NORTH SUBURBAN BAR ASSOCIATION

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N S B A N E W S

SPRING 2015

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PRESIDENT'S MESSAGE – July 2015

By: Anna Morrison-Ricordati, President

Dear NSBA Members:

Wow! What a year. It was great to see so many faces at the April 21, 2015 ethics seminar, which included a morning session: "A More Civil Practice," addressing ethical considerations in civil cases; and an afternoon session: "It's Criminal: When Losing Your License is the Least of Your Concerns" addressing the possible criminal ramifications of ethical violations. Judge Earl B. Hoffenberg appeared at the break to accept the NSBA's Appreciation of Service Award for his outstanding contributions to the North Suburban legal community. Our distinguished speakers included: Marci Rolnik Walker (Lawyers for the Creative Arts); Katherine Erwin (Illinois Supreme Court Commission on Professionalism); Pari Karim (Center for Conflict Resolution); Sharon Opryszek (ARDC); Mia Jigante (Dykema Gossett PLLC); and Sari Montgomery (Robinson Law Group LLC). And of course, this insightful and educational seminar would not have taken place without the efforts of NSBA's CLE Coordinator, Ray Ricordati!

The NSBA's May 14, 2015 Judges Night at the North Shore Country Club hosted a record 100(+) attendees, including over 50 Judges from Cook County and the surrounding jurisdictions, for an evening of hors d'oeuvres, cocktails and celebration! This turnout was in no small part due to our honoree, Judge Sebastian Patti, elected to the Circuit Court of Cook County in 1996 and currently the Presiding Judge Domestic Violence Division. Special thanks to Judge Grace G. Dickler for presenting the "Top Ten" reasons we appreciate Judge Patti and for her heartfelt contributions to the evening's events!

We are also grateful for the work of Betsy Minor, on behalf of the YWCA Evanston/North Shore, who did an excellent job organizing the Pro Bono Attorney Training, "Nuts & Bolts of IDVA: Effective Representation of Victims of Domestic Violence" hosted by the NSBA at the Skokie Courthouse on June 3, 2015.

Finally, the 2014-2015 NSBA held its Annual Meeting on June 9, 2015, electing the NSBA's 2015-2016 Officers & Directors, and including a first-rate CLE on "Product Liability" by NSBA member Ed Moor.

All of this in an historic and monumental year in which the Supreme Court upheld marriage equality!

I cannot thank everyone enough for all of your committed support and participation in the 2014-2015 NSBA events. We look forward to seeing you at the September 17, 2015 Installation Dinner!

Very truly yours,

Anna

"Be the change you wish to see in the world." M. Gandhi

2013-2014 NSBA Officers & Directors:

Officers:

Anna Morrison-Ricordati, *President*
Ray Ricordati, III, *1st Vice President*
Molly Caesar, *2nd Vice President*
Rick Pullano, *3rd Vice President*
John Stimpson, *4th Vice President*
Michael Craven, *Secretary*
Vince Pinelli, *Treasurer*
Jan Weinstein, *Immediate Past President*

Directors:

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Brian Clauss
William Ensing
Barb Lusky
Ana Pontoga
David Pasulka
Paul Plotnick
Hon. Jesse G. Reyes
Robert A. Romanoff
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From the Editor's Desk:

As I complete my last newsletter, I want to thank all of our members that have provided me with valuable content over the last year. The newsletter is heavily dependent on its members forwarding relevant material and information. I strongly encourage you to continue to pass on any newsworthy information to the editor. Furthermore, at our last board meeting we decided to start including in the newsletter any professional accomplishments or awards of our members.

I also want to give a special recognition to Angela Peters for the outstanding work she does year-in and year-out in producing "On the Tip of Your Tongue".

It was a pleasure serving as your NSBA newsletter editor and I hope to see you all at the Installation Dinner on September 17, 2015.

Thanks,

Rick Pullano

NSBA JUDGES NIGHT 2015


NORTH SUBURBAN BAR ASSOCIATION'S ANNUAL
Judges Night
Recognizing
Hon. Sebastian T. Patti
COCKTAILS AND HORS D'OEUVRES
$85 ($75 BEFORE MAY 1); JUDGES COMPLIMENTARY
6:00-8:30 PM MAY 14, 2015
RSVP: PRESIDENT@NSBA.ORG
NORTH SHORE COUNTRY CLUB
1340 GLENVIEW RD., GLENVIEW, ILLINOIS 60025


EXIT

THANKS TO OUR SPONSERS!!!

AMR Law Group, LLC

Robert Romanoff

Daniel O'Brien

Hon. Allen Goldberg

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RP Law Offices of Richard L. Pullano P.C.

NSBA UPCOMING EVENTS

Gerald S. Schur Award Reception

Our friend and past president, Jerry Schur, has always been a strong supporter of his friends and community. This generosity extends to his alma mater through the Gerald S. Schur Award at The John Marshall Law School. The Schur Award provides financial support to John Marshall students who serve our veterans through their work with the school's Veterans Legal Support Center & Clinic. This year's theme "Around the World in Eighty Days" is in commemoration of Jerry's 80th birthday.

To honor Gerald S. Schur (JD '63, LLM '68), his friends Leisa Braband and Dick Mortell (JD '81) request the pleasure of your company at the Gerald S. Schur Award Reception on Tuesday, August 25, at 5:30 pm. The event, including appetizers and cocktails, will be held at The John Marshall Law School, at the corner of Jackson and State, in room 3E.

An $80 donation to the Gerald S. Schur Award, payable to The John Marshall Law School, is suggested. To give now, please visit www.jmls.edu/give and select "Schur Award" from the designation drop-down menu.

Please respond to the invitation by August 14 to Lauren Prihoda at lprihoda@jmls.edu or (312) 386-2871.

Premises Liability and Common Defenses

By: Richard L. Pullano

Richard Pullano is a plaintiff's injury attorney and the founder of Pullano Law Offices. His practice areas includes, but is not limited to: wrongful death, medical malpractice, transportation liability (truck, railroad, bus, aviation and automobile), construction liability and premise liability.

INTRODUCTION

A premises liability case is a type of negligence action that typically involves a dangerous condition on a property causing an injury to a person on the property. Common examples of premises liability cases involve falls down stairwells, slip and falls on ice and trip and falls on sidewalks. When investigating whether a viable cause of action exists against a property owner for an allegedly dangerous condition, it is imperative that the attorney be familiar with key bodies of law that may apply to the facts of the case. The requisite elements of negligence and common defenses will be discussed in this article.

ELEMENTS OF NEGLIGENCE

Where a premises liability action is based in common law negligence, "the essential elements . . . may be stated briefly as follows: the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Ward v. K Mart Corp*, 136 Ill.2d 132, 140 (1990). "A duty of care arises when the parties stand in such a relationship to one another that the law imposes upon defendant an obligation of reasonable conduct for the benefit of plaintiff." *Deibert v. Bauer Bros. Constr. Co., Inc.*, 141 Ill.2d 430, 437 (1990) citing *Ward*, 136 Ill.2d at 140. The factors considered when determining the existence of a duty include: the foreseeability of injury, the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant. *Id.* at 438; *Bucheleres v. Chicago Park Dist.*, 171 Ill.2d 435, 456 (1996). As a result, whether the property owner owed the plaintiff a duty of care is a fact specific analysis. When looking at specific types of premises liability cases, the fact intensive nature of these cases is readily apparent.

A. Injury on a Stairwell

Stairs present inherent risks of injury by their very nature. Accordingly, in Illinois, it has been held that a property owner has a duty of care with respect to stairs where the stairs are considered "unreasonably dangerous." *See Van Gelderen v. Hokin*, 2011 IL App (1st) 093152 (July 29, 2011). For example, facts tending to show that the stairs were improperly designed, inadequately lighted, covered with a foreign substance, or slippery are sufficient to establish that

the stairs at issue are unreasonably dangerous. *Id.* Further, courts have held that a duty of care is owed where the stairs are masked or obscured from view. *Id.* Under these circumstances, courts reason that an injury on a stairwell is reasonably foreseeable. *Id.* When these facts are established, the possessor of land has been held to owe invitees a duty of reasonably care.

Since the duty analysis is a fact intensive inquiry, it is important to inspect the stairs in a timely manner following an injury. By doing so, the attorneys can be assured that they are inspecting a scene that is in the same or similar condition as it existed at the time of the incident. Conducting a scene inspection with a well-qualified consultant, such as an architect or structural engineer, is also important. The consultant should specialize in building codes and life safety codes that establish what is considered "unreasonably dangerous" or "merely just a regular stairwell". When determining whether you have a meritorious case, knowing the law and choosing the right consultant is essential to deciding whether to pursue a premises liability case, especially one involving an injury on a staircase.

