No. 121800

IN THE
SUPREME COURT OF ILLINOIS

ISAAC COHEN,

Plaintiff-Appellee,

vs.

CHICAGO PARK DISTRICT,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois,
First Judicial District, Fourth Division, Case No. 1-15-2889.

There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, Case No. 2014 L 005476,
the Honorable William E. Gomolinski, Judge Presiding.

BRIEF OF DEFENDANT-APPELLANT CHICAGO PARK DISTRICT

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ORAL ARGUMENT REQUESTED

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BRIEF OF DEFENDANT-APPELLANT CHICAGO PARK DISTRICT

INTRODUCTION

This lawsuit involves a personal injury claim for damages sustained as a result of a bicycle accident on the Multi-Use Lakefront Trail "the Lakefront Trail". The Circuit Court of Cook County ("Circuit Court") granted the Motion for Summary Judgment filed by Defendant Chicago Park District ("the Park District"), finding that the Park District was immune under the Local Governmental and Governmental Employees Tort Immunities Act ("the Tort Immunity Act" or "the Act"). Plaintiff Isaac Cohen ("Plaintiff") appealed the decision to the Illinois Appellate Court, First District ("Appellate Court"). The Appellate Court reversed the judgment of the Circuit Court. The Chicago Park District petitioned this Court for leave to appeal, and the Petition was allowed. No questions are raised on the pleadings.

STATEMENT OF ISSUES

Whether the Circuit Court properly granted the Park District's Motion for Summary Judgment, finding that the Lakefront Trail is a "road" afforded absolute immunity under Section 3-107(a) of the Tort Immunity Act.

Whether the Circuit Court's decision should be affirmed where the Lakefront Trail is a "trail" afforded absolute immunity under Section 3-107(b) of the Tort Immunity Act.

Whether the Circuit Court properly granted the Park District's Motion for Summary Judgment, finding that the facts fail to rise to the level of willful and wanton conduct as is required by Section 3-106 of the Tort Immunity Act.

Whether the Circuit Court's decision should be affirmed where the Park District is afforded absolute immunity under Sections 2-109 and 2-201 of the Tort Immunity Act for discretionary decisions such as the repair of the Lakefront Trail.

STATEMENT OF JURISDICTION

Plaintiff filed his Complaint at Law against Defendants City of Chicago[1] and the Park District on May 21, 2014. A-01[2]. The Circuit Court granted the Park District's Motion for Summary Judgment on July 28, 2015. A-09. Plaintiff appealed the decision to the Appellate Court, and, on October 27, 2016, the Appellate Court issued its opinion reversing the decision of the Circuit Court. A-16. The Park District filed a Petition for Rehearing on

[1] The Circuit Court granted Defendant City of Chicago's Motion to Dismiss on November 24, 2014. C-262. The City is not a party to this Appeal.

[2] The appendix to this Brief is cited to as "A" (A-1 through A-52). The Record on Appeal consists of three volumes of the Common Law Record (cited to as "C"), one volume of the Report of Proceedings (cited to as "R"), and two supplemental volumes of the Common Law Record (cited to as "Supp. C"). The Table of Contents to the Record on Appeal is found at A-42 through A-52.

November 17, 2016, which the Appellate Court denied on December 7, 2016. A-39. The Park District mailed its Petition for Leave to Appeal on January 11, 2017, within 35 days of the order denying the Park District's Petition for Rehearing. The Park District then filed a Motion to File its Petition for Leave to Appeal *Instanter*, which the Supreme Court allowed and filed the Park District's Petition for Leave to Appeal on January 31, 2017. A-40. Plaintiff filed a Motion to Dismiss for Want of Jurisdiction on April 19, 2017, which this Court denied on May 8, 2017. A-41.

STATUTES INVOLVED

The Tort Immunity Act provides in pertinent part:

> Sec. 3-107. Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street (2) county, state or federal highway or (3) a township or other road district highway. (b) Any hiking, riding, fishing or hunting trail.

745 ILCS 10/3-107.

> Sec. 3-106. Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury.

745 ILCS 10/3-106.

> Sec. 1-210. "Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. This definition shall apply in any case where a "willful and wanton" exception is incorporated into any immunity under this Act.

745 ILCS 10/1-210.

> Sec. 2-109. A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

745 ILCS 10/2-109.

> Sec. 2-201. Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS 10/2-201.

STATEMENT OF FACTS

I. THE LAKEFRONT TRAIL

The Park District's Director of Planning & Construction, Robert Rejman; Deputy Director of Capital Construction, Linda Daly; Director of Facility Management, Robert Arlow; and Senior Project Manager, Bill Gernady, provided detailed descriptions of the Lakefront Trail and the Park District's annual inspection and repair procedures for the Lakefront Trail. The Lakefront Trail spans approximately twenty-six miles, running from Hollywood Avenue at the north to 71st Street at the south. C-408 (p. 22), 428 (p. 33), 466 (p. 19).

The Lakefront Trail is approximately twenty-one feet at its widest and twelve feet at its narrowest, and was designed to accommodate the Park District's maintenance vehicles, including SUV's, cars, golf carts, garbage trucks, and riding lawnmowers. C-408 (pp. 23-24), 429 (pp. 34-35). The Lakefront Trail is comprised of concrete, asphalt, and compacted gravel screens. C-430 (p. 41). The asphalt applied on the Lakefront Trail has a

thicker overlay, intended to enable use of the Lakefront Trail by heavy vehicles and garbage trucks. C-468 (p. 27). Approximately 30,000 patrons use the Lakefront Trail on a typical summer day. C-429 (p. 35). Most of the areas surrounding the Lakefront Trail are undeveloped, open parkland. C-429 (p. 36). Patrons often fish along the shoreline that is adjacent to and accessible from the Lakefront Trail. C-431 (p. 42).

II. THE PARK DISTRICT'S ANNUAL INSPECTION AND REPAIR OF THE LAKEFRONT TRAIL

Every spring, when the weather permits, the Park District's Senior Project Manager, Bill Gernady ("Gernady"), inspects the Lakefront Trail ("the inspection"), in order to generate a scope of work, by driving the length of the Trail with a Park District vehicle. C-410 (pp. 32-33), 425 (p. 18). Gernady's position[3] requires extensive construction experience and expertise. C-412 (pp. 39-40), 440 (p. 78), 463 (p. 9). Gernady has worked in the construction field for over thirty years and has been involved in the Lakefront Trail inspection/repair process for the fourteen years he has been employed by the Park District. C-464 (p. 10), 466 (pp. 19-20). The Park District depends on Gernady's expertise to determine which conditions of the Lakefront Trail need to be addressed, as there are no procedures or guidelines relating to the inspection. C-412 (pp. 39-40), 417 (pp. 59-60). The inspection is conducted in spring because the Lakefront Trail is subjected to significant damage in the winter by waves, severe storms, and ice run-up. C-425 (p. 18), 428 (p. 31).

As part of the inspection, Gernady will look for and identify any defects, such as

[3] Gernady was the assistant Job Order Contractor at the time of the subject incident, but he alone conducted the Lakefront Trail inspection in 2013 and had the same responsibilities then as he does now under the title of Senior Project Manager. C. 465 (p. 17), 467 (p. 25).

cracks in the pavement, missing pavement, painted lane markings that are worn and difficult to read, and damaged signage. C-411 (p. 35). The initial inspection typically takes a couple of weeks to complete. C-412 (p. 41). After finalizing a scope of work, Gernady drafts a request for proposal ("RFP") to be issued to a group of rapid-response general contractors for bid through the Park District's rapid-response program. C-411 (p. 36), 470 (pp. 35, 37). The rapid-response program consists of a group of pre-qualified outside contractors. C-415 (p. 50).

The RFP takes two to three weeks to prepare and includes a written description of the work that needs to be completed—including photos, locations, and required materials. C-412 (p. 41), 469-70 (pp. 33-34). The Senior Project Manager has wide latitude in determining the necessary repairs, and the Park District does not have a set policy regarding the manner in which inspections must be completed. C-468 (pp. 28-29)

When determining which bid to accept for the completion of the repairs, Gernady considers the current workload of the contractors. C-470 (pp. 35-36). Upon selecting a contractor, Gernady will issue a notice to proceed. C-470 (p. 37). The notice to proceed does not typically include a deadline for the project [4] —because weather conditions on the Lakefront Trail are not always conducive to work deadlines—but it is assumed that the work will be carried out as soon as possible. C-416 (p. 56), 475 (p. 55). Gernady decides the project timeline, taking into account the availability of asphalt or other materials,

[4] While the Park District's director of Planning & Construction, Robert Rejman, testified that contractors are usually given an anticipated schedule regarding when Lakefront Trail repairs should be conducted, Rejman goes on to state that the Senior Project Manager, Gernady, makes project timeline decisions and Gernady has testified that he never issued a notice to proceed, for the Lakefront Trail, that included a deadline. C. 439 (p. 76), C. 475 (p. 55).

equipment, and labor. C-439 (p. 76).

Part of the Senior Project Manager's analysis during the annual Lakefront Trail inspection includes determining which, if any, conditions require immediate repair. C-418 (p. 63). In the case of an emergency—such as an instance where the Lakefront Trail experienced severe storm damage—Gernady may elect to contact a contractor directly, in order to have them address the condition, rather than including the condition in the RFP to be sent to the rapid-response contractors. C-483 (p. 86). In a situation where an area of the Lakefront Trail is rendered impassible due to significant damage, that area may be blocked off using barriers and signs. C-433 (pp. 52-53). The Park District does not use cones to mark cracks and holes in the Lakefront Trail as "they [would not] stay there very long." C-433 (pp. 52-53). The budget allocation for the annual Lakefront Trail repairs is pre-approved each year. C-411 (pp. 36-37). Gernady conducts a follow-up inspection, after the contractors complete their repairs, to ensure that the work was completed satisfactorily. C-466 (p. 20).

Apart from the annual Lakefront Trail inspection, the Park District also administers spot inspections that are prompted by Park District patrons or staff who notice a condition on the Lakefront Trail and report it to the Park District (also referred to as a "spot inspection request"). C-433 (p. 50), 450 (p. 23). The spot inspection/repair process typically takes thirty to ninety days, depending upon the level of urgency. C-450 (p. 24). Patrons can report Lakefront Trail conditions by calling the Park District's designated telephone number. C-433 (p. 50).

Robert Arlow ("Arlow") is the Park District's Director of Facility Management. C-446 (p. 7). He manages the Park District's approximately 260 in-house trades employees,

who are tasked with maintaining and repairing the Park District's approximately 300 buildings and 600 parks. C-447 (p. 10). Arlow receives and responds to spot inspection requests pertaining to conditions throughout the Park District's properties. C-450 (p. 22). When Arlow receives a spot inspection request, he or a member of his staff will inspect the area in-person. C-450 (pp. 24, 26). Arlow has discretion to determine whether or not a condition needs to be addressed, and he is not bound by any Park District guideline when making this determination. C-450 (p. 24), 451 (p. 27). After conducting the spot inspection, Arlow weighs the circumstances and determines if the condition could be more efficiently addressed by the Park District's in-house trades employees, as opposed to requiring the use of outside contractors. C-447 (p. 12). The Facility Management Department does not have an asphalt crew and repairs to concrete and asphalt—including this type of repair for the Lakefront Trail—are almost exclusively conducted by outside contractors. C-423 (p. 13), 447 (p. 13), 451 (p. 29).

III. REPAIR OF THE SUBJECT CONDITION

In spring 2013—around June—Arlow received a call from a park patron regarding a gap in the concrete on the Lakefront Trail near the north side of the Shedd Aquarium—i.e. the subject condition. C-453 (pp. 36-37), 454 (p. 38), 477 (p. 65). In response, Arlow contacted Gernady and, a few days after receiving the initial call, they inspected the condition. C-454 (p. 39). Arlow and Gernady determined[5] that the subject condition should be included in the RFP for Lakefront Trail repairs, which Gernady had generated that

[5] While Arlow does not decide how conditions of the Lakefront Trail will be repaired, he does manage the Park District's in-house trades employees and has the authority to assign a project to an in-house tradesperson if this would be more efficient. C. 447 (pp. 12-13), C. 458 (p. 57).

spring to be sent to the rapid-response contractors. C-136, 436 (p. 64). The aforementioned RFP was issued on June 10, 2013. C-137-38. Meccor Industries ("Meccor") submitted its bid for the project on June 12, 2013. C-139. The Park District issued a notice to proceed to Meccor on June 19, 2013. C-141. Beverly Asphalt Paving Company, a sub-contractor of Meccor, used asphalt to repair the subject condition on July 10, 2013. C-439 (p. 74), 480 (p. 77), 481 (p. 79). In July or August 2013, Arlow returned to the Lakefront Trail, after the rapid-response contractor, Meccor, had completed the project, to ensure that the subject condition had been addressed—which it had. C-439 (p. 74), 456 (p. 47).

