No. 124565

In the

Supreme Court of Illinois

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS,

Plaintiffs-Appellees,

v.

ILLINOIS UNION INSURANCE COMPANY and
STARR INDEMNITY & LIABILITY COMPANY,

Defendants-Appellants.

On Appeal from the Illinois Appellate Court, First Judicial District,
Second Division, No. 1-18-0158.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 16 CH 02605.
The Honorable **Celia Gamrath**, Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT ILLINOIS UNION INSURANCE COMPANY

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POINTS AND AUTHORITIES

ARGUMENT

I. This Court Should Reverse the Appellate Court's Decision and Affirm the Circuit Court's Judgment Because No "Offense" of "Malicious Prosecution" Took Place "During" Any Illinois Union Policy Period.

Sanders and the City argue that the "offense" of "malicious prosecution" in this case did not occur in 1994, when City police officers framed Sanders and caused false criminal charges to be filed against him, but in 2014, when Sanders was acquitted. For the most part, Sanders and the City rely on the same flawed reasoning employed by the appellate court majority below to support their argument.

As Illinois Union explained in greater detail in its opening brief, the conclusion that the "offense" of "malicious prosecution" does not occur until exoneration is incorrect for numerous reasons, including the following: First, it "distort[s] the common, popular meaning of what is meant by an 'offense.'" *First Mercury Insurance Co. v. Ciolino,* 2018 IL App (1st) 171532, ¶ 32. Second, it improperly "limit[s] the meaning of 'offense' by requiring the completion of tort law elements." *Id.* ¶ 31. Third, it is inconsistent with the intended operation of an occurrence-based policy, which, "containing multiple references to coverage for *** offenses happening during the policy period, reflects the intent to insure only for the insured's acts or omissions that happen during a policy period." *Indian Harbor Insurance Co. v. City of Waukegan,* 2015 IL App (2d) 140293, ¶ 32 (*Indian Harbor*). Fourth, it would result in unwise policy implications, such as "invit[ing] insurers to selectively decline to write or renew insurance once the insured's potential liability for malicious prosecution [is] raised but before the right to sue *** accrue[s]." *Sanders v. Illinois Union Insurance Co.*, 2019 IL App (1st) 180158, ¶ 48 (Mason, J., dissenting). (See Illinois Union Br. at 11-29.)

Alternatively, Sanders and the City argue that a separate "offense" of "malicious prosecution" occurred each time Sanders was tried on the 1994 criminal charges, including the retrials that occurred in 2013 and 2014. Those retrials were not separate "offenses" of "malicious prosecution" because Sanders was retried on the same false charges that were filed against him in 1994. Indeed, the docket number of the criminal case never changed from 1994 until the prosecution concluded. (R. V6, C2623-59.) Accordingly, there was a single prosecution and only one corresponding "offense" of "malicious prosecution," which occurred upon commencement of the prosecution. *St. Paul Fire & Marine Insurance Co. v. City of Waukegan*, 2017 IL App (2d) 160381, ¶ 36 (*City of Waukegan*). (See Illinois Union Br. at 29-31.)

Rather than rehashing these arguments in detail, Illinois Union submits this reply to make the following four points: *First,* Illinois Union's proposed trigger (the initiation of the criminal prosecution) is clear, consistent, and does not (as Sanders contends) permit an insurer to "pick and choose" different elements of the tort to trigger coverage. *Second*, the plain, ordinary, and popular meaning of the term "malicious prosecution" supports the conclusion that the "offense" of "malicious prosecution" occurs upon initiation of the malicious prosecution. *Third*, the fact that a malicious prosecution action can be based on the insured tortfeasor's "continuation" of criminal proceedings after probable cause ceases to exist does not support an exoneration trigger or multiple triggers. *Fourth*, the case law cited by Sanders and the City to support an exoneration trigger or multiple triggers is inapposite and unpersuasive.

Each point is discussed in greater detail below.

