BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. THE HIGHLANDS, LLC, an Illinois limited liability corporation, and MURPHY FARMS, INC., (a division of MURPHY-BROWN, LLC, a North Carolina limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation). Respondents.	PCB No. 00-104 (Enforcement)

RESPONDENT THE HIGHLANDS, LLC
MOTION FOR SUMMARY JUDGMENT
ON COUNT I OF THE AMENDED COMPLAINT

COMES NOW the Respondent, The Highlands LLC, by its attorneys, Harrington, Tock & Royse, and, pursuant to Title 35 Illinois Administrative Code Section 101.516, respectfully moves the Pollution Control Board for entry of summary judgment in favor of The Highlands, LLC and against the People of the State of Illinois on Count I of the Amended Complaint and, in support thereof, states as follows:

1. Count I of the Amended Complaint alleges that The Highlands has allowed offensive odors to emanate from its hog facility and has hereby caused air pollution in violation of Sec. 9(a) of the Environmental Protection Act.

2. "Air pollution" is defined, in part, as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to ... unreasonably interfere with the enjoyment of life or property." (415 ILCS 5/3.02.) If there is no interference, there is no air pollution.
3. Whether or not an odor "unreasonably" interferes with the enjoyment of life or property is to be determined by the Board pursuant to 415 ILCS 5/33(c).
4. Although the Illinois Attorney General has brought this action on behalf of the People of the State of Illinois, the Complaint only identifies one specific residence that is "experiencing odors at an intensity and frequency that interfere with the enjoyment of their home." (Paragraph 82 of the Amended Complaint.) That residence is the residence of Roy and Dianne Kell. (See paragraph 44 of the Amended Complaint.)
5. The Kells filed a complaint against The Highlands and Murphy Family Farms, Inc. in the Circuit Court of Knox County on October 22, 1999, two months before this action was filed by the Attorney General. (The first page of that Complaint showing the Circuit Clerk's filed date stamp of October 22, 1999 is attached as Exhibit "A-1".) The Kells alleged that, as a result of the noxious and offensive odors generated by The Highlands hog facility, the Kells were no longer able to enjoy

and live at their residence as they had before the facility began operating. The Kells alleged that odors were a nuisance because they resulted from The Highlands negligent violation of the prohibition against air pollution as set forth at 415 ILCS 5/9(a) and failed to utilize or employ adequate odor control methods in the handling of the swine waste and waste water so as to not cause air pollution in violation of 35 Illinois Administrative Code 501.402(c)(3). The Kells also alleged that they suffered personal injury as a result of the odors from the hog facility. Those personal injuries alleged to have been sustained by the Kells included headaches, nausea, difficulty breathing, and "other substantial and material annoyance and inconvenience". The Kells sought both money damages and an order that would require The Highlands to abate the "generation and creation of noxious and offensive odors which regularly and frequently permeate the air in and around Plaintiff's residence and yard." A certified copy of the Kells Second Amended Complaint is attached hereto and made a part hereof Exhibit "A".

6. Upon Joint Motion and Stipulation to Dismiss and upon entry of the Order dated March 11, 2002, the Kells' Second Amended Complaint against The Highlands was dismissed with prejudice. Certified copies of the Joint Motion and Stipulation to Dismiss and Order are attached hereto and made a part hereof as Exhibits "B" and "C", respectively.

7. The Joint Motion And Stipulation To Dismiss (Exhibit "B") states that all issues among the parties have been fully resolved, compromised, and settled.
8. This dismissal of the Kells' Second Amended Complaint with prejudice pursuant to a settlement agreement was an adjudication on the merits.
9. The Illinois Attorney General is barred by *res judicata* from pursuing this enforcement action against The Highlands based upon any alleged unreasonable interference with the Kells' enjoyment of life and property arising out of odors originating from The Highlands' hog facility.
10. Alternatively, if the Attorney General is not so barred by *res judicata,* hog odors that originate from The Highlands have not interfered with the Kells' enjoyment of life and property since March 11, 2002.
11. The Kells have not filed a complaint of any odor originating from The Highlands that has interfered with their enjoyment of life or property since January 2002.
12. Since March 11, 2002, the Kells have continued to live in the same residence in which they resided when The Highlands commenced operations in 1997. (See Affidavit of Douglas B. Baird attached hereto and made a part hereof.)

13. Alternatively, if odors that originated from The Highlands have interfered with the Kells' enjoyment of life and property since March 11, 2002, that interference has not been unreasonable.

14. In order to determine if interference is not unreasonable, the Board must consider the five factors set forth in Sec. 33(c) to determine if such interference is unreasonable.

15. The first factor under 33(c) is the character and degree of injury to or interference with the protection of the health, general welfare and physical property of the people.

16. The only "people" identified in the Amended Complaint to be "experiencing odors at an intensity and frequency that interfere with the enjoyment of their home" are the Kells.

17. The Kells have settled their own action against The Highlands, they have continued to reside in the same location since the settlement, and they have made no complaints of odors originating from The Highlands since January 2002.

18. There is no genuine issue of material fact that odors from The Highlands have not interfered with the Kells health, general welfare and physical property since January 2002.

19. The second factor to be considered under 33(c) is the social and economic value of the pollution source.

20. The Highlands employs 14 people full time. The Highlands paid wages and salaries to its employees totaling $392,716.00 in 2002. (See Affidavit of Douglas Baird.)

21. Most of the employees of The Highlands are local residents who reside in Knox County. The wages and salaries that are paid to the employees of The Highlands are spent locally by the employees and go back into the county economy. (See Affidavit of Douglas Baird.)

22. The annual operating expenses for 2002 for The Highlands totaled $1,354,915.00. Much of the annual operating expenses of The Highlands are spent locally within the county and go into the county economy. (See Affidavit of Douglas Baird.)

23. The Highlands will pay real estate taxes in Knox County this year totaling $37,863.44 arising out of this facility. Of that amount, $19,270.29 will be paid to the local school district. (See Affidavit of Douglas Baird.)

24. This Board has established the following policy:

> "a) It is the purpose of the General Assembly in adopting the Environmental Protection Act to restore, maintain and enhance the purity of the air and waters of Illinois in order to protect health, welfare, property and the quality of life. An adequate supply of healthy livestock is essential to the well-being of Illinois citizens and the nation. They provide the daily source of meat, milk and eggs. Their efficient, economic production must be the concern of both producers and consumers if we are to have a continued abundance of high quality, wholesome food and of other livestock products at reasonable prices. The policy shall be to

establish regulations that will provide a balance between a wholesome environment and the efficient production of adequate livestock products."

25. There is no social or economic value in closing The Highlands.

26. There is no genuine issue of material fact that the second factor favors The Highlands.

27. The third factor to be considered under 33(c) is the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved.

28. The Highlands is located in Elba Township, Knox County. The closest community is Williamsfield, which is located three miles north of The Highlands facility in Truro Township. (See Affidavit of Douglas Baird.)

29. As shown on the residential directory for Elba Township and for Truro Township, those townships are sparsely populated except for Williamsfield. Within a two mile radius of The Highlands, there are less than three residences per square mile. (See Affidavit of Douglas Baird.)

30. As shown on the zoning map of Elba Township, the entire 36 square miles of Elba Township is zoned "F" for farming except for a portion of Section 6 of that Township. (See Affidavit of Douglas Baird.)

31. As shown by the zoning map of Truro Township, almost the entire township is zoned either "F" for farming or "C" for conservation along

the Spoon River, except for the community of Williamsfield. (See Affidavit of Douglas Baird.)

32. The Galesburg/Knox County 1999 Comprehensive Plan contains information as to the type of land use within the county. According to that comprehensive plan, 95% of the county is in cropland, grassland and forest and only 2% of the county is in urban or built-up land. (See Affidavit of Douglas Baird.)

33. According to the Illinois Agricultural Statistics 2002 Annual Summary prepared by the Illinois Agricultural Statistics Service, Knox County produced 126,900 hogs in 2001. That volume of production ranked Knox County sixth in the state in hog production. (See Affidavit of Douglas Baird.)

34. There is no genuine issue of a material fact that the third factor favors The Highlands.

35. The fourth factor under 33(c) is the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

36. In paragraph 83 of the Amended Complaint, the Complainant suggests various alternatives to reduce the odor intensity from the existing facilities. Those suggested alternatives include the following: (a) provide a cover for the first two lagoons; (b) capture and flare gas from the entire waste management system; (c) provide a cover for the

first three lagoons; (d) replace the first lagoon with an anaerobic digester; (e) replace all three of the first lagoons with an anaerobic digester; (f) provide for twice weekly draining of the under floor manure storage pits and refilling with odor free water with a dissolved oxygen concentration in excess of 2.0 mg/l; (g) provide adequate filtration for exhaust air generated at the building; (h) reduce the population of the hogs.

37. The Complainant has not alleged that any of the above alternatives is either technically practicable or economically reasonable.

38. Mr. Doug Baird of The Higlands has reviewed the alternatives suggested by the Complainant in paragraph 83. In Mr. Baird's opinion, none of the proposed alternatives are technically practicable and economically reasonable. (See Affidavit of Douglas Baird.)

39. In the opinion of Mr. Doug Baird, The Highlands is doing all that it can in the area of odor management that is technically practicable and economically reasonable.

40. There is no genuine issue of material fact that the fourth factor favors The Highlands.

41. The fifth factor to be considered under 33(c) is any subsequent compliance.

42. Mr. Doug Baird has stated in his Affidavit the improvements that have been made by The Highlands to reduce odors.

43. The Kells settled their action against The Highlands and continue to reside ¼ mile from The Highlands without complaint.

44. There is no genuine issue of material fact that the fifth factor favors The Highlands.

45. Not all five factors under Sec. 33(c) need be found in the movant's favor.

46. There is no genuine issue of material fact that most, if not all, of the five factors favor The Highlands.

WHEREFORE, The Highlands prays that:

(1) This Board determine that the Complainant is barred by the doctrine of *res judicata* from pursuing any complaint against The Highlands arising out of complaints by either Roy Kell and/or Dianne Kell or utilizing any testimony by either Roy and/or Dianne Kell in support of any alleged violation of any statute or regulation pertaining to or applicable to odors, whether past, present or future, originating from The Highlands hog facility.

(2) This Board enter summary judgment in favor of The Highlands and against the Complainant on Count I as a result of the Complainant being barred by *res judicata* from pursuing Count I as pled.

(3) In the alternative, if the relief requested above is denied, this Board enter partial summary judgment in favor of The Highlands on Count I for that period of time commencing March 11, 2002 forward for the

reason that either (a) no odor(s) that originated from The Highlands has (have) interfered with the Kells' enjoyment of their life or property since March 11, 2002 or (b) if there has been interference since that time, such interference has not been unreasonable.

The Highlands L.L.C. by its attorneys, Harrington, Tock & Royse

BY: _____
Jeffrey W. Tock

Prepared by:

Jeffrey W. Tock
Harrington, Tock & Royse
201 W. Springfield Avenue, Suite 601
P.O. Box 1550
Champaign, IL 61824-1550
Telephone: (217) 352-4167

vlb/Complain.jef/2003/Highlands-MtnSummJdgmt

"EXHIBIT A"

Kell vs. The Highlands, L.L.C. and Murphy Family Farms
99-L-62
Second Amended Complaint

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT OF ILLINOIS
KNOX COUNTY

ROY KELL and DIANNE KELL,	)	
Plaintiffs,	)	
vs.	)	Case No. 99 L 62
THE HIGHLANDS, L.L.C., and MURPHY FAMILY FARMS, INC.	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

Plaintiffs, ROY KELL and DIANNE KELL, by their attorneys, KINGERY DURREE WAKEMAN & RYAN, ASSOC., for their cause of action against the Defendant, THE HIGHLANDS, L.L.C. (hereinafter "HIGHLANDS"),and MURPHY FAMILY FARMS, INC.(hereinafter "MURPHY"), state as follows:

COUNT I
(Nuisance-Negligence-Civil Damages)

1. In 1990 Plaintiffs moved into the residence located at 1097 Knox Road 220 East in Knox County, Illinois, and have lived there continuously to the present date.

2. In December 1997, Defendant began operating a large scale, industrial hog-raising facility located approximately one-quarter mile directly to the west of Plaintiff's residence; said

facility is also located in Knox County, Illinois.

3. In the spring of 1998, noxious odors and fumes began entering and permeating the air in Plaintiffs' yard, residence and the land to the west of Defendant's hog facility.

4. The noxious and offensive odors that emanate from Defendant's hog facility result from the substantial quantities of fecal waste generated by the hogs therein and the chemicals utilized by Defendant during the regular course of operation of the facility.

5. That prior to the construction and beginning of operations of Defendant's large scale, industrial hog-raising facility, the property upon which the facility was constructed had been used for grain growing, specifically corn, hay and beans.

6. There are generally at least 3500 pigs present in Defendant's facility, which generate daily thousands of gallons of fecal waste which is drained from the facility into four wastewater lagoons adjacent to the buildings which house the hogs.

7. The lagoons are uncovered and allow the odors from the swine waste and wastewater to enter the air and travel to Plaintiffs' residence downwind of the facility.

8. The building which houses the hogs has several vent fans which point directly to the east, which operate to force the fumes and odors from hogs into the air toward Plaintiffs'residence downwind of the facility.

9. By virtue of the number of hogs in Defendant's facility, extremely substantial quantities of solid swine waste sludge accumulate in Defendant's waste lagoon. That swine waste sludge is transported by Defendant's employees or agents from the facility to other fields in close proximity to Plaintiff's residence and generates noxious dust, and noxious and offensive odors.

10. The swine waste water from the waste lagoons at Defendant's's facility is sprayed via an irrigation unit on the property immediately west of Defendant's facility, which causes noxious particles of the wastewater to accumulate on the windows of Plaintiffs' residence, their automobile and other possessions, in addition to generating noxious and offensive odors.

11. In the late spring and summer months of 1998, the noxious and offensive odors generated by Defendant's hog facility began to regularly and frequently permeate the air in and around Plaintiff's yard and residence, and have continued to do so to the present date.

12. That as a result of the noxious and offensive odors generated by Defendant's hog facility Plaintiffs are no longer able to enjoy and live at their residence as they had before the facility began operating; Plaintiffs for example:

(a) cannot leave the windows in their residence open at night;

(b) cannot leave the windows in their house open when they leave the home;

(c) cannot hang clean clothes to dry on an outdoor line;

(d) do not entertain friends or guests in their yard or at their home;

(e) cannot eat with windows open;

(f) must run their air conditioning in their house and vehicle to remove odors; and

(g) have been required to alter and change numerous aspects of the daily affairs of life.

13. That Plaintiffs' furniture and curtains in their residence, upholstery in their vehicle and clothes regularly and frequently absorb the noxious and offensives odors generated by Defendant's hog facility, requiring that these items either be cleaned or discarded.

14. That the noxious and offensive odors generated by Defendant's hog facility which permeate the air in and around Plaintiff's residence and yard constitute an unreasonable and substantial invasion of Plaintiffs' use and enjoyment of their residence and yard.

15. That Defendant's operation of the hog facility is negligent in one or more of the following respects, in that it.

a. Causes the discharge or emission of contaminants into the environment so as to cause or tend to cause air pollution, in violation of 415 ILCS 5/9(a) (1998);

b. Fails to utilize or employ adequate odor control methods in the handling of the swine waste, and wastewater so as to not cause air pollution, in violation of 35 Ill. Adm. Code 501.402(c)(3) (1998);

c. Disregarded in construction regulatory set-back requirements recommending at least one-half mile between

the facility and in residential homes, as Plaintiffs' residence is only one-quarter (1/4) mile from the facility;

d. Maintains an extremely large number of hogs in the facility which generate a substantial volume of waste in a manner that cause the noxious and offensive odors to permeate the air regularly in and around Plaintiffs' residence and yard;

e. Was constructed, and operations undertaken though Defendant knew, or in the exercise of reasonable care should have known, that substantial and regular noxious and offensive odors and fumes would be produced by the thousands of hogs regularly raised and present in the facility and their large volume of fecal waste and wastewater.

16. That since noxious and offensive odors generated by Defendant's hog facility began regularly and frequently permeating the air in and around Plaintiff's residence and yard, Plaintiffs have been forced to incur substantial additional utility costs for the increased use of the air conditioning system in the residence, additional costs for their furniture, curtains and the upholstery in their residence, and will in the future be forced to incur substantial additional costs for damage to their personal property and for an alternative residence to their current home.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for judgment against the Defendant, THE HIGHLANDS, L.L.C., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

COUNT II
(Nuisance--Negligence--Personal Injury)

1-15. Plaintiff, ROY KELL, repeats and realleges the allegations of Paragraphs 1-15 of Count I as and for Paragraphs 1-15 of Count II, as though fully set forth herein.

16. That as a result of Defendant's operation of the hog facility, Plaintiff, ROY KELL has suffered, and will in the future suffer, personal injury, specifically pain and suffering, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, ROY KELL, prays for judgment against the Defendant, THE HIGHLANDS, L.L.C., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFF DEMAND TRIAL BY JURY.

COUNT III
(Nuisance--Negligence--Personal Injury)

1-15. Plaintiff, DIANNE KELL, repeats and realleges the allegations of Paragraphs 1-15 of Count I as and for Paragraphs 1-15 of Count III, as though fully set forth herein.

16. That as a result of Defendant's operation of the hog facility, Plaintiff, DIANNE KELL has suffered, and will in the

future suffer, personal injury, specifically pain and suffering, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, DIANNE KELL, pray for judgment against the Defendant, THE HIGHLANDS, L.L.C., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFF DEMAND TRIAL BY JURY.

COUNT IV
(Nuisance--Negligence--Abatement)

1-16. Plaintiffs repeat and reallege the allegations of Paragraphs 1-16 of Count I as and for Paragraphs 1-16 of Count IV, as though fully set forth herein.

17. Plaintiffs repeat and reallege the allegations of Paragraphs 16 of Count II and III as and for the allegations of Paragraph 17 of Count IV, as though fully set forth herein.

18. The Plaintiffs do not have an adequate remedy at law and, therefore, abatement of the noxious and offensive odors generated by Defendant's hog facility is proper.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for the entry of an Order requiring Defendant, THE HIGHLANDS, L.L.C., to abate the generation and creation of noxious and offensive odors which regularly and frequently permeate the air in and around

Plaintiffs' residence and yard, and pray for their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

Count V
(Nuisance-Intentional--Civil Damages)

1-14. Plaintiffs repeat and reallege Paragraphs 1-14 of Count I as and for Paragraphs 1-14 of Count V.

15. That Defendant's operation of the hog facility is intentional in one or more of the following respects, in that Defendant knew:

a. That due to the extremely large number of hogs to be contained and raised at the facility, substantial noxious and offensive odors and fumes would be generated regularly by its operation;

b. That the operation of the venting system on the facility would generate substantial and regular noxious and offensive odors and fumes;

c. That the maintenance and handling of the swine waste and wastewater lagoons would generate substantial and regular noxious and offensive odors and fumes;

d. That spraying of swine wastewater and the transporting and spreading of swine waste sludge would generate substantial and regular noxious and offensive odors and fumes.

16. That since noxious and offensive odors generated by Defendant's hog facility began regularly and frequently permeating the air in and around Plaintiff's residence and yard, Plaintiffs have been forced to incur substantial additional utility costs for the increased use of the air conditioning system in the residence, additional costs for their furniture,

curtains and the upholstery in their residence, and will in the future be forced to incur substantial additional costs for damage to their personal property and for an alternative residence to their current home.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for judgment against the Defendant, THE HIGHLANDS, L.L.C., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

COUNT VI
(Nuisance--Intentional--Personal Injury)

1-15. Plaintiff, ROY KELL, repeats and realleges the allegations of Paragraphs 1-15 of Count V as and for Paragraphs 1-15 of Count VI, as though fully set forth herein.

