2018 IL App (5th) 170070-U

NO. 5-17-0070

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MADALYN M. MORRIS, Plaintiff-Appellant and Cross-Appellee, v. ELLARETTA G. AYDT, Defendant-Appellant and Cross-Appellee, and JOE D. BERRY, Deputy Sheriff of Washington County, Illinois; DANNY BRADAC, Sheriff of Washington County, Illinois; and THE COUNTY OF WASHINGTON, State of Illinois, Defendants-Appellees and Cross-Appellants.	)	Appeal from the Circuit Court of Washington County. No. 15-L-2 Honorable Daniel J. Emge, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Section 5-106 of the Local Governmental and Governmental Employees Tort Immunity Act provides immunity from liability for negligence only in the context of fire protection or rescue services. Genuine questions of material fact remained as to whether an officer was enforcing or executing a law when he responded to a 9-1-1 call where no contact was made with the caller. Genuine questions of material fact existed concerning whether the officer's conduct was willful and wanton.

¶ 2 This appeal involves the applicability of two provisions in the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 *et seq*. (West 2014)) in litigation over a vehicle accident involving a police officer who was responding to a 9-1-1 call. The officer involved activated his emergency lights just seconds before running a stop sign. In ruling on cross-motions for summary judgment, the trial court held that (1) section 5-106 (745 ILCS 10/5-106 (West 2014)) applies as a matter of law, (2) section 2-202 (*id*. § 2-202) does not apply as a matter of law, and (3) genuine issues of material fact remain concerning whether the officer's conduct was willful and wanton. The driver and passenger of the other vehicle appeal, arguing that section 5-106 is not meant to apply outside the context of fire protection or medical rescue services. The officer and his employers cross-appeal, arguing that (1) section 2-202 applies as a matter of law because responding to a 9-1-1 call is part of a course of conduct involved in enforcing a law and (2) there is insufficient evidence to allow a jury to find that the officer's conduct was willful and wanton. We affirm in part, reverse in part, and remand for further proceedings consistent with this decision.

¶ 3 On January 3, 2015, Washington County Sheriff's Department dispatcher Sloane Laird answered a 9-1-1 call. The caller did not say anything, but Laird could hear a voice speaking in the background. She could also hear "rustling" sounds. Laird attempted to call the number to find out whether the call was a misdial, but her call went directly to voice mail. Deputy Joe Berry, one of the defendants in this case, responded to the call. Laird noted in her report of the incident that the call sounded "like a pocket dial."

According to Deputy Berry, Laird "may have" told him this when she dispatched the call to him.

¶ 4 The accident at issue occurred while Deputy Berry was traveling east on County Highway 6 en route to the address indicated by the 9-1-1 call. According to Deputy Berry, it was foggy out and the road was wet because it had recently stopped raining. However, there was little or no traffic on the road. Deputy Berry did not activate either his sirens or his emergency lights prior to approaching the intersection of Highway 6 and County Highway 13. That intersection is controlled by a two-way stop sign, and traffic on Highway 13 has the right of way. Deputy Berry slowed as he approached the intersection. He looked both ways and did not see any vehicles approaching on Highway 13. He activated his emergency lights and began to speed up as he proceeded across the intersection. He did not activate his siren.

¶ 5 As Deputy Berry crossed the intersection, his vehicle was struck by a vehicle driven by Ellaretta Grace Aydt, another defendant in this case. The plaintiff, Madalyn Morris, was a passenger in Aydt's vehicle. Morris, Aydt, and Deputy Berry all sustained injuries as a result of the collision.

¶ 6 On March 2, 2015, Morris filed this action against Deputy Berry, Washington County Sheriff Danny Bradac, and Washington County (collectively, the county defendants) and Aydt. The county defendants filed a cross-claim against Aydt, and Aydt filed a cross-claim against them.

¶ 7 On September 19, 2016, the county defendants filed a motion for summary judgment. They argued that (1) Deputy Berry was immune from liability for negligence

under section 5-106 of the Tort Immunity Act (745 ILCS 10/5-106 (West 2014)) because he was responding to an emergency call when the collision occurred; (2) Deputy Berry was also immune from liability for negligence under section 2-202 (*id*. § 2-202) because he was enforcing or executing a law; (3) Sheriff Bradac and Washington County were immune from liability under section 2-109 (see *id*. § 2-109 (providing that a public entity is immune from liability unless its employees are liable)); and (4) Deputy Berry's conduct was not willful or wanton as a matter of law. On October 25, 2016, Aydt filed a cross-motion for summary judgment, arguing that as a matter of law, neither statute provided the defendants with immunity.

¶ 8 Among the evidence considered by the court in ruling on these motions was the Vehicle Pursuit and Emergency Vehicle Operation Policy of the Washington County Sheriff's Department. The policy provides that when responding to an emergency call, the driver may proceed past a stop sign or red light without stopping, but must reduce speed before doing so. An emergency vehicle other than a police vehicle must also activate either its emergency lights and/or its siren in order to go through stop signs and red lights or disregard other traffic rules. The policy does not set forth any rules for whether and when police vehicles must use their emergency lights and/or sirens.

