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Illinois COURTS BULLETIN

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ILLINOIS SUPREME COURT: CIVIL

Implied Warranty of Habitability | 1st Dist.

Sienna Court Condominium Assoc. v. Champion Aluminum Corp., 2018 IL 122022 (12/28/18) Cook Co. Certified question answered; appellate court reversed; circuit court reversed; remanded.

The purchaser of a newly constructed home may not assert a claim for breach of implied warranty of habitability against a subcontractor who took part in the construction of the home, where the subcontractor had no contractual relationship with the purchaser. The loss that can be recovered under implied warranty of habitability, which sounds in contract and not in tort, is pure economic loss.

Pension Code | 1st Dist.

Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago, 2018 IL 122793 (12/3/18) Cook Co. Circuit court affirmed in part and reversed in part; remanded.

(Court opinion corrected 12/13/18.) Individual plaintiffs are nine retired or working employees and one spouse of a deceased former employee of city of Chicago Board of Education, all participants in one of three public pension funds. Plaintiffs challenged constitutionality of three reforms that modify calculation of annuities. As to participants who were already members on the effective date of those reforms, the denial of future ability to earn service credit on leave of absence for labor organization employment violated pension clause of Illinois Constitution. Circuit court erred in dismissing portions of plaintiffs' complaint alleging violation of pension clause by changing the law and diminishing plaintiffs' retirement system benefits by denying the use of a union salary under section 8-226(c) or 11-215(c)(3) to calculate the "highest average annual salary." The term "pension plan" in section 8-226(c)(3) must be construed so as to apply to a defined benefit plan only, and not to defined contribution plans.

Privilege | 3d Dist.

Palm v. Holocker, 2018 IL 123152 (12/13/18) Marshall Co. Appellate court affirmed as modified; circuit court affirmed in part and reversed in part.

Court held in contempt counsel for refusing to provide answers to two interrogatories seeking the names of health care providers who had treated his client, who was sued for personal injuries after he struck a pedestrian with his vehicle. The physician-patient privilege does not apply in any action in which the patient's physical or mental condition is "an issue". In this case, neither defendant's physical nor mental condition is an issue, and thus the physician-patient privilege applies.

Special Interrogatories | 2d Dist.

Stanphill v. Ortberg, 2018 IL 122974 (12/28/18) Winnebago Co. Appellate court affirmed; circuit court reversed; remanded with instructions.

Plaintiff filed wrongful death and survival action against social worker and EAP counselor and her employer hospital alleging negligent care led to his father's death by suicide six days after social worker saw him. After jury trial, jury entered a general verdict in favor of plaintiff. Jury answered "No" on special interrogatory as to whether it was reasonably foreseeable to social worker, at time of visit, that decedent would commit suicide within nine days. Circuit court erred in giving special interrogatory to jury, as it was phrased in the subjective and was thus necessarily improper and it did not test an ultimate fact of the case. Circuit court should have employed an objective, professional standard in the special interrogatory. Circuit court erred in relying on second district's 2011 opinion in *Garcia* case, as it does not support claim that subjective standard was appropriate. To the extent that the *Garcia* opinion can be read as holding that subjective standard is appropriate to determine foreseeability, it is overruled. Remanded with instructions that judgment be entered on general verdict in plaintiff's favor.

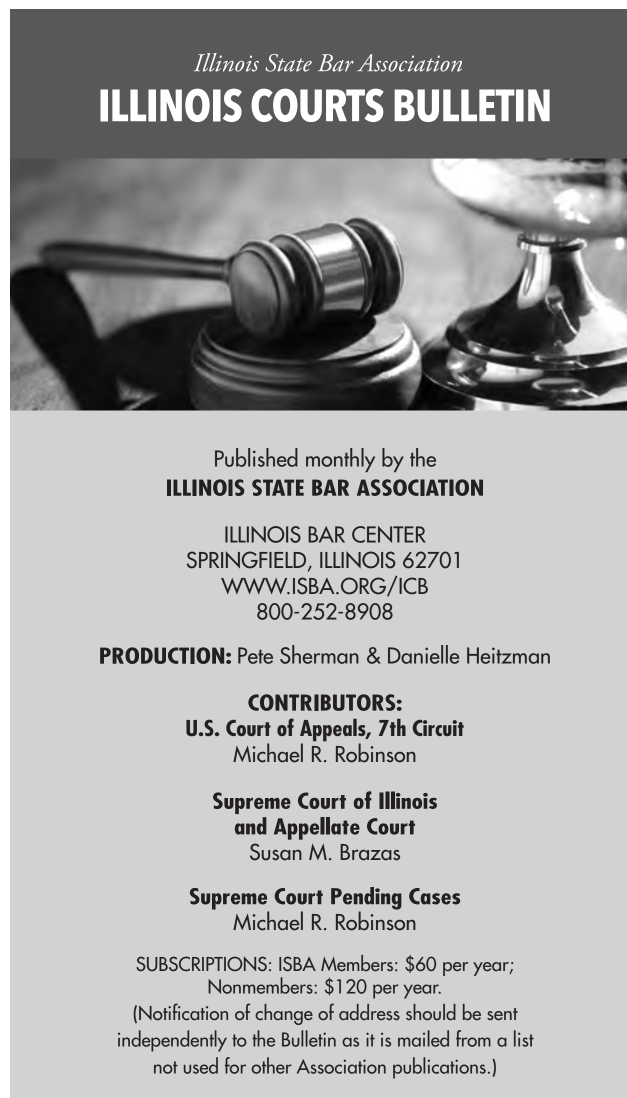
Termination of Parental Rights | 3d Dist.

In re N.G., 2018 IL 121939 (8/9/18) Will Co. Appellate court affirmed; circuit court reversed.

(Dissent from denial of rehearing.) Circuit court erred when it terminated respondent father's parental rights to his minor child. Unconstitutional

Illinois State Bar Association

ILLINOIS COURTS BULLETIN



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aggravated unlawful use of a weapon (AUUW) conviction is null and void, and thus cannot serve as a basis for finding father depraved under section 1(D)(i) of Adoption Act. With this conviction removed from consideration, DCFS cannot establish that father met the statutory definition of depravity. Thus, termination of parental rights of father under presumption of depravity was thus contrary to manifest weight of evidence.

ILLINOIS SUPREME COURT: CRIMINAL

Fines and Fees | 1st Dist.

People v. Clark, 2018 IL 122495 (12/28/18) Cook Co. Circuit court affirmed; appellate court affirmed.

Defendant was convicted, after jury trial, of Class 2 felony delivery of a controlled substance, and was ordered to pay a total of $1,549 in fines, fees, and costs. Defendant appealed the imposition of certain monetary charges imposed by circuit court. A fine is punitive in nature and is imposed as part of a sentence for a criminal offense, and a fee is assessed to recover expenses incurred by state in prosecuting the defendant. The $2 Public Defender Records Automation Fund fee, the $2 State's Attorney Records Automation Fund fee, the $15 Court Document Storage Fund fee, the $190 "Felony Complaint Filed" fee, and the $15 court automation fee are all fees that compensate the state for costs related to the defendant's prosecution.

Possession of a Controlled Substance | 3d Dist.

People v. Manzo, 2018 IL 122761 (12/28/18) Will Co. Appellate court reversed; circuit court court reversed; remanded.

Defendant was convicted, after jury trial, of unlawful possession of a weapon by a felon but was acquitted of unlawful possession of a controlled substance with intent to deliver. Totality of circumstances fails to establish a nexus between supplier's drug deals and defendant's home. Magistrate had no substantial basis to conclude that probable cause existed to believe that evidence of the crimes charged would be found in a search of defendant's home, and thus search warrant was not supported by probable cause and was thus invalid. Complaint for search warrant is a bare-bones affidavit, as it is conclusory, asserting only officer's belief that probable cause existed. Statements in complaint, that supplier drove a vehicle registered to defendant's residence address to one drug deal and 19 days later walked to another drug deal from that address, are completely devoid of facts to support officer's judgment that probable cause existed. Good-faith exception to exclusionary rule does not apply to this bare-bones affidavit.

Postconviction Petitions | 2d Dist.

People v. Simms, 2018 IL 122378 (12/13/18) DuPage Co. Appellate court reversed; circuit court court affirmed.

Defendant was convicted, after bench trial, of murder and other offenses. Petition filed a postconviction petition on Nov. 14, 1995, and with leave of court filed an amended postconviction petition on May 21, 1997. Court dismissed the amended petition without an evidentiary hearing. Illinois Supreme Court affirmed dismissal of most of the claims, but reversed dismissal of claims alleging perjury, and remanded for evidentiary hearing. On July 7, 2004, defendant filed "Withdrawal of Claims," expressing desire to withdraw remaining claims, and court entered order indicating those claims were withdrawn. On Oct. 18, 2011, defendant filed *pro se* Section 2-1401 petition. Section 13-217 of Code of Civil Procedure applies to provide timeframe for refiling a postconviction petition at a later date after it has been withdrawn. Section 13-217 is available to a petitioner who timely files an original petition but subsequently chooses, and is granted leave, to withdraw it. Petitioners who choose this procedural option are bound by its limitations, one of which requires refiling or reinstatement within one year or within the remaining limitation period, whichever is greater.

ILLINOIS APPELLATE COURT: CIVIL

Abuse and Neglect | 1st Dist.

In re C.L., 2018 IL App (1st) 180577 (11/21/18) Cook Co., 3rd Div. Reversed and remanded with directions.

Prior to birth of minor, now age five, DCFS had opened cases against respondent mother as to her six other children. Minor was placed in a foster home and has resided there throughout pendency of abuse-and-neglect case. Court erred in focusing on parental fitness in relation to changing permanency goal or closing case to private guardianship. In setting permanency goal, court must give full consideration to the best-interest factors outlines in Section 2-28 of Juvenile Court Act. Mother's slow progress toward reunification and her failure to return any of her other children home raise serious concerns about her ability to parent the minor. Mother has consistently failed to complete random drug screenings. Further attempts at returning home are not in minor's best interest. Adoption and termination of mother's parental rights are not appropriate as mother and minor continue to have a relationship with one another. Private guardianship with foster parents is an appropriate permanency goal and would serve minor's best interests.

Arbitration | 5th Dist.

Ward v. Hilliard, 2018 IL App (5th) 180214 (10/5/18) Randolph Co. Reversed and remanded.

Plaintiff filed complaint alleging that defendants were negligent in management of her IRA. Parties' contract as to management of IRA included an agreement to arbitrate disputes stemming from the contract. Plaintiff acknowledged that, prior to signing account application, she understood that defendants were agreeing to open and manage her IRA account in exchange for her agreement to arbitrate disputes arising from management of her account. Physical attachment is not required for a separate document to be incorporated by reference. Documents as a whole reveal intent of the parties to be bound to arbitration provisions.

Child Support

2d Dist. | ***In re Marriage of Barboza,*** 2018 IL App (2d) 170384 (12/13/18) DuPage Co. Vacated and remanded.

Court erred in granting husband's motion to dismiss wife's second petition to modify child support. Court that presided over dissolution proceedings did not explicitly find a cap on child support to be in the children's best interests. The fact that parties agreed to cap child support

in MSA (Marital Settlement Agreement) was irrelevant for purposes of ruling on wife's second petition to modify support.

5th Dist. | ***In re Marriage of Rushing,*** 2018 IL App (5th) 170146 (11/30/18) Marion Co. Affirmed in part and vacated in part.

Parties filed petition to modify child support, postdissolution. Court properly considered joint income of husband and his current wife in assessing child support. Court did not abuse its discretion in ordering that arrearage be paid at $100 per month, and that as long as arrearage existed, husband could not claim minor child as a dependent, and thereafter parties would alternate years claiming child as a dependent. Court abused its discretion in ordering that for child support to be reduced and to rely solely on husband's income, he and his current wife had to be physically separated, in context of their legal separation.

2d Dist. | ***In re Marriage of Verhines,*** 2018 IL App (2d) 171034 (11/20/18) DuPage Co. Reversed.

Husband petitioned for reduction of child support, claiming that involuntary termination led to early retirement and that, at age 64, he no longer earned the net income upon which support amount had been based in 2010. Court erred in granting petition. Lower earned income in retirement should not result in presumption that there has been a substantial change in economic fortune resulting in a decreased ability to pay child support. Petitioner failed to prove that his financial position in retirement renders him less able to pay full monthly support amount of $3,043. Husband's retirement lifestyle, and the funds supporting it, demonstrate his continued ability to meet his existing obligation. His financial security in retirement will not be jeopardized by drawing upon his retirement funds and other assets to meet his existing child support obligation. Statutory factors support original award; court erred in failing to consider wife's costs in running household and that wife does not have liquidity that husband does.

Class Actions | 1st Dist.

Clark v. Gannett Co., Inc., 2018 IL App (1st) 17204 (11/20/18) Cook Co., 2d Div. Reversed and remanded.

Class counsel filed Rule 137 motion for sanctions against objector's counsel. After hearing, court held objector in contempt for failing to appear at hearing, fined him $500, and denied motion for sanctions. In hearing, court erred in granting motion *in limine* to exclude evidence of objector's counsel's pattern of conduct in representing objectors in class action suits. Denial of motion *in limine* is reversed and remanded for new Rule 137 hearing. Pattern of conduct engaged in by objector, his counsel (licensed in Texas but not Illinois), and local counsel is relevant to objector's possible improper purpose of seeking attorneys' fees with bare minimum of effort, expense, and time. By preparing but not signing pleadings or appearing in court, Texas attorney has circumvented Rule 137, but he is not relieved of responsibility for his representation of objector in Illinois; and he failed to adequately supervise actions of local counsel. Both attorneys have engaged in a fraud on the court.

Collective Bargaining Agreements | 1st Dist.

Hampton v. The Chicago Transit Authority, 2018 IL App (1st) 172074 (12/20/18) Cook Co., 4th Div. Affirmed in part and reversed in part; remanded.

Plaintiff had been CTA bus driver for 28 years. His last day of employment was Dec. 31, 2006, and he began his retirement on Jan. 1, 2007. As plaintiff's last day of work was Dec. 31, 2006, the day the 2004 collective bargaining agreement (CBA) expired, he was not represented by the union on Jan. 1, 2007. Thus, he has standing to challenge the reduction in his health-care benefits under the 2017 CBA. As retirement plan agreement explicitly excluded retired employees from its definition of an employee, as of Jan. 1, 2007, he was a retiree, not an employee. The designation-of-beneficiary form he signed in 1978 does not cause him to be bound by the 2007 CBA or by any amendments made after his employment ceased. CTA has no obligation to provide plaintiff his health-care benefits and plaintiff has no cause of action against CTA for breach of contract or for constitutional violation of Pension Code.

Condominium Property Act | 2d Dist.

Hometown Condominium Ass'n No. 2 v. Mohammed, 2018 IL App (2d) 171030 (11/29/18) Kane Co. Affirmed.

Hometown Condominium Association ("Hometown") created a lien against a unit, based on owners' failure to pay assessments and late fees for several years. Defendant purchased that unit at a sheriff's sale after foreclosure but did not pay his assessments either. Hometown then filed complaint for forcible entry, detainer, and breach of contract. Defendant's partial payment of one month of postforeclosure assessments, made 17 months after confirmation of sale, did not extinguish the lien. A foreclosure purchaser must pay the postforeclosure sale assessments to confirm extinguishment of the lien, which defendant failed to do.

Condominiums | 1st Dist.

Siena at Old Orchard Condominium Ass'n v. Siena at Old Orchard, L.L.C., 2018 IL App (1st) 182133 (12/27/18) Cook Co., 4th Div. Reversed.

