2019 IL App (2d) 170567-U
Nos. 2-17-0567 & 2-17-0729 & 2-17-0917 cons.
Order filed February 5, 2019
Modified Upon Denial of Rehearing April 15, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ESTATE OF HANNAH KENDALL, DECEASED, BY SARAH R. KENDALL and MARY KENDALL, AS ITS CO-SPECIAL ADMINISTRATORS,	)	Appeal from the Circuit Court of Winnebago County.
&	)	
ESTATE OF JADE GARZA, DECEASED, BY CHRISTOPHER P. GARZA and SABRINA KNAPP, AS ITS CO-ADMINISTRATORS,	)	Nos. 11-L-251, 12-L-1, 13-L-222
Plaintiffs-Appellants,	)	
v.	)	
MONSANTO COMPANY,	)	Honorable Edward J. Prochaska,
Defendant-Appellee.	)	Judge, Presiding.

BAILEY KNAPP, DELANIE KNAPP, and SHANNON E. SETCHELL,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiffs-Appellants,	)	Nos. 11-L-251, 12-L-1, 13-L-222
v.	)	
MONSANTO COMPANY,	)	Honorable

	)	Edward J. Prochaska,
Defendant-Appellee.	)	Judge, Presiding.

BAILEY KNAPP, DELANIE KNAPP, and SHANNON E. SETCHELL,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiffs-Appellants,	)	
	)	Nos. 11-L-251, 12-L-1, 13-L-222
v.	)	
COMMONWEALTH EDISON COMPANY,	)	Honorable
	)	Edward J. Prochaska,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the trial court's summary judgment ruling in favor of defendant, Monsanto Company; because plaintiffs' complaints are barred by the exclusive remedy provision of the Workers' Compensation Act, we need not reach the issue of whether plaintiffs were owed a duty of care. However, we reversed the trial court's summary judgment ruling in favor of defendant, Commonwealth Edison Company, as the trial court abused its discretion in denying plaintiffs leave to file an amended expert affidavit.

¶ 2 This consolidated appeal involves an electrical accident in a Tampico corn field which claimed the lives of two teenage girls and injured two others. At issue are two summary judgment rulings, the first in favor of defendant, Monsanto Company (Monsanto), and the second in favor of defendant, Commonwealth Edison Company (ComEd). In both instances the trial court found that the company did not owe the victims a duty of care. With respect to Monsanto, the court additionally ruled that plaintiffs' claims were barred by the exclusive remedy provision of the Workers' Compensation Act (the Act) (820 ILCS 305/5(a) (West 2012). With respect to ComEd, the court additionally struck an affidavit from the plaintiffs' expert

pursuant to Supreme Court Rule 191(a) (eff. Jan. 4, 2013). Because of the similar facts underlying both summary judgment rulings, we review them together.

¶ 3 I. BACKGROUND

¶ 4 The record in this case is voluminous, spanning more than seven years of litigation and involving numerous parties. We will limit our background discussion to those facts necessary for a basic understanding of the issues raised on appeal. Additional facts will be provided as they become pertinent during the course of our analysis.

¶ 5 We begin with the facts common to both summary judgment rulings. The accident in question took place on July 25, 2011, at the Canal Farm, owned by Donald and Virginia Matthews. As Donald and Virginia were retired, the farm was managed by LKS, Inc., an entity formed by the Matthews' son, Craig. The day-to-day farm operations were overseen by LKS employee Kevin Larkey. LKS employee Alex Fisch reported directly to Larkey. LKS contracted with Monsanto to provide seed and services for growing corn on the Canal Farm.

¶ 6 R&J Enterprises of IL, Inc. (R&J) was founded by Rodney Scott and Jerry Navarra. Monsanto contracted with R&J to recruit workers—mostly high school students—for corn detasseling, a process which involves removing the tassels from the tops of corn stalks for purposes of pollination control and cross-breeding. R&J worked exclusively with Monsanto. It was through this arrangement that Hannah Kendall, Jade Garza, Bailey Knapp, and Delanie Knapp were hired to perform detasseling work at the Canal Farm.

¶ 7 Larkey testified during his deposition that he was at the Canal Farm on Friday, July 22, when the cornfield was machine cut for a second time. In Larkey's experience, detasseling took place within a couple days of the second machine cutting. Before Larkey left the Canal Farm that day, he activated the irrigator to water the cornfield over the weekend.

¶ 8 A large thunderstorm soaked the Tampico area on the morning of Saturday, July 23. Larkey instructed Fisch via text message to turn off the irrigator if the Canal Farm received sufficient rainfall. Around 11:00 a.m., Fisch texted Larkey that he was going to turn off the irrigator. Shortly thereafter, Fisch sent Larkey a text message titled: "Problems in Tampico." During a subsequent phone call, Fisch explained to Larkey that the irrigator was not running when he arrived in the cornfield. Fisch noticed that part of the electric meter was laying on the ground beneath the meter box, melted into a ball. The grass around the meter box was blackened and burned. Fisch said he received a "tingle" when he pushed the first of two switches to deactivate the power to the irrigator. He then used a plastic jug to push the second switch. Fisch texted Larkey pictures of the meter box and its melted components. Larkey placed a phone call to a local electrician, Brian Wetzel, and left a message stating that he thought the Canal Farm had suffered electrical damage due to a lightning strike.

¶ 9 On Sunday, July 24, Larkey informed the Matthews of the electrical problem at the Canal Farm and explained that he had placed a call to an electrician. The Matthews authorized Larkey to follow up with Wetzel. Neither the Matthews nor anyone from LKS contacted Monsanto or ComEd about the electrical issues. Larkey, Fisch, Donald, Virginia, and Craig each testified during their depositions that they did not think this was necessary because Larkey was following up with Wetzel and they did not believe there were any imminent safety concerns.

