No. 123220

In the Supreme Court of Illinois

A&R JANITORIAL, as subrogee of TERESA MROCZKO,

Plaintiff—Intervenor, 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 ILINOIS, FIRST JUDICIAL DISTRICT, NO. 1-17-0385

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

NO. 14 L 8396

HON. WILLIAM E. GOMOLINSKI, JUDGE PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT PEPPER CONSTRUCTION COMPANY

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Introduction

Mroczko is asking this Court to disregard bedrock principles essential to the effective administration of the judicial system – finality in judgments, the prohibition against repetitive litigation, the impropriety of reversing a circuit court's decision based on forfeited arguments, and the principle of party presentation which ensures that the litigants, and all levels of the court, have the opportunity to consider the parties' factual and legal arguments. And Mroczko requests all of this to benefit the party responsible for her inability to recover for her injuries – Mroczko. While Mroczko pursues a legal malpractice action against her initial counsel, arguing that her inability to recover for her personal injuries resulted from that counsel's failure to timely file her action[1], Mroczko stands in this Court, claiming that her inability to recover those damages results from the circuit court's inequitable application of the res judicata doctrine. But the circuit court adhered to res judicata precedent when it denied Mroczko's petition to intervene after her personal injury action was dismissed. The appellate court's decision, reversing the circuit court order, should be reversed, since the decision: disregarded res judicata precedent; was based on arguments never articulated by Mroczko in the circuit or appellate court; erroneously concluded that Mroczko had an interest in the subrogation action after her

[1] Mroczko v. Belcher Law Offices, 2017 L 000697, Circuit Court of Cook County. See, People v. Davis, 65 Ill. 2d 157165 (1976), (judicial notice may be taken of proceedings in other courts.) See also, Appendix to Pepper's opening brief, A-124, p. 16; A137-143.

rights were extinguished by the dismissal of her personal injury action; improperly considered events that occurred after the order denying Mroczko's petition was final and appealable; and improperly vacated the circuit court's order of September 22, 2017 while operating under the limited jurisdiction of a Supreme Court Rule 304(a) finding of January 31, 2017.

Unable to dispute that the elements of res judicata were satisfied, Mroczko raises new arguments, and complains that the circuit court's application of res judicata was inequitable.

In this Court, Mroczko no longer relies on the argument she employed in the circuit court to overcome the res judicata bar - that the circuit court's September 12, 2016 order dismissing Mroczko's personal injury action in 15 L 5957 was not an adjudication on the merits. (Vol. IX, 2027-2031) Nor does Mroczko challenge the remaining elements of res judicata – an identity of parties and an identity of cause of action. Since all three elements of res judicata were satisfied, the circuit court acted well within its discretion in denying Mroczko's petition to intervene in A&R's subrogation lawsuit, finding it was an attempt to file the same action against the same party two months after the dismissal of her personal injury action. Rein v. Noyes, 172 Ill. 2d 325, 334 (1996). Likewise, the circuit court's order denying Mroczko's petition to intervene fulfilled the objectives underpinning the doctrine of res judicata: to protect a defendant from the harassment and expense of re-litigating the same claim, and to promote judicial economy. Richter v. Prairie Farms Dairy, Inc., 2016 IL 119518, ¶ 21. Nothing in Mroczko's response brief

disputes that all three elements of res judicata have been satisfied, or that the circuit court's order fulfills the policy considerations behind the doctrine.

Unable to confront the res judicata bar head on, Mroczko attempts to misdirect this Court, raising new arguments she has never before asserted. Mroczko's new arguments are based on an essential false premise – that Pepper seeks to re-litigate A&R's right to recover Mroczko's non-economic damages in its subrogation action. (Mroczko's brf, pp. 9-10) Not so. Preliminarily, this argument makes no sense, since Pepper has settled with A&R in an amount that exceeds the compensation benefits that A&R has paid to Mroczko to date. A&R Janitorial v. Pepper Constr. Co., 2017 IL App (1st) 170385, ¶11. After the circuit court denied Mroczko's petition to intervene in the subrogation action, and after the circuit court made an express finding that the order was final and appealable, the circuit court rejected Pepper's argument that A&R Janitorial was barred from pursuing damages in excess of it subrogation lien, and Pepper settled with A&R, resulting in a dismissal of A&R's subrogation action. Id., ¶¶11-12. That battle is over. No party appealed the dismissal of the subrogation lawsuit on September 22, 2017 and that order is not at issue in this appeal, no matter how Mroczko tries to conflate the two separate claims.

