2019 IL App (1st) 181594

FIRST DIVISION
June 28, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 1-18-1594

KATHLEEN BROWN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 006900
	)	
THE CITY OF CHICAGO,	)	Honorable
	)	Gregory Wojkowski,
Defendant-Appellee.	)	Judge Presiding.
	)	

PRESIDING JUSTICE MIKVA delivered the judgment of the court, with opinion.
Justices Griffin and Walker concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff in this case, Kathleen Brown, was lying unconscious in an alley near her home when she was run over by a Chicago Police Department vehicle driven by an on-duty officer. Ms. Brown sued the City of Chicago (City), alleging it was vicariously liable for the officer's conduct. The jury found the officer had not been willful and wanton but returned a verdict in favor of Ms. Brown on her negligence count, in an amount reduced by her own contributory negligence. The City then moved for a judgment notwithstanding the verdict, on the basis that the general verdict was inconsistent with the jurors' affirmative answer to a special interrogatory. The special interrogatory asked whether, "[a]t the time the accident occurred," the

officer was "en route to [a] domestic disturbance call" that the officer and his partner were dispatched to just prior to striking Ms. Brown. The City argued, and the trial court agreed, that this was legally equivalent to a finding that the officer was "executing or enforcing" the law at the time of the accident, triggering the qualified immunity provided for in section 2-202 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act or Act) (745 ILCS 10/2-202 (West 2014)).

¶ 2 On appeal, Ms. Brown challenges this legal equivalency. She maintains that the special interrogatory did not ask the jury to decide an ultimate question of fact and thus did not serve as a true test of the jury's general verdict. Exercising, as we must, all reasonable presumptions in favor of the general verdict, we agree with Ms. Brown that the jury's verdict in her favor was not absolutely irreconcilable with its determination that the officers in this case were en route to a domestic disturbance call. We reverse the trial court's order granting the City's motion for a judgment notwithstanding the verdict and reinstate the jury's verdict in favor of Ms. Brown.

¶ 3 I. BACKGROUND

¶ 4 The facts of this case are largely undisputed. On the night of July 2, 2015, the plaintiff, Kathleen Brown, was run over by a Chicago police vehicle in an alley near the intersection of Madison Street and Laramie Avenue. At the time of the accident, Ms. Brown was lying unconscious in the alley. The officer driving the vehicle had turned his headlights off so as not to attract attention as he and his partner patrolled the alley for potential narcotics activity. Just before striking Ms. Brown, the officers received a call from their dispatch to respond to a domestic disturbance. They paused to acknowledge the call and—without turning on the vehicle's headlights, emergency lights, or siren—turned north into another portion of the alley, at which point their vehicle ran over Ms. Brown.

¶ 5 Ms. Brown sued the City for the negligence and willful and wanton conduct of the driver, Officer David Potter. The City asserted, as affirmative defenses, contributory negligence, failure to mitigate damages, and immunity under section 2-202 of the Tort Immunity Act. Section 2-202 provides 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." *Id.* The City contended that because Officer Potter "had been dispatched and was en route to a call for a domestic disturbance," he was "executing or enforcing the law," thus triggering the qualified immunity afforded by that section.

¶ 6 A. Trial Testimony

¶ 7 A first trial in this case, held in November 2017, resulted in a hung jury. A second trial, which is the subject of this appeal, took place over four days in early January 2018. The jury heard from Ms. Brown, Officer Potter, his partner Officer Rory Oliver, police dispatcher Paula Trampus, and Timothy Hicks, the City's accident reconstruction expert. The evidence depositions of several medical professionals were also read to the jury, but transcripts of that testimony do not appear in the record on appeal.

¶ 8 Ms. Brown testified that on June 2, 2015, she was living at 56 North Laramie Avenue in Chicago. She and her boyfriend had been out to eat, and she had a few beers. Earlier in the week Ms. Brown had not felt well, and she began to feel ill again later that evening. She took the garbage out and began to walk down the alley to the Walgreens pharmacy on the corner of Latrobe Avenue and Madison Street to get something for her stomach. Ms. Brown explained that there is "a lot of lighting" in that area and "[y]ou can see all the way down the alley." Before she reached the Walgreens, Ms. Brown apparently fell to the ground, unconscious. She awoke sometime later to "a burning sensation" on her face and leg and could not move her legs. Ms.

Brown did not know how she came to be lying on the ground or how long she was there, and she did not remember being run over by a police vehicle. The next thing she remembered was waking up in the hospital.

