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

Defendants-Appellee

Appeal from the Circuit Court Cook County, Illinois,

Circuit Court Case Number 2013 L 010098

The Honorable Judge Daniel T. Gillespie

BRIEF OF THE PLAINTIFF-APPELLANT

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4/27/2018 4:23 PM
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POINTS & AUTHORITIES

NATURE OF THE CASE

This appeal involves several matters of first impression regarding 740 ILCS 57 *et. seq.*, the Drug Dealer Liability Act ("DDLA"). This cause of action is brought by minor Noah Wingert ("Plaintiff") and arises out of the death of his father Michael Neuman ("Michael") by cocaine and heroin overdose on June 9, 2012. On September 10, 2013, Cassandra Lee Wingert ("Cassandra"), as Special Administrator of the Estate of Michael William Neuman, filed suit against Kevin Jatczak ("Kevin"). R. C25-28. After substantial motion practice, on October 13, 2015, Noah Wingert, a minor, by his mother and next friend, Cassandra Lee Wingert, filed his Fourth Amended Complaint alleging liability against Patsy Hradisky, as Special Administrator of the Estate of Kevin Jatczak ("Defendant"), Julie Holda ("Julie") and Simone Holda ("Simone") pursuant to the DDLA. R. C306-15. On March 10, 2016, Defendant filed a 2-615 Motion to Dismiss Plaintiff's Fourth Amended Complaint, which argued that the DDLA was unconstitutional. R. C349-C373. On May 4, 4016, the Honorable Judge Gillespie ordered that 740 ILCS 57/25(b)(2) was unconstitutional as violating due process and severed from the DDLA. R. C399. Thus, Plaintiff was allowed to proceed under 740 ILCS 57/25(b)(1) only. *Id.* On June 13, 2017, Plaintiff filed his Fifth Amended Complaint at Law, which was identical to the Fourth Amended Complaint at Law, except that it preserved Count I from his Second and Third Amended Complaints for purposes of appeal. R. C256. On September 30, 2017 Defendant filed her Motion for Summary Judgment on Count I of Plaintiff's Fifth Amended Complaint, which argued that Plaintiff failed to present any evidence that Kevin provided the drugs that caused Michael's fatal overdose. R. C530-36 (excluding exhibits). Plaintiff responded by arguing, in part, that

740 ILCS 57/25(b)(1) does not require Plaintiff to prove Defendant provided drugs on the date of death. R. C721-32. On December 5, 2017, the Honorable Judge Gillespie entered an order: (1) granting Defendant's Motion for Summary Judgment finding no genuine issue of material fact as to whether Defendant proximately caused Michael's overdose, (2) dismissing Co-Defendants Julie and Simone without prejudice, and (3) staying enforcement of the order until January 3, 2018 and finding the order final and appealable as of that date. R. C746. On January 19, 2018 Plaintiff timely filed his notice of appeal. R. C747. On February 2, 2018, this Honorable Court remanded this matter to the circuit court of Cook County for the limited purpose of making and recording findings in compliance with Supreme Court Rule 18. R. C758. On March 6, 2018, the Honorable Judge Gillespie entered a Corrected Memorandum Opinion and Judgment Order setting forth his finding that 740 ILCS 57/25(b)(2) was unconstitutional as violating due process. R. C776-92.

JURISDICTIONAL STATEMENT

This appeal is brought pursuant to Illinois Supreme Court Rule 302(a). This Court has original jurisdiction because it is an appeal from a final judgment in a case in which a statute of the state of Illinois has been held invalid. This appeal was timely filed on January 19, 2018. R. C747. The circuit court entered final judgment on December 5, 2017, but stayed enforcement of the order until January 3, 2018. R. C746. On May 4, 2016, the circuit court found 740 ILCS 57/25(b)(2) unconstitutional. R. C399.

ISSUES PRESENTED FOR REVIEW

1. Did the circuit court err in ruling that 740 ILCS 57/25(b)(2) was unconstitutional?

2. Did the circuit court err in ruling that 740 ILCS 57/25(b)(1) required Plaintiff to prove Defendant's conduct was a proximate cause of death?

STATUTES AND ORDINANCES INVOLVED

740 ILCS ILCS 57/1 *et seq.* 1995 ILL. ALS 293, 1995 Ill. Laws 293, 1995 ILL. P.A. 293, 1995 ILL. HB 153 (produced in its entirety in Plaintiff's appendix).

STATEMENT OF FACTS

Cassandra provided a deposition in this matter and testified as follows. She is the Plaintiff's mother. R. C606, P. 5 L. 14-16. Plaintiff is 8 years old and was born on December 12, 2008. R. C606, P. 5, L. 21-24. Plaintiff is the son of Michael, who is the decedent in this action. R. C606, P. 5, L. 17-20. Plaintiff was three years old when Michael passed away. R. C624, P. 78, L. 1-3. Michael was twenty two years old when he passed away. R. C632, P. 109, L. 15-16. Prior to his death, Michael was a stay at home father because Cassandra was going to school. R. C632, P. 109, L. 22- P. 110, L. 1. Julie and Michael's mother, Candy Neuman (Candy), were very good friends. R. C611, P. 24, L. 4-8. Julie was Simone's mom and Kevin's girlfriend. R. C631, P. 107, L. 23. Simone, Kevin, and Julie lived at 3249 S. Oak Park Ave., Berwyn, IL. R. C633, P. 112, L. 20 – P. 113, L. 1; C612, P. 28, L. 18 – P. 29, L. 1 (defining "residence").

Cassandra knew that Michael purchased prescription drugs and cocaine from Kevin because she watched Michael "walk in the house and return with less money and more drugs." R. C615, P. 41, L. 1 -21. Cassandra heard Simone state he needed to go downstairs to get drugs from Kevin. R. C616, P. 44, L. 21 – P. 45, L. 21. Cassandra had

knowledge Simone received cocaine from Kevin based on Simone statements and seeing Simone go downstairs and come back up with cocaine. R. C616, P. 47, L. 2-6; R. C620, P. 62, L. 19 – P. 63, L.1. She never witnessed Kevin hand cocaine to Simone. R. C616, P. 47, L. 1. Cassandra witnessed Simone sell cocaine to Michael. R. 617, P. 48, L. 1-5. Cassandra overheard arguments between Michael and Simone about owing money for drugs. R. C620, P. 62, L. 4-14. Cassandra considered Kevin the brains of the operation because he had access to prescription drugs and cocaine and would give drugs to Simone to distribute. R. C621, P. 67, L. 2 – 22. Cassandra witnessed dozens of drug transactions at the residence during which people would come upstairs and give Simone money, and Simone return with drugs that he would give to the customer after taking money downstairs. R. C631, P. 104, L. 6 – P. 105, L. 10.

Candy provided a deposition in this matter and testified as follows. Candy first noticed that Michael was using drugs other than marijuana in approximately 2010 or 2011. R. C644 P. 17, L. 17-18. In late 2011, Julie, Candy, and Kevin were together at the dining room table playing cards and doing cocaine. R. C647, P. 29, L. 17-21. Julie, Candy and Kevin were downstairs and Michael, Simone and two other individuals were upstairs. R. C647, P. 30, L. 1-8. Simone lived in the upstairs portion of Kevin's house. R. C651, P. 44, L. 10 – P. 45, L. 3. While playing cards, Candy witnessed Kevin receive a phone call from Simone. R. C647, P. 30, L. 12-16. Thereafter, Kevin hung up and "said I'll be right back" and proceeded to retrieve a tinfoil wrapped package from his room and carry it upstairs. R. C647, P. 30, L. 18 – P. 31, L. 1. Candy could hear constant foot traffic begin upstairs within half an hour of Kevin transporting the package. R. C655, P. 60, L. 7-23. That evening, Candy witnessed Kevin give Michael a line of cocaine. R.

C658, P. 73, L. 6-9. Later still that evening, Candy heard Kevin state: "I'm not bringing up no more stuff, and he's not coming down. So I'm not answering the phone. I'm tired." R. C648, P. 33, L. 16-18. Kevin stated he didn't want to go back upstairs because "I don't need 5-0 here." R. C661, P. 86, L. 1-3. Kevin has provided Candy with cocaine on four or five occasions. R. C661, P. 86, L. 9.

Ricky Garcia (Ricky) also provided testimony in this matter. On one occasion a year before Michael's death, Kevin provided cocaine to Ricky, Simone and another individual. R. C672, P. 10, L. 2-6. On another occasion, Ricky and Michael purchased $40 worth of cocaine from Kevin. C673, P. 14, L. 18 – P. 15, L. 3. On a separate occasion, Ricky saw Kevin open the front door and let Michael in, and Michael returned with drugs. R. C675, P. 23, L. 6-13. Michael was "messed up" the whole year prior to his death. R. C675, P. 21, L. 3-9. Michael would lie to Ricky about needing money for Plaintiff, but would use the money to pay Kevin for drugs. R. C677, P. 31 L. 20 – C678, P. 32, L. 17.

Detective Nicholas Schiavone testified about his investigation into Michael's death. Detective Schiavone is a detective for the Berwyn Police Department and was assigned to the criminal investigations unit in 2008. R. C691, P. 6, L. 15-17. Detective Schiavone was called to MacNeal Hospital on June 9 at 11:19 a.m. to investigate a young deceased male. R. C693, P.12, L. 14 – P. 13, L. 15. Andrew Costanzo told Detective Schiavone that he brought Michael to the hospital because Simone refused to call an ambulance. R. C695, P. 23, L. 1-5. Andrew Costanzo stated that Simone had come to the hospital with him, but had left the scene. R. C695, P. 23, L. 8-11. Simone told Detective Schiavone that Michael had died at his residence on the morning of Michael's death. R.

C696, P. 26, L. 5-22. During the investigation, Simone admitted to being a drug dealer of crack cocaine and heroin. R. C700, P. 42, L. 10-15. On the night of his death, Francisco Garcia told Detective Schiavone that Michael was "chain smoking" crack cocaine. R. C702-03, P. 51, L. 10 – P. 52, L. 14. A crack pipe was found at Simone's residence the morning after Michael's death. R. C709, P. 76, L. 17 – P. 77, L. 2. Michael died as a result of opiate and cocaine intoxication. R. C705, P. 60, L. 4-15.

STANDARD OF REVIEW

The appropriate standard of appellate review for ruling on summary judgments is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102 (1992).

The standard of review for dismissal pursuant to either Section 2-619 or 2-615 of the Illinois Code of Civil Procedure is *de novo*. *N. Trust Co. v. County of* Lake, 353 Ill.App.3d 268, 275 (2d Dist. 2004).

ARGUMENT

On January 1, 1996, the Drug Dealer Liability Act 740 ILCS 57/1 *et seq.* (DDLA) became effective. The DDLA was enacted to shift the tremendous societal costs of the illegal drug market from its victims to those who profit off it because our common law did not provide victims with a meaningful source of recovery. 740 ILCS 57/5. The remarkable feature of the DDLA is that it imposes liability on the basis of market participation instead of breaching a duty to an individual drug user. 740 ILCS 57/10(9). Undoubtedly, the liability scheme crafted by our legislature is a significant departure from the remedies available under the common law. However, our legislature believed

this departure was necessary because of the vast resources our community expends in our futile effort to overcome the burdens imposed by this illegal market. 740 ILCS 57/10.

The DDLA provides plaintiffs with two alternative means of proving a defendant's participation in the illegal drug market. 740 ILCS 57/25(b). First, a plaintiff may recover damages from a defendant who knowingly distributed, or knowingly participated in the chain of distribution of, an illegal drug that was actually used by the individual drug user. 740 ILCS 57/25(b)(1) (the "Direct Liability Provision"). Second, a plaintiff may recover damages from a person who knowingly participated in the illegal drug market if the plaintiff can prove three elements: (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").

The Honorable Judge Gillespie erred in granting Defendant summary judgment because: (1) the Legislature Constitutionally exercised its police power when enacting the Area Liability Provision, and (2) the Direct Liability Provision does not require Plaintiff to prove that Defendant's conduct was a proximate cause of death.

I. The Legislature Constitutionally Exercised Its Police Power When Enacting The Area Liability Provision

The Legislature constitutionally exercised its police power when enacting the Area Liability Provision because it was reasonably necessary to achieve the goal of providing an appropriate civil remedy to victims of the illegal drug market and deterring participation in the illegal drug market. The Due Process Clause of the Fourteenth

Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, s 1. Similarly, the Illinois Constitution provides: "No person shall be deprived of life, liberty or property without due process of law." Ill. Const. of 1970 art. I, s 2. The Illinois Supreme Court applies decisions of the United States Supreme Court based on federal constitutional provisions to the construction of comparable provisions in the State Constitution. *People v. Levin*, 623 N.E.2d 317 (Ill. 1993).

In order to constitute a valid exercise of the police power, a statute must bear a reasonable relationship to the public interest sought to be protected and the means adopted must be a reasonable method of accomplishing the chosen objective. *Opyt's Amoco, Inc. v. S. Holland*, 149 Ill.2d 265, 269-70 (1992)(*citing Crocker v. Finley*, 99 Ill.2d 444 (1984)). Due process requirements prevent the arbitrary and unreasonable exercise of the police power. *Opyt's Amoco Inc.*, 149 Ill.2d at 270 (*citing Illinois Gamefowl Breeders* Association v. Block, 75 Ill.2d 443, 453 (1979)). Once the legislature identifies a problem and enacts legislation to protect and promote the general welfare of its citizens, the legislature is presumed to be a valid exercise of the police power. *Id.* Nevertheless, it remains within the province of the court to determine whether the police power was properly exercised. *Opyt's Amoco, Inc.*, 149 Ill.2d at 270 (*citing Figura v. Cummins*, 4 Ill.2d 44, 49 (1954)).

This Honorable Court affords substantial deference to legislative enactments because the formulation and implementation of public policy are principally legislative functions. This statute carries a strong presumption of constitutionality under Illinois law. *People v. McCarty*, 223 Ill.2d 109, 135 (2006). The party challenging a statute must

clearly establish that it violates the constitution. *People v. Johnson*, 225 Ill.2d 573, 584 (2007). If it is reasonably possible to uphold the constitutionality of a statute, a court must do so. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 306-07 (2008). Thus, this Honorable Court cannot nullify a legislative enactment merely because it is considered unwise or offends the public welfare. *Roselle Police Pension Board v. Village of Roselle*, 232 Ill.2d 546, 558 (2009).

Here, the Area Liability Provision does not cause due process concerns because: (1) the Area Liability Provision's abolishment of the causation requirement is constitutional because Defendant does not have a vested right in the proximate cause element of a traditional negligence claim; (2) the trial court's reliance on *Smith v. Eli Lilly & Co.* is misplaced because this Court's decision did not analyze the scope of our Legislature's police power; (3) the Legislature's use of congressional districts was reasonable and is not a statutory presumption; (4) the DDLA's criminal conviction statutory presumption is constitutional because it is rebuttable and merely establishes Plaintiff's prima facie case; and (5) any unconstitutional portions of the Area Liability Provision are severable.

A. The Area Liability Provision's Abolishment of the Causation Requirement Is Constitutional Because Defendant Does Not Have a Vested Right in the Proximate Cause Element of a Traditional Negligence Claim

The Area Liability Provision's abolishment of the common law proximate cause requirement is a constitutional exercise of the legislature's police power because it was reasonably necessary to achieve the goals of providing an appropriate civil remedy to victims of the illegal drug market and deterring participation in the illegal drug market.

