COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2552 **Cir. Ct. No. 2011CV97**

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

BRODY J. HOLMAN, HUNTER G. HOLMAN AND JORDAN D. HOLMAN, BY THEIR GUARDIAN AD LITEM, DEAN R. ROHDE,

PLAINTIFFS-RESPONDENTS,

PATTI HOLMAN AND DANIEL HOLMAN,

PLAINTIFFS,

V.

MICHAEL S. HARVEY, TOWN OF WASHBURN AND RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

ABC INSURANCE COMPANY, BAYFIELD COUNTY, DEF INSURANCE COMPANY, HEALTH PARTNERS AND STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Bayfield County: ROBERT E. EATON, Judge. *Reversed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Michael Harvey, the Town of Washburn, and Rural Mutual Insurance Company (collectively, Harvey) appeal a judgment awarding damages to Brody Holman, Hunter Holman, and Jordan Holman. The Holmans were injured when the minivan they were riding in collided with a motor grader operated by Harvey, a Town of Washburn employee. Harvey moved for summary judgment, arguing he was entitled to governmental immunity. The circuit court denied Harvey's motion, concluding there was a disputed issue of material fact as to whether the known and compelling danger exception to governmental immunity applied. We conclude Harvey is immune from suit. We therefore reverse.

BACKGROUND

¶2 The accident at issue in this case took place at the "T" intersection of County Highway C and McKinley Road in Bayfield County. County Highway C, a two-lane road, runs east and west across the top of the "T." McKinley Road, which also has two lanes of traffic, runs south from the "T" intersection. County Highway C is a through highway, and access from McKinley Road is controlled by a stop sign.

¶3 East of the intersection with McKinley Road, County Highway C is level, and there is visibility for about two miles. However, 300 to 400 yards west of the intersection is the crest of a hill. Between this hillcrest and the intersection is a ravine known as the Sioux River dip. A driver approaching McKinley Road

from the west on County Highway C proceeds from the hillcrest down into the Sioux River dip and then drives back up to a second hillcrest just west of the intersection.

¶4 Harvey is the Town's road superintendent. On the morning of January 4, 2011, the day of the accident, he decided to spend the day scraping ice from the Town's roads using a John Deere 744 motor grader. The grader is garaged at the town hall, which is located on County Highway C, just east of the intersection with McKinley Road. At his deposition, Harvey testified the Town does not have any written rules, policies, or procedures dictating when or how he should use the grader to scrape ice from the roads. Instead, he uses his discretion and scrapes when the conditions are right. On January 4, Harvey decided to scrape the intersection of McKinley Road and County Highway C first and then proceed south down McKinley Road. He testified clearing the McKinley Road/County Highway C intersection requires four passes with the grader and takes about five minutes.

¶5 Harvey pulled the grader out of the garage at about 8 a.m. and turned left (west) onto County Highway C. He then immediately turned left (south) onto McKinley Road. He scraped a portion of the intersection while making the turn, and he then proceeded forward about twenty feet onto McKinley Road. He then backed the grader up so that its back edge was even with the edge of the intersection. He stopped at the stop sign and looked both ways for vehicles. He did not see any traffic approaching from either direction on County Highway C, so he began backing the grader into the intersection.

¶6 Harvey backed the grader up far enough that it blocked both lanes of County Highway C. As he backed up, he looked to the west and saw a minivan

cresting the hill on the far side of the Sioux River dip. Based on his experience, Harvey believed he had time to move the grader out of the way before the minivan reached the intersection. He therefore dropped the grader blade and began moving the grader forward. However, he soon felt a "tremendous smack" and realized the minivan had hit the grader.

¶7 The Holmans, who were riding in the minivan at the time of the accident, testified at deposition to a different version of events. Jordan Holman, who was seventeen years old at the time, was driving the minivan when the accident occurred. He and his two brothers, Hunter and Brody, were on their way to school. Hunter was fifteen at the time and Brody was twelve.

¶8 Jordan testified he was driving east on County Highway C at the posted speed limit of fifty-five miles-per-hour. As the minivan crested the hill on the west side of the Sioux River dip, Jordan saw Harvey's grader driving away from County Highway C and onto McKinley Road. Jordan did not slow down because he assumed the grader was going to continue moving south on McKinley Road. Jordan lost sight of the grader when the minivan entered the Sioux River dip. When the minivan emerged from the Sioux River dip, Jordan saw the grader "in the very beginning process of backing up" into the intersection of McKinley Road and County Highway C.

