No. 124565

In the
Supreme Court of Illinois

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS,

Plaintiffs-Appellees,

v.

ILLINOIS UNION INSURANCE COMPANY and STARR INDEMNITY & LIABILITY COMPANY,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois, First Judicial District,
Second Division, No. 1-18-0158.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 16 CH 02605.
Honorable Celia Gamrath, Judge Presiding.

BRIEF OF APPELLEE
THE CITY OF CHICAGO HEIGHTS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

The City of Chicago Heights (the "City") filed a Complaint for Declaratory Judgment and other relief (the "DJ Complaint") against Illinois Union Insurance Company ("Illinois Union") and Starr Indemnity and Liability Company ('Starr") (collectively "Illinois Union/Starr" or the "Insurers") seeking a declaration that the Insurers owe insurance coverage obligations to the City under policies issued by Illinois Union/Starr (R. C-41-280,[1], for the underlying civil rights/wrongful torts case titled *Rodell Sanders v. City of Chicago Heights, et al.,* Case No. 13-CV-221 (the "*Sanders Lawsuit*"). R. C-2336-C-2364, V. 5; Ins. App. A-77-105. In the *Sanders Lawsuit,* among other claims, Rodell Sanders ("Sanders") alleged that the City maliciously prosecuted him, which manifested on July 22, 2014, when Sanders was acquitted and exonerated of the crimes of murder, attempted murder and armed robbery, for which he had been convicted and served almost 20 years in prison. In settling the underlying *Sanders Lawsuit,* without any admission of fault or wrongdoing, the City assigned to Sanders certain, but not all, of its rights of recovery against Illinois Union/Starr. Both the City and Sanders (collectively "the City/Sanders") maintain the Insurers have separate coverage obligations to the City and to Sanders. These obligations are set forth in the City's/Sanders's Second Amended DJ Complaint, R. C-2295-2578, V. 5; Ins. App. A-36-76. The single issue considered by the Circuit and Appellate Courts below is whether the Illinois Union/Starr policies are

[1] The Record on Appeal will be cited throughout this Brief with specific reference to the Common Law Record as follows: "R. C- ____." Where a volume is specified in the Record, such volume will also be specified. Citations to the Supplement to the Record will be provided as follows: "SUP R-___" If applicable, the citations will also include page references to Appellant Starr Indemnity's Appendix, which was filed along with Starr's Brief on June 26, 2019, and will be cited as "Ins. App. at A- ___."

triggered by the *Sanders Lawsuit.*

The City maintains that coverage is triggered under the 2012-2013 and/or the 2013-2014 liability policies issued by Illinois Union/Starr, which provide coverage for the specific offense of malicious prosecution. Illinois Union/Starr filed a Motion to Dismiss the DJ Complaint, pursuant to 735 ILCS 2-619(a)(9), arguing that none of the claims alleged in the *Sanders Lawsuit* occurred during their policy periods. On January 2, 2018, Cook County Circuit Court Judge Celia Gamrath rendered judgment in favor of Illinois Union/Starr, with the determination that the triggering event under the Illinois Union/Starr occurrence policies is the institution of the malicious prosecution and injury to Sanders, not his exoneration. R. C-3077-C-3087, V. 6; Ins. App. at A-1-11. Judge Gamrath additionally rejected the argument that Sanders's three separate and discrete trials served as the basis for finding multiple triggers for malicious prosecution. R. C-3087, V. 6; Ins. App. at A-11. On appeal, the First District Appellate Court (the "*Sanders's* Court") reversed Judge Gamrath, determining that:

> [T]he language of the Illinois Union policies, when read in context, is plain in providing that coverage is triggered by the 'offense' of malicious prosecution 'happening' within the policy period and the offense of malicious prosecution only happens once all of the elements of the tort are met. In the present case, that means that the coverage trigger was well within the effective periods of the Illinois Union and Starr policies. Thus, the Trial court erred when it dismissed plaintiffs' second amended complaint with prejudice.

Sanders et al. v. Illinois Union Ins. Co. et al., 2019 IL App (1st) 180158 at ¶ 31, Ins. App. at A-27. Because the *Sanders's* Court concluded that Sanders's exoneration triggered coverage under the Insurers' policies, the Court did not address the City's alternative argument that Sanders's retrials were additional triggers for coverage. *Id.* 2019 IL App (1st) 180158 at ¶32. The Insurers now appeal the trigger ruling.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Are Illinois Union and Starr Indemnity Insurance Companies entitled to be awarded a declaratory ruling from the Illinois Supreme Court, which would establish a general rule concerning the trigger for coverage of claims of malicious prosecution, regardless of the policy language at issue?

STATEMENT OF FACTS

I. THE CITY INVOKED COVERAGE FOR THE *SANDERS LAWSUIT* UNDER PRIMARY AND EXCESS LIABILITY POLICIES

The significant dates alleged in the *Sanders Lawsuit* are the dates of Sanders's exoneration on July 22, 2014, and the dates of his second and third trials, which occurred in August of 2013 and July of 2014. R. C-2304-05, C-2345-2346, V. 5; Ins. App. at A-10, 45-46. Significantly, there is no date identified concerning the initiation of charges. Illinois Union issued policies to the City for consecutive policy periods beginning in November of 2010. However, only the 2012-2013 and 2013-2014 policies are at issue. Illinois Union issued $1 million primary liability occurrence polices to the City with policy periods spanning from November 1, 2012 to November 1, 2013 (R. C-2366-2425, V. 5; Ins. App. at A-107-166); and from November 1, 2013 to November 1, 2014 (R. C-2427-2483, V. 5; Ins. App. at A-168-224). Illinois Union promised to indemnify the City for damages and claim expenses in excess of the retained limit (self-insured retention is $100,000 per claim, R. C-2367, 2428, V. 5; Ins. App. at A-108, 169), for which the City becomes legally obligated to pay because of a claim first arising out of an occurrence happening during the policy period for personal injury taking place during the policy period. R. C-2389, 2450, V. 5; Ins. App. at A-130, 191.

Starr began issuing insurance to the City in November of 2011. Similar to Illinois

Union there are two policies at issue – the 2012-2013 and the 2013-2014. Starr issued $10 million excess "follow form" liability policies to the City with policy periods spanning from November 1, 2012 to November 1, 2013 (R. C-2485-2512, V. 5; Ins. App at A-226-253); and from November 1, 2013 to November 1, 2014 (R. C-2515-2539, V. 5; Ins. App. at A-256-280). Starr promised to pay the "Ultimate Net Loss" in excess of the "Underlying Insurance" (Illinois Union), which provided $1 million annually. Except for the terms, definitions, conditions and exclusions set forth in the Starr policies, the coverage provided by Starr follows the terms, definitions, conditions and exclusions of the Underlying Insurance. R. C-2492, 2522, V. 5; Ins. App. at A-233-263; Excess Liability Policy form, Section I Coverage, Paragraph A, p. 3 of 10; Policy Declarations, p. 1 of 3.; Schedule of Underlying Insurance, p. 1 of 2. R. C.-2488, 2518-19, V. 5; Ins. App. at A-229, 259-60. In that definitions of "occurrence" and "personal injury" are not set forth in Starr's policies, Starr's coverage will incorporate and follow Illinois Union's definitions for "occurrence" and "personal injury." *Id.*

II. LIABILITY POLICY LANGUAGE AT ISSUE

The liability coverage under Illinois Union's/Starr's policies is occurrence based, and therefore claims must occur within the designated policy period. The policy defines the insured to include the named insured and all current and former employees while acting within their scope of duties for the named insured. R. C-2378-79, C-2439-40, 2485, 2515, V. 5; Ins. App. A-118-120, 180-181, 226, 256. Pertinent definitions (which are cited herein with emphasis in bold as included in the original) include the following:

> 6. **Conflicting State Law or Regulation**
>
> In the event that provisions of this Policy conflict with any state law or regulation, then such law or regulation shall prevail and

this Policy is amended to conform with such law or regulation.

R. C-2370, C-2431, V. 5; Ins. App. A-111, 172. Common Condition, Definitions, and Exclusions pp. 2 of 20.

12. **Interpretation**

The terms and conditions of this **Policy** shall be interpreted and construed as a commercial contract in an evenhanded fashion as between the parties. If the language of this **Policy** is to be interpreted in any suit, arbitration, mediation or appeal, any dispute regarding such interpretation shall be resolved in the manner most consistent with the relevant terms and conditions, without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the **Insured** or the **Insurer** and without reference to the reasonable expectation of either the **Insured** or the **Insurer.**

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R. C-2373, C-2434, V. 5; Ins. App. A-114, 175. Common Conditions, Definitions, and Exclusions pp. 5 of 20.

23. **Occurrence** means:

***

b. With respect to **Personal Injury**, only those offenses specified in the **Personal Injury** Definition. All damages arising out of substantially the same **Personal Injury** regardless of frequency, repetition, the number or kind of offenses, or number of claimants, will be considered as arising out of one **Occurrence**.

***

24. **Personal Injury** means one or more of the following offenses:

a. False arrest, false imprisonment, wrongful detention or malicious prosecution;

***

R. C-2379-2380, 2440-2441, V. 5; Ins. App. A-120-121, 181-182. Common Conditions, Definitions, and Exclusions pp. 11 of 20.

The Insuring Agreement in the Illinois Union primary policies provides as follows:

General Liability Coverage Part

In consideration of the payment of the premium, in reliance upon the **Application**, and subject to the Declarations and the terms and conditions of this **Policy**, the **Insureds** and the **Insurer** agree as follows:

A. Insuring Agreement

The **Insurer** will indemnify the **Insured** for **Damages** and **Claim Expenses** in excess of the **Retained Limit** for which the **Insured** becomes legally obligated to pay because of a **Claim** first arising out of an **Occurrence** happening during the **Policy Period** in the Coverage Territory for **Bodily Injury**, **Personal Injury**, **Advertising Injury**, or **Property Damage** taking place during the **Policy Period**.

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R. C-2389, 2450, V. 5; Ins. App. A-130, 191. General Liability Coverage Part, p. 1 of 5.

The Section I. Coverage terms in the Starr Excess Liability Policy provide:

SECTION I. COVERAGE

A. We will pay on behalf of the Insured, the "Ultimate Net Loss" in excess of the "Underlying Insurance" as shown in **ITEM 5.** of the Declarations, that the Insured becomes legally obligated to pay for loss or damage to which this insurance applies and that takes place in the Coverage Territory. Except for the terms, definitions, conditions and exclusions of this Policy, the coverage provided by this Policy shall follow the terms, definitions, conditions and exclusions of the applicable First Underlying Insurance Policy(ies) shown in **ITEM 5.A.** of the Declarations.

