

13-3790

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Michael W. Underwood, Joseph M. Vuich, Raymond)
Scacchitti, Robert McNulty, John E. Dorn, William J.) Appeal from the United States
Selke, Janiece R. Archer, Dennis Mushol, Richard) District Court for the Northern
Aguinaga, James Sandow, Catherine A. Sandow, Marie) District of Illinois, Eastern
Johnston, and 338 other Named Plaintiffs listed in Exhibit) Division
1 to Complaint,)
Plaintiffs-Appellants,) No. 13-CV-5687
v.) Hon. Judge James F. Holderman
CITY OF CHICAGO, a Municipal Corporation,)
Defendant, and) Removed From
Trustees of the Policemen's Annuity and Benefit Fund of) Circuit Court of Cook County
Chicago;) Illinois; No. 2013 CH 17450
Trustees of the Firemen's Annuity and Benefit Fund of)
Chicago;)
Trustees of the Municipal Employees' Annuity and)
Benefit Fund of Chicago; and)
Trustees of the Laborers' & Retirement Board)
Employees' Annuity & Benefit Fund of Chicago, et al.)
Defendants-Appellees.

Appellants' Motion to Certify a Question to the Illinois Supreme Court

Retirees, Plaintiffs-Appellants, respectfully move the Court to certify the following question to the Illinois Supreme Court:

Whether, in light of *Kanerva*'s declaration that healthcare benefits are protected benefits under the Illinois Constitution Article XIII §5, the District Court's dismissal of the complaint here should be reversed.

The District Court dismissed this case based on its prediction that the Illinois Supreme Court would rule that healthcare benefits are not protected by the Illinois Constitution. Now that

the Illinois Supreme Court has squarely declared that retiree health benefits *are* protected by Article XIII §5, the City now asserts that *Kanerva* is not even applicable, and that the retiree health benefits are also not protected under principles of contract, estoppel or other vesting. As we will show herein, that issue is currently before the Illinois Supreme Court under circumstances suggesting the likelihood that that case will eliminate the City's argument here.

1. Questions May Be Certified, Even After Briefs Have Been Filed.

The fact that Plaintiffs have already filed their Appellate Brief does not prohibit the Court from itself choosing to certify a question after briefs have been filed. *Chicago Teachers Union Local No. 1. v. Bd. Of Educ.*, 662 F.3d 761 (7th Cir. 2011) (certified questions after rendering a decision and in the course of rehearing).

2. The City's new argument that the *Kanerva* decision does not control and is not dispositive on the Appeal.

In this case, the City's opposition to Retirees' motion for a preliminary injunction against the recently announced 2015 rate increases exposed the Defendants' position as ignoring the Illinois Supreme Court's decision in *Kanerva*.

In Defendants' so framing the issue, the best course of action would be to seek the Illinois Supreme Court's interpretation of Illinois law because the issue is squarely the application of Illinois law. This is underscored by the fact that Plaintiffs filed this case in state court, and it was removed by Defendants. Thus, the City removed this state law constitutional question, recognized the state Supreme Court authoritative role on the issue before this court, then when the Illinois Supreme Court ruled squarely against the City's position, the City now argues that it has no impact.

The District Court's dismissal here rested entirely on its incorrect prediction that the Illinois Supreme Court would rule that healthcare benefits are not benefits that are protected by

the “pension protection clause” of the Illinois Constitution. The Defendants now change course and argue that the *Kanerva* decision is *not* controlling; and that this Court should proceed to its own summary judgment basis, as rights not protected by contract, vesting, or estoppel.

Indeed that question of how contract principles apply to retiree healthcare claims is *now* before the Illinois Supreme Court in *Matthews*. (Illinois Supreme Court, No. 117713, Petition for Leave to Appeal Granted, September 24, 2014. See Ex. 1). Having lost on its primary argument, the City now asserts that the District Court’s decision should instead be upheld on a summary judgment-type-basis – introducing new evidence, without the benefit of discovery, upon arguments without support in this Appellate Record.

