COURT OF APPEALS
DECISION
DATED AND RELEASED

April 18, 1996

NOTICE

No. 93-2894

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

ESTATE OF DONALD R. LANGE, BY SANDRA M. LANGE, SPECIAL ADMINISTRATRIX OF THE ESTATE OF DONALD R. LANGE, AND SANDRA M. LANGE, INDIVIDUALLY,

Plaintiffs-Appellants,

v.

WILLIAM P. WHEELER, CITY OF HORICON AND WAUSAU INSURANCE COMPANIES,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dodge County: WILLIAM MCMONIGAL, Judge. *Reversed and cause remanded*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. Minutes after City of Horicon Police Officer William P. Wheeler allowed Craig Fuller to operate a motor vehicle on a public highway, Fuller crashed into a utility pole and a cement milkhouse, killing

himself and two passengers and seriously injuring plaintiff, Daniel L. Voelker. Voelker and representatives of the decedents brought this tort liability action against the City, Wheeler, and the defendants' insurers. After considering the submissions of the parties, the trial court granted defendants' motion for summary judgment dismissing plaintiffs' complaints. The trial court concluded that, on the undisputed facts, Wheeler was immune from liability under § 893.80(4), STATS.[1]

The trial court erroneously decided the question of Wheeler's negligence, not the question of his immunity for his acts.[2] On a motion to dismiss based on immunity, the public officer is assumed to be negligent. ***Kimps v. Hill***, 187 Wis.2d 508, 514, 523 N.W.2d 281, 285 (Ct. App. 1994), *aff'd*, No. 92-2736, slip op. (Apr. 10, 1996). Whether the officer is immune is a question of law. *See* ***id***. at 513, 523 N.W.2d at 284. If the material facts are undisputed, a court may properly enter judgment as a matter of law. *See* ***Heck & Paetow Claim Service, Inc. v. Heck***, 93 Wis.2d 349, 356, 286 N.W.2d 831, 834 (1980).

We recently reviewed summary judgment methodology in ***Landreman v. Martin***, 191 Wis.2d 787, 800-01, 530 N.W.2d 62, 66-67 (Ct. App. 1995). In the usual case, we first examine whether the complaint states a claim and whether the answer raises a material issue of fact. ***Id***. at 800, 530 N.W.2d at 66. In this case, defendants concede that plaintiffs' complaints state a claim. We therefore examine the moving parties' proof to determine whether they state a

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[1] Section 893.80(4), STATS., 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 employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

[2] The dissent makes the same mistake. My colleague asks us to usurp the prerogative of the jury and determine as a matter of law that Officer Wheeler properly exercised his discretion. He would confer immunity on Wheeler simply because of his status.

prima facie case for summary judgment. If they do, we next look to the opposing parties' affidavits to determine whether material facts are in dispute which entitle the opposing party to a trial. ***Id***. at 800, 530 N.W.2d at 66-67. If at any point we determine that there is a genuine issue of fact entitling the opposing party to a trial, we reverse the summary judgment and remand the matter for further proceedings. *See* ***id***. at 800, 530 N.W.2d at 67.

In this case, we conclude that defendants' proof does not establish a *prima facie* case that Officer Wheeler is immune from tort liability under § 893.80(4), STATS., or was not negligent in allowing Fuller to operate a motor vehicle on a public highway.

Most of the facts are undisputed; it is the inferences which the parties draw from those facts which are at variance. The following facts are taken from the parties' statements of fact and from Wheeler's deposition.

On March 6, 1991, at approximately 2:00 a.m., Wheeler stopped a vehicle operated by William Masche after it failed to observe a stop light in the City of Horicon. Craig Fuller, Donald Lange and Daniel Voelker were passengers. Because Masche's operating privilege had been revoked, Wheeler would not allow him to continue to operate the vehicle. Lange and Fuller volunteered to drive. Officer Wheeler administered a preliminary breath test (PBT) to both. Wheeler determined that Lange was intoxicated. Fuller admitted that he had been drinking and Wheeler obtained PBT readings of .06, .07, .08, and .09. Wheeler made a written report on March 6, 1991, to the Horicon Chief of Police of these test results. In his deposition, Wheeler was asked the following question and gave the following answer:

QIs it fair to say you had a problem with the machine [the breathalyzer] that night functioning properly?

AThere was something that wasn't quite the same that I've never ran into before when I did use it as far as getting it cleared.

Wheeler also deposed that when he administers a PBT, he already knows that he is going to be arresting the operator for operating while under the influence. He also testified that he doesn't use the PBT unless he first suspects that the operator is intoxicated. He conceded that if an operator's blood alcohol level was .05 or above, that could cause "some type of impairment."

Wheeler admitted that he did not administer field sobriety tests to Fuller.

