E-FILED
2/14/2022 12:00 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

No.

IN THE SUPREME COURT OF ILLINOIS

SCOTT MARION, individually and on behalf of all others similarly situated, *Plaintiff-Respondent,* v. RING CONTAINER TECHNOLOGIES, LLC, *Defendant-Petitioner.*	)	Motion for Direct Appeal Under Illinois Supreme Court Rule 302(b) and/or Supervisory Order Under Illinois Supreme Court Rule 383 On appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee, IL, Civil Department, Law Division, No. 2019 L 89, to the Appellate Court of Illinois, Third Judicial District, No. 3-20-0184 The Honorable Judge Adrienne W. Albrecht, Judge Presiding

PETITIONER RING CONTAINER TECHNOLOGIES, LLC'S MOTION FOR DIRECT APPEAL UNDER ILLINOIS SUPREME COURT RULE 302(b) AND/OR SUPERVISORY ORDER UNDER ILLINOIS SUPREME COURT RULE 383

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Petitioner Ring Container Technologies, LLC ("Ring Container") requests leave under Illinois Supreme Court Rule 302(b) for a direct appeal to this Court, or, in the alternative, supervisory relief under Illinois Supreme Court Rule 383 in this case, which involves the important question of what statutes of limitations apply to claims under the Illinois Biometric Information Privacy Act ("BIPA"). In support of this request, Ring Container states as follows.

INTRODUCTION

1. BIPA does not contain its own statute of limitations. The question of what statutes of limitations apply to BIPA claims remains unresolved, causing significant and ongoing uncertainty in hundreds of cases pending across Illinois.

2. On February 3, 2022, this Court issued its decision in *McDonald v. Symphony Bronzeville Park, LLC*, Illinois Supreme Court Case No. 126511, stating, *inter alia*, that "personal and societal injuries caused by violating [BIPA's] prophylactic requirements are different in nature and scope from the physical and psychological work injuries that are compensable under the [Workers'] Compensation Act. . . . As such . . . McDonald's loss of the ability to maintain her privacy rights was not a psychological or physical injury that is compensable under the [Workers'] Compensation Act." *McDonald*, 2022 IL 126511, ¶¶ 43-44 (emphasis added).

3. The *McDonald* decision provides guidance on BIPA claims and how they intersect with the Workers' Compensation Act. However, the issue of what statutes of limitations apply to BIPA claims remains unresolved, and will affect an untold number of present and future BIPA actions. Notably, many pending BIPA actions could be immediately resolved as a matter of law depending on the judiciary's opinion on the applicable statute of limitations.

4. This Court recently accepted an appeal in *Tims v. Black Horse Carriers, Inc.*, Illinois Supreme Court Case No. 127801, regarding the applicability of one particular statute of limitations to BIPA. However, the fact that *Tims* concerns only one statute of limitations is highly problematic because – as set forth in Ring Container's appeal – there is more than one potentially applicable limitations period.

5. As of this writing, this Court will decide *Tims* before Ring Container's appeal is even heard in the appellate court. If the Court were to decide the *Tims* appeal without concurrently considering Ring Container's appeal, this Court would be issuing a decision of very significant magnitude without availing itself of the complete landscape of arguments.

6. Specifically, Ring Container's appeal includes the certified question of whether the two-year statute of limitations for personal injuries applies to BIPA claims. In *McDonald*, this court characterized injuries stemming from BIPA violations as being "personal and societal injuries." This is particularly noteworthy because the applicability of the two-year statute of limitations for personal injuries is part of Ring Container's appeal, but is absent from *Tims*.

7. The Court therefore should allow a direct appeal in this case, which will allow the Court to consider and provide guidance to Illinois lower courts regarding all of the potential BIPA statutes of limitations, in one, combined/consolidated appeal.

PROCEDURAL HISTORY

8. On August 13, 2019, Plaintiff-Appellee Scott Marion ("Marion") filed the underlying action against Ring Container in the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County.

9. On November 7, 2019, Ring Container filed a motion to dismiss, which contended, among other defenses, that the Illinois Code of Civil Procedure's two-year statute of limitations for personal injuries should apply, and that if applicable, Plaintiff's claims would be untimely.

10. On April 20, 2020, the circuit court found that there was a substantial ground for difference of opinion about the three questions below, and certified them for interlocutory appeal to the Illinois Appellate Court for the Third District, pursuant to Rule 308:

> (1) Whether the one-year statute of limitations for privacy actions, 735 ILCS 5/13-201, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 et seq.
>
> (2) Whether the two-year statute of limitations for personal injuries, 735 ILCS 5/13-202, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 et seq.
>
> (3) Whether the exclusivity provisions in the Workers' Compensation Act, which state, among other things, that an employee has "[n]o common law or statutory right to recover damages from the employer * * * for [an] injury [ ] sustained by any employee while engaged in the line of his duty," 820 ILCS 305/5; 820 ILCS 305/11, bar a claim for statutory damages under BIPA that is based upon an injury that arises in, and during the course of, employment.

11. On July 21, 2020, the appellate court accepted the appeal, likewise finding that there was a substantial ground for difference of opinion. The appeal has been fully briefed for over a year – since January 27, 2021 – and a joint motion for oral argument before the Third District was allowed exactly one year ago – on February 10, 2021.

12. However, on February 19, 2021, Plaintiff Marion moved to continue the oral argument date pending this Court's decision in *McDonald*. On March 19, 2021, the appellate court allowed Marion's motion, over Ring Container's objection, and stayed this matter pending the decision in *McDonald*. Ex. 1. Ring Container later moved to lift the stay as to the two statute-of-limitations questions, but on June 8, 2021, the appellate court denied that motion. Ex. 2.

AUTHORITY AND ARGUMENT

I. This Court should accept this direct appeal under Rule 302(b).

A. Rule 302(b) allows a direct appeal in the circumstances here.

13. Rule 302(b) provides that "[a]fter the filing of the notice of appeal to the appellate court in a case in which the public interest requires prompt adjudication by the Supreme Court, the Supreme Court or a justice thereof may order that the appeal be taken directly to it."

14. Unlike Rule 302(a), which requires a "final judgment," Rule 302(b) requires only a pending appeal on an issue yet to be decided by the appellate court. As this Court has previously held, a disposition on the merits by the appellate court is "an eventuality not contemplated by the transfer mechanism described in Rule 302(b)." *People v. Pawlaczyk*, 189 Ill. 2d 177, 186 (2000).

15. This Court has previously granted direct review of Rule 308 interlocutory appeals, similar to the situation here. *See, e.g., O'Connor v. A & P Enters.*, 81 Ill. 2d 260, 265 (1980) (interlocutory appeal under Rule 308 accepted by appellate court, and then motion to transfer appeal to supreme court under Rule 302(b) was allowed); *Heidelberger v. Jewel Companies, Inc.*, 57 Ill. 2d 87, 88, 312 N.E.2d 601, 601–02 (1974) ("Defendant's motion for summary judgment was denied by the circuit court, and the

appellate court thereafter allowed a petition for leave to appeal under our Rule 308. We transferred that appeal to this court under Rule 302(b).").[1]

16. Moreover, this court has previously taken direct review of important issues to advance the public interest, regardless of the form of the appeal. Specifically, this court has, on its own motion, granted leave to appeal under Rule 302(b) on multiple occasions. *See In re H.G.*, 197 Ill. 2d 317, 757 N.E.2d 864 (2001); *People v. Waid*, 221 Ill. 2d 464, 472–73, 851 N.E.2d 1210, 1215 (2006). (The Court has also granted review of petitions for leave to appeal in several BIPA cases over the last four years.)

17. Here, the requirements for a Rule 302(b) transfer are satisfied. First, the appeal is in the requisite procedural posture, as Ring Container's appeal was accepted by the Third District, but the Third District has yet to issue an opinion (or even hear oral argument on the appeal due to the aforementioned stay of proceedings).

18. Second, this is a case in which the public interest requires prompt adjudication by the Supreme Court. There are hundreds of BIPA cases pending across the various courts of Illinois, many of which could be swiftly resolved (as a matter of law or practicality) given clarification of the applicable statute of limitations.

[1] Notably, while Rule 302(b) references a "notice of appeal," that specific filing is not contemplated by Rule 308. That is because "Rule 308 is an exception to the general rule that only final orders from a court are subject to appellate review." *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257, 777 N.E.2d 390, 395 (2002), as modified (Sept. 13, 2002). Rather than a notice of appeal, petitioners moving under Rule 308 must file an application for leave to appeal. "Illinois courts have repeatedly held that where the parties failed to file an application for leave to appeal within 14 days, as required by Rule 308, the appellate court lacked jurisdiction to address the merits of the appeal." *People ex rel. Pressol GmbH & Co. KG v. Pressl*, 328 Ill. App. 3d 274, 276, 765 N.E.2d 1174, 1175 (2002) (Theis, J.). *See also Camp v. Chicago Transit Auth.*, 82 Ill. App. 3d 1107, 403 N.E.2d 704 (1980). Here, Ring Container timely filed an application for leave to appeal, attached as Exhibit 3, which the appellate court allowed, Exhibit 4.

19. The determination of the applicable statute of limitations for BIPA claims would also significantly affect actions that would not be completely barred by this Court's determination. For example, a hypothetical class action filed today claiming BIPA violations from 2017 to 2021 would have drastically different class size, discovery oversight, and potential damages implications depending on whether a one, two, or five year limitations period applied.

20. This Court should also accept direct appeal of this issue now to promote judicial economy. In addition to the hundreds of BIPA lawsuits currently pending, there are countless potential and future BIPA litigants whose claims will be affected by the applicable statute of limitations. Biometric technology, which was somewhat uncommon when BIPA was passed in 2008, is now ubiquitous. In fact, dozens of BIPA complex class action cases have already been filed in the Illinois courts this year. Furthermore, the promotion of judicial economy is now more vital than ever, given the incredible backlog and strain on the judiciary stemming from the COVID-19 pandemic, particularly in a state as populous and litigious as Illinois. Allowing this direct appeal now provides the Court with the opportunity to consider and provide much-needed clarity about all potential BIPA statutes of limitations at the same time.

21. In addition, BIPA jurisprudence is evolving rapidly and has many real-life implications on both individuals and corporate entities. For example, potential BIPA liability is driving many businesses to evaluate their insurance coverage, whether to use biometric devices to further business interests, and whether to continue operations in Illinois at all. Likewise, Illinois citizens and workers would benefit from greater clarity on their legal rights concerning the use of biometrics in the workplace and beyond.

Accordingly, this Court should seize the opportunity to address this issue now, to provide clarity to Illinois citizens and businesses.

B. The statute-of-limitations certified questions in this appeal should be accepted because doing so will allow the Court to consider all statutes of limitations that might apply to BIPA, an opportunity that is not provided by *Tims*.

22. As to the certified questions in its appeal, Ring Container acknowledges that certified question 3, concerning the exclusivity provisions in the Workers' Compensation Act, should be answered in the negative based on the *McDonald* opinion.

23. The first and second certified questions, however, concern the applicability of statutes of limitations to BIPA claims, a different issue from that decided in *McDonald*, and one that has not yet been decided by this Court. On January 26, 2022, this Court allowed an appeal in *Tims*, which presents similar, but not identical issues to those raised by the first and second certified questions. *See infra*, ¶¶ 24-28. Opening briefs in *Tims* are presently due on March 2, 2022.

24. In *Tims*, the Illinois Appellate Court for the First District held that claims brought pursuant to BIPA Sections 15(c) and (d) include an express element of publication and therefore are governed by 735 ILCS 5/13-201's one-year statute of limitations for "publication of matter violating the right of privacy." Ex. 5 ¶ 32. Conversely, the First District held that claims brought pursuant to BIPA Sections 15(a), 15(b), and 15(e) do not include an element of publication and are not governed by Section 13-201's one-year limitations period, but rather are governed by the five-year limitations period of Section 735 ILCS 5/13-205. *Id*. ¶¶ 31-34. The First District's opinion in *Tims* is attached as Exhibit 5 and the Petition for Leave to Appeal that was granted in *Tims* is attached as Exhibit 6.

25. Importantly, although the *Tims* appeal will address the statute of limitations for BIPA claims, it will not address whether a two-year statute of limitations applies to BIPA claims – the second certified question presented in this case. This apparently is because the claims against the defendant in *Tims* would not be barred by a two-year statute of limitations, so no party has addressed that argument in *Tims*.

26. However, the two-year statute of limitations is a viable potential limitations period that could apply to BIPA claims, as shown by the fact that a Rule 308 appeal on all three certified questions was allowed, over Plaintiff-Appellee's objection, in this case. *See* Ill. S. Ct. Rule 308 (appeals only allowed if both the trial court and the appellate court find that a "substantial ground for a difference of opinion" exists). Furthermore, the Court's recent decision in *McDonald* may strengthen the argument that the two-year limitations period applies. *McDonald* refers to BIPA injuries as "personal" injuries, the same term used by the two-year statute of limitations at issue in Ring Container's appeal. *Compare McDonald*, 2022 IL 126511, ¶ 43 *with* 735 ILCS 5/13-202.

