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 of Cook County, Illinois
Circuit Court Case No. 13 L 10098
The Honorable Daniel T. Gillespie, Judge Presiding

BRIEF AND ARGUMENT OF DEFENDANT-APPELLEE

Kyle McConnell
MEAGHER & GEER, P.L.L.P.
216 N. Jefferson Street, Suite 100
Chicago, Illinois 60661
(312) 463-1045
Attorney No. 6311216
kmcconnell@meagher.com
Attorney for Defendant-Appellee

E-FILED
8/10/2018 8:04 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT 6

740 ILCS 57/25(b) 6
740 ILCS 57/25(b)(1) 6
740 ILCS 57/25(b)(2) 7

I. The Area Liability Provision violates a defendant's due process rights because it imposes an irrebuttable presumption of causation that bears no rational relationship to the facts that trigger the presumption 8

A. The Area Liability Provision imposes an irrebuttable presumption that a defendant caused the plaintiff's damages. 9

740 ILCS 57/25(b)(2) 9

B. United States Supreme Court precedent requires an irrebuttable presumption to be rationally connected to the facts that trigger the presumption. 10

Tot v. United States, 319 U.S. 463, 467 (1943) 10, 11
W. & A.R.R. v. Henderson, 279 U.S. 639 (1929) 10, 11

C. The Area Liability Provision's irrebuttable presumption violates a defendant's due process rights because it has no rational connection to the facts that trigger the presumption 12

740 ILCS 57/25(b)(2)(A)-(C) 12

II. This Court's analysis and rejection of market liability theories in *Smith v. Eli Lilly & Co.* exemplifies why the DDLA's Area Liability Provision is unconstitutional 13

Smith v. Eli Lilly & Co., 137 Ill.2d 222 (1990) 13

A. This Court recognized in *Smith* that without a showing of causation, resulting decisions are arbitrary and unfair to defendants. 14

Smith v. Eli Lilly & Co., 137 Ill.2d 222 (1990) 14, 15, 16, 17
Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986) 16
Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) 16
Case v. Fibreboard Corp., 743 P.2d 1062 (Okla. 1987) 16

B. The Area Liability Provision so severely tramples the foundational principles of our tort system this Court championed in *Smith* that it violates a defendant's due process rights.....17
Best v. Taylor Mach. Works, 179 Ill.2d 367 (1997).....17, 18

C. Oklahoma correctly ruled that the DDLA's Area Liability Provision violates a defendant's due process rights because failing to require any showing of causation is arbitrary and unreasonable.....18

Steed v. Bain-Holloway, 356 P.3d 62 (2015).....18, 19
Case v. Fibreboard Corp., 743 P.2d 1062 (Okla. 1987).....19

III. Plaintiff wrongly relies on workers' compensation and dram shop statutes to justify the DDLA because both of those examples require some connection between the plaintiff and defendant . 20

A. Illinois' Workers' Compensation Act requires employees to demonstrate that their injury resulted from their employment.....21

805 ILCS 305/1(d).....21
805 ILCS 305/1(a)(3).....21

B. Illinois' Dram Shop Act also requires injured persons to demonstrate that the establishment licensed to sell alcohol caused the intoxication of the person who caused their injuries.....22

235 ILCS 5/6-21(a).....22

IV. The DDLA's Area Liability Provision also violates a defendant's due process rights because it punishes a defendant for harm caused to nonparty victims rather than the plaintiff 24

Philip Morris USA v. Williams, 549 U.S. 346 (2007).....24

A. The United States Supreme Court has ruled that imposing punitive damages on a party for harm caused to nonparty victims violates a defendant's due process rights 24

Philip Morris USA v. Williams, 549 U.S. 346 (2007).....24, 25
State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 25
Lindsey v. Normet, 405 U.S. 56 (1972) 24

B. The DDLA's Area Liability Provision violates the due process concerns identified in *Williams* 25

V. Under either interpretation of the Area Liability Provision, its enactment was not a valid exercise of the Legislature's police power because it is both irrational and arbitrary 26

Sherman Reynolds, Inc. v. Mahin, 47 Ill.2d 323 (1970) 27

A. The mere finding by a legislature that a serious problem exists "does not permit the adoption of arbitrary and unrelated means of meeting it." 27

Boynton v. Kusper, 112 Ill.2d 356 (1986) 27

B. If a legislature can impose liability on a defendant without any showing of causation in fact or proximate cause, any limit on the legislature's police power is illusory 28

Boynton v. Kusper, 112 Ill.2d 356 (1986) 29

VI. Plaintiff's contention that the Direct Liability Provision does not require a showing of causation in fact or proximate cause is wrong for the same reasons the Area Liability Provision is unconstitutional 31

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court correctly ruled that Section 25(b)(2) of the Drug Dealer Liability Act violates a defendant's due process rights where an arbitrary irrebuttable presumption of causation is imposed that lacks a rational connection to the facts triggering the presumption.

2. Whether the Drug Dealer Liability Act violates a defendant's due process rights where it does not require a plaintiff to show a defendant was the cause in fact or proximate cause of plaintiff's damages.

3. Whether the circuit court properly granted summary judgment in favor of Defendant where Plaintiff failed to offer any evidence that Defendant was the cause in fact or proximate cause of Plaintiff's decedent's overdose and what illegal drug caused Plaintiff's decedent's overdose.

STANDARD OF REVIEW

Review of a circuit court's ruling on the constitutionality of a statute is *de novo*. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 389 (1997). As such, this Court's scope of review is not limited to or bound by any specific material relied upon by the circuit court. *Id*. The standard of review for a circuit court's entry of summary judgment is also *de novo*. *Gen. Cas. Ins. Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002).

STATEMENT OF FACTS

A. Procedural Background

This lawsuit stems from the overdose of Michael William Neuman on June 9, 2012. The mother of Mr. Neuman's son, Cassandra Lee Wingert, filed the suit on behalf of her minor son, Noah Wingert ("Plaintiff"). R. C520. Plaintiff filed her initial Complaint at Law against the owner of the premises where Michael Neuman's overdose occurred, Kevin Jatczak ("Defendant"). The Complaint at Law sought recovery on grounds that Defendant had either allowed illegal drugs to be provided to Mr. Neuman, or negligently allowed the sale of drugs at his premises. R. C26-28. Defendant moved to dismiss the Complaint on grounds that Illinois has never imposed a duty on one party to prevent a second party's own intentional or criminal act. R. C71-72. Plaintiff was granted leave to amend her Complaint rather than respond to Defendant's motion. R. C85.

