

# THE MISAPPLICATION OF THE ILLINOIS TORT IMMUNITY ACT TO THE INTENTIONAL TORTS OF POLICE OFFICERS

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## I. INTRODUCTION

A serious confusion concerning the application of the Illinois Tort Immunity Act to the intentional torts of police officers pervades both Illinois and federal case law.<sup>1</sup> Although the General Assembly only intended for police officers to be immunized against liability for negligent acts committed in the course of law enforcement conduct, courts have altered the purpose of the Act by allowing police officers to affirmatively assert immunity against intentional torts like battery and false imprisonment. The pervasiveness of this misconstruction likely owes to the fact that police officers are authorized by statute to engage in conduct that contains, by definition, discrete intentionally harmful acts, and to the Act itself, which incorporates language mirroring the parameters of the common law tort of willful and wanton conduct.

For these reasons, the Seventh Circuit, most Illinois courts, and countless litigants in both forums have adopted the erroneous construction of the Tort Immunity Act. However, far from being an innocuous misinterpretation of a statute, the erroneous construction has confusing and harmful effects on litigation that strongly prejudice plaintiffs and, under certain circumstances, defendant-officers. Consequently, both the Seventh Circuit and upper-level Illinois courts should hear this matter to correct the erroneous application by trial courts.

The following article attempts to resolve this problem by first sketching a brief history of the Tort Immunity Act and the likely origins of the erroneous construction, discussing examples and authority relating to the issue, presenting the correct construction of the statute, and then detailing the negative consequences resulting from the use of the erroneous construction.

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1. Local Governmental and Governmental Employees Tort Immunity Act, 745 ILL. COMP. STAT. 10/1-101 (2012) [hereinafter Tort Immunity Act].

## II. HISTORY

While the question of sovereign immunity has a long history in Illinois, the specific issue of the intentional torts of police officers did not arise until the passage of the Tort Immunity Act in 1965.<sup>2</sup> The General Assembly passed the Tort Immunity Act on the basis of two general policy considerations. First, the legislature was concerned that providing for ordinary liability would increase budgetary requirements and the cost of government services, thereby increasing the tax burden imposed on the public.<sup>3</sup> The Assembly reasoned that the scope of governmental functions was so great that “negligence and injury were inevitable,” and consequently decided to conditionally immunize certain governmental acts from tort liability.<sup>4</sup> The other consideration derived from the general argument that some legislative and executive functions should not be subjected to public or judicial examination.<sup>5</sup> Providing for judicial and public review of the decisions of public officials would ultimately shift the authority of public officials to the judiciary and juries.

In contrast to higher-level public officials, police officers receive a comparatively lower level of immunity protection because officers merely perform the duties prescribed by the legislative body rather than exercise discretionary political powers.<sup>6</sup> Moreover, indemnification of officers by municipalities makes it less likely that exposure to liability will deter officers from providing effective enforcement.<sup>7</sup> Nevertheless, the General Assembly chose to immunize the ordinary negligence of police officers, in part because “a police department’s negligence[,] its oversights, blunders, omissions is [*sic*] not the proximate or legal cause of harms committed by others.”<sup>8</sup> Further, tort immunity for police officers has often been justified in other jurisdictions because, for example, “officers are often called upon to make difficult decisions, sometimes with only split seconds to respond,” and “they ought not face civil liability or the burden of the litigation process, including discovery and trial.”<sup>9</sup>

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2. Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 NW. U. L. REV. 265, 276 (1966-1967).

3. *Id.*

4. *Id.*

5. *Id.* at 279.

6. *Id.* at 280.

7. The Illinois Supreme Court has noted that “the possibility of indemnification of a police officer under the indemnity provisions (Ill.Rev.Stat.1979, ch. 24, pars. 1-4-5, 1-4-6), following a finding of negligence liability, minimizes any adverse effects which may impact upon the individual officer or the vigorous enforcement of law.” *Aikens v. Morris*, 583 N.E.2d 487, 490 (Ill. 1991).

8. *Porter v. City of Urbana*, 410 N.E.2d 610, 612 (Ill. App. Ct. 1980).

9. *Civil Liability for Use of Deadly Force*, 2007 (12) AELE MONTHLY L. J. 101, 102 (2007).

### A. Willful and Wanton Conduct

Under the Tort Immunity Act, a police officer 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.”<sup>10</sup> The statute further 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.”<sup>11</sup> The Illinois Supreme Court subscribes “to the Restatement’s view that there is a qualitative difference between negligence and willful and wanton conduct” and thus defines willful and wanton conduct in terms of “quasi-intent” or recklessness.<sup>12</sup> Stated in general terms, where it has been established that an officer was enforcing the law, the officer’s conduct will be immunized from suit unless the officer was enforcing the law in a reckless manner.

### B. Enforcing the Law

The courts have also defined what constitutes “enforcing the law” for the purposes of police officer tort immunity, noting that “immunity is not afforded for every act or omission by public employees during their hours of duty.”<sup>13</sup> In distinguishing enforcement of the law from mere acts performed while on duty, the Illinois Supreme Court has held that “[e]nforcing the law is rarely a single, discrete act, but is instead a course of conduct.”<sup>14</sup> Consequently, immunity does not only apply where the specific, allegedly tortious act was simultaneously the enforcement of a specific law, but rather to an entire “unbroken” course of conduct that has “definite and cohesive parameters” related to the enforcement of the law.<sup>15</sup>

The determination of whether an officer is executing or enforcing a law is ultimately dependent upon facts and circumstances of each particular case.<sup>16</sup> The key question is whether the allegedly tortious act was “shaped or affected” by the officer’s enforcement of the law.<sup>17</sup> The set of conduct found by courts to constitute enforcement of the law includes attempts to prevent a

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10. 745 ILL. COMP. STAT. 10/2–202 (2012).

11. 745 ILL. COMP. STAT. 10/1–210 (2012).

12. *Burke v. 12 Rothschild’s Liquor Mart, Inc.*, 593 N.E.2d 522, 531 (Ill. 1992); *see also Murray v. Chi. Youth Ctr.*, 864 N.E.2d 176, 189 (Ill. 2007) (holding that “willful and wanton” includes, in addition to actual intent to harm, a “range of mental states” including the “utter indifference for the safety or property of others” and the “conscious disregard for the safety of others or their property”).

13. *Aikens v. Morris*, 583 N.E.2d 487, 491 (Ill. 1991).

14. *Thompson v. City of Chi.*, 484 N.E.2d 1086, 1088 (Ill. 1985).

15. *Aikens*, 583 N.E.2d at 491.

16. *Id.* at 493.

