No. 125017

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

DENNIS TZAKIS, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, A PROPOSED CLASS ACTION	)	
Plaintiffs/Appellees	)	On Leave to Appeal from the Appellate Court of Illinois, First Appellate District, Fourth Division, No. 1-17-0859, There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Circuit Court Case No. 09 CH 6159 Consolidated with 10 CH 38809, 11 CH 11 CH 29586, 13 CH 10423 and 14 CH 6755,
v.	)	
BERGER EXCAVATING CONTRACTORS, ET AL., INCLUDING A PROPOSED, DEFENDANTS CLASS,	)	
Maine Township, City of Park Ridge and Metropolitan Water Reclamation District Presiding Of Greater Chicago,	)	Honorable Sophia H. Hall Judge Presiding
Defendants/Appellants.	)	

PLAINTIFFS-APPELLEES' REPLY TO DEFENDANTS-APPELLANTS' RESPONSE TO PLAINTIFFS-APPELLEES' REQUEST FOR CROSS-RELIEF

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PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF REQUEST FOR CROSS RELIEF

I. The Public Duty Rule Has Never Been Applicable To A Claim Arising Out Of A Condition Created By The Construction Of Public Works.

Even if the LPEs retained any right to assert the Public Duty Rule despite *Coleman*, their argument fails because the Public Duty Rule has never been applied where a plaintiff's claim arose out of the construction of public improvements. *Belton v. Forest Preserve District Of Cook County*, 407 Ill.App.3d 409 (1st Dist. 2011) leave to appeal denied 949 N.E.2d 1096 (2011). *Belton* rejected the District's argument that the Public Duty Rule negated its maintenance duties under Section 3-102 and that the District's duties were limited to certain users of its property and did not encompass persons on adjacent property such as Belton driving on the adjacent highway. Noting that *Van Meter v. Darian Park District*, 207 Ill.2d 359 (2003) and other cases evidenced "considerable, well-settled authority" indicating that "public entities are liable for injuries occurring on adjacent or abutting land", the Court stated:

> "If it were true that a public entities' duties to maintain its property were owed to certain users of its property and no one else in the world, the *Van Meter* line of authority would not exist." *Belton* at 418

See also *City of Chicago v. Seben,* 165 Ill 371, 377-378 (1987) "It is the duty of a municipal corporation, which exercises its power of building sewers, to keep such sewers in good repair…"; *In re Chicago Flood Litigation*, 176 Ill.2d 179, 194 (1997) " 'A corporation acts judicially…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" citing *Seben,* 165 Ill. at 377–78; *Van Meter* at 390. *Belton* continued:

> "**The District argues the 'Illinois common law [public duty rule] firmly supports a policy of no duty to individuals,'** and that since Belton in an individual, he can never establish the duty element of his tort claim. This is not an accurate statement. **If it was an accurate statement of the rule, then the rule would conflict with most of municipal liability law**, including the immunity statute and precedent discussed above which the District itself has argued indicate the District owes property maintenance *duties* to individual intended and permitted users of its property. **If the District really owed no duties to individuals, then there would be no need for the statutory immunities.** We are unpersuaded by the District's alternative argument."
>
> *Belton* at 426 (emphasis added).

Application of the Public Duty Rule herein would also contravene municipal liability law spanning over 130 years. Similarly, if the Public Duty Rule were applicable herein, it would eliminate the need for the statutory immunities which the LPEs also assert before this Court. (See LPEs' Brief at pages 41-44).

Therefore, even if the decision in *Coleman* were not applicable to this litigation, the Public Duty Rule could not be applied to the Plaintiffs' damage claims because those claims arise out of damages caused by the LPEs' public works projects to which the Public Duty Rule has never been applied in the history of Illinois law.

II. The LPEs Are "Possessors" Of The Land Adjacent To Plaintiffs' Homes Within The Meaning Of Tort Law Because They Control That Land And, Therefore, Are Liable For The Catastrophic Damages Caused By The Artificial Conditions They Created And Operated On That Land.