¶ 10 Larkey received a phone call from a Monsanto representative on the morning of Monday, July 25, explaining that some girls had been electrocuted in the corn field. Larkey was in disbelief because he understood that "there was no power to be at the field with the meter blown out and with [Fisch] shutting the boxes off."

¶ 11 Bailey Knapp testified during her deposition that she was detasseling in a group with Hannah, Jade, and Delanie. The four customarily detasseled together, as they were able to choose their own work groups. They encountered the irrigator in the area where they were working, which Bailey described as being unusual based on her experience detasseling. Bailey reached the irrigator first, making contact with her rubber boots and rubber gloves to climb on top. She felt a tingling sensation through her hands and quickly jumped back to the ground. She turned around to warn the others, but Hannah and Jade were already dead—both of them stuck to the irrigator. Delanie had fallen back into a puddle of water and she could not move. Her screams attracted the other detasselers who, in turn, ran to get help. Bailey and Delanie were later transported to the hospital for their injuries, Bailey by ambulance and Delanie by helicopter.

¶ 12 Plaintiffs, Sarah R. Kendall and Mary Kendall, filed a wrongful death complaint as co-administrators of the Estate of Hannah Kendall. Plaintiffs, Christopher Garza and Sabrina Knapp,[1] filed a wrongful death complaint as co-administrators of the Estate of Jade Garza. (The two estates are referenced herein collectively as "the Estates.") A negligence complaint was also filed by plaintiffs, Bailey Knapp and Delanie Knapp, along with their mother, Shannon E. Setchell (collectively "the Knapps").[2] On the issue of damages, the Knapps alleged that Bailey and Delanie suffered severe internal and external injuries, including injuries to their nervous systems, hands, legs, and feet.

[1] The record reflects that Sabrina Knapp gave birth to Jade Garza. Christopher Garza was Jade's father. Sabrina later married Michael Knapp, who is the father Bailey and Delanie Knapp from his previous marriage to Shannon E. Setchell.

[2] Shannon E. Setchell's claims were based on allegations of expenditures and future liabilities associated with caring for Bailey and Delanie.

¶ 13 The complaints named Monsanto, ComEd, R&J, LKS, Kevin Larkey, Donald and Virginia Matthews, and Alton Irrigation, Inc., as defendants. The trial court granted R&J's motion for dismissal from all complaints under section 2-619(a)(9) of the Code of Civil Procedure ("Code") (735 ILCS 5/2-619(a)(9) (West 2012)). The Estates reached settlements with each of the remaining defendants except Monsanto, while the Knapps reached settlements with each of the remaining defendants except Monsanto and ComEd.

¶ 14 Monsanto

¶ 15 The Estates and the Knapps alleged, generally, that Monsanto was negligent in failing to (1) notify LKS of when the detasselers would be entering the cornfield, (2) ensure that the cornfield was free of electrical hazards, and (3) ensure that the irrigator was positioned away from the area where the detasseling would be taking place. Monsanto moved for summary judgment against each of the plaintiffs, arguing that it had breached no duty of care to the victims. Monsanto also argued that plaintiffs' claims were barred by the exclusive remedy provision of the Act, because (1) Monsanto was a "joint employer" of the victims and (2) Monsanto was contractually obligated to provide the victims' workers' compensation coverage.

¶ 16 The Estates filed a combined response that was adopted by the Knapps. Plaintiffs pointed to Larkey's deposition testimony that, in his experience, the seed company (Monsanto) would notify the grower (LKS) before the detasselers went into the cornfield. However, Larkey was never informed by anyone from Monsanto that detasseling would be taking place on July 25, 2011. Larkey testified that, if he had been so informed, he would have told Monsanto not to allow the detasselers into the cornfield because (1) the irrigator had not been moved to its resting position and (2) the electrical issues rendered the cornfield unsafe. Plaintiffs also argued that

Monsanto could not avail itself the Act's exclusive remedy provision because the victims were employed exclusively by R&J.

¶ 17 In a written memorandum of decision, the trial court ruled in favor of Monsanto and against plaintiffs. The court agreed with Monsanto on the negligence issue for three reasons. First, the court found that the accident was not reasonably foreseeable to Monsanto, as "no one at Monsanto had any reason whatsoever to know that lightning had struck the irrigator or its meter base, or that the entire length of the quarter-mile long irrigator had somehow become electrified." Second, the court found that Monsanto had adequately informed the victims, through the company's mandatory safety training program, that they should avoid the irrigators. The training went so far as to admonish the victims that they should not climb on the irrigators or engage in any "horseplay" around them. Third, the court noted Larkey's deposition testimony that he knew the second machine cutting had taken place on Friday, July 22. In his experience, corn detasseling took place within a couple days of the second machine cutting. Larkey also testified that he knew Monsanto representatives would be in the cornfield on Monday, July 25, and he did not believe the electrical issues presented any imminent safety concerns. These statements contradicted Larkey's claim that, if Monsanto had informed him of the impending detasseling, he would have told Monsanto not to allow the detasselers into the cornfield.

¶ 18 Turning to the exclusive remedy provision of the Act, the trial court agreed with plaintiffs that there were "numerous facts which create triable issues" as to whether Monsanto was a "joint employer." However, the court agreed with Monsanto that the exclusive remedy provision applied because Monsanto was contractually obligated to pay for the victims' workers' compensation benefits. The court noted that Monsanto had previously raised the same issue in a motion to dismiss pursuant to section 2-619(a)(9) of the Code. Monsanto's motion to dismiss

relied on our supreme court's holding in *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196 (2008). The trial court denied the motion, finding that the payment of workers' compensation benefits was not enough to trigger the exclusive remedy provision under *Ioerger* absent "some sort of relationship" between Monsanto and R&J. However, Monsanto renewed its argument in its motion for summary judgment based on this court's holding in *Burge v. Exelon Generation Co., LLC*, 2015 IL App (2d) 141090. The court ruled that, pursuant to *Burge*, Monsanto was entitled to summary judgment based solely on the exclusive remedy issue.

