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 Illinois Appellate Court, First Judicial District, Second Division, No. 01-18-0158, on Appeal from the Circuit Court of Cook County, Illinois, No. 16 CH 02605 Honorable **Celia Gamrath**, Judge Presiding

REPLY BRIEF OF APPELLANT, STARR INDEMNITY & LIABILITY COMPANY

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POINTS AND AUTHORITIES

ARGUMENT

I. Appellees ignore the dual insuring agreement requirements of: 1) a causative "occurrence" during the policy period; and 2) resulting "personal injury" during the policy period.

The subject policies' insuring agreement *twice* uses the phrase "during the policy period" to establish *two requirements* to trigger coverage. The insuring agreement requires that the cause of the claim—the "occurrence"—happen "during the policy period." (A130, A191, A233, A263) The insuring agreement also requires that the injury for which the claim is made take place "during the policy period." (A130, A191, A233, A263) Consequently, to trigger coverage, both the cause and the injury must happen "during the policy period."

These dual requirements provide integral context for this case. The cause and injury at issue took place in 1994, when the City commenced a malicious prosecution. Appellees seek to erase the insuring agreement's dual requirements and instead trigger coverage under policies issued in 2013 and 2014, when *neither the cause nor the injury took place*.

Appellees' position is grounded in a misunderstanding of how the insuring agreement operates. For example, with respect to a typical "bodily injury" claim, the dual requirements of "occurrence" and "bodily injury" during the policy period are addressed through two different definitions for these terms. With respect to a "property damage" claim, the

dual requirements of "occurrence" and "property damage" during the policy period are addressed through two different definitions for these terms. Cause and injury. Two requirements. Two definitions.

With respect to "personal injury" and "advertising injury" claims, *the policies still have the dual requirements* of cause and injury "during the policy period." (A130, A191, A233, A263) However, for these types of injuries, as is typical, cause and injury are both defined by reference to the same enumerated "offenses." (A116, A120-21, A177, A181-82, A233, A263)

For example, for a defamation claim falling under "advertising injury" coverage, the policy still requires the causative "occurrence" and "injury" during the policy period. The policy accomplishes this by defining both the "occurrence" and "injury" as "the offense of defamation." (A116, A121, A177, A182, A233, A263) The common definition addresses both trigger-of-coverage requirements because the "offense of defamation" is a reference to both the "occurrence" (the defamatory act) and the intertwined injury (defamation). As such, the dual requirements of "occurrence" and "injury" are not *eliminated* by sharing a common definition. Rather, the requirements of an "occurrence" during the policy period and "injury" during the policy period are both encompassed by reference to the "offense of defamation" during the policy period.

Similarly, for a malicious prosecution claim falling under "personal injury" coverage, the insuring agreement still requires both the "occurrence" and "personal injury" during the policy period. The policy defines these two requirements by reference to the common "offense of malicious prosecution." (A120-21, A181-82, A233, A263) Again, the reason a common definition works for "personal injury" is because the "offense of malicious prosecution" represents both the causative conduct (maliciously prosecuting someone) and the simultaneously resulting injury (suffering a malicious prosecution). The fact that the policies are triggered by the "offense of malicious prosecution" during the policy period does not mean that the insuring agreement's requirements of an "occurrence" and "injury" are *eliminated*; it just means that both requirements are built into the common reference to the "offense of malicious prosecution."

Sanders protests that the "offense of malicious prosecution" cannot possibly "convey two different meanings." (Sanders Br. 12) Sanders is wrong. The law of many states, including Illinois, holds that the "offense of malicious prosecution" refers to both the wrongful conduct of instituting a malicious prosecution and the resulting harm, which happens simultaneously. *E.g.*, *Indian Harbor Ins. Co. v. City of Waukegan*, 2015 IL App (2d) 140293, ¶ 26 (holding that filing a criminal complaint with malice and without probable cause immediately inflicts injury, in that the

victim is arrested, required to post bail and suffers reputational damage); *St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2014 IL App (2d) 131312, ¶ 26 (holding that one who is maliciously prosecuted suffers injury and damages immediately upon being prosecuted). For a malicious prosecution claim, the causative act and resulting injury cannot and do not happen separately—they are inextricably intertwined.