¶9 Jordan tried to stop, but the minivan skidded on a patch of ice. He then tried to avoid the grader by driving to the left, but the grader backed up until it was blocking the entirety of County Highway C. "[A]t the last second," Jordan "turned a hard right" and "ended up hitting [the grader's] tire." Hunter and Brody gave accounts of the accident that essentially mirrored Jordan's testimony.

¶10 All three of the Holmans were injured in the accident. Along with their parents, Patti and Daniel Holman, they sued Harvey for damages.[1] Harvey moved for summary judgment, arguing he was entitled to governmental immunity under WIS. STAT. § 893.80(4).[2] He also asserted the Holmans' claims were subject to the $50,000-per-person damage cap for tort claims against governmental subdivisions and their employees set forth in WIS. STAT. § 893.80(3). In response, the Holmans conceded each plaintiff's damages were capped at $50,000. However, they contended Harvey was not entitled to governmental immunity because the ministerial duty and known and compelling danger exceptions to immunity applied.

¶11 The circuit court denied Harvey's summary judgment motion, concluding there was a "genuine issue of material fact regarding whether Harvey was confronted with a known and compelling danger." The court did not address the ministerial duty exception.

¶12 The parties subsequently stipulated to the entry of judgment against Harvey in the following amounts, along with interest from the date of the judgment: Brody Holman—$50,000; Hunter Holman—$5,000; and Jordan Holman—$16,500. The parties agreed Patti and Daniel Holman's claims would be dismissed with prejudice. The stipulation preserved Harvey's right to appeal the circuit court's denial of his summary judgment motion. The circuit court

[1] The Holmans also sued Bayfield County. All parties subsequently stipulated to the County's dismissal.

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

entered judgment in accordance with the parties' stipulation. Harvey now appeals, arguing the circuit court erred by failing to grant him summary judgment.

DISCUSSION

¶13 We independently review a circuit court's summary judgment decision, using the same methodology as the circuit court. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Harvey argues he is entitled to judgment as a matter of law because he is immune from suit under WIS. STAT. § 893.80(4). The application of § 893.80(4) and its exceptions to a set of facts presents a question of law that we review independently. ***Heuser ex rel. Jacobs v. Community Ins. Corp.***, 2009 WI App 151, ¶21, 321 Wis. 2d 729, 774 N.W.2d 653.

¶14 WISCONSIN STAT. § 893.80(4) states that governmental subdivisions and their employees are immune from liability for acts that are "done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Stated differently, the statute immunizes governmental subdivisions and their employees from liability for "any act that involves the exercise of discretion and judgment." ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314. Governmental immunity is subject to several exceptions, though, which "represent[] a judicial balance struck between 'the need of public officers to perform their functions freely [and] the right of an aggrieved party to seek redress.'" ***Id.***, ¶24 (quoting ***C.L. v. Olson***, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988)). The Holmans argue two exceptions to governmental

immunity apply in this case: the ministerial duty exception and the known and compelling danger exception.

¶15 We conclude neither the ministerial duty exception nor the known and compelling danger exception abrogates Harvey's governmental immunity. Harvey was therefore entitled to summary judgment. We acknowledge there are factual disputes regarding how the accident occurred. However, even accepting the Holmans' version of the facts as true, we conclude Harvey is immune from suit. *See* ***Hagen v. City of Milwaukee Employes' Ret. Sys. Annuity & Pension Bd.***, 2003 WI 56, ¶11, 262 Wis. 2d 113, 663 N.W.2d 268 (affirming summary judgment despite factual disputes because moving party was entitled to judgment as a matter of law even if nonmoving party's version of facts was accepted as true).

I. The ministerial duty exception

¶16 The ministerial duty exception to governmental immunity "is not so much an exception as a recognition that immunity law distinguishes between discretionary and ministerial acts, immunizing the performance of the former but not the latter." ***Lodl***, 253 Wis. 2d 323, ¶25. A duty is ministerial, as opposed to discretionary, if it 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." ***Lister v. Board of Regents of Univ. of Wis. Sys.***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976). The first step in the ministerial duty analysis is to identify a source of law or policy that imposes the alleged duty. ***Pries v. McMillon***, 2010 WI 63, ¶31, 326 Wis. 2d 37, 784 N.W.2d 648. We then examine the language of the law or policy "to evaluate whether the

duty and its parameters are expressed so clearly and precisely, so as to eliminate the official's exercise of discretion." ***Id.***, ¶26.