Amendment to condominium declaration—that removed the requirement that parties submit disputes to mediation and then, if not settled, to arbitration—is not retroactive, but affected only future disputes. Thus, preamended version of the declaration governs cause of action which arose prior to effective date of amendment.

Conspiracy | 1st Dist.

Chadha v. North Park Elementary School Ass'n, 2018 IL App (1st) 171958 (12/20/18) Cook Co., 4th Div. Affirmed.

Plaintiff purchased property, next to elementary school, which contained a fire-damaged building that was boarded up. School board member, without identifying himself as such, approached plaintiff about a "client" wanting to buy property, but plaintiff declined. Two years later, pursuant to order of housing court and after numerous notices of building-code violations, plaintiff demolished the building and built a new structure on property. School then filed complaint against plaintiff alleging that as a result of demolition he introduced lead into the ground that posed hazard to students, but later voluntarily dismissed complaint. Plaintiff sued school, alleging abuse of process for unsubstantiated suit, and then amended complaint adding school board members and others, and adding claims including RICO violations and civil conspiracy. Court properly granted summary judgment for defendants, as a matter of law, as plaintiff cannot prove that code violations and demolition order were unwarranted and occurred only due to defendants' wrongful conduct.

Court properly denied defendants' motion to dismiss under Citizen Participation Act, as defendants failed to prove that plaintiff's suit was meritless or retaliatory.

Contempt | 1st Dist.

Windy City Limousine Company LLC v. Sal Milazzo, 2018 IL App (1st) 162827 (1/20/18) Cook Co., 4th Div. Affirmed.

Plaintiff sued defendants alleging misappropriation of its confidential information, which they then allegedly used to create a competing transportation company. Court entered agreed order, granting plaintiff a temporary restraining order, barring defendants from using, accessing, or distributing its confidential information. Court properly dismissed plaintiff's petition for indirect criminal contempt and denied its motion to reconsider. Petition failed to set forth allegations specifically and definitely and thus, as a whole, failed to sufficiently inform them of the nature of charges against them. Defendants could not expect than action they admitted to in agreed order would later form basis of a contempt charge.

Contracts | 1st Dist.

Shapich v. CIBC Bank USA, 2018 IL App (1st) 172601 (12/14/18) Cook Co., 5th Div. Affirmed in part and reversed in part; remanded.

First subordination agreement, drafted by bank and which bank required plaintiff to sign, is ambiguous as to whether plaintiff's manufacturing company was permitted to pay plaintiff on the note, and thus it cannot be determined whether a breach occurred. Thus, court erred in entering summary judgment on plaintiff's claim for tortious interference with a contractual relationship against the bank. Court proply denied bank's motion for summary judgment.

Rico Industries, Inc. v. TLC Group, Inc., 2018 IL App (1st) 172279 (12/27/18) Cook Co., 4th Div Affirmed.

Parties entered into agreement in which defendant was to be exclusive sales representative of plaintiff's products sold to Walmart. Plaintiff later sought to terminate agreement and filed declaratory judgment complaint. Agreement was terminable at will as it was of indefinite duration. Court properly granted summary judgment for plaintiff as to alleged violation of the Illinois Sales Representative Act in defendants' counterclaims seeking unpaid commissions on basis that defendant was unable to prove its damages. Court properly granted summary judgment for plaintiff on defendant's procuring cause claim in its counterclaim. Court properly granted plaintiff's section 2-615 motion to dismiss as to remaining counts of defendant's counterclaims.

Corporations | 1st Dist.

Munroe-Diamond v. Munroe, 2018 IL App (1st) 172966 (1/10/19) Cook Co., 3rd Div. Affirmed in part and vacated in part; reversed and remanded.

Parties to appeal are siblings, shareholders, and directors of a moving and storage company. Sisters filed *mandamus* action for inspection of corporate books and records. Sisters, as corporate directors, have a presumptive right to inspect corporate books and records, unless brothers can carry their burden of proving that their purpose for inspection is improper. Brothers made factually specific allegations that sisters are using inspection demand as a cudgel to get more money for their shares, which is a valid defense of improper purpose. Thus, judgment on the pleadings for sisters was error.

Counterclaims | 1st Dist.

Ammons v. Wisconsin Central, Ltd., 2018 IL App (1st) 172648 (12/20/18) Cook Co., 1st Div. Affirmed.

(Court opinion corrected 1/8/19.) If a train crash occurs and the railway employee involved files a personal-injury claim against his employer for negligence, where both parties' alleged harm arises out of the same occurrence and both parties are alleged to have been negligent, the employer cannot pursue a counterclaim for negligence for the property damage caused in the crash. This interpretation is consistent with the Federal Employers Liability Act's (FELA) overarching goal of providing a remedy to employees injured while participating in this dangerous occupation.

Defamation | 1st Dist.

Kainrath v. Grider, 2018 IL App (1st) 172270 (12/29/18) Cook Co., 1st Div. Affirmed.

Plaintiffs, who are municipal officeholders and current or former city employees, sued Township and Township Assessor for defamation and false light. Court properly denied defendants' motion for summary judgment under Citizen Participation Act. A defendant does not have protection under the Act if the suit has potential merit, even if plaintiff's motivation for filing was, in part, retaliatory. As defendants failed to show that defamation claims were meritless, burden never shifted to plaintiffs to show by clear and convincing evidence that the letter Assessor published was not genuinely aimed at procuring favorable action. Assessor's testimony that he did not act with actual malice when he sent the letter is insufficient to show lack of a question of material fact.

Razavi v. School of the Art Institute of Chicago, 2018 IL App (1st) 171409 (11/20/18) Cook Co., 2d Div. Affirmed.

(Correcting case link.) Plaintiff, who had been expelled from defendant college after defendants (fellow students) made complaints that he had sexually assaulted and stalked them, filed defamation action. Repeated allegations about a claimed sexual assault or misconduct made to campus security and school authorities, and which are published as part of an investigation into, and disciplinary hearing for, the alleged misbehavior, are cloaked with absolute privilege. Court properly dismissed defamation claims against defendant students.

Discovery

2d Dist. | ***People ex rel. Madigan v. Stateline Recycling, LLC,*** 2018 IL App (2d) 170860 (12/27/18) Winnebago Co. Reversed; vacated; remanded with directions.

Court found defendant in "friendly contempt" for failing to comply with a discovery order which requires that she allow Illinois Attorney General (AG) and Illinois EPA to inspect her commercial property pursuant to AG's discovery request. AG's discovery request seeks unrestricted access to the property, requesting an actual search of the site, not just a constructive search for information. Circuit court erred in failing to require that AG, at a minimum, meet the three-part test, set forth in U.S.

Supreme Court's 1987 decision in *New York v. Burger*, for a warrantless inspection of a closely regulated business. Court erred in failing to consider Fourth Amendment principles at all in compelling defendant's compliance with unrestricted search of her property and in failing to place any limits on time, place, and scope of inspection as contemplated by *Burger* decision.

5th Dist. | ***Batson v. Township Village Associates, LP,*** 2019 IL App (5th) 170403 (1/7/19) Madison Co. Certified question answered; remanded.

Plaintiff filed complaint for injuries sustained while riding in an elevator. Court denied plaintiff's motion to bar testimony of defendants' examining physician because plaintiff's counsel was not provided with a copy of examiner's report within time required under Supreme Court Rule 215(c). The failure to deliver a copy of examiner's report to counsel for the party examined within time specified by Rule 215(c) or within any extension or modification thereof granted by court will result in exclusion of examiner's testimony, opinions, and results of any tests or X-rays that were performed, except at the instance of the party examined.

Due Process | 1st Dist.

Flanigan v. The Board of Trustees of the University of Illinois at Chicago, 2018 IL App (1st) 170815 (12/14/18) Cook Co., 5th Div. Affirmed.

(Court opinion corrected 12/28/18.) Medical student was dismissed from defendant College of Medicine, after he was instructed, but failed, to complete a fitness-of-duty examination. Plaintiff's second amended complaint established that he was afforded due process rights. Plaintiff has not, and cannot, allege that defendants disregarded disciplinary proceedings of college or university. Plaintiff was invited to participate in underlying proceedings but refused. The officer suit exception did not apply, and thus plaintiff failed to show that defendants' actions fell outside protections of sovereign immunity. Court properly dismissed second amended complaint based on lack of subject-matter jurisdiction.

Evidence | 2d Dist.

People v. Maples, 2018 IL App (2d) 160577 (12/15/18) Carroll Co. Affirmed.

Defendant was convicted, after bench trial, of one count of tattooing the body of a minor. Because language in pertinent statute, as to a person licensed to practice medicine, was an exception to, as opposed to a description of, the offense of tattooing a minor, the state was not required to prove that defendant did not have such a license. State proved beyond a reasonable doubt that defendant knew the victim was under age 18 when he tattooed her.

Freedom of Information Act (FOIA)

1st Dist. | ***Sargent Shriver National Center on Poverty Law, Inc v. The Board of Education of the City of Chicago,*** 2018 IL App (1st) 171846 (12/3/18) Cook Co., 1st Div. Affirmed.

Plaintiff made three requests under FOIA to board of education, for release of certain records as to policing in the Chicago Public Schools. Court properly dismissed with prejudice, pursuant to Section 2-615, plaintiff's complaint for willful violation of FOIA. Plaintiff rejected board's invitation to narrow or clarify its FOIA requests. Board properly exercised its unilateral ability, under FOIA, to extend its own response deadlines by five days. A public body asserting a section 3(g) exemption must make a clear and convincing showing that burden of compliance outweighs public interest in disclosure. Board complied in good faith with section 3(g) by providing written explanation for noncompliance.

3d Dist. | ***Turner v. Joliet Police Department,*** 2019 IL App (3d) 170819 (1/7/19) Will Co. Affirmed.

Plaintiff filed declaratory and injunctive relief against police department, alleging the department claimed inapplicable exemptions in responding to his FOIA document request. Court properly dismissed plaintiff's claims with prejudice. Because plaintiff now has received all the requested documents, his claims are moot. Department correctly relied on Rule 415(c) as basis for exemption limiting disclosures prohibited under state rules. Plaintiff failed to sufficiently allege department's willful and intentional noncompliance with FOIA request to warrant a civil penalty.

4th Dist. | ***Rushton v. The Department of Corrections,*** 2019 IL App (4th) 180206 (1/8/19) Sangamon Co. Reversed and remanded.

Plaintiffs filed FOIA request requesting a copy from Department of Corrections (DOC) of settlement agreement entered into by DOC's medical and mental-health services provider and estate of a prisoner who allegedly died from inadequate medical care. Settlement agreement directly relates to a governmental function because it involved settling of a claim arising out of its rendering of medical care.

Forcible Entry and Detainer Act | 1st Dist.

Goodwin v. Matthews, 2018 IL App (1st) 172141 (12/20/18) Cook Co., 4th Div. Affirmed.

Court entered order of possession in favor of plaintiffs in a forcible entry and detainer action. As the complaint alleged a definite and concrete controversy under the Forcible Entry and Detainer Act, plaintiffs established the existence of a justiciable matter. Defendant was not entitled to a five-day notice under section 9-209 of the Act, as nothing indicates that he was a lessee of the property. No error in court striking defendant's jury demand, as it was filed after date when he was required to appear. As defendant waived objections to personal jurisdiction, he was not entitled to an evidentiary hearing on his motion to quash. Court did not abuse its discretion in granting plaintiff's oral motion to amend complaint, as it occurred prior to entry of order of possession, and less than two months after filing of original complaint.

Foreclosure | 1st Dist.

The Forest Preserve District of Cook County v. Royalty Properties, LLC, 2018 IL App (1st) 181323 (12/20/18) Cook Co., 4th Div. Affirmed.

After evidentiary hearing, court entered order appointing a receiver during pendency of a foreclosure action as to 40-acre horse farm. Court properly found forest preserve as mortgagee in possession during pendency of foreclosure proceedings. Court's finding that property was clearly agricultural in nature and that property was used predominantly for growing and harvesting of hay and the feeding, breeding, and management of horses was not against manifest weight of the evidence.

Gambling | 1st Dist.

Dew-Becker v. Wu, 2018 IL App (1st) 171675 (12/14/18) Cook Co., 6th Div. Affirmed.

After bench trial, in dispute over bets in a fantasy-sports contest through a website, court entered decision in favor of defendant. Court properly found that section 28-8 of Loss Recovery Act, which provides a cause of action for damages to the loser of certain illegal bets against the winner of the bets, does not allow recovery when the gambling is conducted through a third-party website rather than a wager directly between one person and another.

Garnishment | 1st Dist.

National Collegiate Student Loan Trust 2004-1 v. Ogunbiyi, 2018 IL App (1st) 170861 (12/24/18) Cook Co., 1st Div. Reversed and remanded.

Defendant failed to repay her student loans. Once she found employment, the note holder sought an order garnishing 15 percent of her pretax income. The wage deduction provisions in section 12-803 of Code of Civil Procedure explicitly eliminated circuit court discretion in determination of amount to deduct from wages. Court has no discretion in a request for a wage-deduction order on grounds of extreme hardship.

Guardianship

3d Dist. | ***In re Estate of Mirabella S.,*** 2018 IL App (3d) 180414 (12/13/18) Will Co. Reversed and remanded.

Petitioner sought guardianship of the minor daughter of her former boyfriend, a Wisconsin resident, claiming that he had left the minor to live with her in Illinois for more than one year. Court failed to comply with requirements of Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), and granted guardianship of minor to petitioner without any authority to do so. As Wisconsin retains continuing and exclusive jurisdiction to make custody determinations as to the minor, court lacked jurisdiction to award petitioner guardianship and to modify the Wisconsin custody order, which granted father sole custody.

3d Dist. | ***In re Estate of M.L.,*** 2018 IL App (3d) 170712 (12/27/18) Will Co. Reversed and remanded.

Court erred in granting motion (filed by children's grandparents) to disqualify petitioner's attorney based on alleged conflict with petitioner's sister, who also filed petition for guardianship over petitioner's children. No grandparents failed to prove that they were prejudiced by petitioner and his sister sharing counsel, and thus they lacked standing to bring motion for disqualification. Petitioner and his sister did not have a direct conflict at any time during proceedings.

5th Dist. | ***In re Guardianship of Lillian Burdge,*** 2018 IL App (5th) 170317 (11/16/18) St. Clair Co. Affirmed in part and reversed in part.

Court awarded petitioners (two daughters) guardianship of their mother, awarded another petitioner (son) guardianship of his mother's estate, and awarded another daughter visitation with her mother. Court's order appointing a guardian of a person or estate will not implicitly revoke an existing power of attorney (POA) in every case. Evidence showed the mother lacked capacity to control or to revoke the POA, and also revealed the son was indifferent to mother's living conditions and to his sister's financial exploitation of mother. Court's findings and order, revoking son's authority as mother's health care POA and naming two daughters as plenary guardians of the person, met requirements of section 2-10 of POA Act. No abuse of discretion in court naming son as guardian of mother's estate, based on witness testimony and GAL reports. Order requiring that one daughter be allowed visitation with mother for five hours, three times a week, is premature, and no evidence suggested that two other daughters had unreasonably prevented her from visiting mother.

Involuntary Admission | 4th Dist.

In re Bonnie S., 2018 IL App (4th) 170227 (12/3/18) McLean Co. Affirmed.

