

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).

2012 IL App (4th) 110142-U

Filed 4/13/12

NO. 4-11-0142

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

GILLESPIE COMMUNITY UNIT SCHOOL DISTRICT)	Appeal from
NO. 7, MACOUPIN COUNTY, ILLINOIS; and)	Circuit Court of
THE ILLINOIS MINE SUBSIDENCE INSURANCE)	Macoupin County
FUND,)	No. 09L22
Plaintiffs-Appellants,)	
v.)	
UNION PACIFIC RAILROAD COMPANY, a Delaware)	Honorable
Corporation,)	Patrick J. Londrigan,
Defendant-Appellee.)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Justice Steigmann concurred in part and dissented in part.

ORDER

¶ 1 *Held:* Plaintiffs have adequately pleaded that because of an alter-ego relationship, assumption of liability, direct participation, and merger, the legal responsibility for subsidence resulting from the removal of naturally necessary subjacent support passed from the coal-mining company ultimately to the present owner of the mineral estate.

¶ 2 There are two plaintiffs in this case, Gillespie Community Unit School District No. 7 (School District) and the Illinois Mine Subsidence Insurance Fund (Fund). They both seek to recover damages for subsidence of land caused by coal mining. In addition to suing an architectural firm, Wight & Co., for allegedly giving an inadequate warning about the risk of subsidence, the School District and Fund are suing Union Pacific Railroad Company.

¶ 3 Union Pacific did none of the coal-mining, but plaintiffs seek to hold Union Pacific

liable through express assumption of liability, an alter-ego relationship, direct participation, merger of corporations, or a combination of those theories. The trial court granted Union Pacific's motion to dismiss plaintiffs' claims against it on the ground of failure to state a cause of action, and the court also denied plaintiffs permission to add certain proposed counts to their complaints. The court made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)), and plaintiffs appeal.

¶ 4 Viewing the complaints in a light most favorable to plaintiffs and taking the well-pleaded factual allegations therein to be true (*McCready v. Secretary of State*, 382 Ill. App. 3d 789, 794 (2008)), we conclude that some, but not all, of the counts of plaintiffs' complaints fail to state a cause of action. And we find no abuse of discretion in the denial of leave to amend the complaints. Therefore, we affirm the trial court's judgment in part and reverse it in part and remand this case for further proceedings.

¶ 5 I. BACKGROUND

¶ 6 A. The School District's Appeal

¶ 7 1. *The First Amended Complaint*

¶ 8 a. The Close Relationship Between Superior Coal Company
and Chicago and North Western Railroad Company

¶ 9 Superior Coal Company was a subsidiary of Chicago and North Western Railway Company (Chicago and North Western), which owned almost all of Superior Coal's common stock (all except for the qualifying shares owned by Superior Coal's directors). Coal was the reason for this close relationship between the two companies. Chicago and North Western organized Superior Coal for the purpose of providing Chicago and North Western a dependable and economical supply of coal for its steam locomotives, at prices cheaper than those charged by independent commercial

sources.

¶ 10 So, the whole *raison d'être* of Superior Coal was to be Chicago and North Western's coal supplier. To that end, Superior Coal acquired the coal and mineral rights to 40,000 acres in southeastern Macoupin County—all under the direction of Chicago and North Western—and from 1904 to 1953, Superior Coal operated coal mines in that area, including the Number 2 Mine in Sawyerville. Eventually, mining operations in the Number 2 Mine expanded to the land directly beneath Benld.

¶ 11 Superior Coal was under the complete control of Chicago and North Western and had its place of business in Chicago and North Western's general business office. Chicago and North Western kept and maintained Superior Coal's business records. The officers of Superior Coal reported directly to the officers of Chicago and North Western and took direction from them regarding the business and mining operations of Superior Coal. All of Superior Coal's operating funds came from the sale of coal to Chicago and North Western—which even determined the price at which Superior Coal would sell its coal to the parent corporation.

¶ 12 Although, in form, Superior Coal was a separate corporation, it actually operated as an integral part of Chicago and North Western. Superior Coal was, in practice, a mere instrumentality or department of Chicago and North Western, with no independent existence and no independent commercial business, the School District alleges.

¶ 13 According to the School District's amended complaint, the following circumstances show how Superior Coal was completely subsumed under Chicago and North Western:

"(a) The general procedure at Chicago and North Western when dealing with outside corporations was to use Chicago and North

Western stationary but such was not the procedure regarding communications between Chicago and North Western and Superior Coal—such communications went on plain stationery because those communications were considered interdepartmental rather than between outside corporations.

(b) Books and records of Superior Coal Company were kept in the accounting department of Chicago and North Western by Chicago and North Western's bookkeepers and clerks. No part of this administrative expense was paid by Superior Coal Company.

(c) Superior Coal Company's treasurer was paid by Chicago and North Western. Superior Coal Company's lawyers were paid by Chicago and North Western. Superior Coal Company's tax records were handled by Chicago and North Western's tax department who were [*sic*] paid by Chicago and North Western. The mechanical department of Chicago and North Western was in charge of the mechanical equipment of Superior Coal and the expense related to that equipment was paid by Chicago and North Western.

(d) None of the expenses associated with the accounting department, treasury department, tax department, lawyers, mechanical department, water department, or any other department of Chicago and North Western which performed duties for Superior Coal were reimbursed to Chicago and North Western by Superior Coal, except

for one accountant actually stationed at the coal mine and a small monthly expense.

(e) The land department of Chicago and North Western handled all real estate transactions for Superior Coal, with the associated expense undertaken by Chicago [a]nd North Western. Similarly, the insurance department of Chicago and North Western handled all insurance matters for Superior Coal, with no reimbursement made.

(f) For years, the general auditor of Chicago and North Western acted as the general auditor for Superior Coal, signing vouchers on its behalf, although he held no office with the coal company. Similarly, the tax commissioner for Chicago and North Western acted for Superior Coal with regard to tax matters.

(g) The motive of Chicago and North Western in organizing Superior Coal was to obtain locomotive coal for less than the ordinary commercial price. The coal company made no sales to outside parties, except for nominal quantities of coal sold to employees for personal use.

(h) Chicago and North Western borrowed money from a New York bank facility, which loans were secured by Superior Coal's property.

(i) The president of Superior Coal occupied a suite of offices

at Chicago and North Western's headquarters.

(j) When the president of Superior Coal received a directive from Chicago and North Western he considered it a command and immediately put it in force.

(k) Chicago and North Western made purchasing contracts for Superior Coal without consulting Superior Coal.

(l) The treasurer of Chicago and North Western Railway paid all of Superior Coal's bills for material.

(m) Superior Coal took direction from Chicago and North Western's assistant general manager and general purchasing agent with regard to the tonnage of coal necessary to be produced for the operation of Chicago and North Western for delivery at points all over the railroad for weekly consumption.

(n) The 'price' for the coal 'sold' by Superior Coal to Chicago and North Western was determined so that Superior Coal could pay its employees, but the 'price' only represented the actual cost of operations. The cost information was forwarded to various officers at Chicago and North Western and they entered it on the books at so much per ton. As cash was needed by Superior Coal, the Treasurer of the Superior Coal, who was the Treasurer of Chicago and North Western Railway, transferred the funds to Superior Coal's account, so Superior Coal could pay current bills.

(o) There was at one time a contract between Superior Coal and Chicago and North Western for the purchase of coal at a price of 20¢ over cost, but there was a parallel agreement requiring Superior Coal to declare a dividend to Chicago and North Western in an amount equal to that figure.

(p) An agreement regarding transfer of coal between Superior Coal and Chicago and North Western provided that for many years Superior Coal, although constituting a separate corporation in form, had been managed and operated, with its properties managed and operated, as a branch or department of Chicago and North Western."

¶ 14

b. The Dissolution of Superior Coal

¶ 15

On September 14, 1956, the board of directors of Chicago and North Western passed a resolution that Superior Coal be dissolved and that Chicago and North Western assume Superior Coal's liabilities. The resolution stated as follows:

"WHEREAS, this Company has adopted a policy of reducing the number of its subsidiary corporations, and in furtherance of that policy it has been determined to be in the best interest of this Company that the Superior Coal Company (all of whose outstanding shares are owned by this Company) be dissolved, that its assets be transferred to this Company, and that this Company assume its liabilities (in the event that such liabilities cannot be fully liquidated prior to the time a certificate of dissolution has been issued by the

Secretary of State of Illinois);

* * *

FURTHER RESOLVED, that this Company assume any liabilities of the Superior Coal Company (subject to applicable Statutes of Limitations) that cannot be fully liquidated prior to the time a certificate of dissolution has been issued by the Secretary of State of Illinois."

Thus, by the terms of the resolution, Chicago and North Western was to acquire all of Superior Coal's assets and also was to assume all of Superior Coal's liabilities that remained unliquidated at the time of dissolution, provided that judicial enforcement of the liabilities was not barred by any statute of limitations.

¶ 16 On December 28, 1956, Superior Coal transferred to Chicago and North Western all its mineral rights in Macoupin County, including the Number 2 Mine.

¶ 17 In February 1957, Superior Coal was dissolved.

¶ 18 At the time of the dissolution, Superior Coal's president and secretary listed their office address as 400 West Madison Street in Chicago, which also was the street address of Chicago and North Western. Chicago and North Western owned all 20,000 shares of capital stock in Superior Coal, except for the five directors' qualifying shares.

¶ 19 c. The Succession of Ownership From Chicago and Northwestern to Union Pacific

¶ 20 In 1970, Chicago and North Western sold its assets and liabilities to the newly formed North Western Employees Transportation Corporation, including "liabilities **** of any kind, nature and description, whether public or private, whether arising by or as a result of agreement, action,

omission to act, law or violation of law, or otherwise, whether known or unknown, whether accrued or not accrued for any purpose, and whether or not disclosed by this Agreement or reflected in any book or record of any [*sic*] [Chicago and North Western]."

¶ 21 In 1972, North Western Employees Transportation Corporation changed its name to Chicago and North Western Transportation Company. The company afterward changed its name to Chicago and North Western Railway Company. (For the sake of simplicity, we will refer to both North Western Employees Transportation Corporation and Chicago and North Western Transportation Company as "New Chicago and North Western.")

