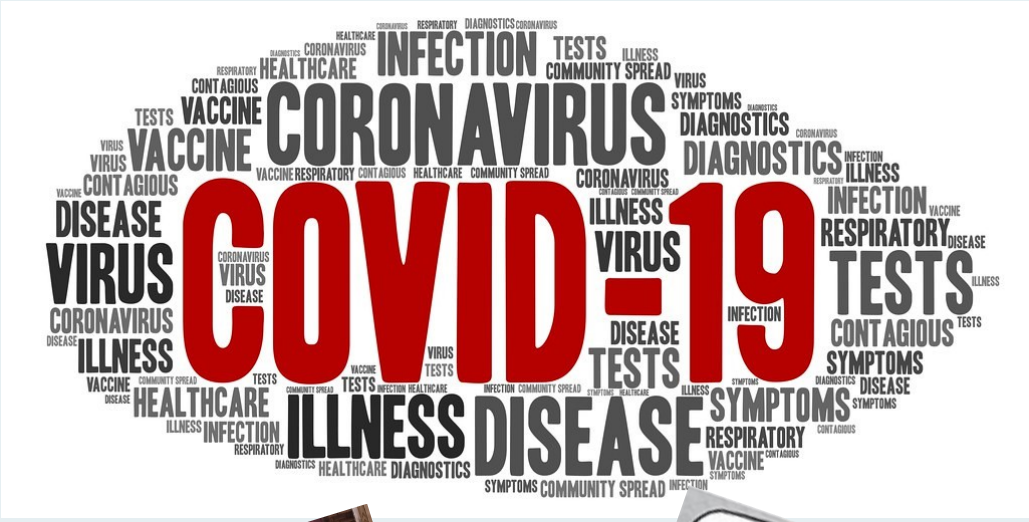
# In Brief

McHenry County Bar Association Quarterly Publication—November 2020







# ELECTIONS 2020

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**2020/21**

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Vonda Vaughn
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*Technology*
Shaina Kalanges
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# Upcoming Events

| Date | Event | Location | Time |
|---|---|---|---|
| November 5 | Criminal Law Section Meeting | Virtual | Noon |
| November 10 | Family Law Section Meeting | Virtual | Noon |
| November 12 | Civil Law Section Meeting | Virtual | Noon |
| November 17 | Board of Governors Meeting | Virtual | Noon |
| December 15 | Board of Governors Meeting | Virtual | Noon |
| January 7 | Criminal Law Section | Virtual | Noon |
| January 12 | Family Law Section Meeting | Virtual | Noon |
| January 14 | Civil Law Section Meeting | Virtual | Noon |
| January 19 | Board of Governors Meeting | Virtual | Noon |
| January 26 | General Meeting | Virtual | Noon |

## Board Meeting Minutes

July Meeting Minutes

August Meeting Minutes

September Meeting Minutes

**Inside this issue:**

# President's Page

**By Jenette Schwemler**

**2020/21 MCBA President**

**The Interesting Life and Decision Making of The Notorious RBG**

In September, we lost a dynamo in the law profession: Ruth Bader Ginsberg. I am dedicating this article to focus on a few of the more interesting aspects of her life and career.

Ruth Bader Ginsberg ("RBG") was born Joan Ruth Bader on March 15, 1933. RBG's older sister died when she was very young, and her mother died before she graduated high school. She went to college and earned a bachelor's degree at Cornell University. She attended law school at Harvard, where she was one of the few women in her class, but ultimately graduated from Columbia Law School.

RBG, as many know, was a champion of gender equality. She co-founded the Women's Rights Project at the America Civil Liberties Union, and became the Project's general counsel in 1973.[1] By 1974, she had participated in more than 300 gender discrimination cases. By 1976, she won five out of the six gender discrimination cases she argued before the Supreme Court.[2] When arguing before courts on the topic of discrimination, she opted to use the term "gender" discrimination, rather than "sex" discrimination based on her secretary's suggestion that the word "sex" was distracting to the judges.[3]

As an advocate, RBG wrote the brief in Reed v. Reed, 404 U.S. 71 (1971), which convinced the Supreme Court to extend the protections of the Equal Protection Clause of the 14th Amendment to women. In 1973, she filed the first federal case to challenge involuntary sterilization on behalf of Nial Ruth Cox, a mother who had been coercively sterilized under North Carolina's Sterilization of Persons Mentally Defective program in Cox v. A.M. Stanton, MD, *et al.*, 529 F.2d 47 (4th Cir. 1975).[4] In 1976, she filed an amicus brief in Craig v. Boren, 429 U.S. 190, which challenged an Oklahoma law that set different drinking ages for men and women.[5] Her colleague and friend, Antonin Scalia, touted her as being the Thurgood Marshall for women's rights.

After blazing a trail for gender equality as an attorney, she was nominated to the Supreme Court by Bill Clinton in 1993. She was the first Jewish justice since the resignation of Justice Abe Fortas in 1969, and became the longest serving Jewish justice on the court. When Sandra Day O'Connor retired in 2006, RBG was the sole woman on the highest court. This is when some say she "found her voice and used it."[6] When Justice John Paul Stevens retired, RBG became the senior justice of the court's "liberal wing," which gave her the authority to assign authorship of the dissenting opinions.

While on the Supreme Court, RBG authored the opinion in United States v. Virginia, 518 U.S. 515 (1996) which invalidated the Virginia Military Institute's male only admissions policy as violating the 14th Amendment. Although she was pro-choice, she joined the majority in striking down Nebraska's partial birth abortion statute in Stenberg v. Carhart, 530 U.S.914 (2000). In Gonzales v. Carhart, 550 U.S.124 (2007), she dissented in a 5-4 decision to defer to legislative findings that partial birth abortion procedures were not safe for women. RBG influenced the other justices in the case of Safford Unified School District v. Redding, 557 U.S. 364 (2009) in ruling the school violated the 4th Amendment when it required a 13 year old female to strip to her bra and underwear so she could be searched for drugs. In Shelby County v. Holder, 570 U.S. 529 (2013), she wrote an extremely impassioned dissent which led her to become known as the "Notorious RBG." In Shelby County, the majority rolled back the 1965 Voting Rights Act's protections, and permitted states, including those with histories of racially motivated voter suppression, to change their voting procedures without any outside oversight. RBG argued the Act's requirement for preclearance of changes in voting procedures in covered jurisdictions (those States where suppression was most virulent) was a fit solution for minority voters and States. RBG recognized that after the passage of the Voting Rights Act, almost as many blacks registered to vote in Alabama, Mississippi, Georgia, Louisiana, North Carolina and South Carolina as were registered the entire century before 1965. She painstakingly went through the difficult history of voter suppression without the protections of the Voting Rights Act and the gains made since its passage.

One of her more interesting non-legal achievements was having a species of praying mantis species named after her. The *Ilomantis ginsburgae* species description is novel because it relies heavily on the features of the female genitalia. Apparently, the neck plate of the species bears resemblance to a jabot, which RBG was known for wearing.

It is a sad time for the law profession, as we have lost one of the most thoughtful and intelligent justices sitting on the highest court. One of my favorite quotes from her was in response to the question, "When will there be enough women on the [Supreme] Court?" Her response: "When there are nine." RIP, RBG.

[1]Hensley, Thomas R.;Hale, Kathleen; Snook, Carl (2006), The Rehnquist Court: Justices, Rulings, and Legacy. ABC CLIO Supreme Court Handbooks, Santa Barbara, CA ABC-CLIO.

[2, 5]Lewis, Neil A. (June 15, 1993) "The Supreme Court: Women in the News; Rejected as a Clerk, Chose as a Justice: Ruth Joan Bader Ginsberg." The New York Times

[3] Toobin, Jeffrey (March 11 2013). "Heavyweight; How Ruth Bader Ginsberg has moved the Supreme Court. New Yorker

[4] Tabacco, Mar Ria (September 2020), "The forgotten time Ruth Bader Ginsberg fought against forced sterilization." The Washington Post

[6] Greenhouse, Linda (May 2007). " In dissent, Ginsburg finds her voice at Supreme Court." The New York Times

# MEMBER NEWS

## Press Release

Woodstock Law Firm Prime Law Group, LLC is pleased to announce the hiring of attorney Grace L. Jinkins to the firm. Grace will be practicing in a variety of areas including, real estate, estate planning, corporate transactions, local government, traffic law, and education law.

Grace graduated from the University of Wisconsin-Whitewater in White-Water, Wisconsin with a degree in Sociology. Grace went on to earn her law degree from Northern University College of Law, in DeKalb, Illinois. She even did a judicial internship in Rock County, Janesville, Wisconsin.