After bifurcated hearing, court entered two separate orders, finding that respondent was in need of emergency involuntary admission to the Department of Human Services and was subject to involuntary administration of psychotropic medication. Second certificate was filed promptly, under the circumstances, and was not unreasonable and did not prejudice respondent. State presented sufficient testimony to allow court to make an informed decision, thus substantially complying with purpose of section 3-810 of Mental Health and Developmental Disabilities Code. Written notification of nonmedicinal treatments is required only when they are reasonable, viable alternatives. State provided proper written notice of all reasonable alternative treatments to respondent. Code does not require that specific evidence must be presented as to who is authorized to administer treatment.

Juvenile Law | 1st Dist.

In re N.A., 2018 IL App (1st) 181332 (12/31/18) Cook Co., 1st Div. Affirmed.

Respondent minor, age 17 at time of offense, was adjudicated delinquent of armed robbery and sentenced to three years probation. Totality of circumstances and U.S. Supreme Court's 1972 *Neil v. Biggers* decision factors favor state and support court's finding that victim's identification was reliable. Victim had an unobstructed view of minor's face and his gun from a distance of two feet for five to seven minutes, was certain he was the man who robbed her at gunpoint, and had no problem picking him out of a photo array. The basic legal principle that a single eyewitness identification of the accused under circumstances permitting a positive identification is sufficient to convict is still intact. Minor failed to overcome strong presumption that counsel, as a matter of sound trial strategy, decided not to present victim's nine-year-old daughter as a witness to deprive state of an opportunity to emphasize that she sat next to victim as she was being robbed, and thus no ineffective assistance of counsel.

Landlord Tenant

1st Dist. | ***The Takiff Properties Group Ltd. #2 v. GTI Life, Inc.,*** 2018 IL App (1st) 171477 (12/26/18) Cook Co., 2d Div. Affirmed.

(Court opinion corrected 1/9/19.) After bench trial, court entered judgment in favor of landlord as to its claim that tenant, which had abandoned the property, owed overdue rent. Court found that lease contractually waived landlord's obligation to mitigate damages. Tenant waived the right to require an answer to its affirmative defense, and thus landlord did not admit that it failed to mitigate damages, and did

not unequivocally reflect an intent to waive its contractual right not to relet the premises. Tenant has not shown that court erred in enforcing lease provision that excused landlord from reletting the premises. Section 9-213.1 of Code of Civil Procedure extended to tenants the same common-law affirmative defense previously available to every other litigant, but tenant contractually waived that affirmative defense.

2d Dist. | ***Crystal Lake Limited Partnership v. Baird & Warner Residential Sales, Inc.,*** 2018 IL App (2d) 170714 (11/30/18) McHenry Co. Affirmed in part, reversed in part, and vacated in part; remanded.

Landlord sued tenant for breach of commercial leases, alleging that tenant breached a covenant to restore premises to their original configuration at end of lease terms and that such failure was also a holdover under the lease. Jury found in landlord's favor on two counts, but court later granted tenant judgement not withstanding the verdict (JNOV) on holdover claim. Sufficient evidence for jury to conclude that tenant held possession constructively, as tenant exercised control over premises after leases expired. Issue of possession is a factual one for jury to decide, and JNOV was improper. Court's conditional ruling, that tenant is entitled to new trial on holdover claim based on improper jury instruction, is reversed, and verdict is reinstated. Remanded for proceedings on issue of landlord's attorney fees, as court erred in considering only proportionality and should have considered eight factors as set forth in the 2001 *Esker v. Cle-Pas's* appellate court decision. Court properly denied prejudgment interest, as that was controlled by terms of lease.

Legal Malpractice | 1st Dist.

The Northern League of Professional Baseball Teams v. Del Giudice, 2018 IL App (1st) 172407 (12/28/18) Cook Co., 6th Div. Affirmed.

Court properly entered judgment for defendants, after jury trial on plaintiff's legal malpractice claim. Plaintiff claimed that defendants breached standard of care when they failed to include an automatic $1-million-exit-fee provision in the league agreement. The type of exit fee the owners intended was vigorously contested between the parties at trial. Court properly barred plaintiff's expert from testifying as to new opinions, and beyond the league agreements he had previously disclosed as basis of his opinion. Court properly qualified defendants' two expert witnesses, as they have experience in sports law, contracts, and liquidation clauses. No error in giving non-Illinois Pattern Jury Instructions, as they conveyed the correct principles of contract law applicable to evidence. Any errors did not substantially prejudice plaintiff and thus a new trial is not warranted.

Abramson v. Marderosian, 2018 IL App (1st) 180081 (11/30/18) Cook Co., 6th Div. Affirmed.

Court granted summary judgment to defendant, former counsel for plaintiff, and denied plaintiff's motion seeking additional discovery prior to entry of summary judgment and denied two motions to amend complaint. In decision whether to allow discovery to plaintiff, court could consider all relevant circumstances, including long history of plaintiff's litigation against defendant, and as plaintiff failed to specify what further discovery might reveal. Complaint contains no allegations that defendant negligently advised him about the time in which he could seek to vacate settlement agreement, or that he negligently advised plaintiff about communications with his father, after settlement agreement. Plaintiff failed to provide proposed amended complaint to consider whether it met certain factors pertinent to motion to amend.

Nelson v. Quarles & Brady LLC, 2018 IL App (1st) 171653 (9/27/18) Cook Co., 4th Div. Affirmed.

(Court opinion corrected 12/19/18.) After bench trial, court entered judgment for defendant law firm in legal malpractice claim, as to firm's representation of plaintiff in federal district court in his suit against his former business partner in two auto dealerships. Seventh circuit reversed district court's ruling against plaintiff. Parties then settled that action, and plaintiff then filed this action. Circuit court properly found that plaintiff failed to establish proximate cause aspect of his legal malpractice claim as to plaintiff's claim for an oral agreement for sale of plaintiff's shares to business partner. Court was within its discretion to accept testimony of defense expert that plaintiff would not have been able to demonstrate a provable oral agreement in underlying litigation. Evidence from third parties did not establish existence of an oral agreement. Court's rulings that plaintiff failed to establish that it was more likely than not that he would have succeeded on breach-of-contract claim, and that firm did not deviate from standard of care, were not against manifest weight of evidence.

Maintenance | 1st Dist.

In re Marriage of Wojcik, 2018 IL App (1st) 170625 (12/17/18) Cook Co., 1st Div. Affirmed in part and reversed in part.

In Marital Settlement Agreement (MSA), husband was to pay financial support to wife for 60 months to support both the wife and the parties' then-minor child. After payments were made for 60 months, wife asked court to extend husband's maintenance obligation. After trial, court ordered husband to pay permanent maintenance, and to pay retroactive maintenance dating back to when the petition was filed. MSA provided that support obligation was for 60 months, reviewable. MSA contained express termination events, none of which ever occurred. Award was supported by the evidence, as wife's domestic duties, during 30-year marriage, allowed husband's business to thrive, she was a stay-at-home mother for most of the marriage, she would never achieve lifestyle she enjoyed during marriage, and made good-faith efforts at self-sufficiency. Court erred in ordering husband to pay prejudgment interest on the retroactive maintenance award. The retroactive maintenance award did not become due and cannot be considered unpaid until the court entered judgment modifying and extending husband's support obligation.

Malicious Prosecution | 1st Dist.

Grundhoffer v. Sorin, 2018 IL App (1st) 171068 (7/9/18) Cook Co., 1st Div. Affirmed.

(Court opinion corrected 1/2/19.) Court properly granted summary judgment for defendants on malicious prosecution claim, as plaintiff failed to establish the damages element of her claim. Plaintiff was required to present a factual basis for damages that would arguably entitle her to judgment. Law-of-the-case doctrine is inapplicable, as court did not consider the same issues in the previously filed motion to dismiss as it did in the motion for summary judgment.

Mandamus Relief | 5th Dist.

Lavite v. Dunstan, 2018 IL App (5th) 170114 (1/2/19) Madison Co. Affirmed in part and reversed in part.

Dispute over the amount of control and oversight the county board has over County Veterans Assistance Commission (VAC) operations under Military Veterans Act. Plaintiff, as VAC superintendent, reviewed and approved his attorney's unredacted itemized invoice, and when he presented Warrant No. 16-4 demanding payment of invoice, there were sufficient funds in 2016 Administrative Fund to pay those expense, and thus warrant should have been processed and paid shortly after it was submitted. Plaintiff established that he is entitled to a writ of *mandamus*, directing defendants to pay remaining balance due, plus interest due, from unreserved fund account. Superintendent of VAC has authority for approval of itemized statements. Defendants failed to show that any policies prohibited them from paying any unredacted invoices. Plaintiff failed to establish a clear right to payment of Warrant No. 16-5; at presentment of invoice, fiscal year 2016 had closed, and VAC had exhausted its 2016 Administrative Fund.

Mootness | 1st Dist.

Maday v. Township High School District 211, 2018 IL App (1st) 180294 (11/30/18) Cook Co., 5th Div. Appeal dismissed.

Plaintiff, who is transgender, sought preliminary injunction for unrestricted use of the girls locker room for her last semester of high school. Court properly denied motion as moot, as plaintiff graduated from high school in May 2018. Resolution of plaintiff's underlying case on the merits (pending federal and state court actions) will answer the question of how the Illinois Human Rights Act applies to transgender students' rights as to school locker rooms. Plaintiff has not made a clear showing that the material facts are likely to occur and cannot satisfy the criteria for the public interest exception to mootness.

Motion for Summary Judgment | 3d Dist.

Taliani v. Lisa Resurreccion, 2018 IL App (3d) 160327 (12/3/18) Putnam Co. Affirmed.

Plaintiff, a Department of Corrections inmate, filed action for intentional infliction of emotional distress, alleging that defendants (his ex-wife and funeral home) denied him his right to visit with the remains of his deceased 19-year-old son. Although defendants' conduct was arguably insensitive and inconsiderate, it did not rise to level of extreme and outrageous, and plaintiff's emotional distress was not severe. No common-law right exists in next of kin to visit with a deceased relative's remains.

Motion to Dismiss | 3d Dist.

Kimbrell v. State Bank of Speer, 2018 IL App (3d) 170498 (12/5/18) Peoria Co. Affirmed.

Plaintiff, a nonlawyer proceeding *pro se*, filed a complaint, amended twice, on behalf of herself and on behalf of her mother and her husband. Court properly dismissed second amended complaint as a nullity due to plaintiff's unauthorized practice of law, as she was clearly representing all three plaintiffs.

Municipal Law | 1st Dist.

City of Chicago v. Haywood, 2018 IL App (1st) 180003 (12/21/18) Cook Co., 5th Div. Reversed and remanded.

Section 10-8-505(a) of Municipal Code of Chicago, prohibiting the sale of tickets near a stadium or playing field, is rationally related to the city's interests in public safety and welfare. That section does not violate the First Amendment's overbreadth doctrine on its face. It is within powers of city to regulate use of streets and other municipal property and to regulate traffic and sales on the street.

Natural Accumulation | 1st Dist.

Jordan v. The Kroger Co., 2018 IL App (1st) 180582 (12/18/18) Cook Co., 2d Div. Affirmed.

Plaintiff was injured when she slipped and fell on ice outside defendant grocery store. Defendant lawn care company was contracted to do snow and ice removal there. Court properly granted summary judgment to defendants. As a matter of law, when a property owner contracts with a snow removal company to remove natural accumulations of snow and ice, the mere existence of the contract does not create a duty to third parties to protect them from such accumulations, absent evidence that the third party personally relied on the contract.

Negligencen | 1st Dist.

Milevski v. Ingalls Memorial Hospital, 2018 IL App (1st) 172898 (12/20/18) Cook Co., 4th Div. Affirmed.

Plaintiff fell and was injured while performing work in course of his employment in telecommunications room at a hospital when flooring gave way. Hospital filed third-party complaint against plaintiff's employer, alleging that if hospital was found liable, then employer also was contributorily negligent. Court properly entered summary judgment for hospital as there was no evidence that hospital had actual or constructive notice of any defects in the raised flooring prior to plaintiff's fall.

Kramer v. Szczepaniak, 2018 IL App (1st) 171411 (12/19/18) Cook Co., 3rd Div. Reversed and remanded.

Uber driver became irate when plaintiffs remarked that he had made several wrong turns and was lost and then offered to assist. Driver demanded that they exit his vehicle at about 2 a.m. in a high-crime area. Plaintiffs could not get another ride home and were injured when a speeding driver struck them as they crossed at a busy intersection. Court erred in dismissing all defendants except driver who struck plaintiffs. The effects of the negligence of the Uber driver had not come to rest in a position of safety, as they had not arrived safely at their destination as he promised, and thus intervening negligence of speeding driver did not absolve him of negligence. Uber driver's negligence was active: When he dumped plaintiffs on roadside in the middle of the night amid dark, high-traffic streets, he materially worsened their position, which he created by his own negligence. Questions of fact exist as to reasonable foreseeability of speeding driver's negligence, precluding dismissal.

Ordinances | 1st Dist.

Iwan Ries & Co v. The City of Chicago, 2018 IL App (1st) 170875 (12/20/18) Cook Co., 4th Div. Reversed.

Court granted partial summary judgment for plaintiffs, which operated to strike down City of Chicago Other Tobacco Products Tax Ordinance. Court found that city's home-rule authority to enact ordinance was preempted by section 8-11-6a(2) of the Illinois Municipal Code. Because city had enacted a tax on cigarettes prior to July 1, 1993, it fulfilled the condition of the statute that "a tax" exist on either the number of units of cigarettes or tobacco products. Thus, city is not preempted from now enacting a tax on other tobacco products.

Paternity | 1st Dist.

In re Marriage of Sparks, 2018 IL App (1st) 180932 (12/28/18) Cook Co., 1st Div. Affirmed.

Court entered judgment of dissolution that incorporated parties' child-custody settlement for a minor born to wife during marriage. Husband later filed petition to terminate his parent and child relationship with minor, and after trial court found husband's petition timely as it was filed within two years of his acquiring actual knowledge of relevant facts as to minor's parentage. Court then vacated all previously entered orders as to custody, visitation, and support. Court's finding that wife fraudulently concealed from husband facts about who minor's father was is not against manifest weight of evidence. Six-month delay between when husband obtained actual knowledge and filing petition satisfied due diligence standard, given significance of decision to terminate child and parent relationship.

Pension Code

1st Dist. | ***Johnson v. Municipal Employees', Officers', & Officials' Annuity & Benefit Fund of Chicago,*** 2018 IL App (1st) 170732 (12/26/18) Cook Co., 2d Div. Affirmed.

Illinois Supreme Court ruled that Pension Code amendments violated the Illinois Constitution's pension protection clause. Plaintiffs' counsel in one of the consolidated cases petitioned for attorney's fees, seeking over $200,000 under Illinois Civil Rights Act and an additional $750,000 from a "common fund." Court properly denied fee petition as impermissible under Pension Code, as issues raised by lawsuits (in *Jones v. MEABF* case) have no relation or connection to the Civil Rights Act, and plaintiffs in those cases were not aggrieved parties suing under the Illinois Constitution on subject of discrimination based on race, color, national origin, or gender. Pension Code bars garnishing plan participants' pention entitlements for any purpose.

2d Dist. | ***Frisby v. Village of Bolingbrook Firefighters' Pension Fund,*** 2018 IL App (2d) 180218 (12/31/18) DuPage Co. Reversed.

Plaintiff firefighter fell on ice in parking lot when exiting her car to report for work at fire station (20 minutes prior to shift start time). Pension Fund Board denied request for line-of-duty pension but granted request for not-on-duty pension. Court reversed, finding that plaintiff was entitled to line-of-duty benefits. Board properly found that plaintiff was not performing an "act of duty" as defined by Pension Code, even though village superintendent of public safety had recently told firefighters, via e-mail: "If you're not early—you're late. I appreciate you looking out for each other at shift changes." Plaintiff was not yet on duty, and no ordinance, rule, or regulation imposed on plaintiff the act of exiting her vehicle in parking lot.

