No. 124283

In the

Supreme Court of Illinois

BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually,

Plaintiffs-Appellees,

v.

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, a body corporate and politic,

Defendant-Appellant.

On Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-17-0336.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2012 L 000048.
The Honorable **William E. Gomolinski**, Judge Presiding.

BRIEF AND ARGUMENT OF PLAINTIFFS-APPELLEES, BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually

THOMAS A. DEMETRIO
EDWARD G. WILLER
FRANCIS PATRICK MURPHY
CORBOY & DEMETRIO, P.C.
33 North Dearborn Street
Suite 2100
Chicago, Illinois 60602
(312) 346-3191
(egw@corboydemetrio.com)

Counsel for Plaintiffs-Appellees

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiffs provide this Nature of the Case to clarify the proceedings that took place in both the trial court and at the Appellate Court. Defendant's Nature of the Case references that Plaintiffs' Second Amended Complaint at Law alleged both willful and wanton negligence and construction negligence against Defendant. However, Defendant failed to report that both the willful and wanton issue and the construction negligence issues were raised on appeal to this Court.

Plaintiffs appealed to the First District Appellate Court of Illinois from the trial court's § 2-615 dismissal of paragraphs 30.b. and 30.c. of Plaintiffs' Second Amended Complaint at Law, the willful and wanton supervision claims, *and* the trial court's grant of Defendant's motion for summary judgment dismissing Plaintiffs' construction negligence claims on the basis of § 2-201 immunity. The Appellate Court reversed both the dismissal of the willful and wanton allegations and the grant of summary judgment.

Defendant's failure to raise the reversal of the dismissal of the willful and wanton allegations in its brief to the Supreme Court of Illinois constitutes waiver of this issue.

ISSUE PRESENTED FOR REVIEW

Whether a local public entity is entitled to discretionary immunity under §2-201 of the Tort Immunity Act when it provides no evidence of an actual conscious exercise of discretion and provides no evidence of making policy determinations in relation to the hazard at issue.

PROCEDURAL HISTORY

On January 3, 2012, Plaintiffs' Complaint at Law was filed in the Circuit Court of Cook County naming Defendant. (R.C75.) Plaintiffs alleged one count of construction negligence on behalf of Jeffrey Andrews, and one count of loss of consortium on behalf of his wife, Becky Andrews (R.C75, R.C78).

On January 3, 2013, Plaintiffs filed an Amended Complaint at Law, adding Count III, willful and wanton construction negligence on behalf of Jeffrey Andrews, and Count IV, loss of consortium on behalf of Becky Andrews, based on willful and wanton construction negligence (R.C385). On October 10, 2013, Plaintiffs filed a Second Amended Complaint at Law (R.C919).

Defendant moved to dismiss Plaintiffs' Second Amended Complaint on March 4, 2014, and on April 23, 2014 the trial court dismissed paragraphs 30.b. and 30.c. of Plaintiffs' Second Amended Complaint at Law, thereby striking Plaintiffs' willful and wanton supervision claims (R.C1192).

The Circuit Court dismissed the willful and wanton supervision counts of Plaintiffs' Second Amended Complaint, reasoning that Plaintiffs could not establish that Defendant had knowledge of similar prior injuries as required under *Floyd ex rel Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 702 (2d Dist. 2005) (R.C1205–C1207). Plaintiffs timely filed a Motion to Reconsider on April 16, 2015 which was denied (R.C3784, R.C5355).

Defendant moved for summary judgment on the remaining counts in Plaintiffs' Second Amended Complaint.[1] While Defendant cites to the Motion for Summary Judgment dated March 28, 2016 (see Defendant's brief, p. 8), the body of which appears in the record at R.C4100-R.C4115, it should be clarified that this was not the motion the Circuit Court actually ruled on. The March 28, 2016 filing violated the judge's page limit and was superseded by a motion that complied with the judge's rule (see R.C4761-R.C4762 V3). The Court's order establishes that it ruled on the latter motion, which was dated April 11, 2016 (R.C5116).

Plaintiffs filed their Motion to Reconsider on August 31, 2016, which was denied. Plaintiffs timely filed their Notice of Appeal on February 3, 2017 (R.C5137, R.C5334, R.C5352).

Plaintiffs' appeal was taken from a final judgment pursuant to Illinois Supreme Court Rules 301 and 303. Ill. S. Ct. R. 301 (eff. Feb 1, 1994); Ill. S. Ct. R. 303 (eff. July 1, 2017). The trial court granted summary judgment in the Defendant's favor in a memorandum opinion and order filed on August 4, 2016 (R.C5114-24). Thereafter, on January 17, 2017, the trial court denied the Plaintiffs' motion to reconsider (R.C5334). Within thirty days, the Plaintiffs filed a notice of appeal on February 3, 2017 (R.C5352-53). The Appellate Court filed its opinion and judgment on November 5, 2018. The Defendant filed its petition for leave to appeal within 35 days on December 10, 2018. This Court granted leave to appeal on January 31, 2019.

[1] N.B. On May 14, 2019, plaintiffs-appellees were granted leave to supplement the Record on Appeal to include the defendant's Motion for Summary Judgment filed April 11, 2016. See attached Motion for Summary Judgment in the Appendix. (R.C5373-82)

STATEMENT OF ADDITIONAL FACTS

This case comes before the Court following the Appellate Court's reversal of the granting of summary judgment in favor of Defendant, Metropolitan Water Reclamation District of Greater Chicago ("MWRD" or "Defendant").

The Appellate Court also reversed the trial court's order granting the MWRD's 2-615 Motion to Dismiss paragraphs 30.b. and 30.c. of Plaintiffs' Second Amended Complaint at Law, of which no appeal is taken from and, as such, is not before this Court.

The First District Appellate Court reversed and remanded the decisions of the lower court. *Andrews v. Metro. Water Reclamation Dist.*, 2018 IL App. (1st) 170336. (See Defendant's Appendix.) The Appellate Court looked to the plain language of § 2-201 of the Tort Immunity Act and ruled that Defendant failed to meets it burden of proof in establishing that there was a conscious decision to determine whether the ladder configuration was safe for Jeffrey Andrews to use and whether its engineer was making a policy determination in reference to ladder on-site usage.

THE OCCURRENCE

On April 21, 2011, Jeffrey Andrews was a cement finisher employed by F.H. Paschen, S.N. Nielsen and Associates, LLC, and was assigned to a project crew at MWRD Calumet Water Reclamation Plant (R.C920). Defendant owned the project to which Jeffrey Andrews was assigned, known as the *Primary Settling Tanks and Grit Removal Facilities, CWRP* ("the Project") (R.C919). The general contractor for the project was a joint venture named F.H. Paschen, S.N. Nielsen/IHC Construction Joint Venture. Plaintiff's employer, F.H. Paschen, S.N. Nielsen and Associates, LLC was a subcontractor of the Joint Venture (R.C9120).

On April 21, 2011, Jeffrey Andrews was assigned to apply sealant to a gate at the bottom of a twenty-nine (29) foot deep effluent chamber (R.C921). In order to complete his assigned task, Andrews and his co-employee, Luis Cuadrado, were required to use a job-made wooden ladder, previously constructed by the crew, to ascend from the ground level to the base of the effluent chamber (R.C778). Thereafter, plaintiff was required to pivot his body off the job-made ladder onto a fiberglass extension ladder (R.C779). Andrews was required to perform such pivoting without the benefit of a horizontal access platform, which would safely allow Andrews to transition from the job-made ladder onto the fiberglass extension ladder (R.C779).

The Project site had experienced heavy rains prior to April 21, 2011 (R.C475). Thus, the area around the effluent chamber was extremely muddy; the middle of the chamber was filled with about three feet of water (R.C475, R.C3655, ¶ 12). This condition violated Defendant's dewatering mandates as set forth in its contract with the Joint Venture (R.C4930). The top of the concrete wall and the ladder rungs were covered with dried mud at the time of the occurrence, and boots were necessary to complete the work with which Andrews and Cuadrado were tasked (R.C475, C3655, ¶ 11).

On that date, while attempting to pivot himself onto the fiberglass ladder, Jeffrey Andrews fell 29 feet down to the base of the chamber, landing upon his co-worker, Luis Cuadrado, who had previously descended into the chamber (R.C860, R.C792). Jeffrey Andrews was transported to a local hospital via helicopter with multiple fractures and severe, career-ending head injuries (R.C1227).

OSHA VIOLATIONS

After the occurrence, OSHA cited the Joint Venture for violating 29 CFR 1926.1053(a)(10). The citation stated that the Joint Venture violated the regulation because two or more separate ladders were used to reach an elevated work area and the ladders were not offset with a platform or landing between the ladders (R.C4619–R.C4621).

The process which Andrews used, without the benefit of a horizontal access platform, was utilized on at least six other effluent tanks during the two months leading up to the incident on April 21, 2011 (R.C780). Defendant had observed this process prior to Jeffrey Andrews' injury and failed to correct this unsafe method, despite its written internal policies which dictated otherwise (R.C3413, R.C3633–R.C3634). Patrick Healy, a worked on the jobsite testified that Greg Florek and other MWRD employees had seen the crews using the ladder configuration (R.C3413).

VIOLATIONS OF GENERAL SPECIFICATIONS

The Project was governed by extensive documents entitled "Metropolitan Water Reclamation District of Greater Chicago: General Specifications" ("General Specifications"). The General Specifications delegated construction safety to the Joint Venture, but granted Defendant's engineer power to approve or disapprove its plans, procedures, and records of safety (R.C3633). Defendant's engineer was also required to enforce the General Specifications and ensure that the contractor followed them (R.C2137, R.C2148–R.C2152).

