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## MUNICIPAL LAW GROUP

### **Illinois Supreme Court Holds That Failure to Repair A Sidewalk After Notice of Defect and Injury May be Immune From Liability if Discretion is Exercised in the Decision Not to Repair.**

#### **Monson v. City of Danville**

2018 IL 122486

Plaintiff sued the City of Danville (City) for injuries she sustained as a result of tripping and falling on a sidewalk that the City owned and maintained. On December 7, 2012, plaintiff went shopping, and when she walked towards the curb where she had parked her car, she walked into an inch of water. Plaintiff then felt her shoe strike something, which caused her to lose her balance, fall forward, and hit her chin on the sidewalk.

Plaintiff brought suit against the City and claimed that the City was negligent and their failure to repair the uneven seam between two slabs of sidewalk concrete was the direct and proximate cause of her fall. The Circuit Court granted summary judgment in the City's favor, finding that it was immune under the Local Government and Governmental Employees Tort Immunity Act ("Act"), Sections 2-109 and 2-201 (745 ILCS 10/2-109; 2-201) because the City exercised discretion in deciding not to repair the sidewalk at issue. Plaintiff appealed, arguing that the circuit court inappropriately applied the Act. The Appellate Court affirmed. The Appellate Court found that the repair of uneven seam between two slabs of sidewalk was a discretionary function, rather than ministerial, such that the City was entitled to immunity under Section 2-109 and 2-201 of the Tort Immunity Act which absolutely immunizes discretionary acts.

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The Illinois Supreme Court reversed and remanded the case to the Circuit Court for further proceedings. The Court noted that the City had reviewed the sidewalk in the area of the Plaintiff's fall in 2012 and made the determination not to repair that portion of the sidewalk. However, the City did not present any evidence documenting the decision and the reasons not to repair the particular section of sidewalk at issue in this case. The Court reasoned that depending on the facts, decisions involving repairs to public property can be discretionary matters subject to immunity under section 2-201. A public entity claiming immunity for an alleged failure to repair a defective condition must, however, present sufficient evidence that it exercised discretion in making the decision not to perform the repair. The Court held that the failure to present such evidence is fatal to the immunity defense. The Court stated that without evidence of why a decision not to repair was made, nearly every failure to maintain public property could be described as an exercise of discretion. The Court reasoned that because the City did not present any evidence documenting the decision not to repair the particular section of the sidewalk where plaintiff fell, the City is not entitled to summary judgment based on its claim of 2-201 discretionary immunity.

The Illinois Supreme Court's holding in *Monson v. Danville* maintains the viability of 2-201 absolute immunity in the context of allegedly defective public property; however, the holding emphasizes the need for evidence of discretion having been exercised in a public entity's decision not to repair. We recommend that a written policy be created that sets out factors on which decisions to repair public property are based. Any decision not to repair should be documented with the relevant factors from the policy carefully identified. Such evidence will assist defense counsel in proving the applicability of 2-201 absolute immunity in a personal injury action.