No. 123220

In the Supreme Court of Illinois

A& R Janitorial, as subrogee of Teresa Mroczko Mroczko, *Plaintiff-Appellant,*	Appeal from the Appellate Court of Illinois First District Case No: 1-17-0385
Teresa Mroczko, *Intervenor-Appellee,*	Circuit Court of Cook County Court No. 14 L 8396 Honorable William E. Gomolinski, Judge Presiding
Pepper Construction Co., Pepper Construction Group, LLC Perez & Associates, Inc., Perez Carpet, CBRE, Inc., Blue Cross and Blue Shield Association. *Defendant-Appellants*	

BRIEF AND ARGUMENT OF INTERVENOR-APPELLEE TERESA MROCZKO

Elliot R. Schiff
Schiff Gorman, LLC
One East Wacker Drive
Suite 1100
Chicago, Il. 60601
(312)345-7202
eschiff@schiff-law.com
Attorney for Intervenor-Appellee, Teresa Mroczko

E-FILED
6/27/2018 9:31 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

POINTS & AUTHORITIES

Pages(s)

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

V. CONCLUSION

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

ISSUES PRESENTED FOR REVIEW

I. Whether The Doctrine of *Res Judicata* Bars Recovery Of Teresa Mroczko's Non-Economic Damages

II. Whether Teresa Mroczko Should Have Been Allowed to Intervene As A&R Had No Interest In Protecting Her Right to Non-economic Damages That Provisionally Resulted in The Settlement With Pepper Construction Co. And Perez & Associates.

III. Whether A&R's Attorneys Who Were Defending Teresa Mroczko's Worker's Compensation Claim Should Be Disqualified Upon Claiming Relief On Her Behalf In The Subrogation Lawsuit

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

SUPPLEMENTAL STATEMENT OF FACTS

On August 11, 2014, A&R, as statutory subrogee of Teresa Mroczko, [hereinafter Teresa] filed its Complaint in Subrogation in cause 2014 L 8396 against Pepper Construction Co., Perez & Associates and others. [Vol. 1, C4-C16]. The Complaint originally was limited to monies A&R had "paid and may become liable to pay in the future Workers' Compensation benefits to Mroczko." Accordingly, it sought an amount to "cover its losses and damages." [Vol. 1, C15]. On June 11, 2015, while A&R's Subrogation lawsuit was pending, Teresa's prior counsel filed a separate lawsuit against Pepper Construction Co., Perez & Associates, and others in cause 15 L 5957. [Vol. 2, C351-365]. In that lawsuit, Teresa sought recovery for her personal injuries seeking damages for her pain and anguish, medical care and services needed and for her inability to attend to her usual duties and affairs. [C354]. On December 18, 2015, this lawsuit was dismissed as untimely with leave to amend. [Vol. 3, C702].

On April 28, 2016, a First Amended Complaint in 15 L 5957 was filed seeking the same recovery but amending its allegations against Pepper Construction Co., but naming Perez & Associate and others without any "new allegations." [Vol. 3, C704-C715]. On August 31, 2016, the circuit court heard arguments on motions to dismiss based on the statute of limitations. [Vol. 9, C2005-C2014]. On September 12, 2016, this First Amended Complaint was dismissed with prejudice predicated upon the expiration of the two-year statute of limitations. [Vol. 8, C1993-C1999]. The court's order ruled pursuant to Supreme Court Rule 304(a) that there was no just reason to delay enforcement or appeal. [Vol. 3, C1990].

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

On November 10, 2016, with new counsel, Teresa petitioned to intervene in A&R's subrogation action [Vol. 6, C1373-1375] and file an amendment to A&R's subrogation Complaint seeking to expand recovery to include her permanent injuries, damages and loss of trade. [Vol. 6, C1376-C1377]. On December 20, 2016, the trial court denied Teresa's Petition to Intervene and amend the Complaint that A&R Janitorial, as subrogee had filed in cause 2014 L 8396. [C2034]. On January 31, 2017, the trial court entered an order pursuant to Supreme Court Rule 304(a) finding its December 20, 2016 Order was final and appealable. [C2041].

On February 14, 2017, Mroczko filed her Notice of Appeal from the orders of December 20, 2016 and January 31, 2007. [C2057]. On March 13, 2017, Mroczko filed an amendment to the Notice of Appeal reflecting her status as Intervenor Appellant in place of her previous designation as Plaintiff Appellant. [C2062-2063].

While Teresa was proceeding with her appeal, A&R Janitorial's subrogation action continued against Pepper Construction Co. and Perez & Associates. On March 3, 2017, A&R Janitorial filed its First Amended Complaint expanding the relief it sought to include present and future pain and anguish, damages for attending to her usual duties and affairs as well as her lost wages and the medical expenses incurred and value of that time. [Supp. R. Vol. 1, Part 1, C27-33; A1-A7]. Pepper Construction Co. sought dismissal of paragraphs 5, 17 and the *ad damnum* of the Amended Complaint that contained elements of damages in excess of A&R Janitorial's subrogation lien rights. [Supp. R. Vol. 1, Part 1, C35-44]. Pepper Construction Co.'s 2-619 Motion, relying upon the decision in *Sankey Bros. Inc. v. Guilliams* 167 Ill. App.3d 393 (1987) asserted principally that the claims for those damages were barred by the doctrine of *res judicata*

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

as a result of the dismissal of Teresa's lawsuit in cause 15 L 5957. Perez & Associates joined in that Motion. [Supp. R. Vol 1, Part 1, C46-47].

A&R filed its Response arguing that that *res judicata* did not apply and the *Sankey Bros. Inc.* decision was inapplicable since Teresa's claim was brought for construction negligence and A&R's claim was for general negligence. As A&R's Subrogation Complaint had been filed timely, under the express language of Section 5(b), A&R claimed it was entitled to pursue the full measure of damages that Mroczko would be entitled to pursue had she brought general negligence claims against Pepper and Perez, including amounts in excess of A&R 's workers' compensation liability, attorney fees, and costs. It further observed that *Sankey Bros. Inc.* ruled that the employee could not intervene but allowed the employer to pursue all of its remedies including amounts that might be in excess of the employer's lien. [Supp. R. Vol.1, Part 2, C71-80]. Pepper Construction Co. filed its Reply. [Supp. R. Vol. 1, Part 2, C82-86].

On July 26, 2017, the circuit court issued its memorandum order and opinion holding that "A&R is able to seek full recovery for all of Mroczko's potential claims against Defendants." [Supp. R. Vol. 1, Part 2, C88-99; A8]. In explaining the damages available to A&R's Subrogation Complaint, the circuit court found that the statute allowed for A&R to recover more than its subrogation rights:

> . . . A&R could potentially recover more than the amount of its lien, which it then would have to turn over to Mroczko. This is exactly what the plain language of Section 5(b) provides for in the cited portion above. If A&R could only pursue its lien, there could never be a possibility that it would recover in excess of that amount. Thus, in order to prevent this language from being rendered meaningless, A&R must be allowed to claim in excess of its lien. [Supp. R. Vol. 1, Part 2, C 96].

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

In finding that *Sankey Bros. Inc.* inapplicable, the circuit court concluded that Teresa's claims were dismissed as untimely but that decision could not be applied retroactively to A&R's claims that had been filed timely. Furthermore, it observed that in *Sankey Bros.,* the court only barred the employee from intervening in the employer's lawsuit but nevertheless allowed the employer to proceed with its claim, which was timely filed under Section 5(b) of the Workers' Compensation Act, without the intervention of the employee. *Sankey Bros.Inc.*, 167 Ill. App. 3d at 398. [Supp. R. Vol. 1, Part 2, C93-94].

Upon learning that the very attorneys who were defending Teresa's workers compensation claim before the Industrial Commission were now being allowed to pursue her remedy for personal injuries including non-economic losses, Teresa sought to disqualify those attorneys and allow her the choice of her own counsel. [Supp. R. Vol. 1, Part 3, C101-103]. As articulated at the hearing to disqualify, Teresa's attorney sought to illustrate the problem noting that before the Industrial Commission, A&R's attorneys were presenting medical testimony to limit her recovery but in the Subrogation lawsuit, the same attorneys would be presenting evidence to support her injuries as extensive. A&R's attorney acknowledged that in pursuing the subrogation lien, they owed no duty to Teresa:

> Mr. Keane: Your Honor, I want to make it clear since this is a motion directed to me. I don't represent Teresa Mroczko. Their motion says that I do. That's not correct. I've never represented her. I don't represent her. I represent A&R. [Supp R. Vol. 2, C 125].

The court agreed that this was an "anomaly in the law" but noted that section 5(b) allows for the employee to recover in excess of the employer's rights. [Supp R. 124]. On

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

August 4, 2017, the circuit court rejected Teresa's Motion to Disqualify. [Supp. R. Vol. 1, Part 3, C 105].

Teresa's concern that A&R Janitorial's attorneys had a conflict was simply that although A&R Janitorial had been given the right to obtain recovery for her non-economic damages, it was not in A&R's interest to forcefully do so. Rather A&R, having a subrogation right to monies already paid and those in the future that it would have to pay, its only interest was to use Teresa's right to non-economic damages solely to leverage a larger payment from Pepper Construction Co. and Perez & Associates. This concern proved to be prophetic.

On November 21, 2017, A&R Janitorial entered into a Settlement Agreement and Release with Defendants Pepper Construction Co. and Perez & Associates who collectively agreed to pay A&R $850,000.00. The Agreement acknowledged that as of the date of the agreement, A&R Janitorial had paid worker's compensation benefits to Teresa $342,000.00 and the parties to the Agreement anticipated that future workers' compensation benefits would likely exceed $850,000.00. The Agreement further provided that in the event that Teresa's Appeal results in the reversal of the trial court's denial of Teresa's petition to intervene, and the negligence claim was reinstated, A&R agreed that it shall not possess any lien rights on Teresa's eventual recovery in her negligence claim against Pepper and/or Perez. That is, A&R agreed that in that event, it waives all lien rights that it otherwise might have in connection with the workers compensation benefits paid to Teresa. [Supp. R. Vol 1, Part 3, C110-116; A20].

On appeal, Teresa requested the Appellate Court to take judicial notice of the proceedings that had taken place in A&R Janitorial's subrogation action at the time that

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

Teresa was presenting her arguments on appeal. Pepper Construction Co. objected. The Appellate Court noted that there was no disagreement of the accuracy of the exhibits and concluded that there was no sound reason to deny judicial notice of documents that contained readily verifiable facts. The Appellate Court reviewed the record in 14 L 8396 on matters material to the issue now before this Supreme Court. [Supp. R. Vol. 1, Part 1, C6-C25 at C 13; A27-46].

The Appellate Court then considered whether the doctrine of *res judicata* barred A&R Janitorial from seeking recovery for Teresa's pain and suffering. Concluding that A&R had timely filed its lawsuit seeking damages for the employee's damages for pain and suffering, it had an interest in this lawsuit as permitted by 820 ILCS 305/S(b) (West 2016). Any monies in excess of the amount of compensation paid or to be paid under that Act was to be paid to the injured employee. The Appellate Court reasoned that since A&R was not a party to that action, *res judicata* cannot bar its claim here. [Supp. R. Vol. 1, Part 1, C18] In so finding, the Court distinguished *Sankey Bros. Inc*., where the employer only sought recovery of its subrogation rights while the employer in the present matter sought recovery for pain and suffering. Thus, Teresa had an interest in the matter as pled. [Supp. R. Vol. 1, Part 1, C15-16]

Turning to the question of whether Teresa should have been allowed to intervene, the Appellate Court observed that there was no statutory enactment controlling the issue and accordingly the focus was on the Code of Civil Procedure where it noted:

> ·'Upon timely application anyone shall be permitted as of right to intervene in an action: *** when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2016). [Supp. R. Vol. 1, Part 1, C18]

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

One seeking to intervene:

> "shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file. In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." 735 ILCS 5/2-408(d) (West 2016). [Supp. R. Vol. 1, Part 1, C19].

The Appellate Court then considered whether A&R Janitorial could adequately represent the interests of Teresa. As the circuit court had not addressed the statutory rights for intervening when it denied the petition, the matter was remanded for consideration of that issue.

I. THE APPELLATE COURT CORRECTLY FOUND THE DOCTRINE OF *RES JUDICATA* DID NOT BAR TERESA MROCZKO'S RIGHT TO RECOVER FOR HER NON-ECONOMIC DAMAGES

The barring of a lawsuit predicated upon the equitable grounds of *res judicata* requires (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996).

