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ARGUMENT

I. THE APPELLATE COURT IMPROPERLY REVERSED THE DECISION OF THE CIRCUIT COURT.

Teresa Mroczko (“Mroczko”) failed to file a personal injury complaint within the applicable statute of limitations, but her employer, A&R Janitorial, as Statutory Subrogee of Teresa Mroczko (“A&R”), preserved its rights by timely filing the present subrogation action pursuant to 820 ILCS 305/5(b) (hereinafter commonly referred to as “Section 5(b)”). Accordingly, A&R may prosecute its subrogation action and seek to recover all damages that would have been available to Mroczko had she timely filed a complaint against Pepper Construction Company (“Pepper”) and Perez and Associates (“Perez”). However, it does not follow that Mroczko has an absolute right to intervene. Section 5(b) provides an express provision allowing an employer to intervene into an employee’s suit, but the Illinois Workers’ Compensation Act (“IWCA”) is silent as to the ability of an employee to intervene into the employer’s subrogation suit. See 820 ILCS 305/5(b) (“The employer may, at any time thereafter join in the action upon his motion so that all orders of court after hearing and judgment shall be made for his protection.”). Accordingly, if Mroczko desires to intervene, she is required to present a proper basis to the circuit court for it to consider in determining whether to allow her to intervene.

The appellate court reversed the circuit court, finding that it abused its discretion in not applying 735 ILCS 5/2-408. (A151-A170). However, at no point did Mroczko ever cite or raise Section 2-408 as the basis for her alleged right to intervene. Illinois Supreme Court Rule 341(h)(7) provides that “[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.” Ill. S. Ct. R. 341(h)(7). Accordingly, the appellate court should not have considered a basis which

Mroczo failed to raise in the circuit court and appellate court briefs. Along those lines, the circuit court properly ruled upon the motions and arguments presented and exercised its discretion in denying Mroczo's petition. (Vol. IX, C2034). As follows, the appellate court improperly reversed the circuit court decision.

Mroczo's petition to intervene into A&R's Section 5(b) subrogation action did not cite a proper basis for intervention, but rather incorrectly argued that Mroczo had a right to amend the complaint filed by A&R. (Vol. VI, C1373-1377). In fact, Mroczo's petition to intervene actually appears to be a request to take control of A&R's subrogation action and file an amended complaint adding "new parties" that were previously dismissed by A&R. (Vol. VI, C1376-1377). See 735 ILCS 5/2-408(f) ("the applicant shall not raise new issues or add new parties."). Accordingly, the circuit court properly denied Mroczo's petition based upon the fact that Mroczo was attempting to file a complaint not only outside the applicable statute of limitations, but also against "new parties" not before the court.

In addition, Mroczo's petition and circuit court response brief fail to argue that the representation of her interests was inadequate pursuant to Section 2-408, thus the appellate court relied upon a forfeited argument in its reversal of the circuit court. (A151-A170). As Mroczo failed to raise any argument based upon Section 2-408, A&R and all other parties have been denied their opportunity to properly respond to such a position. Further, the failures of Mroczo have resulted in the appellate court reversing the circuit court for not considering arguments that were never presented. The appellate court should not search the record for an unargued and unbriefed reason to reverse the circuit court as such activism transforms the court into an advocate for one party over another.

People v. Givens, 237 Ill. 2d 311, 323 (2010). Accordingly, any argument as to the application of Section 2-408 has been forfeited by Mroczko. This Court has directed circuit courts to follow the principle of party presentation, which requires parties to frame the issues for decision and the circuit court to act as the neutral arbiter on the matters presented by the parties. *Id.* Accordingly, the parties are required to advance the facts and arguments entitling them to the relief sought. The circuit court followed the principle of party presentation and ruled upon the petition based upon the arguments and law presented by the parties. If Mroczko was relying upon Section 2-408 then she was required to cite such section and make the appropriate arguments consistent with its provisions. However, the record is clear that Mroczko was not relying upon Section 2-408 as her briefs and arguments fail to contain any reference to such statute.

