

No. 1-11-0635

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

JOEL SCHWABE,)	
)	
Plaintiff,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
HAHN AGENCY, INC., and ROBERT J. HAHN,)	No. 06 L 10213
)	
Defendants and Third-Party Plaintiffs-Appellants)	Honorable
)	Allen S. Goldberg,
)	Judge Presiding.
(Buschbach Insurance Agency, Inc.,)	
)	
Third-Party Defendant-Appellee).)	

JUSTICE R. GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Where a third-party plaintiff files a complaint for contribution against a third-party defendant, the third-party plaintiff's appeal from the trial court's grant of summary judgment was rendered moot when the third-party plaintiff entered into a settlement agreement that did not extinguish the third-party defendant's liability in the underlying action.

No. 1-11-0635

¶ 2 Plaintiff Joel Schwabe filed suit against defendants Hahn Agency, Inc., and Robert Hahn (collectively, Hahn) for insurance producer malpractice in connection with a lapse of coverage for Schwabe's carpentry business. Hahn then brought an action against third-party defendant Buschbach Insurance Agency, Inc. (Buschbach), for contribution. Buschbach filed a motion for summary judgment in the third-party action, which the trial court granted, finding that Hahn's complaint was time-barred. Schwabe and Hahn subsequently entered into a settlement agreement in the underlying action and Schwabe's complaint against Hahn was dismissed with prejudice. Hahn appeals the grant of Buschbach's motion for summary judgment, arguing that the trial court applied the incorrect statute of limitations. For the following reasons, we dismiss the appeal as moot.

¶ 3 BACKGROUND

¶ 4 I. Underlying Action

¶ 5 On September 27, 2006, Schwabe filed a complaint for negligence against Hahn (the underlying complaint); the complaint was amended three times. The third amended complaint makes the following allegations. On October 11, 2003, Schwabe gave a check to Hahn, his insurance broker, to renew his insurance policy with Western Heritage Insurance Company (Western Heritage), which had previously provided commercial liability coverage for Schwabe's carpentry business. In violation of Hahn's duty of ordinary care and skill, Hahn waited until October 29, 2003, to renew the insurance policy, leaving Schwabe without insurance from October 11, 2003, to October 29, 2003. On November 26, 2003, Schwabe received a copy of his renewed Western Heritage insurance policy and a letter from Hahn stating that the policy was an

No. 1-11-0635

“October 11th renewal” of his Western Heritage insurance; Hahn did not inform Schwabe that the policy was not renewed on October 11, 2003, and that Schwabe had a gap in coverage.

Schwabe was later sued in a negligence action for damages that arose from an injury involving Schwabe’s equipment that occurred on October 15, 2003, and, because of Hahn’s negligent acts, did not have insurance coverage and was forced to hire an attorney to defend the lawsuit.

Schwabe sought judgment against Hahn “in such amount as is found to be due,” plus costs.

¶ 6 The injured individual’s mediation memorandum, which is included in the record on appeal, indicates that the injured individual and Schwabe settled the claim for \$40,000; the same mediation memorandum includes an affidavit from Schwabe’s attorney that his attorney fees totaled \$66,802.07. Thus, the record indicates that Schwabe was responsible for approximately \$107,000.

¶ 7 Attached to Schwabe’s complaint was a letter from Western Heritage, stating that the injury involving Schwabe’s business occurred during the lapse in coverage, and that Western Heritage declined to defend or indemnify Schwabe.

¶ 8 Also attached to Schwabe’s complaint was Hahn’s deposition testimony, in which defendant Hahn stated that he had faxed a request to renew the policy on October 9, 2003, followed by a second request on October 29. He additionally testified that he received the policy on November 25 and did not notice that the incorrect effective date was listed on the policy: “I looked at the policy, reviewed the policy. And perhaps it was an assumption on my part given that I requested a renewal and received a renewal policy. And the date on the policy differed from the originally requested renewal date. *** I missed the policy date. I glanced over the

No. 1-11-0635

policy and missed the different date on the policy.” He testified that he became aware of the gap in coverage only in October 2005 when Schwabe requested copies of the policy. He contacted the president of Buschbach at that time, who told him that Buschbach had not received a fax transmittal from Hahn on October 9, 2003, and that the policy date could not be changed.

