
393. *Id.* at 364, 910 N.E.2d at 85.
394. *Id.* at 350, 910 N.E.2d at 77.
395. *See id.* at 355–63, 910 N.E.2d at 80–84.
396. *Alfred H.H.*, 233 Ill. 2d at 351, 910 N.E.2d at 78.

Court rejected each argument and affirmed the appellate court's dismissal of the respondent's appeal as moot.

First, the respondent argued that the Mental Health Code mandated review of his involuntary commitment.[397] The respondent asserted that the Mental Health Code provides a general exception to the mootness doctrine in all mental health cases because most mental health cases will become moot before the appeals are heard.[398] The supreme court rejected the respondent's argument, stating that no provision in the Mental Health Code required appellate review.[399] The court observed that Illinois case law has rejected a general exception to the mootness doctrine in mental health cases.[400] Rather, a reviewing court must conduct a case-by-case analysis to determine whether an already established exception to the mootness doctrine would apply.[401] Thus, the supreme court concluded that there was no *per se* exception to the mootness doctrine in mental health cases.[402]

Second, the supreme court considered and rejected the application of the public interest exception.[403] Under the public interest exception, a court can hear an otherwise moot case if: "(1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question."[404] Applying those factors, the supreme court held that the respondent had failed to show that his case was "of a public nature."[405] Indeed, the court stated that the issue presented, whether the trial court had sufficient evidence to commit the respondent to a mental health facility, was case-specific and lacked the breadth and public effect required to satisfy the public nature factor.[406] Next, the court addressed the respondent's argument that because the case had precedential value, it satisfied the second public interest factor.[407] The court dismissed the respondent's argument, stating that the

397. *Id.* at 352, 910 N.E.2d at 78 (citing 405 ILL. COMP. STAT 5/2-816 (2006)).
398. *Alfred H.H.*, 233 Ill. 2d at 352, 910 N.E.2d at 78.
399. *Id.* at 353, 910 N.E.2d at 79.
400. *Id.* at 353–55, 910 N.E.2d at 79–80 (discussing *In re* Barbara H., 183 Ill. 2d 482, 702 N.E.2d 555 (1998)) (adopting a case-by-case approach in finding an exception to the mootness doctrine); (*see* Yiadom v. Kiley, 204 Ill. App. 3d 418, 424–25, 562 N.E.2d 310, 313 (1st Dist. 1990) (rejecting a blanket exception for mootness in mental health cases, but finding mootness here because the case was capable of repetition yet avoiding review)).
401. *Alfred H.H.*, 233 Ill. 2d at 355, 910 N.E.2d at 80.
402. *Id.*
403. *Id.* at 358, 910 N.E.2d at 82.
404. *Id.* at 355, 910 N.E.2d at 80 (citing People ex rel. Wallace v. Labrenz, 411 Ill. 618, 622, 104 N.E.2d 769, 772 (1952)).
405. *Alfred H.H.*, 233 Ill. 2d at 356–57, 910 N.E.2d at 81.
406. *Id.* at 357, 910 N.E.2d at 81.
407. *Id.*

public interest "factor requires that the party asserting justiciability show that there is a need to make an authoritative determination for future guidance of public officers."[408] That a decision would have precedential value is not enough to qualify the respondent's suit for the public interest exception.[409] Finally, the court held that there was no likelihood of recurrence because each decision to commit a person to a mental health facility must be based on a new evaluation.[410]

Third, the court addressed whether the respondent's case could fit under the exception for circumstances that are capable of repetition yet avoid review.[411] There are two elements to that exception: "First, the challenged action must be of a duration too short to be fully litigated prior to its cessation. Second, there must be a reasonable expectation that the same complaining party would be subjected to the same action again."[412] The supreme court reasoned that the first prong was easily met because the order at issue had a duration of 90 days.[413] As to the second prong, the court concluded that the respondent failed to show how a resolution of the present litigation, which was based on a specific mental health hearing, could assist him in future litigation.[414] Thus, the supreme court held that the capable-of-repetition-yet-avoiding-review exception did not apply.[415]

