

No. 1-13-3146

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WENDELL BURTS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 11 M3 2332
)	
PAUL J. PETRICK and the)	Honorable
VILLAGE OF STREAMWOOD,)	Thomas D. Roti,
)	Judge Presiding.
Defendants-Appellees.)	

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm summary judgment in favor of defendants on plaintiff's negligence complaint because no genuine issue of material fact existed as to whether the police officer was executing or enforcing the law where he was responding to a crime in progress when his vehicle allegedly hit the plaintiff. Therefore, the police officer was immune from liability under section 2-202 of the Tort Immunity Act and the village that employed the officer was immune under section 2-109 of the Tort Immunity Act.

¶ 2 Plaintiff, Wendell Burts, appeals the trial court's grant of summary judgment on his negligence complaint in favor of defendants, Paul J. Petrick (Petrick), and Petrick's employer, the Village of Streamwood (the Village). The trial court concluded that Petrick, a police officer, was

responding to a report of a crime in progress when his police vehicle allegedly struck plaintiff and, therefore, Petrick was immune from liability for negligence as a matter of law under section 2-202 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) which states 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." (Emphasis added.) 745 ILCS 10/2-202 (West 2010). The court also concluded that the Village was immune from liability under section 2-109 of the Tort Immunity Act which provides that a public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCS 10/2-109 (West 2010). Plaintiff filed this timely appeal contending that the matter must be submitted to a fact finder for credibility determinations. We conclude that there are no genuine issues of material fact concerning whether Petrick was responding to a radio call of a crime in progress at the time of the alleged accident. Thus, the trial court correctly concluded that he was executing and enforcing the law within the meaning of section 2-202 of the Tort Immunity Act. We affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On July 4, 2010, Petrick, a police sergeant employed by the Village, allegedly struck plaintiff with his police vehicle. On June 23, 2011, plaintiff filed a one-count negligence complaint against defendants. On June 27, 2013, defendants moved for summary judgment and attached a video of the incident taken from Petrick's squad car, the Village's police reports, and the deposition testimony of plaintiff, Petrick, Sergeant Clyde Hayden, and a witness, Phillip Smith.

¶ 5 Petrick testified that he was the only patrol sergeant on duty on July 4, 2010, the night of the accident. While on patrol in the area of Bartlett Road and Irving Park Road in Streamwood, he saw plaintiff standing outside of a 7-Eleven convenience store, and approaching cars as the occupants were getting out. Petrick recognized plaintiff from two previous encounters when plaintiff had been asking customers for money. Petrick also testified that the Village has a panhandling ordinance that provides it is "unlawful for one individual to approach another individual requesting money."

¶ 6 Petrick drove into the 7-Eleven parking lot, parked in front of the store, left his vehicle, and approached plaintiff. He smelled alcohol on plaintiff's breath. Petrick asked plaintiff what he was doing and told him not to ask customers for money. In his deposition, plaintiff testified that he had drunk several beers and smoked marijuana earlier that day, but denied that he had been asking anyone for money.

¶ 7 Petrick also testified that, while standing on the sidewalk in front of the 7-Eleven, he heard a dispatch to a fight in progress in the area of McKool Street involving ten or twenty subjects. Petrick testified that McKool Street is a high-crime area and he had been in the area for previous calls. Petrick considered the call an emergency.

¶ 8 Petrick testified regarding the Village police report attached to defendants' motion, also referred to as a "Call for Service" report. According to the police report, a call was received by dispatch at approximately 12:01 a.m. on July 4, 2010, concerning a fight involving approximately 20 males. Two police officers were initially assigned by dispatch to the fight call at approximately 12:02 a.m. In addition, two other police units which included a K-9 unit, self-dispatched at 12:03 a.m. Petrick heard the dispatch call over his portable police radio worn on his shoulder between 12:02 and 12:03 a.m. Petrick was not listed on the report, but he testified

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that he would not be an immediate officer dispatched because he was the supervisor and would have self-dispatched.

¶ 9 Former police sergeant, Clyde Hayden, testified at his deposition that he was the other shift commander on the night of the incident. Hayden was below Petrick in the chain of command. Hayden confirmed that the call came out for the need to respond to the fight. He also confirmed Petrick's statement that the shift sergeant would respond to calls concerning fights involving multiple individuals. Hayden testified that the sergeant is responsible for any incident or any serious incident occurring in the Village at the time. He further testified that it is the sergeant's personal responsibility to respond to an emergency call to assist the patrol officers and observe their actions. In his deposition, plaintiff testified that he did not hear Petrick's police radio or hear anybody talking to him on his police radio at any time.

