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APPELLATE COURT 4TH DISTRICT

No. 04-22-0092
No. 04-22-0093
No. 04-022-0094
Consolidated with
04-22-0090

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

JULIEANNE AUSTIN, as the parent or legal guardian of T.L. and L.A., *et al.*

Plaintiffs-Respondents,

v.

THE BOARD OF EDUCATION OF COMMUNITY UNIT SCHOOL DISTRICT #300 *et al.,*

Defendants,

And

ILLINOIS DEPARTMENT OF PUBLIC HEALTH; DR. NGOZI EZIKE, in her official capacity as Director of the Illinois Department of Public Health; ILLINOIS STATE BOARD OF EDUCATION; DR. CARMEN I. AYALA, in her official capacity as Director of the Illinois State Board of Education; and GOVERNOR JAY ROBERT PRITZKER, in his official capacity,

Defendants-Petitioners.

Appeal from the Circuit Court of Sangamon County, Illinois

Case No. 2021-CH-500002

The Honorable Raylene Grischow, Judge Presiding

MARK and EMILY HUGHES, as the parents and guardians of students G.H. and L.H., as well as on behalf of all parents and guardians of students similarly situated

Plaintiffs-Respondents

v.

Appeal from the Circuit Court of Sangamon County, Illinois

HILLSBORO COMMUNITY SCHOOL DISTRICT #3, a body politic and corporate, DAVID POWELL, as Superintendent of HILLSBORO COMMUNITY SCHOOL DISTRICT #3 *Defendants,* ILLINOIS DEPARTMENT OF PUBLIC HEALTH and DR. NGOZI EZIKE, in her official capacity as Director of the Illinois Department of Public Health, ILLINOIS STATE BOARD OF EDUCATION and DR. CARMEN I. AYALA, in her official capacity as Director of the Illinois State Board of Education, and GOVERNOR JAY ROBERT PRITZKER, in his official capacity, *Defendants-Petitioners.*	Case No. 2021 CH 500005 The Honorable Raylene Grischow Judge Presiding

MATTHEW ALLEN, as well as all Other educators similarly situated, *et al*. *Plaintiffs-Respondents* v. 500007 ILLINOIS DEPARTMENT OF PUBLIC HEALTH, *et al.* And THE BOARD OF EDUCATION OF NORTH MAC COMMUNITY UNIT SCHOOL DISTRICT #34, A body politic and corporate, *et al*. *Defendants.*	2021 CH The Honorable Raylene Grischow Judge Presiding

PLAINTIFFS-RESPONDENTS CONSOLIDATED RESPONSE TO STATE DEFENDANTS-PETITIONERS MEMORANDUMS IN SUPPORT OF RULE 307(d) PETITIONS FOR REVIEW OF TEMPORARY RESTRAINING ORDER

Discussion

As Defendants note, this court should review the trial court's granting of the temporary restraining order at issue here for an abuse of discretion. *Capstone Fin. Advisors v. Plwaczynski*, 2015 IL App (2d) 150957 at ¶ 7. "An abuse of discretion will be found only where the court's ruling is arbitrary, fanciful, unreasonable, or where or where no reasonable person would take the view adopted by the trial court." *People v. Baez*, 241 Ill.2d 44, 106 (2011) (internal citations omitted). "Abuse of discretion means clearly against logic; the question is not whether the appellate court agrees with the [trial] court, but whether the [trial] court acted arbitrarily, without employing conscientious judgment or whether, considering all the circumstances, the court acted unreasonably and ignored recognized principles of law, which resulted in substantial prejudice." *People v. Lynn*, 388 Ill.App.3d 272, 277 (4th Dist. 2009). For the reasons set forth below, Defendants fail to show the trial court abused its discretion, and their Petition should be denied.

