No. 125691

In the

Supreme Court of Illinois

RUSSELL ZANDER,

Plaintiff-Appellant,

v.

ROY CARLSON and ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL,

Defendants-Appellees.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-18-1868.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2017 L 63098.
The Honorable **Martin S. Agran**, Judge Presiding.

BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLEES

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NATURE OF THE CASE

In this appeal, plaintiff Russell Zander challenges the Circuit Court's April 30, 2018 order which dismissed his Complaint against defendant Roy Carlson pursuant to Section 2-615 of the Code of Civil Procedure for failure to state a cause of action, and dismissed his Complaint against defendant Illinois Fraternal Order of Police Labor Council pursuant to Section 2-619(a)(1) of the Code of Civil Procedure for lack of jurisdiction. Plaintiff also appears to challenge the Circuit Court's July 31, 2018 Order denying his motion to reconsider. Plaintiff further challenges the November 21, 2019 decision of the Appellate Court affirming the judgment of the Circuit Court.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court err when it dismissed plaintiff's Complaint against defendant Roy Carlson with prejudice pursuant to Section 2-615 of the Code of Civil Procedure, where plaintiff failed to state a claim for legal malpractice in light of the United States Supreme Court's *Atkinson* Rule?

2. Did the Circuit Court abuse its discretion when it denied plaintiff's Motion to Reconsider, rejecting plaintiff's assertion of facts and legal theories that were raised for the first time in the motion to reconsider?

3. Did the Circuit Court err when it dismissed plaintiff's Complaint against defendant Illinois Fraternal Order of Police Labor Council pursuant to Section 2-619(a)(1) of the Code of Civil Procedure for lack of jurisdiction, where plaintiff's claim amounted to an unfair labor practice claim over which the Illinois Labor Relations Board had exclusive jurisdiction?

STATUTES INVOLVED

Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq.

5 ILCS 315/2 Policy (in pertinent part)

…It is the purpose of this Act to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements.

It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all. To prevent labor strife and to protect the public health and safety of the citizens of Illinois, all collective bargaining disputes involving persons designated by the Board as performing essential services and those persons defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such disputes. It is the public policy of the State of Illinois that where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act. To that end, the provisions for such awards shall be liberally construed.

5 ILCS 315/5 Illinois Labor Relations Board; State Panel; Local Panel (in pertinent part)

(a) There is created the Illinois Labor Relations Board. The Board shall be comprised of 2 panels, to be known as the State Panel and the Local Panel.

(a-5) The State Panel shall have jurisdiction over collective bargaining matters between employee organizations and the State of Illinois, excluding the General Assembly of the State of Illinois, between employee organizations and units of local government and school districts with a population not in excess of 2 million persons, and between employee organizations and the Regional Transportation Authority.

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STATEMENT OF FACTS

Plaintiff, Russell Zander, initiated this action on September 11, 2017 by filing a two-count complaint against the defendants, the Illinois Fraternal Order of Police Labor Council ("IFOP Labor Council") and its employee, Roy Carlson ("Carlson"). (C9-20.)[1] Count I of the Complaint alleged legal malpractice against Carlson and Count II sought to impose vicarious liability against Carlson's employer, the IFOP Labor Council, for Carlson's alleged negligence. (*Id.*) In sum, plaintiff purported to state a cause of action against both defendants based upon Carlson's alleged conduct in representing plaintiff during collectively bargained for grievance proceedings between plaintiff and his former employer, the Village of Fox Lake ("the Village"). (C15-20; C212-13; SA2-3.)[2] Plaintiff alleged that those grievance proceedings ultimately resulted in the Village terminating his employment as a police officer. (*Id.*)

Plaintiff alleged that, at all relevant times in this case, defendant Carlson was employed by the IFOP Labor Council as an attorney. (C2, ¶¶3, 5; C3, ¶11.) The IFOP Labor Council is a "labor organization" established pursuant to Section 2(i) of the Illinois Public Labor Relations Act, 5 ILCS 315/2(i)), and represents thousands of public safety and criminal justice

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1 "C__" represents a citation to the Common Law Record. All page citations omit leading zeroes. Facts taken from the plaintiffs' Complaint were accepted as true solely for the purposes of the defendants' motion to dismiss.

2 "SA__" represents a citation to the Defendants-Appellees' Supplemental Appendix attached hereto. All page citations omit leading zeroes.

employees through the State who have collective bargaining rights under the Act. (C97, ¶3.) Plaintiff alleged that both Carlson and the IFOP Labor Council were negligent in various ways throughout plaintiff's grievance process with the Village, including the resulting arbitration process and termination proceedings. (C4-9.)

At all times alleged in the Complaint, the IFOP Labor Council was the exclusive bargaining representative for police officers employed by the Village of Fox Lake Police Department, and was recognized as such by the Illinois Labor Relations Board. (C97; C148-150.) The IFOP Labor Council represented police officers of the Village, including plaintiff, by its employee Carlson throughout the grievance process alleged in the Complaint pursuant to a collective bargaining agreement between the Village and the IFOP Labor Council. (C10-11; C97-98; C115-117.)

Defendants Carlson and the IFOP Labor Council promptly moved to dismiss plaintiff's Complaint. (C77-84.) In their motion, they argued that plaintiff's claims were barred by 735 ILCS 5/2-615 and the *Atkinson* Rule set forth by the United States Supreme Court, which forecloses state law claims against agents of unions for alleged misconduct related to a collective bargaining agreement and holds that the union itself is the sole source of recovery for any injuries inflicted by it. (C79-81.) Defendants also argued that because plaintiff's claim arose from the collective bargaining agreement between the IFOP Labor Council and plaintiff's employer, the Village of Fox

Lake, the Illinois Labor Relations Board had exclusive jurisdiction over this matter, therefore requiring dismissal pursuant to 735 ILCS 5/2-619(a)(1). (C81-84.)

Defendants submitted the affidavit of Richard Stomper in support of their motion to dismiss pursuant to Section 2-619(a)(1) of the Code of Civil Procedure. (C97-98.) This uncontroverted affidavit established that (a) the IFOP Labor Council was a "labor organization" established in accordance with the Illinois Public Labor Relations Act (5 ILCS 315/2(i)); (b) the IFOP Labor Council was the sole and exclusive bargaining agent for police officers employed by the Village of Fox Lake, including plaintiff; and (c) the collective bargaining agreement between the IFOP Labor Council and the Village of Fox Lake governed the grievance process between Plaintiff and the Village of Fox Lake described in the Complaint, including the proceedings that ultimately resulted in plaintiff's termination. (*Id.*) The affidavit also included the applicable collective bargaining agreement (C99-147) as well as the certification of representative designating the IFOP Labor Council as the exclusive representative of Village of Fox Lake police officers. (C148-150).

In response, plaintiff argued that the facts of this case were distinguishable from *Atkinson* by claiming that his case did not arise from the collective bargaining agreement. (C160-64.) Plaintiff also argued that the cases cited by defendants were distinguishable because plaintiff alleged the existence of an attorney-client relationship between himself and Carlson.

(C164-67.) Alternatively, plaintiff argued that even if no attorney-client relationship existed between himself and Carlson, he was a third-party beneficiary of an attorney-client relationship between Carlson and the IFOP Labor Council. (C167-69.) Finally, plaintiff argued that because he styled his claim as one for legal malpractice and not an unfair labor practice, he was not required to pursue his claim before the Illinois Labor Relations Board. (C169-171.)

The Circuit Court conducted a hearing on defendants' motion to dismiss on March 30, 2018, during which it heard oral argument. (C210.) The court took the matter under advisement and continued the case to April 30, 2018 for ruling. (*Id.*) On April 30, 2018, the court entered its order granting the motion, dismissing plaintiff's claims against defendant Carlson pursuant to Section 2-615 and the claims against IFOP Labor Council pursuant to Section 2-619(a)(1). (C211; SA1.) In sum, the court dismissed all of plaintiff's claims with prejudice pursuant to the arguments and caselaw cited by defendants in the motion to dismiss. (C211-13; SA1-3.)

Incorporated into the Circuit Court's April 30, 2018 order was its memorandum setting forth its decision and the case law upon which the court relied. (C212-13; SA2-3.) In it, the Circuit Court noted that plaintiff was a police officer for the Village of Fox Lake, that plaintiff alleged that Carlson was an employee of the IFOP Labor Council, and that Carlson was held out to the members of the union as the union's attorney who would represent all

members in labor disputes or grievances with the various employers of the police officers. (C212; AS2.) The Circuit Court noted the close parallels between the Illinois Public Labor Relations Act and the National Labor Relations Act, and that Illinois courts look to federal decisions interpreting the NLRA in considering analogous provisions of the Illinois Public Labor Relations Act. (*Id.*) The Circuit Court further highlighted certain provisions of the collective bargaining agreement and found that the United States Supreme Court's decision in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), applied to bar plaintiff's claims against defendant Carlson. (C213; SA3.) The Circuit Court also found plaintiff's Complaint against the IFOP Labor Council amounted to a claim that the union breached its duty of fair representation and was therefore subject to the Illinois Labor Relations Board's exclusive jurisdiction, citing *Foley v. American Federation of State, County, and Municipal Employees*, 199 Ill.App.3d 6 (1st Dist. 1990). (*Id.*)

On May 29, 2018, plaintiff filed a motion to reconsider. (C217.) In it, plaintiff raised several arguments for the first time, asserting that the court should reconsider its ruling due to fiduciary duties purportedly owed by Carlson to plaintiff, analogizing the case to bankruptcy proceedings and urging the court to permit an action against Carlson to the extent of his malpractice insurance, and likening the role of Carlson as a union employee to that of a court-appointed attorney. (C219-25.) Plaintiff also repeated his argument that because he styled his claim as one for legal malpractice and

not an unfair labor practice, he was not required to pursue his claim before the Illinois Labor Relations Board. (C226.)