Prior to joining, Grace practiced in McHenry County in various areas of the law. Grace brings with her team experience and a proven track record of success and positive attitude.

We are confident that Grace will be an excellent fit and a strong team member to the organization.

**To contact Attorney Grace L. Jinkins:**

**Email:** gjinkins@primelawroup.com

**Phone: 815-338-2040 ext. 109**

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**The MCBA will be hosting a Toys for Tots toy drive again this year. The drive will run from November 16th—December 11th.**

**We will have 2 drop off locations:**

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Andrew J. Mertzenich

Andrew brings experience in both Criminal and Civil Law to appeals. As a former prosecutor with the Winnebago County State's Attorney's Office and now actively participating in civil litigation with Prime Law Group, LLC, Andrew has a broad knowledge of several areas of law. Andrew also publishes a Civil Decision Digest, copies of which can be found on our website.

Prime is also pleased to have Tracy A. McGonigle on their team as Tracy brings a diverse background with animal rights, and appeals work. Tracy began her career as an Assistant Defender with the Illinois State Appellate Defender and has represented clients in hundreds of criminal and civil appeals, including appeals from administrative and municipal decisions as well as trial and appellate court decisions. Tracy has practiced before state and federal appellate courts, including the Illinois Supreme Court and the 7th Circuit Court of Appeals. She has also routinely represented clients on appeal from dangerous dog determinations and feral cat colony decisions.

Tracy McGonigle


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Lance Green

Lance Green is a family law mediator and attorney. As a family law mediator and attorney, he understands the legal requirements for an enforceable and equitable dissolution or family law agreement, and more importantly understands mediation is an alternative dispute resolution method that assists parties in reaching a mutually acceptable agreement. Lance Green has also resolved allocation issues for many previously entrenched parties in the past. Mediation is confidential and conducted in a supportive private and non-adversarial setting. If you are in need of a Mediator in your case, please consider us to help assist in resolving the issues in a cost effective and time efficient manner.

# Ten Cross Examination Rules Compiled

by Honorable Mark R. Facchini

Cross examination is a trial attorney's most important skill. The longer I sit in a courtroom, the more convinced I become. With one question and answer, an entire case can change. Credibility lost. A dispositive fact proven. An affirmative defense eviscerated. All by way of an effective cross examination.

I take no credit for the creation of this list as it is derived from my observations of some of McHenry County's finest trial attorneys, many of whom appear in front of me on a regular basis. I refer all readers to Irving Younger's *Ten Commandments for Cross Examination* available on YouTube. It is a great video tutorial on cross examination. So, without further ado, here are ten rules of cross examination.

1. **Remember why you are cross examining.** The purpose of cross examination is to establish facts or reasonable inferences from facts to support your closing argument. That is it. Period. Cross examination has no further purpose. Do not repeat the direct examination in a leading question format. That is not cross examination. That is exposing the trier of fact to your opponent's case twice. So do not do it. Ever. I mean it. Never.

2. **Only ask questions to which you know (and can prove) the answer.** This is without exception. Cross examination requires controlling the witness to establish facts for your closing argument. You accomplish such by only asking questions to which you know and can prove the answer. You know the facts of your case. You know the weaknesses and strengths of the case. You know your theory of the case. You know what you want to argue. You know all this better than anyone else in the courtroom. Now, ask questions to which you know the answer to establish facts for your closing argument.

3. **Only ask leading questions**. Never ask an open ended question. Period. No exceptions. If you ask an open ended question on cross examination, you are doing it wrong. Reason? You are in control on cross examination. You have a specific goal. You know the answer to the question you are asking. You simply seek that the witness agree with the answer contained in your leading question. By leading, you maintain control and prevent the witness from explaining. If a witness tries to explain, interrupt the witness with a non-responsive objection and ask the Judge to instruct the witness to answer the question asked, nothing more and nothing less. When you ask a non-leading question, you allow the witness to explain and thus you lose control. You do not want that. It will be bad for your case. So just lead. Remember, this is cross examination, not a conversation.

4. **Write the cross examination before trial and stick to the script:** I close my eyes and I can hear Dan Hofmann's mantra, "Stick to the script, Pal." And he's right. Because you are only asking questions to which you know the answer, you can write the cross examination before trial. And stick to the script. A well outlined cross examination may also serve as your closing argument script/outline. Any exceptions to this rule? This time, yes. See rule number five below for the exception to sticking to the script. But you always stick to the rules of cross.

5. **Listen carefully to the witness's answers.** Although you prepared the cross examination before trial and you are sticking to the script, you still must listen to direct and cross examination answers carefully because other areas of cross will develop, especially impeachment by inconsistency or omission. A witness may not only give you the answer you already know, but even more. These answers could lead to further cross topics or magnificent facts for your closing. So always listen. But still follow all the rules of cross examination – only ask leading questions to which you know the answer, etc. You are just simply adding cross examination topics to further your closing arguments.

6. **No cross is better than a bad cross.** Do not be afraid to not cross examine a witness. You will not cross examine a witness in two situations. First: the witness did not testify to important material facts in opposition to your case. Often in cases involving chain of custody or certain processes, you may hear from witnesses that are simply a cog in the case. Do not waste time crossing a witness that provides nothing for your closing argument. No one will think less of you and everyone will appreciate your efficiency. Plus, no cross examination signals to the trier of fact the inconsequence of the witness's testimony. Second: your opponent failed to ask the witness the important questions or elicit important facts beneficial to your opponent's case. You do not want your cross to point out your opponent's er-

rors or worse, give your opponent an opportunity to correct the error of their ways on redirect. However, if you cannot help yourself and cannot resist cross examination, do not ask questions even remotely close to those missed areas.

7. **Never argue with the witness.** Cross examination must never lead to an argument with a witness. Why? Because you lose control of the witness. Rather, if a witness gives an answer you did not expect, you have the ability to disprove that answer. Remember, you only asked questions to which you know the answer. That answer came from somewhere in the case: a written report, written or oral statement (either directly or by omission), a deposition or prior testimony. So instead of arguing with the witness, commit the witness to the incorrect answer, commit them to their prior report, statement or testimony and impeach away. But be careful to not ask one question too many and give the witness an opportunity to explain the inconsistency (see Rule 10 below). Also, an inconsistency may arise amongst your opponent's witnesses. In such a case, commit the witness to the inconsistencies and move on. You now have great fodder for closing argument. An inconsistency or error is much more effective than an argument with a witness. And honestly, you will get more out of the inconsistency or error in closing argument than you would if the witness actually gave you the answer you wanted. So you got that going for you. Which is nice.

8. **Less is more.** A short and concise cross examination is best. This may be accomplished in two ways. First, by asking a limited number of questions focused on a limited number of facts or issues. However, not all witnesses are conducive to a limited cross given the breadth of their direct examination. So with those witnesses, you may accomplish "less is more" by directing the witness (and the trier of fact) to specific topics thus compartmentalizing your cross examination into easy to understand and digestible chunks for the trier of fact.

9. **It's cross examination, not a Quentin Tarantino film.** There are two constants in the life of a trial attorney. First, time is linear. Second, the Judge or Jury do not know the case as well as you do. So it's important for cross examination to have a chronological and/or topical order. Chronological is easy. Cross examine the witness following the chronology of events. However, when dealing with a witness covering a wide span of time and topic, you must compartmentalize. In many areas of law, a variety of the issues are governed by a multitude of statutory or common law factors. When crafting a cross, stay within the particular topic and use the factors as an outline or guide for your cross. This will allow the trier of fact to follow along and absorb the facts elicited in the proper context.

10. **Save the best question for argument.** I have never achieved the "Colombo" moment during a cross examination, nor have I ever seen one. Rather, I've experienced and seen effective cross examinations crumble because one question too many was asked and the witness got a chance to explain. Rather than going for a "kill shot" on cross examination, take your questioning up to the edge and save your final point for argument. Do not be greedy. Be effective. With a solid foundation of cross examination facts and the ability to argue reasonable inferences from those facts, you are best suited to save your best question for closing argument, where it cannot be crumbled by a witness's explanation.

In closing, always remember the three goals of trial practice: win, have fun and don't embarrass yourself. Achieving two out of three is always a victory.

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## New Members

## Welcome to the MCBA!

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# The Unforgettable Paycheck Protection Program …

Author: Mary R. Miller, CPA/ABV, CVA
Miller Verchota, *Certified Public Accountants*

What a year 2020 has been. It will definitely go down in the history books as very unpredictable. The Coronavirus Aid Relief and Economic Security Act, also known as the CARES Act, was signed into law on March 27, 2020. Little did we know that the Paycheck Protection Program (i.e. PPP Loan), would be ever changing in what is forgivable and what is not forgivable. Many times I felt like I may need to go to confession! Should we advise a client to apply, should we not? We had many clients ask us if it was morally correct to apply for the loan.

