

How to Use Tort Immunity to the Advantage of Your Local Government

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You're Riding Your Bike...



BUMP!



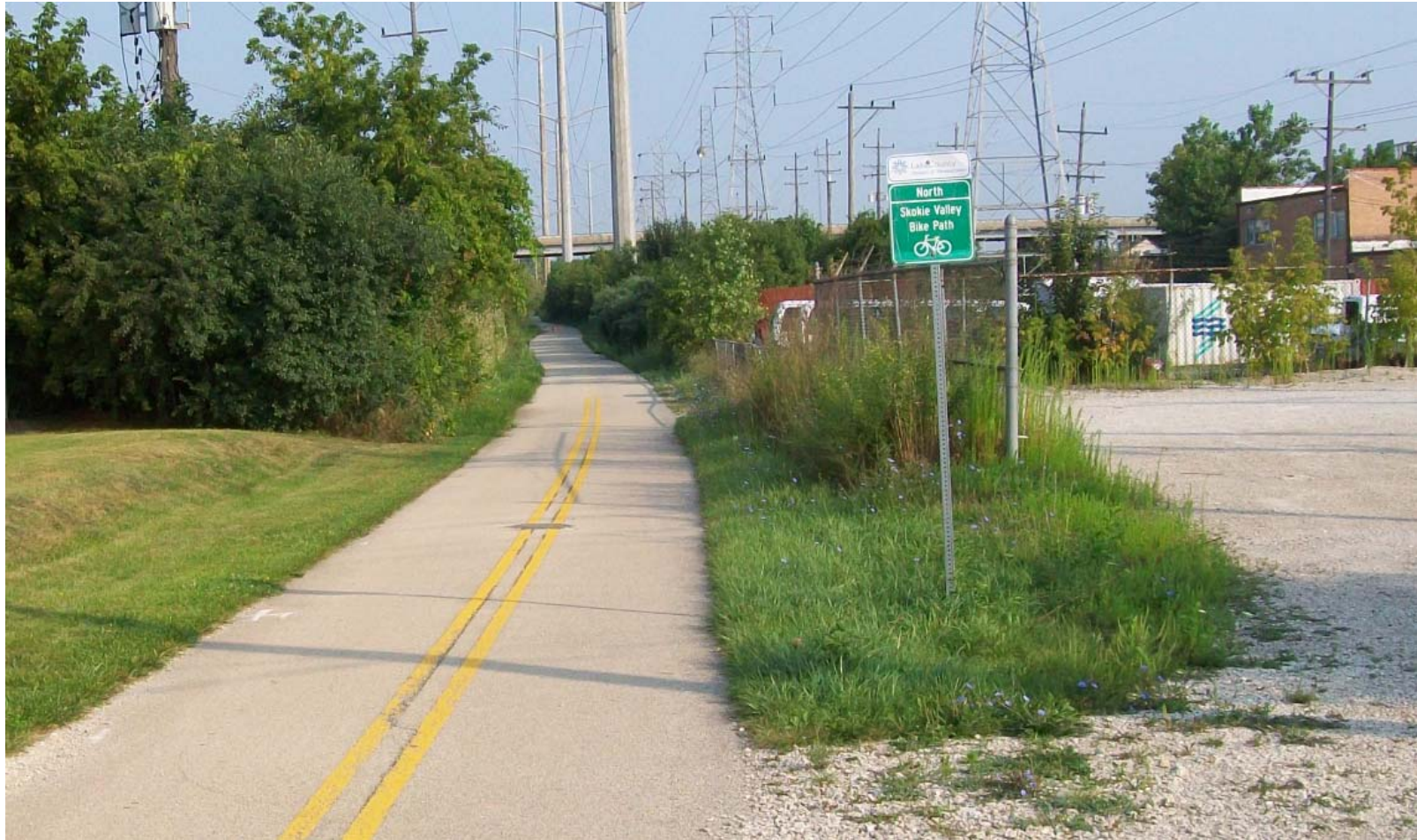
Mount Bikemore



Injuries Result



Who Is Liable?



Who Is Liable?

- The owner of the path! It should have been better maintained. This is Premises Liability 101.
 - (...Right??)
- Not if you are a *local public entity*!

745 ILCS 10/3-107(b)

- “Neither a *local public entity* nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway. (b) **Any** hiking, **riding**, fishing or hunting **trail**.

Local Government and Governmental Employees Tort Immunity Act

- 745 ILCS 10/1-101, et seq.
- Exempts local public entities (and their employees) from civil liability arising out of the operation of government.

