NO. 5-09-0429

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



| | | |
|---|---|---|
| JANE DOE, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | St. Clair County. |
| | ) | |
| v. | ) | No. 01-L-297 |
| | ) | |
| PAT STYVE, | ) | |
| | ) | |
| Defendant | ) | |
| | ) | |
| (Illinois Insurance Guaranty Fund, | ) | Honorable |
| | ) | Robert P. LeChien, |
| Petitioner-Appellant). | ) | Judge, presiding. |

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Donovan concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held*: (1) The trial court properly denied the Fund's petition to intervene because the Fund was not in privity with the party and would not be injured by the postjudgment orders sought and because the intervention would result in manifest prejudice to the parties, (2) the trial court had jurisdiction to enter the amended judgment *nunc pro tunc* because the trial court had reviewed the release prior to entering its order and the terms of the amended order did not modify the consent judgment, (3) the trial court had jurisdiction to grant leave to file a fifth amended complaint because the amendment sought to conform the pleadings to the proof and did not add a new cause of action, and (4) the Fund did not have standing to file a section 2-1401 petition because the Fund is not bound by the judgment in the underlying action and will not be injured by the judgment or benefit from its reversal.

On May 17, 2001, Jane Doe (Doe) filed a complaint sounding in five counts against the Belleville Public Elementary School District 118 (the School), the Board of Education of Belleville Public Elementary School District 118 (the Board), and Pat Styve (Styve). The counts against the School and the Board alleged the negligent supervision and employment

of Styve and the negligent investigation of reports of misconduct by Styve. The count against Styve alleged that while Doe was Styve's student at the School, "she was the victim of inappropriate contact by Defendant Pat Styve" and Styve "intentionally assaulted plaintiff without justification and in violation of statute." Styve filed a *pro se* answer to the complaint on July 17, 2001.

The School denied Styve coverage under its insurance policy because that policy provided coverage to a teacher "only for acts within the course and scope of his duties or employment" by the School. Styve had an insurance policy issued by Reliance Insurance Company (Reliance), through his membership with the American Federation of Teachers. Reliance retained defense counsel for Styve; on January 22, 2002, James E. DeFranco, entered his appearance.

On November 7, 2002, the School filed a motion to dismiss the complaint. The School asserted, *inter alia*, that section 3-108 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-108 (West 2008)) provides immunity to a local public entity or a public employee for any injury caused by a failure to supervise an activity on or for the use of any public property. The School also asserted that section 24-24 of the School Code (105 ILCS 5/24-24 (West 2008)) provides immunity to teachers and school districts from ordinary negligence in maintaining discipline.

On February 20, 2003, Doe filed a first amended complaint that amended the counts against the School and the Board from negligence to wilful and wanton conduct and added a count alleging a violation of the Abused and Neglected Child Reporting Act (325 ILCS 5/1 *et seq.* (West 2008)), which imposed an obligation to report suspected child abuse at any time the defendants suspected or should have suspected a child might have been "sexually abused." On March 17, 2003, the School and the Board moved to dismiss the first amended complaint, and they again asserted, *inter alia*, that they were provided immunity by the Tort

Immunity Act and the School Code.

On May 28, 2003, the trial court entered an order granting the motion to dismiss and granting Doe leave to amend. Thereafter, Doe filed a second amended complaint on July 8, 2003, alleging again that while Doe was Styve's student at the School, she was "the victim of inappropriate contact by the Defendant, Pat Styve, which occurred during the course of his employment with said School" and that he "intentionally assaulted" Doe. The complaint further alleged the School's and the Board's failure to make a required report when they "knew or should have suspected that plaintiff was the victim of sexual abuse."

Styve filed an answer to the second amended complaint on August 6, 2003, denying the allegations. On September 29, 2003, the School and the Board moved to dismiss the cause with prejudice and asserted their affirmative defenses of the statutory immunities. Thereafter, the School and the Board filed a motion for a summary judgment on July 18, 2005.

