Appeal No. 2012AP2499 **Cir. Ct. No. 2011CV2090**

WISCONSIN COURT OF APPEALS
DISTRICT II

EILEEN W. LEGUE,

PLAINTIFF-APPELLANT,

DEPARTMENT OF HEALTH AND HUMAN SERVICES AND FARMERS INSURANCE EXCHANGE,

INVOLUNTARY-PLAINTIFFS,

V.

CITY OF RACINE AND AMY L. MATSEN,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Reilly and Gundrum, JJ.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for review and determination. We respectfully request that the Wisconsin Supreme Court be the body to determine the following issue.

ISSUE

This is another in a series of cases in which the court must reconcile statutory governmental immunity with the public officers' statutory privilege to violate rules of the road during emergencies. The outcome depends on a question that the case law leaves open: does governmental immunity apply when someone

is injured because an officer proceeds against a traffic signal as authorized by WIS. STAT. § 346.03(2)(b) (2011-12),[1] if the officer slowed the vehicle and activated lights and sirens as required by § 346.03(3) but nonetheless arguably violated the duty to operate the vehicle "with due regard under the circumstances" as required by § 346.03(5)?

Resolving this question requires interpretation of WIS. STAT. § 893.80, which creates governmental immunity, along with multiple provisions of WIS. STAT. § 346.03, which creates public officers' privilege to violate rules of the road in emergencies. More specifically, the case asks when, if ever, the "due regard" requirement imposed by § 346.03(5) becomes a "ministerial" obligation, violation of which will create an exception to governmental immunity.

Because the accident at issue occurred during the common situation of an emergency vehicle proceeding against a stop sign or signal, the answer to this question will have broad statewide impact. The case also requires the weighing of important statewide public policy interests: on the one hand, protecting the efficient and effective performance of emergency functions from the drain of tort lawsuits, and, on the other hand, compensating innocent persons injured by alleged negligence during emergency efforts.

We certify the case so that our supreme court can resolve these important open issues of statutory interpretation and public policy.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Facts

The facts relevant to the legal question of whether Officer Amy Matsen[2] was entitled to governmental liability are simple, and we state them in the light most favorable to the jury verdict. In July 2009, Matsen received a dispatch calling her to the scene of a motor vehicle accident. She headed north on Douglas Avenue at a high rate of speed with lights and sirens engaged, periodically sounding her horn. As she neared the intersection of Douglas Avenue and South Street, Matsen saw that the light was red and slowed down.

A KFC restaurant on the southwest corner of the intersection blocked the view between the western portion of South Street and the southern portion of Douglas Avenue. Matsen, her speed reduced to twenty-seven miles per hour (below the posted speed limit of thirty-miles per hour), nonetheless proceeded through the intersection.

At that moment, Eileen Legue was traveling eastbound on South Street at thirty-miles per hour and was just about to enter the intersection with Douglas Avenue. She had her windows up and music playing in her vehicle, and she did not hear Matsen's sirens or horn. The front end of Legue's vehicle struck the driver's side of Matsen's vehicle almost immediately as Legue and Matsen entered the intersection. Both were injured in the collision.

[2] The defendants are Matsen and the City of Racine. However, as the certified issue concerns Matsen's governmental immunity, we refer solely to Matsen throughout this certification, for the sake of convenience.

Legue[3] later sued, seeking compensation for damages she sustained as a result of Matsen's alleged negligence. Matsen's answer included the defense of governmental immunity and the public officer's privilege to violate traffic laws in an emergency under WIS. STAT. § 346.03. A jury trial was held on the issues of whether "upon entering the intersection, [Matsen drove] with due regard under the circumstances for the safety of all persons"; if not, whether her negligence was a cause of the accident; and whether Legue was contributorily negligent. In its verdict, the jury found that both parties were negligent and that each was equally at fault.

Matsen filed motions challenging the jury verdict on the grounds that, as a matter of law, the evidence established that she could not have prevented the accident except by deciding not to enter the intersection, a decision for which, she argued, she is immune from liability.[4] Legue responded that though Matsen's decision to enter the intersection was discretionary, her duty to operate the vehicle with "due regard under the circumstances for the safety of all persons" under WIS. STAT. § 346.03 was ministerial. Due to the KFC building blocking the view between eastbound South Street and northbound Douglas Avenue, Legue argued, Matsen had a ministerial duty to greatly reduce her speed, or even stop, before entering this particular intersection.

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[3] The plaintiffs are not only Legue but also the federal Department of Health and Human Services and Farmers Insurance Exchange. Throughout the certification we refer only to Legue, for convenience.

