No. 121536

IN THE SUPREME COURT OF ILLINOIS

KATHY CORBETT,	)	Appeal from the Second District Appellate Court, Elgin, Illinois
Plaintiff-Appellee,	)	
	)	Appellate Court No. 2-16-0035
v.	)	
	)	There heard on appeal from the Nineteenth Judicial Circuit Court, Lake County, Illinois
THE COUNTY OF LAKE,	)	
Defendant,	)	
and	)	Circuit Court No.: 14 L 493
	)	
THE CITY OF HIGHLAND PARK,	)	The Honorable Christopher C. Stark Judge Presiding
Defendant-Appellant.	)	

BRIEF OF PLAINTIFF-APPELLEE, KATHY CORBETT

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ORAL ARGUMENT REQUESTED

FILED
APR 26 2017
SUPREME COURT
CLERK

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ISSUE PRESENTED FOR REVIEW

Whether the appellate court should be affirmed in finding that the trial court erred when it granted summary judgment for Highland Park based on the determination that the Skokie Valley Bike Path, located in a developed, commercial and industrial area of Highland Park, was a "riding trail" under section 3-107(b) of the Local Governmental and Governmental Employees Tort Immunity Act.

STATUTE INVOLVED

Local Governmental and Governmental Employees Tort Immunity Act 745 ILCS 10/3-107

> "Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) any road which provides access to fishing, hunting or primitive camping, recreational or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway, or (3) a township or other road district highway; (b) any hiking, riding, fishing or hunting trail." 745 ILCS 10/3-107.

STANDARD OF REVIEW

The standard of review from the entry of summary judgment, 735 ILCS 5/2-1005 (b), is *de novo*, but additionally, all of the evidence must be reviewed under the *Pedrick* standard, in the light most favorable to the nonmoving party, here, the plaintiff. *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20. Likewise, "the construction of a statute is a question of law, which we review *de novo*." *Hawes v. Luhr Bros., Inc.*, 212 Ill. 2d 93, 105 (2004).

STATEMENT OF FACTS

The Accident

Plaintiff, Kathy Corbett, was severely injured on August 21, 2013, when she and the group of bicyclists with whom she was riding rode over several large bumps or "defects" in the pavement of the Skokie Valley Bike Path ("the Path") approximately one-tenth of a mile north of Old Deerfield Road. R. C923. One of the riders directly in front of plaintiff lost control of his bicycle when he rode over the bumps and fell, causing plaintiff to ride into him and fall off her bicycle. R. C923.

Highland Park Had Notice of the Defects in the Path, But Failed to Fix it Prior to Plaintiff's Accident

More than one month before the incident at issue on this path, on July 9, 2013, Angus Duthie was involved in a bicycle crash while riding his bicycle southbound on the Path approximately 100 yards north of Old Deerfield Road. R. C878. Duthie fell off his bicycle after hitting a bump protruding up from the Path. R.C. 878. The accident was reported to the Highland Park Police Department on September 10, 2013. R. C890.

The next week, on July 14, 2013, Paul Tyska was injured while riding his bicycle southbound on the Path, just north of Old Deerfield Road. R. C823. Tyska fell off his bike after it hit some bumps that elevated 2 to 3 inches above level ground. R. C899. These bumps were about 100 yards north of Old Deerfield Road. R. C903. The Highland Park Fire Department responded to the scene of Tyska's accident, and took him to the hospital. R. C899. The Highland Park Police also arrived at the scene of the accident, took photographs

of the Path and bumps, interviewed Tyska at the hospital and prepared an accident report. R. C899.

After his crash, Tyska called the Highland Park Police Department to get a copy of the police report *and to tell them to fix the Path.* R. C900. After Tyska's accident was investigated by the Highland Park Police Department, it prepared a Memorandum dated July 16, 2013, which was sent to the Highland Park Finance Department to advise them of Tyska's accident. R. C959. Notwithstanding the report, the City of Highland Park performed no repairs to the Path in the area where Tyska fell, and the defects in the Path in that area remained in the same condition until the time of plaintiff's accident, five weeks later. R. C970; C1004.

Highland Park's Agreement to Maintain the Path

At and before the time of the occurrence, Lake County was subject to a recreational lease agreement over the Path with Commonwealth Edison ("ComEd"). R. C832-33. ComEd was the owner of the right of way encompassing the Path, and Lake County leased the land where the Path was located. R. C833. Lake County then entered into a maintenance agreement with Highland Park with respect to the Path. R. C833. Highland Park was responsible for "routine maintenance" on the portion of the Path within the corporate limits of Highland Park, and expressly agreed to keep the Path "in a reasonably safe and *serviceable condition for bicycle and pedestrian traffic.*" R. C833 (emphasis added). "Routine maintenance" means that Highland Park is responsible for keeping the path free of debris, repairing obstructions, patching, filling potholes and mowing adjacent to the path. R. C173. Specifically, Section 3 of the Agreement states:

> 3. Upon completion, the City shall perform and be responsible for routine maintenance, at no cost to the County, upon the pedestrian bridge over Illinois Route 22 and that portion of the Bikeway between Old Mill Road and West Park Avenue that is located within the corporate limits of the City in accordance with the terms and conditions of the COM ED Agreements.