IV. INCIDENT

In the eight years prior to the subject incident, Plaintiff would ride his bike on the Lakefront Trail nearly every Sunday morning, starting at Fullerton Avenue and heading south on the Lakefront Trail to Northerly Island and then returning north along the same route. C-518 (p. 12), 519 (p. 13).

On or about July 7, 2013, seventy-six-year-old Plaintiff was riding his bicycle southbound on the Lakefront Trail, near the Shedd Aquarium, when he veered into the middle of the northbound and southbound lanes to avoid a pedestrian. C-517 (p. 6), 519 (p. 16). As he was in the process of passing the pedestrian, and while moving at a rate of approximately two to three miles per hour, Plaintiff's bicycle tire allegedly became wedged in a gap between two slabs of concrete, causing him to fall. C-520 (p. 18), 521 (p. 21).

The subject condition consisted of a gap where two concrete slabs joined in the middle of the lanes of the Lakefront Trail. C-521 (pp. 21, 23). The gap was approximately three to four inches at its widest (tapering to the south and north), two to three inches deep, and three to four feet long. C-521 (pp. 21-22). The day of the incident was the first time

Plaintiff observed the subject condition, despite riding his bike on the Lakefront Trail almost every Sunday for the preceding eight years. C-518 (p. 12), 521 (p. 23). Plaintiff described the condition of the Lakefront Trail on the date of the incident as "pretty good"—apart from the subject condition. C-522 (p. 28). Approximately ten to fifteen minutes after Plaintiff's fall, and after having walked his bicycle for a short period of time, Plaintiff remounted his bicycle and biked home. C-523 (p. 30).

Approximately one week after the subject incident, and as Plaintiff was again bicycling on the Lakefront Trail in the area of the subject incident, he noticed that the subject condition had been repaired. C-518 (p. 12), 525 (p. 39).

ARGUMENT

Summary Judgment should be affirmed "on any basis present in the record". *See Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) (the reviewing court can affirm on any basis found in the record); *Kirnbauer v. Cook County Forest Pres. Dist.*, 215 Ill. App. 3d 1013, 1016 (1st Dist. 1991). Further, this Court is not limited to those issues raised in the Park District's Petition for Leave to Appeal, as the doctrine of waiver does not constrain the Court to consider additional bases upon which it can affirm the Circuit Court's decision in order "to provide a just result and to maintain a sound and uniform body of precedent." *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 125 (2004), *quoting Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 504-05 (2002).

The Court's review of the Circuit Court's decision granting summary judgment is de novo. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992). In addition, issues of statutory interpretation involve questions of law, which are also reviewed de novo. *Brunton v. Kruger*, 2015 IL 117663, ¶ 24.

Here, the record supports a finding affirming the Park District's Motion for Summary Judgment, as (1) the Lakefront Trail is an "access road" afforded absolute immunity by Section 3-107(a) of the Tort Immunity Act, (2) the Lakefront Trail is a "trail" afforded absolute immunity by Section 3-107(b) of the Tort Immunity Act, (3) the undisputed facts fail to rise to the level of willful and wanton conduct, as is required by Section 3-106 of the Tort Immunity Act, and (4) the Park District is afforded absolute immunity under Sections 2-109 and 2-201 of the Tort Immunity Act for discretionary decisions such as the nature of repairs to the Lakefront Trail. 745 ILCS 10/2-109 and 10/2-201.

I. SECTION 3-107 OF THE TORT IMMUNITY ACT PROVIDES ABSOLUTE IMMUNITY AS THE LAKEFRONT TRAIL IS EITHER AN ACCESS ROAD OR A TRAIL

The purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government and "to prevent the diversion of public funds from their intended purpose to the payment of damage claims." 745 ILCS 10/1-101.1; *Bubb v. Springfield Sch. Dist. 186*, 167 Ill. 2d 372, 378 (1995). Section 3-107 of the Act provides absolute immunity for injuries caused by a condition of certain categories of roads and trails. 745 ILCS 10/3-107.

A. The Circuit Court Did Not Err in Finding that the Lakefront Trail is a "Road" Afforded Absolute Immunity by Section 3-107(a)

The Circuit Court properly held that the Park District is absolutely immune from liability, where the Lakefront Trail is a "road" as contemplated by Section 3-107(a) of the Tort Immunity Act. A-09.

There exists limited case law interpreting subsections 3-107(a) and (b) of the Tort Immunity Act. Prior to the Appellate Court's decision in this matter, the only case that

interpreted subsection 3-107(a) was *Scott v. Rockford Park Dist.*, 263 Ill. App. 3d 853 (2d Dist. 1994). In *Scott*, the plaintiff was riding his bicycle on a bike path bridge that provided access to a public park. *Id.* at 854. The plaintiff's wheel struck a crack in the path, and he was thrown over the side of the bridge. *Id.* The trial court held that the defendants were immune from liability under Section 3-107(a) of the Tort Immunity Act. *Id.* On appeal, the appellate court affirmed, finding that Section 3-107(a) "unambiguously grants full immunity for access roads leading to fishing, hunting, primitive camping areas, recreational areas, and scenic areas." *Id.* at 857. The court held that the "primitiveness" requirement applied only to camping areas to which the road provided access and not to the nature of the access road (bridge) itself. *Id.* Further, the court found that the relevant access provided by the bridge was access to a park, which was a "recreational area." *Id.* Because the statute was unambiguous, the court's analysis of the statute ended there, and it did not need to resort to any other rules of construction. *Id.*

The *Scott* decision stands in contrast to the Appellate Court's decision here, where the First District Appellate Court determined the statute was ambiguous as to whether "primitive" modifies not only "camping," but also the words "recreational" and "scenic". A-14-15. The Appellate Court's analysis contradicts the main rule of statutory construction, which is to give effect to the plain meaning of the words without inferring limitations or conditions that the legislature did not express. *McElroy v. Forest Pres. Dist.*, 384 Ill. App. 3d 662, 667 (2d Dist. 2008). If the legislature wanted to limit the language in Section 3-107(a) to "primitive recreational" and "primitive scenic" areas, it would have drafted the Section as such. However, because "primitive" is included only before the word "camping," it cannot be read as modifying any word other than "camping."

While *Goodwin* v. *Carbondale Park Dist.*, analyzed Section 3-107 "as a whole", it did so primarily for the distinct purpose of differentiating Sections 3-107 and 3-106 of the Tort Immunity Act. 268 Ill. App. 3d 489, 493 (5d Dist. 1994). Furthermore, the *Goodwin* court distinguished the *Scott* decision, finding that *Scott* interpreted and applied a different subsection of 3-107. *Id* at 494.

In the instant case, the Appellate Court relied on *Mull, McElroy, Brown*, and *Goodwin* for the contention that Section 3-107 applies only to unimproved property. *McElroy*, 384 Ill. App. 3d 662; *Mull v. Kane Cnty Forest Pres. Dist.*, 337 Ill. App. 3d 589 (2d Dist. 2003); *Brown v. Cook Cnty. Forest Pres.*, 284 Ill. App. 3d 1098 (1st Dist. 1996); *Goodwin*, 268 Ill. App. 3d 489. However, not only are these cases distinguishable, as they dealt only with subsection 3-107(b), but they also apply an improper and overly restrictive definition of "trail" which the Courts have used to limit the applicability of Section 3-107 as a whole. (*See infra* Argument Section I. B., regarding the definition of "trail" and the applicability of Section 3-107 to property not found within unimproved areas).

Still, even if this Court finds that Section 3-107(b) is limited to trails in undeveloped areas such as forested or mountainous regions, this does not necessitate an interpretation of Section 3-107(a) that limits this subsection to those roads that provide access to primitive recreational and primitive scenic areas. The doctrine of *in pari materia* (two statutes or sections of the same statute dealing with the same subject matter will be considered with reference to each other) is still subordinate to the primary rule of statutory construction—to ascertain and give effect to the plain and ordinary meaning of the words found in the statute. *Collinsville Cmty. Unit Sch. Dist. No. 10 v. Reg'l Bd.*, 218 Ill. 2d 175, 185-86 (2006).

The plain meaning of "road" is "[a] wide way leading from one place to another, especially one with a specially prepared surface which vehicles can use." Oxford Dictionary, available at http://oxforddictionaries.com/definition/american_english/road. The plain meaning of "recreational" is [r]elating to or denoting activity done for enjoyment when one is not working." Oxford Dictionary, available at http://oxforddictionaries.com/definition/american_english/recreational. The plain meaning of "scenic" is "[p]roviding or relating to views of impressive or beautiful natural scenery." Oxford Dictionary, http://oxforddictionaries.com/definition/american_english/scenic.

Based on the plain meaning of the words, "road," "recreational," and "scenic," it is clear that the Lakefront Trail is covered by the language in Section 3-107(a) of the Tort Immunity Act. The Lakefront Trail is a multi-use trail extending approximately twenty-six miles along Lake Michigan. C-408 (p. 22), 428 (p. 33). While the Lakefront Trail is itself recreational in nature, it also provides access to other recreational areas, scenic areas, and fishing areas. C-429 (p. 36), 431 (p. 42) Further, the Lakefront Trail was designed to accommodate large maintenance vehicles. C-408 (p. 23).

Lastly, even if this Court were to find that "primitive" modifies "camping", "recreational", and "scenic areas", it remains that the Lakefront Trail directly abuts Lake Michigan to the east, where Lake Michigan is by its very nature "primitive" and undeveloped. Further, subsection 3-107(a) also provides that a road—which is afforded absolute immunity—also includes those roads that provide access to fishing, where there is no "primitive" modifier found in the text of the statute for fishing areas and the word "fishing" precedes the word "primitive". 745 ILCS 10/3-107(a). Therefore, the Lakefront Trail is also a "road" for purposes of subsection 3-107, as it provides access to fishing areas

along Lake Michigan. C-431 (p. 42).

B. Section 3-107 is Not Limited to Undeveloped Property

The existing Section 3-107 case law imposes conditions and limitations on the applicability of this Section, which are neither found within nor supported by the clear statutory language. *See Brown*, 284 Ill. App. 3d at 1101 (this was the first case interpreting Section 3-107 that cited to and adopted this definition of "trail"). This very issue is currently pending before this Court in *Corbett v. Cnty. of Lake,* 2016 IL App (2d) 160035 (*pet. for leave to appeal granted*, No. 121536), and the Park District takes the same position on the interpretation of Section 3-107 as Defendant-Appellant the City of Highland Park and *Amicus Curie* the Park District Risk Management Agency.

The word "trail" is neither defined in Section 3-107 nor found elsewhere within the Tort Immunity Act. As such, the courts have been applying the following dictionary definition of the word "trail": a "marked path through a forest or mountainous region". Webster's Third New International Dictionary, 233 (1981); *see Corbett,* 2016 IL App (2d) 160035 at ¶ 23; *McElroy*, 384 Ill. App. 3d at 667; *Mull*, 337 Ill App. 3d at 591-92; and *Brown*, 284 Ill. App. 3d at 1101. That definition of "trail" improperly requires that the property be undeveloped and remain in its natural condition before immunity applies, but where there is no such requirement found in Section 3-107 of the Tort Immunity Act.

Similarly, in *Goodwin*, the Fifth District limited the application of Section 3-107(b) to property "in its natural condition with obvious hazards as a result of that natural condition." 268 Ill. App. 3d at 493. These cases disregard the rules of statutory construction by applying an overly narrow and restrictive definition of the word "trail". This definition of "trail" is nonsensical when considering that the statute was enacted by the Illinois

legislature, where the State of Illinois does not have any mountains, thereby serving only to further limit the definition of "trails" to only those located in forested areas. *Corbett*, 2016 IL App (2d) 160035 at ¶ 29.

The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Nelson v. Kendall Cnty.*, 2014 IL 116303, ¶ 23; *Collinsville Cmty. Unit Sch. Dist. No. 10*, 218 Ill. 2d at 186. The best indicator of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. *Id.* While any ambiguities in the Tort Immunity Act are strictly construed against the public entity—because the Tort Immunity Act is in derogation of the common law—this principle does not permit courts to read into the Act exceptions, limitations, or conditions that the legislature did not express. *Scott*, 263 Ill. App. 3d at 857; *DeSmet v. County of Rock Island*, 219 Ill.2d 497, 510 (2006); *Epstein v. Chicago Bd. of Educ.*, 178 Ill.2d 370, 276-77 (1997); *Barnett v. Zion Park Dist.*, 171 Ill.2d 378, 389 (1996); *McElroy*, 384 Ill. App. 3d at 667.

