Case No. 124641

IN THE SUPREME COURT OF ILLINOIS

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant.	From the Appellate Court of Illinois, Second Judicial District Appeal No. 2-17-1040
KENNETH FRANK, Third-Party Plaintiff-Appellee, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellants.	There on Appeal from the Circuit Court, Fifteenth Judicial Circuit Circuit Court No. 13 L 27 The Honorable William A. Kelly, Judge Presiding.

REPLY BRIEF OF THIRD-PARTY DEFENDANTS-APPELLANTS

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Oral Argument is requested.

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ARGUMENT

I. Frank's negligence action failed to allege that the Grossens were "liable in tort" to Plaintiff since it was not and cannot be premised on the Animals Running Act.

The Contribution Act states that "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." Joint Tortfeasor Contribution Act, 740 ILCS 100/2. According to the plain language of the Contribution Act, a right of contribution under the Act exists only among those who are "subject to liability in tort." Consistent with the language of the Contribution Act, the Illinois Supreme Court has stated that "in order for [a] defendant to have properly alleged a right of contribution pursuant to the Contribution Act, [the] defendant and [the third-party defendant] (1) must both be subject to liability in tort to the [plaintiff], and (2) their liability must arise out of the same injury." *People v. Brockman*, 148 Ill. 2d 260, 268 (1992).

Count I of Defendant Kenneth Frank's ("Frank") contribution action is based upon common law negligence and alleges that Third-Party Defendants David A. Grossen and Virginia J. Grossen ("the Grossens") "allowed a boundary fence to exist…when…the boundary fence was not reasonable to enclose [Frank's] cattle which were contained on [Frank's] property…" (C82-3). As discussed below and at length in previous briefs, Illinois does not recognize a common law duty to guard against another's escaping livestock. Therefore, Frank's negligence claim fails to state a valid claim for contribution upon which relief can be granted as it does not allege that the Grossens are subject to liability in tort to Plaintiff Kirk Raab ("Plaintiff"). (C80-3)

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A. Illinois does not recognize a common law duty to guard against damages caused by another's escaping livestock.

Prior to the adoption of the Illinois Domestic Animals Running at Large Act ("Animals Running Act") in 1871, there was no liability in Illinois for injury or damage caused by animals running at large. *Bulpit v. Matthews*, 145 Ill. 345 (1893). While English common law required every owner of stock to restrain them from trespassing on another's land, this law never applied in Illinois. *Id.* at 351. Due to changing social conditions, the Illinois Legislature later chose to adopt a form of the English common law rule and establish a duty to fence in livestock with the enactment of the Animals Running Act in 1871. *Heyen v. Willis*, 94 Ill. App. 2d 290, 296 (4th Dist. 1968). In making this change, the Legislature expressly limited liability for damage caused by livestock to their owner or keeper only. *Id.*

Because a cause of action did not exist prior to the enactment of the Animals Running Act, the only basis to hold a person liable for damage caused by livestock is through the Animals Running Act. *Heyen*, 94 Ill. App. 2d at 296 ("[T]he duty to guard against injury or damage by estrays is cast by law upon the owner or keeper of the animals, and liability for injury or damage caused by them must be predicated upon the [Animals Running] Act."); *Corona v. Malm*, 315 Ill. App. 3d 692, 698 (2nd Dist. 2000) ("[T]here is no independent basis for the action apart from the [Animals Running] Act itself."); *Douglass v. Dolan,* 286 Ill. App. 3d 181, 186 (2nd Dist. 1997) (holding that unless a landowner is an owner or keeper of livestock as contemplated by the Animals Running Act, the landowner has no common law duty to guard against injuries to persons caused by livestock that have escaped from their enclosures); *Smith v. Gleason*, 152 Ill. App. 3d 346, 348 (2nd Dist. 1987) ("…there is no common law duty on the part of a lessor to guard against damage or injury to persons caused by animals which escape from the leased premises.").

