

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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Attorney and Client

In Re Estate of Martin, 2020 IL App (2d) 190140

Posted: 07/14/2020

Facts: In 2017, three siblings (Paul, Alan, and Tina) all filed competing petitions to be appointed as their mother's guardian of the estate and person. Alan, an attorney, represented himself *pro se*, the other siblings hired counsel. The court appointed a guardian ad litem, whose report stated that the individual subject was able to make decisions, and wanted Tina to make decisions for her. However, in 2018, the subject died. All parties subsequently filed petitions for fees, including Alan, for *pro se* attorney fees and costs. The court denied Alan's petition for fees and various motions filed by the parties. The court allowed motion for fees on the other siblings and ordered them be paid out of an account that had a transfer-on-death beneficiary.

Issue(s) on Appeal: (1) Whether the trial court lacked subject-matter jurisdiction to award attorney fees (2) whether the trial court erred by ordering the approved attorney fees to be paid from a TOD account after the individual subject to the Petition died, (3) whether the Motion to disqualify was wrongfully denied; and (4) whether the counter-petitioner's petition for *pro se* fees was wrongfully denied.

Holding: Affirmed in part, Reversed in Part. Remanded for further proceedings.

Analysis:

- (1) The parties sought attorney's fees in a probate case subject to the probate Act. Tina and Paul took positions adverse to Alan's on a question involving the parties' legal relations, namely whether Tina and Paul were entitled to attorney fees. The determination of whether Tina's and Paul's petitions should have been granted presented a justiciable matter. Therefore, jurisdiction is conferred.
- (2) As to payment of funds from the account that had a transfer-on-death provision, Section 7 of the Uniform TOD Security Registration Act provides that "On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners... Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common." Thus, upon death, the account became property of the siblings, not of the decedent. Therefore, the trial court erred in ordering payout of the proceeds of the account and not from the assets of the decedent's estate.
- (3) As to the Motion to Disqualify, it was now a moot issue. The attorneys were hired on the issue of a guardian, now that the subject had died, no issue of guardianship existed.
- (4) Because they are in derogation of the common law, statutes that allow for attorney fees must be strictly construed when determining what persons come within their operation. The Probate Act's fee provision states: "The attorney for a representative is entitled to reasonable compensation for his services." While the language includes a broad array of persons, the case law has led to a narrowing of those entitled to fees. Under that authority, Alan was not entitled to fees as a matter of law for his services. Thus, the trial court did not err.

Duty to Defend

Pekin Insurance Co. v. McKeown Classic Homes, Inc. 2020 IL App (2d) 190631

Posted: 07/29/2020

Facts: Individuals filed a two-count complaint alleging breach of contract and conversion pursuant to a construction agreement. Defendant's insurance company (Pekin) filed a suit in Declaratory Judgment, alleging that it owed no duty to defend based upon the

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allegations of the Complaint. Pekin filed a motion for summary judgment stating that it had no duty to defend McKeown against claimants' underlying complaint for conversion. The court granted that Motion and denied the Motion to reconsider.

Issues on Appeal: Whether the court erred in granting summary judgment and finding no duty to defend under the terms of the policy and whether the court erred in denying the motion to reconsider.

Holding: Affirmed.

Analysis: When construing an insurance policy, a court's primary objective is to ascertain and give effect to the intentions of the parties as expressed in their insurance contract. If the underlying complaint alleges facts within or potentially within policy coverage, the insurer is obligated to defend its insured even if the allegations are groundless, false, or fraudulent. Based on the clear and unambiguous allegations of intentional conduct by McKeown in claimants' underlying claim for conversion, no accident or "occurrence" as defined by the policy triggered Pekin's duty to defend. The trial court did not err in granting summary judgment to Pekin, as there is no reasonable interpretation of claimants' allegations. Therefore, summary judgment was proper.

