No. 125535

IN THE

SUPREME COURT OF ILLINOIS

CHERYL BARRALL, *et al.*, Plaintiffs-Appellees, –vs– THE BOARD OF TRUSTEES OF JOHN A. LOGAN COMMUNITY COLLEGE, Defendant-Appellant.	Appeal From the Illinois Appellate Court, Fifth Judicial District No. 5-18-0284 There Heard On Appeal From the Illinois Circuit Court First Judicial Circuit Williamson County, Illinois No. 2017-MR-275 Honorable Brad K. Bleyer, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT BOARD OF TRUSTEES

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REPLY BRIEF OF DEFENDANT-APPELLANT BOARD OF TRUSTEES

ISSUE PRESENTED

Plaintiffs recast the issue presented as whether § 3B-5 prohibits a community college "from employing multiple adjuncts to teach a full load of the courses previously taught by a laid-off tenured faculty member." The record does not support this assertion. We will discuss this further in Point I. Simply put, the issue is whether the proviso in § 3B-5 does or does not bar the employment of adjuncts or other part-time or "term" personnel to teach *one or more courses* without first offering to reinstate retrenched faculty who are "competent" to teach that course or courses.

ARGUMENT

I. Section 3B-5 of the Public Community College Act does not apply to part-time adjunct instructors.

Plaintiffs begin Point I of their argument with a litany of canons of statutory interpretation, most of which have no application here. In particular, as we argued in our opening brief, plaintiffs are mistaken if they are suggesting, as they seem to be, that the meaning of § 3B-5, so far as pertinent here, is plain or unambiguous. As our opening brief established (Op. Brief at 7), when statutory language is capable of being understood by reasonably well-informed persons in two or more different ways, it is ambiguous. That is the case here.

Our opening brief addresses in detail the essence of plaintiffs' argument, which is that the phrase "other employee with less seniority" must include adjunct instructors because (1) they are employees of the college, and (2) they have "less seniority" — in fact, in most cases, and in

the case of John A. Logan Community College, they have no seniority at all. Plaintiffs would separate this single phrase — "other employees with less seniority" — from the rest of § 3B-5, in violation of the ancient principle that the statute must be considered in its entirety. "Statutory terms cannot be considered in isolation but must be read in context to determine their meaning." *Dynak v. Board of Educ. of Wood Dale School Dist. 7*, 2020 IL 125062, ¶ 16.

Plaintiffs argue that the term "service" in the § 3B-5 proviso can only refer to a course, and from that conclude that it prohibits a college from employing adjuncts to teach a particular course that a laid off faculty member was competent to teach. Pl. Brief at 4. This argument ignores the language of the statute preceding the proviso, which gives a dismissed faculty member a preferred right to "reappointment to a *position* entailing services he is competent to render prior to the *appointment* of any new *faculty member* . . . ." As we discussed in our opening brief, the proviso must be read as a protection applicable to the dismissed faculty member's right to *reappointment* to a *position*. The proviso must not be taken out of its context.

Most of the rest of plaintiffs' arguments on Point I are fully addressed in our opening brief, and therefore should not be repeated here, but we will respond to two things.

First: Plaintiffs complain that our brief includes citations to certain community college websites, and assert that this is "evidence" which was not presented in the trial court. Pl. Brief at 7. These citations are not "evidence." They are legislative facts in public documents of which this

Court can take judicial notice, something that courts today commonly do. *See, e.g., Cassidy v. China Vitamins, LLC*, 2018 IL 122873, ¶ 43 (references to defendant's website); *Bogenberger v. Pi Kappa Alpha Corporation, Inc.*, 2018 IL 120951, ¶ 91 n. 9 (same) (Theis, J., concurring in part and dissenting in part); *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 13, n. 2. See Daniel Myerson, *Judicial Notice in the Internet Era*, 103 Ill. B.J. 30 (May 2015). Plaintiffs do not claim that this information is inaccurate.

Second: Plaintiffs suggest that our argument concerning a similar layoff clause earlier in § 3B-5 doesn't work here, because plaintiffs in this case do not claim that the college could not lawfully lay off a tenured faculty member and then employ an adjunct to teach one or two courses that the faculty member was qualified to teach. Pl. Brief at 7-8. (This admission seems to concede the interpretation we insist is correct.)

