

# Second District Civil Decision Digest

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\*\*Cases are arranged by type, and then chronologically by decision posting date with the most recent appearing last in the section.

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## Divorce

### In Re Marriage of Solecki, 2020 IL App (2d) 190381

**Date Published:** 8/13/2020

**Facts:** In 2015, the trial court entered a judgment dissolving the marriage of petitioner. Incorporated into the dissolution judgment was a marital settlement agreement (MSA) by which respondent agreed to pay petitioner a percentage of his net income as monthly child support. The MSA provided that, "Annually, when the tax return is furnished, the parties shall conduct a true up, wherein they shall compare the total net income earned by the Husband in the preceding year to the total amount of child support paid in order to determine whether the total support paid accurately reflects thirty-two percent (32%) of Husband's total net income for the year. If the Husband has not paid thirty-two (32%) of the net of all income received by him as defined in this Agreement, then he shall remit to Wife all sums due and owing within thirty (30) days thereof." In September 2017, respondent filed a motion to modify both the parenting-time schedule in

the Joint Parenting Agreement and the child support specified in the MSA. After reviewing several years of records, the trial court modified the MSA and made the changes retroactive to 2017. Each party also bore their own attorneys' fees.

**Issues on Appeal:** (1) whether the trial court properly administered the "true-up" provision in the MSA, (2) whether there was a substantial change in circumstances to warrant modification of support, and (3) whether the trial court erred by

allowing petitioner no opportunity to file a petition for contribution to the costs and attorney fees she incurred in opposing the motion to modify.

**Holding:** Affirmed

**Analysis:** As to the true-up provisions, the MSA follows both rules of contract and statutory interpretation. In this case, The subparagraphs of the applicable article specify different deductions for different types of income. This is in contrast to the Act, which treats all income and deductions uniformly. Since the true-up provisions were irreconcilable with the Act, the trial court should have simply struck them without conducting the true-ups. As to the argument on whether there was a substantial change in circumstances to warrant modification, absent the threshold showing of a substantial change, the trial court may not reach the question of whether child support should be modified. The parties' arguments on the issue of a substantial change are based on changes to their financial conditions. Now that the MSA's provisions for "true-up" were discharged, Petitioner's loss of this safeguard/windfall was itself a substantial change in circumstances that warranted revisitation of support. Therefore, the trial court was warranted in modification as the threshold was met. Finally, as to attorneys' fees, Petitioner claims that the court "did not provide either party with the ability" to petition for contribution. However, Petitioner never made this argument to the trial court, even though she had ample opportunity. Therefore, ordering the parties to bear their own costs was within the trial court's discretion.

## Foreclosure & Real Estate Transactions

### Federal National Mortgage Ass'n v. Altamirano, 2020 IL App (2d) 190198

**Date Published:** 8/31/2020

**Facts:** Plaintiff filed a complaint to foreclose on Defendant's property. The summons listed "WILLIE ALTAMIRANO et al" in the caption. A process server filed affidavits attesting that all four defendants were served. Defendants failed to appear, and a default judgment was entered. Six years later, petitioners filed their section 2-1401 petition

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**Issues on Appeal:** Whether the judgment for foreclosure was void due to defective summons and whether the doctrine of Laches bars the current action to void the judgment.

**Holding:** Affirmed

**Analysis:** The primary basis cited by the trial court in dismissing petitioners' petition was laches. Laches, an equitable doctrine, "precludes a litigant from asserting a claim when the litigant's unreasonable delay in raising the claim has prejudiced the opposing party." Laches is an affirmative defense that requires a defending party to establish two elements: that "the plaintiff failed to exercise due diligence in bringing its suit" and that "the plaintiff's delay served to prejudice the defendant." Here, both elements are easily met. Regarding the first element, all defendants were served and thus had actual knowledge of the foreclosure proceeding. However, no defendant responded to the complaint. Further, as the trial court noted, it was not until over eight years since service was accomplished and over six years since they were evicted from the premises that petitioners first filed their section 2-1401 petition. Petitioners provide no reasonable explanation for this delay and cannot be said to have been acting with due diligence. Therefore, Laches applies and the dismissal of the Petitions was appropriate.

**JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275**

**Date Published:** 4/13/2020 , Corrected:8/14/2020

**Facts:** Plaintiff bank, filed a complaint to foreclose a mortgage against defendant. The bank issues several summons. Defendant was served. After defendant did not appear, Plaintiff moved for a default judgment. The court granted the motion and entered a default judgment of foreclosure and sale. The property was sold and the property was purchased. Almost seven years after the sale, the Defendant filed a motion to quash service and vacate all orders, stating that he was improperly served by a special process server in Cook County. Respondents filed Motions to dismiss, which were granted.