[4] The motion was made on a number of different procedural grounds and attacked the verdict in different ways, but as the circuit court pointed out, the issue raised boiled down to whether, as a matter of law, Matsen is immune from liability for her alleged failure to operate the vehicle with "due regard for the safety of others" by entering the intersection at twenty-seven miles per hour.

The circuit court granted Matsen's motions, holding that Matsen was immune from liability for damages resulting from her discretionary decision to enter the intersection. Legue appeals.

Discussion

Wisconsin law immunizes public officers against liability for damages caused by "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." WIS. STAT. § 893.80(4). Governing case law interprets this statute to mean that public employees are generally immune for damages caused by their acts in the scope of their employment, subject to four exceptions: (1) performance of ministerial duties, (2) known dangers giving rise to ministerial duties, (3) exercise of medical discretion, and (4) intentional, willful, and malicious actions. ***Brown v. Acuity***, 2013 WI 60, ¶42, 348 Wis. 2d 603, 833 N.W.2d 96.

Additionally, the traffic code privileges public officers operating authorized emergency vehicles to violate rules of the road during emergencies. WIS. STAT. § 346.03. Most pertinent in Legue's case, emergency vehicle operators may proceed past a stop sign or signal "after slowing down … for safe operation," § 346.03(2)(b), and giving a visual and audible warning signal, § 346.03(3). Section 346.03 further provides that the emergency responders' privilege to violate rules of the road "do[es] not relieve [responders] from the duty to drive … with due regard under the circumstances for the safety of all persons nor … protect [responders] from the consequences of … reckless disregard for the safety of others." Sec. 346.03(5).

In the case of traffic accidents that happen when an emergency responder fails to yield at a stop light or sign, these statutes must be interpreted

together. From recent case law, we know that, generally speaking, the discretionary decision to violate the rules of the road during an emergency response is immune from suit. ***Estate of Cavanaugh v. Andrade***, 202 Wis. 2d 290, 315, 550 N.W.2d 103 (1996) ("a municipal officer is immune under [WIS. STAT.] § 893.80(4) for the performance of discretionary acts"). Hence, in ***Estate of Cavanaugh***, an officer was immune from liability for his discretionary decision to engage in a high-speed pursuit, and that immunity extended to his speed of travel because "[i]nherent in the decision to pursue is the decision to speed." ***Estate of Cavanaugh***, 202 Wis. 2d at 316.

At the same time, however, we are informed that the officer's manner of operating the vehicle outside the context of the discretionary decision does not qualify for immunity. Liability applies if an officer causes injury by failing to operate the vehicle "with due regard under the circumstances for the safety of all persons" as required by WIS. STAT. § 346.03(5), outside of the discretionary decision to violate the rules of the road. ***Estate of Cavanaugh***, 202 Wis. 2d at 318. In other words, an officer can be liable for negligent driving during an emergency response if damages were caused by the officer's negligent operation of the vehicle beyond the context of the discretionary decision itself.

Under this rule, there was no liability at all for the officer in ***Estate of Cavanaugh***, because "there [was] no credible evidence ... that any alleged negligence ... with respect to physical operation of [the] vehicle was a substantial factor in causing the accident." ***Id.*** at 322. The only credible evidence to support a finding of causal negligence was the evidence of the speeding, which was part and parcel of the discretionary decision to conduct a high-speed chase. ***Id.*** at 316. In contrast, in ***Brown***, an officer was liable for negligence for proceeding against a traffic signal during an emergency response without activating the lights and

sirens required by WIS. STAT. § 346.03(3). ***Brown***, 833 N.W.2d 96, ¶54. Although the decision to proceed against the traffic signal as permitted by § 346.03(2)(b) is discretionary, the supreme court explained, failing to have the required lights and sirens violates a ministerial duty, so no immunity attached. ***Brown***, 833 N.W.2d 96, ¶54.

Turning to the case at hand, all parties agree that Matsen's decision to enter the intersection was discretionary and that liability cannot be premised on that decision, in and of itself. However, liability depends upon a question left open by ***Brown***: does immunity apply if an officer's manner of proceeding against a traffic signal fulfills the ministerial duties of WIS. STAT. § 346.03(2)(b) and (3) (that is, the officer slows the vehicle and activates lights and sirens) but arguably violates the duty to operate the vehicle "with due regard under the circumstances" as required by § 346.03(5)?