A. Illinois Union's Proposed Trigger (the Initiation of the Malicious Prosecution) Is Clear, Consistent, and Does Not (as Sanders Contends) Permit an Insurer to "Pick and Choose" Different Elements of the Tort to Trigger Coverage.

Sanders attempts to create ambiguity in Illinois Union's interpretation of the policy by contending that Illinois Union's position is "contradictory" and creates a "free-for-all" that allows an insurer to "pick and choose" the trigger date that suits its interest. (Sanders Br. at 2, 10.) None of that is true. Illinois Union's proposed trigger is clear, consistent, and appropriately allows for only a single trigger of coverage for the "offense" of "malicious prosecution."

First, Sanders mischaracterizes Illinois Union's position when he accuses Illinois Union of advocating three different triggers: (1) the police officer's underlying investigative misconduct, e.g., fabrication of evidence; (2) the commencement of a false criminal proceeding based on that misconduct; and (3) the resulting injury suffered by the claimant. To the contrary, Illinois Union proposes a single trigger: the date upon which the insured causes a criminal prosecution to be commenced against the claimant with malice and without probable cause.

That trigger follows from the policy's plain terms. "Offense" refers to "a wrongful act or conduct committed during the policy period." *First Mercury*, 2018 IL App (1st) 171532, ¶ 30. "'Malicious prosecution' is the *bringing* of a suit known to be groundless." (Emphasis added.) *Spiegel v. Zurich Insurance Co.*, 293 Ill. App. 3d 129, 134 (1997). It follows that the "offense" of "malicious prosecution" consists of the insured's wrongful act in commencing an improper court proceeding. That is the event that triggers coverage for the "offense" of "malicious prosecution" under an occurrence-based liability insurance policy.

Sanders attempts to confuse the issue by pointing out that, in a criminal proceeding, the prosecution is typically handled by a state prosecutor, rather than a police officer. Thus, according to Sanders, the wrongful act committed by the police officer is not the commencement of the prosecution but rather the underlying investigatory misconduct, such as the fabrication of evidence upon which the criminal charges are based. Sanders then argues that there may be a time gap between the police officer's investigatory misconduct and the commencement of the criminal prosecution, which, according to Sanders, renders it inappropriate to interpret the term "offense" to mean the wrongful act. (Sanders Br. at 2.)

Sanders's argument reflects a misunderstanding of the "offense" that gives rise to a malicious prosecution claim. A police officer's investigatory misconduct does not, standing alone, constitute an "offense" of "malicious prosecution." Rather, the "offense" of "malicious prosecution" occurs only if the police officer "causes" a wrongful criminal prosecution to occur. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 41. Thus, it is the commencement of the malicious criminal prosecution that constitutes the "offense" of "malicious prosecution" and therefore triggers coverage, not the underlying investigative misconduct upon which the prosecution is based. The commencement of the malicious criminal prosecution provides a clear, unambiguous, and readily apparent trigger date for coverage that is consistent with the policies' plain terms.

Relatedly, Sanders contends that the commencement of the criminal action cannot constitute the "offense" of "malicious prosecution," at least with respect to city police officers, because a state prosecutor makes the ultimate charging decision and "any definition of 'offense' that is tied to a non-tortfeasor's conduct is untenable." (Sanders Br.

at 21.) Sanders's argument misses the mark. As stated above, to be held liable for malicious prosecution, the city police officer must have "caused" the prosecution, which means that the city police officer is, in fact, responsible for the commencement of the criminal prosecution, even if the charges are formally filed by a prosecuting attorney. Moreover, Sanders's position that the "offense" must be "tied to" the police officer's conduct obviously undermines his argument that the "offense" occurs upon exoneration, over which the police officer asserts no control. *Town of Newfane v. General Star National Insurance Co.*, 784 N.Y.S.2d 787, 793 (App. Div. 2004) ("[I]n most criminal matters, the original criminal complainant quickly loses control of the prosecution to the pertinent prosecutorial authorities, meaning that the fact of termination is likewise generally outside the control of the insured. Those facts render it inappropriate in our view to equate the termination with the *** 'offense' triggering insurance coverage").

