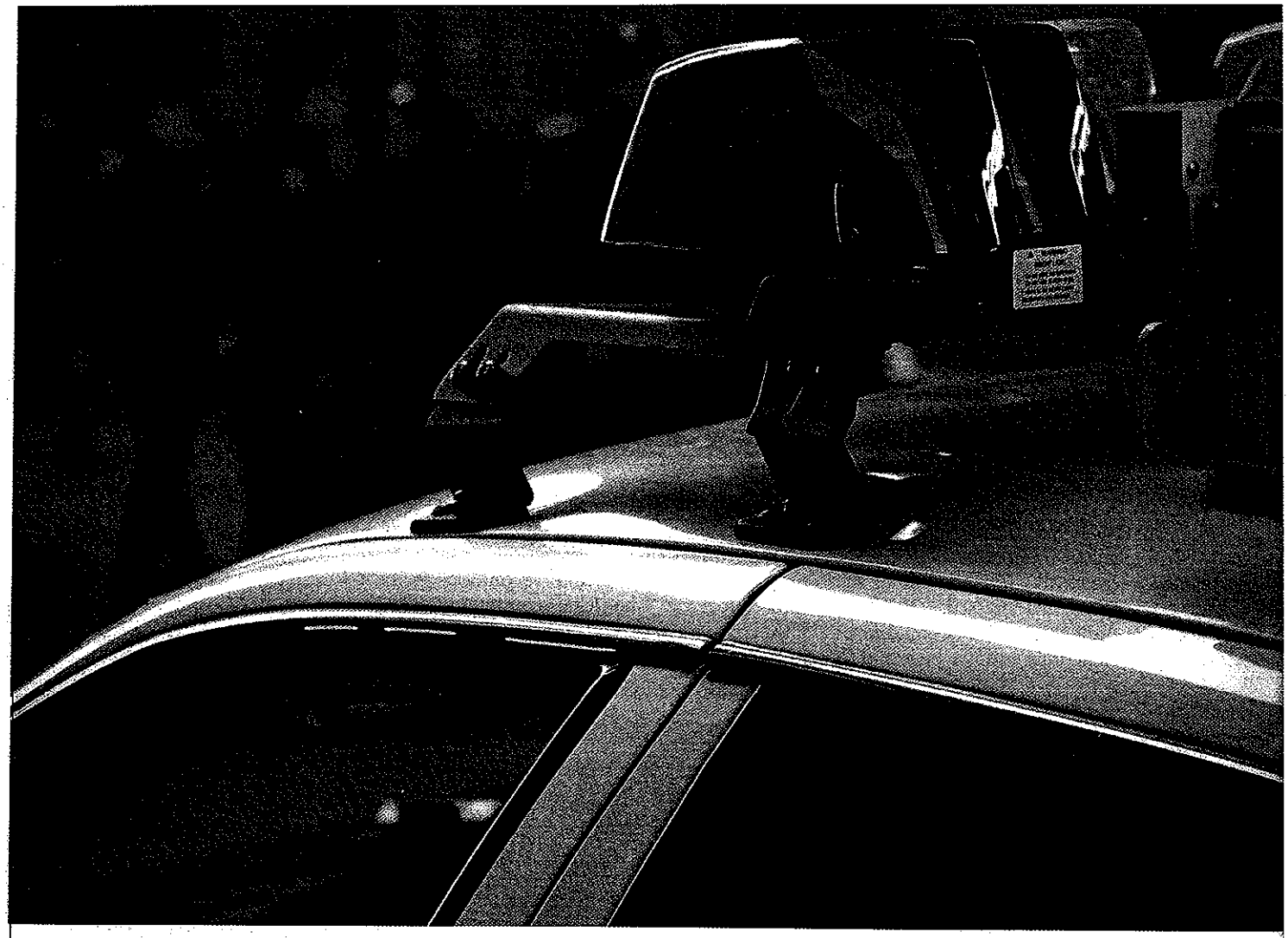

The Demise of the General Willful and Wanton Exception to the Tort Immunity Act

By Michael D. Bersani

One of the most debated issues in the history of the Illinois Local Governmental and Governmental Employees Tort Immunity Act[1] (Tort Immunity Act or "act") has been whether the immunity exception in section 2-202, which provides that a public employee executing or enforcing the law is liable for willful and wanton conduct, effectively creates a general willful and wanton exception under the act.