¶ 9 In response to a discovery request in the underlying action, Hahn admitted that on or before October 11, 2003, Schwabe requested that Hahn renew Schwabe’s policy with Western Insurance and gave Hahn a check for the renewal of the policy. Hahn further admitted to sending a letter to Schwabe stating, “ ‘Enclosed please find the October 11, 2003 renewal of the property/liability coverage’ ” and that no documents or correspondence was sent informing Schwabe of a lapse in coverage. Hahn explained in answers to interrogatories in the underlying action that Hahn sent a fax to Buschbach on October 9, 2003, requesting renewal of the Western Heritage policy effective October 11, 2003, and “anticipated that the renewal policy issued by Western Heritage was effective on the requested renewal date of October 11, 2003.” Hahn admitted that, after October 2005, defendant Hahn spoke to the president of Buschbach, who informed him that Buschbach had no record of receiving a fax on October 9, 2003, requesting renewal of the Western Heritage policy as of October 11, 2003.

¶ 10 In its brief to this court, Hahn concedes that “when the policy was delivered to him on or about November 25, 2003, he reviewed the policy’s terms and coverages, but missed the gap in coverage.” Hahn’s brief further states that “Hahn first learned of the gap in coverage when Schwabe called him for copies of the policies in October[] 2005, after [the injured individual] had sued Schwabe.”

¶ 11 II. Third-Party Contribution Claim

¶ 12 On October 30, 2007, Hahn filed the instant action, which is a one-count third-party complaint for contribution against Buschbach. The complaint alleges that, prior to October 11, 2003, Hahn engaged in a business relationship with Buschbach and that pursuant to that relationship, Hahn procured Western Heritage insurance coverage for Schwabe through Buschbach. Hahn procured insurance for Schwabe for the periods of (1) October 11, 2000, through October 11, 2001; (2) October 11, 2001, through October 11, 2002; and (3) October 11, 2002, through October 11, 2003.

¶ 13 The third-party complaint alleges that on October 9, 2003, Hahn sent a commercial insurance proposal to Buschbach via fax, requesting that Buschbach renew the insurance coverage with an effective date of October 11, 2003. Hahn resubmitted the request on October 29, 2003, again requesting that the coverage be renewed with an effective date of October 11, 2003, and marking the request as a second request.

¶ 14 The third-party complaint further alleges that Buschbach had a duty to exercise reasonable skill, diligence, and ordinary care with respect to the requests for renewal of coverage it received from Hahn on October 9, 2003, and October 29, 2003, and that Buschbach breached its duties by: (1) failing to timely process the request for renewal it received on October 9, 2003; (2) failing to timely notify Hahn that Buschbach had not processed the request for renewal received by Buschbach on October 9, 2003; (3) upon receiving the second request for renewal on October 29, 2003, failing to properly process the renewal so as to effect a renewal with an effective date of October 11, 2003, to avoid a gap in coverage; (4) failing to notify Hahn of

No. 1-11-0635

Buschbach's failure to obtain the renewal in accordance with the request submitted by Hahn; and (5) being "otherwise careless and negligent in the processing of the renewal request" from Hahn.

¶ 15 The third-party complaint alleges that, as a proximate cause of Buschbach's negligence, Hahn has been sued by Schwabe and Hahn has been exposed to damages including but not limited to any sum of money awarded in favor of the injured individual and against Schwabe in the personal injury suit, and attorney fees and costs in defending the lawsuit brought against Hahn by Schwabe. Accordingly, Hahn requested judgment against Buschbach for any sums of money that Hahn was required to pay to Schwabe as a result of the underlying lawsuit against Hahn, as well as attorney fees, costs, and interest.

¶ 16 In its answer, Buschbach denied receiving a fax from Hahn on October 9, 2003.

¶ 17 On February 13, 2008, Buschbach filed an affirmative defense to the third-party complaint, alleging that the claim was barred by the two-year statute of limitations for a cause of action brought against an insurance producer, as provided in section 13-214.4 of the Code of Civil Procedure (the Code) (735 ILCS 5/13-214.4 (West 2006)), which states that "[a]ll causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues." Buschbach alleges that Hahn knew or should have known as early as October 11, 2003, that Schwabe's policy had not been renewed effective October 11, 2003, and that there would be a gap in coverage under the policy. Buschbach further alleges that Hahn knew or should have known by

No. 1-11-0635

October 29, 2003, when it sent a request for renewal to Buschbach, that there was a gap in coverage under Schwabe's policy.

