2018 CASE REPORT

Legislative Reference Bureau
112 State Capitol
Springfield, Illinois 62706
(217) 782-6625

December 2018

TABLE OF CONTENTS

State of Illinois
LEGISLATIVE REFERENCE BUREAU
112 State House, Springfield, IL 62706-1300
Phone: 217/782-6625

December 2018

To the Honorable Members of the General Assembly:

This is the Legislative Reference Bureau's annual review of decisions of the Federal Courts, the Illinois Supreme Court, and the Illinois Appellate Court, as required by Section 5.05 of the Legislative Reference Bureau Act, 25 ILCS 135/5.05.

The Bureau's attorneys screened all court decisions and prepared the individual case summaries. A cumulative report of statutes held unconstitutional, formerly included as an appendix to this publication, is available on the Bureau's website.

Respectfully submitted,

James W. Dodge
Executive Director

INTRODUCTION

This 2018 Case Report contains summaries of recent court decisions and is based on a review, in the summer and fall, of federal court, Illinois Supreme Court, and Illinois Appellate Court decisions published from the summer of 2017 to the summer of 2018.

The information which previously appeared in this publication as Parts 2 and 3 of the Case Report are located online and available through the Legislative Reference Bureau website, http://ilga.gov/commission/lrb_home.html.

QUICK GUIDE TO RECENT COURT DECISIONS

[*] Effective January 1, 2013, the Criminal Code of 1961 was renamed the Criminal Code of 2012 by P.A. 97-1108. This Case Report uses "Criminal Code of 2012" in all instances. A conversion table for the Criminal Code rewrite can be found online at http://ilga.gov/commission/lrb/Criminal-Code-Rewrite-Conversion-Tables.pdf

SUMMARIES OF RECENT COURT DECISIONS

COMMON LAW – RETALIATORY DISCHARGE

Firing an employee responsible for advocating the hiring of qualified instructors at a public institution of higher learning violates a clear mandate of public policy.

In *Roberts v. Board of Trustees Community College District No. 508*, 2018 IL App (1st) 170067, the Illinois Appellate Court was asked to decide whether the circuit court erred in declining to recognize a claim for retaliatory discharge in the context of a public university firing its director of medical programs. Under the common law principle of retaliatory discharge, an employee must allege "(1) the employer discharged the employee, (2) in retaliation for the employee's activities, and (3) the discharge violates a clear mandate of public policy." The plaintiff argued that his discharge for complaining about unqualified instructors at Malcolm X College violated public policy by imperiling the right of students to obtain the benefits of a postsecondary education through federal and State-funded programs. The defendant argued that the tort of retaliatory discharge is a narrow avenue of relief and that Illinois, an at-will employment jurisdiction, lacks a clearly mandated public policy regarding the right to obtain public financial aid for a postsecondary education. The court agreed with the plaintiff, holding that, as a matter of first impression, a claim for retaliatory discharge can be asserted by an employee of a public university whose discharge would undermine the public policy behind the federal Higher Education Act of 1965 (20 U.S.C. 1070-1099d (West 2012)) and the Higher Education Loan Act. The court reasoned that in Section 2 of the Higher Education Loan Act (110 ILCS 945/2 (West 2016)), the General Assembly has concluded that the purpose of providing public funds for higher education is to "provide the fullest opportunity for recipients to learn and develop their intellectual and mental capacities and skills." The court further reasoned that the purpose behind establishing State and federal loan programs is to ensure "individuals without the private means of paying for college education are given access to funds to better develop themselves intellectually so as to provide a greater contribution to our state and country." Because Malcolm X College is a public institution of higher learning whose mission is to educate rather than turn a profit, the court concluded that if the defendant uses federal or State loan money to hire unqualified instructors, the public policy behind the loan programs would be thwarted.

COMMON LAW – SOCIAL HOST LIABILITY RULE

The rule does not apply to an alcohol-related hazing incident.

In *Bogenberger v. Pi Kappa Alpha Corporation, Inc.*, 2018 IL 120951, the Illinois Supreme Court was asked to decide whether the trial court erred in applying the common law rule of social host liability and dismissing the plaintiff's action for negligence in the

alcohol-related death of a prospective pledge. Illinois case law provides that ". . . no liability for the sale or gift of alcoholic beverages exists . . . outside the [Liquor Control Act of 1934]," because providing alcohol is "too remote of a proximate cause of the injury." (*Charles v. Seigfried*, 209 Ill. Dec. 226 (1995)) The defendants argued that the rule against social host liability bars the plaintiff's claim. The plaintiff argued that the common law rule was inapplicable in the context of an alcohol-related hazing incident. The court agreed with the plaintiff, holding that, as a matter of first impression, the rule against social host liability is inapplicable to an alcohol-related hazing incident. The court reasoned that while a social host situation involves selling or providing alcohol, the latter requires "consumption of alcohol in order to gain admission into a school organization in violation of [Illinois law]." Unlike the social host context, an alcohol-related hazing incident, in which alcohol consumption is often required at near-lethal levels, ". . . is not too remote to serve as the proximate cause of intoxication and the resulting injury."

COMMON LAW – DAMAGES OF CORPORATE PLAINTIFF

Damages for lost profits of a corporation with no taxable income can be shown by the compensation paid to principals of the corporation, who also happen to be shareholders, as evidence of the corporation's net profit.

In *Atkins v. Robbins, Salomon & Patt, Ltd.*, 2018 IL App (1st) 161961, the Illinois Appellate Court was asked to decide whether a corporation with no taxable income could ever prove damages for lost profits. In a legal malpractice action against a law firm and attorney defendants for failure to include post-employment restrictive covenants in employment contracts used by the plaintiff corporation, the defendants argued that the plaintiff could not prove any damages because the plaintiff distributed excess income over expenses to the sole shareholder in the form of a salary and bonus allowing the corporation to report no income or a net loss on the corporation's tax returns. The plaintiff argued that "such compensation and . . . accounting practices were proper" to avoid double taxation of income and "using its year-end taxable income fails to realistically reflect its actual financial situation and [would] seriously undermine any such corporation's ability to prove damages." The court agreed with the plaintiff, holding that, as a matter of first impression, "compensation paid to principals of a professional corporation, who also happen to be shareholders, tends to prove the corporation's net profit and thus is relevant evidence for the purpose of proving damages for lost profits." The court reasoned that a contrary holding "would in all likelihood prevent such corporations from ever proving lost profits . . . " and "would allow a windfall to wrongdoers merely because the professional corporation has decided to run its business in the most tax-efficient manner, *i.e.*, avoiding double taxation."

ILLINOIS PUBLIC LABOR RELATIONS ACT – AGENCY FEES

Requiring non-union public employees to pay agency fees to a labor union violates the First Amendment of the United States Constitution.

In *Janus v. American Federation of State, County, & Municipal Employees, Council 31,* 138 S. Ct. 2448 (2018), the Supreme Court of the United States was asked to decide whether requiring employees who are not union members, but are represented by the union in collective bargaining, to pay agency fees to the union is a form of compelled speech that violates the First Amendment to the United States Constitution (U.S. CONST. amend. I). Section 6 of the Illinois Public Labor Relations Act (5 ILCS 315/6 (West 2016)) provides, "Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment. . . ." In *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), the Court held that "nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects." The plaintiff argued that because public sector bargaining involves "inherently 'political' speech," being required to pay agency fees has the effect of subsidizing the speech of the defendant, which violates his First Amendment rights, and that *Abood* was incorrectly decided and should be overturned. The defendant argued, in part, that "promoting labor peace and avoiding free riders" were sufficient state interests to justify the burden placed on the plaintiff's First Amendment rights and that *Abood* should be upheld. The Court agreed with the plaintiff, overturned *Abood,* and held that the agency-fee arrangement "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." In rejecting the defendant's labor peace argument, the Court reasoned that "it is now undeniable that 'labor peace' can be readily be achieved 'through means significantly less restrictive of associational freedoms than the assessment of agency fees'" and pointed to union employees of the federal government and union employees in states that do not have agency-fee arrangements. In rejecting the defendant's free-rider argument, the Court noted that there are less restrictive means that could be used to avoid free riders, such as requiring individual nonmembers to pay for representation in disciplinary matters. The Court further reasoned that *Abood* was unworkable because the line between what activities may be charged to a nonmember and what activities may not be charged to a nonmember "has proved to be impossible to draw." A dissenting opinion argued that *Abood* struck a balance between the public employers' interests and public employees' expression rights. The dissenting opinion reasoned that without agency fees, more and more people will stop paying dues, and "when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative." The dissenting opinion further noted that more than 20 states have enacted legislation requiring agency fees and that "every one of them will now need to come up with new

ways—elaborated in new statutes—to structure relations between government employers and their workers."

ELECTION CODE – FULL-SLATE REQUIREMENT

The full-slate requirement violates the First Amendment of the United States Constitution.

In *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518, the United States Court of Appeals for the Seventh Circuit was asked to decide whether the district court erred when it held that the full-slate requirement of the Election Code violates the First and Fourteenth Amendments of the United States Constitution (U.S. CONST. amend. I; U.S. CONST. amend. XIV). Section 10-2 of the Election Code (10 ILCS 5/10-2 (West 2010)) provides that a petition for the formation of a new political party shall at the time of filing contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision, as the case may be. The plaintiff argued that this full-slate requirement violates its right to political association and restricts its right to access the ballot. The defendant argued that Illinois has an interest in promoting political stability, avoiding overcrowded ballots, and preventing voter confusion. The court agreed with the plaintiff, holding that the full-slate requirement severely burdens the First Amendment rights of minor parties and their members and is not narrowly tailored to a compelling State interest. In doing so, the court reasoned that although the defendant's State interests "are compelling in the abstract," the full-slate requirement actually creates unwanted candidacies and increases political instability by forcing minor parties to field "unserious candidates" who would not otherwise run. The court also reasoned that the signature requirement found in the statute adequately serves the State's interest in limiting the ballot to strong parties.

RETAILERS' OCCUPATION TAX ACT – ASSIGNMENT OF REFUNDS

A lender may not seek a refund of taxes paid by a retailer upon the sale of tangible personal property financed by the lender pursuant to a non-recourse agreement with the retailer that resulted in uncollectible debt.

In *Citibank v. Illinois Department of Revenue*, 2017 IL 121634, the Illinois Supreme Court was asked to review appellate courts' affirmation of the circuit court's holding, reversing the determination of the Illinois Department of Revenue, that the plaintiff was entitled to a refund of taxes attributable to the uncollected debt. Section 6 of the Retailers' Occupation Tax Act (35 ILCS 120/6 (West 2012)) concerns credit memoranda and refunds, and provides, in part, that "[no] credit may be allowed or refund made for any amount paid by or collected from any claimant unless it appears (a) that the claimant bore the burden of such amount and has not been relieved thereof nor reimbursed

therefor and has not shifted such burden directly or indirectly through inclusion of such amount in the price of the tangible personal property sold by him or her or in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he or she or his or her legal representative may be relieved of the burden of such amount, be reimbursed therefor or may shift the burden thereof; or (b) that he or she or his or her legal representative has repaid unconditionally such amount to his or her vendee (1) who bore the burden thereof and has not shifted such burden directly or indirectly, in any manner whatsoever; (2) who, if he or she has shifted such burden, has repaid unconditionally such amount to his own vendee; and (3) who is not entitled to receive any reimbursement therefor from any other source than from his or her vendor, nor to be relieved of such burden in any manner whatsoever." The plaintiff argued that, in the absence of language in the statute prohibiting assignment, claims against the government are assignable; therefore, The plaintiff stepped into the shoes of retailers for the purpose of claiming a refund. The Department of Revenue argued that assignments from retailers did not give The plaintiff a right to a refund of the taxes. The Illinois Supreme Court agreed with the Department, holding that "it is not the intent of the legislature . . . to allow a direct action for a refund by a lender against the Department under these circumstances." The court reasoned that, with respect to assignability, the statute refers only to credit memorandum and not to refunds. The court also looked to the recent addition of Section 6d to the Retailers' Occupation Tax Act (35 ILCS 120/6d (West 2016)) and found that, although that particular Section does not apply here, it evidences the intent of the General Assembly to authorize tax relief only for the retailer. The court also urged the General Assembly to "revisit the issue and make their intent manifest" if the court's interpretation is not what the General Assembly intended.

PROPERTY TAX CODE – ERRONEOUS HOMESTEAD

Clerical error or omission is an affirmative defense against the imposition of interest and penalties concerning erroneous homestead exemptions, and is not part of the Assessor's prima facie case.

In *Hussein v. Cook County Assessor's Office*, 2017 IL App (1st) 161184, the Illinois Appellate Court was asked to decide whether circuit court erred in affirming the decision of the Cook County Assessor's Department of Erroneous Homestead Exemption Administrative Hearings that the plaintiff was liable for unpaid taxes, interest, and penalties attributable to erroneous homestead exemptions granted against her property. Section 9-275 of the Property Tax Code (35 ILCS 200/9-275 (West 2014)) allows the Assessor to place a lien on the taxpayer's property in the case of unpaid property taxes resulting from the application of an erroneous homestead exemption. That Section also provides for the imposition of interest and penalties; however, a taxpayer is not liable for interest and penalties if the erroneous homestead exemption was applied as a result of a clerical error or omission on the part of the Assessor. The plaintiff argued that the Assessor bears the burden of proof in demonstrating that the erroneous homestead exemption was not the

result of a clerical error or omission, and, in this case, the Assessor failed to meet that burden. In the alternative, the plaintiff argued that she presented sufficient evidence at the administrative hearing to prove that the erroneous homestead exemptions were the result of a clerical error or omission. The Assessor argued that the General Assembly intended to place the responsibility for maintaining accurate homestead exemptions on the taxpayer. The court agreed with the Assessor, holding that the burden of proving a clerical error or omission belongs to the taxpayer, and, in this case, the plaintiff failed to meet that burden. The court reasoned that there is a clear general intent throughout Section 9-275 and in other Sections of the Code to place the responsibility for maintaining accurate property exemptions on the taxpayer. The court further reasoned that subsection (c) of Section 9-275, when read together with subsection (f) of that Section, requires the Assessor to prove only that: (1) the property is located in the county; (2) the property owner received 3 or more erroneous homestead exemptions, including one on the property at issue; and (3) the erroneous exemptions were received in the 6 assessment years immediately prior to the assessment year in which the notice was served. The court noted that, if the General Assembly had intended to require the Assessor to prove a lack of clerical error or omission as part of its prima facie case, "we certainly would have expected it to include such a requirement when drafting the Sections identifying the requirements for imposing liability."

ILLINOIS PENSION CODE – LINE-OF-DUTY DISABILITY

The Chicago Firefighter Article's definition of an "act of duty" applies to the Downstate Firefighter Article for the purpose of determining whether a firefighter is eligible for a line-of-duty disability pension under the Downstate Firefighter Article.

In *Law v. Board of Trustees of River Forest Firefighters' Pension Fund*, 2017 IL App (1st) 161826-U, the Illinois Appellate Court was asked to decide whether the Board of Trustees of the River Forest Firefighters' Pension Fund erred by denying the plaintiff's application for a line-of-duty disability pension ("LDD pension") under the Downstate Firefighter Article of the Illinois Pension Code after the plaintiff was injured inspecting a fire truck the fire department was considering purchasing. Section 4-110 of the Illinois Pension Code (40 ILCS 5/4-110 (West 2012)) provides an LDD pension "[i]f a firefighter, as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty, is found . . . to be physically or mentally permanently disabled for service in the fire department . . . ." Section 6-110 of the Code (40 ILCS 5/6-110 (West 2012)) defines "act of duty" as "[a]ny act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person." The plaintiff argued that he qualifies for an LDD pension because his injury occurred while he was on duty inspecting the fire trucks that the fire department was considering purchasing and that one of his duties included driving the fire truck. The defendant argued that inspecting the fire trucks was not

an act of duty for the purpose of qualifying for an LDD pension. The court agreed with the defendant and held that inspecting the fire trucks before they were purchased was not an act of duty. The court noted that "act of duty" is not defined in the Downstate Firefighter Article but, following precedent, reasoned that Section 6-110 of the Code, which defines "act of duty" for the Chicago Firefighter Article, applies to the Downstate Firefighter Article. Applying that definition, the court reasoned that there was no ordinance or order that required him to inspect the fire trucks before they were purchased and that, although being familiar with the equipment benefited the community in a general way, it did not lead to the plaintiff saving the life or property of a particular person.