Instead, Pepper seeks to prevent Mroczko from filing the same claim against Pepper a second time after Pepper obtained an adjudication on the merits in its favor in Mroczko's personal injury action. This Court's review of

the circuit court's order denying Mroczko's petition to intervene, under Supreme Court Rule 304(a) jurisdiction, does not, and cannot, involve A&R's subrogation action against Pepper. (See pp. 17-21 below.) This appeal involves the circuit court's order denying Mroczko's petition to intervene, an order which in no way limited A&R's recovery in its subrogation action. (Vol. IX, C 2034) And under well-settled res judicata precedent, the circuit court correctly determined that Mroczko's attempt to pursue Pepper a second time for the same claim through intervention into the subrogation action was barred by the previous dismissal of her personal injury action.

In an irony too bold to ignore, Mroczko then states that "res judicata absolutely bars Pepper and Perez from contesting [A&R's claim] in this Court." (Mroczko's brief, p. 9) But in this appeal, Pepper does not contest A&R's claim. Instead, Pepper contends that the dismissal of Mroczko's personal injury action barred Mroczko, not A&R, from pursuing Pepper a second time for the same claim.

In promotion of this non-issue, Mroczko then claims that Pepper has argued that "A&R is in privity with Teresa" to support its res judicata position. (Mroczko's Brf, p. 9) But this Court will find no such argument by Pepper. Pepper has never argued that Mroczko's claim is barred because Mroczko was in privity with A&R. Pepper's position has always been that Mroczko's petition was barred by res judicata because she was the same party pursuing the same claim that was previously adjudicated in favor of Pepper.

No privity argument was needed or offered.

Despite Pepper's settlement with A&R, Mroczko argues that "if the doctrine of res judicata is implemented as Pepper desires, then A&R would be barred from seeking moneys in excess of its subrogation lien." (Mroczko's response, p. 11) But Pepper's res judicata argument is directed toward Teresa Mroczko's attempted intervention after the dismissal of her personal injury action, and Pepper has not argued on appeal that A&R is barred from seeking moneys in excess of its subrogation lien.

Mroczko has adopted the appellate court's confusion between Mroczko's petition to intervene, and A&R's subrogation action. The appellate court incorrectly determined that the circuit court's order preventing Teresa Mroczko's intervention barred A&R's subrogation claim: "[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. But res judicata did not bar A&R's claim. A&R's subrogation action continued after Mroczko's petition was denied and Pepper settled with A&R for an amount in excess of the workers' compensation benefits A&R has paid to date in 12 WC 34686, Mroczko's workers' compensation action, which remains open.[2]

Pepper obtained a dismissal of Mroczko's personal injury action. (Vol. VIII, C1990) Pepper objected to Mroczko's subsequent attempt to intervene

[2] The electronic docket for the Illinois Workers' Compensation Commission reveals that case number 12 WC 34686 remains open, a fact about which this Court may take judicial notice. People v. Davis, 65 Ill. 2d 157 (1976).

in A&R's subrogation action more than four years after the occurrence, on both res judicata and statute of limitations bases. (Vol. VI, C1397-1406) The circuit court denied Mroczko's petition to intervene, recognizing that it was Mroczko's second attempt to sue Pepper for the same claim after an adjudication on the merits. (Vol. IX, C2034) The circuit court did not bar A&R's claim, and the appellate court erred in reversing the circuit court's order on this erroneous basis.

Recognizing that Pepper has satisfied the elements of res judicata, Mroczko then resorts to arguing that application of the doctrine would create an "inequitable and unjust result." (Mroczko's brf, p. 10) In other words, the party responsible for filing an untimely lawsuit argues that the reason she can no longer recover for her injuries is because she has been denied equity by the circuit court. But the position that Mroczko now finds herself in did not result from an inequitable manipulation of res judicata precedent. Mroczko's inability to intervene in the subrogation action resulted from her prior counsel's failure to timely file her personal injury lawsuit – an injury for which she has a remedy that her current counsel is pursuing.

