No. 131420

IN THE
SUPREME COURT OF ILLINOIS

KEVIN HAASE and RILEY HAASE,

Plaintiffs-Appellees,

vs.

KANKAKEE SCHOOL DISTRICT 111,
And DARREN WILBUR DAYHOFF

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois
Third Judicial District, No. 3-23-369
There Heard on Appeal form the Circuit Court of Kankakee County, Illinois
County Department, Law Division, No. 2018 L 000012
The Honorable Lindsay Parkhurst, Judge Presiding

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS

Dustin S. Fisher
Deputy General Counsel
Sara Yager
General Counsel
Andrew Fiske
Deputy General Counsel
Park District Risk Management Agency
Attorney for the *amicus curiae*,
the Park District Risk Management Agency (PDRMA)
2033 Burlington Avenue
Lisle, IL 60532
T 630.769.0332
dfisher@pdrma.org
syager@pdrma.org
afiske@pdrma.org

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STATUTES INVOLVED

The statute involved in this matter is the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, *et seq*. (the "Tort Immunity Act"). The relevant sections of the statute are:

> **1-101.1. Purpose: immunities and defenses**
> § 1-101.1. (a) The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses.
> (b) Any defense or immunity, common law or statutory, available to any private person shall likewise be available to local public entities and public employees.

745 ILCS 10/1-101.1.

> **1-206. Local public entity.**
> § 1-206. "Local public entity" includes a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies. "Local public entity" also includes library systems and any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act as well as any not-for-profit corporation organized for the purpose of conducting public business. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.
>
> The changes made by this amendatory Act of the 94th General Assembly do not apply to an action or proceeding accruing on or before its effective date.

745 ILCS 10/1-206.

1-210. Willful and wanton conduct

§1-210. "Willful and wanton conduct" as used in this Act means 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. This definition shall apply in any case where a "willful and wanton" exception is incorporated into any immunity under this Act.

745 ILCS 10/1-210.

2-109. Act or omissions

§ 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.

745 ILCS 10/1-209.

2-201. Determination of policy or exercise of discretion

§ 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.

745 ILCS 10/2-201.

3-108. Willful and wanton conduct concerning supervision of an activity or use of property.

§ 3-108. (a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

745 ILCS 10/3-108.

INTEREST OF THE AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the Park District Risk Management Agency ("PDRMA"). PDRMA is a self-insured intergovernmental risk pool whose members include more than 160 park districts, forest preserve districts, and special recreation associations located in Illinois. Each of its members are local public entities as defined by Section 2-106 of the Local Governmental and Governmental Employees Tort Immunity Act (the "Tort Immunity Act"). 745 ILCS 10/1-206. Together these local public entities own and maintain roughly 200,000 acres of public recreational property, numerous public recreational facilities (including nearly every conceivable type of recreational indoor and outdoor sports facility: soccer, basketball, hockey, tennis, pickleball, skateboarding, swimming, and volleyball, among others) as well as providing camps, sporting leagues, and supervised recreational programs and opportunities for patrons of nearly all ages, including both children and adults. As such, PDRMA has an undeniable interest in the consistent, fair, and uniform application of the Tort Immunity Act, and specifically the proper application and uniform interpretation of discretionary immunity and willful and wanton conduct under the Tort Immunity Act.

PDRMA has appeared as *amicus curiae* before this Court, either jointly or independently, on several prior occasions to address issues which affect the tort liability and/or tort immunity of local governmental entities and their employees. Representative cases include *Barr v. Cunningham*, 2017 IL 120751; *Barnett v. Zion Park District*, 171 Ill. 2d 378 (1996); *Harinek v. 161 N. Clark Street Ltd.*

P'ship, 181 Ill. 2d 335 (1998); *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30 (1998); *Abrams v. City of Chicago*, 211 Ill. 2d 251 (2004); and *Moore v. Chicago Park District*, 2012 IL 112788.

This case involves issues critical to all local public entities across Illinois—particularly those that provide supervision during recreational activities and/or sporting events, whether a recreational soccer game or otherwise. Individuals of all ages and abilities apply for, participate in, and are directly supervised every day by the staff at PDRMA member agencies. These patrons may include, and sometimes do include, patrons with some degree of past behavioral issues, histories of "aggressive play," impulse control issues (as is common with children and, unfortunately at times, adults), significant strength and skill gaps, various physical and/or cognitive disabilities that lead to unwanted behaviors, and even those with past criminal history or pending criminal charges (but no orders prohibiting them from being on public property or participating in public programs).

The appellate court's conclusion that allowing a person with this type of a "checkered past" to participate in any future public recreational program, camp or sporting event either obviates discretionary immunity or potentially constitutes willful and wanton conduct is inconsistent with the Tort Immunity Act and invites widespread consequences transforming the foundation of how public agencies provide recreational services. By holding that a person with a prior "checkered past" was deemed eligible to participate in a recreational program supported a willful and wanton "failure to supervise" claim has the

practical effect of making every injury incurred during a sporting event or recreational activity, camp or program a question of hindsight for a jury regarding the initial eligibility of the offending patron to participate in the program at all.

Further, what activities to offer, how to offer them, what equipment and facilities to use, and eligibility/disciplinary issues are the very core policy determinations that administrative staff, recreational leaders, coaches and camp counselors make on a daily basis in every public recreational program. The increasing use of a hyper-specific formula to determine if a "policy choice" was "actually" made, much less was made by each and every staff member involved in the events leading to an accident or incident, to avoid discretionary immunity under 2-201 of the Tort Immunity Act (745 ILCS 10/2-201) has created an exception which serves to swallow the immunity.

