

# Trial Notebook

## Court clarifies immunity categories that protect police from liability



By Steven P. Garmisa  
Hoey & Farina

There is a sometimes elusive, though always crucial, distinction between lawsuits where an injury was allegedly caused by willful and wanton conduct by a police officer in executing or enforcing a law and cases where a loss occurred because of failure to provide adequate police protection.

Tort immunity applies in the second situation, while there is an exception to immunity in the first case.

Section 2-202 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act shields a governmental entity by immunizing its employees for acts or omissions "in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct."

At the same time, section 4-102 of the act provides immunity for "failure ... to provide adequate police protection or service."

Clarifying the critical difference between these immunities, the Illinois Appellate Court affirmed judgment in favor of the Village of Hoffman Estates and one of its police officers. *McElmeel v. Village of Hoffman Estates*, 2005 WL 2061017 (1st Dist., Aug. 26).

A minivan slid into a ditch on the side of a village road in December 2000. Officer Catherine Bloss stopped southbound traffic so a tow truck could pull out the minivan.

As recounted by the Appellate Court: "Officer Bloss turned on the flashing lights on top of her squad car, as well as the flashing headlights and taillights, but did not place any flares or similar devices to notify southbound traffic of the need to stop. Officer Bloss and the stranded motorist remained in the squad car while the tow truck worked."

A drunken driver smashed into a car that was stopped behind Bloss, killing one passenger and leaving two others with catastrophic injuries.

Granting a motion to dismiss the lawsuit filed on behalf of the victims, the trial judge ruled that Bloss and Hoffman Estates were immune.

The plaintiffs appealed, arguing that there was no immunity because Bloss' conduct was willful and wanton.

Here are some highlights of Justice Calvin C. Campbell's opinion (with various omissions not noted in the quoted text):

"Plaintiffs argue that the trial court erred in ruling that defendants were immune from liability in this case under section 4-102 of the Tort Immunity Act, which provides in relevant part as follows: 'Neither a local public entity nor a public employee is liable for failure ... to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals.'

"Plaintiffs claim that section 4-102 does not immunize defendants from claims of willful and wanton conduct, relying on section 2-202 of the Tort Immunity Act, which provides: 'A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful

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and wanton conduct.’

“Plaintiffs also quote at length from our Supreme Court’s decision in *Doe v. Calumet City*, 161 Ill.2d 374, 388-90 (1994).”

“In *Doe*,” Campbell recounted, “it was alleged that the police declined to break down a door after being informed by an apartment resident that a violent intruder had locked himself inside her apartment with her two minor children.”

The key portion of the Supreme Court’s analysis in *Doe*, including discussion of the special-duty rule, explained:

“Courts have applied various approaches in construing the willful and wanton language of section 2-202 with the common-law special-duty exception and the specific immunities granted police officers in sections 4-102 and 4-107 [providing immunity for injury caused by failure to make an arrest].

“The trial court [in *Doe*] added a showing of willful and wanton conduct to the requirements needed to show a special duty. The trial court then dismissed the negligence count based

on the lack of the control element needed to show a special duty.

“Several panels of the Appellate Court have taken a different approach and found that sections 4-102 and 4-107 provide specific blanket immunity to police officers that prevails over section 2-202.

“Under this reasoning, police officers receive immunity even from allegations of willful and wanton conduct.

“In contrast,” the Supreme Court continued, “some courts have considered willful and wanton conduct to be a statutory exception to the Tort Immunity Act completely separate from the judicially created special-duty exception. Under this reasoning, a plaintiff can state a cause of action for simple negligence by showing a special duty exists, or can allege willful and wanton conduct alone.

“We find this issue to be settled by this court’s recent decision in *Leone v. City of Chicago* (1993), 156 Ill.2d 33. The city in *Leone* argued that the special-duty exception required a showing of willful and wanton conduct pursuant to section 2-202 of the Tort

Immunity Act.