And what about equity for Pepper, the party who: defeated Mroczko's untimely personal injury claim; defeated Mroczko's petition to intervene as the second attempt to pursue her untimely claim; responded to Mroczko's appeal; and has now had to seek review in this Court by filing a petition and two substantive briefs? Mroczko's failure to timely file her personal injury

action has cost Pepper thousands of dollars in legal fees. And Mroczko still has a remedy that she is pursuing. Equity does not lie on Mroczko's side.

Mroczko cites a host of cases which stand for the general proposition that res judicata is an equitable doctrine, but none involve a plaintiff who first filed an untimely action preventing her from later litigating her claim against the same defendant. Instead, Mroczko points to cases where the issue on appeal involved a res judicata element not in dispute here: whether two sequential lawsuits shared an identity of cause of action. (Kasny v. Coonen & Roth, Ltd., 395 Ill. App. 3d 870 (2d Dist. 2009); City of Chicago v. Midland Smelting Co., 385 Ill. App. 3d 945 (1st Dist. 2008); and Best Coin-Op, Inc., v. Paul F. Ilg Supply Co., 189 Ill. App. 3d 638 (1st Dist. 1989)). Another case on which Mroczko relies involved a living plaintiff who attempted to take advantage of a Dead Man's Act ruling in state court to prevent a defendant from defending itself in federal court. (Butler v. Stover Bros. Trucking Co., 546 F. 2d 544 (7th Cir. 1977)). None are helpful here.

And while Mroczko was never comfortable distinguishing Sankey Bros. factually in either the circuit or appellate court, Mroczko has now adopted the appellate court's attempt to establish some daylight between Sankey Bros. and this case. Mroczko embraces the appellate court's conclusion that the employer in Sankey Bros. "never sought to pursue moneys in excess of its lien" to manufacture a distinction with this case. (Mroczko's Brf. p. 10) But that so-called "distinction" is irrelevant to the res judicata analysis, and is

factually and legally incorrect.

First, the nature of the recovery sought by an employer in a 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. Once Mroczko's lawsuit was dismissed, Mroczko no longer had any protectable interest. See, Wood v. Wanecke, 89 Ill. App. 3d 445 (1st Dist. 1980) (A party has no enforceable interest once that party's rights have been time-barred.) Accordingly, Mroczko had no interest in the subrogation action, no matter what recovery A&R requested.

Second, at the time the circuit court rejected Mroczko's petition to intervene, A&R's subrogation complaint was identical to the subrogation complaint in Sankey Bros., seeking damages "for workers' compensation benefits that it had paid, and may have to pay in the future." (Vol. I, C 6, ¶ 13) That was the subrogation complaint on file when the circuit court rendered its decision. Third, the Workers' Compensation Act allows any employer to seek recovery of damages in excess of compensation benefits paid or to be paid to the employee against a third party for an injury to an employee, which must then be turned over to the injured employee. 820 ILCS 305/5(b). Thus, the employer in Sankey Bros. likewise always had the ability to pursue damages in excess of the compensation benefits paid to its employee. 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 following an unfavorable adjudication on the merits.

Contrary to the hollow distinction relied on by the appellate court, there exists no daylight between Mroczko's petition to intervene and the employee's petition to intervene in Sankey Bros. Sankey Bros., Inc. v. Guilliams, 152 Ill. App. 3d 393 (3d Dist. 1987). The court's determination in Sankey Bros. that the employee had no interest in the subrogation action was not based upon the nature of the recovery sought by the employer – it was based on the court's determination that the employee's action was time-barred. "Here, the result of the [subrogation] litigation 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. A&R's subrogation action affected no right of Mroczko for the same reason.

The Sankey Bros.' analysis was sound, and the decision fulfilled the policy goals behind the doctrine of res judicata – finality in litigation and judicial economy. Id. at 398. The Sankey Bros. court stated: "[the employee] had full opportunity to present in the Cook County action all of his claims pertaining to defendants' negligence; that he was unable to do so is attributable to the failure of [the employee] (or of the attorney who represented him in that action) to timely serve [the defendant] with process."

Id. The Sankey Bros. court refused to permit the employee "the back door when the front door [was] closed." Id. at 399. This Court should do likewise.

