Docket No. 124283

IN THE ILLINOIS SUPREME COURT

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

REPLY BRIEF OF DEFENDANT-APPELLANT METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO

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TABLE OF POINTS AND AUTHORITIES

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ARGUMENT

Introduction

The plaintiffs agree with the MWRD that the sole issue before the Court is whether the appellate court correctly reversed the trial court's order granting summary judgment based on the affirmative defense of discretionary immunity set forth in sections 2-109 (745 ILCS 10/2-201 (West 2010)) and 2-201 of the Tort Immunity Act (745 ILCS 10/2-201 (West 2010)) (Br., at 13). That, however, is the extent of the parties' agreement.

The parties' dispute centers on whether the appellate court was correct in requiring proof that the MWRD consciously exercised discretion over the ladder setup based on *Monson v. City of Danville*, 2018 IL 122486, 115 N.E.3d 81, a decision that

came down after the trial court granted summary judgment to the MWRD, rather than follow *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 680 N.E.2d 265 (1997), as the trial court did in granting summary judgment ("In cases involving a construction contract that delegates responsibilities between a public entity and a contractor, the Illinois Supreme and First District Appellate Court have consistently held that a public entity's contractual discretionary authority itself would trigger Section 2-201 immunity") (R.C5118, V3). The MWRD respectfully submits that this construction case is on all fours with *In re Chicago Flood Litigation*, and that the appellate court erred in ignoring *In re Chicago Flood Litigation* and relying on *Monson*, a case that did not involve a written contract under which a local public entity delegated the means, method and safety of the work but retained discretionary supervision of an independent contractor.

I. SECTION 2-201 OF THE TORT IMMUNITY ACT AFFORDS DISCRETIONARY IMMUNITY TO THE MWRD FOR ITS ALLEGED FAILURE TO SUPERVISE THE JOINT VENTURE UNDER THE CONSTRUCTION CONTRACT

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

The plaintiffs' reading of *In re Chicago Flood Litigation* is highly selective (Br., at 20-23). For that reason, a discussion of *In re Chicago Flood Litigation*, including its procedural history, may be of assistance to the Court.

In *In re Chicago Flood Litigation*, the dredging contractor installed wood pilings at a location other than the one specified in the contract. 176 Ill. 2d at 185. The class plaintiffs made separate claims of negligence and willful and wanton negligence in separate counts against the City based on its failure to supervise the dredging contractor's

performance of the work and its subsequent failure to repair the tunnel and warn the public after it was on notice of a breach in the tunnel wall. *Id.* at 185-86. In response to the City's motion to dismiss, the trial court certified separate question of law for interlocutory appeal under Rule 308 based on the City's failure to adequately supervise the river piling work and its failure to repair the tunnel and warn the public. *Id.* at 187. The appellate court held in a Rule 23 order that the City was entitled to section 2-201 immunity regarding its failure to supervise the pilings work but not for its failure to repair or warn. *Id.* at 188.

In answering the certified question of law regarding the pilings work, the Court's discussion appears under the heading "Failure to Supervise" in its opinion. 176 Ill. 2d at 192-96. Much like the plaintiffs here, the class plaintiffs argued that once the City approved the pile-driving plan, the City's actions ceased to be discretionary and the City became liable for its failure to supervise the dredging contractor. *Id.* at 194-95. In rejecting the class plaintiffs' argument, this Court held that the "City's supervision of [the dredging contractor's] pile driving constituted a discretionary activity that immunized the City from liability." *Id.* at 193. After discussing the discretionary immunity doctrine under sections 3-108(a) of the Tort Immunity Act (745 ILCS 10/3-108(a) (West 1994)) and sections 2-109 and 2-201, this Court referred to the discretion that the City retained under the language of the dredging contract: "the contractor shall not drive the piles at any other location than that specified by the City." *Id.* at 195. According to the Court, based on this contract language, the City "retained the discretion to locate the pilings in any location it thought best" for which it was entitled to absolute immunity. *Id.*

Notably, in discussing *In re Chicago Flood Litigation*, the plaintiffs do not point to any evidence of how the City actually exercised its discretionary supervision when the dredging contractor changed the placement of the pilings from the location specified in the contract (Br., at 21-22). The plaintiffs cannot be faulted for not discussing the evidence on this issue—aside from the discretion the City retained under the dredging contract, which this Court quoted, there was no evidence to discuss.