The Circuit Court conducted a hearing on plaintiff's motion to reconsider on July 31, 2018. (C242; SA4.) After being "fully advised in the premises," the court denied plaintiff's motion to reconsider. (*Id.*) In reaching its decision, the Circuit Court specifically found that plaintiff had raised new legal theories and facts in its motion, and that plaintiff's failure to raise those theories before resulted in a waiver of those arguments. (*Id.*) The Circuit Court also found that its previous application of the law was not in error. (*Id.*)

Plaintiff filed a timely notice of appeal on August 27, 2018. (C244.) In plaintiff's notice of appeal, he asserted that he was appealing both the April 30, 2018 order granting defendants' motion to dismiss, as well as the July 31, 2018 order denying his motion to reconsider. (*Id.*) However, plaintiff did not supply a Report of Proceedings pursuant to Ill. Sup. Ct. R. 323(a), and the record does not contain any transcript of either the March 30, 2018 hearing on defendants' motion to dismiss or the July 31, 2018 hearing on plaintiff's motion to reconsider.

On November 21, 2019, the Illinois Appellate Court, First District, issued its opinion affirming the Circuit Court's judgment dismissing plaintiff's Complaint. (SA5, SA12.) In its decision, the Appellate Court recognized the United States Supreme Court's holding in *Atkinson* that interpreted the National Labor Relations Act (29 U.S.C § 151 *et seq*.) such

that "a union's agents may not be held individually liable for actions taken on the union's behalf in the collective bargaining process." (SA7-8.) The Appellate Court next held that *Atkinson* immunity "must fully apply in the public sector" under the Illinois Public Labor Relations Act, 5 ILCS 315/2 (West 2018), because Illinois courts look to federal precedent for guidance in construing the Public Labor Relations Act and because the comprehensive scheme of remedies and administrative procedures would be undermined if it did not. (SA8.) Relying upon several federal decisions applying the *Atkinson* immunity to union attorneys, the Appellate Court affirmed the Circuit Court's dismissal of plaintiff's legal malpractice claim against defendant Carlson. (SA9-11.) It also held that plaintiff's claim against defendant IFOP Labor Council was subject to the exclusive jurisdiction of the Illinois Labor Relations Board, and that plaintiff could not avoid the Public Labor Relations Act's comprehensive statutory scheme through creative pleading. (SA11-12.) Accordingly, the Appellate Court affirmed the Circuit Court's judgment dismissing plaintiff's Complaint. (SA12.)

Standard of Review

1. The trial court's April 30, 2018 order dismissing plaintiff's Complaint pursuant to Section 2-615 and 2-619(a)(1) is subject to *de novo* review. *Solaia Technology, LLC v. Specialty Publishing Co.,* 221 Ill.2d 558,579 (2006).

2. The trial court's July 30, 2018 order denying plaintiff's Motion to Reconsider is subject to an abuse of discretion standard of review. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 347 (2002)

I.

BOTH THE CIRCUIT COURT AND APPELLATE COURT WERE EMINENTLY CORRECT IN HOLDING THAT *ATKINSON* IMMUNITY APPLIED TO DEFEAT PLAINTIFF'S CLAIM AGAINST DEFENDANT CARLSON.

The Circuit Court correctly dismissed plaintiff's Complaint with prejudice pursuant to 735 ILCS 5/2-615, because it failed to plead facts which supported a legally recognized cause of action against defendant Carlson. *Pelham v. Griesheimer*, 92 Ill.2d 13, 17 (1982). The Appellate Court recognized this and properly affirmed the Circuit Court's judgment. Illinois pleading requirements are more stringent than the notice pleading standard used in the federal courts and other jurisdictions, and when considering a motion to dismiss the pleadings are to be construed strictly against the pleader. *Pelham*, 92 Ill.2d at 17. Factual deficiencies may not be cured by liberal construction, and dismissal of a complaint is proper where, as here, it rests upon conclusions of law or facts unsupported by specific factual allegations. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶27. Courts are not required to reach unreasonable and unwarranted conclusions or to draw unreasonable and unwarranted inferences to sustain the sufficiency of a complaint. As such, "[l]egal conclusions, speculation and conjecture must be ignored by the court." *Butitta v. First Mortgage Corp.*, 218 Ill.App.3d 12, 15 (1st Dist. 1991).

A. *Atkinson* Bars Plaintiff's Claim Against Carlson.

In this case, the judgments of both the Circuit Court and Appellate Court dismissing plaintiff's claim against defendant Carlson pursuant to Section 2-615 of the Code of Civil Procedure were eminently correct and should be affirmed by this Court. Plaintiff's attempt to state a claim for legal malpractice against Carlson, whom plaintiff admits was an employee and agent of union defendant IFOP Labor Council, was directly contrary to the United States Supreme Court's decision in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). There, the Supreme Court held that union officers and employees are immune from personal liability for acts undertaken as union representatives on behalf of the union, such that claims against union agents and employees, whether they are sued in tort, contract or both, must be dismissed. 370 U.S. 245-49.

As an initial matter, the Circuit Court and the Appellate Court both correctly noted that Illinois courts regularly look to federal decisions in interpreting the Illinois Public Labor Relations Act and look to federal law given the close parallels between the IPLRA and the National Labor Relations Act. *Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 345 (1989); *Illinois FOP Labor Council v. Illinois Local Labor Rels. Bd.*, 319 Ill.App.3d 729, 737-38 (1st Dist. 2001), citing *Chief Judge of the Illinois Sixteenth Judicial Circuit*, 178 Ill.2d 333 (1997) (holding that decisions of the NLRB and Federal courts guide Illinois courts in interpreting the IPLRA)

and *Rockford Township Highway Dep't v. Illinois State Labor Relations Board*, 153 Ill.App.3d 863, 875 (2nd 1987). Indeed, Plaintiff does not (and cannot) dispute this point. Accordingly, both courts below were correct when they followed the rule set forth in *Atkinson*—and virtually every other court that has considered the issue—and found that Carlson was immunized from plaintiff's legal malpractice claim as a matter of law.

As noted by the Appellate Court in its decision, courts across the country have routinely applied *Atkinson* "to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process." SA8, citing *Montplaisir v. Leighton*, 875 F.2d 1, 4 (1st Cir. 1989)("[T]his principle has become so embedded in our jurisprudence that it brooks no serious challenge.") For example, in *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), the court held that the *Atkinson* Rule applies to a union's in-house counsel, as well as to its retained outside counsel:

> When the union uses its regular outside counsel, the services are sometimes covered under an overall retainer agreement, and there is no additional fee or charge to the union for the law firm's handling of the matter. In any event, whether it be house counsel or outside union counsel, where the union is providing the services, the attorney is hired and paid by the union to act for it in the collective bargaining process.

Peterson, 771 F.2d at 1258.

In *Peterson*, the plaintiff was a professional football player who filed suit against his union and the defendant attorneys (who were staff counsel to

the union) alleging that the attorneys negligently advised him to file the wrong kind of grievance and failed to rectify the error when there was an opportunity to do so. 771 F.2d at 1251. The claim against the union was styled as a breach of the duty of fair representation, while the claim against the attorneys was one for professional malpractice. *Id.* The district court directed a verdict in favor of the attorney on the plaintiff's malpractice claim, and the U.S. Court of Appeals for the Ninth Circuit affirmed based upon the *Atkinson* Rule. *Id.* at 1256.

Specifically, the Ninth Circuit rejected the plaintiff's contention—repeated by plaintiff Zander here—"that an exception to the *Atkinson* rule should be fashioned for union employees who happen to be attorneys." 771 F.2d at 1258. As noted by the Appellate Court below, the court in *Peterson* recognized that when a union hires an attorney to act on its behalf in the collective bargaining process—including an arbitration proceeding where the underlying grievance belongs to a particular union member—the union itself continues to represent and is ultimately responsible to the member. *Id.* Accordingly, the rationale supporting *Atkinson* immunity squarely applied. *Id.*

For thirty-five years following *Peterson*, federal courts of appeals across the country repeatedly looked to *Atkinson* (and *Peterson*) and uniformly prohibited claims made by union members against attorneys employed by or retained by the union to represent the member in a dispute

related to a collective bargaining agreement. *Carino v. Stefan*, 376 F.3d 156, 159-60 (3rd Cir. 2004); *Waterman v. Transport Workers' Union Local 100*, 176 F.3d 150 (2d Cir. 1999); *Arnold v. Air Midwest Inc.*, 100 F.3d 857 (10th Cir. 1996); *Breda v. Scott*, 1 F.3d 908 (9th Cir. 1993)(applying *Atkinson* immunity to outside counsel hire by union to represent plaintiff at arbitration challenging discharge); *Montplaisir*, 875 F.2d 1, 4 (1st Cir. 1989)(noting that courts have followed *Atkinson* "with monotonous regularity").[3]

The U.S. Court of Appeals for the First Circuit, in its decision in *Montplaisir*, considered the question of whether state-law malpractice claims brought by public employees could proceed against their union's lawyers, when the alleged malpractice occurred within the ambit of the collective bargaining process. 875 F.2d at 4. In that case, the plaintiffs were members of the air traffic controllers' union who brought a legal malpractice claim against the lawyers that acted as their union's general counsel that advised regarding an ill-fated strike which ultimately resulted in the plaintiffs losing their jobs. *Id.* at 1. Although the case dealt with the Federal Labor Relations Act and the Civil Service Reform Act, 5 U.S.C. §7101 et seq., because it implicated a comprehensive statutory scheme for regulating labor disputes established by Congress, the court looked to *Atkinson* to find that the lawyers were immune. *Id.* at 4.

