2016 IL App (2d) 150842-U
No. 2-15-0842
Order filed June 28, 2016

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

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ED FIALA, Individually, and on behalf of other, similarly situated persons who reside within the Wasco Sanitary District Plaintiff-Appellant, v. HUDSON HARRISON, Defendant-Appellee.	)	Appeal from the Circuit Court of Kane County. No. 10-L-223 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

¶ 1 *Held*: The trial court properly denied plaintiff's motion to strike defendant's motion to dismiss plaintiff's third amended complaint; however, the trial court abused its discretion by dismissing defendant from the case with prejudice. Affirmed in part, reversed in part, and remanded with instructions for further proceedings.

¶ 2 This is our second review of this case, which involves allegations of a fraudulent scheme to deprive the Wasco Sanitary District of several million dollars in fees paid by taxpayer residents for access to water and sewer services. Although Hudson Harrison is the only defendant with a direct interest in this appeal, several other defendants are named in the lawsuit. The other defendants will be discussed herein as necessary.

¶ 3 Plaintiff, Ed Fiala, filed his third amended complaint against defendants, Wasco Sanitary District (sanitary district), Fox Mill Limited Partnership (Fox Mill), B&B Enterprises (B&B), Jeffrey Boose, Kenneth Blood, Robert Skidmore, Raul Brizuela, Gary Sindelar, Charles V. Muscarello, Patrick Griffen, and Hudson Harrison (collectively, the defendants). In addition to seeking declaratory relief, the complaint includes counts alleging common law fraud and civil conspiracy. The trial court initially dismissed the complaint after concluding that plaintiff lacked standing to bring the lawsuit. On appeal, we reversed the trial court's decision and remanded the cause for further proceedings. See *Fiala v. Wasco Sanitary Dist.*, 2014 IL App (2d) 130253-U (2014). The defendants then moved separately to dismiss the complaint as being legally insufficient. Plaintiff countered with a motion to strike the defendants' motions to dismiss, which the trial court denied. With the exception of Harrison, the trial court granted the motions to dismiss the complaint in favor of each defendant without prejudice. However, the trial court found that Harrison was not alleged to have been complicit in any of the alleged wrongdoing, and it therefore granted Harrison's motion to dismiss with prejudice. This appeal involves plaintiff's challenges to the trial court's denial of his motion to strike and its dismissal of Harrison from the case with prejudice.

¶ 4 I. BACKGROUND

¶ 5 The pleadings reflect that plaintiff is a resident of the Village of Campton Hills and a homeowner within the sanitary district. Plaintiff filed his complaint after the sanitary district denied his requests to attempt recouping the funds that are at the center of this lawsuit. According to plaintiff, the origins of the alleged scheme can be traced to 1994, when the sanitary district passed an ordinance approving an annexation agreement with Fox Mill for the development of 785 residential lots. The agreement provided that Fox Mill would pay for the

construction of a wastewater treatment facility to service the development. In return, the sanitary district agreed not only to annex the Fox Mill development, but also to reimburse Fox Mill for its construction costs. This reimbursement was to be accomplished by directing homeowners in the development to pay Fox Mill for the right to connect to the sanitary district's water and sewer systems. In 2001, the sanitary district amended the ordinance that approved the 1994 annexation agreement to allow Fox Mill to collect connection fees from more than 785 lots. In 2007, Fox Mill assigned its reimbursement rights to B&B.

¶ 6 Plaintiff maintains that the reimbursement negotiated by Fox Mill in the 1994 annexation agreement was illegal from its inception. That point notwithstanding, plaintiff alleges that Fox Mill and B&B have collected over $12 million in connection fees to date, far surpassing the reimbursement that was originally contemplated. The gravamen of plaintiff's third amended complaint is that the various defendants have taken a series of illegal and fraudulent actions throughout the years to perpetuate this scheme and hide the profits from public view. This diversion of funds has required the sanitary district to collect more from its taxpayers than would have been necessary absent the illegal arrangement.