With respect to Sanders's contention that Illinois Union has advocated an "injury" trigger, Sanders cites various portions of Illinois Union's brief where Illinois Union points out that, in the context of malicious prosecution, the commencement of the malicious action and the resulting injury occur simultaneously. This is not (or, at least, should not be) a controversial point, nor does it reflect any inconsistency in Illinois Union's position. Rather, courts have repeatedly recognized that "a maliciously prosecuted criminal defendant suffers injury and damage immediately upon being prosecuted." *St. Paul Fire & Marine Insurance Co. v. City of Zion*, 2014 IL App (2d) 131312, ¶ 26 (*City of Zion*) (citing cases).

For the same reason, there is no inconsistency between Illinois Union's and Starr's positions. Starr's point, as Illinois Union understands it, is simply that the policies reflect

an intent to require that both the wrongful act (the "**Occurrence**") and the injury ("**Personal Injury**") occur during the policy period. The policies then define "**Occurrence**" and "**Personal Injury**" as the "offense" of "malicious prosecution" in recognition of the fact that, when a malicious action is commenced, the wrongful act and injury occur simultaneously. Based on that fact, there is no need for the policy to use different terms to define "**Occurrence**" and "**Personal Injury**" to effectuate the policy's intent. Rather, the "offense" of "malicious prosecution" (the filing of false charges) encompasses both the wrongful act and the injury.

Illinois Union does not disagree with Starr. At the same time, the Court does not have to go that far to determine that Sanders's malicious prosecution claim against the City is not covered. Rather, it is sufficient for the Court to conclude, consistent with the appellate court's decision in *First Mercury*, that the word "offense" refers to the insured's wrongful act in commencing a criminal action maliciously and without probable cause. 2018 IL App (1st) 171532, ¶¶ 30-35. The more important point is that, given this policy structure, it would be unreasonable to interpret "**Occurrence**" and "**Personal Injury**" (both defined as the "offense" of "malicious prosecution") to refer to neither the wrongful act nor the resulting injury but rather Sanders's subsequent exoneration.

Finally, as the above discussion illustrates, Illinois Union's interpretation does not result in a "free-for-all" or permit an insurer to "pick and choose" the trigger of coverage that suits its interest in any particular case. Rather, when a policy covers an "offense" of "malicious prosecution" happening "during" the policy period, the insurer must respond to the claim if the underlying wrongful action was commenced while the insurer's policy was in effect. If the action was not commenced during the policy period, then no coverage

exists. This provides a clear, consistent, and unambiguous trigger date for insureds and their insurers to determine which carriers must respond to a given claim when the policies define coverage in terms of the "offense" of malicious prosecution.[1]

B. The Plain, Ordinary, and Popular Meaning of the Term "Malicious Prosecution" Supports the Conclusion That the "Offense" of "Malicious Prosecution" Occurs Upon the Initiation of the Malicious Action.

Second, Sanders and the City argue that the policies' use of the term "malicious prosecution" supports the conclusion that the "offense" of "malicious prosecution" occurs upon exoneration, rather than initiation of the malicious action, because "malicious prosecution" is a "tort" and favorable termination is an element of the tort. (Sanders Br. at 14-15; City Br. at 16-17.) Relatedly, Sanders argues that there is "no principled way to pick and choose amongst the elements of this tort such that some of them constitute the 'gist' or 'essence' of the tort," and that focusing on the "gist or essence" of the tort as the insured's wrongful act renders the policies' terms redundant because the same wrongful act may satisfy elements of other covered torts, such as false arrest, false imprisonment, or wrongful detention. (Sanders Br. at 14-16.)

None of these arguments has merit. To the contrary, the common understanding of the term "malicious prosecution" supports the conclusion that the "offense" of "malicious prosecution" occurs when the malicious action is initiated, not when it is terminated.