This Honorable Court has never considered individuals to have a vested right in common law rules governing negligence actions such that the Due Process Clause prevents abolishment of common law remedies or requirements. *See Moushon v. Nat'l Garages, Inc.*, 9 Ill.2d 407, 412 (1956)(Workmen's Compensation Act's abolishment of certain common law defenses and remedies was a reasonable exercise of legislature's police power), appeal dismissed 354 U.S. 905 (1957); *Garrity v. Eiger*, 272 Ill. 127 (1916)(Dram Shop Act's imposition of liability on landlords renting to liquor vendors reasonable exercise of police power). In addition, courts around the country have commonly rejected due process challenges to statutes that alter or abolish common law remedies or requirements, such as dram shop acts and workmen's compensation acts. *See* N. Reitner, Dollars for Victims of a "Victimless" Crime: A Defense of Drug Dealer Liability Acts, 15 J. L. & Pol'y 1329 (Lexis 2018); *See e.g. Shaw v. Salt River Valley Water Users Ass'n*, 69 Ariz. 309 (1950); *Khoury v. Carvel Homes South, Inc.*, 403 So.2d 1043 (Fla. Dist. Ct. App. 1981), cert. denied, 412 So.2d 467 (Fla. 1982); *Walters v. Blackledge*, 220 Miss. 485 (1954); *Pierce v. Albanese*, 144 Conn. 241 (1957), cert. denied, 355 U.S. 15 (1957); *Berholf v. O'Reilly*, 74 N.Y. 509, 517 (1878); *Kennedy v. Garrigan*, 121 N.W. 783 (S.D. 1909). Thus, the enactment of dram shop statutes and workers' compensation laws, together with the Supreme Court's repeated decisions to deny certiorari to cases permitting market share liability, provide a sound basis for the constitutionality of the Area Liability Provision's relaxation of the traditional proximate cause requirement. *See Sindell v. Abbott Labs*, 607 P.2d 924 (Cal. 1980), cert. denied, 449 U.S. 912 (1980); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), cert

denied, 493 U.S. 944 (1989); *Collins v. Eli Lilly Co.,* 324 N.W.2d 37 (Wis. 1984), cert. denied, 469 U.S. 826 (1984).

Workers' compensation statutes serve as an example of how legislatures may constitutionally modify or abolish specific fundamentals of tort liability. Like the DDLA, these acts were enacted to remedy the common law's inability to provide redress for injured workers. N. Reitner, 15 J. L. & Pol'y at 1364. Under the common law, employees were generally unable to receive adequate awards for injuries resulting from their employer's breach of duty because of the "unholy trinity" of defenses available to defendants: contributory negligence, assumption of risk, and the fellow servant rule. *Id. (citing* W. Page Keeton et. al., PROSSER AND KEETON ON THE LAW OF TORTS, § 30, at 164-65 (5th ed. 1984). It followed that many industrial injuries went uncompensated, thereby forcing the employee, the least capable individual, to bear the resulting financial burden. N. Reitner, 15 J. L. & Pol'y at 1364 (*citing* Page Keeton et. al. § 30 at 568). The common law's inability to impose liability onto employers induced extremely poor working conditions, inhumane practices, and most significantly, a lack of an incentive for employers to improve their work environments. N. Reitner, 15 J. L. & Pol'y at 1364 (*citing* Page Keeton et. al. § 30 at 573). Courts waited for legislatures to enact a change in the common law's rules for injured employees and have commonly rejected due process challenges to these acts abolishment of defenses and remedies available under the common law. *See e.g. Shaw*, 69 Ariz. 309 (1950); *Khoury v. Carvel Homes South, Inc.,* 403 So.2d 1043 (Fla. Dist. Ct. App. 1981), cert. denied, 412 So.2d 467 (Fla. 1982); *Walters v. Blackledge*, 220 Miss. 485 (1954)(holding that Mississippi Workers' Compensation Law does not violate Due Process Clause despite abrogating

right to bring suit for personal injury and subjecting employers to liability in the absence of neglect or fault).

Workers' compensation statutes parallel the DDLA on statutory and public policy levels. Under these statutes, an employer is subject to liability for injuries arising out of his enterprise, regardless of whether he or the injured employee was negligent. N. Reitner, 15 J. L. & Pol'y at 1365 (*citing* Page Keeton et. al. § 80 at 568). Thus, both workers' compensation laws and the DDLA deviate from the common law's causation requirement in order to allow plaintiffs to overcome the obstacles of recovery that otherwise permit negligent defendants to avoid liability. *Id.* Compellingly, both workers' compensation statutes and the DDLA create an incentive for defendants to refrain from tortious conduct. *Id.* In the same way that workers' compensation laws were enacted to make working conditions safer, the DDLA represents an effort to decrease the prevalence of illegal drugs. *Id.* Workers' compensation acts rest on the theory that damages paid to injured employees should be absorbed by the employer as a cost of production, much like the servicing of machinery or other operating costs. N. Reitner, 15 J. L. & Pol'y at 1366 (*citing* Page Keeton et. al. § 80 at 573). As the employer assumes these costs, he eventually passes them onto the consumer in the form of higher prices. *Id.* Similarly, the DDLA has the potential to drive drug dealers' production costs upward by subjecting them to liability for their conduct, thereby raising the cost of illegal drugs for consumers. *Id.*

This Honorable Court has held that the Illinois Workmen's Compensation Act's abolishment of common law remedies and defenses was a reasonable exercise of the legislature's police power for the promotion of the general welfare because one does not

have a vested right in the common law rules governing negligence actions. *Moushon*, 9 Ill.2d at 412; *See also Grand T.W.R. Co. v. Industrial Com.*, 291 Ill. 167, 175 (1919). In *Grand T.W.R. Co.*, this Honorable Court was asked to decide whether our state's Workman's Compensation Act violated the Due Process Clause because it created liability without fault. *Id.* at 174. This Honorable Court held that the legislature had constitutionally exercised its police power in abolishing common law principles to hold non-negligent employers liable for their employee's injuries. *Id.* at 174-75. In evaluating the statute's constitutionality, this Honorable Court declared that the proper test was not whether the statute did objectionable things, but rather whether there is any reasonable ground to believe that the public safety, health, or general welfare is promoted thereby. *Id.* at 175. This Honorable Court further noted that the police power allowed the legislature to modify, extend, limit, or abolish any cause of action and that no one could insist that the common law shall remain unchanged for his benefit. *Id.* at 173. In sum, this Honorable Court held that the police power granted the legislature broad discretion and authority in passing reasonable regulations to aid in the general welfare of society. *See id.* at 175-76.

Dram shop statutes provide another example of how legislatures may constitutionally abolish or modify specific fundamentals of tort liability because courts nationwide have commonly rejected due process challenges to these statutes. *See e.g. Garrity v. Eiger*, 272 Ill. 127, 134 (1916), aff'd, 246 U.S. 97 (1918)(holding that "in view of the broad authority of the states over the liquor traffic, and the established right to prohibit or regulate the sale of intoxicating liquors, we are unable to discover that there has been a deprivation of property rights in the legislation in question in violation of due

process or law secured by the Fourteenth Amendment"); *see also Pierce v. Albanese*, 144 Conn. 241 (1957), cert. denied, 355 U.S. 15 (1957); *Berholf v. O'Reilly*, 74 N.Y. 509, 517 (1878); *Kennedy v. Garrigan*, 121 N.W. 783 (S.D. 1909).

This Honorable Court's broad pronouncement in *Garrity v. Eiger* is instructive in determining the scope of our Legislature's inherent police power. *Garrity*, 272 Ill. at 134. At issue in *Garrity* was a provision of the Illinois Dramshop Act, then in effect, that provided that the owner of a premises selling intoxicating liquors shall be liable for, and his premises sold, to pay any judgment entered against the person occupying the premises (the bar or tavern owner). *Id.* at 131. Specifically, in order to hold a premises owner liable for a judgment against the tavern owner, the plaintiff was required to prove that: (1) the owner rented or leased to another his building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquor or shall knowingly permit the same to be so used or occupied, and (2) that a judgment has been recovered against the person occupying the building or premises for damages in consequence of the sale of intoxicating liquor on his premises. *Id.* at 134. A plaintiff needed to prove those two facts, and only those two facts, for liability to attach to a land owner. *Id.* The defendant argued that the provision deprived them of their property right without due process of law in violation of both the Illinois and Federal Due Process Clause, in part, because he did not have an opportunity to contest the liability of the tavern owner in the underlying action. *Id.*

This Honorable Court held that our legislature had broad authority to regulate the sale of intoxicating liquor to promote the public welfare because of the "appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of

ardent spirits." *Id.* at 135. This Honorable Court noted that provision making the property owner a guarantor of the tavern owner accomplished one of the statute's purposes of providing compensation to those injured by intoxicated persons. *Id.* at 133. Moreover, the *Garrity* Court found that a land owner was charged with knowledge of the law and may be bound to it by his voluntary involvement in the liquor industry. *Id.* at 136, 138 (stating "[a]nyone entering into the business or leasing his property for it must necessarily accept and agree to be bound by the provisions of the law designed to mitigate the evils of the traffic or to compensate for the damages done by it"). In sum, our legislature had broad authority to ensure victims of alcohol related torts could be compensated because society's interest in mitigating the negative effects of the liquor trade outweighed the individual property rights of those who voluntarily engaged in the industry. *See id.* at 138.

The Connecticut Supreme Court reached a similar conclusion when confronted with a dram shop provision that did not require proof that the sale of intoxicating liquor produced or contributed to the intoxication of the person causing injury. *Pierce*, 144 Conn. at 252-53. The *Pierce* Defendant argued that its due process rights were violated because the statute imposed liability without fault and imposed liability irrespective of any causal relation between the defendant's conduct and the plaintiff's injury. *Id.* at 246-47. The *Pierce* Court found that the legislature's power to regulate and control the liquor industry was much broader than its power to regulate ordinary business activity because of the danger to the public health and welfare inherent in the liquor business. *Id.* at 248 (citations omitted). Moreover, the *Pierce* Court found that the legislature in the exercise of its police power can alter or abolish accepted principles of common law liability to pay

compensation for injuries without violating constitutional mandates. *Id.* at 250-51 (citations omitted). All that needed to be shown to pass constitutional muster was that justification for such legislation was found in the nature of the problem confronting the legislature, the purpose to be accomplished, and the means adopted to accomplish it. *Id.* (citations omitted). However, the *Pierce* Court was careful to note that courts cannot question the wisdom of police legislation and must accord to the legislature a liberal discretion, especially in matters involving potentialities generally recognized as dangerous. *Id.* at 249. Thus, it was reasonable to impose liability without proof of causation, in part, because the legislation was designed to provide compensation to accident victims and those participating in the liquor industry voluntarily accept such potential liability as they are charged with knowledge of the law. *Id.* at 252-53.

This Honorable Court should uphold our Legislature's broad police power in regulating the illegal drug market because of the clear and obvious danger illegal drugs pose to the public health and general welfare of our citizens. Here, the Illinois Legislature has specifically found that every community in the country is affected by the marketing and distribution of illegal drugs. 740 ILCS 57/10(1). In Illinois, our families, employers, insurers, and society in general bear the substantial costs of coping with the marketing of illegal drugs. *Id.* Moreover, a vast amount of State and local resources are expended in coping with the financial, physical, and emotional toll wrongfully imposed by this illegal market. *Id.* In particular, our Legislature has found that: (1) parents of adolescent illegal drug users expend considerable financial resources in seeking treatment, (2) local and state governments face considerable costs in paying for drug treatment and related medical services, (3) insurers pay large sums to pay for drug treatment and related

medical services, (4) employers suffer losses as a result of illegal drug use by employees due to lost productivity, employee drug-related workplace accidents, employer contributions to medical plans, and the need to establish and maintain employee assistance programs, and (5) infants exposed to illegal drugs in utero are often physically and mentally damaged. 740 ILCS 57/10 (5) & (6). Simply put, the illegal drug market imposes incredible costs and burdens on nearly every corner of our society.

Both the *Garrity* and *Pierce* Courts recognized that legislatures have broad police power to regulate the liquor industry because of the inherent dangers posed to society by that industry. *Garrity*, 272 Ill. at 135; *Pierce,* 144 Conn. at 248. Broad deference to the legislature's police power is even more justified here because those who knowingly participate in the illegal drug market within Illinois have by definition engaged in or supported illegal conduct. *See* 740 ILCS 57/20. A drug dealer's property interest in his ill-gotten gains are worthy of far less protection than the property interests of those engaged in legitimate industries.

Like the impetus behind the development of both worker's compensation and dram shop acts, one of the primary purposes of the DDLA is to remedy the common law's inability to provide meaningful redress to those harmed by the illegal drug market. 740 ILCS 57/5; 740 ILCS 57/10(7). Specifically, our legislature found that plaintiffs were often unable to identify potential defendants because market participants expend considerable effort to keep the chain of distribution secret and the clandestine nature of an illegal industry. 740 ILCS 57/10(7).

The Area Liability Provision's abolishment of the common law causation requirement is reasonably related to the legislature's interest in ensuring victims of the

illegal drug market receive compensation for their injuries. Here, the Illinois Legislature specifically found that one of the primary obstacles to recovery under our common law was plaintiffs' inability to prove a given defendant caused the plaintiff's injures. *See* 740 ILCS 57/10(7). Thus, it was reasonable to abolish the causation requirement as it was the principle obstacle to recovery. The abolishment of the causation requirement was justified, in part, because the inability to identify defendants was caused by those same defendants' wrongful conduct in hiding their illegal activities.

Our Workmen's Compensation Act illustrates that "liability without fault" can be constitutionally justified in situations where the cost of injuries incurred in an industry are externalized to society at large. *Moushon*, 9 Ill.2d at 412; *Grand T.W.R. Co.*, 291 Ill. at 175; *see also* N. Reitner, 15 J. L. & Pol'y at 1366 (*citing* Page Keeton et. al. § 80 at 573). Our Legislature abolished the causation requirement, in part, because of its determination that it is fairer for those who profit off of the industry to incur the substantial societal costs the illegal drug market imposes than injured victims (like minor Noah Wingert) who are blameless in causing the harm suffered. *See* 740 ILCS 57/10(2) & (6). This departure from the common law causation requirement is reasonable when one weighs the magnitude of the harm imposed on society by the illegal drug market against a drug dealers' property right in his illegally produced income.

The Area Liability Provision's abolishment of the common law causation requirement is also reasonably related to the legislature's interest in deterring participation in the illegal drug market. 740 ILCS 57/10(4). It was reasonable for the legislature to conclude that the criminal justice system standing alone was not a sufficient deterrent to entry in the illegal drug market because Illinois continued to suffer harm

from the illegal industry in spite of its illegality. *See* 740 ILCS 57/10(2-6). Imposing "liability without fault" can be reasonably expected to deter market participants charged with knowledge of the law and is constitutionally permissible because participants voluntarily submit their property to liability by virtue of their participation. *See Garrity*, 272 Ill. at 136, 138 (stating "[a]nyone entering into the business or leasing his property for it must necessarily accept and agree to be bound by the provisions of the law designed to mitigate the evils of the traffic or to compensate for the damages done by it").

Accordingly, the Area Liability Provisions abolishment of the common law proximate cause requirement is a constitutional exercise of the legislature's police power because it was reasonably necessary to achieve the goal of providing an appropriate civil remedy to victims of the illegal drug market and deterring participation in the illegal drug market.

