No. 128602

In the

Supreme Court of Illinois

CLARK ALAVE,

Plaintiff-Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellant.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-21-0812.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 19 L 010879.
The Honorable **Gerald Cleary**, Judge Presiding.

AMICUS CURIAE BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE CLARK ALAVE

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INTRODUCTION

The Illinois Trial Lawyers Association submits this *amicus curiae* brief in support of Plaintiff Clark Alave. This appeal raises the important question whether § 3-102(a) of the Tort Immunity Act effectively grants Illinois municipalities absolute immunity from personal injury claims brought by bicyclists injured due to unreasonably dangerous road defects even though the City directs bicyclists to ride on streets making biking on city streets a legal, promoted and reasonably foreseeable use of city property. This *amicus* brief offers a broader perspective on this issue and its impact on Illinois courts, municipalities and bicyclists.

A plain reading of the language of § 3-102(a) makes clear that bicyclists are people who are intended and permitted to ride the streets of Chicago and who use those streets in a way that is reasonably foreseeable. Section 3-102(a) states:

> [A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care ***of people*** whom the entity ***intended and permitted to use*** the property in a manner which and at such times was ***reasonably foreseeable*** that it would be use, and shall not be liable for injury unless it is proven that it has ***actual or constructive notice*** of the existence of such a condition that is not reasonably safe ***in reasonably adequate time prior to an injury*** to have taken measures to remedy or protect against such condition.

745 ILCS 10/3-102(a)(emphasis added).

The statutory language of § 3-102(a) presents three conditions that a personal injury plaintiff must satisfy to recover against a municipality for injury caused by an unreasonably dangerous condition:

- Does the plaintiff belong to the group of ***people intended and permitted to use*** the public property?
- Was the plaintiff's manner of ***use*** of the property ***reasonably foreseeable***?
- Did the municipality have adequate ***notice*** of the dangerous condition?

These are three significant evidentiary hurdles for any plaintiff to overcome. Nonetheless, the City of Chicago interprets § 3-102(a) in a way that creates a fourth evidentiary hurdle for plaintiffs by mixing the first two conditions of the statute. According to the City, a plaintiff must not only show that a) he was a member of the public intended and permitted to use the property, and b) his manner of use was reasonably foreseeable, but also c) street signs or markings in the location of the injury expressly declare that plaintiff's foreseeable use of a bicycle on the city street was an intended use. In effect, the City is arguing that a bicyclist who is legally on a city street open for public use and is using that public property in a reasonably foreseeable way must also prove that the city had placed street signs or pavement markings expressly stating that this use was "intended" at the time a plaintiff is injured.

There is no basis in the statutory language of § 3-102(a) or in its legislative history to support the City of Chicago's insertion of a fourth requirement for personal injury plaintiffs to bring their claims. The statutory term "intended and permitted" applies to the people on public property. The term "reasonably foreseeable" refers to the way those people use the property. In this case, Clark Alave was legally riding a bicycle on a city street open to public use in a reasonably foreseeable way when he was injured by a large, unreasonably dangerous pothole in a crosswalk:

(See C.108). The City's restrictive interpretation of §3-102(a) contradicts precedent of this court that the intended use of a street is for purposes of ***travel***. *Wagner v. City of Chicago*, 166 Ill.2d 144, 154, 651 N.E.2d 1120 (1995). The City does not claim that Mr. Alave used Leland Avenue for any purpose other than travel. Consequently, he was clearly an intended user of the road. 166 Ill.2d at 154.

The City's misinterpretation of § 3-102(a) unfairly distinguishes bicyclists from other legal and reasonably foreseeable users of streets open to the public due simply to a lack of street signs or road markings referring to bicyclists. This approach divests bicyclists of a tort remedy available to other foreseeable users of the City's streets. This reading of § 3-102(a) ignores the available evidence that the City "intends," encourages and expects bicyclists to ride on its streets:

(See https://chicagocompletestreets.org/sample-page-2/cycling/). This court can eliminate this inequity by ruling that the word "intended" in § 3-102(a) modifies the word "people" instead of the word "use," which conforms with the principles of statutory construction and recognizes that travel is the intended use of city streets and protects bicyclists who ride on Illinois' public roadways at the invitation of their towns and cities.