Plaintiff's First Amended Complaint added two additional defendants, Simone Holda and Julie Holda. R. C92. Simone Holda rented the upstairs apartment where Mr. Neuman's overdose occurred. R. C696 at P.26. Again, Plaintiff alleged that Defendant Jatczak allowed the use of illegal drugs or failed to prevent the use of illegal drugs on the premises. R. C94. Defendant moved to dismiss Plaintiff's First Amended Complaint under Section 2-615 on grounds that Illinois law does not impose a duty on a person to prevent the criminal acts of either Mr. Holda or Mr. Neuman. Again, Plaintiff sought leave to amend her complaint rather than responding to Defendant's motion, which the circuit court granted. R. C229.

Plaintiff's Second Amended Complaint alleged that Defendant had violated the Drug Dealer Liability Act, 740 ILCS 57/1 et seq ("DDLA"). Plaintiff alleged that Defendant knew that co-defendant, Simone Holda, was a drug user or drug dealer of heroin and cocaine. R. C232. Plaintiff alleged this knowledge was enough to demonstrate that Defendant had "knowingly participated in the illegal drug market" as required by the DDLA. R. C233. Prior to Plaintiff filing her Second Amended Complaint, Defendant Jatczak had passed away and his mother, Patsy Hradisky, was subsequently appointed special administrator of his estate. R. C247. Thus, Plaintiff filed a Third Amended Complaint reflecting this change but that was substantively identical to her Second Amended Complaint. R. C249.

Defendant moved to dismiss Plaintiff's Third Amended Complaint primarily on grounds that the DDLA does not create a cause of action against a property owner alleged to have merely know about or allowed the use or distribution of illegal drugs. R. C262-66. The circuit court granted Defendant's motion and dismissed the count against Defendant Jatczak. R. C305. Plaintiff requested leave to amend, which was granted. *Id.*

In light of the circuit court's ruling that knowledge was insufficient to constitute having "knowingly participated in the illegal drug market", Plaintiff filed her Fourth Amended Complaint alleging that Defendant Jatczak, himself, was a drug dealer and, therefore, had knowingly participated in the illegal drug market. R. C307-09. Defendant moved to dismiss Plaintiff's Fourth Amended Complaint, arguing that the Drug Dealer Liability Act violates a defendant's due process rights under the Fourteenth Amendment of the United States

Constitution, as well as his due process rights under Article I, Section 2 of the Illinois Constitution. R. C352-363. The circuit court agreed, in part, striking one of the two theories of liability under the DDLA, 740 ILCS 57/25(b)(2), severing it from the DDLA. R. C399. This left intact Section 57/25(b)(1), which requires plaintiff to show the defendant provided the drugs actually used by the drug user, thereby causing the plaintiff's damages. For ease of reference and consistency, Defendant will continue to refer to these two sections with the same name as Plaintiff and the circuit court – 740 ILCS 57/25(b)(2) as the "Area Liability Provision", and 740 ILCS 57/25(b)(1) as the "Direct Liability Provision."

Upon completion of discovery, Defendant Jatczak moved for summary judgment on Count I of Plaintiff's Fifth Amended Complaint. R. C352-59. On December 5, 2017, the circuit court granted summary judgment in favor of Defendant Jatczak. R. C746. Plaintiff voluntarily dismissed defendants Simone Holda and Julie Holda. *Id.* This appeal followed.

B. Facts

Michael Neuman, the father of the minor, Noah Wingert, on whose behalf this lawsuit was filed, died on June 9, 2012 while in the upstairs apartment of Defendant Simone Holda. R. C696, P.26. Defendant Holda admitted to Detective Nicholas Schiavonne with the Berwyn Police Department that he was with Mr. Neuman on June 8, 2012. R. C697, P.31. According to Defendant Holda, Mr. Neuman and he had consumed alcohol, marijuana and heroin over the course of the night of June 8 into June 9, 2012. *Id.*

Defendant Holda discovered an unresponsive Mr. Neuman on the morning of June 9, 2012. R. C698, P.32. No evidence or testimony exists in the

record that Defendant Jatczak was even present at the property on June 8 or June 9, 2012.

Plaintiff, Cassandra Lee Wingert, testified that she never saw Defendant Jatczak provide prescription drugs to Michael Neuman. R. C615, P. 41 line 14-16. Plaintiff testified that she never saw Defendant Jatczak provide cocaine to Michael Neuman. R. C616, P.47 line 16-21. Plaintiff also did not witness or observe anyone provide Mr. Neuman with the drugs that ultimately led to his overdose. R. C622, P. 71 line 13-16.

Candy Neuman is the mother of Michael Neuman. She testified that she believed Defendant Jatczak was a drug dealer because 1) she was unaware of Defendant Jatczak having any income, and 2) she saw him with a tinfoil package during a 2011 party. R. C649, P. 37 line 14-23. She admitted she did not know what was inside the tinfoil. R. 648, P.32 line 6-16.

Ricky Garcia was the boyfriend of Mr. Neuman's sister, Amanda Neuman. R. C671, P.5. He testified that he did not observe Defendant Jatczak provide any drugs to Mr. Neuman. R. C674, P. 17, line 2-12. However, Mr. Garcia testified that approximately a year to two years prior to Mr. Neuman's overdose, he was at a party where he, Mr. Neuman, Defendant Holda, and Defendant Jatczak consumed a line of cocaine. C. 674, P.20.

Plaintiff attached to her Response to Defendant's Motion for Summary Judgment a document titled "Report of Postmortem Examination," containing a section titled "Opinion" that states Mr. Neuman's death was an accident resulting from opiate and cocaine intoxication. R. C731-35. However, no testimony or

evidence was adduced regarding this opinion, nor was any foundation laid to admit the document into evidence.

ARGUMENT

The Area Liability Provision of the Drug Dealer Liability Act ("DDLA") violates a defendant's due process rights when it either 1) imposes an irrebuttable presumption of causation where the triggering facts bear no rational relationship to the presumption of causation, or 2) imposes liability on a defendant without any showing the defendant was the cause in fact or proximate cause of plaintiff's damages. Additionally, if a defendant is not shown to be the cause in fact or proximate cause of the plaintiff's damages, then liability is imposed on that defendant for harm caused to a nonparty victim. This also violates a defendant's due process rights. For all of these reasons, the legislature exceeded its police power because the Area Liability Provision is an arbitrary and unreasonable exercise of that power. Thus, the circuit court's rulings must be affirmed.