R. C-2492, 2522, V. 5; Ins. App. A-233, 263, Excess Liability Policy Form p. 3 of 10.

ARGUMENT

I. THE *SANDERS'S* COURT STRICTLY CONSTRUED ILLINOIS UNION'S/STARR'S INSURANCE POLICIES

A. THE SANDERS'S COURT CAREFULLY EXAMINED THE POLICIES

After reviewing the Illinois Union/Starr policies, the *Sanders's* Court concluded that coverage under the policies was triggered upon the completion of the tort of malicious prosecution, *i.e.,* Sanders's exoneration, which occurred while the policies were in effect. *Sanders,* 2019 IL App (1st) 180158 at ¶11. In interpreting the policy language, the *Sanders's* Court applied governing contract law in accordance with Illinois Supreme Court precepts, as set forth in *Founders Ins. Co. v. Munoz,* 237 Ill. 2d 424, 433, 930 N.E.2d 999, 1003-1004 (2010). *Sanders,* 2019 IL App (1st) 180158 at ¶14. The *Sanders's* Court identified the dispute as centering around when the "offense" of malicious prosecution is deemed to occur under the policies. *Sanders,* 2019 IL App (1st) 180158 at ¶ 17. Because the policies do not define the word "offense," the *Sanders's* Court gave that term its plain and ordinary meaning as defined by *Black's Law Dictionary*, which defines "offense" as "[a] violation of the law; a crime, often a minor one." *Sanders,* 2019 IL App (1st) 180158 at ¶ 18, citing *Black's Law Dictionary* (10th ed. 2014). The *Sanders's* Court's utilization of *Black's Law Dictionary* is proper under the governing terms of Illinois Union/Starr policies, which require the "terms and conditions of this **Policy** shall be interpreted and construed as a commercial contract in an evenhanded fashion as between the parties….in the manner most consistent with relevant terms….(emphasis in original)," R. C-2373, C-2434, V. 5; Ins. App. A-114, 175. Common Conditions, Definitions, and Exclusions p. 5 of 20. In that a commercial contract is a legal document, legal definitions of terms and conditions are interpreted as a matter of law. *Thounsavath v. State Farm Mut. Auto. Ins. Co.,* 2018 IL 122558 at ¶ 17.

The *Sanders's* Court determined that the *Black's Law* definition supported an interpretation that the term "offense" refers to the legal cause of action that arises out of wrongful conduct, not just the wrongful conduct itself. The *Sanders's* Court pointed out that torts, crimes and other violations of law are comprised of a number of elements, only one of which is the wrongful act itself. However, the crime, legal violation or tort does not arise or exist until all of the necessary elements have been satisfied. Thus, only upon completion of the final element is a wrongful act transformed into a crime or a tort, as suggested by the legal definition of the word "offense." *Id.* The *Sanders's* Court's analysis is directly on point in this case, where Sanders's ability to invoke the offense of malicious prosecution did not materialize until his exoneration. Until that time, Sanders could only complain of alleged injuries and alleged wrongful acts, but these isolated elements did not equate to the "offense" of malicious prosecution and did not transform into the offense until his exoneration. In fact, after his exoneration, Sanders amended his already pending civil rights complaint to include a claim for malicious prosecution.

As the *Sanders's* Court points out, the Illinois Union/Starr policies also provide coverage for other personal injuries and all of those personal injuries, just like malicious prosecution, are specified legal causes of action. Nowhere in the policy is there a reference to coverage for the underlying wrongful acts themselves. The policies identify the offenses by their proper, legal names and specify the "offense" as the basis for coverage. Unlike the cases relied upon by the Insurers, the Illinois Union/Starr policies do not promise coverage for "injuries" or "wrongful acts" that occur during the policy. Instead, the specified "offenses" must occur during the policy period. *Sanders,* 2019 IL App (1st) 180158 at ¶¶ 19-20. The *Sanders's* Court pointed out that if it were to apply the Insurers'

interpretation of the word "offense," it would be tantamount to adopting an interpretation "which rests on 'gossamer distinctions' that the average person, for whom the policy is written, cannot be expected to understand." *Sanders,* 2019 IL App (1st) 180158 at ¶ 20 (citing *Founders Insurance Co.,* 237 Ill. 2d at 433).

As for other Illinois Appellate Court opinions, the *Sanders's* Court points out that the language in *St. Paul Fire & Marine Ins. Co. v. City of Waukegan,* 2017 IL App (2d) 160381; *Indian Harbor Ins. Co. v. City of Waukegan,* 2015 IL App (2d) 140293; and *St. Paul Fire & Marine Ins. Co. v. City of Zion,* 2014 IL App (2d) 131312, all include markedly different insuring language than the Illinois Union/Starr indemnity policies. *Sanders,* 2019 IL App (1st) 180158 at ¶ 22. In those cases, the policies require the injury resulting from, or the wrongful act giving rise to, malicious prosecution to occur within the policy period. *Sanders,* 2019 IL App (1st) 180158 at ¶ 22. The foregoing cases do not construe policies that require the "offense" of malicious prosecution to happen during the policy period. Therefore, the *Sanders's* Court properly deemed these cases irrelevant to its analysis of the Illinois Union/Starr policies. *Sanders,* 2019 IL App (1st) 180158 at ¶ 22.

With regard to the two other Illinois Appellate malicious prosecution coverage cases, the *Sanders's* Court distinguished each case with accurate and reasonable precision. In *County of McLean v. States Self-Insurers Risk Retention Group, Inc.,* 2015 IL App (4th) 140628, the Fourth District improperly conflated the terms "occurrence" and "personal injury," even though these terms are separately defined in the Risk Retention policies. Although the policy in *McLean* expressly required that the "offenses" specified in the personal injury definition must take place within the policy period, the policy did not specify that the personal injury caused by the listed offenses must take place within the

policy period. Contrary to the policy, the *McLean* court treated the terms "occurrence" and "personal injury" as if they were one and the same thing and arbitrarily focused on when the injury took place. Because the *McLean* court did not examine when the "offense" of malicious prosecution occurs, the *Sanders's* court appropriately deemed the case irrelevant to its analysis and the strict construction of the Illinois Union/Starr policies. *Sanders,* 2019 IL App (1st) 180158 at ¶ 24.

Similarly, the *Sanders's* Court found the recent Illinois Appellate case, *First Mercury Ins. Co. v. Ciolino,* 2018 IL App (1st) 171532, to be irrelevant to the analysis here. The policy in *First Mercury,* like the Illinois Union/Starr policies, requires that the "offense" of malicious prosecution take place within the policy period. However, the *First Mercury* court concluded that the use of the word "offense" did not necessarily indicate an intent by the parties that coverage under the policy be triggered only by the completed tort of malicious prosecution. Instead, the *First Mercury* court rejected application of a legal definition of terms and held that a more straightforward reading of the term "offense" was that the "offensive conduct" take place within the policy period. *Sanders,* 2019 IL App (1st) 180158 at ¶ 26. The *First Mercury* court supported this conclusion based on the Merriam-Webster definition of "offense," which defines the word as "something that outrages the moral or physical senses;" the act of attacking;" the act of displeasing or affronting;" or "a breach of moral or social code." *Sanders,* 2019 IL App (1st) 180158 at ¶ 39. The *Sanders's* Court disagreed with *First Mercury's* opinion concerning the common understanding of the term "offense" and the application of its more generic definition in interpreting the language in an insurance policy, specifically when the term is used in the context of describing a list of legal causes of action and not wrongful acts of misconduct. *Sanders,*

2019 IL App (1st) 180158 at ¶ 27.

Moreover, the *Sanders's* Court expressly identified a distinction in the policy language in the *First Mercury* case. There, the policy required the offense to have been "committed" during the policy period. By contrast, the Illinois Union/Starr policies provide coverage for claims arising out of an occurrence (*i.e.,* the offense) "happening" during the policy period. In analyzing the difference in the meaning of the terms "commit" and "happen," the *Sanders's* Court pointed out that the word "commit" denotes an affirmative, deliberative act by a person, whereas the use of the word "happen" suggests the completion of a process or the passive coming into existence of something. *Sanders,* 2019 IL App (1st) 180158 at ¶ 28.

In its assessment, the *Sanders's* Court acknowledges that it was not unreasonable for the *First Mercury* Court to conclude that the Risk Retention policy intended "offense" to refer to an affirmative act by the insured. However, by contrast, the Illinois Union/Starr policies refer to malicious prosecution "happening" during the policy period, which supports a conclusion that the language refers to the completed tort of malicious prosecution and not the initiation of the prosecution. Relying on dictionary definitions of the terms "happen" and "commit," the *Sanders's* court explained the distinction in the interpretation of the terms, as applied to the insurance policies. An offense or tort *happens* or "come[s] into being," when it is complete. By contrast, the filing of the charges is *committed* or deliberately "carr[ied] into action" at the inception of the proceedings. *Sanders,* 2019 IL App (1st) 180158 at ¶ 28. Based on the material distinction in the language of the policies, as well as the *Sanders's* Court's disagreement with *First Mercury's* application of the generic definition of term "offense," rather than the legal

definition of the term more aptly applied to the Illinois Union/Starr policies, the *Sanders's* Court asserted that it was not bound by the interpretation of the term "offense" utilized in *First Mercury. Sanders,* 2019 IL App (1st) 180158 at ¶ 28.

Based on its in-depth analysis, the *Sanders's* Court accurately concluded that the language of the Illinois Union/Starr policies, when read in context, is plain in providing that coverage is triggered by the "offense" of malicious prosecution "happening" within the policy period and the offense of malicious prosecution only happens once all of the elements of the tort are met. In the *Sanders's* case that meant that the coverage was triggered when Sanders was exonerated in 2014, during Illinois Union's/Starr's policy periods. *Sanders*, 2019 IL App (1st) 180158 at ¶ 31. The *Sanders's* Court's well-reasoned opinion should be upheld.

