

No. 1-10-2648

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GEORGE VOUTIRITSAS and NORTH STAR)	
TRUST COMPANY - LAND TRUST #1345,)	
)	Appeal from the
Plaintiffs-Appellees,)	Circuit Court of
)	Cook County.
)	
v.)	
)	No. 06 L 000646
MCCUAIG, HAEGER, BOLZ & MCCARTY, LLC, and)	
JAMES M. BOLZ,)	
)	
)	
Defendants-Appellants.)	Honorable
)	Allen S. Goldberg,
)	Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Justice Pucinski concurred in the judgment.
Justice Sterba dissented.

HELD: Trial court properly denied defendants' motion for change of venue based on the principles set forth in *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984); trial court properly interpreted the village code relating to preliminary plan approvals; remand for a new trial on the basis of improper jury instructions.

¶ 1 This appeal arises from a judgment entered on a jury verdict in favor of plaintiffs

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George Voutiritsas and North Star Trust Company - Land Trust #1345 (North Star Land Trust) for \$651,000 in a legal malpractice suit. On appeal, defendants James Bolz and McCuaig, Haeger, Bolz & McCarty L.L.C. (McCuaig) contend that: (1) the trial court erred in denying their motion to change venue; (2) the trial court erred in its interpretation of the village code; (3) the trial court erred in instructing the jury on the elements of professional negligence and damages and failed to instruct the jury regarding plaintiffs' failure to submit certain evidence; and (4) the trial court erred in denying defendants' posttrial motion for JNOV. For the following reasons we affirm in part and remand for a new trial.

¶ 2

BACKGROUND

¶ 3 Plaintiffs filed a legal malpractice action in the circuit court of Cook County on January 19, 2006, against defendants. The underlying malpractice action is based on plaintiff's attempt to develop his real property, for which defendants were retained as counsel. Defendants filed their appearance and a motion to transfer venue pursuant to section 2-104 of the Code of Civil Procedure (Code) (735 ILCS 5/2-104 (West 2006)) on March 28, 2006. Plaintiffs subsequently filed a first amended complaint on June 11, 2006, alleging that venue was proper in Cook County because many of the events, transactions, and omissions at issue occurred in Cook County. They also alleged that section 9-12(12) of the village code granted preliminary plan approvals for a one-year period, and if an extension is not granted within that time, the preliminary approval expires and a party must begin the process anew.

¶ 4 Defendants filed a second motion to transfer venue on August 9, 2006, contending that the alleged legal malpractice was caused by a Kane County attorney in Kane County and

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concerned the failure to secure an extension of approval for property in Kane County. The trial court denied defendants' motion on October 16, 2006. Defendants subsequently filed a motion for summary judgment, contending that the application for extension had to be submitted within one year following the preliminary plan approval. In a memorandum opinion denying the motion, the court found that the code was ambiguous as to whether an application for extension could be granted by the village board more than one year after the grant of preliminary plan approval. On August 27, 2009, defendants filed a motion *in limine* to bar plaintiffs' expert witness, Richard Ungaretti, from testifying that section 9-12(12) required that an extension be applied for and approved within a 12-month period. The trial court denied defendants' motion and reversed its prior ruling that the code was ambiguous, concluding that the extension had to be filed and granted within a 12-month period under the village code.

¶ 5 Just after opening statements, plaintiff's counsel read a number of admissions made by defendants in their pleadings to the jury. Of relevance to this appeal, defendants made the following admissions: (1) that Bolz learned of the need to obtain an extension of the preliminary plan approval on September 25, 2003; (2) that Bolz said he would apply for the extension; and (3) that the village code provided that upon receiving preliminary plan approval, plaintiffs had one year to submit final plan documents to the Village Board for approval.

¶ 6 The evidence presented at trial established that Voutiritsas, as beneficiary of the North Star Land Trust, owned a 42-acre parcel of development property at Sommerset Lake (Sommerset Lake) in the Village of Carpentersville (village) in Kane County, Illinois. Voutiritsas, who owns a land development and construction business in Cook County, has owned

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the property since the 1990s. The village granted preliminary plan approval for Sommerset Lake on January 7, 2003, which was valid under section 9-12(12) of the village code until January 7, 2004. Plaintiffs' preliminary plan sought to improve Sommerset Lake with 372 rental apartment units. Voutiritsas testified that previous attempts to obtain preliminary plan approval failed.