The court distinguished *In re Alfred H.H.*, from *In re A Minor*,[416] signaling that the court might have reached a different result if the respondent had asserted constitutional arguments.[417] In *In re A Minor*, the appellant raised a constitutional challenge that related to a specific statutory provision.[418] In *In re A Minor*, the supreme court held that the capable-of-repetition-yet-avoiding-review exception applied.[419] The *In re A Minor* Court reasoned that the same

---

408. *Id.* at 357–58, 910 N.E.2d at 81 (citing *In re* Adoption of Walgreen, 186 Ill. 2d 362, 365, 710 N.E.2d 1226, 1227 (1999) (internal quotations omitted)).
409. *Alfred H.H.*, 233 Ill. 2d at 357, 910 N.E.2d at 81.
410. *Id.* at 358, 910 N.E.2d at 82.
411. *Id.*
412. *Id.* at 359, 910 N.E.2d at 82 (quoting *In re* Barbara H., 183 Ill. 2d 482, 491, 702 N.E.2d 555, 559 (1998) (internal quotations omitted)).
413. *Alfred H.H.*, 233 Ill. 2d at 358, 910 N.E.2d at 82.
414. *Id.* at 360, 910 N.E.2d at 83.
415. *Id.*
416. *In re* A Minor, 127 Ill. 2d 247, 537 N.E.2d 292 (1989).
417. *See Alfred H.H.*, 233 Ill. 2d at 359–60, 910 N.E.2d at 82–83.
418. *Alfred H.H.*, 233 Ill. 2d at 360, 910 N.E.2d at 83 (discussing *In re* A Minor, 127 Ill. 2d 247, 259, 537 N.E.2d 292, 297 (1989)).
419. *Alfred H.H.*, 233 Ill. 2d at 360, 910 N.E.2d at 83 (discussing *In re* A Minor, 127 Ill. 2d 247, 259, 537 N.E.2d 292, 297 (1989)).

challenge before the court could be raised again against the same party.[420] In contrast, in *In re Alfred H.H.*, the respondent did not raise a constitutional argument or challenge a statutory interpretation; he contested only the evidence introduced at his commitment hearing.[421]

Fourth, the court addressed the collateral consequences exception.[422] The collateral consequences exception applies when a plaintiff "suffered, or [is] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision."[423] After establishing that the collateral consequences exception can be applied in mental health cases, the supreme court held that there were no collateral consequences that could be attributed solely to the proceeding under review.[424] The court reasoned that because the respondent was convicted of murder and had multiple involuntary commitments prior to the proceeding at issue in this case, there were no collateral consequences that arose exclusively from the commitment litigation.[425]

Finally, the supreme court disposed of the respondent's argument that general policy considerations, such as potential therapeutic benefits of an appeal for petitioners in mental health cases, warranted review.[426] The supreme court reasoned that because the respondent did not support his policy arguments with case-law, those arguments could not independently command review.[427]

Because no established exception to the mootness doctrine applied to the respondent's suit, the supreme court affirmed the dismissal of that action as moot.[428]

---

420. *Alfred H.H.*, 233 Ill. 2d at 360, 910 N.E.2d at 83 (discussing *In re* A Minor, 127 Ill. 2d 247, 259, 537 N.E.2d 292, 297 (1989)).
421. *Alfred H.H.*, 233 Ill. 2d at 359–60, 910 N.E.2d at 82–83.
422. *Id.* at 361, 910 N.E.2d at 83.
423. *Id.* (quoting Spencer v. Kemna, 523 U.S. 1, 7 (1998) (internal citations omitted).
424. *Alfred H.H.*, 233 Ill. 2d at 360–63, 910 N.E.2d at 83–84.
425. *Id.* at 362–63, 910 N.E.2d at 84.
426. *Id.* at 363, 910 N.E.2d at 84–85.
427. *Id.*
428. *Id.* at 364, 910 N.E.2d at 85.