In this case, while the appellate court may have been focused on its evaluation of whether a single gym teacher (Dayhoff) at the School was adequate or inadequate when supervising a group of children during a gym activity, the decision and opinion of the appellate court are much more far-reaching policy-wise. Troublingly, the decision has the strong potential to negatively impact the availability of cost-effective recreational programs, sports and camps across the State by incentivizing public agencies to adopt zero tolerance approaches to preclude participation whenever a participant has any troubled past—even if the local public entity could exercise discretion in some lesser way to come up with a plan that shows a conscious regard for safety. This could be devastating, among

others, for at-risk youth – many of whom have some level of behaviors in their past – but who greatly benefit from participation in recreational sports, camps and programs, despite these activities often coming with a greater risk of injury.

PDRMA, on behalf of its membership and as a representative of a broad cross-section of local public entities in Illinois, seeks to address two critical issues concerning available tort immunities for the operation and supervision of public recreational activities, camps and programs. First, decisions regarding who may be eligible to participate are themselves discretionary policy determinations subject to 2-201 of the Tort Immunity Act, and not every staff member at the local public entity must exercise the same discretion in order for the employee, and ultimately the public entity, to receive that immunity. Second, knowledge that a participant is "aggressive," larger, more or less "skilled," a "troublemaker" or has a past behavioral or disciplinary history, cannot support a claim for willful and wanton conduct under 1-210 (745 ILCS 10/1-210) of the Tort Immunity Act without specific knowledge that allowing that patron to participate in that event will more-likely-than-not result in another's injury.

ARGUMENT

Introduction to the Issues on Appeal

The appellate majority has concluded that the gym teacher (Dayhoff) did not "know what was happening in his gym class" such that "it also calls into question whether he made a policy determination" (¶ 27). The appellate majority further held that a failure to disseminate information known to the School's front-line supervisors that Student A was "aggressive and a danger to other

students," and/or the "knowledge of Student A's aggression and the lack of precautions to protect other students" may constitute willful and wanton conduct. (¶ 31). For both 2-201 immunity and 3-108 supervision immunity (745 ILCS 10/3-108(a)), the appellate majority held that questions of material fact prevented entry of summary judgment as a matter of law.

Respectfully, the *amicus curiae* believes that the appellate majority's holding is directly contrary to the intent of the legislature in adopting the Tort Immunity Act, and, should this Court adopt the appellate majority's analysis, it will jeopardize the ability of any local public entity to offer recreational camps, sports leagues, open gyms, or practically any supervised recreational activities without fear of protracted litigation due to the often spontaneous conduct of participants during a recreational activity. This is particularly true when the recreational activity involves sports or other games, in which body contact is inherent in the activity (such as children playing a game of soccer, basketball, tag, or any other limitless number of sports and games). The legislature has specifically identified the intent of the Illinois Tort Immunity Act in Section 1-101.1 as follows: "[t]he purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1. This case concerns the operation of mandatory physical education classes with a student who is not only eligible, but *required*, to participate in physical education. However, the analysis this Court adopts will not only address this narrow, specific situation, but undoubtedly influence how future courts apply tort immunity to *all* publicly supervised recreational activities

and events for public entities, such as PDRMA members, whose mission is to specifically provide recreational opportunities for the public—a general public that often comes with all manner of "prior behaviors."

The impact of this Court adopting the appellate majority's holding should not be understated and would likely require public entities providing any type of recreational programming to impose a "zero-tolerance disciplinary policy" in recreational programming. This, in turn, would be devastating for all public recreational programs, but particularly those provided by local public entities serving the most underserved communities and at-risk patrons—patrons with varied backgrounds and behavioral issues.

A general knowledge of past transgressions is hardly uncommon in recreational camps, programs, and activities. These are issues recreational programs regularly address. Adopting the majority opinion that a general knowledge of past "aggression" or even specific past behavior rule violations from a participant may serve as the foundation for a willful and wanton cause of action would mean any potential disciplinary action for behavior by a patron should disqualify that patron from all future participation in camps, programs and activities, or else the supervisors and public entity risk the consequences.

In this case, while the appellate majority's analysis did not thoroughly review Student A's history, it is clear that the School District had met with Student A and had provided counseling, redirection, check-ins, and general discipline in an effort to improve, modify and monitor his behavior—i.e., had engaged in a course of action demonstrating a conscious regard for safety. There

is no question that the School District evaluated and balanced their review of Student A's behavior history against other policies, and that he was deemed eligible by the School District's administrators to participate in physical education class. Student A had never been disciplined because of misconduct in physical education class and had not been involved in misconduct (physical or otherwise) with any other student in that particular class, much less Plaintiff. The activity that led to injury (i.e., soccer) is inherently a contact sport, and even the specific conduct alleged (a shoulder "barge" is also called a "check" or "bump") is often a legal play in soccer, provided there was no elbow or arm extended.

Similarly, it is relatively common in summer camps involving children that horseplay, insubordination, and even physical aggression (such as biting, pushing, or hitting), will arise at some point during the camp. How should local public entities respond after such an incident? Should the child not be permitted to play tag, soccer, basketball, or any activity in which potential physical contact between participants is foreseeable? Should they be automatically expelled, as (unlike school) these are voluntary recreational activities? Should participation for that individual be modified permitting only passive recreational activities, like art or ceramics? If so, how long should a child be sentenced to non-competitive recreational activities, camps, or programs, or be otherwise deemed ineligible for publicly offered recreation?

