2014 IL App (3d) 120710-U

Order filed February 13, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

DIETHARD BEYER, as Special Administrator of the Estate of MARGARET I. WILSON,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee/Cross-Appellant,	)	Appeal No. 3-12-0710
v.	)	Circuit No. 05-L-94
CITY OF JOLIET, an Illinois Municipal Corporation,	)	Honorable Raymond E. Rossi,
Defendant-Appellant/Cross-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held:* Trial court properly found City, through its police officers, liable for death of domestic violence victim, who was killed by her husband less than 24 hours after officers reported to victim's house three times for domestic violence complaints but never completed a report or arrested victim's husband.

¶ 2 On July 20, 2004, Margaret Wilson repeatedly requested assistance from City of Joliet police officers, fearing that her husband, David, had a gun and might harm her. Early the following morning, David shot and killed Margaret. Plaintiff Diethard Beyer, as special

administrator of Margaret's estate, filed an action against the City of Joliet, alleging wrongful death, pain and suffering, and loss of consortium damages. Following a bench trial, the trial court found in favor of Beyer and ordered the City to pay $449,533.08 in damages. We affirm.

¶ 3 On July 20, 2004, Margaret and David Wilson, a married couple, lived together at 520 Campbell Street in Joliet, with Margaret's youngest daughter, Sarah, Sarah's three-year-old son, and Sarah's boyfriend. Between 11:14 a.m. and 1:07 p.m. on July 20, 2004, City of Joliet police were summoned to the Wilsons' residence three times. The first time, Margaret called the police, stating that David was threatening her and had guns in the house. The dispatcher informed the four responding officers: "Husband David threatening to shoot her. They are in living room. Gun is in bedroom upstairs. Children are upstairs in bedroom. Children are about 7 and 16 years of age. They are aware of problems with parents."

¶ 4 At the scene, the responding officers learned that David and Margaret were having a dispute because Margaret was engaged in an extramarital affair with a woman. Margaret told the officers that she knew where David's guns were. She took two of the officers up to the bedroom she shared with David. She found a box and shook it, but it appeared empty. The officers left without filling out a police report. No one asked if any children were present, and no one talked to Sarah.

¶ 5 At 12:40 p.m. that same day, Sarah asked a friend to call 911 when she found David lying on the floor of the Wilsons' home. Officer Francis Gonzalez of the City of Joliet police responded. When he arrived, a paramedic was on the scene and said that David had not eaten or taken his insulin; however, his sugar level was within the normal range. Both Sarah and Margaret asked Gonzalez to take David to the hospital to undergo a psychiatric evaluation. Gonzalez and the paramedic determined that David did not meet the criteria for involuntary

admission into a psychiatric facility. When David appeared stable, Gonzalez left without filing a report.

¶ 6 At 1:07 p.m., Margaret flagged down City of Joliet police officer Robert Kerwin, who was driving by her house. She told Kerwin that she was afraid that David had a gun. Kerwin performed a pat search of David and found no weapons. Kerwin left without writing a report or taking any further action.

¶ 7 At approximately 11:00 p.m., Sarah went to K-Mart in search of her mother. She found her in the parking lot with her female paramour. Sarah became upset, yelled and brandished a knife. Sarah called her brother, Steven, who called David. David told Steven to go to K-Mart to get Margaret and "bring her home." David went to K-Mart himself, stayed for a short time, and then left. After midnight, Sarah, Steven and Margaret arrived at Margaret's home. After that, Sarah, Steven, Margaret and David talked on the front porch. According to Sarah, there was no yelling.

¶ 8 At approximately 5:15 a.m, on July 21, 2004, David awoke to find that Margaret was not in bed with him. He went downstairs and heard her talking on the phone to the "other woman." David "lost it," retrieved a handgun and shot Margaret in the head twice, killing her.

¶ 9 At 5:29 a.m. on July 21, 2004, City of Joliet police were called to the Wilsons' home, just minutes after David had shot and killed Margaret. Diethard Beyer, as special administrator of Margaret's estate, filed a complaint against the City of Joliet, alleging wrongful death under the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 et seq. (West 2004)), pain and suffering under the Survival Act (755 ILCS 5/27-6 (West 2004)), and loss of consortium on behalf of Margaret's three children.

¶ 10 The City filed a motion to dismiss the complaint, arguing that (1) the Domestic Violence

Act did not apply because Margaret did not have an order of protection against David, and (2) plaintiff failed to allege willful and wanton acts or omissions by the police officers. The trial court granted the City's motion. Beyer filed a motion to reconsider, which the trial court denied. Beyer then appealed.

¶ 11 On appeal, this court held that an order of protection is not a necessary condition precedent to a suit against police under the Domestic Violence Act. *Beyer v. City of Joliet*, 392 Ill. App. 3d 81, 86 (2009). We further held that Beyer's complaint sufficiently alleged that Margaret was entitled to protection under the Domestic Violence Act and that Beyer sufficiently pled "a case of willful and wanton failure to act on the part of the police." *Id*. at 86-87. Thus, we reversed the trial court's order dismissing Beyer's complaint and remanded for further proceedings. *Id*. at 87.

¶ 12 The case was reinstated in the trial court. Defendant answered the complaint and raised several affirmative defenses, including contributory negligence by Margaret. A bench trial was held.