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Recognizing that the absence of a common law duty on the part of the landowner is fatal to his contribution claim based on common law negligence, Frank desperately tries to find support in Illinois case law for extending liability to a landowner for damages sustained when another's cattle have escaped and caused injury. Frank argues that such support is found in *Ward v. Brown*, 64 Ill. 307 (1872). (Appellee's brief p. 17-8) In *Ward*, an owner of cattle hired a man named Connors to pasture his cattle in Connors' cornstalk fields for a specified price per week. *Id.* at 308. The fence surrounding Connors' cornstalk fields was insufficient and the cattle broke free and trespassed on to the appellee's land. *Id.* at 309. The Illinois Supreme Court held that, under the Animals Running Act, the owner of the cattle was not liable for the trespass because the owner was not in control of the cattle at the time of the trespass. *Id.*

At the end of the *Ward* case, the Court contemplates additional facts that could make an owner liable,

> "Cases may arise in which the owner would be liable in case, but we see nothing in the facts of this case that would warrant recovery in that form of action…Had [the owner] selected a reckless and irresponsible bailee, and they had known, or had reason to believe, the cattle would commit the trespass when they were placed in [the bailee's] hands, *it might be* the owners would have been liable in case, but there is no evidence of such facts in this case." *Id.* at 310. (Emphasis added)

Frank argues that the above dicta from the *Ward* case shows that a common law cause of action exists since the Court discussed situations in which an owner may be liable, even though the owner is not in possession or control of the animals at issue. *Id.* This argument misses the mark for several reasons. First, Frank is relying on dicta in the *Ward* case, which is not binding as authority or precedent within the stare decisis rule. *See Cates v. Cates*, 156 Ill.2d 76, 80 (1993). Moreover, the Animals Running Act limits liability for damage caused by livestock to their *owner* or keeper. *See* 510 ILCS 55/1 (Emphasis added). Finding an owner liable for negligently selecting a bailee, as discussed in the *Ward* case, would fall squarely

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within the Animals Running Act. Therefore, the *Ward* Court's contemplation of owner liability based on negligent entrustment does not support a common law cause of action outside the Animals Running Act.

Frank makes a similar argument regarding the *Corona v. Malm* case. 315 Ill. App. 3d at 698. In *Corona*, plaintiffs sustained injuries when their car collided with a horse that had escaped from defendant's property. Those plaintiffs then filed a complaint against defendant for violating the Animals Running Act and for common law negligence. *Id* at 693. The appellate court affirmed the trial court's dismissal of the common law negligence action because "there is no independent basis for the action apart from the Act itself." *Id.* at 698. The appellate court went on to state that, "in some cases, liability *might* be predicated on a negligence claim *as in the case where the owner has knowledge of an animal's mischievous propensity*." *Id.* (Emphasis added) In his brief, Frank misleads this Court by omitting the remaining part of the quote after "negligence claim" and argues that *Corona* supports a common law negligence action for damages caused by estrays. (Appellee's brief p. 19-20) The dicta in *Corona* simply contemplates that an owner's knowledge of an animals' dangerous propensity may form a negligence action. *Id.* at 698. This dicta is not applicable to this case as the Grossens are not the owners of the cattle and there are no allegations that Frank's cows were dangerous or that the Grossens had any knowledge whatsoever as to the nature or propensities of Frank's cows.