Further, had Mroczko actually asserted rights under the intervention statute, the circuit court may have properly found her petition to have been untimely since it was filed outside the statute of limitations and months after the dismissal of her personal injury complaint. Mroczko's petition to intervene could also be properly denied on the basis that she has no interest (for which representation is required) against Pepper and Perez, even though she may have a right if, and only when, A&R is able to obtain an amount in excess of its workers' compensation liability, costs, and attorney fees. See 735 ILCS 5/2-408 ("Upon timely application anyone shall be permitted to 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...may be inadequate.")

Whether a party may intervene is a matter committed to the discretion of the trial court. *Sankey Brothers, Inc. v. Williams*, 152 Ill. App. 3d 393, 398 (3d Dist. 1987). "An

abuse of discretion will be found where no reasonable person would take the view adopted by the circuit court.” *Fennell v. Illinois Central R.R., Co.*, 2012 IL 113812, ¶21. As Mroczko was not relying upon Section 2-408, the appellate court erred in concluding that the circuit court abused its discretion in not applying the intervention statute. Rather, the circuit court acted within its discretion in denying Mroczko’s petition to intervene based upon the arguments presented.

In its decision the appellate court attempted to distinguish *Sankey Brothers*, 152 Ill. App. 3d 393, on the supposed basis that the employer therein was seeking “only indemnification for workers’ compensation benefits it had to pay to [its employee],” however, such position fails to appreciate the rights afforded to all employers pursuant to Section 5(b). *A&R Janitorial*, ¶¶ 21, 23 (emphasis in original). The *Sankey Brothers* decision reveals that the employer was not necessarily *only* seeking the amount of its workers’ compensation liability. Rather, it was the employee therein that inferred that the employers “would like to keep [employee] out of this action so that they could settle the matter by recovering only the amount of compensation awarded [to employee].” Although such a concern by the employee may have been genuine, “the right of the employer to sue a third-party tortfeasor is not a new cause of action created by the [IWCA], but is the employee’s right of action taken from him and transferred to the employer.” *Joseph Schlitz Brewing Co. v. Chicago Rys. Co.*, 307 Ill. 322, 327 (1923). Accordingly, when an employee fails to file a timely complaint, the employer may step into the shoes of the employee to prosecute the transferred claims pursuant to Section 5(b).

Further, an employer's Section 5(b) subrogation action is pursued for the same measure of common law damages that the employee would have been entitled to had the employee filed the action themselves. *Beiermann v. Edwards*, 193 Ill. App. 3d 968, 981 (2d Dist. 1990). Along those lines, if the *Sankey Brothers* matter went to trial, the employer would almost surely maximize its ability to recover the full amount of its workers' compensation liability by presenting the full measure of its employee's damages.

This only makes more sense when one factors in possible reduction for the assessment of comparative fault on the part of the employee. After all, the purpose of Section 5(b) is "to 'make whole' an employer who, though not liable under ordinary tort law, is nevertheless liable to his injured employee under the [IWCA]." *People ex rel. Illinois Department of State Police v. Mamok*, 247 Ill. App. 3d 366, 368 (1st Dist. 1993). If the employer were not able to present the full measure of its employee's common law damages an assessment of comparative fault on the part of the employee would necessarily preclude the employer from being made whole.

In addition, if the workers' compensation matter is still open or the workers' compensation settlement contract contains contingencies the full extent of the employer's workers' compensation liability will be unknown at the time of Section 5(b) subrogation trial. Therefore, the employer will not always be able to calculate the precise amount that will be necessary to reimburse its workers' compensation liability. Along those lines, the drafters of Section 5(b) allow the employer to present its employee's case to the trier of fact and request compensation for the employee's full measure of common law damages. If the trier of fact awards an amount in excess of the employer's workers' compensation

liability, attorney fees, and costs, such excess amount must be paid to the employee. (“the employer shall pay over to the injured employee...all sums collected...in excess of the amount of such compensation paid or to be paid under the [IWCA]...”). 820 ILCS 305/5(b).