¶ 13 Sergeant Thomas Grutzius of the City of Joliet Police Department testified that he performed an investigation following Margaret's murder. Grutzius agreed that Margaret was a victim under the Domestic Violence Act with respect to all three encounters with the police on July 20, 2004. He testified that police officers have a duty to write reports if there is a "bona fide" or "good faith" allegation of domestic violence. At his deposition, Grutzius stated that the Joliet police officers that responded to the calls to the Wilsons' home violated the Illinois Domestic Violence Act and the City's general orders by not writing reports. However, at the time of trial, he said he did not believe that the officers violated the Act or any of the City's general orders. He testified that he would not have done anything differently than the officers

did on July 20, 2004.

¶ 14 Thomas Wilson testified that on July 20, 2004, while he was working as a patrol officer for the City of Joliet, he received a call from dispatch to report to 520 Campbell Street because a "woman was being threatened with a gun." He was the first officer to arrive. When he arrived, Margaret told him that David threatened her with a gun. David told Wilson that he did not have a gun. Wilson separated Margaret and David, and he and DeVito went with Margaret upstairs to try to find David's gun. Margaret went into a bedroom and began looking. She found a box, which appeared empty.

¶ 15 Wilson asked Margaret if she wanted him to take her somewhere or if she wanted to speak to a police social worker. She declined and said she "wanted to stay and talk to her husband." Officer Wilson was in the Wilsons' home for a total of 17 minutes. He did not write a report of the incident because he "did not see a valid complaint here or verifiable complaint."

¶ 16 Michael DeVito testified that he was working as a patrol officer for the City of Joliet on July 20, 2004. He was near 520 Campbell Street when he heard that a call had come from that address with "mention of a weapon involved." When he arrived, Officer Wilson was already there talking to Margaret. DeVito approached David and spoke to him. David told him that he and his wife were having "marital issues" and that every time they fight, his wife calls the police on him.

¶ 17 DeVito went upstairs with Margaret and Officer Wilson after Margaret said that David's gun was there. When they arrived at an upstairs bedroom, Margaret retrieved a "flimsy metal" lock box. She shook it, and it appeared to be empty. She then checked around the immediate area and said the gun was not there. He and Wilson offered to take Margaret somewhere, but she said that she did not want to go.

¶ 18 David Remer was a patrol officer with the City of Joliet Police Department on July 20, 2004, when he responded to 520 Campbell Street. He was the third officer to arrive. He knocked on the door, and Officers Wilson and DeVito told him to stay with David while they went upstairs with Margaret. None of the officers told him that David threatened to shoot Margaret. Remer never spoke to Margaret, but he spoke to David, who told him that he was having a problem with his wife and that she calls the police whenever they argue. David said he did not have any guns in the house. After Wilson and DeVito returned downstairs, Remer left.

¶ 19 Gary Baggett, a retired Sergeant of the Joliet Police Department, testified that he went to 520 Campbell Street on July 20, 2004, to respond to the first 911 call. When he arrived, Officers Remer, DeVito and Wilson were already there. He talked to the officers and learned that David and Margaret had "some sort of argument" and that Margaret mentioned that David had a gun in the house. He stayed with Remer while DeVito and Wilson went upstairs with Margaret to try to retrieve a gun. After awhile, Baggett went upstairs to see if they had found anything, but they had not. Baggett went back downstairs and left shortly thereafter. Before he left, he offered to take Margaret somewhere. She said "she would just talk with [David] and she'd be okay."

¶ 20 Baggett testified that when he arrived at the Wilsons' home, he was unaware that David had allegedly threatened to shoot Margaret with a gun. If he had known that, he would have investigated further and possibly arrested David. He agreed that threatening to shoot someone with a gun amounts to "abuse" under the Domestic Violence Act, as well as assault. He also agreed that if David had threatened to shoot Margaret, the Domestic Violence Act and City of Joliet general orders related to domestic violence calls applied.

¶ 21 Francis Gonzalez testified that he responded to the second 911 call from the Wilsons' home on July 20, 2004, which came in as "a call related to attempted suicide." When he arrived,

a paramedic was already there. Gonzalez talked to David and the paramedic. David said that he fainted because he had not eaten or taken his insulin shot; however, his blood sugar was normal.

¶ 22 Gonzalez went across the street to talk to Margaret, who was at a friend's house. She said she was scared to go back into her house because David had threatened to shoot her. Margaret asked Gonzalez to commit David to a hospital for a psychiatric evaluation, but Gonzalez refused because he did not believe David was a danger to himself or anyone else. Gonzalez did not inform Margaret that she could sign a petition to have David involuntarily committed nor did he provide her with such a petition.

¶ 23 Remer also responded to the second 911 call to the Wilsons' home. It was his understanding that an issue with David's diabetes prompted that call. When Remer arrived, a squad car and ambulance were present. When he reached the porch, Gonzalez told him that he was leaving, so Remer turned around, went to his car and left. Remer did not tell Gonzalez that he had been at the house earlier that day.

¶ 24 Robert Kerwin testified that he was on patrol in the 500 block of Campbell Street in Joliet on July 20, 2004. As he was driving, he saw Margaret trying to flag him down. She was talking to David, who was on the porch of their home. Margaret told Kerwin, "[H]e wants me to come in the house." She then said that David either had a gun or she thought he had a gun. Kerwin approached David on the porch and asked him if he had any weapons. He said, "No." Kerwin then patted him down. He did not find any weapons. Kerwin told Margaret that she could leave if she wanted to. She said she did not want to leave, and Kerwin told her, "there is nothing further I can do and I'm going to be leaving." He did not prepare a police report because "[t]here was no need for one."

