**No. 122486**

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**IN THE**
**SUPREME COURT OF ILLINOIS**

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

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**APPELLANT'S BRIEF**

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**ORAL ARGUMENT IS REQUESTED**

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## POINTS AND AUTHORITIES

## NATURE OF THE CASE

Plaintiff-Appellant, Barbara Monson ("Plaintiff"), was injured when she tripped and fell as a result of an uneven sidewalk seam, owned and maintained by Defendant-Appellee, City of Danville ("Danville"). (R. C263, at 68:2–4; R. C265, at 73:5–7) Subsequently, Plaintiff filed a personal injury action to recover money damages under a theory of premises liability which included allegations that Danville was on notice that the sidewalk section in question was unsafe and that Danville possessed sufficient time to remedy the unsafe condition. (R. C7-14) The Trial Court granted summary judgment to Danville based upon discretionary immunity under the Tort Immunity Act (the "Act"). (R. C5-6) The Appellate Court issued its opinion authored by Justice Steigmann on May 9, 2017, affirming the Trial Court's grant of summary judgment in the Defendant's favor. (A2-14).

## JURISDICTION

The jurisdiction of this Court is based upon Ill. S. Ct. R. 315. The Appellate Court Opinion was published on June 15, 2017, affirming the Trial Court's Order granting Motion for Summary Judgment in favor of Danville. (A2-14). In accordance with Ill. S. Ct. R. 315, Plaintiff's Petition for Leave to Appeal was filed on July 19, 2017, thirty-four days after the Order of the Appellate Court. On September 27, 2017, this Court allowed the Plaintiff's Petition for Leave to Appeal. (A1)

## ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred in holding that Danville is entitled to discretionary immunity under the Tort Immunity Act ("Act") for failing to maintain its sidewalks in a reasonably safe condition, thus granting summary judgment in favor of Danville.

## STATUTES INVOLVED

**745 ILCS 10/2.** Local Governmental and Governmental Employees Tort Immunity Act; General Provisions Relating to Immunity.

> **§ 109**. Immunity of Local Public Entities [Act or omission of employee].
>
> 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.
>
> **§ 201**. Immunity of Public Employees [Employee's liability; policymaking and discretionary acts].
>
> 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 10/3**. Local Governmental and Governmental Employees Tort Immunity Act; Immunity from Liability for Injury Occurring in the Use of Public Property.

> **§ 102**. [Duty to maintain property].
>
> **(a)** Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

> **(b)** A public entity does not have constructive notice of a condition of its property that is not reasonably safe within the meaning of Section 3-102(a) if it establishes either:
>
> > **(1)** The existence of the condition and its character of not being reasonably safe would not have been discovered by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property; or
> > **(2)** The public entity maintained and operated such an inspection system with due care and did not discover the condition.

## STATEMENT OF FACTS

On December 7, 2012, Barbara Monson, was walking upon a concrete sidewalk at the intersection of Vermilion Street and North Street in a commercial district of Danville, Vermilion County, Illinois.[1] (R. C248, at 7:18–8:9; R. C262, at 63:1–4; R. C263, at 65:12–66:1) Located along her path of travel was a seam in the sidewalk where two slabs of concrete sidewalk met. (*Id.*) The sidewalk seam was adjacent to the street where customers park and to the entrances of many commercial businesses. (*Id.*) The sidewalk seam was also adjacent to a light pole near the street curb. (*Id.*) One of the slabs of the sidewalk was depressed, creating a height variation of approximately two inches where the two slabs of concrete met. (R. C222)

Earlier in the day, it had rained, and water accumulated upon the lower slab of sidewalk due to the height variation. (R. C264, at 70:19–21, 71:15–72:4) Upon arriving

[1] Citation to the Record on Appeal will appear as follows: "R. C0000." Citation to the Transcript of Proceedings will appear as follows: "Trans. p. 00."

downtown, Plaintiff parked her car along the curb, exited her car, walked along the sidewalk, and entered one of the businesses located in the area. (R. C259, at 51:13–23)

Upon leaving the adjacent business, Plaintiff retraced the same path. (R. C263, at 65:12–14; R. C265, at 73:4–11) As she walked along the sidewalk to her car, she felt her toe hit the elevated portion of the uneven sidewalk, which then caused her to fall. (R. C263, at 68:2–4; R. C265, at 73:5–7) As a result of her fall, Plaintiff suffered serious injuries to her face, mouth, foot, shoulder, and arm, resulting in the need for multiple surgeries. (R. C265–67, at 76:10–84:1) Plaintiff was unable to appreciate any depression in the sidewalk adjacent to the light pole due to the pooling of the water. (R. C265, at 73:12–15)

On December 2, 2013, Plaintiff filed a two-count complaint alleging that Danville failed to maintain the public sidewalk in a reasonably safe condition for use by pedestrians, and such failure constituted 1) negligence; and/or 2) willful and wanton conduct. (R. C7-14)

Danville subsequently tendered an affidavit of its Director of Public Works, Doug Ahrens, and then he was subsequently produced for deposition. In his affidavit, Mr. Ahrens claimed that he inspected the portion of the sidewalk involved during the fall of 2011 (R. C210, ¶ 8.). However, Mr. Ahrens confirmed in deposition that he does not remember inspecting that specific portion of the sidewalk and possesses no documentation related to it, testifying as follows:

> Q. Do you specifically recall as you sit here today looking at this particular area of concrete . . . [t]he particular slab of concrete that Mrs. Monson fell on.

A. I believe I looked at it. Do I recall the date and time that I looked at it, no.
Q. Do you have any documents that show that you looked at this particular slab of concrete?
A. No.

(R. C188, at 18:18–19:5)

Q. With respect to the particular slab that we are here talking about today, do you recall specifically any conversations relating to that slab?
A. No.
Q. Do you have any e-mails or documents or anything that you could produce to us that would relate specifically to that slab?
A. No.
Q. Would it be fair to say that there wasn't a map made of downtown with the different slabs of concrete and which ones were replaced?
A. There was not a map. There were partial maps made is what I would say to that, photos. When you use the term map, I am not sure what you are considering a map but there were some photographs of painted areas and things of that nature that depicted the work areas.
Q. Would it be fair to say that in the course of making these decisions a list of particular areas of concrete that would be considered was created?
A. No list that l am aware of. It was a visual inspection.

(R. C188–89, at 20:7–21:3)

Q. Do you have any specific recollection as to whether or not this particular slab would not fit within the allowable time and budget?
A. Would not fit within the allowable time and budget? No.

(R. C189, at 21:15–19)

Q. Would it be fair to say that there is no specific list of the areas that were repaired?
A. Yes.
Q. Would it be fair to say there is no specific budget for the areas that were repaired?
A. That is correct.

(R. C193, at 40:14–19) Despite the absence of any recollection or documentation pertaining to the sidewalk at issue, Mr. Ahrens' affidavit claims that he made a determination that the sidewalk at issue did not have deviations exceeding two inches and, thus, it was not prioritized for replacement. (R. C188, at 18:18–19:5; R. C209, ¶ 7)

On March 23, 2016, Danville filed a Motion for Summary Judgment. (R. V1, C106) In its motion, Danville argued that its failure to maintain the sidewalk in question was a "discretionary function" and, thus, it was immune from tort action under §2-109 and §2-201 of the Act. (R. C109) Relying principally upon the Second District appellate court decision, *Richter v. College of DuPage*, 2013 IL App (2d) 130095 (which addressed municipal sidewalk repair), Danville argued that municipalities are immune from tort actions if they can establish that: a) their employees determine policy; and b) they exercised discretion.[2] (R. C111–114) Danville argued that it was immune from any failure to maintain, pursuant to §2-109 and §2-201, because there exists no issue of fact regarding whether its employees, Larson and Ahrens, 1) made sidewalks repair policy; and 2) exercised discretion regarding repair. *Id.*

Plaintiff filed a Response in opposition to summary judgment. (R. C228-246) In her Response, Plaintiff argued the following:

1) §3-102 recognizes the municipal duty to maintain public property in a reasonably safe condition;
2) §3-102 grants immunity from liability *only* upon two separate grounds:
   a) the municipality lacked notice (actual or constructive); or
   b) lacked sufficient time to correct;

[2] In addition to asserting tort immunity, Danville argued that summary judgment was warranted, premised upon two other grounds: 1) the defect in the sidewalk was *de minimus* or 2) it was open and obvious. The court did not rule with respect to these additional grounds. Hence, they are not addressed in this Brief.

3) §2-201 cannot be read to abrogate Danville's §3-102 duty, or its grounds to avoid liability; especially in light of the prefatory language of §3-102;
4) §2-201's "[e]xcept as otherwise provided in statute" language shows it is not controlling, where §3-102 is specific as to the required showing necessary to avoid §3-102 liability; and
5) *Richter* was wrongly decided, as the Act requires no determination of "discretionary or ministerial function" to determine liability under §3-102, as it states its own specific grounds.[3]

(R. C232-237). The Trial Court heard argument on Danville's Motion for Summary Judgment on July 12, 2016. (A21-42)

The Trial Court entered a final Order, via docket entry on July 20, 2016, granting Danville's Motion for Summary Judgment. (R. C5–6; A19-20) The Trial Court relied heavily upon the holding of *Richter*, stating that:

> As in *Richter*, the Plaintiff here relies on 3-102 of the Tort Immunity Act which applies to ministerial functions rather than discretionary functions and policy determinations. As in this case, the Parties in *Richter* disputed which § of the Tort Immunity Act controlled the outcome of the case.

(R. C6) Without addressing any of the precedent cited by Plaintiff, the Trial Court held that because Danville presented evidence that its employees made policy and made a decision premised upon that policy, their acts were discretionary and "§2-109 and §2-201 of the Tort Immunity Act grant immunity to the Defendant…" *Id.*

Thereafter, Plaintiff filed her Notice of Appeal, pursuant to 735 ILCS 5/2-1005(c), on July 20, 2016. After oral argument, the Appellate Court issued its opinion on May 9, 2017, affirming the Trial Court's grant of summary judgment. The Appellate Court reasoned that the specific provisions found in §2-109 and §2-201 on the one hand, and

[3] In addition, Plaintiff argued against summary judgment premised upon Danville's *de minimus* and open and obvious arguments. However, these arguments were not addressed by the court in its order of dismissal, and will not be addressed herein.