27. If this case remains stayed while *Tims* is decided, no appellate court will have the opportunity to consider the two-year statute of limitations argument before this Court issues its ruling in *Tims*. Simply put, the full panoply of possible statutes of limitations for BIPA claims will not have been put before the appellate courts. This will both: (1) limit the appellate courts' ability to weigh in on this important issue that will impact literally hundreds of BIPA cases pending all over Illinois; and (2) prejudice Ring Container, which, in the two-year statute of limitations, has a possibly case-dispositive defense.

28. In addition, this case presents different claims than *Tims*. The plaintiff in *Tims* expressly pleads a violation of BIPA Section 15(d) (disclosure to a third party), while the plaintiff here does not. This case therefore presents the issues in a different manner than *Tims*.

II. Alternatively, this Court should issue a supervisory order under Rule 383 directing the appellate court to lift the stay and expedite Ring Container's appeal.

29. In adopting Rule 383 for filing motions for supervisory orders, this Court recognized a need to exercise its supervisory powers to address issues in pending cases. *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 412, 550 N.E.2d 998, 1003 (1990).

30. This Court has held that "[a]s a general rule, we will not issue a supervisory order unless the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice[.]" *People ex rel. Birkett v. Bakalis*, 196 Ill. 2d 510, 512–13, 752 N.E.2d 1107, 1109 (2001) (citing *People ex rel. Foreman v. Nash*, 118 Ill. 2d 90, 97-99, 112 Ill. Dec. 714, 514 N.E.2d 180 (1987)). This Court already has acknowledged on at least one occasion that unsettled and recurring legal issues under BIPA may warrant a supervisory order. *Mosby v. Ingalls Mem. Hospital*, No. 126590 (Jan. 27, 2021) (supervisory order directing First District to accept Rule 308 appeal concerning BIPA's healthcare exclusion).

31. Here, both elements of this general rule are met, justifying the issuance of a supervisory order. First, the normal appellate process has not afforded and will not afford adequate relief to Ring Container. As of this writing, the subject appeal has been pending for nearly two years, and oral argument has not even been held yet because of the year-long stay. Even if the stay is lifted immediately, Ring Container will suffer irreparable prejudice if its appeal is not decided before this Court decides the appeal in

Tims, because the ruling in *Tims* potentially could preclude Ring Container from having its unique and potentially case-dispositive arguments heard by this Court.

32. Second, as explained above, this dispute involves a matter important to the public interest due to its impact on (1) Illinois citizens, workers, and business interests; and (2) the preservation of judicial economy in the state.

33. Accordingly, if this Court does not accept Ring Container's direct appeal, this Court should issue a supervisory order directing the appellate court to lift the stay and expedite the hearing on Ring Container's appeal. (Out of an abundance of caution, and given the timing constraints, Ring Container today also is asking the appellate court to lift the stay and expedite the appeal. A copy of Ring Container's motion, without its exhibits, is attached hereto as Exhibit 7. Such an order would be necessary to promote the administration of justice should this Court decline to accept a direct appeal under Rule 302(b), given the important questions and far-reaching implications of Ring Container's appeal.

CONCLUSION

34. Ring Container respectfully requests that this Court accept direct review of its appeal under Rule 302(b) and consider the statute-of-limitations questions presented in concert with the appeal in *Tims*. That would be the most efficient resolution to the issues briefed above, and would provide much-needed clarity to BIPA litigants and Illinois citizens without needlessly wasting judicial resources on the alternative: years of protracted BIPA filings, appeals, and opinions all to arrive at the same point.

35. In the alternative, should this Court decline to accept direct appeal under Rule 302(b), Ring Container respectfully requests that this Court issue a Rule 383 supervisory order to the appellate court ordering an immediate lift of the stay and an

expedited hearing on the appeal, which has been fully briefed for over a year now. Such an order would provide some relief to Ring Container, which has already been prejudiced by the protracted stay and faces the specter of having the *Tims* appeal decided before its own closely related appeal – but one presenting different arguments and questions of law than *Tims* – is heard.

WHEREFORE Ring Container hereby requests that this Court permit a direct appeal in this case under Rule 302(b) and has attached a proposed order to that effect.

Dated: February 11, 2022

Respectfully submitted,

RING CONTAINER TECHNOLOGIES, LLC

By: */s/ Matthew C. Wolfe*

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Attorneys for Defendant-Petitioner Ring Container Technologies, LLC

VERIFICATION BY CERTIFICATION

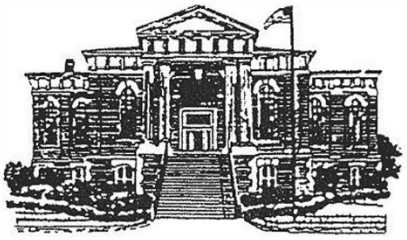
Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certified that the statements set forth in this motion, are true and correct.

/s/ Matthew C. Wolfe

EXHIBIT 1

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT

Matthew G. Butler
Clerk of the Court
815-434-5050



1004 Columbus Street
Ottawa, Illinois 61350
TDD 815-434-5068

March 19, 2021

Mara Ann Baltabols
The Fish Law Firm, PC
200 E. Fifth Ave., Suite 123
Naperville, IL 60563

RE: Marion, Scott v. Ring Container Technologies, LLC
General No.: 3-20-0184
County: Kankakee County
Trial Court No: 19L89

The Court has this day, March 19, 2021, entered the following order in the above entitled case:

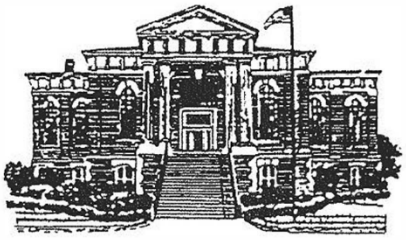
Appellee's Motion to Continue Oral Arguments is ALLOWED. Response noted, is DENIED. Accordingly, Appeal No. 3-20-0184 is STAYED pending the Illinois Supreme Court's Decision in *McDonald v. Symphony Bronzeville Park, LLC*, Case No. 126511.
The parties are ordered to provide individual status reports within 35 days from the issuance of the *McDonald* decision.

Matthew G. Butler
Clerk of the Appellate Court

c: David Jonathon Fish
Erika Anne Dirk
Kali R. Backer
Matthew Charles Wolfe
Melissa A. Siebert

EXHIBIT 2

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT



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June 8, 2021

Matthew Charles Wolfe
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RE: Marion, Scott v. Ring Container Technologies, LLC
General No.: 3-20-0184
County: Kankakee County
Trial Court No: 19L89

The Court has this day, June 08, 2021, entered the following order in the above entitled case:

Appellant's Motion to Lift Stay, Response noted, is DENIED.

Matthew G. Butler
Clerk of the Appellate Court

c: David Jonathon Fish
Erika Anne Dirk
Mara Ann Baltabols
Melissa A. Siebert

EXHIBIT 3

E-FILED
Transaction ID: 3-20-0184
File Date: 4/29/2020 4:22 PM
Barbara Trumbo, Clerk of the Court
APPELLATE COURT 3RD DISTRICT

NO. _____

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

SCOTT MARION, individually and on behalf of all others similarly situated, Plaintiff-Respondent, vs. RING CONTAINER TECHNOLOGIES, LLC, a Tennessee limited liability company, Defendant-Applicant.	Appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, IL, Civil Department, Law Division Circuit Case No. 2019 L 89 Honorable Adrienne W. Albrecht Date of Order Appealed: April 20, 2020

APPLICATION FOR LEAVE TO APPEAL BASED ON CERTIFIED QUESTIONS UNDER SUPREME COURT RULE 308

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TABLE OF POINTS AND AUTHORITIES

Statutes

NATURE OF THE APPLICATION

Defendant-Applicant Ring Container Technologies, LLC ("Ring Container") respectfully requests this Court accept its application for leave to appeal under Illinois Supreme Court Rule 308 and address the three questions certified by the circuit court. Resolution of each question is vital not only to this litigation, but to hundreds of cases currently pending in Illinois.

This application for leave to appeal presents three questions, two pertaining to the statute of limitations that applies to claims brought under the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* ("BIPA"), and one regarding whether such claims are preempted by the exclusive remedy provisions of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* ("IWCA").

In the trial court, Ring Container argued that the one-year statute of limitations for privacy claims, 735 ILCS 5/13-201, applies to claims brought under BIPA. Alternatively, Ring Container proposed that the two-year statute of limitations for personal injuries, 735 ILCS 5/13-202, applies to such claims. Plaintiff Scott Marion argued that the five-year catch-all limitations period, 735 ILCS 5/13-205, applies. With respect to the IWCA preemption issue, Ring Container argued at the circuit court level that the IWCA's exclusive remedy provisions preempt its former employee's BIPA claims; Plaintiff contended that they do not.

Although the trial court held for Plaintiff on the above issues, it agreed with Ring Container that each question presents a novel question of law and certified the following questions:

1. Whether the one-year statute of limitations for privacy actions, 735 ILCS 5/13-201, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.*

2. Whether the two-year statute of limitations for personal injuries, 735 ILCS 5/13-202, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 *et seq*.

3. Whether the exclusivity provisions in the Workers' Compensation Act, which state, among other things, that an employee has "[n]o common law or statutory right to recover damages from the employer * * * for [an] injury [ ] sustained by any employee while engaged in the line of his duty," 820 ILCS 305/5; 820 ILCS 305/11, bar a claim for statutory damages under BIPA that is based upon an injury that arises in, and during the course of, employment.

(C 623–24.) In certifying these questions, the court stated that there is substantial room for difference of opinion as to each question, and an immediate appeal may materially advance the ultimate termination of this litigation. (C 623.) Ring Container asks this Court to grant it leave to appeal and pursue guidance regarding the certified questions.

STATEMENT OF FACTS

This case is one of the hundreds of BIPA lawsuits filed in Illinois in the last three years. (C 41.) Ring Container is a Kankakee County employer that makes plastic containers such as food jars. Plaintiff sued Ring Container, his former employer, alleging that Ring Container failed to comply with certain provisions of BIPA, a statute that regulates the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g); *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186. Specifically, Plaintiff alleged that, as a Ring Container employee, he was required to scan his finger using a biometric timekeeping system to authenticate himself and track his time. (C 4, C 9.) He alleged that Ring Container failed to comply with Sections 15(a) and (b) of BIPA by failing to maintain a publicly available retention schedule and by failing to obtain a written release, respectively. (C 12–13.)

Plaintiff seeks to bring these claims on behalf of a putative class of Ring Container employees.

Ring Container moved to dismiss the complaint on November 7, 2019, arguing, among other reasons for dismissal, that Plaintiff's claims were: (1) barred by the statute of limitations—either by the one-year statute of limitations for privacy claims or by the two-year statute of limitations for personal injury claims—and (2) preempted by the IWCA's exclusive remedy provisions. (C 36–74.) Relying on the Illinois Supreme Court's opinion in *Rosenbach* and other authority, Ring Container argued that BIPA is a privacy statute whose core goal is to protect against the disclosure and publication of personal biometric information, and that the privacy statute of limitations thus applies. Plaintiff responded by arguing that the trial court should forego applying the specific one- and two-year statutes of limitations and instead apply the more general five-year catch-all statute of limitations to BIPA claims. (C 75–91.) Plaintiff's argument hinged on the meaning of the word "publication" in Section 13-201—Plaintiff argued that "publication" must be a statutory element in order for Section 13-201 to apply, and that BIPA does not require an element of publication. (C 79–82.) In its reply, Ring Container clarified how Illinois courts have interpreted "publication" and provided examples in which the one-year statute of limitations applied to privacy claims that do not specifically require publication as an element. (C 360–63.)

On January 24, 2020, the court denied Ring Container's motion to dismiss. (C 462–65.) In denying the motion, the circuit court held that the one-year statute of limitations period provided for in Section 13-201 of the Illinois Code of Civil Procedure does not apply to Plaintiff's claims. (C 464–65.) The court stated that "the limitations

period in Section 13-201 does not apply to all causes of action for breach of privacy," and instead applies only to the "publication of a matter violating the right of privacy." (C 464.) The court then explained that the one-year statute of limitations does not apply to the tort of intrusion upon seclusion. The court compared this tort to other breaches of privacy and, while recognizing that intrusion upon seclusion is "not completely analogous" to BIPA, reasoned it is more closely related to the claims available under BIPA than are the common law privacy actions identified in Section 13-201. (*Id.*) Additionally, the court rejected both the argument that the two-year statute of limitations period within Section 13-202 applies to BIPA and the argument that the IWCA's exclusive remedy provisions bar Plaintiff's claims. (C 462–65.)