¶ 7 In March 2003, plaintiffs were represented by James Kiss, a local real estate investor and attorney. At their first meeting, Kiss told Voutiritsas he believed a low-level condominium development would be more successful than the planned high-end apartment development at Sommerset Lake. However, on August 20, 2003, Kiss notified plaintiffs that he could no longer represent them on matters pertaining to Sommerset Lake because of a conflict of interest. Kiss recommended that plaintiffs hire James Bolz to replace him and arranged a meeting between them.

¶ 8 Bolz testified that he first met with Kiss on September 15, 2003, to discuss the Sommerset Lake project and that Kiss asked him to serve as co-counsel. He and Kiss met with Voutiritsas and his son-in-law, Christopher Noon, who was also involved in the business, on September 18, 2003, at Bolz's office in West Dundee, Kane County, Illinois. During the meeting, they discussed the current 372-apartment unit project for Sommerset Lake that had preliminary approval by the village. Voutiritsas testified that he always used people from the area when doing a development project, and he asked Bolz to represent him because he felt comfortable with him. Voutiritsas told Bolz he wanted him to get an extension of the preliminary plan approval and to contact the village to determine if Sommerset Lake could be improved with condominiums. According to Voutiritsas, Bolz stated that he could file for the

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extension at any time but that it had to be filed prior to expiration and that the filing fee was \$1,000. Bolz stated that such extensions were typically granted and Voutiritsas indicated that he wanted a one-year extension.

¶ 9 Bolz and Kiss subsequently met with village officials on September 24, 2003, to discuss the Sommerset Lake project. At the conclusion of the meeting, Bolz was charged with determining how to convert the project and extend its density.

¶ 10 Kiss sent Bolz a letter on September 29, 2003, suggesting that Bolz write to the village regarding installation of a private road versus a public road, installation of a traffic signal versus a right in/right out intersection, parking, restrictions concerning the building, reduction of the pool's size, density of the project, utilities and issues regarding sewage. Additionally, the letter also indicated that a decision still had to be made as to whether an extension would be filed.

¶ 11 Bolz sent the village a letter on October 6, 2003, raising questions from the meeting and requested a response. Bolz also asked the village to confirm the expiration date of the existing preliminary plan approval. The village responded with a letter on November 4, 2003, advising Bolz that the preliminary plan approval would expire on January 7, 2004, and that it only authorized the development of rental apartments at Sommerset Lake. The letter further advised Bolz that if the developer wanted to do condominiums instead, a new preliminary plan for condominium development would have to be filed and approved. Bolz forwarded a copy of the letter to Voutiritsas. Bolz, Voutiritsas and Kiss met on November 21, 2003, to discuss the village's letter and Voutiritsas told Bolz not to proceed further until he contacted Bolz.

¶ 12 On December 30, 2003, Voutiritsas contacted Bolz and asked him to file for an extension

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of the preliminary plan approval, and subsequently sent a check to Bolz for the extension fee.

Bolz filed the extension request with the village's Community Development Director on January 5, 2004. Subsequently, the village manager and Community Development Director each wrote memorandums to the Village Board recommending that extension of the preliminary plan approval for Sommerset Lake be granted until March 22, 2004. At the board meeting on January 20, 2004, no motion was made to adopt or deny the resolution and the extension request was not approved.

¶ 13 The following day, the Community Development Director sent Bolz a letter indicating that the extension request was denied and also returned the check. Bolz sent a copy of the letter to Kiss, but not to Voutiritsas. Bolz subsequently met with Kiss and Voutiritsas on February 6, 2004. However, Voutiritsas did not recall the meeting. Bolz testified that they discussed whether apartments or condominiums would be viable and financing for the Sommerset Lake project. He also testified that he returned the check to Voutiritsas and told them that the extension request was denied. Voutiritsas testified that Bolz never told him that the extension request was denied and Bolz never returned the check. He also stated that never verified whether or not the extension had been granted or denied, but assumed that it had been.

