

No. 4-22-0622

**IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT**

PEOPLE OF THE STATE OF)	Appeal from the Circuit Court of the
ILLINOIS ex rel., EMILY FOX)	Seventh Judicial Circuit, Sangamon
)	County, Illinois
Relator/Appellant)	
State of Illinois/Appellee)	
)	Circuit Court No. 21 L 000053
v.)	
)	Hon. Adam Giganti, Judge Presiding
JENNY THORNLEY)	
)	
Defendant)	

**Relator-Appellant’s Opposition to the State of Illinois’
Motion to Submit Supplemental Authority**

Relator-Appellant, Emily Fox, by and through her undersigned counsel, hereby files this Opposition to the State of Illinois’ Motion to Submit Supplemental Authority, filed this same day. Fox does not object to the Court’s review of the U.S. Supreme Court decision in *U.S. ex rel. Polansky v. Executive Health Services, Inc.* (No. 21-1052) (“*Polansky*”), which was the subject of the State’s motion. However, Fox objects to the State’s characterization of the decision’s holding, which is both inappropriate in a notice of supplemental authority and which makes material and misleading omissions. Fox asked the State to submit *Polansky* without characterizing the decision but the State refused to do so.

Critically, the State omits from its characterization of *Polansky* that the Supreme Court held the government may not, as a matter of law, move to dismiss a False Claims Act case if it has not first intervened in the case. *See Polansky Op.* at 8. In this case, the State never sought to intervene prior to filing its motion to dismiss so this holding of *Polansky* is material in this case.

There are other manners in which the State’s characterization of *Polansky* omits material statements and holdings of the Court. For example, the State omits that *Polansky* held that in any hearing on a government motion to dismiss a False Claims Act case, “[p]art of the district court’s task is to consider [the relator’s] interests.” *Polansky* Op. at 15. The State further omits the Supreme Court’s statement that at any such hearing the government is expected to “offer[] a reasonable argument for why the burdens of continued litigation outweighs its benefits.” *Id.* at 16. Finally, the State omits the Supreme Court’s explicit statement in *Polansky* that a hearing on a government motion to dismiss a False Claims Act case “might inquire into allegations that a dismissal violate[s] the relator’s right to due process or equal protection.” Op. at 15 n. 4. The relator in *Polansky* had not raised due process objections but Fox has in this case.

Fox is prepared to offer supplemental briefing on the impact of *Polansky* in this case. Absent such briefing, however, she objects to the State’s decision to ignore her request that the Court be notified of *Polansky* without incomplete and misleading editorial comment. Fox appends as Exhibit 1 to this opposition the parties’ correspondence in this regard.

Dated: June 16, 2023

Respectfully submitted,
Emily Fox, Relator-Appellant

By: /s/ Robert M. Andalman
One of her counsel

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Diana Guler (ARDC No. [REDACTED])
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CERTIFICATE OF FILING AND SERVICE

I, Robert Andalman, an attorney, certify that on June 16, 2023, I electronically filed the foregoing *Relator-Appellant's Opposition to the State of Illinois' Motion to Submit Supplemental Authority* with the Clerk of the Court for the Illinois Appellate Court, Fourth Judicial District, by using the Odyssey eFileIL system.

I further certify that on June 16, 2023 the foregoing *Relator-Appellant's Opposition to the State of Illinois' Motion to Submit Supplemental Authority* was served by email and via the Odyssey eFileIL system on the below named participants:

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/s/ Robert M. Andalman

Exhibit 1

From: [Robert Andalman](#)
To: [Huszagh, Richard S.](#); [Nicki Cesario](#); [Diana Guler](#)
Subject: RE: [EXTERNAL] State ex rel Fox v. Thornley (Appeal No. 4-22-0622)
Date: Friday, June 16, 2023 12:58:00 PM
Attachments: [image001.png](#)

Richard,

First, it is always improper to characterize a decision in a notice of supplemental authority.

Second, while I have just read the decision published today, your characterization omits:

- a. That the Court held 2A does not apply after the seal period unless the government intervenes in the action. Op. at 8. In Polansky, the Third Circuit had found the government had intervened and, as the Supreme Court noted, that was not later contested by the Relator there. Op. at 7 n. 2. We do contest that the government ever intervened in our case.
- b. The rest of the court's analysis only applies if the government moves to dismiss "having properly intervened." Op. at 13.
- c. In that case, the Court's holding is that a hearing must be held at which "[p]art of the district court's task is to consider [the relator's] interests." Op. at 15.
- d. The Court states that, at the hearing, the Government must "offer[] a reasonable argument for why the burdens of continued litigation outweigh its benefits." Op. at 16. In Polansky, the government provided an enumeration (not just a conclusion) about the burden on it of the lawsuit. *Id.*
- e. Finally, the Court specifically notes that any hearing on a 2A motion "might inquire into allegations that a dismissal 'violate[s] the relator's right to due process or equal protection.'" Polansky had not raised a Due Process argument, however, as Fox has done. Accordingly, the Court did not decide how or when a lower court should decide that question and it is wrong to suggest otherwise. Op. at 15.

Again, these are just based on my preliminary read. We can argue next month about the application of Polansky. Or you can seek leave for supplemental briefing. But it is not proper to include a half baked characterization that omits that the holding only applies after a proper intervention or that the Supreme Court held generally that the motions should generally be granted without regard to the relator's interests or Due Process.

Rob

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From: Huszagh, Richard S. <Richard.Huszagh@ilag.gov>
Sent: Friday, June 16, 2023 12:33 PM
To: Robert Andalman <randalman@aandglaw.com>; Nicki Cesario <ncesario@aandglaw.com>; Diana Guler <dguler@aandglaw.com>
Subject: RE: [EXTERNAL] State ex rel Fox v. Thornley (Appeal No. 4-22-0622)

Rob,

What part of the motion's description of *Polansky* do you disagree with?

Rich

From: Robert Andalman <randalman@aandglaw.com>
Sent: Friday, June 16, 2023 12:24 PM
To: Huszagh, Richard S. <Richard.Huszagh@ilag.gov>; Nicki Cesario <ncesario@aandglaw.com>; Diana Guler <dguler@aandglaw.com>
Subject: RE: [EXTERNAL] State ex rel Fox v. Thornley (Appeal No. 4-22-0622)

Richard,

We do not object to the Court being provided a copy of the opinion but do object to your characterization of the opinion, with which we disagree.

A notice of supplemental authority properly should simply alert the Court to a decision that the party contends bears on the case.

We ask that you remove the second paragraph of your submission to avoid motion practice on this issue.

Rob

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From: Huszagh, Richard S. <Richard.Huszagh@ilag.gov>

Sent: Friday, June 16, 2023 12:11 PM

To: Robert Andalman <randalman@aandglaw.com>; Nicki Cesario <ncesario@aandglaw.com>;
Diana Guler <dguler@aandglaw.com>

Subject: [EXTERNAL] State ex rel Fox v. Thornley (Appeal No. 4-22-0622)

CAUTION:** Message received from External Source. Exercise caution when opening attachments, clicking links, or exchanging information.***

Counsel,

I am attaching a motion to cite supplemental authority that I am submitting today for filing with the appellate court.

Rich

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