No. 123853

In The
Supreme Court of Illinois

MARY TERRY CARMICHAEL,
Plaintiff-Appellant,

v.

PROFESSIONAL TRANSPORTATION, INC., a foreign Corporation, d/b/a PTI
Defendant-Appellee,

And

ACE AMERICAN INSURANCE CO., a foreign corporation, and
UNION PACIFIC RAILROAD COMPANY, a foreign corporation,
Defendants.

PROFESSIONAL TRANSPORTATION, INC., a foreign corp., d/b/a PTI
Counter-Plaintiff-Appellee,

v.

MARY TERRY CARMICHAEL,
Counter-Defendant-Appellant,

and

JESSE WHITE, ILLINOIS SECRETARY OF STATE
Intervenor-Appellant.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-17-0075. There Heard on Appeal from the
Circuit Court of Cook County, Illinois
County Department, Chancery Division, No. 12 CH 38582
The Honorable Judge **Sophia H. Hall** Presiding.

CROSS-RELIEF REPLY BRIEF OF THE DEFENDANT/COUNTER-PLAINTIFF-APPELLEE, PROFESSIONAL TRANSPORTATION, INC.

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REPLY BRIEF IN SUPPORT OF PTI'S REQUEST FOR CROSS-RELIEF

ARGUMENT

Introduction

Although they disagree on whether plaintiff has a private right of action under 5/8-101(c), plaintiff and the Secretary join forces on the constitutional issues – the plaintiff in an attempt to save her legislative windfall and the Secretary in an attempt to help the legislature save face. However, neither feels constrained by established principles of constitutional law which demand that the discriminatory and arbitrary legislation contained in 5/8-101(c) be struck down.

I. The Secretary's Jurisdiction And Standing Arguments Are Frivolous.

A. This is an Appeal from a Final Order Pursuant to Supreme Court Rules 301 and 303.

The Secretary's jurisdictional arguments (Sec'y Br. 14-18), frivolous as they are, require a brief summary of the relevant pleadings and dispositions below:

- Plaintiff filed her declaratory judgment action against PTI and other defendants on October 1, 2012. (C3-56 V1) (A. 18-28). Plaintiff sought a declaration that 625 ILCS 5/8-101(c) gave her a private right of action against PTI for PTI's alleged violation of the UM/UIM insurance coverage requirements imposed on certain contract carriers by the statute. She asserted a statutory right to recover from PTI up to $250,000 in excess of the $20,000 policy limits she recovered from the negligent driver (Dwayne Bell) responsible for plaintiff's injuries while she was riding in a PTI 6-passenger

van. Plaintiff acknowledged that the PTI driver was not at fault for the accident. (C4-6 V1) (A. 19-21).

- PTI's answer to the declaratory judgment complaint denied liability to plaintiff and asserted various affirmative defenses including that 5/8-101(c) did not afford plaintiff a private right of action for its alleged violation by PTI (C827-28 V4) (A. 50-51). PTI further argued that if such private of action were permissible, then the statute was unconstitutional on various grounds. (C826-27 V4) (A. 49-50).
- In order to obtain a binding resolution of the constitutional issues, PTI also filed a counterclaim against plaintiff and the Secretary of State asserting all of PTI's constitutional challenges to the statute. (C830-35 V4) (A. 53-58).
- The Secretary, joined by plaintiff, moved to dismiss PTI's counterclaim (C234-35 V1), and on January 30, 2015, the circuit court granted the Secretary's motion rejecting all of PTI's constitutional arguments. (C801-08 V4) (A. 2-8). The order contained no Rule 304(a) finding. *Id.*
- Thereafter, the circuit court denied PTI's motion to dismiss plaintiff's complaint wherein PTI urged that a private right of action should not be judicially implied for a violation of 5/8-101(c). (C1032-39, 1125 V5) (A. 17).
- The matter was then transferred to the Law Division for a trial to determine plaintiff's damages arising from the accident. (C1160-61 V5). However, on

the scheduled trial date, plaintiff dismissed the entire action without prejudice pursuant to 735 ILCS 5/2-1009 (C 1176 V5) (A. 139).[1]

- Plaintiff subsequently refiled her action in Case No. 2017-CH-01221, but those proceedings have been stayed pending the outcome of this appeal. (A. 154-61).
- Within 30 days of the December 13, 2016 order dismissing the entire action, PTI filed its notice of appeal from the January 30, 2015 order dismissing its counterclaim, urging the unconstitutionality of 5/8-101(c). (C1177 V5) (A. 140).
- On appeal, PTI urged the unconstitutionality of 5/8-101(c), but also argued that if 5/8-101(c) did not afford plaintiff a private right of action, the Appellate Court would not need to reach the constitutional issues. (A. 220).
- On June 26, 2018, the Appellate Court held that 5/8-101(c) "does not give rise to a private right of action," and it therefore affirmed the dismissal of PTI's counterclaim on mootness grounds without reaching the constitutional issues. (A. 224-25).
- This Court granted plaintiff's Petition for Leave to Appeal on September 26, 2018.

[1] Prior to that dismissal order, plaintiff's claims against other defendants (ACE and UP) had been resolved or dismissed. (C1026, 1189-94 V5).

B. The January 30, 2015 Order Dismissing PTI's Counterclaim Became Final and Appealable When the Entire Case was Dismissed on December 13, 2016.

The January 30, 2015 dismissal of PTI's counterclaim was an involuntary dismissal and a final order on the merits. Supreme Court Rule 273 provides that "an involuntary dismissal of an action other than a dismissal for lack of jurisdiction, for improper venue or failure to join an indispensable party, operates as an adjudication upon the merits." As stated in a case cited by the Secretary, a counterclaim is a "distinct action." *Benford v. Everett Commons, LLC*, 2014 IL App (1st) 131231, ¶ 19 (Sec'y Br. 26). Furthermore, it is well-established law that once a voluntary dismissal of an action is entered terminating that action in its entirety, all previous non-appealable final orders "become immediately appealable." The Secretary himself cites *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503 (1997) (Sec'y Br. 17), holding: "[I]t is well settled that final orders entered in a case become appealable following a voluntary dismissal." Accord *Hudson v. City of Chicago*, 228 Ill. 2d 462, 468 (2008); *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 39.