¶ 19 The Estates filed a timely notice of appeal in case No. 2-17-0567. The Knapps filed a timely notice of appeal in case No. 2-17-0729.

¶ 20 ComEd

¶ 21 The Knapps alleged that ComEd owned the damaged electric meter and provided electrical power to the Canal Farm.[3] They alleged, generally, that ComEd was negligent in failing to (1) properly ground the electrical equipment that supplied electricity to the irrigator, (2) inspect and repair the electrical equipment prior to July 25, 2011, and (3) "provide adequate cutoff devises so that upon the failure of either the irrigator or the supply of electricity from [ComEd], the supply of electricity to [the Canal Farm] would be terminated."

¶ 22 ComEd filed a motion for summary judgment, arguing that it owed no duty of care to Bailey and Delanie because it had no actual or constructive notice of any problem with the "customer electrical equipment" prior to the accident. In support, ComEd attached the affidavit of William Forst, a ComEd employee, who stated that he had personal experience in grounding ComEd equipment. Forst stated that, in the days following the accident, he observed the grounding of ComEd's electrical equipment at the Canal Farm with other engineers and

[3] As noted *supra*, the Estates settled with ComEd.

representatives from the Occupational Safety and Health Administration (OSHA). According to Forst, ComEd's electrical equipment was grounded in compliance with ComEd's specifications and the standards of the National Electrical Safety Code. Forst noted, however, that "[t]he line of demarcation between ComEd's equipment and that of the customer is the secondary terminals of the supply transformer. Everything past the transformer is owned, operated, and maintained by the customer." Forst opined that, based on his personal inspection and experience, the "customer equipment" was not properly grounded.

¶ 23 In response, the Knapps stated that they had not yet disclosed any expert opinions because such disclosures were not yet due. To that end, the Knapps provided the affidavit of Dr. Alton Dee Patton. After summarizing his extensive background in the field of electrical engineering, Patton stated that he had "reviewed the discovery disclosures of the parties in this case." Patton then made a series of statements with respect to the Knapps' allegation that ComEd failed to "provide adequate cutoff devises so that upon the failure of either the irrigator or the supply of electricity from [ComEd], the supply of electricity to [the Canal Farm] would be terminated." The substance of Patton's statements, set forth in paragraphs 5 and 6 of his affidavit, are at the center of this dispute. We therefore recite the statements verbatim:

> "5. [ComEd] supplied a primary distribution lateral which consisted of two phase conductors and a neutral conductor which, to my understanding, was tapped off an overhead three-phase main feeder at the road. The 2-phase lateral was run underground from the tap point to a bank of open-delta transformers located near the pump location that would step down from distribution primary voltage to 480 volts three-phase to supply pump motors. From the supplied information it is clear the 2-phase lateral and the open-delta bank of transformers were all owned and operated by [ComEd].

> 6. At the point where the 2-phase lateral was tapped off the overhead three-phase main feeder, it is appropriate (1) to install surge protective devises (surge arresters) of proper rating to protect the underground lateral from voltage surges including lightning, originating on the overhead three phase main feeder, and (2) to install overcurrent devices such as fuses, sectionalizers, or reclosers of proper rating to automatically operate to de-energize the 2-phase lateral in the event of a fault (short circuit to ground or phases to phase) on the 2-phase lateral." (Parenthesis in original.)

¶ 24 Based on these observations and assertions, Patton opined to a reasonable degree of certainty within the field of electrical engineering that ComEd: (1) created an electrical hazard by failing to install surge protective and overcurrent devices; (2) was aware of the electrical hazard that it had created prior to the accident; (3) should have reasonably foreseen that its failure to install the necessary devices could lead to the electrification of the irrigator; and (4) could have prevented the injuries to Bailey and Delanie by properly installing the necessary devices.

¶ 25 On December 15, 2016, ComEd filed a brief in support of its motion for summary judgment. Therein, ComEd moved to strike Patton's affidavit for failure to comply with Supreme Court Rule 191(a), arguing that the affidavit was insufficient because Patton failed to set forth an adequate factual basis for his opinions. Specifically, ComEd argued that Patton failed to identify the documents, principles, methods, and industry standards that he relied upon.

¶ 26 On March 31, 2017, the trial court heard arguments on ComEd's motion for summary judgment. The sufficiency of Patton's affidavit became a focal point of the hearing. The Knapps' counsel argued that the affidavit was sufficient under Rule 191(a), as the facts relied upon were adequately set forth in paragraph 5, having derived from Patton's review of the extensive discovery disclosures. Counsel then stated:

> "In the alternative, the Court may disagree with my contention that no documents needed to be attached to this because the factual basis is included in paragraph 5. If so, then plaintiff's (sic) ask leave of the Court to amend this affidavit to remedy the defects noted by defense counsel, state that's (sic) it's with—based on personal knowledge, I mean, it is clearly implied that it's based on his knowledge as a lifelong expert in electrical engineering, to say that he could completely testify and to attach sworn or certified copies."

ComEd's counsel responded by arguing that an amended affidavit would be futile because "there's simply nothing [in the record] that could be cited that would support any of these bare-bones conclusory allegations." At the conclusion of the hearing, the trial court stated:

> "Okay. Thank you. I'm going to take under advisement [the Knapps' counsel's] request to amend the affidavit. I want to take a look at the whole big picture first and, and determine whether I think that's necessary.
>
> I do believe [Patton] could easily amend the affidavit to say it's under personal knowledge and attach those documents. I'm *** not certain yet that that's necessary. I'm going to take a look at it."

