No. 122486

IN THE
SUPREME COURT OF ILLINOIS

BARBARA MONSON,	)	Appeal from the Appellate Court
	)	of Illinois, Fourth District,
Plaintiff-Appellant,	)	No. 4-16-0593.
	)	
vs.	)	There Heard on Appeal from
	)	the Fifth Judicial District,
CITY OF DANVILLE, a Home	)	Vermilion County, Illinois,
Rule municipality,	)	No. 13 L 71
	)	Honorable Nancy S. Fahey, Presiding
Defendant-Appellee.	)	

BRIEF *AMICUS CURIAE* OF THE TOWNSHIP OFFICIALS OF ILLINOIS RISK MANAGEMENT ASSOCIATION

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BARBARA MONSON, Plaintiff-Appellant, vs. CITY OF DANVILLE, a Home Rule municipality, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Fourth District, No. 4-16-0593. There Heard on Appeal from the Fifth Judicial District, Vermilion County, Illinois, No. 13 L 71 Honorable Nancy S. Fahey, Presiding

BRIEF *AMICUS CURIAE* OF THE TOWNSHIPS OF ILLINOIS RISK MANAGEMENT ASSOCIATION

POINTS AND AUTHORITIES

Argument

§3-102 of the Tort Immunity Act Does Not Describe An Immunity

The Appellate Court's Ruling Will Not Eviscerate Premises Liability Claims Against Local Public Entities

ARGUMENT

May It Please The Court:

Plaintiff's argument to this Court, as well as that of her supporting *amicus*, the Illinois Trial Lawyers Association, proposes that under no circumstance can a governmental entity or a governmental employee protected generally by the Tort Immunity Act have any immunized discretion to make a decision that affects the condition of any publicly owned property. Plaintiff and her *amicus* insist that all maintenance duties are ministerial and even argue that sustaining the appellate court's ruling will completely eliminate the right of an injured party to recover in a premises liability case. The scope and effect of the appellate court's ruling is far narrower than proposed.

As an *amicus* the focus of this brief will be somewhat broad in scope to address concerns that may extend beyond the parties, and so limited comments are offered here directly responsive to the detailed arguments in Plaintiff's brief, as surely the Defendant's brief will take up the arguments on a point-by point basis.

§3-102 of the Tort Immunity Act Does Not Describe An Immunity

Plaintiff insists that §3-102 describes an immunity in order to try to set up a conflict with §2-102 discretionary immunity. §3-102(b) describes the nature of evidence relevant to constructive notice which, absent actual notice,

is an element of any plaintiff's premises liability case; characterizing this subsection as an immunity is not supported by any authority, and for reasons addressed in detail later in this brief, there can never be an occasion when a case involving constructive notice can conflict with a discretionary decision countenanced by §2-102 for the simple reason there has to be an actual decision. *Corning v. East Oakland Township,* 283 Ill.App. 3d 765, 768 (4th Dist., 1996). As a matter of logic, there has to be actual knowledge or notice of a condition of property before someone can make a decision about it, and so the effort of Plaintiff to set up a conflict between two immunities fails.

§3-102(a) requires any plaintiff asserting a premises liability claim against a local governmental entity to prove actual or constructive notice of the existence of the alleged dangerous condition, but actual or constructive notice is part of any plaintiff's burden of proof against any property owner. See IPI Civil 120.02, whose Notes on Use observe the same duty instruction is to be given whether the landowner is private or a local public entity; also see IPI Civil 120.08, the "issues" instruction, which applies equally to private and public landowners and includes as an element of the plaintiff's case proof the defendant had actual or constructive notice, and see IPI Civil 140.00, which the Committee's Comment notes it has withdrawn because the Committee concluded no special instructions were merited for claims against local public entities.

Considered in this light, it is evident that Article III of the Tort Immunity Act is properly viewed as starting with a general statement of duty in §3-102 (§3-101 being a non-substantive definitions section), *Village of Bloomingdale v CDG Enterprises, Inc.*, 196 Ill.2d 484, 490 (2001). Following are sections that modify the general duty based either on the character of the property or the use of the property.

Plaintiff contends that *Murray v Chicago Youth Center*, 224 Ill.2d 213 (2007) is controlling because of its recognition there may be a more specific immunity section of the Act that controls over §2-201 discretionary immunity; however, this Court in *Murray* was comparing two immunity sections of the Act, and for the reasons noted above, §3-102 is not an immunity section. The appellate court correctly concluded that the discretionary immunity of §2-201 can apply to Article III as well as other substantive Articles of the Act.