Voutiritsas further testified that he did not learn that the extension request was denied or of the January 21, 2004, letter from the village until he attempted to sell the property to Centex Homes¹

¹Alex Jansen from Centex Homes called Noon on May 20, 2004, and notified him that extension of the preliminary plan approval had been denied and faxed him a copy of the village's January 21, 2004, letter so indicating.

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in May 2004.

¶ 14 Bolz further stated that he and Kiss met with the village again on February 17, 2004, and were told that the process would have to start again. They then met with Voutiritsas on March 12, 2004, and Bolz later reviewed some Centex documents for Voutiritsas. Voutiritsas testified that he never called Bolz after receiving notice that the extension was denied; he did not contact Bolz again until he was ready to sue. At the time of trial, plaintiffs still owned the Somerset Lake property.

¶ 15 Noon testified that it would have taken them 30 to 45 days to fulfill the requirements for final plan submission. He also stated that Bolz told them they would get a one-year extension of the preliminary plan approval and that the extension request had to be filed prior to expiration of the preliminary approval.

¶ 16 Plaintiff's expert, Richard Ungaretti, testified that his interpretation of the code was the same as the trial court's, namely that it required an extension request to be granted within one year of the preliminary approval. In his opinion, Bolz' filing an extension request on January 5, 2004, was insufficient time. Ungaretti opined that Bolz was negligent when he told plaintiffs that the extension request need only be filed by January 7, 2004; he believed that Bolz should have advised plaintiffs to request an extension as soon as possible after their first meeting because there was no way to get final approval if the extension request was denied.

¶ 17 On cross-examination, Ungaretti admitted that he previously represented Voutiritsas in 1987 but could not recall the matter specifically. He admitted that his opinion regarding the meaning of the ordinance was not included in his affidavit. Ungaretti also stated that it was

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reasonable for defendant to talk to village staff about the meaning of the ordinance.

¶ 18 Defendants filed a motion for directed verdict on plaintiffs' claim that they were negligent based on an alleged misinterpretation of the village code. The trial court denied the motion based on its prior ruling on defendants' motion *in limine*. The jury subsequently returned a verdict in favor of plaintiffs.

¶ 19 Defendants subsequently filed a posttrial motion for judgment *n.o.v.* contending that the trial court erred in denying their motion for directed verdict and argued that plaintiffs did not prove proximate cause or actual damages. The trial court denied defendants' motion and this timely appeal followed.

¶ 20 **DISCUSSION**

¶ 21 On appeal, defendants contend that (1) the trial court erred in denying their motion to change venue; (2) the trial court erred in its interpretation of the village code; (3) the trial court erred in instructing the jury on the elements of professional negligence and damages and failed to instruct the jury regarding plaintiffs' failure to submit certain evidence; and (4) the trial court erred in denying defendants' posttrial motion for JNOV.

¶ 22 **Motion to Change Venue**

¶ 23 Defendants first contend that the trial court erred in denying their motion to change venue because venue was inappropriate in Cook County. Specifically, they argue that the subject real property was located in Kane County, defendants were in Kane County, and the alleged inaction by defendants occurred in Kane County. In contrast, defendants note that only plaintiffs were residents of Cook County and that is the only contact with Cook County present.

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¶ 24 As a preliminary matter, we address plaintiffs' contention that defendants have presented this court with an insufficient record upon which to review the denial of defendants' motion for change of venue.

¶ 25 An appellant has the burden of presenting a sufficiently complete record of the trial proceedings to support a claim of error. *Leary v. Eng*, 214 Ill. App. 3d 279, 283 (1991); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Without such a record, this court will presume the trial court acted correctly. *Leary*, 214 Ill. App. 3d at 283; *Foutch*, 99 Ill. 2d at 392. However, if the issues raised involve questions of law which are reviewed *de novo*, we may address the merits without a complete record of the proceedings. *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 29 (2003). See also *Dubey v. Abam Building Corp.*, 266 Ill. App. 3d 44, 46 (1994) (appellate court may address merits of case with incomplete record if determination can be made from that record). Additionally, we will resolve any doubts arising from the incompleteness of the record against the appellant. *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 888 (2008).

¶ 26 Section 2-101 of the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2006)) provides in pertinent part: "every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose." 735 ILCS 5/2-101 (West 2006). Here, as stated previously, plaintiffs filed this action in Cook County. Defendants, Kane County residents, argue that venue was inappropriate in Cook County and that Kane County was the proper venue.

