NORTH SUBURBAN BAR ASSOCIATION

N S B A N E W S

WINTER 2014

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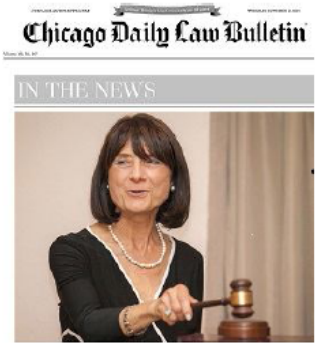
PRESIDENT'S MESSAGE – March 2014



By Jan S. Weinstein, President

Happy 2014! A new year a new beginning. Brrrr! I hope everyone is staying warm.

First, a look back at our final event of 2013, which really seems like a long time ago now. There's nothing like the warm glow of good fellowship to stave off the chill, and I, for one, certainly enjoyed that warmth and high spirits at our holiday party at Zhivago Restaurant, where we were regaled yet again by the Niles North Chorale singing songs of holiday cheer. I am proud to say that the NSBA shared its abundance with the Niles Township Food Pantry. We were very generous--particularly with gift-wrapped children's presents–and the Township was highly appreciative. A heartfelt thanks to all of you who gave.

Also, a heartfelt thank you to the companies who donated to our silent auction: Schaefer's Liquors (wine trio), Kiki's French Bistro (gift certificate) and our home base Happ Inn (two gift certificates). Numerous members donated as well.

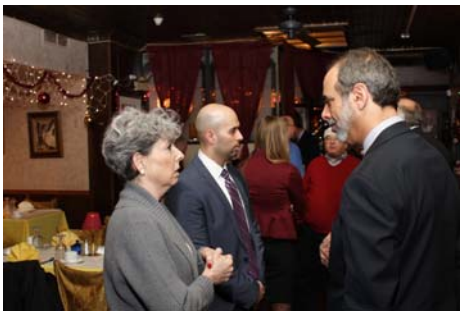
Continuing with our outstanding CLE's, in January, NSBA member Judge Martin Moltz gave a highly interactive presentation about an interesting case he ruled on in the criminal branch court and LVNV v. Trice, involving a non-registered collection agency, in which he wrote an opinion holding that the criminalization of the failure to register is unconstitutional. The case is being appealed to the IL Supreme Court. In February, Board Member Justice Jesse Reyes gave us his annual comprehensive review of the ever changing state of mortgage foreclosure law, including new rules

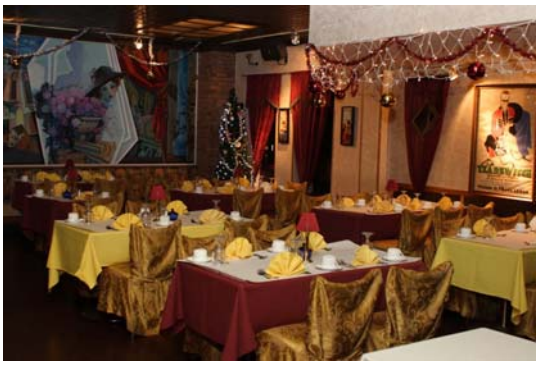
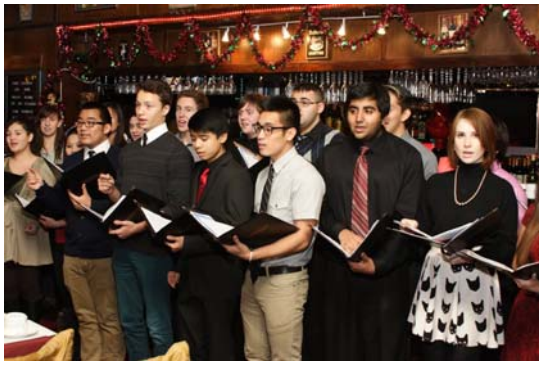
and case law. Little could he have imagined that he would be photographed waving a Tootsie Roll Pop during a sing-a-long of "On the Good Ship Lollypop" in tribute to the late Shirley Temple. I like to add a bit of levity to the CLE's!

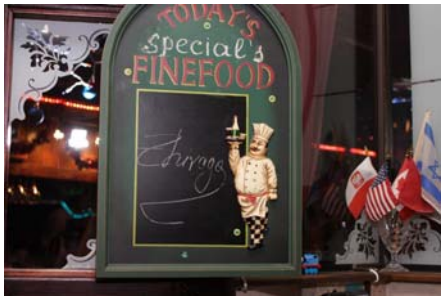
A new initiative, an example of reaching outside the box, was the NSBA sponsorship of a mock court scrimmage at the Skokie Court House. Niles West and Maine West gained valuable practice experience for the ISBA sponsored state mock mourt competition next week. The case they argued was a fictional tort suit by a farmer in Grover's Corners, IL, who believed that the CBS broadcast of "War of the Worlds" was real, causing him to hide in his barn for a month, ruining his business and harming his health. It was a lot of fun. The students are wonderful and were most appreciative. A pizza party and recap followed. Thanks to board member John Stimson for volunteering to judge.

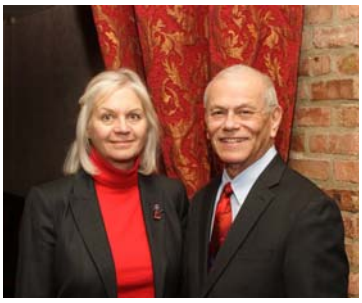
Looking ahead, we have three big events one after another. First, our annual Gary Wild Memorial Dinner is on March 11, 2014, at Gusto Italiano Restaurant in its new, lovely location in downtown Glenview. The food is terrific and we will be having plenty of it! The officers and board have committed to buying tickets for the event and I expect that we will have a good turn out. Per custom, Judge Allen S. Goldberg, a friend of the late Gary Wild, will preside and, in addition to the scrumptious food, our sweet tooth will be satisfied by Fanny May candy of which Gary was so fond. There will be a silent auction and a surprise guest. Our honoree is Clearbrook, a facility in Rolling Meadows which provides comprehensive therapy services to the developmentally disabled from infants to seniors. Many thanks to member Gail Vierneisel, who annually puts the dinner together.

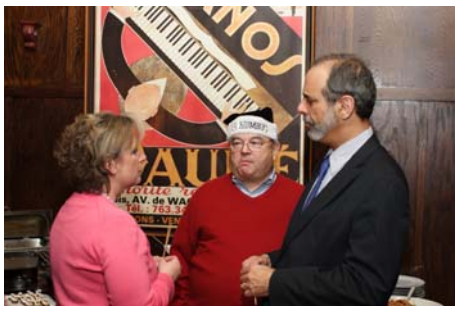
Jan







2014 Gary Wild Honoree:

CLEARBROOK
Creating Opportunities for People with Disabilities

"Clearbrook is committed to being a leader in creating innovative opportunities, services and supports to people with disabilities.

We serve people over a range of ages and disabilities from children diagnosed with developmental delays at birth to the unique needs of seniors with disabilities and all ages in between.

Annually, we support over 6,000 individuals as well as their families in 13 counties, in over 160 communities and 50 locations throughout Chicago and the suburbs. We are proud to be the largest provider of home-based services in Illinois."

