Docket No. 124283

IN THE ILLINOIS SUPREME COURT

BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually, Plaintiffs-Appellees, v. METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, Defendant-Appellant.	On Appeal from the Illinois Appellate Court, First Judicial District Appellate Docket No. 1-17-0336 There Heard on Appeal from the Circuit Court of Cook County, Illinois County Department, Law Division Docket No. 12 L 000048 The Honorable William E. Gomolinski, Judge Presiding

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO

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NATURE OF THE CASE

The plaintiffs, Becky Andrews, as plenary guardian of the person and estate of Jeffrey Andrews, a disabled person, and Becky Andrews, individually, brought this action seeking to recover damages from the defendant, Metropolitan Water Reclamation District of Greater Chicago, a body politic and corporate (the "MWRD"), as a result of injuries which Andrews sustained while working on a construction project at the defendant's water reclamation plant. The plaintiff's second amended complaint alleged willful and wanton negligence and construction negligence against the MWRD. The trial court granted the MWRD summary judgment on grounds that the MWRD as a local public entity was entitled to discretionary immunity under section 2-201 of the Local

Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act"). 745 ILCS 10/201 (West 2010). The appellate court reversed and remanded for further proceedings. 2018 IL App (1st) 170336.

No questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether a local public entity is entitled to discretionary immunity under section 2-201 of the Tort Immunity Act when a construction contract authorizes the public entity discretionary supervision but delegates the means, method and safety of the work to the general contractor.

STATEMENT OF JURISDICTION

This appeal is taken from a final judgment pursuant to Illinois Supreme Court Rules 301 and 303. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R.303 (eff. July 1, 2017). The trial court granted summary judgment in the defendant's favor in a memorandum opinion and order filed on August 4, 2016 (R.C5114-24). Thereafter, on January 17, 2017, the trial court denied the plaintiffs' motion to reconsider (R.C5334). Within thirty days, the plaintiffs filed a notice of appeal on February 3, 2017 (R.C5352-53). The appellate court filed its opinion and judgment on November 5, 2018. The defendant filed its petition for leave to appeal within 35 days on December 10, 2018. This court granted leave to appeal on January 31, 2019.

STATUTES INVOLVED

745 ILCS 10/2-109

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

Laws 1965, p. 2983, § 2-109, eff. Aug. 13, 1965.

745 ILCS 10/2-201

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

Laws 1965, p. 2983, § 2-201, eff. Aug. 13, 1965.

STATEMENT OF FACTS

The Pleadings and the MWRD's Section 2-201 Affirmative Defense

The plaintiffs' second amended complaint (R.C919-42), alleged that the MWRD owned and operated the Calumet Water Reclamation Plant at 400 East 130th Street in Chicago, Illinois, and that the MWRD had entered into a prime contract with F.H. Paschen, S.N. Nielsen/IHC Construction, a joint venture, to construct primary settling tanks and grit removal facilities (R.C920). Prior to April 21, 2011, Jeffrey Andrews, an employee of F.H. Paschen, S.N. Nielsen & Associates LLC ("Paschen"), was assigned to work on the project (R.C920). According to the pleadings, on that date Andrews had to climb down a small job-made wooden ladder and pivot his body onto a fiberglass extension ladder which was placed inside the effluent chamber of primary settling tank no. 2402 (R.C921-22). While transitioning from the smaller ladder onto the extension ladder, he fell to the bottom of the tank and landed on top of a coworker, Luis Cuadrado, who had already descended (R.C922).[1] The plaintiffs alleged that the injuries resulted, *inter alia*, from the MWRD's alternatively negligent or willful and wanton failure to

[1] Luis Cuadrado filed his own action to recover damages under docket no. 12 L 00464, which was consolidated with this case (R.C154-55).

provide a platform or landing for access between the ladders or an extension ladder which could access the effluent chamber, and by failing to provide fall protection and non-slip ladder rungs (R.C923-25; R.C930-31).

Counts I and II of the second amended complaint were brought against the MWRD by Becky Andrews as the guardian of the person and estate of her husband, Jeffrey Andrews, and individually, for her lost consortium (R.C919-32), whereas counts III and IV were brought against the joint venture for construction negligence (R.C932-42). The trial court later granted the joint venture's section 2-619(a)(9) motion to dismiss counts III and IV (R.C1132-23) on grounds that Andrews was an employee of the joint venture and that the exclusive remedy provision of the Workers' Compensation Act barred the plaintiffs' claims (R.C1921).

The MWRD raised discretionary immunity pursuant to section 2-201 of the Tort Immunity Act, 745 ILCS 10/2-201 (West 2010)) as its fourth affirmative defense to the second amended complaint (R.C4091-92). The MWRD alleged, and the plaintiffs admitted, that it was a "sanitary district" organized under the Metropolitan Water Reclamation District Act, 70 ILCS 2605 (West 2010), and that it qualified as a local public entity under the Tort Immunity Act, 745 ILCS 10/1-206 (West 2010) (R.C4091). The MWRD alleged, and the plaintiffs denied, that it was entitled to absolute immunity for acts or omissions of its employees based on the determination of policy or the exercise of discretion pursuant to section 2-201 (R.C4091-92).

The MWRD-Joint Venture Contract

The $200 million project called for building a new facility to treat effluent sewage (R.C1477; R.C1504). The work was governed by a nine-volume contract between the

MWRD and the joint venture, the second volume of which contained certain General Specifications as follows:

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* * * *

Procedures and Methods

(18) The Contractor shall determine the procedure and methods and also design and furnish all temporary structures, sheeting, bracing, tools, machinery, implements and other equipment and plant [sic] to be employed in performing the work hereunder and shall promptly submit layouts and schedules of proposed methods of conducting the work for [the MWRD's Engineer's] approval. The use of inadequate or unsafe procedures, methods, structures or equipment will not be permitted, and the Engineer may disapprove and reject any of same which seem to him to be unsafe for the work hereunder....

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* * * *

The acceptance or approval of any order of procedure, methods, structures or equipment submitted by the Contractor shall not in any manner relieve the Contractor of any responsibility for the safety, maintenance or repairs of any structure or work, or for construction maintenance and safety of the work hereunder....

Handling Water at Treatment Plant Sites

(19) The Contractor shall make all arrangement [sic] for handling and disposing of water entering the work to maintain safe, dry and satisfactory working conditions.

* * * *

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Safety

(22) The Contractor shall be responsible for the safety of the Contractor's employees, Water Reclamation District personnel and all other personnel at the site of the work. The Contractor shall designate a

> responsible member of the Contractor's organization, knowledgeable of the site(s) and work being performed daily, as the safety representative.
>
> * * * *
>
> When work is being performed in tunnels, sewers, pipe, underground structures or other confined spaces, the Contractor shall provide all necessary and appropriate safety equipment.
>
> * * * *
>
> In addition to the safety requirements herein set forth, the Contractor shall comply with the health and safety laws, rules and regulations of federal, state and local governments, including but not limited to:
>
> > Safety Rules—Metropolitan Water Reclamation District of Greater Chicago, dated March 1, 1970 and as subsequently amended.

(R.C3633-36). The contract also included section 01014—Construction Limitations and Constraints—which required the contractor to perform work in such a manner that would least interfere with the operation of the plant, but which specifically stated as follows in paragraph 1.01(C):

> This specification is not intended to specify the means and methods to be used by the Contractor for construction of the Work. The Contractor is solely responsible for all means and methods required to construct the Work as shown in these Project Specifications and Plans.

(R.C835).

The Work

The MWRD's principal civil engineer for the project, John Lemon, and Greg Florek, the MWRD's resident engineer, testified that the MWRD did not supervise the means and methods of performing the work (R.C458; R.C471; R.C2137; R.C2152; R.C2229). Lemon's on-site responsibilities were to ensure that the project was constructed according to the plans and specifications (R.C461; R.C471). Florek walked

the jobsite daily to check the progress of the work and installations such as the water pipe to confirm the use of the correct batting material (R.C2156; R.C2221-22). Florek received daily reports on activities, reviewed specifications for ongoing installations and scheduled inspectors to inspect the installations (R.C2156-57; R.C2173). The MWRD did not inspect the grouting work inside the effluent chambers (R.C2476-77).

The joint venture's senior project manager for the project, Doug Pelletier, and the joint venture's project manager, Marty Platten, testified that the MWRD never dictated safety measures because safety was delegated to the joint venture (R.C1466; R.C2822). The joint venture had several safety representatives on the project (R.C1480-81). The witnesses testified that the MWRD helped administer and facilitate the contract, but Paschen as the managing member of the joint venture was responsible for stopping any unsafe work (R.C474; R.C1494-95; R.C1503-07; R.C2241; R.C2865; R.C2873; R.C4308).

According to Pat Healy, Andrews's foreman, the ladders were set up the day before the occurrence (R.C3406). Healy did not know whether anyone from the MWRD saw the ladder configuration before the accident (R.C3420-21). Florek had no information to suggest that any MWRD employee saw the ladder configuration before the accident and he and another MWRD engineer, Roberto Martinez, Jr., testified that there was no reason for any MWRD employee to be in the chamber (R.C2232-33; R.C2517). Pelletier saw the ladder configuration used at other work sites for the project between three and six times (R.C1483). Platten testified that the MWRD had no involvement in determining the ladder configuration (R.C2864-65; R.C2873).