We were first focusing on the application process and what needed to be included in order to apply for the loan. The CARES Act created a $669 billion small-business loan program called the PPP. The funds were made available between February 15 and June 30, 2020. This was amazing because it was signed into law on March 27, 2020, but February 15th date came into play when calculating various qualification factors for the loan. Most companies with at most 500 employees were eligible for the PPP funds. But, were the banks ready and setup for the application process?

The smaller local banks seemed to gear up first and were ready and able to take the applications. The larger banks seemed to lag behind, and would not take smaller entity applications, we found when assisting our clients. The banks were going to receive fees of between three and five percent of the loan amount for processing the loans. Keep in mind that the banks had to use their own capital for the loans. They will not receive their funds back until the loan forgiveness is approved by the S.B.A. The business was not to incur any costs associated with the loan per the law.

Now the forgiveness part. You need a bottle of Advil near while you read through the law and the subsequent SBA interpretations because they have changed several times. Based on the initial SBA requirements we were advising owners they could include business rent payments as qualified forgiveness amounts. But wait, the rules were redone with the Paycheck Protection Program Flexibility Act (PPPFA), wherein it was than determined that if the company owner seeking forgiveness for the loan, also owned the building they rented, then only the "mortgage interest" was allowed to be added as an expense to be forgiven. This changed several calculations.

Then there is the $100K rule. If you had an employee that earned more than $100K, you could only calculate forgiveness on the $100K, which broke down to $8,333.33 per month. For the 24 week scenario, only $46,253.84 could be calculated into the forgiveness.

And once the PPPFA came into play in early June of 2020, then instead of requiring that the PPP funds be paid out in an eight-week period, which was the original law, you could "pick" instead a longer 24 week period. Instead of using up the funds in just eight weeks, you could use it up in twenty-four weeks. Well, wouldn't that have been nice to know for those restaurants that thought they had to use up all the money for payroll in the eight weeks at a time when their restaurants were ordered by the Governor to close?

The rules also changed for "health insurance" benefits. First the law was written that all health insurance premiums paid by the company could be calculated as payroll benefits and be used towards the total to be forgiven. But wait, what about S Corporation shareholders? Their health insurance is added onto their W2 at year-end. It should already be calculated in the $100K limit so, guess what, no health insurance premiums can be used for the forgiveness calculation for S Corporation shareholders.

What about increasing the owner's pay so that the payroll will be used towards the forgiveness. Well, that too changed with the PPPFA. The owner's wages can only be based on what the owner's W-2 was in 2019.

Okay, let's simplify this if we can. Now with the PPPFA changes, the best way to have the entire amount forgiven is to use the 24 week period and use the funds for just payroll, if you can. Then you do not have to worry about utilities, rent or no rent, mortgage interest, health insurance benefits and let's not forget that the only

payroll tax deduction allowed for the forgiveness is the Illinois unemployment tax.

SBA finally published their loan forgiveness application. First it was a very long and complicated form 3508. The American Institute of Certified Public Accountants (AICPA) wrote complaints to the SBA regarding the form and also petitioned Congress to see if there was any way to have the small loans that were $150K or less be able to use a simpler form with no documentation requirements. What came out of all of those negotiations was a form 3508EZ. This is for businesses that can have the loan forgiven and did not reduce their work force more than 25%. Just recently in September, however, a new form came out, Form 3508S. This form is for those businesses that received a loan of $50K or less. Now they can fill out a one-page form and only have to report their payroll expenses and other documents to the bank. The bank will not be required to forward any other documentation to the SBA.

Hopefully, as of October 22nd, the rules will not change anymore since the SBA has finally started accepting the loan forgiveness applications.

The last piece of information that will be helpful and is going to most likely be challenged in the courts is the "not includable in income" phrase. The original law stated that the money received and forgiven would "not be includable as income". Wouldn't you know the IRS would interpret this much differently. As of today, it is not "includable as income", but IRS ruled that the expenses paid with the PPP funds, such as all the payroll expenses, are NOT deductible on the Corporate or individual tax returns. So in fact, the IRS back doored it as fully taxable "income." The result is the Executive Branch (IRS) negated the Legislative Branch's (Congress) wishes. Seems unfair. The AICPA has petitioned Congress on this. It was Congress's intent to not have it includable as income so that it would not put any additional burden on the small businesses. What about a business that received the PPP money, expended it all, as required, on employee wages, is struggling to stay in business by incurring additional expenses exceeding income. The resulting loss carry forwards, resulting from the PPP expenses being fully deductible, would allow that business time to rebuild their revenue stream after a vaccine is finally developed. That was definitely not the intent of Congress. Congress wanted to get the money into the hands of the consumer to keep the economy functioning until the Pandemic had passed, but if there are no small businesses for the consumer to work at, then the Congressional intent has not been met.

This end result is a continuing story with the end not yet written.

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# Second District Civil Decision Digest

**Third Quarter 2020**

**Andrew J. Mertzenich**

*The content, citations, and analysis provided are for informational use only. No legal advice is being presented herein. An in-person consultation coupled with in-depth and independent research should be made before citing a case.

**Cases are arranged by type, and then chronologically by decision posting date with the most recent appearing last in the section.

## Table of Contents



## Aliens, Immigration, and Citizenship

**In re Parentage of Ervin C.-R., 2020 IL App (2d) 200236**

**Date Published:** 9/30/2020

**Facts:** All the parties were native to Guatelmala. The child, Ervin, was born in August 2006, and the alleged father, Jasinto, was present when his son was born. Jasinto told his family that he was happy to have a son, and he is acknowledged as Ervin's father on Ervin's birth certificate from Guatemala. In November 2006, however, Jasinto left Guatemala and came to the United States. The last contact the mother, Enriqueta, had with Jasinto was in April of 2007. In 2013, Enriqueta left Ervin with her parents, in Guatemala, and she came to the United States. Ervin, in 2016, went to the United States, but was intercepted by federal authorities and placed with his mother. Enriqueta searched for Jasinto, but was unable to find him. Enriqueta then filed a petition to establish parentage, alleging that Ervin had been abandoned by his father. The court's oral ruling questioned whether Ervin was actually abandoned and whether there was a moot point because the status quo would not change in granting the petition. The court, therefore, found that the child was not abandoned.

**Issue(s) on Appeal:** Whether the trial court erred in its interpretation of the word "dependent" in the applicable statute and whether a child may be considered abused, neglected, or abandoned when only one parent has abused, neglected, or abandoned the child, but the other has not.

**Holding:** Reversed and Remanded

**Analysis:** The trial court's determination that the minor was not "dependent" on the court was in error. A judicial order allocating sole decision-making responsibility and parenting time is, unquestionably, an order affecting a child's custody and care. As to the second issue, the plain language and precedent find that the language "on or both" follows the logic that use of the disjunctive indicates that abuse, neglect or abandonment by one parent is sufficient to support the predicate finding. Enriqueta presented sufficient evidence for the trial court to determine whether it was in Ervin's best interest to return to Guatemala or to remain here with his mother.

## Attorney and Client

***In Re* Estate of Martin, 2020 IL App (2d) 190140**

**Posted:** 07/14/2020

**Facts:** In 2017, three siblings (Paul, Alan, and Tina) all filed competing petitions to be appointed as their mother's guardian of the estate and person. Alan, an attorney, represented himself *pro se*, the other siblings hired counsel. The court appointed a guardian ad litem, whose report stated that the individual subject was able to make decisions and wanted Tina to make decisions for her. However, in 2018, the subject died. All parties subsequently filed petitions for fees, including Alan, for *pro se* attorney fees and costs. The court denied Alan's petition for fees and various motions filed by the parties. The court allowed motion for fees on the other siblings and ordered them be paid out of an account that had a transfer-on-death beneficiary.

**Issue(s) on Appeal:** (1) Whether the trial court lacked subject-matter jurisdiction to award attorney fees (2) whether the trial court erred by ordering the approved attorney fees to be paid from a TOD account after the individual subject to the Petition died, (3) whether the Motion to disqualify was wrongfully denied; and (4)

whether the counter-petitioner's petition for *pro se* fees was wrongfully denied.

