No. 126511

IN THE SUPREME COURT OF ILLINOIS

MARQUITA McDONALD,

Plaintiff-Appellee,

v.

SYMPHONY BRONZEVILLE PARK, LLC, *et al.*,

Defendant-Appellant.

On Appeal Under Supreme Court Rule 315
from the Illinois Appellate Court, First District
Case No. 1-19-2398

There on appeal from the Circuit Court of Cook County under Supreme Court Rule 308,
Case No. 2017-CH-11311
The Honorable Raymond Mitchell, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT SYMPHONY BRONZEVILLE PARK, LLC

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AND STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff and her amici ignore altogether Bronzeville's demonstration that the plain language of the Exclusivity Provisions encompasses workplace BIPA injuries, thereby preempting her claim. And she acknowledges, as she must, that her BIPA injury arose from, and was incurred during the course of, her employment.

Having implicitly conceded that preemption *prima facie* applies, Plaintiff's sole argument is that BIPA workplace injuries are "not compensable" within the meaning of the fourth *Folta* exception to workers' compensation exclusivity. But as shown below, each reason offered for this extraordinary conclusion is contrary to settled law.

Plaintiff's final contention—that answering the certified question in the affirmative would eliminate *all* forms of employer liability—is simply a hyperbolic scare tactic that is based on a mischaracterization of Bronzeville's position. As this Court's recent decision in *McAllister* confirms, the Workers' Compensation Act contains multiple "stopping-places," including the four exclusivity exceptions summarized in *Folta*. Routine application of this well-developed jurisprudence has always safeguarded the civil rights of employees and has and will continue to prevent the abolition of legitimate employer liability that Plaintiff professes to fear.

This Court should, therefore, adhere to its long-standing practice of applying the Exclusivity Provisions to all workplace injuries, and reverse.

A. Plaintiff Has No Response To Symphony's Demonstration That The Plain Language Of The Workers' Compensation Act Encompasses BIPA Workplace Injuries.

As shown in Bronzeville's opening brief, the plain, unambiguous language of the Exclusivity Provisions of the Workers' Compensation Act controls the outcome here, compelling reversal.

The Illinois Legislature framed the Exclusivity Provisions in the broadest possible terms to encompass any "injury" incurred "in the line of [] duty," or that "aris[es] out of and in the course of [] employment," 820 ILCS §§305/5(a), 305/11. Without exception, this Court has held that every workplace injury that has come before it is encompassed by the Exclusivity Provisions—including not only statutory injuries, but also non-physical emotional and psychological injuries such as those alleged here. (See Bronze. Br. 18-19, 21-22, 24-26.)[1] Because Plaintiff admittedly incurred her alleged BIPA injury in the workplace while using Bronzeville's equipment to perform routine work (A10-12), it necessarily follows that her exclusive remedy is workers' compensation.

Plaintiff has no principled response to this argument. Actually, she has no response at all, ignoring entirely both the plain meaning of the Exclusivity Provisions and this Court's unbroken line of cases applying them as written to all workplace injuries.

Instead, she puts all her eggs in a single basket, arguing that workplace privacy injuries are never compensable under the Workers' Compensation Act, and for that reason, and that reason alone, are outside exclusivity. But as shown next, each reason she offers for this conclusion is contrary to settled law that emotional and psychological injuries are encompassed by the Workers' Compensation Act.

[1] Citations appear as follows: "Bronze. Br. __" and "A__" refer to Bronzeville's opening brief and appendix, respectively; "Pl. Br. __" refers to Plaintiff-Appellee's brief in this Court; "NELA __" refers to the brief of *amicus curiae* the National Employment Lawyers Association; "ITLA __" refers to the brief of *amicus curiae* the Illinois Trial Lawyers Association; and "WCLA __" refers to the brief of *amicus curiae* the Workers' Compensation Lawyers Association.

Finally, Plaintiff fails to demonstrate that there is a meaningful distinction between workplace privacy injuries and workplace emotional and psychological injuries that would remove such injuries from the broad scope of the Exclusivity Provisions.

B. BIPA Workplace Injuries Are "Compensable" Under The Workers' Compensation Act.

An employee's claim against her employer to redress a workplace injury is barred by the Exclusivity Provisions unless the employee demonstrates that her injury [1] "was not accidental," [2] "did not arise from [her] employment," [3] "was not received during the course of [her] employment," or [4] is "not compensable under the Act." *Folta v. Ferro Eng'g*, 2015 IL 118070, ¶14; *McAllister v. Illinois Workers' Comp. Commission*, 2020 IL 124848 ¶¶ 32-36.