The cases cited by the Secretary, *North Community Bank v. 17011 S. Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 26, *Eychaner v. Gross*, 321 Ill. App. 3d 759, 783 (1st Dist. 2001), *rev'd on other grounds*, 202 Ill. 2d 228 (2002); *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990) (Sec'y Br. 17-18), do not involve, much less question, the established principle that final orders, entered without Rule 304 language, become final and appealable when the

entire action is voluntarily dismissed. Each of the cases cited by the Secretary involved attempts to appeal dismissal orders that lacked Rule 304(a) language while other claims in the case remained pending. In that circumstance, a Rule 304(a) finding is necessary to take an appeal. But as held in *Dubina*, *Hudson*, *Richter*, etc., such final orders, initially entered without Rule 304(a) language, become final and appealable when the entire action is dismissed. That is precisely this case, and we do not comprehend the basis for the Secretary's contrary assertions.

C. PTI Is Not Attempting to Appeal from a Denial of Its Motion to Dismiss.

The Secretary further argues that the order denying PTI's motion to dismiss plaintiff's complaint on the ground that 5/8-101(c) did not give rise to a private right of action was not an appealable order. (Sec'y Br. 17-20). PTI does not contend otherwise. In fact, once plaintiff voluntarily dismissed the entire action, the order was no longer in effect at all. However, that did not preclude PTI from raising, or the Appellate Court from considering the issue, thereby avoiding the need to address PTI's constitutional challenges to 5/8-101(c).

It is another fundamental principle of appellate review that a reviewing court will ordinarily avoid a constitutional question if the case can be decided "on other grounds." *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 396 (1994). Indeed, this Court and the Appellate Court have routinely considered other grounds to avoid constitutional questions, even though those grounds had not been raised below, *Marconi v. City of Joliet*, 2013 IL App (3d) 110865, ¶ 16, citing

People v. Jackson, 2013 IL 113986, ¶ 14, or even where the alternative ground had arguably been waived. *Flynn v. Ryan*, 199 Ill. 2d 430, 438 n.1 (2002). See also Supreme Court Rule 366(a)(5). Thus, the private-right-of-action issue would have been appropriately considered by the Appellate Court even if it had never been raised below, and the fact that it was raised and addressed in a non-final order that was no longer in effect did not limit the Appellate Court's or this Court's consideration of the issue.

D. PTI Has Standing.

The Secretary acknowledges that he admitted below that there is a sufficient "case or controversy" to give PTI standing to pursue its unconstitutionality claims and that the issues are "ripe for review." (Sec'y Br. 26) (R. C372).

There is no basis for his change of position now. Regardless of whether limitations has run on a potential criminal charge (Sec'y Br. 26) (Pl. Rply 5-6), the statute threatens PTI's operating privileges – its very reason for being – and requires specified contract carriers to expend significant sums to procure UM/UIM insurance coverage far beyond the uniform minimum coverage required of all other Illinois vehicle operators (commercial and private). See *Mckenzie v. Johnson*, 98 Ill. 2d 87, 93 (1983) (taxpayer had standing to challenge constitutionality of statute affecting his tax liability). Moreover, the statute is the sole basis for plaintiff's lawsuit seeking to recover up to $250,000 from PTI. If 5/8-101(c) does give plaintiff an implied private right of action against PTI to recover up to $250,000, that monetary claim itself is more than sufficient to create an actual "case or controversy," *i.e.*, "a

legitimate dispute admitting of an immediate and definite determination of the parties' rights, the resolution of which would help terminate all or part of the dispute." *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 173 (1995) (citation). Accord, *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 383 (1997) upholding a declaratory judgment finding that a state statute was unconstitutional, noting that even "the ripening seeds of litigation" between the parties is sufficient to establish an actual case or controversy, citing *Miles Kimball Co. v. Anderson*, 128 Ill. App. 3d 805, 807 (1st Dist. 1984). Here, there are not mere "seeds," but actual litigation by which plaintiff seeks to recover up to $250,000 from PTI under a statute which PTI claims is unconstitutional. Thus, as the Secretary previously conceded, there is a present a case or controversy that is ripe for decision.

II. 625 ILCS 5/8-101(c) Is Unconstitutional.

A. This Court Should Review the Constitutional Issues.

The Secretary correctly urges that this Court can avoid addressing the constitutional infirmities of 5/8-101(c) if it finds, as the Appellate Court did, that the statute does not give rise to a private right of action for its alleged violation. (Sec'y Br. 22-23). However, PTI urges this Court to conclude that this is a case like others, *e.g.*, *Central City Educ. Ass'n, IEA/NEA v. Illinois Educational Labor Relations Bd.*, 149 Ill. 2d 496, 524-25 (1992), where this Court addressed constitutional issues even though it was not required to do so. PTI still must incur the substantial costs of the extraordinary UM/UIM coverage required by 5/8-101(c) (now doubled from $250,000 to $500,000) or face the continuing risk of criminal

fines, imprisonment, and loss of its operating privileges. See *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 383-84 (1997) where this Court held that it would review the constitutionality of a statute that will affect a party's future course of action. All the interested parties are before the Court and all have filed extensive briefs on the constitutional issues.

B. The Meaning of "A Vehicle Designed to Carry 15 or Fewer Passengers" Is Unconstitutionally Vague.

The vagueness and ambiguity inherent in 5/8-101(c)'s singular reference to "a vehicle designed to carry 15 or fewer passengers" (PTI Br. 31-34, 36-38) (emphasis added) is once again confirmed by plaintiff's own Brief (p. 8) which like her Appellate Court Brief (p. 12) and her circuit court brief (C515 V3) states that:

> "The class of individuals that are identified in this statute presently before the court are employees being transported by the employer in a vehicle *that has the capacity of up to 15 passengers*." (Emphasis added) (Pl. Br. 8).