§3-102 on the other, are "mutually exclusive." *Monson v. City of Danville*, 2017 IL App (4th) 160593-U, ¶ 31. The Appellate Court found that no conflict exists between the two provisions of the Act because §2-109 and §2-201 apply to discretionary acts and §3-102 applies to ministerial acts. *Id.* The Court then stated, "[i]f, as here, a factual scenario involves the formulation of policy and discretion in executing that policy, then any subsequent analysis **begins and ends** with sections 2-109 and 2-201 of the Act, and the provisions in Article III of the Act are not applicable at all." *Id.* (emphasis added). The Appellate Court, however, failed to address the plain language of the Act, specifically how §2-201's "except as otherwise provided by statute" language or §3-102's "except as otherwise provided by this article" language affects the analysis so that the analysis does not "begin and end" with §2-109 and §2-201, or any of the Supreme Court precedent cited by Plaintiff. On September 27, 2017, this Court granted the Plaintiff's petition for leave to appeal.

## STANDARD OF REVIEW

This is an appeal from the Circuit Court for the Fifth Judicial Circuit of Illinois, Vermilion County, which granted Danville's Motion for Summary Judgment under 735 ILCS 5/2-1005(c). Summary judgment is proper if, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c). The standard of review pertaining to a trial court's grant of summary judgment is *de novo*. *Allegis Realty Inv'rs v. Novak*, 223 Ill. 2d 318, 330 (2006) (citing *Illinois State Chamber of*

*Commerce v. Filan,* 216 Ill. 2d 653, 661 (2005)). Similarly, where the grant of summary judgment involves the "consideration of the meaning and effect of statutory provisions" the Appellate review is also *de novo*. *Id.* (citing *Hawthorne v. Village of Olympia Fields,* 204 Ill. 2d 243, 254–55 (2003)).

**ARGUMENT**

Petitioner requests this Court reverse and remand this case to the Trial Court because the decision of the Appellate Court is in direct conflict with the plain language of the Act and this Court's long-standing precedent regarding local government immunity. This appeal concerns the Appellate Court's expansive approach to local government immunity in relation to a local government's duty to maintain its property in a reasonably safe condition. This expansive approach is in contradiction to the numerous decisions of this Court and completely ignores the plain language of the Act. This Court should remedy this conflict, and give effect to the legislature's clear intent that governmental immunity should not be so expansive so as to completely eliminate the right of an injured party to recover.

There are two paths by which this Court can analyze a local government entity's liability for failing to maintain its property in a reasonably safe condition, and both paths lead to the same result: reversal of the Appellate Court's decision.

1) Under a strict statutory interpretation analysis, it is clear that the plain language of the Act negates discretionary immunity where another immunity governs, and specifically with respect to §3-102.

2) Under a discretionary-ministerial analysis, this Court's precedent is clear that a city's duty to maintain its property in a reasonably safe condition is a ministerial function, not a discretionary function. Therefore, "discretionary" immunity under the Act simply does not apply in this case.

## I. The Trial Court's grant of Summary Judgment is reversible error because it failed to recognize that: a) immunity was not warranted under §3-102 of the Act; b) pursuant to *Murray,* §3-102 controls over §2-201; and c) *Richter* is inapplicable to the case at bar.

"[The Act] is in derogation of the common law action against local public entities, and must be strictly construed against the public entity involved." *Aikens v. Morris*, 145 Ill. 2d 273, 278 (1991). The Act "grants only immunities and defenses." 745 ILCS 10/1-101.1; *Hubble v. Bi-State Dev. Agency of the Illinois-Missouri Metro. Dist.*, 238 Ill. 2d 262, 278 (2010). The Act does not create any duties, but instead, "codifies those duties existing at common law, to which the subsequently delineated immunities apply." *Vill. of Bloomingdale v. CDG Enterprises, Inc.,* 196 Ill. 2d 484, 490 (2001).

When conducting a statutory construction analysis, the Act "…must be construed as a whole…" *Hubble*, 238 Ill. 2d at 279. "The primary goal of construing the meaning of a statute is to ascertain and give effect to the intent of the legislature. The most reliable indicator of such intent is the statutory language, which must be given its plain and ordinary meaning." *Id* at 268. Accordingly, the first step in statutory construction is to look to the plain language. *Id.* However, where the plain language is not dispositive, the general/specific cannon is often applied. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012); *see also Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 233 (2007).

**a) A plain reading of §3-102 does not afford immunity to Danville because there is no genuine issue of material fact that Danville had notice, and the opportunity to repair.**

Given the aforementioned, the first step in a statutory construction analysis is to determine the intent of the legislature by a plain reading of the statutes at issue. *Hubble*, 238 Ill. 2d at 279. Here, the analysis starts with §3-102 of the Act, which sets forth both the duty of a public entity to maintain its property, and the respective immunities that abrogate said duty. 745 ILCS 10/3-102. The duty is codified as follows:

> …a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used…

745 ILCS 10/3-102(a). The Act goes on to codify the immunities to §3-102 as follows:

> [A municipality] shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

745 ILCS 10/3-102(b). §3-102(b) notes that a public entity is immune where it does not have "constructive notice" under §3-102(a) when it can establish:

1) that the unsafe condition would not have been discovered by a reasonably adequate inspection; or

2) the public entity maintained and operated such an inspection system with due care and did not discover the condition.

*Id.*

The plain language of §3-102 clearly does not contain any mention of "discretion" or "discretionary function." Likewise, it does not contain the word "ministerial" or "ministerial function." The plain language of §3-102 simply does not direct the court to

engage in a discretionary/ministerial function analysis to assess the scope of §3-102 immunity. Instead, the scope of §3-102 immunity is explicitly set forth: a public entity is liable for maintaining its property in a reasonably safe condition, unless one of two conditions exists: a) the public entity lacks sufficient notice; or b) the public entity lacks sufficient time to correct the condition. That is it. Lack of notice and time are the only immunities provided by the legislature in §3-102.

In *Horton*, the plaintiff was awarded damages for injuries he suffered when he was thrown from his motorcycle after hitting a large hole in the defendant-city's street. *Horton v. City of Ottawa,* 40 Ill. App. 3d 544, 546 (3d Dist. 1976). On appeal, the city argued that since the official in charge of city streets had exercised discretion, the official was immune under §2-201, and, therefore, the city was immune under §2-109 (the exact argument raised by Danville). *Id.* at 546–47. When interpreting § 3-102, the *Horton* court stated:

> The plain language of the provisions in article III [of the Act] demonstrates the legislative intention to *continue the common law liability of* local governments for failure to maintain streets in a condition reasonably safe for public use, *provided* the governmental entity has either actual or constructive notice of the defect in time to have corrected the condition…

*Id.* at 548 (emphasis added) (internal citations omitted). Moreover, the *Horton* court specifically rejected the city's argument that §2-109 and §2-201 immunized the city from liability since such "logic . . . would have us disregard article III of the tort immunity statute which deals with liability for injury occurring in the use of public property." *Id.* at 547.

Here, the Appellate Court ignored *Horton*'s reliance on §3-102, instead determining that the *Horton* holding was based upon §3-105 alone. However, in direct contradiction to the Appellate Court's interpretation of *Horton*, the *Horton* court specifically held that a local public entity is directly liable for the dangerous conditions of its property, pursuant to §3-102, regardless of the liability of its employees. *Horton,* 40 Ill. App. 3d at 548 (citing *Hennigs v. Centreville Twp.*, 56 Ill. 2d 151 (1973)). The *Horton* court went on to find §3-105 supportive of the aforementioned conclusion. *Id.* Such support was indicated by the language "furthermore" and "we are therefore persuaded." *Id.* at 548. *Horton* makes it abundantly clear that Article III of the Act has a purpose, and, as the legislature intended, a public entity must be held liable for the unsafe conditions of its property so long as they have notice and reasonable time to remedy the condition. *Id.*

Danville, admittedly, had actual notice of the dangerous condition of the sidewalk that caused Plaintiff's injuries and had reasonable time to remedy it. Danville admits, through its agent, Mr. Ahrens, that a determination was made that the sidewalk at issue did not have deviations exceeding two inches and was not prioritized for replacement. (R. C188, at 18:18–19:5; R. C209, ¶ 7) Based upon the aforementioned, Danville cannot be immune under §3-102, because it had notice and sufficient time to remedy the defect. There exists no issue of fact as to whether Danville received actual notice of the dangerous condition or had time to correct the condition after notice. The sole remaining issue is the extent to which Danville satisfied its statutory duty to maintain its property in a reasonably safe condition. Both the Trial Court and the Appellate Court

failed to properly interpret the plain language of §3-102, and, thus, the grant of summary judgment was error. Accordingly, the Plaintiff requests the Appellate Court's decision be reversed, and this matter remanded to the Trial Court for further proceedings.

**b) §3-102 controls over §2-201 because of the use of unambiguous, plain language in the §2-201 prefatory language, "Except as Otherwise Provided by Statute" and in the §3-102 prefatory language, "Except as Otherwise Provided by this Article."**

Given that the entire Act is to be construed as a whole, it is important to also look at the prefatory language of §3-102, and the claimed immunity of Danville pursuant to §2-201. This analysis aids in determining whether there is an immunity that might apply outside of the those specifically articulated in §3-102. Both §3-102 and §2-201 contain highly significant clauses that both the Trial Court and Appellate Court ignored. The grant of immunity under §2-201 is prefaced with the following phrase: **"Except as otherwise provided by Statute**." 745 ILCS 10/2-201 (emphasis added). This is in contrast to §3-102, which is prefaced with the following phrase: "**Except as otherwise provided by this Article**." 745 ILCS 10/3-102 (emphasis added).

**i. The prefatory language found in §3-102 explicitly limits the immunities to §3-102 to those found within Article 3 of the Act.**

A plain reading of §3-102, and its associated prefatory language, requires a look to one place, and one place only, for exceptions to the duty and immunities found within §3-102: **this Article.** 745 ILCS 10/3-102. The Article specifically referenced is Article 3 of the Act. §2-201 and §2-109 are located in Article 2. To find there is a duty pursuant to §3-102, and then to look first to Article 2 for an immunity to §3-102, is in

complete derogation of the plain language of §3-102. Given a plain reading of §3-102, the only immunities provided in the Act for the failure to maintain public property are those contained within §3-102, or elsewhere within Article 3. There is simply no other way to plainly read the prefatory language in §3-102. Accordingly, the Plaintiff requests the Appellate Court's decision be reversed, and this matter remanded to the Trial Court for further proceedings.