A&R Janitorial's rights are found in the statutory enactment of the Workers' Compensation Act, 820 ILCS 305/5(b). In the absence of an injured employee seeking compensation from a third person, this statute allows the employer to institute a lawsuit for recovery of its subrogation interests and "out of any amount recovered the employer shall pay over to the injured employee . . . all sums collected from such person . . . in excess of the amount of such compensation paid or to be paid" by the employer to the

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

employee. Plainly, the statute anticipates that the employer may elect to seek monies in excess of its lien rights.

Here, A&R chose to pursue the monies in excess of its lien. Pepper Construction Co. and Perez & Associates sought unsuccessfully to bar such a recovery. No appeal was taken from the trial court's denial of those Defendants motions to strike the relief sought in excess of A&R's lien rights. Instead, Pepper and Perez chose to settle with A&R. Now, having failed to appeal A&R's claim that sought damages for Teresa's pain and suffering and her inability to attend to her normal duties and activities (e.g. loss of enjoyment of life), Pepper and Perez now wish to relitigate the matter decided by the circuit court. But it is too late. The matter has been decided. The circuit court's decision has become a final judgment on the merits between the identical parties on the identical cause of action. *Res judicata* absolutely bars Pepper and Perez from contesting the matter in this Court.

In attempting to turn the tables on Teresa to bar pursuit of monies in excess of A&R's lien, Pepper and Perez argue that A&R is in privity with Teresa. Yet, A&R has been at odds with Teresa contesting her petition to intervene, contesting her right to file an Amended Complaint and defending against her claims at the Industrial Commission.

The term "privity" is not a precise one. (*Diversified Financial System*s, *Inc. v. Boyd*, 286 Ill.App.3d 911, 916, (1997)). Identity of interest, not nominal identity, is the determining factor. Where a party cannot adequately represent the interests of another, privity does not exist. *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill.2d 285, 296 (1992).

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

Moreover, A&R was a necessary party to Pepper and Perez's Motion to Dismiss Teresa's lawsuit. If Pepper and Perez wanted to bar A&R from pursuing monies in excess of the subrogation lien, it had the remedy of impleading the employer on its motion to dismiss. It chose not to do so knowing that A&R's lawsuit had been filed timely and the statutory authority existed for seeking such relief as was requested in A&R's Amended Complaint. Pepper and Perez's failure to join A&R in the relief they sought in the 2015 L 5957 makes the court's dismissal void or a nullity as to A&R's right to pursue damages in excess of the subrogation lien. See, *Schnuck Markets, Inc. v. Soffer*, 213 Ill.App.3d 957, 982 (1991)).

Pepper and Perez's claim of privity relies exclusively on one decision, *Sankey Bros. Inc. v. Guilliams*, 152 Ill. App.3d 393 (1987). But as the Appellate Court noted when examining that decision, Sankey Bros. never sought to pursue monies in excess of its lien. Sankey Bros., unlike the present matter, never secured an order allowing recovery for monies in excess of the lien. As such, Osborne, the injured employee, was attempting to resurrect his own personal injury claim rather than join an existing claim.

Res judicata, at its core, is a doctrine of equity, not law. (*Kasney v. Coonen and Roth, Ltd*. 395 Ill. App.3d 870, 874 (2009)). Accordingly, *res judicata* should only be applied as fairness and justice require and should not be technically applied if to do so would create inequitable and unjust results. (*City of Chicago v. Midland Smelting Co.*, 385 Ill.App.3d 945, 963 (2008); *Best Coin–Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill.App.3d 638, 650 (1989)). The burden of showing that *res judicata* applies is on the party who invokes the doctrine. (*Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41). *Res*

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

judicata is intended to be used as a shield and not as a club taking into consideration the practicalities rather than symmetry. *Butler v. Stover Brothers* 546 F.2d 544, 551, 554 (1977).

A&R whose Amended Complaint pursued recovery for Teresa's non-economic damages of pain and suffering and her inability to attend to normal duties and affairs does not raise any argument that those damages should be barred by the doctrine of *res judicata*. To the contrary, it argues that "A&R may prosecute its subrogation action and seek to recover all damages that would have been available to Mroczko had she timely filed a complaint. . . ". [A&R Brief at p. 1]. Teresa agrees that A&R had this right but for reasons set forth *infra* the attorneys pursuing this claim were hopelessly conflicted.

Pepper argues that the Appellate Court was wrong when it distinguished Sankey Bros. since A&R was not barred from pursuing its claim. This assertion is false. When the Appellate Court examined the matters of record, it noted that A&R had been given permission to amend its Complaint to seek personal injuries. But, if the doctrine of *res judicata* is implemented as Pepper desires, then A&R would be barred from seeking monies in excess of its subrogation lien. And, such a result would vacate or circumvent an order of the circuit court despite the fact that the order allowing A&R to secure monies in excess of its subrogation lien was final.

Pepper makes note of the fact that the amended complaint occurred after Teresa's petition to intervene was decided. True, but the Appellate Court had the authority to examine the entire record before invoking the equitable doctrine of *res judicata.* While this matter was originally appealed on the petition to intervene, the case continued

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

affecting Teresa's rights both positively (allowing the Amended Complaint) and negatively (settling the lawsuit and ignoring her rights to recover for personal injuries). Pepper opines that that the Appellate Court should not examine the entire record. The timeline here shows what was happening in the 2014 lawsuit. On September 12, 2016, the circuit court dismissed Teresa's lawsuit in 15 L 5957. [Vol VIII, C1990]. On November 10, 2016, with new counsel retained, Teresa petitioned to intervene and file an Amended Complaint in the existing subrogation lawsuit. [Vol. VI, C1373-1377]. On January 31, 2017, Pepper sought to start the time to appeal by seeking a specific finding from the court pursuant to Supreme Court Rule 304(a) that set the time for Teresa to appeal the denial of her petition to intervene. [Vol. 9, C2035-2039]. On that same date, the court granted Pepper's request. [Vol. 9, C2040].

Approximately one month after Teresa's attempt to file an Amended Complaint in 2014 L 8396 seeking to add a claim for her personal injuries was denied, A&R seized upon that same claim. Teresa's appeal was required to be filed by March 2, 2017. On March 3, 2017, A&R Janitorial filed its First Amended Complaint expanding the relief it sought to include present and future pain and anguish, damages for attending to her usual duties and affairs as well as her lost wages and the medical expenses incurred and value of that time. [Supp. R. Vol. 1, Part 1, C27-33]. Pepper Construction Co. sought dismissal of paragraphs 5, 17 and the *ad damnum* of the Amended Complaint that contained elements of damages in excess of A&R Janitorial's subrogation lien rights. [Supp. R. Vol. 1, Part 1, C35-44]. Pepper Construction Co.'s 2-619 Motion, relying upon the decision in *Sankey Bros. Inc. v. Guilliams* 167 Ill. App.3d 393 (1987) asserted principally that the claims for those damages were barred by the doctrine of *res judicata* as a result of the dismissal of

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

Teresa's lawsuit in cause 15 L 5957. Perez & Associates joined in that Motion. [Supp. R. Vol 1, Part 1, C46-47].

On July 26, 2017, the circuit court issued its memorandum order and opinion holding that "A&R is able to seek full recovery for all of Mroczko's potential claims against Defendants." [Supp. R. Vol. 1, Part 2, C88-99]. On August 4, 2017, the circuit court rejected Teresa's Motion to Disqualify. [Supp. R. Vol. 1, Part 3, C 105]. On November 22, 2017, A&R Janitorial filed its Settlement Agreement and Release with Defendants Pepper Construction Co. and Perez & Associates who collectively agreed to pay A&R $850,000.00. [Supp. R. Vol 1, Part 3, C110-116].

It would be illogical and inequitable for matters completely relevant to the issues before this Court to not consider the proceedings that developed immediately after the appeal was required to be filed. The Appellate Court recognized this. Pepper's concern that the Court is being asked to be an advocate rather than an arbiter is hysteria and hyperbola. The record is fully before this Court for determination and the roles of the parties, the attorneys and the Court are well known.

II. Teresa Mroczko Should Be Allowed to Intervene Here As A&R Had No Interest In Protecting Her Right to Non-economic Damages That Provisionally Resulted in The Settlement With Pepper Construction Co. And Perez & Associates.

The Appellate Court examined the right of an employee to intervene in the employer's lawsuit that had been filed pursuant to 820 ILCS 305/S(b) (West 2016). Concluding there was no statutory right to intervene, the Court concluded that given the legislature's failure to provide a procedure, it was necessary to fall back upon the Code of

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

Civil Procedure's authority citing *Madison Two Associates*, 227 Ill. 2d at 494-95. Section 2-408 establishes the requirements for intervention by right and permissive intervention That section allows upon timely application the right to intervene where the proposed intervenor's interest is or may not be adequate and a resulting settlement will bind the proposed intervenor. 735 ILCS 5/2-408(a). In the discretion of the court, intervention may be allowed where the intervenor's claim has common questions of law or fact in the matter sought to be intervened. 735 ILCS 5/2-408(b).

The present matter involves common questions of law and fact. Too, disallowing Teresa to intervene would be detrimental to her for A&R has no interest in protecting her recovery for non-economic damages. In fact, A&R claims Teresa has no interest which is ably demonstrated by the fact that the matter was settled without any of the proceeds being provided to her. A&R's claim that Teresa has no interest in the subrogation complaint is an argument that is both inconsistent with its stated position and contrary to the decision of the circuit court. In filing its Amended Complaint, A&R sought to recover monies in excess of its lien. The matter was fully briefed and argued before the circuit court. A&R advanced its position that the statute allowed it to make this claim. It should not be allowed to change its position to fit the exigencies of its newest position. Under the doctrine of "mend the hold," A&R's position now detrimental to Teresa should not be allowed where it is inconsistent with its previous position. As examined in *Larson v. Johnson*, 1 Ill. App. 2d 36 (1953):

> 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. [citations omitted].

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

Further, the circuit court agreed and entered an order over Pepper and Perez's objection. Neither A&R, Pepper or Perez took any action to remove that claim before the circuit court entered its order dismissing the case on the basis of a provisional settlement. None of the parties appealed the order of the circuit court. Accordingly, the matter is settled that Teresa had an interest in the lawsuit.

Pepper argues that the failure to cite the section of the Code of Civil Procedure has been detrimental to their rights. But, that is a fallacious position for the Appellate Court remanded the matter for consideration whether intervention should be allowed. Pepper and A&J can offer objections to the circuit court on remand.

Moreover, Pepper's claim that they had no opportunity to challenge the basis for intervention is false. The circuit court was provided with briefs of the parties. [Vol. 6, C1397-1406; Vol. 9, C2017-2024; C2027-2032]. The transcript of the proceedings demonstrate that the circuit court understood the argument for intervention and heard the objections to the intervention before ruling upon it. [Vol. 9, C2005-2014]. This has been shown to satisfy that the matter may be considered on appeal. *See, In Re Marriage of Noble* 192 Ill.App.3d 501 (1989).

Pepper and A&J claim waiver. But this is putting procedure before substance. (*In re Custody of Sexton*, 84 Ill.2d 312 (1981)). And, waiver may apply to a litigant but does not bar this Court from reaching the merits. The rule of waiver is a limitation on the parties and not on the courts. Appellate courts have disregarded the waiver rule in order to achieve a just result (*Gardner v. Mullins* 234 Ill.2d 503 (2009)); *Occidental Chemical Co. v. Agri Profit Systems, Inc.* 37 Ill.App.3d 599 (1976)). The issue now before this Court is important and deserves consideration on the merits for the maintenance of a sound and

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

uniform body of precedent. See, *Kaminski* ***v.*** *Ill. Liquor Control Commission*, 20 Ill.App.3d 416 (1974).

III. A&R's Attorneys Who Were Defending Teresa Mroczko's Worker's Compensation Claim Should Have Been Disqualified Once Those Attorneys Were Allowed To Claim Relief On Her Behalf In The Subrogation Lawsuit

Illinois Supreme Court Rule of Professional Conduct 1.7 prohibits an attorney from engaging in an attorney-client relationship when a potential conflict of interest exists. "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person, or by the lawyer's own interests." 134 Ill.2d R. 1.7(a)(2). When the interests of one person is diametrically opposite another, a conflict of interest exists. See, *Murphy v. Urso*, 88 Ill.2d 444 (1981).