B. The Trial Court's Reliance on *Smith v. Eli Lilly & Co.* is Misplaced Because This Court's Decision Did Not Analyze the Scope of our Legislature's Police Power

This Honorable Court's analysis in *Smith v. Eli Lilly & Co.* is irrelevant to an analysis of our legislature's constitutional authority to abolish or create a cause of action in the exercise of its police power. *See Garrity*, 272 Ill. at 135. In *Smith v. Eli Lilly & Co.*, this Honorable Court was confronted with a plaintiff who was negligently injured by in utero exposure to the drug diethylstilbestrol (DES), but who could not identify the manufacturer of the DES actually ingested by her mother. 137 Ill.2d 222, 225 (1990). As a result, the *Smith* plaintiff argued that she should be excused from the proximate cause element of a traditional common law tort claim and instead be allowed to proceed under one of the various "market share liability" doctrines created by several state supreme

courts. *Id.* at 230-237. Unlike the *Smith* plaintiff, Plaintiff's Fifth Amended Complaint does not set forth a negligence cause of action. R. C 517 – C 527. Rather, Plaintiff's Fifth Amended Complaint sets forth a cause of action arising by statute (the DDLA). *Id.*

The *Smith* Court declined to judicially abolish the proximate cause requirement of traditional tort claims and stated that such a change was most appropriate for the legislature. *Smith,* 137 Ill.2d at 262-63. A legislature exercising its police power to create a new cause of action is fundamentally different than a court modifying a cause of action already existing at common law. In *Smith*, this Honorable Court declined to abolish the proximate cause requirement, in part, because the requirement was a fundamental principle of tort law. *Smith,* 137 Ill.2d at 232. However, it is a fundamental principle of our constitutional law that our Legislature can abolish common law remedies and defenses as a reasonable exercise of the police power for the promotion of the general welfare because one does not have a vested right in the common law rules governing negligence actions. *Moushon*, 9 Ill.2d at 412; *Grand T.W.R. Co.,* 291 Ill. at 175. As explained above, this police power can allow a legislature to impose "liability without fault." *Garrity*, 272 Ill. at 135; *Pierce,* 144 Conn. at 248; *Moushon*, 9 Ill.2d at 412; *Grand T.W.R. Co.,* 291 Ill. at 175. Accordingly, this Honorable Court did not analyze either the Illinois or Federal Due Process Clause in *Smith* because an exercise of the legislature's police power was not implicated.

None of the public policy considerations underlying *Smith* carry the same weight when analyzing an illegal industry. First, the *Smith* Court noted that a major flaw of market share liability is that there is no reliable information to establish defendants' percentages of the market and that neither party could be blamed for the lack of available

information. *Smith,* 137 Ill.2d. at 252. Unlike in *Smith,* illegal drug market participants can be blamed for the lack of available information because of their efforts to conceal their illegal activity. Moreover, there is no reason to establish defendant's percentages of the illegal drug market because the DDLA does not establish the type of market share liability discussed in *Smith. See* 740 ILCS 57/10(9).

Second, the *Smith* Court was concerned that market share liability would place an enormous burden on the judiciary to determine market shares without adequate information. *Smith,* 137 Ill.2d at 253. Here, there is no such concern here because the DDLA does not establish the type of market share liability discussed in *Smith. See* 740 ILCS 57/10(9). Thus, our trial courts will not have to engage in the hopeless task of trying to determine what percentage of the illegal market any particular drug dealer comprises.

Third, the *Smith* Court was concerned that juries and courts would produce arbitrary decisions because it would be impossible to fairly apportion damages without adequate market information. *Smith,* 137 Ill.2d at 253-54. Here, that concern does not exist because a defendant is liable for the entirety of plaintiff's damages by virtue of his market participation. 740 ILCS 57/25(c). In fact, one of the purposes of the DDLA is to encourage defendants to identify other market participants by bringing counterclaims for contribution. 740 ILCS 57/55; 740 ILCS 57/10(11).

Fourth, the *Smith* Court was concerned that market share liability has the potential to treat plaintiffs who cannot identify the specific manufacturer of DES better than those who can. *Smith,* 137 Ill.2d at 255. Here, any plaintiff can bring an action against any market participant. 740 ILCS 57/25(b).

Finally, the *Smith* Court was concerned that market share liability could deter participation in the market and could deter research and development of new drugs that would benefit society. *Smith,* 137 Ill.2d at 255, 263. Here, this Honorable Court should not be concerned about potential liabilities effect on the illegal drug market because the illegal drug market does not provide any benefit to society. In fact, the potential for liability to undermine the illegal drug market was one of the reasons our legislature passed the DDLA. 740 ILCS 57/10(9).

Accordingly, this Honorable Court's analysis in *Smith v. Eli Lilly & Co.* is irrelevant and inapplicable to an analysis of our legislature's constitutional authority to abolish or create a cause of action in the exercise of its police power.

C. The Legislature's Use of Congressional Districts to Approximate Population Was Reasonable and Is Not A Statutory Presumption

The constitutional analysis of both the Trial Court and *Steed* Court suffer from the same defect; both courts analyzed the Area Liability Provision as a statutory presumption of causation instead of analyzing whether the legislature could abolish the causation requirement entirely pursuant to its police power. *See Steed v. Bain-Holloway*, 356 P.3d 62, 64 (Okla. App. 2015); R. C788-90. It is true that a statutory presumption cannot satisfy the due process clause without "some rational connection between the fact proved and the ultimate fact presumed." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 4 (1976), superseded by statute as stated in *Freeman United Coal Mining Co. v. Office of Workers' Compensation Program*, 999 F.2d 291 (7th Cir. 1993). However, a statutory presumption is a presumption that is required by statute by which a court is to presume one fact to be true or false upon the showing that a different fact is true or false. *See e.g. Usery,* 428 U.S. at 4; *Hicks v. Feiock*, 485 U.S. 624, 628 (1988); *Mobile, J. & K. C. R.*

Co. v. Turnipseed, 219 U.S. 35, 42 (1910). However, nothing in the Area Liability Provision instructs a court to presume causation upon a showing of certain facts. *See* 740 ILCS 57/25(b)(2)(A-C).

Rather, the Area Liability Provision of both Illinois and Oklahoma's DDLA allow a plaintiff to seek damages from persons who knowingly participated in the illegal drug market regardless of whether causation was shown, as long as three requirements were met: (1) the "illegal drug market target community of the defendant" must have been the same as the individual drug user's place of drug activity; (2) the defendant's drug market participation must have been connected with the same type of illegal drug utilized by the individual drug user, and (3) the defendant must have participated in the illegal drug market "at any time during the illegal drug use of the individual user." *Steed*, 356 P.3d at 66; 740 ILCS 57/25(b)(2). Like in *Garrity*, a plaintiff is required to prove those facts and only those facts in order for liability to attach. *Garrity*, 272 Ill. at 134. The Area Liability Provision simply does not require a plaintiff to prove causation and is a separate and distinct cause of action from traditional torts including such a requirement. Accordingly, the trial court and *Steed* Court erred when finding the Area Liability Provision unconstitutional because it was irrational and arbitrary to presume that a showing of the above referenced facts proved causation. *See Steed*, 356 P.3d at 68; R. C788-90.

Thus, analyzing the DDLA's use of congressional districts as a presumption is improper. Rather, the proper test in analyzing the constitutionality of the DDLA's use of congressional districts to define "[i]llegal drug market target community," as set forth in 740 ILCS 57/40, is whether the scheme is a reasonable method of accomplishing the chosen objective. *Opyt's Amoco, Inc. v. S. Holland*, 149 Ill.2d 265, 269-70 (1992)(*citing*

Crocker v. Finley, 99 Ill.2d 444 (1984)). The United States Supreme Court's analysis of whether the cost spreading scheme employed in the Black Lung Benefits Act of 1972 (BLBA) was constitutional is instructive here. *See Usery.*, 428 U.S. at 19. In *Usery*, defendant coal mine operators argued that the BLBA spread costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operations presently in business. *Id.* at 18. The *Usery* Court dismissed this argument because "whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 19 (*citing Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955). Rather, the *Usery* Court reasoned, in part, that the imposition of liability for the effects of disabilities bred in the past was justified as a rational measure to spread the costs of the employees' disabilities to those who profited from coal production. *Usery,* 428 U.S. at 18.

As explained above, the objective sought to be accomplished by the DDLA is shifting the cost of the illegal drug market to those who profit off it and to ensure injured victims have a source of recovery. 740 ILCS 57/5. Like the disease caused by coal dust, the illegal drug trade produces considerable economic externalities that the DDLA was designed to reapportion to the industries' victims. Like in *Usery*, the DDLA's use of congressional districts to impose liability is not unconstitutional merely because the cost spreading scheme was unfair or unwise.

It was reasonable for the Illinois Legislature to use congressional districts to impose liability because each congressional district has an approximately equivalent population. Imposing liability in terms of distance would impose greater liability on

Chicago residents than downstate residents because urban areas have denser populations. Limiting liability for a level 1 offense to one's congressional district is a reasonable way of ensuring small time drug dealers throughout the state share responsibility for approximately equivalent shares of the state population. In addition, it was reasonable for the legislature to increase the amount of districts to which a drug dealer was potentially liable based upon the amount of drugs distributed because drug dealers in selling large quantities of drugs contribute more to the societal cost of the market and provide illegal drugs to more individual drug users.

Of course, congressional districts in this state are often unusually shaped because of the political nature of drawing districts. The trial court found that congressional districts are not a reasonable approximation of an individual drug dealer's area of drug dealing. However, this fact is irrelevant because the legislature chose to abolish the causation requirement pursuant to its police power. What is important is that each drug dealer in the state is treated roughly equivalently because congressional districts hold approximately equivalent populations. There is simply no more reasonable manner in which to split the state into blocks of similar populations. Accordingly, basing a drug dealer's liability on congressional districts was a constitutional exercise of the legislature's police power because the scheme is a reasonable method of imposing liability in the absence of a causation requirement.

The imposition of state wide liability for a level 4 offenses is reasonable because those offenders contribute most to our state's drug problem. Possession of 16 ounces or more of cocaine or heroin, or distribution of 4 ounces or more, is a tremendously large quantity of drugs for one person. The legislature could reasonably conclude that

individuals trafficking such large quantities of drugs are near the top of the illegal drug market hierarchy. Thus, imposing state wide liability reasonably accomplishes the DDLA's goal of identifying such dealers because lower level dealers have an interest in identifying their suppliers. Imposing state wide liability also reasonably accomplishes the DDLA's goal of ensuring a source of recovery for victims because high level dealers are more likely to have substantial assets to which a judgment could attach.

Accordingly, the legislature's use of congressional districts to approximate population was a reasonable method of imposing liability and was not a statutory presumption of causation.

D. The DDLA's Criminal Conviction Statutory Presumption Is Constitutional Because it is Rebuttable and Merely Establishes Plaintiff's Prima Facie Case

The DDLA's criminal conviction statutory presumption is constitutional because it is rebuttable and merely establishes a plaintiff's prima facie case. 740 ILCS 57/60(b) states:

> (b) A person against whom recovery is sought who has a criminal conviction under state drug laws or the Comprehensive Drug Abuse Prevention and Control Act of 1970 [citation] is estopped from denying participation in the illegal drug market. Such a conviction is also prima facie evidence of the person's participation in the illegal drug market during the 2 years preceding the date of an act giving rise to a conviction.

740 ILCS 57/60(b). This statutory presumption is significant because the Area Liability Provision requires a plaintiff to prove that 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)(C). The Due Process Clause prevents state legislatures from enacting laws that are procedurally unfair. ROTUNDA & NOWAK, TREATISE ON

CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE§ 17.1, at 245 (2d ed. 1992). In the evidentiary context, the clause limits the legislature's ability to create statutory presumptions, where the proof of one fact constitutes evidence of the existence of an ultimate fact to be proven at trial. *Id.* When deciding whether a particular statutory presumption violates the Due Process Clause, courts apply a rational relation test. Michael H. Graham, Handbook of Federal Evidence s 301.6 (3d ed. 1991) (citing *Usery*, 428 U.S. at 28; *Mobile, J. & K.C.R. Co.*, 219 U.S. at 43; *See also* Dale A. Nance, *Civility and the Burden of Proof*, 17 Harv. J.L. & PUB. POL'Y 647, 672-73 (1994)(stating that the rational relation test requires minimal scrutiny). Thus, a statutory presumption does not constitute a denial of due process of law unless there is no rational connection between the fact proved and the ultimate fact presumed. *Usery*, 428 U.S. at 28. In addition, a statutory presumption in civil proceedings receives less scrutiny under the rational relation test than a presumption in criminal proceedings because the constitution does not forbid shifting the burden of persuasion to the defendant when merely civil remedies are imposed. *Hicks*, 485 U.S. at 628.

The United States Supreme Court has developed a balancing test to help articulate the requirements of the rational relation test in procedural due process cases. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Eldridge*, the Court held that determining the constitutionality of a state's process for depriving an individual of life, liberty, or property required the consideration of three facts: (1) the private interest that will be affected by the state's action; (2) the possibility of mistaken deprivation weighed against the value of procedural alternatives; and (3) the state's interest, including the added burdens of requiring additional or substitute procedures. *Id.* Applied to the

DDLA's statutory presumption, the *Eldridge* test requires courts to balance (1) a drug dealer's private property interest; (2) the risk of mistaken deprivation of the defendant's property; and (3) the government's interest in providing victims of the illegal drug trade with a civil remedy for their injuries. N. Reitner, 15 J. L. & Pol'y at 1358.

For example, it did not violate the Due Process Clause when the Black Lung Benefits Act of 1972 ("BLBA") provided that if a coal miner is shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis it is "irrebuttably presumed" that he was totally disabled by pneumoconiosis at the time of his death and that his death was due to pneumoconiosis for purposes of entitlement to workers compensation benefits from prior coal mining employers even if the miner ceased employment prior to disease contraction. *Usery*, 428 U.S. at 11. The causation presumption could not be rebutted even if defendant proved another cause of death or that pneumoconiosis did not cause any disability during the miner's lifetime. *Id.* The *Usery* Court held the causation presumption was constitutional because Congress could rationally conclude that one with advanced pneumoconiosis would by definition suffer from some measure of disability and that it was rational to deem the Act's benefits deferred compensation to be enjoyed by the miner or his heirs. *Id.* at 25-26. Of note, in *Hicks v. Feiock*, the United States Supreme Court recognized that the burden of persuasion may be shifted to the defendant on a particular element in a civil proceeding. *Hicks*, 485 U.S. at 628. The statutory presumptions at issue here are significantly less problematic that the statutory presumptions approved by the U.S. Supreme Court in *Usery*. First, despite that a conviction for a drug distribution offense serves as prima facie evidence of a defendant's participation in the illegal drug market for the two years

preceding the date of the plaintiff's injury, this provision only serves to collaterally estop defendants from denying having *ever* participated in the illegal drug market. 740 ILCS 57/60(b). Thus, defendants who have prior convictions for drug distribution offenses may avoid liability by offering proof they did not participate in the illegal drug market during plaintiff's established period of drug use.

The criminal conviction statutory presumption merely prevents relitigation of an issue that has already been proved beyond a reasonable doubt in a criminal trial. Under any definition, the fact that a defendant was proven to have been involved in the illegal drug market is rationally related to the ultimate fact of whether that same defendant ever participated in the illegal drug market. There is also a rational relation between the proven criminal conviction and the rebuttable presumption that the drug dealer participated in the illegal drug market for at least two years prior to the conviction because common sense dictates that drug dealers are not usually arrested during their first transaction. Thus, there is a rational relation between the fact presumed and the fact proven in the Area Liability Provision.

The *Eldridge* factors also strongly favor a finding of constitutionality. First, the private interests at stake here is worthy of slight protection because drug dealers have chosen to engage in an illegal market. Second, the risk of erroneous deprivation of property is significantly mitigated by a defendants' ability to offer exculpatory evidence. Moreover, the United States Supreme Court has held that courts may consider the "comparative convenience of producing evidence of the ultimate fact." *Tot v. United States*, 319 U.S. 463, 467 (1943). A drug dealer has vast knowledge of the time period in which he was engaged in the illegal drug market. Conversely, a plaintiff's impossibility

in discovering illegal conduct is one of the principal reasons the DDLA was passed. Finally, the state has an exceedingly compelling interest in providing the victims of the illegal drug trade with a source of recovery. Thus, the *Eldridge* factors all weigh in favor of finding the DDLA's statutory presumption constitutional.

Accordingly, the DDLA's criminal conviction statutory presumption is constitutional because it is rebuttable and merely establishes a plaintiff's prima facie case.

E. Any Unconstitutional Portions of the Area Liability Provision are Severable

The DDLA expressly provides that that the legislature intended for constitutional provisions to be severed from those held invalid. 740 ILCS 57/85. A statute may be in part constitutional and in part unconstitutional. *Best v. Taylor Mach. Works,* 689 N.E.2d 1057 (1997). In Illinois, courts ordinarily give full effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory test and context that the legislature would have preferred no statute at all. 34 Ill. Law and Prac. Statutes § 15(*Citing* People v. Andrews, 364 Ill. App. 3d 253 (2d Dist. 2006).

