No. 124641

In the Supreme Court of Illinois

KIRK RAAB,

Plaintiff,

v.

KENNETH FRANK,

Third-Party Plaintiff-Appellee,

v.

DAVID A. GROSSEN and VIRGINIA J. GROSSEN,

Third-Party Defendants-Appellants.

On Petition for Leave to Appeal from the Illinois Appellate Court,
Second Judicial District, No. 2-17-1040.
There Heard on Appeal from the Circuit Court of the Fifteenth Judicial District,
Jo Daviess County, Illinois, No. 13 L 27.
The Honorable **William A. Kelly**, Judge Presiding.

BRIEF OF APPELLEE KENNETH FRANK

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POINTS & AUTHORITIES

I. The Trial Court incorrectly granted summary judgment, as the Animals Running at Large Act does not, as a matter of law, prohibit Frank's Contribution Action.

A. The Contribution Act

B. The Animals Running At Large Act

ISSUES PRESENTED FOR REVIEW

I. Whether the Animals Running at Large Act precludes contribution from third-party defendants that are neither owners nor keepers, despite their negligent failure to maintain their property.

II. Whether a breach of contract between a defendant and a third-party defendant may be the nexus for "liability in tort" to an underlying plaintiff for purposes of the Contribution Act.

STATEMENT OF FACTS

On November 8, 2013, Plaintiff Kirk Raab ("Raab") filed a one-count complaint against Defendant Kenneth Frank ("Frank") for personal injuries that Raab sustained when he struck a cow that was owned by Frank in the roadway. (R.C2-15) In his answer and affirmative defenses to Raab's complaint, Frank denied all allegations of negligence and asserted as his second affirmative defense that he used reasonable care in restraining the cow from running at large by placing the cow in a pasture when the fences were examined and found to be in good condition and routinely visited the cow pasture and observed the condition of the fences and the gates. (R.C26-31)

On December 8, 2014, Frank filed his amended third-party complaint against David A. Grossen and Virginia J. Grossen ("the Grossens"), which contained three counts. (R.C80-120) In general, Frank alleged that Grossens owned a tract of land bearing Jo Daviess Assessor Parcel Number 16-000-172-00 ("Grossen parcel"), which shares a common fence line with a tract of land owned by Dominic T. Pintozzi bearing Jo Daviess County Assessor Parcel Number 16-000-171-00 ("Pintozzi parcel"). (R.C80-89) Frank further alleged that he was leasing the Pintozzi parcel which encompassed the cattle pasture at the time of the occurrence alleged in Raab's complaint. (R.C81)

Count I of Frank's amended third-party complaint alleged that the Grossens were negligent in committing one or more of the following careless and negligent acts or omissions:

(a) The failure to use reasonable care in maintaining the boundary fence which existed between the Grossen parcel and the Pintozzi parcel;

(b) The failure to repair the fence which existed between the Grossen parcel and the Pintozzi parcel, when they knew or should have known that the fence was in need of repair;

(c) The allowance of a boundary fence to exist between the Grossen parcel and the Pintozzi parcel, when the boundary fence was not in good repair and not constructed of suitable materials;

(d) The allowance of the fence between the Grossen parcel and the Pintozzi parcel, to exist when he knew or should have known that the design of the fence and fencing system was not reasonable and adequate;

(e) The allowance of a boundary fence to exist between the Grossen parcel and the Pintozzi parcel, when he knew or should have known that the boundary fence was not reasonable to enclose the cattle which were contained on the adjacent property; and

(f) Carelessness or negligence with respect to the fence between the Grossen parcel and the Pintozzi parcel.

(R.C82-83.)

In Count II, Frank alleged that Grossen violated the Fence Act in one or more of the following respects:

(a) The failure to maintain a just proportion of the division fence between the Grossen parcel and the Pintozzi parcel, in violation of 765 ILCS 130/3.

(b) The allowance of a division fence to exist between the Grossen parcel and the Pintozzi parcel, which was not properly maintained when they had a responsibility to maintain a just proportion of the division fence pursuant to 765ILCS 130/3.

(c) The allowance of a division fence to exist between the Grossen parcel and the Pintozzi parcel, which was not properly designed and failed to maintain a just proportion of the fence by failing to correct defects in the design of the fence pursuant to 765 ILCS 130/3.

(R.C85.)

In Count III, Frank alleged that on or about January 7, 1970, a Fence Agreement was recorded against the Grossen parcel that obligated Grossen to repair and maintain the portion of the fence where the cow that was struck by Raab had escaped. (R.C86-89) The Fence Agreement was entered into between William H. Meyer and Tillie Meyer, his wife, parties of the first part, and Myrtle Thomas, a widow, and Elizabeth Eckerman and Clifford Eckerman, her husband, parties of the second part. (R.C100-02) Frank alleged that as a successor owner of the parties of the second part, Grossen was required to

maintain the north sixty (60) rods of fence line and the north forty (40) rods of fence line running in an easterly and westerly direction of the boundary fence which existed between the Pintozzi parcel and the Grossen parcel. (R.C88, 100-02) Frank further alleged that Grossen failed to comply with the Fence Agreement by failing to properly maintain the boundary fence between the Pintozzi parcel and Grossen parcel and that, as a direct result of this breach, Raab was injured as alleged within his complaint. (R.C87-88.

