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ILLINOIS STATE BAR ASSOCIATION

Illinois Courts Bulletin

Illinois supreme and appellate and federal seventh circuit case summaries

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Appellate court erred when it reversed trial court's order refusing to enroll Indiana judgment giving custody of infant to paternal grandfather and his wife; after mother, who had lived with them and child since child's birth, moved to Illinois to live with child's father. Although Indiana court's findings, that grandparents qualified as de factor custodians and that it was child's home state, is not against the manifest weight of the evidence, and although father was not entitled to notice until he established parentage in Illinois, initial order was exercise of emergency jurisdiction only. By time of hearing on custody jurisdiction, Indiana court was aware of Illinois parentage determination; and acted without giving father proper notice as required by UCCJEA.

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The full text opinions are available at these locations:

ILLINOIS SUPREME COURT
http: //www.state.il.us/court/Opinions/recent_supreme.asp

ILLINOIS APPELLATE COURT
http: //www.state.il.us/court/Opinions/recent_appellate.asp

SEVENTH CIRCUIT COURT OF APPEALS
http: //www.ca7.uscourts.gov/fdocs/docs.fwx?dname=opinion

ILLINOIS STATE BAR ASSOCIATION

Criminal Cases

DISCOVERY

• **People v. Beaman**, No. 104096 (5/22/08). Appeal, 4th Dist. Reversed and remanded.

At third stage evidentiary hearing of defendant's post conviction petition challenging his murder conviction based on alleged *Brady* violation, evidence that State suppressed evidence that John Doe was evasive during questioning, his lack of cooperation prevented polygraph examination to which he had agreed, was considered suspect by police, had a history of domestic violence against his girlfriend, exhibited erratic behavior as the result of steroid use, and had pending drug charges, is sufficient to establish him as viable alternative suspect. Since State's case against defendant was almost entirely circumstantial; and based on State's argument that all other suspects had been eliminated, and trial court allowed State's motion in limine prohibiting evidence of victim's relationship with John Doe, the suppressed evidence is material; and *Brady* violation entitles defendant to a new trial.

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FINES

• **People v. Jamison**, No. 104852 (5/22/08). Appeal, 1st Dist. Appellate court reversed in part.

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• **Hennings v. Chandler**, Nos. 102694, 103405 Cons. (5/22/08). Appeal, 3rd Dist. Affirmed.

Pursuant to Article X of Code of Civil Procedure, circuit court has authority to review prisoners' petition for writ of habeas corpus, together with attachments, and summarily dismiss it sua sponte when it is clear that the prisoner is not entitled to the requested relief. Therefore, the trial and appellate courts correctly ruled that the petitions should be dismissed without motion to dismiss or hearing.

MURDER

• **People v. Rodriguez,** No. 104679 (6/5/08). Appeal, 1st Dist. Affirmed.

Trial and appellate courts correctly ruled that 15-year sentencing enhancement for commission of murder while armed with a firearm pursuant to §5-8-1(a)(1)(d)(i) of Code of Corrections applies to unarmed defendant, convicted of first degree murder on a theory of accountability.

POST CONVICTION

• **People v. Golden**, No. 104315 (6/5/08). Appeal, 2nd Dist. Vacated and remanded.

Appellate court erred when it affirmed trial court's denial of defendants' post conviction petitions, but remanded the case to the trial court with instructions to allow second successive petitions challenging their convictions for theft. When appellate court concluded that order allowing petitions but denying requested relief was correct, there was nothing left to remand. However, it appears that trial court failed to conduct proper *Strickland* analysis. After concluding that appellate counsel failed to file complete record, it must then consider whether complete record would likely have changed result on appeal.

• **People v. Ross,** No. 103972 (6/5/08). Appeal, 1st Dist. Appellate court affirmed.

Defendant, who was convicted of armed robbery, and who filed premature pro se notice of appeal, was deprived effective assistance of counsel and right to appeal, when his attorney failed to file notice of appeal after he was sentenced. Further, power to allow filing of late notice of appeal five years after his conviction can be inferred from §122-6 of Post Conviction Hearing Act. In addition, appellate court correctly concluded that state failed to present sufficient evidence that pellet gun, used by defendant to coerce victim into turning over his wallet, qualifies as a dangerous weapon, there being no evidence that it was loaded or brandished as a bludgeon. Therefore, conviction of armed robbery must be vacated and substituted by conviction for robbery.

PRETRIAL DETENTION

• **People v. Beachem**, No. 104976 (5/22/08). Appeal, 1st Dist. Appellate court affirmed.

Appellate court correctly concluded that defendant was "in custody" for purposes of credit for days spent in detention pursuant to §5-8-7 on days that he was required to report to Cook County Day Reporting Program. Because the defendant was still under the legal custody of the sheriff, and had a legal duty to submit to that authority at any time and for any reason, and was under the physical supervision of the sheriff for several hours of the day, he was "in custody" for purposes of §5-8-7.

RETAIL THEFT

• **People v. Rowell**, No. 104279 (5/22/08). Appeal, 4th Dist. Reversed and remanded.

State failed to plead and prove that defendant acted in furtherance of a single intention or design when he took several video games, each having a value below $150 from his employer, one at a time. Therefore, his conviction for felony retail theft must be vacated; and conviction for misdemeanor retail theft entered in its place. However, it was not error for trial court to accept evidence totally by stipulation without defendant's specific admonition and agreement; since defense counsel preserved a defense.

SEX CRIMES

• **People v. Heider**, No. 103859 (5/22/08). Appeal, 4th Dist. Appellate court reversed, sentence vacated, remanded.

Trial court erred when it used mental retardation as aggravating factor to sentence 19-year-old retarded defendant, with verbal and emotional maturity of 10-year-old, who had sexual relationship with 12-year-old. Because record does not support trial court's conclusion that defendant's mental retardation makes him more dangerous, it is clear that trial judge improperly used it as a factor in aggravation, rather than a factor in mitigation, as provided by Code of Corrections; and sentenced defendant to 10 years after defendant pled guilty to predatory criminal sexual assault, and State recommended minimum sentence of 6 years. (Dissent filed).

Supreme Court of Illinois
PENDING

Civil Cases

DOMESTIC VIOLENCE ACT

• **Lacey v. Village of Palatine**, Nos. 106353 & 106359 Cons. Appeal, 1st Dist.

Question as to whether trial court properly dismissed plaintiffs' cause of action under Domestic Violence Act where plaintiffs sued de-

fendants (municipalities and police officers) for failing to protect plaintiff-decedent after learning of third-party's plan to have decedent murdered. Appellate court, in reversing trial court, found that exception to immunity contained in §305 of Domestic Violence Act overrode immunities given to defendants under §§4-102 and 4-107 of Tort Immunity Act. Appellate court also found that material question existed as to whether defendants were enforcing Domestic Violence Act at time of alleged willful and wanton conduct.

ELECTION CODE

• **Cook County Republican Party v. State Board of Elections,** No. 106139. Appeal, 1st Dist.

Question as to whether Illinois Board of Elections properly dismissed eight complaints alleging Election Code violations where Board rendered tie vote in all eight complaints. Appellate court held that dismissals were appropriate under language of §9-21 of Election Code, and that review of Board's tie votes was limited to determination as to whether Board acted contrary to law. (Partial dissent filed.)

HIGHWAY ADVERTISING CONTROL ACT

• **Outcome, Inc. v. Dept. of Transportation,** No. 106260. Appeal, 5th Dist.

Question as to whether trial court properly granted plaintiff's motion for summary judgment in action seeking order to direct defendant to issue permits for construction of outdoor advertising signs. Appellate court, in affirming trial court, found that there was sufficient evidence to show that radio tower on property was for business, commercial or industrial purpose, and that such evidence required that defendant issue permits.

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• **Acme Markets, Inc. v. Callanan**, No. 106198. Appeal, 3rd Dist.

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Criminal Cases

DOUBLE ENHANCEMENT

• **People v. Siguenza-Brito,** No. 106068. Appeal, 1st Dist.

Question as to whether trial court committed plain error by entering judgments for both aggravated kidnapping and aggravated criminal sexual assault. Appellate court, in vacating defendant's aggravated kidnapping conviction, found that convictions for both offenses constituted impermissible double enhancement because offenses, which referred to each other in charging instruments, required proof of identical elements. Rule 23 Order.

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• **People v. Robinson,** No. 106078. Appeal, 2nd Dist.

Question as to whether police officer could properly testify to out-of-court statement as to defendant's alleged punch in victim's face made by alleged victim of domestic violence where justification for admission was excited utterance exception to hearsay rule. Appellate court, in affirming defendant's conviction for domestic battery, found that statement was admissible as excited utterance where officer observed results of defendant's ongoing violent outbursts, and where "startling event" was not limited to punch itself, but rather was comprised of defendant's ongoing violent outbursts.

FINES

• **People v. Lewis**, No. 106306. Appeal, 4th Dist.

Question as to whether trial court properly assessed defendant $100 street-value fine when sentencing defendant on charge of possession of controlled substance. While defendant argued that fine was inappropriate where there was no evidence regarding value of drugs in question, appellate court noted that defendant failed to raise issue in trial court and found that trial court's assessment did not constitute plain error.

LESSER-INCLUDED OFFENSE

• **People v. Meor,** No. 106122. Appeal, 1st Dist.

Question as to whether battery is lesser-included offense of criminal sexual abuse. Appellate court, in upholding defendant's convictions for both offenses, found that under "charging instrument approach," battery was not lesser-included offense of criminal sexual abuse since charging instrument for criminal sexual abuse did not contain language indicating that sexual penetration was of insulting or provoking nature as required by battery statute. Rule 23 Order.

POST CONVICTION

• **People v. Brown,** Nos. 106243 & 106273 Cons. Appeal, 1st Dist.

Question as to whether trial court properly dismissed as frivolous defendant's petition for post-conviction relief that raised issue of ineffective assistance of counsel where appellate court found that trial court improperly assessed defendant $155 in court costs and fees pursuant to CCP §22-105 for filing frivolous petition. Defendant, in his petition for leave to appeal, contends that definition of "frivolous" should be such that his petition for post-conviction relief should be remanded for second-stage proceedings where appellate court held that petition was not "frivolous" for purposes of imposing costs and fees under §22-105. State, in its petition for leave to appeal, argues that appellate court erred in vacating costs and fees under §22-105. Rule 23 Order.

• **People v. Laugharn,** No. 106203. Appeal, 4th Dist.

Question as to whether trial court properly dismissed as untimely defendant's petition for post-conviction relief where dismissal was sua sponte without giving defendant notice of its impending ruling and without benefit of defendant's response. Appellate court concluded that petition was properly dismissed, while dissent argued that defendant should have been given opportunity to amend petition to show that petition was timely. (Dissent filed.)

REASONABLE DOUBT

• **People v. Davison**, No. 106219. Appeal, 4th Dist.