Trial Court Proceedings

On March 28, 2016, the MWRD filed a motion for summary judgment on grounds, *inter alia*, that it was entitled to discretionary immunity under section 2-201 of the Tort Immunity Act as a matter of law (R.C4100-4527). Thereafter, the plaintiffs filed an opposing response (R.C4580-4758) and the MWRD filed a supporting reply (R.C5089-98).

On August 4, 2016, in a memorandum order and opinion, the trial court granted the MWRD summary judgment on the remaining claims (R.C5114-24). The trial court cited *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 120, 41 N.E.3d 957, for the proposition that where a contract sets forth discretionary supervision authority, a public entity is entitled to section 2-201 immunity (R.C5119). Next, the trial court quoted from the General Specifications in the MWRD-Joint Venture contract which set forth the MWRD's discretionary authority as follows:

> The Contractor shall determine the procedure and methods and also design and furnish all temporary structures....and shall promptly submit layouts and schedules of his proposed methods of conducting the work to [MWRD's] Engineer for approval. The use of inadequate or unsafe procedures, methods, structures or equipment will not be permitted, and the Engineer *may disapprove and reject any of same which seem to him to be unsafe* for the work hereunder....

(emphasis supplied by the trial court) (R.C5120). The trial court found that the "plain meaning" of this language gave the MWRD's engineer discretionary authority in supervising the safety aspects of the project (R.C5120). The trial court rejected the plaintiffs' argument that the engineer had no discretion under the contract, pointing to the use of the words "may" and "seem to him to be unsafe" as vesting the engineer with discretion (R.C5121). The trial court further rejected the plaintiffs' argument that the

MWRD engineers did not make a policy determination (R.C5123-24). The trial court reasoned that the written construction contract delineated the specific duties and responsibilities between the public entity and the contractor, and neither the contract terms nor any regulations required the MWRD's engineers to correct the contractor's safety issues or provide safety equipment to the contractor or dictate how Florek was to perform his job as the MWRD's engineer (R.C5124). Because Florek acted with discretionary authority in supervising the construction project, his decisions were entitled to section 2-201 immunity (R.C5124).[2]

The trial court denied the plaintiffs' motion to reconsider on January 17, 2017 (R.C5334). Within 30 days, the plaintiffs filed a notice of appeal (R.C5352-53).

The Appellate Court Reverses and Remands

On November 5, 2018, the appellate court reversed and remanded for further proceedings. As relevant to this appeal, with respect to the MWRD's affirmative defense of discretionary immunity under section 2-201, the appellate court held that even if Greg Florek, the MWRD resident engineer, was in a position to make determinations of policy and exercise discretion, there was no evidence that he did so with respect to the act or injury from which Andrews's injury resulted. ¶ 21. The appellate court read this court's recent decision in *Monson v. City of Danville*, 2018 IL 122486, 115 N.E.3d 81, as requiring the local public entity to present evidence of its decision-making process with respect to the ladder configuration before it was entitled to section 2-201 immunity. ¶¶ 22-24. Of the cases cited by the MWRD, the appellate court found *Cabrera*, on which the

[2] The trial court's memorandum order and opinion is included in both the appendix to the petition for leave to appeal and the appendix to this brief for the court's convenience (A.13-A.23).

trial court had relied, "difficult to square with the facts of this case," but determined that the immunity analysis in *Cabrera* was "untenable" after *Monson*. ¶¶ 27-28. According to the appellate court, the right to exercise discretion under a construction contract does not entitle a local public entity to section 2-201 immunity unless it was engaged in both the determination of policy and the exercise of discretion as to the specific act or omission from which a plaintiff's injury resulted. ¶ 28. Absent evidence that the MWRD had notice of the ladder configuration and allowed its use, the court concluded that the MWRD was not entitled to section 2-201 immunity. *Id.*

The MWRD did not file a petition for rehearing in the appellate court. Instead, within 35 days, the MWRD filed a petition for leave to appeal which this court granted, and this appeal now follows.

ARGUMENT

THE APPELLATE COURT ERRED IN REVERSING THE SUMMARY JUDGMENT ENTERED ON THE FOURTH AFFIRMATIVE DEFENSE BASED ON THE DISCRETIONARY IMMUNITY SET FORTH IN SECTION 2-201 OF THE TORT IMMUNITY ACT WHEN THE DEFENDANT RESERVED DISCRETIONARY SUPERVISION OVER THE CONSTRUCTION IN THE WRITTEN CONTRACT BUT DELEGATED THE MEANS, METHOD AND SAFETY OF THE WORK TO THE GENERAL CONTRACTOR

A. The Standard of Review is *De Novo*

The question presented by this appeal is whether a local public entity is entitled to discretionary immunity under section 2-201 of the Tort Immunity Act (745 ILCS 10/2-201 (West 2010)) when a construction contract authorizes the public entity discretionary supervision but delegates the means, method and safety of the work to the general contractor.

The appeal arises from the trial court's memorandum order and opinion which granted summary judgment to the MWRD based on its fourth affirmative defense pursuant to section 2-201 of the Tort Immunity Act. The use of summary judgment is encouraged as an aid to the expeditious disposition of a lawsuit. *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867 (1986). Summary judgment is properly granted where, as here, the pleadings and proofs show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 390-91, 620 N.E.2d 1073 (1993); 735 ILCS 5/2-1005(c) (West 2010). Appellate review of an order granting summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204 (1992). To the extent the trial court's grant of summary judgement turned on interpretation and legal effect of the MWRD-Joint Venture contract, the interpretation of the contract presents a question of law that is also subject to *de novo* review. *Avery v. State Farm Mutual Automobile Ins. Co.*, 216 Ill. 2d 100, 129, 835 N.E.2d 801 (2005). *De novo* consideration means this court performs the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP,* 408 Ill. App. 3d 564, 578, 948 N.E.2d 132 (1st Dist. 2011).

B. The MWRD was Entitled to Discretionary Immunity Under Section 2-201 of the Tort Immunity Act Based on the Discretionary Supervision Vested in the Resident Engineer Under the Construction Contract Between the MWRD and the Joint Venture

1. The MWRD as a Sanitary District is a Local Public Entity That Qualifies for Section 2-201 Discretionary Immunity

The plaintiffs admitted in their reply to the fourth affirmative defense both that

the MWRD is a "sanitary district" organized under the Metropolitan Water Reclamation District Act (740 ILCS 2605 (West 2010)), and that as a "sanitary district," the MWRD is a local public entity and entitled to the immunities set forth in the Tort Immunity Act (R.C4091-92). 745 ILCS 10/1-206 (West 2010).

One of those immunities is found in section 2–201, which provides for discretionary immunity by a public employee as follows:

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

As this court has recognized, section 2-201 immunity is absolute; there is no exception for willful and wanton conduct. *In re: Chicago Flood Litigation.* 176 Ill. 2d 179, 195-96, 680 N.E.2d 265 (1997).

As further relevant here, section 2-109 states that a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCS 10/2-109 (West 2010). Read together, sections 2-109 and 2-201 immunize a public entity from liability for the discretionary acts or omissions of its employees. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 118, 896 N.E.2d 232 (2008) (citing *Arteman v. Clinton Community School District No. 15*, 198 Ill. 2d 475, 484, 763 N.E.2d 756 (2002), and *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 496, 752 N.E.2d 1090 (2001)).

This court has held that the Tort Immunity Act establishes a two-part test to determine which employees may be granted discretionary immunity under section 2–201. An employee may qualify for discretionary immunity "if he holds *either* a position

involving the determination of policy *or* a position involving the exercise of discretion" (emphasis in original). *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 122, 41 N.E.3d 957 (quoting *Harinek v. 161 North Clark Street Ltd. Partnership,* 181 Ill. 2d 335, 341, 692 N.E.2d 1177 (1998)). "This language makes clear that [section 2-201] is concerned with both *the type of position* held by the employee and *the type of action* performed or omitted by the employee" (emphasis in the original). 181 Ill. 2d at 341. In addition, the defendant must show that the act or omission giving rise to the injury was both a determination of policy and an exercise of discretion. *Id.*

In this case, the appellate court erred by not determining that Greg Florek, the MWRD resident engineer, held a position that required the determination of policy or the exercise of discretion. ¶ 21. The contract delegated responsibility for the means, methods and safety of the work to the contractor, which involved a determination of policy in the making of public improvements, and Florek held a position that authorized him in accordance with the MWRD's determination of policy under the contract to disapprove and reject any inadequate or unsafe methods, structures or equipment which in the exercise of discretion seemed to him to be unsafe (R.C3633-35). Noting more was required for discretionary immunity to apply under sections 2-109 and 2-201 of the Act.

2. The Contract Between the MWRD and the Joint Venture was Unambiguous and Vested the Resident Engineer With Discretion to Disapprove and Reject any Inadequate or Unsafe Procedures, Methods, Structures or Equipment

The contract contained the MWRD's General Specifications including the following provision:

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* * * *

Procedures and Methods

> **(18)** The Contractor shall determine the procedure and methods and also design and furnish all temporary structures,...and shall promptly submit layouts and schedules of proposed methods of conducting the work for [the MWRD's Engineer's] approval. The use of inadequate or unsafe procedures, methods, structures or equipment will not be permitted, *and the Engineer may disapprove and reject any of same which seem to him to be unsafe* for the work hereunder....

(emphasis added) (R.C3633-34). Although the trial court relied on this provision in granting summary judgment to the MWRD (R.C5120), the appellate court ignored this language in holding that section 2-201 immunity did not apply under the contract.

