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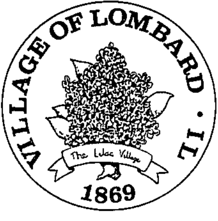

To: Chairperson and Transportation and Safety Committee

Through: Wes Anderson, Director of Public Works

From: Nikki N. Graham, Civil Engineer

Date: December 7, 2006

Subject: Proposed Lilac Bikeway

The T&S Committee is evaluating the proposed Lilac Bikeway and Bike Routes in general to ultimately make a recommendation on implementation to the Village Board. One aspect of designated on-street bike routes is the liabilities associated with intended users versus permitted users.

In the Village, the intended users of roadways are motor vehicles. Pedestrians and bicycles are permitted users. Facilities, such as roads, need to be maintained to a reasonable level for only intended users. If the Village designates bike routes, the intended users then include bicycles. The designated routes and any routes of travel to get from one route to another or to any facilities that bicyclists could be expected to go to would then have to be maintained to the higher standard associated with bicycles.

Attached is a copy of a recent Appellate Court decision provided by Tom Bayer, Village Attorney, that discusses what actions by a municipality may cause the immunities provided by the Local Governmental and Governmental Employees Tort Immunity Act to be lost. As noted in the document (page 8), once the path has been established and bicyclists are considered intended users, the Village is required to "maintain its property in a reasonably safe condition".

Public Works will need to conduct an initial survey and make all necessary improvements and then continue with on-going, regularly scheduled follow-up inspections to ensure the reasonably safe condition. The inspection would include, but not be limited to, major street crossing, grate hazards, pot holes and on-street parking. Also, existing laws affecting bicycling and enforcement programs should be examined.

NG

cc: David P. Gorman, PE, Development Engineer
Jack Cook, Chairman, Ad Hoc Trails Committee
David Hulseberg, AICP, Asst. Village Mgr./Dir. of Community Development

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MEMORANDUM

To: Wes Anderson, Director of Public Works, Village of Lombard

From: Tom Bayer, Village Attorney

Date: November 27, 2006

Subject: **Municipal Liability for Bicycles on the Roadway**

As a follow-up to our discussion on November 14, 2006, relative to the above-captioned matter, enclosed please find a copy of the recent Appellate Court decision that I was referring to, McLean v. City of Peoria. As the ruling was issued as an "order" as opposed to a "decision," it will not be published. However, it contains a good discussion of this area of the law, and what actions by a municipality may cause the immunities provided by the Local Governmental and Governmental Employees Tort Immunity Act to be lost.

If there are any questions, please feel free to call.

encl.
cc: Dave Dratnol, Village Engineer (w/ encl.)
John Johnson, Technical Services Supervisor (w/ encl.)

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NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Re-hearing or the disposition of the same.

3--05--0862

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2006

BLAIR MCLEAN,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	For the 10th Judicial Circuit
	)	Peoria County, Illinois
v.	)	
	)	No. 00-L-333
CITY OF PEORIA, an Illinois Municipal Corporation,	)	
	)	
	)	
Defendant-Appellant.	)	Honorable Michael E. Brandt
	)	Judge, Presiding

ORDER

Plaintiff Blair McLean was injured while riding his bicycle on a street in the City of Peoria (the City). The tire of McLean's bicycle caught in the slotted opening of a sewer grate causing him to be thrown over the bicycle's handlebars. McLean brought a cause of action for negligence against the City. A jury found McLean 25% contributorily negligent and awarded him damages in the amount of $48, 750. The City filed a motion for a judgment notwithstanding the verdict or in the alternative a new trial. The trial court denied the City's motion and the City follows with this appeal.

FACTS

Following a bicycle accident on a Peoria city street, plaintiff Blair McLean filed a cause of action for negligence against the City. At the ensuing jury trial, the following evidence was adduced. McLean testified that, on October 2, 1999, McLean and a bicycling partner set out for a cycling day

trip they had planned using a "Peoria Bicycling Map and Resource Guide." The route McLean and his partner planned consisted of a loop of approximately 12 miles around the downtown area of Peoria. The route took them from Gardner Lane to Prospect Road, south on Prospect to Forrest Hill Avenue and west on Forrest Hill to University Street. McLean testified he was riding a touring bicycle equipped with skinny wheels and rims. He was wearing a helmet, protective gloves and bike shorts.