In the context of the proceedings, the law firm of Rusin & Maciorowski by Douglas B. Kean and Gregory G. Vacala presented a Motion to amend A&R's Complaint to seek recovery for Teresa's personal injuries. Although Pepper Construction Co. and Perez & Associates opposed this amendment, the circuit court allowed it. As no appeal was taken from that decision, it became final and bound the parties to the court's order that allowed such recovery under the doctrine of *res judicata*. Thereafter, Pepper and Perez entered into a settlement agreement without Teresa's involvement, consent or participation in the recovery. The settlement proceeds have been entirely deposited in A&R's insurer's account. There was no hearing on whether any portion of the proceeds should be placed into an escrow account or IOLTA. Of course, the same attorneys who were defending Teresa's workers compensation claim were supposedly pursuing her claim for personal injuries. One would be hard pressed to explain how the attorneys disputing

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

the nature and extent of her injuries in the worker's compensation claim were not diametrically opposed to the right to recover for her personal injuries in the 2014 lawsuit. The settlement of the 2014 L 8396 lawsuit perfects the argument that A&R's attorneys interests were diametrically opposite to Teresa's interest.

A&R argues that it should be allowed to maintain control over its section 5(b) subrogation action maintaining that it has the motivation to maximize recovery. A&R's argument to control the litigation because of this claimed motivation is contradicted by its own actions. The settlement disproves that assertion since it was calculated according to its own terms to be the amount paid to date and the anticipated amount that would be owed in the future for worker's compensation benefits. All that was maximized by the settlement was A&R's interest. There was no attempt to maximize recovery for the damages that the circuit court had allowed A&R's attorneys to secure.

Generally, where lawsuits are commenced against a third person, employees and employers have identical interests in maximizing the recovery an employee receives because the employer receives compensation first from the monetary award the employee receives from a third party. (*Pedersen v. Mi-Jack Products, Inc*. 389 Ill. App.3d 33 (2009)). Thus, employers are not allowed to intervene and participate but are rather given a lien on the recovery. (*Sjoberg v. Joseph T. Ryerson & Son* 8 Ill.App.2d 414 (1956); *Arnold Lies Co. v. Legler* 26 Ill.App.2d 365 (1960)). (*J.L. Simmons v. Firestone Tire & Rubber Co*. 108 Ill.2d 106). The rationale is the same even though it was the employer here that first commenced the lawsuit. Teresa has the absolute incentive to maximize recovery and secure in excess of the subrogation interest.

Once A&R secured the right to obtain recovery for Teresa's personal injuries, the

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

suggestion that their chosen attorneys should be allowed to pursue the available remedies is called into doubt. As the Appellate Court noted, their attorney's admission that they do not represent Teresa casts doubt that they would be effective advocates. A&R's attorneys were propelled by their own interest to maintain control over the lawsuit.

In any event, the Appellate Court properly remanded this matter to the circuit court for determination whether A&R's attorneys should be the advocates and whether Teresa should be allowed to intervene. This was the proper decision.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

CONCLUSION

The Appellate Court properly remanded this matter to the circuit court for determination whether the factors for intervention have been met and gave the circuit court the discretion on limiting Teresa as an intervenor in the litigation. A&R's settlement with Pepper Construction Co. and Perez & Associates provides that if the circuit court's decision is reversed and Teresa's negligence claim is reinstated, A&R agrees that the settlement payment shall be A&R's sole recovery for workers compensation benefits and A&R waives all lien rights. Thus, what would remain would be those damages A&R had sought in its Amended Complaint for Teresa's personal injuries. Thus, based on the terms of the settlement agreement, A&R has no reason to have its choice of counsel.

Teresa Mroczko therefore requests the matter to be remanded to the circuit court for determination of the right to proceed against Pepper Construction Co. and Perez & Associates with her choice of counsel.

Respectfully Submitted

/s/ Elliot R. Schiff
Elliot R. Schiff
Schiff Gorman LLC
1 E. Wacker Dr., Suite 1100
Chicago, IL 60601
(312) 345-7202
eschiff@schiff-law.com

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Intervenor-Appellee Teresa Mroczko conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of Points and Authorities, the Rule 341(c) certificate of compliance and those matters to be appended to the brief under Rule 342(a) is 19 pages.

/s/*Elliot R. Schiff*
Elliot R. Schiff

Elliot R. Schiff
SCHIFF GORMAN LLC
One East Wacker, Suite 1100
Chicago, Illinois 60601
P. 312-345-7202
eschiff@schiff-law.com

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

APPENDIX

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

No. 123220

In the Supreme Court of Illinois

A& R Janitorial, as subrogee of Teresa Mroczko Mroczko, *Plaintiff-Appellant,*	)	Appeal from the Appellate Court of Illinois First District Case No: 1-17-0385
Teresa Mroczko, *Intervenor-Appellee,*	)	Circuit Court of Cook County Court No. 14 L 8396 Honorable William E. Gomolinski, Judge Presiding
Pepper Construction Co., Pepper Construction Group, LLC Perez & Associates, Inc., Perez Carpet, CBRE, Inc., Blue Cross and Blue Shield Association. *Defendant-Appellants*	)	

TABLE OF CONTENTS TO APPENDIX

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

ELECTRONICALLY FILED
3/3/2017 1:23 PM
2014-L-008396
CALENDAR: X
PAGE 1 of 7
CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
LAW DIVISION
CLERK DOROTHY BROWN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

A&R JANITORIAL, as Statutory Subrogee of TERESA MROCZKO,	)	
Plaintiff,	)	
	)	No. 14 L 8396
v.	)	
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP, LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC.,	)	
Defendants.	)	

PLAINTIFF A&R JANITORIAL'S FIRST AMENDED COMPLAINT

NOW COMES Plaintiff, A&R Janitorial, as Statutory Subrogee of Teresa Mroczko, and for its First Amended Complaint against Pepper Construction Co. ("Pepper") and Perez & Associates, Inc. ("Perez"), states as follows:

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

1. On August 17, 2012, Teresa Mroczko was acting within the course and scope of her employment with A&R Janitorial ("A&R") while removing trash from underneath a desk located inside a cubicle on the 4th floor of the Blue Cross Blue Shield ("BCBS") building located at 300 E. Randolph St., Chicago, Illinois when a large wooden desk top fell on her causing injuries.

2. A&R maintained a policy of workers' compensation insurance issued by Acuity Insurance that was in effect at the time of the Ms. Mroczko's August 17, 2012 accident and injuries.

3. Pursuant to the Illinois Workers' Compensation Act. ("IWCA"), A&R and/or Acuity has paid workers' compensation benefits (medical and indemnity) and incurred costs and

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

attorney fees in defending the workers' compensation claim and in prosecuting the present claim, all of which may continue into the future as a result of the negligence of Pepper and Perez as alleged herein.

4. At all relevant times herein there existed Section 5(b) of the IWCA, 820 ILCS 305/(b), which provide in pertinent part:

> (b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act.
>
> ***
>
> In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability.

ELECTRONICALLY FILED
3/3/2017 1:23 PM
2014-L-008396
PAGE 2 of 7

5. A&R brings this action against Pepper and Perez, pursuant to Section 5(b) of the IWCA, and, as statutory subrogree, A&R has stepped into the shoes of Ms. Mroczko and may prosecute all claims and recover all damages which Ms. Mroczko could have alleged and/or recovered against Pepper and Perez.

COUNT I
NEGLIGENCE OF PEPPER

6. Plaintiff A&R re-alleges paragraphs 1-5, as if set forth fully herein.

7. On or about August 17, 2012, Defendant Pepper Construction Company ("Pepper") and Perez & Associates ("Perez") were involved in a carpet replacement project that

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

included the 4th floor of the BlueCross BlueShield ("BCBS") building located at 300 E. Randolph St., Chicago, Illinois.

8. As part of the carpet replacement project, the tops of the desks located inside the offices were removed and placed inside the cubicle areas.

9. On said date, Teresa Mroczko ("Mroczko") was employed by A&R Janitorial as a janitor in the BCBS building.

10. As part of Mroczko's job duties, she was required to remove trash and recycling from underneath the desks located inside the cubicles on the 4th floor of the BCBS building.

11. Defendant Pepper placed, stored, or allowed a large wooden desk top to be left in an upright, unsecured and/or unbalanced position on a dolly.

12. As Ms. Mroczko was removing the trash and/or recycling, the desk top fell on to Ms. Mroczko.

13. The large wooden desk top was placed, stored, and/or allowed to be kept in an upright, unsecured, and/or unbalanced position upon a dolly creating a hazardous condition.

14. At all times relevant, it was the duty of Pepper to manage, oversee, supervise, and or control the carpet replacement project and conduct its activities in a reasonably safe manner for all individuals that may encounter the project.

15. Notwithstanding said duty, Defendant Pepper, by and through its agents, servants, and employees committed one or more of the following careless and negligent acts and/or omissions:

(a) Placed, positioned, or allowed the desk top to be in an upright, unsecured, and/or unbalanced position on a dolly;

(b) Failed to secure the desk top so as to prevent or avoid injury to other persons;

ELECTRONICALLY FILED
3/3/2017 1:23 PM
2014-L-008396
PAGE 3 of 7

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

(c) Failed to provide proper warnings or signs that the desk top was upright, unsecured, or unbalanced so as to create the risk that it might fall;

(d) Failed to maintain or inspect the area of the desk top to ensure that it was placed or stored in a reasonably safe manner;

(e) Failed to block off, rope off, barricade, or prevent access to the area of the desk top to ensure that it would not cause injury to other persons;

(f) Failed to properly supervise, oversee, and/or control the movement, placement, and storage of the desk top;

(g) Failed to properly schedule, sequence, and/or coordinate the work on the project so as to provide a safe work area;

(h) Failed to remedy the upright, unsecured desk top so as to reduce the risk of it falling upon other persons; and

(i) Was otherwise careless and negligent.

ELECTRONICALLY FILED
3/3/2017 1:23 PM
2014-L-008396
PAGE 4 of 7

16. Defendant Pepper knew, or in the exercise of reasonable care, should have known of the aforesaid unsafe acts and conditions taking place and existing in its work area.

17. That as a direct and proximate result of the aforesaid wrongful acts and/or omissions of Defendant Pepper, Ms. Mroczko sustained severe and permanent injuries, both externally and internally and was and will be hindered and prevented from attending to her usual duties and affairs, and has lost and will in the future incur lost wages and the value of that time. Ms. Mroczko also suffered great pain and anguish, both in mind and body, and will in the future continue to suffer. Ms. Mroczko has further incurred and will in the future incur medical expenses for medical care and services endeavoring to become healed and cured of said injuries.

WHEREFORE, Plaintiff A&R Janitorial, as Statutory Subrogee of Teresa Mroczko, prays for judgment against Defendant Pepper Construction Co. in an amount that will fairly and justly compensate for the damages and injuries sustained by Teresa Mroczko in an amount in

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

excess of Fifty Thousand Dollars ($50,000.00), not limited to A&R's liability to Ms. Mroczko under the IWCA, together with costs of this suit.

COUNT II
NEGLIGENCE OF PEREZ

18. Plaintiff A&R re-alleges paragraphs 1-5, as if set forth fully herein.

19. On or about August 17, 2012, Defendant Pepper Construction Company ("Pepper") and Perez & Associates ("Perez") were involved in a carpet replacement project that included the 4th floor of the BlueCross BlueShield ("BCBS") building located at 300 E. Randolph St., Chicago, Illinois.

20. As part of the carpet replacement project, the tops of desks located inside the offices were removed and placed inside the cubicle areas.

21. On said date, Teresa Mroczko ("Mroczko") was employed by A&R Janitorial as a janitor in the BCBS building.

22. As part of Mroczko's job duties, she was required to remove trash and recycling from underneath the desks located inside the cubicles on the 4th floor of the BCBS building.

23. Defendant Perez placed, stored, and/or allowed a large wooden desk top to be left in an upright, unsecured, and/or unbalanced position on a dolly.

24. As Ms. Mroczko was removing the trash and/or recycling, the desk top fell onto Ms. Mroczko.

25. The large wooden desk top was placed, stored, and/or allowed to be kept in an upright, unsecured, and/or unbalanced position upon a dolly creating a hazardous condition.

ELECTRONICALLY FILED
3/3/2017 1:23 PM
2014-L-008396
PAGE 5 of 7

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

26. At all times relevant, it was the duty of Perez to manage, oversee, supervise, and or control the carpet replacement project and conduct its activities in a reasonably safe manner for all individuals that may encounter the project.