Last February in *Ries v City of Chicago*,[2] the Illinois Supreme Court finally put that issue to rest, expressly overruling *Doe v Calumet City*[3] and holding that willful and wanton conduct does not create a general exception to the blanket, absolute immunities otherwise provided in the act. This decision was not surprising, given the supreme court precedent chipping away at *Doe* since it was decided in 1994.

But if the willful and wanton immunity exception in section 2-202 does not apply generally, under what circum-

1. 745 ILCS 10/1-101 et seq.
2. No 109541, 2011 WL 681614 (Ill Sup Ct).
3. 161 Ill 2d 374, 641 NE2d 498 (1994).

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In *Ries v City of Chicago*, the Illinois Supreme Court held that willful and wanton conduct does not create a general exception to the blanket, absolute immunities otherwise provided in the Tort Immunity Act. But when, precisely, does willful and wanton conduct by public employees subject them to liability?

stances does it apply? When, precisely, does willful and wanton conduct by a public employee remove the shield of immunity?

That question was not answered in *Ries*. Indeed, other than to say that the more specific immunity provisions apply over more general ones, the supreme court in *Ries* did not elaborate on the circumstances necessary to trigger loss of immunity under section 2-202, as it had done a few years earlier in *Estate of Hays v County of Rock Island*.[4]

This article will provide a brief overview of the act and some of its foundational case law. It next will discuss *Doe* and its eventual demise under *Ries*. Finally, it will analyze the issue left unresolved in *Ries*, arguing that the court's prior discussion of the "execution and enforcement of any law" requirement under section 2-202 in *Hays* is still a valid standard for determining when section 2-202 applies.

Tort Immunity Act: An overview

Enacted in 1965 in response to the supreme court's abolition of common law sovereign immunity for local governments,[5] the purpose of the act is to protect public entities and employees from liability arising from the operation of government.[6] Specifically, the act is intended to ensure that public funds are not dissipated by private damage awards.[7] Immunity also allows public officials, when acting within their official discretion, to exercise their judgment without fear that a mistake made in good faith might subject them to a lawsuit.[8]

The act reflects the principle that local governments are liable in tort, but that liability is limited by the extensive immunities and defenses set forth in the act.[9] Further, under the 1970 Illinois Constitution, sovereign immunity has been abolished, except as otherwise provided by statute.[10] As a result, municipal tort liability is governed by the act.[11]

The act contains 10 articles. The substantive tort immunity provisions are contained in article 2 (general provisions relating to immunity), article 3 (immunity from liability for injury occurring in the use of public property), article 4 (police and correctional activities), article 5 (fire protection and rescue services), and article 6 (medical, hospital and public health activities).

The act does not create any new duties; it merely codifies common law duties to which the immunity provisions then apply.[12] It is in derogation of the common law and should be construed strictly against municipal defendants.[13] Thus, a municipality is liable in tort just like a private party, unless a specific immunity applies.[14]

Many of the immunity provisions found in the act are absolute, meaning that public entities and employees are immune from liability for both negligence and willful and wanton conduct. For example, section 4-102 provides blanket immunity for failing to provide adequate police protection and service.

Other provisions create limited immunity for negligent acts or omissions but then make exceptions for willful and wanton conduct. Section 2-202 is one of those provisions, specifying that "[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 and wanton conduct."[15]

For years, courts struggled with the notion that willful and wanton conduct provides a general exception to the Tort Immunity Act. That debate is now definitively dead.

Willful and wanton conduct as a general exception to the act

In early decisions interpreting the act, Illinois courts had overlain exceptions to immunity not expressly found in the language of particular provisions of the act. For example, in *Thiele v Kennedy*,[16] the third district held that the act did not provide immunity for "corrupt or malicious motives."