16. That as a result of Defendant's operation of the hog facility, Plaintiff, ROY KELL has suffered, and will in the future suffer, personal injury, specifically pain and suffering, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, ROY KELL, pray for judgment against the Defendant, THE HIGHLANDS, L.L.C., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFF DEMAND TRIAL BY JURY.

COUNT VII
(Nuisance--Intentional--Personal Injury)

1-15. Plaintiff, DIANNE KELL, repeats and realleges the allegations of Paragraphs 1-15 of Count V as and for Paragraphs 1-15 of Count VII, as though fully set forth herein.

16. That as a result of Defendant's operation of the hog facility, Plaintiff, DIANNE KELL has suffered, and will in the future suffer, personal injury, specifically pain and suffering, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, DIANNE KELL, pray for judgment against the Defendant, THE HIGHLANDS, L.L.C., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFF DEMAND TRIAL BY JURY.

Count VIII
(Nuisance-Intentional--Abatement)

1-16. Plaintiffs repeat and reallege Paragraphs 1-16 of Count V as and for 1-16 of Count VIII.

17. Plaintiffs repeat and reallege the allegations of Paragraph 16 of Counts VI and VII as and for the allegations of Paragraph 17 of Count VIII, as though fully set forth herein.

18. The Plaintiffs do not have an adequate remedy at law

and, therefore, abatement of the noxious and offensive odors generated by Defendant's hog facility is proper.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for the entry of an Order requiring Defendant, THE HIGHLANDS, L.L.C., to abate the generation and creation of noxious and offensive odors which regularly and frequently permeate the air in and around Plaintiffs' residence and yard, and pray for their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

COUNT IX
(Nuisance-Negligence-Civil Damages)

1. In 1990 Plaintiffs moved into the residence located at 1097 Knox Road 220 East in Knox County, Illinois, and have lived there continuously to the present date.

2. In December 1997, HIGHLANDS began operating a large scale, industrial hog-raising facility located approximately one-quarter mile directly to the west of Plaintiff's residence; said facility is also located in Knox County, Illinois. The hogs raised at the facility are owed and supplied by MURPHY and raised by HIGHLAND exclusively for MURPHY.

3. In the spring of 1998, noxious odors and fumes began entering and permeating the air in Plaintiffs' yard, residence and the land to the west of HIGHLAND hog facility.

4. The noxious and offensive odors that emanate from

HIGHLANDS' hog facility result from the substantial quantities of fecal waste generated by the MURPHY hogs therein and the chemicals utilized by HIGHLANDS during the regular course of operation of the facility.

5. That prior to the construction and beginning of operations of HIGHLANDS' large scale, industrial hog-raising facility, the property upon which the facility was constructed had been used for grain growing, specifically corn, hay and beans.

6. There are generally at least 3500 hogs present in the facility, which generate daily thousands of gallons of fecal waste which is drained from the facility into four wastewater lagoons adjacent to the buildings which house the hogs.

7. The lagoons are uncovered and allow the odors from the swine waste and wastewater to enter the air and travel to Plaintiffs' residence downwind of the facility.

8. The building which houses the hogs has several vent fans which point directly to the east, which operate to force the fumes and odors from hogs into the air toward Plaintiffs' residence downwind of the facility.

9. By virtue of the number of hogs in the facility, extremely substantial quantities of solid swine waste sludge accumulate in HIGHLANDS' waste lagoon. That swine waste sludge is transported by HIGHLANDS' employees or agents from the facility to other fields in close proximity to Plaintiffs' residence, and generates noxious

dust, and noxious and offensive odors.

10. The swine waste water from the waste lagoons at the facility is sprayed via an irrigation unit on the property immediately west of the facility, which causes noxious particles of the wastewater to accumulate on the windows of Plaintiffs' residence, their automobile and other possessions, in addition to generating noxious and offensive odors.

11. In the late spring and summer months of 1998, the noxious and offensive odors generated by HIGHLANDS' hog facility began to regularly and frequently permeate the air in and around Plaintiff's yard and residence, and have continued to do so to the present date.

12. That as a result of the noxious and offensive odors generated by MURPHY's hog at the HIGHLANDS' facility Plaintiffs are no longer able to enjoy and live at their residence as they had before the facility began operating; Plaintiffs for example:

(a) cannot leave the windows in their residence open at night;

(b) cannot leave the windows in their house open when they leave the home;

(c) cannot hang clean clothes to dry on an outdoor line;

(d) do not entertain friends or guests in their yard or at their home;

(e) cannot eat with windows open;

(f) must run their air conditioning in their house and vehicle to remove odors; and

(g) have been required to alter and change numerous aspects of the daily affairs of life.

13. That Plaintiffs' furniture and curtains in their residence, upholstery in their vehicle and clothes regularly and frequently absorb the noxious and offensives odors generated by the MURPHY hogs at the HIGHLANDS facility, requiring that these items either be cleaned or discarded.

14. That the noxious and offensive odors generated by the MURPHY hogs at the HIGHLAND facility which permeate the air in and around Plaintiff's residence and yard constitute an unreasonable and substantial invasion of Plaintiffs' use and enjoyment of their residence and yard.

15. That MURPHY's location, supply and provision of the thousands of hogs to the HIGHLAND facility is negligent in one or more of the following respects, in that it:

a. Causes the discharge or emission of contaminants into the environment so as to cause or tend to cause air pollution, in violation of 415 ILCS 5/9(a) (1998);

b. Prevents the utilization or employment of adequate odor control methods in the handling of the swine waste, and wastewater so as to not cause air pollution, in violation of 35 Ill. Adm. Code 501.402(c)(3) (1998);

d. Causes an extremely large number of hogs to be present in the facility which generate a substantial volume of waste in a manner that cause the noxious and offensive odors to permeate the air regularly in and around Plaintiffs' residence and yard;

e. Was done when MURPHY knew, or in the exercise of reasonable care should have known, that substantial and regular noxious and offensive odors and fumes would be

produced by their thousands of hogs regularly raised and present in the facility and their large volume of fecal waste and wastewater.

16. That since noxious and offensive odors generated by the MURPHY hogs at HIGHLANDS' facility began regularly and frequently permeating the air in and around Plaintiffs' residence and yard, Plaintiffs have been forced to incur substantial additional utility costs for the increased use of the air conditioning system in the residence, additional costs for their furniture, curtains and the upholstery in their residence, and will in the future be forced to incur substantial additional costs for damage to their personal property and for an alternative residence to their current home.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for judgment against the Defendant, MURPHY FAMILY FARMS, INC., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

COUNT X
(Nuisance--Negligence--Personal Injury)

1-15. Plaintiff, ROY KELL, repeats and realleges the allegations of Paragraphs 1-15 of Count IX as and for the allegations of Paragraphs 1-15 of Count X, as though fully set forth herein.

16. That as a result of Defendant's hogs at the HIGHLANDS facility, Plaintiff, ROY KELL has suffered, and will in the

future suffer, personal injury, specifically pain and suffering, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, ROY KELL, prays for judgment against the Defendant, MURPHY FAMILY FARMS, INC., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFF DEMAND TRIAL BY JURY.

COUNT XI
(Nuisance--Negligence--Personal Injury)

1-15. Plaintiff, DIANNE KELL, repeats and realleges the allegations of Paragraphs 1-15 of Count IX as and for the allegations of Paragraphs 1-15 of Count XI, as though fully set forth herein.

16. That as a result of Defendant's hogs at the HIGHLANDS facility, Plaintiff, DIANNE KELL has suffered, and will in the future suffer, personal injury, specifically pain and suffering, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, DIANNE KELL, pray for judgment against the Defendant, MURPHY FAMILY FARMS, INC., in an amount in excess

of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFF DEMAND TRIAL BY JURY.

COUNT XII
(Nuisance--Negligence--Abatement)

1-16. Plaintiffs repeat and reallege the allegations of Paragraphs 1-16 of Count IX as and for Paragraphs 1-16 of Count XII, as though fully set forth herein.

17. Plaintiffs repeat and reallege the allegations of Paragraphs 16 of Count X and XI as and for the allegations of Paragraphs 17 of Count XII, as though fully set forth herein.

18. The Plaintiffs do not have an adequate remedy at law and, therefore, abatement of the noxious and offensive odors generated by MURPHY's hogs is proper.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for the entry of an Order requiring Defendant, MURPHY FAMILY FARMS, INC., to abate the generation and creation of noxious and offensive odors from their hogs which regularly and frequently permeate the air in and around Plaintiffs' residence and yard, and pray for their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

Count XIII
(Nuisance-Intentional--Civil Damages)

1-14. Plaintiffs repeat and reallege Paragraphs 1-14 of Count IX as and for Paragraphs 1-14 of Count XIII.

15. That MURPHY's supply, location and provision of the

hogs at the HIGHLAND facility is intentional in one or more of the following respects, in that Defendant knew:

a. That due to the extremely large number of hogs to be contained and raised at the facility, substantial noxious and offensive odors and fumes would be generated regularly by its operation;

b. That the operation of the venting system on the facility would generate substantial and regular noxious and offensive odors and fumes;

c. That the maintenance and handling of the substantial volume of swine waste and wastewater lagoons would generate substantial and regular noxious and offensive odors and fumes;

d. That spraying of swine wastewater and the transporting and spreading of swine waste sludge would generate substantial and regular noxious and offensive odors and fumes.

16. That since noxious and offensive odors generated by the MURPHY hogs at the HIGHLANDS' facility began regularly and frequently permeating the air in and around Plaintiff's residence and yard, Plaintiffs have been forced to incur substantial additional utility costs for the increased use of the air conditioning system in the residence, additional costs for their furniture, curtains and the upholstery in their residence, and will in the future be forced to incur substantial additional costs for damage to their personal property and for an alternative residence to their current home.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for judgment against the Defendant, MURPHY FAMILY FARMS, INC., in an

amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

Count XIV
(Nuisance-Intentional--Personal Injury)

1-15. Plaintiff, ROY KELL, repeats and realleges the allegations of Paragraph 1-15 of Count XIII as and for the allegations of Paragraph 1-15 of Count XIV, as though fully set forth herein.

16. That as a result of the foregoing conduct of MURPHY, Plaintiff, ROY KELL has suffered, and will in the future suffer, personal injury, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, pain and suffering, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, ROY KELL, prays for judgment against the Defendant, MURPHY FAMILY FARMS, INC., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

COUNT XV
(Nuisance-Intentional--Personal Injury)

1-15. Plaintiff, DIANNE KELL, repeats and realleges the allegations of Paragraph 1-15 of Count XIII as and for the allegations of Paragraph 1-15 of Count XV, as though fully set forth herein.

16. That as a result of the foregoing conduct of MURPHY,

Plaintiff, DIANNE KELL has suffered, and will in the future suffer, personal injury, including headaches, nausea, difficulty breathing, and other substantial and material annoyance and inconvenience, pain and suffering, as well as the substantial impairment of their normal activities of daily living.

WHEREFORE, Plaintiff, DIANNE KELL, prays for judgment against the Defendant, MURPHY FAMILY FARMS, INC., in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000), plus their costs of suit.

Count XVI
(Nuisance-Intentional--Abatement)

1-16. Plaintiffs repeat and reallege the allegations of Paragraphs 1-16 of Count XIII as and for Paragraphs 1-16 of Count XIV, as though fully set forth herein.

17. Plaintiffs repeat and reallege the allegations of Paragraphs 16 of Counts XIV and XV as and for the allegations of Paragraph 17 of Count XVI, as though fully set forth herein.

18. The Plaintiffs do not have an adequate remedy at law and, therefore, abatement of the noxious and offensive odors generated by MURPHY's hogs at the HIGHLANDS' facility is proper.

WHEREFORE, Plaintiffs, ROY KELL and DIANNE KELL, pray for the entry of an Order requiring Defendant, MURPHY FAMILY FARMS, INC., to abate the generation and creation of noxious and offensive odors from their hogs which regularly and frequently

permeate the air in and around Plaintiffs' residence and yard, and pray for their costs of suit.

PLAINTIFFS DEMAND TRIAL BY JURY.

ROY KELL and DIANNE KELL,
Plaintiffs

By: _____
One of Their Attorneys

PHILIP M. O'DONNELL
KINGERY DURREE WAKEMAN
& RYAN, ASSOC.
416 Main Street, Suite 915
Peoria, IL 61602
(309) 676-3612

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 6-6-03, 20__
By: ☒ U.S. Mail ☐ Hand Delivered ☐ Federal Express ☐ FAX ☐ Overnight Courier ☐ Other:
Signature _____

I hereby certify this to be a true and correct copy.
Dated June 3 20 03
KELLY CHEESMAN
Clerk of the Circuit Court, Knox County, Illinois
By June E McGee Deputy
(SEAL)

EXHIBIT "A-1"

First page of Kell vs. The Highlands, L.L.C. Complaint
Case No. 99-L-62 showing date stamp of October 22, 1999

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT OF ILLINOIS
KNOX COUNTY

ROY KELL and DIANNE KELL, Plaintiffs,	)	
vs.	)	Case No. 99 L 62
THE HIGHLANDS, L.L.C., Defendants.	)	

COMPLAINT

Plaintiffs, ROY KELL and DIANNE KELL, by their Attorneys, KINGERY DURREE WAKEMAN & RYAN, ASSOC., for their cause of action against the Defendant, THE HIGLANDS, L.L.C., state as follows:

COUNT I
(Nuisance/Property Damage)

1. In 1990 Plaintiffs moved into the residence located at 1097 Knox Road 220 East in Knox County, Illinois, and have lived here continuously to the present date.

2. In December, 1997, Defendant began operating a large scale, industrial hog raising facility located approximately one-quarter mile directly to the west of Plaintiff's residence; said facility is also located in Knox County, Illinois.

3. In the spring of 1998, noxious odors and fumes began entering and permeating the air in Plaintiffs' yard, residence and the land to the west of Defendant's hog facility.

4. The noxious and offensive odors that emanate from Defendant's hog facility result from the substantial quantities of fecal waste generated by the hogs therein and the chemicals utilized by Defendant during the regular course of operation of the facility.

EXHIBIT "B"

Kell vs. The Highlands, L.L.C., Case No. 99-L-62
Joint Motion And Stipulation To Dismiss

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

ROY KELL and DIANNE KELL,	)	
Plaintiffs,	)	
vs.	)	Case No. 99 L 62
THE HIGHLANDS, L.L.C., and MURPHY FAMILY FARMS, INC.	)	
Defendants.	)	

JOINT MOTION AND STIPULATION TO DISMISS

Plaintiffs and defendants, by their respective attorneys of record hereby stipulate and jointly move that the Second Amended Complaint in this matter be dismissed in its entirety, with prejudice and without costs, all issues among the parties having been fully resolved, compromised, and settled.

Respectfully submitted,

By: _____

Philip M. O'Donnell, Esq.
Kingery, Durree, Wakeman & Ryan, Assoc.
416 Main Street, Suite 915
Peoria, IL 61602

Counsel for Roy and Dianne Kell

By: _____

Charles M. Gering, Esq.
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096

Counsel for Murphy Farms, Inc.

By: _____

Brian P. Thielen, Esq.
Thielen Law Offices
207 West Jefferson Street
Suite 600
Bloomington, Illinois 61701

Counsel for Highlands, L.L.C.

EXHIBIT "C"

Kell vs. The Highlands, L.L.C.,
Case No. 99-L-62
Order

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

ROY KELL and DIANNE KELL,	)	
Plaintiffs,	)	
vs.	)	Case No. 99 L 62
THE HIGHLANDS, L.L.C., and MURPHY FAMILY FARMS, INC.	)	
Defendants.	)	

ORDER

This cause coming to be heard on the parties' Joint Motion and Stipulation to Dismiss and the Court being fully advised in the premises, it is hereby ordered that the Second Amended Complaint in this matter is dismissed in its entirety, pursuant to the parties' stipulation, with prejudice and without costs to any party.

ENTER:

James B. Stewart
Judge

March 11, 2002
Date

Prepared by:

Charles M. Gering
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096
(312) 372-2000

FILED
KNOX CO., IL
MAR 11 2002
KELLY CHEESMAN
Clerk of the Circuit Court
Mary Wolf Deputy

I hereby certify this to be a true and correct copy.
Dated June 3 20 03
KELLY CHEESMAN
Clerk of the Circuit Court, Knox County, Illinois
By Jane E. McGee Deputy
(SEAL)

AFFIDAVIT OF DOUGLAS BAIRD

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. THE HIGHLANDS, LLC, an Illinois limited liability corporation, and MURPHY FARMS, INC., (a division of MURPHY-BROWN, LLC, a North Carolina limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation). Respondents.	)	PCB No. 00-104 (Enforcement)

AFFIDAVIT OF DOUGLAS BAIRD

I, Douglas B. Baird, being first duly sworn under oath, depose and state as follows:

1. I am a member/manager of The Highlands, LLC.
2. The Highlands, LLC is an Illinois limited liability company. The member/managers of The Highlands, LLC in addition to me are my parents, James and Patricia Baird.
3. The Highlands, LLC was formed for the purpose of owning and operating a farrow to wean hog facility on family owned ground in Knox County, Illinois. The Baird family has been farming in Elba and Truro Townships in Knox County, Illinois since 1852.

4. The farrow to wean facility was constructed in 1997 and 1998 at a cost of approximately $2,900,000.00. The facility first started receiving hogs in December of 1997.
5. The facility first started farrowing pigs in the spring of 1998. The facility has a population of approximately 3,600 gilts and sows that produce approximately 80,000 weaned pigs annually. Young pigs are weaned at an average age of 14 to 21 days at which time they are trucked to other contract hog production facilities in which The Highlands, LLC has no ownership interest.
6. Even before construction started on the facility and before the facility commenced operation, there was a concerted effort by a group known as FARM to prevent the facility from being constructed. Litigation generated by that opposition group resulted in an ultimate decision by the Illinois Supreme Court that approved the siting and zoning of The Highlands facility as originally proposed.
7. From the time the facility opened, I have worked hard as the manager of the facility to try to respond to any odor complaints by neighbors and, to the extent technically feasible and economically reasonable, modifications have been made in the operation and management of the facility to reduce offensive odors.
8. Changes that The Highlands have made since 1998 include the following:

(a) The original manure management system was a BION system that utilized a four cell lagoon system. In response to objections to that system by the Illinois EPA, The Highlands switched from the BION sytem to a BIO SUN system on July 17, 2000. It took until approximately June of 2001 to get the new BIO SUN system to achieve biological maturity and work properly. BIO SUN additives to the lagoon cost $11,045.00 in 2002.

(b) The discharge pipes from the manure collection pits under the slatted floors of the facility originally drained through a pipe that entered the first lagoon above the water level. That pipe has since been re-directed so that the effluent enters the lagoon below the surface of the water.

(c) The frequency with which the pits under the slatted floors are drained into the lagoons has been increased. Each pit is now drained once a week and flushed out with water from the cleaner of the two lagoons that we presently have in active use.

(d) At the request of the Illinois EPA, The Highlands constructed air dams at the east ends of the breeding and gestation buildings in order to divert the flow of exhaust air from being directed at the Kell residence ¼ mile to the east.

(e) An enzyme spray system has been installed within the hog confinement buildings and at the exhaust fans. The purpose of

the enzyme spray is to neutralize the odors caused by pig dander and manure odors generated from the confinement buildings. The enzyme also provides continuous cleaning of exhaust fans and the air outlets.

(f) Manure deposits on top of the manure pit slats in the breeding and gestation barns are scraped into the manure pits daily.

(g) The nursery building is power washed with clean water and disinfected weekly.

(h) The finisher pens are power washed with clean water and disinfected between groups of replacement gilts, which is approximately every 2 ½ months.