**Holding:** Affirmed in part, Reversed in Part. Remanded for further proceedings.

**Analysis:**

(1) The parties sought attorney's fees in a probate case subject to the probate Act. Tina and Paul took positions adverse to Alan's on a question involving the parties' legal relations, namely whether Tina and Paul were entitled to attorney fees. The determination of whether Tina's and Paul's petitions should have been granted presented a justiciable matter. Therefore, jurisdiction is conferred.

(2) As to payment of funds from the account that had a transfer-on-death provision, Section 7 of the Uniform TOD Security Registration Act provides that "On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners… Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common." Thus, upon death, the account became property of the siblings, not of the decedent. Therefore, the trial court erred in ordering payout of the proceeds of the account and not from the assets of the decedent's estate.

(3) As to the Motion to Disqualify, it was now a moot issue. The attorneys were hired on the issue of a guardian, now that the subject had died, no issue of guardianship existed.

(4) Because they are in derogation of the common law, statutes that allow for attorney fees must be strictly construed when determining what persons come within their operation. The Probate Act's fee provision states: "The attorney for a representative is entitled to reasonable compensation for his services." While the language includes a broad array of persons, the case law has led to a narrowing of those entitled to fees. Under that authority, Alan was not entitled to fees as a matter of law for his services. Thus, the trial court did not err.

## Contracts

**Mayster v. Santacruz, 2020 IL App (2d) 190840**

**Date Published:** 9/30/2020

**Facts:** Mayster formed a company to purchase and operate two Mathnasium franchises. However, in negotiating and executing the agreements, Santacruz terminated the transaction based on his "increasing uncertainty as to the financial status of the company," and was found to be in breach of the agreement. The trial court then went on to decide on an affirmative defense of mitigation of damages, finding the Plaintiff failed to mitigate damages. As such, the trial court entered judgment in favor of the defendants. The court subsequently denied a Motion to reconsider.

**Issue(s) on Appeal:** (1) Whether the trial court was justified in finding that there was a failure to mitigate damages and (2) whether a failure to mitigate damages bars recovery.

**Holding:** Affirmed

**Analysis:** The measure of damages for a breach of contract is the amount that will compensate the aggrieved party for the loss that the breach entailed.The purpose of damages is to put the nonbreaching party into the same position, but not a better position, as if the contract had been performed. Where the contract pertains to something that is obtainable in the market, the measure of damages is the difference between the contract price and the fair market value at the time of the breach. The general rule is that a person who is injured by a breach of contract must make a reasonable effort to avoid damages therefrom. The issue of damages is a question of fact, and a trial court's finding of damages will not be disturbed unless it was against the manifest weight of the evidence. As to that issue, Mayster had previously received offers of $120,000 and $110,000 from other potential buyers and was under an obligation to sell the franchise at whatever price could be taken. Moreover, while Mayster might have had offers above $100,000 before Santacruz's offer, none of those offers materialized into a sale. Mayster had no offers after she relisted Barrington for $130,000, which makes her refusal to reduce the price unreasonable. As the court noted, it is common sense that reducing the sales price would make it easier to sell. Therefore, the trial court's finding of a failure to mitigate is supported by the evidence. As to the issue of whether the trial court misapplied the doctrine of avoidable consequences, Illinois has long recognized the doctrine of avoidable consequences.The injured party incurs no liability to the breaching party by failing to take appropriate steps to mitigate its damages. The injured party is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss. Here, the deal fell apart and there was a chance to restate it. However, Mayster refused and tried to sell the franchise at a higher price. When Mayster received no offers, she closed the business purely for personal reasons. As noted, the law does not require Math to pay for Mayster's voluntary decision to close the business. Moreover, the appellate court will not reverse a case to permit recovery of nominal damages.

## Divorce

**In Re Marriage of Solecki, 2020 IL App (2d) 190381**

**Date Published:** 8/13/2020

**Facts:** In 2015, the trial court entered a judgment dissolving the marriage of petitioner. Incorporated into the dissolution judgment was a marital settlement agreement (MSA) by which respondent agreed to pay petitioner a percentage of his net income as monthly child support. The MSA provided that, "Annually, when the tax return is furnished, the parties shall conduct a true up, wherein they shall compare the total net income earned by the Husband in the preceding year to the total amount of child support paid in order to determine whether the total support paid accurately reflects thirty-two percent (32%) of Husband's total net income for the year. If the Husband has not paid thirty-two (32%) of the net of all income received by him as defined in this Agreement, then he shall remit to Wife all sums due and owing within thirty (30) days thereof." In September 2017, respondent filed a motion to modify both the parenting-time schedule in

the Joint Parenting Agreement and the child support specified in the MSA. After reviewing several years of records, the trial court modified the MSA and made the changes retroactive to 2017. Each party also bore their own attorneys' fees.

**Issue(s) on Appeal:** (1) whether the trial court properly administered the "true-up" provision in the MSA, (2) whether there was a substantial change in circumstances to warrant modification of support, and (3) whether the trial court erred by allowing petitioner no opportunity to file a petition for contribution to the costs and attorney fees she incurred in opposing the motion to modify.

**Holding:** Affirmed

**Analysis:** As to the true-up provisions, the MSA follows both rules of contract and statutory interpretation. In this case, the subparagraphs of the applicable article specify different deductions for different types of income. This is in contrast to the Act, which treats all income and deductions uniformly. Since the true-up provisions were irreconcilable with the Act, the trial court should have simply struck them without conducting the true-ups. As to the argument on whether there was a substantial change in circumstances to warrant modification, absent the threshold showing of a substantial change, the trial court may not reach the question of whether child support should be modified. The parties' arguments on the issue of a substantial change are based on changes to their financial conditions. Now that the MSA's provisions for "true-up" were discharged, Petitioner's loss of this safeguard/windfall was itself a substantial change in circumstances that warranted revisitation of support. Therefore, the trial court was warranted in modification as the threshold was met. Finally, as to attorneys' fees, Petitioner claims that the court "did not provide either party with the ability" to petition for contribution. However, Petitioner never made this argument to the trial court, even though she had ample opportunity. Therefore, ordering the parties to bear their own costs was within the trial court's discretion.

## Duty to Defend

**Pekin Insurance Co. v. McKeown Classic Homes, Inc. 2020 IL App (2d) 190631**

**Posted:** 07/29/2020

**Facts:** Individuals filed a two-count complaint alleging breach of contract and conversion pursuant to a construction agreement. Defendant's insurance company (Pekin) filed a suit in Declaratory Judgment, alleging that it owed no duty to defend based upon the allegations of the Complaint. Pekin filed a motion for summary judgment stating that it had no duty to defend McKeown against claimants' underlying complaint for conversion. The court granted that Motion and denied the Motion to reconsider.

**Issue(s) on Appeal:** Whether the court erred in granting summary judgment and finding no duty to defend under the terms of the policy and whether the court erred in denying the motion to reconsider.

**Holding:** Affirmed.

**Analysis:** When construing an insurance policy, a court's primary objective is to ascertain and give effect to the intentions of the parties as expressed in their insurance contract. If the underlying complaint alleges facts within or potentially within policy coverage, the insurer is obligated to defend its insured even if the allegations are groundless, false, or fraudulent. Based on the clear and unambiguous allegations of intentional conduct by McKeown in claimants' underlying claim for conversion, no accident or "occurrence" as defined by the policy triggered Pekin's duty to defend. The trial court did not err in granting summary judgment to Pekin, as there is no reasonable interpretation of claimants' allegations. Therefore, summary judgment was proper.

**3BC Properties, LLC v. State Farm Fire & Casualty Co., 2020 IL App (2d) 190501**

**Posted:** 07/27/2020

**Facts:** Plaintiffs employed a manager (Vasquez) to manage each of the four restaurants. As part of her duties, Vasquez was responsible for supervising the employees and reviewing their time records for payment. 3BC also employed four of Vasquez's relatives in various roles at 3BC's restaurants. 3BC's owners discovered that Vazquez had falsified time records for herself and her four relatives; doing so resulted in overpayments to Vazquez and her kin of more than $66,000. The State Farm policy contained a rider and an exclusion, which insured 3BC against some losses resulting from employee dishonesty. When 3BC tendered the loss and sought reimbursement for Vasquez's wrongdoing, State Farm denied coverage. 3BC sued for a declaratory judgment to determine coverage. The trial court, on Motion for Summary Judgment, granted the same in favor of State Farm, citing two cases.