Until the appellate court handed down its opinion in this case, two courts had held that the discretionary supervision retained by a local public entity in a construction contract was sufficient to qualify for the discretionary immunity in section 2-201. The appellate court's holding wrongly departed from this precedent discussed below.

In the first case, *In re: Chicago Flood Litigation*, 176 Ill. 2d 179, the City of Chicago entered into a written contract in May 1991 under which the dredging contractor was to remove and replace wood pilings at five bridges. *Id.* at 184. The contract provided that "the contractor shall not drive the piles at any other location than that specified by the City," but authorized the City to change its specifications. *Id.* at 195. The dredging contractor notified the City that it had completed the work by September 1991; however, the contractor had installed the pilings for one of the bridges at a location other than where designated in the contract. *Id.* at 184-85. During the pile driving at that location, the contractor had caused a breach in the walls of a tunnel, which the City learned about from a TV news crew in February 1992. *Id.* at 185. Thereafter, City employees inspected

the tunnel, photographed the damage and recommended immediate repairs. *Id.* In April 1992, the tunnel breach opened, causing the Chicago River to flood buildings connected to the tunnel. *Id.* As a result, multiple lawsuits were brought against the City by individuals, businesses, and an insurer seeking to recover for their losses. *Id.* at 185-86. This court held that under the contract the City's supervision of the pile driving was discretionary and not ministerial. *Id.* at 195. In holding that the City was not liable for the failure to supervise the contractor's work, this court referred to sections 2–109 and 2–201 of the Tort Immunity Act and did not go beyond noting that the contract gave the City the right to change the specifications regarding the location of the pile driving, and that the City retained the discretion to locate the pilings as it thought best. *Id.*

In the second case, *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, the City of Chicago asserted that it was entitled to section 2-201 immunity based on a provision in the contract that it had entered into with a subcontractor hired to perform certain work, including sandblasting and painting for a bridge. *Id.* at ¶ 1. The plaintiff, an employee of the subcontractor, sustained his injuries when he slipped on oil underneath the bridge. *Id.* at ¶ 5. The written contract between the City and the subcontractor included the following:

> F. Precautions and Safety
>
> 1. You must take any precautions that may be necessary to render all portions of the Work secure in every respect, to decrease the liability of accidents from any cause and to avoid contingencies that are liable to delay the completion of the Work. You must furnish and install, subject to the approval of the Commissioner, all necessary facilities to provide safe means of access to all points where Work is being performed and make all necessary provisions to insure the safety of workers and of engineers and inspectors during the performance of the Work….
>
> 2. Although the Commissioner may observe the performance of the Work

> and reserves the right to give opinions and suggestions about safety defects and deficiencies, the City is not responsible for any unsafe working conditions. The Commissioner's suggestions on safety, or lack of it, will in no way relieve you of your responsibility for safety on the Work site. You have sole responsibility for safety and the obligation to immediately notify the Commissioner of all accidents.
>
> * * * *
>
> G. Health, Safety, and Sanitation
>
> 1. Clean up....You must clean off all cement streaks or drippings, paint smears or drippings, rust stains, oil, grease, dirt and any other foreign material deposited or accumulated on any portion of your Work, or existing facilities and structures, due to your performance of the Work.
>
> * * * *
>
> Submittals....The Contractor shall not construe Engineer's acceptance of the submittals to imply approval of any particular method or sequence conducting the work, or for addressing health and safety concerns. Acceptance of the programs does not relieve the Contractor from the responsibility to conduct the work according to the requirements of Federal, State, or Local regulations and this specification, or to adequately protect the health and safety of all workers involved in the project and any members of the public who may be affected by the project. The Contractor remains solely responsible for the adequacy and completeness of the programs....and work practices, and adherence to them.

Id. at ¶ 73. In affirming the summary judgment entered in the City's favor, the *Cabrera* court cited this court's decision in *In re: Chicago Flood Litigation* and referred to the contract provision which gave the City the discretion to change the specifications regarding the location of the pilings. *Id.* at ¶ 124. The *Cabrera* court then turned to the contract language in the case before it and held that it similarly authorized the City to "reject or require modification of any proposed or previously approved order of procedure, method, structure or equipment." *Id.* at ¶ 125. The *Cabrera* court reasoned that pursuant to the quoted contract language, the City's supervision was discretionary and protected from liability by discretionary immunity under section 2-201. *Id.*

The appellate court here acknowledged that *Cabrera* was "difficult to square with the facts of this case" based on the similarity between the two. ¶ 27. The appellate court noted that both public projects were governed by similar documents that delegated safety and responsibility for the work to the contractors. *Id.* Indeed, the MWRD-Joint Venture contract here left the means and methods of conducting the work to the contractor's determination while providing that the MWRD engineer "may disapprove and reject any" inadequate or unsafe "procedures, methods, structures or equipment" "which seem to him to be unsafe for the work" (R.C3633-34). Courts interpret the word "may" as discretionary in a contract. *Professional Executive Ctr. v. LaSalle Nat'l Bk.*, 211 Ill. App. 3d 368, 373, 570 N.E.2d 366 (1st Dist. 1991). Notwithstanding this permissive language which gave the MWRD the discretion to approve or reject the "procedures, methods, structures or equipment" used by the contractor in performing the work, the appellate court wrongly considered the discretionary immunity analysis of *Cabrera* "untenable" (¶ 28) after *Monson v. City of Danville*, 2018 IL 122486, 115 N.E.3d 81, and avoided altogether any discussion of this court's decision in *In re: Chicago Flood Litigation.*

The appellate court's reliance on *Monson*, 2018 IL 122486, was misplaced. *Monson* did not involve a local public entity's alleged failure to supervise a contractor in the construction of a public project as did *In re: Chicago Flood Litigation* and *Cabrera.* Instead, in *Monson*, the City of Danville claimed section 2-201 immunity regarding a project which its employees had undertaken to inspect downtown-area public sidewalks and repair defects. ¶¶ 4-6. As this court noted in *Monson*, the City had a preexisting duty under section 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a) (West 2012)) to maintain its property in a reasonably safe condition. ¶ 24. This court further cited case

law holding that "a public entity claiming immunity for an alleged failure to repair a defective condition must present sufficient evidence that it made a conscious decision not to perform the repair." ¶ 33. However, the City had presented no such evidence that its employees had actually inspected the section of the sidewalk where plaintiff fell. ¶ 34. As the City failed to show how it had exercised its discretion in not repairing the sidewalk, it could not assert section 2-201 immunity. ¶ 35.

Notably, here, unlike *Monson*, the MWRD entered into a written construction contract which delegated performance of the work to an independent contractor and reserved discretionary supervision (R.C3633-66). When a public entity enters into a construction contract for public improvements, it is making decisions that determine policy and that require the public entity "to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *Harinek*, 181 Ill. 2d at 342. The written contract between the MWRD and the joint venture evidenced the MWRD's policy determinations by its selection of the contractor, the delineation of the scope of the contractor's work, the bargained-for terms and conditions under which the contractor was to perform the work, and, no less importantly, by its reservation of discretion to the MWRD resident engineer to "disapprove and reject" any "inadequate or unsafe" "procedures, methods, structures or equipment" "which seem to him to be unsafe for the work" (R.C3633-34).

Here, as in *In re: Chicago Flood Litigation* and *Cabrera*, the discretionary supervision that the MWRD retained under the contract was sufficient to qualify for section 2-201 immunity without a further showing that discretion was consciously exercised with respect to the specific act or omission which allegedly caused the worker's

injuries. That Florek as the MWRD resident engineer did not make safety recommendations to the contractor did not change the fact that doing so (or not doing so) was "an act or omission" under section 2-201 entirely within his discretion under the contract.

In holding that the City of Chicago was entitled to section 2-201 discretionary immunity, this court in *In re: Chicago Flood Litigation* did not require proof that the City or a particular employee made a conscious decision to approve the pilings at a different location while the dredging contractor was still engaged in the performance of the work. Indeed, this court's opinion noted only in passing that the contractor notified the City of the completion of the work in September 1991 and the City learned of a breach in the tunnel wall from a TV news crew in February 1992. 176 Ill. 2d at 184-85. The contract language alone was sufficient to immunize the City pursuant to section 2-201 with respect to the performance of the work and the failure to supervise. *Id.* at 195. *Cabrera* followed *In re: Chicago Flood Litigation* by similarly relying on the contract language without requiring further proof of the City's decision-making process as to the oil that accumulated underneath the bridge during the subcontractor's performance of the work. 2015 IL App (1st) 140933, ¶ 125. Here, as in in *In re: Chicago Flood Litigation* and *Cabrera*, the contract language which reserved discretion should be controlling.

Contrary to the appellate court's pronouncement that *Cabrera* was "untenable" (¶ 28), *Monson* did not signal any change in the analysis of section 2-201 immunity. The City's notice of the breach was relevant in *In re: Chicago Flood Litigation* only to its discretionary immunity for its post-contract failures to warn and repair the damaged tunnel wall—similar to the City's failure to repair public property in *Monson*—but not to

its discretionary immunity for its earlier failure to supervise the work under its contract with the dredging contractor. The appellate court here failed to distinguish between the discretionary supervision that a local public entity has retained under a written contract—as *In re: Chicago Flood Litigation* and *Cabrera* recognized—and the discretion that the public entity must specifically exercise in the absence of a written contract as to the repair of public property which it has a preexisting duty to maintain—as recognized in *Monson*. The roles of the public entity in the two situations are not comparable.

