NO. 131420

IN THE
SUPREME COURT OF ILLINOIS

KEVIN HAASE and RILEY HAASE,	) Appeal from the Appellate Court of Illinois, Third District, No. 3-23-369
Plaintiffs-Appellants,	)
v.	) There on Appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, No. 2018-L-00012
KANKAKEE SCHOOL DISTRICT III and DARREN DAYHOFF,	) The Honorable Lindsay Parkhurst,
Defendants-Appellees.	) Judge Presiding.

AMICUS CURIAE BRIEF OF THE ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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ARGUMENT

We hope to provide important assistance to the Court by arguing points that may be deemed too far-reaching for emphasis by the plaintiffs that are intent on winning this particular case. *See Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002)(explaining why *amicus curiae* have an important and substantive role even when parties are represented by adequate counsel); *see also Hudson v. City of Chicago*, 228 Ill. 2d 462, 475 (2008)(addressing ITLA's merits arguments despite those arguments not having been developed or advanced by the litigant).

First, this Court does not have a constitutional role in solving the vexing political problem of funding our schools. Even if it did, tort immunity is ineffective public policy when insurance premiums are a minuscule portion of budgets. Especially when costs are shifted from private insurers to publicly funded social safety net programs. It is unwise to undermine the State's interest in educating its citizens by fostering a culture of dangerous unaccountability in our schools.

Second, our willful and wanton jurisprudence is in disarray, because courts often, and apparently inadvertently, apply the definition of willful and wanton misconduct that is "intentional" or "qualitatively different" as described in *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 450 (1992) without recognizing that *Burke's* reliance on the Restatement (Second) of Torts § 500 was overruled in *Ziarko v. Soo Line R. Co.*, 161 Ill. 2d 267, 276

(1994). The source of confusion is likely that what we call "unintentional willful and wanton conduct" is the same thing that other jurisdictions call "gross negligence," which is conduct that is different in degree from ordinary negligence but not in kind. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 34, at 211-213. The reason that the Restatement (Second) of Torts § 500 focuses extensively on the potential severity of injury and magnitude of risk is because these factors are necessary to infer the "quasi-intent" to do harm necessary to create a "qualitative difference" between willful and wanton conduct and ordinary negligence. Prosser at 212-213.

Courts fail to follow *Ziarko* and its progeny without justifying departure from *stare decisis* when they analyze either the quasi-intent factors of severity of injury threatened by conduct or the magnitude of risk of risk posed. These unexamined departures from *stare decisis* should be explicitly overruled to excise *Burke* from our jurisprudence and to reaffirm *Ziarko*. Moreover, this Court should caution lower courts to refrain from conflating duty and breach to articulate particularized standards of conduct as a rule of law because the right to trial by jury is foundational to our jurisprudence and constitutional democracy.

Third, while we agree with plaintiffs that the lack of conscious decision is dispositive of defendants' discretionary immunity claims; we will offer an expanded analysis that we hope will aid in the maintenance of a sound and uniform body of precedent. Our jurisprudence should not miss the forest

through the trees by failing to retain the separate "policy decision" requirement. In addition, the Legislature's intent to hold schools accountable for willfully and wantonly injuring the students entrusted to their care is demonstrated by their decisions to impose an affirmative statutory duty to maintain discipline in Section 24-24 of the School Code and to amend Section 3-108 to limit supervision immunity to ordinary negligence claims. This Court should follow *Schultz v. St. Clair County*, 2022 IL 126856 and *Moore v. Green*, 219 Ill. 2d 470, 488 (2006) in addition to *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 233 (2007) to reject the invitation to nullify this intent by immunizing the same abuse of discretion that typically differentiates willful and wanton conduct from ordinary negligence. Finally, this Court should not overlook that Section 2-201 is a vicarious immunity that neither immunizes a school district's direct liability for breach of its institutional duty to supervise students nor operates as an exclusionary rule of evidence.

I. Tort Immunity is Misguided Public Policy That Should Not Be Judicially Expanded.

The Illinois Association of School Boards' concern that this Court will impose an "unmanageable burden" is misguided because it is the Legislature that has decided to impose the burdens deemed necessary to keep students safe. *Tzakis v. Maine Township*, 2020 IL 125017, ¶ 31 (the 1970 Constitution abolished all forms of judicially created sovereign immunity). There is no occasion to question the magnitude of the burden imposed here when defendants do not contend that plaintiffs failed to establish their duty. *Harris*

v. Thompson, 2012 IL 112525, ¶¶ 23-25 (the questions of the existence of a duty and applicability of an immunity are separate). This Court should faithfully uphold its obligation to "narrowly construe" statutory immunities to "effect the least—rather than the most—change in the common law." *Murphy-Hylton v. Lieberman Mgmt. Services, Inc.*, 2016 IL 120394, ¶ 33.

If public policy is to enter the analysis, the Tort Immunity Act should not be judicially expanded because: (1) liability insurance is legally required and affordable; (2) danger always follows unaccountability; and (3) dangerous schools undermine the State's interest in educating its citizens.

A. Liability Insurance is Legally Required and Affordable.

The political problem of funding our schools is not an elephant in the room; it is a mouse. The defendant school district's insurance premium and related incidental administration costs, which includes workers' compensation claims, were only 0.96% of defendant district's nearly $65 million budget in the most recently completed fiscal year. Kankakee SD 111, *Annual State of Affairs for the Fiscal Year Ending June 30, 2023*, at 5, 24.[1]

Moreover, public funds are not spared when immunity is applied because school districts are required to carry liability insurance. 105 ILCS 5/10-22.3. Instead, private insurers receive a publicly funded windfall when costs are instead paid for by social safety net programs, such as Medicaid and

[1]https://www.ksd111.org/cms/lib/IL01904746/Centricity/Domain/29/FY%2023%20Annual%20Statement%20of%20Affairs.pdf

Social Security Disability Insurance, which are left paying the tab in many cases.

It is unlikely that tort immunity provides public benefit by lowering the cost of insurance. Market forces - not underwriting losses - drive premium cost increases. J. Robert Hunter et. al., *How the Cash-Rich Insurance Industry Fakes Crisis and Invents Social Inflation*, Consumer Fed. of Am. and Ctr. for Justice & Democracy at New York Law School, at 5 (March 2020).[2] Insurers profit through investment rather than the spread between premiums collected and losses paid. *Id.; see also* Warren E. Buffett, *Letter to Berkshire Hathaway Inc. Shareholders*, at 6 (Feb. 26, 2010)(Explaining the remarkable consistency of the investable "float" maintained between the accrual and payment of claims).[3]

Even if premiums are tangibly reduced, focusing on such a marginal portion of the budget to reduce costs is as foolish as trimming your fingernails to lose weight. Whether the marginal cost savings justify placing the burden of wrongful conduct entirely on those harmed by society's collective failure to establish and maintain safe public institutions is a debatable political question to which reasonable minds can disagree. *See Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 21 (1959) quoting *Barker v. City of Santa Fe*, 136 P.2d 480, 482 (N.M. 1943)(Finding sovereign immunity "almost incredible

[2] https://consumerfed.org/wp-content/uploads/2021/04/How-the-Cash-Rich-Insurance-Industry-Fakes-Crises-and-Invents-Social-Inflation.pdf
[3] Available at: https://www.berkshirehathaway.com/letters/2010ltr.pdf

in this modern age of social enlightenment" because it places the burden of the government's torts on those injured instead of society as a whole "where it justly belongs").

B. Danger Always Follows Unaccountability.

This Court has always recognized that a culture of unaccountability would make our schools more dangerous. *See Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors,* 2012 IL 112479, ¶ 36 ("Long ago, this court acknowledged the paramount importance of ensuring the welfare of children, and others, who are least able to protect themselves"); *see also Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 259 (2007)(explaining that applying the open and obvious rule to product liability cases involving simple products would make products more dangerous). A teacher cannot do his job if he does not know what is occurring in his class.

A multi-agency task force led by the U.S. Department of Education explains why it is important for teachers to intervene early and often.