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¶ 27 “ ‘Proper venue is an important statutory privilege.’ ” *Corral*, 217 Ill. 2d at 154 (quoting *Bucklew v. G.D. Searle & Co.*, 138 Ill. 2d 282, 299 (1990)). A defendant has the right to insist that a lawsuit proceed in a proper venue, provided the defendant raises a timely venue objection. *Corral*, 217 Ill. 2d at 154. A defendant may raise, waive, or forfeit an objection to improper venue. 735 ILCS 5/2-104(b) (West 2006)); *Corral*, 217 Ill. 2d at 154.

¶ 28 The determination of proper statutory venue raises separate issues of fact and law. We will not disturb a trial court’s factual findings unless those findings are against the manifest weight of the evidence. *Corral*, 217 Ill. 2d at 154-55. After reviewing the trial court’s factual findings, we review the legal effect of the trial court’s conclusions *de novo*. *Corral*, 217 Ill. 2d at 155.

¶ 29 It is defendant’s burden to prove that plaintiff’s venue selection was improper, setting forth specific facts and showing a clear right to the relief asked for. *Corral*, 217 Ill. 2d at 155 (citing *Weaver v. Midwest Towing, Inc.*, 116 Ill. 2d 279, 285 (1987)). “ ‘Any doubts arising from the inadequacy of the record will be resolved against the defendant.’ ” *Corral*, 217 Ill. 2d at 155 (quoting *Weaver*, 116 Ill. 2d at 285).

¶ 30 Defendants argue that venue was improper in Cook County because although plaintiffs were residents of Cook County, defendants were residents of Kane County and all alleged transactions related to the underlying legal malpractice claims occurred in Kane County. However, nothing in the record contains the trial court’s factual findings or the basis for the trial court’s decision. The order denying defendants’ motion to transfer venue simply states, “This matter coming to be heard for argument on Defendants’ motion to transfer venue- Amended

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Complaint, the Court duly advised in the premises, it is hereby ordered that Defendants' Motion to Transfer Venue-Amended Complaint is DENIED." The supporting record contains no transcript of the hearing on the motion and no additional record or report of proceedings was provided to this court as permitted by Illinois Supreme Court Rule 306(h) (eff. Sept. 1, 2006). Nor was there a bystander's report or agreed statement of facts filed as authorized under Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005).

¶ 31 From our examination of the supporting record, we know only that defendants' motion to transfer venue on the amended complaint was called for hearing on October 16, 2006. We do not know what evidence or arguments were presented at the hearing, nor do we know the trial court's findings of fact or its reasons for denying defendants' motion to transfer venue; we know only that the motion was denied after a hearing. Thus, we cannot determine whether the trial court's order was based on one or more of the statutory bases for venue. Without an adequate record, we are unable to review the claimed error to determine whether the trial court's factual findings were against the manifest weight of the evidence, or consider the legal effect of its factual findings. Accordingly, we must affirm the denial of defendants' motion to transfer venue to Kane County.

¶ 32 Interpretation of Village Code

¶ 33 Defendants next contend that the trial court erred in its interpretation of the village code related to preliminary plan approvals. Defendants note that the trial court initially concluded that the code was ambiguous but reversed itself on the "eve of trial" when ruling on a motion *in limine*, finding that the code provided that preliminary plan approvals expired within 12 months

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from the original approval unless an extension is granted within that time period. Defendants contend that the trial court's interpretation of the village code, including its conclusion that defendants misinterpreted the code, was the sole basis of plaintiffs' damage claim. They argue that the court's conclusions were included with the jury instructions and effectively prevented defendants from fully cross-examining plaintiff's expert regarding the reasonableness of their actions.

¶ 34 The rules which govern the construction and interpretation of statutes are used in construing municipal ordinances. *Village of Spring Grove v. Doss*, 202 Ill. App. 3d 858, 861 (1990). Courts should first look to the statutory language as the best indication of the intent of the drafters. *Spring Grove*, 202 Ill. App. 3d at 858. Interpretation of an ordinance is a question of law, and our standard of review is *de novo*. *Hawthorne v. Village of Olympia Fields*, 328 Ill. App. 3d 301, 306 (2002).