ILLINOIS POLICE TRAINING ACT – QUALIFIED RETIRED LAW ENFORCEMENT OFFICER

Notwithstanding federal law, a Sheriff's deputy who worked in corrections does not automatically qualify for a permit to carry a concealed weapon.

In *Henrichs v. Illinois Law Enforcement Training and Standards Board*, 306 F.Supp.3d 1049, the United States District Court for the Northern District of Illinois was asked to decide whether the Illinois Law Enforcement Training and Standards Board's rules conflict with federal law because they do not allow correction Sheriff's deputies the right to annually certify to carry a concealed weapon. Section 10 of the Illinois Police Training Act (50 ILCS 705/10 (West 2018)) allows the Board to create rules regarding "annual certification of retired law enforcement officers qualified under federal law to carry a concealed weapon." The Board's rules (20 Ill. Adm. Code 1720.220 (West 2018)) provide that a "qualified retired law enforcement officer" who may carry a concealed weapon is a police officer "of a governmental agency who is primarily responsible for prevention or detection of crime and the enforcement of a criminal code or traffic or highway laws of any state or any political subdivision." However, the federal Law Enforcement Officers Safety Act ("LEOSA") (18 U.S.C. 926C(c)(2) (West 2018)) gives concealed carry rights to law enforcement officers who are "authorized by law to engage in . . . the incarceration of any person . . . . " The plaintiff argued that "the Board . . . has adopted a narrower definition of "qualified retired law enforcement officer" than exists under LEOSA, thereby depriving him of the "right to carry concealed firearms" provided under LEOSA. The defendant argued that LEOSA gives concealed carry rights to "qualified retired law enforcement officers" only if they have proper identification, issued by the agency from which the individual separated, certifying that the individual recently had the requisite firearms training required under 18 U.S.C. 926C(d). The court agreed with the defendant, holding that "LEOSA expressly allows States to adopt their own standards in deciding to whom subsection (d) identifications will be issued" and "in fact does not require state officials to issue subsection (d) identifications." The court reasoned that absent "an obligation on the States to issue subsection (d) identifications, there is no enforceable right to such an identification under" federal law and that any attempt to obligate the States to issue subsection (d) identifications would violate the Tenth Amendment of the United

States Constitution (U.S. CONST. amend. X) by forcing the States' executives to participate in the actual administration of a federal program.

ILLINOIS MUNICIPAL CODE – LOCAL SALES AND USE TAXES

A municipality may sue other municipalities and retailers for deliberately categorizing online retail sales as occurring within the defendant municipalities.

In *City of Chicago v. City of Kankakee*, 2017 IL App (1st) 153531, the Illinois Appellate Court was asked to decide whether the trial court erred when it determined that the municipalities of Chicago and Skokie may not sue other municipalities and retailers for unjust enrichment for tax revenue generated through the deliberately categorizing of online retail sales as occurring within the defendant municipalities. Section 8-11-21 of the Illinois Municipal Code (65 ILCS 5/8-11-21 (West 2014)) provides that "a municipality [may] bring suit against another municipality for damages, costs, and fees incurred due to an agreement to share or rebate sales tax revenue with a retailer." The plaintiffs argued the "plaintiffs would have received a portion of the use tax (part of the 1.25% [local portion of the sales and use taxes]) but because of the questioned rebate agreements and the intentional missourcing of the situs of the sales, the municipal defendants received essentially all of the 1.25% and shared it with the defendant retailers." The defendants argued "that the legislature has never authorized a municipality to sue another municipality for misallocated use tax revenues and that the legislature has vested the Illinois Department of Revenue with authority to redistribute use tax revenue sourced to the wrong municipality." The court agreed with the plaintiffs, holding that "Section 8-11-21 of the Illinois Municipal Code sought to address the harm caused to a municipality resulting from missourced sales tax revenue" and that "nothing in Section 8-11-21 . . . evinces a legislative intent to preclude a municipality from suing another municipality to recover use tax revenue to which it would otherwise have been entitled." The court reasoned that the "alleged rebate agreements at issue here result in nearly the exact same injury as those sought to be remedied by Section 8-11-21 . . . [and] plaintiffs' unjust enrichment claims are neither preempted by, nor overlap with, [the Illinois Department of Revenue's] exclusive authority to assess, collect, remit, or distribute the sales tax or the use tax." The Illinois Supreme Court granted the defendants' petition for leave to appeal on January 18, 2018.

SCHOOL CODE – TRUANT OFFICER

For purposes of receiving benefits under the Public Employee Disability Act and the Public Safety Employee Benefits Act, a truant officer is not a law enforcement officer.

In *Stimeling v. Peoria Public School District 150*, 2018 IL App (3d) 170567, the Illinois Appellate Court was asked to decide whether the trial court erred when it found that the plaintiff, a truant officer, was ineligible to receive benefits under the Public

Employee Disability Act (5 ILCS 345/ (West 2016)) and the Public Safety Employee Benefits Act (820 ILCS 320/)(collectively, "the Acts") because the defendant school district did not hire the plaintiff as a law enforcement officer. Section 26-5 of the School Code (105 ILCS 5/26-5 (West 2016)) provides that the primary responsibility of truant officers is to "investigate all cases of truancy or non-attendance at school in their respective jurisdictions" and further provides that they "shall in the exercise of their duties be conservators of the peace and shall keep the same, suppress riots, routs, affray, fighting, breaches of the peace, and prevent crime; and may arrest offenders on view and cause them to be brought before proper officials for trial or examination." The plaintiff argued that, based on the duties of truant officers described in Section 26-5 of the Code, truant officers are eligible for benefits under the Acts. The court did not agree with the plaintiff, holding that the Code's ambiguity in the description of a truant officer's authority suggests that the General Assembly meant to distinguish truant officers from other types of police officers who are entitled to benefits under the Acts. The court reasoned that omissions in Section 26-5 suggest that "truant officers lack authority to investigate criminal offenses involving drugs, firearms, or battery in schools," which distinguishes truant officers from local law enforcement authorities. The court also noted that the lack of training requirements for truant officers and the lack of authority to investigate nontruancy crimes adds to the distinction between truant officers and law enforcement authorities.

LIQUOR CONTROL ACT OF 1934 – DRAM SHOP ACTIONS

A judgment under the dram shop provisions of the Act may be reduced by the amount the plaintiff receives from other tortfeasors.

In *Chuttke v. Fresen*, 2017 IL App (2d) 161018, the Illinois Appellate Court was asked to decide whether the trial court erred by reducing the amount of the judgment against the defendant under the dram shop provisions of subsection (a) of Section 6-21 of the Liquor Control Act of 1934 (235 ILCS 5/6-21(a) (West 2014)) by the amount that the plaintiff recovered from another tortfeasor. Subsection (a) of Section 6-21 of the Act provides, "Every person who is injured within this State, in person or property, by any intoxicated person has a right of action . . . against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor . . . causes the intoxication of such person." The plaintiff argued that the judgment against the defendant should not be reduced because the purpose of the Section is penal. The defendant argued that under the one-recovery principle, the amount owed to the plaintiff should be reduced by the amount the plaintiff recovered from another tortfeasor. The court agreed with the defendant, holding that the judgment against the defendant may be reduced by the plaintiff's recovery against the other tortfeasor. The court reasoned that precedent establishes that "the proper procedure is to allow a jury deciding a dram shop case to assess a plaintiff's total damages without reference to any amounts already received in settlement from other tortfeasors and then reduce the verdict by such amounts." The court noted that the precedent was established "45 years ago, yet the legislature has never

amended the Act to provide that a judgment against a dram shop cannot be reduced by recovery from another tortfeasor." A concurring opinion noted that "regardless of the merit of plaintiff's argument that the penal nature of [dram shop] damages should exclude them from a setoff . . . her plea for a punitive-damages exception is properly made to the legislature."

HOUSING AUTHORITIES ACT – USE OF BUILDING IN FURTHERANCE OF STATUTORY AUTHORITY

A housing authority may lease a building to a private entity that provides housing to the homeless.

In *Housing Authority of the County of Lake v. Lake County Zoning Board of Appeals*, 2017 IL App (2d) 160959, the Illinois Appellate Court was asked to determine if the circuit court erred when it overturned the defendant Lake County Zoning Board's decision and reinstated a change-in-use permit to the plaintiff for a building it owned and planned to lease to a not-for-profit organization that provides housing to chronically homeless adults. Section 2 of the Housing Authorities Act (310 ILCS 10/2 (West 2014)) vests housing authorities with "all powers necessary or appropriate [to relieve] the shortage of decent safe, affordable, and sanitary dwellings." Section 8.2 (310 ILCS 10/8.2 (West 2014)) grants each housing authority the power "to assist . . . any individual, association, corporation or organization which presents a plan for developing or redeveloping any property" within the housing authority's purview, which plan will promote the housing authority's purposes." Section 8.5 (310 ILCS 10/8.5 (West 2014)) grants each housing authority the power "to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the housing authority." The defendant argued that its decision to deny the change-in-use permit was proper because the plaintiff's proposed use for its building was not a "government use." In support of its argument, the defendant noted that the plaintiff was planning to lease the building to a not-for-profit organization and asserted that such action fails to meet a local ordinance's requirement that a building be "owned or leased by a governmental unit" in order for the building's intended use to be deemed a "government use." Moreover, the defendant argued that the plaintiff's status as "lessor" of the building meant that the plaintiff would not be "directly or personally" using the building in the exercise of its statutory authority. The plaintiff argued that the defendant's decision was clearly erroneous in light of the Housing Authorities Act. The appellate court ultimately agreed with the plaintiff, holding that the plaintiff's lease of its building to a not-for-profit organization that provides housing to the homeless fits the definition of "government use" and is in furtherance of the plaintiff's statutory powers under the Act. The appellate court rejected the defendant's assertion that owners and lessees must "directly or personally" exercise statutory authority, noting that there are no provisions prohibiting a unit of government from leasing a building it owns, "so long as the lease causes the building to be used in a manner that comports with the exercise of the unit of government's statutory authority." In finding that the plaintiff's lease agreement with

the not-for profit organization was in furtherance of the plaintiff's statutory authority, the appellate court found that "the Act expressly permits [the plaintiff] to contractually partner with other entities to provide types of services that further [the plaintiff's] goals and statutory purposes."

A dissenting opinion argued that the plaintiff, as lessor, would not retain use of the building in furtherance of its statutory powers, noting that the lessor-lessee relationship is commonly understood to mean that the lessor "contracts to the lessee the right to "use" [the building]." Rejecting the majority's assertion that "the definition of "government use" . . . permit[s] a unit of government to "use" the property indirectly . . . through the agency of another entity," the dissent argued that "no lessor-lessee relationship has ever been described this way." The dissent further argued that the question of "whether a government unit is using a building "in exercising its statutory authority" is pertinent only if, first, it is using the building at all." In light of the facts of the case, the dissent asserted that the not-for profit organization, as lessee, would have actual use of the building, not the plaintiff. As a result, the not-for profit organization's use of the building would not be a "government use" making the Defendant's reversal of the Director's decision proper.

ILLINOIS VEHICLE CODE – OBSTRUCTED LICENSE PLATES

Any material, including an empty bicycle rack, that can obstruct the visibility of a license plate is prohibited.

In *People v. Varnauskas*, 2018 IL App (3d) 150654, the Illinois Appellate Court was asked to decide whether the trial court erred when it found that a traffic stop, based upon the rear license plate being obstructed by an empty bicycle rack, was valid. Subsection (b) of Section 3-413 of the Illinois Vehicle Code (625 ILCS 5/3-413(b) (West 2014)) provides that "every registration plate shall at all times be securely fastened in a horizontal position to the vehicle for which it is issued so as to prevent the plate from swinging and at a height of not less than 5 inches from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible and shall be maintained in a condition to be clearly legible, free from any materials that would obstruct the visibility of the plate." The State argued that the trial court properly denied the defendant's motion to suppress evidence, because the evidence was obtained during a traffic stop in which there was reasonable suspicion that the empty bicycle rack on the defendant's vehicle was an obstruction to the license plate. The defendant argued that the stop of the defendant's vehicle was unlawful because the bicycle rack was not attached to the license plate. The court agreed with the State, holding that the trial court properly denied the defendant's motion to suppress. The court reasoned that the statute prohibits any materials that would obstruct the visibility of a license plate. A dissenting opinion argued that the statute "establishes that the only obstructions prohibited by the statute are those caused by materials actually affixed to the license plate" and that "the plain language of the Section's title and provisions . . . conspicuously make no mention of obstructions caused by attaching foreign objects to the vehicle itself."

ILLINOIS VEHICLE CODE – TRANSPORTATION OF PASSENGERS FOR HIRE

There is no private right of action for failure to obtain uninsured motorist coverage of vehicles used in transportation of passengers for hire.

In *Carmichael v. Union Pacific Railroad*, 2018 IL App (1st) 170075, the Illinois Appellate Court was asked to decide whether the trial court erred in finding that a private right of action could be implied under Section 8-101(c) of the Illinois Vehicle Code. Subsection (c) of Section 8-101 of the Illinois Vehicle Code (625 ILCS 5/8-101(c) (West 2010)) requires a contract carrier transporting employees in the course of their employment to verify uninsured motor vehicle coverage in a total amount of not less than $250,000 per passenger. Further, *Metzger v. DaRosa*, 209 Ill.2d 30 (2004), provides that in order to judicially imply a private right of action: "'(1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute.'" The plaintiff argued that a private right of action exists under Section 8-101, as the statutory penalties do not compensate the plaintiff for damages. The defendant argued that the fourth element required to show a private right of action under *Metzger* is not met because the statute's own enforcement mechanisms provide an adequate remedy for violations. The court agreed with the defendant, holding that Section 8-101(c) does not imply a private right of action for passengers. The court noted that under *Metzger*, the proper consideration is whether the statutory penalties were sufficient to make compliance with the statute likely. The court further reasoned that the statutory framework for enforcement and penalties were not so deficient that it is necessary to imply a private right of action to effectuate the statute's purpose. A concurring opinion argued the General Assembly to revisit Section 8-101, stating, "The whole reason for uninsured motorist coverage was to take care of expenses of the victims of vehicle crashes. Punishing a license holder under the [Illinois Vehicle Code] does nothing to restore the victim and leaves, in my opinion, a gaping hole in the system of justice."

ILLINOIS VEHICLE CODE – ADMINISTRATIVE HEARINGS

An audio recording or transcript of an administrative hearing is not required to be a part of the record of proceedings filed by the administrative agency.

In *Tobin v. Village of Melrose Park*, 2018 IL App (1st) 171115-U, the Illinois Appellate Court was asked to decide whether the circuit court erred when it proceeded with a hearing in an administrative review case even though no recording of the administrative hearing was available. Subdivision (b)(4) of Section 11-208.3 of the Illinois Vehicle Code (625 ILCS 5/11-208.3(b)(4) (West 2016)) provides that an ordinance establishing a system of administrative adjudication shall provide for "[a]n opportunity for a hearing for the

registered owner of the vehicle cited in the parking, standing, compliance, automated speed enforcement system, or automated traffic law violation notice in which the owner may contest the merits of the alleged violation, and during which formal or technical rules of evidence shall not apply" and that "[t]he hearings shall be recorded, and the person conducting the hearing on behalf of the traffic compliance administrator shall be empowered to administer oaths and to secure by subpoena both the attendance and testimony of witnesses and the production of relevant books and papers." The plaintiff argued that the defendant was required to record the plaintiff's administrative hearing and provide an audio recording thereof with the record of proceedings that it filed. The defendant argued that because there was no audio recording of the administrative hearing available for the date of the plaintiff's hearing, the record that it presented as its answer to the complaint was the entire record available, and thus was sufficient to allow the circuit court's review. The court agreed with the defendant, holding that the circuit court did not err when it proceeded with the hearing in an administrative review case even though no recording of the administrative hearing was available. The court reasoned that the plaintiff failed to show she was prejudiced by the lack of recording. The court further reasoned that an audio recording or transcript is not required to be a part of the record of proceedings filed by the administrative agency. A dissenting opinion argued that the phrase "shall be recorded" implies a requirement that the agency maintain either an audio recording or written transcript of the adjudication hearing and include it in the administrative record.