¶ 18 III. Summary Judgment and Settlement

¶ 19 On February 26, 2010, Buschbach filed a motion for summary judgment on the third-party complaint arguing that the contribution claim was time-barred under the two-year statute of limitations for actions against insurance producers because: (1) Hahn knew or should have known that a lapse in coverage existed no later than November 25, 2003; and (2) Hahn did not file its third-party complaint until October 30, 2007, almost two years too late. In addition, Buschbach argued that Hahn's complaint was barred under the *Moorman* or "economic loss" doctrine. Attached to the motion for summary judgment was the deposition transcript of Buschbach's president, in which she testified that the renewal could not be backdated and that Buschbach received a letter on October 31, 2005, from Hahn informing Buschbach of the issue concerning the effective date of the policy renewal.

¶ 20 In the response to the motion for summary judgment, Hahn argued that there were three possibilities for the accrual of the cause of action: (1) at the earliest, the cause of action accrued when Hahn wrote to Buschbach acknowledging the gap in coverage; (2) alternately, and most likely, the cause of action accrued when coverage was denied on April 19, 2006; or (3) at the latest, the cause of action accrued when Schwabe filed his action against Hahn. In any event, the third-party complaint was filed before any of the possible statutes of limitations had expired. In the response, Hahn did not explicitly refer to section 13-204 of the Code (735 ILCS 5/13-204 (West 2006)), which he now argues on appeal contains the applicable statute of limitations.

No. 1-11-0635

However, he did draw an analogy to the “Contribution statute of limitations,” and argued that the same result should apply here.

¶ 21 On May 20, 2010, the trial court granted summary judgment in favor of Buschbach, finding that the accrual date on the negligent procurement action was November 25, 2003, when Hahn reviewed Schwabe’s renewal policy. The trial court applied the two-year statute of limitations provided in section 13-214.4 of the Code (735 ILCS 5/13-214.4 (West 2006)), finding that the third-party complaint should have been filed no later than November 25, 2005. Since it was filed on October 30, 2007, it was nearly two years too late. Accordingly, the trial court granted Buschbach’s motion for summary judgment.

¶ 22 Hahn filed a motion to reconsider, arguing that the trial court had applied the incorrect statute of limitations when it determined that the cause of action accrued on November 25, 2003. Instead, Hahn argued that the statute of limitations governing contribution and indemnity preempted the statute of limitations for actions against insurance producers. 735 ILCS 5/13-204 (West 2006) (contribution and indemnity); 735 ILCS 5/13-214.4 (West 2006) (insurance producers). Since section 13-204(b) provided that “no action for contribution or indemnity may be commenced more than 2 years after the party seeking contribution or indemnity has been *served with process in the underlying action* or more than 2 years from the time the party, or his or her privy, knew or should reasonably have known of an act or omission giving rise to the action for contribution or indemnity” (emphasis added) (735 ILCS 5/13-204(b) (West 2006)), Hahn argued that the third-party complaint for contribution was not time-barred because the accrual date occurred when Schwabe filed suit against Hahn on September 26, 2006.

No. 1-11-0635

¶ 23 On January 28, 2011, the trial court denied Hahn’s motion to reconsider, finding that Hahn failed to cite precedent for its preemption argument, but as a result of the court’s own research, it found that section 13-214.4 applies even to third-party claims. In the same order, the trial court also dismissed Schwabe’s causes of action against Hahn with prejudice pursuant to an executed release, which was part of a settlement agreement between Schwabe and Hahn. The settlement agreement and release were never made a part of the record on appeal, although it was attached to Buschbach’s motion to dismiss filed before this court and to Buschbach’s appellate brief. However, both parties agree in their briefs to us that the settlement agreement released Hahn and did not name Buschbach. This appeal followed.

¶ 24 After Hahn filed the notice of appeal in the instant case, Buschbach moved in the appellate court to dismiss Hahn’s appeal as moot. In a one-line order, we denied the motion at that time. *Hahn Agency, Inc. v. Buschbach Insurance Agency, Inc.*, No. 1-11-0635 (Oct. 11, 2012). The order stated, in full:

“This cause coming before the Court on the motion of the
Third-Party Defendant-Appellee Buschbach Insurance Agency, Inc.
to dismiss the appeal as moot, due notice having been given and
the Court being advised in the premises,

IT IS HEREBY ORDERED that Buschbach’s motion to
dismiss the appeal as moot is denied.” *Hahn Agency, Inc. v.*
Buschbach Insurance Agency, Inc., No. 1-11-0635 (Oct. 11, 2012).