In each count, Frank sought judgment against Grossen for all sums for which he was liable to Raab in such amount, by way of contribution, as would be commensurate with the degree of misconduct attributable to Grossen in causing the alleged damages to Raab. (R.C83, 86, 88-89) The deposition testimony of Virginia Grossen ("Virginia"), David Grossen ("David") and Kenneth Frank, established that the Grossen parcel and Pintozzi parcel share a common boundary line between them which is divided by a fence and that a small creek or waterway runs through the boundary line fence of the two parcels. (R.C437) The area of the creek crossing through the boundary line fence is where it is believed that the cow escaped. (R.C437, 823-24) Frank testified that he was 99.9% sure that the cattle in question escaped through the creek bed between the Grossen parcel and the Pintozzi parcel because he saw manure and foot prints on the mud and grass within and near the creek bed upon the Grossen parcel in the area where the fence crossed the creek bed between the two parcels. (R.C823-24)

Virginia testified that if one was standing on the property facing the fence, the half of the fence to the right is the owner's responsibility to maintain. (R.C411) The area depicted to the right of the arrow she drew encompasses the portion of the line fence that

crossed the creek bed where Frank believes the cow escaped. (R.C437, 823-24) She admitted that she was responsible for caring for the portion of the fence where the cow had escaped:

> Q. And so let me just ask it this way. Based on the way [the Fence Agreement] is written, it would be fair to say that according to [the Fence Agreement], the owner of your parcel is responsible for caring for what's to the right of the arrow you drew.
>
> A. Yes.

(R.C411-13) Virginia testified that the area she had circled on Exhibit 1 to her discovery deposition contains the portion of the parcel for which she believes she was responsible for caring and this portion encompasses the area where the fence crosses the creek bed. (R.C412, 437)

Virginia testified that after the accident Frank reported to her and her husband that the fence was in bad repair and that they needed to take care of it, she agreed to do so immediately as soon as the weather cooperated. (R.C398) During the month of April in the spring following the incident, they hired Bob Spillane to repair the fence between the Pintozzi parcel and the Grossen parcel. (R.C399) David testified that the repair included electrifying the fence over the creek even though Frank voiced a complaint with the way the repair had been completed. (R.C467-68) The Grossens paid for the repairs.

STANDARD OF REVIEW

On February 6, 2019 the Appellate Court entered an order affirming in part and reversing in part the Trial Court's entry of summary judgement, The Grossens petitioned this Court for leave to appeal. This Court granted the Petition for Leave to Appeal on May 22, 2019. The Supreme Court's review is *de novo*. *Pielet v. Pielet*, 2012 IL 112064, ¶ 30.

ARGUMENT

II. The Trial Court incorrectly granted summary judgment, as the Animals Running at Large Act does not, as a matter of law, prohibit Frank's Contribution Action.

A. The Contribution Act

The Illinois Contribution Act provides in relevant part that "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property… there is a right of contribution among them…" 740 ILCS 100/2. The Act makes no requirement that the basis for liability among contributors be the same. *Id.*

A party's obligation to make contribution rests upon his being subject to liability in tort to the original plaintiff in the underlying action. *Vroegh v. J & M Forklift*, 165 Ill. 2d 523, 528 (1995). "[T]he contribution act focuses, as it was intended to do, on the culpability of the parties rather than on the precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss." *Doyle v. Rhodes*, 101 Ill.2d 1, 14 (1984). In *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill.2d 1, 13 (1977), this Court noted the central policy underlying the right to contribution:

> We agree with Dean Prosser that "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, Torts sec. 50, at 307 (4th ed. 1971)

Illinois has never created a blanket prohibition against contribution actions merely because an underlying plaintiff may not be able to directly sue a third-party defendant. This Court explicitly rejected that argument in *Doyle*, 101 Ill.2d at 9 (holding that the "intent of

the contribution statute was to reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege") and has since expounded upon the interplay between the Contribution Act and immunity from a direct tort action. See *Ramsey v. Morrison*, 175 Ill.2d 218, 224 (1998) (holding that "our courts balance the policy considerations supporting contribution against those supporting immunity to determine which doctrine should prevail in a particular case").

In *Doyle*, this Court analyzed the effect of the Contribution Act upon the Worker's Compensation Act. 101 Ill. 2d at 7. Doyle sued Rhodes for injuries he sustained while at work as a highway flagman, when he was struck by an automobile driven by the defendant. Id. at 4. Rhodes filed a third-party suit for contribution against Doyle's employer, a highway contractor, alleging negligence and violations of Illinois law. Id. at 5. This Court found that the fact that the employer was immune, under the Workmen's Compensation Act, from a suit in tort brought by Doyle as plaintiff was not a bar to Rhodes claim for contribution. Indeed, this Court held that the very "intent of the contribution statute was to reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege." Id. at 9.