On February 13, 2020, Ring Container filed a motion for appellate certification under Illinois Supreme Court Rule 308. (C 466–513.) The motion sought certification of the three questions described above. After reviewing the briefing on the certification issue and a counter-motion by Plaintiff seeking a stay of the case, the circuit court granted Ring Container's Rule 308 motion and certified each of the three proposed questions. (C 619–24.) On April 28, 2020, counsel for Plaintiff indicated that they intend to file a motion to reconsider the certification order, arguing that the court erred in its application of the law.

STATEMENT OF CERTIFIED QUESTIONS

1. Whether the one-year statute of limitations for privacy actions, 735 ILCS 5/13-201, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 *et seq*.

2. Whether the two-year statute of limitations for personal injuries, 735 ILCS 5/13-202, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 *et seq*.

3. Whether the exclusivity provisions in the Workers' Compensation Act,

> which state, among other things, that an employee has "[n]o common law or statutory right to recover damages from the employer * * * for [an] injury [ ] sustained by any employee while engaged in the line of his duty," 820 ILCS 305/5; 820 ILCS 305/11, bar a claim for statutory damages under BIPA that is based upon an injury that arises in, and during the course of, employment.

(C 624.)

STATEMENT OF REASONS
INTERLOCUTORY APPEAL SHOULD BE ALLOWED

The Court should allow this appeal and decide the questions certified by the circuit court because they present important and recurring issues of first impression appropriate for interlocutory appeal. Furthermore, the certified questions present dispositive legal questions concerning whether Plaintiff's case can proceed.

Rule 308 authorizes an interlocutory appeal if (1) the order at issue involves questions of law as to which there are substantial grounds for difference of opinion; and (2) an immediate appeal may advance the ultimate termination of the litigation. Ill. S. Ct. R. 308. All three certified questions presented for appeal meet this standard. As the circuit court acknowledged in its order (C 623), there is no direct authority in Illinois pertaining to any of the certified questions. Moreover, decisions on these issues will materially advance the ultimate termination of the litigation: If Ring Container's stance on any of the three questions is correct, Plaintiff's claims will go no further. This Court therefore should accept this appeal, which will provide important guidance pertinent to the numerous BIPA lawsuits currently pending.

I. The Certified Questions Present Questions Of Law As To Which There Are Substantial Grounds For Differences of Opinion.

A pure question of law—such as a question relating to statutory construction or the interplay between two statutes—is appropriately certified under Rule 308. *See, e.g.,*

Bowman v. Ottney, 2015 IL 119000, ¶ 8 (issue of statutory construction appropriate for review under Rule 308); *Johnston v. Weil*, 241 Ill. 2d 169, 175 (2011) (same); *Sperandeo v. Zavitz*, 365 Ill. App. 3d 691, 692–93 (2d Dist. 2006) (Rule 308 petition granted where the court had to choose between different statutes of limitations). As shown next, the certified questions here are questions of law as to which substantial grounds for differences of opinion exist.

A. Substantial Grounds For Differences Of Opinion Exist As To The Statute of Limitations Questions.

Ring Container's proposed questions are issues of first impression for which there is no appellate precedent. *See, e.g., Doe v. Sanchez*, 2016 IL App (2d) 150554, ¶ 20 (allowing certified questions where "there is no directly applicable case law"); *Costello v. Governing Bd. of Lee County Special Educ. Ass'n*, 252 Ill. App. 3d 547, 552–53 (2nd Dist. 1993) (allowing appeal under Supreme Court Rule 308 where the issue was one of first impression). No appellate court has addressed the appropriate statute of limitations for BIPA claims. (R 28–29.) Although Rule 308 certification on similar, but not identical issues, has been allowed by two Cook County Circuit Courts,[1] and so similar issues could be addressed by the First District, it is black-letter law that this Court is not bound by the First District's decisions. *State Farm Fire & Cas. Co. v. Yapejian*, 152 Ill. 2d 533, 539 (1992) (an appellate court decision is not binding on other appellate districts). Because the statute-of-limitations questions are unsettled in this District, that

[1] The cases in which Rule 308 certification has been allowed are *Tims v. Black Horse Carriers*, No. 2019 CH 03522 (Cir. Ct. Cook Cty.) and *Cortez v. Headly Manufacturing Co.*, 19 CH 04935. As fully briefed in the Circuit Court, neither of those cases address the precise statute of limitations questions at issue here; in particular, neither of the Cook County cases addresses the two-year statute of limitations argument that Ring Container has raised. (C 529–31, C 569–73.) The application for appeal in *Tims* has been granted.

alone is enough to satisfy Rule 308. *Doe*, 2016 IL App (2d) 150554, ¶ 20; *Costello*, 252 Ill. App. 3d at 552-53 (2d Dist. 1993).

Furthermore, the statute-of-limitations questions are close questions about which substantial difference of opinion can exist. BIPA does not provide for a statute of limitations. In such instances, courts look to Illinois statutes of limitations and apply the most specifically analogous one. *See Calumet Country Club v. Roberts Envtl. Corp.*, 136 Ill. App. 3d 610, 612 (2d Dist. 1985). Under Illinois law, a one-year statute of limitations applies to "[a]ctions for slander, libel, or publication of [a] matter violating the right of privacy." *See* 735 ILCS 5/13-201. A two-year statute of limitations applies to claims for personal injury torts. 735 ILCS 5/13-202 ("[a]ctions for damages for an injury to the person . . . shall be commenced within 2 years"). Each of these statutes of limitations is more specifically analogous to BIPA than the five-year catch-all statute of limitations.

There is a strong argument that the one-year statute of limitations applicable to privacy claims applies. For instance, notwithstanding the circuit court's holding, the court asked, "isn't *Rosenbach* replete with the court saying this is a statutorily determined privacy violation . . . the word, 'privacy,' must appear in *Rosenbach* at least 20 times." (R 13.) And although the circuit court analogized BIPA to one of four types of claims for breach of privacy recognized at common law (while recognizing that it was "not completely analogous") (C 464), it is reasonable to conclude that this Court could find a different analogy more compelling.

Specifically, the one-year statute of limitations governs similar claims, such as claims brought under the Illinois Right of Publicity Act ("IRPA"), 765 ILCS 1075/1 *et seq.* Like BIPA, IRPA creates a private right of action in the privacy realm. *See Blair v.*

Nevada Landing P'ship, 369 Ill. App. 3d 318, 323 (2d Dist. 2006) (concluding that the one-year statute of limitations governs IRPA claims involving unlawful publication). Like BIPA, IRPA does not list "publication" as a statutory element of a claim. In other contexts, as well, Illinois law requires very little to constitute publication. *See, e.g., Poulos v. Lutheran Soc. Servs. of Illinois, Inc.*, 312 Ill. App. 3d 731, 740 (1st Dist. 2000) (one-year statute applies to the privacy tort of public disclosure of private facts; facts need not be communicated to the public); *Popko v. Cont'l Cas. Co.* 355 Ill. App. 3d 257 (1st Dist. 2005) ("publication" was met solely by virtue of the fact that information about the plaintiff's performance review was transmitted by his supervisor to another employee). In fact, albeit in a somewhat different context, the First District recently ruled that a BIPA claim alleged "publication" of private material under the common understanding of publication. *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2020 IL App (1st) 191834, ¶ 35 (insurer had duty to defend BIPA claim because it alleged a covered "personal injury" involving "publication"). The one-year statute of limitations thus applies to certain privacy statutes and torts, even if they do not necessarily require publication to the public at large.

BIPA is such a privacy statute. Just as IRPA codified privacy rights and remedies that had long been recognized at common law, BIPA—as the U.S. Court of Appeals for the Ninth Circuit has held—likewise "has a close relationship" to a traditional privacy right: "the individual's control of information concerning his or her person." *Patel v. Facebook*, 932 F.3d 1264, 1270, 1273 (9th Cir. 2019). The Illinois General Assembly enacted BIPA to protect against the disclosure and sale of individuals' biometric identifiers and information. 740 ILCS 14/5 ("Biometrics, however, are biologically

unique to the individual; therefore, once compromised, the individual has no recourse [and] is at heightened risk for identity theft . . .”); *Rosenbach*, 2019 IL 123186, ¶ 34 (stating that the General Assembly enacted BIPA in light of assessing the “difficulty in providing meaningful recourse *once a person’s biometric identifiers or biometric information has been compromised*.”) (emphasis added). Accordingly, the one-year statute of limitations should apply.

Similarly, there is substantial ground for difference of opinion on the issue of whether the two-year statute of limitations period for personal injuries in Section 13-202 applies to BIPA claims. In *Rosenbach*, the Illinois Supreme Court has acknowledged that the interests BIPA protects are “real and significant,” *Rosenbach v. Six Flags Entm’t Corp.*, 2019 IL 123186, ¶ 34, and an injury to these interests plausibly could be characterized as a personal injury. As Plaintiff acknowledges in his complaint, BIPA codifies a privacy right akin to a personal injury tort. (C 10 (“Plaintiff now seeks liquidated damages under BIPA as compensation for the injuries Ring Container has caused.”).) Tort liability can arise from a statutory violation. *People v. Brockman*, 143 Ill. 2d 351, 372–73 (1991). Specifically, a statute may impose tort liability when (1) the statute imposes a duty and (2) the legislature designed the statute to protect human life and safety. *Id.* at 372; *see also Calloway v. Kinkelaar*, 168 Ill. 2d 312, 326 (1995); *Doyle v. Rhodes*, 101 Ill. 2d 1, 17 (1984). BIPA satisfies both criteria because it (1) imposes a duty and (2) was designed to protect the safety of others. First, by regulating the retention, collection, disclosure, and destruction of biometric information, BIPA imposes duties on certain entities to act or refrain from acting. 740 ILCS 14/15(a)-(e) (“A private entity . . . *shall* store, transmit, and protect . . . . ”) (emphasis added). Second, the Illinois

General Assembly passed BIPA to protect the "welfare, security, and safety" of the public. *Id.* § 5(g). The violation of the duty BIPA creates to guard the security and safety to persons therefore can constitute an injury to the person. *See id*. *See also West Bend*, 2020 IL App (1st) 191834, ¶ 35 (BIPA claims constitute "personal injury").

In short, the statute-of-limitations questions are of first impression, which alone satisfies Rule 308's first prong. Moreover, Ring Container's arguments show that they are questions over which substantial differences of opinion exist.

B. The Workers' Compensation Act Preemption Question Is Also A Legal Question As To Which There Is Substantial Ground For Differences Of Opinion.

The IWCA question, also an issue not yet decided by the Illinois Appellate Court, likewise is a legal question appropriate for appeal under Rule 308. *Bowman*, 2015 IL 119000, ¶ 8; *Doe*, 2016 IL App (2d) 150554, ¶ 20. The IWCA provides the exclusive remedy for employment-related injuries absent very limited circumstances, which do not exist here. *Cooley v. Power Constr. Co., LLC*, 2018 IL App (1st) 171292, ¶ 12 ("Employees that are injured at work do not have a cause of action against their employer, and their exclusive remedy is to apply for benefits under the Workers' Compensation Act"). The exclusive remedy provision applies to a "statutory right to recover damages from the employer," such as that provided by BIPA. 820 ILCS 305/5(a). According to Plaintiff, he seeks damages against his employer "as compensation for the injuries Ring Container has caused." (C 10.) He thus alleges a workplace injury, and his exclusive remedy is available under the IWCA.

Whether a statutory claim for damages may proceed in the employment context, notwithstanding the IWCA's exclusive remedy provisions, is an issue as to which there is room for differences of opinion. Indeed, the First District Appellate Court has

acknowledged the room for differences of opinion by granting the petition for leave to appeal in *McDonald v. Symphony Bronzeville Park LLC*, No. 2017-CH-11311 (Application for Leave to Appeal granted Dec. 19, 2019). (C 516.)[2]

* * *

For the reasons above, Rule 308's first requirement is satisfied as to all three questions.

II. An Immediate Appeal From The Court's Order Would Materially Advance the Ultimate Termination Of The Litigation.

Rule 308's second requirement also is satisfied, because an immediate appeal would materially advance the ultimate termination of this litigation. *See Doe*, 2016 IL App (2d) 150554, ¶ 20 (holding that the certified question would materially advance the litigation where certain counts of the complaint could be dismissed depending on the reviewing court's answer). Plaintiff's employment with Ring Container, which provides the basis for his BIPA claims, was terminated on December 15, 2016, yet he did not file his complaint until August 13, 2019—almost three years later. If the one- or two-year statute of limitations period applies to Plaintiff's BIPA claims, those claims are time-barred, and this case would be terminated. Similarly, if the IWCA's exclusive remedy provisions bar an employee's claims for damages under BIPA, the circuit court would no longer have jurisdiction over Plaintiff's claims for damages.