ILLINOIS VEHICLE CODE – CHEMICAL TESTS

The statute authorizing certain warrantless, nonconsensual blood and urine tests is unconstitutional.

In *People v. Eubanks*, 2017 IL App (1st) 142837, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied a motion to suppress evidence and find a statute authorizing warrantless, nonconsensual blood and urine tests unconstitutional under the Fourth Amendment of the United States Constitution (U.S. CONST. amend. IV) and Section 6 of Article I of the Illinois Constitution (ILL. CONST. art. I, §6). Subdivision (c)(2) of Section 11-501.2 of the Illinois Vehicle Code (625 ILCS 5/11-501.2(c)(2) (West 2008)) provides that "if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another, the law enforcement officer shall request, and that person shall submit, upon the request of a law enforcement officer, to a chemical test or tests of his or her blood, breath, other bodily substance, or urine for the purpose of determining the alcohol content thereof or the presence of any other drug or combination of both." The State argued that the statute passes constitutional muster because the requirement that a defendant injure or kill another person is distinguishable from similar statutes that have been held unconstitutional. The defendant argued that causing death or personal injury to another individual does not constitute *per*

se exigency and the court should apply a case-by-case assessment of exigency. The court agreed with the defendant, holding that the statute is unconstitutional on its face. The court reasoned that the statute sets forth an impermissible categorical exception to the Fourth Amendment warrant requirement, as it permits compelled chemical testing without a warrant in all cases in which an officer has probable cause to believe that a driver under the influence has caused death or personal injury to another. The court further reasoned that existence of exigency should be proven on a case-by-case basis. A dissenting opinion, in *dicta*, suggested the General Assembly could prohibit use of unnecessary force to obtain samples, define exigent circumstances, or require everyone who applies for a driver's license or renews one to sign a pre-consent to samples in the event of any accident resulting in death or great bodily harm.

JUVENILE COURT ACT OF 1987 – POSSESSION OF STOLEN VEHICLE

Possession of a stolen vehicle is not a traffic offense subject to transfer to adult criminal court.

In *People v. M.R.*, 2018 IL App (2d) 170342, the Illinois Appellate Court was asked to decide whether the trial court erred when it ruled that the defendants, who were between the ages of 15 and 17 years old, could not be prosecuted as adults for possession of a stolen vehicle. Section 5-125 of the Juvenile Court Act of 1987 (705 ILCS 405/5-125 (West 2016)) provides, "Any minor alleged to have violated a traffic, boating, or fish and game law, or a municipal or county ordinance, may be prosecuted for the violation and if found guilty punished under any statute or ordinance relating to the violation, without reference to the procedures set out in this Article." That Section further provides that "traffic violation" includes reckless homicide, driving under the influence, "or any similar county or municipal ordinance." The minors were charged under paragraph (1) of subsection (a) of Section 4-103 of the Illinois Vehicle Code (625 ILCS 5/4-103(a)(1) (West 2018)), which provides that it is a violation for a "person not entitled to the possession of a vehicle or essential part of the vehicle to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted." The defendants argued that possession of a stolen vehicle is not an offense for which juveniles can be prosecuted as adults under the Juvenile Court Act of 1987. The State argued that Section 4-103 of the Illinois Vehicle Code is a traffic law, and that a minor accused of violating it may be prosecuted as an adult. The court agreed with the defendant, holding that paragraph (1) of Subsection (a) of Section 4-103 of the Illinois Vehicle Code is not a traffic law under the Juvenile Court Act of 1987; therefore, the juveniles could not be tried as adults. The court reasoned that it should not be assumed that laws found in the Illinois Vehicle Code are traffic laws. The court also looked to the definition of "traffic" found in Section 1-207 of the Illinois Vehicle Code in determining that the offense is not a violation of traffic law.

CRIMINAL CODE OF 2012 – YOUTHFUL OFFENDERS

While upholding a 40-year sentence imposed upon a defendant who turned 18 less than 3 months before committing attempted first degree murder, the court urged the General Assembly to consider promulgating new sentencing guidelines for offenders between the ages of 18 and 20.

In *People v. Branch*, 2018 IL App (1st) 150026, the Illinois Appellate Court was asked to decide whether the trial court abused its discretion when it imposed a 40-year sentence for attempted first degree murder in a case in which the defendant turned 18 less than 3 months before the offense. Subsection (c) of Section 8-4 of the Criminal Code of 2012 (720 ILCS 5/8-4 (West 2010)) provides that attempted first degree murder is a Class X felony. That offense carries a sentencing range of 6 to 30 years imprisonment. In addition, the jury found that the defendant discharged a firearm resulting in great bodily harm; under the same Section of the Code, that finding subjected the defendant to a mandatory 25-year to natural life enhancement. The State argued that the trial court was aware of all of the factors in aggravation and mitigation, including the defendant's age, and that the sentence imposed falls within the statutory range. The defendant argued that the sentence was excessive in light of his youth and potential for rehabilitation. The defendant cited *Roper v. Simmons*, 543 U.S. 551 (2005) and *Miller v. Alabama*, 567 U.S. 460 (2012) for the proposition that sentences of capital punishment and life imprisonment without the possibility of parole are unconstitutional when applied to juvenile offenders. He further argued that youthful offenders who are not juveniles should be sentenced less harshly than older offenders because they "have developmental limitations that render them less blameworthy for their poor choices and because they are more capable of rehabilitation." The court agreed with the State, holding that, because of the seriousness of the crime, the severity of the victim's injuries, and the defendant's criminal history, the trial court did not abuse its discretion in imposing the sentence. Nevertheless, the court urged the General Assembly to "consider promulgating new sentencing guidelines for offenders between the ages of 18 and 20."

CRIMINAL CODE OF 2012 – FAMILY OR HOUSEHOLD MEMBERS

The term "family or household members," as it applies to domestic violence, includes persons who were in a dating relationship 15 years ago.

In *People v. Gray*, 2017 IL 120958, the Illinois Supreme Court was asked to decide whether the appellate court erred when it determined that the definition of family or household members violated substantive due process as it applied to the defendant. Section 12-0.1 of the Criminal Code of 2012 (720 ILCS 5/12-0.1 (West 2010)) defines "family or household members" as including persons who have or have had a dating or engagement relationship. Section 12-0.1 further provides that a dating relationship does not include "a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or

social contexts." The State argued that the application of the statutory definition to the defendant's circumstances constituted a reasonable exercise of the State's police power. The defendant argued that the definition of "family or household members" was unconstitutional as applied to the defendant and his relationship with the victim because the relationship was no longer under the effect of the prior romantic intimacy that had existed 15 years earlier. The court agreed with the State, holding that the definition of "family or household members" did not violate substantive due process as applied to the defendant. The court reasoned that not including a time limit on former dating relationships was reasonable and rationally related to the statutory purpose of curbing domestic violence. The court further reasoned that persons who have had a dating relationship are more likely to batter a former partner even after their dating relationship ends and the absence of a time limit on former dating relationships recognizes that such relationships may render persons more vulnerable to abuse by former romantic partners.

CRIMINAL CODE OF 2012 – EAVESDROPPING

Information transmitted by a mobile app, even when the app is not in use, violates the eavesdropping statute.

In *Vasil v. Kiip, Inc.*, 2018 WL 1156328, the United States District Court for the Northern District of Illinois was asked to decide whether a direct, but unintended, recipient of a communication automatically becomes a party to the communication under the eavesdropping statute. Paragraph (3) of subsection (a) of Section 14-2 of the Criminal Code of 2012 (720 ILCS 5/14-2(a)(3) (West 2016)) provides that a person commits eavesdropping when he or she "intercepts, records, or transcribes, in a surreptitious manner, any private electronic communication to which he or she is not a party unless he or she does so with the consent of all parties to the private electronic communication." The statute does not define "party". The plaintiffs argued that information transmitted by plaintiffs' cellular phones to the defendant by a fitness app, even when the plaintiffs were not using the app, violated the eavesdropping statute. The defendant argued that a "direct, but unintended, recipient of a communication becomes a party to [the] communication" under the eavesdropping statute. The plaintiffs suggested that "a sophisticated eavesdropper could skirt Illinois law by developing a data collection program that results in a direct transmission from an entity to the eavesdropper, even if the entity (and its intended recipient) have no idea that a third party is collecting their data." The court agreed with the plaintiffs, holding that it is doubtful that the General Assembly "intended to reward technologically savvy privacy violators by insulating them from liability for unlawful eavesdropping simply because they managed to route the data directly to themselves rather than stealing it from an intended recipient. "The court reasoned that if it adopted the defendant's interpretation," it would swallow the Illinois eavesdropping statute's protection of electronic communications." The court further reasoned that "declaring direct recipients to be parties to a communication would render permissible the most common methods of intrusion, allowing the exception to swallow the rule."

CRIMINAL CODE OF 2012 – VEHICULAR HIJACKING

Vehicular hijacking includes the exercise of control of a vehicle with the victim still present.

In *People v. Reese*, 2017 IL 120011, the Illinois Supreme Court was asked to decide whether the appellate court erred in determining that the offense of aggravated vehicular hijacking requires proof that the defendant took actual physical possession of a vehicle from the driver. Subsection (a) of Section 18-3 of the Criminal Code of 2012 (720 ILCS 5/18-3(a) (West 2006)) provides that "[a] person commits vehicular hijacking when he or she knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force." The State argued that the statutory language does not require an offender to remove a vehicle from the driver's possession, but may be satisfied when the defendant exercises control over the vehicle by use of force. The defendant argued that the statute requires proof that the defendant actually disposed the vehicle from the driver and that merely forcing the driver to drive the vehicle was insufficient. The court agreed with the State, holding that the offense encompasses taking actual physical possession of a vehicle, but may also be committed when a defendant exercises control of the vehicle by use of force or threat of force with the victim still present. The court reasoned that if the General Assembly did not intend merely to enact a separate statute for robbery of a motor vehicle, but also intended to criminalize taking control of a vehicle by force or threat of force, including when the victim remains inside the vehicle. A dissenting opinion argued that the General Assembly's choice to repeat the identical language used in the robbery statute signified its intention to give the vehicular hijacking statute the same meaning.

CRIMINAL CODE OF 2012 – BURGLARY BY UNLAWFUL ENTRY

The physical authority test does not extend to retail theft cases of burglary by unlawful entry.

In *People v. Moore*, 2018 IL App (2d) 160277, the Illinois Appellate Court was asked to decide whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant entered a store without authority when the defendant entered the store during regular business hours, never entered an area of the store that was off-limits to the public, and left while the store was still open. Subsection (a) of Section 19-1 of the Criminal Code of 2012 (720 ILCS 5/19-1 (West 2014)) provides, "A person commits burglary when without authority he or she knowingly enters or without authority remains within a building . . . or any part thereof, with intent to commit therein a felony or theft." The defendant argued that the circumstances of his case failed the physical authority test. The physical authority test states that the meaning of "without authority" under Section 19-1 only applies to situations in which a person "enters a public building lawfully, but in order to commit a theft or felony, and: (1) hides and waits for the building to close, (2) enters unauthorized

areas within the building, or (3) continues to remain on the premises after his authority is explicitly revoked. The State argued that "evidence that the defendant entered a place of business in order to commit a theft is sufficient to satisfy the 'without authority' element of burglary by unauthorized entry." The court agreed with the State, holding that the physical authority test applies only to burglary by unlawfully remaining cases, and not to all retail theft cases that include burglary by unlawful entry. The court reasoned that long-standing case law "has recognized that entering a retail establishment with the intention of committing a theft constitutes burglary." Further, the court pointed out that the General Assembly has had ample opportunity but has not amended the burglary statute since the phrase "without authority" was first interpreted by the courts.

CRIMINAL CODE OF 2012 – UNLAWFUL USE OF A WEAPON

The prohibition on carrying or possessing a firearm within 1,000 feet of a public park is unconstitutional.

In *People v. Chairez*, 2018 IL 121417, the Illinois Supreme Court was asked to decide whether the Circuit Court erred when it vacated the defendant's conviction, finding that the statute prohibiting the possession of a firearm within 1,000 feet of a public park violated the Second Amendment of the United States Constitution (U.S. CONST. amend. II). Paragraph (1.5) of subsection (c) of Section 24-1 of the Criminal Code of 2012 (720 ILCS 5/24-1(c)(1.5) (West 2012)) provides that a person who violates the statute on unlawful use of a weapon [paragraph (4) of subsection (a) of Section 24-1 of the Code (720 ILCS 5/24-1(a)(4) (West 2012))] within 1,000 feet of specific places, including a public park, commits a Class 3 felony. The State argued that the law does not violate the Second Amendment because a public park falls into the category of "sensitive places" contemplated by the United States Supreme Court in declaring that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" do not violate the Second Amendment (*District of Columbia v. Heller*, 554 U.S. 570 (2008)). The State further argued that "prohibiting possession of a firearm within 1,000 feet of a public park falls outside . . . [self-defense] because it has no impact on the right to use arms 'in defense of hearth and home' and is not a ban on carrying arms for self-defense in public." Finally, the State argued that there is a compelling public interest in banning firearms within 1,000 feet of a public park because of the danger to children. The defendant argued that even if a public park is considered a sensitive place, the Court's declaration in *Heller* only applied to schools and government buildings. In addition, the defendant argued that *Heller* "declared the right to bear arms in self-defense to be a fundamental right" and previous Illinois Supreme Court decisions have extended that right beyond the home into public spaces. The court rejected the State's arguments, holding that the statute violates the Second Amendment. The court reasoned that, without evidentiary support to justify the restriction of the right to self-defense, "[t]he result could create a chilling effect on the [Second Amendment] when an otherwise law-abiding individual may inadvertently violate the 1000-foot firearm-restricted zones by just turning a street corner."

CRIMINAL CODE OF 2012 – ARMED HABITUAL CRIMINAL

A defendant's aggravated unlawful use of a weapon conviction may serve as a predicate offense for a conviction under the armed habitual criminal statute, despite that conviction's unconstitutionality.

In *People v. Hernandez*, 2017 IL App (1st) 131871-U, the Illinois Appellate Court, on remand from the Illinois Supreme Court, was asked to decide whether the defendant's aggravated unlawful use of a weapon conviction could serve as a predicate offense for a conviction under the armed habitual criminal statute under the Criminal Code of 2012, despite that conviction being held unconstitutional and later vacated. Subsection (a) of Section 24-1.7 of the Criminal Code of 2012 (720 ILCS 5/24-1.7(a) (West 2010)) provides that a "person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of" certain offenses. The State argued that the defendant's prior aggravated unlawful use of a weapon conviction, although later held unconstitutional and vacated, was sufficient as a predicate offense under the armed habitual criminal statute. The defendant argued that the State failed to prove him guilty under the armed habitual criminal statute beyond a reasonable doubt because his aggravated unlawful use of a weapon conviction was void and could not stand as a predicate offense to prove an essential element under the armed habitual criminal statute. The court agreed with the State, holding that the defendant's prior conviction for aggravated unlawful use of a weapon could serve as a predicate offense for a conviction under the armed habitual criminal statute. The court reasoned that the Illinois Supreme Court's decision in *People v. McFadden*, 2016 IL 117424, was dispositive, comparing the language of the armed habitual criminal statute to the language in the unlawful use or possession of weapons by felons statute of the Code (720 ILCS 5/24-1.1(a) (West 2008)). The court reasoned, relying on *McFadden*, that the defendant's aggravated unlawful use of a weapon conviction was not vacated prior to his armed habitual criminal conviction and could serve as a predicate offense. A dissenting opinion reasoned that because the statutory language of subsection (a) of Section 24-1.7 of the Code is ambiguous, it is appropriate to invoke the rule of lenity and hold that predicate felonies required under the armed habitual criminal statute must be outstanding and constitutionally valid.

CRIMINAL CODE OF 2012 – MOB ACTION

The "acting together" requirement in the mob action offense is applicable to only certain types of joint or concerted action under an agreement or a common criminal purpose.