In the meantime, Reliance became insolvent. Due to the insolvency of Reliance and pursuant to the Illinois Insurance Guaranty Fund Statute–article XXXIV of the Illinois Insurance Code (215 ILCS 5/532 *et seq*. (West 2008)), the Illinois Insurance Guaranty Fund (the Fund) assumed the defense of Styve pursuant to a reservation of rights and filed a separate declaratory judgment action against Styve and Doe regarding the Fund's duties and obligations to Styve under case No. 05 MR 163 in the circuit court of St. Clair County. On October 16, 2006, the trial court dismissed Doe's complaint with prejudice with regard to the School and the Board only and not with regard to Styve. The School and the Board settled with Doe in the amount of $90,000, explicitly excepting Styve.

On December 18, 2006, the trial court entered an order granting Styve's motion for leave to add the affirmative defense of a setoff and deemed the amended answer with affirmative defenses as filed *instanter*. On December 8, 2008, Doe filed a third amended

complaint that omitted the School and the Board, who were no longer parties, and amended the allegation against Styve to "negligently and carelessly, within the course and scope of his duties as a teacher and a mentor, formed an inappropriate sexual relationship with the minor plaintiff." A fourth amended complaint was then filed on December 16, 2008, amending the allegation by removing the word "sexual" and adding two additional allegations that Styve "negligently and carelessly within the course and scope of his duties as a teacher failed to warn plaintiff's parents of any improper activities of their daughter, including running away from home and traveling to dangerous municipalities," and "negligently and carelessly within the course and scope of his duties as a teacher failed to supervise plaintiff."

Styve's counsel became aware of settlement discussions between Styve and Doe and advised the Fund. The Fund advised avoiding any involvement in settlement discussions. Styve's counsel in the declaratory judgment action negotiated the settlement with Doe. The Fund requested that counsel file a motion to dismiss Doe's fourth amended complaint asserting immunity, but counsel refused to do so because he believed that the parties had already agreed to settle and that it was not in the best interest of Styve.

Styve answered the fourth amended complaint on January 2, 2009, denying all the allegations and asserting that he was "entitled to a set-off in the amount co-defendants agreed to pay plaintiff in the settlement agreement reached between co-defendants and plaintiff, in which co-defendants paid plaintiff $90,000."

On February 2, 2009, in anticipation of the settlement, Doe signed a release that released Styve from liability for the following actions:

> "a) Any claim asserted against Styve in the litigation which is the subject matter of this release[] and any claim that could have been asserted in this litigation;
>
> (b) Any alleged failure to notify [Doe's] parents of any potential improper activities of their daughter, including running away from home and traveling to

dangerous municipalities;

(c) Any alleged failure to refrain from meeting or communicating with [Doe]; and

(d) Any negligent supervision of [Doe] at any time that she was a student of or otherwise in the company of Styve.

It is [further] understood and agreed, Styve, [*sic*] denies any intentional misconduct against [Doe], any sexual conduct with her, and any intent to cause harm, and that these denials have been taken into consideration in arriving at the amount of judgment to be entered against Styve."

On February 5, 2009, the trial court entered a consent judgment that stated as follows:

"By consent of the parties, judgment is entered in favor of [Doe] and against Patrick Styve in the sum of THREE HUNDRED THOUSAND DOLLARS AND ZERO CENTS ($300,000.00).

All rights against any insurer for Patrick Styve are transferred to [Doe].

This judgment may not be enforced against any asset of Patrick Styve other than insurance policies which may provide coverage for this judgment."

On May 12, 2009, Doe filed a motion to file a fifth amended complaint seeking to allege "conduct which conforms to the evidence adduced in discovery to date." The fifth amended complaint omitted the allegation alleging an inappropriate relationship and the language "within the course and scope of his duties as a teacher" from the two remaining allegations.