¶ 9 The court also considered a video recording from Deputy Berry's dash cam. Deputy Berry explained during his deposition that the recording shows the precise moment he activated his emergency lights because a click is audible when the emergency lights in his squad car are activated. That click is audible seven seconds prior to the collision. This can be ascertained by the time stamps on the video. It is not clear precisely

how many seconds passed between the moment Deputy Berry activated the lights and the moment he entered the intersection; however, it is clear that it was only a few seconds.

¶ 10 Deputy Berry testified in his deposition that he received a call from dispatch at 3:34 in the afternoon alerting him to the 9-1-1 call. The dispatcher told him that "there was someone on the line" but that "no contact was made." He acknowledged that she also "may have" used the phrase "pocket dial."

¶ 11 Deputy Berry testified that it was daylight when the accident occurred; however, it was cloudy and foggy. He also noted that the roads were wet because it had recently stopped raining. He testified that before the accident, he was traveling down Highway 6 at a speed of "anywhere between 50 and 70 miles per hour." He was not using either his siren or his emergency lights because there was no traffic on the road. He testified that when he approached the intersection of Highway 13, he slowed down to approximately 10 to 15 miles per hour. He looked both to the left and to the right, but did not see any vehicles approaching. He therefore decided to proceed through the intersection without stopping. Deputy Berry was asked how far from the intersection he was when he looked for traffic on Highway 13. He responded, stating that was not able to estimate his distance from the stop sign the last time he looked left and right for traffic. He then stated, "Once I hit the lights, my intent was to continue on through the intersection. I wasn't looking left or right any further."

¶ 12 Deputy Berry testified that he activated his emergency lights as he approached the intersection, but he did not know how far he was from the intersection when he did so. He did not turn on his siren. He estimated that his speed was between 10 and 20 miles per

hour when the collision occurred, but he admitted that he "probably had started to speed up to get on through the intersection."

¶ 13 Deputy Berry testified that it was the policy of the Washington County Sheriff's Department to treat all 9-1-1 calls as emergencies unless and until they knew otherwise. He explained that when a 9-1-1 caller does not respond to the dispatcher, it can be due to a medical need or because the caller has been overpowered by an attacker. He also explained that if an intruder has broken in, it is a good idea for the caller not to talk to the dispatcher so as to avoid letting the burglar know someone is in the building.

¶ 14 Deputy Berry was questioned about the sheriff's department's policy on the use of emergency lights and sirens. He acknowledged that at the time of the accident, he was not familiar with "the actual policy on the lights and sirens." He testified that his own use of lights and sirens when responding to 9-1-1 calls generally depended on whether there was traffic. He was asked if the department had any policy governing the use of emergency lights and sirens at an intersection controlled by a stop sign. He replied, "Basically, as you approached the intersection, prepare to stop, if necessary, if there's traffic within the intersection, with lights and siren, and wait to be yielded to."

¶ 15 Deputy Berry explained his decision to turn on the emergency lights in this case as follows:

> "Once I cleared the intersection and there was no one immediately in that area, I turned them on so that if someone was coming from either direction and further away *** someone wouldn't just see a squad car going through the intersection [with no lights or sirens] and think I was just running a stop sign."

He reiterated that he only turned the lights on once he had made the decision not to stop for the stop sign, explaining that "Whenever you disobey the law, you have to have some type of emergency equipment going."

¶ 16 Sheriff Danny Bradac also gave a deposition in this matter. He testified that the Washington County Sheriff's Department has no specific policy on the use of lights and sirens. He noted that when he goes through a red light or stop sign, he usually activates "the lights and everything." This is so, he explained, because even if he does not see other vehicles, "that doesn't mean that there's not somebody watching [him]." He stated, however, that individual officers have a great deal of discretion concerning the use of emergency lights and sirens.

¶ 17 Sheriff Bradac explained that the investigation of the accident was handled by the Illinois State Police to avoid the conflict of interest that could arise if the Washington County Sheriff's Department were involved in the investigation. He acknowledged that Trooper Brent Sledge, the investigating officer, concluded that Deputy Berry did not activate his emergency lights early enough to provide sufficient warning to other motorists. Sheriff Bradac disagreed with this conclusion. However, he acknowledged that Deputy Berry "could have done a better job" of looking for other vehicles.

¶ 18 Finally, Sheriff Bradac testified about the 9-1-1 call itself. He testified that he listened to a recording of the call and noted that some "muffled *** rumbling or rustling or something" could be heard on the recording.

¶ 19 In his deposition, Trooper Sledge described the measures he took to investigate the accident. He noted that when he arrived at the scene, all of the occupants of the vehicles

involved had already been transported to the hospital. Trooper Sledge took measurements at the accident scene, interviewed both drivers at the hospital, and viewed the video recording from Deputy Berry's dash cam. He noted that in his report, he stated that the weather was clear and was not a factor in the accident. He also noted, however, that it looked dark and gray on the dash cam recording.

