MONTHLY LUNCHTIME SEMINAR SERIES

66TH Session:

IL Tort Immunity Act Defenses: 2-201, 3-102, 3-106 and 3-108

Judge Eileen M. Brewer, Ret.
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Schain, Banks, Kenny & Schwartz, Ltd.

July 11, 2018

JUDGE EILEEN M. BREWER (Ret.)

Judge Eileen M. Brewer is a 28 year veteran of public service to Chicago and Cook County, including 14 years as an Illinois State Court Judge in the Law and Domestic Relations Divisions of the Cook County Circuit Court. Judge Brewer has presided over thousands of civil cases in pretrial and trial stages. For the last seven years, she served as Cook County Law Division's Motion Call Judge, managing thousands of complex cases that touch upon nearly every aspect of civil law. Bar associations have consistently praised Judge Brewer's scholarship, first-rate legal ability, and outstanding judicial temperament.

Judge Brewer has mediated and settled well over a thousand cases and believes that negotiated outcomes offer parties the best chance for resolution on their own terms. Judge Brewer is well known among lawyers for her mediation skills. She quickly analyzes complex legal and factual issues, diffuses emotionally charged situations, and gains the trust of clients and lawyers.

Judge Brewer has substantial litigation, judicial, and settlement experience in Business, Commercial; Personal injury, Torts; Domestic Relations; Employment, Employment Contracts, Discrimination; Professional Liability; Local Government Entities; Sexual Abuse, Sexual Harassment; Civil Rights; and Family Law.

Judge Brewer has served in Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars including "Preparing For and Participating in Mediation and Settlement Conferences in Labor and Employment Cases" in 2017.

Prior to joining the bench, Judge Brewer was Assistant Corporation Counsel for the City of Chicago, and Chief Counsel to the President of the Cook County Board of Commissioners.

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He was awarded a Trial Lawyer Excellence Award by the Jury Verdict Reporter in 2011 and 2017, was named by the Law Bulletin as one of 2007's "40 Under Forty—Forty Illinois Attorneys Under 40 to Watch" and has been selected by his peers as a Leading Lawyer in personal injury defense and insurance law.

Mike earned his Bachelor of Science degree from Western Illinois University in 1989. He was a police officer for the City of Park Ridge Police Department for over 8 years, and was awarded the Park Ridge Police Officer of the Year Award in 1997. While working as a police officer, he attended The John Marshall Law School and earned his Juris Doctorate in 1998.

ILLINOIS TORT IMMUNITY ACT DEFENSES: SECTIONS 2-201, 3-102, 3-106 and 3-108

By
Judge Eileen M. Brewer, Ret.
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July 2018

1. 745 ILCS 10/3-102(a): CARE IN MAINTENANCE OF PROPERTY

A. NO LIABILITY UNLESS PLAINTIFF PROVES THAT DEFENDANT HAD "ACTUAL OR CONSTRUCTIVE NOTICE" OF DEFECT ON PREMISES BEFORE ACCIDENT IN TIME TO REPAIR.

Notice is a mandatory and absolute element of plaintiff's case-to be pleaded and proven. § 3-102(a) of the Tort Immunity Act provides specifically that a public entity "shall not be liable for injury unless it is proven that it has actual or constructive notice" of a condition in "reasonably adequate time prior to an injury to have taken measures to remedy" it.

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.

Actual Notice

Actual notice means simply that local government was actually aware of the presence of a defective condition before an accident.

The case law interpreting the "actual notice" requirement of§ 3-102(a) is clear. If "actual notice" is not proven, Plaintiff has no cause of action. The cases finding no liability of a local public entity for a defective condition in its property absent proof of actual notice include the following:

Cases finding no "notice" under 3-102 include the following:

(1) *Lewis v. Rutland Township*, 824 N.E.2d 1213, 291 Ill.Dec. 963 (3rd Dist. 2005) (township had no notice of large depression in roadway created by rain and flooding over a weekend where school bus passed over roadway on Friday without incident, but struck large depression on Monday- no liability as no § 3-102(a) notice in time to repair before accident).

In granting summary judgment for Rutland Township, in the case of *Lewis v. Rutland Township*, 359 Ill.App.3d 1076 824 N.E.2d 1213 (3rd Dist. 2005),

involving the depression in the road for three days after a heavy rainfall and no "notice" to the Township in time to repair, the Court stated:

> Here, plaintiff proffered no evidence that actual notice of the depression was given to the township prior to February 28, 2000. Further, the pleadings, depositions and competent affidavits establish that there is no genuine issue of fact regarding constructive notice. The only competent evidence indicating the amount of time during which the township's road was in an unsafe condition appeared in plaintiff's deposition testimony, wherein she said that the depression was not unsafe on Friday, February 25 at 4 p.m. and it was unsafe at 4 p.m. the following Monday. Plaintiff also testified that it rained throughout that weekend. It would be unreasonable to require the township to inspect all of its roads within hours of heavy rainfall absent actual notice of a problem. (359 Ill.App.3d at 1080, 824 N.E.2d at 1217.)

(2) *Seigel v. Village of Wilmette*, 324 Ill.App.3d 903, 756 N.E.2d 316 (1st Dist. 2001) (Village had no notice and received no complaints of 1" sunken sidewalk section which accumulated ice and caused plaintiff pedestrian's fall and, therefore, could not be liable for accident).

(3) *Wilsey v. Schlawin*, 35 Ill.App.3d 892,342 N.E.2d 417 (1st Dist. 1976) (no § 3-102(a) notice of missing stop sign by Village where only proofs were Village saw stop sign up one day before accident- no actual or constructive "notice" of missing sign down for 24 hours).

(4) *Stewart v. United States*, 918 F.Supp. 224 (N.D. Ill. 1996) (existence of condition of floor mats overlapping one another for one day insufficient to show constructive notice to local public entity and no actual notice shown).

Constructive Notice

"Constructive notice" is defined as follows in the case of Ramirez v. City of Chicago, 318 Ill.App.3d 18, 740 N.E.2d 1190 (1st Dist. 2000):

> Constructive notice of a condition is said to exist where the condition has existed for such a length of time or is so conspicuous or plainly visible that the public entity should have known of its existence by exercising reasonable care and diligence. (318 Ill.App.3d at 22, 740 N.E.2d at 1194).

The issue of "constructive notice" is often a jury question, as illustrated by these cases:

(1) *DiMarco v. City of Chicago*, 278 Ill.App.3d 318, 662 N.E.2d 525 (1st Dist. 1996) (jury found no constructive notice where section of curb raised 2" higher than rest of curb, though rise existed some 8 to 11 years, but was never noticed by plaintiff or her husband over those years).

(2) *Ramirez v. City of Chicago*, 318 Ill.App.3d 18, 740 N.E.2d 1190 (1st Dist. 2000) (directed verdict for plaintiff was proper on issue of constructive notice where plaintiff tripped on "about a 2" rise" in sidewalk which existed for some 16 years near her doctor's office).

(3) *Stewart v. United States*, 918 F.Supp. 224 (N.D. Ill. 1996) (existence of condition of floor mats overlapping one another for one day insufficient to show constructive notice to local public entity and no actual notice shown).

B. NO LIABILITY UNLESS PLAINTIFF PROVES THAT DEFENDANT FAILED TO MAINTAIN THE PREMISES IN REASONABLY SAFE CONDITION FOR "INTENDED AND PERMITTED USERS" (745 ILCS 10/3-102(a)).

§ 3-102(a) of the Tort Immunity Act grants immunity to local government by providing a local public entity's duty to maintain its property in "reasonably safe condition" extends only to persons intended by local government to be both "intended and permitted users" of the property. An "intended user" is one for whose use the property was planned, designed, constructed and maintained. A "permitted user" is one who is on the property with permission - a non-trespasser.

The following cases give a sense of who is considered an "intended user" of public property - for what purposes or use or uses was the public property planned, designed, constructed and maintained?

