No. 121800

In the Supreme Court of Illinois

ISAAC COHEN	)	On Appeal from the Appellate
	)	Appellate Court of Illinois,
Plaintiff/Respondent.	)	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/Petitioner.	)	Honorable William E. Gomolinski,
	)	Judge Presiding

BRIEF OF PLAINTIFF/APPELLEE ISAAC COHEN

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POINTS AND AUTHORITY

INTRODUCTION

The Chicago Lakefront Trail is the pride of the City of Chicago. It is a highly developed linear park that attracts 60,000 to 70,000 people a day in the summer. As the Chicago Park District proudly states on its website:

> "On any given day activity along the trail includes people commuting to work, training for marathons, caregivers with children in strollers, tourists on rental bikes, teens on skateboards, and thousands of other people taking a leisurely stroll." (www.chicagoparkdistrict.com/lakefront-trail).

The Park District actively encourages people of all ages to use the Trail, touting it as safe and well-maintained. It is within this context that §3-106 of the Tort Immunity Act was created; to encourage the development and maintenance of parks and recreational areas while still holding public entities accountable for willful and wanton conduct. Those same concerns do not apply to §3-107 which was created to provide absolute immunity for injuries on natural, undeveloped property because of the inherent burden to maintain such places. At the other end of the spectrum is §3-102 which provides no immunity for injuries on public streets and sidewalks. The Illinois legislature's rational in promulgating this continuum of immunities underscores the flawed reasoning in the Park District's argument that it is entitled to absolute immunity under §3-107 for injuries on the Lakefront Trail.

So, too, is the Park District's argument that it could never be found willful and wanton, despite evidence it had actual knowledge of a "severe" crack in the the Trail that presented an imminent danger requiring emergency repair, yet in

violation of its own policy to immediately repair known dangers, waited weeks or months to repair the danger. The Park District's inadequate and untimely response reflects a conscious disregard for the public's safety and, at a minimum, raises questions of fact for a jury. For the reasons set forth below, plaintiff requests this Honorable Court affirm the appellate court decision and remand this case for further proceedings.

STATEMENT OF FACTS

The Park District's Brief omits certain facts and misstates others. For a complete presentation of the facts, plaintiff submits the following statement of facts with citations to the record.

Plaintiff Is Injured On The Lakefront Trail

At approximately 9:00 a.m. on Sunday, July 7, 2013, plaintiff, Isaac Cohen, a retired professor of molecular biology at Northwestern University Medical School, was enjoying a leisurely bicycle ride on the Lakefront Trail. (R. C 518; pp. 9, 12-13; R. C 519, p. 14; R. C 520, pp. 17, 19). It was a beautiful, sunny day. (R. C 520, p. 19). Since it was early in the morning, the Lakefront Trail was not busy. (R. C 520, p. 19). As plaintiff was heading south near the Shedd Aquarium, he saw a pedestrian in front of him. (R. C 519, pp. 15-16).

Being conscientious, plaintiff rang the bell on his bike, slowed down and proceeded to coast toward the middle of the Trail in order to go around the left side of the pedestrian. (R. C519, p. 16; R. C 520, pp. 17-18; R. C 522, p. 25). The Park District is aware that bicyclists ride in the middle of the Trail when

passing pedestrians. (R. C 427, p. 17). As plaintiff reached the middle of the Trail, his front bike tire unexpectedly became stuck in a crack in the concrete, causing him to fall to the ground, hitting his left shoulder "very hard on the concrete." (R. C 521, pp. 21-22; R. C 523, p. 29). The crack was approximately 3-4 feet long, 2-3 inches deep and the width of a 2-inch wide bicycle tire. (R. C 521, pp. 21-23). The crack and the concrete were both light gray. (R. C 521, p. 23). One week after the accident, the crack was filled with black asphalt. (R. C 525, p. 39; see post-accident, post-repair photographs, R. C 300-307). Plaintiff injured his left shoulder requiring two surgeries. (R. C 528, p. 49; R. C 530, p. 60).

The Park District's Goal is to Make the Lakefront Trail Safe and Well Maintained to Enhance the Quality of Life in Chicago

The Lakefront Trail is an 18.5 mile multi-use linear park that runs along the Chicago lakefront from Ardmore on the north to 71st Street on the south. (R. C492; C427, p. 26). The purpose of the Trail is to provide recreation. (R. C408, p. 23). Because the Trail is intended to be used by bicyclists, the Park District's goal is to keep it safe for bicyclists. (R. C 410, p. 32; C 414, p. 49; C 435, p. 60). The Park District's mission is threefold: (1) to enhance the quality of life in Chicago by becoming the leading provider of recreation opportunities; (2) to provide safe, inviting, and beautifully maintained parks and facilities; and (3) to create a customer-focused and responsive park system. (R. C 298; C 414, pp. 47-48; C 434, p. 57).

In 2011, the Park District partnered with the Active Transportation Alliance to study Lakefront Trail usage in order to create a "safer, more

convenient and more accessible trail for all users." (R. C 488; C 425, p. 20). The data revealed the Trail is used by more than 60,000 people on a summer weekday and more than 70,000 people on a summer weekend day.[1] (R. C 493). Although recreational in nature, it was determined that the Trail is a "primary transportation corridor for bicycle commuters" and an "integral part of Chicago's bicycle transportation network." (R. C493). Every day, the Trail is used by "people training for marathons, parents with children in strollers, tourists on rental bikes, couples on in-line skates, teens on skateboards, and thousands of other people using the trail for commuting, training or just taking a leisurely stroll." (R. C 488; C 492). Twenty-nine percent of Trail patrons are bicyclists. (R. C 493). The Trail was not designed for vehicular travel by the public. (R. C408, pp. 23-24).

The Lakefront Trail is in a developed area surrounded by numerous commercial restaurants and bars as well as many manmade structures, including parking lots, restrooms, Navy Pier, tennis and basketball courts.[2] (R. C 408, p. 25; C 409, p. 26; C 430, pp. 40-41; C 436, p. 38; C 473, pp. 48-49). Although the Trail is used 24 hours a day, all surrounding facilities and park activities are closed between 11:00 p.m. and 6:00 a.m. (R. C509; C 512). The

[1] The Park District cites Robert Rejman for the proposition that 30,000 patrons use the Trail on a typical summer day (Brief, p. 5), but this is belied by the Active Transportation Alliance study.

[2] The Park District cites Mr. Rejman for the proposition that "most of the areas surrounding the Lakefront Trail are undeveloped, open parkland," (Brief, p. 5) but when questioned at his deposition, he agreed that the trail is surrounded by manmade structures. (R. C 430, pp. 40-41).

grass surrounding the Trail is maintained and mowed by the Park District and the surrounding trees are trimmed. (R. C 430, p. 41; C 449, pp. 18-19). Hunting around the Trail is not allowed. (R. C 431, p. 42). There is no forestry area around the Trail by the Shedd Aquarium.[3] (R. C 449, p. 20).

The Park District's Maintenance of the Lakefront Trail

The Park District maintains and repairs the Lakefront Trail on (1) an annual basis and (2) as-needed. (R. C 266, ¶ 2; R. C 417, p. 58; C 268, ¶ 5). Linda Daly, Director of Capital Construction, testified that repairs and improvements to the Trail are part of the capital budget that is approved by the Park District's Board. (R. C406, p. 15). Daly supervises Senior Project Manager, Bill Gernady. (R. C406, p. 17). In this role, Daly is involved in deciding the contractors from whom to solicit bids and in making decisions on the award. (R. C407, p. 18). Daly also communicates with contractors once they are hired. (R. C407, p. 20).

The Annual Spring Inspection

The Park District's practice and protocol is to inspect the Lakefront Trail each Spring. (R. C439, p. 77). Robert Rejman, Director of Planning & Construction, testified that the inspection is a "priority early Spring project" before the busy summer months. (R. C439, p. 77). Daly and Rejman require Gernady to inspect the Trail each Spring. (R. C411, p. 34; R. C422, p. 17).

[3] The Park District also cites Mr. Rejman for the proposition that "patrons often fish along the shoreline that is adjacent to and accessible from the Lakefront Trail" (CPD Brief, p. 5), but Mr. Rejman never testified about accessibility to the Trail. In fact, Mr. Rejman did not identify what shoreline he was referring to or where he had observed these individuals and testified that he did not know the fishing laws in Illinois and had never seen anyone fish off the beach. (R. C431, p. 42).