I. Plaintiffs have a Right in Need of Protection and are Likely to Succeed on the Merits.

Defendants are not likely to prevail on the merits defending against Plaintiffs' claims because neither the Governor's Executive Orders nor the Illinois Department of Public Health's ("IDPH") emergency rulemaking, or the Illinois State Board of Education, ("ISBE") emergency rulemaking, were valid uses of emergency powers under the Illinois Emergency Management Act (the "IEMA") or the Illinois Administrative Procedures Act. ("IAPA"). As these were not valid uses of power, the due process provisions of the Illinois Department of Public Health Act (the "IDPH Act") remain in effect and leave Plaintiffs an

ascertainable right in need of protection.

Defendants' reliance on the Governor's various powers under the IEMA are misplaced. While Section 7(8) of the IEMA does grant the Governor the power to "control . . . the occupancy of premises," the IEMA does not define "occupancy" and the legislative history for this Section of the IEMA is silent as to its meaning. Black's Law Dictionary defines "occupancy" as "a mode of acquiring property by which a thing which belongs to nobody becomes the property of the person who took possession of it with the intent of owing it." *See* https://thelawdictionary.org/occupancy/ last accessed on February 9, 2022, at 12:41 a.m. Plaintiffs clearly have no interest in this type of "occupancy," nor can schools be said to be property that belongs to nobody. Defendants have conceded, in their own definition of "occupancy," that this term is meant to quantify a number of individuals in a space and not what individuals within that space are required to wear or under what conditions those individuals can be "excluded" from that premises. *See* SR 5231 at 6-12. The Governor himself demonstrated the meaning of this term when he shut schools down in Executive Order 2020-05, a clear demonstration of controlling the "occupancy" of the schools.

https://www.illinois.gov/content/dam/soi/en/web/coronavirus/documents/executiveorder-2020-05.pdf, last accessed February 9, 2022, at 12:55 a.m.[1] Preventing an occupancy in its entirety, or even preventing someone from being evicted from their occupancy, says nothing about whether the term "occupancy" grants the Governor the power to order individuals to wear a particular item in a given premises. Taken to its illogical extreme, and under Defendants' expansive definition of "occupancy," the Governor could, apparently, order

[1] This Court can take judicial notice of information on the government websites noted in this Response. *See, e.g., People v. Johnson,* 2021 IL 125738 at ¶ 54.

citizens of this State to wear masks and all kinds of protective gear in their own homes or, as the Attorney General suggest, prevent them from entering their own home unless they were masked, tested, or vaccinated. SR 5230 at 6-12. This seems clearly beyond the Governor's powers under the IEMA.

Similarly, Defendants reliance on Section 7(12) of the IEMA is misplaced. Defendants cite only a provision of Section 7(12), leaving out the pieces setting forth what this Section is really about. The entirety of Section 7(12) reads:

> "Control, restrict, and regulate by rationing, freezing, use of quotas, prohibitions on shipments, price fixing, allocation or other means, the use, sale or distribution of food, feed, fuel, clothing and other commodities, materials, goods, or services; and perform and exercise any other functions, powers, and duties as may be necessary to promote and secure the safety and protection of the civilian population." 20 ILCS 3305/7(12).

Taken in conjunction with its preceding language, as it must be for purposes of statutory construction, it is evident the other "functions, powers, and duties" referenced relate to economic conditions and are not a general catch-all for the Governor to execute whatever whim strikes him because an "emergency" purportedly exists. Indeed, were it otherwise, the Governor's "other functions, powers, and duties" would swallow every other provision of Section 7 and they would be superfluous. As Defendants so poignantly point out, "Construing a statute in a way that renders part of it a nullity offends basic principles of statutory interpretation." *Nelson v. Artley*, 2015 IL 118058 at ¶ 25. Yet this is what Defendants propose with their theory regarding the language of Section 7(12).

