

# Second District Appellate Decision Digest

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\*The content, citations, and analysis provided are for informational use only. No legal advice is being presented herein. An in-person consultation coupled with in-depth and independent research should be made before citing a case.

\*\*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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### Animal Law

#### Dzierwa v. Ori, 2020 IL App (2d) 190722

**Date Published:** 10/7/2020, Corrected: 10/13/2020

**Facts:** Plaintiff's injury occurred at Defendant's home when Defendants were out of town and plaintiff was "house-sitting." The dog did not have any prior history of aggression towards the Plaintiff. Upon Motion of the Defendants, the court entered summary judgment on the Plaintiff's negligence claim and under applicable statute.

**Issues on Appeal:** Whether the trial court properly entered summary judgment in favor of the Defendant.

**Holding:** Affirmed.

**Analysis:** Illinois precedent holds that the legal owner of a dog cannot be held liable for an injury caused by the dog where the owner was not in a position to control the dog or prevent the injury. In the present matter, the Defendant had relinquished control of the dog and was not in a position to prevent the Plaintiff's injuries at the time of the injury. Therefore, summary judgment as to the negligence claim and applicable statute was appropriate.

### Divorce

#### In re Marriage of Onishi-Chong, 2020 IL App (2d) 180824

**Date Published:** 10/19/2020

**Facts:** After a divorce decree entered, Petitioner alleged that, after the dissolution judgment, she discovered that respondent had misrepresented his actual income during the divorce proceedings

and colluded with his partner to conceal his income to reduce maintenance and support. The parties litigated their divorce for a period of approximately 22 months. Throughout the proceedings the parties engaged in full discovery. After discovery closed, the parties sought to enter a Marital Settlement Agreement. Approximately 4 years after the case began, petitioner filed a motion pursuant to section 2-1401, alleging that respondent secreted his actual income and conspired to shelter income from the divorce. Respondent filed a motion for summary judgment, which was granted by the trial court.

**Issues on Appeal:** Whether summary judgment on the Section 2-1401 Petition was properly granted.

**Holding:** Affirmed.

**Analysis:** Judgments for dissolution of marriage are afforded the same degree of finality as judgments in any other proceeding, even where they incorporate a Marital Settlement Agreement. In order to challenge the validity of an MSA beyond 30 days of the entry of judgment, a party must bring a petition pursuant to section 2-1401 or other method of postjudgment relief. To be entitled to relief under that section, a petitioner must set forth specific factual allegations showing the existence of a meritorious claim, demonstrate due diligence in presenting the claim to the circuit court in the original action, and act with due diligence in filing the petition. In the present matter, the Petitioner had access to and acknowledged the evidence that may have allowed her to raise a cause of action for fraud prior to the divorce judgment. However, because she had access to the information through discovery and settlement negotiations, the Petitioner did not exercise reasonable diligence in presenting the claim to vacate judgment. Therefore, judgment will not be vacated on this basis and summary judgment was appropriate.

### Insurance

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

**Date Published:** 10/30/2020

**Facts:** Plaintiff employed a manager to manage four restaurant franchises owned by Plaintiff. Plaintiff discovered that the manager had falsified time records for herself and her relatives, resulting in overpayment. Plaintiff reported the fraud to the

authorities and tendered claims to their insurance company (Defendant). Defendants refused to pay out pursuant to the policy and Plaintiffs sued. Both parties filed motions for summary judgment. The trial court entered judgment in favor of the defendant, citing the policy's exclusion on paying regular salaries.

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

**Holding:** Affirmed.

**Analysis:** For the policy at issue, there is an exclusion for payment of salaries. The first clause states that the insurer will cover any

loss intentionally caused by an employee to obtain a financial benefit "other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other 'employee' benefits earned in the normal course of employment." The language at issue has been boilerplate since the 1970's, and the overwhelming majority of courts have found that unearned salaries and unearned commissions are, nonetheless, salaries and commissions, and, therefore, subject to exclusion. Wage theft simply is not covered under the terms of the insurance policy

### Worker's Compensation

#### West Bend Mutual Insurance Co. v. TRRS Corp., 2019 IL App (2d) 180934

**Date Published:** 10/16/2020

**Facts:** Petitioner sustained an injury in a forklift accident in 2017 that required surgery. The employers chose to cover lost wages and medical expenses without reporting the incident to their Worker's Compensation Carrier. However, follow up surgery was needed, and this prompted petitioner to file an Application for Adjustment of Claim with the Workers Compensation Commission. Plaintiffs filed a complaint for declaratory judgment in the circuit court. A few days later Plaintiff filed an emergency motion to stay proceedings with the Commission until the declaratory judgment action was resolved. Before the Petitioner/Defendant could file a response and without their counsel present, the circuit court granted the emergency motion to stay. The petitioner then filed an emergency order to vacate the stay order, arguing that the Commission was the proper venue for ruling on coverage issues raised by the Plaintiff. The court held hearing and ultimately vacated the stay order, and then reimposed it.

**Issues on Appeal:** Whether the trial court had authority to grant the Plaintiff's Motion to stay proceedings.

**Holding:** Reversed and Remanded.

**Analysis:** Ordinarily a circuit court's decision to grant or deny a motion to stay will not be overturned on appeal absent an abuse of discretion. The Appellate Court went on to elaborate on the doctrine of primary jurisdiction. Under the doctrine, when a court has jurisdiction over a matter, it should, on some occasions, stay the judicial proceedings pending referral of the controversy, or a portion of it, to an administrative agency having expertise in the area. In this matter, however, the circuit court did the opposite by staying an administrative proceeding pending resolution of the legal issues in the circuit court. The appellate court described the doctrine in detail, and finally established its disagreement with a previous case dealing with the doctrine. The entry of the stay order was a clear error on the part of the trial court. The Plaintiff's relief is with the IWCC, rather than the circuit court, in this stage of litigation.

## 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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