¶ 7 Plaintiff alleges that the various defendants have benefitted from the scheme by way of their connections to Jerry Boose and Kenneth Blood, who are the owners and officers of Fox Mill and B&B. According to plaintiff, Robert Skidmore formerly served as vice president of the sanitary district and has been a sanitary district trustee from 2006 through the present; his wife is a B&B employee. Raul Brizuela was a trustee of the sanitary district from 1998 through 2011; he is married to one of Blood's daughters. Garry Sindelar was a trustee of the sanitary district from 2006 through 2011; he is also an employee of B&B. Charles V. Muscarello formerly acted as legal counsel to the sanitary district; he is now a business partner with B&B through his

interests in various other entities. Finally, Patrick Griffen is an attorney and the vice president of B&B; he is also married to one of Blood's daughters.

¶ 8 Plaintiff alleges that Harrison became involved in the scheme through his interaction with Griffen. In 2005, Harrison sought to annex an undeveloped tract of land known as Norton Farms into the sanitary district for the purpose of developing 106 lots. The sanitary district denied Harrison's request, however, due to a lack of water and wastewater capacity. In 2008, Harrison hired Griffen to represent him in his efforts to develop Norton Farms. Later that same year, the sanitary district entered into an annexation agreement with Harrison. The agreement provided that Harrison would pay $25,000 directly to B&B for every one of the 106 lots that was approved for development, meaning that B&B stood to be paid up to $2,650,000. Plaintiff alleges that Harrison paid a bribe for the sanitary district's approval and that he acted in concert with the other defendants to submit false documents to gain approval for the development from the Illinois Environmental Protection Agency.

¶ 9 The lawsuit was initially removed to federal court based on plaintiff's allegations that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961). The federal court dismissed plaintiff's RICO claim and the lawsuit was removed back to the state trial court for consideration of the claims brought under Illinois law. In separate motions, the defendants moved to dismiss plaintiff's third amended complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 5/2-619 (West 2010)). The trial court stated in a written order that it would address only the sanitary district's argument that plaintiff lacked standing to bring the complaint, explaining that the issue would be "dispositive as to all defendants." After concluding that plaintiff had failed to

sufficiently allege a property interest, and that he therefore lacked standing to bring a taxpayer lawsuit, the trial court dismissed the complaint with respect to all of the defendants.

¶ 10 On appeal, we reversed and remanded the cause for further proceedings, concluding that plaintiff had "sufficiently alleged a property interest in the sanitary district's water and sewage service, which necessarily includes money belonging to the sanitary district that was allegedly disposed of illegally through fraud or conspiracy." *Fiala v. Wasco Sanitary Dist.*, 2014 IL App (2d) 130253-U, ¶ 23 (2014) (*Fiala I*). We additionally noted that plaintiff's complaint was not barred by the doctrine of *res judicata* as a result of the federal court dismissing the RICO claim. *Fiala I*, ¶ 24 (citing *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 392 (2001)).

¶ 11 On remand, the defendants separately renewed their motions to dismiss plaintiff's third amended complaint as legally insufficient pursuant to section 2-615 of the Code. Plaintiff then moved to strike the defendants' motions, arguing that the defendants were required to raise any deficiency with respect to the pleadings in this court during our review of the trial court's ruling on the issue of standing in *Fiala I*. The trial court entered an order denying plaintiff's motion to strike on June 4, 2015, and proceeded to conduct a hearing on the motions to dismiss on August 20, 2015. After hearing arguments, the trial court found that the broad allegations in plaintiff's third amended complaint lacked the specificity necessary to survive a section 2-615 motion to dismiss. In so finding, the trial court commented that plaintiff might nonetheless be able to state a valid cause of action with regard to his allegations surrounding the 2001 amendment to the 1994 ordinance and the relationships between the various defendants and B&B. However, the trial court concluded that Harrison was only alleged to have complied with directions from the sanitary district. The trial court specifically found that plaintiff's allegations, even taken in the light most favorable to plaintiff, "[did] not put [Harrison] in any position other than having paid

the fee as directed by the [sanitary district] to B&B. * * * Because the [sanitary district] directed [Harrison] to pay it to B&B, I don't know how that makes him complicit in any kind of wrongdoing."

¶ 12 Accordingly, the trial court entered an order dismissing each of the defendants, with the exception of Harrison, without prejudice, and granting plaintiff leave to file a fourth amended complaint. In a separate order, the trial court granted Harrison's section 2-615 motion to dismiss with prejudice, stating that there was "no just reason for delaying either enforcement or appeal." Plaintiff filed a timely notice of appeal, stating that he was appealing not only from the trial court's final judgment dismissing Harrison from the case, but also from the trial court's June 4, 2015, order denying his motion to strike.

