No. 120394

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

PAMELA MURPHY-HYLTON, Plaintiff-Appellee, v. LIEBERMAN MANAGEMENT SERVICES, INC., and KLEIN CREEK CONDOMINIUM, Defendant-Appellants.	)	From The Appellate Court of Illinois, First District No. 1-14-3804 There Heard on Appeal from the Circuit Court of Cook County, County Department, Law Division No. 11 L 6147 The Honorable John H. Ehrlich, Judge Presiding

AMICUS BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL

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IV. Immunity Must Be Maintained as An Affirmative Defense To Be Plead and Proven by Defendants, Not Something to be Pled Around by Plaintiffs.

Statement of Interest

The Illinois Association of Defense Trial Counsel (IDC) is made up of Illinois attorneys who devote a substantial portion of their practice to the representation of business, corporate, insurance, professional, governmental, and other individual defendants in civil litigation. For more than 50 years it has been the mission of the IDC to ensure civil justice with integrity, civility, and professional competence.

The IDC has a substantial interest in maintaining the continuity, uniformity and predictability of Illinois law. As that interest applies to the case at bar, the IDC respectfully submits that this Court should hold that the grant of immunity in the Snow and Ice Removal Act, 745 ILCS 75/2, should apply to this case, as the trial court determined. The decision of the Appellate Court in this matter improperly turned an immunity, long recognized as an affirmative defense controlled by defendants' pleadings and proofs, into something that a plaintiff was free to plead around in her complaint. The decision of this Court in this case will directly affect the interests of IDC members who are called upon to defend homeowners, business owners, condominium associations, property management companies, and those that contract for the maintenance and cleaning of properties in all manners, whether through landscaping, snow and ice removal, or other forms.

The IDC's role as a representative of the defense bar in Illinois makes it uniquely situated to address the importance of preserving the

grant of immunity codified in the Snow and Ice Removal Act.

Argument

The decision of the Appellate Court in this matter improperly turned the affirmative defense of statutory immunity into something that a plaintiff was free to plead around in her complaint. In doing so, the decision subverts the considered public policy of Illinois as expressed through the legislature, which is to use immunity as a tool to encourage private actions to benefit the common good with respect to sidewalks. These tools are especially important where, as here, common law rules encourage individual actors to pursue their own self interests in ways that are ultimately detrimental to everyone, a situation referred to as a "tragedy of the commons." In improperly reading the Snow and Ice Removal Act more narrowly than intended, the public policy of Illinois is subverted by the decision of the Appellate Court. The IDC respectfully submits, as *amicus curiae*, that the decision of the Appellate Court should be reversed and the grant of summary judgment in the trial court affirmed.

I. The Common Law Rule Regarding Natural Accumulations of Snow and Ice Created a Classic "Tragedy of the Commons" Scenario Which Incentivized Willful Neglect of Shared Spaces Like Sidewalks.

In order to fully understand how the Snow and Ice Removal Act furthers the public policy of Illinois, it is important to begin with an examination of how liability for injuries as a result of snow or ice on

property operated in absence of the Act.

Common law liability injuries resulting from natural and unnatural accumulations of snow and ice on property is no doubt well understood by this Court and will not be discussed at length. Suffice it to say that the Illinois common law held that no person was a guarantor that her property be free from natural occurring snow and ice, and if injury resulted from such conditions the fault lay with Mother Nature, not the property owner. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 227 (2010). Mother Nature not being amenable to service of process within the State of Illinois, it was recognized that, though unfortunate, there was no recovery in tort for such injuries. In contrast, the property owners' "duty is to prevent an unnatural accumulation on his property, whether that accumulation is the direct result of the owner's clearing of the ice and snow, or is caused by design deficiencies that promote unnatural accumulations of ice and snow." *Webb v. Morgan,* 176 Ill. App. 3d 378, 382–83 (5th Dist. 2010).

These principles, in practice, create perverse incentives for property owners, namely that doing nothing is a guaranteed safe course of action, whereas doing something, *anything*, to attempt to remove snow and ice or to shape the land in a way as to prevent snow and ice from forming opens the possibility of liability. In this way, the individual motives of a rational actor (namely to be guaranteed to be free from liability by letting all snow and ice collect wherever it naturally may)

conflict with the desires of the public at large (namely that the public may be able to walk about freely if each landowner undertakes to clear their own sidewalk). Such a situation is not unique to the problem of encouraging people to keep snow and ice off of their sidewalks for the benefit of all. The situation in which individuals, pursuing their own rational self-interest, eventually spoil an area for all (including themselves) has come to be known as "the tragedy of the commons."