¶ 20 Trooper Sledge testified that Deputy Berry told him that he was driving at a speed of less than 40 miles per hour when the collision occurred. He further testified that Aydt told him that she "vaguely recalled" seeing the emergency lights before the squad car entered the intersection, but that she thought the squad car was going to stop. Trooper Sledge stated that it appeared in the dash cam video that Deputy Berry slowed down considerably and activated his emergency lights prior to entering the intersection; however, he emphasized that Deputy Berry activated the lights "just prior to entering the intersection."

¶ 21 Trooper Sledge issued a citation to Deputy Berry. He acknowledged that he also "probably could have" issued a citation to Aydt for failing to yield the right of way to an emergency vehicle, but he explained that he did not do so because he did not "feel that she was truly at fault" because Deputy Berry's emergency lights were not activated until "the very last" second.

¶ 22 Trooper Sledge was asked about how he would have responded to the 9-1-1 call at issue. He emphasized that every department has its own policies, and noted that he did not know what the Washington County Sheriff's Department's rules were. He explained, however, that responding to a 9-1-1 call usually involves "just normal driving." He noted

that the responding officer may have to "step up [the] response" if the call comes from an address with a history of calls involving crimes or domestic violence. He also noted that pursuant to the policy of the Illinois State Police, responding officers generally do not turn their emergency lights on and off when responding to a call. Instead, there are different codes representing different levels of urgency. He explained that if the circumstances known to the responding officer change while he is en route, the code will change and the officer may need to turn his lights on or off as a result. Asked if he would have stopped at the stop sign, Trooper Sledge said that he most likely would have stopped.

¶ 23 Sergeant Charles Carroll (Sgt. Carroll) was one of Deputy Berry's two shift supervisors at the Washington County Sheriff's Department. He testified in a deposition about how the department normally handled 9-1-1 calls where no contact is made with the caller. He estimated that approximately 46 to 54% of such calls turn out to be true emergencies. He explained, however, that they are generally treated as emergencies because it is better to be safe than sorry.

¶ 24 Sgt. Carroll explained that the sheriff's department uses an informal system of numbered "codes" when responding to calls. Code 1 involves "normal driving," which means obeying traffic laws without activating the emergency lights or siren. At code 2, the officer may go through stop signs and red lights without stopping and must use either his lights or his siren or both. At code 3, the officer may exceed the speed limit and must use both lights and siren. Sgt. Carroll acknowledged that these codes do not appear in any

written policy. We note that Sheriff Bradac testified that the Washington County Sheriff's Department does not use a system of numbered codes at all.

¶ 25 Sgt. Carroll testified that which code to use when responding to a 9-1-1 call is up to the discretion of the officer. He noted, however, that when he responds to 9-1-1 calls with no contact, such as the one at issue in this case, he typically responds at code 1. He explained that he would go to code 2 if the call came from an address where there had been prior instances of domestic violence or from a business that was likely to be targeted in a robbery. Under the circumstances present in this case, Sgt. Carroll stated that he most likely would have stopped at the stop sign.

¶ 26 Aydt and Morris gave depositions as well. Aydt testified that the roads were dry when the accident occurred, and Morris testified that the sun was shining. Aydt testified that prior to the accident, she was driving with her cruise control set at 50 miles per hour. The speed limit on Highway 13 was 55. Aydt testified that the first time she saw Deputy Berry's squad car, it was directly in front of her. Asked how far the car was from her, she replied, "I don't know. It's right in front of me." Morris also described the sequence of events leading to the collision. She acknowledged that prior to the collision, she "was just looking at the countryside." She testified that at some point, she looked up and saw a car, and then Aydt's vehicle struck the car. Both Morris and Aydt testified that they did not see Deputy Berry's emergency lights at any point.

¶ 27 Aydt testified that she tried to stop to avoid the collision, but it was too late. She did not think she skidded, but she was not certain. Aydt was asked about her statement to Trooper Sledge at the hospital. She remembered speaking with a police officer at the

hospital, but she did not remember telling him that she "vaguely recalled" seeing the squad car's emergency lights before the accident. She testified that she was "going in and out of consciousness" at the time. She emphasized that she did not see Deputy Berry's emergency lights at any time.

¶ 28 The trial court entered a written order ruling on the summary judgment motions on January 26, 2017. The court held that section 5-106 applied as a matter of law. The court further held that section 2-202 did *not* apply as a matter of law. Finally, the court found that there were genuine issues of material fact concerning whether Deputy Berry's conduct was willful and wanton. The court granted partial summary judgment to the county defendants on the question of section 5-106 immunity, but denied their motion on the issues of section 2-202 immunity and whether Deputy Berry's conduct was willful and wanton. The court likewise granted Aydt's summary judgment in part on the question of section 2-202 immunity, but denied the motion on the question of section 5-106 immunity. Morris filed a notice of appeal, arguing that the court erred in finding section 5-106 to be applicable. Aydt joined in her appeal. The county defendants filed a cross-appeal, challenging the court's two other rulings.