Question as to whether anhydrous ammonia is "poisonous gas" for purposes of offense of possession of deadly substance. Appellate court, in reversing defendant's conviction, found that anhydrous ammonia is not poisonous gas for purposes of §20.5-6 of Criminal Code (720 ILCS 5/20.5-6). (Partial dissent filed).

WITNESS HARASSMENT

• **People v. Cardamone,** No. 106200. Appeal, 2nd Dist.

Question as to whether record contained sufficient evidence to support defendant's conviction for witness harassment where basis of charge was allegation that defendant falsely reported to police that victim (who was potential witness in another legal proceeding against defendant) had committed certain traffic offenses. Appellate court, in upholding conviction, rejected defendant's claim that record failed to show that traffic stop of victim produced in victim's mind requisite mental anguish or emotional distress, or that his report to police failed to constitute required "communication" to victim for purpose of witness harassment statute.

Appellate Court of Illinois OPINIONS

Civil Cases

ABUSE AND NEGLECT

• 2nd Dist. **In re Ivan H. and Marifer H**., No. 2-08-0065 (6/4/08). Lake Co. Reversed.

Because the provisions of §2--18(4)(c) of Juvenile Court Act apply to shelter care hearings, trial court should not have considered uncorroborated statements of sexual abuse from respondent's daughter as basis for removal at shelter care hearing. Further, because there was no probable cause for safety plan, finding against mother of neglect based on injurious environment because she failed to follow safety plan must be reversed.

• 4th Dist. **In re John C. M.**, No. 4-07-1030 (5/12/08). McLean Co. Affirmed.

Trial court did not lose subject matter jurisdiction when it failed to conduct dispositional hear-

ing within six months of removal of respondent's son because: provisions of §2-22(4) of Juvenile Court Act are directory, and time limit of section was tolled by respondent's waiver when scheduling adjudicatory hearing and failure to object to scheduling of dispositional hearing. Further, finding that mother was unfit, after her son was removed from her care with unexplained head injury and she failed to incorporate lessons from counseling to stop pattern of establishing abusive relationships with men, and that child's natural father was fit, despite allegations from respondent that he had previously abused her, is not against the manifest weight of the evidence.

ARBITRATION

• 1st Dist. **Casablanca Trax v. Trax Records**, No. 1-06-2194 (6/6/08). Cook Co. Reversed and remanded.

Trial court erred when it concluded that defendants, parties to a joint venture agreement closely related loan agreement, waived their right to arbitration of the dispute. Although loan agreement, which the plaintiffs seek to enforce by seizure and sale of secured assets, has no arbitration clause, it is closely related and intertwined with joint venture agreement with broad arbitration clause. Court should have stayed all proceedings pending arbitration and left initial determination regarding arbitrability of dispute to arbitrator.

• 2nd Dist. **Williams v. Jo-Carroll Energy, Inc**., No. 2-07-0802 (5/19/08). Jo Daviess Co. Affirmed and remanded.

Court has jurisdiction to appeal or order staying plaintiff's complaint for damages to dairy cattle, allegedly resulting from exposure to power line, pending arbitration based on SCR 307 as an appeal from an injunction. Further, trial court did not err when it ordered arbitration; because arbitration clause, contained in bylaws of defendant electric cooperative, to which plaintiffs belong, is neither substantively nor procedurally unconscionable. Further, because membership agreement, signed before addition of arbitration clause to bylaws, requires parties to abide by bylaws, arbitration clause shall be enforced against plaintiffs.

• 5th Dist. **Wigginton v. Dell, Inc**., No. 5-07-0076 (6/2/08). St. Clair Co. Affirmed.

Clause in consumer agreement for purchase of computers compelling arbitration, but prohibiting arbitration of claim as class action, is both procedurally and substantively unconscionable. Therefore, trial court did not err when it refused to compel arbitration of only plaintiff's claims. Basis for finding of procedural unconscionability is that plaintiff did not have an opportunity to see arbitration clause in agreement until after he had purchased equipment.

CHILD SUPPORT

• 4th Dist. **In re Marriage of O'Daniel**, No. 4-07-0250 (6/2/08). Sangamon Co. Affirmed.

Trial court did not err when it refused to include distributions from former husband's IRA as income for purposes of child support calculations. Only portion of IRA that might be considered income is that part that represents earnings on deposits; and former wife failed to present any evidence showing portion representing earnings. In addition, trial court did not abuse its discretion when it found that failure by husband to maintain medical insurance was not willful while holding him in contempt for failing to pay his portion of uncovered medical expenses. Further, trial court could properly treat revenue from rental property, retained by former husband's business partner as payment for downpayment advanced by him as §505(3)(h) deduction. (Rejecting second district opinion in *Lindman*).

CONTRIBUTION

• 1st Dist. **Chicago Province of the Society of Jesus v. Clark and Dickens**, LLC, Nos. 1-07-0960 & 1-07-1003 Cons. (6/9/08). Affirmed.

Non-settling objecting defendants failed to provide adequate record to review their challenge to finding that proposed settlement with six defendants, for slightly less than half of damages associated with collapse of building resulting from excavation of neighboring one, was good faith settlement, by failing to include transcripts of at least six hearings when proposed settlement was discussed. Nevertheless, despite indemnification agreement between plaintiffs and some settling defendants, non-settling objecting defendants have failed to meet their burden of establishing that proposed settlement is disproportionate by failing to address the issue of their own duty and relative culpability for purposes of Contribution Act.

COSTS

• 2nd Dist. **Peltier v. Collins**, No. 2-07-0432 (5/16/08). Ogle Co. Affirmed.

Trial court did not err when it awarded to the prevailing plaintiff, after trial, the cost of the court reporter and videographer for the taking of plaintiff's out-of-state treating physician's evidence deposition. The witness was unavailable for trial, being beyond the subpoena power or the court; was necessary to prove plaintiff's personal injury damages; and expenses are authorized by SCR 208.

DEFAMATION

• 1st Dist. **Hanson v. Ahmed**, No. 1-07-2031 (5/27/08). Cook Co. Reversed.

Trial court erred when it denied defendants' motion to dismiss plaintiff's defamation complaint for lack of personal jurisdiction over the defendants who reside in Missouri. Plaintiff's complaint alleges that defendants defamed plaintiff when they denied any involvement in automobile collision with plaintiff in telephone call from their insurance adjuster. Giving statement to Illinois adjuster, who placed the call, is insufficient to satisfy minimum due process requirements for assertion of personal jurisdiction.

• 1st Dist. **Rose v. Hollinger International, Inc**., No. 1-06-2885 (5/19/08). Cook Co. Affirmed.

Intemperate e-mail by editor in chief of newspaper after firing of publisher explaining departure by saying that it would take some time to mend all the damage he has wrought to finances, reputation, relationships, morale and product quality, is inactionable opinion. Therefore, trial court was correct to allow §2-615 motion to dismiss with prejudice.

DISCOVERY

• 1st Dist. **In re All Asbestos Litigation**, No. 1-06-2163 (6/5/08). Cook Co. Reversed.

Trial court abused its discretion when it ordered defendant, pump manufacturer, in asbestos litigation pending in Cook County to search its records for a period of almost 40 years, to ascertain to what job sites it delivered products containing asbestos. Defendant has responded that it stores its records by customers, has already provided a response to general order, and plaintiffs have not alleged that they were exposed to any of defendant's products at any specific location in Illinois.

• 5th Dist. **Berry v. American Standard, Inc**., No. 5-06-0621 (5/19/08). Crawford Co. Affirmed.

Plaintiff, suffering from terminal mesothelioma, who unsuccessfully sought to have his evidence deposition taken, and whose discovery deposition was extended over sufficiently long period of time that he died before it could be taken, was nevertheless a party to the litigation for purposes of SCR 212(a)(5) even after his wife was substituted as plaintiff as administrator of his estate. Nor do they qualify as dying declarations. Therefore, his discovery deposition could not be used as evidence at trial; and was properly barred by trial court.

DISSOLUTION OF MARRIAGE

• 1st Dist. **Engel v. Loyfman**, No. 1-07-1468 (6/6/08). Cook Co. Reversed and remanded.

Because trial court misconstrued the concept of subject matter jurisdiction when it allowed former client's motion to vacate agreed judgment for attorney's fees because complaint was filed within 90 days of order allowing attorney to withdraw, its order must be reversed and remanded. Although motion sufficiently demonstrates basis for vacating order, on remand, court must consider whether attorney's affidavits provide a sufficient response to client's motion; and conduct evidentiary hearing if it does.

• 3rd Dist. **In re Marriage of Schurtz**, No. 3-07-0345 (5/28/08). Peoria Co. Affirmed.

Trial court did not err when it ordered 62-year-old former husband to pay a portion of his disability pension over to his former wife based on provision of Marital Settlement Agreement allocating a portion of his retirement pension to her. Because former husband was entitled to retirement benefits but chose to receive disability benefits instead, the wife is entitled to what she would receive from his retirement benefits. Further, trial court did not abuse its discretion when it refused wife's petition for attorney's fees and interest on past due benefits; because husband had a good faith argument that she was not entitled to receive any portion of his disability.

DRIVING UNDER THE INFLUENCE

• 3rd Dist. **People v. Garstecki**, No. 3-07-0259 (5/16/08). Will Co. Affirmed.

Although trial court violated SCR 431 when it refused defendant counsel's request to directly question prospective juror, it was not reversible error because trial court fully questioned prospective jurors in areas proposed by defendant. Further, evidence that defendant, who refused chemical testing, was swerving and driving across center line, had strong odor of alcohol, glassy eyes, admitted drinking at least two beers, and was believed intoxicated by two officers, is sufficient for jury to find defendant guilty of DUI.

EDUCATIONAL EXPENSES

• 4th Dist. **Sussen v. Keller**, No. 4-07-0704 (5/7/08). Champaign Co. Reversed and remanded.

Trial court's findings when making decision on motion for §513 educational expenses, that child's choice of out-of-state post high school technical school for automobile repair is reasonable, is against the manifest weight of the evidence, since respondent presented evidence that an adequate less expensive local school is available; and there was no evidence in the record to demonstrate that child's choice was a superior program. However, trial court's determination that respondent, who earns $22,000 per year, could afford to contribute one third of expenses for school, transportation and lodging is not against manifest weight. On remand court should order respondent to pay one third of costs of completing associates program for less expensive community college program. (Dissent filed).

ENVIRONMENTAL LAW

• 1st Dist. **Fedex Ground Package System, Inc. v. The Pollution Control Board**, No. 1-07-0236 (5/23/08). Cook Co. Affirmed.

Pollution Control Board correctly interpreted §734.335(d) of Administrative Code when it denied plaintiff's request to approve amended remediation plan for clean up of leaking storage tanks on its property and request for additional reimbursement; because EPA had already issued No Further Remediation letter. Furthermore, regulation is consistent with, and authorized by, statute.

FEDERAL EMPLOYERS' LIABILITY ACT

• 1st Dist. **Dixon v. Union Pacific Railroad Co.**, No. 1-07-2123 (6/9/08). Cook Co. Reversed and remanded.