"What the Plaintiffs protest is the College's decision to hire multiple adjuncts to teach more than a full load of each of their courses while they were still on layoff." Pl. Brief at 8, ¶ 1. The problem with this argument is that neither in their complaint nor in the agreed statement of facts did plaintiffs articulate this claim as such. The complaint alleges that JALC "employed 'term faculty' (or adjuncts) to teach *many* of the courses previously taught by the 27 laid off tenured faculty members, ..." C75 (emphasis added). It then alleges that, had JALC recalled the plaintiffs for the 2016-17 school year, there would have been more than enough work available to employ each plaintiff full-time. C76. The agreed statement of facts merely states that plaintiffs challenge JALC's "decision

to lay Petitioners off during the 2016-17 school year and employ part-time adjunct faculty to teach courses the Plaintiffs were competent to teach." Sup. C4. It is not clear from the record that, as plaintiffs assert in their brief, JALC hired multiple adjuncts to teach courses constituting more than a full load of each and every laid-off faculty member.

Moreover, this is not the issue presented by the plaintiffs in their appeal to the appellate court below. In their appellate court brief as appellant, plaintiffs stated the issue as: "Whether the Trial Court erred in dismissing Plaintiffs' claim on the grounds that that [sic] Section 3B-5 of the Public Community College Act permits a community college to lay off tenured faculty and then employ adjunct faculty to teach the courses previously taught by the tenured faculty." Appellate Court Brief for Appellant, pp. 5-6. It is also not the issue as stated in our opening brief in this Court. Op. Brief at 1-2. Nothing in these issue statements limited the question to the one the plaintiffs have asserted for the first time in their appellee brief in this Court. An issue not raised below cannot be considered for the first time on review. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996).

Nevertheless, even if we assume, as we must, that a college might hire one or more adjuncts to teach many, most, or all the same courses that a particular retrenched faculty member had been teaching, that does not affect the construction of § 3B-5. Either § 3B-5 allows retrenched faculty members to bar the employment of adjunct instructors, or it does not. We have shown that it does not. The decision as to how to allocate

course offerings as between regular faculty and adjuncts is a decision § 3B-5 vests with the college.

II. Plaintiffs' argument concerning the course load of adjunct instructors finds no support in § 3B-5.

As noted above, plaintiffs have attempted to recast the issue in this case as whether a community college can "lay off tenured faculty from their 'positions,' then employ enough adjuncts to teach a full load of the very same courses that previously comprised those 'positions.' " Pl. Brief at 9. They use this as a basis to distinguish the *Biggiam* case (*Biggiam v. Board of Trustees of Community College District No. 516*, 154 Ill. App. 3d 627 (2d Dist. 1987)), where, they say, those facts were not presented.

Plaintiffs' argument, if we understand it correctly, is that § 3B-5 permits community colleges to hire adjunct instructors, even if those instructors teach *one* or *some* of the same courses as were taught by retrenched faculty. According to plaintiffs' recast argument, a retrenched faculty member's statutory protection kicks in only when the adjuncts' teaching assignments are the full-time equivalent of the courses the retrenched faculty member was teaching when he or she was laid off. The plaintiffs' argument is flawed.

The fallacy of this argument is that there is no support in § 3B-5 for any such interpretation. Section 3B-5 governs only a retrenched faculty member's right to reappointment to a position entailing services he or she is "competent to render" in preference to the appointment of "any new faculty member," or to the assignment of faculty or "other employee" with less seniority to replace the retrenched faculty member. Section 3B-5 says nothing about the teaching load of adjunct instructors. As we

have shown in our opening brief, § 3B-5 provides rules governing teaching "positions," not teaching loads or how a college may choose to staff its courses as between faculty and adjuncts.

Contrary to plaintiffs' suggestion (Pl. Brief at 9), we did not argue that *Biggiam's* analysis concerning individual courses was *dictum*. Our argument was and is: the *legal* issue — the interpretation issue — in *Biggiam* was the same as here, and *Biggiam* was correctly decided with respect to that issue. Opening Brief at 11-12. Beyond that, any facts concerning individual faculty members are beside the point, and are immaterial to the interpretation issue in the instant case.