Twelve years later, in *Barth by Barth v Bd of Ed of the City of Chicago*, the first district expanded *Thiele* to include willful and wanton conduct as a general exception to the act.[17] *Barth* was followed into the 1990s when the first district applied a

4. 219 Ill 2d 497, 848 NE2d 1030 (2006).
5. *Harrison v Hardin County Comm Unit School Dist No 1*, 197 Ill 2d 466, 469, 758 NE2d 848, 851 (2001).
6. 745 ILCS 10/1-101.1.
7. *Pouk v Village of Romeoville*, 405 Ill App 3d 194, 196, 937 NE2d 800, 803 (3d D 2010).
8. *Fender v Town of Cicero*, 347 Ill App 3d 46, 48, 807 NE2d 606, 608 (1st D 2004).
9. *Harrison* at 471, 758 NE2d at 851.
10. Id (citing IL Const Art VIII, § 4).
11. *West v Kirkham*, 147 Ill 2d 1, 5, 588 NE2d 1104, 1106 (1992).
12. *Van Meter v Darien Park Dist*, 207 Ill 2d 359, 368, 799 NE2d 273, 279 (2003).
13. Id.
14. Id at 368-69, 799 NE2d at 279.
15. 745 ILCS 10/2-202. Willful and wanton conduct is defined under the 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.
16. 18 Ill App 3d 465, 309 NE2d 394 (3d D 1974).
17. 141 Ill App 3d 266, 273, 490 NE2d 77, 81 (1st D 1986).

willful and wanton exception to otherwise absolute immunities in *Munizza v City of Chicago*.[18]

However, beginning with *Barnett v Zion Park Dist*,[19] the supreme court began to whittle away at the notion that the willful and wanton exception applies generally to all provisions of the act. The park district in *Barnett* was sued for failing to supervise a minor who drowned in a public pool. The court rejected the plaintiff's argument that section 3-108 of the act, which at the time provided blanket immunity for failing to supervise an activity on or the use of any public property,[20] was limited by section 2-202, which provided immunity for negligence in the execution or enforcement of any law, unless the employee's act or omission was willful and wanton.[21] The court found that "Section 2-202 is not a general exception to all of the other immunities established by the Tort Immunity Act."[22]

Several years later, the court came to a similar conclusion in *In re Chicago Flood Litigation*.[23] In that case, work on a bridge caused a breach in an underground tunnel system resulting in the flooding of downtown Chicago. The city was accused of willful and wanton conduct in failing to supervise and repair the work.

The city asserted discretionary immunity under section 2-201 of the act, which contains no exception for willful and wanton conduct. Agreeing with the city and overruling *Barth* in the process, the supreme court stated the following:

> The plain language of section 2-201 is unambiguous. That provision does not contain an immunity exception for willful and wanton misconduct. Where the legislature has chosen to limit an immunity to cover only negligence, it has unambiguously done so. Since the legislature omitted such a limitation from the plain language of section 2-201, then the legislature must have intended to immunize liability for both negligence and willful and wanton misconduct.[24]

Finally, employing the same analysis in 2001, the supreme court in *Village of Bloomingdale v CDG Enterprises, Inc* sounded the death knell to *Thiele* and held that there was no general exception to immunity under the act for "corrupt or malicious motives."[25]

The supreme court in *Hays* found that because the police did not actually respond to or control the scene, section 2-202 did not apply. If *Doe* is no longer good law, is that analysis still valid?

Doe v Calumet City: A hard case making bad law?

Despite the seemingly clear direction of the supreme court with regard to its interpretation of the act in *Barnett*, *Chicago Flood Litigation*, and *CDG Enterprises*, none addressed a preceding decision from the mid-90s – *Doe v Calumet City*.[26]

In *Doe*, the plaintiff, Jane Doe, alleged that she was sexually assaulted, beaten, and threatened by an intruder in her apartment. Jane was able to escape, but the intruder locked himself in the apartment with Jane's two minor children.

Neighbors heard screaming and called 911. Several officers arrived at the scene, including Officer James Horka who assumed a supervisory role. Jane told Officer Horka what happened and that the intruder was locked in the apartment with Jane's two minor children. Jane and several of her neighbors pleaded with Officer Horka to break down the door and rescue the children.

However, Officer Horka refused to enter the apartment and prevented other officers and neighbors from entering the apartment. He stated that he was reluctant to damage the landlord's property, despite Jane's assurances that she would pay for any damage. Rather than rescue the children, Officer Horka questioned Jane in a rude and demeaning manner. When Jane attempted to rescue the children herself, she was ordered to stay put and then physically restrained.