The DDLA provides two methods for a plaintiff to impose liability on a defendant. Section 25(b) of the DDLA contains both of these methods. *See* 740 ILCS 57/25(b).

Section 25(b)(1) – "Direct Liability Provision"

Section 25(b)(1), *i.e.*, the "Direct Liability Provision", imposes liability on a defendant if a plaintiff proves that the defendant "knowingly distributed, or knowingly participated in the chain of distribution of, an illegal drug that was actually used by the drug user." 740 ILCS 57/25(b)(1).

Section 25(b)(2) – "Area Liability Provision"

Section 25(b)(2), *i.e.*, the "Area Liability Provision", imposes liability on a defendant where the defendant knowingly participated in the illegal drug market if 1) "the place of illegal drug activity by the individual drug user is within the illegal drug market target community of the defendant"; 2) "the defendant's participation in the illegal drug market was connected with the same type of illegal drug used by the individual drug user"; and 3) the defendant participated in the illegal drug market at any time during the individual drug user's period of illegal drug use." 740 ILCS 57/25(b)(2).

The Area Liability Provision violates a defendant's due process rights because it either 1) imposes an irrebuttable presumption of causation that bears no rational relationship to the facts triggering the presumption, or 2) imposes liability on a defendant without any showing that the defendant was a cause in fact or proximate cause of plaintiff's injuries or damages. The circuit court correctly ruled that by imposing an irrebuttable presumption of causation that is not rationally related to the triggering fact of a defendant's participation in the illegal drug market.

But even if this Court determines the circuit court incorrectly found the Area Liability Provision imposes an irrebuttable presumption of causation, the only alternative is that it imposes liability on a defendant without any showing that the defendant was a cause in fact or proximate cause of plaintiff's damages. This is an even more egregious violation of a defendant's due process rights. Consequently, the circuit court's ruling that the Area Liability Provision violates a defendant's due process rights must be affirmed.

Regarding the Direct Liability Provision, Plaintiff is wrong that it does not require her to show the defendant was the cause in fact or proximate cause of her claimed damages. This is so for the same reasons the Area Liability Provision is unconstitutional if this Court determines it eliminated any showing that the defendant was the cause in fact or proximate cause of a plaintiff's damages. Indeed, if Plaintiff is correct insofar as the Direct Liability Provision does not require any showing of cause in fact or proximate cause, then the entire DDLA must be struck down as both methods of liability would be unconstitutional and, therefore, unable to be severed.

I. The Area Liability Provision violates a defendant's due process rights because it imposes an irrebuttable presumption of causation that bears no rational relationship to the facts that trigger the presumption.

The DDLA's Area Liability Provision implicitly creates an irrebuttable presumption that a defendant was the cause in fact and proximate cause of plaintiff's damages. Longstanding U.S. Supreme Court case law establishes that where a legislature creates a statutory presumption, the fact presumed must bear a rational relationship to the fact proven. Otherwise, the presumption violates due process. The Area Liability Provision's irrebuttable presumption bears no rational relationship to the fact a plaintiff must show to trigger this presumption –the defendant participated in the same arbitrarily defined drug market as plaintiff and was associated with the same type of illegal drug at approximately the same time as the user's drug use. Consequently, the Area Liability Provision violates a defendant's due process rights by imposing an irrebuttable presumption regarding causation.

A. The Area Liability Provision imposes an irrebuttable presumption that the defendant caused plaintiff's damages.

The DDLA's Area Liability Provision imposes an irrebuttable presumption that the defendant was the cause in fact and proximate cause of the plaintiff's damages. Section 25(b)(2) provides that a plaintiff may seek damages from:

> (2) A person who knowingly participated in the illegal drug market if:
>
> (A) the place of illegal drug activity by the individual drug user is within the illegal drug market target community of the defendant;
>
> (B) the defendant's participation in the illegal drug market was connected with the same type of illegal drug used by the individual drug user; and
>
> (C) the defendant participated in the illegal drug market at any time during the individual drug user's period of illegal drug use.

See 740 ILCS 57/25(b)(2).

As a result, the "Area Liability Provision" in Section 25(b)(2) imposes the irrebuttable presumption that a defendant was the cause in fact and proximate cause of plaintiff's damages if the plaintiff satisfies those three elements. That is, a plaintiff may recover damages from any defendant, whether that plaintiff has any causative link with the defendant – as long as the drug user used drugs in the same illegal drug market target community as defendant, the drug used by the drug user is the same as the drug associated with defendant, and the defendant's participation in the illegal drug market was at the same time as the drug user's

illegal drug use. If a plaintiff meets these three requirements, a defendant is liable to the plaintiff without any showing that defendant was a cause-in-fact or proximate cause for the plaintiff's drug use and resulting damages. This lack of any causation requirement infringes upon a defendant's due process rights under the Illinois and U.S. Constitutions.

B. United States Supreme Court precedent requires an irrebuttable presumption to be rationally connected to the facts that trigger the presumption.

Longstanding U.S. Supreme Court precedent guides the relevant analysis when determining the constitutionality of a statutory presumption. To be sure, the Fifth and Fourteenth Amendments' due process clauses places limits on a legislature's ability to create presumptions. *Tot v. United States*, 319 U.S. 463, 467 (1943). A statutory presumption is unconstitutional when there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.* at 467–68. Thus, a statute violates due process if the presumption is arbitrary or if the presumption denies a fair opportunity to repel it. *W. & A.R.R. v. Henderson*, 279 U.S. 639, 642 (1929). Indeed, "legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty and property." *Id.*

Henderson concerned a provision of the Georgia Civil Code that governed railroad collisions. *Id.* at 640. The statute provided that where a plaintiff sustained injury from a train collision or from other acts involving the operation of a train, the railroad company was presumed to be negligent and liable unless

the company proved that all reasonable care was exercised. *Id.* The Court ruled that the presumption violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 644. The Court explained that the mere fact of a collision between a train and vehicle does not establish a basis for inferring negligence against the railroad company or anyone else. *Id.* at 642-43. Thus, there was no rational connection between the fact that a collision occurred which then triggered the presumption of negligence against the railroad company.

