2017 IL App (1st) 152658-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Appellate Court of Illinois,
First District,
SECOND DIVISION.

DEVELOPERS SURETY AND INDEMNITY COMPANY, an Iowa corporation, by and through its underwriting manager and authorized agent, INSCO INSURANCE SERVICES, INC., a California corporation,
Plaintiff-Appellant,
v.
MARC S. LIPINSKI, individually, and DONNELLY, LIPINSKI & HARRIS, LLC, An Illinois limited liability company, and RIORDAN, DONNELLY, LIPINSKI & McKEE, LTD., an Illinois corporation,
Defendants-Appellees.

No. 1-15-2658
|
June 30, 2017

Appeal from the Circuit Court Of Cook County.
No. 12 L 3758
The Honorable Raymond W. Mitchell, Judge Presiding.

Presiding Justice Hyman concurred in the judgment. Justice Mason specially concurred in the judgment.

ORDER

JUSTICE NEVILLE delivered the judgment of the court.

***1** ¶ 1 *Held*: Where the insurer-subrogee is the real party in interest to the subrogation action because the pecuniary interest of the insured has been fully satisfied, section 2-403(c) of the Code requires that the insurer-subrogee file the action in its own name.

¶ 2 Developers Surety and Indemnity Company (DSI) filed a complaint for **legal malpractice** against Marc Lipinski. After years of litigation, DSI admitted that insurance had compensated it for all losses it suffered due to the alleged malpractice. DSI argued that under the collateral source rule, Lipinski should not benefit from DSI's insurance, so the insurance should not affect the award of damages. DSI admitted that it owed to its insurers all damages it recovered from Lipinski. The trial court held that the collateral source rule did not apply in **legal malpractice** actions. Because DSI could not prove any damages from the alleged malpractice, the court dismissed the complaint.

¶ 3 In this appeal, we hold that section 2-403 of the Code of Civil Procedure (735 ILCS 5/2403 (West 2012)) required DSI to name its insurers, the real parties in interest, as plaintiffs. Because the plaintiffs violated section 2-403, we affirm the dismissal of the complaint.

¶ 4 BACKGROUND

¶ 5 The Underlying Litigation

¶ 6 The University of Chicago hired IRB Construction Partners to act as general contractor to construct a building for the university. IRB subcontracted some of the work to F.E. Moran, Inc., and Moran, in turn, subcontracted some of its work to 3D Industries, Inc. 3D paid a premium to DSI, and DSI issued performance and payment bonds, guaranteeing to Moran, as obligee, that 3D, as principal, would complete its work.

¶ 7 In early May 2005, 3D's employees walked off the job, leaving 3D's work incomplete. DSI assigned Moran's claim on the bonds to its claims handler, Daniel Berge. DSI retained the law firm of Riordan, Donnelly, Lipinski & McKee as surety counsel, and Lipinski served as counsel to DSI for Moran's claim.

¶ 8 On May 25, 2005, Lipinski sent Berge an email informing Berge that Moran had hired workers to complete 3D's work. DSI hired Steve Carlino as an expert to estimate the cost for completion of 3D's work. On June 2, 2005, Hal Emalfarb, attorney for Moran, sent a letter to Lipinski, saying:

> "FE Moran's initial estimate of the cost to complete the 3D Industries, Inc. work is $792,594.00 (estimate to follow). In addition the unpaid suppliers total $582,905.85 *** and the union may be owed over $100,000 for total obligations to complete 3D's contractual obligations of $1,421,499.85 [ ] against a subcontract balance of $478,496.24[ ] leaving a possible deficit estimated (to be reviewed) at $943,003.61[ ] of 3D's outstanding obligations under the bonded subcontract.
>
> *** [D]emand is again made on the surety to pay the unpaid suppliers *** and to cash flow the labor to complete the work. ***
>
> *** [T]he surety's failure to timely respond will be in bad faith as determining a supplier's payment bond claim should take less th[a]n an hour especially since your principal swore under oath [t]he amounts due each supplier. ***
>
> ***2** FE Moran has been forced against its will to take over 3D's obligations to perform the bonded subcontract. Is the surety looking for a replacement contractor? Does the surety agree to fund the bonded incomplete subcontract work by consenting to placing 3D's employees and other Union laborers on its payroll? The delay in a decision is not without substantial financial harm to FE Moran."

¶ 9 Carlino estimated that Moran would need to spend about $200,000 to complete 3D's work. Because Moran had paid 3D $478,496.24 less than the amount it agreed to pay 3D if 3D completed its work, according to Carlino, 3D and DSI owed Moran nothing, and Moran still owed 3D a substantial amount for the work 3D had completed before it stopped working.