Although trial court, in defendant's FELA action, did not abuse its discretion when it gave jury instruction on mitigation of damages based on testimony from plaintiff's surgeon that he could perform medium level work and testimony that he was indifferent to returning to work at the Railroad after his fall from rail car, or refuse to vacate low award for economic damages, its failure to vacate zero award for disability is against the manifest weight of the evidence. Defendant acknowledged a period of total disability immediately after plaintiff's fall, which entitles plaintiff to new trial on the issue of disability damages alone.

FREEDOM OF INFORMATION ACT

• 2nd Dist. **Stern v. Wheaton-Warrensville Community Unit School Dist. 200**, No. 2-07-0424 (6/9/08). DuPage Co. Reversed and remanded.

Trial court erred when it granted summary judgment to school district dismissing plaintiff's complaint seeking to enjoin defendant-school district from refusing to disclose superintendant's contract pursuant to his FOIA request. Even though contract may be contained in superintendant's personnel file, there is material question of fact regarding whether contract is exempt; and trial court must conduct in camera investigation. Further, there is material issue of fact regarding whether school district has waived exemption by supplying contract to members of the media requesting it.

• 5th Dist. **DesPain v. The City of Collinsville**, No. 5-07-0300 (5/9/08). Madison Co. Affirmed in part, reversed in part.

Trial court erred when it concluded that municipality did not violate Freedom of Information Act when it refused plaintiff permission to examine original tape recording of council meetings, but offered to make plaintiff a copy of recording for a fee. However, it was correct to deny the plaintiff's declaratory judgment count, because the issue of the city's failure to comply with notice requirement of §9(a) is now moot.

FOREIGN JUDGMENTS

• 3rd Dist. **Sunseri v. Moen**, No. 3-07-0468 (5/15/08). Rock Island Co. Affirmed in part, reversed in part, remanded.

Neither the Full Faith and Credit Clause nor the Uniform Foreign Money Judgments Enforcements Act require the trial court to expand plaintiff's New York judgment against a partnership beyond the partnership and enforce the judgment against defendant, an individual partner not named in the New York order or served in the New York case. Therefore, trial court properly vacated order allowing supplemental proceedings against individual partner. However, the trial court erred by allowing citation proceedings to continue regarding partnership assets.

GUARDIANSHIP

• 1st Dist. **In re Tasha L.,** No. 1-07-2991 (5/27/08). Cook Co. Affirmed.

Trial court's finding that, after teenage minor's parents were found neglectful by virtue of injurious environment because of substance abuse and domestic violence issues, and minor had been in foster care at paternal uncle and aunt's home for two years, it was in minor's best interests to award her aunt and uncle permanent guardianship and close court file. Although parents had made progress, they had not yet progressed to unsupervised visitation; and minor was doing well in the home of her foster parents. In addition, it was not error for trial court to deny father's petition to appoint new counsel for minor, when guardian ad litem acknowledged that minor wanted to return home to her parents, but advocated against it. Minor acknowledged that she wanted her parents to complete treatment; and indicated no dissatisfaction with guardian ad litem.

INEFFECTIVE ASSISTANCE OF COUNSEL

• 4th Dist. **People v. Young**, No. 4-06-0783 (6/2/08). McLean Co. Affirmed.

After convicting defendant of calculated drug conspiracy, trial court conducted proper *Krankel* hearing upon receipt of letter from defendant, asserting that his counsel was ineffective for failing to call alibi witness, when court questioned defendant's counsel and ascertained that counsel interviewed witness and made strategic decision not to call him at trial. Trial court was not required to question defendant.

INSURANCE

• 1st Dist. **American Economy Ins. Co. v. DePaul University**, No. 1-05-4027 (5/30/08). Cook Co. Affirmed.

Trial court correctly concluded that insurer of lighting contractor had duty to defend owner of building, as additional insured, in litigation for personal injuries sustained by occupant for injuries she sustained as result of exposure to unfiltered fluorescent lighting. Even though owner is the drafter of third party complaint against electrical subcontractor, there is additional evidence in case, not supplied by owner, to bring complaint within coverage of policy. Complaint alleges that plaintiff was injured as a result of negligent "selection and installation" of lighting fixtures, bringing it within potential coverage.

• 1st Dist. **Virginia Surety Company v. Adjustable Forms Inc**., No. 1-07-2663 (5/16/08). Cook Co. Affirmed.

Worker's compensation carrier of subcontractor to major construction project, where general contractor obtained an owner controlled insurance policy from now insolvent carrier, providing general liability and workers' compensation coverage to all companies working on project, and enabling subcontractor to reduce bid by amount of insurance savings, did not provide "other insurance" for purposes of exhaustion of coverage before Illinois Insurance Guaranty Fund. Further, evidence that no coverage was provided could consist of reduction in premiums; and need not consist of language of policy exclusively.

• 1st Dist. **Wolfensberger v. Eastwood**, No. 1-07-0121 (5/12/08). Cook Co. Affirmed in part, reversed in part, remanded.

Trial court erred when it granted summary judgment in favor of issuer of umbrella insurance policy; because the issue of whether driver of vehicle in which plaintiff was a passenger at time of her injury was acting within the scope of his employment when he negligently drove from bar, is material issue of fact. In addition, in order to be covered as individual "engaged in the business or personal affairs" of employer, driver must have been acting within the scope of his employment.

• 3rd Dist. **Progressive Premier Ins. Co**., No. 3-07-0297 (6/11/08). LaSalle Co. Affirmed.

Trial court correctly found that passenger on jet ski, who was injured in accident between two jet skis owned by same insureds, and covered on same policy, was limited to liability limits for one of insured vehicles, because policy provides that $100,000 liability limits applies regardless of the number of watercraft insured.

INVERSE CONDEMNATION

• 1st Dist. **City of Chicago v. Prologis**, No. 1-07-0108 (6/6/08). Cook Co. Affirmed.

Because TIFF bonds are not secured by real estate, subject to condemnation by City of Chicago for expansion of O'Hare Airport, but are secured only by incremental taxes, if any, holders of bond have no inverse condemnation claim against City, even though its acquisition of property by condemnation resulted in bonds becoming valueless.

INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION

• 4th Dist. **In re Denetra P**., No. 4-07-0372 (5/7/08). Sangamon Co. Reversed.

Order allowing the involuntary administration of psychotropic medication must be reversed because petition fails to allege that a good faith effort was made to determine whether there was valid power of attorney for health care or declaration for mental health treatment, and there is evidence in the record that one actually exists. (Dissent filed).

JUDGMENTS

• 1st Dist. **Maniez v. Citibank**, No. 1-06-3713 (6/10/08). Cook Co. Certified question answered.

On interlocutory appeal, certified question regarding whether a memorandum of judgment containing incorrect date for the entry of judgment, creates a lien on the defendant's real estate, pursuant to CCP §12-101, is answered in the negative.

JUVENILE DELINQUENCY

• 1st Dist. **In re Dontrell H**. **v. Bd. of Ed. of the City of Chicago**, No. 1-07-1368 (5/6/08). Cook Co. Reversed and remanded.

Although juvenile court, which had previously entered disposition of court supervision in juvenile delinquency proceeding, appointed an educational advocate from probation office, and ordered that child attend school, had subject matter jurisdiction to entertain supplemental petition for attorney's fees to attorney who filed due process complaint against school district for failing to create and follow appropriate IEP, it erred when it awarded fees without first finding that school district's violation was willful, as required by §4-8.02(a) of School Code.

LEASES

• 1st Dist. **Genesco v. 33 North LaSalle Partners**, Nos. 1-07-2782 & 1-07-3076 Cons. (5/28/08). Cook Co. Affirmed.

Trial court did not err when it granted summary judgment to defendant-lessor in declaratory judgment action brought by tenant, concluding that tenant did not properly exercise termination clause of lease. Tenant mailed notice of termination to wrong address, to wrong addressee, and one day late. Further, it failed to prove either undue hardship or just excuse; and lease provides that time is of the essence.

LIMITATIONS

• 3rd Dist. **McCready v. Illinois Secretary of State**, No. 3-06-0521 (5/15/08). Iroquois Co. Affirmed.

Trial court correctly concluded that plaintiff failed to state a viable claim against Secretary of State for violation of Freedom of Information Act in responding to his request for vehicle title information; because more specific provisions of Vehicle Code apply. Further, counts seeking injunction for violation of Consumer Fraud Act and Deceptive Practices Act are barred by 3-year statute of limitations. In addition, plaintiff, as sole proprietor, who buys commercial paper, does not qualify as person who is entitled to obtain private information in title history; and did not acquire security interest in vehicle until after alleged failure to include secured creditor on title.

LINE OF DUTY DISABILITIES

• 1st Dist. **Merlo v. Orland Hills Police Pension Board**, No. 1-06-3729 (6/4/08). Cook Co. Affirmed.

Trial court correctly concluded that decision by police board to deny claimant's line of duty disability pension for back injury which he sustained when he was unstacking parking blocks, after responding to call from employee of youth recreation center reporting mischievous conduct by a group of juveniles, is clearly erroneous.

LIQUOR LAWS

• 1st Dist. **Addison Group, Inc. v. Daley**, No. 1-06-0532 (5/23/08). Cook Co. Affirmed.

Liquor Control Commission properly considered tavern owner's voluntary payment of fines and acceptance of suspension as evidence of prior violations, when considering appropriate sanction for serving alcohol to a minor. Further, it could properly consider violations before current individual became owner of corporation which holds liquor license. In addition, Commission rules explicitly prohibit litigation of prior charges; and 30-day suspension, based on previous history of violations is not excessive.

MEDICAID

• 1st Dist. **Midwest Emergency Associates-Elgin v. Harmony Health Plan of Illinois**, No. 1-07-0039 (5/15/08). Cook Co. Affirmed.

Plaintiff's complaint against managed care organization alleging quasi contract and unjust enrichment for failing to fully reimburse plaintiff for emergency services provided to patients covered under Medicaid, is subject to CCP §2-619 dismissal. By agreeing to participate in Medicaid, plaintiff, which has no contract with defendant, is entitled to reimbursement at the rate set by HFS only.

MEDICAL MALPRACTICE

• 3rd Dist. **Thornton v. Garcini, M. D.,** No. 3-07-0326 (5/16/08). Will Co. Affirmed.

Plaintiff was not required to present any expert testimony regarding her claim for negligent infliction of emotional distress as a result of defendant-doctor leaving her to remain in delivery room with dead infant half delivered for more than an hour. Further, because single recovery rule was not raised in trial court, and because there was no testimony regarding how the settlement between plaintiff and nurses and hospital for medical malpractice was apportioned, defendant-doctor is not entitled to any set off from prior settlement.

MEDICAL PRACTICE ACT

• 1st Dist. **Center for Athletic Medicine v. Independent Medical Billers**, No. 1-07-1594 (5/28/08). Cook Co. Affirmed.