For more information, visit http://www.clearbrook.org

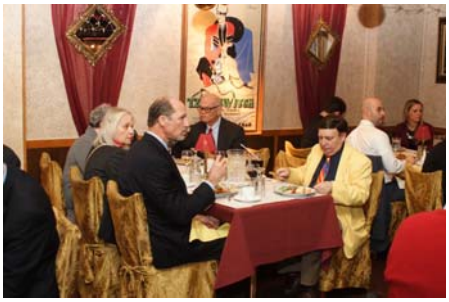
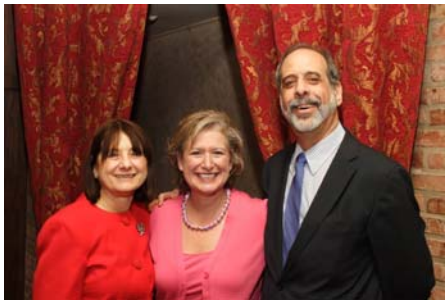
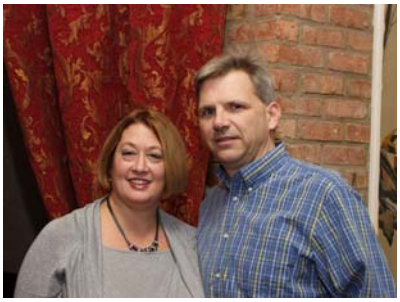
2013-2014 NSBA Officers & Directors:

Officers:

Jan S. Weinstein, *President*
Anna Morrison-Ricordati, *1st Vice President*
Ray Bartel, *2nd Vice President*
Ray Ricordati, *3rd Vice President*
Molly Caeser, *4th Vice President*
Michael Craven, *Secretary*
Richard Pullano, *Treasurer*
Anna P. Krolikowska, *Past President*

Directors:

Hon. Steven J. Bernstein
Brian Clauss
Erica Crohn-Minchella
William Ensing
Burton Grant
Paul Plotnick
Hon. Jesse G. Reyes
Robert A. Romanoff
John Stimson
Phil Witt



From the Editor's Desk:

Thanks to those able to attend the NSBA events this past year and for willingly participating in the photos used in these Newsletters. We have had great attendance at our events this year. If you have any recent articles or information you would like to include in the newsletter, please let me know. We can always use more articles!

We have also had several new members join our ranks. I invite all new members to submit a short biographical statement (and photo) for inclusion in the newsletter to introduce yourself to the organization.

In addition, please send any suggestions fpr the to me at raymond.ricordati@huschblackwell.com.

Thanks, Ray Ricordati

CALENDAR OF EVENTS

September 24, 2013 **5:30-8:30 p.m.**	**2013-2014 Officers Installation Dinner, and presentation of Sanford Blustin Award to Honorable Thomas Kilbride, Chief Justice of the Illinois Supreme Court** **North Shore Country Club, 1340 Glenview Road, Illinois 60025**
October 8, 2013 **6:00 – 8:00 p.m.**	**Dinner CLE – Erica Crohn-Minchella, "Ethical Issues Facing Attorneys In Conventional And Short Real Estate Transactions"** **The Skokie Club , 4741 Main Street, Skokie, Illinois 60076**
November 12, 2013 **6:00 – 8:00 p.m.**	**Dinner CLE – Dan O'Brien, "Personal Injury and Medical Malpractice"** ***Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
December 10, 2013 **6:00 – 9:00 p.m.**	**Holiday Party** **Zhivago Restaurant, 9925 Gross Point Road, Skokie, IL 60076**
January 7, 2014 **6:00 – 8:00 p.m.**	**Dinner CLE – Hon. Martin Moltz, "Current Developments In Illinois Law"** *** Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
February 11, 2014 **6:00 – 8:00 p.m.**	**Dinner CLE – Justice Jesse Reyes, "Current Developments in Illinois Foreclosure Law"** *** Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
March 11, 2014 **6:00 – 8:00 p.m.**	**Gary Wild Dinner – Honoring The Clearbrook Center, "Creating Opportunities For People With Disabilities"** **Gusto Italiano, 1834 Glenview Ave., Glenview, Illinois 60026**
April 8, 2014	**Ethics CLE (6 hours) – Various Speakers, "*Where Are We Going & Where Have We Been … Examining Misconduct in the Courts*"** **Skokie Courthouse, 5600 Old Orchard Road, Skokie, IL 60077**
May 13, 2014 **6:00 – 8:30 p.m.**	**Judge's Night!** **North Shore Country Club, 1340 Glenview Road, IL 60025**
June 10, 2014 **6:00 – 8:00 p.m.**	**Dinner CLE – Ray Ricordati, "Intellectual Property Law in the 21st Century: How The Law is Adapting to The Current Technological Revolution"** *** Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**

***NSBA CLEs** are held at the Happ Inn, 305 Happ Road, Northfield, Illinois 60093. Cost: $31.00 for dinner and 1 hour CLE credit. Food choices include (1) Vegan/Vegetarian, (2) Fish or (3) Chicken/Beef. RSVP to Jan Weinstein: president@ilnsba.org

PLEASE NOTE!!! $25.00 cancellation fee will be charged for no-shows, unless you substitute someone else in your place.

ON THE TIP OF YOUR TONGUE

By Angela Peters

FAMILY LAW

Previously reported re *In re Marriage of Turk*, 2013 IL App (1st) 122486, 996 N.E.2d 62, 374 Ill.Dec. 615, in the October FLASHPOINTS. In a post-judgment matter, the father was ordered to pay child support to the mother even though he was the sole custodian of the parties' two children. Under the parenting schedule, the mother and the father had approximately equal parenting time with the youngest child. (The oldest child and the mother were estranged.) The father was ordered to pay the mother $600 per month in child support, and the appellate court upheld the award under the reasoning that the trial court could award support to a noncustodial parent when both parents have significant parenting time and there is a disparity of income between the two parents, which there was in this case. The Illinois Supreme Court has granted the father's petition for leave to appeal.

The lllinois Supreme Court has upheld the Second District Appellate Court's ruling in Schultz v. Performance Lighting, Inc., 2013 IL App (2d) 120405, 984 N.E.2d 569, 368 Ill.Dec. 623, that the failure of a notice to withhold child support served on an employer that does not include the social security number of the employee obligor makes the notice invalid under 750 ILCS 28/20(c) and thereby does not subject the employer to the $100-per-day penalty for failure to comply with the withholding. The Supreme Court reasoned that the notice at issue was statutorily deficient because §20(c) unequivocally requires that the obligor's social security number be included, without exception. The court also stated that this ruling comports with the same standards of the federal Child Support Enforcement Act, 42 U.S.C. §651, et seq., and noted the importance of maintaining consistency in the interpretation of the statutes for employers who are obligated to deduct child support from their employees' paychecks. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738.

In *In re Aaliyah*, 2013 IL App (2d) 120414,the appellate court reversed a trial court's decision to not deduct the monthly health insurance premiums when calculating a father's net income for child support. The father was subject to two different child support orders for children with two different mothers. When calculating his net income for the first child support order, the court deducted the total amount of his monthly insurance premiums ($485). In the second matter (Aaliyah), the trial court declined to make the deduction, stating that, because he had already received the deduction once, he could not take it again. The court also noted that the amount of his monthly premium did not increase with the addition of the second child. The appellate court reversed, stating that §505(a)(3)(f) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, et seq., allows for the deduction of health insurance premiums for dependents without limitation, not just if the premium increases for adding the child at issue to the plan. Therefore, the trial court should have made the deduction when calculating net income to set support for the second child.

In *In re Marriage of Chez*, 2013 IL App (1st) 120550, the husband appealed a trial court's ruling that the parties' marital residence and vacation residence should be equally divided pursuant to the terms of the parties' premarital agreement. He argued that the terms of the premarital agreement were not clear and unambiguous because the agreement did not address the reimbursement of up-front costs paid for by either party prior to the division of the asset. The appellate court upheld the trial court's finding that the agreement was clear and unambiguous and the equal division of the jointly titled residences because the language provided that "[u]nless the parties agree otherwise in writing to the contrary, any . . . property as to which the parties take title in joint tenancy . . . shall be hereinafter referred to as 'Joint Property' and," upon dissolution of "marriage, all Joint Property shall be divided equally between the parties." 2013 IL App (1st) 120550 at ¶20.

