No. 125535

IN THE
SUPREME COURT OF ILLINOIS

CHERYL BARRALL, et al., Plaintiffs-Appellees, v. **THE BOARD OF TRUSTEES OF JOHN A. LOGAN COMMUNITY COLLEGE,** Defendant-Appellant.	Appeal From the Illinois Appellate Court, Fifth Judicial District, No. 5-18-0284 There Heard on Appeal From the Circuit Court First Judicial Circuit Williamson County, Illinois No. 2017-MR-275 Honorable Brad K. Bleyer, Judge Presiding

BRIEF OF PLAINTIFFS-APPELLEES

Loretta K. Haggard (IL 6239448)
SCHUCHAT, COOK & WERNER
1221 Locust St., Second Floor
St. Louis, MO 63103
(314) 621-2626
Fax: (314) 621-2378
lkh@schuchatcw.com

Attorney for
Plaintiffs-Appellees.

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POINTS AND AUTHORITIES

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II. The Fifth District correctly held, under the facts of this case, that Plaintiffs had a right to bump adjunct faculty out of individual courses.

NATURE OF THE CASE

Plaintiffs/Appellees adopt Defendant/Appellant's statement of the "Nature of the Case," with one clarification. As stated in Plaintiffs' Appellate Brief before the Fifth District Court of Appeals (at 8), Plaintiff Jane Beyler was recalled after the Trial Court's April 23, 2018 decision and May 8, 2018 Judgment. Therefore her demand for reinstatement is moot.

ISSUE PRESENTED FOR REVIEW

Plaintiffs/Appellees agree that the sole issue is a question of law – the interpretation of §3B-5 of the Public Community College Act, 110 ILCS 805/3B-5 (2016). They disagree with Defendant/Appellant's characterization of the question of law presented by the facts. The question of law presented by the facts is whether §3B-5 prohibits a community college, during the two year recall period, from employing multiple adjuncts to teach a full load of the courses previously taught by a laid-off tenured faculty member.

ARGUMENT

I. The Fifth District correctly construed the phrase "other employee with less seniority," as used in Section 3B-5 of the Public Community College Act, to include adjunct faculty.

This Court must construe the retrenchment (or reduction in force) provision of the Public Community College Act ("Act"), 110 ILCS 805/3B-5, as applied to the facts of this case. Section 3B-5 provides:

> If a dismissal of a faculty member for the ensuing school year results from the decision by the Board to decrease the number of faculty members employed by the Board or to discontinue some particular type of teaching service or program, notice shall be given to the affected faculty member not later than 60 days

> before the end of the preceding school year, together with a statement of honorable dismissal and the reason therefor; provided that the employment of no tenured faculty member may be terminated under the provisions of this Section while any probationary faculty member, or any other employee with less seniority, is retained to render a service which the tenured employee is competent to render…. *For the period of 24 months from the beginning of the school year for which the faculty member was dismissed, any faculty member shall have the preferred right to reappointment to a position entailing services he is competent to render prior to the appointment of any new faculty member;* ***provided that no non-tenure faculty member or other employee with less seniority shall be employed to render a service which a tenured faculty member is competent to render***.

(emphasis added). The question before the Court is whether the bolded "proviso" clause prohibits a community college, during the two year recall period, from employing multiple adjuncts to teach a full load of the courses previously taught by a laid-off tenured faculty member.

"In construing the meaning of a statute, the primary rule is to determine and give effect to the intent of the legislature." *Costello v. Governing Board of Lee County Special Educ. Ass'n,* 1993 IL App (2d) 1710, at 21. "The basic intent of the legislature can be ascertained by examining the terminology of the statute, its goals and purposes, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the statute as a whole." *Id.* If the statutory language is plain and unambiguous, the Court must enforce it as written. *Id.* "If the language is capable of being understood by reasonably well-informed persons in two or more different senses, an ambiguity exists, and it is proper to examine sources other than the statute's language to ascertain the legislative intent." *Id.* at 21-22. "A conflict in the interpretation of a single statute can be resolved by referring to the purposes and goals of the statute as a whole." *Id.* at 22-23. "A construction which will render a statute absurd or self

contradictory will be avoided." *Id.* at 25. Each "word, clause or sentence must, if possible, be given some reasonable meaning," and a construction that results in surplus or superfluous words is to be avoided. *Advincula v. United Blood Servs.,* 1996 IL 127, at 33-34.