**Issue(s) on Appeal:** Whether unearned salary payments are nonetheless salary and excluded from coverage

**Holding:** Judgment in favor of State Farm Affirmed.

**Analysis:** The language in this fidelity bond has been an industry-wide standard since the mid-1970s and there are numerous cases interpreting the same provision under similar circumstances. As the trial court noted, almost all these decisions hold that unearned salaries and unearned commissions are nonetheless salaries and commissions. Given the fact that there is an exclusion, the policy clearly was not designed to cover all conceivable employee criminal conduct, and wage theft is simply one form of indirect employee theft that is excluded from coverage. Wage theft simply is not covered under this insurance policy.

## Evidence

***In Re* J.C., 2020 IL App (2d) 200063**

**Posted:** 07/06/20

**Facts:** The Department of Children and Family Services (DCFS) received a hotline call reporting that respondent had given birth to her child and the child had tested positive for opiates and other substances. Respondent had admitted to active drug use when she came into the hospital. Respondent had given the hospital a false name and address after she discharged herself against medical advice while her child was still in the neonatal intensive care unit,

suffering from symptoms of drug withdrawal. The State filed a neglect petition. At a dispositional hearing, the court found that respondent was unfit or unable to care for, protect, or discipline her child. DCFS had temporary custody of J.C. and was then given the discretion to place him. Two months later, DCFS received a hotline report that respondent had called police dispatch and reported shots being fired at her home. Respondent told the police that the shooting was due to a "drug deal gone bad" and that her other child was present. The State filed a subsequent petition to terminate parental rights. Throughout the whole process, including in court, Respondent never stopped using drugs and never undertook services. The court found that the State had proven by clear and convincing evidence all the counts in its motions to terminate parental rights and it found respondent to be an unfit parent. The court also admitted, without objection, group exhibits from the GAL's report and other documents. The court subsequently held a best-interests hearing. At the conclusion of the hearing the court found that it was in the children's best interests that respondent's parental rights be terminated, and it entered an order terminating respondent's parental rights.

**Issue(s) on Appeal:** Whether the trial court relied upon inadmissible hearsay and irrelevant documents in its decision to terminate the Respondent's parental rights.

**Holding:** Order of termination Affirmed. The trial court did not abuse its discretion in allowing the GAL's exhibits to be admitted into evidence at the unfitness hearing, since they were certified records that contained credible evidence of neglect.

**Analysis:** Section 2-18(4)(a) of the Juvenile Court Act allows admission into evidence of any *indicated report.* An indicated report is "any report of child abuse or neglect made to [DCFS] for which it is determined, after an investigation, that credible evidence of the alleged abuse or neglect exists." An indicated report filed pursuant to the Abused and Neglected Child Reporting Act shall be admissible in evidence. Sections 2-18(4)(a) and (4)(b) provide exceptions to the - 10 - 2020 IL App (2d) 200063 hearsay bar. There was no error in admitting the GAL's report as well as it had the proper certifications and notes with specific dates and times for event described in the report.

## Final Orders

**Schaffer v. Greenview Home Builders & Cabinetry Designers, Inc., 2020 IL App (2d) 190230**

**Posted:** 07/15/2020

**Facts:** Plaintiff had previously voluntarily dismissed claims against certain defendants. Further in litigation, the court entered an Order granting Defendants' Motions for Summary Judgment on June 14, 2018 determining that the Defendants did not owe either contractual duties or legal duties to the Plaintiff. On July 25, 2018, Plaintiff moved for leave to file a brief more than 15 pages to support her forthcoming motions to reconsider the June 14th Order. In August of 2018, the Defendant moved the Court to amend the June 2018 Order to include Rule 304(a) language so that they could appeal. Upon hearing, the Court determined that it lacked jurisdiction because its June 14th Order was final and the Motions to reconsider were filed more than 30 days after entry. Plaintiff appeals.

**Issue(s) on Appeal:** Whether the Order entered on June 14 was a final Order and whether the trial court was *revested* with jurisdiction to rule on the pending motions.

**Holding:** The Trial Court was correct in its holding the June 14th Order as final and the Plaintiff was barred from refiling her dismissed claims. Affirmed.

**Analysis:** An order is final when it determines the litigation on the merits so that, if affirmed, only the execution of the judgment remains. Once a final order is entered and 30 days have passed without a post-judgment motion, the circuit court will lose jurisdiction to rule on matters of substance or correct alleged errors involving the merits of a case. Here, the June 14 order disposed of all remaining claims as to all remaining parties in the lawsuit after her voluntary dismissal. As to the argument for revestment, Revestment is an equitable principle, and it refers to the circuit court reacquiring jurisdiction over a case after the court has lost jurisdiction due to the entry of a final order and the passage of 30 days. To allow revestment, both parties must assert positions that are inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment. Here, defendants did not act inconsistently with the merits of the June 14 order and did not support setting aside all or part of the order. Following the entry of the June 14 order, defendants responded to plaintiff's motions to reconsider, which was consistent with preserving summary judgment in their favor. Thus, revestment would be improper.

## Foreclosure & Real Estate Transactions

**Federal National Mortgage Ass'n v. Altamirano, 2020 IL App (2d) 190198**

**Date Published:** 8/31/2020

**Facts:** Plaintiff filed a complaint to foreclose on Defendant's property. The summons listed "WILLIE ALTAMIRANO et al" in the caption. A process server filed affidavits attesting that all four defendants were served. Defendants failed to appear, and a default judgment was entered. Six years later, petitioners filed their section 2-1401 petition

**Issue(s) on Appeal:** Whether the judgment for foreclosure was void due to defective summons and whether the doctrine of Laches bars the current action to void the judgment.

**Holding:** Affirmed

**Analysis:** The primary basis cited by the trial court in dismissing petitioners' petition was laches. Laches, an equitable doctrine, "precludes a litigant from asserting a claim when the litigant's unreasonable delay in raising the claim has prejudiced the opposing party." Laches is an affirmative defense that requires a defending party to establish two elements: that "the plaintiff failed to exercise due diligence in bringing its suit" and that "the plaintiff's delay served to prejudice the defendant." Here, both elements are easily met. Regarding the first element, all defendants were served and thus had actual knowledge of the foreclosure proceeding. However, no defendant responded to the complaint. Further, as the trial court noted, it was not until over eight years since service was accomplished and over six years since they were evicted from the premises that petitioners first

filed their section 2-1401 petition. Petitioners provide no reasonable explanation for this delay and cannot be said to have been acting with due diligence. Therefore, Laches applies and the dismissal of the Petitions was appropriate.

**JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275**

**Date Published:** 4/13/2020 **Corrected:** 8/14/2020

**Facts:** Plaintiff bank filed a complaint to foreclose a mortgage against defendant. The bank issues several summons. Defendant was served. After defendant did not appear, Plaintiff moved for a default judgment. The court granted the motion and entered a default judgment of foreclosure and sale. The property was sold and the property was purchased. Almost seven years after the sale, the Defendant filed a motion to quash service and vacate all orders, stating that he was improperly served by a special process server in Cook County. Respondents filed Motions to dismiss, which were granted.

**Issue(s) on Appeal:** Whether the Defendant was properly served and, as such, whether personal jurisdiction attached. Also, whether the sale to a third party should be overturned.

**Holding:** Affirmed

**Analysis:** Personal jurisdiction may be acquired either by the party's making a general appearance or by service of process as statutorily directed. Furthermore, where the rights of innocent third-party purchasers have attached, a judgment can be collaterally attacked only where an alleged personal jurisdictional defect affirmatively appears in the record. Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment does not affect the rights of a bona fide purchaser. A lack of jurisdiction is apparent from the record if it does not require inquiry beyond the face of the record. The special-process-server affidavit shows that substitute service of the summons and the complaint was made on defendant in Chicago in zip code 60623. To support his argument, defendant cites a map of the area within the zip code, which shows that it is within Cook County. Defendant's citation to the map defeats his argument, however, because it leads the Court beyond the face of the record. As to the mortgagees following a bona fide purchase, a mortgage of realty is afforded the same protections as a bona fide purchaser if the mortgage is supported by consideration and secured in good faith, without knowledge or notice of adverse claims.

**U.S. Bank National Ass'n v. Benavides, 2020 IL App (2d) 190681**

**Date Published:** 8/27/2020

**Facts:** Plaintiff filed a foreclosure action against defendant. Plaintiff, through its counsel, prepared and submitted a summons, which was served at the property's address by leaving a copy of the summons and foreclosure complaint with defendant's son. The summons and complaint were also mailed to defendant. Defendant failed to appear and Plaintiff moved to default judgment. The trial court entered a default order and judgment of foreclosure and sale in favor of plaintiff. Plaintiff mailed a copy of the default order to defendant. 30 days after the entry of the trial court's order approving sale and eviction, defendant filed a motion to quash service. The trial court held a hearing on defendant's motion to quash service. The trial court denied defendant's motion.