Tot involved a presumption contained in the Federal Firearms Act. *Tot*, 319 U.S. at 464. The Federal Firearms Act made it illegal for any person convicted of a violent crime to receive a firearm that was transported in interstate or foreign commerce. *Id.* Under the Act, if a person convicted of such a crime was found to be in possession of a firearm, that fact triggered a presumption that the person transported or received the firearm via interstate commerce and thus in violation of the FFA. *Id.* The burden then shifted to the defendant to disprove the presumption. *Id.* at 469. The Court ruled that it was impermissible to impose a presumption of liability triggered by showing an arbitrary fact lacking any relevance to the presumption. *Id.* at 469-470.

Tot and *Henderson* both demonstrate that if a statute imposes a presumption, the fact that triggers the presumption must bear a rational relationship to the presumed fact. The Area Liability Provision's irrebuttable presumption fails this requirement, rendering it unconstitutional.

C. The Area Liability Provision's irrebuttable presumption violates a defendant's due process rights because it has no rational connection to the facts that trigger the presumption.

The Area Liability Provision's irrebuttable presumption of causation is demonstrably more offensive to a defendant's due process rights than both of the rebuttable presumptions ruled unconstitutional in *Tot* and *Henderson*. First, none of the three perfunctory elements that a plaintiff must show to trigger the presumption of causation has any rational connection to whether any causal link exists between a defendant's conduct and plaintiff's damages. *See* 740 ILCS 57/25(b)(2)(A)-(C). For example, whether a drug user uses drugs in the same electoral district or state where a defendant is alleged to have engaged in the illegal drug market is entirely irrelevant to whether the defendant was a cause in fact or proximate cause of plaintiff's damages. Consequently, the presumption certainly fails the analysis established by the U.S. Supreme Court.

Second, the DDLA does not provide a defendant any mechanism, at all, to rebut the presumption that defendant caused plaintiff's damages. Indeed, even if a defendant were to introduce evidence that another person was solely responsible for plaintiff's damages, it would still not prevent the plaintiff from recovering against the defendant. This extreme legislative fiat that substitutes for such a critical and foundational element as cause-in-fact and proximate cause violates a defendant's due process rights under both the Illinois and United States Constitutions.

In sum, the Area Liability Provision violates a defendant's due process rights by providing that where a plaintiff satisfies three elements unrelated to whether the defendant has any causal nexus with the plaintiff, the defendant is

presumed to have caused the plaintiff's damages. Yet it goes ever further when it does not provide any ability for the defendant to rebut this presumption.

If the Area Liability Provision does not contain an irrebuttable presumption of causation, the only alternative view is even more constitutionally suspect. That is, the DDLA imposes liability on a defendant without any requirement that plaintiff show defendant was a cause in fact or proximate cause of plaintiff's damages.

II. This Court's analysis and rejection of market liability theories in *Smith v. Eli Lilly & Co.* exemplifies why the DDLA's Area Liability Provision is unconstitutional.

Even if this Court determines the Area Liability Provision does not impose an irrebuttable presumption of causation on a defendant, it still violates a defendant's due process rights under the Illinois and U.S. Constitutions. This is so because the only alternative interpretation is that the Area Liability Provision eliminates any showing of causation in fact or proximate cause. This Court has not addressed the Drug Dealer Liability Act's validity or any statute that similarly abrogates any showing of causation in fact or proximate cause between a plaintiff and defendant. However, this Court extensively analyzed why causation is so critical in its discussion and ultimate rejection of market liability theories in *Smith v. Eli Lilly & Co.* 137 Ill.2d 222 (1990).

This Court recognized in *Smith* that failing to require any causation in fact or proximate cause results in *unfair* and *arbitrary* decisions. Here, the Area Liability Provision tramples on the rationale of *Smith* so severely that it violates a defendant's due process rights. Oklahoma, the only other state to address the constitutionality of the DDLA, has agreed with the reasoning in *Smith* in rejecting

market share liability theories and also correctly struck down the Area Liability Provision because failing to require any causative link is fundamentally unfair and arbitrary. This Court should do the same.

A. This Court recognized in *Smith* that without a showing of causation, resulting decisions are arbitrary and unfair to defendants.

This Court in *Smith* confronted the question of whether Illinois should adopt one of the myriad market liability theories to allow plaintiffs injured by the use of a synthetic substance, DES, to recover from DES manufacturers without a showing of causation. *Smith*, 137 Ill.2d 222. DES was prescribed, in part, as a miscarriage preventative. *Id.* at 230. Because DES was a fungible product, it was extremely difficult for a plaintiff to determine the specific manufacturer of the DES ingested by the plaintiff leading to injury. *Id.* at 264. First, this Court acknowledged the substantive tort principles concerning cause-in-fact and a couple of exceptions to this requirement that shifts the burden of causation onto a defendant. *Id.* at 232-34. Then, this Court discussed the few states that had adopted one of the various forms of market liability – California, Washington, Wisconsin, and New York – pointing out the inherent problems with such liability theories. *Id.* at 236-47.

The theories adopted by other states at the time of the *Smith* decision and that this Court rejected can be distilled into the following:

State	**Name of Theory**	**Theory of Liability**
California	Market share liability	Plaintiff must join substantial share of DES manufacturers that may have produced the ingested DES. The burden then shifts to defendant to demonstrate they could not have produced the DES. Otherwise, liability imposed according to

		percentage market share of each defendant.[1]
Washington	Market share alternate liability	Plaintiff can only sue one defendant. The burden then shifts to defendant to prove it did not produce or market the ingested DES, did not produce or market in that geographic area, or did not produce or market DES at that time.[2]
Wisconsin	Risk contribution theory	Plaintiff need only sue one DES manufacturer and make *prima facie* case that it manufactured or marketed the type of DES ingested and the conduct constituted breach of duty to plaintiff. The burden then shifts to manufacturer to prove it did not produce or market DES for prevention of miscarriage during the relevant period or relevant geographical area.[3]
New York	National market share liability	Intended to apportion liability to correspond to the over-all culpability of each defendant measured by amount of risk of injury created to public at large. Defendant could only escape liability by proving it did not participate in the marketing of DES for pregnancy use.[4]

This Court continued with a discussion of the many other courts that have outright rejected any market liability theory. *Id.* at 246-51. After this discussion, this Court considered whether to adopt a market liability theory in Illinois before rejecting all of them because they were "too great a deviation from our existing tort principles." *Id.* at 251-68.

[1] *Id.* at 236-37.
[2] *Id.* at 240.
[3] *Id.* at 242-44.
[4] *Id.* at 245.