III. ILLINOIS APPELLATE COURT DECISIONS

A. Exceptions to the Res Judicata Doctrine

1. Quintas v. Asset Management Group, Inc.[429]

Section 26(1) of the Restatement (Second) of Judgments provides two exceptions to the doctrine of *res judicata*.[430] First, *res judicata* does not apply if the parties have agreed that the plaintiff may split a claim.[431] Second, *res judicata* does not apply if the lower court has expressly reserved the plaintiff's right to maintain a later claim.[432] In *Quintas v. Asset Management Group, Inc.*, the Illinois Appellate Court for the Fourth District held that because the trial court gave the plaintiffs the express right to refile their action, the second exception applied and plaintiffs' action was not barred by *res judicata*.[433]

The plaintiffs, James and Maria Quintas, filed a complaint against financial planner Linda Weinrib and financial planning firms Asset Management Group, Inc. and AMG Guaranty Trust.[434] The financial planner advised the plaintiffs to maintain 50% of their stock in Lucent Technologies during their retirement.[435] After Lucent's stock lost 80% of its value, the plaintiffs filed suit.[436] The complaint alleged three causes of action: negligence, breach of fiduciary duty, and violation of the Consumer Fraud and Deceptive Business Practices Act.[437]

The defendants moved for summary judgment.[438] On October 15, 2004, the trial court granted the defendants' motion for summary judgment on the fiduciary duty and consumer fraud claims, leaving only the negligence cause of action.[439] On October 21, 2004, the plaintiffs filed an emergency motion to dismiss without prejudice under section 2-1009 of the Code.[440] On October

---

429. Quintas v. Asset Mgmt. Grp., Inc., 395 Ill. App. 3d 324, 917 N.E.2d 100 (1st Dist. 2009).
430. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1) (1982).
431. *Id.*
432. *Id.*
433. *Quintas*, 395 Ill. App. 3d at 332, 917 N.E.2d at 107.
434. *Id.* at 326, 917 N.E.2d at 102.
435. *Id.*
436. *Id.*
437. *Id.* (citing 815 ILL. COMP. STAT. 505/1 *et seq*. (2006)).
438. *Quintas*, 395 Ill. App. 3d at 327, 917 N.E.2d at 102.
439. *Id.*
440. *Id.* (citing 735 ILL. COMP. STAT. 5/2-1009 (2004)). On October 21, 2004, the plaintiffs' presented their motion to a judge sitting in for the assigned judge. The sitting judge granted the plaintiffs' motion on October 22, 2004. On October 25, 2004, the plaintiffs appeared before the assigned judge

25, 2004, the trial court entered an order that granted a voluntary dismissal without prejudice, subject to certain conditions.[441] One condition was that the trial court would retain jurisdiction to decide the defendants' Rule 219(e) motion.[442] There is no transcript of the voluntary dismissal hearing; the record is comprised of the docket sheet, the pleadings, and affidavits submitted by the parties.[443] The docket sheet for October 25, 2004, states: "VOLUNTARY DISMISSAL W[ITH] LEAVE TO REFILE–ALLOWED."[444] The defendants filed a motion for expenses under Rule 219(e) within 10 days of the trial court's order, but the trial court continued that motion on the basis of the plaintiffs' indication that they would refile the case.[445]

The plaintiffs refiled the negligence claim on April 6, 2005 (*Quintas II*).[446] On April 18, 2005, the trial court heard the defendants' motion for costs in *Quintas I* and awarded the defendants damages pursuant to Rule 219(e) after finding that the plaintiffs dismissed their suit to avoid discovery deadlines.[447] On November 28, 2005, the defendants filed a motion in *Quintas II* for summary judgment on the basis of *res judicata*.[448] The trial court granted the defendants' motion for summary judgment, and the plaintiffs appealed.[449] The appellate court reversed and remanded the trial court's decision.[450]

On appeal, the parties agreed that the elements of *res judicata* were present.[451] The doctrine of *res judicata* "bars any subsequent actions between the same parties or their privies on the same cause of action" when there is "a final judgment on the merits rendered by a court of competent jurisdiction . . . ."[452] Similarly, public policy prevents parties from claim-splitting.[453] In *Hudson v. City of Chicago*, the Illinois Supreme Court held that "a plaintiff engages in claim-splitting if that plaintiff voluntarily dismisses a claim pursuant to section 2-1009 of the Code after another part of the cause of action has gone to final judgment and subsequently refiles that claim."[454] The

---

and presented the same motion for voluntary dismissal. The trial court entered an order on October 25, 2004, identical to the order entered on October 22, 2004, by the sitting judge.