B. THE DOCTRINE OF *STARE DECISIS* DID NOT BIND THE SANDERS'S COURT AND DID NOT COMPEL THE COURT TO RULE IN FAVOR OF THE INSURERS ON THE ISSUE OF COVERAGE FOR MALICIOUS PROSECUTION

Illinois Union attacks the Sanders's Court's adoption of the exoneration trigger on grounds of *stare decisis*, even while acknowledging that other Illinois Appellate Courts' prior decisions were not binding on the Sanders's Court. The case on which Illinois Union relies for application of the doctrine of *stare decisis*, *St. Paul Fire & Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381, ¶29, 82 N.E.3d 823, 831, recognizes that the decision of one district, division, or panel of the Illinois Appellate Court is not binding on other districts, divisions, or panels. Here the *Sanders's* Court was not bound to follow cases relied on by Illinois Union such as *City of Waukegan*, *Indian Harbor, County of McLean and City of Zion, supra*.

Moreover, with regard to the case of *First Mercury* which, like this case, was

decided by the First District, the *Sanders's Court* does not assert that *First Mercury* was wrongly decided or that it should be abandoned. The *Sanders's Court* points out that *First Mercury,* like all of the other recently decided Illinois wrongful conviction cases, is simply different from the case at bar. The thrust of the *Sanders's* Court's opinion is that the *Sanders's* Court's ruling is not at odds with other Illinois courts. Instead, the disparate rulings can co-exist harmoniously. If coverage determinations are based on the language in the particular policies, there can be no general rule that dictates a formulaic outcome. Therefore, the doctrine of *stare decisis* does not apply. The *Sanders's* Court was not bound to follow *First Mercury*. "The doctrine of *stare decisis* requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts." *O'Casek v. Children's Home & Aid Soc'y*, 229 Ill. 2d 421, 440, 892 N.E.2d 994, 1006 (2008)(citing *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 392 n.2, 830 N.E.2d 575 (2005).

As stated by the Illinois Supreme Court, the doctrine of *stare decisis* does not interfere with a reviewing court's duty to reach the correct decision. *People v. Mitchell,* 189 Ill.2d 312, 339, 727 N.E.2d 254, 270 (2000). A court may examine the facts of its case independently to ensure that a precedential ruling is actually applicable. It is appropriate to depart from *stare decisis* particularly when the law has not developed in a principled and intelligible fashion. *Id*. Indeed "…the most important duty as justices of the Illinois Supreme Court, to which all other considerations are subordinate, is to reach the correct decision under the law." *People v. Mitchell*, 189 Ill. 2d at 339, 727 N.E.2d at 270.

Notwithstanding principles of *stare decisis*, the courts' "… primary objective when construing an insurance policy is to ascertain and give effect to the intention of the parties,

as expressed in the policy language. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 362, 860 N.E.2d 307, 314 (2006); *Gillen*, 215 Ill. 2d at 393, 830 N.E.2d at 582. That is exactly what the *Sanders's* Court did here. The Court construed the specific language of the Illinois Union/Starr policies independently, without automatically adopting the interpretations of other Illinois courts, none of which have been confronted with the same insuring agreement as that included in the Illinois Union/Starr policies.

Moreover, if the words used in a policy are clear and unambiguous, then courts must give them their plain and ordinary meaning. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153, 821 N.E.2d 206 (2004). If, on the other hand, the policy's terms are reasonably susceptible to more than one meaning, they are ambiguous and will be strictly construed against the drafter. *Id.* Here, the *Sanders's* Court determined the language in the Illinois Union/Starr policies was distinguishable from language construed in earlier rulings, thus rendering those cases unpersuasive. Indeed, the *Sanders's* Court carefully considered the cases on which the Insurers relied, including *County of McLean*, which the Court determined was improperly construed by the 4th District. *Sanders v. Ill. Union Ins. Co.*, 2019 IL App (1st) 180158, ¶24. Likewise, after an in-depth analysis of *First Mercury*, the *Sanders's* Court disagreed with its interpretation of the term "offense" and found material distinctions in that the *First Mercury* policy required the offense to have been "committed" during the policy period, while the Illinois Union/Starr policies provide coverage for claims arising out of an occurrence (*i.e.*, the offense) "happening" during the policy period." *Sanders*, 2019 IL App (1st) 180158, ¶27.

The Insurers claim the Sanders's Court went "rogue" and "contrived to discard controlling law" by erroneously relying on minor differences in the policy language.

Illinois Union Brief at p. 15. However, a court does not go "rogue" by focusing on the specific policy language under review, the meaning this language has for coverage, and how coverage determinations may vary between similar, but significantly distinguishable, cases. The *Sanders's* Court analysis was consistent with its obligation to reach the correct decision under the law and was not inconsistent with principles of *stare decisis*.

II. IN ACCORDANCE WITH ESTABLISHED CONTRACT INTERPRETATION PRECEPTS, THE ILLINOIS UNION/STARR POLICY LANGUAGE MUST BE STRICTLY CONSTRUED

A. POLICY INTERPRETATION IS A MATTER OF LAW THAT MUST TAKE INTO ACCOUNT THE TYPE OF COVERAGE PROVIDED

It is the general rule in Illinois that where a question arises as to the legal construction to be placed on the language of an insurance policy, the court's primary objective is to ascertain and give effect to the intent of the parties to the contract. In doing so, the court must construe the policy as a whole, taking into account the type of insurance purchased, the nature of the risks involved and the overall purpose of the contract. *Travelers Ins. Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 293, 757 N.E.2d 481, 491 (2001). If the language is clear and unambiguous, the court will afford the language their plain and ordinary meaning. Conversely, if the language of the policy is susceptible to more than one meaning, it is considered ambiguous and will be strictly construed against the insurer who drafted the policy and in favor of the insured. *Id.; Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 222, 835 N.E.2d 801, 874 (2005); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108, 607 N.E.2d 1204, 1212 (1992).

B. ILLINOIS UNION/STARR POLICIES UNAMBIGUOUS

Here, the type of policy at issue includes a separate Law Enforcement Liability ("LEL") Endorsement, R. C. 2430, 2472, V. 5, Ins. App. A-161, 213. The specialty nature

of the policy must be considered in construing the terminology in the contract. The terms "false arrest," false imprisonment," "wrongful detention" and malicious prosecution are expressly stated as personal injury offenses. Claims identifying these offenses are provided coverage under the Illinois Union/Starr policies. R. C. 2380, 2441, V. 5, Ins. App. A-121, 182. Under the definition of "Occurrence," the policies provide that the definition of the term "Occurrence," with respect to Personal Injury, includes "only those offenses specified in the Personal Injury definition." R. C. 2279, 2440, V. 5, Ins. App. A-120, 181. The terms "false arrest," "false imprisonment," "wrongful detention," and "malicious prosecution" are not further defined in the Illinois Union/Starr policies. Given the absence of any further definitions, common sense must dictate that these terms be given their plain and ordinary meaning in the context of coverage for LEL. The Illinois Supreme Court has acknowledged that legal causes of action are regarded as terms of art in both the criminal setting, *People v. McCarty*, 94 Ill.2d 28, 32, 445 N.E.2d 298, 301 (1983) (opining that theft, like all crimes recognized by law, is a term of art); and in the tort liability setting, *Doe v. McLean County Unit Dist. No. 5*, 2012 IL 112479 at ¶93, 973 N.E.2d 880, 904 (2012)(opining that negligent misrepresentation is a term of art referring to a specific theory of tort liability). Here, the term "malicious prosecution" as an "offense" should similarly be deemed a term of art that refers to a specified theory of tort liability. It cannot be disputed that the malicious prosecution tort requires specific elements to be present before it comes into existence. In undertaking an interpretation of the LEL coverage provided in the Illinois Union/Starr policies, the *Sanders's* Court was justified in consulting *Black's Law Dictionary*, which defines malicious prosecution in the context of a legal term of art.

Terms which are used in an insurance policy but not defined therein must be

construed in keeping with their recognized meanings and courts often refer to dictionaries to obtain this meaning. *Muller v. Fireman's Fund Insurance Co.*, 289 Ill. App. 3d 719, 725, 682 N.E.2d 331, 335 (1st Dist. 1997). The dictionary commonly referenced by Illinois courts is *Black's Law Dictionary*. *Id., see also, Daley v. Datacom Systems Corporation*, 146 Ill. 2d 1, 15-16, 585 N.E.2d 51, 57-58 (1991). When consulting *Black's Law Dictionary* for the definition of "malicious prosecution," the reader will find that the term is defined as a "tort" that requires an adversary to prove certain specific elements, including favorable termination of a lawsuit. *Black's Law Dictionary*, Eighth Edition, Bryan A. Garner, Editor in Chief, 2004, at p. 977. As its first definition for "offense" *Black's Law* states:" "A violation of the law; a crime, often a minor one." Following this definition comes a long list of examples, including a "civil offense," which provides a cross-reference to direct the reader to see the term: "Tort." The second definition of "offense" states: "Civil law. An intentional unlawful action that causes injury or loss to another and that gives rise to a claim for damages. This sense of offense is essentially the same as the common law intentional tort." *Black's Law Dictionary*, Eighth Edition, Bryan A. Garner, Editor in Chief, 2004, pp. 1110-1113. *Black's* definitions of "offense" and "malicious prosecution" both equate the terms with completed "torts." Therefore, given the straightforward, unmodified use of the terms "offense" and "malicious prosecution" as set forth in the Illinois Union/Starr policies, this Court should apply the standard and recognized definitions of these terms to determine that the Illinois Union/Starr policies provide coverage for the completed "tort" of malicious prosecution.

C. IF THIS COURT DEEMS ILLINOIS UNION/STARR POLICIES TO BE AMBIGUOUS, THEN THE POLICY LANGUAGE SHOULD BE CONSTRUED IN FAVOR OF THE CITY INSURED

While the Insurers do not dispute that the Illinois Union/Starr policies promise coverage for the "offense" of "malicious prosecution," they maintain that other courts have come to different conclusions as to the trigger for a claim of malicious prosecution. The Insurers urge the Illinois Supreme Court to establish a general rule that negates the commonly understood meaning for the term "malicious prosecution" and impose a different meaning for use by insurers when addressing claims for coverage of wrongful convictions. Although the City maintains that an examination of the Illinois Union/Starr policies will show an unambiguous promise to provide coverage for the unvarnished tort of malicious prosecution, to the extent this Court deems that the Illinois Union/Starr policy provisions are ambiguous, the policy language should be interpreted in favor of the City insured. *Avery,* 216 Ill. 2d at 222, 835 N.E.2d at 874. The promises in the Illinois Union/Starr policies should not be rendered meaningless by imposition of a general rule that flies in the face of the precepts of Illinois contract interpretation.

