Case No. 124641

IN THE SUPREME COURT OF ILLINOIS

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

BRIEF OF THIRD-PARTY DEFENDANTS-APPELLANTS

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Oral Argument is requested.

E-FILED
6/26/2019 11:53 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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NATURE OF THE CASE

On November 8, 2013, Plaintiff Kirk Raab ("Plaintiff") filed suit against Defendant Kenneth Frank ("Frank") for violations of the Illinois Domestic Animals Running at Large Act ("Animals Running Act") seeking damages for personal injuries he sustained when his squad car collided with a cow owned by Frank. (C12-15) On August 14, 2014, Frank filed a third-party complaint against David A. Grossen and Virginia J. Grossen ("the Grossens") seeking contribution based on theories of negligence, breach of duty under the Fence Act, and breach of contract. (C80-89) Frank and Plaintiff reached settlement and Plaintiff's claims against Frank were dismissed with prejudice on June 9, 2016. (C217-8) On the same date, the Grossens moved for summary judgment on all claims against them. (C154-216) On September 7, 2016, the trial court dismissed Frank's claims for negligence and breach of duty under the Fence Act, but denied the Grossen's motion for summary judgment on the breach of contract claim. (C872)

The Grossens filed a second motion for summary judgment on August 31, 2017. (C915-8) In that motion, the Grossens argued that they owed no duty to Plaintiff under the contract and therefore it could not be the basis for a contribution action. (C917-18) On November 27, 2017, the trial court granted the Grossen's motion for summary judgment and dismissed the remaining claim against the Grossens. (C1115) Frank filed a Notice of Appeal on December 26, 2017. (C1124)

On February 6, 2019, the Appellate Court for the Second District affirmed the decision of the trial court in part and reversed it in part. (A98-A113) As to Count I, the court held that the trial court erred in finding that Frank was barred from bringing a contribution claim based upon the Animals Running Act. (A107-A108) The court found that the trial court properly dismissed Count II because Frank could not maintain an action under the

Fence Act given his failure to provide notice to the Grossens as required by the Act. (A109) As to Count III, the court reversed the trial court, finding that the Contribution Act did not bar Frank from seeking contribution from the Grossens based on a breach of contract theory. (A111-A113)

The Grossens filed a Petition for Leave to Appeal to the Supreme Court of Illinois on March 13, 2019. (A114-A132) The Petition was granted by this Court on May 22, 2019. (A171) No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether landowners, who are not owners or keepers of cattle, have a common law duty under Illinois law to guard against injuries to persons caused by another's livestock that have escaped from their enclosures.

II. Whether a breach of a contract between a defendant and a third-party defendant can create "liability in tort" to an unrelated plaintiff for purposes of the Contribution Act.

JURISDICTION

On February 6, 2019, the Appellate Court for the Second District issued its opinion. (A98-A113) On March 13, 2019, the Grossens filed a timely Petition for Leave to Appeal with the Supreme Court of Illinois pursuant to Illinois Supreme Court Rule 315. (A114-A132) The Illinois Supreme Court granted the Grossens' Petition for Leave to Appeal on May 22, 2019. (A171)

STATUTES INVOLVED

Right of Contribution - 740 ILCS 100/2(a)

"Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is

a right of contribution among them, even though judgment has not been entered against any or all of them."

Illinois Domestic Animals Running at Large Act - Prohibition - 510 ILCS 55/1

"No person or owner of livestock shall allow livestock to run at large in the State of Illinois. All owners of livestock shall provide the necessary restraints to prevent such livestock from so running at large and shall be liable in civil action for all damages occasioned by such animals running at large; Provided, that no owner or keeper of such animals shall be liable for damages in any civil suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large."

STATEMENT OF FACTS

The Grossens are the owners of a parcel of real estate in rural Jo Daviess County ("Parcel A"). (C159-60) Virginia Grossen inherited Parcel A from her mother in 2005 and executed a quit claim deed to convey the property to her and her husband jointly in 2006. (C161) The Grossens rent out Parcel A to lessees for agricultural purposes, but livestock are not kept on Parcel A. (C189) The parcel of land adjacent to the Grossens' parcel ("Parcel B") is owned by the Dominic T. and Donna M. Pintozzi Trust, with Dominic and Donna Pintozzi as Trustees ("Pintozzi"). (C162-3) A fence runs between Parcel A and Parcel B. (C164)

Like the Grossens, the Pintozzi's rent out Parcel B to a lessee, Frank. (C162-3) However, unlike the Grossens' lessee, Frank uses Parcel B for pasturing cattle. (C168-9) Frank is a farmer with decades of experience raising cattle and over forty years of experience building fences. (C165-7) Frank has rented Parcel B from Pintozzi since 2009. (C162-3)

Before agreeing to rent Parcel B, Frank inspected its condition to ensure that it was suitable for pasturing his cattle. (C168-9) Specifically, Frank looked at the condition of the fence that divided Parcels A and B and determined that the fence was sufficient to keep his cattle enclosed in Parcel B. (C168-9) Once he began renting Parcel B, Frank rode his ATV out to the fences and inspected them every Sunday. (C170-1)

Frank and Pintozzi entered into an oral lease agreement regarding Parcel B. (C176) One of the terms of the oral lease was that Frank was responsible for maintaining the fences on Parcel B. (C177) In determining exactly what obligation he had, Frank called Ed Meyer, Pintozzi's predecessor owner of Parcel B, and discussed fence repair and maintenance related to Parcel B. (C177). It was during that conversation that Frank became aware of an Agreement in Connection with Line Fences that had been signed in 1969 by Meyer, the former owner of Parcel B, and Virginia's relatives, the former owners of Parcel A. (C177-80) The Agreement specified which portions of several division fences each of the parties to the contract was to maintain. (C177-80). Prior to 2011, the Grossens were not aware of and had never seen the Agreement in Connection with Line Fences. (C181-2)

Frank knew the Grossens, knew they owned Parcel A, but did not live on it, and knew how to contact them if necessary. (C768-9) The Grossens were not aware that Frank was renting Parcel B from Pintozzi or that he was using Parcel B to pasture his cattle. (C172-5) In early July of 2009, after Frank had begun renting Parcel B, there were heavy rainstorms that damaged portions of the fence that divided Parcel A and Parcel B. (C168-9) Frank did not call the Grossens after the rainstorm to let them know that the fence had been damaged or that it may need repairs. (C168-9) Without input or consultation with the Grossens, Frank made repairs to the fence between Parcels A and B. (C168-9).

In July of 2010, heavy rains again damaged the fence that divided Parcels A and B. Again, Frank did not call the Grossens after the rainstorm to let them know that the fence had been damaged or that it may need to be fixed. (C168-9) Without notifying the Grossens, Frank again repaired the fence between Parcels A and B. (C168-9) In July of 2011, storms once again damaged the fence that divided Parcels A and B. As with the prior two years, Frank did not contact the Grossens to inform them that the fence had been damaged or that it may be in need of repairs. (C168-9) Frank fixed the fence between Parcels A and B without input or consultation from the Grossens. (C168-9) Frank believed that the repairs that he had made to the fence in 2009, 2010 and 2011 were sufficient to keep his cattle restrained. (C168-9)

On November 10, 2011, Frank's cattle escaped and entered onto the roadway, specifically Stagecoach Trail. (C80-9) A squad car being driven by Plaintiff was westbound on Stagecoach Trail when it collided with Frank's escaped cows. (C12, C80-9) After this accident, Frank contacted the Grossens to inform them that there had been an accident involving his cows. (C184) Frank told the Grossens that he believed their fence was in bad repair. (C184) As soon as the Grossens were made aware that Frank believed their portion of the fence was in need of repair, they made plans to have work done on the fence. (C186) In the spring of 2012, the Grossens spent $2,000 to clear brush around the west side of the fence dividing Parcels A and B, and to have the western half of that fence replaced with new post and new wire. (C187-88)

Frank checked both his and the Grossens' portions of the fence every Sunday. (C170-1) The accident occurred on a Thursday night. (C774-5) After the accident, Frank checked the fence. He believed that a jumping deer had struck the top of the Grossens' portion of the fence and had broken it. (C724, C787) Frank testified at his deposition that

the Grossens could have discovered the broken fence only if they inspected the fence daily. (C790-5) In Frank's forty years as a farmer, he had inspected fences only weekly. (C793) Frank did not know anyone in the farming community who checked their fences daily. (C793)

ARGUMENT

Summary judgment was proper in this case as "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c). The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007). Appellate review of an order granting summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992).

Where, as here, the third-party plaintiff seeks recovery based on the third-party defendant's alleged negligence, the third-party plaintiff must plead and prove the existence of a duty owed by the third-party defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach. *Bruns v. City of Centralia,* 2014 IL 116998, ¶ 12 (2014). Whether a duty exists is a question of law appropriate for summary judgment. *Id.* "'In the absence of a showing from which the court could infer the existence of a duty, no recovery by the [third-party] plaintiff is possible as a matter of law and summary judgment in favor of the [third-party] defendant is proper.'" *Id* at ¶ 13 (quoting *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991)).

The Appellate Court's opinion in this case eviscerates the Contribution Act's "subject to liability in tort" requirement and holds that the Act does not preclude claims for contribution by parties not subject to liability in tort. (A102-A108) The Illinois Contribution

Act states in pertinent part that, "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property … there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2(a). Because of the requirement that parties must be "subject to liability in tort," it has been held that if both parties are not subject to liability in tort for the plaintiff's injuries at issue in the underlying action, there is no right of contribution between them. *Hopkins v. Powers*, 113 Ill. 2d 206, 209 (1986); *People ex. Rel. Hartigan v. Community Hosp. of Evanston*, 189 Ill. App. 3d 206, 213–214 (1st Dist. 1989); *J.M. Krejci Co. v. Saint Francis Hosp. of Evanston*, 148 Ill. App. 3d 396, 398, (1st Dist. 1986). The Appellate Court's decision glosses over this requirement, ignores the fact that Frank failed to seek Contribution based on the Animals Running Act and fails to explain how the Grossens are subject to liability in tort to the Plaintiff. (A107).

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

Frank seeks contribution from the Grossens for damages he paid to the Plaintiff as a result of his cattle running at large and injuring Plaintiff. (C80-9) A party's obligation to make contribution rests on his liability in tort to the plaintiff in the underlying action. *Vroegh v. J & M Forklift,* 165 Ill. 2d 523, 528 (1995). There is no requirement that the bases for liability among the contributors be the same. However, some basis for liability to the original plaintiff must exist. *Id.* In this case, since the Grossens are not liable in tort to Plaintiff, they cannot be held liable to Frank for contribution. *Id.*

Plaintiff's claims against Frank were based on the Animals Running Act, which provides redress for injuries caused by animals that escape their confinement. 510 ILCS 55/1.1. As used in the statute, "running at large" or "run at large" means livestock that stray

from confinement or restraint and from the limits of the owner. *Id.* Pursuant to the Act, only owners or keepers of livestock are liable for damages. *Id.* Count I of Frank's contribution action against the Grossens was based on common law negligence. (C80-3) However, Frank alleged in Count I of his complaint that the Grossens "allowed a boundary fence to exist…when…the boundary fence was not reasonable to enclose [Frank's] cattle which were contained on the adjacent property…" (C82-3) Count I of Frank's third-party complaint attempted to hold the Grossens liable for failing to keep his cattle enclosed. (C80-3)

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

Prior to the adoption of the Animals Running Act in 1871, there was no liability in Illinois for injury or damage caused by animals running at large. *Bulpit v. Matthews*, 145 Ill. 345 (1893). While English common law required every owner of stock to restrain them from trespassing on another's land, this law never applied in Illinois. *Id.* When Illinois was first admitted into the Union, English common law was adopted, "only in cases where that law is applicable to the habits and condition of…society, and in harmony with the genius, spirit, and objects of…institutions." *Id.* at 350. Illinois courts specifically found that the English common law rule relating to owner liability for restraining cattle and other animals was not applicable in Illinois because,

> "However well adapted the rule of common law may be to a densely-populated country, like England, it is surely but illy adapted to a new country, like ours, and after showing the universal habit at that time of inclosing fields devoted to agriculture, and permitting stock to run at large…[w]e should feel inclined to hold…that it does not and has never prevailed in Illinois." *Id.* at 350-51.

Because English common law did not apply, there was no cause of action for damages caused by animals running at large; it was the landowner's duty to fence his land against the depredation of animals. *Heyen v. Willis*, 94 Ill. App. 2d 290, 296 (4th Dist. 1968).

Due to changing social conditions, the Illinois Legislature later chose to adopt a form of the English common law rule and establish a duty to fence in livestock with the enactment of the Animals Running Act in 1871. *Heyen*, 94 Ill. App. 2d at 296. In making this change, the legislature expressly limited liability for damage caused by livestock to their owner or keeper only. *Id.* Because a cause of action did not exist prior to the enactment of the Animals Running Act, the only basis to hold a person liable for damage caused by livestock is through the Animals Running Act. *Heyen*, 94 Ill. App. 2d at 296 ("[T]he duty to guard against injury or damage by estrays is cast by law upon the owner or keeper of the animals, and liability for injury or damage caused by them must be predicated upon the [Animals Running] Act."); *Corona*, 315 Ill. App. 3d at 698 ("[T]here is no independent basis for the action apart from the [Animals Running] Act itself."); *Douglass v. Dolan,* 286 Ill.App.3d 181, 186 (2nd Dist. 1997) (holding that unless a landowner is an owner or keeper of livestock as contemplated by the Animals Running Act, the landowner has no common law duty to guard against injuries to persons caused by livestock that have escaped from their enclosures).

In *Heyen v. Willis*, 94 Ill. App. 2d at 296, the decedent lost control of his vehicle trying to avoid cattle that were owned by a tenant and had strayed from the landowner's property. After his death, the plaintiff filed a wrongful death action against a landowner who was not an owner or keeper of the cattle. The appellate court rejected plaintiff's attempts to stylize his complaint against the landowner as a common law negligence action as opposed to a cause of action under the Animals Running Act,

> "we cannot, as plaintiff suggests, lay aside any consideration that this case is a livestock at large problem for plainly it is a livestock at large problem and cannot be considered anything else. The likelihood of injury or damage from estrays, and the attendant duty to use care to prevent such injury or damage, lies not in the place where animals may be kept but in their propensity to roam, their wanderlust. Thus, the duty to guard against injury or damage by estrays is cast by law upon the owner

> or keeper of the animals, and liability for injury or damage must be predicated on the [Animals Running Act]." *Id.* at 296.

The *Heyen* court went on to explain that no common law duty exists upon the part of the landowner and that the question of their negligence would not be submitted to the jury. *Id.* at 297.

This Court should similarly reject Frank's attempt to classify his contribution action against the Grossens as a common law negligence action. Just as in *Heyen*, the action clearly relates to a livestock at large problem. *Id.* Frank is seeking to hold the Grossens, who are indisputably not owners or keepers of the cattle in question, liable for damages caused by his livestock. The Grossens, who merely own land in the vicinity of where Frank pastures his cattle, have no common law duty to guard against injuries to persons caused by another's escaping cows and Count I should be dismissed as a matter of law. *Id.*

Frank's Answer to Petition for Leave to Appeal argues that there is a common law action for animals running at large in Illinois, and in support thereof, he cites several cases. (A163) All of the cases cited by Frank, however, were decided *after* the passage of the Animals Running Act in 1871. (A163) Therefore, they do not support Frank's argument that there is a common law remedy for animals running at large. In *Ward v. Brown*, 64 Ill. 307 (1872) and *Ozburn v. Adams*, 70 Ill. 291 (1873), the Illinois Supreme Court found, consistent with the Animals Running Act, that the party in possession and control of the cattle was liable for the damage caused by the cattle. In *Wade v. Theil*, the Appellate Court applied the doctrine of contributory negligence to a case involving the Animals Running Act by finding the plaintiff at fault for the defendant's bull escaping the pasture. 9 Ill. App. 223 (1881). While the decisions in these cases may contain references to the reasoning advanced in support of the English common law (which was subsequently codified as the Animals Running Act), all of the decisions post-date the enactment of the Act and were decided

based upon it, not based upon a common law negligence theory, as Frank mistakenly asserts. None of the cases stand for the proposition that there is a right of recovery, under Illinois common law, for damages sustained when another's cattle escaped and caused injury.

B. The Appellate Court erred in relying on Doyle v. Rhodes *to find the Grossens "liable in tort" under the Contribution Act.*

In finding the Grossens liable in tort for purposes of the Contribution Act, the Appellate Court relied on *Doyle v. Rhodes,* 101 Ill. 2d 1(1984). (A106-7) In *Doyle*, a road construction worker sued a motorist who injured him during the course of his employment. *Id.* at 4. The motorist filed a third-party complaint against the worker's employer for contribution alleging that the employer's negligence and violation of a worker safety statute contributed to the employee's injury. *Id.* The employer argued that its immunity under the Workers Compensation Act insulated it from liability in tort under the Contribution Act. *Id.* at 6. The *Doyle* Court disagreed and held that the motorist could sue the employer under the Contribution Act because the employer was indeed "subject to liability in tort" to its employee. *Id.* at 11-12. The Court reasoned that the Workers Compensation Act provided an affirmative defense to any tort action brought by an employee. *Id.* at 10-1. This Court concluded that an employer is potentially liable in tort until the immunity defense is established, so the requirement that the employer be "subject to liability in tort" was satisfied. *Id.* at 11.

The Appellate Court's ruling in this case overlooks the critical difference between *Doyle* and the case at bar. (A106-7) Here, Frank sued the Grossens for contribution based on common law negligence resulting from damages caused by his cattle escaping their enclosure. (C82-3) As discussed in Section A above, Illinois does not recognize a common law duty upon landowners to guard against injuries or damages caused by another's livestock. *Heyen*, 94 Ill. App. 2d at 296-7; *Bulpit*, 145 Ill. at 350-1. Unlike in *Doyle*, there is no

immunity, affirmative defense or special privilege that must be asserted to bar the claim. *Doyle*, 101 Ill. 2d at 10-1. Frank's claim simply fails to state a cause of action recognized in Illinois and therefore fails to allege that the Grossens are liable in tort for purposes of the Contribution Act. To hold that a contribution action can proceed under these facts would be to create an unprecedented new duty for landowners in Illinois.

C. Imposing a duty on the Grossens to prevent another's cattle from causing injury is inconsistent with Illinois public policy.

It is well settled that every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 390 (1986). In determining whether the defendant owed a duty to the plaintiff, the court will consider whether the risk of harm to the plaintiff was reasonably foreseeable. *Cunis v. Brennan*, 56 Ill. 2d 372, 376 (1974). With the benefit of hindsight, it can be said that virtually every occurrence is foreseeable. Thus, the question of whether a legal duty exists is contingent upon a variety of factors, and the weight accorded each factor depends upon the circumstances of each case. *O'Hara v. Holy Cross Hospital*, 137 Ill. 2d 332 (1990). In addition to foreseeability, the court will consider the likelihood of injury, the magnitude of the burden of guarding against it, the consequences of placing that burden on the defendant as well as the public policy and social requirements of the time and community. *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 357-58 (1977).

In *Widlowski v. Durkee Foods, Div. of SCM Corp.*, the defendant's employee was made delirious by nitrogen gas to which he was exposed on the job. 138 Ill. 2d 369, 372 (1990). He was transported to the hospital, where his delirium caused him to bite off the plaintiff nurse's finger. *Id.* at 372. Refusing to find that the employer owed the nurse a duty, this Court explained that it could not say that "the risk of harm to [the nurse], who was removed

in time and place, was reasonably foreseeable." *Id.* at 374. The Court also explained that the burden it was being asked to impose on the employer was a heavy one because the employer was not in a position to control the nurse or any other medical personnel, and if they were to accept the nurse's argument, "liability would extend to the world at large." *Id.* at 375.

In the case at bar, the Grossens, as landowners, have no duty to guard against injuries to persons caused by another's livestock that have escaped from their enclosures. *Bulpit*, 145 Ill. at 349. This makes sense, not just when examining the evolution of the law in Illinois, but also as applied to the facts of this case and as a matter of public policy. Like the employer in *Widlowski,* the Grossens were not in a position to control Frank's cattle or to know their habits or propensities to escape confinement. Frank, as the owner of the cattle, was in the best position to know the nature of his animals and the condition of the fences enclosing them.

Frank inspected the fences enclosing his cattle every Sunday, and he knew that the Grossens did not live on Parcel A. (C170-1) Frank even conceded that the Grossens could not have discovered the broken fence unless they inspected the fence daily, and Frank himself did not do that, nor did he know anyone in the farming community who checked their fences daily. (C790-5) Frank was in the best position to prevent this accident from happening, which is why Illinois law imposes a duty on him under the Animals Running Act and does not impose a duty on the Grossens under Illinois common law. To hold otherwise, to allow the Appellate Court's decision to stand, extends a duty of care in regard to a livestock owner's cattle to any neighboring landowner who shares a boundary fence with the cattleowner. The Appellate Court's decision paves the way for a livestock owner to bring a third-party complaint seeking contribution not only against neighbors but to other landowners whose parcels happen to be located in the general vicinity of where cattle, for

example, cause damages to unrelated plaintiffs. This extension of liability is inconsistent with the intent of the Animals Running Act, which, as discussed in Section A above, expressly limited liability to owners or keepers of livestock, and is also inconsistent with this Court's decision in *Widlowksi*. A decision extending liability "to the world at large" is inconsistent with Illinois public policy and would have broad and certain unintended consequences to the public in rural, agricultural areas throughout the state. The costs to be borne by the farming communities who will be forced to guard against these widespread "risks" demonstrate the heavy burden that the Appellate Court's decision imposes on the public. Consistent with the sound reasoning advanced in *Widlowski,* this Court should prevent the imposition of a duty on the public at large and reverse the Appellate Court's decision.

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

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

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

The Contribution Act provides that contribution is permitted between parties who are both subject to "liability in tort" to the plaintiff. 740 ILCS 100/2(a); *see Vroegh v. J & M Forklift,* 165 Ill. 2d 523, 528 (1995). The Appellate Court found that the trial court erred in granting summary judgment[1] because Frank's contribution action could be based on the contract between the Grossens and Frank, even though the contract has no connection to Plaintiff, as long as the injury for which Frank seeks contribution is the same injury for which Frank is liable. (A112)

In order to have a valid contribution claim against the Grossens, Frank must show that the Plaintiff suffered an injury because the Grossens breached a duty to the Plaintiff. *Gilley v. Kiddel*, 372 Ill.App.3d 271, 274-5 (2nd Dist. 2007). Whether a duty exists is normally a question of law, and the answer hinges on whether the parties stood in such a relationship to each other that the law would impose an obligation on the defendant to act reasonably for the protection of the plaintiff. *Id.* When a defendant is accused of negligence due to its failure to perform an act allegedly required by a contractual obligation, the existence of a duty will be determined by the terms of the contract, and the scope of the defendant's duty will not be extended beyond those terms. *Gilley,* 372 Ill.App.3d at 275.

The Grossens owed no duty to the Plaintiff under the terms of the contract as Plaintiff was not a party to the contract, nor was he a third-party beneficiary of the contract. (C100-2) Pursuant to Illinois law, there is a strong presumption that parties to a contract intend that the contract's provisions apply only to them and not to third parties. In order to overcome that presumption, the implication that the contract applies to third parties must be so strong as to be practically an express declaration. *Ball Corp. v. Bohlin Bldg. Corp*., 187 Ill. App. 3d 175, 177(1st Dist. 1989). Furthermore, liability to a third party must affirmatively

[1] Appellate review of an order granting summary judgment is *de novo. Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992).

appear from the contract's language and from the circumstances surrounding the parties at the time of its execution, and cannot be expanded or enlarged simply because the situation and circumstances may justify or demand further or other liability. *Id.* Given that the Plaintiff in this case is not even mentioned in the contract, it is clear that the parties to the contract did not intend for the provisions to apply to the Plaintiff. (C100-2)

On appeal, Frank extensively relied on *Cirilo's, Inc. v. Gleeson, Sklar & Sawyers,* 154 Ill.App.3d 495-6 (1st Dist. 1987) in arguing that the phrase "subject to liability in tort" includes duties that are breached pursuant to a contract. In *Cirilo's*, an employee of the plaintiff had embezzled nearly half a million dollars over a five-year period by periodically making out company checks to herself and cashing them at the plaintiff's bank. *Id.* at 495. The plaintiff sued its accounting firm for negligence. *Id.* The accounting firm in turn filed a third party complaint for contribution against the plaintiff's bank, alleging that the bank failed to exercise ordinary care in paying the forged checks. *Id.* The trial court dismissed the third party complaint, concluding that the bank was not "subject to liability in tort" within the meaning of the Contribution Act because the relationship between the bank and the plaintiff was governed by the contract, not tort law. *Id.* The appellate court reversed, finding that the bank could be deemed to have committed a breach of its duty to plaintiff. *Id.* at 496. Therefore the bank and the accounting firm were "subject to liability in tort" even though the bank's duties to the plaintiff arose from its contracts with the plaintiff, not from tort law. *Id.* at 497.

The Appellate Court overlooked a crucial difference between *Cirilo's* and the case at bar. In *Cirilo's*, there was a relationship between the third-party defendant bank and the original plaintiff; they were connected through the contract to which both were parties, and pursuant to that contract, the bank owed duties to the plaintiff. *Id.* 496-7. In this case, the

contract at issue is between Frank's predecessors and the Grossens' predecessors. (C100-2) There is no relationship between the Grossens and Plaintiff; Plaintiff is not a party to the contract and the contract does not set forth any duties owed by the Grossens to Plaintiff. (C100-2)

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

Whether a breach of contract can ever create tort liability under the Contribution Act is a matter of conflict and disagreement in Illinois as at least three appellate decisions have rejected the reasoning advanced in *Cirilo's*. In *J.M. Krejci Co. v. Saint Francis Hosp. of Evanston*, 148 Ill. App. 3d 396 (1986), the First District found that the third-party defendant was not subject to liability in tort to the original plaintiff because the plaintiff's claim against the third-party defendant was based upon a breach of contract, not negligence. *See also Pier*

Transp., Inc. v. Braman Agency, LLC, 2015 IL App (1st) 150300-U, ¶ 78 ("Plaintiff cannot state a cause of action for contribution on the facts of this case because the right of contribution exists only among parties jointly liable in tort, and not between one party liable for breach of contract and a third-party stranger to that contract.").

In *People ex. Rel. Hartigan v. Community Hosp. of Evanston*, 189 Ill. App. 3d 206, 213–214 (1st Dist. 1989), the Illinois Attorney General brought suit alleging that both a member of the Community Hospital of Evanston's board of directors and a bank had wrongfully dissipated certain assets belonging to the hospital. *Id.* at 210. Specifically, the complaint alleged that the director breached fiduciary duties and that the bank breached both fiduciary and statutory duties to the hospital. *Id.* The First District dismissed the director's cross-claim for contribution, noting that breach of a fiduciary duty was not a "tort" for purposes of the Contribution Act. *Id.* at 214. When the bank cited *Cirilo's* as support for the argument that a breach of statutory and contractual duties amounted to tortious conduct, the court emphasized that the *Cirilo's* court's conclusion, that the bank's breach of statutory and contractual duties amounted to tortious conduct, was unsupported in the law. *Id.* at 214; *see also Wieboldt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 169–71 (N.D.Ill.1990) (mentioning that the decision in *People ex. Rel. Hartigan v. Community Hosp. of Evanston* is more consistent with Illinois Supreme Court precedent than *Cirilo's).*

This Court has never definitively decided the issue of whether the breach of a contract can create tort liability, but it is settled that, in a contribution action, there must be a showing that the party from whom contribution is sought could be held liable in tort to the original plaintiff. *Laue v. Leifheit*, 105 Ill.2d 191, 195-6 (1984). As discussed above, the Plaintiff in this case would have no basis to claim a breach of contract against the Grossens.

It follows that Frank cannot bring a contribution action against the Grossens based on a breach of the contract that has no relation to the original Plaintiff. *Id.*

B. Even if the breach of a contract can establish "liability in tort" under the Contribution Act, Frank cannot maintain an action for breach of contract because he failed to comply with the Fence Act.

The Appellate Court correctly affirmed the trial court when it held that Frank has no right of recovery against the Grossens under the Fence Act for damages caused by his own cattle escaping from their enclosure because Frank failed to provide notice to the Grossens, as required by the Fence Act. *See* 765 ILCS 130, *et seq*. (A109) The Fence Act sets forth the general rules, between owners of adjoining parcels of land, for maintenance of division fences. *See* 765 ILCS 130, *et seq*. The Act more specifically provides that adjoining landowners shall each maintain a "just proportion"[2] of any boundary fence that divides their lands. *See* Id. at § 3. The Act addresses payment for the construction of a division fence and the costs of maintenance of the same. *See* 765 ILCS 130 at §§ 3-4.

The Fence Act also determines the manner in which complaints by one adjoining landowner regarding the failure of the other to construct or maintain the division fence are to be handled. *See* Id. at §§ 6-7. In such instances, the complaining party must lodge the complaint with the established fence viewers in the area who are responsible for viewing the fence and determining whether it is sufficient. *Id.* If an adjoining landowner refuses to construct or maintain a proportion of the fence after being required to do so, the other landowner may undertake the repairs and bring suit in circuit court to recover the non-payor's share of the same. *Id.* at § 11.

[2] "Just proportion" is not defined by the Act, and may mean something other than "equal proportion" depending on the case and which party derives the most benefit from the fence. *See In the Matter of the Estate of Willis*, 276 Ill. App. 3d 1053, 1058-59 (4th Dist. 1995).