Gernady does not have discretion in determining whether to do the annual inspection; he must ensure the repairs are carried out. (R. C418, p. 62). The inspection may be a joint inspection by Gernady and his assistant. (R. C411, p. 34). The purpose of the annual inspection is to identify and repair potentially dangerous conditions that can cause injuries before the summer when the Trail is busiest. (R. C 466, pp. 18-21; C 474, p. 53). Daly and Rejman instruct Gernady and his assistant to identify cracks in the pavement, missing pavement, worn paint, and damaged signage. (R. C 270, ¶ 11; C 411, p. 35; C 418, p. 62; C 425, p. 18; C 474, pp. 52-53). The inspection, maintenance and repair of the Lakefront Trail is a collaborative effort. (R. C433, p 53; C434, p. 54).

According to Rejman, Gernady and his assistant are not free to do whatever they want when inspecting the Trail; they do "whatever" Rejman "tells them to do." (R. C425, p. 21). Rejman gives out orders because he "knows what needs to be done." (R. C425, p. 21). Gernady has performed the annual Spring inspection for the past 14 years (although in 2013, David Richmond was the Sr. Project Manager who signed all contract documents). (R. C424, p. 17; R. C 466, p. 19; C 467, p. 25). For each inspection, Gernady drives the entire Trail twice. (R. C 467, pp. 22-23). Once the inspection is complete, Gernady puts together a package and submits to general contractors for pricing. (R. C 412, pp. 40-41. This process takes anywhere from four to six weeks. (R. C412, p. 41).

Gernady testified that he inspects the Trail in April. (R. C474, p. 53). When doing the inspection, any crack deeper than 1 ½ inches is to be repaired. (R. C468, p. 29). Gernady does not have discretion in determining whether to

repair a dangerous condition; Park District practice dictates it must be fixed. (R. C434, p. 56). For the annual inspection, Gernady takes a measuring wheel, measuring tape (to measure the cracks) and spray paint to identify dangerous conditions. (R. C467, p. 25; R. C468, p. 26).

Gernady manages the Park District's Rapid Response Program ("RRP"). (R. C 463, p. 8). The RRP is to be used only for conditions that present no safety concerns. (R. C 435, p. 61; C 436, p. 62). Conditions that do not present safety concerns are sent out for bid to outside contractors who are part of the RRP. (R. C 435, p. 61; C 436, p. 62). A Request for Proposal is sent with a scope of work to contractors to submit bids. (R. C 469, p. 33; C 470, p. 34; C 415, p. 50). Once bids are received, a Notice to Proceed is sent to the contractor awarded the work. (R. C470, pp. 35, 37). Gernady's supervisors must approve the scope of work and the contractor awarded the work. (R. C 437, pp. 68-69; C482, p. 83).

All conditions in need of repair, even those that are part of the RRP, are to be made as soon as possible. (R. C 0416, p. 56). For that reason, the Park District sets deadlines for having repairs completed. (R. C 474, p. 53; C 475, p. 54; C 439, p. 76). Gernady specifically testified that the Park District will periodically put on a Notice to Proceed a deadline telling a contractor when work has to be completed and/or a specific date to start. (R. C 475, p. 54, 56). Gernady supervises the contractors' work. (R. C 471, p. 41; C 472, p. 42). In fact, Gernandy instructs and orders outside contractors to fill any cracks or holes deeper than 1 inch with asphalt. (R. C 482, p. 82).

If there is an emergency situation that cannot wait to be put in the RRP, Gernady is to come to Daly or Rejman to have that issue priced out immediately. (R. C412, p. 41). According to Daly, unsafe conditions found during the Spring inspection are to be repaired immediately by in-house Park District employees. (R. C 412, p. 41; C 413 p. 42). If an unsafe condition cannot be repaired in-house, outside contractors are contacted by email or phone to make the repair on an expedited basis. (R. C 433, p. 51; C 471, p. 39; C 482, p. 85; C 483, p. 86). Unsafe conditions can be repaired on the same day they are identified. (R. C 483, p. 86).

As-Needed Repairs

In addition to the annual Spring inspection, repairs are made on an "as-needed" basis. (R. C 433, p. 50). When a complaint is received, such as a defect in the Trail, the Park District investigates to see if a repair is needed. (R. C 417, p. 60; C 433, p. 50). If a condition is found to be dangerous, the Park District repairs it on an expedited basis. (R. C 433, p. 50-51). Robert Arlow, Director of Facilities Management, oversees 260 tradesmen, carpenters and laborers who perform maintenance and repairs. (R. C 447, pp. 7, 11, 13).

Arlow receives complaints about defects in the Trail that need repair. (R. C 450, pp. 22-23). When he receives a phone call from a patron, he will act on it; he won't wait because it could be dangerous. (R. C 450, pp. 24-25). When he gets a complaint, he goes to the site to see if it is an unsafe condition. (R. C 451, p. 27). He looks at the severity of the condition. (R. C 451, p. 27). If it needs to be repaired, he calls an in-house tradesperson to get it repaired. (R. C 451, p. 28). If a repair cannot be made in-house, it can be referred to an outside contractor as

an "urgent repair" for bid that day or the next. (R. C 433, p. 51; C 452, p. 33). If a repair cannot be made immediately, the Park District will block off the Trail with barricades and signs. (R. C 433, p. 52). The Park District is also able to mark potholes and cracks with bright colored paint. (R. C 433, p. 52).

The Park District Receives a Complaint about the Crack in the Trail

In the Spring of 2013, Arlow received a phone call from a patron informing him of a crack in the concrete near the Shedd Aquarium. (R. C 273, ¶ 22; C 453, pp. 36-37; C 454, p. 38). The Park District does not dispute that the complaint involved the same crack at issue in plaintiff's incident. (R. C477, pp. 64; C 478, p. 66; C 300; C 525, p. 38; C 308). Arlow could not say if he received the call in early, mid or late Spring, but he "knows it was in the Spring" and, because there was no snow on the ground, he assumes it "had to be later than April." (R. C 453, pp. 36-37). Within a few days of receiving the call, Arlow went to look at the defect. (R. C 454, p. 39). Arlow determined the condition was "severe" and in need of repair. (R. C 452, p. 30; C454, p. 39; R. C 458, pp. 56-57).

Despite the severe condition, Arlow did not contact an in-house tradesperson to perform an immediate repair; instead he called Gernady. (R. C 454, p. 39; C 477, p. 64-65). Arlow does not know why he did not have the crack repaired immediately. (R. C 456, pp. 46-47). After Gernady received the call from Arlow in the Spring of 2013, he went out, looked at the area and agreed it was a dangerous condition that needed to be repaired on an "emergency" basis. (R. C 477, pp. 64-65; C 483, p. 86). The crack was caused by cement coming

apart. (R. C477, p. 65). Despite being an emergency, no repairs or attempted repairs were made from the Spring of 2013 until July 10, 2013. (R. C 455, p. 45).

The 2013 Annual Spring Inspection

Gernady conducted the annual Spring inspection in 2013. (R. C 468, p. 26). On June 10, 2013, Gernady prepared a Scope of Work that included the crack by the Shedd Aquarium along with five other repairs. (R. C 297; C 483, p. 86). Despite classifying the subject crack as an emergency--the only emergency repair that year-- Gernady included it in the RRP as a non-emergency repair rather than repairing it immediately. (R. C 297; C 483, p. 86).

On June 10, 2013, the Park District sent a Request for Proposal with the Scope of Work to outside contractors. (R. C 295). On June 12, 2013, Meccor submitted a proposal. (R. C135). On June 19, 2013, the Park District issued a Notice to Proceed to Meccor. (R. C 141). The Park District gave no dates or deadlines for completion of the work. (R. C 474, p. 53; C 475, p. 54; C 483, p. 89; C 484, p. 93). Meccor subcontracted Beverly Asphalting to perform the repair work. (R. C 91, No. 3). On June 19, 2013, Beverly performed a non-emergency repair at Promontory Point (55th & Lakeshore). (R. C 438, pp. 71-72). On July 10, 2013, three weeks later, Beverly repaired the crack by the Shedd Aquarium. (R. C439, p. 74; C 480, pp. 79-80). Gernady did not supervise Beverly and thus could offer no explanation as to why it repaired the non-emergency defect at Promontory Point on June 19th, but waited three weeks to repair the emergency crack in the concrete on July 10th. (R. C 472, p. 43; C 475, p. 56-57; 480, p. 77).

Arlow Receives Another Complaint

In the Spring of 2014, Arlow received another complaint from a patron about a crack in the concrete near the Shedd Aquarium. (R. C 448, p. 14). Arlow inspected the area and found the crack was similar to, but not as severe, as the crack that led to plaintiff's injuries. (R. C 452, p. 30). Even though it was not as severe, Arlow had Park District laborers go out and immediately fill the crack with asphalt. (R. C 448, p. 14; C 451, p. 29; C 452, p. 30).