Having explicitly alleged in her complaint that her injury occurred during the course of her employment with Bronzeville, (A6-A11:¶¶2, 5, 22-25, 28-31; A17:¶59, alleging Bronzeville owed her "heightened duty" of care "because of the employment relationship of the parties"), Plaintiff thus concedes that this case does not fall within either the second or third exclusivity exceptions. And she recognizes that the "non-accidental" exception is not before the Court, as she admittedly "allege[d] only a negligent violation of [BIPA]," (A67), and neither lower court addressed the issue.[2]

[2] Plaintiff pleaded only a negligent BIPA violation for good reason. Bronzeville's time-clock enabled it to comply with its federal and state wage-hour obligations to its employees by accurately tracking their working hours. At worse, it was negligent when it operated the clock without awareness of BIPA's obligations, which constitutes an "accidental" injury as a matter of law. See, *e.g., Baylay v. Etihad Airways P.J.S.C.*, 222 F. Supp. 3d 698, 704 (N.D. Ill. 2016), aff'd, 881 F.3d 1032 (7th Cir. 2018) ("Both an employee's claim of employer negligence and a claim of employer willful and wanton conduct fall within the definition of 'accidental' and are preempted" by the Illinois Workers' Compensation Act) (citing authority).

Instead, Plaintiff's entire position boils down to her assertion that her alleged BIPA injury is "not compensable" under the fourth exception to exclusivity. Before demonstrating why she is wrong, Bronzeville briefly responds to her contention that it "misrepresented" *Folta* in its opening brief. (Pl. Br. 17.)

1. Bronzeville's Opening Brief Correctly Described And Discussed *Folta.*

Folta said two things of relevance to the "compensability" standard. First, it said that "whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the [Workers' Compensation] Act." *Folta,* 2015 IL 118070, ¶23.

It also said that "compensability" exists except where "there is [a] 'categorical' class without a right to seek benefits against their employer." *Id.*, ¶48. Together, these statements form an unified test—that is, is a particular type of injury initially "in," and if so, has it been excluded?

Plaintiff criticizes Bronzeville for stating several times that, in operation, the compensability analysis under the Workers' Compensation Act effectively turns on whether the particular type of workplace injury has been "excluded" from coverage. But that in effect is exactly how the "compensability" analysis works under the Workers' Compensation Act.

For guidance, the Court should defer to the text of the Workers' Compensation Act, which flatly provides that an "injury" is encompassed by the Workers' Compensation Act if the injury was incurred "in the line of [] duty" or "aris[es] out of and in the course of [] employment," 820 ILCS §§305/5(a), 305/11. The Exclusivity Provisions contain no qualifications to this test; thus, all workplace injuries are within their scope.

In other words, by definition all workplace injuries that occurred in the line of duty or arose out of and in the course of employment presumptively "fit within the purview" of

the Workers' Compensation Act and are, for that reason, presumptively "compensable." Particular types of workplace injuries have been deemed non-compensable under the Workers' Compensation Act only when they contain some sort of categorical characteristic that takes them out of its purview—such as intentional torts that lack the accidental quality that is essential for coverage. *E.g. Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 239-241 (1980).

When so understood, does that mean that the compensability analysis is meaningless, as Plaintiff asserts? (Pl. Br. 17.) The answer is no, of course not, as the rest of *Folta* explains.

As *Folta* held, a particular injury is not rendered non-"compensable" simply because benefits cannot be awarded. See *Folta*, 2015 IL 118070, ¶¶26-31 (rejecting argument that the Exclusivity Provisions "assume the possibility of a right to compensation"). Rather, "compensability" presumptively exists, unless "there is [a] 'categorical' class without a right to seek benefits against their employer." *Id.*, ¶48. That is, a workplace injury (and hence presumptively "compensable") becomes non-compensable only if it has been categorically excluded from coverage.

Bronzeville's opening brief discussed *both* aspects of this test, not just the latter half (which focuses on exclusion), as Plaintiff and her amici falsely claim. And it demonstrated that BIPA workplace injuries fall within the plain meaning of the Exclusivity Provisions, (Bronze. Br. 13-20), and are in no way excluded. (Bronze. Br. 23-30.)