¶17 The parties agree that Harvey had discretion to decide when, where, and how to scrape ice from the Town's roads using the grader. However, the Holmans contend Harvey's operation of the grader on the day of the accident breached ministerial duties imposed by two statutes. They first cite WIS. STAT. § 346.87, which states, "The operator of a vehicle shall not back the same unless such movement can be made with reasonable safety." The Holmans argue § 346.87 creates a ministerial duty "not to back up under unsafe conditions." They contend, as a matter of law, that it was unsafe for Harvey to back the grader into the McKinley Road/County Highway C intersection while their minivan was approaching the intersection on County Highway C.

¶18 We do not agree that WIS. STAT. § 346.87 creates a ministerial duty. The statute does not eliminate a driver's discretion in deciding whether to back a vehicle. It does not set forth a bright-line rule dictating when backing a vehicle is prohibited. It merely directs a driver not to back his or her vehicle unless he or she can do so "with reasonable safety." ***Id.*** In other words, the driver must use his or her judgment to decide whether, under the circumstances, it is safe to back the vehicle. Section 346.87 is not "so clear[] and precise[]" as to "eliminate the [driver's] exercise of discretion." ***Pries***, 326 Wis. 2d 37, ¶26.

¶19 The Holmans argue ***Estate of Cavanaugh v. Andrade***, 202 Wis. 2d 290, 550 N.W.2d 103 (1996), mandates a conclusion that WIS. STAT. § 346.87 imposes a ministerial duty. There, police officer Robert Andrade engaged in a high-speed chase with a vehicle that failed to stop at a red light. ***Cavanaugh***, 202 Wis. 2d at 296. During the chase, the vehicle being pursued struck and killed a

third-party driver. ***Id.*** The deceased driver's estate sued Andrade, who claimed he was entitled to governmental immunity. ***Id.*** at 297.

¶20 On appeal, the supreme court concluded Andrade's decisions to initiate and continue the high-speed chase were discretionary, and he was therefore immune from liability for injuries caused by those decisions. ***Id.*** at 317. However, the court distinguished Andrade's discretionary decisions to initiate and continue the chase from his physical operation of his vehicle during the chase. ***Id.*** The court observed that WIS. STAT. § 346.03(5) (1993-94), required operators of emergency vehicles to drive "with due regard under the circumstances for the safety of all persons." ***Cavanaugh***, 202 Wis. 2d at 316. The court concluded, "[A]n officer may be negligent pursuant to § 346.03(5) for failing to physically operate his or her vehicle with due regard for the safety of others." ***Id.*** at 317. The court then considered whether the evidence supported the jury's determination that Andrade was negligent. ***Id.*** at 319. The court ultimately concluded it did not need to decide whether Andrade was negligent because, even assuming he was, there was no evidence his negligence caused the deceased driver's injuries. ***Id.*** at 320-22.

¶21 The Holmans assert ***Cavanaugh*** held that WIS. STAT. § 346.03(5) (1993-94), imposed a ministerial duty to drive "with due regard under the circumstances for the safety of all persons[.]" The Holmans argue that, if § 346.03(5) (1993-94), was precise enough to impose a ministerial duty, WIS. STAT. § 346.87 is also sufficiently precise.

¶22 We disagree. Contrary to the Holmans' assertion, ***Cavanaugh*** did not explicitly hold that WIS. STAT. § 346.03(5) (1993-94), created a ministerial duty. In fact, the supreme court recently characterized ***Cavanaugh*** as merely

"suggest[ing]" that an officer's physical operation of his or her vehicle "*may* be ministerial *in some circumstances*." ***Brown v. Acuity***, 2010 WI 60, ¶51, 348 Wis. 2d 603, 833 N.W.2d 96 (emphasis added). The ***Cavanaugh*** court ultimately resolved the issue before it by concluding that, even if Andrade had been negligent, his negligence was not causal. ***Cavanaugh***, 202 Wis. 2d at 320-22. We therefore reject the Holmans' argument that ***Cavanaugh*** requires us to conclude WIS. STAT. § 346.87 is precise enough to impose a ministerial duty.

¶23 The Holmans next argue Harvey had a ministerial duty "not to proceed from the stop sign [on McKinley Road] in front of an approaching vehicle in violation of such vehicle's right-of-way." (Capitalization omitted.) As the source of this duty, they cite WIS. STAT. § 346.46(1), which states:

> Except when directed to proceed by a traffic officer or traffic control signal, every operator of a vehicle approaching an official stop sign at an intersection shall cause such vehicle to stop before entering the intersection and shall yield the right-of-way to other vehicles which have entered or are approaching the intersection upon a highway which is not controlled by an official stop sign or traffic signal.

