No. 123220

In The Supreme Court Of Illinois

A&R JANITORIAL, as subrogee of TERESA MROCZKO,

Plaintiff-Appellee,

vs.

PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC., CBRE, INC., AND BLUE CROSS AND BLUE SHIELD ASSOCIATION,

Defendants-Appellants.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

NO. 1-17-0385

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

CASE NO. 14 L 8396

HON. WILLIAM E. GOMOLINSKI,

JUDGE PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT PEPPER CONSTRUCTION COMPANY

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POINTS & AUTHORITIES

Page(s)

STATUTES AND RULES

NATURE OF THE CASE

This appeal arises from the circuit court's order denying Teresa Mroczko's petition to intervene in the subrogation action filed by her employer, A&R Janitorial. Teresa Mroczko filed a personal injury lawsuit against Pepper Construction Company ("Pepper") on June 11, 2015, alleging that she was injured on August 17, 2012 while working as an employee of A&R Janitorial. Pepper moved to dismiss Mroczko's action, arguing that it was untimely since it was filed more than two years after the occurrence. The circuit court agreed, dismissing Mroczko's action against Pepper with prejudice on September 12, 2016. No appeal was taken from that order.

Teresa Mroczko's employer, A&R Janitorial ("A&R"), filed a subrogation action against Pepper on August 11, 2014. A&R sought recovery against Pepper for the worker's compensation benefits it had paid to Mroczko and which it might become liable to pay in the future. On November 10, 2016, Mroczko petitioned to intervene in A&R's subrogation action. Pepper opposed Mroczko's petition, arguing that the petition was barred by the applicable statute of limitations and the doctrine of res judicata, since Pepper had previously obtained an adjudication on the merits in its favor on Mroczko's personal injury claim. The circuit court agreed with Pepper, and denied Mroczko's petition to intervene. The appellate court reversed, holding that the doctrine of res judicata did not bar Mroczko's petition to intervene and that the circuit court abused its discretion in denying Mroczko's petition. The pleadings are at issue in that Pepper maintains that Mroczko's petition

to intervene in A&R's subrogation action was barred by the applicable statute of limitations and the doctrine of res judicata.

QUESTIONS PRESENTED FOR REVIEW

The doctrine of res judicata provides that a final judgment on the merits bars any subsequent action between the same parties for the same cause of action. Did the September 12, 2016 order, dismissing Teresa Mroczko's personal injury action pursuant to Pepper's section 2-619 motion, bar Mroczko's subsequent petition to intervene in an action against Pepper to pursue the same cause of action under the doctrine of res judicata?

The principle of party presentation requires a reviewing court to rely on the parties to frame the issues, and discourages reversal of a lower court's decision for unbriefed reasons. Did the appellate court improperly rely on arguments never raised by Mroczko in the circuit court or on appeal to find that the circuit court abused its discretion?

Attachments to appellate briefs, which are not included in the record on appeal, are not properly before the reviewing court and cannot be used to supplement the record. Did the appellate court improperly rely on attachments to Mroczko's reply brief, which were not contained in the record on appeal, to find that the circuit court abused its discretion?

When a circuit court rules, it has no knowledge as to events that may transpire in the future. Did the appellate court improperly rely on events that occurred after the circuit court's ruling to find that the circuit court

abused its discretion at the time it ruled?

STATEMENT OF JURISDICTION

On December 20, 2016, the circuit court denied Teresa Mroczko's petition to intervene. (Vol. IX, C2034) On January 31, 2017, the circuit court made a written finding pursuant to Supreme Court Rule 304(a) that there was no just reason to delay an appeal from the order denying Mroczko's petition to intervene. (Vol. IX, C2041) Mroczko timely appealed the circuit court's orders of December 20, 2016 and January 31, 2017, resulting in the appellate court's decision of December 27, 2017, reversing the circuit court's order. (A151 – A170)

This Court has jurisdiction under Supreme Court Rule 315, the defendant having timely filed a petition for leave to appeal the appellate court's decision, and this Court having granted leave to appeal. (A171)

STATUTES INVOLVED

"**Workers' Compensation Act**"
Code of Civil Procedure, 820 ILCS 305/5(b) provides in pertinent part:

(b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to Paragraph (a) of Section 8 of this Act...

In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to three months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to Paragraph (a) of Section 8 of this Act, and costs, attorneys' fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability.

"**Intervention Statute**"
Code of Civil Procedure, 735 ILCS 5/2-408 provides in pertinent part:

Intervention. (a) Upon timely application anyone shall be permitted as of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer.

(b) Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

...

(e) A person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file. In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(f) An intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right, provide that the applicant shall be bound by orders or judgments, theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require.

STATEMENT OF FACTS

The Occurrence

On August 17, 2012, Teresa Mroczko ("Mroczko") was employed by A&R Janitorial ("A&R") when she was injured while working at 300 East Randolph Street in Chicago. (Vol. I, C4) At the time of the occurrence, Pepper Construction Company ("Pepper") had been hired by the owner of the building to perform maintenance work at the premises. (Vol. I, C144) Perez & Associates, Inc. ("Perez") was hired to replace carpet on selected floors of the building. (Vol. V, C1108, p. 13) Mroczko was working near a desk that had been placed in an upright position when the desk fell on her. (Vol. I, C5)

The subrogation action – 14 L 8396

On August 11, 2014, A&R, as statutory subrogee of Teresa Mroczko, filed a complaint under Court No. 14 L 8396, seeking recovery against Pepper, among others, for worker's compensation benefits that it had paid, and may have to pay in the future, to its employee, Mroczko, as the result of the August 17, 2012 incident. (Vol. I, C6, ¶13)[1] Mroczko had failed to institute any legal proceedings arising out of the incident at any time prior to three months before the limitations period expired. (Vol. I, C6, ¶11) Accordingly, pursuant to Section 5(b) of the Workers' Compensation Act,

[1] Blue Cross Blue Shield Association was voluntarily dismissed from A&R's subrogation action on November 17, 2014; Pepper Construction Group, LLC was dismissed from the case on December 17, 2014; CBRE was voluntarily dismissed from the subrogation action on December 17, 2014; leaving behind the defendants Pepper Construction Company and Perez. (Vol. I, C137, C173-174),

A&R, as Mroczko's employer, commenced its subrogation action against the defendants. (Vol. I, C6)

Mroczko's personal injury action – 15 L 5957

On June 11, 2015, Mroczko filed her own personal injury lawsuit against Pepper, among others. (Vol. II, C351-365) Mroczko alleged that she was injured on August 17, 2012 while working as an employee of A&R when a desk that was left in a vertical, upright position struck Mroczko. (Vol. II, C353-354) Pepper included an affirmative defense in its answer to Mroczko's complaint that Mroczko's action was untimely. (Vol. III, C590-591) Pepper also moved to consolidate A&R's subrogation action with Mroczko's personal injury lawsuit, and the two actions were consolidated on September 14, 2015. (Vol. II, C466-468; Vol. III, C502)

Defendants move to dismiss Mroczko's personal injury action

On October 20, 2015, Perez moved to dismiss Mroczko's personal injury complaint, arguing that Mroczko's action was barred by the two-year statute of limitations applicable to personal injury actions. (Vol. III, C504-506) The circuit court granted Pepper's request to join Perez's motion to dismiss. (Vol. III, C538) The circuit court dismissed Mroczko's complaint without prejudice, granting Mroczko leave to amend. (Vol. III, C702) Mroczko filed an Amended Complaint on April 28, 2016, alleging one count against Pepper. (Vol. III, C704-715) Pepper moved to dismiss the Amended Complaint pursuant to Section 2-619, arguing that Mroczko's action was untimely. (Vol.

III, C653-662) Specifically, Pepper argued that Mroczko's action was barred by the two-year personal injury statute of limitations since the conduct in question involved routine replacement of carpet, and not an improvement to real property or construction work. (Vol. III, C653-662) On September 12, 2016, the circuit court granted Pepper's motion to dismiss, dismissing Mroczko's action against Pepper in 15 L 5957 with prejudice. (Vol. VIII, C1990) The court included a finding pursuant to Supreme Court Rule 304(a). (Id.) No appeal was taken from that order.

Mroczko Petitions to Intervene in A&R's Subrogation Action

Two months later, on November 10, 2016, Mroczko petitioned to intervene in A&R's subrogation action. (Vol. VI, C1373-1377) In her petition, Mroczko sought leave to intervene and file an Amended Complaint for injuries she allegedly sustained on August 17, 2012 while working for A&R at 300 East Randolph Street, Chicago. (Vol. VI, C1373-1377) In her proposed Amended Complaint, Mroczko sought recovery for injuries and damages resulting from the August 17, 2012 occurrence. (Id.)

Pepper opposed Mroczko's petition to intervene, arguing that Mroczko's petition was barred by the applicable statute of limitations and the doctrine of res judicata, relying on Sankey Bros. Inc. v. Guilliams, 152 Ill. App. 3d 393 (3d Dist. 1987). (Vol. VI, C1397-1406) A&R also filed a response to Mroczko's petition, arguing, among other things, that A&R should maintain control of its subrogation action. (Vol. IX, C2017-2024)

Mroczko responded to Pepper's objections to her petition to intervene, contending that she had a right to sue third parties under the Workers' Compensation Act. (Vol. IX, C2027-2031) Mroczko argued that the September 12, 2016 order in 15 L 5957 dismissing her personal injury action was not an adjudication on the merits. (Vol. IX, C2029-2031) Mroczko described the dispute as "whether the September 12, 2016 order in 15 L 5957 is on the merits requiring the dismissal of the proposed amendment to the complaint based on the doctrine of res judicata." (Vol. IX, C2029) Mroczko conceded that "if this court were to determine that the finding in cause 15 L 5957 was an adjudication on the merits, it would bar the present action from proceeding against either party ..." (Vol. IX, C2030) Mroczko contested no element of the res judicata doctrine other than the "adjudication on the merits" element. (Vol. IX, C2027-2031)

At the December 20, 2016 hearing on Pepper's objection to Mroczko's petition, Mroczko reiterated her position that "an involuntary dismissal pursuant to the statute of limitations, whether it is a motion for summary judgment that ultimately produces that involuntary dismissal or a 619, is not automatically a judgment on the merits ... under res judicata ..." (SR, Vol. I, C23-25)[2] Mroczko articulated no other argument in support of her petition to intervene during the December 20, 2016 hearing. (SR, Vol. I, C20-29)

Relying on Sankey Bros., the circuit court denied Mroczko's petition to intervene, finding that the dismissal of Mroczko's untimely personal injury

[2] SR refers to the supplemental record.

action in 15 L 5957 pursuant to a Section 2-619 motion constituted an adjudication on the merits for the purposes of res judicata. (SR, Vol. I, C26-27) The court stated: "I think ... Sankey ... is almost directly on point. It's a very similar fact scenario. It speaks about whether or not ... a dismissal for failure to comply with the applicable statute of limitations constituted judgment on the merits for [the] purpose of the [res judicata] doctrine." (SR, Vol. I, C26-27) The circuit court concluded that Mroczko's petition to intervene was an attempt to do indirectly what she was unable to accomplish directly in her untimely personal injury action. (SR, Vol. I, C27) The circuit court asked Mroczko's counsel: "So how do I let you come in through the back door for the exact same cause of action ..., seeking the same or similar type damages that you would have sought had I said the statute of limitations didn't apply?" (SR, Vol. I, C24)

On December 20, 2016, the circuit court denied Mroczko's petition to intervene, (Vol. IX, C2034), and on January 31, 2017, entered a written finding pursuant to Supreme Court Rule 304(a). (Vol. IX, C2041) Mroczko appealed from the circuit court's orders of December 20, 2016 and January 31, 2017. (Vol. IX, C2057-58; C2062-2063)

The appellate court reversed, holding that res judicata did not bar Mroczko's attempt to file a second action against Pepper in A&R's subrogation action, and finding that the circuit court abused its discretion in rejecting Mroczko's petition to intervene. A&R Janitorial, as subrogee of

Teresa Mroczko v. Pepper Construction Company, et al, 2017 IL App (1st) 170385. (A151 – A170)

ARGUMENT

I. Res Judicata Barred Mroczko's Petition to Intervene in Her Employer's Subrogation Action Against Pepper After her Personal Injury Lawsuit was Adjudicated in Favor of Pepper.

The appellate court acknowledged that the doctrine of res judicata "prevents a party from filing the same claim against the same party after a prior adjudication on the merits." A&R Janitorial v. Pepper Construction Company, et al, 2017 IL App (1st) 170385, ¶19. The court further acknowledged that after Mroczko's personal injury action against the same defendant was dismissed as untimely, Mroczko "subsequently sought to intervene in [A&R's] subrogation suit against defendants based on the same cause of action." Id. at ¶20. Despite those findings, the appellate court concluded that res judicata did not bar Mroczko's intervention. Id. at ¶23. For the following reasons, the appellate court erred in that determination.

A. Standard of review

The determination of whether a claim is barred under the doctrine of res judicata is a question of law which this Court reviews de novo. Lutkauskas v. Ricker, 2015 IL 117090, ¶43.

B. Res judicata prevents a party from filing the same claim against the same defendant after the defendant has obtained a favorable adjudication on the merits.

"The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of

action." Rein v. Noyes, 172 Ill. 2d 325, 334 (1996). A judgment on the merits "is conclusive as to the rights of the parties ... and, as to them, constitutes an absolute bar to a subsequent action involving the same claim ... or cause of action." Torcasso v. Standard Outdoor Sales, 157 Ill. 2d 484, 490 (1993), (emphasis added). The objectives behind the doctrine of res judicata are twofold: to promote judicial economy by preventing repetitive litigation, and to protect a defendant from the harassment of re-litigating the same claim. Richter v. Prairie Farms Dairy, Inc., 2016 IL 119518, ¶21**.** Finality in litigation has long been recognized as an important goal to prevent abuse of the judicial system and financial hardship to litigants. Rein, 172 Ill. 2d 325 at 340, 343.

Three elements must be satisfied for the doctrine of res judicata to apply: (1) there was a final judgment on the merits rendered by a court of competent jurisdictions; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies. Rein, 172 Ill. 2d 325, 335. Mroczko challenged only the first element in the circuit court and on appeal, but binding precedent and Illinois Supreme Court Rule 273 render that challenge futile.

Supreme Court Rule 273 provides: "Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon

the merits." Ill. S. Ct. R. 273. Since the dismissal of Mroczko's personal injury action was not based on lack of jurisdiction, improper venue, or a failure to join an indispensable party, it operated as an adjudication on the merits. Indeed, this Court has specifically held that a circuit court's decision to dismiss an action based on the applicable statute of limitations "operates as a final judgment on the merits for purposes of res judicata." Rein, 172 Ill. 2d at 336.

Whether the order dismissing Mroczko's untimely personal injury action in 15 L 5957 was an adjudication on the merits so as to satisfy the first prong of the res judicata analysis is, therefore, no longer a matter subject to debate. This Court decided that precise issue more than twenty years ago in Rein. Mroczko's singular challenge to the circuit court's order denying her petition to intervene on a res judicata basis, therefore, does not survive Rein. Under this Court's binding precedent, the order of September 12, 2016 dismissing Mroczko's claim against Pepper barred Mroczko's subsequent petition to intervene to state the same claim against the same defendant.

Moreover, the appellate court's determination that Mroczko's petition to intervene survived a res judicata bar is in direct conflict with a decision of a different division of the appellate court, which resolved the precise issue presented by this appeal quite differently. Thirty years ago, the court in Sankey Bros, Inc. v. Guilliams determined that the dismissal of an employee's untimely personal injury action barred the employee's subsequent

attempt to intervene in his employer's subrogation action against the same defendant based on the doctrine of res judicata. Sankey Bros, Inc. v. Guilliams, 152 Ill. App. 3d 393, 398 (3d Dist. 1987). The Sankey Bros. Court stated: "[at] the time that [the employee] requested leave to intervene, his tort claims against defendants were also barred by the doctrine of res judicata, since a dismissal for failure to comply with the applicable statute of limitations constitutes a judgment on the merits for purposes of that doctrine." Id. The employee, Osborne, was injured on October 20, 1981 while employed by Sankey Bros., Inc. ("Sankey Bros.") Id. at 394. On October 14, 1983, Sankey Bros. filed a subrogation action against the driver of the truck who hit Osborne and the owner of the truck. Id. Sankey Bros. sought recovery for "worker's compensation benefits which it had paid and would be required to pay to Osborne on the basis of the injuries which he allegedly received ..." Id. at 395. Thereafter, Osborne filed his own personal injury lawsuit on October 19, 1983, but named the wrong defendant in his original complaint. Id. at 394. After the limitations period expired, Osborne filed an amended complaint, naming the correct entity, Midwest, as a defendant for the first time. That action, however, was dismissed on July 23, 1985 as untimely on Midwest's motion. Id. at 394. Osborne did not appeal the dismissal of his personal injury action. Id. at 394, 395.

On October 11, 1985, Osborne petitioned to intervene in his employer's subrogation action against Midwest. Id. at 395. The circuit court denied

Osborne's petition for two reasons: (1) Osborne's petition was untimely since it was filed almost four years after the cause of action accrued; and (2) Osborne's "participation in the present action [was] barred by the res judicata effect of the judgment entered in the prior Cook County suit involving Osborne and Midwest." Id. The appellate court affirmed, holding that Osborne's petition to intervene was "barred both by the applicable statute of limitations and the doctrine of res judicata ..." Id. at 398. The court reached that determination despite the fact that there were "new parties" – the employers – in the subrogation action that were not parties to Osborne's personal injury action. The court noted that the doctrine of res judicata was "reflective of a public policy favoring finality in litigation and judicial economy. It ensures that controversies once decided on their merits remain in repose." Id. at 397.

Here, the appellate court reached a contrary conclusion under the same set of relevant facts. Mroczko claimed that she was injured while working on August 17, 2012, (Vol. II, C353-354), but failed to file her personal injury lawsuit against Pepper until June 11, 2015, more than two years after the occurrence. (Vol. II, C351-365) Pepper moved to dismiss Mroczko's amended personal injury complaint pursuant to Section 2-619, arguing that Mroczko's action was untimely. (Vol. III, C653-662) The circuit court agreed, dismissing Mroczko's action against Pepper in 15 L 5957 with prejudice on September 12, 2016, and including a finding pursuant to Supreme Court Rule

304(a). (Vol. VIII, C1990) No appeal was taken from that order.

Approximately two months later, Mroczko petitioned to intervene in A&R's subrogation action against Pepper. (Vol. VI, C1373-1377) In her petition, Mroczko reasserted the same claim against Pepper as the claim in her personal injury action – that she had been injured in the course of her employment with A&R Janitorial on August 17, 2012 at 300 East Randolph Street. (C1373) Pepper opposed Mroczko's petition to intervene, arguing both that Mroczko's petition was untimely and that it was barred by the doctrine of res judicata, relying on Sankey Bros. (Vol. VI, C1397-1406) Mroczko responded to Pepper's objections, raising the sole argument that the September 12, 2016 order in 15 L 5957 dismissing her personal injury action was not an adjudication on the merits. (Vol. IX, C2029-2031) Indeed, Mroczko defined the precise dispute as "whether the September 12, 2016 order in 15 L 5957 is on the merits requiring the dismissal of the proposed amendment to the complaint based on the doctrine of res judicata." (Vol. IX, C2029) Mroczko admitted that "if [the circuit court] were to determine that the finding in cause 15 L 5957 was an adjudication on the merits, it would bar the present action from proceeding against either party ..." (Vol. IX, C2030) Mroczko contested no other element of res judicata. (Vol. IX, C2027-2031), (SR Vol. I, C20-29)

Relying on Sankey Bros., the circuit court denied Mroczko's petition to intervene, finding that the dismissal of Mroczko's untimely personal injury

action pursuant to a Section 2-619 motion constituted an adjudication on the merits for the purposes of res judicata. (SR, Vol. I, C26-27) The court stated: "I think ... Sankey ... is almost directly on point. It's a very familiar fact scenario. It speaks about whether ... a dismissal for failure to comply with the applicable statute of limitations constituted judgment on the merits for [the] purpose of the [res judicata] doctrine." (SR, Vol. I, C26-27) The circuit court found that Mroczko's petition to intervene was an attempt to do indirectly what she had been unable to accomplish directly in her personal injury action. (SR, Vol. I, C27) The circuit court asked: "So how do I let you come in through the back door for the exact same cause of action ..., seeking the same or similar type damages that you would have sought had I said the statute of limitations didn't apply?" (SR, Vol. I, C24) The circuit court denied Mroczko's petition to intervene, (Vol. IX, C2034), correctly assessing the petition as a second attempt to bring the same claim against the same defendant after a previous adjudication in favor of the defendant.

If Mroczko had challenged either of the two remaining elements of res judicata in the circuit court – an identity of parties and an identity of cause of action - she would have been similarly unsuccessful. Mroczko sued Pepper in her personal injury action for injuries she sustained on August 17, 2012 while working at 300 East Randolph Street when a desk left in a vertical, upright position fell on Mroczko. (Vol. II, C351-365) In her proposed amendment to the complaint attached to her petition to intervene, Mroczko alleged the same

claim: that Pepper was responsible for the injuries she sustained on August 17, 2012 while working for A&R Janitorial at 300 East Randolph Street when furniture that had been improperly stacked fell on her. (Vol. VI, C1373-1377) Hence, in both her personal injury action and in her petition to intervene, Mroczko sued Pepper for injuries arising out of her work on August 17, 2012. The party invoking the res judicata bar – Pepper – and the party against whom the res judicata bar was invoked – Mroczko – were the same parties in both actions. The cause of action asserted in Mroczko's petition to intervene was the same cause of action asserted in her personal injury action. Thus, the remaining two elements of res judicata were also satisfied. Rein, 172 Ill. 2d at 335.

But the appellate court felt differently. First, the appellate court seemingly misunderstood the party against whom Pepper invoked the res judicata doctrine. The court stated: "further, plaintiff [A&R] was not a party to appellants [Mroczko's] untimely filed action. Because plaintiff [A&R] was not a party to that action, res judicata cannot bar its [A&R's] claim here." A&R Janitorial, at ¶23. But the circuit court did not bar A&R's subrogation action. The circuit court denied Mroczko's petition to intervene in the subrogation action. (Vol. IX, C2034) And the order denying Mroczko's petition to intervene did not in any way limit A&R's subrogation action. (Vol. IX, C2034) To the extent that the appellate court reversed the circuit court's decision denying Mroczko's petition to intervene based on its belief that the

circuit court barred A&R's subrogation claim, the appellate court's decision was based upon a misapprehension of facts and should be reversed. To the extent that the appellate court believed that the "identity of parties" element of the res judicata analysis was unfulfilled because A&R was not a party to Mroczko's personal injury action, the appellate court erred in its interpretation of res judicata precedent.

No legal authority requires a complete identity of parties before the doctrine of res judicata may be applied. Indeed, in Sankey Bros., the employer was not a party to Osborne's personal injury action when it was dismissed as untimely. Sankey Bros., 152 Ill. App. 3d at 394. Yet, the Sankey Bros. Court still barred Osborne's attempt to intervene in his employer's subrogation action against Midwest since the earlier dismissal of his untimely personal injury action constituted a judgment on the merits for the purposes of res judicata as between Osborne and Midwest. Id. at 398. That outcome fulfilled the "public policy favoring finality in litigation and judicial economy. It ensure[d] that controversies once decided on their merits remain[ed] in repose." Id. at 397, 398.

Pepper obtained a dismissal of Mroczko's personal injury action. Pepper asserted a res judicata bar to Mroczko's attempt to assert the same claim against it a second time for the same cause of action. So long as the party invoking the res judicata bar, and the party against whom it was invoked, were the same in both cases, the res judicata elements were

satisfied, and the policy considerations behind the doctrine were fulfilled.

Mroczko never raised a challenge to the "identity of parties" element of the res judicata analysis before the circuit court. As such, any argument was forfeited. Haudrich v. Howmedica, Inc., 169 Ill. 2d 525,536 (1996). And even if Mroczko had raised such a challenge, Sankey Bros. speaks directly to this point since the employer was not a party to Osborne's personal injury action, but was a party to the subrogation action in which Osborne's petition to intervene was denied on a res judicata basis. Sankey, 152 Ill. App. 3d 393, at 394, 398.

In its opinion, the appellate court identified no legal authority requiring a complete identity of parties across two sequential actions for the doctrine of res judicata to apply. Pepper has uncovered no Illinois authority, (other than Sankey Bros.), addressing this specific issue, but other jurisdictions have considered whether a complete identity of parties is necessary to invoke the doctrine. The Georgia Court of Appeals flatly stated that, in the res judicata context, "[t]he phrase 'same parties' does not mean that all of the parties on the respective sides of the litigation in the two cases shall have been identical[;] it does mean that those who invoke the defense and against whom it is invoked must be the same." Mahan v. Watkins, 256 Ga. App. 260, 261 (2002), citing Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 345 (1980). Such a resolution makes perfect sense. It both ensures that the party against whom res judicata is being invoked has had an

opportunity to bring her claim against a particular defendant, and it protects the defendant from the harassment of repetitive litigation. Since Pepper was the party that invoked the res judicata defense, and Mroczko was the party against whom it was invoked, the "same parties" element of the res judicata analysis was satisfied. The circuit court correctly determined that res judicata barred Mroczko's petition to intervene.

C. The appellate court's attempt to distinguish Sankey Bros. does not withstand scrutiny.

The facts underlying the appellate court's decision in Sankey Bros. are remarkably similar to the facts here. In each case, the defendant obtained a dismissal of the employee's untimely personal injury action before the employee attempted to intervene in the employer's subrogation action against the same defendant. Both circuit courts determined that res judicata prevented the employees from pursuing the same claim a second time against the same defendant in the employer's subrogation action. Despite the conspicuous similarities in the two cases, the appellate court declared that "Sankey does not control the outcome here because it is factually distinguishable." A&R Janitorial, 2017 IL App (1st) 170385, ¶20. But the appellate court's attempt to distinguish Sankey Bros. does not withstand scrutiny.

The appellate court relied on a single basis to distinguish Sankey Bros.: that the employer in Sankey Bros. sought "only indemnification for workers' compensation benefits it had to pay [its employee]," while A&R,

according to the court, "also sought damages for [Mroczko's] pain and suffering." A&R Janitorial, ¶¶21, 23, (emphasis in original.) But that distinction is irrelevant, and both factually and legally inaccurate. As a preliminary matter, the appellate court failed to explain why the nature of the damages sought in the employer's subrogation action influenced whether the employee should be barred from a second bite at the apple through intervention in the subrogation action after the employee's personal injury claim had previously been dismissed. What matters for res judicata purposes is whether the same claimant filed the same claim against the same defendant in a previous lawsuit that was adjudicated in favor of the defendant. Rein, 172 Ill. 2d at 335. The nature of the recovery sought by the employer in the subrogation action has no impact on the res judicata analysis of the employee's attempt to bring the same claim against the same defendant a second time after suffering an unfavorable adjudication on the merits. Therefore, even if the damages sought by the employer in Sankey Bros. differed from A&R's subrogation claim, it was irrelevant to the res judicata analysis.

Next, the appellate court's insistence that A&R's subrogation action differed from the Sankey Bros.' subrogation action at the time the circuit court denied Mroczko's petition to intervene is factually inaccurate. According to the appellate court, A&R "also sought damages for appellant's (Mroczko's) pain and suffering." (A&R Janitorial, ¶23) But that conclusion

was inconsistent with the record. When the circuit court denied Mroczko's petition to intervene, A&R's subrogation complaint requested nothing more than the worker's compensation benefits that A&R "has paid and may become liable to pay in the future." (Vol. I, C6, ¶13) On December 20, 2016, when the circuit court denied Mroczko's petition to intervene, A&R's subrogation claim was no different than the employer's subrogation claim in Sankey Bros. No difference, therefore, existed in the respective subrogation claims sufficient to distinguish Sankey Bros.

After the circuit court denied Mroczko's petition to intervene on December 20, 2016 (Vol. IX, C2034), and after Mroczko appealed the circuit court's order on February 14, 2017 (Vol. IX, C2057-2058), the appellate court noted that A&R then sought to amend its subrogation complaint to pursue damages for Mroczko's pain and suffering, which the circuit court permitted by its order on July 26, 2017.[3] A&R Janitorial, ¶10. Even though A&R added a request for damages for Mroczko's pain and suffering to its subrogation complaint after the circuit court denied Mroczko's petition to intervene, the employer in Sankey Bros. always had the ability to do the same. Section 5(b) of the Workers' Compensation Act allows any employer in a subrogation action to "commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered, the employer shall pay over to the injured

[3] A&R's attempt to so amend its subrogation complaint is not contained in the record on appeal, since it occurred subsequent to the filing of Mroczko's notice of appeal, an issue of concern discussed further below.

employee ... all sums collected ... in excess of the amount of such compensation paid or to be paid under the Act ..." 820 ILCS 305/5, (emphasis added.) Accordingly, all employers have the statutory right to seek damages in excess of compensation benefits paid. Indeed, the employee in Sankey Bros. understood his employer's ability to do so, arguing that his request for intervention, if denied, would relegate the employee to nothing more than a witness "in an action involving his own claim for damages." Sankey Bros., 152 Ill. App. 3d at 395. Moreover, the Sankey Bros. Court recognized the employer's ability to obtain an amount, in its subrogation action against a third party tortfeasor, in excess of the amount of worker's compensation benefits paid, which the employer would then have to turn over to the injured employee. Id. at 396. Thus, the Workers' Compensation Act, and Sankey Bros.' subrogation action, permitted Sankey Bros. to recover amounts in excess of the compensation benefits paid to its employee, including recovery for its employee's pain and suffering. No meaningful difference existed, therefore, between the two subrogation actions sufficient to justify a departure from the sound reasoning, and the holding, in Sankey Bros.

