

¶ 1 *Held:* Trial court properly granted summary judgment where notice of the motion's original filing was given, a briefing schedule was entered, and the responding party was afforded the opportunity to file a written response; however, trial court improperly granted summary judgment where the court called the motion for hearing without the notice required by Cook County Circuit Court Rule 2.1, and denied the responding party's request to enter a briefing schedule on the motion, which resulted in the responding party being denied an opportunity to respond to the motion in writing; affirmed in part and reversed in part.

¶ 2 This case stems from an injury allegedly suffered by plaintiff, Jeffrey A. Cavett, as a result of a fall down stairs at a construction site where he was working. Cavett sued multiple contractors involved with the construction project at issue and one of those contractors filed counterclaims¹ against its codefendants. Two counterdefendants moved for summary judgment and both of their motions were granted by the trial court. The contractor that filed the counterclaims responded in writing to one of the motions for summary judgment, but was not given an opportunity to respond in writing to the other, and now appeals, arguing, *inter alia*, that its procedural due process rights were violated. Although we find that the trial court properly granted summary judgment on the fully briefed motion, we find that the trial court erred in not providing the requisite notice and not allowing the counterclaiming defendant to file a written response to the motion for summary judgment. We affirm in part and reverse in part for the reasons that follow.

¶ 3 I. BACKGROUND

¶ 4 Cavett alleged he was injured on April 15, 2011, at the Central DuPage Hospital construction site (project) when he stepped on a piece of conduit and fell down the stairs. At the time of his injury, Cavett was working for Kole Construction Company d/b/a Midwest Acoustics, a subcontractor on the project. His work for Kole consisted of installing acoustical

¹ We note that the claims here are more properly characterized as crossclaims, as opposed to counterclaims. However, in order to remain consistent with the language used in the parties' briefs and before the trial court, we will continue to refer to them as counterclaims.

ceilings. Cavett sued various other contractors, including, *inter alia*, MTS Titan Electric (MTS), PCS Power and Communications Solutions (PCS), and Mechanical Incorporated (Mechanical), alleging that at least one of those parties was responsible for leaving the conduit on the stairs that caused him to fall. Specifically, Cavett filed his original complaint in 2011, but did not add PCS and Mechanical until his second amended complaint, which was filed on August 25, 2014. MTS filed a counterclaim based on the Joint Tortfeasor Contribution Act (740 ILCS 100/1 *et seq.* (West 2012)), against PCS and Mechanical on December 1, 2014, alleging that if MTS was found liable, then it was entitled to contribution from PCS and Mechanical.

¶ 5 On May 28, 2015, Mechanical filed a motion for summary judgment, arguing that it neither caused Cavett's fall nor was working in the stairwell at issue at the time of his injury. Mechanical cited to Cavett's testimony that conduit or silver pipe caused his fall, and contended it could not be liable because the only type of pipe used by Mechanical or its subcontractors was copper, which was orange in color, and carbon steel, which was black. Mechanical provided the testimony of Peter Plapp, its project manager, in support of its motion. At his deposition, Plapp testified that Mechanical did not use the type of conduit upon which Cavett allegedly slipped and fell. He pointed out that there was a rivet depicted on the end of the conduit or pipe that was recovered from the scene that could not have been present on the copper or carbon steel piping that it used. Plapp also testified that copper or carbon steel piping was much thicker than conduit. Mechanical further argued that it did not control the means, manner, or method of work performed by any of the contractors on the project, and that all other contractors at the project were independent contractors for whom Mechanical did not have a duty to inspect their work area. Mechanical's motion sought a judgment of no liability on Cavett's claims and also on MTS's counterclaim. On June 25, 2015, an order was entered setting a briefing schedule on

Mechanical's motion and setting it for hearing on August 27, 2015.