[3] The Seventh Circuit expressly declined to consider the issue of whether and to what extent *Atkinson* immunity applied to a claim under 42 U.S.C. ' 1983 in *Bagley v. Blagojevich*, 646 F.3d 378, 400 n. 2 (7th Cir. 2010).

Appealing from the dismissal of their complaint in the district court, the plaintiffs offered several reasons why *Atkinson* immunity should not apply. 875 F.2d at 5. These reasons included arguments that plaintiffs would be deprived of a damages remedy and that lawyers should not be "union agents" for purposes of *Atkinson* (*Id.* at 5-6)—the primary arguments Plaintiff Zander asserts here (Brief of Appellant, p. 7). With respect to the absence of a damages remedy, the court noted that Congress specifically intended (a) to shield unions from tort liability for acts related to the collective bargaining process, and (b) to resolve complaints against unions through an administrative process, and concluded "that injured employees might be left without a means of recovering money damages [was] a necessary consequence of" the statutory scheme. *Id.* at 5. The court likewise rejected the argument that *Atkinson* shouldn't apply to union lawyers. Citing *Peterson*, the court found that lawyers act as "an arm of the union" and that "[d]octrinally, *Atkinson* fits this situation like a well-worn glove." *Id.* at 6.

In *Carino*, the plaintiff sued an attorney and his law firm for legal malpractice following the union attorney's representation of her in connection with a labor grievance proceeding against her employer. 376 F.3d at 157. The U.S. Court of Appeals for the Third Circuit affirmed dismissal of the claims against the attorneys pursuant to the *Atkinson* Rule and found that attorneys employed by unions to perform services related to a collective bargaining

agreement were immunized from suit for malpractice. *Id.* at 162. Specifically, the court stated:

> Any court considering her suit against the union attorneys, whether it be a federal court with federal question jurisdiction, a federal court sitting in diversity or a state court, would be compelled as a matter of substantive law, to conclude that §301(b) [of the Labor Management Relations Act] bars her claim under *Atkinson.*

Id. at 161-62.

In addition to the federal courts of appeals, numerous state courts have followed *Atkinson* to bar malpractice claims against attorneys as well. See, e.g., *Aragon v. Pappy*, 262 Cal. Rptr. 646, 652-54 (Cal. Ct. App.1989); *Collins v. Lefkowitz*, 584 N.E.2d 64, 65 (Ohio Ct. App. 1990) (holding that an attorney who is handling a labor grievance under a collective bargaining agreement has not entered into an attorney-client relationship with the union member); *Sellers v. Doe*, 650 N.E.2d 485 (Ohio Ct. App. 1994); *Mamorella v. Derkasch*, 276 A.D.2d 152 (N.Y. App. Div. 2000). *Atkinson* immunity also applies in the context of a local government employee where a state's public labor relations act (such as the IPLRA) applies. *Killian v. Int'l Union of Operating Eng'rs, Local 609-A*, 381 P.3d 161, 165-66 (Wash. Ct. App. 2016)(considering Public Employees Collective Bargaining Act); *Weiner v. Beatty*, 116 P.3d 829, 831-33 (Nev. 2005)(interpreting Nevada Employee Management Relations Act); *Brown v. Maine State Emples. Ass'n*, 690 A.2d 956, 958 n.1 (Me. 1997)(applying State Employee Labor Relations Act).

As was the case in *Peterson*, *Montplaisir*, and *Carino*, *Atkinson* immunity squarely applied to plaintiff's claims against Carlson in this case. Plaintiff alleged that, at all relevant times, Carlson was an agent/employee of plaintiff's union, the IFOP Labor Council. (C10-11, ¶¶3, 5, 11,). The grievance process alleged in the Complaint was conducted pursuant to the collective bargaining agreement that was in effect at that time between the IFOP Labor Council and the Village of Fox Lake. (C10-13; C97, ¶5.) Thus, under *Atkinson*, plaintiff's claims that Carlson mishandled his grievance and termination proceedings were plainly barred.

For this reason, the Circuit Court did not err in its April 30, 2018 order dismissing plaintiff's Complaint with prejudice pursuant to Section 2-615 of the Code of Civil Procedure, and that order as well as the Appellate Court's November 21, 2019 decision should be affirmed by this Court.

B. Plaintiff's Attempts to Distinguish *Atkinson, Peterson,* and Their Progeny Should Be Rejected.

Throughout his Brief plaintiff contends that his claim is legally distinguishable from the facts of *Atkinson* because defendant Carlson was an attorney and should therefore be held to a purported higher standard of conduct as set forth by the Illinois Rules of Professional Conduct. Brief of Appellant, pp. 9-11. However, as expressly noted by the Appellate Court, this concern is unfounded since "nothing in our decision should be read to suggest that union attorneys may not face discipline for violating the rules of

professional conduct." SA11. Moreover, it is well established that the Rules of Professional Conduct do not establish a separate duty or cause of action. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 353 (1st Dist. 2000). Indeed, contrary to plaintiff's argument, the Rules themselves make clear that

> [v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. *** The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Ill. R. Prof'l Conduct (2010), Preamble (eff. Jan. 1, 2010).

Plaintiff also goes to great lengths in attempting to distinguish the Ninth Circuit's decision in *Peterson*, noting that it found that no attorney-client relationship existed between the plaintiff and the union attorney and asserting that plaintiff's allegation of such a relationship means *Peterson* does not apply here. Brief of Appellant, pp. 12, 17. Plaintiff's argument was properly rejected by the Appellate Court, suggesting that such an allegation was a "mere conclusion of law" that could not be squared with the factual allegations of the Complaint. SA9. The attorney-client relationship is a voluntary, contractual relationship that requires the consent of both the attorney and client. *In re Chicago Flood Litigation*, 289 Ill. App. 3d 937, 941 (1st Dist. 1997).

In the present case, plaintiff himself alleged that Carlson was an employee of the IFOP Labor Council, which is a labor union, that plaintiff

was a union member given no input as to the selection of an attorney, and that Carlson was "forced" upon plaintiff by means of a "cramdown." (C11, ¶¶10-12.) As such, the factual allegations of the Complaint did not set forth the existence of an attorney-client relationship between Carlson and plaintiff individually and apart from plaintiff's membership in the union. *Peterson*, 771 F.2d at 1258 ("We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance").

Indeed, plaintiff's argument here that an independent attorney-client relationship existed between himself and Carlson—a union lawyer representing a union member in connection with a grievance proceeding arising out of the collective bargaining agreement—was expressly rejected in the cases he cites. See e.g., *Arnold v. Air Midwest*, 100 F.3d 857, 862-63 (10th Cir. 1996) (rejecting claim of individual attorney-client relationship where union employed attorney); *Niezbecki v. Eisner & Hubbard*, P.C., 717 N.Y.S.2d 815, 821 (N.Y. Civ. Ct. 1999)("While the union may provide legal services by employing in-house counsel or hiring outside counsel for a specific proceeding, no attorney-client relationship between counsel and members results"); *Peterson v. Kennedy*, 771 F.2d at 1258.

Instead, plaintiff's allegations demonstrated only that Carlson—in his capacity as an employee of the IFOP Labor Council—represented plaintiff

during the course of the grievance proceedings related to the Village of Fox Lake's efforts to discipline plaintiff. (C12-15, ¶¶15-29.) As noted in *Peterson*, "where an attorney performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives, the *Atkinson* rule is squarely applicable." 771 F.2d at 1258. Under *Atkinson, Peterson* and their progeny, plaintiff simply could not state a claim for legal malpractice against either of the defendants. The judgments of the Circuit Court and Appellate Court should be affirmed for this reason as well.

C. The Cases Cited By Plaintiff Are Distinguishable.

Plaintiff cites several cases in his Brief in an effort to convince this Court that numerous case have refused to apply *Atkinson* immunity to situations analogous to the facts of this case, including *Warren v. Williams*, 313 Ill.App.3d 450 (1st Dist. 2000), *Weitzel v. Oil Chem. & Atomic Workers Int'l Union Local 1-5*, 667 F.2d 785 (9th Cir. 1982), *Aragon v. Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), and *Canez v. Hinkle*, 210 F. 3d 381 (9th Cir. 2000). Brief of Appellant, pp, 15-18. Each case is readily distinguishable, and none of them support reversing the Appellate Court's decision in this case.

In *Warren v. Williams*, the plaintiff was a police lieutenant for the Village of Robbins. 313 Ill.App.3d at 452. The plaintiff was sued in a civil rights suit in the U.S. District Court for the Northern District of Illinois

naming himself, another officer and the village as defendants. *Id.* The defendant was the village attorney who filed an appearance on behalf of all three defendants in the district court but failed to defend the plaintiff and the other police officer after the village was successfully dismissed, which resulted in the entry of a default judgment against the plaintiff. *Id.* The plaintiff alleged that he had no knowledge of the underlying federal lawsuit until his wages were garnished following entry of the judgment against him. *Id.* at 453. The plaintiff sued the defendant for legal malpractice, prevailed following a bench trial, and that judgment was upheld on appeal. *Id.* at 453-55. Plaintiff states, incorrectly, that plaintiff in *Warren* was a union member. Brief of Appellant at 15. In fact, there was no evidence in that case that the plaintiff was a union member, and the case had nothing to do with the liability of union agents for union wrongs or the applicability of *Atkinson* immunity. As such, *Warren* simply has no bearing on the issues of this case and plaintiff's reliance upon it is wholly misplaced.