“This court held that the judicially created special-duty exception and the statutory willful and wanton exception were separate and distinct exceptions to municipal and officer liability. In support, the court noted that ‘incorporating a willful and wanton requirement into the special-duty doctrine would therefore yield the anomalous result of making recovery more difficult under the doctrine than it already is under the statute. Under these circumstances, the doctrine would cease to operate as an “exception” to sovereign immunity and would instead become an expansion of it.’ *Leone*, 156 Ill.2d at 39.

“Therefore,” the *Doe* court concluded, “plaintiffs can escape the statutory immunities granted municipalities and their employees either by proving facts that show the existence of a special duty and proving simple negligence or by proving willful and wanton conduct alone.”

Invoking the last clause of this long quote from *Doe*, the plaintiffs in *McElmeel* argued that they escaped statutory immunity by alleging that Bloss engaged in willful and wanton conduct.

“Plaintiffs note that *Doe* has been followed by this court in *Fatigato v.*

*Village of Olympia Fields*, 281 Ill.App.3d 347 (1996), and *Ozik v. Gramins*, 345 Ill.App.3d 502 (2003),” Campbell continued.

“However, our Supreme Court has made clear that the applicability of *Doe* — and of section 4-102 versus section 2-202 — depends upon the nature of the governmental activity. ‘Section 4-102 immunity may apply in the context where police officers are simply “providing [or failing to provide] police services,” but section 2-202 immunity requires more particular circumstances for its application, i.e., an act or a course of conduct “in the execution or enforcement” of law.’ *Aikens v. Morris*, 145 Ill.2d 273, 282 (1991).

“In *Doe*, it was alleged that the police declined to break down a door after being informed by an apartment resident that a violent intruder had locked himself inside her apartment with her two minor children.

“In *Fatigato*, it was alleged that police officers acted in a willful and wanton manner when they told a highly intoxicated man to leave his home after a domestic dispute and permitted him to drive his car while highly intoxicated.

“In *Ozik*, it was alleged that the police detained and issued traffic citations to a driver when they knew or should have known that the driver was

both underage and intoxicated, but allowed him to retake control of the vehicle.

“In contrast, in *Long v. Soderquist*, 126 Ill.App.3d 1059, 1064-65, where a deputy was assisting drivers and vehicles involved in two accidents, this court held that the deputy’s failure to light flares near two vehicles, failure to direct the drivers to remove their vehicles from the highway, failure to warn of the presence of the vehicles on the highway, and failure to call for assistance were immunized by section 4-102, even though plaintiffs alleged that those failures constituted willful and wanton conduct.

“Similarly, in *Kavanaugh v. Midwest Club Inc.*, 164 Ill.App.3d 213, 221 (1987), this court concluded that ‘the phrase “adequate police protection or service” in section 4-102 includes the police function of responding to a call of a traffic matter involving a motor vehicle that had been driven off the roadway and into a nearby retention pond,’ as was alleged by the plaintiffs in that case.

“In their reply brief, plaintiffs cite *Fitzpatrick v. City of Chicago*, 112 Ill.2d 211, 221-22 (1986), in which our Supreme Court held that a police officer investigating an automobile accident was ‘enforcing and executing the law’

for the purposes of section 2-202 of the act.

“In this case,” Campbell reasoned, “the police officer was not investigating a traffic accident. Also, the *Aikens* court discusses both *Fitzpatrick* and *Long* by distinguishing them, with no indication that *Long* should be considered bad law.

“In this case, plaintiffs’ allegations describe police action far more similar to that alleged in *Long* and *Kavanaugh* than to that alleged in *Doe* and its progeny.

“At the time of the injury, Officer Bloss was assisting a motorist, not investigating the scene. The same was true in *Long*, even though the motorists there apparently had been in an accident, as the officer there was seeking to check on a motorist’s injury and possibly summon medical assistance.

“Therefore, we conclude that at the time of the collision, the village and Officer Bloss were providing police service immunized by section 4-102 of the act, not executing or enforcing the law within the scope of section 2-202.

“Accordingly, the trial court did not err in dismissing the count against Officer Bloss and the village based on willful or wanton conduct.”

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*E-mail: garmisa@hoeyfarina.com*