¶ 22 In 1995, New Chicago and North Western merged into Union Pacific, and Union Pacific was the surviving entity.

¶ 23 d. Purported Admissions on Which the School
District Relies in Its Amended Complaint

¶ 24 In 1986, in litigation over subsidence-damage claims regarding Benld property situated above coal mines once owned and operated by Superior Coal, John S. Bishof, Jr., the assistant vice president of general claims for New Chicago and North Western, stated under oath that, in its September 1956 resolution, Chicago and North Western's board of directors had resolved to assume the liabilities of Superior Coal.

¶ 25 Also in 1986, George M. Hollander, the associate general counsel of New Chicago and North Western, stated under oath that, by the terms of the 1970 agreement for sale of assets between Chicago and North Western and New Chicago and North Western, the "liabilities of Superior Coal company, [and] obligations which [Chicago and North Western] incurred as a result of the dissolution of Superior Coal," were not excluded from the liabilities purchased by New

Chicago and North Western.

¶ 26 In April 2001, six years after New Chicago and North Western merged into Union Pacific, Daniel R. LaFave, the general counsel of Union Pacific, stated that, with regard to "mining of the Superior Coal Company," Union Pacific was "paying for subsidence at locations where corporate predecessors were responsible for mining operations."

¶ 27 Chicago and North Western, along with its successors in interest, including New Chicago and North Western and Union Pacific, accounted for Superior Coal's subsidence liabilities in their books and records. For example, those books and records show that, between 1996 and 2008, Union Pacific paid nearly \$1 million in subsidence damage claims regarding property in Benld located above coal mines once owned and operated by Superior Coal. And in each instance, Union Pacific obtained a release as the "successor in interest to Chicago and North Western Railway Company a/k/a Chicago and North Western Transportation Company and Superior Coal Company."

¶ 28 e. The Construction of the Elementary School in Benld
and the Destruction of the School By Mine Subsidence

¶ 29 In 2001, the School District entered into agreements for the construction of an elementary school in Benld. The school was constructed at a cost of \$9 million in public funds, and it opened in August 2002.

¶ 30 Six and a half years later, in March 2009, coal pillars in the Number 2 Mine collapsed, causing the ground beneath the school to subside and inflicting structural damage to the school. Within a few weeks, the Illinois State Board of Education determined that the damage was so severe that the school had to be condemned and demolished. The estimated cost to the School District to demolish the existing school and to plan and construct a replacement school is \$22

million.

¶ 31 f. *The Trial Court's Dismissal of Counts I, IV, and V
of the School District's First Amended Complaint*

¶ 32 In its first amended complaint, the School District sought to recover from Union Pacific on the following theories: (1) related entities/alter ego (count I), (2) direct participation liability (count IV), and (3) assumed liabilities (count V).

¶ 33 On January 20, 2011, the trial court entered an order dismissing counts I, IV, and V, with prejudice, pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). The court certified its dismissal order for immediate appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 34 2. *The Trial Court's Denial of Motions By the School District
To Add Counts to Its First Amended Complaint*

¶ 35 a. *The Three Previous Amendments of the School District's Complaint*

¶ 36 The School District filed its complaint in August 2009, alleging, in count I, that Union Pacific was liable for subsidence damage because it had merged with a successor of Chicago and North Western, which was the alter ego of Superior Coal. (Counts II and III of the complaint were against Wight.)

¶ 37 In January 2010, with the trial court's permission, the School District amended its complaint so as to add count IV, which alleged that Union Pacific was liable to the School District because Chicago and North Western had been a "direct participant" in the conduct giving rise to the loss.

¶ 38 In March 2010, again with the trial court's permission, the School District amended its complaint by adding count V, which alleged that Chicago and North Western "expressly

assumed" Superior Coal's liabilities in 1956 and that Union Pacific had succeeded to those liabilities. (At the same time, the School District added an additional count, count VI, against Wight.)

¶ 39 In November 2010, the trial court allowed the School District to amend its complaint again by elaborating on the allegations in counts I, IV, and V.

¶ 40 Thus, the trial court allowed the School District to amend its complaint three times.

¶ 41 b. Denial of Leave To File Counts VII and VIII

¶ 42 Several months before the trial court's dismissal order of January 20, 2011, the School District served upon Union Pacific a request for production of documents, entitled "School District's Sixth Request for Production of Documents." In item 5, the School District requested Union Pacific to produce Chicago and North Western Railway Company's annual report to the Interstate Commerce Commission for the year ending December 31, 1956. Union Pacific balked at this request, but on December 8, 2010, the trial court ordered Union Pacific to comply within 30 days.

¶ 43 On January 10, 2011, Union Pacific served on the School District its response to the request for Chicago and North Western's December 31, 1956, report to the Commission, at the same time objecting to the request as "overbroad, unduly burdensome[,] *** and not reasonably calculated to lead to the discovery of admissible evidence." Nevertheless, on January 11, 2011, Union Pacific produced documents purportedly responsive to the School District's request No. 5. Among those produced documents were two pages from the December 31, 1956, report to the Commission—and only two pages of the report.

¶ 44 Also, the School District requested information from the National Archives Trust regarding Chicago and North Western, including the complete report, dated December 31, 1956, that Chicago and North Western had sent to the Commission. On January 25, 2011, five days after entry

of the trial court's dismissal order and two weeks after Union Pacific's two-page production, the National Archives Trust delivered to the School District's counsel a complete copy of the requested report.

¶ 45 Chicago and North Western's complete report to the Commission revealed that, as of December 31, 1956, "Superior Coal Co. was merged into the C. & N.W. Ry.Co," resulting in \$1,676,535 worth of "[l]and and coal rights [of] Superior Coal Co. [being] acquired [by Chicago and North Western] through merger," with "Superior Coal Co. Stock *** [e]liminated through merger into Chicago and North Western Railway Company." This part of the report had not been included in Union Pacific's production of documents in response to request No. 5.

¶ 46 On the basis of this newly discovered information, the School District moved for leave to file two additional counts against Union Pacific, both of which were premised on theories of assumption of liability through merger: count VII (liability based upon merger) and count VIII (an alternative claim based upon *de facto* merger). On February 14, 2011, the trial court denied the School District's motion for leave to file these additional counts, certifying its dismissal order for immediate appeal pursuant to Rule 304(a).

¶ 47 c. Denial of Leave To File Count IX

¶ 48 In its dismissal order, the trial court held that a coal company that had obtained the transfer of "coal and mine workings of another unrelated company" was "not liable for subsidence or sinking of land areas due to the mining of its predecessor in title." In response to that holding, the School District moved for leave to add count IX to its first amended complaint (liability based upon the transfer of coal mining assets between related companies), purportedly to cure the pleading deficiency identified by the court. In February 2010, the court denied the motion, again certifying

its order for immediate appeal pursuant to Rule 304(a).

¶ 49 B. The Fund's Appeal

¶ 50 The General Assembly created the Fund to provide reinsurance for mine subsidence losses that Illinois property insurers paid to their insureds. See 215 ILCS 5/801.1, 803.1(b) (West 2008). Section 810.1 of the Illinois Insurance Code (215 ILCS 5/810.1 (West 2008)) requires the Fund to enter into reinsurance agreements with all Illinois property insurers. The Fund investigates claims to determine whether the structural damage was caused by mine subsidence. If the Fund determines that the damage was caused by mine subsidence, it then reimburses the primary insurer the amount the primary insurer paid its insured due to the mine subsidence, and the Fund becomes subrogated to the rights of the primary insurer and the insured.

¶ 51 In March 2009, the School District's elementary school in Benld was damaged by mine subsidence. Under its insurance policy with Indiana Insurance Company, the School District was insured for mine subsidence up to a limit of \$350,000 plus certain incidental expenses. Indiana Insurance paid the School District \$367,379 pursuant to the policy.

¶ 52 Pursuant to a reinsurance agreement between Indiana Insurance and the Fund, Indiana Insurance requested and obtained reimbursement from the Fund for the entire amount it had paid to the School District. Consequently, under section 815.1 of the Illinois Insurance Code (215 ILCS 5/815.1 (West 2008)), the Fund became subrogated to the claim of the School District and Indiana Insurance for \$367,379.

¶ 53 Also in March 2009, mine subsidence damaged a house in Benld owned by William and Jennifer Carter. The Carters were insured for mine subsidence losses by State Farm Fire and Casualty Company. The Carters made a claim under their State Farm policy, and State Farm paid

the Carters \$97,277.44 for mine subsidence damage.

¶ 54 State Farm likewise had entered into a reinsurance agreement with the Fund. After paying the Carters' claim, State Farm made a reinsurance claim to the Fund, and in December 2009, the Fund reimbursed State Farm the \$97,277.44 it had paid the Carters. As a result, the Fund became subrogated to the rights of the Carters and State Farm.

¶ 55 Superior Coal was the company that had done the coal mining that undermined both the school and the Carters' house. After paying Indiana Insurance and State Farm, the Fund made a written demand on Union Pacific, as successor to Superior Coal, for reimbursement of the amounts that the Fund had paid as reinsurance. Union Pacific declined to reimburse the Fund.

¶ 56 In February 2010, the Fund sued Union Pacific in the United States District Court for the Southern District of Illinois, seeking to recover the amounts that the Fund had paid to Indiana Insurance and State Farm. The case subsequently was transferred to the United States District Court for the Central District of Illinois, which stayed all proceedings pending the outcome of the present case.

¶ 57 In December 2010, the Fund filed a petition to intervene in the present case, and the trial court granted the petition on January 10, 2011. After the submission of briefs pertaining to possible limitations on the Fund's intervention, the Fund filed a six-count complaint against Union Pacific on February 22, 2011. The complaint consisted of three counts relating to the Fund's claims as subrogee of the School District and its insurer, Indiana Insurance, and another three counts relating to the Fund's claims as subrogee of the Carters and their insurer, State Farm.

¶ 58 Counts I and IV of the Fund's complaint pleaded a theory of assumption of liabilities. The Fund alleged as follows. Superior Coal had mined coal underneath the school and the Carters'

house. Superior Coal had an absolute duty to support the surface above its mine. Chicago and North Western owned all Superior Coal's stock, and when Superior Coal dissolved in 1957, its assets, together with its liabilities that could not be liquidated prior to dissolution, were transferred to and assumed by Chicago and North Western. Eventually, Chicago and North Western merged with Union Pacific.