3BC Properties, LLC v. State Farm Fire & Casualty Co., 2020 IL App (2d) 190501

Posted: 07/27/2020

Facts: Plaintiffs employed a manager (Vazquez) to manage each of the four restaurants. As part of her duties, Vasquez was responsible for supervising the employees and reviewing their time records for payment. 3BC also employed four of Vasquez's relatives in various roles at 3BC's restaurants. 3BC's owners discovered that Vazquez had falsified time records for herself and her four relatives; doing so resulted in overpayments to Vazquez and her kin of more than \$66,000. The State Farm policy contained a rider and an exclusion, which insured 3BC against some losses resulting from employee dishonesty. When 3BC tendered the loss and sought reimbursement for Vasquez's wrongdoing, State Farm denied coverage. 3BC sued for a declaratory judgment to determine coverage. The trial court, on Motion for Summary Judgment, granted the same in favor of State Farm, citing two cases.

Issues on Appeal: Whether unearned salary payments are nonetheless salary and excluded from coverage

Holding: Judgment in favor of State Farm Affirmed.

Analysis: The language in this fidelity bond has been an industry-wide standard since the mid-1970s and there are numerous cases interpreting the same provision under similar circumstances. As

the trial court noted, almost all these decisions hold that unearned salaries and unearned commissions are nonetheless salaries and commissions. Given the fact that there is an exclusion, the policy clearly was not designed to cover all conceivable employee criminal conduct, and wage theft is simply one form of indirect employee theft that is excluded from coverage. Wage theft simply is not covered under this insurance policy.

Evidence

In Re J.C., 2020 IL App (2d) 200063

Posted: 07/06/20

Facts: The Department of Children and Family Services (DCFS) received a hotline call reporting that respondent had given birth to her child and the child had tested positive for opiates and other substances. Respondent had admitted to active drug use when she came into the hospital. Respondent had given the hospital a false name and address after she discharged herself against medical advice while her child was still in the neonatal intensive care unit, suffering from symptoms of drug withdrawal. The State filed a neglect petition. At a dispositional hearing, the court found that respondent was unfit or unable to care for, protect, or discipline her child. DCFS had temporary custody of J.C. and was then given the discretion to place him. Two Months later, DCFS received a hotline report that respondent had called police dispatch and reported shots being fired at her home. Respondent told the police that the shooting was due to a "drug deal gone bad" and that her other child was present. The State filed a subsequent petition to terminate parental rights. Throughout the whole process, including in court, Respondent never stopped using drugs and never undertook services. The court found that the State had proven by clear and convincing evidence all the counts in its motions to terminate parental rights and it found respondent to be an unfit parent. The court also admitted, without objection, group exhibits from the GAL's report and other documents. The court subsequently held a best interest hearing. At the conclusion of the hearing the court found that it was in the children's best interests that respondent's parental rights be terminated, and it entered an order terminating respondent's parental rights.

Issue(s) on Appeal: Whether the trial court relied upon inadmissible hearsay and irrelevant documents in its decision to terminate the Respondent's parental rights.

Holding: Order of termination Affirmed. The trial court did not abuse its discretion in allowing the GAL's exhibits to be admitted into evidence at the unfitness hearing, since they were certified records that contained credible evidence of neglect.

Analysis: Section 2-18(4)(a) of the Juvenile Court Act allows admission into evidence of any *indicated report*. An indicated

report is “any report of child abuse or neglect made to [DCFS] for which it is determined, after an investigation, that credible evidence of the alleged abuse or neglect exists.” An indicated report filed pursuant to the Abused and Neglected Child Reporting Act shall be admissible in evidence. Sections 2-18(4)(a) and (4)(b) provide exceptions to the - 10 - 2020 IL App (2d) 200063 hearsay bar. There was no error in admitting the GAL’s report as well as it had the proper certifications and notes with specific dates and times for event described in the report.

Final Orders

Schaffer v. Greenview Home Builders & Cabinetry Designers, Inc., 2020 IL App (2d) 190230

Posted: 07/15/2020

Facts: Plaintiff had previously voluntarily dismissed claims against certain defendants. Further in litigation, the court entered an Order granting Defendants’ Motions for Summary Judgment on June 14, 2018 determining that the Defendants did not owe either contractual duties or legal duties to the Plaintiff. On July 25, 2018, Plaintiff moved for leave to file a brief more than 15 pages to support her forthcoming motions to reconsider the June 14th Order. In August of 2018, the Defendant moved the Court to amend the June 2018 Order to include Rule 304(a) language so that they could appeal. Upon hearing, the Court determined that it lacked jurisdiction because its June 14th Order was final and the Motions to reconsider were filed more than 30 days after entry. Plaintiff appeals.