In *People v. Barnes*, 2017 IL App (1st) 142886, the Illinois Appellate Court was asked to decide whether the "acting together" element in the mob action statute required joint or concerted action under an agreement or common criminal purpose. Paragraph (1)

of subsection (a) of Section 25-1 of the Criminal Code of 2012 (720 ILCS 5/25-1(a)(1) (West 2008)) provides that a person commits mob action when he or she engages in "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law." The State argued that the language "acting together" in the statute did not require an agreement or common criminal purpose and was an unstated requirement in the statute. The State further argued that the defendant's mere participation in the criminal action meant he was "acting together" with the other, unidentified person. The defendant argued that the "acting together" element in the statute required a concerted action, an agreement, or a common criminal purpose by the participants. The court agreed with the defendant, holding that the ordinary meaning and usage of the phrase "acting together," as well as the history and purpose of the statute, indicated that the General Assembly intended the offense of mob action to apply to only certain types of joint or concerted action under an agreement or a common criminal purpose. The court further reasoned that a looser definition of "together," implying a mere physical proximity without any agreed-upon goal, would be an illogical definition for a criminal statute.

CRIMINAL CODE OF 2012 – CIVIL FORFEITURE

A vehicle driven by an intoxicated person whose driving privileges are revoked due to a prior DUI is subject to forfeiture and is not required to be released to the owner of the vehicle.

In *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, the Illinois Supreme Court was asked to decide whether the forfeiture of the claimant's motorcycle under Section 36-1 of the Criminal Code of 2012 violated the excessive fines clause of the Eighth Amendment (U.S. CONST. amend. VIII). (720 ILCS 5/36–1(a)(6)(A)(i) (West 2012)). Subdivision (a)(6)(A)(i) of Section 36-1 of the Criminal Code of 2012 provides that a vehicle may be seized by law enforcement if it is used "with the knowledge and consent of the owner" in the commission of or in the attempt to commit driving while under the influence during a period in which his or her driving privileges are revoked or suspended if the revocation or suspension was due to a prior violation of driving under the influence. The claimant argued that she has minimal culpability and the monetary loss she suffered due to the forfeiture constitutes excessive penalty. The State argued that the claimant's culpability is high because she knowingly permitted her intoxicated husband to drive without a driving license, and the motorcycle's forfeiture was proportionate. The majority agreed with the State, reversing the appellate court's judgment and holding that Section 36-1 did not violate the excessive fines clause of the Eighth Amendment as applied to the facts of this case. The majority reasoned that the claimant's culpability was sufficient to subject to the motorcycle to forfeiture, and that the claimant failed to present sufficient evidence of the value of the motorcycle for the court to decide whether the forfeiture constituted an unconstitutionally excessive penalty. A dissenting opinion contended that Subdivision (a)(6)(A)(i) of Section 36-1 only authorizes a law enforcement agency to seize

or impound a vehicle if it has been used "with the knowledge and consent of the owner in the commission" of driving under the influence "during a period in which *his or her* driving privileges are revoked or suspended." (Emphasis added.) The dissent argued that this "his or her" refers to the owner of the vehicle and should not be extended to include anyone who might be driving the owner's vehicle. Because the claimant herself was not driving the motorcycle while intoxicated, nor did she have a suspended or revoked license, the motorcycle should be released to the claimant. The dissent further contended that even if "his or her" could be construed as extending to any user of the owner's vehicle, the statute still requires the State to prove that the claimant knew that her husband's driver's license was suspended or revoked specifically due to a prior DUI conviction. The dissent further argued that the majority's interpretation of the statute yielded an absurd result that the General Assembly could not have intended.

CODE OF CRIMINAL PROCEDURE OF 1963 – WARRANT

A reference to a complaint, without attaching the complaint or providing additional details regarding the complaint, is insufficient to incorporate the complaint into a warrant.

In *People v. Boose*, 2018 IL App (2d) 170016, the Illinois Appellate Court was asked to decide whether the trial court erred when it determined that mere reference to a complaint is insufficient to incorporate the complaint into the warrant. Section 108-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/108-14 (West 2014)) provides that "[n]o warrant shall be quashed nor evidence suppressed because of technical irregularities not affecting the substantial rights of the accused." The defendant argued that the warrant was invalid because the incorporated document must accompany the warrant and the warrant itself lacked particularity. The State argued that incorporation by reference is sufficient to satisfy the particularity requirements of the Fourth Amendment of the United States Constitution (U.S. CONST. amend. IV), even if the incorporated document did not accompany the warrant. The court agreed with the defendant, holding that the mere reference to the complaint was insufficient to incorporate the complaint into the warrant. The court reasoned that the warrant did not expressly adopt the complaint's description of the items to be seized, but merely acknowledged the complaint before expressing a different description of the items to be seized. A dissenting opinion argued that the case involves a technical mistake that, pursuant to Section 108-14 of the Code, should not trigger the exclusionary rule. The dissent argued that the warrant sufficiently incorporated the complaint by reference and that the complaint in turn incorporated the affidavit. By reading these documents together, they were sufficient to satisfy the requirements imposed by the Fourth Amendment. The dissent contended that the failure to attach the actual complaint to the warrant was only a technical error that, under Section 108-14 of the Code, should not result in the suppression of relevant and otherwise admissible evidence.

CODE OF CRIMINAL PROCEDURE OF 1963 – POST-CONVICTION RELIEF: STANDING

A defendant has standing to pursue a post-conviction petition, regardless of whether the defendant is released from custody before relief can be granted.

In *People v. McDonald*, 2018 IL App (3d) 150507, the Illinois Appellate Court was asked to decide whether the circuit court erred when it denied the defendant's third-stage post-conviction petition. Before reaching the merits of the defendant's appeal, the court considered whether the defendant had standing to pursue his claims, in light of the fact that, although the defendant was in custody when he filed his petition, his period of incarceration and mandatory supervised release ended while the appeal was pending. Subdivision 122-1(a)(1) of the Post-Conviction Hearing Article of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(a)(1) (West 2014)) provides, "Any person imprisoned in the penitentiary may institute a proceeding under this Article" if the person asserts "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both" in the proceeding that led to his or her conviction. The court noted that the statute is silent as to whether the defendant must be in custody at the time relief is granted in order to be eligible for relief. The court also found that the General Assembly's silence on the matter "could be interpreted in conflicting ways." The court then cited *People v. Dale*, 406 Ill. 238, 246, (1950), for the proposition that the Illinois Supreme Court has "repeatedly referenced the legislature's intent . . . consistently and assuredly casting the custody requirement in terms of relief." The court also noted that several other Illinois Supreme Court cases have "pointed to liberty interests as the defining aspect" of the post-conviction provisions of the Code, which would weigh against a finding that the defendant had standing because the defendant's liberty interests were no longer constrained. However, the court then considered *People v. Davis*, 39 Ill.2d 325, 328-29, (1968), an Illinois Supreme Court case in which the court found that the defendant had standing based upon the advantages of purging a conviction from his record. Although the *Davis* court found that the defendant had standing, it did not explicitly overrule *Dale*. Given that the statute is silent and there is an apparent conflict between Illinois Supreme Court cases, the Illinois Appellate Court in *McDonald* applied the rule of lenity and held that a defendant who files a post-conviction petition while in custody has standing, regardless of whether the defendant is released from custody in the intervening time.

CODE OF CRIMINAL PROCEDURE OF 1963 – SUCCESSIVE POST-CONVICTION PETITIONS

The State cannot provide input on a defendant's motion for leave to file a successive post-conviction petition.

In *People v. Bailey*, 2017 IL 121450, the Illinois Supreme Court was asked to decide whether the circuit court erred in permitting the State to provide input on the merits

of the defendant's motion for leave to file a successive post-conviction petition at the cause and prejudice stage of the motion. Subsection (f) of Section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(f)(West 2014)) provides that a defendant may file a successive post-conviction petition if he or she "first obtains permission from the court and demonstrates to the court cause and prejudice for not having raised the alleged errors in his or her initial post-conviction petition." The State argued that because the Code does not affirmatively prohibit the State from opposing the motion, then the statute should be interpreted as allowing the State's input. The defendant argued that the absence of language expressly allowing the State to file a responsive pleading or to provide input should be interpreted to mean that the General Assembly did not intend the State's participation at that stage of the proceeding. The court agreed with the defendant, holding that it is premature and improper for the State to provide input to the court before the court has granted a defendant's motion for leave to file a successive petition. The court reasoned that the "cause and prejudice determination is a question of law to be decided on the pleadings and supporting documentation submitted to the court by the defendant-petitioner" and the statute does not contain a provision for an evidentiary hearing. Therefore, the State should not be permitted to participate at that stage of the proceeding. In addition, the court noted that successive post-conviction petitions are filed *pro se* and the Code does not contain a provision entitling the defendant to counsel until after the petition is docketed. Thus, permitting the State to argue in that stage of the proceeding when the defendant is not represented by counsel is "inequitable, fundamentally unfair, and raises due process concerns."

SEXUALLY VIOLENT PERSONS COMMITMENT ACT – REEXAMINATION REPORTS

The court is not required to consider a superseding reexamination report issued after the close of evidence in a hearing to determine whether a committed person is still a sexually violent person.

In *In re Commitment of Bice*, 2018 IL App (2d) 170148, the Illinois Appellate Court was asked to determine whether Section 65(b)(1) of the Sexually Violent Persons Commitment Act (725 ILCS 207/65(b)(1) (West 2010)) requires a trial court to consider a reexamination report issued after a committed person and the State have both rested their cases. Section 65(b)(1) provides that "if [a committed] person does not affirmatively waive the right to petition [the committing court for discharge from custody or supervision], the court shall set a probable cause hearing to determine whether facts exist to believe that since the most recent periodic reexamination . . . the condition of the committed person has so changed that he or she is no longer a sexually violent person." In addition, Section 55(a) requires the Department of Human Services to "submit a written report to the court on [a committed person's] mental condition at least once every 12 months after an initial commitment . . . for the purpose of determining whether the person . . . is no longer a sexually violent person." The respondent was involved in a protracted probable cause

hearing that was repeatedly continued at the respondent's request. On appeal, the respondent argued that the trial court erred when it denied his motion to reopen the proofs and introduce a reexamination report issued by his chosen evaluator. In support of his argument, the respondent asserted that Section 65(b)(1) requires a trial court to consider the most recent reexamination report when making a determination on whether a committed person is still a sexually violent person. The State argued that Section 65(b)(1) "sets forth separate and distinct yearly review periods" and therefore the trial court was not required to consider the reexamination report because it was irrelevant to the probable cause hearing. The appellate court ultimately affirmed the trial court's ruling and held that Section 65(b)(1) "does not require the trial court to consider a superseding reexamination report that is issued only after the parties have rested . . . and the trial court has closed the hearing on the State's no-probable-cause motion." The appellate court further held that it is in a trial court's sound discretion to grant a party's motion to reopen the proofs and consider newly generated evidence. In support of its holding, the appellate court disagreed, in part, with both the respondent's and the State's interpretation of Section 65(b)(1), finding that the "natural construction of [the] phraseology" in Section 65(b)(1) and (2) "is that the court must decide whether . . . requisite facts exists *at the time of the hearing*" that the person is no longer a sexually violent person. (Emphasis in original.) As such, the appellate court refused "to adopt any rule that the evidentiary basis of the court's decision is locked on a date that the State files its motion for a finding of no probable cause." Noting that the "Act does not use the term 'review period' [or] any comparable language," the appellate court likewise rejected the State's assertion that Section 65(b)(1) establishes rigid "review periods . . . that require the trial court to exclude new evidence that arises before the parties have rested at a hearing on a no-probable cause motion." The appellate court also did not find that the trial court abused its discretion when it refused to consider the reexamination report at the probable cause hearing, reasoning that the report was only available because the respondent repeatedly requested a continuance for the proceeding. The appellate court did acknowledge that persuasive policy arguments exist in favor of both the respondent's and the State's interpretation of whether the trial court should consider the most up-to-date reexamination report available to the court, or only those reports filed by the close of the evidence. However, the appellate court noted that such policy considerations should be resolved by the General Assembly.

UNIFIED CODE OF CORRECTIONS – LENGTHY SENTENCES FOR MINORS

It is not an abuse of discretion for a court to sentence a 15-year-old bipolar defendant to 36 years in prison for aggravated criminal sexual assault.

In *People v. Patterson*, 2018 IL App (1st) 101573-C, the Illinois Appellate Court was asked to decide whether the circuit court abused its discretion when it sentenced the defendant, a 15-year-old bipolar child, to 36 years in prison for aggravated criminal sexual assault. Subsection (a) of Section 5-4.5-25 of the Unified Code of Corrections (730 ILCS 5/5-4.5-25(a) (West 2017)) provides that the sentence of imprisonment for a Class X felony

"shall be a determinate sentence of not less than 6 years and not more than 30 years." The court held that the circuit court did not abuse its discretion because the defendant was sentenced to 12 years in prison for each of the 3 counts he was convicted. The court reasoned that it must defer to the circuit court's weighing of the evidence concerning sentencing factors and the circuit court imposed a sentence for each count near the middle of the statutory range under the Code. The court urged the General Assembly to consider legislation to "permit juveniles subjected to lengthy sentences to show rehabilitation," similar to legislation enacted in other states.

UNIFIED CODE OF CORRECTIONS – CLASS X SENTENCING

A burglary sentence of 10.5 years in prison is excessive in light of the low level of seriousness of the defendant's offense and his history of only minor, nonviolent offenses.

In *People v. Allen*, 2017 IL App (1st) 151540, the Illinois Appellate Court was asked to decide whether the circuit court abused its discretion when it imposed a sentence of 10.5 years in prison for burglary, and the defendant, who qualified for Class X sentencing, had a record of only minor, nonviolent offenses. Subsection (a) of Section 5-4.5-25 of the Unified Code of Corrections (730 ILCS 5/5-4.5-25 (West 2012)) provides that for a Class X felony, "[t]he sentence of imprisonment shall be a determinate sentence of not less than 6 years and not more than 30 years." Subsection (b) of that Section further provides that a defendant over the age of 21 years who is convicted of a Class 1 or Class 2 felony and has 2 prior and separate felony convictions of a Class 2 felony or greater, he or she must be sentenced as a Class X offender. The defendant argued that the sentence of 10.5 years in prison was excessive, even though the sentence imposed was in the statutory range for Class X sentencing. The State argued that the defendant's sentence was appropriate under the statute and that the circuit court considered appropriate sentencing factors. The court agreed with the defendant, holding that the circuit court abused its discretion in sentencing the defendant and reducing the sentence imposed to 6 years imprisonment. The court reasoned that, even if the General Assembly chose not to exclude petty thefts from the requirements of Class X sentencing, the trial court's failed to take into account the seriousness of the offense in order to impose an appropriate, just, and proportionate sentence. The court further reasoned that the defendant's criminal history was nonviolent, non-serious, and posed no harm to the public. A dissenting opinion reasoned that the General Assembly included all types of Class 1 and Class 2 felony convictions for purposes of a defendant's eligibility for mandatory Class X sentencing, and that the General Assembly would have excluded petty offenses from mandated Class X sentencing if it had intended to do so.

SEX OFFENDER REGISTRATION ACT – RESTRICTION AND REGISTRATION REQUIREMENTS

Recent restrictions and registration requirements added to several sex offense statutes do not violate the due process clauses of the United States and Illinois Constitutions.

