SECOND DIVISION
January 31, 2017

No. 1-15-1706

SNOW & ICE, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	
MPR MANAGEMENT, INC., MPR 99TH STREET LLC, 3701 W. 128TH LLC, 999 RAYMOND LLC, 2150 15TH LLC, 1821 GARDNER LLC, 2000 25TH LLC, 4220 KILDARE LLC, and SOUTH SUBURBAN INDUSTRIAL, LLC,	)	No. 12 M1 150086
	)	
	)	
	)	Honorable
	)	Joyce Marie Murphy
	)	Gorman,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justice Mason concurred in the judgment.
Presiding Justice Hyman concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's breach of contract and *quantum meruit* claims against certain defendants.

¶ 2 Plaintiff agreed with defendant MPR Management, Inc., a property management company, to provide snow and ice removal and salting services at several locations. The locations were identified on a schedule attached to the parties' written contract. Plaintiff initiated this action alleging that it had not been paid for its services. Plaintiff's third amended complaint alleged that defendant MPR Management, Inc. breached the written contract. Plaintiff also

alleged that the owners of the locations identified in the schedule attached to the contract also breached the written contract or, alternatively, were liable for damages on a theory of *quantum meruit*. The property owner defendants moved to dismiss all of the claims against them. The trial court dismissed the breach of contract claims against the property owner defendants pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), and dismissed the *quantum meruit* claims pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). Plaintiff voluntarily dismissed its breach of contract claim against MPR Management, Inc. without prejudice and with leave to re-file. Plaintiff appeals. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The following facts are set forth in plaintiff's third amended complaint. On or about September 17, 2010, Snow & Ice, Inc. entered into a contract with MPR Management, Inc. (MPR)[1] for the removal of snow and ice and salting services at nine separate locations for the period of November 1, 2010, through March 31, 2011. Mary Crandall executed the contract as an agent of MPR. Attached to the contract was a schedule containing the property addresses where services were to be performed. The third amended complaint alleged that MPR 99th Street LLC, 3701 W. 128th LLC, 999 Raymond LLC, 2150 15th LLC, 1821 Gardner LLC, 2000 25th LLC, 4220 Kildare LLC, and South Suburban Industrial, LLC (collectively, the property owner defendants) each owned one or more of the properties.

¶ 5 On August 21, 2012, plaintiff filed this action seeking to recover $90,214.50 in unpaid invoices, along with late charges and attorney's fees. Plaintiff's third amended complaint alleged

[1] The contract attached to the third amended complaint identifies Madison Partners Realty as the party to the contract, but the parties stipulated in the trial court that MPR Management, Inc. was a party to the contract.

a breach of contract claim against MPR (count I), one count of breach of contract against the respective property owner for each property allegedly owned by that defendant (counts II-X), and *quantum meruit* against the respective property owner for each property allegedly owned by that defendant (counts XI-XIX). In counts II-X, plaintiff alleged that it "entered into a contract with [the respective property owner] through its management company and agent, [MPR] ***." Plaintiff alleged that it had performed under the contract and that it had not been paid. In counts XI-XIX, plaintiff alleged that the respective property owner received and unjustly retained the benefit of the services plaintiff performed at the property allegedly owned by each respective defendant.

¶ 6 The property owner defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). They sought to dismiss counts II-X pursuant to section 2-619(a)(9) of the Code, arguing that the contract attached to plaintiff's complaint was between MPR and plaintiff, that there were no other parties to the contract, and that plaintiff failed to allege sufficient facts to set forth the elements of an agency relationship between MPR and the property owner defendants. The property owner defendants also sought to dismiss counts XI-XIX pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), arguing that the third amended complaint failed to state a claim for *quantum meruit* because there was a written contract governing payment for the services, and a party cannot assert quasi-contractual claims when there is a contract concerning the same subject matter.

