IN THE SUPREME COURT OF ILLINOIS
No. 121536

KATHY CORBETT, Plaintiff-Appellee, v. THE COUNTY OF LAKE, Defendant, and THE CITY OF HIGHLAND PARK, Defendant-Appellant.	)	Appeal from the Second District Appellate Court, Elgin, Illinois Appellate Court No. 2-16-0035 There heard on appeal from the Nineteenth Judicial Circuit Court, Lake County, Illinois Circuit Court No.: 14 L 493 The Honorable Christopher C. Stark, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT THE CITY OF HIGHLAND PARK

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

I. THE CITY OF HIGHLAND PARK'S AGREEMENT WITH LAKE COUNTY DOES NOT AFFECT ITS RIGHT TO IMMUNITY UNDER THE TORT IMMUNITY ACT ON PLAINTIFF'S PERSONAL INJURY CLAIM.

II. SECTION II OF PLAINTIFF'S BRIEF AMOUNTS TO A VEILED ATTACK ON THE CONCEPT OF *DE NOVO* REVIEW.

ARGUMENT

I. THE CITY OF HIGHLAND PARK'S AGREEMENT WITH LAKE COUNTY DOES NOT AFFECT ITS RIGHT TO IMMUNITY UNDER THE TORT IMMUNITY ACT ON PLAINTIFF'S PERSONAL INJURY CLAIM.

Rather than discuss the plain and ordinary meaning of the word "trail," Plaintiff chose to open her Response Brief with the curious salvo that the City of Highland Park "removed itself from any tort immunity under the Act when it voluntarily entered into an agreement to maintain the path at issue." Resp. Br. p. 8. Plaintiff's argument derives from Section 4-102 of the Tort Immunity Act, which, after explicitly outlining several immunities relating to police protection services, states: "[t]his immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee." From this premise, Plaintiff jumps to the conclusion that the lack of non-waiver language in Section 3-107 means that the City of Highland Park's agreement to maintain the Skokie Valley Bike Path operates to "remove itself" from the Tort Immunity Act. Plaintiff's conclusion is flawed for several reasons.

First, Plaintiff's conclusion is logically inconsistent with her premise. Implicitly, Plaintiff asks the court to infer that the absence of the same non-waiver language in Section 3-107 that appears in Section 4-102 means that the legislature intended that a municipality's agreement to maintain a trail waives Section 3-107's absolute immunity. A closer examination of the non-waiver language in Section 4-102 reveals that this is not a logical inference. Section 4-102's non-waiver language is limited to the municipality's "contract for *private*

security service" (emphasis added). Thus, one may logically infer from the absence of non-waiver language in Section 3-107 that a municipality's contract with a *private entity* to maintain a trail operates as a waiver of absolute immunity, but that is not the factual scenario presented at bar, where the defendant municipality itself agreed to perform routine maintenance.

Second, Plaintiff's conclusion flies in the face of this Court's numerous decisions refusing to read exceptions and limitations into the immunities provided to local public entities in the Tort Immunity Act that are not explicitly present in the statutory text. *See Ries v. City of Chicago*, 242 Ill. 2d 205, 221-227 (Ill. 2011) (abrogating *Doe v. Calumet City*, 161 Ill. 2d 374 (Ill. 1994) and collecting cases). There is no language in Section 3-107(b) that carves out an exception to the absolute immunity for injuries caused by a condition of a trail where the municipal defendant agreed with a third-party to maintain the trail, and this Court should not return to the *Doe*-era of creating exceptions to the legislature's plain words.

Third, if the legislature intended a municipality's agreement to maintain a trail with a third-party to waive Section 3-107(b)'s absolute immunity, it would have clearly expressed that intention. Waiver of immunity by virtue of an agreement with a third-party was specifically addressed in the original version of Section 3-109(c) of the Tort Immunity Act which called for an explicit waiver of immunities if a local public entity purchased liability insurance.