This Court has previously decided that, even in the case of a limited agreement between two adjoining landowners as to maintenance of a division fence, the Fence Act still applies to address maintenance and notice issues. *See Bigelow v. Burnside*, 269 Ill. 324, 329 (1915). In *Bigelow*, the parties maintained a division fence for many years. Just like Frank and the Grossens, the parties had a limited agreement which set forth their respective obligations with regard to maintenance of the division fence. *Id.* at 325. One of the parties believed that the other party's portion of the fence needed to be replaced and, instead of complying with the Fence Act, he rebuilt the fence and sought reimbursement from his neighbor. *Id.* This Court found that, even though the parties had a contract which defined their respective obligations relating to the division fence, the provisions of the Fence Act nonetheless still applied and the parties were required to comply with them. *Id.* at 330. Because the plaintiff failed to comply with those provisions, recovery was barred. *Id.*

Because the Fence Act also applies to Frank's breach of contract action[3], Frank is similarly estopped from pursing the action against the Grossens. Just like the contract at issue in *Bigelow*, the contract between the Grossens and Frank simply defines the meaning of "just proportion" in terms of each party's obligation as to the division fence. (C100-2) It does not include enforcement terms nor does it provide any remedy if either party fails to perform under the contract. (C100-2) The Fence Act fills in the gaps in the contract, and if Frank had a complaint against the Grossens regarding the maintenance of their portion of the fence, he should have exercised his rights under the Fence Act to require the Grossens to repair portions of the fence he deemed insufficient. *See Bigelow v. Burnside*, 269 Ill. 324, 329

[3] Frank contends in his Answer to Petition for Leave to Appeal that the Grossens waived this argument on appeal. However, this Court can affirm the decision of the lower court if it is justified in law for any reason appearing in record. *Mulvihill v. Shaffer*, 297 Ill. 549, 554 (1921).

(1915) ("[N]o person is liable to contribute to the repair or rebuilding of a division fence until there has first been a finding by fence viewers, legally chosen, that his proportion of the fence needs repair or rebuilding."). Pursuant to *Bigelow*, even if a breach of the contract between the Grossens and Frank could constitute "liability in tort" to Plaintiff under the Contribution Act, Frank's breach of contract action still must fail. Frank failed to give proper notice to the Grossens or otherwise comply with the statutory requirements of the Act, and so, he cannot enforce the contract against the Grossens. (A109)

CONCLUSION

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

Furthermore, the contract between the Grossens' relatives and Pintozzi's predecessors does not create liability in tort for purposes of the Contribution Act because the contract does not set forth any duties owed by the Grossens to Plaintiff. Even if the contract could create tort liability, Frank failed to give proper notice to the Grossens or otherwise comply with the statutory requirements of the Fence Act, and so, he cannot

enforce the contract against the Grossens. This Court should reverse the decision of the Appellate Court and affirm the trial court's holding that Frank cannot maintain a contribution action based on an alleged breach of contract between Frank and the Grossens.

Respectfully submitted,

DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellants

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that this brief conforms to the requirements of Rules 315 and 341. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and mailing and those matters to be appended to the brief under Rule 315 and Rule 342(a), is 7,275 words.

Dated this 26th day of June, 2019.

/s/ *Stephanie R. Fueger*
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IN THE SUPREME COURT OF ILLINOIS

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

NOTICE OF FILING and PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on June 26, 2019, there was electronically filed and served upon the Clerk of the above Court the Brief and Argument of Third-Party Defendants-Appellants. Service of the Brief and Argument of Third-Party Defendants-Appellants will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that she will send to the Clerk of the above Court thirteen copies of the Brief and Argument of Third-Party Defendants-Appellants.

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

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IN THE SUPREME COURT OF ILLINOIS

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

APPENDIX

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E-FILED
6/26/2019 11:53 AM
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SECOND JUDICIAL DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant, KENNETH FRANK, Third-Party Plaintiff/Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants/Appellees.	On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Jo Daviess County, Illinois No. 13 L 27 The Honorable William A. Kelly Judge Presiding

BRIEF AND ARGUMENT OF THIRD-PARTY PLAINTIFF/APPELLANT KENNETH FRANK

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Docket No. 2-17-1040

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant, KENNETH FRANK, Third-Party Plaintiff/Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants/Appellees.	On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Jo Daviess County, Illinois No. 13 L 27 The Honorable William A. Kelly Judge Presiding

BRIEF AND ARGUMENT OF THIRD-PARTY PLAINTIFF/APPELLANT KENNETH FRANK

NATURE OF THE CASE

Plaintiff Kirk Raab ("Raab"), brought this personal injury action under the Illinois Domestic Animals Running at Large Act, 510 ILCS 55/1 *et seq*. (West 2013) ("Domestic Animals Running at Large Act"), against the third-party plaintiff/appellant Kenneth Frank ("Frank"), after Raab sustained injuries as a result of his vehicle striking a beef cow owned by Frank. Frank, in his amended third-party complaint for contribution brought claims against David Grossen and Virginia Grossen (collectively, "Grossen") for

negligence, violation of the Illinois Fence Act, 765 ILCS 130/1 *et seq.* ("Fence Act") (West 2013), and breach of an Agreement in Connection with Line Fences ("Fence Agreement"). The trial court granted Grossen's motions for summary judgment on all counts of the amended third-party complaint, holding that the negligence claim was preempted by the Domestic Animals Running at Large Act, that the Fence Act was not applicable to the facts of this case, and that Frank did not have a basis to seek contribution against Grossen under the Joint Tortfeasor Contribution Act, 740 ILCS 100/1 *et seq*. (West 2013) ("Contribution Act").

No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Whether the trial court erroneously held that the breach of a recorded Fence Agreement requiring the owner of the land to repair and maintain a boundary fence could not form the basis for a claim under the Contribution Act for injuries sustained by the plaintiff after a cow escaped through the fence and his vehicle struck it in the roadway.

Whether the trial court erroneously held that the Fence Act does not apply to the alleged failure to maintain a boundary fence from which a cow escaped, and, therefore, could not form the basis for a claim under the Contribution Act for injuries sustained after the plaintiff struck the cow with his vehicle.

Whether the trial court erroneously held that a common law negligence claim could not form the basis of a claim under the Contribution Act for injuries sustained to the plaintiff after a cow escaped through a fence because it was preempted by the Domestic Animals Running at Large Act.

STATUTES INVOLVED

Domestic Animals Running at Large Act:

55/1. Prohibition

§ 1. No person or owner of livestock shall allow livestock to run at large in the State of Illinois. All owners of livestock shall provide the necessary restraints to prevent such livestock from so running at large and shall be liable in civil action for all damages occasioned by such animals running at large; Provided, that no owner or keeper of such animals shall be liable for damages in any civil suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large.

510 ILCS 55/1 (West 2013).

Joint Tortfeasor Contribution Act:

100/2. Right of Contribution

§ 2. Right of Contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

* * *

740 ILCS 100/2 (West 2016).

Fence Act:

130/3. Division fence

§ 3. When two or more persons have adjoining lands each of them shall make and maintain a just proportion of the division fence between them, …

765 ILCS 130/3 (West 2016).

STATEMENT OF JURISDICTION

This appeal is brought as a matter of right from the Circuit Court of the Fifteenth Judicial Circuit, Jo Daviess County, Illinois, as a final judgment under Rule 303 of the Supreme Court Rules. Ill. Sup. Ct. R.303 (eff. Jul. 1, 2017). After Raab settled and dismissed his case against Frank, the trial court granted Grossen's motion for summary judgment as to counts I and II of the amended third-party complaint on September 7, 2016 (R.C217-18,872-73). On November 27, 2017, the trial court granted Grossen's motion for summary judgment with respect to the remaining count III of the amended third-party complaint (R.C1115-16). Frank filed his notice of appeal within thirty days of the final judgment on December 26, 2017 (R.C1119-23).

STATEMENT OF FACTS

Pleadings

On November 8, 2013, Raab filed a one-count complaint against Frank for personal injuries that Raab sustained when he struck a beef cow that was owned by Frank in the roadway (R.C12-15). Raab alleged that Frank violated the Domestic Animals Running at Large Act by failing to use reasonable care necessary to restrain his cattle from straying from the confinement area (R.C12-15).

In his answer and affirmative defenses to Raab's complaint, Frank denied all allegations of negligence and asserted as his second affirmative defense that he used reasonable care in restraining the cow from running at large by placing the cow in a pasture where the fences were examined and found to be in good condition and routinely

visited the cow pasture and observed the condition of the fences and the gates (R.C26-31).

On December 8, 2014, Frank filed his amended third-party complaint against Grossen, which contained three counts (R.C80-102). In general, Frank alleged that Grossen owned a tract of land bearing Jo Daviess County Assessor Parcel Number 16-000-172-00 ("Grossen parcel"), which shared a common fence line with a tract of land owned by Dominic T. Pintozzi bearing Jo Daviess County Assessor Parcel Number 16-000-171-00 ("Pintozzi parcel") (R.C80-89). Frank further alleged that he was leasing the Pintozzi parcel which encompassed the cattle pasture at the time of the occurrence alleged in Raab's complaint (R.C81).

Count I of Frank's amended third-party complaint alleged that Grossen was negligent in committing one or more of the following careless and negligent acts or omissions:

(a) Failed to use reasonable care in maintaining the boundary fence which existed between the Grossen parcel and the Pintozzi parcel;

(b) Failed to repair the fence which existed between the Grossen parcel and the Pintozzi parcel, when he knew or should have known that the fence was in need of repair;

(c) Allowed a boundary fence to exist between the Grossen parcel and the Pintozzi parcel, when the boundary fence was not in good repair and not constructed of suitable materials;

(d) Allowed the fence between the Grossen parcel and the Pintozzi parcel, to exist when he knew or should have known that the design of the fence and fencing system was not reasonable and adequate;

(e) Allowed a boundary fence to exists between the Grossen parcel and the Pintozzi parcel, when he knew or should have known that the boundary fence was not reasonable to enclose the cattle which were contained on the adjacent property; and

(f) Was otherwise careless or negligent with respect to the fence between the Grossen parcel and the Pintozzi parcel.

(R.C82-83).

In count II, Frank alleged that Grossen violated the Fence Act in one or more of the following respects:

(a) Failed to maintain a just proportion of the division fence between the Grossen parcel and the Pintozzi parcel, in violation of 765 ILCS 130/3.

(b) Allowed a division fence to exist between the Grossen parcel and the Pintozzi parcel, which was not properly maintained when they had a responsibility to maintain a just proportion of the division fence pursuant to 765 ILCS 130/3.

(c) Allowed a division fence to exist between the Grossen parcel and the Pintozzi parcel, which was not properly designed and failed to maintain a just proportion of the fence by failing to correct defects in the design of the fence pursuant to 765 ILCS 130/3.

(R.C85).

In count III, Frank alleged that on or about January 7, 1970, a Fence Agreement was recorded against the Grossen parcel that obligated Grossen to repair and maintain the portion of the fence where the cow that was struck by Raab had escaped (R.C86-89). The Fence Agreement was entered into between William H. Meyer and Tillie Meyer, his wife, parties of the first part, and Myrtle Thomas, a widow, and Elizabeth Eckerman and Clifford Eckerman, her husband, parties of the second part (R.C100-02). Frank alleged that as a successor owner of the parties of the second part, Grossen was required to maintain the north sixty (60) rods of fence line and the north forty (40) rods of fence line running in an easterly and westerly direction of the boundary fence which existed between the Pintozzi parcel and the Grossen parcel (R.C88, 100-02). Frank further alleged that Grossen failed to comply with the Fence Agreement by failing to properly

maintain the boundary fence between the Pintozzi parcel and Grossen parcel and that, as a direct result of this breach, Raab was injured as alleged within his complaint (R.C87-88).

In each count, Frank sought judgment against Grossen for all sums for which he was liable to Raab in such amount, by way of contribution, as would be commensurate with the degree of misconduct attributable to Grossen in causing the alleged damages to Raab (R.C83, 86, 88-89).

The Trial Court Grants Summary Judgment in Favor of Grossen on Counts I and II

On June 9, 2016, following discovery, Grossen filed a motion for summary judgment against Frank with respect to the amended third-party complaint (R.C154-216). At the time of Grossen's filing of this motion, the amended third-party complaint was the only pending complaint in the case as the trial court entered an order on the same date approving a settlement between Raab and Frank, granting Frank's motion for good faith finding, and dismissing Raab's claims against Frank (R.C217-18).

In their motion, Grossen argued that Frank's negligence claim asserted in count I was barred under the Domestic Animals Running at Large Act, which provides for strict liability on an owner or keeper of cattle and that one who keeps or harbors an animal within the meaning of the Act cannot recover for damages caused by the escaped animal (R.C191-92). Grossen argued that count II should be dismissed because the Fence Act governs construction and maintenance of division fences as between the adjoining land owners and does not provide for contribution when one landowner's cattle causes damage to a third-party (R.C195-96). Grossen argued that count III should be dismissed because the Fence Agreement did not run with the land (R.C201-05).

In opposition to the motion, Frank argued that summary judgment should not be granted with respect to count I because the basis for a contributor's obligation, such as Grossen, under the Contribution Act rests in their liability in tort to the injured party, and there is no requirement that the basis of Grossen's liability be the same as Frank's (R.C227-34). With respect to count II, Frank argued that the Fence Act only relieves an owner of land of his duty to keep livestock under the Domestic Animals Running at Large Act upon his own land when a portion of the fence is to be maintained by an adjoining land owner under the Fence Act (R.C244-48). Finally, regarding count III, Frank argued that the Fence Agreement is a covenant which runs with the land because it states that it is "binding upon the parties hereto, their heirs, executors, administrators and assigns" (R.C234-43).

The record on summary judgment included the deposition testimony of Virginia Grossen ("Virginia"), David Grossen ("David") and Kenneth Frank, who testified as follows:

The Grossen parcel and Pintozzi parcel share a common boundary line between them which is divided by a fence and that a small creek or waterway runs through the boundary line fence of the two parcels (R.C437).[1] The area of the creek crossing through the boundary line fence is where it is believed that the cow escaped (R.C437, 823-24). Frank testified that he was 99.9% sure that the cattle in question escaped through the creek bed between the Grossen parcel and the Pintozzi parcel because he saw manure and

[1] See map depicting the boundary line between the Grossen parcel and Pintozzi parcel (Exhibit 1 to Virginia's deposition) (R.C437), a color copy of which is included in the attached Appendix.

foot prints on the mud and grass within and near the creek bed upon the Grossen parcel in the area where the fence crossed the creek bed between the two parcels (R.C823-24).

Virginia testified that if one was standing on the property facing the fence, the half of the fence to the right is the owner's responsibility to maintain (R.C411). The area depicted to the right of the arrow she drew encompasses the portion of the line fence that crossed the creek bed where Frank believes the cow escaped (R.C437, 823-24). She admitted that she was responsible for caring for the portion of the fence where the cow had escaped:

> Q. And so let me just ask it this way. Based on the way [the Fence Agreement] is written, it would be fair to say that according to [the Fence Agreement], the owner of your parcel is responsible for caring for what's to the right of the arrow you drew.
>
> A. Yes.

(R.C411-13). Virginia testified that the area she had circled on Exhibit 1 to her discovery deposition contains the portion of the parcel for which she believes she was responsible for caring and this portion encompasses the area where the fence crosses the creek bed (R.C412, 437).

Virginia testified that after the accident Frank reported to her and her husband that the fence was in bad repair and that they needed to take care of it, she agreed to do so immediately as soon as the weather cooperated (R.C398). During the month of April in the spring following the incident, they hired Bob Spillane to repair the fence between the Pintozzi parcel and the Grossen parcel (R.C399). David testified that the repair included electrifying the fence over the creek even though Frank voiced a complaint with the way the repair had been completed (R.C467-68). On April 21, 2012, Grossen paid for repairs

to the portion of the fence where the cow had escaped, which included electrification of the fence (R.C399, 438).

On September 7, 2016, the trial court entered an order granting Grossen's motion for summary judgment as to counts I and II of the amended third-party complaint and denying Grossen's motion as to count III (R.C872-73). As to count I, the trial court determined that the Domestic Animals Running at Large Act acted as a bar to Frank's negligence claim (R.P38).[2] The trial court granted Grossen's motion with respect to count II based on its belief that the rights and responsibilities created under the Domestic Animals Running at Large Act were not applicable to the facts of this case (R.P38). The trial court denied Grossen's motion with respect to count III, finding that the Fence Agreement ran with the land and that Frank had viable cause of action to prove a breach of that agreement (R.P39).

The Trial Court Grants Summary Judgment in Favor of Grossen on Count III

On August 1, 2017, Grossen filed their second motion for summary judgment as to count III of the amended third-party complaint (R.C897-918). Grossen argued that the right of contribution arises from joint liability in tort causing injury to persons or property and count III was based in contract rather than tort (R.C915-18). In response, Frank argued that there is no requirement in Illinois that the basis for contribution mirror the theory of recovery asserted in the original action, that Grossen breached their duty to Frank under the Fence Agreement and that an allegation of a breach under the Fence Agreement was sufficient to subject Grossen to liability in tort to Raab under the Contribution Act (R.C929-30).

[2] Citation to the reports of proceedings will be to "R.P" to avoid any confusion with citation to the common law record ("R.C").

On November 27, 2017, the trial court granted Grossen's motion for summary judgment as to count III (R.C1115-16). In granting the motion, the trial court found that the contractual obligation between Frank and Grossen was the only basis for contribution with Raab, and that there was no connection between Raab and Grossen to justify a claim under the Contribution Act (R.P57). This appeal follows (R.C1119-23).

ARGUMENT

INTRODUCTION

Summary judgment is properly granted where the pleadings and proofs show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Crum and Forster Managers Corp. v. Resolution Trust Corp*., 156 Ill. 2d 384, 390-91 (1993); 735 ILCS 5/2-1005(c) (West 2016). Motions for summary judgment are a drastic means of resolving a case and should only be utilized when the moving party's right to judgment is clear and free from doubt. *Jackson v. TLC Assoc., Inc.*, 185 Ill. 2d 418, 423-24 (1998). "A motion for summary judgment should only be granted when the pleadings, depositions, and affidavits demonstrate there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Id*. Appellate review of an order granting summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992).

The trial court ignored these well-settled principles when the pleadings, depositions and affidavits demonstrate that Raab was *not* entitled to judgment as a matter of law. Under one view of the evidence, the cow escaped through that portion of the fence that was subject to the Fence Agreement which ran with the land and that Grossen

owed the legal responsibility to maintain. Certainly it is foreseeable that if a cow escaped through the fence, it could cause injury to a motorist. Because the failure to maintain the fence created a foreseeable risk of harm, Grossen owed a duty to protect others from the harm, regardless of whether the source of the duty is the Fence Agreement, the Fence Act or common law.

Frank has a viable cause of action against Grossen under the Contribution Act. First, Grossen is "subject to liability in tort" to the injured party under count III and the nature of the claim between Frank and Grossen is irrelevant. Grossen's breach of a contractual duty to Frank under the Fence Agreement is adequate to subject Grossen to liability in *tort* to Raab for the purposes of the Contribution Act.

Second, as to count II, there is no case in Illinois which has held that a violation of the Fence Act cannot form the basis of a contribution claim against a third party for an injury resulting from livestock. The trial court ignored the specific facts of this case, which imposed an obligation upon Grossen to repair and maintain the fence under the Fence Act.

Finally, as to count I, there is no case law in Illinois that holds that a defendant sued under the Domestic Animals Running at Large Act may not file a contribution action against a third-party based on a theory of negligence that did not derive from the Domestic Animals Running at Large Act. Prior case law allows a defendant sued under the Domestic Animals Running at Large Act to reduce its liability by showing that plaintiff was also at fault in causing the injuries. If a defendant may reduce or even eliminate its liability by showing a plaintiff's comparative fault, that defendant should be able to seek contribution from another party which contributed to cause plaintiff's injury

so that each is responsible for only its *pro rata* share of the common liability, as the Contribution Act contemplates.

For any or all of these reasons, the trial court erred in holding as a matter of law that Frank could not sustain a cause of action under the Contribution Act against Grossen based on a breach of the Fence Agreement, violation of the Fence Act, and common law negligence. Accordingly, as more fully discussed below, summary judgment in favor of Grossen on all three counts of Frank's amended third-party complaint cannot stand.

I. THE TRIAL COURT ERRED IN HOLDING THAT COUNT III FOR CONTRIBUTION BASED ON A BREACH OF THE FENCE AGREEMENT IS BARRED UNDER THE CONTRIBUTION ACT

The Illinois Supreme Court has held that the basis for a contributor's obligation rests on his liability in tort to the injured party. *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 118 Ill. 2d 447, 462 (1987). However, "there is no requirement that the basis for contribution mirror the theory of recovery asserted in the original action." *Id*. at 462. Thus, while there must be liability in tort to the injured party, there is no requirement that the theory of recovery between tortfeasors also lie exclusively in tort.

As long as the contributors are potentially "subject to tort liability" to the injured party, the nature of liability between the tortfeasors is irrelevant. The Illinois Supreme Court in *Doyle v. Rhodes*, 101 Ill. 2d 1, 14 (1984), held that, "the Contribution Act focuses, as it was intended to do, on the culpability of the parties rather than on precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss." *Id*. The court in *Doyle* also noted that "'[t]he theory is that as between the two tortfeasors the contribution is not a recovery for the tort but the enforcement of an

equitable duty to share liability for the wrong done.'" *Id*. at 8 (quoting *Puller v. Puller*, 110 A.2d 175, 177 (Pa. 1955)).

Clearly, the law in Illinois does not require that the basis for contribution derive from the plaintiff's original claim. The Contribution Act is founded upon the doctrine of unjust enrichment, and creates a separate substantive right of restitution rather than a derivative right. *People v. Brockman*, 143 Ill. 2d 351, 366 (1991) (citing *Doyle v. Rhodes*, 109 Ill. App. 3d 590, 592-593 (2d Dist. 1982), *aff'd*, 101 Ill. 2d 1 (1984)). The language of the Contribution Act requires that all defendants be liable in tort and that their liability arise out of the same injury. *Id*. at 371; *see also* 740 ILCS 100/2 (West 2013). The injury is that which is incurred by the plaintiff, as opposed to any injury suffered by the parties seeking contribution. *Id*. at 371.

The words "subject to liability in tort," as used in the Contribution Act, have been interpreted to mean that the persons from whom contribution is sought are potentially capable of being held liable in a court of law or equity. The potential for liability depends merely upon their relative culpability in causing the same injury. *Brockman*, 143 Ill. 2d at 371; *see also Doellman v. Warner & Swasey Co.*, 147 Ill. App. 3d 842, 847 (1st Dist. 1986). In providing guidance as to the meaning of the words "subject to liability in tort," the court in *Brockman* noted that "Dean Prosser teaches that while a court will provide a remedy in the form of an action for damages, one important form of remedy for tort may also be an injunction or restitution. The only requirement is that the availability of these remedies will depend in the first instance upon the possibility that an action for damages could lie for the wrong." *Id*. at 372 (citing W. Keeton, *Prosser and Keeton on Torts*, § 1, at 2-3 (5th ed. 1984)).

The phrase "subject to liability in tort" can include duties giving rise to a tort that arose from contracts. In *Cirilo's, Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill. App. 3d 494 (1st Dist. 1987), the plaintiff brought a lawsuit against its accountants for negligence for failing to discover a forgery scheme perpetuated by the plaintiff's employee. The defendant accountants then filed a third-party contribution complaint against the plaintiff's bank for failing to exercise ordinary care in paying the forged checks. In upholding the contribution claim, the *Cirilo's* court concluded that the defendant and third-party defendant were clearly "subject to liability arising in tort out of the same injury," despite the fact that the duties giving rise to the tort arose from contracts. *Id*. at 497. The court further noted that "under the rationale of *Doyle*, the [third-party defendants] are clearly 'subject to liability in tort arising out of the same injury,' even though their duties to Cirilo's arose from their contracts with that party, not from tort law." *Id*.

Also, the *Cirilo's* court rejected the argument that the contract relationship between the parties would defeat the Contribution Act claim. Instead, the court based its analysis on whether each defendant was charged with a breach of duty that together led to a plaintiff's loss. 54 Ill. App. 3d at 497. In so holding, the court concluded "liability in tort" for Contribution Act purposes can encompass breaches of duties that do not arise from tort law. *Id*.

Other Illinois courts have similarly construed broadly this "potential liability" requirement. *See, e.g., Giordano v. Morgan,* 197 Ill. App. 3d 543, 549 (2d Dist. 1990) (holding Contribution Act applicable in contract case); *Joe & Dan Int'l Corp. v. U.S. Fid. & Guar. Co*., 178 Ill. App. 3d 741, 750 (1st Dist. 1988) (noting that potential liability in

tort is determined at the time of injury, not at the time of the lawsuit, and that Contribution Act applies even when plaintiff has sued in contract). These cases are equally applicable here to support count III of the amended third-party complaint for contribution.

The trial court found that the Fence Agreement ran with the land and was binding on successor parties, inclusive of Grossen (R.C39). Because Grossen was bound by the Fence Agreement, the Fence Agreement imposed a duty upon Grossen to maintain the north sixty (60) rods of fence line and north forty (40) rods of fence line running in an easterly and westerly direction of the boundary fence that existed between the Grossen parcel and the Pintozzi parcel (R.C956-58). As the proofs showed (R.C411-13, 437), Grossen breached this duty, which resulted in the injuries sustained by Raab (R.C86-89). It is certainly reasonably foreseeable that if Grossen breached the Fence Agreement, a cow could escape and cause injury to a motorist (R.C88). Under *Giordano*, *Joe & Dan Int'l* and *Cirilo's*, Grossen would be potentially "subject to liability in tort" for the purpose of the Contribution Act. The fact that the duty at issue is based on a contractual and legal obligation (running with the land) is not an impediment to a claim for contribution. Stated another way, the Contribution Act does not exclude a contractual undertaking from potential tort liability in causing a plaintiff's injury. After all, a party to a contract may be charged with negligence for failing to perform an act required by a contract. *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 208 (2d Dist. 2008).

As previously noted, pursuant to *Brockman*, the focus in determining whether a cause of action for contribution is "subject to liability in tort" should depend upon the party's relative culpability in causing the same injury and whether the remedy arising out

of that injury is an action for damages. 143 Ill. 2d at 371. Frank does not dispute that contribution is predicated on tort liability to the injured party, not between the tortfeasors. *See Cirilo's*. Here, the underlying complaint alleged tort liability against Frank based on violation of the Domestic Animals Running at Large Act (R.C12-15). In turn, Grossen's breach of the Fence Agreement satisfied the "subject to liability in tort" requirement to the extent Raab's injuries were the proximate result of Grossen's breach of the Fence Agreement. Because the trial court erred in holding that a breach of the Fence Agreement alleged in count III could not sustain a claim under the Contribution Act, its grant of summary judgment on count III must be reversed and the case remanded for further proceedings.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE FENCE ACT DID NOT APPLY FOR PURPOSES OF COUNT II FOR CONTRIBUTION BASED ON A VIOLATION OF THE FENCE ACT

Section 3 of the Fence Act provides that "[w]hen two or more persons have adjoining lands each of them shall make and maintain a just proportion of the division fence between them … ." 765 ILCS 130/3 (West 2013). Although the Fence Act does not generally relieve an owner of land of his duty under the Domestic Animals Running at Large Act to restrain his cattle, Illinois courts have forged an exception to this general rule with respect to the portion of fence which is assigned to an adjoining land owner under the Fence Act. In *McKee v. Trisler*, 311 Ill. 536, 545-46 (1924), the court found that the Fence Act does not purport to relieve an owner of land of his common law duty to keep his livestock on his own land *except as to the portion of fence assigned to the owner of the adjoining land*. *Id*. at 545.

As the court in *McKee* stated, the purpose of the Fence Act in relation to the Domestic Animals Running at Large Act is to prevent a party who suffers damages primarily to their land or crops by the animal of another from bringing an action against the adjoining land owner for a portion of the fence which they (the claimant) were required to repair under the Fence Act. *McKee*, 311 Ill. 6 at 545-46. In this instance, Frank presented evidence to create a genuine issue of fact as to whether the animal in question escaped through the portion of the fence that Grossen was required to maintain. Virginia testified that if one was standing on the property facing the fence, the half of the fence to the right is the owner's responsibility to maintain (R.C411, 437). This is the area where the fence crossed the creek bed between the Grossen parcel and Pintozzi parcel, where Frank testified with near certainty that the cattle had escaped (R.C179-180, 823-24). Thus, Virginia was aware or should have been aware that she was responsible for maintaining the portion of the fence where the cow is alleged to have escaped prior to the incident in question. As such, Grossen owed a duty to Raab and the general public under the Fence Act to maintain the portion of the division fence that they were required to repair under the Fence Act.

There is no language in the Domestic Animals Running at Large Act which would prevent an adjoining land owner from bringing a suit for contribution when a third-party is injured on account of a livestock owner's failure to keep his cattle enclosed if a portion of the enclosure in question is to be maintained by an adjoining land owner pursuant to the Fence Act. Further, in *McKee v. Trisler* as previously noted, the Fence Act does alleviate an owner or keeper of livestock under the Domestic Animals Running at Large Act from maintaining the portion of the fence that the owner or keeper of livestock shares

with an adjacent land owner for which the adjacent land owner is responsible to maintain under the Fence Act. Thus, the trial court erred in granting Grossen summary judgment on count II on the basis that the Fence Act did not apply to Grossen's maintenance of the fence. There are also genuine issues of fact precluding summary judgment as to whether Grossen properly maintained their portion of the fence under the Fence Act, and whether the cow had escaped from the portion of the fence that Grossen was obligated to maintain under the Fence Act. Summary judgment in favor of Grossen on count II should be reversed.