The Holmans argue § 346.46(1) creates a ministerial duty to yield to approaching traffic because it gives a driver who is stopped at a stop sign "one and only one option": the driver "must remain stopped and not proceed into the intersection until all approaching vehicles have safely passed."[3]

[3] The parties agree that WIS. STAT. § 346.46(1) imposes two distinct duties on drivers: (1) a duty to stop at an official stop sign; and (2) a duty to yield the right-of-way to approaching vehicles. The parties also agree that the duty to stop at a stop sign is ministerial. However, the Holmans do not argue Harvey violated the duty to stop at a stop sign. They argue only that he violated the duty to yield the right-of-way.

¶24 We do not agree that the duty to yield the right-of-way imposed by WIS. STAT. § 346.46(1) is ministerial. Our supreme court has recognized that yielding the right-of-way requires "a calculation of interference with the right-of-way of other vehicles." *See* ***Sailing v. Wallestad***, 32 Wis. 2d 435, 441, 145 N.W.2d 725 (1966). Stated differently, the duty to yield the right-of-way requires a driver to exercise judgment to determine whether moving his or her vehicle will interfere with another vehicle's path of travel. For instance, a driver stopped at a stop sign must judge how far away the other vehicle is and how fast it is moving. The stopped driver must then determine whether, in light of these factors and other factors like road conditions, he or she can safely move into the intersection without causing a collision. Yielding the right-of-way is therefore a discretionary, not ministerial, duty.

¶25 The Holmans argue WIS. STAT. § 346.46(1) leaves no room for the exercise of discretion because it states a driver stopped at a stop sign "shall" yield the right-of-way to approaching vehicles. The Holmans essentially contend that, under § 346.46(1), whenever a vehicle is coming toward an intersection on a through highway, a driver stopped at the intersection has no choice but to remain stopped until the vehicle on the through highway has passed.

¶26 We disagree. WISCONSIN STAT. § 346.46(1) does not prohibit a driver from entering an intersection simply because another vehicle may be coming toward the intersection somewhere along the through highway. Instead, the statute requires the stopped driver to yield to a vehicle "approaching the intersection[.]" Interpreting a similar statute, our supreme court concluded:

> [A] vehicle on an artery for through traffic may properly be said to be approaching the intersection, when it is not so far distant therefrom that considering the rate of speed at which it is traveling, it would be reasonable to assume that

> a collision would occur were a vehicle, stopped at the intersection, to start in motion and move into the path of the vehicle on the artery for through traffic.

Plog v. Zolper, 1 Wis. 2d 517, 528, 85 N.W.2d 492 (1957).[4] ***Plog*** demonstrates that, when a vehicle is stopped at an intersection, determining whether another vehicle proceeding toward the intersection on a through highway is "approaching the intersection," such that the stopped vehicle must yield, requires the driver of the stopped vehicle to exercise discretion and judgment. This comports with our conclusion that the duty to yield the right-of-way to approaching vehicles under § 346.46(1) is discretionary, not ministerial.

¶27 The Holmans cite three cases in support of their argument that WIS. STAT. § 346.46(1) creates a ministerial duty. *See* ***Brown***, 348 Wis. 2d 603; ***Rolland v. County of Milwaukee***, 2001 WI App 53, 241 Wis. 2d 215, 625 N.W.2d 590; ***Turner v. City of Milwaukee***, 193 Wis. 2d 412, 535 N.W.2d 15 (Ct. App. 1995). However, these cases are distinguishable.

¶28 In ***Brown***, 348 Wis. 2d 603, ¶¶5, 54-55, the supreme court held that a volunteer firefighter who was responding to an emergency violated a ministerial duty when he proceeded through a red light without first giving an audible signal. The relevant statute, WIS. STAT. § 346.03(6) (2009-10), allowed the firefighter to proceed through a red light only if he gave both visible and audible signals. ***Brown***, 348 Wis. 2d 603, ¶54. The court concluded § 346.03(6) (2009-10), imposed a ministerial duty because it completely eliminated the firefighter's

[4] ***Plog v. Zolper***, 1 Wis. 2d 517, 523, 85 N.W.2d 492 (1957), interpreted WIS. STAT. § 85.18(4) (1955-56), which stated, "The operator of a vehicle shall stop as required by s. 85.69 before entering an artery for through traffic, and shall yield the right of way to other vehicles which have entered or are approaching the intersection upon the artery for through traffic."

discretion by specifically prohibiting him from proceeding through a red light without first giving an audible signal. ***Brown***, 348 Wis. 2d 603, ¶54. Unlike the statute at issue in ***Brown***, WIS. STAT. § 346.46(1) does not set forth a bright-line rule dictating when a stopped driver may proceed into an intersection. Section 346.46(1) merely requires the driver to yield the right-of-way to vehicles "approaching the intersection," which requires the driver to exercise his or her discretion.