Rationale

- Allow public officials to exercise their judgment without fear that a mistake made in good faith might subject them to lawsuit
- Protect public funds from being dissipated by damage awards in tort cases).
 - *Smith v. City of Chicago*, 143 F.Supp.3d 741 (N.D. Ill. 2015)

Scheme

- The Act articulates very specific acts and responsibilities that are immune from liability for *damages*
- The Act is broken down into:
 - “General Provisions Relating to Immunity”
 - Immunity for “Injury Occurring in the Use of Public Property”
 - Police, Correctional, Fire, and Rescue Services
 - “Medical, Hospital and Public Health Activities”
 - “Public and Community Service Programs”
 - “Agreements Between Local Public Entities”

Local Public Entity

- § 1-206
- “Local public entity” includes a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies. “Local public entity” also includes library systems and any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act¹ as well as any not-for-profit corporation organized for the purpose of conducting public business. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.

Are You A Local Public Entity (“LPE”)?

- Any local governmental body
- Any not-for-profit corporation organized for the purpose of conducting public business
 - Factors: (1) participation in the business of government, providing services in the area of public health, safety, welfare, and education; (2) degree of government funding; and (3) degree of government involvement.
 - *Barnes v. Chicago House Authority*, 326 Ill.App.3d 710 (1st Dist. 2001)

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. This definition shall apply in any case where a ‘willful and wanton’ exception is incorporated into any immunity under this Act.”

General Provisions Relating to Immunity

- § 2-102 through -109
- LPE not liable for punitive damages arising from injury
- LPE not liable for any injury caused by:
 - adopting or failing to adopt or enforce any law
 - issuance/denial of any permit/license
 - failure to make an inspection, or by making an inadequate or negligent inspection, of any property other than its own
 - oral promise or misrepresentation of its employee (even if intentional)
 - action of its employees that is libelous or slanderous
 - granting or failing to grant public welfare goods or monies
 - act or omission by its employee where employee is not liable

Public Property

- § 3-101 through -110
- Real or personal property owned or leased by a LPE
- Does not include easements, encroachments, and other property not owned, possessed, or leased

Public Property

- Imparts affirmative duty on LPE to exercise ordinary care in the maintenance of its property
 - to maintain its property in a reasonably safe condition for its reasonably foreseeable use
- Immunity unless injury results from “not reasonably safe” condition of which LPE had *actual or constructive notice* in reasonably adequate time prior to injury

Public Property

- No liability for injury on public property caused by:
 - Failure to provide traffic signals/signs
 - Effect of weather conditions on public ways
 - Failure to upgrade public ways
 - Condition of the property if intended to be used for recreational purposes
 - *Unless willful and wanton conduct proximately causes such injury*
 - Condition of property if it is not a street or highway, and it provides access to fishing, hunting, camping, recreational/scenic areas
 - Condition of property if it is a hiking, riding, fishing, or hunting trail

Public Property

- No liability for supervision provided by LPE
 - *Unless willful and wanton conduct in supervision proximately causes such injury*
- No liability for failure to provide supervision
 - *Unless duty imposed by common law or statute, or willful and wanton conduct in so failing*
- No liability for “hazardous recreational activity”
 - Most water contact; bicycle racing/jumping; rock climbing; etc.

Police and Correctional Activities

- § 4-101 through -107
- No liability for failing to provide adequate police protection (or any police protection at all!)
- No liability for failing to provide jail
 - If provided, no liability for failure to provide sufficient equipment, personnel, supervision, or facilities therein
- No liability for failing to furnish medical care for prisoner in custody
 - *Unless willful and wanton conduct in failing to respond to observation of need for immediate medical care*
- No liability for injury inflicted by escaped prisoner
- No liability for failing to arrest, or for releasing a person

Fire Protection and Rescue Services

- § 5-101 through -106
- No liability for failing to provide adequate fire protection, rescue, or other emergency service
- No liability for failing to suppress or contain a fire
- No liability for condition of equipment or facilities
- No liability stemming from fighting a fire
 - *Unless caused by willful and wanton conduct*
- No liability for negligence while driving equipment to emergency
 - *Otherwise, negligence principles do apply to vehicles on public ways*
 - *Does not include impact of large trucks exceeding load limits*

Public Duty Rule

- Common-law principle that local governmental entities owed no duty to individual members of the general public to provide adequate government services
- Abolished in 2016 by Illinois Supreme Court
 - *Coleman v. East Joliet Fire Protection Dist.*, 2016 IL 117952
- Survives as codified in Tort Immunity Act
 - *Benton v. City of Granite City*, 2016 Ill App (5th) 150241

Medical, Hospital, and Public Health Activities

- § 6-101 through -110
- Generally, LPE not responsible for providing, nor for injury resulting from providing, treatment for mental or physical illness or addiction