¶ 7 Plaintiff argued that the property owner defendants' section 2-619 motion was actually a section 2-615 motion, and responded to the motion to dismiss counts II-X by asserting that the third amended complaint properly alleged all of the elements of a breach of contract claim: the existence of a contract, performance by plaintiff, defendants' breach, and damages. Plaintiff also

argued that the identity of the parties to the contract was not clear because "Madison Partners Realty" was identified in the contract but was not a legal entity, and that the contract referenced "Property Owners" throughout. Plaintiff argued MPR was the agent of the property owner defendants. Plaintiff then addressed the property owner defendants' motion to dismiss counts XI-XIX by arguing that it properly stated claims for *quantum meruit*. Plaintiff argued that it could maintain its *quantum meruit* claims in the alternative if there was no contract with the property owners.

¶ 8 On March 18, 2015, the trial court dismissed counts II-XIX with prejudice pursuant to section 2-615 "for the reasons set forth in the briefs submitted by defendants." Plaintiff then filed a motion to voluntarily dismiss count I of the third amended complaint without prejudice. On May 13, 2015, the trial court entered an order that reads: "Count I of Plaintiff's Third Amended Complaint is voluntarily dismissed without prejudice with leave to refile." On June 10, 2015, plaintiff filed a notice of appeal that only identified the dismissal order of March 18, 2015.

¶ 9 ANALYSIS

¶ 10 We have an independent duty to determine whether jurisdiction is proper. *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 16. Plaintiff argues that we have jurisdiction where "the final order disposing of the case was entered on May 13, 2015." We agree that we have jurisdiction over plaintiff's appeal pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303(a) (eff. June 4, 2008). Although a party typically may not appeal its own voluntary dismissal (see *Flores v. Dugan*, 91 Ill. 2d 108, 111-12 (1982)), plaintiff's notice of appeal only identifies the March 18, 2015, order dismissing counts II-XIX. It is well-settled that a voluntary dismissal pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2014)) terminates an action in its entirety and makes all previously-entered orders final and immediately

appealable. See *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503 (1997). Thus, the interlocutory order entered on March 18, 2015, became final and appealable when the only remaining count was voluntarily dismissed on May 13, 2015. Plaintiff's timely-filed notice of appeal identifies only the March 18, 2015, order as the order being appealed. Therefore, we have jurisdiction.

¶ 11 Plaintiff raises two arguments on appeal. First, plaintiff argues that the trial court erred by dismissing counts II-X where the third amended complaint alleged the existence of a contract between plaintiff and the property owner defendants, the written contract was unclear as to who the contracting party was, and that MPR could have been the agent of the property owner defendants. Second, plaintiff argues that the third amended complaint stated claims for *quantum meruit* against the property owner defendants, and that those claims are not barred by the existence of a written contract with MPR.

¶ 12 A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint based on defects apparent from its face (*Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13) and the relevant inquiry is whether the allegations, considered in the light most favorable to the plaintiff, are sufficient to state a cause of action (*Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61). "In ruling on a section 2-615 motion, the court may not consider affidavits, products of discovery, documentary evidence not incorporated into the pleadings as exhibits, or other evidentiary materials." *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 29 (2003). A motion to dismiss under section 2-619(a)(9) admits the legal sufficiency of the complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20. We review *de novo* the dismissal of a claim under either section 2-615 or section 2-619(a)(9). *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Although

defendants filed a section 2-619 motion to dismiss the breach of contract claims (counts II-X) and a section 2-615 motion to dismiss the *quantum meruit* claims (counts XI-XIX), the trial court dismissed counts II-XIX under section 2-615 of the Code, and thus we must determine whether any of the allegations, when considered in a light most favorable to plaintiff, are sufficient to state causes of action for breach of contract and *quantum meruit*. We can affirm the circuit court's dismissal on any grounds supplied by the record and applicable case law. *Illinois Guaranty Fund v. Liberty Mutual Insurance Co.*, 2013 IL App (1st) 123345, ¶ 16.