17. *Id.* at 494.

crime,<sup>18</sup> pursuing a vehicle believed to be carrying suspects,<sup>19</sup> responding to a domestic dispute and ordering the suspect to leave his home,<sup>20</sup> and responding to calls indicating that a crime is in progress.<sup>21</sup> In contrast, police officer conduct that has not received the protection of section 2-202 immunity includes participation in police pursuits when the officer is not authorized to do so by department rules,<sup>22</sup> assisting a stranded motorist,<sup>23</sup> responding to a call but then being called off,<sup>24</sup> engaging in investigative activity when there is no indication that a crime has been committed,<sup>25</sup> transporting a prisoner between facilities,<sup>26</sup> and striking a bystander after the bystander asked questions about the arrest of a friend he had just witnessed.<sup>27</sup>

### III. ANALYSIS

#### A. Intentional Torts of Police Officers

Although the willful and wanton exception appears to unequivocally preclude immunity from liability for intentional torts, a lacuna exists in the case law concerning intentional tort claims against police officers, which has produced prolonged, confusing litigation and an inconsistent federal interpretation of the Tort Immunity Act.

While section 2-202 immunity clearly applies to situations in which a police officer's law enforcement conduct unintentionally caused harm, as in the common case of a civilian injured by a squad car during a high-speed pursuit, the potential for confusion increases when an officer's allegedly tortious acts stem from, and are coextensive with, the officer's law enforcement conduct. Many of the statutory duties and rights of police officers contain authorized actions that could constitute intentional torts, absent legal justification. For example, an officer's use of deadly force, confiscation of property, or imprisonment of suspects all contain discrete acts potentially satisfying the definitions of battery, conversion, and false imprisonment, respectively.

Potential plaintiffs, therefore, have before themselves the discrete act of an officer intending to cause harm to them (and causing it) on the one

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18. *Thompson*, 484 N.E.2d at 1086.

19. *Morton v. City of Chi.*, 676 N.E.2d 985 (Ill. App. Ct. 1997).

20. *Fatigato v. Village of Olympia Fields*, 666 N.E.2d 732 (Ill. App. Ct. 1996).

21. *Morris v. City of Chi.*, 474 N.E.2d 1274 (Ill. App. Ct. 1985); *Vines v. City of Chi.*, 443 N.E.2d 652 (Ill. App. Ct. 1982); *Glover v. City of Chi.*, 436 N.E.2d 623 (Ill. App. Ct. 1982).

22. *Hudson v. City of Chi.*, 881 N.E.2d 430 (Ill. App. Ct. 2007).

23. *McElmeel v. Village of Hoffman Estates*, 835 N.E.2d 183 (Ill. App. Ct. 2005).

24. *Sanders v. City of Chicago*, 714 N.E.2d 547 (Ill. App. Ct. 1999).

25. *Leaks v. City of Chi.*, 606 N.E.2d 156 (Ill. App. Ct. 1992); *Simpson v. City of Chi.*, 599 N.E.2d 1043 (Ill. App. Ct. 1992).

26. *Aikens v. Morris*, 583 N.E.2d 487 (Ill. 1991).

27. *King v. City of Chi.*, 384 N.E.2d 22 (Ill. App. Ct. 1978).

hand, and a statute authorizing the officer to harm them on the other. Thus, when a plaintiff alleges that an officer's enforcement action (e.g., the use of deadly force) was itself unlawful (i.e., constituted battery), the potential for confusion surrounding section 2-202 arises, because intentionally causing harm is, by definition, both willful and wanton under section 2-202 and an element of the deadly force statute.<sup>28</sup>

#### B. Reasons for Asserting Immunity as an Affirmative Defense Against Intentional Torts

The confusion surrounding the application of the Tort Immunity Act to intentional torts generally emerges at the pleading stage when the defense asserts the affirmative defense of immunity, either to defeat the plaintiff's negligence claim or, in some instances, as a response to the plaintiff's initial claim of an intentional tort. Courts and parties likely believe in good faith that tort immunity is a valid affirmative defense against intentional torts for three misguided reasons.<sup>29</sup>

First, from a superficial perspective, the policy justifications behind police officer immunity seem to require the incorporation of intentional torts. If the general purpose of the Act is to protect officers from liability for the consequences of honest judgment calls, then it stands to reason that officers ought to be shielded from liability for the consequences of reasonable law enforcement actions that contain, by definition, discrete intentionally harmful acts. From this same superficial perspective, then, reading the statute as not immunizing officers against intentional tort liability would have the apparently absurd result of protecting officers from liability for actions they were not supposed to commit (e.g., ordinary negligence) and exposing them to liability for actions they were supposed to commit (e.g., employing deadly force, arresting and detaining individuals, etc.). Officer actions authorized by use-of-force statutes, such as arrests and searches and seizures, would seem to constitute by definition causes of action for intentional torts. Indeed, such an interpretation could potentially produce dilemmas in which an officer would be forced to choose between engaging in willful and wanton conduct by performing a law enforcement act containing a discrete intentional tort, or engaging in willful and wanton conduct by refraining from performing that law enforcement act and endangering the community.

These erroneous but superficially plausible interpretations flow into a second justification, which arises from courts' interpretation of law enforcement in terms of an ongoing, unbroken course of conduct. According to this perspective, a willful and wanton analysis must be applied to an entire

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28. 720 ILL. COMP. STAT. 5/7-5 (2012).

29. There are also "artful" reasons for such beliefs, which will be discussed in Subsection D, *infra*.

range of conduct rather than the specific, intentionally harmful act, because law enforcement covers a range of conduct rather than single, discrete acts. The second interpretative error therefore appears to emerge from the separation of the discrete, intentional act of intending to cause harm, and causing harm, from the entire course of conduct constituting enforcement of the law. This new, erroneous interpretation elides over the analysis of the original intentional tort (e.g., battery) and collapses it into the entire course of conduct constituting enforcement of the law (e.g., the events leading up to the use of deadly force). The Tort Immunity Act then functions to protect police officers against complaints of common law intentional torts by requiring the plaintiff to show that the officer's course of law enforcement conduct was willful and wanton rather than requiring the plaintiff to prove the elements of a common law intentional tort. Consequently, in addition to operating on the theory of an intentional tort, the case also proceeds according to the dictates of an ordinary willful and wanton conduct case.

The third reason derives in turn from this consequence. Because section 2-202 uses a term denoting the common law tort of willful and wanton conduct, and because the Tort Immunity Act's definition of willful and wanton appears to comport with Illinois Pattern Jury Instruction for common law willful and wanton conduct cases, it seems reasonable to parties and certain courts that section 2-202 has created a duty for officers to refrain from acting willfully and wantonly in executing statutorily-authorized actions that contain discrete, intentionally harmful acts.<sup>30</sup> Cases operating on the erroneous construction therefore proceed on the assumption that section 2-202 is the basis for the plaintiff's cause of action, rather than the source of an affirmative immunity defense.

### C. Examples and Authority

In order to further illustrate the prevalence of the confusion surrounding the application of section 2-202 to intentional torts, the following sections will consider examples from trial- and appellate-level documents from both federal and Illinois forums. In Illinois courts, the influence of the confusion can be detected from a survey of published trial orders, trial-level briefs, and certain appellate cases concerning the subject. Furthermore, federal courts applying the Tort Immunity Act have come down affirmatively on the side of the erroneous interpretation, explicitly holding that section 2-202 immunity is an affirmative defense to intentional torts.