The following cases illustrate that pedestrians are not "intended users" of streets, parkways and alleys, although they may be "permitted users" and that bicyclists are not "intended users" of streets, though they may be "permitted users" and, therefore, no duty is owed to them.

(1) *Boub v. Township of Wayne*, 183 Ill. 2d 520, 702 N.E.2d 535 (1998) (bicyclist on township road and bridge not an "intended user," as required in § 3-102(a) of Tort Immunity Act, and, therefore, township immune from liability pursuant to § 3-102(a) of Tort Immunity Act when bike wheel caught in gap between wooden slats on township bridge causing bike to flip over and cyclist to sustain serious injuries).

(2) *Sisk v. Williamson County*, 167 Ill.2d 343,657 N.E.2d 903 (1995) (pedestrians are not intended users of county gravel roads though permitted users thereof, and, therefore, county owed no duty to provide or maintain pedestrian walkway or sidewalk alongside the county road).

(3) *Wojdyla v. City of Park Ridge*, 148 Ill.2d 417, 592 N.E.2d 1098 (1992) (pedestrian crossing city street at night at non-crosswalk area struck and killed by auto was not an "intended user" of the street and, therefore, city not liable to pedestrian for failing to maintain its property in reasonably safe condition for plaintiff under§ 3-102(a)).

(4) *Roberson v. City of Chicago*, 260 Ill.App.3d 994, 636 N.E.2d 776 (1st Dist. 1994) (no duty owed by city to pedestrian who fell into hole crossing parkway median separating four lanes of traffic as parkway median intended to separate lanes of traffic and not intended or designed for pedestrian usage).

(5) *Khalil v. City of Chicago*, 283 Ill.App.3d 161, 669 N.E.2d 1189 (1st Dist. 1996) (no duty to maintain alley for pedestrian as pedestrian not "intended user," though pedestrians "permitted users" because their usage was not prohibited - frequent usage of alley by pedestrians did not render it as "intended" for pedestrians).

(6) *Vaughn v. City of West Frankfort*, 166 Ill.2d 155, 651 N.E.2d 1115 (1995) (pedestrian who stepped in hole in street crossing mid-block not "intended user" - no duty to maintain street for pedestrian).

2. 745 ILCS 10/3-108(a) and (b): SUPERVISION IMMUNITY

A. NO LIABILITY FOR FAILURE TO SUPERVISE USE OF OR ACTIVITY ON PUBLIC PROPERTY, BUT IF UNDERTAKE TO SUPERVISE, NO LIABILITY UNLESS WILLFUL & WANTON CONDUCT

A local public entity is granted immunity for its supervision or failure to supervise activities on or the use of public property by § 3-108(a) and (b), supervision immunity, of the Tort Immunity Act. (745 ILCS 10/3- 108(a)(b).)

If no supervision is provided and if the common law/case law or some statute, code, ordinance or regulation does not require supervision, the immunity is absolute and unconditional. (§ 3-108(b).)

If supervision is provided or if the law requires supervision, then there is immunity from negligence, but no immunity from willful and wanton conduct. (§ 3-108(a).)

Supervision Immunity of the Tort Immunity Act provides as follows:

> § 3-108. (a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.
>
> (b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury. (745 ILCS 10/3-108(a) & (b).)

The following cases hold that § 3-108, failure to supervise immunity, of the Tort Immunity Act trumps any duty of a local public entity:

(1) *Moorhead v. Metropolitan Water Reclamation District of Greater Chicago*, 322 Ill.App.3d 635, 749 N.E.2d 443 (1st Dist. 2001) (Metropolitan Water District who hired general contractor Perini to do "deep tunnel" work and Perini hired subcontractor Tunnel Electric to provide lighting in "deep tunnel" not liable to plaintiff construction worker injured when he fell in "deep tunnel" on slippery condition with no lighting as Metropolitan Water District was immune from liability under§ 3-108(b), failure to supervise immunity, for failure to supervise contractor's work).

(2) *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 687 N.E.2d 1042 (1997) (Board of Education immune per § 3-108(a) supervise immunity for fall of construction worker who fell from building and sued Board of Education under Illinois Structural Work Act for failure to supervise work of contractor hired by Board to do construction work on school).

(3) *In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265 (1997) (City immune from liability under§ 3-108(a) failure to supervise immunity for failure to supervise contractor Great Lakes' pile driving activity which breached underground freight tunnel causing flooding in Chicago Loop).

(4) *Valentino v. Hilquist*, 337 Ill.App.3d 461, 785 N.E.2d 891 (1st Dist. 2003) (Community college board of trustees entitled to full blanket supervision immunity (§ 3-108) immunity for former employee's intentional battery and intentional infliction of emotional distress claims stemming from negligent supervision of department vice president. pursuant to provision of Tort Immunity Act in effect at time of injury).

(5) *Repede v. Community Unit School District No. 300*, 335 Ill.App.3d 140, 779 N.E.2d 372 (2nd Dist. 2002) (School District and teacher immune from liability pursuant to § 3-108, supervision immunity, where freshman cheerleader practicing a pyramid routine fell and broke her arm - § 3-108, supervision immunity, is absolute and there are no exceptions).

(6) *Gusich v. Metropolitan Pier & Exposition Authority*, 326 Ill.App.3d 1030, 762 N.E.2d 34 (1st Dist. 2001) (Metropolitan Pier Authority immune from liability to plaintiff who fell off of loading dock due to debris for failure to supervise contractor hired to clean loading dock by virtue of § 3-108, failure to supervise immunity).

3. 745 ILCS 3-106: RECREATIONAL PROPERTY IMMUNITY

A. A LOCAL PUBLIC ENTITY IS NOT LIABLE FOR A CONDITION OF RECREATIONAL PROPERTY UNLESS IT IS GUILTY OF WILLFUL AND WANTON CONDUCT.

Local government maintains vast amounts of property, some of it recreational property, and it receives immunity from negligence in maintaining "recreational property," but no immunity for willful and wanton conduct in maintaining such property by virtue of § 3-106, recreational property immunity (745 ILCS 10/3-106).

Section 3-106, recreational property immunity, provides as follows:

> **3-106. Property used for recreational purposes**
>
> § 3-106. Neither a local public entity nor a public employee is liable for an injury where the liability is based upon the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury. (745 ILCS 10/3-106.)

A. 745 ILCS 1-210: WILLFUL AND WANTON CONDUCT

The Tort Immunity Act also defines the term "willful & wanton conduct" as follows:

> **1-210. Willful And Wanton Conduct**
>
> § 1-210. "Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. (745 ILCS 10/1-210.)

The Appellate Court, in A.D. v. Forest Preserve District of Kane County, 313 Ill.App.3d 919, 731 N.E.2d 955 (2nd Dist. 2000), set out the three- pronged test required to prove willful and wanton conduct: (1) knowledge of dangerous condition; (2) knowledge of prior accidents and injuries from the condition; or, (3) removal of safety device from the recreational property. The Court explained:

> In order to establish willful and wanton conduct, a plaintiff must prove that a defendant engaged in a 'course of action' that proximately caused the injury... A public entity may be found to have engaged in willful and wanton conduct only if it has been informed of a dangerous condition, knew others had been injured because of the condition, or if it intentionally removed a safety device or feature from property used for recreational purposes. (313 Ill.App.3d at 924, 731 N.E.2d at 959.)

Section 1-210's definition of "willful and wanton conduct" requires the Defendant's "course of action" reveal Defendant's mental state dismissive of Plaintiffs safety - that Defendant's actions show "utter indifference to" or "conscious disregard for" Plaintiffs safety:

(1) "Utter indifference to" plaintiff's safety means, "entire, complete, absolute and total disregard" for plaintiff's safety. (Black's Law Dictionary).

(2) "Conscious disregard for" plaintiff's safety means, "intentional, knowing, purposefully ignoring" plaintiff's safety. (Black's Law Dictionary).