(i) The finisher pens are sprayed daily with an enzyme that neutralizes ammonia from the pig manure and reduces odor.

(j) The feed used in the farrowing building contains a high fat content which helps to keep down the dust that is generated by movement of the feed.

(k) The feed in all the buildings now contains an additive known as Micro-Source S which is formulated to reduce manure odor.

9. The EPA has requested that The Highlands install additional equipment to reduce the odor generated by The Highlands. I have reviewed each alternative suggested by the EPA and believe that the alternatives suggested are either technologically not feasible or not

economically reasonable. Each alternative suggested by the EPA and my response to each alternative is as follows:

(a) Provide a cover for the first two lagoons of the existing lagoon system to prevent the escape of odorous gases and provide sufficient aeration to avoid anaerobic conditions in the third and fourth lagoons.

RESPONSE: This suggestion applied to the four lagoon system that was part of the original BION system. Covers reduce the effectiveness of anaerobic lagoons by slowing the process of breaking down organic material. Covers increase the build up of solid organic material. Although The Highlands only actively utilizes two lagoons at this time, a cover for the first of those two lagoons would be expensive at approximately $60,000.00. Those covers tend to be damaged by high winds, can be affected by ice and snow, and tend to require frequent replacement. Both cells had a floating aerator. There would be no way of operating those aerators with a cover. Furthermore, solids need to be removed annually from the bottom of the lagoon. It would be difficult to remove solids from the lagoon if it were covered. Covers are not an effective means of solving waste odor problems. This response applies to all alternatives that suggest the use of covers.

(b) Capture and flare gas from the entire waste management system.

RESPONSE: See response to (a). Also, additional LP gas would be required to maintain a flare at all times, thereby increasing operating expense.

(c) Provide a cover for the first three lagoons and provide sufficient aeration to maintain the fourth lagoon in an aerobic condition.

RESPONSE: The response concerning covers is the same for this alternative as for prior alternatives. Additionally, the aeration required to maintain the fourth lagoon in an aerobic condition would cause a substantial increase in electrical energy that would be economically unreasonable.

(d) Enclose the first lagoon on the existing lagoon system with an enclosed, temperature controlled anaerobic digester and provide sufficient aeration to the second and subsequent lagoons to maintain aerobic conditions.

RESPONSE: Such digesters have not been proven to be effective. The cost of maintaining an elevated temperature year round to support microbial activity would be cost prohibitive. There are no economical insulated covers of a size to fit the first lagoon. The present technology for such digesters requires that the effluent contain 8% solids. The effluent from these two buildings contain

2% or less solids. In order for this technology to work, The Highlands would either have to use a mechanical separation method, which is not currently feasible for hog waste or completely redesign the manure handling system using pit scrapers in the building pits. This alternative is not economically reasonable.

(e) Replace all three of the first lagoons with an enclosed, temperature controlled, anaerobic digester and maintain the fourth lagoon in an aerobic state.

RESPONSE: See the response to (a) and (d).

(f) Provide for twice weekly draining of the underfloor manure storage pits and refilling with odor free water with a dissolved oxygen concentration in excess of 2.0 mg/l.

RESPONSE: The manure pits are presently drained once a week and refilled with water from the cleaner of the two lagoons. To require "odor free water" would mean fresh water being pumped into the pits every week and then flushed every week. The lagoon storage system that is in place at The Highlands was not designed to receive this additional volume of fresh water and would require the construction of an additional lagoon to accommodate the increased volume. This alternative is not economically reasonable.

(g) Provide adequate filtration for exhaust air generated at the swine confinement buildings.

RESPONSE: An air filtration system could only be placed on the breeding and the gestation buildings. Due to design constraints, no other buildings could be fitted with an air filtration system. The net effects on odor reduction by air filtration systems is doubtful.

(h) Reduce organic loading on the treatment system by reducing the population of hogs in the facility.

RESPONSE: This is not an economically reasonable alternative.

10. None of the above alternatives are techically feasible and economically reasonable. The Highlands has taken all measures to reduce the odors that I feel are technically feasible and economically reasonable, with the exception of growing trees as wind breaks. From the time that the facility opened in 1997, most of the complaints received by The Highlands pertaining to the odor have come from Roy and Diane Kell. The Kells live approximately one-quarter mile east of The Highlands. The Kells do not own their home; they have rented their present residence for approximately 20 years.

11. The Kells residence is a farmstead that, until the late 1970s, was used by the tenant of the property to raise hogs. Some of the buildings that were used at the farmstead to raise hogs are still in existence today.

12. On October 22, 1999, the Kells filed suit against The Highlands due to the odors that were being generated by the hog facility.

13. On March 11, 2002, the complaint brought by the Kells against The Highlands was settled and the case was dismissed. Since that date, the Kells have not filed any complaint against The Highlands.

14. Since March 11, 2002, the Kells have continued to reside in the same residence in which they have resided for over twenty years.

15. Whenever I have passed the Kells on the road since March 11, 2002, the Kells have smiled and waved to me.

16. The Highlands presently employs 14 people full time. The payroll for wages and salaries for 2002 was $392,716.00. The total operating expenses for 2002 were $1,354,915.00. The Highlands will pay real estate taxes in 2003 in the total amount of $37,863.44, $19,270.29 of which will be paid to the local school district. A copy of that real estate tax bill is attached to my Affidavit as an Exhibit.

17. Of the 14 people employed by The Highlands, 12 of them live in Knox County.

18. Of the $1,354,915.00 in operating expenses paid by The Highlands in 2002, most of that is paid to people and other businesses within Knox County.

19. Attached to this Affidavit is a copy of a directory that shows Truro and Elba Townships with the names and locations of the rural residents within those two townships. The location of The Highlands is also marked in order to show its position relative to other rural residents

within the two township area. I am personally familiar with the location of each of the residences shown on the directory and the information contained on the directory is true and correct.

20. As a result of the zoning dispute that went to the Illinois Supreme Court concerning The Highlands, I am familiar with the zoning in Elba and Truro Townships. Attached to my Affidavit are copies of the zoning maps for each of those townships. The zoning maps are produced by the Knox County Department of Planning and Zoning and, to my knowledge, are true and accurate.

21. Also attached to my Affidavit is a copy of the cover of the Galesburg/Knox County 1999 Comprehensive Plan along with page 11 of that Plan. Page 11 contains a chart that shows the land use in Knox County. That chart shows that 61% of the county is cropland, 20% is grassland, 14% is forest/woodland, and 2% of the county is urban/built-up land. These documents were obtained directly from the Knox County Office of Planning and Zoning and, to my knowledge are true and correct.

22. Also attached to my Affidavit is a copy of the cover page from the Illinois Agricultural Statistics 2002 Annual Summary and page 130 therein which shows highlights of Knox County. That publication is prepared by the Illinois Agricultural Statistics Service and is issued co-operatively by the Illinois Department of Agriculture and the United

States Department of Agriculture. That publication shows that Knox County produced 126,900 head of hogs in 2001 and that production ranked Knox County sixth in the State of Illinois. To my knowledge, the copies of the pages of this publication attached as an exhibit are true and correct.

FURTHER AFFIANT SAYETH NOT.

Douglas B. Baird

Subscribed and sworn before me
this 13 day of June, 2003.

Notary Public

OFFICIAL SEAL
JEFFREY W. TOCK
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8/25/06

vlb/Complain.jef/2003/Highlands-Baird.Aff

KNOX COUNTY 2002 REAL ESTATE TAX BILL

KNOX COUNTY
2002 REAL ESTATE TAXES
ROBIN E. DAVIS, COUNTY TREASURER
Knox County Courthouse
200 S. Cherry Street
Galesburg, IL 61401

2002

PLEASE READ the instructions on the back of this bill regarding when to pay and where to pay your taxes. Additional information is provided for changing your mailing address and tax exemptions in which you might be entitled.

The County Treasurer only collects your taxes and is not responsible for the amount of your assessment or the amount of your tax bill. We will be happy to assist you or direct you to the proper authority regarding questions about your tax bill.

ASSESSED TO: ROLLING MEADOWS INC
BILL NUMBER: 00026724

ROLLING MEADOWS INC
% BAIRD JAMES R
1122 KNOX HWY 18
WILLIAMSFIELD, IL 61489-0000

******* NORMAL BILL ******

RECEIPT PORTION - KEEP FOR YOUR RECORDS
2002 KNOX COUNTY REAL ESTATE TAX
PAY TO: KNOX COUNTY COLLECTOR

PROPERTY DESCRIPTION	PERMANENT INDEX NUMBER
00000000 W1/2 N120 ACS NE S10 T10 R4 EPA 2001 = 58060	1610200003
	ACRES 60.00 / TAXABLE VALUE 547880
	CODE 0021 / TAX CODE 229
LOCATION OF PROPERTY Sect/Lot Twp Range Acres 00 60.00	TOWNSHIP ELBA

FORMULA FOR TAX CALCULATION - 2002

LAND LOT		0
HOMESITE/BLDG.		0
FARM BLDG.		527240
FARM LAND		20640
BD OF REVIEW EQUALIZED VALUE	=	547880
STATE EQUALIZATION FACTOR***	X	1.00000
STATE EQUALIZED VALUE	=	547880
HOME IMPROVEMENT EXEMPTION	-	0
OWNER OCCUPIED EXEMPTION	-	
HOMESTEAD EXEMPTION	-	
VETERAN EXEMPTION	-	0
SENIOR ASSSESSMENT FREEZE		0
MISC. EXEMPTION	-	0
TAXABLE VALUE	=	547880
TAX RATE	X	6.9109
TOTAL TAX	=	37863.44

***NOT TO BE USED FOR FARM LAND AND FARM BUILDINGS

INTEREST 1½% PER MONTH	TOTAL TAX DUE 37863.44
1977 EQUALIZED VALUE 0	FAIR MARKET VALUE 0

TAXING BODY	Prior Rate	Prior Amount	Current Rate	Current Amount
COUNTY TAX	.7739	4258.43	.8929	4892.25
COUNTY PENSION	.1870	1028.26	.1247	682.96
ELBA TOWNSHIP	1.1646	6407.84	1.2196	6682.54
ELBA TWP. PENSION	.0297	162.96	.0301	164.32
U SCHOOL DIST 210	4.1244	22692.13	3.5168	19270.29
U210 PENSION	.1338	735.63	.1201	655.56
JR COLLEGE DIST. 5	.4734	2604.80	.4966	2720.97
J518 PENSION	.0074	40.47	.0076	41.44
WILLIAMSFIELD FIRE	.4815	2649.12	.3521	1929.09
MTA 16-18-19-20	.0469	258.03	.0488	267.37
WILLIAMSFIELD PUB	.1085	596.95	.1016	556.65
****** TOTALS ****	7.5311	41434.62	6.9109	37863.44

FIRST INSTALLMENT DUE DATE:	06/23/03	AMOUNT	18931.72	SECOND INSTALLMENT DUE DATE: 09/04/03	AMOUNT 18931.72

00126724

1

BILL NUMBER	00026724	FORFEITED TAXES OR YEARS	
PERMANENT INDEX NUMBER	1610200003	CURRENT TAX DUE	18931.72
DUE DATE	06/23/03	TAX PAYMENT-1ST INST.	18931.72
PAID BY OTHER		INTEREST / COSTS	
TOTAL TAX	37863.44	TOTAL PAID	

1610200003 ROLLING MEADOWS INC
ROLLING MEADOWS INC
% BAIRD JAMES R
1122 KNOX HWY 18
WILLIAMSFIELD, IL 61489-0000

DETACH HERE

00226724

2

BILL NUMBER	00026724	FORFEITED TAXES OR YEARS	
PERMANENT INDEX NUMBER	1610200003	CURRENT TAX DUE	18931.72
DUE DATE	09/04/03	TAX PAYMENT-2ND INST.	18931.72
PAID BY OTHER		INTEREST / COSTS	
TOTAL TAX	37863.44	TOTAL PAID	

1610200003 ROLLING MEADOWS INC
ROLLING MEADOWS INC
% BAIRD JAMES R
1122 KNOX HWY 18
WILLIAMSFIELD, IL 61489-0000

ELBA TOWNSHIP DIRECTORY

T-10-N · R-4-E

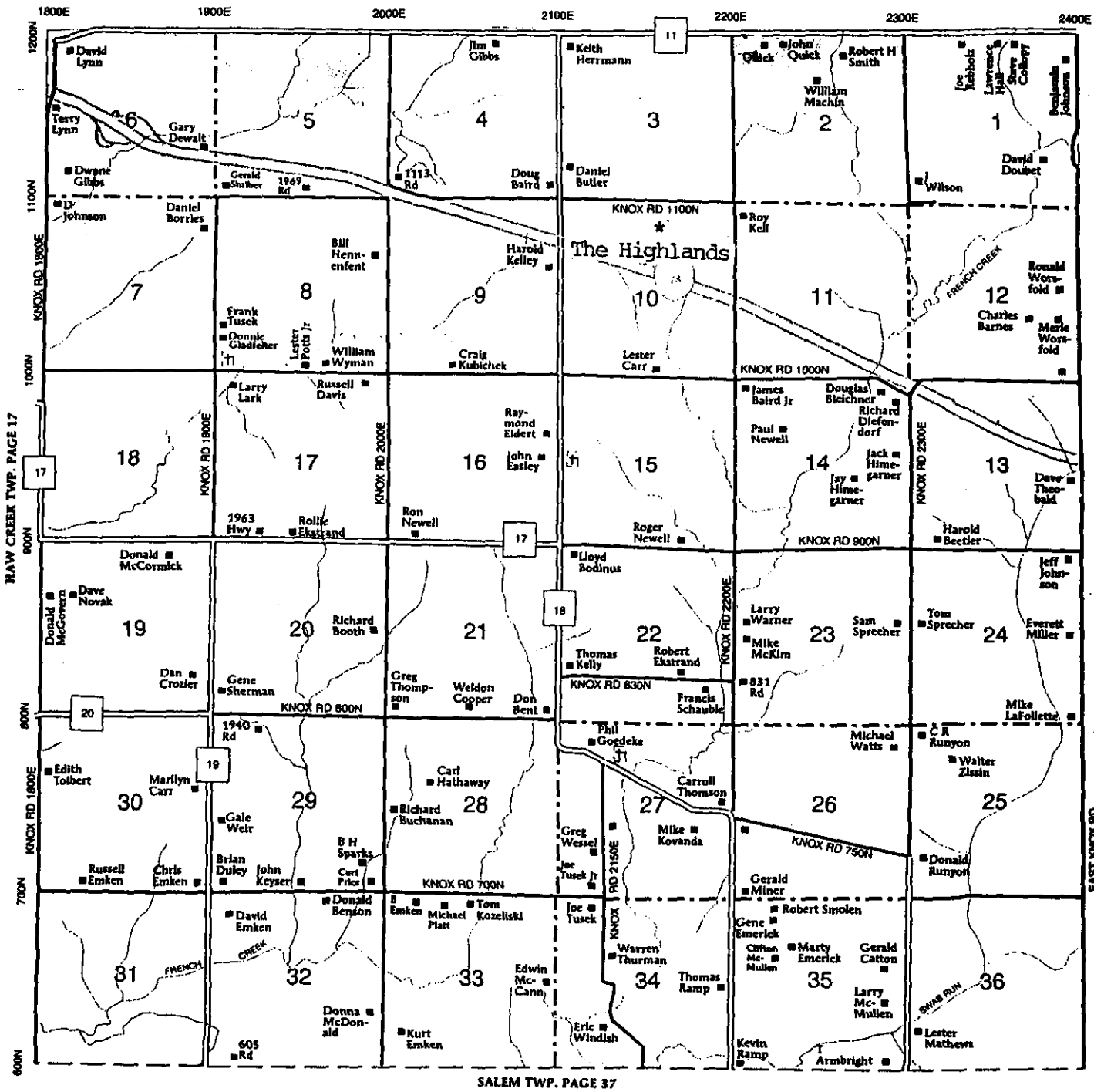
ELBA DIRECTORY

Rural Route & Home Publishers, Ltd.

KNOX COUNTY, ILLINOIS

(Residents - Owner or Renter)