Consistent with Bronzeville's actual reading of *Folta*, Plaintiff now contends that she independently wins under either prong of the "compensability" standard—that BIPA workplace injuries were never encompassed within the Workers' Compensation Act and,

alternatively, were somehow excluded from its scope. But this Court has rejected the foundation of Plaintiff's position, consistently holding that workplace injuries that are similar to the injury here are compensable.

2. Non-Physical Emotional And Psychological Workplace Injuries Are Encompassed By The Exclusivity Provisions.

(a) Characterizing the Workers' Compensation Act as principally concerned with physical injuries, Plaintiff suggests that non-physical injuries are entitled, at best, to minimal protection under the Act. (Pl. Br. 19.) Plaintiff's amicus, NELA, goes further and asserts "physical, bodily harm" is a requirement of compensability. (NELA 11.) As shown in Bronzeville's opening brief, this Court has consistently rejected that contention.

In summarizing the compensability standard in *Folta*, this Court reaffirmed its prior decisions, which squarely held that a physical injury is not a required element of compensability. Thus, compensable non-physical injuries include: the "severe emotional shock" from seeing a co-worker's hand severed by machinery (*Pathfinder*); the "emotional distress" from an employer's lack of medical attention after a heart attack (*Collier*); and "emotional injuries" arising from an alleged false arrest (*Meerbrey*). See *Folta*, 2015 IL 118070, ¶¶19-22.

Such non-physical workplace injuries inherently involve "a [] change in the human organism," "that is traceable to a definite time and place" and can "produce[] a psychological disability," *Pathfinder Co. v. Industrial Comm'n,* 62 Ill. 2d 556, 562, 565 (1976), which is Plaintiff's desired threshold requirement for compensability.[3] (Pl. Br. 19.)

[3] If ever there were a case in which a workplace injury is traceable to "a definite time and place" and to the exact piece of the employer's equipment that caused it, this is it.

As this Court has held time and again, psychological injuries, such as "bodily injury in the form of mental anguish" which Plaintiff allegedly suffered here, (A12:¶¶35-36), are "categorically" within the purview of the Workers' Compensation Act. (See also cases cited at Bronze. Br. 18-19, 21-22.)

(b) Plaintiff attempts to avoid this conclusion by observing that a BIPA violation might cause injury apart from psychological harm, such as financial or reputational harm, or no harm at all. (Pl. Br. 20-21.) But these observations are irrelevant to the compensability inquiry.

This case, of course, involves no allegation that Bronzeville sold or otherwise compromised Plaintiff's biometric information. A claim asserting such a violation is not preempted because it is not based on a workplace injury at all—*i.e.*, an injury that "arise(s) out of and in the course of employment." *Sjostrom v. Sproule*, 33 Ill. 2d 40, 43 (1965); *Folta*, 2015 IL 118070, ¶18. Rather, such an injury is based on the employer's subsequent sale of an asset it did not own.

Equally immaterial is Plaintiff's assertion that an employee might suffer no harm, not even psychological harm, from a workplace BIPA violation. (Pl. Br. 20-21.) First, this Court already rejected Plaintiff's premise, holding in *Rosenbach* that even a "technical" violation of BIPA (*i.e.*, one without actual damages) imposes a "real and significant" injury upon the individual whose rights were impaired. *Rosenbach v. Six Flags Entertainment Corp*., 2019 IL 123186, ¶34.

Moreover, Plaintiff's argument misapprehends the operation of the workers' compensation system. Workplace accidents frequently are minor and produce no actual damage to the employee. Contrast an employee who lightly stubs her toe at work, with the

employee who severely sprains her ankle while working and cannot work. That the former employee suffered no injury or damage does not remove her case from the scope of exclusivity. Rather, it simply eliminates her entitlement to benefits.

What does matter, and what Plaintiff ignores, is the possibility that an employee could suffer emotional or psychological harm from having her biometric information scanned without her consent. Indeed, Plaintiff alleged that is what happened to her. (A12:¶¶35-36.) That possibility, however, destroys Plaintiff's position, because the *Folta* compensability analysis is driven by the *possibility* of recovery for the injury—not whether compensation is available. *Folta*, 2015 IL 118070, ¶¶ 26-31 (rejecting argument that the Exclusivity Provisions "assume the possibility of a right to compensation").

