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## It Means What it Says: The Proper Definition of Willful and Wanton Misconduct under the Tort Immunity Act

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### Introduction

The Illinois Supreme Court reaffirmed the meaning of “willful and wanton” misconduct in the context of section 3-108 of the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/3-108 in *Barr v. Cunningham*, 2017 IL 120751. The unanimous opinion in *Barr* should remind practitioners—and lower courts—not to lose sight of the common sense implications of the willful and wanton exception.

### Facts of the Case

The facts of *Barr* are straightforward. The plaintiff, a Conant High School student, was injured while playing floor hockey during a physical education class. *Barr*, 2017 IL 120751, ¶ 3. More particularly, he suffered a permanent injury when a ball deflected off of his hockey stick and struck him in the eye. *Id.* at ¶ 4. The game itself did not appear particularly dangerous: the players used “squishy” safety balls instead of pucks and plastic hockey sticks instead of wooden ones. *Id.*

Cunningham, a physical education teacher, supervised the game. *Id.* She enforced safety rules prohibiting high sticking, checking, jabbing, slashing, tripping, and the bending of sticks. *Id.* at ¶ 6. She also encouraged students to keep the ball on the floor, and used a whistle to stop play in the event of a rules violation. *Id.* Although a box of safety goggles was stored nearby with the floor hockey equipment, no student used the goggles and Cunningham did not encourage them to do so. *Id.* at ¶ 5.

No direct evidence suggested that the goggles were purchased by the school district for use in floor hockey games, and the plaintiff admitted that he probably would not have used them had he known he had the option of doing so. *Id.* Cunningham believed the use of safety balls negated the need for protective eyewear, and no school or district policy required their use. *Id.* at ¶¶ 6, 8. Prior to this incident, no Conant student had suffered an eye injury resulting from a lack of protective eyewear. *Id.* at ¶ 8.

*Barr* filed a personal injury action in the Circuit Court of Cook County against the school district and Cunningham. *Id.* at ¶ 1. Both raised as affirmative defenses the statutory immunities provided by sections 2-201 and 3-108 of the Tort Immunity Act. 745 ILCS 10/2-201, 3-108. *Id.* at ¶ 3. Section 3-108 provides immunity for the supervision of an act occurring on public property. It states:

- (a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

745 ILCS 10/3-108. “Willful and wanton conduct” is defined elsewhere in the Tort Immunity Act as “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.” 745 ILCS 10/1-210.

This action proceeded to a jury trial and, upon the close of all evidence, the court granted the defendants’ motion for a directed verdict as to section 3-108 of the Tort Immunity Act. *Barr*, 2017 IL 120751, ¶ 9. The trial court cited the plaintiff’s failure to present evidence of willful and wanton conduct as the basis for its decision. *Id.*

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### Decision of Illinois Appellate Court, First District

The plaintiff appealed the trial court's ruling. A divided Illinois Appellate Court found that the Cunningham's conscious decision not to require students to wear safety goggles could be considered by a jury to constitute willful and wanton conduct. *Id.* at ¶ 10. It thus found error in the trial court's decision to direct a verdict in favor of the defendants, and remanded the case for a trial on the merits. *Id.*

The court initially acknowledged that, although the “willful and wanton conduct” question is typically one of fact, a verdict may be directed on this issue if the evidence, when viewed in the light most favorable to the non-movant, “so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.”

### Decision of the Illinois Supreme Court

The Illinois Supreme Court granted the defendants' petition for leave to appeal and allowed the Illinois Trial Lawyers Association, the Park District Risk Management Agency, and the Illinois Governmental Association of Pools to weigh in as *amici curiae*. *Id.* at ¶ 11. The court initially acknowledged that, although the “willful and wanton conduct” question is typically one of fact, a verdict may be directed on this issue if the evidence, when viewed in the light most favorable to the non-movant, “so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.” *Id.* at ¶ 15.

The plaintiff argued that substantial fact questions existed as to whether Cunningham demonstrated a conscious disregard for the students by not requiring their use of safety goggles during the game. *Id.* at 16. He pointed to the fact that the goggles were conveniently stored with the other floor hockey equipment as indicative of their intended use. *Id.* He also argued that, since evidence suggested that Cunningham knew the safety ball occasionally flew into the air, her failure to require use of the goggles raised a question for the jury. *Id.* at ¶ 19. In straightforward fashion, the supreme court rejected both arguments. *Id.* at ¶¶ 16, 19.

The court recounted the safety measures already in place, such as the rules Cunningham enforced and the students' use of plastic hockey sticks and “squishy” safety balls, as credibly supporting Cunningham's determination that goggles were not needed. *Id.* at ¶ 17. Under those circumstances, her belief that a serious eye injury was not within the realm of possibility was entirely reasonable. There was no “conscious disregard” for student safety because the evidence established that Cunningham “consciously considered” student safety. *Id.* Even if her precautions ultimately proved inadequate, the safety-related actions she did take rebutted any notion of willful and wanton conduct. *Id.* at ¶ 18.

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The court further discussed how, at its simplest, willful and wanton conduct is viewed as the failure to take reasonable precautions after knowledge of some impending danger. *Id.* at ¶ 20 (citing *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 449 (1992); *Lynch v. Bd. of Education of Collinsville Comm. Unit Dist. No. 10*, 82 Ill. 2d 415, 429 (1980)). It criticized the appellate court for its view that willful and wanton conduct may be found in the absence of either specific notice of inherent danger or a prior injury. Although an earlier injury need not take the same form, there must be, "at minimum, some evidence that the activity is generally associated with a risk of serious injuries." *Barr*, 2017 IL 120751, ¶¶ 20-21. Such evidence, the court noted, was present in *Murray v. Chicago Youth Center*, 224 Ill. 2d 213(2007) (improperly taught and supervised use of a mini-trampoline, a device well known for its associated risk of spinal cord injuries, suggested the possibility of willful and wanton conduct and precluded summary judgment for the defendants) and *Hadley v. Witt Unit School District 66*, 123 Ill. App. 3d 19 (5th Dist.1984) (industrial arts teacher's failure to stop or instruct students from engaging in the dangerous act of attempting to pound a piece of scrap metal through a hole in an anvil without supervision or eye protection raised the potential of willful and wanton conduct for a jury's consideration). *Id.* at ¶¶ 21-22.

Here, the evidence failed to show that anyone was on notice of a danger posed to students from playing floor hockey with plastic hockey sticks and "squishy" safety balls. *Id.* at ¶ 23. Likewise, there was "no evidence at all of prior injuries" at the school resulting from the game "under any circumstances." *Id.* at ¶ 20. To the contrary, the evidence showed that students had frequently played the same game with the same equipment without injury. *Id.* In light of these conclusions, the supreme court reversed the appellate court and affirmed the trial court's directed verdict in favor of the defendants. *Id.* at ¶ 27.

### Conclusion

For the Illinois Supreme Court, *Barr* was not a close case. Willful and wanton conduct should not be treated lightly, and counsel is advised to use the guidance provided by *Barr* in furtherance of the defenses afforded by the Tort Immunity Act. ■



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