¶ 9 Ms. Brown described her extensive injuries for the jury, including broken bones, a crushed pelvis, deep tissue damage and hemorrhaging, third-degree burns requiring multiple skin grafts, and permanent scarring. Ms. Brown underwent six surgeries and months of physical therapy. She still has sharp pains in her left leg, cannot grip or hold anything for very long with her right hand, and has lost some of the sensation in her right leg.

¶ 10 Officers Potter and Oliver then gave their account of the night of June 2, 2015. The two were working as beat officers on routine patrol in a marked police vehicle when they saw an individual enter a portion of the alley between Laramie and Latrobe on foot. Although the officers were not aware of any specific criminal activity, there was a building in that area known for drug sales, and Officer Potter "wanted to check it out." He explained that when he is on patrol, he routinely goes through the alleys in the area, "just to make sure that nothing is going on that shouldn't be going on." Officer Potter continued south on Laramie, made a U-turn, and entered another portion of the alley, which he knew from experience intersected with the portion of the alley he was interested in. His vehicle's emergency lights and siren were not activated. The headlights were on but at some point Officer Potter turned them off. He explained that the stretch of alley near the Walgreens parking lot is well lit and he turned his lights off to "minimize [the] vehicle a little bit so people [did not] see [it] and, you know, run, stop what they're doing."

¶ 11 When the officers were approximately halfway down the alley, they were dispatched to a domestic disturbance. Officer Oliver explained that "when someone has an emergency or needs police services" and calls 9-1-1, they are connected to the Office of Emergency Management

Communications (OEMC), which then dispatches the call to a particular officer or officers. The dispatched assignment is communicated to the officers over the radio and through a computer inside their vehicle. When the domestic disturbance call came in, Officer Potter stopped the vehicle momentarily and used the vehicle's computer touch screen to acknowledge the call. He then began to make a right turn into the north portion of the alley. The vehicle's headlights were still off at this point. Officer Potter explained that the alley was so well lit that it did not occur to him right away to turn his lights back on. He guessed that had he not encountered Ms. Brown, he would have entered the darker part of the alley, realized his lights were still off, and turned them back on. But, he explained, "everything happened so fast."

¶ 12 As Officer Potter began to make his turn, he felt "a grinding kind of feeling" and heard someone say "hey." Officer Oliver similarly felt a bump and heard a noise under the vehicle. The officers at first thought they had struck the four-foot concrete retaining wall that ran along the right side of that portion of the alley. They exited the vehicle to investigate and, when they discovered that they had hit Ms. Brown, immediately radioed for an ambulance. As other officers arrived, they used a jack to raise the car up off of Ms. Brown until the ambulance arrived, but did not move her for fear that she might have a neck or spinal cord injury.

¶ 13 Neither officer saw Ms. Brown before their vehicle struck her. The retaining wall running along the north and east side of the alley partially blocked their view of what lay around the turn, but Officer Potter was only going three to four miles per hour, was looking outside the front of the vehicle, was not distracted by anything, and the alley was well lit in that area. Ultimately, Officer Potter could not say why he failed to see Ms. Brown. Although he agreed that Ms. Brown was visible in the dash cam video from the evening in question, he noted—as did Officer Oliver—that the view from the dash cam is higher, to the right, and slightly forward compared to

what Officer Potter would actually have seen as the driver of the vehicle.

¶ 14 Both officers testified that they believed they were "en route" to the domestic disturbance when the accident occurred. Officer Oliver noted that they did not routinely activate their lights or siren when responding to a call. And Officer Potter explained that if he had kept driving west, he would have come to Latrobe Avenue, a southbound one-way street. He needed to go north to get to the domestic disturbance call, so he turned north in the alley, planning to make two rights and come out again on Laramie Avenue, a two-way street going both north and south. This route also would have led to the portion of the alley that Officer Potter testified he was interested in investigating that evening, a building on the southwest corner of Laramie and Washington that he said was known for drug activity.

¶ 15 Officer Potter stated that he was not executing or enforcing any law when he and Officer Oliver entered the alley or when they briefly stopped their vehicle to acknowledge the domestic disturbance call. However, he testified that he *was* executing or enforcing the law when the car began to roll forward again because at that point he "proceeded to go on the dispatched call." He was impeached on this point, however, with a contradictory answer he gave at his deposition. At trial, both officers were certain that at the moment they acknowledged the domestic disturbance call and rolled forward they had abandoned their efforts to investigate potential illegal activity in the alley. As Officer Potter explained, "[i]f you're given a dispatch call, unless you have somebody in custody or detained or you're on another call, that's your job. Anything that you're doing, you need to stop, and unless it's an emergency, you need to go to your call for service."

