NO. 123201

IN THE SUPREME COURT OF ILLINOIS

NOAH WINGERT, A MINOR, BY HIS MOTHER AND NEXT FRIEND, CASSANDRA LEE WINGERT

Plaintiff-Appellant

vs.

PATSY A. HRADISKY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF KEVIN JATCZAK, DECEASED

Defendant-Appellee

Appeal from the Circuit Court Cook County, Illinois,

Circuit Court Case Number 2013 L 010098

The Honorable Judge Daniel T. Gillespie

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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SUPREME COURT CLERK

ARGUMENT

Our society faces unique and unprecedented challenges that will require creative and novel legislative solutions as we charge into the 21st century. To hold that something is unconstitutional simply because it is new would forever prevent our legislature from enacting new solutions to old problems even when old solutions are not working. Our future generations deserve a democracy that stands ready to take on our society's greatest challenges; they should not be doomed to repeat the mistakes of the past. The illegal drug market is inflicting catastrophic damage on our society. Justice demands the legislature be given broad latitude in its efforts to combat such an unprecedented problem.

This Honorable Court will be legally justified in refusing to tie the hands of our legislature by striking down the Drug Dealer Liability Act (the "DDLA") because: (1) Defendant fundamentally misunderstands her burden in making a facial constitutional challenge; (2) The Area Liability Provision does not presume causation because the issue of causation is irrelevant to the fact finder under the DDLA; (3) The rational relation test is the applicable limit on the legislature's police power; (4) Defendant's reliance on *Smith* is simply an invitation for this Honorable Court to substitute our legislature's policy judgment with its own; (5) *Williams* is inapplicable because Defendant can contest liability and Plaintiff's claimed damages; (6) The Direct Liability Provision establishes "some connection" to Defendant; (7) Defendant admits that the plain language of the DDLA does not require causation for liability to attach; (8) Whether Michael Neuman died of cocaine and opiate intoxication is not before this Court; and (9) Plaintiff did not waive his police power argument.

I. Defendant Fundamentally Misunderstands Her Burden in Making a Facial Constitutional Challenge

Defendant asks this Honorable Court to cast aside the DDLA in its entirety on the basis of hypothetical scenarios she claims to be unjust. *See e.g.* D. Br. P. 29. However, the trial court agreed with Defendant's contention that the Area Liability Provision was unconstitutional on its face. R. C 788. "A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully because ***an enactment is facially invalid only if no set of circumstances exist under which it would be valid***." *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 305-06 (2008)(citations omitted)(emphasis added).

For example, let us assume that a DDLA plaintiff's father died of a heroin overdose in a small Illinois town and wants to hold a large heroin distributor who dominates the town responsible. Recovery against him could be impossible under the common law, even if he distributes 100% of the town's heroin, because his loyal lieutenants are unwilling to testify to the true source of their illegal product. To make matters worse, all of the small time drug dealers in the town know they must blame each other as the source of heroin to avoid reprisals from the imposing criminal network. Plaintiff has clear and convincing evidence that the defendant distributor sold ten kilos of heroin to a lieutenant the week before his father's overdose one block away from where his father died.

Unfortunately, plaintiff cannot produce any evidence that the loyal lieutenant sold heroin to the small time dealer who sold to his father because of the efforts both criminals make to hide their illegal activity. The small time dealer lies to police and says he got his heroin from an unknown person in the shady part of town so that he will

not be punished by the large distributor. The drug dealer tries to further limit his culpability by claiming "it's not my fault- the guy stole my heroin!" Plaintiff doubts the drug dealer's self-serving lies to police, but doesn't have any way to rebut the drug dealer because his father is dead and cannot tell his side of the story.

Pursuant to the Area Liability Provision, plaintiff sues the distributor because both the lieutenant and dealer are insolvent and the distributor challenges the statutes constitutionality. The distributor's due process rights to his illegally obtained property are not violated because abrogating the common law causation requirement was reasonably related to the public interest in guaranteeing a right to recovery for victims of the illegal drug market, the distributor's own efforts to hide his illegal conduct made proof of causation impracticable, and he has a full and fair opportunity to challenge plaintiff's allegations. Moreover, abrogating the common law causation requirement was reasonably related to the legitimate government interest in undermining the illegal drug market through the imposition of massive liability because criminal sanctions alone did not deter distributor from entering the lucrative black market.