¶ 6 On July 23, 2015, MTS filed a written response to Mechanical's motion, arguing that summary judgment was not proper because it was possible that the conduit or metal pipe in question originated with one of Mechanical's subcontractors. MTS also stated that "[t]he original source of the conduit in question has not been determined. It could have been taken from Pepper's trash dumpsters by anyone, or it could have been brought to the site in someone's tool pouch." MTS cited to the deposition testimony of John Szimon, a carpenter/foreman for Pepper Construction who was present when Cavett arrived at Pepper's construction trailer and said he had slipped or tripped on the stairs. Szimon stated that Cavett showed him a piece of conduit and told him it was on the ground after he fell. Szimon then put the conduit on the stairs and took some photographs. MTS also cited to the deposition testimony of Jeff Peterson and Kevin Heatter, both of whom worked for Pepper, and who testified that they could not identify the pipe as the conduit from photographs, but never personally saw the pipe in question. MTS argued that the only question for the court to decide was whether a question of fact existed regarding whether the conduit originated with Mechanical or its subcontractors, and if so, then summary judgment was not appropriate. Mechanical filed its reply on September 23, 2015.

¶ 7 During briefing on Mechanical's motion for summary judgment, PCS filed its own motion for summary judgment on September 8, 2015. It also sought a judgment of no liability on Cavett's claims and on MTS's claim for contribution. PCS asserted that it was not at the project the day of the accident or in the nine days prior, and submitted testimonial evidence to support its position. PCS argued that because there was no evidence that the object that caused Cavett to fall was owned or utilized by PCS, it was entitled to summary judgment. MTS, as will be discussed further below, was not afforded the opportunity to respond to the motion.

¶ 8 On September 16, 2015, two weeks after PCS filed its summary judgment motion and with Mechanical's own motion for summary judgment pending, Mechanical filed a motion for substitution of judge. The motion was granted on September 24, 2015, and the case was transferred to a new judge the following day. At the first case management conference before the newly assigned judge on September 29, 2015, summary judgment to both Mechanical and PCS was granted over MTS's objection.

¶ 9 The record does not contain a transcript of the proceedings on that day, but a bystander's report was certified by the trial court on January 4, 2016, and reflected that the following transpired. The court was advised that Mechanical's motion for summary judgment was fully briefed, and counsel for Mechanical advised the court that Cavett had not filed a response. Counsel for MTS told the court that MTS had responded to Mechanical's motion and requested a date for oral argument, which was denied. Counsel for PCS advised the court that PCS had also filed a motion for summary judgment, and indicated that he did not think Cavett would be filing a response. Counsels for Mechanical and PCS reiterated to the court that they preferred to have their motions for summary judgment ruled on, rather than delaying to allow other defendants to file their own motions. Neither counsel for Mechanical nor PCS had provided the newly assigned judge with courtesy copies of the relevant briefs prior to the first case management conference.

¶ 10 The court then asked PCS's counsel to state the basis for its motion, and PCS's counsel advised the court that its motion was "largely predicated upon the testimony of PCS's representatives and records produced by PCS which conclusively established that no PCS employees or representatives were on-site at the subject Central DuPage Hospital project for at least nine days prior to the subject occurrence." Then, counsel for MTS asked that a briefing

schedule be entered because MTS sought to respond to PCS's motion regarding questions of fact that supported the motion's denial. The court ruled that Mechanical's and PCS's motions "would be granted because [Cavett] did not object to them and that [MTS] did not have standing to respond to the [m]otions." When counsel for MTS asked the court if it was making a finding that MTS did not have standing, the court "said it was not making such a finding but was stating it." The attorneys could not agree on language for the orders so they stepped back up before the judge. Counsel for MTS requested language in the order regarding Mechanical's motion that the motion was granted over MTS's objection and was based on the court's finding that MTS did not have standing even though it filed a counterclaim for contribution against Mechanical and that MTS requested a hearing date on the motion. MTS requested the same language for the order regarding PCS's motion, but also asked that the order reflect that MTS had asked for a briefing schedule. The court denied the language proposed by MTS and stated that the orders should reflect that both motions were granted over MTS's objection, and indicate that they were final and appealable orders pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) (allowing an appeal to be taken from a final judgment as to one or more but fewer than all parties only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal).