In *Monson*, the defendant had a preexisting duty to maintain its public sidewalks in a reasonably safe condition for intended and permitted users and relied on its own employees for inspection and the repairs. 2018 IL 122486, ¶ 24. Unlike the municipality in *Monson*, the local public entity which employs an independent contractor to perform the work is not liable for harm caused by the latter's negligence unless it retains control over the contractor. *Carney v. Union Pac. R. Co.*, 2016 IL 118984, ¶¶ 31-33, 77 N.E.3d 1. This case, like *In re: Chicago Flood Litigation* and *Cabrera*, deals only with the discretionary supervision retained by the local public entity pursuant to a written contract with an independent contractor for a public construction project.

If this court adopts the appellate court's analysis, local public entities which hire independent contractors and delegate the means, methods and safety of the work while retaining discretionary supervision over construction would be placed in an untenable position. Discretionary immunity would afford protection from liability only when the local public entity goes beyond its role in construction and the bargained-for contract requirements and it involves itself in the operative details of the work. Nothing in *Monson*, any previous supreme court decision or the language of section 2-201 requires

this level of oversight by a local public entity in a public construction project. To claim section 2-201 immunity in this case, according to the appellate court, the MWRD would have had to become directly involved in the grout work inside the effluent chamber of the primary settling tank—contrary to what the work and the contract actually required. Indeed, Florek and Roberto Martinez, Jr., another MWRD engineer, testified that there was no reason for a MWRD employee to be in the chamber (R.C2232-33; R.C2517).

The General Specifications required that only the contractor, not the MWRD, be responsible for the safety of the contractor's employees, and that the contractor follow all "health and safety laws, rules and regulations of federal, state and local governments" including the MWRD's own safety rules (R.C3635-36). The General Specifications also obligated the contractor, not the MWRD, to provide all necessary and appropriate safety equipment in confined spaces such as the effluent chamber of the primary settling tank (R.C3636). The General Specifications granted Florek only the power to check safety reports ("The [MWRD's] Engineer shall be permitted to examine all reports, recommendations, and records of the safety representatives and upon request shall be given copies of any such reports") (R.C3636). However, neither the contract nor any regulation or safety rule required Florek to overrule the contractor's choice of the means of descending into the chamber or to provide safety equipment for Paschen employees to perform the work inside the chamber, contrary to the allegations of the second amended complaint (R.C923-25; R.C930-31).

The appellate court concluded that the MWRD was not entitled to discretionary immunity under section 2-201 because it presented no evidence documenting any decision or refusal to decide whether or not to use the ladder configuration that resulted

in the injury. ¶ 24. For a large scale public improvement the size of the sewage treatment plant, however, unlike the sidewalk repairs at issue in *Monson*, the appellate court's holding is impracticable. A local public entity contracts with a competent independent contractor and delegates the means, methods and safety of the work with the reasonable expectation that public employees will not have to insert themselves into the operative details of the work, such as the configuration of a ladder, on a risk-by-risk daily basis. Likewise, in *In re: Chicago Flood Litigation*, 176 Ill. 2d 179, which was decided on section 2-615 and 2-619 motions to dismiss, this court held that the City was immune even though at the pleading stage it produced no evidence documenting any decision to relocate the wood pilings from the location originally designated in the specifications.

In *In re: Chicago Flood Litigation*, this court noted that as a result of the passage of the Tort Immunity Act, "governmental units are liable in tort on the same basis as private tortfeasors unless a tort immunity statute imposes conditions upon that liability [citations omitted]." *Id.* at 192. If a local public entity must produce evidence of its decision-making process risk-by-risk under the written contract to be able to assert discretionary immunity as to the specific act or omission from which an injury results, as the appellate court held (¶¶ 21, 24), then, as further argued below, local public entities will not be liable on the same basis as private parties to construction contracts. Instead, they will be disadvantaged as they risk subjecting themselves to liability under section 414 of the Restatement (Second) of Torts to the extent they attempt to show they exercised discretionary supervision over the work. Restatement (Second of Torts, § 414 (1965).

C. The Appellate Court's Holding Deprives Local Public Entities of Their Section 414 Defense and Burdens Them in a Way That Private Parties are not Under Construction Contracts

Section 414 states as follows:

> One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.
>
> Comment a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in the Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.
>
> Comment b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.
>
> Comment c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.

> Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second of Torts, § 414, Comments a-c (1965).

Courts generally look to the parties' agreement to determine whether the employer of the independent contractor exercised sufficient control to create a duty and subject itself to liability. *Carney*, 2016 IL 118984, ¶ 41. This court further noted in *Carney* that section 414 liability is not vicarious but direct based on the employer's personal negligence (¶36), and that the employer is deemed to retain sufficient control for liability to attach to the employer when the contractor is not entirely free to perform the work in its own way. *Id.* at ¶¶ 46-48.

Here, on its face, the same language in the contract between the MWRD and the Joint Venture would support both discretionary immunity and non-liability under section 414. However, if the appellate court's reasoning is adopted, local public entities will have to go above and beyond what their contracts require to exercise control over the work in an effort to establish their discretionary immunity defense, contrary to the role that similarly situated private employers of independent contractors enjoy under section 414. Unlike private employers of independent contractors, local public entities will find themselves between a rock and a hard place—potentially exposing themselves to section 414 liability at common law in an effort to establish their section 2-201 defense without knowing in advance whether section 2-201 or section 414 is a defense as a matter of law in the event litigation results. This case proves the point. The plaintiffs' opposing

response to the motion for summary judgment argued that the MWRD should lose on both defenses (R.C4580-4758).[3]

D. The Appellate Court's Holding is Contrary to the Public Policy and Purpose Behind the Tort Immunity Act

The result reached by the appellate court in this case is contrary to the public policy and purpose behind the Tort Immunity Act. The Illinois legislature enacted the Tort Immunity Act to protect local public entities and public employees from liability arising out of the operation of government and to ensure that public funds are not dissipated by tort judgments. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368, 799 N.E.2d 273 (2003).

The appellate court unduly narrowed the scope of discretionary immunity to subject local public entities like the MWRD to potential liability despite the policy determinations they have made and the discretion they exercised by hiring independent contractors to perform public improvements and delineating the contractors' responsibilities for the work and safety in their construction contracts. Further contrary to the public policy and purpose of the Tort Immunity Act, the appellate court's holding places local public entities at a disadvantage to private parties under construction contracts as they must go above and beyond the role they may have as the employer of independent contractors under section 414 to establish defenses they have under the Tort Immunity Act.

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[3] The MWRD asked for summary judgment on section 414 grounds below (R.C4112-14), but the trial court never ruled on that part of the motion for summary judgment and for that reason, the issue was not briefed on appeal to the appellate court.

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, Metropolitan Water Reclamation District of Greater Chicago, respectfully requests that this court reverse the opinion and judgment of the Illinois Appellate Court, First Judicial District, First Division, in favor of plaintiffs-appellees, Becky Andrews, as plenary guardian of the person and estate of Jeffrey Andrews, a disabled person, and Becky Andrews, individually, and that it affirm the judgment of the trial court or that it remand for the entry of judgment in its favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and those matters to be appended to this brief pursuant to Rule 342(a), is 26 pages.

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APPENDIX

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FIRST DISTRICT
FIRST DIVISION
November 5, 2018

No. 1-17-0336

BECKY ANDREWS, as Plenary Guardian of JEFFREY ANDREWS, a Disabled Person, and BECKY ANDREWS, Individually,	) Appeal from the Circuit Court of Cook) County
Plaintiffs-Appellants,	)
v.	) Nos. 12 L 48 & 12 L 64 (cons.)
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)
Defendant-Appellee.	) Honorable William E. Gomolinski) Judge Presiding.

JUSTICE GRIFFIN delivered the judgment of the court, with opinion.
Presiding Justice Mikva and Justice Pierce concurred in the judgment and opinion.

OPINION

¶ 1 This case concerns a construction accident at a project owned and operated by defendant the Metropolitan Water Reclamation District of Greater Chicago. The trial court dismissed plaintiff's claims for willful and wanton misconduct on the basis that no suit may be maintained for willful and wanton conduct without allegations that a similar prior injury occurred because of the condition from which the injury resulted. The trial court later entered summary judgment against plaintiff on her claims that defendant was negligent, finding that defendant, a public entity, is immune from suit under the circumstances. We reverse and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 Jeffrey Andrews, whose interests are represented here by plaintiff Becky Andrews, worked as a cement finisher and was employed by F.H. Paschen, S.N. Nielson and Associates, LLC (Paschen). Defendant, the Metropolitan Water Reclamation District of Greater Chicago, was embarking on a project at 400 East 130th Street in Chicago. A joint venture was formed titled F.H. Paschen, S.N. Nielson/IHC Construction Joint Venture (Joint Venture), that entered into a contract with defendant to be the contractor to construct "primary settling tanks and grit removal facilities."

¶ 4 During the course of the project, Andrews was assigned to apply a sealant at the bottom of a 29-foot effluent chamber of a settling tank. In order to reach the bottom of the chamber, Andrews and a coworker were required to use a ladder made by the construction crew for a portion of the descent. Then, Andrews and the coworker would have to pivot onto a commercially manufactured fiberglass ladder for the remainder of the descent. There was not a horizontal access platform for transferring between the two ladders, the workers were just expected to step over from one ladder to the other. The process had been used several times to reach the bottom of other tanks on this particular construction project.

