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How public sector entities can protect themselves in premise liability cases

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The Illinois Supreme Court recently considered the interplay between two often-cited sections of the Local Governmental and Governmental Employees Tort Immunity Act.

The result affirms the existence of a somewhat narrow but powerful immunity in favor of a public body sued because of the condition of its premises. The case is *Monson v. City of Danville*, 2018 IL 122486.

On Dec. 7, 2012, plaintiff Barbara Monson was shopping in the city of Danville's downtown business district. While walking back to her car, she felt her shoe strike something, causing her to lose her balance and fall, incurring multiple injuries.

Monson sued the city, alleging that the city's negligence and willful and wanton misconduct in failing to repair an uneven seam between two slabs of concrete was the direct and proximate cause of her fall.

In response, the city filed a motion for summary judgment arguing, among other things, that it was immune from liability under Sections 2-109 and 2-201 of the Tort Immunity Act.

The trial court granted summary judgment in favor of the city, and the appellate court affirmed.

The plaintiff appealed to the Illinois Supreme Court, and the court allowed her appeal.

On appeal, the plaintiff argued that the discretionary immunity contained in Section 2-201 of the act is superseded by Section 3-102 of the act. Sections 2-109 and 2-201 of the act provide as follows:

"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.

"Except as otherwise provided by [s]tatute, 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.

Section 3-102(a) provides that a 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 court began its analysis by reviewing the duties of property owners as established by common law, and thus determined that because Section 3-102(a) does not confer any immunity, and instead is simply a codification of existing common-law duties, it does not supersede the immunities set forth in Sections 2-109 and 2-201 of the act.

Next, the court turned to the discretionary immunities provided in Sections 2-109 and 2-201 of the act. The city contended that because its personnel made decisions to repair certain portions of sidewalk and leave other portions unrepaired, it had discretionary immunity, which entitled it to summary judgment.

In considering this argument, the court noted that an 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 a repair on the particular area that is the subject of the claim.

The court noted that the city had offered no evidence documenting the decision not to repair the particular section of sidewalk at issue. Thus, the court concluded, discretionary immunity under Section 2-201 of the act could not be applied.

The court reasoned that the legislature could not have intended discretionary immunity to apply any time a public entity asserted that it had a property inspection program, the subject area was included in the program, and the subject area was not repaired.

Otherwise, Section 2-201 would become impermissibly expansive, as nearly every failure to maintain public property could be classified as an exercise of discretion under the act and thus immune from liability.

In reaching this conclusion, the court focused closely on two discovery depositions of city employees. In the first deposition, the city's superintendent of downtown services stated that she personally walked the city's downtown district and spray painted places she believed required repair, replacement or removal.

In the second deposition, the city's public works director testified that the decision to repair, replace or remove a slab of concrete is a case-by-case basis determination based on a number of factors including the cost and time allowed for the project, the condition of the concrete, nearby obstructions and the path of travel for pedestrians.

The public works director testified that he conducted his own walk-through of the area and after conferring with the superintendent of downtown services and other city employees, made the final decisions about which sections of sidewalk would be repaired, replaced or removed.

Notably, neither employee could recall inspecting or measuring the particular slabs of concrete where the plaintiff fell, nor did the public works director recall making a decision not to repair those specific slabs.

The court then contrasted these facts with another premises liability sidewalk defect case: *Richter v. College of DuPage*, 2013 IL App (2d) 130095. In *Richter*, a student filed a negligence claim against the college after tripping and falling on an uneven sidewalk. Summary judgment was granted by the trial court and affirmed by the appellate court based on a record that carefully set up a Section 2-201 immunity in favor of the community college.

The record in *Richter* reflected that the college's manager of buildings and grounds had unfettered discretion as to the handling of each sidewalk deviation, including the sidewalk in question.

The college's buildings and grounds manager testified that he had discretion to (1) place orange cones to alert individuals to deviations between sidewalk slabs; (2) apply yellow paint to the deviation; and/or (3) physically alter the sidewalk conditions, if necessary.

When notified of the subject condition, the buildings and grounds manager placed orange cones and applied yellow paint, but exercised discretion to hold off on altering the sidewalk slabs until after the final thaw of the winter season.

Thus, in *Richter*, the buildings and grounds manager had a clear policy and could support

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his decision-making process with evidence related to the specific sidewalk slabs at issue, which entitled the college to immunity under Section 2-201.

In contrast, the record in *Monson* did not reflect a decision-making process with respect to the specific sidewalk slabs where the plaintiff allegedly tripped and fell and thus the city was not entitled to immunity under Section 2-201.

The *Monson* case provides a clear roadmap for public bodies seeking to establish discretionary immunity under Section 2-201 of the Tort Immunity Act: On one hand, the city of Danville was unsuccessful in establishing discretionary immunity, because its personnel had not demonstrated specific, discretionary decisions with respect to the sidewalk area in question.

On the other hand, in citing and contrasting the *Richter* case, the court affirmed that absolute immunity under Section 2-201 of the act is not superseded by Section 3-102 of the act and is available where (1) the public body has an established policy of granting discretion to its personnel to make decisions on a case-by-case basis regarding the best course of action for reducing or eliminating risks related to trip and fall conditions and (2) the public body's employee examined the specific condition and made a discretionary judgment call based on those specific conditions.

With an investment of careful planning and foresight, any public body covered by the Local Governmental and Governmental Employees Tort Immunity Act can use this guidance to better protect itself from premises liability claims.

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