Application of these principles to Section 3B-5 of the Community College Act should be straightforward. The first clause of the recall provision of Section 3B-5 is plain. For two years following layoff, a faculty member is entitled to be reappointed "to a position entailing services he is competent to render" before a new faculty member is employed to such a position. 110 ILCS 805/3B-5. "Faculty member" is defined as "a full time employee of the District regularly engaged in teaching or academic support services, but excluding supervisors, administrators and clerical employees." 110 ILCS 805/3B-1. A faculty member earns "tenure" after three years of teaching, and thereafter may only be terminated for cause or laid off in accordance with the Act. 110 ILCS 805/3B-2.

The "proviso" clause prohibits a community college from employing a non-tenured faculty member or "***other employee with less seniority***" to "***render a service***" which a laid off tenured faculty member is "***competent to render***." 110 ILCS 805/3B-5 (emphasis added). The Public Community College Act does not define "employee" or "other employee with less seniority." 110 ILCS 805/3B-1. "Other employee with less seniority" must mean something different or broader than "faculty member," otherwise the phrase is mere surplusage. *Advincula,* at 33-34. Given its ordinary, everyday meaning, the phrase "other employee with less seniority" would encompass part-time term faculty hired on a semester by semester to teach courses that full-time faculty would otherwise teach. *See Land v. Board of Educ.*, 2001 IL App (1st) 662, at 16 ("The plain and ordinary meaning of

'employee' is "'any worker who is under wages or salary to an employer and who is not excluded by agreement from consideration as such a worker'"; term "embodies all persons who work for and are compensated by the Chicago Public Schools, including tenured teachers") (internal citation omitted), *aff'd in relevant part and rev'd in part on other grounds,* 2002 IL 959.

The reference in the proviso to a "service" which the tenured faculty member is "competent to render" can only refer to a course. A set of "courses" or "services" comprises a "position." *See Hayes v. Board of Educ.*, 1981 IL App (4th) 3848, at 7 (defining "position" as "[t]he group of tasks and responsibilities making up the duties of an employee"), *quoting Webster's Third New Int'l Dictionary* 1769 (1961). The plain language of the statute appears to prohibit the College from employing term faculty to render services (teach courses) that the laid off Plaintiffs were competent to render.

The Fifth District agreed. Since the statute does not define "employee" or "seniority," the appellate court looked to the ordinary dictionary definitions. Appendix to Defendant's Brief, at A7 (hereafter "A___"). An "employee" is "a person who is 'employed by another usually for wages or salary and in a position below the executive level." *Id.*, *quoting from Webster's Ninth New Collegiate Dictionary* 408 (1983). Adjunct faculty plainly fall within this definition, the Court held. A5. "Seniority" is defined as "a privileged status attained by length of continuous service." *Id.*, *quoting Webster's Ninth New Collegiate Dictionary* 1071. Since adjunct faculty do not attain seniority at all, the Court held, Plaintiffs "clearly have more seniority than employees with *no* seniority." A7. Giving Section 3B-5 its plain and ordinary meaning, the Fifth District held, adjunct instructors are "employee[s] with less seniority" than the Plaintiffs. A7-8.

The Fifth District properly rejected the rationale of the Second District in *Biggiam v. Bd. of Trustees of Comm. Coll. Dist. No. 516*, 154 Ill. App. 3d 627, 643 (Ill. App. 2nd Dist. 1987), that since adjunct faculty did not earn seniority under the parties' collective bargaining agreement, they cannot fall within the meaning of "other employees with less seniority." A12. It would be absurd and unjust if tenured faculty had preference over non-tenured faculty and less senior tenured faculty, but no preference over adjuncts, the Court held. A18. In reaching its contrary conclusion, *Biggiam* relied on a School Code case which stated that, "[t]he primary purpose of the tenure provisions of the School Code is to give tenured teachers priority over non-tenured teachers…, and, as between tenured teachers, to give priority to those with the longer length of continuing service…." *Biggiam*, 154 Ill. App. 3d at 642, *quoting Birk v. Board of Educ. of Flora Comm. Unit Sch. Dist.*, 104 Ill. 2d 252, 257 (1984). The Fifth District opined that *Biggiam* took *Birk* out of context. *Birk* involved a dispute between two tenured teachers. The Court there had no occasion to consider whether a tenured teacher had the right to bump an employee without any seniority, such as a substitute teacher. "The *Birk* court's silence on a question that was not before it does not support the *Biggiam* court's conclusion that tenure provisions are intended to serve the limited purpose of giving tenured teachers priority over other tenured teachers with less seniority and full-time teachers who have not yet attained tenure," the Court below explained. A16.