**ii. The prefatory language found in §2-201, in conjunction with this Court's holding in *Murray,* renders §2-201 subordinate to §3-102.**

Reversal and remand should occur even in the absence of the "except as otherwise provided by this Article" language in §3-102. "It is a well-settled rule of statutory construction that where there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision must prevail." *Murray*, 224 Ill. 2d at 233 (quoting *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 390 (1998) (internal quotation marks omitted)).

In *Murray*, this Court made it clear that §2-201 does not confer absolute immunity in all cases where a public employee determines policy or exercises discretion, but rather, §2-201 is contingent upon other provisions of the Act, which, in effect, places an important limit on a public entity's immunity. *Id.* at 232. This Court explained the effect of §2-201 as follows:

> It is clear from the prefatory language found in . . . section 2-201 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. . . . In section 2-201 of the Act the legislature included the

> prefatory language "except as otherwise provided by Statute," indicating that **section 2-201 immunity is contingent upon** whether other provisions, either within the Act or some other statute, creates exceptions to or limitations on that immunity.

*Id.* (emphasis added).

The *Murray* court specifically analyzed §2-201 along with two sections of Article 3: §3-108 and §3-109. Importantly, §3-108 contained the following prefatory language: "except as otherwise provided by **this Act**." 745 ILCS 10/3-108. Whereas, §3-109 contained no prefatory language. 745 ILCS 10/3-109.

The *Murray* court held that §2-201 immunity does not apply to §3-108 and §3-109. *Murray,* 224 Ill. 2d at 234. In coming to its conclusion, this Court looked to the prefatory language found in §2-201. *Id.* at 232 (where another provision of the Act directly addresses a plaintiff's injury, §2-201 immunity does not apply, given the section's very clear prefatory language). The city argued that §2-201's general grant of immunity supersedes the exceptions to immunity found within §3-109(c) (specifically addressing hazardous recreational activities). *Id.* at 227–28. This Court rejected the city's argument because of the "except as otherwise provided by statute" prefatory language the legislature included in §2-201. *Id.* at 232. This Court found that although §2-201 "would ordinarily provide immunity against the type of allegations advanced by plaintiffs, there is '**otherwise provided**' in the Act a provision **directly addressing the situation giving rise to [plaintiff's] injury**." *Id.* at 234 (emphasis added).

§3-102 prevails over §2-109 and §2-201 because §3-102 is the "particular provision" that governs a local public entity's immunity relating to the dangerous

conditions of its property. 745 ILCS 10/3-102. This immunity is when the public entity does not have notice of the defect or does not have sufficient time to remedy it. *Id*. In contrast, §2-109 and §2-201 are "general provisions," applying generally without reference to whether it concerns public property, police activity, or anything else. This was, in fact, the same plain reading of the Act used by the Fourth District in relation to §3-102, until this case. *See Courson v. Danville Sch. Dist.*, 333 Ill. App. 3d 86, 92 (4th Dist. 2002) ("We conclude that section 3-102 imposes on a [local public entity] the duty to exercise reasonable care to maintain its property, and that such duty **does not fall within the immunity of section 2-201**." (emphasis added) (citation omitted)). A local public entity is not immunized from its failure to maintain its property in a reasonably safe condition through an employee's decision to not make repairs. *Id.*

Here, §3-102 directly addresses the dangerous condition of Danville's sidewalk, which caused Plaintiff's injury. *See* 745 ILCS 10/3-102. As a result, consistent with the holdings in *Murray* and *Courson*, the prefatory language found in §2-201 renders it subordinate to §3-102. *Murray*, 224 Ill. 2d at 232–34. This Court's holding in *Murray* was presented to both the Trial Court and the Appellate Court as binding authority, and, under the circumstances of this case, *Murray* mandated that §3-102 prevail over §2-201 based both upon §2-201's "except as otherwise provided by statute" prefatory language and the general/particular dichotomy between the two sections. Even absent a plain reading of the prefatory language found in §3-102, it is clear that both the Trial Court and Appellate Court erred in failing, at the very least, to follow *Murray*. Accordingly, the

Plaintiff requests the Appellate Court's decision be reversed, and this matter remanded to the Trial Court for further proceedings.

### iii. Ignoring the prefatory language of §3-102, and §2-201, as well as the holding of *Murray* would result in absurdity and injustice because doing so would eviscerate the common law duty of a city to maintain its property.

"[C]ourts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience, or injustice." *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 195 (1992). "A statute capable of two interpretations should be given that which is reasonable and which will not produce absurd, unjust, unreasonable or inconvenient results that the legislature could not have intended." *Collins v. Board of Trustees of Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 110 (1993). Moreover, "the Tort Immunity Act is in derogation of the common law action against local public entities, and must be strictly construed against the public entity involved." *Aikens*, 145 Ill. 2d at 278.

If, as the Appellate Court found, §2-109 and §2-201 immunity apply regardless of any of the prefatory language, then the Act would produce absurd results. Under §3-102, a local public entity is not liable in tort unless it is proven it had notice of an unsafe condition with reasonable time to repair it, and did not repair it. 745 ILCS 10/3-102. Under §2-109 and §2-201, a city may be immune where 1) a public employee in charge of the city's sidewalks; 2) possesses actual notice of an unsafe condition with reasonable time to repair it; and 3) chooses not to repair said unsafe condition. 745 ILCS 10/2-109; 10/2-201.

This Court, in a slightly different context (where it was interpreting §3-106), refused to interpret § 3-106 so as to "eviscerate the duty codified in §3-102." *Bubb v. Springfield Sch. Dist. 186*, 167 Ill. 2d 372, 382 (1995). If this Court were to hold that §2-109 and §2-201 control, not only would it be in direct contradiction and effectively overrule *Murray*, it would eviscerate a public entity's duty to maintain its sidewalks in a reasonably safe condition. This is unjust and would provide a shield for cities to continue what the legislature sought to remedy when enacting §3-102, namely, the unsafe conditions of a public entity's property. *See Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 318 (1989) ("Besides examining the language of an act, a court should look to the evil that the legislature sought to remedy or the object it sought to attain in enacting the legislation.").

Based upon the Appellate Court's interpretation of the Act, where a public entity has notice of a dangerous condition on its property under §3-102, but an employee makes a decision not to repair the dangerous condition, the public entity will always be **immune** under §2-201. Such a holding renders it impossible for an injured party to meet the requirements of §3-102, without the public entity being simultaneously immune under §2-201. As a result, §3-102 is rendered completely meaningless. The only instance that a Plaintiff might still have a case pursuant to §3-102, is through constructive notice, which would be a completely absurd result, given the complete evisceration of cases with actual notice. Certainly, the legislature could not have intended to provide immunity for public entities with actual notice of a dangerous condition, thus allowing it to sit idly by, while subjecting those with constructive notice to liability. It is clear that in

order for the Act to make sense, §3-102 must be construed according to its intended plain meaning.

As mentioned above, §2-201 cannot control because it would eviscerate the duty to maintain property codified under § 3-102, rendering it surplusage. Such an interpretation would be contrary to the obvious legislative intent to hold public entities liable for the failure to maintain its property. In effect, the Trial Court and Appellate Court's holding that §2-201 controlled has led to the absurd result of nullifying §3-102, thus creating surplusage in the Act. Accordingly, the Plaintiff requests the trial court's grant of summary judgment be reversed and this matter remanded for further disposition.

**c) *Richter* is inapplicable to the case at bar, because it involved a waiver by the parties that cannot be applied to subsequent cases.**

In reaching its decision, both the Appellate and Trial Courts "relie[d] heavily on *Richter,* which [the Trial Court court held] addresses the issues raised by both the Plaintiff and Defendant in this case." (R. V1, C5.) Notwithstanding the fact that *Richter* is a subordinate opinion to *Murray*, *Richter* should have been limited specifically to the parties at issue in that case, because the *Richter* decision relied upon a critical stipulation between the parties that was not made in this case. Specifically, the *Richter* parties reached the following agreement:

> **The parties agree** that §3-102 applies to ministerial functions and that §2-201 applies to exercises of discretion and policy determinations.

*Richter*, 2013 IL App (2d) 130095 ¶36 (emphasis added). Thus, the holding in *Richter*, and the analysis under §2-201, was one that the parties agreed upon, not one that was

based upon the plain language of the Act. *Id.* The *Richter* court was not presented with the question, and certainly did not analyze, whether §3-102 applies only to ministerial functions. The court **assumed** §3-102 applies only to ministerial functions based upon a stipulation (i.e. waiver) of the parties. *Id.* Given the faulty premise stipulated to by the parties in *Richter*, the court was asked to decide one question: whether the public entity's handling of the sidewalk deviation was ministerial (in which case the court assumed §3-102 would automatically apply), or discretionary (in which, by operation of the stipulation, §2-109 and §2-201 would automatically apply). Had the *Richter* court been asked to engage in a critical analysis of whether §3-102 controls over §2-201, it would have been required to address the prefatory language of each section, *Murray* and the arguments that Plaintiff asserts above. Instead, the *Richter* court confined itself to the parameters agreed upon by the parties.

Under the plain language of §3-102, *Murray* and *Courson,* it is irrelevant whether a public entity is performing a ministerial function or discretionary function in cases relating to the unsafe conditions of a public entity's property. Quite simply, §3-102 supersedes §2-201. Both the Trial Court and the Appellate Court should have recognized the limitations of the *Richter* holding and refused to apply it in this matter. In applying the limited holding of *Richter* to this case and ignoring the plain language of §3-102 and *Murray*, both courts committed error. Accordingly, the Plaintiff requests the trial court's grant of summary judgment be reversed and this matter remanded for further disposition.

**II. In the alternative: §2-201 and §2-109 do not apply because, as per this Court's longstanding precedent, maintaining government property is a ministerial function, not discretionary.**

§2-109 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. §2-201 then states:

> 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. Together, these two sections codified the common law doctrine of discretionary immunity. *See Cowper v. Nyberg*, 2015 IL 117811.

In §3-102, the Act also codified the common law duty of a public entity to maintain its property in a reasonably safe condition:

> [A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used...

745 ILCS 10/3-102(a). It further sets forth the governmental immunity provided to public entities under the Act:

> [A municipality] **shall not be liable** for injury unless it is proven that it has actual or constructive **notice** of the existence of such a condition that is not reasonably safe in reasonably adequate **time** prior to an injury to have taken measures to remedy or protect against such condition.

*Id.* (emphasis added); *see also Pattullo-Banks v. City of Park Ridge*, 2014 IL App (1st) 132856, ¶ 15 (§ 3-102 both codifies a common law duty and provides an immunity).