For this reason, Sanders is mistaken that the insurers' position are inconsistent. (Sanders Br. 2, 10-12, 21, 26, 28) The requirement of the "offense of malicious prosecution" during the policy period is the same thing as requiring both the causative "occurrence" and the resulting "personal injury" during the policy period.

The fact that the "offense of malicious prosecution" is simply the manifestation of the two insuring agreement requirements of a causative "occurrence" and resulting "personal injury" during the policy period exposes the foundational mischaracterizations in Appellees' briefs. For example, Appellees erroneously claim as follows:

- "[T]he Illinois Union/Starr policies do not promise coverage for 'injuries' or 'wrongful acts' that occur during the policy." (City Br. 8) (*In fact, the insuring agreement requires both the "occurrence" and "personal injury" during the policy period.)*

- "Nowhere in the policy is there a reference to coverage for the underlying wrongful acts themselves." (City Br. 8) (*In fact, the insuring agreement requires the "occurrence," the malicious prosecution itself, during the policy period.)*
- "[T]he express policy language does not provide that the injury must occur during the policy period." (City Br. 34) (*In fact, the insuring agreement requires that, for any type of covered claim, the alleged injury must take place during the policy period.)*
- "Insurers' definitions … used 'offense' to refer to an entire list of defined legal torts—not injuries or wrongful acts." (Sanders Br. 19) *(In fact, "offense" encompasses both the wrongful conduct and simultaneously resulting injury.)*
- "Insurers … failed to clarify the meaning of the term ['offense'] through its relationship to other terms. Insurers indicated no intent to use a wrongful act trigger … nor intent to use an injury trigger …." (Sanders Br. 24) (*In fact, the insuring agreement requires both an "occurrence" and "personal injury" during the policy period.)*

Sanders queries why, if the wrongful conduct and resulting injury coincide through a common definition, the insuring agreement includes two trigger-of-coverage requirements. (Sanders Br. 29-30) The answer is simple. While all types of covered claims have a dual triggering

requirement of an "occurrence" and "injury" during the policy period, not all types of claims can describe both triggering requirements with a single enumerated "offense," as is the case with malicious prosecution.

Here, neither the causative "occurrence" nor the resulting "personal injury" took place during Appellant insurers' policy periods. Because Appellees cannot satisfy these elements of the insuring agreement, they try to erase this critical context. Instead, Appellees urge this Court to entertain the abstract question of whether "offense"' can mean a completed tort. But Appellees ignore the fact that the only function of the term "offense" in the first place is to give meaning to "occurrence" and "personal injury" during the policy period.

Having stripped "offense" of all context, Appellees' position is built on the false premise that policies that require *both* an "occurrence" and "personal injury" to happen "during the policy period" can be judicially redrafted to require *neither* a causative "occurrence" *nor* "injury" to happen during the policy period. Such an interpretation impermissibly renders meaningless the very language of the insuring agreement. *Horwitz ex rel. Gilbert v. Bankers Life & Cas. Co.*, 319 Ill. App. 3d 390, 410 (1st Dist. 2001) (holding that contract terms must be construed so as to render none surplusage).

It is undisputed that the "occurrence" at issue is the offense of malicious charging, which took place in 1994. (A2, A28) It is similarly undisputed that the "personal injury" at issue is the harm that was simultaneously inflicted at the time of the 1994 malicious prosecution. Therefore, the claim does not present an "occurrence," "personal injury" or "offense" during Appellant insurers' 2013 and 2014 policy periods.

This result is in accord with prior Illinois precedent. This precedent has uniformly established that, where a policy's coverage for a malicious prosecution claim is triggered by an "occurrence," "offense" or "personal injury" during the policy period, then only the policy period in which the wrongful charging first took place is triggered. *First Mercury Ins. Co. v. Ciolino*, 2018 IL App (1st) 171532; *St. Paul Fire & Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381; *Cnty. of McLean v. States Self-Insurers Risk Retention Grp., Inc.*, 2015 IL App (4th) 140628; *Indian Harbor*, 2015 IL App (2d) 140293; *City of Zion*, 2014 IL App (2d) 131312. The present case is no different.