As this Court has stated, the res judicata doctrine "is founded on the premise that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits." Rein, 172 Ill. 2d 325, 340. A final judgment rendered on the merits "is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim ..." Torcasso v. Standard Outdoor Sales, 157 Ill. 2d 484, 490 (1993), emphasis added.

The appellate court found no element of res judicata lacking. Instead, the court concluded that, because A&R was not a party to Mroczko's personal injury action, res judicata could not bar A&R's claim here. A&R Janitorial v. Pepper Construction Co., 2017 IL App (1st) 170385, ¶ 23. But res judicata did not bar A&R's claim here. The circuit court denied Mroczko's petition to intervene – it in no way limited or barred A&R's subrogation claim. The appellate court's essential misunderstanding of the circuit court's order denying Mroczko's petition to intervene resulted in its misapplication of res judicata precedent.

The elements of res judicata were satisfied with respect to Teresa Mroczko's petition to intervene. The circuit court properly determined that Mroczko's petition to intervene in the subrogation action was a second attempt to sue the same defendant for the same cause of action in violation of

res judicata precedent and the principle of finality in judgments. Neither the appellate court, nor Teresa Mroczko, has established that Pepper failed to fulfill the elements of res judicata or that the circuit court's order did anything other than bar Mroczko's attempt to intervene in the subrogation action. The circuit court's order denying Mroczko's petition to intervene was correct under the law and fulfilled the policy considerations underpinning the doctrine of res judicata. This Court should reverse the appellate court's decision, and affirm the decision of the circuit court.

Mroczko's ability to intervene in the subrogation action cannot be divorced from the res judicata analysis.

Mroczko, and the appellate court, act as if the earlier dismissal of Mroczko's personal injury action had never occurred. Mroczko asks this Court to evaluate her rights under the intervention statute - a request she never made in the circuit or appellate courts - with total disregard for the res judicata elephant in the room. But Mroczko cannot pretend that the dismissal never occurred or that res judicata precedent does not control. The appellate court's failure to consider the impact the prior dismissal had on Mroczko's ability to intervene was captured in its declaration that "[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, but whether the trial court abused its discretion in denying plaintiff's petition to intervene." Id. at ¶25. But the trial court's denial of Mroczko's petition to intervene was based upon the earlier dismissal of Mroczko's personal injury

action on the merits, warranting the application of res judicata. The trial court's ruling on Mroczko's petition to intervene cannot be divorced from the fact that Mroczko's personal injury action was dismissed on the merits prior to her attempt to intervene.

Mroczko may have had the right to timely intervene if she had never filed an untimely personal injury action, so long as she fulfilled the requirements of the intervention statute. The fact that Mroczko may have had that right under different circumstances did not permit the court to disregard the circumstances under which she attempted to intervene here. The appellate court's determination that the circuit court improperly failed to consider Mroczko's rights to intervene under the intervention statute misses the defining point – that any rights Mroczko may have had to intervene were barred by the prior dismissal of her personal injury action. The appellate court reasoned as if the dismissal of Mroczko's untimely personal injury action had never occurred. The appellate court improperly disregarded that essential fact and assessed Mroczko's right to intervene on a forfeited argument involving the interpretation of the intervention statute without regard for the earlier dismissal of her personal injury claim. That was error.

Pepper's concern that the appellate court disregarded the important principles of forfeiture and party presentation is not "hysteria and hyperbola."

The only order at issue in this Rule 304(a) appeal is the circuit court's order of December 20, 2016, denying Mroczko's petition to intervene. (Vol.

IX, C 2034) In the circuit court, Mroczko responded to Pepper's objection to her intervention with the sole argument that the order dismissing her personal injury action on September 12, 2016 was not an adjudication on the merits. (Vol. IX, C 2029) 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, C 2030) Mroczko did not attempt to distinguish Sankey Bros. and contested no other element of res judicata. (Vol. IX, C 2027-2031) Likewise, in her opening appellate brief, Mroczko described the "present issue" on appeal 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." (Apx. to Pepper's opening brief, A-20) Mroczko again conceded that if the appellate court were to determine that the order in 15 L 5957 was an adjudication on the merits, "it would bar the present action ..." (Apx. to opening brief, A-22) Pepper agrees.