The underlying rationales for rejecting the market liability theories in Smith establish why the DDLA's Area Liability Provision violates a defendant's due process rights. Washington's version was problematic, in part, because it could result in a defendant "shoulder[ing] complete liability without proof of its being the cause in fact for the injury." *Id.* at 242. Wisconsin's theory was inappropriate because it "contravenes the fundamental tort principle that a mere possibility is insufficient to satisfy causation." *Id.* at 244. New York's version was flawed because it "cannot equate liability to actual harm caused." *Id.* at 245.

This Court also agreed with the rationale of the courts that had rejected any form of market liability, including 1) that "negligence in the air" is an insufficient substitute for causation in fact, and 2) there was "too great a risk that the actual wrongdoer was not before the court and the rule exposed those who were joined to liability greater than their responsibility." *Id.* at 246-47 (citing *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 75 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 246 (Mo. 1984)). This Court cited the Oklahoma Supreme Court who put it aptly – "public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries." *Id.* at 250 (citing *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987)).

As indicated above, this Court ultimately rejected any form of market liability in Illinois. In doing so, this Court held that if courts and juries were allowed to apportion damages without reliable information, the determinations would be *arbitrary* and *unfair*. *Id*. at 253-254. Moreover, imposing "liability

when it is quite possible that the defendant is not before the court is too speculative." *Id.* at 254. This Court ruled that "creation of risk or breach of a duty alone is not sufficient in imposing liability" and "these principles should not be ignored merely because the defendants are members of the drug industry." *Id.* at 266. Simply put, eliminating causation in fact is too great a deviation from a principle that serves a vital function in the law. *Id.* at 268.

B. The Area Liability Provision so severely tramples the foundational principles of our tort system this Court championed in *Smith* that it violates a defendant's due process rights.

The DDLA's Area Liability Provision eliminating both causation in fact and proximate cause trounces almost every principle this Court embraced when it rejected the market share liability theory in *Smith*. In fact, the Area Liability Provision goes even further because even if a defendant could prove that another person caused the plaintiff's injury, it would not exculpate that defendant from liability. Given this, the Area Liability Provision violates a defendant's due process rights.

As the circuit court correctly recognized, illegal drugs do not necessarily arise from the same source, and some drug dealers modify the drugs to increase or decrease their potency. R. C790. Thus, illegal drugs are not fungible like the substance DES addressed in *Smith*. This fact further underscores the fundamentally unfair and arbitrary action of imposing liability on a defendant who is not shown to be a cause in fact or proximate cause of a plaintiff's damages.

The Illinois Constitution serves as a limitation on legislative power. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 377 (1997). And while a legislature may justifiably seek to achieve fairness for tort plaintiffs, "it may not adopt arbitrary

means of achieving that goal." *Id.* at 432. One of the reasons causation in fact and, to a lesser extent, proximate cause are such fundamental principles of tort law is that the Due Process Clauses of the Illinois and United States Constitutions provide protection against fundamentally *unfair* and *arbitrary* actions.

Without a doubt, requiring causation in fact and proximate cause serves as a bulwark against unfair and arbitrary actions. Imposing liability on a defendant without any showing of causation in fact or proximate cause is truly as fundamentally unfair and arbitrary a result imaginable. Indeed, after a lengthy and diligent search, Defendant has been unable to find any example where a legislature or court has entirely abrogated any requirement that a defendant possess any link to a plaintiff, causal or otherwise, before imposing liability on that defendant. Nor has Plaintiff offered any example.

C. Oklahoma correctly ruled that the DDLA's Area Liability Provision violates a defendant's due process rights because failing to require any causative link is arbitrary and unreasonable.

Oklahoma has ruled that the Area Liability Provision violates a defendant's substantive due process rights because failing to require any showing of causation constitutes an arbitrary and unreasonable action by the state. Illinois' DDLA is virtually identical to the former DDLA in Oklahoma and also suffers from the same defect – lack of causation works an arbitrary forfeiture of property rights that is unconstitutional.

The Oklahoma appellate court has confronted a virtually identical version of the DDLA. *Steed v. Bain-Holloway*, 356 P.3d 62 (2015). Section 2-424(B)(2) of Oklahoma's DDLA was equivalent to the Area Liability Provision at issue. *Id.* at

¶ 10-11. In addition, Oklahoma's DDLA, as with Illinois, allowed a plaintiff to recover 100% of his or her damages against any defendant. *Id.* at ¶ 11.

The *Steed* court began its analysis by recognizing there is a strong presumption that favors the constitutionality of a statute. *Id.* at ¶ 6-7. So, a court's function is limited to determining the validity or invalidity of a statute when a party challenges its constitutionality. *Id*. As a result, "a statute's propriety, desirability, wisdom, or practicality" is irrelevant. *Id.* at ¶ 7.

The court identified the question presented as whether the DDLA authorized a taking without due process of law through its own Area Liability Provision. *Id.* at ¶ 17. Thus, the court focused on "the degree to which the alleged conduct must be connected to the claimed harm." *Id.* Beginning its analysis, the court acknowledged that the Oklahoma Supreme Court had previously rejected the market share liability theory in a case concerning the chemical DES. *Id.* at ¶ 19 (citing *Case v. Fibreboard, Corp.,* 1987 OK 79). The Oklahoma Supreme Court rejected the theory because there was an insufficient link between the claimed harm and a defendant's alleged conduct. *Id.* at ¶ 19. Simply put, a defendant sued in tort has a right to have "a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries." *Id*. at ¶ 20 (quoting *Case*, 1987 OK at ¶ 10). With that in mind, the court ruled that Oklahoma's Area Liability Provision in its DDLA was unconstitutional because it "eliminates the necessity of a causation link between persons harmed by an illegal drug and participants in that illegal drug market." *Id.* at ¶ 23.

Here, the Area Liability Provision also suffers from the same constitutional infirmity. Failing to require any causative link, the Area Liability Provision

imposes liability with zero regard to whether a defendant or collection of defendants who are sued includes the actual provider of the illegal drug that harmed the plaintiff or drug user. As a result, imposing liability on a person regardless of that person's conduct is arbitrary and unreasonable. The Due Process Clause in the Illinois and United States Constitutions protects citizens when a legislature enacts a statute that is an arbitrary and unreasonable use of its police power. As a result, the DDLA's Area Liability Provision is unconstitutional and the circuit court's ruling must be affirmed.

III. Plaintiff wrongly relies on workers' compensation and dram shop statutes to justify the DDLA because both of those examples require some connection between the plaintiff and defendant.