441. *Quintas*, 395 Ill. App. 3d at 327, 917 N.E.2d at 102.
442. *Id.* at 328, 917 N.E.2d at 108.
443. *Id.*
444. *Id.*
445. *Id.* at 328, 917 N.E.2d at 103.
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.* at 336, 917 N.E.2d at 110.
451. *Id.* at 329, 917 N.E.2d at 104.
452. *Id.* at 328, 917 N.E.2d at 103.
453. *Id.* at 329, 917 N.E.2d at 104.
454. *Id*. (citing Hudson v. City of Chi., 228 Ill. 2d 462, 482, 889 N.E.2d 210, 222 (2008)).

trial court's order granting summary judgment in *Quintas I* was a final order.[455] Furthermore, both the parties and the cause of action were the same in *Quintas I* as in *Quintas II*.[456] Therefore, the doctrine of *res judiciata* applied to the plaintiffs' claims.[457]

The issue before the appellate court was whether any exception to *res judicata* applied.[458] Section 26(1) of the Restatement (Second) of Judgments provides two exceptions that have been adopted by the Illinois Supreme Court.[459] Under section 26(1), *res judicata* does not apply where: "(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action."[460]

The appellate court examined each of the *res judicata* exceptions.[461] First, the appellate court considered the second *res judicata* exception: whether the lower court expressly reserved the plaintiffs' right to maintain their claim.[462] The appellate court considered the issue to be one of first impression and addressed whether the October 25, 2004 docket entry constituted an express reservation of the plaintiffs' right to refile.[463] The appellate court concluded that the docket entry's language–"with leave to refile"–expressly gave the plaintiffs leave to refile.[464] The court also noted that docket sheet entries are treated as orders of the court.[465]

The appellate court further held that the trial court's written order allowing a voluntary dismissal did not conflict with the docket sheet.[466] The appellate court reasoned that the trial court's omission of the words "right to refile" in its order did not render the order inconsistent with the docket sheet.[467] The court explained that the two orders were consistent because the trial court used the words "without prejudice," which means that the litigant has the right to refile.[468] Because the trial court gave the plaintiffs the express

455. *Quintas*, 395 Ill. App. 3d at 329, 917 N.E.2d at 104.
456. *Id.*
457. *Id.*
458. *Id.*
459. *Id.* at 104 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1) (1982)).
460. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1) (1982).
461. *Quintas*, 395 Ill. App. 3d at 329, 917 N.E.2d at 104.
462. *Id.* at 329, 917 N.E.2d at 104.
463. *Id.*
464. *Id.* at 333, 917 N.E.2d at 107.
465. *Id.*
466. *Id.* at 330, 917 N.E.2d at 105.
467. *Id.*
468. *Id.* at 333, 917 N.E.2d at 107.

right to refile, their suit fell under a *res judicata* exception and was not barred.[469]

In its analysis of section 26(1)(b) of the Restatement, the appellate court stated that the defendants' acknowledgment in their motion that the plaintiffs were granted leave to refile, was persuasive evidence that the trial court expressly reserved the plaintiffs' right to maintain a second action.[470] However, that fact alone would be insufficient to meet the *res judicata* exception in section 26(1)(b) of the Restatement.[471]

Second, the appellate court considered whether the parties had agreed that the plaintiffs could split their claims.[472] The plaintiffs argued that the defendants agreed to claim-splitting by withholding their objection, allowing both claims to exist simultaneously, and using the refiled action for their benefit.[473] The appellate court rejected all of those arguments and held that the defendants had not agreed that the plaintiffs could split their claims.[474]

The appellate court addressed the plaintiffs' argument that the defendants' withheld their objections until after *Quintas II* was filed and thereby allowed the plaintiffs to split their claims.[475] The appellate court stated that the proper time to object is when an action is refiled.[476] Because the defendants objected in their first answer in *Quintas II*, their objections were timely.[477]

Next, the appellate court found that the defendants had not acquiesced to the plaintiffs' refiling by allowing the cases to exist simultaneously.[478] The appellate court explained that the cases existed simultaneously because the trial court did not rule on the defendants' Rule 219(e) motion for expenses until after *Quintas II* had been filed.[479] The purpose of Rule 219(e) is to deter parties from voluntarily dismissing a case to avoid compliance with discovery deadlines.[480] The appellate court stated that "the proper time to file a motion