The Pleadings Narrow The Issues

Plaintiff's one-count Complaint alleged the Park District with willful and wanton. (R. C002). The Park District admitted that it owned, managed, and maintained the Lakefront Trail by the Shedd Aquarium. (R. C005; C025). The Park District admitted it is required to maintain the Trail in accordance with §3-102(a) of the Act which imposes a duty to exercise ordinary care in maintaining public property in a reasonably safe condition. (R. C005; C025). The Park District admitted it could be held liable for willful and wanton conduct in failing to maintain the Trail under §3-106 of the Act. (R. C 005; C 025). The Park District denied its conduct was willful and wanton. (R. C 025).

The Park District filed Affirmative Defenses alleging it was entitled to absolute immunity under §3-107(a), §2-201 (for discretionary acts), and §3-104 (for failing to provide signs or traffic signals). (R. C 387). Plaintiff denied the Affirmative Defenses. (R. C 054).

The Appellate Court Reverses Summary Judgment

On July 28, 2015, the trial court granted summary judgment in favor of

the Park District, finding the Lakefront Trail "is a pathway that provides access to recreational areas as is conceived of by §3-107(a) of the Tort Immunity Act" and, "even if §3-107(a) does not apply," there is no material fact that the Park District engaged in willful and wanton conduct. (R. C 545, 547-548). The trial court further found that §2-201 of the Act did not apply because the Park District employees did not exercise discretion in repairing the crack, but rather performed a ministerial act. (R. C 549, C550).

In the appellate court, the Park District responded to plaintiff's §3-107(a) and willful and wanton arguments, but did not raise §2-201 as an additional ground upon which to affirm the trial court's ruling. The appellate court reversed summary judgment in favor of the Park District, finding that §3-107(a) applied to undeveloped property and, thus, did not apply to the Lakefront Trail, and that questions of fact existed as to whether the Park District was willful and wanton. (R. C 576).

ARGUMENT

I. THE PARK DISTRICT WAIVED REVIEW OF §§2-201 AND 3-107(b) AS NEITHER WAS RAISED IN ITS PETITION FOR LEAVE TO APPEAL OR IN THE APPELLATE COURT

The Park District's Petition for Leave to Appeal raised two issues for review: (1) whether §3-107(a) applies to the Lakefront Trail; and (2) whether questions of fact exist on the issue of willful and wanton conduct. These are the same two issues raised by the Park District in the appellate court. Now, in its Brief to this Court, the Park District raises two additional grounds for review:

§2-201 (absolute immunity for discretionary acts) and §3-107(b) (absolute immunity for injuries on "trails").

Supreme Court Rule 315(b) expressly provides that a party's petition for leave to appeal "shall contain * * * (3) a statement of the points relied upon for reversal of the judgment of the Appellate Court." 177 Ill. 2d R. 315(b)(3). This Court has repeatedly held that the failure to raise an argument in the petition for leave to appeal may be deemed a waiver of that argument. *Khan v. Deutsche Bank AG,* 2012 (IL) 112219, ¶ 64; *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 429 (2002); *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill. 2d 1, 26 (2001).

While adherence to the Rule is not a jurisdictional prerequisite, this Court need not consider the newly raised defenses as the Park District offers no justification for its failure to include the defenses in its petition or in the appellate court below. Moreover, with respect to ¶3-107(b), the Park District not only failed to raise the defense in its petition and in the appellate court, but also failed to raise the defense in the trial court.

Similarly, despite the trial court finding that §2-201 did not apply because the Park District's acts were ministerial rather than discretionary, the Park District opted not to raise §2-201 in the appellate court as a ground for affirming summary judgment in its favor. The Park District could have easily raised §2-201 in the appellate court and in its petition for leave to appeal, but it chose not to. The Park District's failure to adhere to this Court's rules mandates a finding

a waiver. Furthermore, as set forth below, §3-106 trumps §3-107 and §2-201, making review of the newly-raised issues unnecessary.

The Park District's decision to raise these additional defenses indicates a lack of confidence in the merits of its primary argument that the Lakefront Trail falls within §3-107(a). Indeed, the Park District's position that §3-107 applies to developed city parks is contrary to the rules of statutory construction, case law and public policy. And, its secondary argument that it was not willful and wanton is refuted by overwhelming evidence to the contrary.

II. THE TORT IMMUNITY ACT

In 1959, the Illinois Supreme Court abolished sovereign immunity from tort claims for municipalities. *Molitor v. Kaneland Comm. Unit Dist. No. 302,* 18 Ill.2d 11 (1959). In 1965, the Illinois legislature responded by enacting the Tort Immunity Act. *Zimmerman v. Village of Skokie,* 183 Ill.2d 30, 43 (1998). Since the Act was enacted in derogation of common law, it must be strictly construed against the public entity. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 368-69 (2003). Further, the governmental entity bears the burden of proving it is immune under the Act. *Id.* at 370; *Green v. Chicago Bd. of Education*, 407 Ill. App. 3d 721, 726 (1st Dist. 2011).

The Illinois legislature enacted Article III, entitled "Immunity from Liability for Injury Occurring in the Use of Public Property," with specific and distinct immunities depending on the type and use of public property. 745 ILCS 10/3-101 to 10/3-110.

Statute	Type & Use of Public Property	Immunity
§3-102	Streets, sidewalks, parkways, alleys, medians	None
§3-103	Adoption of plan or design of improvement of property	None
§3-104	Failure to provide traffic signals & signs	Absolute
§3-105	Use of Streets, etc.	None
§3-106	Property used for recreational purposes	Negligence only
§3-107	Access roads or trails	Absolute
§3-108	Supervision of an activity or use of property	Negligence only
§3-109	Harzardous recreational activity	Negligence only
§3-110	Waterways, etc.	Absolute

Here, the Park District has admitted that the Lakefront Trail falls squarely within §3-106. (R. C025; SR. 0010). By enacting §3–106, the legislature sought to encourage and promote the development and maintenance of parks, playgrounds and other recreational areas by shielding public entities from liability for simple negligence. *Moore v. Chicago Park Dist.*, 2012 IL 112788, ¶ 9. Section 3-106 provides:

> "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 (West 2012)(Emphasis added).

Initially, §3–106 was limited to parks, playgrounds, and open areas used for recreational purposes. *Bubb v. Springfield School Dist. 186*, 167 Ill. 2d 372, 378 (1995). But, in 1986, the legislature amended the statute to apply to "any public property intended or permitted to be used for recreational purposes . . . " *Id.* Illinois courts have held that the 1986 amendment reflects the legislature's intent to expand the scope of §3-106. *Id.*; *Fennerty v. City of Chicago*, 2015 IL App (1st) 140679, ¶ 15. During House Debates on Article 1 of Senate Bill 1200 during the 1986 Amendment of §3-106, Representative Greiman observed:

> "This Amendment puts kids back in the parks. It puts Saturday's heroes back in the high school football playing field. And, yet, it makes sure that communities will still be liable for wanton and willful conduct that disregards, with conscious indifference, the safety of its citizens." (House Conference Committee Report on SB 1200, 84th Gen. Assem. June 30, 1986).

The Illinois legislature codified what we, as a society, want: we want parks and recreational facilities for the enhancement of our lives, but we also want to be safe and our children to be safe. Allowing public entities to be liable for willful and wanton conduct accomplishes both goals. In furtherance of this goal, §3-106 has been interpreted very broadly to include not only recreational property itself, but also any other property that increases the usefulness of recreational property. *Sylvester v. Chicago Park Dist.*, 179 Ill. 2d 500 (1997)(§3-106 applies to parking lot that provides access to Soldier Field); *Bubb*, 167 Ill. 2d 372 (§3-106 applies to sidewalk adjacent to playground); *Dinelli v. County of*

Lake, 294 Ill. App. 3d 876 (2nd Dist. 1998)(§3-106 applies to bicycle trail crosswalk over roadway since it increased usefulness of trail); *Wallace v. Metro. Pier & Expo. Auth.*, 302 Ill. App. 3d 573 (1st Dist. 1998)(§3-106 applies to Navy Pier as it is recreational in nature); and *Corral v. Chicago Park Dist.*, 277 Ill. App. 3d 357 (1st Dist. 1995)(§3-106 applies to Lincoln Park Zoo because it is in a park and operated by park district).