¶ 16 Paula Trampus, a police dispatcher with the Chicago OEMC 9-1-1 center, was called to testify regarding the types of dispatch records OEMC generates. She explained the difference between a unit query—which follows a particular police unit and shows, within a given period of

time, "any calls that [those particular] officer[s] [were] dispatched to or *** may have assisted on or may have initiated themselves"—and an event query—which is specific to a particular event and may include information about more than one responding police unit. Ms. Trampus noted that the unit query for Officers Potter and Oliver on July 2, 2015, showed that at 11:14:41 p.m., the officers were dispatched to a domestic disturbance, which they acknowledged five seconds later from the police mobile data terminal in their vehicle. About a minute later, however, OEMC records indicated a "preemption event" preventing the officers from responding to the domestic disturbance. This corresponded with the event query for the accident involving Ms. Brown, which the officers had radioed in from the alley.

¶ 17 The City then called Timothy Hicks, a forensic engineer specializing in accident reconstruction. Mr. Hicks had reviewed the dash cam video, police reports, and officer depositions in this case. He met with Officer Potter to determine the officer's height while standing and seated. Mr. Hicks then took the same police vehicle that was involved in the accident to the scene, placed a 12-inch orange cone where the first visible portion of Ms. Brown's body had been, and compared what Officer Potter would have seen with what the dash cam video depicted. Mr. Hicks explained that the dash cam—which is located to the right of the rearview mirror, 6 inches higher than the driver's line of sight and 24 inches forward—provides "a much better vantage point" than a driver of the vehicle would have. He determined, within a 10% margin of error, that Officer Potter had only 29 inches of vehicle travel distance in which Ms. Brown's body would have been visible to him. At speeds of between 2.5 and 5 miles per hour, this would have resulted in less than one second of visibility, occurring just before the vehicle stopped to acknowledge the domestic disturbance, and with no visibility after that point.

¶ 18 At multiple times during the trial, the jury was also shown all or part of the dash cam

footage of the accident. This footage first shows a male figure walking into the north portion of the alley. The police vehicle then makes a U-turn and turns west into the south portion of the alley, where its headlights are turned off. The vehicle proceeds slowly down the alley, very briefly comes to a stop, rolls forward again, and turns into the north portion of the alley, all with its lights still off. In the video, Ms. Brown is lying face-up just beyond the corner of the retaining wall running along the right side of the vehicle. Her head and upper torso come into view just as the vehicle stops and remain visible for several seconds before the vehicle turns into the north portion of the alley. Ms. Brown then disappears under the vehicle's hood. The video continues for some time after the police vehicle has hit Ms. Brown, showing other officers arriving on the scene.

¶ 19 B. Executing and Enforcing the Law

¶ 20 The central issue in this appeal, and one which was addressed numerous times before, during, and after trial, is whether the act or omission that caused Officer Potter to hit Ms. Brown was one made in the "execution or enforcement of any law." If it was, the City is immune from suit for Officer Potter's ordinary negligence. And since the jury found that Officer Potter's conduct was not willful or wanton, a finding that section 2-202 immunity applies would mean that the City bears no responsibility for Ms. Brown's injuries.

¶ 21 Before the second trial in this case, the City renewed a motion for a directed verdict on Ms. Brown's negligence claim that it had made in the first trial, in which it urged the trial court to find as a matter of law that section 2-202 immunity applied. The City also asked the court to bar any questioning of the officers as to whether or not they subjectively believed they were executing or enforcing a law when they struck Ms. Brown. The court denied both requests.

¶ 22 The City then moved to bar any testimony or argument that the domestic disturbance

Officers Potter and Oliver were called to may not have involved an actual emergency or anything more than a request for police services. The trial court judge granted the motion but ruled that the limitation applied equally to both parties: If Ms. Brown could not question the severity of the call, then the City could not emphasize the severity of the call by introducing testimony that it was an "emergency" or an "A1 priority" call. This ruling was not challenged by either party. As a result, the only thing the jury knew about the call was that an OEMC dispatcher had coded it as a domestic disturbance.