Issue(s) on Appeal: Whether the Order entered on June 14 was a final Order and whether the trial court was *revested* with jurisdiction to rule on the pending motions.

Holding: The Trial Court was correct in its holding the June 14th Order as final and the Plaintiff was barred from refileing her dismissed claims. Affirmed.

Analysis: An order is final when it determines the litigation on the merits so that, if affirmed, only the execution of the judgment remains. Once a final order is entered and 30 days have passed without a post-judgment motion, the circuit court will lose jurisdiction to rule on matters of substance or correct alleged errors involving the merits of a case. Here, the June 14 order disposed of all remaining claims as to all remaining parties in the lawsuit after her voluntary dismissal. As to the argument for revestment, Revestment is an equitable principle, and it refers to the circuit court reacquiring jurisdiction over a case after the court has lost jurisdiction due to the entry of a final order and the passage of 30 days. To allow revestment, both parties must assert positions that

are inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment. Here, defendants did not act inconsistently with the merits of the June 14 order and did not support setting aside all or part of the order. Following the entry of the June 14 order, defendants responded to plaintiff’s motions to reconsider, which was consistent with preserving summary judgment in their favor. Thus, revestment would be improper.

Health

McHenry County Sheriff v. McHenry County Department of Health, 2020 IL App (2d) 200339

Posted: 07/22/2020, Corrected 07/23/2020

Facts: The Sheriff’s Department (Plaintiffs) requested that the health department provide the names and addresses of persons who had tested positive for COVID-19. Plaintiffs requested that the information be provided to the Telephone System Board, which oversees the emergency telephone system, so that, upon dispatch, individual police officers could be notified when they could be encountering an infected person, thereby allowing the individual officers to take “adequate precautions” to minimize the risk of infection. The health department made known their objections and the Department (along with several other municipalities) filed suit for declaratory judgment, writ of mandamus, and permanent injunction. The trial court granted plaintiffs’ motions for a temporary restraining order, finding that the police officers had a right to have the names of individuals residing within the County who were infected with COVID-19, and that privacy rights would be protected. the Department filed a motion to reconsider and to dissolve the temporary restraining order, which was denied. The Department filed its notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(d)

Issues on Appeal: (1) whether the trial court usurped the Department’s authority and impermissibly substituted its judgment for the Department’s, (2) whether the record set forth the plaintiff’s case for a temporary restraining order, and (3) whether the Court failed to accord the appropriate weight to the privacy rights of individuals by compelling disclosure of their names and addresses.

Holding: Reversed and Temporary Restraining Order is dissolved.

Analysis: Several issues (including the issue of the denial of the Temporary Restraining Order) were off the table as they were not appealed in time. However, Rule 307(d)(1) expressly provides for appellate “review of the granting or denial of a temporary restraining order or an order modifying, dissolving, or refusing to

dissolve or modify a temporary restraining order.” Therefore, the propriety of the Motion to Reconsider was properly before the appellate court. The only issue before the appellate court when reviewing the denial of a motion to dissolve a temporary restraining order is whether the trial court abused its discretion. To decide this, the broader question of whether the trial court abused its discretion in denying the Department’s motion to dissolve thus narrows to the question of whether plaintiffs have demonstrated a fair question regarding whether they have the right to the name-and-address information they are seeking. The Sheriff does not have the right to this information. Moreover, the trial court’s entry of the temporary restraining order did not preserve the status quo but, rather, it altered it. The status quo was the Department’s agreement to provide the addresses but not the names of individuals who test or have tested positive for COVID-19. The April 10 order changed that status quo by compelling the disclosure of both the names and the addresses

Mechanic’s Lien

REEF-PCG, LLC v. 747 Properties, LLC, 2020 IL App (2d) 200193

Posted: 06/29/2020, Corrected 07/29/2020

Facts: Defendant was found in default on a mortgage obligation and the property went into foreclosure. In the foreclosure action, several holders of mechanics’ liens were also made defendants. Upon hearing, the trial court subordinated the mechanics’ lienholders to \$12 million in new debt, to be issued through receiver certificates, for improvements to secure a 10-year lease with a government agency.