If an employer ultimately chooses to settle the subrogation action for less than the full measure of its employee’s damages that is not tantamount to a complaint seeking “only indemnification for workers’ compensation benefits it had to pay to [its employee].” Rather, that is a strategic decision by the employer to ensure recovery and such decision is well within its rights since it is the party that timely filed and controls the lawsuit.

Accordingly, in all Section 5(b) actions, the employers have the right to present its employee’s full measure of common law damages. Thus, *Sankey Brothers* is not properly distinguished from the present matter by the fact that the employers in *Sankey Brothers* may be willing to settle for the less than the employee’s full measure of damages.

A&R respectfully requests that this Court reverse the appellate court’s decision, and find that the circuit court properly exercised its discretion in denying Mroczko’s petition to intervene.

II. IF MROCZKO IS PERMITTED TO INTERVENE, A&R SHOULD MAINTAIN CONTROL OVER ITS SECTION 5(b) SUBROGATION ACTION.

A&R timely filed the present subrogation action pursuant to Section 5(b) asserting Mroczko’s common law negligence claims against Pepper and Perez. (Vol. I, C00002-C00019). Upon the timely filing by A&R, Mroczko’s common law rights

against Pepper and Perez transferred to A&R and A&R has prosecuted Mroczko's claims against Pepper and Perez for the full measure of her common law damages, including non-pecuniary damages such as pain and suffering and loss of normal life. Should A&R recover an amount in excess of A&R's past and future workers' compensation liability to Mroczko, A&R would be required to remit the excess to Mroczko pursuant to the express language of Section 5(b) ("out of any amount recovered 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 to be paid under this Act...").

Mroczko failed to file a timely complaint against Pepper and Perez, thus Mroczko's only interest in A&R's Section 5(b) subrogation lawsuit is her right to any sums collected by A&R in excess of its past and future workers' compensation liability. (Vol. III, C00702; Vol. III, C01990). Accordingly, if Mroczko is permitted to intervene, A&R should still maintain control of the present Section 5(b) subrogation action, and Mroczko's participation in the litigation should be limited to protection of her interest in any amount that A&R recovers in excess of its past and future workers' compensation liability.

"Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant." *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (1st Dist. 2006); citing D. Dobbs, *Law of Remedies* § 4.3(4), at 604 (2d ed.1993). Subrogation "is designed to place the ultimate responsibility for a loss upon the one on whom in good conscience it ought to fall, and to reimburse the innocent party who is compelled to pay. Under this

doctrine, a person who, pursuant to a legal liability, has paid for a loss or injury resulting from the negligence or wrongful act of another, will be subrogated to the rights of the injured person against such wrongdoer.” *Geneva Construction Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 283 (1954). Subrogation rights originated in common law to prevent unjust or unearned enrichment of one party at the expense of another, but they may also be created by statute or contract. *State Farm Mutual Auto Insurance Co. v. Easterling*, 2014 IL App (1st) 133225 (1st Dist. 2014) ¶ 21.

“[T]he right of the employer to sue a third-party tortfeasor is not a new cause of action created by the [IWCA], but is the employee’s right of action taken from him and transferred to the employer.” *Mamok*, 247 Ill. App. 3d at 368. Indeed, under Section 5(b), “[i]f no suit is filed by the employee, then during the last three months before the limitations period expires, the action is ‘transferred’ to the employer, who may then file the *same suit* against the tortfeasor that the employee could have filed.” *Woodward v. Pratt, Bradford & Tobin, P.C.*, 291 Ill. App. 3d 807, 813 (5th Dist. 1997) (emphasis in original).