¶ 25 Remer also responded to this third request for police at the Wilsons' home because he

was dispatched. When he arrived, Officer Kerwin was talking to Margaret and David by the front porch. Kerwin walked over to Remer's car and told him, "[W]e're done here." Remer never got out of his car. He did not tell Kerwin that he had been there earlier that day.

¶ 26 Beyer testified that he had lived across the street from the Wilsons since 2000 and became close with them. During the late morning of July 20, 2004, Margaret came to his house. According to Beyer, "She was quite upset, and she said she feared for her life. David had threatened to kill her." Margaret told him that the police had been to her house earlier and left. She told him that "she didn't want to be at the house, that she believed that David had a gun or guns and she was very fearful." Beyer had never seen Margaret like that before.

¶ 27 While Margaret was at Beyer's home, Sarah came over and said that David had collapsed. Beyer went to the Wilsons' home and saw a paramedic and police officer. He spoke to the paramedic, who told him that Margaret could give consent for David to go the hospital. Beyer then went back to his house to retrieve Margaret. She returned to her house and told the paramedic and police officer to take David to "the second floor" of St. Joseph's hospital, which is the psychiatric unit. She explained that he had a history of mental health problems and had previously been hospitalized. The police officer and paramedic went back into the house and talked to David, who said that he did not want to hurt himself or others. The police officer and paramedic told Margaret that David could not be involuntarily committed.

¶ 28 A few minutes after the police officer and paramedic left, David tried to convince Margaret to go back home, but Margaret "was deathly afraid to come close to the door." At that point, Margaret flagged down a police officer who was driving by and told him that "she feared for her life because [David] had threatened to kill her and that she believed there were guns in the house." The officer patted down David and then told Margaret and David that they needed to

stop calling the police and handle their problems themselves.

¶ 29 Margaret's son, Steven, testified that his mother married David when he was "a little kid." Steven did not get along well with David because "[h]e was quite an abusive man and he was going after my mom." According to Steven, the police were called "numerous times" when he lived with his mother and David because of David's abuse toward Margaret.

¶ 30 On June 20, 2004, Steven received a phone call from his sister, Sarah, while he was at work. Sarah was "freaking out." She said, "[D]ad is going to kill mom. He caught her with a woman. I've got to come and, you know, help her. We can't find the guns." He said the police were present at the time. He told Sarah to calm down and let the police handle it.

¶ 31 Sarah testified that she woke up to Margaret and David arguing on July 20, 2004. Sarah saw David rip a necklace off of Margaret's neck, then take a picture off the wall and throw it on the ground. She heard David say that he would shoot and kill Margaret. She told David to stop and then she and her son went to a friend's house. When she returned to the Wilsons' home, four police officers were present. One officer was in Margaret and David's bedroom looking for guns, but he did not find any. None of the officers talked to her.

¶ 32 After the police left, Sarah went back inside the house and found David on the floor. She tried to shake him but got no response. She went across the street to get Margaret, but she refused to come back because she was afraid. Sarah asked a friend to call 911. When a police officer and paramedic arrived, she told them she thought David was going to hurt himself and suggested that they take him to the psychiatric unit of the hospital. The officer and paramedic told her that she could not decide if David needed to go to the hospital, but his wife could. Sarah then got Margaret and brought her home. Margaret asked the officer and paramedic to take David to the hospital. She told them about the threats, the guns, her fear, and his history of

mental illness and suicide attempts. According to Sarah, "the ambulance people decided that he wasn't a threat to himself so they said that he could stay."

¶ 33 Samantha King, Margaret's youngest daughter, testified that she recalled many arguments between her mother and David when she was young. She remembered the police being called often and recalled one time when David tried to commit suicide by taking pills after Margaret decided to leave him.

¶ 34 Dorotha Davis, plaintiff's retained expert, testified that she became a commissioned law enforcement officer in 1981. In 2006, she was promoted to deputy chief and currently oversees the police academy as the director of training. In 1992, she became involved in domestic violence teaching and training and now trains nationally and internationally on the topic. She prepared a report with respect to the actions of the Joliet Police Department in this case.

¶ 35 According to Davis, the Joliet police officers had a duty to Margaret under the Domestic Violence Act on all three occasions when they came to the Wilsons' house on July 20, 2004. She further believed that the officers who responded to the calls from the Wilsons' home on that date "made a conscious decision to not afford [Margaret] protection under the Illinois Domestic Violence Act and their general policies or procedures." She believed "very strongly that the officers from Joliet PD acted in a willful and wanton manner on July 20, 2004 with Maggie Wilson." If the police officers had fulfilled their duties, she thought that Margaret would not have been murdered on July 21, 2004. She opined that the police officers' actions were a proximate cause of Margaret's death and that Margaret's death was foreseeable.

¶ 36 Davis testified that a more thorough search of the premises should have been conducted when Margaret did not find the gun where she thought it was. She believed the officers had "reasonable suspicion" to search the entire residence. She also believed that the officers did not

do enough to help Margaret when they responded to her calls. They should have talked to her about her rights and the danger she was in, or, at the very least, prepared a report. Davis explained that an allegation of abuse does not have to be proven or substantiated to be "*bona fide*." Thus, Margaret made a *bona fide*, or "good faith", allegation of domestic violence.