Here, the trial court relied upon potentially unconstitutional applications of the Area Liability Provision to find the provision unconstitutional in all circumstances. *See* R. C 778. This analysis turns the long-standing analysis of a facial challenge on its head and would result in the statutes in each and every successful "as-applied" challenge being held unconstitutional in all future cases. *See Napleton*, 229 Ill.2d at 305-06. This Honorable Court should decline Defendant's invitation to overturn its constitutional jurisprudence so profoundly.

II. The Area Liability Provision Does Not Presume Causation Because The Issue of Causation is Irrelevant to the Fact Finder under the DDLA

Defendant's reliance on *Tot* and *Henderson* is misplaced because Defendant conflates a question of law with a question of fact. *Tot v. United States,* 319 U.S. 463 (1943); *Western & A. R.R. v. Henderson,* 279 U.S. 639 (1929). A presumption is a legal device that either permits or requires the ***trier of fact*** to assume the existence of an ultimate ***fact***, after establishing certain predicate ***facts***. *People v. Woodrum*, 223 Ill.2d 286, 308 (2006)(citations omitted). The U.S. Supreme Court's decision in *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961) is instructive here. In *Communist Party*, the plaintiff cited *Tot* and *Henderson* in support of its argument that § 3 (3)(a)(ii) of The Subversive Activities Control Act violated its Due Process Rights because it could not offer evidence to rebut Congress' finding that "there existed a world communist movement." *Id.* at 113-115. The Supreme Court found that *Tot* and *Henderson* had no application because the only factual finding the legislature required the fact finder to make was whether a particular organization advanced the objectives of the world communist movement. *Id.* Thus, the only set of facts in issue was whether a "particular organization does nor does not operate primarily to advance those objectives; and, as to this, the legislation predetermines nothing." *Id.* The Court expressly noted that the congressional findings that there exists a world communist movement could not be re-examined by the fact-finder, in part, because the factual question asserted was irrelevant to the determination the fact0finder was required to make. *Id.*

Here, the Area Liability Provision requires a fact-finder to determine whether a person knowingly participated in the illegal drug market during the same time period, area, and in connection with the same type of drug as the individual drug user. 740 ILCS 57/25(b)(2). As the Defendant herself admits, the fact-finder is not required to determine whether the drug dealer's activity was a proximate cause of the Plaintiff's damages. Thus, like in *Communist Party*, *Tot* and *Henderson* have no application to the abrogation of the traditional proximate cause requirement because the legislature "predetermines nothing" with respect to an individual defendant's participation in the illegal drug market.

In *Henderson*, the jury was instructed that it was to presume *negligence* based upon the fact a collision resulted in death unless the defendant proved that its employees exercised ordinary care and diligence. *Henderson*, 279 U.S. at 641. Thus, the statutory presumption of negligence was relevant to a factual determination made by the jury, *i.e.*, whether the defendant used ordinary care. The jury could not find in favor of the plaintiff if it resolved the factual question to be presumed in favor of the defendant. Here, the legislature has provided that a plaintiff may recover from a defendant *regardless* of whether causation is shown and thus the factual question (or any evidence tending to disprove it) is irrelevant to the fact finder.

Similarly, in *Tot*, the government was required to prove that a firearm was transported in interstate or foreign commerce for criminal liability to attach. *Tot v. United States*, 319 U.S. 463, 464 (1943). Thus, the statutory presumption of whether the firearm was transported across state lines was relevant to a factual determination made by the jury, *i.e.*, whether the defendant's firearm was in fact used in interstate

commerce. Of note, this fact was essential to the Federal Firearm Act's constitutionality because the Federal Government's constitutional authority for such action derived from the Interstate Commerce Clause and not the police power vested in state legislatures. U.S. Cons. Art. I, §8. Unlike the interstate commerce requirement in *Tot*, the Illinois Legislature does not need the jury to find facts supporting common law elements because the Illinois General Assembly has the inherent power to repeal or change the common law, or do away with all, or part of it. *People v. Gersh*, 135 Ill.2d 384, 395 (1990)(*citations omitted*).