III. COURTS ADDRESSING MALICIOUS PROSECUTION COVERAGE SHOULD AVOID THE TEMPTATION TO AUTHORIZE A BOILERPLATE TRIGGER FOR WRONGFUL CONVICTION CLAIMS

In ruling favorably for Illinois Union/Starr, the Circuit Court chose to follow what has come to be dubbed the "majority view" taken by courts that, when ruling on coverage disputes in wrongful conviction cases, determine that insurance coverage is triggered at the time of the arrest or the initiation of charges. Over the last several years, certain Illinois State courts have coalesced and joined the ranks of the "majority view." The foundation for this point of view has been built upon the premise that the occurrence liability policies

under examination define an occurrence as happening at the time of an "injury." However, as cases have evolved, there is less attention to an analysis of the specific language of the policies and more of a tendency, such as demonstrated by Circuit Court Judge Gamrath, for judges to apply the "majority rule" as black letter law. The City challenges the application of the majority view interpretation in the manner of a "one size fits all" coverage analysis for wrongful conviction coverage cases, regardless of the policy language. In particular, the City maintains the majority view is not applicable here, where the Illinois Union/Starr policies do not link an occurrence with the "injury" or the "wrongful act" and do not link an offense to anything other than fully recognized and completed "torts."

In contrast to the majority view, the so-called "minority view" expressly addresses policy language, and the ordinary and common expectations concerning what the policy terms convey. Courts relying on the minority view generally engage in the express construction of policy language, that at times is ignored and circumvented by the majority view. The City maintains that the coverage analysis in the Sanders's case should be based on the strict construction of the policy language.

A. CERTAIN ILLINOIS COURTS HAVE JOINED THE RANKS OF WHAT HAS BEEN DUBBED THE "MAJORITY VIEW" BASED ON THEIR DETERMINATIONS THAT COVERAGE IS WARRANTED ONLY TO INSURE CLAIMS FOR "INJURY" OR "WRONGFUL ACTS" OCCURRING DURING THE POLICY PERIOD

From the Illinois annals, there are five cases that espouse the majority view: *St. Paul Fire and Marine Ins. Co. v. City of Zion et al.,* 23014 IL App (2d) 131312, Sept. 10, 2014 ("*City of Zion*"); *Indian Harbor Ins. Co. v. City of Waukegan et al.*, 2015 IL App (2d) 140293, Mar. 6, 2015 ("*Indian Harbor*"); *County of McLean et al. v. States Self-Insurers*

Risk Retention Group, 2015 IL App (4th) 140628, June 2, 2013 ("*County of McLean*"); *St. Paul Fire & Marine Insurance Co. v. City of Waukegan,* 2017 Il App (2d) 160381, August 1, 2017 ("*City of Waukegan*"); and *First Mercury Ins. Co. v. Ciolino,* 2018 IL App (1st) 171532, May 11, 2018. ("*First Mercury*"). Each one of these Illinois cases will be examined and distinguished from the coverage analysis that should be applied to the Illinois Union/Starr policies at issue in this Appeal. The City maintains the following cases do not constitute precedent that should control the outcome of this case.

1. *City of Zion*

In *City of Zion*, the policy language is substantively different than that in the Illinois Union/Starr policies. The policy identified the occurrence date to be the date of the "injury" rather than the date of the "offense." In order to determine coverage under the *City of Zion* policy, the court determined "when the 'injury' resulting from malicious prosecution 'happens,' not when the 'offense' is 'committed." *City of Zion,* 2014 IL App (2d) 131312 at ¶14. The *City of Zion* court went on to analyze the policy as promising to pay for damages for "injury," which the court deemed to have resulted at the commencement of the prosecution, not at the favorable termination. *Id.* at ¶25. Significantly, the *City of Zion* court limited its holding to the language in its policy and declined to express an opinion "regarding which occurrence would trigger coverage if a policy were to require the 'offense' of malicious prosecution to be 'committed' during the policy period, rather than, as [in *City of Zion*] requiring the 'injury' caused by the prosecution to 'happen' during the policy period." *Id.* at ¶34.

Notably, courts relying on the *City of Zion* fail to acknowledge that the court limited its holding to the specific language of the policy that was before the court. As these cases

have evolved, *City of Zion* has been referenced as black letter law, with unlimited application. This is unfortunate because the St. Paul policy language, as referenced above, is significantly different from the personal injury definition in most LEL policies. Notably, it is completely distinguishable from the Illinois Union/Starr policy language because the St. Paul policy required the "injury" to happen during the policy period unlike the Illinois Union/Starr policies, which require the "offense" to happen during the policy period. Based on the distinguishable policy language, *City of Zion* is not relevant to the analysis in this case.

2. *Indian Harbor*

Also distinguishable is the policy language in *Indian Harbor*. There the court also made it abundantly clear that it was not interpreting an insurance policy that covered the tort of malicious prosecution. *Indian Harbor,* 2015 IL App (2d) 140293 at ¶34. The *Indian Harbor* court explained that the policies being examined promised to pay damages if an insured's "wrongful act" occurs during the policy period and resulted in injury. As such, the court found that the wrongful act was the filing of the malicious prosecution, not its favorable termination. *Id.* at ¶30. The *Indian Harbor* court stated that the policies at issue did not focus on the "tort" of malicious prosecution, but on the "wrongful acts" resulting in injury during the policy period. Indeed, the definition of wrongful act did not include malicious prosecution.

The court rejected the use of the date on which malicious prosecution accrues as the trigger because, "[s]imply put, the policies do not equate a wrongful act with a completed cause of action." *Id.* at 31. By contrast, Illinois Union/Starr's policies do equate personal injury with a completed cause of action for the offense of malicious prosecution.

The Illinois Union/Starr policies require that the specific "offense" of malicious prosecution, not simply "wrongful acts," happen during the policy period. Based on the distinguishable policy language, *Indian Harbor* is not relevant to the analysis here.

3. *County of McLean*

Using the same analyses of policy language as used by the *City of Zion* and *Indian Harbor* courts, despite the significant policy term differences, the court in *County of McLean* misinterpreted the Risk Retention policy definition of "personal injury." The court interpreted the policy to require that the actual *injury* suffered by the prosecuted party, not the accrual of the tort of malicious prosecution, must serve as the occurrence that must take place within the policy period. *County of McLean*, 2015 IL App (4th) 14028 at ¶33. Citing favorably to application of the reasoning in *St. Paul*, the *County of McLean* court opined that the policy language does not require that the "offense" of malicious prosecution occur while the policy is in effect. *Id.* at ¶37. However, the *McLean* Court improperly conflated the terms "occurrence" and "personal injury," even though these terms are separately defined in the Risk Retention policies. Although the policy in *McLean* expressly required that the "offenses" specified in the personal injury definition must take place within the policy period, the policy did not specify that the personal injury caused by the listed offenses must take place within the policy period. Contrary to the policy, the *McLean* court treated the terms "occurrence" and "personal injury" as if they were one and the same thing and arbitrarily focused on when the injury took place. The *McLean* court did not undertake a complete analysis because it did not examine when the "offense" of malicious prosecution occurs. Accordingly, the case should not be deemed a thorough and complete analysis of the issues before this Court.

4. *City of Waukegan*

City of Waukegan is distinguishable from the case on Appeal because the focus in *City of Waukegan* was on whether events occurring during the applicable St. Paul Policy period, including a Fifth Amendment violation, as well as *Brady* violations, triggered coverage for discrete civil rights violations alleged in separate counts in the underlying claim. The tort of malicious prosecution was not the basis for invocation of coverage. In fact, St. Paul's policy was not in effect at the time of Rivera's exoneration. Therefore, the trigger for malicious prosecution was not at issue. Juan Rivera, the wrongfully accused, was tried for the third time during St. Paul's period and his alleged coerced confession was used against him. Moreover, it was alleged that exculpatory evidence was withheld from the defendant, preventing him from preparing a complete defense to the charges against him during the third trial. These issues are not germane to this Appeal.

The only point of comparison is that the St. Paul policy language in the *City of Waukegan* was exactly the same as the St. Paul policy language in the *City of Zion.* As discussed under *City of Zion* above, the injury or damage had to happen while the agreement was in effect and "personal injury" was defined as "injury" caused by "wrongful acts," including malicious prosecution. *City of Waukegan,* 2017 IL App (2d) 160381, ¶12. The *City of Waukegan* case is not on point for the discussion of whether the tort of malicious prosecution must be complete before it can serve as a trigger in a wrongful conviction case. The case is distinguishable both in terms of the policy language and because St. Paul's policy was not in effect at the time of Rivera's exoneration.

5. *First Mercury*

First Mercury construed a policy that defined the term "personal injury" to mean

"injury, other than 'bodily injury,' arising out of one or more of the following offenses," followed by a list including "malicious prosecution." *First Mercury*, 2018 IL App (1st) 171532, ¶9. This is distinguishable from the Illinois Union/Starr policies because *First Mercury* expressly defines "personal injury" as "injury …arising out of one or more of the following offenses." The Illinois Union/Starr policies do not equate the term "personal injury" with an "injury," but instead equate "personal injury" with an "offense." These policies expressly state that an occurrence means only one of the specified "offenses."

Although the *First Mercury* policy requires a named offense to be committed during the policy period, the *First Mercury* court veered away from the simple and direct meaning of the policy terms and, instead, imbued the term "offense" to mean "offensive" conduct. *Id.* at ¶30. The *First Mercury* court concluded that the "policy refers to a wrongful act or conduct committed during the policy period, regardless of whether the elements of a tort have accrued." *Id.* To arrive at this conclusion, the *First Mercury* court relied on what it deemed to be the primary definition of "offense" found in the Merriam-Webster dictionary, listing: "something that outrages the moral or physical senses"; "the act of attacking"; "the act of displeasing or affronting" or "a breach of a moral or social code." *Id.*, fn.3. The *First Mercury* court rejected Merriam-Webster's definition of "offense", which included: "an infraction of law." *Id.*

The City acknowledges that the Merriam-Webster Dictionary is a reputable and reliable resource. However, it is not the only resource available for the purpose of determining the derivation and meaning of language. Although the *First Mercury* court may have had a particular reason for limiting its definition of the term "offense" to what it designates as the "primary" Merriam-Webster definition, as discussed above, there are

additional authoritative resources that are applicable when conducting a legal analysis of an insurance policy, including *Black's Law Dictionary.* Illinois courts regularly rely on Black's Law Dictionary when terms are not defined in an insurance contract. *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill. 2d 352, 367-68 (2006); *Univ. of Ill. v. Continental Cas. Co.*, 234 Ill.App.3d 340, 360 (4th Dist. 1992). In fact, *Black's Law* has been cited as a secondary legal authority in many U.S. Supreme Court cases. *See e.g. Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, fn2., 129 S. Ct. 2195, 2200 (2009)*; John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 112, 114 S. Ct. 517, 532 (1993).