ARGUMENT

The First District appellate court's decision in this case in favor of Mr. Alave should be affirmed. Section 3-102(a) of the Tort Immunity Act, whose purpose is to codify a public entity's common law duty to maintain its streets in reasonably safe condition, sets out three evidentiary requirements that a plaintiff must establish to bring a successful personal injury claim against a public entity based upon the unreasonably dangerous condition of city property. This court must not read a fourth requirement into § 3-102(a) that the Illinois legislature could not possibly have intended.

I. Mr. Alave was a permitted and intended user of Leland Avenue in Chicago

A. Section 3-102(a) must be read based upon fundamental principles of statutory construction

Long-accepted principles of statutory construction result in the proper interpretation of the phrase ***"of people whom the entity intended and permitted to use the property"*** in § 3-102(a). Courts should look first to the statutory language. *Wagner v. City of Chicago,* 166 Ill. 2d 144, 149, 651 N.E.2d 1120 (1995). This court recently held that a fundamental principle of statutory construction determines the meaning of a word from the context in which it is used instead of analyzing the word in isolation. *Corbett v. County of Lake,* 2017 IL 121536, 104 N.E.3d 389 ¶27. The words and phrases in a statute must be construed in light of the statute as a whole with each provision construed in connection with every other section. *Corbett* ¶ 27. When construing a statute, the court's primary objective is to ascertain and give effect to the legislature's intent. *Wagner,* 166 Ill.2d at 149; *Corbett* ¶ 25. The best indicator of that intent is the statutory language, given its plain and ordinary meaning. *Wagner,* 166 Ill.2d at 149; *Corbett* ¶ 30. Unless a word is defined in the statute, it must be read in context to determine its meaning. *Corbett* ¶ 30. In other words, a word is

known by the company it keeps and is given a more precise content by the neighboring words with which it is associated with. *Corbett* ¶ 31. Two sections of the same statute must be considered in reference to each other so they are given harmonious effect. *Corbett* ¶ 34. When construing statutory language, the court may consider the consequences that would result in interpreting the statute one way or another. *Corbett* ¶ 34. Finally, when interpreting a statute, this court must presume that the legislature did not intend "absurdity, inconvenience, or injustice." *Corbett* ¶35.

B. The City of Chicago owes a historical and statutory duty to maintain city streets in a reasonably safe condition

This court has previously held that purpose of Section 3-102(a) is not to grant a municipality defenses or immunities from a personal injury claim**:**

> [T]he purpose of section 3-102(a) is not to grant defenses and immunities. Instead, it merely codifies, for the benefit of intended and permitted users, the common law duty of a local public body to properly maintain its roads. Immunities and defenses are provided in other sections.

Wagner, 166 Ill.2d at 152. This statute does not convert the City into an insurer for the safety of the traveling public. 166 Ill.2d at 153. Nonetheless, under § 3-102(a), the City owes a duty to maintain its property in a reasonably safe condition so that a person acting with ordinary care will not be injured. *Id.*

C. A proper construction of the term "permitted and intended" in § 3-102(a) modifies "people" – not "use"

Application of the principles set out in *Corbett* and *Wagner* establishes that the term ***"of people whom the entity intended and permitted to use the property"*** in § 3-102(a) modifies the word "people" and not the word "use." The word "people" is immediately followed by the phrase "whom the [public] entity intended and permitted to use." According to *Corbett*, the words "intended and permitted" are neighbors of and keep

company with the word "people." Given the order and context of the wording found in § 3-102(a), the Illinois legislature could only have meant for the word "intended" to modify the word "people."