¶ 13 Plaintiff first argues that it properly alleged the existence of a contract between plaintiff and the property owner defendants. We disagree. In order to maintain a breach of contract claim, the plaintiff must allege the existence of a contract, performance by the plaintiff, a breach by the defendant, and damages to plaintiff resulting from the defendant's breach. See *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 49. Here, plaintiff claims that, at various times during this litigation, "MPR changed their position" on whether it was a party to the contact, therefore, plaintiff was "justified" in "pleading in the alternative, due to its uncertainty as to who it contracted with[.]" Plaintiff fails to explain how it had, and how it sufficiently pled, a valid and enforceable contract with any property owner defendant where it is admittedly "uncertain as to who it contracted with."

¶ 14 Furthermore, the written contract attached to plaintiff's third amended complaint states: "This contract describes the terms and conditions of the agreements made between the parties known as: Snow & Ice, Inc. and Madison Partners Realty – 2340 S River Rd, Suite 310, Des Plaines, IL 60018[.]" The contract was executed by Mary Crandall, and MPR stipulated that

Mary Crandall was its "duly authorized agent."[2] Although the contract repeatedly refers to "property owner," the contract does not further define that term and it identifies no other entity or entities as a party to the contract. Lastly, the schedule of properties attached to the contract was written on MPR's letterhead. Construing the complaint and attached exhibits, along with the stipulation that MPR was the contracting party, in a light most favorable to plaintiff, we find that there was no uncertainty regarding the parties to the written contract: plaintiff and MPR. Plaintiff cannot establish that the defendant property owners were parties to the contract.

¶ 15 Next, plaintiff argues that it properly alleged that MPR executed the contract as the agent of the defendant property owners. "While the existence of an agency relationship is generally a question reserved to the trier of fact, a plaintiff must still plead facts, which, if proved, could establish the existence of an agency relationship." *Saletech, LLC v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 15. Plaintiff alleged that it "entered into a contract with [the respective property owner] through its management company and agent, [MPR] ***." However, plaintiff failed to allege any other facts that might establish an agency relationship between MPR and any of the property owner defendants. Plaintiff's conclusory allegation of an agency relationship is not sufficient to survive a motion to dismiss. Therefore, on this basis the trial court did not err in dismissing the breach of contract claims alleged in counts II-X with prejudice pursuant to section 2-615.

¶ 16 Plaintiff next argues that it properly alleged claims of *quantum meruit* against the property owners. The third amended complaint alleged that: "[p]laintiff engaged in snow and ice removal and salting services at and upon real estate owned by [the respective property owner defendant]"; "the services were received by [the respective property owner defendant] and were

[2] "Mary Crandall d/b/a Madison Partners Realty" was named as a defendant in plaintiff's second amended complaint, but was dismissed with prejudice by stipulation.

of substantial value and benefit" to the property owner; the services were performed "at substantial cost and expense" to plaintiff; and the property owner defendants' "retention of the benefit of the *** services performed *** violates the fundamental principles of justice, equity, and good conscience." Contracts implied in law (quasi-contracts) arise notwithstanding the parties' intentions, result from a duty imposed by law, and are contracts merely in the sense that they are created and governed by principles of equity. *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 334 (1977). No claim on a contract implied in law can be asserted if an express contract or a contract implied in fact exists between the parties and concerns the same subject matter. *Heavey v. Ehret*, 166 Ill. App.3d 347, 355 (1988).

¶ 17 The property owner defendants argue that plaintiff failed to allege sufficient facts regarding whether they accepted plaintiff's services. We agree.

¶ 18 To recover under a theory of *quantum meruit*, a plaintiff must prove that it: (1) performed a service to the benefit of the defendant; (2) it did not perform the service gratuitously; (3) defendant accepted the service; and (4) no contract existed to prescribe payment for the service. *Cove Management v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶ 34. This sort of quasi-contractual theory is not a contract, but rather "is grounded in an implied promise by the recipient of services or goods to pay for something of value which it has received." *Karen Stavins Enterprises, Inc. v. Community College District No. 508*, 2015 IL App (1st) 150356, ¶ 7. "In order to state a claim based upon a contract implied in law, a plaintiff must allege specific facts in support of the conclusion that it conferred a benefit upon the defendant which the defendant has unjustly retained in violation of fundamental principles of equity and good conscience." *Id.*

