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2018 WL 1382797 (Ill.) (Appellate Petition, Motion and Filing)
Supreme Court of Illinois.

Stacy ROSENBACH, as Mother and Next Friend of Alexander Rosenbach, individually and as the representative of a class of similarly situated persons, Petitioner/Plaintiff,
v.
SIX FLAGS ENTERTAINMENT CORP. and Great America LLC, Respondents/Defendants.

No. 123186.
March 1, 2018.

On Petition for Leave to Appeal from the Appellate Court of Illinois, Second District, No. 2-17-317, there on Appeal from the Circuit Court of Lake County, Illinois. No. 2016-CH-13, the Hon. Luis A. Berrones, Judge Presiding

Petition for Leave to Appeal of Plaintiff Stacy Rosenbach

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*1PRAYER FOR LEAVE TO APPEAL

This case presents an issue of statutory interpretation regarding the word "aggrieved." Without Plaintiffs knowledge or consent, Defendants scanned and stored her 14-year-old son Alexander's thumbprint when he entered the Great America theme park in Gurnee, IL. Section 15 (b) of the Biometric Privacy Information Act, 740 ILCS 14/1 et seq. ("BIPA"), forbids any private entity to collect biometric information, such as a thumbprint, unless it first makes certain, written disclosures (including "the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used"), and obtains a written release consenting to collection. 740 ILCS 14/15 (b). Because Defendants collected and stored Alexander's thumbprint without writings and without consent, Plaintiff filed this lawsuit under BIPA's private right of action, which permits "[a]ny person aggrieved by a violation of this Act" to bring an action in court for liquidated or actual damages and injunctive relief. 740 ILCS 14/20. There is no other means of enforcing BIPA.

Defendants moved to dismiss, arguing Plaintiff is not "aggrieved" without an allegation of economic injury or subsequent theft of Alexander's biometrics from Defendants' computer system. The trial court denied the motion but certified two questions for appeal pursuant to SupremeCourt Rule 308. Both questions ask whether a person is "aggrieved" under BIPA "when the only injury he or she alleges is a violation of section 15(b) of the *2 Act." Rosenbach v. Six Flags Entertainment Corp., 2017 IL App (2d) 170317, ¶ 15 (referencing 740 ILCS 14/15 (b)). In answering "no" to both questions, the Appellate Court ignored this Court's prior definition of "aggrieved."

In Glos v. People, 259 Ill. 332, 340 (1913), the Court defined the word "aggrieved" as follows: "A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment." See American Surety Co. v. Jones, 384 Ill. 222, 229-30 (1943) ("In Glos ... this Court defined the word 'aggrieved.'"). Applying Glos here, Plaintiff was aggrieved when Defendants invaded her (and Alexander's) right to written information and opportunity to decide whether to consent to Alexander's fingerprinting.

The Appellate Court did not follow or distinguish Glos. Instead, it held the violation of a legal right causes a person to be "aggrieved" only if it also causes "some actual harm." Rosenbach, 2017 IL App (2d) 170317, ¶ 1. Collecting and storing a 14-year-old's thumbprint, without his mother's informed, written consent, is a "mere technical violation" of BIPA,

insufficient without an allegation of "some actual harm." Id. at ¶¶ 1, 18. Even a claim for injunctive relief will require an allegation of "some actual harm." Id. The Appellate Court did not define "actual harm," but noted it "need not be pecuniary." Id. at ¶ 30.

BIPA is 10 years old, its legislative findings discuss the importance of these new rights for Illinois residents, and cases involving claims under BIPA ***3** are pending in state and federal trial courts in Illinois and elsewhere. In the wake of the Appellate Opinion, it is unclear whether an Illinois resident can enforce or protect her rights under BIPA. Plaintiff respectfully requests that the Court grant this petition and review and interpret this important consumer protection statute.

Alternatively, because the Appellate Court did not follow or distinguish (or mention) this Court's binding decisions in Glos v. People, 259 11*l*. 332 (1913) and American Surety Co. v. Jones, 384 Ill. 222 (1943), Plaintiff respectfully requests that the Court enter a supervisory order pursuant to Illinois Supreme Court Rule 383 instructing the Appellate Court to reverse and reconsider its opinion in light of those decisions.

DATES RELEVANT TO THE TIMELINESS OF THIS PETITION

The Appellate Court filed its opinion on December 21, 2017. On January 24, 2018, this Court granted Plaintiffs request for an extension of time, extending from January 25, 2018, to March 1, 2018, the due date for this petition. Ill. S. Ct. Rule 315(b); Order dated January 24, 2018.

STATEMENT OF THE POINTS RELIED UPON FOR REVERSAL

Glos v. People, 259 Ill. 332, 340 (1913), defines the term "aggrieved" as follows: "A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment. ***'Aggrieved' means having a substantial grievance; a denial of some personal or property right." See also American Surety Co. v. Jones, 384 Ill. 222, 229-30 (1943) (applying Glos); ***4**In re Estate of Harmston, 10 Ill. App. 3d 882, 885 (3d Dist. 1973) ("'Aggrieved' means having a substantial grievance; a denial of some personal or property right."); Greeling v. Abendroth, 351 111. App. 3d 658, 662 (4th Dist. 2004) ("the plaintiff must suffer from an infringement or denial of legal rights").

BIPA prohibits the collection of biometrics without prior informed and written consent. 740 ILCS 14/15 (b) ("No private entity may collect... unless it first ..."). Plaintiff is an "aggrieved" person under Glos and American Surety because Defendants deprived Plaintiff of her rights to receive information and decide whether to consent to Alexander's fingerprinting.

BIPA comprehensively regulates the collection, storage, use, retention, and destruction of biometrics. In BIPA's "legislative findings," the General Assembly noted public fear in the "use of biometrics," and that "many members of the public are deterred from partaking in biometric identifier-facilitated transactions," explained that "the full ramifications of biometric technology are not fully known," and therefore decided that "the public. welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5. Defendants disregarded BIPA and infringed Plaintiffs right to maintain Alexander's biometric privacy by collecting it without prior, informed consent. This is the precise harm the General Assembly sought to prevent.

***5** The Appellate Opinion holds that a person cannot be "aggrieved" by "a mere technical violation of the Act" and "must allege some actual harm." Rosenbach, 2017 IL App (2d) 170317, ¶ 1. Nothing in BIPA suggests any of Section 15's requirements are "merely technical." And, respectfully, the Appellate Court is not permitted to substitute its judgment for the legislature's to decide some statutory requirements are significant and others are not. See, e.g., Illinois Dept. of Healthcare and Family Servs. ex rel. Wiszowaty v. Wiszowaty, 239 Ill 2d 483, 489-90 (Ill. 2011) ("We do not know of any power existing in a court of equity to dispense with the plain requirements of a statute.... When a statute has prescribed a plain rule, free from doubt and ambiguity, it is as well usurpation in a court of equity as in a court of law, to adjudge against it; and for a court of equity to relieve against its provisions, is the same as to repeal it."), quoting First Federal Savings & Loan Ass'n of Chicago v. Walker, 91 Ill. 2d 218, 227 (Ill. 1982) and Stone v. Gardner, 20 Ill 304, 309 (Ill. 1858); Belfield v. Coop, 8 Ill.

2d 293, 307 (Ill. 1956) ("The only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning.").

Depriving a person of information required by statute causes injury. See, e.g., FEC v. Akins, 524 U.S. 11, 21 (1998) ("... a plaintiff suffers an ***6** ' injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"). Depriving a person of the right to refuse to execute a written release causes injury. See, e.g., 405 ILCS 5/2-102 (a-5) (physician must "advise the recipient, in writing, of the side effects, risks, and benefits of the treatment, as well as alternatives to the proposed treatment" and requires informed consent); In re Beverly B., 2017 IL App (2d) 160327, ¶ 32 (discussing informed consent); Fiala v. Bickford Sr. Living Group, LLC, 2015 IL App (2d) 150067 (claim for medical battery requires "lack of consent to the procedure performed, that the treatment was contrary to the patient's will, or that the treatment was at substantial variance with the consent granted").