¶ 37 According to Davis, the police officers made no attempt to locate Sarah or her son even though the first dispatch indicated that children were present in the house. She thought the police officers consciously chose not to look for witnesses. She also testified that the officer who responded to the second 911 call should have sent David to the hospital for an evaluation to determine if he should be involuntarily committed.

¶ 38 Beyer presented to the court the applicable sections of the Domestic Violence Act, as well as City of Joliet's General Order 9-5, which mirrors the Act. It requires all responding officers to "prepare an Offense Report on all bona fide incidents of domestic violence," which must include specific information, such as " [the v]ictim's statement as to the frequency and severity of prior incidents of abuse by same family or household member" and "[the v]ictim's statement as to the number of prior calls for police assistance, and dispositions of the investigations of those calls."

¶ 39 Beyer also presented to the court City of Joliet's General Order 9-23, which deals with mental health subjects and provides:

> "A 'Petition for Hospitalization ***' may be signed by any person 18 years of age or older, who can attest to the need for a mental health evaluation of a person. This petition permits a medical evaluation of a person against his or her will, and detention at a mental health facility for up to 24 hours. *** [T]he completion of a petition does not mean that the petitioner is declaring the person

to be mentally ill, only that he or she believes that the person is in need of an evaluation."

The order further provides that officers must ask a relative, spouse, friend, or other person 18 years of age or older who can attest to the behavior of a person in need of an evaluation to "complete the Petition for Hospitalization."

¶ 40 After the close of Beyer's case, the City moved for a directed finding in its favor. The trial court denied the motion. The City then called its expert, John Bowman, to testify. Bowman retired in 2004 as associate director and associate professor of the University of Illinois Police Training Institute. He considers himself an expert in police practices, customs and training. Based on his review of the information in this case, he determined that none of the police officers violated the Domestic Violence Act or any of the City's general orders related to mental health and/or domestic violence calls.

¶ 41 It was Bowman's opinion that the officers responded properly to the calls from the Wilsons' home on July 20, 2004. He believed that the officers did not have to complete reports for the incidents since no arrests were made. He opined that the City of Joliet police officers did not act willfully and wantonly or in conscious disregard for the safety of Margaret. He believed that the officers did everything possible to try to protect Margaret and did not think that there was anything the police officers could have done that would have led to a different result.

¶ 42 Following the trial, the court rendered a 22-page decision, finding, in part:

"On July 20, 2004 Defendant's officers acted in a willful and wanton manner by violating the Illinois Domestic Violence Act of 1986, the General orders of their agency, specifically the Domestic Violence and Mental Subjects policies and procedures, and basic police procedure and protocol when dealing

with incidents of domestic violence and persons suffering due to a mental health crises when they responded on three occasions within some two hours to 520 Campbell Street, the residence of David and Maggie Wilson."

¶ 43 The trial court discussed contributory negligence, finding that Margaret's negligence could be compared to the police officers' willful and wanton misconduct because the officers did not engage in intentional misconduct. The court then entered judgment in favor of Beyer for a total of $449,533.08, consisting of $12,000 for Margaret's pain and suffering, $2,533.08 for funeral expenses, and $435,000 for loss of consortium.

¶ 44 Willful and Wanton Conduct

¶ 45 Defendant first argues that Beyer failed to prove that the officers committed willful and wanton conduct in violation of the Domestic Violence Act.

¶ 46 Whether a public entity's acts constitute willful and wanton conduct depends on the facts of the particular case. *Bielema v. River Bend Community School District No. 2*, 2013 IL App (3d) 120808, ¶ 12. Whether specific acts constitute willful and wanton conduct is ordinarily a question of fact reserved for the trier of fact. *Id.* A trier of fact's finding of willful and wanton misconduct will be reversed only if it is against the manifest weight of the evidence. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1138 (2004).

¶ 47 In order to be against the manifest weight of the evidence, conclusions opposite those reached by the trier of fact must be clearly evident, plain and indisputable. *Moore v. Anchor Organization for Health Maintenance*, 284 Ill. App. 3d 874, 880 (1996). It is the function of the fact finder to weigh contradictory evidence, judge the credibility of witnesses, and draw ultimate conclusions as to the facts of a case. *Id.* Consequently, a reviewing court may not substitute its judgment for that of the trier of fact merely because different conclusions might be drawn from

the evidence presented at trial. *Id*.

¶ 48 The Domestic Violence Act was passed by the Illinois legislature in response to a significant increase in injuries and deaths stemming from domestic disputes. *Fenton v. City of Chicago*, 2013 IL App (1st) 111596, ¶ 16 (citing 750 ILCS 60/102 (West 2002)). Section 102 sets forth the Act's purposes, which include "[r]ecogniz[ing] domestic violence as a serious crime against the individual and society which *** promotes a pattern of escalating violence which frequently culminates in intra-family homicide ***. 750 ILCS 60/102(1) (West 2002).

¶ 49 The Act details the responsibilities of law enforcement officers. See 750 ILCS 60/301-305 (West 2012)). Section 303 of the Act states, in pertinent part:

> "(a) Every law enforcement officer investigating an alleged incident of abuse, neglect or exploitation between family or household members shall make a written report of any bona fide allegation and the disposition of such investigation. The police report shall include the victim's statements as to the frequency and severity of prior incidents of abuse, neglect, or exploitation by the same family or household member and the number of prior calls for police assistance to prevent such further abuse, neglect or exploitation.
>
> (b) Every police report completed pursuant to this Section shall be recorded and compiled as a domestic crime ***." 750 ILCS 5/303 (West 2002).