This leaves Defendants interpretation of Section 2(m) of the IDPH Act. Section 2(m) of the IDPA Act states, in relevant part: "Nothing in this Section shall supercede the current National Incident Management System and the Illinois Emergency Operation Plan or

response plans and procedures established pursuant to IEMA statutes." 20 ILCS 2305/2(m). Defendants further argue because of this provision, the Governor was not required to suspend the statutory due process provisions of Sections 2(c), (d), (e) of the IDPH Act. Yet Defendants analysis begs the question as to what the exact "response plans and procedures established pursuant to IEMA statutes" might be. Fortunately, the IEMA itself answers this question. The word "plan" only appears one time in Section 7 of the Act, in Section 7(11) specifically, which provides in relevant part, "A proclamation of a disaster shall activate the State Emergency Operations Plan . . . ." 20 ILCS 7(11). The word "procedures" does not appear in Section 7. The Governor IS authorized "To cause to be prepared a comprehensive plan and program for the emergency management of this State . . . ." 20 ILCS 3305/6(c)(2). However, it is not the Governor who executes that plan, but the Illinois Emergency Management Agency, which is granted the power to "Coordinate the overall emergency management program of the State," to "Coordinate with the Department of Public Health with respect to planning for and responding to public health emergencies," and to "Prepare, for issuance by the Governor, executive orders, proclamations, and regulations as necessary or appropriate in coping with disasters." *See* 20 ILCS 3305/5(f)(1), (2.6), and (3). Clearly, then, the "plans and procedures" referenced in Section 2(m) relate to the "plans and procedures" of the Illinois Emergency Management Agency, and not the powers granted to the Governor under Section 7 of the Act.

While Section 7(1) of the IEMA grants the Governor the power to suspend regulatory statutes and orders, rules, and regulations of state agencies, as Defendants tacitly admit, none of the Governor's Executive Orders purport to suspend the IDPH Act or any of its provisions. To that end, Defendants reliance on *Fox Fire Tavern v. Pritzker* is misplaced

as it relates to the IDPH Act not applying and its suspension being unnecessary. The *Fox Fire Tavern* Court noted, "Here, EO61 did not suspend section 2(c), because its measures were not tantamount to quarantine orders, isolation orders, or business-closure orders." That is a far cry from Plaintiffs claims, which the trial court upheld, that masking and exclusion were quarantines as defined in the statute and the Administrative Code.

Defendants assertions regarding the "findings" underpinning the Emergency Rules are misplaced. Indeed, IDPH and ISBE made no findings regarding the existence of an "emergency" as that term is defined in 5 ILCS 100/5-45. The Notice of Emergency Amendments filed by the IDPH and ISBE similarly state the reason for the "emergency" as being "adopted in response to Governor J.B. Pritzker's Gubernatorial Disaster Proclamation issued related to COVID-19 . . . The COVID-19 outbreak is a significant public health crisis that warrants these emergency rules." *See* SR 2830. 5 ILCS 100/5-45(b) requires a given agency to find an emergency exists, it does not grant a given agency the power to defer to what someone else says is an emergency. Yet this is precisely what IDPH and ISBE did – they basically admitted because the Governor said there was an "emergency" there must be one. Even IDPH's backhanded attempt to find an "emergency" fails because an asserted "public health crisis," absent more, does not rise to the statutory definition of an "emergency." Additionally, the trial court properly found that IDPH cannot delegate its authority to anyone other than local health departments and not to school districts. Also, the trial court properly found ISBE has no authority to create rules regarding vaccination or testing to prevent the spread of an infectious disease. These are all matters of the health department.

As for the School District Defendants, their arguments of inherent authority must