The children were eventually rescued by an investigator who entered the apartment through an unlocked rear balcony door – an entrance Officer Horka had refused to use. While Officer Horka was outside, the intruder repeatedly raped Jane's daughter and choked and threatened her son.

The question ultimately before the Illinois Supreme Court in *Doe* was whether the plaintiff stated a cause of action against the police officers for conduct while responding to a police call. The plaintiff had alleged both a claim for negligence and willful and wanton conduct.

The court first rejected the negligence claim, holding that, under the common law public duty doctrine, the police did not owe a duty of care to protect the public at large from harm perpetrated by third parties, unless the facts and circumstances gave rise to a special relationship between the plaintiff and the police.[27] The facts of the case did not support such a special duty.

However, the court then addressed whether a claim for willful and wanton conduct applied where no special duty existed. It held that a plaintiff may avoid statutory tort immunities by either proving facts that show a special duty and negligence or by proving willful and wanton conduct alone.[28]

The court looked to section 2-202 and concluded that the facts alleged by the plaintiff could establish willful and wanton conduct, given Officer Horka's exercise of control at the scene and over the plaintiff, his knowledge that the intruder was in the apartment with the minor children, and his expressed reason for not entering the apartment, i.e., fear of personal liability for property damage.[29]

Distinguishing *Doe*: *Hays v County of Rock Island*

In the ensuing years, the appellate court and many lower courts and practitioners questioned the viability of *Doe*. However, the supreme court did not weigh in again until 2006 when it decided *Hays*.

The plaintiff in *Hays* sued for wrong-

18. 222 Ill App 3d 50, 54, 583 NE2d 561, 564-65 (1st D 1991).
19. 171 Ill 2d 378, 391, 665 NE2d 808, 814 (1996).
20. Id. Section 3-108 was amended after *Barnett* and now includes a willful and wanton exception.
21. 745 ILCS 10/2-202.
22. *Barnett* at 390, 665 NE2d at 814.
23. 176 Ill 2d 179, 680 NE2d 265 (1997).
24. Id at 196, 680 NE2d at 273.
25. 196 Ill 2d 484, 486, 752 NE2d 1090, 1093 (2001). See also *Zimmerman for Zimmerman v Village of Skokie*, 183 Ill 2d 30, 50, 697 NE2d 699, 710 (1998) (holding that special duty doctrine was not an exception to tort immunity).
26. 161 Ill 2d 374, 641 NE2d 498 (1994).
27. Id at 385-86, 641 NE2d at 504.
28. Id at 390, 641 NE2d at 505.
29. Id at 395, 641 NE2d at 508.

ful death based upon the failure of the police to respond to an anonymous caller's report that a motorist had left the road and landed in a ditch. The city argued that the suit was barred by absolute immunity under section 4-102, while the plaintiff claimed that section 2-202's willful and wanton exception provided an exception to section 4-102 immunity.

The supreme court held that "[t]o the extent that *Doe* still represents good law, we hold it is inapplicable under these circumstances, where the police failed to respond to the scene of a possible accident."[30] The court stated that "*Doe* cannot be properly understood without reference to the outrageous conduct alleged of the supervising police officer in that case."[31]

The court in *Hays* concluded that the application of section 2-202 bore "striking similarities to an application of the special duty exception to the public duty rule" in that Officer Horka's control over Jane and the scene was a critical factor in determining that his conduct might give rise to a claim for willful and wanton conduct.[32]

The court then stated that Officer Horka in *Doe* had actually responded to the scene and was engaged in the enforcement or execution of the law when he took a supervisory role over the investigation and law enforcement activities at the scene, including his act of preventing others from entering the apartment to save the children.[33] In contrast, the police in *Hays* did not respond at all and, even if they did, their role would have been that of community caretaking rather than enforcing or executing the law.[34]

The court held that immunity under section 4-102 was premised on a failure by the police to act, while section 2-202 required more particular circumstances, i.e., an act or course of conduct in the enforcement or execution of law.[35]

The *Hays* court then explained the different policy considerations that underscored section 4-102 and section 2-202. When a police officer actually responds to a call for service, he "exercises a degree of control over the situation and may alter the circumstances at the scene for better – or worse."[36] Thus, the legislature intended to immunize the officer from negligence, but not for willful and wanton conduct under those circumstances.[37]