Weitzel v. Oil Chem. & Atomic Workers Int'l Union Local 1-5, 667 F.2d 785 (9th Cir. 1982) is also distinguishable. In that case, which preceded the Ninth Circuit's decision in *Peterson* by several years, the plaintiff sued a law firm to which he had been referred by his union for purposes of prosecuting an unfair labor practice complaint against his employer. 667 F.2d at 786. Both the district court and the court of appeals held that a triable issue of fact existed as to whether a private attorney-client relationship existed

between the plaintiff and the outside law firm. *Id.* at 787. Unlike the facts of that case, and as the Appellate Court correctly noted in this case, plaintiff specifically alleged that defendant Carlson was an agent and employee of the IFOP Labor Council, and there were no allegations of a private attorney-client relationship. SA9-10. *Weitzel* is therefore inapposite here. See also *Peterson*, 771 F.2d at 1260 (distinguishing *Weitzel* and noting that it dealt with "claimants who retain private counsel").

In *Aragon*, the plaintiff brought suit against her employer for breach of the collective bargaining agreement, her union for breach of the duty of fair representation, and the union's outside law firm for professional malpractice. 750 F.2d 1447, 1448. The analysis in that case focused on whether a legal malpractice claim against an outside law firm was preempted by federal labor law. *Id.* at 1455-57. *Aragon* never considered *Atkinson* or any of the cases prohibiting imposition of liability upon union agents or employees (like defendant Carlson) for actions taken on behalf of the union in connection with the collective bargaining process, but rather remanded the malpractice claim to state court. On remand, the Court of Appeal of California ultimately followed *Atkinson* and *Peterson* and held that the attorneys were immune from suit in light of the policy considerations behind federal labor law. *Aragon v. Pappy*, 214 Cal. App. 3d 451, 461-63, 262 Cal. Rptr. 646, 652-54 (1989). Accordingly, the *Aragon* cases in fact support the decisions of the

Circuit Court and Appellate Court in this case, and plaintiff's reliance upon them are woefully misplaced.

Also problematic is plaintiff's citation to *Canez v. Hinkle*, 2000 U.S. App. LEXIS 1391, Case No. 98-16602 (9th Cir. Jan. 8, 2000). As an initial matter, since that case is an unpublished order, it is not even persuasive authority in the Ninth Circuit. 9th Cir. R. 36-3 (prohibiting citations to unpublished dispositions and orders issued before 2007), let alone here. Furthermore, that case is readily distinguishable because the attorney defendants—outside counsel to the union and his law firm—were alleged to have committed malpractice by advising the plaintiff (a union trustee) regarding whether or not the plaintiff could take a personal loan from the union. 2000 U.S. App. Lexis 1391 at *3. As such, the alleged negligence was "wholly unrelated to the collective bargaining process" and *Atkinson* immunity did not apply. *Id.*, citing *Peterson*, 771 F.2d at 1259.

By contrast, plaintiff's own allegations showed that defendant Carlson's conduct related to the grievance process governed by the collective bargaining agreement between the IFOP Labor Council and the Village of Fox Lake. For example, plaintiff alleged:

- "CARLSON has been held out to the members of the FOP as the FOP's attorney who would represent all members in labor disputes or grievances…"(C10, ¶6);

- "ZANDER was informed by more than one employee of FOP that Defendant CARLSON handled all grievances and termination proceedings…"(C11, ¶10);
- "[N]either CARLSON nor FOP restricted the scope of his or its representation of ZANDER, agreeing to handle the entire grievance and termination proceedings on behalf of ZANDER with the Village of Fox Lake."(C12, ¶15);
- "In spite of the obvious benefits to proceeding before the civil service police commission of Fox Lake, CARLSON induced ZANDER to waive that right and agree to an arbitration…"(C13, ¶21);
- "As aforesaid, CARLSON had induced ZANDER to agree to a sole arbitrator and a binding arbitration…"(C13, ¶23).

Furthermore, as correctly noted by the Appellate Court, plaintiff's right to challenge his termination through arbitration was created and governed by the collective bargaining agreement at issue in this case. SA10; C129-130. A similar provision was at issue in *Carino*, 376 F.3d at 158, n.2, where the court rejected the very argument plaintiff asserts here, finding that the matter related to the collective bargaining agreement even though the request to arbitrate the grievance (which was predicated upon the collective bargaining agreement) was ultimately withdrawn. 376 F.3d at 159, 162.

Here, plaintiff's Complaint sought to impose malpractice liability against Carlson, who was a union employee, and the allegations against

Carlson unquestionably "related to the collective bargaining agreement" that governed plaintiff's employment with the Village of Fox Lake Police Department. As a result, the facts of this case are plainly distinguishable from the aforementioned cases cited by the plaintiff. Accordingly, plaintiff's Complaint was properly dismissed pursuant to the *Atkinson* Rule, and the Appellate Court did not err in affirming that dismissal. *Peterson*, 771 F.2d at 1258-59; *Montplaisir*, 875 F.2d at 4; *Carino*, 376 F.3d at 159-60.

II.

THIS COURT MUST REJECT PLAINTIFF'S ARGUMENT RELATING TO CARLSON'S PURPORTED MALPRACTICE INSURANCE, AS THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO RECONSIDER.

In his Brief, plaintiff also urges this Court to find that defendant Carlson should be liable for breaches in the standard of care to the extent of his malpractice insurance coverage. Brief of Appellant, pp. 19-22. In advancing this argument, plaintiff glosses over the fact that he raised it for the first time in his motion to reconsider. *Id.*, p. 5; C234-35. Accordingly, the argument relies upon an unalleged fact that appears nowhere in plaintiff's Complaint. Moreover, to the extent he raises it before this Court, plaintiff necessarily challenges the Circuit Court's July 31, 2018 order denying plaintiff's motion to reconsider. "A ruling on a motion to reconsider is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 347 (2002).

A. Plaintiff Failed to Provide an Adequate Record Pertaining to the July 31, 2018 on Plaintiff's Motion to Reconsider.

As an initial matter, the record on appeal does not contain a Report of Proceedings pursuant to Supreme Court Rule 323(a) or otherwise include a transcript of the July 31, 2018 hearing on plaintiff's motion to reconsider where plaintiff first raised his argument relating to the purported malpractice insurance of Carlson. "Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of the proceeding[,]" such that the reviewing court presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Webster v. Hartman*, 195 Ill.2d 426, 432 (2001), citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)(rejecting claim of error on motion to vacate where appellant failed to include transcript of hearing). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill.2d at 392. Without a transcript of the hearing on the motion to reconsider, there is no basis for holding that the circuit court abused its discretion in denying the plaintiff's motion. *Id.*

For this reason alone, this Court should reject plaintiff's arguments pertaining to malpractice insurance.

B. Plaintiff Forfeited any Argument Pertaining to Carlson's Claimed Malpractice Insurance.

As noted above, plaintiff first made his claim regarding Carlson's purported malpractice insurance in his motion to reconsider. C221-22. It

remains settled law, however, that arguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271 at ¶36, citing *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (1st Dist. 2008). The Circuit Court recognized this fact and denied plaintiff's motion to reconsider on that basis on July 31, 2018. SA4. The Appellate Court likewise found that plaintiff had forfeited this argument. SA11. The Circuit Court simply did not abuse its considerable discretion when it denied plaintiff's motion to reconsider on this basis on July 31, 2018, and the Appellate Court did not err when it affirmed the judgment of the Circuit Court on November 21, 2019.

C. The Appellate Court Correctly Rejected Plaintiff's Argument As Contrary To The Policy Considerations Behind *Atkinson*.

More substantively, and contrary to plaintiff's arguments, the rule set forth in *Atkinson* (and applied to union attorneys like Carlson in *Peterson*, *Carino* and the other cases cited above) simply held that, pursuant to Congressional intent, plaintiff's union "is the sole source of recovery for injury inflicted by it," and that this policy may not be circumvented by permitting state court actions against union officials or agents. *Atkinson*, 370 U.S.at 249. Plaintiff thus was not deprived of a remedy, and in fact had an opportunity to pursue an action for an unfair labor practice against the IFOP Labor Council before the Illinois Labor Relations Board by means of a complaint alleging a breach of the duty of fair representation. 5 ILCS 315/5. See, e.g., *Foley v.*

American Federation of State, County and Municipal Employees, 199 Ill.App.3d 6, 12 (1st Dist. 1990); *Niezbecki*, 717 N.Y.S.2d at 822.

Plaintiff's citations to cases interpreting the bankruptcy code are utterly beside the point. The immunity afforded to Carlson under *Atkinson* is a point of *substantive law* that bars plaintiff's claim in its entirety. *Carino*, 376 F.3d at 161-62 (emphasis added). It is justified by the policy considerations set forth in *Atkinson*, *Peterson,* and their progeny and has absolutely nothing to do with the interests served by federal bankruptcy law. In sum, plaintiff's reliance upon *Green v. Welsh*, 956 F.2d 30 (2nd Cir. 1992)(interpreting bankruptcy code) and other federal bankruptcy cases simply have no bearing on the issues before this Court. Brief of Appellant, pp. 20-21. As noted above, plaintiff was never deprived of a remedy for his purported claim. Plaintiff simply failed to raise any such claim properly (as one for breach of the duty of fair representation against defendant IFOP Labor Council) and in the appropriate forum (before the Illinois Labor Relations Board).

Plaintiff's argument that Carlson has no need for malpractice insurance in light of *Atkinson* immunity is also meritless. Brief of Appellant, p. 19. As plaintiff himself painstakingly argues, union lawyers may be susceptible to claims for malpractice that do not relate to collective bargaining. *Id.*, pp. 17-18. Moreover, in the event that plaintiff had properly pursued his claim as one for breach of the duty of fair representation before

the Illinois Labor Relations Board, defendants Carlson and IFOP Labor Council would have been insured for a defense of any such claims.