also fail as it relates to public health measures such as isolation, quarantine, vaccination and testing. Even though the Court found it improper rulemaking, IDPH tried to delegate authority to school districts in regard to masking and exclusion from school in their emergency rule, and ISBE tried to require the districts by emergency rule to require vaccination or testing. Presumably the School Districts must have forgot to let IDPH and ISBE know such administrative action, albeit improper, was not necessary as the districts broad general power gives them discretion to do it all regardless. As laid out in detail, the IDPH Act has specific statutory measures in place for the purpose of preventing the spread of an infectious disease. The CPS School District, as did the State Defendants, go on about the perils of COVID and how their efforts are necessary to combat it. Once again this is not the question is front of the Court as the question is who has the lawful authority by statute to isolate, quarantine, vaccinate or test, our citizens to limit the spread of an infectious disease. As for CPS, it intentionally tries to mislead this Court by suggesting in its brief that Judge Grischow ruled they do have inherent authority in with respect to COVID-19 mitigation measures. This is a complete mischaracterization as she merely found the school districts have been granted independent authority but not in regard to implementing isolation quarantine, vaccination, and testing against students. (SR 5716) The trial court actually found the inherent authority of the School Districts, whatever its breadth, does not vitiate the due process protections of 20 ILCS 2305. (SR5718). Beyond this, the School Districts go on about various general grants of authority provided them by the legislature. None of those grants vitiate IDPH supreme authority over such matters. CPS proclaims the IDPH Act doesn't restrict their power to adopt COVID measures. Such reasoning in untenable. The IDPH Act doesn't have to restrict their power, as that is not the analysis. The analysis is

who has the power over such matters and it is clear that power lies with IDPH. The Court doesn't have to find the IDPH Act expressly restricts the school districts power as it merely has to find the IDPH Act is supreme over such matters which by default renders the referenced school code provisions subordinate. It is completely irrational to suggest the legislature limited the supreme authority of the health experts, being IDPH, by including due processing protections in the law, but somehow granted the School Districts such broad authority that they could engage in the exact same public health mitigations without the same due process protections being required by them inside the school buildings. Such is not the case. The closest statutory provision in the school code regarding general matters of public health is 105 ILCS 5/27-8.1 which deals with health examinations and immunizations. The legislature in this provision specifically granted the school districts authority to exclude a child from a school for failure to comply with this provision. (Emphasis Added) Nonetheless, the School District Defendants proffer other vague statutory sections give them the authority to exclude students from school if they don't comply with adopted policies such as masking, but such exclusionary authority is nowhere to be found in those other provisions. The School District Defendants suggestions of such broad authority has no merit as the legislature speaks when it gives school districts power to exclude for public health reasons.

Lastly, CPS is being clever in its argument that the trial court order does not comply with 735 ILCS 5/11-101. Nothing could be further from the truth. Judge Grischow made it clear that a board of education is a proper defendant to this action wherein she declined to enter any order against the Hillsboro School District as its board of education was not a named party. (SR5704) The boards of education and the school district are not one and of

the same as properly noted by Judge Grischow. In her order she states the Defendants are temporarily restrained. (SR 5728) Who are the defendants but the boards of education along with the state defendants. All of them were enjoined. School Districts, including CPS and all other boards of education properly in front of the trial court, were enjoined from ordering their respective school districts from engaging in the activities outlined in 3 (b), (c), (d). How much clearer did it need to be.

II. The Circuit Court did not Abuse its Discretion in Finding Plaintiffs' Established Irreparable Harm.

Defendants' misread the trial court's findings regarding irreparable harm. First, Defendants fail to note the trial court's Temporary Restraining Order's reasoning leading up to its citation to *Makindu v. Illinois High School Assn.* Prior to citing this language, the trial court explained, "The legal rights being sacrificed are the rights of due process under 20 ILCS 2305 *et seq*. which are further provided under 77 Ill. Adm. Code 690.1330. The Court finds the Plaintiffs' legal rights to procedural and substantive due process are being sacrificed every day." SR 5585. The trial court went on to note, "Due process of law is a guaranteed right to the Plaintiffs under the Illinois Constitution and has been specifically codified for circumstances such as these under 20 ILCS 2305 *et seq*. If the Legislature did not think due process rights and a method for objecting were important, they would not have created an entire statute on the issue. SR 5586. The trial court then cited *Makindu* before closing with, "Continued deprivation of procedural and substantive rights that are protected by *both statutory and constitutional law* cannot be compensated in the form of damages." *Id*. This accords with *Makindu*, which when the relevant section is cited fully, states, "[W]e note that, when a violation of constitutional rights has been alleged, a further showing of irreparable injury is not required if what is at stake is not monetary damages. This rule is

based upon the belief that equal-protection rights are so fundamental to our society that any violation of those rights causes irreparable harm." *Makindu v. Illinois High Sch. Ass'n*, 2015 IL App (2d) 141201, ¶ 42. The irreparable injury in these matters is not monetary damages; it is the right to due process to which Plaintiffs are entitled and that cannot be remedied by mere monetary compensation. While the State Defendants allege the Plaintiff-Appellees raised no such claim, they averred exactly that "plaintiffs are having their Illinois Constitutional and statutory rights of due process violated on a continual basis. (SR804)