Anitporek v. Village of Hillside, 114 Ill. 2d 246, 248 (Ill. 1986).[1] If the legislature intended an agreement with a third-party to maintain a trail waive the absolute immunity in Section 3-107(b), it would have followed its own lead and crafted explicit language like it did in Section 3-109(c).

Fourth, the current version of Section 3-109(c) belies Plaintiff's waiver argument. That Section reads in relevant part, "[p]ublic entities ... shall be entitled to assert all of the immunities provided by this Act ... unless the local public entities shall elect by action of their corporate authorities or specifically contract to waive in whole or in part such immunities." Nothing in the record suggests that the City of Highland Park's corporate authorities officially acted to waive immunity. Similarly, no language in the agreement between the City of Highland Park and Lake County specifically waives in whole or in part any of the immunities in the Tort Immunity Act.

Fifth, Plaintiff's waiver contention remains unpersuasive in light of Section 7-101 of the Tort Immunity Act, which contemplates the exact type of intergovernmental agreement as exists here between the City of Highland Park and Lake County, but fails to indicate either explicitly or implicitly, that such an agreement to "transfer functions and services" will operate as a waiver of any of the substantive immunities that the Tort Immunity Act provides.

Several well-reasoned decisions of the Illinois Appellate Court support the conclusion that the City of Highland Park did not "remove itself" from the

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[1] The Tort Immunity Act was amended in 1986, removing the explicit waiver of immunity by virtue of the purchase of liability insurance. *See Zimmerman for Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 50-51 (Ill. 1998).

protections of the Tort Immunity Act by agreeing to maintain the trail. In *DiMarco v. City of Chicago*, 278 Ill. App. 3d 318 (Ill. App. 1st Dist. 1996), with Justice Theis delivering the opinion, the court held that immunity provided in the Tort Immunity Act applied to negligence actions based on a voluntary undertaking evidenced by contract. Similarly, *Burley v. On the Waterfront, Inc.*, 228 Ill. App. 3d 412 (Ill. App. 2nd Dist. 1992), held that a park district's contract with a third-party to provide security services at a festival did not operate as a waiver of the park district's immunity under Section 4-102 of the Tort Immunity Act, specifically finding that under Section 9-103(c) of the Tort Immunity Act, a contractual provision must specifically waive "all or part of a governmental entity's tort immunity before such waiver will be found to exist." *Id.* at 418-419. Lastly, in *Barnes v. Chi. Hous. Auth.*, 326 Ill. App. 3d 370 (Ill. App. 1st Dist. 2001), the Court held that the "voluntary undertaking" doctrine does not supersede a municipality's statutory immunity from allegations of either negligence or willful and wanton misconduct because under this Court's decision in *In re Chi. Flood Litig.*, 176 Ill. 2d 179 (Ill. 1997), absent explicit statutory language, the Court will not find exceptions to tort immunity.

For these reasons, the Court should reject Plaintiff's contention that the City of Highland Park's "removed itself" from immunity, and move on to the issue of the whether the Skokie Valley Bike Path is a trail as contemplated by Section 3-107(b).

II. SECTION II OF PLAINTIFF'S BRIEF AMOUNTS TO A VEILED ATTACK ON THE CONCEPT OF *DE NOVO* REVIEW.

Following her waiver argument, Plaintiff continues to avoid discussing the meaning of the word "trail," by instead arguing that "[t]he consistency of interpretations from numerous reviewing courts warrants an affirmance of the appellate court's decision in this case." Resp. Br., p. 11. This argument, and more broadly, the entirety of Section II of Plaintiff's Brief, amounts to no more than a veiled attempt to eschew *de novo* review of the Appellate Court in favor of a more deferential standard. Consistent interpretations of a statutory provision do not warrant "an affirmance" where those interpretations have been consistently wrong. Plaintiff would rather ignore the requirement that this Court revisit the statutory interpretation of Section 3-107(b) anew, and simply encourage the Court to defer to the absurdly narrow definition of the word "trail" used by Court below simply because multiple un-reviewed panels of the Appellate Court have used it in the past.