¶ 27 On July 13, 2017, the trial court issued a written memorandum of decision. The court granted ComEd's motion to strike Patton's affidavit, ruling that it did not comply with Rule 191(a) because it did not address any actual inspection of the equipment or compliance with professional standards. By contrast, the court found that Forst's affidavit was in compliance with Rule 191(a), as it presented facts related to the grounding of the equipment and did not claim to rely on any documents that needed to be attached. In granting ComEd's motion for summary judgment, the court found in pertinent part:

> "Had Patton's Affidavit asserted, with facts rather than conclusions, that the irrigator was in fact electrified because of the lack of surge protective devices, that ComEd would, in fact, expect the lack of surge protectors to allow the irrigator to become electrified, that the injuries were in fact caused by the lack of surge protective devices, or that it is industry standard is (sic) to install such devices—there may have been an issue of genuine fact. However, the Patton Affidavit contains no such factual assertions.
>
> * * *
>
> In this case, the Court was given two Affidavits to examine; one that is sufficient and asserts facts (Forst), and one that is insufficient and asserts conclusions (Patton). Based on the facts that show ComEd's grounding was sufficient, and that ComEd had no knowledge of the lightning strike on the Canal Farm transformer, the Court cannot find an issue of material fact as to the foreseeability of Plaintiff's injuries to ComEd. This finding is necessary with an accident as bizarre as what occurred in this case."

¶ 28 On August 11, 2017, the Knapps filed a "Motion for Reconsideration and for Leave to Amend Affidavit." In arguing that the trial court misapplied Rule 191(a), the Knapps again maintained that the foundation for Patton's opinions was adequately established by the facts set forth in paragraph 5. Thus, according to the Knapps, Patton's affidavit created a genuine issue of material fact as to whether ComEd was negligent. To the extent that the trial court still found Patton's affidavit insufficient under Rule 191(a), the Knapps once again requested leave to file an amended affidavit.

¶ 29 On October 13, 2017, after hearing arguments, the trial court denied the Knapps motion in its entirety. The court acknowledged that it never ruled on the Knapp's oral request to amend Patton's affidavit before issuing its written memorandum of decision, and explained that this was

done for two reasons. First, the court found that the Knapps' request to amend the affidavit should have been made sooner, in response to ComEd's motion to strike the affidavit, filed on December 15, 2016, rather than during the oral argument on ComEd's summary judgment motion, conducted on March 31, 2017. Second, the court recalled that the Knapps' counsel had requested leave only for the purpose of attaching documents; the court did not recall that counsel had ever expressed an inclination to "beef up the foundation" for Patton's opinions. The court concluded in pertinent part:

> "That's the reason I struck the affidavit. Yes, it didn't have the documents as an additional reason, but I don't, you know, it's too late, you don't get another bite at the apple to come up with a new and proper affidavit at this point in time. I think my ruling was correct and I'm gonna stand by it. Motion for leave to file an amended affidavit is denied. And the motion for reconsideration of the Court's order granting [ComEd's] motion for summary judgment is denied."

¶ 30 The Knapps filed a timely notice of appeal in case No. 2-17-0917.

¶ 31 II. ANALYSIS

¶ 32 On this court's own motion, we consolidated the appeals in case Nos. 2-17-0567, 2-17-0729, and 2-17-0917. As discussed, each appeal is taken from a summary judgment ruling. "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact, and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). "In

determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-63 (2007). Summary judgment is inappropriate where the material facts are disputed, or where reasonable persons might draw different inferences from the undisputed facts. *Id.* "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In appeals from summary judgment rulings, the standard of review is *de novo. Adams*, 211 Ill. 2d at 43.

¶ 33 Monsanto

¶ 34 As they did in the trial court, the Knapps have adopted the Estate's arguments with respect to Monsanto. Although the parties argue at length about the issues surrounding Monsanto's alleged negligence, this case is resolved on our determination that plaintiffs' claims are barred by the exclusive remedy provision of the Act.

¶ 35 Section 5(a) of the Act provides as follows:

> "No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization that is wholly owned by the employer, his insurer or his broker and that provides safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal

> representatives of his estate, or any one otherwise entitled to recover damages for such injury." 820 ILCS 305/5(a) (West 2012).

Also relevant is section 11 of the Act, which provides in pertinent part:

> "The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer *** who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act ***." 820 ILCS 305/11 (West 2012).

¶ 36 Here, the contract between Monsanto and R&J expressly stated that "[Monsanto] will provide workers' compensation coverage for [R&J's] workers who are doing work for [Monsanto] while in a field and if the workers use [Monsanto] provided transportation, then to and from [Monsanto's] established pickup and drop off location." The record reflects that Monsanto indeed paid the workers' compensation premiums to cover the detasselers who were recruited by R&J. Monsanto also paid workers' compensation benefits to Bailey and Delanie after they filed workers' compensation claims naming Monsanto as their employer. Although the Estates did not file any such claims, Monsanto made workers' compensation payments to the Estates in the form of funeral benefits.

¶ 37 As noted, R&J successfully moved for dismissal pursuant to section 2-619(a)(9) of the Code. R&J argued that it was immunized from civil liability under section 5(a) of the Act, despite the fact that Monsanto provided the workers' compensation coverage, because it qualified as a "loaning employer" under the Act. See 820 ILCS 305/1(a)(4) (West 2012) (recognizing the concept of "borrowing" and "loaning" employees). R&J argued that its status as a "loaning employer" existed regardless of whether Monsanto was deemed a "borrowing

employer" entitled to the same rights under the Act. See *Falge v. Lindoo Installations, Inc.*, 2017 IL App (2d) 160242, ¶ 14 ("The exclusive-remedy provision extends immunity to borrowing and loaning employers as well."). In granting R&J's motion, the trial court ruled that R&J qualified as an "employer" under the Act, regardless of whether R&J additionally qualified as a "loaning employer."