¶ 10 In September 2005, 3D filed a complaint against Moran, charging Moran with breaching their contract by failing to make payments when due. 3D claimed that Moran's failure to pay left 3D with inadequate funds to pay its employees, leading 3D's employees to walk off the job.

¶ 11 Moran responded with a letter to DSI setting out its out of pocket expenses due to 3D's failure to complete its work and DSI's failure to meet its obligations under the bonds. Berge sent Moran a letter formally denying Moran's claims on the bonds in November 2005.

¶ 12 Moran answered 3D's complaint and filed a counterclaim against 3D for breach of contract and fraud. Moran added a third-party claim against DSI for failure to fulfill its duties as surety, and for acting in bad faith when it denied Moran's claims. Moran's attorney drafted a settlement agreement in November 2005. The parties did not reach a settlement at that time. DSI and Moran engaged in extensive discovery and trial preparation from 2005 through 2009.

¶ 13 In 2010, DSI's general counsel decided to bring in another law firm to help with preparing *3D Industries, Inc. v. F.E. Moran, Inc.*, 05 CH 15386, for trial. The new law firm, Tressler LLP, prepared an extended report, dated June 2010, explaining its analysis of the litigation. According to Tressler, 3D had very weak evidence to support its claim that Moran breached the contract. Moran had strong evidence that 3D breached the contract, and Moran had strong support for almost all of its settlement demand for about $5 million. Tressler also found that "there is a risk that Moran may prevail against [DSI] under the statutory bad faith count. *** [DSI] may have difficulty [ ]proving that, to the extent it relied on Carlino's report, that such reliance was justified or at least not misplaced." Tressler recommended an "aggressive settlement strategy," with

"the settlement range of this matter to be in the area $3,500,000-$4,000,000.

¶ 14 In August and September 2010, DSI, Moran, and other affected parties settled all the claims in *3D v. Moran*. DSI paid Moran $3,700,000.

¶ 15 **Legal** **Malpractice** Litigation

¶ 16 On April 6, 2012, DSI filed a complaint for **legal** **malpractice**, naming as defendants (1) Lipinski, (2) the law firm of Riordan, Donnelly, Lipinski & McKee , and (3) the law firm of Donnelly, Lipinski & Harris, LLC, for whom Lipinski worked in 2010. DSI alleged that Lipinski breached his duties as an attorney, and that because of Lipinski's failures, DSI lost the opportunity to settle *3D v. Moran* in 2005 at a price far less than the $3.7 million DSI eventually paid.

¶ 17 Lipinski asked in discovery for information concerning DSI's recovery from reinsurers for the payments it made in *3D v. Moran*. DSI answered, "This interrogatory is not intended to lead to the discovery of admissible evidence. Pursuant to the collateral source rule, contributions by reinsurance or other entities are not discoverable." The trial court ordered DSI to answer the interrogatory, while expressly leaving unresolved the issue of whether DSI could recover from Lipinski amounts covered by reinsurance. DSI answered:

> ***3** "[DSI] paid $4,773,292.23: of this amount, the total loss was $3,985,415.16, plus expenses of $787,877.07. CHUBB paid $99,160.01 under an E&O policy; Munich Re paid $2,200,000 under a reinsurance policy; Endurance Re paid $602,754.04 under a reinsurance policy."

¶ 18 Thus, DSI admitted that an insurer and two reinsurers had paid a total of $2,901,914.05 of the total settlement plus costs, leaving DSI with unreimbursed damages of $1,871,378.18.

¶ 19 The parties engaged in extensive pretrial discovery, including dozens of depositions and hundreds of interrogatories. DSI's experts said that Lipinski breached his duties by relying on Carlino's opinion, when Carlino had not shown adequate support for that opinion. DSI's experts said that Lipinski had a duty to advise DSI to make a substantial settlement offer in 2005.

¶ 20 The trial court assigned a trial date of August 2015. Lipinski filed a timely motion for summary judgment, arguing that the depositions showed that DSI could not prove that the parties would have reached a settlement in 2005 but for Lipinski's alleged errors, and therefore DSI could not prove the proximate cause element of its cause of action. The trial court denied the motion for summary judgment.

¶ 21 In August 2015, both parties filed numerous motions *in limine*. Both parties recognized the significance of the unresolved issue of whether the collateral source rule applied and left Lipinski liable for all damages due to the alleged malpractice, even though insurers had already reimbursed DSI for much of its loss. DSI filed a motion *in limine* to bar evidence of its insurance coverage; Lipinski filed a motion *in limine* to bar DSI from recovering as damages amounts covered by CHUBB and the two reinsurers.

¶ 22 On September 1, 2015, the trial court held that the collateral source rule did not apply in **legal** **malpractice** actions, and therefore Lipinski could present evidence of DSI's recovery from CHUBB and the reinsurers, and use that recovery to offset any damages awarded to DSI. DSI filed a motion to reconsider. It attached to the motion its two reinsurance contracts. The contracts included the following clause:

> "[DSI] agrees to enforce its rights of salvage and subrogation by taking whatever action is necessary to recover its loss from *** any other party who caused or contributed to its loss or part thereof."