In that respect, Plaintiff's Brief suffers from the same shortcomings as the opinion of the Court below and the opinions of each panel of the Appellate Court that adopted the definition of "trail" as "a marked path through a forest or mountainous region." Specifically, she failed to explain why the legislature, in a state with no mountainous regions, would intend such a definition when others exist. *See Home Star Bank and Fin. Servs. v. Emergency Care and Health Org., Ltd.*, 2014 IL 115526 at ¶ 47. In other words, she has not "shown her work." On the other hand, the City of Highland Park, in its initial Brief

(and the PDRMA in its Amicus Curiae Brief), provided this Court with a thorough, consistent, and thoughtful explanation of why the legislature intended a broader definition of "trail." Under *de novo* review of a statutory provision, this Court's duty is to discern the legislature's intent, not simply affirm because the Court below "followed what every Appellate Court had done before it in deciding what the legislature meant by the term 'riding trail.'" Resp. Br. p. 16.

Included in Plaintiff's attack on the *de novo* standard of review is the frequently cited proposition that "[b]ecause the Tort Immunity Act is in derogation of the common law, it must be strictly construed against the local public entity or public employee," (Resp. Br. p. 12), citing this Court's decision in *Reynolds v. City of Tuscola*, 48 Ill. 2d 339, 342 (Ill. 1971). The invocation of this maxim, frequently cited by the plaintiffs' bar seeking an anti-immunity result, but seldom discussed in detail, warrants further exploration.

This maxim does not mean that words of statutes should be "twisted and tortured so as to produce as little change in the existing [common] law as possible." Warren R. Michael, *Legislation – The Role of the Common Law in Interpretation of Statutes in Missouri,* 1952 WASH U. L. Q. 101, 103 (1952).

> "The dogma as to strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law; and as there is no doubt of that intention here, the extent of the application of the change demands no more rigorous construction than would be applied to penal laws."

Johnson v. Southern Pac. Co., 196 U.S. 1, 17 (1904). As this Court has frequently recognized, the Tort Immunity Act was enacted in response to this Court's abolition of sovereign immunity in *Molitor v. Kaneland Comm. Unit Sch. Dist. No. 302*, 18 Ill. 2d 11 (Ill. 1959), and was thus unambiguously intended to change existing law. On the topic of the strict construction maxim, Justice Story wrote:

> "I agree to that rule in its true and sober sense; and that is that [strictly construed] statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. *And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word...*"

United States v. Winn, 3 Sumn. 209 (Cir. Ct. D. Mass. 1838)(emphasis added). In other words, the task of narrowly construing a statute "does not require rejection of that sense of the words which best harmonizes with the context and the end in view." *United States v. Powell*, 423 U.S. 87, 91 (1975), quoting *Gooch v. United States*, 297 U.S. 124, 128 (1936).

This Court has traditionally recognized the limited purpose of the strict construction maxim. In *Moore v. Hamilton*, 7 Ill. 429, 432 (Ill. 1845), the Court noted that statutes in derogation of common law "ought not to be extended by implication." Similarly, in *May v. Baker, for Use of Robbins*, 15 Ill. 89, 90-91

(Ill. 1853), the Court noted statutory attachment procedures, in derogation of common law, are "dependent entirely upon the statute for its support." More recently in *Barthel v. Ill. Cent. Gulf R.R. Co.*, 74 Ill. 2d 213, 220 (Ill. 1978), the Court explained this maxim by emphasizing that, "[t]he courts will read nothing into such statutes by intendment or implication."

This Court's Tort Immunity Act jurisprudence has also recognized the limited function of the strict construction maxim. In *Sisk v. Williamson County*, 167 Ill. 2d 343, 347-348 (Ill. 1995), the Court noted that the Tort Immunity Act "must be strictly construed against the governmental entity," but nonetheless refused to recognize a non-explicit exception to Section 3-102(a) urged by the plaintiff that pedestrians are intended and permitted users of rural country roads. Similarly, in *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370 (Ill. 1997), the Court found that the strict construction maxim did nothing to alter the plain meaning of Section 3-108(a).