In the instant case, the Lakefront Trail is a developed, paved, linear park intended for recreational purposes that falls squarely within §3-106. The Park District actively encourages bicyclists to use the Trail because it is safe, inviting and "beautifully maintained." (R. C 298). Notwithstanding the Park District's admission that the Trail falls within §3-106, and the obviousness of the Trail's recreational uses, the Park District's primary argument in this litigation has been that it cannot be held liable for injuries on the Trail--even for willful and wanton conduct--because the Lakefront Trail is an access road to recreational and scenic areas and, thus, falls within the ambit of §3-107. But, as the appellate court found, this argument is contrary to the statutory intent, the plain language of §3-106 and §3-107, and the public policy of this State.

III. THE APPELLATE COURT PROPERLY FOUND THAT THE LAKEFRONT TRAIL DOES NOT FALL WITHIN §3-107(a)

The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent. *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332 (2008). The best indication of legislature's intent is the statutory language given its plain and ordinary meaning. *Id.* In determining the legislature's intent, all

provisions of a statutory enactment are viewed as a whole. *In re Detention of Lieberman*, 201 Ill. 2d 300, 308–09 (2002) citing *Michigan Avenue Nat'l Bank,* 191 Ill.2d 493, 504 (2000). Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute. *Id.* citing *Sylvester v. Industrial Comm'n,* 197 Ill.2d 225, 232 (2001). Each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous. *Id.*

Accordingly, in determining the intent of the legislature, the court may consider not only the language of the statute, but also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved. *Id.* citing *People v. Pullen,* 192 Ill.2d 36, 42 (2000). Legislative intent can be ascertained from a consideration of the entire Act, its nature, its object and the consequences that would result from construing it one way or the other. *Id.* citing *Fumarolo v. Chicago Bd. of Educ.,* 142 Ill.2d 54, 96 (1990). In construing a statute, we also presume that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience or injustice. *Id.* Statutes must be construed in the most beneficial way which their language will permit so as to prevent hardship or injustice, and to oppose prejudice to public interests. *Id.* citing *Mulligan v. Joliet Regional Port District,* 123 Ill.2d 303, 313 (1988). All of these considerations lead to one conclusion: the legislature intended for §3-107, as a whole, to apply solely to primitive, undeveloped public property. Section 3-107 of the Act provides as follows:

> 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 of federal highway or (3) a township or other road district highway. (b) Any hiking, riding, fishing or hunting trail. 745 ILCS 10/3-107 (West 2012)(Emphasis added).

The plain language of §3-107(a) reveals the legislature intended for the statute to provide absolute immunity for roads providing access to primitive or undeveloped camping, recreational and scenic areas.[4] By including the word "or" *before* "primitive," the adjective "primitive" modifies not only "camping," but also "recreational" and "scenic." Otherwise, the legislature's use of the first "or" would have been superfluous. If the legislature had intended for primitive to modify only camping, it would have, under the rules of grammar, drafted the statute as: "...fishing, hunting, primitive camping, recreational or scenic areas," but it did not. It included the first "or" for a reason; so "primitive" would modify camping, recreational and scenic.

This interpretation is in accordance with proper grammar principles and usage of the English language. "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. Kielezynski v. Village of Indian Head Park*, 2017 IL App (1st) 161574, at ¶ 26 ("[g]iven the

[4] "Primitive" means: of or relating to the earliest age or period; belonging to or characteristic of an early stage of development. *Merriam-Webster.com* (http://www.merriam-webster.com (5 Jan 2015)).

commercial structures and facilities abutting six lanes of Lakeshore Drive. The Park District regularly performs maintenance and improvements to the Trail. The Park District conducts studies on the Trail and ways to improve upon its usage and safety. That is not the type of activity one undertakes when dealing with primitive property where no annual or "as needed" maintenance is performed and no studies are conducted.

Illinois Case Law Dictates that §3-107 Does Not Apply To The Trail

Plaintiff's interpretation of §3-107 -- that it applies only to primitive camping, recreational and scenic areas -- is fully supported by Illinois law. Our courts have uniformly found that the statute does not apply to roads or trails in developed city parks. *See, e.g., Goodwin*, 268 Ill. App. 3d 489; *Brown*, 284 Ill. App. 3d 1098; *Sites v. Cook Cty. Forest Preserve*, 257 Ill. App. 3d 807 (1st Dist. 1994)(inferring the statutory intent of §3-107(a) "is to relieve public entities from the duty to maintain access roads, which may be unpaved or uneven"). In fact, no Illinois court has applied §3-107(a) or (b) applies to a park or paved bicycle trail in a developed city park.

On the contrary, in *Goodwin*, the only Illinois decision involving a paved bike trail in a developed city park, the court found that §3-107(b) did not entitle the park district to absolute immunity. There, the plaintiff was injured when his bicycle collided with a tree that had fallen across a bike path. The park district moved to dismiss the action (which alleged negligence and willful and wanton conduct), on the ground it was absolutely immune under §3-107(b) which

284 Ill. App. 3d at 1101. In *Brown*, the plaintiff was injured riding on a paved bicycle path in the Cook County Forest Preserve. Although the *path* was developed, the Forest Preserve was not. The First District concluded that, because §3-107 applies to *undeveloped* areas, the defendant was entitled to immunity. *Brown* stands for the proposition that, if a path in a developed city park like the Lakefront Trail does not constitute a "riding trail" for purposes of §3-107(b), it cannot constitute a "road providing access to . . . primitive . . . recreational and scenic areas."

In every Illinois case applying §3-107(a) or (b) (with the sole exception of *Scott*, discussed *infra*), the dangerous condition was located in an undeveloped forest preserve. *McElroy v. Forest Preserve Dist. of Lake Cty.*, 384 Ill. App. 3d 662 (2d Dist. 2008)(manmade bridge connecting gravel portions of hiking and riding trail in forest preserve fell within §3-107(b) unlike trail in developed city park as in *Goodwin*); *Mull v. Kane County Forest Preserve Dist.*, 337 Ill. App. 3d 589 (2d Dist. 2003)(gravel bicycle path in forest preserve fell within §3-107(b), unlike trail in developed city park as in *Goodwin*); *Kirnbauer v. Cook Cty. Forest Preserve Dist.*, 215 Ill. App. 3d 1013 (1st Dist. 1991)(defective cable on road/trail providing access to forest preserve fell within §3-107(a) or (b)).

The Park District gives short shrift to the foregoing decisions on the ground they are distinguishable since they involve §3-107(b) rather than (a) and apply an "improper and overly restrictive definition of trail." (CPD Brief, p. 13). The Park District objects to Illinois courts' definition of trail as "a marked path

through a forest or mountainous region." (CPD Brief, pp. 15-16). The Park District argues that there are no mountains in Illinois and the legislature could not have intended to limit §3-107(b) to trails in forests. The Park District does not know its geography. There are numerous mountainous areas in Illinois near Galena, Shawnee National Forest, Starved Rock, and many other destinations. (See https://www.enjoyillinois.com/outdoor-adventures/ 21 June 2017).

Further, the courts' definition of "trail" is consistent with common usage of the word. For example, when one thinks of a "trail bike," one thinks of an adventurous bike ride on an unmaintained trail in a natural setting. One does not need a trail bike for a paved path in a developed city park. The Park District's suggested definitions conflict with the language of 3-107(b) – "any hiking, riding, fishing or hunting trail" – activities that are typically associated with mountains, forests, streams, and wilderness. Moreover, 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, §3-107(b) plainly applies to four types of trails. The Lakefront Trail is not a hiking, riding, fishing or hunting trail, and none of these activities is associated with an urban, metropolitan area like Chicago.

To support its position that ¶3-107(a) applies to the Lakefront Trail, the Park District relies on *Scott v. Rockford Park Dist.*, 263 Ill. App. 3d 853 (2nd Dist. 1994) even though *Scott* is the only Illinois decision to apply §3-107 outside

the confines of a forest preserve and predates *Goodwin, Brown, Mull* and *McElroy*. And, although *Scott* involved a bicycle and a nearby city park, it bears no other similarities to the instant case.

In *Scott,* the Second District determined that the bridge on which plaintiff fell while riding his bike fell squarely within §3-107(a) since it was used "for motorized travel" and served no other purpose than to provide a means of access between a city street and park maintenance facilities that were separated by a creek (thereby requiring a bridge). *Id.* at 857. In concluding that the bridge fell within §3-107(a), and outside the scope of §3-106, the *Scott* court distinguished §3-106 from §3-107(a), expressly stating it was "clear that the primary distinction that the legislature intended to draw in drafting [§3-106 and §3-107(a)] was between, on the one hand, recreation areas (§3-106) and, on the other hand, (a) roads, other than streets and highways, used to access recreation areas; and (b) trails (§3-107)." *Id.* at 856-857. Based on this critical distinction, the Second District held that the bridge was a "road . . . used to access recreation areas" so as to fall within §3-107. *Id.* at 856.