¶ 19 Here, it is apparent that the locations that were plowed were commercial properties. As such, commercial properties are either vacant or leased. If vacant, we cannot infer the owner would want the property plowed. If leased, snow removal is either the obligation of the lessor or the lessee, and plaintiff here alleged no facts that would allow an inference that the owner wanted, knew, or impliedly agreed to pay for a service that would run to the benefit of the lessee. If the property owner defendants had no knowledge that the services were performed, they could not have accepted or impliedly agreed to compensate plaintiff for its services. Plaintiff's allegations that the property owners benefitted from plaintiff's services, without factual allegations that the defendant owners knew of and intended to pay for those services, are not sufficient to state a cause of action for *quantum meruit*. *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 295 (1991) (implied contract requires facts and circumstances to show that at the time of the service one party expected payment and the other intended to make payment).

¶ 20 In *Cove Management*, an independent contractor to AFLAC entered into a lease agreement with Cove Management for office space. 2013 IL App (1st) 120884, ¶ 5. The lease identified AFLAC as the tenant, despite the independent contractor having no actual authority to rent office space on behalf of AFLAC without express authorization. *Id.* ¶ 4-5. Cove Management sued and asserted claims of breach of contract, ratification, and unjust enrichment/*quantum meruit* against AFLAC. *Id.* ¶ 8. We affirmed the dismissal of the *quantum meruit* claim against AFLAC on the grounds that AFLAC had no knowledge of the lease agreement until the lawsuit was filed. *Id.* ¶ 35. We found that "[w]ithout knowledge of the lease, AFLAC could not accept the services provided, and as a result, plaintiff can prove no set of facts to show that it is entitled to *quantum meruit* recovery." *Id.*

¶ 21 Here, plaintiff has pleaded no facts from which it is reasonable to infer that the property owner defendants had knowledge that plaintiff provided services at their respective properties, that they impliedly agreed to compensate plaintiff for those services, or that any owner authorized MPR to engage plaintiff to perform any service on their behalf for which they agreed to pay.

¶ 22 In sum, we find that counts XI-XIX of plaintiff's third amended complaint did not allege sufficient facts to state claims for *quantum meruit*, and were properly dismissed pursuant to section 2-615.

¶ 23 Finally, after due consideration, the disposition of this appeal is issued pursuant to, and consistent with, Illinois Supreme Court Rule 23 (eff. July, 1, 2011) because this disposition does not establish a new rule of law or modify, explain or criticize an existing rule of law nor does it resolve, create, or avoid an apparent conflict of authority within the Appellate Court.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the trial court's dismissal of counts II-X for breach of contract against the property owner defendants, and affirm the trial court's dismissal of counts XI-XIX alleging claims of *quantum meruit* against the property owner defendants.

¶ 26 Affirmed.

¶ 27 PRESIDING JUSTICE HYMAN, concurring in part and dissenting in part:

¶ 28 In the second part of this dissent, I explain why I take issue with the majority's dismissal of the alternative cause of action sounding in *quantum meruit*. But first, I write in the hope that our supreme court will consider a modest change to Rule 23—in cases with a dissent or special concurrence, the preference of a single justice, rather than a majority of the panel, is sufficient to publish the decision as an opinion ("the one justice rule").

¶ 29 Due to my partial dissent, I asked my colleagues to make this decision an opinion, and they refused. I have never refused a request by a fellow justice to publish. If one of my colleagues thinks a decision should be published, I respect that. My concern, though, goes beyond this specific case.

¶ 30 Dissents and special concurrences serve a number of purposes that benefit the law—clarifying and amplifying it, questioning and probing it, articulating and developing it. In the Illinois appellate court, however, these contributions can be constrained under the current structure of Illinois Supreme Court Rule 23, which lets a majority of the panel determine whether to issue a decision as an opinion. In this way, a majority of the panel has the ability to mute or trivialize a dissent and special concurrence, for any reason or for no reason at all. For this and other justifications, we too should adopt the "one justice rule," as several federal and state courts throughout the country already have done. See *infra*, ¶¶ 51-52.