Section 4-102, however, implicates a separate policy consideration: "Where no officers respond to the scene – whether it is because no police protection services are provided or because the services provided prove to be inadequate – the status quo *ante* is at least not altered to the detriment of those present."[38] Thus, in *Hays*, section 2-202 did not apply as an exception to section 4-102 immunity because the police did not exercise control over the scene and were not enforcing or executing the law.[39]

Overruling *Doe*: *Ries v City of Chicago*

In *Ries*, a police officer investigating a car accident arrested one of the drivers and placed him in the back of a running squad car. The suspect was not handcuffed, and the squad car had no protective cage. The driver jumped over the seat and, using the ignition key left in the vehicle, stole the squad car and drove away.

Officers began pursuit of the vehicle but eventually called off the pursuit because of safety risks. Within a mile from the original accident, the driver ran a red light and hit the plaintiffs' vehicle at a high rate of speed. The plaintiffs were injured and subsequently sued the police officer and city for willful and wanton conduct, alleging that the defendants failed to property secure the suspect, failed to turn off the squad car engine and remove the keys, failed to place the suspect in a squad car with a protective cage, and failed to lock and secure the rear door.

The city and officer moved to dismiss pursuant to section 4-102 (failure to provide adequate police protection or service), section 4-106 (injuries inflicted by an escaped or escaping prisoner), and section 4-107 (failure to make an arrest or by releasing a person in custody). The circuit court denied the motions, finding that, under section 2-202 and *Doe*, there was an exception to these otherwise absolute immunities for willful and wanton conduct.

The court eventually granted a directed verdict for the officer and held that the case could proceed against the city for willful and wanton conduct. A jury ultimately returned a verdict for the plaintiffs, and the city appealed.

The first district reversed, finding that section 2-202's willful and wanton exception did not limit the other absolute immunities found in the act. In reaching its decision, the first district compared the facts in *Ries* to the facts in *Doe* and concluded that *Doe* did not apply because "there was not adequate evidence of police control of the scene of the accident in order to invoke Section 2-202 of the Act."[40]

The supreme court affirmed. But, rather than distinguishing *Doe* as the first district in *Ries* had done (and as the supreme court itself had done in *Hays*), the court held that *Doe* simply no longer represented good law.[41] The court explained that a number of its cases, from *Chicago Flood Litigation* through *Hays*, had rejected the notion that the blanket, absolute immunities found in the act were limited by section 2-202's willful and wanton exception.

Putting it simply, the court noted that these cases stood for the proposition that "if a section of the Tort Immunity Act does not provide for a willful and wanton exception, then none exists."[42] The court then concluded as follows:

> It is time for this court to acknowledge the obvious. Given that *Doe*'s legal underpinning has been consistently repudiated by this court, there is simply no longer any reason to try to either apply or distinguish that case....Because *Doe*'s holding that section 2-202 provides a general willful and wanton exception to the immunities otherwise provided by the Tort Immunity Act is no longer good law, we will not read a willful and wanton exception into section 4-106(b).[43]

Questions unanswered by *Ries*

Clearly, after *Ries*, *Doe* is no longer good law, and a plaintiff cannot rely upon section 2-202's willful and wanton

(Continued on page 370)

30. *Hays* at 515, 848 NE2d at 1042.
31. Id.
32. Id at 519, 848 NE2d at 1044.
33. Id at 520, 848 NE2d at 1044-45.
34. Id at 520, 848 NE2d at 1045.
35. Id.
36. Id at 521, 848 NE2d at 1045.
37. Id.
38. Id.
39. Id. Following the supreme court's decision in *Hays*, the appellate court has consistently refused to apply section 2-202 generally to other more specific, applicable provisions of the act. See *Ware v City of Chicago*, 375 Ill App 3d 574, 581, 873 NE2d 944, 950-51 (1st D 2007); *Bowler v City of Chicago*, 376 Ill App 3d 208, 215, 876 NE2d 140, 146 (1st D 2007); *Anthony v City of Chicago*, 382 Ill App 3d 983, 995-96, 888 NE2d 721, 731-32 (1st D 2008); *Pouk* at 198, 937 NE2d at 805; *Hess v Flores*, No 08-1653, 2011 WL 1227826 (1st D 2011).
40. *Ries v City of Chicago*, 396 Ill App 3d 418, 435, 919 NE2d 465, 479 (1st D 2009).
41. *Ries*, No 109541, 2011 WL 681614 *12.
42. Id.
43. Id.

exception when other immunity provisions apply, such as those found in article 4 of the act. But this begs the question: when *does* section 2-202 apply?