First, 740 ILCS 57/60(b) may simply be deleted in its entirety and plaintiffs would be permitted to prove participation in the illegal drug market against criminally convicted defendants in the same way they may against those who are not.

Second, any portion of 740 ILCS 57/40 may be severed. For example, 740 ILCS 57/40(2-4) can be deleted in their entirety. In addition, 740 ILCS 57/40(1) may be amended to read as follows:

> (1) ~~For a level one offense,~~ the Illinois Representative District in which the defendant's place of participation is situated.

These edits would result in a fully operational law that read:

> Sec. 40. Illegal drug market target community. A person whose participation in the illegal drug market constitutes the following level offense shall be considered to have the following illegal drug market community.
> (1) The Illinois Representative District in which the defendant's place of participation is situated.

The text of the DDLA illustrates that the legislature wanted to maximize the ability of victims to recover. Thus, these changes would likely have been desired if necessary rather than no statute at all.

Accordingly, the Area Liability Provision does not cause due process concerns because: (1) the Area Liability Provision's abolishment of the causation requirement is constitutional because Defendant does not have a vested right in the proximate cause element of a traditional negligence claim; (2) the Trial Court's reliance on *Smith v. Eli Lilly & Co.* is misplaced because this Court's decision did not analyze the scope of our Legislature's police power; (3) the Legislature's use of congressional districts was reasonable and is not a statutory presumption; (4) the DDLA's criminal conviction statutory presumption is constitutional because it is rebuttable and merely establishes Plaintiff's prima facie case; and (5) any unconstitutional portions of the Area Liability Provision are severable.

II. The Direct Liability Provision Does Not Require Plaintiff to Prove Defendant's Conduct Was Proximate Cause of Death

The Direct Liability Provision does not require Plaintiff to prove that Defendant's conduct was a proximate cause of Michael's death. Thus, the Trial Court erred when

granting Defendant's motion for summary judgment because it found no genuine issue of material fact as to whether defendant proximately caused the overdose of plaintiff's decedent. R. C.746. When interpreting a statute, the primary objective is to give effect to the legislature's intent, which is best indicated by the plain and ordinary language of the statute itself. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 357 Ill. Dec. 55, 63 (2012)(*citing In re Donald A.G.,* 221 Ill.2d 234 (2006). Words should be given their plain and obvious meaning unless the legislative act changes that meaning. *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 197 (1942). In giving meaning to the words and clauses of a statute, no part should be rendered superfluous. *Standard Mutual Insurance Co. v. Lay*, 989 N.E.2d 591, 597 (2013). Statutory provisions should be read in concert and harmonized. *People v. Rinehart*, 962 N.E.2d 444, 452-53 (2012). Courts weighing legislative intent also consider the "object to be attained, or the evil to be remedied by the act." *Svithiod Singing Club*, 381 Ill. at 198.

740 ILCS 57/20(a) provides that a person who knowingly participates in the illegal drug market within this State is liable for civil damages as provided in this Act. The Direct Liability Provision provides that Plaintiff may recover damages from "[a] person who knowingly distributed, or knowingly participated in the chain of distribution of, an illegal drug that was actually used by the individual drug user." 740 ILCS 57/25(b)(1). Clearly, the words "cause" or "proximate cause" are not used anywhere within 740 ILCS 57/20(a) or the Direct Liability Provision. Rather, the plain language of the DDLA Direct Liability Provision read in harmony with §20(a) requires a plaintiff to prove: (1) that the defendant knowingly participated in the illegal drug market, and (2) knowingly distributed or knowingly participated in the chain of distribution of, an illegal

drug that was actually used by the individual drug user. 740 ILCS 57/20(a); 740 ILCS 57/25(b)(1). This Honorable Court may not invent a requirement of liability that is not contained within the statute. *See Garrity*, 272 Ill. at 134 (a plaintiff need to prove those two facts, and only those two facts, for liability to attach to a land owner).

The only proximate cause requirement contained in the DDLA relates to damages a plaintiff may recover once liability is established. 740 ILCS 57/25(1)&(2)(Providing a plaintiff may recover damages "proximately caused by the illegal drug use"). Read in harmony with the rest of the DDLA, the plain language of 740 ILCS 57/25(1)&(2) provides that a plaintiff may recover all damages proximately caused by the course of his drug use from any market participant he establishes liability against through either the Direct Liability Provision or Area Liability Provision. Thus, the DDLA is similar to the dram shop provision considered in *Pierce* that did not require proof that the sale of intoxicating liquor was a proximate cause of the claimed injury. *Pierce*, 144 Conn. at 252-53.

A judicially created proximate cause requirement in the Direct Liability Provision would create the absurd result where it was more difficult for a plaintiff to recover against his own drug dealers than other market participants. The Area Liability Provision unquestionably does not contain a proximate cause requirement. 740 ILCS 57/25(b)(2). Thus, accepting the trial court's construction of the Direct Liability Provision would deter plaintiffs from identifying their own drug dealers because recovery under the Direct Liability Provision would be considerably more difficult than under the Area Liability Provision.

The Legislature's intent of imposing liability against "all participants in the illegal drug market" would also be thwarted by a judicially created proximate cause requirement in the Direct Liability Provision. The entirety of the DDLA reflects our legislature's intention to impose liability based on participation in the illegal drug market as a whole and not for breach of duty to any individual drug user. *See* 740 ILCS 57/10(8). Imposing a proximate cause requirement on the Direct Liability Provision would upend this scheme by limiting a drug dealer's potential liability to his own customers to damages proximately caused by the specific doses he provided instead of for his contribution to the harm caused by the drug users' consumption generally.

Reading the Direct Liability Provision and Area Liability Provision in harmony reveals that the Direct Liability Provision was intended to further ease the burden of proof required of a plaintiff. By definition, a person who actually distributed drugs to an individual drug user also satisfies all three prongs of the Area Liability Provision by virtue of that single transaction. 740 ILCS 57/25(b)(2). Thus, the purpose of the Direct Liability Provision must be to allow liability by proof of direct involvement instead of forcing a plaintiff to jump through the hoops of establishing the elements of the Area Liability Provision. This reflects the Legislature's reasonable judgment that it should be easier for a plaintiff to recover against the drug dealers who sold drugs directly to the individual drug user.

An analysis of the full scope of the harm Michael's drug use caused Plaintiff further reveals the error in the trial court's focus on whether Defendant proximately caused the overdose. Here, Plaintiff has presented ample evidence that Kevin Jatczak knowingly participated in the illegal drug market and actually provided drugs to Michael.

R. C615, P. 41, L. 1 -21; R. C620, P. 62, L. 4-14; R. C658, P. 73, L. 6-9; R. C673, P. 14, L. 18 – P. 15, L. 3.; R. C675, P. 23, L. 6-13. Moreover, Plaintiff was not just harmed by the death of his father, but by the impairment of his relationship with his father for the year prior to his death. R. C677, P. 31, L. 20 – R. C678, P. 32, L. 17; R. C675, P. 21, L. 3-9. Common sense dictates that a father "messed up" for an entire year and spending money on drugs instead of support is not as valuable to Plaintiff as a father who is not addicted to drugs. This is especially true because this year was the last year Plaintiff would ever spend with his father.

Accordingly, the trial court erred in granting summary judgment because Plaintiff was not required to prove that Defendant's conduct proximately caused Michael's death.

CONCLUSION

In conclusion, the Honorable Judge Gillespie erred in granting Defendant summary judgment because: (1) the Legislature constitutionally exercised its police power when enacting the Area Liability Provision, and (2) the Direct Liability Provision does not require Plaintiff to prove that Defendant's conduct was a proximate cause of death. The Area Liability Provision does not cause due process concerns because: (1) the Area Liability Provision's abolishment of the causation requirement is constitutional because Defendant does not have a vested right in the proximate cause element of a traditional negligence claim; (2) the Trial Court's reliance on *Smith v. Eli Lilly & Co.* is misplaced because this Court's decision did not analyze the scope of our Legislature's police power; (3) the Legislature's use of congressional districts was reasonable and is not a statutory presumption; (4) the DDLA's criminal conviction statutory presumption is

constitutional because it is rebuttable and merely establishes Plaintiff's prima facie case; and (5) any unconstitutional portions of the Area Liability Provision are severable.

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

Respectfully submitted,

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APPEAL TO THE SUPREME COURT OF ILLINOIS
CASE NO. 123201

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

CERTIFICATION OF BRIEF OR PETITION FOR REHEARING

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 343(a), is 36 pages.

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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

Defendants-Appellee

Appeal from the Circuit Court Cook County, Illinois,

Circuit Court Case Number 2013 L 010098

The Honorable Judge Daniel T. Gillespie

APPENDIX TO THE BRIEF OF THE PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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123201

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APPEAL TO THE ILLINOIS SUPREME COURT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

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

Plaintiff/Petitioner

Reviewing Court No: 123201
Circuit Court No: 2013L010098
Trial Judge: DANIEL T. GILLESPIE

v.

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

Defendant/Respondent

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CIVIL LIABILITIES
(740 ILCS 57/) Drug Dealer Liability Act.

(740 ILCS 57/1)
Sec. 1. Short title. This Act may be cited as the Drug Dealer Liability Act.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/5)
Sec. 5. Statement of purpose. The purpose of this Act is to provide a civil remedy for damages to persons in a community injured as a result of illegal drug use. These persons include parents, employers, insurers, governmental entities, and others who pay for drug treatment or employee assistance programs, as well as infants injured as a result of exposure to drugs in utero ("drug babies"). This Act will enable them to recover damages from those persons in the community who have joined the illegal drug market. A further purpose of the Act is to shift, to the extent possible, the cost of the damage caused by the existence of the illegal drug market in a community to those who illegally profit from that market. The further purpose of the Act is to establish the prospect of substantial monetary loss as a deterrent to those who have not yet entered into the illegal drug distribution market. The further purpose is to establish an incentive for drug users to identify and seek payment for their own drug treatment from those dealers who have sold drugs to the user in the past.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/10)
Sec. 10. Legislative findings. The legislature finds and declares all of the following:
(1) Every community in the country is affected by the marketing and distribution of illegal drugs. A vast amount of State and local resources are expended in coping with the financial, physical, and emotional toll that results from the existence of the illegal drug market. Families, employers, insurers, and society in general bear the substantial costs of coping with the marketing of illegal drugs. Drug babies and parents, particularly those of adolescent illegal drug users, suffer significant non-economic injury as well.

(2) Although the criminal justice system is an important weapon against the illegal drug market, the civil justice system can and must also be used. The civil justice system can provide an avenue of compensation for those who have suffered harm as a result of the marketing and distribution of illegal drugs. The persons who have joined the illegal drug market should bear the cost of the harm caused by that market in the community.

(3) The threat of liability under this Act serves as an additional deterrent to a recognizable segment of the illegal drug network. A person who has non-drug related assets, who markets illegal drugs at the workplace, who encourages friends to become users, among others, is likely to decide that the added cost of entering the market is not worth the benefit. This is particularly true for a first-time, casual dealer who has not yet made substantial profits. This Act provides a mechanism for the cost of the injury caused by illegal drug use to be borne by those who benefit from illegal drug dealing.

(4) This Act imposes liability against all participants in the illegal drug market, including small dealers, particularly those in the workplace, who are not usually the focus of criminal investigations. The small dealers increase the number of users and are the people who become large dealers. These small dealers are most likely to be deterred by the threat of liability.

(5) A parent of an adolescent illegal drug user often expends considerable financial resources, typically in the tens of thousands of dollars, for the child's drug treatment. Local and state governments provide drug treatment and related medical services made necessary by the distribution of illegal drugs. The treatment of drug babies is a considerable cost to local and state governments. Insurers pay large sums for medical treatment relating to drug addiction and use. Employers suffer losses as a result of illegal drug use by employees due to lost productivity, employee drug-related workplace accidents, employer contributions to medical plans, and the need to establish and maintain employee assistance programs. Large employers, insurers, and local and state governments have existing legal staffs that can bring civil suits against those involved in the illegal drug market, in appropriate cases, if a clear legal mechanism for liability and recovery is established.

(6) Drug babies, who are clearly the most innocent and vulnerable of those affected by illegal drug use, are often the most physically and mentally damaged due to the existence of an illegal drug market in a community. For many of these babies, the only hope is extensive medical and psychological treatment, physical therapy, and special education. All of these potential remedies are expensive. These babies, through their legal guardians and through court-appointed guardians ad litem, should be able to recover damages from those in the community who have entered and participated in the marketing of the types of illegal drugs that have caused their injuries.

(7) In theory, civil action for damages for distribution of illegal drugs can be brought under existing law. They are not. Several barriers account for this. Under existing tort law, only those dealers in the actual chain of distribution to a particular user are sued. Drug babies, parents of adolescent illegal drug users, and insurers are not likely to be able to identify the chain of distribution to a particular user. Furthermore, drug treatment experts largely agree that users are unlikely to identify and bring suit against their own dealers, even after they have recovered, given the present requirements for a civil action. Recovered users are similarly unlikely to bring suit against others in the chain of distribution, even if they are known to the user. A user is unlikely to know other dealers in the chain of distribution. Unlike the chain of

distribution for legal products, in which records identifying the parties to each transaction in the chain are made and shared among the parties, the distribution of illegal drugs is clandestine. Its participants expend considerable effort to keep the chain of distribution secret.

(8) Those involved in the illegal drug market in a community are necessarily interrelated and interdependent, even if their identity is unknown to one another. Each new dealer obtains the benefit of the existing illegal drug distribution system to make illegal drugs available to him or her. In addition, the existing market aids a new entrant by the prior development of people as users. Many experts on the illegal drug market agree that all participants are ultimately likely to be indirectly related. That is, beginning with any one dealer, given the theoretical ability to identify every person known by that dealer to be involved in illegal drug trafficking, and in turn each of those others known to them, and so on, the illegal drug market in a community would ultimately be fully revealed.

(9) Market liability has been created with respect to legitimate products by judicial decision in some states. It provides for civil recovery by plaintiffs who are unable to identify the particular manufacturer of the product that is claimed to have caused them harm, allowing recovery from all manufacturers of the product who participated in that particular market. The market liability theory has been shown to be destructive of market initiative and product development when applied to legitimate markets. Because of its potential for undermining markets, this Act expressly adopts a legislatively crafted form of liability for those who intentionally join the illegal drug market. The liability established by this Act grows out of but is distinct from existing judicially crafted market liability.

(10) The prospect of a future suit for the costs of drug treatment may drive a wedge between prospective dealers and their customers by encouraging users to turn on their dealers. Therefore, liability for those costs, even to the user, is imposed under this Act as long as the user identifies and brings suit against his or her own dealers.

(11) Allowing dealers who face a civil judgment for their illegal drug marketing to bring suit against their own sources for contribution may also drive a wedge into the relationships among some participants in the illegal drug distribution network.

(12) While not all persons who have suffered losses as a result of the marketing of illegal drugs will pursue an action for damages, at least some individuals, guardians of drug babies, government agencies that provide treatment, insurance companies, and employers will find such an action worthwhile. These persons deserve the opportunity to recover their losses. Some new entrants to retail illegal drug dealing are likely to be deterred even if only a few of these suits are actually brought.

(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/15)

Sec. 15. Definitions. As used in this Act:

"Illegal drug" means a drug whose distribution is a violation of State law.

"Illegal drug market" means the support system of illegal drug related operations, from production to retail sales, through which an illegal drug reaches the user.

"Illegal drug market target community" is the area described under Section 40.

"Individual drug user" means the individual whose illegal

drug use is the basis of an action brought under this Act.

"Level 1 offense" means possession of one-fourth ounce or more, but less than 4 ounces, or distribution of less than one ounce of a specified illegal drug, or possession of one pound or 25 plants or more, but less than 4 pounds or 50 plants, or distribution of less than one pound of marijuana.

