No. 122486

IN THE SUPREME COURT OF ILLINOIS

BARBARA MONSON, Plaintiff-Appellant, vs. CITY OF DANVILLE, a Home Rule Municipality, Defendant-Appellee.	)	On Appeal from the Decision of the Appellate Court of Illinois, Fourth Judicial District No. 4-16-0593 There heard on appeal from the Court of the Fifth Judicial Circuit, Vermilion County, Illinois Court of the Fifth Judicial Circuit, No. 13 L 71 Honorable Nancy S. Fahey Judge Presiding

AMICUS CURIAE BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL, IN SUPPORT OF DEFENDANT-APPELLEE CITY OF DANVILLE

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Introduction

This *Amicus Curiae* Brief in support of defendant addresses the question of whether a municipality can invoke the immunities available under Section 2-201 and 2-109 of the Local Governmental and Governmental Employees Tort Immunity Act (hereinafter "Tort Immunity Act") in situations where the municipality is under a general duty under Section 3-102(a) of the Tort Immunity Act to maintain its property in a reasonably safe condition.

Amicus submits to this Court that, contrary to plaintiff's argument, the provisions of Section 2-201 and 2-109 on the one hand and Section 3-102(a) on the other are not in conflict, because they address different concepts under the Act. Whereas Section 3-102(a) codifies what a municipality's duties are regarding the maintenance of its property, Sections 2-201 and 2-109 provide immunities for municipalities in specific situations where municipal employees exercise discretion in deciding specifically how to conduct the maintenance of municipal property. The sections of the Act are not in conflict because this Court has recognized, on many occasions, that whether a public entity has a legal duty to take some act or refrain from some act is a separate and distinct issue from whether the public entity may have an immunity that shields it from liability for allegedly failing to fulfill that duty.

This Brief further shows that the interpretation of the Tort Immunity Act advanced by defendant and the appellate court below does not render

Section 3-102(a) moot, as suggested in the *amicus curiae* brief submitted by the Illinois Trial Lawyers Association ("ITLA"). The Brief further shows how the interpretation of the Tort Immunity Act found in dicta in *In re Chicago Flood Litigation*, an unpublished federal district court order relied upon by the ITLA, leads to false conflicts and violates well-established rules of statutory construction. Finally, this Brief demonstrates that the interpretation of the Tort Immunity Act supported by plaintiff and the ITLA is contrary to the public policy considerations behind the Act.

Standard of Review

This case comes before this Court on the granting of a motion for summary judgment in favor of the defendant. The standard of review is *de novo*. *Coleman v. East Joliet Fire Protection Dist.*, 2016 IL 117952, ¶ 20.

I. Plaintiff and the ITLA Fail to Recognize the Distinction Between a Duty and an Immunity.

Plaintiff and the ITLA frame the issue in this case as to whether the duty recognized in 3-102(a) should "prevail" over the immunity provided under Sections 2-201 and 2-109. This analysis is flawed, because it conflates the separate and distinct concepts of duty and immunity. The issue in this case is not whether a duty exists under 3-102(a); defendant has conceded this point. The question is whether defendant has established that it is immune from liability for plaintiff's injuries under 2-201 and 2-109, notwithstanding any alleged failure on its part to fulfill its legal duty.

As this Court has repeatedly recognized, "[t]he issue of whether a duty is owed is a separate and distinct issue from whether a defense of governmental immunity applies." *Coleman v. East Joliet Fire Protection Dist.*, 2016 IL 117952, ¶ 46, *citing Barnett v. Zion Park Dist.*, 171 Ill. 2d 378, 388 (1996); *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 46 (1998); *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001); *Arteman v. Clinton Community Unit School Dist. No. 15*, 198 Ill. 2d 475, 479-80 (2002); *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 507 (2006). "Whether a plaintiff can establish that a local public entity owed a duty is a separate and distinct inquiry from the issue of whether defendants can claim a statutory immunity is available as a defendant. Therefore, 'once a court determines that a duty exists, it then addresses whether [statutory immunity] applies.'" *Coleman*, 2016 IL 117952, ¶ 55, quoting *Harris v. Thompson*, 2012 IL 112525, ¶ 17. "[C]onceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity." *Coleman*, 2016 IL 117952, ¶ 55, quoting *Williams v. State*, 664 P.2d 137, 139 (Cal. 1983). "Obviously, a duty analysis is irrelevant where immunity applies, and the inverse is also true: immunity is irrelevant when there is no duty in the first place." *Coleman*, 2016 IL 117952, ¶ 55.[1]