4th Dist. | ***Ashmore v. Board of Trustees of the Bloomington Police Pension Fund,*** 2018 IL App (4th) 180196 (12/23/18) McLean Co. Reversed and remanded.

Plaintiff, a former police officer, filed application for disability pension benefits for injury from a fall while he was pushing a stranded motorist's vehicle out of the snow. Board's finding that plaintiff was not disabled was against manifest weight of the evidence. As the stuck vehicle was partially obstructing traffic and was blocking an entrance to an apartment complex, plaintiff was performing his duty of keeping the roadway clear of obstructions and allowing tenants to enter and exit their residences. Plaintiff's actions in pushing vehicle out of snow qualify as an "act of duty" for which he is entitled to a line-of-duty pension.

Postconviction Petitions | 3d Dist.

People v. Partida, 2018 IL App (3d) 160581 (12/13/18) Will Co. Vacated and remanded with instructions.

Defendant filed *pro se* motion for leave to file a second successive postconviction petition. After discussion with prosecutor, on the record, court denied the motion. Ruling vacated and remanded for court to conduct an independent determination without considering state's written objection. Circuit court must grant or deny a motion for leave to file a successive postconviction petition according to the Post-Conviction Hearing Act without input from the state.

Probate | 1st Dist.

Hebert v. Cunningham, 2018 IL App (1st) 172135 (12/28/18) Cook Co., 6th Div. Affirmed.

Executor filed complaint seeking declaratory judgment as to funds from the decedent's 401(k) retirement account. Court properly entered judgment in favor of executor and against decedent's ex-wife, who was named as primary beneficiary on 401(k) account. Broad waiver language in divorce decree, stating that each party was forever relinquishing all property rights and claims that each has or may hereafter have against the property of the other, unequivocally encompassed all property rights of any nature, including the beneficial property interest in the decedent's 401(k) account. Waiver language of divorce decree terminated ex-wife's interest in the 401(k) account proceeds, independent of ERISA or the Trusts and Dissolutions of Marriage Act (TDMA).

Promissory Notes | 1st Dist.

McGinley Partners, LLC v. Royalty Properties, LLC, 2018 IL App (1st) 172976 (12/20/18) Cook Co., 4th Div. Affirmed.

Plaintiff sued to enforce a note and guaranty executed by defendants in connection with purchase of a horse farm. Court entered summary judgment for plaintiff and entered judgment against defendants for $8.32 million. Court denied defendants' section 2-1401 petition to vacate judgment. Court did not abuse its discretion in finding that defendants failed to show due diligence in presenting their defense in the underlying suit, where defendants had actual knowledge of the intercreditor agreement no later than eight months prior to entry of summary judgment.

Removal | 5th Dist.

Williams v. Williams, 2018 IL App (5th) 170228 (12/27/18) St. Clair Co. Affirmed.

Court granted wife permission to move from Illinois to North Carolina with parties' two minor children, awarded wife attorney fees and costs as sanctions, and awarded wife retroactive child support. Evidence shows that husband failed to take opportunities for parenting time, was not supportive of wife's needs for help with children, and that neither parent had family support in Illinois. Court properly considered relevant statutory factors and concluded that benefits of relocating children outweighed any potential negative impact. Court properly denied husband's request for more visitation/parenting time with children as he failed to prove that modification would be in children's best interest.

Statutes of Limitations | 1st Dist.

Arnold v. Kapraun, P.C., 2018 IL App (1st) 172854 (12/26/18) Cook Co., 2d Div. Affirmed.

Appellate court reversed class certification in Telephone Consumer Protection Act (TCPA) action, and remanded for further proceedings as plaintiff clinic's individual action remained viable. Clinic then filed Petition for Leave to Appeal (PLA). Court properly dismissed complaint for expiration of statute of limitations, as Petition for Leave to Intervene as class representative was untimely filed. Once statute of limitations tolls for absent class members, the statute begins to run again the day the Supreme Court denies PLA. Petition to intervene was filed 89 days after denial of PLA, although only 64 days remained before expiration of four-year statute of limitations for TCPA actions at time of denial of PLA.

M&S Industrial Co., Inc. v. Allahverdi, 2018 IL App (1st) 172028 (8/26/18) Cook Co., 4th Div. Affirmed.

(Court opinion corrected 12/19/18.) Court properly dismissed plaintiff's complaint arising out of injuries sustained when roof of defendant's building uplifted during a wind storm and struck nearby power lines, resulting in an electrical surge that damaged plaintiff's property. Section 13-214(a) of Code of Civil Procedure, which is the construction negligence limitation period, applies to plaintiff's claims, which involve a defectively constructed roof, a single event that does not entail daily provision of a dangerous utility to a customer.Limitations period was triggered at the time the roof of defendant's building detached and caused damage to plaintiff's property. As four-year limitations period expired before plaintiff filed suit, dismissal was proper.

Tax Deeds | 5th Dist.

In re Application for a Tax Deed, 2018 IL App (5th) 170170 (6/5/18) Saline Co. Affirmed.

(Modified upon denial of rehearing 1/7/19.) Court granted equitable redemption in a tax-deed sale proceeding to the property's owners. Although a 1990 amendment to section 22-45 of Property Tax Code restricted equitable relief as to vacating a tax-deed, in order to preserve and uphold the policy goals of tax deed merchantability and equity to taxpayers, section 22-45, as amended, does not preclude courts' equitable powers as to redemption prior to issuance of a tax-deed. Court properly favored redemption and sought to give liberal construction to redemption laws.

Termination of Parental Rights

1st Dist. | ***In the Interest of Julieanna M.,*** 2018 IL App (1st) 172972 (12/11/18) Cook Co., 1st Div, Affirmed.

(Court opinion corrected 12/14/18.) Court involuntarily terminated parental rights of both parents as to their four minor children, after hearing substantial testimony from several witnesses, and entered order that the minor children be placed for adoption. Juvenile Court Act and Adoption Act do not deprive children or parents of due process, as they give the parties and the court a fair and meaningful opportunity to address what final measures are in the best interests of the child. Section 2-28 of Juvenile Court Act passes constitutional muster, as adoption is the least restrictive method the state can pursue to resolve competing interests and considerations as to the best interests of dependent children.

1st Dist. | ***In re J.B.,*** 2018 IL App (1st) 173096 (12/11/18) Cook Co., 2d Div. Affirmed.

Court terminated parental rights of respondent mother as to her children, now ages nine and six. Respondent cannot show prejudice as to claims of ineffective assistance of counsel, as she was adequately served and made fully aware that she risked losing her parental rights by failing to comply with DCFS requirements. As service of process for personal jurisdiction was effective, orders were not void, and thus counsel would not have gained anything by raising claim as to service.

3d Dist. | ***In re S.P.,*** 2019 IL App (3d) 180476 (1/4/19) Will Co. Affirmed.

Court terminated parental rights of respondent father. Court did not deny respondent's due process rights as a result of court allowing his counsel to withdraw without first complying with Rule 13, or by failing to admonish his client of his right to appeal after entry of dispositional order. During applicable nine-month period, respondent was incarcerated and made no attempt to contact caseworker; and he did not attempt to arrange any visits with minor through DCFS during entirety of proceedings. Court's finding that it was in minor's best interest to terminate respondent's parental rights was not against manifest weight of evidence.

Unions | 1st Dist.

American Federation of State, County and Municipal Employees v. Illinois Labor Relations Board, State Panel, 2018 IL App (1st) 172476 (12/14/18) Cook Co., 6th Div. Affirmed in part and vacated in part.

Administrative review action filed by union, seeking review of state labor board's decision on three unit clarification petitions, which sought to exclude two PSA (Public Service Administrator) positions employed by DCFS and one PSA position employed by IDES from the union's bargaining unit, on grounds that they are managerial or supervisory. Board's holding that all three PSA positions are managerial is not clearly erroneous, as the duties show responsibility for directing the effectuation of management policies and practices, and one PSA position was created to have higher-level duties and ability to supervise other staff.

Wage Payment and Collection Act | 1st Dist.

Thomas v. Weatherguard Construction Company, Inc., 2018 IL App (1st) 171238 (12/27/18) Cook Co., 4th Div. Affirmed.

Plaintiff sued construction company, alleging that defendant was his employer and owed him $47,666 in commissions for contracts plaintiff had procured for defendant. Court properly denied defendant's petition for substitution of judge for cause, or its request for documents of a contingency-fee agreement, where defendant did not expressly request such agreement in discovery and where such agreement would not have limited fee award. Court did not abuse its discretion in determining reasonable attorney fees and costs which, per language of Wage Payment Act, is for all claims involving a common core of facts. The connection between the 10 years of attorney time expended and the amount at issue was deemed reasonable by defendant. That plaintiff was awarded, after bench trial, $9,226.52 in damages, does not render attorney's fee award ($178,449.97 in fees and $1,124.68 in costs) an abuse of discretion, as plaintiff will now receive the money and satisfaction of being paid for his work.

Workers' Compensation | 1st Dist.

Pisano v. Illinois Workers' Compensation Comm'n, 2018 IL App (1st) 172712WC (12/7/18) Cook Co., WC Div. Affirmed in part, reversed in part, and vacated in part.

Plaintiff filed three applications for workers' compensation benefits for injuries sustained while working for city. Arbitrator issued a single decision on all three claims, awarding permanent partial disability (PPD) benefits for injuries to right wrist and right elbow arising out of first accident, and a wage-differential award for injury to right wrist arising out of second accident. Arbitrator determined that injuries from third accident arose out of and in course of vocational-rehabilitation process for second accident. Commission modified rate and commencement date of wage differential awarded for second accident and otherwise adopted arbitrator's decision. Appellate court reinstated scheduled PPD award for injuries to right elbow as entered by the commission in its original decision, and wage differential for injuries to right wrist from first and second accidents. Finding that claimant was not entitled to PTD benefits was not against manifest weight of evidence, as employer showed that he was suitable for employment as a watchman. Decision claimant was not entitled to a separate PPD award for injuries to neck and shoulders as a result of third accident was not against manifest weight of evidence.

Zoning | 1st Dist.

Drury v. Village of Barrington Hills, 2018 IL App (1st) 173042 (12/12/18) Cook Co., 3rd Div. Affirmed in part and reversed in part; remanded.

Plaintiffs, residents of village, filed suit alleging that village ordinance adopted a few days prior, permitting large-scale horse boarding operations on residential property throughout the village, violated substantive due process because it was passed for the benefit of one resident only (who had been cited for violation of previous ordinance, which prohibited such operations) and was not rationally related to public health, safety, or welfare of village. Court erred in dismissing substantive due process challenge at the pleading stage. Parties should have opportunity to put forward their respective positions on justifications for ordinances, or lack thereof, in trial court. Allegations are appropriately suited to a facial challenge. If plaintiffs can show that ordinance was not rationally related to public welfare, then ordinance was void from the outset. Court properly sustained intervenors' objection to agreed settlement order, as village has no authority to declare any ordinance unconstitutional.

ILLINOIS APPELLATE COURT: CRIMINAL

Aggravated Domestic Battery | 3d Dist.

People v. Catchings, 2018 IL App (3d) 160186 (1/18/18) Will Co. Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of two counts of aggravated domestic battery and two counts domestic battery of his girlfriend. Court did not err in allowing state to use defendant's 2011 conviction for possession of a weapon by a felon for impeachment, as it was relevant to and probative of defendant's credibility. State's reference to defendant's felon status did not contravene Illinois Supreme Court's rejection of "mere-fact" impeachment, as reference was a necessary part of the felony that state used to impeach his credibility. Any error in court's use of IPI criminal no. 3.12 was harmless, as it did not affect outcome of trial.

Aggravated DUI | 5th Dist.

People v. Pratt, 2018 IL App (5th) 170427 (12/22/18) St. Clair Co. Affirmed.

After defendant was involved in auto accident, a detective directed medical personnel to draw defendant's blood for chemical testing while he was unconscious. Defendant was later charged with aggravated DUI. As neither exigent circumstances nor implied consent applied, no recognized exception to requirement of a warrant was applicable. Thus, the warrantless blood draw violated the Fourth Amendment. Thus, court correctly suppressed evidence of test results.

Battery

1st Dist. | ***People v. Jamison,*** 2018 IL App (1st) 160409 (12/28/18) Cook Co., 6th Div. Affirmed.

Defendant was convicted after jury trial of three counts of aggravated battery for having punched a person in the face who was attempting to board a CTA bus and for having grabbed the bus driver when he refused to drive. Evidence sufficient for jury to infer defendant acted knowingly when he committed the batteries. No ineffective assistance of counsel, as no prejudice resulted from counsel failing to call two witnesses mentioned in opening statements. Denial of *Batson* challenges, which raised only that defendant and venirepersons were African-American, was not against manifest weight of evidence.

3d Dist. | ***People v. Young,*** 2019 IL App (3d) 160528 (1/3/19) Henry Co. Affirmed.

Defendant pled guilty to misdemeanor battery. Court properly admonished defendant prior to her guilty plea, pursuant to statute in effect at that time. While appeal was pending, admonishment requirements changed. It would be inappropriate to remand solely for the retroactive application of amended statute. Defendant failed to testify that she did not previously understand consequences of her plea, but only that she

had, over the weekend, thought more about the consequences of plea, which is not a proper ground for withdrawal of a guilty plea.

Delivery of a Controlled Substance | 1st Dist.

People v. McCauley, 2018 IL App (1st) 160812 (12/28/18) Cook Co., 3rd Div. Affirmed and vacated.

Defendant was convicted, after bench trial, of delivery of a controlled substance and possession of a controlled substance with intent to deliver. Defendant sold drugs to an undercover officer inside the home of a person for whom defendant regularly performed housework. Officers then returned to that house, without a warrant, and seized more drugs and arrested defendant. Defendant failed to carry his burden of showing that he had a reasonable expectation of privacy in that house. Thus, court properly denied defendant's motion to suppress. DNA fee vacated, as that fee may be imposed only if a defendant is not already registered in DNA databank.

Domestic Battery | 3d Dist.

People v. Shoevlin, 2019 IL App (3d) 170258 (1/3/19) Will Co. Reversed.

Defendant was charged with two counts of domestic battery and case proceeded to jury trial. After both sides gave closing arguments, but prior to state's rebuttal argument, court declared a mistrial. Court denied defendant's motion to dismiss on double jeopardy grounds. Defense counsel, in closing argument, stated that victim (defendant's estranged husband) had a very powerful reason to lie, as he filed for divorce and wanted their children to be taken from defendant. Court made a hasty decision to then declare mistrial. Defense counsel's comments, although improper, did not justify declaration of mistrial. As state failed to show a manifest necessity for mistrial, case dismissed on double jeopardy grounds.

DUI

2d Dist. | ***People v. Mueller,*** 2018 IL App (2d) 170863 (12/13/18) McHenry Co. Affirmed.

(Modified upon denial of rehearing 1/8/19.) Defendant was stopped for improper lane usage (ILU) and was charged with DUI. Court properly granted defendant's motion to quash her arrest and suppress evidence. The ILU statute is not ambiguous and was or should have been within officer's knowledge, and thus officer did not have a reasonable basis to stop defendant. If the purpose of a line in roadway is to divide two lanes, then a vehicle has not changed lanes until it has crossed the line. A stop for ILU is valid when an officer observes multiple lane deviations for no obvious reason. Even if defendant's multiple touches could be considered "lane deviations," the road's twists and turns provided an innocent explanation for those brief touches.