2. There Appears to Be Unfounded Uncertainty By this Court of the Applicability of the *Kanerva* Decision.

This Court suspended briefing to allow for this controlling question to be addressed by the Illinois Supreme Court. Doc. No. 21. When it came down, on July 3, 2014, the Illinois Supreme Court’s decision in *Kanerva v. Weems*, 2014 IL 115811 (Ill. 2014) noted the District Court’s decision below, squarely declaring that the Constitutional provision Article XIII §5’s protection is not limited to annuity payments, and protects *all* benefits that a participant receives by being a participant in a retirement system, specifically including retiree healthcare benefits:

Although some of the benefits are governed by a group health insurance statute and others are covered by the Pension Code, eligibility for all of the benefits is limited to, conditioned on, and flows directly from membership in one of the State’s various public pension systems. Giving the language of article XIII, section 5, its plain and ordinary meaning, all of these benefits, including subsidized health care, must be considered to be benefits of membership in a pension or retirement system of the State and, therefore, within that provision’s protections. See Duncan v. Retired Public Employees of Alaska, Inc., 71 P.3d 882, 887 (Alaska 2003) (giving comparable provision of Alaska Constitution “its natural and ordinary meaning,” there “is little question” that it encompasses “health insurance benefits offered to public employee retirees”). *Kanerva*, 2014 IL 115811, at ¶40

* * *

For the foregoing reasons, we conclude that the State's provision of health insurance premium subsidies for retirees is a benefit of membership in a pension or retirement system within the meaning of article XIII, section 5, of the Illinois Constitution, and the General Assembly was precluded from diminishing or impairing that benefit for those employees, annuitants, and survivors whose rights were governed by the version of section 10 of the Group Insurance Act that was in effect prior to the enactment of Public Act 97-695. Accordingly, the circuit court erred in dismissing plaintiffs' claims that Public Act 97-695 is void and unenforceable under article XIII, section 5. *Kanerva*, 2014 IL 115811, at ¶58

The Illinois Supreme Court's decision further directed that retirees claims are to be liberally construed with a presumption in favor of the retirees:

Moreover, *** to the extent there is any question as to legislative intent and the clarity of the language of a pension statute, it must be liberally construed in favor of the rights of the pensioner. *Kanerva*, 2014 IL 115811, at ¶36

The *Kanerva* decision more than validates the Illinois Appellate Court's recent declarations that retiree healthcare benefits should be viewed with a presumption in favor of vesting. *Matthews v. CTA*, 2014 IL App 123348 (1st Dist. 2014), following and reaffirming the presumption in favor of vesting, set by *Marconi v. City of Joliet*, 2013 IL App 110865 (3d Dist. 2013) (although vacating the trial court's ruling pre-*Kanerva*, that Article XIII §5 protected the healthcare benefits from reduction, ruling that that the retiree healthcare benefits should be reviewed first on a "vesting" basis, but remanding with a presumption in favor of vesting). Notably the Illinois Supreme Court declined to review *Marconi* but accepted *Matthews* (which rejected constitutional protections but followed a presumption in favor of vesting). Exhibit 1, September 24, 2014, Order Petition for Leave to Appeal, *Marconi* – denied No. 116166, *Matthews* – accepted No. 117638. The issue remains a live issue before the Illinois Supreme Court, and referral of this case is timely.

Moreover, referral of the issue can be done in a manner tracking *Matthews* in the Illinois Supreme Court, with opening briefs due on or about October 29, ample time for briefing to

coordinate early.

Subsequently, this Court denied Retirees' motion for a preliminary injunction, without comment (Doc. No. 45) even after the *Kanerva* decision and the City's unilateral announcement of unilateral rate increases of doubtful Illinois legality, to further diminish retiree health benefits. It appears that this Court is headed toward *creating* a conflict of opinions between the Federal Court and the Illinois Supreme Court based on the *Kanerva* decision, and a conflict with the lower Illinois Appellate Courts based on the *Matthews* and *Marconi* decisions. Thus, certification is appropriate here, "where the case concerns a matter of vital public concern," *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) and where the resolution of the issue is "outcome determinative." *Id.* Because the court first stayed briefing on the case due to the *Kanerva* case, but fails to follow its direction in denying the preliminary injunction, it appears the Court may have "genuine" uncertainty about this vital question of state law, central to the disposition of the case, properly prompting certification. *Cleary v. Philip Morris, Inc.*, 656 F.3d. 511, 520 (7th Cir. 2011).