III. THE TRIAL COURT ERRED IN HOLDING THAT COUNT I FOR CONTRIBUTION BASED ON COMMON LAW NEGLIGENCE IS PREEMPTED BY THE ILLINOIS DOMESTIC ANIMALS RUNNING AT LARGE ACT

As previously noted, in *J.I. Case*, the Illinois Supreme Court held that the basis for a contributor's obligation rests on his liability in tort to the injured party. 118 Ill. 2d at 462. Accordingly, there is no requirement that the basis for liability among the contributors be the same. *Id*. Also, the court in *J.I. Case* found that the policy considerations that are reviewed in applying comparative fault principles between an injured plaintiff and a defendant whose liability is premised on strict liability rules are not the same as those embodied in the Contribution Act, which allows contribution based on fault among those whose conduct contributed to the injury. *Id*. at 463. Thus, in this instance the focus should not be on the nature of the claims themselves, but rather the conduct of Grossen, as contributors to the cause of Raab's injuries.

Virginia admitted that she was responsible for caring for the portion of the fence where the cow escaped (R.C411-13, 437). In addition, Grossen's actions subsequent to the incident reflect their acknowledgement of responsibility for maintaining and caring

for the portion of the fence where the cow escaped (R.C398-99, 467-68). Although evidence of subsequent remedial measures is not admissible to prove negligence, such evidence may be admissible for other purposes. For example, evidence of subsequent remedial measures may be admissible for the purpose of proving ownership or control of property where disputed by the defendant. *Herzog v. Lexington Twp.*, 167 Ill. 2d 288, 300-01 (1995).

In her discovery deposition, Virginia testified that after the accident Frank reported to her and her husband that the fence was in bad repair and that they needed to take care of it, she agreed to do so immediately as soon as the weather was cooperative (R.C398). Virginia further testified that in the spring following the incident during the month of April, that they hired Bob Spillane to repair the fence between the Pintozzi parcel and the Grossen parcel (R.C399). Additionally, David testified that the repair that was made to the fence included electrifying the fence over the creek (R.C467-68). Thus, in addition to Grossen's admissions that they were responsible for caring for the portion of the fence where the cow had escaped, Grossen also paid for repairs to the portion of the fence where the cow had escaped, which included electrification of the fence which was presumably needed to restrain cattle (R.C399, 438). Thus, Grossen's testimony and actions, which are indicative of ownership and control, created a duty upon Grossen to maintain the fence independent of the Domestic Animals Running at Large Act. *See Herzog*, 167 Ill. 2d at 300-01.

The Contribution Act is founded upon the doctrine of unjust enrichment, and creates a separate substantive right of restitution rather than a derivative right. *Brockman*, 143 Ill. 2d at 366. In this instance, the negligence claim pled in count I of Frank's

amended third-party complaint (R.C80-112) is not derivative of Raab's original complaint brought under the Domestic Animals Running at Large Act (R.C12-15).

In *Corona v. Malm*, 315 Ill. App. 3d 692 (2d Dist. 2000), the court found that there was no cause of action for negligence when a violation of the Domestic Animals Running at Large Act was also pled finding that liabilities for injuries caused by animals running at large must be predicated upon the Domestic Animals Running at Large Act. *Id*. at 698. The *Corona* court concluded that under the circumstances of that particular case, that the plaintiff's negligence allegations were mere surplusage. *Id*. However, in this instance, Frank's allegations against Grossen are not mere surplusage and are brought as non-derivative claims under the Contribution Act. *Corona* did not involve a third-party claim for contribution and does not bar Frank's claim for contribution here.

Finding that the Domestic Animals Running at Large Act operates as a complete bar to any contribution action sounding in negligence would defeat the purpose of the Contribution Act. In *Skinner v. Reed-Prentice Div. Packing Mach. Co.*, 70 Ill. 2d 1, 15 (1977), the court conveyed that the basis for the right of contribution among tortfeasors was as follows:

> We agree with Dean Prosser '[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrong doer, while the latter goes scott free'.

Id. at 15 (citing Prosser, *Torts*, § 50, at 307 (4th ed. 1971)).

As previously mentioned in *Doyle*, 101 Ill. 2d at 14, the court confirmed the *Skinner* court's logic by finding that "the Contribution Act focuses, as it was intended to do, on the culpability of the parties rather than on the precise legal means by which the

plaintiff is ultimately able to make each defendant compensate him for his loss." *Id*. at 14. In this case, Grossen are liable to Raab for common law negligence in failing to satisfy their duty to repair the fence when it was foreseeable from Grossen's negligence that a cow could escape and cause harm to others.

There is no case in Illinois which holds that a defendant sued under the Domestic Animals Running at Large Act may not file a contribution action against a third-party whose negligence contributed to cause the injury to a third-party. Illinois has long recognized comparative negligence under 735 ILCS 5/2-1116 (West 2016). Such a concept of comparative negligence or contributory negligence is similar in nature to the Contribution Act in that both address the allocation of fault. The courts in Illinois have found that a defendant sued under the Domestic Animals Running at Large Act may reduce its liability by showing that plaintiff was also at fault. In *Galloway v. Kuhl*, 346 Ill. App. 3d 844 (5th Dist. 2004), the court found that the doctrine of comparative negligence, like its predecessor, the doctrine of contributory negligence, applies in cases involving the Domestic Animals Running at Large Act to reduce or bar the plaintiff's recovery. *Id*. at 849.

Even prior to the adoption of comparative negligence, as *Galloway* noted, Illinois courts applied the doctrine of contributory negligence in cases involving the Domestic Animals Running at Large Act on numerous occasions. *See Guffey v. Gayle*, 332 Ill. App. 207 (1947) (where the court reversed a judgment for the plaintiff, whose truck turned over after attempting to avoid the defendant's pig that was running at large on the highway, because the question of contributory negligence was not fairly left to the determination of the jury). *See also DeBuck v. Godde*, 319 Ill. App. 609 (1943) (the

plaintiff's violation of Domestic Animals Running at Large Act and the defendant's negligent driving were matters to be determined by the jury); *Fugett v. Murray*, 311 Ill. App. 323 (1941) (the court considered the contributory negligence of the passenger of the vehicle, which collided with a bull, whose owner was in violation of the Domestic Animals Running at Large Act); *Weide v. Thiel*, 9 Ill. App. 223 (1881) (because it was plaintiff's fault that the defendant's bull had escaped from the pasture, she materially contributed to her own injury and cannot recover); *Ewing v. Chicago and Alton, R.R. Co.*, 72 Ill. 25 (1874) (although a violation of the statute preventing animals from running at large is evidence of negligence, the negligence of the plaintiff must be compared with the negligence of the defendant to determine its effect in preventing recovery).

If, as these cases teach, a defendant's liability under the Domestic Animals Running at Large Act may be reduced or even eliminated by a plaintiff's comparative fault, there is no reason why a defendant should be barred from seeking contribution from a party whose negligence also contributed to plaintiff's injury so that each is responsible for only its *pro rata* share of the common liability, as the Contribution Act contemplates.

In light of the admissions of Grossen in acknowledging their responsibility to maintain the portion of the fence where the cow is alleged to have escaped, the acts and omissions of Grossen created a foreseeable risk of harm to others. In these circumstances, "'every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons.'" *Simpkins v. CSX Transportation, Inc*., 2012 IL 110662, ¶ 19 (quoting *Widlowski v. Durkee Foods*, 138 Ill. 2d 369, 373 (1990)).

Here, it was ultimately Grossen who admitted responsibility to repair the portion of the fence where the cow is alleged to have escaped and Grossen who made repairs to the same portion of the fence to restrain cattle from escaping after the occurrence. Because their negligence formed the basis for a valid contribution claim by Frank for the injuries sustained by Raab, the trial court erred in granting summary judgment in their favor.

CONCLUSION

For all the forgoing reasons, third-party plaintiff/appellant Kenneth Frank, respectfully requests that this Court reverse the orders granting summary judgment on the amended third-party complaint for contribution in favor of the third-party defendants-appellees David A. Grossen and Virginia J. Grossen, and remand for further proceedings.

Respectfully submitted,

By: /s/ Raymond J. Melton

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KENNETH FRANK

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, and those matters to be appended to the brief under Rule 342(a), is 24 pages.

/s/ Raymond J. Melton

Raymond J. Melton

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APPENDIX

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SEP 07 2016

Sharon Ward
CLERK OF THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY ILLINOIS

STATE OF ILLINOIS
COUNTY OF JO DAVIESS } SS.

GEN. NO. 2013-L-27

KIRK RAAB

VS.

PLAINTIFF (S)

KENNETH FRANK

VS.

THIRD PARTY PLAINTIFF

DAVID A. GROSSEN AND VIRGINIA J. GROSSEN,

THIRD PARTY DEFENDANT (S)

JUDGE	COURT REPORTER	PLTF. ATTY. Melton CHECK IF PRESENT	
DEPUTY CLERK	A copy of this order has been sent to:	DEFT. ATTY. Frueger	

ORDER

Third Party Defendants' Motion for summary judgment coming on for hearing on todays date, and the Court, having listened to the argument of the parties and considered the briefs submitted, hereby enters the following Order:

Motion for summary judgment as to Count I of the Third party complaint is granted;

Motion for summary judgment as to Count II of the Third Party complaint is granted;

Motion for summary judgment as to count III of the third party complaint is denied.

progress call set for November 10, 2016 at 10:30 a.m.

Dated Sept. 7, 2016

Enter Will. A. Kelly

Judge

ATTORNEY DRAFTING ORDER

A32

FILED

NOV 27 2017

Sherry Wand
CLERK OF THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY ILLINOIS

2023236-RJM

STATE OF ILLINOIS
COUNTY OF JO DAVIESS } SS.

GEN. NO. 2013L27

Kirk Raab	VS.	David A. Grossen and Virginia J. Grossen
Third Party	PLAINTIFF (S)	Third Party DEFENDANT (S)

JUDGE	COURT REPORTER	PLTF. ATTY. Melton	CHECK IF PRESENT
DEPUTY CLERK	A copy of this order has been sent to:	DEFT. ATTY. Fueger	

Page 1 of 2

ORDER

On this date, pursuant to briefing schedule previously ordered by this Court, Third Party Defendants' Motion for Summary Judgment as to Count III came on for hearing. Following argument by both parties, IT IS HEREBY ORDERED that the Motion for Summary Judgment as to Count III is granted. The Court finds that the contract claim between Third Party Plaintiff and Third Party Defendants is the sole remaining basis for liability in this case, and that Claim cannot support a contribution claim pursuant to the Contribution Act. Count III is, accordingly, dismissed.

Dated Nov. 27, 2017

Enter Will A. Kelly
Judge

ATTORNEY DRAFTING ORDER

A33

ORIGINAL - Circuit Clerk's Copy DUPLICATE - Attorney for Plaintiff Copy TRIPLICATE - Attorney for Defendant Copy

A002

STATE OF ILLINOIS
COUNTY OF JO DAVIESS } SS.

GEN. NO. 2013L27

Kirk Raab

VS.

David A. Grossen
and
Virginia J. Grossen

PLAINTIFF (S)

DEFENDANT (S)

JUDGE	COURT REPORTER	PLTF. ATTY.	CHECK IF PRESENT
DEPUTY CLERK	A copy of this order has been sent to:	DEFT. ATTY.	

ORDER

cont'd.

Summary judgment is granted. This is a final and appealable order, with no just reason to delay enforcement or appeal.

ATTORNEY DRAFTING ORDER

Dated _____, 20___

Enter _____
Judge

ORIGINAL - Circuit Clerk's Copy DUPLICATE - Attorney for Plaintiff Copy TRIPLICATE - Attorney for Defendant Copy

EFILED
12/26/2017 9:53 AM
CLERK OF THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY ILLINOIS

3023236-RJM

ON APPEAL TO THE ILLINOIS APPELLATE COURT
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
JO DAVIESS COUNTY, ILLINOIS

KIRK RAAB, Plaintiff, vs. KENNETH FRANK, Defendant.	)	No.: 13 L 27
KENNETH FRANK, Third-Party Plaintiff-Appellant, vs. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellees.	)	

NOTICE OF APPEAL

NOW COMES the Defendant/Third-Party Plaintiff-Appellant, Kenneth Frank, and hereby appeals from the final judgment entered against him and in favor of the Third-Party Defendants-Appellees, David A. Grossen and Virginia J. Grossen, on November 27, 2017 granting the Third-Party Defendant-Appellees' Motion for Summary Judgment with respect to Count III of the Third-Party Complaint, and from the order entered against the Defendant/Third-Party Plaintiff-Appellant, Kenneth Frank, and in favor or the Third-Party Defendants-Appellees granting the Third-Party Defendants-Appellees' Motion for Summary Judgment as to Counts I and II of the Third-Party Complaint on September 7, 2016, copies of which are attached hereto.

By this appeal, the Defendant/Third-Party Plaintiff-Appellant, Kenneth Frank, will ask the Appellate Court, Second Judicial District, to reverse the final judgment of November 27, 2017 and the order of September 7, 2016 granting summary judgment in favor of the Third-Party Defendants-Appellees, David A. Grossen and Virginia J. Grossen, to remand for further proceedings, and to grant other relief to which the Defendant/Third-Party Plaintiff-Appellant, Kenneth Frank, is entitled on appeal.

Respectfully submitted,

By: /s/ Raymond J. Melton
Attorney for Defendant/Third-Party
Plaintiff-Appellant, Kenneth Frank

Raymond J. Melton 6270265
SmithAmundsen LLC
308 W. State Street, Suite 320
Rockford, IL 61101
(815) 904-8808
rmelton@salawus.com

3023236-RJM

FILED

SEP 07 2016

Sharon Wand
CLERK OF THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY ILLINOIS

STATE OF ILLINOIS
COUNTY OF JO DAVIESS } SS.

GEN. NO. 2013-L-27

KIRK RAAB

VS.

KENNETH FRANK

VS.

THIRD PARTY PLAINTIFF

DAVID A. GROSSEN AND VIRGINIA J. GROSSEN,

THIRD PARTY DEFENDANT

PLAINTIFF (S)

DEFENDANT (S)

JUDGE	COURT REPORTER	PLTF. ATTY. Melton CHECK IF PRESENT	
DEPUTY CLERK	A copy of this order has been sent to:	DEFT. ATTY. Frueger	

ORDER

Third Party Defendants' Motion for summary judgment coming on for hearing on today's date, and the Court, having listened to the argument of the parties and considered the briefs submitted, hereby enters the following Order:

Motion for summary judgment as to Count I of the Third party complaint is granted;

Motion for summary judgment as to Count II of the Third Party complaint is granted;

Motion for summary judgment as to Count III of the third party complaint is denied.

Progress call set for November 10, 2016 at 10:30 a.m.

Dated Sept. 7, 2016

Enter Will A. Kelly

Judge

ATTORNEY DRAFTING ORDER

A37

A006

FILED

NOV 27 2017

Sharon Ward
CLERK OF THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY ILLINOIS

20232326-RJM

STATE OF ILLINOIS
COUNTY OF JO DAVIESS } SS.

GEN. NO. 2013L27

Kirk Raab	David A. Grossen and Virginia J. Grossen
Third Party PLAINTIFF (S)	Third Party DEFENDANT (S)

VS.

JUDGE	COURT REPORTER	PLTF. ATTY. Melton CHECK IF PRESENT	
DEPUTY CLERK	A copy of this order has been sent to:	DEFT. ATTY. Fueger	

Page 1 of 2

ORDER

On this date, pursuant to briefing schedule previously ordered by this Court, Third Party Defendants' Motion for Summary Judgment as to Count III came on for hearing. Following argument by both parties, IT IS HEREBY ORDERED that the Motion for Summary Judgment as to Count III is granted. The Court finds that the contract claim between Third Party Plaintiff and Third Party Defendants is the sole remaining basis for liability in this case, and that Claim cannot support a contribution claim pursuant to the Contribution Act. Count III is, accordingly, dismissed.

Dated Nov. 27, 2017

Enter Will A. Kelly
Judge

ATTORNEY DRAFTING ORDER

ORIGINAL - Circuit Clerk's Copy DUPLICATE - Attorney for Plaintiff Copy TRIPLICATE - Attorney for Defendant Copy

STATE OF ILLINOIS
COUNTY OF JO DAVIESS } SS.

GEN. NO. 2013L27

PLAINTIFF (S)	VS.	DEFENDANT (S)
Kirk Raab		David A. Grossen and Virginia J. Grossen

JUDGE	COURT REPORTER	PLTF. ATTY.	CHECK IF PRESENT
DEPUTY CLERK	A copy of this order has been sent to:	DEFT. ATTY.	

ORDER

cont'd.

Summary judgment is granted. This is a final and appealable order, with no just reason to delay enforcement or appeal.

ATTORNEY DRAFTING ORDER

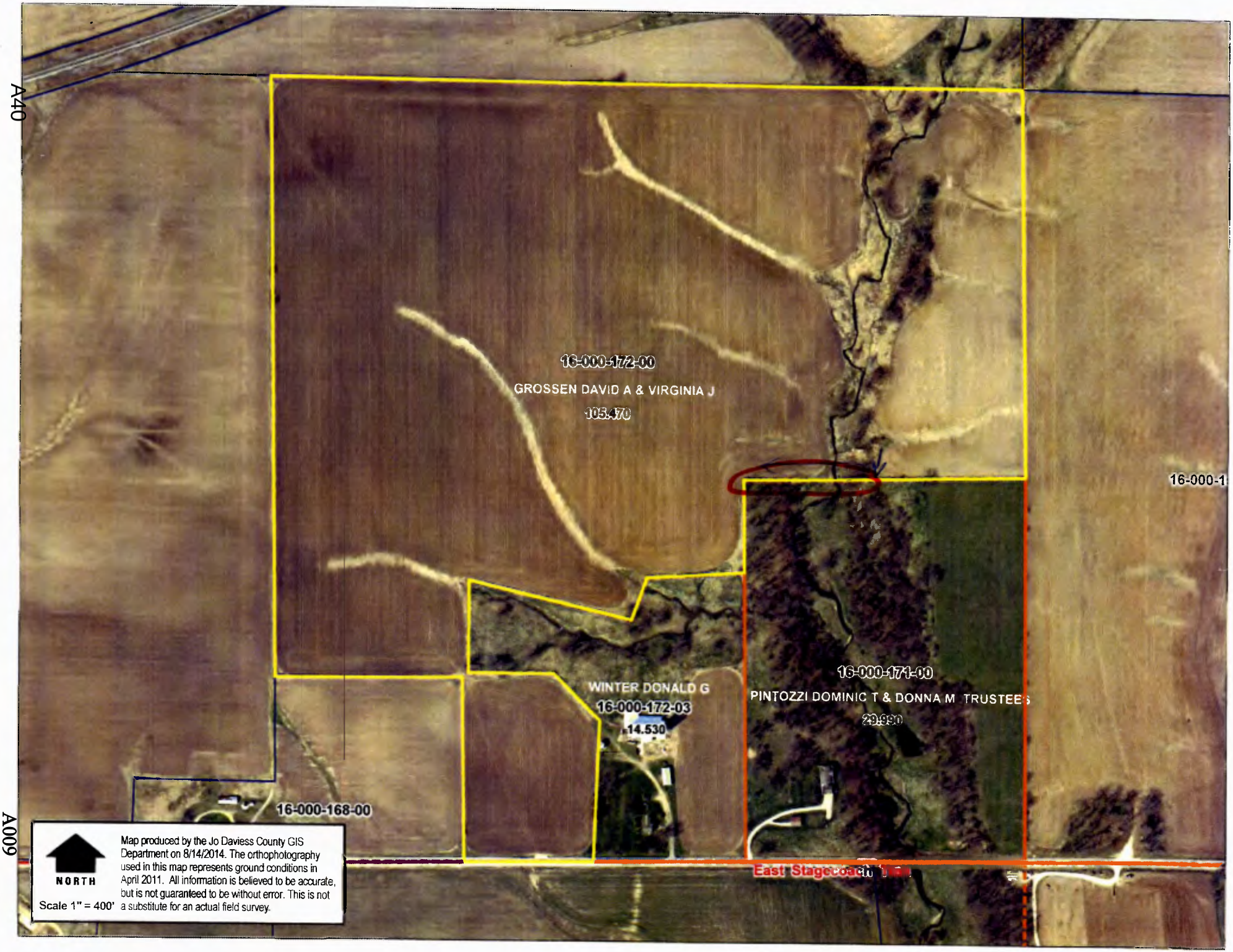
Dated _____, 20___

Enter _____
Judge

ORIGINAL - Circuit Clerk's Copy
A39

DUPLICATE - Attorney for Plaintiff Copy

TRIPLICATE - Attorney for Defendant Copy
A008



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Docket No. 2-17-1040

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant, KENNETH FRANK, Third-Party Plaintiff/Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants/Appellees.	On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Jo Daviess County, Illinois No. 13 L 27 The Honorable William A. Kelly Judge Presiding

NOTICE OF FILING

TO: Stephanie R. Fueger
O'Connor & Thomas, PC
1000 Main Street
Dubuque, Iowa 52001
sfueger@octhomaslaw.com

PLEASE TAKE NOTICE that on the 29th day of May, 2018, the undersigned submitted for electronic filing with the Illinois Appellate Court, Second Judicial District, the Brief and Argument of third-party plaintiff/appellant, a copy of which, along with this notice of filing with proof of service, is served on all counsel of record.

Respectfully submitted,

By: /s/ Raymond J. Melton
Attorney for Third-Party Plaintiff/
Appellant KENNETH FRANK

Raymond J. Melton
SmithAmundsen LLC
308 West State Street, Suite 320
Rockford, Illinois 61101-1140
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PROOF OF SERVICE

I, Stephanie A. Carter, a non-attorney, on oath state that I served this notice and documents referenced therein via electronic mail to the attorney listed on the attached notice of filing at the email address listed on May 29, 2018.

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

/s/ Stephanie A. Carter
SMITHAMUNDSEN LLC

E-FILED
Transaction ID: 2-17-1040
File Date: 7/2/2018 2:25 PM
Robert J. Mangan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

Docket No. 2-17-1040

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant.	Appeal from the Circuit Court, Fifteenth Judicial Circuit, Jo Daviess County, Illinois Circuit Court No. 13 L 27 The Honorable William A. Kelly, Judge Presiding.
KENNETH FRANK, Third- Party Plaintiff-Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellees.	

BRIEF OF THIRD-PARTY DEFENDANTS-APPELLEES

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ATTORNEYS FOR APPELLEES

Oral Argument is requested.

POINTS & AUTHORITIES

I. The trial court correctly dismissed Frank's negligence action because it failed to allege that the Grossens were liable in tort to the Plaintiff since it was not premised on the Animals Running Act.

Vroegh v. J & M Forklift,
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A. Liability for injury or damage caused by estrays must be predicated on the Animals Running Act.

Heyen v. Willis,
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Hopkins v. Powers,
113 Ill.2d 206 (1986) 13, 14

Corona v. Malm,
315 Ill.App.3d 692 (2nd Dist. 2000) 13

B. Because Frank is an "owner" of livestock under the Animals Running Act, he cannot bring suit under that statute for injuries caused by the livestock.

Allendorf v. Redfearn,
2011 Ill.App.2d 110130 (2nd Dist. 2011) 14, 15

II. The trial court correctly granted summary judgment on Frank's claim under the Fence Act because Frank failed to comply with the statutory prerequisites set forth in the Act.

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Fox v. Fearneyhough,
85 Ill.App.2d 371 (4th Dist. 1967).....18, 19

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In the Matter of the Estate of Wallis,
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III. The trial court properly dismissed Frank's contribution claim based on breach of contract as the Grossens owed no duty to the Plaintiff under the contract.

Cirilo's, Inc. v. Gleeson, Sklar & Sawyers,
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Gilley v. Kiddel,
372 Ill.App.3d 271 (2nd Dist. 2007) 23, 24

Ball Corp. v. Bohlin Bldg. Corp.,
187 Ill. App. 3d 175 (1st Dist. 1989)..... 24

STATEMENT OF THE FACTS

David A. Grossen and Virginia J. Grossen (hereinafter "the Grossens") are the owners of a parcel of real estate in rural Jo Daviess County ("Parcel A"). (C159-60) Virginia inherited Parcel A from her mother in 2005 and executed a quit claim deed to convey the property to her and her husband jointly in 2006. (C161) The Grossens rent out Parcel A to lessees for agricultural purposes, but livestock are not kept on Parcel A. (C189) The parcel of land adjacent to the Grossens' parcel ("Parcel B") is owned by the Dominic T. and Donna M. Pintozzi Trust, with Dominic and Donna Pintozzi as Trustees ("Pintozzi"). (C162-3) A fence runs between Parcel A and Parcel B. (C164)

Like the Grossens, the Pintozzi's rent out Parcel B to a lessee, Kenneth Frank (hereinafter "Frank"). (C162-3) However, unlike the Grossens' lessee, Frank uses Parcel B for pasturing cattle. (C168-9) Frank is a farmer with decades of experience raising cattle and over forty years of experience building fences. (C165-7) Frank has rented Parcel B from Pintozzi since 2009. (C162-3) Before agreeing to rent Parcel B, Frank inspected its condition to ensure that it was suitable for pasturing his cattle. (C168-9) Specifically, Frank looked at the condition of the fence that divided Parcels A and B and determined that the fence was sufficient to keep his cattle enclosed in Parcel B. (C168-9) Once he

began renting Parcel B, Frank rode his ATV out to the fence and inspected it every Sunday. (C170-1)

Frank and Pintozzi entered into an oral lease agreement regarding Parcel B. (C176) One of the terms of the oral lease was that Frank was responsible for maintaining the fences on Parcel B. (C177) In determining exactly what obligation he had, Frank called Ed Meyer, Pintozzi's predecessor owner of Parcel B, and discussed fence repair and maintenance related to Parcel B. (C177). It was during that conversation that Frank became aware of an Agreement in Connection with Line Fences that had been signed in 1969 by Meyer, the former owner of Parcel B, and Virginia's relatives, the former owners of Parcel A. (C177-80) Prior to 2011, the Grossens were not aware of and had never seen the Agreement in Connection with Line Fences. (C181-2)

Frank knew the Grossens, knew they owned Parcel A but did not live on it, and knew how to contact them if necessary. (C768-9) The Grossens were not aware that Frank was renting Parcel B from Pintozzi or that he was using Parcel B to pasture his cattle. (C172-5) In early July of 2009, after Frank had begun renting Parcel B, there were heavy rainstorms that damaged portions of the fence that divided Parcel A and Parcel B. (C168-9) Frank did not call the Grossens after the rainstorm to let them know that the fence had been damaged or that it may need repairs. (C168-9) Without input or consultation

with the Grossens, Frank made repairs to the fence between Parcels A and B. (C168-9).

In July of 2010, heavy rains again damaged the fence that divided Parcels A and B. Again, Frank did not call the Grossens after the rainstorm to let them know that the fence had been damaged or that it may need to be fixed. (C168-9) Without notifying the Grossens, Frank again repaired the fence between Parcels A and B. (C168-9) In July of 2011, storms once again damaged the fence that divided Parcels A and B. As with the prior two years, Frank did not contact the Grossens to inform them that the fence had been damaged or that it may be in need of repairs. (C168-9) Frank fixed the fence between Parcels A and B without input or consultation from the Grossens. (C168-9) Frank believed that the repairs that he had made to the fence in 2009, 2010 and 2011 were sufficient to keep his cattle restrained. (C168-9)

On November 10, 2011, Frank's cattle escaped and entered onto the roadway, specifically Stagecoach Trail. (C80-9) A squad car being driven by Plaintiff Kirk Raab ("Plaintiff") was westbound on Stagecoach Trail when it collided with Frank's escaped cows. (C12, C80-9) After this accident, Frank contacted the Grossens to inform them that there had been an accident involving his cows. (C184) Frank told the Grossens that he believed their fence was in bad repair. (C184) As soon as the Grossens were made aware that Frank believed their portion of the fence to be in need of repair, they made plans to

have work done on the fence. (C186) In the spring of 2012, the Grossens spent $2,000 to clear brush around the west side of the fence dividing Parcels A and B, and to have the western half of that fence replaced with new post and new wire. (C187-88)

Plaintiff filed suit against Frank for violations of the Domestic Animals Running At Large Act on November 8, 2013 seeking damages for personal injuries sustained in the accident. (C12-15) On August 14, 2014 Frank filed a third-party complaint against the Grossens seeking contribution based on theories of negligence, breach of duty under the Fence Act, and breach of contract. (C80-89) On June 9, 2016, Frank settled with the Plaintiff and the Plaintiff's claims against Frank were dismissed with prejudice. (C217-8) The Grossens moved for summary judgment on all claims against them on June 9, 2016. (C154-216) On September 7, 2016, the trial court dismissed Frank's claims for negligence and breach of duty under the Fence Act, but denied the Grossen's motion for summary judgment on the breach of contract claim. (C872)

The Grossens filed another motion for summary judgment on August 31, 2017. (C915-8) Their argument regarding the breach of contract claim in their first motion for summary judgment was that the contract did not run with the land. (C201-2) In their second motion for summary judgment, the Grossens argued that they owed no duty to the Plaintiff under the contract and

therefore it could not be the basis for a contribution action. (C917-18) On November 27, 2017, the trial court granted the Grossen's motion for summary judgment and dismissed the only remaining claim against the Grossens. (C1115) Frank filed a Notice of Appeal on December 26, 2017. (C1124)

ARGUMENT

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c). The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 162, 862 N.E.2d 985 (2007). The factual issues in dispute must be material to the essential elements of the cause of action or defense; those which are unrelated, regardless of how sharply controverted, do not warrant the denial of summary judgment. *Boylan v. Martindale*, 103 Ill. App. 3d 335, 340, 431 N.E.2d 62 (2nd Dist. 1982).

