No. 121800

In the Supreme Court of Illinois

ISAAC COHEN,	)	On Appeal from the Appellate
	)	Appellate Court of Illinois,
Plaintiff/Appellee.	)	First Judicial District,
	)	No. 15-2889
vs.	)	
	)	There Heard on Appeal from the
CHICAGO PARK DISTRICT,	)	Circuit Court of Cook County, Illinois,
	)	Court No. 14 L 005476,
Defendant/Appellant.	)	Honorable William E. Gomolinski,
	)	Judge Presiding

AMICUS CURIAE BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE ISAAC COHEN

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POINTS AND AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Illinois Trial Lawyers Association ("ITLA") is a volunteer association primarily comprised of attorneys representing injured persons and their families, including persons injured by the conduct of "local public entities" and "governmental employees" as defined by the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS § 10/1-101 *et seq*. ("the Act"). ITLA seeks to ensure all citizens receive full, equal access to the state's civil justice system.

ITLA respectfully submits this brief because this Honorable Court's decision on the issues presented will substantially affect the rights of persons represented by ITLA's members. Additionally, this Honorable Court's decision concerns Illinoisans' access to the state's civil justice system. ITLA submits this brief to provide this Court with its views and to assist this Court in fully and fairly resolving the important issue presented for review. ITLA submits this brief in support of the position of Plaintiff-Appellee, Isaac Cohen.

SUMMARY OF ARGUMENT

This case calls upon the Court to determine the rights of Illinois citizens' injured on municipal bicycle pathways, specifically the Chicago Lakefront Trail ("the Path.") The First District correctly held that Defendant, CHICAGO PARK DISTRICT, is not entitled to absolute immunity from causes of action arising out of defects on the Path because the Path does not constitute an "access road" or "trail" under Section 3-107 of the Act. It also correctly held that Plaintiff sufficiently pleaded and established Defendant's willful and wanton conduct under Section 3-106 such that the trial court's adjudication of the issue as a matter of law warranted reversal.

The Court should uphold the First District's holdings. Defendant is not entitled to immunity from Plaintiff's cause of action under Section 3-107(a) because the General Assembly intended to limit Section 3-107(a)'s application to access roads for primitive, undeveloped land intended for enjoyment in its natural state. The General Assembly evidenced its intent through the unambiguous plain language of the statute, which immunizes "[a]ny road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas." 745 ILCS 10/3-107(a). Illinois law and commonly understood rules of syntax and usage dictate that the adjective "primitive" modify each noun in the following series. The Path does not provide access to any primitive camping, recreational, or scenic areas; Section 3-107(a) thus does not apply to the *instant* matter.

Similarly, Section 3-107(b) does not apply because the General Assembly intended to limit its application to the types of trails specifically listed within the statute. Its unambiguous plain language evidences the General Assembly's intent to immunize "[a]ny hiking, riding, fishing or hunting trail." 745 ILCS 10/3-107(b). The words "hiking," "riding," "fishing," and "hunting" are present participles that serve as coordinate adjectives; each word equally modifies the noun "trail." Section 3-107(b) also does not apply to the *instant* matter because the Path is not a hiking, riding, fishing, or hunting trail.

The Path does not constitute an "access road" or "trail" under Section 3-107. The Court should view the Path identically to any other roadway, sidewalk, or public way under Section 3-102 and apply Section 3-102's codified ordinary negligence standard to Plaintiff's cause of action. The Path possesses official status as a designated bicycle path. Defendant placed official designations and markers for cyclists on the Path, and considers it a "primary transportation corridor for bicycle commuters" and "an integral part of Chicago's bicycle transportation network." (R. C. 493). Beyond intending and permitting cyclists' non-recreational use of the Path, Defendant and other municipalities actively promote and encourage the Path's use by commuters. The City of Chicago intends to create a 645-mile, fully integrated bicycle path network to encourage non-recreational use of bicycles upon municipal property. The State of Illinois possesses an identical vision. Such municipal

intent belies the logic of treating bicycle paths as "recreational" property under Section 3-106.