The issue is squarely one governed solely by Illinois law, impacting more than 25,000 City of Chicago retirees, thus, the question presented here satisfies the considerations for certification. "Certification is more likely 'when the result of the decision will almost exclusively impact citizens of that state.'" Scott L. Howie, "*Time to Call in the Experts: Seventh Circuit Certifies Question to Illinois Supreme Court*" Illinois Association of Defense Trial Counsel, Vol. 23, No. 3. Indeed, this Court has noted that the impact on the state and development of state law are important guide posts to certify a question. "We also consider whether the issue is of interest to the state supreme court in its development of state law...[c]ertification to a state supreme court is more likely when the result of the decision will

almost exclusively impact citizens of that state.” *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001). Conceptually, the issues arises from uniquely Illinois based claims, litigation in Illinois Courts since 1987, classes certified under Illinois law, and settlements under Illinois law. The case was filed in state court, and removed by Defendants. These legal issues are also Illinois legal questions of state law constitutional interpretation, and addressing Illinois Appellate Court decision in *Matthews* and *Marconi*. The issue is of an on-going Illinois concern because the retirees are facing the loss of health benefits over the next several years with now anticipated yearly unaudited and unilateral rate increases.

The one point that is certain is that the District Court’s dismissal below was wrong, resting fundamentally on its prediction that retiree health care claims would be held not protected by the Illinois Constitution. The City’s new argument that *Kanerva* does not apply, and that Illinois law does not prohibit the City from reducing the health insurance retirement benefits or making adverse changes to the retiree healthcare benefits from the best terms in effect during a participant’s participation must also be decided with a presumption *in favor of vesting*. It is so clear that the *Kanerva* decisions compels reversal and remand, that the City’s distinguishing the case, and the Court’s denial without comment to issue a preliminary injunction suggests some uncertainty of the Court’s view, that supports certification of the question to the Illinois Supreme Court. With all due respect to this Court, the issue here is one of Illinois law that our Supreme Court is addressing already and one which should be the controlling decision either way.

Respectfully Submitted,
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Certificate of Service

I, Clinton A. Krislov, an attorney, on oath state that on October 14, 2014, I filed the attached Motion via Electronic Filing on the Court's website; this attached pleading will be served on the parties listed on the Court's Docket and listed below.

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SUPREME COURT OF ILLINOIS

WEDNESDAY, SEPTEMBER 24, 2014

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

No. 115724 - Marilyn Maxime, petitioner, v. PHH Mortgage Corporation, respondent. Leave to appeal, Appellate Court, Third District. (3-12-0246)

Petitioner having failed to file a petition for leave to appeal within the time allowed by order, this case is DISMISSED.

No. 116166 - Michael Marconi et al., respondents, v. The City of Joliet, etc., petitioner. Leave to appeal, Appellate Court, Third District. (3-11-0865)
Petition for leave to appeal denied.

No. 116555 - In re Latoya C., etc., (People State of Illinois, petitioner, v. Latoya C., respondent). Leave to appeal, Appellate Court, First District.
(1-12-1477)
Petition for leave to appeal denied.

In the exercise of this Court's supervisory authority, the Appellate Court, First District, is directed to vacate its judgment in In the Matter of: Latoya C., case No. 1-12-1477. The appellate court is directed to reconsider its judgment in light of In re Rita P., 2014 IL 115798, to determine whether a different result is warranted.

No. 116911 - Fifth Third Mortgage Company, respondent, v. Janet Phongsa, petitioner. Leave to appeal, Appellate Court, First District. (1-13-2814)

Petitioner having failed to file a petition for leave to appeal within the time allowed by order, this case is DISMISSED.

No. 117635 - People State of Illinois, respondent, v. Allen Strong, petitioner. Leave to appeal, Appellate Court, First District. (1-12-1851)
Petition for leave to appeal denied.

No. 117636 - People State of Illinois, respondent, v. Angerio Curtis, petitioner. Leave to appeal, Appellate Court, Second District. (2-12-0693)
Petition for leave to appeal denied.

No. 117637 - People State of Illinois, respondent, v. Myles Burton, petitioner. Leave to appeal, Appellate Court, Second District. (2-12-0757)
Petition for leave to appeal denied.

No. 117638 - Jerry Matthews et al., etc., respondents, v. Chicago Transit Authority et al. (Retirement Plan for Chicago Transit Authority Employees et al., petitioners). Leave to appeal, Appellate Court, First District. (1-12-3348)
PETITION FOR APPEAL AS A MATTER OF RIGHT OR
LEAVE TO APPEAL ALLOWED.

This case is consolidated with Case Nos.
117713 & 117728.

No. 117639 - People State of Illinois, respondent, v. Ronny Broughton, petitioner. Leave to appeal, Appellate Court, First District. (1-13-0077)
Petition for leave to appeal denied.