A 1968 article in the journal *Science* (dealing with the moral and theoretical challenges of controlling global population growth) popularized the phrase, though the theoretical situation from which the title comes was actually from a little known pamphlet of an 18th Century amateur mathematician. Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243, 1243 (1968), http://science.sciencemag.org/content/sci/162/3859/1243.full.pdf. In the hypothetical, the "commons" was a public area, owned by none, and on which all the local herdsmen were free to graze their sheep. *Id.* The benefit to each herdsman of increasing the size of his flock was kept entirely by him, and the detriment to the land of each additional sheep was spread diffusely amongst everyone who grazed their flock upon the commons. As such, rational self interest would cause every herdsman to expand his flock as much as possible, eventually leading to complete overgrazing and a bareness of land to the detriment of everyone. It was explained:

> Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Id. at 1244. Thus, the "tragedy of the commons" informs us that certain situations require government or other intervention to encourage individuals to act in ways that are not entirely in keeping with their own rational self-interests, for the betterment of everyone and the maintenance of shared areas and resources.

The common law rule regarding the lack of liability for injuries caused by natural accumulations of snow and ice created just such an issue. This is not to be read as a criticism of the common law rule, which certainly has much to recommend it from the perspectives of logic and fairness. The concept that a landowner should not be liable for injuries that result from snow and ice that occur on his land naturally seems only just: who should be sued as a result of the weather, which none can control? And so too, the rules regarding unnatural accumulations: there are good reasons why we would hold that those who undertake action to relocation or reshape the natural accumulations of precipitation (or whose improvements upon property do such reshaping) should be liable for injuries if they fail to exercise ordinary care in doing so.

However, the common law rules, themselves logical and defensible, created perverse incentives that encouraged landowners to allow their land to be less safe over the alternative of making it more (but not

perfectly) safe. Those in control of sidewalks (private land over which the public traverses, so, in essence a "commons" under the control of each landowner) were therefore incentivized to do nothing in removing natural accumulations of snow and ice on those sidewalks. Doing nothing ensured the lack of liability of the actor, and yet increased the risk of harm to others. Doing something to ensure that there was not snow and ice on the sidewalk shifted the risk from others onto the actor itself, something a rational self-actor would be disinclined to do absent some other policy nudge. Accordingly, rational self-interest would dictate that no sidewalk in Illinois might ever be cleared of snow or ice.

The lesson of the "tragedy of the commons" was clearly taken up by the Illinois Legislature in passing the Snow and Ice Removal Act. Regulation of individual behavior to encourage the generation shared benefits is a task which frequently must fall to the State, as it involves policy judgments and the weighing of competing benefits that rational self-actors, considering only their own interests, often would not make. As Hardin explains, all of the responses to such problems (barring all from the commons, a lottery to access the commons, private control of the commons, &c.) are in some form objectionable, and yet, since they are less objectionable than the destruction of the resource at issue, it is imperative that *some* response be chosen. That choosing, then, must fall to the State.

II. The Public Policy of Illinois, to Encourage Care and Maintenance of Common Areas Such as Sidewalks by Private

Actors, Requires Immunity to Extend to this Case.

In applying these principles, it is clear that the decision of the Appellate Court here has undermined the stated public policy of Illinois as expressed through the Legislature in adopting the Snow and Ice Removal Act.

At the outset, it bears noting that this Court is not left to guess at what the Illinois Legislature determined to be the public policy advanced in the Snow and Ice Removal Act. The Legislature included a policy statement within the Act. "It is declared to be the public policy of this State that owners and others residing in residential units be encouraged to clean the sidewalks abutting their residences of snow and ice." 745 ILCS 75/1. To effectuate this policy, recognizing that the common law did not, the Legislature immunized conduct for which there would be liability under common law, namely negligence by one who "removes or attempts to remove snow or ice from sidewalks abutting the property...". 745 ILCS 75/2.

Mindful of its limited role as *amicus,* it not the intention of the IDC to argue the minutiae of the facts of this case, as that is clearly best left to the parties and their advocates. However, in applying the principles discussed above, it is clear that the Appellate Court has undermined the stated policies of the Legislature by reading the grant of immunity contained in the Snow and Ice Removal Act in an improperly narrow fashion.

The Appellate Court framed the case before it as containing a single issue, "whether the immunity provided by the Act only applies to those who create a danger by negligent efforts to remove natural accumulations of ice and snow or instead applies to anyone whose defective property, whether because of factors such as negligent landscaping design or maintenance, creates an unnatural accumulation of ice or snow which causes injury." *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2015 IL App (1st) 142804, ¶1.

