No. 121800

IN THE
SUPREME COURT OF ILLINOIS

ISAAC COHEN,

Plaintiff-Appellee,

vs.

CHICAGO PARK DISTRICT,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois,
First Judicial District, Fourth Division, Case No. 1-15-2889.

There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, Case No. 2014 L 005476,
the Honorable William E. Gomolinski, Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT CHICAGO PARK DISTRICT

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E-FILED
7/25/2017 3:56 PM
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ORAL ARGUMENT REQUESTED

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ARGUMENT

The Court should affirm the decision of the trial court to grant the Park District's Motion for Summary Judgment.

This Court may affirm the trial court's decision on any basis supported by the record. Plaintiff admits that the waiver rule is not a jurisdictional requirement for this Court but still argues that the Park District waived certain arguments included in its Appellant Brief. This Court has previously considered matters that an appellant omitted from their petition for leave to appeal. *See e.g. Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 462 (1976) (the appellee's motion to strike a portion of the appellant's argument was denied, even though the argument was not raised in the petition for leave to appeal); *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 144-45 (1972); *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967) (the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may override the considerations of waiver).

Further, the cases that Plaintiff relies on for his waiver argument involve aggravating circumstances in support of waiver, none of which is at issue in this matter. *See Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 64 (sufficiency of the plaintiff's negligent misrepresentation claim was never argued at any level of the proceeding); *see also Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 429 (2002) (Court held that the waiver principle applied where there was an absence of relevant evidence regarding the newly raised issue). Here, of the two issues omitted from the Park District's Petition for Leave to Appeal, Section 2-201 was raised before the trial court and Section 3-107(b) is a subsection of 3-107—a statute that has been heavily briefed and argued throughout the

life of this matter. 745 ILCS 10/2-201; 745 ILCS 10/3-107(b). Therefore, contrary to Plaintiff's contention that the Park District's failure to raise the issues in its Petition for Leave to Appeal "mandates a finding of waiver", there exists no such "mandate" and, of course, the Court may consider the applicability of Sections 2-201 and 3-107(b) in its review.

Again, this Court should affirm the decision of the trial court, where (1) the Lakefront Trail is afforded absolute immunity under Section 3-107 of the Tort Immunity Act, (2) the facts fail to rise to the level of willful and wanton conduct under Section 3-106; and (3) the Park District is afforded absolute immunity for discretionary policy decisions under Sections 2-109 and 2-201.

I. THE LAKEFRONT TRAIL IS AFFORDED ABSOLUTE IMMUNITY UNDER SECTION 3-107 OF THE TORT IMMUNITY ACT

A. Prior Appellate Cases Improperly Narrowed the Scope and Applicability of Section 3-107

The statutory interpretation issues involving Section 3-107 require *de novo* review. This Court need not adhere to existing appellate case law nor to the unsupported limitations and exceptions that the appellate courts have read into Section 3-107, especially where many of the exceptions were not intended by the legislature, as evidenced by the language of the statute.

The courts should not read limitations into the Tort Immunity Act that the legislature has not supplied. *See Epstein v. Chicago Bd. Of Educ.*, 178 Ill. 2d 370, 376-77 (1997); *In re Chicago Flood Lit.*, 176 Ill. 2d 179, 192-93 (1997); *Barnett v. Zion Park Dist.*, 171 Ill. 2d 378 (1996); *Barnes v. Chicago Housing Auth.*, 326 Ill. App. 3d 710, 723-24 (1st Dist. 2001).

i. Section 3-107 is not limited to primitive or undeveloped property

Section 3-107 does not include any requirement that the subject property must be undeveloped or primitive before 3-107 immunity applies. Again, the definition of "trail" that the 3-107(b) appellate case law has adopted is overly restrictive. While Plaintiff contends that the Park District does not know its geography and that there are indeed mountainous regions in Illinois, it remains that there are no mountains in Illinois, only hills. *See* Plaintiff's Appellee Brief, p. 25. A definition of "trail" that requires the path to run through a mountainous or forested region would limit Section 3-107(b) immunity to those trails located in forests; but, such a limitation is unsupported by the language of the statute.

ii. The applicability of Section 3-107 is not limited to wholly unimproved property

