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,	) On Appeal) from the Appellate Court,) First District, No. 1-17-0336)
Plaintiffs-Appellees,	) There Heard on Appeal from) the Circuit Court of Cook) County, County Department,
v.	) Law Division,) No. 12 L 000048
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, A Body Corporate and Politic,	))) The Honorable) William E. Gomolinski,
Defendant-Appellant.	) Judge Presiding.

AMICUS CURIAE BRIEF OF ILLINOIS TRIAL LAWYERS' ASSOCIATION

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INTRODUCTION AND STATEMENT OF INTEREST

Your *amicus*, the Illinois Trial Lawyers' Association ("ITLA"), is a non-profit organization of Illinois attorneys who regularly represent the interests of people like Becky Andrews and Jeffrey Andrews as plaintiffs in personal injury litigation. The preservation of the right to trial by jury is one of ITLA's core principles.

Many matters that ITLA members handle include claims against public entities, and for that reason, ITLA attorneys are frequently called upon to respond to defenses grounded in the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS §10/1-101 *et seq.* (the "Tort Immunity Act" or the "Act"), which is the basis of the MWRD's argument here.[1] The Tort Immunity Act, when applicable, completely forecloses an injured plaintiff's right to present his or her case to a jury. It is for this reason that the instant case is of interest and importance to ITLA.

Also factoring into ITLA's stake in this case is the fact that it involved a grant of summary judgment at the circuit court level. Summary judgment is a drastic remedy that, if awarded, preempts a party's right to a jury trial. ITLA is committed to ensuring that summary judgment is only granted in the limited circumstances that warrant it. This is not one of those cases, and the First District's opinion should be affirmed in its entirety. Respectfully, ITLA

[1] "MWRD" refers to the defendant, the Metropolitan Water Reclamation District of Greater Chicago.

requests that the Court consider the contents of this *amicus* brief in reviewing and deciding the case.

ARGUMENT

A strict construction of the Tort Immunity Act, combined with a careful examination of the case law addressing the specific type of immunity at issue here ("discretionary immunity"), the evidentiary record, and public policy considerations, yields only one legally and factually sustainable conclusion: the one reached by the First District.

I. SECTION 2-201 REQUIRES AN *EXERCISE* OF DISCRETION *AND* A POLICY DETERMINATION *IN RELATION TO THE HAZARD AT ISSUE IN THE CASE.* THE MWRD PROVED NEITHER.

Local public entities owe the same common-law duties as private parties. They are subject to liability in tort to the same extent as private parties unless one of the immunities articulated in the Act is shown to apply. *Van Meter v. Darien Park Dist.*, 207 Ill.2d 359, 368-69 (2003); *In re Chicago Flood Litigation*, 176 Ill.2d 179, 192 (1997). The Act does not alter the duty (or duties) owed by the public entity, but rather operates to shield the public entity from liability for breaching its duty. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill.2d 484, 490 (2001); *Van Meter*, 207 Ill.2d at 369-70.

The burden of proving the Act's applicability in any given case rests with the public entity that seeks its protection. In assessing whether this burden has been met, the court must construe the Act strictly against the public entity. *Van Meter*, 207 Ill.2d at 369-70; *Gutstein v. City of Evanston*, 402 Ill.App.3d 610, 621-22, 626 (1st Dist. 2010).

The Act sets forth "an extensive list of immunities." *Arteman v. Clinton Community Unit School Dist. No. 15*, 198 Ill.2d 475, 479-80 (2002) [citations omitted]. Only one of these is at issue in this case:

> 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 ("Section 2-201" or the "discretionary-immunity provision"). The immunity here afforded to public *employees* extends to public *entities* such as the MWRD by virtue of 745 ILCS § 10/2-109 ("A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable").

Section 2-201 is "concerned with both *the type of position* held by the employee and *the type of action* performed or omitted by the employee." *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 341 (1998) [emphasis in original]. This Court, in *Harinek*, further explained:

> According to the statute, an employee may be granted immunity if he holds *either* a position involving the determination of policy *or* a position involving the exercise of discretion. The statute is equally clear, however, that immunity will not attach unless the plaintiff's injury results from an act performed or omitted by the employee in determining policy *and* in exercising discretion. … [T]he act or omission must be both a determination of policy and an exercise of discretion.