¶ 31 Text of Rule 23

¶ 32 The text of Rule 23 lays out the criteria for publishing a decision as an opinion: a majority of the panel must determine that the decision "establishes a new rule of law or modifies, explains, or criticizes an existing rule of law" or "resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." Sup. Ct. R. 23(a). This seems straightforward enough; but in practice, these criteria are all too often applied arbitrarily, and "more honored in the breach than in the observance."

¶ 33 The criteria are subjective in nature. There's a lot of wiggle room in the words "modifies," "explains," "criticizes," "resolves," "creates," and "avoids." For example, what does "explain" an existing rule of law mean? Is simply explaining the law's origin enough? How about explaining the law's purpose? Or, explaining how the law applies to certain facts? Within

a panel, there might be staunch disagreement as to whether a decision merits publication. See, e.g., *Oruta v. B.E.W. and Continental*, 2016 IL App (1st) 152735, ¶ 50 (Lampkin, J., specially concurring) (concurring with result but averse to issuing decision as opinion rather than Rule 23 order).

¶ 34 In allowing two justices to dictate whether the decision warrants publication, the majority viewpoint can silence the minority viewpoint, even when the dissent or special concurrence satisfies the criteria of Rule 23. This leaves no recourse for minority voices, because we are not asked to justify why a particular decision was not an opinion. Furthermore, it negates the idea that the decision of an appellate panel consists of the analysis of all three justices, not just the two justices in the majority. Three justices deliberate; three justices cast votes; three justices may express themselves separately; and, thus, three justices render a single "decision," of one, two, and, possibly, three viewpoints. So, to cast off or de-link a dissent or special concurrence from the criteria of Rule 23 ignores the very nature of an appellate court panel's decision.

¶ 35 My dissent is as much a part of this decision as the majority opinion. So, contrary to the majority's contention, this decision does qualify for publication under Rule 23 because my dissent "criticizes" the rule of law utilized by the majority. Further, the majority's decision illustrates the arbitrariness of Rule 23. If two different panels of judges within one division of the First District Appellate Court disagree about a legal rule, then both decisions from those panels should be published because they "create" a conflict of authority within the appellate court. But because this disagreement happened within a panel, rather than between two panels, it does not qualify for publication. This illustrates the need for the change in the text of Rule 23 so that these vital disagreements within a panel are not silenced.

¶ 36 Alternative Reasons to Publish Opinions

¶ 37 There are reasons to publish a decision rather than issue a Rule 23 order, some of which do not fall within the rule's text.

¶ 38 One of them is reaffirming a rule of law's viability despite its age. For instance, an opinion written in 1977 might state plainly a rule of law that hasn't changed in 40 years, and therefore appears to need no further explanation. But, a 2017 opinion restating that rule, and analyzing a modern factual scenario, can be helpful to today's lawyers in understanding the rule's continued applicability. (And reassure lawyers that they have found the most recent, accurate statement of the law.)

¶ 39 The presence of a dissent or special concurrence legitimizes our decision-making process to a degree that unanimous decisions do not achieve. They may indicate "that the law is not as well-settled as courts would assert. If the three judges on a panel cannot agree on the proper resolution of an issue, this suggests that at least one of those judges does not find the case law *** settled on the issue." Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Geo. L. J. 621, 643-644 (2009). Besides reflecting this closeness of issues, a dissent or special concurrence advances reasoned analysis and may stimulate the Supreme Court to accept the case for review. See Frank M. Coffin, *The Ways of A Judge: Reflections from the Federal Appellate Bench* 186 (1980). Likewise, "the existence of dissenting opinions in unpublished opinions cuts against the premise that unpublished opinions are used only in 'easy' cases. *** [C]ases containing dissents and concurrences are, by definition, controversial[.]" Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 221 (2001) (Internal quotation marks and citations omitted).