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[1] Notably, contrary to Sanders's assertion, Illinois Union is not advocating a "blanket rule" that would apply to all liability insurance policies, regardless of the language used. The parties can negotiate a different trigger of coverage. That said, coverage for the "offense" of "malicious prosecution" is a standard term in many commercial general liability insurance policies. See M. Jane Goode, 1 Law & Practice of Insurance Coverage Litigation § 6:26 (June 2019 update). Accordingly, it is particularly appropriate for the Court to consider the wider implications of its interpretation of the instant policies' terms.

As a threshold matter, Illinois Union agrees that "malicious prosecution" is a "tort" and thus coverage applies only to the tort cause of action for malicious prosecution. See, e.g., *Spiegel*, 293 Ill. App. 3d at 132 (concluding that coverage for "malicious prosecution" does not include sanctions imposed by a court for frivolous litigation). That does not, however, answer the question of when the "offense" of "malicious prosecution" occurs for purposes of triggering coverage under an occurrence-based liability insurance policy. See *Town of Newfane*, 784 N.Y.S.2d at 792 (concluding that date cause of action ripened does not "determine[] the issue at hand" because "the policy speaks not of the date upon which an action could have been brought *** but of when the 'offense [was] committed").

Rather, to answer that question, the Court must construe the policies "as a whole" and "'take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract.'" *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292 (2001) (quoting *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)). The Court must also afford the policies' terms their "plain, ordinary, and popular meaning." (Emphasis omitted.) *Id.* (quoting *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992)).

Toward that end, Sanders and the City cite the Merriam-Webster Online Dictionary and Black's Law Dictionary, which refer to "malicious prosecution" as a "tort," but Sanders and the City omit the portions of the definitions that undermine their arguments. (Sanders Br. at 15; City Br. at 17.) In particular, the Merriam-Webster Online Dictionary defines "malicious prosecution" as "the tort of *initiating* a criminal prosecution or civil suit against another party with malice and without probable cause." (Emphasis added.) *Malicious Prosecution*, Merriam-Webster Online Dictionary, https://www.merriam-

webster.com/legal/malicious%20prosecution (visited August 5, 2019). Black's Law Dictionary similarly defines "malicious prosecution" as "[t]he *institution* of a criminal or civil proceeding for an improper purpose and without probable cause." (Emphasis added.) *Malicious Prosecution*, Black's Law Dictionary (11th ed. 2019). And both definitions are consistent with the Illinois Appellate Court's description of "malicious prosecution" in *Spiegel* as "the *bringing* of a suit known to be groundless." (Emphasis added.) 293 Ill. App. 3d at 134.

These authorities show that the term "malicious prosecution" is generally understood to mean a tort occasioned by the institution of a legal proceeding with malice and without probable cause. To be sure, the law prescribes certain elements that must be established before a tort claimant can pursue a cause of action for an earlier malicious prosecution, including favorable termination, but "the 'essence' of the tort of malicious prosecution is the wrongful conduct in making the criminal charge." *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 23 (citing *Muller Fuel Oil Co. v. Insurance Co. of North America*, 95 N.J. Super. 564, 577 (App. Div. 1967)). See also *Mitchinson v. Cross*, 58 Ill. 366 (1871) ("The gist of the action for malicious prosecution is, that the prosecutor acted without probable cause."). Accordingly, the common understanding of "malicious prosecution" supports the conclusion that the "offense" of "malicious prosecution" occurs when the action is commenced.

Moreover, interpreting "malicious prosecution" in this manner does not render the policy's coverage for other torts, such as false arrest or imprisonment, redundant. Malicious prosecution and false imprisonment are different torts that involve different wrongful acts. As stated above, malicious prosecution involves "the bringing of a suit known to be

groundless," *Spiegel*, 293 Ill. App. 3d at 134, and the "offense" occurs when the action is initiated. False imprisonment, on the other hand, involves the act of unlawfully restraining a person against his or her will, *Dutton v. Roo-Mac, Inc.*, 100 Ill. App. 3d 116, 119 (1981), and the "offense" occurs when the arrest is made. Of course, malicious prosecution and false imprisonment may sometimes arise out of the same underlying police misconduct but they still involve discrete acts (one involves the initiation of a criminal prosecution, the other an arrest). It nevertheless makes sense that, since the false arrest and malicious prosecution may occur at the same time and involve the same underlying police misconduct, the same policies will respond to both claims. See *Town of Newfane*, 784 N.Y.S.2d at 794 (observing that an exoneration trigger for the "offense" of "malicious prosecution" would "make no sense" because it would mean that different insurers would be called upon to defend the insured against false arrest and malicious prosecution claims arising out of the same underlying police misconduct committed by the same officials).