Stretching even further, plaintiff relies upon several decades-old cases considering the waiver of immunity doctrine under the Tort Immunity Act, which held that the local public entity's purchase of liability insurance operated as a waiver of any governmental immunity to the extent of insurance coverage. See, e.g., *Beach v. Springfield*, 32 Ill.App.3d 256 (3rd Dist. 1961); *Porter v. City of Urbana*, 88 Ill.App.3d 443, 445 (4th Dist. 1980) (interpreting section 9-103(c) of the Tort Immunity Act). This waiver of immunity doctrine existed when governments and charitable institutions enjoyed common law immunities and did not survive the abolishment of those immunities. *Hudson v. YMCA of Metro. Of Chi. LLC*, 377 Ill.App.3d 631, 634 (1st Dist. 2007). Moreover, Section 9-103(c) was amended in 1986, such that now the existence of liability insurance has no bearing on the extent of a public entity's immunity. *Id.* at 636-37. As such, the cases relied upon by plaintiff are distinguishable, and the public policy of Illinois (as expressed by more recent enactments of the Illinois General Assembly) runs directly opposite to plaintiff's argument.

As recognized by the Appellate Court, plaintiff's argument with respect to malpractice insurance "is merely another effort to shift liability for an alleged breach of a union's duty of fair representation away from the union itself and thus cannot be squared with the Labor Relations Act's

comprehensive statutory scheme governing such claims." SA11, quoting *Atkinson*, 370 U.S. at 249. The Appellate Court was correct when it determined that plaintiff cannot avoid this comprehensive scheme by suing union agents "whether or not the union agent is an attorney who carries malpractice insurance." *Id.*

III.

THE APPELLATE COURT CORRECTLY REJECTED PLAINTIFF'S THIRD-PARTY BENEFICIARY THEORY OF LIABILITY AS IT WOULD UNDERMINE THE NUMEROUS POLICY REASONS SUPPORTING *ATKINSON* IMMUNITY.

Plaintiff also urges this Court to allow his claim to proceed on a third-party beneficiary theory of liability. Brief of Appellant, pp. 22-26. As an initial matter, plaintiff erroneously contends that the decisions of the Appellate Court and Circuit Court denied him a remedy for his purported claim. *Id.*, p. 22. To make this argument, plaintiff ignores the plethora of federal decisions which make plain that plaintiff's remedy is properly brought as an unfair labor practice claim alleging a breach of his union's duty of fair representation. *Peterson*, 771 F.2d at 1259; see also *Montplaisir*, 875 F.2d at 4, and *Arnold*, 100 F.3d at 862. The decisions by state courts agree that the proper remedy is a duty of fair representation claim. See, e.g., *Killian*, 381 P.3d at 166; *Mamorella*, 276 A.D.2d at 155; *Brown*, 690 A.2d at 960 n.6.

Notably, plaintiff fails to cite a single case permitting a malpractice claim to proceed against union counsel under a third-party beneficiary theory

of liability despite the *Atkinson* Rule. For example, neither *Pelham v. Griesheimer*, 92 Ill.2d 13 (1982), *Schechter v. Blank*, 254 Ill.App.3d 560 (1st Dist. 1993), *McLane v. Russell*, 131 Ill.2d 509 (1989), nor *Warren v. Williams*, 313 Ill.App.3d 450 (1st Dist. 2000) arose in the context of a union member seeking to impose malpractice liability against a union attorney performing functions related to the collective bargaining process. As such, those cases are plainly inapposite. Moreover, numerous courts have explicitly rejected the very third-party beneficiary theory that plaintiff advances. *Carino v. Stefan*, 376 F.3d at 162; *Aragon,* 262 Cal. Rptr. at 654. Plaintiff makes no effort to distinguish these cases because he cannot.

More importantly, however, the Appellate Court correctly recognized that plaintiff's proposed rule would frustrate the sound policy reasons for uniform application of the *Atkinson* Rule. SA10-11. Allowing union members to proceed against the union's attorneys for malpractice would anomalously subject the union's agents to a higher standard of care than the union itself. *Breda*, 1 F.3d at 909; *Montplaisir*, 875 F.2d at 6-7. This is because the standard for legal malpractice is negligence, but to prevail in a claim for breach of the duty of fair representation, a plaintiff must prove that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The Appellate Court recognized this same problem under Illinois law, noting that a union may be held liable for breaching its duty of fair representation only where it commits intentional misconduct in

representing an employee, whereas attorneys can be liable for mere negligence. SA8, citing *Knox v. Chicago Transit Authority*, 2018 IL App (1st) 162265, ¶32 and *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶25.

Furthermore, because the two-year statute of limitations for legal malpractice (735 ILCS 5/13-214.3(b)) is significantly longer than the six-month limit for breach of the duty of fair representation claims (5 ILCS 315/11(a)), creating an exception to *Atkinson* immunity would frustrate the strong policy favoring rapid resolution of labor disputes. *Arnold*, 100 F.3d at 862, citing *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 168 (1983). Indeed, this policy of prompt resolution is expressly set forth in the Illinois Public Labor Relations Act itself. 5 ILCS 315/2 (noting that it is the public policy of the state of Illinois to afford an alternate and expeditious procedure for the resolution of labor disputes to which the Act applies). Plaintiff's proposed innovation, however, would subject union attorneys to suit long after the limitation had expired against both the union and the employer. *Arnold*, *Id.* The Appellate Court correctly considered this fact in rejecting plaintiff's arguments.

Finally, courts have determined it would be inequitable to impose liability on union attorneys for what are often "essentially political and strategic decisions of the union." *Breda*, 1 F.3d at 909. All of these sound policy benefits would be frustrated if this Court were to adopt plaintiff's

policy proposals and permit him to independently proceed on his claim against Carlson.

For these additional reasons, as well as those set forth in Sections I and II above, the judgment of both the Circuit Court and Appellate Court which dismissed Count I of plaintiff's Complaint against defendant Carlson should be affirmed.

IV.

PLAINTIFF'S CLAIM AGAINST DEFENDANT ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL WAS PROPERLY DISMISSED AS AN UNFAIR LABOR PRACTICE CLAIM SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE ILLINOIS LABOR RELATIONS BOARD.

Section 2-619 of the Code of Civil Procedure provides for the dismissal of an action where "the court does not have jurisdiction of the subject matter of the action..." 735 ILCS 5/2-619(a)(1). An affirmative matter asserted by a defendant pursuant to Section 2-619 may be supported by material evidence or an affidavit. *Nichol v. Strass*, 192 Ill.2d 233, 247 (2000). Where the existence of a document attached to a pleading or a motion is not disputed, the Court may properly consider that document for the purposes of a Section 2-619 motion. *Christmas v. Hughes*, 187 Ill.App.3d 453, 455 (1st Dist. 1989).

As set forth more fully below, the Circuit Court was eminently correct when it dismissed plaintiff's Complaint with prejudice under Section 2-619(a)(1), because plaintiff's claim in substance was one for an unfair labor practice (namely, an alleged breach of the union's duty of fair representation)

arising from a dispute concerning a collective bargaining agreement. *Arnold v. Air Midwest*, 100 F.3d at 863 (plaintiff's claims for malpractice against union attorney were subsumed in the union's duty of fair representation). As such, the Illinois Labor Relations Board had exclusive jurisdiction over this matter. 5 ILCS 315/5. Plaintiff's claim was not properly before the Circuit Court and therefore was appropriately dismissed because the Illinois Labor Relations Board had exclusive jurisdiction over this claim.

As the Circuit Court correctly recognized, the record established that this case arose from the collective bargaining agreement between the IFOP Labor Council and the Village of Fox Lake. (C97-98). As a result, it was subject to and governed by the Illinois Public Labor Relations Act. 5 ILCS 315/1, *et seq*.

The Public Labor Relations Act and the relevant case law clearly establish that a charge of an unfair labor practice is within the exclusive jurisdiction of the Illinois Labor Relations Board. 5 ILCS 315/5; *Foley v. American Federation of State, County, and Municipal Employees*, 199 Ill.App.3d 6, 12 (1st Dist. 1990); *Cessna v City of Danville*, 296 Ill.App.3d 156 (4th Dist. 1998). Illinois courts recognize that the Board must maintain exclusive jurisdiction over claims, like plaintiff's, which relate to alleged unfair labor practices because "inconsistent judgments and forum shopping will be inevitable if we pronounce a rule whereby breach of the duty of fair representation claims can be maintained in the circuit courts, as well as

before the Board. Furthermore, our already overburdened court system would face increased amounts of unnecessary litigation." *Foley*, 199 Ill.App.3d at 11.

As set forth above, a claim against a union (or its lawyers) for committing malpractice during a grievance process pursuant to a collective bargaining agreement by definition constitutes an unfair labor practice in the nature of a breach of the union's duty of fair representation. *Montplaisir*, 875 F.2d at 1-4; *Arnold*, 100 F.3d at 863; *Killian*, 381 P.3d at 166; *Mamorella*, 276 A.D.2d at 155; *Brown*, 690 A.2d at 960 n.6.; *Weiner*, 116 P.3d at 831-33. The Illinois Labor Relations Board has the exclusive jurisdiction to determine whether a public employee union, such as the IFOP Labor Council, breached its duty of fair representation. In *Foley*, the Appellate Court explained that, under the Public Labor Relations Act, unions have the duty to fairly represent the interests of all of their members. 199 Ill.App.3d at 8-9. The Court further explained that a breach of this duty constitutes an unfair labor practice under the Public Labor Relations Act. *Id.* at 9-10. As such, claims involving breach of the duty of fair representation are "subject to the Act's comprehensive scheme of remedies and administrative procedures." *Id.* at 10. The Public Labor Relations Act gives the Illinois Labor Relations Board exclusive jurisdiction to resolve such claims. *Id; Cessna v City of Danville,* 296 Ill.App.3d 156 (4th Dist. 1998) (holding that Section 5 of the Public Labor Relations Act confers the Labor Relations Board with exclusive jurisdiction over any claims based on a breach of the duty of fair representation, even

though not explicitly styled as such, and that no provision of the Act allows employees to file suit in the circuit court based on an alleged breach of the duty of fair representation).

