No. 122486

IN THE
SUPREME COURT OF ILLINOIS

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

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REPLY BRIEF OF PLAINTIFF-APPELLANT

ORAL ARGUMENT IS REQUESTED

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ARGUMENT

I. The Trial Court's grant of Summary Judgment is reversible error because a) §3-102 articulates immunities to the duty to maintain public property; and b) regardless of the ultimate function of §3-102, the plain language of the Act directs which immunities apply to Danville's failure to maintain its property.

Danville's argument that §3–102 codifies a duty as opposed to an immunity fails for two reasons: a) the argument runs contrary to the plain and explicit purpose of the Act; and b) whether §3–102 is a codified duty, immunity or combination thereof does not change this Court's analysis due to the plain language set forth therein.

a) The plain and explicit purpose of the Act is to codify immunities and §3-102 codifies the duty to maintain public property and the immunities thereto.

Danville has conceded that a duty exists pursuant §3-102. However, Danville and its supporting *amici*, go on to argue – without citing **any** supporting authority – that §3-102 is **not** an immunity. This unsupported proposition must be rejected as §3-102 is clearly an immunity and, by the very nature and plain language of the Act, cannot be construed as anything else. The fact that §3-102 is an immunity provision is further illustrated by Danville and the Township Officials of Illinois Risk Management Association ("TOIRMA")'s inability to agree what §3-102 **is** if it is not an immunity.

Unlike Danville and its supporting *Amici*, the Appellate Court has never been confused what §3-102 is from a reading of its clear language. In *Pattullo-Banks v. City of Park*, the Appellate Court stated the following regarding the **immunities** present in §3-102:

> **The immunity provided in section 3–102**(a) applies where a public entity breaches its duty to exercise ordinary care to maintain its property in a reasonably safe

> condition but (1) the entity did not have actual or constructive notice of the unsafe condition in reasonably adequate time prior to an injury to have taken measures to remedy or protect against the condition, or (2) the injured party failed to use ordinary care or was not an intended and permitted user of the property.

(Internal citations omitted.) (Emphasis added.) 2014 IL App (1st) 132856, ¶ 15. §3-102 is called an immunity throughout the *Pattullo-Banks* opinion no less than 20 times. *Id*. at ¶¶ 5, 14-17, 24-26, 34.

In *Pattullo-Banks*, the Appellate Court explains that "the Act does not create duties; rather, the Act merely codifies those duties existing at common law, to which the subsequently delineated immunities apply." (Internal citations omitted.) *Id*. at ¶ 15. §3-102 codifies the common law duty to use ordinary care to maintain its property and then articulates several immunities that apply **only** to local governments. *Id*. Pursuant to §3-102(a), a local government is absolutely immune from liability to all non-intended and non-permitted users. 745 ILCS 10/3-102(a). Furthermore, while §3-102(a) reiterates the common law rule that a landowner must have actual or constructive knowledge of a condition to be held liable, §3-102(b) delineates two ways that a local government can prove that it did not have constructive knowledge:

1) A local government can show that an inspection system would not have uncovered the dangerous condition if implemented; or
2) A reasonable inspection system was implemented but did not uncover the dangerous condition.

745 ILCS 10/3-102(b).

None of the aforementioned immunities created by §3-102 are available to private landowners in common law nor are found elsewhere in the Act. As such, Danville's position that §3-102 somehow does not articulate an immunity ignores not only the clear

statutory language, but also case law and basic logic. For instance, in common law, unlike a municipality pursuant to §3-102, a private landowner is liable for injuries to an adult trespasser for willful and wanton conduct. *See Mount Zion State Bank & Trust v. Consolidated Communications, Inc.,* 169 Ill. 2d 110, 117 (1995); *see also* Illinois Pattern Jury Instructions, Civil, No. 120.03 (2017) (hereinafter IPI Civil (2017)). A private landowner is also liable in common law for injuries to a trespassing child for failure to remedy a dangerous condition which children would not appreciate if the expense of doing so was slight compared to the risk. *See Mount Zion State Bank & Trust,* 169 Ill. 2d at 117; *see also* IPI Civil, No. 120.05 (2017). §3-102 immunes local governments from these liabilities.