Therefore, instead of relying on an overly restrictive definition of "trail", this Court should employ a definition that more appropriately reflects the intent of the legislature for trails located in Illinois, including:

- "a) a path or track made by repeated passage or deliberately blazed, b) a paved or maintained path or track, as for bicycling or hiking" (Webster's New World College Dictionary, Fourth Edition (2002));
- "a marked or established path or route" (Webster's Collegiate Dictionary, Tenth Edition, (1995)).

Section 3-107(b) does not include any limitations as to where a "trail" must be located, and, instead, only references "Any hiking, riding, fishing or hunting trail." 745

ILCS 10/3-107(b) (emphasis added). Again, there is nothing in Section 3-107 that limits "trails" to those found in forested or mountainous areas, especially where there are no mountains in Illinois. It remains that if the legislature intended to limit Section 3-107(b) immunity to trails in forested areas, it would have done so.

C. In the Alternative, the Lakefront Trail is a "Trail" Afforded Absolute Immunity by Section 3-107(b)

Should this Court rule in favor of the defendant City of Highland Park in *Corbett* (No. 121536) and find that a "trail" under Section 3-107(b) is not limited to only those trails located in forested or mountainous areas, then this Court should also find that the Lakefront Trail is a "trail" afforded absolute immunity under 3-107(b). As discussed in full above, the definition currently applied to "trail" is overly restrictive and does not reflect the intent of the legislature. (*See supra* Argument Section I. B). The Lakefront Trail accommodates bicyclists and pedestrians and directly abuts Lake Michigan as well as surrounding parkland. C-428 (p. 33), 429 (p. 36), 431 (p. 42). Lake Michigan clearly exists in its natural and undeveloped state, and the Lakefront Trail enables patrons to access the surrounding parkland, fishing areas, and scenic areas. C-431 (p. 42).

The fact that the Lakefront Trail is also adjacent to the developed City of Chicago, which is neither owned nor controlled by the Park District, should not have the effect of removing immunity for the Lakefront Trail. In *Mull*, the court noted that the local public entity's immunity was not affected by the "actions of a property owner different from the public entity in question" such that if another entity developed property adjacent to a trail, this development would not affect the underlying immunity afforded to the trail under Section 3-107. 337 Ill. App. 3d at 592-93.

Further, applying an overly restrictive application of Section 3-107 would likely

create disincentives for the continued development, designation, and operation of large-scale trail systems for bicyclists, such as to the Lakefront Trail, due to the potential liability exposure, especially where municipalities such as the Park District fully expected these trails to qualify for the protections afforded by Section 3-107. The Park District already expends significant resources to inspect and maintain the Lakefront Trail, as harsh winters, storm damage, waves, and ice cause damage to the cement and asphalt. C-425 (p. 18), 428 (p. 31). The Park District developed the Lakefront Trail in order to provide a trail for bicyclists and pedestrians that permits them access to the natural beauty and resources of Lake Michigan. The immunity afforded by Section 3-107 is integral to the Park District's ability to preserve and operate the Lakefront Trail.

II. THE FACTS FAIL TO RISE TO THE LEVEL OF WILLFUL AND WANTON CONDUCT AS IS REQUIRED BY SECTION 3-106 OF THE TORT IMMUNITY ACT

The facts fail to support a finding of willful and wanton conduct, as required by Section 3-106 of the Tort Immunity Act. 745 ILCS 10/3-106. The Tort Immunity Act defines willful and wanton conduct as:

> "[A] course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."

745 ILCS 10/2-210. In cases where there is insufficient evidence to sustain an allegation of willful and wanton conduct, the issue should not go to the jury for its consideration. *Barr v. Cunningham*, 2017 IL 120751, ¶ 15.

The Park District's precautionary procedures and acts in this case (including conducting an annual Lakefront Trail inspection, responding to a park patron's spot inspection request regarding the subject condition, incorporating the repairs for the subject

condition in a bid to be addressed through an expedited repair process, and inspecting the subject condition after the rapid-response contractor had completed its work), demonstrate an immediate and ongoing concern for the safety of patrons on the Lakefront Trail and negate an inference of willful and wanton conduct, even if the aforementioned precautions were insufficient to prevent Plaintiff's injury. C-136, 410 (pp. 32-33), 436 (p. 64), 439 (p. 74), 454 (p. 39); *see Lynch v. Board of Educ.*, 82 Ill. 2d 415, 430-31 (1980) (school employees who exercised some precautions to protect students from injury, even if those precautions were insufficient, did not engage in willful and wanton conduct). Given the aforementioned measures undertaken by the Park District, it cannot be said that the Park District engaged in of a course of action showing utter indifference or conscious disregard for the safety of others, as required for a showing of willful and wanton conduct. *Id.*, 745 ILCS 10/2-210; C-136, 410 (pp. 32-33), 436 (p. 64), 439 (p. 74), 454 (p. 39).

In *Lester v. Chicago Park Dist.*, the plaintiff was injured while playing softball at a park. 159 Ill. App. 3d 1054, 1055 (1st Dist. 1987). The plaintiff contended that the Park District was willful and wanton as it caused ruts and holes in the field and then insufficiently and without proper materials attempted to re-fill the holes. *Id.* p. 1056. The court held that to equate the Park District's actions—in discovering the condition complained of and taking affirmative rehabilitative acts after such discovery in an attempt to remedy the problem—with willful and wanton conduct would render that standard synonymous with ordinary negligence. *Id.* p. 1059. Here, Plaintiff's claims are similarly insufficient for a showing of willful and wanton conduct, as Plaintiff argues that the Park District's affirmative efforts to repair the subject condition were insufficient to prevent Plaintiff's injury. *Id.* p. 1056.

While, through the exercise of hindsight, alternative and more expedient means of addressing the subject condition could be identified, a failure to take the best or most expedient course of action does not serve as evidence of willful and wanton conduct. S*ee* *Barr*, 2017 IL 120751, ¶ 18 (teacher who took some safety precautions, but did not require the use of additional, readily available, safety equipment, was not guilty of willful and wanton conduct where a student suffered an injury that likely would have been prevented through the use of said additional safety equipment); *Cunis v. Brennan*, 56 Ill. 2d 372, 376 (1974) (courts will not look back at the mishap with the wisdom born of the event). The Park District addressed the subject condition through the use of an expedited repair process—the rapid-response program—which accelerates the assignment/completion of repairs—as rapid-response contractors are pre-qualified and therefore do not have to go through the Park District's standard bid qualification process. C-415 (p. 50), 433 (p. 51), 484 (p. 93). That the Park District did not ensure the condition was repaired within a shorter timeframe and/or did not employ alternate means to address the condition, outside of the rapid-response program, amounts, at most, to inadvertence, incompetence, or unskillfulness, conduct that does not rise to the level of willful and wanton. *See Bialek v. Moraine Valley Cmty. Sch. Dist. 524*, 267 Ill. App. 3d 857, 865 (1st Dist. 1994).

Although a Park District employee did identify the subject condition as being an emergency, such that it necessitated repair, it remains that all six of the conditions included into the 2013 Lakefront Trail RFP were included for safety reasons, and the mere act of acknowledging that a condition could pose a danger does not establish willful and wanton conduct. C-436 (p. 64), 483 (p. 86); *see Lorenc v. Forest Pres. Dist.*, 2016 IL App (3d) 150424, ¶ 21 (acknowledging that trail sentinels could cause bicyclists to injure themselves

does not establish an utter indifference or conscious disregard for the bicyclist's safety).

In concluding that there is an issue of fact as to whether or not the Park District's conduct rose to the level of willful and wanton, the Appellate Court relied on *Palmer v. Chicago Park Dist.*, 277 Ill. App. 3d 282 (1st Dist. 1995). In *Palmer,* the court found that a fence had been lying on its side for three months and that the defendant knew or should have known that the fence posed a danger during that three month period yet "took no corrective action to repair or warn about the fence." 277 Ill App. 3d at 289 (emphasis added).

In stark contrast, here, upon being notified of the subject condition through a patron complaint, Park District employees promptly inspected the condition and added it to the existing scope of work for the Lakefront Trail repairs, to be addressed through the expedited rapid-response repair process. C-136, 436 (p. 64), 454 (p. 39). The Appellate Court's position, that the Park District's failure to take additional precautions—such as "warn[ing] patrons of the defect, barricad[ing] the defect, or expedit[ing] the repair process"—could constitute willful and wanton conduct, is erroneous. As noted above, a failure to take the best or most expedient course of action does not serve as evidence of willful and wanton conduct and, at most, constitutes inadvertence, incompetence, or unskillfulness. *See Barr*, 2017 IL 120751, ¶ 18; *see also Bialek*, 267 Ill. App. 3d at 865. The Appellate Court's reasoning is further flawed, as the evidence established that the Lakefront Trail experiences severe damage each winter and, as a result, the Park District only blocks off areas of the Lakefront Trail when the area is rendered "impassible;" moreover, variable weather makes it difficult for the Park District to set deadlines for its rapid-response contractors to complete Lakefront Trail repairs. C-428 (p. 31), 433 (p. 52),

475 (p. 55).

Again, the Park District made a conscientious effort to repair the subject condition in a timely manner. As such, the Park District's conduct cannot be classified as exhibiting "utter indifference" or "conscious disregard" for the safety of others as would be required for a showing of willful and wanton conduct.

III. THE PARK DISTRICT IS AFFORDED ABSOLUTE IMMUNITY FOR DISCRETIONARY DECISIONS PURSUANT TO SECTIONS 2-109 AND 2-201 OF THE TORT IMMUNITY ACT

The Park District is absolutely immune from Plaintiff's claims, as the Park District's Director of Facility Management, Arlow, and Senior Project Manager, Gernady, (A) exercised discretion and (B) made policy decisions when determining how the address the subject condition. *See* 745 ILCS 10/2-109 and 2-201.

Section 2-201 immunity applies where a Park District employee's act or omission is both an exercise of discretion and a determination of policy. *See Harinek v. 161 N. Clark St. Ltd. P'ship.*, 181 Ill. 2d 335, 341 (1998). Discretionary acts are those that are 1) unique to a particular office and 2) involve the exercise of personal deliberation and judgment in deciding whether or not to perform a particular act, and how and in what manner the act should be performed. *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390 (1st Dist. 2000). Policy decisions are those that require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests. *Harinek,* 181 Ill. 2d at 342.

A. The Park District's Employees Exercised Discretion with Regard to the Repair of the Subject Condition

Park District employees Arlow and Gernady both made discretionary decisions as there was no prescribed method for addressing the subject condition. In *In re Chi. Flood*

Litig., the defendant City of Chicago ("the city") was notified of damage to a tunnel but did not make repairs in time to prevent the tunnel's failure. 176 Ill. 2d 179, 185 (1997). This Court held that the city was entitled to discretionary immunity for both its failure to promptly repair the tunnel and its failure to warn the plaintiffs of the tunnel defect. *Id.* p. 197. This Court reasoned that there was no prescribed method for how to repair the tunnel, how quickly to make the repair, or how to warn the plaintiffs of the defect. *Id.* at 196-97. This Court further reasoned that the city had to make several discretionary decisions following notice of the tunnel defect, including who would repair the tunnel and, if they elected to use an independent contractor, how the contractor would be hired and on what terms. *Id.* at 197.

Similar to the circumstances in *In re Chi. Flood Litig.*, Arlow made a discretionary decision when he determined that the subject condition should be addressed through the rapid-response program, as opposed to using one of his in-house trades employees. C-447 (p. 12). Arlow possessed the unique role of managing the Park District's approximately 260 trades employees. C-447 (p. 10). He was also responsible for conducting spot inspections and responding to Park District patron and employee notifications regarding conditions of Park District properties. C-447 (p. 10), 450 (p. 22). Arlow was not bound to any Park District guidelines and rendered a decision based on his knowledge and experience as well as considerations including the availability of in-house crews and materials. C-447 (p. 12), 450 (p. 24), 451 (p. 27); *Wrobel*, 318 Ill. App. 3d at 395 (ministerial acts, as opposed to discretionary acts, are those that are absolute, certain and imperative, involving merely the execution of a set task).

After Arlow determined that the subject condition should not be addressed through

the use of an in-house tradesman, Gernady similarly made a discretionary decision in electing to address the subject condition through the rapid-response program. *See Richter v. Coll. of Du Page*, 2013 IL App (2d) 130095, ¶ 44 (the decision not to repair a sidewalk defect was ruled discretionary as the building manager had the unique role of assessing each sidewalk individually before determining how to proceed, there was no set of rules or regulations that he was bound to follow, and he had the discretion to do nothing at all); *see also Harinek*, 181 Ill. 2d at 343 (this Court found that a fire marshal's conduct was an exercise of discretion as the fire marshal had the sole and final responsibility for planning and executing fire drills and was under no legal mandate to perform those duties in a prescribed manner).