TRURO TWP. PAGE 41



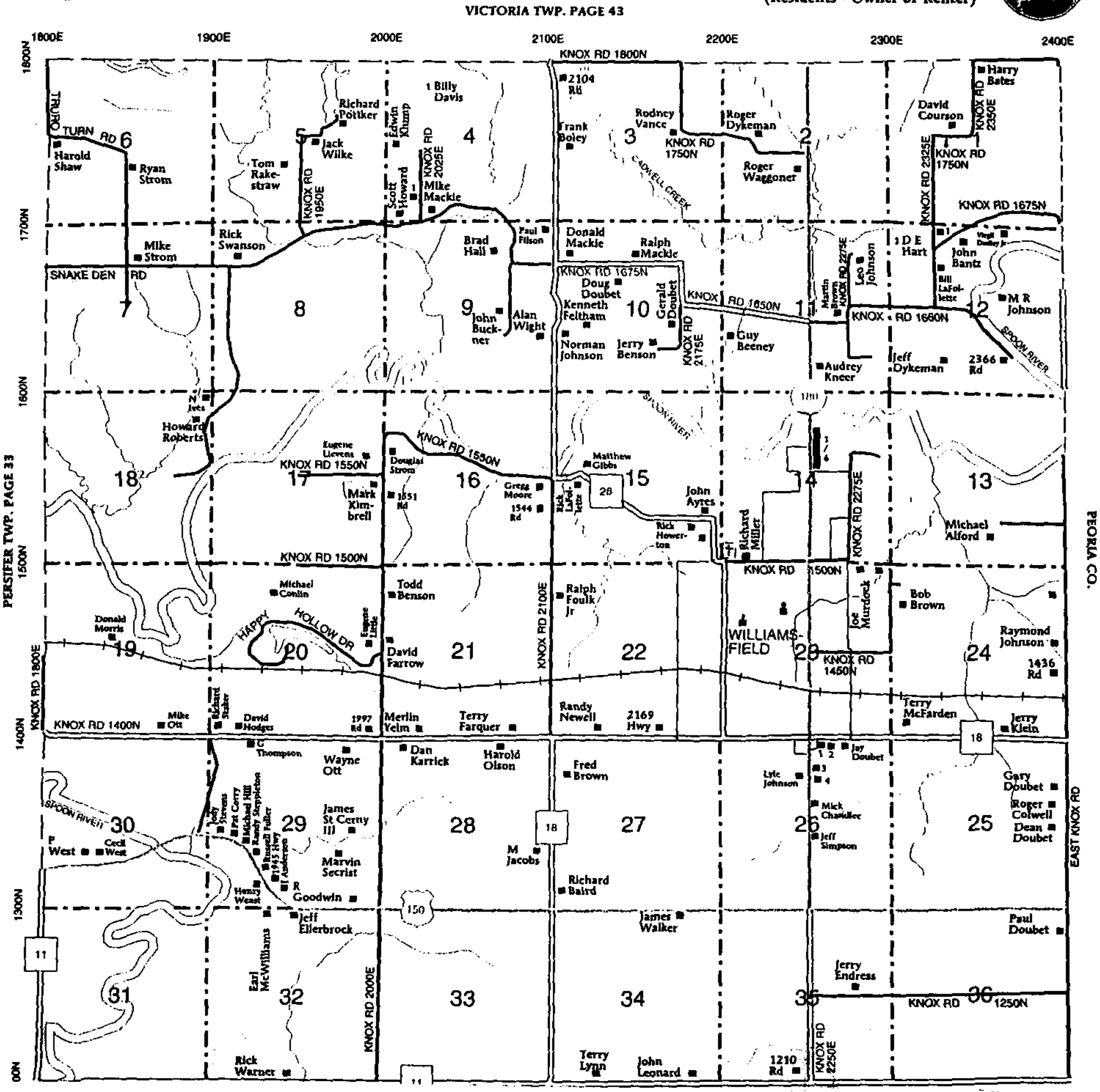
SALEM TWP. PAGE 37

TRURO TOWNSHIP DIRECTORY

KNOX COUNTY, ILLINOIS

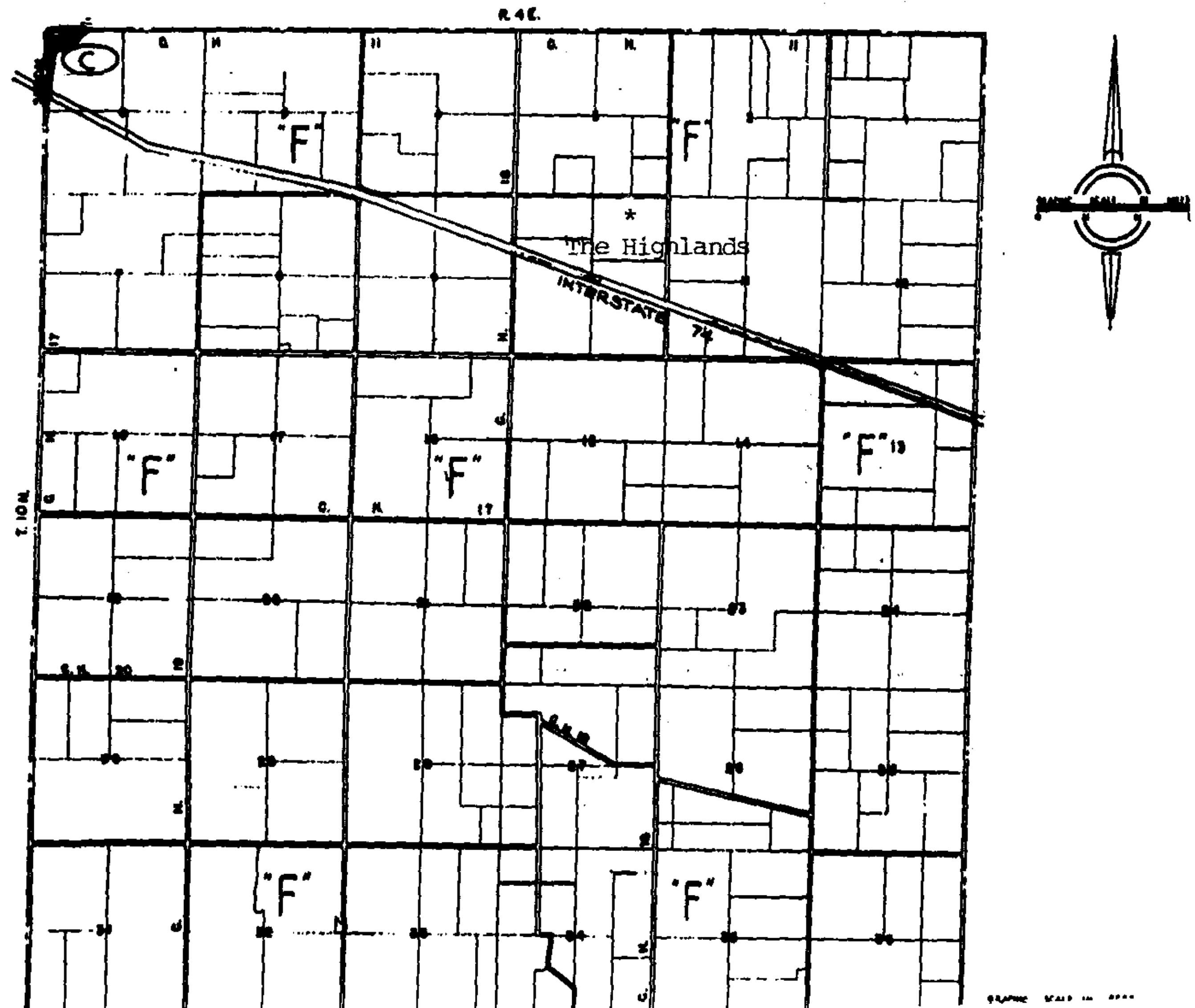
See Page 72 For Additional Names.

(Residents - Owner or Renter)



ELBA TOWNSHIP ZONING DISTRICT MAP

ELBA TOWNSHIP

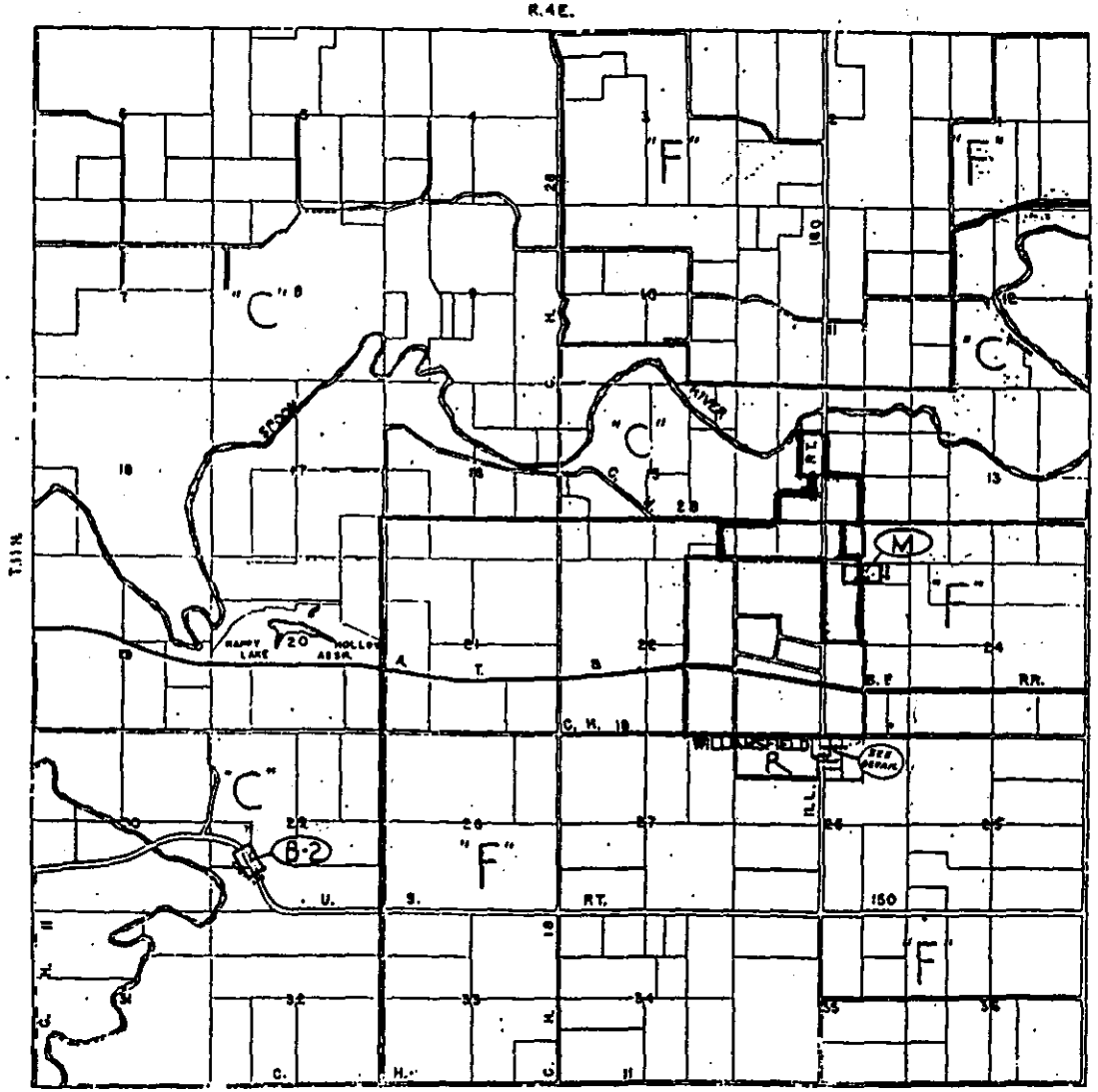


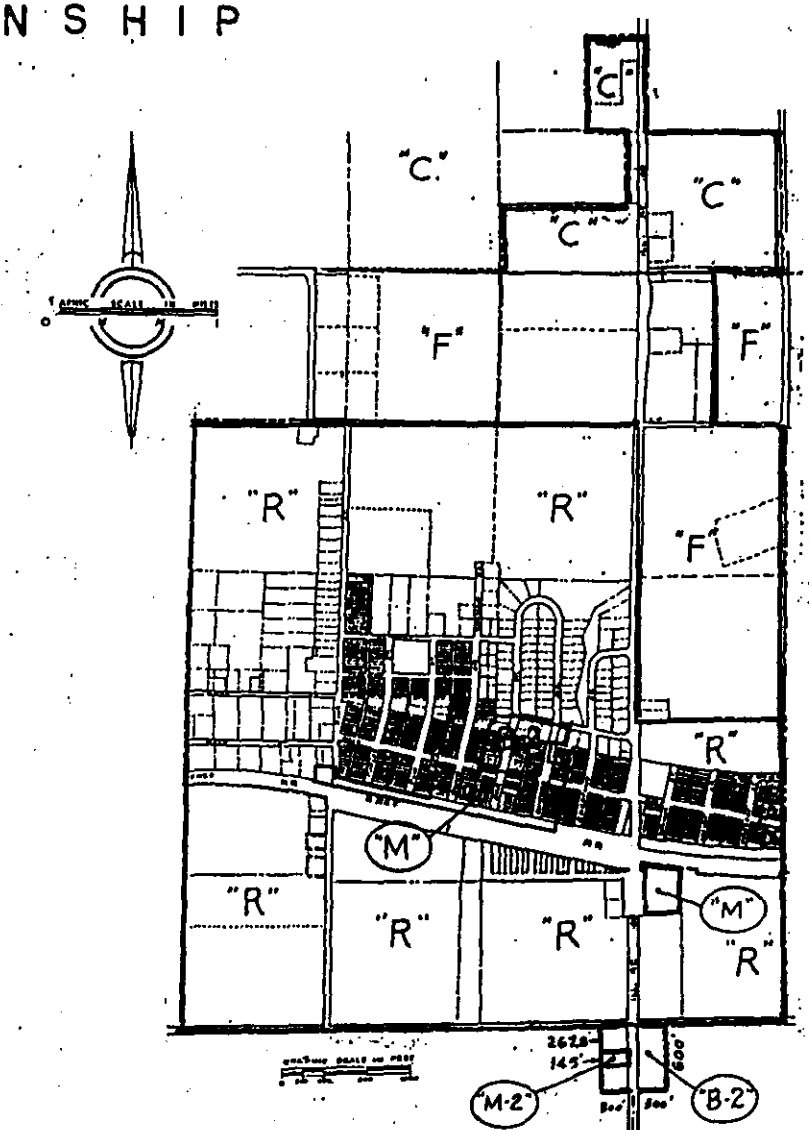
ZONING DISTRICTS

"C" CONSERVATION
"F" FARMING
"R" RURAL RESIDENCE
"B" LOCAL BUSINESS
"B-2" HIGHWAY BUSINESS
"M" RESTRICTED INDUSTRY
"M-2" HEAVY INDUSTRY

TRURO TOWNSHIP ZONING DISTRICT MAP

TRURO TOWNSHIP





WILLIAMSFIELD

MAP NO. 12

by agriculture. Over 79% of the County is either crop land or grass land. Nearly 14% of the County is covered by forest and woodlands. Much of this wooded area is along the Spoon River and other streams within the County. Interestingly, there is more land consumed by open water and wetlands than there is developed urban area. Contributing to the open water category are several private lakes, Galesburg's Lake Storey, and various streams and rivers. In addition, former strip-mined areas in the eastern part of the County now contain large areas of open water and wetlands.

Land use and development trends occurring in Galesburg since 1967 are illustrated on Figure 3. Several significant trends are evident. There has been significant commercial development activity along North Henderson Street near the interchange with U.S. Highway 34. Substantial industrial development has occurred on the southwest side of Galesburg including Maytag along Monmouth Boulevard and the South Henderson Street business park.

Several new multi-family developments have occurred near Sandburg Mall. Major institutional uses have also developed since 1967, including the Henry Hill Correctional Center and Carl Sandburg College. A detailed existing land use survey was completed in 1997 and is summarized below.

Knox County Land Cover

Type of Cover	Acres	% of County
Cropland	281,024	61%
Grassland	91,759	20%
Forest/Woodland	64,243	14%
Wetland	6,601	1%
Urban/Built-up Land	10,883	2%
Open Water	9,364	2%
Other	37	<.1%
Total	463,911	

Galesburg Existing Land Use

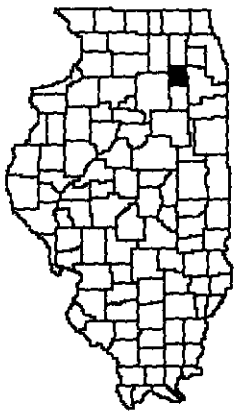
	1965 Acres	1965 Percent	1997 Acres	1997 Percent	1965-1997 Acre Change	1965-1997 Percent Change
Single-Family Dwellings	1,986.9	29.9%	2,575.0	23.1%	588.1	29.6%
Manufactured Homes	7.0	0.1%	91.9	0.8%	84.9	1,212.9%
Two-Family Dwellings	174.6	2.6%	76.6	0.7%	(98.0)	-56.1%
Multi-Family Dwellings	43.6	0.7%	247.7	2.2%	204.1	468.1%
Commercial	138.0	2.1%	544.0	4.9%	406.0	294.2%
Light Industry	96.4	1.5%	224.1	2.0%	127.7	132.5%
Heavy Industry	195.9	2.9%	468.2	4.2%	272.3	139.0%
Parks and Playgrounds	599.7	9.0%	714.5	6.4%	114.8	19.0%
Public and Semi-Public	531.0	8.0%	1,315.4	11.8%	784.4	147.7%
Streets & Railroads	1,433.3	21.6%	1,600.0	14.3%	166.7	11.6%
Total Developed Area	5,206.4	78.4%	7,857.4	84.9%	2,651.0	50.9%
Vacant Area	1,440.8	21.6%	1,681.3	15.1%	240.5	16.7%
Total Area	6,647.2	100.0%	9,538.7	100.0%	2,891.5	43.5%

ILLINOIS AGRICULTURAL STATISTICS
2002 ANNUAL SUMMARY

ILLINOIS AGRICULTURAL STATISTICS

Illinois County Highlights

Kendall County



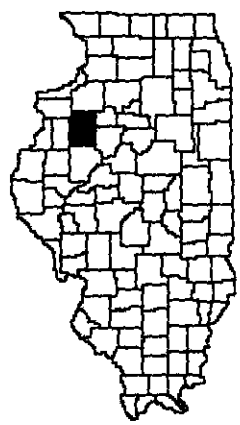
Census of Agriculture (1997)	Value	Rank
Average Age of Farm Operator	53.9	
Number of Farms:	441	80
By Value of Sales:		
Less than $10,000	91	
$10,000 - $99,999	195	
$100,000 or more	155	
By Size:		
1 - 49 Acres	103	
50 - 499 Acres	224	
500 or more Acres	114	
Land in Farms, Acres	167,486	82
Avg. Value of Land & Bldgs./Acre	$3,994	4
Avg. Value of Ag Products Sold/Farm	$133,238	38
Avg. Farm Prod. Expenses/Farm	$95,491	26
Avg. Net Cash Return from Sales/Farm	$40,342	44

Crops (2001)	Acres Harv.	Yield	Prod.	Rank
Corn, Bu.	78,500	133	10,440,500	67
Soybeans,	72,500	42	3,045,000	72
Wheat, Bu.	1,800	78	140,400	61
Sorghum, Bu.	N/A			
All Hay, Tons	N/A			
Oats, Bu.	N/A			

Livestock	No. of Head	Rank
Hogs & Pigs (12/01/01)	25,300	56
Cattle & Calves (01/01/02)	1,500	99
Beef Cows (01/01/02)	N/A	

Cash Receipts (2001)	$1,000	Rank
Crops	37,927	62
Livestock	7,347	75

Knox County



Census of Agriculture (1997)	Value	Rank
Average Age of Farm Operator	54.3	
Number of Farms:	928	26
By Value of Sales:		
Less than $10,000	263	
$10,000 - $99,999	337	
$100,000 or more	328	
By Size:		
1 - 49 Acres	206	
50 - 499 Acres	468	
500 or more Acres	254	
Land in Farms, Acres	389,776	18
Avg. Value of Land & Bldgs./Acre	$1,923	53
Avg. Value of Ag Products Sold/Farm	$140,413	33
Avg. Farm Prod. Expenses/Farm	$89,246	31
Avg. Net Cash Return from Sales/Farm	$44,292	35

Crops (2001)	Acres Harv.	Yield	Prod.	Rank
Corn, Bu.	143,800	166	23,870,800	21
Soybeans,	135,200	48	6,489,600	23
Wheat, Bu.	1,700	74	125,800	68
Sorghum, Bu.	N/A			
All Hay, Tons	13,300	3.62	48,090	13
Oats, Bu.	N/A			

Livestock	No. of Head	Rank
Hogs & Pigs (12/01/01)	126,900	6
Cattle & Calves (01/01/02)	29,400	12
Beef Cows (01/01/02)	12,700	5

Cash Receipts (2001)	$1,000	Rank
Crops	79,205	22
Livestock	35,395	14

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. THE HIGHLANDS, LLC, an Illinois limited liability corporation, and MURPHY FARMS, INC., (a division of MURPHY-BROWN, LLC, a North Carolina limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation). Respondents.	)	PCB No. 00-104 (Enforcement)

THE HIGHLANDS, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

A. RES JUDICATA

"Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies." *People vs. Progressive Land Developers, Inc.* (1992), 151 Ill.2d 285, 602 N.E.2d 820, 176 Ill.Dec. 874 citing *Kinzer vs. City of Chicago* (1989), 128 Ill.2d 437, 446, 132 Ill.Dec. 410, 539 N.E.2d 1216; *Catlett vs. Novac* (1987), 116 Ill.2d 63, 106 Ill.Dec. 786, 506 N.E.2d 586. "That judgment is an absolute barr to subsequent actions involving the same claims or demands by the same parties or their privies." *People vs. Progressive Land Developers, Inc.*, 151 Ill.2d at 294; *Kinzer vs. City of Chicago*, 128 Ill.2d at 446; *Catlett vs. Novac*, 116 Ill.2d at 67. "The doctrine extends not only to what actually was decided in the original action, but

also to matters which could have been decided in that suit." *People vs. Progressive Land Developers, Inc.*, 151 Ill.2d at 294; *LaSalle National Bank vs. County Board of School Trustees* (1975), 61 Ill.2d 524, 529, 337 N.E.2d 19. The essential elements of *res judicata* are:

(1) A final judgment on the merits rendered by a court of competent jurisdiction;

(2) An identity of cause of action; and,

(3) An identity of parties or their privies.

People vs. Progressive Land Developers, Inc., 151 Ill.2d at 294.

1. A final judgment on the merits rendered by a court of competent jurisdiction.

On October 22, 1999, Roy and Dianne Kell filed a complaint in the Circuit Court of Knox County against The Highlands and Murphy Family Farms, Inc.. The Kells eventually filed a Second Amended Complaint on June 8, 2000, a certified copy of which is attached to The Highlands' Motion for Summary Judgment. On March 11, 2002, the parties in that litigation filed a Joint Motion And Stipulation To Dismiss which stated that all issues among the parties had been fully resolved, compromised, and settled. A certified copy of that Motion is attached to The Highlands' Motion for Summary Judgment as Exhibit "B". On March 11, 2002, the Circuit Court of Knox County entered an Order dismissing the case with prejudice pursuant to the Motion And Stipulation. A certified copy

of that Order is attached to The Highlands' Motion for Summary Judgment as Exhibit "C".