In *Ramsey*, the primary issue on appeal concerned "whether a third party sued by an injured employee may recover contribution from a coemployee who is immune from direct suit by the employee under section 5(a) of the Workers' Compensation Act (820 ILCS 305/5(a) (West 1992))." 175 Ill.2d at 220. In determining this central question, this Court conducted a balancing of policies to determine whether the third-party's right to contribution should prevail over the immunity granted to coemployees by the Worker's

Compensation Act. *Id.* at 227. The Court found that a primary purpose of the Workers' Compensation Act is to shift the cost of employee injuries to the industry by making workers' compensation benefits the sole remedy for such injuries, including injuries for which coemployees would otherwise be liable. *Id.* at 229. Thus, contribution from a coemployee would shift the cost of employee injuries from the industry to the coemployee, thereby defeating a central purpose of the workers' compensation system. *Id.* As such, this Court held that immunity granted to coemployees under the Workers' Compensation Act may be raised as a bar to contribution actions. *Id.* at 231. The court noted, however, that under the Court's decision *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155 (1991), a third-party sued by an injured employee may still be able to recover contribution from the employer for the coemployee's negligence. *Id.* at 230. In *Kotecki*, this Court balanced the competing interests of contribution and employer immunity under the Workers' Compensation Act to determine that while an employers' immunity does not raise a bar to contribution actions, the right to contribution is limited to the amount of an employer's liability under said Act. 146 Ill.2d at 165.

Illinois Appellate Courts have also determined the existence of a right of contribution in the face of statutory immunity by applying a balancing test between the competing interests. See e.g., *Larson v. Buschkamp*, 105 Ill.App.3d 965 (2nd Dist. 1982) (doctrine of parent-child immunity does not bar contribution claim); *Wirth v. City of Highland Park*, 102 Ill.App.3d 1074 (2nd Dist 1981) (contribution claim not barred by inter-spousal immunity); but see *Brock v. Anderson Road Associates*, 301 Ill.App.3d 168 (2nd

Dist. 1998) (after duly weighing competing balance of immunities of EMS Act versus contribution, policy factors weighed in favor of barring contribution claim).

B. The Animals Running at Large Act

The Illinois Domestic Animals Running at Large Act provides as follows:

> No person or owner of livestock shall allow livestock to run at large in the State of Illinois. All owners of livestock shall provide the necessary restraints to prevent such livestock from so running at large and shall be liable in civil action for all damages occasioned by such animals running at large; Provided, that no owner or keeper of such animals shall be liable for damages in any civil suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large.

510 ILCS 55/1.

Under the common law, every owner of cattle was bound, at their peril, to keep them from trespassing upon the land of another. *Bulpit v. Matthews*, 145 Ill. 345, 349 (1893). This tenant of English common law was adopted by the general convention of the colony of Virginia in 1776. *Id.* at 350. In 1819, the law was adopted in Illinois by the first state legislature. *Id.* In 1848, however, this Court held in *Seely v. Gilman*, 5 Gilman, 130 (1848), that the common law rule, while adopted in Illinois, was never in force because enforcement under the statute was conditioned upon the habits and conditions of society and because the law was ill-adapted to the open prairies and grasslands of 1848 Illinois. *Id.* (citation omitted) By 1871, however, rapid changes in the State's conditions necessitated the adoption of the Animals Act. *Id.* at 352. Importantly, the *Bulpit* Court held that "since the passage of the present laws relating to domestic animals... we are of the opinion that *the*

common-law rule has, since the passage of that act, been in force in this state." *Id.* at 356. (emphasis added)

After *Bulpit*, this Court again held, in *McKee v. Trisler* that "[t]he effect [of the Animals Running at Large Act] was to restore the common law..." 311 Ill. 536, 543 (1924). In *McKee* this Court undertook an analysis of common law liability in a particular subset of animals running at large cases – those to which the parties are adjoining landowners sharing a common fence, which each, either by agreement or statute, are responsible for maintaining. *Id.* As a part of its analysis, the Court considered three of its prior decisions, each predating both *Bulpit* and the enactment of the Animals Running at Large Act. *Id.* The first, *Seely*, was also considered by *Bulpit*. *Id.* See also *Bulpit*, 145 Ill. at 349. Like the *Bulpit* Court, the *McKee* Court cited to *Seely*'s holding that the common law rule, that the owner of domestic animals was bound at his peril to keep them off the lands of others, was inapplicable in Illinois. *McKee*, 311 Ill. at 542. However, unlike *Bulpit*, *McKee* recognized that *Seely* had been limited by this Court's decisions in *Buckmaster v. Cool*, 12 Ill. 74 (1850) and *McCormick v. Tate*, 20 Ill. 334 (1858).

> In *Buckmaster v. Cool*, 12 Ill. 74, several persons raised crops in a common field, and during the season one of them erected an inside fence sufficient to protect the crops. In November a servant of the defendant removed a portion of the inner fence, by which stock entered the field and destroyed the corn, and the plaintiff recovered damages for such removal. In *McCormick v. Tate*, supra, the court considered the decision in *Buckmaster v. Cool* as limiting the decision in *Seeley v. Peters* to stock running at large and leaving the common law in force as to inside fences unless regulated by the statute regarding partition fences. The decision in *Buckmaster v. Cool* was adhered to, and the common law was repeated as applicable to owners of adjoining fields, unless changed by the statute regarding partition fences.