§ 18 of the General Specifications, entitled "Procedures and Methods," provided, in relevant part, that:

> The use of inadequate or unsafe procedures, methods, structures, or equipment will not be permitted, and the Engineer may disapprove and reject any of the same which seems to him to be unsafe for the work hereunder

(R.C3633-3634)

VIOLATIONS OF DEFENDANT'S SAFETY RULES

Defendant's Safety Rules also governed the project and the work performed by the Joint Venture and the plaintiff (R.C3671). The Defendant's Safety Rules provided specific requirements for ladder safety:

Part 1 - Section 5
Ladders and Scaffolds

1.5.1 Training

a. Each employee that performs work on a portable ladder/ scaffold shall receive training in the inspection, use, and care of such equipment.

b. Employees engaged in the erecting, disassembling, moving, operating, maintaining, and inspecting of scaffolds shall receive training in proper construction techniques.

1.5.2 General

a. A competent person shall inspect the scaffold before it is released for use.

b. *A competent person shall inspect ladders routinely in addition to the everyday use inspections*.

c. Ladders should be secured or tied off regardless of the surface they rest on.

d. The ladder must have an 'MWRD' stamp indicating the ladder meets District design criteria. This label is not a substitute for routine inspections.

e. Side rails, rungs, and hardware must be clean and in good condition.

f. Only one person shall be on a ladder at a time.

g. Defective ladders shall be tagged and taken out of service immediately.

h. *Employees shall have at least one hand free to grasp the ladder and face the ladder when moving up or down the ladder.* (emphasis added)

i. If a ladder is to be placed where the opening of a door may displace it, the door shall be locked or otherwise guarded. Obey any and all directions and safety precautions on the ladder.

j. Portable metal ladders or ladders with metal side rails are NOT approved for use in the District by District personnel. Contractors sometimes bring these ladders onto District property. Contractor's ladders shall not be used near energized equipment or lines.

k. Ladders shall not be painted. They shall be treated only with a transparent non-conducting material.

(R.C3683–R.C3683) (emphasis added).

Defendant's safety rules were not guidelines, they were mandatory requirements.

(R.C3635). Specifically, provision 22 of the General Specifications *required*:

> (1) that the Joint Venture was to follow its Safety Rules; (2) the Joint Venture to designate a responsible member of the Joint Venture's organization as the safety representative; (3) that the designated safety representative be provided with an office at the job site to maintain safety records and keep up-to-date copies of all pertinent safety rules and regulations; (4) that the Joint Venture submit to the MWRD both the identity and resume of the safety representative prior to the commencement of field work; (5) that the contractor submit alterative safety representatives to ensure compliance with the specifications; (6) that the contractor report all accidents to the MWRD; (7) that OSHA was to be enforced as to the Joint Venture.

(R.C3635–R.C3636)

ADDITIONAL CONTRACTUAL VIOLATIONS

Further, Defendant was contractually required to comply with § 01014 of the Project Specifications – Construction Limitations and Restraints. (R.C4904). 16 pages of limitations and constraints dictated to the Joint Venture both the specific sequencing of the work it was to perform and the restrictions and requirements put in place by Defendant (R.C4904-R.C4919). The restrictions dictated the means and methods of the

work, and the Joint Venture did not have the freedom to deviate from these procedures (R.C3656).

The contract between Defendant and the Joint Venture also included a mandatory dewatering program to remove excess water from the job site (R.C4920–R.C4921). The General Specifications further required the contractor to maintain a safe, dry work environment (R.C3655, ¶ 12).

On the date of the subject occurrence, Greg Florek was Defendant's Senior Resident Civil Engineer, and was the only engineer working on the Project on behalf of Defendant (R.C2148). The General Specifications defined "Engineer" as "the Chief Engineer or Acting Chief Engineer, Chief of Maintenance and operations or Acting Chief of Maintenance and Operation, any District Administrative Services of Metropolitan Water Reclamation District of Greater Chicago, or any other Engineer or subordinate designated by the aforementioned" (R.C3626). As Resident Engineer, it was Florek's sole responsibility to enforce all contractual provisions as to the contractor (R.C2152).

With regard to the General Specifications, Florek testified: (1) that the General Specifications were for the subject Project; (2) that the General Specifications were to be followed by the contractor; (3) that the General Specifications were available to him at all times; (4) that it was his job to ensure that the general contractor was following the General Specifications (R.C2137, R.C2139, R.C2148–R.C2152).

Florek's responsibilities were further defined at the pre-construction meeting Defendant held on December 2, 2008, where Defendant required that the "[c]ontractor shall comply with all health and safety laws [and] rules . . . including but not limited to the Safety Rules, OSHA, etc." (R.C3717). It was Florek's responsibility as the Senior

Resident Engineer to enforce all specifications and safety rules, which included disapproving or rejecting unsafe procedures (R.C1446–R.C1447). If Florek had told a Joint Venture supervisor to stop work because it was unsafe, the work would stop (R.C3429).

Douglas Pelletier, the contractor's senior project manager on the subject Project, testified that his chief point of contact on the Project was Greg Florek (R.C1446). Greg Florek would conduct bi-weekly progress meetings with Douglas Pelletier and Martin Platten (R.C1446). According to Pelletier, Greg Florek was responsible for enforcing the Project's General Specifications throughout the duration of the project (R.C1447). Martin Platten also testified that operational details and safety issues were discussed at these meetings (R.C3949).

Clearly, Florek was delegated a supervisory role on the job site. Pelletier testified that, while he did daily walk-throughs, Florek did not walk the site with him (R.C1454). Further, Florek testified that he had no education or training in construction safety and never gave opinions regarding construction safety (R.C2207).

Despite the litany of safety regulations and specifications on the Project, Defendant, through resident engineer Greg Florek, permitted the use of a ladder configuration (i.e. the job-made ladder) which directly violated its safety requirements. Patrick Healy, a crew foreman on the project who was employed by the Joint Venture, testified that Defendant had observed the crew assembling the job-made ladder and the fiberglass ladder to face one another in a tee-pee like formation without an access platform *prior* to Jeffrey Andrews' injury (R.C3413). For illustrative purposes, see Ex. 1 to Dep. of Patrick Healy (R.C3544 V2). Defendant allowed this known danger to persist

and disregarded its duty to correct the use of unsafe methods on the job-site, as required by § 18 of its General Specifications (R.C3633-R.C3634).

Defendant's failure to enforce its mandatory General Specifications and Safety Rules resulted in the use of the unsafe ladder configuration, not just on the chamber on which Plaintiff was injured, but on at least six other previously re-finished effluent tanks on the project as well (R.C779–R.C780).

STANDARD OF REVIEW

This appeal arises from the First District Appellate Court's reversal of the trial court's order and opinion which granted summary judgment to the MWRD, based upon its fourth affirmative defense, pursuant to § 2-201 of the Tort Immunity Act. Since the Act is in derogation of the common law, it must be construed strictly against the public entity seeking immunity. *Snyder v. Curran Twp.*, 167 Ill. 2d 466, 477 (1995); *Aikens v. Morris*, 145 Ill. 2d 273, 277-78 (1991).

The standard of review applicable to the granting of summary judgment is *de novo*. *General Casualty Ins. Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002). The reviewing Court is to view the evidence in the light most favorable to the opponent to the motion and is then to determine whether a genuine issue of material fact was presented and whether the movant is entitled to judgment as a matter of law. *Majca v. Beekil*, 183 Ill. 2d 407 (1998).

A matter of statutory construction is reviewed *de novo*. The goal of statutory construction is to ascertain and give effect to the legislature's intent. The best indication of that intent remains the language of the statute itself, which must be given its plain and ordinary meaning. In interpreting a statute, a reviewing court presumes that the

legislature did not intend absurdity, inconvenience or injustice. *Citizens Opposing Pollution v. ExxonMobile Coal U.S.A.,* 2012 IL 111286, ¶1, 962 N.E.2d 956.

ARGUMENT

Introduction

The Appellate Court correctly reversed summary judgment on the Fourth Affirmative Defense, based on the discretionary immunity set forth in § 2-201 of the Tort Immunity Act, finding Defendant failed to meet the statutory condition precedents of said section by not providing (1) any evidence that there was a decision-making process at all in deciding whether to use the ladder configuration that resulted in Jeffrey Andrews being injured, and by not providing (2) any evidence that Defendant's resident engineer made a policy determination to the action or injury, which resulted in Jeffrey Andrews' injury.

The essence of Plaintiffs' Second Amended Complaint is that the MWRD is responsible for Andrews' significant damages as a result of willful and wanton construction negligence acts or omissions, that it willfully failed to provide an offset platform or landing between the portable ladder and the 43' fiberglass ladder, when it had actual knowledge that offset platforms were not previously used.

There are issues regarding the MWRD's failure to implement a mandatory full protection plan when it had actual knowledge that offset platforms were not used previously. See Plaintiffs' Second Amended Complaint at Law, ¶ 30, sub-allegations a. – n. (R.C923-25).

MWRD bases its entire appeal upon the hope of leading this Court to the unsupported conclusion that it is absolutely immune from suit because of circumstances that go well beyond § 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act. Claiming that the construction contract between it and the joint

venture in and of itself affords MWRD absolute immunity, it is asking this Court to rewrite 2-201, clearly *inapposite* of the plain language of § 2-201. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 235 (2007); *Monson v. City of Danville*, 2018 IL 122486 (2018).