**Issues on Appeal:** Whether the Defendant was properly served and, as such, whether personal jurisdiction attached. Also, whether the sale to a third party should be overturned.

**Holding:** Affirmed

**Analysis:** Personal jurisdiction may be acquired either by the party's making a general appearance or by service of process as statutorily directed. Furthermore, where the rights of innocent third-party purchasers have attached, a judgment can be collaterally attacked only where an alleged personal jurisdictional

defect affirmatively appears in the record. Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment does not affect the rights of a bona fide purchaser. A lack of jurisdiction is apparent from the record if it does not require inquiry beyond the face of the record. The special-process-server affidavit shows that substitute service of the summons and the complaint was made on defendant in Chicago in zip code 60623. To support his argument, defendant cites a map of the area within the zip code, which shows that it is within Cook County. Defendant's citation to the map defeats his argument, however, because it leads the Court beyond the face of the record. As to the mortgagees following a bona fide purchase, a mortgage of realty is afforded the same protections as a bona fide purchaser if the mortgage is supported by consideration and secured in good faith, without knowledge or notice of adverse claims.

**U.S. Bank National Ass'n v. Benavides, 2020 IL App (2d) 190681**

**Date Published:** 8/27/2020

**Facts:** Plaintiff filed a foreclosure action against defendant. Plaintiff, through its counsel, prepared and submitted a summons, which was served at the property's address by leaving a copy of the summons and foreclosure complaint with defendant's son. The summons and complaint were also mailed to defendant. Defendant failed to appear and Plaintiff moved to default judgment. The trial court entered a default order and judgment of foreclosure and sale in favor of plaintiff. Plaintiff mailed a copy of the default order to defendant. 30 days after the entry of the trial court's order approving sale and eviction, defendant filed a motion to quash service. the trial court held a hearing on defendant's motion to quash service. The trial court denied defendant's motion.

**Issues on Appeal:** Had the trial court acquired personal service through appropriately served summons upon the Defendant?

**Holding:** Affirmed

**Analysis:** Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. Generally, a judgment rendered without service of process, where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings. In construing a statute, our primary objective is to ascertain and give effect to the legislature's intent, and the statute's plain language is the most reliable indication of legislative intent. A defendant's missing name from

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the face of the summons was a barrier to obtaining personal jurisdiction. the term “identify” deserves a dictionary explanation. Collectively, defendant’s arguments and the amendment to section 2-201 of the Code do not clearly define the term. “Identify” means “to establish the identity of.” Additionally, the Right of Publicity Act defines “identity” as “any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.” Here, It stands to reason that defendant, upon viewing her name in the summons, could reasonably assume that she is the defendant in pending litigation, thus enabling her to appear and defend against the foreclosure complaint. The Appellate Court then commented that "we feel it necessary to comment on the importance of strict compliance with the form provided in the Article II Forms Appendix. As noted above, Rule

101(d) states that the summons “shall be prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article II Forms Appendix.” Ill. S. Ct. R. 101(d) (eff. Jan. 1, 2018). Strict compliance with the appearance and content of the provided form takes minimal additional effort. This is especially true when the complainant is a bank or financial institution seeking to foreclose upon the home of a mortgagor.

**PNC Bank, National Ass'n v. Kusmierz, 2020 IL App (2d) 190521**

**Date Published:** 8/28/2020

**Facts:** The trial court entered default judgment against the Defendant for failure to appear and subsequently order the property sold through a judicial sale. Six years later, defendants filed a petition for relief from void judgments, pursuant to section 2-1401(f) of the Code of Civil Procedure arguing that all orders entered against them in the foreclosure action were void because defendants were not properly served and, therefore, the trial court lacked personal

jurisdiction over them. The bank (along with subsequent purchasers) moved to dismiss the petitions and the court granted the Motion.

**Issues on Appeal:** The Appellate Court first addressed a filed Motion to Dismiss the Appeal as moot. The Court denied the Motions because, in order to rule on the merits of the Motion, they had to rule on the merits of the case. On appeal, defendants do not contend that they were not actually served but, rather, that the foreclosure judgments against them were void and the trial court erred in dismissing the section 2-1401 petition. Defendants contend that service was improper because it was conducted by an

unauthorized person. Second, the question is whether the doctrine of Laches precludes the ability to void the judgment.