Plaintiff's argument wrongly hinges on the contention that worker's compensation and dram shop statutes justify the DDLA's failure to require any link, causal or otherwise, between the plaintiff and chosen defendant. If anything, Plaintiff's failure to analogize worker's compensation and dram shop statutes as "peas in a pod" with the DDLA underscores the DDLA's critical differences that render it unconstitutional.

At the outset, Plaintiff incorrectly frames the issue as whether a defendant has a vested right in common law rules governing negligence claims. Rather, the question is whether due process under the Illinois and U.S. Constitutions require a plaintiff to demonstrate a defendant has *some* causative link with the plaintiff before the defendant can be liable for that plaintiff's damages. In any event, neither the Workers' Compensation Act nor the Dram Shop Act support finding

the DDLA is constitutional because both of those examples require *some* causal connection between the plaintiff and defendant.

A. Illinois' Workers' Compensation Act requires employees to demonstrate that their injury resulted from their employment.

Unlike the Area Liability Provision, employees making a workers' compensation claim must still demonstrate that their injuries resulted from their employment. Illinois' Workers' Compensation Act contains this requirement:

> "To obtain compensation under this Act, an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment."

805 ILCS 305/1(d).

Thus, an employee must demonstrate that his injury resulted from his employment. Moreover, an employer is liable only to its immediate employees and employees of those with whom the employer subcontracts. *See* 805 ILCS 305/1(a)(3). This requirement can be framed as an altered version of the well-established "but for" cause-in-fact analysis - *but for* the employee being employed by the employer, the employee would not have suffered an injury resulting from that employment. Similarly, and aligning with the purpose behind the workers' compensation act, *but for* the employer employing the employee, the employer would not have gained the benefit of the work performed by the employee. Because of this, comparing the DDLA to workers' compensation offers Plaintiff no quarter.

B. Illinois' Dram Shop Act also requires injured persons to demonstrate that the establishment licensed to sell alcohol caused the intoxication of the person who caused their injuries.

Likewise, Illinois' Dram Shop Act does not support Plaintiff's broad contention because it also requires a causal connection with a defendant. There, a person injured by an intoxicated person has a cause of action against any person licensed to sell alcohol who, by furnishing the alcohol, "*causes* the intoxication of such person." *See* 235 ILCS 5/6-21(a)(emphasis added). Even under the extension of liability to the owner of a building, liability attaches only when the owner knowingly allows another person to use the building for the sale of alcohol and where that person *caused* the intoxication. *Id.* Therefore, workers' compensation and Dram Shop Act causes of action still require that *some* causative link exist between the plaintiff who seeks recovery from a particular defendant.

C. Unlike workers' compensation and dram shop actions, the Area Liability Provision requires no link, causal or otherwise, between a plaintiff and defendant.

Both of these situations stand in stark contrast to the DDLA's Area Liability Provision and hurt, rather than help, Plaintiff's contention it is constitutional. The DDLA requires no link, of any kind, between a plaintiff and defendant before holding the defendant liable for all of plaintiff's damages. If liability under workers' compensation or the Dram Shop Act were truly analogous to the DDLA, the following results would be commonplace.

First, within the context of workers' compensation, an employee of Apple injured in the workplace could sue Microsoft for her injuries on the basis that

Microsoft occupies space within the same industry and market as Apple – computer technology. An absurd scenario.

Within the context of the Dram Shop Act, Restaurant A causes the intoxication of a person who subsequently injures another person. Instead of suing Restaurant A, however, the injured person sues Restaurant B because Restaurant B is also an establishment serving alcohol. This scenario is similarly absurd. Thus, if the Dram Shop Act provided for liability in the same method as the DDLA, it would allow a person injured by an intoxicated person to sue any establishment that serves alcohol within the electoral district where they were injured. By Plaintiff's logic, all establishments that serve alcohol contribute to the public's consumption of alcohol and, therefore, should all be held liable for the consequences of that consumption whether the establishment had any link, whatsoever, to the intoxicated person or injured person. This is equally absurd.

Of course, neither the Workers' Compensation Act nor the Dram Shop Act allows for such liability. Nor could they, because doing so would violate a defendant's due process rights under the Illinois and United States Constitutions just like the DDLA does here. As a result, the above examples demonstrate that Plaintiff's attempt to use the Workers' Compensation Act and Dram Shop Act as support fails. Rather, those two statutes illuminate just how beyond the pale the DDLA goes in eliminating any requirement that plaintiff show a link, causal or otherwise, with a defendant before holding the defendant liable.

IV. The DDLA's Area Liability Provision also violates a defendant's due process rights because it punishes a defendant for harm caused to nonparty victims rather than the plaintiff.

If this Court concludes that the DDLA's Area Liability Provision abrogates any requirement that the plaintiff show a link, causal or otherwise, with the defendant before recovering from that defendant, the plaintiff is simply not recovering for damages inflicted on her by defendant. The U.S. Supreme Court has plainly ruled that where awarding punitive damages to a plaintiff would be for the harm caused to nonparties, the defendant's due process rights are violated. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). While the *Williams* court did not explicitly address whether this rule would also apply to compensatory damages, the rationale of its holding implies that it would. Of equal importance is that it should. Consequently, the Area Liability Provision violates a defendant's due process rights because eliminating causation allows a plaintiff to recover for damages inflicted on a nonparty victim.

A. The United States Supreme Court has ruled that imposing punitive damages on a party for harm caused to nonparty victims violates a defendant's due process rights.

Williams involved a punitive damages award entered against the defendant, Philip Morris USA, for the plaintiff's decedent's smoking-related lung cancer death. *Id.* at 349. One of the reasons the *Williams* Court ruled the punitive damages award violated due process was because the due process clause "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Id.* at 353 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Because of this, the Court

explained, a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge. *Id.*

In fact, the *Williams* Court went as far as to state that it "can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Id.* at 354. Indeed, the court identified the fundamental due process concerns underpinning its ruling were risks of arbitrariness, uncertainty, and lack of notice. *Id.* at 354.

The precursor to *Williams* was *State Farm Mut. Auto. Ins. Co. v. Campbell.* 538 U.S. 408 (2003). *Campbell* involved a bad faith action against State Farm Mutual Automobile Insurance Company seeking compensatory and punitive damages. *Id.* The Court held that compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Campbell*, 538 U.S. at 416. And although the *Campbell* court acknowledged that states possess discretion for imposing punitive damages awards, the Fourteenth Amendment's Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* at 416.