B. Slip and Fall on Ice

Slip and fall cases involving snow and ice are often some of the most difficult cases to prove. In order for liability to attach, the plaintiff must present evidence of the following: the source of the accumulation, the accumulation formed unnaturally and the landowner knew or should have known of the condition. Under the natural accumulation rule, a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property." *Krywin v. Chicago Transit Authority*, 238 Ill.2d 215, 227 (2010). It is the plaintiff that must affirmatively show the origin of the water was unnatural or caused by defendant. *Branson v. R & L Inv., Inc.*, 196 Ill. App. 3d 1088, 1094 (1st Dist. 1990). "To prove constructive notice, a plaintiff must show that the hazardous condition existed for a sufficient amount of time or that, through the exercise of reasonable care, the defendant should have discovered the dangerous condition." *Hornacek v. 5th Ave. Prop. Mgmt.*, 2011 IL App (1st) 103502 ¶29 (Sept. 30, 2011). "However, where a defendant created the condition through its own negligence, a plaintiff does not need to show constructive or actual notice." *Id.* citing *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 715 (4th Dist. 1998).

Showing that the accumulation the plaintiff encountered formed unnaturally is a fact specific inquiry. A typical example of an unnatural accumulation of snow and ice involves an individual plowing snow into piles in a dangerous part of the parking lot, the snow melting and eventually refreezing. Courts have held that the fact that streets are cleared of snow, but there are deep piles of snow, suggests that the snow piles are unnatural accumulations. *Krywin*, 238 Ill.2d at 231–32. However, it has also been held that the mere sprinkling of salt, causing ice to melt, although it may later refreeze, does not aggravate a natural condition so as to form a basis for liability on the part of the property owner." *Barber v. G.J. Partners, Inc.*, 2012 IL App (4th) 110992 ¶20 (Aug. 22, 2012) citing *Harkins v. System Parking, Inc.*, 186 Ill. App. 3d 869, 873 (1st Dist. 1989). Other examples of actionable claims involving falls on ice include defects in the parking lot surface that promote unnatural accumulations. Courts have held that an accumulation was unnatural and actionable based on evidence that a defect was the result of negligent maintenance. *Sepesy v. Archer Daniels Co.*, 59 Ill. App. 3d 56, 59–60 (4th Dist. 1978) (sloping surface created unnatural accumulation); *Webb v. Morgan*, 176 Ill. App. 3d 378, 383 (5th Dist. 1988)(slope of parking lot altered natural run-off); *Wolter v. Chi. Melrose Park Assocs.*, 68 Ill.

App. 3d 1011, 1019 (1st Dist. 1979)(negligent maintenance of parking lot surface could cause unnatural accumulation of ice).

Obtaining photographs of the scene taken on the date of the incident or video of the incident in question are means of showing that the snow piles formed unnaturally. Photographs should also be taken several hours after a rain storm in order to determine if water is draining properly from the area in question as well. Additionally, it is helpful to obtain weather data from the month of the incident, documents regarding plowing procedures and time sheets evidencing when and what work was actually performed leading up to the incident. Further, retaining a land surveyor to conduct a survey of the parking lot surface will assist in setting forth facts regarding the source of the accumulation and whether improper drainage played a role in causing the unnatural accumulation. All of these methods can be a means of establishing a *prima facia* case of negligence in slip and fall cases.

COMMON DEFENSES

A. Open and Obvious

"Illinois law holds that persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." *Bucheleres*, 171 Ill.2d at 447–48. "In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition." *Id.* at 448 citing *Ward*, 136 Ill.2d at 148. In order for a condition to be held to be open and obvious as a matter of law, both the condition and the risk must be apparent to and would be appreciated by a reasonably person in the plaintiff's position exercising ordinary perception, intelligence and judgment. *Deibert v. Bauer Bros. Const. Co*., 141 Ill.2d 430, 435 (1990). When this defense applies, the landowner is relieved of their duty to protect people lawfully on the property from the obvious hazard.

However, the open and obvious doctrine is not an automatic or *per se* bar to the finding of a legal duty on the defendant who owns, occupies, or controls the area in which the injury occurred. *Bucheleres*, 171 Ill.2d at 449. Rather, courts still undertake the traditional duty analysis discussed previously to determine if a duty of care is still owed. As a result, it is a fact intensive inquiry. Depending upon the facts of the case, the "likelihood of injury" factor of the duty analysis can be undermined by an open and obvious condition. On the other hand, "if a danger is concealed or latent, rather than open and obvious, the likelihood of injury increases because people will not be as readily aware of such latent danger." *Id.* Likewise, the doctrine also impacts the "foreseeability of harm" element of the duty analysis as a well. "Simple foreseeability of injury is not, and has never been, dispositive on the issue of whether the law imposes a duty in negligence." *Id.* at 457. But, "the foreseeability of harm to others may be greater or lesser depending on the degree of obviousness of the risks associated with the condition." *Id.* at 456. As a result, where a defendant claims that a condition presents an open and obvious danger in cases <u>not</u> involving fire, heights or bodies of water, courts have held that the obviousness of the risk is properly an issue for a jury to decide. *Quereshi v. Ahmed*, 394 Ill. App. 3d 883, 889 (1st Dist. 2009).

The Restatement (Second) of Torts and Illinois common law recognize two exceptions to the open and obvious doctrine. The exceptions include the "distraction" exception and the "deliberate encounter" exception. Each will be discussed herein.

i. Distraction Exception

The distraction exception is derived from the Restatement and adopted by Illinois courts across the state. Under Section 343A of the Restatement, "[e]ven if the condition of the land was obvious to the invitee, a possessor of land may be liable if the possessor should have anticipated the harm." *Id.* "One instance in which a possessor of land should anticipate such harm is when the possessor has a reason to expect the invitee's attention may be distracted so that the invitee would not discover the condition despite its obviousness." *Id.*

Deibert v. Bauer Brothers Construction Company, Inc. presents a typical example of when the distraction exception applies. In *Deibert*, the plaintiff was an electrician working at a construction site. 141 Ill.2d at 433. One morning, the plaintiff entered a portable bathroom on the construction site. *Id.* It had rained the day before, and the ground was slippery. *Id.* Upon exiting the bathroom, Plaintiff stepped down the six to eight inches from the bathroom to the ground. *Id.* At that time, the plaintiff looked up to ascertain whether construction materials were being thrown off a balcony above and near the bathroom, as construction workers had frequently done so in the past. *Id.* As plaintiff was looking upward and walked away from the bathroom, he stepped into one of the tire ruts on the ground, stumbled and was injured. *Id.* The Supreme Court of Illinois held that the ruts in question were obvious as a matter of law, but found the distraction exception applied as well. *Id.* The court stated "the inquiry is whether the defendant should reasonably anticipate injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but who may reasonably be expected to be distracted, . . . or forgetful of the condition after having momentarily encountered it." *Id.* at 440 citing *Ward*, 136 Ill.2d at 152. Based on the facts presented, the court concluded the defendant had reason to anticipate that workers would be momentarily distracted by fear of possible falling debris and stumble in a rut that the worker would have otherwise noticed and avoided. *Id.*

ii. Deliberate Encounter Exception

The deliberate encounter exception holds that "harm may be reasonably anticipated when the possessor 'has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *LeFever v. Kemlite Co.*, 185 Ill.2d 380, 391 (1998) citing Restatement (Second) of Torts § 343A, Comment *f*, at 220 (1965). Illinois courts have often held that this exception applies when workers are compelled to encounter dangerous conditions as part of their employment obligations. *See Id.*; *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 155–56 (2d Dist. 1992). Courts reason that it should be reasonably foreseeable to a possessor of land that a worker would encounter a risk by taking, *inter alia*, the shorter and more convenient path of travel. *Ralls*, 233 Ill. App. 3d at 155.

LeFever v. Kemlite Company provides a good example of the deliberate encounter exception. In *LeFever*, the defendant manufactured fiberglass reinforced polyester resin panels. 185 Ill.2d at 384. "Edge trim", a waste product from the manufacturing process, was all over the ground. It was uncontested that it was slippery and presented a dangerous condition. *Id.* The

defendant hired the plaintiff to pick up and dispose of the edge trim. When performing his job duties, the plaintiff and other workers made numerous complaints to the defendant about the hazards. *Id.* Unfortunately, the plaintiff slipped on edge trim and injuring his back. *Id.* The Illinois Supreme Court found that the deliberate encounter exception applied. *Id.* The Illinois Supreme Court explained that liability stemmed from the knowledge of the possessor of the premises and what the possessor "had reason to expect" the invitee would do in the face of the hazard. Based on the facts, the Illinois Supreme Court concluded that the defendant could have reasonably foreseen that plaintiff would deliberately encounter the hazard in order to fulfill his job obligations. *Id.* at 392. Therefore, the defendant owed the plaintiff a duty of reasonable care on its premises.