MWRD is also attempting to lead this Court to the unsupported conclusion that local public entities will find themselves between a rock and a hard place as to other defenses it may have to its avail; i.e. Restatement (Second of Torts) § 414 (1965).

Contrary to "these suggestions" by MWRD, those entities seeking 2-201 immunity must comply with the stringent requirements of the statute.

The sole issue before this Court is whether the Appellate Court correctly reversed the granting of summary judgment regarding § 2-201 of the Tort Immunity Act.

The record and argument below clearly establish that the MWRD never exercised any act of actual discretion regarding the ladder usage when performing the act or omission from which the Plaintiff's injuries resulted.

The record and argument below also clearly establish that Defendant's resident engineer never made any policy determinations as to the ladder usage and its configurations that resulted in the injuries to Jeffrey Andrews.

I. THE FIRST DISTRICT APPELLATE COURT WAS CORRECT IN REVERSING THE GRANTING OF SUMMARY JUDGMENT: A PLAIN READING OF THE TORT IMMUNITY ACT REQUIRES THAT ALL PUBLIC ENTITIES EXERCISE DISCRETION AND MAKE POLICY DETERMINATIONS IN RELATION TO THE HAZARD AT ISSUE IN THE CASE TO BE IMMUNE FROM TORT LIABILITY UNDER § 2-201.

The legislative intent under the Tort Immunity Act is clearly found in a plain reading of the statute. Specifically at issue in this case is § 2-201 of the Local

Governmental and Governmental Tort Immunity Act ("the Act" or "2-201"). 2-201 states:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy *when acting in the exercise of such discretion* even though abused.

745 ILCS 10/2-201 (emphasis added). § 2-109 states: "A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109. This Court's guidance regarding statutory interpretation in *Monson* is instrumental in this case:

> At issue is whether the City is entitled to immunity from liability pursuant to § 2-109 and §2-201 of the Act. Determining whether the City is immune involves interpreting language of the Act. This is a question of law, which this court reviews *de novo.* Our primary objective is interpreting a statute is to ascertain and give effect to the intent of the legislature. The most reliable indicator of that intent is the statutory language, given its plain and ordinary meaning. We view the statute as a whole, bearing in mind the subject it addresses and the apparent intent of the legislature in enacting it. Words and phrases should not be viewed in isolation but, rather, must be considered in light of other relevant provisions in the statute.

This Court in *Monson*, dealing with the same statute at issue here, reasoned that 2-201 must be strictly construed against the governmental entity that is asserting immunity. *Id*. at ¶ 15. All of these standards of statutory interpretation apply in this case and it is clear that based on a plain reading of the statute, Defendant is not entitled to discretionary immunity with respect to Jeffrey Andrews.

The language "except as otherwise provided by statute" is especially helpful as this Court noted in *Monson* and indicates that the legislature did not intend for

§ 2-201 "to be absolute and applicable in all circumstances." *Id*. This language stipulates that other provisions in the Tort Immunity Act can create *limitations* or exceptions to that immunity. *Id*

To incur immunity under § 2-201, a local public entity must make policy determinations and exercise discretion. Defendant, by simply entering into a contract, did not exempt itself from making a policy determination or actually exercising discretion. There is no language anywhere in the Tort Immunity Act that makes an exception for municipal entities that enter into a contract. Defendant is not permitted to rewrite the statute to create this imaginary exception. The reality is that MWRD did not exercise discretion. The reality is that MWRD made no policy determination in relation to the hazard at issue in this case; i.e., the unsafe ladder configuration.

This Court in *Monson* ruled that whether or not an act or omission is discretionary should be determined on a case by case basis. *Id*. at ¶ 29. However, as Plaintiffs-Appellees will demonstrate below, MWRD did not exercise discretion relevant to plaintiff's injuries and damages, and, based on a plain reading of the statute, cannot be granted immunity under § 2-201.

II. THE APPELLATE COURT WAS CORRECT IN HOLDING THAT DEFENDANT IS NOT ENTITLED TO DISCRETIONARY IMMUNITY UNDER § 2-201 OF THE TORT IMMUNITY ACT.

Defendant is not immune from liability under § 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act solely based on contractual language in an agreement between Defendant and the Contractor. Defendant offered no evidence that its resident engineer, Greg Florek ever exercised discretion regarding the unsafe ladder configuration that was the proximate cause of Plaintiff's injuries. Although Florek could

have exercised discretion based on the language in the contract, Florek's conduct was not discretionary and did not satisfy the statutory requirements for immunity. Further, Florek was not competent to exercise discretion when it came to matters of safety.

Pursuant to the Tort Immunity Act, immunity will only attach to a municipal entity's negligent act or omission if the injury resulted from an act performed or omitted by the employee in determining policy *and* in exercising discretion. 745 ILCS 10/2-201; *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 341 (1998); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 365 (2003). It has long been established that "the statute is concerned with both *the type of position* held by the employee and *the type of action* performed or omitted by the employee." *E.g.*, *Harinek*, 181 Ill. 2d at 341 (emphasis in original).

Defendant failed at both prongs. Defendant's complete lack of awareness of the safety hazard that was the ladder configuration precluded Defendant or any of its employees from exercising discretion. Further, Defendant was incapable of making policy determinations because its supervisor on the Project, Greg Florek, was incompetent regarding issues of safety.

A. Defendant failed to exercise discretion regarding the safety of the ladder configuration and, therefore, cannot satisfy the second prong of the test for immunity.

Defendant should be barred from claiming that it has discretionary immunity with respect to the ladder configuration that was the cause of Plaintiff's injuries because there was no act of actual discretion. Defendant did not exercise any "discretion" with respect to the cause of plaintiff's injuries and damages.

The discretionary immunity doctrine is codified in § 2-109 and § 2-201 of the Tort Immunity Act. 745 ILCS 10/2-109, 2-201 (West, 199); see *Snyder v. Curran Twp.*, 167 Ill. 2d 466 (1995); *see generally* D. Baum, Tort Liability of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act, 1996 V. Ill. L.F. 981, 988-1000.

At common law, a municipality is offered immunity from liability for the performance of discretionary acts. However, the municipality is not immune from liability for the performance of ministerial acts. *City of Chicago v. Seben*, 165 Ill. 371 (1897).

A municipal entity acts judicially, or exercises discretion, when it selects and adopts a plan in the making of public improvements, such as constructing sewers or drains, but as soon as it begins to carry out that plan, it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner. *Seben*, 165 Ill. at 377-78.

Greg Florek, Defendant's Resident Civil Engineer, was charged with enforcing the contractual provisions of the Joint Venture (R.C 2148-R.C2152). Under the Joint Venture Agreement, Florek was obligated to enforce the General Specifications and Safety Rules, which included disapproving or rejecting unsafe procedures (R.C1446-R.C1447).

However, Florek never actually exercised discretion. In his deposition, he admitted that he never evaluated the scene of the occurrence for any safety violations (R.C880 V3). Therefore, it would have been impossible for him to use his discretion to determine if the configuration was safe or not. Contrary to Defendant's assertion, an

actual exercise of discretion is required for Defendant to be immune under § 2-201 of the Tort Immunity Act. *Monson v. City of Danville*, 2018 IL 122486, ¶ 33 ("Accordingly, a public entity claiming immunity for an alleged failure to repair a defective condition must present sufficient evidence that it made a conscious decision not to perform the repair. The failure to do is fatal to the claim"). Defendant claims that "[n]othing more was required for discretionary immunity to apply under § 2-109 and 2-201 of the Act" since Florek was authorized to make policy determinations under the contract and had the authority to disapprove or reject unsafe conditions using his discretion. (Def.'s Br. 13). This claim is not supported by a plain reading of § 2-201 of the Tort Immunity Act.

Monson cites *Corning v. East Oakland Tp.*, an Illinois Fourth District case. 283 Ill. App. 3d 765 (1996). In *Corning*, the plaintiff was injured when she drove her car into a ditch. *Id*. at 766. The plaintiff filed suit against defendants alleging that the intersection where she crashed was not reasonably safe because the stop sign that had been at the intersection was removed. *Id*. Defendants filed a motion to dismiss claiming they were immune under 2-201 and 3-104 of the Tort Immunity Act. *Id*. The court found that because the stop sign was stolen and removed without defendants' knowledge and not as a result of a decision made by defendants, dismissal of the complaint was improper. *Id*. at 769. The Court reasoned that "'[d]iscretion connotes a conscious decision.'" *Id*. at. 768. Since defendants themselves did not remove the stop sign, they did not exercise any discretion. *Id*. *See also Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257 (1st Dist. 2002) (holding that there were questions of fact as to whether or not defendant made a conscious decision not to repair a pothole that caused the plaintiff's injury and denial of summary judgment was warranted); *Ponto v. Levan*, 2012 IL App. (2d) 110355, ¶ 76

(holding that defendant was not entitled to discretionary immunity because there was never any exercise of discretion with respect to an improvement or plan concerning the specific street at issue).

Defendant MWRD, like the defendant in *Corning*, was completely unaware that the specific ladder configuration that caused Plaintiff's injury was being utilized without conforming to safety requirements. The court in *Corning* said lack of knowledge is equivalent to lack of an ability to make a discretionary decision. 283 Ill. App. 3d at 768. When an individual does not know there is a decision to be made, it is impossible for that individual to exercise discretion.