¶ 23 At oral argument on the motion to reconsider, counsel for DSI informed the court that "100 percent of the plaintiff's provable damages are covered by reinsurance." Counsel explained that DSI admitted that if it had settled *3D v. Moran*, it

would have paid to Moran an amount exceeding the amount left unreimbursed by reinsurers and CHUBB. Counsel said that if the trial court denied the motion to reconsider the ruling on reinsurance, DSI "would not be able to prove its damage element." Lipinski moved to dismiss the complaint with prejudice. On September 3, 2015, the trial court entered an order dismissing the complaint with prejudice.

¶ 24 In October 2015, DSI filed a motion to amend the complaint. In the proposed amended complaint, DSI sought to add a count for subrogation, alleging:

> "[DSI], pursuant to the terms of the Reinsurance, is obligated to 'enforce its rights of salvage and subrogation' on behalf of Endurance Re and Munich Re.
> ***4** ***
>
> *** [P]ursuant to the law of subrogation in Illinois, [DSI] has the right to recover on behalf of the Reinsurance the amounts paid in satisfaction of the underlying claims, and pursuant to the Reinsurance Treaties themselves, [DSI] has a contractual obligation to seek a recovery from Defendants for amounts paid by Reinsurance."

¶ 25 The trial court denied the motion to reconsider and the motion for leave to amend, "because it would be futile." DSI filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 DSI argues on appeal that the collateral source rule does not apply because the reinsurers do not count as collateral sources. Lipinski argues that the trial court correctly applied the **legal malpractice** exception to the collateral source rule. In the alternative, Lipinski argues that this court should affirm the trial court's judgment on grounds advanced in Lipinski's unsuccessful motion for summary judgment, that DSI cannot prove the proximate cause element of its malpractice claim.

¶ 28 We agree with Lipinski that this court has authority to "affirm a trial court's judgment on any grounds which the record supports even if those grounds were not argued by the parties." *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74. We find a problem with the complaint.

¶ 29 Section 2-403(c) of the Code of Civil Procedure (735 ILCS 5/2-403(c) (West 2012)) provides, "Any action hereafter brought by virtue of the subrogation provision of any contract or by virtue of subrogation by operation of law shall be brought either in the name or for the use of the subrogee."

¶ 30 In *Shaw v. Close*, 92 Ill. App. 2d 1, 4 (1968), the court explained:

> "This statute simply means that the interest of a subrogee cannot be concealed in any proceeding brought for its benefit. It must be either named as the plaintiff or disclosed as the real party in interest. Such is the situation in the case at hand. *** The present action, therefore, had to be brought in the name of the subrogee itself or in the name of the plaintiff for the use of the subrogee. Since it was not, it contravened the statute."

¶ 31 In *Gadson v. Among Friends Adult Day Care, Inc.*, 2015 IL App (1st) 141967, ¶ 28, the appellate court applied *Shaw* to a case involving an insurer's subrogation to the rights of its insured. The *Gadson* court said, "under section 2-403(c), where the insurer-subrogee is the only remaining real party-in-interest to the subrogation action because the pecuniary interest of the insured has been fully satisfied, the insurer-subrogee is required to file the action in its own name." See also *Prudential Insurance Co. v. Romanelli*, 243 Ill. App. 3d 246, 250 (1993); *Nitrin, Inc. v. Bethlehem Steel*, 35 Ill. App. 3d 577, 592 (1976).

¶ 32 DSI admitted that its reinsurers and CHUBB covered all of the damages it suffered due to Lipinski's malpractice. Therefore, section 2-403(c) required the reinsurers and CHUBB to file the complaint against Lipinski in their own name, or by DSI "for the use of" the reinsurers and CHUBB. Even in the proposed amended complaint, the plaintiffs have failed to

comply with section 2-403(c). Accordingly, we affirm the dismissal of the complaint.

¶ 33 Conclusion

***5** ¶ 34 The reinsurers and CHUBB did not comply with section 2-403(c) of the Code when they failed to file a complaint against Lipinski in their own name. Therefore, the trial court did not err when it dismissed the complaint.

¶ 35 Affirmed.

¶ 36 JUSTICE MASON, specially concurring.