C. The Fact That a Malicious Prosecution Claim Can Be Based on the Insured Tortfeasor's "Continuation" of Criminal Proceedings After Probable Cause Ceases to Exist Does Not Support an Exoneration Trigger or Multiple Triggers.

Third, Sanders's and the City's arguments that an exoneration trigger or multiple triggers should be used because a malicious prosecution claim can be based on an insured tortfeasor's "continuation" of criminal proceedings similarly lacks merit. (Sanders Br. at 12, 25; City Br. at 44.) To be sure, Illinois Union agrees an insured tortfeasor can be held liable for malicious prosecution if he or she has probable cause when the action is initiated but, during the course of the proceedings, probable cause ceases to exist and the insured continues to prosecute the action. For example, a police officer may have probable cause to believe that someone has committed a crime at the time criminal proceedings are

commenced but later discover exculpatory evidence that establishes the criminal defendant's innocence. In that event, the "offense" of "malicious prosecution" occurs when the police officer "causes" the "continuation" of the prosecution by failing to disclose the exculpatory evidence. That, of course, is not the case here because Sanders alleged that the City framed him with evidence fabricated before he was ever charged and that the City therefore lacked probable cause to prosecute him from the outset. (R. V5, C2340-45 [A81-86].)

Even when law enforcement has probable cause to prosecute at the beginning of a criminal case but later loses that probable cause, there is still only one "trigger" of coverage. This is demonstrated by *Selective Insurance Co. of the Southeast v. RLI Insurance Co.*, 706 Fed. App'x 260 (6th Cir. 2017). In that case, police officers employed by the City of Barberton, Ohio, arrested Clarence Elkins on June 8, 1998, and charged him with rape and murder. *Id.* at 261. The officers had probable cause to believe that Elkins was guilty from the date of the original charges until January 5, 1999, when another man, Earl Mann, implicated himself in the crimes. *Id.* at 262. The officers did not, however, disclose Mann's admission, which caused the prosecution of Elkins to continue after probable cause ceased to exist. *Id.* Elkins was convicted in June 1999 but exonerated in 2005 after it was determined that Mann's DNA matched DNA found on the victim's body. *Id.* at 262-63.

Elkins sued the city for malicious prosecution, and a dispute arose over which of two insurance carriers owed coverage. RLI Insurance Company (RLI) insured the city for liability for an "offense" of "malicious prosecution" occurring prior to June 29, 1998. *Id.* The prosecution of Elkins began before that date. Selective Insurance Company of the

Southeast (Selective) covered the city after June 29, 1998, including the time that city police officers learned of Mann's statement but failed to disclose it. *Id.* at 262. Selective paid $3.25 million to settle Elkins's malicious prosecution claim and then sued RLI to recover that amount. *Id.* at 264.

The court held that RLI had no obligation to pay the settlement because the police officers had probable cause to prosecute Elkins while the RLI policy was in effect and, therefore, no "offense" of "malicious prosecution" occurred during RLI's policy period. *Id.* at 265-66. Rather, the "offense" of "malicious prosecution" occurred at the time city police officers learned of Mann's admission (eliminating probable cause to believe that Elkins had committed the crimes) but failed to disclose it, causing Elkins's prosecution to continue. *Id.*

As noted above, the present case does not involve the situation addressed in *Selective*, and there is no need for the Court to address such circumstances here. Nonetheless, *Selective* illustrates the point that, even when an insured tortfeasor commits the "offense" of "malicious prosecution" by "continuing" a criminal prosecution after probable cause ceases to exist, there remains a single "offense," which occurs when the tortfeasor causes the prosecution to continue notwithstanding the absence of probable cause. There is no basis, in such a situation, to employ an exoneration trigger or multiple triggers.