The Fifth District correctly rejected the College's contention that the phrase, "employee with less seniority," is ambiguous because of the structure of the independent and proviso clauses of the recall provision of the statute. The independent clause states that for 24 months following layoff, "any faculty member shall have the preferred right to

reappointment to a position entailing services he is competent to render prior to the appointment of any new faculty member." 110 ILCS 805/3B-5. The proviso clause states, "provided that no non-tenure faculty member or other employee with less seniority shall be employed to render a service which a tenured faculty member is competent to render." *Id.* The appellate court acknowledged that "a proviso is generally intended to qualify the language that comes before it." A8, citing *Cardwell v. Rockford Memorial Hosp.,* 136 Ill. 2d 271, 278 (1990). In Defendant's view, since the independent clause gives tenured faculty a right to recall only over the hiring of new faculty members, the proviso must be read to apply only to full-time faculty members as well.

The Fifth District rejected Defendant's interpretation as unreasonable, for two reasons. A8. First, the Court believed that the legislature deliberately used broader language in the proviso clause than in the preceding clause, because the independent clause deals with recall to "positions" held by full-time faculty, and the proviso deals with "services" (or courses) offered by full-time faculty or adjuncts. A8-9. Second, the Court cited to the legislative history of Section 3B of the Act, in which Representative Getty stated that tenure was needed "so that a man or woman, who's dedicated many years of teaching honorably, doesn't all of a sudden find himself with a $22,000 a year job being cut so that the community college can hire two for [$]11,250." A9, citing 81st Ill. Gen. Assem., House Proceedings, June 18, 1979, at 99. "That is the essence of what the plaintiffs alleged occurred in this case," the Court held. A9. The Second District in *Biggiam* erred by disregarding the plain language of the proviso clause and instead reading an additional word into the statute, as if it stated, "any other ***tenured*** employee with less seniority." 154 Ill. App. 3d at 643 (emphasis in original). The court below was correct to construe the

proviso clause of the recall provision to include adjunct faculty among "other employees with less seniority."

In Point I of its opening Appellate Brief, Defendant makes two new arguments. First, Defendant cites multiple community college websites *never presented in evidence in the trial court*, in an effort to show that adjuncts are not capable of accruing seniority. (Appell. Brf., at 7-8). Evidence not contained in the record on appeal may not be considered by the appellate courts. *Cnty. of Lake v. Fox Waterway Agency*, 326 Ill. App. 3d 100, 103-104 (Ill. App. 2nd Dist. 2001); *People v. Jones*, 2016 IL App (1st) 141460-U, ¶12 (internet evidence). Even if such evidence were properly before the Court, it is irrelevant to the construction of the statute.

Second, Defendant notes the parallel between the proviso in the recall clause and the proviso in the "functionally identical" layoff clause earlier in Section 3B-5:

> [P]rovided that the employment of no tenured faculty member may be terminated under the provisions of this Section while any probationary faculty member, or any other employee with less seniority, is retained to render a service which the tenured employee is competent to render.

110 ILCS 805/3B-5. Defendant notes, correctly, that where the same words are used in different parts of the same statute, they will be given a consistent meaning unless a contrary legislative intent is clearly expressed. *Maksym v. Bd. of Elec. Commrs.,* 242 Ill. 2d 303, 322 (2011). If the phrase "other employee with less seniority" in the layoff clause includes adjuncts, Defendant argues, then before a tenured faculty member could be laid off in a retrenchment, adjuncts who teach courses that the tenured faculty member is qualified to teach would have to be terminated. "As a result," Defendant argues, "either those courses would have to be dropped from the current curriculum, or the

retrenchment would have to be scrapped." (Appell. Brf., at 9-10). Defendant cannot imagine that the Legislature intended "so great an interference in the curriculum planning and course offerings of community colleges." (*Id.*).