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30. ILL. PATTERN JURY INSTRUCTIONS (CIVIL) 14.01 (2011).

### 1. *Illinois Trial Orders and Briefs*

There are numerous published trial orders and briefs evincing the confused use of the Tort Immunity Act as an affirmative defense against intentional tort claims against police officers. A brief selection will be summarized below in order to illustrate the practical manifestations and consequences of the erroneous construction.

In *Duran v. City of Chicago*, the plaintiff alleged the intentional tort of false arrest against several police officers, and the defendants responded with the affirmative defense of immunity.<sup>31</sup> In determining whether section 2-202 applied to the facts of the case, the court did not question whether immunity could be an affirmative defense to an intentional tort claim, but rather proceeded to analyze whether the facts demonstrated a law enforcement course of conduct.<sup>32</sup> Having concluded that the arrest in question did satisfy the definition of law enforcement for the purposes of section 2-202 analysis, the court then proceeded to recast the dispute in terms of a “willful and wanton” analysis of the entire course of law enforcement conduct, holding that “section 2-202 applies to all of [the officers’] actions, and those actions will be judged under a willful and wanton standard.”<sup>33</sup> Thus, in spite of allowing the plaintiff to proceed under a traditional common law theory of intentional tort, the court nevertheless shifted the analysis to whether all of the defendants’ actions were “willful and wanton.”

The court ultimately modified certain elements of the false arrest claim, noting that the second element of a conventional false arrest claim, requiring a showing that the defendant acted without reasonable grounds, is altered by a 2-202 affirmative defense such that “reasonable grounds” must be supplanted by proof that the defendant acted willfully and wantonly.

Similarly, the plaintiff in *Ross v. Mauro Chevrolet* brought intentional tort claims for false arrest and false imprisonment, and the defense raised section 2-202 as an affirmative defense.<sup>34</sup> The trial court subsequently ruled that the defendant was immunized because the arrest and prosecution were predicated on probable cause and hence not willful and wanton for the purposes of a section 2-202 analysis. In other words, the court assumed that the arrest and prosecution would be tortious unless the motivating behavior underlying both acts was not willful and wanton.

Next, in *Davidson v. City of Chicago*, the plaintiff brought battery and intentional infliction of emotional stress claims against police officers arising

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31. *Duran v. City of Chi.*, No. 05-CH-009493, 2009 WL 3495971 (Ill. Cir. Ct. Oct. 29, 2009).

32. *Id.*

33. *Id.*

34. *Ross v. Mauro Chevrolet, Inc.*, No. 04-L-12398, 2005 WL 5250600 (Ill. Cir. Ct. Dec. 16, 2005).

out of an incident involving the fatal shooting of the plaintiff's daughter.<sup>35</sup> In its motion for summary judgment, the defendants claimed that the plaintiff did not sufficiently plead the elements of the intentional torts, and also noted with respect to the intentional infliction of emotional distress claim that if the court did not "find that the Immunity Act bars such a claim, the claim fails as a matter of law because the Police Officer Defendants' conduct was not extreme and outrageous and was not intentional."<sup>36</sup> The defendants then went on to argue that the plaintiff failed to surmount the immunity conferred by section 2-202 because there was no evidence that the officers intentionally or recklessly battered or inflicted emotional distress, implying that section 2-202 was an adequate affirmative defense against the intentional tort claims.<sup>37</sup>

The plaintiff's response effectively incorporated this interpretation that section 2-202 confers immunity from intentional torts if an officer's conduct was not willful and wanton.<sup>38</sup> The response reasserted the intentional infliction of emotional distress claim and attempted to transform the original battery claim by arguing that the officers acted recklessly in "intentionally shooting into a crowd"; that is, they attempted to comply with the defendants' argument by asserting that the intentional tort of battery was not immunized, because it was committed in a reckless manner. The court ultimately dismissed the intentional infliction of emotional distress claim, and the original battery claim appears to have transformed into a claim of "willful, wanton and reckless conduct."<sup>39</sup>

In yet another false arrest and imprisonment case, the parties in *Larson v. Village of Crestwood* argued over whether section 2-202 immunized the defendant officer from suit.<sup>40</sup> The plaintiff responded to the defendant-officer's motion to dismiss that section 2-202 could not protect the defendant:

[Plaintiff's] Complaint alleges the tort of false arrest and imprisonment which is traditionally understood as an intentional tort. Because section 10/2-202 of the Tort Immunity Act does not protect police officers [*sic*] from intentional or reckless conduct under statute's willful and wanton

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35. Plaintiffs' Complaint at Law, *Davidson v. City of Chicago*, No. 06 L 001577, 2006 WL 6453684 (Ill. Cir. Ct. Feb. 14, 2006).

36. Defendants' Motion for Summary Judgment, *Davidson*, No. 06 L 001577, 2009 WL 5019952.

37. The defendants argued:

§ 2-202 shields the Defendant Officers from liability as they were acting in the execution or enforcement of the law when Defendant Collier fired at Smith and inadvertently hit Plaintiff. Additionally, Defendant Collier was not acting wilfully nor wantonly when he fired at Smith in an effort to protect his life and that of his partner, as discussed in greater detail above. For these reasons, both sections of the Immunity Act apply and Defendants Collier and Chatman are immune from Plaintiff's emotional distress claim.

*Id.*

38. Plaintiffs' Response to Defendants' Motion for Summary Judgment, *Davidson*, No. 06 L 001577.

39. Defendants' Motion, *supra* note 36.

40. Defendants' Reply in Support of Their Motions to Dismiss, *Larson v. Village of Crestwood*, No. 04 L 2966, 2004 WL 5319554 (Ill. Cir. Ct. July 26, 2004).



exception, the arresting police officers and the Village of Crestwood are not protected from liability for the tort of false arrest and imprisonment.<sup>41</sup>

Consistent with *Duran*, the defendant responded that the plaintiff was required, but failed, to allege willful and wanton conduct above and beyond the ordinary elements of false arrest and imprisonment and asserted without any authority that section 2-202 extended immunity for intentional torts.<sup>42</sup> The trial court ultimately rejected the defendant's motion.<sup>43</sup>

A similar exchange occurred between the parties in *Rivera v. Village of Streamwood* when the defendant moved to dismiss the plaintiff's claim of battery for failure to overcome defendant-officer's affirmative defense of immunity under section 2-202.<sup>44</sup> The defendant argued that because he was "executing and enforcing the law at the time of the incident," he could "only be held liable if plaintiff establishes [that he] willfully and wantonly kicked [the plaintiff]."<sup>45</sup> In other words, the plaintiff could not prevail by merely satisfying the traditional elements of a battery, but rather had to demonstrate that the intent to cause harm by kicking and the actual act of kicking, taken together in the context of the officer's enforcement conduct, was additionally willful and wanton. The plaintiff responded that willful and wanton conduct:

necessarily encompasses all intentional torts as well as certain unintentional acts. In this case, Plaintiff states a cause of action for battery. Battery is an intentional tort. Thus, in order to succeed on a battery claim, a plaintiff must prove that the defendant took an intentional action that resulted in a harmful or offensive contact with the plaintiff's person. If Plaintiff proves that Defendant . . . "intentionally" caused a "harmful or offensive contact" with Plaintiff, he will have necessarily proven that Defendant-Officer[s]... conduct was willful and wanton.<sup>46</sup>

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41. Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, *Laxson [sic] v. Village of Crestwood*, No. 04 L 2966, 2004 WL 5322480 (Ill. Cir. Ct. Sept. 20, 2004).