¶ 11 Subsequent to the ruling on the summary judgment motions, the parties appeared before the trial court for a hearing regarding their proposed bystander's reports. During an exchange between counsel for MTS and the court, the court stated that it had "granted summary judgment *** based on the arguments set forth in defendant petitioner's brief and reply." Also, counsel for MTS informed the court that as of the initial case management conference, he did not believe the court had "read any briefs."

¶ 12 MTS filed its timely notice of appeal on October 27, 2015.

¶ 13 II. ANALYSIS

¶ 14 On appeal, MTS argues that the trial court violated its procedural due process rights when it granted Mechanical's and PCS's motions for summary judgment and dismissed MTS's counterclaims against them with prejudice. MTS also argues that the trial court erred in granting the motions based on the issue of standing without considering genuine issues of material fact.

¶ 15 A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). While the summary judgment procedure is an important tool in the prompt administration of justice, it is a drastic measure and should only be granted where the movant's right is so clear as to be free from doubt. *Olson v. Etheridge*, 177 Ill. 2d 396, 404 (1997). A circuit court's decision whether to grant or deny a motion for summary judgment is subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Similarly, a procedural due process claim presents a legal question subject to *de novo* review. *Girov v. Keith*, 212 Ill. 2d 372, 379 (2004).

¶ 16 Although MTS has opted to combine their arguments against Mechanical and PCS, for purposes of clarity and efficiency, we address each of the grounds of MTS's appeal as applied to Mechanical and PCS separately because the two motions were in different stages of briefing when they were granted.

¶ 17 A. Procedural Due Process

¶ 18 Mechanical's Motion for Summary Judgment

¶ 19 MTS argues that it was denied procedural due process when the trial court denied the

continuance its counsel requested for oral argument on Mechanical's motion for summary judgment. MTS also stresses that the court was not provided courtesy copies of the briefs prior to making its decision, which means, as was previously stated to the trial court at the hearing on the bystander's report, that the court did not read the motion, response, and reply.

¶ 20 We begin by noting that MTS has failed to present any case law to support its proposition that the foregoing occurrences amount to a violation of procedural due process. The constitutions of the United States and the State of Illinois provide a right to procedural due process and prohibit the deprivation of property without due process. U.S. Const. amends. V, XIV; Ill. Const. 1970, art. I § 2. "The fundamental requirements of due process are notice of the proceeding and an opportunity to present any objections." *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201 (2009). "Due process is a flexible concept, and not all situations calling for procedural safeguards call for the same kind of procedure." (Internal quotation marks omitted.) *Id.* (citing *Lyon v. Department of Children & Family Services*, 209 Ill. 2d 264, 272 (2004), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¶ 21 Here, Mechanical's motion was filed with the court and was fully briefed at the time the court granted summary judgment. MTS had submitted its written response to the motion two months prior. MTS's counsel was present on the date the court granted the motion and objected for the record. Additionally, Mechanical's counsel advised the court that Cavett had not filed a motion to the response for summary judgment even though the previous judge who was assigned this case had provided an opportunity for the parties to respond to Mechanical's motion in writing by setting a briefing schedule. Further, the trial court's order dated September 29, 2015, that granted Mechanical's motion clearly stated, "and the court being fully advised." There is no reason to believe that such language was ever objected to by MTS because neither the record nor

the bystander's report mentions MTS's counsel having any objection to that language, which suggests that the court was so advised. It was not until the hearing on the bystander's report that MTS's counsel stated on the record that he did not believe the court had read the briefs. Further, it is undisputed that the motion, response, and reply were all filed with the court prior to the initial case management conference before the newly assigned judge. There is no dispute that MTS received notice of Mechanical's summary judgment motion when it was initially filed. It is also apparent that MTS was given an opportunity to object to the motion, both in the form of a written response and an oral objection before the court on September 29, 2015. Thus, the arguments set forth by MTS fail to convince this court that they rise to the level of those contemplated under a due process analysis. For the reasons set forth later in this order, we also do not find that Cook County Circuit Court Rule 2.1(a) was violated as to Mechanical. See *infra* ¶ 27.