To hold that a statute factually presumes a common law element that it omits would cast doubt on the constitutionality of other legislative statutes, such as the Illinois Workers' Compensation Act. 805 ILCS 305/1(d)(eff. 7-13-12). For example, section 305/1(d) of the Illinois Workers' Compensation Act provides that an employee can recover from his employer for any accidental injuries arising from his employment regardless of whether his employer was negligent. *Id.* Applying the Defendant's analysis of the Area Liability Provision to Section 305/1(d) would imply that the legislature's abrogation of the common law breach element was, in fact, an irrebuttable presumption that the employer was negligent merely because an employee was injured in the course of employment. *See* D. Br. P. 9. Thus, applying *Henderson* to the Area Liability Provision would require holding that the Worker's Compensation Act was also unconstitutional because negligence may not be presumed merely upon a showing of injury. *See Henderson*, 279 U.S. at 642-43. Here, a *Henderson* analysis is inappropriate because, just like in Section 305/1(d), the Area Liability Provision's abrogation of the common law causation element is not a presumption that causation in

fact occurred. Rather, the legislature made a factual determination on the issue irrelevant by imposing liability in its absence.

Accordingly, *Tot* and *Henderson* are entirely inapplicable to this case because the fact-finder is not required to determine whether Defendant's conduct was an actual or proximate cause of Plaintiff's damages.

III. The Rational Relation Test Is The Applicable Limit on The Legislature's Police Power

Defendant concedes that the rational relation test applies to this case. D. Br. P. 27. Thus, for the DDLA to be a valid exercise of police power it must bear a reasonable relationship to the public interest sought to be protected and the means adopted must be a reasonable method of accomplishing the chosen objective. *Opyt's Amoco, Inc. v. S. Holland,* 149 Ill.2d 265, 269-70 (1992). Compellingly, Defendant fails to cite a single case applying the rational relation test in support of its argument that the legislature "exceeds its constitutional authority when it eliminates any requirement of causation through…outright abrogation." D. Br. P. 28. Rather, the only case cited by Defendant, *Boynton v. Kusper*, has extremely limited value to our analysis because this Honorable Court applied the strict-scrutiny test. 112 Ill.2d 356, 369 (1986).

Nonetheless, Defendant posits that the DDLA is unconstitutional because it abrogates the common law causation element that the Illinois Worker's Compensation Act in part retained. However, Defendant fails to explain why the common law element of causation is more fundamental than the common law element of breach in negligence actions. Although taken for granted in our modern jurisprudence, the Worker's Compensation Act's abrogation of the breach element was remarkable when first passed. *See Grand T.W.R. Co. v. Industrial Com.*, 291 Ill. 167, 174-175 (1919). In

holding the scheme constitutional, this Honorable Court considered not whether the law was objectionable, but whether there was *any* reasonable ground to believe that the public safety, health or general welfare is promoted thereby. *Id.*

Here, it was reasonable for the legislature to abrogate the causation requirement entirely, as opposed to partially, because of the reasonable judgment that drug dealers who knowingly engage in illegal conduct bear greater moral culpability than legitimate business owners. In fact, the harsh result of abrogating the causation requirement is an explicit purpose of the DDLA and reasonably related to the legislature's legitimate interest in deterring illegal activity. Unlike injured workers who know exactly where they work, abrogating the causation requirement was reasonably related to the legislature's legitimate interest in providing redress to victims who cannot identify tortfeasors because of the tortfeasors' wrongful conduct to disguise their criminal activity.

