

2012 IL App (2d) 110676-U  
No. 2-11-0676  
Order filed March 26, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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JT's FRAMES, INC., Individually and on Behalf of a Class of Similarly Situated Persons,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Respondent,	)	
v.	)	No. 07-CH-436
THE SUNHILL NIC COMPANY, INC.,	)	Honorable Michael J. Sullivan,
Defendant-Petitioner.	)	Judge, Presiding.

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Burke and Birkett concurred in the judgment.

**ORDER**

*Held:* The trial court did not err in certifying the class, where common questions concerning the essential elements of a TCPA claim predominated over individual questions. The trial court did not err in assessing expert testimony, where defendant mischaracterized the testimony. Class definition modified, where trial court's definition appeared to shift the burden of proof to defendant. Affirmed as modified.

¶ 1 Pursuant to Illinois Supreme Court Rule 306(a)(8) (eff. Feb. 16, 2011), defendant, The Sunhill NIC Company, Inc.<sup>1</sup>, petitioned for leave to appeal to this court, seeking to challenge the trial court's order granting plaintiff's, JT's Frames, Inc.'s, motion for class certification. We granted

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<sup>1</sup>Also known as Sunhill Machinery Company.

defendant's petition. On appeal, defendant argues that the trial court abused its discretion and relied on improper legal standards in granting plaintiff's motion for class certification. We affirm, but modify the class definition.

¶ 2

## I. BACKGROUND

¶ 3 On April 2, 2007, plaintiff, which is based in Crystal Lake, brought a class action complaint against defendant, which is based in Seattle, Washington, arguing that defendant sent thousands of unsolicited fax advertisements to at least 40 persons in Illinois and other states (including, as alleged in an amended complaint, on August 11, 2006, to plaintiff). Plaintiff alleged that it was injured as a result of the loss of paper, toner, wear on its fax machine, the opportunity cost of having to receive, review, and route the faxes, and the cost of the inability to use its fax machine for business purposes. Plaintiff asserted: (1) violations of the Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C. § 227 (2006)); (2) a common-law conversion claim; and (3) violations of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2006)).

¶ 4 In its pleadings, including a motion for class certification filed on the same day it filed its initial complaint, plaintiff asserted that it brought its action on behalf of the following class:

“All persons who (1) on or after [separately pleaded as three, four, and five <sup>2</sup>] years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant, and (3) with respect to whom Defendant cannot provide evidence of prior express permission or invitation for the sending of such faxes.”

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<sup>2</sup>Fraud, TCPA, and conversion counts, respectively.

¶ 5 Plaintiff argued that the central issues common to the class, which it urged predominated over questions affecting only individual class members, included: whether defendant engaged in a pattern of sending unsolicited fax advertisements; whether the faxes consisted of advertisements; the manner and method defendant used to compile or obtain the fax numbers to which it sent its faxes; and whether defendant sent faxes without obtaining the recipients' prior express permission or invitation for the faxes.

¶ 6 Plaintiff attached to its initial complaint a copy of a fax it allegedly received from defendant in December 2004 (which is not at issue in this appeal), which consisted of advertisements for a "2004 Holiday Special" on defendant's woodworking equipment. As pertinent to this appeal, plaintiff attached to its amended complaint (filed June 4, 2008) a copy of another fax it allegedly received from defendant on August 11, 2006, which consisted of advertisements for defendant's woodworking machines and which invited recipients to visit defendant's booth at an August 25-26, 2006, trade show in Atlanta, Georgia.

¶ 7 Defendant denied plaintiff's allegations and specifically denied that it sent either fax to plaintiff. It estimated that it sent 12,000 advertisements each year to facsimile machines (during the relevant period). Defendant also raised various affirmative defenses, including that plaintiff consented and provided prior express invitation or permission to receive the faxes from defendant. Defendant stated that it had no records containing any facsimile recipients' consents to receive facsimiles.

¶ 8 In a 2008 deposition, Chen Sun, defendant's president (now deceased), testified that the company distributes woodworking machinery. Typically, the company has between 5 and 10 employees and they work from 9 a.m. to 5 p.m. Sun worked about 16 hours per day (until about 3

or 4 a.m.). Sun was exclusively responsible for decisions concerning defendant's advertising. He created defendant's one-page fax advertisements and used only his work fax machine to send out the fax advertisements. Sun formerly had used a computer-based program called WinFax to send out such advertisements, but the Gateway computer that contained the program "crashed" in 2006 and was discarded.