II. Appellees' remaining arguments fail.

A. Prior Illinois precedent applies.

Appellees contend that prior Illinois precedent addressing when coverage for a malicious prosecution claim is triggered is distinguishable. Specifically, Appellees assert that these cases involve policies that

required wrongful conduct or injury during the policy period. (City Br. 14, 20-25, 32-40; Sanders Br. 3, 20, 23, 33-36) But, as discussed above, the same is true here. The subject policies likewise require the wrongful conduct ("occurrence") and injury ("personal injury") during the policy period. Despite minor policy language variances, the end result is that coverage for a malicious prosecution claim is triggered when the malicious prosecution is commenced, because that is when the "occurrence," wrongful conduct, "offense" and/or resulting injury take place.

To escape this conclusion, Appellees advance a number of meritless assertions. First, Appellees fret that adoption of Appellant insurers' position would lead to a blanket rule that coverage for a malicious prosecution claim would *always* be triggered by commencement of the malicious prosecution, no matter the policy language at issue. (City Br. 3, 13, 18-19; Sanders Br. 3, 30-33, 37-38, 42) Not so. A policy containing materially different language would naturally compel a different result.

Indeed, there are policies on the market that explicitly provide that coverage for a malicious prosecution claim is triggered upon completion of the tort. For example, a case pending in the Northern District of Illinois involves a policy that requires "personal injury" during the policy period and includes completion of the tort in the definition of that term:

> Personal injury liability means:

> 1. False arrest, detention or imprisonment, malicious prosecution or concurrent and directly related assault and battery committed concurrently to such offenses provided:
>
> (a) The criminal or civil charges forming the basis for the false arrest, detention or imprisonment, malicious prosecution or concurrent directly related assault and battery claim or suit is dismissed during the Policy Period; or
>
> (b) The conviction of the claimant based on the false arrest, detention or imprisonment, malicious prosecution or concurrent directly related assault and battery is voided during the Policy Period; or
>
> (c) In the event no criminal or civil charges are filed, the claimant arrested, detained or imprisoned is released from custody during the Policy Period; …
>
> * * * *

Second Am. Compl. at 9, *Starr Indem. & Liab. Co. v. Cook Cty., Ill.*, No. 1:17-cv-01430 (N.D. Ill. filed Feb. 24, 2017), 2018 WL 5401485. Unlike the policies here, coverage under such a policy would be triggered if a criminal conviction is voided or dismissed during the policy period.

Second, Sanders imagines that the insurers reverse engineered their position just to avoid liability: "Insurers settle on the initiation of the prosecution, conveniently selected to disallow coverage." (Sanders' Br. 25) The assertion is intellectually dishonest. The insurers did not "select" this trigger-of-coverage after receiving the claim at issue. The trigger-of-

coverage requirements were drafted independently of this claim, with this interpretation existing as established Illinois law—as both the circuit court and dissent correctly recognized.

Third, the City treats the appellate court's decision below as though it is itself authority for an exoneration trigger-of-coverage. (City Br. 7-15) In perhaps the most salient illustration, the City marvels that "[t]he *Sanders*'s Court's analysis is directly on point in this case." (City Br. 8) *Sanders is* this case. It is the decision under review, not persuasive precedent in its own right.

Fourth, to create the semblance of Illinois authority for their position, Appellees resurrect 41-year-old reversed dictum. (City Br. 26-29; Sanders Br. 40) *Sec. Mut. Cas. Co. v. Harbor Ins. Co.*, 65 Ill. App. 3d 198 (1st Dist. 1978), *rev'd*, 77 Ill. 2d 446, 451 (1979) (holding that the intermediate appellate court's resolution of the coverage dispute exceeded the scope of review). Because the *Security Mutual* intermediate appellate court lacked jurisdiction to make any pronouncements about trigger-of-coverage, and was reversed on this basis, the decision has never represented Illinois law.

The other decisions of "Illinois Courts" on which Appellees rely were not issued by Illinois state courts at all. (City Br. 26, 28-30; Sanders Br. 18, 40-41) *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124 (7th Cir.

2012) (predicting Illinois law); *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012) (predicting Illinois law); *Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010) (predicting Illinois law). In all of these cases, the Seventh Circuit was making an *Erie* guess about Illinois law, in sole reliance on the reversed *Security Mutual* decision. And that guess turned out to be wrong. *E.g.*, *Ciolino*, 2018 IL App (1st) 171532, ¶ 34 (holding that the Illinois Appellate Court, in more recent decisions, rejects the Seventh Circuit's prediction of Illinois law).