McKee, 311 Ill. at 543.

Construing the Fence Act and Animals Running at Large Act together, the *McKee* Court held that:

> [t]he statutes do not purport to relieve an owner of land of his commonlaw duty to keep his stock on his own land *except as to the portion of the fence assigned to the owner of the adjoining land, which such owner must make and maintain of the height and materials specified in the statute*. Neither the plaintiff nor the defendant was relieved of his common-law duty to keep his stock on his own land *except as such duty was cast upon the other*.

*I*d. at 545. (emphasis added)

In keeping with this Court's precedents that the Animals Running at Large Act restored the common law rule in the State of Illinois is its decision in *Ward v. Brown*, 64 Ill. 307 (1872). The Grossens are correct to point out that the Court's decision, insofar as it is based upon its finding that it is the party in possession and control of the animals in question that is liable for damages occasioned by their running at large, is consistent with the Animals Running at Large Act. However, the Grossens conveniently chose to ignore the Court's finding that cases may arise in which an owner lacking possession and control would be liable where guilty of negligence "either in the selection of the bailee or in placing the cattle in his field, or in fact the omission of any duty that devolved upon them." *Id*. at 310. The Grossens cannot logically assert that such a position is consistent with the Animals Running at Large Act, which they aver applies only to parties in possession and control. (Br. of Third-Party Defs.- Appellants, p. 14.) Indeed, an owner could not in such circumstances be held liable under the Animals Running at Large Act. Thus, such liability, which the *Ward* Court finds could arise, must arise, as the Court stated, upon common law negligence.

Contrary to the Grossens' argument, that *Ward* was decided after the passage of the Animals Running at Large Act serves only to highlight that this Court's precedent does not regard the Animals Running at Large Act as the exclusive remedy for damages occasioned by at large domestic animals.

This Court has never held that the Animals Running at Large Act immunizes responsible parties from liability based upon common law tort theories, and indeed indicated the opposite to be true in *Ward*, supra. Nonetheless, the Grossens cite a number of Appellate Court cases, which they assert establish that proposition. In the first, *Heyen v. Willis*, 94 Ill. App. 2d 290 (4th Dist. 1968), plaintiff filed suit under the Animals Act against a landowner for injury and damage sustained when cattle strayed from land under lease to the owner and keeper of the cattle. *Heyen*, 94 Ill. App. 2d at 291. The Court held in favor of the landowner and upheld the trial court's ruling granting his motion for summary judgment because the facts in *Heyen* did not support a finding that the landowner was either an owner or keeper of the cattle in question. *Id* at 295. In response to plaintiff's request that the early common law cases defining "owner" and "keeper" be overruled to reflect the changing social circumstances of the times, the Court held that the request had been met by the Illinois legislature with the adoption of the Animal Act in 1871. *Id.* at 295-6. Citing this Court's precedent in *Bulpit*, 145 Ill. 345, the *Heyen* Court found that "[p]rior to the enactment of the Animals Act there was no liability in Illinois for injury or damage caused by an animal running at large." 94 Ill. App. 2d at 296. Rather, the burden was placed upon a landowner to fence his land against damage caused by another's animals. *Id.*

As such, the Appellate Court held that liability for animals running at large must be predicated upon the Animals Running at Large Act. *Id.*

While *Heyen* cites to both *Bulpit* and *McKee*, insofar as *Heyen* holds that there is presently no common law liability in animals running at large cases, *Heyen* is inconsistent with both *Bulpit* and *McKee*, as each explicitly held that the Illinois' adoption of the Animals Running at Large Act in fact restored the common law rule's applicability in Illinois. See *Bulpit*, 145 Ill. at 356; *McKee*,311 Ill. at 543 (which also held that the common law had been in effect as between adjoining landowners sharing a common fence since the *Buckmaster* decision in 1850, prior to the passage of the Animals Running at Large Act).

The Grossens also cite the more recent decision of *Corona v. Malm*, 315 Ill.App.3d 692 (2nd Dist. 2000). In *Corona*, plaintiffs filed suit against defendant stable owners after a horse escaped from defendants' property and collided with plaintiffs' car. *Id.* at 693. Plaintiffs' based their claim upon the Animals Running at Large Act and common law negligence. *Id.* The trial court granted defendants' motion for summary judgment as to counts of the complaint predicated upon the Animals Running at Large Act after finding that plaintiffs presented no evidence that defendants failed to take reasonable care to restrain the horse. *Id.* Defendants' motion for summary judgment as to plaintiffs' allegations of common law negligence was also granted upon the basis of defendants' arguments that any action for damages sustained by a runaway horse must be predicated on the Animals Running at Large Act. *Id.* at 694.

The Appellate Court upheld the trial courts grant of summary judgment as to the allegations of common law negligence. *Id.* at 698. However, *Corona* departs significantly

from *Heyen* where it notes, in keeping with this Court's decision in *Ward*, "that in some cases, liability might be predicated on a negligence claim." *Id.*

C. The Grossens are "subject to liability in tort" for purposes of the Contribution Act

1. The Animals Running at Large Act does not preclude common law tort actions, independent of the statute, against responsible parties that are neither owners nor keepers of the offending animal.