¶ 13 II. ANALYSIS

¶ 14 Plaintiff raises two issues on appeal. First, he contends that the trial court erred by dismissing Harrison from the case with prejudice. Second, he contends that the trial court erred by denying his motion to strike the defendants' motions to dismiss his third amended complaint. Fox Mill, B&B, Jeffrey Boose, Kenneth Blood, Robert Skidmore, Raul Brizuela, Gary Sindelar, Charles V. Muscarello, and Patrick Griffen filed a joint motion to intervene. We granted the intervenors leave to file a response brief for the purpose of addressing plaintiff's second contention, as a ruling in plaintiff's favor could have precedential value with regard to their interests in this lawsuit. For the following reasons, we agree with plaintiff's first contention, but we reject his second.

¶ 15 This case involves motions to dismiss plaintiff's third amended complaint pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 5/2-619 (West 2010)). A section 2-615 motion tests the legal sufficiency of a complaint. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21.

Rather than raising affirmative defenses, a section 2-615 motion disputes whether the pleadings contain sufficient facts which, if proven, could entitle the plaintiff to relief. *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 10. On the other hand, a section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts an affirmative matter that defeats the claim. *Bjork*, 2013 IL 114044, ¶ 21. The purpose of a section 2-619 motion "is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Our standard of review is *de novo* under either section of the Code. *Glasgow v. Associated Banc-Corp*, 2012 IL App (2d) 111303, ¶ 11. We also review *de novo* a trial court's ruling on a motion to strike. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001) (applying a *de novo* standard of review to a motion to strike an affidavit).

¶ 16 We first address the trial court's order granting Harrison's section 2-615 motion to dismiss with prejudice. As noted, plaintiff's third amended complaint alleges that the various defendants committed common law fraud and civil conspiracy.

¶ 17 In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 96-97 (2004). We must then determine whether the plaintiff's allegations, when considered in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Suburban 1, Inc. v. GHS Mortgage, LLC*, 358 Ill. App. 3d 769, 772 (2005). A cause of action should be dismissed under section 2-615 "only if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover." *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Although not required to set forth evidence in the complaint, the plaintiff cannot simply offer conclusions; rather, the plaintiff must allege

facts sufficient to bring a claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429-30 (2006).

¶ 18 Fraud-based claims require "specific allegations of facts from which fraud is the necessary or probable inference." *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 15 (quoting *Chatham Surgicore, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 803-04 (2005)). A plaintiff must therefore plead facts which establish the elements of fraud, "including what misrepresentations were made, when they were made, who made the misrepresentations, and to whom they were made." *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. To state a cause of action for common-law fraud, a plaintiff must plead: (1) a false statement of material fact; (2) knowledge or belief by the defendant that the statement was false; (3) an intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance. *Id.*

¶ 19 Proof of a civil conspiracy is typically established "from circumstantial evidence and inferences drawn from evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances." *Gillenwater v. Honeywell International, Inc.*, 2013 IL App (4th) 120929, ¶ 138 (quoting *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 134 (1999)). The elements of civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing, by some concerted action, either an unlawful purpose or a lawful purpose by unlawful means, (3) in furtherance of which one conspirator committed an overt tortious or unlawful act. *Fiala v. Bickford Sr. Living Grp., LLC*, 2015 IL App (2d) 150067, ¶ 62.

¶ 20 In his third amended complaint, plaintiff alleges that Harrison paid Griffen a sum of money in the form of legal fees, which was, in actuality, a bribe intended to gain the sanitary district's approval of the Norton Farms annexation agreement. According to plaintiff, Griffen

forwarded to bribe to Brizuela, a then-trustee of the sanitary district. Plaintiff alleges that B&B subsequently deeded the undeveloped Norton Farms property to Harrison for the purpose of securing additional connection fees. However, Harrison knew that B&B's collection of the additional connection fees was the product of an illegal scheme. Thus, Harrison knowingly participated in the illegal scheme. Finally, plaintiff alleges that Harrison and the other defendants acted in concert to submit false applications to the Illinois Environmental Protection Agency, which misrepresented the capacity of the sanitary district, for the purpose of gaining approval for the development of the Norton Farms property.