Defendant is correct that an adjunct must be terminated before a tenured faculty member can be laid off in a retrenchment. In this case, Defendant did not lay off any tenured faculty while "retaining" adjuncts, because the adjuncts automatically ceased to be employed before the retrenchment took effect. This is why Plaintiffs did not challenge their ***layoffs***. Plaintiffs have never suggested that the College cannot lawfully implement a retrenchment, whether to deal with a financial crisis or otherwise. Plaintiffs have never argued that the College could not lawfully lay off a tenured faculty member and then subsequently employ an adjunct to teach one or two courses that each such faculty member was qualified to teach. What the Plaintiffs protest is the College's decision to ***hire multiple adjuncts*** to teach ***more than a full load*** of each of their courses while they were still on layoff. The retrenchment in this case was in name only. The same courses were offered before the retrenchment by tenured faculty, and after the retrenchment by adjunct faculty at a fraction of the cost. Section 3B-5 does not permit such a result.

This Court should affirm the statutory construction adopted by the Fifth District below, and reject the statutory construction adopted by the Second District in *Biggiam*, and declare that adjunct faculty are "other employees with less seniority" within the meaning of Section 3B-5 of the Public Community College Act.

II. The Fifth District correctly held, under the facts of this case, that Plaintiffs had a right to bump adjunct faculty out of individual courses.

The Second District in *Biggiam* stated that bumping rights only apply to "positions" held by non-tenured or less senior tenured faculty, and not to "courses" taught by such faculty. 154 Ill. App. 3d at 647. "[W]hen a reduction in faculty members occurs, the 'positions' occupied by the honorably dismissed faculty members no longer exist," the Court stated. *Id.* at 645. Adjuncts are not hired into "positions," the Court explained, but rather to teach specific courses as needed. *Id.* That much is true, but it begs the question whether it is lawful for a community college (as Defendant did here) to lay off tenured faculty from their "positions," then employ enough adjuncts to teach a full load of the very same courses that previously comprised those "positions." These facts were not presented in *Biggiam*, so it was not necessary for the Court to decide that bumping applies only to "positions" (in the sense of budget line items), and not to courses that taken together would comprise each Plaintiff's previous "position." Plaintiffs argued below that the *Biggiam* Court's pronouncements on this issue were dicta, unnecessary to the holding.

The Fifth District found it unnecessary to decide whether *Biggiam* correctly concluded, on the facts of that case, that the plaintiffs had no right to bump adjuncts out of individual courses. A14. The facts of *Biggiam* were distinguishable, the Fifth District held, because there, "not only were the plaintiffs' *positions* eliminated, nearly all of the *courses* they regularly taught were also eliminated." A14.

The *Biggiam* court relied on a line of School Code cases holding that if a laid off, tenured teacher is not qualified to teach all courses taught by a junior teacher who has been retained, a school board is not required to "gerrymander" a position for the laid off teacher

by cobbling together course assignments from several junior teachers to form a position for the laid off tenured teacher. A13, citing *Biggiam*, 154 Ill. App. 3d at 644, in turn citing *Peters v. Board of Educ. of Rantoul Township High School Dist. No. 193*, 97 Ill. 2d 166 (1983); *Hancon v. Board of Educ. of Barrington Comm. Unit School Dist. No. 220,* 130 Ill. App. 3d 224 (1985); *Catron v. Board of Educ. of Kansas Comm. Unit School Dist. No. 3*, 126 Ill. App. 3d 693 (1984); and *Higgins v. Board of Educ. of Comm. Unit School Dist. No. 303,* 101 Ill. App. 3d 1003 (1981). The Fifth District noted that these School Code cases were "not precisely analogous to the situation at issue in *Biggiam,*" because they dealt with the bumping rights of laid-off, senior faculty with respect to junior faculty who were not laid off. A13. They did not deal with adjuncts (as did *Biggiam*) or substitute teachers which are their analog in the secondary school setting.