Traditionally, behavioral issues are addressed through a combination of prophylactic measures, remedial measures, progressive discipline, or zero tolerance policies. When and how to apply those measures is a core

determination of policy for much (if not most) of recreational programs, camps and activities with supervision as applied to its patrons. Applying the appellate majority's opinion in this case to the broader universe of public recreational programming would seemingly require a person to be deemed ineligible for active recreational activities, programs and camps after displays of physical aggression, or other unwanted behaviors, no matter if the local public entity believes that other less punitive steps would effectively manage the situation and protect the safety of others. Moreover, it also suggests notice of past transgressions must be communicated throughout the *entire* local public entity—even if determined that the patron is not an imminent threat involving the situation at issue. A minor scuffle in an after-school camp may potentially create a question of material fact whether an individual should later be permitted to participate in a separate recreational league soccer game within the same public entity, or whether the upper management at the after-school camp should have told every soccer official and coach at the soccer program about the patron's past scuffle thereby labeling them a "problem".

The needle that the appellate majority asks a local public entity to thread in order to receive the immunity provided by the Tort Immunity Act is entirely too narrow. In the majority holding, the public employees involved allegedly lacked the requisite knowledge to make a "conscious decision" in order to receive discretionary immunity for permitting Student A to participate in open gym soccer. However, that same information available to that defendant seemingly created the alleged "question of fact" as to whether the school was consciously

disregarding student safety by allowing him to participate in that same event. The *amicus curiae* position is that both contentions are incorrect as a matter of law and, read together, place local public entities in a lose-lose position in which they risk liability whenever a patron with prior disciplinary history for behavioral issues injures another during recreational activity.

I. Discretionary Policy Determinations Include General Determinations of Policy, Such As Eligibility And Discipline.

Section 2-201 of the Tort Immunity Act provides, "[e]xcept 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." 745 ILCS 10/2-201 ("§ 2-201"). § 2-109 of the Tort Immunity Act provides 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) ("§ 2-109"). When read together, § 2-201 and § 2-109 of the Tort Immunity Act shield a municipality from liability for discretionary acts or omissions by its employees. *Andrews v. Metropolitan Water Reclamation District Dist. of Greater Chicago*, 2019 IL 124283, ¶ 26.

Discretionary immunity for public employees stems from the idea that public employees should be allowed to exercise professional judgment in making decisions without fear that a good-faith mistake might subject them to liability. *Id*. This Court has held that "[t]he broad immunity found within § 2-201 offers the most significant protection afforded to public employees under the [Tort

Immunity] Act." *Arteman, v. Clinton Community Unit School District No. 15*, 198 Ill. 2d 475, 484 (2002). When determining whether immunity attaches under section § 2-201, courts look at the conduct itself rather than the intent behind it. *Kevin's Towing, Inc. v. Thomas*, 351 Ill. App. 3d 540, 548 (2nd Dist. 2004).

For a public employee to establish § 2-201 immunity, she must establish that the public employee held either a position involving the determination of policy *or* a position involving the exercise of discretion. Second, she must demonstrate that the employee 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. *See Andrews*, 2019 IL 124283, ¶ 27.

There is no dispute that the public employees involved in this case were in positions involving the determination of policy, or the exercise of discretion. Instead, the appellate majority focused on whether the public employee in charge of the physical education class (Dayhoff) made a conscious "policy determination." Specifically, the majority held "[i]f Dayhoff did not know what was happening in his gym class, it also calls into question whether he made a policy determination." ¶27. This is entirely too narrow a focus. Student A's eligibility for physical education class was determined by School District administrators, with specific knowledge of Student A's prior disciplinary and behavioral background. As such, discretionary immunity attaches to those employees and, thus, the local public entity. Moreover, Dayhoff himself, *separately*, engaged in acts sufficient to trigger discretionary immunity. Dayhoff's "conscious decision" was allowing eligible students in class to be

eligible to earn points for participating in the recreational activity and, if so, to choose from his offered activities. Either one of these situations allows for discretionary immunity to attach to the relevant public employees, and, thus, the School District.

The operative and/or uncontested facts are that Student A had a disciplinary history with at least 4 previous reports of engaging in physical altercations—i.e., fighting previously in the school year. There were multiple other reported behavioral matters seemingly related to missing class (or "wandering") and general insubordination. Notably, none of these were related to the physical education class specifically, nor was any of the past physical altercations alleged to be with any person in the physical education class, much less Plaintiff. Indeed, Student A had never had any disciplinary referral for any act in the physical education class. It is equally uncontested that, prior to the incident, administrative School District officials had met with and taken past disciplinary actions/remedial measures with Student A, including a regular problem-solving group, check ins and check outs, discipline, and other steps. While there is no question that Student A had a referral history, administrative School District officials determined that it need only inform Student A's teachers about his history of "wandering" and found that he did not pose any specific danger to any other student or staff so the additional sharing of information was not necessary. Perhaps more importantly, there is no fact suggesting that Student A was suspended, expelled, or otherwise ineligible for this physical education class at the time of this incident.

In the gym class itself, it was undisputed that Dayhoff was aware that Student A was in class, that after 10 minutes of general exercise that all eligible students in class were permitted to choose their form of recreation for the day (basketball versus soccer) and that Student A was ultimately permitted to play soccer and was observed playing soccer. Finally, there is no question that Dayhoff remained in the gymnasium to observe activities, hear conflicts as they arise, and be available for any student requests or complaints. It is merely the adequacy of his supervision that is questioned.

The students in Dayhoff's class were enjoying a free day, a recreational day, which after a brief warm up they were permitted to choose a team sport to play (basketball or soccer). These days occur at random times in the school year, but most often when transitioning to/from lessons such as swimming classes (where students need a swimsuit) or state mandated health classes (where students need not dress in athletic gear). One reason for this is in the transition between lessons, students often forget to bring the appropriate clothing. Students would receive daily grades—5 for merely dressing and up to 5 additional points based on their participation—where Dayhoff is the only teacher in the class of approximately 30 students. Students who were not dressed, were—at Dayhoff's discretion—allowed to participate in certain recreational activities in order to earn back points for the day. This is used as an incentive to increase participation, and better a student's grade in the class.