The following cases found no willful and wanton conduct because the conduct involved did not show "utter indifference to" or "conscious disregard for" plaintiff's safety. "Utter indifference to" or "conscious disregard for' plaintiff's safety means defendant knew of a defective condition, knew injury was almost bound to happen and chose to do nothing.

(1) *Oravek v. Community Dist. No. 146*, 264 Ill.App.3d 895, 637 N.E.2d 554 (1st Dist. 1992) (No willful & wanton conduct for school district not to remove skateboard ramp on school property in violation of school policy where plaintiff injured riding bike onto ramp inadvertently).

(2) *Bialek v. Moraine Valley Community College School Dist. No. 524*, 267 Ill.App.3d 857, 642 N.E.2d 825 (1st Dist 1994) (No willful & wanton conduct where plaintiff collided with goal post used as boundary marker playing pick-up football - not willful and wanton for college not to remove or pad goal post).

(3) *Koltes v. St. Charles Park District*, 293 Ill.App.3d 171, 687 N.E.2d 543 (2nd Dist. 1997) (No willful and wanton conduct on Park District's part where golfer standing by woman's tee hit by golfer on men's tee even though Park District knew of a similar prior accident because knowledge of one prior accident and non-action thereafter is not a "course of conduct" which shows "utter indifference to" plaintiffs safety).

B. WHAT IS RECREATIONAL PROPERTY - *REXROAD V. CITY OF SPRINGFIELD*, 207 ILL.2d 33, 796 N.E.2d 1040 (2003)?

Section 3-106, recreational property immunity, grants immunity to a local public entity, except for willful and wanton conduct, for injuries caused by a condition (not activities) of public property intended or permitted to be used for recreational purposes.

What is "recreational" property"? Whether property is "recreational property" is determined by its nature, intended use and past use. But, analysis is on a case-by-case basis. An example will help explain.

Is a parking lot "recreational property"? It can or cannot be, as two Supreme Court cases illustrate:

(1) *Sylvester v. Chicago Park District*, 179 Ill.2d 500, 689 N.E.2d 1119 (1997) (Parking lot across street from Soldier Field, where plaintiff tripped over concrete parking bumper, was "recreational property" under§ 3- 106 because it increased the usefulness of Soldier Field used for recreational purposes).

Thus, non-recreational property (parking lot) can be "recreational property" if its use increases/aids/allows use of recreational property.

(2) *Rexroad v. City of Springfield*, 207 Ill.2d 33, 796 N.E.2d 1040 (2003) (Parking lot located to serve the school, football practice field and locker room, where plaintiff fell in a hole under construction, was not recreational property under § 3-106 because it served the whole school and was not primarily serving and increasing the usefulness of recreational property - it did so only incidentally).

The Supreme Court in *Rexroad* characterized the parking lot as only "incidental" to recreational property.

> ...we hold that any recreational use of the parking lot in question was so incidental that § 3-106 does not apply. (207 Ill.2d at 43, 796 N.E.2d at 1045.)

4. 745 ILCS 10/2-201: DISCRETIONARY IMMUNITY

A. NO LIABILITY FOR DISCRETIONARY ACTIONS OR JUDGMENT CALLS WHERE NO LAW MANDATES SPECIFIC CONDUCT UNDER RULE OF DISCRETIONARY IMMUNITY (745 ILCS 10/2-201).

A public employee of a local public entity has discretionary immunity when making a policy decision and exercising judgment as to how to act, pursuant to § 2-201, discretionary immunity of the Tort Immunity Act (745 ILCS 10/2-201). If a public employee is not liable by virtue of § 2-201 discretionary immunity, the local public entity, as his or her employer, cannot be liable and is immune from liability (745 ILCS 10/2-109).

Section 2-201, discretionary immunity, provides as follows:

> **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. (745 ILCS 10/2-201.)

The Illinois Supreme Court has applied a two-pronged test to determine when § 2-201 discretionary immunity applies in the case of *Harinek v. 161 No. Clark St. Ltd. Partnership.* (*Harinek v. 161 No. Clark St. Ltd. Partnership*, 181 Ill.2d 335, 692 N.E.2d 1177 (1998) (Chicago city fire marshal not liable for injuries during a fire drill by virtue of § 2-201, discretionary immunity, where he made a policy decision balancing competing interests of efficiency, safety, resources and time and exercised his discretion or best judgment in determining how, when and where to conduct the fire drill).)

The Supreme Court in *Harinek* used a two-pronged test to determine when § 2-201 discretionary immunity bars any cause of action:

(1) a policy decision - balancing of competing interests - the fire marshal balanced the interests of efficiency, safety, resources and time and personnel.

(2) the exercise of discretion or judgment - choosing the best solution - the fire marshal exercised discretion in deciding how, when and where to conduct the fire drill.

The law looks at the actions of local public employees in one of two fashions: (1) the actions are "ministerial"; or (2) the actions are "discretionary."

Ministerial actions are those imposed by and compelled by law. Ministerial actions are actions an employee must perform because they are required by the law - a statute, code, ordinance or common law/case law rule.

All non-ministerial actions are discretionary, involving a judgment call left up the employee to make.

Illustrative of discretionary judgment-calls for which § 2-201, discretionary immunity, provides immunity are the following:

(1) *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill.2d 475, 763 N.E.2d 756 (2002) (§ 2-201 discretionary immunity for School District for failure to provide kneepads as safety equipment for rollerblades in gym class where student fell and fractured leg-§ 2- 201 of Tort Immunity Act trumps duty of School District to furnish safety equipment under School Code/"in loco parentis" statute).

(2) *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 758 N.E.2d 848 (2001) (§ 2-201 discretionary immunity barred suit against School District for decision not to grant student early dismissal where snow storm approaching - when student released with all students later, student in auto accident in snow & motorist sued student & School District).

(3) *In re Estate of Elfayer v. City of Chicago*, 325 Ill.App.3d 1076, 757 N.E.2d 581 (1st Dist. 2001) (§ 2-201 discretionary immunity for City's decision to install 8" concrete median barriers on city streets as no statutes or codes required certain height measurements on median barriers - where drunk driver crossed 8 inch center median barrier and hit oncoming auto head-on).

The *Harinek* case provides an excellent illustration of the application of § 2-201 discretionary immunity.

In *Harinek v. 161 No. Clark Street Ltd. Partnership*, 181 Ill.2d 335, 692 N.E.2d 1177 (1998), the Supreme Court held that the City of Chicago was protected by § 2-201 discretionary immunity from a suit brought by plaintiff Harinek who was injured during a fire drill when she was knocked down by a fire door a person opened into her. The Supreme Court held that§ 2-201 discretionary immunity applied because the defendant City met the two-pronged test for its applicability:

(1) The fire marshal made policy decisions balancing competing interests of efficiency, safety, resources and time in conducting the fire drill;

(2) The fire marshal exercised his discretion in determining how, when and where to conduct the fire drill.

Finding the fire marshal made a policy decision, the Supreme Court in *Harinek* stated:

> We hold that these allegations describe acts and omissions of the fire marshal in determining fire department policy. This court has previously 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.'" *West v. Kirkham*, 147 Ill.2d 1, 11, 167 Ill.Dec. 974, 588 N.E.2d 1104 (1992). The conduct described in the instant complaint falls squarely within this definition. The fire marshal is responsible for planning and conducting fire drills in the City of Chicago. In planning these drills, the marshal must balance various interests which may compete for the time and resources of the department, including the interests of efficiency and safety. The alleged acts and omissions outlined in the complaint, such as the marshal's decisions regarding where to assemble the participants and whether to provide warning signs and alternate routing, were all part of his attempts to balance these interests. Accordingly, these acts and omissions were undertaken in determining policy within the meaning of the statute. (181 Ill.2d at 342-43, 692 N.E. 2d at 1182.)