The Grossens are subject to liability in tort for purposes of the Contribution Act due to their alleged negligent failure to maintain their portion of the common fence between their property and the adjoining property upon which Frank pastured his cattle. The Animals Running at Large Act itself includes no provision immunizing responsible parties other than owners and keepers from liability resulting from common law tort actions. 510 ILCS 55/1. By its own terms, the Act concerns itself exclusively with the liability of owners and keepers and is silent as to all other potentially responsible classes of parties. *Id.* The Grossens ask this Court to read into that silence a prohibition against actions in which the negligence of a non-owner/non-keeper results in animals escaping their enclosure and causing injury and damage.

In keeping with the canons of statutory construction, this Court's precedent interpreting the Animals Running at Large Act has never read such a prohibition into the Act. On the contrary, this Court has indicated that common law negligence actions may lie even against parties lacking possession and control of the animals in question. See *Ward*, supra.

Likening the present matter to that of *Windlowski v. Durkee Foods, Div. of* SCM *Corp.*, 138 Ill. 2d 369 (1990), the Grossens argue that public policy considerations mitigate in favor of upholding the Trial Court's decision to effectively add terms to Animals Running at Large Act. (Br. of Third-Party Defs.- Appellants, p. 16.) In that case, this Court held that an employer owed no duty to the plaintiff nurse, whose finger employer's employee bit off after becoming delirious from on-the-job exposure to nitrogen gas. *Id.* at 372. The Court explained that the risk of harm to the nurse was too remote, and that to find such liability on the part of the employer would result in employer's liability as to all the world. *Id.* at 374-75.

Widlowski is distinguishable from the case at bar. Here, the Grossens had a duty to maintain their share of the common fence upon which Frank's cattle were pastured. That failure to maintain their fence, situated in a pasture, could result in animals escaping from the adjoining property, entering the roadway along the Grossens' property, and injuring a passing motorist is neither remote in time and place nor unforeseeable. In fact, such a possibility is highly foreseeable, for it is precisely the type of circumstance for which such fences are erected to begin with. While the employer in *Widlowski* was not in a position to control the nurse, the Grossens were in a position to control the maintenance of their fence, one of the purposes of which was to control the movements of domestic animals on either side. Had Raab, delirious from his collision with Frank's cattle, bitten a nurse's finger off, *Widlowski* would indeed require a finding that the Grossens owed no duty of care to the nurse. Alas, the actual injuries in the present matter are not nearly so remote.

The Grossens also argue that "to allow the Appellate Court's decision to stand, extends a duty of care in regard to a livestock owners cattle to any neighboring landowner who shares a boundary fence with the cattle owner." (Br. of Third-Party Defs.- Appellants, p. 16.) The Grossens' argument is disengenuous and a misconstruction of the Appellate Court's decision. The Appellate Court's decision did not impose a duty of care upon the Grossens in regard to Frank's livestock. Rather, the Appellate Court's decision imposed upon the Grossens a duty of care in regard to their own fence, which was situated such that it was reasonably foreseeable that there negligent failure to maintain it could result in the escape of Frank's livestock and Raab's subsequent injuries.

The Trial Court incorrectly granted summary judgment, ruling as a matter of law that the Animals Running at Large Act effective precluded a contribution action. This was incorrect as the plain language of the Animals Running at Large Act and this Court's precedent do not preclude the Grossens' contribution liability for Raab's injuries on the basis of their negligent failure to maintain their fence. The Grossens are subject to liability in tort for purposes of the Contribution Act.

2. Even if the Animals Running at Large Act immunizes responsible parties that are neither owners nor keepers, the Grossens are still "subject to liability in tort" for purposes of the Contribution Act.

Relying on this Court's decision in *Doyle*, the Appellate Court in this case held that the Grossens are "subject to liability in tort," pursuant to the Contribution Act, based upon the allegation that they were negligent in failing to maintain the portion of the fence on their property. *Raab v. Frank*, 2019 IL App (2d) 171040, ¶ 31. The Grossens contend, however, that *Hopkins v. Powers*, 113 Ill. 2d 206 (1986) is controlling. In their attempt to

shoehorn the present matter into the purview of the *Hopkins* decision, the Grossens assume the same false equivalency between "subject to liability in tort" and "subject to liability in tort and lacking any affirmative defense, immunity, or special privilege" that this Court rejected in *Doyle*, supra.

In *Hopkins*, this Court found that "there is no statutory or common law duty in Wisconsin or Illinois to refrain from serving intoxicating beverages to a person who then becomes intoxicated and, as a result, injures innocent third persons." 113 Ill. 2d at 211, citing *Wimmer v. Koenigseder*, 108 Ill. 2d 435 (1985) (internal quotations omitted). As such, the Court held that a dramshop which contributes to the intoxication of a person who later causes injury is not thereby liable in tort for purposes of an action for contribution brought by the intoxicated party. *Id.* at 210.

In asking this Court to affirm the Trial Court's grant of summary judgment, the Grossens are critical of the Appellate Court's rejection of the application of *Hopkins* to this case in favor of *Doyle*. The Grossens base their criticism upon their argument that the Fourth District Appellate Court's decision in *Heyen*, supra, renders this case more similar to *Hopkins* than *Doyle*.