¶ 5 The project site experienced heavy rain prior to the subject instance when Andrews was expected to use the ladders to apply the sealant at the bottom of a chamber. The site was muddy and the chamber had approximately three feet of standing water in it. Andrews had to wear boots. On that occasion, while Andrews tried to pivot from the job-made ladder to the fiberglass one, he fell 29 feet down the chamber and landed on his coworker who had already descended. Andrews suffered broken bones and severe, career-ending head injuries.

¶ 6 The work at the project was governed by the Metropolitan Water Reclamation District of Greater Chicago: General Specifications (General Specifications), among other rules and

regulations. Plaintiff points to provisions in the General Specifications and elsewhere that she claims dictated the means and methods of the work and contained safety provisions from which defendant could not deviate. Plaintiff alleges that the dangerous ladder configuration—along with the failure to maintain a safe, dry work site—violated the project's governing documents and other applicable rules and regulations and constituted negligence on behalf of defendant.

¶ 7 Plaintiff's theory of negligence relies on the alleged acts and omissions by defendant's engineer on the project, Greg Florek. The General Specifications delegated construction safety to the Joint Venture, but gave defendant's engineer some degree of control regarding how the work was carried out, including that he enforce the General Specifications. Although defendant had no role in envisioning or creating the ladder configuration, there is a question whether, prior to Andrews's injury, defendant was aware of the workers using that ladder configuration.

¶ 8 Plaintiff, Andrews's wife, filed this case for construction negligence, loss of consortium for that negligence, willful and wanton construction negligence, and loss of consortium for that willful and wanton construction negligence. The trial court dismissed the willful and wanton claims on the basis that plaintiff could not establish that defendant had knowledge of prior injuries resulting from the allegedly unsafe ladder configuration. The trial court later entered summary judgment for defendant on plaintiff's claims based on simple negligence, holding that defendant could not be liable for Florek's alleged acts and omissions because Florek acted with discretionary authority and was making policy determinations. Based on defendant's conclusion that it was exercising discretion, it argues that it is entitled to discretionary immunity under the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 *et seq.* (West 2016); see *id.* § 2-201).

¶ 9 II. ANALYSIS

¶ 10 The trial court dismissed plaintiff's claims based on willful and wanton conduct under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). A section 2-615 motion to dismiss attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Id.*; *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008). All well-pleaded facts must be taken as true, and any inferences should be drawn in favor of the nonmovant. *Jones v. Brown-Marino*, 2017 IL App (1st) 152852, ¶ 19. A section 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Id.* We review the dismissal of a plaintiff's claims *de novo*. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

¶ 11 The Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2016)) states that a local public entity that supervises an activity on public property is not liable for an injury unless the local public entity is guilty of willful and wanton conduct in its supervision proximately causing such injury. *Id.* § 3-108(a). For purposes of the Tort Immunity Act, the General Assembly has defined " '[w]illful and wanton conduct' " as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." *Id.* § 1-210. Whether a defendant's conduct is willful and wanton, for purposes of the Tort Immunity Act, is a question for the jury. *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 27.

¶ 12 Plaintiff argues that the trial court erred when it dismissed her willful and wanton supervision claims. Plaintiff contends that she sufficiently alleged that defendant manifested a conscious disregard for the safety of Jeffrey Andrews when it should have known about the dangerous ladder configuration and failed to enforce the rules and regulations to prevent injury,

despite the agreed requirement that defendant enforce the subject safety rules and General Specifications for the project.

¶ 13 The trial court's dismissal was based on its interpretation of the Tort Immunity Act and case law interpreting that Act. The trial court stated on the record its belief that the willful and wanton supervision claim could not stand, absent some type of allegation that the defendant has prior knowledge of a similar injury arising from the condition (citing *Floyd v. Rockford Park District*, 355 Ill. App. 3d 695 (2005)).

¶ 14 In *Floyd*, the court held that "[p]rior knowledge of similar acts is required to establish a 'course of action' " in order for a public entity to be liable for willful and wanton supervision. *Id.* at 701. The *Floyd* court further held that "even if there was prior knowledge of a similar injury, a plaintiff must plead facts establishing the similarities between the prior injury and the plaintiff's injury." *Id.* at 702. Here, the trial court stated that plaintiff's claim could not stand because "you've got no prior acts; you've got no prior injuries."

¶ 15 We disagree with the trial court's reasoning that similar prior injuries are always required for willful and wanton supervision claims to survive against a public entity. The arguments presented, and the trial court's ruling, were based solely on the willful and wanton exception to the Tort Immunity Act (745 ILCS 10/3-108 (West 2016)). The Illinois Supreme Court recently explained that "[t]o establish willful and wanton conduct *in the absence of evidence of prior injuries*, Illinois courts have required, at minimum, some evidence that the activity is generally associated with a risk of serious injuries." (Emphasis added.) *Barr v. Cunningham*, 2017 IL 120751, ¶ 21. Our supreme court has made it clear that willful and wanton misconduct in supervision can lead to a viable claim "in the absence of evidence of prior injuries," so dismissing plaintiff's claims on that basis alone is contrary to prevailing law.

¶ 16 Here, plaintiff claims that defendant should have known that the improper ladder configuration was being used and knew or had reason to believe that a serious injury could occur as a result of using the ladder configuration—which violated safety rules, regulations, and standard practices. Specifically, plaintiff alleges that defendant knew using tee-peed ladders over a 29-foot hole without the required access platform was dangerous. According to plaintiff, defendant did not employ competent supervision over the project, as it was required to do, to stop such activity, even though the ladder configuration arguably violated rules and regulations and defendant's own safety rules and General Specifications that defendant was obligated to enforce. See *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 246 (2007) (failure to supervise a known dangerous activity and follow safety rules and administrative guidelines can give rise to a cause of action for willful and wanton supervision); *Hadley v. Witt Unit School District 66*, 123 Ill. App. 3d 19, 23 (1984) (supervisor's failure to act in the face of a dangerous situation could constitute actionable willful and wanton misconduct).

¶ 17 Whether conduct is willful and wanton is ultimately a question of fact for the jury. *Cohen*, 2017 IL 121800, ¶ 27. This case was at the pleading stage when plaintiff's claims premised on willful and wanton supervision were eliminated. Plaintiff may be able to demonstrate that the workers were engaged in "an obviously dangerous activity" or she might "introduce evidence of *** particular dangers associated" with the subject activity. See *Barr*, 2017 IL 120751, ¶ 23; see also *Murray*, 224 Ill. 2d at 246. Plaintiff's allegations were sufficient to defeat the motion to dismiss. Plaintiff might be able to prove that defendant acted with utter indifference or conscious disregard for Andrews's safety when it observed or should have observed an activity it knew to be dangerous, knew or should have known that injury could result, and failed to act in face of the danger.

¶ 18 As for plaintiff's claims based on simple negligence, the trial court entered summary judgment against plaintiff under section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2016)). Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the nonmovant, fail to establish that a genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. *Id.*; *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 12. We review a trial court's decision to grant summary judgment *de novo*. *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 8.

¶ 19 Plaintiff argues that the trial court erred when it entered summary judgment on her negligence claims by finding that defendant's engineer, Greg Florek, had exercised discretionary authority. The Tort Immunity Act states that a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCS 10/2-109 (West 2016). The Tort Immunity Act also states that "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." *Id.* § 2-201. The trial court found that "decisions made by [Florek] concerning safety issues on the construction site involved balancing competing interests and judgment calls as to what safety measures were needed." The trial court held that summary judgment was proper here because "engineer Florek acted with discretionary authority in supervising the construction project and his decisions were determinations of policy."

¶ 20 An employee may qualify for discretionary immunity if he holds either a position involving the determination of policy or a position involving the exercise of discretion. *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 122. However, an employee who qualifies

for discretionary immunity based on his responsibilities must also have engaged in both the determination of policy and the exercise of discretion when performing the act or omission from which the plaintiff's injury resulted. *Id.* The statute is concerned with both the type of position held by the employee and the type of action performed or omitted by the employee. *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 341 (1998). Whether the act or omission in question is discretionary or ministerial must be determined on a case-by-case basis. *Cabrera*, 2015 IL App (1st) 140933, ¶ 122.

¶ 21 In this case, even if Florek was in a position where he was entitled to make determinations of policy and exercise discretion, there is no evidence that he was making policy or exercising discretion with respect to the act or injury from which Andrews's injury resulted. To the contrary, Florek testified and defendant has remained steadfast throughout the case that Florek did not know about the ladder configuration. Policy determinations, as contemplated by the Tort Immunity Act, are the decisions that " 'require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests.' " *Harinek*, 181 Ill. 2d at 342 (quoting *West v. Kirkham*, 147 Ill. 2d 1, 11 (1992)). Defendant's position is that Florek knew nothing of the ladder configuration and therefore could not have balanced any interests or exercised judgment about its use.