Statutes offering the greater of statutory damage or actual damage do not require proof of actual damage and can be understood "at least in part, [as] an incentive for private parties to enforce the statute." Standard Mut. Ins. Co. v. Lay, 2013 IL 114617, ¶ 32.

STATEMENT OF FACTS

I. The Biometric Privacy Information Act ("BIPA").

***7** BIPA became law in 2008. 740 ILCS 14/1. It restricts the collection and retention of "biometric identifiers" (such as finger and retina scans) and "biometric information" (information based on a biometric identifier used to identify an individual) (collectively, "biometrics"). The Personal Information Protection Act, 815 ILCS 530/1 et seq. ("PIPA"), enacted two years earlier in 2006, already provided relief in the event of a biometric data breach,[1] and BIPA was intended to fill gaps in existing law. E.g., 740 ILCS 14/5 (e) ("Despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions.")

The General Assembly enacted BIPA to protect consumer biometrics through disclosure, consent, retention, and destruction requirements and private enforcement. BIPA reflects stated legislative concern that consumers must be able to make informed choices before permitting their biometrics to be captured, and the uncertain ramifications when they do, particularly in the context of "streamlined" "security screenings" using "finger-scan technologies"; precisely the circumstances at bar. 740 ILCS 14/5. BIPA defines a "fingerprint" as a "[b]iometric identifier." 740 ILCS 14/10.

The General Assembly's "legislative findings; intent" provide as follows

(a) The use of biometrics is growing in the business and security screening sectors and appears to promise streamlined financial transactions and security screenings.

(b) Major national corporations have selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.

***8** (c) Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions.

(d) An overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information.

(e) Despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions.

(f) The full ramifications of biometric technology are not fully known.

(g) The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.

740 ILCS 14/5.

Because personal biometric information is immutable, BIPA recognizes that the danger of identity theft using biometrics is much greater than with other, mutable, personal information. 740 ILCS 14/5 (c) ("For example, social security numbers, when compromised, can be changed.") If Alexander's thumbprint biometrics are stolen - something which may never come to light (see 740 ILCS 14/5 (f) - he cannot change them and would forever be unable to use them safely to identity himself. Id.

BIPA establishes five distinct requirements for private entities collecting biometrics from Illinois residents as follows:

***9** § 15. Retention; collection; disclosure; destruction.

(a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

(c) No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

(d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:

***10** (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

(2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or

(4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

(e) A private entity in possession of a biometric identifier or biometric information shall:

(1) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and

(2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

740 ILCS 14/15 (subsection (b) in bold).

Each of Section 15's requirements is enforceable only through the private right of action contained in Section 20:

§ 20. Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:

(1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;

***11** (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;

(3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

(4) other relief, including an injunction, as the State or federal court may deem appropriate.

740 ILCS 14/20.

II. Defendants collected and stored Alexander's thumbprint without prior notice or consent.

Defendants operate the Great America amusement park in Gurnee, IL. (C. 005-21, ¶ 16). In advance of her 14-year-old son Alexander's trip to Great America, Plaintiff purchased him a season pass on Defendants' website that he would retrieve during his next visit to the park. Id., ¶¶ 19-21.

In 2014, Alexander traveled to Great America on a school trip. Id., ¶ 19. There, Defendants scanned and stored Alexander's thumbprint biometrics without first: (1) informing Plaintiff or Alexander in writing that his fingerprint would be collected or stored; (2) informing Plaintiff or Alexander in writing of the specific purposes for which Defendants were collecting his fingerprint or how long they would keep it; and (3) obtaining a written release from Plaintiff or Alexander authorizing the collection. Id., ¶¶ 21-28; 740 ILCS 14/15(b).

Defendants collected and retained Alexander's biometrics as part of a nationwide customer biometrics roll-out at Six Flags theme parks across the ***12** United States, including at Great America beginning in 2014, instituted to enhance Defendants' revenue and reduce their costs. Id., ¶¶ 2-3, 31-32.

Defendants collected and stored Alexander's biometrics without satisfying any of BIPA's requirements. C. 005-021, ¶¶ 17-30.

III. Proceedings below

Plaintiff filed her Complaint on January 7, 2016, seeking liquidated damages and injunctive relief. Plaintiffs Amended

Complaint, dated April 22, 2016, is the operative pleading. C005-21.

Defendants moved to dismiss. The Circuit Court denied the motion on June 17, 2016. C004: C124-25. The court held:

I read the statute as a whole, and especially with respect to the legislative findings and intent of the statute, and reconciling that with Section 20. I think an aggrieved party under this statute is defined as by the 10th edition of Black's or the common meaning in every American College Dictionary, and that is somebody who has suffered some injury to a right. I don't think it is dependent upon any actual damages, and especially, I think that's supported by the fact that Section 20 gives you the option of getting liquidated damages or actual damages, whichever is greater.

I think that they, for purposes of a 2-615 motion, and I guess for purposes of the whole case.... I think an aggrieved party is somebody who has had a violation of the statute that is directed at them and violates their right. They have a right to have certain disclosures and they're an aggrieved party. [Id.]

The court further explained that one is "actually damaged" "due to violation of the statute." C109. "[I]f there is a statute made to protect me and somebody violates it, it may be a penny. I mean, you have to put a value. It's difficult to value, but there is actual damage." Id.

***13** Thereafter, Defendants moved to **appeal** pursuant to **SupremeCourt** Rule 308. (C 085). The Circuit Court denied the motion, but later granted Defendants' motion to reconsider. (C 359; C001). The court's April 7, 2017 order on reconsideration certified two questions of law for appeal:

Question 1: Whether an individual is an aggrieved person under § 20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek statutory liquidated damages authorized under § 20(1) of the Act when the only injury he alleges is a violation of § 15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by § 15(b) of the Act.

Question 2: Whether an individual is an aggrieved person under § 20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek injunctive relief authorized under § 20(4) of the Act, when the only injury he alleges is a violation of § 15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by § 15(b) of the Act. [C002-03]

On June 7, 2017, the Appellate Court granted Defendants' application to appeal these certified questions.

After briefing and argument, the Appellate Court issued its opinion answering the certified questions in the negative. 2017 IL App (2d) 170317. In pertinent part, the Appellate Opinion explains:

[I]f the Illinois legislature intended to allow for a private cause of action for every technical violation of the Act, it could have omitted the word "aggrieved" and stated that every violation was actionable. A determination that a technical violation of the statute is actionable would render the word "aggrieved" superfluous. Therefore, a plaintiff who alleges only a technical violation of the statute without alleging some injury or adverse effect is not an aggrieved person under section 20 of the Act.

***14** Id. at ¶ 23 (emphasis in original). The opinion also states, "Plaintiff did not allege in her complaint any harm or injury to a privacy right." Id. at ¶ 20, n.l. The Appellate Court did not explain the parameters of "only a technical violation," but noted "the injury or adverse effect need not be pecuniary." Id. at ¶ 30.

ARGUMENT

BIPA creates a cause of action that may be brought by "[a]ny person aggrieved by a violation of this Act." 740 ILCS 14/20 (emphasis added). In Glos v. People, 259 Ill. 332, 340 (1913), this Court defined the term "aggrieved" as "A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of...." Ignoring Glos and its

progeny, the Appellate Court held the phrase "aggrieved by a violation of this Act" requires an allegation of "some actual harm," not just the allegation of a "mere technical violation" of BIPA. Rosenbach, 2017 IL App (2d) 170317, ¶¶ 1, 17. Nothing in BIPA or Illinois law supports that conclusion.