When a case is dismissed "with prejudice", that means that the plaintiff (the Kells) are not permitted to plead over and the litigation is terminated. *Perkins vs. Collette* (2nd Dist, 1989), 179 Ill.App.3d 852, 534 N.E.2d 1312, 128 Ill.Dec. 707. When a suit is dismissed with prejudice pursuant to a settlement agreement, all claims and causes of action are merged with that dismissal, which acts as an adjudication on the merits. *Glassberg vs. Warshawsky* (2nd Dist., 1994) 266 Ill.App.3d 585, 202 Ill.Dec. 881, 638 N.E.2d 749. The counts set forth in the Kells' Second Amended Complaint alleged a number of different theories of recovery against both defendants. Those theories of recovery included: nuisance, personal injury and abatement of the nuisance.

The Kells were and are residents of Knox County, The Highlands principal place of business is in Knox County and Murphy Family Farms did business in Knox County. Consequently, the Knox County Circuit Court had jurisdiction over the parties and all of the theories of recovery.

2. An identity of cause of action.

"A cause of action is defined by the facts which give the plaintiff a right to relief. While one group of facts may give rise to a number of different theories of recovery, there remains only a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed

to sustain both, then there is identity between the allegedly different causes of actions asserted and *res judicata* barrs the latter action." *People vs. Progressive Land Developers, Inc.*, 151 Ill.2d at 295 quoting from *Morris vs. Union Oil Co.* (1981), 96 Ill.App.3d 148, 157, 51 Ill.Dec. 770, 421 N.E.2d 278. The single group of operative facts common to both the Kells' action filed in the Circuit Court of Knox County and this present action before the Illinois Pollution Control Board is that the hog facility owned and operated by The Highlands has emitted hog odors that have unreasonably interfered with the Kells' enjoyment of their life and property. Since the same facts are necessary for the maintenance of both proceedings, the causes of action are identical. *People vs. Progressive Land Developers, Inc.*, 151 Ill.2d at 296.

3. An identity of parties or their privies.

"Privity is said to exist between parties who adequately represent the same legal interests. It is the identity of interest that controls in determining privity, not the nominal identity of the parties." *People vs. Progressive Land Developers, Inc.*, 151 Ill.2d at 296. The issue under this requirement is whether the Attorney General's interests were adequately represented by counsel for the Kells in the Knox County Circuit Court proceedings. "A non-party may be bound if his own interests are so closely aligned to a party's interest that the party is his virtual representative." *People vs. Progressive Land Developers, Inc.* (1st Dist., 1991), 216 Ill.App.3d. 73, 80, 159 Ill.Dec. 545, 576 N.E.2d 214.

In the Knox County case, the attorney for the Kells prepared and filed several versions of a complaint against The Highlands and Murphys. The final version that withstood the legal challenges of the defendants was the Second Amended Complaint. That complaint consisted of 16 counts, half of which were direct against each defendant. Those counts were based upon the alleged odor nuisance caused by The Highlands/Murphy Family Farms either negligently or intentionally designing and operating The Highlands hog facility so as to permit offensive hog odors that invaded the Kells' property and residence and thereby interfered with their enjoyment of life and property. There were also counts that alleged that the Kells suffered personal injuries including headache, nausea, difficulty breathing and other pain and suffering caused by the hog odors that emanated from The Highlands facility and entered the Kells' property. The Kells also sought the closure of the facility in a count to abate the source of the nuisance. Counsel for the Kells adequately represented the Kells' position on all 16 of those counts to the point that the litigation was settled between the parties and the cause dismissed on March 11, 2002.

The Kells appear to be satisfied with the terms of that settlement and the current level of emission of hog odors from The Highlands facility because the Kells continue to reside in the same residence that they alleged was so badly affected by the hog odors and they now smile and wave at Doug Baird when they pass each other on the road. (See Mr. Baird's Affidavit.)

Although the Illinois Attorney General filed the current Board action against The Highlands and Murphy Family Farms, Inc. ostensibly for the benefit of the People of the State of Illinois, the true parties in interest are actually those residents in close proximity to the source of air pollution who receive direct benefit from the reduction or elimination of that source of air pollution. The only residents identified in the Complainant's Amended Complaint who have been adversely affected by odors emanating from The Highlands are the Kells. If the Attorney General were to be successful in this action before the Board in reducing or eliminating odors emanating from The Highlands, the recipients who would benefit the most would be the Kells. The Kells, who took it upon themselves to pursue their own private cause of action against The Highlands, certainly do not seem to have any regrets in taking matters into their own hands and not relying upon the office of the Illinois Attorney General.

The interests of the Kells and of the State of Illinois were both well represented by the attorney for the Kells in the Knox County action that resulted in a settlement with which the Kells seem to be very pleased. Privity existed between the Attorney General and the Kells as to the Knox County complaint and settlement.

B. ARGUMENT

All three of the essential elements of *res judicata* are present. The doctrine of *res judicata* constitutes an absolute barr to this matter which involves the same cause of action as the Knox County case, but this time brought by the office of the

Illinois Attorney General against The Highlands. *People vs. Progressive Land Developers, Inc.*, 216 Ill.App.3d at 79. This barr extends to any effort made by the Illinois Attorney General to pursue a claim against The Highlands for the benefit of either Roy Kell and/or Dianne Kell, whether directly or indirectly, and any attempt by the Illinois Attorney General to solicit any testimony from either Roy Kell and/or Dianne Kell concerning their former complaints against The Highlands for the emission of offensive odors that may be sought by the Illinois Attorney General to support its complaint against The Highlands for the benefit of the People of the State of Illinois other than Roy and Diane Kell.

The Illinois Attorney General could have intervened in the Knox County action brought by the Kells against The Highlands and Murphy Family Farms in order to pursue in circuit court the same alleged violations of the prohibition against air pollution that the Attorney General is now pursuing in this matter before the Board. The Illinois Attorney General failed to do so. The purpose of *res judicata* is to avoid repetitive litigation of the same issue by giving conclusive effect to a prior judgment. The Illinois Attorney General is bound by the effect of the prior judgment on the merits entered in the Knox County case and is barred from proceeding in this matter on any issue involving the Kells.

The Highlands L.L.C. by its attorneys, Harrington, Tock & Royse

BY: _____
Jeffrey W. Tock

Prepared by:

Jeffrey W. Tock
Harrington, Tock & Royse
201 W. Springfield Avenue, Suite 601
P.O. Box 1550
Champaign, IL 61824-1550
Telephone: (217) 352-4167

vlb/Complain.jef/2003/Highlands-MemoSuppMSJ2

Courtesy copies of the following cases are attached:

People vs. Progressive Land Developers, Inc. (1992), 151 Ill.2d 285, 602 N.E.2d 820, 176 Ill.Dec. 874

Glassberg vs. Warshawsky (2nd Dist., 1994) 266 Ill.App.3d 585, 202 Ill.Dec. 881, 638 N.E.2d 749

People vs. Progressive Land Developers, Inc. (1st Dist., 1991), 216 Ill.App.3d. 73, 80, 159 Ill.Dec. 545, 576 N.E.2d 214

*151 Ill. 2d 285, *; 602 N.E.2d 820, **;*
*1992 Ill. LEXIS 148, ***; 176 Ill. Dec. 874*

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. ROLAND BURRIS, Attorney General of Illinois, Appellant, v. PROGRESSIVE LAND DEVELOPERS, INC., et al., Appellees

No. 72519

Supreme Court of Illinois

151 Ill. 2d 285; 602 N.E.2d 820; 1992 Ill. LEXIS 148; 176 Ill. Dec. 874

October 15, 1992, Filed

PRIOR HISTORY:
[*1]**

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Richard J. Curry, Judge, presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant attorney general challenged the order of the Appellate Court for the First District (Illinois), which dismissed his action filed against appellee land developer to recover charitable assets on the theory of unjust enrichment.

OVERVIEW: The attorney general sought to impose a constructive trust on the assets titled to the land developer. Land developer filed a motion to dismiss, asserting, inter alia, that he was barred from suing by the ruling of the probate court in an earlier petition proceeding both as an actual party thereto and as a privy of one of the religious movement. The probate court determined that the land developer was formed in large part with funds from the bank account of the religious movement and that the monies in the account belonged to the religious leader. The court held that the prerequisites for the application of res judicata had been met. First, the probate court in the petition proceeding fully addressed the merits and determined that it was the religious movement's funds that were used to purchase the land developer's assets. Second, the single group of operative facts common to both cases was that the monies used to form the land developer came from the religious movement. Finally, the attorney general's interests in demonstrating the land developer's assets were funded by the religious movement were adequately represented in the petition proceeding.

OUTCOME: The judgment of the appellate court was affirmed and the doctrine of res judicata barred the attorney general's action.

CORE TERMS: judicata, charitable, constructive trust, probate, privy, privity, used to purchase, laches, religious, donations, lawsuit, titled, cause of action, final judgment, ownership, unjust enrichment, chancery, large part, consisted, treasury, adequately represented, competent jurisdiction, personal property, causes of action, res judicata, former suit, new trial, conclusive, same cause of action, bankruptcy petition

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata

HN1 Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies. That judgment is an absolute bar to subsequent actions involving the same claims or demands by the same parties or their privies. The doctrine extends not only to what actually was decided in the original action but also to matters which could have been decided in that suit.

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata

HN2 The essential elements of res judicata are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies. In other words, if the first suit involved the same cause of action, the judgment in the former suit is conclusive not only as to all questions actually decided but as to all questions which might properly have been litigated and determined in that action. The decision in the former suit estops the parties and all parties in privity with them from relitigating the issue in a subsequent proceeding.

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata

HN3 The merits of an adjudication for purposes of the application of res judicata refer to the substantive rights of the parties.

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata

HN4 A cause of action is defined by the facts which give the plaintiff a right to relief. While one group of facts may give rise to a number of different theories of recovery, there remains only a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and res judicata bars the latter action.

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata

HN5 For purposes of the application of res judicata, privity is said to exist between parties who adequately represent the same legal interests. It is the identity of interest that controls in determining privity, not the nominal identity of the parties.

COUNSEL: Roland W. Burris, Attorney General, of Springfield (Rosalyn B. Kaplan, Solicitor General, and Floyd D. Perkins, Matthew D. Shapiro and Thomas P. James, Assistant Attorneys General, of Chicago, of counsel), for appellant.

Rufus Cook, of Cook Partners Law Offices, Ltd., of Chicago, for appellees.

JUDGES: Justice Clark delivered the opinion of the court.

OPINIONBY: CLARK

OPINION: [*286] [821]** JUSTICE CLARK delivered the opinion of the court:

Appellant, the Illinois Attorney General, appeals the dismissal of an action filed against appellee, Progressive **[*287]** Land Developers, Inc. (Progressive), attempting to recover charitable assets on a theory of unjust enrichment. The chancery lawsuit was brought in the circuit court of Cook County to impose a constructive trust on the assets titled to Progressive. Progressive filed a section 2-619 motion (Ill. Rev. Stat. 1989, ch. 110, par. 2-619) to dismiss

the Attorney General's action **[***2]** alleging that the unjust enrichment suit was barred by *res judicata, laches*, estoppel and the statute of limitations. The trial court granted the motion, and the appellate court affirmed on the grounds of *res judicata* and *laches*. (216 Ill. App. 3d 73.) We granted the Attorney General's petition for leave to appeal (134 Ill. 2d R. 315). We conclude that since the prerequisites of *res judicata* are present, the doctrine applies and bars this action. We do not reach and intimate no view upon the appellate court's conclusion with respect to *laches* and accordingly confine our recitation of the facts to those relevant to disposition of the issue of *res judicata*.

The following facts were alleged in the verified complaint filed in the unjust enrichment suit. Elijah Muhammad was the leader of the charitable religious movement known as the Nation of Islam (the Nation) until his death in 1975. Muhammad's Mosque No. 2 (the Mosque) is an Illinois not-for-profit corporation. Its several affiliated unincorporated entities devoted to charitable and religious purposes include the Council of Imans of the American Muslim Mission (the Council **[***3]** of Imans) and the World Community of Al-Islam in the West (Al-Islam).

According to the complaint, a substantial portion of Progressive's assets consisted of **[**822]** funds that were transferred from the bank accounts and treasury funds of the Nation during Elijah Muhammad's lifetime. The funds were composed of charitable contributions solicited from the Nation's members and its affiliated entities and consisted in large part of donations from a treasury known **[*288]** as "Elijah Mohammad's Number Two Poor Fund Treasury." By these actions, funds and monies of the Nation were commingled with Progressive's assets, which were in turn used to purchase real estate titled to Progressive.

The complaint alleged that Progressive had no equitable rights to the assets and was being unjustly enriched by possession of them. Among other equitable relief, the lawsuit sought to impose a constructive trust on the assets held by Progressive.

Elijah Muhammad died intestate in 1975 and a probate estate was opened that year. On October 24, 1980, several of Elijah Muhammad's heirs filed a 12-count petition for recovery citations to recover property for the estate. (Ill. Rev. Stat. 1989, ch. 110 1/2, par. **[***4]** 16-1 *et seq.*) A central issue bearing on all of the claims was whether certain funds held by Elijah Muhammad during his lifetime, and purchases made in part with those funds, constituted assets which belonged to his estate or to the religious group which he led. Count I sought a citation to recover assets from the First Pacific Bank of Chicago for the transfer of the Poor Fund Treasury account to persons other than the estate. The amount sought by the estate was in excess of $ 3 million.

The trial of count I commenced on October 5, 1981. The First Pacific Bank of Chicago filed counterclaims and third-party complaints for indemnification against the Nation and named the Attorney General as a party on the theory that the People of the State of Illinois were the ultimate beneficiaries and parties in interest of the charitable assets held in the various bank accounts. Summons was served on the Attorney General on May 5, 1981.

On May 27, 1981, the Attorney General filed a general appearance in the probate proceedings. On July 7, the Attorney General filed an answer to the Bank's complaint **[*289]** and subsequently participated fully in the count I litigation. The trial resulted **[***5]** in an entry of judgment for the estate. The judgment was reversed by the appellate court and remanded for a new trial. *In re Estate of Muhammad* (1984), 123 Ill. App. 3d 756, 79 Ill. Dec. 178, 463 N.E.2d 732.

A new trial commenced in 1986 which resulted in a judgment for the estate. Again, the appellate court reversed the judgment and held that the monies in the Poor Fund Treasury account were not the personal property of Elijah Muhammad, but were in fact charitable

assets. *In re Estate of Muhammad* (1987), 165 Ill. App. 3d 890, 117 Ill. Dec. 444, 520 N.E.2d 795.

At the time litigation in count I was proceeding, other action was being taken by the estate with respect to the disputed Progressive assets. On January 11, 1983, Progressive, by action of Emanuel Muhammad, acting as a shareholder of Progressive and in his capacity as administrator of the estate, filed the administrator's first petition for recovery citation as a supplemental proceeding for citation (the petition). The Attorney General was not served with a copy of the petition, nor was he joined as a respondent. He did, however, receive copies of the petition in the mail.

The petition alleged that Elijah Muhammad had been **[***6]** a shareholder of Progressive and sought recovery of the stock of Progressive from, among others, the Nation, the Mosque, and Al-Islam. It further recited that at the time of his death, Elijah Muhammad and his sons owned all of Progressive's stock and that the Nation had improperly seized control of Progressive, sold substantial portions of its assets and misappropriated the proceeds. The petition sought the return of funds and assets which had been distributed or misused as well as the ouster of various persons whom the Nation had purported to name as Progressive's officers and directors following Elijah Muhammad's death.

[*290] On July 22, 1983, the respondents filed an amended answer to the petition. The answer alleged that Progressive was **[**823]** formed by Elijah Muhammad "with the sole intent of furthering the Nation's growth." It further alleged that "the Nation was intended to be the sole shareholder of [Progressive.] Money to form, finance, and operate [Progressive] came from the members of The Nation who lived throughout the United States."

A copy of the amended answer was mailed to the Attorney General. The petition was subsequently amended three times prior to trial in **[***7]** 1984. The Attorney General did not receive copies of the amended petition, including a copy of the third-amended petition on which the trial was based. Further, the Attorney General did not receive copies of any of the filings in the matter after September 21, 1983, including the post-trial filings and motions.

At trial, during cross-examination of one of Progressive's witnesses, respondents attempted to establish that the accounts of the various religious groups which consisted of charitable donations were the source of the monies which Elijah Muhammad used to purchase Progressive's assets. Progressive objected to the line of questioning. Arguments were made by both parties on the objection, with the respondent making clear that its theory of the case was that the assets titled to Progressive were held by Progressive in a resulting or constructive trust for the benefit of the religious charities.

The trial court concluded, however, that the respondent's pleadings were defective with respect to arguing as a defense the creation of a constructive trust. Specifically, the court noted that the respondents' pleadings were conclusory and failed to plead facts demonstrating a constructive **[***8]** trust:

> **[*291]** "COURT: [A constructive trust defense may be argued] provided that proper pleadings have been filed. There have been no affirmative defenses to it.
>
> And basically the question before the Court is the ownership of these properties; legal title to the properties, not the equitable ownership.
>
> You may have a good theory but there is nothing in the pleadings to indicate that you assert that as a defense.
>
> * * *

> Counsel, make an amendment. Look up our Code of Civil Procedure. It's section 2-619, 617, right in there. And look at the amendments and pleadings. And if you come in with a theory of your cause of action, the Court will entertain it then."

The court then sustained Progressive's objection to the respondent's line of cross-examination. At this point, however, Progressive withdrew its relevancy objection. Thus, testimony concerning the source of the funds used to purchase the properties titled to Progressive was presented and litigated during the petition trial.

According to the testimony of two former Nation officials, the money used to purchase Progressive's assets came in large part from donations from Nation members. One of the former officials **[***9]** testified that some of Progressive's properties had been purchased with the Nation's own funds and that the funds used by Elijah Muhammad were in fact from the Poor Fund Treasury account.

The following day, before the trial resumed, respondents again requested the court to consider its pleadings sufficient to plead a constructive or resulting trust as a defense. The court remarked that the respondents' pleadings were "too broad an allegation," but then reconsidered and made the following ruling:

> "COURT: I am not saying that you cannot proceed on your theory, all I am saying is that you need some facts **[*292]** which will support your theory. I, now directed you to that section which says about amendment to pleadings --
>
> * * *
>
> Let me tell you what you do, Counsel, *you present your evidence*, and the Court will consider what Counsel's objection is and the Court will make a ruling.
>
> But I am not saying you don't have a right to show a resulting trust because the case law without you even showing **[**824]** me I know what the case law is the intent of the parties at the time of the transfer was made." (Emphasis added.)

On November 21, 1986, final judgment for the estate was entered **[***10]** in the petition litigation. The court specifically found that Progressive was formed in large part with funds from the Poor Fund Treasury account and that the monies in the account were the personal property of Elijah Muhammad. For instance, the court's findings included the following:

> "6. In 1961, * * * the National Secretary of the religious corporation, organized the Temple No. 2 Poor Fund as a treasury to which persons wishing to make donations to [Elijah Muhammad] personally could contribute. * * * The fact that funds so contributed were contributed to [Elijah Muhammad] personally, were both communicated in the publications of the religious group, * * *.
>
> 7. In early 1972, [Elijah Muhammad] directed [officials] to open an account at the First Pacific Bank of Chicago, to hold his personal funds. * * *
>
> 8. From 1963 to February 25, 1975, properties acquired by [Progressive] were purchased with funds from the [Poor Fund Treasury account], from the bank account known as the Elijah Muhammad Poor fund, and with funds supplied by Elijah Muhammad from other sources. * * * The preponderance of the credible evidence was to the effect that there was no comingling of funds or use

[*11]** of Respondents' funds to purchases Progressive assets."