Failing to find support for a common law duty to guard against injury or damage by estrays, Frank turns to general tort theories and argues that the Grossens have a common law duty to maintain their property and their failure to do so is tortious. (Appellee's brief p. 24) This strategy has already been rejected by Illinois courts in *Heyen v. Willis*, 94 Ill. App. 2d 290 (4th Dist. 1968). In *Heyen*, the decedent lost control of his vehicle trying to avoid cattle

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that were owned by a tenant and had strayed from the landowner's property. *Id.* at 292. After his death, the plaintiff filed a wrongful death action against a landowner who was not an owner or keeper of the cattle. *Id.* The appellate court rejected plaintiff's claim that the landowner owed a duty to the plaintiff to guard against injury or damage caused by a known defect on the premises,

> "Lacking express case authority for this rule, plaintiff seeks to give it credence by drawing analogies to well established tort rules. We grant that plaintiff's cases are good authority in the areas of their decision, yet we consider that they fail to show a common law duty upon the part of the defendant-landowner in this case…we cannot, as plaintiff suggests, lay aside any consideration that this case is a livestock at large problem for plainly it is a livestock at large problem and cannot be considered anything else." *Id.* at 295-6.

Frank's attempts to ignore the plain language of the Animals Running Act and to impose a duty on the Grossens which is not supported by Illinois case law must be denied.

B. No affirmative defense is needed to defeat Frank's common law negligence claim against the Grossens.

Frank argues that the fact that the Grossens are not owners or keepers under the Animals Running Act merely sets up an affirmative defense to his claim for contribution. (Appellee's brief p. 24-5) In *Doyle v. Rhodes*, a road construction worker sued a motorist who injured him during the course of his employment. 101 Ill. 2d 1, 4 (1984). The motorist filed a third-party complaint against the worker's employer for contribution alleging that the employer's negligence and violation of a worker safety statute contributed to the employee's injury. *Id.* The employer argued that its immunity under the Workers Compensation Act insulated it from liability in tort under the Contribution Act. *Id.* at 6. The *Doyle* Court disagreed and held that the motorist could sue the employer under the Contribution Act because the employer was indeed "subject to liability in tort" to its employee. *Id.* at 11-12. The Court reasoned that the Workers Compensation Act provided an affirmative defense to any tort action brought by an employee. *Id.* at 10-1. This Court concluded that an employer

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is potentially liable in tort until the immunity defense is established, so the requirement that the employer be "subject to liability in tort" was satisfied. *Id.* at 11.

Under the rationale set forth in *Doyle*, 101 Ill.2d at 10-11, Frank claims that the Grossens are potentially "liable in tort" to Plaintiff under the Contribution Act until they have asserted their affirmative defense that they are not owners or keepers under the Act. However, Frank sued the Grossens for common law negligence, not for violating the Animals Running Act. (C80-3) Therefore, the Grossens do not need to assert the affirmative defense that they are not owners or keepers as required by the Act to defeat the claim – the claim fails as a matter of law.

Unlike in *Doyle*, there is no immunity, affirmative defense or special privilege that must be asserted to bar Frank's common law negligence claim. *Doyle*, 101 Ill. 2d at 10-1. As discussed in Section A above, Illinois does not recognize a common law duty to guard against damages caused by another's escaping livestock. *Heyen*, 94 Ill. App. 2d at 296-7; *Bulpit*, 145 Ill. at 350-1. In *Vroegh v. J & M Forklift,* this Court held that, "[t]he absence of duty is not an affirmative defense. It attacks the legal sufficiency of the plaintiff's claim. Rather than giving color to the cause of action, it negates one of the action's basic elements." 165 Ill. 2d 523, 530 (1995). Because Frank's complaint for contribution fails to allege that the Grossens owe a duty to the Plaintiff, it is legally insufficient and fails to state a claim under Illinois law. *See* 740 ILCS 100/2.

Similarly, in *Douglass v. Dolan*, the appellate court held that unless a landowner is an owner or keeper of livestock as contemplated by the Animals Running Act, the landowner has no common law duty to guard against injuries to persons caused by livestock that had escaped from their enclosures. 286 Ill. App. 3d 181, 186-7. In line with *Vroegh*, the *Douglass* court found that plaintiff's complaint failed to state a cause of action for negligence because

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the landowner owed no duty to the plaintiff. *Id.* Because the Grossens owe no duty to Plaintiff to guard against damages caused by another's escaping livestock, Frank's negligence claim fails to allege that the Grossens are "liable in tort" to the Plaintiff under the Contribution Act.