Harinek, 181 Ill.2d at 341 [emphasis in original]; see also *Monson v. City of Danville*, 2018 IL 122486, ¶29. The evaluation of the public employee's conduct (*i.e.*, the "type of action" performed or omitted) must be directed particularly towards the "alleged acts and omissions outlined in the plaintiff's complaint." *Harinek*, 181 Ill.2d at 342-43.

MWRD engineer Greg Florek is the employee whose conduct is at issue in this case. While there appeared to be some disagreement on whether his position satisfied Section 2-201, the parties' dispute primarily concerned his conduct, and it is the latter requirement that is the focus of this *amicus* brief.

The MWRD moved for summary judgment on discretionary immunity. Summary judgment is an extraordinary remedy. *Anest v. Bailey*, 198 Ill.App.3d 740, 745 (2nd Dist. 1990). It must be "awarded with caution to avoid preempting a litigant's right to trial by jury." *North American Ins. Co. v. Kemper Nat'l Ins. Co.*, 325 Ill.App.3d 477, 482 (1st Dist. 2001). The court must construe the submissions most favorably to the non-moving party (*Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 43 (2004)), and should grant summary judgment only where its propriety is free from doubt. *Simmons v. American Drug Stores, Inc.*, 329 Ill.App.3d 38, 42 (1st Dist. 2002).

In the particular case of a discretionary-immunity defense, a motion for summary judgment should be denied where the evidence falls short of establishing the facts necessary to sustain the defense. *Monson*, 2018 IL 122486 at ¶¶31, 39; see also *Van Meter*, 207 Ill.2d at 380. A comprehensive analysis of the law and the evidence shows that, here, summary judgment was unwarranted because the MWRD did not prove *either* an exercise of discretion *or* a policy determination, much less *both*.

A. The MWRD proved no exercise of discretion.

1. Florek could not have exercised discretion vis-à-vis the ladder configuration if, as he testified, he was not aware of it. His contractual right to exercise discretion does not meet the statute's requirements.

At his deposition, Greg Florek denied having any knowledge, before Jeffrey Andrews was injured, that the workers were accessing the various effluent chambers on the site by using a "teepee" ladder system.[2] The plaintiffs have pointed to evidence suggesting that Florek, had he been competent and in full compliance with his job duties, could not have avoided seeing the "teepee" ladder configuration and appreciating the safety problems it posed. Nonetheless, Florek's testimony is what it is; and his claim of ignorance foreclosed any chance for the MWRD to prove as a matter of law that his "decision" to allow the continued use of that ladder configuration was "discretionary."

This Court's recent opinion in *Monson v. City of Danville,* 2018 IL 122486, is dispositive of this issue. *Monson* involved a trip-and-fall incident on an uneven sidewalk in downtown Danville. *Monson*, 2018 IL 122486 at

[2] The witnesses in this case described the way the two ladders came together at the top as resembling a "teepee." See, *e.g.*, C2802-03 V2 (testimony of Martin Platten), C3102-03 V2 (testimony of Douglas Pelletier) and C2915 V2 (photograph).

¶1. Doug Ahrens, the director of public works for the defendant ("Danville"), testified that he used his discretion and weighed various factors in deciding which slabs of sidewalk in Danville's downtown area needed repair and which did not. Ahrens was unable to recall inspecting or making any decisions about the specific portion of sidewalk at issue in the case, but believed that he did so because he had "looked at every slab of concrete" downtown. *Id.*, at ¶¶4-6. Both the circuit and appellate courts concluded that Danville proved its right to summary judgment on the question of discretionary immunity. *Id.*, at ¶¶8-9. This Court reversed. *Id.*, at ¶1.

Observing that discretion "connotes a conscious decision" (*Id.*, at ¶33, quoting from *Corning v. East Oakland Tp.*, 283 Ill.App.3d 765, 768 (4th Dist. 1996)), the Court stressed the absence of evidence that Ahrens had looked at and made any decisions about these particular slabs. With no evidence pertaining specifically to the location where the plaintiff fell, Ahrens's broad statement that he looked at "every slab" in the vicinity was not enough to satisfy the Court: "[W]e do not know whether anyone even took note of a sidewalk deviation at that location, or whether it was simply overlooked." *Monson*, 2018 IL 122486 at ¶¶34, 38.