"Level 2 offense" means possession of 4 ounces or more, but less than 8 ounces, or distribution of one ounce or more, but less than 2 ounces, of a specified illegal drug, or possession of 4 pounds or more or 50 plants or more, but less than 8 pounds or 75 plants, or distribution of more than one pound, but less than 5 pounds, of marijuana.

"Level 3 offense" means possession of 8 ounces or more, but less than 16 ounces, or distribution of 2 ounces or more, but less than 4 ounces, of a specified illegal drug or possession of 8 pounds or more or 75 plants or more, but less than 16 pounds or 100 plants, or distribution of more than 5 pounds, but less than 10 pounds, of marijuana.

"Level 4 offense" means possession of 16 ounces or more or distribution of 4 ounces or more of a specified illegal drug or possession of 16 pounds or more or 100 plants or more or distribution of 10 pounds or more of marijuana.

"Participate in the illegal drug market" means to distribute, possess with an intent to distribute, commit an act intended to facilitate the marketing or distribution of, or agree to distribute, possess with an intent to distribute, or commit an act intended to facilitate the marketing and distribution of an illegal drug. "Participate in the illegal drug market" does not include the purchase or receipt of an illegal drug for personal use only.

"Person" means an individual, governmental entity, corporation, firm, trust, partnership, or incorporated or unincorporated association, existing under or authorized by the laws of this State, another state, or a foreign country.

"Period of illegal drug use" means, in relation to the individual drug user, the time of the individual's first use of an illegal drug to the accrual of the cause of action. The period of illegal drug use is presumed to commence 2 years before the cause of action accrues unless the defendant proves otherwise by clear and convincing evidence.

"Place of illegal drug activity" means, in relation to the individual drug user, each Illinois Representative District in which the individual possesses or uses an illegal drug or in which the individual resides, attends school, or is employed during the period of the individual's illegal drug use, unless the defendant proves otherwise by clear and convincing evidence.

"Place of participation" means, in relation to a defendant in an action brought under this Act, each Illinois Representative District in which the person participates in the illegal drug market or in which the person resides, attends school, or is employed during the period of the person's participation in the illegal drug market.

"Specified illegal drug" means cocaine, heroin, or methamphetamine and any other drug the distribution of which is a violation of State law.

(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/20)

Sec. 20. Liability for participation in the illegal drug market.

(a) A person who knowingly participates in the illegal drug market within this State is liable for civil damages as provided in this Act. A person may recover damages under this Act for injury resulting from an individual's use of an illegal drug.

(b) A law enforcement officer or agency, the State, or a person acting at the direction of a law enforcement officer or agency or the State is not liable for participating in the illegal drug market if the participation is in furtherance of an official investigation.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/25)
Sec. 25. Recovery of damages.
(a) One or more of the following persons may bring an action for damages caused by an individual's use of an illegal drug:
(1) A parent, legal guardian, child, spouse, or sibling of the individual drug user.
(2) An individual who was exposed to an illegal drug in utero.
(3) An employer of the individual drug user.
(4) A medical facility, insurer, governmental entity, employer, or other entity that funds a drug treatment program or employee assistance program for the individual drug user or that otherwise expended money on behalf of the individual drug user.
(5) A person injured as a result of the willful, reckless, or negligent actions of an individual drug user.
(b) A person entitled to bring an action under this Section may seek damages from one or more of the following:
(1) A person who knowingly distributed, or knowingly participated in the chain of distribution of, an illegal drug that was actually used by the individual drug user.
(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.
(c) A person entitled to bring an action under this Section may recover all of the following damages:
(1) economic damages, including, but not limited to, the cost of treatment and rehabilitation, medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, support expenses, accidents or injury, and any other pecuniary loss proximately caused by the illegal drug use;
(2) non-economic damages, including, but not limited to, physical and emotional pain, suffering, physical impairment, emotional distress, mental anguish, disfigurement, loss of enjoyment, loss of companionship, services, and consortium, and other nonpecuniary losses proximately caused by an individual's use of an illegal drug;
(3) exemplary damages;
(4) reasonable attorneys' fees;
(5) costs of suit, including, but not limited to, reasonable expenses for expert testimony.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/30)
Sec. 30. Limited recovery of damages.
(a) An individual drug user shall not bring an action for

damages caused by the use of an illegal drug except as otherwise provided in this subsection. An individual drug user may bring an action for damages caused by the use of an illegal drug only if all of the following conditions are met:

(1) the individual personally discloses to narcotics enforcement authorities, more than 6 months before filing the action, all of the information known to the individual regarding all of that individual's sources of illegal drugs;

(2) the individual has not used an illegal drug within the 6 months before filing the action; and

(3) the individual continues to remain free of the use of an illegal drug throughout the pendency of the action.

(b) A person entitled to bring an action under this Section may seek damages only from a person who distributed, or is in the chain of distribution of, an illegal drug that was actually used by the individual drug user.

(c) A person entitled to bring an action under this Section may recover only the following damages:

(1) economic damages, including, but not limited to, the cost of treatment, rehabilitation, and medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, accidents or injury, and any other pecuniary loss proximately caused by the person's illegal drug use;

(2) reasonable attorneys' fees; and

(3) costs of suit, including, but not limited to, reasonable expenses for expert testimony.

(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/40)

Sec. 40. Illegal drug market target community. A person whose participation in the illegal drug market constitutes the following level offense shall be considered to have the following illegal drug market target community:

(1) for a level 1 offense, the Illinois Representative District in which the defendant's place of participation is situated;

(2) for a level 2 offense, the target community described in item (1) plus all Illinois Representative Districts with a border contiguous to that target community; and

(3) for a level 3 offense, the target community described in item (2) plus all Illinois Representative Districts with a border contiguous to that target community;

(4) for a level 4 offense, the State.

(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/45)

Sec. 45. Joinder of parties.

(a) Two or more persons may join in one action under this Act as plaintiffs if their respective actions have at least one place of illegal drug activity in common and if any portion of the period of illegal drug use overlaps with the period of illegal drug use for every other plaintiff.

(b) Two or more persons may be joined in one action under this Act as defendants if those persons are liable to at least one plaintiff.

(c) A plaintiff need not be interested in obtaining and a defendant need not be interested in defending against all the relief demanded. Judgement may be given for one or more plaintiffs according to their respective rights to relief and against one or more defendants according to their respective

liabilities.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/50)
Sec. 50. Comparative responsibility.

(a) An action by an individual drug user is governed by the principles of comparative responsibility. Comparative responsibility attributed to the plaintiff does not bar recovery but diminishes the award of compensatory damages proportionally, according to the measure of responsibility attributed to the plaintiff.

(b) The burden of proving the comparative responsibility of the plaintiff is on the defendant and shall be shown by clear and convincing evidence.

(c) Comparative responsibility shall not be attributed to a plaintiff who is not an individual drug user.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/55)
Sec. 55. Contribution among and recovery from multiple defendants. A person subject to liability under this Act has a right of action for contribution against another person subject to liability under this Act. Contribution may be enforced either in the original action or by a separate action brought for that purpose. A plaintiff may seek recovery in accordance with this Act and existing law against a person whom a defendant has asserted a right of contribution.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/60)
Sec. 60. Standard of proof; effect of criminal drug conviction.

(a) Proof of participation in the illegal drug market in an action brought under this Act shall be shown by clear and convincing evidence. Except as otherwise provided in this Act, other elements of the cause of action shall be shown by a preponderance of the evidence.

(b) A person against whom recovery is sought who has a criminal conviction under state drug laws or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91-513, 84 Stat. 1236, codified at 21 U.S.C. Section 801 et seq.) is estopped from denying participation in the illegal drug market. Such a conviction is also prima facie evidence of the person's participation in the illegal drug market during the 2 years preceding the date of an act giving rise to a conviction.

(c) The absence of criminal drug conviction of a person against whom recovery is sought does not bar an action against that person.
(Source: P.A. 89-293, eff. 1-1-96; 90-655, eff. 7-30-98.)

(740 ILCS 57/65)
Sec. 65. Prejudgment attachment and execution on judgments.

(a) A plaintiff under this Act, subject to subsection (c), may request an ex parte prejudgment attachment order from the court against all assets of a defendant sufficient to satisfy a potential award. If attachment is instituted, a defendant is entitled to an immediate hearing. Attachment may be lifted if the defendant demonstrates that the assets will be available for a potential award or if the defendant posts a bond sufficient to cover a potential award.

(b) A person against whom a judgment has been rendered under this Act is not eligible to exempt any property, of whatever kind, from process to levy or process to execute on the judgment.

(c) Any assets sought to satisfy a judgment under this Act that are named in a forfeiture action or have been seized for forfeiture by any State or federal agency may not be used to satisfy a judgment unless and until the assets have been released following the conclusion of the forfeiture action or released by the agency that seized the assets.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/70)
Sec. 70. Statute of limitations.

(a) Except as otherwise provided in this Section, a claim under this Act shall not be brought more than 2 years after the cause of action accrues. A cause of action accrues under this Act when a person who may recover has reason to know of the harm from illegal drug use that is the basis for the cause of action and has reason to know that the illegal drug use is the cause of the harm.

(b) For a plaintiff, the statute of limitations under this Section is tolled while the individual potential plaintiff is incapacitated by the use of an illegal drug to the extent that the individual cannot reasonably be expected to seek recovery under this Act or as otherwise provided by law. For a defendant, the statute of limitations under this Section is tolled until 6 months after the individual potential defendant is convicted of a criminal drug offense or as otherwise provided by law.
(Source: P.A. 89-239, eff. 1-1-96.)

(740 ILCS 57/75)
Sec. 75. Stay of action. On motion by a governmental agency involved in a drug investigation or prosecution, an action brought under this Act shall be stayed until the completion of the criminal investigation or prosecution that gave rise to the motion for a stay of the action.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/80)
Sec. 80. Effect on existing laws. The provisions of this Act are not intended to alter the law regarding intrafamily tort immunity.
(Source: P.A. 89-293, eff. 1-1-96.)

(740 ILCS 57/85)
Sec. 85. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.
(Source: P.A. 89-293, eff. 1-1-96.)

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

Noah Wingert, a Minor, by his mother and next Friend, Cassandra Lee Wingert	)	
Plaintiff,	)	No. 13-L-10098
v.	)	Judge Daniel T. Gillespie Room 2202 Daley Center
Patsy A. Hradisky, as Special Administrator of The Estate of Kevin Jatczak, Deceased,	)	
Defendant.	)	

CORRECTED MEMORANDUM OPINION AND JUDGMENT ORDER

Nature of the Proceeding: This matter comes before this Court pursuant to the Order of our Illinois Supreme Court remanding this case for the purpose of making and recording findings in compliance with Illinois Supreme Court Rule 18.

Background

Cassandra Lee Wingert brings this action on behalf of her minor son, Noah Wingert who is the true Plaintiff in this case (Plaintiff). Plaintiff is also the son of Michael Neuman (Decedent), whose death by heroin overdose on June 9, 2012, acted as the catalyst for this action. Plaintiff filed suit against Defendants Kevin Jatczak (Jatczak), Julie Holda (Holda), and Simone Holda (Simone), (collectively "Defendants"), on September 10, 2013. However, Jatczak subsequently passed away in an unrelated house fire. As a result, Patsy Hradisky (Defendant), who is Jatczak's mother, began defending against Plaintiff's action on behalf of Jatczak's estate.

Plaintiff's original complaint brought an action based on common law negligence. After extensive motion practice between the parties, Plaintiff ultimately filed his fourth amended complaint which resulted in the constitutional issues discussed herein being placed before this Court. Plaintiff's fourth amended complaint brings suit against Defendants pursuant to 740 ILCS 57, The Drug Dealer Liability Act (the DDLA).

Specifically, Plaintiff alleges that that Defendants are liable to Plaintiff under the DDLA because: 1) They were in the chain of distribution of the drug that was actually provided to the Decedent, and/or 2) While they did not directly or indirectly provide Decedent the actual drugs he used, they are nonetheless liable under the DDLA because they sold the same type of drug, in

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the same geographical area, and during a time period when Decedent used the same type of illegal drug. *Id.*, §25(b)(1)&(2)(A-C).

Defendant now moves to dismiss Plaintiff's complaint pursuant to 735 ILCS 5/2-615 (2-615), because the DDLA violates the Due Process Clause of the 14th Amendment of the U.S. Constitution and Article I, §2 of the Illinois State Constitution. Important to note, Defendant served the Illinois Attorney General with notice giving her adequate time and opportunity to defend the DDLA as mandated in Illinois Supreme Court Rule 19, but the Attorney General explicitly declined to intervene in this case by letter dated April 4, 2016. *See AG Letter attached as* Ex. A. As such, for the reasons set forth below, this Court grants Defendant's motion to dismiss in part. However, prior to delving into the Defendant's constitutional challenges this Court believes a brief recitation of the DDLA's legislative scheme and purpose is useful.

The Drug Dealer Liability Act

On January 1, 1996, the Drug Dealer Liability Act became effective. The Illinois Legislature enacted the DDLA to: 1) create a civil remedy for persons, entities, and communities "injured as a result of illegal drug use", 2) allow those persons and entities to recover damages from those who "have joined the illegal drug market", 3) shift the costs associated with illegal drug use to drug dealers, 4) deter others from selling illegal drugs, and 5) incentivize drug users to seek payment for their treatment from the dealers that sold them the drugs. *Id.*, at §5. Moreover, section 10 of the DDLA, makes it readily apparent that the Illinois Legislature intended the DDLA to be used to: 1) threaten those who consider selling illegal drugs in order to deter them from entering the illegal drug market, 2) impose liability for the terrible costs and effects of illegal drug use on drug dealers both material and insignificant, and 3) erode numerous barriers and problems those injured by illegal drugs encountered in attempting to recover under previously existing civil remedies. *Id.*, §10(1)-(4)&(7).

The DDLA allows a plaintiff to bring an action against two distinct types of defendants: 1) a person who "participated in the chain of distribution of an illegal drug that was actually used by the individual drug user" (Direct Liability Provision), or 2) "A person who knowingly participated in the illegal drug market" (Area Liability Provision). *Id.* at §25(b)(1)&(2). A plaintiff hoping to hold a defendant liable under §25(b)(1) has the burden of proving that the defendant actually participated in the chain of distribution of the drug that was actually used by the drug user at issue in the case. In contrast, a plaintiff wishing to hold a defendant liable under the Area Liability Provision has to also prove three elements: (1) the defendant sold drugs in the same "illegal drug market community" where the injury occurred; (2) the defendant sold the same type of drugs that the user used; and (3) the defendant sold drugs at the time the user caused the plaintiff's injury or used drugs. *Id.* at (b)(2)(A-C). However, if a plaintiff names a defendant who has a criminal conviction pursuant to 21 U.S.C. §801 *et seq.* (the Act), and can meet certain requirements as set forth in the DDLA, section 60 of the DDLA estops the

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defendant from denying participating in the "illegal drug market" he/she will ultimately be liable for participating in. *Id.* at §25(b)(2)(A-C).

To be clear, the DDLA promulgates what the "illegal drug market" is in any given case based on the amount of drugs the defendant possessed, sold, or distributed (hereinafter simply "possessing") when he/she was convicted under the Act, or the amount of illegal drugs the defendant sold or distributed relative to the timeframe at issue in the case. The DDLA's broadest definition of the "illegal drug market" is for those defendants who have been convicted under the Act for possessing an amount of drugs which qualifies as a "level 4 offense" under the DDLA. *Id.* at §40 & §60. To put this in perspective, in certain circumstances a plaintiff who was injured due to a drug user's use of cocaine in Chicago can bring a DDLA action against a defendant[s] who was convicted of possessing 5 ounces of cocaine under the Act in Champaign, Illinois. *DDLA* at §15.