Because the Court limited its discussion of the City's failure to supervise to the language of the dredging contract alone, the plaintiffs must look elsewhere in the opinion for evidence of the City's exercise of discretion separate and apart from its supervision of the work under the contract (Br., at 22-23). The plaintiffs skip to the section of the opinion under the heading "Failure to Repair or Warn" in which this Court held that the City had discretionary immunity over tunnel repairs and its failure to warn the public after it was put on notice of the breach. 176 Ill. 2d at 196-97. The plaintiffs refer to the City's discretion exercised over the failure to repair and warn as somehow supporting discretionary immunity over the separate claim regarding the failure to supervise the contractor's placement of the pilings ("This Court highlighted the city's discretion to locate the pilings where it saw fit *and* the decisions after the city learned of the breach") (emphasis added) (citing 176 Ill. 2d at 195, 197) (Br., at 22-23). According to the plaintiffs, even though this Court separated its discussion of "Failure to Supervise" from "Failure to Repair or Warn" under different headings in its opinion, this Court "combined all of these discretionary acts to afford discretion for decisions made that resulted in…the tunnel flood" (Br., at 23).

The plaintiffs recognize that the Court's discussion of the failure to supervise was not based on the City's conscious exercise of discretionary supervision of the dredging contractor—which is why they shift focus to "the conscious decisions made by the City to repair the breach" (Br., at 22). The plaintiffs' assertion that the MWRD has wrongly attempted "to isolate the discretionary immunity issues" from each other and draw a distinction between the City's failure to supervise and its failure to repair and warn is without merit (Br., at 22-23). It was this Court that separated its legal analysis of the discrete issues of discretionary immunity under different headings in its opinion.

The plaintiffs overlook that this Court had to answer separate and distinct questions of law certified by the trial court with respect to separate and distinct claims. The Court's holding that the City was entitled to discretionary immunity based on the language of the dredging contract answered the certified question on one claim. The Court's holding that the City had discretionary immunity for its failure to repair and warn answered the certified question on a different claim. The Court did not and could not discuss the separate certified questions interchangeably—the discretionary supervision the City retained under the dredging contract would not have supported immunity over its alleged post-contract failures to repair and warn after it was on notice of the damage to the tunnel wall. Conversely, the City's discretionary immunity for its post-contract failure to repair and warn would not have supported discretionary immunity for its earlier failure to supervise the dredging contractor under the contract. The plaintiffs are wrong to insist the City's alleged failures at different times all related to one and the same issue and claim—they did not.

The plaintiffs argue that this case does not come within the holding of *In re Chicago Flood Litigation* because the City was consciously exercising discretion when it inspected the tunnel and made recommendations about repairs (Br., at 23). Even so, the Court considered the City's decision-making process relating to its post-contract failures to repair and warn separately from the City's assertion of discretionary immunity for its earlier failure to supervise the dredging contractor under the contract. On that separate claim, the Court held the City had immunity based on the discretion that it retained over the placement of the pilings under the contract without requiring any proof of the City's decision-making process before the contractor performed the pilings work.

The plaintiffs would have this Court draw the wrong lesson from *In re Chicago Flood Litigation*. Nothing in the opinion suggests that the City had actually exercised discretion in relocating the piling before the dredging contractor completed the performance of its work. The Court noted in only one sentence that: "[b]y September 1991, [the dredging contractor] informed the City that it had fully completed the work." 176 Ill. 2d at 184. Although the Court went on to observe that the contractor had installed the pilings in a location other than originally designated in the contract, the Court did not state that the City knew that the pilings were placed at another location, much less that the City had approved their placement at a different location. *Id.* at 184-85.