42. The defendant argued:

The Tort Immunity Act extends to intentional torts and shields Defendants from liability in this case. Plaintiff provides no support for his argument that the Tort Immunity Act does not extend to intentional torts. A public employee is not liable for conduct related to the execution or enforcement of any law unless the employee's act or omission constitutes willful and wanton conduct. 745 ILCS 10/2-202. The statute and relevant case law contain no statement limiting the reach of tort immunity to causes of action traditionally understood as alleging acts of negligence.

Defendants' Reply in Support of Their Motion to Dismiss, *Larson*, No. 04 L 2966, 2004 WL 5319554.

43. *Laxson [sic]*, No. 04 L 2966, 2004 WL 5322480 (order denying defendant's motion to dismiss).

44. Defendants' Memorandum in Support of Their Motion for Summary Judgment, *Rivera v. Village of Streamwood*, No. 07 L 003536, 2008 WL 7810263 (Ill. Cir. Ct. Oct. 22, 2008).

45. *Id.*

46. Plaintiff's Response to Defendants' Motion for Summary Judgment, *Rivera v. Village of Streamwood*, No. 07 L 3536, 2007 WL 7132702 (Ill. Cir. Ct. 2007).

The court ultimately found in favor of the defendant, and the plaintiff abandoned the battery claim, proceeding instead under the theory that the officer's actions were willful and wanton.<sup>47</sup>

## 2. *Illinois Appellate Court Decisions*

Despite the prevalence of competing interpretations of the scope of section 2-202 at the trial level, the extant upper-level authority on the issue is vague and inconsistent. No court has explicitly addressed the confusion surrounding the intentional torts of police officers committed while engaged in law enforcement conduct.

In *Bohacs v. Reid*, the plaintiff brought suit against defendant officers alleging negligence, battery, false imprisonment, and constitutional violations.<sup>48</sup> The defendant moved for dismissal on the grounds that the complaint did not adequately describe whether intentional, willful and wanton, or negligent conduct was being asserted, and that if negligent conduct was being asserted, section 2-202 precluded the suit from moving forward.<sup>49</sup>

On appeal, the appellate court overturned the trial court's dismissal, holding that the language of the plaintiff's motion sufficiently "described a battery by the officer," and that, "while the officer may have an explanation for his conduct, he admits such conduct by his motion to strike."<sup>50</sup> Furthermore, the battery claim, according to the court, sufficiently described "willful and wanton" conduct to survive the dismissal.<sup>51</sup> This reversal suggests either that the court believed section 2-202 immunized officers against claims of battery unless the battery was also willful and wanton, or that the facts adequately satisfied the common-law definition of a battery, and by that fact simultaneously satisfied the definition of "willful and wanton" for the purposes of section 2-202. The opinion unfortunately does not specify which interpretation was favored. However, both constructions are further supported by the court's contention that "[c]onduct may be willful and wanton without deriving from negligence," implying that willful and wanton conduct could derive from tortious conduct, like battery. Consistent with its interpretation of 2-202, the court ultimately concluded that the officer's behavior could not "be dismissed out-of-hand as being merely in the

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47. Jury Instruction, *Rivera v. Village of Streamwood*, No. 07 L 003536, 2010 WL 1942780 (Ill. Cir. Ct. Mar. 19, 2010).

48. *Bohacs v. Reid*, 379 N.E.2d 1372, 1374 (Ill. App. Ct. 1978).

49. *Id.*

50. *Id.*

51. *Id.* at 1374.

line of duty or not answerable by reason of the immunity section of the Illinois Municipal Code.”<sup>52</sup>

Next, in the *Ross v. Mauro Chevrolet* case discussed above, the plaintiffs appealed the trial court’s dismissal of, *inter alia*, its false arrest and imprisonment claims on the basis of section 2-202 immunity.<sup>53</sup> The appellate court noted that the defendant officers moved to dismiss the claims pursuant to section 2-619(a)(9), which involves the defendant admitting the legal sufficiency of the claims but raising other defects or defenses.<sup>54</sup> Thus, according to the defendants, by asserting the affirmative defense of immunity, the officers had admitted that the plaintiff had sufficiently pleaded false arrest and imprisonment, but nevertheless remained immunized from suit because the facts did not show that the false arrest and imprisonment were caused by the willful and wanton conduct of the officers.

The appellate court implicitly agreed with this construction of section 2-202 by proceeding through an analysis of whether the officers had probable cause and then concluding that the existence of probable cause negated the plaintiff’s contention that the officers’ conduct was willful and wanton.<sup>55</sup> The court’s ultimate holding was that “section 2–202 of the Immunity Act provides the officers with immunity from any liability resulting from their interaction with plaintiff following the observed offense.”<sup>56</sup>

In contrast with the decisions above, the court in *Martel Enterprises v. City of Chicago* took a more nuanced approach, maintaining that the specific nature of the mental state element of the intentional tort determined the applicability of section 2-202.<sup>57</sup> In *Martel*, the city appealed from a directed verdict finding officers liable for conversion.<sup>58</sup> The city argued that the directed verdict on the conversion claim was improper because the judge failed to apply the Tort Immunity Act.<sup>59</sup> In its analysis, the court noted that the city did not “consider how the requirement of intent impacts on the application of the act” and proceeded to an analysis of conversion in the context of section 2-202 immunity.<sup>60</sup> The court’s investigation noted that while conversion was an intentional tort and that negligence could not be a basis for a conversion claim, conversion did not require evidence of “malice, culpability, or conscious wrongdoing.”<sup>61</sup> Thus, the court held that the intent

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52. *Id.*

53. *Ross v. Mauro Chevrolet*, 861 N.E.2d 313, 316-17 (Ill. App. Ct. 2006).

54. 735 ILL. COMP. STAT. 5/2-619 (2012).

55. *Ross*, 861 N.E.2d at 319-20.

56. *Id.*

57. *Martel Enters. v. City of Chi.*, 584 N.E.2d 157, 158 (Ill. App. Ct. 1991).

58. *Id.* at 159.

59. *Id.*

60. *Id.*

61. *Id.*

requisite for conversion did not necessarily fall within the definition of willful and wanton conduct in every instance.