[1] In this Court's divided decision in *Coleman*, which eliminated the "public duty" rule of law in Illinois, this duty/immunity distinction is one point that both the

A good example of this distinction can be found in *Arteman v. Clinton Community Unit School Dist. No. 15*, 198 Ill. 2d 475 (2002). In that case, this Court recognized that a school district has a duty to furnish equipment for the prevention of injuries to students engaged in school activities. However, the question of whether the district had a *duty* to provide such equipment and the question of whether the school district was *immune* from liability for injuries caused by its failure to provide such equipment were separate and distinct questions. *Id.* at 480.

This Court concluded that a school district had a duty to provide safety equipment for a student who was roller-blading as part of a physical education class. *Id.* at 483. However, the school district had established that its decision not to provide such equipment was a discretionary choice that fell within the protection of Section 2-201. *Id.* at 487. This Court found that the plaintiff's position that the general duty to provide safety equipment should trump the school's right to immunity "impermissibly elevates a common law duty over an applicable statutory immunity." *Id.*

Section 3-102(a) "merely codified the common law duty of local public entities." *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 414 (1991). Like the plaintiff in *Arteman*, plaintiff here urges the Court to elevate a municipality's common law duty to maintain its property, as codified in Section

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majority and the dissent agreed upon. *Coleman*, 2016 IL 117952, ¶ 83 (Thomas, J., dissenting).

3-102(a), over the immunities available to the municipality under the Tort Immunity Act. The distinction between duties and immunities is well established under Illinois law and has been recognized by this Court on many occasions. When this distinction is taken into consideration, it becomes clear that Sections 2-201 and 2-109 do not conflict with Section 3-102(a), because the sections address different concepts.

II. No Conflict Exists Between Sections 2-201 and 2-109 on the One Hand and Section 3-102(a) on the Other Because Section 3-102(a) Simply Codifies a Municipality's Common Law Duty to Maintain its Property, Whereas Sections 2-201 and 2-109 are Immunity-Granting Provisions.

Despite the ITLA's suggestions to the contrary, paragraph (a) of Section 3-102 only sets forth what a municipality's duties are with respect to the maintenance of its property; it does not delineate, or restrict, what immunities may be available to a municipality. The ITLA confuses this issue in its brief by categorizing a municipality's lack of actual or constructive notice of a dangerous condition of its property as an "immunity" to a municipality's liability, when such notice is actually a requirement for a duty to arise under Section 3-102(a).

The language used by the Legislature in Section 3-102(a) makes this distinction clear. The statute states that a municipality cannot be liable for injuries caused by a dangerous condition of its property "*unless it is proven that* it has actual or constructive notice of the existence of such a condition." 745 ILCS 10/3-102(a). Thus, the burden is on the plaintiff to prove actual or constructive notice of a dangerous condition. *Krivokuca v. City of Chicago*, 2017

IL App (1st) 152397, ¶ 50; *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 34; *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶ 14. Categorizing the lack of notice as an "immunity," as the ITLA suggests, would improperly shift the burden of proof to the municipality to prove lack of such notice. *See, e.g.*, *Henrich v. Libertyville High School*, 186 Ill. 2d 381, 387 (1998) (an immunity under the Tort Immunity Act "must be raised and pled as an affirmative defense or else it is waived, even if the evidence supports the existence or appropriateness of the defense").

Furthermore, Section 3-102(a) "merely codified the common law duty of local public entities. It did not create new duties or liabilities for public entities which did not previously exist." *Vesey*, 145 Ill. 2d at 414. At the common law, a municipality's duty to maintain its property was the same as a private entity. *Id.* at 412-13. The common law does not impose an absolute duty on a private landowner to protect his guests from defective conditions on his property; for such a duty to arise, it must be proven that the property owner had actual or constructive notice of the defective condition. *Racky v. Belfor USA Group, Inc.*, 2017 IL App (1st) 153446, ¶ 99; *Hanna v. Creative Designers*, 2016 IL App (1st) 143727, ¶ 34; *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (1st Dist. 2000).

By classifying a municipality's lack of actual or constructive notice as an "immunity," the ITLA's position forces the conclusion that a municipality's duty to maintain its property is actually greater than that of a private

landowner. Under the ITLA's scenario, a plaintiff would not need to prove actual or constructive notice on the part of a municipality for a duty to arise; rather, it would be the municipality's burden to prove lack of such notice. Obviously, the Legislature did not intend for the Tort Immunity Act to be interpreted in such a way as to create duties on the part of a municipality that did not otherwise exist.