Issues on Appeal: Whether the trial court had the power to grant and prioritize receiver certificates over prior mechanics liens. Whether there was sufficient evidence to issue receiver certificates and reprioritize the loans at issue.

Holding: Reversed.

Analysis: The purpose of the Mechanics Lien Act is to “permit a lien upon premises where a property owner received a benefit from improvements to his property or realized an increase in property value because of a contractor’s labor and materials.” To effectuate this purpose, section 16 gives the lienholder priority over any other incumbrance until the lienholder is paid. Under precedent, the trial court had the power to issue receiver certificates and prioritize them over the mechanic’s liens. While it is not necessary that every lienholder agree to the subordination of its lien for the court to find it in the best interests of all the parties, “[t]he court has no power to authorize the receiver of an industrial corporation to continue the business and to make receiver’s certificates superior to prior liens, without the consent of the holders of such liens,

unless it be apparently necessary to do so in order to preserve the corporate property.” In reviewing the record, the Appellate Court found no reason, other than the pending lease with the government agency, underlying the trial court’s decision to subordinate the mechanic’s liens behind an additional \$12 million in debt. The court was presented with absolutely no evidence from which to conclude that subordinating the lienholders to an additional \$12 million in debt would be to their benefit.

Municipal Corporations

Village of Campton Hills v. Comcast of Illinois V, Inc., 2019 IL App (2d) 190055

Posted: 07/28/2020

Facts: In March 1988, the County passed Kane County Ordinance No. 88-31 establishing a franchise framework for cable services in unincorporated areas of the County, which included the unincorporated area that later became the Village. The Ordinance provided in part: “The payments required under this section shall continue to the length and extent allowed by law even though all or part of its designated area becomes incorporated by a municipality within the effective term of this ordinance.” In April 2007, the Village was incorporated. On December 31, 2007, the Village and Comcast entered into a franchise agreement, effective January 1, 2008. In March 2013, the Village filed a complaint against Comcast for recovery of unpaid franchise fees. Later that same month, Comcast filed a declaratory judgment action against the Village and the County to determine which party was entitled to the franchise fees Comcast had paid to both parties for the years 2008 through 2012. In August 2016, the Village filed a motion for partial summary judgment. The trial court denied the Village’s motion for partial summary judgment. In March 2018, all three parties filed motions for summary judgment. On September 18, 2018, the trial court found that Comcast was due a credit of \$126,599.29 against the sum it owed to the Village and that the Village was entitled to the franchise fees improperly paid to the County since January 1, 2008. On January 15, 2019, the County filed a motion to stay the judgment pending appeal, pursuant to Illinois Supreme Court Rule 305(i) (eff. July 1, 2017). The County filed its notice of appeal on January 17, 2019. The Village filed a notice of cross-appeal on March 12, 2019.

Issues on Appeal: Whether the term in the Ordinance of “annexation” encompasses “incorporation.” Whether the trial court exceeded its authority by reforming or modifying an agreement between it and Comcast that would have entitled the County to receive franchise fees for the five years after the Village incorporated.

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Holding: Affirmed; cross-appeal dismissed. The trial court properly granted summary judgment in favor of the Village and against the County.

Analysis: The first sentence of the applicable Ordinance granted the County the authority to franchise and tax Comcast but limited that authority to areas “within the County and outside of a municipality.” The most reliable indication of legislative intent is

the plain language of the statute, which must be given its plain and ordinary meaning. As to the argument of modification of the contract, the trial court did not order the County to pay damages; rather it ordered the County to reimburse Comcast for the fees Comcast overpaid to the County. Therefore, the indemnification provision does not permit recovery as contended, and the trial court properly denied the County’s claim.

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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