¶ 22 As a final matter, we note that in its reply brief, MTS has asked us to refrain from deciding the merits of the summary judgments motions at issue in this appeal. Specifically, it stated, "MTS [] will not address the merits of the [m]otions before this [c]ourt as it believes the forum to fully address the merits of the [m]otions is in the [c]ircuit [c]ourt." Because MTS has chosen to expressly waive any appellate argument it may have had on the merits of Mechanical's motion for summary judgment, we do not analyze the merits of the motion. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived").

¶ 23 PCS's Motion for Summary Judgment

¶ 24 MTS argues that the court violated its due process rights when it failed to allow MTS the opportunity to file a written response to PCS's motion for summary judgment. MTS also argues that the court failed to comply with Cook County Circuit Court Rule 2.1(a), which governs the

notice required for hearing of motions. See Cook Co. Cir. Ct. R. 2.1(a) (August 21, 2000); *Berg v. Mid-America Industrial, Inc.*, 293 Ill. App. 3d 731, 734 (1997) (recognizing that "[p]arties to an action who have appeared are entitled to notice of any impending motions or hearings").

¶ 25 As noted above, "due process is a flexible concept, and not all situations calling for procedural safeguards call for the same kind of procedure. Or to put it another way, procedural due process is founded upon the notion that, prior to a deprivation of life, liberty, or property, a party is entitled to notice and opportunity for a hearing *appropriate to the nature of the case.*" (Emphasis in original.) (Internal quotation marks omitted.) *People v. Cardona*, 2013 IL 114076, ¶ 22 (quoting *Jones v. Flowers*, 547 U.S. 220, 223 (2006), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

¶ 26 Cook County Circuit Court Rule 2.1(a) states:

"Except in actions appearing on the daily trial call or during the course of trial, written notice of the hearing of all motions shall be given to all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead, and to all parties whose time to appear has not expired on the date of notice. Notice that additional relief has been sought shall be given in accordance with Supreme Court Rule 105." Cook Co. Cir. Ct. R. 2.1(a) (August 21, 2000).

¶ 27 We find that the court below violated Cook County Circuit Court Rule 2.1(a) when it allowed PCS's motion for summary judgment to be called for hearing without notice to MTS. Here, unlike Mechanical's motion for summary judgment, PCS's motion was not fully briefed. MTS was never afforded an opportunity to respond in writing to PCS's motion. PCS's motion was file-stamped by the clerk's office on September 8, 2015, and notice of said filing was placed in the United States Mail the following day. The notice reflected that PCS's motion was set for

presentment on September 10, 2015, before the original judge at 11 a.m. On September 10, 2015, the original judge continued PCS's motion to October 1, 2015. Subsequently on September 24, 2015, Mechanical's motion for substitution of judge was granted and a new judge was assigned the following day. On September 29, 2015, the newly assigned judge granted PCS's motion for summary judgment without allowing time for MTS to file a written response. Such action by the trial court violated Cook County Circuit Court Rule 2.1 because no written notice of the hearing of PCS's motion for summary judgment was given to MTS. The record reflects that the only notice that MTS received regarding PCS's motion for summary judgment was the original judge's September 10, 2015, order that continued both PCS's and Mechanical's motions to the next case management date, which was October 1, 2015. It is clear that PCS's motion was in a different procedural posture than Mechanical's. Unlike Mechanical's motion, neither the original judge nor the newly assigned judge ever entered a briefing schedule on PCS's motion, depriving MTS of the requisite notice per Cook County Circuit Court Rule 2.1(a) and the opportunity to be heard.

¶ 28 We also find MTS's deprivation particularly egregious in the context of PCS's motion due to the fact that at the time the court below granted PCS's motion for summary judgment, MTS's time for response had not yet elapsed. Cook County Circuit Court Rule 2.1(d), provides in relevant part that the responding party "may serve within twenty-eight (28) days thereafter, an answering memorandum." Cook Co. Cir. Ct. R. 2.1(d) (August 21, 2000). Here, PCS's motion was filed on September 8, 2015. The court granted the motion on September 29, 2015, which was only 21 days after the initial filing, or in other words, MTS had 7 more days to file its response brief. As a result, we find that the court's decision to grant summary judgment in favor of PCS must be reversed and remanded for further proceedings consistent with this order.