¶ 37 I concur in the majority's decision to affirm dismissal of Developers Surety's complaint. I write specially to address the substantive issue raised by the parties on appeal: whether the collateral source ruleapplies in a **legal malpractice** case when the former client has been fully compensated through insurance (in this case re-insurance), but the client has an obligation to repay the collateral source in the event and to the extent of a recovery against the lawyer, thus potentially precluding a double recovery. The majority finds its unnecessary to address this issue given its focus on a procedural issue it finds dispositive, *i.e.*, that the real gravamen of Developers' complaint was a subrogation action in which Developers' reinsurers were the real parties in interest and who, under section 2-403(c) of the Code of Civil Procedure (735 ILCS 5/2-403(c) (West 2012)), were required to be disclosed as such in Developers' complaint.[1] Although I agree this is the correct result, I believe it is necessary to address more of the parties' contentions in order to understand why.

¶ 38 Developers had an attorney-client relationship with defendants and claimed that defendants committed malpractice when, during a relatively brief window of opportunity in the underlying case, they failed to settle the claim against Developers for $1.1 million, far less than the $3.7 million Developers ultimately paid. As damages, Developers sought the difference between the amount it claimed the underlying case could have been settled for in 2005 and the amount it eventually settled for in 2010. Although not necessary to resolution of this appeal, suffice to say that the evidence of defendants' ability to effect a $1.1 million settlement among all parties in interest in 2005 was less than compelling.

¶ 39 When defendants sought discovery of amounts paid by Developers' reinsurers, Developers strenuously resisted those requests, which were the subject of extensive motion practice. Developers contended that defendants were not entitled to discover amounts paid by third parties since the collateral source rule would preclude admission of that evidence at trial. See *Muryani v. Turn Verein Frisch-Auf*, 308 Ill. App. 3d 213, 215 (1999) (collateral source rule holds that benefits received by the injured party from source independent of the tortfeasor will not diminish otherwise recoverable damages); see also *Wills v. Foster*, 372 Ill. App. 3d 670, 673 (2007) ("The rationale for the rule is that the defendant should not be allowed to benefit from the plaintiff's foresight in acquiring insurance.").

¶ 40 Defendants, citing *Sterling Radio Stations, Inc. v. Seith*, 328 Ill. App. 3d 58 (2002), argued that, as a blanket proposition, the collateral source rule does not apply in **legal malpractice** cases. In *Sterling Radio*, this court found that a **legal malpractice** plaintiff whose corporation reimbursed him for a judgment against him in the underlying case could not seek the judgment amount as damages in a later **legal malpractice** action. *Id.* at 65 ("Here, Seith personally paid nothing in satisfaction of the judgment rendered against him *** as a result of defendants' malpractice. Therefore, his measure of damages is zero."). Developers sought to distinguish *Sterling Radio* on the ground that in the context of this case, where the terms of the reinsurance contracts required Developers to pursue third parties responsible for the loss and, if successful, reimburse the reinsurers to the extent of any recovery, there was no possibility of a windfall recovery to Developers and, therefore, the collateral source rule should apply.

***6** ¶ 41 Developers eventually disclosed the payments from its reinsurers and was ultimately compelled, on the eve of trial, to admit that all of the amounts it had paid to settle the underlying case had been reimbursed pursuant to reinsurance agreements. Developers argued that despite this fact, it could still recover the difference in settlement amounts as damages

given its contractual obligation to reimburse its reinsurers and so the jury should not hear evidence of the reinsurers' payments. The trial court, interpreting *Sterling Radio* as a categorical limitation on the applicability of the collateral source rule in **legal malpractice** cases, acknowledged the potential merit in Developers' argument, but felt compelled to follow *Sterling*'s holding. Because the remaining amount of Developers' alleged damages[2] would not warrant the extended jury trial the parties contemplated, Developers ultimately dismissed its complaint.

¶ 42 On October 5, 2015, three and one-half years after it filed this case, Developers sought leave to file an amended pleading asserting a subrogation claim, which still failed to name its reinsurers as the real parties in interest. 735 ILCS 5/2-403(c) (West 2012) (requiring action to be brought "either in the name or for the use of the subrogee"). The trial court denied leave to amend as untimely.

¶ 43 Throughout this protracted litigation, Developers has denied that this was a subrogation action on behalf of its reinsurers. Developers obviously sought to prevent the jury in this case from hearing any evidence regarding payments received from its reinsurers for the obvious reason that a jury's sympathy for a **legal malpractice** victim would likely be tempered by the knowledge that the victim's losses had been covered by a third party, albeit one the victim was obligated to repay. And while I believe Developers' effort to distinguish *Sterling* may well have been meritorious given the focus of *Sterling*'s reasoning—the prevention of a windfall recovery by the malpractice plaintiff—Developers was nonetheless not entitled to mislead the jury by pretending that it had not been reimbursed for the pecuniary loss it sustained in connection with settlement of the underlying case. That is what the subrogation provisions of the Code of Civil Procedure prevent. And it follows that Developers was not entitled to present to the jury a theory of damages that depended on the untrue assumption that it had not been reimbursed for its losses, which was the only theory of damages Developers advanced.[3]

¶ 44 So the majority correctly concludes that Developers was required under section 2-403 to disclose the real parties in interest in this case—its reinsurers. And because Developers waited until after defendants' motion *in limine* had been granted and after the case had been dismissed to seek leave to do what it should have done in the first case—pursue a subrogation action—the trial court correctly exercised its discretion to deny that long overdue amendment, which, as the majority points out, still did not cure the failure to name the real parties in interest.