B. De Minimis Doctrine

The *de minimis* doctrine is often a defense employed in cases involving uneven walking surfaces that cause a trip and fall injury. "The *de minimis* rule originated in cases involving municipalities, where it was noted that 'municipalities do not have a duty to keep all sidewalks in perfect condition at all times.'" *St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505 ¶13 (May 1, 2014) citing *Gillock v. City of Springfield*, 268 Ill. App. 3d 455, 457 (4th Dist. 1994). "Although a municipality has a duty to keep its property in a reasonably safe condition, it has no duty to repair *de minimis* defects in its sidewalks." *St Martin*, 2014 IL App (2d) 130505 ¶13. "The *de minimis* rule stems in large part from the recognition that municipalities would suffer an unreasonable economic burden were they required to keep their sidewalks in perfect condition all the time." *Id.* citing *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 202 (2d Dist. 2003). Thus, "slight defects frequently found in traversed areas are not actionable as a matter of law." *Hartung v. Maple Inv. and Development Corp*, 243 Ill. App. 3d 811, 814 (2d Dist. 1993). While the rule was originally intended for municipalities, the defense also applies to private owners and possessors of land as well. *Id.* at 815–16.

What constitutes a *de minimis* defect depends upon the size of the defect at issue, its location and the burden placed upon the particular defendant to fix defects of the nature at issue. Under certain fact patterns, courts have held that a walking surface variance less than two inches is *de minimis*. *St Martin*, 2014 IL App (2d) 130505 ¶14 ("it is well established that, absent any aggravating factors, a vertical displacement of less than two inches is *de minimis*.") However, it is also widely recognized that "the *de minimis* rule cannot be applied blindly to cover every situation." *Id.* ¶15 citing *Hartung*, 243 Ill. App. 3d at 814; *see also Morris v. Ingersoll Cutting Tool Co.*, 2013 IL App (2d) 120760 ¶12 (Sept. 16, 2013)("There is no mathematical formula or bright-line rule as to what constitutes a slight defect, and each case must be determined on its own facts"). "An unacceptable height variation in one location, such as a busy commercial area where pedestrians must be constantly alert to avoid bumping into one another, may be nonactionable in another area, such as a residential one." *Warner v. City of Chicago*, 72 Ill.2d 100, 104 (1978).

In reality, the *de minimis* rule developed out of the common law duty analysis. The risk of injury and the foreseeability of harm are slight where a defect is small and located in a low traffic area. However, the risk of injury and the foreseeability of harm are higher when the condition is located in a high traffic area. When the burden upon the particular defendant to fix these conditions is slight, courts will likely hold that the defendant owed the plaintiff a duty of reasonable care with respect to an allegedly *de minimis* condition. As a result, one must not lose sight of the traditional duty analysis when common defenses are raised.

CONCLUSION

Premises liability cases are fact specific cases that require a thorough understanding of the law applicable to that particular case. As in any tort case, the traditional duty analysis must be undertaken in order to determine if the defendant owed the plaintiff a duty of care with respect to the allegedly dangerous condition on the property. Likewise, consideration of common defenses raised must be a part of that analysis as well. The open and obvious doctrine places the onus on plaintiff to protect himself or herself from injury, but the exceptions recognize that there are some circumstances where liability for injury from an obvious danger is appropriately placed on the owner or occupier of land. The natural accumulation rule recognizes that an owner or occupier of land cannot absolutely guarantee the safety of their invitees, but allows for liability where the owner's actions or defects in the owner's property caused additional risks not ordinarily imposed on invitees by Mother Nature. Finally, the *de minimis* doctrine balances the potentially enormous economic burden of fixing small hazards with a need to make the property reasonably safe.

ON THE TIP OF YOUR TONGUE

By Angela Peters

FAMILY LAW

Nonmarital Inheritance. In In re the Marriage of Foster, 2014 IL App (1st) 123078, 17 N.S.3d 781, 384 Ill.Dec. 799, the husband did not transmute his nonmarital inheritance into marital property by depositing it into a checking account containing marital property. The husband opened a Scottrade account in his own name during the marriage as well as a Chase checking account, also in his sole name. He deposited both his employment earnings and inheritance income into the Chase account. Thereafter, he would routinely transfer funds from the Chase account into the Scottrade account. At trial, he corroborated the specific transfers through both testimony and bank statements. The trial court ruled that the Scottrade account was marital property and the appellate court reversed, relying heavily on the cases of In re the Marriage of Heroy, 385 Ill.App.3d 640, 895 N.E.2d 1025, 324 Ill.Dec. 310, (1st Dist. 2008), and In re the Marriage of Steel, 2011 IL App (2d) 080974, 977 N.E.2d 761, 364 Ill.Dec. 852. The court held that just because both marital and nonmarital income are commingled in one account does not necessarily establish that the nonmarital inheritance income was transmuted into marital property under §503 (c)(1) of the Illinois Marriage and Dissolution of Marriage Act (MDMA), 750 ILCS 5/101, et seq. Because the husband's inheritance income was easily identifiable in the Chase account and his marital income was exhausted each month after he paid his temporary support obligations, the funds remaining in the Chase account must constitute his nonmarital income. Furthermore, because the transfers to the Scottrade account were made within days of the deposits into the Chase account, the Chase account merely acted as a conduit for the husband to deposit the money and then transfer a portion of his inheritance to the Scottrade account.

Nonmarital income. In In re the Marriage of Foster, supra, a spouse's nonmarital income was considered when determining maintenance. The wife appealed the trial court's maintenance award which provided her with 30 percent of the husband's gross income on the grounds that she should have been allowed the same standard of living as the husband and be awarded 50 percent of his gross income. The husband cross-appealed, arguing that 30 percent of his gross income required him to pay the wife a percentage of his nonmarital inheritance income. Because the case was reversed and remanded on the issue of the character and value of certain assets, the court directed the trial court to review the maintenance award in light of that ruling. However, it did state, in determining the amount of maintenance, that the court should consider the parties' income at the time of dissolution as well as their potential incomes. A spouse is entitled to maintenance in an amount sufficient to maintain the standard of living the parties enjoyed during the marriage if the providing spouse has the means to provide for the other spouse without compromising his own needs. Furthermore, the IMDMA does not state that maintenance must be paid only from marital income and, therefore, the trial court did not err in considering the husband's nonmarital income when it originally determined the maintenance award.

In In re Marriage of Schlichting, 2014 IL App (2d) 140158, the trial court erred in awarding the wife's marital, limited liability company (LLC) membership interest to the husband pursuant to a judgment for dissolution of marriage. The appellate court reversed the trial court's judgment (1) awarding the wife's marital membership interest in an LLC to the husband and (2) requiring the husband to purchase the interest from the wife in the amount of $19,500. The wife held a 20 percent membership interest in an LLC with family members of the husband and the husband held no interest in the company. The LLC operating agreement contained a clause restricting the wife's ability to transfer or sell her interest to the husband (specifically named) unless there was unanimous consent of the other members. The husband had a history of litigating against his family which was, presumably, the reason for such a clause. The agreement also contained a buy-sell provision that included valuation formulas and procedures in the event of a member's divorce. By awarding the wife's interest to husband, the wife would have been required to violate the terms of the operating agreement which the appellate court called an "untenable resolution, particularly where other options were available." 2014 IL App (2d) 140158 at ¶45. The appellate court reversed the trial court's ruling because: (1) an existing policy favors finality in divorce proceedings and discourages future conflict; (2) an LLC operating agreement is to be enforced according to general contract principles; and (3) courts should be mindful of the caselaw concerning the avoidance of potential conflicts between divorce orders and business operating agreements. The court repeatedly stated that while the trial courts are not bound by limitations on transfers imposed in a shareholder or operating agreement, the failure to follow can be an abuse of discretion, and, in this case, it was.

In In re the Marriage of Kiferbaum, 2014 IL App (1st) 130736, correlative orders of protection were permitted under the Domestic Violence Act (DVA), 750 ILCS 60/101, et seq., and, therefore, the wife's petition for an order of protection should not have been dismissed. In a matter of first impression, the appellate court held that while the DVA prohibits mutual orders of protection, it does allows for correlative orders; therefore, the DVA did not require that the trial court dismiss the ex-wife's petition just because the ex-husband had already received an order of protection against the ex-wife. In its decision, the court distinguished mutual and correlative orders. Typically, mutual orders (1) occur within the same document, (2) arise from a singular pleading and proceeding even though one party did not even desire an order of protection, and (3) are clearly prohibited under the DVA. By contrast, correlative orders are allowed under the DVA and arise from separate pleadings: notice and proof of abuse by each party seeking a separate order of protection. Section 215 of the DVA provides that correlative orders may be issued when both parties (1) have properly filed written pleadings, (2) proved past abuse by the other party, (3) given prior written notice (unless excused), (4) satisfied all prerequisites for the type of order and each remedy granted, and (5) otherwise complied with the DVA.

Thank you for this month's contributions from IICLE Family Law November 2014 Flash Points, Donald C. Schiller & Michelle A. Lawless, Schiller DuCanto & Fleck LLP.