I. The meaning of "aggrieved" was established in this Court's prior precedent and compels the conclusion that the denial or impairment of any right created by BIPA - including the right to receive written information about the purpose and length of term for which biometrics are being collected and the right to decline to sign a written release tendered by the collector - causes a person to be "aggrieved."

Before Defendants could collect Alexander's thumbprint biometrics, BIPA required them to provide particular written information about "the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used" (***15**740 ILCS 14/15 (b) (2)) and give Plaintiff an opportunity to decline to execute "a written release" (740 ILCS 14/15 (b) (3)).

Long ago, this Court held that a person is "aggrieved" when his legal right is invaded or denied; nothing more is required to make one "aggrieved." Glos, 259 Ill. at 340 ("A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of .... 'Aggrieved' means having a substantial grievance; a denial of some personal or property right.") See also American Surety, 384 Ill. at 229-30 (applying Glos); Harmston, 10 Ill. App. 3d at 885 ("'Aggrieved' means having a substantial grievance; a denial of some personal or property right."); Greeling, 351 Ill. App. 3d at 662 ("Like any other plaintiff in a 'civil action,' the plaintiff must be "aggrieved" (citation omitted), that is, the plaintiff must 'suffer[] from an infringement or denial of legal rights'").

Like Glos, Black's Law Dictionary defines an "aggrieved party" as, "A party entitled to a remedy; esp:, a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." BLACK'S LAW DICTIONARY (10th ed. 2014). An "aggrieved party" is one who is entitled to a remedy, not exclusively one who suffers loss. The definition includes an adverse effect on one's "personal ... rights" as a basis to be an "aggrieved party." It does not require an adverse effect in addition to injury to or deprivation of one's legal rights.

***16** Glos confronted the issue of whether a non-party to a foreclosure action could challenge the result. This Court held that only an "aggrieved person" could bring such an action and proceeded to analyze and define the meaning of an "aggrieved person." 259 Ill. at 339-40. Later, in American Surety, this Court discussed Glos as having interpreted and defined the term "aggrieved" in Illinois. 384 Ill. 229-30. American Surety involved the interpretation of the Illinois Insurance Code; specifically, which insurers could challenge a ruling by the Director. Id., generally. Like BIPA, the Insurance Code "gives the right of review to any company or person aggrieved by the order or decision of the Director." The Court cited and applied Glos.

Glos and American Surety were Illinois law when the General Assembly drafted the BIPA. "The legislature is presumed to have been aware of" the definition. Benhart v. Rockford Park Dist., 218 Ill. App. 3d 554, 558 (2d Dist. 1991), citing Kozak v. Retirement Bd. Of Firemen's Annuity and Ben. Fund of Chicago, 95 Ill. 2d 211, 218 (Ill. 1983) ("We must presume that in adopting that amendment the legislature was aware of judicial decisions concerning prior and existing law and legislation").

Applying Glos here, Plaintiff was aggrieved when Defendants invaded her (and Alexander's) right to written information and opportunity to decide whether to consent to Alexander's fingerprinting. The Appellate Opinion does not follow or distinguish Glos or American Surety, or mention them.

***17** Courts have consistently held that a person is injured when he is deprived of information required by statute. See, e.g., FEC v. Akins, 524 U.S. 11, 21 (1998) ("... a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) ("common law and the literal understanding of privacy encompass the

individual's control of information concerning his or her person"). "[P]rivacy torts do not always require additional consequences to be actionable." Eichenberger v. ESPN, Inc., 876 F. 3d 979, 983 (9th Cir. 2017). See Mount v. PulsePoint, Inc., 684 F. App'x 32, 34 (2d Cir. 2017), as amended May 3, 2017 (unauthorized access to and monitoring of web-browsing is concrete injury).

Likewise, depriving a person of the right to refuse to execute a written release causes injury. See, e.g., 405 ILCS 5/2-102(a-5) (physician must "advise the recipient, in writing, of the side effects, risks, and benefits of the treatment, as well as alternatives to the proposed treatment" and requires informed consent); In re Beverly B., 2017 IL App (2d) 160327, ¶ 32 (discussing informed consent); Fiala v. Bickford Sr. Living Group, LLC, 2015 IL App (2d) 150067 (claim for medical battery requires "lack of consent to the procedure performed, that the treatment was contrary to the patient's will, or that the treatment was at substantial variance with the consent granted").

***18 II. Technical or not, Defendants' violations of BIPA are actionable under BIPA.**

The Appellate Court stated, "A determination that a technical violation of the statute is actionable would render the word 'aggrieved' superfluous." Rosenbach v. Six Flags Entertainment Corp., 2017 IL App (2d) 170317, ¶ 23. Nothing in BIPA supports the conclusion that some violations are material and others merely technical. The legislature intended that all of BIPA's requirements would be followed and enforced.

***19** Courts are not permitted to substitute their judgment for the legislature's in interpreting a statute's requirements.[2] BIPA comprehensively regulates the collection, storage, use, retention, and destruction of personal biometric information. The General Assembly explained why it enacted BIPA in its "legislative findings" section, identifying public fear of the "use of biometrics," and that "many members of the public are deterred from partaking in biometric identifier-facilitated transactions," explaining that "the full ramifications of biometric technology are not fully known," and concluding "the public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5.

Defendants disregarded BIPA and infringed Plaintiffs right to maintain Alexander's biometric privacy by collecting it without her prior, informed consent. Section 15 (b)'s information and consent requirements are essential, material requirements, not superfluous technicalities. This is the precise harm the General Assembly sought to prevent.

If the General Assembly intended BIPA to prohibit only the disclosure or dissemination of biometrics after collection, BIPA would not regulate their collection in the first place. Interpreting "aggrieved" to require an allegation of harm or injury in addition to the violation of rights BIPA created will undermine the Act's enforcement. The General Assembly could not have intended such an absurd result. See Home Star Bank & Fin. Serve v. Emerg. Care & Health Org., Ltd., 2014 IL 115526, ¶ 24 ("we presume that the legislature did not intend absurd, inconvenient, or unjust consequences").

BIPA is enforceable only through its private right of action. 740 ILCS 14/20. Statutory liquidated damages and injunctive relief are recoverable for the violation of any of BIPAs provisions. Id. Section 15 of BIPA has 5 distinct subparts, each defining and protecting the rights of Illinois residents who might permit the collection of their biometrics, and establishing the duties ***20** and responsibilities of, and restrictions on, the private entities that collect or possess such information. 740 ILCS 14/15. A private entity could violate all of the sections without causing additional, separately identifiable injury or damage.

III. "Aggrieved" identifies who may file suit - only a person whose rights were adversely affected by the violation - rather than limiting the right of action to only some persons whose rights are impaired or denied.

The word "aggrieved" identifies who can bring suit: "[a]ny person aggrieved by a violation of this Act." 740 ILCS 14/20. Only the victim of a BIPA violation can bring suit. A whistleblower employee of a private entity collecting or possessing

biometric information in violation of BIPA cannot; an interested stranger cannot; and the Attorney General of the State of Illinois cannot.

Other Illinois statutes use the word "aggrieved" to denote an invasion of a legal right and a concomitant right to a remedy without requiring proof of actual or pecuniary loss. The Uniform Commercial Code defines an "aggrieved party" to mean "a party entitled to pursue a remedy." 810 ILCS 5/1-201(b). In the chapter on leases, the UCC provides: "Anticipatory repudiation. If either party repudiates a lease contract with respect to a performance not yet due ... the aggrieved party may suspend performance." 810 ILCS. 5/2A-402(c) (emphasis added). Thus, a party can be aggrieved even before suffering damage.