Section 304 of the Act requires police officers to do the following:

> "(a) Whenever a law enforcement officer has reason to believe that a person has been abused, neglected or exploited by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, neglect, or exploitation, including:

(1) Arresting the abusing, neglecting and exploiting party where appropriate;

(2) If there is probable cause to believe that particular weapons were used to commit the incident of abuse, subject to constitutional limitations, seizing and taking inventory of the weapons; [and]

***

(4) Offering the victim of abuse, neglect or exploitation immediate and adequate information *** which shall include a summary of the procedures and relief available to victims of abuse ***.

***

(b) Whenever a law enforcement officer does not exercise arrest powers or otherwise initiate criminal proceedings, the officer shall:

(1) Make a police report of the investigation of any bona fide allegation of an incident of abuse, neglect, or exploitation and the disposition of the investigation ***;

(2) Inform the victim of abuse neglect, or exploitation of the victim's right to request that a criminal proceeding be initiated where appropriate ***." 750 ILCS 60/304(a) & (b) (West 2002).

"Abuse" means "physical abuse, harassment, intimidation of a dependant, interference with personal liberty or willful deprivation ***." 750 ILCS 60/103(1) (West 2002). "Harassment" is defined as "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress;

and does cause emotional distress to the petitioner." 750 ILCS 60/103(7) (West 2002). Unless the presumption is rebutted, "threatening physical force, confinement or restraint on one or more occasions" is "presumed to cause emotional distress." *Id.*

¶ 50 Persons protected by the Domestic Violence Act include "any person abused by a family or household member[.]" 750 ILCS 60/201(a)(I) (West 2002). Under the Act, law enforcement officers cannot be found civilly liable "unless the act is a result of willful and wanton misconduct." 750 ILCS 60/305 (West 2002).

¶ 51 "These provisions reveal the General Assembly's intent to encourage active intervention on the part of law enforcement officials in cases of intrafamily abuse." *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). "To give effect to the legislature's purposes and intent in enacting the Domestic Violence Act, *** judicial recognition of a right of action for civil damages is necessary, provided that the injured party can establish that he or she is a person in need of protection under the Act, the statutory law enforcement duties owed to him or her were breached by the willful and wanton acts or omissions of law enforcement officers, and such conduct proximately caused plaintiff's injuries." *Id.* Willful and wanton conduct indicates a course of action that shows an actual or deliberate intent to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others. *Sneed v. Howell*, 306 Ill. App. 3d 1149, 1159 (1999).

¶ 52 Police inaction does not normally rise to the level of willful and wanton misconduct. *Id.* However, this is not necessarily true under the Domestic Violence Act, because "the Domestic Violence Act puts an affirmative duty on the police to respond to and investigate complaints." *Id.* Law enforcement officers have been found guilty of willful and wanton misconduct when they have failed to arrest an abusing party, particularly where the police were called more than

once because of the abusing party. See *Fenton*, 2013 IL App (1st) 111596.

¶ 53 In this case, the evidence showed that the City's police officers not only violated the Act by failing to complete police reports during each of their visits to the Wilsons' home, but also showed a conscious disregard for the danger that Margaret was in by (1) failing to fully investigate whether any guns were present in the Wilsons' home, (2) failing to fully and effectively communicate with each other regarding the calls from the Wilsons' home, (3) failing to arrest David and/or remove him from the home, (4) failing to determine the identity of witnesses and interview such witnesses, and (5) failing to provide Margaret with sufficient information regarding her rights as a domestic violence victim. Under the circumstances of this case, the trial court's finding that the inactions of the City's police officers amounted to willful and wanton misconduct was not against the manifest weight of the evidence.

¶ 54 II. Proximate Cause

¶ 55 The City next argues that the trial court erred in finding that its officers were the proximate cause of Margaret's death.

¶ 56 A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause. *Crumpton v. Walgreen Co.*, 375 Ill. App. 3d 73, 79 (2007). There are two requirements for a showing of proximate cause: cause in fact and legal cause. *Id.* Legal cause is established if an injury was foreseeable as the type of harm that a reasonable person would expect to see as a likely result of his or her conduct. *Id.*

¶ 57 Proximate cause is generally a question of fact to be decided by the trier of fact. *Fenton*, 2013 IL App (1st) 111596, ¶ 27. However, if an alleged negligent act does nothing more than furnish a condition making the injury possible, and such condition, by the subsequent

independent act of a third party, causes the injury, the two acts are not concurrent and the condition will not be the proximate cause of the injury. *Kirschbaum v. Village of Homer Glen,* 365 Ill. App. 3d 486, 495 (2006). The test to be applied in determining proximate cause is whether the first wrongdoer might have reasonably anticipated the intervening cause as a natural and probable result of the first party's own negligence. *Merlo v. Public Service Co. of Northern Illinois,* 381 Ill. 300, 317 (1942).

¶ 58 When an abuser murders his victim soon after the police respond to a domestic violence call but fail to arrest the abuser, the police are the proximate cause of the murder if an arrest of the abuser would have prevented the murder. See *Fenton,* 2013 IL App (1st) 111596, ¶ 29. It is "both common sense and the well-documented fact that domestic disputes often erupt into serious violence in a very quick fashion." *Id.* ¶ 32. Thus, when police intervention is sought more than once in the same day because of a domestic violence situation, it is foreseeable that a death will occur at the hands of the abuser sometime soon. See *id.* ¶ 31.