¶ 35 The village code at issue in the instant case provides as follows:

“Effect of Approval of Preliminary Plan.

Approval by the Board of Trustees at this stage does not constitute acceptance of the subdivision.

Approval of the preliminary plan shall be:

- a. Considered permission to prepare detailed plans and specifications for such proposed subdivision and for all public improvements therein; and
- b. Effective for no more than twelve (12) months from

the date approval was granted unless, upon application of the subdivider within the period that such approval is valid, the Board of Trustees grants an extension of time beyond such period. The application for such extension shall not require an additional filing fee.

If a final plan has not been approved as required by the provisions of this Ordinance within such twelve (12) month period, or any extensions granted thereto, the preliminary plan must be resubmitted to the Plan Commission as if such plan had never been approved.” Section 9-12(12), Carpentersville Illinois Village Code.

¶ 36 Reviewing the plain language of the statute, we find that it requires a final plan approval or extension of the preliminary plan approval to be applied for and granted by the Board within 12 months from the time that the preliminary plan approval was granted. If neither of those is obtained within that 12-month period, the preliminary plan must be resubmitted “as if such plan had never been approved.” As such, we conclude that the trial court’s interpretation of the code was correct.

¶ 37 Jury Instructions

¶ 38 Defendants also contend that the trial court erred in instructing the jury on the elements

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of

professional negligence and damages and that the court further failed to instruct the jury regarding plaintiffs' failure to submit certain evidence.

¶ 39 The decision as to which jury instructions to use falls within the discretion of the trial court, which a reviewing court will not disturb absent an abuse of that discretion. *Weisman v. Schiller, Ducanto & Fleck, Ltd.*, 368 Ill. App. 3d 41, 59 (2006). On review, the given instructions should be considered as a whole to determine whether they fairly and fully stated the law applicable to the case. *Nika v. Danz*, 199 Ill. App. 3d 296, 307 (1990). Only where it is determined that an instruction misled the jury, thereby prejudicing the losing party, should a reviewing court reverse the trial court. *Nika*, 199 Ill. App. 3d at 307.

¶ 40 Defendants contends that the trial court erred in giving plaintiffs' instruction No. 15, which was given over defendants' objection. Defendants objected to wording contained in the third paragraph of the instruction, namely, "evidence of ordinances and other sources," and argue on appeal that the wording invited the jury to go beyond the testimony of plaintiffs' expert witness and invited a finding of liability based only on the fact that an erroneous judgment was made on interpretation of the village code.

¶ 41 Plaintiffs' instruction No. 15, which is identical to Illinois Pattern Jury Instruction No. 105.01 (Illinois Pattern Jury Instructions, Civil, No. 105.01 (2006) (hereinafter IPI Civil 2006)), stated as follows:

“ ‘Professional negligence,’ by a lawyer is the failure to do something that a reasonably careful lawyer would do or the doing

of something that a reasonably careful lawyer would not do under the circumstances similar to those shown by the evidence.

The phrase, ‘deviation from the standard of practice,’ means the same thing as ‘professional negligence.’

To determine what the standard of practice required in this case is, you must rely upon opinion testimony from qualified witnesses, evidence of ordinances and other sources. You must not attempt to determine this question from any personal knowledge you have. The law does not say how a reasonably careful lawyer would act under these circumstances. That is for you to decide.”

¶ 42 Illinois Supreme Court Rule 239(a) (eff. Jan. 1, 1999) requires that whenever the IPI contains an instruction applicable to a civil case, that instruction should be used unless the court determines that it does not accurately state the law. *Nika*, 199 Ill. App. 3d at 307. To establish legal malpractice, a plaintiff must prove the existence of an attorney-client relationship establishing a duty on the part of the attorney, a negligent act or omission constituting a breach of that duty, a proximate casual relationship between the breach and the damages. *Weisman*, 368 Ill. App. 3d at 51. In professional negligence cases, the plaintiff bears the burden of establishing the standard of care through expert witness testimony. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 24 (1996). This requirement is based on the fact that without expert testimony, jurors, unskilled in the profession, are not equipped to judge the professional’s conduct. *Advincula*, 176

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Ill. 2d at 24, 33.