¶ 40 Instead of delving into additional reasons, suffice it to say, this case presents perhaps the most compelling reason of all—the decision is not unanimous.

¶ 41 On the whole, dissents and special concurrences spur dialogue between panel members, the legal community, legislators, academics, and the public. Each panel is its own tiny marketplace of ideas, and the conflict increases the quality of the ruling. Dissents and special concurrences often force the majority to refine its analysis, even if it doesn't change the ultimate conclusion. As the legal philosopher Karl Llewellyn vividly explained, dissents "ride[] herd on the majority." See K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 26 (1960).

¶ 42 Appellate judges "are not there simply to decide cases, but to decide them as they think they should be decided," confided U.S. Supreme Court Chief Justice Charles Evans Hughes. C. Hughes, *The Supreme Court of the United States* 67 (1928). This helps to prevent hidden agendas or faulty or deficient reasoning in Rule 23 orders, which may be exposed in a dissent or special concurrence. *See* Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. App. Prac. & Process 175, 181 (2001) ("The foremost [criticism of unpublished decisions] appears to be the arguable effect the practice has on judicial accountability.").

¶ 43 Moreover, while dissents and special concurrences may seem of little legal significance at the time, they are known to have influence in the development of the law.

¶ 44 But dissents and special concurrences lose much of their value whenever they are relegated to the margins of Illinois jurisprudence, becoming nothing more than mere appendages to Rule 23 orders. By definition, Rule 23 orders have no precedential or institutional effect and generally cannot be cited, unlike published opinions which may be cited as precedent. There is the anomaly, however, that litigants may cite unpublished opinions, with dissents and special

concurrences, from courts outside of Illinois. This suggests, at the very least, where a decision contains a dissent or special concurrance, it may hold interest for others than just the parties.

¶ 45 That Rule 23 orders are readily available on the internet does not mean much. In truth, Rule 23 orders get little notice from the bar, the judiciary, the media, or the public. To illustrate how inconsequential Rule 23 orders are, think about this—in the First District, copies of a Rule 23 order only circulate to the justices in the division that entered the order, while every published opinion is circulated to every justice. In other words, only four justices are even aware of the entry of a Rule 23 order, let alone that a particular Rule 23 order contains a dissent or a special concurrence. As for Rule 23 orders from Districts Two through Five, neither Rule 23 orders nor opinions are circulated to the First District justices.

¶ 46 Consequences of Issuing Dissents and Concurrences as Rule 23 Orders

¶ 47 As currently written, a majority of the panel can undermine any influence a dissent or special concurrence otherwise might have had on the development of the law. This dispatches an unmistakable yet unfounded signal in regard to a dissent or special concurrence: "Nothing new or important here." I believe we do this institution and the public a disservice when we downplay our disagreements. See *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257, 350 (1837) ("the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent") (Story, J., dissenting). Disagreement, I submit, is one of the most fundamental tasks performed by an appellate justice. Time and again, disagreement among justices brings issues out in the open to be dissected and studied and debated. See *Torres v. Torres*, 60 P. 3d 798, 836 (Hawaii 2002) (Acoba, J., dissenting) ("Only in the light of open debate can the dialectic process take place, subject to the critique of the parties,

the bar, the other branches of government, legal scholars, and future courts. The resulting process of analysis and critique hones legal theory, concept, and rule.")

¶ 48 The failure to publish affects our supreme court as well. The Illinois Supreme Court regularly accepts petitions for leave to appeal from Rule 23 orders, which indicates that the court thinks some Rule 23 decisions involve more far-reaching matters than a panel thought. In 2014, over 40% of the supreme court's civil docket stemmed from Rule 23 orders. See Kirk Jenkins, *How Often Does the Illinois Supreme Court Review Unpublished Decisions (Part II),* found at http://www.illinoissupremecourtreview.com/2015/03/how-often-does-the-illinois-supreme-court-review-unpublished-decisions-part-ii/. In other words, our application of Rule 23 is unreliable. One would think that if a case is important enough to be taken by the supreme court, something about it was compelling enough to have been made an opinion.

