

## Civil Litigation Flash Points<sup>sm</sup> November 2009

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### Illinois Supreme Court Reaffirms Counsel's Duty To Docket-Watch.

Litigants received a stern reminder from the Illinois Supreme Court of the duty to monitor the progress of a lawsuit in order to preserve their right to an appeal. In *Keener v. The City of Herrin, Illinois*, No. 107658, 2009 WL 3212336 (Ill. Oct. 8, 2009), a circuit court granted a defendant's motion to dismiss a complaint in September 2005, but did not mail notice of the ruling to either party. When the plaintiff learned of the dismissal nearly a year afterwards, in August 2006, she filed a motion to reconsider, which the circuit court granted. The circuit court vacated its September 2005 dismissal, but immediately dismissed the complaint again. The plaintiff filed a notice of appeal within thirty days of the August 2006 dismissal and the appellate court reviewed the judgment on its merits. The Illinois Supreme Court, pointing out counsel's duty to monitor the progress of a case in order to assure that the timely filing of an appeal, held that despite the lack of notice, the time for appeal expired 30 days after the September 2005 decision. The circuit court thus lacked jurisdiction to consider and grant the motion to reconsider, and the appellate court lacked jurisdiction to review the case.

### Circuit and Appellate Court Proceedings.

The plaintiff in *Keener* was the representative of a decedent who was released from police custody after an arrest for unlawful consumption of alcohol by a minor. A car struck and killed her after she was released from custody. The plaintiff filed a two-count complaint alleging that the City of Herrin was negligent in its interaction with the decedent, that the negligence resulted in her death, and that the city was liable to the plaintiff under the Illinois survival statute, §27-6 of the Probate Act of 1975, 755 ILCS 5/27-6, and the Wrongful Death Act, 740 ILCS 180/0.01, *et seq.* The circuit court granted a motion to dismiss on the ground that the city owed no duty to the decedent, but gave the plaintiff leave to amend the complaint. The amended complaint included two additional counts alleging willful and wanton conduct. The city again moved to dismiss, raising immunity under the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-102, *et seq.*, and arguing that it owed the decedent no special duty.

The circuit court held a case management conference on August 8, 2005. Its docket entry for that date stated that it would rule on the motion to dismiss by September 9, 2005, and that "Plaintiff will stand on pleadings." The next docket entry, for September 13, 2005, stated the circuit court's ruling:

**Pending is defendant's motion to dismiss. The motion is granted and the case is dismissed. Plaintiff has elected to stand on these pleadings so no amendment of the complaint is needed. The case is dismissed and there is no reason to delay any appeal herein. Clerk to close file.**

A stamp appearing immediately after that docket entry stated that a judicial secretary was to send a copy of the record sheet to the attorneys of record. The secretary did not, however, send a copy to the attorneys.

Seven months after that ruling, and unaware of the circuit court's September 2005 dismissal, the plaintiff responded to the defendant's motion to dismiss. After an August 7, 2006 status hearing, the circuit court entered a docket entry stating: "Attys appear. Motion to dismiss is reconsidered upon written motion to be submitted. Review on Aug. 25, 2006." The next docket entry showed that the plaintiff filed a "Motion to Reconsider" on August 17, 2006, in which it stated that counsel first learned of the dismissal on August 7,

2006. The plaintiff's motion requested that the court "reconsider" its September 13, 2005 dismissal because, among other things, "neither party knew that the Court had made a ruling" on the motion to dismiss. The plaintiff designated the pleading as a "Motion to Reconsider," and not a §2-1401 petition; nevertheless, the plaintiff requested relief under §2-1401 in the body of the motion, arguing that "no notice of the Court's ruling dated September 13, 2005, was ever provided to the attorneys of record."

**The circuit court's next docket entry, dated August 25, 2006, stated: "The motion to reconsider is reviewed." The motion is granted. This court reconsiders its previous ruling on Sept. 13, 2005. After further considering the motion to dismiss same is granted again. This case is dismissed again.**

The defendant, three days later, filed a "Special Appearance" for purposes of challenging the court's jurisdiction to consider the motion to reconsider, arguing that the plaintiff had a duty to follow the progress of her case, and that §2-1401 cannot "save a party from his . . . lawyer's fault or negligence." The circuit court's next docket entry, dated September 5, 2006, implicitly denied the defendant's motion, noting that "Court has ruled on 8-25-06." The plaintiff filed her notice of appeal on September 18, 2006, and the Illinois Appellate Court for the Fifth District concluded that it had jurisdiction to review the circuit court's judgment.


