No. 122486

In the

Supreme Court of Illinois

BARBARA MONSON,

Plaintiff-Appellant,

vs.

CITY OF DANVILLE, a Home Rule Municipality

Defendant-Appellee.

Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-16-0593, there was heard on appeal from the Circuit Court of Vermillion County, Illinois, No. 13 L 71, The Honorable Nancy S. Fahey, Judge Presiding.

BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION,

amicus curiae in support of Plaintiff-Appellant

STEPHEN BLECHA
COPLAN & CRANE, LTD.
1111 WESTGATE STREET
OAK PARK, ILLINOIS 60301
(708) 358-8080 (TELEPHONE)
(708) 358-8181 (FACSIMILE)

E-FILED
11/14/2017 11:15 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

STATUTES INVOLVED

745 ILCS §10/3-102. Care in maintenance of property; constructive notice

§ 3-102. (a) Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

(b) A public entity does not have constructive notice of a condition of its property that is not reasonably safe within the meaning of Section 3-102(a) if it establishes either:

> (1) The existence of the condition and its character of not being reasonably safe would not have been discovered by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property; or
>
> (2) The public entity maintained and operated such an inspection system with due care and did not discover the condition.

745 ILCS 10/2-201. Determination of policy or exercise of discretion

§ 2-201. 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 10/2-109. Acts or omissions

§ 2-109. A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

INTEREST OF THE *AMICI CURIAE*

The Illinois Trial Lawyers Association submits this *amicus curiae* brief in support of the plaintiff, Barbara Monson. The outcome of this case will likely impact every case against a public entity arising out of the entity's duty to maintain its property. §3-102 of the Tort Immunity Act sets forth the burden for suing a public entity for failure to maintain its property. Under the Appellate Court's holding, however, discretionary immunity under §2-201 would prevent courts from even considering §3-102 in many cases.

Additionally, this Court's previous interpretations of the interaction of §2-201 and other sections of the Tort Immunity Act conflict with the Appellate Court's holding. If the Appellate Court's holding stands, then plaintiffs' claims under numerous sections of the Tort Immunity Act would be affected.

Finally, the Appellate Court's expansion of discretionary immunity raises a significant issue of first impression: when multiple decisions were made with respect to a particular piece of property, which decision is evaluated for purposes of determining if subsequent acts or decisions are ministerial or discretionary? The resolution of this issue will have lasting ramifications for plaintiffs seeking relief under the Tort Immunity Act.

This Brief addresses the broader issues at play. Specifically, it addresses: (1) this Court's prior treatment of conflicting Tort Immunity Act provisions, (2) how the abolition of Sovereign Immunity affects the interpretation of §3-102, (3) the policy reasons behind the proper interaction of §2-201 and §3-102, (4) that the

discretionary/ministerial analysis must be tied back to creation of the duty at issue, and (5) that under Illinois law, maintenance of property is ministerial after the property is created.

INTRODUCTION

This Court has interpreted the interaction between §2-201 and Article III of the Tort Immunity Act, as well as the interaction of §2-201 with other sections of the Tort Immunity Act. Each time, this Court recognized that because multiple sections of the Act could apply to the same set of facts, the plain language of the sections, as well as principles of statutory construction, determined which section would apply. The Appellate Court in this case did not follow this Court's framework. Instead, it determined that §2-201 applies first, and §3-102 is only considered if the act in question is ministerial.

Even if both §2-201 and §3-102 apply to this case, however, Illinois law is clear that the City's duty to maintain its property was ministerial. Numerous decisions are made with respect to any piece of public property. A public entity must first decide to create the property. Later, it may decide to improve the property, or to repair the property. While these are all decisions made with respect to public property, each decision carries with it a duty that is distinct from the others. The decision to create public property carries with it the duty to maintain public property. Likewise, decisions to improve or repair public property carry with them the duty to use reasonable care in improving the property, and the duty to use reasonable care in repairing the property, respectively. From each decision follows a duty.

This case is complicated by the fact that the public entity

(1) chose to create sidewalks,

(2) chose to improve some sidewalks, and

(3) chose to repair some sidewalks.

Thus, there are at least three decisions made with respect to the sidewalk at issue, each with its own duty. The issue here is which decision is evaluated for purposes of determining whether subsequent actions are ministerial or discretionary under §2-201.

The plaintiff has alleged that the defendant breached its duty to use reasonable care to maintain its sidewalks. The duty to maintain these sidewalks arose at the time the City built the sidewalks. Under Illinois law, once defendant created those sidewalks, its actions in maintaining the sidewalks were ministerial. The fact that subsequent decisions were made (with subsequent duties created by those decisions) does not change the fact that, after building the sidewalks, defendant's actions or inactions in maintaining the sidewalks were ministerial. As such, if §2-201 applies to this case at all, the City's negligence in maintaining its sidewalks was a ministerial function.