Assuming, however, for the sake of argument that *Biggiam* was sufficiently analogous to the School Code cases it relied on, the Fifth District went on to agree with Plaintiffs' argument that the facts of the present case are "far more analogous to a different line of cases… hold[ing] that school districts may not rearrange teaching assignments in a manner that defeats the rights of tenured teachers even if they do so in good faith." A14, citing *Pennell v. Board of Educ. of Equality Comm. Unit School Dist. No. 4*, 137 Ill. App. 3d 139, 143 (1985); *Hayes v. Board of Educ. of Auburn Comm. Unit School District,* 103 Ill. App. 3d 498, 502 (1981); *Hagopian v. Board of Educ. of Tampico Comm. Unit School Dist. No. 4,* 56 Ill. App. 3d 940, 944 (1978), *rev'd in part on other grounds following remand, sub nom. Relph v. Board of Educ.,* 1981 IL 265. *See also Birk v. Board of Educ.*, 1984 IL 377; and *Relph v. Board of Educ.*, 1977 IL App (3d) 3232, *rev'd in part on other grounds following remand,* 1981 IL 265 (factually similar cases cited by Plaintiffs below

at pages 22-23 of their Appellate Brief, and not specifically relied on by the appellate court for this point). In each of these cases, a school district, like the College here, reassigned a more senior teacher's classes to one or more junior teachers in order to eliminate her position or reduce her courseload. "Here, similarly, the plaintiffs have alleged that the defendant effectively eliminated the teaching positions to which they could have been reappointed by assigning their courses to adjunct instructors, over whom they should have preference under section 3B-5." A14. In these circumstances, the Fifth District concluded, the Plaintiffs "have bumping rights with respect to individual courses." *Id.*

This Court should affirm the Fifth District and distinguish *Biggiam* on the question of whether laid off tenured faculty are entitled to bump adjuncts out of a full load of the very courses that previously comprised their positions. Plaintiffs alleged that the College offered more than enough of each of their core courses to employ each of them full-time. (C76). Plaintiffs are not asking the College to manufacture positions for them by cobbling together course assignments outside their primary areas of expertise, as the plaintiffs did unsuccessfully in *Biggiam* and the School Code cases of *Peters, Hancon, Catron,* and *Higgins.* Rather, they seek to claw back the very courses comprising their full-time positions from multiple employees with less seniority, like the plaintiffs who prevailed in the School Code cases of *Pennell, Hayes, Hagopian, Relph*, and *Birk*.

III. The Fifth District correctly applied the "well-settled judicial construction doctrine."

Under the "well-settled judicial construction doctrine," when the legislature amends a statute and leaves unchanged a provision that has been judicially construed, it is presumed to have adopted the court's prior construction. *People ex rel. Nelson v. Wiersema State Bank*, 361 Ill. 75, 78-79 (1935). Similarly, when the legislature declines to amend a statute following a judicial construction, it is presumed "that it has acquiesced in the court's statement of the legislative intent." *In re Marriage of O'Neill*, 138 Ill. 2d 487, 495-96 (1990). Defendant argues in Point III of its Brief that the legislature's 1989 amendment to an unrelated portion of Section 3B-5 of the Public Community College Act, two years after the *Biggiam* decision, and its decision not to amend Section 3B-5 at any other time since 1987, shows that it ratified *Biggiam* and incorporated it into the statute.

The Court of Appeals below noted that "the presumption relied upon by the defendant is a *'general rule'* of statutory construction, and it does not apply where a contrary legislative intent is clear." A17 (citing *Nelson*, 361 Ill. at 78-79). In its Brief (at 14), Defendant accuses the Court below of misquoting *Nelson,* which actually stated:

> The general rule is, that where terms used in the statute have acquired a settled meaning through judicial construction and are retained in subsequent amendments or re-enactments of the statute, they are to be understood and interpreted in the same sense theretofore attributed to them by the court unless a contrary intention of the Legislature ***is made clear***.

361 Ill. at 78-79 (emphasis added). According to Defendant, "Nothing in the 1989 amendment to Section 3B-5 'made clear' any intent contrary to the holding in *Biggiam*." (Brief, at 14). Defendant makes way too much of the distinction between the phrase "is

clear" (used by the Court below) and the phrase "is made clear" (used by the *Nelson* case). *Nelson* does not require that a contrary legislative intent be found in the statutory amendment itself. *Nelson* did not even apply the well-settled judicial construction doctrine, because it found that the newer statute was "essentially dissimilar" to the prior statute construed by the court. 361 Ill. at 79.