In sum, the U.S. Supreme Court has ruled that imposing liability on a defendant in the form of punitive damages for harm caused to a nonparty victim violates the defendant's due process rights.

B. The DDLA's Area Liability Provision violates the due process concerns identified in *Williams*.

Here, the DDLA's Area Liability Provision implicates all of the due process concerns that the *Williams* court identified when it held that when a punitive

damages award is imposed for harm caused to a nonparty victim, it violates a defendant's due process rights. The arbitrariness of imposing liability for theoretical harm caused to a nonparty victim on a defendant who has not been shown to have any causative link to the harm is abundantly clear. Likewise, allowing a plaintiff to sue any individual within the same community means that the individual sued has no certainty or notice regarding potential claims caused by the individual's conduct.

At bottom, causation has always been required, to some degree, because of the extreme arbitrariness and unfairness that otherwise results. Because the DDLA's Area Liability Provision does not contain any cause in fact or proximate cause requirement, it violates a defendant's due process rights under the Illinois and U.S. Constitutions.

V. Under either interpretation of the Area Liability Provision, its enactment was not a valid exercise of the Legislature's police power because it is both irrational and arbitrary.

Plaintiff posits for the first time on appeal that the Area Liability Provision does not violate a defendant's due process rights because it was a valid exercise of the Legislature's police power. Plaintiff is wrong. The constitutional analysis set forth above demonstrates that the DDLA violates a defendant's due process rights and fails the rational basis standard because it is both irrational and arbitrary to 1) impose liability on a defendant who is not shown to be the cause in fact or proximate cause of the plaintiff's damages, and 2) impose liability on a defendant for harm caused to a nonparty victim.

Plaintiff correctly points out that courts afford great deference to legislative enactments. Plaintiff is also correct that statutes are upheld even if they are unwise or offed the public welfare. Certainly, Defendant does not contend that combatting the scourge of illicit drugs is a public health issue within the purview of the legislature's police power. Nor is Defendant merely contending there is a better way to do so than the DDLA or challenging the DDLA's legislative findings. Finally, Defendant also does not contend that it is tragic when citizens suffer harm from their own, or someone else's, drug use.

But, "[t]o be a valid exercise of police power, the enactment must bear reasonable relation to the public interest sought to be protected and the means adopted must be a reasonable method to accomplish such objective." *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill.2d 323, 327 (1970). To be sure, it is not a valid exercise of such police power to impose liability on a defendant through either 1) creating irrebuttable presumption of causation triggered by unrelated facts, or 2) eliminating cause in fact and proximate cause.

A. The mere finding by a legislature that a serious problem exists "does not permit the adoption of arbitrary and unrelated means of meeting it."

As this Court has previously held, the mere finding by the legislature that a serious problem exists "does not permit the adoption of arbitrary or unrelated means of meeting it." *Boynton v. Kusper*, 112 Ill.2d 356, 367 (1986). This is so because the Due Process Clause prohibits the "arbitrary and unreasonable use of these powers." *Id.*

While it is true that *Smith* dealt with a common law tort remedy whereas the DDLA is a statutory tort, the fundamental principles of tort law are without

question relevant to determining the limits of a legislature's police power where eliminating such principles result in an arbitrary and unreasonable exercise of such power. If a legislature's police power authorizes imposing liability on a defendant without any evidence of causation, of any kind, any limit on such power is illusory. At least the market liability theories discussed and rejected in *Smith* provided a defendant the ability to offer proof that it did not cause the plaintiff's injuries. The Area Liability Provision does not. This failure is such an egregious violation of the foundational principles of tort law discussed in *Smith* that it infringes upon a defendant's due process rights under the Illinois and United States Constitutions.

This case presents the opportunity to reaffirm the fundamental principles upheld in *Smith* and to establish what would essentially constitute the outer limit of the legislature's police power when enacting a statutory tort cause of action. To be sure, there is a limit on the exercise of police power and if this case does not present an example of exceeding that limit, it is hard to envision a more likely scenario.

B. If a legislature can impose liability on a defendant without any showing of causation in fact or proximate cause, any limit on the legislature's police power is illusory.

Of course, Plaintiff is correct that it is within the legislature's purview to create a tort cause of action where none exists at common law. But the legislature exceeds its constitutional authority when it eliminates any requirement of causation either through an irrebuttable presumption triggered by unrelated facts or outright abrogation. Even under the most generous view, the Area Liability Provision exceeds the outer bounds of a legislature's police power.

As mentioned previously, Plaintiff incorrectly frames the issue arguing that a defendant does not have a vested right in the proximate cause element of a negligence tort. Rather, the issue before the court is whether a legislature's police power extends to creating a statutory tort that does not require any showing that a defendant was the cause in fact or proximate cause of a plaintiff's damages. Consequently, Plaintiff's argument that this Court has never considered individuals to have a vested right in common law rules governing negligence actions is irrelevant and unhelpful.

As this Court's precedent makes clear, a limit exists on a legislature's police power. *See Boynton*, 112 Ill.2d at 367. The DDLA's Area Liability Provision exceeds that limit because it is utterly untethered from rationality. Moreover, it is hard to imagine a more arbitrary result than allowing an award against a defendant who does not have any connection to the plaintiff, causal or otherwise.

The question must be asked: if a plaintiff can recover damages from a defendant with whom the plaintiff shares no link, causal or otherwise, where does it end? When the practical consequences are considered, the answer is clear – it does not end. The following scenario illustrates the point: A high net worth individual lives in Springfield, Illinois. That individual is arrested for providing a small amount of marijuana to a neighbor. A marijuana user who lives in Chicago, Illinois, upon hearing of this arrest but who has never met this individual, travels to Springfield and uses marijuana in the same electoral district as the individual.

Were the DDLA's Area Liability Provision constitutional, the marijuana user could file suit against the individual and, upon satisfying the three unrelated facts required to trigger the causation presumption, recover against that

individual for any and all damages related to his drug use. This scenario is a preposterous result that exemplifies how the Area Liability Provision violates an individual's due process rights. But that is not the end.

Subsequent to the marijuana user obtaining a judgment against the individual, every other marijuana user residing within the individual's electoral district also file suit against the individual. Upon the perfunctory showing of the three elements under the DDLA's Area Liability Provision, every marijuana user who sues the individual will obtain their own judgment against the individual, who has no recourse under the DDLA due to its irrebuttable presumption of causation. Surely, such an arbitrary, irrational and fundamentally unfair result violates that individual's due process rights. In fact, it is hard to imagine a more arbitrary and unreasonable exercise of police power that allows such an outcome.