The LPEs argue that they are neither "landowners" nor "possessors" of any property adjacent to the Plaintiffs' and, therefore, Plaintiffs' claims must fail. In the first instance, while the LPEs' deny ownership or possession, the Plaintiffs' Complaint alleges the District and Park Ridge owned, operated, managed…and/or controlled all drainage

structures in Park Ridge including the Basins and tributary sewers from the South Development:

> 381. This Defendant **owned,** operated, managed, maintained, designed, planned, constructed **and/or controlled** drainage components and/or drainage structures from which the excess accumulated stormwater (the nuisance) invaded the Plaintiffs' persons, homes and properties, including owing, operating, managing, maintaining and/or controlling the following properties and their drainage structures and/or creating and/or causing the creation of the nuisance of excess accumulated stormwater from these properties: (a) the Advocate North Development Property, including but the Basins and (b) the Advocate South Development Property including the Dempster Basin Stormwater Subsystem ….
> (Complaint at Page 99, SupC 128) (emphasis added)

In addition, Plaintiffs also allege that the District and Maine Township owned, operated, managed,…and/or controlled all drainage components in Maine Township including the Robin Neighborhood Main Drain (Points C1/C2 through E on the Robin-Dee-Community-North-Development-Map (Complaint Exhibit 1-RA218, SupC10)), the Dee Neighborhood Stormwater Pipe (Points E-G) as follows:

> 388. This Defendant **owned**, operated, managed, maintained, designed, planned, constructed **and/or controlled** drainage components and/or drainage structures from which the excess accumulated stormwater (the nuisance) invaded the Plaintiffs' persons, homes and properties, including owing, operating, managing, maintaining and/or controlling the following properties and their drainage structures and/or creating and/or causing the creation of the nuisance of excess accumulated stormwater from these properties: (a) the Main Drain's Robin Neighborhood Subsegment including the Howard Court Culvert [1]; (b) the Main Drain's Dee Neighborhood Subsegment including the undersized 60" Dee Neighborhood Stormwater Pipe [2]; and (c) the other components of the Main Drain's Robin-Dee Community Segment … (emphasis added).
> (Complaint at Page 100, SupC 129)

[1] Between Points C1/C2 and E on Exhibit 1-Robin-Dee Community-North Advocate Development Map (RDC-NAD Map, RA218, SupC 10).

[2] Between Points E and G on Complaint Exhibit 1 (RDC-NAD Map, RA218,SupC10).

See also, Plaintiffs' allegations at Paragraph 354 as to the District and Park Ridge regarding the PCSS property within Park Ridge.

Furthermore, District ownership, possession and/or control of all PCSS structures is pled within the following allegations of Plaintiffs' Complaint:

> 969. …As the regional local public entity charged with multi-jurisdiction operation of stormwater management, the District **owns and/or controls** all drains, basins, structures, components and other stormwater improvements within the public improvement referred to herein as the "Prairie Creek Stormwater System" ("PCSS") of the Prairie Creek Watershed ("PCW"). (¶969:RA93.) (emphasis added).