¶ 38 However, as also noted, the trial court denied Monsanto's motion to dismiss after finding that Monsanto's payment of workers' compensation benefits alone was not enough to trigger the exclusive remedy provision. The court reasoned that, under our supreme court's holding in *Ioerger*, Monsanto could not be immunized under section 5(a) absent "some sort of relationship" between Monsanto and R&J. The trial court later changed course after considering our recent decision in *Burge*, finding that Monsanto's contractual obligation to pay for the workers' compensation premiums, combined with its actual payment of such premiums, entitled it to summary judgment.

¶ 39 Here, plaintiffs first dispute whether the trial court correctly interpreted *Burge*. They argue that a contractual obligation to pay workers' compensation benefits does not trigger section 5(a) immunity unless the party seeking the immunity also qualifies as an "employer" under the Act. Plaintiffs further argue that section 5(a) immunity is unavailable to Monsanto because the victims were employed exclusively by R&J. In response, Monsanto argues not only that its contractual obligation was enough to trigger section 5(a) immunity, but also that section 5(a) immunity is available because it qualifies as a "joint employer." As we will explain, because we agree with Monsanto that it qualifies for section 5(a) immunity based on its status as a joint employer, we need not determine whether section 5(a) immunity is available to Monsanto based solely on its contraction obligation.

¶ 40 We begin with *Ioerger*. The employer in that case was part of a joint venture. The issues were whether the immunity afforded to the employer under the exclusive remedy provision extended to the employer's co-venturer and to the joint venture itself. *Ioerger*, 232 Ill. 2d at 198. Our supreme court noted that the exclusive remedy provision extends "not only to the employer, but to various other specified entities, including agents of the employer." *Id.* at 201. Because of the partnership principles inherent to joint ventures, the court ruled that the employer's co-venturer was also the employer's agent, and was therefore entitled to the same immunity afforded to the employer under the Act. *Id.* at 202. The court next held that the joint venture *itself* was entitled immunity under the Act for two reasons. First, the court looked again to the partnership principles inherent to joint ventures, reasoning that a joint venture is "inseparable from its constituent entities." *Id.* at 202-03. Second, the court noted that the joint venture was contractually obligated to reimburse the employer for payments of workers' compensation premiums. Thus, allowing the joint venture to invoke section 5(a) immunity was "mandated by the principles underlying the Act's remedial scheme." *Id.* at 203. The court reasoned that "the immunity afforded by the Act's exclusive remedy provision is based on the proposition that one who bears the burden of providing workers' compensation benefits for an injured employee should not also be required to answer to that employee for civil damages in court." *Id.*

¶ 41 In *Burge*, the plaintiff was employed by a limited liability company (ENS) whose sole member was the defendant company (Exelon). Exelon filed a motion to dismiss the plaintiff's negligence complaint based on the exclusive remedy provision of the Act. Exelon argued that, "because it had reimbursed ENS for workers' compensation payments, and because of its authority to manage ENS's affairs, it was cloaked with the same immunity as ENS." *Burge*, 2015 IL App (2d) 141090, ¶ 6. The trial court agreed with Exelon and granted its motion to

dismiss. On appeal, Exelon first argued that it was entitled to immunity as the agent of ENS, regardless of who paid workers' compensation to the plaintiff. *Id.* ¶8. In rejecting Exelon's agency argument, we found that Exelon had the right to control ENS, not the other way around. *Id.* ¶ 9. Thus, we were left with the question of whether Exelon was entitled to section 5(a) immunity based on its role in paying the plaintiff's workers' compensation benefits. *Id.* ¶ 10. We agreed with the plaintiff that "the reasoning in *Ioerger* depends on the existence of some preexisting legal obligation to pay, or reimburse another payor, for compensation due under the Act or for premiums for workers' compensation insurance." *Id.* ¶ 14. We reasoned that it would be problematic to allow an entity that is legally distinct from the employer to unilaterally insulate itself against liability for negligence on a case-by-case basis, choosing to reimburse the employer for workers' compensation payments only in the cases where it is most advantageous. *Id.* We concluded by holding that, "immunity under section 5(a) of the Act cannot be predicated on defendant's payment of workers' compensation unless defendant was under some legal obligation to pay (such as the contractual obligation imposed by the joint-venture agreement in *Ioerger*)." (Parenthesis in original.) *Id.* ¶ 15. After determining that no such legal obligation existed, we reversed the trial court's ruling on Exelon's motion to dismiss. *Id.* ¶ 18.

¶ 42 Here, plaintiffs argue that the reasoning in *Ioerger* and *Burge* applies only when a party is claiming section 5(a) immunity based on a joint partnership or agency relationship with the employer of the injured employee. They note that the contract between Monsanto and R&J provided that R&J was *not* Monsanto's agent, partner, or joint venturer, but was rather an independent contractor. Thus, plaintiffs argue that the issue is controlled by *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437 (1976), which considered whether general contractors can avail themselves of section 5(a) immunity after paying workers compensation benefits to the

employees of uninsured subcontractors. Our supreme court in *Laffoon* held that section 5(a) confers immunity upon general contractors only with respect to their own "immediate employees." *Id*. at 447. Although plaintiffs concede that Monsanto "was not a contractor who hired a subcontractor," they nonetheless argue that the rule from *Laffoon* should apply here, and that Monsanto cannot be entitled to section 5(a) immunity because the detasselers were not Monsanto's "immediate employees."

¶ 43 Monsanto counters that *Laffoon* is inapplicable because that case did not consider a pre-existing contractual obligation to provide workers' compensation benefits. Furthermore, Monsanto argues, applying *Laffoon's* "immediate employee" test outside of the general contractor-subcontractor context would undermine the more recent declaration in *Ioerger* that "the immunity afforded by the Act's exclusive remedy provisions is predicated on the simple proposition that one who bears the burden of furnishing workers' compensation benefits for an injured employee should not also have to answer to that employee for civil damages in court." *Ioerger*, 232 Ill. 2d at 203. According to Monsanto, the better approach is to factor its contractual obligation to pay workers compensation benefits in determining whether it qualifies for section 5(a) immunity as a "joint employer." We agree with Monsanto.