27. Notwithstanding said duty, Defendant Perez, by and through its agents, servants, and employees committed one or more of the following careless and negligent acts and/or omissions:

(a) Placed, positioned, or allowed the desk top to be in an upright, unsecured, and/or unbalanced position on a dolly;

(b) Failed to secure the desk top so as to prevent or avoid injury to other persons;

(c) Failed to provide proper warnings or signs that the desk top was upright, unsecured, or unbalanced so as to create the risk that it might fall;

(d) Failed to maintain or inspect the area of the desk top to ensure that it was placed or stored in a reasonably safe manner;

(e) Failed to block off, rope off, barricade, or prevent access to the area of the desk top to ensure that it would not cause injury to other persons;

(f) Failed to properly supervise, oversee, and/or control the movement, placement, and storage of the desk top;

(g) Failed to properly schedule, sequence, and/or coordinate the work on the project so as to provide a safe work area;

(h) Failed to remedy the upright, unsecured desk top so as to reduce the risk of it falling upon other persons; and

(i) Was otherwise careless and negligent.

28. Defendant Perez knew, or in the exercise of reasonable care, should have known of the aforesaid unsafe acts and conditions taking place and existing in its work area.

29. That as a direct and proximate result of the aforesaid wrongful acts and/or omissions of Defendant Pepper, Ms. Mroczko sustained severe and permanent injuries, both externally and internally and was and will be hindered and prevented from attending to her usual

ELECTRONICALLY FILED
3/3/2017 1:23 PM
2014-L-008396
PAGE 6 of 7

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

duties and affairs, and has lost and will in the future incur lost wages and the value of that time. Ms. Mroczko also suffered great pain and anguish, both in mind and body, and will in the future continue to suffer. Ms. Mroczko has further incurred and will in the future incur medical expenses for medical care and services endeavoring to become healed and cured of said injuries.

WHEREFORE, Plaintiff A&R Janitorial, as Statutory Subrogee of Teresa Mroczko, prays for judgment against Defendant Perez & Associates, Inc. in an amount that will fairly and justly compensate for the damages and injuries sustained by Teresa Mroczko in an amount in excess of Fifty Thousand Dollars ($50,000.00), not limited to A&R's liability to Ms. Mroczko under the IWCA, together with costs of this suit.

ELECTRONICALLY FILED
3/3/2017 1:23 PM
2014-L-008396
PAGE 7 of 7

Respectfully submitted,

RUSIN & MACIOROWSKI, LTD.

By: _____

Douglas B. Keane, one of the attorneys for Plaintiff
A&R Janitorial a/s/o Teresa Mroczko

Gregory G. Vacala
Douglas B. Keane
Rusin & Maciorowski, Ltd.
Attorneys for Plaintiff
10 South Riverside Plaza, Suite 1925
Chicago, Illinois 60606
(312) 454-5110
Firm ID No. 40680
gvacala@rusinlaw.com
dkeane@rusinlaw.com
W:\DOCS\1400\0039\01885827.DOCX

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

A&R JANITORIAL, as Statutory Subrogee of TERESA MROCZKO,	)	
Plaintiff,	)	No. 14 L 8396
v.	)	
PEPPER CONSTRUCTION CO., PEPPER CONSTRUCTION GROUP LLC, PEREZ CARPET, PEREZ & ASSOCIATES, INC.,	)	
Defendants.	)	

MEMORANDUM ORDER AND OPINION

INTRODUCTION

This matter comes for ruling on Defendant Pepper Construction Company's 735 ILCS 5/2-619.1 motion to strike portions of A&R Janitorial's First Amended Complaint.

Background

Defendant Pepper Construction Company ("Pepper") is responsible for maintenance work at the Blue Cross and Blue Shield Building ("Building") where subrogor Teresa Mroczko's injuries occurred. Pepper hired A&R Janitorial ("A&R") to do the janitorial work at the Building. Pepper also hired Defendant Perez Carpet ("Perez") to replace carpeting in part of the Building. A&R employee Teresa Mroczko alleges that she was injured by a falling desk that Perez had placed upright against a wall on the floor where she was working, away from the portion of

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

the Building where the carpeting work was being done. Mroczko filed a workers' compensation claim against A&R. On August 11, 2014, A&R filed a complaint in subrogation against the Pepper and Perez defendants pursuant to Section 5(b) of the Illinois Workers' Compensation Act, which allows employers to file subrogation claims in order to collect the workers' compensation benefits paid to an employee when a third party may be liable for the underlying injury. 820 ILCS 305/5(b).

On June 11, 2015, almost three years after the accident, Mroczko filed a personal injury negligence complaint against Pepper and Perez for her injuries. On September 12, 2016, this court dismissed her untimely complaint with prejudice pursuant to the statute of limitation for negligence under 735 ILCS 5/13-202, finding that her personal injury claims did not arise out of construction negligence as she had claimed, and therefore the four-year construction negligence statute of limitations found in 735 ILCS 5/13-214(a) did not apply. This court included in its dismissal order that it found no just reason to delay the enforcement or appeal of the order pursuant to Illinois Supreme Court Rule 304(a). Mroczko did not file an appeal, but instead sought to intervene in A&R's timely filed subrogation claim on November 10, 2016. This court denied her petition to intervene.

The underlying complaint in this matter is A&R's First Amended Complaint at Law, in which A&R, as subrogee of Mroczko under the Illinois Workers' Compensation Act, seeks to prosecute all claims Mroczko could have brought and recover the full extent of damages that Mroczko could have recovered against Defendants. Pepper contends that the First Amended Complaint should be stricken

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

pursuant to 735 ILCS 5/2-615 for failing to comply with the pleading requirements for subrogation actions set forth in the Illinois Code of Civil Procedure. 735 ILCS 5/2-403(c). Pepper further contends that pursuant to 735 ILCS 5/2-619 and the doctrine of *res judicata*, this court's previous dismissal with prejudice of Mroczko's complaint for personal injury limits A&R's possible recovery to the total amount it will ultimately pay Mroczko in workers' compensation payments, since Mroczko herself is barred from pursuing any claims against Defendants. Pepper additionally moves to strike language in ¶¶ 5 and 17 of the complaint, stating that A&R is pursuing all damages Mroczko may have sought, as well as the *ad damnum* clause at the end of Count I.

REVIEW UNDER 735 ILCS 5/2-619.1

735 ILCS 5/2-619.1 allows a party to file a motion as a combination of a Section 2-615 motion to dismiss based on a plaintiff's substantially insufficient pleadings with a Section 2-619 motion to dismiss based on certain defects or defenses. 735 ILCS 5/2-619.1. A section 2-619.1 motion "(1) *must* be in parts, (2) *must* be limited to and shall specify that it is made under either section 2–615 or 2–619, and (3) *must* clearly show the points or grounds relied upon under the [s]ection upon which it is based." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 21 (internal quotations omitted). Section 2-619.1 does not authorize commingling claims pursuant to 2-615 and 2-619. *Id.*

A Section 2-615 motion to dismiss tests the legal sufficiency of a complaint based upon defects apparent on its face. *Khan v. Deutsche Bank AG*, 2012 IL

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

112219, ¶ 47; *see also In re Chi. Flood Litig.*, 176 Ill. 2d 179, 203 (1997). Under Section 2-615, a cause of action should not be dismissed unless it is apparent, when construed in the light most favorable to the plaintiff, that there are insufficient facts to establish a cause of action upon which relief may be granted. *Hadley v. Doe*, 2015 IL 118000, ¶ 29. The only matters for the court to consider in ruling on the motion are the allegations of the pleadings themselves, rather than the underlying facts. *Barber–Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1068–69 (5th Dist. 1992).

A Section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts an affirmative matter that defeats the claim. 735 ILCS 5/2-619(a)(9). The statute's purpose is to provide litigants with a method for disposing of issues of law and easily proven issues of fact at the outset of a case. *See Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). A Section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise therefrom. *Van Meter*, 207 Ill. 2d at 367. When a court rules on a Section 2-619 motion to dismiss, it "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *In re Chi. Flood Litig.*, 176 Ill. 2d at 188; *see also Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). Section 2-619 lists several different grounds for which an involuntary dismissal may be granted. *See* 735 ILCS 5/2-619(a)(1)–(a)(9).

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

When ruling on a Section 2-619.1 motion, the court first addresses the arguments brought under 2-615, and then under 2-619. *See Mueller by Math v. Community Consol. Sch. Dist. 54*, 287 Ill. App. 3d 337, 340 (1st Dist. 1997).

COURT'S ANALYSIS

A. Dismissal Pursuant to Section 2-615

Pepper argues that A&R's First Amended Complaint must be stricken for failure to comply with 735 ILCS 5/2-403(c), which governs pleading requirements for subrogation actions. Relying on *Walker v. Ridgeview Construction Co,* Pepper contends that, because the First Amended Complaint was not made under oath or with an affidavit attached to the pleading, it does not comply with 403(c) of the Illinois Code of Civil Procedure and should be stricken. *Walker v. Ridgeview Construction Co.,* 316 Ill. App. 3d 592, 596 (1st Dist. 2000). However, the Illinois Supreme Court has stated that subrogation claims under Section 5(b) of the Illinois Workers' Compensation Act need not comply with 2-403(c), because the action is brought under a statutory right of subrogation. *Geneva Construction Co. v. Martin Transfer &Storage Co.*, 4 Ill. 2d 273, 286 (1954). As the Court stated, it will "not be necessary hereafter for employers asserting... claims against tort-feasors to comply with section 22 of the Civil Practice Act, since the 1953 amendments to the Workmen's Compensation Act prescribe a mode of statutory subrogation for employers." *Id.* Accordingly, A&R has properly pled its statutory subrogation claim pursuant to the Illinois Worker's Compensation Act, Section 5(b).

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

B. Dismissal Pursuant to Section 2-619

The core of Pepper's argument is that, pursuant to *res judicata*, this court's denial of Mroczko's claims due to the statute of limitations bars A&R from pursuing the damages that she was cut off from due to her untimely filing. 735 ILCS 5/13-202. A&R takes Mroczko's place as her subrogee, and is not entitled to recover anything beyond what she may recover. Pepper relies on *Sankey Bros., Inc. vs. Industrial Commission*, where the Third District held that an injured worker who had previously filed a third-party suit beyond the limitations period was not allowed to intervene in his employer's statutory subrogation claim. 167 Ill. App. 3d 910, 914 (3d Dist. 1988). Pepper urges this court to decide likewise, due to the factual parallels between *Sankey* and the present case.

The Illinois Supreme Court has stated "the doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any *subsequent* actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996) (emphasis added); *see also People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill.2d 285, 294 (1992); *Kinzer v. City of Chicago*, 128 Ill.2d 437, 446 (1989). Accordingly, *res judicata* applies only to subsequent actions, meaning it is a prospective, not retroactive, doctrine. As Pepper correctly states, *res judicata* extends not only to what was decided in the original action but also to what could have been decided. *Rein* 172 Ill. 2d at 334. Here, A&R filed its subrogation claims within three months of when the statute of limitations would have run on Mroczko's third-party personal

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

injury claims. Mroczko filed her case almost one year later. This court dismissed her claims as untimely, but that decision cannot be applied retroactively to A&R's claims. Furthermore, in *Sankey*, the court only barred the employee from intervening in the claim of the employer—it allowed the employer to proceed with its claim, which was timely filed under Section 5(b) of the Workers' Compensation Act, without the intervention of the employee. *Sankey Bros.*, 167 Ill. App. 3d at 398.

Having held that the doctrine of *res judicata* does not apply, this court must still determine whether A&R may pursue the full extent of Mroczko's potential damages, or whether it is limited to recovering its workers' compensation lien. As A&R's subrogation claim arises from the Illinois Workers' Compensation Act, this requires turning to the guidelines for statutory interpretation.