¶ 9 Addressing how his company obtained the company information that it used to send fax advertisements, Sun explained that defendant collected such information at trade shows and through magazine advertising and other sources. Faxes were sent to preexisting and perhaps (as Sun's testimony was unclear) potential customers who had contacted defendant. Defendant maintained a Quickbooks database, containing its customer list. Defendant also maintained an "ACT" database that contained company information, including fax numbers, not all of which were defendant's customers. Sun used the ACT database to send out fax advertisements. Plaintiff's information was neither in the Quickbooks nor the ACT databases. Sun was unaware how defendant obtained plaintiff's information. Sun denied that defendant ever purchased fax number lists from any third party.

¶ 10 Two of defendant's former employees stated that the telephone line connected to the fax machine in Sun's office was used not only for fax advertising, but also for business record transmissions, voice calls, and to update a postage meter.

¶ 11 Laurence Craig Carter, who worked for defendant's telephone service provider, Qwest Communications, Ltd., as a senior security analyst testified at his deposition that he reviewed defendant's phone records for the period July 19, through August 19, 2006. Defendant was billed only for completed calls. Contrary to an affidavit he signed, Carter testified at his deposition that

he did not conclude that the calls in defendant's file (from Sun's telephone) were fax transmissions; he determined only that they were completed calls.

¶ 12 Robert Biggerstaff, plaintiff's expert in computer network and database design, issued a report of his analysis of defendant's Qwest telephone records for the period July 31, through August 17, 2006. During this period, there were 6,379 successful transmissions from the number used by the fax machine in Sun's office. Biggerstaff stated that the data reflected that the typical daily number of fax transmissions from Chun's office number was small, but that, on certain days, it was many times higher. On fax broadcasting days, the average number of faxes sent was 351 per day, whereas on other days it was about 8 per day. On those high-volume days, there were many consecutive transmissions and the duration of each call was about one minute. "This is consistent with a computerized fax broadcasting system." Biggerstaff located in the records an entry for the fax sent to plaintiff on August 11, 2006. The records showed that this transmission connection lasted 1 minute 24 seconds and was both preceded (2 minutes earlier) and followed (3 minutes later) by transmissions of similar duration. "That transmission was part of an 18-day period of consecutive fax broadcasting activity, beginning on July 31, 2006[,] and ending on August 17, 2006." Biggerstaff compared the contents of defendant's customer list (*i.e.*, the Quickbooks database) to the phone records and determined that only 30 of the 6,379 successful transmissions were sent to defendant's *existing* customers.

¶ 13 At his deposition, Biggerstaff was informed that, contrary to information he had initially received from the phone company, the phone records did not reflect that *all* of the calls consisted of fax transmissions and that they could have been voice transmissions. Biggerstaff nevertheless stated that it was only remotely possible that some of the calls were voice communications, as opposed to

fax communications: “that would be on the level of the likelihood of Elvis still being alive; that’s not likely.” Biggerstaff further testified that he examined the pattern of the calls, whether they repeatedly occurred one right after the other, and other factors. In this case, calls were made outside of normal business hours, which, in addition to the call pattern, reflect that faxing was done with a mechanical device and not by hand.

¶ 14 David Canfield, defendant’s expert, testified at his deposition that, without a trap or device on the phone line, it was very difficult to determine from call detail records that fax broadcasting activity has occurred (as opposed to an internet connection or a voice call). He further testified that indicators of fax broadcasting activity are short communication bursts, such as relatively short connection times and quick connection successions (*i.e.*, one after the other).

¶ 15 On May 9, 2011, following arguments, the trial court granted plaintiff’s class certification motion. In a June 15, 2011, order, the court certified the following class:

“All persons who (1) on or after April 2, 2004; (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Sunhill Machinery; (3) with respect to whom Defendant cannot provide evidence of prior express permission or invitation for the sending of such faxes; and (4) with whom Defendant did not have an established business relationship.”

The court also recited findings that the class was so numerous that joinder was impracticable; that common questions predominated over questions affecting only individual claims; that plaintiff will fairly and adequately represent the class’s interests; and that a class action is an appropriate method for the fair and efficient adjudication of the controversy. Accordingly, the court appointed plaintiff

as class representative. Defendant moved for leave to appeal to this court, and, on August 24, 2011, we granted the motion.

¶ 16

## II. ANALYSIS

¶ 17 Defendant argues that the trial court abused its discretion in granting plaintiff's motion for class certification. Specifically, it argues that: (1) the common issues of law and fact do not predominate over the individualized assessments of whether defendant faxed advertisements without consent to identifiable class members who received the transmissions; (2) the court erred in assessing the conflicting expert testimony; and (3) the court impermissibly shifted the burden of proof. For the following reasons, we reject defendant's first two arguments, but we agree that the class definition must be modified.