¶ 44 "Some of the factors to be considered in determining whether an employer-employee relationship exists are: the right to control the manner in which the work is done, the method of payment, the right to discharge, the required skill level, and who provided the tools, materials, or equipment." *Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 901-02 (2007). For purposes of the Act, if control of an employee is shared by two employers, then the worker is considered to be an employee of both employers, or a "joint employee." *Schmidt v. Milburn Bros.*, 296 Ill. App. 3d

260, 266 (1998); *Nutt v. Pierce Waste Oil Service, Inc.*, 112 Ill. App. 3d 612, 615-16 (1983); *Freeman v. Augustine's Inc.*, 46 Ill. App. 3d 230, 233 (1977).

¶ 45 In *Dildine v. Hunt Transportation, Inc.*, 196 Ill. App. 3d 392 (1990), the plaintiff was injured while making repairs on a cab company's (Happy Cab) automobile. After the plaintiff filed for and received workers' compensation benefits, he filed a negligence action against the company (Hunt) which owned the building where Happy Cab housed its garage. Although the plaintiff spent most of his time repairing Happy Cab automobiles, his workers' compensation benefits were paid under Hunt's insurance policy. The trial court granted Hunt's motion to dismiss after finding that the plaintiff was a joint employee of Hunt and Happy Cab, and that plaintiff's negligence action was therefore barred under the Act. *Id.* at 393-394. The appellate court affirmed, holding in pertinent part:

> "The undisputed facts show that Hunt's managers controlled [the plaintiff's] work and had the right to discharge him. While [the plaintiff] performed work for the most part on Happy Cab automobiles, [the plaintiff] did perform numerous jobs for Hunt on a regular basis. Further, Hunt owned the garage where the explosion occurred *and Hunt had an insurance policy that included Happy Cab employees*. Based on these facts, we cannot find that the trial court erred in finding that, as a matter of law, [the plaintiff] was a joint employee of both Hunt and Happy Cab." (Emphasis added.) *Id.* at 394-395.

¶ 46 In *Schmidt*, the plaintiff was driving a tractor-trailer for his employer (Plote) when he collided with a tractor-trailer being driven by the employee of a different company (Milburn). After the plaintiff filed for and received workers' compensation benefits through Plote, he filed a negligence action against Milburn. However, Milburn filed a motion for summary judgment contending that it was the plaintiff's joint employer, and that the action was therefore barred by

the exclusive remedy provision of the Act. In support, Milburn argued that it was part of five individual companies, including Plote, which made up a single enterprise. According to Milburn, these companies shared the same offices, owned the same trucks, dispatched the trucks from the same facility, and were directed and employed by the same managerial staff. The trial court granted Milburn's motion for summary judgment and the plaintiff appealed. *Schmidt v. Milburn Bros.*, 296 Ill. App. 3d at 261-262. The appellate court reversed, however, based largely on the fact that the plaintiff's workers' compensation benefits were paid through a policy carried by Plote. Although Milburn exercised a certain amount of control over Plote employees, this was not enough to overcome Milburn's lack of interest in the plaintiff's workers' compensation proceedings against Plote. *Id*. at 268-269. The court concluded in relevant part:

> "The workers' compensation statutory scheme is effective because employers are able to spread the risk of loss. [Citation.] *Employers should not have to provide workers' compensation and also have to pay out in common law tort actions*. But here, if defendants are right, Milburn pays nothing for the negligence of its driver—no workers' compensation premiums, no workers' compensation benefits, no tort liability. That would turn the exclusive remedy provision of the [Act] into a sword, instead of a shield. No useful societal purpose would be served. Milburn would receive all the benefits the law provides to a separate and distinct corporate body with none of the usual detriments—tort liability for the negligence of its agent, for instance." (Emphasis added.) *Id*. at 269.

¶ 47 More recently, in *Kay v. Centegra Health System*, 2015 IL App (2d) 131187, the plaintiff filed a negligence action against the health system (Centegra) that operated the medical center (NIMC) where she was employed. Centegra filed a motion for summary judgment, arguing that

it was the plaintiff's "joint employer" along with NIMC. The trial court agreed with Centegra and found that the claim was barred by the exclusive remedy provision of the Act. In so finding, the trial court focused especially on the fact that Centegra paid for the workers' compensation premiums that covered the plaintiff. *Id.* ¶ 7. On appeal, we held that Centegra was entitled to judgment as a matter of law, stating, "[t]he evidence clearly shows that Centegra and NIMC were joint employers of [the plaintiff] and that Centegra provided the workers' compensation insurance that applied to [the plaintiff's] injury." *Id.* ¶ 22. In so holding, we noted that Centegra was the sole member of NIMC and that Centegra had certain powers under the NIMC bylaws. For instance, Centegra's president had the power to appoint and remove NIMC's chief executive officer, Centegra's board of governors had the authority to approve NIMC's operating and capital budgets, and the money that was received for the medical services rendered at NIMC was swept into a common account to pay the obligations of the entire Centegra health system. Additionally, the plaintiff filled out an application form that was entitled "Centegra Health System Employment Application," and she was paid from a Centegra account with paychecks referencing both Centegra and NIMC. *Id.* ¶¶ 23-24. On the issue of the workers' compensation premiums, we rejected the plaintiff's argument that Centegra merely funded her workers' compensation benefits using money that was generated by NIMC. We reasoned that this argument actually highlighted the degree of control and supervision that Centegra exercised over NIMC. *Id.* ¶¶ 27-29. In closing, we held that "Centegra paid for the workers' compensation insurance that covered [the plaintiff], and it is entitled under the Act to immunity to a civil action." *Id.* ¶ 29. Notably, we came to this conclusion after citing the holding in *Ioerger* that "the immunity afforded by the Act's exclusive remedy provision is based on the proposition that one who bears the burden of providing workers' compensation benefits for an injured employee

should not also be required to answer to that employee for civil damages in court." *Id.* ¶ 29 (quoting *Ioerger*, 232 Ill. 2d at 203).