¶ 49 Further, when the lower courts disagree about an issue, publishing these disagreements signals to our higher court that this issue might need its attention. In the First District, where there are two dozen judges and six divisions operating independently, litigants raising an issue before Panel A sometimes get a different answer than they might receive from Panel B. (And a wholly different answer in front of the Second through Fifth Districts.) If these contrary decisions simply float around as unciteable Rule 23 orders, it is harder for litigants to ask for resolution of inconsistencies. This erodes the growth and consistency of the law in a district and among the districts—an outcome to be avoided. (This problem is not limited to courts as large as the First District. Even in a much smaller jurisdiction, unpublished decisions can slip through the cracks, even when their analysis is so vital as to be potentially dispositive of later cases. See, e.g., *John v. State*, 35 P. 3d 53, 65 (Mannheimer, J., concurring) (discovery of relevant but unpublished opinion "demonstrates a pitfall inherent in our system of 'published' and

'unpublished' decisions: so many of our decisions are unpublished that, given enough time and enough change of personnel, the court 'forgets' that we issued those decisions.")).

¶ 50 The minor revision which I propose will have little effect on the number of published opinions. It should come as no surprise that dissents are quite rare in Rule 23 orders; in the First District, historically, dissents are written in less than three percent of Rule 23 cases. See Kirk Jenkins, *Getting a PLA Granted: Does a Dissent Below Help? (And if So, How Much?)*, found at http://www.illinoissupremecourtreview.com/2015/03/getting-a-pla-granted-does-a-dissent-below-help-and-if-so-how-much/. While the Second and Fifth Districts also have consistently low percentages of dissents, the numbers in the Third and Fourth Districts have been higher. *Id.* And special concurrences appear to be even rarer; though the First District issued over 1,800 Rule 23 orders in 2015, they were accompanied by a total of only 31 special concurrences. Publishing these rare cases would not place a noticeable burden on the bench or bar.

¶ 51 A number of jurisdictions have adopted the rule which I propose be applied to the Illinois appellate court decisions, that one member of the panel may demand publication. Many of these jurisdictions also state that the presence of a concurring or dissenting opinion is itself a reason for publication. Among the federal courts with this rule are the United States Courts of Appeal for the First, Fifth, Sixth, and Ninth Circuits. See 1st Cir R. 36.0(b)(2)(A-C) (members of panel shall discuss mode of disposition; decision must be published if any member of panel thinks it appropriate; when panel decides case with dissent or more than one opinion, opinion shall be published unless all participating judges decide against publication); 5th Cir. R. 47.5.1, 47.5.2 (opinion may be published if it "is accompanied by a concurring or dissenting opinion," and "[a]n opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication"); 6th Cir.

I.O.P. 32.1(b)(1)(C) (when determining publication, panels consider whether decision is accompanied by a concurring or dissenting opinion), 32.1(b)(2) ("any panel member may request that a decision be published"); 9th Cir. R. 36-2(g) ("A written, reasoned disposition shall be designated as an OPINION only if it *** [i]s accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression." (capitalization in original)).

¶ 52 State courts with similar rules include Alabama, Arizona, California, Indiana, Missouri, North Dakota, and Texas. See Ala. R. App. P. 53 (if decision without published opinion contains separate concurrence or dissent, then concurrence or dissent shall be published); Ariz. Sup. Ct. R. 111(b)(4) (if decision is accompanied by separate concurrence or dissent, decision shall be published as opinion if author of concurrence or dissent desires); Ca. R. Ct. 8.1105(c)(9) (opinion should be certified for publication if accompanied by separate concurrence or dissent, and publication would make significant contribution to development of law); Ind. R. App. P. 65(A) (judge who dissents from unpublished decision may designate dissent for publication if it establishes, modifies, or clarifies rule of law, criticizes existing law, or involves legal or factual issue of unique interest or substantial public importance); Mo. R. C. P. 84.16(b) (decision may be issued as nonprecedential memorandum decision only if all judges agree to affirm and further believe that opinion would have no precedential value); N.D. Sup. Ct. Admin. R. 27, § 14(c) (opinion may be published only if one of three judges participating in decision determines it meets criteria for publication, and published opinion must include concurrences and dissents); Tex. R. App. P. 47.4 (opinion may not be designated as memorandum opinion if author of concurrence or dissent opposes that designation). Promulgation of such rules respects the importance of dissent and collegiality between members of a panel.