At the time of the accident, McLean was riding in front of his partner and they were traveling northbound on University Street. There was a white line painted on the roadway approximately two feet from the curb. McLean stated he was riding to the right of the white line. In anticipation of a left turn onto Marlene Avenue, which was a block and a half ahead of him, McLean accelerated and prepared to merge to the left. He was biking at approximately 19 to 20 miles per hour. McLean testified he looked back to his partner to ask where they were supposed to turn and to check for vehicles directly behind him or in his "blind spot." When he turned forward again, the front tire of his bicycle became lodged in a slot in a sewer grate causing the bicycle to abruptly halt; this in turn, caused McLean to eject over the handlebars of the bicycle. McLean recalled hitting the concrete with his elbows. He awoke on his back on the sidewalk. His partner told him he had been unconscious for approximately three minutes.

McLean testified that the portion of University Street where the accident occurred is reasonably flat. McLean stated there was no vehicular traffic in the right hand lane as he approached the sewer grate and there was nothing covering the sewer grate to obstruct his view of it. McLean testified he was momentarily distracted when he looked back to inquire about the turn and he did not see the grate before the accident. McLean admitted, that as a motorist, he had observed sewer grates

along the streets of Peoria before the accident. The posted speed limit for University Street is 40 miles per hour. Following the accident, McLean was taken by ambulance to the hospital. He suffered numerous injuries and eventually had surgery performed on his right shoulder. Testimony regarding McLean's injuries and surgery and evidence of his medical bills were introduced at the trial.

Eugene Cummings also testified at trial. Cummings, who was retired at the time of the trial, acted for 15 years as the supervisor in the City's department of public works, street division. As part of his duties, Cummings oversaw the replacement of sewer grates. According to Cummings, the City has a program to replace straight sewer grates (grates with slots running parallel to the roadway) with diagonally slotted grates. Cummings testified that around 1988 and 1989, there were "a couple" accidents involving bicycle riders encountering straight sewer grates. Cummings admitted that as a result of these accidents the City was aware of the hazard the straight grates posed to bicyclists. In a catalog put out by a major supplier of the City's sewer grates, it was recommended that straight sewer grates not be used for bicycle traffic.

Cummings testified that between 1990 and 1992, the City purchased repair kits for every straight sewer grate in Peoria. There are an estimated 8,000 sewer grates throughout the City. The repair kits consisted of metal straps that were installed across the straight grates. Typically, three strips were installed per grate. Cummings stated the sole purpose of installing the repair kits was to make the grates safer for the passage of bicycles. Cummings testified the repair kits were installed throughout the City, including on every straight sewer grate along University Street. No records were kept of the installation of the repair kits. The last time Cummings directed the installation of repair kits was in 1992. Before trial, a box containing approximately 1,000 repair kits was found in a storage area of the sewer department. Cummings testified the City later found, that particularly

where the grates were level with the pavement, snow plow equipment peeled the repair strips off the grates. Remnants of the repair kits remain on some of the City's streets.

Stephen Van Winkle, director of public works for the City, also testified. Van Winkle testified about memos he had written in 1990, 1991 and 1992, in which he requested the city council of Peoria authorize the purchase of repair kits for the sewer grates. Van Winkle admitted the purchase of the repair kits was an acknowledgment that sewer grates with openings parallel to the roadway were hazardous to bicyclists. Van Winkle also testified the map of bicycle paths published by the City in 1996 was for information only, and the city council had not enacted any ordinances or codes with respect to the map.

Albert Schneider also testified. Before Schneider retired as a traffic design engineer from the City in 2003, his responsibilities included management of traffic movement, traffic signal design, traffic sign placement and design, and pavement marking. Schneider testified he was involved in the creation of the "Peoria Bicycling Map and Resource Guide." In developing the guide, the City consulted the Illinois Department of Transportation, the Peoria County Highway Department, the Illinois Valley Wheelmen and the Tri-County Regional Planning Commission.

Schneider testified the primary goal of the bicycle map was to direct cyclists to various points of interest, including schools, parks, and recreational centers, using residential streets whenever possible. He also acknowledged as a goal of the project, the establishment of a network of routes that would allow cyclists to ride no more than one-half mile to reach an established bicycle route. Schneider admitted the bicycle map project contemplated cyclists would have to routinely use non-bicycle paths in order to access established bicycle routes and attractions. Schneider stated the bicycle map was for information only. Originally, it was intended the map would be updated regularly,

however the map was never revised.

Schneider stated the bicycle map indicated bicycle routes by either red, yellow or green lines (Classes I, II and III), depending on the degree of ease with which a cyclist might use the route. Class III or green routes are the most numerous of the designated bicycle routes and are routes on which the cyclist must share the street with motor vehicles. Class III routes are designated with rectangular street signs on which is depicted a bicycle on a green background and the words "Bike Route." Schneider pointed out University Street is not designated on the map as any class of bicycle route, an indication that it had been determined University was not an appropriate bicycle route street.