In *People v. Zetterlund*, 2018 IL App (3d) 150435, the Illinois Appellate Court was asked to determine the constitutionality of the Sex Offender Registration Act ("SORA") (730 ILCS 150/ (West 2012)) and a series of related statutes that impose certain restrictions and registration requirements on a person convicted of a sex offense. The defendant, whose conviction for criminal sexual assault made him subject to SORA restrictions for the remainder of his life, argued that his conviction and 6-year jail term should be overturned because certain restrictions and obligations recently added to the SORA statutory scheme have made it "so onerous" that SORA now violates the due process clauses of the United States and Illinois Constitutions (U.S. CONST. amend. XIV, § 1; ILL. CONST. art. I, § 2). In support of his constitutional challenge, the defendant argued that several statutes were unconstitutional, including subsection (b) of Section 11-9.4-1 of the Criminal Code of 2012 (720 ILCS 5/11-9.4-1(b) (West 2012)) which makes it unlawful for "a sexual predator or child sex offender to knowingly be present in any public park building or on real property comprising any public park." The court disagreed with the defendant and upheld his conviction, holding that SORA does not violate procedural or substantive due process. In support of its holding, the court adopted the rationale in *In re A.C.*, 2016 IL App (1st) 153047, and in *People v. Pollard*, 2016 IL App (5th) 130514, and found that the SORA statutory scheme "affords individuals sufficient procedural safeguards" and is also "rationally related to the purpose of protection of the public from sexual offenders and [therefore constitutes] a reasonable means of accomplishing this goal" even though the statutory scheme "may be overinclusive [as to place] burdens on offenders who pose no threat to the public." As to the constitutionality of Section 11-9.4-1(b), the court acknowledged that it previously concluded in *People v. Pepitone*, 2017 IL App (3d) 140627, and in *People v. Jackson*, 2017 IL App (3d) 150154, that Section 11-9.4-1(b) was "unconstitutional on substantive due process grounds [because] it failed the rational basis test." However, the court no longer agreed with its decisions in *Pepitone* and *Jackson* and instead determined that Section 11-9.4-l satisfies the rational basis test for due process because "the means adopted in Section 11-9.4-1 are a reasonable method of accomplishing the legislature's desired objective of protecting the public from sex offenders." A dissenting opinion disagreed with the majority's finding as to Section 11-9.4-1(b) and instead argued that the *Pepitone* and *Jackson* decisions were correct in finding Section 11-9.4-1(b) unconstitutional. Although the dissenting opinion agreed with the majority that the remaining statutes of the SORA statutory scheme are constitutional under the due process clause, the dissent nevertheless opined that, in general, the SORA statutory scheme is too "broad, burdensome, and . . . restrictive [and] lacks any mechanism by which an offender who poses little to no risk to reoffend can avoid placement on the sex offender registry . . . or can petition to remove himself from SORA's restrictions." As such, the dissent argued

that "[if] a released offender is not likely to reoffend, [then] the restrictions imposed by the SORA statutory scheme serve no other purpose than to frustrate the ability of a person who has served the mandated sentence to reintegrate into society," thereby thwarting that person's ability to fully enjoy the "fundamental elements of the constitutional right to the pursuit of happiness that inures to every citizen."

SEX OFFENDER REGISTRATION ACT – PENALTIES

Certain sex offender penalties are unconstitutional as applied to a defendant who had a sexual encounter with his 15-year-old girlfriend when he was 18 years old.

In *People v. Kochevar*, 2018 IL App (3d) 140660, the Illinois Appellate Court was asked to decide whether the Illinois statutory penalties that apply to a convicted sex offender are unconstitutional as applied to a defendant who had a sexual encounter with his 15-year-old girlfriend when he was 18 years old. Those penalties are set forth in the Sex Offender Registration Act (730 ILCS 150/ (West 2016)), the Sex Offender Community Notification Law (730 ILCS 152/ (West 2016)), Section 11-9.3 of the Criminal Code of 2012 (720 ILCS 5/ 11-9.3 (West 2016)), Section 5-5-3(o) of the Unified Code of Corrections (730 ILCS 5-5-3(o) (West 2016)), and Section 21-101 of the Code of Civil Procedure (735 ILCS 5/21-101 (West 2016)). The defendant argued that his punishment violates the Eighth Amendment of the United States Constitution (U.S. CONST. amend. VIII) because the punishment is "grossly disproportionate to the severity of the crime." The defendant also argued that the restrictions violate the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art I, §11), which provides that "penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." The court agreed with the defendant, holding that the sex offender statutory scheme is unconstitutional as applied to the defendant. In doing so, the court noted that the defendant was convicted of a Class A misdemeanor, which is the least serious of the offenses covered by the sex offender requirements. He would, nevertheless, be subject to restrictions "on employment, community service, business enterprises, recreation, and presence elements of everyday life that remain in effect for the rest of the sex offender's life - all without regard to the seriousness of the offense, his rehabilitative potential, or the likelihood of his ever reoffending." The court also pointed out that nothing in the record suggests that the defendant targeted children, and his risk of reoffending was found to be "low-to-moderate." Although the court affirmed the defendant's conviction, sentence, and term of probation, it vacated the requirement that the defendant register as a sex offender.

SEX OFFENDER REGISTRATION ACT – TEMPORARY ABSENCE: NOTICE TO LAW ENFORCEMENT

The notification requirement for 3-day temporary absences refers to consecutive days, rather than aggregate days.

In *People v. Burchell*, 2018 IL App (5th) 170079, the Illinois Appellate Court was asked to decide whether the Sex Offender Registration Act referred to consecutive days rather than aggregate days in a calendar year for the purpose of the Act's temporary absence notification requirements. Subsection (a) of Section 3 of the Sex Offender Registration Act (730 ILCS 150/3(a) (West 2016)) provides that a "sex offender or sexual predator who is temporarily absent from his or her current address of registration for 3 or more days shall notify the law enforcement agency having jurisdiction of his or her current registration, including the itinerary for travel." The State argued that when the relevant Sections of the Sex Offender Registration Act are "read in conjunction, they lead to a logical conclusion that there is, in fact, a 3-day period in which a defendant is to report temporary absence, because a defendant will be in violation of the law upon his or her third day of temporary absence if he or she never provided any statutory notification." The defendant argued that the "statutory scheme does not explicitly provide a time period during which a defendant is required to report his or her temporary absence from his or her registered address." The defendant also argued that the position put forward by the State violates "due process and the rule of lenity because the plain and ordinary meaning of the language of the statute simply does not support the State's position that an offense has been charged" in the case. The court agreed with the State, holding that the only logical construction of the temporary absence notification requirement of subsection (a) of Section 3, as written, is one that requires notification to be made on, or prior to, the third day of temporary absence. The court reasoned that because the paragraph of subsection (a) of Section 3 that gives rise to the criminal charge is silent on the point as to whether the temporary absence is 3 aggregate days of temporary absence in a calendar year or 3 consecutive days of temporary absence, the court believed that the General Assembly intended that the temporary absence at issue in the case be one of 3 or more consecutive days. The court reasoned that the statute was ambiguous and when language in a penal statute is ambiguous, the court must resort to rules of statutory construction such as the rule of lenity, in which the penal statute must be strictly construed in favor of the accused.

SEX OFFENDER REGISTRATION ACT – TERMINATION OF REGISTRATION

A petitioner for termination of registration requirements must show by a preponderance of the evidence that he or she poses "no risk" to the community, even if the lowest risk category used by treatment providers is "low risk" or "lowest possible risk."

In *In re T.J.D.*, 2017 IL App (5th) 170133, the Illinois Appellate Court was asked to determine if the trial court erred when it denied a petition for termination of sex offender registration requirements because the petitioner failed to demonstrate that he posed "no risk" to the community. Subsection (d) of Section 3-5 of the Sex Offender Registration Act (730 ILCS 150/3-5(d) (West 2014)) requires that an individual prove, by a preponderance of the evidence, that he or she poses "no risk" to the community before a court may terminate his or her sexual offender registration. The petitioner argued that a showing of "no risk" is not possible, noting that his treatment provider stated in his report, "[a] finding of no risk is not possible, as some risk for sexual offense exists even among the general population for whom no prior sexual offenses have been identified." The State argued that while the requirement of a showing of "no risk" is a high bar, it is not impossible to meet, and that the trial court's ruling was not against the manifest weight of the evidence. The court agreed with the State, holding that the trial court properly denied the petition. The court reasoned that the plain language of the statute requires a showing of "no risk." However, the court encouraged the General Assembly to revisit the standard, "considering that medical experts refuse to label an offender as 'no risk' (the lowest recognized category by the treatment providers in this case was 'low risk' or 'lowest possible risk')."

CODE OF CIVIL PROCEDURE – PETITION FOR A CERTIFICATE OF INNOCENCE

A petitioner must prove his or her innocence by a preponderance of the evidence in order to obtain a certificate of innocence, despite U.S. Supreme Court precedent suggesting such a requirement may unconstitutionally burden a petitioner's presumption of innocence.

In *People v. Fields*, 2017 IL App (1st) 140988-U, the Illinois Appellate Court was asked to decide whether the circuit court had properly denied a petition for a certificate of innocence after his conviction for a double murder was overturned. Section 2-702 of the Code of Civil Procedure (735 ILCS 5/2-702 (West 2014)) provides that a certificate of innocence may be obtained by a petitioner if the petitioner proves by a preponderance of the evidence that he or she is innocent of a criminal offense: that was reversed or vacated; after the petitioner's conviction was overturned and the petitioner was found not guilty after retrial; or after the statute containing the criminal offense was held unconstitutional. The Illinois Appellate Court upheld the denial of the petition, finding that "the circuit court did not err in determining that petitioner failed to meet his burden of demonstrating by a preponderance of the evidence that he was innocent." However, a dissenting opinion

argued that Section 2-702 of the Code may be unconstitutional based upon the United States Supreme Court's ruling in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). In *Nelson*, the Court examined a Colorado law allowing for Colorado to refund moneys paid as a result of the criminal conviction that was overturned only if a defendant proved his or her innocence by clear and convincing evidence. In finding Colorado's law unconstitutional, the Supreme Court found that Colorado's law "offends the Fourteenth Amendment's (U.S. CONST. amend. XIV) guarantee of due process" when "the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence." The Supreme Court reasoned that "once those convictions were erased, the presumption of innocence was restored." The dissent argued that *Nelson* "casts a shadow on the constitutionality (of Section 2-702)" that the case should be remanded for an amended petition and briefing on the impact of *Nelson*. The Illinois Supreme Court denied the petitioner's petition for leave to appeal on May 30, 2018.

CODE OF CIVIL PROCEDURE – PER SE CONFLICT OF INTEREST

Failure to disclose a per se conflict of interest, when the information was openly and publicly available to the defendant, is not fraud for purposes of extending a statute of limitations.

In *People v. Malone*, 2017 IL App (3d) 150393-U, the Illinois Appellate Court was asked to decide whether the defendant's motion for relief from judgment was timely filed when the defendant argued that he learned 6 years after sentencing that his plea counsel had a *per se* conflict of interest. Subsection (c) of Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) provides that a petition for relief from judgment must be filed not later than 2 years after the entry of the order or judgment. Section 2-1401 tolls this time limit while "the ground for relief is fraudulently concealed." The defendant argued that the State fraudulently concealed the conflict by not disclosing that his plea counsel appeared as a prosecutor in the case before representing him in his plea proceedings. The State argued that the petition was untimely because it was filed well past the 2-year limitation found in Section 2-1401. The court agreed with the State, holding that the defendant's petition was untimely and had been properly dismissed by the circuit court. The court reasoned that the information the defendant claimed was concealed from him was openly and publicly available in the court file. A concurring opinion argued that, while the dismissal of the defendant's motion was proper, there was a "patent inequity in the fact that the law must deny this defendant any relief." The defendant was deprived of his right to counsel guaranteed by the Sixth Amendment of the United States Constitution (U.S. CONST. amend. VI) and Article 1, Section 8 of the Illinois Constitution (ILL. CONST. art. I, § 8), but the courts, "bound by procedural requirements, have been forced to endorse a patently unconstitutional conviction." The concurring opinion argues that a challenge to a criminal conviction achieved through "such a blatant and serious deprivation of a

fundamental constitutional right" should not be subject to the 2-year limitation period of Section 2-1401.

CODE OF CIVIL PROCEDURE – RELATION BACK STATUTE

A pending complaint can be amended to include a wrongful death claim that accrued after the statute of repose expired.

In *Lawler v. University of Chicago Medical Center*, 2017 IL 120745, the Illinois Supreme Court was asked to decide whether the appellate court erred in reversing the trial court and holding that a pending complaint can be amended to include a wrongful death claim that accrued after the statute of repose expired. The statute of repose, subsection (a) of Section 13-212 of the Code of Civil Procedure (735 ILCS 5/13-212(a) (West 2010)), prohibits actions "brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." The relation back statute, subsection (b) of Section 2-616 of the Code of Civil Procedure (735 ILCS 5/2-616(b) (West 2010)), provides that amendments to a complaint "shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed." The plaintiff filed a medical malpractice complaint against the defendant on August 4, 2011, and the plaintiff died on November 24, 2013 while the action was still pending. The plaintiff's daughter filed an amended complaint adding a wrongful death claim on April 11, 2014, alleging that the plaintiff's death was a result of the medical malpractice. The plaintiff argued the amended complaint was timely under the relation back statute. The defendant argued that the statute of repose extinguished the wrongful death claim before it accrued and cannot "rescue a claim that did not exist before the repose period expired." The Illinois Supreme Court agreed with the plaintiff, holding that the relation back statute does not distinguish between a statute of limitations and a statute of repose when it provides that an amendment "shall not be barred by lapse of time under *any statute* . . . ," as long as the original pleading was timely filed and the original and amended pleadings indicate that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence described in the original pleading. The court reasoned that while the statute of repose "bars a cause of action if it is initially brought more than 4 years after the alleged medical negligence," the relation back statute "governs amendments to complaints and functions without being subject to time limitations."

CODE OF CIVIL PROCEDURE – MANDAMUS; AWARD OF COSTS

A prevailing defendant in a mandamus *action is entitled to reimbursement only of its filing fee and summons costs.*

In *Kotara, LLC v. Schneider*, 2018 IL App (3d) 160525, the Illinois Appellate Court was asked to decide whether the trial court erred when it found that the prevailing defendant in a *mandamus* action is entitled to reimbursement only of its filing fee and summons costs. Section 14-105 of the Code of Civil Procedure (735 ILCS 5/14-105 (West 2014)) provides, "If judgment is entered in favor of the defendant, the defendant shall recover costs." The plaintiff argued that the trial court correctly interpreted the term "costs" in the *mandamus* statute in a narrow manner. The defendant argued that the court should have interpreted "costs" to include all costs actually incurred, consistent with the way the term is used in inverse condemnation proceedings under Section 10-5-65 of the Eminent Domain Act (735 ILCS 30/10-5-65 (West 2014)). The court agreed with the plaintiff, holding that the prevailing defendant was entitled to recover only its filing fee and summons costs. The court reasoned that while the Eminent Domain Act allows for the recovery of "reasonable costs, disbursements, and expenses," the statute governing *mandamus* actions allows only for the recovery of "costs." The court further reasoned that statutes allowing for the recovery of costs are in derogation of common law and must be narrowly construed. The court concluded, "A broader application of the *mandamus* statute's costs provision must come from the legislature and not from the courts."

EMINENT DOMAIN ACT – JUST COMPENSATION; REGULATORY TAKINGS

The Act does not apply in the case of a plaintiff asserting a claim for denying a business license application.

In *Dyson v. City of Calumet City*, 306 F. Supp. 3d 1028, the United States District Court for the Northern District of Illinois was asked to decide whether Calumet City's decision to deny the plaintiff's business license application violated the plaintiff's equal protection and due process rights and constituted a taking without just compensation under the Fifth and Fourteenth Amendments to the United States Constitution (U.S. CONST. amend. V; U.S. CONST. amend. XIV). Before reaching the merits of the case, the court was asked to determine whether the plaintiff's claims were ripe for adjudication. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the United States Supreme Court held that if the State provides an adequate procedure for seeking just compensation, then the property owner may not claim a violation of the just compensation clause until the property owner has used the State procedure and been denied compensation. The defendant argued that the plaintiff has an adequate takings remedy under Section 10-5-5 of the Eminent Domain Act (735 ILCS 30/10-5-5 (West 2016)). The plaintiff argued that the exhaustion doctrine in *Williamson* does not apply in this case because the damages were more extensive than a State court could award in an

inverse condemnation action. The court held that the plaintiff's claims were ripe because, although the State does provide a procedure for compensation in the case of physical takings, it does not have a similar procedure for regulatory takings.

EMINENT DOMAIN ACT – ATTORNEY'S FEES

The court may award fees and costs incurred in connection with relief from a final judgment proceeding under the Code of Civil Procedure arising out of a condemnation proceeding.