Gernady had the unique role of conducting the Lakefront Trail inspections, where there were no Park District guidelines or procedures dictating which conditions required repair or how to accomplish those repairs. C-410 (pp 32-33), 425 (p. 18). Instead, the Park District depended on Gernady's knowledge, experience, and expertise in determining which Lakefront Trail conditions should be addressed and the manner in which they are addressed, and thus, Gernady is also afforded wide latitude in making these determinations. C-412 (pp. 39-40), 417 (pp. 59-60).

B. The Park District's Employees Made Policy Determinations in Deciding How to Handle Lakefront Trail Repairs

Arlow's decision regarding the repair of the subject condition was also a policy determination, where he considered the resources available to the Park District, including the lack of in-house asphalt crews and materials and the efficiency of using an in-house trades employee versus an outside contractor, in determining if the condition should be addressed through the use of outside contractors. C-447 (pp. 12-13); *Wrobel*, 318 Ill. App.

3d at 395 (the decisions of the laborers, in repairing potholes, were characterized as policy determinations because the laborers allocated time and resources amongst the various potholes).

Similarly, Gernady's decision to include the subject condition in the scope of work for the rapid-response RFP, was a policy determination where, in deciding how to address a condition, Gernady considered the availability of materials, equipment, and labor, weather conditions, and the workload of the contractors. C-416 (p. 56), 439 (p. 76), 470 (pp. 35-36), 475 (p. 55). Additionally, there was no prescribed method for determining when, or the manner in which, a condition of the Lakefront Trail must be addressed. *See In re Chi. Flood Litig.*, 176 Ill. 2d at 196-97 (this Court, in determining that the defendant was entitled to discretionary immunity, considered the fact that there was no prescribed method, regarding how quickly a tunnel repair had to be made).

In *Harinek*, this Court reasoned that the fire marshal's acts and omissions during a fire drill were determinations of policy because, when planning and conducting fire drills, the fire marshal balanced various interests which could compete for the time and resources of his department. 181 Ill. 2d at 343. Here, as in *Harinek*, both Arlow and Gernady made policy determinations, as they were required to balance various considerations relating to the time and resources of their respective departments in determining how to address the subject condition.

Therefore, the Park District is absolutely immune from Plaintiff's claims under Sections 2-109 and 2-201 of the Tort Immunity Act, where Park District employees Arlow and Gernady exercised discretion and made policy decisions in determining how to address the subject condition.

CONCLUSION

For the reasons stated above, Defendant-Appellant CHICAGO PARK DISTRICT respectfully requests that this Honorable Court reverse the decision of the Appellate Court and affirm the judgment of the Circuit Court in its favor.

Respectfully submitted,

CHICAGO PARK DISTRICT

By: Heather L. Keil

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Senior Counsel
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Attorneys for Defendant-Appellant

CERTIFICATION OF COMPLIANCE

I, Heather L. Keil, certify that this Brief of Defendant-Appellant Chicago Park District conforms to the requirements of Supreme Court Rules 315, 341(a) and (b). The length of this Brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages.

June 7, 2017
Date

Heather L. Keil

No. 121800

IN THE
SUPREME COURT OF ILLINOIS

ISAAC COHEN,	)	
	)	On Appeal from the
Plaintiff/Appellee,	)	Appellate Court of Illinois,
	)	First Judicial District, Fourth
vs.	)	Division, No. 1-15-2889.
	)	
CHICAGO PARK DISTRICT,	)	There Heard on Appeal from
	)	the Circuit Court of Cook
Defendant/Appellant.	)	County Department, Law
	)	Division, No. 14 L 5476,
	)	the Honorable William E.
	)	Gomolinski, Judge Presiding.

NOTICE OF FILING/CERTIFICATE OF SERVICE

To: *Attorneys for Plaintiff-Appellee*

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PLEASE TAKE NOTICE that on June 7, 2017, the undersigned attorney filed the original and nineteen (19) copies Notice and the foregoing BRIEF OF DEFENDANT-APPELLANT CHICAGO PARK DISTRICT with the Clerk of the Supreme Court of Illinois, copies of which are hereby served upon you.

H. L K
Heather L. Keil

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CERTIFICATE OF FILING/SERVICE BY MAIL

I, Heather L. Keil, an attorney, certify that I filed with the Illinois Supreme Court the original and nineteen (19) copies of the Notice of Filing/Certificate of Service and Brief of Defendant-Appellant Chicago Park District and served upon counsel for each Party to the Appeal three (3) copies of the Notice of Filing and Brief by enclosing copies thereof in envelopes, addressed as shown above, with USPS Priority Mail postage prepaid, and depositing same at the U.S. Post Office, 355 East Ohio Street, Chicago, IL 60611 on June 7, 2017.

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct

Heather L. Keil

APPENDIX

No. 121800

IN THE
SUPREME COURT OF ILLINOIS

ISAAC COHEN,	)	
	)	On Appeal from the
Plaintiff/Appellee,	)	Appellate Court of Illinois,
	)	First Judicial District, Fourth
vs.	)	Division, No. 1-15-2889.
	)	
CHICAGO PARK DISTRICT,	)	There Heard on Appeal from
	)	the Circuit Court of Cook
Defendant/Appellant.	)	County Department, Law
	)	Division, No. 14 L 5476,
	)	the Honorable William E.
	)	Gomolinski, Judge Presiding.

APPENDIX
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Firm No. 48852

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ISAAC COHEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	
CITY OF CHICAGO,	)	***Plaintiff Demands Trial by Jury***
a municipal corporation,	)	
and the CHICAGO PARK DISTRICT,	)	
	)	
Defendants.	)	

COMPLAINT AT LAW

Plaintiff, ISAAC COHEN, through his attorneys, Schiff Gorman LLC, complaining of Defendants, CITY OF CHICAGO, a municipal corporation, and the CHICAGO PARK DISTRICT, alleges as follows:

1. Plaintiff, ISAAC COHEN, is a resident of the City of Chicago, County of Cook and State of Illinois.

2. Defendant, CITY OF CHICAGO, is a municipal corporation.

3. Defendant, CHICAGO PARK DISTRICT, is an entity of Defendant, CITY OF CHICAGO.

4. On July 7, 2013, Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, owned, managed, maintained and controlled the Lakefront Trail as it runs in a generally northwest and southeast direction between the Shedd Aquarium and South Lakeshore Drive in the City of Chicago, County of Cook and State of Illinois.

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5. On or about July 7, 2013, Plaintiff, ISAAC COHEN, was riding his bicycle in a generally southeast direction in the aforementioned area along the Lakefront Trail and was then and there a permitted and intended user of said Lakefront Trail.

6. At the time and place aforesaid, while riding his bicycle, Plaintiff, ISAAC COHEN, was caused to fall to the ground as a result of his bicycle tire getting caught in a pot hole located on the Lakefront Trail.

7. As early as June 10, 2013, Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, were aware of the pot holes and cracks along the aforementioned area of the Lakefront Trail.

8. Specifically, as early as June 10, 2013, Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, were soliciting proposals and bids from outside companies to repair the pot holes along the aforementioned area of the Lakefront Trail, including "crack repairs behind Shedd Aquarium." See **Exhibit A**, attached hereto.

9. Said requests and solicitations for proposals and bids to repair the aforementioned area of the Lakefront Trail was titled "Work Order Rapid Response P-10041-424." **Exhibit A**.

10. At all times relevant herein, Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, knew that the aforementioned area of the Lakefront Trail had pot holes and cracks that were unsafe for intended and permitted users of the Lakefront Trail.

11. At all times relevant herein, Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, owed a duty to refrain from willful and wanton acts or omissions in the maintenance of its property and to keep its property in a safe condition for the safety of intended and permitted users of said property, including Plaintiff, ISAAC COHEN.

12. In violation of said duty, Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, committed one or more of the following willful and wanton acts and/or omissions:

a. Recklessly and in conscious disregard of the safety of intended and permitted users of the Lakefront Trail, including Plaintiff, failed to maintain the Lakefront Trail in a reasonably safe condition when it knew that the Lakefront Trail posed a danger to intended and permitted users of the Lakefront Trail; or

b. Recklessly and in conscious disregard of the safety of intended and permitted users of the Lakefront Trail, including Plaintiff, allowed the Lakefront Trail to remain in a defective condition so that it was unsafe for intended and permitted users of the Lakefront Trail; or

c. Recklessly and in conscious disregard of the safety of intended and permitted users of the Lakefront Trail, including Plaintiff, failed to exercise ordinary care to prevent someone from being injured on the pot holes and cracks on the Lakefront Trail; or

d. Recklessly and in conscious disregard of the safety of intended and permitted users of the Lakefront Trail, including Plaintiff, failed to exercise ordinary care by failing to warn intended and permitted users of the Lakefront Trail of the presence of pot holes and cracks along the Lakefront Trail; or

e. Recklessly and in conscious disregard of the safety of intended and permitted users of the Lakefront Trail, including Plaintiff, by failing to make the necessary improvements to the Lakefront Trail in a timely manner after acquiring knowledge of said defects; or

f. Recklessly and in conscious disregard of the safety of intended and permitted users of the Lakefront Trail, including Plaintiff, failed to close or re-route the Lakefront Trail while waiting to repair the pot holes and cracks that Defendant was aware of along the Lakefront Trail.

13. As a direct and proximate result of one or more of the foregoing willful and wanton acts or omissions of the Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, Plaintiff, ISAAC COHEN, fell off of his bicycle when his tire became stuck in a pot hole along the aforementioned area of the Lakefront Trail, causing Plaintiff to sustain serious injuries of a personal and pecuniary nature.

WHEREFORE, Plaintiff, ISAAC COHEN, requests that this Honorable Court enter judgment in favor of the Plaintiff, ISAAC COHEN, and against the Defendants, CITY OF CHICAGO and the CHICAGO PARK DISTRICT, in an amount in excess of $50,000.00.

Respectfully submitted,

SCHIFF GORMAN LLC

By:_____
Attorney for Plaintiff

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Firm No. 48852

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Firm No. 48852

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ISAAC COHEN, Plaintiff,	)	
v.	)	Case No.
CITY OF CHICAGO, a municipal corporation, and the CHICAGO PARK DISTRICT,	)	*Plaintiff Demands Trial by Jury*
Defendants.	)	

AFFIDAVIT PURSUANT TO RULE 222(b)

Ryan T. McNulty states as follows:

1. I am one of the attorneys for the Plaintiff, ISAAC COHEN.

2. I am familiar with the extent of damages suffered by Plaintiff.

3. I reasonably believe that the total money damages suffered by said Plaintiff is an amount in excess $50,000.00, exclusive of costs.

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that, at this time, the statements set forth in this instrument are true and correct to the best of my knowledge, information and belief.

Respectfully submitted,

SCHIFF GORMAN LLC

By:_____
One of the attorneys for Plaintiff

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rmcnulty@schiff-law.com

Rapid Response Program — Chicago Park District

Request For Proposal

Date:

To: Rapid Response Contractors

From David Richmond

Chicago Park District

541 North Fairbanks

Chicago, Illinois 60611

Re: Work Order Rapid Response P-10041-424

Lakefront Trail Repairs

Dear Rapid Response Contractor:
The Chicago Park District requests that you provide a Cost Proposal, M/WBE Estimate, Work Schedule, Sub-contractor Cost Estimates with Detail of Self Performance for the above referenced project.

Please be reminded that your General Conditions require compliance with the Prevailing Wage Act. Current Prevailing Wage rates can be found at:
http://www.state.il.us/agency/ido/rates/rates.HTM

The Contractor and/or Subcontractors shall immediately report any and all potential environmental issues, concerns, questions, etc. (asbestos, lead based paint, contaminates, etc.) to the Rapid Response Project Manager. The Contractor and/or Subcontractor shall halt work or not commence work in the event that potential environmental issues, concerns, questions, etc. are present or thought to be present until written direction is provided by the Chicago Park District.

A Request for Proposal is the method of procurement used when elements such as experience, past performance, resources, method of approach, and other criteria may outweigh cost. Prior to the award of a Notice to Proceed, the CPD may engage in discussions with responsible submitters and allow or negotiate proposal revisions. A Notice to Proceed may be awarded to the responsive, responsible, and compliant submitter whose proposal has been determined to be the most advantageous to the CPD, in accordance with the evaluation criteria set forth in this Request for Proposal. All factors will be considered.

EXHIBIT
A

The submitter must have verifiably good past and present performance on comparable projects in terms of quality of work and compliance with performance schedules. The CPD may solicit relevant information concerning the submitter's record of performance from current and previous clients, or from any other available sources.

The submitter must have the ability to begin and perform work in a timely manner in accordance with the provided schedules and specifications, and the capacity to perform all services within the necessary time frame.

The reasonableness of the submitter's proposed cost(s) will be taken into account.