ARGUMENT

When two statutes could control a given case, Illinois law first looks to the plain language of the statutes to see which controls. If the plain language is not dispositive, then Illinois law holds that a more specific statute will prevail over a general statute. In this case, both analyses indicate that §3-102 prevails over §2-201.

Even if §3-102 does not prevail, however, the Appellate Court's expansion of discretionary immunity under §2-201 conflicts with long-standing case law. As such, the judgments of the Circuit Court and the Appellate Court should be reversed.

I. STATUTORY CONSTRUCTION

The Tort Immunity Act "must be strictly construed against the public entity involved." *Barnett v. Zion Park Dist.*, 171 Ill. 2d 378, 396 (1996). Strict construction, however, is not needed in this case—the plain language of the statutes indicates that §3-102 prevails over §2-201. §2-201 (discretionary immunity) specifically states that it is subservient to provisions "otherwise provided by Statute," whereas §3-102 states that it is subservient only to provisions "otherwise provided" in Article III of the Tort Immunity Act. Given that §2-201 is not in Article III of the Tort Immunity Act, §2-201 is subservient to §3-102 when the two statutes conflict.

Even if the plain language of the statutes did not control, there is a longstanding statutory construction principle that applies in that a specific statute will control if it conflicts with a general statute. §3-102 applies specifically to

property maintenance, whereas §2-201 applies generally to decisions made by public employees. Thus, even if the interaction of §2-201 and §3-102 were not controlled by the plain language, principles of statutory construction indicate that §3-102 prevails over §2-201.

A. Traditional Notions of Statutory Construction, as Well As Precedent, Indicate that §3-102 Prevails over §2-201 in This Case.

This Court has analyzed the interaction of §2-201 with Article III of the Tort Immunity Act, as well as the interaction of §2-201 with other Articles of the Act. This Section will begin by analyzing those cases, and will conclude by analyzing a Northern District of Illinois case which held that §3-102 prevails over §2-201 in situations such as this.

1. *Murray v. Chicago Youth Center* Provides the Framework for This Analysis

In *Murray v. Chicago Youth Center*, the plaintiff was injured when participating in a supervised tumbling class at defendant's facility. 224 Ill. 2d 213, 234 (2007). On appeal to this Court, the primary issue was whether the immunity and exceptions of §3-109 for hazardous recreational activities applied, and whether §3-109 took "precedence over sections 2–201 and 3–108(a) of the Act." *Id.* at 229.

In finding that §3-109 did take precedence over §2-201 and §3-108(a), this Court relied upon two statutory interpretation principles: (1) that the plain language of the sections indicated §3-109 took precedence, and (2) that §3-109 more specifically applied to the facts of the case.

Looking at the plain language of the sections, this Court first noted that each section is self-limiting in that §2-201 begins "[e]xcept as otherwise provided by Statute," and 3-108 begins "[e]xcept as otherwise provided in this Act." *Id.* at 229-230. From this language, this Court deduced that "the legislature did not intend for the immunities afforded public entities and their employees to be absolute and applicable in all circumstances." *Id.* at 232.

This Court then addressed the "well-settled rule of statutory construction" that when one statute speaks in general terms and applies to cases generally, a more particular statute, relating to one subject, prevails over the general statute. *Id.* at 233. Applying this rule to the facts before it, this Court held that while §2-201 and §3-108 would normally provide immunity under the facts, there was "'otherwise provided' in the Act a provision directly addressing the situation giving rise to Ryan's injury." *Id.* at 234. This Court noted that noted that trampolining was specifically mentioned in §3-109, and held that §3-109(c) directly applied to those facts.

Here, the plain language of both §2-201 and §3-102 indicate that §3-102 is an exception to §2-201, and not vice versa. To begin, §2-201 starts by stating "except as otherwise provided by Statute . . . ." Section 3-102, on the other hand, begins by stating "[e]xcept as otherwise provided in this Article . . . ." The Article to which §3-102 is referring is Article III of the Tort Immunity Act, titled "Immunity from Liability for Injury Occurring in the Use of Public Property." Discretionary immunity for governmental entities (§2-109) and for governmental

employees (§2-201) are in Article II of the Tort Immunity Act. This establishes that the legislature intended for §3-102 to be an exception to §2-201.

Section 2-201 makes clear that other statutes prevail, and §3-102 is the prevailing statute in this case. Likewise, §3-102 explains that it controls unless superseded by another section of Article III. Because the discretionary immunity provisions are in Article II, and because defendant has not alleged immunity under any section of Article III, Section §3-102 controls.

Additionally, Section 2-201 is a general statute, that grants immunity to public employees for discretionary decisions. Section 3-102, on the other hand, specifically deals with the maintenance of property. The issue here is the City of Danville's maintenance of its property. Just as §3-109 more specifically dealt with the claims in *Murray* than §2-201, §3-102 more specifically applies to the claims in this case.