R. C141. Furthermore, Section 4 of the Agreement defines "routine maintenance"

as:

> 4. For the purposes of this Agreement, routine maintenance of the Bikeway and the pedestrian bridge shall be construed to mean the performance, on a regular basis, of all activities necessary to keep the Bikeway in a reasonably safe and serviceable condition for bicycle and pedestrian traffic. Said maintenance activities shall include the inspection of the Bikeway on a regular basis for all defects and/or deficiencies and the removal from the Bikeway of debris and other potential hazards, impediments, or obstructions to bicycle and pedestrian traffic, painting of the bridge, repair of the bridge deck surface and the repair of potholes. Specifically excluded as routine maintenance activities to be performed by the City are changes to the geometrics, surface type, shoulder type, design characteristics, replacement, reconstruction, widening or expansion of the Bikeway, repairs related to drainage problems, structural repairs or replacement of the bridge superstructure and/or bridge abutments.

R. C141. Under Section 2 of the Agreement, Lake County was to remain responsible

for any "major" repair or reconstruction work on the Path:

> 2. The County at no cost to the City shall, unless otherwise provided, design, construct, and retain the jurisdictional authority for the Bikeway and thereafter be responsible for and perform any major maintenance upon that portion of the Bikeway that is located within the corporate limits of the City. The Bikeway shall be a ten foot wide bituminous surfaced facility the construction of which shall incorporate design elements sufficient to maintain positive drainage.

R. C141.

The Bike Path Traverses Through Developed Commercial, Industrial and Residential Areas of Highland Park

There are commercial and industrial businesses, parking lots and buildings abutting both sides of the Path. R. C867; C878. Many of these businesses have cyclone fences that are adjacent to the Path, and behind these fences are stacks of industrial materials such as pipes and cement blocks. R. C867; C875. The Path passes by a Highland Park city park called "Buckthorn Park." R. C866; C879. The Path is not in a wooded, natural scenic area. R. C867; C878. There are large ComEd utility poles that run alongside the entire Path, with multiple power lines overhead. R. C868; C879. The Path is not in a forest or mountainous region. R. C866; C878. The Path intersects with Old Deerfield Road, which is a busy street with motor vehicles regularly crossing the Path. R. C867; C879. As bicyclists approach Old Deerfield Road from the north and south, there are stop signs for the bicyclists but no stop signs for cars traversing Old Deerfield Road. R. C867; C879; C923. The Path is sandwiched between Highway 41 which is less than one block to the east and railroad tracks, which are less than one block to the west. R. C867; C880. The Path is a "bicycle path" not a "riding trail." R. C920.

Plaintiff submitted her Affidavit below which stated as follows. She was familiar with the bike path, including the accident scene, and it did not go through a forest or mountainous region. R. C866. Some large bushes and some grass line the Path, but there are no trees in the area of the accident. R. C866. The Path also passes by Buckthorn Park. R. C866. Large utility poles line the entire Path, with the multiple power lines overhead. R. C867. There are areas where the businesses stack materials against fences to the side of the

Path. R. C867. At the location of the accident, business buildings abut both sides of the Path and several business parking lots are nearby. R. C867. In the area of the accident, a cyclone fence abuts the east side of the Path and the highway and railroad tracks are less than a block away to the east and west respectively. R. C867. Plaintiff's affidavit attached photographs in support of most of her statements about the Path. The first is a Google aerial photograph with "Buckthorn Park" printed adjacent to the Path. R. C869. The second is a shot of a bicyclist riding on the Path, with utility poles and overhead wires on either side; shrubs are on one side of the Path, while the other edge is mostly grass. R. C870. The third shows a stretch of the Path with shrubbery and a utility pole on one side, a cyclone fence with industrial pipe stacked up behind it on the other side, and utility poles in the background. R. C871. The fourth photograph shows the intersection of Old Deerfield Road (which is not labeled) and the Path; utility poles and wires stretch across the road and line the Path in the background. There are buildings a short distance to one side of the path and a parking lot a few feet from the other side. R. C872. The fifth photograph is a Google aerial view labeled "1495 Old Deerfield Road"; it also identifies the Path and several business establishments that are located either between the Path and the railroad tracks or between the path and Old Skokie Valley Road. R. C873. The sixth photograph, also from Google and labeled "1452 Old Deerfield Road," identifies the road and shows what Plaintiff's affidavit identified as parking lots located a few feet to the east of the Path. R. C874. The seventh photograph, a Google aerial view of the general area, identifies numerous business establishments on either side of the Path. R. C875. The final photograph shows a sign identifying the Path and a

stretch of the path, including the grass borders with intermittent shrubbery and utility poles on both sides. R. C876.