In re Marriage of Dhillon, 2014 IL App (3d) 130653, November 7, 2014, Peoria Co., CARTER, Affirmed in part and reversed in part; remanded with directions. In dissolution proceeding, court erred in finding that husband did not dissipate account (into which large amounts of money had been deposited during marriage) during irreconcilable breakdown of marriage; wife testified as to her unhappiness at the time, including that husband was physically abusive and refused to purchase plane ticket for her to attend her cousin's wedding in London although he knew wedding was very important to wife. Funds contributed to husband's 401(k) account prior to marriage were nonmarital property. (McDADE and WRIGHT, concurring.)

P.A. 98-961 (eff. Jan. 1, 2015), which concerns maintenance, creates permissive guidelines for the trial court to apply in situations in which the parties' combined gross incomes are $250,000 or less and no multiple family situations exist. 750 ILCS 5/504(b-1)(1).

See www.ilga.gov/legislation/publicacts/fulltext.asp?name=098-0961&ga=98. Pursuant to the amendments, in all cases the court must first determine if maintenance is appropriate under the factors enumerated in §504(a). 750 ILCS 5/505(a)(3)(g-5). If the court makes such a finding, it then turns to the guidelines to make the calculation by (1) taking 30 percent of the payor's gross income less (2) 20 percent of the payee's gross income. 750 ILCS 5/504(b-1)(1)(A). However, the maintenance award may not result in the payee receiving a total that is in excess of 40 percent of the combined gross income after the maintenance payment is made. Id. The duration of the maintenance is calculated by multiplying the length of the marriage by whichever factor applies: 0 – 5 years (0.20); 5 – 10 years (0.40); 10 – 15 years (0.60); or 15 – 20 years (0.80). 750 ILCS 5/504(b-1)(1)(B). For a marriage longer than 20 years, the court has discretion to order either permanent maintenance or maintenance for a period equal to the length of the marriage. Id.

The appellate court overturned a trial court's ruling that provided a wife with maintenance of $3,700 per month plus 20 percent of the husband's future bonuses for a period of seven years with a review. In re Marriage of Micheli, 2014 IL App (2d) 121245. The husband argued on appeal that the uncapped portion of the bonus had no relation to the wife's standard of living during the marriage. The appellate court agreed and stated that an uncapped amount based on a percentage of his future bonuses could set up a windfall for the wife and has no evidentiary relation to the wife's present needs or the standard of living during the marriage.

Illinois had jurisdiction to award temporary maintenance and attorneys' fees when a wife had never been properly served with process of proceedings in Poland nor submitted herself to the jurisdiction of Poland. In re Marriage of Lasota, 2014 IL App (1st) 132009. The parties had married in Poland but later moved to Illinois. The husband filed a petition for the dissolution of his marriage in Poland, and the wife filed in Illinois weeks later. The Polish court entered a judgment for dissolution of the marriage, but it did not address the division of the parties' property or the issue of maintenance. The wife later filed a petition to register the Polish judgment in Illinois, which was granted. She then filed a petition under §503(d) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, et seq., requesting the Illinois court to allocate the parties' property. 750 ILCS 5/503(d) permits the trial court to dispose of marital property following the dissolution of a marriage by a court that lacked jurisdiction over the absent spouse or to dispose of the property. The husband filed a motion to dismiss this petition on the grounds that the court lacked jurisdiction to dispose of the parties' property under §503(d), that a postnuptial agreement signed by the parties set forth the parties' interests in the marital estate under Polish law, and because the wife had a pending petition for support in Poland. The trial court denied the motion to dismiss and ordered temporary maintenance and attorneys' fees, which the husband refused to pay. He was subsequently held in contempt and appealed the trial court's rulings. The appellate court affirmed and stated that in fact the record did not reflect that the wife had submitted herself to the Polish courts. In fact, the orders in the Polish court demonstrated that the issue of the jurisdiction of the Polish court was in fact an area of dispute between the parties. Therefore, the court's finding that it had authority under IMDMA §503(d) to enter orders regarding temporary support and attorneys' fees was not against the manifest weight of the evidence.

Section 201 of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 750 ILCS 36/101, et seq.,establishes a procedural framework under which a court may exercise subject-matter jurisdiction but does not establish subject-matter jurisdiction itself. The Fourth District held, in a paternity action, that the UCCJEA itself does not confer subject-matter jurisdiction on a trial court to hear a child custody matter. McCormick v. Robertson, 2014 IL App (4th) 140208. This is because a circuit court's subject-matter jurisdiction is conferred entirely by the Illinois Constitution. The court relied heavily on the Supreme Court case of Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill.2d 325, 770 N.E.2d 177, 264 Ill.Dec. 283 (2002), which stated that while the legislature was free to create new justiciable matters by enacting legislation, the creation of such matters does not mean that the legislature is conferring subject matter on the courts since such jurisdiction is derived only from the Constitution. The Fourth District acknowledged the confusion that has ensued because of the UCCJEA's use of the word "jurisdiction" in 750 ILCS 36/201. McCormick, supra. The court concluded that §201 should simply be read to mean that the statute provides a procedural framework within which a trial court may exercise its subject-matter jurisdiction.

In a post judgment modification proceeding, the appellate court upheld the trial court's inclusion of many income items for calculating support. In re Marriage of Pratt, 2014 IL App (1st) 130465. First, the ex-husband argued that the court erred when only using one year of income to calculate his net income. However, the appellate court held that the court properly focused on the ex-husband's earnings in the year in which the court held the modification hearing because the relevant focus for determining income under §505 of the IMDMA, 750 ILCS 5/505, is the parent's economic situation at the time the calculation is made. Second, the ex-husband argued that the court should not have included $5,000 of income, which was an amount he converted from a traditional individual retirement account (IRA) to a Roth IRA, but the appellate court did not find that to be an abuse of discretion because the IMDMA defines "net income" as the total income from all sources, and the transaction was a taxable event. Next, the ex-husband argued that the court improperly estimated his annual dividend income for the entire year when it only had the first-quarter figures and multiplied that number by four. The appellate court ruled that the trial court had the authority to make such an estimation and noted that he could earn more dividend income in a subsequent year. Finally, the ex-husband argued that the court should not have included earnings from his sale of restricted stock options that he was awarded as a property settlement in his income for support purposes because the parties' marital settlement agreement precluded this from being considered when setting support. However, because a provision that precludes certain income from consideration for child support purposes is against public policy, the appellate court refused to enforce it. Therefore, it was properly included as income for calculating support.

Thank you for contributions this month from IICLE Family Law Flashpoints, by Donald C. Schiller and Michelle A. Lawless,Schiller DuCanto & Fleck LLP

In re Marriage of Foster, 2014 IL App (1st) 123078, August 22, 2014, Cook Co., 6th Div., REYES, Affirmed in part and reversed in part; remanded. In dissolution proceeding, court properly found that husband's Scottrade account is his nonmarital property. Husband presented clear and convincing evidence that funds never lost their identity and were never transmuted into marital income, and marital income was insufficient to provide for all marital expenses and debts. Court properly determined that husband did not dissipate marital assets, but instead used his nonmarital income for his own expenditures and properly considered husband's nonmarital income in its determination of maintenance. (ROCHFORD and LAMPKIN, concurring.)

In re Marriage of Akbani, 2014 IL App (5th) 130266, August 26, 2014, St. Clair Co., GOLDENHERSH, Affirmed. Court properly entered order confirming separation and divorce agreement entered into between husband and wife, and properly entered order finding that handwritten agreement of two years later is not binding on parties. Handwritten agreement prepared during voluntary mediation was unenforceable as it contained an attorney review clause, which was a condition precedent to completion of that agreement, and that condition was not met. Husband took no action to contest terms of divorce agreement until a week prior to hearing, and both parties proceeded as if agreement was in effect; no showing of mutual mistake of fact warranting setting aside of agreement.(WELCH and STEWART, concurring.)

In re Parentage of Rogan M., 2014 IL App (1st) 141214, September 12, 2014, Cook Co., 5th Div., REYES, Reversed and remanded. Court denied mother's petition to remove her minor child from Illinois to California. As a removal petition is not a petition to modify custody under Section 610 of the Marriage Act, court should apply preponderance of evidence standard, not the more stringent clear and convincing evidence standard. (PALMER and McBRIDE, concurring.)

Robinson v. Reif, 2014 IL App (4th) 140244, November 24, 2014, Macon Co., STEIGMANN, Affirmed. Maternal grandparents filed petition for permanent and temporary grandparent visitation of their two minor grandchildren, who they had taken care of in their home for 18 months after car accident in which children's mother was killed and their father was severely injured. Children were age 3 and age 7 months at time of accident. Court's judgment, granting petition and setting visitation schedule, was not against manifest weight of the evidence. Plaintiffs presented expert testimony that young children develop attachments to primary caregivers, and opined that children formed attachment to Plaintiffs during this critical development stage and that children would be damaged emotionally if deprived of all visitation with Plaintiffs. (APPLETON and TURNER, concurring.)