This interpretation of "intended and permitted" also fits the historical context of § 3-102(a) and a public entity's common law duty to maintain its property in a reasonably safe condition. As this court has noted, the meaning of a statute depends upon the intent of the drafters at the time of its adoption. *Corbett* ¶ 25. When § 3-102(a) was enacted in 1965, Illinois still recognized differing levels of care owed by landowners to plaintiffs depending on the legal relationship between the two – trespasser, licensee or invitee. *Gabriel v. City of Edwardsville,* 237 Ill. App. 3d 649, 663, 604 N.E.2d 565 (5th Dist. 1992)(Chapman, J., dissenting and citing the Tort Immunity Act, Ill. Rev. Stat. 1965, ch. 85, ¶ 3-102). The focus was on the parties' legal relationship, not on the plaintiff's use of the property. Once the distinction between licensees and invitees was abolished by the Premises Liability Act in 1984, however, there was no longer sound legal basis for § 3-102(a) of the Tort Immunity Act to preclude a premises liability plaintiff from recovery if that plaintiff was legally on the property when he was injured. Premises Liability Act, 740 ILCS 130/1 et. seq. (West 1984). The dissenting opinion in the 1992 appellate decision, *Gabriel v. City of Edwardsville,* highlights this historical context:

> There is no legislative history available for section 3-102(a) but a logical purpose for inserting "people whom the entity intended and permitted to use the property would have been to differentiate between the common law classes of licensees, invitees and trespassers which were still recognized at the time of the passage of the act.

Gabriel, 237 Ill. App. 3d at 663 (5th Dist. 1992)(Chapman, J., dissenting).

Given this context, Justice Chapman's dissent further found that the term "permitted and intended" in § 3-102(a) is meant to modify the word "people":

> A municipality has ***certain property such as streets and sidewalks which are intended to be used by all***; i.e. the city would permit anyone to use these portions of its property. The city has other property such as garages and offices that neither intends or would it permit everyone to use. This limitation is on people who use the property not on the use they make of it. ***It is important to note that "whom the city intended and permitted" refers and modifies people***.

237 Ill. App. 3d at 663.

In 1995, this court recognized that the intended use of city streets is ***for purposes of travel***. *Wagner*, 166 Ill.2d at 154. In *Wagner*, the plaintiff was severely injured when his motorcycle collided with a left turning car at an intersection in Chicago. Wagner asserted the city was negligent in failing to post a no left turn sign at the intersection. 166 Ill.2d at 145-146. The jury found for Wagner. The appellate court affirmed. The city appealed to this court asserting the plaintiff was not an intended and permitted user of the street because he because was speeding and had run a red light. Just as in this case, the City argued that an intended user "is one who uses property for a purpose that the city intends the property to be used" and a permitted user "is one who uses the property for a use that is not prohibited." 166 Ill.2d at 154. This court in *Wagner* rejected the city's argument noting the "the city confuses an intended and permitted use of its property by a negligent plaintiff with an unintended and prohibited use of the property." 166 Ill.2d at 154. This court's analysis continued by recognizing precedent from an earlier decision, *City of Elmhurst v. Buettgen*, 394 Ill. 248, 68 N.E.2d 278 (1946), which holds that:

> [T]he "intended use of the street is: 'for purposes of ***travel*** and as a means of access to and egress from property abutting thereon.'

166 Ill.2d at 154. This court then determined the plaintiff was an intended user of the street since the city never argued that the plaintiff used the street for any purpose other than travel:

> However, the city does not argue that plaintiff used the city's streets for any use other than for purposes of travel. ***Thus, plaintiff must be found to have intended user of the road. Moreover, the use which plaintiff of the road was not prohibited.***

Wagner, 166 Ill.2d at 154 (emphasis added).

The same duty analysis in *Wagner* applies here. As in *Wagner*, the City does not contest that Mr. Alave was using the street as a means for travel. Like the plaintiff's use of a motorcycle in *Wagner*, the City concedes that Mr. Alave's use of a bicycle in this case was permitted and not prohibited. In *Wagner*, the plaintiff had been speeding, had run a stop sign and had struck another vehicle. If an automobile driver who violates traffic laws is nonetheless found to be an intended user of a city streets, then someone like Mr. Alave who was permitted and encouraged by the City to ride his bike on city streets must also be considered an intended user. Any contrary finding ignores a plain reading of § 3-102(a), violates the precedent set out in the *Wagner* decision and is unjust. Therefore, the appellate court decision must be affirmed.