Finally, in begrudging acknowledgment that Illinois law rejects an exoneration trigger-of-coverage, Appellees have no choice but to look outside Illinois to advocate for an exoneration trigger-of-coverage. (City Br. 30-41; Sanders Br. 14, 18, 20, 30-31, 35) *E.g.*, *Roess v. St. Paul Fire & Marine Ins. Co.*, 383 F. Supp. 1231, 1235 (M.D. Fla. 1974) (applying Florida law) (holding that coverage for a malicious prosecution claim is triggered upon exoneration); *Sauviac v. Dobbins*, 949 So. 2d 513, 519 (La. Ct. App. 2006) (same). These cases have been consistently criticized as poorly reasoned, as explained in Illinois Union Insurance Company's reply brief. Thus, they should continue to be rejected.

Importantly, there is a key distinction between the parties' contrasting reliance on foreign authorities. Appellant insurers cite such authorities merely to show that they are *consistent* with Illinois law. *E.g.*,

Ciolino, 2018 IL App (1st) 171532, ¶ 30 (holding that the "offense" of malicious prosecution took place before the policy period, even though the claimant was exonerated during the policy period); *accord Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 814-15 (8th Cir. 2012) (predicting Iowa law). Appellees, on the other hand, cite foreign authorities in an effort to *topple* Illinois law. Appellees' efforts cannot be countenanced.

B. Appellees conflate tort and contract law constructs.

Appellees' discussion of when a malicious prosecution tort cause of action accrues does not answer the question of when insurance coverage for such a claim is triggered. The inquiries are distinct. *See, e.g.*, *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48 ("[T]he time of occurrence in insurance law is different from the time of accrual in tort law.").

Sanders unwittingly shows how Appellees' position collapses this distinction. Sanders observes that a malicious prosecution tort plaintiff who proves only wrongful conduct and injury will lose, as the insured cannot be held liable absent proof of exoneration. (Sanders Br. 34 n.9) The missing element would defeat the merits of a malicious prosecution tort claim, but not the trigger-of-coverage for a malicious prosecution insurance claim. An insurer could still owe a duty to defend, for example, even though the tort claim is premature. *Int'l Ins. Co. v. Rollprint Packaging Prods., Inc.*, 312 Ill. App. 3d 998, 1008-09 (1st Dist. 2000)

(holding that the underlying complaint may allege a potentially covered "offense," yet not allege a fully formed cause of action).

Continuing to conflate tort and contract law, Appellees contend that "malicious prosecution" is a term of art that can mean only the completed tort. (City Br. 16; Sanders Br. 9-10, 14-25) But their cited cases are not insurance coverage cases. *Jane Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479; *Cult Awareness Network v. Church of Scientology Int'l*, 177 Ill. 2d 267 (1997); *People v. McCarty*, 94 Ill. 2d 28 (1983); *Freides v. Sani-Mode Mfg. Co.*, 33 Ill. 2d 291 (1965); *Lieberman v. Liberty Healthcare Corp.*, 408 Ill. App. 3d 1102 (4th Dist. 2011); *Reynolds v. De Geer*, 13 Ill. App. 113 (1st Dist. 1883).

Whatever special meaning "malicious prosecution" has in the tort or criminal settings, it does not carry over into the insurance coverage setting, where the term must be construed according to contract principles. That is why the great weight of authority holds that, for insurance coverage purposes, "malicious prosecution" refers to commencement of the malicious prosecution. *E.g.*, *Genesis*, 677 F.3d at 812-13 (observing that "the clear majority of courts" holds that malicious prosecution "occurs for insurance coverage purposes" when the underlying criminal charges are filed, collecting cases); *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 27 (citing *Genesis* with approval).

C. Appellees concede that an exoneration trigger-of-coverage is irreconcilable with the policies' occurrence-based nature.

Invoking public policy grounds, Sanders proclaims that a trigger-of-coverage tied to the City's injurious conduct is inferior to an exoneration trigger-of-coverage. Sanders notes that the long temporal gap between the malicious commencement of criminal charges and the eventual assertion of a malicious prosecution tort claim leads to greater uncertainty surrounding premium calculations and increases the risk of lost policies and insurer insolvency. (Sanders Br. 43-44) The assertion is not credible and does not support an exoneration trigger-of-coverage.

