COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2446

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SHELDON PARRETT AND DORIS PARRETT,

PLAINTIFFS,

V.

CHRISTOPHER SUDETA AND WEST BEND MUTUAL INS. CO.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

GUARANTY NATIONAL INSURANCE COMPANY, F/K/A VIKING INSURANCE COMPANY OF WISCONSIN,

DEFENDANT,

VILAS COUNTY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vilas County: ROBERT E. KINNEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Dykman, JJ.

¶1 PER CURIAM. Christopher Sudeta appeals a summary judgment dismissing his third-party complaint for contribution against Vilas County. Sudeta, who was sued because of an automobile collision, claimed that a deputy sheriff's negligence contributed to cause the accident. The circuit court concluded the County was immune from liability. Sudeta argues: (1) there is no immunity because of WIS. STAT. § 346.03,[1] (2) there is no immunity because of a known and present danger, and (3) genuine issues of material fact are in dispute. We disagree and affirm the judgment.

BACKGROUND

¶2 On February 12, 1996, at approximately 8 a.m., a vehicle driven by Wayne Bushor was traveling in the Town of St. Germain. Sheldon Parrett was a passenger. When the vehicle reached the edge of town, Vilas County sheriff's deputy Jon Kindlarski noticed that it had a defective brake light. Kindlarski began following the vehicle with the intention of pulling it over. While following, Kindlarski and another deputy discussed how and where to make a safe stop.[2]

¶3 When the vehicle reached Highway 70, a four-lane highway, Kindlarski activated his emergency lights and conducted a traffic stop. Because of large snow banks, the squad car and the vehicle blocked the right hand lane of travel. The squad car's emergency lights remained activated.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] At the time of the accident, Kindlarski was in a "field training program." A more experienced deputy was riding with Kindlarski.

¶4 While Kindlarski was talking to Bushor, a truck driven by Sudeta approached the parked vehicles and struck the rear end of the stopped squad car causing it to hit the Bushor vehicle. Parrett was injured.

¶5 Parrett filed an action against Sudeta and his liability insurer, West Bend Mutual Insurance Company. Sudeta then filed a third-party complaint against Vilas County for contribution. Sudeta alleged that Kindlarski was negligent in the manner by which he conducted the stop.

¶6 Vilas County moved for summary judgment, alleging that it was immune, pursuant to WIS. STAT. § 893.80(4). The circuit court determined that Kindlarski's actions were discretionary in nature and granted the motion. This appeal followed.

STANDARD OF REVIEW

¶7 We review a motion for summary judgment using the same methodology as the circuit court. ***Ottinger v. Pinel***, 215 Wis. 2d 266, 272, 572 N.W.2d 519 (Ct. App. 1997). That methodology is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** Summary judgment presents a question of law that we review independently of the circuit court. ***Id.*** at 272-73.

¶8 When reviewing a summary judgment granting immunity to a public officer, we start with the proposition that the doctrine of immunity assumes that the public officer was negligent. Therefore, the question before us is whether the County is entitled to immunity. *See* ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 88, 596 N.W.2d 417 (1999).

DISCUSSION

I. WISCONSIN STAT. § 346.03

¶9 Public officials are immune from liability for the negligent performance of a discretionary act under WIS. STAT. § 893.80(4).[3] ***Santiago v. Ware***, 205 Wis. 2d 295, 338, 556 N.W.2d 356 (Ct. App. 1996). Sudeta argues that despite the immunity statute, another statute, WIS. STAT. § 346.03[4], authorizes negligence actions against the operator of an emergency vehicle when the operator

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[3] WISCONSIN STAT. § 893.80(4) provides:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

[4] WISCONSIN STAT. § 346.03 provides in relevant part:

> The operator of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions stated in subs. (2) to (5).
>
> (2) The operator of an authorized emergency vehicle may:
>
> (a) Stop, stand or park, irrespective of the provisions of this chapter;
>
> (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
>
> (c) Exceed the speed limit;
>
> (d) Disregard regulations governing direction of movement or turning in specified directions.

fails to drive "with due regard for the safety of others." WIS. STAT. § 346.03(5).[5] He relies on ***Cavanaugh v. Andrade***, 202 Wis. 2d 290, 550 N.W.2d 103 (1996), to argue that the County is liable because Kindlarski failed to drive with due regard for the safety of others when conducting the traffic stop.