No. 117641 - Jan W. Schuett, petitioner, v. Murray Properties, Inc., et al., respondents. Leave to appeal, Appellate Court, Second District. (2-13-0664)
Petition for leave to appeal denied.

No. 117642 - People State of Illinois, respondent, v. Matthew Zucco, petitioner. Leave to appeal, Appellate Court, First District. (1-12-2034)
Petition for leave to appeal denied.

No. 117643 - Gardner Fire Protection District, etc., respondent, v. Gardner Volunteer Fire Department, etc., petitioner. Leave to appeal, Appellate Court, Third District. (3-12-0916, 3-13-0063)
Petition for leave to appeal denied.

No. 117710 - Clayborn L. Smith, Jr., petitioner, v. Robert J. Sprague et al., respondents. Leave to appeal, Appellate Court, Fourth District. (4-13-0822)
Petition for leave to appeal denied.

No. 117711 - BAC Home Loans Servicing L.P., et al., respondents, v. Peter Spanos et al. (Mort A. Segall et al., petitioners). Leave to appeal, Appellate Court, Second District. (2-13-0276)
Petition for leave to appeal denied.

No. 117712 - The Courts of Northbrook Condominium Association, respondent, v. Baldev Bhutani, petitioner. Leave to appeal, Appellate Court, First District.
(1-13-0417)
Petition for leave to appeal denied.

No. 117713 - Jerry Matthews et al., etc., petitioners, v. Chicago Transit Authority et al., respondents. Leave to appeal, Appellate Court, First District.
(1-12-3348)
PETITION FOR LEAVE TO APPEAL ALLOWED.

This case is consolidated with Case Nos.
117638 & 117728.

No. 117714 - People State of Illinois, respondent, v. Alfred Wooten, petitioner. Leave to appeal, Appellate Court, First District. (1-12-0334)
Petition for leave to appeal denied.

No. 117716 - People State of Illinois, petitioner, v. James E. Lewis, respondent. Leave to appeal, Appellate Court, Second District. (2-12-0689)
Petition for leave to appeal denied.

No. 117718 - Friends for Murray Center Incorporated et al., respondents, v. The Department of Human Services et al., etc., petitioners. Leave to appeal, Appellate Court, Fifth District. (5-13-0481)
Petition for leave to appeal denied.
Karmeier, J., took no part.

No. 117720 - Stone Street Partners, LLC, respondent, v. The City of Chicago Department of Administrative Hearings, petitioner. Leave to appeal, Appellate Court, First District. (1-12-3654)
PETITION FOR LEAVE TO APPEAL ALLOWED.

No. 117721 - Calvin Hollins, Jr., et al., petitioners, v. City of Chicago, etc., et al., respondents. Leave to appeal, Appellate Court, First District.
(1-12-3816)

Petition for leave to appeal denied.

No. 117722 - In re Estate of Mary G. Sykes, etc. (Gloria Jean Sykes, petitioner, v. Carolyn Toerpe, respondent). Leave to appeal, Appellate Court, First District.
(1-13-2076)

Petition for leave to appeal denied.

No. 117723 - People State of Illinois, petitioner, v. Dustin P. Ferris, respondent. Leave to appeal, Appellate Court, Fourth District. (4-13-0657)

Petition for leave to appeal denied.

No. 117724 - Evelyn Hart, etc., petitioner, v. Excel Emergency Care, LLC, et al., respondents. Leave to appeal, Appellate Court, First District. (1-12-2871)

Petition for leave to appeal denied.

No. 117725 - People State of Illinois, respondent, v. Melissa Calusinski, petitioner. Leave to appeal, Appellate Court, Second District. (2-12-0383)

Petition for leave to appeal denied.

No. 117727 - People State of Illinois, respondent, v. Anthony Brown, petitioner. Leave to appeal, Appellate Court, First District. (1-11-2604)

Petition for leave to appeal denied.

No. 117728 - Jerry Matthews et al., etc., respondents, v. Chicago Transit Authority, petitioner. Leave to appeal, Appellate Court, First District.
(1-12-3348)

PETITION FOR LEAVE TO APPEAL ALLOWED.

This case is consolidated with Case Nos. 117638 & 117713.

No. 117729 - James G. Singh, petitioner, v. Illinois Department of Employment Security et al., respondents. Leave to appeal, Appellate Court, First District.
(1-12-3344)

Petition for appeal as a matter of right or leave to appeal denied.