If the third-party plaintiff fails to establish any element of the cause of action, summary judgment for the third-party defendant is proper. *Bagent*, 224 Ill.2d at 163. Where, as here, the third-party plaintiff seeks recovery based on the third-party defendant's alleged negligence, the third-party plaintiff must plead and prove the existence of a duty owed by the third-party defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach. *Bruns v. City of Centralia,* 2014 IL 116998, 21 N.E.3d 684, 688-9 (2014). Whether a duty exists is a question of law appropriate for summary judgment. *Id.* at 689. " 'In the absence of a showing from which the court could infer the

existence of a duty, no recovery by the [third-party] plaintiff is possible as a matter of law and summary judgment in favor of the [third-party] defendant is proper.' " *Id.* (quoting *Vesey v. Chicago Housing Authority*, 145 Ill.2d 404, 411, 583 N.E.2d 538 (1991)).

Frank seeks contribution from the Grossens for damages he paid to the Plaintiff as a result of his cattle running at large and injuring the Plaintiff. (C80-9) Under the Joint Tortfeasor Contribution Act, "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them." *Vroegh v. J & M Forklift*, 165 Ill.2d 523, 528 (1995) (quoting 740 ILCS 100/2). A party's obligation to make contribution rests on his liability in tort to the plaintiff in the underlying action. *Id.* There is no requirement that the bases for liability among the contributors be the same. However, some basis for liability to the original plaintiff must exist. *Id.* In this case, since the Grossens are not liable in tort to the Plaintiff, they cannot be held liable to Frank for contribution. *Vroegh*, 165 Ill. 2d at 528 (1995).

I. The trial court correctly dismissed Frank's negligence action because it failed to allege that the Grossens were liable in tort to the Plaintiff since it was not premised on the Animals Running Act.

The Plaintiff's lawsuit against Frank was filed based on the Domestic Animals Running at Large Act ("Animals Running Act"), which provides

redress for injuries caused by animals that escape their confinement. 510 ILCS 55/1.1. As used in the statute, "running at large" or "run at large" means livestock that stray from confinement or restraint and from the limits of the owner. *Id.* Pursuant to the Act, only owners or keepers of livestock are liable for damages. *Id.* The Act provides the livestock owner with an opportunity to avoid strict liability if he or she used reasonable care in restraining such animal and the owner had no knowledge that the animal was running at large. *Id.*

A. Liability for injury or damage caused by estrays must be predicated on the Animals Running Act.

Count I of Frank's contribution action against the Grossens is based on common law negligence. (C80-3) Frank alleges in Count I of his complaint that the Grossens "allowed a boundary fence to exist…when…the boundary fence was not reasonable to enclose [Frank's] cattle which were contained on the adjacent property…" (C82-3) Frank does not assert that the Grossens were the cattle's owners or keepers. (C80-3) The Grossens filed a motion for summary judgment arguing that liability for injury or damage to estrays must be predicated on the Animals Running Act, and that the Grossens cannot be liable under that Act because they are not the owners or keepers of the wandering cattle. (C190-206) The trial court granted the Grossens' motion for summary judgment as to Count I. (C872)

Frank argues that the trial court erred in dismissing Count I because the Animals Running Act does not preempt his common law negligence claim, and therefore the Grossens do not need to be owners or keepers of cattle to be found liable. (R17) This Court was presented with the same argument in *Douglass v. Dolan*, and in response this Court explained,

> "…The issue is not one of 'preemption,' but rather whether Illinois law has ever imposed liability on landowners for injuries caused by the livestock that escaped from the landowners property. If Illinois law does not impose liability in such a situation and if the [Animals Running] Act does not apply, then Count V of Douglass' complaint fails to state a cause of action."

286 Ill.App.3d 181, 186 (1997). The *Douglass* Court went on to hold that unless a landowner is an owner or keeper of livestock as contemplated by the Animals Running Act, the landowner has no common law duty to guard against injuries to persons caused by livestock that had escaped from their enclosures. *Id.* 186-7.

Prior to the enactment of the Animals Running Act in 1871, there was no liability in Illinois for injury or damage caused by an animal running at large. *Bulpit v. Matthews*, 145 Ill. 345, 349 (1893) ("expressly recognized the right of owners of domestic animals to permit them to run at large, and … required the proprietors of fields to surround them with a good and sufficient fence before they could maintain an action for the trespass of stock therein.") If the owner of livestock could not be held liable for injuries caused by his livestock before

the enactment of the Animals Running Act, then a person with absolutely no ownership interest in the livestock, such as the Grossens in this case, could not be held liable either. *Douglass*, 286 Ill.App.3d. at 187.

Due to changing social conditions, the Illinois Legislature made a deliberate choice to establish a duty to fence in livestock when it adopted the Animals Running Act in 1871. *Heyen v. Willis*, 94 Ill.App.2d 290, 296 (4th Dist. 1968). In making this change, the legislature expressly limited the liability for damage caused by estrays to their owner or keeper. *Id.* Because a cause of action did not exist prior to the enactment of the Animals Running Act, the only basis to hold a person liable for damage caused by estrays is through the Animals Running Act. *Heyen*, 94 Ill.App.2d at 296 ("the duty to guard against injury or damage by estrays is cast by law upon the owner or keeper of the animals, and liability for injury or damage caused by them must be predicated upon the [Animals Running] Act"); *Corona v. Malm*, 315 Ill.App.3d 692 (2nd Dist. 2000) ("there is no independent basis for the action apart from the [Animals Running] Act itself.")

It is not uncommon for a statutory cause of action to limit relief by specifying which persons may seek redress for wrongs. For instance, in *Hopkins v. Powers*, the plaintiff who had settled several damage claims against him for accidents caused by his intoxication, brought an action for contribution against the tavern where he had consumed the alcohol based on the Dramshop Act.

Hopkins v. Powers, 113 Ill.2d 206, 209 (1986). The Illinois Supreme Court found that the plaintiff was not among the class of persons who could bring an action against the dramshop under the Dramshop Act because recovery under the Act is limited to innocent third persons who are injured as result of the sale or gift of intoxicating beverages. *Id.* at 211-2. Because the plaintiff himself could not bring a dramshop action against the tavern, the Court concluded that to permit the contribution action would simply afford the plaintiff a means of circumventing the statutory restriction. *Id.* at 212.

The same concern plagues Frank's negligence action against the Grossens. The Plaintiff cannot and did not sue the Grossens because the Grossens cannot be held liable under the Animals Running Act as they are not the owners or keepers of the wandering cattle. (C12-15, C649) Frank cannot circumvent the parameters put in place by the legislature by disguising his claim under the Animals Running Act as a contribution claim for common law negligence.

B. Because Frank is an "owner" of livestock under the Animals Running Act, he cannot bring suit under that statute for injuries caused by the livestock.

One of the objectives of the Animals Running Act is to protect members of the public who cannot be expected to know that animals may have escaped their confinement and pose a risk to them. *Allendorf v. Redfearn*, 2011 Ill.App.3d 110130, ¶¶ 29-34, 954 N.E.2d 414 (2nd Dist. 2011). The Animals

Running Act affords protection to innocent bystanders or third parties who are injured when an owner's cattle escapes and causes harm. *Id.* at ¶¶ 34-5. Therefore, one who keeps or harbors an animal within the meaning of the Animals Running Act cannot recover for damages caused by the escaped animal. *Id.* ("We therefore believe that, just as an animal's "owner" cannot recover under the Animal Control Act, neither can someone who falls within the definition of an "owner" under the [Animals Running] Act recover under that statute.") By bringing this third-party contribution suit against the Grossens, Frank attempts to bypass this prohibition, as well as the established case law of this state which bars such recovery.

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

II. The trial court correctly granted summary judgment on Frank's claim under the Fence Act because Frank failed to comply with the statutory prerequisites set forth in the Act.

Frank also seeks contribution from the Grossens under the Illinois Fence Act ("Fence Act"). Frank contends that the Grossens failed to maintain their portion of the division fence under the Fence Act. Frank further alleges that there is a genuine issue of material fact as to whether the cattle that caused the collision at issue escaped through the portion of the division fence that the Grossens were required to maintain. (C247) Frank wants to use the Fence Act to impose the duty of maintaining the fence on the Grossens, while disregarding his own responsibilities to comply with the applicable prerequisites under the Act. This cherry-picking should not be allowed and for the reasons discussed below, the trial court correctly granted summary judgment in favor of the Grossens on Count II.

To settle issues about the sufficiency of a fence and to spell out division fence responsibilities, the Illinois Legislature enacted the Fence Act. The Fence Act sets forth the general rules for maintenance of division or partition fences between owners of adjoining parcels of land. *See* 765 ILCS 130, *et seq*. The Act more specifically provides that where two persons have lands adjoining, each shall maintain a just proportion of the division fence between them. *See* Id. at §3. "Just proportion" does not mean equal, and thus, adjoining landowners are not required to split the cost of maintaining a division fence between their properties. *In the Matter of the Estate of Wallis*, 276 Ill. App. 3d 1053, 1058-59 (4th Dist.1995). This Act addresses payment for the construction of a division

fence and the costs of maintenance of the same as between adjoining landowners. *See* 765 ILCS 130 at §§ 3-4.

The Fence Act also addresses the manner in which complaints by one adjoining landowner regarding the failure of the other to construct or maintain the division fence are to be handled. *See* Id. at §§6 – 7. In such instances, the complaining party must lodge the complaint with the established fence viewers in their area who, upon receipt of the same, are responsible for viewing the fence and determining whether it is sufficient. *Id.* Once the fence viewers reach a decision as to the sufficiency of the fence or the responsibility of either landowner as to construction or maintenance, the Act provides that their decision shall be reduced to writing and filed with the town or county clerk. *Id.* at §10. The Act also provides that if the assigned fence viewers fail to make a decision within ninety days of the complaint being submitted to them, and if the county board also so fails, either party may then file a complaint in circuit court to address any division fence issues. *Id.* at §10.1. If an adjoining landowner refuses to make or maintain a proportion of the fence after being required to do so, the other landowner may undertake the repairs, and bring suit in circuit court to recover the non-payor's share of the same. *Id.* at §11.

In *Dexter v. Heaghney*, this Court was presented with the question of whether a plaintiff landowner could recover for damages he incurred when his neighbor's livestock destroyed his crops by entering through his own poorly

maintained portion of the division fence. *Dexter v. Heaghney*, 47 Ill. App. 205, 205-6 (2nd Dist. 1892). The *Dexter* court held that, despite the fact that the plaintiff had failed to maintain his portion of the division fence, the plaintiff could still recover damages caused by his neighbor's livestock. *Id.* at 207. The neighbor was responsible for knowing the condition of the division fence and he elected to put his cattle out into the field. *Id.* If the division fence was not sufficient (as this Court later found), then the neighbor had a remedy against the plaintiff pursuant to the Fence Act. *Id.* The neighbor could have brought an action against the plaintiff requiring him to repair the insufficient fence or the neighbor could have made the necessary repairs, then brought an action against the plaintiff to recover for the neighbor's share of any costs. *Id.* What the neighbor had no right to do, according to the Court, was to put his livestock into an enclosure with an insufficient fence, then attempt to avoid liability for damages by claiming that it was plaintiff's responsibility to maintain the fence. *Id.*

In a similar case, *Fox v. Fearneyhough*, the plaintiff released his cattle into a pasture knowing they could get on defendant's land through the defendant's portion of the division fence, which was in disrepair. 85 Ill.App.2d 371, 373-4 (4th Dist. 1967). Some of the plaintiff's cattle died by foundering when they grazed on defendant's crops. *Id.* at 373. The plaintiff brought suit against the defendant based on defendant's failure to maintain his portion of the division

fence. *Id.* at 372. The defendant filed a motion to dismiss claiming that plaintiff was barred from bringing the action because he failed to give the required notice under the Fence Act. *Id.* at 373.The Appellate Court agreed and held that,

> "The objection to the alleged statutory liability, we believe, is well-taken for the reason that the Fencing Act appears to us to be self-contained and plaintiff's remedy for defendant's failure to maintain his portion of the fence is set forth in Section 11 which requires ten days' notice to the parties in default and then, if repairs have not been made, the party giving notice may repair the fence and impose liability upon the nonrepairing party for the costs thereof."

Fox, 85 Ill. App.2d at 373–74. The Court went on to emphasize that plaintiff was aware of the deteriorated condition of defendant's portion of the division fence, yet plaintiff still chose to pasture his cattle in the field. *Id.*

Frank is akin to the plaintiff in *Fox v. Fearneyhough*. *Id.* Frank testified at his deposition that it was his routine to take his ATV out every Sunday and check on the condition of the division fence between Parcel B and Parcel A. (C318-9) Frank knew that the Grossens did not live on Parcel A and that he would be much more familiar with the condition of the division fence than the Grossens. (C1062, C1069) If at any time during his regular Sunday inspection Frank believed that any portion of the fence that the Grossens were responsible to maintain was insufficient, he could have alerted them to that fact. Yet year after year, Frank chose not to do so. (C168-9, C316-7).

Frank could have exercised his rights under the Fence Act to require the Grossens to repair portions of the fence he deemed insufficient, but again, he chose not to do so. (C1062) If Frank had exercised his right to file a complaint with the area fence viewers, and if the Grossens had failed to repair the portion of the fence determined to be their responsibility, Frank could have undertaken the repairs, then sought recovery from the Grossens for their share of those costs. *See* 765 ILCS 130/6. Again, Frank failed to exercise any of those rights. (C1062) Instead, Frank continued to turn his cattle out into Parcel B. Only after his cattle escaped and caused damage to a third party did Frank ever have a conversation with the Grossens about the condition of the division fence. (C1065)

Frank has no right of recovery against the Grossens under the Fence Act for damages caused by his own cattle escaping from their enclosure. As was noted by the *Dexter* court, Frank had a remedy available to him against the Grossens under the Fence Act, but failed to pursue it. *Dexter*, 47 Ill.App. at 207. Frank cannot now pass the buck on to the Grossens because he made the choice to turn his cattle out into pastures enclosed by fences that he now argues were insufficient to keep his cattle confined.

III. The trial court properly dismissed Frank's contribution claim based on breach of contract as the Grossens owed no duty to the Plaintiff under the contract.

Count III of Frank's contribution complaint alleges that there was an Agreement in Connection with Line Fences ("contract") in effect at the time of the accident in which Plaintiff was injured by Frank's cows. (C86-C89) The contract at issue was recorded in the Jo Daviess County Recorder's office on January 7, 1970 and was entered into by the Grossens' relatives who previously owned Parcel A and Pintozzi's predecessors who previously owned Parcel B. (C100-2) The contract states that both parties will be responsible for maintaining their half of several division fences, many of which no longer exist. (C100-2) The contract does not provide for any mechanism to enforce each party's obligation or any remedy if a party fails to perform under the contract. (C100-2) Frank contends in his complaint for contribution that the Grossens' breach of the contract was the proximate cause of the injuries sustained by the Plaintiff. (C88)

The Contribution Act provides that contribution is permitted between parties who are both subject to "liability in tort." 740 ILCS 100/2(a). Frank claims that as long as the contributors are potentially "subject to tort liability" to the plaintiff, the basis for contribution against the tortfeasor is irrelevant. (R46-7) Frank heavily relies on *Cirilo's, Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill.App.3d 494 (1987) in arguing that the phrase "subject to liability in tort" includes duties giving rise to a tort that arose from a contract.

In *Cirilo's*, an employee of the plaintiff had embezzled nearly half a million dollars over a five-year period by periodically making out company checks to herself and cashing them at the plaintiff's bank. *Id.* at 495. The plaintiff sued its accounting firm for negligence. The accounting firm in turn filed a third-party complaint for contribution against the plaintiff's bank, alleging that the bank failed to exercise ordinary care in paying the forged checks. *Id.* The trial court dismissed the third-party complaint, concluding that the bank was not a party "subject to liability in tort" within the meaning of the Contribution Act because the relationship between the bank and the plaintiff was governed by the contract, not tort law. *Id.* The appellate court reversed, finding that the bank could be deemed to have committed a breach of its duty to plaintiff. *Id.* at 496. Therefore the bank and the accounting firm were "subject to liability in tort" even though the bank's duties to the plaintiff arose from its contracts with the plaintiff, not from tort law. *Id.* at 497. Two later decisions have rejected the reasoning in *Cirilo's*. *See People ex. Rel. Hartigan v. Community Hosp. of Evanston*, 189 Ill.App.3d 206, 213–214 (1st Dist. 1989) (noting that the *Cirilo's* court cited to no precedent to support its conclusion that the bank's breach of statutory and contractual duties amounted to tortious conduct.); *see also Wieboldt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 169–71 (N.D.Ill.1990) (mentioning that the decision in *People ex. Rel. Hartigan v.*

Community Hosp. of Evanston is more consistent with Illinois Supreme Court precedent than *Cirilo's).*

Even assuming that a breach of contract sometimes may result in tort liability, there is still no basis to hold the Grossens liable to the Plaintiff in this case. Frank overlooks an important difference between the *Cirilo's* case and the case at bar. In *Cirilo's*, the appellate court found that there was a contract between the third-party defendant and the original plaintiff wherein the third-party defendant owed duties to the original plaintiff. *Id.* 496-7. In this case, the contract at issue is between Frank's predecessors and the Grossens' predecessors. (C100-2) The Plaintiff is not a party to the contract and the contract does not set forth any duties owed by the Grossens to the Plaintiff. (C100-2)

In order to have a valid contribution claim against the Grossens, Frank must show that the Plaintiff suffered an injury because the Grossens breached a duty to the Plaintiff. *Gilley v. Kiddel*, 372 Ill.App.3d 271, 274-5 (2nd Dist. 2007). Whether a duty exists is normally a question of law, and the answer hinges on whether the parties stood in such a relationship to each other that the law would impose an obligation on the defendant to act reasonably for the protection of the plaintiff. *Id.* When a defendant is accused of negligence due to its failure to perform an act allegedly required by a contractual obligation, the existence of a duty will be determined by the terms of the contract, and the

scope of the defendant's duty will not be extended beyond those terms. *Gilley,* 372 Ill.App.3d at 275.

The Grossens owed no duty to the Plaintiff under the terms of the contract as the Plaintiff was not a party to the contract, nor was the Plaintiff a third-party beneficiary of the contract. (C100-2) Pursuant to Illinois law, there is a strong presumption that parties to a contract intend that the contract's provisions apply only to them and not to third parties. In order to overcome that presumption, the implication that the contract applies to third parties must be so strong as to be practically an express declaration. *Ball Corp. v. Bohlin Bldg. Corp.*, 187 Ill. App. 3d 175, 177(1st Dist. 1989). Furthermore, liability to a third-party must affirmatively appear from the contract's language and from the circumstances surrounding the parties at the time of its execution, and cannot be expanded or enlarged simply because the situation and circumstances may justify or demand further or other liability. *Id.* Given that the Plaintiff in this case is not even mentioned in the contract, it is clear that the parties to the contract did not intend for the provisions to apply to the Plaintiff. (C100-2)

In a contribution action, there must be a showing that the party from whom contribution is sought could be held liable in tort to the original plaintiff. *Laue v. Leifheit*, 105 Ill.2d 191, 195-6 (1984). As discussed above, the Plaintiff in this case would have no basis to claim a breach of contract against the Grossens. It follows that Frank cannot bring a contribution action against the

Grossens based on a breach of the contract that has no relation to the original Plaintiff. *Id.*

CONCLUSION

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

The trial court also correctly granted the Grossens' motion for summary judgment as to Frank's claim under the Fence Act. Frank failed to exercise his rights under the Fence Act to require the Grossens to repair portions of the fence he deemed insufficient. Frank, therefore, has no right of recovery against the Grossens for damages caused by his own cattle escaping from their enclosure because he failed to comply with the statutory prerequisites set forth in the Fence Act.

Finally, the trial court properly dismissed Frank's breach of contract claim because the Grossens owed no duty to the Plaintiff under the terms of the contract as the Plaintiff was not a party to the contract, nor was the Plaintiff a third-party beneficiary of the contract.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,415 pages or words.

Dated this 2nd day of July, 2018.

/s/ McKenzie R. Hill

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PROOF OF SERVICE

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E-FILED
Transaction ID: 2-17-1040
File Date: 8/7/2018 5:51 PM
Robert J. Mangan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

Docket No. 2-17-1040

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant, KENNETH FRANK, Third-Party Plaintiff/Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants/Appellees.	On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Jo Daviess County, Illinois No. 13 L 27 The Honorable William A. Kelly Judge Presiding

REPLY BRIEF OF THIRD-PARTY PLAINTIFF/APPELLANT KENNETH FRANK

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ORAL ARGUMENT REQUESTED

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Docket No. 2-17-1040

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant,	On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Jo Daviess County, Illinois
KENNETH FRANK, Third-Party Plaintiff/Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants/Appellees.	No. 13 L 27 The Honorable William A. Kelly Judge Presiding

REPLY BRIEF OF THIRD-PARTY PLAINTIFF/APPELLANT KENNETH FRANK

ARGUMENT

I. AS TO COUNT III, THE GROSSENS ARE LIABLE FOR CONTRIBUTION DUE TO THEIR BREACH OF A CONTRACTUAL OBLIGATION TO REPAIR THE FENCE UNDER THE FENCE AGREEMENT

Count III of the amended third-party complaint for contribution (a breach of contract claim) brought by Kenneth Frank ("Frank") against David Grossen and Virginia Grossen (the "Grossens") is premised on the Grossens' failure to repair and maintain the

fence based upon breach of a Fence Agreement that ran with the land (R.C86-89). The Grossens contend that count III was properly dismissed because they did not owe a duty to the plaintiff, Kirk Raab ("Raab"), under the Fence Agreement. However, the Grossens have failed to acknowledge the applicability of *Cirilo's, Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill. App. 3d 494, 497 (1st Dist. 1987), among other cases cited in the opening brief (at 15-16) which held that a duty arising from a contract can subject a joint tortfeasor to liability in tort to the injured party.

The cases relied upon by the Grossens for their assertion that they do not owe a duty to Raab under the Fence Agreement are distinguishable. In *Hartigan v. Community Hospital of Evanston*, 189 Ill. App. 3d 206 (1st Dist. 1989), the attorney general filed suit against the director of a hospital and a bank alleging that the hospital and the bank mishandled a dissipated restricted endowment fund donated to the hospital. After the bank settled the claim brought against it by the attorney general's office, the trial court dismissed the hospital's crossclaim against the bank.

The court in *Hartigan* found that count I of the complaint directed at both defendants was based on breach of a fiduciary duty which is not a tort under Illinois precedent making the Contribution Act inapplicable. *Id*. at 213. It expressly refused to decide whether the *Cirilo's* court's reasoning properly applied to the facts at bar. *Id*. at 214. Because the original plaintiff's complaint did not contain allegations amounting to a tort claim against the original defendants, it was unnecessary for the court to consider whether the bank's breach of statutory duties amounted to tortious conduct or subjected the third-party defendant to liability in tort under the Contribution Act. *Id*. at 214.

Wieboldt Stores, Inc. v. Schottenstein, 111 B.R. 162 (N.D. Ill. 1990), involved a federal bankruptcy action where the original plaintiff sued the defendant for a fraudulent transfer. The defendant accused of the fraudulent transfer filed a third-party complaint. The third-party defendant moved to dismiss that complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b). *Id.* at 164. Similar to *Hartigan*, the *Wieboldt* court reasoned that the original defendant's third-party contribution claims for breach of fiduciary duty, violation of federal and state conveyance law, and violation of the Illinois Business Corporation Act (IBCA) were pre-empted because the plaintiff's original claim against the original defendant was breach of fiduciary duty which does not sound in tort. *Id*. at 169.

Here, the original claim by Raab against Frank arose out of the Domestic Animals Running at Large Act and not out of a breach of fiduciary duty claim. Further, the Grossens' obligation to repair the fence does not arise out of a fiduciary duty, federal or state conveyance law or the IBCA, but rather, a Fence Agreement that runs with the land. The Grossens have not argued that Raab's original claim under the Domestic Animals Running at Large Act is not tortious in nature creating an absolute bar to any contribution claim. Thus, the *Hartigan* and *Wieboldt* cases are not analogous because they involve a breach of a fiduciary duty claims between the original plaintiff and original defendants which pre-empted any subsequent contribution actions. In contrast, the *Cirilo's* court found that a contractual obligation is sufficient to create liability in tort under the Contribution Act.

The Grossens claim that *Cirilo's* is distinguishable from this case because in *Cirilo's,* there was a contract between the third-party defendant and the original plaintiff;

whereas here, the contract is between the predecessors of the Grossens and predecessors of the Dominic Pintozzi, from whom Frank leased the land (R.81, 100-02). If, as the Grossens suggest, there must be a contract between them and Raab in order for the Contribution Act to apply, such a principle would require contribution to derive from the plaintiff's original claim. This argument must fail. The Contribution Act is founded upon the doctrine of unjust enrichment, and creates a separate substantive right of restitution rather than a derivative right. *People v. Brockman*, 143 Ill. 2d 351, 366 (1991) (citing *Doyle v. Rhodes*, 109 Ill. App. 3d 590, 592-593 (2d Dist. 1982), *aff'd,* 101 Ill. 2d 1 (1984)). The fundamental inquiry here is whether the Grossens were subject to liability in tort to Raab, not whether the Grossens had a contractual obligation to Raab. Thus, in analyzing if the Grossens are subject to liability in tort to Raab, the Court should consider if the Grossens potentially owed a duty to Raab to maintain the fence.

In *Widlowski v. Durkee Foods,* 138 Ill. 2d 369 (1990), the Court recognized that every person owes a duty of ordinary care to *all others* to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity, interest or the proximity of relationship but extends to remote and unknown persons. *Id*. at 373 (citing *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 390 (1986); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69 (1964)). Thus, under *Widlowski*, the Grossens' argument that they are not subject to liability in tort to Raab because there was no privity of contract between Raab and the Grossens fails. All that is required for a duty of care to exist between the Grossens and Raab is that the Grossens guard against injuries which would naturally flow as a reasonably foreseeable and probable consequence of their act of not repairing the

fence. *Id*. at 373. Such a duty to Raab does not depend upon any contract that existed between the Grossens and Frank and/or their predecessors.

The Grossens rely on *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 275 (2d Dist. 2007), and *Ball Corp. v. Bohlin Building, Corp.*, 187 Ill. App. 3d 175 (1st Dist. 1989), for the proposition that the existence of a duty based on a contractual obligation should be determined by the terms of the contract and not extended beyond those terms.

The facts of *Gilley* are not analogous to the facts of this case. In *Gilley*, the court found that the defendant landlord was not liable for the plaintiff's injuries that occurred on the landlord's premises because the lease required the tenant to maintain and keep the premises in good repair. 372 Ill. App. 3d at 276. Further, the court in *Gilley* held that "where a defendant is charged with negligence because of his failure to perform an act allegedly required by contract, the question of whether the defendant actually had a duty to act will be determined by the terms of the contract." *Id*. at 275 (citing *Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127, 134 (1st Dist. 1986)).

The court's analysis in *Gilley* purely involved whether or not a duty was owed between the two parties that entered into the contract. *Gilley*, 372 Ill. App. 3d at 275. In this case, the Grossens are not charged with negligence because of their failure to perform an act allegedly required by a contract. Rather, the relevant inquiry is whether or not the Grossens' contractual obligation under the Fence Agreement made the Grossens potentially liable in tort to Raab.

The Grossens also rely on *Ball*, 187 Ill. App. 3d 175, for the proposition that for there to be liability to a third-party under a contract there must be affirmative language in

the contract to impose liability upon the third-party. *Ball* involved a direct lawsuit by the plaintiff property owner against the defendant sub-contractor when the plaintiff's roof blew off in a wind storm. *Id*. at 176. The *Ball* court concluded that the owner was not a third-party beneficiary of the general contractor's sub-contract and could not bring a negligence claim against the sub-contractor. The facts of *Ball* are not similar to the facts in this case as they do not involve a third-party complaint for contribution that was filed under the Contribution Act.

The trial court here found that the Fence Agreement ran with the land and that Frank had a viable cause of action to prove a breach of that agreement by the Grossens (R.P39). The nature of the Fence Agreement created a duty owed by the Grossens to third parties to repair the fence. The court in *SI Securities v. Bank of Edwardsville*, 362 Ill. App. 3d 925, 1001 (5th Dist. 2005), noted that it is "well settled that covenants running with the land, inhere in the land and bind subsequent purchasers." In *Willoughby v. Lawrence*, 116 Ill. 11 (1886), the court found that:

> If the owner of land enters into a covenant concerning the land – concerning its use – subjecting it to easements or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whether, with respect to this liability in equity, whether the covenant is or is not one which in law 'runs with the land'.

Id. at 22.

Because the trial court found that the covenant ran with the land, the covenant is binding upon the Grossens and imposes a duty upon them to repair the fence (R.P39). The Grossens contend that the covenant running with the land is incomplete and ambiguous because it does not mention the Grossens and does not provide for any

mechanism to enforce each party's obligation or remedy if a party fails to perform under the contract. However, under *SI Securities*, *supra*, this argument is illogical, and the Grossens have presented no case law which indicates that the covenant running with the land is unenforceable or invalid because it does not contain a remedy provision. Obviously, the parties would be able to seek any remedy at law flowing from the breach.