That the Act, and specifically §3-102, specifically articulates the ways a local government is immune from liability for failure to maintain its premises in a manner that is different from the common law is decisively demonstrated by the inability of Danville and TOIRMA to agree as to the purpose of §3-102 if it is not an immunity. TOIRMA incorrectly posits that §3-102 creates a duty of care. This premise fails on its face as the Act does not create duties, it simply creates immunities and defenses to immunize local governments from common law duties. *Pattullo-Banks*, 2014 IL App (1st) 132856, ¶ 15. In fact, a careful review of the entirety of the Act shows that there is not a single section that simply codifies a duty, which is unsurprising given the fact that the Act simply codifies immunities and defenses. *See 745 ILCS 10.* Furthermore, §3-102 is not a pure recitation of common law premises liability because it includes the three immunities articulated above.

Despite its argument to the contrary, Danville admits that the purpose of the Act is to grant immunities and defenses. *See* Danville's Response Brief, at 25*; citing* 745 ILCS 10/1-101.1(a). However, after correctly recognizing that the Act cannot create new liabilities, Danville goes on to argue that §3-102 "identifies situations in which the **[common law] duty is inapplicable**." *See* Danville's Response Brief, at 26 (emphasis added). Danville fails to explain the difference between when a "duty is inapplicable" and an "immunity" – because there is none. Danville argues that §3-102 is not an immunity but creates "conditions precedent" that must be met for a local government to be charged with a duty of care of its premises. *Id*. This logic is utterly flawed because – as Danville concedes – the Act cannot create new duties. *Pattullo-Banks*, 2014 IL App (1st) 132856, ¶ 15. Danville's, and its supporting *Amici's,* attempts to define the statutory language of §3-102 as anything but an immunity are purely semantic and hold no weight under logical scrutiny.

b) Whether §3–102 is a codified duty, immunity or combination thereof does not change this Court's analysis due to the plain language set forth therein.

While §3-102 codifies the common law duty to maintain property and then outlines exceptions (i.e. immunities) to that duty, this premise is not essential to the outcome of this case. Regardless of whether §3-102 codifies a duty and subsequently delineates the immunities thereto, or if it "merely" codifies a duty (which is contrary to the very purpose of the Act), the result is the same: this Court must look at the prefatory language.

Danville and its supporting *amicus* from the Illinois Association of Defense Counsel (hereinafter "IADC") cite to the *Arteman* case for the premise that that once a duty is found pursuant to §3-102, the Court should then analyze whether an immunity from Article II applies, because duty and immunity are separate issues. Both Danville and IADC argue that *Arteman* supports the conclusion §3-102 cannot be elevated over the immunities found in Article II. However, the duty at issue in *Arteman* was a duty not found within the Act, but a duty articulated by common law in *Gerrity v. Beatty,* and its progeny. *Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15*, 198 Ill. 2d 475, 487 (2002) (citing *Gerrity*, *71 Ill.2d 47).* In reversing the appellate court, the Supreme Court found that the Appellate Court had "impermissibly elevate[d] a common law duty over an applicable statutory immunity" *Id.* at 487. Here, §3-102 articulates the duty while also delineating the applicable statutory immunities, found thereafter in Article III.

The prefatory language is abundantly clear that the only parts of the Act that can operate to immunize a local government for failure to maintain its property are the sections delineated in Article III. This proposition is supported by the Danville's own argument that "actual notice and constructive notice of an unreasonably dangerous condition by a public entity are not among the Act's subsequently delineated immunities, as Plaintiff contends." *See* Danville's brief, at 36, ¶1. In support of the aforementioned, Danville goes on to cite *Greeson* noting that "the 'subsequently delineated immunities' appear in the sections of the Act following Section 3–102." Danville's argument is absolutely on point, as is *Greeson.* The immunities to §3-102 "appear in the sections of the Act following Section 3-102." *Greeson v. Mackinaw Tp.*, 207 Ill. App. 3d 193, 203 (3d

Dist. 1990). However, perplexingly, as many other courts have mistakenly done, the aforementioned statement was completely ignored, as was the prefatory language, and then the Trial Court applied §2-201. Contrary to Danville and IADC's arguments, *Arteman*'s logic is on point with the instant case; and this Court must look to the applicable statutory immunities otherwise provided in Article III.