¶ 59 Counts I and IV further alleged that, at various times between 1996 and 2008, Union Pacific paid the Fund more than \$900,000 to reimburse the Fund for payments that the Fund had made to various primary insurers for mine subsidence damage over coal mines previously operated by Superior Coal and that, in releases drafted by Union Pacific's attorney and accompanying those payments, Union Pacific had expressly stated it was the "successor in interest" to Chicago and North Western and Superior Coal.

¶ 60 Counts II and V pleaded a theory of alter ego. These counts alleged that Superior Coal was incorporated in Illinois in 1903 and that, except for five qualifying shares owned by Superior Coal's directors, Chicago and North Western owned all of Superior Coal's stock. Chicago and North Western organized and operated Superior Coal for the express purposes of (1) holding the coal and mineral rights acquired at Chicago and North Western's direction and (2) mining coal in order to provide Chicago and North Western a dependable supply of locomotive fuel at below-market prices. Superior Coal operated its coal mines at Chicago and North Western's direction and under its control.

¶ 61 These counts further alleged that Superior Coal was without operating funds except for the funds it received from Chicago and North Western for the purchase of coal and that Chicago and North Western unilaterally determined the price it paid Superior Coal for the coal. Superior

Coal's place of business was always part of Chicago and North Western's general office, and Chicago and North Western operated Superior Coal as a department of Chicago and North Western rather than as a separate corporation. Superior Coal's officers, most of whom also were officers of Chicago and North Western, took direction regarding Superior Coal's business and mining operations from Chicago and North Western's officers. At all times since its organization in 1903, Superior Coal was under the complete domination and control of Chicago and North Western, which determined and mandated Superior Coal's overall business, mining, and budgetary strategies.

¶ 62 For additional factual support, counts II and V alleged as follows. Communications between Chicago and North Western were considered to be interdepartmental instead of communications between separate corporations. Chicago and North Western maintained Superior Coal's books and records without cost to Superior Coal. Chicago and North Western, instead of Superior Coal, paid Superior Coal's treasurer and lawyers. Various departments of Chicago and North Western, including the accounting, tax, legal, land, insurance, and mechanical departments, provided services to Superior Coal without charge. The general auditor of Chicago and North Western acted as Superior Coal's general auditor, even though he was not an officer of Superior Coal. Chicago and North Western contracted to purchase coal from Superior Coal at 20 cents per ton over Superior Coal's cost but required Superior Coal to pay a dividend to Chicago and North Western in an amount equal to the excess. Between 1948 and 1952, Superior Coal paid dividends to Chicago and North Western totaling \$1,850,000, an amount that substantially exceeded Superior Coal's net income during those years.

¶ 63 Other factual allegations included a recommendation by Morehouse, Superior Coal's vice president, that efforts to dispose of Superior Coal's assets should progress as rapidly as possible

and that if assets could not be sold, Superior Coal's board of directors and its president would be "instructed" to discontinue mining activities and adopt a program for the abandonment of active mines and the salvaging of Superior Coal's assets. Morehouse also recommended that Chicago and North Western's board of directors adopt resolutions authorizing the president and other designated officers of Chicago and North Western to "attend, act and vote at any and all meetings of the stockholders of Superior Coal Company in favor of any and all resolutions which are appropriate to carry out the purposes" recommended by Morehouse.

¶ 64 In a meeting in April 1954, Chicago and North Western's board of directors ordered Superior Coal to discontinue mining operations on June 1, 1954. In that same meeting, Chicago and North Western's board of directors authorized Superior Coal to retain Chicago and North Western's traffic manager as Superior Coal's temporary chief executive officer.

¶ 65 In March 1956, Morehouse wrote a report on attempts to dispose of some or all of Superior Coal's assets. In that report, he wrote that if the course he was pursuing was "approved on behalf of the Railway Company's management," he would continue with current negotiations to obtain the best offer, which would be "reported for the Railway Company's consideration." He emphasized that no commitments would be made for the disposition of Superior Coal's mineral rights "without prior authorization from the Railway Company's management" and that any action other than temporary leasing would be subject to the same approval.

¶ 66 In October 1956, Superior Coal filed a statement of intent to dissolve, in which it recited that Chicago and North Western's directors had "resolved that the proper officers of [Chicago and North Western] arrange for the dissolution of " Superior Coal. In December 1956, Larry Provo, the president of Superior Coal, and Vik, the secretary of Superior Coal, executed a deed transferring

all of Superior Coal's land and mineral rights in Macoupin County to Chicago and North Western. In 1956, Provo and Vik were, respectively, vice president and secretary of Chicago and North Western.

¶ 67 Counts II and V further alleged that, at all relevant times prior to 1957, Superior Coal and Chicago and North Western had a unity of interest and ownership such that the separate identities of the two companies did not exist; that recognition of Superior Coal's supposed separate corporate identity would present an obstacle to the enforcement of the Fund's rights, as subrogee, to recover damages for mine subsidence caused by Superior Coal and its alter ego, Chicago and North Western; and that it was the public policy of Illinois, as reflected in article XXXVIII A of the Illinois Insurance Code (215 ILCS 5/801.1 *et seq.* (West 2008)), to permit the Fund to recover the amounts it had paid to insurers that had reimbursed homeowners for damage to their property caused by mine subsidence. Recognition of the alleged separate identities of Superior Coal and Chicago and North Western would thwart that public policy, the Fund alleged.

¶ 68 Count III (as to the School District) and count VI (as to the Carters) alleged that Chicago and North Western and Superior Coal had merged. As evidence of that merger, those counts alleged that in 1956, Chicago and North Western was required to file an annual report with the United States Interstate Commerce Commission. The report required "specific and full, true, and correct answers to all questions." In its annual report for 1956, Chicago and North Western informed the Commission that, by merger, it had acquired the land and coal rights of Superior Coal and that Chicago and North Western no longer owned Superior Coal's stock, which had been "eliminated through merger into Chicago and North Western Railway Company," effective as of December 31, 1956. The annual report was verified under oath, and it was signed on behalf of Chicago and North

Western by Larry Provo, its vice-president and comptroller, as well as by C.J. Fitzpatrick, its president. Provo was also, in 1956, the president of Superior Coal. Each affirmed their belief that all statements of fact in the report were true and that the report was "a correct and complete statement of the business and affairs of" Chicago and North Western for the year 1956.

¶ 69 Counts III and VI then alleged that, as a result of the merger, Chicago and North Western assumed the liabilities of Superior Coal, including Superior Coal's liabilities for mine subsidence.

¶ 70 On March 2, 2011, Union Pacific filed a motion for dismissal, to which the Fund responded. Union Pacific filed a reply.

¶ 71 On March 30, 2011, the Fund and Union Pacific appeared for a hearing on the motion for dismissal. At the hearing, the parties agreed that counts I, II, IV, and V of the Fund's complaint were properly filed, and Union Pacific orally amended its motion to dismiss those four counts. The Fund also moved for leave to file counts III and VI of its complaint, the counts alleging merger, and Union Pacific opposed that motion.

¶ 72 On April 4, 2011, the trial court entered its judgment and order. The court granted Union Pacific's motion to dismiss counts I, II, IV, and V of the Fund's complaint. The court denied the Fund's motion to file counts III and VI, noting that it had previously denied the School District's motion to add similar counts to its amended complaint. Therefore, the court struck counts III and VI from the Fund's complaint.

¶ 73 In its order of April 4, 2011, the trial court found, pursuant to Supreme Court Rule 304(a), that there was no just reason to delay enforcement or appeal of its order.

¶ 74

II. ANALYSIS

¶ 75 A. Assumption of Liability (Count V of the School District's Amended Complaint and Counts I and IV of the Fund's Complaint)

¶ 76 1. *The Meaning of "Liabilities" and "Applicable Statutes of Limitations" in Chicago and North Western's Resolution of September 14, 1956*

¶ 77 If a coal company such as Superior Coal transfers its assets to another company, the transferee does not assume the coal company's liabilities unless the transferee agrees to do so. The appellate court has held:

" The general rule, which is well settled, is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor. The purchasing or transferee company, that is to say, is not liable on the other company's obligations merely by reason of its succession to such company's property. To render it liable there must be an agreement express or implied, to assume the other company's debts and obligations.' " *Buis v. Peabody Coal Co.*, 41 Ill. App. 2d 317, 322 (1963) (quoting *Alexander v. State Savings Bank & Trust Co.*, 281 Ill. App. 88, 96 (1935)).

See also *Hoppa v. Schermerhorn & Co.*, 259 Ill. App. 3d 61, 64 (1994).

¶ 78 Superior Coal had an obligation, when mining coal, to leave enough subjacent support for the surface estate. See *Wilms v. Jess*, 94 Ill. 464, 468 (1880). A cause of action for breach of that obligation would accrue when the land subsided. See *Treece v. Southern Gem Coal Corp.*, 245 Ill. App. 113, 118 (1923). Any subsidence above Superior Coal's mines would be considered, *prima facie*, to have resulted from Superior Coal's mining activities. See *Wilms*, 94 Ill. at 469. Because

such subsidence might not occur until long after the removal of the subjacent support, Superior Coal's obligation was effectively a permanent obligation, existing as long as Superior Coal existed. Any transferee assuming Superior Coal's obligations would have been on notice that because Superior Coal was a coal-mining company that had removed subjacent support and because resulting subsidence, with the corresponding accrual of a cause of action, might not occur until decades later, the transferee was shifting a load onto its shoulders that it would not soon be able to put down.

¶ 79 The School District and the Fund argue that Chicago and North Western assumed Superior Coal's obligation to provide subjacent support. They argue that, by the terms of the resolution adopted by the board of directors of Chicago and North Western on September 14, 1956, Chicago and North Western explicitly agreed to assume all of Superior Coal's "liabilities"—and "liabilities" included subsidence liabilities. According to the resolution, the board of directors resolved "that [Superior Coal's] assets be transferred to this Company [(Chicago and North Western)], and that this Company assume its liabilities (in the event that such liabilities cannot be fully liquidated prior to the time a certificate of dissolution has been issued by the Secretary of State of Illinois)." (To "liquidate" liabilities means to reduce them to a dollar amount (see *Chicago Title & Trust Co. v. McGlew*, 193 Ill. 457, 461 (1901)) or to discharge them by payment (see *Bridgford v. Riddell*, 55 Ill. 261, 263 (1870)). And again the resolution stated: "FURTHER RESOLVED, that this Company assume any liabilities of the Superior Coal Company (subject to applicable Statutes of Limitations) that cannot be fully liquidated prior to the time a certificate of dissolution has been issued by the Secretary of State of Illinois."