The aforementioned immunities set forth in §3-102 codified the common law immunity afforded to public entities that had no notice of the dangerous conditions on their property. *Chicago v. Stearns*, 105 Ill. 554, 558 (1883). In *Stearns,* the court stated as follows:

> So far as the question of notice to a city of a defective sidewalk is concerned, the law is well settled that the city will not be held liable unless it has notice of the defective walk, or unless it has notice of such facts and circumstances as would, by the exercise of reasonable diligence, lead a prudent person to such knowledge.

*Stearns*, 105 Ill. at 558; *see also Boender v. Harvey*, 251 Ill. 228, 231 (1911); *Chicago v. Dalle*, 115 Ill. 386, 389–90 (1885).

It is no accident that these three sections track the common law, as the legislature was reinstating the immunities, and exceptions to those immunities. *See Cowper*, 2015 IL 117811, ¶ 17; and *Village of Bloomingdale v. CDG Enterprises, Inc.,* 196 Ill. 2d 484, 496 (2001). Although discretionary immunity is codified in §2-109 and §2-201 of the Act, this Court has "continued to employ the common law definitions of discretionary and ministerial functions." *Snyder v. Curran Township*, 167 Ill. 2d 466, 473 (1995). Under the common law definitions of discretionary and ministerial functions, a local government's duty to keep its property in good repair is a **purely ministerial function and not discretionary**. *Hanrahan v. City of Chicago*, 289 Ill. 400, 405 (1919).

Recently, the Fourth District in this case and the Second District in *Richter,* have conflated the definitions for discretionary and ministerial functions relating to property maintenance that have long been established under this Court's precedents. *See Monson,* 2017 IL App (4th) 160593; *and Richter,* 2013 IL App (2d) 130095. This has

resulted in an overly expansive approach to local governmental tort immunity that was never intended by the legislature, is not supported by the text of the Act, and is contrary to the discretionary immunity found at common law, which the Act codified. In fact,

> The doctrine of this court has always been, that while the legal obligation to pave streets is one voluntarily assumed by the municipal authorities, yet when the city constructs these improvements for the benefit of the public it then becomes its duty to keep them in repair. . . . [A] municipality is **liable** for failure to keep its streets in safe condition for public use.

*Johnston v. Chicago*, 258 Ill. 494, 500–01 (1913) (emphasis added) (citing *Chicago v. Seben*, 165 Ill. 371 (1897)) *see also Hanrahan*, 289 Ill. at 405 (Whether a city chooses to construct a public improvement [i.e. create property (for example, to pave a street or construct a sidewalk)], or not, is a discretionary decision; yet, as soon as it carries out a plan to create property, it is then charged with the duty to keep such property in a reasonably safe condition, which is a ministerial duty).

"It is the duty of a municipal corporation, which exercises its power of building sewers, to keep such sewers in good repair, and such duty is not discretionary, but purely ministerial." *Seben*, 165 Ill. at 378-379. The *Seben* court had the following to say about discretionary and ministerial functions:

> It is well settled that municipal corporations have certain powers which are discretionary or judicial in character, and certain powers which are ministerial… Municipal corporations will not be held liable in damages for the manner in which they exercise, in good faith, their discretionary powers of a public or legislative or quasi-judicial character. But they are liable to actions for damages when their duties cease to be judicial in their nature, and become ministerial. Official action is judicial where it is the result of judgment or discretion. Official duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing

> remains for judgment or discretion... **It is the duty of a municipal corporation, which exercises its power of building sewers, to keep such sewers in good repair, and such duty is not discretionary, but purely ministerial.**

*Id.* at 378–79 (emphasis added).

A plain reading of §3-102 shows that the clear intent of the legislature was to hold public entities **liable** (i.e., not immune) for injuries resulting from dangerous conditions on its property when it had notice and sufficient time to remedy. *Cf. Moore v. Green*, 219 Ill. 2d 470, 479 (2006) ("The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent."). This is why this Court, in 1973, just eight years after the Act was enacted, stated the following:

> [Under §3-102, a] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition. It seems clear from this that the **legislature intended** local public entities to be **liable** [i.e., not immune] for injuries resulting from their failure to maintain their property in that condition.

*Hennigs*, 56 Ill. 2d at 154 (emphasis added).

While §2-201 codifies public official immunity, the conjunction of §2-109 and §2-201 codifies **governmental immunity**, and under common law governmental immunity, a public entity's duty to maintain its property in a reasonably safe condition is a **ministerial** function. The immunity for this ministerial function was codified separately in §3-102 of the Act.

The legislature's intent to keep these two immunities separate and to have §3-102 control over any discretionary immunity codified in §2-201 could not have been made clearer by the legislature: §2-201 includes the prefatory language, "except as otherwise provided by statute." Thus, where another statutory provision governs, §2-

201 is wholly negated. The ministerial nature of maintaining property along with the notice-related immunity codified in §3-102 does just this: it "otherwise provides."

§2-109, §2-201, and §3-102, by their plain language, do not refer to "ministerial" or "discretionary" functions as defined at common law, therefore, the discretionary-ministerial analysis is not one that should be conducted when determining a city's liability. However, this Court has favored the discretionary-ministerial approach. *See, e.g.*, *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 371–72 (2003). If this case hinges on the common law distinction between discretionary and ministerial functions, then the **full** common law should be taken into consideration not just part of it. If the common law discretionary-ministerial distinction is retained, then the common law definitions should be retained also, and this Court has long held that a local government entity maintaining property in a reasonably safe condition is a **ministerial** function, not a discretionary function. Therefore, under the common law as codified in the Act, discretionary immunity is simply inapplicable in this case, and the matter should be reversed and remanded to the trial court for further proceedings.

## 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.

BARBARA MONSON, Plaintiff-Appellant,

By: /s/ Miranda L. Soucie
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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 **27** pages.

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**NO. 4-16-0593**

**IN THE**
**APPELLATE COURT OF ILLINOIS**
**FOURTH JUDICIAL DISTRICT**

| | | |
|---|---|---|
| BARBARA MONSON, | ) | Appeal from the Circuit Court of |
| | ) | the Fifth Judicial Circuit, |
| Plaintiff-Appellant, | ) | Vermilion County, Illinois |
| | ) | |
| | ) | Date of Notice of Appeal: August 15, 2016 |
| vs. | ) | Date of Judgment: July 20, 2016 |
| | ) | No. 13 L 71 |
| | ) | |
| CITY OF DANVILLE, a Home | ) | |
| Rule municipality, | ) | |
| | ) | The Honorable Nancy S. Fahey |
| Defendant-Appellee. | ) | Presiding |

# APPENDIX

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SEP 2 9 2017

# SUPREME COURT OF ILLINOIS

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September 27, 2017

In re: Barbara Monson, Appellant, v. The City of Danville, etc., Appellee.
Appeal, Appellate Court, Fourth District.
122486

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

FILED
June 15, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160593

NO. 4-16-0593

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|---|---|---|
| BARBARA MONSON,<br>Plaintiff-Appellant,<br>v.<br>THE CITY OF DANVILLE, a Home Rule Municipality,<br>Defendant-Appellee. | ) | Appeal from<br>Circuit Court of<br>Vermilion County<br>No. 13L71.<br><br><br>Honorable<br>Nancy S. Fahey,<br>Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Justices Holder White and Pope concurred in the judgment and opinion.

**OPINION**

¶ 1 In December 2013, plaintiff, Barbara Monson, sued defendant, the City of Danville (City), requesting compensation for injuries she sustained as a result of her tripping and falling onto a sidewalk the City maintained.

¶ 2 In March 2015, the City filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2014)). Following a July 2016 hearing, the trial court granted summary judgment in the City's favor, finding that the City was immune under sections 2-109 and 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/2-109, 2-201 (West 2014)).

¶ 3 Monson appeals, arguing essentially that the trial court erred by granting summary judgment in the City's favor because the court misapplied the immunity afforded by

the Act. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The following synopsis was gleaned from the parties' pleadings, depositions, affidavits, and other supporting documents filed in the trial court.

¶ 6 On the afternoon of December 7, 2012, Monson went shopping. The temperature that day was mild, and conditions were wet because of an earlier rainstorm. Upon leaving a store in the City's downtown district, Monson walked north to her car, which was parked facing east on an intersecting street about five storefronts away. When she reached the intersection, Monson turned east and walked on the sidewalk between the side of a pharmacy (to her right) and a lamppost positioned closer to the street (to her left). Monson then walked at an angle toward the street curb where she had parked her car. As Monson did so, she walked into an inch of water that had formed on the sidewalk to the right of the lamppost. At that moment, Monson felt her left shoe strike something, which caused her to lose her balance, fall forward, and hit her chin on the sidewalk. Monson required nine stitches to close the cut to her chin and suffered bruising to her left toe, arms, lips, neck, and bicep. Monson also had dental work performed on two chipped teeth and a crown that had partially dislodged from another tooth.

¶ 7 In December 2013, Monson sued the City, alleging that the City's negligence and willful and wanton misconduct in failing to repair an uneven seam between two slabs of sidewalk concrete was the direct and proximate cause of her fall. In her prayer for relief, Monson requested compensation for the injuries she sustained as a result of her striking the defect.

¶ 8 In March 2015, the City filed a motion for summary judgment, in which it included the discovery depositions of (1) Shelly Larson, the City's superintendant of downtown services, and (2) James Douglas Ahrens, the City's public works director.

¶ 9 Larson testified that her various responsibilities as the City's superintendant of downtown services included maintaining the downtown sidewalks. In 2011, Larson personally walked the City's downtown district and spray painted places that she believed required repair, replacement, or removal. Shortly thereafter, the City's engineer toured each site with Larson to determine what recommendations, if any, to make. Larson noted that work later performed on the downtown sidewalks included portions near where Monson had fallen, which were markedly distinct in color from the original concrete.

¶ 10 Larson learned of Monson's claim against the City in late spring 2013, when she accompanied Cathy Courson, the City's risk manager, as Courson took pictures of where Monson had fallen. Upon arriving, Larson saw "a low spot of moisture" and repositioned a nearby city garbage receptacle to prevent other pedestrians from encountering the low spot. Larson did so because she believed that an uneven seam existed between adjoining slabs of concrete, and she wanted to prevent pedestrians from encountering that deviation.

¶ 11 Ahrens testified that the decision to repair, replace, or remove a slab of concrete is a case-by-case determination based upon numerous factors, which included the (1) intended use of the area, (2) normal path of travel, (3) condition of the concrete, (4) proximity to other obstructions, (5) elevation deviations between concrete sections, (6) availability of personnel, and (7) costs. Although not documented as City policy, Ahrens agreed that the aforementioned factors were developed over multiple years in consultation and collaboration with other City departments and personnel. Ahrens stated that the deviation between the two concrete slabs at issue was less than two inches, but elevation deviations alone were not a definitive factor in deciding whether to repair, replace, or remove a slab of concrete.