Moreover, Defendant's citation to *Best v. Taylor Machine Works,* 179 Ill.2d 367, 432 (1997) sets forth exactly why the "absurd scenario" of an Apple employee claiming worker's compensation benefits has no application to this case. In *Best*, this Honorable Court held that a statute's abatement of proportionate several liability in medical malpractice actions "arbitrarily and unconstitutionally provide[d] a ***special benefit*** for medical malpractice plaintiffs". *Id.* at 432. Thus, this Honorable Court was not analyzing a defendant's due process rights in any way. *Id.* Instead, the *Best* Court was analyzing the prohibition against special legislation found in Ill. Const. 1970, art. IV, §13. *Id.* Admittedly, Defendant's computer industry hypothetical would likely be unconstitutional special legislation because if there were a need "to eliminate the

harshness of [the requirement that a plaintiff identify his employer], then logically this need exists for all plaintiffs who have suffered physical injury [at work], and not just [employees of the technology industry]." *See Best*, 179 Ill.2d at 431-32. Here, Defendant does not claim that the Area Liability Provision constitutes special legislation, for good reason, as it is uncontested victims of the illegal drug market suffer a unique inability to recover under common law tort principles. 740 ILCS 57/10(7). Thus, the *Best* Court's analysis of the special legislation prohibition is inapplicable to this case.

As the *Best* Court explicitly noted, the legislature's alteration the common law is unconstitutional only when it is not rationally related to a legitimate government interest. *Best*, 179 Ill.2d at 408. If anything, the *Best* Court's recognition of the legislature's reasonable and justifiable concern with achieving fairness for tort plaintiffs only serves to undermine Defendant's due process argument because abrogation of the causation requirement was reasonably necessary to provide a source of recovery for illegal drug victims given their unique inability to recover under traditional tort principles. *See id.* at 431.

In fact, Defendant does not contest that the legislature's relaxation of the causation requirement in the Dram Shop Act was constitutionally justified because it was reasonably related to the legitimate interest in abating the "appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits." *Garrity v. Eiger*, 272 Ill.127, 134 (1916), aff'd, 246 U.S. 97 (1918). Defendant does not contest the legislature's finding that the illegal drug market imposes the exact same type of societal cost that the Court found so persuasive in *Garrity*. Nonetheless,

Defendant attempts to distinguish *Garrity* on the basis that "some causative link" exists between the plaintiff and the defendant. However, in both *Garrity* and under the Area Liability Provision, a defendant is required to pay a plaintiff's damages caused by a third party by virtue of their market participation rather than breach of duty to the individual plaintiff.

Defendant fails to proffer any constitutional reason that the legislature's policy judgment in regulating an illegal industry differently than a lawful industry should be disturbed by this Honorable Court. Instead, Defendant merely proffers an "absurd scenario" and boldly claims that accepting Plaintiff's logic would require a finding that liquor establishments *should* be liable for intoxication they did not cause. D. Br. P. 23. (emphasis added). Of course, this is not a constitutional argument because neither the Plaintiff himself nor this Court determined when liability *should* attach in these industries. Rather, the legislature determined that causation *should* be abrogated in the DDLA and passed the Dram Shop Act with different requirements based upon different considerations. The fatal flaw in Defendant's entire argument is that the question presented is not what the Plaintiff, or this Court believes what the law *should* be – this Court must decide what the law *is*. *Kozak v. Retirement Board of Firemen's Annuity & Ben. Fund,* 95 Ill.2d 211, 219-20 (1983)(*quoting People v. Wilcox*, 237 Ill. 421, 428 (1908)(emphasis added).

IV. Defendant's Reliance on *Smith* Is Simply an Invitation for This Honorable Court to Substitute Our Legislature's Policy Judgment With Its Own

Defendant's reliance on this Court's use of the words "arbitrary and unfair" in *Smith* conflates the Court's duty to determine public policy in its development of the

common law with the legislature's duty to determine public policy when enacting statutes. Undoubtedly, this Honorable Court has considerable discretion in weighing public policy in the development of the common law because of its responsibility to develop Illinois common law. *Smith v. Eli Lily & Co.*, 137 Ill.2d 222, 268 (1990). However, this Court has repeatedly recognized that it is the mandate of our legislature, and not the courts, to identify society's most pressing problems and to craft appropriate solutions. *See Gersch*, 135 Ill.2d at 395.