D. The Case Law Cited by Sanders and the City to Support an Exoneration Trigger or Multiple Triggers Is Inapposite and Unpersuasive.

Finally, the case law cited by Sanders and the City to support an exoneration trigger or multiple triggers is inapposite and unpersuasive. Their reliance on *Security Mutual Casualty Co. v. Harbor Insurance Co.*, 65 Ill. App. 3d 198, 205-06 (1978), *rev'd on other grounds*, 77 Ill. 2d 446 (1979), is misplaced because *Security Mutual* no longer represents

Illinois law (if it ever did). Not only did this Court reverse the appellate court's decision in *Security Mutual*, but the appellate court incorrectly based its ruling on the elements of the tort cause of action for malicious prosecution rather than the policy language. Indeed, the appellate court in *Security Mutual* did not even recite the policy's operative terms.

The appellate court has since rejected *Security Mutual*, instead recognizing that "the time of occurrence in insurance law is different from the time of accrual in tort law." *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48. The appellate court has thus concluded that *Security Mutual* is "not helpful" in deciding the event that triggers liability insurance coverage. *City of Zion*, 2014 IL App (2d) 131312, ¶ 18. See also *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 16 ("*Security Mutual* provides no guidance on construing an insurance policy *** because the appellate court's analysis in *Security Mutual* focused on the elements of a malicious prosecution action instead of the policy's language.").

Sanders's and the City's reliance on *National Casualty Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010), *American Safety Casualty Insurance Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012), and *Northfield Insurance Co. v. City of Waukegan*, 701 F.3d 1124, 1130 (7th Cir. 2012), is similarly misplaced. In each case, the Seventh Circuit followed *Security Mutual* in concluding that the relevant occurrence was the claimant's exoneration because *Security Mutual* was, at the time, "the only Illinois appellate decision on the issue." *American Safety*, 678 F.3d at 479. See also *Northfield*, 701 F.3d at 1132; *McFatridge*, 604 F.3d at 344-45.

In light of *City of Zion* and its progeny, the Seventh Circuit's decisions are no longer representative of Illinois law. Indeed, the Illinois Appellate Court has consistently found *McFatridge*, *American Safety*, and *Northfield* to be "unpersuasive" given the Seventh

Circuit's reliance on *Security Mutual*. *First Mercury*, 2018 IL App (1st) 171532, ¶ 34. See also *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 31; *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 34; *City of Zion*, 2014 IL App (2d) 131312, ¶ 31. What is more, an Illinois federal district court has recently recognized that the Seventh Circuit's decisions are no longer good law in Illinois and thus has declined to follow them. *Westport Insurance Corp. v. City of Waukegan*, No. 14-cv-419, 2017 WL 4046343, at *2 (N.D. Ill. Sept. 3, 2017) (declining to apply the Seventh Circuit's decision in *American Safety* because *Security Mutual*, on which it was based, has been "roundly rejected" by the Illinois Appellate Court).

Sanders and the City then cite two out-of-state cases, *Roess v. St. Paul Fire & Marine Insurance Co.*, 383 F. Supp. 1231, 1235 (M.D. Fla. 1974), and *Sauviac v. Dobbins*, 949 So. 2d 513, 519 (La. Ct. App. 2006), holding that insurance coverage for malicious prosecution is triggered upon exoneration. Neither case is persuasive. In both, the courts erroneously equated the trigger date for purposes of insurance coverage with the accrual date of the underlying tort cause of action, without analyzing the policy language. *Roess*, 383 F. Supp. at 1235; *Sauviac*, 949 So. 2d at 519. For that reason, courts in this state and elsewhere have rejected *Roess* and *Sauviac*. *City of Zion*, 2014 IL App (2d) 131312, ¶ 33. See also *Zurich Insurance Co. v. Peterson*, 232 Cal. Rptr. 807, 813 (Ct. App. 1986) (observing that *Roess* has been "consistently criticized by other courts" because, among other things, "the *Roess* decision did not consider when the offense occurred, but analyzed only when liability for malicious prosecution arose") (citing *S. Freedman & Sons, Inc. v. Hartford Fire Insurance Co.*, 396 A.2d 195, 199 (D.C. 1978)). In fact, another federal district court in Florida has declined to follow *Roess* as a matter of Florida law, concluding that "[t]he better rule, and the rule that is consistent with Florida law, is to consider the