Holding the fire marshal exercised discretion, the Supreme Court in *Harinek* reasoned:

> Plaintiff contends in the alternative that the appellate court erred in holding that the fire marshal's conduct was discretionary. In construing section 2-201 of the Act, this court has held that 'discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.' Snyder v. Curran Township, 167 Ill.2d 466, 474, 212 Ill.Dec. 643, 657 N.E.2d 988 (1995).
>
> Under these standards, the fire marshal's conduct described in the complaint clearly constituted an exercise of discretion. The marshal bears sole and final responsibility for planning and executing fire drills in buildings throughout Chicago. He is under no legal mandate to perform these duties in a prescribed manner; rather, he exercises his discretion in determining how, when, and where to hold drills such as the one in which plaintiff was injured. The appellate court was therefore correct in concluding that the fire marshal's conduct was discretionary. (181 Ill.2d at 343, 692 N.E. 2d at 1182.)

Thus, the *Harinek* Court held the fire marshal and City were shielded from liability to plaintiff by § 2-201 immunity:

> Because the fire marshal occupied a position involving the determination of policy or the exercise of discretion, and because his conduct as described in the complaint constituted acts or omissions in determining policy and exercising discretion, section 2-201 of the Act immunizes the City from liability for plaintiffs injuries. (181 Ill.2d at 343, 692 N.E.2d at 1182.)

See, also,

(4) *In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265 (1997) (City protected from liability by § 2- 201 discretionary immunity for its decisions in deciding when and how to repair underground tunnel leak caused by contractor and whether and how to warn of tunnel breach).

(5) *Johnson v. Decatur Park District*, 301 Ill.App.3d 798, 704 N.E.2d 416 (4th Dist. 1998) (Park District protected by § 2-201 discretionary immunity for coach's decisions on whether to use safety harness or use spotters for tumbling case where tumbler paralyzed using mini- trampoline).

(6) *Wrobel v. City of Chicago*, 318 Ill.App.3d 390, 742 N.E.2d 401 (1st Dist. 2000) (City immune from liability per § 2-201 of Tort Immunity Act discretionary immunity where auto struck pothole and veered into oncoming traffic - nature creates potholes like it does snow, wind and rain and there is no possible way to prevent reoccurring potholes despite various policies and judgment calls on the best methods to try and repair them).

The Appellate Court in *Wrobel v. City of Chicago*, 318 Ill.App.3d 390, 742 N.E.2d 401 (1st Dist. 2000), concluded that, contrary to plaintiff Wrobel's contention that these were simple ministerial decisions, the decisions with respect to how to handle potholes involved policy decisions and the exercise of discretion. The *Wrobel* Court reasoned:

> These workers are directed by Colianne to remove 'as much' loose asphalt and existing moisture in a pothole 'as possible' before applying the cold mixture. While they are obligated to undertake such measure pursuant to the express directive of their foreman, the workers enjoy discretion in determining how much asphalt and moisture should be actually extracted and whether that amount is indeed adequate to ensure a durable patch.
>
> The decisions of the workers in this regard can also fairly be characterized as policy determination. When confronted with a particular stretch of roadway, the workers must necessarily be concerned with the efficiency in which they prepare any potholes for repair. Specifically, the workers must allocate their time and resources among the various potholes that will be repaired, and they must ensure that not too much time is dedicated to pothole preparation. The more time and resources the workers devote to preparing potholes for a patch, the less time and resources they have available to repair the other potholes existing throughout their daily grid.
>
> For the same reasons discussed above, the extent of the workers' removal efforts represent both a determination of policy and an exercise of discretion. The degree to which a pothole should be prepared, and specifically how much loose asphalt and moisture

will be removed, is a matter of a worker's personal judgment, and encompassed within that judgment are the policy considerations of time and resource allocation during a given workday. (318 Ill.App.3d at 395, 742 N.E.2d at 406.)

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2-201, 3-108, 3-102 and 3-106

Judge Eileen M. Brewer, Ret.
Michael E. Kujawa, Attorney
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745 ILCS 10/2-201 DISCRETIONARY IMMUNITY
NO LIABILITY FOR DISCRETIONARY ACTIONS OR JUDGMENT CALLS WHERE NO LAW MANDATES SPECIFIC CONDUCT

I. **DISCRETIONARY IMMUNITY.** This immunity is one of the most significant protections afforded to local public entities and their employees under the Tort Immunity Act. But the case law interpreting Sect. 2-201 is sometimes confusing and inconsistent.

A. Under Sect. 2-201, a public employee who serves in a position involving the determination of policy or the exercise of discretion is not liable for any injury resulting from his act or omission when making a policy decision and exercising judgment as to how to act even when that discretion is abused.

B. If a public employee is not liable by virtue of Sect. 2-201 discretionary immunity, the local public entity, as his or her employer, cannot be liable and is immune from liability (745 ILCS 10/2-109). Sect. 2-201 immunizes local government employees for both negligence and willful and wanton conduct. Haskell v. Williams, 2013 IL App (4th) 121131.

Section 2-201 provides as follows:

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. (745 ILCS 10/2-201.)

1. The defendant must show that the particular decision at issue was both discretionary and a determination of policy, which means that it is rare to obtain dismissal under this provision on the face of the complaint. See, Van Meter v. Darien Park District, 207 Ill. 2d 359 (2003) (public entity bears the burden of proving that it is entitled to immunity under Sect. 2-201).

II. TWO-PART HARINEK TEST FOR DETERMINING WHETHER SECTION 2-201 APPLIES

Courts use a two part test established by the Illinois Supreme Court in Harinek v. 161 N. Clark St., 181 Ill. 2d 335, 341 (1998) (City of Chicago fire marshal was not liable for injuries during a fire drill when he made a policy decision and exercised his discretion or best judgment in determining how, when and where to conduct the fire drill). Courts focus on the type of position held by the employee and the acts or omissions of the employee.

A. An employee may qualify for immunity if he holds either a position involving the determination of policy or a position involving the exercise of discretion.

1. "Because the fire marshal occupied a position involving the determination of policy or the exercise of discretion, and because his conduct as described in the complaint constituted acts or omissions in determining policy and exercising discretion, section 2-201 of the Act immunizes the City from liability for plaintiffs injuries." (Harinek, 181 Ill.2d at 343).

[redacted] which the plaintiff's injuries resulted.

1. Policy.

a. We hold that these allegations describe acts and omissions of the fire marshal in determining fire department policy. This court has previously 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."' *West v. Kirkham*, 147 Ill.2d 1, 11, 167 Ill.Dec. 974, 588 N.E.2d 1104 (1992). The conduct described in the instant complaint falls squarely within this definition. The fire marshal is responsible for planning and conducting fire drills in the City of Chicago. In planning these drills, the marshal must balance various interests which may compete for the time and resources of the department, including the interests of efficiency and safety. The alleged acts and omissions outlined in the complaint, such as the marshal's decisions regarding where to assemble the participants and whether to provide warning signs and alternate routing, were all part of his attempts to balance these interests. Accordingly, these acts and omissions were undertaken in determining policy within the meaning of the statute. (Harinek, 181 Ill.2d at 342-43.)

a. Plaintiff contends in the alternative that the appellate court erred in holding that the fire marshal's conduct was discretionary. In construing section 2-201 of the Act, this court has held that 'discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act. Snyder v. Curran Township, 167 Ill.2d 466, 474. (1995).

Under these standards, the fire marshal's conduct described in the complaint clearly constituted an exercise of discretion. The marshal bears sole and final responsibility for planning and executing fire drills in buildings throughout Chicago. He is under no legal mandate to perform these duties in a prescribed manner; rather, he exercises his discretion in determining how, when, and where to hold drills such as the one in which plaintiff was injured. The appellate court was therefore correct in concluding that the fire marshal's conduct was discretionary. (Harinek, 181 Ill.2d at 343.)

II. Factors to Consider:

A. Nature of Employee's Position. An employee may qualify if she holds a position involving the determination of policy or the exercise of discretion. As with the fire marshal in Harinek, the higher the employee's job, the more likely that courts will find that the position entailed policy determination and the exercise of discretion.