Illinois public policy also favors treating the claims of cyclists injured on municipal bicycle paths identically to claims of other classes of intended and permitted users of municipal public ways. The Chicago Municipal Code and Illinois Code view these classes of persons identically and Defendant and other municipal entities view bicycle paths analogously to roadways, sidewalks, and other municipal pathways. Accordingly, no rational basis for treating these identically situated groups differently by applying requiring different standards of proof for their injury claims exists.

Finally, the Court should affirm the First District's holding that Plaintiff's legally sufficient cause of action should have been adjudicated by jurors and not the trial judge. A jury could find Defendant's lack of actual remedial measures concerning a known danger showed conscious disregard for the safety of others under Illinois law, and Defendant conceded the legal sufficiency of Plaintiff's allegations when it answered the complaint rather than choosing to file a motion to dismiss pursuant to 735 ILCS 5/2-615. The First District's reversal of the trial court on this issue should be upheld because failing to take actual corrective action to repair or warn citizens of a known dangerous condition constitutes willful and wanton conduct under Illinois law.

ARGUMENT

I. Section 3-102's codified ordinary negligence standard applies to Plaintiff's cause of action without exception because he was an intended and permitted user of the Path who should not face a higher burden of proof than an identically situated intended and permitted user of a roadway, sidewalk, or other municipal pathway.

The City of Chicago officially endowed the Path with designated bicycle path status in 1963. Defendant intends and permits cyclist use of the Path. It manifested its intent by creating cyclist-specific markers and designations on the Path itself. The Chicago Municipal Code and Illinois Municipal Code provide identical rights to motorists and cyclists on municipal roadways. The Act treats intended and permitted cyclists on the roadway identically to other classes of intended and permitted users of the roadway. Defendant and other municipal entities view bicycle paths analogously to roadways, sidewalks, and other public ways. Accordingly, no rational basis exists to treat cyclists on bicycle paths differently than all other intended and permitted users of public ways under the Act by subjecting causes of action brought by cyclists injured on bicycle paths to Section 3-106's willful and wanton burden of proof.

a. Defendant both intends and permits cyclists' use of the Path.

Cyclists such as Plaintiff fall within the specific class of persons for whom Defendant both intends and permits use of the Path. The plain language of Section 3-102 imposes a codified ordinary negligence standard upon cases against municipalities by intended and permitted users of municipal property.

745 ILCS 10/3-102(a); *see also Boub v. Township of Wayne, et al.*, 183 Ill.2d 520, 524 (1998), quoting *Vaughn v. City of W. Frankfort*, 166 Ill.2d 155, 160 (1995) ("[s]ection 3-102(a) of the Act only imposes a duty of ordinary care on municipalities to maintain property for uses that are *both* permitted *and intended*.") (emphasis original). Intended users of municipal property are always also permitted users of said property, but permitted users of municipal property do not necessarily amount to intended users. *Berz v. City of Evanston*, 2013 IL App (1st) 123763, ¶ 10, citing *Boub*, 183 Ill.2d at 524. The nature of the property itself, specifically physical manifestations or markers on the property, determines the subject municipality's intended class of users. *Berz*, at ¶ 11, citing *Boub*, 183 Ill.2d at 528. The standard to which the Court holds Defendant under the Act thus turns on whether Defendant outwardly manifested its intention that cyclists use the Path.

i. Cyclists are both intended and permitted users of the Path because Defendant physically marked the Path's pavement with cyclist designations.

Designations for cyclists physically marked on the Path conclusively demonstrate that Defendant intends and permits cyclists' use of the Path. Physical manifestations on municipal property determine classes of intended users under Section 3-102. *Cole v. City of E. Peoria*, 201 Ill. App. 3d 756, 761-62 (3d Dist. 1990). In *Cole v. City of E. Peoria*, 201 Ill. App. 3d 756 (3d Dist. 1990), a minor cyclist sued a municipality after her bicycle tire fell through a storm sewer grate with openings parallel to the edge of a municipal roadway.