C. Only owners and keepers may be held liable under the Animals Running Act.

The Animals Running Act limits liability for damages caused by estrays to their owner or keeper. 510 ILCS 55/1.1. Frank claims that, despite the plain language of the statute, liability can extend to those who are neither an owner or a keeper since there is no provision in the Act explicitly immunizing these other parties. (Appellee's brief p. 20) Frank's interpretation conflicts with both the express language of the Animals Running Act and the public policy considerations underlying the legislature's decision to limit liability caused by estrays to their owner or keeper.

Where the language of a statute is unambiguous, the only legitimate function of the courts is to enforce the law as enacted by the legislature. *Certain Taxpayers v. Sheahen*, 45 Ill. 2d 75, 84 (1970); *see also Illinois Power Co. v. Mahin*, 72 Ill. 2d 189, 194 (1978). It is improper for a court to depart from the plain statutory language by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. Each word, clause, and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous. *In re Marriage of Goesel*, 2017 IL 122046, ¶ 13 (2017). When a statute creates a cause of action that was unknown at common law, the court must construe it strictly and decline to read in qualifications the legislature did not specify. *Miller v. Kramarczyk*, 306 Ill. App. 3d 731, 732, (2nd Dist. 1999).

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The Animals Running Act states, in part, "[a]ll [1]owners of livestock shall provide the necessary restraints to prevent such livestock from so running at large and shall be liable in civil action *for all damages* occasioned by such animals running at large." 510 ILCS 55/1. (Emphasis added) Because the Act states that owners of livestock are liable for *all* damages caused by the animal running at large, it necessarily follows that those who are not owners or keepers under the Act are not liable for such damages. This interpretation is supported by Illinois case law. *See Smith v. Gleason*, 152 Ill.App.3d 346, 349 (2nd Dist. 1987) ("We are unwilling to extend liability to a landlord where a plain reading of the statute limits liability to an owner or a keeper of the animal.")

Moreover, because liability did not exist prior to the passage of the Animals Running Act, the Legislature specifically chose to place liability on owners and keepers of the livestock when drafting the Act. *Heyen*, 94 Ill. App. 2d at 296. It is disingenuous to suggest that liability can extend to non-owners and non-keepers simply because the Legislature failed to include a list of parties who are not liable. It would be unreasonable to require statutes to include an exhaustive list of parties who are unaffected by the statute. Likewise, listing all the parties who cannot be found liable under the Act would render the express provision extending liability to only owners and keepers superfluous.

Public policy also supports interpreting the Act as holding only owners and keepers liable for damage caused by estrays. As the Court in *Heyen* held,

> "The likelihood of injury or damage from estrays, and the attendant duty to use care to prevent such injury or damage, lies not in the place where animals may be kept but in their propensity to roam, their wanderlust. Thus, the duty to guard against injury or damage by estrays is cast by law upon the owner or keeper of the animals, and liability for injury or damage must be predicated on the [Animals Running Act]." *Heyen*, 94 Ill. App. 2d at 296.

[1] The Act defines an owner as any person who keeps or harbors an animal. 510 ILCS 55/1.1. Therefore, the Act places liability on both owners and keepers.

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The *Heyen* Court recognized that owners and keepers are in the best position to prevent their animals from causing injury or damage. *Id.* This is certainly true in this case as the Grossens did not live on Parcel A, did not know that Frank was renting Parcel B or that he was using Parcel B to pasture his cattle. (C172-5) Frank, on the other hand, rode his ATV out to the fences and inspected them every Sunday. (C170-1) As the owner and keeper of the cattle, Frank was in the best position to know the disposition and nature of his cattle and the condition of the fences enclosing them.