In such situations, the defendant is estopped from denying he/she is liable to the plaintiff, despite the fact that his/her conviction is "prima facie" evidence that he/she participated in the Chicago based plaintiff's "illegal drug market." *Id.* Take note that in this hypothetical, the "illegal drug market" is the entire state of Illinois. *Id.* at §60 & §25(b)(2). Furthermore, if a defendant holds a conviction under the Act for an amount of drugs that qualifies as a "Level 4 Offense" the DDLA holds that defendant liable for the plaintiff's injury simply by "participating" in the illegal drug market at issue. Put another way, the defendant's criminal conviction acts as a fulcrum holding them liable for the plaintiff's injury without allowing them any meaningful way to dispute his/her liability.

Also, in order to serve its intended purpose, the DDLA contains a number of sections which are rather uncommon in other civil liability statutes. The damages scheme set forth in section 25 of the DDLA allows a plaintiff to recover damages including, but not limited to: 23 types of economic/non-economic damages, punitive damages, attorney's fees, and the costs of the suit. *Id.* The same section makes clear that those approved damages are not exhaustive. *Id.* Moreover, the DDLA sets forth a comprehensive list of those persons and entities who may sue as plaintiffs when harmed by an individual's use of an illegal drug including, a parent, legal guardian, child, spouse, sibling, an individual in utero, an employer, a medical facility, an insurer, government entity, an entity that funds a drug treatment program, or a person injured as a result of the willful, reckless, or negligent actions of the individual drug user. *Id.* Lastly, the DDLA permits an intelligent plaintiff (as long as they are not a drug user), to name multiple convicted defendants who cannot rebut liability as long as the plaintiff ensures that the requirements set forth in section 25 and 60 of the DDLA are satisfied. *See Id.* at (b), ("A person entitled to bring an action under this Section may seek damages from *one or more* of the following:") [emphasis added].

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The Parties' Arguments

Defendant provides three separate arguments as to why the DDLA violates the Due Process Clause of the 14th Amendment to the U.S. Constitution, and Article I, §2 of the Illinois State Constitution.

1. **The Defendant's Unconstitutional Arguments**

First, Defendant argues that the DDLA violates a defendant's due process rights by imposing an irrational and arbitrary presumption of causation which is irrebuttable in certain circumstances. In citing *Tot v. United States*, 319 U.S. 463 (1943), Defendant argues that the DDLA's causation presumption, which again can become irrebuttable, is unconstitutional because a Defendant's drug conviction under the Act bears no rational connection to the ultimate fact presumed – that the Defendant's simple participation in the drug market caused the Plaintiff's injury. In further support of Defendant's first argument, she asks this Court to look no further than how the statute defines "illegal drug market" communities based on electoral districts.

Defendant advances that our Illinois Legislature cites no rational basis as to why electoral districts were used to determine which geographical area would be a "place of illegal drug use" and "target community". *DDLA* at §15 & §40. Defendant posits that such categorization, while seemingly arbitrary, becomes clearly so when entertaining the real world possibility that a drug dealer who lives down the block from a drug user will not, at times, be properly named as a DDLA defendant because he/she lives in a different electoral district. In addition, Defendant asks this Court to consider *Steed v. Brain-Holloway*, an Oklahoma case, as persuasive authority because that court analyzed and determined that Oklahoma's own identical version of the DDLA was unconstitutional for the same reasons Defendant presents here.

Second, Defendant maintains that the DDLA violates due process by completely eliminating causation, which the Illinois Supreme Court held was a "fundamental principle of tort law" in *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 232 (1990). Defendant's second argument seems to be implicitly aimed at both sections of 25(b) which allow plaintiffs to name both direct and indirect persons as defendants under the DDLA. Properly distilled, Defendant represents that the DDLA does not require a plaintiff to prove that a defendant named under either section factually caused the plaintiff's injuries. Instead, the DDLA presumes that either by providing the *actual* drugs the drug user took, or even worse, by simply participating in the "illegal drug market" at issue the defendant caused the plaintiff's injury.

Defendant further presents the notion that the DDLA is unparalleled in terms of assuming a defendant caused the plaintiff's injury in relation to other civil recovery statutes. Defendant

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turns this Court's attention to the Illinois Dramshop Act which, while having a relaxed causation requirement, still requires a plaintiff to prove that a liquor business *caused* the intoxication of the party which, in turn, *caused* the Dramshop plaintiff's injury. In contrast, Defendant argues that there is no similar causation requirement in the DDLA. Defendant then prays that this Court consider what may occur if the judiciary allows our Legislature to enact liability statutes without requiring plaintiffs to prove the defendant actually caused the plaintiff's injury. In Defendant's view it will lead to new statutes being enacted on shaky constitutional grounds at the expense of individual due process rights.

Finally, Defendant argues that the DDLA violates due process by employing both market share liability and joint and several liability irregardless of a defendant being 25% at fault or greater. Defendant interprets *Smith v. Eli Lilly & Co.*, along with other foreign court decisions to project the image that the courts in the great majority of states have rejected market share liability explicitly because the market theories shed causation, which is an indispensable part of tort jurisprudence. *Id.* at 137 Ill. 2d 222 (1990). Defendant lastly contends that the DDLA is patently unjust because it also allows a plaintiff to single out a defendant and obtain from him/her the full judgment assigned irrespective of the percentage of that defendant's fault.[1]

2. The Plaintiff's Responsive Arguments

First, Plaintiff argues that both section 25(b)(1)&(2) are constitutional because it's rational to assume that either type of defendant contributes to our state's drug problem. In support, Plaintiff implicitly cites to the legislative findings section of the DDLA as he argues, "[d]rug addiction is an ongoing harm where the damage caused from one dose is often hard to distinguish from damage caused by another dose."*Pltf's Resp. Brf.* at Pg. 2. Gleaned from Plaintiff's argument is the idea that although a drug user overdoses because of his/her use of cocaine on a particular date, the overdose might be due, in part, to the build-up of cocaine in that user's system on several continuous occasions. Using previous methods of recovery, Plaintiff argues that a litigant's ability to prove this type of theory required scientific evidence, which was either hard or expensive to retain. This, argues Plaintiff, is precisely why our Legislature crafted the DDLA with an extremely relaxed causation requirement. As such, Plaintiff argues that the Legislature's decision to relax causation requirements in the DDLA is justified because it is the only practical way our Legislature could hope to serve the purpose for which the DDLA was enacted; Shifting the costs associated with illegal drugs back to drug dealers.

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[1] *See* Wendy Stasell, *Shopping for Defendants: Market Liability under the Illinois Drug Dealer Liability Act*, Vol. 27, Loyola University Chicago L.R., Is. 4 (1996), (During a House debate, Representative Salvi stated that the Drug Dealer Liability Act is "market share liability times ten." House Transcript, *supra* note 138, at 5. The liability created under the Act is similar to market share liability, in that it allows the plaintiff to sue even though he cannot identify the person who caused his injury. *Id.* Representative Salvi stated: "It's very similar to that although it goes much further than that because ... a major drug dealer in the State of Illinois who has lots of assets will find that hundreds of people throughout the State of Illinois will be suing him ... This is civil liability times 1000 ... so if you are interested in getting into the illegal drug market you [sic] better be very careful, because you're going to get sued and if you have assets, you are going to have to pay."). *Id.*

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Moreover, Plaintiff argues that Defendant's reliance on *Steed v. Bain-Halloway* is misplaced because that decision only held Oklahoma's version of the DDLA's Area Liability Provision unconstitutional, while leaving Oklahoma's version of the Direct Liability Provision intact. Additionally, Plaintiff asks this Court to look to the Black Lung and Benefits Act of 1972 (BLBA) to support that the DDLA's irrebuttable presumption is not unconstitutional. The BLBA holds that if a coal miner shows evidence that he/she was afflicted with pneumoconiosis, it was "irrebuttably presumed" that he/she was totally disabled by that affliction at the time of his death for the purposes of receiving death benefits from the miner's employer. *Id.*

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the U.S. Supreme Court held that the irrebuttable presumption in the BLBA was constitutional because Congress could rationally conclude that a miner with pneumoconiosis suffered a disability brought on because of his/her activities as a miner. Thus, the Court held that the BLBA's irrebuttable presumption regarding the miner's affliction being due to his/her duties as a miner was rational and passed constitutional muster. *Id.* at 25-6. In comparison, Plaintiff argues, the DDLA's irrebuttable presumption between a defendant's criminal conviction and the plaintiff's injury is just as rational and therefore constitutional.

Next, Plaintiff argues that the joint and several liability provision in the DDLA is not unconstitutional merely because there may be a fairer way to apportion damages. Plaintiff reminds this Court that it's our Legislature's prerogative to enact legislative remedies in an attempt to solve our society's problems. In support of the constitutionality of the DDLA's joint and several liability provision, Plaintiff cites to the DDLA's legislative findings section where our legislature found that *all* drug dealers are responsible for the harm caused by drugs notwithstanding whether they actually provided the drugs at issue to the user or not. *Id.* at §10.

For Plaintiff's fourth argument he argues that "nothing in the DDLA creates market share liability", but "...creates joint and several liability with a rational causation presumption that a drug dealer who operates within the same area in which drugs were consumed likely caused a portion of the plaintiff's damages." *See Pltf's Resp. Br.* at Pg. 6. Even if that were the case and the DDLA imposes market share liability, Plaintiff contends, the Area Liability Provision is constitutional because the legislature expressly decided to enact it, which distinguishes this case from *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222 (1990). Plaintiff distinguishes that case from this one by advancing the idea that our Supreme Court expressly disfavored and rejected market share liability becoming an *extension* of common law in *Smith v. Eli Lilly & Co. Id.* In this case, however, the Legislature expressly decided to utilize market share liability by passing the DDLA. In short, Plaintiff interprets the *Eli Lilly* decision narrowly to stand for the proposition that our Supreme Court simply refrained from expanding Illinois common law to encompass market share liability, instead of finding that market share liability would be unconstitutional in every situation.

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Plaintiff proposes that the our Legislature balanced its imposition of joint and several liability on defendants held liable by the DDLA, by giving those defendants the right to bring counterclaims and seek contribution from other drug dealers. *Id.* at §55. As section 10 of the DDLA finds, because the illegal drug business is one of a clandestine nature, drug dealers are in the best position to know who other drug dealers are, and if the burden of paying the plaintiff's damages is too great, those defendants can always bring a contribution action against other drug dealers. In short, Plaintiff believes that the DDLA is constitutional because, in essence, the DDLA's legislative scheme is the only practical way to shift the costs and injuries associated with illegal drug use back to the drug dealers who are responsible for it.

Analysis

I. THE CONSTITUTIONAL CHALLENGES DEFENDANT RAISES IN HER MOTION TO DISMISS ARE ONLY PROPER WHEN BROUGHT IN A MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-619(a)(9).

As a preliminary matter, Defendant raised her constitutional challenges to the DDLA in a motion to dismiss filed pursuant to 2-615. Plaintiff responded to the Defendant's constitutional arguments without raising any objection to Defendant's use of 2-615 as the vehicle for her constitutional challenges to be heard. Nor did Plaintiff raise any procedural issue with Defendant bringing her constitutional challenge in the prior 2-615 motion when the Plaintiff asked this Court to reconsider its prior ruling which found 740 ILCS 57/25(b)(2) unconstitutional. *See Pltf's Resp. to Def's Mtn for Summary Judgment.*

As a procedural matter, however, this Court finds it important to note that the Defendant's constitutional challenges to the DDLA which Defendant categorizes as a motion to dismiss pursuant to 2-615, is improper. Constitutional challenges may only be entertained when brought pursuant to 735 ILCS 5/2-619(a)(9) (2-619). *See People v. One 1998 GMC*, 355 Ill. Dec. 900, (2011), (The Illinois Supreme Court found that the defendant's constitutional challenge to forfeiture statutes, which allowed the State to impound vehicles was properly brought under the auspices of 735 ILCS 5/2-619(a)(9), as the constitutional challenge was an "affirmative matter" which defeated the State's claim). Still, because Plaintiff did not object to Defendant raising her constitutional arguments in a 2-615 motion, and responded to the substance of those arguments, in the interest of judicial economy this Court finds it proper to treat the Defendant's motion to dismiss as being brought pursuant to 2-619(a)(9). *See Peterson v. Randhava,* 313 Ill. App. 3d 1, 9, (1st Dist. 2000), ("the substance of the motion, not the title, should determine how the court should treat a motion"); *Loman v. Freeman,* 375 Ill. App. 3d 445, 448 (4th Dist. 2006), ("the substance of a motion, not its label, determines what it is."); *Murcia v. Textron, Inc.*, 342 Ill. App. 3d 433, 437 (1st Dist. 2003), (The First District noted that since the employee was able to address the substance of the employer's arguments in response to its motion, the employee was not prejudiced by the employer's mislabeling of the motion); *Nelson v. Crystal Lake Park Dist.*,

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342 Ill. App. 3d 917, 920 (2nd Dist. 2003); *Storm & Assoc. v. Cuculich*, 298 Ill. App. 3d 1040, 1046, (1st Dist. 1998).

Moreover, as a practical matter, rather than ordering the parties to repeatedly address whether Plaintiff properly pleads facts to state a cause of action under a statute which would ultimately face constitutional challenge, this Court finds it necessary to get to the heart of the matter and determine if the DDLA, which Plaintiff relies on, can pass constitutional muster on its face. In short, this Court finds it important to clarify that it finds 740 ILCS 57/25(b)(2) unconstitutional, after treating the Defendant's motion to dismiss as being made under 2-619(a)(9), instead of 2-615.

II. THE DDLA'S METHOD OF IMPOSING AN IRREBUTTABLE PRESUMPTION OF CAUSATION FOR THE PLAINTIFF'S INJURY ON THOSE DEFENDANTS WHO SIMPLY PARTICIPATED IN THE ILLEGAL DRUG MARKET IS UNCONSTITUTIONAL AS IT VIOLATES THAT DEFENDANT'S RIGHT TO DUE PROCESS

Courts should begin any constitutional analysis with the presumption that the challenged legislation is constitutional, and it is the challenger's burden to clearly establish that the challenged provisions are unconstitutional. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 377 (1997). However, the Illinois Constitution is not a grant, but a limitation on legislative power. *Id.* It is the judiciary's duty to interpret the law and to protect the rights of individuals against acts beyond the scope of the legislative power. *Id.* If a statute is unconstitutional, it is the judiciary's duty to declare it invalid. *Id.* This duty cannot be evaded or neglected, no matter how desirable or beneficial the legislation may appear to be. *Id.*

This Court notes that only a single appellate court case has discussed any of the DDLA's provisions, and that case had no meaningful discussion as to whether the DDLA violates a defendant's due process rights.[2] Thus, this Court is asked to rule on this issue as a case of first impression. Furthermore, this Court finds the Oklahoma Appellate Court's decision in *Steed v. Bain-Holloway*, as persuasive authority since it dealt with Oklahoma's identical version of the DDLA, and the same constitutional issues which are before this Court now. *Id.*, 356 P.3d 62 (Okla. App. 2015). The first important issue is to determine if the DDLA imposes market share liability on defendants.

a. The "Risk Contribution Theory" is the Closest Market Liability Theory Which Is Contained Within the DDLA

Defendant's argument that the DDLA imposes "market share liability" on defendants misses the mark. So too does Plaintiff's argument that the DDLA does not impose *any* type of market liability. Section 10(9) of the DDLA explicitly states:

[2] *Westfield Nat'l Ins. Co. v. Long*, 348 Ill. App. 3d 987 (2nd Dist. 2004), was a declaratory judgment action.

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> "Market liability has been created with respect to legitimate products by judicial decision in some states. It provides for civil recovery by plaintiffs who are unable to identify the particular manufacturer of the product that is claimed to have caused them harm, allowing recovery from all manufacturers of the product who participated in that particular market. The market liability theory has been shown to be destructive of market initiative and product development when applied to legitimate markets. Because of its potential for undermining markets, this Act expressly adopts a legislatively crafted form of liability for those who intentionally join the illegal drug market. *The liability established by this Act grows out of but is distinct from existing judicially crafted market liability.* [emphasis added].