¶ 80 But was the resolution an *agreement*? "To render [the transferee company] liable there must be an agreement express or implied, to assume the other company's debts and

obligations." (Internal Quotation marks omitted) *Buis*, 41 Ill. App. 2d at 322. An "agreement" is bilateral, "[a] mutual understanding between two or more persons about their relative rights and duties regarding past or future performances." Black's Law Dictionary 67 (7th ed. 1999). The resolution of September 14, 1956, was bilateral. It expressed a mutual understanding between Chicago and North Western and its subsidiary, Superior Coal: in the course of its dissolution, Superior Coal would transfer all its assets, including its mineral rights, to Chicago and North Western, and in return, Chicago and North Western would "assume any liabilities of Superior Coal Company (subject to applicable Statutes of Limitations)." In this respect, the resolution expressed an agreement, a contract.

¶ 81 If a contract is clear and unambiguous, its interpretation is a question of law instead of a question of fact, and the court may not consider any evidence extrinsic to the text of the contract. *Lenzi v. Morkin*, 103 Ill. 2d 290, 293 (1984); *Reed Yates Farms, Inc. v. Yates*, 172 Ill. App. 3d 519, 532-33 (1988); *Tishman Midwest Management Corp. v. Wayne Jarvis, Ltd.*, 146 Ill. App. 3d 684, 689 (1986). "A contract term may be unambiguous because it has acquired an established legal meaning." *Rich v. Principal Life Insurance*, 226 Ill. 2d 359, 373 (2007).

¶ 82 The word "liabilities" had an established legal meaning when Chicago and North Western passed its resolution in 1956, and the meaning was broader than a "perfected or absolute liability." The supreme court explained in 1921:

"We know of no definition of the word "liability," either given in the dictionaries or as used in the common speech of men, which restricts it to such as are absolute or excludes the idea of contingency. In fact, it is more frequently used in the latter sense than in the former, as

when we speak of the liability of an insurer or a common carrier or the liability of accidents or to errors; and in Webster's Dictionary the word "liable" is said to refer to a future possible or probable happening which may not actually occur.' (*Cochran v. United States*, 157 U.S. 286.) This court has also held that the word 'liable,' as used in the policy then in question, 'does not signify a perfected or fixed legal liability but rather a condition out of which a legal liability may arise. The word, as most frequently used, does not necessarily exclude the idea of a contingency.' *Home Ins. Co. v. Peoria and Pekin Union Railroad Co.* 178 Ill. 64; see, also, to the same effect, *Benge's Admr. v. Bowling*, 106 Ky. 575; *White v. Green*, 105 Iowa, 176." *Evans v. Illinois Surety Co.*, 298 Ill. 101, 113 (1921).

One of the cases that the supreme court cited in the above-quoted text, *Benge's Administrator v. Bowling*, 51 S.W. 151, 151 (Ky. Ct. App. 1899), explained that "liability" was synonymous with "legal responsibility." "Liability," the Court of Appeals of Kentucky said in *Bowling*, "is defined by Black's Law Dictionary to be 'the state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility.'" *Id.* Likewise, in another case that our supreme court cited, the Supreme Court of Iowa defined "liability" as being obligated to do something. *White v. Green*, 74 N.W. 928, 929 (Iowa 1898). The Supreme Court of Iowa said: "Liability in a legal sense, is the state or condition of one who is under obligation to do at once or at some future time something which may be enforced by action. It may exist without the right of immediate enforcement." *Id.* See also *Loman v. Freeman*, 229 Ill. 2d 104, 121 (2008) (defining "liability" as "a legal obligation

or responsibility enforceable by civil remedy or criminal punishment").

¶ 83 In the present case, there was no right of immediate enforcement until the land subsided, but there was liability. In 1956, Superior Coal had an absolute and unconditional legal obligation, or liability, to provide subjacent support for the owners of the surface estates under which Superior Coal had mined. See *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 468 (1904). When Chicago and North Western assumed all of Superior Coal's liabilities, it assumed Superior Coal's liability to provide subjacent support. That liability included the contingency that, decades in the future, the land might subside over Superior Coal's mines. See *Evans*, 298 Ill. at 113.

¶ 84 Union Pacific observes, however, that, by the terms of the resolution of September 14, 1956, Chicago and North Western assumed Superior Coal's liabilities "subject to applicable Statutes of Limitations." Union Pacific reasons that section 94 of The Business Corporation Act (Ill. Rev. Stat. 1955, ch. 32, ¶ 157.94) is one such applicable statute of limitations because it "is a *statute* which *limits* claims against dissolved Illinois corporations" by "provid[ing] that no such claims may be brought more than two years after an entity has been dissolved." (Emphases in original.) Section 94 provides:

"The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution

if suit or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name." Ill. Rev. Stat. 1955, ch. 32, ¶ 157.94.

¶ 85 Contrary to Union Pacific's assertion, section 94, the corporate survival statute, temporarily *preserves* judicial remedies—saves them from extinction—instead of *limiting* them in the manner of a statute of limitations. But for the corporate survival statute, the right to sue a corporation would abate immediately with the dissolution of the corporation. *Poliquin v. Sapp*, 72 Ill. App. 3d 477, 481 (1979) (citing *Consolidated Coal Co. of St. Louis v. Flynn Coal Co.*, 274 Ill. App. 405 (1934)). The corporate survival statute creates a remedy that did not exist at common law, the remedy of suing a dissolved corporation (or allowing a dissolved corporation to sue). On the basis of this distinction between creating a (temporally limited) remedy and limiting a preexisting remedy, the corporate survival statute and a statute of limitations are fundamentally different. And in 1956, it was clear, from Illinois case law, that the corporate survival statute was not a statute of limitations.

¶ 86 The appellate court first drew a distinction between the corporate survival statute and statutes of limitations in *Dukes v. Harrison & Reidy*, 270 Ill. App. 372 (1933), some 23 years before Chicago and North Western passed its resolution. In that case, the plaintiff brought an action against a corporation within two years after its dissolution (hence a timely action, under the corporate survival statute), but the trial court dismissed her complaint for lack of prosecution. *Id.* at 374-75. She subsequently refiled her complaint more than two years after the dissolution of the corporation,

and the corporation responded with a special appearance, alleging that, under the corporate survival statute, it was now "legally extinct and could not *** be sued." *Id.* at 376-77.

¶ 87 The plaintiff argued, to the contrary, that a statutory exception to statutes of limitations applied to her case. *Dukes*, 270 Ill. App. at 377. Paragraph 26 of the Limitations Act provided that if the plaintiff were " 'nonsuited' " (a "nonsuit" included a dismissal for lack of prosecution (*Sachs v. Ohio National Life Insurance Co.*, 131 F.2d 134, 136 (7th Cir. 1942)) and if the time for bringing the action expired during the pendency of the lawsuit, the plaintiff could later commence a new action within one year after the nonsuit. *Dukes*, 270 Ill. App. at 377. In other words, the plaintiff argued that paragraph 26 gave her an additional year after the nonsuit, regardless of the expiration of any statutes of limitations—including the corporate survival statute.

¶ 88 The defendant did not dispute that paragraph 26 of the Limitations Act was an exception to statutes of limitations, but the defendant insisted that paragraph 26 was irrelevant because the corporate survival statute was not a statute of limitations. *Dukes*, 270 Ill. App. at 378-79. Instead of giving the corporation an affirmative defense against an action, as a statute of limitations would do, the corporate survival statute provided that, two years after the dissolution of a corporation, the corporation was "legally dead for all purposes" and lacked "corporate capacity of any kind." *Id.* Thus, the corporate survival statute did something more elemental than a statute of limitations: after keeping the corporation alive for two years after its dissolution, so as to enable it to sue and be sued during that period, the statute allowed the corporation to finally and definitively die; and a court could no more exercise personal jurisdiction over a dead corporation than it could exercise jurisdiction over a corpse (hence the defendant's special appearance and motion to quash service of process (*id.* at 374)).

¶ 89 The appellate court agreed with the defendant in *Dukes*, drawing an analogy from the supreme court's decision in *Bishop v. Chicago Railways Co.*, 303 Ill. 273 (1922). In *Bishop*, the supreme court considered whether paragraph 26 of the Limitations Act applied to a provision of the Injuries Act of 1853 that required an action for wrongful death to be brought within a year after the decedent's death. *Id.* at 279. The supreme court reasoned that because the Injuries Act created a right that did not exist at common law—namely, the right to recover for wrongful death—" [t]he limitation of the right to sue, fixing the exercise of such right within a year, [was] not a statute of limitations but [was] a condition of the liability itself." *Dukes*, 270 Ill. App. at 379-80 (quoting *Bishop*, 303 Ill. at 277). Hence, paragraph 26 of the Limitations Act, which provided an exception to statutes of limitations, had no effect on the one-year deadline in the Injuries Act—because the deadline in the Injuries Act, instead of being a statute of limitations, was merely a temporal limit on a right that the Injuries Act newly created. *Id.* at 380.