In re Marriage of Saracco, 2014 IL App (3d) 130741, November 25, 2014, Will Co., McDADE, Reversed and remanded with directions. Judgment for dissolution of marriage reserved issue of college contribution, and later court entered order as to one of the parties' children that mother would be responsible for 60% of his college expenses and father would be responsible for 40% of college expenses. Court erred in terminating mother's required contribution toward son's college expenses; court did not specifically find a substantial change in circumstances, and evidence did not support substantial change. Son is an average student who has accepted all available types of financial assistance. Neither his strained relationship with his mother, nor his decision not to work during college (consistent throughout college career) alone supports finding of substantial change. (CARTER and O'BRIEN, concurring.)

In re Marriage of Harnack, 2014 IL App (1st) 121424, November 21, 2014, Cook Co., 5th Div., PALMER, Affirmed and remanded with directions. Court entered default judgment dissolving marriage and apportioning parties' assets, and held that all shares of stock held by husband or his enterprises were marital property, and awarded wife half of shares of stock as her marital portion. Eight months later, husband moved to set aside judgment per Sections 2-1301(e) and 2-1401(a) OF Code of Civil Procedure. No exceptional circumstances exist to warrant relaxing due diligence requirements of Section 2-1401 for husband, and court properly denied Section 2-1401 petition and denied Section 2-1301(e) motion to vacate judgment. Cause remanded for court to amend judgment to clarify provisions for transfer of shares of stock to escrow. (McBRIDE and GORDON, concurring.)

Bjorkstam v. MPC Products Corporation, 2014 IL App (1st) 133710, Nov. 13, 2014. Plaintiffs were injured while they were bystanders to a plane crash in Mexico. Plaintiffs initially filed complaint against manufacturers of allegedly faulty airplane parts. Court dismissed suit on forum non conveniens grounds, finding that Texas was a more convenient forum. Plaintiff then filed suit in Texas, but Texas court dismissed case, finding that Plaintiffs failed to exercise diligence by failing to serve it with suit. Illinois Supreme Court Rule 187(c)(2), which states that a defendant must accept service of process from that court, means service of process as defined by law of forum state. Texas ruling finding lack of diligent service is preclusive, and thus Plaintiffs were not entitled to refile suit in Illinois. Defendants' knowledge of suit did not act as substitute for service of process. (HOWSE and TAYLOR, concurring.)

In re Marriage of Dhillon, Third District, Docket No. 3-13-0653, November 7, 2014. In dissolution proceeding, court erred in finding that husband did not dissipate account (into which large amounts of money had been deposited during marriage) during irreconcilable breakdown of marriage; wife testified as to her unhappiness at the time, including that husband was physically abusive and refused to purchase plane ticket for her to attend her cousin's wedding in London although he knew wedding was very important to wife. Funds contributed to husband's 401(k) account prior to marriage were nonmarital property. (McDADE and WRIGHT, concurring.)

CIVIL MISCELLANEOUS LAW

Hayashi v. Illinois Department of Financial & Professional Regulation, 2014 IL 116023, October 17, 2014, Cook Co., BURKE, Appellate court affirmed. Department of Financial and Professional Regulation permanently revoked Plaintiff chiropractor and physicians' health care licenses as a result of prior misdemeanor convictions for batter and criminal sexual abuse of patients. Plain language of Department of Professional Regulation Law applies to convictions imposed prior to its effective date. Law's impact on Plaintiffs is solely prospective, as it affects only present and future eligibility of Plaintiffs to continue to use their health care licenses, and is not impermissibly retroactive. Revocation of licenses pursuant to Law does not violate substantive or procedural due process. Res judicata does not apply, as issues in disciplinary proceedings pursuant to Medical Practice Act were different from those in revocation proceedings. (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

In re Lance H., 2014 IL 114899, October 17, 2014, 5th Dist., Randolph Co., GARMAN, Appellate court reversed; circuit court affirmed. Circuit court entered order of involuntary commitment to Mental Health Center for 180 days. Mental Health Code does not vest circuit court with authority to rule for or against voluntary admission to a mental health facility, based on an in-court request for voluntary admission during hearing for involuntary admission. Mental Health Code does not require circuit court to sua sponte continue a proceeding for involuntary admission upon request for voluntary admission, but court may grant continuance to file application for voluntary admission, upon motion by Respondent's counsel. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring; BURKE, dissenting.)

White v. The Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, 2014 IL App (1st) 132315, August 29, 2014, Cook Co., 6th Div., REYES, Affirmed and remanded with directions. (Court opinion corrected 10/17/14.) Police officer filed petition with Pension Board seeking pension credit for two prior service periods with City under sections 5-214(b) and 5-214(c) of Pension Code. Officer had previously worked for office of corporation

counsel and as administrative assistant/police aide for City Police Department. Amended version of Section 5-214(b) of Pension Code does not expressly prescribe that amendment be applied retroactively to already pending petitions. Amendment is substantive in nature, as it limits pension service credit to police officers who are on leave and continue to remain in sworn status. Thus, amendment should not be applied retroactively to officer's claim. Officer's work as a police aide consisted of investigative work, and she presented sufficient evidence to satisfy requirements of Section 5-214(c) of Pension Pension Code, and should be awarded applicable pension service credit. (HALL, concurring; LAMPKIN, dissenting.)

American Service Insurance v. Miller, 2014 IL App (5th) 130582, October 17, 2014, St. Clair Co., SPOMER, Affirmed. (Court opinion corrected 10/20/14.) Insurer filed declaratory judgment action against insured for sued filed against insured for auto accident in which insured struck a bicyclist. Court's award of Rule 137 and Rule 219 sanctions against insurer (but not against insurer's counsel) for failure to produce correct insurance policy was appropriate ($20,000 policy limit, plus interest, and $60,000 in attorney's fees and $3900 in litigation expenses), and court found no evidence of intentional concealment or willful misconduct by insurer to warrant further sanctions. (STEWART and CATES, concurring.)

SABA Software, Inc. v. Deere & Company, 2014 IL App (1st) 132381, September 30, 2014, Cook Co., 5th Div., GORDON, Affirmed. (Court opinion corrected 10/17/14.) When a party places a waiver of venue provision in a contract and the other party agrees, fundamental fairness requires that the party who placed it in the contract cannot later complain that the clause is void as against public policy. When a venue waiver clause is placed in a form contract and affects the due process rights of others, the waiver can be void contrary to public policy.(McBRIDE and TAYLOR, concurring.)

Garland v. Sybaris Club International, Inc., 2014 IL App (1st) 112615, October 16, 2014, Cook Co., 4th Div., FITZGERALD SMITH, Affirmed in part and reversed in part. Surviving spouse filed action for wrongful death of passenger in small plane which crashed while en route from Kansas to Palwaukee Airport. Plaintiff alleged that flight instructor was negligent in entrusting plane to pilot, alleging that pilot was not qualified to fly that kind of plane; and alleged that other passenger was de facto owner of plane and negligently supervised pilot. NTSB found probable cause of crash was pilot's failure to maintain airspeed during landing approach. Genuine issues of fact on negligent entrustment claims and vicarious liability/respondeat superior claims, sufficient to withstand Section 2-619 dismissal. Court properly dismissed negligent supervision and de facto ownership claims. (HOWSE and TAYLOR, concurring.)

Hayenga v. The City of Rockford, 2014 IL App (2d) 131261, October 30, 2014, Winnebago Co., McLAREN, Affirmed. Defendant City, a non-home-rule unit of government, impounded Plaintiff's vehicle, after police found drug paraphernalia in vehicle during traffic stop made while Plaintiff's boyfriend was driving. Plaintiff brought administrative action. Court reversed decision of administrative hearing officer, and court properly found that City did not have authority to impound vehicle. Section 11-208.7 of Vehicle Code does not grant authority for non-home-rule entities to impound vehicle, but only to enact ordinances and establish procedures for release of properly impounded vehicles. Officer was not required to arrest boyfriend, but could have issued him a notice to appear per section 107-12 of Code of Criminal Procedure, without taking him into custody.(JORGENSEN and SPENCE, concurring.)

People v. Porter, 2014 IL App (1st) 123396, November 12, 2014, Cook Co., 3d Div., HYMAN, Affirmed in part and vacated in part. Defendant was convicted of retail theft after

bench trial. Defendant's ineffective assistance of counsel claim was insufficiently specific to support the duty to conduct further inquiry under case law standard of People v. Krankel. Defendant's claim focused on her continuing profession of innocence rather than allegation of incompetence.(LAVIN and MASON, concurring.)

Smith v. Greystone Alliance, LLC, No. 14-1758, November 13, 2014,Federal District: N.D. Ill., E. Div., Vacated and remanded. Dist. Ct. erred in dismissing for lack of jurisdiction plaintiff's Fair Debt Collection Practices Act claim after finding that defendant's settlement offer of $1,500 rendered her claim moot because it exceeded any potential recovery she could have obtained. Under Gates, 430 F3d 429, instant dismissal would only be proper if defendant's offer satisfied plaintiff's monetary demand, and record showed that plaintiff demanded more than $1,500. Moreover, Dist. Ct. cannot determine merits of plaintiff's claim and then determine that it lacked jurisdiction where defendant had offered more than what Dist. Ct. believed to be value of claim.