The notice of appeal filed by the respondents was dismissed as untimely and the petition for appeal was denied. **[*293]** Progressive moved to enforce its judgment in February 1987, but on March 6, 1987, the Mosque filed a Chapter 11 bankruptcy petition. Seventeen months later, the bankruptcy case was dismissed for want of equity and dissipation of assets.

Subsequent to the dismissal of the bankruptcy petition, and after the Mosque and Progressive executed a settlement agreement, the verified complaint was filed in the instant matter. On February 14, 1989, Progressive filed a section 2-619 motion to dismiss the Attorney General's action contending that (1) the Attorney General was barred by the probate court ruling in the count I litigation as both an actual party thereto and as a privy of the Nation; (2) the pleadings in the petition proceedings that the Attorney General received in the mail were sufficient to notify him that the issue of equitable as well as legal title to Progressive's assets would be adjudicated in that proceeding; and (3) the Attorney General was guilty of *laches* for not seeking to assert charity's **[***12]** interest while the litigation in the petition proceeding was still in the probate court.

In an order dated May 19, 1989, the trial court granted Progressive's motion and dismissed the cause. The Attorney General filed a motion to reconsider on June 19, 1989, which was denied in an order entered on May 4, 1990.

In an opinion filed on June 20, 1991, the appellate court affirmed the dismissal on the grounds of both *res judicata* and *laches*. With respect to the doctrine of *res judicata*, the court concluded that the defense presented by "the Nation [of Islam] in the [petition] proceeding and the claim made by the Attorney General in the instant litigation are the same, *i.e.*, that monies used to form Progressive came from the members of the Nation and therefore constituted charitable asesets. Thus, both lawsuits arose out of the same group of operative facts and **[*294]** involved the same claim or demand regarding the ownership of Progressive." 216 Ill. App. 3d at 80.

On appeal, the Attorney General argues that the trial and appellate courts incorrectly concluded that *res judicata* applies to bar his lawsuit. The Attorney General argues **[***13]** that he was not a privy of the Nation; that he was not a party to the petition proceeding; and that his chancery action did not embody the same cause of action as the petition proceeding.

HN1 Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and **[**825]** their privies. (*Kinzer v. City of Chicago* (1989), 128 Ill. 2d 437, 446, 132 Ill. Dec. 410, 539 N.E.2d 1216; *Catlett v. Novak* (1987), 116 Ill. 2d 63, 106 Ill. Dec. 786, 506 N.E.2d 586; *People v. Kidd* (1947), 398 Ill. 405, 408, 75 N.E.2d 851.) That judgment is an absolute bar to subsequent actions involving the same claims or demands by the same parties or their privies. (*Kinzer v. City of Chicago*, 128 Ill. 2d at 446; *Catlett v. Novak*, 116 Ill. 2d at 67; *People v. Kidd*, 398 Ill. at 408.) The doctrine extends not only to what actually was decided in the original action but also to matters which could have been decided in that suit. *La Salle National Bank v. County Board of School Trustees* (1975), 61 Ill. 2d 524, 529, 337 N.E.2d 19. **[***14]**

The rule deducible from these decisions is that HN2 the essential elements of *res judicata* are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies. (Accord *Hartke v. Chicago Board of Election Commissioners* (N.D. Ill. 1986), 651 F. Supp. 86, 88.) In other words, if the first suit involved the same cause of action, the judgment in the former suit is conclusive not only as to all questions actually decided but as to all questions which might

properly have been litigated and determined in that action. (La Salle National Bank, 61 Ill. 2d at 529.) The decision in the **[*295]** former suit estops the parties and all parties in privity with them from relitigating the issue in a subsequent proceeding.

The first requirement of the doctrine is met here. HN3 The merits of an adjudication refer to the substantive rights of the parties. A simple reading of the probate court's opinion in the petition proceeding shows that it fully addressed the merits. The court discussed in detail the origin of the monies used to purchase **[***15]** Progressive's assets, which respondents argued was traced to donations from the Nation's members. Although there was some testimony at trial to support this argument, the probate court concluded that the "preponderance of the credible evidence" demonstrated that the Nation's funds were maintained separately from those of Elijah Muhammad's personal accounts and that it was funds from the latter source which were used to purchase Progressive's assets. Whether the probate court's findings were in fact supported by the evidence is not a proper consideration for our review. Rather, we consider simply whether the court rendered a final judgment on the merits for purposes of *res judicata* and, as we conclude that it did, we find that the first requirement of the doctrine is satisfied.

The second requirement, identity of causes of action, is also met. HN4 A cause of action is defined by the facts which give the plaintiff a right to relief. While one group of facts may give rise to a number of different theories of recovery, there remains only a single cause of action. "If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, **[***16]** then there is identity between the allegedly different causes of action asserted and *res judicata* bars the latter action." Morris v. Union Oil Co. (1981), 96 Ill. App. 3d 148, 157, 51 Ill. Dec. 770, 421 N.E.2d 278; Lee v. City of Peoria (7th Cir. 1982), 685 F.2d 196, 199.

[*296] As was noted by the appellate court in this matter, the single group of operative facts common to both cases is that monies used to form Progressive came from the members of the Nation and therefore constituted charitable assets. (216 Ill. App. 3d at 80.) Since the same facts are necessary for the maintenance and proof in both cases, the causes of action are identical. Accord Hartke, 651 F. Supp. at 89; see also City of Elmhurst v. Kegerreis (1945), 392 Ill. 195, 205, 64 N.E.2d 450.

The final requirement for the application of *res judicata* is that there be an identity of parties or privity. HN5 Privity is said to exist between "'parties who adequately represent the same legal interests.'" (Hartke, 651 F. Supp at 90, quoting Donovan v. Estate of Fitzsimmons (7th Cir. 1985), 778 F.2d 298, 301.) **[**826]** **[***17]** It is the identity of interest that controls in determining privity, not the nominal identity of the parties (Smith v. Bishop (1962), 26 Ill. 2d 434, 440, 187 N.E.2d 217 (Schaefer, J., dissenting).) Referring to the dissent in *Smith*, many appellate court decisions discussing privity for purposes of *res judicata* have relied on the definition found in the Restatement of Judgments:

> "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." (Restatement of Judgments § 83, Comment *a*, at 389 (1942).)

(Johnson v. Nationwide Business Forms, Inc. (1981), 103 Ill. App. 3d 631, 634, 59 Ill. Dec. 339, 431 N.E.2d 1096; Country Mutual Insurance Co. v. Regent Homes Corp. (1978), 64 Ill. App. 3d 666, 670, 20 Ill. Dec. 538, 380 N.E.2d 516.) On the other hand, certain authorities, including the Restatement (Second) of Judgments, have abandoned the term "privy" altogether. Montana v. United States **[*297]** (1979), 440 U.S. 147, 154 n.5, 59 L. Ed. 2d

210, 217 n.5, 99 S. Ct. 970, 974 n.5. **[***18]**

The issue under this requirement is whether the Attorney General's interests were adequately represented by the Nation in the petition proceeding. Did the Nation vigorously urge the probate court that the assets of Progressive were deposited by the members of the Nation and that Progressive merely held them in a constructive trust for the benefit of the Nation? Simply because the trial court rejected the Nation's arguments cannot be evidence of inadequate representation. (*Hartke*, 651 F. Supp. at 90.) The arguments were rejected only after the Nation "briefed and argued at length and with competent counsel" the alleged illegal ownership of Progressive's assets. The extensiveness of the pleadings and the briefing all demonstrate that the Attorney General's interests in demonstrating the Progressive's assets were funded by the members of the Nation were adequately represented.

The three elements of *res judicata* are therefore present in the instant matter. By our conclusion, we reject the Attorney General's arguments that he was not a privy of the Nation and that his chancery action does not embody the same cause of action as the petition proceeding. **[***19]**

For these reasons, we conclude that the requirements of *res judicata* are met and the doctrine applies to bar the Attorney General's action. The judgment of the appellate court is affirmed.

Affirmed.

*266 Ill. App. 3d 585, *; 638 N.E.2d 749, **;*
*1994 Ill. App. LEXIS 1132, ***; 202 Ill. Dec. 881*

NORMAN GLASSBERG, Plaintiff-Appellee, v. IRA, TED AND LEROY WARSHAWSKY, Defendants, and JORDAN AND LLOYD STEIN, THE 1030 BUILDING PARTNERSHIP and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, not personally but as Trustee under Trust Agreement dated September 10, 1985, and known as Trust No. 65480, Defendants-Appellants. IRA WARSHAWSKY, TED WARSHAWSKY AND LEROY WARSHAWSKY, Third-Party Plaintiffs, and THE 1030 BUILDING PARTNERSHIP, Third-Party Plaintiff-Appellant, v. WILLIAM KRITT d/b/a WILLIAM KRITT & COMPANY, Third-Party Defendant-Appellee.

No. 1-92-3561

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIRST DIVISION

266 Ill. App. 3d 585; 638 N.E.2d 749; 1994 Ill. App. LEXIS 1132; 202 Ill. Dec. 881

August 8, 1994, Decided

SUBSEQUENT HISTORY: [*1]**

Released for Publication September 13, 1994.

PRIOR HISTORY: APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE JOHN HOURIHANE, JUDGE PRESIDING.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff potential buyer sued defendants, sellers, partnership, and buyers, alleging that the sellers breached an oral agreement to extend the closing date of a real estate contract by declaring the potential buyer default, that the buyers interfered, and seeking specific performance of the contract. The Circuit Court of Cook County (Illinois) granted judgment on the pleadings to third-party defendant broker. The buyers and partnership appealed.

OVERVIEW: A potential buyer of real estate orally agreed with the sellers to extend the closing date of a previous contract. The sellers nevertheless sold the parcel to buyers. The potential buyer brought suit against the sellers, buyers, and partnership, alleging that the buyers tortiously interfered with the previous contract and for specific performance of the contract. The trial court initially found for the potential buyer against the buyers, but, after those parties settled, the trial court dismissed the case. A broker filed motions to vacate the dismissal and for a broker's commission allegedly due from the sellers, attaching an indemnity agreement between the buyers and sellers. The trial court awarded judgment on the pleadings to the broker, entitling the broker to a commission directly from the buyers. The buyers and partnership appealed, contending that no commission was due because no sale occurred and the parties settled their dispute, thereby rescinding the contract. On appeal, the court held that the readiness, willingness and ability of the buyer and the enforceability of the contract had been adjudicated by the trial court. That adjudication was binding on the parties.

OUTCOME: The judgment granting judgment on the pleadings to the broker was affirmed.

CORE TERMS: third-party, prejudgment interest, broker, modify, beneficiary, earnest money, breached, specific performance, closing date, indemnification, sales contract, unspecified, settlement agreement, notice of appeal, requesting, settlement, vacate, entering judgment, buyer, triable issue of fact, tortious interference, granting judgment, leave to file, third party, Illinois Interest Act, legal capacity, final judgment, progression, adjudicated, incidental

LexisNexis(TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Civil Procedure > Appeals > Reviewability > Notice of Appeal

HN1 Ill. Sup. Ct. R. 303 provides that the notice of appeal shall specify the judgment or part thereof appealed therefrom and the relief sought from the reviewing court. 134 Ill. 2d R. 303(c)(2). However, the notice of appeal is to be liberally construed as a whole. An appeal from an unspecified judgment is not waived where: (1) the deficiency is one of form rather than substance; or (2) the unspecified judgment is a step in the procedural progression leading to the judgment specified in the notice of appeal.

Civil Procedure > Appeals > Reviewability > Notice of Appeal

HN2 In Illinois, an appeal from a final judgment draws into issue all prior non-final orders which produced the final judgment. An unspecified order may be reviewed where the specified order directly relates back to the judgment or order sought to be reviewed.

Civil Procedure > Early Pretrial Judgments > Judgment on the Pleadings

HN3 In Illinois, when considering a motion for judgment on the pleadings, the trial court must determine whether the pleadings, construed most favorably against the movant, present a material question of fact that may prevent entry of judgment in favor of the movant.

Civil Procedure > Pleading & Practice > Pleadings > Impleader

Civil Procedure > Settlements > Settlement Agreements

HN4 In Illinois, generally, when a suit is dismissed with prejudice pursuant to a settlement agreement, all claims and causes of action are merged with that dismissal, which operates as an adjudication on the merits. A trial court may enter an order that approves a settlement without precluding a third-party claim. Thus, a trial court may modify an order to the same effect.

Civil Procedure > Preclusion & Effect of Judgments > Law of the Case Doctrine

HN5 In Illinois, absent a denial of participation and due process, it is a "fundamental rule" that an issue, once resolved, is binding on the parties to the proceeding. Thus, a denial of a party in a pleading cannot create a triable issue of fact once the issue has been adjudicated.

Real & Personal Property Law > Brokers > Commissions

HN6 In Illinois, it is well established that a broker's commission is earned once a ready, willing and able buyer is produced. Once a seller enters into an enforceable sales contract with a purchaser procured by a broker, the broker's right to a commission accrues regardless of whether the sale is completed.

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

HN7 In Illinois, in order to recover as a third-party beneficiary of a contract, a party must show that he or she is a direct, rather than incidental, beneficiary of the contract. A third party is a direct beneficiary when the contracting parties have manifested an intent to confer a benefit on the third party.

Civil Procedure > Jurisdiction > Equity Jurisdiction

HN8 A court acting in equity may enter a decree adjudicating all matters in controversy so as to avoid multiple litigation and do full and complete justice.

COUNSEL: Beermann, Swerdlove, Woloshin, Barezky, Becker, Genin & London, of Chicago (Alvin R. Becker and Timothy M. Kelly, of counsel), for appellants.

Burke, Warren & MacKay, P.C., of Chicago (Richard W. Burke and Andrew D. James, of counsel), for appellee Norman Glassberg.

Tenney & Bentley, of Chicago (Richard J. Cochran, of counsel), for appellee William Kritt.

JUDGES: CAMPBELL, O'CONNOR, JR., MANNING

OPINIONBY: CAMPBELL

OPINION: [*586] [751]** PRESIDING JUSTICE CAMPBELL delivered the opinion of the court:

Defendants Jordan and Lloyd Stein and the American National Bank and Trust Company as trustee under a trust agreement dated September 10, 1985, known as Trust No. 65480 ("the Stein defendants") and the 1030 Building Partnership ("1030") appeal orders of the circuit court of Cook County granting judgment on the pleadings to third-party defendant William Kritt d/b/a William Kritt & Company ("Kritt"), thereby entitling Kritt to a broker's commission in a real estate transaction that formed the basis of underlying litigation involving plaintiff Norman Glassberg, defendants Ira, Ted and Leroy Warshawsky and the 1030 Building Partnership ("the Warshawsky defendants"), and the Stein defendants.

The record on appeal indicates the following facts. On October 2, 1985, Glassberg filed a complaint alleging **[***2]** that the Warshawsky **[*587]** defendants agreed to sell Glassberg an improved property located at 1030 North Avenue; a copy of said contract was attached as an exhibit to the complaint. On February 18, 1986, Glassberg filed an amended complaint that also named the Stein defendants. The amended complaint alleged that while the contract between Glassberg and the Warshawsky defendants contained a closing date of September 1, 1985, the parties orally agreed to extend the closing date to October so that Glassberg could finance the purchase with industrial revenue bonds. Glassberg alleged that the Warshawsky defendants breached the oral agreement by declaring Glassberg in default on September 7, 1985. Glassberg further alleged that the Warshawsky defendants sold the property to the Stein defendants in September 1985. Glassberg sought specific performance of the contract with the Warshawsky defendants and sought damages from the Stein defendants for tortious interference with contract.

The defendants filed their answers, denying the material allegations of the amended complaint. On March 24, 1986, the Warshawsky defendants filed a third-party complaint against Kritt, the broker that represented the **[***3]** Warshawsky defendants in their dealings with Glassberg. The Warshawsky defendants alleged that the Kritt's agent violated instructions by granting an extension of the closing date. The Warshawsky defendants also alleged that Kritt refused to remit earnest money held in connection with the Glassberg contract. Kritt later filed an answer denying that it had violated instructions or exceeded

authority regarding the closing date.

On November 10, 1988, the trial court entered an order finding against Glassberg on the claim of tortious interference with contract, but granting Glassberg specific performance of his contract with the Warshawsky defendants. The trial court also found in favor of Kritt on the third-party complaint. The trial court further ruled that the Stein defendants were entitled to a credit from Glassberg in the amount of the fair market value of improvements to the property less the fair market value of rent. The parties then continued to dispute the amount of the Stein defendants' credit until June 1990, when the parties agreed to settle the case.

The parties attempted to effectuate a like-kind exchange, but were unsuccessful in reaching an agreement. The parties ultimately **[***4]** agreed that the Stein defendants would pay Glassberg 1.4 million dollars by January 2, 1991. Glassberg filed a motion to enforce the settlement agreement on January 9, 1991. The trial court entered orders on January 23, 1991, indicating that the case had been settled and that Glassberg and the Stein defendants agreed to dismissal of the case with prejudice.

[*588] **[**752]** On January 28, 1991, Kritt filed a petition to modify or vacate the order of dismissal. Kritt claimed that it was entitled to a broker's commission based on the trial court's November 10, 1988, order granting Glassberg specific performance of the contract. On January 30, 1991, the trial court entered an agreed order granting Kritt leave to file a petition for payment of the commission. On January 31, 1991, Kritt filed a petition for payment of the commission, requesting a disposition of the earnest money as well as judgment against plaintiff and defendants for the amount of the commission.

Glassberg filed a response that denied that the property had been conveyed under the November 10, 1988, order. The Stein defendants filed a motion to dismiss Kritt's petition, arguing that: (1) Kritt was not a party to the action; (2) Kritt did **[***5]** not file its petition until after the case had been dismissed with prejudice; and (3) the petition asserted no basis for collecting from the Stein defendants. On June 12, 1991, Kritt filed an amended petition that claimed the Stein defendant were liable for the commission under an indemnity agreement between the Stein defendants and the Warshawsky defendants; the indemnification agreement was attached as an exhibit to the amended petition.

On September 4, 1991, Kritt moved for judgment on the pleadings against the Warshawsky defendants, arguing that they had not denied the allegations of the petition for payment. The Warshawsky defendants filed a response that denied they breached the real estate contract and argued that the November 10, 1988, order was a nullity. On October 30, 1991, the trial court entered judgment in favor of Kritt and against the Warshawsky defendants in the amount of $ 51,000, but reserved the issue of prejudgment interest and stayed execution of the judgment pending further order of the court.

On December 16, 1991, the Warshawsky defendants filed a petition for indemnification from the Stein defendants. Relying on the settlement agreement, the Stein defendants **[***6]** responded that if any commission was due, it should be paid from the earnest money, with the balance going to the Warshawsky defendants. The Stein defendants' response indicates that the amended settlement agreement, entered into following the Stein defendants' initial failure to pay the settlement, expressly excluded claims involving Kritt and the disposition of the earnest money, but stated that this portion of the amended agreement was not bargained for nor expressly disclosed (though the Stein defendants also indicated that they were not impugning the motive of Glassberg's counsel, who drafted the amended agreement).

On April 7, 1992, the trial court issued a memorandum opinion **[*589]** and order indicating that Glassberg was entitled to the earnest money and that the Stein defendants were required to indemnify the Warshawsky defendants for the full amount of the commission due

to Kritt. On April 14, 1992, Kritt filed a motion to modify the April 7, 1992, order, requesting prejudgment interest and requesting that judgment for the commission be entered directly against the Stein defendants. The Stein defendants responded that judgment was improper because they were not in privity with Kritt **[***7]** and because the judgment rested on the November 10, 1988, which the Stein defendants claim merged with the January 23, 1991, order by operation of law. The Stein defendants also contended that an award of prejudgment interest was not warranted by contract or statute.