¶ 90 The appellate court in *Dukes* found the reasoning of the supreme court in *Bishop* to be apposite. *Dukes*, 270 Ill. App. at 380. The corporate survival statute created a right unknown to the common law: the right to sue a dissolved corporation. By merely placing a temporal limit on that new right, the corporate survival statute did not become a statute of limitations. *Id.*

¶ 91 In cases decided after *Dukes* and before 1956, the appellate court reiterated that the corporate survival statute is not a statute of limitations. *O'Neill v. Continental Illinois Co.*, 341 Ill. App. 119, 129 (1950); *Sarelas v. McCue & Co.*, 291 Ill. App. 540, 545 (1937). Consequently, the principle that the corporate survival statute is not a statute of limitations was the firmly established law in 1956, when Chicago and North Western passed its resolution referring to "applicable Statutes of Limitations." We have held that this resolution expressed a contract between Chicago and North

Western and Superior Coal. "[T]he existing law enters into and is a part of every contract, and the contract should be so construed unless otherwise clearly indicated by the terms of the agreement." *Hindu Incense Manufacturing Co. v. MacKenzie*, 403 Ill. 390, 392 (1949). See also *Illinois Bankers Life Ass'n v. Collins*, 341 Ill. 548, 553 (1930) ("Contracts are presumed to have been entered into in the light of existing principles of law [citation], and the existing law is presumed to be a part of every contract [citation] and contracts should be so understood and construed unless otherwise clearly indicated by the terms of the agreement [citation]."). The resolution of September 14, 1956, does not "clearly indicate" that the term "Statutes of Limitations" includes statutes other than statutes of limitations, so regarded by the law existing at the time. Our duty, then, is to construe "Statutes of Limitations" as excluding the corporate survival statute. See *Hindu Incense*, 403 Ill. at 392; *Illinois Bankers*, 341 Ill. at 553.

¶ 92 This is not a hypertechnical distinction, because, again, a statute of limitations is fundamentally different from a corporate survival statute—as Chicago and North Western and Superior Coal, with their in-house legal department, presumably realized. A statute of limitations bars the plaintiff from a judicial remedy unless the plaintiff brings an action within a specified length of time after the claim accrued. *Madison v. Wedron Silica Co.*, 352 Ill. 60, 62 (1933); *Mazur v. Stein*, 314 Ill. App. 529, 534 (1942); *Maxwell v. Nieft*, 313 Ill. App. 354, 356-57 (1942). A cause of action "accrues" when facts exist that, under the law, authorize one party to bring an action against the another. *Mazur*, 314 Ill. App. at 534. In the context of subsidence liability, the claim accrues when the land subsides over the mine (*Treese*, 245 Ill. App. at 118), at which point the five-year statute of limitations for property damage (735 ILCS 5/13-205 (West 2010)) begins to run.

¶ 93 The corporate survival statute (Ill. Rev. Stat. 1955, ch. 32, ¶157.94), by contrast, does

not care when the cause of action accrued. Instead, the corporate survival statute keeps the dissolved corporation on artificial life support for two years and then pulls the plug—no matter what. At that point, it would be inaccurate to say that the corporate survival statute "bars" or "limits" an action as a statute of limitations would do; there will be no occasion to bar or limit an action, because there no longer will be an entity to sue (*Poliquin*, 72 Ill. App. 3d at 481) and hence there will be no jurisdiction (*Dukes*, 270 Ill. App. at 382; *O'Neill*, 341 Ill. App. at 137).

¶ 94 Granted, Union Pacific cites cases in which courts use the word "limitation" with reference to the corporate survival statute. *People v. Parker*, 30 Ill. 2d 486, 487 (1964) ("[The defendant] appeals the judgment of the county court of Rock Island County, urging that the action was barred by the two-year limitation contained in section 94 of the Business Corporation Act."); *Peetoom v. Swanson*, 334 Ill. App. 3d 523, 526 (2002) (referring to the corporate survival statute as one of the three "statutory limitations periods" that may govern the case); *Vance v. North American Asbestos Corp.*, 203 Ill. App. 3d 565, 570 (1990) (referring to cases "which indicate even fraud is insufficient to extend the grace period from bringing actions beyond the time limits of section 94"); *O'Neill*, 341 Ill. App. at 132 ("It follows that the limitation provided in section 94 of the Corporations [A]ct [citation], limiting suits against the corporation, its officers or stockholders, to a period of two years after dissolution *** barred any remedy against the corporation, its officers, or stockholders ***." (Emphasis omitted.)); *Ruthfield v. Louisville Fuel Co.*, 312 Ill. App. 415, 427-28 (1942) ("We are of the opinion that the cause of action stated in the complaint is barred by limitation, suit not having been brought and service of process had within two years after the date of dissolution."). But the two-year period in the corporate survival statute can be characterized as a "limitation" only in the trivial sense that all finite periods are limited. The two-year period actually

is a "grace period." *Vance*, 203 Ill. App. 3d at 570. Besides, it does not appear that any of these cases actually calls the corporate survival statute a "statute of limitations." Far from it, two of the cases that Union Pacific cites specifically say that the corporate survival statute is *not* a statute of limitations. *Parker*, 30 Ill. 2d at 489 ("The foregoing provision appears to be a survival statute rather than a statute of limitation."); *O'Neill*, 341 Ill. App. at 129 ("Section 79 is not strictly a statute of limitation ***." (Internal quotation marks omitted.)).

¶ 95 This is not to say that, since 1956, no one has ever (incorrectly) referred to the corporate survival statute as a "statute of limitations." Union Pacific cites, for example, the Guide to Illinois Statutes of Limitation published by the Illinois State Bar Association (Adrienne W. Albrecht & Gordon L. Lustfeldt, Guide to Illinois Statutes of Limitation 11 (2010)). This publication, however (a copy of which Chicago and North Western includes in the appendix to its brief), begins with a "caveat" warning "members of the public" not to rely on the publication as a substitute for "independent research." *Id.* at i. Independent research reveals that, under the law existing in 1956, the corporate survival statute was not a statute of limitations. As we have explained, this law was incorporated into the agreement between Chicago and North Western and Superior Coal. See *Hindu Incense*, 403 Ill. at 392.

¶ 96 Union Pacific also cites an official comment to section 12.80 of the Illinois Business Corporation Act of 1983. We cannot seem to access this source at the Internet address Union Pacific provides, but, in any event, this source, like the 2010 Guide to Illinois Statutes of Limitation, would shed little light on the parties' intentions in 1956. The law existing at the time was incorporated into their agreement, not any publications from a later date. See *Hindu Incense*, 403 Ill. at 392.

¶ 97 Chicago and North Western does make another, more compelling argument that is,

by contrast, rooted in the time and circumstances of the 1956 resolution. The argument runs like this. Superior Coal could not be dissolved until all its liabilities has been discharged or, alternatively, adequate provision had been made for them. Section 80 of The Business Corporation Act (Ill. Rev. Stat. 1955, ch. 32, ¶ 157.80) provided as follows:

"When all debts, liabilities, and obligations of the corporation shall have been paid and discharged, or adequate provision shall be made therefor, and all of the remaining property and assets of the corporation shall have been distributed to its shareholders, articles of dissolution shall be executed in triplicate by the corporation by its president or a vice-president, and verified by him, and the corporate seal shall be thereto affixed, attested by its secretary or assistant secretary, which shall set forth:

* * *

(c) That all debts, obligations, and liabilities of the corporation have been paid or discharged or that adequate provision has been made therefor."

¶ 98 So, the articles of dissolution had to say that all of the liabilities of the dissolving corporation had been discharged or that adequate provision had been made for them. Only if the Secretary of State found that the "articles of dissolution conform[ed] to law"—including the law requiring a statement that all liabilities had been discharged or adequately provided for (*id.*)—would he file the articles in his office and issue a certificate of dissolution. Ill. Rev. Stat. 1955, ch. 32, ¶ 157.81. Because Chicago and North Western wanted Superior Coal to be dissolved and because

adequate provision for Superior Coal's liabilities was a precondition of its dissolution, Chicago and North Western assumed Superior Coal's liabilities.

¶ 99 If Chicago and North Western had not assumed Superior Coal's liabilities, the transfer of Superior Coal's assets to Chicago and North Western would have had to await the expiration of the two-year period in the corporate survival statute (Ill. Rev. Stat. 1955, ch. 32, ¶ 157.94), or so it would seem. See *Horbach v. Kaczmarek*, 915 F. Supp. 18, 21 (N.D. Ill. 1996) ("When that *** 'wind-up' period expires, corporate property that has not been disposed of automatically passes to the shareholders."). Given that Chicago and North Western's reason for assuming Superior Coal's liabilities was merely to enable Superior Coal to make "adequate provision" for its liabilities (see Ill. Rev. Stat. 1955, ch. 32, ¶ 157.80), it would have made no sense for Chicago and North Western to assume those liabilities indefinitely, because "adequate provision" for liabilities, from Superior Coal's standpoint, would have had an outer limit of two years after Superior Coal's dissolution, at which point Superior Coal absolutely would cease to exist under the survival statute—as would its liabilities.

¶ 100 Like the partial dissent, we see the force of this reasoning, but this reasoning invites us to consider Chicago and North Western's motivations and needs that led it to pass the resolution, and these motivations and needs are external to the unambiguous contract. For an analogous situation, assume someone were to argue, "Even though the contract, which I myself drafted, clearly says I'm buying a 'Volkswagen van,' I didn't really mean a Volkswagen van; I meant a Volkswagen Beetle, because—look at my garage—only a Beetle would fit in there." Just as we should decline to consider the buyer's needs in this hypothetical situation, we should decline to consider Chicago and North Western's contemporaneous needs, because "[w]here there is no ambiguity in the words

of a contract, the intent of the parties must be determined solely from the contract's language" (*Reed*, 172 Ill. App. 3d at 532) interpreted in light of the then-existing law (*Hindu Incense*, 403 Ill. at 392).

¶ 101 Therefore, we decline to interpret the unambiguous term "Statute of Limitations" as signifying anything other than an actual statute of limitations. Given that, under the case law extant in 1956, the corporate survival statute (Ill. Rev. Stat. 1955, ch. 32, ¶ 157.94) was not a statute of limitations, the corporate survival statute is not signified by the language "applicable Statutes of Limitations" in the resolution of September 14, 1956.

¶ 102 *2. Course of Performance*

¶ 103 Quoting our decision in *K's Merchandise Mart, Inc. v. Northgate Limited Partnership*, 359 Ill. App. 3d 1137, 1144 (2005) (citing 810 ILCS Ann. 5/2-202, Uniform Commercial Code Comment (1)(a), at 95 (Smith-Hurd 1993)), the School District points out that a "course of performance may be considered to explain or supplement the terms of an agreement even without a determination that the agreement is ambiguous." The School District argues that the "course of conduct" by Union Pacific and its predecessors from 1986 to 2005 "demonstrates that the September 1956 Resolution was a blanket assumption by Chicago and North Western of Superior Coal's liabilities, including subsidence liabilities," regardless of the expiration of the two-year survival period for dissolved corporations (Ill. Rev. Stat. 1949, ch. 32, ¶ 157.94).