The illegal drug epidemic is one of our society's most pressing problems. Just last week, the CDC announced its estimate that more than 72,000 Americans died of drug overdoses in 2017, an increase of almost seven percent from 2016. Ahmad FB, Rossen LM, Spencer MR, Warner M, Sutton P. Provisional drug overdose death counts. National Center for Health Statistics. 2018. (www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm). In Illinois alone, it is estimated 2,770 people died of drug overdoses in 2017, an increase of almost 10 percent from 2016. *Id.*[1]

Defendant posits that because abrogating the causation requirement was fundamentally unfair and arbitrary in DES cases it must be unfair and arbitrary here. However, unlike in *Smith*, the legislature's legitimate interest in eradicating an illegal market in and of its self justifies this abrogation because of the magnitude of damage being inflicted. Justice demands that this Honorable Court grant the legislature considerable latitude in addressing such a monumental problem.

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[1] Plaintiff acknowledges these statistics were not available to the Honorable Judge Gillespie and are not included in the record. Nonetheless, Plaintiff invites this Honorable Court to take judicial notice of this easily verifiable government data. *See In Re Commitment of Simons*, 213 Ill.2d 523, 531 (2004).

V. *Williams* is Inapplicable Because Defendant Can Contest Liability and Plaintiff's Claimed Damages

Defendant's reliance on *Williams* is unpersuasive because the DDLA provides Defendant with an opportunity to directly contest both the damages claimed and the facts giving rise to liability. In *Williams,* the Supreme Court held a defendant's procedural due process rights were violated when punitive damages are awarded for damage sustained to a non-party victim. *Phillip Morris USA v. Williams,* 549 U.S. 346, 353 (2007). However, critical to the Court's analysis was the fact that such a defendant did not have an opportunity to present every available defense because there was no opportunity to contest whether the non-party victim was entitled to damages. *Id.* Here, the damages Defendant is called upon to pay are damages it will have an opportunity to contest at trial as a party to the litigation. While the *Williams* Court did note that potential due process concerns included risks of arbitrariness, uncertainly, and lack of notice, the Court was referring to the constitutionality of punitive damages in general and not to any concerns about causation. *Id.* In fact, the *Williams* Court expressly noted that its concerns were alleviated in cases where the potential harm at issue was *to the plaintiff. Williams*, 549 U.S. at 353 (*citing State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 424 (2003)(emphasis in original).

Defendant's complaints about notice of potential claims to individual drug dealers caused by the individual's conduct are unpersuasive because those entering the illegal drug trade "must necessarily accept and agree to be bound by the provisions of the law designed to mitigate the evils of the traffic or to compensate for the damages done by it." *See Garrity*, 272 Ill. at 136, 138. A drug dealer is presumed to know his

potential liability for the entire drug trade in his area and the deterrent effect of this knowledge is one of the underpinnings of the act. *See* 740 ILCS 57/10(4).

Moreover, tort defendants are almost never able to predict with particularity the precise damages their tortious conduct may cause. An assailant may merely give his victim a black eye or his single blow could cause death or paralysis. Here, common sense dictates that almost every adult in our society knows the tremendous societal cost imposed by illegal drug use. Those who profit from that misery do so at their own peril.

VI. The Direct Liability Provision Establishes "Some Connection" to Defendant

Defendant claims that the Direct Liability Provision is unconstitutional for the same reasons as the Area Liability Provision. D. Br. P. 31. However, the only substantive reason proffered for the Area Liability Provision's unconstitutionality compared to the Dram Shop Act and Worker's Compensation Act is that it fails to require "some measure" of causative link between the plaintiff and the defendant. Unquestionably, the Direct Liability Provision requires "some measure" of causative link between the plaintiff and the defendant because it requires the plaintiff to prove that the defendant provided an illegal drug to the plaintiff. Thus, Defendant has failed to meet her burden of clearly establishing the Direct Liability Provision's constitutionality because she failed to provide any other argument. *See People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 290-91 (2003).