In other words, whereas willful and wanton conduct requires “intent to harm, conscious wrongdoing, or utter disregard,” conversion could occur in the absence of “intent to interfere with another’s rights, malice, culpability, or conscious wrongdoing.”<sup>62</sup> The court therefore overturned the directed verdict, holding that it was possible for section 2-202 to immunize the officers from liability for conversion if their intent in converting the property was not of the type that would satisfy the Tort Immunity Act’s definition of willful and wanton conduct.<sup>63</sup> Thus, it is plausible to infer from *Martel* that the court would not find 2-202 to be applicable to torts that required an implied intent to cause harm, such as battery, false imprisonment, or intentional infliction of emotional distress.

Finally, while the court in *Anderson v. Village of Forest Park* applied the now-overruled “willful and wanton” exception to section 2-201 discretionary immunity,<sup>64</sup> its analysis of whether willful and wanton analysis applied to an intentional infliction of emotional distress claim was consistent with the *Martel* court’s analysis.<sup>65</sup> The *Anderson* court held that, simply by virtue of the allegation of intentional conduct, section 2-201 could not compel the dismissal of a claim of intentional infliction of emotional distress.<sup>66</sup> In other words, merely alleging that the elements of an intentional infliction of emotional distress claim have been satisfied renders immunity unavailable as an affirmative defense, because intentionally causing harm is by definition willful and wanton.

### 3. Federal Applications of Section 2-202

The prevailing federal construction of section 2-202, stemming from a series of Seventh Circuit decisions, generally holds immunity to be an affirmative defense against intentional torts. Although these Seventh Circuit decisions purport to rely on the authority of the Illinois Appellate Court, the

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62. *Id.* at 160.

63. *Id.*

64. A series of cases in the 1980s construed section 2-201 of the Tort Immunity Act, providing immunity to public officials for discretionary or policy-making decisions, to not immunize willful and wanton conduct. *See, e.g., Barth by Barth v. Bd. of Educ. of Chi.*, 490 N.E.2d 77 (Ill. App. Ct. 1986). Accordingly, courts like the one in *Anderson* applied the same analysis to public officials that would be applied to police officer liability under section 2-202. This line of cases was subsequently overruled by *In re Chi. Flood Litig.* and public officials were once again afforded immunity for both negligence and willful and wanton conduct. 680 N.E.2d 265 (Ill. 1997). However, that the willful and wanton exception to 2-201 is no longer applicable is irrelevant here because the analysis ultimately turns on the same question of whether willful and wanton immunity applies to intentional torts.

65. *Anderson v. Village of Forest Park*, 606 N.E.2d 205, 213 (Ill. App. Ct. 1992).

66. *Id.*

citations are generally inapposite pointers to decisions defining the tort of willful and wanton conduct or references to other Seventh Circuit opinions.<sup>67</sup> Thus, owing to a lack of argumentation supporting the federal interpretation espoused in these authoritative cases, only a brief summary of the federal application will be provided below.

Federal courts applying section 2-202 rely on the rules described in *Chelios v. Heavener* and *Carter v. Chicago Police Officers*.<sup>68</sup> Both cases stand for the proposition that if a set of facts satisfying the traditional elements of an intentional tort exist, and if a defendant-officer has asserted immunity as an affirmative defense, the plaintiff has the added burden of proving that the defendant-officer also acted willfully and wantonly.<sup>69</sup> For example, in noting that the facts, if accepted by the jury as true, satisfied the traditional elements of a battery, the *Chelios* court stressed that the plaintiff nevertheless had to “clear another hurdle” in showing that the defendant-officer was also willful and wanton when he engaged in an “unauthorized touching” offending a “reasonable sense of personal dignity.”<sup>70</sup>

Several federal trial-level orders apply this construction, holding, for example, that the Tort Immunity Act applies to Wrongful Death Act claims,<sup>71</sup> that plaintiffs had to establish that an officer’s use of deadly force was willful and wanton under section 2-202,<sup>72</sup> and that assault and battery claims are immunized unless the plaintiff also alleges facts suggesting that the officer’s behavior was willful and wanton.<sup>73</sup> However, in one notable exception, a trial court artfully declined to employ the “added burden” analysis of intentional torts, noting that “proving the intentional state of mind required for liability for assault or battery necessarily entails passing the point on the continuum where willful and wanton conduct resides before its overlap with intentional conduct begins.”<sup>74</sup>

The following sections will demonstrate why the prevailing “added burden” approach is incorrect and why it generates undesirable legal consequences during litigation.

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67. *Chelios v. Heavener*, 520 F.3d 678, 692-93 (7th Cir. 2008) (quoting *Breck v. Cortez*, 490 N.E.2d 88, 94 (Ill. App. Ct. 1986); *Stamat v. Merry*, 397 N.E.2d 141, 145 (Ill. App. Ct. 1979)).

68. *Carter v. Chi. Police Officers*, 165 F.3d 1071 (7th Cir. 1998).

69. *Chelios*, 520 F.3d at 692; *Carter*, 165 F.3d at 1080.

70. *Chelios*, 520 F.3d at 692.

71. *White v. Ficaro*, No. 99 C 7369, 2001 WL 109813 (N.D. Ill. Feb. 2, 2001).

72. *Estate of Chlopek by Fahrforth v. Jarmusz*, 877 F. Supp. 1189, 1197 (N.D. Ill. 1995); *Taylor v. City of Chi.*, No. 01 C 2057, 2003 WL 22282386 (N.D. Ill. Sept. 30, 2003).

73. *Rudolph v. Jones*, No. 00 C 3570, 2002 WL 1941360 (N.D. Ill. Aug. 21, 2002).

74. *Mims v. Hoffman*, No. 11 C 1503, 2013 WL 5423851 (N.D. Ill. Sept. 27, 2013).

#### D. The Proper Construction of Section 2-202 and the Consequences of the Improper Construction

Both the federal construction and many of the variations of that construction evinced by Illinois courts and litigants are erroneous. Section 2-202 of the Tort Immunity Act is meant to immunize officers from liability for negligent acts committed in the course of law enforcement conduct. Any extension of the immunity to claims of intentional torts likely runs counter to the intentions of the General Assembly and the Illinois Supreme Court and produces a host of absurd legal theories that have inefficient consequences for litigation.

##### 1. *Why Section 2-202 Does Not Apply to Intentional Torts*

In general, the Illinois Supreme Court has only addressed the applicability of the Tort Immunity Act as it pertains to ordinary negligence. According to the Illinois Supreme Court, section 2-202 of the Tort Immunity Act represents “a reasoned effort to carve out an exception to the general rule of *negligence* liability.”<sup>75</sup> The court has also held that “[t]he Act imposes no duties, but ‘merely codifies those duties existing at common law, to which the subsequently delineated immunities apply.’”<sup>76</sup> Rather than being the basis for a cause of action or a matter to be considered by the jury, the Act is “an affirmative matter properly raised in a section 2–619 motion to dismiss” and “[g]overnmental entities bear the burden of proving their immunity under the Act.”<sup>77</sup>

While not an explicit assertion that section 2-202 does not apply to intentional torts, all of these statements strongly suggest that the scope of liability the Illinois Supreme Court had in mind when interpreting the intent behind the Tort Immunity Act did not include the erroneous construction requiring plaintiffs to prove that defendant-officers were also willful and wanton while committing an intentional tort. Furthermore, while judicial silence on an issue is not necessarily indicative of how a court will decide that issue, the fact that the Illinois Supreme Court has yet to address the applicability of the Tort Immunity Act to intentional torts lends support to this conclusion.