¶ 59 Here, there was more than sufficient evidence to establish that the City's police officers proximately caused Margaret's death. Not only did Davis testify that the officers should have arrested David, but Sergeant Baggett, the most senior officer who responded to Margaret's first 911 call, stated that if he had known David had threatened to shoot Margaret, he would have investigated further and possibly arrested him. If David had been arrested and in police custody, he would not have been able to murder Margaret on July 21, 2004.

¶ 60 Additionally, David's actions were foreseeable. Police were called to the Wilsons' home on two occasions because Margaret feared David had a gun and would shoot her. Sixteen hours later, Margaret was dead because David shot her with a gun and killed her. The officers had opportunities to effectively prevent David's foreseeable behavior on the day in question. Thus,

we affirm the trial court's finding that the inaction of the City's police officers proximately caused Margaret's death.

¶ 61 III. Contributory Negligence

¶ 62 Finally, the City argues that the trial court should have found Margaret more than 50% liable for her own death, thereby precluding Beyer from recovering damages from the City.

¶ 63 Contributory negligence is the failure to exercise that care which, under the circumstances presented by the evidence, a reasonably prudent person would take to avoid injury. *Pantaleo v. Our Lady of the Resurrection Medical Center*, 297 Ill. App. 3d 266, 283 (1998). The issue of contributory negligence is ordinarily a question of fact to be determined by the trier of fact. *Id*.

¶ 64 Illinois is a comparative fault jurisdiction. See *Dyback v. Weber*, 114 Ill. 2d 232, 238-39 (1986). This means that if the plaintiff is partially responsible for her injury, damages are reduced according to the amount she is at fault as long as she was not more than 50% at fault. See 735 ILCS 5/2-1116 (West 2012). If the plaintiff is more than 50% at fault for her injury, she is barred from any recovery. *Id*. A plaintiff's damages can be reduced by her contributory negligence if the defendant's willful and wanton misconduct was only reckless, not intentional. *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41, 48 (1995).

¶ 65 Here, the trial court discussed contributory negligence. Although the court did not expressly state that Margaret was less than 50% at fault for her death, implicit in the trial court's finding of damages was a finding that Margaret was less than 50% at fault for her own death. See *In re Jonathon B.*, 2011 IL 107750, ¶ 72 (reviewing courts presume that a trial court knows and follows the law unless the record affirmatively indicates otherwise). Since Margaret was not more than 50% responsible for her death, plaintiff was allowed to recover damages from the

City. See 735 ILCS 5/2-1116 (West 2012). We agree with the trial court and affirm the trial court's award of damages to plaintiff.

¶ 66 The judgment of the circuit court of Will County is affirmed.

¶ 67 Affirmed.

¶ 68 JUSTICE SCHMIDT, dissenting.

¶ 69 The majority's decision equates any violation of the Illinois Domestic Violence Act of 1986 (the Act) (750 ILCS 60/101 *et seq.* (West 2004)) to willful and wanton conduct on the part of the police. This is not the current state of the law, nor do the facts of this case support such a finding. The plaintiff's case fails on two fronts: (1) the finding of willful and wanton misconduct is against the manifest weight of the evidence; and (2) even assuming the requisite misconduct, subsequent intervening events broke any causal connection between that conduct and decedent's death. The trial court's verdict in favor of plaintiff is against the manifest weight of the evidence.

¶ 70 This court previously held that plaintiff sufficiently alleged that Margaret was entitled to protection under the Act and that plaintiff sufficiently pled "a case of willful and wanton failure to act on the part of the police." *Beyer v. City of Joliet*, 392 Ill. App. 3d 81, 86-87 (2009). We found the complaint essentially alleged that, notwithstanding Margaret's obvious need of assistance, " the police did nothing in response to decedent's calls for help immediately before her death, other than to show up and leave." *Id*. at 87. That was not the evidence at trial.

¶ 71 A. Willful and Wanton Conduct

¶ 72 Did the Joliet police department follow every aspect of the Act or its own department policy to the letter? No. Did police errors or omissions rise to the level of willful and wanton conduct? As a matter of law, no.

¶ 73 Let us rehash. After Margaret made the first call on July 20, 2004, at 11:12 a.m., officers responded and separated the parties. Margaret indicated she knew where the gun was located and took officers upstairs. She found a lockbox, picked it up and shook it. It was empty. Margaret asked the officers what would happen if they found a gun. They stated if David did not have a Firearm Owner's Identification Card (FOID), he would be arrested. Margaret responded that it was possible he did not have a gun. When officers asked Margaret if they could take her somewhere, she refused. Apparently, Sarah was present at the home, but not interviewed by police.

¶ 74 The second call came in at 12:40 p.m. Dispatch characterized it as an attempted suicide call, not a domestic disturbance. Officer Gonzalez and paramedics responded to the scene. The paramedic stated that David had not eaten or taken his insulin, yet his sugar levels were within normal range. Margaret and Sarah both asked for David to be taken to the hospital to undergo a psychiatric evaluation. Neither the paramedics (trained medical professionals) nor the officer believed David met the criteria for involuntary admission.