While *Black's Law* is considered the premier source for legal definitions, even if the reader were to reach out to the opposite end of the spectrum and drill down into the common vernacular by doing a Google search, the first definition that comes up for the term "offense" is "a breach of a law or rule, an illegal act." *See* Google search of the term "offense," https://www.google.com/search?q=Dictionary#dobs=offense (last visited July 30, 2019). Hence, in the sources readily available for both legal scholars and the common man or woman on the street, the term "offense" is directly associated with and related to a completed "tort." As discussed above, *First Mercury's* contract interpretation analysis was limited in scope and substance and thus should not be considered exhaustive on the trigger analysis at issue here.

B. CERTAIN ILLINOIS COURTS HAVE DIVERGED FROM THE MAJORITY VIEW, IN ORDER TO HONOR THE MEANING AND TERMS OF THE POLICIES UNDER THEIR INTERPRETATION

Illinois Union/Starr have based their declination of coverage on the Illinois cases set forth in Section III. A. above. As discussed, each of those cases is distinguishable from

the case before this Court. In contrast to the foregoing cases other Illinois Courts, as discussed below, have come to different conclusions concerning the issue of the trigger for malicious prosecution.

For purposes of considering the minority view cases, the City asks the Illinois Supreme Court to review *Security Mutual Cas. Co. v. Harbor Ins. Co.,* 65 Ill. App. 3d 198, 382 N.E.2d 1 (1st Dist.1978) (rev'd on other grounds, 77 Ill. 2d 446 (1979)) ("*Security Mutual"),* and three Seventh Circuit authorities adopting *Security Mutual's* reasoning - *American Safety Cas. Ins. Co. v. City of Waukegan,* 678 F.3d 475, 478 (7th Cir. 2012) ("*American Safety")*; *National Casualty Company v. McFatridge*, 604 F.3d 335, 343 (7th Cir. 2010) ("McFatridge"); and *Northfield Ins. Co. v. City of Waukegan,* 701 F.3d 1124 (7th Cir. 2012) ("Northfield"). All these cases support a coverage determination based on the specific language of the insurance policies and support the position that, if the policy language so provides, the trigger for claims of malicious prosecution is the date when the criminal case is terminated in favor of the underlying plaintiff. If the policy provides coverage for the tort of malicious prosecution, the rationale is that coverage is not triggered until there is a complete tort, and the tort of malicious prosecution does not exist until the person prosecuted has been exonerated of wrongdoing. *Security Mutual*, 65 Ill.App.3d at 206, 382 N.E.2d at 6.

1. *Security Mutual*

Although recent Illinois Appellate Court decisions have declined to follow *Security Mutual, Security Mutual* has served as significant precedent for federal coverage determinations construing malicious prosecution claims relating to wrongful convictions. Importantly, it has been cited by both minority and majority courts from around the country

as they have analyzed malicious prosecution coverage. Although many courts from foreign jurisdictions have distinguished *Security Mutual,* none of the courts dispense with the case as having been reversed. While the Illinois Supreme Court overturned *Security Mutual* solely on grounds that policy provisions required honoring an arbitration clause, the Supreme Court was silent on *Security Mutual's* substantive ruling. Accordingly, the City maintains *Security Mutual's* reasoning and history are worthy of discussion. In *Security Mutual,* the First District Appellate Court analyzed when liability coverage for the tort of malicious prosecution claims arise. *Security Mutual,* 65 Ill.App.3d at 205, 382 N.E.2d at 6. Relying on Illinois Supreme Court precedent, *Security Mutual* determined that there are necessary elements to state a cause of action for malicious prosecution, including termination of the proceeding in favor of the plaintiff. *Security Mutual,* 65 Ill.App.3d at 205, 282 N.E.2d at 6. Therefore, insurance coverage is not triggered until the final element of termination of suit is satisfied. *Security Mutual,* 65 Ill.App.3d at 206, 382 N.E.2d at 6. *Security Mutual* honors the requisite elements of the tort in equal proportion, finding that malicious prosecution does not accrue until the last element, favorable termination, is in place. Therefore, the date of favorable termination, rather than the commencement of the underlying malicious action was the occurrence triggering coverage under the policy. *Security Mutual,* 65 Ill. App. 3d at 205-206, 382 N.E.2d at 5-6.

In overturning *Security Mutual* on other grounds, the Illinois Supreme Court made a point of stating: "the sole question presented by this appeal is whether under the agreement between the parties the dispute was subject to arbitration. Whether Harbor's claim is meritorious is not the issue." *Security Mutual Cas. Co. v. Harbor Ins. Co.,* 77 Ill.2d 446, 451, 397 N.E.2d 839, 841 (1979). Now that the substantive issue concerning

the trigger for coverage of a malicious prosecution claim is before the Illinois Supreme Court, the opportunity is presented for this Court to clarify whether, in fact, *Security Mutual* should be deemed overturned in both form and substance.

2. *American Safety, McFatridge, and Northfield*

Three Seventh Circuit panels have unanimously upheld the validity of the substantive ruling in *Security Mutual* noting that the Illinois Supreme Court overruled the Appellate Court solely on the issue of arbitrability. *Security Mutual,* 77 Ill. 2d at 446, 397 N.E.2d at 839. The Seventh Circuit first relied on *Security Mutual* in the wrongful conviction context in *National Casualty Co. v. McFatridge,* when it held that a malicious prosecution/due process claim does not occur for insurance purposes until the date of invalidation of the underlying conviction. 604 F.3d at 344-45.

The Seventh Circuit reinforced its respect for *Security Mutual* when it ruled that "under Illinois law, the issuer of the policy in force on the date a convict is exonerated must defend and indemnify an insured whose law-enforcement personnel violate the Constitution (or state law) in the process of securing a criminal conviction." *American Safety,* 678 F.3d at 478. Citing to both the Illinois Supreme Court and the U.S. Supreme Court, in *American Safety,* Chief Judge Easterbrook ruled that:

> [T]o prevail for malicious prosecution or constitutional wrongs that led to a conviction, the plaintiff must be exonerated. Because the victim has no claim until then, the relevant "occurrence" for the purpose of determining insurance coverage is exoneration, the final element of the legal claim. We supported this conclusion by observing that *Security Mutual Casualty Co. v. Harbor Insurance Co.* …had held exactly this as a matter of Illinois law.

American Safety, 678 F.3d at 478-79. Judge Easterbrook pointed out that the American Safety policy defines "occurrence" as the offense or the tort of malicious prosecution,

which, under both state and federal law, does not come into being until the final element of exoneration is in place. *Id.* In discussing the importance of the precise language in a policy, the Seventh Circuit pointed out that "insurers can adjust their exposure by changing the language in their policies, defining the 'occurrence' as the misconduct rather the completed tort." *Id.* at 480. The Seventh's Circuit's recognition of how the outcome could have been different if American Safety's language had consisted of other terms is significant. The Seventh Circuit's policy language discussion demonstrates how the rulings in *City of Zion, Indian Harbor, County of McLean, City of Waukegan* and *First Mercury* can be reconciled with *American Safety.* They are not mutually exclusive, which means there is room for both the majority view and the minority view to coexist.

Notably, *American Safety* was published in April of 2012, prior to the issuance of Illinois Union/Starr policies that incepted on November 1, 2012. Therefore, the Illinois Union/Starr policies could have been adjusted to limit the insurers' exposure to liability for the tort of malicious prosecution. Indeed, Illinois Union/Starr received tender of Sanders's initial civil rights complaint in 2013. However, the Insurers never responded to the tender. Notably, the Insurers renewed the policies for the 2013-2014 policy period. The renewed policies do not reflect any adjustment to limit exposure and do not set forth definitions that would clearly establish the meaning of the terms "occurrence," "malicious prosecution," or "offense," as used in the policies.

Again, in reliance on *Security Mutual,* in *Northfield Insurance,* the Seventh Circuit held that the trigger for a malicious prosecution claim is the date of exoneration. 701 F.3d *at* 1132. While the Seventh Circuit cases were published prior to the findings in *City of Zion, Indian Harbor, County of McLean* and *First Mercury,* they nonetheless provide an

analysis of policies in which the "tort" of "malicious prosecution" is the subject of coverage. Because specific policy language must be recognized, these cases are worthy of consideration in analyzing the Illinois Union/Starr policies. Moreover, as noted above, the findings from the Seventh Circuit can be reconciled with Illinois State jurisprudence concerning the topic of coverage for wrongful conviction cases. Each position has viability, which is dependent upon the express language of the policy.

C. CONTRARY TO THE INSURERS' ASSERTION THAT CASELAW FROM FOREIGN JURISDICTIONS IS MATERIALLY AND SINGULARLY SUPPORTIVE OF THEIR POSITION, AUTHORITIES FROM FEDERAL AND STATE JURISDICTIONS OUTSIDE OF ILLINOIS RECOGNIZE VIABILITY OF BOTH MAJORITY AND MINORITY VIEWS

The Insurers argue that there is substantial authority in jurisdictions outside of Illinois to support a general rule that a malicious prosecution action triggers coverage under the policy in effect when the criminal charges are commenced. In reviewing the cases cited by the Insurers, the overwhelming majority of the cases have distinguishable language in their policies as noted herein. As a threshold matter, rulings entered by foreign jurisdictions are not binding on the Illinois Supreme Court. While the Insurers urge the Illinois Supreme Court to fall into lockstep with rulings issued by other jurisdictions, such encouragement is minimally supported by the Insurers' string-cited references to foreign cases. There is little, if any, discussion of the policy language at issue. Significantly, in examining these cases, it becomes evident that, even where cases espouse the majority view, there is recognition that both the majority and minority views can co-exist harmoniously, as long as the courts focus on the language of the insuring agreement.