¶ 12 In fall 2011, Ahrens began a City project to "enhance the downtown area" and

"improve sidewalk conditions" by inspecting "every slab of concrete in the downtown area." Ahrens explained that Larson and the City's engineer made initial recommendations regarding areas they believed required attention. Larson and others later accompanied Ahrens on an inspection of the City's downtown, which included viewing their recommendations. Ahrens averred that although he could not specifically recall if he inspected the exact slab of concrete where Monson had fallen, his walk-through of the downtown area would have included that area. Ahrens confirmed that he made the final decisions regarding repair, replacement, or removal. In his affidavit, Ahrens stated that he "utilized [his] discretion as the public works director to determine which portions of [the] sidewalks were in need of repair and which portions were not in need of repair." In March 2012, the enhancement project was completed.

¶ 13 In July 2016, the trial court conducted a hearing on the City's motion for summary judgment and, thereafter, took the matter under advisement. Later that month, the court entered the following order:

> "[The City's] motion for summary judgment is granted. The Court, in its decision, relies heavily on [*Richter v. College of Du Page*, 2013 IL App (2d) 130095, 3 N.E.3d 902,] which the court feels addresses the issues raised by both [Monson] and [the City] ***.
>
> The Court finds, based on the depositions of *** Ahrens and *** Larson, that *** Ahrens was the one that made decisions about sidewalk repair. *** Larson would mark *** areas on the sidewalk that she deemed problematic while inspecting the downtown sidewalks. After *** Larson's inspection, she notified

*** Ahrens who, along with *** Larson and others, would conduct his own inspection. *** Ahrens would then apply certain factors and make a determination as to what areas would be repaired or altered and how. *** Ahren's [*sic*] indicated that the general area where *** Monson fell was considered in making his final determination because he looked at every slab of concrete in the downtown area.

The factors *** Ahrens used in making his decision were not contained in any document or policy within the city which required action if certain factors existed and therefore, *** Ahren's [*sic*] actions were discretionary and not ministerial.

As in [*Richter*], the Plaintiff here relies on [section] 3-102 of the [Act] which applies to ministerial functions rather than discretionary functions and policy determinations. As in this case, the parties in [*Richter*] disputed which section of the [Act] controlled the outcome of the case.

Courts have defined a 'policy determination' requirement as a decision that requires the public entity to balance competing interests and to make a judgment call as to what solution will best serve each of those interests.

This Court finds that there is no question of material fact that the City determined policy when handling sidewalk decisions. *** Larson discussed how she personally walked along the

> sidewalks and marked any perceived areas of concern. She then informed *** Ahrens who then walked the same area, applied a litany of factors as outlined in his deposition and made a decision by weighing those factors.
>
> This case stands in contrast to cases in which mandatory compliance with certain regulations or statutes rendered the acts ministerial. In this case, *** Ahrens possessed absolute discretion to resolve each sidewalk issue.
>
> Because this Court finds that section[s] 2-109 and 2-201 of the [Act] grant immunity to the defendant and that summary judgment should be entered for the defendant, the court will not consider plaintiff's arguments in the alternative."

¶ 14 This appeal followed.

¶ 15 II. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT

¶ 16 A. Summary Judgment and the Standard of Review

¶ 17 "Summary judgment is proper when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Internal quotation marks omitted.) *Navistar Financial Corp. v. Curry Ice & Coal, Inc.*, 2016 IL App (4th) 150419, ¶ 18, 55 N.E.3d 153. The interpretation of a statute, such as the Act, presents an issue of law that is appropriate for summary judgment. *Hooker v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2013 IL 114811, ¶ 15, 4 N.E.3d 15. "Issues of statutory interpretation and summary judgment rulings are reviewed *de novo*." *Id.*

¶ 18 B. The Purpose of the Act and the Pertinent Sections the Trial Court Based Its Ruling Upon

¶ 19 "The Act serves to protect local public entities and public employees from liability arising from the operation of government." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368, 799 N.E.2d 273, 279 (2003). By its enactment, "the General Assembly sought to prevent the dissipation of public funds on damage awards in tort cases." *Id*. In *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶ 20, 996 N.E.2d 1168, this court provided the following synopsis regarding the Act:

> "The [Act] grants only immunities and defenses; it does not create duties. Rather, the [Act] merely codifies existing common-law duties, to which the delineated immunities apply. [Citations.] Therefore, whether a local public entity owed a duty of care and whether that entity enjoyed immunity are separate issues. Once a court determines that a duty exists, it then addresses whether the [Act] applies."

"Unless an immunity provision applies, municipalities are liable in tort to the same extent as private parties." *Van Meter*, 207 Ill. 2d at 368-69, 799 N.E.2d at 279. Governmental entities must prove they are entitled to immunity to successfully bar a plaintiff's right to recover. *Hascall*, 2013 IL App (4th) 121131, ¶ 20, 996 N.E.2d 1168.

¶ 20 In this case, the trial court granted summary judgment in the City's favor, finding that the City was immune from liability under sections 2-109 and 2-201 of the Act. Section 2-109 of the 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 2014). Section 2-201 of the Act provides, as follows:

> "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2014).

¶ 21 C. *Richter* and Section 3-102 of the Act

¶ 22 Even though we review the trial court's grant of summary judgment *de novo*, we provide a brief synopsis of the Second District's decision in *Richter*, which the trial court found dispositive. We first, however, quote section 3-102 of the Act to provide context:

> "(a) Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102 (West 2014).

¶ 23 In *Richter*, a student sued the college she had been attending after tripping over an approximately 1½-inch height deviation between the two concrete slabs. *Richter*, 2013 Ill. App

(2d) 130095, ¶¶ 4, 8, 3 N.E.3d 902. The college filed an answer, raising, in pertinent part, the affirmative defense of immunity pursuant to section 3-102 of the Act. *Id.* ¶ 5. The trial court later granted the college leave to file an additional affirmative defense under sections 2-109 and 2-201 of the Act. *Id.* ¶ 6. Eventually, the college moved for summary judgment, claiming discretionary immunity under sections 2-109 and 2-201 of the Act. *Id.* ¶ 23.

¶ 24 In granting summary judgment in the college's favor, the trial court found that with regard to section 3-102 of the Act, genuine issues of material fact remained as to whether (1) the college had prior notice of the deviation and (2) the open and obvious exception applied given the location of the defect. *Id.* ¶ 24. The court then focused on sections 2-109 and 2-201 of the Act, ruling that no genuine issues of material fact existed. *Id.* ¶ 25. Specifically, the court found that the college's building and grounds director (1) established a policy on how to handle such deviations and (2) exercised his discretion regarding whether, how, and when to fix such defects. *Id*. In so finding, the court distinguished the discretion the college's building and grounds director exercised from that of a ministerial act—that is, an action in which no discretion is afforded because the conduct is mandated by, for example, a law, ordinance, or regulation. *Id.* ¶ 26. In this regard, the court ruled that the college's building and grounds director exercised the discretion that afforded him—and by extension the college—immunity under sections 2-109 and 2-201 of the Act. *Id.* ¶ 27.

¶ 25 On appeal, the question before the Second District was whether section 3-102 or section 2-201 of the Act controlled the outcome of the case. *Id.* ¶ 36. The student argued that because section 3-102 of the Act required the college to maintain its property in a reasonably safe condition, a question of material fact remained as to whether the college exercised ordinary care in repairing the height deviation in a reasonable amount of time after learning of its

existence. *Id.* ¶ 37. The college responded that its building and grounds director's handling of the height deviation clearly involved policy and discretion, which afforded the college immunity under section 2-201 of the Act. *Id.* ¶ 39.

¶ 26 The Second District affirmed the trial court's judgment, concluding that based on the record before it, no genuine issues of material fact existed on the issues of the policy the college's building and grounds director devised in addressing such deviations and the discretion he exercised in determining how and when to fix such defects. *Id.* ¶¶ 40-45. In so concluding, the Second District determined that the cases the student relied upon in support of her argument were distinguishable. *Id.* ¶¶ 47-49.

¶ 27 D. Monson's Claim of Error

¶ 28 In her brief to this court, Monson makes several arguments that challenge the trial court's grant of summary judgment in the City's favor. Our review of those arguments reveals that the prevailing theme of her claims can be summarized as follows: that the court erred by granting summary judgment in the City's favor because the court misapplied the immunity afforded by the Act. Specifically, Monson contends that in this case "the immunities afforded by [sections] 2-109 and *** 2-201 (general provisions) are superseded by the exceptions to immunity found within [section] 3-102 (a particular provision)." We reject Monson's contention as it reveals a fundamental misunderstanding of those specific statutory provisions of the Act.

¶ 29 In *Kennel v. Clayton Township*, 239 Ill. App. 3d 634, 639-40, 606 N.E.2d 812, 815-16 (1992), this court provided the following explanation regarding the relationship between sections 2-109 and 2-201 of the Act with section 3-102 of the Act:

> "The common law extended immunity to local governmental entities engaged in governmental or discretionary

> functions, but held them liable for negligence in the performance of ministerial functions. *** Discretionary acts are those which are unique to the particular public office and involve the exercise of judgment. [Citation.] On the other hand, ministerial acts are those *** performed in a prescribed manner, in obedience to the mandate of legal authority, without regard to the exercise of discretion as to the propriety of the acts being done. [Citation.]
>
> The Act was an effort by the legislature to restore common law municipal immunity abolished by the Illinois Supreme Court in *Molitor v. Kaneland Community Unit District No. 302* (1959), 18 Ill. 2d 11, 163 N.E.2d 89. Thus, while the Act codifies the common law, it does not create any new duties. [Citations.]

¶ 30 Under *Kennel*, Monson's contention fails because the discretionary acts governed by sections 2-109 and 2-201 of the Act are unmistakably distinct from the acts governed by section 3-102 of the Act. In other words, those specific provisions pertain to factual scenarios that are mutually exclusive. The absolute immunity afforded municipalities for discretionary acts under sections 2-109 and 2-201 of the Act could not be superseded by section 3-102 of the Act, which governs ministerial acts. As we indicated in *Kennel*, no conflicts exist between these provisions of the Act because they address diametrically distinct issues—that is, where the act or omission at issue is discretionary and where the act is mandated by law. If, as here, a factual scenario involves the formulation of policy and discretion in executing that policy, then any subsequent analysis begins and ends with sections 2-109 and 2-201 of the Act, and the provisions in Article III of the Act are not applicable at all.