Cole, 201 Ill. App. 3d at 757. The grate existed within a four-foot-wide area on the street marked and designated with white lines. *Id.* The trial court granted the municipality's motion for summary judgment, finding immunity under Section 3-105(b) applied over Section 3-102's duty of ordinary care because the subject sewer grate existed as part of a past paving improvement project and was considered safe when the defendant installed it. *Id.* at 759.

The Third District reversed and remanded. *Id.* at 761. The panel found that the plaintiff cyclist amounted to an intended and permitted user of the subject municipal property because the municipality designated and marked the grate-containing area of the roadway with white lines and the plaintiff rode her bicycle within those lines. *Id.* at 762. The panel also found that since the plaintiff raised evidence that the municipality knew of the defective grate and failed to actually correct the defect, she sufficiently met her initial burden of production under the summary judgment standard. *Id.* The defendant municipality's physical markings on the roadway conclusively evidenced its intentions for cyclists' use of that portion of the roadway.

Defendant undisputedly marked the Path with designations for cyclists. The Path contains myriad bicycle-specific signs and markers. Such designations and markers are proudly displayed on the Park District's website page concerning the Path. *See* Chicago Park District, *LakeFront Trail*, http://www.chicagoparkdistrict.com/lakefront-trail/ (last visited June 27, 2017). These physical markers on the Path specifically depict cyclists and

evidence Defendant's intent for cyclists' use of the Path far beyond the non-descript white lines the Third District found conclusive in *Cole*. Cyclists are intended and permitted users of the Path; no contrary argument exists.

b. Cyclists on bicycle paths are legally identical to other classes of intended and permitted users of roadways, sidewalks, and other public ways; Illinois public policy favors treating each class identically under the Act.

The City of Chicago officially endowed the Path with "designated bicycle path" status in 1963.[1] The Path, and bicycle paths generally, do not significantly differ from any other roadway, sidewalk, or other public way. The Path's intended and permitted users should thus be treated identically to intended and permitted users of other roadways, sidewalks, and public ways under the Act. Illinois public policy disfavors arbitrary distinctions that cause different classes of persons to receive different treatment under the same statute. *See Anderson v. Wagner*, 79 Ill.2d 295, 317 (1979), discussing *Grace v. Howlett*, 51 Ill.2d 478 (1972); *Skinner v. Anderson*, 38 Ill.2d 455 (1967); *Harvey v. Clyde Park Dist.*, 32 Ill.2d 60 (1964). Arbitrary distinctions are distinctions between classes that lack any rational basis. *Anderson*, 79 Ill.2d at 317.

No rational basis for disparate treatment between intended and permitted users of bicycle paths and intended and permitted users of similar public ways exists. Each class consists of Illinois citizens that use municipal

[1] *See* City of Chicago, Chicago Streets for Cycling 2020, at 11, available at https://www.cityofchicago.org/content/dam/city/depts/cdot/bike/general/ChicagoStreetsforCycling2020.pdf

public ways for certain purposes. The Chicago Municipal Code holds motorists and cyclists to identical standards of conduct and grants them identical rights upon the roadways. Chicago Municipal Code. § 9-52-010(a). The Illinois Code also holds motorists and cyclists to identical standards of conduct and grants them identical rights upon the roadway. 625 ILCS 5/11-1502. State and local law treats each class of persons the same; the Act should too.

The Act treats intended and permitted users of roadways, sidewalks, and other public ways identically. Section 3-102's codified ordinary negligence standard applies to claims brought by intended and permitted users of public ways. *See*, *e.g.*, *DiDomenico v. Romeoville*, 171 Ill. App. 3d 293, 295-296 (3d Dist. 1988) (pedestrian who tripped in pothole in street while walking to parked car intended and permitted user of street under Section 3-102(a)); *DeMambro v. City of Springfield*, 2013 IL App (4d) 120957 (same); *Larson v. City of Chi.*, 142 Ill. App. 3d 81 (1st Dist. 1986) (roller skater intended and permitted user of sidewalk.) Illinois courts have consistently applied Section 3-102's ordinary negligence standard regardless of the plaintiff's actual intended use of the public way. *See Larsen v. City of Chi*, 142 Ill. App. 3d at 86-87 (rejecting municipality argument that plaintiff's actual use of public sidewalk for recreational purposes should determine scope of immunity under the Act); *Wodjdyla v. City of Park Ridge*, 148 Ill.2d 417, 425-26 (1992) (duty of care not determined by the intent of the user.) As a class, cyclists are identical to motorists, pedestrians, roller skaters, and other intended and permitted

users of public ways. No rational basis for imposing a higher burden of proof upon them under the Act exists.