The Fund filed a motion to intervene on May 20, 2009, alleging that defense counsel refused the Fund's request to file a motion to dismiss or affirmative defenses on behalf of Styve and that instead the consent judgment was entered and became a final judgment. The Fund also asserted that Doe filed a motion to file a fifth amended complaint and that defense

counsel had refused the Fund's request to oppose Doe's motion. Accordingly, the Fund sought leave to intervene to oppose Doe's motion to file a fifth amended complaint, alleging the following: (1) the motion was untimely and filed more than three months after the entry of the consent judgment, (2) the court lacks jurisdiction to entertain the motion to file an amended complaint, (3) section 2-616(c) of the Illinois Code of Civil Procedure (735 ILCS 5/2-616(c) (West 2008)), which is the only basis for amending a pleading after a judgment, does not apply in the instant case "to conform the pleadings to the proofs" because the judgment was entered without a trial so that the "proofs" were never admitted, (4) plaintiff had numerous prior opportunities to amend, and (5) the Fund would sustain prejudice.

On June 3, 2009, defense counsel filed an objection to the jurisdiction of the court and a motion to withdraw as counsel. The motion stated that he had been retained to defend Styve and that his fiduciary duties were owed to Styve. He further stated that coverage counsel for the Fund asserted that he had acted contrary to the interests of the Fund. Accordingly, he sought to withdraw due to a conflict of interest. He further requested that the court enter an order finding that none of the relief requested by Doe affected the terms of the February 5, 2009, consent judgment.

On July 16, 2009, a hearing was held on Doe's motion to file a fifth amended complaint, the Fund's motion to intervene, and counsel's objection to jurisdiction and motion to withdraw. The court entered two orders, a written order and a written amended judgment *nunc pro tunc*. The written order stated the following:

> "(1) Styve's objection to jurisdiction is moot, as Jane Doe does not seek to alter the terms of the judgment relating to enforcement of the amount of the judgment against his personal assets (other than insurance coverage).
>
> 2) DeFranco & Bradley P.C. are permitted to withdraw as counsel[.]
>
> 3) The petition to intervene is denied[.]

4) The motion for leave to file the fifth amended complaint is granted."

The written amended judgment was identical to the previous consent judgment, but it added the following paragraph:

"This Judgment is amended *nunc pro tunc* with the consent of the parties to reflect that at the time the judgment was entered into by the parties on February 5, 2009, the judgment was for claims arising out of the negligent supervision by Pat Styve of Jane Doe and the negligent failure to notify Jane Doe's parents of the improper activities of their daughter which both occurred off school premises and not during the school year and such acts were outside the course and scope of Pat Styve's employment as evidence [*sic*] in the Release signed on February 2, 2009, and reflected in the Fifth Amended Complaint."

On August 14, 2009, the Fund filed its notice of appeal from the order denying the Fund's motion to intervene and granting Doe's motion to file the fifth amended complaint and from the amended judgment (No. 5-09-0673). On September 21, 2009, the Fund filed a section 2-1401 petition for relief from judgment and final order (735 ILCS 5/2-1401 (West 2008)) seeking that the court vacate the July 16, 2009, order and judgment amended for a lack of jurisdiction or, in the alternative, grant the Fund's petition to intervene and reconsider the order and amended judgment. Doe filed a motion to dismiss the Fund's section 2-1401 petition on October 20, 2009, alleging that the Fund lacked standing, the section 2-1401 petition was inconsistent with the purpose of the section 2-1401 petition, and the correct procedure would be a timely appeal. The Fund filed a response on November 16, 2009, alleging that it did have standing, the petition was consistent with the purpose of section 2-1401, and an appeal may be simultaneously pursued. Doe filed a reply to the response on November 24, 2009, alleging that Styve did not object to the entry of the July 16, 2009, order or amended judgment and that the trial court had jurisdiction to grant leave to amend and

enter the amended judgment.

A hearing was held on November 25, 2009. The trial court dismissed the Fund's section 2-1401 petition with prejudice, finding that the Fund is not a party to the suit and lacks standing to file a section 2-1401 petition seeking relief from judgment. The Fund filed a timely notice of appeal on December 10, 2009 (No. 5-09-0429). This court subsequently granted the motion to consolidate the appeals.