---

469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. *Id.* at 336, 917 N.E.2d at 110.
475. *Id.* at 334, 917 N.E.2d at 108.
476. *Id.*
477. *Id.*
478. *Id.* at 335, 917 N.E.2d at 109.
479. *Id.* at 334, 917 N.E.2d at 108.
480. *Id.* (citing ILL. SUP. CT. R. 219(e). (*See* Morrison v. Wagner, 191 Ill. 2d 162, 166–67, 729 N.E.2d 486, 488–89 (2000) (enumerating two mechanisms whereby Rule 219(e) motions can deter parties from evading discovery. First, the court can require the party seeking dismissal to pay reasonable expenses incurred in defending the case. Second, Rule 219(e) provides additional consequences if the refiled action requires the court to consider the prior litigation in setting discovery parameters.).

for expenses under Rule 219(e) is in the original action once the plaintiff has filed for voluntary dismissal."[481] In *Quintas*, the appellate court determined that the defendants filed their motion for expenses at the proper time, after the plaintiffs moved for voluntary dismissal in *Quintas I*.[482]

Finally, the appellate court addressed whether the defendants acquiesced to the refiling by using the refiled action for their own benefit, to file their 219(e) motion and a counterclaim.[483] The appellate court rejected that argument, reasoning that the defendants' filings were proper and timely.[484]

B. Residual Jurisdiction

1. Badea v. Phillips[485]

Rule 219(c) grants a circuit court jurisdiction to consider sanctions after the entry of a final judgment, when a party fails to comply with a court's order or its rules.[486] In *Badea v. Phillips*, the Illinois Appellate Court for the First District held that the circuit court lacked jurisdiction to hear a Rule 219(c) motion for sanctions filed by a non-party after the underlying claim was dismissed.[487]

Badea arose out of a personal injury action.[488] In the underlying case, the defendant's counsel, David Koppelman, sought to depose Dr. Diaz, a non-party witness.[489] Dr. Diaz sought a protective order to exclude questioning about his business and billing practices.[490] Koppelman opposed the motion, alleging that the plaintiff had been charged twice for the same MRI and that counsel should be allowed to question the doctor about that fact.[491] The circuit court granted the protective order.[492] The circuit court orally clarified the parameters governing permissible deposition questions.[493]

---

481. *Quintas*, 395 Ill. App. 3d at 336, 917 N.E.2d at 110.
482. *Id.* at 335, 917 N.E.2d at 109.
483. *Id.*
484. *Id.* at 336, 917 N.E.2d at 110.
485. Badea v. Phillips, 389 Ill. App. 3d 292, 906 N.E.2d 615 (1st Dist. 2009).
486. ILL. SUP. CT. R. 219(c).
487. *Badea*, 389 Ill. App. 3d at 296, 906 N.E.2d at 619.
488. *Id.* at 293, 906 N.E.2d at 616.
489. *Id.*
490. *Id.*
491. *Id.*
492. *Id.* at 294, 906 N.E.2d at 617.
493. *Id.*

On July 17, 2007, the underlying suit was dismissed with prejudice pursuant to a settlement agreement.[494] One month later, Dr. Diaz filed a motion seeking sanctions under Rule 219(c) against Koppelman and his law firm.[495] Dr. Diaz asserted that Koppelman violated the protective order that prohibited him from asking about Dr. Diaz's billing or business practices.[496] In response, Koppelman argued that the circuit court lacked jurisdiction to rule on the motion for sanctions because the motion was filed after the dismissal order was entered.[497] Dr. Diaz replied that the circuit court had jurisdiction to consider sanctions pursuant to Rule 137.[498] The circuit court judge concluded that jurisdiction existed because the motion for sanctions was filed within 30 days of the underlying suit's dismissal.[499] The circuit court then found that Koppelman's questions had violated the protective order and Rule 219(c).[500] The circuit court entered an order prohibiting Dr. Diaz's deposition from being used in collateral proceedings.[501] No monetary sanctions were entered.[502]