Under one interpretation of the law, promoted by Legue, and possibly by extension, the plaintiffs' bar, despite the fact that immunity extended to the officer's speeding as in ***Estate of Cavanaugh***, immunity does not extend to an officer's manner of entering an intersection against a traffic signal. Instead, an officer is liable for violating the WIS. STAT. § 346.03(5) duty to operate the vehicle "with due regard under the circumstances" while proceeding against a traffic signal as authorized by § 346.03(2)(b) and (3). Given that "due regard" is the epitome of a question of fact, under this interpretation of the law, as a practical matter, there would be no governmental immunity for an accident arguably caused by an emergency responder's proceeding against a stop sign or signal. Any question about the responder's duty of ordinary care would trigger a jury trial. *See* Br. and App. of Pl.-Appellant at 28 (asserting that ***Cavanaugh*** "stand[s] for the proposition that in order to fulfill this due regard under the circumstances standard

you essentially have to look at the ordinary common duties of care attributable to all operators of motor vehicles").

Racine, and, we presume, the municipalities and their responder personnel, favor a different interpretation. In their view, not only is the decision to enter the intersection immune, but the manner of entering the intersection is part and parcel of that decision, analogous to the way that immunity for speeding was inherent to immunity for engaging in a high-speed pursuit in ***Estate of Cavanaugh***. *See, e.g.,* Br. of Defs.-Resp'ts at 8 ("[Legue's] argument ignores that these [due care] factors, except for the lookout, form the basis of [the officer's] discretionary decision to enter the intersection.... [and] the balancing of the factors makes the decision immune."). This interpretation is akin to the reasoning articulated in the court of appeals decision in ***Brown v. Acuity***, 2012 WI App 66, 342 Wis. 2d 236, 815 N.W.2d 719. But that case ultimately concerned the application of the more precisely-prescribed duties of slowing down and engaging lights and sirens. Thus, though the supreme court reversed the result in ***Brown***, its analysis was limited to the fact that the vehicle in that case lacked any audible signal, which, it held, violated a clear ministerial duty imposed by WIS. STAT. § 346.03(3) and vitiated immunity. ***Brown***, 833 N.W.2d 96, ¶¶53, 55. The court explained that "unlike the decisions to initiate and continue a high-speed chase in ***Cavanaugh*** ... WIS. STAT. § 346.03(3) directly govern[ed the officer's] acts in proceeding through a red stop signal without an audible signal and satisfies all elements of a ministerial duty." ***Brown***, 833 N.W.2d 96, ¶53. Therefore, although the supreme court's decision in ***Brown*** made clear that the obligation to activate lights and sirens as required by § 346.03(2)(b) and (3) was ministerial, it had no opportunity to articulate whether the "due regard" obligation imposed by § 346.03(5) could also support liability.

Legue's case squarely presents the questions left open by ***Brown*** and ***Estate of Cavanaugh***. When, if ever, does a public officer's obligation to operate an emergency vehicle with "due regard under the circumstances" under WIS. STAT. § 346.03(5) create an exception to the governmental immunity provided by WIS. STAT. § 893.80? When, if ever, does a public officer's decision to violate rules of the road during an emergency trigger potential liability for arguable failure to operate with "due regard under the circumstances" by making that decision? In particular, in the situation of a responder deciding whether to proceed against a stop sign or signal (a situation much more common than a high-speed chase), assuming that the responder has slowed and engaged the required warning lights and sirens, may the responder nonetheless be liable for failing to stop? If the decision to speed is considered part and parcel of the discretionary decision to engage in a high-speed chase, is the failure to stop before crossing an intersection during an emergency part and parcel of the decision to proceed against the stop light or signal?

The ramifications of this decision are huge. If the answer is that immunity for the manner of entering the intersection is subject to the "due regard" condition, then immunity is, we submit, just an empty shell if an accident results. This is because there will always be exposure to a lawsuit in the case of an accident, the very thing that immunity is designed to prevent, according to the line of authority that states the policy justifications underlying governmental immunity:

> [Governmental immunity] is based largely upon public policy considerations that spring from the interest in protecting the public purse and a preference for political rather than judicial redress for the actions of public officers. The policy considerations include:

> (1) The danger of influencing public officers in the performance of their functions by the threat of a lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions … [and other considerations].

Lodl v. Progressive N. Ins. Co., 2002 WI 71, ¶23, 253 Wis. 2d 323, 646 N.W.2d 314 (citations omitted). At the same time, as our supreme court quoting federal authority has observed, the policy of granting immunity to governmental officials necessarily impinges on the ability of innocent injured parties to recover damages:

> The provision of immunity rests on the view that the threat of liability will make [public] officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits…. [H]owever … official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a [public] official.

C.L. v. Olson, 143 Wis. 2d 701, 708-09, 422 N.W.2d 614 (1988) (citations omitted).

In the face of the important, recurring questions of statutory interpretation and public policy underlying the issue of governmental immunity in this case, we respectfully request that our supreme court be the body to decide it in the first instance.