On October 5, 1992, the trial court denied Kritt's request for prejudgment interest, but entered judgment in favor of Kritt and against the Stein defendants in the amount of $ 51,000. The Stein defendants filed a timely notice of appeal from the April 7, 1992, and October 5, 1992, orders; Kritt filed a timely notice of cross-appeal.

Given the nature of the arguments presented by both sides on appeal, it may be useful at this juncture to briefly summarize the basic chronology of the case in tabular form:

10/2/85: Glassberg complaint filed.

2/18/86: amended complaint naming Stein defendants filed.

3/24/86: Warshawsky defendants file third party complaint against Kritt.

[753]** 11/10/88: trial court enters order against Glassberg on tortious interference claim, but grants specific performance; trial court finds in favor of Kritt on third-party claim; credit due the Stein defendants and other issues remained unresolved.
[*8]**
1/23/91: trial court enters orders approving settlement and dismissing the case with prejudice.

1/28/91: Kritt files petition to vacate or modify the order of dismissal.

1/30/91: trial court enters agreed order granting Kritt leave to file petition for payment of commission.

1/31/91: Kritt files petition for payment of commission.

9/4/91: Kritt moves for judgment on the pleadings.

10/30/91: trial court enters judgment in favor of Kritt as against the Warshawsky defendants.

12/16/91: Warshawsky defendants file petition for indemnification from the Stein defendants.

[*590] 4/7/92: trial court rules that Glassberg is entitled to earnest money and that Stein defendants must indemnify Warshawsky defendants for amount of commission due Kritt.

4/14/92: Kritt files motion to modify 4/7/92 order, requesting prejudgment interest and for judgment directly against the Stein defendants.

10/5/92: trial court denies Kritt's request for prejudgment interest, but enters judgment directly against the Stein defendants.

I.

Initially, the Stein defendants and Kritt argue that this court lacks jurisdiction to hear each other's appeal. Relying on Alton Evening Telegraph v. Doak (1973), 11 Ill. App. 3d 381, 296 N.E.2d 605, **[***9]** the Stein defendants argue that Kritt lacked standing to seek post-judgment relief because "William Kritt & Company" is an assumed business name and is not an entity with the legal capacity to sue. However, in Alton Evening Telegraph, there were no facts properly before the court identifying the plaintiff as an entity with legal capacity to sue. (Alton Evening Telegraph, 11 Ill. App. 3d at 382, 296 N.E.2d at 605.) In this case, Kritt was a third-party defendant properly identified and brought into the proceedings as an individual doing business under an assumed name. Thus, the proceedings in this case were not a nullity.

The Stein defendants also argue that the jurisdiction of the trial court lapsed because Kritt's motion to vacate or modify the January 23, 1991, dismissal of the case did not attack the judgment. (See Beck v. Stepp (1991), 144 Ill. 2d 232, 579 N.E.2d 824, 162 Ill. Dec. 10; Andersen v. Resource Economics Corp. (1990), 133 Ill. 2d 342, 549 N.E.2d 1262, 140 Ill. Dec. 390.) In Beck, a letter **[***10]** to a judge was deemed not a proper post-trial motion. (Beck, 144 Ill. 2d at 242, 579 N.E.2d at 829.) In Andersen, a request for leave to file a third amended complaint was deemed not a proper post-trial motion. (Andersen, 133 Ill. 2d at 346-47, 549 N.E.2d at 1264.) This case involves a petition to modify or vacate the trial court's order and thus is not governed by Beck or Andersen.

Kritt argues that this court lacks jurisdiction to entertain the Stein defendants' argument that Kritt was not entitled to a commission because the notice of appeal filed by the Stein defendants and 1030 does not specify the October 30, 1991, order granting judgment in favor of Kritt against the Warshawsky defendants. HN1 Illinois Supreme Court Rule 303 provides that the notice of appeal "shall specify the judgment or part thereof appealed therefrom and the relief sought from the reviewing court." (134 Ill. 2d R. 303(c)(2).) **[*591]** However, the notice of appeal is to be liberally construed as a whole. (Jewel Companies, Inc. v. Serfecz (1991), 220 Ill. App. 3d 543, 547, 581 N.E.2d 186, 189, 163 Ill. Dec. 235.) **[***11]** An appeal from an unspecified judgment is not waived where: (1) the deficiency is one of form rather than substance; or (2) the unspecified judgment is a step in the procedural progression leading to the judgment specified in the notice of appeal. (Jewel Companies, 220 Ill. App. 3d at 547-48, 581 N.E.2d at **[**754]** 189.) Kritt maintains that the order entering judgment against the Warshawsky defendants was a substantive element of its claim against the Stein defendants, but was not a step in the procedural progression leading to that judgment.

Kritt's argument proves too much. Our supreme court has stated that HN2 an appeal from a final judgment draws into issue all prior non-final orders which produced the final judgment. (Burtell v. First Charter Service Corp. (1979), 76 Ill. 2d 427, 433, 394 N.E.2d 380, 382, 31 Ill. Dec. 178.) Burtell also suggests that an unspecified order may be reviewed where the specified order directly relates back to the judgment or order sought to be reviewed. (See Burtell, 76 Ill. 2d at 434-35, 394 N.E.2d at 383.) **[***12]** In this case, the orders specified in the notice of appeal refer to and are based on the prior, unspecified order. Moreover, even though the individual Warshawsky defendants are not parties to this appeal, the Stein defendants' liability is predicated on the judgment against the Warshawsky defendants and therefore may be challenged by the Stein defendants as a judgment adverse to their interest. Cortes v. Ryder Truck Rental, Inc. (1991), 220 Ill. App. 3d 632, 637, 581 N.E.2d 1, 3, 163 Ill. Dec. 50, appeal dismissed, 143 Ill. 2d 637, 587 N.E.2d 1013, 167 Ill. Dec. 398.

II.

We therefore turn to the challenge to the order entering judgment in favor of Kritt against the Warshawsky defendants. The October 30, 1991, order was entered pursuant to Kritt's

motion for judgment on the pleadings, filed pursuant to section 2-615(e) of the Illinois Code of Civil Procedure (735 ILCS 5/2-615(e)). HN3 When considering a motion for judgment on the pleadings, the trial court must determine whether the pleadings, construed most favorably against the movant, present a material question **[***13]** of fact that may prevent entry of judgment in favor of the movant. See Daymon v. Hardin County General Hospital (1991), 210 Ill. App. 3d 927, 932, 569 N.E.2d 316, 319, 155 Ill. Dec. 316.

Kritt's petition alleged that: the trial court ordered specific performance of the Glassberg contract on November 10, 1988; the Glassberg contract provided for a commission of "6% of the sale price;" that the Warshawsky defendants breached the Glassberg contract; and that Glassberg, the Warshawsky defendants and the Stein defendants settled and dismissed their case on January 23, 1991. On appeal, the Stein defendants rely on the Warshawsky defendants' denial that **[*592]** they breached the contract or owed Kritt a commission. The Stein defendants also point to the Warshawsky defendants' contention that the January 23, 1991, dismissal order superseded the November 10, 1988, order. The Stein defendants further point to Glassberg's response to Kritt's motion for judgment on the pleadings, which stated that no sale occurred pursuant to the contract or the November 10, 1988, order.

HN4 Generally, when a suit is dismissed with prejudice pursuant to a settlement **[***14]** agreement, all claims and causes of action are merged with that dismissal, which operates as an adjudication on the merits. (See, e.g., Brandenberg Park East Apartments v. Zale (1978), 63 Ill. App. 3d 253, 259, 379 N.E.2d 674, 679, 19 Ill. Dec. 802.) However, in this case, Kritt moved to have the orders approving the settlement and dismissing the case vacated or modified. A trial court may enter an order that approves a settlement without precluding a third-party claim such as that presented here. (See Granville Beach Condominium Assoc. v. Granville Beach Condominiums, Inc. (1992), 227 Ill. App. 3d 715, 720-21, 592 N.E.2d 160, 163-64, 169 Ill. Dec. 673.) Thus, a trial court may modify an order to the same effect. That the trial court did not formally do so here is a defect of form, rather than substance, and does not warrant a reversal in this case.

The question remains whether Kritt may rely on the November 10, 1988, order to establish that the Warshawsky defendants breached the contract or whether the denial made by the Warshawsky defendants may preclude judgment **[***15]** on the pleadings. As noted above, the purpose of a motion for judgment **[**755]** on the pleadings is to determine whether there is a triable issue of fact. Whether the Warshawsky defendants breached the contract was a triable issue of fact, but the November 10, 1988, order, which was attached as an exhibit to Kritt's petition, indicates this issue had been tried. The November 10, 1988, order was not final and appealable because ancillary matters remained pending, but the trial court's adjudication of the case was the status quo prior to the January 23, 1991, dismissal order that Kritt sought to vacate or modify.

The Stein defendants, by relying on the Warshawsky defendants' denial of a breach of contract, essentially seek to relitigate an issue decided in a proceeding in which the Stein defendants were participating parties. Our supreme court has indicated that, HN5 absent a denial of participation and due process, it is a "fundamental rule" that an issue, once resolved, is binding on the parties to the proceeding. (Central Illinois Public Service Co. v. Allianz Underwriters Insurance Co. (1994), 158 Ill. 2d 218, 225-26, 633 N.E.2d 675, 678-79, 198 Ill. Dec. 834.) **[***16]** Thus, a denial of a party in a pleading cannot create a triable issue of fact once the issue has been adjudicated.

[*593] The trial court did not err in relying on its prior determination of November 10, 1988, but there remains the question of whether it could grant judgment on the pleadings regarding Kritt's alleged entitlement to a commission. The real estate sales contract at issue is attached as an exhibit to Kritt's petition to modify or vacate; thus, it is part of the pleadings. (See, e.g., Bond v. Dunmire (1984), 129 Ill. App. 3d 796, 804, 473 N.E.2d 78, 84,

84 Ill. Dec. 862.) This contract provides that Kritt is to receive six percent of the sale price as a commission. The Stein defendants maintain that no commission is due because no sale occurred and the parties settled their dispute, thereby rescinding the contract.

HN6 It is well established that a broker's commission is earned once a ready, willing and able buyer is produced and once a seller enters into an enforceable sales contract with a purchaser procured by a broker, the broker's right to a commission accrues regardless of whether the sale is completed. (Hallmark & Johnson Properties, Ltd. v. Taylor (1990), 201 Ill. App. 3d 512, 516, 559 N.E.2d 141, 144-45, 147 Ill. Dec. 141.) **[***17]** Moreover, the readiness, willingness and ability of the buyer and the enforceability of the contract had been adjudicated at trial. Thus, given the record on appeal, the trial court did not err in granting judgment on the pleadings on this issue.

III.

The final issue on appeal is whether the pleadings entitled Kritt to a judgment in the amount of the commission directly against the Stein defendants. The Stein defendants claim the trial court erred in ruling that Kritt was a third-party beneficiary of the indemnification agreement between the Stein defendants and the Warshawsky defendants. HN7 In order to recover as a third-party beneficiary of a contract, a party must show that he or she is a direct, rather than incidental, beneficiary of the contract. (See 155 Harbor Drive Condominium Assoc. v. Harbor Point, Inc. (1991), 209 Ill. App. 3d 631, 646, 568 N.E.2d 365, 374, 154 Ill. Dec. 365.) A third party is a direct beneficiary when the contracting parties have manifested an intent to confer a benefit on the third party. 155 Harbor Drive, 209 Ill. App. 3d at 646, 568 N.E.2d at 374. **[***18]**

In this case, the technical rules regarding third-party beneficiaries would appear to render Kritt an incidental beneficiary to the indemnification agreement. The mere fact that the agreement mentions the possibility of a claim raised by Kritt does not mean that the parties intended to directly benefit Kritt. However, HN8 a court acting in equity may enter a decree adjudicating all matters in controversy so as to avoid multiple litigation and do full and complete **[*594]** justice. (E.g., David v. Russo (1983), 119 Ill. App. 3d 290, 456 N.E.2d 342, 74 Ill. Dec. 840.) The Stein defendants could not have raised their objection if the trial court had merely entered an order directing them to pay the Warshawsky defendants and directing the Warshawsky defendants to pay Kritt. Thus, any error in entering judgment directly **[**756]** against the Stein defendants in this case does not warrant reversal on appeal.

IV.

Kritt cross-appeals the decision of the trial court denying Kritt prejudgment interest on the commission, pursuant to section 2 of the Illinois Interest Act (815 ILCS 205/2 (West 1992)). Kritt relies on Emerich v. Leviton (1983), 117 Ill. App. 3d 832, 454 N.E.2d 45, 73 Ill. Dec. 301. **[***19]** However, in Emerich, the seller, buyer and broker all initialled a provision of the sales contract regarding the commission, which rendered it an "instrument in writing" evidencing indebtedness within the scope of section 2 of the Illinois Interest Act. In this case, there is no such mutual assent. The sales contract was not signed by either Kritt or the Stein defendants. Moreover, Kritt urges that prejudgment interest be measured from the date that the sale would have closed, but for the breach. However, it is apparent that the closing date in this case would be the date created by the oral modification of the contract, which presents problems in establishing a claim based on an "instrument in writing." Consequently, the trial court did not err in refusing to award Kritt prejudgment interest.

For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

O'CONNOR, JR., J., and MANNING, J., concur.

*216 Ill. App. 3d 73, *; 576 N.E.2d 214, **;*
*1991 Ill. App. LEXIS 1053, ***; 159 Ill. Dec. 545*

THE PEOPLE ex rel. NEIL F. HARTIGAN, Attorney General, Plaintiff-Appellant, v. PROGRESSIVE LAND DEVELOPERS, INC., et al., Defendants-Appellees

No. 1-90-1006

Appellate Court of Illinois, First District, Fourth Division

216 Ill. App. 3d 73; 576 N.E.2d 214; 1991 Ill. App. LEXIS 1053; 159 Ill. Dec. 545

June 20, 1991
June 20, 1991, Filed

SUBSEQUENT HISTORY: [*1]**

Rehearing Denied August 14, 1991.

PRIOR HISTORY:
Appeal from the Circuit Court of Cook County; the Hon. Richard L. Curry, Judge, presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff Illinois Attorney General sought review of a judgment from the Circuit Court of Cook County (Illinois), which dismissed the attorney general's lawsuit against defendants for recovery of charitable assets on a theory of unjust enrichment. The lawsuit also sought a constructive trust. The lawsuit was dismissed on the basis of res judicata and the theory of laches.

OVERVIEW: The litigation involved the estate of a leader of a religious organization and funds collected from the members of the organization. The estate claimed that the funds were gifts to the leader rather than charitable assets of the organization. The attorney general filed an appearance in the estate's suit and obtained a ruling that the funds were charitable assets. The estate thereafter filed a suit against defendant corporation, alleging that the corporation's assets were part of the estate. Members' contributions were also used to form the corporation. Although the attorney general was aware of this lawsuit, it did not file an appearance. Nearly two years after the estate obtained a judgment in its favor, the attorney general filed his unjust enrichment claim against the corporation. The court affirmed the circuit court's judgment dismissing the attorney general's unjust enrichment suit. First, the court held that the suit was barred by the doctrine of res judicata. Second, the court held that although mere nonaction by government officials was insufficient to justify invoking laches against the state, the attorney general induced the corporation to act to its detriment.

OUTCOME: The court affirmed the judgment of the circuit court dismissing the attorney general's action against defendants alleging unjust enrichment and seeking a constructive trust.

CORE TERMS: laches, charitable, ownership, unjust enrichment, judicata, lawsuit, res

judicata, equitable, privity, constructive trust, mailed, general appearance, cause of action, participated, nonparty, probate, charitable purposes, motion to dismiss, source of income, personally, leader, stock, repetitive litigation, general proposition, unreasonable delay, probate proceeding, inattention, nonaction, virtual, aligned

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata

HN1 The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The doctrine of res judicata applies not only to what actually was decided in the original action but also to matters which could have been decided in that suit. In determining whether two lawsuits involved the same claim, demand or cause of action for purposes of applying res judicata, Illinois courts examine whether the suits arise out of "a single group of operative facts." In determining whether the party in the subsequent litigation was in privity with a party to the earlier litigation, Illinois courts look to the following definition of privity: Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. Under this definition, a nonparty may be bound if his own interests are so closely aligned to a party's interests that the party is his virtual representative.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses

HN2 Laches is an equitable principle which operates to bar an action when, because of the plaintiff's unreasonable delay in bringing suit, the defendant has been misled or prejudiced or has taken a course different from what he would have otherwise taken. No absolute rule governs when laches should apply, and what facts will combine to constitute laches depends upon the circumstances of each case. To establish unreasonable delay, the plaintiff must show that the defendant failed to seek prompt redress after acquiring knowledge of the fact supporting his claim. However, it is not necessary that the plaintiff have actual knowledge of the specific facts upon which his claim is based. If the circumstances are such that a reasonable person would make inquiry concerning these facts, the plaintiff will be charged with laches if he fails to ascertain the truth through readily available channels.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses

Governments > State & Territorial Governments > Claims By & Against

HN3 Mere nonaction by government officials is insufficient to justify invoking laches against the state; there must be some positive act which induced the defendant to act to his detriment. The question to be answered is whether the reasons underlying the reluctance to extend doctrines of estoppel and laches to governmental bodies outweigh the mischief which may result from the state's conduct.

COUNSEL: Neil F. Hartigan, Attorney General, of Springfield (Floyd D. Perkins, Matthew D. Shapiro, and Thomas P. James, Assistant Attorneys General, of counsel), for appellant.

Rufus Cook, of Cook Partners Law Offices, Ltd., of Chicago, for appellees.

JUDGES: Presiding Justice Jiganti delivered the opinion of the court. Linn and McMorrow, JJ., concur.

OPINIONBY: JIGANTI

OPINION: [*75] [215]** PRESIDING JUSTICE JIGANTI delivered the opinion of the court:

The plaintiff, the Illinois Attorney General, filed suit against the defendant, Progressive Land Developers, Inc., attempting to recover charitable assets on a theory of unjust enrichment. The suit also sought the imposition of a constructive trust. Progressive Land Developers made a motion to dismiss on the grounds of *res judicata, laches*, estoppel and the statute of limitations. The trial court dismissed the lawsuit on the basis of *res judicata*, expressing reasoning that would also support the theory of *laches*.

This litigation involves the estate of Elijah Muhammad, the leader of a religious organization **[***2]** known as the Nation of Islam (Nation). The Nation itself is not a legal entity, but is administered by a not-for-profit corporation called Muhammad Mosque No. 2, Inc. (Mosque). Funds collected from the members of the Nation were placed into an account denominated the Poor Fund Account, which was controlled by Elijah Muhammad. Funds from the Poor Fund Account were used for the purposes of the Nation and were also used by Elijah Muhammad personally. According to the Attorney General's complaint, money from the Poor Fund Account was used to establish Progressive Land Developers. The ownership of the Poor Fund Account at the time of Elijah Muhammad's death and the use of that money to establish Progressive Land Developers provides the focus of this appeal. The relationship between the estate of Elijah Muhammad, the Poor Fund Account and Progressive Land Developers will be developed at some length, along with the actions of the Attorney General.

[*76] Elijah Muhammad died in 1975, survived by several children (the Estate). In 1980, **[**216]** the Estate filed a 12-count citation petition seeking to recover property allegedly belonging to the Estate. Counts I and III **[***3]** of the citation petition are pertinent to the instant lawsuit. In count I, the Estate sought to recover a balance in the Poor Fund Account in excess of $ 3 million. Count III was directed against Progressive Land Developers. Count III asserted that Progressive was incorporated but that no stock was ever issued and that Elijah Muhammad made all of the capital contributions to Progressive from his own personal and individual funds. It further alleged that following Elijah Muhammad's death, Progressive allowed the management and operation of its assets "by other than the ESTATE." Among the relief requested was an accounting.