¶ 22 The Illinois Supreme Court recently addressed the application of discretionary immunity under similar circumstances in *Monson v. City of Danville*, 2018 IL 122486. In *Monson*, the plaintiff alleged that she was injured when she tripped and fell on an uneven sidewalk that the city-defendant was negligent in maintaining. *Id.* ¶¶ 1, 32. The city argued that it was immune from liability because the director of public works had recently undertaken to inspect the city's sidewalks as part of a project to make repairs. *Id.* ¶¶ 4-5, 32. The director of public works

testified that he made repair decisions on a case-by-case basis by walking along the sidewalks, inspecting them, and determining what areas were in need of repair. *Id.* He testified that although he did not specifically remember the piece of concrete that allegedly caused the plaintiff's fall, his staff inspected every portion of sidewalk in that area so he must have inspected it and used his discretion to determine that the particular portion of sidewalk did not need to be repaired. *Id.* ¶¶ 5-6.

¶ 23 Our supreme court held that the city-defendant in *Monson* was not immune from liability. *Id.* ¶ 39. The court reasoned that the city's immunity argument must fail because the city did not present "evidence documenting the decision not to repair the particular section of sidewalk at issue in this case." *Id.* ¶ 35. This case is no different in that respect. Contrary to presenting evidence that he was aware of the condition giving rise to the injury and disregarded it, defendant has strenuously objected to any insinuation that it had any knowledge of the configuration being utilized. Under *Monson*, the impetus is on defendant to "present sufficient evidence that it made a conscious decision not to perform the repair." *Id.* ¶ 33. "The failure to do so is fatal to the claim [of immunity]." *Id.*

¶ 24 Defendant has not shown that its alleged failure was an exercise of discretion because there is no evidence that it was aware of or made the decision to implement its goal of sealing the tanks. It presented no evidence at all documenting any decision or refusal to decide whether to use the ladder configuration that resulted in Andrews being injured—there was no decision-making process at all. Like in *Monson*, the record contained "no evidence of the City's decision-making process with respect to the specific site of plaintiff's accident." *Id.* ¶ 38. There were "no facts regarding the City's assessment of the actual site." *Id.* Plaintiff did not present any evidence regarding "whether anyone even took note of a sidewalk deviation (or ladder configuration) at

that location, or whether it was simply overlooked." *Id.* In this case, defendant claims it knew nothing about the procedures being used, and thus, the record before us does not contain sufficient evidence to establish that defendant's handling of the matter constituted an exercise of discretion. See *id.*

¶ 25 Defendant points to some earlier appellate court cases, examining what constitutes a discretionary act and policy determination, where we found that a municipality was entitled to immunity. See, *e.g.*, *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 395 (2000) (city was immune from liability because its laborers tasked with filling potholes were required to determine the manner in which to fill them and how to allocate their time and resources); *Harinek*, 181 Ill. 2d at 342-43 (a fire marshal assembling a group of people during a fire drill was undertaking a discretionary act because the marshal had to plan and conduct the drill and also balance various other interests competing for the time and resources of the department); *Cabrera*, 2015 IL App (1st) 140933, ¶ 125 (city was immune from liability from claims by a construction worker that fell from a city bridge while working on a construction project because the city's supervision of the worker's employer was discretionary).

¶ 26 In *Wrobel*, the city was alleged to have been negligent because it knew about the pothole, but unreasonably repaired it. *Wrobel*, 318 Ill. App. 3d at 393, 395. In *Harinek*, the fire marshal was alleged to have been negligent in conducting a fire drill that was "carried out pursuant to a plan developed by the marshal before the drill began." *Harinek*, 181 Ill. 2d at 342. The situation in both of those cases is readily distinguishable from this case when *Monson* is applied because the defendant in those cases knew of the injurious condition and took measures in relation to that condition. Here, we have a defendant claiming ignorance of the condition giving rise to the injury altogether.

¶ 27 *Cabrera*, on the other hand, is more difficult to square with the facts of this case, in light of the supreme court's decision in *Monson*. In *Cabrera*, a construction worker was injured when he fell into a pit while working to paint a bridge in Chicago. *Cabrera*, 2015 IL App (1st) 140933, ¶¶ 1, 18. The project was governed by documents similar to those that governed the work in this case, such as that safety responsibilities were delegated to the contractors, with the city providing oversight and having a duty to ensure the work was being done according to the contracts. *Id.* ¶¶ 34, 42, 46. When the plaintiff fell, the city and its agents had no notice of the putatively dangerous condition that gave rise to the injury. *Id.* ¶¶ 46, 55. We held that the city was immune from liability in tort because the contract governing the project gave the city the right to " 'reject or require modification of any proposed or previously approved order of procedure, method, structure or equipment.' " *Id.* ¶ 125. We held that, "[b]ecause of this contractual provision, the City's supervision of Era Valdivia was discretionary, meaning the City is immune pursuant to section 2-201." *Id.*

¶ 28 After *Monson*, the immunity analysis done in *Cabrera* is untenable. Simply having the right under the construction contracts to reject methods the contractors might use does not amount to automatic discretionary immunity for any injury resulting from any methods used in the construction. Instead, courts are required to look at the specific act or omission and decide whether the defendant was "engaged in both the determination of policy and the exercise of discretion *when performing the act or omission from which the plaintiff's injury resulted.*" (Emphasis added and emphases omitted.) *Id.* ¶ 122. Here, the act or omission from which plaintiff's injury is alleged to have resulted is defendant allowing the workers to repeatedly use an unsafe ladder configuration. Defendant claims it knew nothing about the utilization of that method. Thus, defendant has not met its evidentiary burden of showing that it exercised

discretion when allowing the workers to use the putatively unsafe method. See *Monson*, 2018 IL 122486, ¶¶ 31, 34. Just because a party has a right to exercise discretion does not mean that it did exercise discretion.

¶ 29 Plaintiff also argues that she was denied equal protection of the laws by virtue of Jeffrey Andrews, a construction worker, being subjected to a more stringent standard for recovery under the Tort Immunity Act (745 ILCS 10/2-201 (West 2016)). Plaintiff maintains that the application of *Cabrera*, 2015 IL App (1st) 140933, and *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997), to the Tort Immunity Act makes it unreasonably difficult for a construction injury victim such as Jeffrey Andrews to defeat tort immunity as compared to someone injured in a nonconstruction capacity. Plaintiff argues that the court in those cases and the trial court here failed to scrutinize Florek's actions on the job site and only focused on his position as supervisor and the documents governing the project, ignoring the second prong of the *Harinek* analysis. See *Harinek*, 181 Ill. 2d at 341 (the immunity statute "is concerned with both *the type of position* held by the employee and *the type of action* performed or omitted by the employee" (emphasis in original)).

¶ 30 The guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner. *American Federation of State, County, & Municipal Employees (AFSCME), Council 31 v. State*, 2015 IL App (1st) 133454, ¶ 30. We need not resolve plaintiff's equal protection argument in light of our reversal on other grounds.

¶ 31 III. CONCLUSION

¶ 32 Accordingly, we reverse and we remand for further proceedings.

¶ 33 Reversed and remanded.

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

BECKY ANDREWS, as Plenary Guardian of the Person and Estate of JEFFREY ANDREWS, a disabled person, and BECKY ANDREWS, individually,	)	
Plaintiffs,	)	No. ~~2012 L 5651~~ 12 L 48 (Consolidated with 2012 L 000464)
v.	)	
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, a body corporate and politic,	)	
Defendant.	)	

MEMORANDUM ORDER AND OPINION

INTRODUCTION

This matter comes for ruling on Defendant Metropolitan Water Reclamation District of Greater Chicago's ("MWRD") Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005.

BACKGROUND

In 2008, defendant MWRD entered into a contract with the general contractor F.H. Paschen, S.N. Nielsen & Associates LLC ("Paschen") for the Primary Settling Tank Project in Chicago. The scope of Paschen's work included furnishing "all labor, materials, equipment and incidentals required to construct the Primary Settling Tanks and Grit Removal Facilities." (Def's Motion for Summary Judgment, Exhibit B). The contract delegated the responsibility of

construction safety to Paschen.[1] It also granted MWRD's engineer power to approve Paschen's construction plans and project procedures and to examine all reports, recommendations, and records of safety.[2]

On April 21, 2011, Paschen employees Jeffrey Andrews and Luis Cuadrado were working on the construction site. They were assigned to apply sealant to a gate at the bottom of a 29-foot-deep effluent tank. To do so, they set up a job-made wooden ladder to ascend and then used an extension ladder to descend into the effluent chamber. After climbing to the top of the job-made wooden ladder, they were required to pivot themselves around this ladder over the wall and onto the extension ladder. There was no access platform. While pivoting, Andrews fell into the 29-foot-deep tank and landed on top of Cuadrado. Both were severely injured.

On January 3, 2012, plaintiff Becky Andrews—the guardian of the person and estate of Jeffrey Andrews—filed the original complaint. On April 4, 2012, this case was consolidated with plaintiff Luis Cuadrado's case against MWRD. On October 10, 2013, Becky Andrews filed her second amended complaint, alleging willful and wanton misconduct and construction negligence against MWRD. She also alleged that MWRD violated: (1) 29 C.F.R. § 1926.1053(a)(10) by not providing a platform or landing when two ladders are used to access the chamber; (2) 29 C.F.R.

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[1] GS-11 Section 22. "The Contractor shall be responsible for the safety of the Contractor's employees, MWRD personnel and all other personnel at the site of work."

[2] GS-8 Section 18. "Before starting construction, the Contractor shall submit his proposed order of procedure to the Engineer for approval.; See also GS-11 Section 22." The Engineer shall be permitted to examine all reports, recommendations, and records of the safety representative and upon request shall be given copies of any such reports, recommendations, and records."