Trial court did not err when it granted summary judgment in favor of defendant-claims processor, which entered into written agreement with plaintiff, professional corporation of physicians, to process medical claims with insurance and government payers for a percentage of the medical fees collected. Contract violates Medical Practice Act, being impermissible fee splitting agreement. In addition, because there is a contract, albeit a void one, there is no cause of action for unjust enrichment.

MORTGAGE FORECLOSURE

• 2nd Dist. **JP Morgan Chase Bank v. Fankhauser**, No. 2-07-0140 (6/4/08). Kane Co. Affirmed in part, vacated in part, remanded.

Although trial court correctly treated motion to vacate judgment of foreclosure of junior mortgage that reserved jurisdiction for purposes of supervising the judicial sale of mortgaged premises and that contains SCR 403(a) language that order is final and that there is no just reason to delay enforcement or appeal, as a §2-1401 motion, and denied it because senior mortgagee failed to show due diligence, it erred when it confirmed judicial sale over objection of senior mortgagee. Objection, which incorporates appraisal of property and bankruptcy schedule of mortgagor showing value approximately ten times the successful bid at sheriff's sale, is sufficient to set forth claim of unconscionability of sale pursuant to §15-1508 of Foreclosure Law and require an evidentiary hearing.

NEGLIGENCE

• 1st Dist. **Britton v. Univ. of Chicago Hospitals**, No. 1-06-3080 (5/23/08). Cook Co. Affirmed.

Plaintiff, who shoved stuck revolving door as he was attempting to enter hospital, and was injured when glass shattered, presented no evidence sufficient to raise material issue of fact, either regarding failure on part of hospital to exercise due care for his safety, or to show that his injury is one that does not ordinarily occur in the absence of negligence and was under exclusive control of the defendant-hospital, in order to invoke res ipsa loquitor. Therefore,

trial court did not err when it granted summary judgment to defendant dismissing plaintiff's complaint.

PARENTAGE

• 3rd Dist. **In re Parentage of G.E.M**, No. 3-06-0848 (5/27/08). Will Co. Reversed.

After plaintiff-mother and voluntary father executed Voluntary Acknowledgement of Parentage after birth of child in 1995, and DuPage County Court entered order declaring him the father of the child shortly thereafter, DuPage County court lacked subject matter jurisdiction, five years later, to grant mother's motion to vacate all prior orders of parentage and support. Voluntary acknowledgement of parentage properly executed can be rescinded only within 60 days or by petition of father alleging fraud, duress or mistake. Therefore, Will County court erred when it denied genetic father's motion to dismiss subsequently filed Parentage Act complaint seeking to declare him the legal father of the child and for support.

PENSIONS

• 1st Dist. **Fields v. Schaumburg Firefighters' Pension Fund**, No. 1-07-2721 (5/30/08). Cook Co. Affirmed.

Absent an application from plaintiff and decision by the Board, correspondence from village employee containing a miscalculation of plaintiff's disability pension annuity, and issuing him a check for benefits which she erroneously concluded he was entitled to receive, is not an administrative decision. Therefore, plaintiff is not entitled to declaratory relief or to an injunction forbidding the Board from taking action to correct the error; and trial court did not err when it granted the Board's motion for summary judgment dismissing plaintiff's complaint.

POLICE AND FIRE BOARDS

• 2nd Dist. **Village of Roselle v. Roselle Police Pension Board**, No. 2-07-0354 (5/19/08). DuPage Co. Affirmed.

Trial court correctly concluded that Article 3 of Police Pension Code did not give Board authority to grant cost of living increase to surviving spouse of retired police officer, even though her husband had received cost of living increases to his pension while he was receiving it.

PREMISES LIABILITY

• 1st Dist. **Britton v. University of Chicago Hospitals**, No. 1-06-3080 (5/27/08). Cook Co. Affirmed.

Plaintiff's complaint against hospital for injuries she sustained when glass on revolving door, which she used to gain entry to hospital, broke after she pushed on it is subject to summary dismissal. Plaintiff failed to present any evidence to show that hospital breached its duty to maintain door; or that its negligent maintenance proximately caused her injuries. Further, since door was not in exclusive control of defendant, and injury was not one that typically occurs in the absence of negligence, the doctrine of res ipsa loquitor does not apply.

• 1st Dist. **Torress v. Midwest Development Co.**, No. 1-06-3698 (5/19/08). Cook Co. Affirmed.

Trial court did not abuse its discretion when it barred expert's testimony regarding unnatural accumulation of snow and ice because expert's deposition reveals that he could not testify to a reasonable degree of scientific and architectural certainty whether water stains were present on underside of roof at time of plaintiff's fall, whether ice damming had occurred at time of plaintiff's fall, whether ice or snow was on plaintiff's concrete step at time of his fall, and whether plaintiff had actually slipped on unnatural accumulation of snow and ice at the time of his fall.

PROMISSORY ESTOPPEL

• 5th Dist. **Newton Tractor Sales, Inc. v. Kubota Tractor Corp.,** No. 5-06-0087 (6/5/08). Fayette Co. Affirmed.

Trial court followed established precedent, which remains viable, when it granted summary judgment dismissing plaintiff's complaint because promissory estoppel is not available as a cause of action; but remains a defense exclusively. Further, trial court did not err when it refused to assess against plaintiff, defendant's costs for deposition subpoena fees and deposition transcription fees, because they were not used at trial. That they were used to obtain summary judgment is not sufficient.

PUBLIC EMPLOYEES DISABILITY ACT

• 1st Dist. **Bahr v. Bartlett Fire Protection District**, No. 1-06-2253 (5/28/08). Cook Co. Reversed.

Trial court erred when it dismissed plaintiff-firefighter's complaint for disability benefits, payment of his health insurance, and attorney's fees as the result of two injuries to his back. Plaintiff is entitled to rate of pay that he was earning on the date of his second injury, whether or not defendant had notified him of impending reduction in his rank and pay. Further, when plaintiff returned to work within a year of his first injury, he did not exhaust the one-year period for payment of his health benefits for purposes of Health Care Benefits for Safety Employees Act; and his claim is not foreclosed by collateral estoppel because of settlement of his workers' compensation claim. Therefore, since second injury was to same part of the body and exasperated his first injury, defendant could not limit his health benefits to one year after his second injury. In addition, he is entitled to attorney's fees under Attorney's Fees in Wage Payments Act.

PUBLIC SAFETY EMPLOYEES BENEFITS ACT

• 2nd Dist. **Senese v. Village of Buffalo Grove**, No. 2-07-1017 (6/5/08). Lake Co. Affirmed.

Trial court correctly concluded that plaintiff-police officer, who while fulfilling his assignment to monitor traffic, was hit from the rear by motorist and suffered disabling injuries, is entitled to receive payment of health insurance premiums because he sustained catastrophic injury from an illegal act. Village has not justified restrictive interpretation of "illegal act" based on context of entire Act.

RAILROADS

• 4th Dist. **Morris v. Illinois Central Railroad Co.**, No. 4-07-0816 (5/19/08). Coles Co. Affirmed.

Trial court correctly concluded that plaintiff's complaint failed to state a cause of action for negligence against railroad for leaving parked railroad cars at crossing; because the presence of rain, poor lighting, and fog are insufficient allegations to give rise to special circumstances sufficient to give rise to duty on part of defendants to warn of car's presence. (Dissent filed).

RES JUDICATA

• 1st Dist. **Westmeyer v. Flynn**, No. 1-07-2946 (5/20/08). Cook Co. Reversed and remanded.

Trial court erred when it dismissed plaintiff's complaint, seeking to pierce corporate veil of former employer, limited liability company, and enforce her judgment against its individual owners based on res judicata. Plaintiff shall maintain a separate action attempting to pierce the corporate veil after she obtains a judgment against limited liability company. Further, doctrine of piercing the corporate veil can be applied to Delaware limited liability company.

SERVICE OF PROCESS

• 2nd Dist. **Hatchett v. Swanson**, No. 2-07-0690 (5/20/08). Winnebago Co. Vacated and remanded.

After plaintiff filed second personal injury complaint, after voluntarily dismissing original complaint, filed a few days before expiration of statute of limitations, trial court erred when it considered time between dismissal of original complaint and filing of second complaint when deciding to grant defendant's motion to dismiss second complaint based on SCR 103(b). However, when determining whether plaintiff has demonstrated due diligence in obtaining service on defendant of second complaint, trial court was free to consider circumstances of original action.

SETTLEMENTS

• 2nd Dist. **Medstrategies Consulting Group v. Schmiege**, No. 2-07-0586 (5/8/08). Kane Co. Reversed.

Trial court erred when it entered judgment in favor of the plaintiff for $79,000 after defendant failed to make timely installment payment toward settlement amount of $25,000. Because there is nothing in the record to show what plaintiff would have been entitled to had case not been settled, provision in settlement agreement increasing total judgment from $25,000 to $79,000 upon failure to make timely payment is an impermissible penalty.

TELEPHONE CONSUMER PROTECTION ACT

1st Dist. **Travel 100 Group v. Mediterranean Shipping Company**, No. 1-06-3744 (5/30/08). Cook Co. Affirmed.

On de novo review, trial court did not err when it denied motion to strike affidavit of former office manager of plaintiff-travel agency, based on allegation that defendant obtained affidavit by leading her to believe she was being subpoenaed for deposition; because plaintiff had opportunity to obtain her discovery deposition and fully explore circumstances surrounding affidavit and witness bias before responding to motion for summary judgment. Further, defendant-advertiser is entitled to summary judgment dismissing plaintiff's complaint pursuant to the Telephone Consumer Protection Act for sending unsolicited faxes because defendant has established that plaintiff signed a series of documents providing its fax number to a travel agency organization to which it belonged and authorized the organization to release its contact information so that prospective suppliers of travel plans could supply it with information.

TORT IMMUNITY ACT

• 1st Dist. **Anthony v. City of Chicago**, No. 1-05-1954 (5/16/08). Cook Co. Certified questions answered.

Plaintiff's complaint against City alleging failure to enforce building code and court order against building owners, who had been found in violation for failure to provide adequate exits, is barred by absolute immunity provisions contained in §2-103 of Tort Immunity Act. Further, willful and wanton exception in §2-102 does not apply to absolute immunity of §4-102 regarding behavior of police officers at scene of disturbance; because plaintiffs have not named any individual employees of City as defendants; and plaintiffs have not alleged sufficient facts to show that City exercised requisite degree of control over premises.

UNIFORM COMMERCIAL CODE

• 2nd Dist. **MidAmerica Bank, FSB v. Charter One Bank, FSB**, Nos. 2-07-0064 & 2-07-0158 Cons. (6/2/08). DuPage Co. Affirmed in part, reversed in part.

After bank stopped payment of cashier's check, and customer of bank, in which check had been deposited, assigned its rights against issuing bank to it, assignee bank was subject to all of the defenses which issuing bank had against assignee bank's customer. Since trial court found that assignee bank's customer acquired cashier's check through fraud, it could not qualify as holder in due course; and, pursuant to §3-411 of Commercial Code, as amended, issuing bank could assert a defense to its dishonor of the check. Therefore, trial court erred when it entered a judgment in favor of assignee bank; but did not err when it denied prayer for attorney's fees.