Public and Community Service Programs

- LPE not liable for any injury incurred by person performing public or community service as ordered by a court
- LPE not liable for any injury resulting from tortious acts of any such person
 - *Unless willful and wanton misconduct or gross negligence by LPE*

Agreements Between LPEs

- May allocate or share liability for an injury resulting from transfer of services or functions
- May account for contribution or indemnification

Statute of Limitations

- § 8-101
- One-year SOL for all actions not arising out of patient care
 - From date of accrual
 - Does not apply to certain contract actions, claims for equitable relief, and federal civil rights claim (*Collins v. Town of Normal*, 2011 IL App (4th) 100694)
- Two-year SOL for actions arising out of patient care
 - From date claimant knew or should have known of injury
 - Absolute four-year SOL from occurrence

Public Employees

- § 2-201 through -214
- “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.”

Public Employees

- Discretionary vs. ministerial: a two-part test
 - *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335 (1998)
- 1) Does employee hold *either* a position involving the determination of policy *or* a position involving the exercise of discretion?
 - If no, immunity does not attach
- 2) If yes, employee did employee engage in *both* the determination of policy *and* the exercise of discretion when performing the act or omission from which the plaintiff's injury resulted?
 - If no, immunity does not attach

Recent Case Law

- *O'Toole v. Chicago Zoological Society*, 2015 IL 118254
 - Trip and fall at Brookfield Zoo
 - No immunity because not a local public entity; Society too separate from forest preserve district
- *Barr v. Cunningham*, 2017 IL 120751
 - Student tort claim against gym teacher for floor hockey injury
 - Gym teacher's failure to require safety goggles was not willful and wanton conduct; immunity applied
- *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615
 - Parents sued over injuries stemming from inadequate anti-bullying policy
 - Administrators had to apply discretion in application of application of policy; immunity applied

Corbett v. County of Lake

- § 3-106
- “Neither a local public entity nor a public employee is liable for an injury where the liability is based on 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.”

Uncontested Facts

- Lake County is a local public entity
- The Skokie Valley Bike Path is a public property intended to be used for recreational purposes
- Lake County is not guilty of willful and wanton conduct proximately causing injury



- Summary judgment for Lake County
- Demonstrates the importance of notice and action

Riding Trail

- § 3-107
- “Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway. (b) Any hiking, riding, fishing or hunting trail.”

Of Course It Is!

- *Brown v. Cook County Forest Preserve*, 284 Ill.App.3d 1098 (1st Dist. 1996)
 - The court found dispositive that “the path on which [Brown] fell is commonly used by bicyclists for riding and that the path is designed to provide access for bicyclists to the natural and scenic wooded areas” around a lake.
 - In light of this description, the court could “see no reasonable dispute regarding whether the place where Brown fell was a ‘riding trail.’”
 - The court also specifically noted that the fact the path was paved did not change the analysis of the issue.

Go On...

- *McElroy v. Forest Preserve District of Lake County*, 384 Ill.App.3d 662 (2nd Dist. 2008)
 - Finding path to be a “riding trail” because it was “built for bicycle riders and hikers, among others,” and because it traverses through areas that allow riders to “enjoy the scenery and wildlife.”
- *Mull v. Kane County Forest Preserve District*, 337 Ill.App.3d 589 (2nd Dist. 2003)
 - A rider injured on a path when she fell after encountering a rut was on a “riding trail.”
 - It was “undisputed that the trail at issue here is used as a riding path,” and that it “runs through some developed areas, but is surrounded by wild grasses and shrubs.”

But Wait!

- *Goodwin v. Carbone Park District*, 268 Ill.App3d 489 (5th Dist. 1994)
 - A path was found to be something other than a “riding trail” because it was located within a developed city park.
- *Sites v. Cook Cnty. Forest Pres. Dist.*, 257 Ill.App.3d 807 (1st Dist. 1994)
 - Immunity denied because the injury was caused by a cable gate erected by the local public entity.
 - The court reasoned that “the statute does not appear to have the purpose to relieve public entities from liability for injuries caused by structures erected on the exempted roads.”

Recent Developments

- *Corbett v. County of Lake*, 2016 IL App (2d) 160035
 - City of Highland Park argued it is a riding trail
 - Second District disagreed, and reversed
- *Kathy Corbett v. County of Lake, et al. (City of Highland Park, petitioner)*, No. 121536 in the Supreme Court of Illinois
 - Petition for Leave to Appeal Allowed on January 25, 2017
 - Parties have submitted briefs
 - Argument not yet scheduled

Thank you!