Thus, by plaintiff's own reading of the statute, the vehicles covered are only those that have a capacity of up to 15 passengers, but may at any given time be carrying "fewer" than 15. PTI's 6-passenger van in which plaintiff was riding at the time of the accident did not ever have "the capacity for up to 15 passengers." Thus, the statute's fundamental ambiguity and vagueness does not give "persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct," *City of Chicago v. Morales*, 177 Ill. 2d 440, 449 (1997)) (citation). Instead, it encourages "arbitrary and discriminatory enforcement." *Id.*

The Secretary has backed off his arguments below trumpeting the particular dangers of 15-passenger vans (C 236-41 V1) because those arguments indicated that he too read the statute to be limited to vehicles that had the capacity to carry 15 passengers. However, his current make-shift arguments, referencing statutes defining multi-family residences; the number of employees required to qualify for a business loan; and the time for gubernatorial appointments by the Senate (Sec'y Br. 30), do not avoid this statute's fundamental ambiguity: Does the vehicle described in 5/8-101(c) reference a vehicle that is designed to carry 15 passengers but may carry "fewer," or does it mean any and all vehicles designed to carry as few as one passenger.

Plaintiff's footnote citation to statutes from other states (Pl. Rply 9) does not elucidate the issue. Plaintiff claims that these cited statutes are relevant because they purportedly mirror the language of 5/8-101(c). But many do not. Indeed, the referenced vehicle codes of California, Minnesota, Virginia and Oregon serve only to provide examples of the type of clarity in drafting that is badly lacking in 5/8-101(c). Furthermore, plaintiff does not advise how, or if, any of the cited statutes have been interpreted and measured against constitutional guarantees or the rule of lenity.

Both plaintiff and the Secretary point to PTI's unverified Answer early in the litigation (Pl. Rply 11) (Sec'y Br. 35-36) although that Answer was subsequently amended. (C 820, 823-24 V4) (C 129 V1). Moreover, that same Answer denied any violation of section 5/8-101(c) (C 129 V1), and also raised PTI's affirmative

defenses and included PTI's counterclaim, both alleging that the statutory phrase "designed to carry 15 or fewer passengers" is unconstitutionally vague and ambiguous. (C 132, C 137 V1). The fundamental point is that even if the statutory language could be interpreted as the circuit court did, it is equally reasonable to read the statute as applying only to a vehicle that has "the capacity of up to 15 passengers" – thereby excluding PTI's 6-passenger vans.

The Secretary urges that just because a statute is capable of two reasonable competing interpretations does not mean it is ambiguous or vague, citing *People v. Velez*, 2012 IL App (1st) 101325, ¶ 44 and *In re B.L.S.*, 202 Ill. 2d 510, 515 (2002) (Sec'y Br. 31-32). Neither case holds that, and *B.L.S.* holds squarely to the contrary: "A statute is ambiguous if it is capable of more than one reasonable interpretation." *Id.* at 515 (citation). See *People v. Jihan*, 127 Ill. 2d 379 (1989) (PTI Br. 37-38). Nor is there any merit in the Secretary's reliance on *People v. Powell*, 343 Ill. App. 3d 699, 703-04 (4th Dist. 2003) for the proposition that a party cannot complain of a statute's ambiguity if there is no dispute that the party is in violation of the statute under either interpretation. (Sec'y Br. 35). That is not this case. If the statute's UM/UIM insurance requirements apply only to a vehicle that has the capacity of up to 15 passengers, PTI's 6-passenger vans were never in violation of the statute.

C. Section 5/8-101(c) Violates the Special Legislation Prohibition in the Illinois Constitution.

In *Piccioli v. Board of Trustees of the Teachers' Retirement System*, 2019 IL 122905, ¶ 18, this Court reiterated the two-part test to determine whether a statute constitutes special legislation:

> "First, we must decide whether the statutory classification at issue discriminates in favor of a select group and against a similarly situated group. Second, if the classification does so discriminate, we must determine whether the classification is arbitrary." (citation).

In its Appellee's Brief, pp. 38-54, PTI amply demonstrated that the additional UM/UIM coverage obligation imposed on the limited group of contract carriers set forth in 5/8-101(c) is both *discriminatory* and *arbitrary*. Both plaintiff and the Secretary argue to the contrary, but none of their arguments can withstand scrutiny.

1. The Statute Is Discriminatory.

Although plaintiff and the Secretary differ on whether plaintiff should be granted a judicially implied cause of action under 5/8-101(c) (Pl. Rply 5,8,20) (Sec'y Br. 2, 5-6, 8, 22-23), they both argue that the statute is constitutional. Indeed, plaintiff argues that the trial court did not even find that the statute was discriminatory. (Pl. Rply 1). While the circuit court did not expressly state that the statute was "discriminatory," she acknowledged its discriminatory nature in attempting to seek out a rational explanation for the favoritism it showed certain passengers and the heavy burden it cast on a very narrow group of commercial vehicle operators for hire that are subject to the additional UM/UIM limits required by 5/8-101(c). (C 806 V4) (A. 61). In any event, this Court reviews the issue *de*

novo. Moline School Dist. No. 40 Bd. Of Educ. v. Quinn, 2016 IL 119704, ¶ 15; *Board of Educ. of Peoria Sch. Dist. No. 150* v. *Peoria Fed. Of Support Staff*, 2013 IL 114853, ¶ *60.*

Furthermore, plaintiff implicitly concedes the discriminatory nature of 5/8-101(c) by urging that a non-discriminatory general law would not have achieved the legislature's purpose. (Pl. Rply 19). Only particular contract carriers are required to provide the extraordinary UM/UIM benefits bestowed by the statute. Likewise, only particular contract carrier passengers benefit from the mandated UM/UIM coverage. No other passengers, commercial passengers or otherwise, are offered such unique protection from the universal threat that they may be injured in an accident caused by a driver with only the minimum required liability insurance limits.