¶ 75 The third and final call came shortly thereafter, around 1:07 p.m., when Margaret flagged down Officer Kerwin. She told Kerwin she believed David had a gun. Kerwin performed a pat search of David and found nothing. Kerwin told Margaret that she could leave while he was standing by, but Margaret, again, stated she did not want to leave the home.

¶ 76 The majority's opinion focuses solely on the language of the Act, overlooking whether or not the conduct could properly be classified as willful and wanton. The Local Governmental and Governmental Employees 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 2006). It has similarly been described by our supreme court as " 'a hybrid between acts considered negligent and behavior found to be intentionally tortious. *** 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.' " *Pfister v. Shusta*, 167 Ill. 2d 417, 422 (1995) (quoting *Ziarko v. Soo Line R.R. Co.*, 161 Ill. 2d 267, 275-76 (1994)). "Whether conduct is willful and wanton is ultimately a question of fact." *Williams v. City of Evanston*, 378 Ill. App. 3d 590, 597 (2007) (citing *Young v. Forgas*, 308 Ill. App. 3d 553 (1999)). "Nonetheless, a court may hold as a matter of law that a public employee's actions do not amount to willful and wanton conduct where no other contrary conclusion may be drawn from the record presented." *Id.*

¶ 77 I acknowledge that responding officers failed to file a report following any of the three calls. This was in direct contravention of the Act and the City of Joliet's General Order 9-5. What it was not, however, was a showing of utter indifference toward Margaret. (Internal quotation marks omitted.) See *Williams v. City of Evanston*, 378 Ill. App. 3d at 601 (citing *Wade v. City of Chicago*, 364 Ill. App. 3d 773 (2006)) (holding that a "[v]iolation of self-imposed rules or internal guidelines *** does not normally impose a legal duty, let alone constitute evidence of negligence, or beyond that, willful and wanton conduct.").

¶ 78 Plaintiff's complaint also alleged failure to investigate and failure to remove David from the premises. The majority, again, emphasizes that the Act puts an affirmative duty on the police to respond to and investigate complaints. See *Sneed v. Howell*, 306 Ill. App. 3d 1149 (1999). The undisputed facts elicited at trial contradict plaintiff's argument that officers failed to investigate. The officers who arrived first at the scene separated the parties and searched David. They also accompanied Margaret upstairs to search for the gun she believed David had. The

lockbox yielded nothing. She did not offer other places the gun may have been located. Furthermore, it was Margaret who, after learning David would be arrested if he did not have a FOID card, then told police that perhaps David did not have a gun. The officers were not required to turn the entire house upside down to uncover a gun that, according to the victim, may or may not have even existed. While not entirely by the book, the officers' actions were also not indicative of "utter indifference" to or "conscious disregard" for the decedent's safety.

¶ 79 B. Proximate Cause

¶ 80 I also take issue with the majority's finding that the actions or inactions of the Joliet police proximately caused Margaret's death. There is only a passing reference to the expansive time gap between the last call at 1:07 p.m. on July 20 and the shooting at approximately 5:20 a.m. on July 21. Also conspicuously absent in the majority's analysis is any reference to the incident that occurred around 11 p.m. on July 20—10 hours after the last call to police and 6 hours before Margaret's death.

¶ 81 Margaret went to K-Mart to meet Michelle Callahan, the woman with whom she was having an extramarital affair. Her adult children, Steven and Sarah, confronted her in the parking lot. The three argued, and Steven and Sarah pled with Margaret to go home to David. Inebriated at the time, Sarah brandished a knife during the confrontation. David showed up by himself shortly thereafter, also asking Margaret to come home. He never left his vehicle, and then returned home. Margaret got into her own car, but did not go home. A chase involving Sarah, Steven, Margaret and Michelle Callahan ensued. Sarah, in an attempt to force her mother to go home, pulled her car in front of Michelle's and slammed on the brakes, nearly causing an accident. A Crest Hill police officer arrived, but no complaints were ever made. Bowing to her children's wishes, Margaret returned home.

¶ 82 Upon arriving back at 520 Campbell Street (David and Margaret's residence), Steven, Sarah, Margaret and David all talked on the front porch. Steven testified that he went off on his mother; he felt that she did not handle the situation appropriately. Steven wanted reassurances from Margaret that she would not keep acting belligerently. An hour later, after being reassured by both David and Margaret that the situation was okay, Steven left. David awoke at approximately 5:15 a.m., and when he realized Margaret was not in bed, he dressed and went downstairs. He discovered Margaret on the phone with Michelle. He heard her tell Michelle that she loved her and she was just softening David up to buy time for she and Michelle to find a place to live together. David said this pushed him over the edge and he shot Margaret.

¶ 83 Even operating under the assumption that the Joliet police officers breached their duty by failing to arrest David, that fact alone is not enough to find willful and wanton conduct and, in turn, impose liability on the defendant. Plaintiff must also prove that defendant's breach proximately caused Margaret's injury. See *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19 (In order to show willful and wanton conduct, plaintiff must prove that defendant owed plaintiff a duty, defendant breached that duty, and that the breach proximately caused plaintiff's injury.). The majority's conclusions that David's actions were foreseeable and that the City's police officers proximately caused Margaret's death are belied by the evidence. It also stretches the holding of *Fenton v. City of Chicago*, 2013 IL App (1st) 111596, beyond the breaking point.