Because we have found that the trial court erred when it did not allow PCS time to file a response, in violation of Cook County Circuit Court Rule 2.1, we need not address MTS's claim of a violation of procedural due process.

¶ 29 B. Standing

¶ 30 The issue of standing of a defendant/counterplaintiff, such as MTS here, to object to a motion for summary judgment filed by its codefendant/counterdefendant was mentioned before and by the trial judge at the initial case management conference on September 29, 2015. The trial court specifically rejected that its rulings on that date were predicated on standing. In the bystander's report and MTS's appellate brief, it is acknowledged that the court was not making a finding as to standing, but rather was "stating it." Further, standing does not appear in the court's September 29, 2015, orders as a basis for granting the motions for summary judgment. As a result, we need not address the issue of standing.

¶ 31 CONCLUSION

¶ 32 Based on the foregoing, we affirm the trial court's grant of summary judgment in favor of Mechanical, and reverse its grant of summary judgment in favor of PCS and remand for further proceedings consistent with this order.

¶ 33 Affirmed in part and reversed in part.
Cause remanded.

¶ 34 JUSTICE SIMON, concurring in part and dissenting in part.

¶ 35 I agree that PCS was not entitled to summary judgment. However, due to the overall perfunctory nature of the proceedings, I would also vacate the judgment entered in favor of Mechanical.

¶ 36 Beginning with PCS—whose summary judgment motion was granted at the same initial case management conference as Mechanical's was—the trial court's refusal to allow MTS to

respond to the motion was reversible error. Especially where the trial court is presented with a motion that shifts the evidentiary burden to the respondent, the right to respond and to meet the shifted burden is fundamental. The majority is correct to recognize the unfairness there, and I concur with the majority in arriving at that conclusion.

¶ 37 As for Mechanical's motion, the unfairness is somewhat less but it still exists.

Mechanical's motion for summary judgment was fully briefed, so there is nothing outwardly objectionable about the trial court ruling on it at any time. However, the motion was granted at what the order granting the substitution of judge said was supposed to be the first "case management conference" before a new judge. It should also be noted that Mechanical was the party that took the substitution of judge.

¶ 38 Everyone agrees that before or during the parties' first appearance before the new judge, no one delivered courtesy copies of the summary judgment motions. Instead, the appellees acknowledge that at the "case management conference" the judge inquired about the nature of the motions and appellees' counsel made representations as to the content of their respective motions. By the time that court appearance concluded, judgment was entered. There is no indication that there was any discussion about the evidence that MTS submitted in opposition to Mechanical's motion. It is not as if MTS defaulted in any way or failed to present evidence in opposition to the motion—it timely submitted about 290 pages of interrogatories, deposition transcripts, photographs, letters, and invoices to be considered.

¶ 39 To reverse the judgment in favor of PCS, the majority focuses extensively on Cook County Circuit Court Rule 2.1(a). It holds that PCS was not entitled to judgment because the motion should not have been "called for a hearing without notice to MTS." *Supra* ¶ 27. But lack of fair notice with regard to Mechanical's motion exists too. Once briefed, Mechanical's motion

was entered and continued by the predecessor judge to October 1, 2015. Then, before October 1st even arrived, the motion was abruptly granted on September 29th. No one had any reasonable expectation that the motion would be heard and decided at this initial appearance. The motion was adjudicated two days before it was set to be before the court according to the court's own order.

¶ 40 By the appellees' own characterization of the proceedings, the case management conference morphed into what was more of an oral argument on the validity of the motions than a case management conference. MTS diligently objected on the record and asked for a short continuance so its primary counsel could appear since there was no indication the motion would be heard that day. MTS was justified in its expectation that there would not be an evaluation of the merits at that court appearance, and the whole episode comes across as manifestly unfair. In consideration of the unnecessary surprise coupled with the trial court's refusal to grant the reasonable, minor accommodations MTS requested, I would find that the unfairness warrants reversal.