¶ 10 Petrick testified that, after receiving the fight dispatch, he ended his encounter with plaintiff to respond to the emergency call. Petrick entered his car, activated his overhead emergency lights, checked the sides of the vehicle, and began to reverse while looking in the rear view mirror. He testified that, after reversing, he applied his brakes and was shifting to drive when he heard a thud at the rear of his vehicle. He left his vehicle and saw plaintiff standing "hunched over with his hands upon his knees." Petrick asked plaintiff "what did you do." Plaintiff told Petrick he had hit him and then plaintiff fell to the ground. Petrick radioed dispatch requesting that paramedics and Officer Hayden respond. Petrick also testified that when he had entered his vehicle, plaintiff had been walking on the sidewalk in front of the 7-Eleven and Petrick did not see him step into the parking lot. The impact occurred at approximately 12:03 a.m.

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¶ 11 In his deposition, plaintiff testified that he began walking towards his car after Petrick told him to leave the 7-Eleven. Plaintiff stated he was walking forward and did not look back. He also said that he did not see Petrick's emergency lights until he was on the ground and looked up.

¶ 12 The store clerk, Phillip Smith, testified that he looked outside and saw plaintiff was leaving the premises. Smith saw Petrick enter his vehicle and turn on his overhead emergency lights "[j]ust seconds after he got in the car and shut the door." Smith did not see Petrick's vehicle hit plaintiff because his view was obscured by posters in the store window. Smith further testified that when Petrick later asked him if he saw what happened, he told Petrick: "No, I just saw you backed out with your lights on and then stopped because I couldn't see anything because there was a poster in the window." Smith also testified as to the rate of speed when Petrick backed out, stating it was "[f]aster than a normal person would back out, like he was...because he had his lights on, it was like he was going to a call, and he was in a hurry to get where he was going."

¶ 13 The video of the incident taken from Petrick's squad car shows that the overhead emergency lights were activated when Petrick reversed from the parking space. The video shows the lights reflected in the store window. The video also shows reflections of the overhead emergency lights on other objects, including the gas pumps, *as* Petrick was backing out, and not, *as* plaintiff asserts, only after the vehicle hit him.

¶ 14 STANDARD OF REVIEW

¶ 15 "Summary judgment is proper if, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

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as a matter of law. [Citation.]” (Internal quotation marks omitted.) *Hess v. Flores*, 408 Ill. App. 3d 631, 636 (2011). Summary judgment can aid in the expeditious disposition of a lawsuit, but it is a drastic means of disposing of litigation. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Thus, it should be allowed only where the right of the moving party is clear and free from doubt. *Id.* Our review of a circuit court's order granting summary judgment is *de novo*. *Hess v. Flores*, 408 Ill. App. 3d at 636.

¶ 16 ANALYSIS

¶ 17 The Illinois Supreme Court has explained that the immunity provided by section 2–202 does not extend to all activities of police officers while on duty but, instead, only to those acts or omissions while in the actual execution or enforcement of a law. *Aikens v. Morris*, 145 Ill. 2d 273, 278 (1991); *Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211 (1986); *Arnolt v. City of Highland Park*, 52 Ill. 2d 27, 33 (1972). “Thus, where an officer is engaged in routine elements of his official duties, such as transporting a prisoner [citation], engaging in routine patrol [citation], or investigating a missing person report [citation], immunity does not attach.” *Bruecks v. County of Lake*, 276 Ill. App. 3d 567, 568 (1995).

¶ 18 When interpreting the phrase “in execution or enforcement of any laws,” courts must give the words their “plain and commonly ascribed meaning.” *Stehlik v. Village of Orland Park*, 2012 IL App (1st) 091278 (quoting *Thompson v. City of Chicago*, 108 Ill. 2d 429, 433 (1985)). In discussing the question of whether a police officer was “executing or enforcing the law” at the time of a plaintiff's injury, our supreme court has explained that “[e]nforcing the law is rarely a single, discrete act, but is instead a course of conduct.” (Internal quotation marks omitted.) *Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211, 221 (1986) (quoting *Thompson v. City of Chicago*, 108 Ill. 2d 429, 433 (1985)); accord *Lacey v. Village of Palatine*, 232 Ill. 2d at 364.