Despite the plaintiffs' efforts, this case cannot be distinguished from *In re Chicago Flood Litigation*. Here, as there, the MWRD was acting with discretion when it selected and entered into a contract with an independent contractor to make public improvements (R.C3633-36). Under the contract, the contractor was responsible for the safety of its employees and required to follow all "health and safety laws, rules and

regulations of federal, state and local governments" including the MWRD's safety rules (R.C3635-36). As further relevant, the contract required the contractor, not the MWRD, to provide all necessary and appropriate safety equipment in confined spaces such as the effluent chamber of the primary settling tank (R.C3636). Similar to the City's retained discretion over the location of the pilings in *In re Chicago Flood Litigation*, the MWRD retained the discretion to "approve and reject" inadequate or unsafe "procedures, methods, structures or equipment" "which seem to [the MWRD] to be unsafe for the work" (R.C633-34). Here, as in *In re Chicago Flood Litigation*, the case arose out of the local public entity's alleged failure to supervise the independent contractor's performance of the work under the contract.

The language under which the MWRD retained discretionary supervision of the contractor's work cannot be distinguished from similar contract language in *In re Chicago Flood Litigation* and *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 120, 41 N.E.3d 957, which followed *In re Chicago Flood Litigation.* The plaintiffs have pointed to no difference between the contract language granting discretion to the local public entity in each case. Similar language should lead to a similar result. If the legislature disagreed with *In re Chicago Flood Litigation* on this point, it could have amended section 2-201 to abrogate the decision but it has not done so in the past twenty years. The MWRD is entitled to discretionary immunity for its alleged failure to supervise the plaintiff's work in the effluent chamber of the primary settling tank.

The plaintiffs argue that MWRD failed both prongs of section 2-201 because: (1) the construction activities on the project did not involve policy determinations and (2) Greg Florek did not hold a position involving either the exercise of discretion or making

policy determinations as the MWRD resident engineer at the construction site (Br., at 15-16). Case law defines policy decisions as those which require the local public entity "to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 342, 692 N.E.2d 1177 (1998) (quoting *West v. Kirkham*, 147 Ill. 2d 1, 11, 588 N.E.2d 1104 (1992)). "[D]iscretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Harinek*, 181 Ill. 2d 343 (citing *Snyder v. Curran Township*, 167 Ill. 2d 466, 343, 657 N.E.2d 988 (1995)). Both prongs of section 2-201 were met in this case.

The plaintiffs' argument ignores that, under the contract, Florek as the resident engineer "*may* disapprove and reject" (emphasis added) any "inadequate or unsafe" "procedures, methods, structures or equipment" "which seem to him to be unsafe for the work" (R.C3633-34). The plaintiffs acknowledge that the word "may" connotes discretion (Br., at 19). The contract vested Florek with as much discretionary supervision over the joint venture's work as the City retained under its contract with the dredging contractor in *In re Chicago Flood Litigation*, and thereby satisfied one prong of section 2-201.

The other prong of section 2-201 was satisfied by the MWRD's policy determinations in selecting the joint venture and negotiating the terms and the scope of its retention in the construction of the new effluent treatment facility. Under the $200 million contract, the MWRD had to balance competing interests as to cost, efficiency and

safety and make a judgment call as to what solution best served those interests. By delegating the means, method and safety of the work to an independent contractor while retaining discretion in Florek to administer the contract, the MWRD was engaged in making policy determinations as to its limited role on site to ensure that the plant was built in accordance with the plans and specifications (R.C461; R.C471).

B. The Cases Cited by the Plaintiffs do not Involve Discretion Retained by a Local Public Entity Under a Contract Delegating the Means, Method and Safety of the Work to an Independent Contractor and are not on Point

The plaintiffs rely on inapposite cases to support their argument that the MWRD was not entitled to discretionary immunity for its failure to supervise the contractor's work here.

The plaintiffs assert that *Monson v. City of Danville* does not contradict *In re Chicago Flood Litigation* (Br., at 25). The MWRD agrees, but not for the reasons urged by the plaintiffs (Br., at 25-26). The plaintiffs and the MWRD agree that the cases do not conflict to the extent that in each case the Court required the local public entity to submit evidence of how it actually exercised discretion over the repair of its property before it was entitled to immunity (Br., at 25-26). In *In re Chicago Flood Litigation*, the City of Chicago presented evidence of its inspection and decision-making process over tunnel repairs, whereas in *Monson*, the City of Danville was not entitled to immunity absent evidence of its decision-making process regarding the particular slab of sidewalk. 2018 IL 122486, ¶¶ 34-35. Notably, the City in each case had not contracted with an independent contractor to repair the tunnel or the sidewalk. *Monson* involved the inspection of a sidewalk in disrepair which the local public entity had a preexisting duty to maintain in a reasonably safe condition for intended and permitted users pursuant to