1. Illinois Workers' Compensation Act, Section 5(b)

In order to determine what A&R can recover from Pepper and Perez, the language of 820 ILCS 305/5(b) must be analyzed following the guidelines for statutory interpretation. As the Illinois Supreme Court states, "the primary rule of statutory construction is to give effect to the intent of the legislature. The best evidence of legislative intent is the language used in the statute and the language must be given its plain and ordinary meaning." *Stroger v. RTA,* 201 Ill. 2d 508 (2002). Additionally, the statute should be construed in "a manner that no term is rendered meaningless or superfluous." *Id.* When considering the statute as a whole they should be interpreted "in such a manner that avoids absurd or unjust results." *Croissant v. Joliet Park District,* 141 Ill. 2d 449.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

Section 5(b) codifies the common law right of subrogation, which gives the subrogee all the rights of the subrogor. Chicago Transit Authority, 110 Ill.App.3d at 381. The language of Section 5(b) in relevant part reads as follows:

> Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act.
> * * *
> In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability. 820 ILCS 305/5(b).

The language of Section 5(b) refers specifically to the ability of an employer to commence proceedings against the potentially liable third party, and requires the employer to pay the injured employee any amount in excess of the employers' workers compensation lien. However, nowhere in the language of this statute did the legislature limit what is recoverable by an employer who timely files a subrogation action against the third party. The statute allows A&R to commence proceedings in Mroczko's name because Mroczko did not file within three months of the limitations period running, which is precisely what A&R did. Section 5(b) does not restrict the damages that A&R can pursue, as long as it complies with the

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

requirement of paying Mroczko the excess recovery over its lien, and this court should not read into the statute any terms that are not provided for in the text.

Moreover, it is also necessary to ensure that no part of the statute is rendered meaningless or absurd by the court's interpretation. Section 5(b) provides that "out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid." 820 ILCS 305/5(b). If Section 5(b) were interpreted as limiting an employer to recovering only the amount of its lien, there would be no reason to state that damages in excess of that lien would be turned over to the employee. If A&R may bring all potential claims that Mroczko could have brought—and pursue all the available remedies that stem from those claims—A&R could potentially recover more than the amount of its lien, which it then would have to turn over to Mroczko. This is exactly what the plain language of Section 5(b) provides for in the cited portion above. If A&R could only pursue its lien, there could never be a possibility that it would recover in excess of that amount. Thus, in order to prevent this language from being rendered meaningless, A&R must be allowed to claim in excess of its lien.

Here, A&R timely filed as Mroczko's subrogee, and so Section 5(b) will allow it to bring every possible claim against the potentially responsible parties that Mroczko herself could have brought. To hold otherwise would improperly limit A&R's ability to pursue its statutory rights to the fullest extent provided under the Illinois Workers' Compensation Act. This court follows the language of the Act to

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

allow A&R to seek all damages Mroczko was entitled to pursue at the time that A&R filed its subrogation claim.

2. Burden of Proof

Finally, this court's decision is also impacted by the differing burdens of proof required in a negligence cause of action and a workers' compensation claim. The Illinois Workers' Compensation Act allows for an employee to recover for injuries in the workplace without any showing of fault on the part of the employer. *Sharp v. Gallagher*, 95 Ill. 2d 322, 326 (1983). Conversely, a personal injury negligence claim requires proof of fault, which may be limited by the plaintiff's comparative negligence.

These critical distinctions further demonstrate that A&R may properly pursue damages in excess of its lien in order to preserve its right to recover the amount paid to Mroczko under her workers' compensation claim. Mroczko may recover for the full extent of her injuries, without having to prove fault and without regard for her own potential contributory negligence. However, in its action against Defendants, A&R will have to meet its burden of proving their negligence in order to recover damages, and those damages may be limited if Mroczko is found to be comparatively at fault. Accordingly, the only way A&R may possibly be able to recover the full extent of its workers' compensation payments to Mroczko is if it is able to pursue all claims and related damages against Pepper and Perez that Mroczko could have sought. This further demonstrates why A&R must be entitled to seek recovery to the same extent as Mroczko could have. Any alternative

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

approach would create the sort of "absurd result" that the rules of statutory interpretation seek to eliminate.

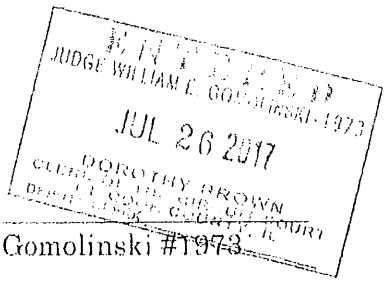
Lastly, this court addresses A&R's argument that it is *required* to pursue all of Mroczko's potential claims, and not merely seek recovery for its lien. A&R relies on *Beiermann v. Edwards*, in which the court held that where the employer took control of a suit that was timely filed by the injured employee against third parties, it was required to pursue all claims and related recovery that the employee could have brought himself. 193 Ill.App.3d 968, 979 (1990). Here, A&R is not taking control of a case that Mroczko had filed first, within the limitations period. It commenced the suit itself, and Mroczko only later attempted to intervene after allowing her claims to expire. Therefore, whether or not A&R *must* bring all claims, as in *Beiermann,* is not relevant to this case and need not be decided. However, *Beiermann* further suggests that this court is correct in holding that A&R is able to seek full recovery for all of Mroczko's potential claims against Defendants.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

COURT'S RULING

Therefore, based on the pleadings, briefs, and case law cited above, Defendant's motion that the First Amended Complaint should be stricken is DENIED. Defendant's motion to strike language in ¶¶ 5 and 17, as well as the *ad damnum* clause at the end of Count I, of A&R's First Amended Complaint is DENIED.

ENTERED:



Judge William E. Gomolinski #1973

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

SETTLEMENT AGREEMENT AND RELEASE OF SPECIFIED CLAIMS

This Settlement Agreement and Release of Specified Claims (the "Agreement") is made and entered into by the following parties (collectively "the Parties"):

1. A&R Janitorial Service, Inc.

2. Pepper Construction Company

3. Perez and Associates, Inc.

4. Selective Insurance Company of America

RECITALS

1. The Parties assert these recitals to explain the circumstances surrounding the execution of the Agreement, and intend them to be an integral part of the Agreement.

2. On August 17, 2012, Teresa Mroczko ("Mroczko") was involved in a work-related accident while working at the BlueCross/BlueShield Tower ("BCBS Tower") located at or near 300 East Randolph Street in Chicago, IL ("the incident"). Mroczko was working within the scope of her employment for A&R Janitorial Service, Inc. ("A&R") at the time of the incident.

3. On or about October 5, 2012, Mroczko filed a workers' compensation claim against A&R in the Illinois Workers' Compensation Commission, under Cause No. 2012 WC 034686, seeking benefits owed in relation to the incident (the "Mroczko WC Claim"). The Mroczko WC Claim remains pending. The execution of this Agreement shall have no effect on the Mroczko WC Claim beyond what is specifically provided for in this Agreement.

4. On or about August 11, 2014, A&R, as Statutory Subrogee of Mroczko, filed a Complaint in Subrogation in the Circuit Court of Cook County, under Cause No. 14 L 8396 (the "A&R Subrogation Claim"). The A&R Subrogation Claim was filed against Pepper Construction Company ("Pepper"), Perez and Associates, Inc. ("Perez") and others, and sought recovery for the amounts A&R had paid and may pay in the future in relation to the Mroczko WC Claim, and also sought recovery for Mroczko's non-economic damages such as pain and suffering and loss of a normal life.

5. On or about June 11, 2015, Mroczko filed a Complaint at Law in the Circuit Court of Cook County, under Cause No. 2015 L 5957. In her Complaint at Law, Mroczko sought recovery against Pepper, Perez and others, for the personal injuries she sustained in the incident (the "Mroczko Negligence Claim").

6. The Mroczko Negligence Claim was dismissed with prejudice on the basis that it was filed beyond the applicable statute of limitations. Mroczko then sought to intervene in the A&R Subrogation Claim. Mroczko's Petition to Intervene was denied. The denial of Mroczko's

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

Petition to Intervene was appealed to the Illinois Appellate Court of Illinois (the "Mroczko Appeal"). That appeal is still pending. .

7. Pepper had executed a Subcontract Agreement with Perez for specified work to be performed at the BCBS Tower where the incident occurred. Based on the terms of the Subcontract Agreement, Pepper tendered its defense and indemnity of both the A&R Subrogation Claim and the Mroczko Negligence Claim to Perez and its insurer, Selective Insurance Company of America ("Selective"). Selective accepted Pepper's tender of defense under a reservation of rights.

8. Pepper filed a Counterclaim against Perez for both Contribution and Breach of Contract in the A&R Subrogation Claim and the Mroczko Negligence Claim. The Breach of Contract Claim was based on Pepper's allegation that Perez had breached its contract with Pepper by failing to procure the type of additional insured coverage required by the Subcontract Agreement (the "Pepper Breach of Contract Claim"). Pepper also filed a Third-Party Complaint for Professional Negligence against Perez's insurance producer, Insure-Rite, Inc. ("Insure-Rite") in connection with its claim that improper coverage had been procured for Pepper. On August 24, 2017, the Pepper Breach of Contract Claim and its Third-Party Complaint against Insure-Rite were severed from the A&R Subrogation Claim, and were transferred to the Commercial Calendar of the Law Division of the Circuit Court of Cook County under Cause No. 17 L 8573.

9. A&R, Pepper, Perez and Selective have reached an agreement resolving the A&R Subrogation Claim, the Pepper Breach of Contract Claim, and all disputes between Pepper and Selective on insurance coverage owed to Pepper over the incident. The parties to this Agreement desire to reduce the terms and condition of their agreement to writing as follows.

RELEASE AND DISCHARGE

A. A&R's Release of Pepper and Perez

1. In consideration of the sum of **EIGHT HUNDRED FIFTY THOUSAND DOLLARS ($850,000.00)**, lawful money of the United States of America, the receipt and adequacy of which are hereby acknowledged, A&R does hereby release and forever discharge Pepper, Perez, their officers, directors, partners, shareholders, employees, agents, representatives, attorneys, insurers, re-insurers, all associated, affiliated, successor, parent and subsidiary companies (collectively "Releasees"), of and from any and all debts, demands, actions, causes of action, suits, damages, injuries, costs, loss of services, expenses, compensation, and any and all claims and liabilities whatsoever, of every kind and nature, both at law and in equity, which A&R has or claims to have had, or now or hereafter may have, and whether known or unknown, by reason of any loss or damage relating to the incident, whether said claims seek recovery for economic or monetary loss, compensatory, exemplary or punitive damages, and whether said claims be founded upon tort or otherwise, or authorized by code, statute or common law of any jurisdiction.

2. In further consideration of the aforesaid payment, A&R understands and agrees that this Agreement includes the release, discharge and satisfaction of any and all claims, judgments, and causes of action which are, or could have been, the subject of the A&R Subrogation Claim.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

3. In further consideration of the aforesaid payment, A&R warrants and represents that it has made no assignment of any claim, cause of action, suit or demand covered by this Agreement, and that no person, firm, corporation, estate or any other entity has been subrogated to any such claim, cause of action, suit or demand, and that it has the sole and complete right and authority to settle, compromise, release and discharge the A&R Subrogation Claim.

4. To date A&R has paid workers' compensation benefits ("WC benefits") in excess of $342,000.00 to or on behalf of Mroczko in connection with the Mroczko WC Claim. The Parties anticipate that A&R may pay out more than $850,000.00 in WC benefits in connection with the Mroczko WC Claim. The Parties agree that this Agreement shall not affect the Mroczko WC Claim and A&R's responsibility to continue to pay WC benefits to Mroczko.

5. In the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated, A&R understands and agrees that it shall not possess any lien rights on Mroczko's eventual recovery in the Mroczko Negligence Claim against Pepper and/or Perez. In short, A&R understands and agrees that the settlement amount mentioned in Paragraph 1. above shall be its sole recovery for WC benefits paid to Mroczko and lien rights accrued in connection with the incident with respect to Pepper and/or Perez. In the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated, A&R agrees that it waives all lien rights that it otherwise might have in connection with WC benefits paid with respect to Pepper and/or Perez.

6. Pepper, Perez, and Selective intend that the amount paid in Paragraph 1. combined with the amount of A&R's waived lien for WC benefits paid and/or WC benefits that do not have to be paid due to credits or workers' compensation holidays, shall serve as a set-off for Pepper and Perez, or either of them, in the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated. A&R agrees to respond to any requests made by Pepper, Perez or their agents, as to additional and/or final amounts of WC benefits paid A&R to Mroczko, in a reasonably prompt fashion, so that Pepper and Perez, or either of them, can calculate the amount of set-off available to them, and further agrees to furnish an executed affidavit on this subject so that Pepper and Perez, or either of them, can request such a set-off from the trial court.