Scott did not involve a dangerous condition on a paved bicycle path *in* a developed city park; it involved a bridge for motorized vehicles to access a park. The Park District's tortured explanation is to claim that the Lakefront Trail is a road just like a bridge is a road. This confounds logic since there is no dispute that, unlike the bridge, the public is prohibited from using motorized vehicles on the Lakefront Trail. (R. C 408, p. 23; C 473, p. 46). Thus, the Trail does not fall

within the Park District's definition of "road" which is "a wide way leading from one place to another especially one with a specially prepared surface which vehicles can use." (CPD Brief p. 14). A bridge over a creek that is used by motorized vehicles fits well within that definition. The Lakefront Trail does not.

The Trail also does not fall within the Vehicle Code's definition of "roadway": "[t]hat portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the berm or shoulder" (625 ILCS 5/1-179 (West 1996)). In fact, the Code defines "[v]ehicle" as "[e]very device, in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power . . .",." 625 ILCS 5/1-217 (West 1996). In contrast, the Code defines "[b]icycle" as "[e]very device propelled by human power upon which any person may ride, having two tandem wheels except scooters and similar devices." 625 ILCS 5/1-106 (West 1996).

The Park District impermissibly seeks to expand the scope of §3-107 to include every "specially prepared surface" regardless of whether public vehicles are allowed. In that case, every sidewalk, shoulder, parkway, gravel path, paved beach, parking lot, tennis court and any other specially prepared surface within a Chicago park would be an "access road" since they all provide access to recreational and scenic areas. The legislature could not have intended for §3-107(a) to apply to every "special" surface in a park. Such an interpretation would eviscerate §3-106 and lead to absurd and unjust results. *Jayko v. Frazcek*, 2012 IL App (1st) 103665, ¶14 (legislature did not intend for absurdity or injustice).

Section 3-107(a) requires a finding that there be a "road." The Illinois legislature (and the Park District's own definition) has determined that a "road" is synonymous with vehicular traffic. It is undisputed that the public is prohibited from using vehicles on the Trail. The Park District's position that the Trail falls within §3-107(a) is unsound and contrary to statutory intent.

Public Policy Mandates that §3-107 Does Not Apply To The Trail

The Park District promotes the Trail as safe and well-maintained for bicyclists, not only for recreational purposes, but also for commuting. The Park District encourages use of the Trail as a "primary transportation corridor for bicycle commuters" and an "integral part of Chicago's bicycle transportation network." (R. C 493). The Park District is aware that "thousands of people [are] using the trail for commuting" each day. (R. C 488; C 492). Unlike all other city parks, the Trail is used 24 hours a day. (R. C 509, C 512).

As a mode of transportation, the Trail is akin to one of the many bike lanes on a Chicago city street rather than to a "road which provides access to fishing, hunting or primitive camping, recreational or scenic areas." If a commuter is injured because of a condition on a city street while riding a bicycle in a bike lane, the City of Chicago is liable for negligence and is entitled to no immunity whatsoever. Since the Park District and the City of Chicago have identical duties to maintain their respective property, it would be illogical to provide absolute immunity for injuries sustained by a commuter using the Trail where the City of Chicago would be liable in negligence for an identical condition on a city street.

Throughout this litigation, the Park District has treated the 18.5 mile paved linear park in the same way it would treat a narrow, bumpy trail in a forest preserve that is never maintained. The Park District is not entitled to re-define the Lakefront Trail as an "access road" running through a primitive forest preserve in order to shield itself from liability.

Furthermore, the Lakefront Trail is used 24 hours a day while all surrounding areas and parks are closed from 11:00 p.m. to 6:00 a.m. It would be irrational to find that the Trail is an access road for purposes of §3-107(a) even though it does not provide access to recreational and scenic areas between the hours of 11:00 p.m. to 6:00 a.m. This same argument applies to the wintertime when the Trail is open, but all adjacent areas, including the beach, are closed or fenced off and no activities are ongoing. During the winter, the Trail does not provide access to any recreational or scenic areas because they are all closed for the season. The legislature could not have intended for §3-107(a) to apply on a seasonal basis as that would render an unreasonable result.

The Park District vigorously promotes the safety of the Trail in an effort to increase usage by recreational and commuter bicyclists. It would be contrary to public policy to allow the Park District to encourage Trail usage, represent that the Trail is safe and then disclaim all liability, even willful and wanton conduct. The public wants parks and recreational facilities, but we also want to be safe. Plaintiff respectfully requests this Court affirm the appellate court and find that §3-107 applies only to undeveloped, primitive property and that neither 3-107(a) or (b) apply to a developed park like the Lakefront Trail.

IV. SECTION 3-106 CONTROLS OVER §3-107

Even if §3-107 was to apply to the Lakefront Trail, it is well-established in Illinois that, when two statutes potentially apply, a court must decide which statute prevails. *See, e.g., Abruzzo,* 231 Ill. 2d at 333; *Robles v. City of Chicago*, 2014 IL App (1st) 131599, ¶14 (finding §2-202 of Act, providing immunity from negligence, prevailed over §2-201 providing absolute immunity). In the instant case, §3-106 and §3-107 provide different immunities (negligence and absolute) and, as such, are in direct conflict and cannot be harmonized. *Moore v. Green*, 219 Ill. 2d 470, 487 (2006)(holding that limited immunity in Domestic Violence Act conflicted with absolute immunity in Tort Immunity Act). Under the well-settled rules that the more specific statute controls the general, and the more recent provision will prevail, §3-106 trumps §3-107. *Moore*, 219 Ill. 2d at 480; *Kayser v. Vill. of Warren,* 303 Ill. App. 3d 198 (2d Dist. 1999)(§3-106 prevailed over §3-102 since purpose of community building was recreational).

Section 3-106, The More Specific Statute, Controls

When a general statutory provision and a more specific one relate to the same subject, it is presumed that the legislature intended the more specific statute to govern. *Abruzzo*, 231 Ill. 2d at 346 (EMS Act which specifically applies to delivery of emergency medical services prevailed over sections of Tort Immunity Act which have a more general application to tort claims for failing to perform an examination); *Ries v. City of Chicago*, 242 Ill. 2d 205 (2011)(§4–

106(b) of Tort Immunity Act more specifically applies to escaping prisoners and, thus, prevailed over §2–202 of Act which applies generally to the execution or enforcement of any law); *Murray v. Chicago Youth Center,* 224 Ill. 2d 213 (2007)(in case involving accident on trampoline, §3–109 of Tort Immunity Act which specifically applies to trampolining prevailed over §2-201 and §3-108 which apply generally to discretionary acts and failure to supervise activity).

Here, §3-106 specifically applies to parks and recreational property like the Lakefront Trail. One of the Park District's stated missions is to "become the leading provider of recreation and leisure opportunities" in Chicago. (R. C 298). Section 3-106 was enacted to encourage and promote the development and maintenance of parks, playgrounds and other recreational areas by shielding public entities from liability for simple negligence. *Moore,* 2012 IL 112788, ¶9.

Section §3-107(a), on the other hand, was enacted to shield public entities from all liability for injuries on undeveloped and natural property that is not intended to be maintained. On its face, §3-107(a) applies to roads providing access to camping, recreational and scenic areas; it does not apply to the recreational area itself. Because §3-106 is the more specific statute to the facts of this case, it prevails over §3-107.

Section 3-106, The More Recent Statute, Controls

When two statutes are in direct conflict, the more recent enactment will generally prevail as the later expression of legislative intent. *Jahn v. Troy Fire Prot. Dist.*, 163 Ill. 2d 275, 281-282 (1994)(holding that *amended* version of §5-

106 of Tort Immunity Act prevailed over Fire Fighter Liability Act as the more recent enactment). Here, §3-107 and 3-106 were originally enacted on August 13, 1965. But, in 1986, §3-106 was amended to include "buildings or other enclosed recreational facilities." Illinois courts have found that the amendment expanded the scope of §3-106. Since the amended version of §3-106 is the more recent enactment, it must prevail over §3-107.

V. THE APPELLATE COURT PROPERLY FOUND THAT SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED ON THE ISSUE OF WILFUL AND WANTON CONDUCT

Summary judgment is a drastic measure and should not be granted unless the movant's right to judgment is clear and free from doubt. *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 44. The purpose of summary judgment is not to try a question of fact but to determine whether one exists. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 122 (1st Dist. 2010). Whether a public entity's acts constitute willful and wanton conduct depends on the facts of the particular case. *Drake v. University of Chicago Hospitals,* 2013 IL App (1st) 111366, ¶ 11.