All Citations

Not Reported in N.E.3d, 2017 IL App (1st) 152658-U, 2017 WL 2856338

Footnotes

1 Since a **legal malpractice** claim cannot be assigned (*Learning Curve International, Inc. v. Seyfarth Shaw LLP*, 392 Ill. App. 3d 1068, 1074 (2009)), Developers' only viable option under section 2-403(c) was to bring the action in its own name "for the use of" its reinsurers.

2 Developers identified its self-insured retention of $500,000 as an element of damage, a position that ignores that Developers would have had to pay that amount if the case settled in 2005 for $1.1 million, as Developers claimed it should have.

3 Developers was only obligated to reimburse its reinsurers for any recovery it obtained against defendants. To the extent Developers recovered as damages less than what the reinsurers paid, Developers has pointed to no contractual obligation that required it to make up the difference through a lump sum payment. Rather, under the terms of the reinsurance agreements, Developers would have reimbursed the reinsurance pool—either through increased premiums or other means—over time. Thus, any viable damage theory would have had to take into account the time value of money—Developers was reimbursed under its reinsurance contracts long before trial—and would have necessarily addressed the complicated calculation of Developers' damages based on its future obligation to reimburse the reinsurance pool for any shortfall through increased premiums, retrospective rate calculations or some other method.

2017 IL App (2d) 160889

Appellate Court of Illinois,
Second District.

IN RE ESTATE OF Marjorie Friedman SCHERR, Deceased
(Lisa K. Scherr, as Trustee of the George H. Scherr Trust Dated March 14, 2002, Petitioner-Appellant,
v.
Julie L. Ehrlich, Joel L. Friedman, and Jeremy L. Friedman, as Heirs and Legatees of the Estate of Marjorie Friedman Scherr, Deceased, Respondents-Appellees).

No. 2-16-0889
|
Opinion filed June 28, 2017

Appeal from the Circuit Court of Lake County, No. 16-P-3, Honorable Donna-Jo R. Vorderstrasse, Judge, Presiding.

OPINION

PRESIDING JUSTICE HUDSON delivered the judgment of the court, with opinion.

¶ 1 I. INTRODUCTION

***1** ¶ 2 Petitioner, Lisa K. Scherr, as Trustee of the George H. Scherr Trust Dated March 14, 2002, appeals an order of the circuit court of Lake County. That order sustained an objection made by respondents, Julie L. Ehrlich, Joel L. Friedman, and Jeremy L. Friedman, to the renunciation of the will of Marjorie Friedman Scherr by her spouse, George H. Scherr (both are deceased). For the reasons that follow, we reverse and remand.

¶ 3 II. BACKGROUND

¶ 4 On September 5, 2015, Marjorie died. George filed a petition for probate and letters on January 5, 2016. The petition stated that Marjorie left a will dated August 14, 1970, which George believed to be her valid last will (the will was executed while Marjorie was married to her first husband, and respondents, Marjorie's children, were the sole surviving legatees under this will). He further averred that it had not been previously admitted to probate. The individuals listed in the will as executor and successor-executor had predeceased Marjorie, so George asked that petitioner, his daughter, be named executor. She was so appointed. The will made no provision for George. Respondents filed their appearances in February 2016.

¶ 5 On April 1, 2016, George filed a renunciation of the will. It stated, "The undersigned, George Scherr, surviving spouse of the above named decedent hereby renounces the will of the decedent which was admitted to probate in this Court on January 14, 2016." George died on May 23, 2016. A copy of the renunciation was sent to respondents' counsel on May 24, 2016. On June 23, 2016, respondents filed an objection to the renunciation. In it, they asserted the following: (1) respondents were not

given notice of the filing of the renunciation, and it was only after George died that their attorney was provided with a copy of the renunciation; (2) the legislative purpose behind allowing a renunciation is to provide for a surviving spouse during that person's lifetime; and (3) this court recently stated that a renunciation abates upon the death of a surviving spouse, even if it was filed before that spouse's death (see *In re Estate of Mondfrans*, 2014 IL App (2d) 130205, ¶ 3). Subsequently, respondents also asserted that petitioner lacked standing to assert George's renunciation, as that right was personal to him. Petitioner responded by offering an assignment to the trust, executed by George, of his interest in Marjorie's estate.