2. This Court's Analysis of Article II's Interaction with Other Articles Indicates that §3-102 Controls

This Court has recognized that Articles II and III of the Tort Immunity Act operate independently. Additionally, this Court has held that §2-201 did not apply when §4-106(b) was more specific. Under these principles, §3-102 should prevail over §2-201.

i. Articles II and III of the Tort Immunity Act Operate Independently

When this Court issued its opinion in *Epstein v. Chicago Bd. of Educ.*, §3-108 (detailing immunity for supervisory activities) did not have an exception for

willful and wanton conduct. 178 Ill. 2d 370 (1997). This Court was tasked with determining whether §2-201's distinction between ministerial conduct and discretionary conduct applied to §3-108. This Court explained that, under the Tort Immunity Act, governmental entities are generally liable in tort, but this liability is limited by the "extensive list of immunities based on specific government functions." *Id.* at 381. The Court then explained that the two immunities at issue, one for discretionary actions and the other for supervisory actions, "operate independently of one another." *Id.* Thus, "discretionary immunity provided for in sections §2–109 and §2–201 does not in any way operate to remove or otherwise limit the immunity granted in section 3–108(a) for the failure to supervise." *Id.* at 381-82. As such, this Court held that it does not matter whether a public employee's activities in supervising are ministerial or discretionary—§3-108 makes no such distinction, and §2-201 operates independently of §3-108.

The Appellate Court in this case applied the discretionary/ministerial distinction of §2-201 to a case falling within §3-102. Yet, just as this Court emphasized that it was error to read that distinction into §3-108(a) in *Epstein*, it is error here to read the discretionary/ministerial distinction into §3-102. Section 3-102 makes no reference to ministerial or discretionary activities. While the Appellate Court states that §3-102 "governs ministerial acts," the language of §3-102 does not reference ministerial or discretionary acts. If the two immunities operate independently, and if the plain language of each is to be given full

meaning, then it cannot just be presumed that §3-102 only applies to ministerial actions.

If these two sections operate independently, and both could apply to this case, the more specific section should apply. If the legislature intended to have §3-102 apply only to ministerial functions, it would have (1) put such language in §3-102, or (2) put a preface in that §3-102 that it applied "except when otherwise provided in this Act." Instead, the plain language of §3-102 contains no discussion of discretionary vs. ministerial functions, and begins "[e]xcept as otherwise provided in this Article." As previously stated, §2-201 is not in the same article as §3-102. The requirements of §2-201 should not apply to §3-102.

ii. §2-202 Did Not Apply When Section 4-106(b) More Specifically Applied to the Facts

In *Ries v. City of Chicago*, a prisoner stole a police vehicle, and when the police pursued, the prisoner crashed into the plaintiffs, causing injuries. 242 Ill. 2d 205, 208 (2011). This Court recognized that both sections §2-202 (providing a willful and wanton exception for government employees actions in the enforcement of a law) and §4-106(b)(providing blanket immunity for injuries caused by escaped prisoners) could apply to the facts of the case. *Id.* at 220.

Citing *Murray* for the principle that a more specific statute will prevail over a general statute, this Court held that §4-106(b) prevailed over §2-202. *Id.* at 220-21. Given that the plaintiffs' injuries were caused by an escaping prisoner, and Section §4-106(b) specifically provides immunity for injuries caused by escaped

prisoners, this Court held that the blanket immunity of §4-106(b) immunized the defendant.

Under this Court's rulings in *Murray*, *Epstein*, and *Ries*, when two portions of the Tort Immunity Act could apply to the same set of facts, the more specific provision controls. Here, §3-102 is the more specific provision, and must therefore control the outcome.

3. The NDIL Has Addressed This Specific Issue, and Construed the Statutes to Indicate that 3-102 Prevails

In *In re Chicago Flood Litig.,* the Northern District of Illinois analyzed the interaction of §2-201 and §3-102, and found that §2-201 did not supersede §3-102. In that case, the plaintiffs sued for damages sustained when the Chicago River broke through a freight tunnel. 1993 WL 278553, at *1 (N.D. Ill. July 20, 1993). The plaintiffs alleged that the city was negligent for "failing to warn plaintiffs or take other appropriate actions knowing that the tunnel ceilings were about to collapse . . . ." *Id.* The city countered that the decision to not warn plaintiffs was discretionary, and therefore immunity applied under §2-201. *Id.* at 10.