In framing the question in this manner, the Appellate Court narrowed the scope of the Snow and Ice Removal Act beyond its words, and in doing so undermined the stated purpose of the Act. The stated purpose of the act is "that owners and others residing in residential units be encouraged to clean the sidewalks abutting their residences of snow and ice." 745 ILCS 75/1. To effectuate this purpose, it immunized any and all acts and omissions by one who "removes or attempts to remove snow or ice from sidewalks abutting the property...". 745 ILCS 75/2. What is imperative to note, and what the Appellate Court overlooked, is that the Act does not specify any methods one may or may not use within the grant of immunity. The Appellate Court appears to have considered only that one may use shovels, plows or salt to remove snow and ice from a sidewalk. While that is undoubtedly true, the Appellate Court looked at landscaping and the shaping of property in order to direct precipitation as a wholly separate activity and one which could not

fall within the meaning of the phrase ""remov[ing] or attempt[ing] to remove snow or ice from sidewalks abutting the property...". 745 ILCS 75/2. In reaching its holding, the Appellate Court narrowed the broad grant of immunity under the Snow and Ice Removal Act to be so narrow as to turn on what type of shovel the defendant wielded.

There can be no doubt that the Act immunizes negligence by one who uses a snow shovel to remove existing snow and ice from a sidewalk but does a poor job. What the Appellate Court overlooked, however, is that the landscaping and sloping of the property which the plaintiff alleged as the unnatural condition causing her injury is also within the broad grant of immunity under the Snow and Ice Removal Act. There is no limitation in the Act that one who waits until snow and ice forms is immune, but one who removes snow and ice from the sidewalks by using landscaping and grading to prevent its formation (or re-freezing) is liable. The Legislature did not specify that snow shovelers are immune but dirt shovelers are not. Rather, any act or omission undertaken to remove snow and ice from sidewalks is immune, save for the wilful and wanton. The recitation of the facts before the trial court at the summary judgment stage in the Appellate Court opinion (see ¶¶3-11) makes clear that the parties to the action understood that what was being argued was the manner in which the landscaping, downspouts and other features of the property created or controlled by the defendants were being used to move precipitation around the property in ways that it would not have moved

naturally. This is exactly the conduct that the Legislature sought to encourage. The holding of the Appellate Court directly contradicts the purpose of the Act as expressed by the Legislature: property owners would be encouraged to leave all land in its natural contours, even if that means that precipitation will be directed onto sidewalks to form unsafe conditions in the winter. This is precisely the self-interested but publicly-undesirable motivation the Legislature abolished in this context.

III. The Snow and Ice Removal Act represents a continuation of Illinois' longstanding use of civil immunity to encourage private protection of "the commons".

The Snow and Ice Removal Act fits within a larger context of a number of immunities enacted by the Legislature which fulfill the same goals of reshaping incentives to avoid "tragedy of the commons" outcomes. Viewed in this context, the error of the Appellate Court decision here becomes that much more apparent.

Chapter 745 of the Illinois Code, "Civil Immunities" shows the many ways in which the Legislature has adopted similar immunities to encourage action for the public good when the common law incentivized inaction.

Just two of the many representative examples are the ways in which the Legislature seeks to encourage volunteers, whether in a medical or a sports context. The well-worn formulations of duty in the negligence context make it apparent that no one would ever face liability for injuries that occurred because they did *not* volunteer to help with a

youth sports league. And yet, the Legislature wanted to encourage such volunteerism, even if occasionally negligent. And so, the Sports Volunteer Immunity Act was passed, raising the threshold for liability above that of ordinary negligence. 745 ILCS 80/0.01 *et seq.* As such, the strong incentive to stand by and do nothing (and thus to be guaranteed to be free of liability) was removed: one could volunteer to coach T-ball knowing that they were immune from liability even if it as ultimately determined that they failed to exercise ordinary care. 745 ILCS 80/1.

So, too, has the Legislature acted to encourage people to render volunteer medical aid to those they encounter: the classic example of the Good Samaritan from the New Testament, after which the Act was named. 745 ILCS 49/1 et seq. The Legislature made explicit what was implicit: that they sought to utilize civil immunity to encourage people to act out in the interest of the greater good, rather than out of their own self interests in avoiding liability:

> The General Assembly has established numerous protections for the generous and compassionate acts of its citizens who volunteer their time and talents to help others. These protections or good samaritan provisions have been codified in many Acts of the Illinois Compiled Statutes. This Act recodifies existing good samaritan provisions. Further, without limitation the provisions of this Act shall be liberally construed to encourage persons to volunteer their time and talents.

745 ILCS 49/2. In interpreting the Snow and Ice Removal Act as the IDC urges here, this Court will uphold the intent of the Legislature, not just as stated specifically in that Act, but also consistent with the manner in

which civil immunities are rightly used to shape private incentives in ways that benefit the greater good.