Nonetheless, the Secretary attempts to defend the statute's discriminatory treatment of certain contract carriers and its preferred treatment of certain contract carrier passengers by obscuring the relationships between the original parties to this litigation or by portraying contract carriers as dangerous entrepreneurs sorely in need of additional regulation. Thus, from the very beginning of his brief through to its conclusion, the Secretary conflates 5/8-101(c)'s UM/UIM mandate with "additional liability insurance." (Sec'y Br. 1). In so doing, the Secretary hopes to add a new embellishment to the hypothetical legislative purpose for 5/8-101(c) stated by the trial court.

According to the Secretary, it is fair to say that the legislation was not only born of a concern that railroad employees had "no voice" or "choice" in their employer's selection of contract carriers (Sec'y Br. 43, 46), but also born of a concern that the contract carriers' employee's drivers were untrained, unlicensed, unsafe, unprofessional drivers, who were eager to compromise passenger safety in order to maximize profits. (Sec'y Br. 44, 51-53).

However, none of these canards are supported by the statute's legislative history, or the record before the trial court. Moreover, these offensive allegations are neither relevant nor rational when one considers the statute at issue. Section 5/8-101(c) criminalizes a failure to obtain extraordinary levels of UM/UIM insurance to protect against the negligence of other motorists, not liability insurance to protect against the negligence of contract carriers' own drivers. Plaintiff conceded below that PTI was wholly blameless for her accident. (C 205, 217 V1). Likewise, the trial court properly concluded based on federal safety studies submitted by the Secretary that safety considerations could not have motivated the legislature to target the operators of six passenger vehicles. (C 807 V4) (A. 7).

Undaunted, however, the Secretary labors to obscure PTI's identity. Although PTI is an independent contractor dealing at arms-length with UP and other railroads (C 630 V1), the Secretary persistently but erroneously presents PTI as the *alter ego* of plaintiff's employer UP. For example, the Secretary asserts that "for much of the litigation Union Pacific and PTI acted jointly" (Sec'y Br. 5, n. 2). Presumably this misrepresentation was intended to further the notion that PTI was

something of a pseudo-employer and so fairly mulcted by 5/8-101(c). After all, according to the Secretary, PTI can try to pass the cost of increased UM/UIM premiums on to UP. (Sec'y Br. 37).

An intent to conflate liability coverage with UM/UIM coverage, and to obscure the parties relationships, would also explain why the Secretary thought it appropriate (Sec'y Br. 54) to cite to *Weksler v. Collins,* 317 Ill.132, 139-40 (1925). *Weksler* upheld the constitutionality of a predecessor statute mandating elevated liability insurance for all commercial vehicle operators carrying passengers for hire, as did 5/8-101 before the legislature passed the arbitrary 5/8-101(c). *Weksler* did not address UM/UIM coverage. The Secretary's citation to a Wisconsin case, *Millers Nat'l Ins. Co. v. City of Milwaukee*, 503 N.W.2d 284, 290-91 (Wis. Ct. App. 1993) is also off the mark. *Millers* upheld the constitutionality of a statute which required a government employer to provide the statutory minimal level of UM/UIM insurance for its own employees when operating government vehicles. (Sec'y Br. 54).

The Secretary also inaccurately describes the trial court's reaction to the Secretary's efforts below characterizing PTI's drivers and their 6-passenger vehicles as unsafe. (Sec'y Br. 10-11). In fact, the trial court concluded: "The State has offered no basis relating to safety concerns with 6-passenger vans." (C 807 V4) (A. 7). Nevertheless, the Secretary's brief unsuccessfully attempts to justify 5/8-101(c)'s discrimination against contract carriers by suggesting that they are unique

pseudo-employers, who harbor a dangerous disregard for their passenger's safety. (Sec'y Br. 53).

Furthermore, there is a second form of discrimination explicit in 5/8-101(c). Indeed, the Secretary concedes that precedent establishes that a law violates the constitution if it grants "an exclusive privilege that is denied to others who are similarly situated." (Sec'y Br. 41). How then to deal with all of those passengers, commercial or otherwise, who remain exposed to injury from motorists who only carry minimal levels of liability insurance and who might strike the vehicle in which they are traveling? Simple. According to the Secretary, they may all be disregarded because the employees who benefit from 5/8-101(c) are without peer. (Sec'y Br. 43, 50). The beneficiaries of the statute are unique and in need of "special" legislation because all of the other passengers have "a voice" in their transport, or their drivers have special operating licenses. *Id.*

But, here again, the Secretary conflates. Whether others have "a voice" in choosing their transport is not a rational reason for solely burdening contract carriers with the obligation to purchase extraordinary amounts of UM/UIM insurance. (PTI's Br. 52-53). Particularly, not when there is no practical opportunity for "the voiced" to determine whether their carrier's UM/UIM insurance is in excess of the statutory minimum. But, the Secretary persists. If other travelers don't like the looks of the driver or vehicles tendered to them, they can choose another. (Sec'y Br. 43-44). However, that again ignores that 5/8-101(c) is focused on UM/UIM insurance, not liability insurance. "A voice" in choosing another driver or vehicle

does not offer protection against the negligent, underinsured motorist who may strike the alternative vehicle you choose.

Indeed, after much digression, the Secretary concedes the point. He admits that the occupants of ambulances and school children do not have the option of rejecting the vehicles and drivers tendered to them. (Sec'y Br. 44). He also admits that would be passengers of every stripe do not have any practical opportunity to ascertain the nature and extent of the UM/UIM insurance that might be carried by their prospective commercial carrier. (Sec'y Br. 46).

But, of course, the Secretary has a fallback position. He still maintains that other Illinois passengers are not comparable to railroad employees because the drivers of other commercial vehicles all have special licenses, and because railroad employees travel on duty much more frequently than do other commercial passengers: two times a day, 40 times a month. (Sec'y Br. 46).

But, here again, the Secretary's imagination gets the better of him. There is nothing in the record which establishes that railroad employees generally, or plaintiff in particular, travel by contract carrier twice a day or 40 times a month. The Secretary cites to PTI's brief, p. 44, in support of that allegation. But there is nothing in the record which supports that allegation, not on p. 44 or otherwise.