In *In re Marriage of Smith*, 2013 IL App (5th) 130349, the Fifth District reversed a trial court's order denying a mother's request for the permanent removal of the parties' minor child to Ohio to become gainfully employed. The mother had been living in her parents' home for some time and had applied to 30 different companies in the St. Louis metropolitan area, with no offers. However, she received an offer from a company in Columbus, Ohio, which had a substantial benefits package. The community also had quality housing and school systems that would benefit the child. The appellate court took issue with the trial court's "arbitrary" ruling not allowing the removal (contrary to the guardian ad litem's recommendation) and held that the mother's motives for removal were rooted in her desire to obtain gainful employment, not to keep the child away from his father. 2013 IL App (5th) 130349 at ¶11. The court also took issue with the fact that the trial court rendered two alternative rulings regarding legal and physical custody dependent on whether the mother voluntarily returned with the child to Illinois within 30 days. These alternative rulings implied that the child's best interests would change overnight depending on whether the mother returned to Illinois within the trial court's time frame, which is wholly against the best-interests standard set forth in IMDMA §602.

Thank you for the above contributions from FAMILY LAW FLASHPOINTS JANUARY 2014, Donald C. Schiller & Michelle A. Lawless, Schiller DuCanto & Fleck LLP.

In re Marriage of Marsh, 2013 IL App (2d) 130423 (December 26, 2013)(HUDSON) Proceeds received by respondent husband from post-dissolution sale of shares of stock owned prior to the dissolution did not constitute "income" for purposes of child support under 750 ILCS 5/505(a)(3), using the plain and ordinary meaning of "income," and the cost basis of stock was $282,079 but sale price was $275,000 and therefore no increase in "wealth" was realized from the sale. Affirmed.

In re Custody of C.C., 2013 IL App (3d) 120342 (December 9, 2013) (WRIGHT). Child custody and support were determined based on voluntary acknowledgment of paternity executed by mother and first alleged father; two years later, intervenor alleged he was child's biological father. DNA testing established that intervenor was biological father. Intervenor filed notice of appeal on April 27, 2012, challenging three separate rulings by trial court: February 14, 2011 (order denying motion to vacate previous paternity order); August 5, 2011 (order denying request for downward deviation in child support); and March 28, 2012 (order requiring intervenor to pay one-third of mother's attorney fees).

The trial court abused its discretion in ordering intervenor biological father to pay one-third of petitioner mother's attorney fees incurred as a result of the complicated parentage proceedings: the trial court provided no specific finding that he was able to contribute and, in fact, suggested he secure a loan to pay the attorney fees. The appellate court declined to address intervenor's request for downward deviation in child support and his motion to vacate the earlier order establishing first alleged father's parentage, as intervenor had failed to file timely notice of appeal of each issue.

In *Dumiak v. Kinzer-Somerville*, 2013 IL App (2d) 130336, 996 N.E.2d 176, 374 Ill.Dec. 729, the trial court correctly ruled that the grandparents did not have standing to pursue a petition for custody of their grandson because the child's mother had physical possession of him at the time the petition was filed. Although the grandparents had physical possession and de facto custody of the child from August 2008 through October 2010, the child's mother assumed physical possession of the child at that point. The mother had continual physical possession from October 31, 2010, until the grandparents filed for custody 96 days later; during this time, she established a residence for the child and made all parental decisions for him, including when to allow his grandparents to see him. The grandparents had acquiesced to this arrangement and returned the child to the mother's home after they visited with their grandson and abided by the mother's decisions concerning when they could see the child.

CIVIL MISCELLANEOUS LAW

In re Vincent K., 2013 IL App (1st) 112915, December 12, 2013, Cook Co., 4th Div., FITZGERALD SMITH, Affirmed. (Court opinion corrected 1/8/14.) Post-Conviction Hearing Act does not apply to juveniles. Respondent, convicted of first-degree murder in a juvenile court proceeding (designated extended juvenile jurisdiction) for stabbing death of fellow 8th-grade student in altercation after, has no access to remedy of Post-Conviction Hearing Act. (HOWSE and LAVIN, concurring.)

Richter v. College of Du Page, 2013 IL App (2d) 130095, December 27, 2013, Du Page Co., Plaintiff sued college for injuries from fall on uneven sidewalk. College was entitled to discretionary immunity under Sections 2-109 and 2-201 as handling of sidewalk deviation was both exercise of discretion and a policy determination, as opposed to a ministerial act. Manager of buildings-and-grounds department of college exercised discretion in handling sidewalk deviation, as discretionary acts are those unique to a particular office and involve exercise of personal deliberation and judgment in deciding whether or how they should be performed. (McLAREN and HUTCHINSON, concurring.)

Illinois State Bar Association Mutual Insurance Company v. Law Office of Tuzzolino and Terpinas, 2013 IL App (1st) 122660, November 22, 2013, Cook Co., 6th Div., REYES, Reversed. (Court opinion corrected 1/13/14.) Court erred in entering summary judgment in favor of Plaintiff legal malpractice insurer, and improperly rescinded contract. Innocent insured clause in insurance policy and common law innocent insured doctrine preserve attorneys' coverage. When applying innocent insured doctrine, court does not necessarily require a divisible contract to partially rescind a contract. Severability clause of insurance policy created separate and distinct contracts, allowing court to partially rescind contract.(HALL and LAMPKIN, concurring.)

Sharp v. The Board of Trustees of the State Employees' Retirement System, 2014 IL App (4th) 130125, January 13, 2014, Sangamon Co., KNECHT, Affirmed. Plaintiff retired from State employment, and Defendants (SURS) approved his monthly pension, but then notified Plaintiff that they had calculated his pension using wrong formula, and would reduce his monthly pension and would collect overpayment. Legislature expressly granted SURS authority to correct a mistake in benefits at any time, but not to fix errors in its pension calculations beyond the 35-day period provided for by Administrative Review Law. (TURNER and STEIGMANN, concurring.)

Ferris, Thompson, and Zweig, Ltd. v. Esposito, 2014 IL App (2d) 130129, February 5, 2014, Lake Co., BIRKETT, Affirmed. Plaintiff law firm referred two workers' compensation cases to an attorney, with Plaintiff to receive 45% of attorney fees with Defendant attorney to receive 55% of fees, but Defendant never paid Plaintiff. Workers' Compensation Commission has authority to set amount of fees to be awarded to attorneys representing claimants before the Commission, and to resolve disputes as

to fees, but is without authority over breach of contract dispute as to referral agreement between two attorneys. (HUDSON and SPENCE, concurring.)

Lorenz v. Dayton, 2014 IL App (3d) 130137, February 5, 2014, McDonough Co., O'BRIEN, Reversed and remanded. Personal injury and wrongful death claims filed against sheriff's department and deputy for damages after car accident between minivan and squad car. Court erred in admitting defense line-of-sight video, as video does not meet test for admissibility of experimental evidence, as defense failed to establish that essential conditions of line-of-sight experiment were substantially similar to those existing when accident occurred. Improper admission prejudiced Plaintiffs, as Plaintiff driver's negligence was critical issue, and video had potential to confuse and mislead jury. (CARTER, concurring; SCHMIDT, dissenting.)

In re Vincent K., 2013 IL App (1st) 112915, December 12, 2013, Cook Co., 4th Div., FITZGERALD SMITH, Affirmed. (Court opinion corrected 2/4/14.) Post-Conviction Hearing Act does not apply to juveniles. Respondent, convicted of first-degree murder in a juvenile court proceeding (designated extended juvenile jurisdiction) for stabbing death of fellow 8th-grade student in altercation after, has no access to remedy of Post-Conviction Hearing Act. (HOWSE and LAVIN, concurring.)