We first address the Fund's argument that the trial court erred in denying its petition to intervene. According to the Fund, it is in privity with Styve and would be injured by the postjudgment rulings sought or obtained by Doe. The decision to allow or deny intervention, whether as a matter of right or permissively, is a matter of sound discretion that will not be reversed absent an abuse of discretion. *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 58 (2002). Section 2-408(a) of the Code of Civil Procedure provides, "Upon timely application anyone shall be permitted as of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order of judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer." 735 ILCS 5/2-408(a) (West 2008).

The Fund asserts that under section 2-408, the Fund is entitled to intervene as of right because there was no representation of the Fund's interests, the Fund may be bound by the order or judgment entered, and the Fund is so situated that it will be adversely affected by the trial court's rulings entered July 16, 2009. The Fund argues that Doe and Styve stipulated to a consent judgment for the amount of the Fund's statutory limit, Styve assigned to Doe his rights against any insurer, and Doe sought a postjudgment amendment to increase her

chances of recovering from the Fund. Accordingly, it argues, the Fund has standing to intervene to challenge the postjudgment rulings sought by Doe because the Fund is in privity with the insured, Styve, and the Fund would be injured by the rulings entered July 16, 2009, which increase the Fund's potential liability. The Fund argues that it is in privity with Styve because the Fund stands in the shoes of Styve's insolvent insurer.

In response, the plaintiff cites *Home Insurance Co. v. Lorelei Restaurant Co.*, 83 Ill. App. 3d 1083 (1980), for the proposition that intervention has been denied when there is a conflict of interest between the insurer and the insured because the insurer is not bound by the underlying action. In *Home Insurance Co.*, the insurer appealed the denial of its petition to intervene in a negligence-and-intentional-conduct action, arguing that its interests were not adequately represented and that it could be bound by an order or judgment entered against it. *Home Insurance Co.*, 83 Ill. App. 3d at 1085-86. In the pending declaratory judgment action, the insurer raised the defense of intentional conduct and denied liability. *Home Insurance Co.*, 83 Ill. App. 3d at 1086. On appeal, the court noted that when there is a conflict of interest between the insurer and the insured, the insurer should not be obligated or permitted to participate in the defense of that case and that its obligation to provide a defense should be satisfied by reimbursing the insured for the costs of the defense. *Home Insurance Co.*, 83 Ill. App. 3d at 1087. To require the insurer to defend " 'would put the insurer and the insured in the untenable position of attempting to cooperate in the conduct of the litigation where their interests were, in fact, adverse.' " *Home Insurance Co.*, 83 Ill. App. 3d at 1087 (quoting *Thornton v. Paul*, 74 Ill. 2d 132, 154 (1978)). Accordingly, the court concluded, if allowed to intervene, the insurers would only prejudice the insureds. *Home Insurance Co.*, 83 Ill. App. 3d at 1087.

The court went on to explain that it was in the best interest of Lorelei to fasten liability upon the insurers by proving that the fire was caused by negligence, and the court stated "It

is in the interest of the intervenors [insurers] to escape this liability and to terminate any possible policy liability by showing that the fire was intentionally set by Lorelei or its agents." *Home Insurance Co.*, 83 Ill. App. 3d at 1087. The court concluded that permitting the intervention in the case would result in manifest prejudice to the remaining parties. *Home Insurance Co.*, 83 Ill. App. 3d at 1087.

The plaintiff argues that in the instant case there is a conflict of interest and that the Fund will not be bound by an order or judgment. The plaintiff argues that it is in the interest of Styve to fasten liability upon the Fund by proving that his conduct was outside the course and scope of his employment and amounted to negligence. The plaintiff also argues that it is in the Fund's interest to escape liability by showing that the conduct was within the course and scope of Styve's employment or was intentional. Accordingly, she argues, it would result in manifest prejudice to Styve and the plaintiff to permit the Fund to intervene. She contends that based on the conflict of interest, the Fund can raise the defense of noncoverage in the pending declaratory judgment action. Thus, she argues, the Fund is not bound, and it cannot intervene as a matter of right. After a thorough review of the record, we agree with the plaintiff's argument that there is a true conflict of interest and that the trial court did not err in denying the Fund's motion to intervene.