As the above hypothetical demonstrates, the DDLA goes further and encourages plaintiffs to seek out a defendant who can satisfy any potential judgment rather than identifying the person who actually caused their damages. The facts of this case also illustrate this point because the person who provided Mr. Neuman with the drugs was identified – Defendant Simone Holda – but he was apparently judgment-proof and, therefore, voluntarily dismissed. R. C692, P. 9. For all of the above reasons, the DDLA's Area Liability Provision is unconstitutional and the circuit court's ruling must be affirmed.

VI. Plaintiff's contention that the Direct Liability Provision does not require a showing of causation in fact or proximate cause is wrong for the same reasons the Area Liability Provision is unconstitutional.

Plaintiff defends Section 25(b)(1), the Direct Liability Provision, on grounds that it does not require a plaintiff to prove the defendant was the proximate cause of a plaintiff's damages. *See Plaintiff's Brief* at 31. Consequently, Plaintiff argues that the circuit court incorrectly granted Defendant summary judgment due to Plaintiff's failure to present any evidence that Defendant was a cause in fact or proximate cause of Plaintiff's damages.

First, what Plaintiff is actually contending is that a plaintiff does not have to prove the defendant was the cause in fact *or* proximate cause of a plaintiff's damages under the DDLA. Second, if Plaintiff is correct that the Direct Liability Provision does not require a showing that a defendant was the cause in fact or proximate cause of the plaintiff's damages, then it, too, violates a defendant's due process rights. Finally, if Plaintiff's contention is correct, thereby rendering both the Direct Liability Provision and Area Liability Provision unconstitutional, then both theories of liability are invalid and the DDLA must be struck down in its entirety because it cannot survive if those two provisions are severed.

Defendant will not restate the arguments presented above regarding the Area Liability Provision's unconstitutionality because they apply equally to Plaintiff's contention that the Direct Liability Provision does not require any showing that Defendant was a cause in fact or proximate cause of Plaintiff's damages.

Rather, as Plaintiff admits, "if it is reasonably possible to uphold the constitutionality of a statute, a court must do so." *Plaintiff's Brief* at 9 (citing *Napleton v. Village of Hinsdale,* 229 Ill.2d 296, 306-07 (2008). The most reasonable interpretation that would uphold the constitutionality of the Direct Liability Provision is that the legislature intended for a plaintiff suing under the Direct Liability Provision to show the defendant was the cause in fact and proximate cause of the plaintiff's damages but unconstitutionally eliminated any causation showing for a plaintiff suing under the Area Liability Provision.

If nothing else, Plaintiff's contention that if the Direct Liability Provision requires a showing of causation in fact and proximate cause of a plaintiff's damages, recovery under the Direct Liability Provision would be more difficult than the Area Liability Provision underscores the arbitrary and unreasonable actions of the legislature. Such arbitrary and unreasonable actions exceeds the legislature's police power and infringes upon a defendant's due process rights under the Illinois and U.S. Constitutions. For all of the above reasons, the circuit court's rulings must be affirmed.

CONCLUSION

The DDLA's Area Liability Provision violates a defendant's due process rights under the Illinois and U.S. Constitutions because it imposes an irrebuttable presumption of causation without any rational connection to the facts that trigger the presumption. Alternatively, the DDLA is unconstitutional because it ignores the foundational principles of tort law recognized by this Court in *Smith* and, consequently, exceeds the legislature's police power in violation of a defendant's due process rights. Finally, the DDLA's Area Liability Provision is also

unconstitutional because it constitutes an arbitrary and unreasonable use of the legislature's police power because lack of causation results in plaintiffs recovering for harm potentially caused to a nonparty victim rather than themselves.

"Public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries." For all of these reasons, this Court should affirm the circuit court rulings by finding that the DDLA's Area Liability Provision is unconstitutional and that summary judgment was properly entered in favor of Defendant.

PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased

By: Kyle McConnell
One of Her Attorneys

Kyle McConnell
MEAGHER & GEER, P.L.L.P.
216 N. Jefferson Street, Suite 100
Chicago, Illinois 60661
(312) 463-1045
Attorney No. 6311216
kmcconnell@meagher.com

No. 123201

IN THE SUPREME COURT OF ILLINOIS

NOAH WINGERT, a minor, by his mother and next friend, CASSANDRA LEE WINGERT, Plaintiff-Appellant, v. PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased, Defendant-Appellee.	Appeal from the Circuit Court of Cook County, Illinois County Department Municipal Division Trial Ct. No. 13 L 010098 The Honorable Daniel T. Gillespie Judge Presiding

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words 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 342(a), is 33 pages or words.

PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased

By: Kyle McConnell
Attorney for Defendant

Kyle McConnell
MEAGHER & GEER, P.L.L.P.
216 N. Jefferson Street, Suite 100
Chicago, Illinois 60661
(312) 463-1045
Attorney No. 6311216
kmcconnell@meagher.com

No. 123201

IN THE SUPREME COURT OF ILLINOIS

NOAH WINGERT, a minor, by his mother and next friend, CASSANDRA LEE WINGERT, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County, Illinois County Department Municipal Division
v.	)	Trial Ct. No. 13 L 010098
PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased, Defendant-Appellee.	)	The Honorable Daniel T. Gillespie Judge Presiding

NOTICE OF E-FILING

To: Service List

PLEASE TAKE NOTICE that on the 10th day of August, 2018, we filed with the Supreme Court of Illinois electronically: **BRIEF AND ARGUMENT OF DEFENDANT-APPELLEE**, copies of which are attached.

By: _____
Attorney for Defendant

Certificate of Service Via E-mail

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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true. A copy of the above and foregoing notice and documents was served upon the party(ies) as above addressed, by email to nnepustil@benshaplaw.com on the 10th day of August, 2018.

Julie Albin

Kyle McConnell
MEAGHER & GEER, P.L.L.P.
216 N. Jefferson Street, Suite 100
Chicago, Illinois 60661
(312) 463-1045
Attorney No. 6311216
kmcconnell@meagher.com

E-FILED
8/10/2018 8:04 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

Wingert v. Jatczak
Trial Court - 13 L 010098
Supreme Court - 123201

SERVICE

Mr. Nick Nepustil Benjamin & Shapiro, Ltd. 180 N. LaSalle St., Suite 2600 Chicago, IL 60601 312-641-5944 nnepustil@benshaplaw.com	Attorney for Plaintiff