[2] McDonald presents a somewhat different issue than the one in this case. Although the questions for appellate certification are very similar, the *McDonald* complaint pleads a cause of action for negligence – the classic type of claim that is preempted by the Illinois Workers' Compensation Act. (C 525.) Thus, it is certainly possible that the First District will rely on that claim in its analysis. The complaint in this case contains no such allegation. Briefing in the *McDonald* appeal has not yet begun.

If the trial court's order is not immediately appealed, both parties will spend substantial time and expense litigating Plaintiff's individual and class action claims before the ability to obtain appellate review would arise. *See Voss v. Lincoln Mall Mgmt. Co*., 166 Ill. App. 3d 442, 448 (1988) (explaining that interlocutory appeals are typically granted in cases that may either be "potentially long and expensive" or "involve 'controlling' questions of law as to which one possible resolution would necessarily dispose of the case"). Thus, this case presents the precise scenario that Rule 308 was designed to address, and this Court should allow Ring Container's appeal.

CONCLUSION

Ring Container respectfully requests that the Court accept the certified questions for immediate appeal pursuant to Rule 308.

Dated: April 29, 2020

Respectfully submitted,

RING CONTAINER TECHNOLOGIES, LLC

By: */s/ Matthew C. Wolfe*
One of Its Attorneys

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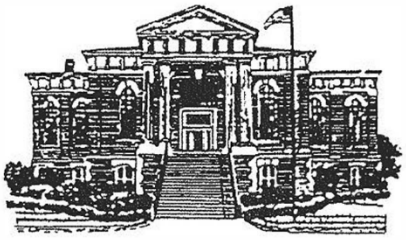
Attorneys for Defendant-Applicant Ring Container Technologies, LLC

EXHIBIT 4

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT



Matthew G. Butler
Clerk of the Court
815-434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815-434-5068

July 21, 2020

Matthew Charles Wolfe
Shook, Hardy & Bacon, LLP
111 South Wacker Drive Suite 4700
Chicago, IL 60606

RE: Marion, Scott v. Ring Container Technologies, LLC
General No.: 3-20-0184
County: Kankakee County
Trial Court No: 19L89

The court has this day, July 21, 2020, entered the following order in the above entitled case:

Appellant's Application for Leave to Appeal, pursuant to Supreme Court Rule 308, Answer of Appellee noted, is ALLOWED.

Appellant's Brief Due	08/25/2020
Appellee's Brief Due	09/29/2020
Reply Brief Due	10/13/2020

Matthew G. Butler
Clerk of the Appellate Court

c: Hon. Adrienne W. Albrecht
David Jonathon Fish
Erika Anne Dirk
Kankakee County Circuit Court
Kimberly Anne Hilton
Mara Ann Baltabols
Melissa A. Siebert

EXHIBIT 5

2021 IL App (1st) 200563

FIRST DISTRICT
SIXTH DIVISION
September 17, 2021

No. 1-20-0563

JOROME TIMS and ISAAC WATSON, Individually and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 19 CH 3522
BLACK HORSE CARRIERS, INC.,	)	Honorable David B. Atkins,
Defendant-Appellant.	)	Judge presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justice Mikva and Justice Oden Johnson concurred in the judgment and opinion.

OPINION

¶ 1 This case concerns a class action brought by plaintiffs Jorome Tims and Isaac Watson against defendant Black Horse Carriers, Inc., under the Biometric Information Privacy Act (Act). 740 ILCS 14/1 *et seq* (West 2018). Defendant brings this interlocutory appeal from circuit court orders denying its motion to dismiss on limitation grounds, denying reconsideration of the same, and certifying a question to this court: whether the limitation period in section 13-201 or section 13-205 of the Code of Civil Procedure (Code) applies to claims under the Act. 735 ILCS 5/13-201, 13-205 (West 2018). On appeal, defendant contends that the one-year limitation period under section 13-201 governs claims under the Act, while plaintiffs contend that the five-year period in section 13-205 governs. As explained below, we answer the certified question as follows: section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act. 740 ILCS 14/15 (West 2018).

¶ 2 I. JURISDICTION

¶ 3 Plaintiffs filed and amended their complaint in 2019 and the trial court denied defendant's motion to dismiss in September 2019. The court denied reconsideration and certified the aforesaid question to this court on February 26, 2020. Defendant applied to this court for leave to appeal on March 27, 2020, which we granted on April 23, 2020. Thus, we have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019), governing interlocutory appeals upon certified questions of law.

¶ 4 II. BACKGROUND

¶ 5 Plaintiff Tims filed his class action complaint in March 2019, raising claims under section 15 of the Act. 740 ILCS 14/15 (West 2018). The complaint alleged that Tims worked for defendant from June 2017 until January 2018. It alleged that defendant scanned and was still scanning the fingerprints of all employees, including plaintiff, and was using and had used fingerprint scanning in its employee timekeeping. "Defendant continues to collect, store, use, and disseminate individual[s'] biometric data in violation of the" Act.

¶ 6 All counts alleged that defendant had violated and was violating the Act by not (a) properly informing plaintiff and other employees of the purpose and length of defendant's storage and use of their fingerprints; (b) receiving a written release from plaintiff and other employees to collect, store, and use their fingerprints; (c) providing a retention schedule and guidelines for destroying the fingerprints of plaintiff and other employees; or (d) obtaining consent from plaintiff and other employees to disclose or disseminate their fingerprints to third parties.

¶ 7 The first count alleged that defendant violated section 15(a) by failing to institute, maintain, and adhere to a retention schedule for biometric data. The second count alleged that it violated section 15(b) by failing to obtain informed written consent and release before obtaining biometric data. The third count alleged that it violated section 15(d) by disclosing or disseminating biometric

data without first obtaining consent. Each count sought a declaratory judgment, injunctive relief, statutory damages for each violation of the Act, and attorney fees and costs.

¶ 8 Defendant appeared and, in June 2019, filed a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)), alleging that the complaint was filed outside the limitation period. The motion noted that the Act itself has no limitation provision and argued that the one-year limitation period for privacy actions under Code section 13-201 applies to causes of action under the Act because the Act's purpose is privacy protection.

¶ 9 Plaintiff Tims responded to the motion to dismiss, arguing that the Act's purpose is to create a prophylactic regulatory system to prevent or deter security breaches regarding biometric data. Plaintiff argued that, in the absence of a limitation period in the Act, the 5-year period in section 13-205 for all civil actions not otherwise provided for should apply to the Act. Plaintiff argued that the one-year period in section 13-201 does not govern all privacy claims but only those privacy claims with a publication element, while the Act does not have a publication element. Plaintiff noted that defendant's motion did not claim destruction or deletion of plaintiff's biometric information so that the alleged violations of the Act regarding plaintiff were ongoing or continuing.

¶ 10 Defendant replied in support of its motion to dismiss, arguing that a privacy claim involving publication as provided in section 13-201 need not require publication as an element. Defendant argued that publication for purposes of section 13-201 consists of disclosure to any third party and that the Act involves publication because it prevents the disclosure or publication of biometric information. Defendant argued that adopting plaintiff's argument would entail applying section 13-201 to the provisions in the Act requiring publication and section 13-205 to the provisions that did not require publication. Lastly, defendant argued that there was no ongoing violation because the alleged violation occurred when plaintiff's fingerprints were initially scanned

for defendant's timekeeping system without his written release and the subsequent fingerprint scannings as he clocked into and out of work were merely continuing ill effects from that violation.

¶ 11 In September 2019, the trial court denied defendant's motion to dismiss. Noting that plaintiff Tims was claiming that defendant violated the Act, rather than claiming a general invasion of his privacy or defamation, the court found section 13-201 inapplicable and instead applied the catchall limitation provision in section 13-205 to the Act, which did not have its own limitation period. The complaint was therefore timely, as it was filed within five years of plaintiff's claim accruing, whether that was at the beginning or the end of his employment by defendant.

¶ 12 Later in September 2019, the complaint was amended to add Isaac Watson as a plaintiff, alleging that Watson was employed by defendant from December 2017 until December 2018.

¶ 13 In December 2019, defendant moved for reconsideration of the denial of its motion to dismiss, reiterating its argument that section 13-201 applies to the Act because both statutes concern the right to privacy. The motion also asked the court to certify to this court the question of which limitation period applies to the Act. Plaintiffs responded, arguing that reconsideration and certification were unnecessary, as the denial of the motion to dismiss was not erroneous.

¶ 14 On February 26, 2020, the trial court denied reconsideration but certified the question of whether the limitation period in section 13-201 or section 13-205 applies to claims under the Act.

¶ 15 III. ANALYSIS

¶ 16 The trial court has certified to this court the question of whether the one-year limitation period in section 13-201 or the five-year limitation period in section 13-205 governs claims under the Act. Defendant and *amicus* the Illinois Chamber of Commerce contend that the Act concerns privacy and section 13-201 governs privacy actions. Plaintiffs contend that section 13-201 governs privacy actions only where publication is an element and that publication is not an element of actions under the Act, so that the default limitation period of section 13-205 should apply.

¶ 17 An appeal pursuant to Rule 308 on certified questions presents a question of law subject to *de novo* review. *Sharpe v. Westmoreland*, 2020 IL 124863, ¶ 6.

¶ 18 A. Limitation Statutes

¶ 19 The applicability of a statute of limitation to a cause of action presents a legal question subject to *de novo* review, and the sole concern in determining which limitation period applies is ascertaining and effectuating the legislature's intent. *Uldrych v. VHS of Illinois, Inc.*, 239 Ill. 2d 532, 540 (2011). In ascertaining legislative intent, that intent is best determined from the plain and ordinary meaning of the statutory language. *Sharpe*, 2020 IL 124863, ¶ 10. If the language is plain and unambiguous, we shall not read into the statute exceptions, limitations, or conditions the legislature did not express. *Id.* ¶ 14. Similarly, when legislative intent can be ascertained from the statutory language, it must be effectuated without resorting to aids for construction such as legislative history. *Id.* ¶ 13.

¶ 20 Section 13-201 establishes a one-year limitation period for "[a]ctions for slander, libel or for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018). Under the common law, publication means communication to both a single party and the public at large. *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 42.

¶ 21 Courts have recognized two types of privacy interests in the right to privacy: secrecy ("the right to keep certain information confidential") and seclusion ("the right to be left alone and protecting a person from another's prying into their physical boundaries or affairs"). *Id.* ¶ 45. The "core of the tort of intrusion upon seclusion is the offensive prying into the private domain of another" rather than publication. *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027, 1033 (1999). Thus, section 13-201 does not apply to intrusion upon seclusion. *Id.* at 1034. Conversely, section 13-201 applies to public disclosure of private facts, appropriation of the name or likeness of another, and false-light publicity. *Id.*

> "Publication is an element of each of the three former torts, whereas publication is not an element of unreasonable intrusion upon the seclusion of another. [Citation.] The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication [citations]." *Id.*

¶ 22 Section 13-205 provides for a five-year limitation period for, in relevant part, "all civil actions not otherwise provided for." 735 ILCS 5/13-205 (West 2018).

¶ 23 B. The Act

¶ 24 The Act includes findings that "[b]iometrics *** are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft" and that "public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(c), (g) (West 2018). As our supreme court has stated, the Act:

> "imposes numerous restrictions on how private entities collect, retain, disclose, and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of hand or face geometry, or biometric information. Under the Act, any person 'aggrieved' by a violation of its provisions 'shall have a right of action *** against an offending party' and 'may recover for each violation' the greater of liquidated damages or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate." *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 1 (quoting 740 ILCS 14/20 (West 2016)).

¶ 25 The Act works "by imposing safeguards to insure that individuals' and customers' privacy rights in their biometric identifiers and biometric information are properly honored and protected" and by "subjecting private entities who fail to follow the statute's requirements to substantial

potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law [citation] whether or not actual damages, beyond violation of the law's provisions, can be shown." *Id.* ¶ 36 (quoting 740 ILCS 14/20 (West 2016)). When a private entity violates the Act, " 'the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.' " *Id.* ¶ 34 (quoting *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 954 (N.D. Cal. 2018)).

> "Through the Act, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information. [Citation.] The duties imposed on private entities by section 15 of the Act [citation] regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right. Accordingly, when a private entity fails to comply with one of section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach." *Id.* ¶ 33 (citing 740 ILCS 14/15 (West 2016)).

¶ 26 In particular, the Act imposes on private entities possessing biometric identifiers or information duties to (a) "develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first"; (b) inform a person in writing that biometric identifiers or information are being collected or stored, the purpose therefor, and the period it will be stored or used, and obtain written release; (c) not "sell, lease, trade, or otherwise profit from" a person's biometric identifier or information; (d) not "disclose, redisclose, or otherwise disseminate" a person's biometric identifier

or information without consent, request, or authorization of the subject, a legal requirement of disclosure, or a court order; and (e) "store, transmit, and protect from disclosure all biometric identifiers and *** information using the reasonable standard of care" and "in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information." 740 ILCS 14/15 (West 2018). The Act thus protects a privacy right of secrecy, "the right of an individual to keep his or her personal identifying information like fingerprints secret." *West Bend Mutual Insurance Co.*, 2021 IL 125978, ¶ 46.