B. Pepper's, Perez's and Selective's Mutual Release

1. The $850,000.00 payment identified in Paragraph 1.A. shall be paid as follows: Selective will pay a total of $382,500.00 to A&R on behalf of Pepper and Perez. Pepper will pay a total of $467,500.00 to A&R on its own behalf.

2. In consideration of the mutual contributions to the $850,000 payment identified in Paragraph 1., Pepper and Selective hereby release any and all claims they may have against each other in connection with the incident and Pepper's claim for coverage under the Selective policy issued to Perez. Pepper releases any claims for indemnity, as an additional insured under the policy or otherwise, and further releases all claims for supplemental payments and/or any other benefit to which it may be entitled as an additional insured or otherwise, with the sole exception of the defense costs described in Paragraph 3 below. Selective releases any claims against Pepper

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

for the recovery of defense costs and indemnity payments made by Selective in connection with the incident, the A&R Subrogation Claim, the Mroczko Negligence Claim, and the Mroczko Appeal.

3. Selective will pay Pepper's defense costs in both the A&R Subrogation Claim and in the Mroczko Appeal until this Agreement is fully-executed.

4. In further consideration of this Agreement, and the mutual promises, agreements, understandings and reliances thereon, but subject to Paragraph 5 below, Pepper and Perez do hereby mutually and reciprocally release and forever discharge each other, along with their respective officers, directors, partners, shareholders, employees, agents, representatives, attorneys, insurers, re-insurers, all associated, affiliated and successor companies, of and from all existing and potential claims which Pepper and Perez have or may have in the future against each other in connection with the incident, the A&R Subrogation Claim and the Pepper Breach of Contract Claim.

5. In the event that the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's petition to intervene, and the Mroczko Negligence Claim is reinstated, Pepper and Perez agree that each retains the right to assert a contribution claim only against the other. However, if the Mroczko Appeal results in the reversal of the trial court's denial of Mroczko's appeal as to one but not both Pepper and Perez, then no contribution claim can be asserted against the Party as to whom the trial court's denial of the petition to intervene was affirmed.

6. The Parties agree that this Agreement shall not affect or infringe in any way on Pepper's ability and right to maintain its professional negligence claim against Insure-Rite.

C. General Terms

1. It is understood and agreed that all representations and agreements made with respect to the subject matter of this Agreement are expressly set forth herein, and this Agreement may not be altered or amended in any way, without the written consent of all parties hereto.

2. It is understood and agreed that all Parties, in entering into this Agreement, have been represented by competent legal counsel and have had the opportunity to conduct a full and adequate investigation of the facts and claims at issue, and have not relied upon the representations, warranties, promises or conditions not specifically set forth in this Agreement.

3. The Parties specifically acknowledge and agree that this Agreement has been prepared, reviewed, studied and executed without compulsion, fraud, duress, or undue influence, and without circumstances which would overcome the free will of the signatories. The Parties further agree that the Agreement is expressly made by the Parties with the requisite experience and advice of independent counsel, each party acting as equals in bargaining the terms of this Agreement and, accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of the Agreement or any amendment to it.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

4. It is understood and agreed that this Agreement shall be interpreted, enforced and governed by the laws of the State of Illinois.

5. It is understood and agreed that the aforesaid payments by Releasees are not to be construed as an admission of any liability on the part of the Releasees. Specifically, Pepper and Perez have denied and continue to deny liability to Mroczko and A&R.

EXECUTION AND ACCEPTANCE

The undersigned represent that they have read this Agreement; that they fully understand the contents of this Agreement; that it contains the entire agreement among the Parties hereto; and that they signed this Agreement as their free and voluntary act.

By: _____
A&R Janitorial Service, Inc.

Its: Exec V.P. /Co-Owner

Date: 11/21/17

By: _____
Pepper Construction Company

Its: _____

Date: _____

By: _____
Perez and Associates

Its: _____

Date: _____

By: _____
Selective Insurance Company of America

Its: _____

Date: _____

8701937 TBOYLAN;JBARRETT

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

4. It is understood and agreed that this Agreement shall be interpreted, enforced and governed by the laws of the State of Illinois.

5. It is understood and agreed that the aforesaid payments by Releasees are not to be construed as an admission of any liability on the part of the Releasees. Specifically, Pepper and Perez have denied and continue to deny liability to Mroczko and A&R.

EXECUTION AND ACCEPTANCE

The undersigned represent that they have read this Agreement; that they fully understand the contents of this Agreement; that it contains the entire agreement among the Parties hereto; and that they signed this Agreement as their free and voluntary act.

By: _____
A&R Janitorial Service, Inc.

Its: _____

Date: _____

By: _____
Pepper Construction Company

Its: VP & Gen Csl

Date: Nov. 15, 2017

By: _____
Perez and Associates

Its: _____

Date: _____

By: _____
Selective Insurance Company of America

Its: _____

Date: _____

8701937 TBOYLAN;JBARRETT

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

4. It is understood and agreed that this Agreement shall be interpreted, enforced and governed by the laws of the State of Illinois.

5. It is understood and agreed that the aforesaid payments by Releasees are not to be construed as an admission of any liability on the part of the Releasees. Specifically, Pepper and Perez have denied and continue to deny liability to Mroczko and A&R.

EXECUTION AND ACCEPTANCE

The undersigned represent that they have read this Agreement; that they fully understand the contents of this Agreement; that it contains the entire agreement among the Parties hereto; and that they signed this Agreement as their free and voluntary act.

By: _____
A&R Janitorial Service, Inc.

Its: _____

Date: _____

By: _____
Pepper Construction Company

Its: _____

Date: _____

By: _____
Perez and Associates

Its: _____

Date: 11-15-17

By: _____
Selective Insurance Company of America

Its: Litigation Supervisor

Date: 11/10/17

8698923 TBOYLAN;JBARRETT

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

THIRD DIVISION
December 27, 2017

2017 IL App (1st) 170385

No. 1-17-0385

A&R JANITORIAL, as Subrogee of Teresa Mroczko,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 L 8396
	)	
PEPPER CONSTRUCTION CO.; PEPPER CONSTRUCTION GROUP, LLC; PEREZ & ASSOCIATES, INC.; PEREZ CARPET; CBRE, INC.; and BLUE CROSS AND BLUE SHIELD ASSOCIATION,	)	
	)	
Defendants-Appellees	)	Honorable
	)	William Edward Gomolinski,
(Teresa Mroczko, Individually, Intervenor-Appellant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court, with opinion.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment and opinion.

OPINION

¶ 1 This is an appeal from an order of the circuit court of Cook County denying Teresa Mroczko's (appellant) petition to intervene in an action filed by her employer, A&R Janitorial (plaintiff) against defendants. Plaintiff, Teresa's employer at the time of her injury, filed its action against the named defendants as the subrogee of Teresa pursuant to section 5(b) of the Illinois Workers' Compensation Act (Act). 820 ILCS 305/5(b) (West 2016). Section 5(b) of the Act allows injured employees to file a lawsuit against a third-party defendant legally liable for an employee's injury and provides that the employer be indemnified for any payments it made under the Workers' Compensation Act to the employee from any recovery made from the lawsuit. If the injured employee does not file a claim against the third-party defendant prior to

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

three months before the expiration of the statute of limitations, section 5(b) also allows the employer to file a claim against the third-party defendant to indemnify itself for benefits paid to its employee and to recover damages, as subrogee, for damages suffered by the injured employee. Under the Act, all money recovered over and above the amounts the employer has already paid to the employee shall be paid to the employee. On June 11, 2015, after the expiration of the two-year statute of limitations, and after the employer timely filed its suit for damages as subrogee, appellant filed her complaint in the circuit court of Cook County seeking damages against defendants for negligence. The court dismissed her complaint for failure to file within the statute of limitations. Teresa did not appeal this dismissal. She then sought to intervene in plaintiff's suit against defendants. The trial court denied appellant's petition to intervene, finding her claim was barred by the doctrine of *res judicata*. The issue presented in this case is whether the dismissal of appellant's untimely filed suit for damages acts to bar, on *res judicata* grounds, her intervention in the employer's timely filed case. We hold it does not and, for the following reasons, the judgment of the circuit court is reversed and the cause remanded.

¶ 2 BACKGROUND

¶ 3 Appellant, Teresa, was injured on August 17, 2012 at a Blue Cross and Blue Shield building in Chicago while she was employed by plaintiff, A&R Janitorial. Blue Cross and Blue Shield had hired A&R Janitorial to perform custodial services, and appellant was one of plaintiff's employees. Blue Cross and Blue Shield was performing renovations to that building and contracted Pepper Construction Co. to replace carpeting, among other work. Pepper Construction subcontracted the task of replacing carpets to Perez & Associates. While appellant was cleaning, she was injured when a desk fell on her. The desk had been moved by Perez in the

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

course of replacing the carpets.

¶ 4 Appellant filed a workers' compensation claim against plaintiff and was awarded relief. That claim is currently under appeal. To date plaintiff has paid appellant over $342,000 in workers' compensation benefits. Illinois' Workers' Compensation Act also allows an employer to seek indemnification from a third-party who may be a cause of the injury for the sums it is required to pay its employee. The Act allows for an injured employee whose injuries are covered under the Act to also file a claim against a third party for common law damages, and the employer is entitled to a portion of those damages recovered by the employee equal to the amount paid by the employer to the employee for that claim:

> "Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act." 820 ILCS 305/5(b) (West 2016).

The employer is entitled to a portion of those damages equal to the amount paid by the employer to the employee for that claim. *Id.* ("from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee").

¶ 5 A party in Illinois may commence a personal injury action "within 2 years next after the cause of action accrued." 735 ILCS 5/13-202 (West 2016). As of May 17, 2014, appellant failed to file a claim against defendants. If the employee fails to file a claim three months prior to the expiration of the statute of limitations, the Act allows an employer to step into the employee's

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

shoes to file a claim for indemnification for the payments it is liable for under the Act and a claim for the employee's common law damages. The Act provides that if an

> "employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability." 820 ILCS 305/5(b) (West 2016).

Plaintiff, as subrogee of appellant's claim, timely filed its complaint against all of the named defendants on August 14, 2014. In November 2014 Blue Cross and Blue Shield Association was voluntarily dismissed from plaintiff's subrogation action. In December 2014, Pepper Construction Group, LLC, and CBRE, Inc. were also voluntarily dismissed from the subrogation action. This left Pepper Construction Co., Perez & Associates, Inc., and Perez Carpet as the only remaining defendants (collectively defendants).

¶ 6 On June 15, 2015, more than two years after her injury, appellant filed her own personal injury action against Pepper Construction Co., Perez & Associates, Inc., Interface America, Inc., and Blue Cross and Blue Shield Association. Appellant claimed her injuries resulted from the

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

construction of an improvement to real property, which would be subject to a four year statute of limitations period. See 735 ILCS 5/13-214 (West 2016) ("Actions based upon tort *** against any person for an act or omission of such person in the *** construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission."). The trial court dismissed appellant's claim without prejudice on December 18, 2015. Appellant subsequently filed her first amended complaint on April 28, 2016. On September 12, 2016, the court dismissed this claim with prejudice for failure to file within the statute of limitations, finding appellant's injury was not the result of construction work and therefore subject to a two year statute of limitations. The court entered a finding under Supreme Court Rule 304(a) there was no just reason to delay enforcement or appeal of its decision to dismiss appellant's claim. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). No appeal was taken from this dismissal.

¶ 7 On November 10, 2016, appellant filed a petition to intervene in this case filed by her employer. In her petition appellant claims she would not be adequately represented by plaintiff. Appellant's ability to intervene in the present case turns on the Illinois Code of Civil Procedure's requirements for intervention as of right and permissive intervention:

> "Upon timely application anyone shall be permitted as of right to intervene in an action: *** when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2016).
>
> "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

a question of law or fact in common." 735 ILCS 5/2-408(b) (West 2016).

Here appellant sought to intervene as of right claiming she was not being adequately represented because plaintiff was only pursuing enough damages for indemnification and not the maximum amount recoverable for her injuries. Appellant attached a proposed amended complaint for plaintiff's subrogation suit with additional counts seeking damages for her pain and suffering in addition to plaintiff's indemnification.

In plaintiff's response to appellant's petition to intervene, plaintiff argued appellant's workers' compensation claim is not fully resolved and that if appellant is found totally disabled then plaintiff could owe appellant for the rest of her lifetime. Plaintiff's contention was that because of this increased risk it faced, it has every incentive to seek the maximum amount of damages. If plaintiff did not seek the maximum amount of damages then it risked not being fully indemnified. Defendants replied to appellant's petition arguing claim preclusion based on her suit against them for the same cause of action being dismissed on the merits for failure to file within the statute of limitations.