Furthermore, the Secretary overlooks the frequency with which most school children travel during the school year. In assessing the travel needs of school children, two times a day during the school year would not be an unfounded assumption based upon common knowledge. Furthermore, the Secretary's

unsupported allegation (however conflated) is limited to commercial travelers, but many of those travelers travel twice or more a day in taxis, limos and other commercial vehicles not subject to the UM/UIM requirements in 5/8-101(c). Thus, the Secretary's "justification" for 5/8-101(c) omits all the other passengers in Illinois who do not benefit from saddling certain contract carriers with the exclusive obligation to purchase extraordinary amounts of UM/UIM insurance as a response to the alleged deficiencies in this State's liability insurance minimums.

The Secretary says he cannot imagine what passengers would be riding in a non-contract carrier vehicle that transports and charges employees in the course of their employment on a per-ride basis. (Sec'y Br. 45). To use the Secretary's own dubious law firm analogy (Sec'y Br. 51-52), it would include every lawyer who takes a cab to and from court and every salesman who takes a cab or limo to and from a client meeting or the airport. Yet, the UM/UIM insurance required for these commercial vehicles used by employees in the course of their employment remains at $20,000. The same is true for every contract carrier's vehicle carrying passengers for reasons other than their employment.

Nor does it matter that all within the narrow groups of contract carriers and passengers specified in 5/8-101(c) are treated the same. Equal treatment of arbitrary groups is not the test for reasonableness. The statute struck down as special legislation in *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12, 32-33 (2003) (PTI Br. 46-47), placed all new and used car dealers on "equal footing," *i.e.*, they were all able to benefit from the heightened statutory requirements for bringing a

consumer fraud action against them. Nevertheless, this Court struck down the statute because, as here, other similarly situated entities did not receive the same benefit. *Id.*

Both plaintiff (Pl. Br. 19) and the Secretary (Sec'y Br. 47) point to statutes upheld even though it was clear they applied only to a single entity. *E.g.*, *Chicago Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357 (1985); *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221 (2005). *Elementary School Dist. 159 v. Schiller*, 221 Ill. 2d 130, 154 (2006); *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315, 333 (2005). But in those cases, unlike the case at bar, there were no similarly situated entities to which the statute could apply. The Secretary also cites cases holding that the legislature may address a perceived evil "one step at a time" (Sec'y Br. 47). But the only further "steps" that have been taken here were to double the UM/UIM limits imposed by 5/8-101(c) from $250,000 to $500,000 per passenger; to add an express reference to "railroad employees" in the statute itself (PTI Br. 8-9, 19, 39-40); and to expressly obligate "rail carriers" to verify the existence of this added UM/UIM coverage. (PTI Br. 48).

Nonetheless, the Secretary asserts that at some future time there may be a legislative effort to impose additional UM/UIM limits on motorists other than contract carriers and that will serve to validate what might otherwise appear to be discriminatory legislation. (Sec'y Br. 47). In the context of 5/8-101(c) that is clearly an idle promise. The ultimate "evil" purportedly addressed by 5/8-101(c) are Illinois motorists with minimal liability policies. The only action that the legislature

has taken to address that "evil" is to raise the required minimum from $20,000 to $25,000. P.A. 98-519, § 5.

Meantime, the legislature has been fixated with 5/8-101(c), tinkering with it from time to time to increase the UM/UIM burden and to otherwise make it more draconian in response to union demands. (PTI Br. 10-13, 47-49). That continuing dichotomy supports the obvious conclusion that 5/8-101(c) is not a "remedial scheme" at all, but is exactly what it otherwise appears to be – an arbitrary legislative boon for the sole benefit of a select group of commercial vehicle passengers.

In sum, 5/8-101(c) openly discriminates. Only a very limited group of contract carriers are required to provide the extraordinary UM/UIM benefits bestowed by the statute. Only a very limited group of commercial passengers benefit from the mandated UM/UIM coverage. To the extent that the statute is based on the legislature's belief that motorists with no or minimal liability insurance are a threat to the safety and welfare of their fellow citizens, then the legislature should address that evil by passing a general law increasing the statutory minimum liability limits and/or UM/UIM limits, across the board, for all motor vehicle operators, or at the very least for all commercial operators who transport passengers for hire and are governed by the otherwise uniform financial responsibility requirements set forth in Chapter 8 of the Vehicle Code.

2. The Statute Is Arbitrary.

A statute is arbitrary if it is not "rationally related to a legitimate state interest." *Moline*, 2016 IL 119704, ¶ 24.

According to both the plaintiff, the Secretary and the trial court, the legislative purpose in enacting the statute was abundantly clear. The legislature was concerned that employees traveling about their master's business in particular types of commercial motor vehicles were exposed to injury by other motorists for which they might not recover full compensation because the minimum level of liability insurance mandated by the same legislature was too low. (Pl. Rply 15) (C. 806 V4), (A. 6). However, assuming that the Illinois legislature had properly identified a problem – universally low liability insurance levels – that "[did] not permit arbitrary or unrelated means of meeting it to be adopted." *Heimgaertner v. Benjamin Elect. Mfg., Co.*, 6 Ill. 2d 152, 159 (1955).

As succinctly stated by this Court in *Heimgaertner*: "Although it is for the legislature to determine when to act in the public interest, it is for the courts to ascertain if the exercise is a proper one." *Id.* Plaintiff, however, wants no part of any discussion balancing her newly granted legislative boon against broader constitutional guaranties. Instead, her brief speaks only in terms of her absolute right to exploit 5/8-101(c) to the fullest. (Pl. Rply 2, 8).