Whether a public entity is guilty of willful and wanton conduct is a question of fact for the jury and should rarely be ruled upon as a matter of law. *Prowell v. Loretto Hosp.*, 339 Ill. App. 3d 817, 823 (1st Dist. 2003)("only in an exceptional case will the issue of willful and wanton misconduct be taken from the jury's consideration").

The parties agree that the statutory definition of "willful and wanton"

found at §1-210 of the Tort Immunity Act applies to the instant case, and 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* or their property." 745 ILCS 10/1–210 (West 2010) (Emphasis added).

Illinois courts define willful and wanton conduct, in part, as the failure to take reasonable precautions after "knowledge of impending danger." *Barr v. Cunningham*, 2017 IL 120751, ¶ 20; *In re Estate of Stewart*, 2016 IL App (2d) 151117, ¶75 ("an omission, or failure to act against a known danger, may substantiate a claim of utter indifference or conscious disregard"). Indeed, willful and wanton conduct has been established in cases where a public entity has actual knowledge of a dangerous condition, but fails to take proper corrective action to guard against the danger. *See, e.g., Murray*, 224 Ill. 2d at 233-34 (reversing summary judgment on issue of willful and wanton where defendant knew of dangers of paralysis from trampoline, but failed to provide sufficient mats and properly trained instructors); *Doe v. Chicago Bd. of Ed.,* 213 Ill.2d 19 (2004)(finding willful and wanton conduct was a question of fact where defendant knew of special needs victim and dangerous propensities of assailant).

Consider the case of *In re Estate of Stewart*. There, the decedent suffered a fatal asthma attack at school and, after a jury returned a verdict in favor of the Estate, the school appealed, arguing there was no evidence to support a finding of willful and wanton conduct. The decedent collapsed during class and his teacher immediately rushed over, turned him on his side to prevent choking,

stayed with him, and sent two students to get the nurse. Despite these efforts, the decedent died. Evidence revealed that 7-20 minutes passed before 911 was called even though there was a phone in the classroom.

In affirming the jury verdict, the Second District found that, rather than emphasize the teacher's initial actions, the jury was free to place more weight on his subsequent actions, i.e., his 7-20 minute delay in calling 911. In reaching this decision, the court noted three factors in addressing the question of willful and wanton conduct: (1) a deviation from standard operating procedures or a policy violation; (2) an unjustifiably lengthy resonse time; or (3) an unjustifiably inadequate response to a known danger. *Id.* at ¶84. All three factors were present in *Stewart*, and are present in the instant case.

It is undisputed that, in the Spring of 2013, the Park District had actual knowledge of the crack in the concrete *and* actual knowledge that the crack was dangerous, "severe" and in need of emergency repair. Arlow testified that he received a patron call in the Spring informing him of the crack. (R. C453, pp. 36-37; C454, p. 38). Arlow could not recall if he received the call in early, mid or late Spring. He merely *assumed* it "had to be later than April" because there was no snow on the ground. (R. C453, pp. 36-37). If there was no snow on the ground in March (i.e., early Spring), Arlow's testimony reveals that he could have received the call as early as March.[5]

[5] Weather reports from the National Climatic Data Center reveal that Spring 2013 was very mild with higher than normal temperatures. From late March 2013, the temperature range was 32 to 60 with little to no prior snow and, in April 2013, the temperature range was 30 to 86. Most days in April the temperature was in the 50s, 60s, and 70s. (http://www.nodc.noaa.gov).

Within a few days of receiving the call, Arlow went to look at the defect and determined it was "severe" and in need of repair. (R. C452, p. 30; C454, p. 39; C458, pp. 56-57). Arlow did not contact an in-house tradesperson to perform an immediate repair, as he had done in Spring 2014 when the same crack was again reported by a patron, even though that crack was not as severe as the crack involved in plaintiff's case. (R. C454, p. 39; C477, p. 64-65; C452, p. 30; C448, p. 14; C451, p. 29). Arlow does not know why he did not have the crack repaired immediately. (R. C456, pp. 46-47). In violation of the Park District's policy to immediately repair unsafe conditions, Arlow instead contacted Gernady who also violated Park District policy by including the crack in the scope of work for the Rapid Response Program in June 2013. (R. C477, pp. 64-65; C483, p. 86).

Either Gernady did not receive the call from Arlow until June, meaning Arlow waited to call Gernady, or Gernady received the call earlier in the Spring, and then waited to include the crack on a "to do" list. Regardless, neither Arlow nor Gernady complied with Park District procedures that required immediate repair of the crack. Indeed, Gernady testified that he went to look at the crack and agreed it was a "dangerous condition that needed to be repaired on an "emergency" basis. (R. C477, pp. 64-65; C483, p. 86).

The Park District has policies regarding "as needed" repairs: if the condition is severe and in need of repair, an in-house tradesperson is to be called to have it repaired immediately. (R. C351, p. 28). If a repair cannot be made in house, it can be referred to an outside contractor as an "urgent repair" for bid that day or the next. (R. C433, p. 51; C452, p. 33). If a repair cannot be made

immediately, the Park District will block off the Trail with barricades and signs. (R. C433, p. 52). The Park District is able to mark dangerous conditions like cracks with bright colored paint. (R. C433, p. 52). Gernady has spray paint at his disposal. (R. C467, p. 25; C468, p. 26).

After receiving the patron complaint and discovering the "severe" crack that was dangerous and in need of emergency repair, neither Arlow nor Gernady did anything required of them by the Park District. They did not attempt an in-house repair. They did not contact an outside contractor for an immediate repair and they did not barricade or paint the crack or put up any signs. Instead, they allowed the dangerous condition to exist for months until Gernady finally included it on the scope of work as part of the Rapid Response Program.

But, in doing so, Gernady violated the Park District's policy regarding the RRP as that program is to be used only for conditions that present no safety concerns. (R. C435, p. 61; C435, p. 62). Indeed, the RRP (which is not rapid at all) takes anywhere from 4 to 6 weeks from the time the scope of work is prepared to when it is submitted to contractors for pricing, making it unsuitable for emergency, dangerous conditions. (R. C412, p. 41).

Park District procedures require Gernady to take emergency issues to his supervisors, Daly and Rejman, to be priced out immediately. (R. C412, p. 41). According to Daly, unsafe conditions are to be repaired by either in-house employees or outside contractors on an expedited basis. (R. C412, p. 41; C413, p. 42; C433, p. 51; C471, p. 39; C482, p. 85; C483, p. 86). Unsafe conditions can be repaired on the same day they are identified. (R. C483, p. 86).

By including the crack on the RRP, Gernady violated numerous Park District safety rules which are in place to protect the public. After Meccor submitted its bid on June 12, 2013, the Park District waited another week, until June 19, 2013, to issue a Notice to Proceed to Meccor. (R. C135; R. C141). Gernady did not request that Meccor repair the crack first – even though it was the only emergency repair that year. (R. C297; C483, p. 86). Once the work began, Gernady set no deadlines for completion of the repair and did not supervise the work. (R. C472, p. 43; C474, p. 53; C475, p. 54, 56-57; C480, p. 77; C483, p. 89; C484, p. 93). As a result of this lack of oversight, Meccor's subcontractor repaired a non-emergency condition on June 19, 2013, but did not repair the subject emergency crack until July 10, 2013. (R. C472, p. 43; C475, pp. 56-57; C480, p. 77).

Compounding matters, Gernady did not repair the crack as part of his annual Spring inspection, even though Rejman testified that the inspection is a "priority early Spring project" to complete repairs before the busy summer. (R. C439, p. 77). Gernady is required to ensure repairs are completed before the busy season. (R. C418, p. 62). Gernady's annual inspections are in April, but the crack was not repaired until July 10, 2013. (R. C474, p. 53). The crack, which was 3-4 feet long, 2-3 inches deep and 2 inches wide, could not have developed within a few weeks or months and, indeed, it is known the crack existed in the Spring when Arlow received a patron call. Gernady measures and repairs cracks that are deeper than 1 ½ inches. (R. C468, p. 29). The Park District requires Gernady to repair all dangerous conditions without delay. (R. C434, p. 56).

Gernady included the crack in the RRP even though Park District mandates that only non-dangerous conditions are to be included on the RRP.