Additional Requirements:

Drawing and Technical Information:
Material Submittals:
Comments:
Proposed Work Schedule:

Additional Instructions:

*Comply with and adhere to all conditions as set forth within the original Rapid Response Contract.
*Ensure a safe environment during and after each work day. Provide and maintain construction fencing and signage as determined at the joint scope meeting.
*Provide tree protection as per Chicago Park District specification.
*Clean up all debris after each work day and at the completion of the project.
*Make repairs to any and all turf that may be damaged as a result of this project.
*Provide as-build drawings, warranty information and other pertinent documents at project close out.

Your proposal is due on or before: June 12, 2013

David Richmond, Rapid Response Manager Date

Rapid Response Program **Chicago Park District**

Date: June 10, 2013

Project Title Lakefront Trail Repairs

Project Number: P10041-424

Final Scope of Work

The contractor shall provide all labor, equipment, supplies, materials, etc. necessary to make repairs at various locations.

1 .Broom out or blow out all tripping minimum of 1" deep or more. And then use a primer

2. Fill all holes with asphalt and roller to compact

3. Remove all old asphalt debris from the chess pavilion to Oak street beach

4. Repair approximately 4' of curb and slab in this area with concrete

5. Grind and overlay with 2" of asphalt at the promontory point under pass east and west sides.

6. Crack repairs behind Shedd Aquarium.

David Richmond, Rapid Response Manager Date

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IN THE CIRCUIT COURT COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ISAAC COHEN, Plaintiff,	)	
v.	)	No. 14 L 5476
CHICAGO PARK DISTRICT, Defendant.	)	

MEMORANDUM ORDER AND OPINION

INTRODUCTION

This matter comes for ruling on Defendant Chicago Park District's 735 ILCS 5/2-1005 Motion for Summary Judgment.

BACKGROUND

This case arises out of a bicycle accident on the Lakefront Trail ("Trail") on July 7, 2013. Plaintiff, Isaac Cohen rode his bicycle along the Trail when his front tire got stuck in a pot hole near the Shedd Aquarium and South Lakeshore Drive. Plaintiff fell from his bicycle and sustained injuries requiring medical attention.

The Chicago Park District ("CPD") owns, operates and maintains the Trail for use as a recreational resource and channel of transportation. In the spring of 2013, CPD's Director of Facility Management, Robert Arlow ("Arlow"), received a phone call from a patron who indicated that there was a crack in the Trail north of the Shedd Aquarium. Arlow visited the location of the defect and reported it to William Gernady ("Gernady") in June 2013. Gernardy passed the information along to outside subcontractors for repair. The subcontractors repaired the defective portion of the Trail on July 10th, 2013. Three days before the subcontractors repaired the trail, Plaintiff sustained his injuries.

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Plaintiff alleges that CPD's failure to adequately maintain, repair, warn, close or make improvements to the Trail resulted in his injuries under a willful and wanton standard. Defendant motions for summary judgment alleging that CPD has immunity pursuant to the Tort Immunity Act. Specifically, CPD maintains that Section 3-107(a) provides absolute immunity for injuries caused by defects in access roads leading to recreational or scenic areas, Section 3-106 immunizes the Park District from all but willful and wanton conduct which cannot be found in this case, Section 3-104 immunizes CPD from failure to warn of any condition or defect in roads and that CPD has absolute immunity from discretionary decisions on how it maintains the Trail.

STANDARD OF REVIEW BY THIS COURT UNDER 735 ILCS 5/2-1005

Summary judgment proceedings do not try an issue of fact. Rather, the purpose is to determine whether an issue of fact exists. *Ferguson v. McKenzie*, 202 Ill. 2d 304, 307 (2001). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c). The pleadings, depositions, admissions on file and affidavits should be construed strictly against the moving party and liberally in favor of the defendant. *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). Summary judgment is drastic and should only be granted if the right of the moving party to dispose of litigation is clear and free from doubt. *Id.* at 240.

This case specifically involves the immunity conferred to local public entities by the Local Governmental and Governmental Employees Tort Immunity Act. The Tort Immunity Act provides public entities immunity from liability from negligence and willful and wanton conduct. 745 ILCS 10/1-101 *et seq*. Section 3-107(a) extends absolute immunity from liability for injuries caused by a condition of "any road which provides access to fishing, hunting, or primitive

camping, recreational, or scenic areas and which is not (1) a city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway. 745 ILCS 10/3-107(a). If Section 3-107(a) applies in the present case, CPD remains immune from Cohen's claims and summary judgment is proper.

The Trail is the type of road conceived of in Section 3-107(a), therefore, CPD has absolute immunity from liability and motion for summary judgment is proper. Section 3-107(a) applies to any road or trail that is not a highway or a street. *Id.* Section 3-107(a) "unambiguously grants full immunity for access roads to fishing, hunting, primitive camping areas, recreational areas and scenic areas." *Scott v. Rockford Park Dist.*, 263 Ill. App. 3d 853, 857 (2nd Dist. 1994). In *Scott v. Rockford*, the Appellate Court held that a bridge that provided access to a paved bike path within a public park fell under Section 3-107(a) immunity because the public park included a playground and other recreational facilities which constituted a recreational area. 263 Ill. App. 3d at 857. In the present case, the Trail is neither a highway nor a street. With the exception of emergency, service or maintenance motor vehicles, use of the trail is reserved for pedestrians and bicyclists. Next, the Trail provides bicyclists and pedestrians a path to a number of recreational and scenic areas including beaches, soccer fields, wetlands, fishing sites, and a bird sanctuary. The areas surrounding the Trail are unquestionably recreational in nature and in many cases and the Trail serves as the sole pathway to these resources.

Plaintiff posits that Section 3-107 immunity does not extend to the Trail. In support of this conclusion, Plaintiff cites *Goodwin v. Carbondale Park District.*, where the court held that a paved bike path in a developed city park was not a "riding trail" as conceived by Section 3-107(b). However, the *Goodwin* decision does not apply here as the court did not interpret and apply subsection (a) of Section 3-107, but rather subsection (b). 268 Ill. App. 3d 489, 494 (5th

Dist. 1994). Further, Plaintiff posits that the plain language of Section 3-107(a) extends immunity only to roads providing access to "primitive" recreational areas. However, as the court noted in *Scott v. Rockford*, the modifier "primitive" does not apply to the nature of the access roads nor to the recreational areas but rather, "to any camping areas thereby provided access." 263 Ill. App. 3d at 857. It follows that while the Trail is a paved, non-primitive access road that is surrounded at times by developed, commercial areas, it is an access road as conceived of by Section 3-107(a). Therefore, CPD has absolute immunity from suit and motion for summary judgment is proper.

Even if Section 3-107(a) does not apply, Plaintiff has not raised any material fact that Defendant engaged in willful and wanton conduct. Section 3-106 of the Tort Immunity Act grants partial immunity to public entities for injuries caused by conditions of public property intended for recreational purposes unless guilty of willful and wanton conduct. 745 ILCS 10/3-106. Willful and wanton conduct, as defined by the Act, is a "course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210. Plaintiff's failure to repair the Trail at issue does not show a deliberate intention to cause harm nor utter indifference or conscious disregard for safety of others. Once Defendant learned of the crack in the Trail, Defendant took affirmative steps to correct the defect. Where a public entity learns of a dangerous condition and takes affirmative steps to remedy it, failure to sufficiently remedy the condition does not render that conduct willful and wanton. *See Lester v. Chicago Park Dist.*, 159 Ill. App. 3d 1054, 1059 (1st Dist. 1987) (trial court dismissed a willful and wanton conduct complaint for failure to state cause of action where plaintiff stepped into inadequately filled-in holes in a softball field, noting that "equating CPD's action with willful

and wanton conduct would render the standard synonymous with ordinary negligence"). While Defendant's may have acted negligently in failing to expedite the rehabilitation of the Trail, Plaintiff's allegations of utter indifference or conscious disregard for the safety of others is meritless and contrary to the plain language of the statute where Defendant took affirmative steps to address the issue. Plaintiff has not pleaded any material fact necessary for willful and wanton conduct; therefore motion for summary judgment is proper.

While Defendants have immunity from liability under Section 3-107(a), Section 2-201 immunity does not apply because CPD employees did not exercise discretion in repairing the crack. An employee may qualify for discretionary immunity under Section 2-201 if he holds either a position involving a determination of policy or position involving exercising of discretion and also engaged in *both* the determination of policy or exercising discretion when performing an act or omission that caused Plaintiff's injury. *Harinek v. 161 North. Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 341 (1998). Our supreme court has stated that while the decision to implement a program of repairs is both a determination of policy and an exercise of discretion, actually carrying out the program is a ministerial act which does not confer Section 2-201's immunity. *Greene v. City of Chicago*, 73 Ill. 2d 100, 108 (1978); *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 625 (1st Dist. 2010). Further whether a municipality engages in a program of public improvement is discretionary but the manner in which the program is implemented is not. *Snyder v. Curran Township*, 161 Ill. 2d 466, 474-75 (1995). Once the decision to perform the work has been made, the work must be done in a non-negligent manner. *Baran v. City of Chicago Heights*, 43 Ill. 2d 177, 180-81 (1969).

In the present case, CPD employees did not exercise discretion. Once CPD employee Arlow received a call notifying CPD of the crack, he inspected it and added it to the list of

repairs to be made as part of the annual trail repair program. As part of the repair program, Gernady subcontracted the repairs once his supervisors approved the scope of work and budget for the project, all part of the repair program. CPD hired subcontractors to make the repairs and did not provide any sort of direction for how the work was to be carried out. As such, by not expediting the program of repairs, the CPD and its employees acted negligently. However, they are not immune because this was not an exercise of discretion, but rather a ministerial act. *See Gutstein*, 402 Ill. App. 3d at 625-26 (holding that a City was not entitled to discretionary immunity under §2-201 where plaintiff fell walking in an unimproved alley where there was an annual repair program in place, once the alley was on the priority list of repairs the employee no longer had discretion and there was no evidence that work had been done in the alley). Though CPD fails to qualify for discretionary immunity under §2-201, it is ultimately irrelevant as they are absolutely immune under §3-107(a).

CPD is also not entitled to absolute immunity under § 3-104 for failing to warn Plaintiff of defects in the Trail. Section 3-104 extends absolute immunity to public entities that fail to provide "traffic warning signs." The Appellate Court has ruled that the term "traffic" also includes "pedestrian" due to the Illinois Motor Vehicle Code's inclusion of the word "pedestrian" in its definition of "traffic." *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 91 (1st Dist. 2004). However extending this protection to failure to warn bicyclists would run counter the reasoning expressed in *Prostran* as bicycle is not included in the Code's definition of "traffic." Where an enactment is clear, courts are not warranted to depart from the plain language of the statute by placing exceptions or conditions that the legislature did not express. *Village of Bloomingdale v. CDG Enters*, 196 Ill. 2d 484, 493 (2001). Yet in claiming that the failure to provide "bicycle warning signs" has the privilege of absolute immunity, Defendant is asking the

court to do just that. Furthermore, the Motor Vehicle Code's definition of "traffic" is limited to use of highways for purposes of travel where highways are defined as ways maintained for purposes of "vehicular travel." 625 ILCS 5/1-207; 625 ILCS 5/1-126. The Trail is not a highway because it is not maintained for vehicular travel. Rather, it is a recreational and transportation resource where vehicular use is limited to emergency and maintenance vehicles in limited circumstances. Defendant is not entitled to absolute immunity under § 3-104 for failing to warn of dangerous conditions on the Trail. However, summary judgment is still proper as Defendants are entitled to absolute immunity from suit under § 3-107(a).

COURT'S RULING

The Trail is a pathway that provides access to recreational areas as is conceived of by Section 3-107(a) of the Tort Immunity Act, therefore Defendant is immune from liability for Plaintiff's injuries. Even if Section 3-107(a) does not apply, Plaintiff has not raised any material fact that Defendant engaged in willful and wanton conduct. No issue of material fact exists in this case and the right of the moving party to dispose of litigation is clear and free from doubt. Accordingly, Chicago Park District's Motion for Summary Judgment is GRANTED.

4022

Judge William E. Gomolinski

ENTERED: JUL 28 2015

Circuit Court-1973

Judge William E. Gomolinski #1973

corrected copy

2016 IL App (1st) 152889
No. 1-15-2889
October 27, 2016

FOURTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ISAAC COHEN,	) Appeal from the Circuit Court
	) of Cook County.
Plaintiff-Appellant,	)
	)
v.	)
	) No. 14 L 5476
CHICAGO PARK DISTRICT,	)
	)
Defendant-Appellee.	) The Honorable
	) William E. Gomolinski,
	) Judge presiding.