Although count I is not directly involved in this lawsuit, a brief history of the litigation involving that count is essential to an understanding of the issue before us. In count I, the Estate sued First Pacific Bank to recover funds remaining in the Poor Fund Account which the bank had turned over to the new leader of the Nation. The Estate's theory was that the funds constituted gifts made to Elijah Muhammad personally and should not have been given to the Nation. The bank filed a third-party claim against the Nation seeking indemnity and served the Attorney **[***4]** General on May 5, 1981, on the basis that the funds constituted charitable assets held for the poor and needy and that the Attorney General had a duty to safeguard such assets.

On May 27, 1981, the Attorney General filed a general appearance in the probate proceeding and subsequently participated fully in the litigation involving the Poor Fund Account. The litigation involved two trials and two appeals to this court. (*In re Estate of Muhammad* (1984), 123 Ill. App. 3d 756, 463 N.E.2d 732 (*Muhammad I*); *In re Estate of Muhammad* (1987), 165 Ill. App. 3d 890, 520 N.E.2d 795 (*Muhammad II*).) In a "Statement of Position" filed in the first trial, the Attorney General, arguing that the Poor Fund Account constituted

charitable assets, stated as follows:

> "Absent a showing that the Honorable Elijah Muhammad had a source of income other than monies received by virtue of being the leader of the Nation of Islam, it must be presumed that the sole source of income of the Honorable Elijah Muhammad was as the Leader of the Nation of Islam. Such monies were thus given to further the causes and charitable **[***5]** purposes expressed by Elijah Muhammad." **[*77]**

The trial court in July of 1986 held that the monies in the Poor Fund Account were gifts to Elijah Muhammad and that he was the equitable owner of the account. In his brief before this court in *Muhammad II*, the Attorney General represented that he had "intervened in the original proceedings under his common-law power and authority to safeguard charitable assets and preserve charitable trusts." The litigation over the Poor Fund Account was ultimately resolved against the Estate and in favor of the position taken by the Attorney General when this court held in 1987 in *Muhammad II* that monies in the account, having been solicited in the name of charity, constituted charitable assets rather than personal property of Elijah Muhammad.

On January 11, 1983, while the litigation was proceeding through the courts, the Estate filed the "Administrator's First Petition for Recovery Citation" against the Mosque, the Nation and certain individual defendants (hereinafter collectively referred to as the Nation). Essentially, like count III of the 1980 citation petition, the petition sought to recover funds and assets held by Progressive. **[***6]** The petition recited that at the time of his death, Elijah Muhammad and his sons owned all of Progressive's stock and that the Nation had improperly seized control of Progressive, sold substantial portions of its assets and misappropriated the proceeds. Although the Attorney General was not served a summons in this proceeding, he was mailed a copy of the petition. On July 22, 1983, the Nation filed an amended answer to the petition alleging that Progressive was formed in 1963 by Elijah Muhammad aided by three of the Nation's trustees "with the sole intent of furthering The Nation's financial **[**217]** growth." The answer alleged that "The Nation was intended to be the sole shareholder of Progressive Land. *Money to form, finance, and operate Progressive Land came from the members of The Nation who lived throughout the United States.* * * * [Elijah Muhammad] was never a shareholder in Progressive Land, but only acted as an official to operate Progressive Land on behalf of all the members of The Nation." (Emphasis added.) The Attorney General was mailed a copy of the amended answer.

The Attorney General was mailed several other pleadings in the Progressive litigation, **[***7]** including a motion for a preliminary injunction filed by the Estate to enjoin the Nation from selling Progressive's assets "until such time as there has been a final adjudication by this court relative to the equitable ownership of Progressive Land Developers, Inc." The mailings stopped on September 21, 1983, and the Attorney General did not receive the third-amended petition on which the trial was based or any of the post-trial filings and motions.

[*78] The trial involving the ownership of Progressive began in March of 1984 and lasted approximately one month. The trial court initially refused the Nation the opportunity to present evidence showing that Progressive was formed with contributions to Elijah Muhammad from members of the Nation. It was the court's position that the theory of a constructive trust was not sufficiently pleaded by the Nation. However, when the court indicated that the Nation need only amend the pleadings to include that theory, counsel for Progressive withdrew his objection and the issue of equitable ownership of Progressive was fully litigated.

In November of 1986, while the litigation involving the Poor Fund Account was pending on

appeal, the trial **[***8]** court entered a judgment in favor of the Estate and against the Nation in the amount of $ 12,975,907.50. The court specifically found that Progressive was formed in large part with funds from the Poor Fund Account and that the monies in the account were the personal property of Elijah Muhammad. An appeal by the Nation was dismissed by this court as untimely, and the supreme court denied leave to appeal. Following the dismissal of the appeal, the Estate and the Nation conducted extensive negotiations and entered into a settlement agreement on August 31, 1988.

On October 20, 1988, nearly two years after the judgment in the Progressive case and almost one year after our decision in *Muhammad II*, the Attorney General filed his unjust enrichment claim against Progressive. The complaint alleged that Elijah Muhammad used money from the Poor Fund Account to purchase real estate and then placed the title to the real estate in Progressive. The complaint further alleged that Elijah Muhammad completely controlled Progressive and used its assets for the charitable purposes of the Nation. In the dispute between the Estate and the Nation over ownership of Progressive's stock after Elijah **[***9]** Muhammad's death, the trial court held that Progressive was funded with Elijah Muhammad's personal assets and that equitable ownership of Progressive therefore rested in the Estate. The complaint alleged that this finding was erroneous in light of this court's opinion in *Muhammad II*, which held that monies in the Poor Fund Account were charitable assets. The Attorney General requested the court to impose a constructive trust on the charitable assets placed in Progressive by Elijah Muhammad.

Progressive filed a section 2 -- 619 motion to dismiss (Ill. Rev. Stat. 1989, ch. 110, par. 2 -- 619) alleging that the unjust enrichment suit was barred by *res judicata, laches*, estoppel and the statute of **[*79]** limitations. The trial court granted the motion to dismiss. In denying reconsideration, Judge Curry made the following statements:

> "The Attorney General here was barred in this action by res judicata, as simple and straightforward a case of res judicata as could be imagined, set in a convoluted and complex fact situation, but res judicata as Illinois case law describes it, pure and simple.
>
> The issue before the trial judge was resolved in a fashion that the Attorney **[**218]** **[***10]** General does not agree with. The issue and the resolution by the probate court was never appealed. Whether the determination by the probate court was right or wrong is irrelevant because it's final.
>
> The Attorney General then says well, I wasn't a part of that. I didn't participate. No one expected me to participate. No one invited me to participate. I didn't participate. I'm not bound. When the Attorney General files a general appearance, the law is clear that he's in the case for all reasons and is bound by all determinations.
>
> So when I say that this is a classic case of res judicata, that's exactly what it is. The extensive briefing, the convoluted proceedings and the zeal to have a different result do not detract from the realities that simple law, well-established law in Illinois dictates the result that was delivered by this court in May of last year."

On appeal, the Attorney General contends that the instant unjust enrichment suit is not barred by *res judicata* because it involves different issues than the earlier citation proceeding. The Attorney General also contends that he was neither a party nor in privity with a party to the citation proceeding. **[***11]**

Essentially, HN1 the doctrine of *res judicata* provides that a final judgment on the merits

rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. (Spiller v. Continental Tube Co. (1983), 95 Ill. 2d 423, 432, 447 N.E.2d 834.) The doctrine is designed to protect litigants from the burden of retrying an identical cause of action or issue with the same party or privy and to enhance judicial economy by prohibiting repetitive litigation. (People v. Bone (1980), 82 Ill. 2d 282, 286, 412 N.E.2d 444, *cert. denied* (1981), 454 U.S. 839, 70 L. Ed. 2d 120, 102 S. Ct. 145.) The doctrine of *res judicata* applies "not only to what actually was decided in the original action but also to matters which could have been decided in that **[*80]** suit." La Salle National Bank v. County Board of School Trustees (1975), 61 Ill. 2d 524, 529, 337 N.E.2d 19, 22, **[***12]** *cert. denied* (1976), 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1668.

In determining whether two lawsuits involved the same claim, demand or cause of action for purposes of applying *res judicata*, Illinois courts have examined whether the suits arise out of "a single group of operative facts." (Radosta v. Chrysler Corp. (1982), 110 Ill. App. 3d 1066, 1069, 443 N.E.2d 670, 673.) In determining whether the party in the subsequent litigation was in privity with a party to the earlier litigation, Illinois courts have often looked to the following definition of privity provided in the Restatement of Judgments:

> "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." (Restatement of Judgments § 83, Comment *a*, at 389 (1942).)

(Johnson v. Nationwide Business Forms, Inc. (1981), 103 Ill. App. 3d 631, 634, 431 N.E.2d 1096; **[***13]** Country Mutual Insurance Co. v. Regent Homes Corp. (1978), 64 Ill. App. 3d 666, 670, 380 N.E.2d 516; Upper Lakes Shipping Ltd. v. Seafarers' International Union of Canada (1963), 40 Ill. App. 2d 392, 401, 189 N.E.2d 753.) In *Nationwide Business Forms*, the court interpreted this definition as meaning that "a nonparty may be bound if his own interests are so closely aligned to a party's interests that the party is his virtual representative." Nationwide Business Forms, 103 Ill. App. 3d at 634, 431 N.E.2d at 1098.

Applying these principles to the case at bar leads us to conclude that the trial court was correct in ruling that the Attorney General's unjust enrichment suit is barred by *res judicata*. The defense made by the Nation in the citation proceeding **[**219]** and the claim made by the Attorney General in the instant litigation are the same, *i.e.*, that monies used to form Progressive came from the members of the Nation and therefore constituted charitable assets. Thus, both lawsuits arose out of the same group of operative **[***14]** facts and involved the same claim or demand regarding the ownership of Progressive.

With regard to the "same party" requirement, we believe that the facts showed that the Attorney General was in privity with the Nation. As stated above, a nonparty may be bound by a judgment if its interests were so closely aligned to a party's interests that the party was the nonparty's virtual representative. (Nationwide Business Forms, 103 Ill. App. 3d 631, 431 N.E.2d 1096.) The Nation in **[*81]** the citation proceeding took the position that assets held by Progressive constituted charitable assets, thereby asserting the public interests in preserving those assets. The Attorney General in the unjust enrichment suit took an identical position. Although the Attorney General argues that he was not aware of the citation proceeding and was therefore not able to fully present his position, the record does not support this argument. To allow the Attorney General's action to proceed now would be to undermine the purpose of the doctrine of *res judicata*, which is to avoid repetitive litigation of the same issue by giving conclusive effect to a prior **[***15]** judgment.

The doctrine of *laches* also operates to bar the Attorney General's claim. HN2 *Laches* is an

equitable principle which operates to bar an action where, because of the plaintiff's unreasonable delay in bringing suit, the defendant has been misled or prejudiced or has taken a course different from what he would have otherwise taken. (*Hippert v. O'Grady* (1981), 97 Ill. App. 3d 310, 312, 423 N.E.2d 228.) No absolute rule governs when *laches* should apply, and what facts will combine to constitute *laches* depends upon the circumstances of each case. (*Eckberg v. Benso* (1989), 182 Ill. App. 3d 126, 132, 537 N.E.2d 967.) To establish unreasonable delay, the plaintiff must show that the defendant failed to seek prompt redress after acquiring knowledge of the fact supporting his claim. (*Eckberg v. Benso*, 182 Ill. App. 3d 126, 537 N.E.2d 967.) However, it is not necessary that the plaintiff have actual knowledge of the specific facts upon which his claim is based. If the circumstances are such that a reasonable person would make inquiry **[***16]** concerning these facts, the plaintiff will be charged with *laches* if he fails to ascertain the truth through readily available channels. *Eckberg v. Benso*, 182 Ill. App. 3d 126, 537 N.E.2d 967.

In the case at bar, the Attorney General argues that his delay in filing the unjust enrichment suit is not unreasonable because he did not know until early in 1988 that there was a dispute concerning the equitable ownership of Progressive's assets. We are not persuaded by this argument. The record reveals that in 1980 the Estate filed a 12-count citation proceeding seeking to recover funds and assets allegedly belonging to the Estate. The Attorney General was made a party to count I, involving the Poor Fund Account, and filed a general appearance in the probate proceeding. The Attorney General participated fully in the litigation over the Poor Fund Account and specifically adopted the position that unless it could be shown that Elijah Muhammad had a source of income other than contributions from the Nation, the monies were "given to further the causes and charitable purposes expressed by Elijah Muhammad."

[*82] Progressive was named as **[***17]** a citation respondent in count III of the 1980 petition. Although that count was abandoned, the Estate in 1983 filed a complaint against the Nation claiming that the Nation had improperly seized the assets of Progressive. The Attorney General was mailed a copy of the original complaint as well as the Nation's answer, which stated that "[m]oney to form, finance and operate Progressive Land came from the members of The Nation" and that Elijah Muhammad operated Progressive "on behalf of all the members of The Nation." These pleadings were filed during the pendency of the Poor Fund Account litigation, which involved a dispute over the equitable ownership of funds contributed to Elijah Muhammad by the members **[**220]** of the Nation. In light of this knowledge, we believe that it was incumbent upon the Attorney General to investigate the dispute involving Progressive's funds and assets and decide whether the facts were sufficient to warrant a claim that they constituted charitable assets.

The Attorney General then maintains that even if the delay was unreasonable, the doctrine of *laches* does not apply to the instant claim for unjust enrichment because the claim was brought **[***18]** by the State in the discharge of its governmental actions. It is true as a general proposition that *laches* will not be applied against the State when acting in its governmental capacity. (*Hickey v. Illinois Central R.R. Co.* (1966), 35 Ill. 2d 427, 448, 220 N.E.2d 415, *cert. denied* (1967), 386 U.S. 934, 17 L. Ed. 2d 806, 87 S. Ct. 957.) The reason supporting this general proposition is that application of *laches* could result in valuable public interests being jeopardized or lost by the negligence or inattention of public officials. (*Hickey*, 35 Ill. 2d 427, 220 N.E.2d 415.) It has therefore been stated that HN3 mere nonaction by government officials is insufficient to justify invoking *laches* against the State; there must be some positive act which induced the defendant to act to his detriment. In *Hickey*, the court stated that "the question to be answered is whether the reasons underlying the reluctance to extend doctrines of estoppel and *laches* to governmental bodies outweigh the mischief which may result from [the **[***19]** State's conduct]." *Hickey*, 35 Ill. 2d at 449, 220 N.E.2d at 426-27.

In our view the instant fact situation shows more than mere nonaction or inattention on the

part of the State. As stated earlier, the Attorney General had knowledge as early as 1981 when it was made a party to the original citation proceeding that there was a dispute over whether funds held by Elijah Muhammad at his death belonged to him personally or the Nation under the theory of constructive trust. The Attorney General intervened in the probate **[*83]** proceedings and participated fully in the litigation concerning the Poor Fund Account. Yet, the Attorney General did not make any claim to Progressive's assets despite knowledge that the Nation was claiming ownership of the assets on the theory that the money used to purchase them came from contributions by the Nation's members. By actively pursuing the Poor Fund litigation while ignoring the controversy over Progressive, the Attorney General led Progressive to believe that the State did not consider Progressive's assets to be charitable in nature. Progressive thus fully litigated the issue of ownership with the **[***20]** Nation, won a judgment in its favor and entered into a settlement agreement fully resolving all of the issues between the parties. Considering all of the circumstances set forth above, we believe that the Attorney General's lawsuit was barred by the doctrine of *laches*.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.

LINN and McMORROW, JJ., concur.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. THE HIGHLANDS, LLC, an Illinois limited liability corporation, MURPHY FARMS, INC., a/k/a MURPHY FAMILY FARMS, a North Carolina corporation, and BION TECHNOLOGIES, INC., a Colorado corporation, Respondents.	)	PCB No. 00-104 (Enforcement)

RESPONDENT'S ANSWER TO COUNT II OF COMPLAINANT'S AMENDED COMPLAINT

COMES NOW the Respondent The Highlands, L.L.C. by its attorneys, Harrington, Tock & Royse, and as its answer to Count II of the Complainant's Amended Complaint, states as follows:

1. Respondent admits the allegations contained in paragraph 1.
2. Respondent admits the allegations contained in paragraph 2.
3. Respondent denies knowledge and information sufficient to form a belief as to the truth of the matters contained therein and demand strict proof thereof.
4. Respondent admits that it operates a swine facility located three miles south of Williamsfield in the Northeast Quarter of Section 10, Township 10 North, Range 4 East, Elba Township, Knox County, Illinois ("the facility") and that the facility's offices are located at 1122

Knox Highway 18, Williams Field, IL 61489. Respondent admits that it owns the buildings and operates the waste water treatment facility and provides labor for operation of the facility, but denies all other allegations contained in this paragraph.

5. Respondent denies it owns the land on which The Highlands is located.
6. Respondent admits that the allegations contained in this paragraph were true as of June 18, 2002, but affirmatively states that said allegations are not true today.
7. Respondent admits the allegations contained in paragraph 7.
8. Respondent admits the allegations contained in paragraph 8.
9. Respondent admits the allegations contained in paragraph 9.
10. Respondent denies the conversion began in April 2000, denies any allegations that the two smaller lagoons have not been "properly closed", and denies that such smaller lagoons have been permanently taken out of operation, but admits the remaining allegations of paragraph 10.
11. Respondent admits the allegations contained in paragraph 11.
12. Respondent admits the allegations contained in paragraph 12.
13. Respondent admits the allegations contained in paragraph 13.
14. Respondent admits the allegations contained in paragraph 14.
15. Respondent admits the allegations contained in paragraph 15.

16. Respondent admits the allegations contained in paragraph 16.

17. Respondent admits the allegations contained in paragraph 17.

18. Respondent admits the allegations contained in paragraph 18.

19. Respondent admits the allegations contained in paragraph 19.

20. Respondent admits the allegations contained in paragraph 20.

21. Respondent denies any knowledge that a neighbor noticed the color of the discharge from the field tiles at approximately 2:00 p.m. on June 18, 2002, but admits all other allegations contained in this paragraph.

22. Respondent admits the allegations contained in paragraph 22.

23. Respondent denies any knowledge of what the EPA inspectors observed.

24. Respondent denies any knowledge as to what was observed by the EPA inspectors. Respondent admits all other allegations contained in paragraph 24.

25. Respondent denies any knowledge as to when the Illinois EPA received notification from IEMA and denies any knowledge as to what the Illinois EPA inspectors found when they inspected the site on June 19th and whether or not the inspectors contacted IDNR. The Respondent admits all other allegations contained in paragraph 25.

26. Respondent denies any knowledge of the findings of the IDNR fisheries biologist.

27. Respondent denies any knowledge of the allegations contained in paragraph 27.

28. Respondent denies the allegations contained in paragraph 28.

29. Respondent admits the allegations contained in paragraph 29.

30. Respondent denies knowledge and information sufficient to form a belief as to the allegations contained in paragraph 30.

31. Respondent admits the allegations contained in paragraph 31.

32. Respondent admits the allegations contained in paragraph 32.

WHEREFORE, the Respondent acknowledges violations of certain statutes and regulations as aforesaid and is prepared to meet with the Attorney General and Illinois EPA to discuss remediation of the stream by restocking the stream with representative species as to those that were killed and to discuss any penalty that may be appropriate.

Jeffrey W. Tock, Attorney

Prepared by:

Jeffrey W. Tock
Harrington, Tock & Royse
201 W. Springfield Avenue
P.O. Box 1550
Champaign, IL 61824-1550
Telephone: (217) 352-4167