> "When students make inevitable mistakes (e.g., incorrectly applying a math strategy, inappropriately managing stress), educators create an opportunity for them to learn and grow by calmly and privately providing specific supportive feedback that addresses the error and teaches the skills needed to be successful in the future." Office of Safe & Supportive Schs. Tech. Assistance Ctr. Collaborative, *Supporting students' social, behavioral, and academic well-being and success: Strategies for educators and school-based staff*, 5 (Fact sheet 2023).[4]

Administrators have an important role too.

[4] Available at: https://t4pacenter.ed.gov/Docs/Fact-Sheets/Supporting_Students_Educators_and_School_Staff_508.pdf

> "To effect long-lasting change, administrators should engage with the entire school community, including school faculty and staff, students, and families and caregivers. Through thoughtful connections with the school community, conversations can focus on preventing undesired behaviors from occurring by creating and sustaining a positive, supportive school climate that effectively responds to student needs. By centering approaches that support positive school climate, occurrences of behaviors that warrant disciplinary procedure can be reduced in intensity and frequency." Office of Safe & Supportive Schs. Tech. Assistance Ctr. Collaborative, *Supporting students' social, behavioral, and academic well-being and success: Strategies for school and district leaders,* 3 (Fact sheet 2023).[5]

Fostering a culture of unaccountability in the schools in which today's young children will grow up should not be taken lightly. Especially when our nation's future prosperity depends on our children's ability to learn accountability for their own actions so that they may grow into productive citizens.

C. Dangerous Schools Undermine the State's Interest in Educating its Citizens.

We fear that that the consequences of judicially created law that fosters dangerous unaccountability would spread beyond the schoolhouse gates. *Board of Education. v. Pico*, 457 U.S. 853, 876 (1982)("the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs"). Parents cannot be expected to send their children to public schools if they become more dangerous and ineffective. Those more fortunate may choose to send their children to private schools with the predictable political unwillingness to fund public schools to follow. Those less fortunate may choose to give up on education altogether. It is foolish to dismiss the potential

[5] Available at: https://t4pacenter.ed.gov/Docs/Fact-Sheets/Supporting_Students_School_and_District_Leaders_508.pdf

consequences of undermining an institution that binds our citizens through common experience and interest.

II. Plaintiffs Are Not Required to Prove a Likelihood of Injury Sufficient to Infer Quasi-Intent to Injure Because Our Definition of Willful and Wanton Conduct Contemplates a Difference in Degree as Opposed to a Difference in Kind.

Plaintiffs are not required to prove that their injury was likely or expected to create a question of fact regarding willful and wanton conduct because: (1) *Ziarko, Poole*, and *Murray* confirm that Illinois' definition of willful and wanton conduct is consistent with Prosser's definition of "gross negligence"; (2) courts usurp a jury's role when they conflate duty and breach to articulate particularized standards of conduct as a rule of law; (3) *Barr*, *Harris*, and *Cohen* are entitled to no deference because they failed to follow *Ziarko, Poole,* and *Murray* without justifying departure from *stare decisis*; and (4) cases requiring proof of quasi-intent to injure should be overruled to excise *Burke*'s overruled reliance upon the Restatement from our jurisprudence.

A. *Ziarko, Poole* and *Murray* Confirm that Our Definition of Willful and Wanton Conduct is Consistent with Prosser's Definition of "Gross Negligence."

The source of our muddled jurisprudence is likely that what we call "willful and wanton conduct" is the same thing that other jurisdictions call "gross negligence." *See* Prosser at 211-213. Prosser describes "gross negligence" as "the failure to exercise even that care which a careless person would use" or "such utter lack of all care." *Id.* at 211-12. Prosser's "gross negligence" is the standard that "differs from ordinary negligence only in degree, and not in kind"

and is what this Court has adopted as its definition of willful and wanton conduct. *Compare id. with Poole v. City of Rolling Meadows*, 167 Ill. 2d 41, 47-49 (1995), *Ziarko*, 161 Ill. 2d at 276, *American Nat. Bank & Trust Co. v. City of Chicago*, 192 Ill. 2d 274, 286 (2000), *and Murray*, 224 Ill. 2d at 235.

> "In *Ziarko*, we recognized that the label 'willful and wanton misconduct" has developed in this State as a hybrid between acts considered negligent and those found to be intentionally tortious. 'Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be only degrees less than intentional wrongdoing.'" *Poole*, 167 Ill. 2d at 48 quoting *Ziarko*, 161 Ill. 2d at 275-76.

Conversely, Prosser explains willful and wanton/reckless conduct in a manner consistent with *Burke*, 148 Ill. 2d at 450 ("[w]e subscribe to the Restatement's view that there is a qualitative difference between negligence and willful and wanton conduct").

> "The usual meaning assigned to 'willful,' 'wanton,' or 'reckless,' according to taste as to the word used, is that the actor has *intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow,* and which thus is usually accompanied by a conscious indifference to the consequences. Since, however, it is almost never admitted, and can be proved only by the conduct and circumstances, an objective standard must of necessity in practice be applied…The result is that 'willful,' 'wanton,' or 'reckless' conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. As a result, there is often no clear distinction at all between such conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated from of negligence, *differing in quality rather than in degree from ordinary lack of care*." Prosser at 213-14 (emphasis added).

The Restatement requires "easily perceptible danger of death or substantial physical harm" and a probability of harm "substantially greater than is

required for ordinary negligence" because these factors are objectively required for the "quasi-intent" to be inferred based on the objective facts necessary to meet Prosser's definition of conduct different in kind. *Compare id.* at 212-13 *with* Restatement (Second) of Torts § 500, comment a, at 590 (1965).

Our courts routinely and erroneously require plaintiffs to prove the facts that establish what we call "intentional willful and wanton conduct" by focusing on the severity of injury and degree of danger factors that are required to prove quasi-intent to injure, but that are irrelevant to a "gross negligence" analysis. *See e.g. Barr v. Cunningham*, 2017 IL 120751, ¶ 20 citing *Burke*, 148 Ill. 2d at 449 (quoting the Restatement to support proposition that willful and wanton conduct requires, in part, a failure to act after "knowledge of impending danger"); *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 31 (actual knowledge of risk insufficient because it was not "extraordinary and unusual"); *Oravek v. Community School District 146*, 264 Ill. App. 3d 895, 900 (1992)(willful and wanton conduct must "shock the conscience" and is "qualitatively different"); *Harris*, 2012 IL 112525, ¶ 45 (citing to cases applying Restatement standard without recognizing the conflation of terms); *Toller v. Plainfield School District 202*, 221 Ill. App. 3d 554, 558 (1991)(applying "high probability of serious physical harm" standard); *Leja v. Community Unit School District 300*, 2012 IL App (2d) 120156, ¶11 (requiring knowledge that conduct will "naturally and probably result in injury").

B. Courts Usurp a Jury's Role When They Conflate Duty and Breach to Articulate Particularized Standards of Conduct as a Rule of Law.

It is unwise to attempt to define the undefinable difference between degrees of fault through bright line rules that cause further mischief by imposing unworkable standards. *Ziarko*, 161 Ill. 2d at 276 (a "hard and thin line definition should not be attempted"); *see also Kirwan v. Lincolnshire-Riverwoods Fire Prot. Dist.*, 249 Ill. App. 3d 150, 157 (2004)("while there is a distinction between negligent conduct and that which is willful and wanton, the distinction is not necessarily a great one"). Importantly, while "gross negligence" and the *Burke* intentional form of "willful and wanton" conduct "tend to merge" in cases involving extremely dangerous conduct, Prosser is clear that the distinction between ordinary negligence and gross negligence at the other end of the spectrum is a question of fact.

> "The prevailing rule in most situations is that there are no 'degrees' of care or negligence; there are only different amounts of care, *as a matter of fact*." Prosser at 210-11 (emphasis added).

Nearly a century ago, Justice Cardozo wisely explained why the conduct required to comply with a litigant's duty in a specific situation should be considered a question of fact in a landmark decision that is foundational to American jurisprudence: *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934). Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence From Cardozo and Posner Torts Opinions*, 62 Fla. L. Rev. 667, 673-81

(2010)(describing *Pokora* as an opinion "outlining the relation between judges and juries and establishing the appeal of standards over rules").