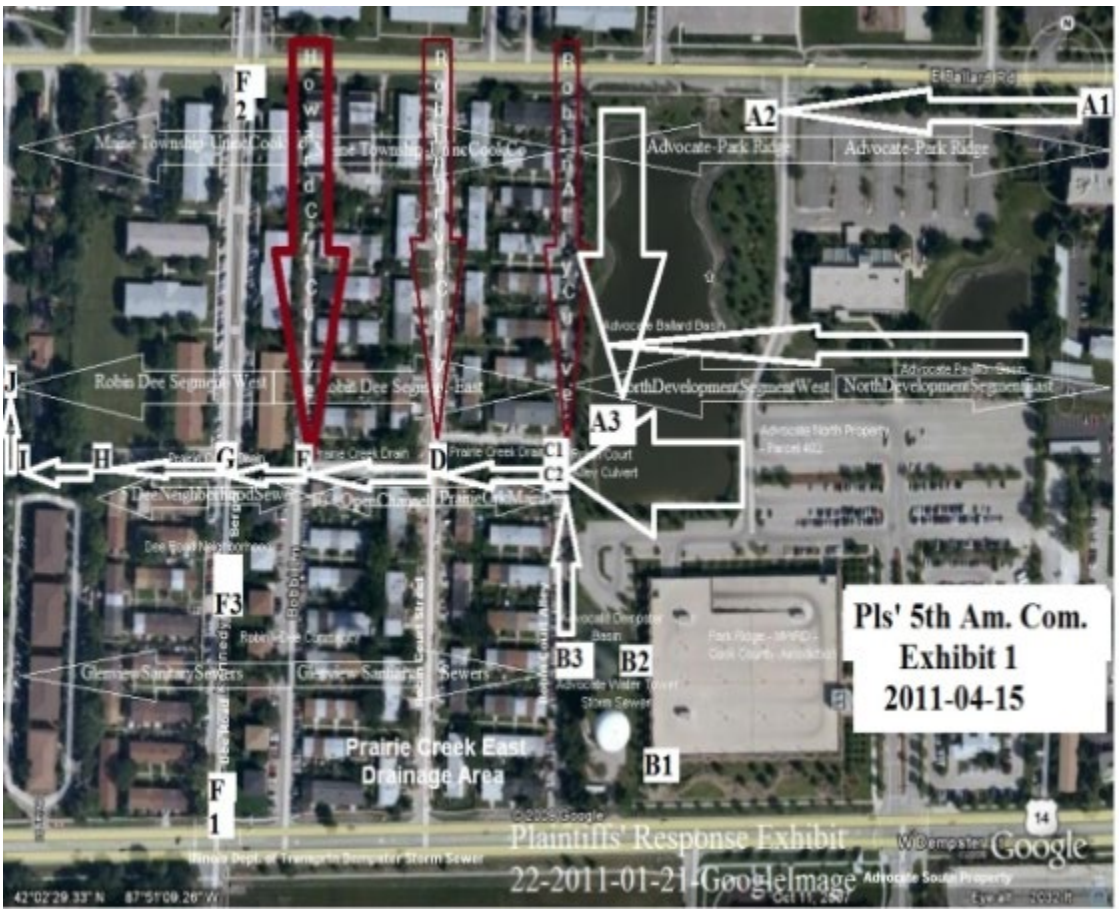
Similar allegations are also made as to both the District and Park Ridge with the Park Ridge municipal boundaries including, critically, the ownership, possession and control of the tributary street stormwater sewers owned by Park Ridge which drain to the PCSS Main Drain on the North Development:

> 547. Control of PCSS Components within Park Ridge Jurisdiction: If this defendant (the District, Park Ridge, Maine Township or County) had jurisdiction over the Prairie Creek Stormwater System including its real property public improvement components in Park Ridge, by its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, this Defendant **owned, possessed and controlled the real property and related estates and interests** in these Prairie Creek Stormwater System properties within Park Ridge: (a) the North Development Main Drain and its connected, related stormwater sewer components; (b) the Ballard Basin and the Pavilion Basin which are the North Development Main Drain's primary structures; and (c) (as to Park Ridge or Maine Township and not the District or County) tributary stormwater sewers to the Ballard and Pavilion Basins and/or North Development Main Drain. (RA 80) (emphasis added).

Likewise, similar allegations are made against the District and Maine Township including ownership, possession and control of all stormwater structures in Maine Township including the Maine Township tributary stormwater sewers such as between Points F1 and G sewer draining into the Dee Neighborhood Stormwater Pipe between Points E and H:

> 548. Control of PCSS Components within Maine Township Jurisdiction: If this defendant (the District, Park Ridge, Maine Township or County) had jurisdiction over the Prairie Creek Stormwater System (PCSS) including its real property public improvement components in Maine Township, by its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, this Defendant **owned, possessed and controlled the real property and related estates and interests** in these PCSS properties Maine Township: (a) the Robin-Dee Community Main Drain including the Robin Neighborhood Main Drain and the Dee Neighborhood Main Drain and their Subsegment systems; and (c) (as to Park Ridge or Maine Township and not the District or County) tributary stormwater sewers to the Robin-Dee Community Main Drain including the Robin Neighborhood Main Drain and Subsegment system components and the Dee Neighborhood Main Drain and Subsegment system components. (RA 80-81) (emphasis added).

All these sewers, drains and retention basins under the control of the LPEs' are adjacent to the Plaintiffs' Robin-Dee Community property as is evident from Exhibit 1 to Plaintiffs' Amended Fifth Amended Complaint set forth below:



Secondly, the LPEs' argument that ownership is the basis for duty is fundamentally flawed because it is premised upon property law – not tort law – as demonstrated by the LPEs' citation to *Nationwide Financial, L.P. v. Pobuda*, 2014 IL 116 116717 for the proposition that "easements are non-possessory property interests". The principle of law address in *Nationwide* does not, and cannot control this case, because it involved application of property law as it pertained to a party's property rights, by way of an easement, to adjacent land owned by another. The decision in *Nationwide Financial* did not involve application of tort law to a plaintiff's tort claim to damages caused by a

dangerous artificial condition created by the possessor of the land. The LPEs' reliance on *Nationwide Financial* is, therefore, entirely misplaced.