In contrast to Section 3-102(a), Sections 2-201 and 2-109 of the Tort Immunity Act are clearly immunity-granting provisions. As this Court has recognized, immunities under these sections are not assumed; rather, the public entity bears the burden of proving that it is entitled to immunity under these sections. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 380 (2003).

By recognizing that Section 3-102(a) speaks to what a municipality's *duties* are, while Sections 2-201 and 2-109 grants *immunities*, the two sections can comfortably co-exist; one need not "prevail" over the other. As this Court recognized in *Coleman*, a court's job is to first consider whether a duty arose. If there is such a duty, the next step is to consider whether the defendant has established that it is entitled to immunity. Here, there is no dispute that defendant had a duty of care under Section 3-102(a). The only question that should be before this Court is whether the immunities under Sections 2-201 and 2-109 apply.

III. The Prefatory Language in Section 3-102(a) Does Not Limit What Immunities May Be Available to a Municipality, But Rather Puts Limitations on the Extent of a Municipality's Duties.

Plaintiff and the ITLA argue that the prefatory language of Section 3-102(a), "except as otherwise provided in this Article," should be interpreted to mean that only the immunities found in Article III of the Act are available to a municipality when the maintenance of property is concerned. However, as discussed above, Section 3-102(a) only addresses the circumstances under which a duty may arise, not the circumstances under which an immunity may apply. By its terms, the prefatory language is a qualification on what a municipality's duties are: "Except as otherwise provided in this Article, a local public entity *has the duty* to …" 745 ILCS 10/3-102(a) (emphasis added).

In fact, this Court has previously concluded that the intent of the prefatory language in Section 3-102(a) is to put limitations on the scope of a municipality's *duty* rather than a limitation on its *immunities*. In *West v. Kirkham*, 147 Ill. 2d 1 (1992), this Court considered the phrase, "[e]xcept as otherwise provided in this Article," in Section 3-102(a) and looked to other provisions in Article III to determine whether a municipality has a duty to provide traffic control devices. This Court concluded: "It is 'otherwise provided' in section 3–104, which is located in article III with section 3–102(a), that a municipality does *not* have a duty to *provide* traffic control devices." *Id.* at 14.

This Court went on to state: "Thus, the obligation to provide traffic control devices is *expressly excluded from the purview of the general duty to*

maintain found in section 3–102(a). This limitation *on the scope of the duty* in section 3–102(a) is in keeping with the scope of that duty as it existed at common law." *Id.* at 14 (emphasis added). In other words, this Court did not interpret the prefatory language in Section 3-102(a) to be a limitation on the *immunities* that a municipality may enjoy, but rather a limitation on the scope of a municipality's *duty*.

Again, when one considers the distinction between duties and immunities recognized by this Court, this erases any tensions between the general duties set forth in 3-102(a) and the immunities provided in Sections 2-201 and 2-109.

IV. A Decision in Favor of the Defendant in this Case Would Not Render Section 3-102(a) Moot.

The ITLA's fear that the recognition of immunity under Section 2-201 in this case would completely nullify a municipality's duties under Section 3-102(a) is misplaced. Recognition of Section 2-201 immunity in this case would in no way ease the burden that a municipality has to meet to establish that it is entitled to immunity under the statute. The ITLA complains that the appellate court's opinion in this case "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." However, meeting the burden of proving immunity under Section 2-201 is not as simple as the ITLA suggests.

This Court has stated, "our cases have made clear that there is a distinction between situations involving the making of a policy choice and the exercise of discretion. Municipal defendants are required to establish both of these elements in order to invoke immunity under section 2–201." *Van Meter*, 207 Ill. 2d at 379. This Court has defined "policy decisions made by a municipality" as "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 v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 342 (2003), *quoting West*, 147 Ill. 2d at 11. This Court has defined "discretionary" actions to be those "unique to a particular public office." *Van Meter*, 207 Ill. 2d at 378, 380. "Where … tailored statutory and regulatory guidelines place certain constraints on the decisions of officials, a court should be reluctant to label decisions falling wholly outside the established parameters as 'discretionary.'" *Snyder v. Curran Township*, 167 Ill. 2d 466, 474 (1995).