***21** Similarly, the mortgage release statute states, "If any mortgagee or trustee, in a deed in the nature of a mortgage ... knowing the same to be paid, shall not, within one month after the payment of the debt secured ... comply with the requirements of Section 2 of this Act, he shall, for every such offense, be liable for and pay to the party aggrieved the sum of $200." 765 ILCS. 905/4 (emphasis added). These are situations where the right to a legal remedy is completely independent of whether the "aggrieved party" has yet suffered any adverse effect other than the violation of rights.

IV. The Appellate Court erred by adding an element - "and who alleges some actual harm" - to BIPA's cause of action for "any person aggrieved by a violation of this Act."

The denial of a right created by BIPA - such as the right to refuse to execute a written release permitting the collection of biometrics - is the only adverse effect necessary to render a "person aggrieved by a violation of this Act." The Appellate Opinion erroneously requires that some other "adverse effect" or "actual harm" must be alleged. 2017 IL App (2d) 170317, ¶ 21.

The General Assembly considered "actual damages" and expressly permitted the recovery of liquidated damages in their alternative. 740 ILCS 14/20 (1) ("liquidated damages of $1,000 or actual damages, whichever is greater"); see also C124. Like other statutes, BIPA creates a right to recover statutory liquidated damages "at least in part, [as] an incentive for private parties to enforce the statute." Standard Mut., 2013 IL 114617 at ¶ 32. Allowing persons whose biometrics are collected in violation of BIPA to sue ***22** for liquidated damages or injunctive relief does not ignore the requirement that a plaintiff must be "aggrieved" before filing suit.

The General Assembly recognized the difficulty in quantifying the damage that necessarily results when BIPA rights are violated - What is the dollar value of taking 14-year-old Alexander's thumbprint biometrics without his mother's written permission? - and set the recoverable liquidated damages at $1,000. If it intended to limit the cause of action to actual damages, it would have said so. See, e.g., Lay, 2013 IL 114617, ¶¶ 31-32. Statutes are construed as written. E.g., Ehredt v. Forest Hospital, Inc., 142 Ill. App. 3d 1009, 1012 (1st Dist. 1986) ("statutory language must be given its plain and ordinary meaning and a court is prohibited from restricting or enlarging the plain meaning of an unambiguous statute"). If a stricter standard were intended, the General Assembly would have included one; absent a stricter standard written into the statute, the court must follow the plain, ordinary meaning of the statutory language. Id.

When the General Assembly wishes to confine a right of recovery to persons who suffer actual damage, it knows how to do so. See, e.g., 815 ILCS 505/10a ("Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person."); 215 ILCS 155/25 ("actual damages"); 740 ILCS 120/3 ("actual damages"); 815 ILCS 305/30 (requiring "actual damages" and permitting ***23** statutory damages only "in addition to" such actual damages); 765 ILCS 910/9 ("actual damages").

The Appellate Opinion makes BIPA redundant of PIPA, 815 ILCS 530/1, which provides remedies for actual damages suffered through data theft.

V. The Appellate Opinion makes even injunctive relief dependent upon an allegation of "some actual harm."

BIPA empowers an aggrieved person to seek injunctive relief. 740 ILCS 14/20 (4). According to the Appellate Opinion, however, if a person does not "allege some actual harm," and "the only injury he or she alleges is a violation of section 15(b) of the Act," she cannot even maintain a BIPA cause of action seeking only injunctive relief. Rosenbach, 2017 IL App (2d) 170317, ¶¶ 1, 17, 28. Injunctive relief is sought to prevent harm, not to remedy it. Kanter & Eisenberg v. Madison Assocs., 116 Ill. 2d 506, 512-13 1987) (injunctive relief "available only to prevent irreparable harm"). Nothing indicates the legislature intended such an inverse, remedy-defeating result. The Appellate Opinion's impact on injunctive relief demonstrates the need for this Court to address the erroneous application of the term "aggrieved" in this case.

VI. The Appellate Opinion has broad and profound implications.

The Appellate Court's determination that violations of section 15 (b) of BIPA are technical and carry no consequence without more "actual harm," negates BIPA's statutory language and intent. The opinion shifts the burden ***24** from the regulated entity to comply with the law and prove its compliance, to the statutory beneficiary who must now allege specific harm from illegal collection or unknown misuse of their biometric data. Of additional importance, the Appellate Opinion affects other statutes that include the phrase "any person aggrieved" or "aggrieved person" in their right to action provision, since the opinion departs from established jurisprudence and engrafts requirements not included or contemplated by the legislature.

CONCLUSION

Plaintiff respectfully submits that the Appellate Court's decision is incompatible with BIPA's plain language, it fails to apply definitions supplied by this Court's binding precedent, and it improperly restricts an important, new Illinois consumer protection statute. Plaintiff alleges that Defendants violated Alexander's rights by collecting his thumbprint biometrics without the written, informed consent BIPA requires. That allegation is sufficient to support a claim for monetary or injunctive relief under BIPA. Plaintiff respectfully requests that the Court grant this petition, reverse the Appellate Court's decision, and answer the certified questions in the affirmative.

In the alternative, because the Appellate Court did not follow or distinguish this Court's binding decisions in Glos v. People, 259 Ill. 332 (1913) and American Surety Co. v. Jones, 384 Ill. 222 (1943), Plaintiff respectfully requests that the Court enter a supervisory order pursuant to Illinois Supreme Court Rule 383 instructing the Appellate Court to vacate and reconsider its opinion in light of those decisions.

Footnotes

[1] Violations of PIPA are actionable under the Consumer Fraud and Deceptive Practices Act, 815 ILCS 530/20, and a 2016 amendment, P.A. 99-503, effective January 1, 2017, covers biometric data breaches. Sec. 530/5(1)(F).

[2] See, e.g., Illinois Dept. of Healthcare and Family Servs. ex rel. Wiszowaty v. Wiszowaty, 239 Ill. 2d 483, 489-90 (Ill. 2011) ("We do not know of any power existing in a court of equity to dispense with the plain requirements of a statute; it has been always disclaimed, and the real or supposed hardship of no case can justify a court in so doing. When a statute has prescribed a plain rule, free from doubt and ambiguity, it is as well usurpation in a court of equity as in a court of law, to adjudge against it; and for a court of equity to relieve against its provisions, is the same as to repeal it."), quoting First Federal Savings & Loan Ass'n of Chicago v. Walker, 91 111. 2d 218, 227 (Ill. 1982) and Stone v. Gardner, 20 Ill. 304, 309 (Ill. 1858); Belfield v. Coop, 8 Ill. 2d 293, 307(Ill. 1956) ("The only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by

the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning.”).

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2011 WL 10723942 (Ill.) (Appellate Petition, Motion and Filing)
Supreme Court of Illinois.

Eileen JACKSON, Respondent-Appellant,
v.
BOARD OF ELECTIONS COMMISSIONERS OF THE CITY OF CHICAGO, et al., Petitioners-Appellees.

No. 11-1928.
March 11, 2011.

On Petition for Leave to Appeal from the Appelllate Court of Illinois for the First Judicial District, Fourth Division
Appellate Court No. 11-0361
There Heard on Appeal from the Circuit Court of Cook County County Department, County Division,
No. 2011 COEL 18
Honorable Maureen Ward Kirby, Judge Presiding.

Petition for Leave to Appeal of Carmelita Earls

Randy Crumpton, 200 S. Michigan Ave., Suite 1240, Chicago, Illinois 60604, 312-435-1102, Attorney for Carmelita Earls.

***2 PRAYER FOR LEAVE TO APPEAL**

Pursuant to Supreme Court Rule 315, petitioner Carmelita Earls ("Earls" or "Candidate") respectfully prays that this Court grant it leave to appeal from the judgment of the Appellate Court of Illinois, First District, Fourth Division.

JURISDICTION

The Appellate Court issued its opinion, which is found in the attached Appendix ("App."), on February 18, 2011. No petition for rehearing was filed.