The appellate court then utilized the alleged difference in the subrogation actions to conclude that Mroczko had an interest in A&R's subrogation action once A&R amended its complaint to add a request for damages due to pain and suffering that the employee in Sankey Bros. lacked due to the nature of the damages requested by his employer. But the Sankey

Bros. Court determined that the employee had no interest in his employer's subrogation suit because the employee's tort claims were "barred by the doctrine of res judicata and the relevant statute of limitations." Sankey Bros., 152 Ill. App. 3d at 399. The lack of the employee's interest in the subrogation action in Sankey Bros. did not stem from the nature of the damages requested by his employer, but from the fact that the employee's claims were barred by the doctrine of res judicata and the statute of limitations: "Here, the result of the [subrogation action] will affect no right of [the employee], since he has no absolute right to intervene in this litigation, and his tort claims against defendants are barred by the doctrine of res judicata and the relevant statute of limitation." Id. at 399, emphasis added.

Mroczko has no interest in A&R's subrogation action for the same reason. Once Mroczko's personal injury action against Pepper was dismissed, Mroczko no longer had any rights against Pepper for the same claim, and thereby, no interest in A&R's subrogation action. Sankey Bros., Inc., 152 Ill. App. 3d at 399. "The code of civil procedure allows intervention as a matter of right only when the party can show an interest in the subject of the action ... The interest must be direct and substantial and it must also be a specific, enforceable and recognizable right ..." Christenson v. Broadway Bank & Trust, 129 Ill. App. 3d 928, 930 (1st Dist. 1984). A party has no enforceable interest once a determination is made that the party's rights have been time-barred. Wood v. Wanecke, 89 Ill. App. 3d 445, 448-449 (1st Dist. 1980). Thus,

to the extent the appellate court distinguished Sankey Bros. on the basis that Mroczko had "an interest" in A&R's subrogation action, she had no such interest once her personal injury action was time-barred. Id.; Sankey Bros., 152 Ill. App. 3d at 399.

And finally, on this point, the appellate court conflated the issue of "interest" in the subrogation action, with a res judicata bar. Whether res judicata bars a litigant's attempt to pursue the same claim against the same defendant a second time requires its own assessment, regardless of an individual's purported right of intervention. The appellate court conflated the two, concluding that if Mroczko fulfilled the requirements for intervention, res judicata could not bar her petition to intervene. The appellate court stated: "The issue before us here does not concern whether the earlier dismissal for failure to file within the statute of limitations was a dismissal on the merits, but whether the trial court abused its discretion in denying plaintiff's petition to intervene." A&R Janitorial, ¶25. But the circuit court denied Mroczko's petition to intervene because the earlier dismissal of her personal injury claim was on the merits. If the earlier dismissal of Mroczko's personal injury action for failure to file within the limitations period constituted a dismissal on the merits, it formed a sufficient basis for the circuit court's order denying Mroczko's petition to intervene under res judicata. The appellate court wrote as if the dismissal of Mroczko's personal injury action had never occurred. The circuit court's decision cannot

be divorced from the res judicata analysis.

The appellate court continued: "The trial court abused its discretion because the court did not apply the applicable law – the intervention provisions of the Code of Civil Procedure."[4] A&R Janitorial, at ¶33. The circuit court's order denying Mroczko's request to intervene was unquestionably based upon applicable law – the doctrine of res judicata. In fact, there were several bases upon which the circuit court could have denied Mroczko's petition to intervene, including the two asserted by Pepper in the circuit court. The circuit court could have determined that the petition was barred by the applicable statute of limitations since it was filed more than four years after the occurrence. Sankey Bros., 152 Ill. App. 3d at 398, ("We conclude that the circuit court's denial of [the employee's] petition for leave to intervene, when considered in view of the policies underlying the doctrine of res judicata and of statutes of limitation, was not a clear abuse of discretion.") The circuit court correctly found that Mroczko's petition was barred by the application of res judicata. Id. If Mroczko had asserted rights under the intervention provisions of the Code of Civil Procedure in the circuit court, Pepper would have raised several challenges to her rights under the intervention statute, among them, the fact that Mroczko's petition was untimely and that she lacked an interest in the subrogation action. 735 ILCS 5/2-408; ("Upon timely application anyone shall be permitted as of right to

[4] Mroczko never raised the intervention provisions of the Code of Civil Procedure as a basis to challenge the circuit court's order in either the circuit or appellate court, a forfeiture that will be discussed below.

intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest ... may be inadequate..."), (emphasis added). The circuit court would have acted well within its discretion to deny Mroczko's petition to intervene on any one of these bases. Denial of Mroczko's petition to intervene on the basis of res judicata was warranted under the law, no matter what rights Mroczko may have claimed under the intervention statute had she intervened before her personal injury action was dismissed.

The appellate court erred in departing from res judicata precedent. The appellate court further erred in distinguishing Sankey Bros. on an irrelevant factual basis; a basis that did not exist at the time of the circuit court's ruling, and does not exist under the language of the Workers' Compensation Act. Whether Mroczko may have had an "interest" in A&R's subrogation action before her untimely personal injury action was dismissed had no effect on the res judicata analysis, that is, whether Mroczko was attempting to sue Pepper for the same cause of action a second time after Pepper secured a dismissal of Mroczko's action on the merits. The circuit court adhered to this Court's res judicata precedent, followed the sound reasoning in Sankey Bros., and correctly denied Mroczko's petition to intervene. This Court should reverse the appellate court's decision, which runs counter to res judicata precedent, and is in direct conflict with Sankey Bros.

II. The Appellate Court Improperly Reversed the Decision of the Circuit Court on Forfeited Bases Never Raised by Mroczko in the Circuit Court or On Appeal.

In the circuit court, Mroczko's response to Pepper's objections to her petition to intervene contained two arguments: (1) that Mroczko had a right under the Workers' Compensation Act to initiate legal proceedings against third parties notwithstanding her employer's payment of compensation benefits; and (2) that the dismissal of her personal injury action in 15 L 5957 on September 12, 2016 was not an adjudication on the merits for the purposes of res judicata. (Vol. IX, C2027-2031) No other arguments were advanced by Mroczko in the circuit court in support of her petition to intervene. Mroczko never asserted that the "same party" prong of the res judicata analysis was unsatisfied, or that Sankey Bros. was inapplicable because Mroczko had "an interest" in the subrogation action under the intervention statute, 735 ILCS 5/2-408. Indeed, Mroczko never felt comfortable distinguishing Sankey Bros. in either her response to Pepper's objections to her petition to intervene in the circuit court (Vol. IX, C2027-2031), or in her briefs in the appellate court. (A7-A26; A86-A94) Tellingly, Mroczko never mentioned Sankey Bros. in any of her written briefs in either the circuit or appellate court – even though the decision was central to Pepper's objection to Mroczko's petition to intervene in the circuit court (Vol. VI, C1397-1406) and in its appellee's brief, (A54-A85).

Likewise, Mroczko never mentioned the intervention statute in her

briefs in either the circuit or appellate court. (Vol. IX, C2027-2031; A7-A26; A86-A94) The appellate court acknowledged that Mroczko "claimed res judicata should not bar her intervention here because a dismissal for failure to file within the statute of limitations should not constitute a judgment on the merits for purposes of res judicata," (A&R Janitorial, ¶9), but then decided the case on an entirely different basis: "the issue before us here does not concern whether the earlier dismissal for failure to file within the statute of limitations was a dismissal on the merits ..." (Id., ¶25). Thus, the appellate court found that the circuit court abused its discretion by failing to consider arguments Mroczko never made, and decided the case on unbriefed issues raised sua sponte by the appellate court.

A. Standard of review

Whether a party may intervene is a matter committed to the discretion of the trial court. Sankey Bros., Inc., v. Guilliams, 152 Ill. App. 3d 393, 398 (3d Dist. 1987); see also Maiter v. Chicago Board of Education, 82 Ill. 2d 373 (1980). "An abuse of discretion will be found where no reasonable person would take the view adopted by the circuit court." Fennell v. Illinois Central RR, Co., 2012 IL 113812, ¶21.

B. The appellate court's sua sponte reliance upon issues neither argued nor briefed violated the principles of forfeiture and party presentation.

This Court has consistently followed the principle of party presentation – that reviewing courts must rely on the parties to frame the issues for

consideration. People v. Givens, 237 Ill. 2d 311, 323 (2010). This Court has admonished that a reviewing court "should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment." Id. quoting Saldana v. Wirtz Cartage Company, 74 Ill. 2d 379, 386 (1978) (emphasis in original). Such activism transforms the reviewing court from an arbiter to an advocate. "Our adversary system works best when the parties themselves advance their best arguments ... and we hear from both sides pursuant to our motto, audi alteram partem." Bogenberger v. Pi Kappa Alpha Corp., 2018 IL 120951, ¶72, (Theis, J., dissenting), (internal citations omitted.) See also, Greenlaw v. United States, 554 U.S. 237, 243 (2008), ("In our adversary system ... we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.") When a reviewing court relies on arguments that are neither briefed nor argued, it denies the parties an opportunity to advance their best arguments, "force[s] the court to speculate as to the arguments that the parties might have presented had [the] issues been properly raised before [the] court," and transforms the court from an adjudicator to an advocate. People v. Rodriguez, 336 Ill. App. 3d 1, 14 (1st Dist. 2002).

Additionally, a decision based on arguments never raised by the parties "weaken[s] the adversarial process in our system of appellate jurisdiction," and prejudices the litigants. Daniels v. Anderson, 162 Ill. 2d 47,

59 (1994). This Court has stated that one of the two most important tasks of a reviewing court is to determine which issues have been forfeited. People v. Smith, 228 Ill. 2d 95, 106 (2008). Deciding an appeal based upon unbriefed issues, therefore, violates both the appellate court's obligation to determine which issues have been forfeited, and the principle of party presentation. An argument never raised in the circuit court denies an opponent the opportunity to respond to the argument legally and factually, and denies the circuit court an opportunity to fully consider the legitimacy of the argument. An appellate court decision based on arguments never raised by the appellee in either the circuit or appellate court compounds this problem, by denying the opponent the opportunity to respond to the arguments in an appellate brief, and by denying the appellate court the benefit of a full discussion of the legal issues. Reversing a circuit court's decision on a basis never articulated in the circuit court or on appeal subverts our system of jurisprudence, and renders meaningless the proceedings in the circuit court. Yet that is precisely what occurred when the appellate court reversed the circuit court's decision on bases Mroczko never raised; bases which the circuit court and Pepper never had an opportunity to address.

C. Mroczko never challenged the "same parties" element of res judicata in either the circuit court or on appeal.

The appellate court refused to apply res judicata to bar Mroczko's petition to intervene, apparently finding that the "same parties" element was not satisfied. The court stated: "A&R was not a party to [Mroczko's]

untimely filed action. Because [A&R] was not a party to that action, res judicata cannot bar [A&R's] claim here." (A&R Janitorial, ¶23.) There are two considerable problems with this statement. First, the statement is factually inaccurate since the circuit court did not bar A&R's claims. The order denied Mroczko's petition to intervene, but in no way limited A&R's recovery. (Vol. IX, C2034) Second, Mroczko never raised the argument that the "same parties" element of res judicata was unsatisfied, either in the circuit court, or in her briefs before the appellate court. (Vol. IX, C2027-2031; A7-A26; A86-A94) Accordingly, Pepper never addressed such an argument in the circuit court or on appeal. The circuit court never addressed the argument as well, since Mroczko never asserted a challenge to the "same parties" element. (SR, Vol. I, C20-29)

The appellate court acknowledged that Mroczko's sole basis for arguing that res judicata should not bar her intervention was her claim that "a dismissal for failure to file within the statute of limitations should not constitute a judgment on the merits for purposes of res judicata," but then acknowledged that its decision would not be rendered on that basis: "[t]he issue before us here does not concern whether the earlier dismissal for failure to file within the statute of limitations was a dismissal on the merits ..." (A&R Janitorial, ¶¶9, 25)

Instead, the appellate court ruled that res judicata did not prevent Mroczko's intervention since A&R was a party to the subrogation action, but

not to Mroczko's personal injury action. If Mroczko had raised such an argument in the circuit court or on appeal, Pepper would have responded that A&R's absence from Mroczko's personal injury action did not preclude Pepper from invoking the doctrine of res judicata against Mroczko when Mroczko attempted to intervene in the subrogation action to file the same cause of action against Pepper. No legal authority stands for the proposition that a complete identity of parties must exist before the doctrine of res judicata may bar a party's attempt to file the same claim against the same defendant a second time following an adjudication on the merits. (See pp. 22-24, above.) So long as the party who invokes the res judicata bar, and the party against whom it is invoked, are the same as the parties to the original proceeding, the doctrine is satisfied and the policy considerations underpinning the doctrine are fulfilled. The appellate court's sua sponte determination that res judicata could not bar A&R's claim since A&R was not a party to Mroczko's untimely personal injury action exposes the peril associated with deciding a case on forfeited and unbriefed arguments. A&R's claim was not barred. That essential fact was misapprehended by the appellate court, leading it to reject res judicata as a basis to deny Mroczko's petition. Res judicata precedent, and Sankey Bros., called for affirmance of the circuit court's order denying Mroczko's petition.

D. Mroczko never raised the provisions of the intervention statute in either the circuit court or on appeal.

The appellate court concluded that the circuit court abused its

discretion because it did not apply the intervention provisions of the Code of Civil Procedure. (A&R Janitorial, ¶33) This means that the appellate court found that the circuit court abused its discretion by failing to consider a legal argument Mroczko never asked it to consider. In point of fact, Mroczko never mentioned the intervention statute or 735 ILCS 5/2-408 in her petition to intervene, (Vol. VI, C1373-1377), in her response to Pepper's objection to her petition, (Vol. IX, C2027-2031), throughout the hearing on Pepper's objection to the petition, (SR, Vol. I, C20-29), in her opening appellant's brief (A7-A26), or in her appellate reply brief. (A86-A94) In her appellate reply brief, Mroczko identified the "controlling issue on appeal [as] whether the equitable doctrine of res judicata should be applied." (A91) If Mroczko had raised the intervention statute, or 735 ILCS 5/2-408, in the circuit court, Pepper would have addressed why Mroczko's attempt to intervene was precluded by the doctrine of res judicata irrespective of the intervention statute. (See pp. 29-31, above.) Pepper also would have addressed why Mroczko's intervention would have been improper under the language of the intervention statute, even without application of res judicata.

The intervention statute allows for intervention as a matter of right, and as a matter of discretion. It provides in pertinent part:

> Intervention. (a) Upon timely application anyone shall be permitted as of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant

> is so situated as to be adversely affected by a distribution or other disposition of property ...
> (b) Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. ...
> (e) a person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file. In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties ... (735 ILCS 5/2-408), (emphasis added.)

If Mroczko had raised the intervention statute in the circuit court, there were multiple issues for the parties' and the court's consideration under the language of the statute. Was Mroczko intervening as a matter of right, or as a matter of discretion? The appellate court summarily concluded that Mroczko here "sought to intervene as of right claiming she was not being adequately represented," but Mroczko's petition to intervene made no such claim. (A&R Janitorial, ¶7); (Vol. VI, C1373-1377) Was Mroczko's petition, filed more than four years after the occurrence in question, a "timely application?" (Vol. VI, C1373-1375) Would Mroczko's intervention unduly delay or prejudice the adjudication of the original subrogation action? Mroczko never asserted rights under the intervention statute, Pepper never had the liberty to challenge those rights, and the circuit court was never provided the opportunity to consider the legal arguments. If the appellate court's decision stands, the case will be remanded to the circuit court to now do what Mroczko could have asked the circuit court to do in the first instance.

As the result of the appellate court's decision, Pepper, and the circuit court, will have to address Mroczko's claim for a third time, and her petition to intervene for a second time, on Mroczko's forfeited arguments. The appellate court's reliance on this forfeited argument renders the proceedings in the circuit court and the appellate court an unmitigated waste of time. Such an outcome exposes the very real and dangerous consequences of relying on forfeited arguments, and violating the principle of party presentation.

And in the end, it is manifestly unfair for the appellate court to indict the circuit court for an abuse of its discretion by failing to consider legal arguments it was never asked to consider. Nor was it proper to reverse the circuit court's decision by relying on unbriefed arguments articulated by no one other than the appellate court, especially where the arguments have no bearing on the circuit court's appropriate determination that res judicata barred Mroczko's petition to intervene in the subrogation action. The appellate court's decision, reversing the circuit court's order based on forfeited arguments raised sua sponte by the court, should be reversed.

III. The Appellate Court Improperly Utilized Documents Outside the Record on Appeal, Concerning Post-Ruling Events, to Find that the Circuit Court Abused its Discretion.

Fundamentally, events outside the record, which occurred after the circuit court issued its ruling denying Mroczko's petition to intervene, should not form the basis for a determination by the reviewing court that the circuit court abused its discretion. Attachments to appellate briefs, which are not

included in the record on appeal, "are not properly before the reviewing court and cannot be used to supplement the record." People v. Garvin, 2013 IL App (1st) 113095, ¶23. Indeed, a different division of this same appellate court flatly stated that "our research has not revealed any Illinois decision in which [attachments to briefs not included in the record] has been done ... we decline to be the first." Id. A reviewing court's determination that a lower court has abused its discretion should be limited to the reviewing court's independent review of the record on appeal. Mohica v. Cvejin, 2013 IL App (1st) 111695, ¶47.

Here, the appellate court considered documents outside of the record, which were attached to the plaintiff's reply brief, to find that the circuit court abused its discretion. Worse yet, the documents on which the appellate court relied concerned events that occurred after the circuit court issued its ruling denying Mroczko's petition to intervene on December 20, 2016. (Vol. IX, C2034)

The appellate court rationalized its unprecedented reliance on attachments to Mroczko's reply brief concerning post-ruling events by stating that the documents were of such a nature that judicial notice could be taken, and that Pepper had not contested their accuracy. A&R Janitorial, ¶14. That justification did not cure the impropriety of relying on documents outside of the record, concerning events which occurred months after the circuit court's ruling, about which the circuit court could have had no

knowledge at the time of its ruling, to find an abuse of discretion. Over Pepper's objections, (A131-A136), the appellate court relied on the following post-ruling events to reach its determination that the circuit court abused its discretion on December 20, 2016 when it denied Mroczko's petition, namely:

> (1) A July 26, 2017 order in which the circuit court permitted A&R Janitorial to pursue Mroczko's non-economic damages (A&R Janitorial, ¶10);
>
> (2) An August 4, 2017 hearing on the issue of whether A&R Janitorial's counsel should be disqualified from pursuing Mroczko's non-economic damages in the subrogation action, (A&R Janitorial, ¶10); and
>
> (3) A&R Janitorial's amendment to its subrogation complaint, filed September 29, 2017. (A&R Janitorial, ¶¶9, 10)

The appellate court knew of these events only as the result of its review of attachments to Mroczko's reply brief (A86-A130), which were not contained in the record on appeal. (A&R Janitorial, ¶14) The appellate court utilized these post-ruling events to support its conclusion that the circuit court abused its discretion in its prior order denying Mroczko's petition to intervene. The appellate court stated "[Mroczko] sought to intervene as of right claiming she was not being adequately represented because [A&R] was only pursuing enough damages for indemnity and not the maximum amount recoverable for her injuries." (A&R Janitorial, ¶7) But Mroczko's petition to intervene said no such thing, nor did her response to Pepper's objection to her petition. (Vol. VI, C1373-1375; Vo. IX, C2027-2031) Nor did Mroczko raise such an argument in her opening appellant's brief. (A7-A26) Likewise, the

appellate court stated that "[Mroczko] claims she has a right to intervene ... because her interests are not adequately represented by [A&R]." (A&R Janitorial, ¶13) But again, Mroczko never made any such claim in the trial court or in her opening brief. The appellate court improperly relied on attachments to Mroczko's reply brief, all of which involved pleadings and rulings in the circuit court months after the order at issue denying Mroczko's petition to intervene. (A86-A130) The appellate court's reliance upon these documents was inappropriate for several reasons.

First, the documents involve events that occurred after the circuit court's ruling. Self-evidently, the documents could not have been, and were not, considered by the circuit court at the time it issued its ruling. No legal authority was offered by Mroczko at the time she attached the documents to her reply brief, or by the appellate court at the time it relied on the documents, establishing that a reviewing court may consider post-ruling events in order to find an abuse of the circuit court's discretion. And no caution was offered by the appellate court as to the dangers presented by permitting litigants to rely on events which occur long after a circuit court's ruling to undermine the ruling. Where would such a tactic lead if countenanced? What damage would such a practice exact on the circuit court's authority? And what impact would condoning such a maneuver have on the finality of an order under Supreme Court Rule 304(a), which permits appeals to be taken from judgments as to fewer than all parties or claims?

Could the appellee attack such a judgment at any time throughout the remainder of the litigation because of events occurring after the judgment? At bottom, the appellate court accused the circuit court of abusing its discretion by failing to consider events which had not yet occurred.

Second, the documents were inappropriately attached to the plaintiff's reply brief and were not part of the record on appeal. As noted above, attachments to briefs which are not included in the record "are not properly before the reviewing court and cannot be used to supplement the record." People v. Garvin, 2013 IL App (1st) 113095, ¶23.

Third, a reviewing court's determination that a circuit court abused its discretion is a significant finding, and should be based upon its independent review of the record, which documents the facts and legal arguments with which the circuit court was faced at the time of its ruling. Mohica, 2013 Ill. App. (1st) 111695, ¶47.

Fourth, points not argued in an appellant's opening brief "are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7), (eff. July 1, 2017). In her rely brief, Mroczko argued for the first time that the circuit court' order of July 26, 2017 permitting A&R to pursue damages in excess of its workers compensation lien somehow justified reversal of the circuit court's order of December 20, 2016, denying Mroczko's petition to intervene. (A86-A94) This new argument never should have been considered by the appellate court since it was

improperly raised for the first time in the reply brief, precluding Pepper from offering a substantive response.

Finally, it is manifestly unfair to accuse the circuit court of abusing its discretion by failing to consider events which had not yet occurred. At the time the circuit court denied Mroczko's petition to intervene, the circuit court could not know that A&R would amend its subrogation action to include a claim for Mroczko's personal injuries, or that Mroczko would claim that her interests would be inadequately represented. That is not to suggest that the circuit court's ruling denying Mroczko's petition would have been affected by those subsequent events – res judicata still would have barred Mroczko's petition. Mroczko had an opportunity to pursue her personal injury action, but she failed to do so in a timely fashion. That error has a remedy, but it is not pursuit of the same claim that has already been dismissed against the same defendant. Mroczko's initial counsel's failure to timely file her lawsuit, and the dismissal order entered as a consequence, prevented her from intervening in the subrogation action, without regard for whether her employer would seek recovery for her non-economic damages or adequately represent her interests in doing so.

The circuit court's decision should not have been evaluated by events which occurred subsequent to its ruling. The singular issue on appeal, according to Mroczko, was whether the circuit court's order in 15 L 5957, dismissing Mroczko's personal injury action as untimely on September 12,

2016, was an adjudication on the merits. Mroczko conceded that, "if [the circuit court] were to determine that the finding in cause 15 L 5957 was an adjudication on the merits, it would bar the present action from proceeding..." (Vol. IX, C2030), (emphasis added). Pepper agrees. Consideration of post-ruling events, outside of the record, to find an abuse of discretion, was manifestly unfair to the circuit court, and inappropriate under the law.

The circuit court denied Mroczko's petition to intervene, finding that the dismissal of Mroczko's untimely personal injury action pursuant to a 2-619 motion constituted an adjudication on the merits for the purposes of res judicata. (SR, Vol. I, C26-27) In so ruling, the circuit court appropriately evaluated the elements of res judicata and determined that Mroczko's petition to intervene was a second attempt to recover damages against the same defendant for the same claim. (SR, Vol. I, C27) The circuit court acted well within its discretion in finding that the prior adjudication on the merits in favor of Pepper in Mroczko's personal injury action barred Mroczko's attempt to intervene against Pepper for the same claim. No basis existed for a finding that the circuit court abused its discretion in denying Mroczko's petition to intervene. The appellate court's decision should be reversed.

CONCLUSION

The appellate court's decision runs counter to precedent in a number of ways: by failing to adhere to this Court's *res* judicata precedent; by issuing a decision in direct conflict with Sankey Bros.; by issuing a decision based wholly on forfeited arguments; by violating the principle of party presentation; by relying on documents outside of the record on appeal; and by relying on events which occurred subsequent to the circuit court's ruling about which the circuit court could have had no knowledge. The appellate court improperly sidestepped the *res* judicata analysis and conflated the right of intervention with a *res* judicata bar. The circuit court was correct in denying Mroczko's petition to intervene after an unfavorable adjudication on the merits against her. The appellate court's decision, reversing that dismissal, should be reversed.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: **/s/Julie A. Teuscher**
One of the Attorneys for Defendant-
Appellant, Pepper Construction Company

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RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the Brief under Rule 342(a) is 11,183 words.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: ***/s/Julie A. Teuscher***
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A P P E N D I X

TABLE OF CONTENTS TO APPENDIX

PAGE(S)

06014/038657/TPB/MPM
ORDER CCG-2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as Statutory Subrogee of TERESA MROCZKO,

Plaintiff,

v.

PEPPER CONSTRUCTION COMPANY, et. al.,

Defendants.

No. 14 L 8396

ORDER

THIS CAUSE COMING TO BE HEARD on the Petition to Intervene and to File an Amended Complaint filed by TERESA MROCZKO, due notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED THAT: 5244 5292

1) TERESA MROCZKO'S Petition to Intervene and to file an Amended Complaint in the captioned lawsuit is Denied.

4335
② CMC @ 1-31-17 at 9:45 A.M. to Stand

ENTERED: _____, 20__

Judge Judge's No.

Firm ID No. 44613
Name CASSIDAY SCHADE LLP
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DOROTHY A. BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

8414281

Judge
William E. Gomolinski
DEC 20 2016
Circuit Court – 1973

C02034

ORDER

06014/038657/TPB/MPM
CCG-2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as Statutory Subrogee of TERESA MROCZKO,

Plaintiff,

v.

PEPPER CONSTRUCTION COMPANY, et. al.,

Defendants.

No. 14 L 8396

ORDER

THIS CAUSE COMING BEFORE THE COURT ON Pepper Construction Company's Motion for a Rule 304(a) Finding as to the Court's Order of December 20, 2016, due notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED THAT:

1) The Motion is granted. Pursuant to Illinois Supreme Court Rule 304(a), this Court makes the express written finding that there is no just reason to delay the enforcement or appeal, or both, of this Court's Order of December 20, 2016 denying Teresa Mroczko's Petition to Intervene in the captioned lawsuit.

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ENTERED: , 20

Judge William E. Gomolinski
JAN 31 2017
Circuit Court – 1973

Judge Judge's No.

DOROTHY A. BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

8430061

C02041

Firm #48852

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as subrogee of TERESA MROCZKO,	)	
Plaintiff,	)	
vs.	)	Case No.: 14 L 8396
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC PEREZ & ASSOCIATES, INC. PEREZ CARPET, CBRE, INC. BLUE CROSS AND BLUE SHIELD ASSOCATION,	)	
Defendants.	)	

NOTICE OF APPEAL

Plaintiff-Appellant, TERESA MROCZKO, through her attorneys, SCHIFF GORMAN LLC, appeals to the Appellate Court of Illinois for the First District from the following order entered in this matter in the Circuit Court of Cook County, Illinois, County Department, Law Division:

1. The order of December 20, 2016 denying TERESA MROCZKO'S Petition to Intervene and to file an Amended Complaint at Law.

2. The order of January 31, 2017 making the order of December 20, 2016 final.

By this appeal, Plaintiff-Appellant will request the Appellate Court to reverse the orders of December 20, 2016 and January 31, 2017, and remand this cause with directions to grant TERESA MROCZKO'S Petition to Intervene and grant leave to file an Amended Complaint at Law so this case may proceed to a trial on the merits as to all claims, or for such other and further relief as the Appellate Court may deem proper.

C02057

Respectfully submitted,

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C02058

H/S

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PAGE 1 of 2
CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
LAW DIVISION
CLERK DOROTHY BROWN

Firm #48852

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as subrogee of TERESA MROCZKO, TERESA MROCZKO, individually As intervenor-appellant Plaintiff,	)	
vs.	)	Case No.: 14 L 8396
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC PEREZ & ASSOCIATES, INC. PEREZ CARPET, CBRE, INC. BLUE CROSS AND BLUE SHIELD ASSOCATION, Defendants.	)	

AMENDMENT TO NOTICE OF APPEAL

Intervenor-Appellant, TERESA MROCZKO, individually, through her attorneys, SCHIFF GORMAN LLC, appeals to the Appellate Court of Illinois for the First District from the following order entered in this matter in the Circuit Court of Cook County, Illinois, County Department, Law Division:

1. The order of December 20, 2016 denying TERESA MROCZKO'S Petition to Intervene and to file an Amended Complaint at Law.

2. The order of January 31, 2017 making the order of December 20, 2016 final.

By this appeal, Intervenor-Appellant requests the Appellate Court to reverse the orders of December 20, 2016 and January 31, 2017, and remand this cause with directions to grant TERESA MROCZKO'S Petition to Intervene and grant leave to file an Amended Complaint at Law so this case may proceed to a trial on the merits as to all claims, or for such other and further relief as the Appellate Court may deem proper.