¶ 27 To enforce these duties, "[a]ny person aggrieved by a violation of this Act shall have a right of action" and "may recover for each violation" (1) $1000 liquidated damages or actual damages, whichever is greater, for negligent violations; (2) $5000 liquidated damages or actual damages, whichever is greater, for intentional or reckless violations; (3) reasonable attorney fees and costs; and (4) other relief including injunctions. 740 ILCS 14/20 (West 2018). A person aggrieved by a violation of the Act need not allege or show "actual injury or adverse effect, beyond violation of his or her rights under the Act." *Rosenbach*, 2019 IL 123186, ¶ 40.

¶ 28 C. Analysis

¶ 29 Here, we find from the language of section 13-201 including actions "for publication of matter violating the right of privacy" (735 ILCS 5/13-201 (West 2018)) and from our decision in *Benitez* that section 13-201 does not encompass all privacy actions but only those where publication is an element or inherent part of the action. Had the legislature intended to include all privacy actions, it would have written something like "actions for slander, libel, or privacy" or "actions for slander, libel or violations of the right of privacy." Similarly, had the legislature intended to include any privacy action that merely concerns or pertains to publication, it would have used such broad language rather the narrower "for publication." Logically, an action *for* something has that thing as a necessary part or element of the action.

¶ 30 Turning to the Act, section 15 imposes various duties upon which an aggrieved person may bring an action under section 20. Though all relate to protecting biometric data, each duty is separate and distinct. A private entity could violate one of the duties while adhering to the others, and an aggrieved person would have a cause of action for violation of that duty. Moreover, as section 20 provides that a "prevailing party may recover for each violation" (740 ILCS 14/20 (West 2018)), a plaintiff who alleges and eventually proves violation of multiple duties could collect multiple recoveries of liquidated damages. *Id.* § 20(1), (2).

¶ 31 While all these duties concern privacy, at least three of them have absolutely no element of publication or dissemination. A private party would violate section 15(a) by failing to develop a written policy establishing a retention schedule and destruction guidelines, section 15(b) by collecting or obtaining biometric data without written notice and release, or section 15(e) by not taking reasonable care in storing, transmitting, and protecting biometric data. *Id.* § 15(a), (b), (e). A plaintiff could therefore bring an action under the Act alleging violations of section 15(a), (b), and/or (e) without having to allege or prove that the defendant private entity published or disclosed any biometric data to any person or entity beyond or outside itself. Stated another way, an action under section 15(a), (b), or (e) of the Act is not an action "for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018).

¶ 32 Conversely, publication or disclosure of biometric data is clearly an element of an action under section 15(d) of the Act, which is violated by disclosing or otherwise disseminating such data absent specified prerequisites such as consent or a court order. 740 ILCS 14/15(d) (West 2018). Section 15(c) similarly forbids a private party to "sell, lease, trade, or otherwise profit from" biometric data (*id.* § 15(c)), which entails a publication, conveyance, or dissemination of such data. In other words, an action under section 15(c) or (d) *is* an action "for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018).

¶ 33 We therefore find that section 13-201 governs actions under section 15(c) and (d) of the Act while section 13-205 governs actions under sections 15(a), (b), and (e) of the Act. As we are answering the certified question based on the relevant statutory language, which is not ambiguous, we need not resort to, and shall not address, aids of construction such as legislative history.

¶ 34 IV. CONCLUSION

¶ 35 Accordingly, we answer the certified question: Code section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act. 740 ILCS 14/15 (West 2018). We remand this cause to the circuit court for further proceedings consistent with this opinion.

¶ 36 Certified question answered; cause remanded.

No. 1-20-0563	
Cite as:	*Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19-CH-3522; the Hon. David B. Atkins, Judge, presiding.
Attorneys for Appellant:	David M. Schultz, John P. Ryan, Adam R. Vaught, and Louis J. Manetti Jr., of Hinshaw & Culbertson LLP, of Chicago, for appellant.
Attorneys for Appellee:	Ryan F. Stephan, James B. Zouras, and Catherine T. Mitchell, of Stephan Zouras, LLP, of Chicago, for appellees.
***Amicus Curiae*:**	Melissa A. Siebert and Matthew C. Wolfe, of Shook, Hardy & Bacon LLP, of Chicago, for *amicus curiae* Illinois Chamber of Commerce.

EXHIBIT 6

No. _____

IN THE SUPREME COURT OF ILLINOIS

JOROME TIMS; ISAAC WATSON; individually and on behalf of a class of similarly situated persons *Plaintiffs-Respondents,* vs. BLACK HORSE CARRIERS, INC. *Defendant-Petitioner.*	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-20-0563 There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 2019 CH 3522 The Honorable David B. Atkins Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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10/22/2021 4:53 PM
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Prayer for Leave to Appeal

Defendant-Petitioner Black Horse Carriers, Inc., in accordance with Illinois Supreme Court Rule 315(a), prays for leave to appeal from the judgment of the Appellate Court of Illinois, First Judicial District.

Judgment Below

The Appellate Court's decision was entered on September 17, 2021. (Opinions attached as Appendix at 1) No petition for rehearing was filed.

The issue on appeal to the Appellate Court was a certified question under Supreme Court Rule 308. The question was as follows: whether the limitations periods set forth in 735 ILCS 5/13-201 ("Defamation – Privacy") or 735 ILCS 5/13-205 apply to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (SR at 286.)

The Appellate Court answered the question by holding "Code section 13-201 governs actions under section 15(c) and (d) of the [Biometric Information Privacy] Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act. 740 ILCS 14/15 (West 2018)." (Appendix ¶ 35)

Points Relied Upon For Review

Lawsuits filed under the Biometric Information Privacy Act ("Act") have increased greatly in the past few years. But as the trial court stated in certifying the question below, "there is no direct authority in Illinois on what statute of limitations properly applies to claims under [the Act], and the issue has arisen in numerous such cases at the trial level, including this one." (SR 285.) The question in this appeal presents a question of statewide importance

because the trial courts are without clear guidance on what statute of limitations to apply to claims under the Act. The circuit court certified the question below asking whether the one-year privacy statute in section 13-201 or the five-year statute in section 13-205 applied. The Appellate Court's answer was, both apply. This Court should grant leave to appeal for the following reason.

1. The Appellate Court below has held that section 13-201 (one-year privacy statute) governs actions under section 15(c) and (d) of the Act while section 13-205 (five-year catch call statute) governs actions under sections 15(a), (b), and (e) of the Act. (Opinion, ¶ 33)

Section 13-201 provides a one-year statute of limitations for actions "for publication of matter violating the right of privacy[.]" 735 ILCS 5/13-201. The court reached this conclusion by finding section 13-201 applies only to claims that have an "element" of publication. The court then read the five section 15 subsections in isolation and determined section 15(a), (b), and (e) do not have elements of publication, therefore section 13-201 does not apply to them. Instead, the court found those subsection are governed by the five-year statute of limitations in section 13-205.

This conclusion fails to recognize the purpose of the Act is to protect against the unauthorized publication of biometric data before it occurs. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 37. Each subsection of section 15 plays a role in protecting against unauthorized

publications. As a result, the Act itself involves publication of a matter involving the right of privacy. The Act name itself is the Biometric Information *Privacy* Act. The mere fact certain actionable duties may not have a publication element does not take away from the fact the purpose of the Act is to avoid publication of private biometric data. The Appellate Court thus erred in determining the entire Act is not governed by section 13-201.

Statement of Facts

On March 18, 2019, plaintiff Jorome Tims filed a class action complaint against his former employer, defendant Black Horse. (SR 1-22) The complaint asserted claims under BIPA. (*Id.*) BIPA regulates the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). "Biometric identifier" includes "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10.

Tims' Complaint alleged that Black Horse required its employees to use a timeclock that used finger scans as an authentication method. (*Id.* at 10.) Tims alleges Black Horse's use of the timeclock violated BIPA in various ways. First, he claims that Black Horse failed to maintain a publicly available policy in violation of section 15(a) of the statute. (*Id.* at 16-17.) Second, he alleges Black Horse failed to obtain written release in violation of section 15(b). (*Id.* at 18-19.) Finally, he claims Black Horse disclosed his information to third parties in violation of section 15(d). (*Id.* at 20-21.)

In response to Plaintiff's Complaint, Black Horse moved to dismiss the Complaint as barred under the one-year statute of limitations for privacy claims provided by section 5/13-201. (*Id.* at 23-59.) Black Horse argued BIPA is a privacy statute that seeks to protect the unauthorized disclosure of biometric identifiers. (*Id.* at 30.) Therefore, BIPA is governed by the privacy statute of limitations. (*Id.* at 31-35.)

In response, Tims argued that the five-year catchall statute of limitations applied to BIPA. (*Id.* at 63-67.) Tims agreed that "it is undisputed that BIPA is a privacy statute." (*Id.* at 65.) But Tims argued the one-year privacy statute of limitations did not apply because (1) it only applied to privacy claims in which publication was a required element; and (2) BIPA claims do not have a publication element. (*Id.* at 65-67.) Tims asserted that instead of the one-year privacy statute of limitations, the five-year statute of limitations controlled because it is for all "Illinois statutes that do not provide a specific limitations period." (*Id.* at 64.)

In reply, Black Horse explained that it was undisputed that a BIPA violation is a privacy injury, so the law requires the privacy statute of limitations to govern BIPA claims. Black Horse stressed that section 5/13-201 applied to privacy claims more generally that involved publication, and not merely claims where publication is an element of the claim. (*Id.* at 101-08.) It further argued that there was no authority for the claim that publication must be an element of a privacy claim for section 5/13-201 to apply. (*Id.* at 103-08.)

Black Horse also showed how there was no question that BIPA was a privacy statute that involved publication.

On September 23, 2019, the Circuit Court denied Black Horse's motion to dismiss. (*Id.* at 168-70.) It held that the privacy statute of limitations in 5/13-201 did not apply because "this action is premised on Plaintiff's claims that Defendant violated BIPA; not that Defendant has generally invaded Plaintiff's privacy or defamed him." (*Id.* at 169.) It further held that the five year statute of limitations applied by "default" because BIPA "does not provide an explicitly stated statute of limitations." (*Id.* at 170.)

On December 17, 2019, Black Horse filed a motion to reconsider the order denying its motion to dismiss or, in the alternative, for appellate certification under Illinois Supreme Court Rule 308. (*Id.* at 225-40.) It argued that the court erred in its holding that the privacy statute of limitations did not apply to BIPA because, under settled Illinois Supreme Court precedent, the type of injury determines the statute of limitations—and the type of injury with a BIPA violation is unquestionably a privacy injury. (*Id.* at 227-30.) It also argued section 5/13-201 applies to all privacy claims that involve publication, and BIPA involves publication. (*Id.* at 230-33.)

Alternatively, Black Horse argued that the court should certify the statute of limitations issue under Rule 308 because the conditions were met and this Court could offer useful guidance on the issue, particularly with the proliferation of BIPA trial-level cases. (*Id.* at 233-36.) On February 26, 2020,

the circuit court entered an order denying the motion to reconsider, but certifying a Rule 308 question. (*Id.* at 285-86.)

On appeal, the Appellate Court held that section 13-201 governs actions under section 15(c) and (d) of the Act, but section 13-205 governs actions under section 15(a), (b), and (e) of the Act. It started its analysis with the following statement.

> Here, we find from the language of section 13-201 including actions "for publication of matter violating the right of privacy" (735 ILCS 5/13-201 (West 2018)) and from our decision in *Benitez* [*v. KFC National Management Co.*, 305 Ill. App. 3d 1027 (2nd Dist. 1999) that section 13-201 does not encompass all privacy actions but only those where publication is an element or inherent part of the action. Had the legislature intended to include all privacy actions, it would have written something like "actions for slander, libel, or privacy" or "actions for slander, libel or violations of the right of privacy." Similarly, had the legislature intended to include any privacy action that merely concerns or pertains to publication, it would have used such broad language rather the narrower "for publication." Logically, an action for something has that thing as a necessary part or element of the action.