II. AS TO COUNT II, THE ILLINOIS FENCE ACT IS APPLICABLE BECAUSE THE GROSSENS WAIVED THE STATUTORY PREREQUISITES SET FORTH IN THE ACT

The Grossens contend that pursuant to the Fence Act, 765 ILCS 130/3-9, Frank failed to lodge a complaint with respect to the fence with the fence viewers in their area and further did not obtain a written decision from the fence viewers. They contend that failure to comply with the requirements of the Fence Act is an absolute bar to Frank's contribution claim brought under the Fence Act (R.C83-86). It is clear that the intent of the Fence Act is to determine which party is responsible for maintaining and paying for the maintenance of a division fence. 765 ILCS 130/5 (West 2013).

In this instance, the Grossens waived any right they may have had under the Fence Act to have a fence viewer ascertain who was responsible for maintaining and repairing a certain portion of the fence because they admitted full responsibility for maintaining and repairing the portion of the fence where the cow is alleged to have escaped. In her discovery deposition, Virginia Grossen admitted that she was responsible for caring for the portion of the fence where the cow escaped (R.C411-13, 437). In addition, Grossens' actions subsequent to the incident reflect their acknowledgment of responsibility for maintaining and caring for the portion of the fence where the cow escaped (R.C398-99, 467-68). Although evidence of subsequent remedial measures is not

admissible to prove negligence, such evidence may be admissible for the purpose of proving ownership or control of property where disputed by the defendant. *Herzog v. Lexington Twp*., 167 Ill. 2d 288, 300-01 (1995).

In her discovery deposition, Virginia Grossen testified that after the accident Frank reported to her and her husband that the fence was in bad repair and that they needed to take care of it, she agreed to do so immediately as soon as the weather was cooperative (R.C398). Further, David Grossen testified that the repair that was made to the fence included electrifying the fence over the creek (R.C467-68). Thus, the Grossens admitted by their own actions and words that they were responsible for repairing the fence in question. These admissions defeat the notice provisions as set forth in the Fence Act. If in fact the Grossens admitted responsibility to maintain the fence, no fence viewer would be necessary to determine that the Grossens had a responsibility for maintaining and repairing the fence.

The Grossens' argument that Frank should have notified them that the fence was in disrepair prior to the occurrence fails. The Grossens waived their right to notice of any dispute with regard to repairs to the fence under the Fence Act in light of the Fence Agreement, which obligated them to repair the fence in question.

The Grossens' argument that they lacked notice of their obligation to repair the fence is contrary to Illinois law. Constructive notice of an encumbrance arises when the encumbrance is in the chain of title. *Krueger v. Oberto*, 309 Ill. App. 3d 358, 368 (2d Dist. 1999). An encumbrance will be in the chain of title only when it is recorded in the grantor-grantee index of the county in which the property lies. *Id*. Grantor-grantee index is the legal record required to be maintained by the recorder. *Id*.

Here, the Grossens were on constructive notice of their obligation to repair the portion of the fence where the cow escaped because the Fence Agreement recorded within the chain of title for the parcel which it owned.[1] Because the Grossens had constructive notice, the procedure as defined in the Fence Act with respect to notifying the adjacent land owner and employing the fence viewers is inapplicable.

The Grossens have relied upon *Dexter v. Haghney*, 47 Ill. App. 205 (2d Dist. 1892), and *Fox v. Fearneyhough*, 85 Ill. App. 2d 371 (4th Dist. 1967), for the proposition that a party cannot invoke the Fence Act unless it has complied with the notice provisions as required under the Act. As to the 1892 *Dexter* case, appellate court cases decided prior to 1935 have no precedential value. *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill. 2d 200, 221 (2008). However, neither of these cases involved an agreement recorded within the chain of title that obligated the parties to repair certain portions of the fence. In neither case was there an admission by either party to maintain the fence. Also, in neither case did either party undertake an action subsequent to the dispute regarding the fence to repair a portion of the fence in question sufficient to restrain cattle.

Dexter and *Fox* were direct actions by the two adjoining fence owners against one another. Count II of Frank's amended third-party complaint seeks to hold the Grossens liable under the Contribution Act for their proportionate share of fault for Raab's injuries for failing to maintain the fence (R.C83-86). Neither of the cases relied on by the Grossens address whether or not the notice provisions of the Fence Act are required when

[1] The Fence Agreement was recorded in the Grantor-Grantee Index as Instrument Number 119617 on January 7, 1970 (R.C100-02).

a party seeks contribution from another party for failing to maintain a portion of its fence under the Fence Act.

There are no cases in Illinois which address whether the notice provisions of the Fence Act are required when a party utilizes the act to seek contribution from an adjoining fence owner. However, *McKee v. Trisler,* 311 Ill. 536, 545-46 (1924), is more germane to this issue than the cases cited by the Grossens. In *McKee*, the court found that the Fence Act does not purport to relieve an owner of land from his common law duty to keep his livestock on his own land except as to the portion of the fence assigned to the owner of the adjoining land. *Id*. at 545. As the court in *McKee* stated, the purpose of the Fence Act in relation to the Domestic Animals Running at Large Act is to prevent parties who suffer damages primarily on their land or crops by the animal of another from bringing an action against the adjoining land owner for a portion of the fence which they (the claimant) were required to repair under the Fence Act. *Id*. at 545-46.

In this instance, Raab's original claim in his complaint was brought under the Domestic Animals Running at Large Act (R.C6-11). Because Frank was relieved of his obligation to repair the portion of the fence required to be repaired by the Grossens pursuant to the Fence Agreement, Frank had no obligation to repair the portion of the fence where the cows escaped under the Domestic Animals Running at Large Act as noted in *McKee*. Thus, under *McKee*, Frank should be entitled to seek contribution from the Grossens for their failure to repair the portion of the fence assigned to them.

III. AS TO COUNT I, THE ILLINOIS DOMESTIC ANIMALS RUNNING AT LARGE ACT DOES NOT CREATE IMMUNITY FROM LIABILITY FOR THE GROSSENS UNDER THE CONTRIBUTION ACT

The Grossens rely on *Douglass v. Dolan*, 286 Ill. App. 3d 181, 186 (1997), for the proposition that they are immune from liability under the Domestic Animals Running at Large Act because they are merely landowners and not owners or keepers of livestock as defined under the Act. The Grossens further claim that the Act creates immunity from liability because they have no common law duty to guard against the injuries caused by livestock that escaped from an enclosure when they were not the owners or keepers of the animal in question.

The Grossens rely upon *Allendorf v. Redfearn*, 2011 IL App (2d) 110130, ¶¶ 34-35, for the proposition that one who keeps or harbors an animal within the meaning of the Domestic Animals Running at Large Act cannot recover for damages caused by the escaped animal. However, the case at hand is not similar to *Allendorf* in light of the fact that count I of Frank's third-party complaint seeks contribution against the Grossens for negligence rather than the Domestic Animals Running at Large Act (R.C83-86).

Frank is not attempting to bypass the Domestic Animals Running at Large Act prohibition against an owner or keeper of an animal from recovering damages under the Act. He is not trying to recover damages that he personally sustained as a result of the escape of the livestock that he owned, but rather is seeking contribution from the Grossens for a portion of the monetary settlement he paid to Raab. This situation is much different from the facts of *Allendorf,* where a plaintiff who was classified as an owner or keeper of an animal was attempting to seek damages for his own personal injuries that were directly caused to him by the animal. 2011 IL App (2d) 110130, ¶¶ 34-35.

The Grossens further argue that because over 100 years ago there was no liability in Illinois for injury or damage caused by an animal running at large before the enactment of the Domestic Animals Running at Large Act; that now after the enactment of the Act a person with absolutely no ownership interest in the livestock, such as the Grossens, cannot be held liable for injuries caused by another's livestock. This argument must fail.

In addition to *Douglas* and *Allendorf*, the Grossens also rely on *Heyen* v. *Willis*, 94 Ill. App. 2d 290, 296 (4th Dist. 1968), and *Corona v. Malm*, 315 Ill. App. 3d. 692 (2d Dist. 2000), for the proposition that liability under the Domestic Animals Running at Large Act is restricted to the owner or keeper of the animal. The Grossens ignore that Frank's third-party claim is not a direct action by the original plaintiff, Raab, against the Grossens, but rather is brought by a joint tortfeasor under the Contribution Act. None of the aforementioned cases relied upon by the Grossens address the issue of whether the Contribution Act allows a negligence action for contribution against a third-party for failure to maintain cattle enclosure fencing. Although there is no case in Illinois that addresses this issue, on numerous occasions courts have found that a party's immunity from a direct suit by the plaintiff may not necessarily immunize a party from a contribution claim by a defendant sued by the plaintiff. *Doyle v. Rhodes*, 101 Ill. 2d 1, 6-10 (1984).

Contribution, once a common law right, is now a statutory remedy in which parties who are subject to tort liability arising from a single injury share the payment of damage awards. The Contribution Act serves to sort out the relative rights of multiple defendants after the plaintiff has collected from among those defendants who are each fully responsible for all of the damages. *Vroegh v. J&M Forklift*, 165 Ill. 2d 523, 529

(1995); *BHI Corp. v. Litgen Concrete Cutting and Coring Co.*, 346 Ill. App. 3d 300, 306 (1st Dist. 2004). The Contribution Act is founded upon the doctrine of unjust enrichment, and creates a separate substantive right of restitution rather than a derivative right. *Brockman*, 143 Ill. 2d at 366.

Thus, in this case Frank's right to seek contribution from the Grossens is not derivative of Raab's original claim brought against Frank under the Domestic Animals Running at Large Act. The Grossens have relied upon *Hopkins v. Powers*, 113 Ill. 2d 206, 209 (1986), for the proposition that if a plaintiff cannot bring a cause of action against an original defendant that the same plaintiff should also be barred from filing a contribution action against the original defendant. This is because such a "duplicative" action would simply allow the plaintiff a means of circumventing the restriction that prevented the original action. *Id*.

However, the facts in the *Hopkins* case are not analogous to the case at bar. First, in *Hopkins*, the plaintiff attempted to utilize the Contribution Act to file a contribution claim against the original and only defendant when the plaintiff's dram shop claim was otherwise barred as a direct suit against the plaintiff. *Id*. at 209-12. Second, the court in *Hopkins* analyzed whether dram shop liability equates to tort liability subjecting a party to be "liable in tort" for the purposes of the contribution act. *Id*.

The case at bar is different because it involves the Domestic Animals Running at Large Act and not the Dram Shop Act. It further involves an action by Frank as a third-party plaintiff against the Grossens as third-party defendants for contribution. For the rule of law as set forth in *Hopkins* to be applicable here, Raab would need to have brought a contribution action against Frank. This clearly did not occur.

The case at bar is harmonious with *Wirth v. City of Highland Park*, 102 Ill. App. 3d 1074 (2d Dist. 1981). The Second District in *Wirth* noted that the trend in Illinois has been to curtail common law tort doctrines to allow contribution among joint tortfeasors. *Id*. at 1080 (citing *Skinner v. Reed-Prentice Division Package Machinery Co*., 70 Ill. 2d 1 (1978)). The *Wirth* court also noted that one commentator has said that "perhaps the Illinois Contribution Statute abolishes the traditional notion of common law tort immunities." *Id*. The *Wirth* court also stated that in a parallel situation the *Skinner* decision "balanced policy considerations which immunize an employer from a direct suit by an employee with policy considerations which make people who cause an injury responsible for their degree of culpability and allowed contribution from an employer." *Id*. The *Wirth* court in citing *Comparative Contribution: The Legislative Enactment of the Skinner Doctrine*, 14 J. Mar. L. Rev. 173, 193 (1980), noted:

> "It is the further intent of the committee that the right of contribution thus created be recognized as founded upon the doctrine of unjust enrichment. The right is a separate right of restitution. It is not a derivative right and thus is not barred by any common law or statutory immunity which would preclude the prime claimant from pursuing an action directly against the party from whom contribution is sought."

Id. at 1081 (internal citations omitted).

Thus, the *Wirth* court reached the conclusion that interspousal tort immunity, a statutory bar which one tortfeasor may use as a defense in an action by the plaintiff, is not a bar to an action by a joint tortfeasor for contribution. *Id*. at 1081. In reaching this conclusion, the court reasoned that for an equitable distribution of fault in negligence suits "equity requires that contribution be allowed even where our statute provides for interspousal tort immunity which would bar a direct suit by the plaintiff. Such a rule is

inconsistent with the desirable policy of the equitable distribution of loss among those parties responsible." *Id*. at 1081.

There have been cases in Illinois where the courts have found that statutory immunity is not applicable under the Contribution Act. *See Larson v. Buschkamp*, 105 Ill. App. 3d 965, 969 (2d Dist. 1982) (finding that the doctrine of Parent-Child Tort Immunity is not a substantive bar to actions between parent and child, nor does the contribution statute itself prevent such an action for contribution). *See also Hartigan v. Berry*, 128 Ill. App. 3d 195, 199 (1st Dist. 1984) (finding that the use of parent-child immunity to insulate parents from a contribution action is simply not consistent with our present system of equitable apportionment of fault).

It is proper to balance policy considerations in determining whether a right of contribution will prevail over a competing immunity from a direct tort suit. *Ramsey v. Morrison*, 175 Ill. 2d 218, 225 (1997). Here, the public policy considerations of the Domestic Animals Running at Large Act are outweighed by the public policy considerations supporting contribution. The Domestic Animals Running at Large Act was designed to provide redress for injuries caused by animals where the animals were turned out to graze and wandered. *File v. Duewer*, 373 Ill. App. 3d 304, 308 (4th Dist. 2007). The Grossens fail to cite any case suggesting that the primary purpose of the Domestic Animals Running at Large Act is to protect non-owners of livestock from liability caused by their own negligence, nor can they.

Under *Wirth*, an immunity which one tortfeasor may use as a defense in an action by a plaintiff is not bar to an action by a joint tortfeasor for contribution. *Wirth*, 102 Ill. App. 3d at 1081. Allowing contribution even when a statute would bar a direct suit by the

plaintiff is consistent with the desirable policy of the equitable distribution of loss among those parties responsible. *Id*. at 1082. Imposing contribution upon the Grossens, non-owners of livestock, who had a contractual and admitted duty to maintain their fence, is consistent with the purpose of the Domestic Animals Running at Large Act to provide redress for injuries caused by wandering animals. Accordingly, this Court should reverse the trial court's grant of summary judgment as to count I.

CONCLUSION

For all of the foregoing reasons, Third-Party Plaintiff/Appellant Kenneth Frank, respectfully requests that this Court reverse the orders granting summary judgment on the amended third-party complaint for contribution in favor of the Third-Party Defendants/Appellees David A. Grossen and Virginia J. Grossen, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 16 pages.

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E-FILED 5
Transaction ID: 2-17-1040
File Date: 8/7/2018 5:51 PM
Robert J. Mangan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

Docket No. 2-17-1040

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant, --- KENNETH FRANK, Third-Party Plaintiff/Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants/Appellees.	On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Jo Daviess County, Illinois No. 13 L 27 The Honorable William A. Kelly Judge Presiding

NOTICE OF FILING

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PLEASE TAKE NOTICE that on the 7th day of August, 2018, the undersigned submitted for electronic filing with the Illinois Appellate Court, Second Judicial District, the Reply Brief of Third-Party Plaintiff/Appellant, a copy of which, along with this notice of filing with proof of service, is served on all counsel of record.

Respectfully submitted,

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Attorney for Third-Party Plaintiff/
Appellant KENNETH FRANK

E-FILED
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PROOF OF SERVICE

I, Stephanie A. Carter, a non-attorney, on oath state that I served this notice and documents referenced therein via electronic mail to the attorney listed on the attached notice of filing at the email address listed on August 7, 2018.

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

/s/ Stephanie A. Carter
SMITHAMUNDSEN LLC

2019 IL App (2d) 171040
No. 2-17-1040
Opinion filed February 6, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant and Third-Party Plaintiff-Appellant (David A. Grossen and Virginia J. Grossen, Third-Party Defendants-Appellees).	)	Appeal from the Circuit Court of Jo Davies County. No. 13-L-27 William A. Kelly, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Justices Jorgensen and Spence concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Kirk Raab of the Jo Daviess County Sheriff's Department, was driving his squad car west on Stagecoach Road in Scales Mound when he collided with a cow owned by the defendant, Kenneth Frank. Raab filed an action against Frank for injuries he suffered during the collision. Frank thereafter filed a third-party complaint for contribution against his neighbors, David A. and Virginia J. Grossen, asserting that the cow had gotten out through a fence they had failed to maintain. The trial court subsequently granted the Grossens' motion for summary

judgment. Frank appeals from that order. We affirm in part, reverse in part, and remand for additional proceedings..

¶ 2 I. BACKGROUND

¶ 3 The Grossens own a parcel of real estate in rural Jo Daviess County (Parcel A). Virginia Grossen inherited Parcel A from her mother in 2005 and executed a quitclaim deed to convey the property to her and her husband jointly in 2006. The Grossens do not live on Parcel A. They rent Parcel A to lessees for agricultural purposes, but livestock are not kept on Parcel A. The parcel of land adjacent to Parcel A (Parcel B) is owned by the Dominic T. and Donna M. Pintozzi Trust, with Dominic and Donna Pintozzi as trustees. A fence runs between Parcel A and Parcel B.

¶ 4 The Pintozzis have rented Parcel B to Frank since 2009. Frank uses Parcel B for pasturing cattle. Before agreeing to rent Parcel B, Frank inspected it to ensure that it was suitable for pasturing his cattle. Frank looked at the fence that divided Parcels A and B and determined that it was sufficient to keep his cattle enclosed on Parcel B. After he rented the property, Frank rode his ATV to the fence and inspected it every Sunday.

¶ 5 Frank and the Pintozzis entered into an oral lease regarding Parcel B. Under the lease, Frank was responsible for maintaining the portion of the fence on Parcel B. Frank subsequently learned that an agreement had been signed by the prior owners of Parcels A and B regarding fence maintenance. The Grossens were not aware of the fence agreement prior to 2011.

¶ 6 Frank knew that the Grossens owned Parcel A but did not live on it. Frank knew how to contact the Grossens if necessary. The Grossens were not aware that Frank was renting Parcel B or using that land to pasture cattle.

¶ 7 In July 2009, July 2010, and July 2011, heavy rainstorms damaged portions of the fence that divided Parcels A and B. After each of these three storms, Frank repaired the fence. He did not call the Grossens after any of the rainstorms to let them know that the fence had been damaged or that it might need repairs. Frank believed that the repairs he had made to the fence in 2009, 2010, and 2011 were sufficient to keep the cattle restrained.

¶ 8 On November 10, 2011, Frank's cattle escaped and entered onto the road. Raab was driving on the road and collided with one of Frank's cows. After the accident, Frank contacted the Grossens to inform them of the accident. Frank told the Grossens that he believed that the fence dividing Parcels A and B was in bad repair. The Grossens then made plans to have work done on the fence. In the spring of 2012, the Grossens spent $2000 to clear brush around the west side of the fence and to have the western half of the fence replaced with new post and new wire.

¶ 9 On November 8, 2013, Raab filed a one-count complaint against Frank for personal injuries he suffered during the collision. Raab alleged that Frank had violated the Domestic Animals Running at Large Act (Running at Large Act) (510 ILCS 55/1 (West 2010)) by failing to use the reasonable care necessary to restrain his cattle from straying from the confinement area. In his answer, Frank raised the affirmative defense that he used reasonable care in restraining the cattle, because they were kept in a well-fenced area.

¶ 10 On August 14, 2014, Frank filed a three-count third-party complaint against the Grossens. As amended, the complaint sought contribution based on theories of negligence, breach of duty under the Fence Act (765 ILCS 130/3 (West 2010)), and breach of contract. Frank alleged that the cattle escaped and injured Raab because the Grossens did not keep their portion of the fence in good repair.

¶ 11 On June 9, 2016, the trial court approved a $225,000 settlement agreement between Raab and Frank. On that same day, the Grossens filed a motion for summary judgment on Frank's third-party complaint. The Grossens argued that count I of Frank's complaint was barred by the Running at Large Act; count II was barred by the Fence Act; and count III should be dismissed because the fence agreement did not run with the land.

¶ 12 The record on summary judgment included the deposition testimony of the Grossens and Frank. The Grossens testified that they were not aware that there was a problem with the fence until Frank told them, following the accident. Frank testified that he checked both his and the Grossens' portions of the fence every Sunday. The accident occurred on a Thursday night. After the accident, he checked the fence. He determined that a jumping deer had struck the top of the Grossens' portion of the fence and had broken it. Frank testified that the Grossens could have discovered this only if they inspected the fence daily. However, in his 40 years as a farmer, he had inspected the fences only weekly. Further, he did not know anyone in the farming community who checked their fences daily.

¶ 13 On September 7, 2016, the trial court granted the Grossens summary judgment on counts I and II of Frank's third-party complaint. As to count I, the trial court determined that the Running at Large Act barred Frank's contribution claim. As to count II, the trial court found that the rights and responsibilities created under the Fence Act were not applicable to the facts of the case. The trial court denied the Grossens' motion with respect to count III, finding that the fence agreement ran with the land and that Frank had a viable cause of action for breach of that agreement.

¶ 14 On August 1, 2017, the Grossens filed their second motion for summary judgment, as to count III of Frank's third-party complaint. The Grossens argued that, because count III was

premised on a breach of contract, Frank could not recover under the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/2 (West 2010)).

¶ 15 On November 27, 2017, the trial court granted the Grossens' motion for summary judgment as to count III. The trial court found that the contract between Frank and the Grossens was the only basis for contribution. As such, there was no connection between Raab and the Grossens to justify a claim under the Contribution Act. Following the trial court's ruling, Frank filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 A. The Contribution Act

¶ 18 On appeal, Frank argues that the trial court erred in granting the Grossens summary judgment on each of the three counts of his third-party complaint. Frank maintains that the trial court incorrectly determined that he could not bring a contribution claim against the Grossens.

¶ 19 The purpose of a motion for summary judgment is to determine whether a genuine issue of material fact exists (*People ex rel. Barsanti v. Scarpelli*, 371 Ill. App. 3d 226, 231 (2007)), and such a motion should be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2016)). In determining the existence of a genuine issue of material fact, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). Summary judgment may be granted only where the facts are susceptible to a single reasonable inference. *Consolino v. Thompson*, 127 Ill. App. 3d 31, 33 (1984). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the

judgment is incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997). We review *de novo* the trial court's grant of a motion for summary judgment. *AUI Construction Group, LLC v. Vaessen*, 2016 IL App (2d) 160009, ¶ 16.

¶ 20 Contribution is a statutory remedy in Illinois, governed by the Contribution Act (740 ILCS 100/2 (West 2010)). The right to contribution arises under the Contribution Act from tort liability, and the statute apportions recovery among the contributors on the basis of their relative culpability. Section 2 of the Contribution Act states:

> "(a) Except as otherwise provided in this [Contribution] Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.
>
> (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability." 740 ILCS 100/2 (West 2010).

Section 3 of the Act, concerning the amount of contribution, provides:

> "The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his *pro rata* share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability." 740 ILCS 100/3 (West 2010).

Thus, the basis for a contributor's obligation rests on his liability in tort to the injured party. *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 118 Ill. 2d 447, 462 (1987). The bases for liability among the contributors need not be the same. *Id.* Further, the basis for contribution need not mirror the theory of recovery asserted in the original action. *Id*. The Contribution Act is founded upon the equitable doctrine of unjust enrichment. *People v. Brockman*, 143 Ill. 2d 351, 366 (1991).

¶ 21 Here, Frank's contribution claim is premised on his allegation that the Grossens negligently maintained their portion of the fence, which allowed Frank's cattle to escape and injure Raab. The trial court determined that (1) Frank's complaint was barred by the Running at Large Act, (2) the Fence Act was not applicable, and (3) he could not rely on a contract for a contribution claim. We consider each of the trial court's holdings in turn.

¶ 22 B. The Running at Large Act

¶ 23 The Running at Large Act governs domestic animals running at large. In 1895, the statute imposed strict liability on a defendant for damages caused by domestic animals running at large. *McQueen v. Erickson*, 61 Ill. App. 3d 859, 862 (1978). In 1931, the statute was amended to provide that the owner or keeper of such animals was not liable for damages if he was able to establish that he used reasonable care in restraining the animals and did not know that the animals were running at large. *Id.* Illinois courts have consistently held that the statute is designed to provide redress for injuries caused by animals grazing at pasture beyond the control and supervision of their owners. *Zears v. Davison*, 154 Ill. App. 3d 408, 411 (1987). To recover damages under this statute, the plaintiff must prove only that he was injured by an animal running at large owned or kept by the defendant. To avoid strict liability, the defendant must

then affirmatively plead and prove that (1) he exercised due care in restraining his animal and (2) he lacked knowledge that it had escaped. *Corona v. Malm*, 315 Ill. App. 3d 692, 697 (2000).

¶ 24 In *Heyen v. Willis*, 94 Ill. App. 2d 290, 296 (1968), the court held that only the animal's owner could be liable for the animal's conduct under the Running at Large Act. In that case, Heyen filed a wrongful-death action against a landlord (Willis) and his tenant (Lyons). *Id.* at 291. According to the record, the decedent had died when he lost control of his vehicle trying to avoid cattle that were owned by Lyons and had strayed from Willis's property. *Id.* Both Lyons and Willis knew that the pasture fences were inadequate to restrain cattle. *Id.* at 292. Although the rental agreement required Lyons to repair the fence, Willis never inspected to ensure that the fence had been repaired. *Id.* Heyen argued that these allegations demonstrated that Willis had breached his legal duty to the decedent. *Id.* Heyen further alleged that Willis was liable as an animal "keeper" under the Running at Large Act. *Id.* The trial court granted summary judgment to Willis. *Id.* at 291.

¶ 25 On appeal, the reviewing court affirmed the trial court's judgment. *Id.* at 297. The court explained that Willis was not a "keeper" of the cattle, because he owned no interest in the cattle, was not responsible for their care, and had no right to their custody or control. *Id.* at 295. The court noted that a lessor had a common-law duty to guard against damage caused by strays that escaped from the premises as a result of a defect on the premises that was known at the time of the lease. *Id.* However, the court found that, in adopting the Running at Large Act in 1871, the legislature limited liability to the strays' owner or keeper. *Id.* at 296. The court declined to extend liability beyond the owner or keeper, explaining:

> "The likelihood of injury or damage from estrays, and the attendant duty to use care to prevent such injury or damage, lies not in the place where animals may be kept but in

> their propensity to roam, their wanderlust. Thus, the duty to guard against injury or damage by estrays is cast by law upon the owner or keeper of the animals, and liability for injury or damage caused by them must be predicated upon the [Running at Large] Act. No common law duty exists upon the part of the landowners in this case and the question of their negligence in placing their premises in the possession of Lyons for the grazing of cattle should not be submitted to a jury." *Id.* at 296-97.

¶ 26 Thus, although the Contribution Act suggests that Frank has a right to contribution from the Grossens for the damages he paid to Raab (see 740 ILCS 100/2 (West 2010)), the Running at Large Act suggests that Frank must bear all of those losses himself (see *Heyen*, 94 Ill. App. 2d at 296). The question hence is how to reconcile these two seemingly conflicting statutes.

¶ 27 The answer lies within our supreme court's decision in *Doyle v. Rhodes*, 101 Ill. 2d 1 (1984). In that case, the supreme court analyzed the interplay between the Contribution Act and the Workers' Compensation Act (Ill. Rev. Stat. 1981, ch. 48, ¶¶ 138.5(a), 138.11 (now codified at 820 ILCS 305/5(a), 11)). There, the plaintiff, Charles Doyle, was working as a highway flagman for Rein, Schultz & Dahl (Rein), a highway contractor, when he was struck by an automobile driven by the defendant, Kathleen Rhodes. *Doyle*, 101 Ill. 2d at 4. Doyle filed a complaint against Rhodes, who in turn filed a third-party complaint against Rein, seeking contribution. *Id.* at 4-5. Rhodes alleged that Rein was negligent and had violated the Road Construction Injuries Act (Ill. Rev. Stat. 1981, ch 121, ¶ 314.1 *et seq.* (now codified at 430 ILCS 105/0.01 *et seq.* and known as the Road Worker Safety Act)). *Doyle*, 101 Ill. 2d at 5. In response, Rein argued that, because of the exclusive-remedy provision of the Workers' Compensation Act, it was not liable in tort to Doyle, its employee, and consequently was not liable to Rhodes under the contribution statute. *Id.* at 6.

¶ 28 The supreme court held that the fact that an action by Doyle against Rein was barred by the Workers' Compensation Act did not provide Rein with immunity from a third-party action. *Id.* at 8, 14. The supreme court explained that this was because "the intent of the contribution statute was to reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege." *Id.* at 9.

¶ 29 Based on *Doyle*, the fact that Raab would be barred from pursuing an action against the Grossens by the Running at Large Act has no bearing on Frank's ability to seek contribution from the Grossens. The trial court therefore erred in determining that the Running at Large Act barred Frank's claim for contribution.