In short, the Court should not use the strict construction maxim as a means to justify the end of ignoring the ordinarily and popularly understood meaning of the word "trail." Even if the Court finds the word "trail" in Section 3-107(b) ambiguous, the strict construction maxim, as it is properly understood, cannot justify reading intendments or implications into the immunity provision that are simply not in the text. Section 3-107(b) provides immunity for injuries caused by a condition of "*any* ... riding ... trail" (emphasis added). The strict construction maxim does not provide a valid basis upon which the Court may rely in order to replace the statutory word "any" with the exceptions urged by

Plaintiff such as "a riding trail that a defendant has not agreed to maintain," "a non-maintained riding trail," "an undeveloped riding trail," or "a natural riding trail."

III. THE FIRST DISTRICT APPELLATE COURT'S DECISIONS IN *FOUST* AND *COHEN* DO NOT INFORM THE STATUTORY CONSTRUCTION OF SECTION 3-107(b).

Continuing to avoid directly addressing the germane issue of the meaning of the word "trail," Plaintiff next criticizes the City of Highland Park for failing to discuss the Appellate Court opinions *Foust v. Forest Pres. Dist. of Cook Cnty.*, 2016 IL App (1st) 160873 and *Cohen v. Chicago Park Dist.*, 2016 IL App (1st) 152889 in its opening Brief. Resp. Br. p. 16. The reason the City of Highland Park did not discuss these two decisions is simple – neither decision advances the issue of whether the Skokie Valley Bike Path is a trail as contemplated by Section 3-107(b).

The Appellate Court's decision in *Foust*, 2016 IL App (1st) 160873 is predicated upon the holding that a falling tree limb is not a "condition of" a trail as contemplated by Section 3-107(b). This issue remains entirely irrelevant to this case, in which the parties agree that Plaintiff's accident and resultant injuries were caused by a "condition of" the Skokie Valley Bike Path. The decision briefly discusses the issue of whether the path is a "trail" as contemplated by Section 3-107(b), however, that analysis is nonessential to the Court's holding. Moreover, as the path at issue in that case runs through a forest, the Court easily characterizes it as a trail even under the absurdly narrow definition used by both the Court below here and the un-reviewed

panels of the Appellate Court going back to *Brown v. Cook Cnty. Forest Pres.*, 284 Ill. App. 3d 1098 (Ill. App. 1st Dist. 1996).

Similarly, the Appellate Court's decision in *Cohen*, 2016 IL App (1st) 152889 does not touch upon whether the Lakefront Trail is a "riding trail" as contemplated by Section 3-107(b) because the Chicago Park District did not argue that the Lakefront Trail is a "trail" under that Section. This case, instead turns upon Section 3-107(a), and even more narrowly, whether the word "primitive" in that section modifies only the word "camping" which it immediately precedes, or if it also modifies the following sequential phrase "recreational or scenic areas." This presents an issue of statutory construction utterly distinct from the issue presented here, i.e., what does "trail" mean.

To the extent that the Appellate Court based its conclusion in *Cohen* upon a reading of Section 3-107(b), that reading simply harkened back to the same analytical error made by the Court below and in *Goodwin v. Carbondale Park Dist.*, 268 Ill. App. 3d 489 (Ill. App. 5th Dist. 1994), assuming without any textual support in the statute that the legislature intended Section 3-107(b) to apply to solely to "unimproved," "undeveloped," or "natural" trails, when the language of the statute itself could not more clearly include "*any*" trail within the ambit of its absolute immunity.