Like the teacher in *In re Estate of Stewart*, who took some action to protect the student, but was nevertheless found willful and wanton for his failure to timely call 911, the Park District's initial acts in identifying the dangerous crack and including it in the RRP do not absolve it of willful and wanton conduct. These acts reflect the Park District planned to repair the crack, but never actually took any corrective actions for months. The Park District's conduct violated its policies and procedures, resulted in an unjustifiably long response time, and was a wholly inadequate response to a known danger. The Park District's conduct evinces an utter indifference to or conscious disregard for the safety of others so as to constitute willful and wanton conduct.

In its Brief, the Park District incorrectly cites *Barr* for the proposition that "the failure to take the best or most expedient course of action does not serve as evidence of willful and wanton conduct and, at most, constitutes inadvertence, incompetence or unskillfulness."[6] (CPD Brief, p. 21, citing *Barr,* at ¶18). But, unlike the instant case, the defendant in *Barr* had no knowledge the activity was dangerous. A school teacher allowed students to play floor hockey with plastic hockey sticks and a "squishy" safety ball, but did not require safety goggles that were available because she did not believe a serious eye injury could occur. Plaintiff sustained an eye injury, but this Court held that there was

[6] Paragraph 18 of the *Barr* decision does not contain the language cited by CPD.

no willful and wanton conduct because the teacher did not know of any risk of an eye injury and there were no prior injuries. The risk of an eye injury from a squishy ball seems virtually non-existent while the risk of serious injury from a bike tire getting stuck in a crack in the middle of the Trail is a virtual certainty.

Moreover, unlike the defendant in *Barr* who denied knowledge of danger, it is undisputed that the Park District knew the crack presented an imminent danger, was "severe" and in need of emergency repair. Indeed, with 60,000-70,000 people using the Trail each summer day, nearly one-third of which are bicyclists, the danger in allowing a crack in the middle of the Trail to exist, just wide enough for a bike tire, is obvious. The crack presented not only an imminent danger to bicyclists, but also to mothers pushing their babies in strollers. Just as bike tire could become stuck in a crack, a stroller tire could easily get stuck, catapulting a baby onto the hard concrete. Despite knowledge that the crack presented a serious risk of injury, the Park District failed to repair the crack in an appropriate and timely manner and, by doing so, violated the its own policies and procedures which are designed to protect the public safety and prevent injuries like those sustained by the instant plaintiff.

A risk of injury was obvious in *Hadley v. Witt Unit Sch. Dist. 66*, 123 Ill. App. 3d 19 (1984) where a teacher observed plaintiff and three boys attempting to pound a piece of scrap metal through a hole in an anvil, but did not tell them to stop or instruct them to put on safety goggles. After about 20 minutes, a metal chip flew into plaintiff's eye. The appellate court reversed summary

judgment and held that the teacher's "failure to act after observing the students engaging in a dangerous activity could constitute willful and wanton conduct."

Similarly, in *Murray v. Chicago Youth Center,* 224 Ill. 2d 213 (2007), this Court held that questions of fact existed as to whether the Youth Center was guilty of willful and wanton conduct after the plaintiff suffered a spinal cord injury while using a mini-trampoline during an extracurricular tumbling program. The evidence showed that the defendant did not provide proper mats, supervision by a trained instructor, trained spotters or safety equipment. This Court held that the failure to take adequate safety precautions in light of defendant's knowledge of the inherent dangers of mini-trampolines created a factual dispute as to defendant's willful and wanton conduct. *See also Hill v. Galesburg Comm. Unit Sch. Dist. 205,* 346 Ill.App.3d 515, 517 (2004)(school subject to willful and wanton liability where it permitted plaintiff to participate in chemistry experiment without eye protection despite knowledge of danger); *Vilardo v. Barrington Comm. Sch. Dist. 220*, 406 Ill. App. 3d 713, 724 (2d Dist. 2010)(reckless disregard occurs when, after knowledge of a danger, a public entity fails to exercise ordinary care to prevent the danger).

These cases unequivocally establish that willful and wanton conduct exists when the defendant *knows* of a danger and fails to take action to correct the danger in a reasonable period of time. There is no legal authority which stands for the proposition that *planning* to make a repair negates willful and wanton conduct. Indeed, no such case exists because including a dangerous

condition on a "to do" list and soliciting bids does nothing to protect the public. In the case at bar, the dangerous crack existed for as long as 4 months (March-July) while the Park District was planning its repair.

In the cases relied upon by the Park District, none of the defendants had knowledge of a danger and, thus, no willful and wanton conduct was found. The only case cited by the Park District involving some knowledge of a potential danger was *Lorenz v. Forest Preserve Dist.,* 2016 IL App (3d) 150424. There, a volunteer trail sentinel supervisor told a trail sentinel to not step into the trail during a bicycle event, lest a bicyclist might be injured. Ignoring the supervisor, a volunteer sentinel stepped onto the trail resulting in plaintiff's injury. The court found that the singular act of the sentinel was not willful and wanton.

The facts in the instant case are far more egregious than those in *Lorenz* and involve far more than a singular act. Despite actual knowledge of the dangerous crack, the Park District did not correct the danger or make any attempt to protect the public by painting the crack or barricading the area for months even though its policies required immediate corrective action.

The Park District's entire argument is predicated on actions it took in planning to correct the danger: Arlow calling Gernady, Gernady including the crack in the scope of work, Gernady soliciting bids, and Gernady awarding the work to Meccor. (CPD Brief, 20). According to the Park District, the fact that it did not ensure the condition was repaired within a shorter timeframe or employ alternate means to address the condition may be inadvertence or incompetence,

but is not willful and wanton. The Park District's argument is fatally flawed because it had knowledge of a danger and did nothing to correct it or protect the public. Other than the final action on July 10, 2013 when the crack was repaired, the Park District did nothing to negate the imminent danger. Whatever minimal actions it took, the Park District never corrected the danger, never mitigated the danger and did absolutely nothing to protect the public.

Illinois courts have found willful and wanton conduct (or at least a question of fact) in cases involving far less facts than those present in the instant case. For instance, in *Palmer v. Chicago Park District,* 277 Ill. App. 3d 282 (1st. Dist. 1995), the court found allegations of willful and wanton conduct were sufficient where a 30-foot section of fence had fallen in a city park and been left unrepaired for three months despite the park district conducting daily inspections and despite the obviousness of the danger the fence posed. The Park District attempts to distinguish *Palmer* by claiming the Park District there "took no corrective action to repair" or warn about the fence. (CPD Brief, p. 21). But, the Park District here also took no corrective action to repair the crack and did not barricade or paint or place signage to warn Trail patrons of the crack. From the moment the Park District learned of the crack until the time it was repaired on July 10, 2013, nothing was done to the crack itself. It was in the same dangerous, severe condition at all times.

As it did in the trial and appellate courts, the Park District once again relies upon the case of *Lester v. Chicago Park Dist.* 159 Ill. App. 3d 1054 (1st

Dist. 1987) to establish that "affirmative acts" (no matter how small or insignificant) negate any possibility of willful and wanton conduct. In *Lester*, the plaintiff was injured playing softball and alleged that the Park District repaired ruts in the softball field, but did so ineffectively. In affirming dismissal of plaintiff's complaint, the appellate court stated that the Park District's conduct in undertaking "affirmative *rehabilitative* acts" to fill in the ruts in the field indicated a concern for possible injuries, and did not rise to the level of utter indifference or conscious disregard for the safety of others.

As the appellate court here found, the facts in *Lester* are in stark contrast to those in the instant case and are readily distinguishable. Whereas, in *Lester*, the Park District actually repaired the dangerous ruts (albeit negligently), the Park District here made absolutely no attempt to remedy the dangerous condition prior to plaintiff's injury. *Lester* did not establish a bright line rule that a public entity cannot, as a matter of law, be willful and wanton if it takes *any* affirmative action. (R. C 548). In fact, the court in *Lester* limited its holding to "affirmative *rehabilitative* acts." Rehabilitate is defined as "to restore to good condition." (http://dictionary.reference.com).

In the case at bar, the undisputed evidence reveals the Park District did not undertake any *rehabilitative* act. It did nothing to restore the gap to good condition. Over the course of several weeks and/or months, the Park District did nothing more than pass along a patron complaint from one co-worker to another and solicit bids for general repair work. Those actions are far from

rehabilitative. After the work was awarded, the Park District did nothing for another 30 days; it did not give any deadlines to the contractor and did not supervise the work. The only "affirmative rehabilitative act" taken by the Park District to repair the crack to a good condition was performed in mid-July, but by then, it was too late; plaintiff had already been injured. The Park District's conduct in this case is totally inapposite from the actions taken in *Lester*.