1. Monson v. City of Danville, 2017 IL App (4th) 160593-U (public works director made policy determinations relating to the repair, replacement, or removal of sidewalks on a case by case basis and used discretion to decide which portions of a sidewalk were in need of repair or not).

2. But courts have found that positions such as a general laborer also satisfy this prong.

   a. Wrobel v. City of Chicago, 318 Ill.App.3d 390 (1st Dist. 2000) (City immune in case where auto struck pothole and veered into oncoming traffic. "The extent of the workers' removal efforts represents both a determination of policy and an exercise of discretion. The degree to which a pothole should be prepared, and specifically how much loose asphalt and moisture will be removed, is a matter of a worker's personal judgment, and encompassed within that judgment are the policy considerations of time and resource allocation during a given workday").

b. The Tort Immunity Act, Sec. 2-201: An employee must have engaged in both the determination of policy and the exercise of discretion when performing the act or omission in question.

1. Policy Determination. Conduct is considered to be policy making if it involves balancing competing interests and making a judgement call as to what solution will best serve those interests. Harinek, 181 Ill.2d at 342 (quoting West v. Kirkham, 147 Ill.2d 1, 11 (1992)). Few courts offer a basic definition of "policy" or "determination of policy while many describe and define "discretionary acts."

a. Harrison v. Hardin County Community Unit School District No. 1, 197 Ill.2d 466 (2001) (Sect. 2-201 discretionary immunity barred suit against School District for decision not to grant student early dismissal where snow storm approaching and student injured in auto accident in snow. The principal made a policy decision when he balanced the interest of one student's desire to leave early before the weather worsened with that of the school's interest in an orderly dismissal. He exercised discretion when he refused the student's request for early dismissal and instead told him to wait for the entire school to be dismissed.)

b. Arteman v. Clinton Community Unit School District No. 15, 198 Ill.2d 475 (2002) (Sect. 2-201 discretionary immunity for School District for failure to provide kneepads as safety equipment for rollerblades in gym class where student fell and fractured leg. The decision making process included balancing the district's interest in saving money against its desire to protect its students from injury. Because the process included the balancing of competing interests, the decision not to provide knee pads was discretionary and a policy decision).

c. Courson ex rel. Courson v. Danville School Dst. No. 118, 333 Ill. App. 3d 86, 90 (shop teacher's operation of a table saw without a safety guard was a discretionary policy decision because he had to balance safety interests against resources and skill of students so as to choose the best way to perform his job).

2. Exercise of Discretion – Discretionary acts are those which are unique to a particular public office and involve the exercise of personal judgement and deliberation in deciding how and in what fashion the act should be performed or whether to perform the act. Harrison, 197 Ill.2d at 472; Snyder v. Curran Township, 167 Ill.2d 466, 474 (1995).

a. Wrobel v. City of Chicago, 318 Ill.App.3d at 395 (laborers decisions regarding filling potholes is discretionary). But see Gustein v. City of Evanston, 402 Ill. App. 3d 610, 629 (1st Dist. 2010)(court rejected city's claim of discretionary immunity where city failed to present evidence regarding whether employee exercised discretion by choosing which materials to use in alley repair).

b. Nichols v. City of Chicago Heights, 2015 IL App (1st Dist.) 1122994 (court found City immune under Sect. 2-201 after flood, noting that the City had a duty to maintain its sewers but how it maintained them was a discretionary decision. "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.")

c. In re Estate of Lilyard v. City of Chicago, 325 Ill.App.3d 1076, (1st Dist. 2001) (Sect. 2-201 discretionary immunity for City's decision to install 8" concrete median barriers on city streets as no statutes or codes required certain height measurements on median barriers where drunk driver crossed 8 inch center median barrier and hit oncoming auto head-on).

d. Johnson v. Decatur Park District, 301 Ill.App.3d 798, 704 N.E.2d 416 (4th Dist. 1998) (Park District protected by Sect. 201 discretionary immunity for coach's decisions on whether to use safety harness or use spotters for tumbling case where tumbler paralyzed using mini trampoline.

e. In re Chicago Flood Litigation, 176 Ill.2d 179 (1997) (City protected from liability by Sect. 2- 201 for its decisions in deciding when and how to repair and whether and how to warn of tunnel breach. The City's decisions were discretionary and policy decisions).

C. Ministerial Acts

1. Discretionary immunity does not apply to ministerial acts. Conduct is ministerial if performed on a given set of facts in a prescribed manner, in obedience to a mandate of legal authority and without reference to the official's discretion as to the propriety of the act. (Harrison, 197 Ill.2d at 472).

    a. In re Chicago Flood Litigation, 176 Ill.2d at 194. ("Official duty is ministerial, when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it, prescribes and defines the time, mode and occasion of its performance with such certainty, that nothing remains for judgment or discretion."

2. Ministerial acts do not require the exercise of judgment or discretion and the public official may be held liable for the negligent performance of a ministerial duty.

a. Snyder, 167 Ill.2d at 474 (a township's placement of a warning sign was a ministerial act because regulations and statutes controlled the sign's placement. A highway commissioner did not have discretion to decide on sign's placement).

b. Hill v. Galesburg Cmty. Unit School Dst. 205, 346 Ill. App. 3d 515 (3d Dist. 2004) (student injured when teacher failed to require students to wear eye protection during chemistry experiments. Eye Protection Act required teacher to ensure that students wear eye protection when students performed an experiment involving caustic or explosive chemicals or hot liquids. The Eye Protection Act triggered the teacher's responsibilities and his acts were ministerial in nature. He had no discretion to permit the class to proceed without the students wearing eye protection. Section 2-201 did not provide immunity to the school district).

c. Tranh v. City of Granite City, 379 Ill.App. 795 (5th Dist. 2008) (municipality's assertion of discretionary immunity under Sect. 2-201 did not immunize it from liability for failing to maintain its sewer system during a power outage. Court explained that a municipality's operation of a sewage system is subject to statutory and regulatory guidelines. The Illinois legislature has given authority to the Pollution Control Board, a division of the Illinois Environmental Protection Agency, to adopt regulations regarding the management of wastewater, and compliance is mandatory. City's failure to timely operate bypass pumps so as to avoid flooding were thus found to be ministerial and not immune).

d. But see Mulvey v. Carl Sandburg High School, 2016 IL App. (1st Dist.) 151615 (court found school officials immune under Sect. 2-201 in a bullying case, despite the existence of a written anti-bullying policy, rejecting a ministerial application of the policy, noting that the school officials' acts or omissions constitute discretionary acts and policy determinations. Court noted that the implementation of the District's anti-bullying policy was discretionary in nature and the policy did not mandate a specific response to every set of circumstances).

745 ILCS 10/3-108(a) and (b):

SUPERVISION IMMUNITY

NO LIABILITY FOR FAILURE TO SUPERVISE USE OF OR ACTIVITY ON PUBLIC PROPERTY, BUT IF UNDERTAKE TO SUPERVISE, NO LIABILITY UNLESS WILLFUL & WANTON CONDUCT

A local public entity is granted immunity for its supervision or failure to supervise activities on or the use of public property by § 3-108(a) and (b), supervision immunity, of the Tort Immunity Act. (745 ILCS 10/3- 108(a)(b).)

If no supervision is provided and if the common law/case law or some statute, code, ordinance or regulation does not require supervision, the immunity is absolute and unconditional. (§ 3-108(b).)

If supervision is provided or if the law requires supervision, then there is immunity from negligence, but no immunity from willful and wanton conduct. (§ 3-108(a).)

SUPERVISION IMMUNITY

Supervision Immunity of the Tort Immunity Act provides as follows:

§ 3-108. (a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

(b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury. (745 ILCS 10/3-108(a) & (b).)