II. The Trial Court's grant of Summary Judgment is reversible error because Danville's duty to maintain its property, by operation of the Act, cannot be discretionary, as it is a requirement.

Both Danville and its *amici* admit that, as codified in §3-102, local governments have a legal "duty to exercise ordinary care to maintain its property in a reasonably safe condition." 745 ILCS 10/3-102. Such a legal duty, by definition, cannot be "discretionary" – it is a requirement of the local government. *See Kennell v. Clayton Twp.*, 239 Ill. App. 3d 634, 639 (4th Dist. 1992) ("[i]t has been recognized that it is part of the ministerial duty of a municipality to keep its streets and sidewalks in a reasonably safe condition for public travel"); s*ee also Blackaby v. City of Lewistown*, 265 Ill. App. 63, 71 (3rd Dist. 1932) ("[i]t is a part of the ministerial duty of a city to keep its streets and sidewalks in a reasonably safe condition for public travel"). However, after recognizing that Danville has a legal duty to maintain its property, Danville and its *amici* attempt to confuse the ministerial function of exercising ordinary care to maintain property, which is at issue here, with discretionary functions that are not at issue in this case, for instance: (1) whether to make improvements to property; and (2) the plan for making improvements to property. Danville spends much of its Response Brief arguing whether "a program of public improvement is a discretionary matter. "However, this is entirely irrelevant as, "[t]o

maintain property is to keep it in a state of repair or efficiency and is considered a ministerial act while to improve property falls under the discretionary decision of the government entity." (Internal citations omitted.) *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 56 (1st Dist. 2003). The issue here is whether Danville failed to maintain its sidewalk and has nothing to do with making improvements to property.

Here, Plaintiff alleged that Danville failed to exercise ordinary care to maintain its sidewalk in a reasonably safe condition, which admittedly is a legal duty of Danville. Plaintiff's cause of action does not concern at all whether Danville should have made improvements to public property or the specifics of any plan to do so. The assertions by Danville that this case involves anything other than Danville's duty of ordinary care to maintain its property is a strategic attempt at confusion of the actual issue before this Court. The heavy reliance by Danville and its *amici* on the holdings in *In re Chicago Flood Litig.*, 176 Ill. 2d 179, 188 (1997) and *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 393 (1st Dist. 2000) are illustrative of the aforementioned as neither case involved a cause of action for failure to maintain property.

Danville cites to *Chicago Flood Litigation* for the proposition that this Court should somehow disregard the prefatory language of §3-102 because "the prefatory language of Section 3-102 and Section 2-201 played no role in this Court's ultimate decision in that regard." *See* Danville's Response Brief, at 28. In fact, *Chicago Flood Litigation* makes no mentioned of §3-102 or its prefatory language because it was simply not an issue in the case. In *Chicago Flood Litig.*, a class of litigants sued the City of Chicago for flood damage when an old tunnel flooded during repairs by an independent contractor hired by the city.

176 Ill. 2d at 185-186. "During pile driving at the bridge, Great Lakes caused a breach in the tunnel wall by physically breaking, weakening, or creating excessive pressure on the tunnel wall." *Id*. at 185. The only questions that were certified for appellate review were as follows:

1) whether the City's proprietary use of the tunnel precludes immunity under the Act;
2) whether the Act immunizes any of the City's alleged **failures to adequately contract for, supervise, or monitor the river piling work**; and
3) whether the *Moorman* doctrine bars the claims of those plaintiffs who allege only economic loss.

(Emphasis added.) *Id*. at 186. This Court held that the city was immune under §3-108 and §2-201. *Id*. at 192-196.