The issue here is what does it mean to be a "possessor" of land under tort law. In that regard, an examination of pertinent provisions of the Restatement (Second) of Torts which have been adopted by this Court and the Appellate Courts, demonstrates that the "possessor of land" has a different meaning under tort law, more specifically one may be a "possessor" of land with no legal interest in the property.

As discussed at Page 73 of Plaintiffs' Request For Cross Relief, the Appellate Court in *Dealers Service & Supply Co. v. St. Louis National Stockyards Co*, 155 Ill.App.3d 1075, 1079 (5th Dist. 1987) applied the Restatement (Second) of Torts, Section 364 (1975) which focused upon the duty of a "possessor of land" stating as follows:

> "A possessor of land is subject to liability to others outside the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm".

The LPEs' argue that the "adjacent landowner duty is generally owed only by landowners and, citing to *Dealers*, state their view of the law is justified because "an owner can both possess and control their land".

However, the Restatement of Torts nowhere defines the "possessor of land" has being limited to the landowner. Likewise, neither this Court nor the Appellate Courts limit application of the Restatement of Torts as it pertains to negligent activities by a "possessor of land" to the actual landowner or to a person holding a possessory interest in the land. As an example, the decision in *Dealers* was followed by the Supreme Court's decision in *Deibert v. Bauer Brothers Construction*, 141 Ill.2d 239, 241(1990), also cited at Page 73 of Plaintiffs' Request For Cross Relief. In *Deibert*, the Suprme Court,

applying Restatement (Second) of Torts, Section 343 and Section 343A, held that a general contractor -- who did not own the land nor hold any possessory interest in the land under principles of property law -- was a "possessor of land" under principles of tort. Therefore, the general contractor was liable to the employee of a subcontractor injured as a result of a dangerous condition created on that land by the general contractor.

Thus, ownership of the land is not the predicate for tort liability. Moreover, as established by *Deibert*, a "possessor of land" does not, under principles of tort law, require the defendant hold any actual property interest in the land in order to be subject to tort liability for a dangerous condition the defendant created on that land.

This concept of who will be deemed a "possessor of land", as it pertains to tort liability, also applies to the "possessor of land" who creates a dangerous condition on the land which causes harm to others outside of that land. In *Hammond v. SBC Communications, Inc.* 365 Ill. App.3d 879, 889-890 (1st Dist. 2006) the Appellate Court accepted Section 363 of the Restatement (Second) of Torts for the principle that a "possessor of land" in an urban area or residential area could be held liable for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm caused by the condition of trees on the land near a highway being used by others outside the land. In *Hammond*, the plaintiff brought an action against telephone companies for injuries caused by a tree which fell across the road and struck his vehicle. The tree was located on a right-of-way easement on the side of the road held by the telephone companies. The Court ruled that the Defendants could be considered "possessors" of land for the limited purpose of their easement under Section 363(2) of the Restatement (Second) of Torts

What is important for purposes of this case is what it means to be a "possessor of land" under Chapter 13 of the Restatement (Second) of Torts which presents tort principles pertaining to the subject entitled: "Liability for Conditions and Use of Land" . In that regard *comment d* to§§ Section 363 provides the answer, stating as follows:

> "The words "possessor of land" as used in the Restatement of this Subject are defined in § 328E."

Section 328E of the Restatement (Second) of Torts defines "Possessor of Land" as follows:

> "A possessor of land is
> (a) a person who is in occupation of the land with intent to control it or
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

The Comment to Section 328E goes on to explain the concept of "possession" in the context of tort law, in the following manner:

> "Possession" has been given various meanings in the law, and the term frequently is used to denote the legal relations resulting from facts, rather than in the sense of describing the facts themselves. It is used here strictly in the factual sense, because it has been so used in almost all tort cases.
>
> The important thing in the law of torts is the possession, and not whether it is or is not rightful as between the possessor and some third person. Thus, a disseisor is a possessor from the moment that his occupation begins, although as between the disseisor and the true owner he is not legally entitled to possession until his adverse possession has ripened through lapse of time into ownership."