¶ 29 Before turning to the parties' contentions, we note that our review of a trial court's ruling on a motion for summary judgment is *de novo*. *Hatteberg v. Cundiff*, 2012 IL App (4th) 110417, ¶ 29. In conducting this review, we must determine whether there are any genuine issues of material fact remaining to be tried and whether the moving party is entitled to judgment as a matter of law. *Id.* (citing 735 ILCS 5/2-1005(c) (West 2010)). We also note that resolution of two of the issues before us requires us to construe the two

pertinent provisions of the Tort Immunity Act. Statutory construction is a question of law. Thus, we likewise review *de novo* the court's interpretation of the statutes. *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 16.

¶ 30 Under the Tort Immunity Act, public employees enjoy limited immunity from liability for negligence under certain circumstances. The act contains "an extensive list of immunities based on specific government functions." *Harris v. Thompson*, 2012 IL 112525, ¶ 16. This case involves two of those immunities. Section 5-106 provides immunity from liability for "injury caused by the negligent operation of a motor vehicle or firefighting or rescue equipment, when responding to an emergency call." 745 ILCS 10/5-106 (West 2014). Section 2-202 provides immunity from liability for any "act or omission in the execution or enforcement of any law." *Id*. § 2-202.

¶ 31 As noted, these statutes provide limited immunity. While they provide immunity for liability for ordinary negligence, they do *not* provide immunity for willful and wanton conduct. See *id*. §§ 2-202, 5-106. Moreover, the provisions of the Tort Immunity Act create exceptions to the general rule that local governmental entities and their employees are liable in tort. *Aikens v. Morris*, 145 Ill. 2d 273, 277-78 (1991). Because these provisions are "in derogation of the common law" rule that liability exists, they must be narrowly construed. *Id*. at 278. With these principles in mind, we turn to the parties' claims.

¶ 32 We first consider the argument of appellants Morris and Aydt. They contend that the trial court erred in concluding that the county defendants were immune from liability under section 5-106. They argue that this statute applies only in the context of fire and

rescue services and does not apply to any other type of emergency. Alternatively, they argue that the court should not have granted summary judgment because there was a genuine question of material fact concerning the existence of an emergency. We agree with their first contention.

¶ 33 In construing the relevant provisions of the Tort Immunity Act, our fundamental goal is to determine and effectuate the intent of the legislature. The best indicator of legislative intent is the language of the statute, which should be given its plain and ordinary meaning. *Hayashi*, 2014 IL 116023, ¶ 16. However, statutes must not be read in isolation. We must presume that the legislature intended statutory provisions that relate to the same subject to be harmonious and consistent with each other. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 60 (2006). We must also consider the subject addressed by a statute "and the apparent intent of the legislature in enacting it." *Hayashi*, 2014 IL 116023, ¶ 16.

¶ 34 Section 5-106 appears in article V of the Tort Immunity Act, which is entitled "Fire Protection and Rescue Services." Other statutes in article V provide immunity from liability for injuries caused by failure to establish a fire department or medical rescue or other type of emergency service (745 ILCS 10/5-101 (West 2014)), failure to suppress or contain a fire (*id*. § 5-102), negligence while fighting a fire (*id*. § 5-103(b)), or the condition of firefighting equipment (*id*. § 5-103(a)). Article V also contains a statute providing immunity from liability for damage to roads and bridges caused by firefighting equipment that exceeds the weight limit for those roads and bridges traveling over them en route to a fire. *Id*. § 5-104. Morris and Aydt argue that because the legislature placed

section 5-106 within the article governing firefighting and rescue services, it is meant to apply only in that context and not to general emergencies.

¶ 35 The county defendants, by contrast, point to the language of the statute itself. It provides: "Except for willful or wanton conduct, neither a local public entity, nor a public employee acting within the scope of his employment, is liable for an injury caused by the negligent operation of a motor vehicle or firefighting or rescue equipment, when responding to an emergency call." *Id.* § 5-106. The county defendants argue that this language indicates that the legislature intended a much broader application of the statute than that urged by Morris and Aydt. In particular, they note that the statute applies to any "public employee" and to the operation of any "motor vehicle." They argue that the term "emergency" must be given its plain and ordinary meaning, and they assert that an "emergency" is "commonly defined as an 'urgent need for assistance or relief.' " See *Young v. Forgas*, 308 Ill. App. 3d 553, 561 (1999) (quoting Merriam-Webster's Collegiate Dictionary 377 (10th ed. 1998)).

¶ 36 We note that the trial court also pointed to the language making the statute applicable to "public employees" operating "motor vehicles." In addition, the court noted that in rural communities, it is common for police to assist fire departments or other emergency services. Thus, the court concluded that the statute can apply to police officers.

¶ 37 The question, however, is not whether the statute ever applies to police officers such as Deputy Berry. Rather, the question is whether the statute applies to the particular governmental function he was fulfilling when the collision occurred.