The court disagreed, explaining that even if the failure to warn was a discretionary determination of policy, the city would not necessarily be entitled to immunity. *Id.* The court explained that "Section 2–201 is prefaced by the clause, "[e]xcept as otherwise provided by statute." *Id.* The court then identified two sections of the Tort Immunity Act that were "otherwise provided by statute": §3–102 and §3-103. With regard to §3-102, the court stated that it "embodies the

common law duty of a property owner to maintain its property in a reasonably safe condition and provides that the City may be found liable where it fails to do so despite actual or constructive knowledge of an unsafe condition." These sections may preclude the City from invoking immunity for its failure to warn plaintiffs about or otherwise protect plaintiffs from the impending flood even if these failures were discretionary.

While the Appellate Court, both in this case and in *Kennell v. Clayton Twp.*, 239 Ill. App. 3d 634 (4th Dist. 1992), applied §2-201 over §3-102, it did not use the framework provided by this Court in *Murray*, *Epstein*, and *Ries*. The Northern District, in *In re Chicago Flood Litig.*, followed the statutory construction outlines mandated by this Court, and found that §3-102 prevailed. This is the right outcome under this Court's prior analyses.

B. The Tort Immunity Act Applies to this Case; Not Common Law

The Appellate Court looked to how the common law defined a public entity's duty to maintain. But the common law in this area has been replaced by statute. Moreover, even under the common law, the relevant actions in this case were ministerial.

1. Unless an Immunity Applies, Governmental Entities Are Liable in Tort Just Like Private Entities

With the abolition of Sovereign Immunity, "governmental units are liable in tort on the same basis as private tortfeasors unless the General Assembly promulgates a valid statute imposing conditions on their liability."

Barnett v. Zion Park Dist., 171 Ill. 2d 378, 396 (1996). If this proposition is true, then all common law immunities are gone. *Kennell*'s reliance upon a single case from 1932 where it was said that a governmental entity's duty to maintain is ministerial, is misplaced because the ministerial/discretionary distinction was abolished with the abolition of Sovereign Immunity. While the legislature revived the ministerial/discretionary distinction when drafting the Tort Immunity Act, it also created an immunity specifically targeted at the maintenance of private property. The Tort Immunity Act controls this case, not common law immunities, or common law definitions.

2. Under *Blackaby*'s Logic, the Duty to Maintain Property is Ministerial, and There is No Need to Contemplate Whether the Decision was Discretionary.

The Appellate Court relied upon *Kennell v. Clayton Tp.*, 239 Ill.App.3d 634, 639 (4th Dist. 1992) for the proposition that §3-102 only applies to ministerial actions. ¶30. The *Kennell* court, in turn relied upon *Blackaby v. City of Lewistown* for its interpretation of the common law. 265 Ill. App. 63, 71 (3d Dist. 1932). Even under the logic of *Blackaby*, however, this case survives.

If the courts are going to rely upon *Blackaby* to define the duty of a public entity in maintaining its property, then they must follow the clear language of that case. The *Blackaby* court specifically held that "[i]t is a part of the ministerial duty of a city to keep its streets and sidewalks in a reasonably safe condition for public travel." *Id.* The *Blackaby* court did not state that a city's liability for maintaining streets and sidewalks is nullified if a discretionary decision was involved—rather,

it stated that the maintenance of streets and sidewalks is ministerial. *Id.* Thus, under the *Blackaby* court's logic, there is no need to determine if there was a discretionary decision made in this case, because the maintenance of public property is, by law, a ministerial function.

C. If 3-102 Only Applies to Ministerial Functions, Why Does it Exist?

The Appellate Court held that "[t]he absolute immunity afforded municipalities for discretionary acts under sections 2-109 and 2-201 of the Act could not be superseded by section 3-102 of the Act, which governs ministerial acts." ¶30. This holding, however, effectively renders §3-102 moot.

If §3-102 only applies to ministerial functions, there is no situation in which §3-102 applies and §2-201 does not apply. It could be argued that §3-102 serves to indicate that willful and wanton conduct is not immunized in the ministerial maintenance of property, but that logic fails as §2-201 does not provide an exception for willful and wanton activity.

D. Section 3-102(b) Incorporates Discretionary Decisions

Section 3-102(b)(1), dealing with constructive notice, requires the factfinder to analyze discretionary decisions. This Section reads as follows:

> (b) A public entity does not have constructive notice of a condition of its property that is not reasonably safe within the meaning of Section 3-102(a) if it establishes either:
>
> > (1) The existence of the condition and its character of not being reasonably safe would not have been discovered by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which

> failure to inspect would give rise to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property;

Under Section 3-102(b)(1), if a plaintiff provided sufficient evidence that an inspection system would have discovered the dangerous condition, the fact finder must then consider the cost of the inspection, and weigh that cost against the potential danger. This weighing of cost versus the potential danger involves evaluating a discretionary decision.

If the legislature intended to have §3-102 only apply to ministerial functions, it would not have allowed for the factfinder to evaluate discretionary decisions. It could be argued that §3-102(b)(1) creates an exception to §2-201's applicability. But, under the Appellate Court's holding, this argument would defy logic, in that §2-201 is applied first, and then §3-102 is applied only if the action was ministerial. Section 3-102(b)(1) would not even come into play if the decision was discretionary.