SUPERVISION IMMUNITY

The following cases hold that § 3-108 of the Tort Immunity Act, failure to supervise immunity, trumps any duty of a local public entity:

(1) *Moorhead v. Metropolitan Water Reclamation District of Greater Chicago*, 322 Ill.App.3d 635 (1st Dist. 2001) (Metropolitan Water District who hired general contractor Perini to do "deep tunnel" work and Perini hired subcontractor Tunnel Electric to provide lighting in "deep tunnel" not liable to plaintiff construction worker injured when he fell in "deep tunnel" on slippery condition with no lighting as Metropolitan Water District was immune from liability under§ 3-108(b), failure to supervise immunity, for failure to supervise contractor's work).

(2) *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370 (1997) (Board of Education immune per § 3-108(a) supervise immunity for fall of construction worker who fell from building and sued Board of Education under Illinois Structural Work Act for failure to supervise work of contractor hired by Board to do construction work on school).

(3) *In re Chicago Flood Litigation*, 176 Ill.2d 179 (1997) (City immune from liability under§ 3-108(a) failure to supervise immunity for failure to supervise contractor Great Lakes' pile driving activity which breached underground freight tunnel causing flooding in Chicago Loop).

WILLFUL & WANTON CONDUCT

Section 1-210's definition of "willful and wanton conduct" requires the defendant's "course of action" reveal defendant's mental state dismissive of plaintiffs safety – that defendant's actions show "utter indifference to" or "conscious disregard for" plaintiffs safety:

(1) "Utter indifference to" plaintiff's safety means, "entire, complete, absolute and total disregard" for plaintiff's safety. (Black's Law Dictionary).

(2) "Conscious disregard for" plaintiff's safety means, "intentional, knowing, purposefully ignoring" plaintiff's safety. (Black's Law Dictionary).

745 ILCS 1-210:
WILLFUL AND WANTON CONDUCT

The Tort Immunity Act also defines the term "willful & wanton conduct" as follows:

§ 1-210. "Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. (745 ILCS 10/1-210.)

Barr v Cunningham, 2017 IL 120751 (IL S. CT. 2017)

1. evidence that the teacher instituted several safeguards to prevent injuries shows that, at most, she took insufficient precautions. The fact that she did not take the additional step of requiring goggles does not establish a conscious disregard for her students' safety. Thus, her decision not to require the students to use available safety equipment, standing alone, does not rise to the level of willful and wanton conduct.

2. to establish willful and wanton conduct in the absence of evidence of prior injuries, Illinois courts have required, at minimum, some evidence that the activity is generally associated with a risk of serious injuries.

3. there was no evidence presented at trial that floor hockey played with plastic hockey sticks and squishy balls is an obviously dangerous activity. Plaintiff failed to introduce evidence of any particular dangers associated with floor hockey that called for the use of protective eyewear by students. Thus, plaintiff failed to meet his burden of proving that defendants knew or had reason to know that he could be seriously injured from playing floor hockey without safety goggles. Under these circumstances, plaintiff's claim that the teacher was willful and wanton in neglecting to require safety goggles amounts to mere speculation, which is insufficient to establish a claim for willful and wanton conduct.

745 ILCS 10/3-102 - CARE IN MAINTENANCE OF PROPERTY

I. Section 3-102 codifies the common law duty requiring public entities to maintain their property in a reasonably safe manner. It establishes and restricts the public entity's duty with respect to its property. Under this provision, a public entity is not liable unless it is proven that it had actual or constructive notice of a condition that was not reasonably safe in a sufficient time before the accident to have taken measures to remedy or protect against the condition. A public entity only owes a duty to intended and permitted users of its property. A plaintiff must plead and prove facts establishing that he is an intended and permitted user and therefore is within the scope of the city's duty. See Hough v. Kalousek, 279 Ill. App. 3d 855,860 (1st Dist. (1996); Vaughn v. City of West Frankfort, 166 Ill. 2d 155 (1995).

Section 3-102 provides as follows:

§ 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.

II. NO LIABILITY UNLESS PLAINTIFF PROVES THAT PUBLIC ENTITY HAD "ACTUAL OR CONSTRUCTIVE NOTICE" OF DEFECT ON PREMISES BEFORE ACCIDENT IN TIME TO REPAIR.

A. **Notice** is a mandatory and absolute element of plaintiff's case-to be pleaded and proven. Sect. 3-102(a) of the Tort Immunity Act provides specifically that a public entity "shall not be liable for injury unless it is proven that it has actual or constructive notice" of a condition in "reasonably adequate time prior to an injury to have taken measures to remedy" it. A plaintiff has the burden of proving that a local public entity had actual or constructive notice of the alleged defective condition.

1. **Actual notice** means that a public entity was actually aware of the presence of a defective condition before an accident. A plaintiff must establish that there was notice or knowledge of the dangerous condition itself, not the unsafe nature of the condition. Glass v. City of Chicago, 323 Ill. App. 3d 158, 163 (1st Dist. 2001). The plaintiff must also prove timely notice of the specific defect itself and not just the general condition of the area. Zameer v. City of Chicago, 2013 IL App (1st Dist) 120198. See also Brzinski v. N.E. Ill. Reg. R.R. Corp., 384 Ill. App. 3d 202, 206 (1st Dist. 2008) (notice of other defective conditions does not establish notice of the condition causing the accident). A public entity has actual notice when one of its employees has actual knowledge of the condition. Glass at 163.

a. Perfetti v. Marion Cty, 2013 IL App (5th) 110489 (plaintiff failed to present evidence that Marion County had actual notice of the defective condition of the roadway or that the defective condition of the roadway was apparent for such a length of time or was so conspicuous or plainly visible that Marion County should have known of its existence by exercising reasonable care and diligence).

b. Lewis v. Rutland Township, 359 Ill. App. 3d 1076 (3rd Dist. 2005) (court granted summary judgment to the defendant, finding that the township had no actual or constructive notice of large depression in roadway created by rain and flooding over the weekend. The court noted that a school bus had passed over the roadway on Friday without incident but struck a large depression on Monday and did not have notice in time to repair before the accident).

c. Siegel v. Village of Wilmette, 324 Ill.App.3d 903 (1st Dist. 2001) (village had no notice and received no complaints of 1" sunken sidewalk section which accumulated ice and caused plaintiff pedestrian's fall and, therefore, could not be liable for accident).

d. Wilsey v. Schlawin, 35 Ill.App.3d 892,342 N.E.2d 417 (1st Dist. 1976) (no Sect. 3-102(a) notice of missing stop sign by Village because no actual or constructive "notice" of missing sign down for 24 hours).

e. Stewart v. United States, 918 F.Supp. 224 (N.D. Ill. 199) (existence of condition of floor mats overlapping one another for one day insufficient to show constructive notice to local public entity and no actual notice shown).

2. **Constructive notice** is present where the condition has existed for such a length of time or is so conspicuous or plainly visible that the public entity should have known of its existence by exercising reasonable care and diligence. Ramirez v. City of Chicago, 318 Ill.App.3d 18 (1st Dist. 2000), Perfetti at 19.

a. Whether a public entity had constructive notice of a defective condition is usually for the trier of fact.

i. DiMarco v. City of Chicago, 278 Ill.App.3d 318, 662 N.E.2d 525 (1st Dist. 1996) (upheld special interrogatory finding by jury of no constructive notice where section of curb raised 2" higher than rest of curb, though rise existed some 8 to 11 years, but was never noticed by plaintiff or her husband over those years).

ii. Palermo v. City of Chicago Heights, 2 Ill. App. 3d 1004, 1008 (1st Dist. 1971)(city not liable because of inadequate notice when plaintiff fell into a hole in parkway after lid to meter box flipped over); Coultas v. City of Winchester , 208 Ill. App. 3d 238, 240-241 (4th Dist. 1991).

b. Cases holding that constructive notice may be determined as a matter of law:

i. Krivokuca v City of Chi., 2017 IL App (1st) 152397, ¶ 51 (court upheld grant of summary judgment finding that there was no evidence whatsoever that the City had actual or constructive notice of a condition that allegedly caused the sinkhole).