¶ 31 In support of her contention, Monson relies on cases that are distinguishable because they do not concern acts or omission of a public entity where discretion was at issue. See *Horton v. City of Ottawa*, 40 Ill. App 3d 544, 548, 352 N.E.2d 23, 26 (1976) (city was liable because section 3-105 of the Act expressly excluded physical damage or deterioration of streets from immunity); *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 234, 864 N.E.2d 176, 188-89 (2007) (youth center was liable because, although immunity was afforded under section 3-109(a) of the Act for the hazardous recreational activity at issue, the willful and wanton exception under section 3-109(c) of the Act applied); *Hascall*, 2013 IL App (4th) 121131, ¶ 32, 996 N.E.2d 1168 (summarizing the holding in *Murray*). Monson's reliance on this court's decision in *Courson v. Danville School District No. 118*, 301 Ill. App 3d 752, 704 N.E.2d 447 (1998), is also unpersuasive. In *Courson*, we reversed the trial court's grant of summary judgment because the school district failed to establish that the absence of a safety guard on a table saw was a discretionary decision as contemplated by the Act. *Id*. at 758, 704 N.E.2d at 451.

¶ 32 In *Van Meter*, 207 Ill. 2d at 373, 799 N.E.2d at 281, the supreme court reaffirmed the dual-pronged inquiry required to determine whether section 2-201 immunity applies. Specifically, that immunity afforded under section 2-201 of the Act is not applicable unless the plaintiff's injuries were the result of acts performed or omitted by the public entity in determining policy and exercising discretion in executing that policy. *Id.*

¶ 33 Here, as in *Richter*, the acts or omissions that Monson challenges constituted discretionary acts and policy determinations taken by Ahrens, the City's public works director. Ahrens testified that the policy regarding the repair, replacement, or removal a slab of concrete was to be undertaken on a case-by-case basis using numerous factors, which were developed over multiple years in consultation and collaboration with other City departments and personnel.

In fall 2011, Ahrens used his discretion in implementing those policy considerations as he began a project to enhance the City's downtown area, confirming that he "utilized [his] discretion as the Public Works Director to determine which portions of [the] sidewalks were in need of repair and which portions were not in need of repair."

¶ 34 Monson further claims that Ahrens' testimony established that the City had actual notice of the dangerous condition, which would have negated any immunity afforded under section 3-102 of the Act. For reasons we have previously articulated, we need not engage in such an analysis. However, we note that regardless of how the City became aware of the deviation—whether by routine maintenance inspection or by actual notice provided by a pedestrian—the City would have retained immunity under section 2-109 of the Act if Ahrens had inspected the defect and exercised his discretion to do nothing, even if that determination could later be viewed as negligent. See *Hascall*, 2013 IL App (4th) 121131, ¶ 22, 996 N.E.2d 1168 ("In section 2-201, the legislature immunized liability for both negligence and willful and wanton misconduct." (Internal quotation marks omitted.)).

¶ 35 Because we conclude that there was no genuine issue of material fact that the City was immune from liability under section 2-109 of the Act, we affirm the trial court's grant of summary judgment in the City's favor.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm the trial court's judgment.

¶ 38 Affirmed.

**APPEAL TO THE APPELLATE COURT OF ILLINOIS**
**FOURTH DISTRICT**

**FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT**
**VERMILION COUNTY, ILLINOIS**

| | | |
|---|---|---|
| BARBARA MONSON, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 2013-L-71 |
| | ) | |
| CITY OF DANVILLE, a Home | ) | Honorable Craig DeArmond |
| Rule municipality, | ) | Judge Presiding |
| | ) | |
| Defendant. | ) | |

**NOTICE OF APPEAL**

BARBARA MONSON, Plaintiff-Appellant in the above-entitled cause, appeals to the Appellate Court of Illinois, Fourth District, from the order of the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois, entered in this cause on July, 20 2016, in favor of Defendants-Appellees, and against the above-named Plaintiff-Appellant, for Motion of Summary Judgment.

Plaintiff-Appellant requests that the above order be reversed and this cause be remanded for further proceedings.

BARBARA MONSON, Plaintiff-Appellant,

by _____
of Spiros Law, P.C

Miranda L. Soucie, No. 6304049
For service: mail@spiroslaw.com
For correspondence: msoucie@spiroslaw.com
Spiros Law, P.C.
2807 N. Vermilion, Suite 3, Danville, IL 61832
Telephone: 217.443.4343

**PROOF OF SERVICE**

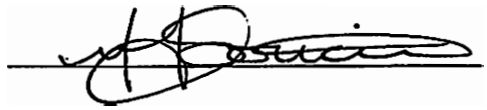
I, the undersigned, being first duly sworn on oath, depose and state that I mailed a copy of the foregoing to:

Clerk of the Appellate Court
State of Illinois Appellate Court
Fourth District
201 W. Monroe Street
PO Box 19206
Springfield, IL 62794-9206

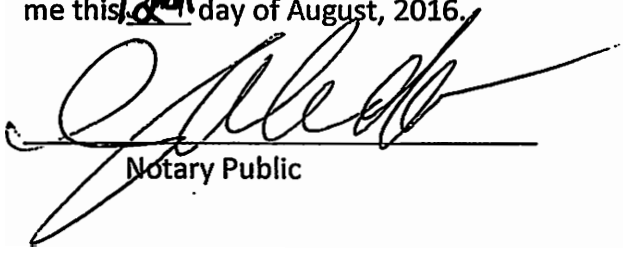
Vermilion County Circuit Clerk
Vermilion County Courthouse
7 N. Vermilion Street
Danville, IL 61832

Mr. Scott McKenna
Best, Vanderlaan & Harrington
25 E. Washington St., Suite 800
Chicago, IL 60602

in an envelope properly addressed and with postage prepaid, by mailing said envelope from a United States Post Office box located in Champaign, Illinois on the 12th day of August, 2016.



Subscribed and sworn to before
me this 12th day of August, 2016.



Notary Public


Miranda L. Soucie, No. 6304049
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2807 N. Vermilion, Suite 3, Danville, IL 61832
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GENERAL NO.

IN THE APPELLATE COURT OF THE STATE OF ILLINOIS
FOR THE FOURTH DISTRICT

| | | |
|---|---|---|
| BARBARA MONSON,<br><br>Plaintiff-Appellant,<br>v.<br><br>CITY OF DANVILLE, a Home Rule municipality.<br><br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court<br>of the Sixth Judicial Circuit,<br>Vermilion County, Illinois<br><br>Trial Court No. 13-L-71<br><br>Date of Judgment: July 20, 2016,<br><br>Honorable Nancy S. Fahey<br>Judge Presiding |

To: Mr. Scott McKenna
Best, Vanderlaan & Harrington
25 E. Washington St., Suite 800
Chicago, IL 60602

**NOTICE OF FILING**
**NOTICE OF APPEAL**

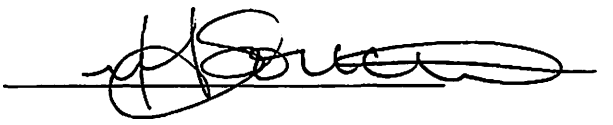
PLEASE TAKE NOTICE that on August 12, 2016, the undersigned Appellant filed the Attached Notice of Appeal with the Clerk of the Fifth Judicial Court, Danville, Illinois. I caused a copy to be delivered to the Clerk of the Appellate Court of Illinois, Fourth District, Appellate Court Building, Springfield, IL 62701-9206.

Dated this 17th day of August, 2016.

By: _____
Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that on the 17th day of August, 2016, a copy of the foregoing ***Notice of Filing***, together with its attachments, was served by depositing same in the U.S. Mail, at Champaign, Illinois, in an envelope securely sealed, postage prepaid and legibly addressed to the above-named parties.



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| | | | |
|---|---|---|---|
| | Motion hearing set for 04/27/2016 at 10:30 in courtroom 4B. | | |
| **04/22/2016** | Plaintiff's Response In Opposition To City Of Danville Defendant's Motion For Summary Judgment filed. | | |
| **04/26/2016** | Secretary for plaintiff's counsel called this date requesting to change the hearing of 4/27/16 from a Motion for Summary Judgment to a Phone Conference. After checking with defense counsel, the hearing of 4/27/16 has been changed to a status via phone conference. | | |
| **04/27/2016** | Atty Soucie & Spiros appears for Plntf, Atty MCKenna for Deft City, Due to Spiros firm currently handling matter for the Court's family, I am recusing myself from this case & re-assigning it to J. Fahey for all further proceedings. Attys informed on phone conference to set all further matters on her calendar. | | |
| **06/15/2016** | City of Danville's Reply In Support Of Its Motion For Summary Judgment filed. | | |
| **07/12/2016** | Case called for hearing on motion for summary judgment. Atty. | NSF | JSA |
| | McKenna present for the City of Danville. Atty. Soucie present on | NSF | JSA |
| | behalf of petitioner. Arguments heard. Atty. McKenna ordered to | NSF | JSA |
| | provide case law by 7-15-16. Court takes matter under advisement. | NSF | JSA |
| | (kmr) | NSF | JSA |
| **07/20/2016** | Defendant's Motion for Summary Judgment is granted. The Court, in its | NSF | |
| | decision, relies heavily on Richter v College of DuPage which the | NSF | |
| | Court feels addresses the issues raised by both the Plaintiff and | NSF | |
| | Defendant in this case. | NSF | |
| | The Court finds, based on the depositions of Doug Ahrens and Shelly | NSF | |
| | Larson, that Doug Ahrens was the one that made decisions about side- | NSF | |
| | walk repair. Shelly Larson would mark, with neon paint, areas on the | NSF | |
| | sidewalk that she deemed problematic while inspecting the downtown | NSF | |
| | sidewalks. After Ms Larson's inspection, she notifed Mr Ahrens who, | NSF | |
| | along with Ms Larson and others, would conduct his own inspection. | NSF | |
| | Mr Ahrens would then apply certain factors and make a | NSF | |
| | determination as to what areas would be repaired or altered and how. | NSF | |
| | Mr Ahren's indicated that the general area where Mrs Monson fell | NSF | |
| | was considered in making his final determination because he looked at | NSF | |
| | every slab of concrete in the downtown area. | NSF | |
| | The factors Mr Ahrens used in making his decision were not contained | NSF | |