3d Dist. | ***People v. Racila,*** 2018 IL App (3d) 170361 (12/18/18) Will Co. Reversed and remanded with instructions.

(Court opinion corrected 12/31/18.) Defendant was arrested for DUI and court granted his petition to rescind statutory summary suspension. Officer stopped defendant for speeding, and had probable cause, or reasonable grounds, to believe that defendant had been operating a motor vehicle while under the influence of alcohol. Field sobriety tests were given when weather was clear and pavement was dry and level, defendant's breath smelled of alcohol, he had open cans of beer in the car, and he admitted that he had been drinking.

Evidence | 1st Dist.

People v. Meyers, 2018 IL App (1st) 14089 (12/3/18) Cook Co., 1st Div. Affirmed.

Defendant was convicted, after jury trial, of two counts of aggravated discharge of a firearm in the direction of a peace officer. Eyewitness testimony of officers, and other evidence, was sufficient for conviction. Court properly admitted photograph of bullet hole in garage, as it was relevant in light of officer's and evidence technician's testimony of what they personally observed in the garage at the scene. Probative value of evidence in showing direction of bullet that officer saw defendant discharge from his gun substantially outweighed any danger of unfair prejudice. No error in prosecutor's statement to jury that the officers were brave.

Felony Murder | 1st Dist.

People v. Mitchell, 2018 IL App (1st) 153355 (12/20/18) Cook Co., 4th Div. Affirmed.

Defendant was convicted, after jury trial, of felony murder predicated on aggravated kidnapping. Defendant was not prosecuted for aggravated kidnapping, and the term "kidnapping" was employed in a general, nontechnical context, and need not be defined. Jury was presented with evidence that defendant and codefendants duct-taped victim's limbs, forcibly removed him from his business, held him in basement of a residence, and transported him to Indiana against his will. Thus, there was no serious risk the jury did not understand definition of kidnapping. Jury would not have been misled or confused by jury instructions presented, although definitional instruction for "kidnapping" was not provided to jury.

Fraud | 1st Dist.

People v. Caraga, 2018 IL App (1st) 170123 (12/4/18) Cook Co., 2d Div. Affirmed.

Defendant, and four codefendants, participated in organized scheme to commit mortgage fraud. Straw buyer in this transaction was an undercover federal agent and part of a sting operation. Defendant was convicted, after bench trial, of loan fraud, financial institution fraud, attempted theft, wire fraud, and forgery. Defendant's knowledge of conspiracy and agreement to participate were evidence from his statements during and immediately after raid when federal agents stopped the closing. His words and actions showed that he knew about mortgage-fraud conspiracy and he agreed to become part of it when he completed loan application for purported buyer, whom he knew would not be living in the property (which was fraudulent for FHA loans). Coconspirator statements made outside of a defendant's presence or before defendant agrees to participate in transaction are admissible under the coconspirator's exception.Sufficient evidence showed defendant's intent to aid and abet coconspirators in accomplishing the mortgage fraud. Defendant's failure to possess a loan originator's license was relevant for background purposes, and was not overly prejudicial.

Home Invasion | 3d Dist.

People v. Felton, 2019 IL App (3d) 150595 (1/4/19) LaSalle Co. Affirmed; remanded with directions.

Defendant was convicted for home invasion (of 93-year-old victim) and attempted first degree murder in separate trials. Evidence of defendant's commission of home invasion had significant probative value, and showed a clear motive for defendant to attempt to murder his accomplice, out of fear that he would implicate him. Defendant chose to proceed with a bench trial before the same judge, and did not move for substitution of judge. Evidence of his guilt of attempted murder was overwhelming. Probative value of evidence of home invasion was not substantially outweighed by risk of unfair prejudice, and court did not err in admitting evidence of it in trial for attempted murder. Section of Criminal Code that has sentence enhancement for discharge of firearm in attempted first degree murder is not unconstitutionally vague. Sentencing enhancement of natural life in prison is not excessive given grievous nature of shooting victim's injuries.

Illinois Sex Offender Registration Act | 2d Dist.

People v. Najar, 2018 IL App (2d) 160919 (12/20/18) Kendall Co. Affirmed.

Defendant was convicted, after jury trial, of unlawful failure to report as a sex offender. Court did not err in denying defendant's request for two Illinois Pattern Jury Instructions where he asserted affirmative defense of mistake of fact and testified that he mistakenly believed that required reporting date was after the actual 90-day deadline. Court correctly determined that what allegedly occurred was a lapse of memory and not a mistake of fact. Evidence was insufficient to support a mistake-of-fact defense.

Ineffective Assistance of Counsel

1st Dist. | ***People v. Walker,*** 2018 IL App (1st) 160509 (12/27/18) Cook Co., 4th Div. Affirmed.

Defendant was convicted, after jury trial, of first degree murder, and found that defendant personally discharged firearm that caused victim's death. Defendant claimed that his defense counsel was ineffective in failing to inform him of mandatory 25-year firearm enhancement, leading him to reject a 27-year plea offer. Defendant cannot show reasonable probability that, but for his counsel's deficient advice, he would have accepted plea offer. Even without mandatory enhancement, defendant knew he was facing a possible 60-year sentence for murder, and the 53-year sentence he received was less than this maximum.

3d Dist. | ***People v. Horman,*** 2018 IL App (3d) 160423 (12/23/18) LaSalle Co. Affirmed and remanded.

Defendant was convicted, after jury trial, of first degree murder and concealment of a homicidal death. Defendant appealed, arguing that defense counsel was ineffective for failing to file a motion for reconsideration of pretrial order granting state a continuance and motion to dismiss on speedy trial grounds. Court failed to make any type of preliminary inquiry to determine whether defendant raised a "colorable claim" of ineffective assistance of counsel. Remanded with instructions to conduct a preliminary *Krankel* inquiry.

4th Dist. | ***People v. Roddis,*** 2018 IL App (4th) 170605 (11/21/18) Macon Co. Reversed and remanded with directions.

Defendant was convicted, after bench trial, of aggravated domestic battery. Defendant filed *pro se* a motion to reduce sentence that also alleged that trial counsel was ineffective. Court erred in addressing merits of defendant's ineffective assistance of counsel claims instead of determining whether new counsel should have been appointed, as court had previously allowed appointed counsel to withdraw because of a potential conflict. Court committed reversible error when it conducted *Krankel* hearing and concluded, on the merits, that there was no ineffective assistance of counsel. The sole issue to be decided at a *Krankel* hearing is whether to appoint counsel. Remanded with directions to appoint new counsel for defendant, so that new counsel may take whatever action the new counsel deems appropriate as to defendant's *pro se* claims of ineffective assistance of counsel.

Juvenile Sentencing

1st Dist. | ***People v. Price,*** 2018 IL App (1st) 161202 (12/24/18) Cook Co., 1st Div. Reversed and remanded with directions.

Amendment increasing the minimum age for automatic transfer to criminal court from 15 to 16 years of age is procedural, and applies retroactively to "ongoing proceedings" in pending cases. That amendment applies where defendant's criminal trial had concluded and guilty verdict was entered, but defendant had not yet been sentenced as an adult. Defense counsel was ineffective for failing to argue its retroactive application. Remanded, with directions to vacate sentence and to give state 10 days from date sentence is vacated to, if state so chooses, file a petition requesting a discretionary transfer hearing before the judge who tried the case.

3d Dist. | ***People v. Robinson,*** 2018 IL App (3d) 170287 (12/20/18) Will Co. Reversed and remanded.

Defendant, age 15 at time of offense, was convicted of first degree murder and was sentenced to 50 years. Defendant's *pro se* postconviction petition, arguing that sentence was a *de facto* life sentence and violated the Eighth Amendment, set forth an arguable basis in law and fact. Court's extremely brief reference to defendant's youth was arguably an insufficient consideration of youth and its attendant circumstances.

Liens | 5th Dist.

People v. Schneider, 2019 IL App (5th) 150106 (1/8/19) Madison Co. Affirmed.

Defendant was convicted, after jury trial, of attempted unlawful clouding of title, based on a lien defendant attempted to record, alleging that a bank owed him $400,000 for two properties he had lost in foreclosure proceedings more than 20 years earlier. Court's questioning of potential jurors did not substantially comply with requirements of *Zehr* case and Rule 431(b). None of the jurors was told that the defendant is not required to testify, and none was asked whether they both understood and accepted principle that defendant was presumed innocent. Evidence was not close enough that failure to comply with Rule 431(b) threatened to tip the scales of justice against defendant.

Murder

1st Dist. | ***People v. Boston,*** 2018 IL App (1st) 140369 (12/31/18) Cook Co., 4th Div. Affirmed.

Defendant was convicted, after jury trial, of first degree murder. Any error in prosecutor's statements during closing argument was not so serious that it affected fairness of trial. Jury sent note, during deliberations, stating, "Can self-defense be a mitigating factor? (Definition of mitigating factor is unclear on sheet)." Court responded, after concurring with counsel, that jurors heard the evidence and have the instructions of law and were to continue to deliberate. Jury instructions included IPIs on first degree murder, second degree murder, definition of a mitigating factor, and the use of force in self-defense. Court did not abuse its discretion by determining that any additional "clarification" could confuse or sway jurors. Record was corrected, based on court reporter's recollection and notes and judge's recollection, to reflect that one juror answered "yes" during jury polling, rendering moot defendant's claim that verdict was not unanimous.

1st Dist. | ***People v. Talbert,*** 2018 IL App (1st) 160157 (12/27/18) Cook Co., 2d Div. Affirmed.

Defendant was convicted, after jury trial, of first degree murder of one person, attempted first degree murder of another person, and aggravated discharge of a firearm in the direction of another person. Court properly allowed jury to hear evidence of bad acts committed by his cousin weeks prior to shooting. Evidence of prior arson threat and attempt were necessary to explain why cousin would order defendant to fire at the family. Cousin's motive was relevant, regardless of whether defendant was aware of it, as state presented specific evidence that defendant was doing cousin's bidding. Evidence had great probative value as it explained an otherwise inexplicable shooting. No ineffective assistance of counsel in defense counsel's failure to present witness testimony he promised in opening statement, as witnesses may have substantially changed their account of events without warning.

1st Dist. | ***People v. Castillo,*** 2018 IL App (1st) 153147 (12/18/18) Cook Co., 2d Div. Affirmed.

After a separate but simultaneous bench trial, defendant, age 19 at time of offense, was convicted of first degree murder from his and a codefendant's brutal beating of a man who sustained severe brain injuries, lived in a semicomatose state for 13 years, and then died. Nature of injuries that led to death confirms that defendant's actions were knowing, and evidence shows his knowing conduct was not so improbable, unsatisfactory, or inconclusive as to leave a reasonable doubt as to his guilt. Evidence was sufficient to prove him guilty of first degree murder.

1st Dist. | ***People v. Herring,*** 2018 IL App (1st) 152067 (12/11/18) Cook Co., 2d Div. Affirmed.

Defendant, age 19 at time of offense, was convicted of first degree murder of two men: owner of car that defendant had damaged and an evidence technician. State did not violate *corpus delicti* rule. Beyond defendant's statement, his guilt was corroborated by phone records, his fingerprint on item taken from the scene, the presence of his cell phone near scene, and witness testimony that defendant had told her he wanted to take speakers from car. Sufficient evidence for rational trier of fact to find that defendant committed the crime. Victim's statements to friends and family that his car had been burglarized and that he was going to wait for police and for burglar to return were properly admitted under "state-of-mind" exception to hearsay rule. The tape of 911 call by victim's mother to police was properly admitted under excited utterance or spontaneous declaration exception to hearsay rule. State disclosed entire video of interrogation, and was not required to preview trial strategy by disclosing that it would play only 15 minutes of the 27-hour-long video. Mandatory life sentence did not violate Eighth Amendment.

3d Dist. | ***People v. Landerman,*** 2018 IL App (3d) 150684 (12/3/18) Will Co. Affirmed.

Defendant, age 19 at time of offense, was convicted, after jury trial, of two counts of first degree murder and sentenced to natural life imprisonment. State presented ample evidence to prove defendant guilty of first degree murder, as a principal as to death of one victim and under theory of accountability as to the death of the other victim. Presentence investigation report discussed defendant's history of mental illness and susceptibility to peer pressure, but there was no sworn testimony or factual findings as to these matters. Defendant's argument that his counsel was ineffective for failing to raise an as-applied constitutional challenge to his sentence is premature, and better suited to postconviction proceedings.

Possession of a Controlled Substance Near a School | 3d Dist.

People v. Larke, 2018 IL App (3d) 160253 (12/14/18) LaSalle Co. Affirmed.

Defendant was convicted, after jury trial, of unlawful possession of a controlled substance with intent to deliver, and also alleged defendant was within 1,000 feet of a school at the time of the offense. Court did not err in referring jury back to its instructions, and in refusing to answer directly jury's question during deliberations: "If we have a hung jury, will the defendant be found not guilty on all charges?" Disposition after a verdict involves matters the jurors are not called upon to deliberate. Court did not err in allowing state to introduce evidence of defendant's prior conviction for possession of cannabis with intent to deliver as other-crimes evidence of defendant's intent to deliver the cocaine.The other-crimes evidence was reliable because it was a conviction. The fact that a different drug was involved in the prior offense did not make the prior offense and the current offense dissimilar.

Possession of Weapons

1st Dist. | ***People v. Lawrence,*** 2018 IL App (1st) 161267 (12/27/18) Cook Co., 4th Div. Affirmed.

Defendant was convicted, after jury trial, of unlawful possession of a weapon by a felon. Officers stopped vehicle in which defendant was a passenger, for failing to stop at a red light before making a right turn. Officer observed defendant "moving around" with a handgun sticking out of front pocket of his sweatshirt. Officer took possession of handgun after defendant exited vehicle. Officer had reasonable suspicion that defendant was armed in seizing gun, as he viewed defendant in possession of gun. Court did not coerce a guilty verdict by instructing juror to keep deliberating after jury sent out a note "nine guilty, three not guilty. What next?" No error in court answering jury's note asking if the transcripts were available by saying that the transcripts were unavailable "today," as defense counsel specifically asked for this response to be given. No ineffective assistance of counsel in this request, as it was a strategic decision.

1st Dist. | ***People v. McLaurin,*** 2018 IL App (1st) 170258 (12/22/18) Cook Co., 1st Div. Reversed.

Defendant was convicted, after bench trial, of being an armed habitual criminal. State failed to prove defendant guilty beyond a reasonable doubt because it failed to present sufficient evidence that he possessed a firearm as defined by Criminal Code. Conviction was based solely on testimony of witness that from 50 feet away she observed defendant walking in the street holding what appeared to be a gun. The only detail that witness could provide about the gun was its color. That testimony, standing alone, was not sufficient to sustain conviction.

5th Dist. | ***People v. Garner,*** 2018 IL App (5th) 150236 (11/19/18) Jackson Co. Vacated and remanded with directions.

Defendant was convicted, after jury trial, of unlawful possession of a weapon by a felon. Court erred in making arbitrary blanket evidentiary ruling denying defendant the right to recross any witness, because it allowed state to present evidence of new matters, on redirect, that defendant was unable to confront. Court's ruling affected the entire proceeding and was clearly prejudicial to defendant's case.

Postconviction Petitions

1st Dist. | ***People v. Patterson,*** 2018 IL App (1st) 160610 (12/14/18) Cook Co., 5th Div. Affirmed.