**Issue(s) on Appeal:** Had the trial court acquired personal service through appropriately served summons upon the Defendant?

**Holding:** Affirmed

**Analysis:** Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. Generally, a judgment rendered without service of process, where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings. In construing a statute, our primary objective is to ascertain and give effect to the legislature's intent, and the statute's plain language is the most reliable indication of legislative intent. A defendant's missing name from the face of the summons was a barrier to obtaining personal jurisdiction. The term "identify" deserves a dictionary explanation. Collectively, defendant's arguments and the amendment to section 2-201 of the Code do not clearly define the term. "Identify" means "to establish the identity of." Additionally, the Right of Publicity Act defines "identity" as "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice." Here, It stands to reason that defendant, upon viewing her name in the summons, could reasonably assume that she is the defendant in pending litigation, thus enabling her to appear and defend against the foreclosure complaint. The Appellate Court then commented that "we feel it necessary to comment on the importance of strict compliance with the form provided in the Article II Forms Appendix. As noted above, Rule

101(d) states that the summons "shall be prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article II Forms Appendix." Ill. S. Ct. R. 101(d) (eff. Jan. 1, 2018). Strict compliance with the appearance and content of the provided form takes minimal additional effort. This is especially true when the complainant is a bank or financial institution seeking to foreclose upon the home of a mortgagor

**PNC Bank, National Ass'n v. Kusmierz, 2020 IL App (2d) 190521**

**Date Published:** 8/28/2020

**Facts:** The trial court entered default judgment against the Defendant for failure to appear and subsequently order the property sold through a judicial sale. Six years later, defendants filed a petition for relief from void judgments, pursuant to section 2-1401(f) of the Code of Civil Procedure arguing that all orders entered against them in the foreclosure action were void because defendants were not properly served and, therefore, the trial court lacked personal jurisdiction over them. The bank (along with subsequent purchasers) moved to dismiss the petitions and the court granted the Motion.

**Issue(s) on Appeal:** The Appellate Court first addressed a filed Motion to Dismiss the Appeal as moot. The Court denied the

Motions because, in order to rule on the merits of the Motion, they had to rule on the merits of the case. On appeal, defendants do not contend that they were not actually served but, rather, that the foreclosure judgments against them were void and the trial court erred in dismissing the section 2-1401 petition. Defendants contend that service was improper because it was conducted by an unauthorized person. Second, the question is whether the doctrine of Laches precludes the ability to void the judgment.

**Holding:** Affirmed

**Analysis:** A section 2-1401 petition alleging that the underlying judgment was void is not subject to the time, due-diligence, or meritorious-defense requirements applicable to other section 2-1401 petitions. However, even if the judgments were void, the dispositive question becomes whether the purchasers are bona fide. Specifically, where the rights of innocent third-party purchasers have attached, a judgment may be collaterally attacked only where an alleged personal-jurisdictional defect affirmatively appears in the record. A lack of jurisdiction is apparent if it does not require inquiry beyond the face of the record. The service affidavit does not specify that service was effected in Cook County. Further, the affidavit reflects the process server's representation that she was authorized to serve process "pursuant to 735 ILCS 5/2-202(a)," the very statute that defendants claim was violated. Because the jurisdictional defect does not affirmatively appear on the face of the record, section 2-1401(e) protects the purchasers' rights in the property. As to the bank's Motion to Dismiss the Petitions due to the doctrine of laches, petitions alleging void judgments are not subject to ordinary time restrictions. However, although void judgments may be attacked at any time, laches "can preclude relief in an appropriate case where prejudice is demonstrated." "Laches has been defined as 'such neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity.Defendants here presently seek against the Bank restitution and profits from the sale of the property, but they were served with the complaint and summons (Halina in person and Jerzy via abode service), notifying them that their interest in the property was in jeopardy, six years prior to filing their section 2-1401 petition. For six years, they did nothing to protect their rights in the property and, had they participated in court proceedings, they might have earlier discovered the alleged defect in service. To permit relief against the Bank at this juncture and under these circumstances would be inequitable.

**Wilmington Savings Fund Society, FSB v. Barrera, 2020 IL App (2d) 190883**

**Date Published:** 9/21/2020

**Facts:** Plaintiff was the holder of a mortgage on property, and filed to foreclose the mortgage due to default in payment. The Barreras appeared through counsel and filed a motion to dismiss the complaint under sections 2-619(a)(4) and (a)(9) of the Code of Civil Procedure. Defendants cited the single refiling rule under Section 13-217 as their affirmative matter, indicating that a previous holder of the mortgage had filed 2 actions to foreclose previously, and those had been dismissed. The trial court dismissed the action. The court ruled that the suit was barred because the default dates alleged in the third complaint were at issue in the earlier two actions.

**Issue(s) on Appeal:** Whether the dismissed foreclosure complaint alleged a separate subsequent default and therefore did not violate the single re-filing rule.

**Holding:** Reversed and Remanded

**Analysis:** The single refiling rule cannot bar a complaint based on a later default. The allegations of the Complaint were new and subsequent to the previous matters. However, the Appellate Court further stated that the single re-filing rule follows res judicata cases. Under res judicata principles, a later suit cannot be barred unless it asserts the same cause of action as an earlier suit; the transactional test is used to determine whether an identity exists between causes of action. Notably, the single-refiling rule, unlike res judicata, does not require a final adjudication on the merits in the prior lawsuit. Under the transactional test, separate claims are treated as the same cause of action when they arise from a single group of operative facts. Under res judicata principles, "a defendant's continuing course of conduct, even if related to conduct complained of in an earlier action, creates a separate cause of action." The Appellate Court then applied the "new-default rule." Potential future defaults cannot pragmatically be treated as part of the same group of operative facts as actual defaults. A default that has not yet occurred is a paradigmatic hypothetical issue; further, it is not definite and concrete. Thus, a default that has not occurred typically cannot be litigated. In the present matter, the ongoing failure to pay taxes and fees constitued new defaults that were not barred by the single-filing rule. Thus, dismissal was not appropriate.

**John Franklin & Dorothy Bickmore Living Trust v. Nanavati, 2020 IL App (2d) 190710**

**Date Published:** 9/23/2020

**Facts:** The plaintiffs listed their property for sale and received an offer for purchase from 2 offerors. The Contract, however, identified only a single seller, when in fact there were two. The contract provided that the seller would convey good-andmerchantable title to the buyers by warranty deed. It also provided that, in any litigation "with respect to this Contract," the "prevailing party ... shall be entitled to collect reasonable attorney fees and costs from the non-prevailing party as ordered by a court of competent jurisdiction." Shortly after the first seller signed the contract, the other buyer became dissatisfied with the sale price and reneged. The contract did not give the seller the right to rescind the contract. Also of interest was an unrecorded quitclaim deed held by the other seller. Regardless, based upon the facts, the Trial Court entered judgment against the Defendants for breach of contract and awarded damages.

**Issue(s) on Appeal:** Whether the trial court's finding of breach of contract was in error as a matter of law and whether the Plaintiffs were entitled to attorneys' fees and costs pursuant to the contract.

**Holding:** Affirmed

**Analysis:** The Appellate court found that the contract was binding. While the second seller had not signed the contract, the contract is still binding upon the seller who does sign it, especially

when they are named as the sole seller. Therefore, that seller was still bound to transfer their interest, even though the contract would not be binding on the other party. As to the matter of attorneys' fees, a hearing on fees, more than a typical nonevidentiary hearing, invites the introduction of new facts through attorney representations. However, the appellants failed to supply an adequate record upon which the appellate court could make a ruling. As the appellate court has to resolve against the appellant any doubts that arise from the incompleteness of the record, this ended the matter.

## Freedom of Speech

**WC Media, Inc. v. Village of Gilberts, 2020 IL App (2d) 190250**

**Date Published:** 8/18/2020

**Facts:** Plaintiff sells outdoor billboard advertising. In 2017, plaintiff leased four properties in the Village, which is in Kane County, upon which it intended to erect two or three billboards facing Interstate 90. A Village ordinance banned billboards within the Village. After suit was filed, the Village amended the Ordinance and filed a Motion to Dismiss the Complaint as moot. Before the court ruled on the Village's motion to dismiss, plaintiff, with leave of court, filed a one-count first amended complaint. Plaintiff alleged that the amended ordinance so severely restricts billboards that it effectively bans them. More specifically, plaintiff alleged that (1) any billboard meeting the amended ordinance's requirements could not be seen from I-90, (2) the amended ordinance is not consistent with the customary use of billboards, (3) no advertiser would invest in a billboard that was so restricted, and (4) the amended ordinance denies private investment. Plaintiff requested a declaratory judgment that the amended ordinance is invalid. The Village moved to dismiss and the trial court granted the Motion without prejudice. With leave of the trial court, plaintiff filed a second amended complaint for declaratory judgment. It essentially repeated the allegations of the first amended complaint, but it added that plaintiff leased the locations within the Village to place billboards that would be seen by motorists on I-90. The Village filed a section 2-615 motion to dismiss the second amended complaint. The court granted with prejudice the Village's motion to dismiss. Plaintiff filed a timely appeal.