It is clear, therefore, that in order to be a "possessor" of land within the meaning of tort law, and more specifically those provisions of the Restatement Of Torts that have been adopted in Illinois, including Section 343, Section 343A, Section 363 and Section 364, the defendant need not hold any property rights or even a lawful interest in the land

– not even an easement. Instead, the defendant need only be an occupier of the land with intent to control it.

In this case, the LPEs clearly occupy the land adjacent to the Plaintiffs' homes because (1) they own the sewers and the land on which the sewers are located such as the tributary street sewers and the main drains and (2) they constructed or were directly involved in the construction of their storm water system on that land. The LPEs further occupy that land adjacent to the Plaintiffs' homes in connection with the ongoing operation of their storm water system. At the same time, it is the artificial creation and control of invading stormwater on land adjacent to Plaintiffs' homes that have repeatedly caused catastrophic flooding damages to the Plaintiffs.

Likewise, Restatement (Third) of Torts, Physical & Emotional Harm, Section 49 defines "possessor" predicated upon control similar to Restatement (Second) of Torts. In that regard, Section 49's Comment a is entitled "*History"* and emphasizes actual control as the test for whether the defendant is a possessor stating: ". … it is administratively easier to use control as the standard than to determine an individual's intent.

Section 49's Comment b is entitled "*Owners*" and reinforces control not ownership stating: "... However, **the critical issue is occupation and control rather than ownership…**" (emphasis added). Equally relevant, as to the issue of ownership and title, Section 49's Comment c is entitled "*Control"* and holds that legal title is not required, stating "…. **An actor who controls land without legal title … is nevertheless a possessor**…." (Emphasis added).

Therefore, with respect to Plaintiffs' argument, at Pages 74-75 of their Request For Cross Relief, that the LPEs are "possessors of land" within the meaning of Section 49

and Section 54 of the Restatement 3rd of Torts, the Plaintiffs are not expanding, what the LPEs claim (at Page 42 of their Response) is their "limited duty", under Illinois tort law. The LPEs are a "possessor of the land" adjacent to Plaintiffs' homes and, therefore, they are liable for the damages caused by the artificial conditions they created on that land.

Nevertheless, while Section 49 and Section 54 of the Restatement (Third) of Torts have not expressly been adopted by this Court, the factual allegations in this case and existing law warrant adoption. Section 364 of the Restatement (Third) of Torts recognized in *Dealers* is substantially similar to Section 54(a) which provides as follows:

> (a) The **possessor of land** has a duty of reasonable care for artificial conditions or conduct on the land that poses a risk of physical harm to persons or property not on the land. (emphasis added).

As stated above, the LPEs clearly occupy the land where their public works structures and improvements are located and they are in control of that land because their ongoing operating of their stormwater system. Therefore, the LPEs hold the position of a "possessor of land", within the meaning of Section 54(a) as well as Section 54(b). At the same time Section 49 of the Restatement (Third) of Torts defines "possessor" predicated on control exactly as defined under Section 328E of the Restatement (Second) of Torts. Therefore, formal adoption of Section 49 and Section 54 of the Restatement (Second) of Torts would be a natural extension of existing of law.

By reason of the foregoing, the Plaintiffs specifically request that this Court adopt the Restatement (Third) of Torts, Physical and Emotional Harm, Sections 54 and 49 in addition to Restatement (Second) of Torts, Sections 364 and 328D per *In Re Marriage of Mitchell,* 181 Ill.2d 169, 177 (1998) and reverse the the Appellate Court's dismissal of Count 25, Count 45 and Count 64 of the Plaintiffs' Amended Fifth Amended Complaint.

III. Plaintiffs Are Entitled To Proceed With Their Claims Based Upon The Codified Duties Owed By The LPEs Under Sections 3-102 and 3-103 Of The Tort Immunity Act.

A. The Purpose Of Section 3-102 Is Not To Grant Immunities Or Defenses.

The LPEs cite to *Monson* at Page 42 of their Brief stating that "the express purpose of the Act was to provide immunities and defenses for local government". While that statement is correct, as a general proposition, it is certainly not correct with respect to Section 3-102 of the Act. This Court clearly stated that "section 3-102 does not grant any immunities". *Monson* at ¶21. Indeed, while the LPEs cite specifically to Paragraph 24 of this Court's Opinion in *Monson*, the Court states at Paragraph 24 that "no court has held section 3-102(a) grants immunities to municipalities". Thereafter, citing to *Wagner v. City of Chicago*, 166 Ill.2d 144, 151-152, this Court went on in Paragraph 24 to state the following:

> "[T]he language in section 3-102(a) is clear; the city has a duty to maintain its property in a reasonably safe condition so that persons using ordinary care are not harmed. ***
>
> ***
>
> *** [T]he purpose of section 3-102(a) is *not to grant defenses and immunities*. Instead, it merely codifies, for the benefit of intended and permitted users, the common law duty of a local public body to properly maintain its roads. *Immunities and defenses are provided in other sections*. [Citation]" (emphasis added.)"