In *Forest Preserve District of Cook County v. Continental Community Bank and Trust Company*, 2017 IL App (1st) 170680, the Illinois Appellate Court was asked to decide, as a matter of first impression, whether the Eminent Domain Act permits the circuit court to award fees and costs incurred in a separate proceeding. Subsection (a) of Section 10-5-70 of the Eminent Domain Act (735 ILCS 30/10-5-70(a) (West 2014)) provides for the award of fees and costs where it is determined that a plaintiff cannot acquire the property by condemnation and the defendant incurs such fees and costs in defense of the complaint. The dispute arose when the plaintiff sought to acquire 12.5 acres that were held by the trustee for the benefit of the beneficiary. The beneficiary agreed to give the plaintiff fee simple title to that property in exchange for $1.4 million. The circuit court entered an agreed judgment order to that effect. The beneficiary petitioned for relief from the agreed judgment order under Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401). The beneficiary entered into a retainer agreement with an attorney that provided that the attorney would be paid a non-refundable $1,200 retainer and, in the event of recovery, 20% of the amount recovered. The circuit court vacated the agreed judgment order and reinstated the condemnation case. The attorney filed a petition for attorney's fees and costs in connection with the relief from final judgment proceeding. The plaintiff argued that the Eminent Domain Act does not grant the circuit court authority to award attorney's fees and costs for the work that the attorney did in the relief from judgment proceeding. The attorney argued that his efforts recovered the property for the defendant beneficiary that could be directly traceable to the settlement that the plaintiff paid to the beneficiary. The appellate court agreed with the defendant, holding that, although Illinois follows the American rule, which prohibits prevailing parties from recovering their attorney's fees from the losing party absent an express statutory or contractual provision, the relief from judgment petition under Section 2-1401 of the Code of Civil Procedure was filed in defense of a condemnation action under the Eminent Domain Act. The court reasoned that the intent of the Act is to pay defendants for all reasonable attorney's fees incurred in defense of the condemnation proceedings. The court concluded that the attorney should be awarded attorney's fees under a theory of *quantum meruit*, meaning that the trial court is literally to award attorney's fees as much as the attorney deserves.

BIOMETRIC INFORMATION PRIVACY ACT – FACIAL RECOGNITION

The term "biometric identifier" includes scans of face geometry obtained from photographs.

In *Monroy v. Shutterfly*, 2017 WL 4099846, the United States District Court for the Northern District of Illinois, in ruling on defendant's motion to dismiss, was asked to decide whether a scan of face geometry obtained from photographs meets the definition of "biometric identifier" provided in Section 10 of the Biometric Information Privacy Act (740 ILCS 14/10 (West 2016)). Section 10 of the Act provides, "'Biometric identifier' means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs . . ." Section 10 of the Act also states, "Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers." The defendant argued that this Act does not apply to scans of face geometry obtained from photographs because the definition of "biometric identifier" explicitly excludes photographs, and the definition of "biometric information" expressly states that "biometric information" does not include information "derived from items or procedures excluded under the definition of biometric identifiers." The court disagreed with the defendant, holding that the Act applies to the data obtained by defendant's facial-recognition technology. The court reasoned that if "biometric identifiers" do not include information obtained from images or photographs, the definition's reference to a "scan of face geometry" can only be narrowly read to mean an *in-person* scan of a person's face, which would leave little room for the law to "adapt and respond to technological development." The court further reasoned that if the General Assembly had intended a "scan of face geometry" to refer only to an *in-person* scan of a face, it would have signaled this more explicitly.

BIOMETRIC INFORMATION PRIVACY ACT – RIGHT OF ACTION

A technical violation of the Act does not create a right of action.

In *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317, the Illinois Appellate Court, in answering certified questions, was asked to decide whether a technical violation of the statute, absent an allegation of injury or adverse effect, renders a party "aggrieved" and thus eligible to bring an action under Section 20 of the Biometric Information Privacy Act (740 ILCS 14/20 (West 2016)). Section 20 of the Biometric Information Privacy provides, "Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party." The plaintiff argued that the defendants' failure to comply with the notice and consent requirements of subsection (b) of Section 15 of the Act (740 ILCS 14/15(b) (West 2016)) is sufficient to render the plaintiff "aggrieved" without a showing of actual injury. The defendants argued that the word "aggrieved" in Section 20 of the Act

should be interpreted to require actual harm or adverse consequences in order to be consistent with the Act's language and purpose. The court agreed with the defendants, holding that a party who alleges only a technical violation of the statute without alleging some injury or adverse effect is not an aggrieved person under Section 20 of the Act. The court reasoned that while the Act does not define "aggrieved," the plain and ordinary meaning of the term in the dictionary suggests that there must be an actual injury, adverse effect, or harm in order for a person to be "aggrieved." Furthermore, the court reasoned that if the General Assembly intended to allow for a private cause of action for every technical violation of the Act, "it could have omitted the word 'aggrieved' and stated that every violation was actionable." Because the statute states that a party has to be "aggrieved" to have a right of action, the court concluded that a determination that a technical violation of the statute is actionable would render the word "aggrieved" superfluous.

STALKING NO CONTACT ORDER ACT – EXPIRED ORDER

Absent a tolling provision in the statute, a court cannot extend an expired stalking no contact order.

In *People ex rel. Webb v. Wortham*, 2018 IL App (2d) 170445, the Illinois Appellate Court was asked to decide whether the circuit court erred in finding that an expired stalking no contact order cannot be extended and that a respondent must be properly served with a summons for a new proceeding. Subsection (b) of Section 60 of the Stalking No Contact Order Act (740 ILCS 21/60 (West 2012)) provides that a summons for a stalking no contact order "shall be served by the sheriff or other law enforcement officer." Section 65 of the Act provides that "notice of hearings on petitions or motions shall be served in accordance with Supreme Courts Rules 11 and 12," which allow for service by mail. The defendant argued that, because a previous stalking no contact order had expired before it could be extended, and service for a new proceeding for a new order was defective, there was no valid order and the circuit court properly dismissed the criminal charge of violating a stalking no contact order. The State argued that there was no defect in service because a motion to extend the stalking no contact order had been filed before the order expired and the defendant had been properly served by mail, as provided under Section 65 the Act (740 ILCS 21/65 (West 2012)). The defendant argued that because the stalking no contact order expired before the court date, a new proceeding for a new stalking no contact order was required, requiring service of a summons under Section 60. The court agreed with the defendant, holding that the stalking no contact order had expired and the defendant was not properly served with a new summons. The court reasoned that the order expired several days before the circuit court could extend it and the Act "nowhere provides that the running of a plenary order is tolled by the filing of a motion to extend it." The court noted that if the General Assembly intended a tolling provision in the statute, it would have provided one. However, the court concluded, because the stalking no contact order expired before the circuit court could extend it and no tolling provision exists for circumstances in which there is a pending motion to extend, a new summons is required for a new proceeding.

FARM NUISANCE SUIT ACT – IMMUNITY

The Act protects livestock raising activities that began less than one year before the passage of an ordinance banning such activities under certain circumstances.

In *Village of Chadwick v. Nelson*, 2017 IL App (2d) 170064, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found that the Farm Nuisance Suit Act did not exempt the defendant landowner from prosecution for violating a local ordinance banning the keeping of livestock on property. Section 2 of the Act (740 ILCS 70/2 (West 2016)) defines "farm" as "any parcel of land used for the growing and harvesting of crops; for the feeding, breeding, keeping, and management of livestock; for dairying, horse keeping, or horse boarding or for any other agricultural or horticultural use or combination thereof." Section 3 of the Act (740 ILCS 70/3 (West 2016)) states, "No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation . . . ." The defendant argued that the plaintiff was preempted from enforcing the ordinance by the Act, because the defendant had been using the land as a farm for longer than a year before the ordinance was passed. The plaintiff argued that the Act does not apply because the defendant began raising livestock on the property less than a year before the ordinance was passed. The plaintiff further argued that the activity of cutting and baling hay was "*de minimis*," thus even if the activity had already been going on for at least the preceding year, it did not constitute a "farm operation" within the meaning of the Act. The court agreed with the plaintiff, reversing the circuit court's decision and holding the defendant exempt from prosecution under the Act. The court reasoned neither the definition of "farm" in Section 2 nor the immunity provision in Section 3 of the Act require a farm's activity to bear some indeterminate level of "operational significance." The court suggested that the General Assembly could have defined the term "farm" or the immunity provision in such a way to include or exclude a specific agricultural use, or to restrict the scope of an ongoing farming activity.

JOINT TORTFEASOR CONTRIBUTION ACT – GOOD-FAITH SETTLEMENTS

A good-faith settlement agreement discharges a settling defendant from contribution liability that may be owed to non-settling defendants.

In *Antonicelli v. Rodriguez*, 2018 IL 121943, the Illinois Supreme Court was asked to decide whether the trial court erroneously entered a finding of a good-faith settlement agreement between the settling defendant and the plaintiff. Subsection (c) of Section 2 of the Joint Tortfeasor Contribution Act (740 ILCS 100/2 (West 2012)) provides that when "a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful

death." Subsection (d) of Section 2 of the Act further provides that a settling joint tortfeasor who settles in good faith with the injured party is discharged from contribution liability. Section 2-1117 of the Code of Civil Procedure (735 ILCS 5/2-1117 (West 2012)) provides that "in actions on account of bodily injury or death or physical damage to property, based on negligence" the defendants sued by the plaintiff shall be jointly and severally liable for all other damages in addition to liability for medical expenses. The non-settling defendants argued that the trial court erred in entering a finding of good faith in the settlement between the settling defendant and the plaintiff because it failed to consider any rights of contribution under Section 2-1117 of the Code of Civil Procedure. The plaintiff and the settling defendant argued that the trial court did not err in finding good faith, and therefore, the settling defendant is discharged from any contribution liability to the non-settling defendants. The court agreed with the plaintiff and settling defendant, holding that the trial court did not err when it found that the settlement satisfied the good-faith requirement of Section 2 of the Joint Tortfeasor Contribution Act. The court, citing case law, reasoned that while Section 2-1117 of the Code "comes into play before the Contribution Act and is applied to determine liability" or apportionment of fault between defendants after trial, Section 2-1117 does not "affect other codefendants' liability before entering a finding of a good-faith settlement by one defendant" in a pretrial settlement agreement.

A concurring opinion added that the "case provides the legislature with another opportunity to clarify whether it intended the phrase 'the defendants sued by the plaintiff' in Section 2-1117 . . . to include settling defendants, such that settling defendants should appear on a verdict form for purposes of apportionment of fault between defendants." This concurrence made a point of stating that it "is time for the legislature to step in and answer this question definitively once and for all."

Similar to the concurrence, a dissenting opinion argued that the trial court abused its discretion in entering a finding of good faith because that finding removes the settling defendant from a verdict form for the purposes of apportionment of fault. Citing prior opinions of the court, the dissent reasoned that "the phrase 'defendants sued by the plaintiff' means all the defendants who were sued by plaintiff," and that "the plain language of Section 2-1117 requires that fault must be allocated among all defendants, settling and non-settling alike." The dissent further called for a "broader construction of 'good faith'" in the context of apportionment of fault.

JOINT TORTFEASOR CONTRIBUTION ACT – VICARIOUS LIABILITY

No right of contribution exists among 2 or more defendants who are each vicariously liable for the acts or omission of the same employee.

In *Sperl v. Henry*, 2017 IL App (3d) 150097, the Illinois Appellate Court was asked to decide whether the trial court erred when it found that both defendants, Dragonfly and CHR equally contributed, were equally at fault for the motor vehicle accident at issue, and should be equally responsible for the damages awarded by the jury. Subsection (b) of Section 2 of the Joint Tortfeasor Contribution Act (740 ILCS 100/2 (West 2010)) provides

that the right to contribution "exists only in favor of a tortfeasor who has paid more than his pro rata share of common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share." Section 3 of the Act (740 ILCS 100/3 (West 2014)) provides that "[t]he pro rata share of each tortfeasor shall be determined in accordance with his relative culpability." CHR argued that the trial court correctly found that contribution was available because Dragonfly repeatedly admitted its own negligence and a vicariously liable defendant may be held responsible for contribution. Dragonfly argued that "CHR is not entitled to contribution because the Act creates a right of contribution based upon comparative fault and neither CHR nor Dragonfly were at fault in the case." The court agreed with Dragonfly, holding that the Act does not create a right of contribution in this case because neither CHR nor Dragonfly were at fault. The court reasoned that when an employer is held vicariously liable for its employee's conduct, the employer is not at fault in fact because it has not committed any tortious act that renders it directly liable for the harm. Rather, the court reasoned that liability for the employee's conduct is imposed as a matter of policy based solely upon the employer's relationship with the employee. Thus, the court found that an employer who is vicariously liable for the negligent conduct of its employee may not seek contribution under the Act against another employer who is vicariously liable for the same conduct of the same employee if (1) the employee is the only tortfeasor who is at fault in fact and (2) there is no evidence that either of the employers were at fault in fact. The court noted that it is the role of the General Assembly to create a right of contribution among 2 or more defendants who are each vicariously liable for the acts or omissions of the same employee. A dissenting opinion noted that the court's holding is unjust and "undermines the Act's goal of equitably enforcing damages among defendants." The Illinois Supreme Court granted CHR's petition for leave to appeal on March 21, 2018.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – DISCRETIONARY IMMUNITY

A local public entity cannot claim discretionary immunity for an employee's act or omission without providing evidence that the act or omission was based upon a conscious decision or policy determination.

In *Monson v. City of Danville*, 2018 IL 122486, the Illinois Supreme Court was asked to decide whether the City of Danville as defendant was entitled to discretionary immunity for its failure to repair a sidewalk defect. Section 2-109 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-109 (West 2012)) provides that a "local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." Section 2-201 of the Act (745 ILCS 10/2-201 (West 2012)) provides that "except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused."

Subsection (a) of Section 3-102 of the Act (745 ILCS 10/3-102(a) (West 2012)) provides that "except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used," and that a local public entity shall not be held liable for injury unless it has actual or constructive notice of an unsafe condition.

The plaintiff argued that the defendant cannot claim discretionary immunity because the provisions of subsection (a) of Section 3-102, as an immunity clause, supersede that of Sections 2-109 and 2-201, and that the defendant breached its duty to maintain the sidewalk in a reasonably safe condition. The defendant argued that the act or omission of not repairing the sidewalk was discretionary in nature as "a matter of public policy within its employees' discretion," and it is therefore immune from liability under Sections 2-109 and 2-201. The court agreed with the defendant, in part, but ultimately held that the defendant failed to prove that it was entitled to discretionary immunity under Sections 2-109 and 2-201. The court rejected the plaintiff's argument that subsection (a) of Section 3-102 is a superseding immunity clause, reasoning: (1) that it is not an immunity clause at all, but merely codifies a common law duty, and as such, it cannot supersede the immunities provided under Sections 2-109 and 2-201, and (2) that the plaintiff would have to prove actual or constructive notice of an unsafe condition for the defendant to be liable under that provision. However, the court also rejected the defendant's argument, that its act or omission of not repairing the defective sidewalk was a matter of discretion entitling the defendant to immunity because the defendant offered no "evidence documenting the decision not to repair the particular section of sidewalk at issue." Therefore, the court reasoned, the defendant's failure to repair the sidewalk did not constitute an exercise of discretion or a determination of policy by its employee which would entitle the defendant to immunity, and it breached a duty to maintain the sidewalk in a reasonably safe condition.

The concurring opinion disagreed with the majority's reasoning concerning the interpretation and application of subsection (a) of Section 3-102 of the Act. While the concurrence agreed with the court's decision rejecting discretionary immunity, the concurring opinion believed that the plain language of Section 3-102 indicates that it is an immunity clause controlling Section 2-201. Specifically, because of the words, "except as otherwise provided in this Article," "the detailed provisions of Section 3-102 were intended to apply unless one of the limitations on liability set forth in that Section or an immunity found elsewhere in Article III applies." Since the immunity of Section 2-201 provides that conflicting language elsewhere in the statute controls ("except as otherwise provided by statute"), "the immunity in Section 2-201 does not apply to negate the more specific and contradictory provisions set forth in Section 3-102." The concurring opinion argued that the General Assembly intended the immunities in Article III, such as those regarding a public entity's failure to repair its unsafe property to apply, and "did not intend to erase the specific language of Section 3-102 with Section 2-201's general discretionary immunity."