Green v. Papa, 2014 IL App (5th) 130029, February 5, 2014, 5th Dist., St. Clair Co., SPOMER, Affirmed. Court properly entered judgment for law firm in legal malpractice action. Plaintiff claimed negligence by attorney who did not serve notice of evidence deposition on her treating physician who her attorney deposed, and Court of Claims excluded deposition testimony, finding that it was a discovery deposition. Plaintiff failed to prove that exclusion of physician's deposition at underlying trial before Court of Claims was proximate cause of her damages. Court of Claims' decision was based on its erroneous conclusions of facts and law, and it had no basis to exclude Plaintiff's subsequent treatment from her damage award irrespective of whether her physician's testimony was admitted. (STEWART, concurring; CATES, specially concurring.)

In re Estate of Feinberg, 2014 IL App (1st) 112219, February 3, 2014, Cook Co.,1st Div., CUNNINGHAM, Affirmed in part and reversed in part; remanded. After bench trial, court entered judgment, pursuant to citation to recover assets filed by bank as trustee, against son $788,957, and against daughter and her husband for $1.91 million, for misappropriation of funds. Court within its discretion in awarding $100,000 to granddaughter in attorney fees, to compensate for fees incurred from date her attorneys retained through date the bank's recovery citation was issued; bank was well able and well-equipped to litigate its citations, and granddaughter's complaint was largely duplicative of bank's actions. Court properly denied bank's request for prejudgment interest, as bank failed to demonstrate actual fraud to establish respondent's delay in returning funds was unreasonable and vexatious.(HOFFMAN and DELORT, concurring.)

In re Charles W., 2014 IL App (1st) 131281, February 7, 2014, Cook Co., 5th Div., PALMER, Affirmed. Respondent, age 79 and diagnosed with dementia and Alzheimer's, became adoptive father of his two minor grandsons; adoptive mother was deceased. Respondent's condition significantly impaired his ability to provide necessary care and parenting of minors. No ineffective assistance of counsel, as Respondent failed to show prejudice by failure to object and by other conduct of his counsel. Court did not err in finding minors dependent and making minors wards of the court. Courts are given wide latitude in admitting evidence in dispositional hearings.(McBRIDE and TAYLOR, concurring.)

CRIMINAL LAW

In Re Kendale H., 2013 IL App (1st) 130421, December 27, 2013, Cook Co., 5th Div., GORDON, Reversed and remanded with directions. (Court opinion corrected 1/8/14.) Seizure did not occur when police made vehicular chase of minor who began running away on foot in a vacant lot, after police started chasing him. Police discovered one shotgun shell on minor during search of minor's clothing after police shot minor in abdomen during chase. Remanded so State may introduce, at suppression hearing, evidence on what led to shooting, as timing of seizure is critical. Minor was seized when police shot him in abdomen and fell to ground. (McBRIDE and PALMER, concurring.)

People v. Tapia, 2013 IL App (2d) 111314, January 9, 2014, Lake Co., BIRKETT, Affirmed. Defendant claimed ineffective assistance of counsel by his attorney failing to correct error in presentence investigation report (PSI) on which trial court relied in sentencing Defendant to 15 years upon his plea to attempted first-degree murder. Defendant forfeited the issue by failing to file post-judgment motion, and waiting 2 years to raise claim in pro se post-conviction petition. Defendant conceded that he reviewed PSI prior to sentencing hearing, and failed to speak up when sentencing judge specifically referenced the erroneous portion of PSI. (McLAREN and ZENOFF, concurring.)

People v. Porter, 2014 IL App (3d) 120338, January 13, 2014, Peoria Co., O'BRIEN, Reversed. Defendant was convicted of armed violence, after having been arrested while leaving gas station after buying a drink. Measured by an objective standard, officer had no reason to believe that Defendant was armed and dangerous. Thus, court erred in denying motion to quash and suppress. Without the evidence that should have been suppressed, State cannot prove Defendant's guilt. (CARTER and HOLDRIDGE, concurring.)

People v. Branch, 2014 IL App (1st) 120932, January 15, 2014, Cook Co., 3d Div., HYMAN, Affirmed. Defendant was convicted, after jury trial, of possession of a controlled substance with intent to deliver. Officer witnessed Defendant give a man cash after eight hand-to-hand transactions, and officer later found Defendant in possession of 11 individually packaged capsules of heroin. Jury could have reasonably found that drugs Defendant possessed on arrest were not a separate supply, and that he intended to deliver remaining heroin capsules. (NEVILLE and MASON, concurring.

U.S. v. Cheek, Federal 7th Circuit Court Criminal Court, No. 12-2472, January 22, 2014, C.D. Ill., Affirmed. In prosecution on drug distribution charges arising out of series of secretly recorded controlled drug buys, Dist. Ct. did not err in admitting testimony of FBI agent, who offered opinions regarding meaning of words and phrases contained in transcripts of recorded conversations, even though defendant argued that agent improperly testified as expert witness under guise of lay witness. Govt. may use law enforcement officer as both expert and lay witness during same trip to witness stand, and instant agent testified only as lay witness, where: (1) he based his opinions on his personal observations and perceptions derived from investigation into instant charged offense; and (2) subject matter of opinions did not require scientific, technical or specialized knowledge. Fact that agent was experienced investigator did not alter nature of his testimony. Dist. Ct. also did not err in allowing jury to view transcripts containing agent's interpretation of code words and phrases, since Dist. Ct. has discretion to allow jury's viewing of said transcripts as listening aids, and since defendant failed to identify any inaccuracies of agent's interpretations contained in transcript.

People v. Shanklin, 2014 IL App (1st) 120084, January 31, 2014, Cook Co., 6th Div., Affirmed. Defendant was convicted, after jury trial, of first-degree murder, home invasion, and aggravated criminal sexual assault.Court properly held Frye hearing and determined that GSS (Gudjonsson Suggestibility Scale) method of testing for susceptibility to interrogation techniques did not meet Frye standard for reliability and admissibility. Court properly denied Defendant's motion to suppress, as

Defendant did not exhibit signs of severe heroin withdrawal that would render his statement unknowing and involuntary.(LAMPKIN and REYES, concurring.)

People v. Croft, 2013 IL App (1st) 121473, November 26, 2013, Cook Co., 2d Div., QUINN, Affirmed. (Modified upon denial of rehearing 2/4/14.) Defendant, then age 17, was convicted, after bench trial, of murder, aggravated kidnapping, and sexual criminal sexual assault of 16-year-old victim. At sentencing hearing, trial court expressly considered Defendant's PSI, which included his age. Court exercised its discretion in sentencing Defendant to natural life imprisonment, and natural life sentence was not unconstitutional, as it was discretionary, not mandatory; and court properly considered his youth as a mitigating factor, as well as heinous nature of offense. (SIMON and PIERCE, concurring.)

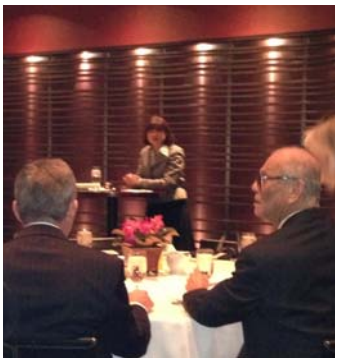
People v. Williams, 2013 IL App (1st) 112693, December 26, 2013, Cook Co., 4th Div., LAVIN, Reversed and remanded. (Modified upon denial of rehearing 12/13/14.) Defendant was convicted, after bench trial, of first-degree murder based on accountability theory. Evidence was insufficient to sustain conviction for first-degree as Defendant did not share any common criminal intent or design with any codefendants. Court's finding that Defendant was conspiring with shooter conflicted with State's theory of crime and court's finding that Defendant was not in a gang. Thus, inference, which was sole legal basis for culpability, was demonstrably unreasonable. (HOWSE and FITZGERALD SMITH, concurring.)