The well-settled judicial construction doctrine is "merely a jurisprudential principle, not a rule of law," and it is given little weight "where the meaning of the statute is unambiguous." *Blount v. Stroud,* 232 Ill. 2d 302, 325 (2009); *People v. Perry*, 224 Ill. 2d 312, 331-332 (2007). The Fifth District correctly found the phrase "other employee with less seniority" to be plain and unambiguous, and to include adjunct faculty. A7-8. Accordingly, the judicial construction doctrine should be given little weight here.

The doctrine is also less likely to be applied where the judicial construction has not been "extensively relied upon by Illinois courts." *Perry*, 224 Ill. 2d at 332 (Supreme Court overruled two appellate decisions that contradicted plain language of statute and that were not widely cited). The cases cited by Defendant in its Brief (at 14-16) all involved a prior Supreme Court case or multiple appellate cases, rather than a single prior appellate case as here. *See In re Marriage of O'Neill*, 138 Ill. 2d 487 (1990) (nine appellate decisions from three different districts); *People v. Way*, 2017 IL 120023 (prior Supreme Court case); *Pielet v. Pielet*, 2012 IL 112064 (five cases from two appellate districts and two federal courts); *People v. Villa*, 2011 IL 110777 (Supreme Court case and five more recent appellate decisions); *Hubble v. Bi-State Development Agency*, 238 Ill. 2d 262 (2010) (three appellate cases); *Bruso v. Alexian Bros. Hosp.*, 178 Ill. 2d 445 (1997) (Supreme Court case, three appellate cases, and one federal case); *Morris v.*

William L. Dawson Nursing Center, Inc., 187 Ill. 2d 494 (1999) (long-established Supreme Court precedent); *People v. Agnew*, 105 Ill. 2d 275 (1985) (prior Supreme Court decision); *Illinois Power Co. v. City of Jacksonville*, 18 Ill. 2d 618 (1960) (two prior Supreme Court cases). *Cf. People v. Phagan,* 2019 IL App (1st) 153031 (applying the well-settled judicial construction doctrine based on one prior appellate case, but declining to follow three other appellate cases from same district reaching contrary result). Plaintiffs cited below (at pages 16-17 of their Reply Brief) to yet other cases applying the well-settled judicial construction doctrine against a backdrop of long-standing or well-developed caselaw *See Burrell v. S. Truss,* 1997 IL 49, at 5-7 (four appellate cases); *Carver v. Bond/Fayette/Effingham Reg'l Bd. of School Trustees,* 1992 IL 14, at 7 (long-standing Supreme Court precedent); *Leischner v. Daniel's Restaurant, Inc.,* 1977 IL App 3669, at 2-3 (three appellate districts over a period of 87 years).

Biggiam is but one, poorly reasoned decision of one appellate district, that contradicts the plain language of Section 3B-5. This case does not involve a prior Supreme Court case or a long line of settled precedent from numerous appellate courts, where the judicial construction doctrine would carry greater weight. Moreover, Section 3B-5 has been amended only once since it was originally enacted, rather than multiple times as in other cases applying this principle of statutory construction. *Cf. Pielet* (statute amended numerous times over substantial period of time, against backdrop of settled judicial construction); *R.D. Masonry, Inc. v. Indus. Comm'n (Hunter),* 2005 IL 629, at 11-12 (statute amended many times in context of consistent Supreme Court authority).

Finally, the result reached in *Biggiam* on the facts of the case was not controversial, because the plaintiffs' courses were eliminated as well as their positions. If

the legislature was even aware of the *Biggiam* decision when it amended Section 3B-5 in 1989, it may well have found the decision consistent with perfectly defensible School Code cases like *Peters, Catron, Hancon,* and *Higgins*. *Biggiam* is only controversial when its reasoning is applied to the facts of cases like the present one, where tenured faculty were laid off and all of their own classes were instead parceled out to part-time adjuncts.