¶ 6 Following a hearing, the trial court sustained respondents' objection to the renunciation. It first addressed petitioner's standing. Respondents complained that the assignment was not verified. Petitioner testified as to George's execution of the assignment and his capacity to do so. The trial court then found that the assignment was valid and transferred to the trust the "ability to enforce" the renunciation. The court then turned to the renunciation.

¶ 7 Respondents argued that George's renunciation abated at his death. Respondents acknowledged that no Illinois case holds that a renunciation abates at death. However, they pointed to *dicta* in *Mondfrans*, *id.*, that did so state. Further, respondents pointed to Illinois public policy, which indicates that a renunciation's sole purpose is to provide for a surviving spouse after the death of the decedent spouse. Petitioner responded that George had complied with the "very simple requirements of the statute" and that *Mondfrans* was factually inapposite. According to petitioner, since George complied with the statute in its entirety, his subsequent death had no bearing on the validity of the renunciation.

***2** ¶ 8 The trial court began its ruling by acknowledging that there was "no case in Illinois that [had] exactly these facts." The trial court noted the Illinois public policy that a renunciation is for the benefit of the surviving spouse and that the interests of any heirs of that spouse are irrelevant. The trial court rejected petitioner's position that filing is sufficient to complete the renunciation. It explained that it hears "objections to renunciations all the time," based on issues like premarital agreements or divorce decrees. It then reasoned, "So renunciation still has to be approved by the court." The trial court acknowledged that its position "raises the issue [of] how long does one have to survive for a renunciation to take effect." However, it emphasized that this was not at issue here. Rather, in this case, the renunciation had not come before the trial court and "was not approved yet." Further, George died "shortly after the renunciation" and it would not benefit him. Accordingly, the trial court concluded that allowing the renunciation would violate public policy and it sustained the objection. This appeal followed.

¶ 9 III. ANALYSIS

¶ 10 On appeal, petitioner argues that the trial court erred in sustaining respondents' objection. She primarily relies on the plain language of section 2-8 of the Probate Act of 1975 (Act) (755 ILCS 5/2-8 (West 2016)). Respondents raise three arguments in opposition. First, they contend that the policy underlying the statute indicates that the right to renounce abates on the death of the renouncing spouse. Second, they contend that any action that is a creation of statute abates on the death of the party advancing the cause of action, absent a statutory provision providing otherwise. Third, they contend that petitioner lacks standing.

¶ 11 A. Section 2-8 of the Act

¶ 12 Initially, we note that we are confronted with the task of ascertaining the meaning of a statute. The construction and application of a statute are matters we review *de novo*. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13. Thus, our foremost guide to resolving this appeal is the language of the statute itself. *In re Objections to Tax Levies of Freeport School District No. 145*, 372 Ill. App. 3d 562, 579 (2007). Where the language of a statute is plain and unambiguous, we must apply it without resorting to external aids of construction. *Moore v. Green*, 219 Ill. 2d 470, 479 (2006). We may not depart from the plain language of a statute and read into it exceptions, limitations, or conditions that conflict with the legislature's clearly expressed intent. *Barnett v. Zion Park District*, 171 Ill. 2d 378, 389 (1996).

¶ 13 Here, the statute in question reads, in pertinent part, as follows:

> "*In order to renounce a will, the testator's surviving spouse must file in the court in which the will was admitted to probate a written instrument signed by the surviving spouse and declaring the renunciation.* The time of filing the instrument is: (1) within 7 months after the admission of the will to probate or (2) within such further time as may be allowed by the court if, within 7 months after the admission of the will to probate or before the expiration of any extended period, the surviving spouse files a petition therefor setting forth that litigation is pending that affects the share of the surviving spouse in the estate. *The filing* of the instrument is a complete bar to any claim of the surviving spouse under the will." (Emphases added.) 755 ILCS 5/2-8(b) (West 2016).

Thus, in the first sentence, the statute plainly states that the *filing* of a document renouncing the will is the operative act in effectuating the renunciation. Nowhere does it state that anything else, such as judicial approval, is required. In the final sentence, the statute again states that the *filing* of the document effectuates the renunciation.

¶ 14 The meaning of "file" is not obscure. The United States Supreme Court has explained it thusly: "An application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000); see also Black's Law Dictionary 642 (7th ed. 1999) (defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record"). Webster's Third New International Dictionary 849 (2002) defines "file" as, *inter alia*, "to place (as a paper or instrument) on file among the legal or official records of an office" and "to return (a law case) to the office of the clerk of a court *without action on the merits*." (Emphasis added.) None of these definitions imply in any way that judicial action is necessary before a document is deemed to be "filed." Accordingly, the plain language of section 2-8 of the Act specifies that a renunciation is accomplished by the filing of an appropriate document.