A. The Court Should Clarify the Limited Extent of the Nature of a Conscious Decision As A Prerequisite for Discretionary Immunity.

Illinois courts have already whittled away discretionary immunity, especially in property defect cases. In *Corning v. East Oakland Township*, 283 Ill. App. 3d 765 (4th Dist. 1996), the plaintiff claimed that the absence of a stop sign made an intersection unreasonably dangerous and was the proximate cause of a major traffic incident. Previously, the township had placed a sign at this location, but it had been removed by vandals. *Id.* at 766. The township argued that the decision to replace the sign was an exercise of discretion and a determination of policy, as it was not required under the Manual on Uniform Traffic Devices to even have a sign in that location (relying on *Snyder v. Curran Township*, 167 Ill. 2d 466, 472 (1995)). The trial court agreed and granted summary judgment. *Id.* at 767. Reversing, the Fourth District held that "discretion" necessarily requires some "conscious decision." *Id.* at 768. The Court held that while there was proof that the defendant exercised discretion when it erected the sign that there was no proof that it decided to remove it or even knew that vandals had taken it. *Id.* While the failure to maintain and/or inspect the sign was a discretionary act, because it had no knowledge that the sign had been removed, defendant's position was "an impermissibly expansive definition of discretionary immunity" as the sign was removed without any input or thought by public employees. *Id.* In other words, that the intersection was dangerous not because the defendant made a conscious decision to remove a traffic sign, but because it was stolen without its knowledge or authority. *Corning*, 283 Ill. App. 3d at 768.

Over twenty-years later, the "conscious decision" language which first appeared in *Corning* was cited approvingly by this Court in *Monson v. City of Danville*, 2018 IL 122486. *Monson* involved a sidewalk defect in the commercial

district of the City of Danville. The trial court granted summary judgment based upon § 2-201 immunity and the appellate court affirmed. Reversing, this Court held that the City of Danville did not meet "its burden of establishing that the alleged acts of omissions constituted an exercise of discretion and a determination of policy by its employees within the meaning of section 2-201." *Id.* ¶ 34. The evidence showed that a project to repair downtown-area sidewalks commenced in fall 2011 and was substantially completed in spring 2012. The accident took place later on December 7, 2012. *Id.* ¶ 3. The city employee testified that he did not remember ever inspecting the portion of the sidewalk where the plaintiff would ultimately fall. *Id.* at ¶34. Contrary to statements in his affidavit, the same city employee admitted that he did not recall any conversations or decisions regarding the specific slabs at issue and that he had no emails or documents regarding those slabs. *Id.* Citing *Corning,* this Court held that the City had not met its burden of proof to obtain the immunity because it failed to present "any evidence documenting the decision not to repair the particular section at of sidewalk at issue." *Id.* ¶ 35. This Court held that unlike *Richter v. College of DuPage*, 2013 IL App (2d) 130095, where the defendant was given discretionary immunity for a "wait and see" approach towards a known defect, there was no evidence regarding any decision-making process with respect to the specific sidewalk defect that allegedly caused plaintiff to fall:

> While the City presented evidence that the site was included in an overall evaluation of its sidewalks, there are no facts regarding the City's assessment of the actual site. We do not know which factors were taken into account by the City in deciding not to repair the sidewalk. More importantly, we do not know whether anyone even took note of a sidewalk

> deviation at that location, or whether it was simply overlooked. The record before us thus does not contain sufficient evidence to establish that the City's handling of the sidewalk defect constituted an exercise of discretion.

Monson, 2018 IL 122486, ¶ 38. Accordingly, this Court held that because the defendant had not met its burden of establishing discretionary immunity as a matter of law, it was not entitled to summary judgment on this basis. *Id.* ¶ 39.

This Court continued to develop this standard in *Andrews v. Metro. Water Reclamation Dist. of Greater Chicago*, 2019 IL 124283. In *Andrews*, the plaintiff was injured when a two-ladder configuration to work on a tank collapsed causing plaintiff to fall thirty feet onto a co-worker. *Id.* ¶ 6. A senior civil engineer testified that the defendant had nothing to do with how its contractor performed its work; that defendant had nothing to do with the safety aspects of the work; that he walked the jobsite once or twice a day to confirm that the work was being performed in compliance with the contract; and that he had never seen the two-ladder configuration prior to the accident. *Id.* at ¶ 12. The trial court granted summary judgment based on the fact that the "the [District] engineer had discretionary authority to make policy determinations under the terms of the contract." *Id.* ¶ 15. The First District reversed and held that even if the engineer had authority to make policy determinations and exercise discretion, because he had no actual knowledge of the ladder configuration that allegedly caused the injury, he could not have made policy or exercised discretion with respect to work done. *Id.* ¶ 16. After review of the record, this Court held that the "only disputed issue" was whether the engineer "exercised discretion and made a policy determination in connection with the alleged acts or omissions that resulted in

plaintiff's injuries." *Id.* ¶ 29. This Court held that "a municipal defendant asserting immunity under section § 2-201 must present evidence of a conscious decision by its employee pertaining to the conduct alleged to have caused the plaintiff's injuries. It follows that, if the employee was totally unaware of a condition prior to the plaintiff being injured, he or she could not possibly have exercised discretion with respect to that condition." *Id.* at ¶ 34. Since the engineer was "totally unaware" of the "two-ladder setup" that allegedly caused the injuries, "he was unable to weigh the risks and benefits and make a conscious decision with respect to the condition involved in the accident." *Id.* ¶ 35.

Two justices, however, dissented on two concerns—one of which is directly implicated in this case. Justices Karmeier and Garman specifically highlighted their concern "that 'the conscious decision' rule will come to require the articulation of 'magic words' evincing a conscious decision, a requirement that ignores what may reasonably be inferred from conduct and circumstance." *Id.* at ¶ 65. Here, an additional concern now arises: whether the 'magic words' must be reiterated by each subsequent employee in a position of policy in order to preserve the immunity.