F. Section 3-102 Provides Significant Immunities, But Not For Discretionary Policy Determinations

Section 3-102 is an immunity. This is made clear by the language of the statute which specifically addresses when public entities are not liable. The Section identifies multiple forms of immunity:

- No liability if the injured person was unintended or unpermitted;
- Actual or constructive notice;

- No constructive notice if a reasonably adequate inspection system would not have discovered the dangerous condition;

- No constructive notice if a reasonably adequate inspection system would have discovered the dangerous condition, if the practicability and cost of the inspection would have outweighed potential danger;

- No constructive notice if a public entity maintains a reasonably adequate inspection system with due care and did not discover the condition.

Section 3-102 does provide immunity, but not for discretionary decisions. If the legislature intended for discretionary decisions not to maintain property to be included in §3-102, it would have either (1) written the section to specifically immunize discretionary decisions, or (2) written the section to be subservient to §2-201. The legislature did not immunize discretionary decisions within the language of §3-102, and made §2-201 subservient to §3-102 by prefacing §2-201 with "[e]xcept as otherwise provided by statute . . . ." Thus, while §3-102 does provide protections for public entities, it does not provide immunity for discretionary decisions.

G. Policy Concerns

Holding that §3-102 applies in this case, instead of §2-201, would not create public policy concerns. All of the immunities listed in §3-102 still apply. Holding the opposite, however, would create situations in which public entities could simply state that it was making a policy determination, and the effect of §3-102 would be nullified.

Defendant here did not identify a single discretionary decision it made to not repair the sidewalk in question—rather, it identified a "discretionary" plan in which the sidewalk would have been included. This could be said of any repairs.

For example, if a city received numerous complaints about a pothole in a bike lane over several months, and someone was injured while biking over that pothole the city could escape liability by having an employee testify (1) that the city had a policy of checking pothole complaints, and (2) while the city has no record of checking this particular pothole, it must have been checked under the policy. Under the Appellate Court's ruling, the city is immune because discretion trumps any duty under §3-102.

In sum, with three pieces of testimony, a city is immune from liability: (1) the city had a policy of checking for dangerous conditions, (2) there is no record of an inspection of the dangerous condition at issue, but it must have been checked under the policy, and (3) the employee who checked under the policy exercised discretion.

The Appellate Court's expansion of discretionary immunity would also affect other portions of the Tort Immunity Act. Section 3-102 is not unique from other sections of the Tort Immunity Act, at least with respect to whether §2-201 should be applied before other sections. For instance, applying §2-201 before §3-108 (supervisory immunity) would create the following result: a public employee's willful and wanton supervision of a drowning child at a pool would be immunized

if the City testified that it entrusted its lifeguards with discretion regarding which children to save. In such a scenario, §3-108 would not even be analyzed.

II. THE DUTY INVOLVED, AS WELL AS THE TIMING OF THE UNDERTAKING OF A PUBLIC POLICY, AFFECT WHETHER AN ACTION IS MINISTERIAL OR DISCRETIONARY.

In order to determine whether an act or decision is discretionary, it must first be determined: (1) what duty is allegedly immunized, and (2) what immunity provision immunizes that duty. Additionally, Illinois case law indicates that the discretionary/ministerial analysis is directly related to the time at which the public entity undertook the public project. Subsequent duties that apply to the same public project after the undertaking of the project do not affect the discretionary/ministerial analysis of the original duty.

A. What Duty is at Issue?

The plaintiff here alleged that defendant was negligent in not properly maintaining the sidewalk. (C10). The plaintiff did not allege that the defendant was negligent in improving the sidewalk, or in is decision to not repair this specific piece of sidewalk. Rather, the complaint alleges that defendant breached its duty to maintain its property. (C10). The next question is whether there is an immunity provision that immunizes this breach of duty.

B. What Immunity Provision Immunizes the Duty?

Whether a public entity owes a duty, and whether a public duty is immune under the Tort Immunity Act, are separate issues. *Coleman v. East Joliet Fire Protection Dist.,* 2016 IL 117952, ¶ 46. Immunities act to prevent liability based upon

a particular duty. *Id.* In other words, a court will not analyze immunities if there is no duty, but once a duty has been established, the court must determine whether a public entity is immunized from claims that it breached that duty. *See id.*

The defendant does not argue that it does not owe a duty, but rather alleges that §2-201 and §2-109 immunize any potential breach of the duty to maintain property.