C#20692

Respectfully submitted,

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C 02063

DMS

No. 17-0385

In the Appellate Court of Illinois First Judicial District

A&R JANITORIAL, as subrogee of TERESA MROCZKO and TERESA, MROCZKO, Individually,	)	
Intervenor-Appellant	)	Appeal from
vs.	)	Court No. 14 L 8396
	)	Hon. Judge William E. Gomolinski
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC PEREZ & ASSOCIATES, INC. PEREZ CARPET, CBRE, INC. BLUE CROSS AND BLUE SHIELD ASSOCATION,	)	
Defendants-Appellees	)	

BRIEF OF INTERVENOR-APPELLANT TERESA MROCZKO

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Oral Argument Requested

No. 17-0385

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

A&R JANITORIAL, as subrogee of TERESA MROCZKO and TERESA, MROCZKO, Individually, Intervenor-Appellant vs. PEPPER CONSTRUCTION CO., PEREZ & ASSOCIATES, INC. Defendants-Appellees	)	Appeal from Court No. 14 L 8396 Hon. Judge William E. Gomolinski

POINTS AND AUTHORITIES

NATURE OF THE CASE

This Appeal arises from three different legal proceedings all of which arise out of an injury to Teresa Mroczko sustained on August 17, 2012. Teresa filed a workers' compensation claim and began receiving benefits. When she did not pursue a lawsuit, her employer, as subrogee, as was their right pursuant to 820 ILCS 305/1 et. seq., filed a timely lawsuit against Pepper Construction Co. and Perez & Associates on April 27, 2015, Teresa's workers' compensation attorneys filed a separate lawsuit against Pepper Construction Co. and Perez & Associates. Pepper Construction Co. and Perez & Associates successfully asserted that Teresa's lawsuit was untimely.

Thereafter, with new counsel, Teresa sought to intervene in the timely lawsuit filed by her employer and amend the Complaint to seek recovery for her personal injuries. This Petition to Intervene and file the Amended Complaint was denied.

This timely appeal followed.

ISSUES PRESENTED FOR REVIEW

Whether The Injured Employee Has The Right To Intervene In The Employers Subrogation Lawsuit

Whether The Injured Employee Has The Right To Control The Subrogation Lawsuit Originally Filed By The Employer

Whether The Doctrine of Res Judicata Bars The Claim Teresa Mroczko asserted in her Amended Complaint As Being Untimely

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rule 301 which provides that "every final judgment of a circuit court in a civil case is appealable as of right." On December 20, 2016, the trial court denied Teresa Mroczko's Petition to Intervene and amend the Complaint. [C2034]. On January 31, 2017, the trial court entered an order that pursuant to Supreme Court Rule 304(a) its December 20, 2016 Order was final and appealable. [C2041].

On February 14, 2017, Plaintiff Teresa Mroczko filed her Notice of Appeal from the orders of December 20, 2016 and January 31, 2007. [C2057]. On March 13, 2017, Teresa filed an amendment to the Notice of Appeal reflecting her status as Intervenor Appellant in place of her previous designation as Plaintiff Appellant. [C2062-2063].

STATUTES INVOLVED

820 ILCS 305/5(b) provides in pertinent part:

(b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act.

In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability.

735 ILCS 5/13-214 provides in pertinent part:

§ 13-214. Construction--Design management and supervision. As used in this Section "person" means any individual, any business or legal entity, or any body politic.
(a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission. Notwithstanding any other provision of law, contract actions against a surety on a payment or performance bond shall be commenced, if at all, within the same time limitation applicable to the bond principal.

735 ILCS 5/13-202 provides in pertinent part:

§ 13-202 Personal injury--Penalty. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation that may proceed pursuant to subsection (a) of Section 7.1 of the Criminal Conversation Abolition Act, except damages resulting from first degree murder or the commission of a Class X felony and the perpetrator thereof is convicted of such crime, shall be commenced within 2 years next after the cause of action accrued . . .

STATEMENT OF FACTS

On August 17, 2012, Teresa Mroczko ["Teresa"] while acting within the course and scope of employment with A & R Janitorial was performing janitorial services at the BlueCross Blue Shield building located at 300 E. Randolph Street, Chicago, Illinois. Pepper Construction Company ["Pepper"] was present on the premises having contracted to perform certain construction work that included replacing the carpeting. Pepper subcontracted the carpeting work to Perez & Associates. In order to accommodate the replacement of the carpet, furniture was moved and stacked. Teresa was removing trash and recycling bins from underneath a desk when a desk table that had been stored nearby fell on top of her. [C 4-C19; C351-C365; C1596-1608]

The Worker's Compensation Claim [12 WC 34686]

Teresa filed an application for adjustment of claim before the Industrial Commission. A&R Janitorial, through its insurer began paying certain compensation to Teresa and has also paid certain medical benefits. This matter continues to pend before the Industrial Commission. [C1410]

The Complaint in Subrogation (14 L 8396)

Teresa did not institute legal proceedings against persons liable for her injuries prior to three months before such an action was barred. Accordingly, on August 14, 2014, A&R Janitorial, statutory subrogee of Teresa, as permitted by 820 ILCS 305/1 et. seq., filed a lawsuit in the Circuit Court of Cook County against Pepper and Perez as well as others[1] seeking monies to cover its losses and damages arising from benefits and monies paid and those benefits and

[1] The other named parties were subsequently dismissed.

monies it may be obligated to pay in the future. [C1408-C1423]. This matter continues to pend.

Teresa's Complaint (15 L 5957)

On June 11, 2015, Teresa filed her Complaint against Pepper and Perez as well as others seeking recovery for her personal injuries suffered August 17, 2012. [C351-365]. Pepper answered the Complaint [C585-591] while Perez moved to dismiss the Complaint asserting that the two year statute of limitations [735 ILCS 5/202] controlled and not the four year construction limitation period [735 ILCS 5/13-214]. Accordingly, Perez asserted that the action was untimely. [C504-506]. Thereafter, Pepper was granted leave to join Perez's Motion to Dismiss. [C538].

On September 14, 2015, the 15 L 5957 lawsuit was consolidated for discovery purposes only with the 14 L 8396 lawsuit. [C502].

On December 18, 2015, the Complaint was dismissed without prejudice and Teresa was given leave to file an amended Complaint. [C702].

On April 28, 2016, Teresa filed her First Amended Complaint attaching various exhibits that included various transcripts seeking to establish that Pepper was engaged in the planning, supervision, management of construction or an improvement to real property and thus the action was timely filed within four years of the injury as allowed by 735 ILCS 5/13-214. There were no new allegations brought against Perez. [C704-C994]. Pepper filed a Motion to Dismiss pursuant to 735 ILCS 5/2-619 again asserting the lawsuit was untimely as controlled by 735 ILCS 5/202. [C1542-C1553].

On September 12, 2016, the Court granted the Motion to Dismiss finding that there was no just reason to delay enforcement or appeal of its decision [C1990] reasoning that the activities

of Pepper was not construction but rather maintenance and upkeep. [C1992-C1999].

Teresa's Petition to Intervene in 14 L 8396

On November 10, 2016, Teresa, through new counsel, petitioned to intervene in the 14 L 8396 lawsuit filed by A&R Janitorial. Attached to the Petition to Intervene was the proposed Amendment to A&R Janitorial's lawsuit. The Amendment sought recovery for her personal injuries. [C1373-C1377].

Pepper opposed the Petition to Intervene and the request for leave to amend the A&R Janitorial Complaint. Pepper asserted that the Petition to Intervene and amend the Complaint was barred by res judicata following the determination of the statute of limitations as determined in 15 L 5957. [C1397-C1406]

A&R Janitorial's Response took no position as to the Petition to Intervene but asserted that it was entitled to seek recovery for all past, present and future payments made to Teresa plus attorney fees and costs associated with the subrogation action. It further asserted that the recovery included non-pecuniary damages such as pain and suffering. It acknowledged that monies in excess of the workers' compensation lien belonged to Teresa. [C2017-C2026].

Teresa's Response to both Pepper and A&R Janitorial Service disputed that the finding that the statute of limitations expired in 15 L 5957 was res judicata and disputed that Teresa did not have the right to intervene and control the litigation. [C2027-C2033].

On December 20, 2016, the Court denied Teresa's right to intervene and file an amendment to the 14 L 8396 Complaint. [C2034]. On January 31, 2017, pursuant to Pepper's Motion [C2035-C2040], the Court entered an order pursuant to Supreme Court Rule 304(a) that its previous order was now final and appealable. [C2041].

On February 14, 2017, Teresa filed her Notice of Appeal from the orders of December

20, 2016 and January 31, 2007. [C2057]. On March 13, 2017, Teresa filed an amendment to the Notice of Appeal reflecting her status as Intervenor Appellant in place of her previous designation as Plaintiff Appellant. [C2062-2063].

ARGUMENT

I. STANDARD OF REVIEW

Intervenor-Plaintiff requests appellate review of the trial court's Orders of December 20, 2016 and January 31, 2017 denying the Petition to Intervene and finding that Teresa's proposed Amended Complaint was untimely based on the doctrine of res judicata. This appeal involves issues regarding the interpretation and statutory construction of 820 ILCS 305/5(b) and the propriety of the trial court's decision to conclude that the proposed Amended Complaint was untimely as controlled by the doctrine of res judicata. All of the issues raised in this appeal involve questions of law which are subject to a *de novo* standard of review. (*Zahl v. Krupa* 365 Ill. App.3d 652 (2012)). Questions of statutory interpretation and construction are questions of law that are reviewed *de novo*. (*LaSalle Bank Nat. Ass'n v. Cypress Creek 1, LP*, 242 Ill. 2d 231, 237 (2011)). Questions of the application of res judicata are likewise reviewed *de novo*. *Carlson v. Rehabilitation Institute of Chicago* 2016 IL App (1st) 143853.

II. TERESA MROCZKO HAS THE RIGHT TO INTERVENE IN THE EMPLOYER'S SUBROGATION LAWSUIT.

A&R Janitorial took no position on whether Teresa may intervene in the subrogation lawsuit that it had filed to secure its payments made and to be made arising from the worker's compensation claim she filed. Pepper Construction Co. takes the position that she may not so intervene.

Echales v. Krasny 12 Ill.App.3d 530 (1957) is instructive here. In 1950, Joseph Budz died from injuries sustained in the course and scope of his employment for which he received workers'

compensation benefits. His employer Echales filed a lawsuit to recover workers' compensation benefits paid to Budz's estate. Five years later, in 1955, when the matter appeared for trial, his widow sought to intervene and amend the Complaint to add her count for damages above that which the employer sought. The trial court denied the relief and on appeal, the Appellate Court ruled that she should have been allowed to intervene and amend the Complaint. To the same effect is the decision in *Geneva Construction Co. v. Martin Transfer & Storage Co.* 4 Ill.2d 273 (1954).

Accordingly, the right to intervene here and amend the Complaint belongs to Mroczko.

III. TERESA MROCZKO HAS THE RIGHT TO CONTROL THE SUBROGATION LAWSUIT FILED BY HER EMPLOYER

By statute, an injured employee who sustains damages caused by some person other than his employer has the right to initiate "legal proceedings . . . against such other person to recover damages notwithstanding [the] employer's payment of or liability to pay compensation. . ." 820 ILCS 305/5(b). And, the non-negligent employer is not permitted to participate in the trial of the common-law action of his injured employee against the negligent third-party defendant but has the right of intervention limited to his right to protect his lien in all orders of court after hearing and judgment. See, *Legler v. Douglas* 26 Ill. App.2d 365 (1960); *Pederson v. MiJack Products, Inc.* 389 Ill. App.3d 33 (2009). *Sjoberg v. Joseph T. Ryerson & Son* 8 Ill.App.2d 414 (1956).

While it is true that the subrogation action was filed first and Teresa seeks to intervene, the right to proceeds above the subrogation interest should be paramount. It makes little sense to allow the employer to control the litigation merely because it filed within the statutory allowed period of three months before the expiration of the statute of limitations. Since monies in excess of the subrogation rights belong to Teresa (*Page v. Hibbard*, 119 Ill.2d 41 (1987)), the employer's

interest in forcefully pursuing those rights is non-existent. However, the employer's rights are necessarily protected by Teresa controlling the litigation whereby the employer's lien is fully protected. E.g. *Pederson v. MiJack Products, Inc.* 389 Ill. App.3d 33 (2009).

Accordingly, Teresa should be entitled to control the lawsuit and pursue her rights in excess of the subrogation interests of the employer.

IV. THE TRIAL COURT ERRED IN FINDING THAT THE DOCTRINE OF RES JUDICATA BARRED THE CLAIM TERESA MROCZKO ASSERTED IN HER AMENDED COMPLAINT AS BEING UNTIMELY

In cause 2014 L 8396, A&R Janitorial has pending its lawsuit against Pepper Construction Company and Perez Associates, Inc. In cause 15 L 5957, Pepper brought its motion to dismiss Teresa Mroczko's Complaint pursuant to 735 ILCS 5/2-619 asserting the statute of limitations barred the cause of action. On September 12, 2016, an Order was entered granting Pepper Construction Company's Motion to Dismiss. There was no appeal taken from that Order. The present issue is whether the September 12, 2016 Order in 15 L5957 is on the merits requiring the dismissal of the proposed amendment to the Complaint based on the doctrine of *res judicata.*

In *Downing v. Chicago Transit Authority,* 162 Ill.2d 70 (1994), the Chicago Transit Authority was timely sued when one of its employees operating a bus struck a bicyclist. After the statute of limitations expired, an amended Complaint was filed adding the bus driver to the lawsuit. The bus driver secured summary judgment based on the statute of limitations whereupon the Chicago Transit Authority sought summary judgment based on the doctrine of *res judicata* asserting that the former judgment barred plaintiff's present claims against the CTA. There, the Supreme Court reversed lower courts decisions finding that the judgment releasing the CTA employee from liability was not an adjudication on the merits. The Supreme Court reasoned that "When a summary judgment is granted because the statute of limitations has run, the merits of the

action are never examined." *Downing,* 162 Ill.2d at 77.

Leow v. A&B Freight Line, Inc. 175 Ill.2d 176 (1997) is also instructive on this question. There, on March 11, 1992, Leow suffered injuries while using a forklift to load skids containing manufactured products onto a semi-trailer truck. A & B Freight Line, Inc., owed the truck. One of its employees, Pasch, allegedly unexpectedly drove the truck away from the loading dock causing the forklift which Leow was operating to fall from the loading dock to the concrete floor below.

Shortly before the two year statute of limitations, on March 8, 1994, Leow filed a single-count complaint naming A & B Freight Line, Inc., as the sole defendant. On September 14, 1994, Leow filed an amended complaint adding a second count against Pasch. Pasch moved to dismiss pursuant to section 2–619(a)(5) claiming that the two-year statute of limitations had run as to him. The trial court granted Pasch's motion to dismiss. The ruling was made appealable pursuant to Supreme Court Rule 304(a) which Leow did not appeal.

On November 1, 1994, A & B Freight Line filed a motion to dismiss count I of plaintiff's complaint on the grounds that a dismissal with prejudice of an action against A & B Freight's employee, Pasch, barred any action against A & B Freight based on the doctrines of *respondeat superior* and *res judicata.* The trial court granted A & B Freight's motion to dismiss and the appellate court affirmed. The Supreme Court however reversed noting that adhering to the policy behind Supreme Court Rule 273 should not be automatically labeled a judgment on the merits. Rather, it believed that the basis on which the judgment was granted should be examined to determine whether the merits of the case were ever considered. (*Leow*, 175 Ill.2d at 187). The Court then concluded the involuntary dismissal on statute of limitations grounds, was not a prior adjudication on the merits.

In the present matter, the present lawsuit 14 L 8396 continues against both Perez & Associates and Pepper Construction Co. If this Court were to determine that the finding in cause 15 L 5957 was an adjudication on the merits, it would bar the present action from proceeding against either party and do violence to 820 ILCS 305/1 et. seq. While Perez & Associates makes no argument here, Pepper Construction Co. is seeking to use *res judicata* s a sword and not a shield. (*Thorton v. Williams* 89 Ill.App.3d 544 (1980)). Two lawsuits have been filed against Pepper Construction Co. arising from the injuries sustained by Teresa. The matter was consolidated for purposes of discovery and clearly Pepper Construction Co. knew that the 14 L 8396 lawsuit was timely filed against it. Pepper Construction Co. knew that had either the cases been consolidated for all purposes or if Teresa moved to intervene in 14 L 8396, the statute of limitations would have been a non-issue. Certainly, Pepper Construction Company must concede that had Teresa's former attorneys not brought her separate lawsuit or dismissed the 15 L 5957 lawsuit prior to the ruling on the statute of limitations, Teresa would have been entitled to join in the 14 L 8396 lawsuit. Rather, Pepper has used a clever strategy to deny Teresa a remedy by presenting its motion for summary judgment based on the statute of limitations. Pepper Construction Co. should not be rewarded for this cleverness. There is no equity in seeking to bar Teresa from recovery for Pepper's silence. It must be remembered that *res judicata* should be applied only as fairness and justice require. (*Murneigh v. Gainer,*_177 Ill.2d 287 (1997)). The purpose of the statute of limitations is "certainly not to shield a wrongdoer; rather, it is to discourage the presentation of stale claims." (*Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.,*_61 Ill.2d 129, 137 (1975)). Here, Pepper Construction Co. was not deprived of its ability to investigate and defend the lawsuit. The allegations in both Complaints set forth the same factual basis.

For these reasons, as fairness and justice requires, equity should not allow the use of the doctrine of res judicata to shield Pepper Construction Co. from adding Teresa to the lawsuit 14 L 8396 and amending A&R Janitorial's lawsuit.

CONCLUSION

WHEREFORE, Intervenor/appellant Teresa Mroczko respectfully requests that this Court (1) reverse the trial court's Orders of December 20, 2016 and January 31, 2017 that barred her Petition to Intervene and denied her request to file the Amended Complaint.

Respectfully submitted,

Schiff Gorman, LLC

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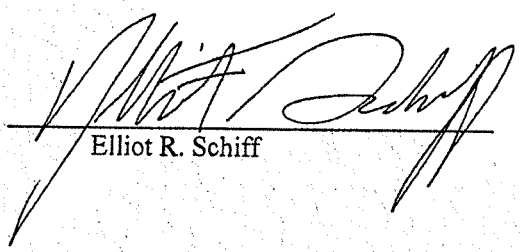
CERTIFICATE OF COMPLIANCE

I certify that this Brief of Intervenor/Appellant conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 15 pages.



Elliot R. Schiff

CERTIFICATE OF SERVICE

I, Bridie Conroy, a non-attorney, on oath state that on May 23, 2017, I filed the foregoing with the Clerk of the Appellate Court and served the attorneys of record at their respective business address via U.S. Mail with First Class postage prepaid, and depositing same in the U.S. Mail Depository at 1 East Wacker Drive, Chicago, IL 60601.

Bridie Conroy

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No. 17-0385

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

A&R JANITORIAL, as subrogee of TERESA MROCZKO and TERESA, MROCZKO, Individually,	)	
Intervenor-Appellant	)	Appeal from
vs.	)	Court No. 14 L 8396
	)	Hon. Judge William E. Gomolinski
PEPPER CONSTRUCTION CO., PEREZ & ASSOCIATES, INC.	)	
Defendants-Appellees	)	

TABLE OF CONTENTS TO APPENDIX

06014/038657/TPB/MPM
CCG-2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JANITORIAL, as Statutory Subrogee of TERESA MROCZKO, Plaintiff, v. PEPPER CONSTRUCTION COMPANY, et. al., Defendants.	No. 14 L 8396

ORDER

THIS CAUSE COMING TO BE HEARD on the Petition to Intervene and to File an Amended Complaint filed by TERESA MROCZKO, due notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED THAT:

1) TERESA MROCZKO'S Petition to Intervene and to file an Amended Complaint in the captioned lawsuit is Denied.

(2) CMC @ 1-31-17 at 9:45 A.M. to Stand

Firm ID No. 44613
Name CASSIDAY SCHADE LLP
Attorney for PEPPER CONSTRUCTION COMPANY
Address 20 North Wacker Drive, Suite 1000
City Chicago, IL 60606
Telephone (312) 641-3100
E-Mail mmoothart@cassiday.com

_____, 20__

ENTERED:

_____
Judge Judge's No.

DOROTHY A. BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

8414281

Judge
William E. Gomolinski
DEC 20 2016
Circuit Court – 1973

A001

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as Statutory Subrogee of TERESA MROCZKO, Plaintiff, v. PEPPER CONSTRUCTION COMPANY, et. al., Defendants.	No. 14 L 8396

ORDER

THIS CAUSE COMING BEFORE THE COURT ON Pepper Construction Company's Motion for a Rule 304(a) Finding as to the Court's Order of December 20, 2016, due notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED THAT:

1) The Motion is granted. Pursuant to Illinois Supreme Court Rule 304(a), this Court makes the express written finding that there is no just reason to delay the enforcement or appeal, or both, of this Court's Order of December 20, 2016 denying Teresa Mroczko's Petition to Intervene in the captioned lawsuit.

Firm ID No. 44613
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_____, 20__

ENTERED:

Judge
William E. Gomolinski

JAN 31 2017

Judge Judge's No.
Circuit Court – 1973

DOROTHY A. BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

8430061

A002

Firm #48852

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as subrogee of TERESA MROCZKO,	)	
Plaintiff,	)	
vs.	)	Case No.: 14 L 8396
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC PEREZ & ASSOCIATES, INC. PEREZ CARPET, CBRE, INC. BLUE CROSS AND BLUE SHIELD ASSOCATION,	)	
Defendants.	)	

NOTICE OF APPEAL

Plaintiff-Appellant, TERESA MROCZKO, through her attorneys, SCHIFF GORMAN LLC, appeals to the Appellate Court of Illinois for the First District from the following order entered in this matter in the Circuit Court of Cook County, Illinois, County Department, Law Division:

1. The order of December 20, 2016 denying TERESA MROCZKO'S Petition to Intervene and to file an Amended Complaint at Law.

2. The order of January 31, 2017 making the order of December 20, 2016 final.

By this appeal, Plaintiff-Appellant will request the Appellate Court to reverse the orders of December 20, 2016 and January 31, 2017, and remand this cause with directions to grant TERESA MROCZKO'S Petition to Intervene and grant leave to file an Amended Complaint at Law so this case may proceed to a trial on the merits as to all claims, or for such other and further relief as the Appellate Court may deem proper.

Respectfully submitted,

Schiff Gorman LLC

/s/ Elliot R. Schiff
One of the Attorneys for Plaintiff-Appellant,
Teresa Mroczko

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Firm #48852

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

A&R JANITORIAL, as subrogee of TERESA MROCZKO, TERESA MROCZKO, individually As intervenor-appellant Plaintiff,	)	
vs.	)	Case No.: 14 L 8396
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC PEREZ & ASSOCIATES, INC. PEREZ CARPET, CBRE, INC. BLUE CROSS AND BLUE SHIELD ASSOCATION, Defendants.	)	

AMENDMENT TO NOTICE OF APPEAL

Intervenor-Appellant, TERESA MROCZKO, individually, through her attorneys, SCHIFF GORMAN LLC, appeals to the Appellate Court of Illinois for the First District from the following order entered in this matter in the Circuit Court of Cook County, Illinois, County Department, Law Division:

1. The order of December 20, 2016 denying TERESA MROCZKO'S Petition to Intervene and to file an Amended Complaint at Law.

2. The order of January 31, 2017 making the order of December 20, 2016 final.

By this appeal, Intervenor-Appellant requests the Appellate Court to reverse the orders of December 20, 2016 and January 31, 2017, and remand this cause with directions to grant TERESA MROCZKO'S Petition to Intervene and grant leave to file an Amended Complaint at Law so this case may proceed to a trial on the merits as to all claims, or for such other and further relief as the Appellate Court may deem proper.

Respectfully submitted,

Schiff Gorman LLC

/s/ Elliot R. Schiff
One of the Attorneys for Intervenor-Appellant,
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No. 17-0385

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

A&R JANITORIAL, as subrogee of TERESA MROCZKO and TERESA, MROCZKO, Individually,	)	
Intervenor-Appellant	)	Appeal from
vs.	)	Court No. 14 L 8396
	)	Hon. Judge William E. Gomolinski
PEPPER CONSTRUCTION CO., PEREZ & ASSOCIATES, INC.	)	
Defendants-Appellees	)	

TABLE OF CONTENTS FOR RECORD ON APPEAL

VOLUME 1 OF 9

VOLUME 2 OF 9

VOLUME 3 OF 9

VOLUME 4 OF 9

VOLUME 5 OF 9

VOLUME 6 OF 9

VOLUME 7 OF 9

VOLUME 8 OF 9

Exhibit 7 to Pepper Construction Company's Response Brief
in Opposition to Teresa Mroczko's Petition
to Intervene and for Leave to File an Amended
Complaint.....C01752-C01887

VOLUME 9 OF 9

E-FILED
Transaction ID: 1-17-0385
File Date: 9/5/2017 12:46 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-17-0385

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

A&R JANITORIAL, as subrogee of TERESA MROCZKO,

Intervenor--Appellant,

vs.

PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC., CBRE, INC., AND BLUE CROSS AND BLUE SHIELD ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

THERE HEARD AS CASE NO. 14 L 8396

HONORABLE WILLIAM E. GOMOLINSKI, JUDGE PRESIDING

RESPONSE BRIEF OF DEFENDANT-APPELLEE PEPPER CONSTRUCTION COMPANY

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Attorneys for Defendant-Appellee

ORAL ARGUMENT REQUESTED

No. 1-17-0385

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

A&R JANITORIAL, as subrogee of TERESA MROCZKO, and TERESA MROCZKO, Individually, ***Intervenor-Appellant,*** **vs.** **PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC., CBRE, INC., AND BLUE CROSS AND BLUE SHIELD ASSOCIATION,** ***Defendant-Appellee.***	**ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY** **THERE HEARD AS CASE NO. 14 L 8396** **HONORABLE WILLIAM E. GOMOLINSKI, JUDGE PRESIDING**

RESPONSE BRIEF OF DEFENDANT-APPELLEE PEPPER CONSTRUCTION COMPANY

POINTS & AUTHORITIES

STATUTES & RULES

NATURE OF THE CASE

On June 11, 2015, Teresa Mroczko filed a personal injury action against Pepper Construction Company ("Pepper"), among others, alleging that she was injured during an incident that took place on August 17, 2012. Pepper successfully moved to dismiss Mroczko's action, arguing that the lawsuit was filed outside the applicable limitations period. No appeal was taken from that decision.

Two months after the dismissal of her personal injury case, Mroczko petitioned to intervene in her employer's subrogation action. Pepper opposed the petition to intervene, arguing that the petition was barred by the doctrine of *res judicata* since the circuit court had previously dismissed Mroczko's action, and since Mroczko was attempting to pursue the same action against the same party following an adjudication on the merits. The circuit court denied Mroczko's petition to intervene, finding that the doctrine of *res judicata* barred Mroczko's petition and that Mroczko could not achieve through the back door what she had been prevented from accomplishing through the front door. The circuit court found that there was no just reason to delay the enforcement or appeal of the order denying Mroczko's petition pursuant to Supreme Court Rule 304(a). This appeal followed.

ISSUES PRESENTED FOR REVIEW

1. Supreme Court Rule 273 provides that the involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits. Did the circuit court's order of September 12, 2016 dismissing Mroczko's personal injury action pursuant to section 2-619 based on Mroczko's failure to file her action within the applicable limitations period constitute an adjudication on the merits?

2. The doctrine of *res judicata* provides that a final judgment on the merits bars any subsequent actions between the same parties for the same cause of action. Did the circuit court's order of September 12, 2016 dismissing Mroczko's personal injury action bar her subsequent petition to intervene against the same party for the same cause of action?

STATUTE INVOLVED

820 ILCS 305/5(b) provides in pertinent part:

(b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act. ...

In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability.

STATEMENT OF FACTS

The Subrogation Action – 14 L 8396

On August 11, 2014, A&R Janitorial, as statutory subrogee of Teresa Mroczko, filed a complaint under Court No. 14 L 8396, seeking recovery against Pepper Construction Company, Pepper Construction Group, LLC, Perez Carpet, Perez & Associates, Inc., CBRE, Inc., and Blue Cross and Blue Shield Association, for Worker's Compensation benefits that it had paid, and would have to pay in the future, to its employee, Teresa Mroczko, as the result of an accident that occurred on August 17, 2012 at the Blue Cross Blue Shield Building located at 300 East Randolph Street, Chicago. (Vol. I, C 4-19)[1] Mroczko had failed to institute any legal proceedings arising out of the incident at any time prior to three months before the limitations period expired. (Vol. I, C 6) Accordingly, pursuant to Section 5(b) of the Workers' Compensation Act, A&R Janitorial, as Mroczko's employer, commenced its action against the defendants to recover any losses A&R Janitorial sustained as the result of Workers' Compensation benefits paid to Mroczko. (Vol. I, C 6).

Mroczko's Personal Injury Action – 15 L 5957

On June 11, 2015, Teresa Mroczko filed her own personal injury action against Pepper Construction Company, Perez & Associates, Inc., Interface Americas, Inc., d/b/a Interface Flor, and Blue Cross and Blue Shield Association. (Vol. II, C 351-C 365) In her complaint, Mroczko alleged that while she was working as a janitor employed by

[1] Blue Cross Blue Shield Association was voluntarily dismissed from A&R Janitorial's subrogation action on November 17, 2014, Pepper Construction Group, LLC was dismissed from the case on December 17, 2014, and CBRE was voluntarily dismissed from plaintiff's subrogation action on December 17, 2014, (Vol. I, C 137, C 173 and C 174), leaving behind the defendants Pepper Construction Company (hereinafter "Pepper") and the Perez defendants.

A&R Janitorial on August 17, 2012, she suffered certain injuries after a desk left in a vertical, upright position struck Mroczko. (Vol. II, C 353-354) Pepper filed an answer and affirmative defenses to Mroczko's complaint, asserting, among other things, that Mroczko's complaint was barred by the applicable two year statute of limitations for personal injury actions found in 735 ILCS 5/13-202. (Vol. III, C 590-591) Pepper also moved to consolidate A&R Janitorial's subrogation action with Mroczko's personal injury action, and the two actions were consolidated on September 14, 2015. (Vol. II, C 466-C 468; Vol. III, C 502)

Defendants Move to Dismiss Mroczko's Personal Injury Action

On October 20, 2015, Perez & Associates moved to dismiss Mroczko's complaint pursuant to 735 ILCS 5/2-615, arguing that Mroczko's action was barred by the two year statute of limitations applicable to personal injury actions. (Vol. III, C 504-C 506) Specifically, Perez argued that Mroczko's injuries did not arise out of construction or improvement to real property, but instead occurred during routine maintenance involving the replacement of carpet in a preexisting building. (Vol. III, C 506) On October 20, 2015, the circuit court granted Pepper's request to join Perez's motion to dismiss. (Vol. III, C 538) On December 18, 2015, the circuit court dismissed Teresa Mroczko's complaint without prejudice and granted Mroczko leave to amend. (Vol. III, C 702)

Mroczko then filed her First Amended Complaint on April 28, 2016. (Vol. III, C 704-715) Pepper filed a section 2-619 motion to dismiss Mroczko's First Amended Complaint on May 23, 2016, arguing that Mroczko's action was barred by the two year personal injury statute of limitations since the conduct in question involved the routine replacement of carpet and not an improvement to real property or construction work.