***3** ¶ 15 As the meaning of section 2-8 is clear, we have no occasion to resort to external aids of construction. *Moore*, 219 Ill. 2d at 479. These include matters of public policy, which may be considered only to resolve an ambiguity in a statute. *People ex rel. Madigan v. Bertrand*, 2012 IL App (1st) 111419, ¶ 36; *Golladay v. Allied American Insurance Co.*, 271 Ill. App. 3d 465, 469 (1995) (citing *Chapman v. Richey*, 78 Ill. 2d 243, 248-49 (1980)). In this case, respondents have failed to establish that section 2-8 is ambiguous, and our reading of the statute indicates that it is not. As such, any consideration of the purpose behind the statute is not relevant to our inquiry; our only task is to apply and enforce it as it is written. *Madigan*, 2012 IL App (1st) 111419, ¶ 36. Accordingly, we hold that the renunciation was complete when it was filed and that George's subsequent death is immaterial.

¶ 16 We recognize that this court stated in *Mondfrans*, 2014 IL App (2d) 130205, ¶ 3, that "[e]ven if [the decedent] or [his heir] had petitioned to renounce the will while [the decedent] was alive, his right to renounce would have abated upon his death, because there was no concealment." As indicated by the prefatory phrase "even if," these facts simply were not before the *Mondfrans* court. As such, this statement is pure *dictum*, and *obiter dictum* at that. *Obiter dictum* consists of "remark[s] or expression[s] of opinion that a court uttered as an aside." *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 277 (2009). Judicial *dictum*, conversely, is "an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause." *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). As the facts hypothetically suggested in the *Mondfrans* court's remark were not before the court, this clearly was more an aside than an expression of an opinion on a point argued by counsel. Thus, the remark constitutes *obiter dictum*, which "is not binding as authority or precedent." *Id*.

¶ 17 Because the renunciation was complete, we fail to see how George's subsequent death somehow undid it. Though there is no Illinois case directly on point, other jurisdictions have considered the effect of a spouse's death after that spouse had renounced a will. In *In re Renunciation of Will of Sayre*, 415 S.E.2d 263, 265-66 (W.V. 1992), after holding that the right to renounce is personal to a surviving spouse, the court went on to hold that, where a renunciation is complete prior to a surviving spouse's death, it may be given effect despite that spouse's intervening death. The court elaborated, "[W]here a spouse makes an election to renounce a will prior to such spouse's death, the actual election has already been accomplished." *Id*. at 266. In *Spencer v. Williams*, 569 A.2d 1194, 1196-97 (D.C. 1990), the court held as follows:

> "It is true that, absent exceptional circumstances, death terminates the right of a surviving spouse,

> whether competent or incompetent, to renounce the will. [Citations.] In the present case, however, [the decedent], acting through her conservator, filed her election to renounce the will while she was still alive. That [the decedent] did not live to receive her share does not alter our analysis."

Hence, these courts held that, so long as the renunciation was complete, a surviving spouse's subsequent death did not undo it.

¶ 18 Respondents' attempts to distinguish these cases are unavailing. Respondents point out that in *Sayre*, 415 S.E.2d at 264, the "County Commission * * * approved the renunciation." Whatever the process needed to perfect a renunciation in that case, such a step was unnecessary here, where, as explained above, section 2-8 makes filing the operative act for completing a renunciation. Thus, the distinction respondents point to is not material. Without significant explanation, respondents assert that *Spencer* is distinguishable because "the estate had been put on notice" of the renunciation. It is not apparent to us how this fact affected the validity of the renunciation. Hence, *Spencer* provides sound guidance on the salient issue of when a renunciation has been completed.

***4** ¶ 19 Respondents cite a number of cases from foreign jurisdictions. However, *Cahill v. Eberly*, 38 F.2d 539, 541 (D.C. Cir. 1930), involved a situation where the renouncing spouse did not comply with the statutory requirements for renouncing. Here, George complied with the requirements of section 2-8. In *In re Knofler's Estate*, 52 N.E.2d 667, 671-72 (Ohio Ct. App. 1943), unlike in this case, the renouncing spouse did not elect to make a renunciation prior to her death. Similarly, respondents' citation to *Grammer v. Bourke*, 70 N.E.2d 198, 200 (Ind. Ct. App. 1946), is unavailing, as the surviving spouse did not actually make an election before she died. In *Hogan v. Roche*, 63 A.2d 794 (N.H. 1949), the court held void an attempt by a guardian to renounce a will on behalf of a surviving spouse; in *Gowing v. Laing*, 77 A.2d 32 (N.H. 1950), a companion case with *Hogan*, the court held that, where the surviving spouse died before renouncing, that right did not survive her. Neither case helps respondents, as neither involved the death of a surviving spouse *after* that spouse renounced. *In re Estate of Pearson*, 192 So. 2d 89, 90 (Fla. Dist. Ct. App. 1966), involved a statute that, unlike ours, required judicial action to complete a renunciation. Other cases cited—briefly—by respondents are not on point.