Public projects, such as roads, sidewalks, and sewer systems, are in place for years, and as such, multiple decisions are made regarding these projects over time. Illinois case law indicates that the discretionary/ministerial analysis under §2-201 and §2-109 is directly tied to (1) the duty that is allegedly breached, and (2) the timing that such duty was undertaken. As shown below, if a public entity undertakes a public project, and a duty is created at that point in time, it is the decisions with respect to this undertaking that are potentially discretionary. Once the duty to maintain the public property arises, subsequent duties that arise do not alter the discretionary/ministerial analysis with respect to the initial duty to maintain the public property.

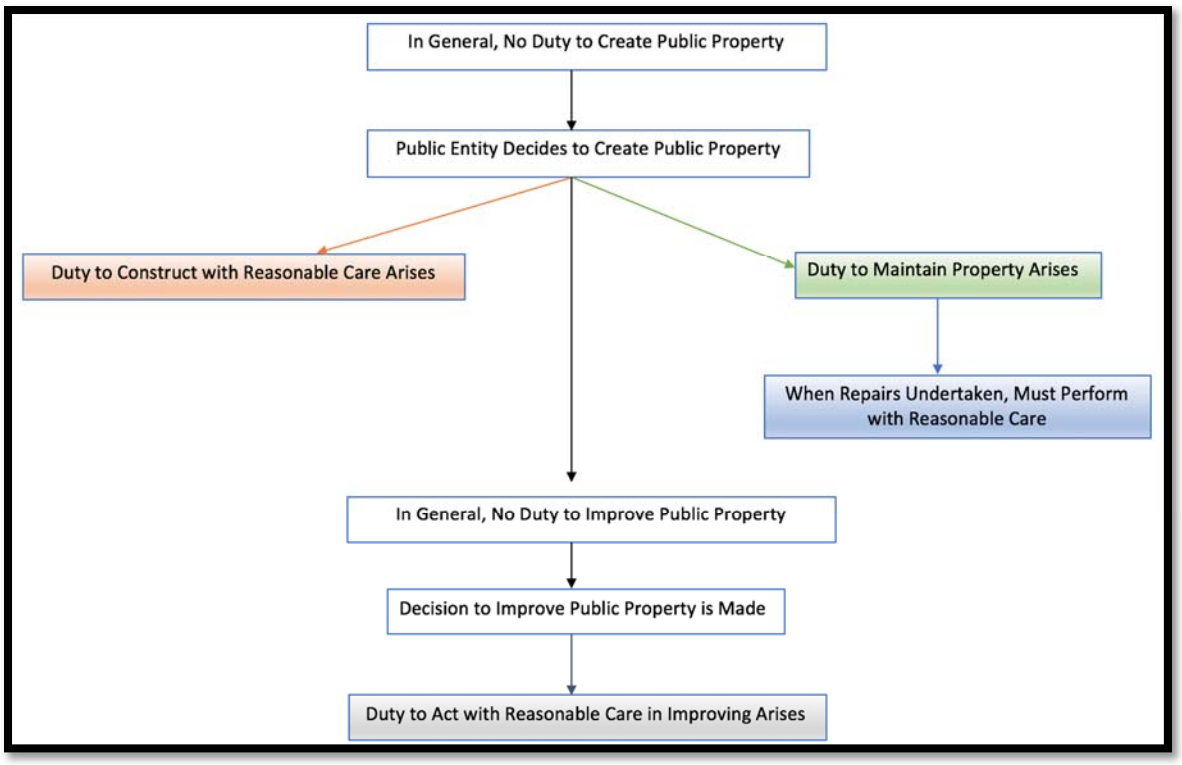
1. A Public Entity May Have Multiple Duties for a Single Piece of Property

Illinois courts have consistently held that a public entity's duty to maintain property arises at the time it created the property. Additional duties may arise over time with respect to that piece of property, as shown below, but those duties do not render the initial duty to maintain moot.

To begin, a public entity has discretion in whether or not to perform a public work or make an improvement. *Snyder v. Curran Twp.*, 167 Ill. 2d 466, 474 (1995). In other words, there is no duty to create public property, such as sidewalks. Once the decision is made to create public property, the construction "must be done with reasonable care and in a nonnegligent manner." *Id.*; *Baran v. City of Chicago Heights*, 43 Ill. 2d 177, 180 (1969); *Greene v. City of Chicago*, 73 Ill. 2d 100, 108 (1978). When the construction of public property is completed, "a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition." 745 ILCS §10/3-102. In making repairs to public property, a public entity also has a duty to make such repairs with reasonable care." *Robinson v. Washington Twp.*, 2012 IL App (3d) 110177, ¶14.

Likewise, a public entity generally owes no duty to make improvements to public property. *Synder*, 167 Ill. 2d at 474. Once a public entity undertakes to make such improvements, however, it must act with reasonable care in making such improvements. *Id.*

The above analysis provides for four distinct duties, as indicated in the following graph:



These four duties operate independently, even though they may arise with respect to one single piece of property. There is no case law that says, once a public entity owes a duty to act with reasonable care in improving property, the duty to maintain property is abolished.