After Plaintiff's Accident, Highland Park Takes Action to Fix the Path

At 8:40 am on the day of Plaintiff's accident (the accident occurred at 7:47 am), officer Ghoga of the Highland Park Police Department contacted the Lake County Department of Transportation in an attempt to get the defects that caused Plaintiff's accident fixed. R. C985-86. The procedure at Highland Park Police Department when there was an accident with injury involving a condition on the Path, was to notify the department charged with remedying the Path; explain the situation; and then, try to get it rectified as soon as possible. R. C987. The Highland Park Public Works Department has responsibility for routine repairs of the Path, so any potential problem requiring routine maintenance that is sent to the Public Works Department by the police would be remedied. R. C1005. After receiving the call from Officer Ghoga, Paul Serzynski of the Lake County Department of Transportation inspected the Path on the day of Plaintiff's accident, several hours after it had occurred. R. C970. On August 23, 2013, two days after Plaintiff's crash, the Lake County Department of Transportation made a permanent repair to the Path where the crash occurred by cutting out a section of the Path and replacing it with new asphalt. R C834; C856.

The Trial Court Grants Summary Judgment Which Is Reversed on Appeal

Both Lake County and Highland Park filed motions for summary judgment. R. C112. Lake County's motion was uncontested; was not appealed; and is not at issue in these proceedings. R. C1016. In its motion, Highland Park asserted that "the sole inquiry into whether this immunity (Section 3-107(b)) applies is whether the bike path is a riding trail as

envisioned by the Local Governmental and Governmental Employees Tort Immunity Act." R. C463. In her response, Plaintiff asserted, "the only question before the court, is whether the paved bike path in question, which runs through the heart of a busy industrial/commercial business area, falls within the narrow class of recreational property specified in section 3-107(b)." R. C810. After hearing oral arguments on December 16, 2015, the trial court granted Highland Park's Motion for Summary Judgment. R. C1022-23. Plaintiff appealed to the Illinois Appellate Court, Second District, which reversed the judgment of the Circuit Court. R. C1027. Highland Park petitioned this Court for leave to appeal, which was granted.

ARGUMENT

I.
THE APPELLATE COURT WAS CORRECT IN HOLDING THAT SECTION 3-107(B) DOES NOT APPLY BECAUSE THE PATH WAS "EASILY ACCESSIBLE" FOR MAINTENANCE AND BECAUSE HIGHLAND PARK AGREED TO MAINTAIN IT

Although this case implicates the Tort Immunity Act with respect to the meaning of a "trail" under the Act, the disposition of this case is not dependent on an interpretation of the Tort Immunity Act, at all. To the contrary, in this case, the municipality of Highland Park removed itself from any tort immunity under the Act when it voluntarily entered into an agreement to maintain the path at issue. Unlike in other sections of the Act, nothing in § 3-107 states that a municipality can enter into an agreement, (here, to provide maintenance to the path), and then retain a tort immunity defense. For example, in *Packard v. Rockford Professional Baseball Club,* 244 Ill. App. 3d 643 (1993), *appeal denied*, 152 Ill. 2d 563 (1993), a case involving § 4-102 of the Act, the court rejected, *inter alia,* that the defendant

park district waived its tort immunity defense as a result of entering into an agreement to provide security at the baseball field because the Act expressly stated that entering into any such agreement would not constitute a waive of the immunity defense. 244 Ill. App. 3d at 648, 649. So here, had the legislature intended for Highland Park to be able to preserve a tort immunity defense, when it has entered into a contract to maintain the path, the legislature would have so stated in the Act. Section 3-107 contains no such provision.

Illinois Courts have interpreted section 3-107, as a whole, to apply only to property that need not be maintained by the local governmental body because it is in a "natural condition with obvious hazards as a result of that condition" and the "burden in both time and money" to maintain it in a safe condition would be too great. *Goodwin v. Carbondale Park Dist.*, 268 Ill. App. 3d 489, 493 (5th Dist. 1994); *see also Brown v. Cook Cnty. Forest Preserve*, 284 Ill. App. 3d 1098, 1100 (1st Dist. 1996); *Cohen v. Chicago Park Dist.*, 2016 IL App (1st) 152899, ¶ 42. In *Cohen*, the First District followed the reasoning in *Goodwin*, and found it to be "logical and persuasive." 2016 IL App (1st) 152899, ¶ 42. "By immunizing a public entity from liability for injuries occurring on the property specified in section 3-107, the legislature has, in effect, relieved public entities from the burden of having to maintain such property." *Id.*; *see also, Sites v. Cook Cnty. Forest Preserve*, 257 Ill. App. 3d 807, 811 (1st Dist. 1994) (inferring the statutory intent of section 3-107 "is to relieve public entities from the duty to maintain such access roads which may be unpaved and uneven."). The *Cohen* court concluded, "[i]t makes sense that the legislature would relieve a public entity from maintaining access roads to primitive scenic and recreational areas