(Opinion, ¶ 29)

From there, the court found three sections did not have an element of publication or dissemination. "A private party would violate section 15(a) by failing to develop a written policy establishing a retention schedule and destruction guidelines, section 15(b) by collecting or obtaining biometric data without written notice and release, or section 15(e) by not taking reasonable care in storing, transmitting, and protecting biometric data." (*Id.* ¶ 31) The court concludes, "an action under section 15(a), (b), or (e) of the Act is not an action "for publication of matter violating the right of privacy." (*Id.*)

Conversely, the court found that publication or disclosure of biometric data is an element of claims under section 15(c) and (d). The court section 15(c) "forbids a private party to sell, lease, trade, or otherwise profit from" biometric data (id. § 15(c)), which entails a publication, conveyance, or dissemination of such data. In other words, an action under section 15(c) or (d) is an action for publication of matter violating the right of privacy." (*Id.* ¶ 32) Additionally, section 15(d) is violated by disclosing or otherwise disseminating such data absent specified prerequisites such as consent or a court order. (*Id.*)

The court then concluded "[w]e therefore find that section 13-201 governs actions under section 15(c) and (d) of the Act while section 13-205 governs actions under sections 15(a), (b), and (e) of the Act. As we are answering the certified question based on the relevant statutory language, which is not ambiguous, we need not resort to, and shall not address, aids of construction such as legislative history." (Opinion, ¶ 33)

Argument

The certified question before the Appellate Court was "whether the limitations periods set forth in 735 ILCS 5/13-201 ("Defamation—Privacy") or 735 ILCS 5/13-205 apply to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1," The Appellate Court answered the question by holding both apply. Specifically, it held "section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act." (Opinion, ¶ 35)

The subsections of Section 15 of the Act impose on private entities possessing biometric identifiers or information the following duties: (a) "develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first"; (b) inform a person in writing that biometric identifiers or information are being collected or stored, the purpose therefor, and the period it will be stored or used, and obtain written release; (c) not "sell, lease, trade, or otherwise profit from" a person's biometric identifier or information; (d) not "disclose, redisclose, or otherwise disseminate" a person's biometric identifier or information without consent, request, or authorization of the subject, a legal requirement of disclosure, or a court order; and (e) "store, transmit, and protect from disclosure all biometric identifiers and *** information using the reasonable standard of care" and "in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information." 740 ILCS 14/15.

To enforce these duties, "[a]ny person aggrieved by a violation of this Act shall have a right of action" and "may recover for each violation" (1) $1000 liquidated damages or actual damages, whichever is greater, for negligent violations; (2) $5000 liquidated damages or actual damages, whichever is

greater, for intentional or reckless violations; (3) reasonable attorney fees and costs; and (4) other relief including injunctions. 740 ILCS 14/20.

This Court has stated "[t]he duties imposed on private entities by section 15 of the Act (740 ILCS 14/15 (West 2016)) regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right." *Rosenbach*, 2019 IL 123186, ¶ 33. "The strategy adopted by the General Assembly through enactment of the Act is to try to head off such problems before they occur." *Id.* ¶ 36. It does this "by imposing safeguards to insure that individuals' and customers' privacy rights in their biometric identifiers and biometric information are properly honored and protected to begin with, before they are or can be compromised." *Id.* "When a private entity fails to adhere to the statutory procedures, as defendants are alleged to have done here, the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized." *Id.* ¶ 34 (internal citations omitted).

In reaching its conclusion, however, the Appellate Court did not look at the mandatory procedures in context of the whole Act. Instead, the court looked at subsection (a), (b), (c), (d), and (e) as separate, distinct causes of action. Then, in analyzing whether the privacy statute of limitations applies, it stated "that section 13-201 does not encompass all privacy actions but *only those where*

publication is an element or inherent part of the action." (Opinion, ¶ 29 (emphasis added))

It analyzed as follows:

> While all these duties concern privacy, at least three of them have absolutely no element of publication or dissemination. A private party would violate section 15(a) by failing to develop a written policy establishing a retention schedule and destruction guidelines, section 15(b) by collecting or obtaining biometric data without written notice and release, or section 15(e) by not taking reasonable care in storing, transmitting, and protecting biometric data. Id. § 15(a), (b), (e). A plaintiff could therefore bring an action under the Act alleging violations of section 15(a), (b), and/or (e) without having to allege or prove that the defendant private entity published or disclosed any biometric data to any person or entity beyond or outside itself. Stated another way, an action under section 15(a), (b), or (e) of the Act is not an action "for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018).
>
> Conversely, publication or disclosure of biometric data is clearly an element of an action under section 15(d) of the Act, which is violated by disclosing or otherwise disseminating such data absent specified prerequisites such as consent or a court order. 740 ILCS 14/15(d) (West 2018). Section 15(c) similarly forbids a private party to "sell, lease, trade, or otherwise profit from" biometric data (id. § 15(c)), which entails a publication, conveyance, or dissemination of such data. In other words, an action under section 15(c) or (d) is an action "for publication of matter violating the right of privacy."

(Opinion, ¶¶ 31, 32)

The Appellate Court's determination that publication must be an element relied on *Benitez v. KFC Nat'l Mgmt. Co.*, 305 Ill. App. 3d 1027, 1034 (2d Dist. 1998). *Benitez* considered whether claims for invasion of privacy based on the defendants secretly viewing plaintiffs in the bathroom were governed by Section 5/13-201. The Court determined the plaintiffs' claims were best

categorized as stating a claim for "intrusion upon the seclusion of another." *Id.* at 1033. The court noted the core of the tort of intrusion upon seclusion "is the offensive prying into the private domain of another." *Id.* Examples included "invading someone's home, illegally searching someone's shopping bag in a store, eavesdropping by wiretapping, peering into the windows of a private home, or making persistent and unwanted telephone calls." *Id.* In determining the proper statute of limitations to apply, the court found "the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication." *Id.* Because the tort of intrusion upon seclusion does not have anything to do with publication of private information, the court found section 13-201 did not apply.

Benitez acknowledged a conflict in its holding with *Juarez v. Ameritech Mobile Comm., Inc.*, 746 F. Supp. 798, 806 (N.D. Ill. 1990) (holding that alleged claims for invasion of privacy must be brought within one year), *aff'd*, 957 F.2d 317 (7th Cir. 1992); *see also Hrubec v. Nat'l R.R. Passenger Corp.*, 778 F. Supp. 1431, 1435 (N.D. Ill. 1991), *reversed on other grounds*, 981 F.2d 962 (7th Cir. 1992). *Juarez* and *Hrubec* both held that Section 13-201 should not be read so narrowly to exclude privacy claims for intrusion upon seclusion. *Id. Juarez* and *Hrubec* instead relied on the historical application of Section 13-201 to all privacy claims.

Regardless, the Appellate Court overread *Benitez* to hold publication must be an element of each subsection of the Act for section 13-201 to apply. *Benitez* never expressly limits the scope of section 13-201 to only privacy claims which require publication as an element. Instead, Benitez said, "[t]he fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13--201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication (see 735 ILCS 5/13--201 (West 1994)." *Benitez,* 305 Ill. App. 3d at 1034. The reference to "an element" was simply an acknowledgement that intrusion upon seclusion has nothing to do with the publication of private information. As *Benitez* then said, 13-201 governs "privacy torts *involving publication.*" *Id.* (emphasis added).

As a result, section 13-201 should govern the Act because the entire Act is designed as a privacy claim to prevent the unauthorized publication of biometric data. It is, therefore, a cause of action involving publication. The mere fact certain actionable duties may not have a specific publication element does not take away from the fact the purpose of the Act is to avoid the unauthorized publication of biometric data. For example, this Court in *Rosenbach* said "[t]he strategy adopted by the General Assembly through enactment of the Act is to try to head off such problems before they occur." *Rosenbach,* 2019 IL 123186, ¶ 36. Likewise, the Appellate Court has held the

entire purpose of the Act is "to prevent an unauthorized disclosure[.]" *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶70.

Furthermore, the plain language of the Act and its legislative history eliminate any doubt that the Act is a privacy claim involving publication. *Sekura* stated that "[w]hen interpreting a statute, we do not read a portion of it in isolation; instead we read it in its entirety, keeping in mind the subject it addresses and the drafters' apparent objective in enacting it." *Sekura*, 2018 IL App (1st) 180175 ¶42. The Appellate Court, however, analyzed each subsection of Section 15 in isolation. Such an interpretation conflicts with the drafters' objective. *Id.* at ¶42.

It is in this context that the Court should grant leave to appeal to analyze whether sections 15(a), (b), and (e) involve publication alone those section are part of the strategy of the Act to prevent an "unauthorized disclosure." *Sekura*, 2018 IL App (1st) 180175 ¶70. For example, section 15(a) states that an entity needs to enact a policy for retention or destruction of biometric data or the entity must destroy the data within 3 years of their last interaction. The purpose behind section 15(a) is to protect the biometric data from being disclosed to a third-party, because without a retention or destruction policy, the data could be disseminated. Similarly, section 15(b) discusses the need to obtain a written release. The written release allows a person to know where their biometric data will go, which allows a person to determine if they want their data to be disseminated. And section 15(e)

requires taking reasonable care in storing, transmitting, and protecting biometric data which too is aimed to prevent unauthorize dissemination of biometric data. Section 15(e) states in part that a private entity needs to "protect from disclosure all biometric identifiers and biometric information[.]" 740 ILCS 14/15. As a result, the plain language and purpose of the Act establish that, unlike intrusion upon seclusion, it is a cause of action premised on protecting against the unauthorized publication of private data.

Though the language of the Act is clear that its purpose is to prevent unauthorized publication of biometric data, its legislative history also provides further proof that the privacy statute of limitations should apply. The *Sekura* court reviewed the legislative history behind the Act and found Senator Ryg identified its primary impetus. *Sekura*, 2018 IL App (1st) 180175¶63. A company known as Pay By Touch had assets that contained biometric information, it went into bankruptcy and the court approved the sale of it, which sale included this information. *Id.* Thereafter, the Illinois legislature sought to address the valid concerns of what would happen to the biometric data of thousands of Illinois citizens. *Id.* The concern was that biometric data would be disclosed to the wrong person and end up in the wrong hands. Thus, the legislature sought "to protect against unauthorized disclosure." *Id.* at ¶70.

A statute that shares similar goals on related subjects as the Act is the Illinois Right of Publicity Act ("IRPA"), 765 ILCS 1075/1 *et seq*. Neither the Act nor IRPA have an expressed statute of limitations. Neither require publication

to the masses to state a claim. Both the Act and IRPA expand on the common law right for an invasion of privacy. They also both allow for actual damages or statutory damages. Both statutes also allow for the recovery of attorneys' fees and costs. And in *Blair v. Nevada Landing Partnership*, 369 Ill. App. 3d 318, 323 (2nd Dist. 2006), the court applied the one-year statute of limitations to an alleged violation of IPRA.

The application of the privacy statute of limitations to IPRA at the time the Act had been enacted provides further evidence that the privacy statute of limitations must apply here. A Court "must presume" that several statutes relating to the similar subjects are governed by one spirit and that the legislature intended the statutes to be interpreted harmoniously. *Uldrych v. VHS of Ill., Inc.*, 239 Ill.2d 532, 540 (2011); *Evanston v. Riseborough*, 2014 IL 114271, ¶ 24.

Blair established that the privacy statute of limitations applied to IRPA in December of 2006. *Blair*, 369 Ill. App. 3d at 323. IRPA supplanted the "common law right of publicity," but it did not supplant "any other rights provided by the law including but not limited to the common law right of privacy." 765 ILCS 1075/60. Thereafter, the legislature passed the Act in May of 2008 – 1 1/2 years after *Blair* was decided.

Over a decade later, Senator Ryg and several other sponsors of the Act

confirmed that the legislature passed the Act in the same spirit as IRPA.[1] Senator Ryg and several other sponsors submitted an amicus brief in *Rosenbach*. *Id.* The legislators' amicus brief compared the Act to IRPA. *Id.* They explained in their amicus brief how the Act and IRPA share similar goals on related subjects. As a result, the same one-year privacy statute of limitations that applies to IRPA must apply to Act.

Regardless the proper interpretation of the Act and the statute of limitations that applies, however, this Court should grant leave to appeal to decide the issue and provide uniformity to claims brought under the Act.

Conclusion

WHEREFORE, Defendant Black Horse Carriers, Inc. respectfully requests this Court allow its petition for leave to appeal.

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[1] Brief Amicus Curiae, available at http://illinoiscourts.gov/SupremeCourt/SpecialMatters/2018/123186_MOT3.pdf (last accessed October 20, 2021).

CERTIFICATION

I certify that this application conforms to the requirements of Rule 341(a) and (b) and Rule 367. The length of this petition, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service is 4,014 words.

/s/ Adam R. Vaught

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he is electronically filed via Odyssey eFileIL the Petitioner's Petition for Leave to Appeal with the Clerk of the Supreme Court of Illinois, on the 22nd day of October, 2021.

In addition, the undersigned certifies that the foregoing Petitioner's Petition for Leave to Appeal is being serving on counsel of record by sending a copy thereof via email on the 22nd day of October, 2021, before 5:00 p.m. to counsel of record listed below.

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Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

By: /s/ Adam R. Vaught

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APPENDIX

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2021 IL App (1st) 200563

FIRST DISTRICT
SIXTH DIVISION
September 17, 2021

No. 1-20-0563

JOROME TIMS and ISAAC WATSON, Individually and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 19 CH 3522
BLACK HORSE CARRIERS, INC.,	)	Honorable David B. Atkins,
Defendant-Appellant.	)	Judge presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justice Mikva and Justice Oden Johnson concurred in the judgment and opinion.