The trial court's reasoning is, ultimately, eminently sound. Article I, Section 2 of the Illinois Constitution provides, "No person shall be deprived of due process of life, liberty, or property with due process of law nor be denied equal protection of the laws." ILL CONST. ART. I § 2. In addition to the IDPH Act, there are numerous statutes in Illinois that provide "statutory" due process rights to ensure the constitutional guarantees of substantive and procedural due process are protected. *See, e.g.* Illinois Juvenile Courts Act, 705 ILCS 405/1-5; Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/600 *et seq*. The IDPH Act, as do other Illinois statutes, merely, as the trial court recognized, codifies protections set out in the Illinois Constitution. The Parties may quibble as to whether this is "constitutional" due process or "statutory" due process, but in the end, due process arises from, as is relevant here, one place, and one place only: the Illinois Constitution.

Defendants remaining arguments are rank speculation and completely miss the point of the trial court's ruling. As has been the case for nearly two full years, Defendants attempt to parlay fear to get their way. Defendants primarily cite to the affidavit of Daniel J. Montgomery, head of the Illinois Teachers Federation, for the speculative statement, "more schools will shift to full-time remote learning to avoid an outbreak." Of course, Mr.

Montgomery's affidavit is filled with nothing but hearsay and speculation regarding what "may" happen if a temporary restraining order is granted. SR 3141-43. Defendants then attempt to use the affidavit of Dr. Susan Casey Bleasdale, M.D. to show how masking supposedly reduces the spread of Covid-19. SR 2414-17. Yet all these pages of the record show is Dr. Bleasdale is happy to follow whatever guidelines require masks with absolutely no empirical data underlying any of her statements indicating that masks actually do, in fact, "reduce the likelihood that Covid-19 will spread."

Ultimately, Defendants fail to recognize, or address, the irreparable harm the trial court found, namely, Plaintiffs' rights to due process being repeatedly, and continuously, violated by Defendants. In the end, Defendants fail to explain how the fear mongering they promote about remote learning and the spread of Covid-19 somehow makes the due process violations suffered by Plaintiffs less irreparable.

III. The Circuit Court did not Abuse its Discretion in Balancing the Hardships.

Defendants are not correct that the trial court failed to balance the equities. The first paragraph in the trial court's Order regarding "Balancing of Hardships" clearly reflects the weighing of competing interests. Indeed, the trial court noted while Defendants told the trial court how the public would be injured by the spread of Covid-19, they in fact "offered no direction evidence of such a proposition." SR 5590. The trial court went on to note, with emphasis, "It is worth noting the Plaintiffs do not seek any order of this Court dismantling masking, vaccination or testing policies in their totality." *Id*. In other words, the trial court balanced the flagrant violations of Plaintiffs' due process rights with the public's right to continue wearing a mask, get vaccinated, and subject themselves to testing, and found that, since the public still had the option of participating in Defendants' mitigation strategies, the

balancing of the equities favored Plaintiffs. Finally, as the trial court noted, the IDPH Act is the balance of interests of public health against individual liberty when the spread of an infectious disease needs to be limited. The legislatures balancing of those competing interests does not yield to the Defendants fear mongering.