Mroczko should have been limited to that argument in the appellate court. "It has frequently been held that the theory upon which a case is tried in the lower court cannot be changed on review, and that an issue not presented to or considered by the trial court cannot be raised for the first time on review." Daniels v. Anderson, 162 Ill. 2d 47, 58 (1994), quoting Kravis v. Smith Marine, Inc. 60 Ill. 2d 141, 147 (1975). The "adjudication on the merits" argument was the only argument the circuit court was asked to

consider in support of Mroczko's petition to intervene. It was the only argument advanced by Mroczko in her opening appellate brief. If forfeiture constitutes one of the two most important determinations to be made by a reviewing court, then a reviewing court should not permit an appellee in the appellate court to assert new arguments for the first time in her reply brief. S. Ct. R. 341(h)(7); See also, People v. Smith, 228 Ill. 2d 95, 106 (2008). The appellate court cast aside any concerns for this principle, crucial to the effective and efficient administration of the judicial system, and found that the circuit court abused its discretion by failing to consider arguments that Mroczko never asked it to consider.

Mroczko argues that her failure to ask the circuit court to consider the provisions of the intervention statute on which the appellate court relied has not been detrimental to Pepper's rights because "the Appellate Court remanded the matter for consideration whether intervention should be allowed" and Pepper can "offer objections to the circuit court on remand." (Mroczko's brief, p. 15.) But that misses the point. The circuit court, Pepper, and likely the appellate court, should not have to litigate Mroczko's petition to intervene a second time because Mroczko failed to raise the intervention statute the first time. Remand, with instructions to the circuit court to analyze the applicability of the intervention statute, means that Pepper and the circuit court have to do all over again what could, and should, have been done the first time. And for whose benefit: the party who failed to make the

argument. That is why forfeiture matters.

Moreover, the appellate court's reliance on unbriefed arguments to reverse the circuit court's order was a violation of the principle of party presentation. A reviewing court's "search of the record for unargued and unbriefed reasons to reverse a lower court's decision is improper." People v. Givens, 237 Ill. 2d 311, 323 (2010), emphasis added. That is not Pepper's hyperbola- that is language adopted by this Court. And that is precisely what occurred here. The appellate court reversed the circuit court's order by finding that the circuit court abused its discretion by failing to apply the statutory factors of the intervention statute, and by finding that Mroczko had an interest in the subrogation suit lacking in Sankey Bros. A&R Janitorial, ¶¶ 23, 33. Mroczko never argued either point in the circuit court or on appeal. Mroczko never asked the circuit or appellate court to analyze her right of intervention under 735 ILCS 5/2-408, or to consider the statutory factors under that statute. She never mentioned the statute. Mroczko never suggested to the circuit or appellate court that she had an interest in the subrogation lawsuit distinct from the employee's interest in Sankey Bros., likely because the two subrogation actions were identical at the time the circuit court denied Mroczko's petition to intervene and because she recognized that she had no interest in the subrogation lawsuit once her personal injury action was dismissed. Mroczko's sole argument was that res judicata should not bar her petition to intervene and amend the complaint to

include the claim which had previously been dismissed by the circuit court, because she considered that dismissal order less than an adjudication on the merits. The appellate court determined that the circuit court abused its discretion by failing to consider legal arguments it was never asked to consider, and by failing to consider events that had not yet occurred.

And what is the result? The appellate court has remanded the case to the circuit court to now consider the arguments that Mroczko could have made in the circuit court but did not. The only culpable party in this procedural mess is the sole beneficiary of the appellate court's decision. If the appellate court's decision stands, the circuit court has to consider Mroczko's personal injury claim for a third time. Pepper has to defend Mroczko's claim for a third time. The previous proceedings in the circuit court relative to Mroczko's petition to intervene are rendered meaningless, prejudicing everyone except Mroczko, including the circuit court, the appellate court, and this Court. If the appellate court is affirmed, the only circuit court claim will be Mroczko's personal injury lawsuit against Pepper – no claims as between A&R, Pepper, or any other party still exist. So Pepper will find itself defending a lawsuit that was previously dismissed on the merits, with no appeal taken. And unlike Mroczko, Pepper has no workers' compensation claim, or legal malpractice claim, on which to rely to mitigate its damages. Considerations of judicial economy and simple justice for a litigant require a finding of forfeiture here.