BIPA workplace privacy injuries *may* be compensable under the Workers' Compensation Act either because a BIPA violation imposes a "real and significant injury" per *Rosenbach*, or because an employee might suffer actual psychological or emotional injuries. And that is all that is required to satisfy the *Folta* "compensability" standard. *Folta*, 2015 IL 118070, ¶¶18, 23-31, 48.

3. BIPA Does Not Exclude Itself From Compensability.

Parroting, without saying so, the second half of the *Folta* compensability analysis, Plaintiff and her amici assert that BIPA somehow excludes itself from the Workers' Compensation Act. Their arguments lack merit.

(a) Amicus Workers' Compensation Lawyers' Association ("WCLA") argues that a statutorily-created injury is *outside* worker's compensation exclusivity, unless the statute in question explicitly incorporates the Exclusivity Provisions. (WCLA 4-5.) Even a cursory review of the plain language of Exclusivity Provisions reveals that the law works in just the opposite fashion.

The Exclusivity Provisions bar, without qualification, a "*statutory right* to recover damages from the employer" for workplace injuries. 820 ILCS §§305/5(a), 305/11. Nothing in the Workers' Compensation Act limits its preemptive effect to only statutes that explicitly incorporate its Exclusivity Provisions.

Moreover, as Bronzeville previously demonstrated, this Court has applied the Exclusivity Provisions to every form of workplace injury where the fundamental statutory criteria are met—the occurrence of an accidental injury during work. (Bronze. Br. 13-15.) As this Court has explained, "[t]he language of [820 ILCS §305/5(a)], read alone, leaves no room for construction[:] [i]t bars any 'statutory right to recover damages for injury.'" *Gannon v. Chicago, M., St. P. & P. Ry. Co*., 13 Ill. 2d 460, 462 (1958) (employee's claim under Scaffold Act barred under "broad sweep" of Section 5(a)); (see also cases cited at Bronze. Br. 14-16.)

This preemption occurs, moreover, even though the statutes in question, like BIPA, provide for a private right of action. *Gannon*, at 462-63; see also *Vacos v. LaSalle Madison Hotel*, 21 Ill App.2d 569, 572 (1959) (Exclusivity Provisions bar claim under Dram Shop Act, which provides for private right of action); *Carey v. Coca Cola Bottling Co. of Chicago*, 48 Ill. App. 3d 482, 483-84 (1977) (same; Structural Work Act).

Plaintiff is simply incorrect that the existence of a private statutory right of action exempts BIPA from the broad sweep of the Exclusivity Provisions. (Pl. Br. 26.) Like Plaintiff's statutory injury here, when a statutory workplace injury is encompassed by the Workers' Compensation Act, preemption automatically applies under this Court's cases, even as to statutes, like BIPA, enacted after the Workers' Compensation Act.

The Legislature could, of course, adopt legislation exempting a particular statutory injury from the Exclusivity Provisions, and it is presently considering legislation that would exempt BIPA workplace injuries from the Workers' Compensation Act.[4] If anything, this underscores that exempting particular workplace injuries from the Workers' Compensation Act is the Legislature's role, not the role of the Court.

Thus, Plaintiff and amici have it dead wrong: a statutory workplace injury is encompassed by exclusivity unless the statute in question explicitly excludes it—which BIPA does not do.

The WCLA's cases say nothing different. *Interstate Scaffolding, Inc. v. Illinois Worker's Comp. Comm'n*, 236 Ill. 2d 132 (2010), merely says that an employer's obligation to pay benefits does not end when it terminates the employee; it says nothing about what injuries are subject to exclusivity.

Equally irrelevant is *Liu v. Four Seasons, Hotel, Ltd.*, 2019 IL App (1st) 182645, which found that a BIPA claim was not subject to arbitration under the parties' agreement. Neither it, nor the other cases Plaintiff or WCLA cite in passing, suggest that statutory injuries are outside the Workers' Compensation Act unless the statute explicitly incorporates the Exclusivity Provisions.

(b) Plaintiff next contends that BIPA's purposes are incompatible with the conclusion that BIPA workplace injuries are "compensable" under *Folta.* (Pl. Br. 22-27.) This contention fails for multiple reasons.

[4] Illinois House Bill 3697 would amend the Workers' Compensation Act to provide that it does not preempt or prevent an employee from recovering under BIPA. HB 3697 passed the House but was re-referred to the Committee on Assignments. 102nd Ill. Gen. Assem., House Bill 3697, 2021 Sess.