A municipal employee, and by extension the municipality, would not be protected under Sections 2-201 and 2-109 for failing to make a repair to municipal property when the employee's decision whether or not to make the repair was constrained by a tailored statutory or regulatory guideline. For example, in *Snyder*, this Court concluded that a township highway commissioner did not have discretion to decide where to place a sign warning of a curve on a township road. This Court found that the commissioner was

mandated by the Illinois Vehicle Code to place the warning sign on the right side of the road and at least 425 feet in advance of the curve, and therefore he had no discretion to do what he did: place the warning sign on the left side of the road approximately 67 to 120 feet before the curve. *Snyder*, 167 Ill.2d at 470-71. This Court reasoned that the commissioner's decision where to put the sign was not "discretionary" because the commissioner was bound to perform his duties "under a given set of facts in a prescribed manner." *Id.* at 474.

Likewise, in *Trtanj v. City of Granite City*, 379 Ill. App. 3d 795 (5th Dist. 2008), the appellate court concluded that a municipality's assertion of discretionary immunity under Section 2-201 did not shield it from liability for failing to maintain its sewer system during a power outage. The court found that there were material issues of fact concerning whether the municipality timely hooked up a bypass pump to a sewer lift station and whether its acts or omissions in hooking up the bypass pump resulted in a backup of sewage into the plaintiffs' basement. *Id.* at 804. The court concluded that the municipality had failed to establish that the process of hooking up a bypass pump was discretionary. *Id.* "Once the alarm sounded to alert [the municipality's] street department of the power outage at the … lift station, [the] street workers had no discretion; they were required to follow the prescribed procedures for hooking up the bypass pump. In other words, in hooking up the bypass pump, [the municipality's] employees were acting '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.'" *Id.*, *quoting* *Snyder*, 167 Ill. 2d at 474.

As the outcomes of *Snyder* and *Trtanj* show, the immunities granted by Sections 2-201 and 2-109 do not render moot the duties that a municipality has under Section 3-102(a). However, in contrast to the municipalities in *Snyder* and *Trtanj*, the municipality *in this case* has established that the employee in charge of repairing municipal sidewalks, Doug Ahrens, had discretion, as the city's Director of Public Works, to determine which portions of which sidewalks were in need of repair and which were not. (R. C209, ¶ 6). In exercising his discretion, Ahrens considered the size of the deviation between sidewalk slabs, the distance of the condition from other obstructions, the typical path of travel for pedestrians and the conditions of the surface of the sidewalk. (R. C187, at 15:11-16:15). These factors were developed through discussions with city engineers and the Superintendent of Downtown Services over the course of several years. (R. C187-88, at 16:20-17:3).

Amicus suggests to the Court that it can easily affirm the appellate court's opinion in this case without disturbing this Court's prior jurisprudence regarding the burden that a public entity must meet to establish immunity under Sections 2-201 and 2-109. In other words, a public entity must still prove that it is entitled to immunity under Sections 2-201 and 2-109 under the standards set forth in *Snyder* and *Van Meter*, even when the question of property maintenance under Section 3-102(a) is at issue.

V. The Federal District Court's Dicta in *In re Chicago Flood Litigation* is Flawed Because It Fails to Recognize the Distinction Between Duties and Immunities.

The ITLA cites dicta from the federal district court's unpublished order in *In re Chicago Flood Litigation*, No. 93-C-1214, 1993 WL 278553 (N.D. Ill. July 20, 1993), as support for its contention that the duties recognized under Section 3-102(a) "prevail" over any immunities found in Section 2-201. However, the federal district court failed to recognize what this Court recognized in *West v. Kirkham*, that the prefatory language in Section 3-102(a) addresses a public entity's duties, not its immunities.

By reading the prefatory language in Section 3-102(a) to set limitations on the immunities provided to a public entity, the federal court in *In re Chicago Flood Litigation* created a conflict within the Tort Immunity Act where none should exist. Under the reasoning supported by the ITLA and the federal district court, a public entity's duty under Section 3-102 could also trump the immunities in Section 3-108 (745 ILCS 10/3-108), as Section 3-108 contains the same prefatory language found in Section 2-201: "Except as otherwise provided …" Thus, the position of the ITLA and federal district court would lead to the following paradox when Section 3-108 immunity is at issue: a municipality would be liable for injuries caused by its failure to maintain its property in a reasonably safe condition, per Section 3-102, but not under those circumstances provided in Section 3-108 ("Except as otherwise provided in this Article"). However, turning to Section 3-108, one would find that the

immunities therein are subject to, and thus limited by, the duties recognized under Section 3-102 ("Except as otherwise provided in this Act"). The federal court construed this as a conflict: "Because sections 3–108(a) and 3–102(a) are both prefaced by the phrase '[e]xcept as otherwise provided,' an endless loop arises in jointly construing these provisions." *In re Chicago Flood Litigation*, 1993 WL 278553, at * 6. Then, the federal court took the extraordinary step of concluding that Section 3-102(a) takes precedence over Section 3-108(a), thus arguably rendering Section 3-108(a) meaningless. *Id.* Surely, this was not the intent of the Legislature in enacting the Tort Immunity Act.