IV. The Fifth District correctly relied on the legislative history of Section 3B-5 of the Act.

In Point IV, Defendant faults the appellate court for relying on the statement of Representative Getty during House debate on the tenure provisions of the Act. It is true that the statement of one legislator, even the bill sponsor, is not conclusive on the question of legislative intent. *People v. Burdunice*, 211 Ill. 2d 264, 270 (2004). The Court below did not give controlling weight to Representative Getty's statement. It first found the phrase, "other employee with less seniority" in Section 3B-5 to be plain and unambiguous, not requiring resort to other maxims of statutory construction. A7. Only in response to Defendant's argument that the phrase is ambiguous in light of the structure of the independent and proviso clauses did the appellate Court look to the legislative history. A8-9 (from 81st Ill. Gen. Assem., House Proceedings, June 18, 1979).

According to Defendant (Brief, at 18), "Rep. Getty's statement clearly refers to a faculty member who holds a regular full-time teaching position on an annual contract – '$22,000 *a year* job' (emphasis added) – who, without tenure could be fired and replaced by two beginning or low-seniority faculty members who would hypothetically be paid $11,000 *per year*." (App. 31-32) (from 81st Ill. Gen. Assem., House Proceedings, June 18,

1979). It is not at all clear that is what Rep. Getty meant. He could well have been referring to part-time adjuncts. He was actually responding to comments of an opponent, Rep. Skinner, about *part-time faculty*:

> There are different strategies on how to choose professors for a junior college…. [O]ne can either opt for a large percentage of full-time professors, or one can opt for a larger percentage of part-time professors and a smaller percentage of full-time professors. The part-time professor route is infinitely cheaper. Well, not infinitely cheaper, but much, much cheaper, because you don't have to pay all the employee benefits that a full-time teacher gets. And, yet because that… part-time teacher may want very much to teach and develop a reputation that might lead to further part-time teaching in another local junior college, the quality of teaching by the part-timer may be better than the quality of teaching by the full-timer. It seems to me this is an extremely significant Bill, and I would reiterate the need has not been made for why we should vote in favor of this Bill.

(A29) (from 81st Gen. Assem., House Proceedings, June 18, 1979). The Bill passed, of course (A39 & A43), indicating that a majority of the legislature supported the "fundamental fairness" of awarding tenure to full-time professors after three years of teaching, even if part-time professors would be "much, much cheaper." In no way does Rep. Getty's statement suggest that a community college should be free to get rid of tenured faculty and hire adjuncts to teach their classes at a fraction of the cost.

The legislative debates included in Defendant's Appendix provide support for Plaintiffs' construction of the statute, even beyond Rep. Getty's statements as the House bill sponsor. There was vigorous debate in both the House and Senate about whether community college faculty should be treated for tenure, dismissal, and retrenchment purposes more like elementary and secondary school teachers or like university professors. Opponents of the bill argued in favor of local control, allowing tenure in community colleges to be bargained rather than imposed, and basing tenure on a lengthy

peer review process over six or seven years as in the universities rather than automatically conferring it after the passage of three years. (Rep. Walsh, at A24-25; Rep. Skinner, at A28-29; Rep. Kane, at A34) (from 81st Gen. Assem., House Proceedings, June 18, 1979); (Sen. Buzbee, at A41; Sen. Nimrod, at A42) (from 81st Gen. Assem., Senate Proceedings, May 24, 1979). Two opponents specifically spoke in opposition to imposing on community colleges the same seniority-based restrictions that the School Code imposed on layoffs and recalls. (Rep. Walsh, at A24-25; Rep. Skinner, at A28-29) (from 81st Gen. Assem., House Proceedings, June 18, 1979). Supporters of the bill argued that community college faculty are lower paid than university faculty; they are evaluated solely on teaching rather than research and publishing; a quarter of community colleges had not developed tenure policies through collective bargaining; and some community colleges had been arbitrary and capricious in their dismissal practices. (Rep. Getty at A24, A32) (from Ill. Gen. Assem., House Proceedings, June 18, 1979); (Sen. Berman, at A43) (from Ill. Gen. Assem., Senate Proceedings, May 24, 1979).