Ponto v. Levan, 2012 IL App (2nd) 110355, is also instructive. The plaintiff in *Ponto* was injured in a collision with Dale Levan on River Road in the City of Dixon ("City"). The plaintiff sued Levan, and Levan filed a counterclaim against the City, arguing that he had encountered a patch of ice created by a leaking water main near the accident site. *Ponto*, 2012 IL App (2nd) 110355 at ¶¶1, 5. The City presented the testimony of its water department superintendent, Willard Cox, who testified about a pre-accident agreement the City had with an engineer to perform repairs on River *Street*, which was in the same general vicinity as – but distinct from – River *Road*. Cox related that, prior to the accident, he was unaware of any issues with the water main on River Road, which is why it wasn't included in the River Street engineering agreement. *Id.*, at ¶¶11-13.

The court concluded that Cox's conduct relative to the accident was neither an exercise of discretion nor a policy determination. *Id.*, at ¶¶65-77. It emphasized Cox's ignorance of any problem with River Road specifically:

> We conclude that, on the accident date, Cox was not exercising discretion with respect to any improvement or plan concerning River Road ... [H]is decisions as to any improvement concerned River Street and not River Road. ... We reject the City's argument that Cox made a discretionary decision to *delay* any improvement under River Road, as his statements reflect that he was not even *aware* of any recurring leak issues with that pipe.

Id., at ¶76 [emphasis in original].

Turning to the case at hand, nobody questions that the contract documents vested Florek with the authority to prohibit work methods or equipment that "seem[ed] to him to be unsafe" (C3633-34). Based on this provision, Florek presumably also had authority to *permit* the use of work methods that "seem[ed]" *safe* to him, at least to an extent.[3] But as the First District recognized, "[j]ust because a party has a right to exercise discretion does not mean that it did exercise discretion." *Andrews v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 2018 IL App (1st) 170336, ¶28. If Florek had seen the ladder configuration and decided to allow the workers to continue to use it because, in his opinion, it was safe, the MWRD may have been able to make a stronger case for discretionary immunity. But according to Florek, that isn't what happened. According to Florek, he was completely oblivious to the ladder setup.

In support of its assertion that a contractual right to exercise discretion is sufficient, the MWRD cites *In re Chicago Flood Litigation*, 176 Ill.2d 179, 194-95 (1997); and *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933. This reliance is misplaced.

A close reading of *Chicago Flood* reveals an important factual distinction from the present case. In *Chicago Flood,* the municipal defendant (the "City") *did gain awareness* of the problem before any damage occurred, upon which it inspected the tunnel and recommended "immediate repairs." *Chicago Flood,* 176 Ill.2d at 184-85. Thus, while the Court may have referenced the defendant's retention of the right to exercise discretion (*Id.*, at 195), the record in *Chicago Flood* demonstrated *an actual exercise* of that

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[3] The Plaintiffs cite evidence that, at the time of the incident, the work failed to conform in more than one respect to the MWRD's minimum safety standards. In such an instance, Florek would not appear to have the discretion to allow the work to continue, regardless of his personal views.

right. Such evidence is entirely absent here. Furthermore, to the extent that *Chicago Flood* may be read to suggest that the *right* to exercise discretion is enough, ITLA submits that Your Honors' far more recent decision in *Monson* unmistakably establishes that the discretion must have been *exercised*.[4]

In *Cabrera*, the City hired a contractor ("Era Valdivia") to sandblast and paint a bridge. *Cabrera*, 2015 IL App (1st) 140933, ¶3. The plaintiff, an Era Valdivia employee, slipped on oil while trying to access the underside of the bridge. *Id.*, at ¶¶15-20. The evidence did not establish that either the City or its on-site engineering consultant ("ESI") ever said anything to Era Valdivia about how to access the underside of the bridge or was aware of oil in the area where the plaintiff fell. *Id.*, at ¶¶3, 44-46. In other words, unlike *Chicago Flood*, the evidence did not demonstrate an actual exercise of discretion on the part of the municipal defendant. The First District nonetheless concluded, in reliance on *Chicago Flood*, that the City's contractual authority to reject or require revisions to any of Era Valdivia's work methods entitled it to discretionary immunity. *Id.*, at ¶¶123-25.