The appellate court vacated the circuit court's order and held that the circuit court lacked jurisdiction to enter sanctions under Rule 219(c).[503] Before it dealt with the residual jurisdiction issue, the appellate court addressed Dr. Diaz's argument that the court retained jurisdiction under Rule 137.[504] Rule 137 imposes sanctions based on "a pleading, motion, or other paper . . . signed in violation of this rule."[505] The appellate court found that Rule 137 did not apply.[506] The court explained that Dr. Diaz's motion did not qualify as a Rule 137 motion because it sought sanctions based on a discovery violation rather than a court filing.[507]

Thus, the issue before the appellate court was whether the circuit court retained jurisdiction to hear a Rule 219(c) motion for sanctions filed by a non-party after the underlying suit was dismissed.[508] In resolving the issue, the

494. *Id.*
495. *Id.* at 294–95, 906 N.E.2d at 617.
496. *Id.*
497. *Id.* at 295, 906 N.E.2d at 618.
498. *Id.* at 296, 906 N.E.2d at 618.
499. *Id.* at 295, 906 N.E.2d at 617.
500. *Id.* at 295, 906 N.E.2d at 618.
501. *Id.*
502. *Id.*
503. *Id.* at 299–300, 906 N.E.2d at 621.
504. *Id.* at 296, 906 N.E.2d at 618.
505. ILL. SUP. CT. R. 137.
506. *Badea*, 389 Ill. App. 3d at 296, 906 N.E.2d at 618–19.
507. *Id.* at 296, 906 N.E.2d at 618.
508. *Id.* at 296, 906 N.E.2d at 619.

appellate court focused on whether the circuit court had residual jurisdiction at the time the motion for sanctions was filed.[509]

First, the appellate court considered whether the circuit court retained residual jurisdiction under section 2-1203 of the Code.[510] Section 2-1203 of the Code states, that "[o]nce a final order has been entered, the circuit court retains residual jurisdiction for 30 days."[511] However, the appellate court explained that section 2-1203 applies only to challenges made by parties in a bench trial and was therefore inapplicable to a case where a non-party challenged a discovery sanction motion.[512]

Second, the appellate court examined the text of Rule 219(c) to determine whether the circuit court had residual jurisdiction to rule on Dr. Diaz's motion.[513] The court explained that rules of legislative construction govern the interpretation a Supreme Court Rule.[514] Thus, a court looks to the plain language and the intent of a Rule when construing its meaning.[515]

The appellate court held that Rule 219(c) did not provide the circuit court with residual jurisdiction.[516] Rule 219(c) states in pertinent part that a motion for sanctions must be "pending . . . prior to the filing of a notice or motion seeking a judgment or order of dismissal."[517] The court reasoned that, by its plain language, the Rule applies only to *pending* cases.[518] Also, the court noted that the remedies set forth in Rule 219(c) demonstrate that the Rule applies before a final judgment is entered.[519] Furthermore, the court held that residual jurisdiction under Rule 219(c) applies only to orders imposing monetary sanctions.[520]

Finally, the appellate court addressed Dr. Diaz's argument that the circuit court retained inherent jurisdiction to enforce its own protective order by imposing sanctions.[521] The appellate court agreed that, as a general matter, courts retain jurisdiction to enforce their orders.[522] However, the appellate

509. *Id.*
510. *Id.* at 297, 906 N.E.2d at 619.
511. 735 ILL. STAT. COMP. 5/2-1203(a) (1994).
512. *Badea*, 389 Ill. App. 3d at 297, 906 N.E.2d at 619.
513. *Id.*
514. *Id.*
515. *Id.*
516. *Id.* at 298, 906 N.E.2d at 620.
517. *Id.* at 297, 906 N.E.2d at 619 (citing ILL. SUP. CT. R. 219(c)).
518. *Badea*, 389 Ill. App. 3d at 297, 906 N.E.2d at 619.
519. *Id.*
520. *Id.*
521. *Id.* at 298, 906 N.E.2d 615, 620.
522. *Id.* (citing Am. Soc'y of Lubrication Eng'rs v. Roetheli, 249 Ill. App. 3d 1038, 1044, 621 N.E.2d 30, 34 (1st Dist. 1993)).