To begin with, this is a phantom test that was never endorsed by Illinois courts, as the absence of Illinois authorities makes clear.[5] It also runs counter to the bedrock rule that clear and unambiguous statutory language must be applied in accordance with its plain meaning.

Moreover Plaintiff's incompatibility contention is factually incorrect. Despite discussing this point at length, Plaintiff offers precious little substance to support her conclusion.

Plaintiff first stresses that BIPA was intended to deter misconduct. (Pl. Br. 22, 24.) But her contention ignores that this Court has consistently applied the Exclusivity Provisions to employee claims under statutes likewise intended to deter misconduct. (Bronze. Br. 32-33, citing, *e.g.*, *Gannon.*)

Plaintiff next says, without citation, that compensability is determined not just by the "type of damages" being sought, but also by "the reasons the legislature made those damages available." (Pl. Br. 23.) Again, this is a made-up test not recognized by Illinois law.

To the contrary, *Folta* teaches that compensability turns on the type of injury at issue, *Folta*, 2015 IL 118070, ¶18, ¶¶26-31—which in this case is plainly encompassed by the Workers' Compensation Act. See Part A above. If the Legislature decides that a type of workplace injury is outside the Workers' Compensation Act, it can pass legislation

[5] Plaintiff's out-of-state cases are both non-authoritative and distinguishable. For example, *Daniel v. City of Minneapolis*, 923 N.W.2d 637 (Minn. 2019) held that an employee could pursue a discrimination claim against his employer "[b]ecause [his] alleged injury under the human rights act arose not from his original ankle injury but from his employer's alleged discriminatory response to that injury. . ." Far from helping Plaintiff here, such cases eviscerate her no "stopping-place" assertion.

saying just that. Absent such legislation, it is improper for this Court to create a new, judicial exception to the Workers' Compensation Act in disregard of its plain language.

(c) Plaintiff's amicus, the WCLA, contends that the "Workers' Compensation Act does not accord the [Workers' Compensation] Commission with jurisdiction over BIPA claims." (WCLA 4.) That is so, it says, first because the Workers' Compensation Act itself never mentions BIPA; and second because BIPA "expressly exclude[s]" itself by providing that BIPA claims are to be resolved in court.

First, this argument assumes the wrong question. The question here is not whether the Commission is authorized to adjudicate BIPA workplace liability claims. The Workers' Compensation Act provides, as the WCLA obviously knows, for "no-fault" recovery in the event of a covered injury. *Moushon v. National Garages, Inc*., 9 Ill. 2d 407, 412 (1956). The Commission is thus never "accord[ed]. . . jurisdiction" over an underlying "claim," but it does determine whether a compensable workplace injury occurred.

Second, the WCLA's argument improperly assumes its conclusion. It is premised on the notion that BIPA workplace injuries are not "compensable." But, as previously shown, they are compensable, which necessarily means that the Commission is statutorily authorized to award benefits for such injuries. *Folta*, 2015 IL 118070, ¶21 ("'emotional distress'. . . 'compensable' under the Act.")

Third, as discussed in Part (3)(a) above, that a statute provides for a private right of action has no bearing on whether the Workers' Compensation Act preempts claims seeking redress for *workplace* injuries under that statute. *E.g., Gannon, supra.*

Fourth, as discussed in Bronzeville's opening brief, the Workers' Compensation Act preempts Plaintiff's claims for statutory damages only. She still has a private right of action in Circuit Court for injunctive relief under BIPA. (Bronze. Br. 3, 8, 33-36.)

(d) Plaintiff and amici assert there is no "stopping-place" for Bronzeville's position, which they claim would, if accepted, protect employers from *any* form of liability to their employees. (Pl. Br. 30-33; NELA 4, 11.) This is a rhetorical argument, with no substance.

First, Plaintiff and amici are responding to a phantom argument Bronzeville never made. Bronzeville has never claimed that the Workers' Compensation Act wipes out all potential employer civil liabilities. Rather, it used the term "every injury" as a term of art in the same way this Court has used that term in countless cases—to refer to workplace injuries of the type encompassed by the Workers' Compensation Act. See *e.g. Gannon,* 13 Ill. 2d at 462 (Workers' Compensation Act "bars any 'statutory right to recover damages for injury.'")