Defendant argues that the Appellate Court ignores the provision of the contract that gave Florek the *opportunity* to exercise discretion. However, this is untrue. The Appellate Court stated:

> [E]ven if Florek was in a position where he was entitled to make determinations of policy and exercise discretion, there is no evidence that he was making policy or exercising discretion with respect to the act or injury from which Andrews' injury resulted.

Andrews v. Metro. Water Reclamation Dist., 2018 IL App. (1st) 170336, ¶ 21 (Appendix). The Appellate Court did not ignore the contractual provision that gave Florek the chance to exercise discretion, but pointed out that despite this option, he did not actually exercise discretion which is what is required to trigger any statutory immunity.

Defendant also asserts that the term "may" in the contract between Defendant and F.H. Paschen is discretionary. (Def.'s Br. 17). Although the term "may" permitted Defendant to exercise discretion, it does not mean that it actually did exercise discretion with respect to the ladder configuration. In fact, there is evidence in the record to the

contrary. Defendant itself characterizes Florek's authority as a "reservation of discretion." (Def.'s Br. 18). A reservation of discretion does not satisfy the statutory requirements for discretionary immunity. In fact, it is contrary to the plain language of the statute. Florek never even saw the ladder configuration and as a result did not know there was a decision to be made about whether or not said ladder configuration was unsafe. Therefore, it would have been impossible for him to make this decision. This utter lack of discretion estops Defendant from claiming it is immune under the Tort Immunity Act; therefore, the Appellate Court properly reversed the trial court's granting of summary judgment in favor of the Defendant.

B. The Appellate Court's holding that Defendant was not entitled to discretionary immunity is consistent with Illinois case law.

Defendant contends that the Appellate Court erred in finding that it was not entitled to discretionary immunity, arguing that this case is more similar to this Court's decision in *In re Chicago Flood Litigation* than it is to *Monson*. This contention is meritless.

This Court, in *In re Chicago Flood* conducted a 3-108(a) analysis and found that the City was immune for supervision. 176 Ill. 2d 179 (1997). There was no evidence in the Supreme Court opinion that a statutory analysis of the burden of proof of elements of § 2-201 was ever performed for supervision, other than relying upon the 3-108 decision of the Appellate Court. In stark contrast, this Court in *Monson* analyzed all of the salient facts to determine whether the City of Danville met the stringent requirements requests of § 2-201 in seeking immunity.

Similarly, the Appellate Court in *Andrews* conducted such a statutory analysis, finding that there was no evidence that Florek made policy determinations or exercised

discretion with respect to the act or injury for which Andrews' injury resulted. Defendant's position was that Florek knew nothing of the ladder configuration and, therefore, could not have balanced any interest or exercised judgment about its use. As in *Monson*, there are no evidentiary facts to establish MWRD's conscious assessment of the actual site.

Defendant draws a comparison between this case and *In re Chicago Flood Litigation* because in both cases, Defendants entered into a contract with a contractor to perform construction work. However, Defendant here ignores the vital distinction between the two cases: an actual exercise of discretion in *Re Chicago Flood Litigation* and none here.

In *In re Chicago Flood Litigation*, the city entered into a contract to "remove and replace piling clusters at five Chicago River bridges, including the Kinzie Street Bridge." 176 Ill. 2d 179, 184 (1997). The contractor did not abide by the contract and installed pilings at the wrong location which resulted in a breach and caused damage to the wall of the underground freight tunnel system. *Id*. A third party discovered this breach and informed the city. *Id*. An inspection followed and the city made plans for immediate repairs. However, these repairs were too late and the tunnel breach opened, resulting in the Chicago River flooding the tunnel and many buildings connected to it. *Id*. This Court found that "[m]unicipal corporations will not be held liable in damages for the manner in which they exercise, in good faith, their discretionary power of a public, or legislative, or quasi judicial character." *Id*. at 194. This Court held that the city exercised discretion in locating the pilings *and in repairing the breach of the tunnel wall*. *Id*. at 194-95.

Defendant alleges that this Court, in *In re Chicago Flood Litigation*, found that Defendant had discretionary immunity based on the right to change the locations of the pile driving. (Def.'s Br. 15). Significantly, this Court's analysis did not end there. In addition to finding that the City retained discretion to locate the pilings where it thought best, this Court also found that the decisions made after the city discovered the breach were discretionary. *Id*. at 197. This Court could have ended the analysis after the failure to supervise issue. However, this Court chose to continue, placing a focus on the conscious decisions made by the City to repair the breach. *Id*. Defendant argues that in *In re Chicago Flood Litigation*, this Court established precedent that allowed entities to claim immunity solely based on its contract. (Def.'s Br. 15). Defendant attempts to draw this distinction stating:

> The City's notice of the breach was relevant in *In re Chicago Flood Litigation* only to its discretionary immunity for its post-contract failures to warn and repair the damaged tunnel wall—similar to the City's failure to repair public property in *Monson*—but not to its discretionary immunity for its earlier failure to supervise the work under its contract with the dredging contractor.

(Def.'s Br. 19-20). In drawing this distinction, Defendant cites to no authority. Defendant could not have cited to any authority because this distinction does not exist. This Court, in *In re Chicago Flood Litigation*, did not isolate the failure to supervise issue, but chose to include the failure to repair or warn for a reason. This Court did not a conduct a complete 2-201 analysis with regard to the failure to supervise claim, but instead, conducted a complete analysis in reference to the failure to repair and warn issues. This Court highlighted the city's discretion to locate the pilings where it saw fit *and* the decisions after the city learned of the breach. *Id*. at 195, 197 (holding the decisions about who and how to hire an entity to repair the tunnel and whether or not to warn the public

were discretionary). All of these decisions together afforded the city discretionary immunity. There was only one injury in *In re Chicago Flood Litigation*. This Court combined all of these discretionary acts to afford the city immunity for decisions made that resulted in that injury: the tunnel flood.

Conversely, Defendant's attempt to isolate the discretionary immunity issues raised solely in the City's contract with Great Lakes has no basis in *In re Chicago Flood Litigation* and has no statutory legal application under the Tort Immunity Act.

In *In re Chicago Flood Litigation*, this Court did not have occasion to consider whether or not a local public entity that had entered into a repair contract was entitled to discretionary immunity in the absence of an actual exercise of discretion because *there was an actual exercise of discretion* with regard to repairing and warning of the breach.

It was clear that the City knew about the breach and made plans to repair the breach. The decision of how, when and who was going to repair the breach was discretionary which entitled the city to immunity. *Id*. at 197. *In re Chicago Flood Litigation* is distinguishable from this case because unlike *In re Chicago Flood Litigation*, there was no actual exercise of discretion to decide whether or not to conform the ladder configuration to the safety regulations set forth in the contract. *In re Chicago Flood Litigation*, there was an actual inspection and an actual decision to make repairs. Here, Florek never inspected the site where Plaintiff was injured and never made a decision about the ladder configuration that caused Plaintiff's injury. Florek also made no policy determination.

Defendant also contends the Appellate Court erred in relying on *Monson* and that it is distinguishable from this case. (Def.'s Brief at 17). However, this is not a valid

contention. Defendants claim that because *Monson* was not a construction case and did not involve a contractor, it is not applicable to the facts of this case. In *Monson*, the defendant City undertook a project to inspect and repair sidewalks. 2018 IL 122486, ¶ 4. The City charged the director of the public works department with determining which slabs of sidewalk needed to be repaired. *Id*. The plaintiff was injured while walking on the sidewalk when she fell after her foot hit a piece of concrete. *Id*. at ¶ 3. The area where the plaintiff fell had not been repaired by the city. *Id*. at ¶ 5. When asked if he remembered making the decision not to repair the concrete, the director of public works responded that he did not recall making a decision as to the specific slab that caused plaintiff's injuries. *Id*. He reasoned that he must have "consider[ed] the slab of concrete because we looked at every slab of concrete." *Id*.

In *Monson*, this Court held that Defendant did not supply any evidence that the *particular* slab of concrete was inspected and that the director made a decision not to repair the slab. *Id*. at ¶ 35. This Court reasoned that "a public entity claiming immunity for an alleged failure to repair a defective condition must present sufficient evidence that it made a conscious decision not to perform the repair. The failure to do so is fatal to the claim." *Id*. at ¶ 33. This Court focused on the defendant's utter lack of evidence of any knowledge of the sidewalk defect, reasoning that, "We do not know which factors were taken into account by the City in deciding not to repair the sidewalk. More importantly, we do not know whether anyone even took note of a sidewalk deviation at that location, or whether it was simply overlooked." *Id*.at ¶ 38.

Like the defendant in *Monson*, Defendant here provides no evidence of any knowledge of the unsafe ladder configuration. In fact, there is evidence in the record to

the contrary. (See Florek Dep., R.C880.) As this Court held in *Monson*, for a defendant to be immune under 2-201, the defendant has to be aware of the specific condition that results in a plaintiff's injuries, and to make a conscious decision whether or not to repair the condition. 2018 IL 122486, ¶ 33. Failure to provide such evidence prohibits immunity under the Tort Immunity Act. *Id*.

Defendant concedes that this Court in *Monson* recognized a local public entity's preexisting duty to maintain its property in a reasonably safe manner. (Def.'s Br. 17). However, Defendant then goes on to say that these cases are different because of the existence of a contract in one and not the other. However, there is no section of the Tort Immunity Act that draws a distinction between entities that have entered into a contract and entities that have not done so. Specifically, § 3-102(a), the section that requires that public entities safely maintain their property, does not draw this distinction. The statute provides: "a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition." 745 ILCS 10/3-102(a). The plain language of this statute does not absolve public entities that have entered into a contract from safely maintaining their property. A local public entity is not permitted to contract out of immunity by simply entering into a contract. Therefore, the applicability of both the 3-102(a) and 2-201 provisions of the Tort Immunity Act to this case makes it comparable to *Monson*; and the existence of a contract does not change the analysis.