¶ 84 In *Fenton*, Henry Fenton lived with his girlfriend Valerie and her 22-year-old son, Rovale. Fenton first called 911 at 1:30 a.m., stating that there was "violence" going on with Rovale. *Id*. at ¶ 4. The officers arrived to find Rovale angry, drunk and boisterous. Valerie told officers that Rovale and Fenton had gotten into an argument. *Id*. at ¶ 5. Officers asked Fenton

and Valerie if they wanted Rovale arrested, and Valerie said they did not. The officers escorted Rovale to his bedroom basement. They did not speak to Fenton. *Id*. At 2:30 a.m., Fenton called 911 again, stating much the same drama as before. *Id*. at ¶ 6. The police arrived, and escorted Rovale out of the house, where he said he would wait for his girlfriend to pick him up in an hour. The temperature outside was said to be near zero. *Id*. Six minutes later, Fenton called a final time, urgently telling the operator that Rovale was going to break into the home. *Id*. at ¶ 7. The officers were again dispatched, only to find Fenton beaten and stabbed to death. In finding that the police acted willful and wantonly, the court focused on the fact that they had probable cause to arrest Rovale, but failed to do so. *Id*. at ¶ 19. Indeed, under the Act, they had an affirmative duty to take reasonable steps to prevent further abuse, including arresting the abuser where appropriate. 750 ILCS 60/304(a) (West 2002). The court also found proximate cause, given the six-minute time frame between the officers escorting Rovale off the premises to wait outside the house and Fenton's final urgent call that Rovale was breaking in. *Id*. at ¶ 29. To those who get most of their exercise by jumping to conclusions, I want to make clear, the point is not that Margaret was responsible for her own death; it is that the Joliet police are not.

¶ 85 It is apparent to me that compared to the six-minute time frame between the last 911 call and the fatal attack in *Fenton*, Margaret's death is simply too far removed to find that the officers' actions or inaction proximately caused her death. I would also note that the Joliet police were not confronted with a drunk or angry perpetrator, but by a calm and cooperative David, who told them that he did not have a gun or threaten to shoot her, and even by a complainant, who said maybe David had a gun, maybe he did not. Also, I find it important that in *Fenton*, there was no evidence that the victim or anyone else provoked the killer after police left.

¶ 86 As the majority points out, proximate cause describes two distinct requirements: cause in fact and legal cause. Both requirements must be met in order to establish proximate cause. *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002). Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury. *Young v. Bryco Arms*, 213 Ill. 2d 433, 446 (2004). " 'Legal cause,' by contrast, is largely a question of foreseeability." *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). Legal cause is established only if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it. *Simmons*, 198 Ill. 2d at 558. " 'As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.' " *Young*, 213 Ill. 2d at 446 (quoting *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 456 (1992)).

¶ 87 The *Fenton* court held that it is "both common sense and the well-documented fact that domestic disputes often erupt into serious violence in a very quick fashion." *Fenton*, 2013 IL App (1st) 111596, ¶ 32. It also noted that it agreed with the finding of *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 365 (2009), where the police cannot be subjected to " 'generalized, open-ended duty to protect victims of domestic violence,' " but found *Lacey* so factually distinguishable as to have little or no bearing on the case. *Fenton*, 2013 IL App (1st) 111596 at ¶ 28. *Lacey* involved a lengthy domestic dispute, where the police investigated allegations that decedent's ex-boyfriend was making arrangements to kill her. *Lacey*, 232 Ill. 2d at 356-57. The ex-boyfriend had a history of harassment allegations and arrests in his background. During the investigation, officers provided extensive protection to decedent, but once the investigation was closed, all protective detail ceased. *Id*. at 355. Six weeks later, the ex-boyfriend brutally

murdered decedent and her mother. *Id*. Our supreme court held the officers were not otherwise "enforcing" the Act so as to bring them within the scope of limited liability. *Id*. at 368-69.

¶ 88 Here, Margaret was killed in the early morning hours the next day after a series of intervening events. Where, as here, there are effective intervening causes, or a negligent act does nothing more than furnish a condition making the injury possible, there is no proximate cause and, therefore, no liability. See *Kirschbaum v. Village of Homer Glen*, 365 Ill. App. 3d 486 (2006).

¶ 89 While the issue of proximate cause is ordinarily a question for the jury to decide, it is well settled that the lack of proximate cause may be determined, as a matter of law, by the court where the facts as alleged do not sufficiently demonstrate both cause in fact and legal cause. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395-96 (2004). Margaret refused to leave the home, despite offers from the officers to take her elsewhere. She told them David might not have a gun. Later, she met with her lover. Her adult children followed her to the K-Mart parking lot and chased her down the street, urging her to go home to David. Later still, she called Michelle from the home she shared with David to tell her she loved her and let her know she had every intention of leaving David. David said it was when he heard Margaret talking to Michelle that he snapped and shot her. The police could not reasonably be asked to account for or anticipate these escalating events, which occurred hours after they were last called to the home. Margaret's actions amounted to throwing gasoline on a fire. They, of course, do not justify David's actions. They do, I believe, break any causal connection between police conduct and Margaret's death. David, and David alone, is responsible for killing Margaret.

¶ 90 And finally, 10 hours after the last time the Joliet police were called, Margaret's adult children encouraged, even begged, her to go home to the man that ultimately shot her. Those

same family members are the real parties in interest in this lawsuit, claiming that the police are responsible for Margaret's death.

¶ 91 I would reverse the judgment of the trial court and, therefore, dissent.