If Frank had any remedy in this case, it was against the Grossens directly based on the Fence Act. As Frank emphasizes in his brief, the Grossens do not owe a duty of care with regard to Frank's livestock, but rather, they owe a duty of care to maintain their own fence. (Appellee's brief p. 22) This conduct falls squarely within the parameters of the Fence Act, which sets forth the general rules for maintenance or division of partition fences between owners of adjoining parcels of land. *See* 765 ILCS 130, et seq. Illinois courts have interpreted the Fence Act as providing a remedy for a neighbor's failure to maintain their portion of a division fence. *Fox v. Fearneyhough*, 85 Ill.App.2d 371, 373-4 (4th Dist. 1967). Unfortunately for Frank, the Fence Act requires ten days' notice to the parties in default and then, if repairs have not been made, the party giving notice may repair the fence and impose liability upon the nonrepairing party for the costs thereof. *See* 765 ILCS 130/11. If at any time during his regular Sunday inspection, Frank believed that any portion of the Grossen's part of the fence was insufficient, he could have alerted them to that fact by providing the required notice under the Fence Act. Yet year after year, Frank chose to undertake the repairs himself and [2]failed to notify the Grossens. (C168-9, C316-7). Frank cannot now pass

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[2] The Appellate Court correctly affirmed the trial court when it held that Frank has no right of recovery against the Grossens under the Fence Act for damages caused by his own cattle

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the buck on to the Grossens by stretching the plain meaning of the Animals Running Act beyond recognition, or by creating a brand new common law duty for landowners to guard against injuries caused by escaping livestock.

The trial court correctly granted the Grossens' motion for summary judgment as to Frank's common law negligence action as it was not premised on the Animals Running Act and there is no independent basis for the action apart from the Act itself. Moreover, the Animals Running Act does not apply to the Grossens because they were not the owners or keepers of the escaped cattle that caused the damage to the Plaintiff.

II. The breach of a contract between a defendant and a third-party defendant cannot create "liability in tort" to an unrelated plaintiff for purposes of the Contribution Act.

Count III of Frank's contribution complaint alleges that there was an Agreement in Connection with Line Fences ("contract") in effect at the time of the accident in which Plaintiff was injured by Frank's cows. (C86-C89) The contract at issue was recorded in the Jo Daviess County Recorder's office on January 7, 1970 and was entered into by the Grossens' relatives who previously owned Parcel A and Pintozzi's predecessors who previously owned Parcel B. (C100-2) The contract specifies which portion of several division fences each party is to maintain, many of which no longer exist. (C100-2) The contract does not provide for any mechanism to enforce each party's obligation, nor does it provide for any remedy if a party fails to perform under the contract. (C100-2)

A. The Grossens owe no duty to Plaintiff under the contract.

The Contribution Act provides that contribution is permitted between parties who are both subject to "liability in tort" to the plaintiff. 740 ILCS 100/2(a); *see Vroegh v. J & M*

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escaping from their enclosure because Frank failed to provide notice to the Grossens, as required by the Fence Act. (A109)

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Forklift, 165 Ill. 2d 523, 528 (1995). The Appellate Court found that the trial court erred in granting summary judgment because Frank's contribution action could be based on the contract between the Grossens and Frank, even though the contract has no connection to Plaintiff, as long as the injury for which Frank seeks contribution is the same injury for which Frank is liable. (A112)

The Appellate Court cites *Giordano v. Morgan*, 197 Ill. App. 3d 543, 547-8 (2nd Dist. 1990) and *Joe & Dan International Corp. v. United States Fidelity & Guaranty Co.* 178 Ill. App. 3d 741, 750 (1st Dist. 1988) as support for its holding that liability under a contract can establish "liability in tort" under the Contribution Act. (A111-A112) However, both *Giordano* and *Joe & Dan* involved contracts between the plaintiffs and the third-party defendants wherein the third-party defendants owed contractual duties to the plaintiffs. *Giordano,* 197 Ill. App. 3d at 545; *Joe & Dan International Corp.,* 178 Ill. App. 3d at 743-4. The court in *Joe & Dan* emphasized that liability potentially existed, "notwithstanding that their differing duties *to the plaintiff arose from their contracts with [the plaintiff]*, not tort law." *Joe & Dan International Corp.,* 178 Ill. App. 3d at 750 (Emphasis added). In other words, an independent basis for tort liability existed between the third-party defendants and the plaintiffs in these cases. In the case at bar, there is no relationship, contractual or otherwise, between the Grossens and Plaintiff. (C100-2) Plaintiff is not even mentioned in the contract and the contract does not set forth any duties owed by the Grossens to Plaintiff. (C100-2)