The Grossens contend that in light of *Heyen*, this Court's decision in *Hopkins* requires the conclusion that since a suit filed by Raab against the Grossens could have been subject to an affirmative defense and possible dismissal under the Animals Running at Large Act, the Grossens do not meet the "subject to liability in tort" requirement of the Contribution Act. According to the Grossens, *Heyen* holds that there is neither statutory nor common law liability in Illinois for any party other than an "owner" or "keeper" in

animals running at large cases. *Hopkins*, therefore, dictates that the Grossens are not liable in tort for the purposes of the Contribution Act.

Following its own analysis of *Heyen*, the Second District rejected the Grossen's arguments and found that the present case is analogous to this Court's decision in *Doyle*. In its rejection of the Grossens' reliance upon *Hopkins*, the Second District found *Hopkins*, to be distinguishable on the grounds that the third-party defendant in *Hopkins* could not be subject to liability in tort, for "selling alcohol is not a tortious act." *Raab*, 2019 IL App (2d) at ¶ 31. In the present case, however, the Grossens are alleged to have negligently failed to maintain the portion of the fence on their property, and "a failure to maintain one's property can be tortious." *Id.*, citing *Ortiz v. Jesus People, USA*, 405 Ill. App. 3d 967, 973 (1st Dist. 2010) (holding that a landowner can be liable for negligently allowing a dangerous condition to persist on his property). As was the case in *Doyle*, the fact that Raab may be barred from pursuing such an action, at least under the Animals Running at Large Act, has no bearing on Frank's ability to seek contribution from the Grossens. *Id.* at ¶ 29.

Even if the Grossens' argument that the Animals Running at Large Act dictates that owners and keepers are the only class of responsible parties than can be held liable in animals running at large cases, they err in their failure to recognize that such a circumstance, akin to the Worker's Compensation Act in *Doyle*, merely sets up an affirmative defense to their apparent liability for failing to maintain their fence. Even the Grossens make no attempt to argue that any Illinois case has held that a negligent failure to maintain one's property could not be tortious. Immunity under the Animals Running at Large Act for responsible parties other than owners and keepers would be relevant to such

a cause of action only insofar as it bears upon the viability of such cause in an animals running at large case in which the defendant is neither the owner nor keeper of the animals in question.

An affirmative defense is one which:

> does not negate the essential elements of the plaintiff's cause of action. To the contrary, it admits the legal sufficiency of that cause of action. It assumes that the defendant would otherwise be liable, if the facts alleged are true, but asserts new matter by which the plaintiff's apparent right to recovery is defeated.

Vroegh, 165 Ill.2d at 530.

> If a plaintiff has a valid cause of action against a defendant when the injury occurs, the fact that the defendant may ultimately be able to assert an affirmative defense fatal to plaintiff's action will not defeat a codefendant's contribution claim against him.

Id. at 529.

Their assumed immunity under the Animals Running at Large Act furnishes the Grossens with a classic example of an affirmative defense, exactly like that raised by the third-party defendant in *Doyle*. The Grossens' remedy, therefore, is to acknowledge their apparent liability for their failure to maintain their property but assert that such liability is defeated by the Animals Running at Large Act, which, so their argument would go, provides the exclusive right of recovery in animals running at large cases and applies only to the animal's owners and keepers.

The *Hopkins* Court, insofar as it held that "there is no statutory or common law duty in Wisconsin or Illinois to refrain from serving intoxicating beverages to a person who then becomes intoxicated and, as a result, injures innocent third persons," 113 Ill. 2d at 211, furnishes defendants in similar cases with a means of attacking the legal sufficiency of

contribution claims based upon allegations of a such a duty. Such pleadings necessarily fail to state a cause of action for contribution. Thus, a contribution defense predicated upon *Hopkins* is not an affirmative defense, and therein lies the distinction between the Grossens' argument in this case and that of the third-party defendant in *Hopkins*.

The Grossens' attempt to hide behind any immunity conferred upon them by the Animals Running at Large Act amounts to an attempt to subvert the very purpose of the Contribution Act, which this Court has held "was to reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege." *Doyle*, 101 Ill. 2d at 9. Because immunity under the Animals Running at Large Act would provide the Grossens with only an affirmative defense and not a means of attacking the legal sufficiency of a potential action brought by Raab for their negligent failure to maintain their property, this case is distinguishable from *Hopkins* and falls squarely within the four corners of this Court's decision in *Doyle*.

As was previously stated, since its decision in *Doyle*, this Court has further expounded upon the interplay between one party's immunity from direct suit and another's right to contribution. See *Ramsey* and *Kotechi*, supra. Accordingly, Frank's right to contribution must be balanced against the Grossens' assumed immunity from direct action. In the present case, the Grossens have argued that limiting liability in animals at large cases to a single class of responsible parties – owners and keepers – serves the important public policy in favor of limiting liability to the individuals in direct possession and control of the animals. (Br. of Third-Party Defs.- Appellants, p. 16.) The Grossens' argument ignores the fact that in many instances, such as the case at bar, adjoining

landowners, while lacking direct control of their neighbor's animals, are nonetheless responsible for caring for the fences through which cattle owners exact control over their animals. Where such landowners' negligent failure to maintain their fences can result in the escape of their neighbors cattle and injury to third parties, justice and fairness dictate that the negligent landowners share in the burden of the loss. To deny contribution in such circumstance defeats the purpose of the Contribution Act, which was designed to reach any culpable party regardless of their immunity from direct tort action. *Doyle*, 101 Ill.2d at 9.