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

Twenty-seven days before the *Cohen* opinion was published, the Court below had already used the same reasoning and reached the same conclusion:

> "We agree with the *Goodwin* court that behind the categorical grant of immunity is the recognition of the "burden in both time and money if the local governmental entity were required to maintain these types of property in a safe condition" and that requiring such maintenance would defeat the very purpose of these type of recreational areas, that is, the enjoyment of activities in a truly natural setting." These considerations do not apply to a bicycle or hiking path in the midst of an easily accessible developed area. Indeed, the City would not even be a party to this appeal had it not found it manageable to take on the burden of maintaining the path in a safe condition." *Corbett v. Cnty. of Lake*, 2016 IL App (2d) 160035, ¶ 32 (citations omitted) (quoting *Goodwin*, 268 Ill. App. 3d at 493).

Goodwin, Cohen and the Court below recognized that the purpose behind Section 3-107(b) was to immunize local governmental entities from liability for injuries that occur on trails in natural, undeveloped, rustic areas because the burden on the governmental entity to maintain these trails would be too great. However, when a local governmental entity voluntarily enters into an agreement to maintain a trail, as Highland Park did here, then it can no longer be said that their burden to maintain is too great. In fact, it is not a "burden" at all.

In this case, it is undisputed that Highland Park had entered into a maintenance agreement with Lake County to provide routine maintenance on the path within the corporate limits of Highland Park, including all activities necessary to keep the path in a reasonably safe and serviceable condition for bicycle traffic. R. C173. They agreed to fix all potholes, bumps, cracks, etc. R. C173. Highland Park knew, going into its agreement with Lake County, that they would be providing routine maintenance to keep the path in a

reasonably safe condition for bicycle traffic. R. C87; R. C833. Highland Park should not now be allowed to use section 3-107(b) to shield itself from liability. Clearly, this was not the situation the legislature envisioned when it enacted section 3-107. Simply stated, this was no longer an immunity case as soon as Highland Park agreed to maintain the path.

II.
THE APPELLATE COURT WAS CORRECT TO FOLLOW PRECEDENT IN INTERPRETING SECTION 3-107(B)

With this case, there now have been seven reported cases interpreting the word "trail" under section 3-107(b) of the Tort Immunity Act; four times before this case and two after. Although this court has recently accepted for review the case of *Cohen v. Chicago Park Dist.*, No. 121800 (IL 2017), which involves an injury from a bike fall on the Lakefront Trail near the Shedd Aquarium, every published reviewing court decision has interpreted the meaning of "trail" under § 3-107(b) exactly the same way the appellate court did in this case. The consistency of interpretations from numerous reviewing courts warrants an affirmance of the appellate court's decision in this case. To hold otherwise would result in the reversal an entire body of established, consistent law with respect to § 3-107(b) of the Act.

The four Appellate decisions interpreting the word "trail" in section 3-107(b), prior to the appellate court decision in this case include, in chronological order: *Goodwin v. Carbondale Park District*; *Brown v. Cook County Forest Preserve*; *Mull v. Kane County Forest Preserve*, 337 Ill. App. 3d 589 (2d Dist. 2003), *appeal denied*, 204 Ill. 2d 662 (2003); *McElroy v. Forest Preserve District of Lake County*, 384 Ill. App. 3d 662 (2d Dist. 2008). Each of these courts recognized that the word "trail", as used in section 3-107(b), was

ambiguous and, therefore, subject to judicial interpretation. Because the Tort Immunity Act is in derogation of the common law, it must be strictly construed against the local public entity or public employee. *Kirnbauer v. Cook Cnty. Forest Preserve*, 215 Ill. App. 3d 1013, 1017 (1st Dist. 1991); *Reynolds v. City of Tuscola*, 48 Ill. 2d 339, 342 (1971). If a statute within the Tort Immunity Act contains an ambiguity, we will strictly construe the statute against the public entity because its immunities are in derogation of the common law. *McElroy*, 384 Ill. App. 3d at 666. Here, the Tort Immunity Act must be strictly construed against Highland Park and any ambiguities must be construed against Highland Park.

When interpreting an ambiguous statute, courts must ascertain and give effect to the intention of the legislature. *Mull*, 337 Ill. App. 3d at 591. As the Court in *Mull* explained, the best indication of the legislature's intent is the language of the statute which is the most reliable indicator of the legislator's objectives in enacting a particular law. *Id.* Statutory language is to be given its plain, ordinary and popularly understood meaning. *Id.* The plain and ordinary meaning of a "trail' is "a marked path through a forest or mountainous region." *Id.* (quoting Webster's Third New International Dictionary (1993).