By their proof, defendants have raised the question whether Wheeler exercised the discretion a reasonably competent police officer would have exercised in the same circumstances. We conclude that the factfinder could infer from Wheeler's own testimony that he did not exercise that discretion. He admitted that the PBT was not operating properly and he got four different readings when he tested Fuller for intoxication. He also admitted that he knew that a reading of .05 blood alcohol content could cause "some type of impairment." He did not administer field sobriety tests, from which the factfinder could infer that he did not follow proper police procedure. Further, he did not follow his usual procedures. When he believed it necessary to administer a PBT to an operator, he intended to arrest the operator for operating while under the influence. Of course, in this case, Fuller had not yet operated the vehicle, but he was about to, with Wheeler's permission.

We therefore conclude that defendants have failed to establish a *prima facie* case for summary judgment. Further, the factfinder could infer from plaintiffs' proof that Wheeler allowed Fuller to operate a motor vehicle on a public highway knowing he was intoxicated. Plaintiffs submitted a letter from Forensic Associates, Inc. of April 14, 1993, in which Dr. Richard E. Jensen stated that it was likely that Fuller's blood alcohol concentration was slightly greater than .20 percent by weight ethyl alcohol in his blood stream when Wheeler stopped Masche's vehicle. He also opined that Fuller would have displayed obvious signs of intoxication because of his young age and lack of experience in the consumption of alcoholic beverages. He further concluded that Wheeler should have been aware that an operator can be impaired at alcohol concentrations as low as .05 percent by weight ethyl alcohol. Of course, Wheeler admitted that he was so aware.

It is also undisputed that a blood sample taken from Fuller at the scene of the accident showed a blood alcohol content of .20 percent.

If Fuller was intoxicated, Wheeler had no discretion to allow him to operate a motor vehicle on a public highway. *See* ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 258, 533 N.W.2d 759, 763 (1995) (officer's duty to act in face of known danger may be absolute, certain and imperative). Wheeler's duty to see that Fuller did not operate a motor vehicle while intoxicated was ministerial.

The burden of showing that there are no disputed issues of fact or inferences to be drawn from undisputed facts precluding summary judgment rests on the moving party. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). The burden is a very heavy one. "A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt." ***Id***.

Defendants argue that plaintiffs had to show that Wheeler "knew" Fuller was intoxicated. Even if we accept that proposition, the undisputed facts permit a factfinder to reach that conclusion. Questions as to knowledge and state of mind cannot ordinarily be decided on summary judgment.

> Questions involving a person's state of mind, *e.g.*, whether a party knew or should have known of a particular condition, are generally factual issues inappropriate for resolution by summary judgment. *See* No. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §§ 2729-2730, at 229, 238 (2d ed. 1983). However, where the palpable facts are substantially undisputed, such issues can become questions of law which may be properly decided by summary judgment. *See* ***Fonda v. Gray***, 707 F.2d 435, 438 (9th Cir. 1983). But summary judgment should not be granted where contradictory inferences may be drawn from such facts, even if undisputed.

United States v. Perry, 431 F.2d 1020, 1022 (9th Cir. 1970).

Braxton-Secret v. A.H. Robins Co., 769 F.2d 528, 531 (9th Cir. 1985).

Contradictory inferences abound in this case, making summary judgment inappropriate. We therefore reverse the judgment and remand for trial.[3]

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

[3] In a separate brief, the City and Wheeler argue that Wheeler's negligence, if any, was not the proximate cause of plaintiffs' injuries and death. They argue that to hold Wheeler and the City liable while refusing to hold providers of alcohol to adults liable in similar circumstances would deny them equal protection under the law. This argument is not sufficiently developed for us to make a ruling. *See* ***State v. Nicholson***, 148 Wis.2d 353, 368, 435 N.W.2d 298, 305 (Ct. App. 1988). In any event, we do not equate the duty of a police officer with the duty of a bartender or social host.

DYKMAN, J. (*dissenting*). Within the last year, the supreme court has explained how we are to analyze § 893.80(4), STATS., in cases against police officers and the municipalities which employ them. The case is ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 533 N.W.2d 759 (1995). The principles in ***Barillari*** were recently restated by the supreme court in ***Kimps v. Hill***, No. 92-2736 (Wis. Apr. 10, 1996). In ***Barillari***, a murdered woman's family sued the city because city police detectives promised to arrest their daughter's ex-boyfriend and then failed to do so, thereby permitting him to murder the woman. The case came to the court on summary judgment and the court concluded that the city was immune from liability as a matter of law. ***Id.*** at 262, 533 N.W.2d at 765. ***Barillari*** is not new law. It discusses municipal immunity in the specific context of the discretion given to police officers in the performance of their duties. That is the situation here, though this time the plaintiffs assert that a police officer should have known that a person was intoxicated and threatened him with an arrest if he insisted on driving.