(Vol. III, C 653-C 662) Mroczko responded, arguing that she was injured during improvements to the building and that her action was timely under the construction statute of limitations found in 735 ILCS 5/13-214. (Vol. VIII, C 1890-1903) Pepper replied, arguing that carpet replacement was not part of a larger construction project, but was instead ordinary maintenance. (Vol. VI, C 1334-C 1338)

On September 12, 2016, the circuit court granted Pepper's 2-619 motion to dismiss Teresa Mroczko's personal injury claim in 15 L 5957. (Vol. VIII, C 1990) The circuit court included a finding pursuant to Supreme Court Rule 304(a) that there was no just reason to delay the enforcement or appeal from the order dismissing Mroczko's action against Pepper. (*Id.*) No appeal was taken from the order dismissing Mroczko's personal injury action against Pepper and no other challenge was ever asserted with respect to the order.

Mroczko Petitions to Intervene in Subrogation Action

Instead, on November 10, 2016, Teresa Mroczko petitioned to intervene in A&R Janitorial's subrogation action. (Vol. VI, C 1373-C 1375) Specifically, Mroczko sought to "intervene in this cause and amend the complaint seeking money damages for her injuries and damages above those benefits and moneys being sought by A&R Janitorial." (Vol. VI, C 1375) Mroczko attached a proposed amendment to the subrogation complaint, seeking recovery for "permanent injuries and damages" and for "future" injuries and damages. (Vol. VI, C 1376-C 1377)

Pepper filed a brief in opposition to Mroczko's petition to intervene on December 6, 2016. (Vol. VI, C 1397-C 1406) Pepper argued that Mroczko's petition to intervene, and the damages sought therein, were barred by the applicable statute of limitations and

the doctrine of *res judicata*. (Vol. VI, C 1400-C 1402) A&R Janitorial filed a Response to Mroczko's petition, arguing, among other things, that A&R should maintain control of its subrogation action. (Vol. IX, C 2017- C 2024) Mroczko filed a response to Pepper and A&R Janitorial's objections to her petition to intervene. (Vol. IX, C 2027-2031) Mroczko claimed that the order dismissing her personal injury action based upon the expiration of the statute of limitations was not an adjudication on the merits and that *res judicata* should not bar her intervention and proposed amended complaint. (Vol. IX, C 2028-C 2031)

The circuit court agreed with Pepper. Relying on *Sankey Brothers v. Gillian*, the circuit court determined that the dismissal of Mroczko's personal injury action pursuant to section 2-619, based on Mroczko's failure to timely file her action within the applicable limitations period, constituted an adjudication on the merits for the purposes of *res judicata*. (SR, Vol. I, pp. 26, 27)[2] The court stated: "I think ... *Sankey* ... is almost directly on point. It's a very similar fact scenario. It speaks about whether or not ... a dismissal for failure to comply with the applicable statute of limitations constituted judgment on the merits for [the] purpose of the [*res judicata*] doctrine." (SR Vol. I C 26-27) The circuit court also determined that Mroczko's petition to intervene was an attempt to do indirectly what she was unable to accomplish directly in her personal injury action. (SR, Vol. I, C 27) The court stated: "So how do I let you come in through the back door for the exact same cause of action that you seek, seeking the same or similar type damages that you would have sought had I said the statute of limitations didn't apply?" (SR, Col. I, C 24) The court entered an order on December 20, 2016, denying Teresa Mroczko's petition to intervene and file an amended complaint. (Vol. IX, C 2034)

[2] SR refers to the supplemental record.

Pepper filed a motion for a 304(a) finding with respect to the court's order of December 20, 2016 which was allowed on January 31, 2017. (Vol. IX, C 2037-2038; C 2041) Mroczko filed a timely notice of appeal on February 14, 2017, appealing from the circuit court's orders of December 20, 2016 and January 31, 2017. (Vol. IX, C 2057-2058) Mroczko then filed an amendment to her notice of appeal on March 13, 2017, amending her status from plaintiff to intervenor-appellant. (Vol. IX, C 2062-2063) This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

The defendant Pepper takes issue with the standard of review described in Mroczko's appellant's brief. Mroczko attempts to cast the standard of review as *de novo*, involving the interpretation of the Workers' Compensation Act. However, the order from which Mroczko appeals is the circuit court's order of December 20, 2016, denying her petition to intervene and file an amended complaint. (Vol. IX, C 2034) Whether a party may intervene is a matter committed to the discretion of the trial court. *Sankey Brothers, Inc. v. Guilliams*, 152 Ill. App. 3d 393, 398 (3d Dist. 1987); *see also Maiter v. Chicago Board of Education,* 82 Ill. 2d 373 (1980). The Workers' Compensation Act, and specifically, Section 5(b), provides no statutory right to an employee to intervene in the event that an employer commences a proceeding within three months before an action against a third party would be barred. *820 ILCS 305/5(b)* Whether to permit the employee's petition to intervene, therefore, is not a matter of statutory interpretation under the Workers' Compensation Act. Instead, the decision whether to permit an employee to intervene in an employer's subrogation action is a matter "committed to the discretion of the trial court." *Sankey Brothers, Inc.* at 398. As such, the trial court's decision denying a petition for leave to intervene will not be reversed absent a clear abuse of discretion. *Id.* An abuse of discretion occurs "when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Kayman v. Rasheed*, 2015 IL App (1st) 132631, ¶ 66.

"The issue of whether a claim is barred by *res judicata* comprises a question of law, which is subject to *de novo* review." *Oshana v. FCL Builders, Inc.*, 2013 IL App

(1st) 120851, ¶ 13. Thus, while this Court will conduct a *de novo* review of the trial court's determination that the 2-619 dismissal of Mroczko's untimely personal injury claim constituted an "adjudication on the merits" so as to have *res judicata* effect, this Court should review the trial court's decision denying Mroczko's petition to intervene under an abuse of discretion standard.

II. THE DOCTRINE OF *RES JUDICATA* BARRED MROCZKO'S ATTEMPT TO INTERVENE IN THE SUBROGATION ACTION TO PURSUE THE SAME CLAIM AGAINST THE SAME DEFENDANT AFTER IT HAD BEEN DISMISSED IN HER PERSONAL INJURY ACTION.

A. The doctrine of *res judicata* provides that a final judgment on the merits bars any subsequent action between the same parties for the same cause of action.

"The doctrine of *res judicata* bars the refiling of an action previously adjudicated on the merits when the action is directed against the same parties and involves the same claims." *DeLuna v. Treister*, 185 Ill. 2d 565, 572 (1999). Three conditions must be satisfied in order for the doctrine of *res judicata* to apply: (1) there has been a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) the parties are identical in both lawsuits. *Id.* The purpose behind the doctrine of *res judicata* is the protection of the defendant from harassment and the protection of the public from multiple lawsuits. *Rein v. Noyes & Company,* 172 Ill. 2d 325, 343 (1996).

Mroczko raises no challenge with regard to two of the three elements necessary for application of the doctrine – an identity of cause of action and identity of parties in both lawsuits. Instead, Mroczko challenges only the first element of *res judicata* – whether a final judgment on the merits was entered in Mroczko's personal injury lawsuit. As Mroczko states in her opening brief: "The present issue is whether the September 12,

2016 order in 15 L 5957 is on the merits requiring the dismissal of the proposed amendment to the complaint based on the doctrine of *res judicata*." (Pltf's Brf, p. 11) Under Supreme Court Rule 273, and well-settled precedent, the order entered on September 12, 2016 dismissing Mroczko's personal injury claim pursuant to section 2-619 for Mroczko's failure to timely file the action within the applicable limitations period is an adjudication on the merits.

B. The dismissal of Mroczko's personal injury claim constituted an adjudication on the merits.

Mroczko argues in her appellant's brief that the order dismissing her personal injury action in 15 L 5957 pursuant to 735 ILCS 5/2-619, based upon the expiration of the statute of limitations, was not an adjudication on the merits. Supreme Court Rule 273 and well-settled case law, however, establish otherwise.

Supreme Court Rule 273 provides as follows:

> Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

Under the plain language of Rule 273, therefore, any involuntary dismissal, other than one for lack of jurisdiction, improper venue, or failure to join an indispensable party, operates as an adjudication upon the merits. Pepper's section 2-619 motion to dismiss was based upon Mroczko's failure to file her personal injury lawsuit within the applicable two-year statute of limitations, 735 ILCS 5/13-202. (Vol. III, C 653-C 662) The circuit court granted the motion to dismiss, finding that the two year statute of limitations applied to Mroczko's action. (Vol. VIII, C 1994) No appeal was taken from that order. Since the involuntary dismissal of Mroczko's action was on a basis other than lack of

jurisdiction, improper venue, or failure to join an indispensable party, the order granting Pepper's 2-619 motion to dismiss in 15 L 5957 on September 12, 2016 operated as an adjudication upon the merits under Supreme Court Rule 273.

Long-settled precedent of the Illinois Supreme Court also leaves no room for a dispute on this point. The Illinois Supreme Court has considered, and specifically rejected, Mroczko's argument here that a dismissal based upon the expiration of the statute of limitations should not be considered an adjudication on the merits. In *Rein v. Noyes*, plaintiffs originally filed a multiple count complaint against a number of defendants in 1990. *Rein v. Noyes & Company*, 172 Ill. 2d 325, 327, 328 (1996). The defendants moved to dismiss certain of the counts on the basis that they were barred by the applicable statute of limitations. *Id.* at 329. The trial court dismissed certain of the counts on that basis, after which plaintiffs voluntarily dismissed the remaining counts of their complaint. *Id.* at 329, 330. Approximately 19 months after the voluntary dismissal, plaintiffs filed a new, multiple count complaint against the defendants. *Id.* at 331. The defendants moved to dismiss the entire complaint pursuant to § 2-619, arguing that the complaint was barred under the doctrine of *res judicata*. *Id.* at 332.

On appeal, plaintiffs argued that the doctrine of *res judicata* was inapplicable because the dismissal of certain counts based upon the expiration of the statute of limitations in plaintiff's original action was not an adjudication on the merits for the purposes of *res judicata*. *Id.* at 334. The issue for the Illinois Supreme Court, therefore, was whether the trial court's dismissal based on the applicable statute of limitations was a final adjudication on the merits. And on this point, the Illinois Supreme Court was unambiguous: "Therefore, under Rule 273, the trial judge's decision to grant defendants'

motion to dismiss the rescission counts in *Rein I* based on the applicable statute of limitations is a final adjudication on the merits and operates as a final judgment on the merits for purposes of *res judicata.*" *Id.* at 336.

Three years later, the Illinois Supreme Court issued another decision interpreting Supreme Court Rule 273. In *DeLuna v. Treister*, the Supreme Court determined that an involuntary dismissal pursuant to § 2-619 for failing to comply with § 2-622 of the Illinois Code of Civil Procedure constituted an adjudication upon the merits as defined in Illinois Supreme Court Rule 273. *DeLuna v. Treister*, 185 Ill. 2d 565, 573 (1999). Citing *Rein*, the Court reasoned that the dismissal was obtained involuntarily pursuant to § 2-619 and was not listed as one of the exceptions in Supreme Court Rule 273. *Id.* at 574. The Court plainly stated "if a plaintiff's action is involuntarily dismissed for a reason not expressly excepted by the rule ... then the rule *deems* the dismissal a dismissal on the merits. That is the purpose of the rule." *Id.* at 575, (emphasis in original).

Mroczko's claim that the dismissal of her untimely personal injury action is not an adjudication on the merits is contrary to the law in this state as it has existed for over twenty years. Pepper's motion to dismiss satisfies all of the criteria necessary to constitute an adjudication on the merits under Supreme Court Rule 273, *Rein,* and *DeLuna*. Pepper moved to dismiss Mroczko's action under § 2-619 based upon Mroczko's failure to timely file her action within the applicable statute of limitations. (Vol. III, C 653-C 662) Her action was involuntarily dismissed by the trial court on that basis. (Vol. VIII, C 1990; C 1992-1999) Since the dismissal was for a reason not expressly excepted from Rule 273, the dismissal operates as an adjudication upon the merits. *De Luna*, at 575.

C. The issue before this Court has previously been decided in *Sankey Brothers, Inc., v. Guilliams* – a decision notably absent from Mroczko's appellant's brief.

Notably absent from Mroczko's appellant's brief is any mention of the most factually germane decision on the issue presented - *Sankey Brothers, Inc., v. Guilliams,* 152 Ill. App. 3d 393 (3d Dist. 1987). In *Sankey*, William Osborne was employed by Sankey Brothers, Inc. (Sankey) when he was injured in an accident on October 20, 1981. *Id.* at 394. Sankey filed a subrogation action on October 14, 1983, seeking indemnification for workers' compensation benefits it had paid to Osborne. *Id.* at 395. On October 19, 1983, Osborne filed his own negligence action in the Circuit Court of Cook County, but named the wrong defendant. *Id.* at 394. Osborne filed an amended complaint on September 4, 1984 naming the correct defendant, Midwest, however that action was dismissed on Midwest's motion since the suit against Midwest was filed outside the applicable limitations period and Midwest was not served within the relevant limitations period. *Id.* The record contained no indication that Osborne appealed the order dismissing his action against Midwest. *Id.* at 394, 395.

Thereafter, on October 11, 1985, Osborne filed a petition for leave to intervene in the subrogation lawsuit filed by his employer, Sankey, to assert his purported rights under § 5(b) of the Workers' Compensation Act. *Id.* at 395. The circuit court denied Osborne's petition on two separate bases: Osborne filed his petition for leave to intervene almost 4 years after the cause of action accrued, and Osborne's petition to intervene was barred by the *res judicata* effect of the dismissal of his personal injury action in Cook County. *Id.* Osborne appealed, arguing: (1) the strict application of the doctrine of *res judicata* should be relaxed under the circumstances; (2) under § 5(b) of the Workers'

Compensation Act, Osborne should be deemed a necessary party to the subrogation action; and (3) that employees should be granted the same right as employers under the Workers' Compensation Act to join in an action against a third party tortfeasor. *Id.*

The appellate court made the preliminary determination that § 5(b) of the Workers' Compensation Act governs the rights of *employers* to obtain indemnification for workers' compensation payments made, but contained no language addressing an employee's attempt to intervene in a suit filed by its employer. *Id.* at 396. The court then considered whether the doctrine of *res judicata* barred Osborne's attempt to intervene. The appellate court affirmed the circuit court's denial of Osborne's petition for leave to intervene, finding that "at the time that Osborne requested leave to intervene, his tort claims against defendants were also barred by the doctrine of *res judicata,* since a dismissal for failure to comply with the applicable statute of limitations constitutes a judgment on the merits for purposes of that doctrine." *Id.* at 398. The court reasoned: "Osborne had full opportunity to present in the Cook County action all of his claims pertaining to the defendants' negligence; that he was unable to do so is attributable to the failure of Osborne (or of the attorney who represented him in that action) to timely serve Midwest with process." *Id.* The court further stated: "permitting intervention under these circumstances 'would in effect permit [the employee] the back door when the front door is closed.'" *Id.* at 399, *citing Hartford Accident & Indemnity Co. v. Rigdon*, 418 F. Supp. 540 (S.D. Ala. 1976).

The facts and legal issue in *Sankey* are virtually identical to the facts and legal issue presented herein. The dismissal of Mroczko's personal injury action on September 12, 2016 was an adjudication on the merits. (Vol. VIII, C 1990) Mroczko's subsequent

attempt to intervene in A&R Janitorial's subrogation action in November of 2016 was barred by the doctrine of *res judicata* since the petition constituted a subsequent action involving the same cause of action against the same party following an adjudication on the merits. *Rein,* 172 Ill. 2d 325, 335. Mroczko pursued no appeal from the circuit court's order dismissing her personal injury action pursuant to its untimely filing. That involuntary dismissal constituted an adjudication on the merits, preventing her from pursuing a petition to intervene against the same party for the same cause of action. Just as in *Sankey*, this Court should affirm the circuit court's denial of Mroczko's petition for leave to intervene.

D. Rather than citing the pertinent decisions in *Rein, DeLuna,* and *Sankey,* Mroczko directs this Court to decisions which are factually and legally distinct.

Rather than directing this Court to pertinent law on the doctrine of *res judicata* and the application of the doctrine to a petition for leave to intervene following an involuntary dismissal of a personal injury claim, Mroczko misdirects this Court to decisions easily distinguishable from the facts here. For example, in *Downing*, plaintiff brought suit against the CTA and an "unknown employee and agent" within the limitations period after he was struck by a city bus. *Downing v. Chicago Transit Authority,* 162 Ill. 2d 70, 72 (1994). Plaintiff filed a second amended complaint, naming the driver, Woodrow Williams, as a defendant for the first time, outside the limitations period. *Id.* The trial court granted summary judgment to Williams, ruling that the two-year statute of limitations as to him had expired. *Id.* The CTA then moved for summary judgment, arguing that the summary judgment in favor of Williams acted as *res judicata* to plaintiff's claims against the CTA. *Id.* at 73. The trial court granted the

CTA's motion for summary judgment (except for an allegation that the CTA had negligently maintained the bus), and the appellate court affirmed. *Id.* The Illinois Supreme Court reversed on a very specific basis. *Id.* The Court determined that the summary judgment in favor of Williams was not an "involuntary dismissal" under the terms of Supreme Court Rule 273. *Id.* at 74, 75. Summary judgment was not the same as an involuntary dismissal under § 2-619 and thereby, did not operate as a judgment on the merits under Rule 273. *Id.* at 75. Since the first element required for *res judicata* – an adjudication on the merits – was not satisfied, the trial court erred in granting summary judgment to the CTA. *Id.* at 76. The crucial distinction, therefore, that renders *Downing* inapplicable to these circumstances is that *Downing* involved a motion for summary judgment, and not an involuntary dismissal governed by Supreme Court Rule 273.

Likewise, *Leow* is significantly factually distinct. *Leow v. A&B Freight Line*, 175 Ill. 2d 176 (1997). In *Leow*, the plaintiff filed a personal injury claim against A&B Freight, under a theory of vicarious liability, for injuries caused by its employee, Pasch. *Id.* at 178. In an amended pleading, filed after the expiration of the limitations period, Leow added A&B's employee Pasch as a named defendant. *Id.* Pasch successfully moved to dismiss the claim against him, arguing that the claim was filed beyond the applicable statute of limitations. *Id.* at 178, 179. A&B then moved to dismiss the claim against it on the basis of *res judicata*. *Id.* at 179. A&B argued that the involuntary dismissal of Pasch constituted an adjudication on the merits, and since A&B's employee could no longer be liable to plaintiff, A&B's derivative liability should be eliminated as well. The circuit court granted A&B's motion, however the Illinois Supreme Court reversed. *Id.* at 188. The Court distinguished its decision in *Rein* by noting that *Rein*

involved the application of the doctrine of *res judicata* to a subsequent claim against the *same defendant*. *Id.* at 184. In *Leow*, however, the issue involved a separate claim against a different defendant, a distinction the Supreme Court described as "critical." *Id.* The Court determined that the "involuntary dismissal of Pasch was not an adjudication on the merits as to A&B Freight." *Id.* at 188. The Illinois Supreme Court in *DeLuna* explained precisely how its decision in *Loew* two years previously was limited. The *DeLuna* Court stated as follows:

> However, the court specifically limited the applicability of the *Costello* test – whether the basis for dismissal forced the defendant to prepare to meet the merits of plaintiff's claim – to instances where 'separate defendants are involved.' *Leow*, 175 Ill. 2d at 186. Where the party that procures an involuntary dismissal in a case is the same party that later asserts that the dismissal was a 'final adjudication on the merits,' then whether an adjudication on the merits actually occurred is determined by applying Rule 273 according to its plain terms." *DeLuna*, 185 Ill. 2d 565 at 578.

Here, the party that procured the involuntary dismissal in Mroczko's personal injury action – Pepper – is the same party that later asserted that that dismissal constituted an adjudication on the merits so as to invoke the doctrine of *res judicata*. Such was not the case in *Leow* – a distinguishing fact which the Illinois Supreme Court found determinative.

Mroczko also relies on *Thornton* and *Murneigh* in her efforts to persuade this Court that the circuit court abused its discretion in denying her petition for leave to intervene. But again, both decisions are significantly factually distinct. The issue in *Thornton* was whether the defense of *res judicata* "may be waived by a defendant by his failure to affirmatively assert it in a timely fashion." *Thornton v. Williams*, 89 Ill. App. 3d 544 (1st Dist. 1980). The defendant delayed more than three and a half years, to the

second day of trial, before asserting that the same property damage claim had been satisfied in a prior lawsuit brought by the plaintiff's collision insurance carrier. *Id.* at 546. A division of this Court rejected the defendant's *res judicata* claim, refusing to reward the defendant for his silence and noting that "because the defendant did not defend in the first action, the hardship of defending multiple suits is not present." *Id.* at 548.

No such facts are present here. Pepper did not wait three and a half years to file its objection to Mroczko's petition to intervene, nor has Mroczko asserted such an argument. Pepper filed its brief in opposition to Mroczko's Petition to Intervene less than four weeks after Mroczko filed her petition. (Vol. VI, C 11373–C1375; C 1397–C 1406) Secondly, Pepper *did* defend Mroczko's first action, resulting in a dismissal pursuant to the statute of limitations, and would have suffered the hardship of defending a second suit if the doctrine of *res judicata* had not prevented Mroczko's petition to intervene. (Vol. III, C 653-C 662)

Finally, *Murneigh* provides Mroczko with no relief. Mroczko cites *Murneigh* for the general proposition that *res judicata* should be applied only when fairness and justice require. (Pltf's Brf, p. 13) But the facts in *Murneigh* are significantly different than those here. In *Murneigh*, the Illinois Supreme Court refused to apply the doctrine of *res judicata* to a subsequent action, finding that an entirely different element of the doctrine was not satisfied. *Murneigh v. Gainer*, 177 Ill. 2d 287, 299 (1997). In his first lawsuit, Murneigh challenged the constitutionality of sections 5-4-3(a)(3) and (c) of the Unified Code of Corrections ("the Code") after the defendant attempted to obtain a blood sample in November of 1992. *Id.* at 293. In his second lawsuit, Murneigh challenged the

constitutionality of section 5-4-3(i) of the Code after the defendant attempted to obtain a second blood sample on a subsequent occasion. *Id.* at 295, 296. The court held that "*res judicata* should not be applied to preclude a party from litigating the central issue in a second suit where such issue was not adjudicated in the first suit." *Id.* at 301. The facts giving rise to the two lawsuits did not arise from a single incident and the legal issues presented by the different statutes differed. *Id.* at 299.

Such is not the case here. In Mroczko's personal injury action, she claimed that the defendants caused her injury as the result of an accident that took place on August 17, 2012. (Vol. II, C 351-C 365) In Mroczko's petition to intervene, Mroczko requested leave to file an amended complaint, reasserting the same cause of action – that on or about August 17, 2012, Mroczko was injured as the result of acts or omissions by Pepper while performing work at the Blue Cross Blue Shield building located at 300 East Randolph Street. (Vol. VI, C 1373-1377) Unlike *Murneigh*, therefore, Mroczko attempted to file a second action arising from a single incident involving the same facts which had previously been adjudicated on the merits.

Pepper satisfied each and every element of the doctrine of *res judicata.* Pepper was the defendant who obtained an adjudication on the merits in Mroczko's personal injury action and is the same defendant who objected to Mroczko's petition to intervene on the basis of *res judicata.* Under the controlling precedent of *Rein* and *DeLuna*, and the factually apposite decision in *Sankey*, this Court should affirm the circuit court's denial of Mroczko's petition for leave to intervene on the basis of *res judicata.*

III. THE INVOLUNTARY DISMISSAL OF MROCZKO'S PERSONAL INJURY ACTION PRIOR TO HER PETITION TO INTERVENE PREVENTS MROCZKO FROM INTERVENING IN OR CONTROLLING THE SUBROGATION ACTION.

In her appellant's brief, Mroczko argues generally that an employee has the right to intervene in an employer's subrogation lawsuit. But in support of this general proposition, Mroczko relies on decisions missing the critical fact present here - Mroczko's decision to first file an untimely personal injury action before attempting to intervene in the subrogation action. If Mroczko had never filed an untimely personal injury action, then the precedent on which Mroczko relies might be pertinent. For instance, the Illinois Supreme Court's 1954 decision in *Geneva Construction Company* stands for the general propositions that an employer may assert a subrogation action against third parties to recover the amount of worker's compensation benefits paid, and that an employee may intervene in a timely filed subrogation action even if the petition to intervene is not filed within the limitations period. *Geneva Construction Company v. Martin Transfer & Storage Company*, 4 Ill. 2d 273, 284, 290. The Court found no prejudice to the defendant in allowing the petition. *Id.* at 288.

Geneva Construction, however, did not involve an employee's attempt to first file an untimely personal injury action which the defendant was forced to defend and dismiss, followed by a petition to intervene in a subrogation action. Pepper would be prejudiced here if forced to defend the same cause of action for a second time, arising out of the same facts, for which it had already obtained an adjudication on the merits. The doctrine of *res judicata* was not in play in *Geneva Construction*. Pepper opposed Mroczko's petition to intervene in the subrogation action because her claim for personal injury damages had already been adjudicated on the merits and her petition to intervene was a second attempt to recover damages arising out of the same accident between the same parties and was thus barred. No such facts were present in *Geneva Construction*.

Similarly, in *Echales v. Krasny*, a division of this Court issued a decision in 1957 standing for the simple proposition that an employee has the right to intervene in a timely filed subrogation action. *Echales v. Krasny*, 12 Ill. App. 2d 530, 535 (1st Dist. 1957). The Court allowed the employee to intervene in the subrogation action even though the petition to intervene was filed after the expiration of the statute of limitations. But *Echales* did not involve a petition to intervene that was only filed after the involuntary dismissal of an employee's untimely action. No issues of *res judicata* were in play in *Echales* and the Court merely determined that the petition to intervene filed on behalf of the employee should be permitted. *Id.*

Moreover, the reasoning given by the courts in both *Geneva Const. Co.* and *Echales* for allowing the injured employee to intervene was the change in the Illinois Workers' Compensation Act brought about by the Illinois Supreme Court's decision in *Grasse v. Dealers' Transport Co.*, 412 Ill. 179 (1952). Prior to the *Grasse* decision, the first paragraph of Section 29 of the Illinois Workers' Compensation Act provided that an injured employee's common law action for damages against a third-party tortfeasor transferred to his or her employer and the employee *could not bring* a common law action in his or her own name. *See Geneva Const. Co.*, 4 Ill. 2d at 276; *Grasse*, 412 Ill. at 182 . Such is no longer the case. Injured employees may now pursue third party actions against tortfeasors, and therefore, the underlying rationale in *Geneva* and *Echales* for permitting an employee to intervene in the employer's subrogation action outside the period of limitations no longer exists.

Pepper agrees that an employee may intervene in a subrogation lawsuit as a matter of general law. But Mroczko's decision to file an untimely lawsuit, which was

dismissed pursuant to section 2-619, prevents her from later attempting to intervene in the subrogation action. These unique facts were present in neither *Geneva* nor *Echales*.

Mroczko also argues that she has the right to control the subrogation lawsuit filed by her employer. The *res judicata* determination renders that argument moot. If Mroczko cannot intervene in the subrogation lawsuit, then she has no right to control the action. And even if the *res judicata* determination somehow does not render Mroczko's argument on this point moot, Mroczko offers this Court no pertinent legal authority in support of her argument that she has the right to control the subrogation action.

While section 5(b) of the Workers' Compensation Act authorizes an injured employee to pursue legal proceedings against an entity other than his employer notwithstanding the employer's payment of compensation under the Act, the Act contains no provision authorizing the employee to control the subrogation lawsuit when the subrogation lawsuit is filed before plaintiff's personal injury action. Instead, the Act provides: "In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to three months before such action would be barred, the employer may in his own name or in the name of the employee ... commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee ..." *820 ILCS 305/5(b).* In such instances where the employee fails to file a third party proceeding at any time prior to three months before the action is barred, nothing in the Workers' Compensation Act grants the employee the statutory right to control the subrogation lawsuit first filed by her employer. If Teresa Mroczko had timely filed her personal injury action against the third party defendants, then she would have retained control of her personal injury lawsuit. Once

A&R Janitorial, as subrogee of Teresa Mroczko, filed its subrogation lawsuit within the time permitted by the Act, no statutory right existed for Mroczko to assume control of the subrogation lawsuit. Mroczko has cited no such language in the Act.

Moreover, none of the decisions cited by Mroczko permit an employee to assume control of the employer's subrogation lawsuit. Instead, all three decisions upon which Mroczko relies in her appellant's brief on this point concern the rights of an intervening *employer* to participate at the time of trial or to control the timely filed lawsuit of the employee. None involve an employee's right to intervene in the subrogation lawsuit and control the lawsuit filed by her employer.