**Holding:** Affirmed

**Analysis:** A section 2-1401 petition alleging that the underlying judgment was void is not subject to the time, due-diligence, or meritorious-defense requirements applicable to other section 2-1401 petitions. However, even if the judgments were void, the dispositive question becomes whether the purchasers are bona fide. Specifically, where the rights of innocent third-party purchasers have attached, a judgment may be collaterally attacked only where an alleged personal-jurisdictional defect affirmatively appears in the record. a lack of jurisdiction is apparent if it does not require inquiry beyond the face of the record. The service affidavit does not specify that service was effected in Cook County. Further, the affidavit reflects the process server’s representation that she was authorized to serve process “pursuant to 735 ILCS 5/2-202(a),” the very statute that defendants claim was violated. Because the jurisdictional defect does not affirmatively appear on the face of the record, section 2-1401(e) protects the purchasers’ rights in the property. As to the bank's Motion to Dismiss the Petitions due to the doctrine of laches, petitions alleging void judgments are not subject to ordinary time restrictions. However, although void judgments may be attacked at any time, laches “can preclude relief in an appropriate case where prejudice is demonstrated.” “Laches has been defined as ‘such neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity. Defendants here presently seek against the Bank restitution and profits from the sale of the property, but they were served with the complaint and summons (Halina in person and Jerzy via abode service), notifying them that their interest in the property was in jeopardy, six years prior to filing their section 2-1401 petition. For six years, they did nothing to protect their rights in the property and, had they participated in court proceedings, they might have earlier discovered the alleged defect in service. To permit relief against the Bank at this juncture and under these circumstances would be inequitable.

**Freedom of Speech**

**WC Media, Inc. v. Village of Gilberts, 2020 IL App (2d) 190250**

**Date Published:** 8/18/2020

**Facts:** Plaintiff sells outdoor billboard advertising. In 2017, plaintiff leased four properties in the Village, which is in Kane County, upon which it intended to erect two or three billboards

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facing Interstate 90. A Village ordinance banned billboards within the Village. After suit was filed, the Village amended the Ordinance and filed a Motion to Dismiss the Complaint as moot. Before the court ruled on the Village's motion to dismiss, plaintiff, with leave of court, filed a one-count first amended complaint. Plaintiff alleged that the amended ordinance so severely restricts billboards that it effectively bans them. More specifically, plaintiff alleged that (1) any billboard meeting the amended ordinance's requirements could not be seen from I-90, (2) the amended ordinance is not consistent with the customary use of billboards, (3) no advertiser would invest in a billboard that was so restricted, and (4) the amended ordinance denies private investment. Plaintiff requested a declaratory judgment that the amended ordinance is invalid. The Village moved to dismiss and the trial court granted the Motion without prejudice. With leave of the trial court, plaintiff filed a second amended complaint for declaratory judgment. It essentially repeated the allegations of the first amended complaint, but it added that plaintiff leased the locations within the Village to place billboards that would be seen by

motorists on I-90. The Village filed a section 2-615 motion to dismiss the second amended complaint. The court granted with prejudice the Village's motion to dismiss. Plaintiff filed a timely appeal.

**Issues on Appeal:** Whether the Village's amended ordinance is a valid regulation.

**Holding:** Affirmed

**Analysis:** The Act provides for the control of outdoor advertising signs that are located within 660 feet of interstate highways. Section 7 of the Act provides that " 'State, county or municipal' " zoning authorities may also regulate the size, lighting, and spacing of signs. Also, a municipality's home-rule or non-home-rule status is not determining factor, because section 7 of the Act specifically authorizes municipalities to enact regulations concerning outdoor advertising. Plaintiff acknowledges that the Village can regulate outdoor advertising under section 7 of the Act but argues that the Village cannot ban it. The plain language of the amended ordinance allows billboards that are up to 80 square feet and 10 feet high. The crux of plaintiff's virtual-ban argument is the allegation in paragraph 29 of the second amended complaint that a conforming billboard "would have no commercial value." Citing case law, the Appellate Court held that a noncustomary use is demonstrated only when signs exceed the regulations imposed by section 6 of the Act. Thus, the restrictions in the

Village's amended ordinance are not contrary to customary use. In other words, compliance with local zoning regulations does not deprive an advertiser of its right to operate in business areas.

Whether an advertiser finds it commercially advantageous to do so is not a relevant criterion in determining the validity of an ordinance.