ii. Ramirez v. City of Chicago, 318 Ill.App.3d 18 (directed verdict for plaintiff was proper on issue of constructive notice where plaintiff tripped on "about a 2" rise" in sidewalk which existed for some 16 years near her doctor's office. Although the question of whether constructive notice exists is normally one of fact, it becomes a question of law which may be determined by the court if all of the evidence, when viewed in the light most favorable to the defendant public entity, so overwhelmingly favors the plaintiff that no contrary verdict could stand).

iii. Livings V. Chicago, 26 Ill. App. 3d 850, 854 (1st Dist. 1975) (2-3'-long, 3'-wide, 2 ½' deep sidewalk defect had existed for 1-2 years. The court found that under the facts of the case, the only reasonable conclusion to be drawn could well be that the city had notice, whether actual or constructive, of the defect, and this issue might then have been determined as a matter of law by the court.

iv. Burns v. City of Chicago, 2016 IL App. (1st) 151925 (upheld grant of summary judgement where plaintiff failed to provide facts showing that the City had constructive notice of the raised tiles on which plaintiff fell on and that the City had sufficient time to take measures to repair the tiles).

v. Glass v. City of Chicago, 323 Ill. App. 3d 158, 163 (1st Dist. 2001) (because the undisputed and uncontradicted evidence established that the deteriorated portion of the sidewalk was approximately eight inches in width, three feet in length, and 2½ inches deep and that the defective condition had existed for one or two years prior to the accident and because the undisputed and uncontradicted evidence established that the City had been advised of the problem, the only reasonable conclusion to be drawn is that the City had notice, whether actual or constructive, of the defect, and the existence of notice should have been determined as a matter of law by the court).

3. Other Notice issues

a. Notice is presumed if the municipality creates the condition. Bernal v. City of Hoopeston, 307 Ill. App. 3d 766,772 (4th Dist. 1999). But when the condition was created by independent contractors for defendant, this rule does not apply. Coultas v. City of Winchester, 208 Ill. App. 3d 238 (4th Dist. 1991). Pinto v. DeMunnick, 168 Ill. App. 3d 771, 775 (1st Dist. 1988).

b. Constructive notice is generally not found when conditions are formed suddenly, such as a damaged sign or spilled liquid. Finley v. Mercer Cty., 172 Ill. App. 3d 30 (3rd Dist. 1988) (damaged stop sign); Cook v. Gould, 109 Ill. App. 3d 311 (3d Dist. 1982) (unreported and inconspicuous oil spills on street 3 hours before accident).

III. NO LIABILITY UNLESS PLAINTIFF PROVES THAT DEFENDANT FAILED TO MAINTAIN THE PREMISES IN A REASONABLY SAFE CONDITION FOR "INTENDED AND PERMITTED USERS."

A local government's duty to maintain its property in "reasonably safe condition" extends only to persons intended by local government to be both "intended and permitted users" of the property.

A "permitted user" is one who is on the property with permission - a non-trespasser. An "intended user" is one for whose use the property was planned, designed, constructed and maintained. Vaughn v. City of West Frankfort, 166 Ill. 2d 155, 160 (1995) (the City's duty extends only to persons whose use of the property is both intended and permitted.

A. Permitted User

1. A plaintiff is not a permitted user and is owed no duty when plaintiff's use of the property is prohibited by ordinance. Lipper v. City of Chicago, 233 Ill. App. 3d 834, 838 (1st Dist. 1992)(where municipal ordinance prohibits bicyclists over 12 years of age from riding on sidewalks, such bicyclists are not permitted users of the sidewalk).

2. A person does not become an unpermitted user if she violates an ordnance while using the public property for an otherwise permitted purpose. A motorist is an intended and permitted user of a road permitted for vehicular traffic even if she violates ordinances. See Wagner v. City of Chicago, 166 Ill. 2d 144, 154 (1995) (violates traffic signals); Rector v. Mattingly, 273 Ill. App. 3d 344, 347 (5th Dist. 1995)(intoxicated driver).

B. Intended users.

1. Courts look at the nature of the property when determining whether a plaintiff is an intended user of property, Boub v. Township of Wayne, 183 Ill. 2d 520, 525 (1998); Vaughn v. City of West Frankfort, 166 Ill. 2d 155, 162-63 (1995).

2. The municipality's intent, not the plaintiff's intent, controls. The fact that the use of property is foreseeable to, or known to, the municipality, does not make the use intended. Wojdyla v. City of Park Ridge, 148 Ill. 2d 417,428 (1992); Swett v. Village of Algonquin, 169 Ill. App. 3d 78, 93 (2d Dist. 1988).

C. Users of Property

1. Pedestrians

a. Streets. Pedestrians are not intended users of streets, except in crosswalks and when entering or exiting their legally parked vehicles, because streets are designed for the use of motor vehicles. Sisk v. Williamson County, 167 Ill. 2d 343, 347,351 (1995); Vaughn v. City of West Frankfort, 166 Ill. 2d 155, 160-61, 163 (1995);

See also Curatola v. Village of Niles, 154 Ill. 2d 201, 213-14 (1993) (recognizing exception to rule for pedestrians using the street in the immediate vicinity of their lawfully-parked vehicles in order to enter or exit the vehicle).

i. A pedestrian crossing the street to her legally parked car is not an intended user of the street. Wojdyla v, City of Park Ridge, 148 Ill. 2d 417 (1992); Mason v. City of Chicago, 173 Ill. App. 3d 330 (1st Dist. 1988); Grove v. City of Park Ridge, 240 Ill. App. 3d 659,661-662 (1st Dist. 1992).

ii. A pedestrian going to her legally parked car who is not in its immediate vicinity when she falls is not an intended user. Bonert v. Village of Schiller Park, 322 Ill. App. 3d 557 (1st Dist. 2001).

iii. A pedestrian who falls in the parking lane but who is not going to or from his car is not an intended user. Green v. City of Chicago, 209 Ill. App. 3d 311, 313-14 (1st Dist. 1991).

iv. Taxis. A passenger is not an intended user of the street when entering or exiting a taxi. Scarse v. City of Chicago, 272 Ill. App. 3d 903 (1st Dist. 1995).

v. Buses. A pedestrian entering or exiting a bus from or onto a street, outside the crosswalk, is not an intended user of the street, even at bus stops. Instead, buses are intended to discharge passengers onto the sidewalk. Lewis v. City of Chicago, 2017 IL App (1st)161888 (city owed a duty to maintain the streets only for intended and permitted users. Because the plaintiff, a pedestrian exiting the bus, was injured in the street outside of the crosswalk, he was not an intended and permitted user of the street); Wolowinski v. City of Chicago, 238 Ill. App. 3d 639 (1st Dist. 1992); Vance v. City of Chicago, 199 Ill. App. 3d 652 (1st Dist. 1990).

b. **Curbs.** Under section 3-102, a curb is viewed as part of the street. A pedestrian injured by a defective curb condition outside of a crosswalk is not an intended user. Williams v. City of Chicago, 371 Ill. App. 3d 105 (1st Dist. 2007).

c. **Alleys.** Pedestrians are not intended users of alleys, except when they are taking out their garbage to garbage cans, if garbage cans are required to be placed in the alley. Thomas v. Town of Cicero, 307 Ill. App. 3d 840 (1st Dist. 1999); Gutstein v. City of Evanston, No. 1-08-3607 (1st Dist. March 12, 2010).

d. **Medians.** Pedestrians are not intended users of medians in streets. Krampert v. Village of Mount Prospect, 332 Ill. App. 3d 41, 44 (1st Dist. 2001); Roberson v. City of Chicago, 260 Ill. App. 3d 994, 997-98 (1st Dist. 1994). See also Pence v. Northeast Illinois Regional Commuter Railroad Corp., 398 Ill. App. 3d 13,20 (1st Dist. 2010) (pedestrian who falls on railroad tracks that cross street is not an intended user).