| | | |
|---|---|---|
| | in any document or policy within the city which required action if | NSF |
| | certain factors existed and therefore, Mr Ahren's actions were | NSF |
| | discretionary and not ministerial. | NSF |
| | As in Richter, the Plaintiff here relies on 3-102 of the Tort Immunity | NSF |
| | Act which applies to ministerial functions rather than discretionary | NSF |
| | functions and policy determinations. As in this case, the Parties in | NSF |
| | Richter disputed which section of the Tort Immunity Act controlled | NSF |
| | the outcome of the case. | NSF |
| | Courts have defined a "policy determination" requirement as a decision | NSF |
| | that requires the public entity to balance competing interests and to | NSF |
| | make a judgment call as to what solution will best serve each of those | NSF |
| | interests. | NSF |
| | This Court finds that there is no question of material fact that the | NSF |
| | City determined policy when handling sidewalk deviations. Ms Larson | NSF |
| | discussed how she personally walked along the sidewalks and marked any | NSF |
| | perceived areas of concern. She then informed Mr Ahrens who then | NSF |
| | walked the same area, applied a litany of factors as outlined in his | NSF |
| | deposition and made a decision by weighing those factors. | NSF |
| | This case stands in contrast to cases in which mandatory compliance | NSF |
| | with certain regulations or statutes rendered the acts ministerial. | NSF |
| | In this case, Mr Ahrens possessed absolute discretion to resolve each | NSF |
| | sidewalk issue. | NSF |
| | Because this Court finds that sections 2-109 and 2-201 of the Tort | NSF |
| | Immunity Act grant immunity to the Defendant and that summary | NSF |
| | judgment should be entered for the Defendant, the Court will not | NSF |
| | consider Plaintiff's arguments in the alternative. | NSF |
| | This docket may stand as the Order of the Court and a copy is to be | NSF |
| | given to all counsel of record. | NSF |
| **08/15/2016** | Notice of Appeal filed. | |
| | Proof Of Mailing Notice filed. | |
| **08/19/2016** | Request To Prepare The Record on Appeal filed. | |
| **08/24/2016** | Letter from Appellate Court filed. Case docketed General #4-16-0593 | |
| **08/29/2016** | Letter from Appellate Court w/docketing statement attached on file. | |
| | APPEAL DUE: 10/17/16 | |
| **09/14/2016** | Transcript of 7/12/2016 filed. | |

IN THE CIRCUIT COURT

FOR THE FIFTH JUDICIAL CIRCUIT

VERMILION COUNTY, DANVILLE, ILLINOIS

BARBARA MONSON, Plaintiff,
-vs-
CITY OF DANVILLE, a Home, Rule municipality, Defendant.

NO. 13 L 71

**TRANSCRIPT OF PROCEEDINGS**

BE IT REMEMBERED, and CERTIFIED, that on to wit: The 12th day of July, 2016, the following proceedings were held in the aforesaid cause before The Honorable NANCY S. FAHEY, Circuit Judge.

APPEARANCES: MS. MIRANDA L. SOUCIE
Attorney at Law
On behalf of the Plaintiff

MR. SCOTT D. MCKENNA
Attorney at Law
On behalf of the Defendant

**MOTION FOR SUMMARY JUDGMENT**

Jamie S. Atkinson, CSR
Official Court Reporter
Vermilion County Courthouse

(Tuesday, July 12, 2016, at 11:00 a.m.)

WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:

THE COURT: 13 L 71, Monson versus City of Danville.

State your appearances, please.

MS. SOUCIE: Miranda Soucie on behalf of the Plaintiff.

MR. MCKENNA: Scott McKenna for the Defendant City.

THE COURT: Okay. And this is set for a Motion for Summary Judgment. I was given courtesy copies of everything that's been filed including case law which I have previously read, and this is scheduled for a half hour.

Are you ready to proceed?

MS. SOUCIE: We are.

MR. MCKENNA: We are, Judge.

THE COURT: Okay. Go ahead.

MR. MCKENNA: Should I sit, Judge, or would you like me to stand?

THE COURT: You can -- whatever you prefer.

MR. MCKENNA: Okay. Okay.

You know, basically the motion's pretty simple. Obviously the first part is relying on the discretionary immunity that is under the Tort Immunity Act.

The -- I think the evidence is clear from the testimony of Doug Ahrens, A-H-R-E-N-S, and Shelly Larson that what they did was it was their job to make the determination as to what parts of the City sidewalk to replace or repair, and then -- so that would be the policy determination part of that two prong test that goes into the discretionary immunity that's afforded to municipalities. Then the second prong would be the execution of that. Did they actually use discretion in terms of following that policy, which I think the evidence is clear from them that they did and I -- I don't think that there's any contrary evidence that speaks to that -- that goes contrary to that. They walked around, Shelly Larson did it first, Doug Ahrens did it second. They walked around the City, determined what needed to be repaired or replaced, they made the marks and then those repairs or replacements were made or they were not made according to what they determined was necessary. And I think that the most significant evidence as to

that is that there were photographs provided in the Motion for Summary Judgment that were produced in discovery that shows within -- on that very block, you know, two blocks from here marks were made mere feet away from where Ms. Monson claims to have fallen and there was also -- there's a map -- there various pre incident when this work was being done on the sidewalks there was mapping basically done in the downtown area showing where work was supposed to be done or at least planned to be done and that shows work done on North Street between Vermilion and Hazel, it shows some work done on Vermilion just south of North, and then we have the photograph with the actual markings on the pavement and then we see the post incident photographs that work was actually done. There's no more better evidence of people using discretion in terms of, you know, what needed to be repaired, replaced than that itself. That mere feet away from where Ms. Monson claims to have fallen they actually did do some work and they decided, Ms. Larson and Mr. Ahrens in conjunction decided work in the very specific area that Ms. Monson claims to have fallen did not need to be done and that that's within their discretion and there's really no issue as to well was

that a proper decision cause it's not really relevant. What's relevant is that they followed their -- their policy and employed their discretion to determine it wasn't necessary there. And I think when we get into the other parts of the argument about whether this is a de minimis defect and so forth that probably answers the question about why they made that decision, but regardless, they used that formula to -- to basically make the decision that it didn't need to be done. So the argument that -- and I think that evidence has been pretty clear cut. The argument that Plaintiff is making it appears in the response brief is that this immunity is simply not available to the City which I think is a fairly twisted reading of the law of the Tort Immunity Act and it's certainly not something that any recent cases have held.

The -- the Richter case, I -- you know, is a perfect example of a case that involved a sidewalk. It was a claim defect with a person that was in charge of the property that had a process by which they determine or try to determine whether the, you know, property needed repair and then they used discretion to say it didn't and that was a case that summary judgment was granted for the defense. The argument --

one argument -- and I -- you know, Plaintiff cited some cases -- or a case saying that it was comparing basically two immunities. Immunity is a discretionary immunity and then the 3 108 immunity for recreational property and I guess tried to draw a parallel that in that instance the court said that the immunity for dis- -- discretionary immunity was not available to the City because the recreational -- the statute about recreational immunity applied which allowed willful wanton conduct to proceed forward. But to me that's -- that's a fairly tortured analysis because what they're -- you know, the Plaintiff there is comparing two immunities, um, and the court there said, well, the more specific one because this accident happened on recreational property, it's going to govern. And that little sentence in the beginning of 3 102 that says unless otherwise indicated a City has a duty to maintain its property. Plaintiff I guess is saying, well, that's now obviated by the fact that -- you know, that the recreational immunity in that case applied to say well willful wanton is an exception which is true but here we don't have -- we don't have willful wanton, we don't have anything that -- we don't have -- this is a straight forward

municipal property case where 3 102 certainly does apply. And now the next question, you know, duty is not an issue in this case. I think Plaintiff pointed that out in their response and absolutely that's right. The next question will be is there an immunity that now applies here. And there is no immunity other than the discretionary immunity that's afforded in the Act. So we're not comparing different language and different immunities to try to come to a conclusion. It's pretty clear that the discretionary immunity applies here.

The Plaintiff cited some cases that go back a ways and I think, you know, the significant part about that, you know, cited them to say that the immunity cannot -- simply cannot apply in a 3 102 context when you're just talking about, um, you know, a -- a City's duty to take care of its property -- I -- to me that -- that strains common sense because there is -- what -- what they were deciding I believe was something before the Molitor case and before the Tort Immunity Act was basically upended and changed, where just, you know, and to say -- not upended but it really kind of introduced actually, that provided immunities at different levels in different situations

and it was trying to say that this needs to be fact specific. I believe that's the -- that's the conclusion or that's at least the implication from those cases that the Plaintiff cites. There is -- there is no -- there is no, um, mention of any of this in the Richter case which is directly on point that describes a very exact same situation we're dealing with here and I think is -- is very applicable and -- and should be followed.

What we have here is a public property. We have a duty to maintain but then we have an immunity that is -- could potentially be available if the evidence shows that it's applicable in this situation and here every piece of evidence along the way shows that it does apply. That Mr. Ahrens, Ms. -- Ms. Larson followed -- were in a position to execute policy and, in fact, followed their discretion by saying this particular piece of concrete did not need to be fixed.

With respect to, you know, the other two arguments that are being made, I think that would also be dispositive. The first is de minimis and I think it's -- I mean, it's really just a matter for the Court to look at photographs, and it seems clear that

this condition is somewhere about one and a half inches, you know, we have -- with the benefits of these photographs, with a ruler and it seems clear that's the case. Almost all the case law that's out there says that two inch -- two inches is really the standard. Kind of -- obviously there are exceptions that I'll get into, but the standard for the de minimis condition to be found. Plaintiff I think is arguing that well, this is a commercial district, people may be expecting to walk here. The significant part about that is, that's obviously a pretty vague statement. This is in general obviously a commercial district. Where this particular condition was was right next to a light post. It was away from -- if you look at the photographs of the sidewalk, where people would generally walk, it was away from the handicap ramp where -- which Ms. Monson chose not to use and chose to take this angle to her car, and one of the factors that Mr. Ahrens said he used and in determining whether to make repairs at a particular spot was its location to other obstructions was the likelihood that it would be in a walking path for somebody and that's exactly what happened here. What happened was Ms. Monson deviated from what would be a

regular walking path. Not to say that she was not a permissible user but I think that's a different question than whether it's an area where she would be expected to walk considering a handicap ramp is right there, considering where cars are parked. So I think just on its face this is a de minimis condition. If there's a de minimis condition there's no duty to repair it. In the alternative, if the Plaintiff is going to argue that it's not a de minimis condition then I don't know how they get around the fact this is not open and obvious. That's also a dispositive issue for the Court to decide. There -- the condition's apparent from the photograph. Ms. Monson claimed that she didn't see it, although she was looking straight ahead, she also admits she wasn't distracted, there was nothing environmentally around her that prevented her from seeing it, she said there was a puddle in that area. The curious thing about that is Ms. Monson admits in her deposition the very same path she took when she fell is what she took when she got from her car to the business down the street. It -- and I know the Court is not suppose to get into credibility determinations at this stage, however, that really strains any sort of common sense. Since if there was

a puddle there that Ms. Monson walked in and apparently couldn't see this condition is what she's saying it's really not a reasonable thing for somebody to have walked through that puddle when they got out -- got out of the car to go to where they needed to go. So I think that that's pretty flimsy excuse that the Plaintiff made.