An employer’s Section 5(b) subrogation action is pursued for the same measure of common law damages as the employee would have been entitled to had the employee filed the action themselves. *Beiermann*, 193 Ill. App. 3d at 981. This is because “Section 5(b) embraces both an action for “damages” by the employer on behalf of its employee as well as one seeking merely reimbursement of monies paid to its employee.” *Mamok*, 247 Ill. App. 3d at 368; citing *The Department of Law Enforcement v. Willis*, 61 Ill. App. 3d 495, 498 (5th Dist. 1978); see also *Melohn v. Ganley*, 344 Ill. App. 316, 324 (2d Dist. 1951). (“[The IWCA] authorizes a single common law action for the damages resulting

from [a third-party tortfeasor's] allegedly wrongful conduct, which is for the common benefit of the employer and the employee.”). Along those lines, concerning subrogation actions brought by an employer, Section 5(b) expressly states 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 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).

Accordingly, here, A&R's present Section 5(b) subrogation action is not an independent cause of action of A&R. Rather, A&R is prosecuting Mroczko's common law negligence claims against Pepper and Perez *for the common benefit of* A&R and Mroczko, whereby A&R is pursuing Mroczko's full measure of common law damages, including non-pecuniary damages. In so prosecuting Mroczko's claim, should A&R recover an amount in excess of A&R's past and future workers' compensation liability, the express language of Section 5(b) requires that amount to be remitted to Mroczko, less A&R's attorney fees and costs incurred prosecuting the subrogation action. Should Mroczko be permitted to intervene to protect her Section 5(b) interest in any excess recovery, the same would enable the trial court to enter binding orders adjudicating Mroczko's Section 5(b) interest as between her and A&R. See 735 ILCS 5/2-408(a)(2) and (f). In addition, intervention by Mroczko may also allow her to object to any improper attempts by Pepper and Perez to limit the amount of damages recoverable by A&R to its past and future workers' compensation liability.

However, as Mroczko failed to file a timely action, intervention by her would not permit her to substitute as plaintiff, file an amended complaint, or control the litigation. Rather, her role as an intervenor would be limited to her right to any recovery by A&R in excess of its workers' compensation liability, attorney fees, and costs. Along those lines, Section 2-408(f) provides that "the court may in its order allowing intervention... provide that... the applicant shall not interfere with the control of the litigation..." 735 ILCS 5/2-408(f).

Indeed, when A&R timely filed the present Section 5(b) subrogation action, Mroczko's right of action was taken from her and transferred to A&R. See *Mamok*, 247 Ill. App. 3d at 368. Using the timeless common-law subrogation metaphor, upon the filing of the present Section 5(b) subrogation action, A&R "stepped into her shoes" against Pepper and Perez, and Mroczko has cited no authority that requires A&R to "return her shoes" upon Mroczko's intervention. Rather, by the express language of Section 5(b), Mroczko retains only an interest in any recovery by A&R in excess of its past and future workers' compensation liability that A&R may obtain "while wearing Mroczko's shoes."

Further, it makes sense to permit whichever party properly files the action first to maintain control of the litigation, whether it is the employer or employee. Along those lines, the statutory three-month window in which an employer may file a Section 5(b) subrogation action gives the injured employee a 21-month "head start" to file suit and control the litigation. In doing so, the drafters of Section 5(b) prevented a pure "race to the courthouse" between employers and employees concerning the filing of civil actions

against third-party tortfeasors while at the same time maintaining the same statute of limitations period.

Accordingly, if Mroczko genuinely desired to control a third-party civil action concerning her injuries, she had ample time to commence a lawsuit prior to A&R's filing of its Section 5(b) subrogation action. Indeed, it would be manifestly unfair to permit Mroczko to now "hijack" the litigation from A&R after it has spent considerable time and costs prosecuting her transferred claims toward a trial of this matter. Further, such a holding would potentially create an incentive for employees to allow their employers to file and litigate the employee's third-party claims, waiting to intervene and take control of the litigation on the eve of settlement or trial. In doing so, injured employees would avoid the risk of expending potentially unrecoverable costs, while monitoring the progress of the subrogation litigation for the likelihood of success on the merits. Surely, the drafters of Section 5(b) did not envision such a state of affairs, and rather, chose to expressly permit the injured employee to recover the excess amount above their employer's workers' compensation liability where the employer timely filed a third-party civil action.