Plaintiff argues that Section 3-107 should only apply to undeveloped and unimproved property, such that 3-107 cannot apply to the Lakefront Trail because it is paved and maintained by the Park District. *See* Plaintiff's Appellee Brief, pp. 21-22. However, in *Mull v. Kane Cnty. Forest Pres. Dist.*, the appellate court noted that a local public entity's immunity under Section 3-107 is not barred where another entity develops property adjacent to a trail. 337 Ill. App. 3d 589, 592-593 (2d Dist. 2003). Plaintiff also contends that the trail must be unimproved such that it would require a "trail bike" to ride an unmaintained trail in a natural setting, but several cases apply Section 3-107 immunity to improved trails. *See e.g. McElroy v. Forest Pres. Dist. of Lake Cnty.*, 384 Ill. App. 3d 662 (2d Dist. 2008) (developed bridge); *Brown v. Cook Cnty. Forest Pres.*, 284 Ill. App. 3 1098 (1st Dist. 1996) (paved path).

iii. Property covered by Section 3-107 need not offer uninterrupted access

Plaintiff then goes on to argue that Section 3-107 also includes additional limitations, including that the Lakefront Trail cannot be considered an access road or a trail because it can be used twenty-four hours a day but where the beaches and surrounding parkland are closed from 11 p.m. to 6 a.m., such that the Trail does not actually provide access to any fishing or scenic areas during the overnight hours. *See* Plaintiff's Appellee Brief, p. 29. However, the fact that the areas served by the access road may temporarily close either overnight or during the off-season does not negate a finding that Section 3-107 applies, since there is no requirement that the areas provided access to remain open twenty-four hours a day or open every month of the year before immunity applies. Similarly, Section 3-107(b) does not include any requirement that the trail provide for around-the-clock or year-round hiking, riding, fishing, or hunting before immunity applies.

iv. The Illinois Vehicle Code's definition of roadways does not apply to Section 3-107

Plaintiff also argues that the Lakefront Trail cannot be considered an access road because it does not fall within the Illinois Vehicle Code's definition of a "roadway". *See* Plaintiff's Appellee Brief, p. 27. However, there is no such requirement found in Section 3-107 that any covered access road must meet this definition. In fact, Section 3-107(a) specifically excludes city streets and state or federal highways. Plaintiff emphasizes that only Park District and emergency vehicles are allowed on the Lakefront Trail (and not public motorized vehicles) to argue that Section 3-107(a) should not apply, but, again, there is no requirement that the access road allow public motorized vehicles before

Section 3-107(a) immunity applies.

Except for the limitations and exceptions set forth by the plain language of the statute, Section 3-107 applies to "[a]ny road" or "[a]ny trail". The additional limitations and exceptions that Plaintiff argues for are completely unsupported by the language of the statue and run contrary to the intent of the legislature. As such, Section 3-107 applies to the Lakefront Trail.

B. The Dual Nature of the Lakefront Trail Does Not Preclude the Applicability of Section 3-107, Especially Where Section 3-107 is More Specific to the Lakefront Trail

Plaintiff argues that Section 3-106 should apply to the Lakefront Trail instead of Section 3-107 because 3-106 is more "specific" to the subject property, as the Lakefront Trail itself is recreational in nature. *See* Plaintiff's Appellee Brief, p. 31. However, the dual nature of the Lakefront Trail—which affords both recreational opportunities including walking and biking as well as a way to access Lake Michigan and surrounding parkland—does not limit the applicability of Section 3-107.

Instead, Section 3-107 provides immunity for specifically enumerated categories of recreational property (i.e. access roads and trails). This is evident even when looking at the existing Section 3-107 case law, where many of the incidents involve bicycle accidents on paths that are afforded absolute immunity under Section 3-107. While bicycle riding is in and of itself recreational in nature, it is the nature of the subject property—an access road or a trail—that dictates the applicability of Section 3-107(a). Further, Section 3-107(b) makes clear that the immunity is intended to apply to trails including riding, hiking, fishing, and hunting trails, even though the trails themselves may also be considered recreational property.