ILLINOIS LOCAL GOVERNMENT AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – LEGISLATIVE IMMUNITY

Legislative immunity does not extend to employees of a municipality that participate in the legislative process, but do not perform legislative acts.

In *Village of Tinley Park v. Connolly*, 2017 WL 5891329, the United States District Court for the Northern District of Illinois was asked to decide whether legislative immunity should apply to non-legislators. Section 2-205 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-205 (West 2012)) provides that a "public employee is not liable for an injury caused by his adoption of, or failure to adopt, an enactment, or by his failure to enforce any law." Illinois common law further provides that "members of a municipal council are not liable personally for their legislative acts." (*Mahoney Grease Serv., Inc. v. City of Joliet*, 406 N.E.2d 911 (1980)). The plaintiff argued that the scope of the legislative immunity defense under Illinois law is governed by the Local Governmental and Governmental Employees Tort Immunity Act, and that the Act does not provide immunity for the plaintiff's claim for breach of fiduciary duties. The defendant argued that because she held the position of Director of Planning for the Village of Tinley Park, she was shielded from liability by the Illinois common law doctrine of legislative immunity. The court agreed with the plaintiff, holding that legislative immunity does not extend to employees of a municipality that participate in the legislative process, but do not perform legislative acts. The court reasoned that the Local Governmental and Governmental Employees Tort Immunity Act "only provides immunity from suit for claims against government employees arising from torts," and because the claim against the plaintiff for a breach of fiduciary duty, which is not a tort under Illinois law, the Act does not control and immunity is determined by Illinois common law. However, the court further reasoned that it is not clear under Illinois law whether legislative immunity extends to non-legislators who are employees of a municipality that participate in the legislative process, but do not perform legislative acts, such as enacting ordinances. Citing case law, the court stated that since no court had previously found Illinois common law legislative immunity applicable to non-legislative actors, it should not extend such immunity absent a compelling reason to do so. Because the Illinois Supreme Court has narrowly construed legislative immunity as applying to legislators and there is already a separate common law immunity in Illinois for non-legislative officials performing discretionary duties (the public official immunity doctrine), the court found no compelling reason to extend legislative immunity to non-legislators, and it declined to extend such immunity to the defendant.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – CONDITIONS OF ROADS AND TRAILS

For purposes of determining whether a local public entity or public employee is entitled to immunity, the Act makes no distinction between natural and unnatural conditions on a road or trail.

In *Colella v. Lombard Park District*, 2017 IL App (2d) 160847, the Illinois Appellate Court was asked to determine if the trial court erred in granting the defendant's motion to dismiss the complaint on the grounds that the defendant was immune from liability under Section 3-107(b) of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-107(b) (West 2014)). That statute provides, "Neither a local public entity nor a public employee is liable for an injury caused by a condition of . . . [a]ny hiking, riding, fishing, or hunting trail." The plaintiff was injured by a "spiked timber" that was dumped, along with other debris, into a wooded area that the defendant was responsible for managing and maintaining. During a rainstorm that flooded the area in the days prior to the plaintiff's injury, the debris was dispersed along a trail that the plaintiff was using at the time of her injury. The plaintiff alleged that the defendant allowed the debris to be dumped in the wooded area and had actual and constructive notice that the debris was dispersed along the trail. In light of these allegations, the plaintiff argued that the immunity provided under Section 3-107(b) was inapplicable because the spiked timber did not constitute a "physical" or "natural" condition of the trail. In support of her argument, the plaintiff relied on *Sites v. Cook County Forest Preserve District*, 257 Ill. App. 3d 807 (1994), which held that a cable gate erected on an access road maintained by a forest preserve district "should not be considered a physical condition of the road covered by Section 3-107(b) . . . [because] the statute does not appear to have the purpose to relieve public entities from liability for injuries caused by structures erected on the exempted roads." The plaintiff also relied on *Goodwin v. Carbondale Park District*, 268 Ill. App. 3d 489 (1994), which held that Section 3-107 did not provide a park district with immunity from the willful and wanton conduct claims filed by a cyclist who had collided with a fallen tree that stretched across a paved bike path because Section 3-107 only covers "unimproved property . . . which is in its natural condition . . . because . . . the burden of both time and money [would be too great] if the local governmental entity were required to maintain these types of property in a safe condition." The defendant argued that *Sites* was "questionable legal authority" because "it conflicts with *Kirnbauer v. Cook County Forest Preserve* District, 215 Ill. App. 3d 1013 (1991), [which found] that Section 3-107 [immunity] applied when the plaintiff was injured by a steel cable that was stretched across the entrance to a forest preserve." The defendant presented no argument in challenge of *Goodwin*. The appellate court in this case ultimately disagreed with the plaintiff's arguments and affirmed the trial court's ruling, holding that the spiked timber that injured the plaintiff was a "condition" of the trail covered by Section 3-107(b). In support of its holding, the appellate court agreed with the defendant that the ruling in *Sites* was questionable and noted that *Sites* also contradicted *McElroy v. Forest Preserve District of Lake County*, 384 Ill. App. 3d 667 (2008), which held that "immunity provided by Section 3-107 applies to man-made

objects such as a wooden bridge or a boardwalk." The appellate court rejected the *Goodwin* court's assertions that a trail must be "unimproved" and in its "natural condition" to fall under Section 3-107, reasoning that the General Assembly "could have easily added such an exception to Section 3-107 if it deemed necessary." Moreover, the appellate court noted that the court in *Goodwin* "contradict[ed] the notion that Section 3-107 applies only to injuries caused by naturally occurring conditions" when it held that Section 3-107 "applies broadly to all 'injuries sustained on' access roads and trails." The appellate court acknowledged that "[a] countless number of dangerous conditions, both naturally and unnaturally occurring, undoubtedly exist on the many access roads and trails in which Section 3-107 applies." However, the appellate court found "nothing in the plain language of Section 3-107 to indicate that [the] legislature intended to immunize [public entities] for willful and wanton conduct relating to [a] fallen tree but not to [a] spiked timber." Moreover, the appellate court opined that any distinction made between natural and unnatural conditions for the purpose of determining liability under Section 3-107 would ultimately undermine the very purpose of that Section, which is to relieve public entities from the obligation to maintain certain property.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – RIDING TRAIL

Immunity from liability for injury caused by the condition of a hiking, riding, fishing, or hunting trail applies only to primitive or rustic trails.

In *Corbett v. County of Lake*, 2017 IL 121536, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the city was not immune from liability for personal injuries arising out of a bicycling accident on a municipal bike path because the path was not a riding "trail," as defined in subsection (b) of Section 3-107 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-107 (West 2012)). That Section provides that "neither a local public entity nor a public employee is liable for an injury caused by a condition of . . . any hiking, riding, fishing or hunting trail." The plaintiff argued that: (1) the path is not located in a wooded, natural scenic area; (2) the path passes by a city park; and (3) at the specific location where the accident occurred, there are commercial and industrial businesses, parking lots, and buildings abutting both sides of the path. The defendant argued that the decisions of neighboring landowners to develop their property and the fact that the path is adjacent to a road did not defeat the immunity conferred by Section 3-107(b). The defendant argued that the nature of the path itself is determinative of whether it is a riding trail under Section 3-107(b). The defendant argued that the undisputed evidence that the path is surrounded by grass, shrubs, hedges, and bushes shows that it is a riding trail as contemplated by Section 3-107(b). The court agreed with the plaintiff, holding that subsection (a) of Section 3-107 refers to roads that provide access to primitive areas, rather than official streets, which

suggests that the General Assembly intended Section 3-107 of the Act to apply to primitive, unfinished trails and roads. These include any designated hiking, riding, fishing, or hunting trail that retains its original, natural surfaces and is not improved with asphalt, concrete, crushed aggregate, or similar finishes and is not intended for ordinary on-road type bicycles, bicyclists pulling children in trailers, pedestrians pushing strollers, or similar forms of transportation. The court reasoned that if a bicycle path winding through a public park were subject to blanket immunity under Section 3-107(b), a pedestrian would be barred from suing for an injury caused by a condition of a path, while being able to sue for the exact same injury occurring on park grounds next to the path.

SNOW AND ICE REMOVAL ACT – SIDEWALK

The Act does not extend immunity to snow removal from a pathway in the parking area behind a condominium building.

In *Hussey v. Chase Manor Condominium Assoc.*, 2018 IL App (1st) 170437, the Illinois Appellate Court was asked to decide whether the trial court erred in finding that a pathway in the private parking area behind a condominium building is a "sidewalk" under the Snow and Ice Removal Act. Section 2 of the Snow and Ice Removal Act (745 ILCS 75/2 (West 2012)) provides, "Any owner, lessor, occupant or other person in charge of any residential property, or any agent of or other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks abutting the property shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk . . . ." The plaintiff argued that the immunity provision of the Act should not apply because the pathway was not a public right-of-way, citing cases holding that a condominium driveway is not a "sidewalk" within the meaning of the Act. The defendant argued that a condominium driveway was a "sidewalk" under the Act, and cited cases relying on the interpretation of Section 1 of the Act (745 ILCS 75/1 (West 2012)), which provides that it is the public policy of the State that residential landowners "be encouraged to clean the sidewalks abutting their residences of snow and ice." The defendant reasoned that private walkways constitute "sidewalks" within the meaning of Section 2 of the Act so long as they "border" or "abut" the building. The court agreed with the plaintiff and reversed the trial court's decision, holding that a condo building's parking lot is not a "sidewalk" under the Act. The court reasoned that because the Act is in derogation of the common law, it should be strictly construed. Following that principle, the court noted that the word "sidewalk," as used in Section 2, refers to the public right-of-way bordering the property and not to the pathways leading to the building. The court reasoned that had the General Assembly wished to include within its immunity walkways that abut the *house* itself, it could have easily used the same language in Section 2 that it used in Section 1 of the Act.

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – DISGORGEMENT

Fees that have been earned by an attorney are not subject to disgorgement.

In *In re the Marriage of Goesel*, 2017 IL 122046, the Illinois Supreme Court was asked to decide whether the appellate court erred in determining that fees that have already been earned by an attorney in a dissolution of marriage proceeding are not considered "available funds" that may be disgorged. Subdivision (c-1)(3) of Section 501 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/501(c-1)(3) (West 2014)) provides that "the court shall assess an interim award against an opposing party in an amount necessary to enable the petitioning party to participate adequately in the litigation" and "[i]f the court finds that both parties lack financial ability or access to assets or income for reasonable attorney's fees and costs, the court shall enter an order that allocates available funds for each party's counsel, including retainers or interim payments, or both, previously paid, in a manner that achieves substantial parity between the parties." The plaintiff argued that the term available funds means that the funds exist somewhere. The defendant argued that the term available funds does not include funds already earned by an attorney for past services. The court agreed with the defendant, holding that funds earned by an attorney in the normal course of representation for past services are not "available funds." The court reasoned that holding such funds to be available for disgorgement would mean that an attorney could be ordered to pay all of the funds in a lump sum to another party's counsel years later, despite the fact that the funds belonged to the attorney and he or she had used them in a way that he or she had every legal right to do, and if he or she does not comply, then the attorney can be held in contempt and jailed. In its opinion, the court stated that the General Assembly should define what it means by "available funds" and explain whether this includes fees that the attorney has already earned, whether attorneys who are no longer on the case may also be ordered to disgorge fees, and whether it is a defense to disgorgement that the attorney no longer has the money.

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – MODIFICATION/TERMINATION OF SUPPORT

The circuit court retains jurisdiction to enforce its temporary orders entered prior to abatement or dismissal of dissolution proceedings.

In *Wertz v. Christopoulos*, 2017 IL App (1st) 160560-U, the Illinois Appellate Court was asked to decide whether the circuit court erred when it entered an order concerning a dissolution action that had been abated and dismissed. Subsection (d) of Section 510 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/510(d) (West 2014)) provides, "When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, modified, revoked or commuted to a lump sum payment, as equity may require, and that

determination may be provided for at the time of the dissolution of the marriage or thereafter." The defendant argued that an order by the circuit court before the death of the plaintiff should be clarified and designated as a qualified domestic relations order. The respondent argued that the circuit court lost jurisdiction prior to the entry of an order because the plaintiff had died and the qualified domestic relations order was entered more than 30 days after the dissolution of marriage case was dismissed. The court agreed with the defendant, holding that a circuit court retains jurisdiction to enforce its temporary orders with a qualified domestic relations order when the qualified domestic relations order effectuates a provision for children's benefits in a temporary order that was entered prior to abatement or dismissal of the dissolution proceedings. The court reasoned that the statute's use of "may" permits the court to exercise its discretion when enforcing a support order and does not make it mandatory that support orders be enforced only at the time of the dissolution of marriage or thereafter. A dissenting opinion argued that the trial court cannot transform the dismissal of a petition into a dissolution for the purpose of equitably enforcing its orders.

PROBATE ACT OF 1975 – ADULT GUARDIANSHIP: WARD'S ESTATE PLAN

An amendment to the estate management plan of an adult with disabilities that deviates from intestacy is authorized by the Act.

In *In re Estate of Rivera*, 2018 IL App (1st) 171214, the Illinois Appellate Court was asked to decide whether a guardian's proposed amendment of a disabled adult's estate could deviate from intestacy. The ward was 23 years old and permanently and profoundly disabled by birth injuries, and, because of physical and cognitive delays, never had testamentary capacity, never married, and never had or adopted children. The ward was a recipient of a $12 million personal injury settlement. Subsection (a-5) of Section 11a-18 of the Probate Act of 1975 (755 ILCS 5/11a-18(a-5)(West 2016)) provides that the probate court, upon petition of a guardian, other than the guardian of a minor, and after notice to all other persons interested as the court directs, may authorize the guardian to exercise any or all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability. The ward's initial estate plan followed intestacy and benefited both parents and all full and half siblings in equal shares. The guardian filed a verified petition seeking amendment of the estate plan to benefit the ward's mother and her family and exclude the ward's father and his family. The judge, applying *Howell v. Howell*, 2015 IL App (1st) 133247, modified the plan, holding that a preponderance of the evidence indicated that it was in the ward's best interest to deviate from intestacy in favor of those family members who had a consistent and loving relationship with the ward and to exclude those family members who did not. The appellants argued that it was error to allow the amendment to the estate plan because the Probate Act of 1975 does not specifically authorize amending a trust to deviate from intestacy, and that even if it did, the court should

have applied a clear and convincing standard in determining the ward's best interests. The guardian argued that clause (11) of subsection (a-5) provides that the ward's wishes, as best they can be ascertained, shall be carried out, whether or not tax savings are involved. The court agreed with the guardian, holding that the guardian of an estate is obligated to propose to the court an estate plan that includes as beneficiaries only individuals whom the guardian has reason to believe the ward would choose to include, if the ward was present and not under disability. The court reasoned that the Probate Act of 1975 empowers and obligates an estate guardian to amend a disabled adult ward's estate plan when material circumstances change and an existing plan, whether it be an original or amended version, is no longer in the ward's best interests due to a change in circumstances.

RESIDENTIAL REAL PROPERTY DISCLOSURE ACT – APPLICABILITY

The applicability of the Act is determined by the number of residential dwelling units of each property in a real estate transaction, not the aggregate units.