In *Pokora*, 292 U.S. at 105, the Supreme Court reversed a lower court's judgment that the plaintiff committed contributory negligence as a matter of law. The overruled lower court relied upon Justice Holmes' opinion in *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66, 70 (1927), which announced that the care required of motorists approaching rail crossing was clear and better handled by judges than juries. Cunningham, 62 Fla. L. Rev. at 673. Justice Cardozo disagreed after providing a series of hypotheticals that demonstrated "the need for caution in framing standards of behavior that amount to rules of law." *Pokora*, 292 U.S. at 105. Rather, the particularized conduct required by a specific situation is "for the judgment of a jury" that is in a better position to rely upon their "everyday experience." *See id.* at 104-06.

In *Ney v. Yellow Cab. Co.*, 2 Ill. 2d 74, 81-84 (1954), this Court employed remarkably similar reasoning to hold that statutory violations are *prima facie* evidence of negligence rather than negligence *per se*. This is why it is error to conflate the concepts of duty and breach by using "the term duty to state conclusions about the facts of particular cases, not as a general standard." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 443 (2006) citing 1 D. Dobbs, Torts § 226, at 577 (2001).

Courts erroneously decide a question of fact when they take it upon themselves to declare conduct as "merely negligent" under the guise of a duty

analysis. *Compare* Prosser at 210-11 *with Clay v. Chicago Board of Education*, 22 Ill. App. 3d 437, 441 (1974)(weighing "tremendous burdens" that would be imposed when duty not at issue); *Castaneda v. Community Unit Sch. Dist. No. 200*, 268 Ill. App. 3d 99, 105-06 (1994)(same); *see also Pomaro v. Community Consolidated School District 21*, 278 Ill. App. 3d 266, 269 (1995)(interpreting *Ziarko* as providing discretion to the "*court* or jury" to decide whether conduct was willful and wanton)(emphasis added); *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 303 (2010)(Creating bright line evidentiary rule by finding that awareness of danger would not be sufficient because defendants did not intentionally remove safety device or protect some persons and not others).

It is unwise for courts to claim a monopoly upon common sense because it deprives our judicial system the flexibility necessary to administer justice based on the merits of the case before it and not bright line rules that fail to account for the contingencies of tomorrow. *See Ney*, 2 Ill. 2d at 81 (extolling benefit of common law's ability to adapt to "changing times and mores").

Here, Dayhoff's "work email" excuse for not supervising the students he was being paid to supervise is no different from the "multitasking at the time" excuse rejected in *McQueen v. Green,* 2022 IL 126666, ¶ 53. The question of whether Dayhoff displayed an utter indifference to the safety of his class when it would have easy to pull Student A aside to talk to him about his attention seeking behavior is for the taxpayers of Kankakee County to answer as jurors.

C. *Barr*, *Harris*, and *Cohen* Are Entitled to No Deference Because They Failed to Follow *Ziarko* and *Poole* Without Justifying Their Departure from *Stare Decisis*.

Barr, Harris, and *Cohen* should be overruled because: (1) the Tort Immunity Act codifies the *Ziarko* definition of willful and wanton conduct; (2) this Court fails to accurately assess circumstantial evidence or constructive knowledge when it applies the Restatement without discussing *Ziarko* or *Poole*; (3) taking "some precautions" often disproves a subjective quasi-intent to injure but should not be an absolute defense when proving intent is not required; (4) obviousness and prior injuries should not be the only allowable evidence of knowledge; and (5) limiting willful and wanton conduct to severe injury cases or conduct that could cause serious injuries would be unconstitutional.

1. The Tort Immunity Act Codifies the *Ziarko* Definition of Willful and Wanton Conduct.

This Court has held that Section 1-210 sets forth the *Ziarko* and *Poole* definition of willful and wanton conduct and defendants do not contend otherwise. *Murray*, 224 Ill. 2d at 235. The Legislature amended Section 1-210 in 1998 at the same time a willful and wanton conduct exception was added to Section 3-108 and clearly intended for its definition to set forth the common law definition as described in *Poole*, 167 Ill. 2d at 47-49 shortly before it was passed. *Compare* P.A. 90-805, § 5, eff. 12-2-88 *with Thomas v. Khoury*, 2021 IL 126074, ¶ 14 ("A statute in derogation of the common law is strictly construed,

meaning that common-law principles will not be deemed abrogated by the statute unless that abrogation is clearly stated").

Even if it did not, the Legislature has acquiesced to *Murray*, 224 Ill. 2d at 235 through multiple amendments. *See e.g.* P.A. 99-461, eff. 1-1-17 (amending 745 ILCS 10/2-302); P.A. 98-557, eff. 1-1-14 (amending 745 ILCS 10/4-106); P.A. 97-589, eff. 1-1-12 (amending 745 ILCS 10/6-101); P.A. 99-922, eff. 1-17-17 (amending 745 ILCS 10/9-107). The Legislature should not be deemed to be aware of the failure to follow long standing law in *Barr*, *Cohen*, and *Harris* when this Court would have discussed *stare decisis* if it intended to overrule *Murray*, *Ziarko*, and *Poole*.

This Court should be mindful that resurrecting *Burke* will have far-reaching implications. For example, plaintiffs in cases like *Givens v. City of Chicago*, 2023 IL 127837, ¶¶ 72-73 will be entitled to favorable verdicts when they otherwise would not be because it cannot be (or at least should not be) that plaintiffs are required to prove conduct different in kind but are also subject to comparative negligence reductions. *Burke*, 148 Ill. 2d at 443.

Decisions applying the rejected Restatement definition should be overruled and are not entitled to deference because *stare decisis* applies only to questions "deliberately examined and decided." *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 102. The inadvertent failure to follow precedent is the erratic change in law *stare decisis* is intended to avoid. *Id.* at ¶ 103 ("any departure from *stare decisis* must be specially justified").

> "When a thing is wrong, it is wrong. The longer we wait to right this wrong…the more difficult it will be to rectify the error, embedded in the case law through usage." *Hayes v. Mercy Hospital & Medical Center*, 136 Ill. 2d 450, 495-96 (1990)(Calvo, J. dissenting, joined by Ward and Clark, JJ.)

Failing to explicitly overrule *Burke* and its progeny that continue to apply the rejected Restatement definition of willful and wanton conduct will degrade the rule of law and create a precedent for future courts to freely disregard today's decisions.

2. This Court Fails to Accurately Assess Circumstantial Evidence or Constructive Knowledge When It Applies the Restatement Without Discussing *Ziarko* and *Poole*.

This Court errs when it ignores constructive knowledge evidence by applying the Restatement's intent to harm factors when they are not at issue. *See e.g. Barr,* 2017 IL 120751, ¶¶4-5; *Harris*, 2012 IL 112525, ¶45. Proof of constructive knowledge is sufficient to establish willful and wanton conduct. *Murray,* 224 Ill. 2d at 236-241 quoting *Ziarko*, 161 Ill. 2d at 274 (willful and wanton conduct includes a "failure to discover the danger through… carelessness when it could have been discovered by the exercise of ordinary care'"); *see also Palmer v. Chicago Park District*, 277 Ill. App. 3d 282, 288-89 (1995)(a park district's conduct could be willful and wanton when it was alleged that defendant knew or should have known of the dangers posed by the fallen fence and failed to implement remedial measures). Moreover, constructive knowledge may be proven by circumstantial evidence. *Heider v. DJG Pizza, Inc.*, 2019 IL App (1st) 181173, ¶¶ 38-39; *see also Cruz v. Costco Wholesale*

Corp., 24-1843, 7 (7th Cir. 2025)(Rejecting trial court's conclusion that plaintiff could not establish constructive notice because "all [she] established is an absence of evidence.")(applying Illinois law).[6]

Accordingly, a question of fact usually exists when courts apply the right standard because teachers should always perform basic safety due diligence. *See e.g. Landers v. School District No. 203*, 66 Ill. App. 3d 78, 83 (1978)(utter indifference to safety shown despite subjective failure to appreciate the severity of the risk); *Manuel v. Red Hill Community School District No. 10 Board of Education*, 324 Ill. App. 3d 279, 290 (2001)(allegation that defendant knew that the stairs it directed a student to use were "slippery" was sufficient to establish knowledge of danger); *Peters v. Herrin Community School District No. 4*, 401 Ill. App. 3d 356, 362 (2010)(student's allegation that he was "instructed by the coaching staff to encounter the hazard" was sufficient); *McQueen,* 2022 IL 126666, ¶ 53 (directing driver to proceed without determining it was safe to do so showed utter indifference to the safety of others).