In *Legler*, the Second District Appellate Court determined only that the "intervening non-negligent employer is not permitted to participate in the trial of the common law action of his injured employee against the negligent third party defendant." *Arnold Lies Company Ex Rel. Zurich Ins. Co. v. Legler,* 26 Ill. App. 2d 365, 375 (2d Dist. 1960). The court held that the employer's right of intervention was limited to the protection of its lien. *Id.*

Likewise, in *Sjoberg v. Joseph T. Ryerson & Son, Inc.*, 8 Ill. App. 2d 414 (1st Dist. 1956), the court determined over 60 years ago that the Workers' Compensation Act permitted an employer to intervene in an employee's personal injury suit, provided the employer "[was] not permitted to participate in the conduct or trial of the suit." The Court concluded that allowing the employer to join the action through intervention for the purpose of protecting its lien "shall not extend to the intervening petitioner the right to participate in the conduct or trial of the suit, without the consent of plaintiff." *Id.* at 418.

Sjoberg, therefore, does not stand for the proposition that an employee may take control of an employer's subrogation action.

Plaintiff's citation to *Pederson v. Mi-Jack Products, Inc.*, is equally unavailing. In *Pederson*, the employee timely filed a negligence and product liability action, but did not timely sue the manufacturer of the crane causing the injury. *Pederson v. Mi-Jack Products, Inc.*, 389 Ill. App. 3d 33, 35 (1st Dist. 2009). When plaintiff filed a legal malpractice action against her attorney, plaintiff's employer filed a petition to intervene "as party plaintiff" in order to protect its lien. *Id.* at 36. The employer's petition to intervene was granted, but only to the extent that the employer could protect its lien. *Id.* at 37. The court struck the intervenor's complaint, rejected the employer's request to exercise joint control over the lawsuit, and held that the employer cannot intervene for the purpose of controlling a lawsuit filed by the employee. *Id.* at 40, 41.

None of these decisions stand for the proposition that an employee has the right to control an employer's subrogation action filed by the employer within three months prior to the expiration of the limitations period for plaintiff's personal injury action. No such right exists in the Workers' Compensation Act and no such right is found under common law. Accordingly, even if Mroczko's petition to intervene survived the application of *res judicata* after the untimely filing of her personal injury lawsuit, Mroczko could still not control the subrogation lawsuit.

CONCLUSION

The involuntary dismissal of Mroczko's personal injury action on September 12, 2016 was an adjudication on the merits from which no appeal was taken. The circuit court acted well within its discretion when it denied Mroczko's later petition to intervene into A&R's subrogation lawsuit, finding that the petition was barred under the doctrine of *res judicata* since the petition arose out of the same facts and circumstances, involved the same parties, and followed an adjudication on the merits dismissing Mroczko's action. Mroczko, therefore, has no right to intervene in this subrogation action and no right to control the subrogation lawsuit. The Defendant-Appellee Pepper Construction Company respectfully requests that this Court affirm the circuit court's Order of December 20, 2016, denying Teresa Mroczko's petition to intervene and file an amended complaint.

Respectfully submitted,

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RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the Brief under Rule 342(a) is 26 pages.

Respectfully submitted,

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No. 17-0385

In the Appellate Court of Illinois First Judicial District

A&R JANITORIAL, as subrogee of TERESA MROCZKO and TERESA, MROCZKO, Individually,	)	
Intervenor-Appellant	)	Appeal from
vs.	)	Court No. 14 L 8396
	)	Hon. Judge William E. Gomolinski
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC PEREZ & ASSOCIATES, INC. PEREZ CARPET, CBRE, INC. BLUE CROSS AND BLUE SHIELD ASSOCATION,	)	
Defendants-Appellees	)	

REPLY BRIEF OF INTERVENOR-APPELLANT TERESA MROCZKO

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Oral Argument Requested

TABLE OF CONTESNTS & POINTS AND AUTHORITIES

THE TRIAL COURT ERRED IN FINDING THAT THE DOCTRINE OF *RES JUDICATA* BARRED AS UNTIMELY TERESA MROCZKO'S RIGHT TO INTERVENE AND ASSERT RECOVERY IN HER AMENDED COMPLAINT

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE DOCTRINE OF *RES JUDICATA* BARRED AS UNTIMELY TERESA MROCZKO'S RIGHT TO INTERVENE AND ASSERT RECOVERY IN HER AMENDED COMPLAINT

Pepper Construction Co. does not dispute that Teresa Mroczko has the right to intervene in her employer's subrogation lawsuit. Nor, does Pepper dispute that Teresa has the right to control the subrogation lawsuit once she intervenes. Pepper's sole position is that Teresa is barred from intervening and controlling the litigation because she is barred by the doctrine of *res judicata.*

In the underlying lawsuit, after Teresa's Petition to Intervene in the 2014 L 8396 was denied, A&R filed an Amended Complaint that sought monies in excess of monies paid which would, if recovered, be paid to Teresa. [Attachment 1].[1] Pepper Construction Co. sought dismissal of certain paragraphs of the Amended Complaint that contained elements of damages in excess of its lien. Pepper Construction Co.'s Motion to Dismiss was denied, the trial judge finding:

> . . . A&R could potentially recover more than the amount of its lien, which it then would have to turn over to Mroczko. This is exactly what the plain language of Section 5(b) provides for in the cited portion above. If A&R could only pursue its lien, there could never be a possibility that it would recover in excess of that amount. Thus, in order to prevent this language from being rendered meaningless, A&R must be allowed to claim in excess of its lien. [Attachment 2, p. 9].

The court then concluded that A&R may properly pursue damages in excess of its lien in order to

[1]In ruling on this matter, a court may take judicial notice of other proceeding where a holding in one cause involving substantially the same parties is determinative of the pending cause. (*Walsh v. Union Oil Co. of California*, 53 Ill.2d 295, 299 (1973); Goran v. Glieberman, 276 Ill. App.3d 590 (1995); All Purpose Nursing Service v. Illinois Human Rights Commission, 205 Ill. App.3d 816, 823 (1990). Further, the court can and should take judicial notice of matters of record in other cases in the same court. The attachments 1,2,3 and 4 are from the underlying 2014 lawsuit.

preserve its right to recover the amount paid to Morczko under her workers' compensation claim.

Upon that ruling, Teresa sought to have A&R attorneys removed on the basis that they had a conflict of interest since they sought in the Workers' Compensation claim to minimize her injury while in the 2014 L 8396 lawsuit, they would be seeking (presumably) to maximize her injuries. [Attachment3]. However, A&R's attorney rejected that there could be any conflict as he did not represent Teresa but rather only represented A&R. [Attachment 4, p. 18]. The court agreed and denied the motion stating: "I am denying the motion to disqualify because in no way, shape or form do they represent Ms. Mroczko." [Attachment 4, p. 20].

The posture then was Teresa's right to intervene and have someone protect her interests and represent her in the 2014 lawsuit was denied. And, Pepper sought to take advantage of that dilemma by asserting the equitable doctrine of *res judicata*. The burden of showing that *res judicata* applies is on the party who invokes the doctrine. (*Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41). *Res judicata,* at its core, is a doctrine of equity, not law. (*Kasney v. Coonen and Roth, Ltd.* 395 Ill. App.3d 870, 874 (2009)). Accordingly, *res judicata* should only be applied as fairness and justice require and should not be technically applied if to do so would create inequitable and unjust results. *City of Chicago v. Midland Smelting Co.,* 385 Ill.App.3d 945, 963 (2008); *Best Coin–Op, Inc. v. Paul F. Ilg Supply Co.,* 189 Ill.App.3d 638, 650 (1989).

The present matter is illustrative why this Court should not apply this equitable doctrine. The trial court has allowed Teresa to recover money damages for injuries in excess of her employer's statutory rights. Pepper and Perez have been required to defend those claims. When Teresa's former attorneys filed a separate lawsuit in 2015, the logical, fair and appropriate action should have been to consolidate her claim into the earlier and timely 2014 lawsuit. Instead, Pepper sought dismissal predicated upon the statute of limitations. Had the case been

consolidated, the Motion would have been summarily rejected or the Motion would have not even been filed as it lacked merit.

Pepper makes no claim that it would have had to prepare on a closed matter. To the contrary, the 2014 lawsuit was active and being pursued through extensive discovery. This is not a stale claim.

Unlike the Supreme Court's decision in *Rein v. David A. Noyes & Co.* 172 Ill.3d 325 (1996), Pepper makes no claim that Teresa's petition to intervene is seeking to split her claims and appeal in a piecemeal manner.

Nor does Pepper make a claim that the doctrine of *res judicata* is designed to protect it from untimely lawsuits or that it is fundamentally unfair to be required to defend itself against Teresa's claims that exceed the employer's statutory rights. Indeed, Pepper is still being required to defend those very same claims albeit brought by her employer. The trial judge has rejected Pepper's objection that has allowed her employer to seek recovery of monies in excess of the lien. What Pepper is attempting to do by barring the right to intervene is using *res judicata* as a sword rather than a shield. The doctrine of *res judicata* however is intended to be used only as a shield, not a sword. *Thornton v. Williams,* 89 Ill.App.3d 544, 548 (1980).

The posture of how this matter comes before the Court is relevant for another reason. Here, Teresa sought to intervene in the pending 2014 lawsuit that had been timely filed. The right to intervene was denied. The record here reflects that only Pepper Construction Co. filed a Motion to Dismiss the lawsuit filed in 2015 L 5957 pursuant to 735 ILCS 5/2-619 asserting the lawsuit was untimely as controlled by 735 ILCS 5/202. [C1542-C1553]. Perez did not join in that Motion nor did they file their own Motion.

The Illinois Supreme Court relying upon the reasoning in *Costello v. United States* 365

U.S. 265 (1961) has concluded that a dismissal is not an adjudication on the merits where "separate defendants are involved." (*Leow v. A&B Freight Line, Inc.* 175 Ill.2d 176 at 184 (1997)). Where the party that procures an involuntary dismissal in a case that is not the same party that later asserts that the dismissal was a "final adjudication on the merits," the prior dismissal must have caused the defendant to prepare to address the actual merits of plaintiff's claim before the dismissal will be deemed "on the merits." (*Leow* 175 Ill.2d at 186). The dismissal is personal to Pepper. *DeLuna v. Treister,* 185 Ill.3d 565 (1999).

There is no question that Perez had to start anew and address the merits of plaintiff's claim since the 2014 lawsuit had been pending for two years at the time of the court's order barring the right to intervene.

Ultimately, the controlling issue on appeal is whether the equitable doctrine of *res judicata* should be applied. This Court has the power, right and duty to assess the matter under the glare of its role in doing equity. Since the trial court has allowed Teresa has a right to recover for her own personal injuries above the right of the employer's statutory right, there is no equitable rationale that should bar her right to intervene. This matter is quite unique and calls upon an equitable analysis.

PRAYER FOR RELIEF

WHEREFORE, Intervenor/appellant Teresa Mroczko respectfully requests that this Court (1) reverse the trial court's Orders of December 20, 2016 and January 31, 2017 that barred her Petition to Intervene and denied her request to file the Amended Complaint.

Respectfully submitted,

By: _____
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Attorney for Intervenor/Appellant,

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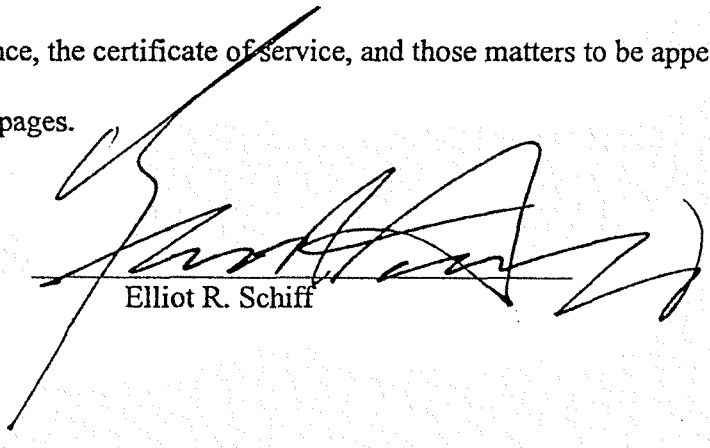
CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief of Intervenor/Appellant conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 5 pages.



Elliot R. Schiff

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury as provided by law in section 1-109 of the Illinois Code of Civil Procedure that on October 3, 2017, I filed the foregoing with the Clerk of the Appellate court and served the attorney of records at the following business address via U.S. Mail:

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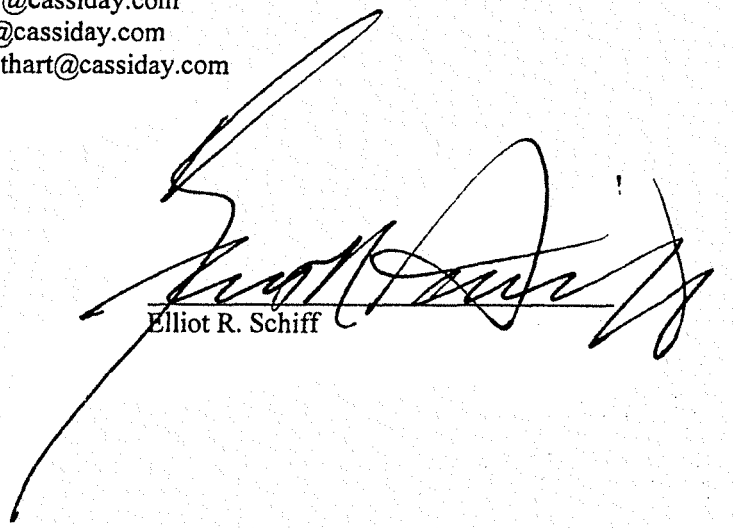

Elliot R. Schiff

ATTACHMENT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

A&R JANITORIAL, as Statutory Subrogee of TERESA MROCZKO,	)	
Plaintiff,	)	No. 14 L 8396
v.	)	
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC.,	)	
Defendants.	)	

PLAINTIFF A&R JANITORIAL'S FIRST AMENDED COMPLAINT

NOW COMES Plaintiff, A&R Janitorial, as Statutory Subrogee of Teresa Mroczko, and for its First Amended Complaint against Pepper Construction Co. ("Pepper") and Perez & Associates, Inc. ("Perez"), states as follows:

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

1. On August 17, 2012, Teresa Mroczko was acting within the course and scope of her employment with A&R Janitorial ("A&R") while removing trash from underneath a desk located inside a cubicle on the 4th floor of the Blue Cross Blue Shield ("BCBS") building located at 300 E. Randolph St., Chicago, Illinois when a large wooden desk top fell on her causing injuries.

2. A&R maintained a policy of workers' compensation insurance issued by Acuity Insurance that was in effect at the time of the Ms. Mroczko's August 17, 2012 accident and injuries.

3. Pursuant to the Illinois Workers' Compensation Act. ("IWCA"), A&R and/or Acuity has paid workers' compensation benefits (medical and indemnity) and incurred costs and

attorney fees in defending the workers' compensation claim and in prosecuting the present claim, all of which may continue into the future as a result of the negligence of Pepper and Perez as alleged herein.

4. At all relevant times herein there existed Section 5(b) of the IWCA, 820 ILCS 305/(b), which provide in pertinent part:

> (b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act.
>
> ***
>
> In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability.

5. A&R brings this action against Pepper and Perez, pursuant to Section 5(b) of the IWCA, and, as statutory subrogree, A&R has stepped into the shoes of Ms. Mroczko and may prosecute all claims and recover all damages which Ms. Mroczko could have alleged and/or recovered against Pepper and Perez.

COUNT I
NEGLIGENCE OF PEPPER

6. Plaintiff A&R re-alleges paragraphs 1-5, as if set forth fully herein.

7. On or about August 17, 2012, Defendant Pepper Construction Company ("Pepper") and Perez & Associates ("Perez") were involved in a carpet replacement project that

included the 4th floor of the BlueCross BlueShield ("BCBS") building located at 300 E. Randolph St., Chicago, Illinois.

8. As part of the carpet replacement project, the tops of the desks located inside the offices were removed and placed inside the cubicle areas.

9. On said date, Teresa Mroczko ("Mroczko") was employed by A&R Janitorial as a janitor in the BCBS building.

10. As part of Mroczko's job duties, she was required to remove trash and recycling from underneath the desks located inside the cubicles on the 4th floor of the BCBS building.

11. Defendant Pepper placed, stored, or allowed a large wooden desk top to be left in an upright, unsecured and/or unbalanced position on a dolly.

12. As Ms. Mroczko was removing the trash and/or recycling, the desk top fell on to Ms. Mroczko.

13. The large wooden desk top was placed, stored, and/or allowed to be kept in an upright, unsecured, and/or unbalanced position upon a dolly creating a hazardous condition.

14. At all times relevant, it was the duty of Pepper to manage, oversee, supervise, and or control the carpet replacement project and conduct its activities in a reasonably safe manner for all individuals that may encounter the project.

15. Notwithstanding said duty, Defendant Pepper, by and through its agents, servants, and employees committed one or more of the following careless and negligent acts and/or omissions:

(a) Placed, positioned, or allowed the desk top to be in an upright, unsecured, and/or unbalanced position on a dolly;

(b) Failed to secure the desk top so as to prevent or avoid injury to other persons;

(c) Failed to provide proper warnings or signs that the desk top was upright, unsecured, or unbalanced so as to create the risk that it might fall;

(d) Failed to maintain or inspect the area of the desk top to ensure that it was placed or stored in a reasonably safe manner;

(e) Failed to block off, rope off, barricade, or prevent access to the area of the desk top to ensure that it would not cause injury to other persons;

(f) Failed to properly supervise, oversee, and/or control the movement, placement, and storage of the desk top;

(g) Failed to properly schedule, sequence, and/or coordinate the work on the project so as to provide a safe work area;

(h) Failed to remedy the upright, unsecured desk top so as to reduce the risk of it falling upon other persons; and

(i) Was otherwise careless and negligent.

16. Defendant Pepper knew, or in the exercise of reasonable care, should have known of the aforesaid unsafe acts and conditions taking place and existing in its work area.

17. That as a direct and proximate result of the aforesaid wrongful acts and/or omissions of Defendant Pepper, Ms. Mroczko sustained severe and permanent injuries, both externally and internally and was and will be hindered and prevented from attending to her usual duties and affairs, and has lost and will in the future incur lost wages and the value of that time. Ms. Mroczko also suffered great pain and anguish, both in mind and body, and will in the future continue to suffer. Ms. Mroczko has further incurred and will in the future incur medical expenses for medical care and services endeavoring to become healed and cured of said injuries.

WHEREFORE, Plaintiff A&R Janitorial, as Statutory Subrogee of Teresa Mroczko, prays for judgment against Defendant Pepper Construction Co. in an amount that will fairly and justly compensate for the damages and injuries sustained by Teresa Mroczko in an amount in

excess of Fifty Thousand Dollars ($50,000.00), not limited to A&R's liability to Ms. Mroczko under the IWCA, together with costs of this suit.

COUNT II
NEGLIGENCE OF PEREZ

18. Plaintiff A&R re-alleges paragraphs 1-5, as if set forth fully herein.

19. On or about August 17, 2012, Defendant Pepper Construction Company ("Pepper") and Perez & Associates ("Perez") were involved in a carpet replacement project that included the 4th floor of the BlueCross BlueShield ("BCBS") building located at 300 E. Randolph St., Chicago, Illinois.

20. As part of the carpet replacement project, the tops of desks located inside the offices were removed and placed inside the cubicle areas.

21. On said date, Teresa Mroczko ("Mroczko") was employed by A&R Janitorial as a janitor in the BCBS building.

22. As part of Mroczko's job duties, she was required to remove trash and recycling from underneath the desks located inside the cubicles on the 4th floor of the BCBS building.

23. Defendant Perez placed, stored, and/or allowed a large wooden desk top to be left in an upright, unsecured, and/or unbalanced position on a dolly.

24. As Ms. Mroczko was removing the trash and/or recycling, the desk top fell onto Ms. Mroczko.

25. The large wooden desk top was placed, stored, and/or allowed to be kept in an upright, unsecured, and/or unbalanced position upon a dolly creating a hazardous condition.

26. At all times relevant, it was the duty of Perez to manage, oversee, supervise, and or control the carpet replacement project and conduct its activities in a reasonably safe manner for all individuals that may encounter the project.

27. Notwithstanding said duty, Defendant Perez, by and through its agents, servants, and employees committed one or more of the following careless and negligent acts and/or omissions:

(a) Placed, positioned, or allowed the desk top to be in an upright, unsecured, and/or unbalanced position on a dolly;

(b) Failed to secure the desk top so as to prevent or avoid injury to other persons;

(c) Failed to provide proper warnings or signs that the desk top was upright, unsecured, or unbalanced so as to create the risk that it might fall;

(d) Failed to maintain or inspect the area of the desk top to ensure that it was placed or stored in a reasonably safe manner;

(e) Failed to block off, rope off, barricade, or prevent access to the area of the desk top to ensure that it would not cause injury to other persons;

(f) Failed to properly supervise, oversee, and/or control the movement, placement, and storage of the desk top;

(g) Failed to properly schedule, sequence, and/or coordinate the work on the project so as to provide a safe work area;

(h) Failed to remedy the upright, unsecured desk top so as to reduce the risk of it falling upon other persons; and

(i) Was otherwise careless and negligent.

28. Defendant Perez knew, or in the exercise of reasonable care, should have known of the aforesaid unsafe acts and conditions taking place and existing in its work area.

29. That as a direct and proximate result of the aforesaid wrongful acts and/or omissions of Defendant Pepper, Ms. Mroczko sustained severe and permanent injuries, both externally and internally and was and will be hindered and prevented from attending to her usual

duties and affairs, and has lost and will in the future incur lost wages and the value of that time. Ms. Mroczko also suffered great pain and anguish, both in mind and body, and will in the future continue to suffer. Ms. Mroczko has further incurred and will in the future incur medical expenses for medical care and services endeavoring to become healed and cured of said injuries.

WHEREFORE, Plaintiff A&R Janitorial, as Statutory Subrogee of Teresa Mroczko, prays for judgment against Defendant Perez & Associates, Inc. in an amount that will fairly and justly compensate for the damages and injuries sustained by Teresa Mroczko in an amount in excess of Fifty Thousand Dollars ($50,000.00), not limited to A&R's liability to Ms. Mroczko under the IWCA, together with costs of this suit.

Respectfully submitted,

RUSIN & MACIOROWSKI, LTD.

By: _____
Douglas B. Keane, one of the attorneys for Plaintiff
A&R Janitorial a/s/o Teresa Mroczko

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ATTACHMENT 2

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PAGE 1 of 12
CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
LAW DIVISION
CLERK DOROTHY BROWN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as Statutory Subrogee of TERESA MROCZKO,	)	
Plaintiff,	)	
	)	No. 14 L 8396
v.	)	
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC.,	)	
Defendants.	)	

MEMORANDUM ORDER AND OPINION

INTRODUCTION

This matter comes for ruling on Defendant Pepper Construction Company's 735 ILCS 5/2-619.1 motion to strike portions of A&R Janitorial's First Amended Complaint.

Background

Defendant Pepper Construction Company ("Pepper") is responsible for maintenance work at the Blue Cross and Blue Shield Building ("Building") where subrogor Teresa Mroczko's injuries occurred. Pepper hired A&R Janitorial ("A&R") to do the janitorial work at the Building. Pepper also hired Defendant Perez Carpet ("Perez") to replace carpeting in part of the Building. A&R employee Teresa Mroczko alleges that she was injured by a falling desk that Perez had placed upright against a wall on the floor where she was working, away from the portion of

the Building where the carpeting work was being done. Mroczko filed a workers' compensation claim against A&R. On August 11, 2014, A&R filed a complaint in subrogation against the Pepper and Perez defendants pursuant to Section 5(b) of the Illinois Workers' Compensation Act, which allows employers to file subrogation claims in order to collect the workers' compensation benefits paid to an employee when a third party may be liable for the underlying injury. 820 ILCS 305/5(b).

On June 11, 2015, almost three years after the accident, Mroczko filed a personal injury negligence complaint against Pepper and Perez for her injuries. On September 12, 2016, this court dismissed her untimely complaint with prejudice pursuant to the statute of limitation for negligence under 735 ILCS 5/13-202, finding that her personal injury claims did not arise out of construction negligence as she had claimed, and therefore the four-year construction negligence statute of limitations found in 735 ILCS 5/13-214(a) did not apply. This court included in its dismissal order that it found no just reason to delay the enforcement or appeal of the order pursuant to Illinois Supreme Court Rule 304(a). Mroczko did not file an appeal, but instead sought to intervene in A&R's timely filed subrogation claim on November 10, 2016. This court denied her petition to intervene.

The underlying complaint in this matter is A&R's First Amended Complaint at Law, in which A&R, as subrogee of Mroczko under the Illinois Workers' Compensation Act, seeks to prosecute all claims Mroczko could have brought and recover the full extent of damages that Mroczko could have recovered against Defendants. Pepper contends that the First Amended Complaint should be stricken

pursuant to 735 ILCS 5/2-615 for failing to comply with the pleading requirements for subrogation actions set forth in the Illinois Code of Civil Procedure. 735 ILCS 5/2-403(c). Pepper further contends that pursuant to 735 ILCS 5/2-619 and the doctrine of *res judicata*, this court's previous dismissal with prejudice of Mroczko's complaint for personal injury limits A&R's possible recovery to the total amount it will ultimately pay Mroczko in workers' compensation payments, since Mroczko herself is barred from pursuing any claims against Defendants. Pepper additionally moves to strike language in ¶¶ 5 and 17 of the complaint, stating that A&R is pursuing all damages Mroczko may have sought, as well as the *ad damnum* clause at the end of Count I.

REVIEW UNDER 735 ILCS 5/2-619.1

735 ILCS 5/2-619.1 allows a party to file a motion as a combination of a Section 2-615 motion to dismiss based on a plaintiff's substantially insufficient pleadings with a Section 2-619 motion to dismiss based on certain defects or defenses. 735 ILCS 5/2-619.1. A section 2-619.1 motion "(1) *must* be in parts, (2) *must* be limited to and shall specify that it is made under either section 2–615 or 2–619, and (3) *must* clearly show the points or grounds relied upon under the [s]ection upon which it is based." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 21 (internal quotations omitted). Section 2-619.1 does not authorize commingling claims pursuant to 2-615 and 2-619. *Id.*

A Section 2-615 motion to dismiss tests the legal sufficiency of a complaint based upon defects apparent on its face. *Khan v. Deutsche Bank AG*, 2012 IL

112219, ¶ 47; *see also In re Chi. Flood Litig.*, 176 Ill. 2d 179, 203 (1997). Under Section 2-615, a cause of action should not be dismissed unless it is apparent, when construed in the light most favorable to the plaintiff, that there are insufficient facts to establish a cause of action upon which relief may be granted. *Hadley v. Doe*, 2015 IL 118000, ¶ 29. The only matters for the court to consider in ruling on the motion are the allegations of the pleadings themselves, rather than the underlying facts. *Barber–Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1068–69 (5th Dist. 1992).

A Section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts an affirmative matter that defeats the claim. 735 ILCS 5/2-619(a)(9). The statute's purpose is to provide litigants with a method for disposing of issues of law and easily proven issues of fact at the outset of a case. *See Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). A Section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise therefrom. *Van Meter*, 207 Ill. 2d at 367. When a court rules on a Section 2-619 motion to dismiss, it "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *In re Chi. Flood Litig.*, 176 Ill. 2d at 188; *see also Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). Section 2-619 lists several different grounds for which an involuntary dismissal may be granted. *See* 735 ILCS 5/2-619(a)(1)–(a)(9).

When ruling on a Section 2-619.1 motion, the court first addresses the arguments brought under 2-615, and then under 2-619. *See Mueller by Math v. Community Consol. Sch. Dist. 54*, 287 Ill. App. 3d 337, 340 (1st Dist. 1997).

COURT'S ANALYSIS

A. Dismissal Pursuant to Section 2-615

Pepper argues that A&R's First Amended Complaint must be stricken for failure to comply with 735 ILCS 5/2-403(c), which governs pleading requirements for subrogation actions. Relying on *Walker v. Ridgeview Construction Co*, Pepper contends that, because the First Amended Complaint was not made under oath or with an affidavit attached to the pleading, it does not comply with 403(c) of the Illinois Code of Civil Procedure and should be stricken. *Walker v. Ridgeview Construction Co.*, 316 Ill. App. 3d 592, 596 (1st Dist. 2000). However, the Illinois Supreme Court has stated that subrogation claims under Section 5(b) of the Illinois Workers' Compensation Act need not comply with 2-403(c), because the action is brought under a statutory right of subrogation. *Geneva Construction Co. v. Martin Transfer &Storage Co.*, 4 Ill. 2d 273, 286 (1954). As the Court stated, it will "not be necessary hereafter for employers asserting... claims against tort-feasors to comply with section 22 of the Civil Practice Act, since the 1953 amendments to the Workmen's Compensation Act prescribe a mode of statutory subrogation for employers." *Id.* Accordingly, A&R has properly pled its statutory subrogation claim pursuant to the Illinois Worker's Compensation Act, Section 5(b).

B. Dismissal Pursuant to Section 2-619

The core of Pepper's argument is that, pursuant to *res judicata*, this court's denial of Mroczko's claims due to the statute of limitations bars A&R from pursuing the damages that she was cut off from due to her untimely filing. 735 ILCS 5/13-202. A&R takes Mroczko's place as her subrogee, and is not entitled to recover anything beyond what she may recover. Pepper relies on *Sankey Bros., Inc. vs. Industrial Commission*, where the Third District held that an injured worker who had previously filed a third-party suit beyond the limitations period was not allowed to intervene in his employer's statutory subrogation claim. 167 Ill. App. 3d 910, 914 (3d Dist. 1988). Pepper urges this court to decide likewise, due to the factual parallels between *Sankey* and the present case.