**Issue(s) on Appeal:** Whether the Village's amended ordinance is a valid regulation.

**Holding:** Affirmed

**Analysis:** The Act provides for the control of outdoor advertising signs that are located within 660 feet of interstate highways. Section 7 of the Act provides that " 'State, county or municipal' " zoning authorities may also regulate the size, lighting, and spacing of signs. Also, a municipality's home-rule or non-home-rule status is not determining factor, because section 7 of the Act specifically authorizes municipalities to enact regulations concerning outdoor advertising. Plaintiff acknowledges that the Village can regulate outdoor advertising under section 7 of the Act but argues that the Village cannot ban it. The plain language of the amended ordinance allows billboards that are up to 80 square feet and 10 feet high. The crux of plaintiff's virtual-ban argument is the allegation in paragraph 29 of the second amended complaint that a conforming billboard "would have no commercial value." Citing case law, the Appellate Court held that a noncustomary use is demonstrated only when signs exceed the regulations imposed by section 6 of the Act. Thus, the restrictions in the Village's amended ordinance are not contrary to customary use. In other words, compliance with local zoning regulations does not deprive an advertiser of its right to operate in business areas. Whether an advertiser finds it commercially advantageous to do so is not a relevant criterion in determining the validity of an ordinance.

## Health & Public Safety

**McHenry County Sheriff v. McHenry County Department of Health, 2020 IL App (2d) 200339**

**Posted:** 07/22/2020, Corrected 07/23/2020

**Facts:** The Sheriff's Department (Plaintiffs) requested that the health department provide the names and addresses of persons who had tested positive for COVID-19. Plaintiffs requested that the information be provided to the Telephone System Board, which oversees the emergency telephone system, so that, upon dispatch, individual police officers could be notified when they could be encountering an infected person, thereby allowing the individual officers to take "adequate precautions" to minimize the risk of infection. The Health Department made known their objections and the Department (along with several other municipalities) filed suit for declaratory judgment, writ of mandamus, and permanent injunction. The trial court granted plaintiffs' motions for a temporary restraining order, finding that the police officers had a right to have the names of individuals residing within the County who were infected with COVID-19, and that privacy rights would be protected. The Department filed a motion to reconsider and to dissolve the temporary restraining order, which was denied. The Department filed its notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(d).

**Issue(s) on Appeal:** (1) whether the trial court usurped the Department's authority and impermissibly substituted its judgment for the Department's, (2) whether the record set forth the plaintiff's case for a temporary restraining order, and (3) whether the Court failed to accord the appropriate weight to the privacy rights of individuals by compelling disclosure of their names and addresses.

**Holding:** Reversed and Temporary Restraining Order is dissolved.

**Analysis:** Several issues (including the issue of the denial of the Temporary Restraining Order) were off the table as they were not appealed in time. However, Rule 307(d)(1) expressly provides for appellate "review of the granting or denial of a temporary restraining order or an order modifying, dissolving, or refusing to dissolve or modify a temporary restraining order." Therefore, the propriety of the Motion to Reconsider was properly before the appellate court. The only issue before the appellate court when reviewing the denial of a motion to dissolve a temporary restraining order is whether the trial court abused its discretion. To decide this, the broader question of whether the trial court

abused its discretion in denying the Department's motion to dissolve thus narrows to the question of whether plaintiffs have demonstrated a fair question regarding whether they have the right to the name-and-address information they are seeking. The Sheriff does not have the right to this information. Moreover, the trial court's entry of the temporary restraining order did not preserve the status quo but, rather, altered it. The status quo was the Department's agreement to provide the addresses but not the names of individuals who test or have tested positive for COVID-19. The April 10 order changed that status quo by compelling the disclosure of both the names and the addresses.

## Mandamus

**Sharp v. Baldwin, 2020 IL App (2d) 181004**

**Date Published:** 9/11/2020

**Facts:** Plaintiff is in the custody of the Illinois Department of Corrections (IDOC), serving a sentence of 30 to 125 years for the 1970 murder of a Chicago police officer. In May 2018, plaintiff filed a complaint for mandamus, pursuant to section 14-101 of the Code. In his complaint, plaintiff alleged that, effective January 1, 2018, the legislature had amended the Corrections Code. The Defendant filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure. After supplemental briefing and argument, the trial court granted the motion to dismiss.

**Issue(s) on Appeal:** Whether the Plaintiff was entitled to credit for programs completed prior to an amendment to the Illinois Correction Code.

**Holding:** Affirmed

**Analysis:** Mandamus is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved. A writ of mandamus will issue only if the petitioner establishes (1) a clear right to the relief requested, (2) a clear duty of the public official to act, and (3) clear authority in the public official to comply with the writ. The plain language of Public Act 100-3 requires sentence credit for program participation for persons, like plaintiff, who were convicted of first degree murder "for credit earned on or after the effective date of this amendatory Act." Plaintiff is seeking to force defendant to grant him credit for program participation that occurred prior to the effective date of the amendatory act. Thus, construing the allegations of the complaint in the light most favorable to plaintiff, the Appellate court found that the allegations were insufficient to establish a cause of action upon which relief may be granted. Therefore, dismissal pursuant to section 2-615 of the Code was appropriate.

## Mechanics' Liens

**REEF-PCG, LLC v. 747 Properties, LLC, 2020 IL App (2d) 200193**

**Posted:** 06/29/2020, Corrected 07/29/2020

**Facts:** Defendant was found in default on a mortgage obligation and the property went into foreclosure. In the foreclosure action, several holders of mechanics' liens were also made defendants. Upon hearing, the trial court subordinated the mechanics' lienholders to $12 million in new debt, to be issued through receiver certificates, for improvements to secure a 10-year lease with a government agency.

**Issue(s) on Appeal:** Whether the trial court had the power to grant and prioritize receiver certificates over prior mechanics liens. Whether there was sufficient evidence to issue receiver certificates and reprioritize the loans at issue.

**Holding:** Reversed.

**Analysis:** The purpose of the Mechanics Lien Act is to "permit a lien upon premises where a property owner received a benefit from improvements to his property or realized an increase in property value because of a contractor's labor and materials." To effectuate this purpose, section 16 gives the lienholder priority over any other incumbrance until the lienholder is paid. Under precedent, the trial court had the power to issue receiver certificates and prioritize them over the mechanic's liens. While it is not necessary that every lienholder agree to the subordination of its lien for the court to find it in the best interests of all the parties, "[t]he court has no power to authorize the receiver of an industrial corporation to continue the business and to make receiver's certificates superior to prior liens, without the consent of the holders of such liens, unless it be apparently necessary to do so in order to preserve the corporate property." In reviewing the record, the Appellate Court found no reason, other than the pending lease with the government agency, underlying the trial court's decision to subordinate the mechanic's liens behind an additional $12 million in debt. the court was presented with absolutely no evidence from which to conclude that subordinating the lienholders to an additional $12 million in debt would be to their benefit.

**Matteo Construction Co. v. Teckler Blvd Development Site, LLC, 2020 IL App (2d) 190766**

**Date Published:** 8/3/2020 **Corrected:** 8/4/2020

**Facts:** Plaintiff sent a copy of its claim of lien to Defendant by certified mail. The claim provided the (1) parties' names, (2) property description, (3) work performed, and (4) amount due. The lien was for excavation and grading services that plaintiff, pursuant a November 2014 contract, provided in the construction of a self-storage facility. Defendant received the Notice 3 days later. 4 months later, plaintiff filed its complaint to foreclose its lien. Defendant moved to dismiss, claiming that plaintiff failed to perfect its lien under the Act by failing to wait 10 days from the date of notice to record the claim of lien. The trial court granted the Motion to dismiss based upon the fact that the lien was not perfected because of a failure to follow the 10-day period described in the Act.

**Issue(s) on Appeal:** Does the plain language of the Act require a 10-day waiting period before recording a lien in order for a lien to be perfected OR whether plaintiff only had to wait 10 days prior to filing suit to enforce the lien.