The first case to interpret the term "riding trail" under Section 3-107(b) was *Goodwin v. Carbondale Park District.* In *Goodwin*, the plaintiff was injured when he collided with a tree while riding his bicycle on the Greenway Bike Path, a paved bike path winding through a city park. 268 Ill. App. 3d at 490. The *Goodwin* court analyzed both section 3-106 and 3-107 of the Act noting that while both applied to recreational property, 3-106 provides immunity only for ordinary negligence while 3-107 extends absolute immunity for both ordinary and willful and wanton negligence for injuries sustained on certain specified types

of recreational property (i.e. any hiking, riding, fishing or hunting trail). *Id.* at 492-93. The court asked itself whether the paved bike path within this developed city park fell within the narrow class of recreational property specified in section 3-107(b), then answered "we think not." *Id.* at 493. In light of the fact that plaintiff was injured in a developed city park which was never intended by the legislature to be the type of recreational property for which 3-107(b) provides absolute immunity, the court found that the path plaintiff was injured on was not a riding trail under section 3-107(b). *Id.* at 493-94. The court more broadly held that section 3-107(b) was intended to apply only to unimproved property which is not maintained by the local government entity and which is in its natural condition with obvious hazards as a result of that condition. *Id.* at 493. The court's reasoning follows:

> "Absolute immunity is extended for injuries sustained on these types of property because of the burden in both time and money if the local governmental entity were required to maintain these types of property in a safe condition. Furthermore, requiring such maintenance would defeat the very purpose of these types of recreational areas, that is, the enjoyment of activities in a truly natural setting." *Id.*

The first case to rely upon Webster's definition of the word "trail" was *Brown v. Cook County Forest Preserve*. In *Brown*, plaintiff was injured after falling off his bicycle while riding on a path in the Saulk Trail Woods Forest Preserve. 284 Ill. App. 3d at 1099. Although the path was paved, it was in an area that was wooded, undeveloped and circled a lake. *Id.* at 1100. In interpreting the word "trail" of section 3-107(b), 1Section 3-107(b) the court looked to Webster's Dictionary for its plain and ordinary meaning, then determined that since the path in question was in a forest and "provided bicyclists with access to the natural and scenic wooded areas around Saulk Lake," the court held that section 3-107(b)

applied. *Id.* at 1101. In so holding, the court found that Section 3-107(b) does not apply to bicycle "paths which traverse developed city land." *Id.* The court pointed out that the plaintiff, in his own deposition, described the area where he was injured as "a forest." *Id.* This is the opposite of the deposition testimony and Affidavits in the case at bar where witnesses, including plaintiff, have explicitly stated that, "the path is **not** in a forest or mountainous region." R.C. 866; R.C. 878.

The next case to use the Webster's definition of "trail" was *Mull v. Kane County Forest Preserve*. In *Mull*, Plaintiff fell from a bike after encountering a rut while riding on the Great Western Trail in the Kane County Forest Preserve. 337 Ill. App. 3d at 590. Summary judgment was denied by the trial court on the issue of the path being "a riding trail" under section 3-107(b) and defendant appealed. *Id.* at 591. The appellate court looked up the word "trail" in Webster's Dictionary and found: "a marked path through a forest or mountainous region," then found that since the trail in question was unpaved, traversed seventeen miles of wooded and undeveloped forest preserve land, and provided access to forests, section 3-107(b) applied. *Id.* at 592 (quoting Webster's Third New International Dictionary (1993). Mull is significant because the trail in question there, although it ran through "some developed areas," was "surrounded by wooded and undeveloped land" and ran "through a forest preserve." *Id.*

Following *Mull*, the court in *McElroy v. Forest Preserve District of Lake County* held that a wooden bridge in a forest preserve was part of a "hiking" or "riding trail" under section 3-107(b). 384 Ill. App. 3d at 669. Like *Brown* and *Mull* before it, the accident in *McElroy* took place on a bike trail in a forest preserve. *Id.* at 663. The defendant, Forest Preserve

District of Lake County, described the trail in its website as "a 5 ½ mile trail with bridges and boardwalks" in 1,225 acres of forest preserve property. *Id.* The plaintiff and his wife testified at their depositions that they decided to ride in the forest preserve because they were interested in taking a scenic ride and seeing the nature in the preserve. *Id.* The plaintiff was injured while riding over a bridge in the trail that traversed over wetlands. The only question on appeal was whether the manmade wooden bridge from which plaintiff fell was part of a "riding trail" which would provide immunity under section 3-107(b). *Id.* at 666. The appellate court, just like in *Brown* and *Mull*, looked to Webster's Dictionary for the plain and ordinary meaning of the word trail, then found that, because the trail in question led directly to the bridge and continued at the other end of the bridge, and because the bridge was an integral part of the trail itself, allowing passage over a wetland area, the bridge was part of the "riding trail" under section 3-107(b). *Id.* at 669.