The strong similarities between this case and *Monson* indicate that the holding in *Monson* should be applied here. Monson does not contradict *In re Chicago Flood Litigation*'s holding because there was a conscious decision made and the Defendant was aware of the condition in the tunnel. Therefore, the Appellate Court correctly held that

Defendant's lack of knowledge of the ladder configuration and, consequently, the lack of any conscious decision regarding the ladder configuration barred an immunity defense under 2-201 of the Tort Immunity Act.

Defendant also contends that *Cabrera v. ESI Consultants, Ltd.* is controlling in this case. 2015 IL App (1st) 140933. The plaintiff in *Cabrera* fell from a bridge while working for a contractor. *Id*. at ¶ 15, 18. The contract involved the city delegating the work to the contractor while retaining the right to make sure the work was being performed in accordance with the contract. *Id*. at ¶ 34, 42, 46. The First District Appellate Court of Illinois held that the city had discretionary immunity because of a contractual provision that read: "reject or require modification of any proposed or previously approved order of procedure, method, structure, or equipment." *Id*. at ¶ 125.

The Appellate Court in this case held that, "[a]fter *Monson*, the immunity analysis done in *Cabrera* is untenable." *Andrews*, 2018 IL App (1st) 170336, ¶ 28. The analysis set forth in Monson is the proper framework to use when determining if an entity is entitled to 2-201 discretionary immunity. The Appellate Court in this case recognized that the legal reasoning set forth in *Cabrera* was flawed due to the *Monson* ruling, and overturned its own ruling in *Cabrera*.

C. Defendant's contention that the contract itself is the sole indicator that Defendant exercised discretion would create nearly unlimited immunity for municipal and government entities, which is contrary to legislative intent.

Defendant argues that it is immune under 2-201 because the Contract gave Florek discretion to approve or disapprove of the use of "unsafe procedures, methods, structures, or equipment" on the construction site. (Def.'s Brief at 13). This argument is entirely inconsistent with the legislature's intent in enacting the Tort Immunity Act. Defendant's

claim that an entity is immune because they used discretion in entering into a contract and included provisions in the contract giving an engineer the ability to exercise discretion would grant immunity to every entity that entered into a contract. The Tort Immunity Act does not confer this kind of broad immunity.

This Court in *Monson* recognized that the legislature did not intend for discretionary immunity to apply to "every failure to maintain public property." 2018 IL 122486, ¶ 35. Under Defendant's theory, a City would need only allege that a general discretionary policy existed. *Id*. The court in *Corning* held that a defendant's "decision not to maintain or inspect their property was an act of discretion, but this is an 'impermissibly expansive definition of discretionary immunity.'" 283 Ill. App. 3d at 768. The court rejected this expansive definition, explaining that in codifying § 3-102 of the Tort Immunity Act (which creates a common law duty to maintain property), the legislature did not intend to grant immunity every time an entity failed to inspect its property. *Id*.; *see also Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 627 (2010).

It is clear that the legislature did not intend to grant absolute immunity to government entities under 2-201. Although Defendant attempts to circumvent the legislative intent based on the contract that it entered into with F.H. Paschen, this is not the law. The legislative intent is clear that for a government entity to be immune, it must *exercise* discretion and make policy determinations. 745 ILCS 10/2-201. Defendant's theory that entering into a construction contract is both an exercise of discretion and a policy determination. However, if this was the case, there would be absolute immunity for government entities. There would be no incentive for government entities to repair or maintain their own property because in entering into a contract, they would craft

complete immunity provisions, reserving the right to exercise discretion. This result would be in stark contrast to the legislature's intent in enacting the Tort Immunity Act. Therefore, the contract alone does not grant Defendant absolute immunity under 2-201. Defendant, despite entering into the contract, was required to exercise discretion and make policy determinations. Defendant's failure to exercise discretion with regard to the ladder configuration that caused Plaintiff's injuries enjoins Defendant from an immunity defense. The Appellate Court was correct in finding that Defendant's Motion for Summary Judgment on the basis that it was immune should have been denied.

D. In addition to Defendant's failure to exercise discretion, Greg Florek was not competent to make policy decisions on the job site.

Defendant's brief does not address Florek's ineptitude to make policy determinations because of his lack of training or knowledge regarding safety. However, this issue was briefed in the Appellate Court and also plays a role about whether or not statutory immunity attaches in this case. For immunity to attach to the acts or omissions of a municipal entity, the injury must also result from a policy determination. *Harrison v. Hardin Cty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 472 (2001). "[P]olicy decisions [are] those that require the governmental entity or employee to balance competing interests and to make a judgment call as to what solutions will best serve each of those interests." *Id.*; *Valentino v. Hilquist*, 337 Ill. App. 3d 461, 472 (1st Dist. 2003); *Roark v. Macoupin Creek Drainage Dist.*, 316 Ill. App. 3d 835, 840 (4th Dist. 2000).

Even if Greg Florek could have exercised discretion in implementing Defendant's plan, he could not make policy determinations on the job site because he was not competent in safety issues. (R.C2207–R.C2208). Given his deficiency in safety training,

Greg Florek was unable to understand the competing interests and balance them accordingly to make a policy determination.

In *Murray*, the instructor of the trampoline program in which the plaintiff was injured was not trained in tumbling and did not always provide spotters to students, even when students were performing stunts outside of the class lesson or outside the students' own skill level. 224 Ill. 2d at 219. The Illinois Supreme Court reversed summary judgment, in part, because the program "was not supervised by an instructor with professional preparation in teaching trampolining, nor was it taught in a proper manner with reminders of the risk of injury incorporated into the teaching process." *Id.* at 246.

Similar to the instructor in *Murray*, Florek was not competent to make any policy determinations or deviate from the adopted plans. Florek admitted that he had no education or training in construction safety and *never* gave opinions regarding construction safety. (R.C2207–R.C2208). To make a policy determination, one must balance interests and weigh competing factors. Florek, however, could not appreciate the safety risks that the work site presented, and thus was unable to balance the competing interests of safety and efficiency on the Project.

Here, there is no evidence that Florek made a judgment call or balanced competing interests regarding the use of access platforms and safe ladders. Rather, like the instructor in *Murray*, Florek's lack of training rendered him incapable of weighing competing interests when it came to the unsafe ladder configuration.

III. DEFENDANT'S CONTENTION THAT THE APPELLATE COURT'S DECISION WOULD ELIMINATE A RESTATEMENT (SECOND OF TORTS, § 414 (1965) DEFENSE IS MERITLESS

The question of duty is "distinct from, *and precedent to*, the question of whether the Tort Immunity Act applies." *Salvi v. Village of Lake Zurich*, 2016 IL App (2nd) 150249, ¶ 33 (emphasis added). In other words, the potential for immunity is only considered if the Court *first* finds a duty to exist; and the inquiries are entirely separate and distinct from one another. This Court has so recognized. See, *e.g., Arteman v. Clinton Community Unit School Dist. No. 15*, 198 Ill.2d 475, 480 (2002); and *Harris v. Thompson*, 2012 IL 112525, ¶ 17.

A. A duty defense under Restatement (Second Torts, § 414 (1965) is not an issue on this appeal, based on the proceedings below.

MWRD decided to forego making any substantive duty argument at the trial court. In its Motion for Summary Judgment, it chose, instead, to proceed on the immunity to which it believed it was entitled to, and that was the only issue on which the trial court passed judgment. (See generally C5114-24).[2]

Based on the proceedings in the trial court, a duty defense under Restatement (Second Torts, § 414 (1965) was waived. Therefore, Plaintiffs-Appellees will not address a § 414 duty defense within the context of this case or under these facts. Instead, any reference that Plaintiffs-Appellees make to § 414 of the Restatement of Torts is in a broader context and is not in relation to the specific facts of this case.

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[2] In its Summary Judgment motion, filed April 11, 2016, the MWRD chose to proceed solely on the immunity issues. "While summary judgment is proper here because the MWRD owed no duty to the plaintiff, the MWRD need not establish the lack of a duty in order for the Court to grant summary judgment in its favor based on the absolute immunity afforded by § 2-201 of the Illinois Tort Immunity Act." See attached Motion for Summary Judgement in the Appendix. (R.C5382)

B. There is no public policy reason that would undermine the Appellate Court's holding because a defendant can exercise discretion without exerting too much control so as to eliminate a Restatement (Second Torts, § 414 (1965) duty defense.

Defendant argues that the Appellate Court's holding in this case places an unfair burden on local public entities because it would deprive them of their Restatement of Torts Second § 414 defense ("414 defense"). This section of the Restatement states:

> One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414: Negligence in Exercising Control Retained by Employer (Am. Law. Inst. 1965). Defendant waived any § 414 defense here; it is not an issue in this appeal.

Plaintiffs-Appellees will address Defendant's § 414 defense argument on a broader public policy scale and not with respect to the specific parties in this litigation.

Defendant's assertion that public entities would be deprived of this defense if this Court upholds the Appellate Court's holding is unsound. Defendant argues public entities will be required to "go above and beyond what their contracts require" in exercising control over the work that they have delegated to the contractor in order to sustain a valid tort immunity defense. (Def. Brief at 24).

However, this is a complete misinterpretation of the Appellate Court's holding.