VII. Defendant Admits the Plain Language of the DDLA Does Not Require Causation For Liability to Attach

Defendant asks this Honorable Court to create a causation requirement in the Direct Liability Provision by judicial fiat on the sole basis that abrogation of the

common law's causation requirement is unconstitutional. *See* D. Br. P. 31-32. However, *Napleton* does not stand for the broad proposition that this Honorable Court may invent a requirement of liability that is not contained within the statute. *Napleton*, 229 Ill.2d at 306-07; *Cf. Garrity v. Eiger*, 272 Ill. 127 (1916)(refusing to judicially construct additional element of liability). Rather, the *Napleton* Court simply recited, but did not rely upon, the oft-repeated maxim that "***if a statute's construction is doubtful***, a court will resolve the doubt in favor of the statute's validity." *Napleton*, 229 Ill.2d at 306-07 (*citing People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 291 (2003)(emphasis added). This requires a statute to be ambiguous and for the proffered construction to be a reasonable one. *Cryns*, 203 Ill.2d at 291.

Here, Defendant does not contend the plain language of the Direct Liability Provision includes a causation requirement and fails to provide a reasonable construction of the statute requiring a showing of proximate cause. Moreover, there is no just reason for this Honorable Court to strain to construct such a reading because Defendant has not established the Direct Liability Provision is unconstitutional if it abrogates the proximate cause requirement. This Court should refuse Defendant's invitation to invent a requirement of liability that the legislature did not intend.

VIII. Whether Michael Neuman Died of Cocaine and Opiate Intoxication Is Not Before This Court

The issue of whether Michael Neuman died as a result of opiate and cocaine intoxication is not before this Court because Defendant did not assert lack of evidence regarding cause of death as the basis for her Motion for Summary Judgment. The sole basis for Defendant's Motion for Summary Judgment was Plaintiff's failure to produce any evidence Defendant provided the specific drugs from which Plaintiff overdosed. R.

C 535. In fact, Defendant admitted that the medical examiner found that Plaintiff died as a result of acute opiate and cocaine intoxication in her statement of facts. R. C 534. Plaintiff's Response to Defendant's Motion for Summary Judgment relied upon the fact that it was undisputed that Michael Neuman died as a result of cocaine and opiate intoxication. R. C 725.

As a general rule in civil cases, the plaintiff has the burden of producing evidence sufficient to establish each element of his or her claim. *Thacker v. UNR Industries, Inc.*, 151 Ill.2d 343, 354 (1992). However, the party moving for summary judgment bears the burden of proof and the initial burden of production. *Pecora v. County of Cook*, 323 Ill.App.3d 917, 933 (1st Dist. 2001). A defendant filing a *Celotex* motion satisfies its initial burden of production when it points out the absence of evidence supporting the plaintiff's position. *Hutchcraft v. Independent Mech. Indus.*, 213 Ill.App.3d 351, 355 (4th Dist. 2000). Unlike a traditional motion for summary judgment where a defendant affirmatively disproves an essential element of the plaintiff's case, a *Celotex* motion is a motion for summary judgment asserting that the plaintiff lacks sufficient evidence to establish an essential element. *Id.* Once the defendant asserts a lack of evidence, the burden shifts to the plaintiff to present some factual basis that would arguably entitle the plaintiff to judgment on that element. *Hutchcraft*, 213 Ill.App.3d at 355 (*citing Kimbrough v. Jewel Cos.*, 92 Ill.App.3d 813, 819 (1981). The plaintiff's burden of production is simply to provide "some evidence" sufficient to support judgment on the issue if contrary evidence is ignored. *See Pyne v. Witmer*, 129 Ill.2d 351, 362 (1989). A party may rely upon his pleadings alone to raise

issues of material fact if the defendant does not meet her burden of production. *See Purtill v. Hess*, 111 Ill.2d 229, 241 (1986).