¶ 38 Morris and Aydt acknowledge that the provision at issue is applicable to police officers when they are assisting with fire or rescue services. As they point out, the provision has been applied in that context in at least one reported case. See *Carter v. Simpson*, 328 F.3d 948, 951 (7th Cir. 2003). However, as Morris and Aydt also correctly note, no Illinois case has applied the statute to police officers or other public employees who were performing functions other than firefighting or rescue services. See *Harris*, 2012 IL 112525 (considering the applicability of the statute to an ambulance driver); *Hatteberg*, 2012 IL App (4th) 110417 (considering its applicability to a volunteer firefighter); *Williams v. City of Evanston*, 378 Ill. App. 3d 590 (2007) (considering the applicability of the provision to a firefighter/EMT who was driving an ambulance); *Hampton v. Cashmore*, 265 Ill. App. 3d 23 (1994) (considering whether the statute provided immunity to an ambulance driver); *Buell v. Oakland Fire Protection District Board*, 237 Ill. App. 3d 940 (1992) (discussing the immunity provision in a contribution claim against an ambulance driver).

¶ 39 We agree with Morris and Aydt that the statute does not provide immunity to public employees performing functions other than firefighting or rescue services. We acknowledge that section 5-106, if read in isolation, might be susceptible to the interpretation advanced by the county defendants. However, we must consider all the provisions of a statutory enactment as a whole in order to accurately glean the intent of the legislature. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 507 (2003).

¶ 40 The stated purpose of the legislative enactment at issue here is "to protect public entities and public employees from liability arising from the operation of government."

745 ILCS 10/1-101.1(a) (West 2014). As we have discussed, it provides numerous immunity provisions related to specific governmental functions. See *Harris*, 2012 IL 112525, ¶ 16. Article II is called "General Provisions Relating to Immunity." See 745 ILCS 10/2-101 to 2-302 (West 2014). The Tort Immunity Act also contains four articles that relate to specific types of government services. Article IV contains immunity provisions related to "Police and Correctional Activities" (see *id.* §§ 4-101 to 4-107); article VI governs immunity for "Medical, Hospital and Public Health Activities" (see *id.* §§ 6-101 to 6-110); and article VIA deals with "Public and Community Service Programs" (see *id.* §§ 6A-101 to 6A-105). Article V, as discussed, covers "Fire Protection and Rescue Services." In light of the stated purpose and the structure of the Tort Immunity Act, we find that the legislature clearly intended the immunity provision in section 5-106 to apply to public employees performing a specific government function—responding to emergency calls involving firefighting and rescue services.

¶ 41 It is worth noting that most of the immunity provisions in these articles apply to "public entities" and "public employees" in spite of providing immunity for specific functions. See, *e.g.*, *id.* § 4-102 (immunity for failure to establish a police department or provide adequate police protection); *id.* § 4-105 (immunity for failure to provide or obtain medical care for a prisoner); *id.* § 5-103(b) (immunity for negligent acts or omissions while fighting a fire); *id.* § 6-109 (immunity for liability for failure to admit a person to a medical facility). We are therefore not persuaded that the language in the statute making it applicable to "public employees" operating "motor vehicles" evinces a legislative intent for a broader immunity.

¶ 42 We are likewise not persuaded that *Young*, a case cited by the county defendants, requires us to reach a different result. That case involved a firefighter responding to a fire alarm. *Young*, 308 Ill. App. 3d at 556. Responding to a fire alarm is a function to which the provisions of the Fire Protection and Rescue Services article unquestionably apply. However, the alarm turned out to be a false alarm, and it came from a building that had recently generated another false alarm. *Id*. at 561. At issue in *Young* was whether the fire alarm could be treated as an emergency in light of these circumstances. *Id*. The *Young* court emphasized that the firefighter defendant was dispatched to fight a fire. *Id*. at 562. The court explained that a fire alarm indicates that "a high probability of serious injury or significant property loss" exists. *Id*. The court also noted, as the county defendants point out, that "[t]he term 'emergency' is commonly defined as an 'urgent need for assistance or relief.' " *Id*. at 561 (quoting Merriam-Webster's Collegiate Dictionary 377 (10th ed. 1998)). The court concluded that in light of the high probability of danger inherent in a fire alarm, the alarm met this definition and constituted "a legitimate emergency call for help." *Id*. at 562.

¶ 43 Although the *Young* court did point to a broad definition of the word "emergency," as the county defendants point out, the question there was the level of urgency that attached to the fire alarm under the circumstances of the case, not whether responding to the alarm was one of the functions covered by the immunity provision in section 5-106. Thus, the *Young* court did not address the question at issue here. For these reasons, we find that the trial court erred in partially granting the county defendants' motion for summary judgment on this basis and in denying Aydt's motion on this same basis.