D. Section 3-102(a) next requires a "permitted and intended" person to "use" public property in a "reasonably foreseeable manner"

According to these same principles, reading the word "use" in context can only refer to the phrase that follows directly thereafter: "property in a manner which and at such times was reasonably foreseeable." Based upon the language of the statute, the use of public property is measured by whether that use is reasonably foreseeable to the public entity. This interpretation of the language of § 3-102(a) makes sense and avoids unjust

results for both bicyclists and municipalities. Given the limitation imposed by the requirement that any use of public property must be reasonably foreseeable before a premises liability plaintiff may recover, public entities are protected from the concerns for "excessive litigation" and "runaway verdicts" raised by the City of Chicago's corporation counsel before the appellate court.

E. Under the proper interpretation of § 3-102(a), Mr. Alave was an intended person using Leland Avenue in a reasonably foreseeable manner

Mr. Alave was a permitted and intended person using a city street in a foreseeable way. Why was Clark Alave intended and permitted to use Leland Avenue? There is no evidence that he was not. City streets are open to the public. Mr. Alave was legally on Leland Avenue when he was injured. Mr. Alave was not a trespasser, was not a fugitive from the law and was not using Leland Avenue in a prohibited manner like a member of the public who breaks into a vacant office at city hall office or park district gymnasium after hours. In this case, the City of Chicago does not complain that Mr. Alave was an unintended ***person*** using its property. Instead they argue his ***manner of use*** precludes his recovery. This claim, which is contrary to proper interpretation of § 3-102(a) and the reasoning in *Wagner*, should be denied.

F. Section 3-102(a) must not be interpreted to reach an unjust result

Contrary to the accepted principles of statutory construction set out above, the City of Chicago's strained interpretation of the language in § 3-102(a) can only lead to inconvenient, unjust and absurd results. ***First,*** the City's approach encourages bicyclists to use city streets without any warning those streets may not be reasonably safe for this clearly foreseeable use. Just like 625 ILCS 5/11-1502 of the Illinois Motor Vehicle Code,

the Chicago Municipal Code grants bicyclists all the rights and subjects them to all the duties applicable to the driver of a vehicle. Chicago Municipal Code § 9-52-010(a). Further, on its web site and in its promotional materials, the City encourages bike riders over age 12 to "ride your bicycle on the street" and "ride on the road not the sidewalk," ***but fails to warn these bicyclists*** that they have no right to expect that the streets will be reasonably safe in undesignated areas.

Second, the City's interpretation of § 3-102(a) unfairly places Chicago bicyclists in an absurd No Man's Land where the City instructs bicyclists to ride on city streets, instead of sidewalks, yet penalizes these same bike riders when they follow this instruction and are injured by an unreasonably dangerous condition. If this court were to follow the City's position to its logical extreme, bicyclists would be limited to riding their bikes only on streets designated by signs or road markings. As soon as bicyclists moved outside one of these designated areas, they would be required to dismount their bikes and presumably walk those bikes on sidewalks, a location where the City prohibits bike-riding, until reaching another "bicycle-designated" street no matter how far away that might be. The City has already conceded that it does not expect "persons using bicycles [to] walk their bicycles at all points when not in a designated bicycle lane." *Alave v. City of Chicago,* 2022 IL App (1st) 210812 ¶ 37. This inconvenience is the opposite result from what the City promotes in its media efforts to encourage bike riding throughout Chicago. If bike riders knew the City's true position, bike ridership would only decrease and the City would lose one of the attractions that draws people to Chicago.

II. Section 3-102(a) already protects municipalities from meritless claims

A. Municipalities are not insurers for the safety of the traveling public

Section 3-102(a) limits the level of care that the City must exercise to maintain its property. The City owes the duty to maintain its property in a reasonably safe condition so that person acting with ordinary care will not be injured by property. If the City maintains its property accordingly, then a person injured on a city street has no cause action. In this way, the City's liability is limited and it will not become an insurer for the traveling public:

> We conclude that under section 3-102(a) of the act, the city has a duty to maintain its property in a reasonably safe condition so that a person acting in ordinary care will not be injured. ***If the city maintains its property in such a condition it has breached no duty*** and a negligent plaintiff on the property has not cause of action. The city has no duty to foresee and prevent injuries due solely to the plaintiff's own negligence. ***It is also not an insurer for safety of the traveling public***.