¶ 30 In so ruling, we reject the Grossens' argument that the instant case is analogous to our supreme court's decision in *Hopkins v. Powers*, 113 Ill. 2d 206 (1986). In that case, our supreme court considered whether a dramshop is "subject to liability in tort" for purposes of a cause of action brought under the Contribution Act. *Id.* at 208. The plaintiff, after being served alcohol by the dramshop, was involved in a car accident that caused personal injuries to others, as well as property damage. *Id.* at 209. After compensating those he had injured, the plaintiff filed a contribution action against the defendant, the dramshop operator. *Id.* The supreme court decided that a dramshop that contributes to the intoxication of a person who later causes injury to another is not "liable in tort" under the Dramshop Act (Ill. Rev. Stat. 1983, ch. 43, ¶ 135 (now codified at 235 ILCS 5/5-21)) for purposes of an action for contribution brought by the intoxicated party. *Hopkins*, 113 Ill. 2d at 210. The supreme court concluded that, although serving intoxicating beverages can impose liability on dramshops, that liability is not grounded in tort, but arises purely from the Dramshop Act. *Id.* at 211. The supreme court held, that because the liability on dramshops under the Dramshop Act is "*sui generis* and exclusive," the

defendant was not "liable in tort" for purposes of the Contribution Act. *Id.* Thus, the plaintiff could not maintain an action against the dramshop under the Contribution Act. *Id.* The supreme court additionally held that the plaintiff could not recover under the Dramshop Act, because he was not among the class of innocent third persons who may recover under the Dramshop Act. *Id.* at 211-12. The supreme court explained:

> "Plaintiff's attempt to use the Contribution Act to recover a portion of the losses he incurred in reaching settlements for the damages he caused by his intoxication amounts to an attempt to circumvent the statutory bar of the Dramshop Act. Recognizing that a direct route to recovery is unavailable, plaintiff seeks an indirect route by way of the Contribution Act. But because plaintiff is barred from direct recovery under the Dramshop Act, he is barred as well from recovery under the Contribution Act." *Id.* at 212.

¶ 31 *Hopkins* is distinguishable. There, the plaintiff sought contribution from the defendant for selling alcohol. However, selling alcohol is not a tortious act. *Id.* at 211. Thus, the defendant could not be liable in tort. *Id.* Conversely, in the instant case, Frank argued that the Grossens were negligent for failing to maintain the portion of the fence on their property. A failure to maintain one's property can be tortious. See *Ortiz v. Jesus People, USA*, 405 Ill. App. 3d 967, 973 (2010) (landowner can be liable for negligently allowing a dangerous condition on his property).

¶ 32 C. The Fence Act

¶ 33 We next address whether the trial court properly found that Frank could not maintain a cause of action under the Fence Act. The Fence Act provides that "[w]hen 2 or more persons

have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them." 765 ILCS 130/3 (West 2010). If a person fails to maintain his fence, then

> "[A]ny two fence viewers of the town or precinct, as the case may be, shall, on complaint by the party aggrieved, after giving due notice to each party, examine such fence, and if they deem the same to be insufficient, they shall so notify the delinquent party, and direct him to repair or rebuild the same within such time as they may deem reasonable." 765 ILCS 130/6 (West 2012)

Further, if any person who is liable to contribute to the repair of a fence fails or neglects to do so, then the injured party, upon providing 10 days' written notice, may repair the fence at the expense of the person neglecting to repair the fence. *Id.* § 11.

¶ 34 We believe that the Fence Act clearly provides that, before a landowner can be liable, he must be given notice of a problem with the portion of fence that he is required to maintain and the opportunity to fix the problem. See *id.* §§ 6, 11. Here, before the accident, Frank did not give the Grossens any notice that there was any problem with their portion of the fence. Indeed, Frank testified that he was not aware that there was a problem with the Grossens' portion of the fence until after the accident. Thus, based on Frank's failure to provide notice to the Grossens, the trial court properly determined that Frank could not maintain an action under the Fence Act. Accordingly, we find that the trial court properly granted the Grossens summary judgment on count II of Frank's complaint.

¶ 35 In so ruling, we reject Frank's arguments that the Grossens waived their right to receive notice that there was a problem with their portion of the fence because (1) they acknowledged after the accident that they had an obligation to fix their portion of the fence and (2) the fence agreement required them to maintain their portion of the fence. Under the Fence Act,

acknowledging ownership of a fence or being obligated to maintain the fence is not the same as receiving timely notice that the fence is in need of repair. The Grossens could have waived their right to notice under the Fence Act only if they were aware of the problem with the fence and had an opportunity to fix it before the accident. However, the record clearly reveals that they were not aware of any such problem.

¶ 36 We also find Frank's reliance on *McKee v. Trisler*, 311 Ill. 536 (1924), to be misplaced. In that case, the defendant's bull entered the plaintiff's land through the fence that the defendant shared with the plaintiff, and the bull killed one of the plaintiff's mules and injured another. *Id.* at 538. The plaintiff sued for damages. *Id.* The trial court instructed the jury that, if it found that the plaintiff's portion of the fence was in good repair when the defendant's bull entered the plaintiff's property and injured the mules, then it should find in the plaintiff's favor. *Id.* at 540-41. The jury found in the plaintiff's favor. *Id.* at 538. On review, both the appellate court and the supreme court affirmed. *Id.* at 547. The supreme court explained that the jury instruction properly stated the law, because the plaintiff had the burden to prove that his portion of the fence complied with the statute or that the defendant's bull came through the defendant's portion of the fence. *Id.* at 544-46.

¶ 37 *McKee* is distinguishable in two regards. First, it addresses a landowner's burden of proof under the Fence Act in order to recover damages when his neighbor's livestock trespasses on his land. Thus, that case would be analogous here only if the Grossens had filed an action against Frank for his trespassing cattle. Second, because damages were sought by the adjacent landowner, and not the bull's owner, *McKee* contains no discussion of what notice the bull's owner would have had to provide regarding the condition of the adjacent landowner's portion of

the fence before he could seek damages. Absent such a discussion, *McKee* is not applicable to the case at bar.

¶ 38 D. Contribution Claim Based on Breach of Contract

¶ 39 As noted earlier, although the trial court found that the fence agreement ran with the land and that Frank had stated a viable claim under that agreement, it held that the contract between Frank and the Grossens was not a proper basis on which Frank could seek contribution for the damages he had paid to Raab.

¶ 40 We believe that the trial court's decision on this matter is incorrect, as it is inconsistent with this court's analysis in *Giordano v. Morgan*, 197 Ill. App. 3d 543 (1990). In that case, after Giordano was in a car accident, she filed a complaint against Morgan, who had been driving the car that struck her, as well as her own insurance agent and insurance company (insurance defendants) for not procuring the replacement insurance that she had purchased. *Id.* at 544-45. Giordano settled with the insurance defendants for $37,750. *Id.* at 547. Following a jury trial, Giordano received a judgment against Morgan for $16,392. *Id.* Morgan thereafter argued that the Contribution Act should apply and that the insurance defendants' settlement should be set off against the jury verdict, reducing the judgment against her to zero. *Id.* The trial court agreed and reduced the judgment against her. *Id.* On appeal, this court reversed. *Id.* at 552.

¶ 41 We explained that, in order for contribution to apply, "one or more persons [must be] liable in tort arising out of the same injury." (Emphasis omitted.) *Id.* at 548. We found that Morgan was clearly liable. We stated that it was unclear whether the insurance defendants were similarly liable, because the counts against them were based on breach of contract. *Id.* We found, however, that, although breach of contract is "certainly a nontort theory, it is not determinative as to whether the parties might also be 'subject to liability in tort' for purposes of

contribution." *Id.* (quoting *Joe & Dan International Corp. v. United States Fidelity & Guaranty Co.*, 178 Ill. App. 3d 741, 750 (1988)).

¶ 42 We then addressed whether Giordano's claims against Morgan and the insurance defendants were for the "same injury." *Id.* at 550. We held that the injuries were related but not the same. We explained that the actions of the insurance defendants were related to Morgan's only because, were it not for Morgan's negligence and Giordano's resulting injuries, the insurance defendants' failure to procure the required insurance would not have been at issue. *Id.* at 551. We held that, because the injuries were not the same, the Contribution Act was inapplicable and the trial court erred in reducing the judgment on the verdict. *Id.* at 552.

¶ 43 Here, as set forth in *Giordano*, Frank is not prohibited from invoking the Contribution Act to seek recovery from the Grossens based on a breach-of-contract theory. Rather, this court looks to whether the injury for which Frank seeks contribution is the same injury for which Frank is liable. Frank is seeking contribution for the damages he paid to Raab due to the straying cattle. As this is the same injury that Frank is liable for, the trial court erred in finding that Frank could not seek contribution under the fence agreement.

¶ 44 In so ruling, we find the Grossens' reliance on *People ex rel. Hartigan v. Community Hospital of Evanston*, 189 Ill. App. 3d 206, 213-14 (1989), and *Wiebolt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 169-71 (N.D. Ill. 1990), to be misplaced. Each of those cases involved a breach of fiduciary duty, which is not a tortious act that is subject to contribution. See *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445 (1989).

¶ 45 We also reject the Grossens' reliance on *Ball Corp. v. Bohlin Building Corp.*, 187 Ill. App. 3d 175, 177 (1989). The Grossens assert that the case stands for the proposition that there is a strong presumption that parties to a contract intend that the contract's provisions apply only

to them. That presumption can be overcome only if the language in the contract strongly implies that third parties were intended to benefit from the contract. See *id*. Because the fence agreement makes no reference to Raab, the Grossens insist that the fence agreement does not impose liability on them for Raab's injuries.

¶ 46 We do not disagree with the principles set forth in *Ball Corp.* However, as that case does not discuss contribution between joint tortfeasors, it is not pertinent to the instant case. Rather, what is pertinent is that a fence agreement existed between the parties. In order for Frank to be able to recover contribution from the Grossens, some relationship must have existed between them that would render contribution equitable. *Ohio Savings Bank v. Manhattan Mortgage Co.*, 455 F. Supp. 2d 247, 255 (S.D.N.Y. 2006). The fence agreement establishes that relationship between the Grossens and Frank.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the judgment of the circuit court of Jo Daviess County granting summary judgment to the Grossens on count II of Frank's third-party complaint, regarding a violation of the Fence Act. We reverse the court's judgment granting summary judgment to the Grossens on counts I and III of Frank's third-party complaint and remand for additional proceedings on those counts.

¶ 49 Affirmed in part and reversed in part.

¶ 50 Cause remanded.

Case No. _____

IN THE SUPREME COURT OF ILLINOIS

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant. _____ KENNETH FRANK, Third- Party Plaintiff-Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellees.	Petition for Leave to Appeal from the Appellate Court, Second District, Case No. 2-17-1040 There on Appeal from the Circuit Court, Fifteenth Judicial Circuit, Jo Daviess County, Illinois, Law Division, Circuit Court No. 13 L 27 The Honorable William A. Kelly, Judge Presiding.

DAVID A. GROSSEN AND VIRGINIA J. GROSSEN'S PETITION FOR LEAVE TO APPEAL

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Oral Argument is requested.

E-FILED
3/13/2019 3:36 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

PRAYER FOR LEAVE TO APPEAL

Pursuant to Illinois Supreme Court Rule 315, David A. Grossen and Virginia J. Grossen ("the Grossens") respectfully petition for leave to appeal the judgment of the Illinois Appellate Court for the Second Judicial District in *Raab v. Frank*, 2019 IL App (2d) 171040. (A1-A16)[1]

JUDGMENT BELOW

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. The Appellate Court entered its judgment on February 6, 2019. (A1-A16) No petition for rehearing was filed.

POINTS RELIED UPON IN SEEKING REVIEW

The Illinois Contribution Act states in pertinent part that, "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property … there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2(a). Because of the requirement that parties must be "subject to liability in tort," it has been held that if both parties are not subject to liability in tort for the plaintiff's injuries at issue in the underlying action, there is no right of contribution between them. *Hopkins v. Powers*, 113 Ill. 2d 206, 209 (1986); *People ex. Rel. Hartigan v. Community Hosp. of Evanston*, 189 Ill. App. 3d 206, 213–214 (1st Dist. 1989); *J.M. Krejci Co. v. Saint Francis Hosp. of Evanston*, 148 Ill. App. 3d 396, 398, (1st Dist. 1986). The Appellate Court's decision in this case, however, eviscerates the Contribution Act's "subject to liability in tort" requirement and holds that the Act does not preclude claims for contribution by parties not subject to liability in tort. (A5-A11, A14-A16)

[1] The record on appeal is cited as "C___." Citations to this Petition's appendix are cited as "A___."

This petition raises two issues, each warranting the Court's review.

Plaintiff Kirk Raab's ("Plaintiff") lawsuit against Defendant Kenneth Frank (hereinafter "Frank") was filed based on the Domestic Animals Running at Large Act ("Animals Running Act"), which provides redress for injuries caused by animals that escape their confinement. 510 ILCS 55/1.1. Pursuant to the Act, only owners or keepers of livestock are liable for damages. *Id.* Count I of Frank's third party action for contribution against the Grossens is based on common law negligence. (C80-3) However, liability for injury or damage caused by estrays must be predicated on the Animals Running Act, and the Grossens cannot be liable under that Act because they are not the owners or keepers of the wandering cattle that caused injury to the Plaintiff. *Heyen v. Willis*, 94 Ill. App. 2d 290, 296 (4th Dist. 1968). (C190-206) (R17)

The Appellate Court found that the Grossens are subject to liability in tort under the Contribution Act because Frank alleged general negligence against the Grossens for failing to maintain a portion of their fence, which ultimately led to his cattle escaping. (A9-A11) This holding ignores the fact that, prior to the enactment of the Animals Running Act, there was no common law liability in Illinois for injury or damage caused by an animal running at large. *Bulpit v. Matthews*, 145 Ill. 345, 349 (1893). In 1871, the Illinois Legislature made a deliberate choice to establish a duty to fence in livestock when it adopted the Animals Running Act. *Heyen*, 94 Ill.App.2d at 296. In making this change, the legislature expressly limited the liability for damage caused by estrays to their owner or keeper. *Id.* Allowing contribution under these facts either creates a brand new common law duty for landowners to guard against injuries to persons caused by livestock which escaped their confinement, or it completely disregards the plain language of the statute and the will of the legislature which limited liability for damages to owners or keepers of livestock only. Additionally, the ruling

below represents a departure from a long line of Illinois cases, including: *Douglass v. Dolan*, 286 Ill. App. 3d 181, 186 (2nd Dist. 1997); *Smith v. Gleason*, 152 Ill. App. 3d 346, 348-9 (2nd Dist. 1987); *Heyen*, 94 Ill. App. 2d at 296; *Bulpit*, 145 Ill. at 349. If left uncorrected, the opinion below will create confusion and dramatically expand the liability of landowners.

The present case also affords this Court an ideal opportunity to resolve the confusion between numerous conflicting appellate court holdings regarding whether a breach of contract can constitute "liability in tort" under the Contribution Act. In defending Count III of his contribution complaint, Frank heavily relied on *Cirilo's, Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill. App. 3d 494 (1st Dist. 1987) in arguing that the phrase "subject to liability in tort" includes duties giving rise to a tort that arose from a contract. The Appellate Court found that Frank can seek contribution from the Grossens based on an alleged breach of a contract between Frank and the Grossens. (A14-A16) This holding blatantly ignores the fact that the contract in *Cirilio's* was between the plaintiff and the third-party defendant. *Id.* at 496. The holding also disregards the growing line of cases criticizing the *Cirilio's* holding that a breach of contract action can amount to "liability in tort" under the Contribution Act. *See People ex. Rel. Hartigan*, 189 Ill. App. 3d at 213–214; *J.M. Krejci Co.*, 148 Ill. App. 3d at 398; *Wieboldt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 169–71 (N.D. Ill. 1990).

STATEMENT OF FACTS

The Grossens are the owners of a parcel of real estate in rural Jo Daviess County ("Parcel A"). (C159-60) Virginia Grossen inherited Parcel A from her mother in 2005 and executed a quit claim deed to convey the property to her and her husband jointly in 2006. (C161) The Grossens rent out Parcel A to lessees for agricultural purposes, but livestock are not kept on Parcel A. (C189) The parcel of land adjacent to the Grossens' parcel ("Parcel B") is owned by the Dominic T. and Donna M. Pintozzi Trust, with Dominic and Donna

Pintozzi as Trustees ("Pintozzi"). (C162-3) A fence runs between Parcel A and Parcel B. (C164)

Like the Grossens, the Pintozzi's rent out Parcel B to a lessee, Frank. (C162-3) However, unlike the Grossens' lessee, Frank uses Parcel B for pasturing cattle. (C168-9) Frank is a farmer with decades of experience raising cattle and over forty years of experience building fences. (C165-7) Frank has rented Parcel B from Pintozzi since 2009. (C162-3) Before agreeing to rent Parcel B, Frank inspected its condition to ensure that it was suitable for pasturing his cattle. (C168-9) Specifically, Frank looked at the condition of the fence that divided Parcels A and B and determined that the fence was sufficient to keep his cattle enclosed in Parcel B. (C168-9) Once he began renting Parcel B, Frank rode his ATV out to the fences and inspected them every Sunday. (C170-1)

Frank and Pintozzi entered into an oral lease agreement regarding Parcel B. (C176) One of the terms of the oral lease was that Frank was responsible for maintaining the fences on Parcel B. (C177) In determining exactly what obligation he had, Frank called Ed Meyer, Pintozzi's predecessor owner of Parcel B, and discussed fence repair and maintenance related to Parcel B. (C177). It was during that conversation that Frank became aware of an Agreement in Connection with Line Fences that had been signed in 1969 by Meyer, the former owner of Parcel B, and Virginia's relatives, the former owners of Parcel A. (C177-80) Prior to 2011, the Grossens were not aware of and had never seen the Agreement in Connection with Line Fences. (C181-2)

Frank knew the Grossens, knew they owned Parcel A but did not live on it, and knew how to contact them if necessary. (C768-9) The Grossens were not aware that Frank was renting Parcel B from Pintozzi or that he was using Parcel B to pasture his cattle. (C172-5) In early July of 2009, after Frank had begun renting Parcel B, there were heavy rainstorms

that damaged portions of the fence that divided Parcel A and Parcel B. (C168-9) Frank did not call the Grossens after the rainstorm to let them know that the fence had been damaged or that it may need repairs. (C168-9) Without input or consultation with the Grossens, Frank made repairs to the fence between Parcels A and B. (C168-9).

In July of 2010, heavy rains again damaged the fence that divided Parcels A and B. Again, Frank did not call the Grossens after the rainstorm to let them know that the fence had been damaged or that it may need to be fixed. (C168-9) Without notifying the Grossens, Frank again repaired the fence between Parcels A and B. (C168-9) In July of 2011, storms once again damaged the fence that divided Parcels A and B. As with the prior two years, Frank did not contact the Grossens to inform them that the fence had been damaged or that it may be in need of repairs. (C168-9) Frank fixed the fence between Parcels A and B without input or consultation from the Grossens. (C168-9) Frank believed that the repairs that he had made to the fence in 2009, 2010 and 2011 were sufficient to keep his cattle restrained. (C168-9)

On November 10, 2011, Frank's cattle escaped and entered onto the roadway, specifically Stagecoach Trail. (C80-9) A squad car being driven by Plaintiff was westbound on Stagecoach Trail when it collided with Frank's escaped cows. (C12, C80-9) After this accident, Frank contacted the Grossens to inform them that there had been an accident involving his cows. (C184) Frank told the Grossens that he believed their fence was in bad repair. (C184) As soon as the Grossens were made aware that Frank believed their portion of the fence to be in need of repair, they made plans to have work done on the fence. (C186) In the spring of 2012, the Grossens spent $2,000 to clear brush around the west side of the fence dividing Parcels A and B, and to have the western half of that fence replaced with new post and new wire. (C187-88)

Frank checked both his and the Grossens' portions of the fence every Sunday. (C170-1) The accident occurred on a Thursday night. (C774-5) After the accident, Frank checked the fence. He believed that a jumping deer had struck the top of the Grossens' portion of the fence and had broken it. (C724, C787) Frank testified at his deposition that the Grossens could have discovered the broken fence only if they inspected the fence daily. (C790-5) In Frank's forty years as a farmer, he had inspected fences only weekly. (C793) Frank did not know anyone in the farming community who checked their fences daily. (C793)

On November 8, 2013, Plaintiff filed suit against Frank for violations of the Animals Running Act seeking damages for personal injuries sustained in the accident. (C12-15) On August 14, 2014 Frank filed a third-party complaint against the Grossens seeking contribution based on theories of negligence, breach of duty under the Fence Act, and breach of contract. (C80-89) On June 9, 2016, Frank settled with Plaintiff and Plaintiff's claims against Frank were dismissed with prejudice. (C217-8) The Grossens moved for summary judgment on all claims against them on June 9, 2016. (C154-216) On September 7, 2016, the trial court dismissed Frank's claims for negligence and breach of duty under the Fence Act, but denied the Grossen's motion for summary judgment on the breach of contract claim. (C872)

The Grossens filed a second motion for summary judgment on August 31, 2017. (C915-8) In that motion, the Grossens argued that they owed no duty to Plaintiff under the contract and therefore it could not be the basis for a contribution action. (C917-18) On November 27, 2017, the trial court granted the Grossen's motion for summary judgment and dismissed the only remaining claim against the Grossens. (C1115) Frank filed a Notice of Appeal on December 26, 2017. (C1124)

On February 6, 2019, the Appellate Court affirmed the trial court in part and reversed the trial court in part. (A1-A16) As to Count I, the Court held that the trial court erred in finding that Frank was barred from bringing a contribution claim based upon the Animals Running Act. (A7-A11) The Court found that the trial court properly dismissed Count II because Frank could not maintain an action under the Fence Act given his failure to provide notice to the Grossens as required by the Act. (A11-A14) As to Count III, the Court found that the trial court erred in holding that the Contribution Act barred Frank from seeking contribution from the Grossens based on a breach of contract theory. (A14-A16)

ARGUMENT

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

Frank seeks contribution from the Grossens for damages he paid to the Plaintiff as a result of his cattle running at large and injuring Plaintiff. (C80-9) A party's obligation to make contribution rests on his liability in tort to the plaintiff in the underlying action. *Vroegh v. J & M Forklift,* 165 Ill. 2d 523, 528 (1995). There is no requirement that the bases for liability among the contributors be the same. However, some basis for liability to the original plaintiff must exist. *Id.* In this case, since the Grossens are not liable in tort to Plaintiff, they cannot be held liable to Frank for contribution. *Id.*

Plaintiff's claims against Frank were based on the Animals Running Act, which provides redress for injuries caused by animals that escape their confinement. 510 ILCS 55/1.1. As used in the statute, "running at large" or "run at large" means livestock that stray from confinement or restraint and from the limits of the owner. *Id.* Pursuant to the Act, only owners or keepers of livestock are liable for damages. *Id.*

Count I of Frank's contribution action against the Grossens is based on common law negligence. (C80-3) Frank alleges in Count I of his complaint that the Grossens "allowed a boundary fence to exist…when…the boundary fence was not reasonable to enclose [Frank's] cattle which were contained on the adjacent property…" (C82-3) Frank does not assert that the Grossens were the cattle's owners or keepers. (C80-3) The Grossens filed a motion for summary judgment arguing that liability for injury or damage caused by estrays must be predicated on the Animals Running Act, and that the Grossens cannot be liable under that Act because they are not the owners or keepers of the wandering cattle. (C190-206) The trial court granted the Grossens' motion for summary judgment as to Count I (C872), but the Appellate Court reversed, finding that the Animals Running Act does not preempt Frank's common law negligence claim, and therefore the Grossens do not need to be owners or keepers of cattle to be found liable. (A10-A11) This holding gives plaintiffs an unprecedented sidestep of statutory limitations and definitions under the Act, which should be reversed by this Court.

A. Contribution actions cannot be used to circumvent statutory definitions and limitations.

In finding that the Grossens are liable in tort for purposes of the Contribution Act, the Appellate Court relied on *Doyle v. Rhodes,* 101 Ill. 2d 1(1984). In *Doyle*, a road construction worker sued a motorist who injured him during the course of his employment. *Id.* at 4. The motorist filed a third party complaint against the worker's employer for contribution alleging that the employer's negligence and violation of a worker safety statute contributed to the employee's injury. *Id.* The employer argued that its immunity under the Workers Compensation Act meant that it was not liable in tort, and therefore could not be liable for contribution. *Id.* at 384. The *Doyle* Court disagreed and held that the motorist could sue the employer under the Contribution Act because the employer was indeed "subject to liability

in tort" to its employee. *Id.* at 11-12. The Court reasoned that the Workers Compensation Act provided an affirmative defense to any tort action brought by an employee. *Id.* at 10-11. This Court concluded that an employer is potentially liable in tort until the immunity defense is established, so the requirement that the employer be "subject to liability in tort" was satisfied. *Id.* at 388.

The Appellate Court's ruling in this case fails to realize the important differences between *Doyle* and the case at bar. First, the Workers Compensation Act which was at issue in *Doyle* provides an affirmative defense to any action brought by an employee. *Id.* at 387. An employer owes duties to his employee and thus, an employee may recover in tort against his employer for a work-related injury if the employer fails to raise the Worker's Compensation Act immunity as an affirmative defense. *Id.* at 10. Conversely, the Animals Running Act plainly and specifically limits liability to owners and keepers of animals. 510 ILCS 55/1.1. If a person is not an owner or keeper under the Animals Running Act, like the Grossens, they have no duty with regard to another's cattle and are simply not subject to liability in tort under the Act. *Id.*

Second, the motorist's third party complaint in *Doyle* was based on negligence and a violation of a worker safety statute, both of which are legitimate grounds for tort liability against an employer. *Id.* at 384. In this case, either Frank's third party action is based on the Animals Running Act, which does not apply because the Grossens are not owners or keepers, or Frank's action is based on negligence, which, as discussed below, does not exist at common law. (C189) To hold that a contribution action can proceed under these facts would be to insulate the contribution action from statutory definitions and limitations, as well as to create new common law in its wake. No Illinois case or statute suggests that a

contribution action deserves such special treatment at the expense of the will of the legislature and decades of common law.

B. Illinois does not recognize a common law duty to guard against injuries to persons caused by escaping livestock.

The ruling below fails to appreciate the similarities between the case at bar and *Hopkins*, 113 Ill. 2d at 209. In *Hopkins*, the plaintiff who had settled several damage claims against him for accidents caused by his intoxication, brought an action for contribution against the tavern where he had consumed the alcohol based on the Dramshop Act. This Court found that the plaintiff was not among the class of persons who could bring an action under the Dramshop Act because recovery under the Act is limited to innocent third persons who are injured as result of the sale or gift of intoxicating beverages. *Id.* at 211-2. Because the plaintiff himself could not bring a dramshop action against the tavern, the Court concluded that to permit the contribution action would simply afford the plaintiff a means of circumventing the statutory restriction. *Id.* at 212.

The Appellate Court distinguished *Hopkins* by finding that the liability imposed by Dramshop Act is purely statutory; therefore if liability cannot be imposed under the Dramshop Act—which was the case in *Hopkins*—there was no other basis to hold the defendant liable in tort for purposes of the Contribution Act. (A11) In this case, however, the Appellate Court found that the Grossens could be held liable under general negligence theories even if the Animals Running Act was not applicable. (A11) This holding is incorrect and misconstrues a long line of Illinois cases which find that a landowner has no common law duty to guard against injuries to persons caused by another's livestock which escape from their confinement. *See Bulpit*, 145 Ill. at 349; *Heyen*, 94 Ill. App. 2d at 296; *Smith*, 152 Ill. App. 3d at 348;; *Douglass*, 286 Ill. App. 3d at 186; *Corona v. Malm*, 315 Ill. App. 3d 692 (2nd Dist. 2000).

In *Heyen v. Willis*, 94 Ill. App. 2d at 296, the Appellate Court rejected the plaintiff's attempts to stylize the complaint as a common law negligence action as opposed to a cause of action under the Animals Running Act, and held that the plaintiff failed to show a common law duty on the part of the defendant-landowners. *Id.* at 295. The *Heyen* court explained that, prior to the enactment of the Animals Running Act in 1871, there was no liability in Illinois for injury or damage caused by an animal running at large. *Id* at 296.

Due to changing social conditions, the Illinois Legislature made a deliberate choice to establish a duty to fence in livestock when it adopted the Animals Running Act in 1871. *Heyen*, 94 Ill. App. 2d at 296. In making this change, the legislature expressly limited the liability for damage caused by estrays to their owner or keeper. *Id.* Because a cause of action did not exist prior to the enactment of the Animals Running Act, the only basis to hold a person liable for damage caused by estrays is through the Animals Running Act. *Heyen*, 94 Ill. App. 2d at 296 ("the duty to guard against injury or damage by estrays is cast by law upon the owner or keeper of the animals, and liability for injury or damage caused by them must be predicated upon the [Animals Running] Act"); *Corona*, 315 Ill. App. 3d at 698 ("there is no independent basis for the action apart from the [Animals Running] Act itself.")

Just as in *Hopkins*, if the Animals Running Act does not apply, there is no other basis to hold the Grossens liable in tort for purposes of the Contribution Act. Illinois does not impose a common law duty on a landowner to guard against injuries caused by their escaping livestock. *See Bulpit*, 145 Ill. at 349. And if Frank, as an owner of cattle, has no *common law* duty to prevent those cattle from escaping their enclosure, then the Grossens, who are neither owners nor keepers of cattle, certainly have no such duty under the Act. (C189)

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

Count III of Frank's contribution complaint alleges that there was an Agreement in Connection with Line Fences ("contract") in effect at the time of the accident in which Plaintiff was injured by Frank's cows. (C86-C89) The contract at issue was recorded in the Jo Daviess County Recorder's office on January 7, 1970 and was entered into by the Grossens' relatives who previously owned Parcel A and Pintozzi's predecessors who previously owned Parcel B. (C100-2) The contract states that both parties will be responsible for maintaining their half of several division fences, many of which no longer exist. (C100-2) The contract does not provide for any mechanism to enforce each party's obligation or any remedy if a party fails to perform under the contract. (C100-2)

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

The Contribution Act provides that contribution is permitted between parties who are both subject to "liability in tort." 740 ILCS 100/2(a). The Appellate Court found that Frank's contribution action could be based on the contract between the Grossens and Frank, even though it has no connection to Plaintiff, as long as the injury for which Frank seeks contribution is the same injury for which Frank is liable. (A15) On appeal, Frank extensively relied on *Cirilo's, Inc.*, 154 Ill. App. 3d at 495-6 in arguing that the phrase "subject to liability in tort" includes duties that are breached pursuant to a contract. The Appellate Court did a disservice in failing to examine the *Cirilo's* case in light of several subsequent rulings that criticized its holding.