There is no question that in this case the School District administrators knew and approved of Student A's eligibility for physical education class, despite evaluating his past behavioral disciplinary history. This is evident from the undisputed evidence of the disciplinary and remedial steps the School District took, and the fact that School District administrators did not expel or suspend Student A from physical education class. It is also undisputed that Dayhoff determined to allow students in his classroom to choose from the activities

selected by Dayhoff for their daily physical education after an introductory session of exercising—a free day between lesson plans, and a day which students were permitted to choose between playing basketball or soccer with friends and classmates. Dayhoff specifically made a decision to permit Student A (who otherwise did not dress for gym class) to participate in free day recreation to earn lost points and enjoy the activity. These decisions are not only conscious—but actual determinations of policy. The fact that one public employee (Dayhoff) was not a decision maker in another public employee's (the School District administrators) conscious decision should not destroy the immunity for each employee, nor the public entity's immunity via § 2-109. In fact, such conscious decisions by each set of public employees should be a separate and independent basis for discretionary immunity to attach to the public entity, which cannot be held liable where its public employee cannot be held liable. 745 ILCS 10/2-109.

For example, in *Harrison v. Hardin County Comm. Unit School Dist. No.1*, 197 Ill.2d 466, 474 (2001), this Court held that the school defendant had discretionary immunity for the principal's decision to refuse a 16-year-old student to leave school early during inclement weather after he expressed his concern over getting into an accident. In applying the immunity, this Court noted:

> [The principal] had to consider the circumstances surrounding [student's] request, including the weather and road conditions, [student's] safety, and the lack of permission from [student's] parents or guardian. [The principal] then had to balance the competing interests of [student's] desire to leave early before the weather worsened with that of the school's interest in an orderly dismissal, along with the

> possibility that if one student was dismissed early then, in the future, every student would want to leave early. [The principal] then had to make a judgment as to how best to perform his duties as principal and find a solution that best served all of these interests.

Id. Notably, however, it was not just the principal of the school who played a role in release of this student from school. After speaking with the principal, the student went to his next class and "asked his teacher if he could use the phone to call his parents to get permission to leave early. The teacher told [the student] to sit down and that school would be dismissed early." *Id*. at 469. Nothing in the decision suggests that, in addition to the principal's exercise of discretion, in order to receive the immunity, the public entity defendant must assert each and every public employee in the chain of decision making have made a determination of policy. The fact that the principal in question had determined that the student was ineligible to leave before dismissal provided the immunity for the school district defendant. That a teacher, later that same day, denied the student the ability to have his parents arrange for him to come home (or as argued by plaintiff come and pick up the new driver in inclement weather) was irrelevant as the immunity had already attached.

In *Hascall v. Williams*, 2013 IL App (4th) 121131, the plaintiff brought a multi-count complaint alleging her daughter had been regularly bullied by three students from kindergarten through the beginning of fourth grade. The plaintiff sought a meeting with the school principal, superintendent, and her fourth-grade classroom teacher and demanded to have her daughter moved to a different classroom because of the ongoing bullying. *Id*. at 4. Her daughter, however, was

not reassigned by the principal. *Id.* After her request to reassign her daughter into a different classroom, the alleged bullies:

> slapped a book [the victim] was holding, and "threatened [victim]" [the bullies] again followed [victim] into the school restroom. [Victim] entered a stall and the girls kicked open the door of the stall, injuring [victim]. The girls 'threatened' [victim] by stating, 'I'm going to kill you' or similar words.

Id. at 7. In finding that discretionary immunity applied, the Appellate Court of Illinois, Fourth District, held that "the determination whether bullying has occurred and the appropriate consequences and remedial action are discretionary acts under these facts." *Id.* at 28. The decision relied, in part, on prior decisions, such as *Albers v. Breen*, 346 Ill. App. 3d 799, 808 (4th Dist. 2004), where the court noted: "A school principal dealing with a disciplinary matter must balance competing interests—the confidentiality of his information source, the appropriate level of punishment, the concerns of all the children's parents, the impact of his decision on the student body generally—and make a judgment as to what balance to strike among them." *Id.* at 808.

In each of these cases, the principals made determinations of policy, and the court did not require a second, subsequent, "conscious decision" by the individual teachers to take additional steps before the immunity attached to the public entity; the policy decision-making by the principal was sufficient. The fact that the teacher in *Hascall* did not consciously allow bullies to follow the plaintiff into the restroom did not create a secret path around the discretionary immunity that attached to the principal and therefore the school.

However, in the case at hand, the appellate majority seems to hold the exact opposite: that all public employees involved must have made the same conscious choice. There is no question that School District administrators were aware of Student A's prior behavioral issues, and made a conscious decision that included the appropriate level of punishment, what remedial steps to take, what information to emphasize with teachers (the behavior of "wandering"), and whether Student A continued to be eligible for normal daily lessons at the school, including but not limited to participation in gym class. There is no question of fact that Student A was permitted by the School District administrators to participate in physical education class without any additional supervision or accommodation. That Dayhoff, the gym teacher, was unaware of this background is irrelevant to discretionary immunity—as it was in *Harrison*, *Hascall*, and *Albers*.

This is not to say that Dayhoff's position does not involve its own, separate and independent discretionary policy determinations, however. His determinations included (but were in no way limited to): (1) identifying the lesson plan for that day; (2) permitting the students in class to choose their activity from among options; (3) the rules and locations for the game; (4) any equipment used; (5) whether students who were not wearing their designated uniforms would be permitted to participate in recreational activity; (6) what had been successful and unsuccessful to engage the students in this class; (7) staffing and resources available; (8) providing a daily grade based upon participation. The mere fact that Dayhoff was unaware of Student A's history in other

classrooms, or with School District administrators, should have no impact how these determinations of policy were made, or strip away his own discretionary policy determinations subject to discretionary immunity.