¶ 48 Applying the reasoning from *Dildine*, *Schmidt*, and *Kay* to the facts here, it is clear that Monsanto qualifies as a "joint employer" that is entitled to immunity under section 5(a) of the Act. The detasselers recruited by R&J completed application forms with Monsanto's name and trademark, along with a section labeled "Monsanto Payroll Use Only." The contract between Monsanto and R&J provided that R&J would begin the detassling work on the day required by Monsanto. The contract also provided that any workers hired by R&J were required to be at least 13 years of age and were to be paid at least minimum wage under state and federal law.

¶ 49 Furthermore, R&J cofounder Rodney Scott made a number of uncontested statements during his deposition testimony which favor of Monsanto's status as a joint-employer. Scott acknowledged that R&J submitted completed application forms to Monsanto for screening, and that Monsanto had the power to reject applicants and fire employees. The parents of under-aged applicants were required to sign and return a letter from Monsanto in which the parents provided emergency contact information and granted consent for their children to perform detasseling services "for Monsanto Company." Monsanto provided the detasselers with a "Horseplay and Harassment" policy, instruction on safe work practices, and training on how to perform the task of detasseling. Monsanto transported the detasselers to the fields using buses that were leased by Monsanto and driven by Monsanto employees. Monsanto had the power to stop the detasselers' work at any time, and had in fact exercised such authority in the past based on dangerous weather conditions. Monsanto provided the detasselers with protective equipment and also stationed field nurses who provided the detasselers with any necessary first-aid services. Finally,

Scott acknowledged that R&J utilized Monsanto's payroll services and the detasselers' paychecks were issued by Monsanto without any reference to R&J.

¶ 50 Considering these facts along with Monsanto's contractual obligation to provide the detasselers' workers' compensation benefits, and considering that Monsanto actually honored its contractual obligation and paid such benefits, we agree with Monsanto that it exercised the requisite level of control over the detasselers to qualify as a "joint employer." Accordingly, Monsanto is entitled to immunity from plaintiff's claims under section 5(a) of the Act. We acknowledge that we are resolving this issue on a slightly different basis than did the trial court, but we are not bound by the trial court's reasoning and may affirm on any basis supported by the record. *Mutual Management Services, Inc. v. Swalve*, 2011 IL App (2d) 100778, ¶ 11. Here, Monsanto exercised a degree of control over the detasselers that was similar to Hunt's control over the plaintiff in *Dildine* and Centegra's control over the plaintiff in *Kay*.

¶ 51 Arguing to the contrary, plaintiffs repeatedly characterize Monsanto's contractual obligation to provide workers' compensation benefits as a "nefarious plan to avoid any and all civil liability under the guise of workers' compensation." Setting aside the unpersuasive nature of their rhetoric, plaintiffs' assertion is meritless. "The exclusive remedy provision 'is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.' " *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (1990) (quoting 2A A. Larson, Law of Workmen's Compensation § 65.11 (1988)). Here, Monsanto has not attempted to turn the exclusive remedy provision "into a sword, instead of a shield" for the purpose of avoiding any and all liability—like Milburn attempted in *Schmidt*. *Schmidt*, 296 Ill. App. 3d at 269. To the contrary, by contractually obligating itself to pay the

workers' compensation premiums to cover *every single detasseler* recruited by R&J, Monsanto merely sought to benefit from the *quid pro quo* that is made available to employers through the exclusive remedy provision. By doing so, Monsanto added to the level of control that it was already exerting over the detasselers pursuant to its contract with R&J and Scott's undisputed deposition testimony.

¶ 52 For all of these reasons, we affirm the trial court's summary judgment ruling in favor of Monsanto and against the plaintiffs, as Monsanto is entitled to section 5(a) immunity based on its status as the victims' "joint employer."

¶ 53 ComEd

¶ 54 At issue here are the trial court's rulings that (1) Patton's affidavit did not comply with Supreme Court Rule 191(a), and (2) the Knapps were not entitled to leave to file an amended affidavit. Rule 191(a) provides in relevant part:

> "Affidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Supreme Court Rule 191(a) (eff. Jan 4, 2013).

¶ 55 The Knapps maintain that Patton's affidavit is in compliance with Rule 191(a) based on the factual assertions set forth in paragraph 5. In the alternative, the Knapps argue that they should have been granted leave to file an amended affidavit to bring it into compliance with the rule. ComEd counters not only that the affidavit was properly stricken, but also that the Knapps

"could not have cured the affidavit's lack of factual foundation by amendment." This is based on ComEd's conclusion that "it was the Canal Farm's failure to properly ground its power panel that electrified the irrigator." In the alternative, ComEd argues that Knapps should not have been granted leave to file an amended affidavit because their request was untimely.

¶ 56 This case is similar in several respects to *Robidoux v. Oliphant*, 201 Ill. 2d 324 (2002), "the seminal case interpreting the scope of Rule 191(a)." *Enbridge Pipeline (Illinois), LLC v. Kiefer*, 2017 IL App (4th) 150342, ¶ 41. In *Robidoux*, a medical malpractice case, the plaintiff provided a doctor's affidavit in response to the defendant's motion for summary judgment. After stating his qualifications, the doctor stated that he had reviewed the record and depositions. The doctor proceeded to opine that the treatment provided by the defendant fell below the standard of care, as the defendant "failed to recognize in a timely fashion that the patient had a[n] unstable pelvic fracture that was the most probable source of the bleeding, failed to take appropriate measures to provide adequate fluid resuscitation therapy and failed to take appropriate measures to immobilize and repair the damages [*sic*] blood vessels." The doctor then opined that, "had the patient received appropriate fluid resuscitation in a timely manner, and appropriate treatment to immobilize and repair the damage to blood vessels in the pelvic region, it is more probably true than not that the patient would have survived." In closing, the doctor stated, "[t]his affidavit is based on my education, training and experience, as well as my review of the various materials referenced herein and that, if sworn as a witness, I can and will testify competently to the facts and opinions stated herein, to a reasonable degree of medical certainty." *Robidoux*, 201 Ill. 2d at 329-30.