¶ 25

ANALYSIS

¶ 26 On appeal, Hahn argues that the trial court erred in granting summary judgment in favor of Buschbach because the trial court applied the statute of limitations governing actions against insurance producers (735 ILCS 5/13-214.4 (West 2006)) when it should have applied the statute of limitations that applies to contribution and indemnity actions (735 ILCS 5/13-204 (West 2006)). In response, Buschbach raises a number of arguments that it claims are dispositive of the issue regardless of the merits of Hahn’s preemption argument: (1) that Hahn forfeited its argument that section 13-204 preempts section 13-214.4 by raising it for the first time in the motion to reconsider and thus has abandoned any objection to the circuit court’s ruling that the claim was barred under section 13-214.4; (2) that Hahn’s appeal must be dismissed as moot under section 2(e) of the Joint Tortfeasor Contribution Act (the Contribution Act) (740 ILCS 100/2(e) (West 2006)) because the terms of Hahn’s settlement with Schwabe barred any contribution claim against Buschbach; and (3) that Hahn’s claim for contribution is barred by the *Moorman* doctrine. Additionally, Buschbach argues that section 13-204 does not apply to Hahn’s claim for contribution: (1) because section 13-204 applies only to contribution actions where the underlying claim involves injury to person or property; and (2) because Hahn has not established that the required elements of section 13-204 were satisfied. For the following reasons, we find that Hahn’s appeal is moot, and we dismiss the appeal.

¶ 27

I. Standard of Review

¶ 28 A trial court is permitted to grant summary judgment only “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

No. 1-11-0635

to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2008). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a trial court's decision on a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL App (1st) 110137, ¶ 26.

¶ 29 “Summary judgment is a drastic measure and should only be granted if the movant’s right to judgment is clear and free from doubt.” *Outboard Marine Corp.*, 154 Ill. 2d at 102. However, “[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment.” *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). A defendant moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing “ ‘that there is an absence of evidence to support the nonmoving party’s case.’ ” *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

¶ 30 “ ‘The purpose of summary judgment is not to try an issue of fact but *** to determine whether a triable issue of fact exists.’ ” *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). “ ‘To withstand a summary judgment motion, the nonmoving party need not prove his case at this preliminary stage

No. 1-11-0635

but must present some factual basis that would support his claim.’ ” *Schrager*, 328 Ill. App. 3d at 708 (quoting *Luu*, 323 Ill. App. 3d at 952). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 31 II. Statutes of Limitation at Issue

¶ 32 In the case at bar, Hahn asks us to determine whether section 13-214.4 or section 13-204 applies to his third-party complaint against Buschbach. Section 13-214.4 provides, in full:

“Action against insurance producers, limited insurance representatives, and registered firms. All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.” 735 ILCS 5/13-214.4 (West 2006).

¶ 33 Section 13-204 provides, in relevant part:

“(a) In instances where no underlying action seeking recovery for injury to or death of a person or injury or damage to property has been filed by a claimant, no action for contribution or indemnity may be commenced with respect to any payment made to that claimant more than 2 years after the party seeking

No. 1-11-0635

contribution or indemnity has made the payment in discharge of his or her liability to the claimant.

(b) In instances where an underlying action has been filed by a claimant, no action for contribution or indemnity may be commenced more than 2 years after the party seeking contribution or indemnity has been served with process in the underlying action or more than 2 years from the time the party, or his or her privy, knew or reasonably should have known of an act or omission giving rise to the action for contribution or indemnity, whichever period expires later.

(c) The applicable limitations period contained in subsection (a) or (b) shall apply to all actions for contribution or indemnity and shall preempt, as to contribution or indemnity actions only, all other statutes of limitation or repose, but only to the extent that the claimant in an underlying action could have timely sued the party from whom contribution or indemnity is sought at the time such claimant filed the underlying action ***.”