In order to further substantiate this conclusion, it is important to return to the hypothetical reasons for asserting section 2-202 as an affirmative defense against intentional torts described above. From a certain limited (and ultimately erroneous) perspective, a police officer who lawfully and

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75. *Aikens v. Morris*, 583 N.E.2d 487, 490 (Ill. 1991) (emphasis added).

76. *Murray v. Chi. Youth Ctr.*, 864 N.E.2d 176, 185 (Ill. 2007) (quoting *Barnett v. Zion Park Dist.*, 665 N.E.2d 808 (Ill. 1996)).

77. *DeSmet ex rel. Estate of Hays v. County of Rock Island*, 848 N.E.2d 1030, 1035 (Ill. 2006).

reasonably uses force against an individual has committed an intentional tort, because intentionally causing harm to an individual satisfies the elements of generic intentional torts.<sup>78</sup> In addition to the reasons mentioned above in section B, section 2-202 appears as an attractive affirmative defense because there are several federal cases involving section 2-202 as an affirmative defense against intentional torts, and because section 2-202 appears to impose an extra burden on the plaintiff to prove willful and wanton conduct.

Under Illinois law, a defense is affirmative in nature if, “by the raising of it, a defendant gives color to his opponent’s claim and then asserts new matter by which the apparent right is defeated.”<sup>79</sup> Thus, in raising section 2-202 as an affirmative defense, the defendant-officer has, in effect, admitted to the intentional tort and shifted the burden to the plaintiff to plead facts sufficient to suggest that the intentional tort was also willful and wanton. However, the subsequent progression of the trial becomes unpredictable at this point and the benefits provided to the defense by section 2-202 can either disappear or increase to the point of prejudicing the plaintiff, depending on the interpretation of the court and the application of police force statutes.<sup>80</sup>

Most obvious here is the paradox that intentional torts, which are normally willful and wanton by definition, are not construed in this context as willful and wanton unless they are subsequently shown to be willful and wanton in a different way. As mentioned above, proponents of the erroneous construction attempt to avoid this paradox by applying the analysis to the entire course of conduct and not just the conduct satisfying the definition of willful and wanton, so that the discrete intentional tort is considered in the context of the entire law enforcement action. The case can then require the plaintiff to prove both the intentional tort and the tort of willful and wanton conduct.

This approach is unnecessary and ultimately erroneous because statutes that authorize an officer’s “tortious” behavior, unless the behavior was motivated by unreasonable beliefs (as opposed to the willful and wanton mental standard in section 2-202), already exist.<sup>81</sup> For example, Illinois courts have routinely held that “[t]he measure of the police officer’s civil liability for use of deadly force is co-extensive with his criminal liability.”<sup>82</sup>

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78. The problem with this perspective is discussed later in this section.

79. *Horst v. Morand Bros. Beverage Co.*, 237 N.E.2d 732, 738 (Ill. App. Ct. 1968).

80. The possible consequences for litigation are discussed in Subsection ii, *infra*.

81. *See, e.g.*, 720 ILL. COMP. STAT. 5/7-5 (2012) (officer’s force is authorized if officer reasonably believes force to be necessary); 725 ILL. COMP. STAT. 5/107-2 (2012) (officer’s arrest and seizure is authorized if officer reasonably believes arrestee was committing an offense); *see also* Robert H. Hanaford, *Police Officer Liability Under Illinois Law*, 82 ILL. B.J. 554 (1994). In a survey of police officer liability that included a consideration of the Tort Immunity Act, the author does not discuss the use of force in the context of immunity, but rather in the context of Illinois statutes providing for the use of force.

82. *LaMonte v. City of Belleville*, 355 N.E.2d 70, 76 (Ill. App. Ct. 1976). Interestingly, the defendant-officer also asserted section 2-202 immunity in the alternative, but the *LaMonte* court declined to

Thus, as in criminal cases, the statutes providing for officers to engage in “tortious” activity by intentionally causing harm to suspects apply, and section 2-202 is not a valid affirmative defense.

Applying section 2-202 to intentional torts also contradicts a key holding of the Illinois Supreme Court that the Act imposes no new duties.<sup>83</sup> Specifically, the misconstruction requiring the plaintiff to clear another hurdle by proving that the defendant-officer was also “willful and wanton” in committing the intentional tort implies the creation of a new duty for officers to not act willfully and wantonly.

A dubious policy rationale for nevertheless asserting section 2-202 immunity here is that the statutes authorizing the officer’s “tortious” behavior seem to require the defendant-officer to assume the burden of proving that his or her actions were reasonable under the law, whereas section 2-202, depending on the interpretation of the court, requires the plaintiff to prove willful and wanton conduct.<sup>84</sup> Thus it would seem that relying on these statutes rather than section 2-202 would give rise to voluminous and costly litigation because a plaintiff would merely need to plead that the officer intended to cause harm, and indeed caused harm, and the officer would then be required to justify the harmful act by showing reasonable belief. Because officers lawfully engage in such conduct every day, so the argument goes, officers should receive the burden-shifting protection of section 2-202, lest the incentives to engage in proper police activity are disturbed by the looming prospect of always having to show that police actions were predicated on reasonable belief.

This policy argument is unjustified given the protections against frivolous litigation provided at the pleading stage and the language of the Act itself, which suggests that section 2-202 immunity was not intended to supplant the ordinary statutory defenses provided to officers.<sup>85</sup>

In Illinois, “the intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm, but rather an intent to bring about a result which will invade the interests of another *in a way that the law will not sanction.*”<sup>86</sup> Because the law sanctions the “tortious” conduct of the police officer in, for instance, using deadly force or arresting a suspect under the guidance of reasonable belief, the plaintiff must plead facts sufficient to suggest that the officer intended to invade the plaintiff’s interests in a way not sanctioned by law. Thus, rather than being required to merely

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address whether section 2-202 applied to battery because the issue had been mooted by the fact that the officer’s use of force had been found reasonable as a matter of law.

83. *Aikens v. Morris*, 583 N.E.2d 487 (Ill. 1991).

84. ILL. PATTERN JURY INSTRUCTIONS (CIVIL) B21.02.02 (2011).

85. “Nothing contained herein shall operate to deprive any public entity of any defense heretofore existing and not described herein.” 745 ILL. COMP. STAT. 10/2-111 (2012).