STATEMENT OF FACTS

Carmelita P. Earls filed her nomination papers to have name placed on the ballot as Candidate for Alderman for the 28th Ward. C 105-171. The Objector filed an objector's petition against the nomination papers of the Candidate. C 27-96. The petition alleged that the candidate was not qualified to appear on the ballot as she was in arrears in debt due the City of Chicago ("City") "including but not limited to unpaid property taxes through a fraudulently obtained homeowners exemptions for County of Cook, State of Illinois". C 30.

At a hearing before Hearing Officer William Cadigan of the Chicago Board of Elections, the Objector argued her case, which was primarily the presentation of public records. C 615-675. Various documents were introduced into evidence. (Objectors Exhibits 1-11). C 615-675. The Candidate testified at the hearing when shown 3 exhibits indicating that a home exemption had been taken on three properties owned by she and her husband that she had not signed either document and that she was unaware that the exemptions had been taken, including the one for her current home. C 637-638. She also indicated that her husband handles the properties. C 637-638. Objector's Exhibit 5 shows that on December 6, 2010, a letter was sent to the ***3** Candidate and her husband from the Cook County Assessor's Office stating that, "it has come to this Office and Alderman [Ed] Smith's attention that you have received Homeowner type Exemptions on multiple properties". C 460-461. December 6, 2010, was several weeks after the end of the filing period. Further, Candidate's Exhibit 1, which is dated November 17, 2010, a City of Chicago, Department of Revenue Indebtedness Statement, signed by Christine M. Haynes, Indebtedness Check Unit for the City of Chicago, Department of Revenue, Accounts Receivable Division, states:

"The Department of Revenue performed a thorough indebtedness investigation at the request of the individual referenced above on the date indicated for outstanding debt owed to the City of Chicago.

Please accept this as confirmation that no outstanding debt was found across any of the debt types, Parking, Water, Administrative Hearings, Inspection Fees, Cost Recovery and Tax/Licensing." C 437.

On December 24, 2010, the Hearing Officer for the Chicago Board of Elections properly ruled that Earls, a candidate for Alderman of the 28th ward of the city of Chicago for the General Municipal Election to be held on February 22, 2011, was not indebted to the city of Chicago and eligible to be a candidate for said office. The Hearing Officer stated, "the Objector simply has not demonstrated that the payments the Candidate purportedly owed and indeed paid are of the type contemplated under the Illinois Municipal Code that should bar Candidate from being eligible for seeking municipal office...the Objector provides no direct authority for the proposition that a debt purportedly owed to Cook County would bar a candidate from office in the city of Chicago." C 526-531.

On January 11, 2011, the Chicago Electoral Board found "the only evidence of indebtedness presented was regarding an amount owed to the Cook County Assessor...that the ***4** Hearing Officer correctly concluded that the Cinkus case provides no support for the conclusion that a debt purportedly owed to Cook County would bar a candidate from seeking office in the city of Chicago." C 533-53.9. On January 27, 2011, the Circuit Court of Cook County affirmed the decision of the Chicago Electoral Board. C 709.

On February 18, 2011, Illinois Appellate Court reversed the Hearing Officer, the Chicago Electoral Board and Circuit Court of Cook County and that Earls was ineligible to be a candidate due to owning "a portion of property taxes due to the city of Chicago; therefore arrearages on property taxes are also arrearage on taxes to the city, and a person in arrears in property taxes in not eligible to run for elective municipal office under section 3.1-10-5(b) of the Illinois Municipal Code." App. 16.

POINTS RELIED UPON FOR REVERSAL

This Court should review this case since as a result of the decision by the First District, there are far-reaching consequences with respect to the Court's decision in Cinkus v. Village of Stickney Officers Electoral Board, 228 I11.2d 200 (2008) and a person access to the ballot.

More specifically, the First District's opinion should be reviewed and reversed for the following independent reasons:

1. In deciding that a property tax debt is a debt owed to the municipality, the Illinois Appellate Court is expanding the plain language of the statute to include county. The property taxes billed to Earls on December 6, 2010 and subsequently paid by Earls was not a debt to the city of Chicago but to the county of Cook, and does not fall within the restraints of section 3.1-10-5(b) of the Illinois Municipal Code.

2. Even assuming the debt was a debt owed to the city of Chicago by the Candidate ***5** and not the county of Cook, it did not become due until December 6, 2010, after the filing period ended for nomination papers to run for an office in the General Municipal Election held February 22, 2011, which was November 22, 2010.

3. Whether the Candidate allegedly committed some type of error in receiving a Homeowner's Exemption she was not entitled to, is beyond the scope of the Board of Elections authority. See, *Delgado v. Board of Election Commissioners of City of Chicago,* 224111.2d 481 (2007). In Delgado, the court states, "under section 10-10 of the Election Code, 10 ILCS 5/10-10 (West 2004), an election board's scope of inquiry with respect to objections to nomination papers is limited to ascertaining whether those papers comply with the provisions of the Election Code governing such papers. *Id.* At the time the Candidate filed her nomination papers including her Statement of Candidacy she was not indebted to the city of Chicago.

4. In this instance, the public's interest to ballot access far exceeds the state's interest in ensuring a candidate is debt free to the municipality in which they seek to run for elective office when issue of the debt is de minim us.

5. Although, the General Municipal Election of February 22, 2011 has occurred, the city of Chicago is still scheduled to have run-off elections for at least 14 various wards throughout the city on April 5, 2011, and in the alternative this case is an exception to the mootness doctrine in that it involves a substantial public interest.

ARGUMENT

1. The Opinion Below Expands The Language Of Section 3.1-10-5(b) Of The Illinois Municipal Code.

The Illinois Municipal Code provides in relevant part that "[a] person is not ***6** eligible for an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality..." 65 ILCS 5/3.1-10-5(b). In this case, the Appellate Court's ruling below stretches this Court's decision in the Cinkus case far beyond its meaning. *Cinkus v. Village of Stickney Officers Electoral Board,* 228 I11.2d 200, 204 (2008), In fact, the Appellate Court's ruling expands the language of section 3.1-10-5(b) of the Illinois Municipal Code to include county. In this case, Cook County.

The debt is not a city debt. C 460-461. The letter sent to the Candidate on December 6, 2011, indicating that the Candidate and her husband may owe property taxes for "Homeowner type exemptions" is from the Cook County Assessor's Office and not the city of Chicago. C 460-461. The letter states, "payment must be made out to the Cook County Treasurer's Office". C 461. In the *Cinkus* case, there was a judgment entered by a court in favor of that municipality. *Id.* Although, the Appellate Court rejected the argument that the city of Chicago would not have standing in enforce a judgment in the case at bar. App. 14. The Appellate Court cites the Property Tax Code, 35 ILCS 200/20-155 and 160 (West 2010) as actions the city can take to enforce collection of property taxes from the county collector but nothing regarding any action that the city can take directly against the Candidate and her husband in the case at bar. App. 14. Further, evidence that in this instance, the debt is a debt to the county and not the city, and section 3.1-10-5(b) of the Illinois Municipal Code does not apply.

2. Assuming The Debt Was Owed To The City By The Candidate, It Did Not Become Due Until After December 6, 2011.

There was no debt prior December 6, 2010. If there was an issue with regards to the Candidate's Homeowners Exemption, then that is an issue that must be addressed by the Cook ***7** County Assessor, not the City of Chicago or the Chicago Board of Elections. Persons seeking to have their names placed on the ballot for the General Municipal Election which was held February 22, 2011, had until November 22, 2010 to file their nomination papers. Prior to November 22, 2011, Candidate Earls received a letter from the city indicating that city's search of its own records revealed no debt of the types listed in the letter. App. 15. The municipality would be in the best position to determine what is a debt to the municipality. The Candidate received the letter from the Cook County Assessor indicating a possible issue with her property taxes sometime after December 6, 2010.