The Illinois Supreme Court has stated "the doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any *subsequent* actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996) (emphasis added); *see also People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill.2d 285, 294 (1992); *Kinzer v. City of Chicago*, 128 Ill.2d 437, 446 (1989). Accordingly, *res judicata* applies only to subsequent actions, meaning it is a prospective, not retroactive, doctrine. As Pepper correctly states, *res judicata* extends not only to what was decided in the original action but also to what could have been decided. *Rein* 172 Ill. 2d at 334. Here, A&R filed its subrogation claims within three months of when the statute of limitations would have run on Mroczko's third-party personal

injury claims. Mroczko filed her case almost one year later. This court dismissed her claims as untimely, but that decision cannot be applied retroactively to A&R's claims. Furthermore, in *Sankey*, the court only barred the employee from intervening in the claim of the employer—it allowed the employer to proceed with its claim, which was timely filed under Section 5(b) of the Workers' Compensation Act, without the intervention of the employee. *Sankey Bros.*, 167 Ill. App. 3d at 398.

Having held that the doctrine of *res judicata* does not apply, this court must still determine whether A&R may pursue the full extent of Mroczko's potential damages, or whether it is limited to recovering its workers' compensation lien. As A&R's subrogation claim arises from the Illinois Workers' Compensation Act, this requires turning to the guidelines for statutory interpretation.

1. Illinois Workers' Compensation Act, Section 5(b)

In order to determine what A&R can recover from Pepper and Perez, the language of 820 ILCS 305/5(b) must be analyzed following the guidelines for statutory interpretation. As the Illinois Supreme Court states, "the primary rule of statutory construction is to give effect to the intent of the legislature. The best evidence of legislative intent is the language used in the statute and the language must be given its plain and ordinary meaning." *Stroger v. RTA*, 201 Ill. 2d 508 (2002). Additionally, the statute should be construed in "a manner that no term is rendered meaningless or superfluous." *Id.* When considering the statute as a whole they should be interpreted "in such a manner that avoids absurd or unjust results." *Croissant v. Joliet Park District*, 141 Ill. 2d 449.

Section 5(b) codifies the common law right of subrogation, which gives the subrogee all the rights of the subrogor. Chicago Transit Authority, 110 Ill.App.3d at 381. The language of Section 5(b) in relevant part reads as follows:

> Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act.
> * * *
> In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability. 820 ILCS 305/5(b).

The language of Section 5(b) refers specifically to the ability of an employer to commence proceedings against the potentially liable third party, and requires the employer to pay the injured employee any amount in excess of the employers' workers compensation lien. However, nowhere in the language of this statute did the legislature limit what is recoverable by an employer who timely files a subrogation action against the third party. The statute allows A&R to commence proceedings in Mroczko's name because Mroczko did not file within three months of the limitations period running, which is precisely what A&R did. Section 5(b) does not restrict the damages that A&R can pursue, as long as it complies with the

requirement of paying Mroczko the excess recovery over its lien, and this court should not read into the statute any terms that are not provided for in the text.

Moreover, it is also necessary to ensure that no part of the statute is rendered meaningless or absurd by the court's interpretation. Section 5(b) provides that "out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid." 820 ILCS 305/5(b). If Section 5(b) were interpreted as limiting an employer to recovering only the amount of its lien, there would be no reason to state that damages in excess of that lien would be turned over to the employee. If A&R may bring all potential claims that Mroczko could have brought—and pursue all the available remedies that stem from those claims—A&R could potentially recover more than the amount of its lien, which it then would have to turn over to Mroczko. This is exactly what the plain language of Section 5(b) provides for in the cited portion above. If A&R could only pursue its lien, there could never be a possibility that it would recover in excess of that amount. Thus, in order to prevent this language from being rendered meaningless, A&R must be allowed to claim in excess of its lien.

Here, A&R timely filed as Mroczko's subrogee, and so Section 5(b) will allow it to bring every possible claim against the potentially responsible parties that Mroczko herself could have brought. To hold otherwise would improperly limit A&R's ability to pursue its statutory rights to the fullest extent provided under the Illinois Workers' Compensation Act. This court follows the language of the Act to

allow A&R to seek all damages Mroczko was entitled to pursue at the time that A&R filed its subrogation claim.

2. Burden of Proof

Finally, this court's decision is also impacted by the differing burdens of proof required in a negligence cause of action and a workers' compensation claim. The Illinois Workers' Compensation Act allows for an employee to recover for injuries in the workplace without any showing of fault on the part of the employer. *Sharp v. Gallagher*, 95 Ill. 2d 322, 326 (1983). Conversely, a personal injury negligence claim requires proof of fault, which may be limited by the plaintiff's comparative negligence.

These critical distinctions further demonstrate that A&R may properly pursue damages in excess of its lien in order to preserve its right to recover the amount paid to Mroczko under her workers' compensation claim. Mroczko may recover for the full extent of her injuries, without having to prove fault and without regard for her own potential contributory negligence. However, in its action against Defendants, A&R will have to meet its burden of proving their negligence in order to recover damages, and those damages may be limited if Mroczko is found to be comparatively at fault. Accordingly, the only way A&R may possibly be able to recover the full extent of its workers' compensation payments to Mroczko is if it is able to pursue all claims and related damages against Pepper and Perez that Mroczko could have sought. This further demonstrates why A&R must be entitled to seek recovery to the same extent as Mroczko could have. Any alternative

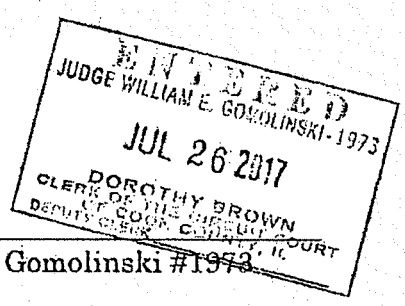
approach would create the sort of "absurd result" that the rules of statutory interpretation seek to eliminate.

Lastly, this court addresses A&R's argument that it is *required* to pursue all of Mroczko's potential claims, and not merely seek recovery for its lien. A&R relies on *Beiermann v. Edwards*, in which the court held that where the employer took control of a suit that was timely filed by the injured employee against third parties, it was required to pursue all claims and related recovery that the employee could have brought himself. 193 Ill.App.3d 968, 979 (1990). Here, A&R is not taking control of a case that Mroczko had filed first, within the limitations period. It commenced the suit itself, and Mroczko only later attempted to intervene after allowing her claims to expire. Therefore, whether or not A&R *must* bring all claims, as in *Beiermann*, is not relevant to this case and need not be decided. However, *Beiermann* further suggests that this court is correct in holding that A&R is able to seek full recovery for all of Mroczko's potential claims against Defendants.

COURT'S RULING

Therefore, based on the pleadings, briefs, and case law cited above, Defendant's motion that the First Amended Complaint should be stricken is DENIED. Defendant's motion to strike language in ¶¶ 5 and 17, as well as the *ad damnum* clause at the end of Count I, of A&R's First Amended Complaint is DENIED.

ENTERED:



Judge William E. Gomolinski #1973

ATTACHMENT 3

Firm #48852

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as subrogee of TERESA MROCZKO,	)	
Plaintiff,	)	
vs.	)	Case No.: 14 L 8396
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC PEREZ & ASSOCIATES, INC. PEREZ CARPET, CBRE, INC. BLUE CROSS AND BLUE SHIELD ASSOCATION,	)	***Plaintiff Demands Trial By Jury***
Defendants.	)	

TERESA MROCZKO'S MOTION TO DISQUALIFY DOUGLAS B. KEANE AND RUSIN & MACIOROWSKI, LTD.

TERESA MROCZKO ("MROCZKO") through her attorneys, SCHIFF GORMAN LLC, moves to disqualify Douglas B. Keane and Rusin & Maciorowski, Ltd from representing the interests of Teresa Mroczko. In support thereof, Mroczko states as follows:

1. This lawsuit arises from injuries sustained by Mroczko on or about August 17, 2012 while acting within the course and scope of employment with A & R JANITORIAL.

2. As a result of that August 17, 2012 injury, Mroczko filed an Application for Adjustment of Claim seeking monies, medical expenses and lost income pursuant to the provisions of the Illinois Workers Compensation Act.

3. MROCZKO's workers compensation claim is now pending before the Industrial Commission under cause 12 WC 34686.

4. Rusin & Maciorowski, Ltd. represents A&R Janitorial in that proceeding and has been contesting Mroczko's injuries as in part being unrelated to the occurrence. They also contest her ability to return to work.

5. In the present matter, Rusin & Maciorowski, Ltd and Keane have pursued recovery against Pepper Construction Co. and Perez & Associates for reimbursement of monies paid and to be paid by A&R Janitorial pursuant to §5(b) of the Workers Compensation Act 820 ILCS 305/(b).

6. Rusin & Maciorowski, Ltd. and Keane have now sought to amend their Complaint seeking to pursue Pepper Construction Co. and Perez & Associates for recovery of Mroczko's non-covered Workers Compensation losses that are not allowed under the Workers Compensation Act including pain and suffering and loss of enjoyment of life.

7. On July 26, 2017, this court ruled that A&R Janitorial could pursue the non-economic damages of Teresa Mroczko that would be in addition to those rights under §5(b) of the Workers Compensation Act.

8., The Illinois Rules of Professional Conduct, Rule 1.7 provides that a "lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . or a third person."

9. Rusin & Maciorowski, Ltd. are defending the Workers' Compensation Act claim brought by Teresa Mroczko and have sought to limit her recovery in that proceeding while engaged in seeking to represent her for recovery of monies for those same injuries. This places

the law firm and their lawyers adverse to Mroczko and there is a significant risk that the representation of her will be materially limited as they seek to limit her recovery against A&R Janitorial Services and its insurers.

WHEREFORE, TERESA MROCZKO prays that Rusin & Maciorowski, Ltd and their attorneys including Keane be removed due to this conflict of interest and for other relief that the court deems just.

Respectfully submitted,

SCHIFF GORMAN LLC

s/Elliot R. Schiff
Elliot R. Schiff

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ATTACHMENT 4

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

A&R JANITORIAL, as statutory subrogee of TERESA MROCZKO,
Plaintiff,
vs.
PEPPER CONSTRUCTION COMPANY, et al,
Defendants.
) No. 14 L 8396
) consolidated with
) 15 L 5957

TERESA MROCZKO,
Plaintiff,
vs.
PEPPER CONSTRUCTION CO., PEREZ & ASSOCIATES, INC., INTERFACE AMERICAS, INC., d/b/a INTERFACE FLOOR and BLUE CROSS AND BLUE SHIELD ASSOCIATION,
Defendants.

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable WILLIAM E. GOMOLINSKI, Judge of said Court, on the 4th day of August, 2017, at the hour of 10:15 a.m.

REPORTED BY: MARIA MICELI, CSR
LICENSE NO: 084-003859

APPEARANCES:

RUSIN, MACIOROWSKI, FRIEDMAN, LTD., by
MR. DOUGLAS B. KEANE
10 South Riverside Plaza - Suite 1530
Chicago, Illinois, 60606
(312) 454-5110
dkeane@rusinlaw.com
On behalf of Plaintiff A&R Janitorial;

SCHIFF GORMAN, LLC, by
MR. ELLIOT SCHIFF
One East Wacker Drive - Suite 2850
Chicago, Illinois, 60601
(312) 345-7200
eschiff@schiff-law.com
On behalf of Plaintiff Teresa Mroczko;

CASSIDAY SCHADE, LLP, by
MR. MICHAEL MOOTHART
20 North Clark Street - Suite 1000
Chicago, Illinois, 60606
(312) 641-3100
mmoothart@cassiday.com
On behalf of Pepper Construction;

LAW OFFICES OF DAVID A. IZZO & ASSOCIATES, by
MR. KEVIN GREENWOOD
33 North Dearborn Street - Suite 1605
Chicago, Illinois, 60602
(312) 822-3329
behalf of Perez & Associates.

MR. KEANE: Good morning, your Honor. Doug Keane for Plaintiff, A&R.
MR. MOOTHART: Michael Moothart for Defendant Pepper.
MR. SCHIFF: Elliot Schiff for Teresa Mroczko.
MR. GREENWOOD: Kevin Greenwood for Perez.
MR. KEANE: A couple motions up here today, Judge.
THE COURT: I saw the one motion to stay. I read it.
MR. SCHIFF: And I have a motion to disqualify.
THE COURT: Disqualify who?
MR. SCHIFF: The attorney for --
MR. KEANE: Plaintiff's counsel.
MR. SCHIFF: Yes.
THE COURT: Okay.
MR. SCHIFF: I don't know what order you want to take this in.
THE COURT: Well, if I stay it, does it matter?
MR. SCHIFF: If you stay it, does it matter.
THE COURT: Does your motion matter or does it become moot?

MR. SCHIFF: Well, it never becomes moot, but by staying it, it doesn't --
THE COURT: Prolongs it.
MR. SCHIFF: That's correct.
THE COURT: So let's do this. Let me get these people out of here real quick so I can get these lawyers out and maybe they can make some money and I'll hear both motions.
MR. KEANE: Thank you.
(Whereupon, a short break was taken.)
THE COURT: For the record again.
MR. GREENWOOD: Kevin Greenwood for Perez.
MR. KEANE: Dough Keane for Plaintiff A&R.
MR. MOOTHART: Michael Moothart for Pepper Construction Company.
MR. SCHIFF: Elliot Schiff for Teresa Mroczko.
THE COURT: All right, I have two motions before me. One motion is for the disqualification of counsel, which would be A&R's counsel, correct, to represent Ms. Mroczko?
MR. SCHIFF: Her interests and those matters not covered by workmen's compensation claim.

THE COURT: And I have a second motion by Pepper Construction Company that asks for a stay of these proceedings pending appeal of Ms. Mroczko's rights.

MR. MOOTHART: Correct.

THE COURT: So if we don't delay, if we grant the stay all it does is delay the motion as to whether or not A&R can be proper parties and represent Ms. Mroczko's interest in their 5(b) claim, correct, that they filed in the Circuit Court, that they filed timely pursuant to 5(b)?

MR. SCHIFF: That's correct, but there's one part to that that needs to be considered.

THE COURT: Go ahead.

MR. SCHIFF: Previously you had ruled and what's up on appeal currently --

THE COURT: Is Ms. Mroczko doesn't have the right to intervene in the current proceedings.

MR. SCHIFF: To proceed with what her rights would be personally. Yet this Court, in my view, respectfully, gave an inconsistent decision by saying that the workmen's compensation attorney

who's defending against her, her firm, has the right to promote, produce and pursue that matter. So while I've got --

THE COURT: There's no question in my mind. None. I know the ruling I gave and there's absolutely, positively no question in my mind that the legislature promulgated under 5(b) that they give the employer the right to timely file if Ms. Mroczko didn't timely file.

Ms. Mroczko did not timely file under the two year -- I'm doing this off of memory. I don't have any briefs or anything in front of me. Did not timely file within the two-year statute of limitations that a personal injury case is required to be filed under the Code of Civil Procedure. She effectively had her rights terminated and barred by the statute of limitations at that time.

Under the Workers' Compensation Act Paragraph 5(b) it specifically says that the employer may timely file if the employee doesn't timely file that third-party claim within that period of time and they have within the last three months of the statute in which to timely

file their claim. A&R timely filed their claim within that period of time.

Ms. Mroczko subsequently came in after I denied her proceeding under the statute of limitations and she asked to intervene in the current litigation. She thought that she could come in here and my ruling back then was that she would be able to do something indirectly that she wasn't able to do directly by representing her own rights in this case when her rights were effectively barred.

She has no rights as she stands before this Court today according to this Court's ruling. and so the only issue is whether or not A&R can properly present claims for damages on behalf of Ms. Mroczko and under the 5(b) statute then provide to her any amount that they would recover in excess of what they paid under the workmen's compensation benefits or, effectively, their lien, in quotes.

A&R has the right to present all of that evidence and I said that in my prior ruling and that's because if A&R doesn't -- isn't able to do all those things, it's probably never going

to recover their lien because of the different burdens of proof, the different ways that you analyze a workers' compensation claim with no fault as opposed to whether or not you have comparative negligence in a negligence claim.

It seems to me that it would be language that would be unnecessary that was promulgated by the legislature under 5(b) which specifically says certain things and it would render that language ineffective and would really come up with an absurd result, in my opinion.

I issued that proceeding. I issued that ruling. And now I'm met with this motion that she can't -- they cannot protect Ms. Mroczko's rights.

MR. SCHIFF: Well, in my view they have a conflict under Rule 1.7. It's a concurrent conflict it seems pretty clear to me. But here's my concern above all else.

There's a motion to stay pending the decision in the appellate court that would somehow presumably impact their right to -- their right, meaning A&R's right, to seek damages for Ms. Mroczko above what she would have -- what A&R

is entitled to get reimbursement on this workmen's compensation benefit.
THE COURT: Yeah, there's no question that in my ruling A&R is limited to recover for themselves only the amount of money that they paid pursuant to their lien under the Workers' Compensation Act. If there would be any excess recovery then, in fact, that amount must be turned over to Ms. Mroczko pursuant to 5(b) in its clear and plain meaning of the language of that statute.
MR. SCHIFF: So what your ruling says is that A&R's attorneys can present evidence before the jury allowing her recovery for, we'll call them non-economic damages; loss of enjoyment of life, pain and suffering. Things that are not part of the workmen's compensation recovery.
THE COURT: It's not my ruling, it's what 5(b) says.
MR. SCHIFF: I'm not --
THE COURT: It's what the statute says.
MR. SCHIFF: I'm not trying to quarrel with you.

THE COURT: I understand.
MR. SCHIFF: I'm just trying to say that's what the ruling allows. And your ruling previously was when Ms. Mroczko's own attorney, us, came in to say let us pursue that you said no, the time is barred. It's up on appeal.
My perception of this is that those two rulings cannot -- do not mesh and do not work together, that they are inconsistent.
My position is is that what happens if we put a stay and the appellate court rules, affirms your decision and says you're correct.
THE COURT: I'm pretty sure they will on this one. I feel confident.
MR. SCHIFF: I'm not disagreeing with you here, okay. I'm just pointing that out.
Now if that's the case, how does that really impact? Does that change the right of A&R to pursue the remedies for her non-economic damages? Does that impact upon that? My suggestion here is that --
THE COURT: Let's stop right here. Hold your thought because I get confused very easily so I need to interrupt when I need to say something.

I barred Ms. Mroczko's claim under the statute of limitations, agreed?
MR. SCHIFF: Agreed.
THE COURT: I gave 304(a) language with respect to her individual right to pursue it which has now been barred by the statute of limitations and there's been no appeal of that.
MR. SCHIFF: That is correct.
THE COURT: So how is it that Ms. Mroczko has any right whatsoever when she has previously been barred? And wouldn't the doctrine of res judicata then apply as was previously asked for by Pepper Construction Company as to a subsequent cause? How does she get the right to participate in a litigation that she has been previously barred from?
MR. SCHIFF: Now, that's a great question and let me respond with the following question: If she can't pursue it, how can she recover, that is how can A&R seek money damages, for those same injuries if it's been barred? But that's your ruling.
THE COURT: No, it's not my ruling. The statute clearly says it. And there are other

cases that apply. And there is a Second District case that even says that they can pursue it and they must pursue it.
Now I didn't rule whether they must or they must not pursue it because that wasn't part of what I needed to rule upon.
However, it is clear from the case law that's been presented that they have the right to pursue it and recover whatever they can. And that may be the -- my ruling has always been that that may be the only way that they can fully recover their lien because of the different burdens of proof.
I don't make the laws. I don't try and create the laws. All I try and do is enforce the laws within the plain language and the meaning of the statutes and the case law that has previously interpreted it.
Now if that's an inconsistent finding, nobody's ever brought that to my attention other than today and those rules are gone. I mean, my rulings are over on those issues.
That one ruling as to whether or not she could intervene is up on appeal, but I don't think that

staying it matters at this stage of the game.
MR. SCHIFF: Well, okay. I happen to disagree. I do think the rulings are inconsistent and I don't --
THE COURT: I understand, but that's why you get paid the big bucks.
MR. SCHIFF: And that's why my suggestion here is that rather than stay this until that appellate court decision affirms you, which may very well happen.
THE COURT: Thank you.
MR. SCHIFF: You understand this is not a personal disagreement.
THE COURT: Of course it isn't.
MR. SCHIFF: And then what you do is you certify this question of whether or not they can continue to pursue her money damages for those elements that are not covered by the workmen's compensation act. Because that will not allow what I think is an inconsistency in whatever the appellate court rules and what this Court has ruled. So that we take them up -- because that matter is now pending and the briefing is in September. It's a fairly -- it's got the exact

same factual circumstances basically.
It's saying, basically, Ms. Mroczko, you cannot recover for your personal injuries, your pain and suffering, your loss of enjoyment. Mr. A&R, you may pursue her recovery for her personal injuries, okay, you may do so. And if you do collect any money above your workmen's compensation, you must turn that over to her. So you're giving her the right to collect one way, but not the other way.
And so all I'm suggesting is that --
THE COURT: I'm not giving her the right to recover one way as opposed to the other way. I understand the inconsistency and I will tell you on the record, I agree with you. Because I previously barred her and said she has no recovery and no right to do so.
The problem is, is there is a blatant inconsistency in it in what each of those statutes really claim. And the way that I looked at it and the way that I decided the case was that if Ms. Mroczko timely filed within the statute of limitations that, in fact, she controls her own destiny.

On the other hand, under 5(b) it always gave if Ms. Mroczko never filed, if she never did anything 5(b) still gave them the right to pursue it on her behalf. And I understand your ruling -- or your logic to the Court.
But what I would suggest to you that it's truly not inconsistent in that -- I lost my train of thought. See what I mean when you get old?
MR. SCHIFF: I'm older than you so it's not fair.
THE COURT: Oh, you think you are.
MR. KEANE: Your Honor, if I may.
THE COURT: Hold on. But I denied her under the statute of limitations from controlling her own destiny and recovering based upon her controlling her litigation because if she timely files then the only thing that happens is A&R reverts to a lien. They don't get the right to control her litigation.
And it is an anomaly in the law and your position is that since I've terminated her rights she should not be able to recover anything on 5(b).

MR. SCHIFF: No, that's not my position.
THE COURT: Well, that's what the inconsistency is because I've terminated her rights, she should technically not be entitled to anything because she didn't timely file.
But there is a coexistent statute under workers' comp 5(b) that says they can recover for her and pay her the excess.
They timely filed. It's as if Ms. Mroczko's subsequent filing is just a nullity. It means nothing.
MR. SCHIFF: Which may turn out to be the case, but if you do that then A&R can't act as the attorney to pursue that remedy, or their attorneys can't pursue that remedy. And my way of solving the problem -- and I should let you know so that there's some transparency here. I came in and had filed a legal malpractice case. That's how I first got involved in all of this, okay, which is still pending, okay.
THE COURT: Sure.
MR. SCHIFF: And it's going to be affected by your decisions. I am not trying to prevent her recovering for those personal injuries, I have a

responsibility to her. So if she can recover for her personal injuries --
THE COURT: You just don't want them to do it.
MR. SCHIFF: Well, I just don't think they can do it because they can't be on one side saying her workmen's compensation claim is excessive and it doesn't deserve this kind of money and the physicians that we have that are defending this are trying to limit her recovery is inconsistent with whatever claim they're trying to make for her in saying this case against Pepper --
THE COURT: Listen, when I first had to rule on this issue I didn't deny that I thought that there was some very interesting code of conduct issues as to whether or not they could adequately represent a client who they don't even care about. They don't care about Ms. Mroczko. They care about their lien. I wondered whether or not Ms. Mroczko could ever have a case for malpractice against them because they're representing her interests and yet they have no real representation of her. They are adverse to her on the A&R side.

However, it all resolves around the fact that Ms. Mroczko's rights have been terminated for her failure to adequately file within the statute of limitations.
So there is no personal cause of action for Ms. Mroczko. Under the statute, under 5(b), they just have the right to get damages that would potentially be in and above what their lien is.
So I think that, to me in my little brain, absolves and resolves the conflict because there is no legal right for Ms. Mroczko. It has been terminated.
They have the right to present it to the effect of their lien, but if there is a recovery in excess she's entitled to it. I don't expect that to be much.
MR. SCHIFF: Well --
MR. KEANE: Your Honor, I want to make it clear since this is a motion directed to me. I don't represent Teresa Mroczko. Their motion says that I do. That's not correct. I've never represented her. I don't represent her. I represent A&R.
THE COURT: That's another really good point

because he does not represent Ms. Mroczko. He can only present evidence of damages that would satisfy his lien and if there was any excess it would go over to Ms. Mroczko.
MR. SCHIFF: But his pleading speaks otherwise. His pleading which Pepper sought to strike which this Court denied sought elements that did not have any interest to A&R but only as to Ms. Mroczko.
So therefore, all I'm suggesting, and it's a fascinating law school class --
THE COURT: It is.
MR. SCHIFF: -- is that you certify this question of whether or not they can pursue those elements of damages that are not recovered under workmen's compensation. So this inherent conflict of the statutes --
THE COURT: I don't think there's an inherent conflict. I still think that they don't represent Ms. Mroczko. I don't think they ever have represented Ms. Mroczko. I think that they solely represent A&R. But they have the right to present damages that may have been incurred by Ms. Mroczko which is a distinct and separate difference.

MR. SCHIFF: Okay. I just disagree, but there we are.
THE COURT: I understand.
MR. KEANE: So your Honor, we would ask that their motion to disqualify be denied. Although we are in agreement with the 308(a) language, I think this is a case where we could take a 308(a) certification on the question of res judicata and then join the current --
THE COURT: On the question of res judicata?
MR. KEANE: Well, the question of res judicata is the issue that Pepper --
THE COURT: I'm inclined -- I am denying the motion to disqualify because in no way, shape or form do they represent Ms. Mroczko. They represent this entity that really no longer exists other than they have some damages. And they have the right to present those damages in their case in chief. That's number one.
MR. SCHIFF: Now we go to whether you'll certify the question for 308.
THE COURT: I am disinclined to do so, I really am.
I have never been afraid to certify a 308(a)

issue. Ever. To my chagrin the appellate court doesn't like it very much. I'm inclined just to deny the stay, let it go forward, try the case and let the chips fall where they may.

No one has ever brought an argument in this case about the statute and its applicability. And this Court is not sua sponte going to do something on its own. It addresses the motions that you bring to me. I had motions to dismiss based upon certain issues, including res judicata, including statute of limitations, and including whether or not there's been a proper intervention.

And as to whether or not I should strike certain portions of a complaint, none of those issues are in conflict with what you may bring up today or as to whether or not that statute impermissibly allows him to present claims to a barred party under the statute of limitations.

I don't think it's actually ripe for certification. You would like me to because it's solves a lot of the legal issues. I'm denying both motions. Go forward with your trial.

MR. SCHIFF: All right. Not to be disrespectful, so we don't have an official motion

to certify, so I have -- this is what our intention is to do this, okay, but I want to so advise you that the reason why we're doing it is because you haven't really been presented with a proper petition to certify.

THE COURT: Certification petitions are solely in the discretion of the trial court.

MR. SCHIFF: Agreed.

THE COURT: And I'll exercise my discretion one way or the other when you present it.

MR. GREENWOOD: Judge, just one thing.

THE COURT: Go ahead.

MR. GREENWOOD: On behalf of Perez, we joined Pepper's motion to strike, which was denied.

But I need an order that says that it applies to us also.

THE COURT: Well, if you joined, then of course it applies to you, so put whatever you want in the order.

MR. GREENWOOD: Okay, thanks.

MR. MOOTHART: As far as case status, we did the last (f)(3) yesterday. Last week was the denial of the motion to strike. I still need to do an answer and affirmative defense, I can file

that today.

THE COURT: Okay, put it in the order.

MR. KEANE: Perez also needs to file their answers and affirmative defenses.

THE COURT: Put it in the order. When are you going to do it by? When is your trial date?

MR. KEANE: 9/22.

THE COURT: If you're done with your last (f)(3) expert, what's left?

MR. KEANE: Just evidence deps.

THE COURT: Okay. Now what do you want me to do today because I'm ready to certify you. You can take your evidence deps when you want to any time prior to trial.

MR. KEANE: I don't think there's any further discovery.

THE COURT: Sorry. I'm not into wasting the efforts of or the judicial economies of this situation. I understand what they are. I understand what my ruling means and I'm not trying to create more havoc. All I've tried to do is rule upon the motions that you have presented to me for ruling. And I have done so. And the other issues that you now create are on your own.

They're not -- they're ancillary to this case.

Maybe I'll be admonished for that. Maybe I won't be. It's my ruling. I've exercised my discretion.

MR. SCHIFF: Thank you, Judge.

MR. GREENWOOD: Thank you.

MR. MOOTHART: Thank you, Judge.

(Which were all the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

MARIA MICELI, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said hearing.

M. Miceli

Certified Shorthand Reporter

25

E-FILED
Transaction ID: 1-17-0385
File Date: 11/15/2017 4:42 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

038657AP/06014/JAT

No. 1-17-0385

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

A&R JANITORIAL, as subrogee of TERESA MROCZKO,

Plaintiff-Appellant,

vs.

PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC., CBRE, INC., AND BLUE CROSS AND BLUE SHIELD ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

THERE HEARD AS CASE NO. 14 L 8396

HONORABLE WILLIAM E. GOMOLINSKI, JUDGE PRESIDING

MOTION TO STRIKE ATTACHMENTS TO MROCZKO'S REPLY BRIEF, OR, IN THE ALTERNATIVE, SUBMIT ADDITIONAL ATTACHMENTS FOR THE COURT'S CONSIDERATION

NOW COMES the Defendant-Appellee, PEPPER CONSTRUCTION COMPANY, ("Pepper"), by its attorneys, CASSIDAY SCHADE LLP, and in support of its motion to strike the attachments to Teresa Mroczko's ("Mroczko's") reply brief, or, in the alternative, to submit additional documents for the Court's consideration, states as follows:

1. In May of 2016, Pepper moved to dismiss Mroczko's personal injury action in case No.15 L 5957 as untimely. (Vol. III, 653-662) Before Pepper filed its motion, it participated in several depositions, including: Teresa Mroczko's deposition on April 20, 2015 (Vol. IV, C 787-812), a second session of Teresa Mroczko's deposition on January 22, 2016 (Vol. III, C 717-749), Michael Munro's deposition on January 22, 2016 (Vol. IV, C 832-864), and Gerald Kearns' deposition on March 3, 2016 (Vol. IV, C 754-786) On September 12, 2016, the circuit court dismissed Mroczko's personal injury action in case No. 15 L 5957 as untimely pursuant to Pepper's § 2-619 motion. (Vol. VIII, C 1990) No appeal was taken from that final

order.