While Danville would have this Court believe otherwise, not at issue in the appeal was the city's duty of ordinary care codified in §3-102. In fact, §3-102 is not mentioned in the *Chicago Flood Litig.* opinion **at all**. *Id*. at 185-187. This is because the complaint in *Chicago Flood Litig.* alleged that the repair work was not performed in an adequate manner, not that someone was injured on the city's property – a key distinction from this matter. Even if §3-102 was an issue in *Chicago Flood Litig.*, this Court would have come to the same conclusion - that the city was immune. This is because §3-102 contains an immunity from the common law by limiting a local government's duty to maintain property only to "people whom the entity intended and permitted to use the property." 745 ILCS 10/3-102. The *Chicago Flood Litig.* case did not concern an injury to any person who was using the tunnels owned by the city, but "damages for various alleged losses proximately caused by the flood, including: injury to their property; lost revenues, sales, profits, and good will; lost wages, tips, and commissions; lost inventory; and

expenses incurred in obtaining alternate lodging." *Id*. at 185. In fact, none of the plaintiffs in *Chicago Flood Litig.* are noted to have ever used the tunnel, let alone have been permitted to use the tunnel. As such, §3-102 clearly was not at issue in *Chicago Flood Litig.* and Danville's heavy reliance on it is clearly misplaced.

If that were not enough to distinguish *Chicago Flood Litig.,* it also involved a certified question from the lower court: "whether there is a willful and wanton exception to the discretionary act immunity granted to the City by the Act." *Id.* at 186. For purposes of the Appeal, it was a certified question and agreed upon premise that discretionary immunity applied, but the Court needed to know whether there was an exception for willful and wanton conduct. *Id*. Accordingly, the Court was asked to answer a question that assumed that discretionary immunity pursuant to §2-201 and §2-109 was at issue in the case. That premise existed because the focus was on §3-108, which provides the following prefatory language: "Except as otherwise provided by this Act," which clearly allows the Court to look back at Article II for additional immunities. 745 ILCS 10/3-108.

Similar to *Chicago Flood Litig.,* §3-102 was not an issue – and not even mentioned – in *Wrobel*, which involved an allegation that the City of Chicago negligently repaired a pothole. 318 Ill. App. 3d at 391. The city had repaired a pothole when four days later the plaintiffs were injured in a car collision when a vehicle hit the pothole and lost control. *Id*. According to the Appellate Court in *Wrobel,* the plaintiffs' theory of negligence was "not entirely clear." *Id*. at 393. Plaintiffs asserted that the city was negligent because it failed to remove residual asphalt and moisture from the pothole before repairing it. *Id*. at 395. However, the Appellate Court held that the city was immune under §2-201 because "the

workers enjoy the discretion to determine how much residual asphalt and moisture to remove from potholes." *Id.* §3-102 was not an issue, nor was it discussed at all in *Wrobel*.

Moreover, even if §3-102 was discussed in *Wrobel*, the Appellate Court's holding that the city was immune would have been the same. The *Wrobel* opinion noted that the plaintiffs alleged that at the time the city's workers left the location of the occurrence after fixing the pothole four days earlier, "no open and unrepaired potholes… presumably existed." *Id*. at 393. Rather, due to the city's negligent repair work, the pothole suddenly re-appeared sometime in the four days after it was fixed and "the rapid appearance of the condition gives rise to an inference that a prior repair failed rapidly." *Id*. Under the plaintiff's theory in *Wrobel*, the city did not have actual or constructive knowledge of the condition and would have been immune pursuant §3-102. *Id*. Regardless, §3-102 was not an issue in *Wrobel* and Danville's reliance on this case is entirely misplaced.

Even if §3-102 were an issue in either of the above cases, it is also important to note that *in re Chicago* was decided in 1997 and *Wrobel was* an Appellate Court decision from 2000. *Murray v. Chicago Youth Center* is more recent and more salient to the issues at hand. 224 Ill. 2d 213, 232 (2007). In fact *Murray* is the sole Supreme Court decision which analyzes the prefatory language contained throughout the Act with any scrutiny. *Murray* makes it abundantly clear, based upon the prefatory language of difference sections of the Act, that "the legislature did not intend for the immunities afforded public entities and their employees to be absolute and applicable in all circumstances."

Danville and its amicus' arguments are heavily reliant upon trying to confuse issues of negligence in the course of making repairs (*Wrobel*) and negligence in supervising

repairs (*Chicago Flood Litig.*) with a duty of ordinary care to maintain property codified in §3-102. Neither *Chicago Flood Litig.* nor *Wrobel* involved §3-102, nor could they because there was no person on the city's property in the former and no actual or constructive knowledge in the later. As such, Danville's arguments should be disregarded, and this Court should focus on the actual clear and unambiguous language of §3-102, which is at issue in this matter.