Further, an employer has the motivation to maximize the recovery in a Section 5(b) subrogation action (whether by judgment or settlement) especially when the workers' compensation matter is pending. In this case, the workers' compensation matter filed by Mroczko against A&R is pending, thus A&R seeks to maximize its recovery against Pepper and Perez in order to ensure that the amount collected exceeds its past and future workers' compensation liability. Indeed, when the employer asserts the full measure of civil damages that the injured employee would be entitled to, the same

increases the likelihood of obtaining the maximum amount against which the employer could be reimbursed for prior and future workers' compensation liability. If the employer merely sought recovery of its current workers' compensation lien then the employer would be left paying further unrecoverable benefits in the pending workers' compensation matter.

The complaint filed by A&R was commenced pursuant to Section 5(b), thus A&R may pursue all damages recoverable pursuant to Section 5(b). A&R never waived its right to present and recover damages in excess of its past and future workers' compensation liability. Along those lines, since an employer filed Section 5(b) action is for the full measure of the employee's civil damages, the perceived settlement value in the eyes of a defendant third-party tortfeasor is commensurate with that potential common law liability. Accordingly, the defendant will be required to pay the true measure of its common law liability whether the action is being pursued by the employee or the employer. If an employer ultimately chooses to accept an amount less than its total workers' compensation liability, the same could very well be based upon the employer's desire to guarantee at least some recovery versus the cost and risk of proceeding to trial based upon the merits of the employee's claim. Such would not be a novel result as even in employee filed actions settlements are at times reached for an amount less than the total workers' compensation liability. Further, any such settlement by an employer for an equivalent to or less than its total workers' compensation liability would not preclude an employee from proceeding against the employer for the full workers' compensation benefits.

It should also be noted that the drafters of Section 5(b) chose to include language therein requiring employer approval where an employee desired to settle their common law claims against third-party tortfeasors for less than an employer's past and future workers' compensation liability. The applicable language of Section 5(b) states that:

In such actions brought by the employee or his personal representative...No release or settlement of claim for damages by reason of such injury or death, and no satisfaction of judgment in such proceedings shall be valid without the written consent of both employer and employee or his personal representative, except in the case of the employers, such consent is not required where the employer has been fully indemnified or protected by Court order.

820 ILCS 305/5(b).

However, there is no corresponding language in Section 5(b) prohibiting an employer from settling an employer filed Section 5(b) subrogation action for an amount equivalent to or less than their total workers' compensation liability without employee approval. As such, it is apparent that should the drafters of Section 5(b) have desired such a provision, they were aware of that possibility based upon their inclusion of language placing restrictions on an employee's right to settle an employee filed action.

Mroczko has failed to cite any law in support of the proposition that an intervening employee should be allowed to control the employer's timely filed Section 5(b) subrogation action. Rather, all law cited by Mroczko provides that the party that filed the action maintains control of the litigation. Accordingly, Mroczko is not permitted to control the present litigation, but rather her intervention, if any, is limited to the protection of her Section 5(b) interest in any amount recovered by A&R in excess of its past and future workers' compensation liability.

CONCLUSION

WHEREFORE, Plaintiff-Appellee, A&R Janitorial, as Statutory Subrogee of Teresa Mroczko, respectfully requests that this Court reverse the appellate court's decision, and find that the circuit court properly exercised its discretion in denying Mroczko's petition to intervene. In the alternative, if the appellate court's decision is not reversed, A&R requests that if Mroczko is permitted to intervene, A&R maintain control over the present Section 5(b) subrogation action and Mroczko's intervention be limited to protection of her interest in any recovery by A&R in excess of its past and future workers' compensation liability, costs, and attorney fees.

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 containing the Rule 341(d) cover, 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 fourteen (14) pages.

/s/Douglas B. Keane

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