2. **Bicyclists.** City ordinance prohibits bicyclists over 12 years of age from bicycling on City sidewalks. Bicyclists over 12 are not intended users of sidewalks. Prokes v. City of Chicago, 208 Ill. App. 3d 748, 750 (1st Dist. 1991). Bicyclists are also not intended users of the streets unless authorized by law. Boub v. Township of Wayne, 183 Ill. 2d 520, 536 (1998); Latimer v. Chicago Park District, 323 Ill. App. 3d 466, 471-73 (1st Dist. 2001).

Special thanks to Judge John Ehrlich – 2013 handout "Illinois Tort Law Concerning Local Government Entities" (Section 3-102-Intended and Permitted Users.

745 ILCS 3-106:
RECREATIONAL PROPERTY IMMUNITY

A LOCAL PUBLIC ENTITY IS NOT LIABLE FOR A CONDITION OF RECREATIONAL PROPERTY UNLESS IT IS GUILTY OF WILLFUL AND WANTON CONDUCT.

Local government maintains vast amounts of property, some of it recreational property, and it receives immunity from negligence in maintaining "recreational property," but no immunity for willful and wanton conduct in maintaining such property by virtue of § 3-106, recreational property immunity (745 ILCS 10/3-106).

Section 3-106, recreational property immunity, provides as follows:

Neither a local public entity nor a public employee is liable for an injury where the liability is based upon the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury. (745 ILCS 10/3-106.)

WHAT IS RECREATIONAL PROPERTY:

REXROAD V. CITY OF SPRINGFIELD, 207 ILL.2d 33 (2003)

Section 3-106, recreational property immunity, grants immunity to a local public entity, except for willful and wanton conduct, for injuries caused by a condition (not activities) of public property intended or permitted to be used for recreational purposes.

Whether property is "recreational property" is determined by its nature, intended use and past use. But, analysis is on a case-by-case basis. An example will help explain.

Is a parking lot "recreational property"? It can or cannot be, as two Supreme Court cases illustrate:

Sylvester v. Chicago Park District, 179 Ill.2d 500 (1997) (Parking lot across street from Soldier Field, where plaintiff tripped over concrete parking bumper, was "recreational property" under§ 3- 106 because it increased the usefulness of Soldier Field used for recreational purposes).

Thus, non-recreational property (parking lot) can be "recreational property" if its use increases/aids/allows use of recreational property.

WHAT IS RECREATIONAL PROPERTY?

Rexroad v. City of Springfield, 207 Ill.2d 33 (2003) (Parking lot located to serve the school, football practice field and locker room, where plaintiff fell in a hole under construction, was not recreational property under § 3-106 because it served the whole school and was not primarily serving and increasing the usefulness of recreational property - it did so only incidentally).

The Supreme Court in *Rexroad* characterized the parking lot as only "incidental" to recreational property.

...we hold that any recreational use of the parking lot in question was so incidental that § 3-106 does not apply. (207 Ill.2d at 43.)

Abrams v. Oak Lawn-Hometown Middle School, 2014 IL App (1st) 132987 (2014)

1. "Where an injury occurs on an area of public property which has both recreational and nonrecreational purposes, should Section 3–106 immunity apply when said area is located within a public school where the primary character of the area and overall facility is educational and nonrecreational?"

2. [illegible] no indication that the school has ever intended or permitted the Cafetorium to be used for recreational purposes. The uses described were all educational or incidental to educational uses, which are nonrecreational uses, with the exception of perhaps the parties and ceremonies for the school sports teams and the occasional meetings convened by local taxpayers. The educational or incidental uses include the room's daily use as the school's lunch room and the various events including student assemblies, school club meetings, and induction ceremonies to school groups such as the honor society. We reject the school district's contention that the school band, chorus, and drama programs make recreational use of the Cafetorium, particularly when giving performances. We find that the students' musical and dramatic practices and performances are part of the educational process and are not recreational uses. Chorus performances, band performances, and school plays occur primarily to instruct the students rather than provide recreation to them, their friends and families, or the community.

Moore v. Chicago Park Dist., 2012 IL 112788 (IL S. Ct. 2012)

1. "Does an unnatural accumulation of snow and ice constitute the 'existence of a condition of any public property' as this expression is used in Section 3–106 of the Tort Immunity Act?"

2. Since 3–106 does not incorporate the natural accumulation rule, the fact that the snow and ice in this case allegedly accumulated unnaturally is irrelevant to the question of immunity

3. 3–106 does not contain a requirement that a condition of public property must be "affixed" before immunity applies.

4. Although 3-106 does not define "condition," Illinois courts have, on numerous occasions, applied section 3–106 immunity to movable conditions of public property.

5. Our holding that snow and ice are a condition of public property such that defendant is immune from liability under section 3–106 is in harmony with that statute's purpose, which, as we have stated, is to encourage the development and maintenance of, inter alia, public parks, playgrounds, "open areas, buildings or other enclosed recreational facilities."

WILLFUL & WANTON CONDUCT

The following cases found no willful and wanton conduct because the conduct involved did not show "utter indifference to" or "conscious disregard for" plaintiff's safety. "Utter indifference to" or "conscious disregard for' plaintiff's safety means defendant knew of a defective condition, knew injury was almost bound to happen and chose to do nothing

Cohen v. Chicago Park District, --- N.E.3d ---- (IL S. CT. 2017)

1. In this case, there is no dispute that the Lakefront Trail is not open to public, motorized traffic. Accordingly, the Lakefront Trail is not a "road" within the meaning of section 3–107(a). For this reason, defendant is not afforded blanket immunity for conditions of the Lakefront Trail under section 3–107(a).

2. Cracks and potholes in paved surfaces are an unfortunate but unavoidable reality, particularly in climates such as Chicago's. There were no prior injuries involving the crack, which would have alerted defendant to any extraordinary risk or danger to the users of the path. It is undisputed that defendant in this case took corrective action. When notified of the crack in the pavement, it was inspected and placed on the repair list for defendant's rapid response program.

3. Plaintiff emphasizes that defendant could have done more. Plaintiff points out that, once notified of the crack in the pavement, defendant could have immediately barricaded the path or performed a temporary repair using in-house employees, rather than waiting for an outside contractor. While this may be true, we think it clear that to equate defendant's actions in this case "with willful and wanton conduct would render that standard synonymous with ordinary negligence."

A.D.y. Forest Preserve District of Kane County, 313 Ill.App.3d 919 (2d Dist. 2000), set out the three-pronged test required to prove willful and wanton conduct: (1) knowledge of dangerous condition; (2) knowledge of prior accidents and injuries from the condition; or, (3) removal of safety device from the recreational property. The Court explained:

> In order to establish willful and wanton conduct, a plaintiff must prove that a defendant engaged in a 'course of action' that proximately caused the injury... A public entity may be found to have engaged in willful and wanton conduct only if it has been informed of a dangerous condition, knew others had been injured because of the condition, or if it intentionally removed a safety device or feature from property used for recreational purposes. *Id. at* 924.

Oravek v. Community Dist. No. 146, 264 Ill.App.3d 895 (1st Dist. 1992) (No willful & wanton conduct for school district not to remove skateboard ramp on school property in violation of school policy where plaintiff injured riding bike onto ramp inadvertently).

Bialek v. Moraine Valley Community College School Dist. No. 524, 267 Ill.App.3d 857 (1st Dist 1994) (No willful & wanton conduct where plaintiff collided with goal post used as boundary marker playing pick-up football - not willful and wanton for college not to remove or pad goal post).

Koltes v. St. Charles Park District, 293 Ill.App.3d 171 (2nd Dist. 1997) (No willful and wanton conduct on Park District's part where golfer standing by woman's tee hit by golfer on men's tee even though Park District knew of a similar prior accident because knowledge of one prior accident and non-action thereafter is not a "course of conduct" which shows "utter indifference to" plaintiffs safety).