In *Cirilo's*, an employee of the plaintiff had embezzled nearly half a million dollars over a five-year period by periodically making out company checks to herself and cashing them at the plaintiff's bank. *Id.* at 495. The plaintiff sued its accounting firm for negligence.

The accounting firm in turn filed a third party complaint for contribution against the plaintiff's bank, alleging that the bank failed to exercise ordinary care in paying the forged checks. *Id.* The trial court dismissed the third party complaint, concluding that the bank was not "subject to liability in tort" within the meaning of the Contribution Act because the relationship between the bank and the plaintiff was governed by the contract, not tort law. *Id.* The appellate court reversed, finding that the bank could be deemed to have committed a breach of its duty to plaintiff. *Id.* at 496. Therefore the bank and the accounting firm were "subject to liability in tort" even though the bank's duties to the plaintiff arose from its contracts with the plaintiff, not from tort law. *Id.* at 497.

The Appellate Court overlooked a critical difference between *Cirilo's* and the case at bar. In *Cirilo's*, there was a contract between the third party defendant and the original plaintiff, and thus, the third-party defendant owed duties to the original plaintiff. *Id.* 496-7. In this case, the contract at issue is between Frank's predecessors and the Grossens' predecessors. (C100-2) Plaintiff is not a party to the contract and the contract does not set forth any duties owed by the Grossens to Plaintiff. (C100-2)

The Appellate Court cites *Giordano v. Morgan*, 197 Ill. App. 3d 543, 547-8 (2nd Dist. 1990) and *Joe & Dan International Corp. v. United States Fidelity & Guaranty Co*. 178 Ill. App. 3d 741, 750 (1st Dist. 1988) as support for its holding that liability under a contract can establish "liability in tort" under the Contribution Act. (A14-A15) However, both *Giordano* and *Joe & Dan* involved contracts between the plaintiffs and the third party defendants wherein the third party defendants owed contractual duties to the plaintiffs. *Giordano,* 197 Ill. App. 3d at 545; *Joe & Dan International Corp.,* 178 Ill. App. 3d at 743-4. In fact, the Court in *Joe & Dan* specifically relied on the holding in *Cirilo's* to find possible tort liability and emphasized that liability potentially existed, "…notwithstanding that their differing duties *to*

the plaintiff arose from their contracts with [the plaintiff], not tort law." *Joe & Dan International Corp.,* 178 Ill.App.3d at 750. (Emphasis added) In other words, an independent basis for tort liability existed between the third party defendants and the plaintiffs in these cases. The existence of a contract did not create the tort liability, though perhaps it is more likely that in a case where a contract exists between parties, duties will arise subjecting the parties to liability in tort if breached. Here, again, Plaintiff is not even mentioned in the contract between the Grossens and Frank and the contract does not set forth any duties owed by the Grossens to Plaintiff. (C100-2)

The overarching issue of whether a breach of contract can constitute tort liability under the Contribution Act warrants review by this Court because at least three appellate decisions have rejected the reasoning advanced in *Cirilo's*. In *J.M. Krejci Co.*, 148 Ill. App. 3d at 398, the First District found that the third party defendant was not subject to liability in tort to the original plaintiff because the plaintiff's claim against the third party defendant was based upon a breach of contract, not negligence. *See also Pier Transp., Inc. v. Braman Agency*, LLC, 2015 IL App (1st) 150300-U, ¶ 78 ("Plaintiff cannot state a cause of action for contribution on the facts of this case because the right of contribution exists only among parties jointly liable in tort, and not between one party liable for breach of contract and a third-party stranger to that contract.")

In *People ex. Rel. Hartigan v. Community Hosp. of Evanston*, 189 Ill. App. 3d 206, 213–214 (1st Dist. 1989), the Illinois Attorney General brought suit alleging that both a member of the Community Hospital of Evanston's board of directors and a bank had wrongfully dissipated certain assets belonging to the hospital. Specifically, the complaint alleged that the director breached fiduciary duties and that the bank breached both fiduciary and statutory duties to the hospital. The First District dismissed the director's cross-claim for contribution,

noting that breach of a fiduciary duty was not a "tort" for purposes of the Contribution Act. *Id.* at 214. When the bank cited *Cirilo's* as support for the argument that a breach of statutory and contractual duties amounted to tortious conduct, the court emphasized that the *Cirilo's* court's conclusion, that the bank's breach of statutory and contractual duties amounted to tortious conduct, was unsupported in the law. *Id.* at 214; *see also Wieboldt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 169–71 (N.D.Ill.1990) (mentioning that the decision in *People ex. Rel. Hartigan v. Community Hosp. of Evanston* is more consistent with Illinois Supreme Court precedent than *Cirilo's).*

B. Even if the beach of a contract can establish "liability in tort" under the Contribution Act, Frank cannot maintain an action for breach of contract because he failed to comply with the Fence Act.

The Appellate Court correctly determined that Frank has no right of recovery against the Grossens under the Fence Act for damages caused by his own cattle escaping from their enclosure because Frank failed to provide notice to the Grossens, as required by the Fence Act. *See* 765 ILCS 130, *et seq*. (A11-A12) Because the Fence Act also applies to Frank's breach of contract action, Frank is similarly estopped from pursing the action against the Grossens.

The Fence Act sets forth the general rules, between owners of adjoining parcels of land, for maintenance of division fences. *See* 765 ILCS 130, *et seq*. The Act more specifically provides that adjoining landowners shall each maintain a "just proportion"[2] of any boundary fence that divides their lands. *See* Id. at §3. The Act addresses payment for the construction of a division fence and the costs of maintenance of the same. *See* 765 ILCS 130 at §§ 3-4.

[2] "Just proportion" is not defined by the Act, and may mean something other than "equal proportion" depending on the case. *See In the Matter of the Estate of Willis*, 276 Ill. App. 3d 1053, 1058-59 (4th Dist. 1995).

The Fence Act also determines the manner in which complaints by one adjoining landowner regarding the failure of the other to construct or maintain the division fence are to be handled. *See* Id. at §§6 – 7. In such instances, the complaining party must lodge the complaint with the established fence viewers in the area who are responsible for viewing the fence and determining whether it is sufficient. *Id.* If an adjoining landowner refuses to construct or maintain a proportion of the fence after being required to do so, the other landowner may undertake the repairs, and bring suit in circuit court to recover the non-payor's share of the same. *Id.* at §11.

The contract between the Grossens and Frank simply defines the meaning of "just proportion" in terms of each party's obligation as to the division fence. (C100-2) It does not include enforcement terms or provide any remedy if a party fails to perform under the contract. (C100-2) The Fence Act fills the gaps in the contract, and if Frank had a complaint against the Grossens regarding the maintenance of their portion of the fence, he should have exercised his rights under the Fence Act to require the Grossens to repair portions of the fence he deemed insufficient. *See Bigelow v. Burnside*, 269 Ill. 324, 329 (1915) ("…no person is liable to contribute to the repair or rebuilding of a division fence until there has first been a finding by fence viewers, legally chosen, that his proportion of the fence needs repair or rebuilding.")

In *Bigelow v. Burnside*, 269 Ill. 324 (1915), the parties maintained a division fence for many years. Like Frank and the Grossens, the parties in *Bigelow* had a limited agreement which set forth their respective obligations with regard to maintenance of the division fence. *Id.* at 325. One of the parties believed that the other party's portion of the fence needed to be replaced and, instead of complying with the Fence Act, he rebuilt the fence and sought reimbursement from his neighbor. *Id.* The Illinois Supreme Court found that even though

the parties had a contract related to the division fence, the provisions of the Fence Act nonetheless still applied and the parties were required to comply with them. *Id.* at 330. Because the plaintiff had failed to comply with those provisions, he could not recover. *Id.*

Pursuant to *Bigelow*, even if a breach of the contract between the Grossens and Frank could constitute "liability in tort" to Plaintiff under the Contribution Act, Frank's breach of contract action still must fail. Frank failed to give proper notice to the Grossens or otherwise comply with the statutory requirements of the Act, and so, he cannot enforce the contract against the Grossens. (A11-A13)

APPENDIX

The Grossens have attached an appendix of the February 6, 2019 judgment of the Illinois Appellate Court for the Second Judicial District. (A1-A16)

CONCLUSION

For the foregoing reasons, the Grossens respectfully request that this Court grant the Grossens' Petition and reverse the Appellate Court's February 6, 2019 ruling as to Counts I and III.

Respectfully submitted,

DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellees-Petitioners

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that this petition conforms to the requirements of Rules 315 and 341. The length of this petition, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service and mailing and those matters to be appended to the petition under Rule 315, is 5,960 words.

Dated this 13th day of March, 2019.

/s/ *McKenzie R. Blau*

McKenzie R. Blau

PROOF OF SERVICE

I certify that on March 13, 2019, I, the undersigned party or person acting in their behalf, did serve this Petition for Leave to Appeal on:

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by:	_____ U.S. Mail	_____ FAX
	_____ An approved EFSP	_____Overnight Courier
	_____ Federal Express	____X____Email

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

/s/ *McKenzie R. Blau*

McKenzie R. Blau

Case No. _____

IN THE SUPREME COURT OF ILLINOIS

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant. _____ KENNETH FRANK, Third- Party Plaintiff-Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellees.	Petition for Leave to Appeal from the Appellate Court, Second District, Case No. 2-17-1040 There on Appeal from the Circuit Court, Fifteenth Judicial Circuit, Jo Daviess County, Illinois, Law Division, Circuit Court No. 13 L 27 The Honorable William A. Kelly, Judge Presiding.

APPENDIX

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2019 IL App (2d) 171040
No. 2-17-1040
Opinion filed February 6, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant and Third-Party Plaintiff-Appellant (David A. Grossen and Virginia J. Grossen, Third-Party Defendants-Appellees).	)	Appeal from the Circuit Court of Jo Davies County. No. 13-L-27 William A. Kelly, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Justices Jorgensen and Spence concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Kirk Raab of the Jo Daviess County Sheriff's Department, was driving his squad car west on Stagecoach Road in Scales Mound when he collided with a cow owned by the defendant, Kenneth Frank. Raab filed an action against Frank for injuries he suffered during the collision. Frank thereafter filed a third-party complaint for contribution against his neighbors, David A. and Virginia J. Grossen, asserting that the cow had gotten out through a fence they had failed to maintain. The trial court subsequently granted the Grossens' motion for summary

judgment. Frank appeals from that order. We affirm in part, reverse in part, and remand for additional proceedings..

¶ 2 I. BACKGROUND

¶ 3 The Grossens own a parcel of real estate in rural Jo Daviess County (Parcel A). Virginia Grossen inherited Parcel A from her mother in 2005 and executed a quitclaim deed to convey the property to her and her husband jointly in 2006. The Grossens do not live on Parcel A. They rent Parcel A to lessees for agricultural purposes, but livestock are not kept on Parcel A. The parcel of land adjacent to Parcel A (Parcel B) is owned by the Dominic T. and Donna M. Pintozzi Trust, with Dominic and Donna Pintozzi as trustees. A fence runs between Parcel A and Parcel B.

¶ 4 The Pintozzis have rented Parcel B to Frank since 2009. Frank uses Parcel B for pasturing cattle. Before agreeing to rent Parcel B, Frank inspected it to ensure that it was suitable for pasturing his cattle. Frank looked at the fence that divided Parcels A and B and determined that it was sufficient to keep his cattle enclosed on Parcel B. After he rented the property, Frank rode his ATV to the fence and inspected it every Sunday.

¶ 5 Frank and the Pintozzis entered into an oral lease regarding Parcel B. Under the lease, Frank was responsible for maintaining the portion of the fence on Parcel B. Frank subsequently learned that an agreement had been signed by the prior owners of Parcels A and B regarding fence maintenance. The Grossens were not aware of the fence agreement prior to 2011.

¶ 6 Frank knew that the Grossens owned Parcel A but did not live on it. Frank knew how to contact the Grossens if necessary. The Grossens were not aware that Frank was renting Parcel B or using that land to pasture cattle.

¶ 7 In July 2009, July 2010, and July 2011, heavy rainstorms damaged portions of the fence that divided Parcels A and B. After each of these three storms, Frank repaired the fence. He did not call the Grossens after any of the rainstorms to let them know that the fence had been damaged or that it might need repairs. Frank believed that the repairs he had made to the fence in 2009, 2010, and 2011 were sufficient to keep the cattle restrained.

¶ 8 On November 10, 2011, Frank's cattle escaped and entered onto the road. Raab was driving on the road and collided with one of Frank's cows. After the accident, Frank contacted the Grossens to inform them of the accident. Frank told the Grossens that he believed that the fence dividing Parcels A and B was in bad repair. The Grossens then made plans to have work done on the fence. In the spring of 2012, the Grossens spent $2000 to clear brush around the west side of the fence and to have the western half of the fence replaced with new post and new wire.

¶ 9 On November 8, 2013, Raab filed a one-count complaint against Frank for personal injuries he suffered during the collision. Raab alleged that Frank had violated the Domestic Animals Running at Large Act (Running at Large Act) (510 ILCS 55/1 (West 2010)) by failing to use the reasonable care necessary to restrain his cattle from straying from the confinement area. In his answer, Frank raised the affirmative defense that he used reasonable care in restraining the cattle, because they were kept in a well-fenced area.

¶ 10 On August 14, 2014, Frank filed a three-count third-party complaint against the Grossens. As amended, the complaint sought contribution based on theories of negligence, breach of duty under the Fence Act (765 ILCS 130/3 (West 2010)), and breach of contract. Frank alleged that the cattle escaped and injured Raab because the Grossens did not keep their portion of the fence in good repair.

¶ 11 On June 9, 2016, the trial court approved a $225,000 settlement agreement between Raab and Frank. On that same day, the Grossens filed a motion for summary judgment on Frank's third-party complaint. The Grossens argued that count I of Frank's complaint was barred by the Running at Large Act; count II was barred by the Fence Act; and count III should be dismissed because the fence agreement did not run with the land.

¶ 12 The record on summary judgment included the deposition testimony of the Grossens and Frank. The Grossens testified that they were not aware that there was a problem with the fence until Frank told them, following the accident. Frank testified that he checked both his and the Grossens' portions of the fence every Sunday. The accident occurred on a Thursday night. After the accident, he checked the fence. He determined that a jumping deer had struck the top of the Grossens' portion of the fence and had broken it. Frank testified that the Grossens could have discovered this only if they inspected the fence daily. However, in his 40 years as a farmer, he had inspected the fences only weekly. Further, he did not know anyone in the farming community who checked their fences daily.

¶ 13 On September 7, 2016, the trial court granted the Grossens summary judgment on counts I and II of Frank's third-party complaint. As to count I, the trial court determined that the Running at Large Act barred Frank's contribution claim. As to count II, the trial court found that the rights and responsibilities created under the Fence Act were not applicable to the facts of the case. The trial court denied the Grossens' motion with respect to count III, finding that the fence agreement ran with the land and that Frank had a viable cause of action for breach of that agreement.

¶ 14 On August 1, 2017, the Grossens filed their second motion for summary judgment, as to count III of Frank's third-party complaint. The Grossens argued that, because count III was

premised on a breach of contract, Frank could not recover under the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/2 (West 2010)).

¶ 15 On November 27, 2017, the trial court granted the Grossens' motion for summary judgment as to count III. The trial court found that the contract between Frank and the Grossens was the only basis for contribution. As such, there was no connection between Raab and the Grossens to justify a claim under the Contribution Act. Following the trial court's ruling, Frank filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 A. The Contribution Act

¶ 18 On appeal, Frank argues that the trial court erred in granting the Grossens summary judgment on each of the three counts of his third-party complaint. Frank maintains that the trial court incorrectly determined that he could not bring a contribution claim against the Grossens.

¶ 19 The purpose of a motion for summary judgment is to determine whether a genuine issue of material fact exists (*People ex rel. Barsanti v. Scarpelli*, 371 Ill. App. 3d 226, 231 (2007)), and such a motion should be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2016)). In determining the existence of a genuine issue of material fact, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). Summary judgment may be granted only where the facts are susceptible to a single reasonable inference. *Consolino v. Thompson*, 127 Ill. App. 3d 31, 33 (1984). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the

judgment is incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997). We review *de novo* the trial court's grant of a motion for summary judgment. *AUI Construction Group, LLC v. Vaessen*, 2016 IL App (2d) 160009, ¶ 16.

¶ 20 Contribution is a statutory remedy in Illinois, governed by the Contribution Act (740 ILCS 100/2 (West 2010)). The right to contribution arises under the Contribution Act from tort liability, and the statute apportions recovery among the contributors on the basis of their relative culpability. Section 2 of the Contribution Act states:

> "(a) Except as otherwise provided in this [Contribution] Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.
>
> (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability." 740 ILCS 100/2 (West 2010).

Section 3 of the Act, concerning the amount of contribution, provides:

> "The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his *pro rata* share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability." 740 ILCS 100/3 (West 2010).

Thus, the basis for a contributor's obligation rests on his liability in tort to the injured party. *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 118 Ill. 2d 447, 462 (1987). The bases for liability among the contributors need not be the same. *Id.* Further, the basis for contribution need not mirror the theory of recovery asserted in the original action. *Id*. The Contribution Act is founded upon the equitable doctrine of unjust enrichment. *People v. Brockman*, 143 Ill. 2d 351, 366 (1991).

¶ 21 Here, Frank's contribution claim is premised on his allegation that the Grossens negligently maintained their portion of the fence, which allowed Frank's cattle to escape and injure Raab. The trial court determined that (1) Frank's complaint was barred by the Running at Large Act, (2) the Fence Act was not applicable, and (3) he could not rely on a contract for a contribution claim. We consider each of the trial court's holdings in turn.

¶ 22 B. The Running at Large Act

¶ 23 The Running at Large Act governs domestic animals running at large. In 1895, the statute imposed strict liability on a defendant for damages caused by domestic animals running at large. *McQueen v. Erickson*, 61 Ill. App. 3d 859, 862 (1978). In 1931, the statute was amended to provide that the owner or keeper of such animals was not liable for damages if he was able to establish that he used reasonable care in restraining the animals and did not know that the animals were running at large. *Id.* Illinois courts have consistently held that the statute is designed to provide redress for injuries caused by animals grazing at pasture beyond the control and supervision of their owners. *Zears v. Davison*, 154 Ill. App. 3d 408, 411 (1987). To recover damages under this statute, the plaintiff must prove only that he was injured by an animal running at large owned or kept by the defendant. To avoid strict liability, the defendant must

then affirmatively plead and prove that (1) he exercised due care in restraining his animal and (2) he lacked knowledge that it had escaped. *Corona v. Malm*, 315 Ill. App. 3d 692, 697 (2000).

¶ 24 In *Heyen v. Willis*, 94 Ill. App. 2d 290, 296 (1968), the court held that only the animal's owner could be liable for the animal's conduct under the Running at Large Act. In that case, Heyen filed a wrongful-death action against a landlord (Willis) and his tenant (Lyons). *Id.* at 291. According to the record, the decedent had died when he lost control of his vehicle trying to avoid cattle that were owned by Lyons and had strayed from Willis's property. *Id.* Both Lyons and Willis knew that the pasture fences were inadequate to restrain cattle. *Id.* at 292. Although the rental agreement required Lyons to repair the fence, Willis never inspected to ensure that the fence had been repaired. *Id.* Heyen argued that these allegations demonstrated that Willis had breached his legal duty to the decedent. *Id.* Heyen further alleged that Willis was liable as an animal "keeper" under the Running at Large Act. *Id.* The trial court granted summary judgment to Willis. *Id.* at 291.

¶ 25 On appeal, the reviewing court affirmed the trial court's judgment. *Id.* at 297. The court explained that Willis was not a "keeper" of the cattle, because he owned no interest in the cattle, was not responsible for their care, and had no right to their custody or control. *Id.* at 295. The court noted that a lessor had a common-law duty to guard against damage caused by strays that escaped from the premises as a result of a defect on the premises that was known at the time of the lease. *Id.* However, the court found that, in adopting the Running at Large Act in 1871, the legislature limited liability to the strays' owner or keeper. *Id.* at 296. The court declined to extend liability beyond the owner or keeper, explaining:

> "The likelihood of injury or damage from estrays, and the attendant duty to use care to prevent such injury or damage, lies not in the place where animals may be kept but in

> their propensity to roam, their wanderlust. Thus, the duty to guard against injury or damage by estrays is cast by law upon the owner or keeper of the animals, and liability for injury or damage caused by them must be predicated upon the [Running at Large] Act. No common law duty exists upon the part of the landowners in this case and the question of their negligence in placing their premises in the possession of Lyons for the grazing of cattle should not be submitted to a jury." *Id.* at 296-97.

¶ 26 Thus, although the Contribution Act suggests that Frank has a right to contribution from the Grossens for the damages he paid to Raab (see 740 ILCS 100/2 (West 2010)), the Running at Large Act suggests that Frank must bear all of those losses himself (see *Heyen*, 94 Ill. App. 2d at 296). The question hence is how to reconcile these two seemingly conflicting statutes.

¶ 27 The answer lies within our supreme court's decision in *Doyle v. Rhodes*, 101 Ill. 2d 1 (1984). In that case, the supreme court analyzed the interplay between the Contribution Act and the Workers' Compensation Act (Ill. Rev. Stat. 1981, ch. 48, ¶¶ 138.5(a), 138.11 (now codified at 820 ILCS 305/5(a), 11)). There, the plaintiff, Charles Doyle, was working as a highway flagman for Rein, Schultz & Dahl (Rein), a highway contractor, when he was struck by an automobile driven by the defendant, Kathleen Rhodes. *Doyle*, 101 Ill. 2d at 4. Doyle filed a complaint against Rhodes, who in turn filed a third-party complaint against Rein, seeking contribution. *Id.* at 4-5. Rhodes alleged that Rein was negligent and had violated the Road Construction Injuries Act (Ill. Rev. Stat. 1981, ch 121, ¶ 314.1 *et seq.* (now codified at 430 ILCS 105/0.01 *et seq.* and known as the Road Worker Safety Act)). *Doyle*, 101 Ill. 2d at 5. In response, Rein argued that, because of the exclusive-remedy provision of the Workers' Compensation Act, it was not liable in tort to Doyle, its employee, and consequently was not liable to Rhodes under the contribution statute. *Id.* at 6.

¶ 28 The supreme court held that the fact that an action by Doyle against Rein was barred by the Workers' Compensation Act did not provide Rein with immunity from a third-party action. *Id.* at 8, 14. The supreme court explained that this was because "the intent of the contribution statute was to reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege." *Id.* at 9.

¶ 29 Based on *Doyle*, the fact that Raab would be barred from pursuing an action against the Grossens by the Running at Large Act has no bearing on Frank's ability to seek contribution from the Grossens. The trial court therefore erred in determining that the Running at Large Act barred Frank's claim for contribution.

¶ 30 In so ruling, we reject the Grossens' argument that the instant case is analogous to our supreme court's decision in *Hopkins v. Powers*, 113 Ill. 2d 206 (1986). In that case, our supreme court considered whether a dramshop is "subject to liability in tort" for purposes of a cause of action brought under the Contribution Act. *Id.* at 208. The plaintiff, after being served alcohol by the dramshop, was involved in a car accident that caused personal injuries to others, as well as property damage. *Id.* at 209. After compensating those he had injured, the plaintiff filed a contribution action against the defendant, the dramshop operator. *Id.* The supreme court decided that a dramshop that contributes to the intoxication of a person who later causes injury to another is not "liable in tort" under the Dramshop Act (Ill. Rev. Stat. 1983, ch. 43, ¶ 135 (now codified at 235 ILCS 5/5-21)) for purposes of an action for contribution brought by the intoxicated party. *Hopkins*, 113 Ill. 2d at 210. The supreme court concluded that, although serving intoxicating beverages can impose liability on dramshops, that liability is not grounded in tort, but arises purely from the Dramshop Act. *Id.* at 211. The supreme court held, that because the liability on dramshops under the Dramshop Act is "*sui generis* and exclusive," the

defendant was not "liable in tort" for purposes of the Contribution Act. *Id.* Thus, the plaintiff could not maintain an action against the dramshop under the Contribution Act. *Id.* The supreme court additionally held that the plaintiff could not recover under the Dramshop Act, because he was not among the class of innocent third persons who may recover under the Dramshop Act. *Id.* at 211-12. The supreme court explained:

> "Plaintiff's attempt to use the Contribution Act to recover a portion of the losses he incurred in reaching settlements for the damages he caused by his intoxication amounts to an attempt to circumvent the statutory bar of the Dramshop Act. Recognizing that a direct route to recovery is unavailable, plaintiff seeks an indirect route by way of the Contribution Act. But because plaintiff is barred from direct recovery under the Dramshop Act, he is barred as well from recovery under the Contribution Act." *Id.* at 212.

¶ 31 *Hopkins* is distinguishable. There, the plaintiff sought contribution from the defendant for selling alcohol. However, selling alcohol is not a tortious act. *Id.* at 211. Thus, the defendant could not be liable in tort. *Id.* Conversely, in the instant case, Frank argued that the Grossens were negligent for failing to maintain the portion of the fence on their property. A failure to maintain one's property can be tortious. See *Ortiz v. Jesus People, USA*, 405 Ill. App. 3d 967, 973 (2010) (landowner can be liable for negligently allowing a dangerous condition on his property).

¶ 32 C. The Fence Act

¶ 33 We next address whether the trial court properly found that Frank could not maintain a cause of action under the Fence Act. The Fence Act provides that "[w]hen 2 or more persons

have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them." 765 ILCS 130/3 (West 2010). If a person fails to maintain his fence, then

> "[A]ny two fence viewers of the town or precinct, as the case may be, shall, on complaint by the party aggrieved, after giving due notice to each party, examine such fence, and if they deem the same to be insufficient, they shall so notify the delinquent party, and direct him to repair or rebuild the same within such time as they may deem reasonable." 765 ILCS 130/6 (West 2012)

Further, if any person who is liable to contribute to the repair of a fence fails or neglects to do so, then the injured party, upon providing 10 days' written notice, may repair the fence at the expense of the person neglecting to repair the fence. *Id.* § 11.

¶ 34 We believe that the Fence Act clearly provides that, before a landowner can be liable, he must be given notice of a problem with the portion of fence that he is required to maintain and the opportunity to fix the problem. See *id.* §§ 6, 11. Here, before the accident, Frank did not give the Grossens any notice that there was any problem with their portion of the fence. Indeed, Frank testified that he was not aware that there was a problem with the Grossens' portion of the fence until after the accident. Thus, based on Frank's failure to provide notice to the Grossens, the trial court properly determined that Frank could not maintain an action under the Fence Act. Accordingly, we find that the trial court properly granted the Grossens summary judgment on count II of Frank's complaint.

¶ 35 In so ruling, we reject Frank's arguments that the Grossens waived their right to receive notice that there was a problem with their portion of the fence because (1) they acknowledged after the accident that they had an obligation to fix their portion of the fence and (2) the fence agreement required them to maintain their portion of the fence. Under the Fence Act,

acknowledging ownership of a fence or being obligated to maintain the fence is not the same as receiving timely notice that the fence is in need of repair. The Grossens could have waived their right to notice under the Fence Act only if they were aware of the problem with the fence and had an opportunity to fix it before the accident. However, the record clearly reveals that they were not aware of any such problem.

¶ 36 We also find Frank's reliance on *McKee v. Trisler*, 311 Ill. 536 (1924), to be misplaced. In that case, the defendant's bull entered the plaintiff's land through the fence that the defendant shared with the plaintiff, and the bull killed one of the plaintiff's mules and injured another. *Id.* at 538. The plaintiff sued for damages. *Id.* The trial court instructed the jury that, if it found that the plaintiff's portion of the fence was in good repair when the defendant's bull entered the plaintiff's property and injured the mules, then it should find in the plaintiff's favor. *Id.* at 540-41. The jury found in the plaintiff's favor. *Id.* at 538. On review, both the appellate court and the supreme court affirmed. *Id.* at 547. The supreme court explained that the jury instruction properly stated the law, because the plaintiff had the burden to prove that his portion of the fence complied with the statute or that the defendant's bull came through the defendant's portion of the fence. *Id.* at 544-46.

¶ 37 *McKee* is distinguishable in two regards. First, it addresses a landowner's burden of proof under the Fence Act in order to recover damages when his neighbor's livestock trespasses on his land. Thus, that case would be analogous here only if the Grossens had filed an action against Frank for his trespassing cattle. Second, because damages were sought by the adjacent landowner, and not the bull's owner, *McKee* contains no discussion of what notice the bull's owner would have had to provide regarding the condition of the adjacent landowner's portion of

the fence before he could seek damages. Absent such a discussion, *McKee* is not applicable to the case at bar.

¶ 38 D. Contribution Claim Based on Breach of Contract

¶ 39 As noted earlier, although the trial court found that the fence agreement ran with the land and that Frank had stated a viable claim under that agreement, it held that the contract between Frank and the Grossens was not a proper basis on which Frank could seek contribution for the damages he had paid to Raab.