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The *Fitzpatrick* court reiterated its rejection of the "overly narrow" interpretation of section 2-202 of the Tort Immunity Act as granting immunity *only* where the *specific*, allegedly negligent act was one of execution or enforcement. *Id.* "Therefore, where the evidence establishes a police officer was engaged 'in a course of conduct designed to carry out or put into effect any law' at the time his alleged negligence occurred, sections 2-202 and 2-109 of the Act provide an affirmative defense to the officer and his employer." *Stehlik*, 2012 IL App (1st) 091278, ¶ 20 (quoting *Fitzpatrick*, 112 Ill. 2d at 221).

¶ 19 Ordinarily, the question of whether a police officer is executing and enforcing the law is a factual determination that must be made in light of the circumstances involved in each case. *Arnolt*, 52 Ill. 2d at 35; accord *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 388 (2007) (noting that the question "appears to have been determined on a case-by-case basis"). However, the question can be resolved as a matter of law where "the evidence is undisputed or susceptible to only one possible interpretation." *Hudson*, 378 Ill. App. 3d at 388; accord *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 367 (2009) ("a court may, as a matter of law, determine whether officers were enforcing a law when the facts alleged support only one conclusion"); *Sanders v. City of Chicago*, 306 Ill. App. 3d 356, 361 (1999); *Morton v. City of Chicago*, 286 Ill. App. 3d 444, 455 (1997). Several cases have held, as a matter of law, that a police officer responding to a radio call of a crime in progress is executing and enforcing the law within the meaning of section 2-202 of the Tort Immunity Act.

¶ 20 In *Morris v. City of Chicago*, 130 Ill. App. 3d 740 (1985), the plaintiff brought suit against a police officer and the city for injuries he sustained when his parked car was struck by the police vehicle after it slid on a patch of ice. *Id.* at 741-42. Although the officer was responding to a call regarding a crime in progress, at the time of the collision, the officer had

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turned off his siren and his vehicle was not equipped with rooftop "Mars" lights. *Id.* at 742. The trial court granted the defendants' motion for a directed verdict, noting that the officer's "undisputed testimony showed that he was executing or enforcing a law when the collision occurred, and thus defendants were within the protection of the Tort Immunity Act." *Id.*

¶ 21 On appeal, the court rejected the plaintiff's argument that since the officer "did not actually see a crime being committed and was not in the act of apprehending an offender when the collision occurred, the trial court's directed verdict, finding that he was executing or enforcing a law, was error or, alternatively, presented a question for the jury." *Id.* at 743. As the court noted, the uncontroverted evidence established that the police officer assumed that a crime was being committed when he received the radio report and, when the collision with plaintiff's car occurred, the police officer was responding to a radio report of a crime in progress. *Id.* The plaintiff could produce no evidence to dispute the officer's testimony. *Id.*

¶ 22 Also, summary judgment was affirmed in *Bruecks v. County of Lake*, 276 Ill. App. 3d 567 (1995), a case in which a deputy sheriff was responding to a report of shots fired when he struck a pedestrian crossing the road. *Id.* at 568. At his deposition, the officer testified that three other deputies had previously been dispatched to the area, but he stated that he would also respond. *Id.* At the time his car struck plaintiff, the deputy did not have his emergency lights or siren activated and also stated that he did not feel the situation was an "emergency." *Id.* The court concluded that, as a matter of law, the deputy was executing or enforcing the law at the time of the accident, even though the deputy did not subjectively consider the situation to be an emergency, was not specifically dispatched to the scene, and did not have his emergency lights or siren activated. *Id.* at 569. As the court explained, the deputy responding to the call of shots fired "clearly was being called upon to execute or enforce a law." *Id.* at 569.

¶ 23 In *Morton v. City of Chicago*, 286 Ill. App. 3d 444 (1997), the plaintiff was severely injured when she was struck by a car driven by a suspect, Jamal Massie, whom the police were pursuing. *Id.* at 446. The plaintiff brought an action against Massie, with whom she later settled, and the city, alleging both negligence and willful and wanton conduct. *Id.* As to the negligence count, the trial court granted summary in favor of the city, pursuant to the immunity provided by section 2-202. *Id.*