It is undeniable that the legislature acted here to further the interests of labor, just as plaintiff and the Secretary repeatedly assert. (Pl. Rply 15, 20; Sec'y Br. 52-53). Certainly, when properly motivated and reasonably implemented, that can be

a proper exercise of the legislature's police power. Our Workmen's Compensation Act is a notable example, as is legislation dealing with maximum working hours, minimum wages and unemployment compensation. *Heimgaertner,* 6 Ill. 2d at 160; *Grasse v. Dealer's Transport Co.*, 412 Ill. 179 (1952). The validity of such legislation has been sustained "as a regulation of the master-servant relationship". *Heimgaertner*, 6 Ill. 2d at 161. However, this case does not involve a regulation of the master-servant relationship. Instead, as set forth in PTI's initial brief (pp. 46-48), it involves a legislative end-run-around the master-servant relationship – all so that plaintiff can obtain benefits from her employer surrogate (PTI) without having to go through the collective bargaining process.

"[T]he police power cannot override the natural demands of justice, nor disregard the constitutional guarantees in respect to the taking of private property, due process and equal protection of the laws." *Id.* at 159. This Court has held that "[t]he special legislation clause prohibits the General Assembly from conferring a special benefit or privilege upon one person or group and excluding others that are similarly situated." *Crusius*, 216 Ill. 2d at 325 (citation). Here, not only is PTI uniquely burdened, other similarly situated commercial passengers are ignored by the legislature's arbitrary action.

Equally fallacious is plaintiff's argument that if 5/8-101(c) is not enforced, PTI will get off "scot free." (Pl. Rply 15). PTI is not "getting off" anything. It was blameless for the accident which was solely the fault of the underinsured driver. (C205, 217 V1). Plaintiff's lack of "remedy" argument is equally baseless. (Pl.

Rply 15). As set forth in PTI's Opening Brief (p. 7) railroad employees are covered for accidents exactly like this one by a no-fault "Off-Track Vehicle Accident Benefits" provision in their unions' National Labor Agreement with their railroad employers. (C 6-8, C 14-27 V1; C 861-66 V4) (A. 129-30, 201-14). That provision entitles plaintiff and other railroad employees to significant recoveries for lost wages and medical expenses that plaintiff collected from UP in this case.

However, plaintiff maintains that this Court should ignore these substantial no-fault benefits she has already received pursuant to the National Labor Agreement. According to her, she "earned" those and other accident benefits, and that should be the end of any inquiry into how they may impact the reasonableness of the legislature's action. (Pl. Rply 2-3). However, the list of remedies available to plaintiff far out-strip those available to other commercial vehicle passengers, who might also be injured by tortfeasors with inadequate liability insurance coverage. Thus, her generous pre-existing benefits further suggest that the legislature's unique intervention on behalf of her union membership was truly ill-conceived and arbitrary.

Plaintiff's relentless self-centered focus on her own "earned" benefits and privileges, and her desire for still more can also be remarkably obtuse. At one point her brief deviates into a discussion of the Illinois State Board of Education's interpretation of "First Division" and "Second Division" vehicles under a wholly different statute – 625 ILCS 5/1-217. (Pl. Rply 10). The diversion could merely be written off as another puzzling digression, except that it serves as a reminder that

5/8-101(c) does not extend its exceptional UM/UIM benefits to school children, or to any other commercial vehicle passengers, even though the other passengers all fall under the broader ambit of 5/8-101, itself. Plaintiff expresses concern for "the welfare and safety of our children" (Pl. Rply 12), but children do not benefit from 5/8-101(c). Only on-duty employees transported by contract carriers benefit from 5/8-101(c). Not school children, not even the ill and in-firm who are being transported by ambulance. No other Illinois passengers benefit. Not even other commercial vehicle passengers.

Yet, on-duty employees are the least in need of such largess. Injured railroad employees, such as plaintiff, enjoy a host of benefits (Pl. Rply 2-3; PTI Br. 25-27), and non-railroad employees already enjoy workmen's compensation coverage while traveling as passengers about their master's business. *Xiao Ling Peng v. Nardi*, 2017 IL App (1st) 170155, ¶¶ 10-13 (collecting cases). Thus, singling out on-duty employee passengers for the extraordinary UM/UIM benefits to be provided by "contract carriers," who have no direct labor/management relationship with them, can hardly be called anything but arbitrary. Particularly when it leads to nonsensical results as it would here – extraordinary UM/UIM coverage for a contract carrier's "on-duty" passengers, but no such coverage for the contract carrier's own employee/driver – all of whom might be injured solely by the negligence of an "underinsured motorist."

This Court has previously stricken down arbitrary legislation implemented under the guise of an exercise of police power, precisely because the legislation

favored either management or labor and allowed them to improperly exploit the employer/employee relationship. *See, e.g. Grasse*, 412 Ill. 179 (1952) (holding that a select portion of the Workmen's Compensation Act was an unconstitutional exercise of the police power insofar as it took away an employee's right of action against a tortfeasor and transferred it to the employer); and *Heimgaertner,* 6 Ill.2d 152 (holding a pay-while-voting statute invalid to the extent that it violated constitutional guarantees by requiring an employer to pay for employees' time while they were absent from work). This case is even further removed from a proper exercise of police power, because it does not even directly bear on the employer/employee relationship. Instead, it saddles a third party with the cost of the generous labor benefits at issue. Moreover, in so doing, it circumvents federal railroad labor law. (PTI Br. 46-49).

Citing Justice Theis' dissent in *Moline Sch. Dist. 40 Bd. of Educ. v. Quinn* ("*Moline*") 2016 IL 119704, ¶ 67, the Secretary urges that the legislature's political motivation alone does not render 5/8-101(c) unconstitutional. (Sec'y Br. 56). PTI agrees. Section 5/8-101(c) is unconstitutional, not because it was politically motivated, but because the legislature enacted a statute that imposes a significant burden on a narrow group of commercial vehicle operators, and grants a significant benefit to a select group of commercial vehicle passengers that is not available to any other similarly situated passengers – all without any "rational relationship to a legitimate state interest." *Moline* at ¶ 26.

Nonetheless, the Secretary maintains that a statute's legislative history – no matter how toxic – is irrelevant in ascertaining whether a statute's purpose is rational or arbitrary. Although the Illinois Attorney General has previously contended that the judiciary should not adopt a hypothetical interpretation of a statute belied by its legislative history, he states that this Court should not feel constrained by prior Attorney General opinions. (Sec'y Br. 57).