¶10 The issue in ***Cavanaugh*** was whether a police officer was immune from an action arising out of a high speed chase. Our supreme court concluded that the police officer's decisions to initiate and continue a high-speed chase were discretionary and entitled to immunity under WIS. STAT. § 893.80(4). ***Id.*** at 315-16. However, the court further concluded that the officer would be liable pursuant to WIS. STAT. § 346.03(5) if, during the chase, he failed to drive his vehicle with due regard for the safety of others. ***Id.*** In other words, the officer was immune for discretionary acts, but the manner of driving under § 346.03 was not considered discretionary.

A. Discretionary Decision

¶11 The first question then is whether Kindlarski's decision where to stop the vehicle was discretionary. If it was, the County is immune. If it was not, we must then determine whether WIS. STAT. § 346.03 applies. Sudeta concedes that Kindlarski's decision whether to stop the truck was a discretionary decision.

[5] WISCONSIN STAT. § 346.03(5) states:

> The exemptions granted the operator of an authorized emergency vehicle by this section do not relieve such operator from the duty to drive or ride with due regard under the circumstances for the safety of all persons nor do they protect such operator from the consequences of his or her reckless disregard for the safety of others.

However, Sudeta contends that under ***Cavanaugh***, Kindlarski's decision where to stop the truck was not discretionary. We disagree.

¶12 A public officer's duty is discretionary unless the duty "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Kierstyn***, 228 Wis. 2d at 91 (citation omitted).

¶13 While following the vehicle, Kindlarski and an accompanying deputy discussed how and where to make a safe traffic stop. The two deputies considered the time of day, the fact that there were school buses on the road, and the heavy morning traffic, before concluding that it would not be suitable to stop the vehicle in town. The deputies decided to proceed further out of town on Highway 70. The deputies then determined that it was safe to conduct a traffic stop. Despite the presence of large snow banks, the officers considered that the highway was straight and that there was a clear line of sight for approaching traffic to view the stopped vehicles.

¶14 When conducting traffic stops, police officers make decisions based upon their judgment and experience. The decision where to stop a vehicle is often as important as whether to stop it in the first place. Here, Kindlarski's decision involved the consideration of a number of factors. We conclude that Kindlarski's decision where to stop the vehicle was discretionary. Therefore, the County is entitled to immunity.

B. Due Regard

¶15 Even if Kindlarski's decision where to stop the vehicle was not discretionary, we conclude that WIS. STAT. § 346.03 does not create liability. Sudeta claims that the County is liable because Kindlarski failed to drive with due regard for the safety of others when he stopped the vehicle in a lane of traffic. We disagree.

¶16 WISCONSIN STAT. § 346.03 establishes certain privileges for the operators of emergency vehicles. For example, the operator does not have to obey the rules of the road for stopping or parking; the operator may proceed past red lights and stop signs, exceed the speed limit, and disregard one-way street signs and turning restrictions. WIS. STAT. § 346.03(2). However, under the statute, an officer is not protected from the consequences of reckless disregard for the safety of others. WIS. STAT. §§ 346.03(5). Nor is the officer relieved of the duty to *drive* with due regard for the safety of others. ***Id.***

¶17 Sudeta does not allege that Kindlarski operated his squad car with reckless disregard. Rather, Sudeta alleges that Kindlarski failed to drive with due regard for the safety of others. Because due regard applies only to driving an emergency vehicle, the issue is whether Kindlarski was "driving."

¶18 There is nothing in the record indicating that Kindlarski somehow failed to "drive" with due regard. At the time of the collision, Kindlarski had already stopped and parked his vehicle. Unlike the officer in ***Cavanaugh***, Kindlarski was no longer physically driving his squad car.