Again, while an access road could also be considered recreational property, as it increases the usefulness of the recreational property, the statutory language clearly sets forth that Section 3-107 immunity is to be applied. The legislature made clear that the categories of recreational property found in Section 3-107 are to be afforded additional immunities beyond the broad class of "recreational property" that is covered by Section 3-106 of the Tort Immunity Act. Plaintiff also argues that Section 3-106 should apply because it was amended more recently than Section 3-107, and, thus, the more recent statute controls. *See* Plaintiff's Appellee Brief, pp. 31-32. However, the situation at bar involves two subsections of the same statute rather than two distinct statutes, as was the issue presented in the only case Plaintiff cites to support his argument. *See Jahn v. Troy Fire Prot. Dist.*, 163 Ill. 2d 275 (1994) (the Tort Immunity Act controlled where the Fire Fighter Liability Act was in direct conflict with the more recently amended Tort Immunity Act). Here, when the legislature updated or amended one of the subsections of the Tort Immunity Act, it was certainly aware of the other subsections of the Tort Immunity Act, such that it did not intend for the more recently amended subsection to apply to the exclusion of any other applicable subsection. Further, Sections 3-106 and 3-107 are not in direct conflict, as Section 3-107 merely applies to a specific category of recreational property. Therefore, again, the language of Section 3-107 makes clear that it is the more specific statute for access roads and trails such as the Lakefront Trail.

C. Public Policy Considerations Run Contrary to Plaintiff's Argument

The Park District's implementation of an inspection and maintenance program through Rapid Response to address the significant maintenance burden posed by the Lakefront Trail—due to its location directly adjacent to Lake Michigan and the damage

caused by waves and winter storms—should not strip the Park District of the immunities afforded by Section 3-107. Such a finding would only serve as a disincentive for public entities to voluntarily develop and maintain access roads and trails, which would have otherwise been afforded the immunities established in Section 3-107. Further, without specific language in the statute to indicate otherwise, a voluntary undertaking by a local public entity does not supersede the immunities provided by the Tort Immunity Act. *Barnes v. Chi. Hous. Auth.*, 326 Ill. App. 3d 710, 718-19 (1st Dist. 2001). As such, the Lakefront Trail should still be afforded immunity under Section 3-107 despite the voluntary steps taken by the Park District for maintenance and upkeep of the Lakefront Trail.

D. The Lakefront Trail is Either a Road Under 3-107(a) or a Trail Under 3-107(b)

Lastly, even if this Court were to find that the word "primitive" modifies camping, recreational, and scenic areas as found in Section 3-107(a), the Lakefront Trail provides access to fishing areas on Lake Michigan and also provides access to the scenic areas and views of Lake Michigan, which is by its very nature, both primitive and undeveloped. While the Park District voluntarily maintains the Lakefront Trail in an effort to keep the Trail safe, especially where it is subjected to storm damage and erosional forces, such voluntary affirmative acts do not strip the Park District of the absolute immunity afforded by Section 3-107. Lastly, the Lakefront Trail qualifies as a riding and fishing trail under Section 3-107(b). The existing appellate case law interpreting Section 3-107(b) routinely found that bicycle paths were riding trails for the purposes of this section. Therefore, the Lakefront Trail is afforded absolute immunity under Section 3-107.

II. THE FACTS FAIL TO RISE TO THE LEVEL OF WILLFUL AND WANTON CONDUCT

While the Park District maintains that the Lakefront Trail is to be afforded absolute immunity under Section 3-107, even if this Court were to find that Section 3-106 should apply, the facts fail to rise to the level of willful and wanton conduct. Neither party disputes that the Lakefront Trail is recreational property, which is afforded the protections set forth in Section 3-106 of the Tort Immunity Act.[1]

The condition allegedly causing Plaintiff's injury (hereafter "the condition") is a gap, approximately two inches at its widest point, between two pieces of concrete forming a small section of the twenty-six[2] mile Lakefront Trail. C-408 (p. 22), 521 (pp. 21-22). A Park District employee's characterization of the condition as an "emergency" is, alone, insufficient for a showing of willful and wanton conduct, where relevant factors include the nature of the condition and the reasonableness of the Park District's response in comparison. C-483 (p. 86). "While omission, or failure to act against a known danger, may substantiate a claim of utter indifference or conscious disregard; one must consider the totality of the circumstances in deciding whether a defendant acted with utter indifference or conscious disregard." *Stewart v. Oswego Cmty. Unit Sch. Dist. No 308*,

[1] The *Amicus Curiae* Brief of the Illinois Trial Lawyers Association ("ITLA") erroneously contends that Section 3-106 should not apply to the Lakefront Trail. Neither party contends that Section 3-106 is inapplicable. Further, ITLA argues that the Lakefront Trail is the same as a bicycle lane on a city street, but it remains that the Lakefront Trail is not a city street and that Section 3-107 expressly excludes city streets. The fact that patrons also use the Lakefront Trail as a transportation corridor does not render either Section 3-107 or 3-106 inapplicable, as there is no such limitation in the text. In fact, ITLA's argument only serves as further support for the applicability of Section 3-107(a) if the Lakefront Trail is to be considered as equivalent to a city street.