¶ 20 Respondents also cite a number of Illinois cases that set forth policy considerations underlying the right of renunciation. See, *e.g.*, *Rock Island Bank & Trust Co. v. First National Bank of Rock Island*, 26 Ill. 2d 47 (1962). They also cite several cases addressing the right of dower, some going back to the 1850s. These cases provide, at best, tangential guidance as they predate the enactment of section 2-8 (they obviously do not address its plain language, which is the primary issue here). Moreover, as they address policy, we have no occasion to consider them given that the statute is not ambiguous. *Madigan*, 2012 IL App (1st) 111419, ¶ 36.

¶ 21 In sum, we hold that where, as here, a surviving spouse has complied with all the steps specified in section 2-8, the renunciation is complete and the subsequent death of the surviving spouse does not undo it.

¶ 22 B. Abatement

¶ 23 Respondents next argue that under Illinois law, where an action is created by statute, it abates upon the death of a party unless there is some statutory provision for its survival. Whether this principle has any bearing upon the instant case presents a question of law, subject to *de novo* review. See *Vincent v. Alden-Park Strathmoor, Inc.*, 399 Ill. App. 3d 1102, 1104 (2010). Respondents rely on *Shapiro v. Chernoff*, 3 Ill. App. 3d 396, 401 (1972), which states, "Under Illinois law, if an action is one created by statute, and neither that statute nor any other provides for its survival, the action abates upon the death of a party." *Shapiro* cites *Creighton v. County of Pope*, 386 Ill. 468, 476 (1944), in which our supreme court observed, "Again, in Illinois, it has long been settled that a cause of action created by statute does not survive unless declared so to do by the statute itself or unless provision for its survival is made by some other statute."

¶ 24 As respondents recognize, for abatement to be a consideration, an action would have to be pending:

> "Although the petition had been filed prior to the death of the surviving spouse, the Court had not yet heard any argument or made any determinations concerning the petition. As such, the action was

> merely pending at the time of George's death. Because there is no law providing for the survival of the action, it abated upon George's death."

However, as explained above, the statute requires nothing beyond filing to perfect the renunciation. This is not to say that it could not still be challenged and undone; however, pursuant to the statute, if it were to stand, it would be effective as of the date it was filed. In any event, as the renunciation was complete, it was not abated by George's death. *Cf. Tunnell v. Edwardsville Intelligencer, Inc.*, 43 Ill. 2d 239, 242 (1969) ("So too, when a plaintiff dies after having received a verdict in his favor but before the entry of judgment, his action does not abate and he is entitled to judgment upon that verdict.").

¶ 25 C. The Assignment and Standing

***5** ¶ 26 Respondents also contend that George's right to renounce was personal to him and unassignable. Though there are no cases directly on point, respondents point to some case law that they contend is analogous. They assert, for example, that claims made pursuant to a penal statute are personal and not assignable. See, *e.g.*, *Hart Conversions, Inc. v Pyramid Seating Co.*, 658 N.E.2d 129, 131 (Ind. Ct. App. 1995). Similarly, **legal malpractice** claims are not assignable. *Clement v. Prestwich*, 114 Ill. App. 3d 479, 480-81 (1983). Respondents contend that the right to renounce, being personal to the surviving spouse (see *Rock Island Bank & Trust Co.*, 26 Ill. 2d 47), should be subject to the same limitation.

¶ 27 Whatever the underlying merits of respondents' argument, it is not on point. George did not assign his right to renounce; he assigned the interest he possessed after exercising his right to renounce. The assignment reads, in pertinent part, as follows:

> "I, George H. Scherr, am an heir of the Estate of Marjorie Friedman a/k/a Marjorie Friedman Scherr, Deceased ('Estate') and am entitled to a distribution from the Estate pursuant to the Renunciation that I filed in said Estate and pursuant to my rights to receive a spousal award in the Estate. I do hereby transfer and assign all my right, title, and interest in the Estate to the George H. Scherr Trust dated March 14, 2002 ('Trust')."

In other words, George did not assign the right to renounce. That right was exercised in accordance with the plain language of section 2-8 of the Act, before George's death. Respondents cite nothing to support the notion that an interest in an estate acquired through renunciation is unassignable. As such, we find this argument unpersuasive.

¶ 28 IV. CONCLUSION

¶ 29 In light of the foregoing, we reverse the order of the circuit court of Lake County sustaining respondents' objection to George's renunciation of Marjorie's will. This cause is remanded for further proceedings consistent with this opinion.

¶ 30 Reversed and remanded.

Justices McLaren and Spence concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2017 IL App (2d) 160889, 2017 WL 2805650