Court properly dismissed defendant's *pro se* petition at first stage of postconviction proceedings because his vagueness challenge to the armed habitual criminal (AHC) statute has no arguable basis in the law. Defendant's guilty plea did not serve as waiver of his claim on appeal, and thus did not bar defendant from challenging on direct appeal the constitutionality of the statute that served as basis for his conviction. Plain language of AHC statute clearly defines the unlawful conduct, which does not contain any limiting language as to sequence or separate entry of the predicate convictions. No arbitrary enforcement occurred, as defendant was convicted of two separate offenses in two separate cases stemming from his actions in two separate incidents that occurred more than one month apart.

3d Dist. | ***People v. Lopez,*** 2019 IL App (3d) 170798 (1/4/19) Rock Island Co. Affirmed.

Defendant, age 16 at time of offense, was convicted of first degree murder after two persons were hit on the head with a club: One survived, but one died due to multiple brain injuries. Defendant's sentence of 50 years, with day-for-day sentencing credit, is not a *de facto* life sentence, as he is scheduled to be paroled at age 41. Case does not fall within the category of cases considered by U.S. Supreme Court decision in *Miller* and its progeny, that life sentences for juvenile defendants violate the Eighth Amendment. Mitigating evidence was presented, and there was no indication that court did not consider it. Court did not err in denying, at third stage, defendant's successive postconviction petition which claimed that sentencing court failed to consider his youth in determining sentence.

4th Dist. | ***People v. Coe,*** 2018 IL App (4th) 170359 (12/25/18) McLean Co. Reversed and remanded.

Defendant filed postconviction petition and, while awaiting evidentiary hearing, he completed his sentence. Court erred in dismissing petition as moot. Despite defendant's release from custody, he still has a personal stake in outcome of postconviction proceeding sufficient to prevent his case from being moot. Defendant had standing under section 122-1(a) of Post-Conviction Hearing Act because he was in prison when he filed his petition. Any date subsequent to filing of petition is irrelevant to his standing.

Probable Cause | 2d Dist.

People v. Jaimes, 2019 IL App (2d) 160426 (1/11/19) DuPage Co. Affirmed.

Defendant was arrested inside gas station for unlawful possession of cocaine with intent to deliver after police learned of specific agreement between informant and defendant for delivery of five ounces of cocaine at a specific location. When defendant arrived at the prearranged location, there was probable cause to arrest him. Vehicle was close by and cocaine was in plain view in vehicle. Police were aware of facts sufficient to lead a reasonably cautious person to believe that defendant had committed a crime.

Reckless Homicide | 1st Dist.

People v. Whitlock, 2018 IL App (1st) 152978 (12/28/18) Cook Co., 6th Div. Affirmed.

Defendant was charged with numerous offenses, including felony murder, after the car he was driving crashed into another vehicle, killing its occupant. Later, state amended felony murder charge to knowing murder and added a count of reckless homicide. Defendant was convicted, after bench trial, of reckless homicide, and was found not guilty on all other charges. Defendant's speedy trial rights were not violated by addition of knowing murder and reckless homicide charge. The later indictment gave defendant notice that state would proceed under knowing theory of murder instead of felony murder theory. The reckless homicide count was not "new and additional." Evidence at trial was sufficient for finder of fact to conclude defendant knew he was fleeing from the Chicago police.

Relief from Judgment | 3d Dist.

People v. Stewart, 2018 IL App (3d) 160408 (11/9/18) Peoria Co. Vacated and remanded with directions.

(Modified upon denial of rehearing.) Court erred in granting state's motion to dismiss defendant's section 2-1401 petition. As court recharacterized defendant's *pro se* pleading as a successive postconviction petition, court erred in failing to admonish defendant that it was doing so in failing to admonish defendant that the petition would be subject to the strictures of the Post-Conviction Hearing Act and erred in failing to give defendant an opportunity to withdraw or amend his pleading.

Sentencing | 1st Dist.

People v. Woods, 2018 IL App (1st) 153323 (12/24/18) Cook Co., 1st Div. Vacated and remanded with directions.

Defendant was convicted, after bench trial, of two counts of armed robbery and sentenced to concurrent terms of 34 years. Court plainly erred by insisting that defendant cooperate with the Presentence Investigation (PSI) and then using this information against him, as this

deprived him of his Fifth-Amendment rights and deprived him of a fair sentencing hearing. Conviction for armed robbery with possession of a firearm must be vacated as it is predicated on same physical act as his conviction for armed robbery with personal discharge of a firearm, under the one-act, one-crime doctrine. Remanded for resentencing before a different judge with a new PSI.

People v. Vega, 2018 IL App (1st) 160619 (12/21/18) Cook Co., 6th Div. Affirmed.

Defendant, age 18 at time of offense, was convicted of two counts of attempted first degree murder. As defendant did not raise his constitutional claims in trial court, there was no evidentiary hearing and court made no findings of fact to determine whether Eighth-Amendment protection for juveniles apply to defendant's circumstances. As record is insufficient to address either as-applied challenge, claims under proportionate penalties clause and Eighth Amendment are premature and are more appropriately raised in postconviction petition. Court considered mitigating circumstances and seriousness of crime, and sentence is not abuse of discretion.

Sexual Assault

1st Dist. | ***People v. Charles,*** 2018 IL App (1st) 153625 (12/26/18) Cook Co., 2d Div. Affirmed.

Defendant, age 23 at time of offense, was convicted, after jury trial, of aggravated criminal sexual assault with a firearm and aggravated kidnapping with a firearm and sentenced to two consecutive 22-year prison terms. Evidence was sufficient to support jury's finding that defendant was armed with a firearm, as gun was visible and within his reach in back seat of car while he assaulted victim in front seat. Admission of defendant's prior conviction for aggravated unlawful use of a weapon for impeachment purposes was harmless error. No ineffective assistance of counsel, as evidence against defendant was overwhelming. Sentence was not excessive, and as defendant waived his right to remain silent, court could properly consider his failure to express remorse at sentencing.

3d Dist. | ***People v. Gonis,*** 2018 IL App (3d) 160166 (12/13/18) Grundy Co. Affirmed.

Defendant was convicted, after stipulated bench trial, of criminal sexual assault of his daughter, then age 16. Court did not err in admitting into evidence the results of DNA paternity tests showing that there was a 99.9999 percent probability that he was the father of his daughter's two children who were born when she was 17 and 19. Defendant failed to show that the use of a prior probability necessitated an assumption that he had sexual intercourse with his daughter.

4th Dist. | ***People v. Hayden,*** 2018 IL App (4th) 160035 (12/3/18) Champaign Co. Reversed and remanded.

(Court opinion corrected 12/4/18.) Defendant was convicted, after jury trial, of two counts of predatory criminal sexual assault of a child and sentenced him to natural-life imprisonment. Court committed reversible error by denying defendant's motion for severance of charges. One victim (friend of defendant's stepdaughter) is alleged to have been assaulted in 2015 and another victim (defendant's stepdaughter) in 2012. These were two separate and distinct incidents involving two separate and distinct persons and not parts of same comprehensive transaction. As charges were misjoined, much bolstering hearsay evidence was admitted that would have been inadmissible if charges were severed. These cumulative hearsay statements could have persuaded jury to overlook weaknesses in state's case, and were prejudicial to defendant.

4th Dist. | ***People v. Stevens,*** 2018 IL App (4th) 160138 (11/20/18) Ford Co. Reversed and remanded.

Defendant was convicted, after jury trial, of two counts of predatory criminal sexual assault of his daughter, then age 11. Court never asked whether jurors understood the state's burden to prove defendant guilty beyond a reasonable doubt or the fact that defendant was not required to present evidence on his own behalf. Thus, the court committed error. Statements by two witnesses were hearsay statements made by child victim. Court erred in failing to give IPI Criminal 4th No. 11.66. State erred when it said, in rebuttal, that the cunning nature of sexual predators is something "we" see on a daily basis, and when it asked jury in closing what kind of message it would send to victims if defendant was acquitted. Cumulative effect of errors, as case is closely balanced, requires new trial.

Statutory Summary Suspension | 3d Dist.

People v. Norris, 2018 IL App (3d) 170436 (12/31/18) Will Co. Affirmed.

Court properly denied defendant's petition to rescind statutory summary suspension (SSS). Defendant was placed under lawful arrest for DUI. Officer had reasonable suspicion to believe that defendant was driving while under the influence of alcohol. Appellate court defers to court's factual findings that defendant refused testing and that officer read required warning to him. Hearing commenced within the prescribed 30-day-time window, and no misconduct in state moving for a continuance. Exclusionary rule, in context of an alleged *Miranda* violation, is inapplicable in SSS hearings.

Weapons | 1st Dist.

People v. Kelly, 2018 IL App (1st) 162334 (12/12/18) Cook Co., 3rd Div. Affirmed.

Defendant was convicted, after bench trial, of possession of a firearm while in violation of Cannabis Control Act. Breadth of the Aggravated Unlawful Use of a Weapon (AUUW) provisions and their burden on the Second Amendment are moderate to minimal. State provided sufficient information to support conclusion that persons who simultaneously possess a firearm and cannabis are likely to misuse firearms, thus creating an issue of public concern. Legislature sought to prevent reckless discharge of firearms from persons under influence of cannabis or other specified illegal drugs in AUUW statutes, thus imposing burden on Second-Amendment right. State's justifications for doing so are sufficient to support modest burden on that right and AUUW statutes are not facially unconstitutional.

People v. McLaurin, 2018 IL App (1st) 170258 (12/11/18) Cook Co., 1st Div, Reversed.

Defendant was convicted, after bench trial, of being an armed habitual criminal and sentenced to seven years. State failed to prove defendant guilty beyond a reasonable doubt because it failed to present sufficient evidence that he possessed a firearm as defined by the Illinois Criminal Code. Witness's testimony that she observed defendant in possession of

an item that she believed was a firearm, standing alone, was not sufficient to sustain defendant's conviction. No evidence was presented that the item witness observed met the statutory definition of a firearm.

SEVENTH CIRCUIT COURT OF APPEALS: CIVIL

Aliens

Beltran-Aguilar v. Whitaker, No. 18-1799 (1/2/19) Petition for Review, Order of Bd. of Immigration Appeals Petition denied.

Immigrating judge did not err in denying alien's application for cancellation of removal to Mexico, where said denial was based on alien's Wisconsin battery conviction, which qualified as crime of domestic violence under 8 USC section 1229b(b)(1)(C). Court in *Yates*, 842 F.3d 1051, previously found that Wisconsin battery offense is crime of violence under 18 USC section 924(e), and court rejected defendant's claim that Wisconsin crime of battery is not crime of violence because it can be satisfied by causing illness or impairment of physical condition that would not require use of force, where defendant failed to show that Wisconsin would actually prosecute individuals on battery charges based on said acts.

Yafai v. Pompeo, No. 18-1205 (1/4/19) N.D. Ill., E. Div. Affirmed.

District court did not err in dismissing on consular nonreviewability grounds plaintiffs' action under Administrative Procedure Act and Declaratory Judgment Act, seeking review of consular officer's decision to reject alien's visa application. Basis for denial was officer's finding that alien had sought to smuggle her two children into U.S., rendering alien inadmissible under 8 USC section 1182(a)(6)(E), and record otherwise showed that doctrine of consular nonreviewability precluded review of officer's visa denial by district court, since officer's decision was facially legitimate and *bona fide*, where officer cited to valid statutory basis and factual predicate for said visa denial. Moreover, while alien attempted to invoke bad-faith exception to said doctrine by presenting evidence that alien could not have attempted to smuggle her children into U.S. because they were deceased, alien had failed to make affirmative showing of officer's bad faith, where record showed that officer simply did not believe alien's claims, which by itself, was insufficient to show that officer was dishonest or had illicit motive. (Dissent filed.)

Black Lung Benefits Act

Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs, No.18-2097 (12/21/18) Petition for Review, Order of Benefits Review Bd. Order enforced.

Record contained sufficient evidence to support ALJ's ultimate finding that claimant qualified for black lung disease benefits, where claimant established rebuttable presumption in favor of obtaining said benefits, since record showed that claimant, who suffers from breathing problems, spent at least 15 years working at coal mine and that he suffered from totally disabling respiratory or pulmonary impairment. Moreover, while employer submitted opinions from two physicians indicating that claimant's disability was related to other factors, ALJ could properly reject said opinions, where: 1) said physicians did not explain how they eliminated claimants' 30 years of coal mine dust exposure as potential cause of his pulmonary impairment; 2) said physicians did not explain how claimant did not have chronic obstructive pulmonary disease given claimant's years of treatment for said condition; and 3) opinion of third physician, who diagnosed claimant with clinical pneumoconiosis and ruled out heart disease as source of claimant's disability, was supported by record. Court rejected employer's contention that ALJ necessarily credited opinion that claimant's drop in oxygen levels was not pulmonary related, or that board erred in remanding ALJ's initial decision that claimant could not invoke 15-year rebuttable presumption.

Disposition of Unclaimed Property Act

Goldberg v. Frerichs, No. 18-2432 (1/2/19) N.D. Ill., E. Div. Vacated and remanded.

District court erred in granting Illinois Treasurer's motion for summary judgment in plaintiff's action seeking compensation for time defendant had taken plaintiff's unclaimed property under Illinois Disposition of Unclaimed Property Act, where: 1) District court found that owners of property taken into state's custody are entitled to be compensated for time value of money only if property was earning interest at moment state took it into custody; and 2) Plaintiff's property (i.e., check for $100) was not earning interest before state took custody of it. Court of appeals found that plaintiff would be entitled to income that property earned in state's hands regardless of whether it had been earning income when it was in owner's possession.

Employment Discrimination

Swyear v. Fare Foods Corp., No. 18-2108 (12/26/18) S.D. Ill. Affirmed.

District court did not err in granting employer's motion for summary judgment in plaintiff's Title VII claim alleging that defendant subjected her to sexual harassment and then terminated her on basis of her sex and in retaliation for making discrimination claim. Coworker's discussions regarding his romantic relationships, as well as other workers' use of sexual nicknames, though inappropriate, were not directed at plaintiff and were too infrequent to cause alteration of her work environment. Moreover, coworker's touching of plaintiff on work-related overnight stay at hotel was not threatening to plaintiff and was addressed by defendant once plaintiff reported said conduct to management. Also, plaintiff's attendance and other performance problems supported defendant's claim that plaintiff was terminated for reasons other than her sex or fact she had reported sexual harassment.

Terry v. Gary Community School Corp., No. 18-1270 (12/14/18) N.D. Ind., Hammond Div. Affirmed.

Magistrate judge did not err in granting school district's motion for summary judgment in principal's Title VII action alleging that defendant reassigned plaintiff to assistant principal position at different school and subsequently failed to promote her to principal position at different school on account of her gender. Plaintiff failed to present evidence to dispute defendant's claim that plaintiff was reassigned because her school was closed due to declining enrollment. Also, plaintiff failed to present evidence to show that defendant's explanation that male coworker was promoted to principal position because he had more relevant principal experience at said school was unworthy of belief. Fact that plaintiff had highest score given by interview committee for said promotion did not require different result, where successful candidate did not interview with committee and where plaintiff failed to present evidence to show

how defendant typically filled vacant principal positions. Also, record supported defendant's explanation that plaintiff was terminated because it was undergoing financial crisis and had need to reduce administrative staff so as to preclude plaintiff's retaliation claim. Moreover, historical difference in pay between plaintiff's and male coworker's principal positions, as well as defendant's salary freeze, precluded plaintiff from establishing any Equal Pay Act action based upon male coworker's higher salary.

Wrolstad v. CUNA Mutual Ins. Co., No. 17-1920 (12/18/18) W.D. Wisc. Affirmed.