The *Corbett* Appellate Court analyzed each of the preceding opinions and found them to be "persuasive and sensible." 2016 IL App (2d) 160035, ¶ 28. It then stated, "[f]or that reason, and in the interest of stare decisis, we follow them insofar as they are consistent." *Id.* The Court then held, "the case law that we follow does require that, to be within section 3-107(b), a path need not only be used by bicyclists (or hikers or both), but be located within a 'forest or mountainous region'" *Id.* at ¶ 29 (quoting *Brown*, 284 Ill. App. 3d at 1101). As a matter of law, this restriction defeats the City's assertion that the path is a riding or hiking trail." *Id.*

The Court explained that it did not limit "trail" to just being "in a forest." It could also be improved (*McElroy*, 384 Ill. App. 3d at 667); it could be paved (*Brown*, 284 Ill. App.

3d at 1101); it could run along some developed areas (*Mull,* 337 Ill. App. 3d at 592) and alongside a roadway (*see Brown* 284 Ill. App. 3d 1098). *Id.* However, in reaching its conclusion, the Court stated:

> "Although the presence of some development in the area of a path does not *per se* mean that the path is not a "trail", the presence of industrial and residential development *all around* a path negates any conclusion that it is located within a "natural and scenic wooded area" or that it is "surrounded by wooded or undeveloped land." A forest preserve is a "forest", even with a moderate degree of improvement within and without. An industrial/commercial/residential area is not a forest because it contains narrow strips of green space on which a few trees stand. The location of the path in this case is wholly different from the forest preserves in *Brown, Mull* and *McElroy*, which were vast areas that were for the most part kept in their natural state for those who sought recreation in such a relatively wild setting. The path is in even less of a natural state than the city park in *Goodwin.* " *Id.* at ¶ 30 (citations omitted).

The *Corbett* Court adhered to precedent, and respectfully, its decision should be affirmed. It simply followed what every Appellate Court had done before it in deciding what the legislature meant by the term "riding trail."

III.
TWO MORE APPELLATE DECISIONS AFTER *CORBETT* HAVE FOLLOWED THE SAME PRECEDENT

Conspicuously absent from either Highland Park's or the Park District's Amicus brief is any mention of the two new cases that are squarely on point with the issue before this court. These two cases, *Cohen v. Chicago Park District*, 2016 IL App (1st) 152899, decided October 27, 2016, and *Foust v. Forest Preserve District of Cook County*, 2016 IL App (1st) 160873, decided September 30, 2016, both interpreted "trail" under Section 3-107(b) in the exact same way that Corbett and the other four cases had before it.

In *Foust*, the Plaintiff's decedent was killed when a tree limb overhanging a paved bike path in Erickson Woods fell on her while she rode under it. 2016 IL App (1st) 160873, ¶ 4. One of the questions the court considered was whether the path was a "riding trail" for purposes of section 3-107(b). *Id.* at ¶ 41. In its analysis, the court stated that, "Our courts have looked to the plain and ordinary meaning of a trail as a "marked path through a forest or mountainous region" *Id.* at ¶ 43 (quoting *Mull*, 337 Ill. App. 3d at 591-92). Since the path in question ran through Erickson Woods and there existed trees, shrubs and other vegetation in close proximity to the edges of the bike path, and since an affidavit of one of defendant's employees stated that the path "runs through forested areas, the Skokie Lagoons, and along the North Branch of the Chicago River," the court concluded that the path was properly characterized as a "riding trail" for purposes of section 3-107(b). *Id.*

The most recent case to analyze section 3-107 is *Cohen*, where the Plaintiff was injured when he fell off his bicycle after it hit a crack in the Lakefront Trail. 2016 IL App (1st) 152899, ¶ 1. The record revealed that the Lakefront Trail was 18 miles and ran along Chicago's lakefront. *Id.* at ¶ 6. It was made of concrete and asphalt, and passed manmade structures such as paved basketball courts, restrooms, bike rental facilities, golf courses, parking lots, baseball fields, vendors, skate parks, and at least 3 bars and restaurants. *Id.* at ¶¶ *6-8.* "The grass around the Lakefront Trail is mowed, trees are trimmed, and gardens are maintained. Hunting around the trail is prohibited." *Id.* at ¶ 8.

The defendant filed a motion for summary judgment arguing that it was entitled to absolute immunity under section 3-107(a) of the Act because the Lakefront Trail was an "access road" to fishing, hunting, recreational and scenic areas. *Id.* at ¶ *20.* Plaintiff

contended that the Lakefront Trail applied only to roads providing access to primitive, recreational and scenic areas. *Id.* at ¶ *26.* The trial court granted defendant's motion and Plaintiff appealed. *Id.* at ¶ 22.

In interpreting section 3-107(a), the First District noted that its primary objective was to "ascertain and give effect to the intent of the legislature." *Id.* at ¶ 27 (quoting *Brunton v. Kruger*, 2015 IL 11763, ¶ 24). The best reflection of the legislature's intent is the statute's language, which is given its plain and ordinary meaning. *Id.* "Words and phrases in a statute must be interpreted in light of other relevant statutory provisions and the statute as a whole, rather than in isolation." *Id.* The court explained that "[b]ecause section 3-107(a) was ambiguous, it may utilize the doctrine of *in pari materia* to interpret its meaning. In doing so, it is appropriate to consider section 3-107(a) *in pari materia* with section 3-107(b)." *Id.* at ¶ 28.