There are similar policy determinations throughout PDRMA membership. As noted above, a child in a summer camp may push, hit, or bite another camper, receive remedial measures or formal discipline and subsequently register for another park district program where the direct supervisor of the new program is not only unaware of this patron's history, but has no input on the patron's general eligibility for the program (for example the team's coach). Or, alternatively, if a player is suspended for insubordination during a sporting event, which is a "coach's decision," that information should not require disclosure to after-school camp counselors prior to deeming the child eligible for after-school camp. The reality is that each public employee exercises discretion within the parameters of his or her position and makes a judgment call based upon the information available to them at the time. This must be what § 2-201 immunity provides, or the immunity is illusory.

Proclamations alone that discretionary immunity is the "most significant protection" provided by the legislature for employees involved in the operation of local public government are worthless if the immunity unobtainable in practice. Past battles over whether an act was ministerial or discretionary have now evolved into whether an acknowledged discretionary decision was "fully" "conscious." In this case, the answer is clear: yes, the School District's administrative staff was aware of Student A's history and continued to allow him

full participation in physical education class—even if they were unaware he was specifically playing soccer or any other specific recreational activity on that given day. Yes, Dayhoff was aware that all students eligible to participate in class were choosing to play soccer or basketball, including Student A—even if he was unaware of Student A's past behavioral issues in other classes or in his personal life. However, as a legal principle a conscious decision should not require knowing every fact that could impact a decision, even if relevant. The immunity requires only that a determination by an employee was actually made— to remove the street sign versus a vandal stealing it.

Discretionary immunity, ironically, is on the precipice of becoming a significant protection for only malicious or intentional bad acts of public employees. *See Strauss v. City of Chicago*, 2022 IL 127149. This is not the legislative intent, which is to protect public employees who are making difficult everyday judgment calls from the effects of those decisions. While abuses of public power may still be discretionary policy decisions, the determination to allow an alleged troubled teen to participate in soccer is no less of a judgment call in need of protection through § 2-201 immunity. As such, PDRMA on behalf of its members, would urge the Illinois Supreme Court to reverse the Fourth District's decision, and affirm the trial court's holding that Kankakee School District 111 is entitled to judgment as a matter of law on the basis of discretionary immunity.

II. Willful and Wanton Supervision Requires Specific, Foreseeable, and Probable Dangers That are Consciously Disregarded.

The majority decision fails to identify *a single case* in its analysis to support its holding that "failure to disseminate" information of Student's A's behavioral history to Dayhoff could be willful and wanton conduct (¶31). In contrast, the dissent identifies *no less than 24 cases* that support the position that inadequate or even no supervision of children does not support a claim for willful and wanton conduct. (¶ 42). The difference in authority is not only striking, but by reversing decades of precedent, the impact affirming the majority's analysis would have on public employees who supervise recreational activities on public property would be devastating. Put simply, under the appellate majority's interpretation of statutory immunity (and of § 1-210 specifically), a local public entity and/or public employee will be entitled to immunity from negligence liability in the supervision of an activity only when they can conclusively demonstrate that the participant in question had no history of rule violations, physical aggression, or other poor conduct or, alternatively, that the local public entity advertised any history to every staff at the agency who may be supervising the individual at any time. This, of course, would not only frustrate the legislative intent in adopting the Tort Immunity Act, but would for all practical purposes result in the cessation of nearly all athletic and recreational activities for any individual with a history of misconduct or behavioral issues, for fear of the crippling tort liability. *See, e.g., Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 380 ("We agree with the Board that this analysis by the *Eck* court is seriously flawed. The *Eck* court's importation of the common law discretionary/ministerial distinction into section 3-108(a) is not appropriate. As explained above, courts must not read conditions into the Tort Immunity Act that

conflict with its plain language [citing *Barnett*]. Such an approach wrongly results in court-made limitations on what the legislature has prescribed in an area constitutionally designated as the legislature's own. . . .").

How the supervision of patrons who have behavioral or disciplinary issues is interpreted by this Court impacts every public employee who supervises children. Children act erratically, spontaneously, and expose themselves or others to injury through immaturity. As past courts have noted:

> The mere fact that teenagers, being teenagers, may comport themselves in such a manner as to expose themselves or others to injury is legally insufficient to support a claim of willful and wanton misconduct in the absence of a specific, foreseeable, and probable danger.

Choice v. YMCA of McHenry Cnty., 2012 IL App (1st) 102877, ¶ 72.

There is also no reason to suspect the appellate majority's analysis will be limited to children. Adult softball players collide with baserunners, soccer players attempt "slide-tackles" (essentially trying to steal the ball from a competitor by throwing their body into the ground and sliding across to hit the ball), and hockey players check or slash competitors, regardless of age. With recreational activities in particular, participants of any age "may comport themselves in a manner as to expose themselves or others to injury," be it from horseplay, poor behavior, skill gaps or overly aggressive play.

This Court has partially reviewed this issue in the past with sports, and in particular, organizational defendants such as coaches and officials, when a participant injured another with overly aggressive and illegal play, noting: "[t]o

successfully plead a cause of action for failing to adequately enforce the rules in an organized full-contact sport, plaintiff must allege that the defendant acted with intent to cause the injury or that the defendant engaged in conduct 'totally outside the range of the ordinary activity' involved with coaching or officiating the sport." *Karas v. Strevell*, 227 Ill. 2d 440, 464–65 (2008) (citing *Knight v. Jewett,* 3 Cal. 4th at 320). Indeed, the early cases regarding the so-called "contact sports exception" flow from the case of *Nabozny v. Barnhill*, 31 Ill. App. 3d 212 (1st Dist. 1975), which held soccer was a contact sport and (somewhat ironically in this case given the nature of injury being shoulder to shoulder contact) that "[t]he only legal contact permitted in soccer is shoulder to shoulder contact between players going for a ball within playing distance." *Id.* at 214. This conduct is precisely what is alleged to have occurred in this case and certainly was not "totally outside the range of ordinary activity" in a school soccer game.