3. The Issue Of Whether The Candidate Allegedly Committed Error In Receiving A Homeowner's Exemption She Was Not Entitled To, Is Beyond The Scope Of The Board Of Elections Authority.

Whether the Candidate allegedly committed some type of fraud in receiving a Homeowner's Exemption she was not entitled to, is beyond the scope of the Board of Elections authority. See, *Delgado v. Board of Election Commissioners of City of Chicago,* 224 Ill.2d 481 (2007). Further, the issue would be complicated because the taxes are paid to the Cook County Treasurer and not the City of Chicago, therefore, §3.1-10-5(b) would not apply in this in case. C 431-432. In Delgado, the court states, "under section 10-10 of the Election Code, 10 ILCS 5/10-10 (West 2004), an election board's scope of inquiry with respect to objections to nomination papers is limited to ascertaining whether those papers comply with the provisions of the Election Code governing such papers. *Id.*

Section 65 ILCS 5/3.1-10-5(b) and *Cinkus v. Village of Stickney Officers Electoral Board,* 228 I11.2d 200, 204 (2008), simply do not apply in the case at bar. As the Objector correctly, quotes Commissioner Cowen in another case that was before the Chicago Board ***8** Electoral Board, "We're not a court, so we can't decide whether Mr. Emmanuel owes a city tax, whether he has a defense to payment of the city tax, those are issues for a court, not for us." *Maksym vs Emanuel* 11 EB MUN 010, December 23, 2010 Transcript page 88. See Appellant's Brief, page 8.

The same would hold true that the electoral board does not have the authority to determine the many complicated issues that

this case presented. Such as, is a property tax owed to Cook County a city debt? Whether or not the Candidate improperly took an Homeowners Exemption? There are many more issues that this case present that are just beyond the scope of the Board's authority.

4. The Public's Interest To Ballot Access Far Exceeds The State's Interest In Ensuring A Candidate Is Debt Free To The Municipality.

In the case at bar, the public's interest to ballot access far exceeds the state's interest in ensuring a candidate is debt free to the municipality in which they seek to run for elective office when issue of the debt is de minim us. It is basic that the courts view the right of a citizen to hold political office as a valuable one. *McGuire v. Nogaj,* 146 Ill.App.3d 280 at 282 (1st Dist. 1986). The exercise of this right is not to be prohibited or curtailed by plain provision of the law. Id. Statutes imposing disqualification should be construed liberally, resolving all doubts in favor of a candidate's eligibility. *Id.*

The issues raised, the Appellate Court's cavalier dismissal of Supreme Court precedent, and the importance of the election in the life of the 28th ward of the City of Chicago and its people all combine to demonstrate why this Court should grant review of the Appellate Court decision. The Appellate Court decision disenfranchises not just this particular candidate ***9** but every voter in the 28th ward who would consider voting for her or who had already voted for her. Well-settled law does not countenance such a result decision certainly involves a question of such importance to the public's interest that it should be decided by the Supreme Court.

5. Although The General Municipal Election Was Held On February 22, 2011, There Are Run-Off Elections On April 5, 2011, And In The Alternative, This Case Is An Exception To The Mootness Doctrine.

Although, the General Municipal Election of February 22, 2011 has occurred, the city of Chicago is still scheduled to have run-off elections for at least 14 various wards throughout the city on April 5, 2011. The Court could order a special election between Candidate Earls and person who received the most votes in the February 22, 2011 election, if the Court was to reverse the lower court and determine that Candidate Earls' name should have been on the ballot.

In the alternative, even if this case is not heard by April 5, 2011, this case must still be heard by the Supreme Court as it is a case of first impression in the state and this case is an exception to the mootness doctrine in that it involves a substantial public interest. *Cinkus v. Village of Stickney Officers Electoral Board,* 228 Ill.2d 200, 204 (2008).

The criteria for application of the public interest exception are: (1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable to guide public officers; and (3) the question is like to recur. Id. The present case meets this test. This appeal raises a question of election law, which inherently is a matter public concern. The question of whether property taxes is debt to a municipality, in this instance the city of Chicago, and not the county is a question that is likely to recur. In addition, similar questions such when the debt was determined and to what extent does the electoral board has authority to determine if a municipal ***10** debt is owed by a candidate. Thus, an authoritative resolution of the issue is desirable to guide public officers.

CONCLUSION

This Court should grant the petition for leave to appeal.

Appendix not available.

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2012 WL 8262379 (Ill.) (Appellate Petition, Motion and Filing)
Supreme Court of Illinois.

In the Interest of A.P.& J.P., Minors. People of the State of Illinois, Petitioner-Petitioner,
v.
LISA P., Respondent-Respondent.

No. 113875.
February 22, 2012.

This Appeal Involves a Question of Child Custody, Adoption, Termination of Parental Rights, or Other Matter Affecting the Best Interests of a Child.
On Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District No. 3-11-0191
There on Appeal from the Circuit Court of the 10th Judicial Circuit Peoria County, Illinois, Nos. 10-JA-338 & 10-JA-339
The Honorable Mark Gilles, Judge Presiding.

Petition for Leave to Appeal

Lisa Madigan, Attorney General of Illinois, 100 West Randolph, 12th Floor, Chicago, Illinois 60601.

Patrick Delfino, Director, State's Attorneys, Appellate Prosecutor, Terry A. Mertel, Deputy Director, Judith Z. Kelly, Staff Attorney, State's Attorneys, Appellate Prosecutor, 628 Columbus Street, Suite 300, Ottawa, Illinois 61350, (815) 434-7010, Counsel for Petitioner-Petitioner the People of the State of Illinois.

Jerry Brady, State's Attorney, Peoria County Courthouse, Peoria, Illinois 61602, Of Counsel.

***1 PRAYER FOR LEAVE TO APPEAL**

Pursuant to **Supreme Court** Rule 315, the People of the State of Illinois respectfully petition for leave to appeal from the judgment of the Appellate Court, Third District, which reversed the circuit court's order finding A.P. and J.P. to be neglected minors.

The questions presented are ones of general importance because the appellate court failed to follow this Court's holding In re Arthur H., 212 Ill.2d 441, 467 (2004), that the issue in an adjudicatory hearing on a neglect petition is whether the minor was neglected, not whether the minor's parent was responsible for the neglect. The appellate court, in an opinion published January 20, 2012, reversed the trial judge's finding that J.P. and 21/2-year-old A.P. were neglected minors by reason of an injurious environment when A.P. sustained burns to his face while he was left unsupervised in a house with running bath water. Although the appellate court recited the language from Arthur H. 212 Ill.2d at 447, that the only question to be resolved at an adjudicatory hearing is whether the child is neglected and not whether a parent is neglectful (In re A.P. 2012 IL App (3d) 110191, ¶19), the appellate court did not apply it. Instead, the appellate court found that because "the respondent had no previous reason to suspect that her boyfriend would act neglectfully in caring for [the minors]... It is clear from the record that the respondent's failure to provide a safe environment for A.P. was unintentional and not wilful." In re A.P., ¶ 20. In so doing, the appellate court shifted its focus from A.P. to respondent at the adjudication stage. Rather than determine that A.P. was in a neglectful environment, the appellate court focused on whether respondent, when leaving her children in his boyfrien's care, had a reason to suspect that he would act neglectfully.

***2** The appellate court further erred in finding that the trial judge had abused his discretion in admitting records from the Pediatric Resource Center (PRC) into evidence as business records pursuant to 705 ILCS 405/2-18(4)(a). That statute provides that any writing or record of a hospital or public or private agency, made as a record of any condition relating to a minor in a neglect proceeding shall be admissible in evidence as proof of the condition if the document is made in the regular course of such business to make it, within a reasonable time after the occurrence. The appellate court found that the report made by the PRC doctor, who examined A.P. by referral from the Department of Children and Family Services (DCFS) and not as part of A.P.'s follow-up medical care and whose later-filed report incorporated the results of the DCFS investigation,

was not made in the regular course of business but was a document prepared in anticipation of litigation. *In re A.P.,* ¶16.