Even if the Animals Running at Large Act immunizes the Grossens from direct liability for their own negligent failure to maintain their property, they are still "subject to liability in tort" under the Contribution Act. As such, this Court should find that the Trial Court improperly granted summary judgment in favor of the Grossens.

II. A Nexus for Contribution Liability May be Based Upon a Breach of Contract.

A. The Grossens are "subject to liability in tort" for purposes of the Contribution Act as a result of their breach of the fence agreement.

Well-settled case law supports use of, in certain cases, an underlying contract as a necessary basis for contribution liability. See *Raab*, 2019 IL App (2d) at ¶¶ 40, 41. In such cases, the contract identifies or establishes a relationship between culpable parties such that contribution is equitable. *Id.* (citing *Ohio Savings Bank v. Manhattan Mortgage Co.*, 455 F.Supp.2d 247, 255 (S.D.N.Y. 2006). The Grossens' efforts to persuade this Court to focus solely on their alleged lack of contractual obligations to Raab amounts to an attempt to

erroneously reframe the analysis in terms of a pure contract dispute rather than a contribution claim.

Examining the specific facts of this case the Trial Court failed to follow existing precedent in granting summary judgment in favor of the Grossens. In declining to acknowledge a basis for contribution liability in an underlying contract, the Trial Court did not consider the decision in *Giordano v. Morgan*, 197 Ill.App.3d 543 (2nd Dist. 1990).

The Court in *Giordano* plainly held that while breach of contract is a "nontort theory it is not determinative as to whether the parties might also be subject to liability in tort for purposes of contribution. *Id.* at 548, citing *Joe & Dan International v. USFG*, 178 Ill.App. 3d 741 (1st Dist. 1988). In *Giordano* a victim of a car accident sued the adverse driver and various insurance producers or insurers related to her efforts to purchase and obtain insurance. *Id.* at 544. Evaluating the contribution claims the *Giordano* court held that while the underlying claims were stated as contractual "it is not determinative as to whether the parties might also be subject to liability in tort for contribution." *Id.* at 548. *Giordano*, relying on *Joe & Dan*, allowed the contribution claims to go forward. *Id.* The First District expressly held in *Joe & Dan* that "the contribution act focuses on the culpability of the parties rather than the precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss." 178 Ill.App.3d at 750, citing *Doyle*, 101 Ill. 2d at 14.

The Grossens are critical of the Appellate Court for failing to examine the First District's decision in *Cirilio's Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill. App. 3d 494 (1st Dist. 1987) in light of subsequent decisions of other appellate district. Yet, the Appellate Court

did not use *Cirilio's* as a stated basis for reaching its opinion. The Grossens disingenuously attempt to sidestep that fact by asserting that *Giordano* finds its authority in *Joe & Dan*, which "specifically relied on the holding in *Cirilio's*." (PLA, p. 14) The Court in *Joe & Dan*, however, merely references its decision in *Cirilio's* and notes the factual similarity of the cases, relying, in actuality, upon this Court's holding in *Doyle*. *Joe & Dan*, 178 Ill. App. 3d at 750.

Once again seeking to sidestep this Court's analysis in *Doyle*, the Grossens encourage this Court to adopt the rationale they proffer existed in *J.M. Krejci Co. v. Saint Francis Hosp. of Evanston*, 148 Ill. App. 3d 396 (1st Dist. 1986) and in *Pier Transportation Inc. v. Braman Agency* 2015 IL. App. (1st) 150300-U and thereby overrule the Second District's decision in *Giordano* and the First District's decision in *Joe & Dan*. They also seek to direct this Court's attention to *People ex Rel Hartigan v. Community Hospital of Evanston*, 189 Ill. App. 3d 206 (1st Dist. 1989). The Grossens neglect, however, to note that the Appellate Court expressly addressed *Hartigan* and noted that it involved a "breach of fiduciary duty, which is not a tortious act that is subject to contribution". *Raab*, 2019 IL App (2d) at ¶ 14. More pointedly, both *J.M. Krejci* and *Hartigan* are First District cases decided prior to that Court's decision in *Joe & Dan*. *Pier Transportation*, was an unpublished opinion and therefore non-precedential in any court. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2nd Dist. 2009).

In addition to their direct attack on the validity of the decisions in *Cirilio's*, *Joe & Dan*, and *Giordano*, the Grossens seek to draw this Court's attention to a critical distinction between those decisions and the present matter, which distinctions they argue the

Appellate Court failed to acknowledge. The Grossens argue that in each of *Cirilio's*, *Joe & Dan*, and *Giordano* involved contracts between the plaintiffs and the third-party defendants wherein the third-party defendants owed contractual duties to the plaintiffs. Here, according the Grossens, Raab was not a party to the fence agreement and the agreement sets forth no duties owed to Raab. The lack of any duty to Raab under the fence agreement, the Grossens argue, defeats Raab's hypothetical action for breach of contract and, thereby, defeats Frank's contribution action predicated upon the Grossens breach of the fence agreement.