¶ 44 We now turn our attention to the arguments of the county defendants. They first argue that the court erred in holding that section 2-202 is not applicable. This immunity provision does not apply to any and all activities of a police officer while on duty. Instead, like most other provisions in the Tort Immunity Act, it applies only to a specific function—that of enforcing or executing a law. *Aikens*, 145 Ill. 2d at 278; *Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211, 221 (1986). Whether an officer was enforcing or executing a law at the relevant time is a question of fact to be resolved based on the circumstances of the case. *Leaks v. City of Chicago*, 238 Ill. App. 3d 12, 16, (1992). However, a court may decide the question as a matter of law where there is undisputed evidence from which only one conclusion is possible. *Simpson v. City of Chicago*, 233 Ill. App. 3d 791, 792 (1992).

¶ 45 The county defendants contend that the court should have found the immunity afforded by section 2-202 to be applicable to Deputy Berry as a matter of law because he was "engaged in a course of conduct" to enforce or execute the law at the time of the accident. See *Fitzpatrick*, 112 Ill. 2d at 221 (explaining that enforcing laws " 'is rarely a single, discrete act, but is instead a course of conduct' " (quoting *Thompson v. City of Chicago*, 108 Ill. 2d 429, 433 (1985))). We agree that the court erred in finding the statute to be inapplicable as a matter of law. However, we believe there are genuine issues of material fact that must be resolved to determine whether Deputy Berry was enforcing or executing a law. As such, we do not believe the question of the applicability of the statute can be resolved on a motion for summary judgment.

¶ 46 In discussing the applicability of section 2-202 immunity, the trial court focused on two cases—*Hudson v. City of Chicago*, 378 Ill. App. 3d 373 (2007), and *Bruecks v. County of Lake*, 276 Ill. App. 3d 567 (1995). We, too, begin our analysis with these two cases.

¶ 47 In *Hudson*, the plaintiff was seriously injured in a motor vehicle accident with a Chicago police officer. *Hudson*, 378 Ill. App. 3d at 375. The officer (Officer Lee) and her partner (Officer Ray) heard a call over their radio stating that a murder suspect in a white van was being pursued by other officers on the Eisenhower Expressway. *Id*. at 379. The dispatcher did not direct them to join in the pursuit of the suspect. However, Officer Lee drove her vehicle onto the expressway in the direction of the pursuit. *Id*.

¶ 48 The Chicago Police Department had a policy limiting participation in an active pursuit to two vehicles absent specific authorization. *Id*. at 378. Both Officer Lee and Officer Ray denied that they were violating this policy by attempting to join in the pursuit of the suspect. Instead, both stated that they intended to offer any necessary assistance to the officers who were directly involved in the pursuit. *Id*. at 391. Both officers were asked to explain what they meant by "assistance." Officer Lee explained that additional officers might be needed if, for example, the suspect began shooting at people or took a hostage. *Id*. She also explained that providing assistance "could include something 'as little as traffic control.' " *Id*. Officer Ray testified that additional officers might be needed to help apprehend the suspect if he fled on foot after the vehicular pursuit ended. *Id*.

¶ 49 A jury found in favor of the plaintiff. The City of Chicago appealed, arguing that it was entitled to a judgment notwithstanding the verdict based on the immunity provisions

of the Tort Immunity Act. *Id*. at 375. (We note that the plaintiff voluntarily dismissed Officer Lee from the lawsuit, leaving the City as the sole defendant. *Id*.)

¶ 50 On appeal, the First District recognized that section 2-202 would have provided Officer Lee with immunity for negligence had the accident occurred while she was actually providing traffic control or any of the other types of assistance she and Officer Ray mentioned in their testimony. *Id*. at 392. The court also recognized that section 2-202 would have applied if she had been driving to the scene to provide any of those types of assistance. *Id*. However, the court found that "there was no specific indication in the record that traffic control was actually required or requested or that the officers engaged in the actual pursuit required or requested backup." *Id*. The court explained that the jury was thus free to conclude that Officer Lee "was merely making herself available to enforce the law should the need arise." *Id*. The court held that "[t]he mere fact that a police officer acts on the speculation that she may be required to enforce or execute some, as yet, undetermined law is not enough to activate the immunity set forth in section 2-202." *Id*. at 392-93. It therefore upheld the trial court's denial of the City's motion for judgment notwithstanding the verdict. *Id*. at 393.

¶ 51 In *Bruecks*, the Second District reached the opposite conclusion. There, a Lake County sheriff's deputy heard a report over his radio that shots had been fired. Although three other deputies were dispatched to the scene, he stated that he, too, would respond. *Bruecks*, 276 Ill. App. 3d at 568. On his way to the scene, the deputy's vehicle struck and injured a minor who was crossing the road on foot. *Id*.

¶ 52 The plaintiff sued Lake County and the deputy, alleging only negligence, not willful and wanton conduct. The defendants filed a motion for summary judgment, arguing that they were immune from liability for negligence under the Tort Immunity Act. *Id*. The trial court granted the motion, and the plaintiff appealed. *Id.*

¶ 53 The plaintiff argued on appeal that the immunity provision did not apply because the deputy was not enforcing any law when the accident occurred. This was so, he argued, for two reasons. First, no one was arrested or charged with any crime in connection with the incident. Second, the deputy "could not even name a specific law that had been violated." *Id*. at 569. In rejecting this argument, the Second District explained that "[s]hots being fired in a residential neighborhood create the potential for danger, and thus require investigation, regardless of whether the shooter is apprehended or is ultimately found to have violated any law or ordinance." *Id*. The court also reasoned that accepting the plaintiff's argument "would make the existence of immunity depend upon circumstances which developed after the fact." *Id*.