This Court should grant review of this case to clarify that the focus at a neglect adjudicatory hearing remains on whether the minor remains neglected, not on what respondent knew, and to clarify the scope of reports admissible as business records under the Juvenile Court Act.

STATEMENT REGARDING JUDGMENT AND REHEARING

The appellate court's Rule 23 Order was issued December 13, 2011. Respondent-mother filed a motion to publish on December 16, 2011, which was allowed January 20, 2012. No petition for rehearing was filed. This petition is being filed within 35 days from the allowance of the motion to publish, in accordance with Supreme Court Rule 315(b)(2).

***3 POINTS RELIED UPON IN SEEKING REVIEW**

I

In Reversing The Trial Judge's Finding That The Minors Were Neglected Due To An Injurious Environment, The Appellate Court Improperly Shifted Its Focus From The Minors To The Respondent, Thus Failing To Follow This Court's Holding In In Re Arthur H., 212 III.2d 441 (2004). II

II

Records And Reports Prepared By The Pediatric Resource Center Relating To A Minor In A Neglect Or Abuse Proceeding Are Admissible As Business Records Under 705 ILCS 405/2-18(4)(a).

STATEMENT OF FACTS

A.P., born XX/XX/2008, is the son of respondent-mother Lisa P. and Jeremy P., who was not a party to the appeal. The evidence in the instant case showed that 21/2-year-old A.P. received second degree burns to his face and head on August 17, 2010, from hot water in a bathtub while in the care of Chad McLee, respondent-mother's boyfriend. On November 23, 2010, a juvenile petition was filed in the instant case. The petition alleged that A.P. was an abused minor due to the infliction of physical injury, by other than accidental means, by McLee. (C. 1)[1] The petition further alleged that both A.P. and his sibling, J.P., were neglected minors by reason of an injurious environment because: (a) a physical injury was inflicted on A.P. by McLee; (b) A.P.'s face ***4** was burned with hot water causing second degree burns which could not have occurred absent abuse and/or neglect by McLee; and (c) McLee initially lied but then admitted he left the water running and left the minors unsupervised while he stepped outside to have a cigarette. (C. 1; C*. 1)

At the outset of the evidentiary hearing on the petition, the People introduced into evidence the certified records of OSF St. Francis Hospital in Peoria as People's Exhibit 1. (R. 18-19) The People also introduced into evidence People's Exhibit 2, the certified copy of the records from Pediatric Resource Center (PRC), the subject of an earlier motion in limine (C. 80), which was admitted into evidence over respondent's objection (R. 19, 23).

The testimony at the adjudicatory hearing showed that respondent-mother had left A.P. and J.P. with McLee while she went to a doctor's appointment. (R. 25) Respondent-mother and McLee did not live together. (R. 26) She telephoned McLee on her way back from her appointment to tell him she was approximately 10 minutes away from picking them up. (R. 25-26,34-35) McLee told her he was going to hop in the shower. (R. 35) Upon arriving at McLee's home, respondent observed the burn on A.P.'s face, which had occurred approximately 10 to 15 minutes earlier. She immediately took A.P. to the emergency room at St. Francis Hospital. (R. 25-26,34-35) Records admitted without objection from St. Francis Hospital disclosed that respondent told the St. Francis Hospital nurse that McLee had bathed the other children and was putting new water in the tub for A.P. when A.P. "ran into the bathroom to get a toy and slipped on the floor and fell head first into the tub." (People's Exhibit 1, tab A) A.P. was transferred to Springfield Memorial Hospital to be admitted to the burn ward. (People's Exhibit 1, tabs A, B) He was discharged from the ***5** burn unit the following day with Bacitracin and ointment,

received follow-up out-patient care, and healed well. (People's Exhibit 2, tab 4)

The DCFS notes, contained within People's Exhibit 2, indicated that three days after the injury, Chad McLee changed his story from having been in the bathroom when A.P. fell in the bathtub. He told investigators that he turned on the water to take a bath and went into another room to have a cigarette. Ultimately, he told police that he went outside to have a cigarette, as he thought the kids were in the basement. He acknowledged he did not see what had happened. (People's Exhibit 2, tab 3)

Finally, People's Exhibit 2 contained a report from Dr. Channing Petrak, a staff physician with the PRC. (People's Exhibit 2, tab 1) She spoke with respondent and performed a physical examination on A.P. two days after the injury, reviewed the medical records and investigative notes, and concluded the report with her impressions, including her opinion that A.P.'s burns were most consistent with inflicted burns due to child physical abuse. (People's Exhibit 2, tab 1) The respondent had preserved her objection to the admission of People's Exhibit 2, specifically Dr. Petrak's report. (C. 80; R. 19)

The trial judge disagreed with Dr. Petrak's opinion that the burns were most consistent with inflicted burns due to abuse. At the conclusion of the hearing, he found that the allegation of abuse was not proved. (R. 51) He found that, "...If not for Mr. McLee's inability to just come clean with what happened, I may have been able to say it was an accident. But... I don't believe that it is an accident that occurred without at least neglect... I think more likely than not he was neglectful in watching your children that day...." (R. 51-52) The trial judge noted that if her boyfriend were giving her children baths, he was a big ***6** part of their environment and that environment was injurious to their health. (R. 52-53) The minors were adjudicated neglected. (C. 119; C*. 118)

Following a dispositional hearing, the minors were not adjudicated wards of the court. Respondent-mother and the minors' father were found fit, named as guardians of the minors, and the case was closed. (C. 142)

Respondent-mother appealed, raising two issues. She contended that the trial judge's finding of neglect by reason of an injurious environment was against the manifest weight of the evidence, and that the trial judge erred in finding People's Exhibit 2, containing Dr. Petrak's letter, admissible in evidence as a business record pursuant to 705 ILCS 405/2-18(4)(a).

The Appellate Court, Third Judicial District, initially in a Rule 23 Order issued December 13, 2011, and subsequently in an opinion issued January 20, 2012, following respondent's motion to publish, agreed with both of respondent's contentions. The appellate court reversed the judgment of the Peoria County Circuit Court finding A.P. and J.P. to be neglected minors due to an injurious environment.

No petition for rehearing was filed. The People are filing this petition for leave to appeal within 35 days of the January 20, 2012, opinion issued herein.

*7 ARGUMENT

I

In Reversing The Trial Judge's Finding That The Minors Were Neglected Due To An Injurious Environment, The Appellate Court Improperly Shifted Its Focus From The Minors To The Respondent, Thus Failing To Follow This Court's Holding In *In Re Arthur H.,* 212 III.2d 441 (2004).

A.P. was a neglected minor on August 17, 2010, when he was in a household in which a caregiver left the bathroom, and indeed the house, while running bathwater. The caregiver thought the 21/2 -year-old minor was in another room of the house with the older minors. In fact, the 21/2-year-old minor went into the unattended bathroom and sustained burns from the bath water. The caregiver initially lied to respondent-mother and authorities, saying he had been in the bathroom when the minor came in and slipped while retrieving a toy, resulting in the burns. (People's Exhibit 1, tab A) Days later, he acknowledged to authorities that he was outside smoking a cigarette when the incident occurred. (People's Exhibit 2, tab 3)

The trial judge declined to find the child abused but did find that the minor, and his older sibling J.P., were neglected minors

by reason of an injurious environment. (R. 51) He did not believe the incident was an accident, rather that it had occurred because of neglect. He did not find that respondent was neglectful but noted that McLee, who had lied about what had happened, was obviously a big part of the minors' environment. (R. 51-52) Thus, the trial judge found the minors to be neglected by reason of an injurious environment, without finding respondent neglectful. The trial judge's ruling was not against ***8** the manifest weight of the evidence, and the appellate court erred in reversing that ruling.

