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When is a Riding Trail Really a Riding Trail?

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Heyl Royster

This is a question many park districts in Illinois are asking. Under the Illinois Local Governmental and Governmental Employees Tort Immunity Act (hereinafter "Tort Immunity Act"), "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, recreation, 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. (b) Any hiking, riding, fishing or hunting trail." 745 ILCS 10/3-107.

This provision, if applicable, would afford absolute immunity to claims of injuries on a riding trail. In the alternative, the riding trail would be afforded partial immunity under the recreational property immunity provision. The Tort Immunity Act states, "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." 745 ILCS 10/3-106.

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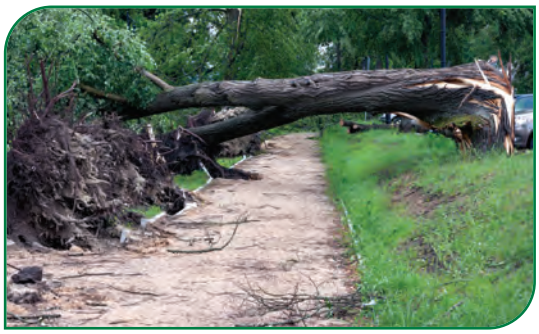
Over the years, the move toward a more active, healthy and "green" society, along with a nationwide effort to convert abandoned railroad right-of-ways into trails, has created over 940 miles of trails in Illinois. http://www.railstotrails.org/our-work/united-states/illinois/#state and https://www.dnr.illinois.gov/publications/documents/00000642.pdf The Tort Immunity Act grants immunity to local public entities, including park districts, for incidents that occur as a result of a condition of their riding trails. However, the Illinois appellate courts have had a difference of opinion as to what type of immunity riding trails are afforded: absolute immunity as a riding trail or immunity from standard negligence under the recreational property immunity provision?

Envision a 15.5-mile asphalt trail that is used by bikers, skaters, walkers and runners. The trail links with several others, affording the user access to over 100 miles of continuous trails. The 15.5-mile paved trail passes through and by old growth forests, a local park with a pond, neighborhoods, businesses, public roadways and a State Park with a lake. Is this trail a riding trail under the Tort Immunity Act?

The Appellate Court Decisions

In *Goodwin v. Carbondale Park District*, the plaintiff was injured when his bicycle collided with a tree that had fallen across a paved bike path that went through a city park. *Goodwin v. Carbondale Park District*, 268 Ill. App. 3d 489, 490 (5th Dist. 1994). The trial court dismissed plaintiff's complaint, holding in part that the defendant was immune under section 3-107(b) of the Tort Immunity Act because the path was a riding trail. *Id.* However, the Fifth District of the Illinois Appellate Court reversed the dismissal, holding that "the paved bike path located in a developed city park" was not a riding trail. *Id.* at 492. The court reasoned that section 3-107(b) was intended to apply to "unimproved property which is not maintained by the local governmental body and which is in its natural condition with obvious hazards as a result of that natural condition." *Id.* at 493. The court concluded that, given this reasoning, the legislature did not intend section 3-107(b) to include a paved bike path within a developed city park. *Id.* at 493-94.



The First District of the Illinois Appellate Court held in *Brown v. Cook County Forest Preserve* that section 3-107(b) immunized the defendant from liability for an injury that the plaintiff suffered when he hit a bump and fell while riding on a bicycle path in the Saulk Trail Woods Forest Preserve. *Brown v. Cook County Forest Preserve*, 284 Ill. App. 3d 1098, 1099 (1st Dist. 1996). The court relied on the dictionary definition of "trail" as "a 'marked path through a forest or mountainous region.'" *Id.* at 1101 (quoting *Webster's Third New International Dictionary* 2423 [1981]). It concluded that the bike path on which the plaintiff had been riding met this definition because it was "designed to provide access for bicyclists to the natural and scenic wooded areas around Saulk Lake." *Id.* It was not material to the court that the path was paved and the court was not persuaded to hold for the plaintiff merely because the path was adjacent to a highway. *Id.* at 1099. The court distinguished the case from *Goodwin* by explaining that the *Goodwin* court had stressed that the bicycle path in question had traversed a developed city park. *Id.* at 1101.

Likewise, in *Mull v. Kane County Forest Preservation District*, the court held that the forest preserve was immune under section 3-107(b) when the plaintiff fell while riding on a 17-mile forest-preserve bicycle path. *Mull v. Kane County Forest Pres. Dist.*, 337 Ill. App. 3d 589 (2d Dist. 2003). The fact that the bicycle path was adjacent to a road and that the entrance to a subdivision was near the path was not crucial to its decision. *Id.* at 592-93. What was crucial to the court was that the path was "surrounded by wooded or undeveloped land and [ran] through a forest preserve." *Id.* at 592.