1. <u>Opinions Outside of Illinois Espouse the Minority View</u>

As will be noted below in the summaries of foreign cases upon which the Insurers

rely, voices from courts yielding to the majority view have recognized that the opposing or "minority view" has viability. In addition to the referenced Seventh Circuit cases, courts acknowledge *Security Mutual, supra*, and a contemporaneous Florida district court case that served as the early standard bearers for the minority view. As a predecessor to *Security Mutual*, the court in *Roess v. St. Paul Fire & Marine Ins. Co.*, 383 F. Supp. 1231 (M.D. Fla. 1974), found that coverage was triggered for purposes of malicious prosecution on the date of the favorable termination of the malicious action. In *Roess*, the court analyzed a civil malicious prosecution claim under Florida law and in accordance with the laws governing contract interpretation. Over objections that favorable termination was merely a condition precedent to filing suit rather than an indispensable ingredient of the claim itself, the court ruled that favorable termination is an essential element and the cause of action does not mature or accrue until that element has been accomplished. *Roess*, 383 F. Supp. at 1235. The court held that there was nothing in Florida law to indicate that one element is the "essence" of the tort or might be regarded as more important than another element. *Id*. Thus, the date of favorable termination of the malicious action was the operative occurrence that triggered coverage. The court also rejected the carriers' arguments about an "unwary insurer" suffering any prejudice by the use of an exoneration trigger. *Id*.

In a more recently published opinion, a Louisiana court has articulated a clear rationale for adopting the minority view when policy language so dictates. In *Sauviac III v. Dobbins*, 949 So.2d 513 (La. App. 5th Cir. 2006), a Louisiana Appellate court considered a policy, which provided coverage for malicious prosecution if the "offense" was committed in the coverage territory during the policy period. *Id.* at 518. In undertaking its analysis, the court determined that malicious prosecution is a separate and independent

cause of action, the elements of which include bona fide termination in favor of the plaintiff. The plaintiffs' cause of action did not accrue or become ripe until the administrative and judicial proceedings were dismissed and these dismissals necessarily formed part of the elementary basis for a cause of action for malicious prosecution and therefore were deemed to be occurrences under the insurance policies. *Id.* at 519. In arriving at its conclusion, the *Sauviac* court construed the express language of the policy in accordance with strict contract construction. *Id.* at 517. The City urges the Illinois Supreme Court to similarly apply a strict construction analysis to the language of the Illinois Union/Starr policies.

2. <u>Opinions Outside of Illinois, Which Espouse the Majority View, Construe Policies Containing Markedly Different Language</u>

The Insurers cited several U.S. federal appellate court cases from outside of Illinois, which have no binding authority. In *City of Erie v. Guaranty National Insurance Co.,* 109 F.3d 156 (3d Cir. 1997), a federal Third Circuit Appellate Court analyzed coverage for malicious prosecution under Pennsylvania law. The policy in question included generic language concerning coverage for law enforcement incidents, but did not include specific language relating to coverage for the tort of malicious prosecution. *Id.* at 158, fn. 4. In fact, the court specifically stated that "we see no clear intent in the language of the policies in this appeal favoring either the majority or minority positions." *Id*. at 160, fn. 5. Approaching its analysis from a generic perspective, the court found that a tort occurs for insurance purposes at the time when the injuries caused by the tort first manifest themselves, even though the court conceded that the tort actually did not manifest itself until favorable termination. *Id.* at 163. Notably, the Third Circuit affirmed the holding from the District Court in the underlying *City of Erie v. Guaranty National Insurance Co.,*

935 F. Supp. 610 (W. D. Pa. 1996), which explained that because the Pennsylvania Supreme Court had not addressed the issue of triggering events in malicious prosecution cases, it decided to rely on authority from a gender discrimination case, which found a trigger upon adoption of a discriminatory practice. *Id.* at 615. Given the many characteristics that distinguish this case from the *Sanders's* coverage analysis, the Insurers' reliance on *City of Erie* is completely misplaced.

Similarly, the Eighth Circuit Court of Appeals ruling in *Royal Indemnity Co. v. Werner,* 979 F.2d 1299 (8th Cir. 1992), is inapposite. The *Royal c*ourt analyzed a state tort claim of malicious prosecution related to a securities fraud suit. The court did not engage in a detailed analysis of the issue, but instead relied on the reasoning from the district court below. In *Royal Indemnity Co. v. Werner,* 784 F. Supp. 690 (E.D. Mo. 1992), the district court ultimately relied on dicta from a hazardous waste case. The *Royal* district court acknowledged binding authority from other states, including Illinois, in which the date of exoneration triggers coverage for a claim of malicious prosecution (citing *Security Mutual*). However, the *Royal* district court somewhat arbitrarily settled on the date of the making of the criminal complaint for purposes of triggering insurance coverage. Significantly, Royal's policy did not describe malicious prosecution as an "offense," which is distinguishable from the policies before this Court. The *Royal* court left open the possibility that a different decision could result if the policy language specified coverage for the "offense" of malicious prosecution because the "offense" of malicious prosecution is not complete until the underlying action is terminated. If so, ultimate legal liability would not be triggered until exoneration. *Royal Indemnity,* 784 F. Supp. at 692.

When the *Royal* case reached the Eighth Circuit, the majority agreed with the

district court but there was a strong dissenting opinion, which provides a detailed analysis of why the majority was wrong in finding that insurance is triggered at the time when the malicious prosecution is filed. In dissenting, Judge Gibson pointed out that the majority's opinion was in conflict with the rule announced for the accrual of the malicious prosecution claim. The dissent reminded the majority that "there was no malicious prosecution injury, and no claim to be covered by the policy until the [underlying] litigation concluded." *Royal*, 979 F.2d at 1300 (dissenting opinion). Also, of note is the dissent's rejection of the "unwary insurer" concern. Judge Gibson pointed out that insurers choose the language for their policies. Insurers may include malicious prosecution or not and may require policy applicants to provide information on pending lawsuits to use in determining whether to insure such risks. *Id.* at 1301. Taken in its entirety, there are discussions included in the *Royal* rulings that support a strict construction of policy language, as urged by the City.

Additionally, reliance on the federal appellate court in *Genesis Insurance Co. v. City of Council Bluffs*, 677 F.3d 806 (8th Cir. 2012), is misplaced since the *Genesis* court construed a policy that provided coverage for an "injury" arising out of malicious prosecution. *Id.* at 809. In following the majority view, the *Genesis* court relied on the express provisions of the policy in determining that the plaintiffs' injuries occurred at the time the underlying criminal charges were filed. *Id.* at 815. In the case at bar, the express policy language does not provide that the injury must occur during the policy period.

The Insurers also cite to a number of federal district court opinions from outside of Illinois, which are also non-binding. In *Southern Maryland Agricultural Association, Inc v. Bituminous Casualty Corp.*, 539 F. Supp. 1295 (D.C. Md. 1982), in construing a policy that provided coverage for an "injury" arising out of certain offenses, the district court

addressed a state court claim of malicious prosecution and, applying Maryland law, found that "there is coverage if the plaintiffs engage in conduct resulting in the application of the State's criminal process to the [claimants] during the period in which the policy was in effect." *Id.* at 1303. In that this holding presents an ambiguous conclusion that is dependent on Maryland criminal law, *Maryland* is not a viable authority on which to rely.

In *North River Insurance Co. v. Broward County Sheriff's Office,* 428 F.Supp.2d 1284 (S.D. Fl. 2006), in its analysis of a policy providing coverage for "injury" occurring during the policy period, the court addressed coverage for state claims of false arrest, false imprisonment and malicious prosecution, finding that, under the terms of the policy, the injury must occur during the policy period. *Id.* at 1287. *North River* does not serve as persuasive authority.

In *Selective Insurance Company of South Carolina v. City of Paris,* 681 F.Supp.2d 975 (C.D. Ill., 2010), the *Paris* court acknowledged that it must analyze state law claims under state law and in so doing, in the absence of an Illinois Supreme Court case on point, must give proper regard to Illinois Appellate court cases. However, the *Paris* court failed to give any credence to *Security Mutual, supra,* which calls into question the court's lack of respect for Illinois Appellate Court rulings. Regardless of the *Paris* court's snub of *Security Mutual,* discarding the ruling as "shaky at best," the *Paris* ruling is not instructive to this case because it was construing a policy that provided coverage for an "injury" that occurs during the policy period. *Id.* at 983.

In *Gulf Underwriters Insurance Co. v. City of Council Bluffs,* 755 F.Supp.2d 988 (S.D. Ia. 2010), the Iowa district court, relying on Iowa law, construed claims for malicious prosecution. Even though the court admitted that termination is the event that ripens a

malicious prosecution claim and starts the clock running on the statute of limitations, the court summarily dismissed the argument without adequate explanation. *Id.* at 1008. The court reflected uncertainty about the triggering event when it stated that injuries should be deemed to have occurred "no later than 1978," the year in which the conviction took place. *Id.* (emphasis added) at 1007. The imprecise analysis in *Gulf* is not useful in establishing a bright line for coverage because the *Gulf* court settles on a vague passage in time that is not one of the elements necessary to state a malicious prosecution claim. *Gulf* does not identify either the commencement or the termination of the action as the trigger date for malicious prosecution and, therefore, is not a viable authority on which to rely. *Id.*

Similarly, *TIG Insurance Co. v. City of Elkhart*, 122 F. Supp. 3d 795 (N.D. Ind. 2015), is not on point because the *TIG* court construed an LEL policy that provided coverage for "wrongful acts" which arise out of law enforcement activities, with the express provision that the "wrongful act(s) must occur during the policy period and within the policy territory." *Id.* at 801.