III. The Trial Court's grant of Summary Judgment is reversible error and Danville greatly exaggerates the ramifications of adopting the clear and unambiguous language of §3-102 that holds local governments must reasonably maintain their property.

The torrent of extreme hyperbole espoused by Danville and, to a greater extent, its *amici* about the effects of ruling upon the clear and unambiguous language of the Act is a baseless scare tactic this Court cannot lend credence to. TOIRMA's claims that so holding will open the "floodgates of unlimited liability," is an exaggerated baseless claim. *See* TOIRMA'S Amicus Brief, at 11. In actuality, local governments would be subject to the plain language and intended purpose of the act: the would be required to maintain public property in an ordinary and reasonable manner for the safety of those permitted to use it. This is the same standard that every other property owner has under the law, with some added immunities pertaining to permitted users and for reasonable inspection systems. No court, including this Court, has ever viewed acting reasonably as an impossible burden.

TOIRMA claims that requiring local governments to reasonably maintain public property would dissipate "public funds on damage awards in tort cases." *See* TOIRMA'S Amicus Brief, at 12. Both Defense *amici* argue that the Plaintiff's interpretation of the Act

is improper as it "ignores the fundamental intent of the Act," that being to prevent the dissipation of public funds…" *Id.* at 3; *and* IADC's Amicus Brief, at 15. However, they fail to recognize the statutory history of the Act itself. Contrary to the arguments set forth by both *amici*, the Act was not passed in order to prevent local funds from ever paying out on claims against a local government. If it had done so, it would have simply codified sovereign immunity, which was clearly abolished in 1959. *Molitor v. Kaneland Community Unit District No. 302,* 18 Ill.2d 11 (1959). The Act was passed **after sovereign immunity was abolished** in order to provide immunity to local governments and prevent dissipation of local funds*. Murray v. Chicago Youth Ctr.,* 224 Ill. 2d 213, 229 (2007) (emphasis added). In light of the aforementioned, the Act clearly outlines the immunities and defenses to the common law duties intended to accomplish said goal, while still retaining liability in certain, specifically outlines situations. 745 ILCS 10*.* As a result, "[u]nless an immunity provision applies, municipalities are liable in tort to the same extent as private parties." *Murray,* 224 Ill. 2d at 229 (2007). This Court has recognized that imposing liability on property owners who fail to maintain their property in a reasonably safe manner for permitted users is not only the law of this State, but sound public policy. *See Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 441 (2006). Local governments will not dissipate public funds for failure to maintain public property as long as they adhere to the public policy of this State, as codified in §3-102.

TOIRMA also argues that local governments need discretion in prioritizing public property maintenance because of limited government funding and incorrectly states that Plaintiff wants a jury to decide "whether a public official's express decision to allocate

available resources to something other than the condition at hand which allegedly caused the injury was the right decision." As stated above, this Court has held that it is the best public policy for this State that property owners be liable for failure to maintain property that subsequently injures permitted users. *See Marshall*, 222 Ill. 2d at 441. Like a private business that must do so, there is no discretion in whether to act reasonably; it is the law and public policy of this State.

Furthermore, contrary to the apocalyptic scenario outlined by Danville and its *amici*, applying a reasonable standard to local governments as required by statute will not affect their ability to make discretionary decisions about public finances. Local governments do not form out of thin air and suddenly own of a multitude of dilapidated properties that must be repaired within a fixed budget. Local governments have the discretion to decide whether to purchase specific properties, whether to permit the use of specific properties by specific users, and whether to close a specific property to public use due to its unsafe condition. There are many discretionary acts that are immune; however, as held at common law and codified by the General Assembly in §3-102, the reasonable maintenance of public property for the safety of permitted users is not one of them.

IV. Danville's Argument that Summary Judgment was warranted because the sidewalk condition was *De Minimis* fails because there are questions of fact as to the height of the condition and the surrounding conditions.