2. The Discretionary/Ministerial Analysis Must Be Tied to the Duty at Issue

Illinois case law indicates that the discretionary/ministerial analysis applies to the creation of the initial duty with respect to a piece of property. In *City of Chicago v. Seben*, this Court explained that the adoption of a general plan of sewers may be discretionary, but once constructed, the public entity's maintenance of those sewers is ministerial. 165 Ill. 371, 379 (1897). Likewise, in *Snyder,* this Court held that a public entity does not have a duty to erect warning

traffic signs, once the public entity decides to place a warning traffic sign, it had a duty to do so with reasonable care. *Snyder,* 167 Ill. 2d at 474.

The Illinois appellate courts have made similar holdings. In *Robinson v. Washington Twp.*, the Third District held that upon undertaking to repair a roadway, defendant owes a duty to do so with reasonable care. 2012 IL App (3d) 110177, ¶14. Likewise, the Fourth District recognized that a public entity does not generally owe a duty to create or improve public highways or traffic control devices, "once having undertaken the construction of public highways and traffic control devices, public entities have a duty to install and maintain them with reasonable care." *Corning v. East Oakland Tp.*, 283 Ill.App.3d 765, 767 (4th Dist. 1996); *see also Ellison v. Village of Northbrook,* 272 Ill.App.3d 559, 563 (1st Dist. 1995).

These cases show that the duty of care arises from some action on the part of the public entity – whether it be (1) the decision to create property, (2) the decision to improve public property, or (3) the decision to repair public property.

Here, the defendant undertook to build the sidewalk in question. Once it built that sidewalk, it had a duty to maintain that sidewalk, and from the onset of that duty onwards, defendant's actions in maintaining that sidewalk were ministerial.

3. There are Other Duties in this Case, but Plaintiff did not Allege the Breach of the Other Duties

The Appellate Court relied heavily upon facts indicating (1) that defendant undertook a plan to improve the sidewalks in an area that included the subject

section, (2) that defendant created certain factors for determining whether a particular sidewalk stretch should be repaired, and (3) that Ahrens exercised discretion in determining which sections should be repaired. ¶33. Yet, those decisions and actions did not relate to the duty in question—the duty to maintain property in a reasonably safe condition.

i. The Four Duties that Apply to the Sidewalk

Duty of Reasonable Care in Planning. When the defendant undertook to initially construct the sidewalks, it had a duty to use reasonable care in such planning. Discretionary issues that may arise with respect to this duty would be materials used or the dimensions of the sidewalk. The plaintiff did not allege that the City was negligent in planning for the construction of sidewalks, and thus, there is no reason to determine whether §2-201 affects this duty.

Duty of Reasonable Care in Undertaking a Plan to Improve. When the defendant undertook to improve sidewalks, it had a duty to do so with reasonable care. A public entity that undertakes a plan to improve public property has a duty to do so with reasonable care. *Robinson v. Washington Twp.*, 2012 IL App (3d) 110177, ¶14. Plaintiff here has not alleged either (1) that defendant was negligent in its plan to improve, or (2) that defendant was negligent in carrying out its plan to improve. Thus, whether any immunity applies to this duty is irrelevant to the case at bar.

Duty to Use Reasonable Care in Inspecting Sidewalks. Defendant had a duty to use reasonable care in inspecting sidewalks under its plan to improve. *Id.*

But any immunity protecting the inspector's decisions with respect to which sidewalks should be repaired only nullifies the duty created the undertaking to improve the sidewalks. The plaintiff has not alleged a violation of this duty.

Duty to Maintain Property. The plaintiff alleged that the public entity did not use reasonable care in maintaining its sidewalks. The City's duty to maintain those sidewalks arose years before defendant undertook to implement improvements, and years before Ahrens began evaluating the sidewalks. Defendant's duty to maintain arose when the sidewalk was built. Once the sidewalk was built, subsequent actions in maintaining the sidewalk were ministerial.

ii. The Decision to Analyze is the Decision to Create the Sidewalks

The Appellate Court did not distinguish between the duties listed above. And, more significantly, it applied the discretionary/ministerial analysis to the wrong decision. The decision that provides the framework for what decisions are ministerial or discretionary is the initial decision to provide sidewalks. That decision created the maintenance duty, and that decision dictated that maintenance activities would be henceforth ministerial.

4. §3-102 is a Law Which Mandates Reasonable Care in Maintenance

The Appellate Court, both in this case and in *Kennell*, held that the defendants' decisions with regard to property were discretionary because they did not fall within the definition of ministerial actions—i.e. the actions were not "in

obedience to the mandate of legal authority, without regard to the exercise of discretion as to the propriety of the acts being done." *Kennell v. Clayton Tp.*, 239 Ill.App.3d 634, 639 (4th Dist. 1992); *see also Monson v. City of Danville*, 2017 IL App (4th) 160593, ¶ 30.