2. Subsequently, on November 10, 2016, Mroczko petitioned to intervene into A&R Janitorial's subrogation action, Court No. 14 L 8396. (Vol. VI, C 1373-1375)

3. On December 20, 2016, the circuit court denied Mroczko's petition to intervene on the basis of *res judicata*, finding that the dismissal of Mroczko's personal injury action in 15 L 5957 was an adjudication on the merits that barred Mroczko's subsequent efforts to intervene in the subrogation lawsuit to litigate the same issue. (Vol. IX, C 2034)

4. The singular issue on appeal is whether the circuit court acted within its discretion when it denied Mroczko's petition to intervene on December 20, 2016. That decision concerns the application of *res judicata* law to undisputed facts on December 20, 2016. No orders prior to, or subsequent to, the December 20, 2016 order are at issue in this appeal.

5. In her opening brief, Mroczko took the position that the order dismissing her personal injury action did not constitute an adjudication on the merits for the purposes of *res judicata*, even though Supreme Court Rule 273 and established precedent of the Illinois Supreme Court leave no room for dispute on that legal point. Mroczko abandoned that argument in her reply brief. Instead, Mroczko now attempts to misdirect this Court, asking this Court to review unnecessary, additional documents, by attaching documents to her reply brief about events subsequent to the circuit court's ruling. This Court's analysis should concern the issue as to whether the circuit court acted within its discretion on December 20, 2016 in applying the law of *res judicata* to the undisputed facts. Mroczko's desperate request to have this Court consider irrelevant events which occurred subsequent to the ruling at issue, and which are not contained within the record on appeal, is improper.

6. First, Supreme Court Rule 341(h)(6)prohibits a party from including facts in an appellate brief without appropriate citation to the record on appeal. This limitation prevents

litigants from attempting to do precisely what Mroczko attempts here – asking this Court to reverse the circuit court for reasons that the circuit court was not asked to consider. It is manifestly unfair for Mroczko to urge this Court to reverse the circuit court's decision based on facts or arguments that the circuit court did not, and could not, consider at the time it issued its ruling. It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525,536 (1996). The reasoning behind this iron-clad rule is self-evident: no trial judge should be reversed on a basis that the trial judge was not asked to consider.

7. Second, Mroczko asks this Court to take "judicial notice" of the attachments to her Reply brief. But judicial notice must be taken of *facts*, not legal arguments. *People v. Davis*, 65 Ill. 2d 157, 162 (1976). Moreover, judicial notice is taken of *prior* facts which may have been relevant at the time the circuit court ruled, not facts which are developed subsequent to the ruling. *Id.* at 164, 165. Mroczko has provided this Court with no legal authority requiring this Court to take judicial notice of either legal arguments, or of facts which occurred subsequent to a circuit court ruling, in order to disturb the circuit court's ruling - and for good reason. The circuit court's decision should not be evaluated by events subsequent to its decision which the circuit court was not asked to consider.

8. Third, none of the attachments to Mroczko's reply brief are relevant to the single legal issue presented on appeal. The issue as to whether *res judicata* precluded Mroczko's subsequent petition to intervene in the subrogation action is unaffected by whether A&R Janitorial could seek recovery of damages in excess of its worker's compensation lien. Instead, the issue as to whether *res judicata* should have precluded Mroczko's petition to intervene concerns whether a final judgment on the merits was previously rendered by a court involving the same parties for the same cause of action. *DeLuna v. Treister*, 185 Ill. 2d 565, 572 (1999).

The purpose behind the doctrine is the protection of the defendant and the judiciary from multiple lawsuits for the same claim. *Rein v. Noyes & Company*, 172 Ill. 2d 325, 343 (1996). Pepper unquestionably defended and defeated Mroczko's personal injury claim in case No. 15 L 5957 by participating in discovery, establishing the nature of the work in which Mroczko was involved at the time of the occurrence, and establishing that the limitations period applicable to her personal injury action had expired. (Vol. III, C653-662) Pepper should not have to litigate Mroczko's claim a second time.

9. Fourth, Mroczko argues that Pepper has "taken advantage" of Mroczko's procedural dilemma, and that "fairness and justice" call for this Court to reverse the decision of the circuit court on Mroczko's petition to intervene. (Reply brief, p. 2) But the dilemma that Mroczko now finds herself in is the *direct result of her failure to timely file her personal injury action*, and not any unfair advantage taken by Pepper. And Mroczko has recourse for that failure, recourse which she is currently pursuing in a legal malpractice action, filed on January 20, 2017, by her current counsel against her former counsel. (*See* Attachment 4 to Mroczko's Reply Brief, p. 16: "I came in and had filed a legal malpractice case." *See also*, Legal Malpractice Complaint, attached hereto as Exhibit A.) Mroczko's legal malpractice action seeks recovery of moneys Mroczko "would have otherwise obtained by virtue of a judgment against or settlement with such third-parties, including Pepper Construction Company or others ..." (See Ex. A, p. 6) Mroczko's inability to intervene in the subrogation action did not result from the inequitable application of the doctrine of *res judicata* - it resulted from her original counsel's failure to timely file a personal injury claim and failure to timely petition to intervene in the subrogation action. In her legal malpractice action, Mroczko is pursuing the appropriate recourse for her prior counsel's failure.

10. Moreover, if this Court takes judicial notice of facts or circumstances which

occurred after the circuit court denied Mroczko's petition to intervene, then the Court should also be advised that A&R Janitorial's subrogation lawsuit has been dismissed pursuant to settlement. (See order of September 22, 2017, attached hereto as Exhibit B.) The subrogation action, therefore, into which Teresa Mroczko petitioned to intervene no longer exists. There is no action into which Mroczko may intervene.

11. Finally, after the circuit court denied Pepper's motion to strike A&R's request in its subrogation action for damages in excess of its worker's compensation lien, Pepper settled with A&R for $850,000.00. (See Release and Settlement Agreement, attached hereto as Exhibit C.) Pepper substantially increased its settlement offer to A&R to an amount in excess of A&R Janitorial's worker's compensation lien following the circuit court's order allowing A&R to recover an amount in excess of its lien, and specifically, A&R's right to recover for "every claim that Mroczko herself could have brought." (Plaintiff's Reply, Attachment 2, p.9) It would be grossly unfair to now permit Mroczko to pursue her own claim against Pepper after Pepper has settled with A&R Janitorial for an amount recognizing A&R's ability to pursue Mroczko's non-economic damages. Pepper would then be prejudiced for Mroczko's failure to timely pursue her personal injury action. Pepper would be prejudiced due to no failure of its own.

12. Pepper defended and defeated Mroczko's personal injury claim. Mroczko's current "dilemma" results from her lawyer's failure to timely file her personal injury action. Pepper should not be prejudiced for that lawyer's mistake. Mroczko's legal malpractice action provides her with an avenue to obtain full recourse for whatever injuries she sustained as the result of her attorney's failure to timely file her action without unfairly prejudicing Pepper.

13. This Court should not be distracted by events that occurred after, and are irrelevant to, the ruling at issue. In her Reply, Mrozko attempts to confuse the chronology of events in this case, arguing that this Court should assess Mroczko's right to intervene after the

circuit court subsequently allowed A&R Janitorial to recover damages in excess of its current lien. But this appeal tasks the Court with assessing Mroczko's right to intervene after her personal injury action was dismissed. The record on appeal provides this Court with the information it requires to evaluate the circuit court's ruling at the time the ruling was made.

WHEREFORE, for the foregoing reasons, the Defendant-Appellee, PEPPER CONSTRUCTION COMPANY respectfully requests that this Court strike the attachments to Mroczko's reply brief, disregard said attachments as irrelevant to the single issue presented on appeal, or, in the alternative, consider the additional attachments to this motion to strike.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: **/s/Julie A. Teuscher**
One of the Attorneys for PEPPER CONSTRUCTION COMPANY

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8699398 JTEUSCHE;BWEEKS

Firm No. 48852

**IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

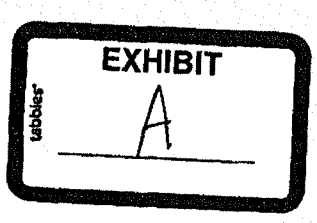
TERESA MROCZKO, Plaintiff,	)	
vs.	)	Court No.
BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER, BRYANT M. GREENING	)	
Defendants	)	

COMPLAINT AT LAW
(Legal Malpractice)

NOW COMES Plaintiff, TERESA MROCZKO [hereinafter TERESA], by and through her attorneys, SCHIFF GORMAN LLC, and complaining against the Defendants, BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and BRYANT M. GREENING, states as follows:

1. In August of 2012 and continuing to this date, BELCHER LAW OFFICES n/k/a ALEKSY BELCHER was a law firm duly licensed by the State of Illinois in the practice of law. The law firm's practice emphasized proficiency in representing persons injured in the course and scope of employment.

2. In August of 2012 and continuing to this date, MATTHEW J. BELCHER was an attorney duly licensed in the State of Illinois and was an employee and agent of BELCHER LAW OFFICES n/k/a ALEKSY BELCHER. His practice has an emphasis in representing persons injured in the course and scope of employment. At all times set forth herein, MATTHEW J. BELCHER acted in the course and scope of his employment with BELCHER LAW OFFICES n/k/a ALEKSY BELCHER.



3. In August of 2012 and continuing to this date, BRYANT M. GREENING was an attorney duly licensed in the State of Illinois and was an employee and agent of BELCHER LAW OFFICES n/k/a ALEKSY BELCHER. One of the areas of emphasis of GREENING's practice was in representing persons injured in the course and scope of employment. At all times set forth herein, BRYANT M. GREENING acted in the course and scope of his employment with BELCHER LAW OFFICES n/k/a ALEKSY BELCHER.

4. On or about August 17, 2012, TERESA was injured during the course and scope of her employment with A & R Janitorial.

5. In late September or early October of 2012, TERESA met with MATTHEW J. BELCHER and/or other attorneys at BELCHER LAW OFFICES n/k/a ALEKSY BELCHER for the purpose of seeking legal representation for the recovery of damages for the injuries sustained on August 17, 2012.

6. MATTHEW J. BELCHER and/or other attorneys at BELCHER LAW OFFICES n/k/a ALEKSY BELCHER interviewed TERESA to secure information as to when, how and where her injuries were sustained on August 17, 2012.

7. During the course of interviewing TERESA, MATTHEW J. BELCHER and/or other attorneys at BELCHER LAW OFFICES n/k/a ALEKSY BELCHER were advised:

a. TERESA was performing general cleaning services for A & R Janitorial on the fourth floor at the building commonly called the Blue Cross Blue Shield building located at 300 E. Randolph Street, Chicago, Illinois.

b. Furniture was being moved to allow for replacing the carpet.

c. The movement of the furniture was not being performed by A&R Janitorial.

d. The carpet replacement was not being performed by A&R Janitorial.

e. TERESA had suffered serious injuries.

f. During the course of taking the garbage from underneath a table, the desk or table fell on her.

g. TERESA had not returned to work.

8. From August 17, 2012 until August 17, 2014, neither BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER nor BRYANT M. GREENING undertook any of the following:

a. inspected the locus of the occurrence;

b. retained an investigator for purposes of determining how the furniture was placed prior to it falling upon her.

c. secured or interviewed any statements from witnesses to the occurrence;

d. secured photographs of the scene;

e. secured any contracts for persons performing work on the date of the occurrence;

f. investigated who placed the furniture that fell on TERESA;

g. secured A & R Janitorial insurer's investigative file concerning the circumstances that resulted in TERESA'S injury on August 17, 2012.

9. During the period from August 17, 2012 until May 5, 2014, BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and/or BRYANT M. GREENING analyzed whether TERESA had a reasonable basis to claim that any other person other than her employer might be liable for her injuries.

10. Due to BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and/or BRYANT M. GREENING's failure to undertake any investigation, they concluded on May 5, 2014 that they were unable to identify any other person against whom a lawsuit could be filed for TERESA'S personal injuries sustained on August 17, 2012.

11. From May 5, 2014 thru August 17, 2014, BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and/or BRYANT M. GREENING undertook no further investigation to determine if there were other persons against whom a lawsuit could be filed for personal injuries sustained by TERESA on August 17, 2012.

12. On August 11, 2014, A & R Janitorial as statutory subrogee of TERESA MROCZKO filed a lawsuit in the Circuit Court of Cook County, Illinois seeking recovery against third parties including Pepper Construction Co. of monies A&R Janitorial or its insurer had paid or become obligated to pay to TERESA pursuant to the Illinois Workers' Compensation Act .

13. BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and/or BRYANT M. GREENING learned of A&R Janitorial's Complaint prior to August 17, 2014.

14. Alternatively, BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and/or BRYANT M. GREENING learned of A&R Janitorial's intention to file its Complaint as subrogee of TERESA MROCZKO prior to August 17, 2014.

15. On June 11, 2015, BELCHER LAW OFFICES n/k/a ALEKSY BELCHER filed the Complaint on behalf of TERESA against Pepper Construction Co. and others seeking recovery for her injuries sustained on August 17, 2012.

16. On September 14, 2015, the lawsuit filed by BELCHER LAW OFFICES n/k/a ALEKSY BELCHER on behalf of TERESA was consolidated for discovery purposes with the lawsuit filed by A & R Janitorial as subrogee of TERESA.

17. On September 12, 2016, following a briefing schedule on Pepper Construction Co.'s Motion to Dismiss based on the untimely lawsuit filed by BELCHER LAW OFFICES

n/k/a ALEKSY BELCHER, an order of dismissal was granted and the court specifically finding that there was no just reason to delay enforcement or appeal of that decision.

18. On October 17, 2016, BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and/or BRYANT M. GREENING withdrew from further representing TERESA in the lawsuit filed against Pepper Construction Co. and others.

19. Defendants, in their responsibilities to provide legal representation to TERESA, and in providing professional services to her, owed plaintiff a duty to possess and apply the knowledge and use the skill and care ordinarily used by a reasonably well qualified attorneys practicing in the same locality under the circumstances for which they were retained.

20. Defendants deviated from their duty to TERESA and failed to adhere to the standard of care of reasonably well qualified lawyers practicing in the same locality and were thereby negligent in one or more of the following ways:

a. Failed to investigate the negligence of Pepper Construction Co. and others that caused TERESA to sustain injuries when furniture stacked improperly fell upon her; or

b. Failed to bring a timely lawsuit against Pepper Construction Co. for the injuries TERESA sustained on August 12, 2012; or

c. Failed to intervene in the timely lawsuit brought by A & R Janitorial prior to the entry of the final order dismissing Pepper Construction Co. on September 12, 2016; or

d. Failed to refer TERESA to a qualified attorney to represent her in a lawsuit against Pepper Construction Co.;

e. Failed to consult with A & R's insurer to identify persons or companies including Pepper Construction Co. who might be liable for TERESA'S personal injuries.

21. Accordingly, but for the negligence of Defendants, a lawsuit would have been filed and successfully prosecuted to judgment in favor of TERESA and against such third-

parties, including Pepper Construction Co. who were legally responsible for the negligent preparation, handling, loading and/or stacking of the furniture that fell upon her.

22. As a direct and proximate cause of one or more of the aforementioned negligent acts and or omissions of Defendants, TERESA has sustained damages in that she has been deprived of monies that he would have otherwise obtained by virtue of a judgment against or settlement with such third parties, including Pepper Construction Co. or others, who were legally responsible for the negligent preparation, handling, loading and/or stacking of the furniture that fell upon her.

WHEREFORE, Plaintiff, TERESA MROCZKO prays for judgment against Defendants BELCHER LAW OFFICES n/k/a ALEKSY BELCHER, MATTHEW J. BELCHER and/or BRYANT M. GREENING, in excess of the limits of the Circuit Court of Cook County, Law Division, as well as costs incurred in presenting this lawsuit.

Respectfully submitted,

SCHIFF GORMAN LLC

By: s/Elliot R. Schiff
Elliot R. Schiff
One of the Attorneys for Plaintiff

Elliot R. Schiff
Ryan T. McNulty
SCHIFF GORMAN LLC
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(312) 345-7200
(312) 345-8645 (fax)
Attorney No. 48852

AFFIDAVIT PURSUANT TO RULE 222(b)

Elliot R. Schiff states as follows:

1. I am one of the attorneys for the plaintiff TERESA MROCZKO.

2. I am familiar with the extent of damages suffered by TERESA MROCZKO.

3. I reasonably believe that the total money damages suffered by TERESA MROCZKO exceed $50,000.00, exclusive of costs.

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct to the best of my knowledge, information and belief.

s/Elliot R. Schiff
Elliot R. Schiff, Esq.
One of the Attorneys for the Plaintiff

Elliot R. Schiff 312-345-7202
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SCHIFF, GORMAN LLC
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(312) 345-8645 (fax)
Attorney No. 48852

06014/38657/TPB/MPM
ORDER CCG-2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as subrogee of TERESA MROCZKO, Plaintiff, v. PEPPER CONSTRUCTION COMPANY and PEREZ & ASSOCIATES, INC., Defendants.	No. 14 L 8396

DISMISSAL ORDER

This matter having come before this Court and the Court having been advised in the premises that all matters in controversy have been resolved between the parties, and by agreement of the parties.

IT IS HEREBY ORDERED THAT the above-captioned case is dismissed with prejudice, without further cost to any party, all claims having been compromised and settled.

IT IS HEREBY FURTHER ORDERED THAT this Court shall retain jurisdiction of this matter in the event that any party fails to execute any necessary document, fulfill any agreed to conditions, adjudicate any liens, and/or pay the agreed settlement amount.

No BT mediator was used for settlement

Firm ID No. 44613
Name CASSIDAY SCHADE LLP
Attorney for PEPPER CONSTRUCTION COMPANY
Address 20 North Wacker Drive, Suite 1000
City Chicago, IL 60606
Telephone (312) 641-3100
E-Mail mmoothart@cassiday.com

_____, 20__
ENTERED: JUDGE JAMES P. FLANNERY
SEP 22 2017
Circuit Court-1505
Judge Judge's No.

DOROTHY A. BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

8636779

EXHIBIT
tabbies
B

SETTLEMENT AGREEMENT AND RELEASE OF SPECIFIED CLAIMS

This Settlement Agreement and Release of Specified Claims (the "Agreement") is made and entered into by the following parties (collectively "the Parties"):

1. A&R Janitorial Service, Inc.

2. Pepper Construction Company

3. Perez and Associates, Inc.

4. Selective Insurance Company of America

RECITALS

1. The Parties assert these recitals to explain the circumstances surrounding the execution of the Agreement, and intend them to be an integral part of the Agreement.

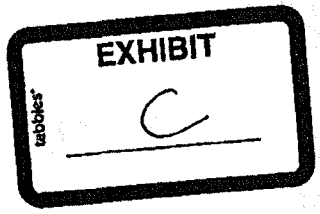
2. On August 17, 2012, Teresa Mroczko ("Mroczko") was involved in a work-related accident while working at the BlueCross/BlueShield Tower ("BCBS Tower") located at or near 300 East Randolph Street in Chicago, IL ("the incident"). Mroczko was working within the scope of her employment for A&R Janitorial Service, Inc. ("A&R") at the time of the incident.

3. On or about October 5, 2012, Mroczko filed a workers' compensation claim against A&R in the Illinois Workers' Compensation Commission, under Cause No. 2012 WC 034686, seeking benefits owed in relation to the incident (the "Mroczko WC Claim"). The Mroczko WC Claim remains pending. The execution of this Agreement shall have no effect on the Mroczko WC Claim beyond what is specifically provided for in this Agreement.

4. On or about August 11, 2014, A&R, as Statutory Subrogee of Mroczko, filed a Complaint in Subrogation in the Circuit Court of Cook County, under Cause No. 14 L 8396 (the "A&R Subrogation Claim"). The A&R Subrogation Claim was filed against Pepper Construction Company ("Pepper"), Perez and Associates, Inc. ("Perez") and others, and sought recovery for the amounts A&R had paid and may pay in the future in relation to the Mroczko WC Claim, and also sought recovery for Mroczko's non-economic damages including pain and suffering and loss of a normal life.

5. On or about June 11, 2015, Mroczko filed a Complaint at Law in the Circuit Court of Cook County, under Cause No. 2015 L 5957. In her Complaint at Law, Mroczko sought recovery against Pepper, Perez and others, for the personal injuries she sustained in the incident (the "Mroczko Negligence Claim").

6. The Mroczko Negligence Claim was dismissed with prejudice on the basis that it was filed beyond the applicable statute of limitations. Mroczko then sought to intervene in the A&R Subrogation Claim. Mroczko's Petition to Intervene was denied. The denial of Mroczko's



Petition to Intervene was appealed to the Illinois Appellate Court of Illinois (the "Mroczko Appeal"). That appeal is still pending. .

7. Pepper had executed a Subcontract Agreement with Perez for specified work to be performed at the BCBS Tower where the incident occurred. Based on the terms of the Subcontract Agreement, Pepper tendered its defense and indemnity of both the A&R Subrogation Claim and the Mroczko Negligence Claim to Perez and its insurer, Selective Insurance Company of America ("Selective"). Selective accepted Pepper's tender of defense under a reservation of rights.

8. Pepper filed a Counterclaim against Perez for both Contribution and Breach of Contract in the A&R Subrogation Claim and the Mroczko Negligence Claim. The Breach of Contract Claim was based on Pepper's allegation that Perez had breached its contract with Pepper by failing to procure the type of additional insured coverage required by the Subcontract Agreement (the "Pepper Breach of Contract Claim"). Pepper also filed a Third-Party Complaint for Professional Negligence against Perez's insurance producer, Insure-Rite, Inc. ("Insure-Rite") in connection with its claim that improper coverage had been procured for Pepper. On August 24, 2017, the Pepper Breach of Contract Claim and its Third-Party Complaint against Insure-Rite were severed from the A&R Subrogation Claim, and were transferred to the Commercial Calendar of the Law Division of the Circuit Court of Cook County under Cause No. 17 L 8573.

9. A&R, Pepper, Perez and Selective have reached an agreement resolving the A&R Subrogation Claim, the Pepper Breach of Contract Claim, and all disputes between Pepper and Selective on insurance coverage owed to Pepper over the incident. The parties to this Agreement desire to reduce the terms and condition of their agreement to writing as follows.

RELEASE AND DISCHARGE

A. A&R's Release of Pepper and Perez

1. In consideration of the sum of **EIGHT HUNDRED FIFTY THOUSAND DOLLARS ($850,000.00)**, lawful money of the United States of America, the receipt and adequacy of which are hereby acknowledged, A&R does hereby release and forever discharge Pepper, Perez, their officers, directors, partners, shareholders, employees, agents, representatives, attorneys, insurers, re-insurers, all associated, affiliated, successor, parent and subsidiary companies (collectively "Releasees"), of and from any and all debts, demands, actions, causes of action, suits, damages, injuries, costs, loss of services, expenses, compensation, and any and all claims and liabilities whatsoever, of every kind and nature, both at law and in equity, which A&R has or claims to have had, or now or hereafter may have, and whether known or unknown, by reason of any loss or damage relating to the incident, whether said claims seek recovery for economic or monetary loss, compensatory, exemplary or punitive damages, and whether said claims be founded upon tort or otherwise, or authorized by code, statute or common law of any jurisdiction.

2. In further consideration of the aforesaid payment, A&R understands and agrees that this Agreement includes the release, discharge and satisfaction of any and all claims, judgments, and causes of action which are, or could have been, the subject of the A&R Subrogation Claim.

3. In further consideration of the aforesaid payment, A&R warrants and represents that it has made no assignment of any claim, cause of action, suit or demand covered by this Agreement, and that no person, firm, corporation, estate or any other entity has been subrogated to any such claim, cause of action, suit or demand, and that it has the sole and complete right and authority to settle, compromise, release and discharge the A&R Subrogation Claim.

4. To date A&R has paid workers' compensation benefits ("WC benefits") in excess of $342,000.00 to or on behalf of Mroczko in connection with the Mroczko WC Claim. The Parties anticipate that A&R may pay out more than $850,000.00 in WC benefits in connection with the Mroczko WC Claim. The Parties agree that this Agreement shall not affect the Mroczko WC Claim and A&R's responsibility to continue to pay WC benefits to Mroczko.

5. In the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated, A&R understands and agrees that it shall not possess any lien rights on Mroczko's eventual recovery in the Mroczko Negligence Claim against Pepper and/or Perez. In short, A&R understands and agrees that the settlement amount mentioned in Paragraph 1. above shall be its sole recovery for WC benefits paid to Mroczko and lien rights accrued in connection with the incident with respect to Pepper and/or Perez. In the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated, A&R agrees that it waives all lien rights that it otherwise might have in connection with WC benefits paid with respect to Pepper and/or Perez.

6. Pepper, Perez, and Selective intend that the amount paid in Paragraph 1. combined with the amount of A&R's waived lien for WC benefits paidand/or WC benefits that do not have to be paid due to credits or workers' compensation holiday s, shall serve as a set-off for Pepper and Perez, or either of them, in the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated. A&R agrees to respond to any requests made by Pepper, Perez or their agents, as to additional and/or final amounts of WC benefits paid A&R to Mroczko, in a reasonably prompt fashion, so that Pepper and Perez, or either of them, can calculate the amount of set-off available to them, and further agrees to furnish an executed affidavit on this subject so that Pepper and Perez, or either of them, can request such a set-off from the trial court.

B. Pepper's, Perez's and Selective's Mutual Release

1. The $850,000.00 payment identified in Paragraph 1.A. shall be paid as follows: Selective will pay a total of $382,500.00 to A&R on behalf of Pepper and Perez.. Pepper will pay a total of $467,500.00 to A&R on its own behalf. .

2. In consideration of the mutual contributions to the $850,000 payment identified in Paragraph 1., Pepper and Selective hereby release any and all claims they may have against each other in connection with the incident and Pepper's claim for coverage under the Selective policy issued to Perez. Pepper releases any claims for indemnity, as an additional insured under the policy or otherwise, and further releases all claims for supplemental payments and/or any other benefit to which it may be entitled as an additional insured or otherwise, with the sole exception of the defense costs described in Paragraph below. Selective releases any claims against Pepper

for the recovery of defense costs and indemnity payments made by Selective in connection with the incident, the A&R Subrogation Claim, the Mroczko Negligence Claim, and the Mroczko Appeal.

3. Selective will pay Pepper's defense costs in both the A&R Subrogation Claim and in the Mroczko Appeal until this Agreement is fully-executed.

4. In further consideration of this Agreement, and the mutual promises, agreements, understandings and reliances thereon, but subject to Paragraph 4 below, Pepper and Perez do hereby mutually and reciprocally release and forever discharge each other, along with their respective officers, directors, partners, shareholders, employees, agents, representatives, attorneys, insurers, re-insurers, all associated, affiliated and successor companies, of and from all existing and potential claims which Pepper and Perez have or may have in the future against each other in connection with the incident, the A&R Subrogation Claim and the Pepper Breach of Contract Claim.

5. In the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated, Pepper and Perez agree that each retains the right to assert a contribution claim only against the other. However, if the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's appeal as to one but not both Pepper and Perez, then no contribution claim can be asserted against the Party as to whom the trial court's denial of the petition to intervene was affirmed.

6. The Parties agree that this Agreement shall not affect or infringe in any way on Pepper's ability and right to maintain its professional negligence claim against Insure-Rite.

C. General Terms

1. It is understood and agreed that all representations and agreements made with respect to the subject matter of this Agreement are expressly set forth herein, and this Agreement may not be altered or amended in any way, without the written consent of all parties hereto.

2. It is understood and agreed that all Parties, in entering into this Agreement, have been represented by competent legal counsel and have had the opportunity to conduct a full and adequate investigation of the facts and claims at issue, and have not relied upon the representations, warranties, promises or conditions not specifically set forth in this Agreement.

3. The Parties specifically acknowledge and agree that this Agreement has been prepared, reviewed, studied and executed without compulsion, fraud, duress, or undue influence, and without circumstances which would overcome the free will of the signatories. The Parties further agree that the Agreement is expressly made by the Parties with the requisite experience and advice of independent counsel, each party acting as equals in bargaining the terms of this Agreement and, accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of the Agreement or any amendment to it.

4. It is understood and agreed that this Agreement shall be interpreted, enforced and governed by the laws of the State of Illinois.

5. It is understood and agreed that the aforesaid payments by Releasees are not to be construed as an admission of any liability on the part of the Releasees. Specifically, Pepper and Perez have denied and continue to deny liability to Mroczko and A&R.

EXECUTION AND ACCEPTANCE

The undersigned represent that they have read this Agreement; that they fully understand the contents of this Agreement; that it contains the entire agreement among the Parties hereto; and that they signed this Agreement as their free and voluntary act.

By: _____
A&R Janitorial Service, Inc.

Its: _____

Date: _____

By: _____
Pepper Construction Company

Its: VP & Gen Csl

Date: Nov. 15, 2017

By: _____
Perez and Associates

Its: _____

Date: _____

By: _____
Selective Insurance Company of America

Its: _____

Date: _____

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By: _____
A&R Janitorial Service, Inc.

Its: _____

Date: _____

By: _____
Pepper Construction Company

Its: _____

Date: _____

By: _____
Perez and Associates

Its: _____

Date: 11-15-17

By: _____
Selective Insurance Company of America

Its: Litigation Supervisor

Date: 11/10/17

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corrected copy

DMS

THIRD DIVISION
December 27, 2017

2017 IL App (1st) 170385

No. 1-17-0385

A&R JANITORIAL, as Subrogee of Teresa Mroczko,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 L 8396
	)	
PEPPER CONSTRUCTION CO.; PEPPER CONSTRUCTION GROUP, LLC; PEREZ & ASSOCIATES, INC.; PEREZ CARPET; CBRE, INC.; and BLUE CROSS AND BLUE SHIELD ASSOCIATION,	)	
	)	
Defendants-Appellees	)	Honorable
	)	William Edward Gomolinski,
(Teresa Mroczko, Individually, Intervenor-Appellant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court, with opinion.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment and opinion.