Both the supreme court in *Hays* and the first district in *Ries* distinguished *Doe* and found that because the police did not actually respond to or control the scene, section 2-202 did not apply.[44] If *Doe* is no longer good law, is that analysis still valid? The supreme court in *Ries* did not address this issue, instead finding that the more specific immunity, section 4-106(a), prevailed over the more general immunity set forth in section 2-202.[45]

Section 2-202 provides that a public employee is not liable unless he willfully and wantonly *executes or enforces the law*.[46] Section 2-202 therefore by its plain language does not extend to all police activities.[47] Rather, section 2-202 applies to acts that are part of a "course of conduct designed to carry out or put into effect any law."[48]

Thus, in *Fitzpatrick v City of Chicago*, a police officer who observed and responded to a traffic accident was in the process of executing or enforcing the law.[49] Similarly, in *Thompson v City of Chicago*, section 2-202 applied when the officer was attempting to quell a disturbance at a rock concert and backed up his squad car into plaintiff.[50]

Following that logic, the public employee who commits willful and wanton misconduct is liable, but only if he or she was actually enforcing or executing the law, as opposed to doing "nothing at the time of the injury" or taking "some action to enforce the law but then stopp[ing] and an injury occur[s] thereafter."[51]

In *Hays*, the court distinguished *Doe* by opining that the officer in *Doe* not only responded to the scene but also ostensibly enforced or executed the law when he exercised control over it and thereby "alter[ed] the circumstances... for better – or worse."[52]

It is not clear whether this "control" analysis still survives because it may be nothing more than a fact-specific attempt by a court to make sense of the now defunct *Doe* decision. It is more likely, however, that the analysis may aid a court or jury in some circumstances in determining whether an officer has engaged "course of conduct designed to carry out or put into effect any law." If so, *Hays* is applicable and instructive.

Conclusion

For years, practitioners and the courts have struggled with the notion that willful and wanton conduct provides a general exception to the Tort Immunity Act. That debate is now definitively dead. The supreme court in *Ries* held that *Doe* no longer represents good law, and that willful and wanton conduct does not provide a general exception to the otherwise blanket, absolute immunities found throughout the act.

Nonetheless, section 2-202's willful and wanton exception still may apply where more specific immunities are not applicable. The court's "control analysis" in *Hays* is a valid framework for making this determination. ■

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44. *Hays* at 520, 848 NE2d at 1045; *Ries* at 434-35, 919 NE2d at 479.

45. *Ries*, 2011 WL 681614 *8.

46. Section 2-202 is applicable to public entities through section 2-109 of the act, which provides that a public entity is not liable for torts committed by its employee where the employee is not liable.

47. See e.g., *Hays* at 520, 848 NE2d at 1045 (holding that section 2-202 does not apply to police community caretaking functions); *Aikens v Morris*, 145 Ill 2d 273, 583 NE2d 487 (1991) (holding that section 2-202 does not apply to routine police activities, such as transporting prisoners); *Leaks v City of Chicago*, 238 Ill App 3d 12, 606 NE2d 156 (1st D 1992) (holding that officer was not enforcing the law when he spotted possible drug deal while on routine patrol).

48. *Fitzpatrick v City of Chicago*, 112 Ill 2d 221, 221, 492 NE2d 1292, 1296 (1986).

49. Id at 222, 492 NE2d at 1297.

50. 108 Ill 2d 429, 433, 484 NE2d 1086, 1087 (1985)

51. See also *Pouk* at 198, 37 NE2d at 804; see also *Ries*, 2011 WL 681614 *14 (Thies specially concurring) (finding that section 2-202 narrowly applies to more particular circumstances, i.e., when the police are engaged in a course of conduct in the execution or enforcement of law).

52. *Hays* at 521, 848 NE2d at 1045.