Here, Plaintiff could rely upon his pleadings to raise an issue of material fact regarding the cause of Michael Neuman's death because Defendant neither asserted a lack of evidence on the issue nor submitted contrary evidence on the issue. Thus, Plaintiff's allegation that Michael Neuman died on June 9, 2012 as a result of heroin, opiate and/or cocaine consumption is sufficient to create an issue of material fact to the extent a lack of evidence on the issue is now being raised. R. C 520, ¶9. Alternatively, Plaintiff produced "some evidence" Michael Neuman died, in part, as a result of cocaine intoxication because he was "chain smoking" crack cocaine on the night of his death (R. C 702-03, P. 51, L. 10 – P. 52, L. 14), a crack pipe was found at the residence the morning after Michael's death (R. C709, P. 76, L. 17 – P. 77, L. 2), and Detective Schiavone relied upon the medical examiner's cause of death being opiate and cocaine intoxication in the course of his investigation (R. C 705, P. 60, L. 4-9).

IX. Plaintiff Did Not Waive His Police Power Argument

Defendant indirectly contends that Plaintiff has waived his police power argument by raising it for the first time on appeal. Plaintiff acknowledges he did not specifically say "police power" in his arguments before the Honorable Judge Gillespie. Nonetheless, denying the DDLA was unconstitutional was equivalent to stating the legislature constitutionally invoked its police power because the police power was the only logical source of the legislature's authority to enact the DDLA. Thus, the issue was adequately raised in the trial court.

Nonetheless, waiver is an admonition on the parties and not the court. *Village of Lake Villa v. Stokovich*, 211 Ill.2d 106 (2004). Here, this Honorable Court should consider that Plaintiff did not have an opportunity to directly urge Judge Gillespie to reconsider his written constitutional analysis because his analysis was completed pursuant to this Court's supervisory order directing him to do so after Plaintiff filed notice of appeal. *Id.* Moreover, this Honorable Court has the responsibility for a just result and for the maintenance of a sound and uniform body of precedent that may sometimes override the considerations of waiver that stem from the adversary character of our system. *Id.* Sixteen of our sister states have passed a variation of the DDLA.[2] However, this Honorable Court is the first state supreme court to determine whether the DDLA is constitutional. This Court's analysis will set the precedent for this Act nationwide and will likely be cited whenever a legislature passes a different variation of market share liability in the future. This Court's duty to the maintenance of the

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[2] **Arkansas** - ***Drug Dealer Liability Act***, 1995 Ark. Acts No. 896 (codified at Ark. Code Ann. " 16-124-101 to -112 (Michie Supp. 1997)); **California** - ***Drug Dealer Liability Act***, 1996 Cal. Legis. Serv. 3792 (West) (codified at Cal. Health & Safety Code " 11700 to 11717 (West Supp. 1998)); **Colorado** - Colo. Rev. Stat. 13-21-801 to 813; **Georgia** - ***Drug Dealer Liability Act***, 1997 Ga. Laws 387 (codified at O.C.G.A. ' 51-1-46 (Supp. 1998)); **Hawaii** - ***Drug Dealer Liability Act***, 1995 Haw. Sess. Laws ch. 203 (codified at Haw. Rev. Stat. Ann. ' 663D (Michie Supp. 1997)); **Indiana** - ***Drug Dealer Liability Act***, 1997 Ind. Acts 2924 (codified at Ind. Code Ann. ' 34-1-70 (Michie Supp. 1998) (repealed by 1998 Ind. Acts. 8 (effective July 1, 1998)); Reenacted by by P.L.1-1998, SEC.19 (codified at Ind. Code Ann. 34-24-4-1 to 14); **Louisiana** - Louisiana ***Drug Dealer Liability Act***, 1997 La. Sess. Law Serv. 719 (West) (codified at La. Rev. Stat. Ann. " 9:2800.61-.76 (West Supp. 1998)); **Michigan** - ***Drug Dealer Liability Act***, 1994 Mich. Legis. Serv. 27 (West) (codified at Mich. Comp. Laws Ann. " 691.1601-.1619 (West Supp. 1998)); **New Hampshire** - Chapter 318-C:1, et seq. (2005); **New York** - ***Drug Dealer Liability Act***, Gen. Oblig. Sec. 12-101 et seq.; **Oklahoma** - ***Drug Dealer Liability Act***, 1994 Okla. Sess. Law Serv. ch. 179 (West) (codified at Okla. Stat. Ann. tit. 63, " 2-421 to -435 (West 1997)); **South Carolina** - S. Carolina Stat. 44-54-10 to 140; **South Dakota** - South Dakota Codified Laws Sec. 34-20 C-1 et seq.; **Tennessee** - TCA 29-38-101 et seq. [2005, ch. 77]; **Utah** - Drug Dealer's Liability Act, 1997 Utah Laws 1991 (codified at Utah Code Ann. 58-37e-1 to -14 (Supp. 1998)).