Past this oversight on Defendants part, they then continue their fear-mongering and speculation to attempt to demonstrate harm to the public. For example, they cite the affidavit of Dr. Bleasdale again to point out the case rate for those under 20 in Illinois has increased from 11 per 100,000 to 556 per 100,000. SR 2412. Mathematically, that means cases have risen from 0.011% to 0.556%. An increase to be sure, but statistically, overall, insignificant. What Defendants don't tell this Court is whether the number of fatalities from Covid-19 have correspondingly increased. According to the IDPH website, since the onset of Covid-19, there have been 9 people under 20 whom lost their lives "with" COVID. *See* https://dph.illinois.gov/covid19/data.html, last accessed February 8, 2022, at 9:46 p.m. During that same time frame, there have been 281,278 cases of Covid-19 in those under 20. *Id*. This means the death rate for those under 20, the primary age range of students, is 0.0032%. The loss of a person's life is the ultimate tragedy, but Defendants have made no demonstration there is likely to be a significant increase in the number of deaths, instead using it as a way to instill fear. Dr. Bleadsdale's affidavit also references the Omnicron variant of Covid-19 was the dominant variant as of December 18, 2021. SR 2413. Yet the most up to date statistics for the Centers for Disease Control do not even track deaths in the 12 to 17 age because they are "too low." *See* https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status, last accessed February 8, 2022, at 10:03 p.m. And, no brief by Defendants would be complete without the threat of overwhelmed hospitals, parents removing their

children from school, and school closures. None of these are substantiated. As it relates to hospital bed and ventilator utilization, 464 Covid-19 patients are utilizing 2,968 intensive care beds statewide and 270 Covid-19 patients are utilizing 5,526 ventilators statewide – the respective percentages there are Covid-19 patients utilizing 15.6% of Illinois' intensive care unit beds and 4.9% of Illinois' ventilators. *See* https://dph.illinois.gov/covid19/data/hospitalization-utilization.html, last accessed February 8, 2022 at 10:13 p.m. Defendants then cite to Mr. Montgomery's affidavit for the proposition the lack of Covid-19 mitigations might cause parents to pull children out of schools. SR 3141-42. This is a fascinating statement coming from the head of a teacher's union as it is utterly unclear what "parents" he spoke to and anything they told him is hearsay. Finally we get the affidavit of Dr. Alexandra Sontag of the Chicago Public School System, predicting the doom of Chicago schools closing. SR 3211-12. Dr. Sontag appears to forget Chicago's schools closed not because of Covid-19, but because its teachers refused to come to work. *See, e.g.,* https://www.foxnews.com/media/chicago-teachers-union-crushed-for-walkout.[2]

Defendants citation to *Goss v. Lopez* is misleading. Before even reaching the type of due process hearing to which plaintiffs were due, the Court first had to determine if they were even entitled to due process. The Court found they were entitled to due process, noting "A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). It was only after finding due process applied that the Court limited the nature of those hearings, finding a brief hearing, without counsel or witnesses, satisfied due process. *Id*. at

[2] This Court can take judicial notice of information on mainstream internet sources as referenced in this Response. *Kopnick v. JL Woode Mgmt. Co.*, 2017 IL App (1st) 152054 at ¶ 26.

583.

Here, the due process to which Plaintiffs are entitled is clearly set forth in the IDPH Act. There is no question, as there was in *Goss*, about the nature of the due process to which Plaintiffs are entitled. No, here Plaintiffs have been denied due process in its entirety, despite being entitled to it by statute. Defendants' recitation of *Goss* does nothing for them.

Conclusion

Plaintiffs did not "shed their rights" at the schoolhouse door. *Id*. at 574. Yet, despite maintaining their rights to due process, Defendants' basic premise is providing due process is "impracticable." If only due process could be thrown away as quickly as Defendants wish it could be. We are living in strange times and many of our rights have vanished in the face of "emergency" orders and rules not made by our Legislature – we essentially live at the whim of the Governor. It is for times such as these that due process becomes even more important. "At times, 'it is important to stand on the side of due process, even at the cost of some inefficiency.'" *People v. Bradley*, 2017 IL App (4th) 150527, ¶ 21. So it is here – while it may be "impracticable" to honor the due process rights to which Plaintiffs are entitled, the trial court, correctly, stood on the side of due process. Nothing in Defendants' Petition suggests the trial court abused its discretion and her ruling should stand.