[2] There is conflicting testimony regarding the length of the Lakefront Trail, ranging from 18.5 miles to 26 miles. C-408 (p. 22) (26 miles), 492 (18.5 miles).

2016 IL App (2d) 151117, ¶ 75. Here, considering the nature of the condition (a gap between slabs of concrete in an outdoor path), the Park District's response amounts to, at most, negligence:

> [A] failure to repair a dangerous condition may constitute negligence whenever the likelihood of severe injury outweighs the burden of preventing injury, but the same failure constitutes willful and wanton conduct only if the balance is especially one-sided, as where the likelihood of severe injury is particularly great or the burden of preventing it patently small. Only in cases of such severe imbalances could the failure to act shock the conscience in the manner of willful and wanton misconduct.

Id. 105. Plaintiff's reliance on *Stewart* is misplaced where the defendant in that case failed to response appropriately to a life-threatening emergency. *See Stewart*, 2016 IL App (2d) 151117 at ¶¶ 45, 88 (the defendant delayed calling 911 for up to twenty (20) minutes while a student was suffocating, which constituted an unreasonable delay in response to a life-threatening emergency). Here, the record is devoid of any evidence of prior injuries caused by the condition, where the danger posed by the condition was only realized where Plaintiff's slow pace enabled his bicycle tire to wedge in the two inch gap. C-520 (p. 18), 521 (p. 21). Such a condition is arguably *de minimis*. *See St. Martin v. First Hospitality Ground, Inc.*, 2014 IL App 2d 130505, ¶¶ 13, 14 (it is common knowledge that sidewalks are constructed in slabs for the very reason that they must be allowed to expand and contract with changes in temperature; absent any aggravating factors, a vertical displacement of less than two inches is *de minimis*); 521 (pp. 21-22). Plaintiff's position regarding the Park District's conduct in repairing the condition only serves to render the willful and wanton standard synonymous with ordinary negligence. *See Lester v. Chicago Park Dist*., 159 Ill. App. 3d 1054, 1059 (1987).

The minor nature of the condition is relevant when considering the reasonableness of the Park District's response. *See Stewart*, 2016 IL App (2d) 151117 at ¶ 113.

> In the face of a known danger, the failure to perform a simple preventative act can, depending on the circumstances, constitute willful and wanton conduct. Courts must be careful as to how they express this proposition and cannot allow for a failing that amounts to simple negligence to substantiate a willful-and-wanton claim.

Id. Any argument that the Park District addressed the gap through the use of the Rapid Response Program instead of taking an alternative, more immediate action does not shock the conscious, as would be required for a showing of willful and wanton conduct—especially where the manner in which the Park District addressed the condition did not violate Park District policy. C-136, 436 (p. 64), 454 (p. 39), 456 (p. 47); *Stewart*, 2016 IL App (2d) 151117 at ¶ 105.

A. The Park District's Response to the Condition Through its Rapid Response Program Did Not Violate Park District Policy

In *Stewart*, the court relied on the Defendant's non-compliance with an existing policy in determining that the defendant's response to the emergency could rise to the level of willful and wanton. 2016 IL App (2d) 151117 at ¶ 88 (the defendant teacher failed to adhere to a school policy requiring that he immediately call 911 when faced with a life or death situation). Here, Plaintiff incorrectly claims that the Park District violated its policy by (i) including the condition in the scope of work sent out to the Rapid Response contractors, (ii) not having the condition repaired immediately by an in-house trades employee, (iii) not setting a firm deadline for project completion, and (iv) not barricading and/or painting the condition while the Rapid Response Program was underway.

i. The Rapid Response Program is used to address potentially dangerous conditions

Both Plaintiff and the appellate court misconstrue the testimony given by Robert Rejman (hereafter "Rejman") regarding the purpose of the Rapid Response Program. *Cohen v. Chi. Park Dist.*, 2016 IL App (1st) 152889, ¶ 55. Rejman testified to the following:

> Q. [Is] it fair to say that once Chicago Park District puts out a solicitation for bids, that that work is going to be carried out?
> A. Not always.
> Q. Can you explain to me when it's not[?]
> A. We'll put out rapid response request for jobs that aren't absolutely necessary, they are not safety concerns. They may be optional like a new feature in a park and we're pricing it through more than one means.