¶ 40 We believe that the trial court's decision on this matter is incorrect, as it is inconsistent with this court's analysis in *Giordano v. Morgan*, 197 Ill. App. 3d 543 (1990). In that case, after Giordano was in a car accident, she filed a complaint against Morgan, who had been driving the car that struck her, as well as her own insurance agent and insurance company (insurance defendants) for not procuring the replacement insurance that she had purchased. *Id.* at 544-45. Giordano settled with the insurance defendants for $37,750. *Id.* at 547. Following a jury trial, Giordano received a judgment against Morgan for $16,392. *Id.* Morgan thereafter argued that the Contribution Act should apply and that the insurance defendants' settlement should be set off against the jury verdict, reducing the judgment against her to zero. *Id.* The trial court agreed and reduced the judgment against her. *Id.* On appeal, this court reversed. *Id.* at 552.

¶ 41 We explained that, in order for contribution to apply, "one or more persons [must be] liable in tort arising out of the same injury." (Emphasis omitted.) *Id.* at 548. We found that Morgan was clearly liable. We stated that it was unclear whether the insurance defendants were similarly liable, because the counts against them were based on breach of contract. *Id.* We found, however, that, although breach of contract is "certainly a nontort theory, it is not determinative as to whether the parties might also be 'subject to liability in tort' for purposes of

contribution." *Id.* (quoting *Joe & Dan International Corp. v. United States Fidelity & Guaranty Co.*, 178 Ill. App. 3d 741, 750 (1988)).

¶ 42 We then addressed whether Giordano's claims against Morgan and the insurance defendants were for the "same injury." *Id.* at 550. We held that the injuries were related but not the same. We explained that the actions of the insurance defendants were related to Morgan's only because, were it not for Morgan's negligence and Giordano's resulting injuries, the insurance defendants' failure to procure the required insurance would not have been at issue. *Id.* at 551. We held that, because the injuries were not the same, the Contribution Act was inapplicable and the trial court erred in reducing the judgment on the verdict. *Id.* at 552.

¶ 43 Here, as set forth in *Giordano*, Frank is not prohibited from invoking the Contribution Act to seek recovery from the Grossens based on a breach-of-contract theory. Rather, this court looks to whether the injury for which Frank seeks contribution is the same injury for which Frank is liable. Frank is seeking contribution for the damages he paid to Raab due to the straying cattle. As this is the same injury that Frank is liable for, the trial court erred in finding that Frank could not seek contribution under the fence agreement.

¶ 44 In so ruling, we find the Grossens' reliance on *People ex rel. Hartigan v. Community Hospital of Evanston*, 189 Ill. App. 3d 206, 213-14 (1989), and *Wiebolt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 169-71 (N.D. Ill. 1990), to be misplaced. Each of those cases involved a breach of fiduciary duty, which is not a tortious act that is subject to contribution. See *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445 (1989).

¶ 45 We also reject the Grossens' reliance on *Ball Corp. v. Bohlin Building Corp.*, 187 Ill. App. 3d 175, 177 (1989). The Grossens assert that the case stands for the proposition that there is a strong presumption that parties to a contract intend that the contract's provisions apply only

to them. That presumption can be overcome only if the language in the contract strongly implies that third parties were intended to benefit from the contract. See *id*. Because the fence agreement makes no reference to Raab, the Grossens insist that the fence agreement does not impose liability on them for Raab's injuries.

¶ 46 We do not disagree with the principles set forth in *Ball Corp.* However, as that case does not discuss contribution between joint tortfeasors, it is not pertinent to the instant case. Rather, what is pertinent is that a fence agreement existed between the parties. In order for Frank to be able to recover contribution from the Grossens, some relationship must have existed between them that would render contribution equitable. *Ohio Savings Bank v. Manhattan Mortgage Co.*, 455 F. Supp. 2d 247, 255 (S.D.N.Y. 2006). The fence agreement establishes that relationship between the Grossens and Frank.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the judgment of the circuit court of Jo Daviess County granting summary judgment to the Grossens on count II of Frank's third-party complaint, regarding a violation of the Fence Act. We reverse the court's judgment granting summary judgment to the Grossens on counts I and III of Frank's third-party complaint and remand for additional proceedings on those counts.

¶ 49 Affirmed in part and reversed in part.

¶ 50 Cause remanded.

Case No. _____

IN THE SUPREME COURT OF ILLINOIS

KIRK RAAB, Plaintiff, v. KENNETH FRANK, Defendant. KENNETH FRANK, Third- Party Plaintiff-Appellant, v. DAVID A. GROSSEN and VIRGINIA J. GROSSEN, Third-Party Defendants-Appellees.	Petition for Leave to Appeal from the Appellate Court, Second District, Case No. 2-17-1040 There on Appeal from the Circuit Court, Fifteenth Judicial Circuit, Jo Daviess County, Illinois, Law Division, Circuit Court No. 13 L 27 The Honorable William A. Kelly, Judge Presiding.

NOTICE OF FILING

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E-FILED
3/13/2019 3:36 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

PLEASE TAKE NOTICE that on March 13, 2019, I caused to be filed with the Clerk of the Illinois Supreme Court, a Petition for Leave to Appeal, a copy of which together with this Notice of Filing is herewith served upon you.

PLEASE TAKE FURTHER NOTICE THAT, in accordance with Supreme Court Rules, this Notice of Filing, together with the Petition for Leave to Appeal, was served and filed electronically on March 13, 2019 with the Clerk of the Illinois Supreme Court.

CERTIFICATE OF SERVICE BY EMAIL

McKenzie R. Blau certifies that she caused to be served the foregoing Notice of Filing Amended Notice of Appeal and Amended Notice of Appeal upon:

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Via email to their address listed above, sent from Dubuque, Iowa on March 13, 2019, before the hour of 4:30PM.

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

By: McKenzie R. Blau

McKenzie R. Blau 6311074

No. 124641

In the Supreme Court of Illinois

KIRK RAAB,

Plaintiff,

v.

KENNETH FRANK,

Third-Party Plaintiff-Respondent,

v.

DAVID A. GROSSEN and VIRGINIA J. GROSSEN,

Third-Party Defendants-Petitioners.

On Petition for Leave to Appeal from the Illinois Appellate Court,
Second Judicial District, No. 2-17-1040.
There Heard on Appeal from the Circuit Court of the Fifteenth Judicial District,
Jo Daviess County, Illinois, No. 13 L 27.
The Honorable **William A. Kelly**, Judge Presiding.

ANSWER TO PETITION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF FACTS

On November 8, 2013, Plaintiff Kirk Raab ("Raab") filed a one-count complaint against Defendant Kenneth Frank ("Frank") for personal injuries that Raab sustained when he struck a cow that was owned by Frank in the roadway. (R.C2-15) In his answer and affirmative defenses to Raab's complaint, Frank denied all allegations of negligence and asserted as his second affirmative defense that he used reasonable care in restraining the cow from running at large by placing the cow in a pasture when the fences were examined and found to be in good condition and routinely visited the cow pasture and observed the condition of the fences and the gates. (R.C26-31)

On December 8, 2014, Frank filed his amended third-party complaint against David A. Grossen and Virginia J. Grossen ("the Grossens"), which contained three counts. (R.C80-120) In general, Frank alleged that Grossens owned a tract of land bearing Jo Daviess Assessor Parcel Number 16-000-172-00 ("Grossen parcel"), which shares a common fence line with a tract of land owned by Dominic T. Pintozzi bearing Jo Daviess County Assessor Parcel Number 16-000-171-00 ("Pintozzi parcel"). (R.C80-89) Frank further alleged that he was leasing the Pintozzi parcel which encompassed the cattle pasture at the time of the occurrence alleged in Raab's complaint. (R.C81)

Count I of Frank's amended third-party complaint alleged that the Grossens were negligent in committing one or more of the following careless and negligent acts or omissions:

(a) The failure to use reasonable care in maintaining the boundary fence which existed between the Grossen parcel and the Pintozzi parcel;

(b) The failure to repair the fence which existed between the Grossen parcel and the Pintozzi parcel, when they knew or should have known that the fence was in need of repair;

(c) The allowance of a boundary fence to exist between the Grossen parcel and the Pintozzi parcel, when the boundary fence was not in good repair and not constructed of suitable materials;

(d) The allowance of the fence between the Grossen parcel and the Pintozzi parcel, to exist when he knew or should have known that the design of the fence and fencing system was not reasonable and adequate;

(e) The allowance of a boundary fence to exist between the Grossen parcel and the Pintozzi parcel, when he knew or should have known that the boundary fence was not reasonable to enclose the cattle which were contained on the adjacent property; and

(f) Carelessness or negligence with respect to the fence between the Grossen parcel and the Pintozzi parcel.

(R.C82-83.)

In Count II, Frank alleged that Grossen violated the Fence Act in one or more of the following respects:

(a) The failure to maintain a just proportion of the division fence between the Grossen parcel and the Pintozzi parcel, in violation of 765 ILCS 130/3.

(b) The allowance of a division fence to exist between the Grossen parcel and the Pintozzi parcel, which was not properly maintained when they had a responsibility to maintain a just proportion of the division fence pursuant to 765ILCS 130/3.

(c) The allowance of a division fence to exist between the Grossen parcel and the Pintozzi parcel, which was not properly designed and failed to maintain a just proportion of the fence by failing to correct defects in the design of the fence pursuant to 765 ILCS 130/3.

(R.C85.)

In Count III, Frank alleged that on or about January 7, 1970, a Fence Agreement was recorded against the Grossen parcel that obligated Grossen to repair and maintain the portion of the fence where the cow that was struck by Raab had escaped. (R.C86-89) The Fence Agreement was entered into between William H. Meyer and Tillie Meyer, his wife, parties of the first part, and Myrtle Thomas, a widow, and Elizabeth Eckerman and Clifford Eckerman, her husband, parties of the second part. (R.C100-02) Frank alleged that as a successor owner of the parties of the second part, Grossen was required to

maintain the north sixty (60) rods of fence line and the north forty (40) rods of fence line running in an easterly and westerly direction of the boundary fence which existed between the Pintozzi parcel and the Grossen parcel. (R.C88, 100-02) Frank further alleged that Grossen failed to comply with the Fence Agreement by failing to properly maintain the boundary fence between the Pintozzi parcel and Grossen parcel and that, as a direct result of this breach, Raab was injured as alleged within his complaint. (R.C87-88.

In each count, Frank sought judgment against Grossen for all sums for which he was liable to Raab in such amount, by way of contribution, as would be commensurate with the degree of misconduct attributable to Grossen in causing the alleged damages to Raab. (R.C83, 86, 88-89) The deposition testimony of Virginia Grossen ("Virginia"), David Grossen ("David") and Kenneth Frank, established that the Grossen parcel and Pintozzi parcel share a common boundary line between them which is divided by a fence and that a small creek or waterway runs through the boundary line fence of the two parcels. (R.C437) The area of the creek crossing through the boundary line fence is where it is believed that the cow escaped. (R.C437, 823-24) Frank testified that he was 99.9% sure that the cattle in question escaped through the creek bed between the Grossen parcel and the Pintozzi parcel because he saw manure and foot prints on the mud and grass within and near the creek bed upon the Grossen parcel in the area where the fence crossed the creek bed between the two parcels. (R.C823-24)

Virginia testified that if one was standing on the property facing the fence, the half of the fence to the right is the owner's responsibility to maintain. (R.C411) The area depicted to the right of the arrow she drew encompasses the portion of the line fence that

crossed the creek bed where Frank believes the cow escaped. (R.C437, 823-24) She admitted that she was responsible for caring for the portion of the fence where the cow had escaped:

> Q. And so let me just ask it this way. Based on the way [the Fence Agreement] is written, it would be fair to say that according to [the Fence Agreement], the owner of your parcel is responsible for caring for what's to the right of the arrow you drew.
>
> A. Yes.

(R.C411-13) Virginia testified that the area she had circled on Exhibit 1 to her discovery deposition contains the portion of the parcel for which she believes she was responsible for caring and this portion encompasses the area where the fence crosses the creek bed. (R.C412, 437)

Virginia testified that after the accident Frank reported to her and her husband that the fence was in bad repair and that they needed to take care of it, she agreed to do so immediately as soon as the weather cooperated. (R.C398) During the month of April in the spring following the incident, they hired Bob Spillane to repair the fence between the Pintozzi parcel and the Grossen parcel. (R.C399) David testified that the repair included electrifying the fence over the creek even though Frank voiced a complaint with the way the repair had been completed. (R.C467-68) The Grossens paid for the repairs.

ARGUMENT

Petitioner outlines no issue that merits this Court's attention, and there are no apparent conflicts between appellate districts or with any decision of this Court. On the contrary, the decision of the Appellate Court is consistent with precedent from this Court. The Petition should be denied.

I. The Appellate Court's Decision that the Grossens are Subject to Liability in Tort Under the Contribution Act is Consistent with the Decisions of this Court and with the Decisions of this State's Appellate Districts.

The Illinois Contribution Act provides in relevant part that "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property… there is a right of contribution among them…" 740 ILCS 100/2. The Act makes no requirement that the basis for liability among contributors be the same. *Id*. See also *Doyle v. Rhodes*, 101 Ill. 2d 1 (1984). In this case, the Second District held that the Grossens could be found liable in tort to Raab based upon the allegation that they were negligent for failing to maintain the portion of the fence on their property. *Raab v. Frank*, 2019 IL App (2d) 171040, ¶ 31. The Grossens suggest that the Second District's decision "eviscerates the Contribution Act's 'subject to liability in tort' requirement." (PLA, p. 2) The Grossens' conclusion that the Second District's decision runs contrary to the requirements of the Contribution Act is premised upon an erroneous argument that the Second District's decision in this case conflicts with this Court's decision in *Hopkins v. Powers*, 113 Ill. 2d 206 (1986) and with the Fourth District's decision in *Heyen v. Willis*, 94 Ill. App. 2d 290 (1968).

The Grossens correctly assert, citing *Vroegh v. J & M Forklift*, 165 Ill. 2d 523, 528 (1995), that a party's obligation to make contribution rests upon his being subject to liability in tort to the original plaintiff in the underlying action. (PLA, p. 8) The Grossens' mistake rests in their assertion that the Grossens' are not "subject to liability in tort" to Raab within the meaning of Contribution Act. The Grossens mistakenly base their argument on the Fourth District's decision in *Heyen,* as suggesting a holding in this case that is in line with this Court's decision in *Hopkins*, as opposed to the Court's decision in *Doyle*. In their attempt to manufacture a conflict between the decisions of the Appellate Districts, the Grossens assume a false equivalency between "subject to liability in tort" and "subject to liability in tort and lacking any affirmative defense, immunity, or special privilege," effectively adding terms to the Contribution Act not placed there by the legislature. Grossens' reliance on *Heyen*, is misplaced.

In *Heyen*, plaintiff filed suit under the Running at Large Act against a landowner for injury and damage sustained when cattle strayed from land under lease to the owner and keeper of the cattle. 94 Ill. App. 2d at 291. The Fourth District held in favor of the landowner, on appeal of the trial court's ruling granting his motion for summary judgment because the facts in *Heyen* did not support a finding that the landowner was either an owner or keeper of the cattle in question. *Id* at 295. In response to plaintiff's request that the early common law cases defining "owner" and "keeper" be overruled to reflect the changing social circumstances of the times, the Second District held that the request had been met by the Illinois legislature with the adoption of the Animal Act in 1871. *Id.* at 295-6. Citing this Court's precedent in *Bulpit v. Matthews*, 145 Ill. 345 (1893), the *Heyen* Court

found that "[p]rior to the enactment of the Animals Act there was no liability in Illinois for injury or damage caused by an animal running at large." 94 Ill. App. 2d at 296. Rather, the burden was placed upon a landowner to fence his land against damage caused by another's animals. *Id.*

In trying to create conflict among decisions, the Grossens contend that in light of *Heyen*, this Court's decision in *Hopkins v. Powers* requires the conclusion that since a suit filed by Raab against the Grossens could have been subject to an affirmative defense and possible dismissal under the Running at Large Act, the Grossens do not meet the "subject to liability in tort" requirement of the Contribution Act." (PLA, p.12) This reading of *Hopkins* was rejected by the Appellate Court. In *Hopkins*, this Court found that "there is no statutory or common law duty in Wisconsin or Illinois to refrain from serving intoxicating beverages to a person who then becomes intoxicated and, as a result, injures innocent third persons." 113 Ill. 2d at 211, citing *Wimmer v. Koenigseder*, 108 Ill. 2d 435 (1985) (internal quotations omitted). As such, the Court held that a dramshop which contributes to the intoxication of a person who later causes injury is not thereby liable in tort for purposes of an action for contribution brought by the intoxicated party. *Id.* at 210. According to the Grossens, *Heyen* holds that there is neither statutory nor common law liability in Illinois for any party other than an "owner" or "keeper" in animals running at large cases and *Hopkins* therefore dictates that the Grossens are not liable in tort for the purposes of the Contribution Act.

The Grossens are critical of the Second District's rejection of the application of *Hopkins* to this case in favor of *Doyle v. Rhodes*. Following its own analysis of *Heyen*, the

Second District found that the present case is analogous to this Court's decision in *Doyle v. Rhodes*. *Raab*, 2019 IL App (2d) at ¶ 29. In *Doyle*, this Court analyzed the effect of the Contribution Act upon the Worker's Compensation Act. 101 Ill. 2d at 7. Doyle sued Rhodes for injuries he sustained while at work as a highway flagman, when he was struck by an automobile driven by the defendant. *Id.* at 4. Rhodes filed a third-party suit for contribution against Doyle's employer, a highway contractor, alleging negligence and violations of Illinois law. *Id.* at 5. This Court found that the fact that the employer was immune, under the Workmen's Compensation Act, from a suit in tort brought by Doyle as plaintiff was not a bar to Rhodes claim for contribution. Indeed, this Court held that the very "intent of the contribution statute was to reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege." *Id.* at 9.

In its rejection of the Grossens' reliance upon *Hopkins*, the Second District found *Hopkins*, to be distinguishable on the grounds that the third-party defendant in *Hopkins* could not be subject to liability in tort, for "selling alcohol is not a tortious act." 2019 IL App (2d) at ¶ 31. In the present case, however, the Grossens are alleged to have negligently failed to maintain the portion of the fence on their property, and "a failure to maintain one's property can be tortious." *Id.*, citing *Ortiz v. Jesus People, USA*, 405 Ill. App. 3d 967, 973 (2010) (holding that a landowner can be liable for negligently allowing a dangerous condition to persist on his property). As was the case in *Doyle*, the fact that Raab may be barred from pursuing such an action, at least under the Act, has no bearing on Frank's ability to seek contribution from the Grossens. *Id.* at ¶ 29.

The Grossens' contention that the Second District's decision amounts to an evisceration of the Contribution Act's "subject to liability in tort" requirement is inconsistent with *Doyle*. Their assertion that their potential defense to a suit brought by Raab defeats Frank's contribution action amounts to an interpretation of the Contribution Act in which "subject to liability in tort" is equivalent to "subject to liability in tort and lacking any affirmative defense, immunity, or special privilege," an interpretation expressly rejected by this Court in *Doyle*. As such, only the Grossens' *interpretation* of the Contribution Act has been rejected, and not just by the Second District but by this Court.

Refusing to accept this Court's analysis in *Doyle*, the Grossens attempt to manufacture a controversy between the Second and Fourth District Courts by asserting that *Heyen* stands for the proposition that there is no common law remedy for animals running at large in the State of Illinois. Unfortunately, the very authority upon which the *Heysen* analysis is grounded expressly rejects that assertion.

The history of the common law regarding animals at large is analyzed extensively in the *Bulpit* decision. Under the common law, every owner of cattle was bound, at their peril, to keep them from trespassing upon the land of another. *Bulpit*, 145 Ill. at 349. This tenant of English common law was adopted by the general convention of the colony of Virginia in 1776. *Id.* at 350. In 1819, the law was adopted in Illinois by the first state legislature. *Id.* In 1848, however, this Court held in *Seely v. Gilman*, that the common law rule, while adopted in Illinois, was never in force because enforcement under the statute was conditioned upon the habits and conditions of society and because the law was ill-adapted to the open prairies and grasslands of 1848 Illinois. *Id.* (citation omitted) By 1871,

however, rapid changes in the State's conditions necessitated the adoption of the Animals Act. *Id.* at 352. Importantly, the *Bulpit* Court held that "since the passage of the present laws relating to domestic animals… we are of the opinion that *the common-law rule has, since the passage of that act, been in force in this state*." *Id.* at 356. (emphasis added)

Consequently, as the *Heyen* analysis of Illinois common law relating to animals running at large is grounded in the authority of the *Bulpit* holding, *Heyen* cannot stand for the proposition that there was never of common law remedy for animals running at large in the State of Illinois, contrary to the Grossens' assertions. Further, early Illinois cases following the passage of the Animals Act, but predating even *Bulpit*, apply common law tort principles to animals at large cases. See *Ward v. Brown*, 64 Ill. 307 (1872) (holding that an owner of cattle may be held liable for the trespass of his cattle where guilty of negligence in the selection of an agister, the placing of the cattle in the agister's field, or in the omission of a duty); *Ozburn v. Adams*, 70 Ill. 291 (1873) (holding that the issue of the liability of a property owner was fairly submitted to a jury when cattle he neither owned nor kept broke through a fence under his duty of care); *Wade v. Thiel*, 9 Ill. App. 223 (1881) (holding: (1) that an adjacent landowner could not recover against a bull's owner for damages resulting from the bull's breach of a shared fence due to the adjacent landowner's fault in causing the bull's breach; and (2) that an owner of domestic animals under another's exclusive care may be held liable under a declaration containing the proper averments if he was negligent in selecting his bailee).

The Fourth District's decision in *Heyen*, is grounded in the authority of this Court's decision in *Bulpit*, which held that the English common law rule has been in effect in

Illinois since the passage of the Animal's Act in 1871. Thus, *Heyen* cannot stand for the proposition that there was no common law tort remedy in animals running at large cases in Illinois. As such, the Grossens' efforts at manufacturing a conflict between the Fourth District's decision in *Heyen* and the Second District's decision in this case are without merit.

The Second District's decision in this case is consistent with the Contribution Act, with this Court's decision in *Doyle*, with this Court's decision in *Hopkins*, and with the Fourth District's decision in *Heyen*. The Grossens have outlined no issue that merits this Court's attention. Therefore, there Petition for Leave to Appeal should be denied.

II. A Nexus for Contribution Liability May be Based in an Underlying Contract.

The Appellate Court created no new precedent by issuance of its decision. It applied the specific facts of this case to existing law. Prior case law supports use of, in certain cases, an underlying contract as a necessary basis for contribution liability. Examining the specific facts of this case the Appellate Court followed existing precedent in reversing summary judgment in favor of Grossen. Specifically, the Court followed its decision in *Giordano v. Morgan*, 197 Ill.App.3d 543 (1990).

The Court in *Giordano* plainly held that while breach of contract is a "nontort theory it is not determinative as to whether the parties might also be subject to liability in tort for purposes of contribution. *Id.* at 548, citing *Joe & Dan International v. USFG*, 178 Ill.App. 3d 741, 533 N.E. 2d 912, 127 Ill.Dec. 830 (1988). In *Giordano* a victim of a car accident sued the adverse driver and various insurance producers or insurers related to her efforts to purchase and obtain insurance. *Id.* at 544. Evaluating the contribution claims the

Giordano court held that while the underlying claims were stated as contractual "it is not determinative as to whether the parties might also be subject to liability in tort for contribution." *Id.* at 548. *Giordano*, relying on *Joe & Dan*, allowed the contribution claims to go forward. *Id.* The First District expressly held in *Joe & Dan* that "the contribution act focuses on the culpability of the parties rather than the precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss." 178 Ill.App.3d at 750, citing *Doyle*, 101 Ill. 2d at 14.

The Grossens are critical of the Appellate Court for failing to examine the First District's decision in *Cirilio's Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill. App. 3d 494 (1987) in light of subsequent decisions of other appellate districts. (PLA p.13) Yet, the Appellate Court did not use *Cirilio's* as a stated basis for reaching its opinion. The Grossens disingenuously attempt to sidestep that fact by asserting that *Giordano* finds its authority in *Joe & Dan*, which "specifically relied on the holding in *Cirilio's*." (PLA, p. 14) The Court in *Joe & Dan*, however, merely references its decision in *Cirilio's* and notes the factual similarity of the cases, relying, in actuality, upon this Court's holding in *Doyle*. *Joe & Dan*, 178 Ill. App. 3d at 750.

As was the case above, the Grossens' arguments amount to an attempt to manufacture a purported disagreement among the Appellate Courts, when none exist. In doing so, the Grossens once again fail to acknowledge this Court's analysis in *Doyle*. Ignoring *Doyle*, the Grossens encourage this Court to intervene and adopt the rationale they proffer existed in *J.M. Krejci Co. v. Saint Francis Hosp. of Evanston*, 148 Ill. App. 3d 396

(1986) and in *Pier Transportation Inc. v. Braman Agency* 2015 IL. App. (1^{st}) 150300-U.[1] They also seek to direct this Court's attention to *People ex Rel Hartigan v. Community Hospital of Evanston*, 189 Ill.App. 3d 206 (1989). In suggesting this Appellate Court's opinion warrants this Court intervening, the Grossens neglect to note that the Appellate Court expressly addressed *Hartigan* and noted that it involved a "breach of fiduciary duty, which is not a tortious act that is subject to contribution". *Raab*, 2019 IL App (2d) at ¶ 14. Not to mention of course that *Hartigan* is a First District case decided prior to that Court's decision in *Joe & Dan*.

There is no conflict created between Appellate Districts. *J.M. Krejci* was a First District case decided before that Court's decisions in either *Joe & Dan* or *Cirlio's*. *Pier Transportation*, is also a First District decision that does not purport to overrule any prior First District precedent, not to mention the fact that *Pier Transportation* was an unpublished opinion and therefore non-precedential. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009). The Second District's Decision in *Giordano* is congruent with First District precedent, to which the Grossens themselves cite for their argument that a conflict among the appellate districts exist. Even if the cases to which the Grossens cite were in conflict with the holdings of *Joe & Dan* and *Cirilio*, they are all First District cases. Conflicting opinions within a single appellate district do not create a conflict among multiple appellate districts. Moreover, to the extent that the Grossens believe the Appellate Court failed to

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[1] Pier Transportation is an unpublished decision and its citation by Grossen conflicts with S.Ct. Rule 23(e)(1).

address decisions from other appellate districts, the proper mechanism would have been a petition for rehearing.

As was the case above, the Second District's decision in this case is consistent with the decisions of the appellate districts and with the decisions of this Court. The Grossens have outlined no issue that merits this Court's attention. Therefore, the Petition for Leave to Appeal should be denied.

III. Arguments Relating to Estoppel as to the Fence Act are Improper

The Appellate Court ruled in favor of Grossen as to Count II, a claim derived from the Fence Act. *Raab*, 2019 IL App (2d) at ¶ 34. Having not pled estoppel in the lower court, Grossen wants to have this Court now use this portion of the Appellate Court's decision as an affirmative defense to bar "action" against them. (PLA, p.16) Estoppel is an affirmative defense which does not appear to have been pled at the trial court. Issues not raised in the trial court are waived and cannot be argued for the first time on appeal. *In re Marriage of Minear*, 181 Ill.2d 552, 565 (1998).

Grossen does not fairly outline the Appellate Court's reasoning or opinion. A direct claim under the Fence Act may have been dismissed, but nothing in that portion of the opinion suggests that the underlying contract between the parties may not establish a duty, that later gives rise to a potential claim by a reasonably expected third party beneficiary of that contract. The claim by Frank is pursuant to the Contribution Act, not the Fence Act. Whether Frank may, or may not, be able to successful win a breach of contract action under the Fence Act does not diminish the right of contribution. It also

fails to address the well settled case law that makes landowners potentially liability for failing to maintain their property.

There is simply no need for this Court to accept review of the Appellate Court's decision. The decision applied a well settled interpretation of the Contribution Act and the decisions of this Court and of the appellate districts. Further, the Appellate Court's decision created no new law or standard. The decision simply reverses a grant of summary judgment and remands for further proceedings in the trial court.

CONCLUSION

For the reasons set forth herein, the Petition for Leave to Appeal should be denied.

Respectfully submitted,

KENNETH FRANK,
Defendant/Third-Party Plaintiff-Appellant

By WARD, MURRAY, PACE & JOHNSON, P.C.
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CERTIFICATE OF COMPLIANCE

I certify that this answer conforms to the requirements of Rules 341(a) and (b). The length of this answer, excluding the pages contained in the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 16 pages.

/s/ Timothy B. Zollinger
Timothy B. Zollinger

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

KIRK RAAB, *Plaintiff,*	)	
v.	)	No. 124641
KENNETH FRANK, *Third-Party Plaintiff-Respondent,*	)	
v.	)	
DAVID A. GROSSEN and VIRGINIA J. GROSSEN, *Third-Party Defendants-Petitioners.*	)	

The undersigned, being first duly sworn, deposes and states that on April 3, 2019, there was electronically filed and served upon the Clerk of the above court the Answer to Petition for Leave to Appeal. Service of the Answer will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Stephanie R. Fueger
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Within five days of acceptance by the Court, the undersigned states that he will send to the above court thirteen copies of the Answer bearing the court's file-stamp.

/s/ Timothy B. Zollinger
Timothy B. Zollinger

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

/s/ Timothy B. Zollinger
Timothy B. Zollinger

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May 22, 2019

In re: Kirk Raab v. Kenneth Frank, Appellee (David A. Grossen et al., Appellants). Appeal, Appellate Court, Second District.
124641

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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