¶ 43 In a recent case, our Supreme Court considered whether IPI Civil (2006) No. 105.01 accurately states Illinois law on the type of evidence a jury may consider in determining whether a physician has complied with the standard of care. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶1. The court found that the distinction between the evidence required to establish professional negligence versus institutional negligence “has been completely eliminated by the 2006 IPIs,” and the 2006 professional negligence IPI does not reflect the necessity of expert testimony. *Studt*, 2011 IL 108182, ¶23. The court specifically noted that “bylaws, rules, regulations, policies, and procedures” were now on equal footing with expert testimony in judging a professional’s conduct, which is not the law in Illinois. *Studt*, 2011 IL 108182, ¶23. The court held that because the 2006 professional negligence IPI did not accurately state the law, the trial court erred in giving the instruction to the jury, and that reversal was warranted if the error resulted in “serious prejudice” to the defendant’s right to a fair trial. *Studt*, 2011 IL 108182, ¶28.

¶ 44 Similarly, in the case at bar, the 2006 professional negligence IPI was given to the jury which was not an accurate statement of the law. Accordingly we find that the trial court erred in giving the instruction over defendant’s objection. We further find that defendants were seriously prejudiced by the instruction as it misled the jury as to the definition of professional negligence and there is no way to determine whether the jury only considered the expert's testimony as to the standard of care or viewed defendant Bolz' misapplication of the village code as proof of his professional negligence. Thus, a new trial is warranted. See *Weisman*, 368 Ill. App. 3d at 59.

¶ 45 Remaining Issues

¶ 46 Our disposition of the preceding issue makes it unnecessary to address defendants' remaining issues as we are remanding for a new trial. See *Karcazes v. Antoniou*, 174 Ill. App. 3d 1074, 1080 (1988).

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we affirm the order of the circuit court of Cook County denying defendants' motion for change of venue based on the principles set forth in *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984); affirm the trial court's interpretation of the village code related to preliminary plan approvals; and remand for a new trial on the basis of improper jury instructions.

¶ 49 Affirmed in part; vacated in part; cause remanded.

¶ 50 JUSTICE STERBA, dissenting:

¶ 51 I cannot join in today's decision because I do not agree with the majority that the error in giving the professional negligence instruction prejudiced the defendants. Accordingly, I would affirm the judgment of the trial court and reach the remaining issues on appeal.

¶ 52 In *Studt*, our supreme court held that the defendants were not seriously prejudiced by the erroneous instruction, thus, reversal was not warranted. *Studt*, 2011 IL 108182 at ¶31. In reaching this conclusion, the court determined that although the rules and regulations were admitted into evidence, and the jury was erroneously instructed that it could rely on rules and regulations in addition to expert testimony in determining the standard of care that was required, the rules and regulations themselves were not held out as establishing the standard of care. *Id.* at

¶29.

¶ 53 This is analogous to the case at bar. The language of the ordinance was admitted into evidence and the court ruled on the proper interpretation of the ordinance, but the ordinance itself was not held out as establishing the standard of practice. In fact, contrary to defendants' repeated assertions that Ungaretti merely said that Bolz wrongly interpreted the ordinance, the court prevented both sides from even discussing the interpretation of the ordinance during Ungaretti's testimony. Instead, Ungaretti opined that a reasonably careful lawyer would have filed a request for an extension with enough time not only to obtain a ruling on the request prior to the expiration date, but also to prepare a final plan for submission if the request was denied.

¶ 54 Not only do I think the defendants failed to demonstrate that they were seriously prejudiced, I do not believe they demonstrated that they were prejudiced at all. The ordinance had to be presented and the meaning of the ordinance had to be ruled on by the court, because that interpretation established the baseline for the expert's opinion about whether filing a request for an extension two days before the deadline constituted professional negligence. Without that baseline, the expert could not even express an opinion about whether the attorney violated the standard of practice. The jury had to consider the meaning of the ordinance regardless of whether the word "ordinance" was included in the professional negligence instruction.

¶ 55 As in *Studt*, the ordinance "merely buttressed the expert testimony" that Bolz violated the standard of practice by failing to timely file the extension request. See *Id.* However, the ordinance itself was never held out as establishing the standard of practice. Thus, it is my view that the jury could not have been misled and the defendants were not prejudiced by the erroneous

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instruction. I therefore respectfully dissent.