Plaintiffs-Appellees,

/s/ Lance C. Ziebell
/s/ Thomas G. DeVore
By: Their Attorneys

Lance C. Ziebell
Lavelle Law, Ltd.
1933 North Meacham Road
Schaumburg, Illinois 60173
ARDC No.: 6298037
lziebell@lavellelaw.com

Thomas G. DeVore
IL Bar Reg. No. 06305737
118 N. 2nd St.
Greenville, IL 62246
tom@silverlakelaw.com

CERTIFICATE OF SERVICE

CERTIFICATE OF FILING AND SERVICE

I certify that on February 9, 2022, I electronically filed the foregoing Notice of Interlocutory Appeal with the Clerk of the Circuit Court for the Seventh Judicial Circuit, Sangamon County, by using the Odyssey eFileIL system.

I further certify that the other participants in this case, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system. As a courtesy, the other participants also will be served via e-mail.

Counsel of Record for School District Defendants, Intervenors, And Amici

Merry C. Rhoades
Christine L. Self
mrhoades@tuethkeeney.com
cself@tuethkeeney.com

Robert E. Swain
Stephanie E. Jones
rob@krihaboucek.com
stephanie@krihaboucek.com

James A. Petrungaro
Paulette A. Petretti
Adam Dauksas
jpetrungaro@edlawyer.com
ppetretti@edlawyer.com
adauksas@edlawyer.com

Caitlin Frazier Satterly
Jason T. Manning
fsatterly@hlerk.com
jmanning@hlerk.com

Charles A. LeMoine
clemoine@dykema.com

H. Allen Yow
jmanning@hlerk.com

Vincent D. Resse
Melanie Renken
vreese@mickesotoole.com
mrenken@mickesotoole.com

David J. Braun
S. Jeff Funk Luke
M. Feeney
Brandon K. Wright
dbraun@millertracy.com
jfunk@millertracy.com
lfeeney@millertracy.com
bwright@millertracy.com

Lisa R. Callaway
Dawn M. Hinkle
Abigail C. Rogers
lcallaway@ecbslaw.com
dhinkle@ecbslaw.com
arogers@ecbslaw.com

John Shapiro
Richard Self
Dylan Smith
jshapiro@freeborn.com
rself@freeborn.com
dsmith@freeborn.com

Nikoleta Lamprinakos
Susan E. Nicholas
Dennis L. Weedman
Hailey M. Golds
nlamprinakos@robbins-schwartz.com
snicholas@robbins-schwartz.com
dweedman@robbins-schwartz.com
hgolds@robbins-schwartz.com

David J. Braun,
dbraun@millertracy.com
S. Jeff Funk
jfunk@millertracy.com
Luke M. Feeney,
lfeeney@millertracy.com
Brandon K. Wright,
bwright@millertracy.com

Loretta K. Haggard
Natalie J. Teague
lkh@scwattorney.com
njt@scwattorney.com

Jay E. Greening
Robert B McCoy
Jeffrey J. Gaster
jay.greening@mhtlaw.com
robert.mccoy@mhtlaw.com
jeffrey.gaster@mhtlaw.com

William R. Pokorny
Shelli L. Anderson
Jennifer A. Smith Dana
Fattore Crumley
Nicki Bazer
Scott Metcalf
Melisa Sabota
Koga Ndikum-Moffor
Caroline K. Kane
wrp@franczek.com
sla@franczek.com
jas@franczek.com
dfc@franczek.com
nbb@franczek.com
srm@franczek.com
mls@franczek.com
knm@franczek.com
ckk@franczek.com

Mallory A. Milluzzi
mamilluzzi@ktjlaw.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Lance C. Ziebell
Lance C. Ziebell
ARDC No. 6298037
Lavelle Law, Ltd.
Suite 600
1933 North Meacham Road
Schaumburg, Illinois 60173
Phone: (847) 705-7555
Email: lziebell@lavellelaw.com