86. *Cowan v. Ins. Co. of N. Am.*, 318 N.E.2d 315, 323 (Ill. App. Ct. 1974) (emphasis added).



plead intent to harm and actual harm, the plaintiff should be required, under correct procedure, to show that the officer intended to cause harm and lacked the reasonable belief that the harm was necessary, as required by Illinois police force statutes. While the defendant-officer would have to plead facts and potentially show that the use of force was predicated on reasonable belief, the defendant-officer would not necessarily be required to admit the tort and assert an affirmative defense.<sup>87</sup>

## 2. *Consequences of the Erroneous Construction*

Another response to this criticism might be: “So what?” Even if section 2-202 does not apply to intentional torts, the course of litigation will likely proceed analogously if section 2-202 were used as an affirmative defense, because both the question of whether an officer’s beliefs were reasonable and whether the officer was willful and wanton are ultimately questions for the jury, and because the defendant-officer will have to at least perfunctorily present the sort of affirmative defense evidence that would be required had the officer used traditional statutory defenses.<sup>88</sup> This response does not adequately address the difficulties endemic to the grant of sovereign immunity in cases of police officer intentional or willful and wanton misconduct.

### i. The Erroneous Construction Contradicts the Intentions of the General Assembly and Can Unjustly Benefit the Defense

If section 2-202 is construed consistently with the federal rule, several negative consequences result. First and foremost, the construction allows defendant-officers to circumvent the statutes provided by the General Assembly for the evaluation of officer behavior, which would require officers to plead facts sufficient to show, for example, that the use of deadly force or arrest and seizure were predicated on objectively reasonable beliefs.<sup>89</sup> If section 2-202 applies to the intentional torts of police officers, the language in the various statutes allowing for the use of force and for

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87. For example, in *LaMonte v. City of Belleville*, the appellate court held that the defendant-officer did not need to assert statutorily-authorized use of force as an affirmative defense against a battery claim, and that merely raising the issue in its denial was sufficient for the purposes of summary judgment. 355 N.E.2d 70, 76 (Ill. App. Ct. 1976).

88. *Simmons v. City of Chi.*, 455 N.E.2d 232, 236 (Ill. App. Ct. 1983) (determination of whether officer’s use of force was reasonable is a matter for the jury); *Mostafa v. City of Hickory Hills*, 677 N.E.2d 1312, 1319 (Ill. App. Ct. 1997) (holding that “[g]enerally, the trier of fact decides the question of whether defendant’s conduct is willful and wanton”).

89. See, e.g., 720 ILL. COMP. STAT. 5/7-5 (2012) (officer’s force is authorized if officer reasonably believes force to be necessary); 725 ILL. COMP. STAT. 5/107-2 (2012) (officer’s arrest and seizure is authorized if officer reasonably believes arrestee was committing an offense)

arrests and seizures, provided that the officer's actions were based on objectively reasonable beliefs, would be rendered superfluous.

For example, in the context of the erroneous application of section 2-202, an officer's conduct under these traditional defense statutes would only be unlawful if the officer was also willful and wanton, which is in direct conflict with the plain language of the statutes. According to the Illinois Supreme Court, it is presumed that the General Assembly will not pass a law expressly contradicting an existing law without first repealing the existing law.<sup>90</sup> Because the General Assembly did not repeal the existing statutes, and because section 2-111 of the Tort Immunity Act explicitly states that the Act does not preclude public officials from using existing defenses to torts, it is reasonable to conclude that the General Assembly did not intend for section 2-202 immunity to supersede the statutory defenses to intentional torts provided to police officers.<sup>91</sup>

As previously discussed, this misconstruction ultimately creates a new duty for police officers to refrain from engaging in willful and wanton conduct while engaging in law enforcement conduct that contains discrete intentionally harmful acts. Litigants adhering to the misconstruction in Illinois courts will therefore naturally look to the Illinois Pattern Jury Instructions (IPI) for guidance, because it provides jury instructions for cases applying the traditional common law willful and wanton rule:

When I use the expression "willful and wanton conduct" I mean a course of action which [shows actual or deliberate intention to harm] [or which, if not intentional,] [shows an utter indifference to or conscious disregard for (a person's own safety) (and) (the safety of others)].<sup>92</sup>

This instruction appears to clearly implicate the defendant-officer, who, as a result of asserting a section 2-202 affirmative defense, had previously admitted to committing an intentional tort. However, this instruction will have to be modified because the defendant-officer likely employed additional defenses under the various police conduct statutes, such as the reasonable belief that the plaintiff was committing an offense.<sup>93</sup> In order to accurately reflect the erroneous construction of section 2-202, the willful and wanton IPI will have to be modified to incorporate a clause exculpating the defendant-officer for deliberate harm if the defendant-officer was justified

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90. Moore v. Green, 848 N.E.2d 1015, 1021 (Ill. 2006).

91. Aikens v. Morris, 583 N.E.2d 487 (Ill. 1991).

92. ILL. PATTERN JURY INSTRUCTIONS, *supra*, note 84

93. A defendant-officer would naturally raise such defenses in the course of a case where the plaintiff was burdened with proving that the defendant-officer's law enforcement conduct was willful and wanton.

under the traditional police conduct statutes.<sup>94</sup> Omitting such a clause and retaining the unmodified IPI would appear to incompletely state the law by omitting the fact that intentionally tortious or willful and wanton conduct is immune from liability if the conduct is not also redundantly willful and wanton in a different way.

Such a modified IPI instruction further burdens the plaintiff and likely confuses the jury because the IPI instruction for burden of proof for willful and wanton conduct places the burden on the plaintiff to prove willful and wanton conduct.<sup>95</sup> Consequently, the jury would be instructed that the plaintiff had the burden of proving an additional element in its willful and wanton conduct case by disproving the defendant-officer's affirmative defense of reasonable belief. In other words, because the willful and wanton instruction would have to be modified in order to reflect the defendant-officer's defense that, although the officer intentionally harmed the plaintiff, the officer did not do so willfully and wantonly, and because the burden-shifting instruction requires the plaintiff to prove willful and wanton conduct as defined in the modified instruction, the jury would be instructed that the plaintiff, in establishing its intentional tort argument, had the burden of disproving what amounted to the defendant-officer's affirmative defense. Such an instruction is clearly at odds with the nature of affirmative defenses to intentional torts, which burden the defendant with proving the facts necessary to establish the affirmative defense before requiring the plaintiff to respond.<sup>96</sup>

Finally, by circumventing the statutory defenses against intentional torts, the section 2-202 affirmative defense allows defendant-officers to shift the burden to the plaintiff at the pleading stage and heighten the severity of conduct that must be proved to pierce immunity. Indeed, under the erroneous construction, a defendant-officer may use the affirmative defense of immunity by simply pleading facts showing that the officer was engaged in law enforcement conduct at the time the intentional tort was committed. The burden then shifts to the plaintiff to demonstrate that the defendant-officer

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94. Modifying IPI instructions implicates Supreme Court Rule 239(a) requiring an applicable IPI instruction to be used unless the court determines that it does not accurately state the law. ILL. SUP. CT. R. 239. While courts are allowed to modify IPI instructions if the new instructions accurately reflect case law, the case law concerning section 2-202 in Illinois would likely be insufficient to warrant such an alteration. *See Studt v. Sherman Health Sys.*, 951 N.E.2d 1131, 1138 (Ill. 2011) (holding that an IPI instruction may be modified if it does not accurately reflect case law).