OPINION

¶ 1 This is an appeal from an order of the circuit court of Cook County denying Teresa Mroczko's (appellant) petition to intervene in an action filed by her employer, A&R Janitorial (plaintiff) against defendants. Plaintiff, Teresa's employer at the time of her injury, filed its action against the named defendants as the subrogee of Teresa pursuant to section 5(b) of the Illinois Workers' Compensation Act (Act). 820 ILCS 305/5(b) (West 2016). Section 5(b) of the Act allows injured employees to file a lawsuit against a third-party defendant legally liable for an employee's injury and provides that the employer be indemnified for any payments it made under the Workers' Compensation Act to the employee from any recovery made from the lawsuit. If the injured employee does not file a claim against the third-party defendant prior to

three months before the expiration of the statute of limitations, section 5(b) also allows the employer to file a claim against the third-party defendant to indemnify itself for benefits paid to its employee and to recover damages, as subrogee, for damages suffered by the injured employee. Under the Act, all money recovered over and above the amounts the employer has already paid to the employee shall be paid to the employee. On June 11, 2015, after the expiration of the two-year statute of limitations, and after the employer timely filed its suit for damages as subrogee, appellant filed her complaint in the circuit court of Cook County seeking damages against defendants for negligence. The court dismissed her complaint for failure to file within the statute of limitations. Teresa did not appeal this dismissal. She then sought to intervene in plaintiff's suit against defendants. The trial court denied appellant's petition to intervene, finding her claim was barred by the doctrine of *res judicata*. The issue presented in this case is whether the dismissal of appellant's untimely filed suit for damages acts to bar, on *res judicata* grounds, her intervention in the employer's timely filed case. We hold it does not and, for the following reasons, the judgment of the circuit court is reversed and the cause remanded.

¶ 2 BACKGROUND

¶ 3 Appellant, Teresa, was injured on August 17, 2012 at a Blue Cross and Blue Shield building in Chicago while she was employed by plaintiff, A&R Janitorial. Blue Cross and Blue Shield had hired A&R Janitorial to perform custodial services, and appellant was one of plaintiff's employees. Blue Cross and Blue Shield was performing renovations to that building and contracted Pepper Construction Co. to replace carpeting, among other work. Pepper Construction subcontracted the task of replacing carpets to Perez & Associates. While appellant was cleaning, she was injured when a desk fell on her. The desk had been moved by Perez in the

course of replacing the carpets.

¶ 4 Appellant filed a workers' compensation claim against plaintiff and was awarded relief. That claim is currently under appeal. To date plaintiff has paid appellant over $342,000 in workers' compensation benefits. Illinois' Workers' Compensation Act also allows an employer to seek indemnification from a third-party who may be a cause of the injury for the sums it is required to pay its employee. The Act allows for an injured employee whose injuries are covered under the Act to also file a claim against a third party for common law damages, and the employer is entitled to a portion of those damages recovered by the employee equal to the amount paid by the employer to the employee for that claim:

> "Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act." 820 ILCS 305/5(b) (West 2016).

The employer is entitled to a portion of those damages equal to the amount paid by the employer to the employee for that claim. *Id.* ("from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee").

¶ 5 A party in Illinois may commence a personal injury action "within 2 years next after the cause of action accrued." 735 ILCS 5/13-202 (West 2016). As of May 17, 2014, appellant failed to file a claim against defendants. If the employee fails to file a claim three months prior to the expiration of the statute of limitations, the Act allows an employer to step into the employee's

shoes to file a claim for indemnification for the payments it is liable for under the Act and a claim for the employee's common law damages. The Act provides that if an

> "employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability." 820 ILCS 305/5(b) (West 2016).

Plaintiff, as subrogee of appellant's claim, timely filed its complaint against all of the named defendants on August 14, 2014. In November 2014 Blue Cross and Blue Shield Association was voluntarily dismissed from plaintiff's subrogation action. In December 2014, Pepper Construction Group, LLC, and CBRE, Inc. were also voluntarily dismissed from the subrogation action. This left Pepper Construction Co., Perez & Associates, Inc., and Perez Carpet as the only remaining defendants (collectively defendants).

¶ 6 On June 15, 2015, more than two years after her injury, appellant filed her own personal injury action against Pepper Construction Co., Perez & Associates, Inc., Interface America, Inc., and Blue Cross and Blue Shield Association. Appellant claimed her injuries resulted from the

construction of an improvement to real property, which would be subject to a four year statute of limitations period. See 735 ILCS 5/13-214 (West 2016) ("Actions based upon tort *** against any person for an act or omission of such person in the *** construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission."). The trial court dismissed appellant's claim without prejudice on December 18, 2015. Appellant subsequently filed her first amended complaint on April 28, 2016. On September 12, 2016, the court dismissed this claim with prejudice for failure to file within the statute of limitations, finding appellant's injury was not the result of construction work and therefore subject to a two year statute of limitations. The court entered a finding under Supreme Court Rule 304(a) there was no just reason to delay enforcement or appeal of its decision to dismiss appellant's claim. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). No appeal was taken from this dismissal.

¶ 7 On November 10, 2016, appellant filed a petition to intervene in this case filed by her employer. In her petition appellant claims she would not be adequately represented by plaintiff. Appellant's ability to intervene in the present case turns on the Illinois Code of Civil Procedure's requirements for intervention as of right and permissive intervention:

> "Upon timely application anyone shall be permitted as of right to intervene in an action: *** when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2016).
>
> "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have

a question of law or fact in common." 735 ILCS 5/2-408(b) (West 2016). Here appellant sought to intervene as of right claiming she was not being adequately represented because plaintiff was only pursuing enough damages for indemnification and not the maximum amount recoverable for her injuries. Appellant attached a proposed amended complaint for plaintiff's subrogation suit with additional counts seeking damages for her pain and suffering in addition to plaintiff's indemnification.

¶ 8 In plaintiff's response to appellant's petition to intervene, plaintiff argued appellant's workers' compensation claim is not fully resolved and that if appellant is found totally disabled then plaintiff could owe appellant for the rest of her lifetime. Plaintiff's contention was that because of this increased risk it faced, it has every incentive to seek the maximum amount of damages. If plaintiff did not seek the maximum amount of damages then it risked not being fully indemnified. Defendants replied to appellant's petition arguing claim preclusion based on her suit against them for the same cause of action being dismissed on the merits for failure to file within the statute of limitations.

¶ 9 On December 20, 2016, the trial court heard arguments on appellant's petition to intervene and to file an amended complaint. At the hearing, appellant claimed *res judicata* should not bar her intervention here because a dismissal for failure to file within the statute of limitations should not constitute a judgment on the merits for purposes of *res judicata*. Pepper Construction Co. argued claim preclusion did bar her claim, relying primarily on *Sankey Brothers, Inc. v. Guilliams*, 152 Ill. App. 3d 393 (1987). The court denied appellant's petition to intervene, finding *Sankey Brothers Inc.* supported applying *res judicata* to bar appellant's claim. The court issued an order on January 31, 2017, under Supreme Court Rule 304(a) that its December 20, 2016 order was final and appealable, and allowed the case between plaintiff and

defendants to continue. Appellant timely filed her appeal of the trial court's denial of her petition to intervene.

¶ 10 Plaintiff then sought to amend its complaint to pursue recovery of damages for appellant's pain and suffering, and loss of enjoyment of life. On July 26, 2017, the trial court ruled plaintiff could pursue those non-economic damages. Appellant then sought to have plaintiff's counsel disqualified for a conflict of interest under a theory plaintiff's counsel could not simultaneously represent plaintiff against appellant in a workers' compensation claim while also representing plaintiff seeking appellant's non-economic damages against defendants. A hearing on the motion was held on August 4, 2017. At the hearing plaintiff's counsel argued there was no conflict of interest, stating: "I don't represent Teresa ***. I never represented her." The court found "he does not represent [appellant.] He can only present evidence of damages that would satisfy his lien and if there was any excess it would go over to [appellant.]" The court denied appellant's motion to disqualify plaintiff's counsel based on its finding plaintiff's counsel only represented plaintiff and not appellant.

¶ 11 While this case was pending on appeal, plaintiff and defendant reached a settlement agreement where defendants agreed to pay plaintiff $850,000. On September 22, 2017, the trial court entered an order dismissing with prejudice plaintiff's subrogation case against defendants because the controversy between the parties had been resolved, subject to the outcome of this appeal. Plaintiff appeals from the order denying her petition to intervene.

¶ 12 ANALYSIS

¶ 13 The issue in this appeal is whether the trial court abused its discretion by denying appellant's petition to intervene. Defendants argue application of *res judicata* bars appellant's intervention in this case, while appellant maintains the doctrine of *res judicata* does not bar

intervention. Appellant claims she has a right to intervene in this case because her interests are not adequately represented by plaintiff.

¶ 14 As a preliminary matter, we note appellant attached to her reply brief a copy of her motion to remove plaintiff's counsel, the transcript of the hearing on that motion, and the trial court's order denying the motion. Defendants have filed a motion to strike appellant's exhibits or in the alternative to consider those exhibits along with exhibits defendants attached to their motion. We denied defendants' motion to strike appellant's attachments and ordered that defendants' additional attachments will be considered. Defendants attached to their motion a copy of the trial court's order dismissing this case with prejudice and a copy of the settlement agreement entered between plaintiff and defendants. Ordinarily attachments and exhibits to briefs are not the proper means of supplementing the record. See *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 23. Here, defendants have not argued against the accuracy of appellant's exhibits. In appellant's response to defendants' motion to strike appellant's attachments, appellant argued both her exhibits and defendants' exhibits should be considered. She also did not contest the accuracy of defendants' exhibits.

> "In an instance such as this no sound reason exists to deny judicial notice of public documents which are included in the records of other courts and administrative tribunals. (McCormick, Evidence sec. 330, at 766 (2d ed. 1972).) Such documents fall within the category of readily verifiable facts which are capable of 'instant and unquestionable demonstration.' " *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976).

Therefore, we will take judicial notice of defendants' exhibits attached to their motion as well as appellant's exhibits.

¶ 15 Standard of Review

¶ 16 The decision to allow appellant to intervene is at the sound discretion of the trial court and we review the decision for an abuse of discretion. *Sankey Brothers, Inc.*, 152 Ill. App. 3d at 397. "The decision to allow or deny intervention, whether permissive or as of right, is a matter of sound judicial discretion that will not be reversed absent an abuse of that discretion." *Argonaut Insurance Co. v. Safway Steel Products, Inc.*, 355 Ill. App. 3d 1, 7 (2004). A trial court abuses its discretion when "no reasonable person would take the view adopted by the trial court." *Id.* "If a trial court's decision rests on an error of law, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law." *North Spaulding Condominium Ass'n v. Cavanaugh*, 2017 IL App (1st) 160870, ¶ 46.

¶ 17 Here the trial court's interpretation of the doctrine of *res judicata* was the basis for its ruling denying appellant's petition. Application of *res judicata* concerns a question of law which we review *de novo*. *Lelis v. Board of Trustees of Cicero Police Pension Fund*, 2013 IL App (1st) 121985, ¶ 13. Therefore, we review *de novo* the trial court's application of *res judicata* as a bar to appellant's intervention, while we review for abuse of discretion the trial court's overall judgment to deny appellant's petition to intervene.

¶ 18 *Res Judicata* and Intervention

¶ 19 The doctrine of *res judicata*, also known as claim preclusion, is an equitable doctrine that prevents a party from filing the same claim against the same party after a prior adjudication on the merits. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996) ("For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies."). In the present case appellant filed a

claim against defendants in June 2015, over two years after her August 17, 2012 injury. The court dismissed appellant's case with prejudice for failure to file her claim within the statute of limitations and appellant did not appeal.

¶ 20 Appellant subsequently sought to intervene in plaintiff's subrogation suit against defendants based on the same cause of action (the August 17, 2012 workplace injury). The trial court found appellant already filed a claim over the same cause of action against defendants and the matter was adjudicated with a final judgment on the merits. The trial court denied appellant's petition for intervention based on a finding that application of the doctrine of *res judicata* barred appellant's intervention in her employer's subrogation suit. In reaching this ruling the trial court relied heavily on *Sankey Brothers, Inc.*, 152 Ill. App. 3d 393. *Sankey Brothers, Inc.* is instructive. However, *Sankey* does not control the outcome here because it is factually distinguishable.

¶ 21 In *Sankey*, the petitioner-intervenor, Osborne, was employed performing road work when he was hit by a truck. *Id.* at 394. Osborne was employed by a subcontractor hired by the general contractor, Sankey Brothers, Inc. Osborne filed a workers' compensation claim against his employer-subcontractor for the injury which occurred on October 20, 1981. On October 14, 1983, Sankey filed its own suit against the truck driver and the corporation which owned the truck because the employee had not filed his own suit against the defendants within three months from the expiration of the statute of limitations. Unlike this case, in *Sankey* the employer filed a complaint as its insurance company's subrogee seeking *only* indemnification for workers' compensation benefits it had to pay to Osborne. *Id.* at 395. On October 19, 1983, Osborne filed a suit, intending to sue the corporation which owned the truck, but he named the incorrect party. *Id.* at 394. On December 20, 1983, an Industrial Commission arbitrator entered on order finding Osborne completely disabled and ordered his employer subcontractor to pay him an amount per

week for life. That decision was under appeal pending the *Sankey* court's decision. *Id.* Osborne filed an amended complaint in September 1984 which named the correct corporation as defendant, but that action was dismissed in July 1985 because the defendant was not served with process within the relevant statute of limitations. *Id.* Osborne did not appeal. *Id.* at 394-95. In October 1985, Osborne filed a petition for leave to intervene in Sankey's suit to assert his rights under section 5(b) of the Act. *Id.* at 395. The trial court denied his petition and Osborne appealed, asserting he was a necessary party to the suit.

¶ 22 The appellate court affirmed, but not simply because Osborne had his individual suit dismissed and *res judicata* barred subsequent suit on his part. The issue was whether Osborne had an interest in his employer's subrogation suit. Thus, the court held that it must review the petition for intervention under the provisions for intervention in the Code of Civil Procedure: "The lack of any specific guidance in the Workers' Compensation Act or in the case law interpreting it, with respect to intervention under the facts of the present case, renders applicable the provisions of the Code of Civil Procedure relating to intervention." *Sankey Brothers Inc.*, 152 Ill. App. 3d at 397. The court held "Osborne was barred by both the applicable statute of limitation and the doctrine of *res judicata* from maintaining a personal injury action against defendants at the time that he sought to intervene in this cause." *Id.* at 398. The court determined Osborne did not have an interest in the suit because he had "no absolute right to intervene" by statute and because Osborne's tort claims would be "barred by the doctrine of *res judicata* and the relevant statute of limitation." *Id.* at 399. The primary concern of the court was the propriety of exposing the third party to the worker's common law injury claims, which were time-barred.

¶ 23 In this case, however, appellant's employer timely filed its suit seeking more than simply indemnification; the employer also sought damages for appellant's pain and suffering. In contrast

to *Sankey*, where the statute of limitations for the employee's damages for pain and suffering had expired, in this case the employer timely filed a complaint seeking damages for pain and suffering. Therefore, appellant has an interest in this lawsuit. 820 ILCS 305/5(b) (West 2016) ("the employer shall pay over to the injured employee *** all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid by under this Act"). See also *Bernardini v. Home & Automobile Insurance Co.*, 64 Ill. App. 2d 465, 467 (1965) ("in Illinois causes of action for personal torts are not assignable. *** Subrogation operates only to secure contribution and indemnity whereas an assignment transfers the whole claim. *** The subrogation does not deprive the insured of a recovery for pain and suffering."). Appellant's action was not assigned to plaintiff; plaintiff simply filed a subrogation suit and appellant is entitled to any damages exceeding indemnification. Further, plaintiff was not a party to appellant's untimely filed action. Because plaintiff was not a party to that action, *res judicata* cannot bar its claim here. See *Rein*, 172 Ill. 2d at 334-35 (for *res judicata* to apply to an action there must be an identity of parties). Certainly if plaintiff had been named a party to that action it would have asserted that it had a timely filed complaint for damages as subrogee that was already pending. We conclude appellant had an interest in this case, unlike the employee in *Sankey. Sankey Brothers Inc.*, 152 Ill. App. 3d at 399; see also *Bernardini*, 64 Ill. App. 2d at 467. Therefore, *Sankey* does not control the outcome of this case and we find *res judicata* does not bar appellant's intervention.

¶ 24 Whether appellant may intervene turns on the intervention provisions of the Code of Civil Procedure. While the Act makes an explicit provision for an employer to intervene in an employee's suit, the Act is silent as to the ability of the employee to intervene once the employer has filed a subrogation suit. Therefore, we conclude we must look to the Code of Civil Procedure

to determine whether intervention is warranted. The legislature implemented the Act

> "against the background of an existing legislative scheme that included section 1–108(b) of the Code of Civil Procedure [citation]. That statute expressly provides that where proceedings are governed by some other statute, the other statute controls to the extent it regulates procedure, but that article II of the Code, also known as the Civil Practice Law [citation], applies to matters of procedure not regulated by the other statute." *Madison Two Associates v. Pappas*, 227 Ill. 2d 474, 494 (2008).

The Act does not confer a statutory right to intervene upon an employee if the employer has filed against the third party as subrogee of the employee after the employee has failed to file suit within the three month window prior to the expiration of the statute of limitations. See 820 ILCS 305/5(b) (West 2016). Given the legislature failed to provide specific procedures for intervention in an employer's subrogation suit, section 2-408 of the Code of Civil Procedure governs whether an employee can intervene in an employer's subrogation suit. See *Madison Two Associates*, 227 Ill. 2d at 494-95 ("In light of this law, we must presume that when the General Assembly enacted the tax objection provisions of the Property Tax Code without including a particular provision addressed to intervention in circuit court, it intended the matter to be governed by the intervention provisions set forth in article II of the Code of Civil Procedure."). Section 2-408 establishes the requirements for intervention by right and permissive intervention:

> "Upon timely application anyone shall be permitted as of right to intervene in an action: *** when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2016).

> "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS 5/2-408(b) (West 2016).

¶ 25 Defendants argue *DeLuna v. Treister*, 185 Ill. 2d 565 (1999) controls the issue of whether appellant may intervene in the present suit. In *DeLuna*, the administrator of an estate filed a medical malpractice claim against the defendant doctor and hospital. *DeLuna*, 185 Ill. 2d at 568. The defendant moved for summary judgment and the plaintiff failed to attach an affidavit as required by section 2-622 of the Code. *Id.* at 569; see also 735 ILCS 5/2-622 (West 2016). The trial court dismissed the plaintiff's case with prejudice and the dismissal was upheld by our supreme court. *DeLuna*, 185 Ill. 2d at 569-70. After this dismissal, a new administrator to the estate refiled the medical malpractice claim against the hospital and doctor. The defendants both moved to dismiss this new claim, arguing application of the doctrine of *res judicata* barred the newly filed claim. The issue before our supreme court was whether the dismissal for failure to comply with section 2-622 served as a dismissal on the merits. *Id.* at 574. However, the issue of whether a party barred from filing its own claim could intervene in a previously timely filed subrogation suit was not before the *DeLuna* court. The issue before us here does not concern whether the earlier dismissal for failure to file within the statute of limitations was a dismissal on the merits, but whether the trial court abused its discretion in denying plaintiff's petition to intervene. Therefore, *DeLuna* does not control the outcome of this case.

¶ 26 Here appellant maintains she has a right to intervene in plaintiff's subrogation suit against defendants, relying on *Geneva Construction Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273 (1954) and *Echales v. Krasny*, 12 Ill. App. 3d 530 (1957). We find both cases inapposite. Both

cases involved versions of the Act found unconstitutional under Illinois' prior constitution. Neither case involved a petitioner who initially filed a claim past the statute of limitations, had that claim dismissed, failed to seek appeal, and then attempted to intervene in a timely filed subrogation suit.

¶ 27 In *Geneva Construction Co.* an employee of Geneva Construction Co. was injured in the course of his employment and was awarded compensation under the "Workmen's Compensation Act." *Geneva Construction Co.*, 4 Ill. 2d at 275; Ill. Rev. Stat. 1947, chap. 48, ¶ 166. Geneva Construction then sued the defendant third-party tortfeasor to recover the compensation it paid to the employee. While the suit was pending, the provision of the Workmen's Compensation Act that Geneva Construction brought suit under was declared unconstitutional by the Illinois Supreme Court in a separate case. See *Grasse v. Dealer's Transport Co.*, 412 Ill. 179 (1952). Then, the employee filed a petition for leave to intervene, which the trial court allowed. *Geneva Construction Co.*, 4 Ill. 2d at 276.

¶ 28 *Geneva* does not stand for the principle that an employee has a right to intervene in her employer's subrogation suit. The *Geneva* court addressed two issues: 1) Whether an employer could recover from a third-party tortfeasor compensation the employer paid an injured employee even when the provision of the Act the employer sued under was declared unconstitutional (*id.* at 276) ("In determining the propriety of the judgment of the Appellate Court we shall consider first whether plaintiff Geneva Construction Company could properly recover from defendant Martin Transfer and Storage Company the amount of workmen's compensation paid an employee as a result of defendant's negligence."); and 2) Whether an amended complaint filed by an employee-intervenor outside the statute of limitations related back to a timely filed subrogation suit of the employer. *Id.* at 286 ("We turn, then, to the second question - whether the

claim of plaintiff [employee], which was first asserted by an amendment to the complaint *** is barred by the Statute of Limitations."). The *Geneva* court concluded the amended complaint related back to the employer's timely filed complaint, consistent with the Civil Practice Act. *Id.* at 289. Whether the employee had a right to intervene was not before the *Geneva* court. The trial court in *Geneva* had already exercised its discretion to allow the employee to join in the suit. Our supreme court was not reviewing that exercise of discretion, instead it reviewed whether the amended complaint the petitioner-intervenor filed related back to his employer's timely filed subrogation suit.

¶ 29 Appellant's reliance on *Echales v. Krasny* is similarly misplaced. In *Echales*, an employee died from injuries sustained in the course of employment. In September 1950 the employer brought suit under the Workmen's Compensation Act against the third-party tortfeasors to recover compensation paid by him to the widow and minor children of his employee. *Id.* at 531. In 1952 the section of the Workmen's Compensation Act the plaintiff sued under was declared unconstitutional by our supreme court in *Grasse*, while the *Echales* litigation was pending. In 1954 the plaintiff-employer filed a motion to allow the administratrix of the employee's estate to intervene as an additional party plaintiff and to amend the original complaint. That motion was denied and the cause dismissed. *Id.* Just as in the *Geneva* case, the motion to intervene and amend the complaint in *Echales* was dismissed because the one-year statute of limitations for wrongful death had run. *Id.* at 534-35. The intervenor in *Echales* never filed a separate action that was dismissed prior to petitioning to intervene in the employer's suit. *Echales* itself noted the factual parallel between that case and the *Geneva* case.

> "We think the *Geneva* case is parallel factually with the instant case and is decisive of the right of plaintiffs to amend their complaint and for the

> administratrix to intervene. In the *Geneva* case the suit, as here, was brought under Section 29 of the Workmen's Compensation Act by the employer. After the decision in the *Grasse* case holding the first paragraph of Section 29 of the Workmen's Compensation Act unconstitutional, the plaintiff in the *Geneva* case sought leave to have the injured employee intervene against the third-party tortfeasor, the injury having occurred more than four years before the employee sought to intervene. The motion to intervene was opposed on the ground that the Statute of Limitations under the Injuries Act had run, and the employee's right was therefore barred." *Echales*, 12 Ill. App. 2d at 534.

The issue before the *Echales* court was whether application of the statute of limitations barred intervention and amendment of a timely filed complaint. The *Echales* court concluded that "justice requires that in the instant case the parties be permitted to amend their pleadings and the administratrix allowed to intervene, and it was error for the court to deny plaintiffs leave to file their tendered amended complaint." *Id.* at 535. The *Echales* court did not create an absolute right of intervention for an injured employee. Moreover, the present case is factually distinguishable. Here the issue is not the relation back of an amendment to a timely filed complaint, but whether appellant meets the statutory conditions for intervention.

¶ 30 Under the Code of Civil Procedure, the party seeking intervention

> "shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file. In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." 735 ILCS 5/2-408(d) (West 2016).

In ruling on a petition to intervene as of right, the "trial court's discretion is limited to determining timeliness, inadequacy of representation and sufficiency of interest; once these threshold requirements have been met, the plain meaning of the statute directs that the petition be granted." *City of Chicago v. John Hancock Mutual Life Insurance Co.*, 127 Ill. App. 3d 140, 144 (1984). We thus turn to the trial court's exercise of its discretion to deny appellant's petition to intervene. See *In re Bailey*, 2016 IL App (5th) 140586, ¶ 21 ("When a party petitions for intervention as of right, section 2-408(a)(2) limits the court's analysis to a determination of the timeliness of the application, whether there has been inadequacy of representation, and the sufficiency of the applicant's position in the proceedings. [Citation.] If these threshold requirements are met, then, under the plain meaning of the statute, the petition to intervene shall be granted.").

¶ 31 Failure to Apply Statutory Factors for Intervention

¶ 32 A party has a right to intervene upon a showing that "representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2016). When the court dismissed appellant's petition to intervene the court failed to determine whether appellant timely filed her petition, whether appellant's interests are being adequately represented by plaintiff, or whether appellant will be bound by the judgment. Appellant contends plaintiff cannot adequately represent her interests based on her argument that plaintiff has an incentive to settle for an amount less than or equal to what plaintiff paid to appellant in the workers' compensation claim. On appeal, plaintiff claims it will adequately represent appellant's interests because plaintiff may not be fully indemnified if it does not pursue maximum damages. Conversely, at a hearing on appellant's motion to disqualify plaintiff's counsel, appellant claimed plaintiff's counsel had a

conflict of interest because counsel represents plaintiff in the appeal of the workers' compensation claim and not her interest. Plaintiff's counsel refuted this claim by stating in open court he did not represent appellant, had never represented appellant, and only represented plaintiff in this case. This statement is incongruent with plaintiff's assertion that it has every incentive to pursue maximum damages. The trial court failed to make a finding as to whether appellant's interests are adequately protected by plaintiff.

¶ 33 The trial court abused its discretion because the court did not apply the applicable law – the intervention provisions of the Code of Civil Procedure. *Sankey Brothers, Inc.*, 152 Ill. App. 3d at 397; 735 ILCS 5/2-408 (West 2016). Application of the wrong legal standard is an abuse of discretion. *North Spaulding Condominium Ass'n*, 2017 IL App (1st) 160870, ¶ 46 ("If a trial court's decision rests on an error of law, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law."). Therefore, we reverse the trial court's ruling and remand for further proceedings consistent with this opinion. See *Madison Two Associates*, 227 Ill. 2d at 496 ("Because the circuit court ruled as a matter of law and did not reach the question of whether the requirements for intervention under section 2–408 of the Code of Civil Procedure [citation] would otherwise have been satisfied under the particular facts of these cases, the appellate court also acted properly when it remanded the causes to the circuit court for a hearing on the intervention petitions.").

¶ 34 We note plaintiff argued on appeal that if appellant was permitted to intervene, she should nonetheless not be allowed to control the litigation. In cases where a court exercises its discretion to grant a party's petition to intervene,

> "[a]n intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right,

> provide that the applicant shall be bound by orders or judgments, theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require." 735 ILCS 5/2-408(f) (West 2016).

Thus, if on remand the trial court determines the factors for intervention are met under the Code of Civil Procedure, the trial court has discretion to limit how the intervenor may participate in the litigation.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons the order of the circuit court of Cook County denying appellant's petition to intervene is reversed. Consequently, the circuit court's order dismissing the matter with prejudice is also reversed, and this cause is remanded for further proceedings consistent with this opinion.

¶ 37 Reversed and remanded.

DMS

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March 21, 2018

In re: A&R Janitorial, etc., et al., Appellees, v. Pepper Construction Co., Appellant. Appeal, Appellate Court, First District.
123220

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

TABLE OF CONTENTS TO RECORD ON APPEAL

VOLUME 1 OF 9

VOLUME 2 OF 9

VOLUME 3 OF 9

VOLUME 5 OF 9

VOLUME 6 OF 9

VOLUME 7 OF 9

VOLUME 8 OF 9

TABLE OF CONTENTS TO SUPPLEMENTAL RECORD ON APPEAL

038657AP/06014/JAT

No. 123220

IN THE SUPREME COURT OF ILLINOIS

A&R JANITORIAL, as subrogee of TERESA MROCZKO,

Plaintiff-Appellee,

vs.

PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC., CBRE, INC., AND BLUE CROSS AND BLUE SHIELD ASSOCIATION,

Defendants-Appellants.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT
CASE NO. 1-17-0385

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CASE NO. 14 L 8396

HON. WILLIAM E. GOMOLINSKI, JUDGE PRESIDING

NOTICE OF FILING AND PROOF OF SERVICE

To: See Attached Service List

PLEASE TAKE NOTICE THAT ON **April 25, 2018** the undersigned attorney caused to be electronically filed the **Brief and Appendix of Defendant-Appellant Pepper Construction Company** with the Clerk of the Illinois Supreme Court. The undersigned further certifies that on April 25, 2018 the parties listed above were served with a copy of this notice, Brief of Defendant-Appellant and Appendix at their respective email addresses by emailing the same. Under Penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: ***/s/Julie A. Teuscher***
One of the Attorneys for Defendant-Appellant, PEPPER CONSTRUCTION CO.

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038657AP/06014/JAT
A&R JANITORIAL, as subrogee of TERESA MROCZKO v. PEPPER CONSTRUCTION CO., et al.

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