Next on appeal the Fund argues that the court did not have jurisdiction to enter the *nunc pro tunc* amended judgment or the order granting Doe's motion for leave to file a fifth amended complaint. We first address the court's *nunc pro tunc* amended judgment. The court has the power, even after the expiration of its term at which the judgment was rendered, to correct or amend the entry thereof *nunc pro tunc* to make it conform to the judgment that the court actually rendered. *Hill v. Dillon*, 106 Ill. App. 2d 201, 207 (1969). The function of a *nunc pro tunc* order is merely to correct the record of the judgment and not to alter the judgment actually rendered. *Dauderman v. Dauderman*, 130 Ill. App. 2d 807, 809 (1970).

The purpose of a *nunc pro tunc* order is limited to entering into the record something that was actually done, and it may not be used to supply omitted judicial action, to correct judicial error, or to cure a jurisdictional defect. *Spears v. Spears*, 52 Ill. App. 3d 695, 698 (1977). A *nunc pro tunc* amendment of the record must be based upon some note or memorandum from the records or quasi-records of the court to ensure that the judgment was actually rendered. *Spears*, 52 Ill. App. 3d at 698. A judgment may be amended *nunc pro tunc* when the record, in its entirety, is clear and convincing that a particular judgment is the actual judgment of the court. *Dauderman*, 130 Ill. App. 2d at 810-11.

The Fund argues that there is nothing in the record to indicate that, at the time the consent judgment was entered, it was entered for acts outside the course and scope of Styve's employment. The Fund urges this court to ignore the release because it does not contain the words "the negligent acts occurred outside the course of Styve's employment." However, the release lists several negligent acts on which the consent judgment was based. All the listed negligent acts occurred off of school premises and not during the school year. In essence, the negligent acts occurred outside the course and scope of Styve's employment as a teacher. It is reflected in the record and through Styve's own testimony that all the negligent acts committed by Styve and referenced in the release occurred off of school premises and not during the school year. Accordingly, by the very nature of the negligent acts, they were outside the course and scope of Styve's employment. When the record is read in its entirety, it is evident from the consent judgment that the negligent acts occurred outside the course and scope of Styve's employment.

The Fund also argues that the release should not be considered because it was not a part of the actual court file until after the *nunc pro tunc* amended judgment was filed. In response, Doe asserts that this is irrelevant. There is no dispute that the release was executed prior to the entry of the consent judgment. The amended judgment itself reflects that the

court reviewed the release prior to entering the amended judgment. Furthermore, case law states that *nunc pro tunc* orders must be based on some note or memorandum from the record or quasi-records of the court. *Spears*, 52 Ill. App. 3d at 698.

In response, the plaintiff notes that prior to the hearing, counsel for Styve filed a written objection to the jurisdiction of the court to modify the terms of the consent judgment. However, the terms of the consent judgment were not modified. The July 16, 2009, order specifically stated, "Styve's objection to jurisdiction is moot, as Jane Doe does not seek to alter the terms of the judgment relating to enforcement of the amount of the judgment against his personal assets (other than insurance coverage)." After reviewing the record, we conclude that the trial court had jurisdiction to enter the *nunc pro tunc* amended judgment and did not err in doing so because the record reveals that the court reviewed the release prior to entering the amended judgment and the terms of the amended judgment did not modify the consent judgment.