GS-8 Section 18. "The Contractor shall determine the procedure and methods and also design and furnish all temporary structures, sheeting, bracing, tools, machinery, implements and other equipment and plant to be employed in performing the work hereunder, and shall promptly submit layouts and schedules of his proposed methods of conducting the work to Engineer for approval. The use of inadequate or unsafe procedures, methods, structures or equipment, will not be permitted, and Engineer may disapprove and reject any of same which seem to him to be unsafe for the work hereunder. . . ."

§ 1926.1053(a)(1)(ii) by not providing the extension ladder which can adequately access to the effluent chamber; (3) OSHA 29 § C.F.R. subpart M by not providing fall protection; and (4) 29 C.F.R. § 1926.1054(b)(2) by failing to provide non-slip ladder rungs. Andrews further alleged that these requirements were mandated by the General Specifications and Safety Rules in the construction contract between MWRD and Paschen.

This Court has dismissed with prejudice the allegations of willful and wanton supervision in its hearing on MWRD's 735 ILCS 5/2-615 motion to dismiss the second amended complaint. The plaintiffs' motion for reconsideration was denied on July 8, 2015. This Court further denied MWRD's 735 ILCS 5/2-619(a) motion to dismiss, finding a question of fact concerning the allegations of willful and wanton conduct.

On April 11, 2016, the defendant moved for summary judgment under Section 2-201 of the Tort Immunity Act, arguing it was immune from liability for discretionary decisions relating to the project. 745 ILCS 10/2-201. After reviewing all of the briefs, pleadings, and relevant case law, this Court held a hearing on the merits on June 23, 2016.

COURT'S ANALYSIS

The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine question of material fact exists. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-165 (Ill. 2007). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the non-moving party. *Krickl v. Girl Scouts*, 402 Ill.

App. 3d 1, 4 (Ill. App. Ct. 1st Dist. 2010). A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw differing inferences from the undisputed facts. *Id.* Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and therefore should be allowed only where the right of the moving party is clear and free from doubt. *Bagent*, 224 Ill. 2d at 163. Whether an act is discretionary or ministerial is usually a question of fact, but summary judgment is appropriate where a contract has delegated responsibilities between a public entity and a contractor and parties have acted accordingly. *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App 1st 140933 ¶120 (affirmed summary judgment for the defendant under Section 2-201).

Defendant argues that it is entitled to absolute immunity under 745 ILCS 10/2-201 because the contract that the parties entered into granted MWRD's engineer discretionary authority in supervising the construction project. In response, the plaintiffs point to MWRD's specifications and safety manual, and argue that the decisions MWRD made relating to the construction project were ministerial because MWRD was bound by the contract terms and the safety mandates.

Section 2-201 of the Tort Immunity Act grants immunity to municipal defendants engaged in discretionary acts as follows:

> Except otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused. 745 ILCS 10/2-201 (West 2012).

The Illinois supreme court has established a two-part test to determine which employees may be granted discretionary immunity under Section 2-201. First, an employee may qualify for

discretionary immunity "if he holds either a position involving the determination of policy *or* a position involving the exercise of discretion." *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 341 (1998) (emphases in original). Second, an employee who satisfies the first part of the test must also have engaged in both policy determination and the exercise of discretion when performing the act or omission from which the plaintiff's injury resulted. *See id.*

There is no statutory definition of the terms "discretion," "ministerial," and "policy," and Illinois courts have applied the common law definitions. *See Snyder v. Curran Township*, 167 Ill.2d 466, 473 (1995). Under common law, "discretionary acts are those which are unique to a particular public office, and involve the exercise of personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act should be performed." *Id* at 464. In contrast, "ministerial acts are those which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Id.*

In cases involving a construction contract that delegates responsibilities between a public entity and a contractor, the Illinois Supreme Court and First District Appellate Court have consistently held that a public entity's contractual discretionary authority itself would trigger Section 2-201 immunity. *See In re Chicago Flood Litigation*, 176 Ill.2d 179 (1997); *See also Cabrera v. ESI Consultants, Ltd.*, 2015 IL App 1st 140933 ¶120. In *In re Chicago Flood Litigation*, the City of Chicago contracted with a dredging company to remove and replace wood piling clusters at five bridges, with specifications in the contract as to the exact locations to install pilings. 176 Ill.2d at 184. The dredging company deviated from those specifications and caused a breach in a freight tunnel, which later flooded the buildings connected to it. *Id.* Our

supreme court held that the City was immune under Section 2–201 of the Tort Immunity Act, reasoning that the City's supervision of the dredging company's pile driving was discretionary rather than ministerial because the contract authorized the City discretionary power to change its specifications. *Id* at 195.

In *Cabrera v. ESI Consultants*, the First District Appellate Court held that where a contract set forth discretionary supervision authority, a public entity was entitled to Section 2-201 immunity. 2015 IL App 1st 140933 ¶120. In *Cabrera*, the City of Chicago contracted with the plaintiff's employer on a construction project. The plaintiff was injured while working on the project and sued the City. *Id* at ¶1. In moving for summary judgment on the basis of Section 2-201 immunity, the City cited the following contract provisions:

> [The contractor] must take any precautions that may be necessary to render all portion of the Work secure in every aspect . . . [The contractor] must furnish and install, *subject to the approval* of the [City's] Commissioner, all necessary facilities to provide safe means of access to all points where the Work is bring performed . . . .
>
> Although the Commissioner *may observe* the performance of the Work and *reserves the right to give opinions and suggestions about safety defects and deficiencies*, the City is not responsible for any unsafe working conditions . . . [The Commissioner's] acceptance of the programs does not relieve the Contractor from the responsibility to conduct the work according to the requirements of Federal, State, or Local regulations. *Id* at ¶73 (emphasis added).

The *Cabrera* court affirmed the circuit court's granting summary judgment for the City, reasoning that "the contract authorized the Commissioner to reflect or require modification of any proposed or previously approved order or procedure, method, structure or equipment." *Id* at ¶125 (internal quotation mark omitted). Thus, the *Cabrera* court held that "the City's supervision of [the contractor] was discretionary, meaning the City is immune pursuant to section 2-201." *Id.*

In the instant case, MWRD contracted with Paschen on the construction project. The contract contained MWRD's General Specifications including the following provision cited by both parties:

> The Contractor shall determine the procedure and methods and also design and furnish all temporary structures . . . and shall promptly submit layouts and schedules of his proposed methods of conducting the work to [MWRD's] Engineer for approval. The use of inadequate or unsafe procedures, methods, structures or equipment, will not be permitted, and [MWRD's] Engineer *may disapprove and reject any of same which seem to him to be unsafe* for the work . . . . (emphasis added).

According to the plain meaning of this clause, MWRD's engineer had discretionary authority in supervising the safety aspects of the project. The engineer could choose to reject any procedure or measure that "seem[ed] to him" to be unsafe. Moreover, the record also supports the plain meaning of the contract clause above. The deposition testimony of Paschen's senior project engineer Douglas Pelletier shows that MWRD's resident engineer Greg Florek exercised his discretion when interpreting MWRD's specifications. Indeed, Florek testified that MWRD had nothing to do with how Paschen performed its work or implemented safety measures. (Pl. Andrew's Response to Def's for Summary Judgment, Exhibit 9, p. 30).

In their response, the plaintiffs argue that the contract *required* MWRD to enforce all safe rules and regulations as to the use of ladders on the project without room for discretion. The plaintiffs interpret the contract clause in two parts. First, they interpreted "the use of inadequate or unsafe procedures, methods, structures or equipment, will not be permitted" as a mandate. Second, they read "the Engineer may disapprove and reject any of same which seem to him to be unsafe for the work" as a catch-all provision. The plaintiffs' argument also relies on a memo from MWRD and Paschen's 2008 pre-construction meeting, which reflected that "the contractor shall comply with . . . [Defendant's] Safety Rules." Thus, a combination of the construction

contract language and the memo of the pre-construction meeting created the mandate that unequivocally prohibited inadequate and unsafe procedures, requiring the defendant to adhere to the safety rules and other requirements in a ministerial way. As a result, MWRD's engineer could only enforce its safety rules, including specific rules regarding the use of ladders, when supervising the construction project, and could not deviate from the mandate or decide which safety measures were sufficient based on the engineer's own judgment. Moreover, the plaintiffs argue that the catch-all provision allowed the MWRD to exercise discretion *only* with regards to safety matters not explicitly covered by any rule or mandate, and that the ladder requirements do not fall into that category.

However, contract interpretation is a question of law. *See Illinois Tool Works, Inc. v. Commerce & Industry Insurance Co.*, 2011 IL App (1st) 103736 at ¶11. Our supreme court has held that in interpreting a contract, a court should initially look to the language of the contract on its face. *See Rakowski v. Lucente*, 104 Ill.2d 317, 323 (1984) (stating that both the meaning of a written agreement and the intent of the parties is to be gathered from the face of the document without assistance from extrinsic evidence). If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of extrinsic evidence. *See id.* Here, the plain meaning of the contract language is clear. "The Engineer may disapprove and reject any of same which seem to him to be unsafe for the work." The term "may" and the phrase "seem to him to be unsafe" granted MWRD's engineer discretionary power. Thus, this court need not look beyond the contract to the 2008 pre-construction meeting. Moreover, the very purpose of hiring Paschen was to build the effluent tank. Even if this court accepts the plaintiffs' version of contract interpretation, the contract language only imposed a "mandate" to the contractor, not to MWRD. The *Cabrera* court also

held that a subcontractor's obligation to comply with safety rules, including OSHA, would not make the general contractor's discretionary authority ministerial. 2015 IL App 1st at ¶ 73 (finding the City of Chicago's had discretionary supervision power even if the contractor had to work according to the federal, state, or local regulations).