Conversely, courts err when they ignore circumstantial evidence of knowledge by erroneously requiring the actual or obvious knowledge required to infer intent. *See e.g. Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 17. For example, in *Barr*, safety goggles were stored in the

[6] This Court may take judicial notice of this publicly filed opinion applying Illinois law as persuasive authority. It is available at: https://www.govinfo.gov/content/pkg/USCOURTS-ca7-24-01843/pdf/USCOURTS-ca7-24-01843-0.pdf

same bucket as the ball that caused serious injury when it struck the plaintiff's eye. 2017 IL 120751, ¶¶ 4-5. This Court held that "there was no evidence introduced at trial that defendants were aware of facts which would have put a reasonable person on notice of the risk of serious harm from the activity." *See id.* at ¶ 24. However, just as a tumbling teacher should endeavor to learn safety standards applicable to the activities he directs students to perform in class (*Murray,* 224 Ill. 2d at 246), or a dispatcher should determine the scope of the problem posed by improperly loaded equipment before directing his driver to proceed (*McQueen,* 2022 IL 126666, ¶ 53), a jury could reasonably find that the teacher should have found out what the goggles were for before deciding not to use them.[7]

Similarly, *Harris*, 2012 IL 112525, ¶ 45, declined to find a question of fact presented by evidence that an ambulance driver disobeyed a traffic signal at high speeds without his siren on. *Contra Baumgardner v. Boyer*, 320 Ill. App. 438 (1943)(abstract published)(jury question regarding willful and wanton conduct presented by evidence that driver disregarded warning signs and failed to stop at an intersection, entered the intersection without warning at high rate of speed and struck the rear end of the plaintiff's vehicle despite evidence that defendant did not see the sign); *but see also Klatt v. Commonwealth Edison Co.*, 33 Ill. 2d 481, 489 (1965)(whether driving on the

[7] *Leja* made a similar mistake by refusing to recognize that a warning label and instruction booklet warning of the danger that injured the student were sufficient to create a question of fact. 2012 IL App (2d) 120156, ¶¶ 16-25.

shoulder of a road on a rainy day and then swerving into traffic is willful and wanton is a fact question that must be resolved by the jury); *Captain v. Saviano*, 335 Ill. App. 125 (1948)(abstract published)(question of fact was presented when a driver sped at night on the wrong side of the road and struck a pedestrian, even though the pedestrian was in the roadway; a few feet from the curb).

All the conclusions that *Harris*, 2012 IL 112525, ¶ 45, cites for its remarkable departure from previously settled law come from cases substantively applying *Burke's* requirement of qualitatively different conduct that was overruled by *Ziarko* and *Poole*. *See e.g. Bartolucci v. Falleti,* 382 Ill. 168, 176 (1943)(applying the "naturally and probably" standard and holding "negligence and willfulness are as unmixable as oil and water"); *Murphy v. Vodden,* 109 Ill. App. 2d 141, 149 (1969)(fact that other drivers knew icy conditions required driving at lower speeds was insufficient because defendant was not "conscious his conduct would probably result in injury"); *Lipscomb v. Lewis*, 619 N.E.2d 102, 106 (Ohio App. 1993)(expressly applying Restatement). Applying the correct standard compels the conclusion that whether the *Harris* defendant was utterly indifferent to the safety of others by proceeding blindly into an intersection at high speeds without first determining if other vehicles were present was a question of fact for the jury to decide. *See* Prosser at 210-11 (determining degrees of negligence is a question of fact); *McQueen,* 2022 IL 126666, ¶ 53.

3. Taking "Some Precautions" Often Disproves Intent but Should Not Be an Absolute Defense When Proving Intent is Not Required.

Municipal defendants regularly cite *Barr*, 2017 IL 120751, ¶ 18 for the proposition that a bright line rule absolves a defendant of liability in all circumstances so long as they "take some precautions to protect students from injury, even if those precautions were insufficient." *See e.g.* Def. Pet. Leave to Appeal at 2; *Tripp v. Board of Education of Hinsdale Township High School District 86*, 2024 IL App (3d) 230072-U, ¶ 29. If true, the following hypothetical defendants would be absolved from liability as a matter of law: (1) a lifeguard that left a class of kindergarteners unattended at a pool so that she could go shopping but told them "don't go in the water" before she left (*contra Kolodziej v. Justice Park Dist.,* 2020 IL App (1st) 191032-U, ¶¶ 55-58 (finding that allowing young child to enter pool area and failing to conduct a headcount after directing students to leave could be willful and wanton); or (2) a school district that knowingly passed a child molesting teacher to another district without mentioning his prior misconduct because the district "took some precautions by conducting an exit interview where he acknowledged that he was wrong to demonstrate masturbation to students in his health class and assured them he would never do it again." *But c.f. Doe-3,* 2012 IL 112479, ¶ 45 (finding school district had duty to relay accurate information about teacher's sexual misconduct).

Courts err by applying the rejected Restatement standard when they focus on unsuccessful precautions because an attempt to avoid harm often disproves the subjective culpability required to render conduct different in kind, but is irrelevant in a "gross negligence" analysis. *Compare* Prosser at 213-14 (explaining that "mistake resulting from inexperience, excitement, or confusion and more than mere thoughtlessness or inattention" is insufficient to render conduct "aggravated" negligence different in quality), *with Murray*, 224 Ill. 2d at 219 (whether instructor was willful and wanton was question of fact even though he made sure the trampoline was locked in position and a double layer of floor mats was placed around the device), *Bowers by Bowers v. Du Page County Regional Board of School Trustees*, 183 Ill. App. 3d 367, 380 (1989) (willful and wanton conduct adequately pled when defendant provided some albeit insufficient padding), *Benhart v. Rockford Park Dist.*, 218 Ill. App. 3d 554, 559-60 (1991)(defendant "removed a safety feature," which provided notice even though the defendant subjectively believed that removing the grip tape from the bottom of the pool made the pool safer), and *Oelze v. Score Sports Venture LLC* , 401 Ill. App. 3d 110, 123 (2010)(question of fact established despite precautions taken of instructing employees to keep walkways clear and having walkways cleaned regularly).

Cases holding that "some precautions" are an absolute defense should be overruled because plaintiffs are not required to prove quasi-intent to injure in Illinois. These cases include *Lynch v. Board of Ed. of Collinsville Community*

Unit District No. 10, 82 Ill. 2d 415, 430-31 (1980), *Poelker v. Warrensburg Latham Community Unit School Dist. No. 11*, 251 Ill. App. 3d 270 (1993), *Lorenc v. Forest Preserve Dist. of Will County*, 2016 IL App (3d) 150424, ¶ 21, *Biancorosso v. Troy Community Consolidated School District No. 30C*, 2019 IL App (3d) 180613, ¶ 15, and *Geimer v. Chicago Park District,* 272 Ill. App. 3d 629 (1995).

4. Obviousness and Prior Injuries Should Not Be the Only Allowable Evidence of Knowledge.

Barr again required proof of "quasi-intent" to injure when it stated that a defendant must be aware of a risk of "serious injuries" in the absence of prior injuries. *Compare* 2017 IL 120751, ¶ 21 *with* Restatement (Second) of Torts § 500 cmt. a (explaining that "easily perceptible danger of death or substantial physical harm" is required to make reckless conduct not only different in degree but also in kind). Such a bright line evidentiary rule requiring prior injury or obviousness to prove knowledge is a remarkable departure from this Court's historical understanding that willful and wanton conduct cases "always present divergent circumstances and facts which, in most instances, are wholly dissimilar." *Myers v. Kajefska*, 8 Ill. 2d 322, 329 (1956) quoting *Mower v. Williams*, 402 Ill. 486, 489-90 (1949).