So I think we're left with really the only reasonable inference from the evidence is that this was if not de minimus then it's clearly open and obvious to her, open and obvious to a reasonable person which is really the standard. There's nothing distracting her, there's nothing obstructing it and it's right there for her to see.

So I think really there's three bases any one of the three justifies summary judgment in this case. And in my -- in my opinion all three really do apply -- well, I'd say two, could be -- either be the de minimis or it could be the open and obvious but certainly the discretionary immunity.

Thank you, Judge.

THE COURT: Did you submit copies of the cases that you relied on to me?

MR. MCKENNA: I --

THE COURT: I can't find them.

MR. MCKENNA: I looked for that this morning, I don't think so, Judge.

THE COURT: Well, I'm please requesting that you do submit them to me, hard copies.

MR. MCKENNA: I will.

THE COURT: Cause I'm gonna take this under advisement. But I want them by the end of the week, please.

MR. MCKENNA: Sure. Absolutely.

THE COURT: Ma'am.

MS. SOUCIE: Thank you, Your Honor.

The first question I'd like to address is whether the immunity applies, cause as counsel stated earlier really there's no question of duty in this matter and it's really a matter of statutory construction. That's what we're looking at here and that's what guides us to the results that we have argued in our brief, and as a result of the statutory construction we don't even get into the question of ministerial versus discretionary decisions. It's not twisted, it's plain language. And the plain language of section 2-201 states that except as otherwise provided by the statute and then goes on to talk about

a public employee being immunized for discretionary determinations of policy related to their employment.

Counsel indicated that the cases cited by the Plaintiff were older cases, but there is a more recent case, a 2007 case that we cited and that's the Murray case. And while it does not talk about Section 3-102 it does talk about Section 2-201 which is the immunity that they are alleging in this case. And Murray talked about 2-201 and that except as otherwise provided by statute section in relation to another section of the act and they stated in that case that where another section of the act provides that a City, municipality or -- or some other entity has a specific duty to do something Section 2-201 does not apply. While it did not talk about 3-102 clearly 3-102 exists in the act and we can plug that into similar situation in Murray and the only result that is reasonable in that situation is provided for by the law is that Section 2-201 does not apply in this situation.

Counsel indicated that Richter is the case that, um, should be followed in this case, but the issue with that case is they completely ignore the plain language of the statute. They don't even mention the except as otherwise provided by statute

section in that case. There are multiple cases including the Horton case that do mention 2-201 along with the Murray case, and Horton actually talked about 3-102 as it relates to 2-201 and states that a City cannot claim immunity for dangerous defect in streets regardless of the liability of public officials obligated to maintain and repair streets, and the reason why they state that is because 3-102 converts liability upon local public entities for injuries from a failure to maintain its property in a reasonably safe condition. As a result of that the only conclusion here is that there is no immunity that applies because the second immunity they are asking for is irrelevant because it's only based upon 2-201.

In the alternative, I should address the discretionary versus ministerial, and the first thing I'd like to mention is that there are serious questions of fact relating to whether or not there was a discretion -- a discretionary determination made in this case. And the reason there are serious questions of facts is because there are serious credibility issues related to those -- that testimony, and Your Honor obviously cannot make determinations of credibility, that is something that is relied upon and

given to the province of the jury. If you look at the testimony of Mr. Ahrens, throughout his deposition along with the affidavit, and I talk about this on page 12 of my brief, they make no sense when put together. He has no recollection or documentation of anything. He clearly indicates in his affidavit that he made determination relating to the sidewalk in question but he has no recollection of doing so, no documentation of doing so, no budget relating to it, no photographs, and when you take all of those in account the affidavit clearly was made for purposes of the summary judgment motion, it had nothing to do with what actually happened in this case and, in fact, Mr. Ahrens and Ms. Larson had no ability to testify as to what happened in this case. So there are serious questions of fact related to credibility as to whether or not there was a discretionary determination made in this case. So when it talks about whether or not Section 2-201 actually applies from the discretionary immunity standpoint it's a question of fact at this point. And in the third point related to open and obvious, I think it's obviously a stretch to say that if something's open and obvious -- open and obvious it's not de minimus. If something's imminent it must

be open and obvious. Counsel's essential argument is that it's either one or other, if there's no liability there's nothing that lies in between them. That's certainly not what the law is. There are many things that lie in between. Here we have a situation where there's a crack in a sidewalk that's approximately two inches, there's questions as to how big, there's multiple different pictures that show different things. At the time it was covered by water. Ms. Monson was in a business district. She was walking directly to the path to her car. It wasn't off the sidewalk, it actually was on the sidewalk, it just was adjacent to a light pole that was directly where her car was and cars obviously in this business district park along the sidewalk. There are questions of whether or not it was open obvious, there are questions as to whether or not it's de minimus, but does not mean that the conclusion this Court must make is that it's either one or the other and nothing in between and when there's questions as to whether it's one or the other, something in between obviously that's a question for the jury. There are serious questions of fact relating to discretionary immunity, serious questions of fact related to open and obvious

versus de minimus. As a result summary judgment should be denied on those bases. But it's the Plaintiff's contention that we don't even get there because there is no immunity under Section 2-201.

Thank you.

THE COURT: Mr. McKenna.

MR. MCKENNA: Just briefly, Judge. On that legal argument as to whether the immunity is gonna apply, I -- I talked about that Murray case and, again, what it was comparing were two immunities. They weren't comparing the duty statute which is 3 102 to an immunity statute which is 2 101, um, because we know that the -- what the law is, that first the Court needs to find a duty. Here there's no issue as to that. Then the Court makes an analysis as to whether an immunity applies and that's what we're here for today. So it would completely -- basically the rule would completely eat up the immunity. If you were to say, well, in any sort of condition involving public property there cannot possibly be any immunity, really under any situation is what the Plaintiff is saying that the immunities are completely worthless when it comes to maintenance of public property which is probably, you know, 75 percent of most lawsuits

against municipalities, that's off the top of my head, but I certainly get the impression that what Plaintiff is arguing is that basically there cannot be any assertion of immunity when it comes to maintenance property and I just -- when you talk about statutory construction I cannot believe that that is what the legislature ever intended, and that simply in looking at the -- the statutes and that language unless otherwise indicated or provided by statute that it cannot possibly be what the legislature meant when they put that in there. What -- and I think what the Murray case pointed out, what they -- that sentence does mean is that if there's another statute that is more specific and that specifically addresses the facts of this case then that would potentially govern and that's what they found because the accident was on recreational property, we're gonna apply the recreational immunity statute and that says willful wanton is in play. So that's what -- that's what that Murray case was deciding. They weren't deciding whether there could not be any immunity for discretionary acts under a 3 102 duty. And to me, again, when I say that's what that torts rely I think their complaint is employing to try to read in

basically no ability to -- to plead an immunity for a case like this.

With respect to -- you know, counsel said that there are issues of fact in terms of whether discretion even applies in this case because Mr. Ahrens had no documentation, no recollection of anything, obviously that's a -- a vast exaggeration. The question was, do you have a specific recollection of looking at this specific crack in the sidewalk and obviously he didn't -- he didn't have a -- that recollection. However, what he then does recollect is that he was in charge of this project. He walked through the entire project. He pointed out where work was marked, what -- and that he would have reviewed. He pointed out that he was then -- walked a mere couple feet over to go past and looked at that area that Ms. Monson claims she tripped on, there was also additional work around the corner. Clearly what Mr. Ahrens was saying was that he certainly remembers that he would have done that. Can he say like any doctor that comes into court, can they -- if they don't have a specific recollection of that patient they're not -- not able to testify which is clearly ridiculous. They can base their testimony on

documentation, on evidence presented to them, and what Mr. Ahrens did was look at photographs, look at the mapping of where the work was suppose to be done and said, yeah, of course, I -- that's something I would have investigated and -- and determined and looked at it to see whether it needed repairs. So to me there is no issue of fact on that. Clearly work done a couple feet away from -- or a condition a couple feet away from where work was eventually done is going to have been looked at by either Mr. Ahrens, Ms. Larson and highly likely looked.

So with that, Judge, I will provide the case law that -- that we cited. I apologize that you didn't have that.

Thank you.

THE COURT: Okay. And provide it by the end of this week which is the 15th, Friday the 15th and then I'll have a decision by next week.

MR. MCKENNA: Okay. Judge, would you like it emailed, faxed or mailed?

THE COURT: Mailed. Hard copies.

MR. MCKENNA: Okay. We will do that.

THE COURT: I'm old fashioned.

MR. MCKENNA: No problem.

THE COURT: All right.

MR. MCKENNA: Thanks, Judge.

THE COURT: Thank you.

(Cause adjourned.)

WHICH WERE ALL THE PROCEEDINGS MADE OF RECORD IN THIS CAUSE ON SAID DAY.

# C E R T I F I C A T E

I, Jamie S. Atkinson, Official Court Reporter in and for the County of Vermilion, State of Illinois, do hereby certify that the foregoing to be a true and accurate transcript of the proceedings had in the before-entitled cause on said day.

Dated this 14th day of September, 2016.

Jamie S. Atkinson, CSR
Official Court Reporter
License No. 084-004156

**TABLE OF CONTENTS FOR THE RECORD ON APPEAL**

**No. 122486**
**IN THE**
**SUPREME COURT OF ILLINOIS**

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

**NOTICE OF FILING**

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PLEASE TAKE NOTICE that on the 1st day of November, 2017, the undersigned filed the APPELLANT'S BRIEF 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.

E-FILED
11/1/2017 4:01 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

**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 1st day of November, 2017, I served a copy of the APPELLANT'S BRIEF and NOTICE OF FILING by electronically mailing the same to:

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