c. Section 3-106 of the Act arbitrarily subjects cyclists on bicycle paths to a higher burden of proof than identical classes of intended and permitted users of other public ways.

Public policy favors treating all classes of intended and permitted users of public ways, including cyclists on bicycle paths, identically under the Act. The Act should apply the same burden of proof to each class' respective causes of action. As explained above, the Act applies Section 3-102's codified ordinary negligence standard to the claims of intended and permitted users of public ways, even cyclists using municipal roadways within designated lanes. *See Cole v. City of E. Peoria*, 201 Ill. App. 3d 756, 761-62 (3d Dist. 1990). Section 3-106 of the Act, however, arbitrarily subjects cyclists using marked and designated bicycle lanes to a higher standard of proof than it does cyclists using municipal roadways within designated lanes. The sole criteria governing which standard of proof applies to a cyclist's cause of action is the location of the injury-causing defect. No rational basis for the Act imposing different standards of care between identical classes of intended and permitted public way users exists because no rational distinction between "recreational" bicycle paths and "non-recreational" bicycle paths exists.

Section 3-106 applies a willful and wonton standard of proof to claims arising out of defects on bicycle paths and states:

> "Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106.

This section immunizes public entities for ordinary negligence to encourage the development and maintenance of public parks, playgrounds, and similar recreational areas. *Lewis v. Jasper Cty. Comm. Unit School Dist. No. 1, et al.*, 258 Ill. App. 3d 419, 422 (5d Dist. 1994). It does not immunize Defendant or other park districts from all tort claims, nor does apply to all public recreational property. *Rexroad v. City of Springfield,* 207 Ill.2d 33 (2003) (despite General Assembly's rationale for Section 3-106, immunity did not apply to non-recreational pathways on school property that provided access to recreational property); *Larson v. City of Chicago,* 142 Ill. App. 3d 81, 87 (1st Dist.1986) (Section 3-106 was not intended to address every injury involving public recreational property and did not apply to roller skater on sidewalk); *John v. City of Macomb,* 232 Ill. App. 3d 877, 881 (3d Dist. 1992) (applying *Larsen* court's logic despite statutory amendment to Section 3-106); *Adamczyk v. Township High Sch. Dist. 214*, 324 Ill. App. 3d 920 (1st Dist. 2001) (parking lot adjacent to school gymnasium not recreational property

under Section 3-106.) The intended nature of public property is often difficult to ascertain because public property often serves more than one intended use; the determination is thus made on a case-by-case basis. *Adamczyk*, 324 Ill. at 926.

i. Any distinction between "recreational" and "non-recreational" bicycle paths is arbitrary because bicycle paths serve the same purpose as other public ways and Defendant and other municipal entities view bicycle paths analogously to all other public ways.

The Act should treat bicycle paths like roads, sidewalks, and other public ways instead of treating them like parks, playgrounds, or gymnasiums because municipalities not only intend and permit non-recreational use of bicycle paths –they actively promote and encourage such use. Defendant and other municipalities view bicycle paths analogously to roadways, sidewalks, and other public ways: each exists as an integral part of larger transportation networks.

Bicycle paths, including the Path, are identical to all other public ways because they are commuter routes increasingly relied upon by both citizens and municipalities. Defendant itself views the Path as a "primary transportation corridor for bicycle commuters" and "an integral part of Chicago's bicycle transportation network." (R. C. 493). Defendant's current work on the Path includes installation of a multi-million dollar dedicated, asphalt bicycle path for commuters. *See* City of Chicago, Press Release,

https://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2017/may/LFTSeparation.html. Defendant's "commuter lane" overhaul of the Path evidences its intentional dedication to promoting and encouraging intended and permitted non-recreational use of the Path. It also evidences Defendant's intention that commuters use the Path like they would roadways, sidewalks, or other public ways.