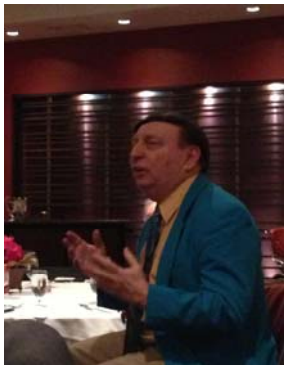
People v. Williams, 2014 IL App (3d) 120240, January 23, 2014, Peoria Co., WRIGHT, Affirmed in part and remanded with directions. (Modified upon denial of rehearing 2/11/14.) Defendant was convicted of possession of a controlled substance with intent to deliver. Court must properly calculate fines, fees, assessments, costs, and charges; court's written order does not recite a sum certain, and it is unclear whether Defendant received a copy of clerk's calculations at time of sentencing.(LYTTON and McDADE, concurring.)

People v. Hunter, 2014 IL App (3d) 120552, January 16, 2014, Will Co., WRIGHT, Vacated and remanded with directions. (Modified upon denial of rehearing.) Defendant was convicted of aggravated battery. At sentencing, court did not address any financial obligations with sentence, but later signed judgment ordering defendant to pay costs of prosecution. Court systems charge is a fee. Both parties should be allowed to address calculations of fees and costs, and court should enter written order as to amount and nature of each charge. (CARTER and O'BRIEN, concurring.)

People v. Fields, 2014 IL App (1st) 110311, February 11, 2014, Cook Co., 2d Div., PIERCE, Affirmed in part and reversed in part. Defendant was convicted, after jury trial, of armed robbery and being an armed habitual criminal. Defendant was not denied effective assistance of counsel by his counsel failing to move for severance of charges against him. Decision whether to seek severance is generally a matter of trial strategy, and Defendant failed to overcome that presumption. Defendant's Class 4 AUUW conviction cannot stand, as it has been found unconstitutional, as predicate offense for armed habitual criminal conviction. 15-year enhancement for use of firearm is constitutional. (NEVILLE and MASON, concurring.)

Thank you to IICLE Flashpoints, ISBA e-clips and Family Law new Case Reports for contributions.





Annual Ethics CLE

The NSBA Annual Ethics CLE Seminar, ***"Where Are We Going & Where Have We Been … Examining Misconduct in the Courts"*** will be held at the Skokie Courthouse, Room 201, on ***April 8, 2014***(*) from 9:00 am to 5:00 pm.

Marking the 30 year anniversary of the first conviction in "Operation Greylord," this seminar will examine ethics from behind the bench and beyond.

The slate includes a morning session with speaker **Kathy Field Orr** (Kathleen Field Orr & Associates) to address ALJ ethics in light of recent advisory opinions highlighting breaches of professional conduct, along with **Kathy Twine** (Judicial Inquiry Board) to aid attorneys in recognizing and responding to suspected judicial misconduct. **Esther Seitz** (Craven Law Office), will also be discussing the media's role in enhancing transparency in the Courts.

The afternoon session will include a special presentation by **Terrence Hake** (Cook County Sheriff's Office), a Cook County prosecutor who witnessed the bribery and corruption in the criminal preliminary hearing courtrooms and subsequently worked undercover with the FBI on the monumental, public corruption sting known as "Operation Greylord." This presentation will be followed by a panel discussion including attorneys **Mark Damisch** (Damisch & Damisch, Ltd.), **Irv Miller** (The Miller Firm, P.C.), and NSBA's own **Paul Plotnick** (Law Offices of Paul Plotnick) all of whom will share their experiences in practice during "Operation Greylord" and their take on the positive impact of ethical rule changes on the practice of law in Cook County.

*(Pending MCLE ethics approval, a total of 6 hours ethics credit is anticipated for the day long program).

Full day $90.00 (includes lunch & beverages)
Half day $45.00 (includes beverages)

Please mail a check to NSBA, PO Box 731, Glenview, IL 60026
RSVP to president@ilnsba.org
You can also pay by check at the door.

Mengarelli v. Marquardt & ORAH Animal Hospital … A DIFFERENT KIND OF SETTLEMENT

By: Anna Morrison-Ricordati
(First published in ISBA Animal Section Newsletter, Feb. 2014)

On December 5, 2010, Michael and Heather Mengarelli were eager to bring their two Pomeranian dogs Dolce and Lindsay to the Holiday Open House hosted by their veterinarians at Orchard Road Animal Hospital (ORAH). There, the Mengarellis hoped to have Dolce and Lindsay photographed with "Santa Paws" for $10, as had been advertised by ORAH in the weeks prior to the scheduled event.[1] However, as the Mengarellis entered the first set of doors to the veterinary clinic, a large, 150(+) lb. mastiff barreled through the second set of doors (separating the ORAH lobby from the entry vestibule), and grasped the Mengarellis' 5 lb. dog Dolce in its mouth.[2] Heather, who had entered with Dolce on leash, was shoved during the attack such that her sunglasses were knocked to the floor as the mastiff began violently thrashing Dolce.[3] Michael, who was holding their other dog Lindsay (who had a heart condition and thus was not on a leash) wrestled with the mastiff. When Dolce was finally dropped from the mastiff's jaws, he scampered to the opposite corner of the vestibule, trailing blood and screaming in pain.[4] Heather fell to her knees and screamed at the top of her lungs for help, while trying to comfort Dolce, whose blood covered Heather's hands.[5] The holiday scarf Dolce had been wearing for his photo was now in his mouth.[6] Heather removed the scarf from Dolce's mouth, held him and cried.[7] Only after an ORAH employee arrived and moved the mastiff from the vestibule into the lobby bathroom, did the ORAH employee return to take Dolce to a veterinarian for help.[8] A large pool of blood remained in the spot where Dolce laid.[9] The mastiff had lacerated Dolce's aorta.[10] The ORAH veterinarians tried, but ultimately could not save Dolce.[11]

The Mengarellis called the Montgomery Police for help,[12] but the responding officer dismissed the incident as a "civil" matter and refused to issue any citations to Angela Marquardt,

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[1] 09/18/12 Dep. of Linda Fleig, p. 80-01; 08/23/12 Dep. of Mike Mengarelli, p. 100-101; 08/23/12 Dep. of Heather Mengarelli, p. 86-87.
[2] 08/23/12 Dep. of Heather Mengarelli, p. 80-88.
[3] 08/23/12 Dep. of Heather Mengarelli, p. 117.
[4] 08/23/12 Dep. of Heather Mengarelli, p. 83-85.
[5] 08/23/12 Dep. of Heather Mengarelli, p. 95; 08/23/12 Dep. of Mike Mengarelli, p. 100.
[6] 08/23/12 Dep. of Heather Mengarelli, p. 86-87; 08/23/12 Dep. of Mike Mengarelli, p. 100.
[7] 08/23/12 Dep. of Heather Mengarelli, p. 86-87; 08/23/12 Dep. of Mike Mengarelli, p. 100.
[8] 08/23/12 Dep. of Heather Mengarelli, p. 86-87, 127; .08/24/12 Dep. of Angela Marquardt, p. 60.
[9] 08/23/12 Dep. of Heather Mengarelli, p. 87; 08/23/12 Dep. of Mike Mengarelli, p. 34.
[10] 08/28/12 Dep. of Joel Huffman, p. 83.
[11] See, 09/27/12 Lisa Gruhlke, p. 175:23-176:6, but see 08/28/12 Joel Huffman, p. 74:14-85:18.
[12] See, Plaintiffs' Response to ORAH's Motion for Summary Judgment, p. 9. ORAH's owner felt no duty to report the attack to police (09/18/12 Dep. of L. Fleig, p. 53-54), despite the statutory language found in both the Montgomery Ordinance (dog attacking or injuring any human being or other animal) and Kane County Ordinance (dog posing a serious and unjustified imminent threat of serious physical injury or death to a person or companion animal) that would deem the mastiff "dangerous." 10/15/12 Dep. of J. Ciribassi, p. 144-147.