Second, and most importantly, the Exclusivity Provisions themselves, as construed by this Court, establish the so-called "stopping-place." They bar damage claims *only* "for injur[ies] sustained by any employee while engaged in the line of [ ] duty" or "arising out of and in the course of the employment," 820 ILCS §§ 305/5(a), 305/11. And, as *Folta* makes clear, they bar damage claims for *all* such injuries except where one of the four recognized exclusivity exceptions applies. *Folta,* 2015 IL 118070, ¶14.

Significantly, the components of the preemption standard have been thoroughly developed by this Court's jurisprudence, providing clear guidance for future application. For example, this Court recently made clear that coverage exists only when both the

"arising out of" and "course of employment" conduct" components are satisfied. *McAllister,* 2020 Il. 124848, ¶¶ 32-36. And it carefully explicated the meaning of these components, describing, among other things, the required "causal connection between the employment and the accidental injury," as well as the types of risks that are "associated with employment." *Id.*, ¶¶ 36, 40.

In other words, the "stopping-place" that Plaintiff chides Bronzeville for not establishing already exists under settled law, and has been routinely applied in countless cases. Thus, amici's *in terrorem* recitation of numerous employment-related statutes that would be rendered meaningless if the Court answers the certified question in the affirmative is a grossly exaggerated scare tactic that has no foundation. (NELA 6-7.) Whether claims under those statutes are barred by the Workers' Compensation Act will depend solely on the nature of the specific claims and injuries at issue under those statutes, not on whether this Court determines that BIPA workplace injuries are preempted.

Moreover, Plaintiff's doomsday rhetoric is plainly overheated, as the cited statutes are not candidates for Workers' Compensation Act preemption under existing law. For example, neither claims for unpaid wages under the Wage Payment and Collection Act (820 ILCS §115/11), nor claims for failure to pay minimum wage under the Illinois Minimum Wage Law (820 ILCS §105/12) seek redress for an "injury [] sustained by any employee while engaged in the line of [ ] duty." 820 ILCS §§ 305/5(a), 305/11.

Likewise, workplace discrimination, harassment, and retaliation claims under the Illinois Human Rights Act are by no means triggered by "accidental" conduct, nor do such claims arise because the victimized employee performed her duties and responsibilities. Rather, such claims arise because the perpetrator decided to engage in an unlawful act.

Here, in sharp contrast to injuries under the statutes which Plaintiff cites, Plaintiff's alleged injury was incurred in the exact same manner typical of compensable workplace injuries: from using her employer's equipment while performing a required work function. That is, Plaintiff allegedly suffered an injury at work and during work that is "traceable to a definite time and place" and which "can produce[] a psychological disability." Consequently, this case is squarely within the wheelhouse of Workers' Compensation Act exclusivity and does not present a legitimate "stopping-place" problem.

(e) Finally, Plaintiff contends BIPA workplace injuries are exempt from exclusivity because the Legislature supposedly had no need to explicitly provide in BIPA that they are excluded. (Pl. Br. 29.) Not only is Plaintiff wrong, but her contention is pure guesswork that bucks common sense.

First, the law is the opposite: because the Workers' Compensation Act creates a broad, all-encompassing test for exclusivity, newly created employee-statutory rights are subject to Workers' Compensation Act preemption if the injury incurred was "in the line of [] duty" or "arose out of and in the course of [] employment," 820 ILCS §§305/5(a), 305/11, unless the injury is explicitly excluded.

Second, as demonstrated in Bronzeville's opening brief, the pre-BIPA appellate case law found that similar workplace injuries were preempted. (Bronze. Br. 21-22.) Even if Plaintiff's attempted distinctions of those cases were sound (and they are not),[6] she points

[6] Plaintiff claims one pre-BIPA case, *Richardson v. Cty. of Cook*, 250 Ill. App. 3d 544 (1993) was undermined by *Folta*, a post-BIPA decision. (Pl. Br. 27.) But even if that were true (and it is not) that would say nothing about the state of the law when BIPA was enacted. Plaintiff also suggests that *Goins v. Mercy Ctr. for Health Care Servs.*, 281 Ill. App. 3d 480 (2d Dist. 1996) and *Benitez v. KFC Nat. Mgmt. Co.*, 305 Ill. App. 3d 1027 (2d Dist. 1999) should be ignored because they supposedly did not employ the precise

to nothing that demonstrates the Legislature intended such a monumental shift in workers' compensation exclusivity for workplace BIPA injuries by: (1) remaining silent on the matter, and (2) placing BIPA—not in the Employment section of the ILCS—but in the Civil Liabilities section. One must squint real hard to credit Plaintiff's point.