Although the *Harinek* court has established a two-part test to determine discretionary immunity, the appellate courts in *Chicago Flood* and *Cabrera* granted defendant's summary judgment motion based on the first part alone. In some cases, however, courts have gone over both parts of the Section 2-201 test. *See e.g. Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 394 (1st Dist. 2000). Here, the plaintiffs' argument relies heavily on the second part, thus this court will continue its analysis.

According to the second part of the test, to trigger Section 2-201 immunity, the act or omission must also be a policy determination. *See Harinek*, 181 Ill. 2d 335 at 341. The Illinois Supreme Court has defined policy determinations as "[d]ecisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *Wrobel*, 318 Ill. App. 3d at 394.

In *Wrobel*, the plaintiffs claimed injuries from the defendant municipality's negligent repair of a pothole. The First District Appellate Court affirmed the trial court's grant of summary judgment under Section 2-201 for the defendant. The court looked at how the work was done, and found that the decisions of the workers could fairly be characterized as policy determinations because "when confronted with a particular stretch of roadway, the workers must necessarily be concerned with the deficiency in which they prepare any potholes for repair." *Id.* Moreover, the workers had to allocate their time and resources among the various potholes that needed repair, and they must ensure that not too much time is dedicated to pothole preparation. *See id.*

In the instant case, the record shows that the decisions of MWRD's resident engineer Greg Florek were policy determinations. First, according to Florek's deposition, he did not recall whether he had ever referred to any specific requirements in the General Specifications during the construction phrase of the work. Instead, he testified that his on-site decisions were based on his interpretation of the situation. Second, the General Specifications only mandated that the contractor, not MWRD's engineers, be responsible for the safety of contractor's employees and follow all federal, local, and other regulations.[3] Indeed, the General Specification only granted MWRD's engineer power to check safety reports.[4] Therefore, any possible decisions made by an MWRD engineer concerning safety issues on the construction site involved balancing competing interests and judgment calls as to as to what safety measures were needed. *Harinek*, 181 Ill. 2d at 342. Accordingly, such decisions were determinations of policy.

The plaintiffs further argue that even if there was a discretionary act, MWRD's engineers did not make a simultaneous policy determination. The plaintiffs' argument relies on the recent First District case *Barr v. Cunningham*, 2016 IL App (1st) 150437. In *Barr*, a student was injured in gym class when a ball bounced off the floor during a hockey game. The injured student then sued the teacher and the school district. *Id* at ¶ 3. The First District held that the teacher was not entitled to Section 2-201 immunity, reasoning that his decision to allow students play without safety goggles was not a policy decision because the school mandated the use of goggles in floor hockey games. *Id.* Furthermore, the court noted that there was no evidence indicating that the teacher balanced competing interests and made a judgment call regarding what solution would

[3] *See* GS-11 Section 22. "The Contractor shall be responsible for the safety of the Contractor's employees, MWRD personnel and all other personnel at the site of work."
[4] *See* GS-11 Section 22. "The Contractor shall permit MWRD's engineer to examine all reports recommendations, and records of the safety representatives and upon request shall be given copies of any such reports, recommendations, and records."

best serve those interests in deciding not to require students to wear goggles. *Id.* The court also noted that the goggles were available for use, and the amount or availability of goggles did not impact the teacher's decisions. *See Id.*

Barr is distinguishable from the present case for two reasons. First, unlike the circumstances in *Barr*, the present case involves a written construction contract that delineates the specific duties and responsibilities between the public entity and the contractor. Second, the school in *Barr* explicitly required the use of goggles in gym class, and teachers could only adhere to school's safety requirement. Here, neither the contract terms nor any other regulations required MWRD's engineer to correct the contractor's safety issues or provide safety equipment to the contractor. In this case, there is no mandate dictating how Greg Florek had to perform his tasks as MWRD's engineer. Accordingly, this court finds that the plaintiffs' argument relying on *Barr* is unpersuasive and the engineers' decisions were simultaneous policy determinations.

COURT'S RULING

For the reasons discussed above, this court finds that the MWRD engineer Florek acted with discretionary authority in supervising the construction project, and his decisions were determinations of policy. Therefore, this court finds the Section 2-201 of the Tort Immunity act applies, providing immunity for the defendant. Based upon the pleadings, briefs, record, hearing, and case law cited above, this court orders that the MWRD's Motion for Summary Judgment is GRANTED.

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Judge W[illegible] Jlinski

ENTERED: AUG 0[illegible], 2016

Circuit Court-1973

Judge William E. Gomolinski #1973

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Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Andrews, et al
v.
MWRD

No. 12L48 cons. w/ 12L464

ORDER

This cause coming on for Ruling of the Motion To Reconsider or Vacate August 4, 2016 Order granting Summary judgment in favor of MWRD, finding absolute immunity under the Tort Immunity Act,

It is Ordered:

Said motion are denied. 5957 5285 8-4-16

Attorney No.: 02329
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Judge
William E. Gomolinski

ENTERED: JAN 17 2017 MT

Circuit Court – 1973

Dated: , ,

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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AAP
A.W.W.

#02329 EGW\tb 2/3/2017 2012S-0017

**APPEAL TO THE APPELLATE COURT OF ILLINOIS
THE FIRST JUDICIAL DISTRICT, FROM THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually,

Plaintiffs,

v.

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, a body corporate and politic and F.H. PASCHEN, S.N. NIELSEN/ IHC CONSTRUCTION, a Joint Venture,

Defendants.

No. 2012 L 000048

FILED
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
2017 FEB -3 AM 11:18
CIVIL APPEALS DIVISION
DOROTHY BROWN
CLERK

NOTICE OF APPEAL

Plaintiff, BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually, by their attorneys, CORBOY & DEMETRIO, P.C., appeals to the Appellate Court of Illinois, First District, from the following orders entered by the Circuit Court of Cook County, Illinois:

A. The Order entered by the Honorable William E. Gomolinski on April 23, 2014 granting defendant, Metropolitan Water Reclamation District of Greater Chicago's, Motion to Dismiss paragraphs 30.b. and 30.c. of Andrews' Second Amended Complaint at Law, pursuant to 735 ILCS 5/2-615. (See Exhibit 1.)

B. The Order entered by the Honorable William E. Gomolinski on July 8, 2015 denying plaintiffs' Andrews' Motion to Reconsider the April 23, 2014 Order which granted

C 5352 V3

defendant's Motion to Dismiss paragraphs 30.b. and 30.c. of Andrews' Second Amended Complaint at Law, pursuant to 735 ILCS 5/2-615. (See Exhibit 2.)

C. The Order entered by the Honorable William E. Gomolinski on August 4, 2016 granting defendant, Metropolitan Water Reclamation District of Greater Chicago's, Motion for Summary Judgment. (See Exhibit 3.)

D. The Order entered by the Honorable William E. Gomolinski on January 17, 2017, denying plaintiffs' Andrews' Motion to Reconsider the August 4, 2016 Order which granted defendant's Motion for Summary Judgment. (See Exhibit 4.)

By this appeal, plaintiffs will ask the Appellate Court to reverse the Orders (1) granting defendant, Metropolitan Water Reclamation District of Greater Chicago's, Motion to Dismiss paragraphs 30.b. and 30.c. of Andrews' Second Amended Complaint at Law, pursuant to 735 ILCS 5/2-615, and against plaintiffs; (2) denying the Motion to Reconsider; (3) granting defendant, Metropolitan Water Reclamation District of Greater Chicago's, Motion for Summary Judgment, and against plaintiffs; (4) denying the Motion to Reconsider; and (5) for other such relief as this Court will deem just and proper.

Respectfully submitted,

By: _____
Edward G. Willer

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TABLE OF CONTENTS OF APPELLATE RECORD

Docket No. 124283

IN THE ILLINOIS SUPREME COURT

BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually, Plaintiffs-Appellees, v. METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, Defendant-Appellant.	On Appeal from the Illinois Appellate Court, First Judicial District Appellate Docket No. 1-17-0336 There Heard on Appeal from the Circuit Court of Cook County, Illinois County Department, Law Division Docket No. 12 L 000048 The Honorable William E. Gomolinski, Judge Presiding

NOTICE OF FILING

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PLEASE BE ADVISED that on this 11th day of April, 2019, we caused to be electronically filed with the Office of the Clerk of the Illinois Supreme Court, the attached brief and argument on behalf of defendant-appellant Metropolitan Water Reclamation District of Greater Chicago in the above-entitled cause, a copy of which, along with this notice of filing with affidavit of service, is herewith served upon you.

Respectfully submitted

By: /s/ Michael Resis
Attorneys for Defendant-Petitioner

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AFFIDAVIT OF SERVICE

The undersigned, Jacqueline Y. Smith, a non-attorney, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that I caused the foregoing notice of filing and defendant-appellant's brief and argument to be served upon the parties listed above on this 11th day of April, 2019, by electronic mail and electronically through the court's Odyssey electronic filing manager.

/s/ Jackie Smith
SmithAmundsen LLC