Defendant is not the only Illinois municipality intentionally promoting intended and permitted non-recreational use of bike paths. The City of Chicago recently unveiled its vision of a 645-mile, fully integrated bicycle path network connecting each of its neighborhoods. The plan touts the City of Chicago's goal to become the nation's most "bike-friendly" city. *See* City of Chicago Department of Transportation, Chicago Streets for Cycling Plan 2020, at 7, https://www.cityofchicago.org/content/dam/city/depts/cdot/bike/general/ChicagoStreetsforCycling2020.pdf. The City desires further increase of the amount and percentage of persons commuting to work each day via bicycle. *Id.* at 10. The plan evidences other Illinois municipalities' intentional dedication to promoting and encouraging intended and permitted non-recreational use of the bicycle paths. It also evidences bicycle paths' essential role and ubiquity in municipal transportation networks. The Chicago Department of Transportation clearly views municipal bicycle paths analogously to its existing roadways, sidewalks, and other public ways.

The State of Illinois similarly recognizes cycling as an ever-growing means of transportation. It too actively promotes and encourages intended and permitted non-recreational use of bicycle paths within the State. The Illinois Department of Transportation released the Illinois Bike Transportation Plan in 2014. *See* State of Illinois, Illinois Department of Transportation, Illinois Bike Transportation Plan, http://www.idot.illinois.gov/transportation-system/transportation-management/planning/illinois-bike-transportation-plan. The plan sought to establish "a framework for the State to address the changing transportation trends while enhancing safe and sustainable transportation options in Illinois." *Id.* Much like the City of Chicago's plan, the State's plan focuses on developing existing bicycle paths and creating additional bicycle paths as part of a comprehensive transportation network. *Id.* The Illinois Department of Transportation, like the Chicago Department of Transportation, clearly views municipal bicycle paths analogously to its existing roadways, sidewalks, and other public ways.

Illinois public policy favors treating the claims of cyclists injured on municipal bicycle paths identically to claims of other classes of intended and permitted users of municipal public ways. The Chicago Municipal Code and Illinois Code view these classes of persons identically and Defendant and other municipal entities view bicycle paths analogously to roadways, sidewalks, and other municipal pathways. Accordingly, no rational basis for treating these

identically situated groups differently by applying requiring different standards of proof for their injury claims exists.

II. The General Assembly intended to limit Section 3-107's application to primitive municipal property intended to be used in its natural state; the General Assembly did not intend to absolutely immunize paved, maintained bicycle trails intended to be used as public ways.

The Court should affirm the First District's holding because the General Assembly did not intend Section 3-107(a) or (b)s' application to maintained municipal bicycle paths. As noted above, Defendant and other municipal entities consider bicycle paths analogous to other public ways and actively encourage non-recreational citizen use of bicycle paths as commuter pathways. The General Assembly did not enact Section 3-107 to immunize municipal entities from injuries occurring on commuter pathways that municipal entities intend and expect their citizens to traverse daily. It intended the opposite by limiting Section 3-107's immunity to undeveloped, primitive land that municipal entities expect their citizens to enjoy in its natural state. Defendant's attempt to classify its bicycle pathway, which it views as an important, well-traversed commuter pathway, analogously to a horse-riding trail or game trail lacks any support in the plain language of the Section 3-107 and is belied by Section 3-107's purposes.

a. Section 3-107(a)'s plain language unambiguously limits its application to access roads to primitive land.