Yet, §3-102 is a legal authority which binds public entities, and does not allow for discretion. Section §3-102 requires that public entities must use reasonable care to maintain public property in a reasonably safe condition. There is no discretion—the public entity must exercise this reasonable care.

5. The Appellate Court's Distinction of *Murray* is Flawed

The Appellate Court distinguished this Court's *Murray* decision because it did not "concern acts or omission of a public entity where discretion was at issue." *Monson v. City of Danville*, 2017 IL App (4th) 160593, ¶31. That is not what this Court held in *Murray*. Rather, this Court recognized that the defendant was asserting §2-201 immunity for discretionary decisions, but did not need to analyze whether the defendant's actions were discretionary or ministerial, because it held that §3-108(a) prevailed over §2-201. Because there was no need for this Court to consider whether the City's actions were ministerial or discretionary in *Murray*, the Appellate Court's distinction of *Murray* is flawed.

6. Section 3-102 Carries No Weight Under the Appellate Court's Holding

A public entity makes all sorts of decisions with respect to public property. In determining whether a decision or action with respect to public property is

discretionary or ministerial, the court must look to the duty that was allegedly breached. If subsequent decisions can abrogate the duty to maintain public property, then §3-102 is irrelevant.

The Appellate Court has explained that "[e]very failure to maintain property could be described as an exercise of discretion," and that if the legislature intended for such a result, it would not have codified the duty to maintain public property. *Anderson v. Alberto-Culver USA, Inc.*, 317 Ill. App. 3d 1104, 1117 (1st Dist. 2000).

Upon receiving notice of any dangerous condition on public property, a public entity is faced with at least two options: (1) do something or (2) do nothing. The decision to do nothing, under the Appellate Court's holding, is protected by discretionary immunity so long as the person who decided to do nothing was in a policy-making position. This holding allows public entities to escape liability under §3-102 by simply putting forth a person in a policy-making decision to testify that the decision to do nothing was discretionary. Such a holding renders §3-102 moot.

CONCLUSION

There are two ways to view the issue on appeal—(1) as an issue of statutory construction, or (2) as an issue of the breadth of discretionary immunity. Under either view, the Appellate Court must be reversed.

The plain language of §3-102 and §2-201 makes clear that §2-201 is subservient to §3-102. Even absent that language, however, §3-102 more specifically applies to the facts of this case, and therefore must control.

Regardless of statutory interpretation, the City's duty to maintain its sidewalk was a ministerial function. The duty to maintain arose at the time the City built the sidewalk, and was not abrogated by subsequent decisions. Illinois law holds that, once the duty to maintain arose, actions or inactions in furtherance of that duty are ministerial. As such, even setting aside statutory construction, the judgments of the Circuit Court and the Appellate Court must be reversed.

Respectfully submitted,

By: /s/ Stephen Blecha
On behalf of the Illinois
Trial Lawyers Association

STEPHEN BLECHA
COPLAN & CRANE, LTD.
1111 WESTGATE STREET
OAK PARK, ILLINOIS 60301
(708) 358-8080 (TELEPHONE)
(708) 358-8181 (FACSIMILE)
SBLECHA@COPLANCRANE.COM

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341 certificate of compliance, and the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

By: /s/ Stephen Blecha

No. 122486

IN THE SUPREME COURT OF ILLINOIS

BARBARA MONSON, Plaintiff-Appellant, v. CITY OF DANVILLE, a Home Rule Municipality, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-16-0593 There heard on appeal from the Circuit Court of Vermillion County, No. 13 L 71

TO: All Counsel of Record
(See attached Service List)

PLEASE TAKE NOTICE that on **November 1, 2017**, I electronically filed the following with the Supreme Court of Illinois, the attached:

- **Motion for Leave to File an *Amicus Curiae* Brief in Support of Plaintiff-Appellant**
- **Proposed Brief of Illinois Trial Lawyers Association, *amicae curiae* in support of Plaintiff-Appellant**

/s/ Stephen Blecha

COPLAN & CRANE, LTD.
1111 Westgate Street
Oak Park, IL 60301
Tel: (708) 358-8080
Fax: (708) 358-8181
Cook County Firm ID: 41511

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I, the undersigned, on oath, subject to penalty of perjury as provided by 735 ILCS 5/1-109, certify that I served this Notice and the specified pleadings by mailing a copy to all counsel for parties on **November 1, 2017**, with postage prepaid.

/s/ Julia Dwyer

Attorney for Plaintiff, Barbara Monson

Miranda Soucie
Spiros Law, P.C.
2807 N. Vermillion, Suite 3
Danville, IL 61832

Attorney for Defendant, City of Danville

Scott McKenna
Scott Dolezal
Best, Vanderlaan & Harrington
25 East Washington St., #800
Chicago, IL 60602