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[4] It is worth noting here that, in *Monson*, the discretionary-immunity provision was the sole focus on appeal. By stark contrast, *Chicago Flood* was a complex class action matter in which discretionary immunity was only one of several issues considered by this Court. Among the other topics covered by the opinion were (1) an argument that the City's "proprietary" use of the subject tunnel was non-governmental and therefore outside the scope of the Act (*Chicago Flood*, 176 Ill.2d at 189-92); (2) a claim of "supervisory" immunity under 745 ILCS §10/3-108 (a) (*Id.*, at 192-93); (3) the application of the "*Moorman* doctrine" (*Id.*, 176 Ill.2d at 197-207); and (4) whether the case involved an "ultrahazardous activity" so as to allow the plaintiffs to pursue a strict liability theory (*Id.*, at 207-13). In the context of the overall opinion, the discretionary-immunity discussion (*Id.*, at 192-95) was relatively brief.

In the instant case, the First District correctly recognized that this aspect of *Cabrera* was fatally incompatible with *Monson*:

> After *Monson*, the immunity analysis done in *Cabrera* is untenable. Simply having the right under the construction contracts to reject methods the contractors might use does not amount to automatic discretionary immunity for any injury resulting from any methods used in the construction. Instead, courts are required to look at the specific act or omission and decide whether the defendant was "engaged in both the determination of policy and the exercise of discretion *when performing the act or omission from which the plaintiff's injury resulted*." (Emphasis added and emphases omitted.) [Citing *Monson*, 2018 IL 122486 at ¶122.]

Andrews, 2018 IL App (1st) 170336, ¶28. The First District also emphasized how the MWRD had "strenuously objected to any insinuation that it had any knowledge of the [ladder] configuration," a position that was irreconcilable with the suggestion that there had been a conscious decision about the very same ladder configuration. *Id.*, at ¶24.

2. The MWRD's decision to hire a contractor was not sufficiently connected to the circumstances of Jeffrey Andrews's injuries to trigger Section 2-201.

The MWRD's *amicus* suggests that the requisite "exercise" of discretion in this case occurred when the MWRD "deci[ded] to enter into a written agreement charging control to the independent contractor." (*Amicus Curiae* Brief of Illinois Association of Defense Trial Counsel ("IADTC"), p. 9). This argument fares no better than the one discussed above.

Section 2-201 explicitly refers to immunity "for an injury *resulting from* [a public employee's] act or omission in determining policy when acting in the exercise of such discretion" [emphasis added]. In other words, for this provision to apply, the "discretionary" act or omission must have had a causal relationship to the plaintiff's injury. See *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 342-43 (1998) (considering whether the "alleged acts and omissions outlined in the plaintiff's complaint" met Section 2-201's prerequisites). The "act or omission from which plaintiff's injury is alleged to have resulted" in the present case is the defendant's failure to stop the workers from "repeatedly us[ing] an unsafe ladder configuration." *Andrews v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 2018 IL App (1st) 170336, ¶28.

The Tort Immunity Act must be construed strictly against the public entity that claims its protection (*Monson v. City of Danville*, 2018 IL 122486, ¶15), and courts should refrain from "impermissibly expansive definition[s] of discretionary immunity" (*Snyder v. Curran Tp.*, 167 Ill.2d 466, 472 (1995)).

The contract documents bear a date of 2008 (see, *e.g.*, C1547 V2 and C1870 V2). Jeffrey Andrews was injured in 2011, and none of the conduct that the plaintiffs aver to have caused his injuries relates to decisions the MWRD made years earlier, in the preconstruction phase of the job. Rather, the plaintiffs' allegations pertain to the MWRD's failure to stop the workers from using an unsafe ladder configuration to access the effluent chambers; the failure to remove excess water from the site; and other related acts and omissions pertaining immediately to the conditions on the jobsite in 2011, at or near the time of Jeffrey Andrews's fall. (See generally C919-25 V1 (Second

Amended Complaint, Count I).) The allegations say nothing about the MWRD's much earlier, and very general, decision to hire a contractor to perform the work.