OPINION

¶ 1 This case concerns a class action brought by plaintiffs Jorome Tims and Isaac Watson against defendant Black Horse Carriers, Inc., under the Biometric Information Privacy Act (Act). 740 ILCS 14/1 *et seq* (West 2018). Defendant brings this interlocutory appeal from circuit court orders denying its motion to dismiss on limitation grounds, denying reconsideration of the same, and certifying a question to this court: whether the limitation period in section 13-201 or section 13-205 of the Code of Civil Procedure (Code) applies to claims under the Act. 735 ILCS 5/13-201, 13-205 (West 2018). On appeal, defendant contends that the one-year limitation period under section 13-201 governs claims under the Act, while plaintiffs contend that the five-year period in section 13-205 governs. As explained below, we answer the certified question as follows: section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act. 740 ILCS 14/15 (West 2018).

¶ 2 I. JURISDICTION

¶ 3 Plaintiffs filed and amended their complaint in 2019 and the trial court denied defendant's motion to dismiss in September 2019. The court denied reconsideration and certified the aforesaid question to this court on February 26, 2020. Defendant applied to this court for leave to appeal on March 27, 2020, which we granted on April 23, 2020. Thus, we have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019), governing interlocutory appeals upon certified questions of law.

¶ 4 II. BACKGROUND

¶ 5 Plaintiff Tims filed his class action complaint in March 2019, raising claims under section 15 of the Act. 740 ILCS 14/15 (West 2018). The complaint alleged that Tims worked for defendant from June 2017 until January 2018. It alleged that defendant scanned and was still scanning the fingerprints of all employees, including plaintiff, and was using and had used fingerprint scanning in its employee timekeeping. "Defendant continues to collect, store, use, and disseminate individual[s'] biometric data in violation of the" Act.

¶ 6 All counts alleged that defendant had violated and was violating the Act by not (a) properly informing plaintiff and other employees of the purpose and length of defendant's storage and use of their fingerprints; (b) receiving a written release from plaintiff and other employees to collect, store, and use their fingerprints; (c) providing a retention schedule and guidelines for destroying the fingerprints of plaintiff and other employees; or (d) obtaining consent from plaintiff and other employees to disclose or disseminate their fingerprints to third parties.

¶ 7 The first count alleged that defendant violated section 15(a) by failing to institute, maintain, and adhere to a retention schedule for biometric data. The second count alleged that it violated section 15(b) by failing to obtain informed written consent and release before obtaining biometric data. The third count alleged that it violated section 15(d) by disclosing or disseminating biometric

data without first obtaining consent. Each count sought a declaratory judgment, injunctive relief, statutory damages for each violation of the Act, and attorney fees and costs.

¶ 8 Defendant appeared and, in June 2019, filed a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)), alleging that the complaint was filed outside the limitation period. The motion noted that the Act itself has no limitation provision and argued that the one-year limitation period for privacy actions under Code section 13-201 applies to causes of action under the Act because the Act's purpose is privacy protection.

¶ 9 Plaintiff Tims responded to the motion to dismiss, arguing that the Act's purpose is to create a prophylactic regulatory system to prevent or deter security breaches regarding biometric data. Plaintiff argued that, in the absence of a limitation period in the Act, the 5-year period in section 13-205 for all civil actions not otherwise provided for should apply to the Act. Plaintiff argued that the one-year period in section 13-201 does not govern all privacy claims but only those privacy claims with a publication element, while the Act does not have a publication element. Plaintiff noted that defendant's motion did not claim destruction or deletion of plaintiff's biometric information so that the alleged violations of the Act regarding plaintiff were ongoing or continuing.

¶ 10 Defendant replied in support of its motion to dismiss, arguing that a privacy claim involving publication as provided in section 13-201 need not require publication as an element. Defendant argued that publication for purposes of section 13-201 consists of disclosure to any third party and that the Act involves publication because it prevents the disclosure or publication of biometric information. Defendant argued that adopting plaintiff's argument would entail applying section 13-201 to the provisions in the Act requiring publication and section 13-205 to the provisions that did not require publication. Lastly, defendant argued that there was no ongoing violation because the alleged violation occurred when plaintiff's fingerprints were initially scanned

for defendant's timekeeping system without his written release and the subsequent fingerprint scannings as he clocked into and out of work were merely continuing ill effects from that violation.

¶ 11 In September 2019, the trial court denied defendant's motion to dismiss. Noting that plaintiff Tims was claiming that defendant violated the Act, rather than claiming a general invasion of his privacy or defamation, the court found section 13-201 inapplicable and instead applied the catchall limitation provision in section 13-205 to the Act, which did not have its own limitation period. The complaint was therefore timely, as it was filed within five years of plaintiff's claim accruing, whether that was at the beginning or the end of his employment by defendant.

¶ 12 Later in September 2019, the complaint was amended to add Isaac Watson as a plaintiff, alleging that Watson was employed by defendant from December 2017 until December 2018.

¶ 13 In December 2019, defendant moved for reconsideration of the denial of its motion to dismiss, reiterating its argument that section 13-201 applies to the Act because both statutes concern the right to privacy. The motion also asked the court to certify to this court the question of which limitation period applies to the Act. Plaintiffs responded, arguing that reconsideration and certification were unnecessary, as the denial of the motion to dismiss was not erroneous.

¶ 14 On February 26, 2020, the trial court denied reconsideration but certified the question of whether the limitation period in section 13-201 or section 13-205 applies to claims under the Act.

¶ 15 III. ANALYSIS

¶ 16 The trial court has certified to this court the question of whether the one-year limitation period in section 13-201 or the five-year limitation period in section 13-205 governs claims under the Act. Defendant and *amicus* the Illinois Chamber of Commerce contend that the Act concerns privacy and section 13-201 governs privacy actions. Plaintiffs contend that section 13-201 governs privacy actions only where publication is an element and that publication is not an element of actions under the Act, so that the default limitation period of section 13-205 should apply.

¶ 17 An appeal pursuant to Rule 308 on certified questions presents a question of law subject to *de novo* review. *Sharpe v. Westmoreland*, 2020 IL 124863, ¶ 6.

¶ 18 A. Limitation Statutes

¶ 19 The applicability of a statute of limitation to a cause of action presents a legal question subject to *de novo* review, and the sole concern in determining which limitation period applies is ascertaining and effectuating the legislature's intent. *Uldrych v. VHS of Illinois, Inc.*, 239 Ill. 2d 532, 540 (2011). In ascertaining legislative intent, that intent is best determined from the plain and ordinary meaning of the statutory language. *Sharpe*, 2020 IL 124863, ¶ 10. If the language is plain and unambiguous, we shall not read into the statute exceptions, limitations, or conditions the legislature did not express. *Id.* ¶ 14. Similarly, when legislative intent can be ascertained from the statutory language, it must be effectuated without resorting to aids for construction such as legislative history. *Id.* ¶ 13.

¶ 20 Section 13-201 establishes a one-year limitation period for "[a]ctions for slander, libel or for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018). Under the common law, publication means communication to both a single party and the public at large. *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 42.

¶ 21 Courts have recognized two types of privacy interests in the right to privacy: secrecy ("the right to keep certain information confidential") and seclusion ("the right to be left alone and protecting a person from another's prying into their physical boundaries or affairs"). *Id.* ¶ 45. The "core of the tort of intrusion upon seclusion is the offensive prying into the private domain of another" rather than publication. *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027, 1033 (1999). Thus, section 13-201 does not apply to intrusion upon seclusion. *Id.* at 1034. Conversely, section 13-201 applies to public disclosure of private facts, appropriation of the name or likeness of another, and false-light publicity. *Id.*

"Publication is an element of each of the three former torts, whereas publication is not an element of unreasonable intrusion upon the seclusion of another. [Citation.] The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication [citations]." *Id.*

¶ 22 Section 13-205 provides for a five-year limitation period for, in relevant part, "all civil actions not otherwise provided for." 735 ILCS 5/13-205 (West 2018).

¶ 23 B. The Act

¶ 24 The Act includes findings that "[b]iometrics *** are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft" and that "public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(c), (g) (West 2018). As our supreme court has stated, the Act:

"imposes numerous restrictions on how private entities collect, retain, disclose, and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of hand or face geometry, or biometric information. Under the Act, any person 'aggrieved' by a violation of its provisions 'shall have a right of action *** against an offending party' and 'may recover for each violation' the greater of liquidated damages or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate." *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 1 (quoting 740 ILCS 14/20 (West 2016)).

¶ 25 The Act works "by imposing safeguards to insure that individuals' and customers' privacy rights in their biometric identifiers and biometric information are properly honored and protected" and by "subjecting private entities who fail to follow the statute's requirements to substantial

potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law [citation] whether or not actual damages, beyond violation of the law's provisions, can be shown." *Id.* ¶ 36 (quoting 740 ILCS 14/20 (West 2016)). When a private entity violates the Act, " 'the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.' " *Id.* ¶ 34 (quoting *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 954 (N.D. Cal. 2018)).

> "Through the Act, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information. [Citation.] The duties imposed on private entities by section 15 of the Act [citation] regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right. Accordingly, when a private entity fails to comply with one of section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach." *Id.* ¶ 33 (citing 740 ILCS 14/15 (West 2016)).

¶ 26 In particular, the Act imposes on private entities possessing biometric identifiers or information duties to (a) "develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first"; (b) inform a person in writing that biometric identifiers or information are being collected or stored, the purpose therefor, and the period it will be stored or used, and obtain written release; (c) not "sell, lease, trade, or otherwise profit from" a person's biometric identifier or information; (d) not "disclose, redisclose, or otherwise disseminate" a person's biometric identifier

or information without consent, request, or authorization of the subject, a legal requirement of disclosure, or a court order; and (e) "store, transmit, and protect from disclosure all biometric identifiers and *** information using the reasonable standard of care" and "in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information." 740 ILCS 14/15 (West 2018). The Act thus protects a privacy right of secrecy, "the right of an individual to keep his or her personal identifying information like fingerprints secret." *West Bend Mutual Insurance Co.*, 2021 IL 125978, ¶ 46.

¶ 27 To enforce these duties, "[a]ny person aggrieved by a violation of this Act shall have a right of action" and "may recover for each violation" (1) $1000 liquidated damages or actual damages, whichever is greater, for negligent violations; (2) $5000 liquidated damages or actual damages, whichever is greater, for intentional or reckless violations; (3) reasonable attorney fees and costs; and (4) other relief including injunctions. 740 ILCS 14/20 (West 2018). A person aggrieved by a violation of the Act need not allege or show "actual injury or adverse effect, beyond violation of his or her rights under the Act." *Rosenbach*, 2019 IL 123186, ¶ 40.

¶ 28 C. Analysis

¶ 29 Here, we find from the language of section 13-201 including actions "for publication of matter violating the right of privacy" (735 ILCS 5/13-201 (West 2018)) and from our decision in *Benitez* that section 13-201 does not encompass all privacy actions but only those where publication is an element or inherent part of the action. Had the legislature intended to include all privacy actions, it would have written something like "actions for slander, libel, or privacy" or "actions for slander, libel or violations of the right of privacy." Similarly, had the legislature intended to include any privacy action that merely concerns or pertains to publication, it would have used such broad language rather the narrower "for publication." Logically, an action *for* something has that thing as a necessary part or element of the action.

¶ 30 Turning to the Act, section 15 imposes various duties upon which an aggrieved person may bring an action under section 20. Though all relate to protecting biometric data, each duty is separate and distinct. A private entity could violate one of the duties while adhering to the others, and an aggrieved person would have a cause of action for violation of that duty. Moreover, as section 20 provides that a "prevailing party may recover for each violation" (740 ILCS 14/20 (West 2018)), a plaintiff who alleges and eventually proves violation of multiple duties could collect multiple recoveries of liquidated damages. *Id.* § 20(1), (2).

¶ 31 While all these duties concern privacy, at least three of them have absolutely no element of publication or dissemination. A private party would violate section 15(a) by failing to develop a written policy establishing a retention schedule and destruction guidelines, section 15(b) by collecting or obtaining biometric data without written notice and release, or section 15(e) by not taking reasonable care in storing, transmitting, and protecting biometric data. *Id.* § 15(a), (b), (e). A plaintiff could therefore bring an action under the Act alleging violations of section 15(a), (b), and/or (e) without having to allege or prove that the defendant private entity published or disclosed any biometric data to any person or entity beyond or outside itself. Stated another way, an action under section 15(a), (b), or (e) of the Act is not an action "for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018).