C-435 to 436 (pp. 61-62). Plaintiff and the appellate court interpreted the above exchange as follows: the Park District does not employ the rapid response program to address potentially dangerous conditions. *Cohen*, 2016 IL App (1st) 152889 at ¶ 55 ("Rejman testified the rapid response system is to be used only for jobs that do not present safety concerns […])"; Plaintiff's Appellee Brief, p. 7 ("The RRP is to be used only for conditions that present no safety concerns. Conditions that do not present safety concerns are sent out for bid to outside contractors who are part of the RRP.") (internal citations omitted). The aforementioned interpretation is flawed where Rejman testified that conditions addressed through the rapid response program are "not always" safety concerns—indicating that the majority of the conditions addressed through the rapid response program do present safety concerns. C-435 to 436 (pp. 61-62). Rejman goes on to testify that all six conditions included in the 2013 Lakefront Trail scope of work sent out to the Rapid Response contractor presented safety concerns. C-436 (p. 64).

ii. The Park District does not have a policy of addressing severe conditions through the use of in-house tradespersons or by contacting contractors directly

Furthermore, Plaintiff mistakenly claims that the Park District has a policy of addressing severe conditions by either employing in-house trades or by contacting a contractor directly, outside of the rapid response program. *See* Plaintiff's Appellee Brief, p. 35. Plaintiff's contention relies on the following testimony:

> Robert Arlow:
> Q. If you get a complaint, you go out there, investigate it, and you look at the condition and you agree it's a condition that needs to be fixed, what do you do?
> * * *
> A. I will call the – whatever trade needs to be involved […]
> * * *
> Q. […] [T]he Lakefront Trail is almost exclusively repaired by outside contractors?
> * * *
> A. Yes.
> Q. Are you aware of any other time where CPD employees went out and fixed the trail besides the occasion in June of 2014 you told me about earlier?
> A. Not to my knowledge. Again, I'm two years up here.

C-451 (pp. 28-29).

> Linda Daly:
> Q. If the senior project manager is out doing an inspection and he identifies a defect that he believes should be addressed immediately, is there anything he can do to have that problem addressed immediately without having to wait for the whole general contractor process to take its toll?
> A. If [the senior project manager saw a defect and] felt it was an emergency situation that couldn't wait to be put in the package with every other item he found along the 26 miles, yes, he **could** come to Rob or I and say, [t]his needs more immediate attention, and we would **potentially** break that out and get it priced immediately without the rest of

the scope.

C-412 (p. 41) (emphasis added).

> William Gernady:
> Q. Have there been occasions when you have been at the Chicago Park District where there have been emergencies […] for work that needed to be done on the Lakefront Trail where you gave a verbal authorization to begin the work before you issued a notice to proceed?
> * * *
> A. Possibly for when we had a northeaster or really bad storm on the lake, yes.

C-471 (p. 39).

> Q. You also stated that you can determine whether a certain repair may be classified as sort of an emergency room repair, is that correct?
> A. Yes.
> Q. Okay. And in that case you **may** contact the contractor directly and not submit the notice [to proceed] right away; correct?
> * * *
> A. Yes

C-483 (p. 86) (emphasis added). The aforementioned testimony establishes that, while the Park District may contact a contractor directly or have repairs conducted outside of the Rapid Response Program, there was not, as Plaintiff asserts, an established policy requiring that the Park District do so.

iii. The Park District does not have a policy of setting deadlines for Rapid Response repairs

In Gernady's fourteen years of involvement in the Park District's Lakefront Trail inspection/repair process, he had never issued a notice to proceed for a Lakefront Trail project that had a deadline. C-475 (p. 54), 466 (pp. 19-20). The timing of Rapid Response repairs depends on the availability of asphalt or materials, equipment, and labor. C-439

(p. 76). Unless it is specifically written otherwise, contractors are to complete Lakefront Trail repairs as soon as possible. C-416 (p. 56). Thus, the Park District does not have a policy of setting deadlines for Rapid Response repairs; rather, the Rapid Response contractor is tasked with completing Lakefront Trail repairs as soon as possible. C-416 (p. 56), 439 (p. 76), 475 (p. 54)

iv. The Park District does not have a policy of barricading or painting conditions of the Lakefront Trail

Finally, while both Plaintiff and the appellate court suggested that the Park District could have painted and/or blocked off the condition while the Rapid Response process was underway, the Park District does not have a policy of marking cracks/gaps with paint, and the Park District does not use cones because they would not remain in their intended position. C-433 (pp. 52-53); Plaintiff's Appellee Brief, p. 36; *Cohen,* 2016 IL App (1st) 152889 at ¶ 55. Instead, the Park District only barricades a section of the Lakefront Trail when it is rendered impassable. C-433 (p. 52).