Although courts disagree as to when sidewalk defects are:

> …so slight that the question is one of law, and where it is one of fact for the jury, . . . the decisions recognize that **no mathematical standard can be adopted in fixing the line of demarcation, and that each case must be determined upon its own particular facts and circumstances**."

Arvidson v. Elmhurst, 11 Ill. 2d 601, 604 (1957) (emphasis added).

Even though there is no precise mathematical standard, the actionable "stumbling point" for sidewalk cases appears to occur when the defect approaches two inches. *Warner v. Chicago*, 72 Ill. 2d 100, 102, 105 (1978). Nevertheless, smaller height variations, between 1 1/8 to 1 7/8 inches, present a factual question for the jury, when other aggravating factors exist. *See Hartung v. Maple Inv. & Dev. Corp.*, 243 Ill. App. 3d 811, 815 (2nd Dist. 1993). *Hartung* held that:

> [M]inor defects in a sidewalk may be actionable where there are other aggravating factors such as heavy traffic because pedestrians may be distracted and must be constantly alert to avoid bumping into each other.

Id. *Baker* also held that a sidewalk located near a busy intersection in a commercial district with a crack having a variation of two inches (according to the Plaintiff) and 1 1/4 inches (according to the city), was properly presented to the jury, even though "a defect of this magnitude may not be actionable in [a] residential area." *Baker v. Granite City*, 75 Ill. App. 3d 157, 160–61 (5th Dist. 1979). *Hess* also stated that, for a sidewalk located in a commercial district, a city's negligence is established as a matter of law where a plaintiff testifies that the elevation of a crack in the sidewalk is about 1 1/2 to 2 inches, and where there are color photographs showing that the condition of the sidewalk was such that the Plaintiff had no alternative but to walk over the dangerous area. *Hess v. Chicago* 101 Ill. App. 3d 426, 427, 430, 431 (1st Dist. 1981).

Finally, in *Arvidson*, the Supreme Court held that a two-inch height variation between two sidewalk slabs in a commercial district established that it was error for the Appellate Court to dismiss the negligence as a matter of law. *Arvidson v. Elmhurst*, 11 Ill. 2d 601, 603, 609 (1957).

In the case at bar, the record demonstrates that the improperly maintained slab of concrete slanted downward toward the street and was about 1 inch below the adjoining slab at one end, and 2 inches below the adjoining slab at the end which was nearer to the street. This improperly maintained sidewalk was near the curb of a commercial district, on which there were abutting stores and parking meters. It could reasonably be foreseen that the area would be traversed by pedestrians en route to the adjacent stores. Moreover, the circumstances of the accident, whereby Plaintiff stepped with her heel on the higher slab, and her sole on the lower slab, thereby causing her to lose her balance, were also within reasonable contemplation. Under these circumstances, it **cannot be found** that all reasonable minds would agree that the 2-inch variation and the height of the adjoining slabs of the sidewalk near the curb **was so slight a defect that no danger to pedestrians could reasonably be foreseen**.

Furthermore, there is a question of fact as to the height difference that caused Plaintiff to fall. In the photographs produced by Plaintiff, the height difference is approximately two inches, as of January 25, 2013. *See* C222 (Def.'s Mot. Summ. J. Ex. F, at 9); Supplemental Record, A-5. Danville produced a photograph two and a half years later that shows the height variation to be 1 1/2 inches. Because Plaintiff's photo was taken closer in time to the incident it should be given more weight. *See Warner v. City of Chicago*, 72 Ill. 2d 100, 104–05 (1978). Because there is a factual dispute as to the height of the variance, there are clearly factual issues that preclude summary judgment on the basis of *de minimis*.

V. In the alternative, if this Court finds that a discretionary v. ministerial immunity analysis is warranted, the Trial Court's grant of Summary Judgment is reversible error because there are genuine issues of material facts related to whether there was a discretionary decision made.