Illinois case law is clear: willful and wanton conduct exists if a defendant fails to take appropriate and timely action to remedy a known, dangerous condition that presents a risk of injury. The facts in the instant case support a finding of willful and wanton conduct; at a minimum, questions of fact exist.

VI. SECTION 2-201 DOES NOT APPLY

There are several reasons why §2-201 does not apply. First, the Park District waived review of §2-201 by failing to raise it in the appellate court or in its petition for leave to appeal (see Section I above). Second, the limited immunity in §3-106 prevails over the absolute immunity in §2-201. Third, the Park District employees engaged in ministerial, not discretionary, acts.

In *Moore v. Chicago Youth Center,* 224 Ill. 2d 213 (2007), the plaintiff suffered a spinal cord injury while using a mini-trampoline, the defendant argued it was absolutely immune under §2-201 because its actions were discretionary. Plaintiff argued that §3-109, which provides immunity for negligence arising out of hazardous recreational activity, prevailed over §2-201. This Court agreed. In reaching this conclusion, the court noted that §2-201

provides: "*Except as otherwise provided by Statute,* a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (Emphasis added).

This Court found that the prefatory language made it clear that the legislature did not intend for the immunity afforded under §2-201 to be absolute and applicable in all circumstances. By including the language at the beginning of §2-201 "except as otherwise provided by Statute," the legislature indicated that §2-201 immunity is contingent upon whether another provision, either within the Act or some other statute, creates exceptions to or limitations on that immunity. *Id.* at 232. The *Moore* court found that §3-109, which lists trampolining as a hazardous recreational activity, directly addressed the situation giving rise to the plaintiff's accident and, therefore, fell within the "otherwise provided" language in the prefatory sentence of §2-201. Thus, this court concluded that §3-109 prevailed over §2-201. *Id.* at 234.

In the instant case, the Lakefront Trail falls within §3-106 which provides limited immunity to the Park District and its employees for injuries on recreational property. Like the Court found in *Moore*, §3-106 falls within the "otherwise provided" language in §2-201. Because of the need to protect public safety from injuries on parks and recreational facilities, §3-106 prevails over 2-201 as it did in *Moore*.

Even if §2-201 did not contain the prefatory language, when two statutes potentially apply, it is well-settled that the more specific statute controls the general, and the more recent provision will prevail. As discussed in Section IV above, §3-106 prevails §2-201. Section 3-106 specifically applies to parks like the Trail whereas section 2-201 applies generally to any discretionary acts regardless of the type or use of property.

Even if this Court were to consider the applicability of §2-201, the Park District is not entitled to absolute immunity because there is no evidence a Park District employee engaged in both the determination of policy and an exercise of discretion in its inspection, maintenance and repair of the Trail. Further, the Park District has a ministerial duty to maintain the Trail in a reasonably safe condition for its intended and permitted use.

The Illinois Supreme Court has developed a two-part test to determine whether §2-201 applies. First, an employee may qualify for discretionary immunity "if he holds *either* a position involving the determination of policy *or* a position involving the exercise of discretion." *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 341 (1998). However, an employee who satisfies the first prong of the test must also have engaged in *both* the determination of policy *and* the exercise of discretion when performing the act or omission from which the plaintiff's injury resulted. *Id*. Whether the act or omission in question is discretionary or ministerial must be determined on a case-by-case basis. *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 622 (1st Dist. 2010).

Policy determinations involve "those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *Harinek*, 181 Ill.2d at 342. "Discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Gutstein*, 402 Ill.App.3d at 622-3.

A municipal corporation exercises discretion when it selects and adopts a plan in the making of public improvements, 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 manner. *Id.* at 623. While the improvement of property is a discretionary act, the maintenance of property consists of keeping it in a state of repair or efficiency and constitutes a ministerial task. *Morrissey v. City of Chicago*, 334 Ill.App.3d 251 (1st Dist. 2002).

The case of *Gutstein v. City of Evanston* 402 Ill. App. 3d 610 (1st Dist. 2010) is directly on point. There, the plaintiff alleged that she fell walking in an unimproved alley behind her home. The City had an annual program to regrade alleys that was administered by the public works supervisor. Prior to the accident, plaintiff had complained to the Alderman who added the alley to the list of alleys to be repaired that year. After the jury returned a verdict for the plaintiff, Evanston appealed, arguing that it was absolutely immune because

the decision of how and when to fix the alley was a discretionary decision of its public works supervisor.

The appellate court disagreed, concluding that Evanston was not entitled to discretionary immunity under §2–201 because: (1) the city had established a program of annually regrading all its unimproved alleys, which merely involved the execution of a set task (*i.e.*, a ministerial act); (2) once the alderman put the plaintiff's alley on the priority list for repair, the city supervisor no longer had discretion; and (3) there was no evidence that *any* work was done in the alley, let alone *how* it was done. *Id.* at 625–26, 341Ill.Dec. 26, 929 N.E.2d 680.

Similarly, in the instant case, the Park District has an established program for repairing the Trail each year and on an as-needed basis. The program involves a hierarchical process involving a collaborative effort by numerous levels of employees, none of whom exercise both discretion and determine policy. (R. C433, p. 53; C434, p. 54). The Park District mandates the Trail be inspected as a "priority early Spring project." Rejman requires Gernady to inspect the Trail. Rejman testified that Gernady does not have discretion in determining whether to do the annual inspection; he must ensure the repairs are carried out. (R. C411, p. 34; C422, p. 17). According to Rejman, Gernady is not free to do whatever he wants when inspecting the trail; Rejman tells him what to do. (R. C425, p. 21). Gernady does not have discretion in determining whether to repair a dangerous condition; the Park District dictates they must be fixed. (R. C 434, p. 56). Further, Gernady's supervisors must approve the scope

of work and the contractors awarded a project. (R. C437, pp. 68-69; C482, p. 83).

After Arlow received a call from a patron complaining about the crack, he inspected the crack (just like the Alderman in *Gutstein*), found it to be unsafe, and had Gernady add it to the list of RRP repairs. Gernady's role, like the role of the city supervisor in *Gutstein*, in carrying out the task of making the repairs was ministerial – Gernady had no discretion. He was required to have the defects repaired if the budget and scope of work was approved by his supervisors. Once the outside contractor was hired, Gernady was no longer involved. He did not give the contractor any deadlines for completing the work and did not oversee their work. And, as in *Gutstein*, the crack was not repaired. *See Ponto v. Levan*, 2012 IL App (2d) 110355 (2012)(City water superintendent's decision to replace water main had to go through hierarchy of decision-makers, thus, decision was not unique to a particular office and not discretionary). Under Illinois law, maintaining the Trail in a safe condition is a ministerial task for which there is no immunity under §2-201.

CONCLUSION

WHEREFORE, plaintiff/appellee, ISAAC COHEN, respectfully requests this Court affirm the appellate court decision and find as a matter of law that (1) §3-107 applies to primitive, undeveloped areas; (2) the Trail does not fall within §3-107; (3) that §3-106 prevails over §3-107 and §2-201; (4) the Park District was willful and wanton or, at a minimum, questions of fact exist; (4) the Park

District is not entitled to absolute immunity under §2-201; (5) this matter is remanded to the trial court; and (6) for any further relief this Court deems just.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this *Brief of Plaintiff/Appellee* conforms to the requirements of Illinois Supreme Court Rules 341(a) and (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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

/s/ Jill B. Lewis
Jill B. Lewis

No. 121800

In the Supreme Court of Illinois

ISAAC COHEN Illinois Plaintiff/Respondent. vs. CHICAGO PARK DISTRICT, Defendant/Petitioner.	))))))))))	Petition for Leave to Appeal from the Appellate Court of First District, No. 15-2889 Circuit Court of Cook County Court No. 14 L 05476 Honorable William E. Gomolinski Judge Presiding

NOTICE OF FILING

PLEASE TAKE NOTICE that we have on the ***11th day of July, 2017***, served and filed electronically with the Clerk of the Supreme of Illinois the ***Brief of Plaintiff/Appellee, Isaac Cohen***, a copy of which is attached hereto.

/s/ Jill B. Lewis
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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned, an attorney, certifies that the statements set forth in this instrument are true and correct, and that one copy of this Notice of Filing and Certificate of Service and three (3) copies of the Brief of Plaintiff/Appellee, Isaac Cohen were served upon counsel for Defendant/Appellant, CHICAGO PARK DISTRICT, on July 11, 2017 via U.S. Mail by depositing the same in the United States Mail at One East Wacker Drive, Chicago, Illinois 60601 in an envelope, with proper postage affixed, and plainly addressed to:

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