§ 2-201 requires a local public entity to make determinations of policy and exercise discretion. Governmental entities can exercise discretion without exercising control of the actual work and maintain a 414 defense. Comment C of § 414 states:

> In order for the rule stated in this section to apply, the employer must have retained at least some degree of control over the manner in which the work

> is done. *It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.*

Id. Comment C (emphasis added). Stopping work, inspecting reports, making suggestions or recommendations, or prescribing alterations or deviations are all discretionary acts that *if exercised*, would entitle a public entity defendant tort immunity. *See Ponto v. Levan*, 2012 IL. App. (2d) 110355, ¶ 66 (holding city's superintendent exercised discretion in making recommendations for water main improvements); *Hanania v. Loren-Maltese*, 319 F. Supp. 2d 814, 836 (N.D. Ill. 2004) (holding that altering the nature and responsibilities of the town collector's office was discretionary and entitled the public entity to immunity). These exercises of discretion do not require a public entity to physically get involved in the work. Therefore, Defendant's contention that its employees would have had to be in the effluent chamber performing the grout work has no basis in the law. There is nothing in the statute that requires a defendant to perform the actual work of the contractor.

However, local public entities are also not permitted to contract out of tort liability. Based on the legislative intent of 2-201, it is clear that the legislature did not intend for public entities to have absolute immunity. *Monson v. City of Danville*, 2018 IL. 122486, ¶ 35. Entering into a contract does not give local public entities permission to close their eyes to any wrongdoing on their property. Local public entities are required to exercise ordinary care in maintaining their own property. 745 ILCS 10/3-102(a). In the exercise of ordinary care, a defendant is immune when making policy determinations and exercising discretion. 745 ILCS 10/2-201. Making these policy determinations and exercising discretion

does not require that a local public entity exercise so much control over a project that it would be deprived of its §414 defense.

Neither 3-102(a) or 2-201 make any distinction between construction projects that involve a contractor and a project that a public entity undertakes to do on its own. Therefore, public entities that enter into a contract to complete a construction job are held to the same standard as any other public entity that has not entered into a contract. This standard is that a public entity must exercise reasonable care to maintain its property in a reasonably safe condition; the public entity will only be immune from liability if in this exercise of reasonable care the defendant made policy determinations and exercised discretion.

IV. WHILE DEFENDANT WAIVED THE ISSUE, THE APPELLATE COURT CORRECTLY REVERSED THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS' WILLFUL AND WANTON ALLEGATIONS

A. Defendant's failure to raise the issue of the willful and wanton supervision claim in its initial brief constitutes waiver of this issue and Defendant is, therefore, prohibited from addressing it or raising it in their reply.

Defendant failed to address at any point in their initial brief that the Appellate Court reversed the trial court's dismissal of paragraphs 30.b. and 30.c. of Plaintiffs' Second Amended Complaint. Therefore, Defendant is barred from raising this issue or addressing it in their reply brief. Illinois Supreme Court Rule 341(h)(7) states in relevant part: "Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." *See also Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 64 (holding that defendants forfeited review of a negligent misrepresentation claim because defendants failed to raise the issue).

Defendant makes no mention of the motion to dismiss paragraphs 30.b. and 30.c. of Plaintiffs' Second Amended Complaint and makes no arguments regarding willful and wanton supervision in its brief. Therefore, Defendant is barred from raising this issue or making arguments related to it at any point throughout the duration of this Appeal.

B. The Appellate Court correctly reversed the trial court's dismissal of Plaintiffs' willful and wanton supervision claims.

The Appellate Court properly reversed the trial's court dismissal of Plaintiffs' willful and wanton supervision claims. Plaintiffs were not required to prove evidence of prior knowledge of prior similar injuries based on Illinois Supreme Court precedent. *See Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 246 (2007) (holding prior similar injuries are not required to prove willful and wanton conduct if a plaintiff can show the activity posed known risks, was not adequately supervised by a competent instructor, and the relevant guidelines were not followed); *Barr v. Cunningham*, 2017 IL 120751 (holding knowledge of prior similar injuries is only one manner in which to bring a claim for willful and wanton conduct). In light of the holdings in *Murray* and *Barr*, the Appellate Court's holding that Plaintiffs' willful and wanton claims be reinstated should be affirmed.

In the Local Governmental and Governmental Employees Tort Immunity Act ("the Act"), the Illinois legislature defined willful and wanton conduct as "[a] course of action which shows an actual or deliberate intention to cause harm, or, which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210. This Court held in *Barr* that plaintiffs can establish willful and wanton conduct if they can offer "some evidence that the activity is generally associated with a risk of serious injuries." 2017 IL 120751 at ¶ 21.

Plaintiffs did not set forth a theory that Defendant knew others had been injured because of the condition. Rather, Plaintiffs' cause of action asserts that Defendant was willful and wanton because it knew of the dangerous condition and did nothing to rectify it. The allegations in Plaintiffs' Second Amended Complaint at Law are sufficient to establish this knowledge. Plaintiffs' alleged that, prior to the occurrence, Defendant was aware (1) that the ladder configuration was being utilized by the crew, and (2) that the configuration was dangerous and violated its policies. (R.C921 ¶¶ 15, 16, 17, 26).

Defendant manifested a conscious disregard for the safety of Jeffrey Andrews and all other employees assigned to the Project in its failure to follow OSHA regulations and its own safety rules, and maintain the ladders and effluent chambers in a safe condition. Defendant allowed the practice of using job-made wooden ladders to traverse upon 29-foot fiberglass ladders, without the benefit of an access platform, on at least six (6) prior tanks before the date of subject occurrence. (R.C3530).

Plaintiffs' alleged that, on the days prior to the occurrence, heavy rains which created extremely muddy conditions in the area surrounding the subject settling tank. (R.C921 ¶12). Not only did the muddy rungs violated the Safety Rules (requiring clean ladder rungs), but the mud also aggravated an already dangerous condition.

The General Specifications and Safety Rules clearly established that the subject ladder configuration was associated with a risk of serious injuries. § 1.5.2 General, of the Safety Rules provided, in part: "A competent person shall inspect ladders routinely in addition to the everyday use inspections; side-rails, rungs, and hardware must be in clean and good condition; employees shall have at least one hand free to grasp the ladder and face the ladder when moving up or down the ladder." (R.C3682). Further, OSHA

regulation 29 CFR 1926.1053(a)(10) required that if two or more separate ladders are used to reach an elevated work area, the ladders must be offset with a platform or landing between them. Therefore, per the General Specifications, Defendant was required to intervene and prevent the use of this unsafe structure. (R.C3633-R.C3634).

Defendant's knowledge of the risk posed by the ladder configuration is further exemplified through the testimony of crew foreman Patrick Healy. Healy testified to the process of tee-peeing the job-made wooden ladder with the fiberglass ladder to access the effluent tanks. (R.C3367-R.C3368). He testified that this configuration was used without an access platform, and that Defendant had observed the crew using this method on the job site prior to the accident. (R.C3413). The unsafe condition of this ladder configuration was easily recognizable, and competent supervision by Defendant would have led Defendant to prevent further use of this unsafe method. (R.C3413).

A defendant's "*failure to take adequate safety precautions in light of their knowledge of the inherent dangers of the activity*" is evidence of willful and wanton conduct. *Barr v. Cunningham*, 2017 IL 120751, ¶ 21 (citing *Murray*, 224 Ill. 3d at 246) (emphasis added).

The acts and omissions of Defendant, as Plaintiffs' alleged in their Second Amended Complaint at Law, established that Defendant knew or had reason to know that the conditions on the subject project were unreasonably dangerous, and consciously disregarded this danger by allowing Jeffrey Andrews to use the ladder configuration. (R.C935-C936). Therefore, this Court should find that dismissal of Plaintiffs' claims of willful and wanton conduct was erroneous, and reverse the dismissal of those claims.

CONCLUSION

It is respectfully requested that the Appellate Court's opinion, including the reversal of the granting of Defendant's 2-615 Motion to Dismiss paragraphs 30.b. and 30.c. of Plaintiffs' Second Amended Complaint at Law, which was not appealed to this Court, be affirmed. It is requested that the trial court's grant of summary judgment be vacated, and that the trial court's Order dismissing paragraphs 30.b. and 30.c. of Plaintiffs' Second Amended Complaint at Law be vacated, and that this matter be further remanded to the trial court for trial.

Respectfully submitted,

/s/ Edward G. Willer
Edward G. Willer
CORBOY & DEMETRIO, P.C.
Attorneys for Plaintiffs-Appellees
33 North Dearborn Street, Suite 2100
Chicago, Illinois 60602
(312) 346-3191
Firm I.D. No. 108

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. 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 those matters to be appended to this brief pursuant to Rule 342(1), is 37 pages.