¶ 57 The defendant filed a motion to strike the doctor's affidavit, arguing that it violated Rule 191(a) because it consisted only of vague conclusions and contained no admissible facts. *Id.* at

330. The trial court granted the defendant's motion to strike as well the defendant's motion for summary judgment. The plaintiff then filed a motion to reconsider, to which she attached the doctor's supplemental affidavit. This, in turn, prompted the defendant to file a motion to strike the supplemental affidavit. The trial court again granted the defendant's motion to strike on the basis that the supplemental affidavit was untimely, despite finding that it complied with Rule 191(a) and was further adequate to create a genuine issue of material fact. *Id.* at 331.

¶ 58 On appeal, our supreme court noted that, although the initial affidavit appeared to be "somewhat conclusionary," it was "not convinced that the affidavit [was] as devoid of factual support as defendants maintain." The court suggested that the initial affidavit sufficiently asserted that the decedent had an unstable pelvic fracture, and that the defendant failed to recognize this condition in a timely fashion as the most probable source of bleeding. The court ruled, however, that the initial affidavit was properly stricken because it did not have attached any sworn or certified copies of the papers relied upon. *Id*. at 343. In rejecting the plaintiff's argument that this was merely a technical requirement that need not be strictly followed, the court reasoned that relaxing the requirement would allow a party to avoid summary judgment by simply producing an expert to support its position. *Id.* at 344.

¶ 59 The court next addressed the plaintiff's argument that the trial court erred in striking the supplemental affidavit and in denying her motion to reconsider. In so ruling, the trial court stated that the plaintiff had no excuse for failing to submit the supplemental affidavit before the summary judgment ruling. *Id.* at 345. The trial court also recounted the "chronic pattern" of tardiness that had "infected" the proceedings. *Id.* at 346. After noting that a trial court's ruling on a motion to reconsider will not be disturbed absent an abuse of discretion, our supreme court held as follows:

> "Given the circumstances in this case, and given the sound policy reasons invoked by the trial judge, we cannot say that it was an abuse of discretion for the judge to strike the supplemental affidavit. The trial court therefore did not err in striking the supplemental affidavit and in denying the motion for reconsideration."

¶ 60 As was the case with the initial affidavit in *Robidoux*, Patton's affidavit in this case is not as devoid of factual support as defendants maintain. Similar to the doctor's observations of the patient's pelvic injuries in *Robidoux*, Patton made a series of highly technical observations based on his review of the discovery disclosures in the record. That said, we agree with the trial court that the foundation for Patton's opinions is lacking, especially with respect to the industry standards relied upon. Furthermore, similar to the initial affidavit in *Robidoux*, Patton's affidavit also fails here for a lack of supporting documents. Strict compliance with this requirement is necessary at the summary judgment stage, because cross-examination is unavailable to the opposing party and judges must be presented with valid evidentiary facts upon which to base summary judgment rulings. *Robidoux*, 201 Ill. 2d at 336-38.

¶ 61 The question, then, becomes whether the trial court erred in striking Patton's affidavit without first ruling on the Knapps' request for leave to file an amended affidavit. Unlike the plaintiff in *Robidoux*, the Knapps requested leave to file an amended affidavit *before* the trial court entered its summary judgment ruling. The record reflects that the Knapps' counsel discussed *Robidoux* and specifically noted this distinction in making her oral request. Counsel also stated that she was seeking leave to "remedy the defects noted by defense counsel." At that time, the trial court said nothing of the timeliness or inadequacy of counsel's request, stating only that it was taking the matter under advisement because it wanted to "look at the whole big picture first" and determine whether an amended affidavit was necessary. However, the court

later reasoned that it entered its summary judgment ruling without first ruling on the Knapps' counsel's request because the request was untimely and made only for the purpose of attaching documents rather than for the purpose of "beefing up" the foundation for Patton's opinions. These justifications strike us as arbitrary.

¶ 62 ComEd argues that there was no reason for an amended affidavit, suggesting that the evidence indisputably establishes that the injuries suffered by Bailey and Delanie were caused by the "Canal Farm's failure to properly ground its power panel that electrified the irrigator." We disagree. Forst's affidavit states that the "customer's equipment" was not properly grounded, but it says nothing to establish the element of causation. The trial court acknowledged as much in its written memorandum of decision, finding that Patton's affidavit, if proper, may establish a genuine issue of material fact as to whether the injuries suffered by Bailey and Delanie were caused by ComEd's failure to install the necessary surge protective devices. Given this finding, it is perplexing that the court granted ComEd's motion for summary judgment without ruling on the Knapps' request to file an amended affidavit. Although the Knapps clearly could have sought leave to file an amended affidavit prior to the oral argument on ComEd's motion for summary judgment, this case is unlike *Robidoux* in that there is nothing to suggest that the Knapps exhibited a chronic pattern of tardiness.

¶ 63 For these reasons, we hold that the trial court abused its discretion in denying the Knapps leave to file an amended affidavit. Accordingly, we reverse the trial court's summary judgment ruling in favor of ComEd. We express no opinion as to whether the Patton can ultimately bring his affidavit into compliance with Rule 191(a), or whether the Knapps will ultimately be able to survive a renewed motion for summary judgment.

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, we affirm the trial court's summary judgment ruling in favor of Monsanto and we reverse the court's summary judgment ruling in favor of ComEd.

¶ 66 Affirmed in part, reversed in part, and remanded for further proceedings.