¶ 41 But even more than the bad optics, there are serious reasons to question the foundation of the judgment. The trial court expressed on more than one occasion that MTS did not have standing to challenge Mechanical's motion for summary judgment because the injured plaintiff did not object to it. That is an incorrect statement of law and no one defends it on appeal, perhaps tacitly acknowledging that it is legally inaccurate. Based on what transpired, it is ostensibly reasonable for MTS to suspect that lack of standing was the reason for the ruling against it. In the context of PCS's motion being granted at the same time and in the same breath, a lack-of-standing decision actually makes more sense because it would apply equally to both nonmovants.

¶ 42 It is hard to imagine being able to harmonize the reasoning behind the decisions jointly.

There are three lines of reasoning that could have possibly formed the basis for the trial court's orders: (1) that MTS lacked standing to object to *both* motions; (2) that *both* movants were entitled to a judgment on the merits; or (3) that PCS was entitled to a judgment for lack of standing, but Mechanical was entitled to a judgment on the merits.

¶ 43 As to option (1), in their motions, neither party argued lack of standing as a basis for its entitlement to summary judgment nor do they argue it here. Whether a personal injury plaintiff wants to pursue recovery against a putatively liable third person is irrelevant to a defendant's right to seek contribution from potential joint tortfeasors. As to option (2), if we are prepared to say that both judgments were on the merits, then we also must ascribe to the unusual notion that the trial court reviewed the merits of both motions and consciously decided that no matter what unknowable evidence PCS might have, it could never raise a question of material fact. And option (3) is just not logical under the circumstances. PCS and Mechanical were similarly situated and there is no reason to believe that the trial court treated them differently. Suffice it to say, none of the options provide confidence in the foundation on which the judgments are built.

¶ 44 There is certainly reason to think that the trial court's belief that MTS lacked standing was the basis for its ruling. But we actually have no idea what the basis for the summary judgment ruling was, despite MTS's best efforts to find out. The majority points out that "standing" does not appear in the trial court's summary judgment order. *Supra* ¶ 30. True, but no reason for the decision appears. If a party properly seeks an explanation for a dispositive ruling against it, as MTS did here, I believe that a litigant is entitled to one. See *Hanson v. Aetna Life & Casualty*, 625 F. 2d 573, 575 (5th Cir. 1980) (explaining that parties are entitled to know the reasons upon which summary judgment is based, at least where the underlying holding is ambiguous or inascertainable); see also *Clay v. Equifax, Inc.*, 762 F. 2d 952, 957-58 (11th Cir.

1985) (collecting cases explaining the unfairness inherent in mystery summary judgment rulings).

¶ 45 As this case demonstrates, it is very difficult for a party to get meaningful review in this court when it is deprived of knowing, and it is impossible for us to discern from the record, the basis for the adverse ruling. A party that properly challenges a motion for summary judgment and supports its challenge with evidence is entitled to a decision on the merits at the trial court level. We do not know if the trial court got to the merits or if it ruled based on its belief that there was a lack of standing. It is impossible for even the appellees to definitively tell us the basis on which they were granted summary judgment.

¶ 46 In explaining its holding reversing the judgment in favor of PCS, the majority explains that the deprivation of MTS's rights was "particularly egregious" because of the sudden disposition. *Supra* ¶ 28. I agree that MTS's deprivation resulting from the judgment in favor of Mechanical is not of the same degree, but it is of the same kind. Mechanical's motion for summary judgment was adjudicated in conjunction with an order we all consider to be unsound, and both judgments may very well have been based on the same mistake.

¶ 47 In the course of us remanding the case so that the trial court can evaluate PCS's motion on the merits, and because PCS and Mechanical's motions for summary judgment are basically the same, I would remand the whole matter so that MTS gets a ruling on the merits in each instance. That would be an almost-equally efficient result. Mechanical has a fully briefed summary judgment motion on file so no briefing or discovery is even required, and we would at least ensure that we are protecting MTS's procedural due process rights which we have not ensured here. Since the whole disposition has been thrown into question, I would vacate the judgment in its entirety and remand the case for further proceedings.