## **Mechanics' Liens**

**Matteo Construction Co. v. Teckler Blvd Development Site, LLC, 2020 IL App (2d) 190766**

**Date Published:** 8/3/2020 , Corrected:8/4/2020

**Facts:** Plaintiff sent a copy of its claim of lien to Defendant by certified mail. The claim provided the (1) parties' names, (2) property description, (3) work performed, and (4) amount due. The lien was for excavation and grading services that plaintiff, pursuant a November 2014 contract, provided in the construction of a self-storage facility. Defendant received the Notice 3 days later. 4 months later, plaintiff filed its complaint to foreclose its lien. Defendant moved to dismiss, claiming that plaintiff failed to perfect its lien under the Act by failing to wait 10 days from the date of notice to record the claim of lien. The trial court granted the Motion to dismiss based upon the fact that the lien was not perfected because of a failure to follow the 10-day period described in the Act.

**Issues on Appeal:** Does the plain language of the Act require a 10-day waiting period before recording of a lien in order for a lien to be perfected OR whether plaintiff only had to wait 10 days prior to filing suit to enforce the lien.

**Holding:** Remanded

**Analysis:** The purpose of the Mechanics Lien Act is to protect those who in good faith furnish labor or materials for construction of buildings or public improvements. Once the statutory requirements are met, the Act should be liberally construed to carry out its remedial purpose. Citing precedent, the Appellate Court found that because the lienholder did not pursue suit against the Defendant before the 10-day period, their lien was perfected and enforceable. The Appellate Court also talked about the importance of the word "or" in the Act. Used in its ordinary sense, the word "or" expresses an alternative, indicating that the various parts of the sentence that it connects are to be taken separately. Therefore, an entity or person entitled to a lien under the Act may either wait 10 days to file a claim for lien, or 10 days to file the suit. Accordingly, the trial court erred when it determined that plaintiff failed to perfect its lien by prematurely recording it. Section 28 allowed plaintiff, 10 days after notice, to either file its claim of lien or file suit to enforce the lien. Plaintiff waited 10 days before filing suit. Plaintiff complied with section 28.

## Products Liability

### Porter v. Cub Cadet, LLC, 2020 IL App (2d) 190823

**Date Published:** 8/14/2020

**Facts:** Plaintiff asserted in an Amended Complaint that he had purchased a tractor from Defendant. He further alleged that he later had Defendant service the tractor to address a faulty hydraulic pump system. While plaintiff was operating the tractor, the engine shut down as a result of hydraulic pump failure, and the tractor rolled over, injuring plaintiff. After amending the Complaint, the Defendants moved to dismiss. The Trial Court granted the Motions and dismissed with prejudice.

**Issues on Appeal:** (1) Whether the Complaint sufficiently plead a cause of action for defective product design; (2) whether the trial court should have permitted plaintiff to amend the complaint further; (3) whether the trial court properly dismissed plaintiff's claim for recovery based on the voluntary undertaking doctrine.

**Holding:** Affirmed

**Analysis:** A defective-design claim is based on negligence where the Defendant knew or should have known about a potential

defect. Nevertheless, a plaintiff cannot simply write the words 'knew or should have known' in a complaint and survive a § 2-615 motion to dismiss. This was the language in the amended complaint. As such, the complaint was properly dismissed. The question to whether the plaintiff should have been allowed to amend the complaint further comes down to whether the third amended complaint would have cured the defects indicated in the previous motions to dismiss. although the proposed third amended complaint explains how plaintiff's accident happened, it sheds little light on the key question of whether Defendants exercised reasonable care in designing plaintiff's product at issue. Even assuming there was a voluntary undertaking here and that Defendants failed to exercise reasonable care, plaintiff fails to explain how the failure increased the risk of harm. Plaintiff does not allege that he relied on the alleged voluntary undertaking. Accordingly, the trial court properly dismissed plaintiff's voluntary-undertaking claim. Furthermore, Illinois now follows the approach of section 323 as set forth in the Restatement (Second) of Torts. As such, the standard proffered by the Plaintiff is not controlling.

## About the Contributor

Andrew J. Mertenich is appellate counsel at Prime Law Group, LLC. Andrew has argued before the Second District Appellate Court for the State of Illinois and contributes opinions on amicus briefs for organizations wishing to file into cases. Andrew also presents CLE on Appellate Practice for bar associations throughout the area and provides consultation services to local attorneys and litigants on how best to approach their appellate issues. He publishes the quarterly *Second District Civil Decision Digest* with several local bar associations.

Outside of law, Andrew is a passionate musician. He is Principal Organist at Court Street United Methodist Church in Rockford, IL. Andrew also volunteers with the Land of Lincoln Theatre Organ Society as a technician and performer. He donates regularly to several causes and sits on the Boards of the American Guild of Organists – Rockford Chapter and the Land of Lincoln Theatre Organ Society. He is also a regular listener and contributor to National Public Radio (NPR).



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