District court did not err in granting employer's motion for summary judgment in action alleging that defendant discriminated against plaintiff on account of his age for failing to hire plaintiff into pension-participant-support specialist position after plaintiff's position with defendant had been eliminated, and for retaliating against plaintiff for pursuing appeal of initial denial of his age-discrimination claim. Plaintiff failed to present evidence to counter defendant's explanation that plaintiff was not hired for position because he lacked one-on-one customer-service experience that younger successful candidate had, and because plaintiff's salary goal was higher than defendant's salary range for said position while successful candidate's salary goal was within said range. Fact that interviewer noted that successful candidate had "potential for longevity" was not evidence of age discrimination, where said comment was tied to successful candidate's enthusiasm and persistence. Also, defendant's retaliation claim was untimely, where alleged retaliatory act, i.e., defendant's sending of letter to plaintiff indicating that it will file lawsuit seeking to enforce waiver provision of plaintiff's severance agreement if plaintiff persisted in his appeal of initial denial of his age discrimination claim, occurred more than 300 days prior to plaintiff's filing of his retaliation charge. Court rejected plaintiff's claim that said claim was timely where it was filed within 300 days of defendant's filing of lawsuit seeking to enforce said waiver clause. (Partial dissent filed.)

Lee v. Northeast Illinois Regional Commuter Railroad Corp., No. 18-1930 (1/8/19) N.D. Ill., E. Div. Affirmed.

District court did not err in dismissing with prejudice plaintiffs' (amended) second amended complaint, alleging against defendants (employer and 11 individual defendants) racial discrimination, hostile work environment, disparate treatment, retaliation, negligent and intentional infliction of emotional distress, discrimination under 14th Amendment, discrimination in violation of Title VII, violation of Americans with Disabilities Act, and breach of employment contract. Plaintiffs were given four opportunities to cure serious pleading defects such as failure to provide defendants notice as to what claims were being asserted against which defendants and yet failed to file adequate complaint. Moreover, plaintiffs failed to address defendants' claim that breach-of-contract claims were preempted by Railway Labor Act. As such, district court was not required to permit plaintiffs opportunity to file third amended complaint, where record showed that plaintiffs otherwise failed to provide any argument that each of their claims in prior complaints satisfied applicable pleading standards.

Income Tax

Sugarloaf Fund LLC v. Commissioner of Internal Revenue, No. 18-1046 (12/21/18) U.S. Tax Court Affirmed.

Record contained sufficient evidence to support tax court judgment, finding that partnership was sham that was formed solely to evade taxes, which resulted in adjustments to plaintiff's income as well as imposition of certain penalties. Plaintiff's scheme was essentially same scheme found to be sham in *Superior Trading, 728 F.3d 676*, where partnership: 1) acquired severely distressed or uncollectible accounts receivables from Brazilian retailers by selling interests in partnership; 2) retailers then redeemed their interests in partnership; 3) partnership then transferred receivables to several newly formed companies; 4) U.S. taxpayers then acquired newly formed companies, received receivables, and then wrote off receivables as bad-debt expenses; and 5) partnership asserted cost-of-goods sold expense. As such, tax court could properly find that partnership was sham since only aim and effect of partnership was to "beat" taxes. Moreover, individual who created partnership disregarded partnership formalities by awarding two 99-percent interests in partnership to Brazilian retailers, and Brazilian retailers failed to identify accounts receivable being transferred to partnership. Also, step-transaction doctrine allowed commissioner to treat Brazilian retailers' contributions and redemptions of partnership as sale of assets, which would reduce partnership's basis in receivables to what it had actually paid for them.

Injunction

BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc., No. 18-1054 (1/9/19) N.D. Ill., E. Div. Vacated and remanded.

In action alleging that defendant violated terms of contract requiring defendant to sell its business to plaintiff once plaintiff exercised option to purchase said business as part of same contract requiring plaintiff to purchase loans that defendant made to third parties and to pay defendant to service said loans, district court erred in granting defendant's request for entry of preliminary injunction to require plaintiff to continue to purchase defendant's loans and to pay defendant for servicing said loans until district court resolved sale of business issue. Said injunction improperly failed to limit duration of injunction to June 1, 2018, drop dead date contained in contract, after which neither party would have any obligation to perform under terms of contract, and district court otherwise failed to enter instant injunction as separate document as required under Rule 65(d)(1)(C). Also, district court failed to require that defendant post bond to cover any losses plaintiff might sustain should there be future finding that it was wrongfully enjoined. As such, remand was required for determination as to whether plaintiff sustained any damages incurred after June 1, 2018, drop dead date by reason of instant injunction and to determine whether either side owes damages to other for any breach of contract calling for sale of defendant's business.

Insurance

The Medical Protective Co. of Ft. Wayne, Ind. v. American International Specialty Lines Ins. Co., No. 18-1737 (12/18/18) N.D. Ind., Ft. Wayne Div. Affirmed and reversed in part and remanded.

District court erred in granting insurance company's motion for summary judgment in malpractice insurance company's action alleging that defendant breached insurance policy issued to plaintiff, where defendant had refused to indemnify plaintiff for excess payment it made in underlying medical malpractice action that resulted in judgment that exceeded limits of policy issued by plaintiff to physician under circumstances, where: 1) plaintiff had rejected two offers to settle malpractice action with proceeds of policy it issued to physician; 2)

malpractice action went to trial during which jury awarded damages in excess of policy limits, and 3) plaintiff paid excess judgment to plaintiffs in underlying malpractice action under physician's claim that plaintiff had wrongfully refused to settle malpractice action. Defendant's policy to plaintiff had exclusion for any claim arising out of plaintiff's wrongful act occurring prior to inception of policy if plaintiff knew or could have reasonable foreseen that such wrongful act could lead to lawsuit, and district court found that said exclusion applied, since as of date that plaintiff obtained policy, plaintiff knew or should have foreseen that its failure to settle malpractice action within policy limits could lead to lawsuit seeking recovery for excess judgment in malpractice action. Court of appeals, though, found that there was triable issue as to whether plaintiff had committed any wrongful act in failing to settle malpractice action, where, at time plaintiff had rejected settlement offers, more discovery was contemplated, and where plaintiff had reason to believe that any jury verdict would not lead to extra-contractual liability, since any judgment would have been offset by $2.3 million settlement that plaintiffs in malpractice action had received from other defendants.

Intervention

State of Illinois v. City of Chicago, No. 18-2805 (1/2/19) N.D. Ill., E. Div. Affirmed.

District court did not err in denying motion by police union to intervene in action alleging that Chicago Police Department's use-of-force policies and practices violated federal constitution and Illinois law, where parties engaged in efforts to craft consent decree. Motion was untimely, since union waited nine months after its knowledge of lawsuit to file motion, where at time lawsuit was filed, union publicly opposed any consent decree that parties to lawsuit might enter into, and where union expressed at that time that consent decree could threaten union's collective bargaining agreement (CBA) rights. Court rejected union's contention that timeliness inquiry should run from time it determined that state was not protecting its interests, despite state's assurances that it would do so, since union knew at outset of lawsuit that its interests were adverse to parties and that consent decree would address issues under purview of CBA. Also, union did not establish prejudice arising out of instant denial, where carve-out language in consent decree indicated that decree was not meant to usurp rights under CBA, and union otherwise had remedies under CBA to address any claim that consent decree violated CBA. Moreover, record showed that delay in requesting intervention would prejudice parties who expended time and effort in settling case.

Negligence

Hutchison v. Fitzgerald Equipment Co., Inc., No. 18-2203 (12/14/18) N.D. Ill., E. Div. Affirmed.

District court did not err in granting defendant's motion for summary judgment in plaintiff's negligence claim alleging that defendant, which had preventative maintenance contract with plaintiff's employer on forklift used in plant, was negligent in failing to warn plaintiff's employer to install backup alarm on said forklift, where said forklift that was operated by plaintiff's coworker backed over plaintiff's foot. Record showed that forklift was not shipped to original owner with installed backup alarm, and that no regulations required forklift to have backup alarm at time of accident. Moreover, plaintiff could not establish that defendant owed any duty to warn about backup alarm, where record showed that plaintiff's employer and defendant were equally aware of availability and use of backup alarm. Also, court rejected plaintiff's contention that defendant voluntarily undertook responsibility to advise plaintiff's employer to install backup alarm based on fact that other forklift at plant had such alarm, since: 1) plaintiff failed to establish that individuals at defendant were aware of any forklift at plant having such alarm; and 2) defendant's undertaking at plant was limited to scope of its maintenance contract on said forklift. Too, plaintiff could not prevail on any "in-concert" liability claim against defendant, where plaintiff only alleged that defendant had failed to act, rather than provided substantial assistance in any tortious conduct.

Qualified Immunity

Dockery v. Blackburn, No. 17-1881 (12/19/18) N.D. Ill., E. Div. Reversed and remanded.

District court erred in denying police officers' motion for summary judgment asserting that they were entitled to qualified immunity in plaintiff's Section 1983 action alleging that defendants used excessive force by using Taser four times on him while he was being fingerprinted after his arrest on trespass and criminal damage to property charges. Court of appeals had jurisdiction to consider defendants' interlocutory appeal, where: 1) entire incident was captured on videotape; and 2) issue on appeal was purely legal question as to whether use of Taser was objectively reasonable under circumstances of case. Moreover, court of appeals found that first use of Taser was objectively reasonable, where video showed that plaintiff was uncooperative when defendants attempted to handcuff him at police station during their attempt to fingerprint plaintiff, and plaintiff twice escaped their grasp. Also, remaining three Taser usages were objectively reasonable, where video showed that within two seconds of first Taser use, plaintiff flipped over, maintained his combative demeanor, kicked his foot at one defendant, sat up, and pulled Taser prong out of his arm and ignored defendants' instructions to lie down.

Quiet Title Act

Ronkowski v. U.S., No. 18-2269 (12/28/18) W.D. Wisc. Affirmed.

District court did not err in granting U.S. Forest Service's motion for summary judgment in landowner's action alleging that they were entitled to easement over defendant's land for vehicular access to their property after plaintiffs had used and maintained said proposed easement since 1972. Fact that plaintiffs can access their property by alternative route, even if said route was unpaved and contained deep ruts, precludes plaintiffs from establishing easement by necessity, since they cannot show that they cannot otherwise access public road from their property via alternative route. Moreover, plaintiffs also could not show for purposes of establishing easement by implication that they would not be able to enjoy their property without proposed easement.

Religious Land Use and Institutionalized Persons Act

Neeley-Bey v. Conley, No. 17-2980 (1/2/19) S.D. Ind., Indianapolis Div. Affirmed and remanded in part.

District court did not err in granting prison officials' motion for summary judgment in prisoner's action seeking damages on allegation that defendants violated his rights under First Amendment free exercise and establishment clauses, where: 1) defendants restricted plaintiff from

participating in certain aspects of worship services of Moorish Science Temple of America (MSTA) after MSTA minister who led said services at prison advised prison chaplain that defendant's status as "sovereign citizen" precluded him from participating in certain aspects of MSTA worship services, although he could be present as "guest;" 2) prison chaplain directed plaintiff to abide by MSTA minister's conditions for plaintiff's presence at MSTA worship services; and 3) plaintiff was punished by defendants for not abiding by chaplain's directive. Defendants were entitled to qualified immunity, since: 1) there was no clearly established law that prison officials cannot deny prisoner's exercise of First Amendment rights, where religious entity itself established limitations for plaintiff to follow; and 2) any forced inclusion of unwanted person in group infringes on group's freedom of expressive association if presence of said person affects in significant way group's ability to advocate public or private viewpoint. However, district court erred in failing to consider plaintiff's requests for injunctive relief under free exercise clause and Religious Land Use and Institutionalized Persons Act to determine whether there was sufficient penological reasons for instant restrictions, but that district court should consider on remand whether claim for injunctive relief is moot due to plaintiff's relocation to different prison.

Removal Jurisdiction

Betzner v. The Boeing Co., No. 18-2582 (12/14/18) S.D. Ill. Reversed and remanded.

District court erred in *sua sponte* remanding to state court plaintiff's personal injury action alleging that plaintiff was exposed to asbestos fibers emanating from certain products manufactured by defendant, where defendant had removed said action to federal court under federal officer removal provisions under 28 USC section 1442(a). Defendant alleged sufficient facts to support federal officer removal, since defendant asserted that it was involved in assembly of heavy bomber aircrafts that were built under defendant's contract with U.S. government under circumstances where government controlled design and development of said aircraft and required strict adherence to its detailed specifications. Moreover, defendant alleged sufficient facts in its notice of removal to support its claim that it was entitled to government contractor defense. Court further found that: 1) district court erred in stating that defendant was required to submit evidence to support its claims set forth in its notice of removal; and 2) defendant sufficiently alleged that it was "acting under" U.S, its agencies, or its officers by stating that it was assisting or carrying out duties of U.S. Air Force.

Section 1983 Action

Horshaw v. Casper, No. 16-3789 (12/14/18) S.D. Ill. Affirmed and vacated in part and remanded.

District court erred in granting motion for summary judgment filed by two prison guards and former warden in Section 1983 action by prisoner, alleging that said defendants knew that he faced risk of attack by other prisoners and did nothing to prevent subsequent attack on plaintiff by said prisoners. Record contained dispute as to whether defendants had received letter from plaintiff that described said threat of attack, which precluded entry of summary judgment, and defendant warden conceded that he would have placed plaintiff in protective custody had he received said note. Moreover, neither defendant contended that threat articulated by plaintiff was false or that plaintiff was otherwise not credible in describing said threat.

Lapre v. City of Chicago, No. 17-3024 (12/17/18) N.D. Ill., E. Div. Affirmed.

District court did not err in granting city's motion for summary judgment in plaintiff's Section 1983 action alleging that defendant's policies and practices concerning supervision of detainees in its lockup caused plaintiff's death from suicide in his holding cell. Record showed that defendant's personnel conducted screening questionnaire when plaintiff first arrived at jail, that plaintiff did not exhibit any behavior indicating suicide risk at that time, and that someone at jail visually inspected plaintiff in his cell every 15 minutes either in person or on video monitor until plaintiff was observed hanging himself in his cell. While plaintiff's estate asserted that five of defendant's policies demonstrated that it was deliberately indifferent toward risks of suicide and were moving forces behind plaintiff's death, plaintiff's estate failed to support said claim with reliable statistics indicating that suicide rates at jail increased because of said policies or that suicide rate at defendant's jail was disproportionate to suicide rate of free population. Also, plaintiff failed to show that defendant's policies/practices of using horizontal bars in plaintiff's cell, failure to provide suicide kits to lockup personnel, failure to reassess suicide risks when detainees return from court appearances, failure to have personnel personally inspect detainees, or failure to properly train personnel on identifying persons with suicide risks either had causative effect on plaintiff's suicide or would affect frequency of suicides taking place at jail.

Mitchell v. City of Elgin, No. 16-1907 (1/2/19) N.D. Ill., E. Div. Affirmed and reversed in part and remanded

District court erred in dismissing plaintiff's Section 1983 action alleging that police officials violated plaintiff's Fourth Amendment's rights by arresting her without probable cause on charge of electronic communication harassment, where district court based dismissal on caselaw foreclosing claims for unlawful detention after initiation of formal legal process. While U.S. Supreme Court subsequently found in *Manual, 137 S.Ct. 911* that plaintiff had potential Fourth Amendment cause of action, remand was required to determine timeliness of plaintiff's Fourth Amendment claim, where: 1) applicable two-year limitation period starts when plaintiff's detention ended; 2) plaintiff was released on bond shortly after her arrest, which was more than two years prior to filing instant lawsuit; and 3) record failed to identify conditions of her bond so as to know one way or another as to whether her conditions of her bond imposed significant restrictions on her liberty to demonstrate that she was still "in custody" until she was exonerated at trial on her charge.