And finally, the forfeited arguments were not likely an error of omission by Mroczko's current competent counsel. Instead, Mroczko's current counsel likely recognized that her intervention in the subrogation case depended on Mroczko's ability to overcome the res judicata argument. If res judicata barred Mroczko's attempt to resurrect her claim for personal injuries in A&R's subrogation suit, then the provisions of the intervention statute could not save her. Mroczko no longer had a protectable interest. The doctrine of res judicata was designed to prevent exactly what occurred here – Mroczko's attempt to re-litigate a matter that had already been adjudicated on the merits.

The doctrines of forfeiture and party presentation do not elevate procedure over substance as Mroczko contends. Instead, they ensure that the parties have an opportunity to provide the courts with a thorough discussion of the issues presented, that the courts have an opportunity to consider the same to minimize the risk of a decision that misapprehends the facts or the law, and that both the parties and the courts have to do so only once. It is not the job of the reviewing courts to ferret out unarticulated and unbriefed reasons to reverse the decision of a circuit court. The dangers of doing so are exposed in this appeal. Any challenge to the circuit court's order other than a challenge to the "adjudication on the merits" element of res judicata was forfeited by Mroczko. And on that argument, Pepper prevails. Rein v. Noyes, 172 Ill. 2d 325, 336 (1996).

Mroczko's notice of appeal, filed on February 14, 2017, did not vest the appellate court with jurisdiction to disturb the September 22, 2017 order dismissing A&R's subrogation action.

The circuit court's January 31, 2017 order, expressly finding that there was no just reason to delay the enforcement or appeal of the court's December 20, 2016 order, rendered the December 20 order final and appealable. (C 2041) Ill. S. Ct. R. 304(a). No objection was lodged to Pepper's request for a Rule 304(a) finding. Mroczko filed her Notice of Appeal on February 14, 2017. (Apx., A3-4) In an appeal pursuant to Supreme Court Rule 304(a), the reviewing court "can consider only questions existing when [a litigant] filed his notice of appeal." North Community Bank v. 17011 South Park Ave., LLC, 2015 IL App (1st) 133672, ¶ 29. Once a notice of appeal is filed, the reviewing courts "have no jurisdiction to consider the validity of the subsequent proceedings ..." Id. The purpose behind Supreme Court Rule 304(a) is to "provide a predictable guide for determining when an order of the trial court is final and appealable." Chicago, MSP &P R Company v. Harris Trust & Savings Bank, 63 Ill. App. 3d 1012, 1018 (1st Dist. 1978).

The appellate court's decision runs afoul of this rule of finality. First, the appellate court reversed the circuit court's order of September 22, 2017 dismissing A&R's subrogation action against Pepper even though no appeal was taken from that order. A&R Janitorial, ¶¶11, 36. The appellate court was operating under the limited jurisdiction conferred by Supreme Court

Rule 304(a) concerning the December 20, 2016 order denying Mroczko's petition. Mroczko's Notice of Appeal so stated. (Apx., A3-4) And no appeal was taken from the September 22, 2017 order. The scope of the appeal, therefore, was limited to the December 20, 2016 order, and the appellate court lacked jurisdiction to disturb the September 22, 2017 order. North Community Bank, 2015 IL App (1st) 133672, ¶27. Minimally, this court should reverse the appellate court's order vacating the September 22, 2017 order on jurisdictional grounds.

Next, the appellate court relied on events that occurred during the remainder of the litigation, after the circuit court's ruling, and after the Supreme Court Rule 304(a) finding, to support its conclusion that the circuit court abused its discretion in denying Mroczko's petition to intervene. At stake here is the principle of finality, critical not only for litigants, but also for the effective administration of the judicial system. The appellate court relied on a July 26, 2017 order, which permitted A&R Janitorial to pursue Mroczko's non-economic damages, to find that the circuit court abused its discretion in denying Mroczko's petition to intervene seven months earlier. A&R Janitorial, ¶10. The appellate court then used that July 26, 2017 order to find that Mroczko "had an interest" in A&R's subrogation action, and that the circuit court failed to consider this, even though it had not yet occurred. A&R Janitorial, ¶23. The court offered no legal authority permitting it to consider post-ruling events to evaluate the discretion of a circuit court ruling,

but suggested it could do so by taking judicial notice of court documents. Id., ¶14. But the court did not merely take judicial notice of court documents; it used the documents to accuse the circuit court of abusing its discretion by failing to consider events that had not yet occurred. Beyond the impropriety of evaluating the circuit court's decision by considering events about which the circuit court could not know, the appellate court's reasoning here was faulty for several reasons.