¶ 23 At the end of the first day of trial, the trial court denied the City's request to submit a jury instruction that would "define what executing and enforcing was." In response to this, the City asked for a special interrogatory focusing on what counsel understood to be the key question of fact identified by the court: "At the time of the occurrence, was Officer Potter en route to the domestic disturbance call?" The court took the request under advisement.

¶ 24 At the close of Ms. Brown's case, the City moved for a directed verdict on the negligence claim, arguing that the undisputed evidence demonstrated the officers were en route to the domestic disturbance at the time of the accident. The City argued that the court could conclude from this, as a matter of law, that the officers were executing and enforcing the law. The trial court explained why it was denying this motion:

> "Applying the appropriate standard to Defendants' directed verdict motion, which is that the motion should be viewed in a light most favorable to the nonmoving party, the court believes this is a genuine issue of material fact as to whether the police officer was still engaged in routine patrol at the time of the incident or had already left routine patrol and was now executing and enforcing the law by responding to the domestic violence call.

> This is, in part, and mainly in part, due to the extremely short period of time between the domestic violence dispatch and the accident with the Plaintiff. So, the motion is denied."

¶ 25 At the jury instruction conference that followed, the court decided that it would give the jury all of the same instructions that it had in the first trial, including the following:

> "There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided 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. (745 ILCS 10/2-202)."

¶ 26 The City then asked for a ruling on its motion for a special interrogatory asking the jury if, at the time of the accident, Officer Potter was en route to the domestic disturbance call. It offered to withdraw the question posed to the first jury—"At the time the accident occurred, was Officer Potter acting in the execution and enforcement of any law?"—because, in its view, the new question "actually test[ed] the factual issue which [was] determinative."

¶ 27 Counsel for Ms. Brown objected, insisting that the jury should, as in the first trial, be asked whether Officer Potter was executing and enforcing the law because "[t]hat's what the statute says," "[t]hat's the test," and an affirmative answer to the new interrogatory would not necessarily conflict with a general verdict in Ms. Brown's favor.

¶ 28 The trial court allowed the City's substitute question, noting that the question of fact for the jury to decide was "whether or not [Officer Potter] left patrolling and responded to the call." The court explained its reasoning as follows:

> "If you take a look at the cases, a policeman patrolling is not in the

> execution and enforcement of law. If he's out there and he's just patrolling, or he's patrolling through the alley to find out what's going on at the other end of the alley, he's not executing and enforcing the law.
>
> On the other hand, once he begins to leave that mode or he leaves that mode and he begins to act in terms of responding to a call, now he becomes—now he comes to that position, in my opinion, that he is executing and enforcing the law. And again, because it's such a short timeframe here, I don't think it can be decided as a matter of law and that's why I'm denying your motion for directed verdict."

¶ 29 The City renewed its motion for a directed verdict on negligence at the close of all the evidence, and the trial court again denied the motion.

¶ 30 During closing arguments, counsel for Ms. Brown urged the jury to find that Officer Potter was not executing and enforcing the law when he struck Ms. Brown, stating:

> "[Officer] Potter testified *** that he was not enforcing except for the response to the call. Both Potter and Oliver testified that they were making a call for service. Unequivocally, they did not have their siren on, did not have their lights on, didn't even have their headlights on. It's fair for you to ask, [w]as Potter really starting that service call response, or was he doing something else at the time that this occurred?"

¶ 31 Counsel for Ms. Brown pointed out that the officers had not stopped to acknowledge the domestic disturbance call at the point where the two portions of the alley intersected but "further [*sic*] [back] where their cover [was] not blown," and with their headlights still off. They did not rush ahead, lights and siren activated, and go the wrong way up the one way street that lay directly ahead of them, but stayed on the path they were already on. Counsel posited that the

officers were "going and doing the exact same thing that they would have done whether or not they ever received [the domestic disturbance] call," and that their actions indicated that the officers were still hopeful that their investigation of the alley would "turn[ ] up *** a far more interesting event than going to a domestic call." Counsel urged the jury to conclude that Officer Potter didn't see Ms. Brown in the alley because he had "tunnel vision"—"[h]is focus was [on] getting around that corner unseen, no lights on, slowly, and sneaking up on whoever was there."

¶ 32 In his closing, counsel for the City told the jurors "[t]he law is that if you're responding to a call, if there's—if you're doing something in furtherance of executing and enforcing any law, then you get sort of a heightened legal standard." He then urged the jurors to believe the officers when they testified that they had abandoned their investigation of the alley and were en route to the domestic call.