time of the arrest and incarceration the 'trigger'" in malicious prosecution cases. *North River Insurance Co. v. Broward County Sheriff's Office*, 428 F. Supp. 2d 1284, 1289-90 (S.D. Fla. 2006).

Sanders also cites *American Guarantee & Liability Insurance Co. v. 1906 Company*, 273 F.3d 605 (5th Cir. 2001). That case is inapposite because it did not decide when the "offense" of "malicious prosecution" occurs for purposes of triggering insurance coverage. Rather, the court decided when the "offense" of "invasion of the right of private occupancy" occurred with respect to invasion of privacy claims arising out of the insured's conduct in surreptitiously videotaping women in a dressing room. *Id.* at 617-18.

Additionally, the court's reasoning is unpersuasive because it concluded that the "offense" did not occur, for purposes of triggering insurance coverage, until the claimants discovered the invasion of their privacy, even though some of the videotaping occurred the prior year. *Id.* at 618. In support, the court reasoned that, under Mississippi's "discovery rule," the claimants' tort cause of action did not accrue until they discovered the invasion. *Id.*

Contrary to the court's decision, the "discovery rule" has nothing to do with when an "offense" occurs for purposes of triggering insurance coverage. In Mississippi, as in Illinois, "[t]he discovery rule tolls the statute of limitations until a plaintiff should have reasonably known of some negligent conduct." *Neglen v. Breazeale*, 945 So. 2d 988, 990 (Miss. 2006). Accord *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10. The fact that a claimant does not discover his or her injury until later does not mean that no "offense" has occurred. Indeed, if no "offense" had occurred, there would be no need to toll the

limitations period. Instead, the discovery rule tolls the statute of limitations to permit the claimant to seek redress for an "offense" that previously occurred, upon discovery of it.

Accordingly, as Illinois Union explained in its opening brief, courts in Illinois and other states have consistently rejected the notion that an "offense" does not occur, for purposes of triggering insurance coverage, until the claimant's cause of action accrues under tort law. *First Mercury*, 2018 IL App (1st) 171532, ¶ 31 (quoting *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48 ("[T]he time of occurrence in insurance law is different than the time of accrual in tort law.")). See also *City of Erie, Pa. v. Guaranty National Insurance Co.*, 109 F.3d 156, 161 (3d Cir. 1997) ("[C]ourts have consistently rejected the idea that they are bound by statutes of limitations when seeking to determine when a tort occurs for insurance purposes.") Rather, courts have correctly observed that "the time of accrual is used to determine when the statute of limitations begins to run," which is a "separate consideration." *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48. See also *City of Erie*, 109 F.3d at 161 ("Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns."). In *American Guarantee*, the court failed to recognize that distinction and, instead, improperly concluded that the "offense" did not occur until the cause of action accrued under tort law. 273 F.3d at 618.

Finally, Sanders and the City cite *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407 (2006), and *Travelers Indemnity Co. v. Mitchell*, 925 F.3d 236 (5th Cir. 2019), to support their arguments that each of Sanders's retrials constituted a separate "offense" of "malicious prosecution." Neither case supports that assertion.

In *Nicor*, this Court held that 195 separate mercury spills that occurred when the insured gas company removed gas meter regulators from customers' homes did not

constitute a single "happening," "event," or "accident" for purposes of determining the number of "occurrences" under liability insurance policies. 223 Ill. 2d at 434. The facts and policy language in *Nicor* were thus entirely different from the present case.