court rejected Dr. Diaz's contention that "enforcement" includes the imposition of sanctions for a violation of Rule 219(c).[523] The court explained that "[w]e are unconvinced that any residual jurisdiction the circuit court may have to enforce its own order extends so far as to impose a sanction for a violation of Supreme Court Rule 219(c), which we treat as analogous to statutory authority."[524] As a result, the appellate court lacked jurisdiction to rule on Dr. Diaz's motion.[525]

C. Reversible Error

1. Missner v. Clifford[526]

In order to show that a court has committed reversible error, the appellant must demonstrate prejudice.[527] In *Missner v. Clifford*, the Illinois Appellate Court for the First District held that the circuit court did not commit reversible error when it converted the plaintiff's motion to dismiss into a summary judgment motion because the plaintiff was not prejudiced by the conversion, as the court's analysis would have been the same in connection with either type of motion.[528]

The plaintiff, attorney David Missner, brought a defamation action against the defendant, attorney Robert Clifford.[529] The suit arose out of a press release that Mr. Clifford's law firm, Clifford Law Offices, issued accusing Mr. Missner of committing certain acts in the course of a bankruptcy proceeding.[530] The defendant filed a combined motion for summary judgment and to dismiss under section 2-619(a)(9)[531] of the Code, as well as supporting exhibits and affidavits.[532] In his summary judgment motion, the defendant asserted that he did not publish the statements at issue.[533] In the alternative, the defendant filed a motion to dismiss, on the basis of affirmative defenses, including the fair report privilege.[534] The plaintiff argued that the defendant's section 2-619(a)(9) motion to dismiss was improper because the putative affirmative

523. *Badea*, 389 Ill. App. 3d at 298, 906 N.E.2d at 620.
524. *Id.* at 298–99, 906 N.E.2d at 620.
525. *Id.* at 296, 906 N.E.2d at 619.
526. Missner v. Clifford, 393 Ill. App. 3d 751, 914 N.E.2d 540 (1st Dist. 2009).
527. *Id*. at 759, 914 N.E.2d at 549.
528. *Id.* at 759, 914 N.E.2d at 548–49.
529. *Id.* at 752, 914 N.E.2d at 544.
530. *Id.*
531. 735 ILL. COMP. STAT. 5/2-619(a)(9) (2006).
532. *Missner*, 393 Ill. App. 3d at 754–55, 914 N.E.2d at 545.
533. *Id.* at 754, 914 N.E.2d at 545.
534. *Id.* at 755, 914 N.E.2d at 545.

defenses attacked the factual basis of the complaint and thus were not true affirmative defenses.[535]

The circuit court analyzed the combined motion under the standard that governs summary judgment motions, reasoning that because the parties were relying on evidence developed during discovery, the motion was more in the nature of a request for summary judgment.[536] Based on the defendant's affirmative defenses, the circuit court granted summary judgment.[537] The plaintiff appealed, arguing that the circuit court erred in converting the motion to dismiss into a summary judgment motion *sua sponte* when the defendant had chosen to file the motion as a motion to dismiss.[538]

The appellate court held that while it had been unnecessary to convert the motion to dismiss to a summary judgment motion, the circuit court did not commit a reversible error because the plaintiff was not prejudiced by the conversion.[539]

The appellate court held that the circuit court properly could have considered the defendant's affirmative defenses and supporting exhibits in the context of a section 2-619 motion.[540] The appellate court first concluded that the defendant's affirmative defenses were true affirmative defenses and therefore proper under a section 2-619 motion.[541] The appellate court then observed that affidavits and depositions may be considered by the court when deciding a section 2-619 motion to dismiss.[542] As a result, the fact that the parties relied on facts advanced in discovery did not necessitate the circuit court's conversion of the section 2-619 motion into a summary judgment motion.[543]

The appellate court went on to hold that, because the analysis under a section 2-619 motion and a summary judgment motion are so similar, the plaintiff did not suffer prejudice by the circuit court's error.[544] The court reasoned that both summary judgment motions and motions to dismiss require the same analysis: "did the evidence submitted by the parties demonstrate the