Once Mroczko's personal injury action was dismissed as untimely, she no longer had a protectable interest in recovering her non-economic damages. Sankey Bros., 152 Ill. App. 3d 393, 399. No matter what A&R's subrogation complaint requested, any interest that Mroczko had in pursuing her claim for non-economic damages was extinguished when her personal injury action was dismissed as untimely. Second, at the time the circuit court denied Mroczko's petition to intervene on December 20, 2016, A&R's subrogation complaint requested only reimbursement for workers' compensation benefits paid and to be paid in the future. (Vol. I, C6, ¶ 13) Mroczko's workers' compensation case remains pending today, and the amount of compensation benefits which A&R Janitorial will ultimately pay to Mroczko is uncertain, and may include permanent and total disability benefits. The settlement funds that A&R received in it subrogation action, therefore, may ultimately prove to be insufficient to cover the compensation benefits that A&R will have to pay to Mroczko. The appellate court's declaration that Mroczko had

an interest in A&R's subrogation action, was, therefore, inaccurate both factually and legally. Even if the post-ruling events could properly be considered, nothing about those events affected the legitimacy of the circuit court's determination that Mroczko's petition to intervene was an improper attempt to sue the same defendant for the same claim twice.

Mroczko's essential argument on this point must be that the order denying her petition did not constitute a final judgment, even after the 304(a) finding and her notice of appeal, such that it could be revisited at any time throughout the remainder of the subrogation litigation. That conflicts with both the language and purpose of Supreme Court Rule 304(a), to provide finality to such judgments. If this Court condones the appellate court's reliance on post-ruling events to disturb the circuit court's decision, then a final judgment as to fewer than all parties with an express finding pursuant to Supreme Court Rule 304(a) would remain open to attack throughout the remainder of ongoing litigation, rendering the rule meaningless. The appellate court's analysis should have been confined to the information available to the circuit court at the time of its decision. The appellate court's jurisdiction did not include a review of the September 22, 2017 order dismissing A&R's subrogation complaint pursuant to settlement. The appellate court's failure to so restrict its review violated the principle of finality, Supreme Court Rule 304(a), and Supreme Court Rule 303. This Court should reverse.

CONCLUSION

Mroczko's overarching argument is that she has been aggrieved as the result of the inequitable application of res judicata. But Mroczko's inability to pursue her personal injury claim did not result from an inequitable application of res judicata. Mroczko's inability to pursue her claim resulted from her prior counsel's failure to timely file her personal injury action. Mroczko agrees with that assessment, and is pursuing a legal malpractice action because of it. A defendant should not have to defend the same claim against the same party a second time simply because the plaintiff's former counsel failed to timely file the initial action. Likewise, the circuit court should not have to adjudicate a plaintiff's claim more than once. Yet that is exactly what Mroczko is asking this Court to allow. The circuit court's order denying Mroczko's petition to intervene was properly based on the law of res judicata. The appellate court's decision, reversing the circuit court's order, ignored res judicata precedent, violated the principles of forfeiture and party presentation, improperly relied upon post-ruling events to attack a final judgment, and improperly vacated an order over which it had no jurisdiction. This Court should reverse the appellate court's decision, and affirm the circuit court's order.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: **/s/Julie A. Teuscher**
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RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this REPLY 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 5,610 words.

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8911747 JTEUSCHE;BWEEKS

038657AP/06014/JAT

No. 123220

IN THE SUPREME COURT OF ILLINOIS

A&R JANITORIAL, as subrogee of TERESA MROCZKO,

Plaintiff-Intervenor-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 **August 13, 2018**, the undersigned attorney caused to be electronically filed **Defendant-Appellant Pepper Construction Company's Reply Brief**, with the Clerk of the Illinois Supreme Court. The undersigned further certifies that on August 13, 2018, the parties listed above were served with a copy of this notice and Reply Brief 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,

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