Allowing the initial decision to enter into a contract to serve as the requisite "exercise of discretion" would constitute an "impermissibly expansive" construction of Section 2-201 (*Snyder*, 167 Ill.2d at 472) and would fly in the face of the firmly drawn distinction between making an agreement and carrying it out:

> A [municipal] corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, such as constructing sewers or drains; but, *as soon as it begins to carry out that plan, it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner.*

City of Chicago v. Seben, 165 Ill. 371, 378 (1897) [emphasis added]. (While *Seben* long predated the Tort Immunity Act, its discussion regarding the distinction between discretionary and ministerial conduct remains relevant. See *In re Chicago Flood*, 176 Ill.2d at 193-94, and cases there cited; see also *LoCoco v. XL Disposal Corp.*, 307 Ill.App.3d 684, 698 (3rd Dist. 1999).)

Consistent with Section 2-201 on its face, a public entity seeking to be excused of liability must present evidence that the conduct at issue in the plaintiff's complaint – not some general decision made years earlier – was "discretionary." As applied to the present case, that means that the MWRD's entry into a contract in 2008 is insufficient to invoke immunity.

B. The MWRD also failed to show that any of the conduct at issue in the pleading qualified as a policy determination.

While the concepts of policy determination and exercise of discretion are often conflated, both are required for the discretionary-immunity provision to apply, and a proper analysis requires that they be addressed individually. *Ponto v. Levan*, 2012 IL App (2nd) 110355, ¶¶64, 68.

Policy determinations are those that require a governmental entity or its employee "to balance competing interests and to make a judgment call as to what solutions will best serve each of those interests." *Harrison v. Hardin County Community Unit School Dist. No. 1*, 197 Ill.2d 466, 472 (2001). As with the exercise-of-discretion requirement, this question must be evaluated with reference to the time and location of the plaintiff's injury.

Florek's testimony that he did not know about the "teepee" ladder configuration prevents the MWRD from meeting its burden. *Ponto v. Levan* is again instructive. In *Ponto*, the court found that neither an exercise of discretion nor a determination of policy was shown. *Ponto*, 2012 IL App (2nd) 110355, ¶¶65-77. Cox's lack of knowledge of a problem with the accident site (see discussion *supra*) was relevant to both issues. With respect to the policy-determination requirement, the court noted that Cox did not discover a problem on River Road until after the accident, and concluded: "*...on the date of Ponto's accident*, Cox was not involved in a policy determination *concerning River Road*." *Id.*, at ¶71 [emphasis added].

Like Cox in *Ponto*, Florek testified that he was unaware of the relevant ladder configuration at all times prior to Jeffrey Andrews's catastrophic injuries. It naturally follows that he could not possibly have balanced any "competing interests" or made a "judgment call" to allow the use of that ladder system. The "policy determination" requirement, like the exercise-of-discretion requirement, was not met. Section 2-201 was accordingly not available to the MWRD as a means of escaping liability in this case.

II. LOWERING THE BURDEN OF PROOF FOR DISCRETIONARY IMMUNITY, SIMPLY BECAUSE THIS IS A CONSTRUCTION NEGLIGENCE CASE, WOULD BE IMPROPER AND UNFAIR.

As discussed in detail above, the MWRD and its *amicus* (jointly, "the Defense") urge the Court to hold that discretionary immunity can be proven here by the reservation of a *right* to exercise discretion (as opposed to an actual exercise), and/or an "exercise" of discretion that consists of a generalized decision remote in time and subject matter from the circumstances of the plaintiff's injury.

Acknowledging, at least implicitly, that such a result would be directly at odds with the statute on its face and with *Monson*, the Defense notes that *Monson* concerned a public entity's duty as codified at 745 ILCS §10/3-102 (a), and suggests that a different standard of proof for discretionary immunity should apply where, as here, the defendant's duty arises out of construction negligence principles. They proceed to explain that, if an actual exercise of discretion with regard to the hazard at issue in the case is required, public entities will be "forced ... to secure evidence sufficient to establish ... discretionary immunity" (IADTC's *Amicus* Brief, p. 2); and the same evidence might work to their detriment on other issues central to a construction negligence case (see, *e.g.*, MWRD's Brief, pp. 23-25; and IADTC's *Amicus* Brief, pp. 8-10).

There is no valid basis for the Defense's proposal. It is untenable on multiple levels. The statute, the case law, and basic principles of fairness require that it be emphatically rejected by this Court.

A. Neither the Act nor the case law construing it support the Defense's proposal.

1. Section 2-201 does not authorize any modifications to the defendant's burden of proof based on the circumstances surrounding the plaintiff's injury.