In *Aidan Development Corporation v. KSA Grand Ventures LLC*, 2018 IL App (1st) 171321-U, the Illinois Appellate Court was asked to decide whether the trial court properly held the seller subject to the requirements of the Residential Real Property Disclosure Act in a transaction that involved 2 buildings totaling 5 residential dwellings. The Residential Real Property Disclosure Act defines residential real property as "real property improved with not less than one nor more than 4 residential dwelling units" (765 ILCS 77/5 (West 2014)). Section 55 of the Act (765 ILCS 77/55 (West 2014)) provides, "If the seller fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract" and that the court may award attorney fees to the prevailing party if a person fails to act or provides false information on the disclosure. The seller argued that the 2 buildings sold as part of one real estate transaction (encompassing more than 4 residential dwelling units) should be treated as a single residential real property and are not subject to the disclosure requirements of the Act. The seller reasoned that the General Assembly "intended the key to the definition of 'residential real property' to be the total number of residential dwelling units being purchased" because when there are more than 4 units, the General Assembly "assumed that the purchaser is sophisticated enough to not need the protection of the Act." The seller further argued that in order for the buyer to recover attorney fees, the buyer must prove that the seller knowingly violated the Act, and the buyer failed to do so. The buyer argued that each building qualified as residential real property under the Act and that the seller should have provided the disclosures required by the Act. The buyer also argued that the trial court properly awarded attorney fees because it found that the seller's arguments and tactics demonstrated knowing misconduct. With respect to whether the transaction was subject to the Act, the court agreed with the buyer, holding that summary judgment for the buyer was appropriate. The court reasoned that each building (with 4 or less residential dwelling units each) is its own piece of residential real property, so the seller is subject to

the disclosure requirements of the Act. The court further reasoned, "If the [General Assembly] wanted to limit the disclosure obligations under the Act to any and all sales in which the aggregate number of residential dwelling units sold under the contract happened to be 4 or less, it could have easily said so." As to the issue of attorney fees, the appellate court agreed with the seller and held that the trial court erred in awarding attorney fees. The court found that the trial court's reasoning, that attorney fees were proper because the seller's motion to reconsider "was not well-grounded in fact," is not an appropriate ground to award attorney fees under Section 55 of the Act.

CONDOMINIUM PROPERTY ACT – LIEN

The Act does not require a condominium association to file a lawsuit against the prior owner in order to collect unpaid assessments from a foreclosure buyer.

In *Sylva, LLC v. Baldwin Court Condominium Association, Inc.*, 2018 IL App (1st) 170520, the Illinois Appellate Court was asked to decide whether the Condominium Property Act requires that a lawsuit to collect the assessments be filed against the prior owner as a prerequisite to recovering them from a foreclosure buyer. Paragraph 4 of subsection (g) of Section 9 of the Condominium Property Act (765 ILCS 605/9(g)(4) (West 2012)) provides, "The purchaser of a condominium unit at a judicial foreclosure sale . . . shall have the duty to pay the proportionate share, if any, of the common expenses for the unit which would have become due in the absence of any assessment acceleration during the 6 months immediately preceding institution of an action to enforce the collection of assessments . . . " The plaintiff argued that it was not required to pay the assessments that accrued during the previous ownership because the Act requires the association to sue the predecessor owner for the assessments first. The defendant argued that it was entitled to collect back assessments under the Act because it did take action to collect back assessments by filing a lien claim and providing notice of the lien to the buyer. The court agreed with the defendant and reversed the circuit court's decision, holding that the Act does not require a condominium association to file a lawsuit against the prior owner in order to collect unpaid assessments from the foreclosure buyer. The court reasoned that the phrase "institution of an action" in Section 9 refers to actions by an association to collect the money it is entitled to from the foreclosure buyer, rather than from the original owner. The court further reasoned that the General Assembly has made a policy decision that rather than requiring a condominium association to bear the full burden of a nonpaying owner, the foreclosure buyer, who may be buying at a premium and has advance notice of the unpaid assessments, should take on that burden.

SELF-SERVICE STORAGE FACILITY ACT – CONTRACT TYPEFACE

The requirement that certain statutory contract language be printed in bold or underlined type is not changed by the fact that the rest of the contract is also printed in bold or underlined type.

In *One Way Apostolic Church v. Extra Space Storage, Inc.*, 2018 WL 620054, the United States District Court for the Northern District of Illinois, in ruling on the defendant's motion for partial summary judgment, was asked to decide whether the limitation of value provision in a contract must stand out in a way other than being printed in bold type or underlined as required by Section 7.5 of the Self-Service Storage Facility Act (770 ILCS 95/7.5 (West 2011)). Section 7.5 of the Act provides that "[i]f the rental agreement contains a limit on the value of property that may be stored in the occupant's space . . . this limit provision must be printed in bold type or underlined in the rental agreement in order to be enforceable." The plaintiff argued that because most parts of the subject rental agreement were in bold or underlined, the legislative intent behind Section 7.5 of the Act required the limitation of value provision to stand out from the rest of the contract in some other way. The court disagreed with the plaintiff and granted the defendant's motion for summary judgment, holding that Section 7.5 of the Act does not require the limitation of value provision to stand out from the rest of the contract in any way other than being printed in bold or underlined type. The court reasoned that the plain language of Section 7.5 only requires the limitation of value provision to be printed in bold type or underlined, but nothing in the statute specifies that the limitation of value provision must be printed differently than any other words in the contract or that it must stand out in any unique manner.

ILLINOIS HUMAN RIGHTS ACT – ASSOCIATIONAL DISABILITY

Associational disability claims are possible under the Act.

In *Calabotta v. Pibro Animal Health Corp.*, 2018 WL 813583, the United States District Court for the Central District of Illinois was asked to decide, for the purpose of determining if the plaintiff's complaint under the Americans with Disabilities Act was timely filed, whether the Illinois Human Rights Act recognizes an associational disability claim, which is a claim of discrimination based on a person's association with a person with a disability. Subsection (Q) of Section 1-103 of the Act (775 ILCS 5/1-103(Q) (West 2016)) defines "unlawful discrimination" as "discrimination against a person because of his or her . . . disability . . . ." The Act does not expressly authorize associational disability claims. However, the plaintiff argued that because the Act is to be liberally construed, an associational disability claim is not specifically foreclosed and, therefore, the Illinois Department of Human Rights would have jurisdiction over such a claim. The defendant argued that the Department does not have the authority to grant or seek relief from an associational disability discrimination claim. The court agreed with the plaintiff and held

that it is possible that an associational disability claim could exist under a liberal reading of the Act. The court reasoned that not taking a general approach to the question would require the Equal Employment Opportunity Commission to "deal with complicated issues of state law to determine whether a claim has any potential being allowed under state law." The court noted that it was "not holding that such a claim necessarily exists under the Illinois Human Rights Act, merely that it would be possible for a court to hold that such a claim exists."

INTEREST ACT – INTEREST RATE IN LOANS INVOLVING CORPORATIONS

The exception to the 9% per annum maximum contractual interest rate for a loan made to a corporation does not require that the loan to be made for business purposes.

In *McGinley Partners, LLC v. Royalty Properties, LLC, et al*, 2018 IL App (1st) 171317, the Illinois Appellate Court was asked to decide whether a promissory note executed by defendants (a corporation and 2 individuals) with an interest rate of 20% violates the Interest Act's 9% maximum interest rate. Subsection (1) of Section 4 of the Interest Act (815 ILCS 205/4(1) (West 2004)) provides that "in all written contracts it shall be lawful for the parties to stipulate or agree that 9% per annum, or any less sum of interest . . . . " Subsection (l) includes various exceptions to the 9% maximum interest rate, including, in relevant part, "[a]ny loan made to a corporation" (815 ILCS 205/4(1)(a) (West 2004)). The plaintiff had been assigned the promissory note executed by the defendants and sued the defendants over nonpayment of the promissory note. The promissory note related to a transaction purchasing a horse farm that included a residence. The defendant argued that the Interest Act's exception for loans made to a corporation only applies to loans classified as a "business loan" and the property secured by the promissory note included the residence of the 2 individual defendants. The plaintiff argued that the exception applied since the promissory note was executed by a corporation defendant. The court agreed with the plaintiff, holding that the exception applied "regardless of whether the property was to be maintained as a residence or for business purposes." The court reasoned that since the requirement that a transaction be a "business loan" was not in the text of the statute, the only requirement that needed to be met was that the loan was made to a corporation. The court distinguished the exception in paragraph (a) from the exception contained in paragraph (c), which did explicitly contain the business loan requirement. (["any business loan to a business association or copartnership"] (815 ILCS 205/4(1)(c) (West 2004))).

PERSONNEL RECORD REVIEW ACT – PROHIBITED DISCLOSURES

Disciplinary reports protected from disclosure under the Act are also exempt from disclosure under the Freedom of Information Act.

In *Johnson v. Joliet Police Department*, 2018 IL App (3d) 170726, the Illinois Appellate Court was asked to determine if the trial court erred when it found that the Personnel Record Review Act ("Review Act") prohibited the disclosure of disciplinary records the plaintiff sought from the defendant under a Freedom of Information Act ("FOIA") request. Section 8 of the Review Act (820 ILCS 40/8 (West 2016)) requires employers to "delete disciplinary reports, letters of reprimand, or other records of disciplinary action [that] are more than 4 years old." The plaintiff filed a FOIA request for all disciplinary records the defendant possessed concerning one of its employees. The defendant denied the plaintiff's FOIA request on the grounds that the records were older than 4 years old, and therefore not subject to disclosure because Section 8 of the Review Act requires that they be destroyed. The plaintiff argued that the trial court's decision was erroneous because Section 11 of the Review Act (820 ILCS 40/11 (West 2016)) provides that "[t]his Act shall not be construed to diminish a right of access to records already otherwise provided by law." The plaintiff urged the court to interpret Section 11 of the Review Act to mean that the right of access provided by FOIA trumps the disclosure restriction provided under Section 8 of the Review Act. The defendant countered that Section 8 of the Review Act must be given effect because Section 7.5(q) of FOIA (5 ILCS 140/7.5(q) (West 2016)) specifically exempts from disclosure "[i]nformation prohibited from being disclosed by the Personnel Records Review Act." The appellate court agreed with the defendant, holding that the disclosure restriction under Section 8 of the Review Act is applicable to FOIA requests and therefore disciplinary records that are more than 4 years old are exempt from disclosure under FOIA. In support of its holding, the court noted that under the tenets of statutory construction "a statute should be construed so that no word or phrase is rendered superfluous or meaningless." Additionally, when 2 or more statutes concern the same subject, "specific language in a statute must take precedence over more general language on the same topic." Applying these principles to the case, the court found that the disclosure exemption provided under Section 7.5(q) of FOIA would be "superfluous and meaningless" if Section 11 of the Review Act was interpreted as rendering the Review Act inapplicable to FOIA. The court also found that the "specific language of FOIA, which references the Review Act [and its prohibited disclosures] by name, must take precedence over the general construction guidance found in Section 11 of the Review Act."

WORKERS' COMPENSATION ACT – INTERVENTION IN A SUBROGATION SUIT

The Act does not grant an employee a statutory right to intervene in his or her employer's timely filed subrogation suit; the court must apply the intervention provisions of the Code of Civil Procedure.

In *A&R Janitorial v. Pepper Construction Co.*, 2017 IL App (1st) 170385, the Illinois Appellate Court was asked to determine whether the trial court abused its discretion when it denied the appellant's petition to intervene in a subrogation action filed by her employer against the defendant on the grounds that the doctrine of *res judicata* barred the appellant's claim. Subsection (b) of Section 5 of the Workers' Compensation Act (820 ILCS 305/5(b) (West 2016)) permits an injured employee to file a claim for common law damages against a third-party defendant who is legally liable for the employee's injury and requires the employee, upon receipt of any recovery amounts, to indemnify his or her employer for any workers' compensation benefits paid or owed to the employee. Section 5(b) also provides that if the employee "fails to institute a proceeding against such third person at any time prior to the 3 months before such action would be barred, the employer may in his own name or in the name of the employee . . . commence a proceeding against such other person for the recovery of damages . . . and out of any amount recovered the employer shall pay . . . the injured employee . . . all sums collected . . . [that are] in excess of [any benefits] paid or to be paid [to the employee]." The defendant invoked the trial court's ruling and argued that *res judicata* barred the appellant's petition to intervene because the appellant had previously filed a claim against the defendant, which the trial court dismissed for failure to file within the statute of limitations. The appellant argued that *res judicata* was inapplicable because "a dismissal for failure to file within the statute of limitations should not constitute a judgment on the merits for purposes of *res judicata*." The court agreed with the appellant and reversed the trial court's ruling. The court determined that the appellant had an interest in the plaintiff's subrogation suit because the plaintiff had timely filed its suit and was seeking pain and suffering damages for the appellant in addition to indemnification for any workers' compensation benefits paid out or owed to the appellant. Furthermore, the court determined that *res judicata* did not bar the appellant's petition to intervene because the "plaintiff was not a party to the appellant's untimely filed action." More importantly, the court noted that "the [Workers' Compensation Act] is silent as to the ability of an employee to intervene once the employer has filed a subrogation suit." Consequently, the appellant's right to intervention "turns on the intervention provisions of the Code of Civil Procedure." On March 21, 2018, the Illinois Supreme Court granted leave to appeal.

WORKERS' COMPENSATION ACT – APPEAL BOND REQUIREMENT

The Act does not (i) categorically exempt employees from filing an appeal bond when seeking judicial review of a payment order issued by the Workers' Compensation Commission or (ii) limit the appeal bond requirement to parties against whom a compensation award is entered.

In *Joiner v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 161866WC, the Illinois Appellate Court was asked to determine if the trial court erred when it dismissed the plaintiff's petition for judicial review of an order issued by the Workers' Compensation Commission ("Commission") on the grounds that the plaintiff failed to file an appeal bond as required under Section 19(f)(2) of the Workers' Compensation Act (820 ILCS 305/19(f)(2) (West 2016)), thereby depriving the trial court of subject-matter jurisdiction to review the Commission's order. Section 19(f)(2) provides that "no summons [authorizing judicial review] shall issue unless the one against whom the Commission shall have rendered an award for payment of money shall upon the filing of his written request for such summons file with the clerk of the court a bond conditioned that if he shall not successfully prosecute the review he will pay the award and the costs of the proceedings in the courts." The plaintiff, who had sought judicial review of the Commission's order directing him to pay $64,000 in attorney fees to 3 attorneys who had previously worked on the plaintiff's workers' compensation claim, argued that the bond requirement under Section 19(f)(2) did not apply to him because: (1) the court in *Celeste v. Industrial Comm'n*, 205 Ill. App. 3d 423 (1990), held that the bond requirement only applies to an employer, not an employee such as himself; and (2) the Commission's order requiring him to pay attorney fees cannot be classified as "an award of money" because the court in *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469 (1994), held that "only *compensation awards* constitute "awards" or "decisions" [under Section 19(f)(2)]." (Emphasis in original). The appellate court rejected both of the plaintiff's arguments and affirmed the trial court's order dismissing the plaintiff's petition for judicial review.

As to the plaintiff's first argument, the appellate court found that the holding in *Celeste* was specific to that case and did not support the view that employees are categorically exempted from the bond requirement under Section 19(f)(2). In support of its finding, the appellate court noted that the facts in *Celeste* were distinguishable from the plaintiff's case because in *Celeste* the only "order for the payment of money" issued by the Commission was the compensation award. Thus, the *employer* was "the only party ordered to pay any money" under the Commission's order. Since the employee in *Celeste* was only seeking judicial review of the compensation award amount, and not any amount to cover attorney fees as in the plaintiff's case, the appellate court found it proper for the *Celeste* court to determine that the employee was not subject to Section 19(f)(2)'s bond requirement because the order to pay the compensation award was not against the employee. More importantly, the court noted that had the General Assembly wanted to exempt employees from the bond requirement, it could have done so by including an express limitation in Section 19(f)(2). The fact that no such limitation was contained in the plain language of

Section 19(f)(2) indicated to the appellate court that the General Assembly intended for that Section to have broad applicability.

As to the plaintiff's second argument that *Nickum* held that "only *compensation awards* constitute "awards" or "decisions" under Section 19(f)(2), the appellate court noted that *Nickum* was distinguishable from the plaintiff's case because *Nickum* "did not address the bond requirement under Section 19(f)(2) . . . [but instead] addressed . . . Section 19(g) . . . which expressly applies only to Commission awards "providing for the payment of compensation" under the Act." More importantly, the appellate court found that *Nickum* actually undermined the plaintiff's argument because Section 19(f)(2) does not contain a "similar express limitation" as that found in Section 19(g). According to the appellate court, the lack of such an express limitation in Section 19(f)(2) "strongly suggests that no limitation was intended" by the General Assembly. Noting that "absent a patent ambiguity, reviewing courts must confine themselves to the plain language of the relevant statute," the appellate court ultimately refused to interpret "the plain, unambiguous terms of Section 19(f)(2)" as limiting the bond requirement "to parties against whom an award of "compensation" had been entered."

CASES

M

N

O

P

V

W

ACT INDEX

R

S

U

W

STATUTE INDEX