• 5th Dist. **Johnson v. First Banks, Inc**., No. 5-06-0646 (6/5/08). Madison Co. Affirmed.

Trial court correctly concluded that plaintiff, who did not have an account at defendant, Missouri state bank, lacked standing to bring a class action complaint for wrongful dishonor of check, because he was not a "customer" of that bank within definition of UCC. Further, because Federal Law allows banks to charge a check cashing fee, any state law claim is preempted by National Banking Act and regulations interpreting it.

WORKERS' COMPENSATION

• 1st Dist. **Comfort Masters v. Workers' Compensation Commission**, No. 1-07-1951 (5/20/08). WC div. Affirmed.

Workers' Compensation Commission's decision to award claimant medical expenses for treatment, including surgery, that he received in New Mexico following his work related injury is not erroneous; because claimant's massages, received from acupuncturist at no charge, is not physician for purposes of §8(a) two choice rule and treatment was within chain of referral. Furthermore, even were she a physician, her services would not count as a choice, since employer was never asked to pay for her services.

• 1st Dist. **Palmer v. Reightliner, LLC**, No. 1-06-2076 (6/4/08). Cook Co. Reversed.

Because Illinois, as the place of injury of the plaintiff and the place of filing the complaint for personal injuries, has the most significant contact to the litigation, trial court erred when it applied Ohio Law to determine that Ohio employer, who paid plaintiff's workers' compensation claim in Ohio, was immune from contribution for plaintiff's injuries. Therefore, it should not have dismissed defendants' third party complaint against plaintiff's employer for contributions in plaintiff's complaint against owner and employee of facility at which plaintiff fell from ladder while installing security system.

• 5th Dist. **Dawson v. Workers' Compen–sation Commission**, No. 5-07-0339WC (5/8/08). Franklin Co. Affirmed.

Workers' Compensation Commission's refusal to award claimant wage differential pursuant to §8(d)(1) of Act, because of claimant's CWP is not against manifest weight of the evidence; because claimant presented insufficient evidence to prove that claimant's respiratory condition caused him to be unemployable as a coal miner.

WRONGFUL DEATH

• 1st Dist. **Mercado v. Mount Sinai Hosp. Med. Center of Chicago**, No. 1-06-1825 (5/27/08). Cook Co. Certified question answered.

Plaintiff's complaint for wrongful death of her fetus daughter is not barred by the provisions of §2.2 of Wrongful Death Act; because complaint alleges that she agreed to terminate the pregnancy based on misdiagnosis that she had an ectopic pregnancy, which was not viable, when she actually had a viable uterine pregnancy. Therefore, plaintiff's agreement to terminate her pregnancy does not qualify as a "requisite consent" within meaning of Act.

Criminal Cases

CONFESSIONS

• 1st Dist. **People v. Hopkins**, No. 1-07-0224 (5/27/08). Cook Co. Affirmed.

Although defendant's arrest was illegal, trial court did not err when it refused to suppress his confession; because intervening statement by defendant's companion, with which police confronted defendant, attenuated the illegal arrest. Defendant presented no evidence that companion's statement was obtained illegally; and State was not required to prove that statement was obtained legally.

CONTROLLED SUBSTANCES

• 4th Dist. **People v. Galmore**, No. 4-07-0073 (4/30/08). Champaign Co. Vacated and remanded.

Trial court erred when it imposed a $10,000 street value fine that was not supported by the evidence at trial and bore no relationship to the testimony of the officers, or to the proposed calculation provided by the prosecutor. (Dissent filed).

DOMESTIC BATTERY

• 2nd Dist. **People v. Dominguez**, No. 2-06-1304 (5/14/08). Lake Co. Affirmed.

At defendant's trial for domestic battery, where victim appeared and contradicted version of events that she had given, she was not unavailable for purposes of defendant's right of confrontation. Further, conversation with 911 operator was not testimonial in nature; because questions from operator were directed on ascertaining whether immediate aid needed to be sent. In addition, victim's handwritten statement to police officer was properly admitted pursuant to §115-10.1 of Code of Criminal Procedure.

DRIVING UNDER THE INFLUENCE

• 2nd Dist. **People v. Weathersby**, No. 2-06-0725 (6/4/08). Kane Co. Affirmed in part as modified, vacated in part.

Although trial court erred by allowing police officer to testify to results of HGN Nystagmus test without conducting a *Frye* hearing, it was not reversible error. Further, testimony that defendant was thick tongued, glassy eyed, smelled of alcohol, admitted that open bottle of malt liquor belonged to him, and that he had been drinking, and refused to take breathalyzer test, is sufficient to support jury's verdict of guilty of DUI. However, it was error for trial court to impose restitution for DUI task force, and refuse to give defendant credit for time served.

FELONY MURDER

• 1st Dist. **People v. Rosenthal**, No. 1-05-4085 (5/20/08). Cook Co. Reversed.

Defendant's conviction of felony murder predicated on aggravated battery with a firearm must be reversed because the qualifying felonious act, shooting a gun into a vehicle, is the same act that caused the death of the victim.

FITNESS TO STAND TRIAL

• 4th Dist. **People v. Palmer**, No. 4-07-0620 (5/23/08). Macon Co. Affirmed and remanded.

Although the decision was not a wise one, there is nothing in the record to indicate that defendant was unfit to choose to represent himself. Further, the prosecutor's closing argument, which pointed out that the defendant had the right to represent himself, and that the jury

should only consider those arguments made by the defendant that were supported by the evidence, is proper. However, trial court erred when it required defendant to show good cause before it allowed his request to appoint counsel for assisting with post sentencing motions.

GUILTY PLEA

• 1st Dist. **People v. Delvillar**, No. 1-06-2449 (6/11/08). Reversed and remanded.

Because legislature, when enacting CCrP §113-8, used the word "shall" in its language, it intended the requirement that the trial court admonish defendant that entering into guilty plea could potentially affect defendant's immigration status to be mandatory. Further, it does not matter that defendant told the trial court that he was a citizen before the trial court accepted his guilty plea to aggravated unlawful use of a weapon by a felon. Defendant is entitled to withdraw his guilty plea because trial court failed to comply with §113-8.

• 2nd Dist. **People v. Phipps**, No. 2-06-0423 (5/29/08). Winnebago Co. Reversed and remanded.

Defendant, whose counsel failed to object to State's motion to vacate his guilty plea to reckless homicide, and substitute a plea to Aggravated DUI, after State added that charge more than 120 days after defendant was taken into custody, was deprived effective assistance of counsel. Aggravated DUI charge is subject to compulsory joinder with reckless homicide; and its addition violates Speedy Trial Act. (Dissent filed).

HOME INVASION

• 3rd Dist. **People v. Godfrey**, No. 3-06-0819 (5/23/08). Peoria Co. Affirmed.

Appellate court will not invoke SCR 615 to reduce defendant's conviction from home invasion to criminal trespass because there is not evidentiary weakness to home invasion conviction. Defendant broke door down to enter home of his girlfriend after she locked the door and refused to answer her phone, even though she invited him earlier in the day. Further, defendant, who was sentenced to statutory minimum of six years, cannot claim ineffective assistance of counsel in failing to warn him of consequences of going to trial because trial court clearly admonished him on minimum sentence during pretrial appearance.

INDICTMENTS

• 1st Dist. **People v. Winford**, No. 1-05-3785 (6/2/08). Cook Co. Affirmed as modified.

Defendant, who was charged with possession of a controlled substance within 1000 feet of a school with intent to deliver, but who was convicted of possession of a controlled substance, was not misled by indictment when it mistakenly named cocaine instead of heroin. Indictment charged defendant with correct statutory violation; and no one showed any confusion at trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

• 1st Dist. **People v. McCarter**, No. 1-06-0058 (6/6/08). Cook Co. Remanded.

Although prior inconsistent statement of witness that defendant had made comments admitting to murder of rival drug dealer was not proper impeachment, impermissible opinion, and inadmissible hearsay, she having no personal knowledge of the events, its admission was not plain error. Nor is admission of gruesome autopsy photos. In addition, defendant, who chose to forego counsel and prepare pro se post trial motion, is subject to same standards and rules of waiver as defendants represented by counsel. However, trial court did not make sufficient inquiry into defendant's pro se claim that defense counsel insisted on jury trial and overrode his desire for a bench trial. It is insufficient for court to conclude that it would have found defendant guilty anyway.

• 2nd Dist. **People v. Bolton**, No. 2-06-0462 (5/8/08). DuPage Co. Affirmed.

After defendant filed pro se petition alleging that his trial counsel had been ineffective for failing to file motion to suppress confession, indictment or information, trial court was not obligated in subsequent *Krankel* hearing, to explore every possible source of motion to suppress. Further, when determining whether defendant was subject to sentencing as a Class X offender for burglary based on two prior Class 2 felony convictions, trial court did not exceed permissible inquiry when, after defendant disputed assertion in presentence report about one of his prior convictions, it considered transcript of prior sentencing hearing.

JURY DELIBERATIONS

• 3rd Dist. **People v. Johnson**, No. 3-06-0555 (6/10/08). Will Co. Reversed and remanded.

During deliberation after trial of defendant for criminal sexual abuse, trial court deprived defendant of his right to be present at critical stage of the proceeding when it responded to note from jury, asking for help with resolution of its 11-1 split, by telling them to continue deliberating, without notifying either prosecution or defense. Further, State has failed to prove that deprivation did not prejudice defendant.

MURDER

• 1st Dist. **People v. Wesley**, No. 1-06-3172 (5/12/08). Cook Co. Affirmed as modified.

Evidence from four eyewitnesses, although slightly inconsistent, coupled with defendant's admission that he was in vicinity of murder of drug dealer, who had been arguing with another about his right to sell drugs on particular corner, is sufficient to convict defendant of murder. Further, although portion of statement given by witness at trial regarding comment made at site of shooting was hearsay, the trial court cured any error associated with its admission by limiting instruction it gave to jury that they were to consider statement only for purpose of determining bias or motive of witness.

POST CONVICTION

• 2nd Dist. **People v. Wyles**, No. 2-07-0702 (6/10/08). Lake Co. Affirmed as modified.

Because defendant failed to obtain leave of court, pursuant to §1(f) of Post Conviction Hearing Act, to file second successive post conviction petition, trial court, rather than reviewing it substantively and finding it without merit, should have dismissed it for failure to obtain leave of court.

PROBATE

• 4th Dist. **In re Estate of Charles Ray Hoch**, Deceased, No. 4-07-0614 (5/19/08). Champaign Co. Affirmed.