Pursuant to this settled precedent, the Circuit Court lacked jurisdiction over the plaintiff's claims against the IFOP Labor Council and Carlson. Plaintiff's allegations and the affidavit of Richard Stomper confirmed that the claims arose from activities undertaken by the union and its authorized representative and occurring pursuant to the collective bargaining process. As such, plaintiff's allegations constituted a claim for breach of the duty of fair representation, over which the Labor Relations Board had exclusive jurisdiction. *Arnold*, 100 F.3d at 863; *Weiner*, 116 P.3d at 831-33.

In challenging the Circuit Court's April 30, 2018 order as to the IFOP Labor Council, plaintiff studiously ignores the federal decisions in *Montplaisir* and *Arnold*, as well as numerous state decisions like *Killian* and *Brown*, several of which were cited and relied upon by the Appellate Court in its decision. SA11-12. These authorities explicitly state that plaintiff's claim is not one for legal malpractice, but rather an alleged breach of his union's duty of fair representation. Instead, plaintiff cites to a litany of unrelated cases dealing with a hodge podge of theories of liability, including implied indemnity, vicarious liability, and agency. Brief of Appellant, pp. 27-28. In doing so, plaintiff appears to have no answer to the Appellate Court's

admonition that *Atkinson* applies "to foreclose state-law claims, however inventively cloaked" (SA8) and that such claims are properly styled as duty of fair representation claims to be brought before the Illinois Labor Relations Board. SA11, citing *Montplaisir*, 875 F.2d at 4.

For the reasons set forth above, plaintiff's arguments that his claims were unrelated to the collective bargaining agreement are without merit must be rejected by this Court. Plaintiff's Complaint was thus properly dismissed with prejudice as to the IFOP Labor Council pursuant to Section 2-619(a)(1) of the Code of Civil Procedure.

CONCLUSION

The Circuit Court did not err when it dismissed plaintiff's Complaint with prejudice, where the record clearly demonstrated that plaintiff's claim against defendant Roy Carlson was barred by the United States Supreme Court's *Atkinson* Rule. In addition, the Circuit Court correctly dismissed plaintiff's Complaint against defendant Illinois Fraternal Order of Police Labor Council pursuant to Section 2-619(a)(1) of the Illinois Code of Civil Procedure for lack of jurisdiction, where plaintiff's claim amounted to an unfair labor practice over which the Labor Relations Board had exclusive jurisdiction. Accordingly, the Circuit Court's April 30, 2018 order should be affirmed in all respects.

Similarly, the Appellate Court was correct when it affirmed the judgment of the Circuit Court in its November 21, 2019 decision, and that decision should likewise be affirmed.

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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 40 pages.

/s/ Brendan J. Nelligan
Brendan J. Nelligan

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS TO SUPPLEMENTAL APPENDIX

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ZANDER

v.

CARLSON & IFOP LABOR COUNCIL

No. 2017 L 63098

4271
8004

ORDER

This matter coming before the Court for ruling on Defendants' Motion to Dismiss, the Court being fully advised following oral argument, for the reasons set forth in Court and the attached memorandum, it is hereby ORDERED:

(1) Defendant's 2-615 motion is granted with prejudice as to Defendant Carlson;

(2) Defendants' 2-619 (a)(1) motion is granted with prejudice as to Defendant Illinois Fraternal Order of Police Labor Council.

ENTERED
JUDGE MARTIN S. AGRAN - 1630
APR 30 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Attorney No.: 25017
Name: B. Nelligan / Pretzel & Stouffer
Atty. for: Defendants
Address: 15 Wacker # 2500
City/State/Zip: Chicago IL 60606
Telephone: 312-346-1973

ENTERED:

Dated:

Judge

Judge's No.

1 of 3

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

C 211

Zander v Illinois Fraternal Order of Police Labor Council,
2017 L 63098

Defendants Illinois Fraternal Order of Police Labor Council and Roy Carlson's §2-619.1 Motion To Dismiss Plaintiff's Complaint

I. Immunity §2-615

Rockford Township Highway Dep't v. Illinois State Labor Relations Bd., 153 Ill. App. 3d 863, 874-75 (2d Dist. 1987) - As the legislative history of the ILPRA indicates a close parallel between the Illinois act and the National Labor Relations Act, we will follow Federal law in resolving this question.

Burbank v. Illinois State Labor Relations Bd., 128 Ill. 2d 335, 345 (1989) - We deem it appropriate, in light of the close parallel between section 10(a) of the Illinois Public Labor Relations Act (Ill. Rev. Stat. 1985, ch. 48, par. 1610(a)) and section 8(a) of the National Labor Relations Act (NLRA) (29 U.S.C. § 158(a) (1982)), to examine Federal interpretations of the NLRA where those decisions are consistent with the purposes of our Act. Of course, where the legislature has modified the Act, or otherwise departed from the NLRA's statutory scheme, it can be inferred that it intended a different result, and, with respect to those changes, Federal authority may be of limited value.

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 249 (1962) - We have already said in another context that § 301 (b) at least evidences "a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it". This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, or both, in a separate count or in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable.

Carino v. Stefan, 376 F.3d 156, 160 (3rd Cir. 2004) - Our court has recognized that *Atkinson* provides individual union members and officers immunity from suit for union wrongs. And, "with monotonous regularity, other courts of appeals have cited *Atkinson* to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process.

Plaintiff was a police officer for the Village of Fox Lake. Plaintiff alleges in his legal malpractice complaint that Carlson was an employee of FOP and that he was held out to the members of the FOP as the FOP's attorney who would represent all members in labor disputes or grievances with the various employers of the police officers who were members of the FOP. (Cmplt, ¶¶ 6-7). Carlson was assigned to represent Plaintiff in a termination hearing brought by the Village. Plaintiff alleges the union provided him with an inexperienced attorney and that Carlson's inexperience resulted in Plaintiff being terminated.

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Relations between the Village and the FPO were governed by the Collective Bargaining Agreement which was in effect at the time. Sec 1.1 of the Collective Bargaining Agreement states in pertinent part that "the Village recognizes the Union as the sole and exclusive collective bargaining representative for all full time commissioned Police Officers in the rank of Sergeant and below. Sec. 1.3 states "The union recognizes its responsibility as bargaining agent and agrees fairly to represent all employees in the bargaining unit, whether or not they are members of the Union." Article V states in pertinent part: "Except as specifically limited by the express provisions of this Agreement, the Village retains all traditional rights to manage and direct the affairs of the Village in all its various aspects and to manage and direct it employees, including but not limited to the following: *** to discipline, suspend and/or discharge non-probationary employees for just cause; ***.

There are no Illinois cases on the issue of immunity. *Atkinson* which is a U.S. Supreme Court case and by which I am bound was an appeal from the 7th Circuit. Relying on *Atkinson* and *Carino,* Defendant Carlson is immune from suit. As such Defendant Carlson's §2-615 Motion To dismiss is granted.

II. Lack of Jurisdiction §2-619(a)(1)

Foley v. American Federation of State, County, & Municipal Employees, etc., 199 Ill. App. 3d 6, 10-11(1st Dist. 1990) - Because the Illinois Public Labor Relations Act and the IELRA were both enacted to provide "a comprehensive regulatory scheme for public sector collective bargaining in Illinois" we find that the Compton policy concerns are equally applicable to the case at bar. Inconsistent judgments and forum shopping will be inevitable if we pronounce a rule whereby breach of the duty of fair representation claims can be maintained in the circuit courts, as well as before the Board. Furthermore, our already overburdened court system would face increased amounts of unnecessary litigation. *** Accordingly, we uphold the circuit court's determination that breach of a duty of fair representation is an unfair labor practice within the Board's exclusive jurisdiction. *Id.* at 12.

This case is about the union's failure to provide the Plaintiff with fair representation. As such, this is an unfair labor practice within the Illinois Labor Relations Board's exclusive jurisdiction. Accordingly, Defendant Illinois Fraternal Order of Police Labor Council's §2-619(a)(9) Motion To dismiss is granted.

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Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Zander
v.
Carlson et al.

No. 17 L 63098

ORDER

Matter before the Court on hearing on Plaintiff's Motion to Reconsider after hearing argument the Court fully advised in the premises

IT IS ORDERED:

- Plaintiff's Motion to Reconsider order Dated April 30, 2018 is denied. The Court finding that Plaintiff's Motion raised new legal theories and facts and failure to raise these theories and facts prior to Motion to Reconsider resulted in waiver. The Court ~~not erring in~~ further finds its previous application of the law was not in error.

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ENTERED:
JUDGE MARTIN S. AGRON - 1630
JUL 31 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
COOK COUNTY, IL
DEPUTY CLERK

Dated: ,

Judge 1630
Judge's No.

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

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Illinois Official Reports

Appellate Court

Zander v. Carlson, 2019 IL App (1st) 181868

Appellate Court Caption	RUSSELL ZANDER, Plaintiff-Appellant, v. ROY CARLSON and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants-Appellees.
District & No.	First District, Fourth Division No. 1-18-1868
Filed Rehearing denied	November 21, 2019 December 18, 2019
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 17-L-63098; the Hon. Martin S. Agran, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Thomas W. Gooch III and Sabina D. Walczyk, of The Gooch Firm, of Wauconda, for appellant. Brendan J. Nelligan and Matthew J. Egan, of Pretzel & Stouffer, Chtrd., of Chicago, for appellees.

Panel

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Burke concurred in the judgment and opinion.