None of those concerns came to pass here. United National Insurance Company ("United National"), which insured the City in 1994, when it caused criminal charges to be filed against Sanders, did not lose the policy or become insolvent. In fact, United National paid its full policy limits in settlement of the claim—a claim that arose years after the City's injurious conduct took place. (A3, A13, A59)

What is more, common sense dictates that a trigger-of-coverage tied to the City's injurious conduct preserves an occurrence-based policy's benefit of the bargain. From the City's perspective, the benefit of occurrence-based coverage under Appellant insurers' 2013 and 2014 policies is *prospective*: protection from wrongful conduct and resulting injury during the policy periods that may not give rise to claims until

years into the future, after the policies expire. From Appellant insurers' perspective, the benefit of occurrence-based coverage under their 2013 and 2014 policies is *retrospective*: protection from exposure for claims arising from wrongful conduct and resulting injuries that took place decades before Appellant insurers came on the risk and could assess how to underwrite the City's operations. To override the policies' occurrence-based nature, by compelling them to respond to a loss that materialized nearly 20 years ago, would be to upend the parties' negotiated bargain in favor of a stranger to the contracts.

III. Appellees' multiple trigger theory is legally and factually untenable.

Illinois cases have squarely and repeatedly rejected a multiple trigger theory, as applied to malicious prosecution claims. *E.g.*, *City of Waukegan*, 2017 IL App (2d) 160381, ¶¶ 44, 48 (observing that *City of Zion*, *Indian Harbor* and *County of McLean* all rejected a multiple trigger theory for wrongful conviction claims). *City of Waukegan* is well-reasoned and a correct statement of Illinois law, for the reasons set forth in Appellant insurers' opening briefs. The City concedes the point, by mounting no challenge to *City of Waukegan*, while Sanders protests only that the case is technically not binding. (City Br. 42-48; Sanders Br. 47)

In an effort to portray its role in Sanders' retrials as distinct from the original malicious prosecution proceedings, the City contends that each

trial was a separate "occurrence." (City Br. 46) The City relies on multiple factual differences among the trials—for example, that they involved different litigators. The assertion makes no sense. The fact that different state employees may have conducted each trial does not establish that the City engaged in new and different wrongful conduct or that there was a new and different root cause of Sanders' 1994 injury. The City can do no more than identify differences of no import to the analysis.

Sanders takes a different tack, insisting that the City's decision to "push forward" with each trial is new and different wrongful conduct. (Sanders Br. 46) In support of this proposition, Sanders offers a false analogy. Sanders posits that a homeowner who suffers three floods and three instances of associated flood damage, in 1994, 2013 and 2014, would be entitled to coverage from all insurers on the risk during those years. The underlying premise is that each flood is a separate event that causes new and separately compensable damage. But that premise does not apply here. A more apt analogy is a single flood that occurs in 1994 and causes one instance of associated flood damage that continues into 2013 and ends in 2014. Not even Appellees maintain that this situation would trigger anything other than the 1994 policy.

Sanders also claims that each retrial inflicted "additional" injury, beyond incarceration. (Sanders Br. 45) His own words belie that claim.

The operative complaint alleged that Sanders sustained "*continued* incarceration" and, absent the City's wrongful conduct, "he would have been exonerated even earlier." (A55) Translation: Sanders' injury was identical in nature at both the outset and conclusion of the malicious prosecution proceedings, differing only in degree. While post-1994 conduct may have exacerbated the original malicious prosecution and injury, it did not constitute a new and separately compensable "occurrence" or "personal injury." As such, Sanders' continued imprisonment does not trigger coverage anew.

CONCLUSION

For the reasons stated above and upon the authorities cited, Starr Indemnity & Liability Company respectfully requests that this Court grant the relief requested in its opening appellant brief.

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 reply brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 17 pages.

/s/ *Agelo L. Reppas*
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NOTICE OF FILING and PROOF OF SERVICE

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.*	)	No. 124565

The undersigned, being first duly sworn, deposes and states that on August 27, 2019, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Defendant-Appellant Starr Indemnity & Liability Company. Service of the Reply Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, 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 Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Agelo L. Reppas
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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.

/s/ Agelo L. Reppas
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