In re: Shru. R., 2014 IL App (4th) 140275, August 25, 2014, McLean Co., TURNER, Affirmed. State filed petition for adjudication of wardship for two minor children, and court found Respondent mother unfit and terminated her parental rights, finding it in best interest of minors . Mother abandoned children by returning to India, without telling anyone, while children were in foster care, and subjected minors to sexual abuse. Lack of adoptive goal did not weigh against termination, as it is only one factor, and foster family did not foreclose possibility of adoption but sought different options to maximize minors' chance to receive financial aid for college. (HOLDER WHITE and STEIGMANN, concurring.)

McCarthy v. Taylor, 2014 IL App (1st) 132239, August 22, 2014, Cook Co., 5th Div., GORDON, Affirmed. Court properly found that a handwritten amendment to trust naming successor trustee is valid and enforceable. Where language of a trust is ambiguous and settlor's intent cannot be determined, court may rely on extrinsic evidence to aid construction. If petition to construe trust states facts that, if proven, show latent ambiguity, then hearing with extrinsic evidence will be held to determine possible existence of latent ambiguity. Trial properly considered extrinsic evidence, as trust's amendment clause is ambiguous. (McBRIDE and TAYLOR, concurring.)

In re Marriage of Sheth, 2014 IL App (1st) 132611, August 22, 2014, Cook Co., 5th Div., GORDON, Dismissed. Court entered order changing custodian of four bank accounts belonging to Defendant's children; order was entered while Defendant was incarcerated on federal conviction for healthcare fraud. Defendant signed "Certificate of Service" on his notice of appeal, but signature was not notarized, and thus appellate court has no jurisdiction as Certificate of Service cannot be considered an affidavit, as Rule 12(b)(3) requires certification of attorney or affidavit of nonattorney. (PALMER and TAYLOR, concurring.)

In re E.F., 2014 IL App (3d) 130814, September 4, 2014, LaSalle Co., SCHMIDT,

Affirmed in part and reversed in part. State filed petition to involuntarily commit Respondent to treatment facility for inpatient mental health treatment and petition for administration of psychotropic medication. Court properly granted petition remanding Respondent to care and custody of medical providers and DHS, as court's findings of fact and law were sufficient per Section 3-816(a) of Mental Health and Developmental Disabilities Code. Court erred in allowing medical providers to administer psychotropic medications, based on court's failure to specify exact medications and their dosages to be administered. (McDADE and O'BRIEN, concurring.)

CitiMortgage, Inc. v. Moran, 2014 IL App (1st) 132430, August 29, 2014, Cook Co., 5th Div., GORDON, Affirmed. Bank filed mortgage foreclosure action, and one Defendant filed Section 2-619 motion to dismiss for lack of standing, on grounds that bank did not produce valid assignment of note and mortgage. Court properly entered default order against that Defendant. Although Defendant had never set his motion for hearing, motion had no merit, as he failed to provide appellate court with transcript of proceedings, and it is reasonable to conclude that trial court reviewed note and mortgage attached to complaint. Illinois Mortgage Foreclosure Law does not require plaintiff to submit any specific documentation demonstrating that it owns the note or right to foreclose on mortgage, other than copy of mortgage and note attached to complaint. (PALMER and TAYLOR, concurring.)

Roach v. Union Pacific Railroad, 2014 IL App (1st) 132015, September 5, 2014, Cook Co., LAMPKIN, Affirmed. Widow filed suit for survival and wrongful death claims against decedent's former employer, claiming that his death, at age 57, was result of injuries sustained while working at rail yard. Jury verdict of $1.589 million. Court did not abuse its discretion by barring Defendant from asking widow about fact that she and decedent lived in separate residences. Court properly allowed decedent's family physician to offer opinion about decedent's cause of death, as physician's discovery deposition gave Defendant sufficient notice that physician believed decedent's hypertension was aggravated by trauma of accident and led to his stroke and death. Even though physician had not treated decedent for 17 months prior to his death, he was his primary physician for 10 years and treated him for hypertension before and after accident. (ROCHFORD and REYES, concurring.)

Sherer v. Sarma, 2014 IL App (5th) 130207, September 5, 2014, Montgomery Co., SCHWARM, Affirmed. (Court opinion corrected 9/11/14.) Plaintiff filed wrongful death and survival actions alleging negligent treatment of her deceased daughter and daughter's husband. Defendant psychiatrist had provided treatment for depression and schizophrenia through county mental health department to daughter's husband, who stabbed his wife to death. Psychiatrist had no duty to protect and warn wife under the circumstances, as there was no evidence that husband had ever made any specific threats to harm his wife. That husband and wife were both patients of Defendant did not change the duty owed, and to expand duty would be contrary to case law and public policy. (WELCH and CHAPMAN, concurring.)

BLTREJV3 Chicago, LLC v. The Kane County Board of Review, 2014 IL App (2d) 140164, September 3, 2014, Kane Co., McLAREN, Affirmed. Tax appeals sent to Kane County Board of Review are not timely when deposited with a third-party commercial carrier (such as FedEx) on due date for filing appeal of property tax assessment. Board had adopted and published rules of procedure that incorporated the Statute on Statutes, which has a "mailbox rule" providing that a document is deemed "filed" as of date of mailing via U.S. mail. Board rules state that "mailbox rule" does not apply to communications delivered by FedEx or other commercial or non-commercial delivery entity. Had Petitioners sent tax appeals via U.S. mail, the postmark would have served as date of filing, and Board would have considered appeals timely.(BURKE and JORGENSEN, concurring.)

In re Daveisha C., 2014 IL App (1st) 133870, August 27, 2014, Cook Co., 3d Div, HYMAN, Affirmed. Juvenile court entered protective order barring, without leave of court, the public guardian (who was attorney and GAL for minor) from copying his copy of Victim Sensitive Interview (VSI) of sexual abuse victim whose mother and stepfather were charged with abuse and neglect. Court was within its discretion in granting protective order which allowed all parties' counsel to receive copy of minor's VSI on signing acknowledgement of protective order. Court

recognized sensitive nature of VSI and the need for strict protective measures, and order did not impermissibly impede parties' ability to prepare for trial.. (NEVILLE and MASON, concurring.)

In re Duckworth, Nos. 14-1561 & 14-1650 Cons., November 21, 2014, Federal District: C.D. Ill., Reversed and remanded. In action by lender seeking to enforce its security interest in property held by debtor, Dist. Ct. erred in enforcing said security interest where security agreement contained wrong date of promissory note signed by debtor, and where Dist. Ct. considered parole evidence to obtain correct date of said promissory note. Although lender could use parole evidence to correct instant mistake when seeking to enforce security interest directly with debtor, lender could not use parole evidence against bankruptcy trustee. As such, instant security agreement did not give lender security interest in specified collateral that could be enforced against trustee.

Carroll v. Akpore, 2014 IL App (3d) 130731, November 25, 2014, Knox Co., HOLDRIDGE, Reversed and remanded. Inmate filed pro se mandamus petition against warden and director of DOC, alleging they were not in compliance with statutory requirements for sanitary food preparation. Trial court must follow procedural framework in Code of Civil Procedure and mandamus statute, and cannot dismiss sua sponte a petition for mandamus relief, unless relief sought was cognizable in a postconviction petition, even if petitioner did not proceed under Post-Conviction Hearing Act. Relief sought in this mandamus petition was not an issue that could be addressed in a postconviction petition, and thus trial court erred in dismissing petition without allowing it to be served on Defendants. (SCHMIDT and O'BRIEN, concurring.)

In re F.O.,2014 IL App (1st) 140954, November 21, 2014, Cook Co., GORDON, Affirmed**.** Juvenile court properly determined that nine-year-old minor was not subject to Indian Child Welfare Act (ICWA) prior to terminating Respondent mother's parental rights. Mother admitted that she stated that she had "Seminole Creek" heritage and that "Seminole Creek" is not a tribe recognized by Bureau of Indian Affairs. State complied with its duties under the ICWA by sending notices to BIA. No letters from various Indian tribes with whom Respondent claimed heritage were part of record, and notices sent by State to tribes were sufficient under ICWA. (PALMER and McBRIDE, concurring.)

Boyer v. Buol Properties, 2014 IL App (1st) 132780, November 20, 2014,Cook Co., 4th Div., TAYLOR, Affirmed in part and reversed in part; remanded. After bench trial, court entered judgment in tenant's favor against landlords for violations of Chicago Residential Landlord and Tenant Ordinance, for total of $8,063.40. Plaintiff tenant cashed a check sent to her by landlords, labelled "Return of Sec. Deposit", with letter listing deductions from her security deposit. When landlords sent the check, they were not aware that tenant disputed the amount or the listed deductions, and thus did not intend check as compromise and settlement of disputed claim . Thus, tenant's act of cashing the check was not an accord and satisfaction. Tenant's silence during statutory compliance period does not estop her from filing suit (FITZGERALD SMITH, specially concurring; EPSTEIN, concurring in part and dissenting in part.)