¶29 The Holmans' reliance on ***Rolland***, 241 Wis. 2d 215, is also unavailing. There, we concluded a bus driver had a ministerial duty "not to drive the bus with a wheelchair or scooter passenger aboard unless the passenger was secured." ***Id.***, ¶12. However, we held that determining how to secure the passenger was discretionary because it required the bus driver to exercise his judgment. ***Id.***, ¶¶10-11. Similarly, Harvey's duty to yield the right-of-way was discretionary because it required him to exercise his judgment to determine whether he could enter the intersection without causing a collision with an approaching vehicle.

¶30 Nor does ***Turner***, 193 Wis. 2d 412, help the Holmans. In ***Turner***, the plaintiff sued the City of Milwaukee for injuries sustained when she was bitten by a dog that had attacked at least twelve people during the three preceding years. ***Id.*** at 416. The City had failed to seek a court order for the dog's removal or destruction before the plaintiff was bitten, despite an ordinance stating, "A vicious animal that has been involved in 2 or more previous unprovoked attacks, injuries or bites shall be removed from the city or destroyed as a result of judgment rendered by a court of competent jurisdiction." ***Id.*** at 416-18. On appeal, we agreed with the plaintiff that this ordinance imposed a ministerial duty on the City to seek removal or destruction of the dog. ***Id.*** at 420-21.

¶31 The Holmans assert the City had a ministerial duty in ***Turner*** even though "some judgment was required to determine whether a dog was 'vicious' and whether previous attacks were 'unprovoked.'" They therefore argue a duty can be ministerial even if fulfilling the duty requires the government actor to exercise his or her judgment. The Holmans are incorrect. The ordinance at issue in ***Turner*** defined the terms "vicious" and "unprovoked." ***Id.*** at 417. Consequently, the ordinance completely eliminated the City's discretion in deciding whether to seek an order for removal or destruction of the dog. Conversely, under WIS. STAT. § 346.46(1), Harvey had discretion to determine whether he could enter the intersection without colliding with an approaching vehicle. As a result, unlike the ordinance in ***Turner***, § 346.46(1) does not impose a ministerial duty.

II. The known and compelling danger exception

¶32 The Holmans next argue Harvey is not entitled to governmental immunity because the known and compelling danger exception applies. The known and compelling danger exception abrogates immunity in dangerous situations where "the nature of the danger is compelling and known to the [public] officer and is of such force that the public officer has no discretion not to act." ***Olson***, 143 Wis. 2d at 715. In other words, the exception applies when "there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers." ***Lodl***, 253 Wis. 2d 323, ¶4. The exception does not apply in all dangerous situations, though. ***Id.***, ¶40. Instead, it is reserved for situations where the danger is "compelling enough that a self-evident, particularized, and non-discretionary municipal action is required." ***Id.***

¶33 The Holmans argue Harvey was confronted with a known and compelling danger because he was unable "to observe vehicles approaching from the west during the time period when they were traveling within the Sioux River dip." The Holmans contend, "Moving blindly into the intersection without knowing whether a vehicle was approaching was sufficiently hazardous behavior to give rise to a ministerial duty to take precautions to deal with the hazard." They assert Harvey could have responded to this danger in three ways: (1) by "observ[ing] the part of the roadway that was visible and continu[ing] to observe to the west for a sufficient period of time for any vehicle to emerge into view from the Sioux River dip[;]" (2) by using warning signs; or (3) by using a flagger.

¶34 The Holmans' known and compelling danger argument is self-defeating. A danger is known and compelling when it is so hazardous that it gives rise to a duty to act "*in a particular way*." ***Id.***, ¶44. The duty must be "explicit as to time, mode, and occasion for performance," and it may not "admit of any discretion." ***Id.*** A dangerous circumstance that gives rise to a generic duty to "do something," but does not impose a duty to act in a particular way, is not a known and compelling danger. ***Id.***, ¶¶43-44. Here, the Holmans concede Harvey could have responded to the alleged danger in multiple ways. Accordingly, Harvey was not confronted with a situation so dangerous that a "self-evident, particularized, and non-discretionary municipal action" was required. *See* ***id.***, ¶40. The known and compelling danger exception to governmental immunity is therefore inapplicable.

By the Court.—Judgment reversed.

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