Clearly, from the DDLA's explicit language our Legislature intended to institute a type of *market liability* within the DDLA. Thus, Plaintiff's suggestion that the DDLA imposes no such market liability variation is unpersuasive. However, Defendant's categorization of the DDLA's market liability scheme as "Market Share Liability" is not on point either. In fact, as set forth below, none of the market liability theories our Illinois Supreme Court discussed in *Smith v. Eli Lilly & Co.*, fit perfectly into the DDLA's legislative scheme. *Id.* at 137 Ill. 2d 222 (1990).

In "market share liability," a plaintiff is required to join the manufacturers of a "substantial share" of the market as defendants in the plaintiff's lawsuit. *Id.* at 237. The plaintiff then must proffer a prima facie case on every element of strict liability negligence except identifying the direct tortfeasor, who actually provided the drug to the plaintiff. *Id.* The burden thereafter shifts to the defendants to demonstrate that they could not have provided the drug to that particular plaintiff. *Id.* If the defendant fails in this regard the court then fashions a market share theory to apportion damages based on the likelihood that the defendant supplied the drug the plaintiff took considering each defendant's share of the market. *Id.* The ideal result is that each manufacturer's liability for the plaintiff's injury and the portion of the judgment it must pay is approximately equivalent to the chance the plaintiff took the manufacturer's drug. *Id.*

The market share liability theory described in *Smith* is inapplicable to illegal drug dealers named as defendants under the DDLA for several reasons. *Id.* First, it's practically impossible for an Illinois plaintiff to join all illegal drug dealers which have a "substantial share" of the market due to the clandestine nature of the illegal drug trade. Second, it's even more difficult to know within any degree of certainty how much of a market share each individual defendant has in the illegal drug market than it is to apportion approximate market shares to *legal* drug manufacturers for the same reason. Third, in market share liability, a legal drug manufacturer who is named as a defendant at least enjoys the opportunity to demonstrate that they could not have provided the plaintiff with the actual drug which caused his injury. *Id.* In comparison, a defendant named in an Illinois DDLA action might not have such an opportunity because there is a presumption of causation that becomes irrebuttable if a particular defendant has a criminal

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conviction under the Act (assuming the plaintiff meets the other criteria which triggers §60 of the DDLA to apply).

Instead, of all the market liability theories our Supreme Court described in *Smith*, the closest that comes to describing the market liability theory used within the DDLA is the "Risk Contribution Theory" which the Wisconsin Supreme Court fashioned in *Collins v. Eli Lilly Co.* *Id.* at 116 Wis. 2d 166 (1984); *Smith*, 137 Ill. 2d at 243. To support utilizing that market theory of liability, the Wisconsin Supreme Court held that "[e]ach defendant contributed to the *risk* of injury to the public and, consequently, the risk of injury to individual plaintiffs." *Id.* To justify the approach the Wisconsin Supreme Court held that "...each defendant shares, in some measure, a degree of culpability in producing or marketing" a harmful drug [and] as between the injured plaintiff and the possibly responsible drug company, the drug company is in a better position to absorb the cost of the injury." *Id.*

When a Wisconsin plaintiff relied on the Risk Contribution Theory the plaintiff was still required to allege that: 1) the patient ingested the drug, 2) the drug caused the plaintiff's injury, 3) the defendant manufactured or marketed the drug, and 4) the defendant's conduct constituted a breach of a legal duty to the patient. *Id.* Thus, just like an Illinois plaintiff moving under the DDLA, "[t]he plaintiff need only sue one [drug dealer] and that [drug dealer] need not constitute a *substantial share* of the market." [emphasis added] *Id.* Still, however, the Risk Contribution Theory as applied to the DDLA is imperfect as well, because a legal drug manufacturer named as a defendant in Wisconsin still enjoys the opportunity of proving "by a preponderance of the evidence that it did not produce or market" the drug, which caused the plaintiff's injury. *Id.* As stated above, a drug dealer named as a defendant in a DDLA action may not enjoy a similar opportunity.

However, the distinction makes little difference as our Illinois Supreme Court was highly critical of Wisconsin's "Risk Contribution Theory" as well. *See Id.*, ("[i]f only one company is sued and no others are impleaded, that company is liable for all the damages if it cannot exculpate itself."). The Illinois Supreme Court also noted that "If more than one defendant is joined or impleaded, damages are determined according to the jury's assignment of liability under Wisconsin's comparative negligence statute. *Id.* Similarly, the DDLA also seems to allow defendants held liable under the statute to reduce their apportionment of damages by showing their comparative "responsibility" was less than that of the other co-defendants. *Id.* at §50.

i. Defendant's Joint and Several Liability Argument Is Unpersuasive

The fact that the DDLA allows defendants to reduce the apportionment of the damages that they owe, indicates that the DDLA does not impose joint and several liability regardless of whether the defendant is 25% or more at fault. Pursuant to 735 ILCS 5/2-1117, a tortfeasor is liable for the total judgment a plaintiff is owed only if a jury finds the defendant 25% or more at fault. If not, the defendant is only liable for his share of the judgment that is less than 25%

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attributable to the plaintiff's injury. However, Defendant argues that the DDLA rescinds the 25% at-fault threshold which triggers a defendant being held joint and severally liable to the plaintiff.

First, Defendant fails to cite any specific portion of the DDLA to support her argument. Second, setting aside the fact that a central tenet of Illinois law is that the burden of proving a claim is wrought on the party making it, a close reading of the DDLA reveals no such language. Instead, the language closest to standing for the notion Defendant raises can be located at section 45(c) of the DDLA, which reads, "[a] plaintiff need not be interested in obtaining...all the relief demanded[] Judgement may be given for one or more plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities." *Id.* However, this statutory language is insufficient for this Court to conclude that defendants are jointly and severally liable irrespective of the percentage a jury judges them at fault. In short, Defendant fails to sufficiently cite any specific authority to support that joint and several liability under the DDLA is unconstitutional. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

b. The Illinois Supreme Court's Decision In *Smith v. Eli Lilly & Co.*, Seriously Questioned the Constitutional Feasibility Of Using Market Liability Principles In Illinois Tort Law

Notwithstanding the fact that the DDLA seems to utilize a version of Wisconsin's Risk Contribution theory, the result of applying such a market liability theory seems to run afoul of our Illinois Supreme Court's decision in *Smith v. Eli Lilly & Co. Id.* at 137 Ill. 2d 222. In *Smith v. Eli Lilly & Co.*, our Illinois Supreme Court performed an exhaustive analysis as to whether market liability theories could be applied in a suitable framework in Illinois, and decided it was untenable. *Id.* This is evident in the language expressly dictated by the Illinois Supreme Court itself, as well as the numerous times the Supreme Court directly quoted the decisions of other state courts which expressed the same concern. *See Id.*, 137 Ill. 2d at 238, ("[Market Share Liability] theory will result in imposition of liability on pure conjecture and ... rewards the plaintiff who, unlike the ordinary plaintiff, no longer has to take the chance that the responsible defendant cannot be reached or is unable to respond financially"); *Id.* at 244, ("It has been said that [Risk Contribution] theory contravenes the fundamental tort principle that a mere possibility is insufficient to satisfy causation."); *Id.* ("Furthermore, it is possible that liability will far exceed the probability that a defendant caused the injuries."); *Id.* at 245 ("Though it is too early to determine how [New York's Risk Contribution theory] will be received, it certainly is the *most radical* in its departure from established tort principles and it is admittedly flawed in that it cannot equate liability to actual harm caused.") [emphasis added]; *Id.* at 246, ("[The Iowa Supreme Court] recognized market share liability as a radical departure from traditional tort concepts and it rejected allowing "'negligence in the air'" to serve as a substitute for causation in fact."); *Id.*, *quoting Mulcahy v. Eli Lilly & Co.* (Iowa 1986), ("...awarding damages to an admitted innocent party by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain.").

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Although the parentheticals above showcase the concerns courts across the nation share when determining if market liability theories can provide a workable framework that does not run adrift of fundamental constitutional principles, it's worth highlighting our Illinois Supreme Court's own words after it held that market share liability was "too great a deviation from our existing tort principles...". *Smith*, 137 Ill. 2d at 251; *Id.* at 251-2, ("A major flaw, in regards to DES cases, is that there is only a small amount of, or in some cases no, reliable information available to establish the defendants' percentages of the market."); *Id.*, at 253, ("Acceptance of market share liability and the concomitant burden placed on the courts and the parties will imprudently bog down the judiciary in an almost futile endeavor. This would also create a tremendous cost, both monetarily and in terms of the workload, on the court system and litigants in an attempt to establish percentages based on unreliable or insufficient data."); *Id.*, at 253-4, ("If we were to allow courts and juries to apportion damages when reliable information is not available, the clear result would be that the determinations will be arbitrary and there will be wide variances between judgments, without sufficient explanation as to these differences."); *Id.* at 254, ("To impose liability when it is quite possible that the defendant is not before the court is too speculative."); *Id.* at 255, ("Surely, this *specific market* would be nearly impossible to establish.") [emphasis added]; *Id.*, ("The theory thus punishes plaintiffs who can satisfy the identification element, while creating an incentive not to locate the particular [defendant]"). To put it mildly, our Illinois Supreme Court expressed a rather negative view of incorporating any market liability theory into a usable framework within Illinois law. Absent our Supreme Court's direction to the contrary, this Court declines to enter a ruling that may be adverse to our highest Court's decision.

To the Plaintiff's credit, it is true that our Supreme Court's decision in *Smith v. Eli Lilly & Co.* only declined to expand Illinois common law to encompass market share liability. However, our Illinois Supreme Court did not explicitly assert that a statute which uses such market liability theories would not run afoul of the Illinois and U.S. Constitutions, which have now arisen with the enactment of the DDLA. Instead it left that question open and to be decided when such legislation was enacted. *See Id.*, at 262-3, ("*Perhaps*, as a number of other courts and commentators have suggested, this change is most appropriate for the legislature to develop, with its added ability to hold hearings and determine public policy.") [emphasis added]; *See Madison v. City of Chicago*, 415 Ill. Dec. 498, 503, (1st Dist. 2017), ("... where our supreme court makes a pronouncement, even where it is not essential to the disposition of the case, such a statement is either judicial *dictum* that is entitled to "much weight," or *obiter dictum*, which can be "binding in the absence of a contrary decision of that court."). Surely, therefore, this Court is not at liberty to simply disregard our Supreme Court's statements in binding precedent regarding the same issue no matter how small or large that dicta may be. This discussion is not to suggest, of course, that our Legislature can *never* employ market liability theories, but only that they must, as with any piece of legislation, craft such statutes so individual constitutional rights remain viable. In any event, absent direction to the contrary from a higher court, this Court finds the DDLA is unconstitutional on its face because the application of a modified version of Risk Contribution

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Theory runs contrary to our Illinois Supreme Court's decision in *Smith v. Eli Lilly & Co. Id.*,137 Ill. 2d at 268.

III. §25(b)(2) OF THE DDLA IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT ARBITRARILY PRESUMES THAT A DEFENDANT WHO PARTICIPATES IN THE ILLEGAL DRUG MARKET CAUSED THE PLAINTIFF'S INJURY

a. The DDLA's Area Liability Provision Is Unconstitutional

There is no evidence in the record to suggest that Defendant Jatczak was criminally convicted of any violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Therefore, it would be inappropriate for this Court to find section 60 of the DDLA unconstitutional. Instead, Defendant contends that the Area Liability Provision set forth in section 25(b)(2) is unconstitutional on its face. This Court agrees. Section 25(b)(2) of the DDLA presumes that the defendant caused the plaintiff's injury if the plaintiff proves three facts: (1) the defendant sold drugs in the same "illegal drug market community" where the injury occurred or drugs were used; (2) the defendant sold the same type of drugs that the user used; and (3) the defendant sold drugs at the time the user caused the plaintiff's injury. *Id.* However, the presumed fact - that the defendant's conduct caused the plaintiff's injury - has no rational relationship to these proven facts and fails to establish any reasonable probability that the defendant's participation in the illegal drug market caused the plaintiff's injury. The Oklahoma Appellate Court's decision in *Steed v. Bain-Holloway,* echoes this Court's reasoning and is persuasive authority. *Id.* at 356 P.3d 62 (Okla. App. 2015).

In *Steed v. Bain-Holloway,* the friends of three minor plaintiffs brought suit under Oklahoma's identical version of the DDLA, against 51 defendants. *Id.*; 63 O.S. 2011 2-421 *et seq.* Identical to section 25(b)(2) of the DDLA, section 2-424(B)(2) of Oklahoma's statute allowed a plaintiff to seek damages from persons who knowingly participated in the illegal drug market, as long as three requirements were met: (1) the "illegal drug market target community of the defendant" must have been the same as the individual drug user's place of drug activity; (2) the defendant's drug market participation must have been connected with the same type of illegal drug utilized by the individual drug user, and (3) the defendant must have participated in the illegal drug market "at any time during the illegal drug use of the individual user." *Steed,* 356 P.3d at 66; *Id.* at 2-424(B)(2)(a-c).

One of the defendants in *Steed,* moved to dismiss the plaintiff's action because the Oklahoma statute infringed on his due process rights under the 14th Amendment to the U.S. Constitution and Oklahoma State Constitution because the statute impermissibly imposed liability on him without showing a causal relationship between his participation in the illegal drug market and the plaintiff's injuries. *Id.*, 356 P.3d at 64-65. The Oklahoma appellate court

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agreed. The Oklahoma appellate court found that section 2-424(B)(2) of Oklahoma's drug statute arbitrarily created civil liability by imposing liability without regard to whether the defendants named under that section of the statute actually provided the drug user with the drug that caused the plaintiff's injury. *Steed*, 356 P.3d at 68. The *Steed* Court further noted that the statute's irrebuttable presumption of causation, which arose when a defendant had a criminal conviction under the Comprehensive Drug Abuse Prevention and Control Act of 1970, was unreasonable because it imposed liability on those defendants when the wrongful conduct was actually caused by another. *Id.* at 68. The *Steed* Court concluded that section 2-424(B)(2) of the Oklahoma statute was unconstitutional because it artificially created a connection between an alleged harm and wrongful conduct, which was too tenuous to adequately protect a potential defendant's right to substantive due process. *Steed*, 356 P.3d at 68. In sum, the *Steed* Court invalidated Oklahoma's version of the DDLA's Area Liability Provision because it arbitrarily imposed liability on defendants regardless of whether those defendants participation in the illegal drug market actually caused the plaintiff's injury. *Id.*

The same rationale the *Steed* court expressed in finding Oklahoma's version of section 25(b)(2) of the DDLA unconstitutional rings true here. *Id.* The DDLA's Area Liability Provision arbitrarily presumes that by simply participating in the illegal drug market at issue the defendant caused the plaintiff's injury because the defendant either: 1) provided drugs to the user on some previous occasion, 2) created an illegal drug market in the drug user's community, or 3) provided the drugs to the user which proximately caused the Plaintiff's injury. Thus, the Area Liability Provision's irrational presumption of causation occurs in two ways. Simply because a defendant participates in the illegal drug market where the drug user or drug use was located does not mean that the defendant actually provided the drug user with illegal drugs. Separately, a defendant's participation in the illegal drug market does not automatically correlate into becoming the cause of a plaintiff's injury. The rationality of the DDLA's Area Liability Provision becomes even more questionable when considering that the DDLA arbitrarily defines what constitutes an "illegal drug market" based on Illinois electoral districts. Simply distilled, the DDLA's Area Liability Provision commits a classic causal fallacy where it assumes that a relationship between one thing (the Defendant's participation in the illegal drug market), is the cause of the other (the Plaintiff's injury).