¶ 21 Plaintiff argues that his third amended complaint states a valid cause of action not only against Harrison, but also against the other defendants. We note that, even though the other defendants are not directly involved in this appeal, a determination of whether plaintiff's allegations were sufficient to state a valid cause of action against Harrison would necessarily require an analysis of the sufficiency of plaintiff's allegations against the other defendants. This is because the specific allegations against Harrison, when considered in isolation, lack the foundation for an analysis of whether plaintiff has pleaded facts necessary to satisfy the elements of fraud and civil conspiracy. Further complicating matters is the procedural posture of this case. As discussed above, the trial court has granted plaintiff leave to file a fourth amended complaint against the other defendants. For these reasons, we decline to hold that the allegations in plaintiff's third amended complaint, even when considered in the light most favorable to plaintiff, are sufficient to state a valid cause of action against any of the various defendants, including Harrison. See *Suburban 1, Inc.*, 358 Ill. App. 3d at 772. We note, however, that "there exists in this state a policy, long adhered to by our courts, that favors an adequate and appropriate hearing of a litigant's claim on the merits, and it is well established that a cause of

action should not be dismissed with prejudice unless it is clear that no set of facts can be proved under the pleading which would entitle the plaintiff to relief." *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85 (2003). Taking this policy into consideration, we disagree with the trial court's decision to dismiss Harrison from the lawsuit with prejudice.

¶ 22 A trial court's decision to dismiss a complaint with prejudice is reviewed for an abuse of discretion. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 28; see also *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143188, ¶ 16 ("Whether to allow an amendment of a complaint is a matter within the sound discretion of the trial court, and, absent an abuse of discretion, the court's determination will not be overturned on review."). When reviewing such a decision, a reviewing court considers "whether the trial court, before dismissing with prejudice, took into account the unique and particular circumstances of the case before it; if so, the court did not abuse its discretion." *Razor Capital*, 2012 IL App (2d) 110904, ¶ 28. If a plaintiff can state a cause of action by amending the complaint, dismissal with prejudice on the pleadings should not be granted. *Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc.*, 323 Ill. App. 3d 15, 26 (2001).

¶ 23 Here, the trial court commented that plaintiff's third amended complaint "begins to develop some odor" where plaintiff alleges that the 1994 annexation agreement was amended in 2001 to allow for B&B's collection of additional connection fees, and that the trustees of the sanitary district maintained improper relationships with B&B. On those bases, the trial court concluded that there "could be a valid cause of action." Without drawing any conclusions regarding the propriety of that decision, we are perplexed by the trial court's determination that Harrison was only alleged to have followed the sanitary district's directions, and that plaintiff had therefore failed to allege that Harrison was "complicit in any kind of wrongdoing." As noted

above, plaintiff alleged that Harrison knowingly participated in the fraudulent scheme by paying a bribe for the approval of the Norton Farms annexation and by falsifying applications to the Illinois Environmental Protection Agency. Taking into account the unique and particular circumstances of this case (*Razor Capital*, 2012 IL App (2d) 110904, ¶ 28), we do not believe it is clear that plaintiff could prove no set of facts which would entitle him to relief against Harrison. See *Smith*, 207 Ill. 2d at 584-85. We therefore conclude that the trial court abused its discretion in dismissing Harrison from the case with prejudice. On remand, the trial court is instructed to allow plaintiff an opportunity to amend his pleadings against Harrison.

¶ 24 We now turn to plaintiff's contention that the trial court erred in denying his motion to strike the defendants' section 2-615 motions. As discussed, Harrison and the other defendants initially filed separate motions to dismiss plaintiff's third amended complaint pursuant to sections 2-615 and 2-619 of the Code. However, the trial court addressed only the sanitary district's argument that plaintiff lacked standing, finding that plaintiff had failed to sufficiently allege a property interest. We confined our analysis to that issue on appeal in *Fiala I*, concluding that plaintiff sufficiently alleged a property interest in the sanitary district's water and sewage service. *Fiala I*, 2014 IL App (2d) 130253-U, ¶¶ 12-23. We also briefly addressed and rejected an alternative argument that the complaint was barred by the doctrine of *res judicata*. *Id*. at ¶ 24. Thus, the only issues that we considered in *Fiala I* were whether plaintiff's third amended complaint withstood a section 2-619 motion to dismiss brought under subsections (a)(4) and (a)(9). See 735 ILCS 5/2-619(a)(4) (West 2010) (permitting involuntary dismissal where the cause of action is barred by a prior judgment); 735 ILCS 5/2-619(a)(9) (West 2010) (permitting involuntary dismissal where the claim asserted is barred by an "affirmative matter avoiding the legal effect of or defeating the claim"); see also *In re Estate of Schlenker*, 209 Ill. 2d 456, 461