In summary, the Appellate Court decisions in *Foust* and *Cohen* do not inform the Court's analysis on the issue presented in this case. Plaintiff suggests that their mere existence inherently demonstrates their correctness. However, these cases, like the decision below, simply parrot the abstractions

and conclusions of the un-reviewed Appellate Court panels in *Goodwin* and *Brown* that were erroneous *ab initio*, and Plaintiff's reliance on them reinforces her reluctance to engage in a truly *de novo* statutory construction analysis. Of course, Plaintiff would rather count up decisions that support her position than attempt to explain why those decisions are correct.

IV. THE ASSORTMENT OF ARGUMENTS IN SECTION IV OF PLAINTIFF'S RESPONSE BRIEF FAIL TO PERSUADE THAT THE COURT BELOW PROPERLY CONSTRUED SECTION 3-107(b).

Section IV of the Plaintiff's Response Brief continues her attack on the *de novo* nature of this Court's review, as she argues that consistent and uniform application of precedent, in and of itself, supplies this Court with a reasonable basis for affirming the action of the court below in reversing the Circuit Court's entry of summary judgment in favor of the City of Highland Park. Resp. Br. pp. 19-20.

In support of this contention, Plaintiff asserts that "the law is much broader than what Highland Park wants this court to believe." Resp. Br. p. 20. Plaintiff recaps the Appellate Court decisions holding that (1) a trail may be comprised of gravel or asphalt or be somewhat improved (*Mull* v. *Kane Cnty. Forest Pres. Dist.*, 337 Ill. App. 3d 589 (Ill. App. 2nd Dist. 2003)); (2) a trail may include a manmade bridge (*McElroy v. Forest Pres. Dist. of Lake Cnty.*, 384 Ill. App. 3d 662 (Ill. App. 2nd Dist. 2008)), and; (3) a trail may run alongside roads and guardrails (*Brown*, 284 Ill. App. 3d 1098). This analysis leaves out the only true consistency of the reported Appellate Court decisions construing Section 3-107(b) – only Forest Preserve Districts are given the benefit of immunity

(*Brown, Mull, McElroy*), while other local governmental entities are consistently denied the immunity when they are providing the same governmental service, simply because the paths at issue do not run through a forest region and are thus "defined out" of "trail" status (*Goodwin, Corbett*, and impliedly *Cohen*). Again, Plaintiff fails to explain why the legislature intended such a result, especially in light of the arguable unconstitutionality of Section 3-107(b) under such a construction pursuant to this Court's decision in *Harvey v. Clyde Park Dist.*, 32 Ill. 2d 60 (Ill. 1964).

Plaintiff next criticizes the City of Highland Park for offering the Court several definitions of the word "trail" which are broader than the definition the Appellate Court used below. Resp. Br. p. 21. Plaintiff contends:

> "[p]luting aside how this would lead to confusion, uncertainty and inconsistency over which of the several definitions to apply. . . the fallacy with this argument is that the definition 'marked path through a forest or mountainous region' would still have to be included in the analysis if several definitions are, indeed, used."

Resp. Br. p. 21. Plaintiff's contention misconstrues the City of Highland Park's purpose in offering the Court several alternative definitions of the word "trail." The purpose was not, as Plaintiff suggests, to urge the Court to create a test directing the lower courts to engage in a linguistic battle royal every time a local public entity raises Section 3-107(b) as a defense. Rather, the purpose was to provide the Court with several options from which to choose for defining the word "trail" if it should decide that resorting to a definition is necessary to

resolve this case – with each option better reflecting the legislature's intent than the one used by the court below.

Next, Plaintiff provides four (4) reasons why she contends the California Court of Appeal's interpretation of that state's analogue to Section 3-107(b) is unpersuasive. Resp. Br. pp. 22-25.

First, Plaintiff contends that under California law, immunity is the "general rule" and that under Illinois law, liability is the "general rule" and immunity is the exception. This is a "chicken or the egg" argument. Ultimately, which is the "general rule" and which is the "exception" is of no importance because the policy purposes behind both liability in certain instances and immunity in certain instances are the same either way.