735 ILCS 5/13-204 (West 2006).

To the extent that we are called upon to interpret these statutes, our standard of review is *de novo*. *People v. Anthony*, 2011 IL App (1st) 091528, ¶ 8 (“The interpretation of a statute is a question of law that is reviewed *de novo*.”).

¶ 34

III. Mootness

¶ 35 In the case at bar, we agree with Buschbach that, regardless of the statute of limitations to be applied, the appeal of Hahn’s contribution claim against Buschbach was rendered moot by the settlement agreement between Hahn and Schwabe.

¶ 36 As an initial matter, Hahn argues that we have already decided that Buschbach’s argument is without merit because we denied Buschbach’s motion to dismiss the appeal as moot on October 11, 2012. *Hahn Agency, Inc. v. Buschbach Insurance Agency, Inc.*, No. 1-11-0635 (Oct. 11, 2012). However, “the denial of a motion to dismiss an appeal prior to briefing and argument is not final and may be revised at any time before the disposition of the appeal.” *Hwang v. Tyler*, 253 Ill. App. 3d 43, 45 (1993); see also *Estate of Gagliardo*, 391 Ill. App. 3d 343, 349 (2009); *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 57 (1999). As we have previously explained, “since there is but one appellate court, a panel *** revisiting, during an on-going appeal, an issue that another panel addressed in a ruling *** is the equivalent of one trial judge revisiting an interlocutory decision of the judge he succeeded.” *People ex rel. Madigan v. Illinois Commerce Comm’n*, 407 Ill. App. 3d 207, 222 (2010) (citing *Commonwealth Edison Co. v. Illinois Commerce Comm’n*, 368 Ill. App. 3d 734, 742 (2006)). Thus, “the law-of-the-case doctrine does not preclude” us from deciding to dismiss the appeal on mootness grounds. *Madigan*, 407 Ill. App. 3d at 222. Accordingly, we may consider Hahn’s argument.

¶ 37 As a general rule, Illinois appellate courts will not review moot cases. *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998). A case on appeal becomes moot, when “ ‘the issues involved in the trial court no longer exist,’ ” and it is “impossible for the appellate court to grant the complaining

No. 1-11-0635

party effectual relief.” *In re A Minor*, 127 Ill. 2d 247, 255 (1989) (quoting and citing *LaSalle National Bank v. City of Chicago*, 3 Ill. 2d 375, 378-79, 380 (1954)); *In re Barbara H.*, 183 Ill. 2d 482, 490-91 (1998) (consideration of the issues will not affect the result and “a decision on the merits cannot result in appropriate relief to the prevailing party”). In the case at bar, we find that it would be impossible for us to grant Hahn effectual relief, because Hahn’s settlement with Schwabe bars Hahn from seeking contribution from Buschbach.

¶ 38 The Contribution Act contemplates the sharing of common liability by two or more parties who are jointly responsible for the injury suffered by the plaintiff.” *Board of Trustees of Community College, District No. 508, County of Cook v. Coopers and Lybrand LLP*, 296 Ill. App. 3d 538, 549 (1998). However, under the Contribution Act, a settling tortfeasor may not bring a contribution action against a nonsettling tortfeasor unless the settlement extinguished the nonsettling tortfeasor’s liability. 740 ILCS 100/2(e) (West 2006). The statute provides in relevant part, that:

“(c) When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury ***, it does not discharge any of the other tortfeasors from liability for the injury *** unless its terms so provide ***.

(e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another

tortfeasor whose liability is not extinguished by the settlement.”

740 ILCS 100/2(c), (e) (West 2006).

¶ 39 The Contribution Act aims to address two public policy considerations: (1) the encouragement of settlement, and (2) the equitable apportionment of damages among tortfeasors. *Davis v. American Optical Corp.*, 386 Ill. App. 3d 866, 871 (2008) (citing *Johnson v. United Airlines*, 203 Ill. 2d 121, 133 (2003)). Therefore, only a settling tortfeasor who has paid more than his *pro rata* share in a settlement that extinguishes the liability of a nonsettling tortfeasor may seek contribution from that nonsettling tortfeasor. *Davis*, 386 Ill. App. 3d at 871; see also *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108 (1992).