Similarly, *Cohen*, 2017 IL 121800, ¶ 31 distinguished *Palmer*, 277 Ill. App. 3d at 288-89 based on the degree of risk posed without recognizing that *Palmer* "stressed the obvious nature" of the danger because it established constructive knowledge. However, the *Cohen* defendant had actual knowledge

of the condition. *Id.* Applying the Restatement's "qualitative difference" requirement is the source of error. *Compare id.* (citing *In re Estate of Stewart*, 2016 IL App (2d) 15117, ¶ 105 for the proposition that "'nature of the danger' must be taken into consideration when evaluating whether a defendant's conduct is willful and wanton") *with Stewar*t, 2016 IL App (2d) 15117, ¶ 105 ("Only in cases of such severe imbalances could the failure to act *shock the conscience* in the manner of willful and wanton misconduct").[8]

Conversely, in *Straub v. Mt. Olive*, 240 Ill. App. 3d 967, 980 (1993), willful and wanton conduct was sufficiently alleged because "other individuals had informed [defendant] and [defendant] knew other people had tripped or fallen over the wire, informing [defendant] of the danger before the plaintiff sustained her injury." *Id. Straub's* focus upon the defendant's knowledge without undue differentiation between sources of knowledge was proper because willful and wanton conduct is not limited to cases involving prior injuries or obvious danger when intent is not at issue. *See Bernesak v. Catholic Bishop*, 87 Ill. App. 3d 681, 686 (1980)(holding that permitting children to play a game defendant "knew to be risky and dangerous" could be willful and wanton without discussion of degree of danger or risk).

[8] Whether the defendant's failure to barricade the path as plaintiff suggested was willful and wanton should have been decided by the jury. *See Cohen*, 2017 IL 121800 at ¶¶ 42-43 (Kilbride, J. dissenting). Conversely, the majority's opinion reads like a duty analysis and notes that "cracks and potholes in paved surfaces are an unfortunate but unavoidable reality, particularly in climates such as Chicago's." *See id* at ¶¶31-33. *Cohen* erred by conflating a duty analysis with a breach analysis.

Evidence of a defendant's knowledge will take many different forms depending on the case and it is unwise to create bright-line evidentiary rules that will inevitably prove to be unworkable. *See Peach v. McGovern*, 2019 IL 123156, ¶¶30-33, 44 (overruling bright line rule requiring expert testimony to admit photos of vehicle damage); *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 56-57 (2000)(rejecting the same part of the body rule as "nothing more than a bright-line relevancy standard"). The obviously dangerous nature of the activity was sufficient in *Murray*, but the universally recognized safety standards that should have been followed were too. 224 Ill. 2d at 246. Training is another way to establish knowledge of danger. *American Nat. Bank*, 192 Ill. 2d at 286; *Kirwan*, 349 Ill. App. 3d at 157. There is no logical reason that "near miss" incidents could not provide the same notice of injury that an injury itself does. *See Scarano v. Town of Ela*, 166 Ill. App. 3d 184, 190 (1988)(alleging knowledge of prior accidents where children fell from the slide at issue without specifying whether those children were injured).

5. Limiting Willful and Wanton Conduct to Severe Injury Cases or Conduct That Could Cause Serious Injuries Would Be Unconstitutional.

Arbitrarily denying a remedy regardless of circumstances based solely on the severity of injury associated with the activity when proving "quasi-intent" to injure is not required would be constitutionally dubious. *Compare* Ill. Const. 1970, art. I, § 12 *with Barr,* 2017 IL 120751 at ¶ 21 (requiring a "risk of *serious* injury")(emphasis added). The vastness of human experience dictates

that there will be situations where a known risk of minor injury was consciously disregarded in an egregious fashion. For example, a school could cause mass food poisoning by intentionally defying an order not to serve food before health code violations are corrected.

An additional constitutional question arises because both classes suffer the exact same legal injury of being injured by someone that engages in conduct that they know to be dangerous. *See Allen v. Woodfield Chevrolet, Inc.,* 208 Ill. 2d 12, 32 (2003)(statutes that discriminate between plaintiffs suffering identical legal injuries are typically unconstitutional); *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 195-96 (1952); *Grace v. Howlett*, 51 Ill. 2d 478, 487-488 (1972); *Thomas*, 2021 IL 126074 at ¶ 15 (rejecting a construction of the Wrongful Death Act that would have provided special privileges to certain defendants causing identical harm); *Cleary v. Catholic Diocese of Peoria*, 57 Ill. 2d 384, 388 (1974)(rejecting construction of the now repealed School Tort Liability Act that would raise special legislation question as "erratic judicial law making, in derogation of the legislative intent").

Accordingly, *Barr, Harris*, and *Cohen* should be overruled because: (1) the Tort Immunity Act codifies the *Ziarko* definition of willful and wanton conduct; (2) this Court fails to accurately assess circumstantial evidence or constructive knowledge when it applies the Restatement without discussing *Ziarko* or *Poole*; (3) taking "some precautions" often disproves intent but should not be an absolute defense when proving intent is not required; (4) obviousness

and prior injuries should not be the only allowable evidence of knowledge; and (5) limiting willful and wanton conduct to severe injury cases or conduct that could cause serious injuries would be unconstitutional.

D. Appellate Court Cases Requiring Proof of Quasi-Intent to Injure Should Be Overruled to Excise Erroneous Application of the Restatement from Our Jurisprudence.

Burke will continue to muddle our jurisprudence unless the following types of appellate court decisions are explicitly overruled: (1) "shock the conscience" cases; (2) cases erroneously requiring plaintiffs to prove intent to injure by focusing on degree of risk; and (3) cases ignoring evidence of constructive knowledge of danger.

1. "Shock the Conscience" Cases Should Be Overruled.

Oravek, 264 Ill. App. 3d at 900 erred, although forgivably so, by stating that willful and wanton must "shock the conscience" and that a "qualitative difference" is necessary six days after *Ziarko* was published. However, it is still cited regularly for these propositions despite being overruled *sub silentio* the following year by *Poole*, 167 Ill. 2d at 47-48. *See e.g. Romito v. City of Chicago*, 2019 IL App (1st) 118152, ¶ 30; *Mathias v. Winnebago Community School District 323*, 2021 IL App (2d) 200039-U, ¶ 22; *Foulks v. Community Unit School District 428*, 2021 IL App (2d) 200461-U, ¶ 19; *Johnson v. Highland Elementary School*, 2020 IL App (2d) 190479-U, ¶ 29; *Tudela v. Tron, LLC,* 2024 IL App (1st) 232438-U, ¶ 62; *Pryor v. Chicago Transit Authority*, 2022 IL App (1st) 200895, ¶ 42; *Agwomoh v. Village of Dolton*, 2022 IL App (1st)

210982, ¶ 64. (all citing *Oravek*, 264 Ill. App. 3d at 900). These cases should be overruled because *Oravek* causes mischief even when it is not explicitly cited. *See e.g. Cohen,* 2017 IL 121800, ¶ 31 ("nature of the danger" must be considered) citing *Stewart*, 2016 IL App (2d) 15117, ¶ 105 (only severe imbalances "shock the conscience").

2. Cases That Erroneously Require Plaintiffs to Prove Intent to Injure by Focusing on Degree of Risk Should Be Overruled.

Illinois cases analyzing the probability of danger or magnitude of injury threatened should be overruled because they are requiring plaintiffs to prove the "quasi-intent" to inflict injury contemplated by the Restatement sufficient to render conduct "qualitatively different" or "different in kind." *See e.g. Toller*, 221 Ill. App. 3d at 558 (defendant must act "with knowledge that such conduct posed a high probability of serious physical harm"); *Leja*, 2012 IL App (2d) 120156, ¶ 11 (defendant must know or should have known that conduct will "naturally and probably result in injury"). These cases should be overruled even if *Barr* survives because they impose a far higher standard than "*a* risk of serious injury." *See* 2017 IL 120751, ¶ 21 (emphasis added); *Murray*, 224 Ill.