¶ 33 But in rebuttal counsel for Ms. Brown again asked the jurors to consider, not just what the officers said, but what they did. He urged the jurors to conclude, primarily from the dash cam video, that Officer Potter was *not* solely focused on getting to the domestic disturbance call when he turned the corner in the alley:

> "As a matter of fact, he thinks that someone is around the corner, and he's going to come around and, boom, put the lights on. And maybe he would have called in [for other offices to continue the investigation in the alley] or maybe he would have taken care of it himself and said someone else go [to the domestic disturbance]; I've got a drug transaction in progress here. And this case isn't about whether it's right or wrong for him—You know, I would hope that he's going to arrest drug suspects, stop drug dealing. It's not a criticism of that. But it's an acknowledgement that that's most likely where his mind was at, and that's what explains how you miss a person in a pink outfit laying there

in the path of your vehicle."

¶ 34 Following closing arguments, the jury deliberated for the remainder of the day on Friday, January 5, 2018. Shortly after 5 p.m. they let the trial judge know that they "seem[ed] to be stuck without a way forward unanimously" and at 5:19 p.m. they asked "Does 'execution or enforcement of any law' begin when an officer acknowledges a call over the radio and/or in car [computer?]" The trial court sent the jurors a note explaining that this was "an issue for [them] to decide."

¶ 35 Upon receiving that response, the jurors elected to break for the day. They returned to deliberate on Monday, January 8, 2018, but shortly before 1 p.m. indicated that they were deadlocked. Noting that the first case had ended in a mistrial because of a deadlocked jury, the trial court suggested to counsel for both parties that they might want to agree to a less-than-unanimous verdict. The parties agreed to accept a verdict by 10 of the jurors. Twenty-three minutes later the jury reported that it had reached a verdict. Eleven jurors signed both the verdict form and the special interrogatories. The jurors found the City liable for negligence but not for willful and wanton conduct. Concluding that Ms. Brown had suffered $530,000 in damages but was herself 50% at fault, the jury awarded her $265,000. The jurors answered "yes" when asked if Officer Potter was en route to the domestic disturbance call at the time the accident occurred.

¶ 36 The trial court entered judgment on the jury's general verdict, but the City moved for a judgment notwithstanding that verdict, based on the jury's affirmative answer to the special interrogatory. The City reiterated its position that, as a matter of law, section 2-202 immunity is triggered any time an officer is en route to a dispatched call. And Ms. Brown reiterated her position that the answer to the special interrogatory did not necessarily conflict with the general verdict because "Officer Potter could be en route but at the same time engaging in the very same

activity he was before receiving the call."

¶ 37 The court agreed with the City, vacated the judgment in Ms. Brown's favor, and entered judgment in the City's favor based on the jury's special finding. The court concluded that the special interrogatory "was proper and the Court was obligated to tender it to the jury." In the court's view, the interrogatory "was necessary, in that it resolved the ultimate critical factual issue as to whether Officer Potter was en route to the domestic call, which was dispositive of the negligence claim in this case" and "would entitle [the City] to immunity."

¶ 38 II. JURISDICTION

¶ 39 The trial court granted the City's motion for a judgment notwithstanding the verdict on July 10, 2018, and Ms. Brown timely filed her notice of appeal on July 25, 2018. We have jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. July 1, 2017)), governing appeals from final judgments entered by the circuit court in civil cases.

¶ 40 III. ANALYSIS

¶ 41 Ms. Brown urges us to reverse the trial court's order granting the City's motion for a judgment notwithstanding the verdict. The jury's general verdict in her favor should not have been disturbed, she maintains, because the special interrogatory asking the jury whether Officer Potter was en route to the domestic disturbance call at the time of the accident did not call on the jurors to decide an ultimate issue in the case, did not serve as a true check on their general verdict, and did not result in a finding that was absolutely irreconcilable with the general verdict. The City urges us to affirm, insisting that if Officer Potter was en route to a domestic call at the time of the accident, he was necessarily executing and enforcing the law, and the City was entitled to immunity under section 2-202 of the Act. We agree with Ms. Brown and find, for several reasons, that the jury's general verdict and its answer to the special interrogatory are not

absolutely irreconcilable. The jury's verdict should therefore not have been overturned.