Since the bill passed, the legislature must have been persuaded that tenure in community colleges should be guided by the same principles as under the School Code. The Third District in *Piatak v. Black Hawk College Dist. No. 503*, 1195 IL App (3d) 141, at 10-11, reached the same conclusion. (Legislative intent behind tenure provisions of the Community College Act are same as that underlying School Code: "'[T]o provide continuity and stability for students; provide some degree of job security, thus affording teachers the ability to pursue a career free from arbitrary hiring and firing; attract teachers of high quality; and retain experienced teachers.'"), *quoting Johnson v. Bd. of Educ.,* 1981 IL 303, at 8-9. This legislative history provides further support for applying the

reasoning of the factually apposite School Code cases (*Birk, Pennell, Hayes, Hagopian,* and *Relph*) to the facts of this case.

V. The Fifth District properly considered the policies behind the Public Community College Act, and rejected the erroneous *Biggiam* decision which was not entitled to *stare decisis* consideration.

Defendant concludes in Point V of its Brief with an elaborate hypothetical that it contends would be required by the Fifth District's statutory construction. According to Defendant, if it wanted to offer a course in early Illinois history, and no full-time faculty could pick it up, it would have to not only offer the course to any faculty member who was laid off during the past two years, but would also have to create a full-time position including other courses for such faculty member – courses which presumably would not be offered otherwise. Such a result, the College contends, would be financially impossible and unreasonable.

This hypothetical is entirely divorced from the facts of this case. Plaintiffs alleged – and for purposes of a motion to dismiss, their allegations must be taken as true – that the College laid them off and then offered enough of the courses previously taught by Plaintiffs through adjuncts, such that all of the Plaintiffs could have been employed full-time. (C76). In other words, Defendant eliminated Plaintiffs' positions only in the sense that they were removed as budget line items. Defendant continued to offer enough of the *work* that was previously performed by the Plaintiffs, to have employed the Plaintiffs full-time. Plaintiffs have never claimed that the College had to manufacture unnecessary work for them. The School Code cases appropriately cited in *Biggiam* (*Peters, Hancon, O'Catron,* and *Higgins*) make clear that a school district (and derivatively, a community

college) need not gerrymander or create positions out of whole cloth. Plaintiffs have only ever claimed that they were entitled to be recalled to teach a full load of the classes that the College opted to continue offering through adjuncts following their layoffs.

Defendant correctly notes that "in the context of statutory construction, *stare decisis* considerations are at their apex. (Brief, at 20, *quoting People v. Espinoza*, 2015 IL 118217, ¶29). "'*[S]tare decisis* requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts.'" *O'Casek v. Children's Home & Aid Society,* 229 Ill. 2d 421, 440 (2008), *quoting Gillen v. State Farm Mutual Automobile Ins. Co.*, 215 Ill. 2d 381, 392 n.2 (2005); and *Schiffner v. Motorola, Inc.*, 297 Ill. App. 3d 1099, 1102 (1998). "Thus, the opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels." *O'Casek*, 229 Ill. 2d at 440. The Fifth District was under no obligation to follow *Biggiam*. It carefully analyzed all aspects of *Biggiam*, rejected the Second District's construction of the phrase "other employee with less seniority," and distinguished *Biggiam* on the question of whether laid off faculty may bump into courses as well as positions. This Court should do the same.

CONCLUSION

Plaintiffs respectfully request this Court to affirm the Fifth District's decision in its entirety, and reject the flawed reasoning of the Second District in the factually inapposite case of *Biggiam v. Board of Trustees*. This Court should construe Section 3B-5 of the Public Community College Act as to prohibit Defendant from laying off tenured

faculty and employing adjuncts to teach a full load of courses previously taught by the tenured faculty. This Court should remand this case to the trial court for trial

Respectfully submitted,

/s/ *Loretta K. Haggard*
Loretta K. Haggard (IL 6239448)
Schuchat, Cook & Werner
1221 Locust St., Second Floor
St. Louis, Missouri 63103
(314) 621-2626
Fax: (314) 621-2378
lkh@schuchatcw.com

CERTIFICATE OF SERVICE

On this 12th day of May, 2020, the undersigned filed this Brief of Plaintiffs-Appellees with the Clerk of the Supreme Court using the eFiling system which will send notification of such filing to:

Edward J. Kionka
ted@kionkalaw.com

Rhett T. Barke
rbarke@southernillinoislaw.com

Don E. Prosser
dprosser@southernillinoislaw.com

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.

/s/ *Loretta K. Haggard*

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,867 words.

/s/ Loretta K. Haggard