2d at 246 (evidence established that serious injury "*can result* from an improperly executed somersault")(emphasis added). [9]

Adopting either *Toller* or *Leja* would produce absurd results. Arguably, drunk driving does not meet the standard when most drunk drivers make it home without being in an accident or pulled over. Forcing students to play Russian roulette would not meet the lofty "more-likely-than-not result in another's injury" test urged by PDRMA because every student has an 83.3%

[9] We provide a list of such cases that we have found in the hope that they will be explicitly overruled although there are many others: *Grant v. Board of Trustees of Valley View School District No. 365-U*, 286 Ill. App. 3d 642, 647 (1997); *Albers v. Community Consolidated No. 204 School,* 155 Ill. App. 3d 1083, 1085 (1987); *Sigeman v. Buffington*, 237 Ill. App. 3d 832 (1992); *Choice v. YMCA of McHenry County*, 2012 IL App (1st) 102822, ¶ 72; *Pohmrehn v. Crete-Monee High School District*, 101 Ill. App. 3d 331, 335 (1981); *Tripp v. Board of Education of Hinsdale Township High School District* 86, 2024 IL App (3d) 230072-U, ¶¶ 33,40; *Foulks*, 2021 IL App (2d) 200461-U, ¶ 11; *Tamez v. Chicago Public Schools*, 2021 IL App (1st) 200935, ¶ 16; *Satinoff v. Highland Park Library*, 2021 IL App (2d) 120558-U, ¶ 19; *Templar v. Decatur Public School District No. 61*, 182 Ill. App. 3d 507, 512 (1989); *Weiss v. Collinsville Community School District No. 10*, 199 Ill. App. 3d 68, 72 (1983); *Brooks v. McLean County Unit District No. 5*, 2014 IL App (4th) 130503, ¶¶ 38, 4;*, Jackson v. Chicago Board of Education*, 192 Ill. App. 3d 1093, 1100 (1989); *Mancha v. Field Museum of Nat'l Hist.,* 5 Ill. App. 3d 699, 703 (1972); *Holsapple v. Casey Community Unit School District C-1*, 157 Ill. App. 3d 391, 393 (1987); *Mathias v. Winnebago Community School District 323*, 2021 IL App (2d) 200039-U, ¶ 22; *Knapp v. Hill,* 276 Ill. App. 3d 376, 383 (1995); *Shwachman*, 2016 IL App (1st) 143865-U, ¶ 39; *Washington v. Chicago Board of Education*, 204 Ill. App. 3d 1091, 1096 (1990); *Pomaro v. Community Consol. School District 21*, 278 Ill. App. 3d 266, 269 (1995)(Relying upon cases setting forth *Burke* definition despite recognizing *Ziarko*); *Booker v. Chicago Board of Education*, 75 Ill. App. 3d 381, 386 (1979)(Requiring "intentional breach" of duty); *Guyton v. Roundy*, 132 Ill. App. 3d 573, 578 (1985)(same); *Tijerina v. Evans*, 150 Ill. App. 3d 288, 292 (1986)(Weighing degree of danger posed by activity); *Ozuk v. River Grove Board of Education*, 281 Ill. App. 3d 239, 247 (1996)(same); *Oropeza v. Board of Education of City of Chicago*, 238 Ill. App. 3d 399, 403 (1992)(same); *Ramos v. Waukegan Community Unit School District No. 60*, 188 Ill. App. 3d 1031, 1039 (1989)(Requiring either prior injuries or obviously dangerous conduct); *Majewski v. Chicago Park District*, 177 Ill. App. 3d 337, 340 (1988)("Willful and wanton misconduct goes *far beyond* mere inadvertence")(emphasis added).

chance of survival. *See Neitzel v. State*, 655 P. 2d 325, 337 (Alaska Ct. App. 1982).

3. Cases Ignoring Evidence of Constructive Knowledge of Danger Should be Overruled.

Floyd ex rel. Floyd v. Rockford Park District, 355 Ill. App. 3d 695, 701 (2005) and *Geimer v. Chicago Park District*, 272 Ill. App. 3d 629, 635 (1995) should be overruled because both are cited regularly despite having been overruled *sub silentio* by *Murray*, 224 Ill. 2d at 246 (safety standards are evidence of constructive knowledge of danger). *See, e.g. Andrews v. Metropolitan Water Reclamation District of Greater Chicago*, 2018 IL App (1st) 170336, ¶ 17 *aff'd* 2019 IL 124283 (rejecting trial court's reliance on *Floyd* to require prior similar injuries in addition to safety rule violations).

The source of *Floyd's* error is reliance upon the overruled appellate court decision *Murray v. Chicago Youth Center*, 352 Ill. App. 3d 95, 98 (2004) for the proposition that "[p]rior knowledge of similar acts is required to establish a 'course of action.'" *Floyd,* 355 Ill. App. 3d at 702. This caused *Floyd* to ignore the fact that the policy at issue was created after another child was hit with a metal baseball bat because "the particular circumstances of that incident were not pleaded." *See id.; cf. Doe ex rel. Ortega-Piron v. Chicago Board of Education*, 213 Ill. 2d 19, 21 (2004)(plaintiff was not required to allege details of prior sexual assaults).

Floyd further erred by extending the fact that proof of a rule violation is not willful and wanton conduct *per se* to create a rule that proof of a rule

violation could never be considered as evidence of knowledge. Similarly, the *Geimer* Court was wary of holding that a self-imposed safety rule could impose a duty because it did not want to discourage municipal defendants from adopting safety rules. 272 Ill. App. 3d at 635. This analysis conflates the duty and breach elements. *See Marshall,* 222 Ill. 2d at 443.

Both *Floyd* and *Geimer* were overruled *sub silentio* by *Murray*, 224 Ill. 2d at 246, because they fail to recognize that the policies at issue were evidence of actual or constructive knowledge of danger. *See Torres v. Peoria Park District*, 2020 IL App (3d) 190248, ¶¶ 26-27 (knowledge of danger inferred from existence of internal policy prohibiting conduct that defendant told the plaintiff that they could perform).

In sum regarding willful and wanton conduct, plaintiffs are not required to prove that injury was likely or expected in order to create a question of fact because: (1) *Ziarko, Poole*, and *Murray* confirmed that Illinois' definition of willful and wanton conduct is consistent with Prosser's definition of "gross negligence"; (2) courts usurp a jury's role when they conflate an analysis of duty with an analysis of breach to articulate particularized standards of conduct; (3) *Barr*, *Harris*, and *Cohen* are entitled to no deference because they failed to follow *Ziarko* and *Poole* without justifying their departure from *stare decisis*; and (4) appellate court cases requiring proof of quasi-intent to injure should be overruled to excise *Burke*'s overruled reliance upon the Restatement from our jurisprudence.

III. Defendants Are Not Entitled to Section 2-201 Immunity Because This Statute is Limited to Vicarious Liability Claims and Both the School Code and Tort Immunity Act Reflect a More Specific Contrary Legislative Intent When Teachers Fail to Supervise Students or Fail to Maintain Discipline.

The trial court erred in granting summary judgment pursuant to Section 2-201 because: (1) Section 2-201 does not immunize the decisions necessary to comply with defendants' duties to supervise and to maintain discipline because they were not policy decisions and were not discretionary; (2) Section 2-201 cannot be interpreted to nullify the School Code's statutory duty to impose discipline or the Tort Immunity Act's supervision immunity limitation; (3) Section 2-201 is a vicarious immunity that does not immunize a district's direct liability for breach of its institutional duty to supervise; and (4) Section 2-201 must be established by the defendants and it is unconstitutional for a court to decide a question of fact necessary to establish an affirmative defense.

A. The Particular Acts Taken to Fulfill Defendants' Duties to Supervise and to Maintain Discipline Were Not Discretionary Policy Decisions.

PDRMA's suggestion that this Court has abandoned the ministerial/discretionary act distinction should be rejected because this common law distinction is "explicitly" retained in Section 2-201. *Epstein v. Chicago Board of Education,* 178 Ill. 2d 370, 380 (1997). Once a governmental agency has decided to perform a public work, it must be done with reasonable care and in a nonnegligent manner. *Snyder v. Curran Township*, 267 Ill. 2d

466, 474 (1995). It is the "duties of the defendant" that should be characterized as either ministerial or discretionary. *Id.*

A teacher does not have the discretion not to supervise his students because he is required by law to do so. The intricacies of how he exercises that duty are not discretionary decisions for purposes of immunity because they are instead relevant to a breach analysis. *See Snyder*, 167 Ill. 2d at 474 quoting W. Prosser, Torts § 132, at 988-90 (4th ed. 1971)[10] ("It would be difficult to conceive of any official act that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail"). This is why school supervision cases "usually involve no issue of discretion at all." Prosser at 1048.