¶ 42 Special interrogatories are meant to test the validity of a jury's general verdict. *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002). If a jury's special finding of fact contradicts its verdict, the special finding controls and the verdict cannot stand. *Id.* Section 2-1108 of the Code of Civil Procedure (Code) currently provides that, when requested by a party, a proper special interrogatory *must* be submitted to the jury. 735 ILCS 5/2-1108 (West 2014). "Proper" in this context means that the special interrogatory asks the jury to decide "an ultimate issue of fact upon which the rights of the parties depend," such that an answer to the question will be "inconsistent with some general verdict that might be returned." *Simmons*, 198 Ill. 2d at 555. Importantly, inconsistency between a general verdict and the answer to a special interrogatory should be found "only when the special finding is *clearly and absolutely irreconcilable* with the general verdict." (Emphasis added.) *Price v. City of Chicago*, 2018 IL App (1st) 161599, ¶ 24. If "a 'reasonable hypothesis' exists that allows the special finding to be construed consistently with the general verdict, they are not 'absolutely irreconcilable' and the special finding will not control." (Internal quotation marks omitted.) *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 112 (2005). "[A]ll reasonable presumptions are exercised in favor of the general verdict." (Internal quotation marks omitted.) *Id.* We review both the propriety of a special interrogatory and the grant or denial of a judgment notwithstanding the jury's verdict *de novo*. See 735 ILCS 5/2-1108 (West 2014); *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37.

¶ 43 Here, the purported conflict between the jury's general verdict and its answer to the special interrogatory involves section 2-202 of the Tort Immunity Act (745 ILCS 10/2-202 (West 2014)). That section, as noted above, provides 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.) *Id.* Section 2-109 of the Act extends this qualified immunity to the public employee's employer, who could otherwise be vicariously liable for the employee's conduct. *Id.* § 2-109. Immunity under section 2-202 is an affirmative defense for which a defendant bears the burden of proof. *Leaks v. City of Chicago*, 238 Ill. App. 3d 12, 17 (1992).

¶ 44 The Act itself does not define the phrase "execution or enforcement of any law." Courts have held that neither the failure to activate emergency lights and sirens nor an officer's subjective belief regarding the nature of his or her conduct is dispositive of whether the officer was executing or enforcing a law. *Bruecks*, 276 Ill. App. 3d at 569. And while it is inappropriate for immunity to rest on "circumstances which develop[ ] after the fact," like whether anyone [is] ultimately arrested or charged with a crime (*id.*), "[t]he mere fact that a police officer acts on the *speculation* that she may be required to enforce some, as yet, undetermined law is not enough to activate the immunity set forth in section 2–202" (emphasis added) (*Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 392–93 (2007)).

¶ 45 Courts have found that an officer is executing or enforcing the law when he or she makes an arrest (*Glover v. City of Chicago*, 106 Ill. App. 3d 1066, 1074 (1982)), responds to a report of shots fired or a crime in progress (*Bruecks v. County of Lake*, 276 Ill. App. 3d 567, 569 (1995); *Morris v. City of Chicago*, 130 Ill. App. 3d 740, 744 (1985)), or travels to the scene of a multivehicle traffic accident to enforce the traffic laws (*Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211, 221-22 (1986)). By contrast, courts have found that an officer is *not* executing or enforcing the law when he or she "is engaged in routine elements of his official duties," such as transporting a prisoner (*Bruecks*, 276 Ill. App. 3d at 568), "providing service in the nature of a community caretaking function" (*DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 520 (2006)),

or conducting routine patrol (*Leaks*, 238 Ill. App. 3d at 17).

¶ 46 Over the years our supreme court has provided guidance on how these fact-specific determinations should be made. The court first made clear in *Arnolt v. City of Highland Park*, 52 Ill. 2d 27, 33 (1972), that "[t]he immunity granted a public employee for his negligent acts extends only to the act or omission done *while in the actual execution or enforcement of a law* and not to every act or omission done while on duty as a public employee." (Emphasis added.) As the court noted, the words "in the execution or enforcement of any law" must "be given their plain and commonly ascribed meaning." (Internal quotation marks omitted.) *Id.*

¶ 47 For a number of years following *Arnolt*, courts often rigidly required "the precise allegedly negligent, act [to be] one of execution or enforcement." *Fitzpatrick*, 112 Ill. 2d at 220 (noting this trend and collecting cases). But in *Thompson v. City of Chicago*, 108 Ill. 2d 429, 434 (1985), our supreme court rejected this approach as "overly narrow." Recognizing that " '[e]nforcing the law is rarely a single, discrete act, but is instead a course of conduct,' " the court held that section 2-202 immunity applies whenever "the evidence establishes that at the time of his alleged negligence a public employee was engaged in a course of conduct designed to carry out or put into effect any law." *Fitzpatrick*, 112 Ill. 2d at 221 (quoting *Thompson*, 108 Ill. 2d at 433).