In addition, in *Monson* this Court also recognized that "predicate of a duty on the part of the defendant public entity" under Section 3-102 requires the plaintiff prove "notice of a dangerous condition" as one of the elements, stating:

> "It is the plaintiff's burden to allege and prove all of the elements of a negligence claim, including a duty owed by the defendant, a breach of that duty, and that the breach was the proximate cause of the plaintiff's injuries. *First Springfield Bank*

> *& Trust v. Galman*, 188 Ill. 2d 252, 256 (1999). **Under section 3-102(a), actual or constructive notice of a dangerous condition is an element of a negligence claim.** See *Lansing v. County of McLean*, 69 Ill. 2d 562, 572-73, 1 (1978) (**actual or constructive notice requirement in section 3-102 of the Act is a necessary predicate of a duty on the part of the defendant public entity**); *Glass v. City of Chicago*, 323 Ill. App. 3d 158, 162-64, (2001) (**the plaintiff has the burden to prove actual or constructive notice under section 3-102(a)**). By contrast, the immunities in the Act are affirmative defenses, which the defendant has the burden to plead and prove. ***Monson*** *at ¶23*

It is quite clear that by every interpretation, Section 3-102(a) codifies the elements of a negligence claim allowable against a public entity which is separate and distinct, from an ordinary common law negligence claim.

The LPEs reliance upon *Village of Bloomingdale v. DCG Enterprises, Inc.*, 196 Ill.2d484 (2001) is entirely misplaced because this Court's decision in that case did not involve any claim of negligence against a public entity and, therefore, Section 3-102 was never addressed by the Court.

Based upon the foregoing, it was entirely proper for Plaintiffs to plead Section 3-102 as the basis for the Section 3-102(a) statutory failure-to-maintain-its-property negligence claims generally set out as to all LPEs in Part IV of the Complaint at Paragraphs 558-560 (page 132) and brought against the District at Paragraphs 969-983 (Pages 207-211) and Count 36 at Paragraphs 1010-1072 (Page 224) with comparable averments against Park Ridge at Paragraphs 1105-1115 (Page 243) and in Count 57 at Paragraphs 1194-1198 (Page 243 and against Maine Township at Paragraphs 1234-1243 (Pages 249-250) and in Count 74 at Paragraphs 1312-1314 (Pages 262-263).

B. The Plaintiffs Are Intended And Permitted Users Under Section 3-102 Because System Which Caused The Catastrophic Damages Is A System The Are Charged To Use And Must Rely Upon For Stormwater Drainage.

Section 3–102 states:

> Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe **condition *for the use* in the exercise of ordinary care *of people whom the entity intended and permitted to use the property* in a manner in which and at such times as it was reasonably foreseeable that it would *be used*,..** " (Emphasis added.)
>
> 745 ILCS 10/3–102(a) (West 2004).

It is reasonable to infer from the A5AC that the LPEs all foresaw and actually knew that the Plaintiffs would need to use the LPEs' stormwater management system, the PCSS, during a storm: this is when stormwater drains to the PCSS' main drains from street tributary sewers. As such, Plaintiffs are intended and permitted users given their proper, foreseeable use of the tributary street sewers owned and operated by the LPEs.

Plaintiffs further allege the following with respect to being charged user fees by the LPEs in order to receive stormwater management services, as set forth at Paragraph 25 of their Complaint:

> 25. … **Each of these local public entities receives tax monies and fees from Plaintiffs for the services it provides relating to planning, development, review and/or management of the Prairie Creek Stormwater System public improvement.**

Plaintiffs further allege actual payment of fees for stormwater managements services as set forth at Paragraph 353:

> 353. The Plaintiffs **paid fees and taxes for the stormwater management services based upon the stormwater management services provided by this Defendant and this Defendant collected these fees and taxes from the Plaintiffs for the stormwater management services.**

The fact that the LPEs charge and receive fees from the Plaintiffs supports the inference that the Plaintiffs' are foreseeable "intended and permitted users" of the PCSS.