¶ 104 For an example of this purported course of performance, the School District alleges that, in April 2001, six years after New Chicago and North Western merged into Union Pacific, Union Pacific's general counsel, Daniel R. LaFave, stated that, with regard to the "mining of the Superior Coal Company," Union Pacific was "paying for subsidence at locations where corporate predecessors were responsible for mining operations." Also, the School District observes, "Chicago

and North Western[] and its successors in interest, including New Chicago and North Western and Union Pacific, have accounted for their acknowledged Superior Coal subsidence liabilities in their books and records, well beyond the Survival Act time period." From 1996 to 2008, Union Pacific alone paid nearly \$1 million to resolve claims for subsidence of land in Benld over coal mines once owned and operated by Superior Coal.

¶ 105 Nevertheless, such words and conduct by Chicago and North Western and its successors could not establish a course of performance unless Superior Coal had knowledge of the words and conduct and accepted, or acquiesced in, the words and conduct. Section 1-303(a) of the Uniform Commercial Code (810 ILCS 5/1-303(a) (West 2010)) defines a "course of performance" as follows:

"(a) A 'course of performance' is a sequence of conduct between the parties to a particular transaction that exists if:

(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection."

¶ 106 The agreement in this case is the resolution of September 1956. It is unclear that this agreement involved repeated occasions for performance. See 810 ILCS 5/1-303(a)(1) (West 2010). Instead, Chicago and North Western was to wind up the affairs of Superior Coal, such as by

liquidating Superior Coal's liabilities, and Superior Coal then was to dissolve. It would seem there was only one occasion for performance: the winding up.

¶ 107 Assuming, *arguendo*, that the agreement did involve repeated occasions for performance, Superior Coal could not have known of this performance, and could not have accepted it or acquiesced in it, from 1986 to 2008, because Superior Coal was dissolved in 1957. See 810 ILCS 5/1-303(a)(2) (West 2010). The dissolution of a corporation is analogous to the death of an individual. *People v. Mazzone*, 74 Ill. 2d 44, 48 (1978). Like the dead, a dissolved corporation knows nothing, accepts nothing, and acquiesces in nothing, because to do those things, the corporation would have to exist.

¶ 108 In sum, Superior Coal could not have agreed to any course of performance after its dissolution. Nevertheless, the School District and the Fund have adequately pleaded that Chicago and North Western assumed Superior Coal's liability to provide adequate subjacent support and that this liability subsequently was passed on to New Chicago and North Western through its assumption of Chicago and North Western's liability and then to Union Pacific through its merger with New Chicago and North Western. Therefore, we reverse the dismissal of count V of the School District's amended complaint as well as counts I and IV of the Fund's complaint.

¶ 109 B. Superior Coal as the Alter Ego of Chicago and North Western (Count I of the School District's Amended Complaint and Counts II and V of the Fund's Complaint)

¶ 110 1. "*Mere Instrumentality*" Combined with "*Injustice*"

¶ 111 Count I of the School District's amended complaint relies on the theory that Superior Coal was the alter ego of Chicago and North Western and that Chicago and North Western therefore shared Superior Coal's legal responsibility to provide subjacent support for the land above Superior

Coal's mines. In its brief, the School District argues that this theory of an alter-ego relationship is legally sound because, in *Edwards v. Chicago & Northwestern Ry. Co.*, 79 Ill. App. 2d 48, 52-53 (1967)—on the basis of some of the very same facts that the School District pleads in its amended complaint—this court found that an alter-ego relationship between Superior Coal and Chicago and North Western had been pleaded.

¶ 112 According to the School District, this alter-ego relationship between Superior Coal and Chicago and North Western is important because it is a first step in a process by which legal responsibility passed from Superior Coal ultimately to Union Pacific (alternatively, Chicago and North Western's express assumption of Superior Coal's liabilities could serve as the first step). The School District reasons as follows. Because Superior Coal was the alter ego of Chicago and North Western, Chicago and North Western, like Superior Coal, had the legal responsibility to provide subjacent support for the land under which Superior Coal dug its mines. "Chicago and North Western's subsidence liability transfer[red] to New Chicago and North Western as a result of New Chicago and North Western's 1970 purchase of Chicago and North Western," the School District says, and "New Chicago and North Western's subsidence liability transfer[red] to Union Pacific as a matter of law as a result of the 1995 merger" of those two companies. (Emphases omitted.)

¶ 113 Union Pacific counters that making it liable for Superior Coal's mining activities dating from more than half a century ago would run counter to the supreme court's decision in *Tankersley v. Peabody Coal Co.*, 31 Ill. 2d 496 (1964), in which the supreme court declined to hold Peabody Coal Company liable for the inadequate subjacent support left by its predecessor in title, Stonington Coal Company.

¶ 114 In *Tankersley*, the plaintiffs were the owner and the tenant of some farmland in

Christian County. For a period of time before 1916, Stonington operated a coal mine extending below the land. *Tankersley*, 31 Ill. 2d at 498. In 1916, Stonington conveyed the mine to Peabody, "a wholly unrelated corporation," and until 1924, Peabody mined coal in some, but not all, areas under the land. *Id.* Parts of the land subsided, and the plaintiffs sued Peabody and won a jury award. *Id.* at 497. Apparently, Peabody did not dispute its liability for subsidence caused by its own mining operations, but Peabody did not think it should be held liable for subsidence in areas that only Stonington had mined. *Id.* at 498.

¶ 115 The supreme court agreed with Peabody, holding that "a mine operator [was] not liable for injury to the surface through default of his predecessor." *Tankersley*, 31 Ill. 2d at 502. A contrary rule, in the supreme court's view, would have been unreasonable and would have "discourage[d] coal companies from purchasing and entering worked-over mines," for not only would the coal company have been strictly liable for subsidence caused by its own mining operations, but it also would have been strictly liable for subsidence caused by the mining operations of its predecessors, over which it had no control. *Id.* Strict liability for other companies' mining operations, which possibly went back many decades, would not have been a tantalizing prospect for anyone contemplating buying a coal mine. *Id.* at 501-02.

¶ 116 But if beforehand, the purchasing company had a close enough relationship with the selling company, holding the purchasing company liable for subsidence caused by the selling company's mining operations would not necessarily put the purchasing company at the mercy of an uncontrollable stranger. Therefore, in *Tankersley*, the supreme court was careful to frame the issue as "whether a coal mine operator [was] liable for surface subsidence over areas mined only by his predecessor in title, where there ha[d] been no express assumption of such liability, and the

predecessor [was] a wholly unrelated business entity." (Emphasis added.) *Tankersley*, 31 Ill. 2d at 498. And to clinch the point, the supreme court referred to Peabody as "a wholly unrelated corporation" (that is, wholly unrelated to Stonington). *Id.*

¶ 117 As this court pointed out in *Edwards*, Superior Coal and Chicago and North Western, by contrast, were closely related to each other, and *Tankersley* is distinguishable for that reason. *Edwards*, 79 Ill. App. 2d at 54. Superior Coal was a subsidiary of Chicago and North Western, which owned almost all of Superior Coal's stock, and the officers of Superior Coal took direction from the officers of Chicago and North Western regarding the business and mining operations of Superior Coal—right down to the tonnage of coal that Superior Coal was to mine and the price at which Superior Coal was to sell the coal to Chicago and North Western.

¶ 118 Admittedly, just because Company A owns a majority of the shares of stock in Company B, it does not follow, from that fact alone, that Company B is the alter ego of Company A. See *Hills of Palos Condominium Ass'n, Inc. v. I-Del, Inc.*, 255 Ill. App. 3d 448, 480 (1993); *Hopgood v. Anheuser-Busch, Inc.*, 120 Ill. App. 3d 222, 227 (1983). Otherwise, there would be no such things as subsidiaries. See 18 Am. Jur. 2d *Corporations* § 41 (2004) ("A subsidiary corporation is one in which another corporation, a parent corporation, owns a majority of the shares of its stock."). And, admittedly, just because Company A exerts influence over Company B—the kind of influence that a majority stockholder normally enjoys—that fact is not enough to make Company B an alter ego of Company A, either. See *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 291 (2007) ("Parent companies are free to craft overall business and budgetary strategies [for their subsidiaries]."); *Hopgood*, 120 Ill. App. 3d at 227.

¶ 119 If the influence is so pervasive and overwhelming, however, as to make Company B

a "mere instrumentality" of Company A and if upholding the fiction of their separate corporate identities would "sanction a fraud or promote injustice," Company B will be regarded as the alter ego of Company A. *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 205 (1981). When we regard the pleadings in a light most favorable to plaintiffs (see *In re Estate of Lieberman*, 391 Ill. App. 3d 882, 886 (2009)), Superior Coal looks like the puppet, and Chicago and North Western looks like the puppeteer. Arguably, the separate corporate form of Superior Coal was superfluous because Superior Coal existed solely to serve Chicago and North Western's purposes and to implement its managerial commands. Superior Coal, for instance, was not permitted to obtain the best price for its coal by selling the coal on the market, but, instead, Superior Coal had to sell its coal to Chicago and North Western at whatever price Chicago and North Western dictated. And Chicago and North Western set this price high enough only to cover Superior Coal's operating costs so as to enable Superior Coal to continue altruistically serving Chicago and North Western. It is true that, on one occasion, Chicago and North Western allowed Superior Coal to charge 20 cents above cost—but that was only on condition that Superior Coal paid the 20-cent difference to Chicago and North Western as a dividend. Between 1948 and 1952, Superior Coal paid dividends to Chicago and North Western that substantially exceeded Superior Coal's net income during those years. Taking unfair advantage of a subsidiary is one of the indices of an alter-ego relationship. *Hopgood*, 120 Ill. App. 3d at 227.