The terms "neglect" and "injurious environment" have fluid meanings that vary with the facts and circumstances of a particular case. Thus, cases involving adjudication of neglect are suigeneris and each case must ultimately be decided on the basis of its own particular facts. *In re N.B.,* 191 III.2d 338, 346 (2000). Generally, neglect is considered to be the failure by responsible adults to exercise the care that circumstances demand; it encompasses both willful and unintentional disregard of duties. *In re Stilley,* 66 III.2d 515, 520 (1977).

The People must prove allegations of neglect by a preponderance of the evidence, meaning proof that the allegations are more probably true than not. *In re Arthur H.,* 212 III.2d at 464. When considering whether - finding of neglect is appropriate, the trial judge must consider only whether the minor is in fact neglected and not the parent's actions. *Id.* at 467. Thus, the definition of a minor neglected by reason of an injurious environment does not address the question of who may be responsible for such adverse conditions because, in the first instance, that question does not matter. *In re J.W.,* 386 Ill.App.3d 847, 852-53 (4th Dist. 2008). As the court in *J.W.* continued:

What matters initially is only whether the child is neglected because these conditions exist. After all, the Act's mandate is to protect children, not to assign blame to parents. If the State proves the neglect allegation, then causation - and remediation - can and should be addressed by the trial court at the dispositional hearing. [Id. at 853.]

In the instant case, at the dispositional hearing, respondent-mother and the minors' father were found to be fit parents, guardianship of the minors was retained in the parents, the minors were not adjudicated wards of the court, and the case was closed. (C. 142; R. 61)

***9** The minors were adjudicated neglected. Respondent-mother was not found to be a neglectful parent. The appellate court's reversal of the neglect adjudication, based on its finding that "the respondent had no previous reason to suspect that her boyfriend would act neglectfully in caring for [the minors]" *A.P.,* ¶20, erroneously shifted the focus of the adjudicatory hearing from the minor to the respondent-parent. This Court should grant leave to appeal and reverse the appellate court's holding in this regard.

***10 II**

Records And Reports Prepared By The Pediatric Resource Center Relating To A Minor In A Neglect Or Abuse Proceeding Are Admissible As Business Records Under 705 ILCS 405/2-18(4)(a).

Prior to the adjudicatory hearing, respondent-mother filed a motion in limine to bar admission into evidence of, inter alia, any letters or reports prepared by any physician employed by or associated with the Pediatric Resource Center of the University of Illinois College of Medicine at Peoria (PRC). (C. 80) Respondent contended such documents were records of a consulting physician prepared in anticipation of litigation and thus not admissible as business records pursuant to 705 ILCS 405/2-18. (C. 80-84) The People filed a response, asserting that once a proper foundation was established, the PRC records would be admissible pursuant to section 2-18(4)(a). (C. 105-08)

The matter was heard at the outset of the adjudicatory hearing. (R. 3-17) The trial judge took the matter under advisement, to be more fully considered in the context of the case. (R. 16-17) The People then moved for admission of all of their exhibits into evidence and the matter was adjourned until the afternoon. (R. 18-19, 21)

When the case resumed, the trial judge ruled that People's Exhibit 2 (PRC records) was admissible. (R. 23) The People then relied on the contents of People's Exhibit 2, including Dr. Petrak's opinion that the second degree burns were consistent with inflicted child physical abuse. (R. 37) Having allowed People's Exhibit 2 to be admitted into evidence, the trial judge

nonetheless rejected Dr. Petrak's opinion and found that the allegation of abuse was not proved. (R. 51)

***11** On appeal, respondent continued her objection to the admission of Dr. Petrak's opinion letter as a business record under section 2-18(4)(a). The appellate court agreed with respondent, finding that the PRC records, and Dr. Petrak's report, were not made in the regular course of a hospital or agency but rather "appear to have been prepared in anticipation of litigation." *In re A.P.,* 2012 IL App (3d) 110191, ¶ 16. The People submit the appellate court erred.

The People assert that Peoples Exhibit 2, and Dr. Petrak's letter in particular, was clearly admissible under section 2-18(4)(a) of the Juvenile Court Act.[2] Section 2-18(4)(a) states:

Any wrtng, record, photograph or x-ray of any hospital or public or private agency, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a minor in an abuse, neglect or dependency proceeding, shall be admissible in evidence as proof of that condition, act, transaction, occurrence or event, if the court finds that the document was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter... [705 ILCS 405/2-18(4)(a)]

The above provision permits certified records to be admitted at trial without the additional foundational requirements of the business records exception to the hearsay rule. *In re Yasmine P.,* 328 III.App.3d 1005, 1010 (3d Dist. 2002). Because the Juvenile Court Act specifically provides for the admission of business records into evidence, Supreme Court Rule 236 ***12** (providing for the admission of business records into evidence in civil cases) is not applicable in this matter. *In re A.B.,* 308 III.App.3d 227, 234-35 (2d Dist. 1999). In the instant case, People's Exhibit 2 was accompanied by a "certification and delegation of authority" certifying that the records produced pursuant to the subpoena decus tecum "were made in the regular course of business and that it was in the regular course of business to make such records." People's Exhibit 2, p. 2.

The PRC is a division of the University of Illinois College of Medicine at Peoria, in affiliation with the Children's Hospital of Illinois, and Dr. Petrak is a medical doctor on their staff. *See* People's Exhibit 2. The history of the development of Dr. Petrak's letter shows that it was not prepared in anticipation of litigation but that it was based primarily on her examination of A.P. and her conversation with respondent-mother two days after the injuries. The letter in question is a writing from a hospital, due to an event relating to a minor in a neglect or abuse case, and it was made in the regular course of business. Because of their inherent reliability and trustworthiness, diagnoses and opinions contained in medical records are admissible as a proper part of the business records exception to the hearsay rule. *Troyan v. Reyes,* 367 II.App.3d 729, 734 (3d Dist. 2006). Dr. Petrak's report was proper and admissible, as it contained her medical opinion based on her physical examination of A.P., information relayed to her about A.P., and A.P.'s medical records. *See In re R.R.,* 409 Ill.App.3d 1041, 1046 (3d Dist. 2011). It is reasonable for a medical professional to rely on information supplied by the patient or someone with an interest in the patient's well-being. A medical expert's opinion as to the cause of injury that is based on his or her ***13** examination of the patient and the medical history relayed by the patient is proper and admissible. *See In re R.R.,* 409 III.App.3d at 1045-46.

The People acknowledge that in *In re J.Y.,* 2011 IL pp (3d) 100727, ¶14, the Appellate Court, Third District, recently held that Dr. Petrak's letter was improperly admitted as a business record because the People did not satisfy certain foundational requirements. However, the People note that in the instant case the appellate court did not discuss the issue of foundation or cite its previous opinion in J.Y.

The trial judge did not abuse his discretion in admitting the PRC records, including Dr. Petrak's report, into evidence pursuant to section 2-18(4)(a). The appellate court erred in reversing that ruling. This Court should grant leave to appeal to consider this issue and reverse the appellate court's holding in this regard.

***14 CONCLUSION**

For the foregoing reasons, the People request that this Court grant leave to appeal from the judgment of the Appellate Court, Third District.

Appendix not available.

Footnotes

[1] The volume containing the common law record for the minor A.P., cause number 10-JA-338, will be referred as "C." The volume containing the common law record for the minor J.P., cause number 10-JA-339, will be referred to as "C*".

[2] The People note that in this civil proceeding the propriety of the admission of this evidence concerns admission as a business record and does not implicate a criminal defendant's right to confrontation under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). 11

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