In re Estate of Ostern, 2014 IL App (2d) 131236, November 20, 2014, 2d Dist., Kane Co., SCHOSTOK, Reversed and remanded. Court granted motion of Petitioners, two adult children of disabled adult, to create a trust for estate of their mother. However, Petitioners failed to inform court of a pre-existing trust for mother's estate, which included the children of a third adult child (who had been convicted, in Pennsylvania, of statutory equivalent of financial exploitation of an elderly person and who thus, per Illinois Probate Code, could not receive benefit from victim's

estate), who should have received notice of Petitioners' motion. Trial court had jurisdiction to vacate order allowing trust, with result of returning to status quo existing prior to creation of that trust, where court could properly adjudicate parties' rights as potential heirs or beneficiaries of estate of mother, who died after order was entered. (JORGENSEN and BIRKETT, concurring.)

Shipley v. Hoke, 2014 IL App (4th) 130810, November 24, 2014, McLean Co., STEIGMANN, Affirmed. Plaintiff's failure to serve Defendant law firm with a separate citation to discover assets precluded trial court from exercising personal jurisdiction over it in supplementary proceedings against defendant, a defunct manufacturer of asbestos fibers. The restraining provision of a citation to discover assets is binding only upon party cited. A judgment creditor's right to relief under Section 2-1402(f)(1) of Code of Civil Procedure expires with termination of supplementary proceedings. Termination provisions of Supreme Court Rule 277(f) provides incentives for judgment creditor to discover and reach all available property to satisfy judgment during limited time allotted. Plaintiff's failure to request extension of supplementary proceedings beyond default six-month time limit doomed his right to invoke Section 2-1402(f)(1) after termination of proceedings. (HARRIS and HOLDER WHITE, concurring.)

CRIMINAL LAW

People v. Patterson, 2014 IL 115102, October 17, 2014, 1st Dist., Cook Co., KILBRIDE, Appellate court reversed; remanded. Defendant was 15 years old when he was charged with three counts of aggravated criminal sexual assault. Pursuant to the Illinois automatic transfer statute (705 ILCS 405/5-130 (West 2008)), his case was transferred from juvenile court to criminal court, where defendant was tried as an adult, convicted by a jury of all three counts, and sentenced to a total of 36 years in prison. On appeal, the appellate court reversed defendant's convictions and remanded the cause for a new trial, holding that the circuit court of Cook County had erred by admitting defendant's confession. 2012 IL App (1st) 101573. The court also concluded that evidence of the victim's sexual history was admissible on remand under the "constitutional necessity" exception to the state rape shield statute (725 ILCS 5/115-7(a) (West 2008)). (GARMAN, FREEMAN, THOMAS, KARMEIER, and BURKE, concurring; THEIS, dissenting.)

People v. Hernandez, 2014 IL App (2d) 131082, October 20, 2014, Lake Co., JORGENSEN, Affirmed. Defendant was convicted, after bench trial, of first-degree murder, and sentenced to 84 years and 3 years MSR. Defendant and his brother, in gang-related crime, set fire to a home, killing a boy and seriously injuring family members. Court properly denied postconviction petition as frivolous and patently without merit, as allegations are directly contradicted by the record and Defendant cannot establish prejudice by any failure of counsel to communicate off the record State's offer of 20-60 years, as any error was clearly remedied by numerous on-record explanations of offer. Defense counsel's decisions to not object during State's remarks at sentencing hearing, and to not present all possible witnesses at trial due to language barrier, were matters of trial strategy and thus not ineffective assistance of counsel. (SCHOSTOK and BIRKETT, concurring.)

People v. Hall, 2014 IL App (1st) 122868, October 30, 2014, Cook Co.,1st Div., HARRIS, Affirmed in part and vacated in part; remanded for resentencing. Court entered summary dismissal of pro se postconviction petition. Because Defendant was subject to improper double enhancement at sentencing, as a prior conviction was used both as element of instant

offense and to find him eligible for Class X sentence, his sentence is void, and this issue may be raised at any time. (DELORT and CONNORS, concurring.)

U.S. v. Campbell, No. 12-3724, October 21, 2014, N.D. Ill., E. Div., Affirmed. Record contained sufficient evidence to support jury's guilty verdict on charges of harboring illegal aliens in scheme to use said aliens in prostitution ring, where: (1) term "harboring" required showing that defendant provided shelter to illegal aliens in place where authorities were unlikely to find them; and (2) record established requisite harboring activities where defendant had confiscated all of said aliens' identifying documents, forced them to live and commit prostitution under assumed name in controlled environment and prohibited them from communicating with anyone outside his control. Ct. rejected defendant's claim that he took actions that heightened risk that aliens would have been detected by immigration authorities. Ct. also rejected defendant's claim that record did not support interstate element of his Hobbs Act convictions, where defendant used Internet and long-distance telephone calls to extort money and maintain control over said illegal aliens.

U.S. v. Schmitt, No. 13-2894, October 20, 2014, S.D. Ind., Evansville Div., Affirmed. In prosecution on unlawful possession of firearm charge, Dist. Ct. did not err in denying defendant's motion to suppress rifle found in plain view in defendant's basement during execution of arrest warrant. While defendant argued that instant seizure was improper because it had occurred after defendant had been arrested on first floor of his home, seizure was proper, where rifle was discovered during protective sweep of defendant's home. Fact that rifle was in locked basement did to require different result. Ct. also did not err in admitting certain evidence of defendant's uncharged drug dealing/possession, where defendant had contested issue of his possession of rifle, and where such evidence was relevant on issue of defendant's motive to possess instant rifle, which govt. claimed was used to support his drug dealing activities.

U.S. v. Sinclair, No. 12-2604, October 21, 2014, N.D. Ind., S. Bend Div., Affirmed. In prosecution on drug and firearm charges, Dist. Ct. did not err in denying defendant's motion to continue his trial in order to obtain new counsel, where said motion was considered on day prior to start of trial. While last-minute nature of defendant's continuance request was insufficient by itself to deny said request, Dist. Ct. properly could consider last-minute nature of request, along with fact that any continuance would have caused inconvenience to 34 jurors who were told to report for jury duty, as well as to court personnel and witnesses. Moreover, defendant failed to establish that proposed new counsel would have actually accepted case or would have been able to be prepared for trial within time frame set forth in continuance motion.

U.S. v. Mayfield, No. 11-2439, November 13, 2014, Federal District: N.D. Ill., E. Div., Vacated and remanded. In prosecution on charge of conspiracy to rob drug stash-house, Dist. Ct. erred in granting govt.'s motion in limine to prevent defendant from presenting entrapment defense. Dist. Ct. improperly made credibility finding when granting instant request, and defendant otherwise presented enough evidence to justify giving entrapment instruction to jury, where defendant testified that govt. informant: (1) appealed to his friendship when requesting that he assist him in instant staged robbery; (2) gave money to defendant in order to create debt that he knew defendant could not repay; (3) exploited said debt by alluding to his status as gang member; and (4) repeatedly pestered defendant over substantial period of time. Also, although defendant had extensive prior criminal history, he presented sufficient evidence with respect to his lack of predisposition to commit instant robbery given his repeated rejections of informant's request. Fact that defendant subsequently participated in planning of robbery and in recruiting of other members of alleged conspiracy did not require different result. (Dissent filed.)

People v. Lerma, 2014 IL App (1st) 121880, September 8, 2014, Reversed and remanded with directions. Defendant was convicted, after jury trial, of first degree murder, personally discharging firearm that caused death, and aggravated discharge of weapon in connection with murder. Only one living eyewitness to shooting identified Defendant. Court refused to allow testimony of Defendant's expert on eyewitness identification whose report directly addressed effects of eyewitness identification when eyewitness identifies an acquaintance in certain circumstances. Trial courts must carefully consider and scrutinize proposed expert eyewitness identification testimony. (SIMON and LIU, concurring.)

People v. Gonzalez-Carrera, 2014 IL App (2d) 130968, September 2, 2014, Du Page Co., SCHOSTOK, Affirmed. Defendant was stopped based on officer seeing pickup truck for driving with one red taillight, as officer observed one taillight to have a hole the size of a couple inches in the red plastic covering, so that taillight emitted both red and white light when brakes were activated. State failed to establish valid basis for traffic stop, as it was daylight, dry, clear visibility, and none of the conditions requiring use of two red taillights existed at time of stop. Court thus properly granted Defendant's motion to suppress evidence found in his vehicle during traffic stop. (ZENOFF and HUDSON, concurring.)