The interpretation of a statute should always be considered in light of the legislative intention, *U.S. Bank National Association v. Clark*, 216 Ill.2d 334, 346 (2005). The Tort Immunity Act is intended to protect local public entities and public employees from liability arising from the operation of government. 745 ILCS 10/1-101.1(a). Plainly stated, the purpose of the Act is to prevent dissipation of public funds on damage awards in tort cases. *Van Meter v. Darien Park District*, 207 Ill.2d 359, 368 (2003); *Murray v. Chicago Youth Center,* 224 Ill.2d 213, 229 (2007). Plaintiff and her supporting *amicus*

ignore the fundamental intent of the Act and instead advocate for an unlimited ministerial and non-discretionary duty to maintain public property without regard to the availability of funds or other relevant resources to do so, and to pay damage awards to anyone who is or claims to have been injured by a condition of public property.

Discretionary Decisions Addressing Repair or Maintenance of Property May Be Immunized

Immunized discretion exercised in conjunction with a repair project is firmly established in this Court's jurisprudence under the Tort Immunity Act. In *In re Chicago Flood Litigation*, 176 Ill.2d 179, 194 – 195 (1997) this Court expressly recognized that even where a project has already been started (usually the trigger for the transition from a governmental to a ministerial activity), a city may nonetheless decide to change the project as a matter of discretion and retain §2-201 discretionary immunity.

> "We agree with the appellate court that the City's supervision of Great Lakes' pile driving was discretionary rather than ministerial. The cases recognize "that, depending upon the situation, what might be considered a repair can be a discretionary matter." *Kennell v. Clayton Township,* 239 Ill.App.3d 634, 641, 179 Ill.Dec. 980, 606 N.E.2d 812 (1992), citing *Lusietto,* 107 Ill.App.2d at 244, 246 N.E.2d 24. In the present case, the contract between the City and Great Lakes provided that "the contractor shall not drive the piles at any other location than that specified by the City," and authorized the City to change its specifications. Thus, the City retained the discretion to locate the pilings in any location it thought best. See *Lusietto,* 107 Ill.App.2d at 244, 246 N.E.2d 24. This was a matter within the City's discretion for which there is immunity under the Act."

The only way to distinguish *In re Chicago Flood Litigation* would be to note that the work being done by the City of Chicago was contracted to a private company, Great Lakes, whereas work on the city sidewalks could have been done directly by City of Danville employees; anyone wishing to distinguish *In re Chicago Flood Litigation* on this basis has to argue that the City of Chicago somehow acquired greater immunity under the Act by contracting with a private party than it would have if its own workers were performing the job, a legal proposition for which there is no authority whatsoever.

This Court's opinion *In re Chicago Flood Litigation,* cites on multiple occasions the appellate court's opinion in *Lusietto v. Kingan*, 107 Ill.App.2d 239 (3rd Dist., 1969). *Lusietto* involved a highway commissioner whose immunized discretionary decision was at hand:

> "The defendant's duties were not ministerial, they were governmental in character and required the exercise of discretion and judgment. With regard to holes in the highway, the defendant must exercise discretion and judgment as to which holes to fill and which holes not to fill. If the hole is to be filled, which holes are to be filled first? He must perform all of this within the limitations of available manpower, equipment and finances. It is a well-established principle of the common law that an immunity exists in favor of public officials when they are exercising their official discretion on matters that are discretionary in nature and not ministerial."

Lusietto v. Kingan, 107 Ill. App. 2d 239 at 244 (3rd Dist., 1969), which in turn was quoted favorably in *More v. Illinois*, 68 Ill. 2d 223, 233 – 234 (1977).

The foregoing language was quoted favorably in *Greeson v. Mackinaw Township*, 207 Ill. App. 3d 193, 200 (3rd Dist., 1990) *appeal denied* 139 Ill. 2d 595 (1991).

The case at bar presents undisputed evidence that the City's public works director – before Plaintiff's alleged accident - followed a thought process based on a developed policy that weighed the competing interests that are relevant to a discretionary decision. The City's motion for summary judgment was not solely based on a self-serving assertion of its public works director unsupported by other evidence, but instead was fully supported by corroborating evidence that there really in fact was a discretionary decision made with respect to the particular area of sidewalk allegedly involved in the injuries sustained by Plaintiff.

The proposal at least inferred if not articulated by Plaintiff and her *amicus* that the appellate court's ruling below will eliminate all claims against local public entities for lack of maintenance of public property because there will always be a claim of a discretionary immunity defense is vastly overstated: In order to claim discretionary immunity the local governmental entity will have to plead and prove that there was a discretionary decision deliberately and intentionally made prior to the injuries sustained by the plaintiff; it has long been recognized that discretionary immunity cannot be applied where there was no conscious decision on the topic. *Corning v. East Oakland*

Township, 283 Ill.App. 3d 765, 768 (4th Dist., 1996). Also see *Morrissey v. City of Chicago*, 344 Ill.App. 3d 251, 256 (1st Dist., 2002) wherein the appellate court concluded that the discretionary immunity of §2-201 could not apply where there was no evidence that a conscious decision was made by any city employee to fix (or not fix) a particular pothole. To state it another way, the immunity of §2-201 requires some evidence that the failure to do something was an actual decision and not just a mere oversight. *Courson v. Danville School District No. 118*, 301 Ill.App.3d 752, 757 (4th Dist., 1998).