the owner of the large mastiff.[13] Despite admissions that the mastiff pulled her from the ORAH lobby (so strongly that it hurt her hand), through a set of doors, and into the entryway vestibule where the mastiff mauled Dolce, Ms. Marquardt claimed that she had control of her dog and was not liable.[14] The veterinary clinic failed to place a staff member near the doors of its lobby even though it had invited ***all*** of its clients (over 2000) along with the general public to the photography event. The clinic, which also failed to restrict the entry of dogs that were known to have vicious, dangerous, or other aggressive tendencies, disclaimed all liability.[15]

The Mengarellis experienced obvious emotional injuries during the attack, and further suffered for the loss of their dog, Dolce.[16] Yet, the Mengarellis were left with no option but to file suit against Angela Marquardt and ORAH in the Kane County Circuit Court. Civil litigation, however, was ill-equipped to fully address the Mengarellis' damages and their hoped-for goals in bringing suit.

The Animal Control Act & Attacks on Companion Animals

The Illinois Animal Control Act addresses animal attacks on persons, but does not specifically address injuries to owned companion animals. 510 ILCS 5/16 reads:

> Animal attacks or injuries. If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby. (Source: P.A. 94-819, eff. 5-31-06.)

While the Act is a powerful statutory tool for dog attacks to persons, the Act does not specifically address a litigant's damages for dog attacks on companion animals.[17] For this reason, most litigants seek damages for the loss of his or her companion animal under common law theories of liability for property damage, personal injury and emotional distress.

Animal Valuation in Illinois – Property Damages

Animals, which still bear the antiquated designation of "property," differ drastically from other types of property, such as tables and chairs. For example, as sentient beings, laws exist to protect the well-being of animals, while there are no such similar laws to mandate the humane care and treatment of tables and chairs.[18] For companion animals, where there often exists a strong human/animal bond, it should come as no surprise that a particular animal may have a much higher value to his or her owner than that same animal might have to a random purchaser.

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[13] 11/01/12 Dep. of Officer Bertolotti, (not transcribed); 08/28/12 Dep. of Joel Huffman, p. 99.

[14] 08/24/12 Dep. of Angela Marquardt, p. 56-57; 09/27/12 Dep. of Lisa Gruhlke, p. 129; .

[15] 08/24/12 Dep. of Linda Fleig, p. 102-109; 09/27/12 Dep. of Lisa Gruhlke, p. 44:13-47:17, 59:1-62:21, 149:10-152:23, 195:19-196:21

[16] 02/07/12, Pl. 2nd Am. Cmpl.

[17] While it could be argued that the language of 510 ILCS 5/16 incorporates emotional distress for the injury to any person following an attack leading to the death of that person's companion animal, trial courts have been reluctant to apply an expansive reading where companion animals are not specifically mentioned and damages for other animals are directly addressed in other sections of the Act. See, 510 ILCS 5/19 (addressing damage to livestock).

[18] See, e.g., Illinois Humane Care for Animals Act, 510 ILCS 70; Federal Animal Welfare Act, USC, Title 7, Ch. 54, among others.

In Illinois, damages for the negligent loss of a companion animal are determined by the "value to owner" standard. A plaintiff is required to prove actual value at trial. *See Anzalone v. Kragness*, 365 Ill.App.3d 365, 372 (1st Dist. 2005).

While Defendants disputed both Dolce's value to the Mengarellis and the extent of emotional damages available pursuant to *Anzalone*,[19] the reasonableness of Dolce's high value was bolstered by several pieces of evidence. First, other ORAH clients (including defendant Marquardt and ORAH client(s) deposed as witnesses[20]) ascribed similar values to their own companion animals. In addition, ORAH profited by providing veterinary "care" and "treatment" to the companion animals of its clients.[21] Over the seven years the Mengarellis used ORAH's services, they had spent thousands of dollars caring for their companion animals.[22] However, in an attempt to devalue the Mengarellis' dog, the ORAH veterinarian claiming to have performed emergency procedures on Dolce ***after*** the fatal attack, testified to his beliefs (1) that companion animals are mere "property," and (2) that his services were akin to "oil changes" in a car.[23] When asked if he espoused these views to clients who love their companion animals and who pay a lot of money for veterinary services, he stated, "No," because he is "smart," they [the clients] "wouldn't understand," and he didn't want to absorb the expenses of lawsuits for "emotional damages."[24]

Negligence Based Actions – Personal Injury & Emotional Damage

While Illinois law does allow emotional damages for intentional harm to owned animals,[25] most dog attack cases do not involve intentional acts; thus, only negligence theories apply. Nonetheless, the Mengarellis undeniably were emotionally harmed by witnessing the attack *and* as a result of Dolce's death.

Defendants attempted to strike the Mengarellis' claims of negligent infliction of emotional distress, citing limitations on emotional damages for the negligent loss of a companion animal, and by alleging that the Mengarellis were not in the "zone of danger" during the attack. This attempt failed, because the Mengarellis' allegations included the fact that Michael and Heather were not only witness/bystanders to the brutal mauling of their dog, Dolce, but that they also were *direct*

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[19] See, Property Damages Jury Instruction given in *Anzalone v. Kragness* on April 24, 2007, Case No. 05 L 5887, in the Circuit Court of Cook County, *"The damage to property, determined by the actual value to the owner immediately before the occurrence. This may include loss of companionship and loss of sentimental value. You may consider the length of time the plaintiff owned the property before it became damaged. You may exclude the purchase price as a basis for valuation, if the sum does not really reflect the value of the destroyed property. Whether any of these elements of damages has been proved by the evidence is for you to determine*."

[20] During the October 14, 2012 deposition of witness and ORAH client Sharon Northup, Ms. Northup indicated an assessment like Dr. Huffman's would negatively impact her decision to use a particular veterinarian who held such views (not transcribed); 08/24/12 Dep. of Angela Marquardt, p. 31-32.

[21] 08/24/12/12 Dep. of Linda Fleig, p. 163-165 (refusal to answer questions pertaining to ORAH profits).

[22] 08/23/12 Dep. of Heather Mengarelli, p. 47-49.

[23] 08/28/12 Dep. of Joel Huffman p. 133:1-9..

[24] See, 08/28/12 Joel Huffman p. 133:10-136:9, 137:22-142:14. Despite Dr. Huffman's 'legal' assessment, Illinois courts have determined that a trier of fact may consider the owner's emotions as a component of a plaintiff's claim for damages. *See Anzalone v. Kragness*, 356 Ill.App.3d 365, 370–372 (1st Dist. 2005); *Shoop v. Daimler Chrysler Corp*., 371 Ill.App.3d 1058, 1064 (1st Dist. 2007) (distinguishing the "diminished value" of truck purchaser's property damages from "sentimental or emotional damages resulting from the wrongful death of a family pet" in other cases); s*ee also LaPorte v. Associated Independents, Inc*., 163 So. 2d 267, 268-69 (Fla. 1964) (dog owner permitted to recover, as part of damages, for the owner's mental suffering at the killing of her dog).