The First District correctly found that Section 3-107(a) only immunizes roads that provide access to primitive land. Statutory interpretation requires courts to ascertain the General Assembly's intent. *Brunton v. Kruger*, 2015 IL 117663, ¶ 24. Statutory language best reflects the General Assembly's intent. *Id.* Section 3-107 reads:

> Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street (2) county, state or federal highway or (3) a township or other road district highway. 745 ILCS 10/3-107(a)

The First District centered the issue of Section 3-107(a)'s application on the legislature's intended meaning of the word "primitive." *Cohen v. Chi. Park Dist.*, 2016 IL App (1st) 152889, at ¶ 30. Plaintiff argued that the word "primitive," as an adjective, modified each noun ("camping," "recreational," and "scenic") immediately following it. *Id.* Defendant argued that "primitive" only modified the first noun, "camping," that followed it, and that the General Assembly would have repeated the adjective "primitive" before each noun in the series if it intended such application. *Id.* The First District found each interpretation reasonable, and thus turned to other aids of statutory interpretation to ascertain the legislature's intent. *Id.* at ¶ 38.

The First District was too generous to Defendant's interpretation of Section 3-107 because proper usage of the English language only supports one interpretation of Section 3-107(a)'s plain language: Plaintiff's interpretation.

Defendant's brief to this Court repeats its previously rejected argument. (Defendant's Brief, at 12) ("[i]f the legislature wanted to limit the language in Section 3-107(a) to "primitive recreational" and "primitive scenic" areas, it would have drafted the Section as such. However, because "primitive" is included only before the word "camping," it cannot be read as modifying any other word than "camping.")

Defendant's argument is simply incorrect; the opposite proposition, which is also the basis of Plaintiff's plain language argument, is actually correct. The word "primitive" as the General Assembly uses it in Section 3-107, is an adjective that modifies a series of nouns: "camping areas," recreational areas," and "scenic areas." 745 ILCS 10/3-107(a). "Under generally accepted rules of syntax, an initial modifier 'will tend to govern all elements in the series unless it is repeated for each element.' The American Heritage Book of English Usage, chapter 2, ¶ 10 (Houghton Mifflin, 1996); *see also Lyons Twnshp. ex rel. Kielczynski v. Village of Indian Head Park*, 2017 IL App (1st) 161574, at ¶ 26 ("[g]iven the commonly understood principles of grammar and usage, we find the legislature intended for the adjective "oral" to modify both "promise" and "misrepresentation." The fact that the disjunctive term "or" was used does not negate the legislature's ability to use one adjective to modify multiple nouns.")

The General Assembly does not include an adjective for each noun it intends to modify in each statute it enacts because doing so violates commonly understood principles of grammar and usage. Defendant's belief that the

General Assembly must draft statutes in such a manner lacks any authority in grammar, usage, or Illinois law, which renders it unreasonable. Common usage and rules of syntax support only one interpretation of Section 3-107(a): Plaintiff's interpretation. Section 3-107(a) is thus unambiguous and the Court should apply its plain text to exclude the Path from its scope. *See Kaider v. Hamos*, 2012 IL App (1st) 111109, ¶ 11 ("a statute is not ambiguous simply because the parties disagree as to its meaning.")

b. Section 3-107(b)'s plain language unambiguously limits its application to hiking, riding, fishing, and hunting trails and Defendant does not claim the Path is a hiking, riding, fishing, or hunting trail.

Section 3-107(b)'s plain language unambiguously limits its application to specifically enumerated wildlife trails and the Path is not a wildlife trail. Section 3-107(b)'s plain language immunizes municipalities for causes of action arising from conditions of "[a]ny hiking, riding, fishing or hunting trail." 745 ILCS 10/3-107(b). The words "hiking," "riding," "fishing," and "hunting" are present participles that serve as coordinate adjectives; each word equally modifies the noun "trail." *See* Gary Lutz and Diane Stevenson. *Grammar Desk Reference*, pp. 209-210 (2005). Accordingly, Section 3-107(b) is unambiguous; it only applies to four types of trails. The Path does not constitute a hiking, riding, fishing, or hunting trail and Defendant does not argue that the Path is actually a hiking, riding, fishing, or hunting trail. Defendant instead focuses its argument on the definition of the word "trail." (Defendant's Brief, 15-18). This argument lacks relevance because Section 3-107 unambiguously limits

immunity to specifically-listed trails. Defendant's failure to argue that the Path is either a hiking, riding, fishing, or hunting trail thus serves as an admission that Section 3-107(b) does not apply to the Path.