### **Illinois Supreme Court Decision.**

The Illinois Supreme Court ruled that the circuit court lost jurisdiction over the case 30 days after dismissing the action on September 13, 2005, and that it lacked jurisdiction to grant the plaintiff's motion to reconsider. The Supreme Court reversed the appellate court's ruling that it had jurisdiction to review the judgment.

The Illinois Supreme Court pointed out that the circuit court's August 8, 2005 docket entry, stating that it intended to rule on the motion to dismiss by September 9, 2005 and that the plaintiff would "stand on the pleadings," provided notice to the parties. Specifically, the Court noted that "[t]here is at least an inference to be drawn" from that entry that "the parties were advised a ruling was forthcoming" and the court ultimately issued its ruling on September 13, 2005.

The Supreme Court relied on its decision in *Granite City Lodge No. 272, Loyal Order of the Moose v. City of Granite City*, 141 Ill. 2d 122, 565 N.E.2d 929, 152 Ill.Dec. 247 (1990), holding that the failure of either party to receive actual notice of an order disposing of a post-trial motion does not toll the time period for filing a notice of appeal. In *Granite City*, the Court held that actual notice to the parties is not required, so long as the order appealed from is expressed (1) publicly, (2) in words, and (3) at the situs of the proceedings. The circuit court's docket entry dated September 13, 2005 was "clearly" a "final order expressed publicly, in words, and at the situs of the proceeding" as required under *Granite City*. The Supreme Court pointed out that, as set forth in *Mitchell v. Fiat-Ellis, Inc.*, 158 Ill. 2d 143, 632 N.E.2d 1010, 198 Ill.Dec. 399 (1994), it is "counsel's duty to monitor the progress of [a] case to ensure that an appeal is timely filed." The Supreme Court thus held that the plaintiff's motion to reconsider was not a timely post-judgment motion, and that it had to file a notice of appeal with thirty days of September 13, 2005. Its September 2006 notice of appeal was untimely, and the appellate court had no jurisdiction to consider the merits of the case.

The Supreme Court also rejected the appellate court's "well-intentioned" decision to exercise jurisdiction by viewing the motion to reconsider as a §2-1401 petition. That section generally allows for vacatur of a final judgment after 30 days when, among other things, there is proof of a defense or claim that would have precluded entry of the judgment in the original action. The movant must offer proof of diligence in both discovering the defense or claim and presenting the petition.



The Supreme Court found that the plaintiff “did not even *attempt* to comply with the requirements for §2-1401 proceedings” and among other things did not give the defendant an opportunity to file an appearance with 30 days after service, or apprise the defendant that a default could be entered against him by failing to timely answer or otherwise file an appearance. The Supreme Court found no evidence in the record that the defendant was ever served with process for a §2-1401 petition, and noted that the circuit court “granted whatever it granted” before the 30-day period for responding to a proper §2-1401 petition expired. The circuit court specifically granted what it referred to as a “motion to reconsider,” not a §2-1401 petition.

The Supreme Court held that the plaintiff “obviously” did not prove that a meritorious claim existed in the original action, because the circuit court “with the same evidence and arguments before the court, again dismissed her action as meritless” in the same docket entry in which it granted the motion to reconsider. “Had the [circuit] court found that plaintiff had proven a meritorious claim in a section 2-1401 petition . . . the [circuit] court could not have immediately dismissed the action as meritless, based upon *the same evidence*. That simply defies logic.” [Emphasis in original.] 2009 WL 3212336 at \*6.

The Supreme Court concluded that the circuit court’s granting of the plaintiff’s motion to reconsider “was nothing more than an attempt to give plaintiff an order from which she could timely file an appeal” but that it could not alter the fact that it lacked jurisdiction to do so. 2009 WL 3212336 at \*7.