[25] See, e.g., 510 ILCS 70/16.3, Illinois Humane Care for Animals Act.

victims of the mastiff's attack – albeit to a far lesser degree than Dolce.[26] As direct victims, physically involved in the struggle resulting from the mastiff's attack on Dolce, the rules pertaining to "zone of danger" in NIED did not apply to the Mengarellis.[27] But even if the "zone of danger" rule had applied, a complaint that alleged that the plaintiffs (1) were in the "zone of danger," (2) had a reasonable fear for their own safety, and (3) suffered physical injuries or illness resulting from the alleged emotional distress[28] would have been sufficient.

The Mengarellis argued they were in the "zone of danger" by having specifically pled that they feared for their own safety.[29] Such fear would reasonably exist for anyone trapped by, and witness to, a bloody and brutal mauling by an uncontrolled dog.[30] The trial court, however, determined that, under the theory of NIED, the Mengarellis could only seek damages for their own fear and the fear for each other while Dolce was being brutally mauled. The trial court would not allow the Mengarellis' emotional damages for their independent fear for Dolce during or after the attack, nor could they seek damages for their fear that Lindsay (the Mengarellis' other dog, which had been carried due to her heart condition[31]) would be harmed.

Reckless Actions – Dog Owner & Failure to Restrain

The Montgomery Police were wrong in claiming there was nothing they could do to help the Mengarellis. In fact, the Montgomery Ordinances specifically address dog attacks, including a definition for "dangerous animal," "penalties," and "companion animal attacks" as follows:

> Sec. 4-1. Definitions.
>
> The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:
> *[. . .]*
> *Dangerous animal* includes any animal that at any time has attacked or injured any human being, or another animal.
>
> Sec. 4-2. Penalty.

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[26] 10/12/11, Pl. 2nd Am. Cmpl. ¶¶ 58-59.

[27] *See Corgan v. Muehling*, 143 Ill.2d 296, 302, 305-309, 312 (1991) (zone-of-danger rule does not apply to a direct victim who allegedly suffered emotional distress and it was not necessary to allege physical injury); *Hayes v. Illinois Power Company*, 225 Ill.App.3d 819, 824-25 (4th Dist. 1992); *Campbell v. Robinson*, 2007 WL 1765558 (Del. Super., June 19, 2001) (allowing negligent infliction of emotional distress where a dog has attacked).

Illinois case law states the "zone of danger" rule does not apply where emotional distress is a foreseeable consequence of the injuries sustained by the Plaintiffs. The Illinois Supreme Court recently addressed the issue emotional distress in *Clark v. Children's Memorial Hospital*, 353 Ill.Dec. 254 (2011), wherein the parents in a wrongful birth case were not required to prove "zone of danger" on a theory of negligent infliction of emotional distress. In allowing the plaintiffs' claims for negligent infliction of emotional distress, the *Clark* Court commented that the "physical manifestation" and "zone of danger" rules should not be used to reject the mental distress damages of plaintiff victims any more than they would in a case of libel or invasion of privacy where a plaintiff's emotional distress was a foreseeable element of damages for a personal tort. *Id*. at 260 ¶ 17, 274, ¶ 101, 276 ¶ 107, 279 ¶ 125.

[28] *See Rickey v. Chicago Transit Authority*, 98 Ill.2d 546 (1983).

[29] 10/12/11, Pl. 1st Am. Cmpl. ¶¶ 85-86.

[30] 10/12/11, Pl. 1st Am. Cmpl. ¶¶ 15-20, 82-83, 85-86.

[31] 08/23/13 Dep. of Heather Mengarelli, p. 80.

> Any owner of an animal or any other person who shall violate any of the provisions of this chapter shall, upon conviction, be punished as provided in section 1-10. This penalty shall be in addition to other penalties or remedies provided by this chapter.
>
> Sec. 4-9. Dangerous animals.
> (a) No person shall own, keep or harbor a dangerous animal within the city unless the person shall keep such animal safely and securely confined so as to protect from injury any person who shall lawfully come upon the premises or be in the vicinity where such animal may be located. Adequate warning by signs or otherwise shall be given to persons coming lawfully upon the premises or being in the vicinity of such dangerous animals.
> (b) Any dangerous animal that attacks or injures any person or other animal within one year after a previous attack or injury is a public nuisance which may be abated in accordance with this chapter.
> (c) Any animal that without provocation attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be is a public nuisance which may be abated in accordance with this chapter.
> (Ord. No. 983, § 1, 2-11-02)

That the Montgomery Police – for whatever reason - were unaware, unwilling, or not properly trained to enforce the Montgomery Ordinance against Angela Marquardt was unfortunate, especially where such an ordinance mandates an owner's responsibility for his or her animal's training and control, and serves to prevent similar attacks in the future. Police failure to intervene has been addressed by other courts, but it remains a discretionary action without consequence in many civil lawsuits.[32]

In the Mengarellis' case, Angela Marquardt's awareness of her mastiff's propensity to harm other animals was disputed. Arguments were made in support of punitive damages because defendant Marquardt could have taken at least the following steps to have prevented the December 5, 2010 attack: (1) not bringing a dog with demonstrated aggressive tendencies to the open house; (2) failing to properly train the mastiff, including proper training for responses to verbal commands; and (3) enabling the development of training to address the dog's territorial and predatory aggression, among others.[33]

However, the trial court refused to allow punitive damages against Defendant Marquardt, which made an alternative means to ensure that the mastiff could not harm others all the more important.

Reckless Actions –The Presence of Children & Other Small Animals

The Mengarellis argued that ORAH acted recklessly in hosting an event in which ORAH failed to warn its patrons of that aggressive dogs might be present, and that ORAH failed to advise

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[32] *See O'Keefe v. Hagan*, 2012 Ill. App. Unpub. LEXIS 796; 2012 IL App (4th) 110425-U , concurring opinion of Justice Appleton, *14 "*Of course, it must first be noted that this matter need not have reached the stage of litigation had either the Girard police officer or the Macoupin County animal control officer exerted some effort to restore Boomer to his rightful legal owner, which is something I believe most police officers would have done, rather than washing his or her hands of the situation because 'it's a civil matter'*" (emphasis added).

[33] 03/18/13, Expert Report of Linda Case, p. 2-5.

its patrons of the attack when it occurred on December 5, 2010.[34] Despite ORAH's knowledge that other clients would be in attendance, some with children and small animals.[35] While the Mengarellis sat in an ORAH exam room waiting for news regarding whether the attack on Dolce had been fatal, Heather remained in fear of the mastiff, who was "scratching, pounding, and barking" in the lobby bathroom. [36] The dog had been placed there by an ORAH employee without warning any others of the danger the mastiff presented.[37]

Additionally, the front double doors, which led to the vestibule and a second set of double doors that led to the lobby, were the *only* entryway accessible to the over 2000+ invited clients and public guests. The importance of the entryway and lobby was noted by Plaintiffs' expert in her March 18, 2013 report.[38] Also, ORAH was unable to disclaim knowledge of the lobby's importance where Dr. Flieg, ORAH's owner, admitted that other acts of animal violence had occurred at this location (Ex. 8, p. 136), and commented on the proper handling of aggressive dogs in the lobby.[39]

ORAH admittedly did not use any of its "systems in place" to identify aggressive dogs at the December 5, 2010, Open House.[40] No one was monitoring the entrance.[41] Indeed, the use of such systems for typical, everyday operating procedures arguably revealed that ORAH was well-aware of its duty to protect against the reasonably foreseeable danger that occurs when encountering an aggressive dog at ORAH's facility, evidencing its willful and reckless disregard for dog attacks. The absence of such systems during the open house at the December 5, 2010 event was disconcerting.