In addition, the facts demonstrate actual and intended use because the Plaintiffs drain their stormwater into the municipal PCSS through the street sewers under Robin Alley, Robin Court, Howard Court, Bobbi Lane, Dee Road, Briar Court and Carleah Avenue. In turn, these tributary stormwater sewers under the ownership and control of the LPEs drain to the PCSS main drains including the open, 10 foot wide, channelized Robin Neighborhood Main Drain between Points C1/C2 and E and the enclosed 60" Dee Neighborhood Stormwater Pipe traversing the Robin-Dee Community from Points E through G. Ownership of the streets and street sewers is pled. See paras. 25, 363, 362, ***infra***.

Given the fundamental, quasi-contractual relationship between the Plaintiffs and LPEs, the Plaintiffs are the "intended and permitted users" of the PCSS including the street tributary sewers into which Plaintiffs drain their stormwater.

C. The "Intended and Permitted User" Element §3-102(a) Supports Justice Thomas' Analysis That §3-102(a) Has Distinct Proof Elements from The Common-law Duty.

The LPEs' assertion of the not "intended and permitted user" as an element of Plaintiffs' proof to prevail on a statutory Section 3-102(a) claim supports Justices Thomas' observation in ***Monson*** that the elements of a statutory Section 3-102(a) claim are separate and distinct from a common-law claim. Justice Thomas noted that "nonintended and nonpermitted users" are excluded from a claim under Section 3-102(a) in contrast to a common-law duty to maintain claim which does not have the "nonintended and nonpermitted user" limitation:

> …Similarly, subsection (a) removes from liability, in ways not countenanced by the common-law duty, situations involving nonintended and nonpermitted users as well as those involving injury to persons not exercising ordinary care. ***Monson*** at para. 63.

As such, the LPEs' assertion that Plaintiffs are neither intended nor permitted users supports Justice Thomas' recognition that a statutory Section 3-102 claim is not "the common-law duty, simply published in statutory form" [3]but an independent cause of action from the common-law duty to maintain.

D. Section 3-103(a) Codifies A Common Law Duty And Does Not Set Out An "Intended and Permitted" Requirement, Hence, Plaintiffs Should Be Entitled To Proceed With Theirs Claims Based Upon The Duty Codified Under §3-103(a).

Section 3-103(a) does not have an exception for "intended and permitted user" as does Section 3-102(a). Hence, even if it was determined that "intended and permitted user" was not pled, this fact would not affect the application of Section 3-103 to the Plaintiffs' claims.

Secondly, as Plaintiffs acknowledge at Pages 81-87 their Request For Cross Relief, there is no dispute that Section 3-103(a) does not impose any new obligations. However, there can be no dispute based on the authorities cited that Section 3-103(a) does codify the common law duty owed by the LPEs. In this case, Plaintiffs' pleading of Section 3-103(a) does not seek to impose any new obligation – it seeks to plead nothing more than the duty which this Court, the Appellate Court and the LPEs all acknowledge is codified by the statute.

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[3] Justice Gordon concluded relating to Section 3-102(a) that: "The statutory duty *is* the common-law duty, simply published in statutory form". ***Tzakis II*** at para. 60.

IV. Plaintiffs' Common Law Claims Were No5 Dismissed But Merely Stricken Without Prejudice And, Therefore, Should The Court Deny Plaintiffs Right To Recover Damages Under Section 3-102 And Section 3-103 Tort Immunity Act, Plaintiffs Should Be Allowed To Replead And Reassert Those Claims.

The Fifth Amended Complaint (5AC) was the immediate predecessor complaint to the Amended Fifth Amended Complaint (A5AC). The 5AC set out two codified statutory claims under Sect. 3-102(a) and Section 3-103 as to each LPE: Counts 36 and 37 as to the District, Counts 57 and 58 as to Park Ridge and Counts 74 and 75 as to Maine Township. These claims were entitled as follows, using the District counts as an example:

> COUNT 36: DISTRICT: ARTICLE III, SEC. 3-102A STATUTORY DUTY TO MAINTAIN PROPERTY
>
> COUNT 37: DISTRICT: ARTICLE III, SEC. 103 DUTY TO REMEDY DANGEROUS PLAN

These are the counts dismissed by the First District and the subject of the Request for Cross Relief.