It is a well-established canon of statutory construction that statutes must be construed as a whole and should not be interpreted in such a manner that renders any portion of them superfluous or meaningless. *In re Jarquan B.*, 2017 IL 121483, ¶ 22. Recognizing the distinction between duties (as set forth in Section 3-102(a)) and immunities (as set forth in Section 2-201 and other provisions) avoids the false conflict created by the court in *In re Chicago Flood Litigation* and preserves the cohesion of the Tort Immunity Act.

VI. Plaintiff' and the ITLA's Interpretation of the Tort Immunity Act Runs Counter to the Purposes Behind the Act.

The interpretation of the Tort Immunity Act set forth by plaintiff and the ITLA would force a municipality to expend undue amount of resources on one category of public actions – maintaining its property – at the expense of other important government functions.

The overarching purpose of the Tort Immunity Act "is to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1(a). One of the realities recognized by the Act is that local governmental entities have limited resources and "[b]y providing immunity, the legislature sought to prevent the diversion of public funds from their intended purpose to the payment of damage claims." *Bubb v. Springfield School Dist. 186*, 167 Ill. 2d 372, 378 (1995).

The Tort Immunity Act clearly allows municipalities discretion on how to allocate their resources for important government functions, such as law enforcement (*see* 745 ILCS 10/4-102 (immunizing municipalities from any liability for failing to establish a police department or failing to provide "adequate police protection or service")) and fire protection (*see* 745 ILCs 10/5-102 (providing blanket immunity to a municipality for failing to provide or maintain sufficient fire protection personnel, equipment or other fire protection facilities)). However, plaintiff's interpretation of the Tort Immunity Act would elevate the maintenance of property over all other government functions and prevent a municipality from making policy decisions or exercising discretion on how to maintain its own property. Once a crack appears on a sidewalk owned by a municipality and the municipality has notice of the crack, the municipality would have no discretion to decide when and how to address the situation. By being stripped of any discretion on how to handle cracked sidewalks, a municipality would be forced to expend resources on

minor property repairs even though the municipality may have decided that the public would best be served by allocating those resources to other government functions, such as police and fire protection.

Therefore, not only is the plaintiff and the ITLA's interpretation of the Tort Immunity Act hostile to the statutory language employed by the Legislature and this Court's longstanding recognition of the distinction between duties and immunities, the effects of the rule of law championed by the plaintiff and the ITLA would fly in the face of the Legislature's primary intent in giving local governmental entities the freedom to decide how best to use their limited resources for the benefit of the public at large.

CONCLUSION

For the reasons stated above, it is respectfully requested by the *Amicus* that this Court recognize that the immunities provided by Section 2-201 and 2-109 of the Tort Immunity Act are not superseded by a public entity's general duty of property maintenance, as recognized in Section 3-102(a). Specifically, the *Amicus* urges this Court to keep the immunities available to municipalities, and other public entities, in situations where public employees in charge of maintaining public property must balance competing interests and make judgment calls about what solutions will best serve the public interests, and where those employees have exercised their discretion in deciding the best way to go about repairing and maintaining public property.

WHEREFORE, *Amicus Curiae* Illinois Association of Defense Trial Counsel respectfully requests that this Honorable Court AFFIRM the opinion of the Fourth District Appellate Court and AFFIRM the trial court's order granting summary judgment in favor of the defendant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 17 pages.

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Subscribed and sworn to before me this 22nd day of January, 2018.

/s/ Ana M. Tame
Notary Public

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Official Seal
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My Commission Expires Aug 16, 2020

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CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on January 22, 2018, I electronically filed and transmitted the foregoing Amicus Brief with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other individual in this case, named below will be served via e-mail, pursuant to Rule 11(c), and courtesy copy through Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure [735 ILCS 5/1-109], I certify that the statements set forth in this **Certificate of Filing and Proof of Service** are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

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