III. The First District correctly reversed that the trial court's improper adjudication of Plaintiff's cause of action as a matter of law.

The First District correctly held that jurors could find Defendant's lack of actual remedial measures concerning a known danger showed conscious disregard for the safety of others. Section 1-210 defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or, which if not intentional, shows an utter indifference to or conscious disregard for the safety of others on the property." 745 ILCS 10/1-210. The First District's reversal of the trial court on this issue should be upheld because failing to take actual corrective action to repair or warn citizens of a known dangerous condition constitutes willful and wanton conduct under Illinois law.

a. The First District correctly found that Defendant's course of action may constitute willful and wanton conduct under Illinois law.

The First District correctly found that Defendant's failure to take actual corrective action concerning a known dangerous defect in a timely manner constitutes willful and wanton conduct under Illinois law. Defendant's knowledge of the subject defect and failure to take actual corrective action to repair the defect or warn citizens of its existence is beyond dispute. The First

District thus properly applied *Palmer v. Chi. Park Dist.*, 277 Ill. App. 3d 282, 284 (1st Dist. 1995) to the *instant* matter. *Cohen v. Chi. Park Dist.*, 2016 IL App (1st) 152889, at ¶ 55.

In *Palmer*, the trial court dismissed a plaintiff's complaint alleging willful and wanton conduct because it found allegations that the Park District knew of a defect on its property for three months but failed to repair, warn of, of protect against the defect did not sufficiently establish the Park District's conscious disregard for the safety of others. *Palmer v. Chi. Park Dist.*, 277 Ill. App. 3d 282, 283 (1st Dist. 1995). The First District reversed, finding Plaintiff's allegations, taken as true, established the Park District's willful and wanton conduct because "defendant knew or should have known of the dangers posed by the fallen fence and yet failed to implement remedial measures." *Id.* at 284.

Defendant undisputedly knew of the dangers posed by the subject defect and undisputedly failed to actually implement remedial measures. Defendant possessed knowledge of the subject defect in Spring 2013. (R. C 273; C 453, pp. 36-37; C 454, p. 38). Defendant also knew the defect was "severe," in need of repair, dangerous, and needed repair on an emergency basis. (R. C 452, p. 30; R. C 456, pp. 46-47; R. C 447, pp. 64-65). Despite this knowledge, Defendant only planned to repair the defect. (C 436, at p. 64; C 454, at p. 39). Defendant did not actually implement its repair plans until after Plaintiff's fall, which occurred months later. (R. C 455, at p. 45). Defendant's complete failure to

actually implement its planned remedial measures distinguishes the *instant* matter from its cited authority.

Defendant heavily relies upon *Lester v. Chi. Park Dist.*, 159 Ill. App. 3d 1054, 1055 (1st Dist. 1987) and other similar authorities for the proposition that Illinois law did not require it to competently implement remedial measures. (Defendant's Brief, 19-21.) In those cases, however, the defendant entities actually implemented remedial measures. *See*, *e.g.*, *Lester v. Chi. Park Dist.*, 159 Ill. App. 3d 1054, 1056 (1st Dist. 1987) (defendant park district actually attempted to repair holes and ruts in field.) Here, Defendant did not actually implement remedial measures; it only planned to implement remedial measures. Defendant cannot exculpate itself with evidence of remedial measures that it never actually undertook. Accordingly, *Lester* and Defendant's other cited authorities do not apply, and the First District correctly applied *Palmer*. The Court should affirm the First District's holding.

b. The First District correctly reversed the trial court's improper adjudication of Plaintiff's cause of action because Illinois law requires juries to adjudicate factual issues raised by legally sufficient causes of action alleging willful and wanton conduct.