The distinction between a discretionary (and immunized) decision on whether to perform a certain maintenance task, on the one hand, and the ministerial act of actually doing the work, on the other hand, was recognized in *Gutsein v. City of Evanston*, 402 Ill.App.3d 610, 622 (1st Dist., 2010) which involved an immunized decision by an alderman that a condition in an alley needed to be repaired and who placed the alley on a priority list for spot repairs; on the other hand, the city's employee who was to perform the repair was simply carrying out ministerial tasks, it being conceded he was not vested with discretionary decision making power. The immunized decision of the alderman required the balancing of competing interests and the making of a judgment call as to what solution will best serve each of those interests. *Gutsein v. City of Evanston*, 402 Ill.App.3d 610, 622 citing *Harinek v. 161 North Clark Street Limited Partnership*, 181 Ill.2d 335, 341 – 342 (1998).

The reality is that all local public entities have budgets; limited funds and other resources, and must make decisions balancing the competing interests for those funds and resources. What better match is there for applying discretionary immunity to the fundamental reason the Tort Immunity Act exists [to protect public funds - *Van Meter v. Darien Park District*, 207 Ill.2d 359, 368 (2003)] when there is undisputed credible evidence of a deliberate decision making process that led to a decision how and in what situations to utilize available resources to best protect the public's interest to have reasonably safe conditions on public property?

From the perspective of this *amicus*, the need cannot be overstated to have the ability to make immunized discretionary decisions on whether and when maintenance or repair work is done on public property. The vast majority of personal injury claims against townships arise from the condition of township roads. By statute, an elected public official, the highway commissioner of the relevant township (road district or consolidated road district, as the case may be 605 ILCS 5/6-101 – 5/6-106) is empowered to maintain the roads. 605 ILCS 5/6-201.7. The highway commissioner makes annual decisions of the amount of real estate tax levies, but of course " . . . subject to the limitations provided by law." 605 ILCS 5/6-201.5; see 605 ILCS 5/6-501(b); 605 ILCS 5/6-508; 605 ILCS 5/6-508.1. The highway commissioner's discretion is shared with others, as he is required to obtain the

approval of the county superintendent of highway and the Illinois Department of Transportation before spending the motor fuel tax allocation from the Department. 605 ILCS 5/6-701.2. The highway commissioner has the express statutory authority to cause a levy of real estate taxes for the purpose of, among other things, repairing bridges and culverts, and is authorized to accumulate the proceeds of the tax for such number of years as may be necessary to acquire the funds necessary to pay the cost. 605 ILCS 5/6-508.

The portions of the Illinois Highway Code applicable to highway commissioners directly address the repair and maintenance of roads. In certain particulars the Tort Immunity Act also addresses the repair and maintenance of roads. "The legislature is presumed to have intended statutes that relate to a single subject and that are controlled by a single policy to be consistent and harmonious. *Collins v. Board of Trustees of Firemen's Annuity and Benefit Fund*, 155 Ill.2d 103, 111 - 112 (1993). Given this principle, because the legislature gave discretion in the Illinois Highway Code to highway commissioners on the acquisition and accumulation of funds to permit performance of repair and maintenance, the discretionary immunity of §2-201 of the Tort Immunity Act must be extended to actual discrete discretionary decisions by highway commissioners discharging their duties under the Highway Code.

While much of the governmental process for township roads may be neatly packaged in the portion of the Illinois Highway Code that relates to township road districts and township highway commissioners, the same rights and powers and discretions must necessarily be attributable to the proper personnel of municipalities and other units of local government. This idea has been recognized as to an alderman of a city. *Gutsein v. City of Evanston*, 402 Ill.App.3d 610, 622 (1st Dist., 2010). The Municipal Code has perhaps hundreds of provisions that can be applicable to municipal properties, and fundamentally those provisions take up the same basic relevant factors as the Highway Code, viz., budgets; limited funds and other resources, and the allocation of the functions of government to employees who are responsible for developing and applying policies – and making decisions - that are uniquely governmental in character. See *Lusietto v. Kingan*, 107 Ill. App. 2d 239 at 244 (3rd Dist., 1969).

It might be argued that an injured individual should not be precluded by the discretionary immunity of §2-201 from having a jury decide whether a public official's express decision to allocate available resources to something other than the condition at hand which allegedly caused the injury was the right decision. The application of §2-201, it is acknowledged, does not allow an injured person the right to have a jury make that decision because the discretionary decision immunity applies even when the discretion was abused,

and so the appellate court below correctly concluded that the application of §2-201 immunity ended the inquiry. But is this fair?