JUSTICE BURKE delivered the judgment of the court, with opinion.
Justices McBride and Howse concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Isaac Cohen, injured his shoulder after riding over a defect in the Lakefront Trail and falling off of his bike. He filed suit against defendant, the Chicago Park District (Park District), claiming it engaged in willful and wanton conduct by failing to repair the defect. The trial court granted summary judgment in favor of the Park District, finding it was immune from liability under section 3-107(a) of the Local Governmental and Governmental Employees Tort

Immunity Act (Act) (745 ILCS 10/3-107(a) (West 2012)), which grants absolute immunity to local entities for injuries caused by a condition of a "road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas." The court also found the Park District's conduct was not willful and wanton and thus, even if section 3-107(a) of the Act did not apply, the Park District was immune from liability under section 3-106 of the Act (745 ILCS 10/3-106 (West 2012)), which provides immunity for injuries occurring on recreational areas, except where a local public entity engages in willful and wanton conduct proximately causing the injuries. 745 ILCS 10/3-106 (West 2012).

¶ 2 On appeal, plaintiff argues the trial court erred by (1) finding the Lakefront Trail fell within the scope of section 3-107(a) of the Act, (2) finding section 3-107(a) of the Act governed instead of section 3-106, and (3) finding as a matter of law that the jury could never find the Park District's conduct to be willful and wanton.

¶ 3 We conclude the trial court erred by finding section 3-107(a) of the Act applied and by finding no genuine issue of fact existed as to whether the Park District's conduct was not willful and wanton. Accordingly, we reverse the court's grant of summary judgment and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff testified in a deposition that on a Sunday morning in July 2013 he was riding his bike southbound on the Lakefront Trail near the Shedd Aquarium when he veered toward the middle of the trail to pass a pedestrian.[1] His wheel became caught in a crack in the concrete. The crack was about three or four feet long, two to three inches deep, and three to four inches wide at

[1] Plaintiff testified in his deposition that the accident may have occurred on July 7, 2013, but he could "not say for sure." He also testified the incident could have occurred "maybe" in the beginning of August; however, he thought it occurred in July. Plaintiff knew the accident happened on a Sunday and that by the following Sunday, the defect had been repaired. It is undisputed that the defect was repaired on July 10, 2013. Accordingly, the evidence suggests plaintiff's accident occurred on July 7, 2013.

its widest part. Plaintiff fell, injuring his shoulder. The next week, he went for another bike ride and noticed the defect had been repaired.

¶ 6 In 2011, the Park District partnered with the Active Transportation Alliance to study Lakefront Trail usage. Plaintiff attached the Active Transportation Alliance's report to its response to the Park District's motion for summary judgment. The Alliance's report, and the deposition testimony of various Park District employees, established that the Lakefront Trail is an approximately 18-mile, multi-use trail that runs along the lakefront from Ardmore Street on the north to 71st Street on the south. It is made of concrete and asphalt and contains over 50 access points. The purpose of the Lakefront Trail is to provide recreation. It is designed for use by bicyclists, and the Park District's mission is to keep the Lakefront Trail safe for bicyclists. The Lakefront Trail is not open to the public for vehicular travel; however, Park District maintenance vehicles utilize the trail. According to the deposition testimony of Park District employee Robert Thompson, the Lakefront Trail provides access to scenic views and various recreational areas such as a golf course, beaches, softball fields, tennis courts, and harbors.[2] The Park District's overall mission is to (1) enhance the quality of life in Chicago by becoming the leading provider of recreation and leisure opportunities; (2) provide safe, inviting, and beautifully maintained parks and facilities; and (3) create a customer-focused and responsive park system that prioritizes the needs of children and families.

¶ 7 The Active Transportation Alliance's report showed more than 70,000 people access the trail on a typical summer weekend day and more than 60,000 people access it on a typical summer weekday. The study indicated the trail is a primary transportation corridor for bicycle commuters and is an integral part of Chicago's bicycle transportation network. During the study,

[2] Thompson testified in an unrelated case, and the Park District attached Thompson's testimony to its motion for summary judgment. On appeal, plaintiff challenges the Park District's reliance on Thompson's testimony. We address plaintiff's argument in this regard later in this opinion.

70% of people who accessed the trail were pedestrians, 29% were bicyclists, and 1% were other users. The report stated the Lakefront Trail is also used by "people training for marathons, parents with children in strollers, tourists on rental bikes, couples on in-line skates, teens on skateboards, and thousands of other people using the trail for commuting, training or just taking a leisurely stroll." At the time of the Alliance's report, the trail was "officially" closed between 11 p.m. and 6 a.m.

¶ 8 Linda Daly, Park District deputy director of capital construction, and Robert Rejman, Park District director of planning and construction, testified in depositions that man-made structures such as paved basketball courts, showers and restrooms, bike rental facilities, golf courses, parking lots, baseball fields, vendors, skate parks, and at least three bars and restaurants surround the Lakefront Trail. The grass around the Lakefront Trail is mowed, trees are trimmed, and gardens are maintained. Hunting around the trail is prohibited.

¶ 9 Park District employee William Gernady testified in a deposition that he inspects the Lakefront Trail annually for defects, including cracks in the pavement. Gernady has inspected the trail for 14 years. Every spring, Gernady drives along the Lakefront Trail twice and measures and marks with paint the areas that need to be repaired. Per his own policy, Gernady has any defect deeper than one and a half inches repaired.

¶ 10 After conducting his inspection, Gernady compiles a scope of repairs to be performed and creates a request for proposal to collect bids from a pool of pre-qualified "rapid response" contractors. The "rapid response" program is an expedited procurement process for the Park District through which most Lakefront Trail repairs are conducted. According to Rejman's deposition testimony, rapid response requests are used for "jobs that aren't absolutely necessary" and do not present safety concerns. Gernady testified the Park District notifies a contractor that it

has accepted the contractor's bid by providing the contractor with a "notice to proceed." According to Rejman, the Park District also typically provides the contractor with an anticipated schedule indicating the date upon which the Park District would like the repair to be completed. At times, Gernady supervises the contractors' repairs.

¶ 11 Daly testified that if Gernady discovered a defect during his inspection that he believed to be an emergency, that defect could "potentially" be priced out immediately, on its own, instead of being included in the "scope of work" with the other repairs. Rejman testified that to expedite the repair process, the Park District can alert contractors that a repair is urgent. Gernady testified the Park District can also immediately contact a contractor, instead of submitting a notice to proceed, and instruct the contractor that he is allowed to proceed with the work. Rejman testified that at times, a contractor will make a repair within a few days; however, this depends on the availability of contractors, and repairs can "take a little bit longer" during a busy time of year. Gernady testified repairs can be completed "[w]ithin one day sometimes."

¶ 12 Rejman testified that the Park District has blocked off areas of the Lakefront Trail with barricades and signs when those areas have been impassable due to difficult conditions. Rejman explained these larger barriers have been erected "in areas where a lot of damage has been done." Rejman was not "aware" of the Park District ever marking potholes or cracks with bright-colored paint; however, he "would think" this was something the Park District was capable of doing. He did not think the Park District would place cones near cracks or holes because "the cones wouldn't stay there for very long."

¶ 13 Robert Arlow, the Park District's director of facility management, testified in a deposition that he manages tradesmen who maintain and repair Park District buildings. Generally, Arlow's department does not perform maintenance and repair work to the Lakefront

Trail because it does not have an asphalt crew. However, if an absolute need arose to repair "a small thing," Arlow "could probably send a carpenter out with a bag of asphalt." Arlow only knew of this happening on one occasion, in June 2014. According to Arlow, the Lakefront Trail is repaired almost exclusively by outside contractors.[3]

¶ 14 Arlow receives complaints from Park District patrons about park conditions in need of repair. When he receives a call, Arlow inspects the defect himself or asks somebody else to check the defect and determine its severity. If Arlow determines the condition needs to be fixed, he calls a general foreman and tells him to send somebody to look at the condition and determine the type of repair that can be performed.

¶ 15 In the spring of 2013, Arlow received a call from a patron informing him of a defect on the Lakefront Trail between the Shedd Aquarium and South Lake Shore Drive. Arlow did not know the exact date he received the call, but because snow was not on the ground, he assumed it "had to be later than April." Arlow inspected the defect within a few days of receiving the call and determined it was in need of repair. He contacted Gernady. Arlow did not know why he did not have a Park District laborer immediately fill the defect with asphalt.

¶ 16 Gernady testified he recalled receiving Arlow's call regarding a dangerous crack in the "time zone of June" 2013. According to Gernady, this was the only 2013 Lakefront Trail repair that was classified as an emergency. Gernady included the crack in the scope of work that he prepared to solicit bids from the rapid response contractors. On June 10, 2013, the Park District sent a request for proposal to the rapid response contractors.

[3] During her deposition, Linda Daly was asked whether Park District employees ever conduct repairs in-house. She responded that "[i]t would come through Bob Arlow's department. I don't know if they've done Lakefront Trail repairs." Later, Daly testified if Arlow could not repair something in-house, he would ask Daly's department to solicit an outside contractor. Daly confirmed that Arlow or his staff would first see whether they could address the issue themselves.

¶ 17 On June 12, 2013, Meccor Industries submitted a proposal. On June 19, the Park District sent a notice to proceed to Meccor Industries. It did not include a completion deadline. Subcontractor Beverly Asphalt Paving Company (Beverly) repaired the defect on July 10, 2013. Gernady testified that before doing so, Beverly completed a repair on another part of the Lakefront Trail on June 19, 2013. Gernady could not explain the reason for the gap in Beverly's work between June 19 and July 10.

¶ 18 About a year later, in approximately June 2014, Arlow received another complaint from a patron about the trail's condition near the Shedd Aquarium. After viewing the condition, Arlow determined it was "[s]imilar but not as severe as where the accident occurred." Arlow had the crack filled by in-house laborers.

¶ 19 In May 2014, plaintiff filed a complaint against the Park District, alleging it engaged in willful and wanton conduct by failing to repair the defect.[4] The Park District filed an answer, claiming its conduct was not willful or wanton. The Park District also filed an affirmative defense, asserting it was entitled to absolute immunity under section 3-107(a) of the Act.

¶ 20 In May 2015, the Park District filed a motion for summary judgment arguing, *inter alia*, that it was entitled to absolute immunity under section 3-107(a) of the Act because the Lakefront Trail was an "access road" to fishing, hunting, recreational, and scenic areas. The Park District further argued that even if it was not entitled to immunity under section 3-107(a) of the Act, it was entitled to immunity under section 3-106 of the Act because its conduct was not willful and wanton.

[4] Plaintiff also named the City of Chicago as a defendant. However, after the Chicago Park District admitted ownership and maintenance responsibilities for the Lakefront Trail, the City filed a motion to dismiss, which the trial court granted.

¶ 21 In July 2015, the trial court granted the Park District's motion for summary judgment, finding the Park District was immune under section 3-107(a) of the Act because the Lakefront Trail was the type of road envisioned by that portion of the statute. The court also found that, even if section 3-107(a) of the Act did not apply, plaintiff failed to raise any material fact that the Park District engaged in willful and wanton conduct. The court found plaintiff's allegations of utter indifference to or conscious disregard for the safety of others were meritless, as the Park District took affirmative steps to correct the defect after learning of it.

¶ 22 In August 2015, plaintiff filed a motion to reconsider, which the trial court denied. This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, plaintiff argues the trial court erred by (1) finding the Lakefront Trail fell within section 3-107(a) of the Act, (2) finding section 3-107(a) of the Act governed instead of section 3-106, and (3) finding as a matter of law that the jury could never find the Park District's conduct to be willful and wanton. We address plaintiff's arguments in turn.

¶ 25 A. Absolute Immunity Under Section 3-107(a) of the Act

¶ 26 Plaintiff first alleges the trial court erred by finding the Park District was immune from liability under section 3-107(a) of the Act. Specifically, plaintiff contends section 3-107(a) applies only to roads providing access to primitive recreational and scenic areas. Plaintiff observes the Lakefront Trail is a paved, non-primitive, linear park surrounded by developed, commercial areas. Plaintiff maintains that in finding the Lakefront Trail fell within section 3-107(a), the court ignored Illinois rules of statutory construction, case law, and public policy concerns associated with granting the Park District absolute immunity.

¶ 27 In interpreting section 3-107(a) of the Act, our primary objective is "to ascertain and give effect to the intent of the legislature." (Internal quotation marks omitted.) *Brunton v. Kruger*, 2015 IL 117663, ¶ 24. The best reflection of the legislature's intent is the statute's language, which we give its plain and ordinary meaning. *Id.* Words and phrases in a statute must be interpreted in light of other relevant statutory provisions and the statute as a whole, rather than in isolation. *County of Du Page v. Illinois Labor Relations Board*, 231 Ill. 2d 593, 604 (2008). We may also consider the purpose of the law and the consequences that would result in interpreting the statute one way or the other. *Id.* We presume the legislature did not intend absurdity, inconvenience, or injustice. *Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007).