---

535. *Id.*
536. *Id.* at 759, 914 N.E.2d at 548.
537. *Id.* at 757, 914 N.E.2d at 547.
538. *Id.* at 759, 914 N.E.2d at 548. Plaintiff Missner also argued that the court erred in applying the fair report privilege to the defamation action. However, the defamation discussion is beyond the scope of this article.
539. *Id.* at 759, 914 N.E.2d at 548–49.
540. *Id.* at 759, 914 N.E.2d at 549.
541. *Id.*
542. *Id.*
543. *Id.*
544. *Id.* at 760, 914 N.E.2d at 549.

existence of a question of material fact to preclude disposition as a matter of law?"[545] Accordingly, the circuit court did not commit a reversible error.[546]

IV. ILLINOIS SUPREME COURT RULE AMENDMENTS

In 2009, the Illinois Supreme Court amended the Supreme Court Rules. This survey discusses in detail two of those amendments that relate specifically to civil procedure: Rule 204 and 239. Also, effective on December 29, 2009, Rules relating to the service of papers, Rules 11, 12, 361, 367, 373, 381, and 383, were amended and now allow for service to be made by delivery to a third-party commercial carrier.[547] For a complete listing of all of the 2009 amendments, please consult the Illinois Supreme Court's website.[548]

A. Supreme Court Rule 204–Compelling Appearance of Deponent.

Rule 204 regulates the process for compelling the appearance of a deponent.[549] The amended Rule, addresses the procedure for challenging a nonparty's failure to comply with Rule 204.[550] The amendment adds section (d), titled "Noncompliance by Nonparties: Body Attachment."[551] The amendment became effective on June 11, 2009.[552] Section (d) states:

> (1) An order of body attachment upon a nonparty for noncompliance with a discovery order or subpoena shall not issue without proof of personal service of the rule to show cause or order of contempt upon the nonparty.
> (2) The service of the rule to show cause or order of contempt upon the nonparty, except when the rule or order is initiated by the court, shall include a copy of the petition for rule and the discovery order or subpoena which is the basis for the petition for rule.
> (3) The service of the rule to show cause or order of contempt upon the nonparty shall be made in the same manner as service of summons provided for under sections 2-202, 2-203(a)(1) and 2-203.1 of the Code of Civil Procedure.[553]

---

545. *Id.*
546. *Id.*
547. ILL. SUP. CT. R. 11, 12, 361, 367, 373, 381, 383.
548. The Illinois Supreme Court website is http://www.state.il.us/court/.
549. ILL. SUP. CT. R. 204.
550. *Id.*
551. *Id.*
552. *Id.*
553. *Id.*

B. Supreme Court Rule 239–Instructions.

Rule 239 addresses pattern jury instructions.[554] In the amended Rule, the former section (e), titled "Instructions During Trial," is now moved to subsection (f).[555] The newly added section (e) regulates jury instructions given at the close of evidence.[556] Rule 239(e) now states:

> Instructions After the Close of Evidence. After the close of evidence, the court shall repeat any applicable instructions given to the jury before opening statements and instruct the jury on procedural issues and the substantive law applicable to the case, including, but not limited to, the elements of the claim or affirmative defense. The court may, in its discretion, read the instructions to the jury prior to closing argument. Whether or not the instructions are read prior to closing argument, the court shall read the instructions to the jury following closing argument and shall at that time distribute a written copy of the instructions to each juror. Jurors shall not be given a written copy of the jury instructions prior to counsel concluding closing argument.[557]

The 2009 amendment also deleted portions of section (d) that addressed instructions given after closing arguments.[558] Prior to the amendment, section (d) subsections (i) and (ii) included a sentence that stated "[t]he court need not read these instructions after closing arguments."[559] Because the newly added section (e) now addresses instructions given after closing arguments, that sentence has been removed.[560] The amendments to Rule 239 became effective on September 1, 2009.[561]

V. CONCLUSION

Illinois courts' 2009 civil practice decisions do not include any startling departures from existing law, but the supreme court and the appellate courts repeatedly illustrated the seriousness that they accord to the requirements of the Illinois Code of Civil Procedure and the Supreme Court Rules, particularly where those requirements delimit courts' jurisdiction.

---

554. ILL. SUP. CT. R. 239.
555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. *See id.*
561. ILL. SUP. CT. R. 239.