¶ 40 In *Dixon*, the Illinois Supreme Court held that, where a nonsettling party was not a party to the settlement agreement, the settling party could not seek contribution from the nonsettling party under the Contribution Act, rendering the propriety of the dismissal of the contribution claim a moot issue. *Dixon*, 151 Ill. 2d at 117. The plaintiff, who was injured in a motor vehicle accident, brought a lawsuit seeking damages for his injuries against the driver of a motor vehicle, and four corporations including the plaintiff’s employer, Chicago and North Western Transportation Company (North Western)¹ and Jeep Corporation (Jeep). *Dixon*, 151 Ill. 2d at 111-13. North Western filed a counterclaim against Jeep, seeking contribution pursuant to the Contribution Act. *Dixon*, 151 Ill. 2d at 113. Jeep subsequently settled with the plaintiff. *Dixon*, 151 Ill. 2d at 113-114. On the same day the trial court entered the order approving the settlement

¹ The plaintiff filed suit against North Western pursuant to the Federal Employers’ Liability Act (45 U.S.C. § 51 *et seq.* (1988)).

No. 1-11-0635

agreement between Jeep and the plaintiff, the trial court also entered an order dismissing North Western's contribution claim against Jeep because of the settlement. *Dixon*, 151 Ill. 2d at 114. North Western appealed, and the appellate court affirmed. *Dixon*, 151 Ill. 2d at 114-15. During the pendency of the appeal to the supreme court, North Western settled with the plaintiff. *Dixon*, 151 Ill. 2d at 115.

¶ 41 Our supreme court held that North Western's settlement with the plaintiff barred it from seeking contribution from Jeep, rendering the dismissal of North Western's counterclaim for contribution moot. *Dixon*, 151 Ill. 2d at 115-16. The supreme court held that North Western's settlement agreement with the plaintiff did not extinguish Jeep's liability to the plaintiff because Jeep was not a party to the settlement agreement. *Dixon*, 151 Ill. 2d at 115-16. The supreme court noted that a party that settles may seek contribution only from parties whose liability was extinguished by the same settlement agreement. *Dixon*, 151 Ill. 2d at 116. The court pointed out that reinstating North Western's contribution claim against Jeep would only result in the dismissal of the contribution claim pursuant to section 2(e) of the Contribution Act, and that "North Western's settlement has made it impossible for this court to grant it effectual relief." *Dixon*, 151 Ill. 2d at 117.

¶ 42 Likewise, in the case at bar, Buschbach was not a party to the settlement agreement between Schwabe and Hahn. Thus, Schwabe released solely Hahn from liability and, accordingly, Hahn may not seek contribution from Buschbach. 740 ILCS 100/2(e) (West 2006); *Dixon*, 151 Ill. 2d at 118. Consequently, if we were to grant Hahn's request and reverse the grant

No. 1-11-0635

of summary judgment, like in *Dixon*, Hahn's complaint would be dismissed by the trial court pursuant to section 2(e) of the Contribution Act.

¶ 43 Hahn argues that we should not look solely to the terms of the settlement agreement and release, but should consider the effect of the settlement and release to determine whether the settlement extinguished Buschbach's liability to Schwabe. Hahn cites to *Solimini v. Thomas*, 293 Ill. App. 3d 430 (1997), where the appellate court upheld a right of contribution for a tortfeasor that satisfied the full judgment as settlement of a jury verdict, and subsequently sought contribution against a joint tortfeasor. The jury verdict was against both the settling and nonsettling tortfeasors. *Solimi*, 293 Ill. App. 3d at 432. Although the terms of the settlement between the settling tortfeasor and the plaintiff did not reference the nonsettling tortfeasor, the settling tortfeasor satisfied the complete judgment against both it and the nonsettling tortfeasor, demonstrating that it had paid more than its *pro rata* share to effectuate the settlement. *Solimi*, 293 Ill. App. 3d at 436. Further, the settling tortfeasor was solely asking for contribution from the nonsettling tortfeasor solely in excess of its *pro rata* share. *Solimini*, 293 Ill. App. 3d at 432-33. The appellate court held that the satisfaction of the full jury verdict, in effect, acted to extinguish the nonsettling tortfeasor's liability. *Solimini*, 293 Ill. App. 3d at 436.