PDRMA's suggestion that all discretionary decisions are immunized should be rejected because the plain language of section 2-201 requires both a determination of policy and an exercise of discretion. *Monson v. City of Danville*, 2018 IL 1224866, ¶ 29. Policy decisions cannot be synonymous with discretionary decisions because Section 2-201 separately refers to positions "involving the determination of policy or the exercise of discretion," but later requires both. This Court should be cognizant that declining to interpret section 2-201 to require both "policy" and "discretion" could require its holdings that a plaintiff must be both an "intended" and "permitted" user to establish a duty pursuant to Section 3-105 or that Section 3-106 applies to property that is intended or permitted to be used for recreational purposes to be reexamined.

[10] Note that *Snyder* quotes an earlier version of Prosser than cited throughout the rest of this brief, so page numbers do not line up if one is reading the 1984 edition.

Executive-branch employees and officers are immunized "when those decisions involve the kind of basic policy issues *typically involved in legislation*." Prosser at 1046 (emphasis added). The "countless informal, discretionary determinations to handle student behavior" (IASB Br. at 14) made daily are not policy decisions. *See Harrison v. Hardin County Community Unit School District No. 1,* 197 Ill. 2d 466, 474 (2001)(emphasizing the effect allowing student to leave early would have on other students during future storms); *Strauss v. City of Chicago,* 2022 IL 127149, ¶ 71 (finding that an alderman's statements advocating for a certain decision that would affect the community he represents to be immunized). This is consistent with how we colloquially define "policy." "Policy." Merriam-Webster.com. https://www.merriam-webster.com/dictionary/policy. Accessed 21 May. 2025 (emphasis added)(defining policy, in part, as "a *high-level overall plan* embracing the general goals and acceptable procedures especially of a governmental body" or "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and *future decisions*")(emphasis added).

B. Section 2-201 Cannot Be Interpreted to Nullify the School Code's Statutory Duty to Impose Discipline or the Tort Immunity Act's Supervisory Immunity Limitation.

The School Code and Tort Immunity Act both demonstrate the Legislature's intent for children injured by willful and wanton supervision to have recourse. 105 ILCS 5/24-24; 745 ILCS 5/3-108. Both statutes must be read

together to effectuate that legislative intent. *See In re Estate of Poole*, 207 Ill. 2d 393, 406-09 (2003) (Probate Act and Wrongful Death Act must be interpreted together to provide intended compensation). Defendants' immunities must be strictly construed to enact the smallest possible infringement on plaintiffs' common law remedies. *Murphy-Hylton*, 2016 IL 120394, ¶ 33.

Accordingly, Section 2-201 does not immunize plaintiffs' allegations because: (1) Section 24-24 of the School Code contains both a duty and a corresponding limited immunity that cannot be nullified by a general immunity and (2) either Section 24-24 or Section 3-108 are the more specific immunity.

1. Section 24-24 of the School Code Contains Both a Duty and Corresponding Limited Immunity That Cannot Be Nullified by a General Immunity.

Section 24-24 of the School Code imposes an affirmative statutory duty to maintain discipline upon both teachers and administrators. 105 ILCS 5/24-24 (providing that any person "providing a related service for or with respect to a student *shall maintain discipline in the schools*")(emphasis added). Section 24-24 should be read as both imposing a duty and a corresponding immunity to avoid rendering the words "shall maintain discipline" meaningless. *See Schultz v. St. Clair County*, 2022 IL 126856, ¶ 19.

Absolute general immunity cannot be applied to the breach of a statutory duty when doing so contravenes legislative intent. *Moore v. Green*,

219 Ill. 2d 470, 488 (2006)(rejecting a construction of a statutory immunity that would render a statutory duty "superfluous or vaguely advisory"). For example, the Domestic Violence Act imposes a duty to enforce its provisions and a corresponding limited immunity for tort claims associated with a breach of this duty that cannot be nullified by a general absolute immunity. *Id.* at 490.

Here, interpreting Section 2-201 as immunizing discretionary policy decisions regarding discipline would nullify Section 24-24's affirmative duty because abuse of discretion is what typically differentiates willful and wanton conduct from negligence. Moreover, Section 2-201 states "except as otherwise provided by statute" and was passed at the same time as the School Code. Separately the Tort Immunity Act expressly contemplates the potential liability imposed by the School Code by immunizing injuries arising out of "a school safety patrol." 745 ILCS 10/2-211. It is unlikely that the Legislature intended for Section 2-201 to completely immunize breaches of the duty set forth in Section 24-24 without a statement qualifying "except as otherwise provided by statute."

Perhaps conversely, *Henrich v. Libertyville High School*, 186 Ill. 2d 381, 391 (1998) declined to decide whether Section 3-108 or Section 24-24 was the more specific immunity because 745 ILCS 10/1-206 provides that the Tort Immunity Act applies to school districts. This analysis between two supervision statutes should not be extended to a general discretionary immunity. *See id. Henrich* overlooks that holding that Section 2-201 is not the

most specific immunity does not render the inclusion of school districts in the definition of "local public entity" meaningless because there are many other immunities provided in the Tort Immunity Act that do not have a corollary in the School Code. *See id.*; *see e.g.* 745 ILCS 10/3-106. Nonetheless, it is now clear that an affirmative statutory duty will prevail over a less specific general immunity. *Moore*, 219 Ill. 2d at 488.

2. Either Section 24-24 or Section 3-108 Are the More Specific Immunity.

Even if Section 24-24 is considered an immunity only, Section 2-201 is not applicable to school supervision claims because either Section 24-24 or Section 3-108 is the more specific immunity statute. A more specific immunity with an exception for willful and wanton conduct prevails over a more general absolute immunity regardless of presence or absence of limiting language in the more general immunity. *Schultz,* 2022 IL 126856, ¶¶ 29-31 (limited immunity provided by the ETS Act prevailed over otherwise applicable Tort Immunity Act provision because it is the more recent and specific immunity). *Harris* does not change the result here because there was not a "more specific immunity" issue when the plaintiff relied upon duties set forth in other statutes. 2012 IL 112525, ¶¶ 23-25. Accordingly, Section 24-24 contains a more specific immunity regardless of whether it also contains a statutory duty.

To the extent either *Henrich*, 186 Ill. 2d at 390 or *Harris*, 2012 IL 112525, ¶¶ 23-25 suggest otherwise with respect to Section 3-108, they have been overruled by *Schultz.*, 2022 IL 126856, ¶ 29. It is implausible that the

Legislature amended Section 3-108 in response to *Epstein*, 178 Ill. 2d 370 and *Barnett v. Zion Park District,* 171 Ill. 2d 378, 392 (1996) with the intent that Section 2-201 would nullify its amendment by immunizing the same abuse of discretion necessary to show willful and wanton conduct.

Moreover, Section 3-108 contains a narrower limiting introductory clause ("except as otherwise provided by this Act") than Section 2-201 ("except as otherwise provided by statute"). Accordingly, Section 3-108(b) expressly contemplates providing immunity for total absence of supervision where a duty to supervise is imposed by statute without corresponding immunity.

This Court should be mindful that its decision could render the willful and wanton exceptions contained in both 745 ILCS 10/3-106 (recreational property) and 745 ILCS 10/3-109 (ultrahazardous recreational activity) a nullity. Compellingly, allowing Section 2-201 to override more specific immunities would nullify the limitation on the immunity provided for improvements to public property provided by 745 ILCS 10/3-103(a) because the failure to correct a previously legislatively approved design or plan will always involve discretionary policy decisions.

Accordingly, Section 2-201 does not immunize plaintiffs' allegations because: (1) Section 24-24 of the School Code contains both a duty and corresponding limited immunity that cannot be nullified by a general immunity; and (2) either Section 24-24 or Section 3-108 are the more specific immunity.