The MWRD would ostensibly have this Court hold that a defendant in a construction negligence case can invoke discretionary immunity based on a lesser degree of evidence than, say, a defendant in a case involving a pedestrian who tripped on an uneven sidewalk or a motorist injured in an accident caused by a pothole. The Tort Immunity Act, which must be construed strictly against public entities, affords no basis for such a reduced standard of proof.

The language of the discretionary-immunity provision appears verbatim earlier in this brief. As has already been discussed extensively, a defendant seeking its protection must show that the conduct at issue in the plaintiff's complaint constituted both an exercise of discretion and a policy determination. Section 2-201 does not authorize any departures from its stated prerequisites, "[e]xcept as otherwise provided by Statute."

The MWRD has identified no statute that allows for any adjustments to the burden based on the plaintiff's theory of liability, the existence of a contract between the public entity and a contractor, or anything else; and it would be inappropriate for the Court to read such conditions or exceptions into Section 2-201:

> In interpreting an immunity provision, our primary goal is to ascertain and give effect to the intention of the legislature. We seek that intent primarily from the language used in the Tort Immunity Act. [Citation.] Where an enactment is clear and unambiguous, we are not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express. [Citations.] This court may not legislate, rewrite or extend legislation. If a statute, as enacted, seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to this court. [Citations.]

DeSmet ex rel. Estate of Hays v. County of Rock Island, 219 Ill.2d 497, 510 (2006).

2. Case law makes clear that "duty" and "immunity" are entirely separate and distinct questions.

The Tort Immunity Act implicitly recognizes "duties existing at common law." *Ware v. City of Chicago*, 375 Ill.App.3d 574, 578 (1st Dist. 2007). At 745 ILCS §10/3-102 (a), the Act specifically codifies one of these common-law duties: a public entity's duty to maintain public property in a reasonably safe condition for its intended users. This was the duty at issue in *Monson*. However, it is certainly not the only common-law duty recognized in Illinois, and as a general rule, all common-law duties owed by private parties are also borne by public entities. *Van Meter v. Darien Park Dist.*, 207 Ill.2d 359, 368-69 (2003).

Among the various other common-law duties that are recognized in Illinois (albeit not explicitly referenced in the Act) are those expressed in the Restatement (Second) of Torts, Sections 343 and 414 (1965), which apply, respectively, to premises liability and construction negligence cases. *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill.App.3d 34, 40 (1st Dist. 2004). Under Section 414, an entity that entrusts work to a contractor while retaining control over parts of that work owes a duty[5] to exercise its control with reasonable care to eliminate hazardous work practices (a "Section 414" or "construction negligence" theory). *Moorehead v. Mustang Const. Co.*, 354 Ill.App.3d 456, 459 (3rd Dist. 2004); *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 1059, 1063 (1st Dist. 2000). Section 343 imposes a duty on possessors of land to exercise reasonable care to protect invitees from dangerous conditions on the property (a "Section 343" or "premises liability"

[5] As an aside, the IADTC incorrectly suggests that Section 414 offers "immunity" when the requisite degree of retained control is not shown, and that Your Honors recognized as much in *Carney v. Union Pacific R. Co.*, 2016 IL 118984, ¶33 (IADTC's *Amicus* Brief, p. 4 (n. 1)). In reality, Section 414 – when its prerequisites, including retained control, are established – *triggers a duty*, which makes the provision an exception to the general rule that one who hires a contractor does *not* owe a duty with reference to the contractor's work. It is the general "no-duty" rule, and not Section 414, that this Court likened to an immunity. See *Carney*, 2016 IL 118984, ¶¶29-33.

theory). Restatement (Second) of Torts, Section 343 (1965); *Clifford*, 353 Ill.App.3d at 41-42.[6]

The question of duty is "distinct from, *and precedent to*, the question of whether the Tort Immunity Act applies." *Salvi v. Village of Lake Zurich*, 2016 IL App (2nd) 150249, ¶33 [emphasis added]. In other words, the potential for immunity is only considered if the court *first* finds a duty to exist; and the inquiries are entirely separate and distinct from one another. This Court has so recognized. See, *e.g.*, *Arteman v. Clinton Community Unit School Dist. No. 15*, 198 Ill.2d 475, 480 (2002); and *Harris v. Thompson*, 2012 IL 112525, ¶17.