The United States Supreme Court held that when a court is determining if a particular statutory presumption violates the Due Process Clause of the 14th Amendment the court must apply a "rational relation test." *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). Thus, the DDLA's statutory presumption under section 25(b)(2) will be upheld if there is a "rational relation between the fact proved and the ultimate fact presumed". *Id.* The DDLA's Area Liability Provision, however, is unconstitutional on its face because it is both irrational and arbitrary. *Id.* It presupposes that the plaintiff's injury, which was caused by a drug user's illegal use of drugs (unless the plaintiff is the drug user), was also arbitrarily caused by the defendant's participation in an illegal drug market, which is arbitrarily defined itself.

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Lastly, this Court cannot reasonably determine a way that the DDLA's Area Liability Provision can be construed in a manner that would preserve its validity. The Plaintiff himself fails to suggest a manner in which section 25(b)(2) of the DDLA can stand in harmony with the Defendant's right to due process. Instead, the Plaintiff remains committed to the view that every individual drug dealer is responsible for every single instance of drug use and the harm that results. This is not rational, however, when taking into account that illegal drugs do not always arise from the same source, and some drug dealers cut or modify drugs to increase or decrease their potency and quantity. An additional problem unaddressed by any authority is that if the Defendant is held liable to the Plaintiff under the DDLA's Area Liability Provision in one instance, nothing prevents other plaintiffs, in separate DDLA proceedings, from holding the same Defendant liable in other actions again and again.

b. It Is Necessary For This Court To Find Section 25(b)(2) Of The DDLA Unconstitutional For There Is No Other Way That The Plaintiff Can Maintain An Action Against The Defendant And The Area Liability Provision Violates The Defendant's Due Process Rights.

Since the DDLA contains a severability provision this Court was able to sever section 25(b)(2) without having to invalidate the entire statute when it granted Defendant's motion to dismiss in part on May 4, 2016. *Id.* at §85. However, Plaintiff was able to maintain his action against Defendant Jatczak pursuant to section 25(b)(1) of the DDLA even after the Area Liability Provision was severed. Although Plaintiff proceeded through discovery, he was still unable to show facts supporting that Defendant "knowingly distributed, or...participated in the chain of distribution of [heroin] that was actually used" by the Plaintiff's Decedent as required under section 25(b)(1) of the DDLA, when faced with Defendant's motion for summary judgment. *Curatola v. Niles*, 154 Ill. 2d 201, 207 (1993). As a result, Defendant's motion was granted. Therefore, with this Court's determination that section 25(b)(2) of the DDLA violates the Defendant's right to due process, and because Plaintiff's cannot receive judgment upon any alternative ground, it was necessary for this Court to find the Area Liability Provision unconstitutional.

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For the reasons stated above, IT IS HEREBY ORDERED:

1. Defendant Jatczak's Motion to Dismiss Pursuant to 2-615 Is Treated As A Motion To Dismiss Pursuant to 2-619(a)(9);
2. Defendant's Motion to Dismiss Is Granted In Part, and Denied In Part;
3. 740 ILCS 57/25(b)(2) is found to be facially unconstitutional as violative of due process as set forth in the Due Process Clause of the 14th Amendment, and Article I, §2 of the Illinois State Constitution and is hereby severed from 740 ILCS 57, *et seq.*; and
4. These findings shall be filed with the Clerk of the Illinois Supreme Court as ordered by the Illinois Supreme Court on February 2, 2018.

ENTERED:

Daniel T. Gillespie

Judge Daniel T. Gillespie #1507

Associate Judge
Daniel T. Gillespie
MAR - 6 2018
Circuit Court – 1507

123201

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 5, 2016

Kyle McConnell
Scott, Halsted & Babetch, P.C.
216 N. Jefferson Street, Suite 100
Chicago, Illinois 60661

Re: Noah Wingert, etc., v. Patsy A. Hradisky, etc., et al., No. 13 L 010098

Dear Mr. McConnell:

This letter acknowledges receipt of your March 3, 2016 notice of claim of unconstitutionality in the above-referenced matter. Based upon a review of the notice and the documents sent by electronic mail on March 23, 2016, the opportunity to intervene will not be pursued by this office at this time.

Kindly advise me of the Court's resolution of this constitutional claim. Thank you for your cooperation. Should you have any questions, please contact me at 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601 or at (312) 814-1030.

Very truly yours,

Roger P. Flahaven
Deputy Attorney General
Civil Litigation

RPF/amr

500 South Second Street, Springfield, Illinois 62706 • (217) 782-1090 • TTY: (877) 844-5461 • Fax: (217) 782-7046

Ex. A
C 792

123201

Order **(2/24/05) CCG N002**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Wingert

v.

Hradiskey, et al

No. 13 L 10098

ORDER

This cause coming to be heard on Defendant's 2-615 Motion to Dismiss Plaintiff's Fourth Amended Complaint, parties appearing by counsel, & the Court fully advised, it is ordered: 4271 5271

Defendant Hradisky's Motion to Dismiss is granted in part, and denied in part:

740 ILCS 57/25(b)(2) is found to be unconstitutional as violative of due process and is hereby severed from 740 ILCS 57, et seq.

740 ILCS 57/25(b)(1) is found to be constitutional.

Atty. No.: 37245

Name: Kyle McConnell / Scott, Halsted & Babetch, P.C.

Atty. for: Hradisky

Address: 216 N Jefferson St. #100

City/State/Zip: Chicago, IL 60661

Telephone: 312-463-1045

ENTERED:

Associate Judge
Daniel T. Gillespie

MAY - 4 2016

Circuit Court – 1507

Dated: _____

_____ _____

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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SUBMITTED - 768588 - Matt Cross - 3/22/2016 12:14 PM

C 399

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

NOAH WINGERT, a minor, by his mother and next friend, CASSANDRA LEE WINGERT,

Plaintiff,

v.

PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased, JULIE HOLDA, And SIMONE HOLDA,

Defendants.

13 L 010098

CC M. M

ORDER

This matter coming to be heard on motion by Patsy A. Hradisky, as Special Administrator of the Estate of Kevin Jatczak, Deceased, for Summary Judgment as to Count I of Plaintiff's Fifth Amended Complaint at Law, the court fully advised and parties appearing by counsel, it **is ordered:**

4280
4271

The Court, having found no genuine issue of material fact as to whether Defendant, Patsy A. Hradisky, as Special Administrator of the Estate of Kevin Jatczak, proximately caused the overdose of plaintiff's decedent, Michael William Neuman, for which damages are sought, hereby enters summary judgment in favor of Patsy A. Hradisky on Count I of Plaintiff's Fifth Amended Complaint at Law.

4336

4200
4240
4368
4251

Defendants, Julie Holda and Simone Holda, are hereby dismissed without prejudice and with leave to re-file within one year.

Plaintiff is granted 30 days until 1-3-18 to amend her response with an affidavit laying foundation for the autopsy report attached to Plaintiff's Response. Enforcement of this order is stayed until 1-3-18 and this order is neither final nor appealable until 1-3-18. This Court finds that there is no just reason to delay appeal, pending stay until 1-3-18, and this order is final and appealable as of 1-3-18.

Scott, Halsted & Babetch, P.C.
216 N. Jefferson St., Suite 100
Chicago, IL 60661
312-463-1045
Atty. No. 37245
Attorney for Patsy A. Hradisky

_____, 2017

Enter:

Judge Judge's No.

Associate Judge
Daniel T. Gillespie
DEC 05 2017

Circuit Court – 1507

C 746

123201 AAP #03013

APPEAL TO THE SUPREME COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY
THE HONORABLE DANIEL T. GILLESPIE

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)

Reviewing Court No.

Circuit Court No. 2013 L 010098

FILED
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
2018 JAN 19 AM 11:00
CIVIL APPEALS DIVISION
DOROTHY BROWN
CLERK

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiff-Appellant, NOAH WINGERT, a minor, by his mother and next friend, CASSANDRA LEE WINGERT, hereby appeals from the Orders entered on *December 5, 2017, May 4, 2016, and September 15, 2015* copies of which is attached as Group Exhibit 1 and incorporated by reference as if fully set forth herein.

Plaintiff-Appellant requests that the orders of *December 5, 2017, May 4, 2016, and September 15, 2015* , be reversed and this matter reinstated for trial on the merits. This appeal is filed pursuant to Supreme Court Rule 302.

Appellant's Name: Noah Wingert, a minor, by his mother and next friend, CASSANDRA LEE WINGERT
Appellant's Attorney: Nicholas Nepustil of Benjamin & Shapiro Ltd., 180 N. LaSalle St. #2600, Chicago, IL 60601, (312) 641- 5944, Cook County Attorney # 03013

Appellee's Name: Patsy Hradisky, as Special Administrator of the Estate of Kevin Jatczak, Deceased
Appellant's Attorney: Kyle McConnel, Meagher & Geer P.L.L.P, 216 N. Jefferson St. #100,, Chicago, IL 60661, (312) 801-5030

ORAL ARGUMENT REQUESTED

Nicholas Nepustil
Benjamin & Shapiro, Ltd.
180 N. Lasalle Street, Suite 2600
Chicago, Illinois 60601
(312) 641-5944

123201

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-LAW DIVISION

Rev. 5/14

Wingert
Plaintiffs

-v-

Estate of Sotczak
Defendants

NO: 13 L 10098

Motion Call: "B" Time: 1100 Line #: 4

2005 Trial Date: _____

CASE MANAGEMENT ORDER

(Please check off all pertinent paragraphs and circle proper party name)

(8230) ____ 1. Category #1 (18-mo. discovery) (8232) ____ 1A. Category #2 (28 Mo. Discovery)

(4231) ____ 2. Written, 213(f)(1), (f)(2) and 214 discovery to be **issued** by _____ *or deemed waived;*

(4296) ____ 3. Written, 213(f)(1), (f)(2) and 214 discovery to be **answered** by _____;

(4218) ____ 4. Party depositions, fact, 213(f)(1) and/or (2) depositions to be **completed** by _____;

(4288) ____ 5. Subpoenas for treating physicians' deps to be **issued** by _____ *or deemed waived;*

(4218) ____ 6. Treating physicians depositions to be **completed** by _____;

(4206) ____ 7. (Plaintiff) - (Defendant) - (Add. Party) shall **answer** 213 (f)(3) Interrogatories by _____;

(4218) ____ 8. **Plaintiff's 213(f)(3)** witnesses' depositions to be **completed** by _____;

(4218) ____ 9. **Defendant's 213(f)(3)** witnesses' depositions to be **completed** by _____;

(4218) ____ 10. **Add. party's 213(f)(3)** witnesses' depositions to be **completed** by _____;

(4295) ____ 11. **All fact discovery, SCR 213(f)(1) and/or SCR 213(f)(2) discovery is closed.** *(Circle all applicable)*

(4619) ____ 12. The matter is continued for subsequent Case Management Conference on 10-22-15 at 9:15 (AM/PM in Room 2202 for:

(A) ✓ Proper Service (B) ____ Appearance of Defendants (C) ____ Case Value
(D) ✓ Pleadings Status (E) ____ Discovery Status (F) ____ Pre-Trial/Settlement
(G) ____ Mediation Status (H) ____ Trial Certification (I) ____ Other

Patsy Trudnicky as Administrator of Kevin Sotczak's Estate, motion to dismiss Count II of the third amended complaint is granted. If granted, 28 days to amend complaint against Estate of Sotczak

(4005) ____ 13. Case is DWP'd. (4040) ____ The case is voluntarily dismissed pursuant to 735 ILCS 5/2-1009.

(4331) ____ 14. Case stricken from CMC Call (4284) ____ Motion Stricken or Withdrawn from Call (4330) ____ Case stricken from Motion Call.

NAME: SHB P.C. - Jeffrey S. #100
ADDRESS: 440 N Jefferson St. #100
PHONE: 312-496-1145
ATTY ID#: 31645
ATTY FOR PARTY: D

ENTER:

JUDGE _____ NO.

Associate Judge
Daniel T. Gillespie
SEP 15 2015
Circuit Court – 1507

NOTICE:

★ COPIES OF ALL PRIOR CMC ORDERS MUST BE BROUGHT TO ALL CMC COURT DATES.

★ FAILURE OF ANY PARTY TO COMPLY WITH THIS CMC ORDER WILL BE A BASIS FOR SCR 219(C) SANCTIONS. FAILURE OF ANY PARTY TO ENFORCE THIS CMC ORDER WILL CONSTITUTE A WAIVER OF SUCH DISCOVERY BY THAT PARTY.

C 748

SUBMITTED - 763763 - Nicholas Nepustil - 3/25/2018 2:18 PM

123201

Order (2/24/05) CCG

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

L Wingert

v.

No. 13 L 10098

Hradisky, et al

ORDER

This cause coming to be heard on Defendant's 2-615 Motion to Dismiss Plaintiff's Fourth Amended Complaint, parties appearing by counsel, & the Court fully advised, it is ordered:

Defendant Hradisky's Motion to Dismiss is granted in part, and denied in part:

740 ILCS 57/25(b)(2) is found to be unconstitutional as violative of due process and is hereby severed from 740 ILCS 57, et seq.

740 ILCS 57/25(b)(1) is found to be constitutional.

Atty. No.: 37245

Name: Kyle McConnell / Scott, Halsted & Babetch, P.C.

Atty. for: Hradisky

Address: 216 N Jefferson St #100

City/State/Zip: Chicago, IL 60606

Telephone: 312-463-1045

ENTERED:

Associate Judge
Daniel T. Gillespie

Dated: MAY - 4 2016

Circuit Court - 1507

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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C 749

123201

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

NOAH WINGERT, a minor, by his mother and next friend, CASSANDRA LEE WINGERT,	)	
Plaintiff,	)	
	)	13 L 010098
v.	)	
	)	
PATSY A. HRADISKY, as Special Administrator of the Estate of Kevin Jatczak, Deceased, JULIE HOLDA, And SIMONE HOLDA,	)	
	)	
Defendants.	)	

ORDER

This matter coming to be heard on motion by Patsy A. Hradisky, as Special Administrator of the Estate of Kevin Jatczak, Deceased, for Summary Judgment as to Count I of Plaintiff's Fifth Amended Complaint at Law, the court fully advised and parties appearing by counsel, it is ordered:

The Court, having found no genuine issue of material fact as to whether Defendant, Patsy A. Hradisky, as Special Administrator of the Estate of Kevin Jatczak, proximately caused the overdose of plaintiff's decedent, Michael William Neuman, for which damages are sought, hereby enters summary judgment in favor of Patsy A. Hradisky on Count I of Plaintiff's Fifth Amended Complaint at Law.

Defendants, Julie Holda and Simone Holda, are hereby dismissed without prejudice and with leave to re-file within one year.

Plaintiff is granted 30 days until 1-3-18 to amend her response with an affidavit laying foundation for the autopsy report attached to Plaintiff's Response. Enforcement of this order is stayed until 1-3-18 and this order is neither final nor appealable until 1-3-18. This Court finds that there is no just reason to delay appeal, pending stay until 1-3-18, and this order is final and appealable as of 1-3-18.

Scott, Halsted & Babetch, P.C.
216 N. Jefferson St., Suite 100
Chicago, IL 60661
312-463-1045
Atty. No. 37245
Attorney for Patsy A. Hradisky

Associate Judge
Daniel T. Gillespie 2017
Enter: DEC 05 2017
Circuit Court - 1507
Judge Judge's No.

APPEAL TO THE SUPREME COURT OF ILLINOIS
CASE NO. 123201

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

NOTICE OF FILING

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

On the ***27th*** day of ***April***, ***2018,*** we filed, by electronic means, with the Clerk of the Illinois Supreme Court the Brief of the Plaintiff-Appellant and accompanying Appendix which are attached and herewith served upon you.

BENJAMIN & SHAPIRO, LTD.
180 North LaSalle Street
(312) 641-5944

Attorneys for Plaintiff
Chicago, Illinois 60601
Attorney Code No. 03013

AFFIDAVIT OF ELECTRONIC MAILING

UNDER PENALTIES as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, and certifies that he caused this Notice and attachment(s) to be served by e-mailing a copy to kmcconnell@meagher.com in an e-mail originating from nnepustil@benshaplaw.com on April 27, 2018.

Nicholas Nepustil