¶ 53 Accordingly, for all the reasons I have just described, I ask that our supreme court consider amending Rule 23 so a single member of a panel, when there is a dissent or special concurrence, may designate a decision's publication as an opinion.

¶ 54 The Trial Court Erred in Dismissing the Quantum Meruit Counts.

¶ 55 I agree with my colleagues that the trial court properly dismissed the breach of contract counts against the property owners. But I believe the trial court erred in also dismissing the *quantum meruit* counts against the property owners (counts XI through XIX), which Snow & Ice plead in the alternative. See 735 ILCS 5/2-613(b) (West 2012) (parties permitted to plead claims in the alternative, without regard to consistency.) I would hold that these counts set forth the bare-bones elements of a claim to survive a 2-615 motion to dismiss, and the trial court should have allowed the alternative counts to proceed.

¶ 56 To state a claim for *quantum meruit*, Snow & Ice must present facts showing that it performed a service to benefit the property owners, in exchange for compensation; the property owners accepted the service; and no contract existed to prescribe payment. *Rubin & Norris, LLC v. Panzarella*, 2016 IL App (1st) 141315, ¶ 36. In the third amended complaint, Snow & Ice alleged that at various times, it provided snow and ice removal services at the property owners' addresses for several months, at substantial cost and expense to Snow & Ice. Also, Snow & Ice alleged that the property owners received and benefited from these services, and retained those benefits, without paying Snow & Ice. In exhibits, Snow & Ice specified the dates on which these services were provided and the amount of money involved.

¶ 57 These allegations suffice to state a claim for *quantum meruit.* While the third amended complaint "is not a model of the factual detail and accuracy that should be included in a *quantum meruit* claim, it is not so lacking in relevant factual allegations concerning the nongratuitous

services [plaintiff] provided to [defendants] as to merit dismissal." *Rubin*, 2016 IL App (1st) 141315, ¶ 43 (complaint stated claim for *quantum meruit* where it specified services provided to defendant, acceptance of service, and monetary benefit accruing to defendant from services).

¶ 58 The majority concludes that these facts were not enough, because Snow & Ice did not plead facts about whether the property owners wanted these snow removal services or even knew that they were being performed. These are the types of facts that can only be brought forward in discovery. Snow & Ice's point of contact for this work was MPR, not the individual property owners; there is no reason that Snow & Ice would know, before filing the complaint, what the property owners had told MPR about their snow removal needs.

¶ 59 *Cove Management v. AFLAC, Inc.*, 2013 IL App (1st) 120884, on which the majority principally relies, is easily distinguished and inapplicable to this case. Dismissal there turned on unchallenged affidavits stating that AFLAC did not know about the lease until Cove filed its lawsuit. *Id*. at ¶¶ 34-35. Because AFLAC didn't know about the lease, it could not have accepted the services provided.

¶ 60 Here, there are no unchallenged factual assertions from the property owners that they did not know they were receiving a benefit from Snow & Ice. In fact, it is easier to believe that AFLAC, a large corporation, would not know about one action of one individual contractor than to believe that the property owners did not know that anyone was plowing their parking lots and shoveling their sidewalks for a five-month period, or did not want that service performed. (Particularly in the midst of a typical Chicago winter.) This is a factual dispute best explored in discovery. For the purposes of a 2-615 motion (where we are to accept the well-pled facts as true and draw favorable inferences for Snow & Ice), it is enough for Snow & Ice to assert that it

removed snow from the properties, at substantial benefit to the property owners and at substantial cost to Snow & Ice.