The 5AC also set out four common-law negligence claims against the District at Counts 26-29, Park Ridge as to Counts 46-49 and Maine Township at Counts 65-68. Using the counts pled against the District as an example equally applicable to Park Ridge and Maine Township, the common law counts stricken without prejudice were:

> COUNT 26: DISTRICT: NEGLIGENCE BASED UPON FORESEEABLE HARM-STORMWATER AND SANITARY SEWER WATER;
>
> COUNT 27: DISTRICT: NEGLIGENCE: MAINTENANCE AND OPERATION;
>
> COUNT 28: DISTRICT: NEGLIGENT MAINTENANCE AND OPERATION OF THE PCSS PUBLIC IMPROVEMENT AND SANITARY SEWERS; and
>
> COUNT 29: DISTRICT: NEGLIGENT DESIGN: FORESEEABLE HARM DUTIES.

These counts are evident in the A5AC as strike throughs: the actual averments were not deleted from the A5AC. See as an example A5AC Paragraphs 994-1021 (Complaint at Pages 211-216; SUP C 241-246).

The "strike throughs" which appear in the A5AC is that upon filing of the 5AC, the Defendants argued at the Status Hearing on September 27, 2011 that the proposed 5AC exceeded the scope of the order granting leave to amend the Fourth Amended Complaint (4AC). Thereafter, on October 24, 2011, after oral argument, these Counts were "stricken for reasons stated in open court on 9/27/11 **without prejudice** as no leave was granted by the Court to file these new counts". (R234, emphasis added).

Thereafter, the Plaintiffs believing their statutory counts -- which codified the LPEs' common law duties -- were adequate, Plaintiffs proceeded on those statutory claims under Sections 3-102 and 3-103 without requesting leave to refile their common law claims. However, should this Court affirm the Appellate Court's dismissal of Plaintiffs statutory claims they should be granted leave to replead their common law claims.

CONCLUSION

For the forgoing reasons as well as those set forth in the Plaintiffs-Appellees' Brief and Request For Cross Relief, the Plaintiffs-Appellees' request the following relief from this Court as Court:

A) As to the District, reverse dismissal as Count 25 (Adjacent Property Possessor claim), Count 36 (Section 3-102A Statutory Duty to Maintain Claim) and Count 37 (Section 3-103 Statutory Duty to Remedy After-Plan-Execution Dangerous Conditions);

B) As to Park Ridge, reverse dismissal of similar claims in Count 45 (Plaintiffs' Adjacent Property Possessor claim), Count 57 (Sec. 3-102A claim) and Count 58 (Sec. 3-103 claim);

C) As to Maine Township, reverse dismissal of similar claims as to Count 64 (Plaintiffs' Adjacent Property Possessor claim), Count 74 (Sec. 3-102A claim) and Count 75 (Sec. 3-103 claim);

D) Alternatively, should this Court affirm dismissal of Counts , 36, 37, 57, 58, and 74 and 75 (the Section 3-102 and Section 3-103 claims respectively), that this case be remanded with directions that Plaintiff be allowed to amend their Complaint to as to plead the LPEs' breach of their common law duties owed to the Plaintiffs as set forth in Counts 26-29 as to the District, Counts 46-49 as to Park Ridge and Counts 65 – 68 as Maine Township; and

E) That this Court adopt the Restatement (Third) of Torts, Physical and Emotional Harm, Sections 54 and 49 and/or Restatement (Second) of Torts, Sections 364 and 328D per *In Re Marriage of Mitchell,* 181 Ill.2d 169, 177 (1998).

June 4, 2020

Respectfully submitted,

SPINA, McGUIRE & OKAL, P.C.

By /s/ *Timothy H. Okal*
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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I, Timothy H. Okal, certify that this Reply Brief conforms to the requirements of Rules 341(a) and (b). The length of this Reply Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) Certificate of Compliance, and the Certificate of Service is 19 pages.

June 4, 2020

/s/ *Timothy H. Okal*
Timothy H. Okal

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct , and that he is the attorney for Plaintiffs-Appellees and that, on June 4, 2020, he electronically filed the Plaintiffs-Appellees' Reply To Defendants-Appellants' Response To Appellees' Request For Cross Relief, via the Statewide Electronic Filing System (Odyssey eFileIL) and has emailed copies of said filing to the following attorneys of record for the Defendants-Appellants:

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