In analyzing section 3-107(b), the *Cohen* court noted that since the decision in *Scott v. Rockford Park District*, 263 Ill. App. 3d 853 (1994): "Illinois courts have uniformly found that section 3-107(b) does not apply to trails in developed areas." *Id.* at ¶ 40; *see also Brown*, 284 Ill. App. 3d at 1101 (paved bike paths that traverse developed city land are not "riding trails" under section 3-107(b)); *Goodwin*, 268 Ill. App. 3d at 493-94 (a paved bike path in a developed city park is not included within section 3-107(b)); *Mull*, 337 Ill. App. 3d at 592 (distinguishing *Goodwin* on the basis that the trail in *Goodwin* was located in a developed city park). It concluded that, since section 3-107(b) has been limited to trails in undeveloped areas, it follows that section 3-107(a) is likewise intended only to apply to access roads to undeveloped and primitive areas. *Id.* The court further noted that:

> "The legislature clearly limited immunity under section 3-107(a) to access roads to 'primitive' camping areas as opposed to all camping areas. It is logical to infer that the legislature likewise intended section 3-107(a) to apply only to primitive recreational and scenic areas where it listed recreational and scenic areas in the same sentence as 'primitive' camping areas. In sum, *consideration of section 3-107 as a whole* supports a finding that section 3-107(a) was intended only to apply to roads providing access to primitive, undeveloped recreational areas." *Id.* (emphasis added).

The *Cohen* court also found that considering section 3-107(a) in *pari materia* with section 3-106 further supported its determination. It stated:

> "Both sections involve recreational property; yet section 3-106 provides immunity only for ordinary negligence whereas 3-107(a) provides absolute immunity. Noting this distinction, the *Goodwin* court found section *3-107 as a whole* referred to unimproved property which the local government did not maintain and which was "in its natural state with obvious hazards as a result of that natural condition." The [*Goodwin*] court explained that the legislature extended absolute immunity to the property outlined in section 3-107(b) because of the burden a local governmental entity would experience in having to maintain such property in a safe condition. Further, the *Goodwin* court explained, requiring the government to conduct maintenance on this type of property 'would defeat the very purpose of these types of recreational areas, that is the enjoyment of activities in a truly natural setting." *Id.* at ¶ 41 (citations omitted) (quoting *Goodwin*, 263 Ill. App. 3d at 493).

Based on the *Cohen* court's detailed, thorough analysis of the legislative intent behind section 3-107, *as a whole*, it is clear that the legislature never intended section 3-107(b) to apply to the bike path in the case at bar. The path in the case at bar is simply not located in a forest, nor is it in a primitive, undeveloped, natural, scenic recreational area.

IV.
REVERSING THE APPELLATE COURT WOULD REVERSE AN ENTIRE BODY OF LAW THAT HAS BEEN APPLIED CONSISTENTLY AND UNIFORMLY

Illinois courts have been applying the same definition of the word "trail" as "a marked path through a forest or mountainous region" (Webster's Third New International

Dictionary (1981)) since the *Brown* Court first did it in 1996. Every case since *Brown* that has analyzed section 3-107(b) has endorsed this definition. This definition has been applied uniformly and consistently ever since.

What Highland Park wants this court to do now is change the well-settled law. It argues that the definition of trail as a marked path through a forest or mountainous region is too narrow, and does not make sense in Illinois. They suggest that a broader definition must be used. In reality, the law is much broader than what Highland Park wants this court to believe.

In applying the definitions noted above, Illinois courts have extended it to include gravel and asphalt paths (*Mull,* 337 Ill. App. 3d at 592), a manmade bridge connecting gravel portions of the path (*McElroy,* 384 Ill. App. 3d at 669), a path that runs alongside roads and guardrails (*Brown*, 284 Ill. App. 3d at 1102) and paths that run through some developed areas (*Mull,* 337 Ill. App. 3d at 592). The court below noted how they are not construing section 3-107(b) as narrowly as some have urged, adding that a "trail" need not be wholly unimproved to qualify under section 3-107(b); nor does a path need to be unpaved to qualify; nor does the area surrounding the path need to be completely undeveloped. *Corbett,* 2016 IL App (2d) 160035, ¶ 28.

Highland Park and the Park District *Amicus* urge this court to use definitions of "trail" taken from other dictionaries and to stop using the Webster's definition that has been used for the past twenty years. Obviously, they've chosen dictionary definitions that suit their needs and which they believe will help them win their case. One of the definitions they've chosen, however, states, "a paved or **maintained** path or track, as for bicycling or

hiking." PDRMA, p.10; HP p.16. This definition could not apply to section 3-107, however, because requiring local governmental entities to maintain the path would defeat the very purpose of the statute.