In addition to federal district court rulings, the Insurers invoke rulings from the supreme courts of other States, which similarly do not serve as binding authority. In *Paterson Tallow Co., Inc. v. Royal Globe Insurance Companies*, 89 N.J. 24, 444 A.2d 579 (1982), the Supreme Court of New Jersey made a determination that insurance coverage for malicious prosecution claims is triggered when the complaint is filed because that is when the "essence" of the malicious prosecution claim occurs. *Id.* at 30, 444 A.2d at 582. Further, the Court found that "the offense of malicious prosecution is substantially completed once the complaint is filed, and the favorable termination of the maliciously prosecuted proceedings is merely a prerequisite to the filing of the suit." 89 N.J. at 34, 444

A.2d at 586. Significantly, there is a lengthy dissent submitted by two of the seven New Jersey Supreme Court justices, which takes issue with the reasoning presented by the *Paterson* majority and by courts that have made similar findings. The dissent focuses on the essential elements of the tort of malicious prosecution and reminds the majority that binding law requires that each and every element must be established or the cause of action must fail. "Termination of the prosecution in favor of the plaintiff is a *sine qua non* of the tort of malicious prosecution." *Id.* at 38, 444 A.2d at 587 (dissenting opinion). The dissent points out that despite "the universal view that without favorable termination there can be no liability for malicious prosecution, the majority has created 'the *offense* of malicious prosecution … *for insurance purposes,'* which is committed at the time the criminal complaint is filed. No rationale or explanation has been advanced why this limited view should be adopted to deny coverage." *Id.*

The dissent also takes issue with the characterization of the termination of criminal proceedings as merely a "condition precedent," which is in direct conflict with authorities that recognize termination as an essential element of the tort. *Id.* at 39, 444 A.2d at 588 (dissenting opinion). The dissent pointed out that there was no authority for the contention that although an essential ingredient, termination is not required to create the tort of malicious prosecution. In fact, it was noted that without such favorable termination, the legal obligation to pay damages does not arise. There can be no legal injury until all the essential elements of the tort have occurred. *Id.* The dissent disagreed that policies should be construed from the viewpoint of what the insurance company "intended to insure against" and disputed that consideration must be provided for the "unwary insurance company." *Id.* The dissent laid out industry standards that allow insurance companies to

set the boundaries for risk and noted that insurance companies can request any pertinent information about criminal proceedings which the prospective insured had instituted. Companies have the option to refuse to issue policies or can assert appropriate exclusions. *Id.* at 40, 444 A.2d at 588 (dissenting opinion). The well-reasoned dissenting arguments articulate views that run contrary to the Insurers' assertions and warrant consideration.

In *Billings v. Commerce Insurance Co.*, 458 Mass. 194, 936 N.E.2d 408 (2010), the Massachusetts Supreme Court addressed a civil state malicious prosecution tort arising out of zoning board dispute, which is distinguishable because it does not address a wrongful conviction claim. The Massachusetts court settled on the filing date rather than the date of service of the malicious complaint because the filing date is allegedly more easily ascertained. *Id.*, 458 Mass. at 199, 936 N.E.2d at 413. Such designation is arbitrary and the ruling unworthy of reliance.

The Insurers also rely on foreign state appellate court opinions, which are not binding and are based on distinguishable policy language. In *Zook v. Arch Specialty Ins. Co. v. MJQ Concourse, Inc.*, 336 Ga. App. 669, 784 S.E. 2d 119 (Ga. App. 2016), a Georgia court construed a policy, which provided coverage for an "injury" arising out of a list of various offenses, including malicious prosecution. *Id.* at 336 Ga. App. 676. Demonstrating a similar contrast, the court in *Harbor Insurance Company v. Central National Insurance Company*, 165 Cal.App.3d 1029, 211 Cal. Rptr. 902 (2d Dist. 1985), construed a policy providing coverage for "injury" arising out of a list of offenses. *Id.* at 1036, 211 Cal. Rptr. At 907. In considering coverage for a civil malicious prosecution claim the court decided that "the gist of the tort is committed when the malicious prosecution is commenced and the defendant is subjected to process or other injurious impact by the action." *Id.* Like other

cases finding the triggering event at the inception of the underlying action, the determination is ill-defined. In *Harbor,* it is unclear whether the "gist" of the tort is when the complaint is filed or when service is perfected or both.

In *American Family Mutual Insurance Company v. McMullin*, 869 S.W.2d 862 (Mo. Ct. App. 1994), in a civil malicious prosecution case, the court arrived at the conclusion that the triggering event for insurance coverage of a state malicious prosecution claim should be the filing of the underlying lawsuit based on the general rule in Missouri, which holds that the occurrence date of an event for insurance purposes accrues when the complaining party is first actually damaged. *Id.* at 864-865. Accordingly, since the policy language included a requirement that "damages" must occur within the policy period, the court identified the inception of the case as the trigger. Unlike, *American Family,* the Illinois Union/Starr policies do not require the "damages" to occur within the policy period. Similarly inapposite is *City of Lee's Summit v. Missouri Public Entity Risk Mgmt.,* 390 S.W. 3d 214 (Miss. App. W.D. 2012), which construed a policy that provided coverage at the time the first actual "damage" occurred. *Id.* at 220.

In *Newfane v. General Star Nat. Ins. Co.,* 14 A.D.3d 72, 784 N.Y.S.2d 787 (N.Y. App. Div. 2004), a New York Appellate court construed a policy that provided coverage for injuries arising from malicious prosecution. The court rejected the termination of the underlying action as a trigger for coverage finding that it was a mere condition precedent to the tort. The court concluded that "the injury to the accused was contemporaneous with the initiation of the criminal proceeding against him and hence complete long before the inception of coverage and the incidental termination of the criminal prosecution**.**" *Id.,* 14 A.D.3d at 80. In addition to the distinguishing policy language at issue in this case,

Newfane is in conflict with prevailing authority which finds termination an essential element of the offense.

In *Consulting Engineers, Inc. v. Insurance Company of North America*, 710 A.2d 82 (Pa. Super Ct. 1998), in which a policy that provided coverage for injury arising from certain offenses was under review, the Pennsylvania Appellate court simply parroted holdings from other cases without undertaking an in-depth analysis of the relevant facts and policy terms. Notably, there is a strong dissenting opinion from Judge Del Sole who took issue with the finding that an "occurrence" for which the insurance company is liable is the commencement of the suit, a point at which that occurrence is not yet a tort. *Id.* at 89 (dissenting opinion). The dissent also found the concern about the "unwary insurance company" to be unpersuasive because insurers have adequate means of protecting their interests. *Id.*

Finally, the Insurers make reference to *Freedman & Sons, Inc. v. Hartford Fire Insurance Co.,* 396 A.2d 195 (D.C. Ct. App. 1978). In *Freedman,* the District of Columbia Court of Appeals, without reference to any authority, gives short shrift to the general rule that all of the elements of a cause of action must exist before an offense is cognizable. *Id.* at 198. The *Freedman* court distinguished the *Roess* case, *supra,* based on an opinion that *Roess* was concerned with the manifestation of liability rather than when the offense is committed. The *Freedman* court created a dubious distinction between what constitutes an "offense" for insurance purposes and what constitutes an "offense" for purposes of stating a tort claim and accordingly proclaimed *Roess* irrelevant, which ushered in the decades-long debate between the majority and minority views. This debate need not interfere with insurance policy interpretation. The City urges the Illinois Supreme Court to recognize

that both the majority and minority views can co-exist harmoniously, as long as coverage determinations are grounded in the meaning and intent of the policy language at issue.

IV. THE TRANSCRIPT FROM JUDGE GAMRATH'S ORAL ARGUMENT PROVIDES SUPPORT FOR THE STRICT CONSTRUCTION OF THE ILLINOIS UNION/STARR POLICIES

Significantly, during the oral argument in the Circuit Court on November 2, 2017, Judge Gamrath identified the significant differences between the policy language in the Illinois Union/Starr policies and the policies construed by all of the prior Appellate Court wrongful conviction coverage rulings. In response to Illinois Union/Starr's reliance on recent Illinois coverage cases Judge Gamrath made these comments:

> Isn't that different from the policy language here? In other words, the Second District cases and the majority of cases that talk about this majority view, don't they define personal injury as injury from one of these torts? Our language says personal injury means one of the torts. In other words, it means one or more of the following offenses including malicious prosecution. Is that a distinction without a difference or is that the difference right there?

SUP R-13.

Judge Gamrath also raised the precise issue posited by the City:

> So what about saying St. Paul goes out of its way to say, we express no opinion regarding which occurrence would trigger coverage if a policy were to require the offense of malicious prosecution to be committed during the policy period rather than as here requiring the injury caused by the prosecution to happen during the policy period. St. Paul, which is – and I'm talking St. Paul vs. City of Zion. So this court again goes out of its way to distinguish the LEL policy from the general liability section that talks about offense. And it makes a distinction in the language. Is our language more akin to the offense versus the injury which was at issue in *Zion*?

SUP R-18-19.

***

> The issue that they left open is the issue facing this court?

SUP R-19.

> Judge Gamrath additionally asked these pertinent questions:
>
> And so what you're asking me to do is just say, all coverage should have this general rule. We should follow the majority, no matter what the policy language looks like?
>
> ***
>
> So then when would I rule differently? In other words, when would the minority position prevail? What kind of language would we need?

SUP R-32.

As demonstrated by the keen observations of the differences in policy language, Judge Gamrath expressed serious misgivings about the application of the "majority view" to the facts before her. Notwithstanding Judge Gamrath's express concerns, all reservations seem to have been overridden by her belief that she was bound by the doctrine of *stare decisis* which, as discussed above, is not applicable in this case because of the material distinctions in the policy language of other Illinois Appellate Court cases.

V. IF THE ILLINOIS SUPREME COURT APPLIES THE "MAJORITY VIEW" INTERPRETATION TO THE ILLINOIS UNION/STARR INSURING AGREEMENT, THE CHARGES THAT WERE INITIATED AGAINST SANDERS AT HIS SECOND AND THIRD TRIALS SHOULD BE RECOGNIZED AS SEPARATE OFFENSES OF MALICIOUS PROSECUTION BECAUSE THEY INITIATED NEW ACTIONS

A. INSURER'S POLICIES TRIGGERED MULTIPLE TIMES WITH EACH TRIAL

During the 2012-2013 and 2013-2014 Illinois Union/Starr policy periods Sanders was tried before a jury of his peers, in two separate proceedings that were wholly independent from his initial trial that occurred 20 years' earlier. Because the *Sanders's* Court concluded that Sanders's exoneration triggered coverage under Illinois Union's/Starr's policies, the Court did not address whether Sanders's retrials were additional triggers for coverage. *Sanders,* 2019 IL App (1st) 180158, at ¶32. Illinois

Union claims Sanders's retrials are not new coverage triggers because they did not involve new conduct during the 2012-2013 and 2013-2014 Illinois Union/Starr policy periods. However, such assertion is not accurate. Each new trial entails new affirmative actions, which should be analyzed to determine whether the defendants' participation constituted the commencement or continuation of discrete offensive conduct resulting in new injuries. If so, such conduct which would satisfy the first prong of a claim for malicious prosecution. Resulting injuries would trigger a discrete claim of malicious prosecution. Injuries may be distinct from one another despite stemming from the same initial acts. See, *Travelers Indem. Co. v. Mitchell*, 2019 U.S. App. LEXIS 15915, *19.