In *Biggiam*, the plaintiffs claimed that § 3B-5 gave them the right to bump part-time instructors from particular courses, which they allegedly were competent to teach. The appellate court framed the legal issue:

> We consider at the outset the issue we believe is foremost in this appeal: whether section 3B-5 *** create[s] rights for faculty members only with respect to other faculty members, or whether such rights may be asserted over part-time instructors as well.

Biggiam, 154 Ill. App. 3d at 638. As here, the particular courses taught or the course loads of the part-time instructors were not pertinent.

Plaintiffs next suggest that the appellate court properly found persuasive a line of cases decided under the School Code, and argue that the result in those cases should govern the result here. Pl. Brief at 11. It should be readily apparent that the School Code cases are not helpful for the resolution of this dispute.

As plaintiffs' argument concedes, the cited School Code cases concern the rights of laid-off senior teachers under the School Code to bump junior teachers from full-time elementary or secondary school positions.

Pl. Brief at 10. The dispute in the instant case does not concern the rights of senior community college faculty under the Public Community College Act to bump junior community college faculty from a faculty position — employment which is defined under the Act as full-time employment. The issue in this case is whether a community college may, consistent with § 3B-5, employ ad hoc a part-time instructor to teach one or more courses that a retrenched tenured faculty member is competent to teach. The cases cited by plaintiffs arising under the School Code do not address a similar issue. Significantly, plaintiffs do not contend that the School Code cases they cite judicially interpret language in the School Code which parallels or is similar to the proviso language of § 3B-5 of the Public Community College Act. The School Code does not contain a provision analogous to § 3B-5. The mere fact that one purpose of the School Code is to protect senior teachers is not enough to make the cases cited by plaintiffs relevant here.

We note that plaintiffs make no argument concerning our statutory analysis in Point II of our opening brief (Opening Brief at 12-13).

III. Plaintiffs have shown no sound reason why the well-settled judicial construction doctrine should not be applied in this case.

Plaintiffs next argue that the admittedly "well-settled" judicial construction doctrine should not control here, for several reasons.

First, plaintiffs say it is just a jurisprudential principle. Pl. Brief at 13. It may not be a rule of law or a conclusive presumption, but it is a well-established canon of construction which has been applied by this Court and the appellate court many times.

Second, plaintiffs argue, it is to be given little weight where the

meaning of the statute is unambiguous. But as we have already shown, the statute certainly is ambiguous. If § 3B-5's meaning was plain, we would not be here today. See our opening brief at page 7.

The decision below is not entirely consistent on this point, but to the extent the appellate court determined that § 3B-5 should be given "its plain and ordinary meaning" (A.7), that meaning is not clear at all with respect to part-time or term instructors such as adjuncts. Since the relevant language is ambiguous, the judicial construction doctrine should be given its full force.

Third, plaintiffs say it is less likely to be applied where the judicial construction has not been extensively relied upon by Illinois courts. Pl. Brief at 13. This "less likely" policy should not be applied here, however, for two reasons. First, it is more probable that the issue has not arisen because the *Biggiam* decision has been the unquestioned law for 33 years. Second, whether *Biggiam* has been relied on in other cases is not the relevant inquiry here. It is whether the Illinois General Assembly is presumed to have accepted and relied on *Biggiam*. The General Assembly amended § 3B-5 without any change to the provision in question here. This acquiescence is the basis for the doctrine.

Plaintiffs maintain that *Biggiam* is "but one, poorly reasoned decision of one appellate district . . . ." Pl. Brief at 14. Of course, we differ as to whether *Biggiam* is "poorly reasoned." Plaintiffs suggest that the doctrine would carry greater weight if *Biggiam* was one of a long line of settled precedent, or if the precedent had been a supreme court case. But in many of the judicial construction cases, the reviewing court applied the