¶ 32 Conversely, publication or disclosure of biometric data is clearly an element of an action under section 15(d) of the Act, which is violated by disclosing or otherwise disseminating such data absent specified prerequisites such as consent or a court order. 740 ILCS 14/15(d) (West 2018). Section 15(c) similarly forbids a private party to "sell, lease, trade, or otherwise profit from" biometric data (*id.* § 15(c)), which entails a publication, conveyance, or dissemination of such data. In other words, an action under section 15(c) or (d) *is* an action "for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018).

¶ 33 We therefore find that section 13-201 governs actions under section 15(c) and (d) of the Act while section 13-205 governs actions under sections 15(a), (b), and (e) of the Act. As we are answering the certified question based on the relevant statutory language, which is not ambiguous, we need not resort to, and shall not address, aids of construction such as legislative history.

¶ 34 IV. CONCLUSION

¶ 35 Accordingly, we answer the certified question: Code section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act. 740 ILCS 14/15 (West 2018). We remand this cause to the circuit court for further proceedings consistent with this opinion.

¶ 36 Certified question answered; cause remanded.

No. 1-20-0563

Cite as:	*Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19-CH-3522; the Hon. David B. Atkins, Judge, presiding.
Attorneys for Appellant:	David M. Schultz, John P. Ryan, Adam R. Vaught, and Louis J. Manetti Jr., of Hinshaw & Culbertson LLP, of Chicago, for appellant.
Attorneys for Appellee:	Ryan F. Stephan, James B. Zouras, and Catherine T. Mitchell, of Stephan Zouras, LLP, of Chicago, for appellees.
***Amicus Curiae*:**	Melissa A. Siebert and Matthew C. Wolfe, of Shook, Hardy & Bacon LLP, of Chicago, for *amicus curiae* Illinois Chamber of Commerce.

EXHIBIT 7

No. 3-20-0184
IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

SCOTT MARION, individually and on behalf of all others similarly situated, Plaintiff/Appellee, v. RING CONTAINER TECHNOLOGIES, LLC, a Tennessee limited liability company, Defendant/Appellant.	Appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, IL, Civil Department, Law Division Circuit Case No. 2019 L 89 Honorable Adrienne W. Albrecht Date of Order Appealed: April 20, 2020

RING CONTAINER TECHNOLOGIES, LLC'S
MOTION TO LIFT STAY AND EXPEDITE DECISION

This fully-briefed appeal involves three certified questions relating to claims under the Illinois Biometric Information Privacy Act ("BIPA"). On March 19, 2021, the Court stayed this appeal pending the Illinois Supreme Court's decision in *McDonald v. Symphony Bronzeville Park, LLC*, Illinois Supreme Court Case No. 126511. On February 3, 2022, the Supreme Court issued its decision in *McDonald*.

Accordingly, Defendant-Appellant Ring Container Technologies, LLC ("Ring Container") respectfully requests that the Court lift the stay of this appeal and expedite a decision on all three certified questions, two of which are not controlled by the Supreme Court's decision in *McDonald*. For the reasons given below, if the stay is not lifted and a decision issued soon, Ring Container will be prejudiced and the law governing the statute of limitations for BIPA claims could be thrown into disarray.

In support, Ring Container states as follows:

1. On April 20, 2020, the circuit court certified the following questions for interlocutory appeal pursuant to Rule 308:

> (1) Whether the one-year statute of limitations for privacy actions, 735 ILCS 5/13-201, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 et seq.
>
> (2) Whether the two-year statute of limitations for personal injuries, 735 ILCS 5/13-202, applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1 et seq.
>
> (3) Whether the exclusivity provisions in the Workers' Compensation Act, which state, among other things, that an employee has "[n]o common law or statutory right to recover damages from the employer * * * for [an] injury [ ] sustained by any employee while engaged in the line of his duty," 820 ILCS 305/5; 820 ILCS 305/11, bar a claim for statutory damages under BIPA that is based upon an injury that arises in, and during the course of, employment.

2. On July 21, 2020, this Court accepted the appeal. As of January 27, 2021, the appeal was fully briefed. On February 10, 2021, the parties filed a joint motion for oral argument, which the Court allowed, but on February 19, 2021, Plaintiff-Appellee Scott Marion ("Marion") moved to continue the oral argument date pending the Illinois Supreme Court's decision in *McDonald*. On March 19, 2021, the Court allowed Marion's motion and stayed this matter pending the decision in *McDonald*.

3. The *McDonald* appeal concerned whether the BIPA claims of the plaintiff in that case are preempted by the Illinois Workers' Compensation Act. The Supreme Court ruled that the "personal and societal injuries caused by violating [BIPA's] prophylactic requirements are different in nature and scope from the physical and psychological work injuries that are compensable under the [Workers'] Compensation Act. . . . As such . . . McDonald's loss of the ability to maintain her privacy rights was not a psychological or physical injury that is

compensable under the [Workers'] Compensation Act." *McDonald*, 2022 IL 126511, ¶¶ 43-44. A copy of the Supreme Court's opinion in *McDonald* is attached as Exhibit 1 to this motion.

4. Ring Container acknowledges that the *McDonald* opinion is binding on this Court and that, as a result, certified question 3 should be answered in the negative.

5. The first and second certified questions, however, concern the correct statute of limitations to be applied to BIPA claims, a different issue from that decided in *McDonald*, and one that has not yet been decided by the Illinois Supreme Court. On January 26, 2022, the Court allowed an appeal in a case that presents similar, but not identical issues, *Tims v. Black Horse Carriers, Inc.*, Illinois Supreme Court Case No. 127801. Opening briefs are due in that case on March 2, 2022.

6. In *Tims*, the Illinois Appellate Court for the First District held that claims brought pursuant to BIPA Sections 15(c) and (d) include an express element of publication and therefore are governed by 735 ILCS 5/13-201's one-year statute of limitations for "publication of matter violating the right of privacy." Ex. 2 ¶ 32. Conversely, the First District held that claims brought pursuant to BIPA Sections 15(a), 15(b), and 15(e) do not include an element of publication and are not governed by Section 13-201's one-year limitations period, but rather are governed by the five-year limitations period of Section 735 ILCS 5/13-205. *Id*. ¶¶ 31-34. The First District's opinion in *Tims* is attached as Exhibit 2 and the Petition for Leave to Appeal that was granted in *Tims* is attached as Exhibit 3.

7. Importantly, although the *Tims* appeal will address the statute of limitations for BIPA claims, it will not address whether a two-year statute of limitations applies to BIPA claims – the second certified question presented in this case. This apparently is because the claims

against the defendant in *Tims* would not be barred by a two-year statute of limitations, so no party has addressed that argument in *Tims*.

8. However, the two-year statute of limitations is a viable potential limitations period that could apply to BIPA claims, as shown by the fact that a Rule 308 appeal on all three certified questions was allowed, over Plaintiff-Appellee's objection, in this case. *See* Ill. S. Ct. Rule 308 (appeals only allowed if both the trial court and the appellate court find that a "substantial ground for a difference of opinion" exists).

9. If this case remains stayed while *Tims* is decided, no appellate court will have the opportunity to consider the two-year statute of limitations argument before the Illinois Supreme Court issues its ruling in *Tims*. Simply put, the full panoply of possible statutes of limitations for BIPA claims will not have been put before the appellate courts. This will both: (1) limit the appellate courts' ability to weigh in on this important issue that will impact literally hundreds of BIPA cases pending all over Illinois; and (2) prejudice Ring Container, which, in the two-year statute of limitations, has a possibly case-dispositive defense. (Accordingly, given the time constraints caused by the Supreme Court granting the petition for leave to appeal in *Tims*, today Ring Container has also filed in the Supreme Court a Motion for Direct Appeal Under Illinois Supreme Court Rule 302(b) and/or Supervisory Order Under Illinois Supreme Court Rule 383, which is attached hereto, without its exhibits, as Exhibit 4.)

10. Based on all of the above, Ring Container respectfully requests that the Court lift the stay of this appeal and allow the parties to file simultaneous supplemental briefs on the effect of *Tims* and any other intervening case law within 14 days from the date the stay is lifted, and schedule oral argument for as soon as practicable after the filing of the supplemental briefs. If

the Illinois Supreme Court grants Ring Container's Motion for Direct Appeal, Ring Container of course will immediately inform this Court.

11. Counsel for the parties conferred about this Motion, but were unable to reach agreement before filing.

WHEREFORE, Ring Container respectfully requests the Court: (1) lift the stay of this appeal; (2) allow the parties to file simultaneous supplemental briefs on the effect of *Tims* and any other intervening case law within 14 days from the date the stay is lifted; (3) schedule oral argument as soon as practicable thereafter; and (4) issue a ruling as soon as practicable.

Dated: February 11, 2022

Respectfully submitted,

RING CONTAINER TECHNOLOGIES, LLC

By: */s/ Matthew C. Wolfe*
One of Its Attorneys

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No. 3-20-0184
IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

SCOTT MARION, individually and on behalf of all others similarly situated, Plaintiff/Appellee, v. RING CONTAINER TECHNOLOGIES, LLC, a Tennessee limited liability company, Defendant/Appellant.	)	Appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, IL, Civil Department, Law Division Circuit Case No. 2019 L 89 Honorable Adrienne W. Albrecht Date of Order Appealed: April 20, 2020

ORDER

This matter coming to be heard on Defendant-Appellant Ring Container Technologies, LLC's Motion to Lift Stay and Expedite Decision, the Court being advised in the premises, **IT IS HEREBY ORDERED THAT:**

1. Ring Container's Motion to Lift Stay and Expedite Decision is GRANTED / DENIED.

2. Ring Container's request that the parties be allowed to file simultaneous supplemental briefs on the effect of *Tims* and any other intervening case law within 14 days of the date of this order is GRANTED / DENIED.

3. Ring Container's request to schedule oral argument as soon as practicable after filing of supplemental briefs is GRANTED / DENIED. Oral argument is set for _____.

Dated: _____

_____
JUSTICE

_____
JUSTICE

_____
JUSTICE

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on **February 11, 2022**, I caused a true and correct copy of **RING CONTAINER TECHNOLOGIES, LLC'S MOTION TO LIFT STAY AND EXPEDITE DECISION** to be electronically filed with the Clerk's Office of the Illinois Appellate Court, Third Judicial District, using e-filing provider **Odyssey eFileIL,** which sends notification and a copy of this filing by electronic mail to all counsel of record.

I further certify that I caused a courtesy copy of this filing to be served by electronic mail upon the following:

David Fish
Kimberly Hilton
Mara Baltabols
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Attorneys for Plaintiff-Appellee

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the above statements set forth in this instrument are true and correct.

/s/ Matthew C. Wolfe

No.

IN THE SUPREME COURT OF ILLINOIS

SCOTT MARION, individually and on behalf of all others similarly situated, *Plaintiff-Respondent,* v. RING CONTAINER TECHNOLOGIES, LLC, *Defendant-Petitioner.*	)	Motion for Direct Appeal Under Illinois Supreme Court Rule 302(b) and/or Supervisory Order Under Illinois Supreme Court Rule 383 On appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee, IL, Civil Department, Law Division, No. 2019 L 89, to the Appellate Court of Illinois, Third Judicial District, No. 3-20-0184 The Honorable Judge Adrienne W. Albrecht, Judge Presiding

ORDER REGARDING PETITIONER RING CONTAINER TECHNOLOGIES, LLC'S MOTION FOR DIRECT APPEAL UNDER ILLINOIS SUPREME COURT RULE 302(b) AND/OR SUPERVISORY ORDER UNDER ILLINOIS SUPREME COURT RULE 383

This cause coming on to be heard on Petitioner Ring Container Technologies, LLC's Motion for Direct Appeal Under Illinois Supreme Court Rule 302(b) and/or Supervisory Order Under Illinois Supreme Court Rule 383, and the Court being advised in the premises;

IT IS THEREFORE ORDERED that Defendant-Petitioner Ring Container Technologies, LLC's Motion for Direct Appeal Under Illinois Supreme Court Rule 302(b) is **GRANTED / DENIED**; and

Defendant-Petitioner Ring Container Technologies, LLC's Motion for Supervisory Order under Illinois Supreme Court Rule 383 is **GRANTED / DENIED**.

DATED: _____ ENTERED: _____

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on February 11, 2022, I caused a true and complete copy of the foregoing **PETITIONER RING CONTAINER TECHNOLOGIES, LLC'S MOTION FOR DIRECT APPEAL UNDER ILLINOIS SUPREME COURT RULE 302(b) AND/OR SUPERVISORY ORDER UNDER ILLINOIS SUPREME COURT RULE 383** to be filed electronically with the Clerk's Office of the Supreme Court of Illinois, using e-filing provider Odyssey eFileIL, which sends notification and a copy of this filing by electronic mail to all counsel of record. I further certify that I caused an additional courtesy copy of this filing to be served by electronic mail upon the following:

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Attorneys for Plaintiff-Respondent

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certified that the statements set forth in this motion, notice of filing, and certificate of service are true and correct.

/s/ Matthew C. Wolfe