Savory v. Cannon, No. 17-3543 (1/7/19) N.D. Ill., E. Div. Reversed and remanded.

District court erred in dismissing as untimely former prisoner's Section 1983 action that was filed on Jan. 11, 2017, alleging that: 1) police officials coerced plaintiff into giving false confession to double murder and maliciously prosecuting him on double murder charges that resulted in conviction and sentence of 40 to 80 years; 2) governor of Illinois commuted plaintiff's sentence in December of 2011; and 3) different governor of Illinois on Jan. 12, 2015, issued pardon that "acquitted and discharged" plaintiff's convictions. Instant Section 1983 claim was timely, since: 1) relevant limitations period was two years; 2) under *Heck, 512 U.S. 477*, plaintiff could not bring his Section 1983 claim until he had obtained favorable termination of challenge to his conviction; and 3) Section 1983 action did not accrue until plaintiff had received pardon on Jan. 12, 2015, which would make instant claim timely.

Court rejected defendants' contention that limitations period began in 2011 when governor commuted plaintiff's sentence, since plaintiff's murder convictions were still intact at that time. It also found that *Heck's* "favorable-termination" requirement still applied even in circumstances where plaintiff could not obtain *habeas* relief because his sentence had already been served.

Sinn v. Lemmon, No. 18-1724 (12/14/18) S.D. Ind., Indianapolis Div. Affirmed and reversed in part and remanded.

District court did not err in granting prison officials' motion for summary judgment in prisoner's Section 1983 action alleging that defendants were deliberately indifferent to his physical safety by failing to protect him from known gang violence at prison. Plaintiff failed to contest qualified-immunity claim made by two defendants. Moreover, district court appropriately entered summary judgment in favor of two other defendants, where record showed that: 1) said defendants, who were supervisors, were unaware of plaintiff's history of being assaulted by gang member prisoners; and 2) plaintiff could not otherwise establish claim that supervisors were liable based on allegations that conditions at prison were generally unsafe, since plaintiff could only present evidence of isolated incidents of violence. However, district court erred in granting summary judgment motion filed by one defendant, where record showed that said defendant had knowledge of gang activity at prison, as well as knowledge of initial attack of plaintiff by gang members and plaintiff's articulated fear that he would be attacked in retaliation by same gang members, who shortly thereafter effectuated said attack. Court rejected defendant's claim that plaintiff's complaints lacked sufficient details regarding threats posed by specific prisoner(s).

Securities

Orgone Capital III, LLC v. Daubenspeck, No. 18-1815 (1/7/19) N.D. Ill., E. Div. Affirmed.

District court did not err in granting defendants' motion to dismiss as untimely plaintiffs' common-law action alleging fraud, fraudulent concealment of material information, breach of fiduciary duty, and negligent misinformation in connection with plaintiffs' purchase of securities sold by defendants. Relevant limitations period was three years under Illinois statute that covered securities-based claims, and plaintiffs alleged in original complaint that they learned of alleged wrongdoings through "PrivCo Report" and congressional hearings that took place by April of 2013, while plaintiffs waited until October of 2016 to file complaint. Moreover, although plaintiffs filed amended complaint that redacted all reference to said report and congressional hearings, district court could still find that complaint was untimely, where plaintiff failed to assert facts in amended complaint to contradict fact that plaintiffs were aware of facts in April of 2013 that in exercise of reasonable diligence would have led them to actual knowledge of alleged wrongdoings. Court also rejected plaintiffs' contention that relevant limitations period was five years.

Social Security

McHenry v. Berryhill, No. 18-1691 (12/26/18) S.D. Ind., Indianapolis Div. Vacated and remanded.

ALJ erred in denying plaintiff's application for Social Security disability benefits based upon plaintiff's degenerative disc disease and her fibromyalgia, after concluding that plaintiff lacked sufficient evidence that her conditions were disabling and that plaintiff was not credible about her limitations. Although ALJ could properly determine that plaintiff was not credible with respect to certain aspects of her claim, ALJ erred in denying said application based in part on his review of plaintiff's April 2014 MRI, where: 1) said MRI demonstrated that plaintiff had multiple impinged nerves in addition to spinal cord compression; 2) said MRI raised question as to when her arguably disabling condition began; and 3) ALJ could not interpret said MRI on his own without assistance of medical expert.

SEVENTH CIRCUIT COURT OF APPEALS: CRIMINAL

Confession

U.S. v. Higgins-Vogt, No. 18-1528 (12/21/18) C.D. Ill. Affirmed.

In prosecution of Hobbs Act robbery and firearms charges, district court did not err in denying defendant's motion to suppress two inculpatory statements in which he admitted to killing driver of getaway car involved in said robbery, even though defendant argued that both statements were involuntary because they arose out of discussions defendant had with "mental health counselor" who was employed at county jail, where said individual was not licensed mental health professional, and where said individual pledged confidentiality to defendant, but then urged defendant to talk to police after hearing his confession to said killing and elicited inculpatory statements from defendant during both of defendant's statements given to authorities. While counselor functioned as agent of law enforcement, which would typically cut against finding that defendant's statements were voluntary, record showed that defendant's statements were voluntary, where: 1) defendant reached out to counselor on his own initiative and confessed to killing driver; 2) counselor never reached out to police about defendant's confession prior to defendant making statements to authorities; 3) defendant's statements to authorities came only on defendant's initiative; and 4) defendant's confession to authorities about killing came shortly after defendant spoke to girlfriend about killing. Court rejected defendant's claim that counselor was required to give defendant *Miranda* warnings during his initial conversations with counselor.

Evidence

U.S. v. Proano, No. 17-3466 (1/7/19) N.D. Ill., E. Div. Affirmed.

In prosecution on two counts of willful deprivation of constitutional rights arising out of police officer's firing 16 shots at moving car filled with teenagers, district court did not err in denying defendant's motion to dismiss indictment based on claim that prosecution was tainted when FBI agents met with internal police investigator who discussed incident with defendant, even though defendant claimed that statements he gave to internal investigator could not be used against him in any criminal prosecution under *Garrity, 385 U.S. 493*, because he was forced under pain of losing his job to participate in internal investigation. Defendant failed to show that any protected statements were actually revealed to prosecution, and government established alternative source for information contained in statements in form of dashcam video and other reports that provided independent bases for prosecution. Also, district court could properly admit evidence of defendant's training, as

well as police department's policies, since said evidence was relevant on defendant's mindset at time of incident. Too, district court did not err in giving jury instruction that defendant acted willfully if he intended to deprive two victims of shooting of their right to be free from unreasonable force, and that defendant acted intentionally if he used force knowing that said force was more than what reasonable officer would have used under said circumstances.

Ineffective Assistance of Counsel

Lee v. Kink, No. 18-1005 (12/21/18) N.D. Ill., E. Div. Vacated and remanded.

District court erred in denying defendant's *habeas* petition that challenged his kidnapping and rape convictions on ground that his trial counsel was ineffective for failing to interview five individuals, who, according to defendant, could have corroborated his claim that he and alleged victim had engaged in consensual sex. State court that examined said issue failed to conduct evidentiary hearing to determine what efforts counsel made to interview said individuals, and what they would have said at trial beyond what was contained in their affidavits for purposes of determining whether trial counsel was ineffective. As such, remand was required because district court failed to conduct such hearing.

Restitution

U.S. v. Johnson, No. 18-1313 (12/21/18) S.D. Ill. Affirmed.

District court did not err in imposing $79,325 restitution order as part of defendant's sentence on charge of preparing false tax returns for her clients, where said amount reflected what had not been collected at time of presentencing report from defendant's clients who had submitted said returns. While defendant argued that said figure was improper because prosecutor should had told sentencing judge how much more it might collect from defendant's clients, and that said amounts should have been revealed as exculpatory material under *Brady, 373 U.S. 83*, no *Brady* violation occurred, since defendant merely had to ask prosecutor how much more had been collected since date of presentencing report, but failed to do so. Moreover, defendant will receive credit against restitution award for whatever government collects from clients.

Right to Counsel

Schmidt v. Foster, No. 17-1727 (12/20/18) E.D. Wisc. Affirmed.

District court did not err in denying defendant's *habeas* petition challenging his first-degree murder conviction, under circumstances where trial court rejected defendant's provocation defense, after conducting *ex parte* examination of defendant under circumstances where defense counsel was directed to remain silent. While court of appeals observed that trial courts should not normally hold *ex parte* hearings in which defense counsel are silenced, no U.S. Supreme Court case has addressed whether trial court's direction to counsel to remain silent under instant circumstances constituted denial of his right to counsel. As such, court of appeals could not say that procedure was unreasonable application of supreme court precedent, since 1) supreme court caselaw required showing that there was complete denial of counsel during critical stage of prosecution; and 2) defendant failed to make such showing, since defense counsel filed notice of provocation defense, argued for its application during court hearings, briefed law, and submitted offer of proof that was used during *ex parte* hearing. Also, defendant was able to consult with his counsel immediately prior to *ex parte* examination of defendant and during recess in said examination. (Dissent filed.)

Sentencing

U.S. v. Bustos, No. 18-1388 (1/10/19) N.D. Ill., E. Div. Affirmed.

District court did not err in sentencing defendant to 100-month term of incarceration on drug conspiracy charge, even though defendant argued that said sentence was substantively unreasonable, and that 60-month term of incarceration was more appropriate, where: 1) his criminal history calculation overrepresented his actual criminal history; 2) his codefendants played larger role in charged offense; and 3) he was of advanced age, was deportable, had poor health, and had low likelihood of recidivism. However, sentence was at low end of applicable guideline range, record showed that defendant played vital role in setting up drug purchase, and defendant's extensive criminal history demonstrated need for significant sentence to promote respect for law and to provide deterrence to others. Fact that defendant was 62 years old at time of charged offense did not constitute persuasive mitigation evidence, where district court could properly note that defendant made choice to commit said offense at said age, after having committed two prior drug offenses. Also, district court could properly note that defendant's status as deportable alien could prove beneficial to him, where he would not have to face any conditions of supervised release if he was deported following his incarceration.

U.S. v. Hagen, No. 18-1579 (1/2/19) S.D. Ill. Reversed and remanded.

District court committed plain error in including defendant's prior convictions for allowing child truancy in calculation of defendant's criminal history when sentencing defendant on drug conspiracy charge. Under section 4A1.2(c)(1) of USSG, certain prior convictions cannot be counted in defendant's criminal history, such as nonsupport of child or spouse, and defendant's prior convictions for allowing child truancy were sufficiently similar under guideline's five-part test to nonsupport of child or spouse offense, since both offenses pertained to guardian's failure to fulfill his or her responsibilities to minor in his or her care. As such, defendant was entitled to new sentencing hearing for recalculation of her criminal history.

U.S. v. Kuczora, No. 17-2725 (12/14/18) E.D. Wisc. Affirmed.

District court did not err in sentencing defendant to 70-month term of incarceration on wire fraud charge, even though said sentence was higher than applicable 31-to-41-month guideline range. Instant sentence was with district court's broad discretion in imposing defendant's sentence, where: 1) defendant took advantage of 68 victims; 2) six victims provided testimony regarding tragic consequences of defendant taking their money based upon false promise of obtaining financing on their behalf; and 3) defendant showed no remorse for his actions and devised second fraudulent scheme after his indictment on instant offense. Court rejected defendant's contention that district court failed to adequately explain reasons for instant upward variance, since district court gave adequate explanation for why variance was appropriate under section 3553(a). Court also rejected defendant's contention that district court was required to give him advance notice of grounds on which it was considering upward variance.

Shepard v. Krueger, No. 17-1362 (12/26/18) S.D. Ind., Terre Haute Div. Affirmed.

District court did not err in denying defendant's section 2241 petition seeking to challenge his 15-year mandatory minimum sentence for drug and firearm offenses, where original district court in Kentucky had applied Armed Career Criminal Act (ACCA) enhancement based on defendant's three Kentucky state-court convictions on charge of second-degree burglary. Under *Malone*, *889 F.3d 310*, defendant's second degree burglary convictions qualified as "generic burglaries" for purposes of applying enhancement under ACCA because said statute applied to buildings generally and not to vehicles or watercraft. As such, defendant was properly sentenced under ACCA.

Stalking

Maier v. Smith, No. 18-2151 (1/11/19) W.D. Wisc. Affirmed.

District court did not err in denying prisoner's *habeas* petition challenging his Wisconsin conviction on stalking charge that stemmed from defendant sending two separate letters to jurors who had previously found defendant guilty of threatening two Wisconsin judges, where several jurors found said letters to be either threatening or disturbing. Record contained sufficient evidence to support stalking conviction, where letters, which reminded jurors that they had helped put defendant in prison, asked them if he could reveal their identities to other inmates, emphasized his mistreatment in prison and his placement in mental institutions and requested that they "do the right thing" by mailing questionnaire to Prison Advisory Board to support his pardon request, satisfied objective standard that reasonable person in position of instant jurors would have understood said letters to be threatening, and that defendant was on notice that jurors would suffer serious emotional distress because of his communications. Court rejected defendant's argument that Wisconsin stalking statute violated his First Amendment rights by punishing him for unintentional threats, or that instant jury instructions misstated appropriate "true threat" standard under Wisconsin law.

Wire Fraud

U.S. v. Corrigan, No. 17-3642 (1/3/19) N.D., Ill., E. Div. Affirmed.

Record contained sufficient evidence to support defendant's conviction on four counts of wire fraud stemming from scheme in which defendant obtained money from two investors by making false statement that plaintiff's company needed additional funds to pay for healthcare insurance premiums for employees, where defendant ultimately used investors' funds for personal expenses. Instant indictment properly alleged wire fraud offense, testimony from investors, defendant's email correspondence that misled investors with respect to purpose of said funds, and financial records indicating that defendant spent funds on unrelated personal expenses established all three elements of wire fraud offense. Also, district court did not err in ordering restitution of full $110,000 that defendant had received from investors, even though defendant argued that restitution should have been reduced by 50 percent since half of investors' funds were properly spent on business expenses, where defendant failed to produce evidence to support claim of some lesser amount of restitution.

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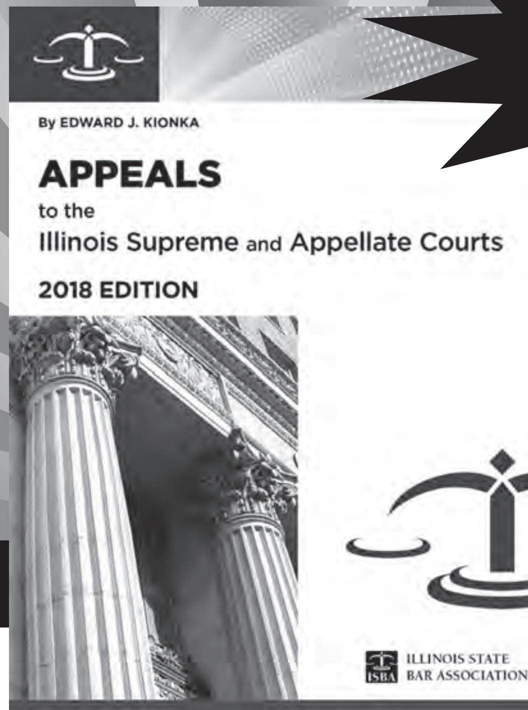

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