¶ 18 Section 2-801 of the Code of Civil Procedure provides that an action may proceed as a class action only if the trial court finds: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of fact or law common to the class, and those common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801 (West 2006). The proponent of class certification bears the burden of establishing all four of section 2-801's prerequisites. *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 761 (2008). "[T]he trial court may conduct any factual inquiry necessary to resolve the issue of class certification presented by the record." *Id.* at 764. However, the court may not inquire into the merits of the plaintiff's individual claims; its inquiry is limited to assessing whether the plaintiff's claim, assuming its merits, satisfies section 2-801. *Id.* Decisions regarding class certification are within the trial court's discretion and

will not be disturbed on appeal unless the trial court abused its discretion or applied impermissible legal criteria. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125-26 (2005).

A trial court abuses its discretion where no reasonable person would agree with its position. *Spiegel v. Hollywood Towers Condominium Ass'n*, 283 Ill. App. 3d 992, 1001 (1996).

¶ 19 A. Commonality

¶ 20 Defendant argues first that the trial court erred in finding that common questions predominated over questions affecting only individual class members. In assessing this element, a court must determine “whether common or individual issues will be the object of most of the efforts of the litigants and the court.” *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 448-49 (2006).

A court must further identify the substantive issues that will control the outcome, determine which issues will predominate, and then determine whether they are common to the class. *Id.* at 449. The court must look beyond the pleadings to assess the claims, defenses, facts, and law. *Id.*

¶ 21 We turn first to the TCPA. In enacting the TCPA, Congress sought to address telemarketing abuses. *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 WL 2163718 at \*3. Section 227 of the TCPA prohibits the use of “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5). As amended by the Junk Fax Prevention Act of 2005, a sender is not liable under the TCPA if it has an established business relationship (EBR) with the recipient, obtained the recipient’s prior consent, and the advertisement contains an opt-out notice. 47 U.S.C. § 227(b)(1)(C).

¶ 22 Defendant argues that plaintiff did not make the requisite showing of commonality and predominance. Specifically, it argues that plaintiff's proof did not show on a class-wide basis that defendant *faxed advertisements* and did so without *consent to identifiable class members* who *received* the transmissions or owned the receiving fax machine or computer. According to defendant, successful adjudication of its own individual claim would not establish a right of recovery on behalf of the class. The call detail records for Sun's phone line, defendant urges, did not show whether the line was used for voice calls or fax transmissions. Further, it asserts that plaintiff did not show that the calls, if they were fax transmissions, consisted of advertisements or other kinds of communications from defendant to putative class members. Defendant further argues that individual questions predominate because plaintiff did not and cannot identify individual class members who received the fax transmissions or who owned the receiving fax machine or computer. It also contends that individual questions predominated as to whether the advertisement was solicited or, if unsolicited, whether each putative class member volunteered contact information giving rise to an EBR. Defendant notes that Sun testified that he had made an individual decision regarding to whom to send each fax and reviewed his contacts before sending each fax. Thus, according to defendant, the trial court would have to perform an individualized assessment leading to hundreds of mini-trials.

¶ 23 We conclude that the trial court did not err in assessing the commonality requirement. It was not unreasonable for the court to find that the predominant issues in this case will be common questions rather than individual questions. As to the issue whether defendant faxed advertisements, plaintiff presented Biggerstaff's testimony that the phone records reflected (even after it was clarified to him that the phone company did not represent that *all* records were facsimile transmissions)

periods of high-volume fax broadcasting activity. Indeed, defendant concedes that it sent about 12,000 fax advertisements per year. For the period July 31, to August 17, 2006, Biggerstaff isolated high-volume from low-volume days (*i.e.*, he was able to isolate days that averaged 8 calls from ones that averaged 351 calls), successful transmissions from unsuccessful transmissions, and a fax transmission from non-fax transmissions (based upon call length and pattern and which included the fax advertisement sent to plaintiff). Indeed, Canfield, defendant's expert, testified that, although it is very difficult to determine from call records that fax broadcasting activity has occurred, indicators of such activity are short connection times and calls made one after the other, evidence upon which Biggerstaff relied in coming to his conclusions. Further, even though Sun testified that he worked until the early morning hours, the phone records reflect that the fax broadcasting patterns testified to by the experts occurred beyond even the time that Sun professed to be working (e.g., 5 a.m.). Finally, there was evidence (*i.e.*, the phone company records) showing the recipients' phone numbers.