However, the Secretary's discount of 5/8-101(c)'s legislative history is also contradicted by judicial precedent. Where, as here, "the reason for the classification is not apparent from the language of the statute itself," this Court in reviewing a special legislative challenge should undertake a "comprehensive review" of the statute's legislative history to determine the General Assembly's intent. *Allen v. Woodfield Chevrolet., Inc.*, 208 Ill.2d 12, 25 (2003). And, unlike the cases cited by the Secretary, this is not a case where there is a dearth of information concerning the legislative purpose, so that rational speculation might be properly indulged in to support the challenged legislation. Here, it is well-documented that the legislation was passed in response to labor unions' desires to secure increased job benefits. That alone does not make the legislation inherently unconstitutional, but it is a reality that cannot be ignored.

The Secretary cites to *Piccioli*, 2019 IL 122905 (Sec'y Br. 53, 57). But *Piccioli* completely undercuts the Secretary's premise that fantasy trumps reality when measuring suspect legislation against constitutional guarantees. This Court was divided in *Piccioli*, but both the majority and the minority opinions looked to

the legislative history in attempting to best determine the legislature's motivation. *Id.* at ¶¶ 4, 26, 45-48. In *Piccioli*, that history was not definitive – here it is.

PTI concedes that railroad union lobbyists are brilliant legislative tacticians. (PTI Br. 47-49, 54). But their lobbying expertise does not allow the legislature to trounce on PTI's constitutional rights. See *Moline*, where this Court found that a property tax exception afforded only to a certain airport facility was unconstitutional special legislation, given the existence of many other similarly situated aviation facilities, 2016 IL 119704, ¶ 19. This Court made no apologies to the legislature in pointing out that our constitution's special legislation clause originated in response to our General Assembly's past abuses: "It is predicated in part on the conviction that governments should establish and enforce general principles applicable to all their citizens and not enrich particular classes of individuals at the expense of others..." *id.* at ¶ 19, and that "governments should establish and enforce general principles applicable to all their citizens . . . so that 'one class or interest should not flourish by the aid of government, whilst another is oppressed with all the burdens.'" *Moline*, 2016 IL 119704, ¶ 19.

The same fundamental principles that caused this Court to strike down the statute in *Moline* as unconstitutional special legislation apply here. Prior to the enactment of 5/8-101(c), all commercial vehicle operators transporting passengers for hire were subject to the same uniform requirements of $250,000 in liability insurance and $20,000 in UM/UIM coverage. Except for the narrow group of contract carriers thereafter carved out by 5/8-101(c), all of the other similarly

situated commercial vehicle operators who transport passengers for hire are still under that same uniform requirement of a minimum $20,000 UM/UIM coverage (now increased to $25,000). Likewise, with the exception of those railroad and other employees transported by a contract carrier in the course of their employment, thousands of similarly situated persons who ride daily on Illinois highways in taxis, limos, courtesy vans, school transportation vehicles, ambulances and other for hire vehicles operated by non-contract carriers in the course of their employment or otherwise, or who ride in vehicles operated by contract carriers not in the course of their employment, have no statutory right to any UM/UIM coverage in excess of the $20,000 minimum limits required by the Illinois Insurance Code. 215 ILCS 5/143a and 5/143a-2(2).

Illinois precedent recognizes that available insurance coverages – liability, uninsured motorist and underinsured motorist coverages – are all "inextricably linked." *Phoenix, Ins. Co. v. Rosen,* 242 Ill. 2d 48, 58 (2011); *Schultz v. Illinois Farmers Ins. Co.,* 237 Ill. 2d 391, 404 (2010). Arbitrarily disturbing that balance through special legislation intended to benefit a select few, is not only unconstitutional, but it conflicts with the mandate of the Illinois Insurance Code, the Illinois Vehicle Code and established public policy. *See, State Farm Mutual Auto Ins., Co. v. Villicana,* 181 Ill. 2d 436, 453 (1998).

This Court has long recognized that UM/UIM coverage, in particular, was conceived as a relatively inexpensive form of insurance protection intended as a benefit to all consumers, and that allowing UM/UIM coverage to be

manipulated to provide special benefits for a few might well increase the cost of coverage generally and make it more difficult and costly to obtain for others. *Id.* As written, 5/8-101(c) ignores such precedent, undercuts fundamental constitutional guarantees, turns the previous uniform application of 625 ILCS 5/8-101 on its head. Through 5/8-101(c), our legislature has "weaponized" UM/UIM coverage to benefit a select few. Under 5/8-101(c), UM/UIM coverage is no longer an individual consumer's decision, at least not for the targeted "contract carriers." They are no longer permitted the freedom to link their UM/UIM coverage to their liability coverage as they see fit. Instead, this targeted group of vehicle operators is alone required, under penalty of criminal law and the threat of losing their operating licenses, to secure exorbitant amounts of UM/UIM coverage – $250,000 (now $500,000) – per passenger. This serves no legitimate state interest.

Again, the Secretary conjectures that the drivers of other vehicles for hire such as ambulances, school transport vehicles, taxis, limousines, motor coaches, etc. are subject to more training, licensing, and supervision than contract carriers' drivers and are therefore safer drivers than PTI drivers. (Sec'y Br. 44, 50, 52-53). This "safer driver" supposition has no evidentiary basis, but even if it did, it would not add any semblance of rationality to 5/8-101(c)'s increased UM/UIM limits imposed on PTI and other contract carriers for accidents that, as here, were caused solely by the negligence of an underinsured driver of another vehicle. Section 5/8-101(c) criminalizes a failure to obtain extraordinary levels of UM/UIM insurance to

protect against the negligence of other drivers, not liability insurance to protect against the negligence of a contract carrier's own drivers. Ambulances, school transport vehicles, taxis, limousines, etc., no matter how safe or competent their drivers, are no more likely to be struck by a negligent uninsured or underinsured driver than a contract carrier transporting employees in the course of their employment.