B. Because an incidental third-party beneficiary lacks standing to bring suit under a contract to which he is not a party, a contribution action based on a breach of contract theory is necessarily defeated as there is no basis for liability to the incidental beneficiary.

Frank's assertion that Plaintiff was "plainly an incidental third-party beneficiary" of the contract does not save his contribution claim. (Appellee's brief p. 31) Before addressing the merits of Frank's argument on this point, it is important to note that Frank has never

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previously argued that Plaintiff was an incidental beneficiary of the fence agreement. Issues not raised in the trial court are waived and cannot be argued for the first time on appeal. *In re Marriage of Rodriguez*, 131 Ill.2d 273, 279 (1989). Frank has thereby waived any argument that Plaintiff's status as an incidental beneficiary in some way entitles him to seek contribution from the Grossens.

Frank's argument that the contribution claim against the Grossens survives because Plaintiff was an incidental beneficiary of the fence agreement is fundamentally flawed. Frank overlooks the most essential element of a contribution claim: "[S]ome basis for liability to the original plaintiff must exist. If a defendant is not a tortfeasor *vis-à-vis* the original plaintiff, it cannot be a joint tortfeasor *vis-à-vis* a codefendant and may not be held liable to that codefendant for contribution." *Vroegh,* 165 Ill.2d at 529; 740 ILCS 100/2. Under Illinois law, it is well settled that an incidental beneficiary has no rights under a contract and is therefore precluded from bringing suit. *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 14. Accordingly, Plaintiff does not have standing to assert a breach of contract claim against the Grossens as an incidental beneficiary thus negating any basis for liability on the part of the Grossens and defeating Frank's contribution claim. *See id.*

Although Frank attempts to misdirect this Court by framing Plaintiff's lack of standing as an issue to be raised as an "affirmative defense" in the hypothetical breach of contract action between Plaintiff and the Grossens, such an argument must fail as it inherently presupposes the existence of a valid claim. Frank correctly notes that an affirmative defense that may defeat a plaintiff's action will not necessarily defeat a contribution claim. *Vroegh*, 165 Ill.2d at 529. However, it is not enough to simply label the defect as an affirmative defense in order to save the contribution claim. Illinois law is clear that a party from whom contribution is sought must be "potentially capable of being held

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liable to the plaintiff in a court of law or equity." *Id.* While a procedural bar or immunity that might ultimately preclude the plaintiff from recovering from the defendant directly would not necessarily defeat a contribution action (i.e., statute of limitations or parent-child tort immunity), a legally insufficient claim is fatal to a contribution action. *Id.* As the Court discussed in *Vroegh*:

> The reason for this lies in the nature of affirmative defenses. An affirmative defense does not negate the essential elements of the plaintiff's cause of action. To the contrary, it admits the legal sufficiency of that cause of action. It assumes that the defendant would otherwise be liable, if the facts alleged are true, but asserts new matter by which the plaintiff's apparent right to recovery is defeated. A defendant may always elect not to raise such a defense even where it is available to him, and his potential tort liability remains unless he properly invokes the defense and until he can establish that it is meritorious. *Id.* at 530.