¶ 28 "A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different ways." (Internal quotation marks omitted.) *Brunton*, 2015 IL 117663, ¶ 24. Where statutory language is unclear or ambiguous, we may employ extrinsic aids of interpretation. *Id.* One such aid is the doctrine of *in pari materia*, pursuant to which we construe two statutes dealing with the same subject "so that they may be given harmonious effect." (Internal quotation marks omitted.) *Collinsville Community Unit School District No. 10 v. Regional Board of School Trustees of St. Clair County*, 218 Ill. 2d 175, 185 (2006). However, this rule is subordinate to the "cardinal rule" of statutory construction that we must ascertain and give effect to the legislature's intent. *Id.* at 186. Where a statute within the Act contains an ambiguity, the statute will be strictly construed against the public entity because the Act's immunities "are in derogation of the common law." *McElroy v. Forest Preserve District*, 384 Ill. App. 3d 662, 666 (2008). Statutory interpretation involves a question of law and accordingly, our standard of review is *de novo*. *Brunton*, 2015 IL 117663, ¶ 24.

¶ 29 Section 3-107(a) of the Act provides that a local public entity is not liable for an injury caused by a condition of "[a]ny road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway." 745 ILCS 10/3-107(a) (West 2012).

¶ 30 The dispute in this case centers in part on the legislature's use of the word "primitive." Plaintiff argues that "primitive" modifies "camping," "recreational," and "scenic" and thus, section 3-107(a) grants absolute immunity only for injuries occurring on roads that provide access to "primitive" camping areas, "primitive" recreational areas, and "primitive" scenic areas. The Park District, by contrast, maintains that the word "primitive" applies solely to "camping" and not to "recreational" or "scenic" areas. The parties also dispute whether the Lakefront Trail is an "access road" within the meaning of the statute. Plaintiff contends the trail itself is recreational property that falls within section 3-106 of the Act and thus, it is not an "access road" to recreational or scenic areas.[5] In addition, plaintiff posits, the Lakefront Trail is not a "road."

¶ 31 In finding section 3-107(a) applied to the Lakefront Trail, the trial court relied on the decision in *Scott v. Rockford Park District*, 263 Ill. App. 3d 853 (1994). There, a child was injured while riding his bike over a bridge that provided access to a public park. *Id.* at 854. The appellate court concluded the bridge fell within section 3-107(a) of the Act, despite the plaintiffs' arguments that section 3-107 applied only to wilderness areas and that the bridge was not a road providing access to fishing, hunting, or primitive camping areas, recreational, or scenic areas.

[5] As evidence of the various recreational areas to which the Lakefront Trail provided access, the Park District attached to its summary judgment motion the deposition testimony of a former Park District employee in an unrelated case. On appeal, plaintiff challenges the inclusion of such testimony. The Park District responds that plaintiff failed to challenge the testimony in the trial court and, in any event, the depositions could be used pursuant to Illinois Supreme Court Rule 212(a)(4) (eff. Jan. 1, 2011). We need not resolve this dispute because we find section 3-107(a) of the Act relates only to primitive recreational and scenic areas; accordingly, the deposition testimony as to the various non-primitive recreational activities around the Lakefront Trail is irrelevant.

Id. at 855, 858. The *Scott* court reasoned that the plain language of the statute unambiguously granted "full immunity for access roads to fishing, hunting, primitive camping areas, recreational areas, and scenic areas." *Id.* at 857. The court also stated the statute's "requirement of 'primitiveness' clearly [did] not apply to the nature of access roads but, rather, to any camping areas thereby provided access." *Id.* In reaching its decision, the court rejected the plaintiffs' assertion that because the park and bridge were covered by section 3-106 of the Act, they were not encompassed by section 3-107. *Id.* at 856. The court found the "primary distinction" the legislature intended to draw in enacting sections 3-106 and 3-107 was between, on the one hand, recreation areas (section 3-106) and, on the other hand, roads other than streets or highways used to access recreational areas, and trails (section 3-107). *Id.* at 856. The court found "no conflict in the legislature's determination that local entities should be immune from liability only for negligent actions connected with the broader category of properties covered in section 3-106 while they would receive full immunity covering the trail and access-road properties covered in section 3-107." *Id.* at 856-57. Further, the court stated, it was unaware of any clear indication that "access roads" under section 3-107(a) were only those roads "providing access to wilderness areas." *Id.* at 857.

¶ 32 The Park District argues that *Scott* should control. Plaintiff, on the other hand, recognizes the *Scott* decision but argues that in more recent cases such as *Goodwin v. Carbondale Park District*, 268 Ill. App. 3d 489 (1994), and *Brown v. Cook County Forest Preserve*, 284 Ill. App. 3d 1098 (1996), Illinois courts have found section 3-107 applies only to roads or trails in undeveloped areas. Plaintiff notes that in *Scott*, the court stated it was unaware of any indication that "access" roads were limited to roads providing access to wilderness areas. See *Scott*, 263 Ill. App. 3d at 857. Plaintiff posits that because *Scott* predated *Goodwin* and *Brown*, the *Scott* court

did not have the benefit of those decisions when determining that access roads were not limited to roads providing access to "wilderness" areas. According to plaintiff, *Scott* is the sole Illinois decision to apply section 3-107 outside of the confines of a forest preserve.

¶ 33 In *Goodwin*, the plaintiff was injured when his bicycle collided with a tree that had fallen across a paved bike path in a city park controlled by the defendant, a park district. *Goodwin*, 268 Ill. App. 3d at 490. The appellate court found the defendant was not entitled to immunity under section 3-107(b) of the Act, which immunizes a public entity from liability for injuries caused by a condition of a " 'hiking, riding, fishing or hunting trail.' " *Id.* at 491, 494 (quoting 745 ILCS 10/3-107(b) (West 1992)). Specifically, the court found the path was not a "riding trail" within the meaning of section 3-107(b) of the Act. *Id.* at 492. The court noted that although sections 3-106 and 3-107 of the Act both applied to recreational property, section 3-106 provided immunity only for negligence, whereas section 3-107 provided absolute immunity. *Id.* at 492-93. The *Goodwin* court then went on to consider how the property described in section 3-107(b) differed from the property described in section 3-106. *Id.* at 493. The court stated as follows.

> "Reading section 3-107 *as a whole* indicates that the property referred to therein is unimproved property which is not maintained by the local governmental body and which is in its natural condition with obvious hazards as a result of that natural condition. Thus, access roads that are not maintained as city, town, or village streets or county, State, or Federal highways or township or road district highways are included in section 3-107(a). Such roads generally would be used only for access to unimproved, undeveloped recreational areas and generally not for access to

developed city parks located within the city limits." (Emphasis added.) *Id.*

The *Goodwin* court explained that the legislature extended absolute immunity for injuries sustained on the properties specified in section 3-107(b) because of the burden that maintaining those types of properties would impose on governmental entities. *Id.* Further, the court stated, "requiring such maintenance would defeat the very purpose of these types of recreational areas, that is, the enjoyment of activities in a truly natural setting." *Id.* The *Goodwin* court distinguished *Scott* on the basis that *Scott* interpreted section 3-107(a), while its decision involved section 3-107(b). *Id.* The court also stated that to the extent its reasoning differed from the *Scott* court's reasoning, it believed the *Scott* court's reasoning was wrong. *Id.*

¶ 34 Subsequent to *Goodwin*, our court in *Brown* agreed that "paved bicycle paths which traverse developed city land" are not "riding trails" for purposes of section 3-107(b). *Brown*, 284 Ill. App. 3d at 1101. The plaintiff in *Brown* fell on a paved bike path in a forest preserve. *Id.* at 1099. Noting that "trail" was defined as a "marked path through a forest or mountainous region," the court found section 3-107(b) applied to the bike path, which was designed to provide access to natural and scenic wooded areas around a lake. (Internal quotation marks omitted.) *Id.* at 1101. The court explained that it was irrelevant whether the path was paved, as the area in which the plaintiff fell was not "developed" simply because the path on which he was riding happened to be paved. *Id.*

¶ 35 Similarly, in *Mull v. Kane County Forest Preserve District*, 337 Ill. App. 3d 589, 592 (2003), the court held a gravel bicycle path, which ran through some developed areas but was surrounded by wild grasses and shrubs, was a "trail" under section 3-107(b). The court distinguished *Goodwin* on the basis that the trail in *Goodwin* was located in a developed city

park, whereas the trail in *Mull* was "surrounded by wooded or undeveloped land" and ran "through a forest preserve." *Id.* at 592.

¶ 36 Following *Mull*, the court in *McElroy v. Forest Preserve District*, 384 Ill. App. 3d 662, 666, 669 (2008), held that a wooden bridge in a forest preserve was part of a "hiking" or "riding trail" under section 3-107(b). In doing so, the court expressed its disagreement "with *Goodwin's* contention that a trail must be 'unimproved' in order to fall under section 3-107(b)." *Id.* at 667. The court noted that *Mull* and *Brown* both involved arguably "improved trails," and that those cases distinguished *Goodwin* on the basis that the trail in *Goodwin* ran though a developed city park. *Id.*

¶ 37 After reviewing the aforementioned cases, we agree with plaintiff that the legislature could not have intended section 3-107(a) of the Act to apply to the Lakefront Trail. We recognize, as the Park District points out, that *Scott* analyzed the defendant's immunity under section 3-107(a) of the Act. By contrast, *Goodwin*, *Brown*, *Mull*, and *McElroy* each considered the defendants' immunity under section 3-107(b). Nonetheless, in light of the case law that has developed subsequent to *Scott*, we find *Scott* unpersuasive.

¶ 38 First, we disagree with the *Scott* court that the plain language of section 3-107(a) is unambiguous. See *Scott*, 263 Ill. App. 3d at 857. As previously detailed, section 3-107(a) of the Act immunizes a local public entity from liability for an injury caused by a condition of "[a]ny road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas." 745 ILCS 10/3-107(a) (West 2012). This language can reasonably be interpreted as both of the parties suggest. On the one hand, the statute can be read to provide immunity for injuries arising on roads providing access to primitive camping areas, primitive recreational areas, and primitive scenic areas. However, the statute can also be read as providing immunity for injuries

arising on roads that provide access to primitive camping, recreational areas, and scenic areas. Thus, we find the statute to be ambiguous. See *Brunton*, 2015 IL 117663, ¶ 24 (a statute is ambiguous if it can be understood by reasonably well-informed persons in two or more different ways).

¶ 39 Because section 3-107(a) is ambiguous, we may utilize the doctrine of *in pari materia* to interpret its meaning. In doing so, it is appropriate to consider section 3-107(a) *in pari materia* with section 3-107(b). See *Collinsville*, 218 Ill. 2d at 185-86 (under the doctrine of *in pari materia*, we construe two statutes dealing with the same subject so that they are given harmonious effect; the doctrine also applies to different sections of the same statute and is consistent with the rule of statutory construction that we must view all of the provisions of a statute as a whole).

¶ 40 As previously detailed, since the *Scott* decision, Illinois courts have uniformly found section 3-107(b) does not apply to trails in developed areas. See *Brown*, 284 Ill. App. 3d at 1101 (paved bike paths that traverse developed city land are not "riding trails" under section 3-107(b)); *Goodwin*, 268 Ill. App. 3d at 493-94 (a paved bike path in a developed city park is not included within section 3-107(b)); see also *Mull*, 337 Ill. App. 3d at 592 (distinguishing *Goodwin* on the basis that the trail in *Goodwin* was located in a developed city park). That section 3-107(b) has been limited to trails in undeveloped areas supports a determination that section 3-107(a) was likewise intended only to apply to access roads to undeveloped and primitive areas. Further, we note, the legislature clearly limited immunity under section 3-107(a) to access roads to "primitive" camping areas as opposed to all camping areas. It is logical to infer that the legislature likewise intended section 3-107(a) to apply only to primitive recreational and scenic areas where it listed recreational and scenic areas in the same sentence as "primitive" camping

areas. In sum, consideration of section 3-107 as a whole supports a finding that section 3-107(a) was intended only to apply to roads providing access to primitive, undeveloped recreational areas.