¶ 44 Unlike the settlement in *Solimini*, there was no jury verdict that Hahn satisfied, and thus, Hahn has not provided any evidence that it paid all of plaintiff's damages or paid in excess of its *pro rata* share. As noted in the Contribution Act, the "right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability." 740 ILCS 100/2(b) (West 2006). Schwabe's cause of action was solely against Hahn. Schwabe's

No. 1-11-0635

complaint alleged that, due to the fact that Schwabe's insurer declined to defend and indemnify the injury that occurred involving Schwabe's equipment during the lapse in coverage, Schwabe was responsible for the costs associated with the injury, which totaled at least \$106,000 (settlement costs and attorney fees). However, Hahn has not shown that its settlement with Schwabe satisfied the full amount that Schwabe could recover from all tortfeasors. As the appellant, Hahn has the burden of providing a sufficiently complete record to enable us to review his claims. *Scassifero v. Glaser*, 333 Ill. App. 3d 846, 860 (2002). In the absence of evidence that Hahn satisfied the full amount of liability, we cannot find that the settlement agreement operated to extinguish Buschbach's liability. Since the Contribution Act bars Hahn from recovering from Buschbach, the question of whether summary judgment was properly granted is now moot.

¶ 45 As a final matter, we note that there are exceptions to the mootness doctrine "in certain, rare cases." *Dixon*, 151 Ill. 2d at 117. "An otherwise moot issue will occasionally be considered where [1] 'the magnitude or immediacy of the interests involved warrant[s] action by the court' or [2] where the issue is 'likely to recur but unlikely to last long enough to allow appellate review to take place because of the intrinsically short-lived nature of the controversies' in which it could arise." (Internal quotation marks omitted.) *Dixon*, 151 Ill. 2d at 117-18 (quoting *First National Bank v. Kusper*, 98 Ill. 2d 226, 235 (1983)). We cannot find that this case presents either of these situations, and Hahn does not argue that it does. Accordingly, we find that Hahn's settlement with Schwabe has rendered the propriety of the trial court's grant of summary judgment a moot issue.

¶ 46

IV. *Res Judicata*

¶ 47 We find Hahn’s *res judicata* argument to be similarly unpersuasive. Hahn argues that Buschbach’s liability was extinguished under the doctrine of *res judicata* because, pursuant to the settlement agreement, Schwabe’s causes of action were dismissed with prejudice.

¶ 48 “Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been reached by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions.” *Goodman v. Hanson*, 408 Ill. App. 3d 285, 299-300 (2011) (citing *Hudson v. City of Chicago*, 228 Ill.2d 462, 467); see also *Downing v. Chicago Transit Authority*, 162 Ill. 2d 70, 73-74 (1994)). Here, *res judicata* does not apply because: (1) a dismissal with prejudice pursuant to a settlement agreement is not a final judgment on the merits, and (2) the parties were not identical in both actions.

¶ 49

A. Not a Final Judgment

¶ 50 First, *res judicata* does not apply because a settlement agreement is not a final judgment on the merits. In Illinois, there is a split of authority as to whether a dismissal with prejudice pursuant to a settlement agreement may satisfy the first requirement of *res judicata*. *Goodman*, 408 Ill. App. at 300; *Jackson v. Callan Publishing, Inc.*, 356 Ill. App. 3d 326, 339-40 (2005) (noting the split of authority). Compare *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (1999) (order entered pursuant to a settlement constituted a final judgment on the merits for the purposes of *res judicata*) with *Kandalepas v. Economou*, 269 Ill. App. 3d 245, 252 (1994) (an agreed order is not a judicial determination of the parties’ rights, but rather is a recordation of the agreement between the parties).

No. 1-11-0635

¶ 51 In *SDS Partners, Inc.*, the appellate court held that a settlement order was a final judgment on the merits because it “amounts to a decision as to the respective rights and liabilities of parties based on the facts before the court.” *SDS Partners, Inc.*, 305 Ill. App. 3d at 896. The original parties of a property damage lawsuit entered into a settlement agreement and the case was dismissed with prejudice. *SDS Partners, Inc.*, 305 Ill. App. 3d at 894-895. SDS Partners Inc. became the owner of the property that was the subject of the settlement agreement. SDS filed a petition to intervene to enforce the settlement agreement. The trial court denied SDS’ petition because the court had lost jurisdiction for the purposes of enforcement. SDS filed a new lawsuit alleging an identical cause of action to the previously settled lawsuit. SDS appealed after the trial court dismissed its complaint stating that it was barred by estoppel by verdict or collateral estoppel. *SDS Partners, Inc.*, 305 Ill. App. 3d at 895. The appellate court held that SDS’ complaint was barred by *res judicata* because the settlement agreement left no remaining issues with respect to the property damage except enforcement of the settlement agreement. *SDS Partners, Inc.*, 305 Ill. App. 3d at 895-896.