Trial court did not err when it sua sponte dismissed proceedings filed in Illinois to probate will of decedent after previously appointed Louisiana administrator of decedent's estate filed motion challenging authority of Illinois executrix. Because Louisiana court action was filed first, includes same parties and issues, and court can fully litigate issues presented, and Uniform Probate Act provides for domicile to be decided by court in first filed proceeding, dismissal pursuant to §2-619(c)(3) is appropriate.

RIGHT TO COUNSEL

• 1st Dist. **People v. Tucker**, No. 1-06-2816 (5/27/08). Cook Co. Reversed and remanded.

Trial court failed to make adequate inquiry into defendant's request for a continuance to hire new counsel on date scheduled for trial when defendant knew name of new attorney, defendant's current counsel stated that he had "lost track of defendant," who was in custody, defendant had not previously asked for a continuance, and defendant's family members, who defendant claimed had talked to new counsel, were present in court.

SEARCH AND SEIZURE

• 2nd Dist. **People v. Wheat**, No. 2-06-0888 (6/2/08). Stephenson Co. Affirmed in part, reversed in part, remanded.

There was a substantial basis for judge issuing the search warrant to believe that probable cause existed that cannabis found loose in trash can outside a dwelling, along with cell phone addressed to person other than defendant, at defendant's address, was associated with defendant's residence; especially since person who came out of that residence several months earlier participated in a controlled buy. However, after jury returned a verdict finding defendant guilty of possession with intent to deliver cocaine, trial judge failed to give defendant adequate opportunity to poll the jury, when it waited only two seconds between the time it read the verdict and the time discharged the jury. Further it erred by denying the verdict when defense counsel interjected to request it at first opportunity, six seconds later, because it had already discharged the jury.

• 4th Dist. **People v. Bryant**, No. 4-06-0223 (5/23/08). Vermilion Co. Reversed and remanded.

Because trial court failed to give sufficient deference to judge issuing search warrant based on testimony of police officers regarding tips from multiple sources and information that they obtained corroborating tips, it erred when it al-

lowed defendant's motion to suppress evidence obtained from search warrant. In addition, information from calls to 911 operator are more reliable than "anonymous tips" because operator can identify caller even when they don't give their name. Further, trial court's interpretation of good faith exception to probable cause for search warrant is too narrow.

• 4th Dist. **People v. Rollins**, No. 4-03-0538 (5/19/08). Vermilion Co. Reversed and remanded.

Trial court erred when it allowed motion to suppress evidence seized from defendant's vehicle after anonymous call was received by police dispatcher that an unidentified black male from Chicago was selling cannabis out of trunk of brown four door Chevrolet with no hub caps at specified location and police observed defendant's vehicle, matching the description given by the caller and coming from the specified location carrying four black men. After stop police ascertained that defendant was from Chicago and obtained permission to search the vehicle. Further, appellate delays have not deprived defendant of due process since almost all of it was caused by defense counsel. (Dissent filed).

SENTENCING

• 1st Dist. **People v. Mobley**, No. 1-06-2486 (6/11/08). Cook Co. Affirmed.

Defendant, who was found guilty of residential burglary, with prior felony retail theft conviction, is not eligible for TASC probation by virtue of §40-5(7) of Alcoholism and Other Drug Dependency Act. Further, her disqualification bears rational relationship to purpose of Act; and violates neither due process nor equal protection.

SEX CRIMES

• 2nd Dist. **People v. Hernandez**, No. 2-06-0548 (5/12/08). DuPage Co. Affirmed as modified.

Defendant has failed to prove that mandatory natural life sentence for conviction of aggravated criminal sexual assault of two 6-year-old boys violates proportional penalties clause of Illinois Constitution as applied to him, despite his status as first offender. However, 5-year sentences for aggravated criminal sexual abuse cannot be consecutive; because defendant cannot serve any more than one life term.

SEXUALLY VIOLENT PERSONS COMMITMENT ACT

• 1st Dist. **In re Detention of Edward Gavin**, No. 1-07-2512 (5/27/08). Cook Co. Affirmed.

Trial court correctly concluded that petition to detain respondent pursuant to the Sexually Violent Persons Commitment Act was timely filed, where defendant was convicted of burglary of a business while on MSR for qualifying sexual offense and returned to penitentiary both for violation of terms of MSR and burglary. Therefore, burglary was concurrent sentence; and petition filed within 90 days of release for burglary, even though qualifying sex offense had already been discharged, was timely pursuant to §15(b)(5). Further, even though Act was amended in 2007 to expand its application, it does not mean that defendant did not qualify under pre amendment version.

SPEEDY TRIAL ACT

• 2nd Dist. **People v. Sitkowski**, No. 2-07-0305 (6/4/08). DuPage Co. Affirmed.

After defendant failed to appear for trial of his aggravated DUI charges, was subsequently convicted and imprisoned on unrelated charges in another county, and filed speedy trial demand while incarcerated, trial court did not err when it included period that defendant was on MSR for purposes of intrastate detainers speedy trial calculations. Having exceeded 160-day period before trial, excluding time that charges were dismissed, court was compelled to dismiss charges.

UNLAWFUL USE OF A WEAPON BY A FELON

• 1st Dist. **People v. Allen**, No. 1-06-1928 (5/12/08). Cook Co. Affirmed.

Section 24-1.1 of Criminal Code, which makes conviction of prior felony an element of the offense of unlawful possession by a felon, violates neither due process nor equal protection. Further, SCR 451(g), enabling the court to bifurcate jury trial where a prior conviction enhances the offense, does not apply because defendant's prior felony conviction is an element of the offense; and Rule was not passed until after defendant's trial.

USE IMMUNITY

• 1st Dist. **People v. Ousley**, No. 1-07-0348 (5/29/08). Cook Co. Affirmed.

Trial court did not err when it denied State's motion to grant use immunity to co-defendant, charged with murder, pursuant to §106-2.5, while acknowledging that it planned to introduce statement that the same co-defendant gave upon his arrest in case he gave inconsistent testimony at trial. Although language of statute uses the word "shall," it does not prescribe consequence for the court's refusal. Because constitutional issues would arise whether co-defendant gives substantive testimony at trial or not, the trial court was not premature in its ruling. Further, it would be unreasonable to expect a jury to consider co-defendant's testimony against the other defendants; but ignore it when deciding his own guilt.

VEHICULAR HIJACKING

• 1st Dist. **People v. Robinson**, Nos. 1-06-3753 & 1-07-0912 Cons. (5/22/08). Cook Co. Vacated in part.

State failed to present sufficient evidence to convict defendant of aggravated vehicular hijacking when only testimony that victim was in immediate presence of her vehicle was her testimony that she was three houses away from it when defendant grabbed her car keys. Further, defendant's truth in sentencing sentence to 25 years for armed robbery, because of severe injury inflicted on victim, does not violate due process. Nor is it excessive, being within the prescribed sentencing range.

U.S. Court of Appeals 7TH CIRCUIT

Civil Cases

• **LaGuerre v. Mukasey**, No. 06-4164 (5/20/08). Petition for Review, Order of Board of Immigration Appeals. Petition denied.

Board did not err in denying alien's CAT claim and finding that alien's Illinois conviction for domestic violence qualified as "crime of violence" and "aggravated felony" that rendered him deportable under 8 USC 1101(a)(43)(F) and 18 USC 16. Elements of crime supported Board's finding that domestic violence charge involved use of physical force by alien. Moreover, alien failed to show in CAT claim that it was more likely than not that he would be tortured if removed to Haiti.

• **Zeqiri v. Mukasey**, No. 07-1103 (6/3/08). Petition for Review, Order of Board of Immigration Appeals. Petition dismissed and denied in part.

Record contained sufficient evidence to support Board's denial of alien's request for withholding of removal based on claim that she was victim of past persecution on account of her ethnic Albanian minority status. Some of alien's claims of persecution were inconsistent with alien's statements given at airport interview, and alien otherwise failed to establish that any persecution she experienced was particularized as to her. Moreover, court of appeals lacked jurisdiction to review Board's decision that alien's asylum request was untimely.

AMERICANS WITH DISABILITIES ACT

• **Dargis v. Sheahan**, No. 05-2575 (5/16/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in granting defendant-employer's motion for summary judgment in action under ADA alleging that defendant improperly failed to reinstate plaintiff to restructured job following his stroke. Plaintiff failed to show that he could perform essential functions of his correctional officer position where plaintiff's physician placed him on restrictions that required no inmate contact, and plaintiff could not demand that he have no contact with inmates, and where contact with inmates was normal part of plaintiff's rotation of duties that could not be subtracted from performance expectations of correctional officer.

APPELLATE PROCEDURE

• **Gross v. Town of Cicero**, No. 06-4042 (6/6/08). Appeal, N.D. Illinois, E. Div. Appeal reinstated.

Plaintiff sought reconsideration of court of appeals' order dismissing his appeal for failure to file timely brief. Record showed that plaintiff's opening brief was four days late after plaintiff had already received prior extensions of time totaling 17 months, and after last order granting extension of time indicated that no further extensions would be granted. However, court

of appeals ultimately agreed to reinstate appeal, but only if plaintiff paid $5,000 sanction.

• **Stoller v. Pure Fishing Inc.,** No. 07-1936 (5/29/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in denying plaintiff's motion under FRCP 60(b) seeking reconsideration of underlying merits of default judgment where court of appeals had previously dismissed for failure to prosecute plaintiff's direct appeal of default order. Plaintiff could not use FRCP 60(b) motion as substitute for direct appeal.

ATTORNEY FEES

• **Mostly Memories, Inc. v. For Your Ease Only, Inc**., No. 06-3560 (5/27/08). Appeal, N.D. Illinois, E. Div. Reversed and remanded.

District court erred in denying defendants' motion for attorney fees under §505 of Copyright Act as prevailing party in action alleging 47 counts of copyright infringement. Prevailing party is presumed to be entitled to attorney fees under §505, and district court failed to provide rationale for reviewing court to determine whether district court's denial was act of discretion.

BANKRUPTCY

• **Chiplease, Inc. v. Steinberg**, No. 07-1879 (5/15/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in affirming bankruptcy court order that denied plaintiff's motion to compel Trustee to assume debtor's contract with third-party and to assign debtor's rights in contract to plaintiff. Record showed that debtor's right to renew terms of contract had expired, and thus Trustee's assumption of contract would have subjected Trustee to sanctions under Fed. R. Bankr. P. 9011.

CLASS ACTION FAIRNESS ACT

• **Spivey v. Vertrue, Inc**., No. 08-8009 (6/11/08). Appeal, S.D. Illinois. Reversed and remanded.

District court erred in remanding to state court plaintiff's class action that had been previously removed under Class Action Fairness Act, where district court found that amount in controversy did not exceed $5 million jurisdictional minimum. Reversal was required since plaintiff's lawsuit alleged that defendant systematically submitted unauthorized credit card charges, and since district court found only that recovery of more than $5 million was "uncertain" as opposed to "impossible." Court further found that plaintiff's petition for leave to appeal under 28 USC 1453(c), which was filed on 10th day after district court's remand order, was not untimely.