The Illinois Union/Starr policy language does not expressly exclude multiple triggers. In fact, personal injury means one or more of the listed offenses and Sanders alleged multiple offenses causing injury. In the *Mitchell* case, the insurers brought a declaratory judgment action seeking a declaration that they had no coverage obligations for an underlying wrongful conviction civil rights lawsuit. The issue was whether the injuries the plaintiff suffered between 2005 and 2011 triggered a duty to defend, even though the wrongful causal acts occurred decades prior. *Travelers Indem. Co. v. Mitchell*, 2019 U.S. App. LEXIS 15915, *7. Based on policy interpretation, the *Mitchell* Court found that the insurer's policies were not triggered by the initial wrongful acts but by resulting injuries. Therefore, the policies permitted multiple triggers of coverage for different injuries. *Id*. at *6,7. As in *Mitchell*, here the Illinois Union/Starr policy language does not restrict coverage to one trigger. Therefore, each trial may be deemed a commencement of a discrete prosecution, from which discrete injuries arose. Notably, in *Mitchell*, multiple carriers, who issued policies effective during discrete policy periods,

were found to have provided policies that triggered coverage. *Id*. Similarly, multiple carriers were on risk for Sanders' claims, including Illinois Union/Starr.

B. BY DEFINITION, MALICIOUS PROSECUTION INCLUDES CONTINUANCE OF THE CRIMINAL PROCEEDINGS

As recently discussed by the Illinois Supreme Court, to state a cause of action for the tort of malicious prosecution, the plaintiff must prove five elements, the first of which is: "(1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant…" *Beaman v. Freesmeyer*, 2019 IL 122654, ¶26. Sanders' second trial occurring in August 2013 and his third trial occurring in July 2014 are discrete events causing the "continuance" of a criminal proceeding. R. C-2304-05, C-2345-2346, V. 5; Ins. App. at A-45-46, 86-87. Retrials are directly related to the first element of the tort malicious prosecution, which provides for either the commencement or continuance of a judicial proceeding. Sanders' second and third trials, while arguably part of the continuance of an original criminal or civil judicial proceeding, warrant an independent examination to determine whether all elements of a cause of action for a "malicious prosecution" claim are fulfilled. Each trial deserves an assessment of whether the elements are satisfied.

Regarding discrete prosecutions, it is indisputable that Sanders's prior convictions were set aside before each re-trial. Sanders' prior conviction from 1994 had been wholly nullified prior to the time he was re-tried in 2013 and 2014. The slate had been wiped clean, the convictions set aside and the unexpired portion of Sanders' prior sentencing extinguished. *North Carolina v. Pearce*, 395 U.S. 711, 721, 89 S. Ct. 2072, 2078 (1969). Indeed, the Illinois Supreme Court has consistently recognized the usual rule that, upon reversal of a murder conviction, the prior conviction no longer exists. *People v. Blue*, 207 Ill.2d 542, 552, 802 N.E.2d 208, 213 (2003) (citing *Bullington v.*

Missouri, 451 U.S. 430, 443, 101 S. Ct. 1852 (1981).

When a defendant voluntarily seeks to have a conviction set aside and is successful, it is as though the slate has been wiped clean and the conviction is wholly nullified so that a defendant is not placed in double jeopardy at a re-trial. *People v. Crutchfield*, 363 Ill. App. 3d 1014, 1025, 820 N.E.2d 507, 517 (2004). It cannot be refuted that separate and intervening acts occurred as a result of Sanders' second and third trials, which happened during Illinois Union's/Starr's policy. Therefore, the events occurring at Sanders' second and third trial should be deemed to be separate occurrences.

VI. INSURERS' ARGUMENT THAT EVOLVING TORT LAW SERVES AS GROUNDS TO ESTABLISH A GENERAL RULE GOVERNING A SINGLE TRIGGER FOR MALICIOUS PROSECUTION IS WITHOUT MERIT

Illinois Union/Starr argue that because of the evolution of tort law, trigger of coverage should not be equated with the accrual of the tort but, instead, should be the date of the initial injurious conduct. Illinois law does not provide a basis for such a limited general rule. In fact, the recent Illinois Supreme Court discussed above may serve to support the City's position that there is not one single trigger for malicious prosecution. In *Beaman v. Freesmeyer*, 2019 IL 122654, the Illinois Supreme Court considered the proper test to satisfy the "commencement or continuance" prong of the tort of malicious prosecution. *Id.* at ¶ 1. The Illinois Supreme Court held that the trial court was required to examine "whether the defendants' conduct or actions proximately caused the commencement or continuance of the original criminal proceeding by determining whether defendants played a significant role in [the defendant]'s prosecution." *Beaman*, 2019 IL 122654, ¶¶ 15-16. In the instant case Sanders was subjected to three separate trials and thus three separate prosecutions. Significantly, there are numerous distinctions warranting

the treatment of each of Sanders's trials as a separate occurrence which, in accordance with *Beaman,* would require an independent examination of whether the defendants' conduct or actions in each occurrence proximately caused the "continuation" of the original criminal proceeding.

Notably, the three trials ended completely differently: first a conviction, then a hung jury, then an acquittal. Second, the timing of the trials supports a finding of separate occurrences. Sanders's re-trials took place decades after his initial trial. Sanders was tried in 1994 then again in August 2013 and July 2014. R. C-2304-5, V. 5, Ins. App. A-45-46. Third, the postures of the trials were completely different. Sander's conviction had already been vacated at the time of the 2013 and 2014 trials, and the court held that there was good reason for jurors to disbelieve the government's key witnesses. *See People v. Sanders*, 2012 IL App (1st) 110373-U (holding there were "reasons for jurors to doubt Haslett's credibility and Armstrong's ability to identify the men who took part in the murder"). Moreover, the government changed its theory of the case at the second and third trials, asking for Sanders to be found guilty on an "accountability theory" (meaning he was not the killer, but had some alleged responsibility for the killer's actions). R. C-2306, V. 5; Ins. App. A-47. Lastly, the litigators and evidence were different in the 2013 and 2014 trials; for example, there were new witnesses and substantially more testimony concerning an alternate suspect. All of these distinctions would seem to require a separate and independent analysis at the inception of each trial to determine if the requisite elements were in place to allege a subsequent claim of malicious prosecution. To the extent this Court determines that the inception of the criminal process triggers coverage, rather than the exoneration, *Beaman* supports the argument that each new trial would trigger an independent claim for

malicious prosecution, which would entail an examination as to whether the named defendants were the proximate cause for the "continuance" of each prosecution.

Regardless of the clarification concerning the proximate cause for the commencement or continuation of the prosecution, as noted by the *Beaman* Court, the necessary elements for the tort of malicious prosecution, including favorable termination of the criminal proceedings, have long been consistently recognized in Illinois. *Beaman,* 2019 IL 122654 at ¶35. Indeed, for at least the last century, in Illinois the term "malicious prosecution" has been used to refer to a cause of action, which has as one of its elements the requirement that the underlying proceedings have been terminated in favor of the plaintiff. *Hurlbert v. Charles,* 238 Ill. 2d 248, 255, 938 N.E.2d 507, 512 (2010); *Reynolds v. DeGeer,* 113 Ill. App. 113, 116, 1883 WL 10460, *2 (March Term 1883) (1st Dist. 1883); *Robertson v. City of Marion,* 97 Ill. App. 332, 334 (4th Dist. 1901). Therefore, the City fails to see how the evolution of tort law, to the extent applicable, has any impact on this coverage case. The elements of malicious prosecution have remained consistent.

Moreover, as the drafter of the insuring agreement for the parties, the Insurers were in the position to include language in their policies that would define the terms "malicious prosecution" and "offense" to expressly clarify the trigger date. Illinois Union/Starr are not constrained from modifying policy terms to account for any evolution in tort law or insurance law that they consider impactful to coverage. Indeed, as discussed herein, there has been considerable debate between the majority and minority viewpoints over the last several decades, with substantive rulings coming out of the Illinois courts within the last decade. Notwithstanding the public and widely known debate on the issue of trigger for malicious prosecution, Illinois Union/Starr did nothing to clarify the terms of their policies.

This is particularly striking given that Illinois Union has issued virtually the same policy to the City from 2010 through 2014 and Starr has issued virtually its same policy to the City from 2011 through 2014.

As expressly alleged in the DJ Complaint, Sanders filed his initial civil rights Complaint on January 11, 2013, R. C- 2306, V. 5; Ins. App. A-47. The City tendered the initial Complaint to both Illinois Union and Starr Indemnity. R. C-2313, Ins. App. A-54. When Sanders's claims for malicious prosecution ripened after his acquittal, the City tendered the amended civil rights complaint and reasserted their claims for coverage to Illinois Union and Starr Indemnity. R. C-2314, V. 5; Ins. App. A-55. Both carriers were non-responsive to the City's tender for approximately two years, until December 22, 2014, when they declined coverage. *Id.* Significantly, at the time when the City gave notice of the original Sanders' complaint, the 2012-2013 policies, which had been issued on November 1, 2012 were in place. R. C-2368, V. 5; Ins. App. A-109; R. C-22485, V. 5; Ins. App. A-226. Notwithstanding the Insurers' knowledge of the *Sanders Lawsuit*, both Insurers renewed the exact same policies, including LEL coverage, which were issued to the City effective November 1, 2013 through November 1, 2014. R. C-2367, V. 5, Ins. App. A-108; R. C-2515, V. 5; Ins. App. A-256. It was during the 2013-2014 policy period that Sanders' exoneration occurred. Clearly, Illinois Union and Starr Indemnity were not unwary insurers. They could have non-renewed or clarified the language in their policies if they intended to decline coverage, but they did not. The assertion that evolution in tort law should immunize the Insurers from honoring their express promises to provide coverage for the "offense" of malicious prosecution should not be ratified by this Court.

VII. CONCLUSION

WHEREFORE, in light of the foregoing, the City respectfully requests that this Court affirm the First District Appellate Court's ruling, which concludes that Sanders's exoneration triggered coverage under Illinois Union's/Starr's policies, and for any further relief this Court deems just and fair.

Dated this 31st day of July 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.

/s/Paulette A. Petretti
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No. 124565

In the Supreme Court of Illinois

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS,

Plaintiffs-Appellees,

v.

ILLINOIS UNION INSURANCE COMPANY and STARR INDEMNITY & LIABILITY COMPANY,

Defendants-Appellants.

NOTICE OF FILING and PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on July 31, 2019, there was electronically filed and served upon the Clerk of the above court, **Brief of Appellee of the City of Chicago Heights** and, on the same day, the foregoing transmission was e-mailed to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief, bearing the Court's file stamp, will be sent to the above court.

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

Respectfully submitted,

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Plaintiff-Appellee

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