Highland Park and the Park District suggest that "several alternative definitions" of the word "trail" can be used (HP p.16), and that courts "should consider various (and sometimes conflicting) dictionary definitions for a term or phrase, in an effort to ascertain and give effect to the intent of the legislature in using a particular word or phrase in a statute." Amicus, p.11. Putting aside how this would lead to confusion, uncertainty and inconsistency over which of the several definitions to apply, especially in this case where courts have been consistently and uniformly using the same clear definition for the past twenty years, the fallacy with this argument is that the definition "marked path through a forest or mountainous region" would still have to be included in the analysis if several definitions are, indeed, used.

Highland Park also suggests that this Court should follow California law in order to overturn the Appellate Court's decision below. They argue that since the Tort Immunity Act is based in part upon the California Government Claims Act, and since the California legislature, similar to Illinois, did not define the word "trail", that this Court should follow what the Appeals Courts in California have done. Specifically, that is to grant absolute immunity not only on bike paths in "primitive" areas, but also on "Class I Bikeways", which are essentially bike lanes on city streets (HP p.25-26). The reason for this, according to the Appeals Court, was to protect municipalities from paying damages claims "in today's litigious society." HP p.26.

There are several flaws with Highland Park's argument here. First, the recent case of *Foust*, which Highland Park cited in its Petition for Leave to Appeal but conveniently left out of its Brief to this Court, given the same request to follow out-of-state cases, one from California and one from Colorado, to make its decision in a tort immunity case. The *Foust* court refused, stating:

> "Both the Colorado and California courts stated that the statutes they were interpreting provided that immunity was the general rule and liability was the exception to the rule (citations omitted). By contrast, our Illinois Supreme Court has stated that under the Tort Immunity Act, liability is the general rule and immunity is the exception to the rule. Thus, the public policy reasons underlying other courts' holdings do not necessarily apply equally to the instant case." 2016 IL App (1st) 160873, ¶ 55.

The second flaw in Highland Park's argument was also highlighted in the *Foust* case. The *Foust* court explained, "[o]ur legislature has amended the Tort Immunity Act to expand the scope of immunity when it has determined that it is in the public's best interest to do so." *Id.; see also, Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 509 (1997) (explaining that section 3-106 was amended in 1986 to expand the scope of immunity in order to decrease the costs of liability insurance for local public entities). *We leave such a determination to the legislature and will not expand the scope of immunity through judicial action*." *Id.* at ¶ 55 (emphasis added). Section 3-107(b) has been applied uniformly and consistently now in the seven cases cited above. There is no need to change it. However, if changes need to be made in the future, such determination should be left up to the legislature, not the courts.

The third flaw with Highland Park's argument to follow the California courts by extending absolute immunity to Class I Bikeways, which would essentially mean extending immunity to every bike path in Illinois, no matter if its in a wooded, undeveloped area or on

a city street. This is exactly what the legislature explicitly did not intend when it enacted section 3-107. Taking section 3-107 as a whole, part (a) states:

> "(a) any road which provides access to fishing, hunting or primitive camping, recreational or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway, or (3) a township or other road district highway..."

745 ILCS 10/3-107(a). Clearly, the legislature never intended immunity to extend to streets, highways or roads, as to the California Courts have apparently done.

The final flaw in Highland Park's argument to use California law is a public policy one favoring absolute immunity over public safety. Highland Park cites another California Court of Appeals case for the following proposition:

> "No doubt it is cheaper to build fences and keep the public out than to litigate and pay three, four, five or more judgments per year in perpetuity. But that would deprive the public of access to recreational opportunities. If public entities cannot rely on immunity for recreational trails, they will close down existing trails and perhaps entire parks where those trails can be found." (Highland Park Brief p.21 (quoting *Montenegro v. City of Bradbury*, 215 Cal. App. 4th 924, 932 (Cal. App. 2d 2013)).

The case at bar involves the City of Highland Park, which reaps the economic benefit of having bike paths in its community so that its residents will enjoy living there and so that people who are thinking about moving will want to move there. The court will recall that this is a case where Highland Park voluntarily entered into an agreement with Lake County to perform "minor repairs" to the bike path - - just patch some potholes and fix some bumps as necessary. Any major repairs or reconstruction was left to Lake County. No doubt it would be cheaper for Highland Park to patch up a few of those bumps and rough spots in the

path every year rather than let them go unmaintained and risk the threat of lawsuits when people get severely injured when they ride over them.

CONCLUSION

The precedent that the Appellate Court followed in reversing the trial court's order of summary judgment is persuasive, sensible, and consistent. There is no need to reverse it and change an entire body of law. For these reasons, and all of the reasons set forth above, Plaintiff-Appellee, Kathy Corbett, respectfully requests that this Court affirm the decision of the Appellate Court.

Respectfully submitted;

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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney for the appellee, Kathy Corbett, hereby certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under 342(a), is 24 pages.

Lynn D. Dowd