¶ 8 On December 20, 2016, the trial court heard arguments on appellant's petition to intervene and to file an amended complaint. At the hearing, appellant claimed *res judicata* should not bar her intervention here because a dismissal for failure to file within the statute of limitations should not constitute a judgment on the merits for purposes of *res judicata*. Pepper Construction Co. argued claim preclusion did bar her claim, relying primarily on *Sankey Brothers, Inc. v. Guilliams*, 152 Ill. App. 3d 393 (1987). The court denied appellant's petition to intervene, finding *Sankey Brothers Inc.* supported applying *res judicata* to bar appellant's claim. The court issued an order on January 31, 2017, under Supreme Court Rule 304(a) that its December 20, 2016 order was final and appealable, and allowed the case between plaintiff and

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

defendants to continue. Appellant timely filed her appeal of the trial court's denial of her petition to intervene.

¶ 9 Plaintiff then sought to amend its complaint to pursue recovery of damages for appellant's pain and suffering, and loss of enjoyment of life. On July 26, 2017, the trial court ruled plaintiff could pursue those non-economic damages. Appellant then sought to have plaintiff's counsel disqualified for a conflict of interest under a theory plaintiff's counsel could not simultaneously represent plaintiff against appellant in a workers' compensation claim while also representing plaintiff seeking appellant's non-economic damages against defendants. A hearing on the motion was held on August 4, 2017. At the hearing plaintiff's counsel argued there was no conflict of interest, stating: "I don't represent Teresa ***. I never represented her." The court found "he does not represent [appellant.] He can only present evidence of damages that would satisfy his lien and if there was any excess it would go over to [appellant.]" The court denied appellant's motion to disqualify plaintiff's counsel based on its finding plaintiff's counsel only represented plaintiff and not appellant.

¶ 10 While this case was pending on appeal, plaintiff and defendant reached a settlement agreement where defendants agreed to pay plaintiff $850,000. On September 22, 2017, the trial court entered an order dismissing with prejudice plaintiff's subrogation case against defendants because the controversy between the parties had been resolved, subject to the outcome of this appeal. Plaintiff appeals from the order denying her petition to intervene.

¶ 11 ANALYSIS

¶ 12 The issue in this appeal is whether the trial court abused its discretion by denying appellant's petition to intervene. Defendants argue application of *res judicata* bars appellant's intervention in this case, while appellant maintains the doctrine of *res judicata* does not bar

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

intervention. Appellant claims she has a right to intervene in this case because her interests are not adequately represented by plaintiff.

¶ 13 As a preliminary matter, we note appellant attached to her reply brief a copy of her motion to remove plaintiff's counsel, the transcript of the hearing on that motion, and the trial court's order denying the motion. Defendants have filed a motion to strike appellant's exhibits or in the alternative to consider those exhibits along with exhibits defendants attached to their motion. We denied defendants' motion to strike appellant's attachments and ordered that defendants' additional attachments will be considered. Defendants attached to their motion a copy of the trial court's order dismissing this case with prejudice and a copy of the settlement agreement entered between plaintiff and defendants. Ordinarily attachments and exhibits to briefs are not the proper means of supplementing the record. See *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 23. Here, defendants have not argued against the accuracy of appellant's exhibits. In appellant's response to defendants' motion to strike appellant's attachments, appellant argued both her exhibits and defendants' exhibits should be considered. She also did not contest the accuracy of defendants' exhibits.

> "In an instance such as this no sound reason exists to deny judicial notice of public documents which are included in the records of other courts and administrative tribunals. (McCormick, Evidence sec. 330, at 766 (2d ed. 1972).) Such documents fall within the category of readily verifiable facts which are capable of 'instant and unquestionable demonstration.' " *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976).

Therefore, we will take judicial notice of defendants' exhibits attached to their motion as well as appellant's exhibits.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

¶ 14 Standard of Review

¶ 15 The decision to allow appellant to intervene is at the sound discretion of the trial court and we review the decision for an abuse of discretion. *Sankey Brothers, Inc.*, 152 Ill. App. 3d at 397. "The decision to allow or deny intervention, whether permissive or as of right, is a matter of sound judicial discretion that will not be reversed absent an abuse of that discretion." *Argonaut Insurance Co. v. Safway Steel Products, Inc.*, 355 Ill. App. 3d 1, 7 (2004). A trial court abuses its discretion when "no reasonable person would take the view adopted by the trial court." *Id.* "If a trial court's decision rests on an error of law, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law." *North Spaulding Condominium Ass'n v. Cavanaugh*, 2017 IL App (1st) 160870, ¶ 46.

¶ 16 Here the trial court's interpretation of the doctrine of *res judicata* was the basis for its ruling denying appellant's petition. Application of *res judicata* concerns a question of law which we review *de novo*. *Lelis v. Board of Trustees of Cicero Police Pension Fund*, 2013 IL App (1st) 121985, ¶ 13. Therefore, we review *de novo* the trial court's application of *res judicata* as a bar to appellant's intervention, while we review for abuse of discretion the trial court's overall judgment to deny appellant's petition to intervene.

¶ 17 *Res Judicata* and Intervention

¶ 18 The doctrine of *res judicata*, also known as claim preclusion, is an equitable doctrine that prevents a party from filing the same claim against the same party after a prior adjudication on the merits. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996) ("For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies."). In the present case appellant filed a

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

claim against defendants in June 2015, over two years after her August 17, 2012 injury. The court dismissed appellant's case with prejudice for failure to file her claim within the statute of limitations and appellant did not appeal.

¶ 19 Appellant subsequently sought to intervene in plaintiff's subrogation suit against defendants based on the same cause of action (the August 17, 2012 workplace injury). The trial court found appellant already filed a claim over the same cause of action against defendants and the matter was adjudicated with a final judgment on the merits. The trial court denied appellant's petition for intervention based on a finding that application of the doctrine of *res judicata* barred appellant's intervention in her employer's subrogation suit. In reaching this ruling the trial court relied heavily on *Sankey Brothers, Inc.*, 152 Ill. App. 3d 393. *Sankey Brothers, Inc.* is instructive. However, *Sankey* does not control the outcome here because it is factually distinguishable.

¶ 20 In *Sankey*, the petitioner-intervenor, Osborne, was employed performing road work when he was hit by a truck. *Id.* at 394. Osborne was employed by a subcontractor hired by the general contractor, Sankey Brothers, Inc. Osborne filed a workers' compensation claim against his employer-subcontractor for the injury which occurred on October 20, 1981. On October 14, 1983, Sankey filed its own suit against the truck driver and the corporation which owned the truck because the employee had not filed his own suit against the defendants within three months from the expiration of the statute of limitations. Unlike this case, in *Sankey* the employer filed a complaint as its insurance company's subrogee seeking *only* indemnification for workers' compensation benefits it had to pay to Osborne. *Id.* at 395. On October 19, 1983, Osborne filed a suit, intending to sue the corporation which owned the truck, but he named the incorrect party. *Id.* at 394. On December 20, 1983, an Industrial Commission arbitrator entered on order finding Osborne completely disabled and ordered his employer subcontractor to pay him an amount per

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

week for life. That decision was under appeal pending the *Sankey* court's decision. *Id.* Osborne filed an amended complaint in September 1984 which named the correct corporation as defendant, but that action was dismissed in July 1985 because the defendant was not served with process within the relevant statute of limitations. *Id.* Osborne did not appeal. *Id.* at 394-95. In October 1985, Osborne filed a petition for leave to intervene in Sankey's suit to assert his rights under section 5(b) of the Act. *Id.* at 395. The trial court denied his petition and Osborne appealed, asserting he was a necessary party to the suit.

¶ 21 The appellate court affirmed, but not simply because Osborne had his individual suit dismissed and *res judicata* barred subsequent suit on his part. The issue was whether Osborne had an interest in his employer's subrogation suit. Thus, the court held that it must review the petition for intervention under the provisions for intervention in the Code of Civil Procedure: "The lack of any specific guidance in the Workers' Compensation Act or in the case law interpreting it, with respect to intervention under the facts of the present case, renders applicable the provisions of the Code of Civil Procedure relating to intervention." *Sankey Brothers Inc.*, 152 Ill. App. 3d at 397. The court held "Osborne was barred by both the applicable statute of limitation and the doctrine of *res judicata* from maintaining a personal injury action against defendants at the time that he sought to intervene in this cause." *Id.* at 398. The court determined Osborne did not have an interest in the suit because he had "no absolute right to intervene" by statute and because Osborne's tort claims would be "barred by the doctrine of *res judicata* and the relevant statute of limitation." *Id.* at 399. The primary concern of the court was the propriety of exposing the third party to the worker's common law injury claims, which were time-barred.

¶ 22 In this case, however, appellant's employer timely filed its suit seeking more than simply indemnification; the employer also sought damages for appellant's pain and suffering. In contrast

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

to *Sankey*, where the statute of limitations for the employee's damages for pain and suffering had expired, in this case the employer timely filed a complaint seeking damages for pain and suffering. Therefore, appellant has an interest in this lawsuit. 820 ILCS 305/5(b) (West 2016) ("the employer shall pay over to the injured employee *** all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid by under this Act"). See also *Bernardini v. Home & Automobile Insurance Co.*, 64 Ill. App. 2d 465, 467 (1965) ("in Illinois causes of action for personal torts are not assignable. *** Subrogation operates only to secure contribution and indemnity whereas an assignment transfers the whole claim. *** The subrogation does not deprive the insured of a recovery for pain and suffering."). Appellant's action was not assigned to plaintiff; plaintiff simply filed a subrogation suit and appellant is entitled to any damages exceeding indemnification. Further, plaintiff was not a party to appellant's untimely filed action. Because plaintiff was not a party to that action, *res judicata* cannot bar its claim here. See *Rein*, 172 Ill. 2d at 334-35 (for *res judicata* to apply to an action there must be an identity of parties). Certainly if plaintiff had been named a party to that action it would have asserted that it had a timely filed complaint for damages as subrogee that was already pending. We conclude appellant had an interest in this case, unlike the employee in *Sankey*. *Sankey Brothers Inc.*, 152 Ill. App. 3d at 399; see also *Bernardini*, 64 Ill. App. 2d at 467. Therefore, *Sankey* does not control the outcome of this case and we find *res judicata* does not bar appellant's intervention.

¶ 23 Whether appellant may intervene turns on the intervention provisions of the Code of Civil Procedure. While the Act makes an explicit provision for an employer to intervene in an employee's suit, the Act is silent as to the ability of the employee to intervene once the employer has filed a subrogation suit. Therefore, we conclude we must look to the Code of Civil Procedure

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

to determine whether intervention is warranted. The legislature implemented the Act

> "against the background of an existing legislative scheme that included section 1–108(b) of the Code of Civil Procedure [citation]. That statute expressly provides that where proceedings are governed by some other statute, the other statute controls to the extent it regulates procedure, but that article II of the Code, also known as the Civil Practice Law [citation], applies to matters of procedure not regulated by the other statute." *Madison Two Associates v. Pappas*, 227 Ill. 2d 474, 494 (2008).

The Act does not confer a statutory right to intervene upon an employee if the employer has filed against the third party as subrogee of the employee after the employee has failed to file suit within the three month window prior to the expiration of the statute of limitations. See 820 ILCS 305/5(b) (West 2016). Given the legislature failed to provide specific procedures for intervention in an employer's subrogation suit, section 2-408 of the Code of Civil Procedure governs whether an employee can intervene in an employer's subrogation suit. See *Madison Two Associates*, 227 Ill. 2d at 494-95 ("In light of this law, we must presume that when the General Assembly enacted the tax objection provisions of the Property Tax Code without including a particular provision addressed to intervention in circuit court, it intended the matter to be governed by the intervention provisions set forth in article II of the Code of Civil Procedure."). Section 2-408 establishes the requirements for intervention by right and permissive intervention:

> "Upon timely application anyone shall be permitted as of right to intervene in an action: *** when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2016).

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

> "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS 5/2-408(b) (West 2016).