The appellate majority focused on the School District's failure to provide Dayhoff information about Student A's propensity for aggressive behavior in other settings, presumably so Dayhoff could provide a greater level of attention to Student A during the game. Yet, there was nothing specific, foreseeable, and probable suggesting that Student A would injure this plaintiff or anyone in the class at all. Student A had been in Dayhoff's gym class for seven months, and there is no evidence that Student A had (a) any prior disciplinary referrals from this class; (b) had ever injured any student in this class; (c) had made any threats or ill-intentions known about Plaintiff; (d) had made any threats or ill-intentions known about any other student in the class; or (e) would otherwise be a risk

playing soccer. Indeed, there are no facts suggesting that any student had previously been injured in Dayhoff's physical education class in those seven months. Finally, and perhaps most importantly for willful and wanton analysis, it is an undisputed fact that no person during any point of the game preceding the injury brought Student A's alleged "aggressive play" or otherwise obnoxious behavior to Dayhoff's attention. Dayhoff remained in the same room throughout the class, available to receive complaints from any student in the class. Even if he was allegedly distracted at times, watching the basketball game instead of the soccer game, or even working on his computer, that does not negate the fact that Plaintiff himself as well as other children in the class described conduct that is generally related to soccer play. The danger in this case was not specific, foreseeable or probable, nor "totally" outside the range of play.

Illinois courts have defined willful and wanton conduct broadly as the failure to take reasonable precautions after "knowledge of impending danger." *See Barr v. Cunningham*, 2017 IL 120751, ¶ 20. This Court has also cautioned that cases based on whether the public defendant simply "could have done more" reduces the willful and wanton standard to something synonymous with mere negligence. *See Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 33. Cases like the instant case demand that the Court adopt the "specific, foreseeable, and probable" standard to evaluate what it means to be an "impending" danger. Otherwise, the cautionary language noted in *Cohen* will continue to be overlooked, and cases alleging mere negligence (inadvertence, inadequacy, or unskillfulness) will have no qualitative difference from those alleging willful and

wanton misconduct. However difficult it may be to describe (as opposed to define) willful and wanton misconduct, it is meant to be a type of conduct morally akin to deliberate or intentional conduct, not negligence. *Loitz v. Remington Arms*, 138 Ill.2d 404, 416 (1990) (citing *Breland v. Ideal Roller*, 150 Ill. App. 3d 445, 457 (1st Dist. 1986) (wanton misconduct is when a "defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard for it")). The majority decision in this case significantly lowers this bar by claiming that a teenager with behavioral issues, alone, establishes that he or she is an impeding danger to any and all members of the public.

The majority decision is directly in conflict with past cases that have dealt with unruly patrons in sports and camp settings. For example, in *Floyd v. Rockford Park District*, 355 Ill. App. 3d 695 (2nd Dist. 2005), the plaintiff alleged that the injury resulted from a staff member's failure to supervise an unruly summer camp participant. 355 Ill. App. 3d at 697-698. The participant in question "regularly and continuously exhibited belligerent and violent behavior toward the supervisors and the other registered participants." *Id.* Plaintiff pleaded that this participant "fought with, threatened and verbally abused other participants and supervisors," and he "disobeyed orders and directions given to him." *Id.* This culminated with the incident in question, in which the participant took a metal bat and allegedly intentionally struck plaintiff, causing injury. *Id.* The Second District held that "[a]bsent from plaintiff's complaint is any allegation that registered participants, or particularly [the perpetrator], had used metal golf clubs or baseball bats to batter other children, supervisor, or anyone

else. Prior knowledge of similar acts is required to establish a course of action [demonstrating willful and wanton conduct]." *Id*. at 701.

In *Geimer v. Chicago Park District*, 272 Ill. App. 3d 629 (1st Dist. 1995), the court held that the following conduct did not create a question of fact regarding willful and wanton conduct for an injury that occurred later in the same football game:

> On the first play of the game, Tony punched the plaintiff in the rib cage. [Plaintff] complained about Tony to the nearest referee, and the referee said he would watch him. The next play Tony hit the plaintiff with his arms extended, and the plaintiff again complained to the referee. On a later play where a pass landed in front of the plaintiff, Tony shoved the plaintiff and landed on top of him. Plaintiff's teammates complained to the referees after this play. On another play, Tony struck one of plaintiff's teammates and knocked him to the ground. Plaintiff's teammate then screamed at Tony, Tony shoved the teammate, the teammate shoved back, and then Tony threw a wild swing which missed. At this point, the referees and other players grabbed and separated the men. On another play, plaintiff was dragged to the ground by Tony after catching a pass. Several penalties were called against Tony, but he was not thrown out of the game. In the second half of the game, six similar incidents took place, including pushing, shoving, elbowing, tackling, and placing a forearm shiver.

Id. at 630-631.