Further, to the extent *Nicor* informs the Court's analysis, it supports Illinois Union's position that this case involves a single "offense" of "malicious prosecution," which occurred when Sanders's underlying criminal prosecution commenced. In *Nicor,* the Court applied the "cause theory," under which "the number of occurrences is determined by referring to the cause or causes of the damage." 223 Ill. 2d at 418. Here, Sanders's alleged injury resulted from a single "cause," namely, the City's initiation of a false, malicious criminal prosecution against him in 1994. Each trial constituted a part of that same prosecution, which increased Sanders's damages but were not independent "causes" of any new injuries. Indeed, the appellate court applied *Nicor* in in this way in *Indian Harbor*, where the court held that the insured city's alleged conduct that prolonged Juan Rivera's prosecution, which included three separate trials, likewise "presented a single cause and therefore a single occurrence." *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 44. See also *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 36 (holding that "Rivera's second and third trials were continuations of his wrongful prosecution, which increased his damages but were not new injuries").

Turning to *Mitchell*, that case is inapposite because it involved coverage for "bodily injury" occurring during the policy period, not the "offense" of "malicious prosecution." There, the claimants alleged that Bobby Ray Dixon and Larry Ruffin were wrongfully convicted and collectively incarcerated for 83 years based on evidence that was fabricated by law enforcement officers employed by Forrest County, Mississippi. *Mitchell*, 925 F.3d

at 238. The claimants further alleged that Dixon and Ruffin suffered numerous bodily injuries during their incarceration that were caused by the officers' wrongful acts, including physical assaults, infections, and other ailments. *Id.* at 242, 244. The policies covered damages for "bodily injury," including "sickness" and "disease," that occurred during the policy period. *Id.* at 240-41, 242-43. The court held that coverage was triggered because the claimants alleged discrete "bodily injuries" in each policy period. *Id.* at 242, 244. In reaching that conclusion, the court distinguished cases involving "personal injury" coverage for "malicious prosecution." *Id.* at 245.

In this case, Sanders and the City do not seek coverage for "bodily injuries" occurring during any of Illinois Union's policy periods. Rather, they seek coverage for the "offense" of "malicious prosecution" occurring during the policy period. As Illinois Union explained in its opening brief, the vast majority of courts in Illinois and elsewhere have concluded that the "offense" of "malicious prosecution" occurs once, on the date the malicious action is commenced. (Illinois Union Br. at 14-15, 29-30.) The reasoning employed by those courts is sound: "Offense" refers to the insured's "wrongful act or conduct committed during the policy period," which, in the context of a malicious prosecution claim, is the insured's commencement of a legal proceeding against the claimant with malice and without probable cause. See, e.g., *First Mercury,* 2018 IL App (1st) 171532, ¶ 30. Further, the entire prosecution, including retrials, constitutes a single "offense." See, e.g., *City of Waukegan,* 2017 IL App (2d) 160381, ¶ 48. This Court should employ the same reasoning and hold that Sanders's underlying malicious prosecution claim involved a single "offense," which occurred in 1994 when the City's police officers framed Sanders and caused false criminal charges to be filed against him.

CONCLUSION

For the reasons stated above and in Illinois Union's opening brief, the circuit court properly concluded that the "offense" of "malicious prosecution" occurred in 1994, when City police officers framed Sanders and caused false criminal charges to be filed against him. The appellate court erred when it reversed and held that the "offense" of "malicious prosecution" occurred in 2014, when Sanders was acquitted. Accordingly, this Court should reverse the appellate court's decision and affirm the circuit court's judgment dismissing Sanders's and the City's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance and the certificate of service is 19 pages.

/s/ Christopher A. Wadley
Christopher A. Wadley

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS, *Plaintiffs-Appellees,* v. ILLINOIS UNION INSURANCE COMPANY and STARR INDEMNITY & LIABILITY COMPANY, *Defendants-Appellants.*	)	No. 124565

The undersigned, being first duly sworn, deposes and states that on August 27, 2019, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Defendant-Appellant Illinois Union Insurance Company. Service of the Reply Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

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

/s/ Christopher A. Wadley
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