ORAH placed no restrictions in the invitations sent to its clients, its e-mail blast, its mailings, or its public banner, and had no signs restricting entry at the premises.[42] The Mengarellis argued that ORAH was in a unique position of knowing its own clients and even had the means to identify aggressive dogs, which were noted on client files or with "pop ups" on the computer,[43] but ORAH failed to separately and specifically advise any of its clients – including those with known aggressive/dangerous tendencies - not to attend with their animals.[44] The Mengarellis argued that

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[34] 08/24/12 Dep. L. Fleig, p. 51.

[35] 08/24/12 Dep. L. Fleig, p. 37.

[36] 08/23/12 Dep. of H. Mengarelli, p. 153. On December 5, 2010, ORAH exhibited little concern for the Mengarellis themselves (asking only the owner of the mastiff if she needed help (09.27.12 Dep. of L. Gruhlke, p. 126, 198-200), while failing to even offer such help to the Mengarellis (08.29.12 Dep. of Peggy Reed, p. 167-168). Thereafter, ORAH employees acknowledged anger at the Mengarellis – the victims in this case - because they had discussed the attack with members of the press. 08.29.12 Dep. of Annette May, p. 99-100.

[37] *Id.*

[38] 03/18/13 Expert Report of Linda Case, p. 6.

[39] " If there was a dog that was coming through as aggressive, yes. You would tell the owners that are there to move dogs aside we're going to bring a dog in that's aggressive so we can direct it right into an exam room, 08/24/12 Dep. L. Fleig, p. 123-124. [. . .] Other than, you know, if they are aggressive to other animals, but not the people. And then we do have dogs like that come into the clinic. And w[ith] those, we just make sure, you know, the lobby is empty." 09/18/12 Dep. of L. Fleig, p. 64.

[40] 09/27/12 Dep. of L. Gruhlke, p. 161, 207; 08/29/12 Dep. of P. Reed, p. 71-72; 08.28.12 Dep. of D. Distajo, p. 60.

[41] Despite the presence of at least eighteen (18) paid staff and four (4) unpaid veterinarians on December 5, 2010, (09/27/12 Dep. of L. Gruhlke, p. 55), no one was assigned to monitor the front door, vestibule or the entrance to the lobby (09/27/12 Dep. of L. Gruhlke, p. 161); 09/27/12 Dep. of L. Gruhlke, p. 10, 39, 47, 161, ex. 2.

[42] 09/27/12 Dep. of L. Gruhlke, p. 47; Ex. 8, p. 95-96).

[43] 08.24.12 Dep. L. Fleig, p. 94.

[44] 08/24/12 Dep. L. Fleig p. 95-96.

all of these acts were made in reckless disregard for the safety of open house attendees.[45]

According to Plaintiffs' expert report, ORAH could have taken the following steps at little or no cost: (1) limiting or controlling the number of people who attended the event; (2) utilizing guidelines for proper dog control; (3) excluding aggressive dogs; and (4) stationing a person near the entry way.[46] However, the trial court refused to allow punitive damages against ORAH, which made an alternative means to ensure ORAH face some level of accountability while maintaining the transparency of ORAH's actions all the more important to avoid repeating the events of December 5, 2010.

Elements of a Successful Settlement

As in all disputes, the needs and wants of the parties may be gained only through the available legal remedies. For animal cases, the current remedies often fail to directly address the matters most important to plaintiffs. Nonetheless, a successful resolution may be achieved in a negotiated settlement.

First, all trials are risky. The venue, judge and jury pool pose even greater concerns when seeking discretionary remedies involving animals. While *Anzalone* was monumental in establishing the application of "actual value" v. "market value," an anticipated award is not guaranteed, and a plaintiff's case rests with the trier of fact. For example, a rural farmer may not acknowledge the higher value of an emotional bond with a companion dog when compared to the market value he or she ascribes to livestock or other property. Alternatively, an unmarried urban condo dweller may place an unexpectedly high monetary value on the loyalty and companionship of an animal akin to that of his or her much pampered companion cat. This relatively recent and unknown value is often enough to encourage all parties to at least consider settlement as an option.

Second, a successful trial – in most cases – can only result in a monetary award. The lack of apology or concern, coupled with the freedom of the parties to do as they wish after their insurance providers have paid for the case, can be enough to incentivize a highly favored plaintiff to take a lower monetary settlement, when coupled with an agreement for specific future actions by a defendant.

Third, a non-confidential agreement can encourage settlement where a plaintiff will accept defendant's minimal responsibility to maintain the right to promote change by telling his or her story in the context of the litigation. This also encourages a defendant who is unconcerned with the publicity of unresolved accusations or a high dollar verdict, and merely seeks to avoid the expense of trial while allowing his or her insurance company to pay only a small sum to resolve the matter entirely.

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[45] *See Bresland v Ideal Roller & Graphics Co*., 150 Ill. App. 3d 445, 458 (1st Dist. 1986) ("We note that where an act is performed with intent ***or with conscious disregard or indifference for the consequences when the known safety of other persons is involved, even constructive knowledge concerning those persons is sufficient for a finding of willful and wanton misconduct***") (emphasis added). While Defendant ORAH singularly focused on the loss of Plaintiffs' pet dog as a reason for denying punitive damages (Def. Rsp. p. 4 ¶1 & 5 ¶1), Illinois Courts do not restrict cases involving damages to property with sentimental or aesthetic value to only compensatory relief. *See Roark v. Musgrave*, 41 Ill. App. 3d 1008, 1014-1015 (5th Dist. 1976) (determining that "[i]t may also be true that defendant was not malicious in the ***taking of timber from plaintiff's land***," but holding "that there was sufficient evidence of ***aggravating circumstances to support the award of punitive damages in defendant's failure to make any real attempt to ascertain the boundaries of the property from which he was to cut trees***"). Defendant ORAH nonetheless admitted that the law on pets in Illinois is "abundantly clear" in their acceptance of the determinations in *Anzalone* and *Jankoski*, which cases were cited by Plaintiffs.

[46] 03/18/13, Expert Report of Linda Case, p. 5-7.

In the Mengarelli case, regardless of the amount, a monetary award alone would not have sufficed.[47] The parties reached a settlement only where Defendant Marquardt (owner of the large mastiff) agreed to (1) the payment of $14,000.00; (2) to muzzle the mastiff at all times in public; (3) to obtain professional dog training for the mastiff; and (4) to ensure compliance could be enforced in the Circuit Court of Kane County (including monetary fines per offense & attorneys' fees if proven). Here, Defendant Marquardt was able to pay the Mengarellis an amount less than they may have achieved at trial, because the Mengarellis' concerns for the safety of other dogs and the emotional trauma for other persons who might face the same situation were met. This agreement was necessarily non-confidential once the matter was resolved with defendant ORAH.

As for ORAH, which undoubtedly would have disputed the validity of any award following a successful jury verdict, a non-confidential settlement for the lesser amount of $5,000.00 allowed the Mengarellis to publicly discuss their concerns, while similarly avoiding the expense of a protracted trial and appeal. It would also allow a public discussion of highly relevant issues – including animal valuation – in the context of veterinarians who directly profit from the emotional bonds shared with companion animals, yet disclaim the monetary value of this bond when faced with liability.

The Case For Negligent Emotional Distress Damages

Beyond being an example of an effective settlement, the Mengarelli case highlights a need for change. Whether through common law or legislation, animals are clearly part of the modern day family, and emotional distress damages are undeniable where a companion animal has been negligently injured or killed. That the laws do not fully address these damages in the context of negligent acts in no way lessens the emotional damages felt by an aggrieved party. It simply points to the hypocrisy of enabling a negligent offender to profit from our close emotional bonds with animals, while escaping the full scope of liability that cannot be tolerated in fair judicial system. It is this author's sincere hope that the Mengarelli case will prompt further discussion within the animal law community.

[47] 07/29/13 Settlement Agreement (Mengaralli & Marquardt); 08/16/13 Settlement Agreement (Mengarlli & ORAH)

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