¶ 120 So, one could reasonably conclude, from plaintiffs' allegations of fact, that Superior Coal was nothing more than a tool of Chicago and North Western—as this court held in *Edwards* on the basis of fewer facts than plaintiffs have pleaded in the present case (*Edwards*, 79 Ill. App. 2d at 50-51, 53). We held in *Edwards*:

"In the present case, if the plaintiffs can produce evidence that

there was a unity of interest and ownership between the Chicago and Northwestern Railway Company and the Superior Coal Company and that the recognition of the coal company's separate identity would 'present an obstacle to the due protection or enforcement of public or private rights' or would 'promote injustice,' then liability could properly be predicated against the railway company. The amended complaints of the plaintiffs have alleged that such a unity existed and that such an injustice would result. Therefore, the trial court erred in dismissing those parts of the amended complaints which predicated liability against the railway company for surface subsidence over areas mined by its subsidiary, the Superior Coal Company." *Edwards*, 79 Ill. App. 2d at 52-53 (quoting *Kruse v. Streamwood Utilities Corp.*, 34 Ill. App. 2d 100, 113 (1962)).

¶ 121 How would recognizing the separate corporate identities of Superior Coal and Chicago and North Western "promote injustice"? See *Main Bank*, 86 Ill. 2d at 205; *Edwards*, 79 Ill. App. 2d at 53. The short answer is that it would allow Chicago and North Western to mine coal without bearing any of the corresponding responsibility to provide subjacent support. If Superior Coal was merely an instrumentality of Chicago and North Western, then Chicago and North Western really was the corporation doing the coal mining (through Superior Coal). The entity doing the coal mining should be the entity incurring strict liability for resulting subsidence. Chicago and North Western should not be allowed to shift responsibility to its coal mining tool, Superior Coal. Chicago and North Western should share Superior Coal's legal responsibility either to leave adequate natural

subjacent support in place or to replace the natural support with adequate artificial support.

¶ 122 *2. The Transfer of Legal Responsibility From Chicago and North Western, First, to New Chicago and North Western and, Afterward, to Union Pacific*

¶ 123 As we have explained, plaintiffs have pleaded facts that could reasonably lead to the conclusion that Superior Coal was the alter ego of Chicago and North Western. And if Superior Coal was the alter ego of Chicago and North Western, Superior Coal's responsibility to leave adequate subjacent support was also Chicago and North Western's responsibility.

¶ 124 The next question is how that responsibility was transferred to Chicago and North Western's successor in title, New Chicago and North Western, and thence to Union Pacific. According to the School District's complaint, when New Chicago and North Western (then known as "North Western Employees Transportation Corporation ") bought Chicago and North Western in 1970, New Chicago and North Western agreed to assume Chicago and North Western's "liabilities *** of any kind, nature and description, whether public or private, whether arising by or as a result of agreement, action, omission to act, law or violation of law, or otherwise, whether known or unknown, whether accrued or not accrued for any purpose, and whether or not disclosed by this Agreement or reflected in any book or record of any [*sic*] [Chicago and North Western]." This language is even stronger than the language in Chicago and North Western's resolution of September 14, 1956, in which it assumed Superior Coal's liabilities. Apparently as part of the consideration for Chicago and North Western's assets, New Chicago and North Western agreed to assume Chicago and North Western's (Superior Coal's) liability to provide subjacent support.

¶ 125 Afterward, in 1995, when New Chicago and North Western merged into Union Pacific, Union Pacific became "responsible and liable for all liabilities and obligations" of New

Chicago and North Western, including New Chicago and North Western's liability to provide subjacent support, a liability it had assumed from Chicago and North Western/Superior Coal. 805 ILCS 5/11.50(a)(5) (West 1994) (Such "surviving or new corporation thenceforth is responsible and liable for all the liabilities and obligations of each of the corporations so merged."); 13 Ill. L. & Prac. *Corporations* § 340 (2000). When the land subsided beneath the school in 2009, "[a] cause of action then accrue[d] on the liability." *Benge's Administrator*, 51 S.W. at 151 (cited in *Evans*, 298 Ill. at 113).

¶ 126

3. *The Superior Coal Cases*

¶ 127 Union Pacific argues that twice, in *Superior Coal Co. v. Department of Finance (Superior I)*, 377 Ill. 282 (1941), and in *Superior Coal Co. v. Department of Finance (Superior II)*, 4 Ill. 2d 459 (1954), the supreme court rejected the contention that Superior Coal was the alter ego of Chicago and North Western.

¶ 128 It is true that, in *Superior I*, the supreme court refused to pierce the corporate veil between Superior Coal and Chicago and North Western (*Superior I*, 377 Ill. at 295), but it is important to keep in mind the ultimate reason for this refusal. Superior Coal requested the courts to pierce the corporate veil between itself and Chicago and North Western, and to declare Superior Coal to be a mere instrumentality of Chicago and North Western, in order that Superior Coal could avoid paying a retailers' occupation tax on the coal it had sold to Chicago and North Western. *Id.* at 283-84. The supreme court found this request to be problematic for the following reason. Superior Coal and Chicago and North Western had used these separate corporate forms for nearly 40 years and presumably had benefitted financially from doing so. Allowing Superior Coal now to renounce these separate corporate forms at its convenience, in order to avoid paying \$102,730.75

in tax and penalties, would not have seemed quite fair. *Id.* at 295.

¶ 129 Granted, in its decision in *Superior I*, the supreme court mentioned a few facts that arguably went against an alter-ego theory. For example, claims for worker's compensation were made against Superior Coal instead of against Chicago and North Western (*Superior I*, 377 Ill. at 286), and when the federal government seized control of railroad companies during World War I, it did not seize control of Superior Coal (*Id.* at 287). Nevertheless, what really seemed to drive the supreme court's decision in *Superior I* was the inequity of allowing Superior Coal to put on and take off the corporate costume at its own convenience. If Superior Coal had reaped the benefits of a separate corporate form, it should not be allowed to shirk the burdens thereof. *Id.* at 290.

¶ 130 Given this rationale in *Superior I*, a *third party* would not necessarily be precluded from piercing the corporate veil between Superior Coal and Chicago and North Western. In fact, a third party did so in his complaint in *Edwards*. *Edwards*, 79 Ill. App. 2d at 52-53. A corporation, however, may not pierce its own corporate veil for its own benefit. *In re Rehabilitation of Centaur Fire Insurance Co.*, 158 Ill. 2d 166, 173-74 (1994); *Superior I*, 377 Ill. 2d at 290.

¶ 131 As for the other Superior Coal case that the supreme court decided, *Superior II*, we do not see how it has much relevance. In *Superior II*, Superior Coal contended it should not have to pay a retailers' occupation tax on its sale of coal to Chicago and North Western if the coal was destined for out-of-state delivery. Superior Coal argued that such sales fell within a statutory exception for interstate business. *Superior II*, 4 Ill. 2d at 462-63. The supreme court disagreed. It held that once the coal was loaded into railroad cars at the mine in Illinois, the coal became the property of Chicago and North Western and, at that point, the railroad was in possession of the coal not merely as a carrier but as a purchaser. *Id.* at 467.

¶ 132 The only arguable relevance of *Superior II* lies in a remark the supreme court made about *Superior I*. The supreme court said: "We there held [(in *Superior I*)] that the facts and circumstances did not warrant the disregarding of the *fiction* of the corporate entity." (Emphasis added.) *Superior II*, 4 Ill. 2d at 463. Thus, the corporate entity was a fiction, but under the facts and circumstances of *Superior I*, the fiction would be enforced; Superior Coal had to live with its own sham.

¶ 133 In the interest of justice, though, a third party can ask a court to disregard the fiction of the corporate entity. Consequently, we conclude that the trial court erred in this case by granting Union Pacific's motion to dismiss count I of the School District's amended complaint and counts II and V of the Fund's complaint.

¶ 134 C. Direct Participation (Count IV of the School District's Amended Complaint)

¶ 135 In count IV of its amended complaint, the School District advances the theory that Chicago and North Western directly participated in the subsidiary's activity that ultimately caused the School District's and the Carters' losses. In paragraph 47 of count IV, the School District alleges:

"Union Pacific is liable for the damages caused by the March 2009 subsidence to the School District's property, including the Benld School, due to its merged company's (New Chicago and North Western) purchase of liabilities relating to Chicago and North Western's direct participation in its subsidiary's (Superior Coal) overall business and budgetary strategy for its mining operations, including the failure to provide the surface property owner (the School District) with adequate subjacent support when conducting

mining operations in Number 2 Mine of Superior Coal."

When we take the factual allegations in the quoted text to be true and read those allegations in a light most favorable to the School District, resolving all reasonable inferences in the School District's favor, the "overall business and budgetary strategy" that Chicago and North Western imposed upon its subsidiary, Superior Coal, included "the failure to provide the surface owner *** with adequate subjacent support."

¶ 136 In *Forsythe*, 224 Ill. 2d at 290, the supreme court stated as follows:

"[W]e hold that direct participant liability is a valid theory of recovery under Illinois law. Where there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy and carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability. The key elements to the application of direct participant liability, then, are a parent's specific direction or authorization of the manner in which an activity is undertaken and foreseeability. If a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable. Similarly, if a parent company mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries. We again stress, though, that

allegations of mere budgetary mismanagement alone do not give rise to the application of direct participant liability."

The School District appears to be alleging that not only did Chicago and North Western determine Superior Coal's "overall business and budgetary strategy for its mining operations" but, as part of this strategy, Chicago and North Western determined the manner in which Superior Coal performed the mining operations and that manner included leaving inadequate subjacent support in the Number 2 Mine. "[I]f parent companies do interfere directly in the manner their subsidiaries undertake certain activities, they must do so with reasonable care." *Id.* at 291. By imposing on Superior Coal a business and budgetary strategy that included leaving inadequate subjacent support, Chicago and North Western interfered directly in the manner in which Superior Coal undertook its mining activities. Therefore, we conclude that the trial court erred by dismissing count IV of the School District's amended complaint.