¶ 48 But most recently, in *Aikens v. Morris*, 145 Ill. 2d 273, 283 (1991), the court warned, that its adoption of this approach in *Thompson* "does not diminish the vitality of *Arnolt*." Just as the court was concerned in *Thompson* with rectifying an overly narrow application of its holding in *Arnolt*, in *Aikens* it seems to have been concerned with the potential for an overly broad application of its holding in *Thompson*. The court described the intended limitations on that holding as follows:

> "*Thompson* does not remotely suggest *** that police actions which are other than 'in the execution or enforcement of law' are immunized. *Thompson* only broadens the focus of inquiry from simply a singular, allegedly negligent act to *a cognizable and related group of actions, all of which must be, for purposes of section 2-202 immunity, 'in execution or enforcement' of law*." (Emphasis added.) *Id.* at 280.

¶ 49 As we read these cases, a court must still begin with the allegedly negligent act or omission. If the negligent act itself is one done in the execution or enforcement of the law, section 2-202 plainly applies. The officer is likewise afforded immunity if the negligent act is part of a "cognizable and related group of actions" (*id*. at 280) all designed to execute or enforce the law. In this case, the special interrogatory was "absolutely irreconcilable" with the general verdict if, and only if, the officers being "en route" to the domestic call necessarily meant that they were executing and enforcing the law. Because we see several scenarios in which the jury's answer to the special interrogatory and its general verdict can be read consistently, there is no "absolute" inconsistency which supported overturning the jury's verdict.

¶ 50 First, it is not clear on this record that the domestic disturbance call that Officers Potter and Oliver were dispatched to necessarily called for them to execute or enforce any law. As the City acknowledged at oral argument, an officer is not executing and enforcing the law *every* time that he or she responds to a dispatched call. *See Simpson v. City of Chicago*, 233 Ill. App. 3d 791, 793 (1992) (holding that an officer responding to a non-emergency call from a dispatcher to investigate a missing person was not executing and enforcing the law).

¶ 51 The City has taken at least three positions on what, if anything, must be known about a call for an officer's response to it to constitute the execution or enforcement of a law. At times the City has emphasized the special nature of the call the officers received in this case—referring

to it at trial as an "A1 priority" or a 9-1-1 emergency dispatch. At other times, the City has advanced the argument that when an officer is dispatched to *any c*all, he or she is executing or enforcing the law. The City has also argued that, while we do not know much about this particular call, it is enough to know that the call involved a "domestic disturbance."

¶ 52 The City argues that under section 102 of the Illinois Domestic Violence Act of 1986 (Domestic Violence Act) (750 ILCS 60/102(5) (West 2014)), "law enforcement officers have a responsibility 'to provide immediate, effective assistance and protection' to *victims of domestic incidents*." (Emphasis added.) And it points out that section 304 of that act imposes certain duties on officers who respond to such calls, even where no arrest is made and no criminal proceedings are initiated. See *id.* § 304(b).

¶ 53 In its motion for leave to file supplemental authority, the City also draws our attention to *Romito v. City of Chicago*, 2019 IL App (1st) 181152, ¶¶ 38, 42-44—a recent opinion of this court we were already familiar with—in which the court held that an officer sitting in her double-parked vehicle to file a report required by the Domestic Violence Act was executing and enforcing the law for purposes of section 2-202 immunity when another vehicle crashed into her. Noting that the *Romito* court included in its opinion no details regarding the particular domestic dispute in that case, the City insists that such details are always irrelevant. According to the City, it does not matter what an officer knows about a domestic disturbance he or she is dispatched to; all domestic disturbance calls are governed by the Domestic Violence Act and all will necessarily involve executing and enforcing the law.