CONTRACTS

• **United Stars Industries, Inc. v. Plastech Engineered Products, Inc**., Nos. 07-2919 et al Cons. (5/13/08). Appeal, W.D. Wisconsin. Affirmed.

District court did not err in granting plaintiff's motion for summary judgment in action seeking enforcement of parties' compromise agreement regarding defendant's purchase of metal tubing manufactured by plaintiff, as well as plaintiff's practice of charging defendant for certain surcharges for raw materials used in manufacture. Record supported plaintiff's claim that it could pass on disputed surcharges to defendant, and defendant failed to present any evidence to support its theory of the case.

CORPORATIONS

• **Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec**, Nos. 07-1660 & 07-2116 Cons. (6/3/08). Appeal, N.D. Illinois, E. Div. Affirmed and vacated in part, and remanded.

District court did not err in granting defendant's motion for summary judgment in action by plaintiff to collect on default judgment against defendant-corporation that is no longer in business, as well as defendant-officers and employees of corporation. As to plaintiff's veil-piercing claims, plaintiff failed to show that corporation was undercapitalized or that corporation failed to observe corporate informalities. Moreover, fact that corporate funds were commingled with other entities did not require different result where corporation used strict accounting of each entity's balances. Plaintiff also failed to show that any individual employee or officer exercised any ownership control over corporation.

DUE PROCESS

• **General Auto Service Station v. City of Chicago**, Nos. 05-2515 & 06-2672 Cons. (5/16/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in finding in favor of City in §1983 action alleging that defendant could not enforce 1990 zoning ordinance against plaintiff's advertisement sign, which, plaintiff argued, should have been grandfathered in as lawful use at time 1990 ordinance went into effect. While plaintiff's sign was lawful when originally erected in 1962, it became unlawful use when plaintiff's predecessor failed to obtain appropriate permit to illuminate and enlarge sign in 1960s and 1970s. Accordingly, sign was not eligible for grandfather treatment.

• **Michalowicz v. Village of Bedford Place**, No. 06-3857 (6/11/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in dismissing for failure to state cause of action plaintiff-firefighter's §1983 action alleging that defendants denied him due process by terminating him without giving him adequate notice and opportunity to respond at his pre-termination hearing. Dismissal was required where Illinois Administrative Review Act provided plaintiff with adequate remedies for violations alleged in complaint.

EMPLOYMENT DISCRIMINATION

• **Filar v. Bd. of Ed. of the City of Chicago**, No. 07-1275 (5/22/08). Appeal, N.D. Illinois, E. Div. Affirmed and reversed in part, and remanded.

District court erred in granting defendant-employer's motion for summary judgment in Title VII action alleging that defendant-employer changed plaintiff's status from full-time teacher to district-wide substitute teacher on account of her age. Plaintiff's proposed comparatives consisting of two-tenure track teachers were suitable comparatives for purposes of establishing prima facie case of age discrimination. Moreover, material question existed as to motivation for plaintiff's change of status where (1) decision-maker gave protected teaching assignments to comparatives just prior to changing plaintiff's status; (2) plaintiff had excellent job reviews; and (3) absent said assignments, decision-maker would have been forced to give substitute teacher assignment to one of younger comparatives.

• **Lewis v. City of Chicago**, No. 07-2052 (6/4/08). Appeal, N.D. Illinois, E. Div. Reversed.

Plaintiffs (black applicants who received "qualified" rating under written test for firefighter position) filed untimely charge of discrimination under Title VII in action alleging that test had disparate impact on black applicants, where charge was filed more than 400 days after plaintiffs received notice of test results. Although charge was filed within 300 days from date defendant hired first applicants from "well-qualified" list, operative date for filing charge was date plaintiffs received notice of test results since (1) discrimination was complete when tests were scored; and (2) defendant's act of hiring other applicants was automatic consequence of test scores rather than product of fresh act of discrimination.

• **Tamayo v. Blagojevich**, No. 07-2975 (5/27/08). Appeal, N.D. Illinois, E. Div. Affirmed and reversed in part, and remanded.

District court erred in dismissing for failure to state cause of action plaintiff's Title VII complaint alleging, among other things, that defendants failed to approve plaintiff's promised salary increase in part because of her gender. Under Bell Atlantic, plaintiff's complaint included sufficient facts in support of her claim of sex discrimination given her allegations with respect to her male comparatives. Fact that plaintiff also alleged that defendants' actions were based in part on political concerns did not preclude her from proceeding on her sex discrimination claim. District court though, did not err in dismissing plaintiff's First Amendment claim alleging that she was retaliated against for speaking out against defendants' attempts to control Illinois Gaming Board where plaintiff's speech, in form of testimony before legislative committee, fell within her official job duties.

FIRST AMENDMENT

• **Callahan v. Fermon**, Nos. 05-4313 et al. Cons. (5/20/08). Appeal, C.D. Illinois. Reversed and remanded.

Record failed to support jury's verdict in favor of plaintiff-police officer in §1983 action alleging that he was laterally transferred from position in retaliation for making official complaints about his superior officers. Under *Garcetti*, plaintiff's statements were made as part of his official duties, and thus plaintiff did not speak

as "citizen" for purposes of establishing First Amendment retaliation claim.

• **Samuelson v. LaPorte Community School Corp**., No. 06-4351 (5/22/08). Appeal, N.D. Indiana, S. Bend Div. Affirmed.

District court did not err in granting defendant-school officials' motion for summary judgment in §1983 action by plaintiff-teacher/coach alleging that defendants violated plaintiff's First Amendment rights by failing to renew his coaching contract in retaliation for complaining about discriminatory practices concerning girls' athletic program and other school-related issues. Court rejected plaintiff's claim that defendants' requirement that plaintiff speak to his supervisors, as opposed to school board members, about plaintiff's professional responsibilities constituted prior restraint. Moreover, plaintiff failed to show that decision-makers were aware of plaintiff's complaints prior to decision not to renew his coaching contract.

INSURANCE

• **National Athletic Sportswear, Inc. v. Westfield Ins. Co**., No. 07-3762 (6/10/08). Appeal, N.D. Indiana, Ft. Wayne Div. Affirmed.

District court did not err in granting defendant-insurance company's motion for summary judgment in action by plaintiff-insured alleging that defendant breached insurance contract by failing to pay for plaintiff's losses, and that defendant engaged in bad faith for refusing to settle plaintiff's claim. District court could properly find that plaintiff's refusal to participate in second "Examination Under Oath" as required by terms of policy constituted breach of contract by plaintiff even though plaintiff's representative had undergone initial 8-hour examination.

INVESTMENT COMPANY ACT

• **Jones v. Harris Associates**, No. 07-1624 (5/19/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in granting motion for summary judgment filed by defendant-advisor to complex of open-ended mutual funds in action alleging that administration fees charged by defendants were too high in violation of §36(b) of Investment Company Act. While court of appeals agreed with plaintiff that market approach used by district court as outlined in *Gartenberg* was improper, plaintiff nevertheless failed to establish violation where there was no evidence that defendant had hindered mutual fund trustees in their ability to negotiate favorable price for defendant's services.

LABOR LAW

• **Harney v. Speedway SuperAmerica, LLC**, No. 07-3488 (5/30/08). Appeal, S.D. Indiana, Indianapolis Div. Affirmed.

District court did not err in granting defendant-employer's motion for summary judgment in action alleging that defendant's delay in paying and forfeiting employee bonuses violated Indiana's Wage Payment Statute. Under Indiana law, plaintiffs could not obtain any relief since bonuses could not be considered as "wages" in that defendant placed continued employment as condition to receiving bonuses and plaintiffs did not meet said condition. Moreover, because bonuses were not wages, plaintiffs could not seek statutory damages for alleged late payments of them.

MULTI-EMPLOYER PENSION PLAN AMENDMENT ACT

• **Chicago Truck Drivers, Helpers and Warehouse Workers Union v. El Paso CGP Co**., Nos. 06-3362 et al. Cons. (5/13/08). Appeal, N.D. Illinois, E. Div. Affirmed and vacated in part, and remanded.

In action under MPPAA seeking to collect withdrawal liability, district court erred in finding that defendants forfeited their right to contest liability based on 1999 "proof of claim" for withdrawal liability that was filed by plaintiffs in Chapter 7 bankruptcy of one of defendants' affiliates. Proof of claim failed to trigger defendants' statutory duty to arbitrate where bankruptcy trustee did not inform defendants of filing of proof of claim. However, record showed that defendants had actual knowledge of proof of claim when attorney for defendants became aware of its existence in 2002 when doing due diligence in another lawsuit. Thus, defendants forfeited right to contest liability by failing to make timely arbitration demand after becoming actually aware of proof of claim in 2002.

QUALIFIED IMMUNITY

• **Cherita v. Gresbach**, No. 07-1756 (5/19/08). Appeal, E.D. Wisconsin. Affirmed.

District court did not err in denying defendant-caseworker's motion for summary judgment alleging qualified immunity in §1983 action alleging that defendant violated plaintiff-children's Fourth and Fourteenth Amendment rights when conducting under-the-clothes examinations of each child's body during separate interviews at their private school as part of child abuse investigation. Under *Heck*, it is violation of Fourth Amendment to conduct searches without warrant or probable cause, consent or exigent circumstances. Moreover, reasonable caseworker would have known true state of law at time search occurred.

• **Purtell v. Mason**, No. 06-3176 (5/14/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in granting defendant-police officer's motion for summary judgment in action alleging that defendant violated plaintiff's 4th Amendment rights by temporarily arresting him for disorderly conduct when plaintiff and neighbor engaged in physical confrontation over yard display containing tombstones with epithets describing demise of neighbors. Record contained sufficient probable cause to support arrest for disorderly conduct. Moreover, defendant was entitled to qualified immunity as to plaintiff's claim that defendant violated plaintiff's 1st Amendment rights by compelling him to remove tombstones from lawn since, although words on tombstones did not qualify as unprotected "fighting words," defendant's mistaken belief that he could order removal of tombstones under fighting words doctrine was reasonable.

STATUTES OF LIMITATIONS

• **Knutson v. UGS Corp**., No. 07-2959 (5/13/ 08). Appeal, S.D. Indiana, Indianapolis Div. Affirmed.

District court did not err in finding as to two of three commission sales of which plaintiff sought recovery were time-barred by Indiana's 2-year statute of limitations period for actions seeking recovery relating to terms of conditions of employment since plaintiff's lawsuit was based on part-written and part-oral contract. However, district court erred in finding that same 2-year statute of limitations period applied to third commission sale that was based on written provisions of compensation contract. However, plaintiff's claim was without merit under terms of compensation agreement.