¶ 54 The trial court in this case noted that under *Hudson*, speculation about the need to enforce a law is insufficient to invoke the immunity provided by section 2-202, but that under *Bruecks*, immunity cannot depend on circumstances that develop after the fact. The court noted that these two holdings are potentially inconsistent. In attempting to reconcile them and apply them to the facts before it, the court emphasized that a 9-1-1 call where no contact is made with the caller can be anything from a "pocket dial" or misdial to a child calling accidentally to a medical emergency or a report of a crime. The court reasoned that by responding to such a call, Deputy Berry was making himself available to

enforce the law if necessary. The court therefore found this case to be more akin to *Hudson* than to *Bruecks*. For the reasons that follow, however, we do not find the instant case to be analogous to either *Hudson* or *Bruecks*.

¶ 55 One crucial distinction between this case and the *Hudson* case is the difference in procedural posture. As we discussed earlier, *Hudson* was an appeal from an order denying a motion for judgment notwithstanding the verdict after a jury found that a police officer was not enforcing a law at the time of the accident. *Hudson*, 378 Ill. App. 3d at 375. The appellate court was called upon to decide only whether the evidence before the jury was sufficient to allow it to make that finding. In other words, the court was called upon to determine whether section 2-202 applied as a matter of law. It was not also called upon to decide whether the statute was *inapplicable* as a matter of law. This appeal involves rulings on motions for summary judgment filed by two parties. This court must therefore determine whether the question of section 2-202 immunity can be resolved *either way* as a matter of law.

¶ 56 We also note that the *Hudson* court found additional support for its ruling from evidence that at least 12 other police vehicles were already involved in pursuing the suspect or providing support to the lead officers. *Id.* at 393. Thus, the First District explained, jurors were free to find that Officer Lee was "merely following the pursuit out of personal interest in the outcome or some unofficial camaraderie with her fellow officers." *Id*. No similar facts are involved in this case.

¶ 57 However, we do not find this case to be analogous to *Bruecks* either. That case involved a report of gunshots, a situation that logically involves a high degree of

likelihood that a crime has occurred or might occur. Here, by contrast, Deputy Berry had no information about the reason for the call to which he was responding. When asked whether he believed that he was enforcing a law at the time of the accident, Deputy Berry explained, "I didn't have evidence that a crime had been committed, but I didn't have evidence that one hadn't either." Sgt. Carroll testified that approximately half of all 9-1-1 calls received by the Washington County Sheriff's Department were not true emergencies. It is not clear whether he meant that these calls did not require urgent attention or whether they were not actual calls for assistance at all. There was also evidence that the dispatcher had reason to believe that the 9-1-1 call in this case was a "pocket dial," and Deputy Berry testified that she "may have" told him as much. Thus, there is evidence in the record that would allow jurors to conclude that Deputy Berry was merely checking on the residents to determine whether they had a need for assistance, a function which falls within the community care-taking role of the police.

¶ 58 On the other hand, there was also testimony that police departments generally presume 9-1-1 calls are actual requests for assistance unless they can confirm otherwise. In addition, there was testimony that when a citizen calls 9-1-1 to report a burglary in progress, the caller should say nothing to the dispatcher so as not to alert the intruder to the caller's presence. One officer even testified that he advises people to follow this course of action for their own safety. Thus, there is evidence in the record that would allow a jury to find that the 9-1-1 call at issue appeared to carry with it a high likelihood of criminal activity, much as the report of shots fired did in *Bruecks*. We do not believe this question can be resolved either way on a motion for summary judgment. We

therefore conclude that the court correctly denied summary judgment to the county defendants on the question of section 2-202 immunity, but we find that the court erred in granting summary judgment to Aydt on this question.

¶ 59 Finally, the county defendants argue that the court erred in concluding that genuine issues of material fact existed concerning whether Deputy Berry's conduct was willful and wanton. We disagree.

¶ 60 The Tort Immunity Act defines willful and wanton conduct 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 (West 2014). This definition is identical in substance to the definition of willful and wanton conduct articulated by our supreme court. *Harris*, 2012 IL 112525, ¶ 41; *Hampton*, 265 Ill. App. 3d at 30. As such, in considering whether there is evidence to support a finding that Deputy Berry's conduct was willful and wanton, we may find guidance in cases that did not arise under the statute. *Hampton*, 265 Ill. App. 3d at 30. Willful and wanton conduct is "qualitatively different" from conduct that is merely negligent. *Hudson*, 378 Ill. App. 3d at 398. Illinois courts have long held that this qualitative difference means that willful and wanton conduct "requires a 'heightened state of mind.' " *Hampton*, 265 Ill. App. 3d at 30 (quoting *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 448 (1992)).