Plaintiff cites *In re Estate of Jolliff*, 199 Ill. 2d 510 (2002), but *Jolliff* further demonstrates why 5/8-101(c) lacks a rational basis and constitutes special legislation. The statute at issue in *Jolliff* allowed certain members of a disabled person's family (immediate family members) to recover custodial care costs. Thus, other family members who were not within the immediate family were denied recovery despite the custodial care costs they may have expended. This Court upheld the statute, noting that the distinction served a legitimate state interest. It encouraged immediate family members to commit themselves to caring for disabled relatives, while precluding a wider pool of potential claimants jockeying for statutory remuneration, thereby interfering with the efficient handling of probate estates. *Jolliff*, 199 Ill. 2d at 523. The Secretary offers *Curielli v. Quinn*, 2015 IL App (1st) 143511 (Sec'y Br. 41), but there the statute barring a real estate agent from acting as broker and attorney in the same transaction affected all real estate brokers in the same way, and served a legitimate state interest in preventing conflicts of interest inherent in such dual capacity transactions. *Curielli*, ¶¶ 20-22.

Here, in contrast, there is no rational basis and no legitimate state interest served by selectively limiting either the benefits or the burden of the increased UM/UIM limits set forth in 5/8-101(c) to the narrow group of contract carriers and employees described therein. See *In re Petition of the Village of Vernon Hills*, 168 Ill. 2d 117 (1995), where this Court held that a statute permitting a non-home-rule municipality in a county with a population between 500,000 and 750,000 to effect certain property transfers so that they would be located in only one fire protection district could not be upheld because there was no rational basis for any distinction based on population size. As the Court reasoned:

> "If a real need exists to eliminate the alleged disadvantages and dangers of multiple fire protection districts serving one municipality, then the same need to remedy this evil also exists in other counties as well, regardless of the level of the population of the county." *Vernon Hills*, 168 Ill. 2d at 125.

The same is true with respect to 5/8-101(c) in the instant case. If there is a real need to increase liability insurance limits or the UM/UIM insurance protection afforded to persons traveling on Illinois highways, there is simply no rational basis to limit that increase to the very narrow segment of persons described in 5/8-101(c).

D. Section 5/8-101(c) Violates the Equal Protection Clause of the U.S. and Illinois Constitutions.

"Whether a classification is arbitrary is generally determined under the same standards that are applicable to an equal protection challenge." *Piccioli*, 2019 IL 122905, ¶ 20.

Arbitrary special legislative classifications are unconstitutional. So is the burden shifting of public concerns to private shoulders. Both forms of

arbitrary legislation fall within Mr. Justice Holmes' admonishment in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 398, 415-16 (1922), which was cited with approval in *Heimgaertner*, 6 Ill. 2d at 162: "(A) strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

CONCLUSION

For the reasons set forth herein and in its Opening Brief, PTI respectfully requests that this Court affirm the Appellate Court on the grounds that Chapter 8 provides sufficient enforcement remedies so that it is not necessary to imply a private right of action for a violation of 5/8-101(c) and, in any event, a violation of the statute does not give rise to a tort analog required for implication of a private right of action. PTI also asks that this Court affirm the Appellate Court on the additional ground that the "rule of lenity" requires that the ambiguous 15-passenger vehicle reference in 5/8-101(c) be read as inapplicable to PTI's 6-passenger vans.

Finally, in view of the operating cost burden, the threat of criminal prosecution, and the threatened loss of operating privileges imposed by 5/8-101(c), PTI also requests that this Court, in accord with *Board of Educ. of Peoria School Dist. No. 150*, 2013 IL 114853, ¶ 60, grant PTI cross-relief by declaring that 5/8-101(c) is unconstitutional on one or more of the grounds urged herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 341(c), I certify that this Cross-Relief Reply Brief conforms to the requirements of Rules 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 7,988 words using the Word Count provided by Microsoft Word. On April 30, 2019, this Court allowed the Cross-Relief Reply Brief to exceed the word limitation but not to exceed 8,000 words.

Respectfully submitted,

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No. 123853

In The
Supreme Court of Illinois

MARY TERRY CARMICHAEL,
Plaintiff-Appellant,

v.

PROFESSIONAL TRANSPORTATION, INC., a foreign Corporation, d/b/a PTI
Defendant-Appellee,

and

ACE AMERICAN INSURANCE CO., a foreign corporation, and
UNION PACIFIC RAILROAD COMPANY, a foreign corporation,
Defendants.

PROFESSIONAL TRANSPORTATION, INC., a foreign corp., d/b/a PTI
Counter-Plaintiff-Appellee,

v.

MARY TERRY CARMICHAEL,
Counter-Defendant-Appellant,

and

JESSE WHITE, ILLINOIS SECRETARY OF STATE
Intervenor-Appellant.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-17-0075. There Heard on Appeal from the
Circuit Court of Cook County, Illinois
County Department, Chancery Division, No. 12 CH 38582
The Honorable Judge **Sophia H. Hall** Presiding.

NOTICE OF FILING and CERTIFICATE OF SERVICE

To: All attorneys of record (see attached Service List)

PLEASE TAKE NOTICE that on May 8, 2019, we electronically filed with the Clerk of the Supreme Court of Illinois, through eFileIL, the ***Cross-Relief Reply Brief of the Defendant-Appellee/Counter-Plaintiff-Appellee, Professional Transportation , Inc.'s*** and

Notice of Filing and Certificate of Service, true and correct copies of which are attached and hereby served upon you.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, a non-attorney, certify that on this 8th day of May, 2019, true and correct copies of the attached ***Cross-Relief Reply Brief of the Defendant-Appellee/Counter-Plaintiff-Appellee, Professional Transportation , Inc.*** and ***Notice of Filing and Certificate of Service*** were served via eFileIL and that on the same day, a pdf of same was served via email to the attorneys of record on the attached Service List.

/s/ Rita A. Ayers
Rita A. Ayers

/x/ Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

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