/s/ Edward G. Willer
Edward G. Willer

Attorneys for Plaintiffs-Appellees
CORBOY & DEMETRIO, P.C.
33 North Dearborn Street, Suite 2100
Chicago, Illinois 60602
(312) 346-3191
egw@corboydemetrio.com

SUPPLEMENTAL APPENDIX

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

BECKY ANDREWS, as Plenary Guardian of the Person and Estate of JEFFREY ANDREWS, a disabled person, and BECKY ANDREWS, individually,	)	
Plaintiffs,	)	
vs.	)	Case No. 2012 L 000048 (Consolidated with 2012 L 000464)
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, a body corporate and politic,	)	
Defendant.	)	

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MOTION FOR SUMMARY JUDGMENT

The defendant, METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, by and through its attorneys, BRADY, CONNOLLY & MASUDA, P.C., and for its Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005, states the following:

INTRODUCTION

Plaintiffs' Second Amended Complaint at Law alleges Jeffrey Andrews sustained personal injuries on April 21, 2011 at the facility owned by the Metropolitan Water Reclamation District of Greater Chicago, ("MWRD") located in Chicago, Illinois. (The Second Amended Complaint is attached as Ex. A.) This court is well familiar with the facts of this matter. The plaintiff alleges he fell into an effluent chamber while transitioning from a job-made ladder to a 30 foot extension ladder. This Court has already stricken with prejudice allegations of willful and wanton supervision. (A transcript from the MWRD's Motion to Dismiss is attached hereto as Ex. B.) Plaintiff's motion for reconsideration of this ruling was denied on July 8, 2015. This Court denied the MWRD's 735 ILCS 5/2-619(a) motion to dismiss finding a question of fact

C5373

concerning the allegations of willful and wanton conduct. (See transcript attached as Ex. C.) As set forth below, the MWRD is entitled to absolute immunity under 745 ILCS 10/2-201 for discretionary decisions relating to the project.

CONTRACT PROVISIONS

The contract between the MWRD and the general contractor (F.H. Paschen/S.N. Nielsen/IHC Construction Joint Venture)[1] contains various provisions which delegate control over safety and the means and methods of the work solely to Paschen. Paschen's scope of work under Section 1.02 requires the furnishing of *"all labor, materials, equipment and incidentals required to construct the Primary Settling Tanks and Grit Removal Facilities."* (See Ex. D.)[2] The contract includes General Specifications which delegate sole responsibility for: "Procedures and Methods"; "Safety" and "Handling Water at Treatment Plant Sites" to Paschen. (See Gen. Spec., attached as Ex. E, GS 8 – GS 10.)

> ***Procedures and Methods***
> *The Contractor shall determine the procedure and methods and also design and furnish all temporary structures, sheeting, bracing, tools, machinery, implements and other equipment and plant [sic] to be employed in performing the work hereunder ...*
>
> *The use inadequate or unsafe procedures, methods, structures or equipment will not be permitted, and the* ***Engineer may disapprove and reject any of same which seem to him to be unsafe for the work hereunder ...***
>
> *The acceptance or approval of any order of procedure, methods, structures or equipment submitted by the Contractor shall not in any manner relieve the Contractor of any responsibility for the safety, maintenance or repairs of any structure or work, or for construction maintenance and safety of the work hereunder ... Id.* [emphasis added.]

Section 05515 – Ladders and Accessories – sets forth specifications for the installation of ***permanent*** ladder fixtures. (See Ex. F.) Section 01014 – Construction Limitations and Constraints – specifically states: *"This specification is not intended to specify the means and*

[1] The plaintiff was an employee of F.H. Paschen, S.N. Nielsen & Associates LLC, the managing member of the Joint Venture. References herein will refer to the Joint Venture as "Paschen."
[2] Due to the size of the contract it is not attached in its entirety. Only the cited provisions are attached hereto.

methods to be used by the Contractor for construction of the Work. The Contractor is solely responsible for all means and methods required to construct the Work as shown in these Project Specifications and Plans." (See Ex. G.)

DEPOSITION TESTIMONY

A. **Doug Pelletier.** Doug Pelletier was Paschen's Senior Project Manager whose responsibilities included scheduling, quality control, cost control, and some safety. (Pelletier, Ex. H, p. 16, 17.) Paschen was responsible for stopping any unsafe work at the jobsite. (Ex. H, p. 77.) During his two and one-half years on the project, the MWRD never dictated safety measures for work performed under Pelletier's supervision. (Ex. H, p. 49.) Paschen had several safety representatives on the project, including J.P. Youpel. (Ex. H, p. 63, 64.) Paschen was responsible for determining means and methods of the work. (Ex. H, p. 86 - 90.)

B. **John Barkowski.** John Barkowski was the Field Operations Manager for Paschen at the MWRD project. (Barkowski, Ex. I, p. 11.) The MWRD had no role in how any subcontractors performed their work. (Ex. I, p. 82, 83.) If the MWRD raised a safety concern, Paschen supervisors would determine whether there was a safety violation. (Ex. I, p. 85.)

C. **Marty Platten.** Marty Platten, Project Manager for Paschen, testified he had no recollection of ever discussing safety topics with Greg Florek while walking the jobsite. (Platten, Ex. J, p. 15.) Platten and Florek discussed design issues and scheduling. (Ex. J, p. 16.) Platten testified the MWRD could not enforce MWRD safety rules as to Paschen because safety was delegated to Paschen. (Ex. J, p. 43.) The MWRD had no specifications for work practices. (Ex. J, p. 73.) OSHA inspected the ladder configuration after the accident and found it was OSHA compliant. (Ex. J, p. 84.) The MWRD never stopped Paschen's work for any safety issue. (Ex. J, p. 94.) The MWRD had no role in determining the ladder set up. (Ex. J, p. 86.)

D. **Pat Healy**. The plaintiffs' foreman, Pat Healy, testified the MWRD could not stop his work. (Healy, Ex. K, p. 36, 70.) The MWRD had no role in safety and no control over the means and methods of their work. (Ex. K, p. 69, 71.) Healy and his crew were never told how to do their work by the MWRD. (Ex. K, p. 73.) Healy was interviewed by OSHA after the accident and advised the ladder configuration was used for work to grout an effluent chamber on only one prior occasion. (Ex. K, p. 55 -56; 89 -90.) The ladders were set up the day prior to the occurrence. (Ex. K, p. 55.) Healy testified he had no knowledge as to whether anyone from the MWRD ever saw this ladder configuration prior to the accident. (Ex. K, p. 69.)

E. **John Lemon**. John Lemon, MWRD's principal civil engineer for the primary settling tanks and grit removal facilities project, was produced for deposition. (Lemon, Ex. L, p. 19.) His position falls within the definition of "Engineer" as defined by the General Specifications. (Ex. L, p. 56, 57.) Lemon's on-site responsibilities were to ensure that the project was constructed according to the plans and specifications. (Ex. L, p. 29.) The MWRD did not supervise the means and methods of the work performed by contractors on the jobsite. (Ex. L, p. 67.) The general contractor was solely responsible for safety and the means and methods of performing the work. (Ex. L, p. 79.) The MWRD had employees walk the site to inspect the work which was installed. (Ex. L, p. 34, 35.) The MWRD did not have a safety person designated for the project. (Ex. L, p. 35.) Lemon testified he was familiar with the nine-volume contract for the project, a copy of which was marked as an exhibit during the deposition. (Ex. L, p. 20.)

F. **Greg Florek**. Greg Florek was a Senior Civil Engineer for the MWRD, reporting to John Lemon, and served as the only resident engineer for this project. (Florek, Ex. M, p. 14, 29, 106.) He has never had any courses, education or training in construction safety. (Ex. M, p. 10.) Greg Florek testified his jobsite walks were to check the progress of the work and the "installations,"

such as an installed water pipe to confirm the correct "batting material." (Ex. M, p. 98.) Florek testified the MWRD had nothing to do with how Paschen performed its work or safety aspects of the Paschen's work. (Ex. M, p. 118.) Florek had no information that any MWRD employee saw the ladder configuration prior to the accident. (Ex. M, p. 110.)

G. **Roberto Sanchez, Jr.**. Roberto Sanchez, an MWRD engineer, testified his jobsite walks amounted to *"just seeing how the work was progressing"* and nothing more. (Sanchez, Ex. N, p. 18.) Sanchez also testified the MWRD could enforce the specifications for the work, such as a pump of a certain size or power, but enforcement did not involve safety or means and methods. (Ex. N, p. 63-64.) The MWRD did not inspect grouting inside the effluent chambers. (Ex. N, p. 21 -22.) Sanchez never observed the ladder configuration prior to the accident. (Ex. N, p. 23.) Sanchez never stopped work at the jobsite. (Ex. N, p. 47.) Safety and means and methods of the work were the sole responsibility of the general contractor. (Ex. N, p. 55.) The general contractor's safety representative was responsible for enforcing safety of the general contractor's work. (Ex. N, p. 57.) Sanchez was not aware of any work in the area of the accident within seven or ten days prior to the accident and the MWRD would have no reason to be in that area. (Ex. N, p. 62.)

I. THE MWRD IS ENTITLED TO ABSOLUTE IMMUNITY UNDER 745 ILCS 10/2-201.

The MWRD is a "sanitary district" organized under the Metropolitan Water Reclamation District Act, 70 ILCS 2605. As a "sanitary district," the MWRD is entitled to the immunities afforded by the Illinois Tort Immunity Act. 745 ILCS 10/1-206. The MWRD is entitled to absolute immunity pursuant to 745 ILCS 10/2-201:

> *§ 2-201. Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.*

Local public entities are sheltered under the immunity granted to public employees covered by Section 2-201 pursuant to 745 ILCS 10/2-109 ("*A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.*"). *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933. Section 2-201 of the Tort Immunity Act provides absolute immunity; there is no exception for willful and wanton conduct. *In re: Chicago Flood Litigation*, 176 Ill.2d 179, 195 (1997). The Tort Immunity Act sets forth a two-part test to determine which employees may be granted discretionary immunity under Section 2-201. *Cabrera*, 2015 IL App (1st) ¶122. First, an employee may qualify for discretionary immunity if he holds either a position involving the determination of policy or a position involving the exercise of discretion. *Id.* An employee who satisfies the first prong must have also engaged in both the determination of policy and the exercise of discretion when performing the act or omission from which the plaintiff's injury resulted. *Id.*

Policy decisions involve those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests. *Id.* ¶123; *Wrobel v. City of Chicago*, 318 Ill.App.3d 390, 394 (1st Dist. 2000)[City of Chicago laborers charged with repairing potholes involved both policy determinations and the exercise of discretion and, therefore, subject to immunity under Section 2-201.] Discretionary acts are those unique to a particular public office and involve the exercise of personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act should be performed. *Id.* ¶ 395. In contrast, 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. *Harinek v. 161 N. Clark Street*, 181 Ill.2d 335 (1998)[City of Chicago fire marshal's conduct in

conducting fire drill was both exercise of discretion and policy determination; in planning drills marshal had to balance various interests including time and resources, efficiency and safety].