section 3-102(a) of the Tort Immunity Act. 745 ILCS 10/3-102(a) (West 2012). Unlike *Monson*, this case does not involve the common law duty of ordinary care to maintain public property codified in section 3-102(a). The plaintiffs have never alleged that the MWRD breached any duty of care under section 3-102(a).

Where the parties disagree is whether *Monson* also applies to a local public entity's failure to supervise an independent contractor's work pursuant to the discretionary supervision that the local public entity has retained under a written contract. The plaintiffs argue that *Monson* applies to the MWRD's failure to exercise discretion over the independent contractor's choice of ladder setup in this case (Br., at 24-25), despite the fact that this Court did not require similar proof of how the City actually exercised discretion over the dredging contractor's pilings work in *In re Chicago Flood Litigation*. To the extent the appellate court required proof of the MWRD's actual exercise of discretion regarding the ladder setup in the effluent chamber of the primary settling tank, the appellate court created a conflict between *Monson* and *In re Chicago Flood Litigation*.

The other Illinois Supreme Court cases cited by the plaintiffs are not on point. In *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 364 N.E.2d 176 (2007), this Court held that the defendants were entitled only to limited immunity for "extrahazardous recreational activity" under section 3-109(a) of the Tort Immunity Act (745 ILCS 10/3-109 (West 1992)), rather than absolute immunity under section 2-201, when a student sustained spinal cord injuries while using a mini-trampoline during an extracurricular tumbling program. The Court reasoned that the limited immunity for "extrahazardous recreational activity" under section 3-109(a) fell within the exception to section 2-201.

224 Ill. 2d at 232-33. Here, unlike *Murray*, the plaintiffs are not relying on some other provision of the Tort Immunity Act as an exception to the discretionary immunity provided under section 2-201.

Also inapposite is *Snyder v. Curran Township*, where this Court held that a township was not entitled to section 2-201 immunity when it was sued by a motorist following a traffic accident based on its failure to place a warning sign in conformity to the Illinois Traffic Manual. 167 Ill. 2d at 472-74. There, section 11-304 of the Illinois Vehicle Code (625 ILCS 5/11-304 (West 1992)) mandated local authorities' compliance with the manual's specifications governing the placement of traffic control devices. *Id.* at 472. Here, however, unlike *Snyder*, neither the contract nor any law similarly obligated the MWRD to overrule and mandate the contractor's choice of the means of descending into the effluent chamber of the primary settling tank at the time of the accident.

The appellate cases on which the plaintiffs are relying involve a local public entity's preexisting duty to maintain and repair public ways, and are not on point. *Robinson v. Washington Township*, 2012 IL App (3d) 110177, 976 N.E.2d 610, held that a township was not entitled to section 2-201 immunity with regard to the failure to make road repairs of a pothole which caused a traffic accident. ¶ 12. Similarly, *Ponto v. Levan*, 2012 IL App (2d) 110355, ¶ 76, 972 N.E.2d 772, involved a city's maintenance of a broken water main which flooded a street, *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 626-27, 929 N.E.2d 680 (1st Dist. 2010), a city's regrading of an alley, and *Corning v. East Oakland Township*, 283 Ill. App. 3d 765, 768-69, 670 N.E.2d 350 (4th Dist. 1996), a township's failure to replace a stolen stop sign. These cases are representative of the line of cases holding that public improvements are discretionary but repairs of public

property are generally (but not always) ministerial. None of these cases addresses the discretionary supervision that a local public entity retains under a contract delegating the means, method and safety of construction work to an independent contractor.

C. The MWRD was not Required To Insert Itself Into the Work That the Independent Contractor was Performing in the Effluent Chamber in the Primary Settling Tank to Qualify for Discretionary Immunity Under Section 2-201

The parties dispute the ramifications that will follow this Court's decision.