Therefore, Plaintiff must demonstrate that the Park District's response was so inadequate, in light of the condition, that it "shocks the conscious" despite the Park District not having violated any existing policies. *See Stewart,* 2016 IL App (2d) 151117 at ¶ 105. The cases cited by Plaintiff are distinguishable from the case at bar where, either the condition complained of was much more severe and/or the defendant failed to take any action to address the condition. *See Murray v. Chi. Youth Ctr.*, 244 Ill. 2d 213, 246 (2007) (the minor plaintiff suffered a paralysis injury while participating in the defendant's tumbling class, where the instructor knew of the risk of paralysis yet failed to supervise, spot, or otherwise adhere to universally accepted safety guidelines); *see also Palmer v. Chicago Park Dist.*, 277 Ill App. 3d 282 (1st Dist. 1995) (the defendant's

employees did not take any steps to address a three foot high and thirty foot long fence that had been lying on its side, within a playground, for a three month period); *Hadley v. Witt Unit School Dist.*, 123 Ill. App. 3d 19 (5th Dist. 1984) (the teacher witnessed the minor plaintiff hammering a piece of metal through a hole in an anvil for up to twenty minutes while the plaintiff was supposed to be working on a woodworking assignment, yet did not take any action, and, as a result, the minor plaintiff suffered a severe eye injury and visual impairment).

Here, the Park District's response, i.e. including the condition in the Rapid Response Program and following through to completion, was a reasonable means of addressing an approximately two inch wide gap between two slabs of concrete. C-436 (p. 64), 439 (p. 74), 456 (p. 47), 521 (pp. 21, 23). This is especially true where the Rapid Response Program is an expedited repair process used for urgent repairs. C-433 (p. 51). Any claim or finding that the Park District could have had the condition painted or otherwise marked/barricaded while the Rapid Response Program was underway does not "shock the conscious" where the Park District does not barricade conditions unless they render the Lakefront Trail impassible; the Park District does not have a policy of painting conditions on the Trail; and the twenty-six mile Lakefront Trail is subjected to significant damage every winter by waves, severe storms, and ice run-up (rendering a system of painting and/or barricading all safety concerns highly burdensome). C-425 (p. 18), 428 (p. 31) C-433 (pp. 52-53).

Both Plaintiff and the appellate court relied on the circumstances of the subsequent 2014 repair, where the Park District implemented a temporary fix to address a less prominent gap or condition using an in-house trades employee to perform a patch

repair. *See* Plaintiff's Appellee Brief, p. 11; *Cohen*, 2016 IL App (1st) 152889 at ¶ 55; C-451-52 (pp. 29-30). However, it remains that the Park District does not have an asphalt crew and the repairs to concrete are almost exclusively performed by outside contractors. C-423 (p. 13), 477 (p. 13), 451 (p. 29). The Park District's use of an in-house trades employee to perform a patch repair on a less prominent gap the year after the subject incident does not render the Park District's response to the subject 2013 condition willful and wanton. C-423 (p. 13).

Furthermore, the timing of the repair was reasonable given the Park District's adherence to its established Lakefront Trail repair procedure and the nature of the condition. Robert Arlow (hereafter "Arlow") could not identify the exact date that he received the call notifying him of the condition—he estimated that it was approximately June 2013. C-453 (pp. 36-37), 454 (p. 38), 477 (p. 65). However, both Arlow and Gernady inspected the condition a few days after the call. C-454 (p. 39). Arlow and Gernady elected to include the condition in the Rapid Response bid that had been generated that spring[3]. The purpose of the Lakefront Trail inspection and subsequent Rapid Response bid is to identify and repair dangerous conditions that could cause patron injuries. C-426 (pp. 24-25), 466 (p. 19). Thus, "a few days" after receiving the complaint, the Park District's employees had inspected the condition and initiated a repair process that is employed each year to repair potentially dangerous conditions. C-426 (pp. 24-25), 454 (p. 39), 466 (p. 19). The request for Rapid Response bid proposals was sent out on June 10, 2013; Meccor, the contractor that conducted the 2013 Lakefront Trail repairs,