¶ 24 In affirming the grant of summary judgment on the negligence count, this court noted that the record contained no evidence upon which a jury could rely to find the police officers' actions were a proximate cause of the plaintiff's injuries. *Id.* at 455. As we also explained, the city's employees were immunized by section 2-202 provided they were engaged in the "execution or enforcement of any law." *Id.* We reviewed the facts noting that "the police suspected Massie and his passengers of being involved in drive-by shootings." *Id.* Massie's car was blocking the road when a detective stopped behind him and activated his oscillating lights, which we noted was "a recognizable sign of police activity." *Id.* At that point, one of Massie's passengers drew a gun on the detective. *Id.* "Massie sped off, violating numerous traffic laws." *Id.* The detective followed Massie. *Id.* As we explained: "These facts, as well as our case law, establish that any contention that the police involved here were not engaged in law enforcement is utterly baseless." *Id.* We conclude that the instant case is similar to *Morris*, *Bruecks*, and *Morton*.

¶ 25 The undisputed evidence, including the police report, shows that there was a dispatch regarding a fight in progress. Plaintiff asserts, however, that there is a genuine issue of material fact concerning whether Petrick was responding to the call at the time of the alleged accident. However, the "numerous" issues of fact raised by plaintiff are not genuinely in dispute, or are not material. For instance, plaintiff notes that there is a dispute as to whether he was actually

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panhandling. While disputed, this issue is immaterial. Plaintiff contends that "[a]lthough this may appear to be an insignificant piece of evidence, it can allow a jury, at trial, to determine Sergeant Petrick is not credible when discussing the occurrence on the night in question."

Plaintiff then posits that "[i]f a jury finds this, they may be more likely to disregard other parts of Sergeant Petrick's testimony, specifically whether or not a call was received by Sergeant Petrick regarding a fight in progress."

¶ 26 Contrary to plaintiff's contention, there is no genuine issue of material fact that Petrick received the call. Petrick testified that he heard the call. Plaintiff offers no contradictory evidence but merely notes that *he* did not hear the call. This does not create a question of fact. See, e.g., *Williams v. City of Evanston*, 378 Ill. App. 3d 590, 600 (2007) (explaining that witnesses' "simple failure to recollect hearing the sirens" prior to an accident did not directly contradict the testimony of the other witnesses who heard the siren). Petrick's testimony that he heard the call is *undisputed*.

¶ 27 Plaintiff contends that, even assuming Petrick heard the police call regarding the crime in progress, there is a genuine issue of material fact as to whether Petrick was *actually responding* to the call. In support of this contention, plaintiff asserts there was no evidence that Petrick was *required* to respond to the call. Yet Petrick testified that he was required to respond, Hayden confirmed Petrick's statement that the shift sergeant would respond to calls concerning fights involving multiple individuals, and there is no contradictory evidence. Plaintiff is speculating that, at the time of the alleged accident, Petrick may not have been responding to the emergency call. "However, [m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment. [Citation.]" (Internal quotation marks omitted.) *Harrison v. Addington*, 2011 IL App (3d) 100810, ¶ 61.

¶ 28 Plaintiff asserts that "[o]ne key issue of material fact that must be established is the actual point in time Sergeant Petrick's Mars lights were activated," in an effort to show that a contested issue of material fact exists. We disagree.

¶ 29 The precise moment the emergency lights were activated is legally irrelevant. Plaintiff has conceded in his brief that responding to an actual call to enforce a law will shield an officer from liability, even if the officer is proceeding without his Mars light or siren. *Morris v. City of Chicago*, 130 Ill. App. 3d 740 (1985); *Bruecks v. County of Lake*, 276 Ill. App. 3d 567 (1995). Thus, the exact time that Petrick activated his lights is not a "material" fact.

¶ 30 CONCLUSION

¶ 31 In sum, Petrick was immune from liability for negligence as a matter of law pursuant to section 2-202 of the Tort Immunity Act, and the Village was immunized as a matter of law pursuant to section 2-109 of the Act. Contrary to plaintiff's assertions, this case does not "boil down to the credibility of the witnesses." The undisputed evidence here establishes that, at the time Petrick's vehicle allegedly struck plaintiff, Petrick was "executing and enforcing the law" in responding to a dispatch concerning a fight involving 10-20 individuals. A fight in progress is considered a crime and responding to it is not part of a police officer's routine patrol duties. The call that Petrick heard was considered an emergency call, requiring an emergency response by Petrick as a supervisor, because the fight was in a high crime area with multiple subjects. Here, no genuine issue of material fact existed and the trial court correctly determined that defendants were entitled to judgment as a matter of law. We affirm the order of the circuit court of Cook County granting summary judgment to defendants.

¶ 32 Affirmed.