Perhaps the best indication that the Illinois Legislature intended for their grants of civil immunity to be remedies to "tragedy of the commons" situations is the fact that the Legislature granted broad immunity to people who actually operate commons for public enjoyment under the Recreational Use of Land and Water Areas Act. 745 ILCS 65/1. There, it was stated that "[t]he purpose of this Act is to encourage owners of land to make lad and water areas available to any individual or members of the public for recreational or conversation purposes by limiting their liability toward persons entering thereon for such purposes." *Id.*

There can be no doubt that the Snow and Ice Removal Act is all of a piece with these other immunities, in which private conduct is being encouraged for the public good through the grant of the knowledge that such action will be free from civil liability. Just as certain is the fact that the decision of the Appellate Court in this case runs afoul of this principle. The Appellate Court has reverted to the common law situation, where landowners are encouraged to do nothing to change the shape or the land or the natural landscaping growing thereon, even if that means that snow and ice will naturally flow onto the sidewalks. This is exactly the situation the Legislature sought to change in passing the Snow and

Ice Removal Act. As with the other examples cited herein, immunity must be read towards its overall purpose, namely encouraging private actors to act for the benefit of all, and avoiding the "tragedy of the commons."

IV. Immunity Must Be Maintained as An Affirmative Defense To Be Plead and Proven by Defendants, Not Something to be Pled Around by Plaintiffs.

As a final note, not only was the decision of the Appellate Court here wrong, it was reached through incorrect reasoning as well. It has long been recognized that the special protection afforded to defendants by civil immunities justifies placing of the burden of raising and proving the immunity on them. And, logically, an immunity is an affirmative defense: something that acknowledges the plaintiff's claim but raises other affirmative matter that avoids or defeats the claim. Somehow, the Appellate Court entirely lost sight of this, and in doing so gave plaintiffs the opportunity to plead around the public policy of Illinois as expressed through the legislature.

This Court has long held that immunities do not turn on what is included in the plaintiff's pleadings. Rather, immunities are an affirmative defense, and the defendant raising the immunity bears the burden of properly raising it and proving its applicability to the case at bar. *See, e.g., Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 370 (2003)("Because the immunities afforded to governmental entities [under the Tort Immunity Act] operate as an affirmative defense, those entities bear the burden of properly raising and proving their immunity under

the Act. It is only when the governmental entities have met this burden that a plaintiff's right to recovery is barred.") Further, Illinois courts explicitly reject the contention that a plaintiff's pleading may shift the burden or evade immunity by its contents. In a case involving immunity for discretionary acts of a public school teacher, this Court noted:

> The [school] district argues that, when legal conclusions are disregarded, the complaint does not sufficiently allege that the teacher lacked discretionary authority. However, as the movant under section 2–619, defendant has the initial burden of going forward. Moreover, immunity is an affirmative defense that defendant must plead and prove. *Defendant may not shift this burden to plaintiff by arguing that the complaint does not contain allegations to refute the affirmative defense.*

Catberro v. Naperville School Dist. No. 203, 317 Ill. App. 3d 150, 154 (2d Dist. 2000)(internal citations omitted, emphasis added).

It is only logical that, while a defendant may not shift its burden to prove its affirmative defense of immunity to the plaintiff, nor may a plaintiff be allowed to rob a defendant of the opportunity to prove immunity through crafting a complaint to avoid such facts. Where, as here, a defendant pleads and proves that its conduct falls within a recognized civil immunity, the inquiry is over and the suit must be dismissed, as the trial court recognized. When the Appellate Court revived the instant suit by noting that *the plaintiff's allegations* did not establish that immunity applied, it unwittingly eviscerated the affirmative defense of immunity created by the Snow and Ice Removal Act. This was plainly in error. It should be noted that the decision here notes only one

time that immunity was raised as an affirmative defense. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2015 IL App (1st) 142804, ¶3. Thereafter, the decision comes adrift and eventually lands on the conclusion "that allegations of negligence in a defendant's snow and ice removal efforts are required in order to trigger immunity under the Act." *Id.* ¶30.

A defendant's immunity should not depend on the plaintiff's pleadings, and Illinois has never recognized such to be the case. Allowing plaintiffs to choose to plead around immunities undermines the considered policy judgments of the legislature in apportioning risk and reward for maintaining areas for the public good.

V. Conclusion

The IDC, as *amicus curiae*, respectfully requests that the decision of the Appellate Court be reversed, and the trial court's grant of summary judgment affirmed. The public policy of Illinois, as expressed through the Legislature, is to encourage private actors to maintain clean sidewalks for the benefit of all. In adopting the Snow and Ice Removal Act, the Legislature did not determine that some shovels are immune while others are not: the goal is to encourage clear sidewalks, regardless of the manner that they are cleaned. The decision of the Appellate Court here subverts that goal, reintroducing the "tragedy of the commons" problem that existed at common law and, here, extending it to create a

tragedy of the common areas. For all of these reasons, the Illinois Association of Defense Trial Counsel urges reversal.

Respectfully submitted:

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix and pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 16 pages.

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