C. The Constitutionality Of The Workers' Compensation Act Is Well-Settled.

Plaintiff's amicus, the Illinois Trial Lawyers' Association ("ITLA"), also argues that it would be unconstitutional to apply the Exclusivity Provisions of the Workers' Compensation Act to BIPA. (ITLA 2-23.) Not only is this contention outside the issue as to which this Court granted review, it is frivolous.

As this Court recently noted, it "has long upheld" the "constitutionality" of the Workers' Compensation Act. *Wingert by Wingert v. Hradisky*, 2019 IL 123201, ¶46 (citing *Moushon*, 9 Ill.2d 407, 412; *Grand Trunk Western Ry. Co. v. Industrial Comm'n*, 291 Ill. 167, 173 (1919)).

Indeed, this Court has consistently upheld the applicability of the Workers' Compensation Act to workplace injuries made redressable by each and every statute that has come before it. (See cases cited at Bronze. Br. 14-15, 18-21, 24-26.) And in the process, it has rejected every single constitutional challenge that has been mounted, including that it violates equal protection or the constitutional "right to a certain remedy." *Folta*, 2015 IL 118070, ¶¶44-49. As such, the constitutionality of the Workers' Compensation Act is settled law beyond a plausible challenge.

Furthermore, the ITLA's entire constitutional challenge rests on a demonstrably false factual premise—namely, that applying the Exclusivity Provisions to BIPA

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language later used in *Folta*. But that ignores that they squarely held that injuries similar to those alleged here were within the Workers' Compensation Act. (Bronze. Br. 21-22.)

workplace injuries would "strand its victims without mechanisms for redress" by depriving workers of the right "to try obtain recourse for their losses." (ITLA 13-14, 23.)

But that is the *opposite* of how worker's compensation works. As the ITLA acknowledges elsewhere, the Workers' Compensation Act provides workers with "prompt, sure and definite" compensation for all workplace injuries, with industry bearing "the cost of such injuries." *O'Brien v. Rautenbush*, 10 Ill. 2d 167, 173 (1956), overruled in part by *Rylander v. Chicago Short Line Ry. Co*., 17 Ill. 2d 618 (1959). And psychological and non-physical injuries such as those at issue here are encompassed within that certain remedy (see cases cited at Bronze. Br. 18-19), a point which the ITLA ignores, but does not dispute. Finally, neither Plaintiff nor ITLA dispute that a BIPA-Plaintiff will always have a private right of action for injunctive relief in Circuit Court, which is the most critical remedial aspect of BIPA.

Thus, the ITLA's lengthy discussion of the common law antecedents of the right to redress (ITLA 6-10) is beside the point, as is its discussion of the judicial role in protecting it. (*Id.* 10-14.) While the ITLA is correct that Bronzeville's cases do not support "stranding" workers with no possible redress (*id*. 23-28), that is because Bronzeville made no such argument.

CONCLUSION

For the foregoing reasons, this Court should adhere to its long-standing practice of applying the Exclusivity Provisions to all workplace injuries. Accordingly, it should reverse the judgments below and answer the certified question in the affirmative.

DATED: July 28, 2021

Respectfully submitted

By: */s/ Richard P. McArdle*

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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 **17** pages.

/s/ Richard P. McArdle

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NOTICE OF FILING

PLEASE BE ADVISED that on July 28, 2021 I have caused the **REPLY BRIEF OF DEFENDANT-APPELLANT SYMPHONY BRONZEVILLE PARK, LLC** to be filed in the Supreme Court of Illinois, using the Court's online filing system.

Dated: July 28, 2021

Respectfully submitted

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PROOF OF SERVICE

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.

On July 28, 2021, the **REPLY BRIEF OF DEFENDANT-APPELLANT SYMPHONY BRONZEVILLE PARK, LLC** was [1] filed in the Supreme Court of Illinois, using the Court's online filing system, Odyssey eFileIL, and [2] served by email to the email addresses of the persons named below, with a paper copy sent to those without email addresses:

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Additionally, within five days of acceptance of e-filing by the Court, I will cause to be submitted 13 copies of the **REPLY BRIEF OF DEFENDANT-APPELLANT SYMPHONY BRONZEVILLE PARK, LLC** to the Office of the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701 by depositing in the U.S. mail, proper postage pre-paid from our offices below.

Date: July 28, 2021 */s/ Richard P. McArdle*

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