¶ 24 As to consent, we reject defendant's argument that no evidence tended to show that the advertisements were unsolicited or that the intended recipient did not have an EBR<sup>3</sup> with defendant.

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<sup>3</sup>As plaintiff notes, the TCPA contains an exception if the sender can show an EBR with the target. However, this exception applies only if the sender also includes a required opt-out notice on the fax. 47 U.S.C. § 227(b)(1)(C)(iii). The notice must state that the target has the right to request no future faxes be sent and must include contact information and a cost-free mechanism by which to make the request. 47 U.S.C. § 227(b)(2)(D). Defendant, plaintiff contends, did not include opt-out language on its fax advertisement, so, the EBR exception does not apply in this case. Defendant complains that the argument is forfeited because plaintiff raises it for the first time on appeal. We

Again, Biggerstaff testified that he compared defendant's customer list (*i.e.*, the Quickbooks database) to the phone company records, and determined that only 30 (*i.e.*, a relatively small and ascertainable number) of the 6,379 successful transmissions during the relevant period were sent to defendant's existing customers. Further, Sun could not state whether plaintiff was a customer.

¶ 25 Defendant relies on *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318 (5th Cir. 2008).<sup>4</sup> In *Biopay*, the defendant, through a third-party contractor, had sent over 4,000 fax advertising messages to potential clients, one of which was sent to the plaintiff. The primary issue in the district court was if the determination of whether the recipient of each fax had consented to its transmission would require a series of mini-trials. The evidence reflected that the defendant had collected fax numbers from various sources, including both actual and potential customers, and that its databases did not consistently or accurately reflect recipient consent. The defendant had argued that there was no class-wide basis upon which to distinguish recipients who had consented to receiving the faxes from those who had not done so, which suggested that the determination of consent or the lack thereof required mini-trials. The plaintiff had argued that the defendant had not proven consent and that class certification was proper because the defendant sent its faxes as part of a common course of conduct. The district court certified the class. The reviewing court reversed. *Id.* at 329. The court

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need not address this argument at length because, as plaintiff notes, Biggerstaff was able to compare the phone records to defendant's Quickbooks customer list and identify the targets of defendant's August 2006 fax broadcasting campaign that had purchased from defendant.

<sup>4</sup>Section 2-801 is patterned after Rule 23 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 23), and federal decisions interpreting Rule 23 are persuasive authority with regard to the question of class certification in Illinois. *Avery*, 216 Ill. 2d at 125.

noted that the plaintiff was required to “advance a viable theory employing generalized proof to establish liability with respect to the class involved, and it means too that district courts must only certify class actions filed under the TCPA when such a theory has been advanced.” *Id.* at 328. Based on the lack of evidence of the existence of a class-wide basis for distinguishing which recipients gave consent and which did not, the court held that the predominance requirement had not been established. *Id.* at 329.

¶ 26 *Biopay* does not support defendant’s argument because ascertaining whether recipients had consented to receiving the faxes was far more problematic in that case than it likely will be here. The *Biopay* defendant had collected fax numbers from various sources, as Sun claimed he did here, and *Biopay*’s databases did not consistently or accurately reflect recipient consent. However, here, as previously noted, plaintiff (unlike the plaintiff in *Biopay*) presented evidence that, by comparing the phone records with the Quickbooks database, Biggerstaff was easily able to identify defendant’s existing customers. See, e.g., *Critchfield*, 263 P.3d at 778 (defendant’s potential ability to identify some members of class that fall within statutory exception does not defeat certification, where it “should be a relatively simple matter to separate those parties out of the class without requiring a series of mini-trials on the question of consent or an [EBR]”; if the defendant “demonstrates that so many parties fall within the exceptions that the integrity of the class is undermined, then the district court may consider decertifying the class”).

¶ 27 We further reject defendant’s argument that there was no direct evidence of the faxes’ contents. Defendant argues that plaintiff produced only one advertisement. However, Sun testified that he was exclusively responsible for defendant’s advertising content and that he created one-page advertisement campaigns. The fax plaintiff received was prepared to advertise an upcoming trade

show, and Sun testified that he sent the fax advertisement to companies in defendant's ACT database that were geographically close to the show's location in Georgia.