(2004) (noting that lack of standing qualifies as an "affirmative matter" within the meaning of section 2–619(a)(9)).

¶ 25 Plaintiff first argues that our holding in *Fiala I* went much further, asserting that we recognized the factual basis of his third amended complaint, and that we impliedly held that the complaint contained a valid cause of action. Thus, plaintiff argues, the legal sufficiency of the complaint was established in *Fiala I*, and the trial court should have therefore granted his motion to strike the renewed section 2-615 motions on that basis. Plaintiff requests that we reverse the trial court's decision denying his motion to strike so that he may be permitted to advance his claim to the next phase of the litigation and conduct discovery. Tempting as this invitation may be, given the likelihood that we will see these parties in *Fiala III*, we decline to grant such relief.

¶ 26 In *Fiala I*, prior to our analysis, we summarized the trial court's findings in support of its conclusion that plaintiff lacked standing. We stated in pertinent part:

> "* * * the trial court found that 'the essence' of plaintiff's allegations were that defendants, other than the sanitary district, 'engaged in fraud, conspiracy, and self-dealing in violation of several Illinois [statutes] and the common law for their own personal (and that of their respective entities) interests, at the expense of [the sanitary district's] interests.' " *Fiala I*, 2014 IL App (2d) 130253-U, ¶ 10.

Near the conclusion of our analysis on the issue of standing, we stated as follows:

> "In sum, and contrary to the trial court's determination, the essence of plaintiff's complaint is that, through defendants' fraudulent scheme, the sanitary district was deprived of money that it should have collected through connection fees. * * * plaintiff has sufficiently alleged a property interest in the sanitary district's water and sewage

service, which necessarily includes money belonging to the sanitary district that was allegedly disposed of illegally through fraud or conspiracy." *Id*. ¶ 23.

¶ 27 Plaintiff relies on the first sentence in this paragraph to support his argument. However, when viewed in the proper context, the statement in question related to our conclusion that plaintiff had gone beyond merely alleging that the defendants had engaged in a fraudulent scheme to profit at the expense of the sanitary district. Rather, plaintiff alleged that the defendants had actually deprived the sanitary district of money that should have been rightfully collected, and plaintiff therefore sufficiently alleged a property interest in the sanitary district's water and sewage service. Hence, contrary to plaintiff's assertion here, our statements in *Fiala I* were made for the sole purpose of establishing that plaintiff had standing to bring the lawsuit; they were not meant to suggest anything regarding the legal sufficiency of plaintiff's third amended complaint.

¶ 28 Plaintiff's second argument is that the defendants waived any challenge to the legal sufficiency of his third amended complaint under section 2-615. Plaintiff notes that an appellee has the opportunity to raise an issue for the first time on appeal for the purpose of sustaining the trial court's judgment, so long as the factual basis for the issue was before the trial court. *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶ 114. We therefore had the authority in *Fiala I* to affirm the trial court's dismissal of plaintiff's third amended complaint for any reason appearing in the record. See *AIDA v. Time Warner Entertainment Co., L.P.*, 332 Ill. App. 3d 154, 157-60 (2002) (affirming the trial court's section 2-615 dismissal of the plaintiff's complaint on grounds that the plaintiff lacked standing under section 2-619, even though the defendant never filed a section 2-619 motion). Plaintiff argues that this rule should operate by extension to bar the defendants from renewing their section 2-615 motions because they failed to

challenge the legal sufficiency of the complaint in *Fiala I*. Stated differently, because the complaint was before us in *Fiala I*, and because the defendants could have used that opportunity to challenge the legal sufficiency of the complaint as an alternative ground for affirming the trial court's section 2-619 dismissal on the issue of standing, plaintiff argues that the defendants' failure to raise any such alternative arguments constituted a waiver of the issue on remand.