In *Cabrera*, the plaintiff was injured while working on a construction project. 2015 IL App (1st) ¶1. His employer, Valdivia Contractors, contracted with the City of Chicago (City) to perform certain work including sandblasting and painting a bridge. *Id.* The plaintiff alleged the City had a presence on the project, controlled the work, had authority over means and methods and had authority over jobsite safety. *Id.* ¶5. Chuck Shum, a civil engineer for the City, testified his duties included construction management, supervising the construction consultant and the contractors. *Id.* ¶44. Shum had no role with respect to safety on the project; safety was the contractor's responsibility. *Id.* ¶46. Shum had authority to stop work if he observed something hazardous or dangerous at the jobsite. *Id.* ¶47.

The City's contract with Valdivia included the following provisions:

- You must take any precautions that may be necessary to render all portions of the Work secure in every respect ... You must furnish and install, subject to the approval of the Commissioner, all necessary facilities to provide safe means of access to all points where Work is being performed and make all necessary provisions to insure the safety of workers and of engineers and inspectors during the performance of the work.
- Although the Commissioner may observe the performance of the Work and reserves the right to give opinions and suggestions about safety defects and deficiencies, the City is not responsible for any unsafe working conditions. The Commissioner's suggestions on safety, or lack of it, will in no way relieve you of your responsibility for safety on the Work site. You have sole responsibility for safety and the obligation to immediately notify Commissioner of all accidents.
- The Contractor shall not construe Engineer's acceptance of the submittals to imply approval of any particular method or sequence conducting the work, or for addressing health and safety concerns. Acceptance of the programs does not relieve the Contactor from the responsibility to conduct the work according to the requirements of Federal, State, or Local regulations ...
- The Contractor shall facilitate the Engineer's observations as required, including allowing ample time to view the work. The Contractor shall furnish, erect scaffolding or other mechanical equipment to permit close observation of [the work] ... the Contractor shall provide the Engineer with a safety harness and a lifeline according to OSHA regulations. *Id.* ¶73.

The City moved for summary judgment asserting it was entitled to absolute immunity under Section 2-201 of the Tort Immunity Act. *Id.* The City also argued in the alternative it was entitled to immunity against plaintiff's negligence claims under Section 3-108(a) of the Tort Immunity Act and that it owed no duty to the plaintiff because the City did not control Valdivia employees with respect to safety. *Id.* The plaintiff argued Section 2-201 was inapplicable because plaintiff's claims were not related to the City's exercise of discretion or policy-making decisions. *Id.* Plaintiff also asserted, under Section 3-108(a), whether the City's conduct was willful and wanton was a fact question for the jury. *Id.* The trial court granted summary judgment to the City. *Id.* ¶86.

On appeal, plaintiff argued the trial court erred in finding the City was not willfully and wantonly negligent and in determining the City owed no duty to supervise Valdivia. *Id.* ¶ 119. The Appellate Court stated the "dispositive" issue on appeal was the City's immunity for discretionary decisions under Section 2-201. *Id.* In affirming summary judgment, the Appellate Court noted the contract authorized the Commissioner to "reject or require modification of any proposed, method, structure or equipment." *Id.* ¶125. As such, the City's supervision of Valdivia was "discretionary, meaning the City is immune pursuant to Section 2-201." *Id.*

This case falls squarely within the facts of *Cabrera* and establishes the MWRD's right to absolute immunity, notwithstanding this court's prior ruling finding a question of fact with regard to allegations of willful and wanton conduct. Indeed, as the court in *Cabrera* stated, the dispositive issue is immunity under Section 2-201 of the Tort Immunity Act – not whether a question of fact exists as to willful and wanton conduct. The contract language which the court in *Cabrera* found controlling is nearly identical to that in the MWRD contract. The controlling language here, as concerning "*unsafe procedures, methods, structures or equipment,*" states:

*"the Engineer **may disapprove and reject any of same which seem to him to be unsafe for the work hereunder.**"* Notably, it is this very provision of the General Specifications which plaintiff cited in opposition to the MWRD's Motion to Dismiss pursuant to 735 ILCS 5/2-619(a). (See Response Brief, Exhibit O, p. 3.)

The MWRD's entitlement to absolute immunity does not turn on the existence of a duty in tort or whether the alleged misconduct is willful and wanton or merely negligent. The dispositive issue is whether the MWRD's alleged acts or omissions involve the exercise of discretion within the purview of Section 2-201 immunity. The MWRD's decision on what contractor to hire, the contractor's scope of work, the terms and conditions by which the work was to be performed, and decisions regarding delegation as to means and methods and safety are all discretionary acts. Any act by an MWRD engineer to reject unsafe work methods, procedures or equipment – which seem unsafe to the engineer – is undeniably a matter of discretion. Like the repair of potholes in *Wrobel*, the fire drill in *Harinek* and control over construction safety in *Cabrera*, the MWRD's alleged liability entirely stems from its exercise of discretion and policy determinations.

This discretion is readily apparent under the plain language of the contract – language which is nearly identical to that in *Cabrera*. Further, there can be little question that policy determinations are inherent in any decision by an MWRD engineer given their role in the construction of a massive multi-million dollar water treatment facility. Any decision to stop the work of Paschen or mandate different work methods or procedures is inextricably tied to a balancing of competing interests and a "judgment call" as to what solution would best serve each of those interests. *Harinek*, 181 Ill.2d at 342. At a minimum, these interests would involve timing to complete the work, allocation of resources, efficiency and safety considerations. Here,

summary judgment is proper as the MWRD has a right to absolute immunity under Section 2-201 of the Tort Immunity Act.

II. THE MWRD's RIGHT TO ABSOLUTE IMMUNITY APPLIES IRRESPECTIVE OF ANY NO DUTY UNDER RESTATEMENT §414.

The existence of a duty and the existence of immunity are separate issues. *Barnett v. Zion Park Dist.*, 171 Ill.2d 378, 388, 665 N.E.2d 808, (1996). Here, the MWRD's right to absolute immunity exists separate and apart from any alleged duty owed under Restatement §414. The MWRD owed no duty to the plaintiff because it did no retain or exercise the requisite control over the means and methods of the work or safety issues. *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, 10 N.E.3d 444; *Fonseca v. Clark Construction Group, LLC*, 2014 IL App (1st) 130308, 10 N.E.3d 274. While summary judgment is proper here because the MWRD owed no duty to the plaintiff, the MWRD need not establish the lack of a duty in order for this court to grant summary judgment in its favor based on the absolute immunity afforded by Section 2-201 of the Illinois Tort Immunity Act.

WHEREFORE, the defendant, METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, requests an order granting summary judgment in its favor and for such further relief as deemed just and proper.

Respectfully Submitted,

By: W. Scott Trench
Attorneys for Defendant MWRD

Robert J. Winston rwinston@bcm-law.com
W. Scott Trench strench@bcm-law.com
BRADY, CONNOLLY & MASUDA, P.C. (Firm No: 35370)
10 S. LaSalle Street, Suite 900
Chicago, IL 60603
Tel: (312) 425-3131
Fax (312) 425-0110

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually, *Plaintiffs-Appellees,*	)	
v.	)	No. 124283
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, *Defendant-Appellant.*	)	

The undersigned, being first duly sworn, deposes and states that on May 14, 2019, there was electronically filed and served upon the Clerk of the above court the Brief of Plaintiffs-Appellees. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

SEE ATTACHED SERVICE LIST

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Edward G. Willer
Edward G. Willer

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Edward G. Willer
Edward G. Willer

SERVICE LIST

Mr. Michael Resis
SmithAmundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
mresis@osalaw.com; ibailey@salawus.com; jysmith@salawus.com

ATTORNEY FOR DEFENDANT-APPELLANT, METROPOLITAN WATER RECLAMATION DISTRICT

Mr. Robert J. Winston / Mr. W. Scott Trench
BRADY, CONNOLLY & MASUDA, P.C.
10 S. LaSalle Street, Suite 900
Chicago, Illinois 60603
rwinston@bcm-law.com; strench@bcm-law.com; rschultz@bcm-law.com

ATTORNEY FOR DEFENDANT-APPELLANT, METROPOLITAN WATER RECLAMATION DISTRICT

Mr. Robert E. Elworth
HEPLER BROOM
30 N. LaSalle, Suite 2900
Chicago, Illinois 60602
Robert.Elworth@heplerbroom.com

ATTORNEY FOR AMICUS CURIAE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL

Ms. Kirsten M. Dunne
Goldberg Weisman Cairo
One E. Wacker Drive, 38th Floor
Chicago, Illinois 60601
kdunne@justicestartstoday.com

ATTORNEY FOR AMICUS CURIAE ILLINOIS TRIAL LAWYERS ASSOCIATION