**Holding:** Reversed and Remanded

**Analysis:** The purpose of the Mechanics Lien Act is to protect those who in good faith furnish labor or materials for construction of buildings or public improvements. Once the statutory requirements are met, the Act should be liberally construed to

carry out its remedial purpose. Citing precedent, the Appellate Court found that because the lienholder did not pursue suit against the Defendant before the 10-day period, their lien was perfected and enforcable. The Appellate Court also talked about the importance of the word "or" in the Act. Used in its ordinary sense, the word "or" expresses an alternative, indicating that the various parts of the sentence that it connects are to be taken separately. Therefore, an entity or person entitled to a lien under the Act may either wait 10 days to file a claim for lien, or 10 days to file the suit. Accordingly, the trial court erred when it determined that plaintiff failed to perfect its lien by prematurely recording it. Section 28 allowed plaintiff, 10 days after notice, to either file its claim of lien or file suit to enforce the lien. Plaintiff waited 10 days before filing suit. Plaintiff complied with section 28.

## Municipal Corporations

**Village of Campton Hills v. Comcast of Illinois V, Inc., 2019 IL App (2d) 190055**

**Posted:** 07/28/2020

**Facts:** In March 1988, the County passed Kane County Ordinance No. 88-31 establishing a franchise framework for cable services in unincorporated areas of the County, which included the unincorporated area that later became the Village. The Ordinance provided in part: "The payments required under this section shall continue to the length and extent allowed by law even though all or part of its designated area becomes incorporated by a municipality within the effective term of this ordinance." In April 2007, the Village was incorporated. On December 31, 2007, the Village and Comcast entered into a franchise agreement, effective January 1, 2008. In March 2013, the Village filed a complaint against Comcast for recovery of unpaid franchise fees. Later that same month, Comcast filed a declaratory judgment action against the Village and the County to determine which party was entitled to the franchise fees Comcast had paid to both parties for the years 2008 through 2012. In August 2016, the Village filed a motion for partial summary judgment. The trial court denied the Village's motion for partial summary judgment. In March 2018, all three parties filed motions for summary judgment. On September 18, 2018, the trial court found that Comcast was due a credit of $126,599.29 against the sum it owed to the Village and that the Village was entitled to the franchise fees improperly paid to the County since January 1, 2008. On January 15, 2019, the County filed a motion to stay the judgment pending appeal, pursuant to Illinois Supreme Court Rule 305(i) (eff. July 1, 2017). The County filed its notice of appeal on January 17, 2019. The Village filed a notice of cross-appeal on March 12, 2019.

**Issue(s) on Appeal:** Whether the term in the Ordinance of "annexation" encompasses "incorporation." Whether the trial court exceeded its authority by reforming or modifying an agreement between it and Comcast that would have entitled the County to receive franchise fees for the five years after the Village incorporated.

**Holding:** Affirmed; cross-appeal dismissed. The trial court properly granted summary judgment in favor of the Village and against the County.

**Analysis:** The first sentence of the applicable Ordinance granted the County the authority to franchise and tax Comcast but limited that authority to areas "within the County and outside of a municipality." The most reliable indication of legislative intent is the plain language of the statute, which must be given its plain and ordinary meaning. As to the argument of modification of the contract, the trial court did not order the County to pay damages; rather it ordered the County to reimburse Comcast for the fees Comcast overpaid to the County. Therefore, the indemnification provision does not permit recovery as contended, and the trial court properly denied the County's claim.

## Products Liability

**Porter v. Cub Cadet, LLC, 2020 IL App (2d) 190823**

**Date Published:** 8/14/2020

**Facts:** Plaintiff asserted in an Amended Complaint that he had purchased a tractor from Defendant. He further alleged that he later had Defendant service the tractor to address a faulty hydraulic pump system. While plaintiff was operating the tractor, the engine shut down as a result of hydraulic pump failure, and the tractor rolled over, injuring plaintiff. After amending the Complaint, the Defendants moved to dismiss. The Trial Court granted the Motions and dismissed with prejudice.

**Issue(s) on Appeal:** (1) Whether the Complaint sufficiently plead a cause of action for defective product design; (2) whether the trial court should have permitted plaintiff to amend the complaint further; (3) whether the trial court properly dismissed plaintiff's claim for recovery based on the voluntary undertaking doctrine.

**Holding:** Affirmed

**Analysis:** A defective-design claim is based on negligence where the Defendant knew or should have known about a potential defect. Nevertheless, a plaintiff cannot simply write the words 'knew or should have known' in a complaint and survive a § 2-615 motion to dismiss. This was the language in the amended complaint. As such, the complaint was properly dismissed. The question to whether the plaintiff should have been allowed to amend the complaint further comes down to whether the third amended complaint would have cured the defects indicated in the previous motions to dismiss. although the proposed third amended complaint explains how plaintiff's accident happened, it sheds little light on the key question of whether Defendants exercised reasonable care in designing plaintiff's product at issue. Even assuming there was a voluntary undertaking here and that Defendants failed to exercise reasonable care, plaintiff fails to explain how the failure increased the risk of harm. Plaintiff does not allege that he relied on the alleged voluntary undertaking. Accordingly, the trial court properly dismissed plaintiff's voluntary-undertaking claim. Furthermore, Illinois now follows the approach of section 323 as set forth in the Restatement (Second) of Torts. As such, the standard proferred by the Plaintiff is not controlling.

## Wills & Probate Estates

**Young v. Weiland, 2020 IL App (2d) 191042**

**Date Published:** 9/9/2020

**Facts:** Mary Young died in 2014, leaving four surviving children. Six years after Mary's death, her children's disagreements persist over matters concerning the disposition of her estate and the parties are before the Second District again to resolve those differences. Shortly after Mary died, plaintiff filed a will contest and later a multicount complaint. The trial court later dismissed the complaint for want of prosecution. Plaintiff moved to vacate the DWPs and the trial court reopened the estate for the purpose of filing objections and set a time for a response to the motion to vacate. Plaintiff then refiled the complaint, seeking a constructive trust and accounting and alleging conversion, fraud and duress, undue influence, and tortious interference with inheritance expectancy. The next day, plaintiff moved to withdraw his motion to vacate the DWPs. The trial court later dismissed the refiled complaint pursuant to a 2-619 motion brought by the defendants.

**Issue(s) on Appeal:** Whether plaintiff was precluded from refiling his complaint under section 13-217 before he withdrew his pending motion to vacate the Dismissal for want of prosecution of the original complaint.

**Holding:** Reversed and Remanded

**Analysis:** section 13-217 provides that, when an action is dismissed for want of prosecution, "then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff *** may commence a new action within one year or within the remainingperiod of limitation, whichever is greater, after *** the action is dismissed for want of prosecution." Section 13-217 operates as an extension of the applicable statute of limitations. Here, the plaintiff timely filed the new action pursuant to the statute. Therefore, the statute was satisfied. Plaintiff also argued that the refiling of the complaint while the motion to vacate was still pending was consistent with the statute and promoted judicial economy, which the Appellate Court agreed to. In general, where defendants have not articulated (and we cannot discern) how they were prejudiced by plaintiff's refiling and neither the statute nor case law prohibit a refiling prior to the withdrawal of a motion to vacate a DWP, the trial court's dismissal warrants reversal. Judicial economy weighs in favor of finding no error with the refiling here. Also, the fact that the statute does not preclude such a result promotes the goal of avoiding statutory interpretations that lead to absurd, inconvenient, or unjust consequences. IN A SPECIAL CONCURRENCE, Justice McLaren commented: I specially concur because I do not see the need for further analysis once we determined that the statutory language clearly relates that the refiling time starts from the date the DWP order is entered and that the refiling here was timely. The remaining analysis is merely judicial dictum.

## About the Contributor

Andrew J. Mertzenich is appellate counsel at Prime Law Group, LLC. Andrew has argued before the Second District Appellate Court for the State of Illinois and contributes opinions on amicus briefs for organizations wishing to file into cases. Andrew also presents CLE on Appellate Practice for bar associations throughout the area and provides consultation services to local attorneys and litigants on how best to approach their appellate issues. He also curates and publishes the *Second District Civil Decision Digest* with several local bar associations.

Outside of law, Andrew is a passionate musician. He is Principal Organist at Court Street United Methodist Church in Rockford, IL. Andrew also volunteers with the Land of Lincoln Theatre Organ Society as a technician and performer. He donates regularly to several causes and sits on the Boards of the American Guild of Organists – Rockford Chapter and the Land of Lincoln Theatre Organ Society. He is also a regular listener and contributor to National Public Radio (NPR).

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