People v. Gooch, 2014 IL App (5th) 120161, September 3, 2014, Williamson Co., GOLDENHERSH, Affirmed. (Court opinion corrected 9/11/14.) Defendant entered plea of guilty to one count of criminal sexual assault of his daughter. Assault occurred over 8 years, beginning when daughter was age 5, and Defendant was sentenced to 12 years. Sentence was not excessive, as Defendant committed assault repeatedly, over 8 years, and never stopped until victim reported abuse to her mother. Where a plea agreement reached between a defendant and the State is silent as to sentencing, a defendant is not required to move to withdraw guilty plea before challenging his sentence. A concession of charges in plea agreement is not negotiated, but is an open plea, where it does not directly speak to sentence imposed. (CHAPMAN and CATES, concurring.)

U.S. v. Zuniga, No. 13-1557, September 11, 201, Federal District: N.D. Ill., E. Div., Affirm. In prosecution on unlawful possession of firearm charge, Dist. Ct. did not err in admitting out-of-court statement by individual who claimed that he saw defendant point gun at victim's head in backyard area of tavern. Said statement qualified as excited utterance, where individual witnessed event, came back into tavern within one minute and whispered to another to call police. Fact that defendant whispered utterance did not detract from startling nature of incident. Moreover, declarant need not be completely incapable of deliberative thought at time of utterance in order for it to be admissible under excited utterance exception to hearsay rule. Also, any error was harmless since there was other evidence to support finding that defendant unlawfully possessed weapon.

People v. Warren, 2014 IL App (4th) 120721, June 6, 2014, Champaign Co., KNECHT, Affirmed in part and vacated in part; remanded with directions. Modified upon denial of rehearing 8/29/14.) Defendant was convicted, after jury trial, of unlawful possession with intent to deliver. Defendant's sentence was void to extent the street-value fine ordered by court was less than street-value of all the crack cocaine recovered. Court must ensure that amended sentencing judgment contains $2,000 mandatory assessment per Section 411.2(a)(2) of Controlled Substances Act, and $100 crime-lab analysis fee. As Defendant submitted a DNA sample for analysis in 2005, the DNA analysis fee imposed by clerk is void. (APPLETON and POPE, concurring.)

People v. Madison, 2014 IL App (1st) 131950, August 27, 2014, Cook Co., 3d Div., HYMAN, Appeal dismissed. Court entered order finding her unfit to stand trial, but after she filed notice of appeal she was found fit to stand trial with medication. Order did not require her to take medication, but only referred her for treatment. Defendant reported that she had not been taking her medication, and thus by her own voluntary act alleviated any arguable collateral consequences related to court's finding of unfitness. Collateral consequences exception to mootness doctrine does not apply, and thus appeal is moot. (NEVILLE and MASON, concurring.)

People v. Green, 2014 IL App (3d) 120522, August 26, 2014, Will Co., McDADE, Affirmed. Defendant was convicted of first degree murder. Court properly denied Defendant's motion to quash arrest and suppress, as investigatory stop leading to arrest was proper, and defense failed to shift burden to State. Information relied upon by police stemmed from various sources armed with incriminating facts; Defendant had history of domestic violence toward murder victim and had sent her threatening text messages; seizure of his vehicle was based on reasonable and articulable suspicion. Length of custodial interview was extended because Defendant's version of events continued to change, and thus duration of his interview does not render his statements involuntary or unreliable. (HOLDRIDGE and O'BRIEN, concurring.)

People v. Ford, 2014 IL App (1st) 130147, Cook Co., 2d Div., PIERCE, Affirmed in part and vacated in part; remanded with directions. Defendant was convicted of possessing contraband (dangerous weapon) in a penal institution, and sentenced as Class X offender to 14 years in prison. Although MSR was never mentioned at sentencing hearing, after commitment DOC added three-year MSR term. A term of MSR is part of every qualifying sentence regardless of whether term is mentioned during sentencing or omitted from sentencing order.(SIMON and LIU, concurring.)

People v. Salazar, 2014 IL App (2d) 130047, November 20, 2014, Kendall Co., BIRKETT, Affirmed. Defendant was convicted, after jury trial, of first-degree murder and two counts of attempted first-degree murder, all based on theory of accountability. Evidence supported jury's guilty verdicts, as it was clear from testimony that Defendant piloted his vehicle in manner to aid in commission of shooting and kept vehicle in a stationary position until firearm was emptied while passenger fired semiautomatic weapon, firing each round individually, 11 separate times. Jury could infer that Defendant, after piloting vehicle to put passenger in a good position to shoot at victims in vehicle, waited till shooting was over before fleeing the scene. Jury instruction for attempted murder was not confusing or misleading, as there were two attempted murder charges involving two different victims whose names were listed on the instruction. (BURKE and HUTCHINSON, concurring.)

People v. Breeden, 2014 IL App (4th) 121049, November 25, 2014, Champaign Co., HARRIS, Affirmed in part and vacated in part; remanded with directions. Court sentenced Defendant to 58 months imprisonment for failure to register as a sex offender. Sentence was not an abuse of discretion, as court considered his criminal history, including 14 convictions for driving while license suspended revealing a contemptuous attitude toward the law, and his failure to attend court-ordered sex offender risk assessment. (KNECHT, concurring; APPLETON, concurring in part and dissenting in part.)

People v. Hasselbring, 2014 IL App (4th) 131128, November 24, 2014, Champaign Co., POPE, Reversed and remanded. Defendant was convicted, after jury trial, of aggravated driving with a drug, substance, or compound in his breath, blood, or urine. State's expert testified benzoylecgonine is not a drug listed as a controlled substance, and State did not argue or present evidence showing that it is a compound. Jury asked whether it qualified as a substance. Trial

judge's answer, "yes, cocaine metabolite qualifies as a drug, substance, or intoxicating compound" was incorrect, in conflict with evidence presented, and served to direct verdict in State's favor, could have confused the jury, and resolved ultimate issue for jury. No double jeopardy impediment to retrial, as rational jury could have found that a substance resulting from Defendant's use of cocaine before driving was present in Defendant's system. (KNECHT and TURNER, concurring.)

People v. Clark, 2014 IL App (1st) 123494, November 20, 2014, Cook Co., 4th Div., EPSTEIN, Vacated and remanded. Defendant was convicted, after bench trial, of uncharged offenses, finding they were lesser-included offenses of charged offenses of aggravated vehicular hijacking while armed with firearm and armed robbery while armed with firearm. Offenses of which Defendant was convicted, aggravated vehicular hijacking with a dangerous weapon other than a firearm and armed robbery with a dangerous weapon other than a firearm were not lesser-included offenses because charging instruments did not permit inference that Defendant used a weapon other than a firearm during the offense. Thus, convictions are reduced to vehicular hijacking and robbery, and remanded for resentencing. (FITZGERALD SMITH and HOWSE, concurring.)

People v. Guillen, 2014 IL App (2d) 131216, November 25, 2014, Du Page Co., SCHOSTOK, Reversed and remanded. Court erred in dismissing charges of aggravated DUI on basis that charges placed Defendant in double jeopardy. State and trial court realized, during initial plea hearing, that offense was felony DUI rather than misdemeanor which Defendant had been charged. Jeopardy had not attached at the point when State nol-prossed the misdemeanor charges. Judge had never finally or unconditionally accepted the plea, as would be required for true acceptance of plea, and judge's intention and ruling were clear that he would not accept guilty plea. (ZENOFF, specially concurring; HUDSON, dissenting.)

People v. Bradford, 2014 IL App (4th) 130288, November 24, 2014, McLean Co., HARRIS, Affirmed. Defendant was convicted, after bench trial, of burglary, for knowingly and without authority remaining within Walmart with intent to commit therein a felony or theft. A defendant who develops an intent to steal after his entry into a public building may be found guilty of burglary by unlawfully remaining. Just as a defendant's entry is "without authority" if accompanied by a contemporaneous intent to steal, a defendant's remaining is "without authority" if it also is accompanied by an intent to steal. State sufficiently proved Defendant remained in Walmart "without authority" as he moved through the store and stole merchandise. Any authority Defendant may have had to remain in store was implicitly withdrawn once he formed intent to steal from store. Thus, evidence was sufficient to convict Defendant of burglary as charged. (POPE and TURNER, concurring.)

People v. Hensley, 2014 IL App (1st) 120802, November 24, 2014, Cook Co.,1st Div., HARRIS, Affirmed. Defendant was convicted, after jury trial, of first degree murder, attempted first degree murder, and aggravated battery with a firearm in shooting that killed one person and injured another. Court within its discretion in admitting proof of other crimes as they were part of continuing narrative of crime charged. Defendant failed to show that State knowingly used perjured testimony or that State's closing rebuttal argument resulted in reversible error. Defendant's right to confrontation was not violated when State presented testimony from medical examiner who did not perform autopsy of victim, as autopsy report was prepared in normal course of business. Appellate court refuses to department from Illinois precedent addressing doctrine of transferred intent, which is applicable to attempted murder cases where unintended victim is injured. (DELORT and CONNORS, concurring.)

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