¶ 54 We are not convinced that this is true. In *Romito* it was undisputed that the call in question was a domestic violence call. *Romito*, 2019 IL App (1st) 181152, ¶ 42. Although the City and the trial court in this case used terms like "domestic incident," "domestic dispute call,"

and "domestic violence call" interchangeably, all that the record reflects and the special interrogatory references is a "domestic disturbance." The Domestic Violence Act states that it is intended to protect "victims of domestic *violence*." (Emphasis added.) 750 ILCS 60/102(5) (West 2014). And the duties enumerated in section 304(a) apply only "[w]henever a law enforcement officer has reason to believe that a person has been abused, neglected, or exploited by a family or household member." *Id.* § 304(a). Here, nothing in the record indicates that the domestic disturbance Officers Potter and Oliver were called to on July 2, 2015, involved violence, abuse, neglect, or exploitation.

¶ 55 Even if we were to assume that a response to this call necessarily involved executing and enforcing the law, it is not a given that, when the jurors answered the special interrogatory, their understanding of the term "en route" matched that of the trial court. The trial court made clear when it agreed to ask this special interrogatory, that it assumed that being "en route" meant the officer had made a conscious choice to respond to the dispatched call and abandon his patrol of the alley for drug dealers. But the jury could have viewed the "en route" question in much simpler terms. Was Officer Potter going in the direction of the domestic disturbance? Was he on a path that would take him there? The most we can be sure of from the jurors' answer is that they did not believe Officer Potter's act of turning right into the north part of the alley was *inconsistent* with him responding to the domestic disturbance. To conclude from it that they necessarily believed Officer Potter had completely abandoned his prior search of the alley to actively embark on his new assignment assumes too much.

¶ 56 This was clearly a dispute at trial. The officers testified that, when they were dispatched to the domestic disturbance, they immediately and completely abandoned the routine patrol of the alley that they had been engaged in just seconds before. But the jury may have concluded that

this testimony was contradicted by evidence of the officers' actual conduct in those critical seconds. Indeed, in closing argument Ms. Brown's counsel urged the jury to conclude based on the officers' actions that, even after acknowledging the domestic disturbance call, they were reluctant to give up the possibility of finding a drug deal taking place in the alley and remained focused, on "getting around that corner unseen, no lights on, slowly, and sneaking up on whoever was there."

¶ 57 We see at least a third manner in which the general verdict and the special interrogatory answer can be read consistently. If the jury believed the City's reconstruction expert, Mr. Hicks, then the only opportunity Officer Potter had to see—or negligently fail to see—Ms. Brown in the alley occurred *before* Officer Potter stopped to receive the call about the domestic disturbance, and certainly before he pulled forward again to make his turn. If so, the negligent conduct could not have been "shaped or affected in any manner by the nature of duties in either enforcing or executing [the] law." *Aikens*, 145 Ill. 2d at 286. The City would be responsible for the officers' negligent failure to see Ms. Brown in that brief period of time when she was visible to them, even if they were executing and enforcing the law a few seconds later, after they received the dispatch call.

¶ 58 This is all speculative, but the point is that, although we can never know the precise basis for a jury's verdict, that verdict must be allowed to stand if *any* set of facts exists under which it can be harmonized with the jury's special findings. Overriding a jury's verdict is a drastic step that affects public confidence in the jury system. Although the law at present not only allows but requires courts to pose special interrogatories to a jury designed to undermine the often hard-fought consensus that their general verdict represents, courts have a duty to exercise all reasonable presumptions in favor of the jury's verdict. *Blue*, 215 Ill. 2d at 112. The verdict and

the special finding will be found to conflict only when no reasonable hypothesis exists under which they may be harmonized. *Price*, 2018 IL App (1st) 161599, ¶ 24.

¶ 59 As of the drafting of this opinion, an amendment to section 2-1108 of the Code approved by the legislature and awaiting the governor's signature would make the submission of special interrogatories discretionary, rather than mandatory. 101st Ill. Gen. Assem., House Bill 2233, 2019 Sess. That same amendment would require the trial court, in the event of an inconsistency, to direct the jury to further consider its special finding in light of its general verdict, and would leave it to the trial court's discretion whether to order a new trial based on any such inconsistency. *Id*. While this procedure was not available here, this case, in which both the court and the jury clearly worked very hard to correctly apply the law to the facts, is a good illustration of the need for the increased flexibility that this amendment is intended to provide.

¶ 60 IV. CONCLUSION

¶ 61 For the reasons stated above, we reverse the judgment notwithstanding the verdict, reinstate the jury's verdict of $265,000 in favor of Ms. Brown, and enter judgment on that verdict in favor of Ms. Brown and against the City.

¶ 62 Reversed.