C. Section 2-201 is a Vicarious Immunity That Does Not Immunize a District's Direct Liability for Breach of Its Institutional Duty to Supervise.

Section 2-201 does not immunize the district's breach because: (1) the district had a direct duty to supervise; (2) Section 2-201 does not immunize direct liability claims; and (3) Section 2-201 is not a rule of evidence that bars an employee's knowledge from being imputed to the district.

1. The District Had a Direct Duty to Supervise.

The district owed a direct common law duty to supervise the students entrusted to it. *See Barnett,* 171 Ill. 2d at 387 ("Unquestionably, at common law a private operator of a public swimming pool or bathing resort" would have owed a duty); *see also* 745 ILCS 10/3-108 (separately immunizing vicarious and direct duties to supervise). In *Doe ex rel. Ortega-Piron v. Chicago Board of Education*, this Court properly analyzed the knowledge of the district itself rather than any individual employee when it was alleged that the district breached its duty to protect a minor by failing to provide a bus attendant. 213 Ill. 2d 19, 27, 29 (2004).

Conversely, *Bowers* suggests that a district's liability for improper supervision could be vicarious only. 183 Ill. App. 3d at 376. *McQueen*, 2022 IL 126666, ¶¶ 43-47 explains why this is incorrect. Section 3-108(b) recognizes that the complete failure to supervise is one of many circumstances where a district could have been willful and wanton in its supervision even if no individual employee was necessarily willful and wanton.

2. Section 2-201 Does Not Immunize the District for its Direct Liability.

Section 2-201 does not apply to direct liability claims. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 116 (2008). Historically, public officers and employees were liable for their actions without exception even if the government unit itself was protected by sovereign immunity. Prosser at 1056. In fact, the Legislature plainly states when it intends for immunity to apply to both direct and vicarious liability claims. *See e.g.* 745 ILCS 10/2-102 ("in any action brought directly or indirectly against it…").

Interpreting Section 2-109 to also include direct liability claims would render much of the Tort Immunity Act meaningless. For example, the Act separately immunizes a local public entity for "an injury caused by adopting or failing to adopt an enactment" (745 ILCS 10/2-103), which would be unnecessary if conduct squarely addressed by Section 2-201 applied to direct liability claims. In addition, such a broad interpretation of Section 2-109 would nullify any need for the immunities provided by 745 ILCS 10/2-104 and 2-105 for the same reason.

Smith's dicta citing *Arteman* for the proposition that "together, Sections 2-201 and 2-109 provide discretionary immunity to public entities" does not change the result. 231 Ill. 2d at 118 citing *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill. 2d 475, 584 (2002). *Arteman* never analyzes the question of whether Section 2-109 extends immunity to vicarious liability claims only. 198 Ill. 2d at 477-88. A judicial opinion, like a judgment, is

authority only for what is actually decided in the case. *In re N.G.*, 2018 IL 121939, ¶ 67. To the extent *Arteman* does, it was overruled by *Smith*, 231 Ill. 2d at 118. This Court may not simply infer that Section 2-109 extends immunity to direct liability claims in the absence of express language. *Loman v. Freeman*, 229 Ill. 2d 104, 125-26 (2008).

Moreover, the notion that a school district itself as opposed to its teachers could be immunized for policy decisions regarding discipline overlooks that Section 24-24 states that "each board shall establish a policy on discipline" and sets forth some required components of the policy. 105 ILCS 5/23-24. Separately, the board is required to adopt and implement "a policy addressing sexual abuse of children" with specific requirements. 105 ILCS 5/10-23.13 Section 2-201 cannot immunize these required discretionary policy decisions because it would nullify statutory intent. *See Moore,* 219 Ill. 2d at 488.

3. Section 2-201 Is Not a Rule of Evidence Which Bars an Employee's Knowledge from Being Imputed to the District.

Section 2-201 is not an exclusionary rule of evidence. 745 ILCS 10/2-201 ("is not liable for…"); *Doe,* 213 Ill. 2d at 19-29 (finding prior disciplinary actions provided notice of danger of propensity to commit sexual assault); *see also People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521, 528 (1998)("privileges are strongly disfavored because they operate to 'exclude relevant evidence and thus work against the truth seeking function of legal proceedings'"). Every employee's knowledge is imputed to the district. *Pavlik v. Wal-Mart Stores,*

Inc., 323 Ill. App. 3d 1060, 1066 (2001). The district's potential immunity for policy decisions occurring before the accident does not compel the conclusion that their knowledge of those facts cannot be considered when analyzing their breach of a separate duty at a different time.

Accordingly, Section 2-201 does not immunize the district's breach because: (1) the district had a direct duty to supervise; (2) Section 2-201 does not immunize direct liability claims; and (3) Section 2-201 is not a rule of evidence which bars an employee's knowledge from being imputed to the district.

D. Section 2-201 Immunity Must Be Established by the Defendants and it is Unconstitutional for a Court to Decide a Question of Fact Necessary to Establish an Affirmative Defense.

Plaintiffs have a constitutional right to have the jury resolve any fact question presented by defendants' Section 2-201 immunity claim. *See People v. Lobb*, 17 Ill. 2d 287, 298-299 (1959) citing *People v. Kelly*, 347 Ill. 221 (1931)(Having the jury decide "facts in controversy" is essential element of right to trial by jury). The right to trial by jury includes the right to have all factual questions presented to the jury even those necessary to resolve elements typically decided as a matter of law. *See e.g. Becker v. Alexian Brothers Medical Center*, 2021 IL App (1st) 200763, ¶ 13 (question of fact regarding existence of duty). Trials have one fact finder. *See Miller v. Ehler*, 407 Ill. 602, 611-12 (1950)(The full hearing required by due process of law contemplates that all of the evidence should be submitted before a single judge,

master, or other tribunal which may see the witnesses, weigh their testimony, and determine their credibility).

In sum with respect to Section 2-201, the trial court erred in granting summary judgment because: (1) Section 2-201 does not immunize the decisions necessary to comply with defendants' duties to supervise and to maintain discipline because they were not policy decisions; (2) Section 2-201 cannot be interpreted to nullify the School Code's statutory duty to impose discipline or the Tort Immunity Act's supervision immunity limitation; (3) Section 2-201 is a vicarious immunity that does not immunize a district's direct liability for breach of its institutional duty to supervise; and (4) Section 2-201 immunity must be established by defendants and it is an unconstitutional deprivation of the right to a jury trial for a court to decide a question of fact necessary to establish an affirmative defense.

Conclusion

The appellate court should be affirmed. However, it should be affirmed for the reasons we that we explain so that an opportunity to provide needed clarification to our jurisprudence is not wasted.

Respectfully Submitted,

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NO. 131420

IN THE
SUPREME COURT OF ILLINOIS

KEVIN HAASE and RILEY HAASE,	)	Appeal from the Appellate Court of Illinois, Third District, No. 3-23-369
Plaintiffs-Appellants,	)	
	)	There on Appeal from the Circuit Court of the Twenty-First
v.	)	Judicial Circuit, Kankakee County, No. 2018-L-00012
KANKAKEE SCHOOL DISTRICT III and DARREN DAYHOFF,	)	The Honorable Lindsay Parkhurst,
Defendants-Appellees.	)	Judge Presiding.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of service, and those matters to be appended to the brief under Rule 342(a), is 43 pages.

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KANKAKEE SCHOOL DISTRICT III and DARREN DAYOFF,	)	The Honorable Lindsay Parkhurst,
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NOTICE OF FILING

To: See Attached Service List

Please take notice that on June 4, 2025, I electronically submitted the *Amicus Curiae Brief of the Illinois Trial Lawyers Association*, with the Clerk of the Supreme Court. A copy of the brief is attached and herewith served upon you.

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CERTIFICATE OF SERVICE

Nicholas Nepustil, an attorney, served the foregoing *Notice* along with a copy of the *Amicus Curiae Brief of the Illinois Trial Lawyers Association*, along on the individuals listed below on this the 4th day of June, 2025:

Via Odyssey E-filing Service – See Attached Service List

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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