"[W]here questions of fact exist regarding the distinction [between ministerial and discretionary acts], grants of summary judgment have been held to be error." *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 255 (2002) (*citing Courson*, 301 Ill.App.3d at 758). The *Morrissey* court went on to state as follows:

> Every failure to maintain property could be described as an exercise of discretion under municipal defendants' expansive approach to governmental immunity. The legislature could not have intended such a result; otherwise, it would not have codified the common law duty to maintain property under section 3–102 of the [Tort Immunity] Act. The Tort Immunity Act must be strictly construed against the public entity involved.
>
> Accordingly, summary judgment may not be entered where there is a material fact question of whether public property was maintained in conformity with applicable safety standards * * * "

Id. at 256 *(quoting Anderson v. Alberto–Culver USA, Inc.,* 317 Ill. App. 3d 1104 (2000)). "'Discretion' connotes a conscious decision." *Id*. (*citing Corning v. East Oakland Township*, 283 Ill. App. 3d 765, 768 (1996)). In fact, the TOIRMA brief said it best, when it articulated that in order for an act or omission to involve discretion "there has to be an actual decision," and "the immunity of §2-201 requires some evidence that the failure to do something was an actual decision..." *See* TOIRMA'S Amicus Brief, at 2 and 7. The lower court is *Morrissey* noted **the record lacked evidence that anyone had, in fact, made a "decision" with respect to the "particular hole" that caused the plaintiff's injury**. *Id.* at 255. Hence, the trial court found that "questions of fact remain on the issue of whether

the City actually made a conscious decision that would entitle it to discretionary immunity regarding the alleged failure to repair the pothole in question." *Id.* at 257.

Here, while the Trial Court accepted Mr. Ahrens' testimony that he *must have* made a decision with regard to the sidewalk repair in question because he testified he reviewed others nearby (R. C5-6), the truth is that the record is completely devoid of any evidence that Mr. Ahrens made a conscious decision to not repair the **particular** section of sidewalk at issue. (R. C188, at 18:18–19:5; C188–89, at 20:7–21:3). As such, the trial court erred in finding that there remained no genuine issue of material fact.

Danville cites to no authority in support of its position that a general recollection of a larger project will suffice to establish a specific decision, in contravention of the requirements set forth in *Corning* and cited by *Morrissey*. There remain questions of fact as to whether Danville's failure to repair the specific section of sidewalk was a conscious decision, as such, the summary judgment was inappropriate.

Similarly, Mr. Ahrens was bound by Danville's ordinances to repair the sidewalk at issue in "a prescribed manner." *See* Danville Ordinance §100.52. He was also mandated to repair the sidewalk at issue in strict compliance with the standards set forth by the Department of Engineering and Urban Services §100.75. In light of these requirements, Plaintiff argues that there is a genuine issue of material fact regarding whether Mr. Ahrens actions were ministerial.

Danville's repeated assertion that Mr. Ahrens' actions were discretionary, without more, does not constitute a compelling argument. Mr. Ahrens testified that he engaged in a project to repair the sidewalk. Thus, he was compelled to repair the sidewalk "in a

prescribed manner" pursuant to ordinance. The trial court erred in granting summary judgment, because "a material fact question of whether public property was maintained in conformity with applicable safety standards." *See Anderson,* 317 Ill. App. 3d at 1117.

CONCLUSION

For the reasons set forth above, Plaintiff-Appellant respectfully requests that this Court enter the following relief on appeal:

(A) Reverse the trial court's July 20, 2016 Order, granting summary judgment in favor of Danville;

(B) Remand this matter to the Circuit Court for further proceedings; and/or

(C) For such other and further relief as this Court deems just and proper to which Plaintiff-Appellant is entitled on appeal.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 Rule 342(a), is **18** pages.

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PLEASE TAKE NOTICE that on the 5th day of February 2018, the undersigned filed the REPLY BRIEF OF PLAINTIFF-APPELLANT electronically with the Clerk of the Supreme Court of Illinois, a copy is hereby served upon you.

/s/ Miranda L. Soucie
Of Spiros Law, P.C.

CERTIFICATE OF SERVICE

I, the undersigned, under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure, certify that the statements set forth in this instrument are true. On the 5th day of February 2018, I served a copy of the REPLY BRIEF OF PLAINTIFF-APPELLANT and NOTICE OF FILING by electronically mailing the same to:

Mr. Scott McKenna
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/s/ Miranda L. Soucie
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