In *Siegmann v. Buffington*, 237 Ill. App. 3d 832 (3rd Dist. 1992), the plaintiff engaged in a fight in the school parking lot with defendant. *Id*. at 833. The very next day, the plaintiff was told by the defendant's friends that he was going to fight him a second time after school. *Id*. The plaintiff went to the principal with the specific threat and told the principal that he had no interest in

fighting. *Id*. The principal met with the defendant and told him he was aware of the previous fight, told him not to do it again, told him not to bother the plaintiff or have any of his friends bother the plaintiff. *Id*. The defendant nevertheless fought the plaintiff exactly as threatened after school, in the parking lot as predicted, causing injury. *Id*. The plaintiff brought suit against the school district, alleging that the principal should have done more, and specifically should have placed a monitor in the parking lot to ensure the fight did not happen. *Id*. at 834. The appellate court held that these facts were not willful and wanton as a matter of law; even though the principal could have done more, and the appellate court believed it "in hindsight may have been the more prudent course of action", the fact that the principal took some steps to prevent the defendant's planned attack showed at least some conscious regard for the safety of the plaintiff. *Id*. at 834-935.

As these cases make clear, willful and wanton conduct requires something more than just knowledge of a general potential or "impending" danger. All dangers are foreseeable with the benefit of hindsight. Decades of supervision cases, cited in the dissent, show that the appropriate standard to determine if there is a question of fact on a willful and wanton supervision claim is whether the "impending danger" was specific, foreseeable, and probable. If Student A or another student had informed the School District of Student A's plan to harm Plaintiff, or if he had told Dayhoff—the impending danger might have been specific, foreseeable, and probable. If Plaintiff had told School District administrators or Dayhoff that he was concerned that Student A was going to try

to injure him—the impending danger could have been specific, foreseeable, and probable. Importantly, then the analysis should not end there, as this would not yet establish willful and wanton conduct on its own merits under the Tort Immunity Act. Plaintiff must also prove a "course of action" to find willful and wanton misconduct, such there would next need to be a finding that the public entity consciously disregarded that "specific, foreseeable, and probable" danger, or did nothing to ameliorate it.

The majority decision failed in both regards. First, the "impending danger" that was a seventh-grade boy with past disciplinary issues was not a specific, foreseeable, and probable threat to Plaintiff in gym class or the School generally as he walked the halls (as in *Floyd* and *Geimer*). Second, even if this was a specific, foreseeable, and probable risk to Plaintiff's safety (and it was not), the School District had taken numerous disciplinary steps with Student A in an attempt to mitigate that risk (as in *Siegmann*). That Defendants did not prevent this specific accident creates no material issue of triable fact.

The Tort Immunity Act's purpose is to insulate public entities and their employees from liabilities arising from the operation of government. Should this become the standard required of public entities in permitting individuals to participate in recreational activities, it will have the exact opposite effect. The threat this analysis would pose to PDRMA members—those that provide public recreational opportunities to the general public—would require a radical change in how eligibility and discipline would be handled. Verbal altercations, rough play, or pushing, bumping and any kind of fighting would result in removal from

programming and jeopardize all future eligibility. It is imperative that this Court reverse the majority decision and apply a standard that allows public entities to provide opportunities for communities to engage in sports and recreation without the fear of a lengthy lawsuit any time a participant collides with a competitor.

CONCLUSION

The appellate majority's opinion is contrary to the legislative intent as expressed in §§ 2-201 and 1-210 of the Tort Immunity Act. Discretionary immunity is intended to provide protection to public employees who in the scope of their employment must make judgment calls. There is no question that Defendants in this case made a series of determinations that resulted in Student A being eligible for, and participating in, a soccer match in physical education class with the same level of supervision as any other student. The appellate majority also reversed well settled precedent, including this Court's decisions, setting forth the appropriate analysis of "willful and wanton conduct" as defined in § 1-210 of the Tort Immunity Act. The *amicus curiae* therefore respectfully urge this Court to adopt “specific, foreseeable, and probable” analysis to determine when a danger is “impending,” and only after the determination of that impending danger would a public entity’s “course of conduct” demonstrate a conscious disregard or utter indifference to this “specific, foreseeable, and probable” threat. Such analysis demands that the Court reverse the appellate court majority below and affirm the trial court's entry of a summary judgment in favor of Defendants on the basis that the

allegations and evidence of record do not satisfy the requirements for willful and wanton conduct as a matter of law.

Respectfully submitted,

Dustin S. Fisher

Dustin S. Fisher
Sara Yager
Andrew Fiske
Park District Risk Management Agency
Attorneys for the *amicus curiae*, the Park District Risk Management Agency (PDRMA)

Dustin S. Fisher
Sara Yager
Andrew Fiske
Park District Risk Management Agency 2033 Burlington Ave.
Lisle, IL 60532
T 630.769.0332
dfisher@pdrma.org
syager@pdrma.org
afiske@pdrma.org

No. 131420

IN THE
SUPREME COURT OF ILLINOIS

KEVIN HAASE and RILEY HAASE,

Plaintiffs-Appellees,

vs.

KANKAKEE SCHOOL DISTRICT 111,
And DARREN WILBUR DAYHOFF

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois
Third Judicial District, No. 3-23-369
There Heard on Appeal form the Circuit Court of Kankakee County, Illinois
County Department, Law Division, No. 2018 L 000012
The Honorable Lindsay Parkhurst, Judge Presiding

CERTIFICATE OF COMPLIANCE

Dustin S. Fisher, as attorney for PDRMA, hereby certifies that this *amicus curiae* brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the parts containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

Dustin S. Fisher

Dustin S. Fisher
Park District Risk Management Agency
2033 Burlington Avenue
Lisle, IL 60532
T 630.769.0332
dfisher@pdrma.org

Dustin S. Fisher
Deputy General Counsel
Sara Yager
General Counsel
Andrew Fiske
Deputy General Counsel
Park District Risk Management Agency
Attorney for the *amicus curiae*,
the Park District Risk Management Agency (PDRMA)
2033 Burlington Avenue
Lisle, IL 60532
T 630.769.0332
dfisher@pdrma.org

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