¶ 28 Finally, we reject defendant's argument that standing cannot be established on a class-wide basis because plaintiff cannot show that the class actually *received* unsolicited fax advertisements. Both Carter and Biggerstaff testified that the phone records reflected successfully completed calls. In any event, on their own, factual variations among class members claims do not defeat a class action. *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 548 (2003). That some members are not entitled to relief because of some particular factor will not bar the class action. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 338 (1977). After the litigation of common questions, questions that are peculiar to individual class members may be determined in ancillary proceedings. *Clark*, 343 Ill. App. 3d at 548. Critically, "[i]ndividual questions of injury and damages do not defeat class certification." *Clark*, 343 Ill. App. 3d at 549; see also *Critchfield Physical Therapy v. The Taranto Group, Inc.*, 263 P. 3d 767, 779 (Kan. 2011) (TCPA does not require that plaintiff successfully complete fax transmission, but only that they attempted to complete a transmission; plaintiffs need not prove that they received fax transmissions; issue will not defeat commonality).

¶ 29 B. Expert Testimony

¶ 30 Next, defendant argues that the trial court erroneously certified the class without first rigorously analyzing Biggerstaff's, plaintiff's expert's, testimony. See *Wal-Mart Stores, Inc. v. Dukes*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2541, 2551 (2011) (a class may be certified only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied") (quoting *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982)). Defendant seizes on the

portion of Biggerstaff's testimony wherein, after he was informed that the phone company expert did not aver that the 6,379 call detail records were all fax transmissions, he stated that "theoretically" all of the 6,379 calls could have been voice transmissions. Defendant asserts that plaintiff's expert did not definitively distinguish between faxing activity and voice calls or testify as to what was faxed. It points to Canfield's testimony that the only way to make this distinction is by a trap device and that such a device was not in place for Sun's office phone line. Defendant urges that there was no generalized proof by which to ascertain an identifiable class and its members without going beyond the Qwest telephone records and engaging in thousand of mini-trials. We disagree.

¶ 31 Defendant presents an incomplete summary of Biggerstaff's testimony and, therefore, mischaracterizes it. Biggerstaff initially testified that the volume and pattern of calls in the phone records were consistent with computerized fax broadcasting. After he was informed of Carter's testimony that not all of the records were fax transmissions, Biggerstaff left his opinion essentially unchanged and stated that it was only remotely possible that some of the calls were voice transmissions: "but that would be on the level of the likelihood of Elvis still being alive; that's not likely." He then repeated his initial opinion that the call pattern and the fact that many of the calls were made outside of normal business hours reflected that the faxing was done by a mechanical device. Even Canfield, defendant's expert, testified that indicators of fax broadcasting activity were short connection times and quick connection successions, factors upon which Biggerstaff also relied.

¶ 32 C. Burden Shifting

¶ 33 Defendant's final argument is that the trial court's class definition impermissibly shifted the burden of proof by limiting the class to those "with respect to whom *Defendant cannot provide evidence* of prior express permission or invitation for the sending of such faxes; and (4) with whom

Defendant did not have an [EBR].” (Emphasis added.) To prevail under the TCPA, a *plaintiff* must show that the defendant: (1) used a fax machine, computer or other device to send a fax; (2) the fax was unsolicited; and (3) the fax constituted an advertisement. *Saf-T-Gard, Inc. v. Wagener Equities, Inc.*, 251 F.R.D. 312, 314 (N.D. Ill. 2008). Plaintiff responds that the foregoing language merely tracks the TCPA. We disagree with plaintiff, as the statute contains no reference to a *defendant’s* proffer of evidence on the consent issue. 47 U.S.C. § 227(a), (b). We agree with defendant that the language is problematic, and we modify that portion of the class definition to read: “All persons who (1) on or after April 2, 2004; (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Sunhill Machinery; (3) from whom Defendant did not receive prior express permission or invitation for the sending of such faxes; and (4) with whom Defendant did not have an EBR.”

¶ 34 We reject defendant’s argument that the class definition the trial court adopted differs from that in plaintiff’s amended complaint and its motion for class certification. Notwithstanding that defendant failed to raise this objection below, the adopted class definition tracks the TCPA by adding the language referencing the EBR. See 47 U.S.C. § 227(b)(1)(C). We find no error with this revision. Further, we reject defendant’s argument that the class definition is overly broad, referencing a multi-year period instead of, as defendant proposes, August 11, 2006, the date on which plaintiff claims it received defendant’s fax. In an answer to an interrogatory, defendant stated that it “estimates it sent 12,000 advertisements *each year* to facsimile machines during the Relevant Time Period.” In another answer, defendant admitted that, within a *five-year period* from the date of the complaint, it sent more than 10,000 advertisements to telephone numbers. These answers

belie its argument on appeal that the evidence reflected that it could only conceivably be shown that an unsolicited fax advertisement was sent to a class member on August 11, 2006.

¶ 35

### III. CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed as modified and the cause is remanded for further proceedings.

¶ 37 Affirmed as modified; cause remanded.