The Defense's argument disregards and tramples upon these well-established principles insofar as it would have this Court apply a reduced "immunity" burden to certain defendants solely based on the source of their duties. Absent some compelling reason to depart from precedent (which the Defense has not provided), Your Honors should firmly reject this notion. Holding that a defendant whose duty arises from its retained control over construction work and/or its ownership of a construction site can claim

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[6] While most of the focus in the present case has been on Section 414, the Court will note that the plaintiff's Second Amended Complaint also supports a Section 343 theory, as it includes allegations about *both* an unsafe work practice (tradespeople's use of a two-ladder system "teepeed" at the top without a safe means of transitioning from one ladder to the other) and a hazardous condition on the property (mud and standing water in the tradespeople's work area).) (See C923-25 V1.)

immunity more easily than a defendant alleged to have breached the duty codified in Section 3-102 (a) would be unprecedented and unreasonable.

The record reveals another weakness in the MWRD's argument – that being the MWRD's decision to forego making any substantive argument on the duty question.[7] The MWRD chose instead to proceed on the immunity to which it believed it was entitled, and that was the only issue on which the circuit court passed judgment. (See generally V5114-24 V3.)

B. Holding as the Defense urges this Court to do would be patently unfair.

The Defense suggests that, in Section 414/construction negligence cases, a public entity seeking to invoke discretionary immunity will be disadvantaged if it is held to the same burden of proof as public entities in all other types of cases. As previously noted, these types of concerns must be addressed to the legislature. Section 2-201 on its face provides no indication that the defendant's burden is subject to change based on what type of case is involved. Construing the statute strictly against the MWRD compels the rejection of its proposal.

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[7] The March 28, 2016 motion for summary judgment that appears in the record at C4100-15 V3 is not the motion the circuit court actually ruled on. This filing violated the judge's page limit and was superseded by a motion that complied with it (see C4761-62 V3). The court explicitly stated that its ruling pertained to an April 11, 2016 motion (C5116 V3) – not the one filed on March 28, 2016. While counsel for your *amicus* was unable to locate the record citation for the April 11, 2016 motion, it is available at 2016 WL 11556428. ITLA encourages the Court to review the April 11, 2016 motion since it refutes the MWRD's contention that it "asked for summary judgment on section 414 grounds below" (MWRD's Brief, p. 25 (n. 3) (citing the earlier, superseded motion)).

Furthermore, there is no inequity in holding Section 414 defendants to the discretionary-immunity requirements that apply in other sorts of cases. To the contrary, lowering the burden would provide an unjust advantage to public entities in Section 414 proceedings and would be unfair to Section 414 plaintiffs, public entities in non-Section 414 cases, and the courts.

1. Holding Section 414 governmental defendants like the MWRD to the discretionary-immunity burden mandated by the statute is fair.

The MWRD bemoans the First District's decision as placing public entities in Section 414 cases in an untenable position by essentially requiring them, as a prerequisite to invoking discretionary immunity, to engage in behavior that may work to their disadvantage on another subject that is usually contested in Section 414 cases, "retained control." (See MWRD's Brief, pp. 20, 24-25.) Similarly, the IADTC complains that, if the First District's opinion is affirmed, public entities will be "forced" to "secure evidence" supporting a claim of discretionary immunity only to perhaps later have that same evidence work against them should they try to establish an insufficient retention of control under Section 414. (See IADTC's Brief, pp. 2, 9-10.)

The Defense's arguments are premised on the fanciful notion that every move a public employee makes on a construction site is calculated to put the public entity in the best possible stance to claim discretionary immunity *if* someone is injured during the work and *if* litigation results. This isn't how things work on most construction sites. Nor should it be. A public employee with a regular presence on the site, and with both the authority and responsibility for safety concerns, should be primarily focused on doing his or her job and *preventing injuries to workers*, so that there is no need to defend a personal injury suit at all.