SUMMARY JUDGMENT

• **Ciomber v. Cooperative Plus, Inc.,** No. 06-3807 (5/28/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in granting defendant's motion for summary judgment in negligence action after district court excluded testimony of plaintiff's expert witness due to plaintiff's failure to comply with Rule 26(a)(2)'s requirement that plaintiff tender to defendant statement regarding basis of expert's opinion, and after it refused to consider plaintiff's Rule 56.1 response to summary judgment motion. Plaintiff's Rule 26(a)(2) report failed to contain any details to explain basis of expert's opinion, and plaintiff could not cure deficiency by tendering expert's deposition testimony. Moreover, district court did not abuse discretion in refusing to consider plaintiff's Rule 56.1 response where plaintiff failed to separate his proposed facts from his responses to defendant's proposed material facts.

SURFACE TRANSPORTATION ASSISTANCE ACT

• **Aux Sable Liquid Products v. Murphy**, No. 07-1402 (5/19/08). Appeal, N.D. Illinois, E. Div. Affirmed.

District court did not err in granting plaintiff's motion for summary judgment in action under STAA seeking injunction to prevent defendant-Township officials from lowering weight limits on road leading from plaintiff's truck terminal to Interstate 57, where justification for defendant's action was only to protect road from damage. District court could properly find that weight restriction was preempted by STAA where effect of defendants' action was denial of all access to Interstate 57 for plaintiff's trucks leaving plaintiff's terminal.

TELECOMMUNICATIONS ACT

• **Illinois Bell Telephone Co. v. Box**, Nos. 07-3557 & 07-3683 Cons. (5/23/08). Appeal, N. D. Illinois, E. Div. Affirmed.

District court did not err in affirming Commerce Commission's decision requiring plaintiff to provide CLECs (competitive local exchange carriers) with use of plaintiff's entrance facilities at TELRIC

prices. While plaintiff argued that use must be at higher tariff rates, court found that Telecommunications Act does not prohibit Commerce Commission from using TELRIC to regulate price for interconnection services that plaintiff must furnish under §251(c)(2) of Telecommunications Act.

Criminal Cases

COMPETENCY

• **U.S. v. Alden**, No. 07-1709 (5/30/08). Appeal, S.D. Illinois. Affirmed.

In prosecution on drug distribution charges, district court did not err in failing to sua sponte order competency hearing in spite of defendant's demonstration of irrational behavior when representing himself at trial. While record reflected that defendant became obsessed with irrelevant legal issues and demonstrated his paranoia with criminal system, record also showed that defendant understood charges against him and was capable of assisting in his own defense. Fact that defendant espoused ludicrous legal position was insufficient, by itself, to demonstrate incompetency.

DUE PROCESS

• **Rizzo v. Smith**, No. 07-3552 (6/9/08). Appeal, E.D. Wisconsin. Affirmed.

District court did not err in denying defendant's habeas petition challenging his sexual assault conviction on grounds that trial court denied him due process by denying him access to victim's treatment records for purposes of cross-examining treating psychologist as to his opinion as to why victim failed to immediately report sexual assault. Defendant was only entitled to have trial court perform in camera inspection of records, which was performed by trial court in instant case. Moreover, trial court ultimately found that there was no exculpatory information in records that was helpful to defendant's case. Defendant also was not entitled to have independent psychological examination of victim where defendant's own expert conceded that he did not need to personally examine victim.

EVIDENCE

• **U.S. v. Watson**, Nos. 06-2680 et al. Cons. (5/13/08). Appeal, N.D. Illinois, E. Div. Affirmed.

In prosecution on bank robbery charges, district court did not err in admitting secretly recorded statement from co-defendant, who, while implicating himself in charged offenses, also implicated defendant. Admission of recorded statement was proper under FRE 804(b)(3) where: (1) co-defendant was unavailable to testify at trial; (2) recorded statement was against co-defendant's penal interest; and (3) statement was otherwise trustworthy. Moreover, admission of recorded statement did not violate Confrontation Clause since co-defendant's statement was not testimonial in nature.

HABEAS CORPUS

• **Latham v. U.S.**, No. 07-1724 (5/29/08). Appeal, S.D. Illinois. Reversed.

District court erred in dismissing as untimely defendant's habeas petition, which was filed more than one year after date of defendant's dismissal of his direct appeal. Record showed that habeas petition was timely where defendant filed motion to reinstate appeal within time to seek rehearing of dismissal order, which was sufficient to put off "finality" (for purposes of triggering limitations period) until court of appeals acted on motion.

PRISONERS

• **Pavey v. Conley**, No. 07-1426 (6/5/08). Appeal, N.D. Indiana, S. Bend Div. Reversed and remanded.

District court erred in finding that plaintiff-prisoner seeking damages governed by Prison Litigation Reform Act was entitled to jury trial on factual issue relating to defense of failure to exhaust administrative remedies. Issue should be decided by district court after permitting parties to engage in discovery on issue.

• **Walker v. Sheahan**, No. 07-2817 (5/14/08). Appeal, N.D. Illinois, E. Div. Affirmed and reversed in part, and remanded.

District court did not err in granting defendant-prison officials' motion for summary judgment in action alleging that defendants (in their official capacities) violated plaintiff-prisoner's constitutional rights by using excessive force to subdue plaintiff and deprived him of access to medical care. Record showed that defendant failed to present sufficient evidence to support his contention that defendants did not enforce policies against use of excessive force or that defendants employed inadequate investigation into claims of excessive force. However, district court erred in entering summary judgment in favor of defendants as to plaintiff's claims against defendants individually where record did not support district court's ruling that (1) plaintiff's claims were time-barred; (2) defendant failed to satisfy exhaustion requirements under Prison Litigation Reform Act; and/or (3) excessive force claims lacked evidentiary support.

RIGHT TO COUNSEL

• **Carlson v. Jess**, No. 07-3428 (5/19/08). Appeal, E.D. Wisconsin. Affirmed.

District court did not err in granting defendant's habeas petition challenging his sexual assault conviction on grounds that state trial court deprived defendant of counsel of his choice by denying defendant's motion for substitution of counsel and continuance of trial. Trial court's finding that relationship between defendant and his original counsel was satisfactory was not supported by record, and denial of motion to continue to allow substitute counsel to prepare for trial was arbitrary where (1) trial was only expected to take one day; (2) defendant was not seeking long delay; and (3) there was no evidence that request for substitution of counsel/continuance was attempt to "game" system.

SEARCH AND SEIZURE

• **U.S. v. Garcia**, No. 07-3582 (6/3/08). Appeal, E.D. Wisconsin. Affirmed.

In prosecution on drug distribution charges, district court did not err in denying defendant's motion to suppress evidence seized from home of defendant's girlfriend, where basis of motion was claim that search warrant was not supported by probable cause. Warrant was supported by sufficient probable cause where informant claimed to have seen drugs in home only three days prior to application for warrant, and where informant had reliable track record for providing information that had previously resulted in arrests of three other individuals.

SENTENCING

• **U.S. v. Garrett**, No. 06-3982 (6/10/08). Appeal, W.D. Wisconsin. Vacated and remanded.

District court erred in sentencing defendant to 189 months on drug distribution charge where sentence was based, in part, on defendant's Wisconsin bail jumping conviction. Said conviction was sufficiently similar to offense of contempt of court under sentencing guidelines, which required exclusion of conviction from defendant's criminal history score.

• **U.S. v. Howell**, No. 07-2118 (5/29/08). Appeal, C.D. Illinois. Affirmed.

District court did not err in sentencing defendant to 235-months on drug conspiracy charges based, in part, on application of manager or supervisor enhancement. While defendant argued that enhancement should not apply since he had only friendship relationship with individual to whom he supplied drugs, district court could properly apply enhancement where defendant controlled drug supply and delivery and paid individual additional money to perform protection services.

• **U.S. v. McHugh**, No. 07-3594 (6/12/08). Appeal, W.D. Wisconsin. Vacated and dismissed.

District court erred in striking phrase "which do not include early release" from sentencing recommendation that defendant otherwise receive substance abuse treatment programs while incarcerated. Court of appeals lacks jurisdiction to alter any recommendation to Bureau of Prisons since recommendation is not part of district court's judgment. Moreover, district court could not use Rule 36 to enlarge time provided by Rule 35(a) for fixing any judicial mistakes.

• **U.S. v. Romero**, No. 05-3681 (6/6/08). Appeal, W.D. Wisconsin. Vacated and remanded.

Defendant was entitled to new sentencing hearing under *Kimbrough* where district court based defendant's drug distribution sentence on 100:1 crack cocaine to powder cocaine ratio. Moreover, district court must apply guidelines as they existed at time of first sentencing hearing.

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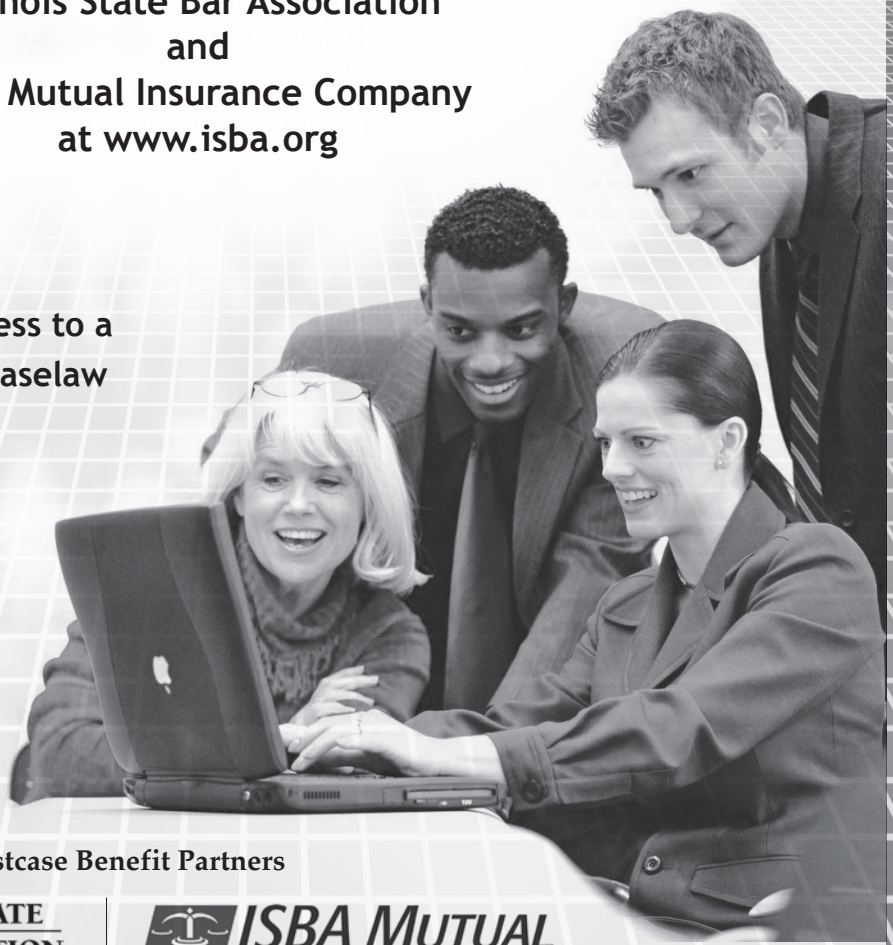

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