The Fund also argues that the trial court did not have jurisdiction to grant leave to file the fifth amended complaint. According to the Fund, Doe's motion to amend was not a proper motion under section 2-616(c) of the Code of Civil Procedure because there was no trial and no proofs were admitted. Pursuant to section 2-616(c) of the Code of Civil Procedure, "[a] pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(c) (West 2008). Amendments to conform the complaint to the evidence should be granted liberally, and any doubt should be resolved in favor of the amendment. *Lawson v. Hill*, 77 Ill. App. 3d 835, 845 (1979).

The plaintiff notes that at no time did Styve ever make an oral or written objection to the amendment of the complaint. In fact, the Fund acknowledges that Styve's attorney refused to oppose the plaintiff's motion to amend because it was not in the best interest of his

client. The plaintiff argues that in this case there was a final judgment, the amendment sought to conform the pleadings to the proof, and it was based on the evidence contained in discovery to date, which included Styve's deposition. Styve testified in his deposition about incidents that had occurred off of school property and not during the school year. The fifth amended complaint did not add a new cause of action. It merely removed the language "within the course and scope" of employment from the allegations and removed the allegation of an "inappropriate relationship." Here, Doe relied on deposition testimony to support her amendment to conform the pleadings to the proof. Proofs are not limited to the proofs admitted at the trial. See *Ruff v. Northwestern Memorial Hospital*, 159 Ill. App. 3d 811 (1987). We agree with the plaintiff's argument and conclude that leave to file her fifth amended complaint was properly granted because her amendment sought to conform the pleadings to the proof and did not add a new cause of action.

Next on appeal the Fund argues that the trial court improperly denied the Fund's section 2-1401 petition to vacate the July 16, 2009, order and *nunc pro tunc* amended judgment. The Fund asserts that the orders are void for a lack of jurisdiction. The trial court held the Fund lacked standing to file the section 2-1401 petition because it was not a party to the action, and the trial court did not reach the merits of the petition. Accordingly, it is premature for this court to address the merits of the Fund's section 2-1401 petition. We will only address whether the Fund has standing. Generally, "[a] nonparty to a judgment has no standing to seek relief from that judgment by filing a section 2-1401 petition." *In re J.D.*, 317 Ill. App. 3d 445, 449-50 (2000). There are a few exceptions to this general rule. A nonparty may have standing to seek relief under section 2-1401 if the party (1) is privy to the record, (2) is injured by the judgment and will derive a benefit from its reversal, or (3) is competent to release error. *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1002 (2008).

The plaintiff argues that the Fund is not privy to the record. The Illinois Supreme

Court has defined "privies to the record" to be "heirs, executors, administrators, terre-tenants, or those having an interest in remainder or reversion, or one who is made a party by the law. 7 Ency. of Pl. & Pr. 857; [citation]." *White Brass Castings Co. v. Union Metal Manufacturing Co.*, 232 Ill. 165, 168 (1907). Privy has also been defined as a " 'mutual or successive relationship to the same rights of property.' " *Upper Lakes Shipping Ltd. v. Seafarers' International Union of Canada*, 40 Ill. App. 2d 392, 401 (1963) (quoting *Keith v. Thayer*, 181 Ill. App. 370, 372 (1913)). Here, the Fund does not fit within the definition of "privy to the record."

The plaintiff also argues that the Fund is not injured by the judgment and will not derive a benefit from its reversal. When a conflict of interest exists between an insurer and insured, the insurer is not estopped from raising issues of noncoverage in subsequent proceedings. *Home Insurance Co. v. Lorelei Restaurant Co.*, 83 Ill. App. 3d 1083, 1087 (1980). Therefore, the insurer is not bound by the judgment against the insured in the underlying proceeding. *Home Insurance Co.*, 83 Ill. App. 3d at 1087. In the instant case, there is a conflict of interest between the insured and the insurer. Because the Fund is not bound by the judgment in the underlying action, it will not be injured by the judgment and will not benefit from its reversal. Accordingly, we conclude that the trial court properly denied the Fund's section 2-1401 petition.

For the foregoing reasons, the rulings entered by the circuit court of St. Clair County are hereby affirmed.

Affirmed.