Wagner, 166 Ill.2d at 154 (emphasis added).

The plain language of §3-102(a) and the analysis in *Wagner* clearly and concisely rebut the City's unfounded fear that a principled reading of the statute will lead to a rise in burdensome, meritless litigation and show that its faulty interpretation of the term "intended user" is not necessary to protect municipalities from a rise in personal injury claims.

B. To recover, premises liability plaintiffs must also prove that the public entity had sufficient notice of any unreasonably dangerous condition

Section 3-102(a) states:

> [A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care ***of people*** whom the entity ***intended and permitted to use*** the property in a manner which and at such times was ***reasonably foreseeable*** that it would be use, and shall not be liable for injury unless it is proven that it has ***actual or constructive notice*** of the existence of such a condition that is not

> reasonably safe ***in reasonably adequate time prior to an injury*** to have taken measures to remedy or protect against such condition.

745 ILCS 10/3-102(a)(emphasis added). Section 3-102(b) defines constructive notice:

> A public entity does not have constructive knowledge of a condition of its property that is not reasonably safe within the meaning of Section 3-102(a) if it establishes either:
>
> (1) The existence of the condition and its character of not being reasonably safe would not have been discovered by an inspection system that was reasonably adequate.. to inform the public entity whether the property was safe for the use or uses for which the public entity use or intended others to use the public property ***and for uses that the public entity actually knew others were making of the public property or adjacent property*.**
>
> (2) The public's entity maintained and operated such an inspection system with due care and did not discover the condition.

745 ILCS 10/3-102(b)(1)(2)(emphasis added). Section 3-102(b) places a duty on the municipality to perform inspections sufficient to determine whether its property is safe for intended uses and uses ***which it actually knows about***. As set forth in *Wagner*, the City has no duty to foresee and prevent injuries due solely to the plaintiff's own negligence. Instead, the municipality's duty is limited to conditions it knows of or should have discovered with reasonable inspection. Thus, a public entity has the additional defense it inspected the property with due care but did not discover any defect in the roadway. § 3-102(b)(2).

The City knows bikes are ridden on its streets. Section 3-102 requires a public entity to inspect its property for unsafe conditions relating to known uses like bike riding. When §§ 3-102(a) and (b) are read together, the meaning of the statue is clear. People who are intended and permitted to be on public property are entitled to seek recovery for injuries resulting from uses foreseeable to the municipality.

CONCLUSION

In summary, a plain reading of § 3-102(a) refutes the City of Chicago's contention that bicyclist Clark Alave was not a permitted and intended user of Leland Avenue when he was injured by the unreasonably dangerous pothole in the crosswalk. As this court has noted, the intent of ***city streets*** is to make them available for travel. In light of all the evidence, the City clearly intends for bike riders to travel on all city streets, not just those designated by street signs or road markings. Section 3-102(a) does nothing more than codify every public entity's common law duty to exercise ordinary care to maintain its streets in a reasonably safe condition. Section 3-102(a) is not intended to provide a public entity with defenses to or immunity from liability. Nonetheless, § 3-102(a) does not impose an unfair burden on municipal defendants since they are still entitled to assert the wide range of defenses available to all defendants in personal injury cases. For these reasons, the opinion of the appellate court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a), (b), Rule 315(h) and 345. The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 13 pages.

/s/ Stephen S. Phalen
Stephen S. Phalen

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

CLARK ALAVE, *Plaintiff-Appellee,* v. CITY OF CHICAGO, *Defendant-Appellant.*	)))))))))	No. 128602

The undersigned, being first duly sworn, deposes and states that on March 22, 2023, there was electronically filed and served upon the Clerk of the above court the *Amicus Curiae* Brief of Illinois Trial Lawyers Association in Support of Plaintiff-Appellee. On March 22, 2023, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Stephen S. Phalen
Stephen S. Phalen

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.

/s/ Stephen S. Phalen
Stephen S. Phalen