¶ 41 Considering section 3-107(a) *in pari materia* with section 3-106 further supports our determination. Both sections 3-106 and 3-107(a) involve recreational property; yet, section 3-106 provides immunity only for ordinary negligence, whereas section 3-107(a) provides absolute immunity. Noting this distinction, the *Goodwin* court found section 3-107 *as a whole* referred to unimproved property, which the local government did not maintain and which was "in its natural [state] with obvious hazards as a result of that natural condition." *Goodwin*, 268 Ill. App. 3d at 493. The court explained that the legislature extended absolute immunity to the property outlined in section 3-107(b) because of the burden a local governmental entity would experience in having to maintain such property in a safe condition. *Id.* Further, the *Goodwin* court explained, requiring the government to conduct maintenance on this type of property "would defeat the very purpose of these types of recreational areas, that is, the enjoyment of activities in a truly natural setting." *Id.*

¶ 42 We find the *Goodwin* court's reasoning to be logical and persuasive. By immunizing a public entity from liability for injuries occurring on the property specified in section 3-107, the legislature has, in effect, relieved public entities from the burden of having to maintain such property. See *Sites v. Cook County Forest Preserve District*, 257 Ill. App. 3d 807, 811 (1994) (inferring the statutory intent of section 3-107 "is to relieve public entities from the duty to maintain such access roads, which may be unpaved and uneven."). It makes sense that the legislature would relieve a public entity from maintaining access roads to primitive scenic and

recreational areas because maintaining those roads would defeat the purpose of the primitive property, *i.e.*, its enjoyment in its natural state. *Goodwin*, 268 Ill. App. 3d at 493.

¶ 43 In sum, we conclude section 3-107(a) of the Act applies only to access roads to primitive recreational and scenic areas and does not apply to the Lakefront Trail. Based on our finding, we need not consider plaintiff's alternative arguments, *i.e.*, that the Lakefront Trail was not a "road" and that it did not provide "access." We also need not address plaintiff's argument that a conflict exists between sections 3-106 and 3-107(a) of the Act given our finding that section 3-107(a) of the Act does not apply.

¶ 44 B. Immunity for Willful and Wanton Conduct Under Section 3-106

¶ 45 Having determined that section 3-107(a) does not apply to the Lakefront Trail, we must now consider whether the Park District was entitled to summary judgment based on section 3-106 of the Act, which provides immunity against negligent conduct but not willful and wanton conduct. 745 ILCS 10/3-106 (West 2012). Plaintiff argues the trial court erred by finding no genuine issue of material fact existed that the Park District engaged in willful and wanton conduct. He posits the Park District acted willfully and wantonly in its maintenance of the Lakefront Trail or, at the very least, a genuine issue of material fact exists as to whether the Park District was willful and wanton.

¶ 46 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Seymour v. Collins*, 2015 IL 118432, ¶ 42. "The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine

issue of material fact exists." *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14. We review the trial court's decision to grant summary judgment *de novo*. *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 43.

¶ 47 The Act defines "willful and wanton conduct" as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2012). "Whether a person is guilty of willful and wanton conduct is a question of fact for the jury and should rarely be ruled upon as a matter of law." (Internal quotation marks omitted.) *Robles v. City of Chicago*, 2014 IL App (1st) 131599, ¶ 17. However, "a court may hold as a matter of law that a public employee's actions did not amount to willful and wanton conduct when no other contrary conclusion can be drawn." (Internal quotation marks omitted.) *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 10. In deciding whether a willful and wanton conduct charge should have been submitted to the jury, neither the trial court nor our court may resolve conflicts in the evidence or decide the weight to be given the evidence or the relative credibility of the witnesses. *Robles*, 2014 IL App (1st) 131599, ¶ 17.

¶ 48 Initially, we note, the Park District characterizes the "willful and wanton" standard as "a high standard of culpability" that approaches "the degree of blame associated with intentional harm." Plaintiff challenges the Park District's characterization. The parties' dispute in this regard stems from the legislature's 1998 amendment to section 1-210, in which it added the following language to the statute without modifying the definition of willful and wanton conduct: "[t]his definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." Pub. Act. 90-805, § 5 (eff. Dec. 2, 1998) (amending 745 ILCS 10/1-210).

¶ 49 Plaintiff argues the legislature's amendment did not impose a heightened willful and wanton standard, citing to *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007), and *Harris v. Thompson*, 2012 IL 112525. However, the Park District insists that plaintiff's reliance on *Murray* is misplaced because the *Murray* court expressly declined to review the legislative intent of the 1998 amendment. See *Murray*, 224 Ill. 2d at 242-43. The Park District cites to *Thurman*, in which the appellate court stated the legislature used "strong language" in defining willful and wanton conduct and found the statutory definition of willful and wanton applied "to the exclusion of inconsistent common-law definitions." *Thurman*, 2011 IL App (4th) 101024, ¶ 13. The Park District also relies on hearing transcripts from the General Assembly pertaining to the 1998 amendment. Based on these transcripts and *Thurman*, the Park District argues the definition of "willful and wanton" in section 1-210 of the Act does impose a high standard of culpability under the law.

¶ 50 We need not resolve the dispute between the parties regarding the Park District's characterization of the willful and wanton standard because, fundamentally, the parties agree that the definition governing plaintiff's claim is the statutory definition set forth in section 1-210 of the Act. In other words, the parties agree that whether the Park District was willful and wanton turns on whether the Park District acted with utter indifference to or conscious disregard for the safety of patrons. Accordingly, this is the definition we will utilize in determining the propriety of the court's decision to grant summary judgment, and we need not determine whether the Park District's characterization of this standard as a "high standard" is correct. See *Barr v. Cunningham*, 2016 IL App (1st) 150437, ¶ 16 (although the defendants challenged the plaintiff's citation to a supreme court case, the plaintiff cited that case only for the proposition that willful and wanton conduct existed on a continuum; ultimately, the parties agreed that the overarching

issue was whether the plaintiff "acted with conscious disregard for the safety of the others" (internal quotation marks omitted) and thus, both parties agreed the defendants' actions should be measured against the Act's definition of willful and wanton).

¶ 51 We turn then to whether the trial court properly granted summary judgment. Plaintiff argues the court erred because the evidence shows the Park District was willful and wanton, or a genuine issue of fact exists as to whether it was willful and wanton. Plaintiff posits that after learning of the defect, the Park District did not repair it until July, even though it had the ability to conduct an emergency repair. Further, plaintiff observes, the Park District did not barricade the gap or mark it with paint. The Park District responds that the facts in this case do not in any way show it was willful and wanton where, upon learning of the defect, it immediately engaged in efforts to repair the crack.

¶ 52 In *Palmer v. Chicago Park District*, 277 Ill. App. 3d 282, 284 (1995), the plaintiff alleged that he injured himself when his leg became caught in a large portion of wire mesh fence that had fallen in a playlot and had been lying on its side for three months. *Id.* The court found the plaintiff stated a cause of action for willful and wanton misconduct where he pled that the defendant knew or should have known about the fence and took "no corrective action to repair or warn about" it. *Id.* at 288-89.

¶ 53 On the other hand, in *Lester v. Chicago Park District*, 159 Ill. App. 3d 1054, 1055, 1060 (1987), the court found the plaintiff failed to set forth a claim of willful and wanton conduct where the plaintiff alleged the Park District caused ruts and holes in a softball field and refilled them with improper materials. The court agreed with the Park District that the Park District's rehabilitative acts of filling in the holes and ruts "indicated a concern for possible injuries" and did not amount to "utter indifference" or "conscious disregard" for the safety of patrons' lives.

Id. at 1059. The court explained that to equate the Park District's actions of discovering the condition and "taking affirmative rehabilitative acts after such discovery in an attempt to remedy the problem with willful and wanton conduct would render that standard synonymous with ordinary negligence." *Id.*

¶ 54 Here, there is no dispute that the Park District knew of the defect prior to plaintiff's injury, although the parties dispute the exact date on which the Park District learned of the crack. Our review of the record shows the Park District became aware of the defect no earlier than May 2013, although it may have learned of the defect later than May 2013. Arlow testified he could "[n]ot exactly" recall when he received the patron's complaint regarding the defect but he knew it was during the spring. Arlow then testified there was no snow on the ground when he received the call and thus "[i]t had to be later than April." Gernady testified that he received Arlow's call regarding the complaint in the spring of 2013. When asked in what month, Gernady stated in the "time zone of June." We note that plaintiff suggests the Park District also knew of the defect based on Gernady's annual spring inspection; however, plaintiff has not cited to any portion of the record establishing that Gernady noticed the defect during his inspection or that the defect existed at that time.

¶ 55 Turning to the actions of the Park District after learning of the defect, we agree with plaintiff that whether the Park District was willful and wanton is an issue of fact. We note the Park District did take *some* action to repair the defect. After receiving the patron's call, Arlow inspected the defect and contacted Gernady, who included it in the scope of repairs to be submitted for bid to the rapid response contractors. The defect was repaired through the rapid response process on July 10. On the other hand, however, Rejman testified the rapid response system is to be used only for jobs that do not present safety concerns, but the defect in this case

was classified as an emergency—the sole 2013 Lakefront Trail repair to be classified as such. Further, the evidence showed the Park District had methods by which to expedite the repair process, such as immediately contacting a contractor or alerting the contractor that a repair is urgent. Arlow also testified that a defect less severe was repaired in 2014 by in-house laborers. Notably, the evidence also showed that while the rapid repair process was taking place, the Park District did not engage in any efforts to barricade, mark, or otherwise warn patrons of the defect. See *Palmer*, 277 Ill. App. 3d at 289 (finding the plaintiff alleged willful and wanton conduct where the plaintiff alleged the defendant took no corrective action to repair or warn about the fence).

¶ 56 In light of all of the foregoing, it was inappropriate for the trial court to hold as a matter of law that the Park District was not willful and wanton. See *Thurman*, 2011 IL App (4th) 101024, ¶ 10 (a court may hold as a matter of law that a public employee's actions did not amount to willful and wanton conduct only where "no other contrary conclusion can be drawn" (internal quotation marks omitted)). Instead, whether the Park District's actions amounted to willful and wanton misconduct is a question of fact. It is for the trier of fact to consider the efforts the Park District made to repair the defect and evaluate whether those efforts demonstrated utter indifference to or conscious disregard for patrons' safety in light of the evidence that the Park District failed to warn patrons of the defect, barricade the defect, or expedite the repair process, despite the defect having been recognized as dangerous and in need of emergency repair. Accordingly, the trial court improperly granted summary judgment.

¶ 57 Plaintiff's reliance on *Lester* does not convince us otherwise. The plaintiff in *Lester* alleged that he was injured because the Park District repaired a defect but did so improperly. See

Lester, 159 Ill. App. 3d at 1055-56. By contrast, here, the plaintiff was injured because the Park District had not yet repaired the defect.

¶ 58 In sum, we conclude the trial court erred by granting summary judgment.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 61 Reversed and remanded.

CORRECTED

No. 1-15-2889 2016 DEC 12 PM 2:51

ISAAC COHEN, Plaintiff-Appellant, v. CHICAGO PARK DISTRICT, Defendant-Appellee.	) Appeal from the Circuit Court) of Cook County.)))) No. 14 L 5476))) The Honorable) William E. Gomolinski,) Judge presiding.

ORDER

This cause coming on to be heard on defendant-appellee's petition for rehearing, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the petition for rehearing is denied.

DATED: _____

JUSTICE

JUSTICE

JUSTICE

ORDER ENTERED
DEC 07 2016
APPELLATE COURT, FIRST DISTRICT

2017 APR -3 AM 11:31

SUPREME COURT OF ILLINOIS

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March 29, 2017

In re: Isaac Cohen, Appellee, v. Chicago Park District, Appellant.
Appeal, Appellate Court, First District.
121800

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

SUPREME COURT OF ILLINOIS

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CAROLYN TAFT GROSBOLL
Clerk of the Court

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May 08, 2017

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In re: Cohen v. Chicago Park District
121800

Today the following order was entered in the captioned case:

Motion by Appellee to dismiss appeal for want of jurisdiction. Denied.

Order entered by the Court.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: George Peter Smyrniotis ✓
Jill Bernstein Lewis

TABLE OF CONTENTS TO THE RECORD ON APPEAL [1]

TABLE OF CONTENTS TO THE COMMON LAW RECORD [2]

[1] The Record on Appeal consists of three (3) volumes of the Common Law Record (cited to as "C"), one (1) volume of the Report of Proceedings (cited to as "R"), and two (2) supplemental volumes of the Common Law Record (cited to as "Supp. C").

[2] The Common Law Record consists of three (3) volumes and is cited to as "C" in the Park District's Brief.

TABLE OF CONTENTS TO THE RECORD ON APPEAL

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[3] The Park District's Motion for Summary Judgment is found in the Supplemental Record. Supp. C-6 to Supp. C-286

TABLE OF CONTENTS TO THE REPORT OF PROCEEDINGS [4]

[4] The Report of Proceedings consists of one (1) volume and is cited to as "R" in the Park District's Brief.

TABLE OF CONTENTS TO THE SUPPLEMENTAL RECORD [5]

[5] The Supplemental Record consists of two (2) volumes and is cited to as "Supp. C" in the Park District's Brief.