¶19 Sudeta argues that stopping a vehicle necessarily involves driving. We are not persuaded. To begin with, the statute itself distinguishes stopping

from other kinds of activity. WISCONSIN STAT. § 346.03(2)(a) separately refers to a "stop." Other subsections refer to activities more commonly considered driving: running red lights and stop signs, speeding, and going the wrong way on one-way streets. WIS. STAT. § 346.03(2)(b)-(d).

¶20 We conclude that Sudeta's complaint is not really about Kindlarski's actions in driving to a stop, but rather his decision to stop in the place where he did. That decision was separate from the act of driving. The County is therefore not liable under WIS. STAT. § 346.03.

II. KNOWN AND PRESENT DANGER

¶21 Sudeta argues that the County is not immune based on the "known and present danger" exception to WIS. STAT. § 893.80(4). He contends that Kindlarski had a duty to stop the vehicle in a manner that protects the public and that blocking a lane of traffic created a known, immediate, and obvious danger.

¶22 A compelling and known danger creates a duty of response that is an exception to the immunity granted public officers and municipalities. ***Kimps v. Hill***, 200 Wis. 2d 1, 15-16, 546 N.W.2d 151 (1996). A public officer may face liability when he or she is aware of a danger of such a nature that the public officer's duty to act becomes absolute, certain and imperative. ***Ottinger***, 215 Wis. 2d at 277 (quotation omitted). When an officer is faced with a compelling and known danger, he or she has a clear and absolute duty to act. ***Kimps***, 200 Wis. 2d at 15-16.

¶23 In ***Cords v. Anderson***, 80 Wis. 2d 525, 538, 259 N.W.2d 672 (1977), our supreme court held that a park manager had an absolute, certain and imperative duty to place warning signs on a dangerous trail or close the trail. The

manager knew that people regularly used the trail at night and that the trail passed within a few inches from a ninety-foot gorge. The park manager knew the terrain was dangerous. As manager, he was in a position to do something about it. Because there "can be no policy of leaving [the trail] alone when such an obvious danger exists," the court held that the park manager had a ministerial duty to act. ***Id.***

¶24 Here, however, the nature of the danger was not so extreme as to create in Kindlarski a ministerial duty to park his squad car elsewhere. Kindlarski and an accompanying deputy discussed how and where to make a safe stop. Both deputies thought that the location of the stop was safe. The location was on a four-lane highway, the roadway was straight, and the stopped vehicles would be clearly visible to approaching traffic despite the presence of snow banks. Kindlarski's emergency lights were activated. The fact that Sudeta did not see the flashing lights is not attributable to the inherently dangerous nature of the location of the stop.

¶25 Under these facts, an officer conducting a traffic stop cannot reasonably be compared to the "compelling and known" danger posed by a trail passing inches from a ninety-foot gorge. The nature of the danger posed here cannot be equated with the danger in ***Cords*** and did not create a duty that was "clear and absolute." ***Kimps***, 200 Wis. 2d at 15-16. Therefore, the known and present danger exception does not apply.

III. GENUINE ISSUE OF A MATERIAL FACT

¶26 Last, Sudeta argues that the circuit court erred by granting summary judgment because there are disputed issues of material fact. First, Sudeta contends that Kindlarski's negligence was improperly decided by summary judgment

because negligence questions involve conflicting evidence.[6] *See* ***Madison Newspapers, Inc. v. Pinkerton's, Inc.***, 200 Wis. 2d 468, 478-79, 545 N.W.2d 843 (Ct. App. 1996). Second, Sudeta claims it was improper to determine causation on summary judgment. We disagree.

¶27 These factual issues are irrelevant to the legal issues. When reviewing a summary judgment granting immunity to a public officer, we already start with the proposition that the doctrine of public immunity assumes that the public officer was negligent. Therefore, the question before us is whether the County and Kindlarski are entitled to immunity. *See* ***Kierstyn***, 221 Wis. 2d at 88. We have concluded that the County and Kindlarski are entitled to immunity. Therefore, the factual issue of whether Kindlarski negligently caused the accident is irrelevant.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] Sudeta claims that whether the sun was blinding him and whether his windshield was iced up was in dispute.