In *Vroegh*, a fireman was killed after a forklift's propane fuel tank exploded. *Id.* at 526. The fireman's estate brought a wrongful death action against the facility where the fire occurred, the company that maintained the forklift, and the company that supplied the forklift's propane and fuel tank. *Id.* at 527. After the count against the facility was dismissed on the grounds that the "fireman's rule" shielded the facility from liability, the remaining defendants initiated a third-party action against the facility seeking contribution. *Id.* at 526. This Court ultimately held that the application of the "fireman's rule" was fatal to the contribution claim because it went "to the threshold question of whether an owner or occupier of land has any duty to firefighters injured while fighting a fire on his premises. Where the rule applies, it means that *no duty is imposed by the law*." *Id.* at 530 (emphasis added).

In a similar way, a contracting party owes no duty to an incidental beneficiary. *See Carlson*, 2016 IL App (1st) 143853, ¶ 14. There is no point at which the Grossens can be said to have been even potentially liable to Plaintiff under a breach of contract theory due to the fact that Plaintiff had no rights under the contract and lacked standing to bring suit. Much

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like the *Vroegh* case, "[t]here could never have been a meritorious claim because there never was a duty that was breached." *Id.* Plaintiff could never have made a meritorious claim against the Grossens due to his lack of standing. The fact that Plaintiff is, at most, an incidental beneficiary to the contract is fatal to Frank's contribution claim.

This outcome comports with sound public policy. To find that Frank could maintain a contribution action against the Grossens would widen the scope of contribution actions exponentially. One can imagine that almost any party liable in a tort action would be able to seek contribution on the basis that the injured party was an incidental beneficiary to some existing contract. This would encourage defendants to seek contribution from parties that could otherwise not be held liable due to the fact that the original plaintiff had no rights under the contract and lacked standing to bring suit against the third-party defendants. Such an outcome goes well beyond the intended limits of the Contribution Act, which provides for contribution claims against only those parties who may be "legally culpable" for a plaintiff's injuries. *See Vroegh*, 165 Ill.2d at 531. Therefore, Frank's claimed nexus for contribution liability based on Plaintiff's status as an incidental beneficiary must fail.

CONCLUSION

This Court should affirm the trial court and dismiss all three counts of Frank's contribution complaint against the Grossens. Unless a landowner is an owner or keeper of livestock as contemplated by the Animals Running Act, the landowner has no common law duty to guard against injuries to persons caused by livestock that have escaped from their enclosures. The Appellate Court's decision opens the door for an extension of duty to those who are neither owners nor keepers of cattle, which is inconsistent with Illinois public policy and imposes too heavy a burden on the public to guard against injury which is best prevented by someone like Frank. Frank was in the best position to prevent this accident

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from happening and Frank appropriately bears the responsibility for the consequences of his cattle escaping their confinement.

Furthermore, the contract between the Grossens' relatives and Pintozzi's predecessors does not create liability in tort for purposes of the Contribution Act because the contract does not set forth any duties owed by the Grossens to Plaintiff. Similarly, Frank's attempt to claim that Plaintiff is an incidental beneficiary of the contract does not save his contribution claim. Because an incidental beneficiary has no rights under a contract and is precluded from bringing suit, there is no point at which the Grossens could be liable in tort to Plaintiff under the Contribution Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that this Reply Brief conforms to the requirements of Rules 315 and 341. 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 mailing and those matters to be appended to the brief under Rule 315 and Rule 342(a), is 5,090 words.

Dated this 14th day of August, 2019.

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IN THE SUPREME COURT OF ILLINOIS

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant. KENNETH FRANK, Third- Party Plaintiff-Appellee, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellants.	**Case No. 124641**

NOTICE OF FILING and PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on August 14th, 2019, there was electronically filed and served upon the Clerk of the above Court the Reply Brief and Argument of Third-Party Defendants-Appellants. Service of the Reply Brief and Argument of Third-Party Defendants-Appellants 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 she will send to the Clerk of the above Court thirteen copies of the Reply Brief and Argument of Third-Party Defendants-Appellants.

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 herein are true and correct.

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