¶ 52 Conversely, in *Kandalepas v. Economou*, the appellate court held that the doctrine of *res judicata* did not apply to settlement agreement because agreements are contracts and not a final judgment on the merits. *Kandalepas*, 269 Ill. App. 3d at 252. The parties were partners in the ownership of a corporation. *Kandalepas*, 269 Ill. App. 3d at 247. The parties attempted to dissolve their ownership and entered into failed dissolutions of the partnership: the parties’ first settlement agreement, which was approved by the trial court, was rescinded and they entered into a new settlement, which was also approved by the trial court. The parties were then in dispute

No. 1-11-0635

over the enforcement of the new settlement. *Kandalepas*, 269 Ill. App. 3d at 247-248. After the trial court granted summary judgment in favor of the plaintiffs, the defendants claimed that the trial court's order was barred by *res judicata*. *Kandalepas*, 269 Ill. App.3d at 251-52. The appellate court held that the agreed order was "not a judicial determination of the parties' rights, but rather is a recordation of the agreement between the parties" (*Kandalepas*, 269 Ill. App. 3d at 252 (citing *In re Haber*, 99 Ill. App. 3d 306, 309 (1981))) and that the order was "merely a recitation of the settlement agreement between the parties and, like any other agreement, its interpretation is governed by the law of contracts." *Kandalepas*, 269 Ill. App. 3d at 252 (citing *Clark v. Standard Life & Accident Insurance Co.*, 68 Ill. App. 3d 977 (1979)). The appellate court reasoned that because the first settlement agreement between the parties was rescinded and a new settlement agreement enforced, it is evidence that the settlement agreement was not a final judgment on the merits. *Kandalepas*, 269 Ill. App. 3d at 252.

¶ 53 In *Goodman*, we considered the split of authority and held that an executed release that was part of a legal malpractice settlement did not establish *res judicata* because the settlement was not a judgment on the merits. *Goodman*, 408 Ill. App. 3d at 300. The plaintiff, the principal heir of an estate, brought an action against defendants, the former attorneys for the executor of the estate, alleging the defendants negligently failed to file an estate and generation-skipping transfer tax return. *Goodman*, 408 Ill. App. 3d at 286. The parties settled the lawsuit that released the defendants from liability arising out of the cause of action. *Goodman*, 408 Ill. App. 3d at 286. Subsequently, the plaintiff filed a second lawsuit against some of the defendants which was related to the plaintiff's previous causes of action. *Goodman*, 408 Ill. App. 3d at 286-

No. 1-11-0635

292. We held that the first requirement of *res judicata* was not satisfied because there was no actual decision on the merits of the first lawsuit. *Goodman*, 408 Ill. App. 3d at 300.

¶ 54 In the case at bar, we follow our earlier conclusion in *Goodman* that the doctrine of *res judicata* does not apply to dismissals with prejudice pursuant to a settlement agreement. Thus, the first requirement of *res judicata* is not satisfied, and Schwabe would not be barred from seeking recourse from Buschbach, meaning that Buschbach’s liability was not extinguished by the settlement agreement and subsequent dismissal.

¶ 55 B. Not Identical Parties

¶ 56 Second, the doctrine of *res judicata* does not apply because its second requirement – identity of parties – is also not satisfied. *Goodman*, 408 Ill. App. 3d at 299-300 (*res judicata* requires that “the parties or their privies are identical in both actions”). The parties agree that the settlement agreement did not name Buschbach but named solely Hahn and Schwabe. Thus, there is no identity of parties. For these reasons, we do not find Hahn’s *res judicata* argument persuasive.

¶ 57 CONCLUSION

¶ 58 Pursuant to section 2(e) of the Contribution Act (740 ILCS 100/2(e) (West 2006)), Hahn’s settlement with Schwabe bars Hahn from seeking contribution from Buschbach.

Consequently, this appeal from the trial court’s grant of summary judgment in Buschbach’s favor is rendered moot.

¶ 59 Dismissed as moot.