The Grossens once again represent to this Court that any obstacle to Raab's ability to recover in a direct action defeats Frank's contribution claim. Again, the Grossens advocate a reading of the Contribution Act such that "subject to liability in tort" means "subject to liability in tort and lacking any affirmative defense, immunity, or special privilege," effectively adding terms to the Act.

Illinois contract law recognizes third-party beneficiaries – intended and incidental. *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 14. Intended beneficiaries are intended by the parties to the contract to directly benefit from the agreement's performance. *Id.* Under the contract, intended beneficiaries may sue to enforce the contract. *Id.* Intended beneficiaries are ordinarily expressly identified in the contract. *Id.* On the other hand, incidental beneficiaries to a contract have no rights under the contract's terms and may not sue to enforce the contract's performance. *Id.* "[A] challenge to the plaintiff's third-party beneficiary status is a proper affirmative defense in a section 2-619 motion to dismiss." *Id.*

Akin to their attempt to hide from Frank's contribution action behind their alleged affirmative defense to Raab under the Animals Running at Large Act, the Grossens again seek to elevate their affirmative defense to Raab's hypothetical contract claim to a bar of Frank's contribution action. However, in doing so, the Grossens again ignore this Court's long standing precedent that an affirmative defense fatal to plaintiff's action will not defeat a defendants contribution claim. See *Vroegh*, supra. Moreover, the Grossens' again ignore this Court's many decisions holding that the very purpose of the Contribution Act was to reach all culpable parties, regardless of any affirmative defense they might have to an action brought by the plaintiff. See *Skinner*, *Doyle*, *Hopkins*, *Kotechi*, *Vroegh*, and *Ramsey* supra. Because the Grossens' defense to Raab's hypothetical contract claim amounts only to an affirmative defense to that action, Frank's contribution action, based upon their breach of the fence agreement, is analogous to the defendant's in *Doyle*.

Whether or not the Grossens' are correct in their argument that Raab was not an intended beneficiary of the fence agreement, he was plainly an incidental third-party beneficiary. It is reasonably foreseeable that the Grossens' failure to perform could result in animals escaping from the adjoining property, thus entering the roadway along the Grossens' property, and potentially injuring a passing motorist. In fact, preventing such occurrences was in part the point of their duties, as the property owner, under the long-existing fence agreement. The Trial Courts grant of summary judgment ignored this factual issue.

While the Grossens' arguments may prove fatal to a direct action by Raab for breach of the fence agreement, their culpability in causing the circumstances that resulted

in his injuries are undiminished by that outcome. The Contribution Act's purpose is to prevent the Grossens' avoidance of an equitable share in that loss under such circumstances. Therefore, this Court should hold that the Trial Court erred in granting summary judgment in favor of the Grossens as to Frank's contribution action.

B. The Grossens' argument that noncompliance with the Fence Act bars Frank's contribution action are improper and erroneous.

Issues not raised in the trial court are waived and cannot be argued for the first time on appeal. *In re Marriage of Minear*, 181 Ill.2d 552, 565 (1998). Both the Trial Court and the Appellate Court held that having failed to provide the requisite notice, Frank could not maintain an action under the Fence Act. *Raab*, 2019 IL (2d) at ¶ 34. Having themselves failed to raise in the courts below the issue of whether Frank's failure to provide notice and resulting inability to maintain an action under the Fence Act bars his contribution action, the Grossens now make that argument for the first time. As such, the Grossens have waived that issue on this appeal.

In any event, the Grossens argument is erroneous. A party's obligation to make contribution rests upon his being subject to liability in tort to the original *plaintiff* in the underlying action *Vroegh*, 165 Ill. 2d at 528. For the forgoing reasons, the Grossens are "subject to liability in tort" to Raab for purposes of the Contribution Act for their breach of the fence agreement. The question of whether Frank can maintain an action under the Fence Act has no bearing upon the Grossens' liability in tort to Raab and, as such, is irrelevant to Frank's contribution action.

CONCLUSION

For the reasons set forth herein, this Court should reverse the Trial Court's decision granting summary judgment in favor of the Grossens as to Frank's contribution actions based upon the Grossens' negligent failure to maintain their property and breach of the fence agreement.

Respectfully submitted,

KENNETH FRANK,
Defendant/Third-Party Plaintiff-Appellee

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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 33 pages.

/s/ Timothy B. Zollinger
Timothy B. Zollinger

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

KIRK RAAB,	)	
Plaintiff,	)	
v.	)	No. 124641
	)	
KENNETH FRANK,	)	
	)	
Third-Party Plaintiff-Appellee,	)	
v.	)	
	)	
DAVID A. GROSSEN and VIRGINIA J. GROSSEN,	)	
	)	
Third-Party Defendants-Appellants.	)	

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 the Brief of Appellee. Service of the 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 he will send to the above court thirteen copies of the Brief bearing the court's file-stamp.

/s/ Timothy B. Zollinger
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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/ Timothy B. Zollinger
Timothy B. Zollinger