¶ 61 Whether conduct is willful and wanton depends on the circumstances of each individual case. *Harris*, 2012 IL 112525, ¶ 41. It is "a question of degree." *Hampton*, 265 Ill. App. 3d at 30. Thus, " 'a hard thin line definition' " is not appropriate. *Id.* "Under the

facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be only degrees less than intentional wrongdoing." *Young*, 308 Ill. App. 3d at 562-63 (citing *Ziarko v. Soo Line RR Co.*, 161 Ill. 2d 267, 275-76 (1994)).

¶ 62 Whether a defendant's conduct is willful and wanton is generally a question of fact to be determined by the jury. *Harris*, 2012 IL 112525, ¶ 42; *Hampton*, 265 Ill. App. 3d at 30. However, a court may grant summary judgment and hold as a matter of law that conduct is not willful and wanton if the evidence in the record is insufficient to permit the jury to reach the opposite conclusion. *Hatteberg*, 2012 IL App (4th) 110417, ¶ 30; *Hampton*, 265 Ill. App. 3d at 31. We reiterate, however, that summary judgment is only appropriate if there are no genuine questions of material fact to be resolved and the moving party is entitled to judgment on the issue as a matter of law. *Hatteburg*, 2012 IL App (4th) 110417, ¶ 29.

¶ 63 Here, there is nothing to suggest that Deputy Berry intended to harm Morris and Aydt. The question, then, is whether there is evidence that he acted with "utter indifference to or conscious disregard for" their safety. It is undisputed that Deputy Berry activated his emergency lights mere seconds before entering the intersection and did not activate his siren at any point. Officer Sledge opined that Deputy Berry's decision to activate the lights at the "very last" second did not give Aydt sufficient time to react. However, failure to activate emergency lights and sirens—or failure to do so in a timely manner—does not automatically amount to willful and wanton conduct. *Harris*, 2012 IL 112525, ¶ 44. Likewise, speed is not decisive. *Id.* ¶ 45. Thus, the undisputed evidence

that Deputy Berry slowed down before entering the intersection, while relevant, is not dispositive.

¶ 64 Conduct may be found to be willful and wanton if the defendant knows of an impending danger and fails to exercise ordinary care to prevent that danger. *Young*, 308 Ill. App. 3d at 563 (quoting *Ziarko*, 161 Ill. 2d at 274). This is often the basis for a finding of willful and wanton conduct in the context of automobile accidents. *Hampton*, 265 Ill. App. 3d at 31-32.

¶ 65 We find the conflicting evidence concerning the road and weather conditions at the time of the accident to be particularly significant in this regard. Deputy Berry testified that it was foggy and the roads were wet. Other witnesses testified that the roads were dry. Trooper Sledge testified that it was cloudy, but did not say it was foggy. Morris testified that it was sunny. We note that the dash cam recording clearly shows that the roads were wet and that it was cloudy. Although it does not appear to be foggy in the video, it is possible for jurors to believe Deputy Berry's testimony and find that there was at least patchy or light fog.

¶ 66 Both of these conditions increase the danger involved in proceeding through an intersection without stopping, and that has an impact on what precautions are reasonable to reduce that danger. Wet roads increase the distance needed for a vehicle to safely stop, making it critical to give motorists approaching the intersection as much notice as possible, which Deputy Berry did not do. Fog reduces visibility, but Deputy Berry admitted that once he decided to go through the intersection, he increased his speed and proceeded without continuing to look for other vehicles. These facts raise genuine

questions as to whether Deputy Berry ignored a heightened risk of danger posed by road and weather conditions.

¶ 67 Moreover, although there is no indication that Deputy Berry intended to harm Morris or Aydt, we believe the record raises genuine questions as to whether he acted with conscious disregard for their safety. Deputy Berry admitted in his deposition that he activated his emergency lights only because he wanted to signal to any drivers that he was legally allowed to cross the intersection against the stop sign, not because he felt it was necessary to warn other drivers. This admission, coupled with evidence that he failed to provide sufficient warning to other motorists under road conditions that created a heightened risk of danger, raises questions that would make summary judgment inappropriate.

¶ 68 For the foregoing reasons, we hold that section 5-106 is not applicable as a matter of law and that genuine issues of material fact remain as to both the applicability of section 2-202 and whether Deputy Berry engaged in willful and wanton conduct. We therefore reverse the portions of the court's order finding that section 5-106 is applicable, granting partial summary judgment to the county defendants on this question, and denying Aydt's motion on this question. We also reverse the portions of the order finding section 2-202 to be inapplicable as a matter of law and granting Aydt partial summary judgment on this issue. However, we affirm the portion of the order holding that there are genuine issues of material fact precluding summary judgment as to whether Deputy Berry's conduct was willful and wanton. We affirm the court's denial of summary

judgment to the county defendants on both this issue and on the availability of immunity under section 2-202. We remand for further proceedings consistent with this decision.

¶ 69 Reversed in part; affirmed in part; cause remanded.