OPINION

¶ 1 When the Village of Fox Lake (Village) sought to terminate Russell Zander's employment as a police officer, Zander waived his right to a hearing before the local police board and opted instead to challenge his dismissal through the arbitration process outlined in the collective bargaining agreement between the Village and his union, the Illinois Fraternal Order of Police Labor Council (FOP). He pursued this course on the advice of Roy Carlson, an FOP staff attorney who later represented him at the arbitration hearing. After the arbitrator ruled against him, Zander sued Carlson and the FOP for legal malpractice. In dismissing the complaint, the circuit court held that Carlson was immune from personal liability for actions taken on behalf of a union in the collective bargaining process and that Zander's claim against the FOP must be brought before the Illinois Labor Relations Board, which has exclusive jurisdiction over claims that a union has violated its duty to fairly represent its members. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 We draw the following facts from Zander's complaint. In December 2014, the Village's police chief placed Zander on administrative leave based on allegations of misconduct. Sometime thereafter, the police chief filed formal charges recommending Zander's termination. In response to Zander's request for legal representation, the FOP assigned Carlson to represent him. Carlson is a licensed attorney and FOP employee who represents FOP members in grievance and termination proceedings. Zander did not pay Carlson (other than indirectly through his union dues), and the two did not sign a retainer agreement. According to Zander, the FOP forced him to accept Carlson's representation and gave him no input in the selection. Zander alleges that he formed an attorney-client relationship with Carlson through acquiescence.

¶ 4 Under the Illinois Municipal Code, a police officer facing discharge is entitled to a hearing before the local Board of Fire and Police Commissioners (police board), unless a collective bargaining agreement between the municipality and the officer's union provides for arbitration of such disputes. See 65 ILCS 5/10-2.1-17 (West 2018). The collective bargaining agreement between the Village and the FOP provides that an officer may elect to challenge his discharge either before the police board or through the agreement's ordinary grievance-arbitration procedure. On Carlson's advice, Zander elected to proceed via arbitration. After a two-day hearing, the arbitrator upheld the decision to terminate Zander's employment.

¶ 5 Zander then filed a two-count complaint against Carlson and the FOP. Count I alleged that Carlson owed Zander a duty of care arising from their attorney-client relationship and that Carlson breached that duty by negligently advising Zander to waive his right to a hearing before the police board and by inadequately representing him at the arbitration hearing. Count II alleged that the FOP assumed its own duty of care to Zander by providing him with legal

representation and that it breached that duty by assigning him an inexperienced and incompetent lawyer. Alternatively, count II alleged that the FOP was vicariously liable for Carlson's negligence.

¶ 6 Carlson and the FOP moved to dismiss the complaint. Citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), they argued that Zander's claim against Carlson should be dismissed pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)) because a union agent is immune from personal liability for actions taken on the union's behalf in the collective bargaining process. And they argued that Zander's claim against the FOP should be dismissed under section 2-619(a)(1) of the Code (*id.* § 2-619(a)(1)) because the Illinois Labor Relations Board (Board) has exclusive jurisdiction over claims that a union violated its duty to fairly represent its members.

¶ 7 In response, Zander argued that Carlson was not entitled to immunity under *Atkinson* because the arbitration proceeding challenging his termination was unrelated to the collective bargaining process and because Carlson acted on his (rather than the union's) behalf due to their attorney-client relationship. Zander argued, alternatively, that he should be able to sue Carlson for malpractice as a third-party beneficiary of the FOP's attorney-client relationship with Carlson. Finally, Zander argued that his claim against the FOP did not fall within the Board's exclusive jurisdiction because it was not based on the duty of fair representation but instead sought to hold the FOP vicariously liable for Carlson's malpractice.

¶ 8 The circuit court dismissed the complaint, holding that Carlson was immune from suit under *Atkinson* and that Zander's claim against the FOP fell within the Board's exclusive jurisdiction. In a motion to reconsider, Zander argued that Carlson should be subject to liability to the extent of his malpractice insurance coverage. The circuit court denied the motion, finding that Zander's new argument was forfeited. Zander then filed a timely notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 We review the dismissal of a complaint under sections 2-615 and 2-619 of the Code *de novo*. *Bogenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 23; *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 41. A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint. *Bogenberger*, 2018 IL 120951, ¶ 23. The question is whether the complaint's allegations, if proved, would entitle the plaintiff to relief. *Id.* In making this determination, we must accept the complaint's well-pleaded allegations as true. *Id.* "The critical inquiry is whether the allegations of the complaint, when construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Id.* A motion to dismiss under section 2-619, on the other hand, "admits the legal sufficiency of the plaintiff's complaint but asserts a defense defeating the claim." *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, ¶ 14. Under section 2-619(a)(1), a complaint should be dismissed if "the court does not have jurisdiction of the subject matter of the action." 735 ILCS 5/2-619(a)(1) (West 2018). When considering a motion to dismiss under section 2-619, we again must accept the complaint's well-pleaded allegations as true and view them in the light most favorable to the plaintiff. *American Family Mutual Insurance Co. v. Krop*, 2018 IL 122556, ¶ 13; *Shirley v. Harmon*, 405 Ill. App. 3d 86, 90 (2010).

¶ 11 With those standards in mind, we turn to Zander's legal malpractice claim against Carlson. In *Atkinson*, the United States Supreme Court held that, under the Taft-Hartley Act (29 U.S.C. § 185), which amended the National Labor Relations Act (NLRA) (29 U.S.C. § 151 *et seq.*), a

union's agents may not be held individually liable for actions taken on the union's behalf in the collective bargaining process. 370 U.S. at 245-49. That rule rests on the "view that only the union [should] be made to respond for union wrongs, and that the union members were not to be subject to levy." *Id.* at 247-48. "This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, *** for violation of a collective bargaining contract for which *** the union itself is liable." *Id.* at 249. Rather, "national labor policy" demands that "when a union is liable for damages for violation of [a collective bargaining agreement], its officers and members are not liable for these damages." *Id.* Following *Atkinson*, courts have repeatedly "cited *Atkinson* to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process." *Montplaisir v. Leighton*, 875 F.2d 1, 4 (1st Cir. 1989). "This principle has become so embedded in [NLRA] jurisprudence that it brooks no serious challenge." *Id.*

¶ 12 As noted above, *Atkinson* interpreted the NLRA, which governs labor relations in the private sector. The first question we must address is whether *Atkinson* immunity applies under the Illinois Public Labor Relations Act (Labor Relations Act), which "regulates labor relations between public employers and employees." 5 ILCS 315/2 (West 2018). We hold that it does. "[T]he legislative history of the [Labor Relations Act] indicates a close parallel between the Illinois act and the National Labor Relations Act ***." *Rockford Township Highway Department v. Illinois State Labor Relations Board*, 153 Ill. App. 3d 863, 874-75 (1987). For that reason, Illinois courts regularly look to federal precedent interpreting the NLRA for guidance in construing the Labor Relations Act. See *Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*, 178 Ill. 2d 333, 339 (1997); *Illinois Fraternal Order of Police Labor Council v. Illinois Local Labor Relations Board*, 319 Ill. App. 3d 729, 737 (2001). Courts in other jurisdictions, moreover, have construed both federal and state public labor relations laws to provide *Atkinson* immunity. See *Montplaisir*, 875 F.2d at 4-5; *Weiner v. Beatty*, 116 P.3d 829, 832-33 (Nev. 2005); *Brown v. Maine State Employees Ass'n*, 690 A.2d 956, 958 n.1 (Me. 1997); *Best v. Rome*, 858 F. Supp. 271, 275 (D. Mass. 1994).

¶ 13 We find that the structure of the Labor Relations Act supports the application of *Atkinson* immunity to agents and officers of public sector unions. Under the Labor Relations Act, a union owes its members a "duty of fair representation" arising from the union's "statutory role as exclusive bargaining agent" for its members. *Cessna v. City of Danville*, 296 Ill. App. 3d 156, 163 (1998). The Labor Relations Act vests the Board with exclusive jurisdiction over claims that a union has violated its duty of fair representation. *Id.*; see also *Foley v. American Federation of State, County & Municipal Employees*, 199 Ill. App. 3d 6, 8-10 (1990). And it requires a union member to establish "intentional misconduct" by the union to prevail on such a claim. 5 ILCS 315/10(b)(1) (West 2018); see *Knox v. Chicago Transit Authority*, 2018 IL 162265, ¶ 32 ("A union violates its duty of fair representation only where it commits intentional misconduct in representing an employee."). This "comprehensive scheme of remedies and administrative procedures" (*Foley*, 199 Ill. App. 3d at 10) would be undermined by a rule that allowed union members to circumvent the Board's exclusive jurisdiction and avoid the Labor Relations Act's intentional misconduct standard by relabeling duty of fair representation claims as negligence actions against a union's agents or officers. Thus, "[t]o preserve the integrity of [the Labor Relations Act's] statutory scheme, the *Atkinson* rule must fully apply in the public sector." *Montplaisir*, 875 F.2d at 5.