Second, Plaintiff contends that the California cases are not persuasive because the City of Highland Park is improperly seeking an expansion of the scope of tort immunity through judicial action. This argument could not be more wrong. The Court below narrowed the scope of tort immunity through judicial action, and the City of Highland Park is asking this Court to correct that error by applying Section 3-107(b) as it is written; *Plaintiff* is urging the Court to *narrow* the scope of immunity by reading in phantom exceptions.

Third, Plaintiff contends that the text of Section 3-107(a) supports the lower court's interpretation of Section 3-107(b) and indicates a narrower scope of immunity than that intended by the California legislature. To the contrary, the text and structure of Section 3-107(a) support the inference that the legislature intended a broader interpretation of the immunity set forth in

Section 3-107(b) than the Court below used, and one more in line with the California decisions. Subsection (a) starts with the phrase "any road" and subsection (b) starts with the phrase "any trail." Subsection (a), however, goes on to explicitly qualify and limit the breadth of the phrase "any road", i.e., not a street or highway, while subsection (b) contains no explicit limitations or qualifications on the breadth of the phrase "any trail." Thus, one can reasonably infer that the legislature intended the immunity relating to "trails" to encompass all trails in the broadest sense of the word. After all, the legislature has shown that it will explicitly qualify and limit an immunity when it intends that result.

Lastly, Plaintiff contends that the California decisions are not persuasive because in California, public policy favors "absolute immunity over public safety." Resp. Br. p. 23. This is a gross mischaracterization of the California Court of Appeal decisions cited in the City of Highland Park's initial Brief. The policy explanation in the California decisions is more aptly described as favoring citizen access to trails over non-access. A method by which to encourage local governmental entities to allow such access is to provide immunity from damages claims. The public would surely be safer from bicycle accidents if cities closed their riding trails. In enacting Section 3-107(b), the legislature determined that the best way to ensure citizen-riders access to the riding trails that they want to use, is to require that those citizen-riders assume the risk for injuries caused by conditions of those trails, and to provide the local public entities that control access to them with absolute immunity. Plaintiff may not like the

method that the legislature chose to advance its policy choice, however, this Court is not the proper forum to challenge the wisdom of the legislature's policies and its chosen methods for advancing them.

CONCLUSION

Defendant-Appellant, the CITY OF HIGHLAND PARK, respectfully requests that this Honorable Court reverse the decision of the Appellate Court and affirm the judgment of the Circuit Court in its favor.

Respectfully submitted,

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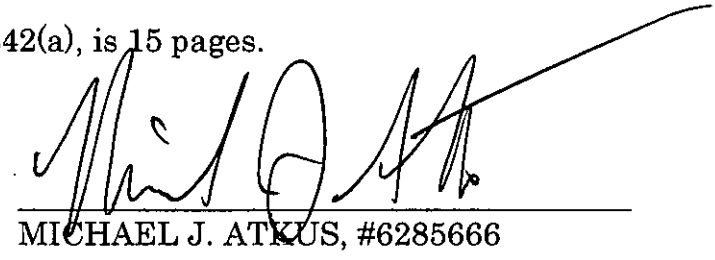
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.



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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record herein, certifies that the original and nineteen (19) copies of the foregoing **REPLY BRIEF OF DEFENDANT-APPELLANT THE CITY OF HIGHLAND PARK** was filed with the Clerk of the Supreme Court of Illinois, and three (3) copies thereof were served upon the following, by depositing the same in the U.S. Mail, first-class postage prepaid on the 10th day of May, 2017:

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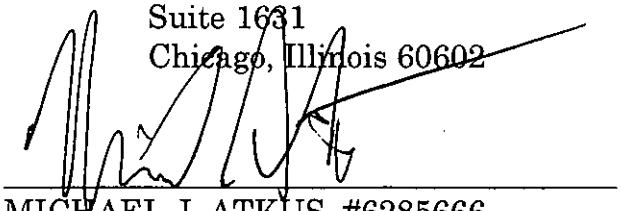

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