High summary judgment standards in cases involving allegations of willful and wanton conduct exist for a reason. Summary judgment in such cases is rare. *Robles v. City of Chi.*, 2014 IL App (1st) 131599, ¶ 17. Trial courts only remove the factual determination of whether conduct constituted willful and wanton conduct if no verdict based upon the plaintiff's proffered evidence

could ever stand. *Barr v. Cunningham*, 2017 IL 120751, ¶ 15. Trial courts may not resolve conflicts in the evidence or assign weight to certain evidence in determining whether a willful or wanton charge should reach jurors. *Robles*, at 17.

This high summary judgment standard exists because it is identical to 735 ILCS 5/2-615's standard, and 735 ILCS 5/2-615 affords defendants the opportunity for dismissal of legally insufficient claims at an early stage of the pleadings. Each standard requires the plaintiff to present facts upon which a jury could render a verdict in the plaintiff's favor. *Thurman v. Champaign Park Dist.*, 2014 IL App (1st) 131599, ¶ 8, quoting *Tedrick v. Community Resource Center*, *Inc.*, 235 Ill. 2d 155, 161 (2009) ("a cause of action should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief."), compare *Barr v. Cunningham*, 2017 IL 120751, ¶ 15 ("[a] verdict may be directed on this issue if the evidence, viewed in its light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.") Cases alleging willful and wanton conduct are only decided as a matter of law when either pleadings or proofs are legally insufficient such that no verdict can stand upon them.

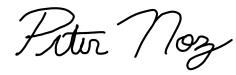
Plaintiff's pleadings and proofs were legally sufficient and his cause of action should be adjudicated by a jury. Defendant conceded the legal sufficiency of Plaintiff's willful and wanton allegations when it answered

Plaintiff's complaint rather than filing a motion to dismiss pursuant to 735 ILCS 5/2-615. (R. C 005; C 025). Put another way, Defendant's answer conceded that a jury could render a verdict based upon proof of the facts alleged in Plaintiff's complaint. *See Thurman*, at ¶ 8, 10. As noted above, Plaintiff raised undisputed evidence of each allegation contain in his complaint; specifically, that Defendant knew of the dangers posed by the subject defect yet failed to actually implement remedial measures over a period of months. Illinois law would almost certainly support a jury verdict based upon that evidence. *See Palmer v. Chi. Park Dist.*, 277 Ill. App. 3d 282, 283 (1st Dist. 1995). The Court should affirm the First District's reversal of the trial court adjudication of Plaintiff's cause of action because Plaintiff's pleadings and proofs are legally sufficient.

CONCLUSION

The Court should affirm the First District's reversal of the trial court's judgment and remand for further proceedings.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 345, 341(a), and 345(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, and the certificate of service is twenty-four (24) pages.

Peter Noz

Peter C. Nozicka

No. 121800

In the Supreme Court of Illinois

ISAAC COHEN,	)	On Appeal from the Appellate
	)	Appellate Court of Illinois,
Plaintiff/Appellee.	)	First Judicial District,
	)	No. 15-2889
vs.	)	
	)	There Heard on Appeal from the
CHICAGO PARK DISTRICT,	)	Circuit Court of Cook County, Illinois,
	)	Court No. 14 L 005476,
Defendant/Appellant.	)	Honorable William E. Gomolinski,
	)	Judge Presiding

NOTICE OF FILING and CERTIFICATE OF SERVICE

NOTICE OF FILING

TO: Elliot R. Schiff, Esq. Schiff Gorman, LLC One East Wacker Drive Suite 1100 Chicago, Illinois 60601 (312) 345-7202 Email: eschiff@schiff-law.com

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Please take note that on this 11TH DAY OF July 2017, the undersigned filed with the Clerk of the Supreme Court of Illinois the attached ILLINOIS TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE ISSAC COHEN, a copy of which is hereby served on you. Upon receipt of acknowledgement that the documents have been accepted for filing, we will submit the required number of copies bearing the file stamp within five (5) days.

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and states that the undersigned electronically filed with the Clerk of the Supreme Court of Illinois the attached ILLINOIS TRIAL LAWYERS ASSOCIATION *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE ISSAC COHEN with the above court and that he also served copies in the above entitled via Odyssey File & Serve and electronic mail on the 11th day of July 2017.

Peter Nozicka