¶ 137

D. The Survival Statute

¶ 138 On the authority of *Peetoom v. Swanson*, 334 Ill. App. 3d 523, 529-30 (2002), Union Pacific argues that, even if Superior Coal was Chicago and North Western's alter ego and even if Chicago and North Western directly participated in the removal of naturally necessary subjacent support, the Survival Act (Ill. Rev. Stat. 1949, ch. 32, ¶ 157.94) bars plaintiffs' claims. In *Peetom*, 334 Ill. App. 3d at 525, the plaintiffs won a default judgment against The Swanson Group, Inc. (Swanson). Swanson then was involuntarily dissolved, and in a prove-up hearing after Swanson's dissolution, the trial court awarded damages to the plaintiffs. *Id.* The plaintiffs initiated citation proceedings against Swanson, but the plaintiffs were unsuccessful in collecting from Swanson, because Swanson was insolvent. *Id.* The plaintiffs then filed an action against Swanson's

shareholders and directors, D. Michael Gibson, John Powers, and Hugh Funderburg, seeking to pierce the corporate veil on the theory that Swanson was a " 'mere facade for the operation of its shareholders, ' "—in other words, Swanson was an alter ego of Gibson, Powers, and Funderburg. *Id.* The plaintiffs argued, and the Second District agreed, that the five-year period in the Survival Statute (805 ILCS 5/12.80 (West 1998)) was applicable to the plaintiffs' citation proceeding. The appellate court reasoned: "[S]ection 12.80 specifically provides that a corporation's dissolution does 'not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders.'" 805 ILCS 5/12.80 (West 1998). Therefore, despite Swanson's dissolution, [the] plaintiffs were entitled under section 12.80 to file suit against Swanson and its shareholders within five years from the date of dissolution." *Id.* at 529.

¶ 139 Union Pacific reasons that just as Gibson, Powers, and Funderburg were shareholders of the alter ego Swanson, Chicago and North Western was the shareholder of the alleged alter ego in this case, Superior Coal. Union Pacific observes that in 1957, as now, the Survival Statute, by its terms, governs actions against shareholders of the dissolved corporation as well as actions against the dissolved corporation. The statute provides:

"The dissolution of a corporation *** shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution." Ill. Rev. Stat. 1949, ch. 32, ¶ 157.94.

Union Pacific reasons that if, by reason of the dissolution of Superior Coal in 1957, a remedy against

Superior Coal's shareholder, Chicago and North Western, would have become unavailable two years after the dissolution, a liability, contingent or otherwise, could not possibly have been passed on from Chicago and North Western ultimately to Union Pacific.

¶ 140 In *Edwards*, 79 Ill. App. 2d at 52-53, however, this court held that the Survival Statute was inapplicable to a subsidence action against the parent corporation, Chicago and North Western, given that, under the facts of the complaint, the subsidiary, Superior Coal, was Chicago and North Western's alter ego. This court held that the trial court properly had dismissed the claim against Superior Coal, because the plaintiffs had not filed their claim within the two-year period in the Survival Statute. *Id.* at 51. Nevertheless, the action against Chicago and North Western could proceed. This court phrased the issue this way:

"May liability be predicated against a parent corporation, owning substantially all the shares of a subsidiary corporation, for surface subsidence over areas mined by a subsidiary corporation, where, upon dissolution of the subsidiary, the mineral rights and assets of the subsidiary were transferred to the parent and where suits for damage were initiated within five years after the alleged subsidence, but after the period within which a suit could be brought against the dissolved corporation ***?" *Id.* at 51-52.

This court answered yes (*id.* at 53), and that answer applies to the present case. See 8 Ill. Prac. *Business Organizations* § 18.8 (2010) ("Finally, the survival statute is not applicable to the dissolution of a corporation when either the parent corporation of a subsidiary or the shareholders of an operating company can be shown to be the alter egos of the dissolved corporation.").

¶ 141 It is true that in *Edwards*, 79 Ill. App. 2d at 52, there was a second issue: whether Chicago and North Western had fraudulently induced the plaintiffs to delay filing their action until after the end of the survival period for filing actions against Superior Coal. But the plaintiffs pleaded the fraud theory in the alternative (*id.* at 51), and this court's discussion of Superior Coal as the alter ego of Chicago and North Western stands on its own, without any reference to the second issue, the theory of fraudulent inducement to exceed the survival period (*id.* at 52-53).

¶ 142 E. Denial of Leave To Amend the Complaints

¶ 143 The School District argues that the trial court abused its discretion by denying it permission to add to its amended complaint count VII (liability based upon merger), count VIII (alternative claim based on *de facto* merger), and count IX (liability based upon the transfer of coal mining assets between related companies).

¶ 144 We ask whether the denial of the motion to amend was an abuse of discretion. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). The standard of abuse of discretion is the most deferential standard of review known to the law. *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). In applying this deferential standard, though, we "must look to the criteria on which the trial court should rely to determine if the trial court abused its discretion." (Internal quotation marks omitted.) *Paul v. Gerald Adelman & Associates*, 223 Ill. 2d 85, 99 (2006). For purposes of granting or denying a motion to amend a complaint, those criteria are as follows: "whether the amendment would cure a defect in the pleadings; whether the other party would be prejudiced or surprised by the proposed amendment; timeliness of the proposed amendment; and whether there were previous opportunities to amend the pleadings." *Lee*, 152 Ill. 2d at 467-68. It is up to the trial court to decide the weight to give to any one of those criteria relative to the other criteria. Arguably, the School

District had plenty of previous opportunities to amend its complaint. The document that was the basis of the proposed counts VII and VIII of the School District's amended complaint, Chicago and North Western's 1956 report to the Interstate Commerce Commission, was a public record, available for the asking from the National Archives Trust, and the court previously allowed the School District to amend its complaint three times. Much briefing and argument had already occurred. We cannot reasonably hold that the court abused its discretion by denying the motion when the School District requested, for the fourth time, to amend its complaint.

¶ 145 The trial court's decision to deny the School District leave to amend its amended complaint yet again so as to plead a merger and a *de facto* merger has significance for the intervenor, the Fund. Even though the Fund had no previous opportunities to assert a merger theory, the court's decision as to what the School District may plead can affect what the Fund may plead. Section 2-408(f) of the Code of Civil Procedure (735 ILCS 5/2-408(f) (West 2010)) provides as follows:

"An intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right, provide that the applicant shall be bound by orders or judgments, theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require."

The trial court could have reasonably decided that merger theories might have been more properly raised at an earlier stage of the proceeding, before the extensive briefing and argument that had already occurred, and consequently the court was within its authority under section 2-408(f) to strike the merger claims (counts III and VI) from the Fund's complaint.

¶ 146

III. CONCLUSION

¶ 147 For the foregoing reasons, we affirm the trial court's judgment in part and reverse it in part. We affirm the denial of leave to add counts VII, VIII, and IX to the School District's complaint, and we affirm the striking of counts III and VI from the Fund's complaint. Nevertheless, we reverse the dismissal of counts I, IV, and V of the School District's amended complaint, and we reverse the dismissal of counts I, II, IV, and V of the Fund's complaint. We remand this case for further proceedings.

¶ 148

Affirmed in part and reversed in part; cause remanded.

¶ 149 JUSTICE STEIGMANN, specially concurring in part and dissenting in part:

¶ 150 My decision to dissent in part puts me in an unusual position because I commend my distinguished colleague who wrote the Rule 23 order in this case for doing an excellent job identifying the issues, analyzing them, and coming up with a thoughtful resolution. I also commend the attorneys for both sides, who not only did a fine job in their briefs but also were exceptionally helpful at oral argument.

¶ 151 Nonetheless, after careful consideration, I conclude that I cannot concur with the majority in all respects. Specifically, I disagree that this court should reverse the dismissal of count V of the School District's amended complaint.

¶ 152 The School District bases its argument regarding count V on the language in the September 14, 1956, resolution adopted by the board of directors of Chicago and North Western, in which it was resolved that Superior Coal's assets would be transferred to Chicago and North Western. That resolution further provided that Chicago and North Western would assume any liabilities of Superior Coal "(subject to applicable Statutes of Limitations) that cannot be fully liquidated prior to the time a certificate of dissolution has been issued by the Secretary of State of Illinois."

¶ 153 After carefully analyzing this resolution, the majority concludes that this resolution expressed an agreement and is therefore a contract. I agree. That conclusion means that when attempting to construe this language, we should use the normal tools available in construing a contract to determine what it means.

¶ 154 This is an important point because the School District's sole basis underlying count V is its claim that this language in the resolution opened the door for Chicago and North Western

to assume Superior Coal's liabilities *literally* in perpetuity that—but for that language—the company would not have assumed beyond two years. So, in my judgment, one must consider the resolution in context and ask whether the language cited by the School District could possibly mean what the School District contends that language means.

¶ 155 Everyone agrees that, by operation of law, Chicago and North Western had assumed the liabilities of Superior Coal for at least two years after the September 1956 merger. Everyone also agrees that because Superior Coal was a wholly owned subsidiary of Chicago and North Western, the Chicago and North Western board, in preparing this resolution for the acquisition of Superior Coal, was essentially negotiating with itself. That is, this was not an arm's-length negotiation between two competing parties in which they were looking out for their own interests. The only real party in interest at the table was Chicago and North Western, and that company could have put anything it wished in the resolution of acquisition.

¶ 156 So, the question I find troubling, as I consider the language of the resolution and the interpretation the School District wishes to give it, is this: Why would the Chicago and North Western board "choose perpetual risk as opposed to certain safety" when it came to acquiring the liabilities of Superior Coal? I used quotation marks in a portion of the previous question because I am quoting the language used by defendant's counsel at oral argument, which in turn I used when the School District's counsel gave his rebuttal portion of oral argument. I asked him to place himself back into 1956 at the table of the board of directors of Chicago and North Western and envision *any* scenario in which that board, consistent either with its fiduciary duty to the company or with the common sense of looking out for the company it represented, would have used language to hold Chicago and North Western at perpetual risk when they were under no obligation of any kind to do

so. Counsel was not able to provide any such scenario, and neither am I.

¶ 157 I use the word "perpetual" advisedly in that question because earlier during the School District's oral argument, I noted that the resolution upon which its claim in count V is based was passed 50 years before the subsidence that occurred in this case. I pointed out that for all we know, that subsidence might not have occurred for 150 years, instead of just 50. I then asked counsel whether he believed defendant would still be liable 150 years after the fact, under that hypothetical scenario. With commendable candor, he responded yes.

¶ 158 In the absence of any possible explanation for why the Chicago and North Western board would have caused such a self-inflicted wound upon that company by choosing "perpetual risk as opposed to certain safety," I cannot view the language of the resolution as supportive of the School District's claims in count V. Even if the language in question has some uncertainty or ambiguity, no suggested interpretation can be considered that, in context, simply makes no sense. Accordingly, I respectfully dissent from the majority's decision that this court should reverse the trial court's dismissal of count V. I otherwise concur fully with the majority's Rule 23 order.