[3] Plaintiff's suggestion, that the condition may have been identified during the 2013 Lakefront Trail inspection, is unsupported by the evidence and was rejected by the appellate court for that reason. *Cohen*, 2016 IL App (1st) 152889, ¶ 54.

submitted its bid on June 12, 2013; the Park District approved Meccor's bid on June 19, 2013; and the condition was repaired on July 10th. C-137-38, 139, 141, 439 (p. 74), 480 (p. 77), 481 (p. 79). The request, bidding, and repair process was completed within thirty days.

In summary, the Park District's inclusion of the condition in the Rapid Response Program, an expedited repair process, without employing further remedial measures while the Rapid Response process was underway, does not rise to the level of willful and wanton conduct as a matter of law—especially where the Park District's response was consistent with Park District policy.

III. THE PARK DISTRICT IS ABSOLUTELY IMMUNE FOR ITS EMPLOYEES' DISCRETIONARY POLICY DECISIONS

Discretionary immunity applies as both Arlow and Gernady made discretionary policy decisions in electing to address the condition through the Rapid Response Program. There are no Park District guidelines or procedures dictating which conditions of the Lakefront Trail require repair or how to accomplish those repairs. C-410 (pp. 32-33), C-412 (pp. 39-40), 417 (pp. 59-60), 425 (p. 18). Arlow and Gernady considered the resources available to the Park District, including: the lack of in house asphalt crews; the availability of materials, equipment, and labor; weather conditions; and the workload of the contractors in determining the appropriate repair procedure. C-416 (p. 56), 439 (p. 76), 447 (pp. 12-13), 470 (pp. 35-36), 475 (p. 55).

Plaintiff contends that "[a]ccording to Rejman, Gernady is not free to do whatever he wants when inspecting the trail; Rejman tells him what to do." Plaintiff's Appellee Brief, p. 48. However, Plaintiff's assertion is inaccurate where Rejman only testified that the senior project manager must conduct the spring inspection; not that the senior project

manager must adhere to Rejman's instructions in determining the procedure through which repairs are made. C-425 (p. 21). As such, prescribing an appropriate repair procedure is a discretionary policy decision for which the Park District is absolutely immune.

CONCLUSION

For the reasons stated above, Defendant-Appellant CHICAGO PARK DISTRICT 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,
CHICAGO PARK DISTRICT

By: /s/ Heather L. Keil

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CERTIFICATE OF COMPLIANCE

I, Heather L. Keil, certify that this Reply Brief of Defendant-Appellant Chicago Park District conforms to the requirements of Supreme Court Rules 315, 341(a) and (b). The length of this Brief, excluding the pages 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 18 pages.

July 25, 2017 /s/ Heather L. Keil
Date

No. 121800

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	)	the Circuit Court of Cook
Defendant/Appellant.	)	County Department, Law
	)	Division, No. 14 L 5476,
	)	the Honorable William E.
	)	Gomolinski, Judge Presiding.

NOTICE OF FILING/CERTIFICATE OF SERVICE

To: *Attorneys for Plaintiff-Appellee*
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PLEASE TAKE NOTICE that on July 25, 2017, the undersigned attorney electronically filed the Notice and the foregoing REPLY BRIEF OF DEFENDANT-APPELLANT CHICAGO PARK DISTRICT with the Clerk of the Supreme Court of Illinois, copies of which are hereby served upon you.

/s/ Heather L. Keil

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7/25/2017 3:56 PM
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CERTIFICATE OF FILING/SERVICE BY MAIL

I, Heather L. Keil, an attorney, certify that I electronically filed with the Illinois Supreme Court the Notice of Filing/Certificate of Service and Reply Brief of Defendant-Appellant Chicago Park District and served upon counsel for each Party to the Appeal three (3) copies of the Notice of Filing and Brief by enclosing copies thereof in envelopes, addressed as shown above, with postage prepaid, and depositing same in the U.S. Mail at 541 N. Fairbanks Ct., Chicago, IL 60611 on July 25, 2017.

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct

/s/ Heather L. Keil