(*) Area where the bike was was not a bike route

Schneider testified that posted on University Street there are 16 diamond shaped signs depicting a black bicycle against a yellow background. According to Schneider, these signs indicate crossings where University Street intersects with a designated bicycle path. The design of these signs is based on the federal government's manual of uniform traffic control devices, and the signs are considered warning signs for motorists. The signs are, at times, located adjacent to an intersection of a bicycle path that crosses University Street and, at times, are located a block or more in advance of these intersections.

Before the commencement of the jury trial, the city sought, through a motion *in limine*, to preclude the introduction of the evidence and testimony regarding the City's purchase of repair kits and the installation of the kits on the sewer grates. The trial court denied the City's motion. At the close of McLean's evidence, the City sought a directed verdict, which the trial court also denied. After the close of the evidence, the jury determined McLean was 25% contributorily negligent and awarded him damages in the amount of $48, 750. The City moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court again denied the City's motion and the

City follows with this appeal.

ANALYSIS

The first issue raised by the City is whether the trial court erred in denying the City's motions for a directed verdict and a judgment notwithstanding the verdict. Directed verdicts and judgments notwithstanding verdicts should be entered in only those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. Pedrick v. Peoria & E.R. Co., 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). A trial court should not reweigh evidence and set aside a verdict just because the jury could have drawn different conclusions or inferences from the evidence or because the court feels another result would have been far more reasonable. Kamp v. Preis, 332 Ill. App. 3d 1115, 1120, 774 N.E.2d 865, 870 (2002).

Similarly, the appellate court should not usurp the jury's role on questions of fact that were fairly submitted, tried and determined from the evidence, which did not overwhelmingly favor either position. Kamp, 332 Ill. App. 3d at 1120, 774 N.E.2d at 870-71. If there is any evidence, which, standing alone and considered to be true, together with the legitimate inferences that the jury may draw from it, fairly tends to support the verdict of the jury, a motion for a directed verdict or a judgment notwithstanding the verdict may not be resolved against the plaintiff. See Seeds v. Chicago Transit Authority, 409 Ill. 566, 570-71, 101 N.E.2d 84, 87 (1951) (stating that the question may be resolved against the plaintiff's verdict only when it appears the facts bearing on the question are not in dispute and that reasonable men would draw the same inference from such undisputed facts.) We apply a *de novo* standard when reviewing rulings on motions for directed verdicts and judgments notwithstanding the verdict. Evans v. Shannon, 201 Ill. 2d 424, 427-28, 776 N.E.2d 1184, 1186

(2002).

The parties agree that the liability of the City depends on whether it owed a duty to McLean under section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (the Act). 745 ILCS 10/3-102(a) (West 2002). Section 3-102(a) of the Act provides, in part: "[A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of the people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used." 745 ILCS 10/3-102(a) (West 2002). The City contends a directed verdict or judgment notwithstanding the verdict is the appropriate disposition for this cause of action because the undisputed evidence showed McLean was not an intended user of the street where he was injured.

Language from Tort Immunity Act

Section 3-102(a) of the Act imposes a duty of ordinary care on municipalities only for uses that are both permitted *and* intended (emphasis in original). Boub v. Township of Wayne, 183 Ill. 2d 520, 524, 702 N.E.2d 535, 537 (1998). An intended user of property is, by definition, also a permitted user; however, a permitted user of property is not necessarily an intended user. Boub, 183 Ill. 2d at 524, 702 N.E.2d at 537. It is the intent of the local public entity that is controlling in determining whether a user is both a permitted and intended user of property. Boub, 183 Ill. 2d at 525, 702 N.E.2d at 538. In determining whether a particular use was permitted or intended, it is appropriate to look at the physical manifestations of the property, such as pavement markings and signs. See Diefendorf v. City of Peoria, 308 Ill. App. 3d 465, 470-71, 720 N.E.2d 655, 659-660 (1999) (finding, in part, that under the circumstances of plaintiff's injury, neither the physical manifestations of the sidewalk nor the "Peoria Bicycling Map and Resource Guide" supported plaintiff's contention that bicyclists were intended users of the sidewalk); Boub, 183 Ill. 2d at 528-29,

702 N.E.2d at 702 N.E.2d at 539 (finding no special pavement markings or signs indicated bicyclists, like motorists, were intended to ride on the rural road/bridge where plaintiff's injury took place).