The flipside of that coin is that there can be no meaningful let alone fair way for anyone to make the contrary assessment: Who is to say that the use of funds elsewhere to repair another condition did not prevent an accident at that location involving a worse injury or a series of injuries? Should a jury be permitted to decide that a decision made jointly by a highway commissioner, the county's superintendent of highways and the Illinois Department of Transportation (605 ILCS 5/6-701.2) to use available motor fuel tax resources to fix a condition elsewhere was wrong? The wisdom of a discretionary decision will always be dependent upon forecasting what is the priority and where the public's interest in being protected from potentially dangerous conditions of public property is best directed. Justice Cardozo famously noted that liability cannot be premised on ". . . the wisdom born of the event . . . " *Greene v Sibley, Lindsay & Curr Co.* 177 N.E. 416, 257 N.Y. 190, 192 (Court of Appeals of N.Y., 1931). Without immunized discretion on the part of persons in discretionary decision making positions, whether a highway commissioner, an alderman, or a public works director as in the case at bar, the floodgates of unlimited liability for local units of government for conditions of public property are truly opened without regard to the availability of funds and other resources and will result in a complete abandonment of the fundamental purpose of the Tort Immunity

Act: to prevent dissipation of public funds on damage awards in tort cases. *Murray v. Chicago Youth Center,* 224 Ill.2d 213, 229 (2007).

The Appellate Court's Ruling Will Not Eviscerate Premises Liability Claims Against Local Public Entities

The record in this case has come to this Court without any argument being preserved by Plaintiff that there is a disputed issue of fact; the sole issue presented in Plaintiff's brief to this Court is a purely legal issue of statutory interpretation. Plaintiff argues that all any local public entity has to do is to assert that an immunized discretionary decision was made, and a plaintiff's case is lost. The resolution of the issue at hand will not, as the Illinois Trial Lawyers Association's *amicus* brief claims, "impact every case against a public entity" based on premises liability. A local public entity defending a premises liability case claiming §2-201 discretionary immunity must plead the immunity as an affirmative defense. *Van Meter v. Darien Park District*, 207 Ill.2d 359, 370 (2003). In order to successfully pursue summary judgment, the defense will have to convince the trial court there is no genuine issue of material fact. 735 ILCS 5/2-1005. The record before this Court is compelling that there was an actual discretionary immunized decision made with respect to the sidewalk.

Because there must be an actual decision, (*Corning v. East Oakland Township,* 283 Ill.App. 3d 765, 768 (4th Dist., 1996), no claim involving constructive notice will be affected by the appellate court's ruling, nor will a

claim involving inadequately or poorly performed maintenance or repair. *Gutsein v. City of Evanston*, 402 Ill.App.3d 610, 622 (1st Dist., 2010).

In an effort to persuade this Court that affirming the appellate court will be the death knell for premises liability cases against local units of government, the Illinois Trial Lawyers Association's *amicus* brief claims the local entity, upon receiving notice of a condition, may intentionally do nothing and just have someone testify that there was a deliberate decision to do nothing to escape liability; Plaintiff echos this argument positing it as the public employee deciding to just "sit idly by." This is an unsupported and incredibly and utterly cynical view of our elected and managerial public employees and officials. They do not let the public coffers fill up unspent, just to avoid tort liability. They have limited budgets and resources. The inference that they do not take seriously the statutory and legal duties which they are charged with and that they do not do what can reasonably be done to try to protect the users of public property within the limits of the resources available, is more than mere hyperbole. If the defense of §2-201 is raised, the rigors of cross-examination of the relevant public employee by the plaintiff's attorney and other discovery to address whether (1) there was a deliberate decision (2) by someone who actually had discretion, and (3) made as a matter of policy, is the tool available to a plaintiff to overcome the defense.

As presented to this Court, there is no dispute in the record that the immunized decision of the City's public works director, coming as it did before Plaintiff's accident, was properly considered as a dispositive issue under §2-201. There is no dispute that his decision was in accordance with the policy at the time it was made. The trial court and the appellate court correctly concluded there was no need to consider §3-102.

CONCLUSION

The right of local public entities to be protected from liability and the dissipation of funds in the operation of government in accordance with the Tort Immunity Act is the Act's stated purpose. Given the reality of limited money available to fund public budgets, the administration of those budgets and the allocation of the money to further the public good is the very nature and definition of the "operation of government." The ability of policy making public employees to do their jobs without being second-guessed after the fact, including how and when to allocate limited funds and resources to the repair and maintenance of public property, should be upheld by this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the rule 341(d) cover, the rule 341(h)(1) statement of points and authorities, the rule 341(c) certificate of compliance and the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.

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