The plaintiffs and their amicus, the Illinois Trial Lawyers Association ("ITLA"), argue that local public entities should not be allowed to use their contract with independent contractors to shield their failure to supervise the work. Otherwise, they claim the discretionary immunity afforded under section 2-201 would be too broad. This argument cannot withstand analysis.

Policy determinations by local public entities in planning public improvements are not litigation-driven; decision-makers are guided by more immediate concerns, including time, the resources available and the overall cost of the project. The City of Chicago did not insert language reserving discretion over the location of pilings in its contract with the dredging contractor in *In re Chicago Flood Litigation* so that it could later assert section 2-201 immunity for its failure to supervise the placement of the pilings. Likewise, the MWRD delegated the means, method and safety of the work to be performed under its $200 million construction contract for reasons other than asserting section 2-201 immunity in a lawsuit. Although this case is important to the parties, the MWRD-Joint Venture contract was negotiated based on the MWRD's considerations of how best to build the new sewage treatment facility.

The plaintiffs argue that Florek was not competent on safety issues to exercise the discretion he had in administering the contract (Br., at 28-29). However, the plaintiffs ignore that a local public entity contracts with an independent contractor and delegates the means, methods and safety of the work with the reasonable expectation that public employees like Florek will not have to insert themselves into the operative details, such as a ladder setup, on a daily basis. Here, the evidence is undisputed that the joint venture had several safety representatives on the project (R.C1480-81) and the joint venture was responsible for stopping any unsafe work (R.C274; R.C1494-95; R.C1503-07; R.C2241; R.C2865; R.C2873; R.C4308). The MWRD's role was to ensure that the project was constructed according to the plans and specifications (R.C461; R.C471).

In making this argument, the plaintiffs' reliance on *Murray* is misplaced. There, the issue of the trampoline's instructor's competence related to the willful and wanton claim, not to the defendants' section 2-201 discretionary immunity defense. 224 Ill. 2d at 246.

If this Court adopts the appellate court's reasoning, discretionary immunity would protect local public entities from liability only when they involve themselves in the operative details of the independent contractor's work. In this case, it would mean that the MWRD would have to become directly involved in the grout work in the effluent chamber, despite the contract and testimony that there was no reason for a MWRD employee to be in the chamber or inspect the grout work (R.C2232-33; R.C2476-77; R.C2517). The result would be anomalous in practice. As previously argued in the petition and opening brief, local public entities would be effectively deprived of the same section 414 defense (Restatement (Second) of Torts, § 414 (1965)) that private employers

are able to assert under their contracts with independent contractors in the same circumstances. This court should reverse the judgment of the appellate court and affirm the judgment of the trial court.

II. THE PLAINTIFFS HAVE RAISED AN ISSUE THAT IS NOT PART OF THIS APPEAL

Although the plaintiffs recognize that this appeal presents only the issue of whether the MWRD is entitled to discretionary immunity under section 2-201, they nevertheless argue an issue that is not part of the MWRD's appeal to this Court.

According to the plaintiffs, the appellate court was correct in reversing and reinstating the willful and wanton allegations (Br., at 33-36). This issue is not before the Court. As section 2-201 immunity is absolute (*In re Chicago Flood Litigation*, 176 Ill. 2d at 195-96), the issue of section 2-201 immunity which the MWRD has properly raised is a complete defense to the willful and wanton allegations as well as to the negligence allegations. This Court need not and should not address the propriety of the plaintiffs' willful and wanton allegations

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 15 pages.

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PLEASE BE ADVISED that on this 27th day of June, 2019, we caused to be electronically filed with the Office of the Clerk of the Illinois Supreme Court, the attached reply brief on behalf of defendant-appellant Metropolitan Water Reclamation District of Greater Chicago in the above-entitled cause, a copy of which, along with this notice of filing with affidavit of service, is herewith served upon you.

Respectfully submitted

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AFFIDAVIT OF SERVICE

The undersigned, Jacqueline Y. Smith, a non-attorney, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that I caused the foregoing notice of filing and defendant-appellant's reply brief to be served upon the parties listed above on this 27th day of June, 2019, by electronic mail and electronically through the court's Odyssey electronic filing manager.

/s/ Jackie Smith
SmithAmundsen LLC

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