In the instant case, the evidence indicated, in part, a fact the City conceded: during the period when the City was installing repair kits on the sewer grates, bicyclists were intended users of the city streets. The City had been aware of previous bicycle accidents involving sewer grates and from 1990 through 1992 had purchased enough repair kits to modify all the straight sewer grates in the City. A former city supervisor testified that all the sewer grates on University Street had at one time been modified with the repair apparatus. The only function of the sewer grate repair kits was to make the grates safe for bicycles. The City contends that the subsequent publication of the "Peoria Bicycling Map and Resource Guide," and the fact that the City stopped installing repair kits after 1992, indicates that, by the time of McLean's accident, the City had abandoned any efforts to make all of its streets available to cyclists as intended users.

Despite the City's assertion, we believe the jury could have legitimately inferred, from the evidence of the City's purchase and installation of the sewer grate repair kits, that the City's intention that cyclists were intended users of the streets continued through the time of McLean's injury. We do not view the bicycle map as a definitive indicator of the City's intent. Furthermore, the City's former traffic design engineer testified that when the City published the map, it contemplated cyclists would have to navigate routes other than those it had classified as bicycle routes in order to visit suggested sites of interest; therefore, the jury may have reasonably inferred the City intended cyclists as the reasonably foreseeable users of these non-designated routes. For these reasons, we cannot conclude the evidence, when viewed in its aspect most favorable to McLean, so overwhelmingly favors the City that no contrary verdict could ever stand. The trial court did not err in denying the

City's motions for a directed verdict and a judgment notwithstanding the verdict.

The City's second issue on appeal is whether the trial court erred in denying the City's motion *in limine*. McLean asserts the City has waived this issue because it failed to raise a contemporaneous objection when the evidence of the repair kits was introduced at trial. See Lundberg v. Church Farm, Inc., 151 Ill. App. 3d 452, 460, 502 N.E.2d 806, 812 (1986) (stating that where no objection is made to improper evidence at the time of its admission, the objection is waived). Waiver, however, is a limitation on the parties and not the courts. In re Marriage of Sutton, 136 Ill. 2d 441, 446, 557 N.E.2d 869, 871 (1990). In the present case, it appears from the record of the procedural history, the City may have genuinely interpreted the court's rulings as conclusively admitting the evidence, leaving the City with no alternative except to elicit further testimony with respect to the repair kits in an effort to mitigate McLean's inferences. For this reason we consider the City's second issue.

The City contends the trial court erred as a matter of law in admitting the evidence of the repair kits because the evidence was neither relevant, as it merely demonstrated the City's concern for cyclists as permitted users of the streets, nor probative, as the installation of the kits ceased years before McLean's accident. We find the City's arguments unavailing. It is undisputed the repair kits were installed solely for the safety of the bicycle user and whether the City later decided bicyclists were no longer intended users of the streets was a question properly put to the jury. We view the trial court's determination of this matter as within its inherent power to admit or exclude evidence. See Simmons v. Garces, 198 Ill. 2d 541, 570, 763 N.E.2d 720, 738 (2002) (stating it is within the discretion of the trial court to make evidentiary rulings). As an evidentiary ruling, the trial court's denial of a motion *in limine*, in general, will not be disturbed absent a clear abuse of discretion. Beehn v. Eppard, 321 Ill. App. 3d 677, 680, 747 N.E.2d 1010, 1013 (2001). For the reasons stated, we do

not believe the trial court abused its discretion in denying the City's motion.

The City's third and final issue on appeal is whether the jury's apportionment of only 25% of the negligence to McLean was against the manifest weight of the evidence. Questions of fact decided by a jury are reviewed under the deferential manifest weight of the evidence standard. Joel R. by Salazar v. Board of Education of Mannheim School District 83, Cook County, Ill., 292 Ill. App. 3d 607, 613, 686 N.E.2d 650, 655 (1997). A verdict is against the manifest weight of the evidence where, in viewing the evidence in a light most favorable to the prevailing party, an opposite conclusion is clearly apparent, or the fact-finder's finding is palpably erroneous and wholly unwarranted, is clearly the result of passion or prejudice or appears to be arbitrary and unsubstantiated by the evidence. Salazar, 292 Ill. App. 3d at 613, 686 N.E.2d at 655. We need only determine whether the fact finder's decision was a reasonable one. Salazar, 292 Ill. App. 3d at 613, 686 N.E.2d at 655.

In the instant case, the City contends McLean's portion of negligence should have been higher because he knew that sewer grates were present, he failed to keep a proper lookout and he was traveling too fast for conditions. On the other hand, as McLean points out, the City knew the sewer grates were hazardous for bicyclists and had failed to correct the problem to ensure the streets were reasonably safe for the use of cyclists, who, the jury found, were intended users of the street. We conclude the jury's apportionment of 25% of the negligence to McLean was not unreasonable and, therefore, not against the manifest weight of the evidence.

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.

O'BRIEN, J., with LYTTON and HOLDRIDGE, JJ., concurring.