¶ 14 Zander appears to accept that *Atkinson* immunity applies under the Labor Relations Act, but he argues that such immunity should not extend to a union's lawyers. We disagree. In *Peterson v. Kennedy*, 771 F.2d 1244, 1257 (9th Cir. 1985), the Ninth Circuit refused to create "an exception to the *Atkinson* rule *** for union employees who happen to be attorneys." The court recognized that "[l]abor grievances and arbitrations frequently are handled by union employees or representatives who have not received any professional legal training at all." *Id.* at 1258. When a union instead hires an attorney "to act for it in the collective bargaining process"—including in an "arbitration proceeding" where "the underlying grievance belongs to a particular union member"—the union itself continues to "represent[,] and is ultimately responsible to[,] the member." *Id.* In those circumstances, the court held, "the rationale behind the *Atkinson* rule is squarely applicable." *Id.*

¶ 15 As *Peterson* explained, sound policy reasons support the extension of *Atkinson* immunity to attorneys who act on behalf of a union in matters arising under a collective bargaining agreement or that otherwise relate to the collective bargaining process. As we noted above, a union may be held liable to a member for breaching its duty of fair representation "only where it commits intentional misconduct in representing an employee." *Knox*, 2018 IL 162265, ¶ 32. In a legal malpractice action, by contrast, an attorney may be held liable for merely negligent conduct. *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 25. Allowing union members to file malpractice suits against union attorneys for actions taken in connection with the collective bargaining process would "anomalous[ly]" hold "certain agents or employees of the union *** to a far higher standard of care than the union itself." *Peterson*, 771 F.2d at 1259. Worse yet, because duty of fair representation claims are subject to a six-month statute of limitations (see 5 ILCS 315/11(a) (West 2008)), while legal malpractice actions are subject to a lengthier two-year statute of limitations (see 735 ILCS 5/13-214.3(b) (West 2018)), failing to extend *Atkinson* immunity to union attorneys would subject them to personal liability for actions taken on behalf of a union well after the limitations period for a claim against the union itself had expired. See *Peterson*, 771 F.2d at 1259 (observing that, under such a rule, "the union attorney would often be the only defendant against whom a disappointed [union member] could proceed").

¶ 16 For these reasons, courts have consistently followed *Peterson* in "reject[ing] efforts to distinguish lawyers from other union agents for purposes of *Atkinson* immunity" (*Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862 (10th Cir. 1996)) and "have uniformly concluded that *Atkinson* prohibits claims made by a union member against attorneys employed by or retained by the union to represent the member in a labor dispute." *Carino v. Stefan*, 376 F.3d 156, 160 (3d Cir. 2004).

¶ 17 Zander argues that *Atkinson* and *Peterson* do not support the dismissal of his malpractice claim under section 2-615 because his complaint alleged a direct attorney-client relationship between him and Carlson. While we must accept the well-pleaded allegations of Zander's complaint as true when assessing its legal sufficiency, we are not required to accept "mere conclusions of law or fact unsupported by specific factual allegations." *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996). Zander's complaint alleged that Carlson was an FOP employee who regularly represented police officers in labor disputes, grievances, and termination proceedings. He alleged that, by acquiescing in Carlson's representation of him, he formed an attorney-client relationship with Carlson. But he conceded that he and Carlson did not sign a retainer agreement; that he had no input into the FOP's decision to assign Carlson

to represent him; and that he did not pay for Carlson's services, other than indirectly through his union dues. Zander's contention that his mere acceptance of Carlson's representation created an attorney-client relationship is foreclosed by *Peterson*, which rejected the notion that "an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance." 771 F.2d at 1258.

¶ 18 *Peterson* recognized that "union members who have themselves retained counsel to process grievances on their behalf" are not prohibited from bringing malpractice suits against their retained attorneys, even if the attorney otherwise "serves as the union's regular outside counsel and is employed at the union's suggestion." *Id.* at 1259. But to invoke this exception, the union member must show that the attorney "specifically agreed *** to provide direct representation to [the union member] as an individual client" and was not merely "acting pursuant to [his] obligation to provide representation for or on behalf of the union." *Id.* at 1261. Notably, Zander's complaint did not allege any specific agreement by Carlson to directly represent Zander as an individual client. To the contrary, Zander alleged that Carlson was an FOP employee whose duties included regularly representing union members in grievance and termination proceedings and whose services were provided to Zander (and other union members) as a benefit of union membership. Even viewing the allegations in Zander's complaint in the light most favorable to him, he failed to sufficiently allege an attorney-client relationship between him and Carlson. See *Arnold*, 100 F.3d at 862-83 (rejecting union member's attempt to "recharacterize" his relationship with union attorney where the attorney was "retained by the union," the attorney's services were "provided to [the union member] as a benefit of [his] union membership," and the attorney "also provided services on behalf of [the union] to *** other [union members] threatened with termination").

¶ 19 Zander makes several other attempts to avoid the application of *Atkinson* immunity, but none is persuasive. He contends that the arbitration proceeding challenging his termination was not related to the collective bargaining process. But Zander's right to challenge his termination through arbitration was created and governed by the collective bargaining agreement. Under the agreement, Zander had the option to waive his right to a hearing before the police board and instead challenge his termination through the arbitration procedures applicable to other types of grievances. Whether it related to an ordinary grievance or a termination decision, the arbitration proceeding clearly was "part of the collective bargaining process." *Breda v. Scott*, 1 F.3d 908, 909 (9th Cir. 1993) (applying *Atkinson* immunity to outside counsel hired by union to represent member at arbitration hearing challenging his discharge).

¶ 20 Zander also argues that, even in the absence of a direct attorney-client relationship, he should be permitted to sue Carlson for malpractice as a third-party beneficiary of the FOP's attorney-client relationship with Carlson. It is true that an attorney may owe a duty of care to a nonclient who "is an intended third-party beneficiary of the relationship between the client and the attorney," where the attorney acts "at the direction of or on behalf of the client to benefit or influence [the] third party." *In re Estate of Powell*, 2014 IL 115997, ¶ 14. But applying the third-party beneficiary doctrine to overcome a union attorney's *Atkinson* immunity would undermine the policy reasons that support such immunity in the first place. Contrary to the basic principle underlying *Atkinson* immunity, employing the third-party beneficiary doctrine in this manner would shift liability arising from a union's representation of its members from the union itself to the union's agents. And, as discussed above, it would

upset the Labor Relations Act's statutory scheme governing a union's duty of fair representation by replacing the statute's intentional misconduct standard (and six-month statute of limitations) with the general negligence standard (and two-year statute of limitations) applicable to malpractice actions. For these reasons, the third-party beneficiary doctrine cannot be used to "remove the *Atkinson* bar." *Carino*, 376 F.3d at 162.

¶ 21 Zander contends that extending *Atkinson* immunity to union attorneys will insulate such attorneys from the harm that their misconduct might cause to union members and free them from complying with the rules of professional conduct. This concern is unfounded. The union itself retains the right "to sue its attorney for malpractice or for breach of contract, and to compensate a union member out of the recovery for any damages he may have suffered." *Peterson*, 771 F.2d at 1259. And nothing in our decision should be read to suggest that union attorneys may not face discipline for violating rules of professional conduct. See *id.* at 1258 (recognizing that a union attorney may have "certain ethical obligations" to a union member whom he represents in a grievance proceeding, even if "his principal client is the union").

¶ 22 Zander argues that he should be permitted to recover damages from Carlson up to the limits of any malpractice insurance coverage that Carlson may have. But Zander forfeited this argument by raising it for the first time in his motion to reconsider. See *Caywood v. Gossett*, 382 Ill. App. 3d 124, 133 (2008) ("arguments raised for the first time in a motion for reconsideration in the circuit court are waived on appeal"). In any event, the argument is merely another effort to shift liability for an alleged breach of a union's duty of fair representation away from the union itself and thus cannot be squared with the Labor Relations Act's comprehensive statutory scheme governing such claims or with the basic principle that "the union as an entity *** should *** be the sole source of recovery for injury inflicted by it." *Atkinson*, 370 U.S. at 249. Neither the Labor Relations Act nor *Atkinson* can "be evaded or truncated by the simple device of suing union agents" personally, whether or not the union agent is an attorney who carries malpractice insurance. *Id.* For all of these reasons, the circuit court correctly dismissed Zander's legal malpractice claim against Carlson.

¶ 23 That brings us to Zander's claim against the FOP. As discussed above, the Labor Relations Act imposes on public sector unions a duty to fairly represent their members and makes the breach of that duty an unfair labor practice. See *Foley*, 199 Ill. App. 3d at 8-10. The Labor Relations Act vests the Board with exclusive jurisdiction over unfair labor practice charges, including claims that a union has breached its duty of fair representation. *Id.* at 10-12. In addition, the Labor Relations Act creates a six-month statute of limitations for unfair labor practice charges (see 5 ILCS 315/11(a) (West 2018)) and expressly provides that "a labor organization or its agents shall commit an unfair labor practice *** in duty of fair representation cases only by intentional misconduct in representing employees" (*id.* § 10(b)(1)(ii)).

¶ 24 Zander contends that his claim against the FOP is not subject to the Board's exclusive jurisdiction—or, presumably, to the Labor Relations Act's six-month statute of limitations and intentional misconduct standard—because he has not alleged that the FOP breached its duty of fair representation. But Zander cannot avoid the Labor Relations Act's comprehensive statutory scheme through creative pleading. See *Montplaisir*, 875 F.2d at 4 (rejecting union members' effort to avoid "labor-law preemption" by choosing "not to couch their complaint as an unfair labor practice"). At bottom, Zander's attempt to hold the FOP liable for Carlson's performance at the arbitration proceeding challenging Zander's termination rests on the FOP's

duty to fairly represent Zander in matters related to the collective bargaining process. Because the Labor Relations Act "creates and defines" the FOP's duty of fair representation, Zander "must look to the provisions of that Act for his remedy." *Brown*, 690 A.2d at 959. Zander's claim thus falls within the Board's exclusive jurisdiction, and the circuit court correctly dismissed it for lack of subject matter jurisdiction.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we affirm the circuit court's judgment dismissing Zander's complaint.

¶ 27 Affirmed.

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

RUSSELL ZANDER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 125691
	)	
ROY CARLSON and ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL,	)	
	)	
	)	
Defendants-Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on August 12, 2020, there was electronically filed and served upon the Clerk of the above court the Brief and Supplemental Appendix of Defendants-Appellees. Service of the 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 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Brendan J. Nelligan
Brendan J. Nelligan

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/ Brendan J. Nelligan
Brendan J. Nelligan