Furthermore, there are many other ways that public entities in Section 414 cases can defend claims in those instances where they cannot meet the requirements of the discretionary-immunity provision. One option would be for the defendant to move for summary judgment on the issue of retained control. Since retained control bears directly on whether a duty exists, and since a duty analysis should precede an immunity analysis, the defendant might thereby eliminate the need to even address immunity. Another option would be for the defendant to seek protection under a different item of the "extensive list of immunities" set forth in the Act. *Arteman v. Clinton Community Unit School Dist. No. 15*, 198 Ill.2d 475, 479-80 (2002) [citations omitted]. A defendant's inability to prove its right to one particular type of immunity (here, discretionary immunity) in no way means that none of the many other immunity provisions will apply.

Plainly, the ramifications of the First District's ruling, if affirmed, are nowhere near as dire for Section 414 governmental defendants as the Defense suggests. In any event, as covered at length above, the First District's ruling is the only one that complies with the statute as written.

The legislature, rather than the judiciary, is the appropriate place for voicing grievances like those the Defense cites here.

> ***2. Lowering the discretionary-immunity burden for a Section 414 governmental defendant like the MWRD, in addition to violating the statute, would be unfair to all other participants in the legal system.***

Even if Section 2-201 allowed the result urged by the Defense – which it doesn't – it would be highly undesirable from a public policy perspective.

The Defense's proposal would work injustice upon Section 414 plaintiffs by making it more difficult for them to defeat a discretionary-immunity defense than it is for plaintiffs in all other types of cases. A review of construction negligence case law illustrates that Section 414 plaintiffs are already held to a demanding "retained control" standard that prevents them, in many cases, from even overcoming a motion for summary judgment on the element of duty. Abundant and highly specific evidence is required of Section 414 plaintiffs to show that there is so much as a question of fact warranting submission to a jury – much less to actually prove their cases should they make it to trial. See, *e.g.*, *LePretre v. Lend Lease (US) Const., Inc.*, 2017 IL App (1st) 162320, ¶¶24-45; and *Snow v. Power Const. Co.*, LLC, 2017 IL App (1st) 151226, ¶¶50-62. There is no valid basis for allowing Section 414 defendants to prove a right to discretionary immunity on the basis of evidence that not only fails to satisfy Section 2-201 on its face, but that would almost surely be characterized as insufficient to prove "retained control" if offered by a Section 414 plaintiff.

The Defense's proposal would also be unfair to public entities wishing to assert discretionary immunity in matters not arising out of construction negligence. While Section 414 defendants would get the benefit of a reduced burden of proof, all other defendants would still be required to meet the burden exactly as written in the discretionary-immunity statute.

Finally, ruling as the Defense urges this Court to rule would create mass uncertainty for courts at all levels since it would radically change the legal landscape of tort immunity. If the MWRD in this case were deemed to meet Section 2-201's requirements on the basis of evidence other than the type unequivocally demanded by the statute on its face, courts considering future cases involving tort immunity might understandably wonder, *e.g.*, what the precedent requiring a "strict" construction of the Tort Immunity Act against the public entity truly means, or whether any immunity provisions other than Section 2-201 might similarly allow specific categories of defendants the benefit of a reduced burden of proof. The chaos that would ensue in this scenario can easily be avoided if this Court rules consistently with Section 2-201 on its face and affirms the First District.

CONCLUSION

The result reached by the appellate court comports perfectly with well-established principles concerning the Tort Immunity Act generally, and with the language of the discretionary-immunity provision in particular. While that is surely an ample basis for affirmance, it is also easy to see that public policy concerns militate in favor of the First District's ruling as well. ITLA respectfully urges this Court to affirm.

Respectfully submitted,

GWC INJURY LAWYERS LLC

Dated: May 14, 2019

By: /s/ *Kirsten M. Dunne*

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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,	) On Appeal) from the Appellate Court,) First District, No. 1-17-0336)
Plaintiffs-Appellees,	) There Heard on Appeal from) the Circuit Court of Cook) County, County Department,
v.	) Law Division,) No. 12 L 000048
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, A Body Corporate and Politic,	))) The Honorable
Defendant-Appellant.	) William E. Gomolinski,) Judge Presiding.

CERTIFICATION OF *AMICUS CURIAE* BRIEF

I certify that the *Amicus* Brief of the Illinois Trial Lawyers' Association conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages for the Rule 341 (d) cover, the Rule 341 (h) (1) statement of points and authorities, the Rule 341 (c) certificate of compliance, and the certificate of service, is 24 pages.

Dated: May 14, 2019

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