¶ 29 In support, plaintiff urges us to apply the reasoning set forth in *Midway Airlines, Inc. v. Department of Revenue*, 234 Ill. App. 3d 866 (1992). In that case, Midway protested the Department's assessment of over $90,000 in tax on food trays and hand towels, contending that the items were exempt under either: (1) a temporary storage exception; or (2) a rolling stock exception. An administrative law judge concluded that the temporary storage exception applied, but did not address the applicability of the rolling stock exception. However, the then-director of the Department had the authority to render the final decision in the dispute as to tax liability. The director declined to follow the administrative law judge's recommendation, maintaining that neither exception applied. The circuit court then reversed the director's decision, finding that the rolling stock exception applied, but making no finding with regard to the temporary storage exception. On appeal, the Department raised the single issue of whether the circuit court erred in determining the applicability of the rolling stock exception. *Id*. at 867-68.

¶ 30 The appellate court reversed the circuit court, holding that the rolling stock exception was inapplicable, and further rejecting Midway's request that the cause be remanded for a finding with regard to the temporary storage exception. *Midway Airlines, Inc.*, 234 Ill. App. 3d at 869-870. The court held in relevant part: "Although an appellee need not cross-appeal a decision of the trial court in which he has obtained all that has been asked for [citation], we believe the failure to present to the reviewing court the previously-asserted, alternative reasons for

sustaining the trial court's judgment should constitute an abandonment of those reasons and result in their waiver." *Id*. at 870. The court further noted that it would be "promoting piecemeal litigation" if it did not consider the issue waived, as a remand for a ruling on the applicability of the temporary storage exemption would likely result in a second appeal. *Id.*

¶ 31 *Midway Airlines* is distinguishable from the present case, and we decline to apply its reasoning under these circumstances. Here, the procedural issue regarding the legal sufficiency of plaintiff's third amended complaint had not yet been addressed at the time of our appellate review in *Fiala I.* However, in *Midway Airlines*, the substantive issue regarding the applicability of the temporary storage exception had been addressed before the case reached the appellate court. Because that case involved an administrative review, the appellate court was required to affirm the Department's ruling unless it was found to be contrary to the manifest weight of the evidence. *Midway Airlines, Inc.*, 234 Ill. App. 3d at 868. As discussed, the director of the Department had concluded that neither the temporary storage exception nor the rolling stock exception applied to the food trays and hand towels, thereby rejecting the administrative law judge's conclusion that the items should be exempt under the temporary storage exception. *Id*. at 867-68. Thus, although the temporary storage exception was not addressed by the circuit court, and it was therefore not the focal point of the Department's appeal, the issue had nonetheless been ruled upon during the course of the underlying litigation. Under the unique circumstances in *Midway Airlines*, we can understand why the appellate court would have declined to remand the cause to the circuit court for a ruling on a substantive issue that had been previously argued and decided.

¶ 32 Because the trial court in this case did not initially address the legal sufficiency of plaintiff's third amended complaint, we do not believe it was incumbent on the defendants to

argue during *Fiala I* that the complaint should be dismissed under section 2-615 as an alternative ground for affirming the trial court's dismissal under section 2-619. We also believe it would be impractical to hold that an appellee has a burden to raise any and all alternative grounds for affirming a trial court's dismissal on procedural grounds, and we are unaware of any cases holding otherwise. Finally, we note that our Supreme Court has cautioned against affirming a trial court's dismissal of a complaint with prejudice on the basis of a correctable pleading defect. See *Geaslen v. Berkson, Gorov & Levin, Ltd.*, 155 Ill. 2d 223, 230 (1993). Therefore, even if the defendants had challenged the legal sufficiency of the complaint in *Fiala I*, it is unlikely that we would have addressed the issue.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's denial of plaintiff's motion to strike the motions to dismiss his third amended complaint. We reverse the trial court's order dismissing Harrison from the lawsuit with prejudice, and we remand the cause with instructions that plaintiff be permitted to amend his complaint accordingly.

¶ 35 Affirmed in part, reversed in part, and remanded with instructions.