The Second District of the Illinois Appellate Court has further departed from the *Goodwin* court's holding that a trail must be "unimproved" to qualify as a riding trail under section 3-107(b) and instead endorsed the dictionary definition of "trail" as cited in *Brown*. *McElroy v. Forest Pres. Dist. of Lake County*, 384 Ill. App. 3d 662, 667 (2d Dist. 2008). The court reasoned that "rarely, if ever, is a 'riding trail' found in nature without any improvements

to make the trail accessible and safe to the public." *Id.*

In a 2016 decision, the Second District held that a trail need not be unpaved to qualify as a riding trail and that the character of a path as a riding trail is not automatically defeated by the existence of any development in the surrounding area. *Corbett v. County of Lake*, 2016 IL App (2d) 160035, ¶28 (2d Dist. 2016). However, the court also held that because the riding trail at issue was surrounded by narrow bands of greenway, industrial development, residential neighborhoods, parking lots, railroad tracks and major vehicular thoroughfares, the trail did not qualify as a riding trail under section 3-107(b). *Id.* at ¶29.

Under these Appellate Court decisions, whether our hypothetical 15.5-mile paved trail was considered a riding trail under the Tort Immunity Act and was provided absolute immunity really depended on where in the state that trail was located and what type of land surrounded the trail.

Recent Illinois Supreme Court Decision

Corbett v. County of Lake was appealed to the Illinois Supreme Court. The Court issued its decision on November 30, 2017. *Corbett v. County of Lake*, 2017 IL 121536. As one local director of over 100 miles of shared-use trails told me, the decision was "the trail Grinch ruining Christmas."

In *Corbett v. County of Lake*, the Illinois Supreme Court resolved the differences between the Appellate Court decisions discussed above. The Court held that the inclusion of the words "hiking," "fishing," and "hunting" in the same sentence as "riding" indicated that the legislature intended to apply blanket immunity only to primitive, rustic, or unimproved trails. The court concluded that, under the Tort Immunity Act, absolute immunity for "trails" applied only to rustic trails in their natural environment and did not include paved or otherwise finished trails, such as those designated for on-road bicycles. In other words, shared-use bike paths intended for bicycles, pedestrians, and in-line skaters are not considered riding trails under the Tort Immunity Act and are not afforded absolute immunity.

The Future of Litigation for Riding Trails

Although absolute immunity no longer applies to our hypothetical 15.5-mile trail, the recreational immunity provision of the Tort Immunity Act still applies. This means that a Plaintiff will need to prove that the governmental entity was willfully and wantonly negligent and that this willful and wanton negligence was the proximate cause of Plaintiff's damages

This was addressed recently by the Illinois Supreme Court in *Cohen v. Chicago Park District*. *Cohen v. Chi. Park Dist.*, 2017 IL 121800. The plaintiff was riding his bicycle on the Lakefront Trail, a shared-use path that runs along the shore of Lake Michigan in Chicago, when his front wheel caught in a crack in the pavement and he fell. Plaintiff alleged that the Chicago Park District acted willfully and wantonly in failing to maintain the path and was therefore responsible for the injuries that resulted from his fall.

The Court held that the Chicago Park District was immune from suit under the recreational property provision of the Tort Immunity Act because, while the park district was not afforded absolute immunity for conditions of the trail under the riding trail immunity provision, the park district's conduct in repairing the crack could not be deemed willful and wanton and there were no prior injuries involving the crack, which would have alerted the park district to any extraordinary risk or danger to the users of the path.

Conclusion

While unfortunately, the paved shared-use trails throughout the state are not protected with absolute immunity, they still are partially protected under the recreational property immunity provision of the Tort Immunity Act. Cases brought by those allegedly injured on these trails are still very defensible. However, based on the ruling in *Corbett v. County of Lake*, only an amendment to the Tort Immunity Act by the Illinois Legislature granting immunity to these shared-use paths will allow for the absolute immunity of the hundreds of miles of paved riding trails in the state of Illinois.

Heather Mueller-Jones concentrates her practice in civil litigation, and trial as well as ADR settings, including personal injury, professional liability and product liability defense. Her focus includes representing individuals, business and governmental entities in the defense of civil litigation claims throughout Illinois and Missouri.

Heather joined Heyl Royster in 2016 as Of Counsel. Before joining Heyl Royster, Heather worked at a mid-sized defense firm in the St. Louis Metro East area, where she represented clients, including governmental entities, in the defense of personal injury and product liability claims throughout Illinois and Missouri. Heather has first- and second-chair trial experience. She has obtained defense verdicts in several mandatory arbitrations, and argued and won summary judgment motions, in state court venues such as Madison County, Illinois, and in the United States Federal Court, Central District of Illinois. Heather has also written and argued appeals in the Fifth District of Illinois.