95. ILL. PATTERN JURY INSTRUCTIONS (CIVIL) B21.02.02 (2011).

96. The statutes authorizing intentionally harmful police conduct function as affirmative defenses, and “[t]he burden of proving an affirmative defense is on the one asserting it.” *Baylor v. Thiess*, 277 N.E.2d 154, 155 (Ill. App. Ct. 1971). Moreover, at common law, once a defendant has given color to the plaintiff's claim by, for example, conceding to an intentional tort, the defendant must then assert a “new matter by which the apparent right is defeated.” *Horst v. Morand Bros. Beverage Co.*, 237 N.E.2d 732, 738 (Ill. App. Ct. 1968).

was also behaving willfully and wantonly at the time the intentional tort was committed.

Whereas the statutes providing for the tortious conduct in question require only that the plaintiff demonstrate that the officer's conduct was motivated by unreasonable beliefs, the section 2-202 immunity requires the plaintiff to prove the heightened mental state standard of willful and wanton. In other words, because an individual can harbor unreasonable beliefs but not be willful and wanton, application of section 2-202 to the intentional torts of police officers obviates the reasonable belief standard provided by the General Assembly in police force statutes and increases the difficulty of proving liability for the plaintiff.

The *Carter* case discussed above is an instructive example of how the Seventh Circuit's erroneous construction of section 2-202 deviates from the implied intentions of the General Assembly and disproportionately burdens the plaintiff.<sup>97</sup> In *Carter*, the plaintiff asserted federal excessive force and unreasonable search and seizure claims, and tortious assault and battery claims under the Illinois Wrongful Death Act. The Seventh Circuit held that the jury's finding for the plaintiff on the federal claims did not necessitate a finding for the plaintiff on the state claims.<sup>98</sup> The court reasoned that because the federal claims were predicated on a reasonableness standard and the state claims were predicated on the section 2-202 willful and wanton standard, it was logically possible for a jury to find the officers unreasonable and hence liable on the federal claims but not willful and wanton for the purposes of the state claims. Thus, as a result of the erroneous application of section 2-202 to intentional torts, the outcome of the case was radically altered from the proper course it would have taken had the Illinois police statutes providing for a reasonable belief standard properly been applied.

#### IV. RESOLUTION

The solution to this problem should be readily apparent at this point. The erroneous construction of the Tort Immunity Act, applying section 2-202 immunity to the intentional torts of police officers committed in the context of a law enforcement action, directly controverts the intentions of the Illinois General Assembly, creates inefficient and prejudicial litigation, and likely provides for burdensome forum-shopping to the extent that the Illinois construction of section 2-202 is incoherent.

At a minimum, the Seventh Circuit should abrogate its current rule applying section 2-202 to intentional torts because it deviates from the intentions of the Illinois General Assembly, creates a new duty for police

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97. *Carter v. Chi. Police Officers*, 165 F.3d 1071 (7th Cir. 1998).

98. *Id.* at 1081.

officers, and unjustly prejudices plaintiffs by forcing them to prove a heightened standard at odds with the reasonable belief standard provided in the Illinois police conduct statutes. The Seventh Circuit must construe section 2-202 exclusively as an affirmative defense conferring immunity on officers for negligent acts committed while enforcing the law.

Illinois courts may not need such a drastic change because Illinois authority on the issue is vague, with certain cases appearing to adhere to something approximating the correct construction. The *Martel* and *Anderson* cases hew closely to the proper construction of section 2-202, although *Martel* ultimately deviates by countenancing factual situations where officers could assert section 2-202 immunity against a common law claim of conversion. The *Martel* court is wrong in this respect because the General Assembly already provided for officers to “convert” property if their actions were motivated by reasonable beliefs.<sup>99</sup> Heightening that standard to willful and wantonness prejudices the plaintiff and contradicts the intentions of the General Assembly.

Nevertheless, fastidious advocacy in Illinois courts could go a long way toward avoiding the prejudicial effects of a section 2-202 affirmative defense to an intentional tort claim, because the proper construction of section 2-202 can be gleaned from cases like *Martel*. However, the prevalence of the erroneous construction found just among published trial-level documents strongly suggests that the problem is more pressing. In all likelihood, an authoritative case from an upper-level Illinois court abrogating the rules from cases that seem to espouse the erroneous construction will be necessary.

Finally, consistency between Illinois courts and the Seventh Circuit on the precise meaning of section 2-202 would also discourage forum-shopping and promote justice by removing the negative incentive for plaintiffs to not assert federal claims in conjunction with state claims.

## V. CONCLUSION

Whether resulting from a basic misinterpretation of the law or an inartful (and sometimes artful) pleading, the erroneous use of section 2-202 immunity by defendant-officers as an affirmative defense against common law intentional tort claims must be prohibited. The error in such an application becomes clear in light of the purposes of the General Assembly behind the Tort Immunity Act and the absurdities that result from deviating from those purposes. Section 2-202 only provides police officers with immunity from liability for negligent acts committed while enforcing the law. Extending this protection to intentional tort claims ignores the

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99. 725 ILL. COMP. STAT. 5/108-1 (2012).

traditional defenses against intentional torts and produces inefficient litigation.

Indeed, the General Assembly has already provided for defenses against intentional tort claims that protect police officers from liability for harmful actions committed while enforcing the law, if the officers' conduct was predicated on reasonable beliefs. Supplanting these defenses with section 2-202 would have the effect of eliminating the reasonable belief standard set forth by the General Assembly, and would in turn prejudice plaintiffs by heightening the difficulty of proving the liable mental state. Moreover, use of the erroneous construction in Illinois courts can prolong litigation and prejudice both parties by confusing the jury and improperly shifting burdens of proof.

These negative consequences of the erroneous construction are borne out at the trial level and in the extant upper-level authority in both Illinois and federal courts. In Illinois, trials involving the erroneous construction are regularly beset by time-consuming disputes over the application of section 2-202, and at the federal level, plaintiffs are immediately disadvantaged from the start by the burden of surmounting the Seventh Circuit's "additional hurdle" of proving that an officer's conduct was willful and wanton.

Section 2-202 was never intended to transform common law intentional tort claims against police officers into hybridized intentional tort and common law willful and wanton conduct cases. In order to avoid the inefficient and prejudicial litigation associated with this erroneous construction, upper-level Illinois and federal courts must take steps to abrogate existing rules predicated on this construction and promulgate a new, bright-line interpretation that re-establishes section 2-202 immunity on the basis intended by the General Assembly: as an affirmative defense against negligence claims.