¶ 24 Defendants argue *DeLuna v. Treister*, 185 Ill. 2d 565 (1999) controls the issue of whether appellant may intervene in the present suit. In *DeLuna*, the administrator of an estate filed a medical malpractice claim against the defendant doctor and hospital. *DeLuna*, 185 Ill. 2d at 568. The defendant moved for summary judgment and the plaintiff failed to attach an affidavit as required by section 2-622 of the Code. *Id.* at 569; see also 735 ILCS 5/2-622 (West 2016). The trial court dismissed the plaintiff's case with prejudice and the dismissal was upheld by our supreme court. *DeLuna*, 185 Ill. 2d at 569-70. After this dismissal, a new administrator to the estate refiled the medical malpractice claim against the hospital and doctor. The defendants both moved to dismiss this new claim, arguing application of the doctrine of *res judicata* barred the newly filed claim. The issue before our supreme court was whether the dismissal for failure to comply with section 2-622 served as a dismissal on the merits. *Id.* at 574. However, the issue of whether a party barred from filing its own claim could intervene in a previously timely filed subrogation suit was not before the *DeLuna* court. The issue before us here does not concern whether the earlier dismissal for failure to file within the statute of limitations was a dismissal on the merits, but whether the trial court abused its discretion in denying plaintiff's petition to intervene. Therefore, *DeLuna* does not control the outcome of this case.

¶ 25 Here appellant maintains she has a right to intervene in plaintiff's subrogation suit against defendants, relying on *Geneva Construction Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273 (1954) and *Echales v. Krasny*, 12 Ill. App. 3d 530 (1957). We find both cases inapposite. Both

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

cases involved versions of the Act found unconstitutional under Illinois' prior constitution. Neither case involved a petitioner who initially filed a claim past the statute of limitations, had that claim dismissed, failed to seek appeal, and then attempted to intervene in a timely filed subrogation suit.

¶ 26 In *Geneva Construction Co.* an employee of Geneva Construction Co. was injured in the course of his employment and was awarded compensation under the "Workmen's Compensation Act." *Geneva Construction Co.*, 4 Ill. 2d at 275; Ill. Rev. Stat. 1947, chap. 48, ¶ 166. Geneva Construction then sued the defendant third-party tortfeasor to recover the compensation it paid to the employee. While the suit was pending, the provision of the Workmen's Compensation Act that Geneva Construction brought suit under was declared unconstitutional by the Illinois Supreme Court in a separate case. See *Grasse v. Dealer's Transport Co.*, 412 Ill. 179 (1952). Then, the employee filed a petition for leave to intervene, which the trial court allowed. *Geneva Construction Co.*, 4 Ill. 2d at 276.

¶ 27 *Geneva* does not stand for the principle that an employee has a right to intervene in her employer's subrogation suit. The *Geneva* court addressed two issues: 1) Whether an employer could recover from a third-party tortfeasor compensation the employer paid an injured employee even when the provision of the Act the employer sued under was declared unconstitutional (*id.* at 276) ("In determining the propriety of the judgment of the Appellate Court we shall consider first whether plaintiff Geneva Construction Company could properly recover from defendant Martin Transfer and Storage Company the amount of workmen's compensation paid an employee as a result of defendant's negligence."); and 2) Whether an amended complaint filed by an employee-intervenor outside the statute of limitations related back to a timely filed subrogation suit of the employer. *Id.* at 286 ("We turn, then, to the second question - whether the

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

claim of plaintiff [employee], which was first asserted by an amendment to the complaint *** is barred by the Statute of Limitations."). The *Geneva* court concluded the amended complaint related back to the employer's timely filed complaint, consistent with the Civil Practice Act. *Id.* at 289. Whether the employee had a right to intervene was not before the *Geneva* court. The trial court in *Geneva* had already exercised its discretion to allow the employee to join in the suit. Our supreme court was not reviewing that exercise of discretion, instead it reviewed whether the amended complaint the petitioner-intervenor filed related back to his employer's timely filed subrogation suit.

¶ 28 Appellant's reliance on *Echales v. Krasny* is similarly misplaced. In *Echales*, an employee died from injuries sustained in the course of employment. In September 1950 the employer brought suit under the Workmen's Compensation Act against the third-party tortfeasors to recover compensation paid by him to the widow and minor children of his employee. *Id.* at 531. In 1952 the section of the Workmen's Compensation Act the plaintiff sued under was declared unconstitutional by our supreme court in *Grasse*, while the *Echales* litigation was pending. In 1954 the plaintiff-employer filed a motion to allow the administratrix of the employee's estate to intervene as an additional party plaintiff and to amend the original complaint. That motion was denied and the cause dismissed. *Id.* Just as in the *Geneva* case, the motion to intervene and amend the complaint in *Echales* was dismissed because the one-year statute of limitations for wrongful death had run. *Id.* at 534-35. The intervenor in *Echales* never filed a separate action that was dismissed prior to petitioning to intervene in the employer's suit. *Echales* itself noted the factual parallel between that case and the *Geneva* case.

> "We think the *Geneva* case is parallel factually with the instant case and is decisive of the right of plaintiffs to amend their complaint and for the

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

> administratrix to intervene. In the *Geneva* case the suit, as here, was brought under Section 29 of the Workmen's Compensation Act by the employer. After the decision in the *Grasse* case holding the first paragraph of Section 29 of the Workmen's Compensation Act unconstitutional, the plaintiff in the *Geneva* case sought leave to have the injured employee intervene against the third-party tortfeasor, the injury having occurred more than four years before the employee sought to intervene. The motion to intervene was opposed on the ground that the Statute of Limitations under the Injuries Act had run, and the employee's right was therefore barred." *Echales*, 12 Ill. App. 2d at 534.

The issue before the *Echales* court was whether application of the statute of limitations barred intervention and amendment of a timely filed complaint. The *Echales* court concluded that "justice requires that in the instant case the parties be permitted to amend their pleadings and the administratrix allowed to intervene, and it was error for the court to deny plaintiffs leave to file their tendered amended complaint." *Id.* at 535. The *Echales* court did not create an absolute right of intervention for an injured employee. Moreover, the present case is factually distinguishable. Here the issue is not the relation back of an amendment to a timely filed complaint, but whether appellant meets the statutory conditions for intervention.

¶ 29 Under the Code of Civil Procedure, the party seeking intervention

> "shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file. In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." 735 ILCS 5/2-408(d) (West 2016).

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

In ruling on a petition to intervene as of right, the "trial court's discretion is limited to determining timeliness, inadequacy of representation and sufficiency of interest; once these threshold requirements have been met, the plain meaning of the statute directs that the petition be granted." *City of Chicago v. John Hancock Mutual Life Insurance Co.*, 127 Ill. App. 3d 140, 144 (1984). We thus turn to the trial court's exercise of its discretion to deny appellant's petition to intervene. See *In re Bailey*, 2016 IL App (5th) 140586, ¶ 21 ("When a party petitions for intervention as of right, section 2-408(a)(2) limits the court's analysis to a determination of the timeliness of the application, whether there has been inadequacy of representation, and the sufficiency of the applicant's position in the proceedings. [Citation.] If these threshold requirements are met, then, under the plain meaning of the statute, the petition to intervene shall be granted.").

¶ 30 Failure to Apply Statutory Factors for Intervention

¶ 31 A party has a right to intervene upon a showing that "representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2016). When the court dismissed appellant's petition to intervene the court failed to determine whether appellant timely filed her petition, whether appellant's interests are being adequately represented by plaintiff, or whether appellant will be bound by the judgment. Appellant contends plaintiff cannot adequately represent her interests based on her argument that plaintiff has an incentive to settle for an amount less than or equal to what plaintiff paid to appellant in the workers' compensation claim. On appeal, plaintiff claims it will adequately represent appellant's interests because plaintiff may not be fully indemnified if it does not pursue maximum damages. Conversely, at a hearing on appellant's motion to disqualify plaintiff's counsel, appellant claimed plaintiff's counsel had a

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

conflict of interest because counsel represents plaintiff in the appeal of the workers' compensation claim and not her interest. Plaintiff's counsel refuted this claim by stating in open court he did not represent appellant, had never represented appellant, and only represented plaintiff in this case. This statement is incongruent with plaintiff's assertion that it has every incentive to pursue maximum damages. The trial court failed to make a finding as to whether appellant's interests are adequately protected by plaintiff.

¶ 32 The trial court abused its discretion because the court did not apply the applicable law – the intervention provisions of the Code of Civil Procedure. *Sankey Brothers, Inc.*, 152 Ill. App. 3d at 397; 735 ILCS 5/2-408 (West 2016). Application of the wrong legal standard is an abuse of discretion. *North Spaulding Condominium Ass'n*, 2017 IL App (1st) 160870, ¶ 46 ("If a trial court's decision rests on an error of law, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law."). Therefore, we reverse the trial court's ruling and remand for further proceedings consistent with this opinion. See *Madison Two Associates*, 227 Ill. 2d at 496 ("Because the circuit court ruled as a matter of law and did not reach the question of whether the requirements for intervention under section 2–408 of the Code of Civil Procedure [citation] would otherwise have been satisfied under the particular facts of these cases, the appellate court also acted properly when it remanded the causes to the circuit court for a hearing on the intervention petitions.").

¶ 33 We note plaintiff argued on appeal that if appellant was permitted to intervene, she should nonetheless not be allowed to control the litigation. In cases where a court exercises its discretion to grant a party's petition to intervene,

> "[a]n intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right,

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

> provide that the applicant shall be bound by orders or judgments, theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require." 735 ILCS 5/2-408(f) (West 2016).

Thus, if on remand the trial court determines the factors for intervention are met under the Code of Civil Procedure, the trial court has discretion to limit how the intervenor may participate in the litigation.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons the order of the circuit court of Cook County denying appellant's petition to intervene is reversed. Consequently, the circuit court's order dismissing the matter with prejudice is also reversed, and this cause is remanded for further proceedings consistent with this opinion.

¶ 36 Reversed and remanded.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

No. 123220

In the Supreme Court of Illinois

A& R Janitorial, as subrogee of Teresa Mroczko Mroczko, *Plaintiff-Appellant,*	Appeal from the Appellate Court of Illinois First District Case No: 1-17-0385
Teresa Mroczko, *Intervenor-Appellee,*	Circuit Court of Cook County Court No. 14 L 8396 Honorable William E. Gomolinski, Judge Presiding
Pepper Construction Co., Pepper Construction Group, LLC Perez & Associates, Inc., Perez Carpet, CBRE, Inc., Blue Cross and Blue Shield Association. *Defendant-Appellants*	

NOTICE OF FILING AND CERTIFICATE OF SERVICE

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on the **27th day of June, 2018**, the undersigned attorney caused to be filed electronically with the Clerk of the Supreme of Illinois the **Intervenor-Appellee Teresa Mroczko's Brief.** The undersigned further certifies that on June 27, 2018, the parties listed on the Service List attached hereto were served with a copy of this Notice and Brief of Intervenor-Appellee at their respective email addresses by emailing the same. Under Penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct.

Respectfully submitted,

SCHIFF GORMAN LLC

s/Elliot R. Schiff
Attorney for Teresa Mroczko

Elliot R. Schiff, Esq.
Schiff Gorman, LLC
One East Wacker Dr., Suite 1100
Chicago, IL 60601
(312) 345-7202
eschiff@schiff-law.com

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM

SERVICE LIST
No. 123220

Julie A. Teuscher
Cassidy Shade LLP
20 N Upper Wacker Dr #1000,
Chicago, IL 60606
(312) 444-2484
(312) 444-1669
jteuscher@cassiday.com
Attorneys for Defendant Pepper Construction Co.

Tod H. Rottman, Esq.
Law Office of David A. Izzo
33 N. Dearborn Street, Suite 1605
Chicago, IL 60602
312-706-1900
855-283-6875 (fax)
tod.rottman@selective.com
Attorney for Defendant Perez & Associates, Inc.

DOUGLAS B. KEANE
RUSIN & MACIOROWSKI
10 S. RIVERSIDE PLAZA, SUITE 1925
CHICAGO, IL 60606
T (312) 454-5130 | F (312) 454-6166
DKEANE@RUSINLAW.COM|WWW.RUSINLAW.COM

Anthony Tunney
HeplerBroom, LLC
30 N. LaSalle, Suite 2900
Chicago, IL 60602
Phone: 312-230-9100
Fax: 312-230-9201
Anthony.tunney@heplerbroom.com
Attorney for Insure-Rite, Inc.

SUBMITTED - 1318043 - Thomas Gorman - 6/27/2018 9:31 AM