doctrine in reliance on only one or two previous decisions interpreting the relevant provision — for example, *People v. Way*, 2017 IL 120023, ¶ 27; *Nelson v. Artley*, 2015 IL 118058, ¶ 23 (A); *Karbin v. Karbin*, 2012 IL 112815, ¶ 47 (A); *People v. Young,* 2011 IL 111886, ¶ 15 (A); *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 380 (2008) (A); *Wakulich v. Mraz*, 203 Ill. 2d 223, 233 (2003); *Morris v. William L. Dawson Nursing Center*, 187 Ill. 2d 494, 499 (1999); *Bruso v. Alexian Bros. Hospital*, 178 Ill. 2d 445, 458 (1997)[1] (A); *People v. Agnew*, 105 Ill. 2d 275, 280 (1985); *Miller v. Lockett*, 98 Ill. 2d 478, 483 (1983); *In re Grant's Estate*, 83 Ill. 2d 379, 387-88(1980) (A). And in the citations above with the letter "A" at the end, the relevant decision was an appellate court case.

In support of this point, plaintiffs argue that the result reached in *Biggiam* was "not controversial." Pl. Brief at 14. We fail to see how this, even if true (who knows?), is relevant to the issue of statutory interpretation presented here. They go on to argue that, even if the legislature was aware of *Biggiam* (ignoring the presumption that it was), "it may well have found the decision consistent with perfectly defensible School Code cases . . . ." *Id.* It is folly to speculate as to the state of mind of the Illinois General Assembly on an issue such as this. The judicial construction canon of interpretation has never countenanced any such legislative mind-reading.

Plaintiffs have not shown any sound reason why the judicial construction doctrine, analyzed in more detail in our opening brief (Op.

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[1] Plaintiffs erroneously include *Bruso* as a case involving multiple prior decisions. On this point, the single pertinent decision prior to the 1987 amendment in question was *Passmore v. Walther Memorial Hosp.*, 152 Ill. App. 3d 554 (1st Dist. 1987). *Bruso*, 178 Ill. 2d at 458.

Brief at 13-17) should not be followed in the instant case.

IV. The legislative history of § 3B-5 is irrelevant to the issue here.

As plaintiffs note, the appellate court's resort to legislative history presupposes that the relevant statutory language is, indeed, ambiguous. If the meaning was plain, as the majority opinion below earlier asserted (A.7), reference to extrinsic aids would be improper (A.4).

On this point, we stand on the analysis in our opening brief. Op. Brief at 17-19. In addition to the doubtful value of such legislative history, nothing in the history of § 3B-5 (all of which is reproduced in the appendix to our opening brief) sheds any light on the issue in this case.

In their brief, plaintiffs quote from the comments of Rep. Skinner. Pl. Brief at 16 (A.29). But as the quotation indicates, Rep. Skinner was actually speaking in *opposition* to the bill. It would be unreasonable to infer anything about the views of those who voted *for* the bill based on the comments of a single legislator who voted *against* it.

Plaintiffs' argument that the "legislative history provides further support for applying the reasoning of the factually apposite School Code cases" (Pl. Brief at 17-18) is without any rational support.

V. Policy.

As to the policy considerations, we stand on our opening brief.

Plaintiffs suggest that our hypothetical is "entirely divorced from the facts of this case." Pl. Brief at 18. Plaintiffs misunderstand the issue presented. At the beginning of plaintiffs' brief (Pl. Brief at 1), they acknowledge that the statutory interpretation issue is one of law, but then assert that the question is whether § 3B-5 bars a college from

employing multiple adjuncts to teach a full load that could have been offered to a retrenched faculty member. We disagree. The statute says nothing about the course load of someone "employed to render a service." The question is whether the proviso applies to adjunct or part-time instructors *at all*. It does not. If there is to be any different policy, that is a decision for the General Assembly.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the Board of Trustees of John A. Logan Community College prays that the judgment of the appellate court be REVERSED and the judgment of the circuit court AFFIRMED.

Respectfully submitted,

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Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and 315. The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11 pages.

Certificate of Service

The undersigned, a licensed attorney, certifies that on May 26, 2020, he filed and served the foregoing document by electronic means.

He further certifies that on May 26, 2020, at approximately 9:00 a.m., he served this document on the attorneys of record for Plaintiffs-Appellees Cheryl Barrall, *et al.*, by attaching a true copy to an email message sent to the following email address of record:

Loretta K. Haggard lkh@schuchatcw.com

Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.