common law and to itself as a national thought leader demands such a decision be made based upon the best information available regardless of whether it was raised in the trial court. This is especially true as Defendant's facial challenge to the DDLA will strike down the statute for all future plaintiffs if upheld.

CONCLUSION

This Honorable Court will be legally justified in refusing to tie the hands of our legislature by striking down the DDLA because: (1) Defendant fundamentally misunderstands her burden in making a facial constitutional challenge; (2) The Area Liability Provision does not presume causation because the issue of causation is irrelevant to the fact finder under the DDLA; (3) The rational relation test is the applicable limit on the legislature's police power; (4) Defendant's reliance on Smith is simply an invitation for this Honorable Court to substitute our legislature's policy judgment with its own; (5) Williams is inapplicable because Defendant can contest liability and Plaintiff's claimed damages; (6) The Direct Liability Provision establishes "some connection" to Defendant; (7) Defendant admits that the plain language of the DDLA does not require causation for liability to attach; (8) Whether Michael Neuman died of cocaine and opiate intoxication is not before this Court; and (9) Plaintiff did not waive his police power argument.

WHEREFORE, for the foregoing reasons, Plaintiff-Appellant Noah Wingert, a minor, by his mother and next friend, Cassandra Lee Wingert, respectfully requests that this Court reverse the orders of the circuit court granting Defendant's motion for summary judgment and finding 740 ILCS 57/25(b)(2) unconstitutional and remand this case for completion of discovery and for trial on the merits.

Respectfully submitted,

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APPEAL TO THE SUPREME COURT OF ILLINOIS
CASE NO. 123201

NOAH WINGERT, a minor, by his mother and next friend, CASSANDRA LEE WINGERT,	)
Plaintiff-Appellant,	) Appeal from Cook County) Circuit Number: 2013 L 010098) Trial Judge: Honorable Daniel T. Gillespie) Date of Notice of Appeal: 1/19/18) Date of Judgment: 1/3/18) Date of Postjudgment Motion Order: N/A
- v -	
PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased	) Supreme court rule which confers jurisdiction upon the reviewing court) 302(a)
Defendant - Appellee	)

CERTIFICATION OF BRIEF OR PETITION FOR REHEARING

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 343(a), is 19 pages.

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APPEAL TO THE SUPREME COURT OF ILLINOIS
CASE NO. 123201

NOAH WINGERT, a minor, by his mother and next friend, CASSANDRA LEE WINGERT,	)
Plaintiff-Appellant,	)Appeal from Cook County)Circuit Number: 2013 L 010098)Trial Judge: Honorable Daniel T. Gillespie)Date of Notice of Appeal: 1/19/18)Date of Judgment: 1/3/18)Date of Postjudgment Motion Order: N/A
- v -	
PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased	)Supreme court rule which confers)jurisdiction upon the reviewing court 302(a)
Defendant - Appellee	)

NOTICE OF FILING

TO: Kyle McConnell *via electronic mail* kmcconnell@meagher.com

On the ***24*** day of ***August***, ***2018,*** we filed, by electronic means, with the Clerk of the Illinois Supreme Court the Brief of the Plaintiff-Appellant and accompanying Appendix which are attached and herewith served upon you.

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AFFIDAVIT OF ELECTRONIC MAILING

UNDER PENALTIES as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, and certifies that he caused this Notice and attachment(s) to be served by e-mailing a copy to kmcconnell@meagher.com in an e-mail originating from nnepustil@benshaplaw.com on August 24, 2018.

Nicholas Nepustil