The rule of municipal and public officer immunity for injuries resulting from acts performed within the scope of a municipal employee's public office is found in § 893.80(4), STATS., which 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 employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

Section 893.80(4), STATS., sets forth the general rule that a public officer or employee is immune from personal liability for injuries resulting from acts performed within the scope of the individual's public office. ***Barillari***, 194 Wis.2d at 257, 533 N.W.2d at 763.[4] The rule is subject to three exceptions. First,

[4] In ***Kimps v. Hill***, No. 92-2736, slip op. at 7-8 n.6 (Wis. Apr. 10, 1996), the court noted that the general rule of immunity for state public officers or employees stands in contrast to that for municipalities where the rule is liability, and the exception is immunity. The court added that the rule of liability was abrogated in ***Holytz v. City of Milwaukee***, 17

a public officer or employee does not enjoy immunity if he or she engages in conduct which is malicious, willful, or intentional. ***Id.*** Second, a public officer or a municipality is not immune for the negligent performance of a ministerial duty. ***Id.*** "A public officer's duty is ministerial only when 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." ***Id.*** at 257-58, 533 N.W.2d at 763 (quoted sources omitted). Third, a public officer is not immune when he or she is aware of a known and compelling danger, a danger which is of "such quality that the public officer's duty to act becomes `absolute, certain and imperative.'" ***Id.*** at 258, 533 N.W.2d at 763 (quoted sources omitted).

The police officer must have actual knowledge of the danger for the duty to lose its discretionary nature. ***Id.*** at 260-61, 533 N.W.2d at 764. This is because:

> the nature of law enforcement requires moment-to-moment decision making and crisis management which, in turn, requires that the police department have the latitude to decide how best to utilize law enforcement resources. Unlike those professionals who have a set daily calendar they follow, police officers have no such luxury. For these reasons, it is clear that law enforcement officials must retain the

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Wis.2d 26, 115 N.W.2d 618 (1962), except for actions which are legislative, judicial, quasi-legislative or quasi-judicial. ***Kimps***, slip op. at 7-8 n.6. This rule is set out in § 893.80(4), STATS. But the court added that "[t]he concepts and theories articulated in ***Lister [v. Board of Regents***, 72 Wis.2d 282, 240 N.W.2d 610 (1976),] are generally applicable to both state and municipal officers and the tests for immunity are similar." ***Kimps***, slip op. at 7-8 n.6 (citing ***Scarpaci v. Milwaukee County***, 96 Wis.2d 663, 682 n.19, 683 n.20, 292 N.W.2d 816, 826 (1980)).

> discretion to determine, at all time, how best to carry out their responsibilities.

Id. at 260, 533 N.W.2d at 764. In concluding that the city was immune, the court reasoned that the detectives "could not look at this situation and see a homicide just waiting to happen." ***Id.*** at 261, 533 N.W.2d at 764 (quoted source omitted). It distinguished the facts of its case from those in ***Cords v. Anderson***, 80 Wis.2d 525, 531-32, 541, 259 N.W.2d 672, 675, 679-80 (1977), in which a park manager knew of a dangerous twenty-foot slide and eighty-foot drop off within one foot of a hiking trail, but failed to erect a warning sign. The court also distinguished ***Domino v. Walworth County***, 118 Wis.2d 488, 490-91, 347 N.W.2d 917, 918-19 (Ct. App. 1984), because in that case, the county had actual knowledge of a tree lying across a road, but failed to assign someone to provide for safe passage along the roadway. Indeed, in ***C.L. v. Olson***, 143 Wis.2d 701, 723, 422 N.W.2d 614, 622 (1988), the court required actual knowledge of a danger to preclude immunity: "The plaintiff has, on appeal, failed to demonstrate that the possibility of recidivism was any more than just that—a possibility."

Most of the time we will conclude that a police officer's duty is discretionary because it is unusual that a police officer has actual knowledge of a danger which carries with it more than a possibility of injury—the "homicide just waiting to happen" in ***Barillari***. This also advances the reason behind the rule of § 893.80(4), STATS., which provides immunity in most circumstances, because police officers should not be inhibited in doing the public's business for fear of lawsuits and liability. The ***Barillari*** court explained:

> We look to our police departments to enforce our laws and to maintain order in what is becoming an increasingly dangerous society. Routinely, police face critical situations, many of which have the potential for violence. On a typical day, any given law enforcement officer may be arresting and questioning suspects, interviewing and counseling victims, talking to witnesses, rescuing children, and investigating criminal activity. In the course of their work, police must often try to console and reassure people who are distraught and fearful. *Faced with escalating violence, they must continuously use their discretion to set priorities and decide how best to handle specific incidents. Police officers must be free to perform their responsibilities, using their experience, training, and good judgment, without also fearing that they or their employer could be held liable for damages from their allegedly negligent discretionary decisions*.

Barillari, 194 Wis.2d at 261-62, 533 N.W.2d at 764-65 (emphasis added).

The plaintiffs contend that Officer William P. Wheeler's action in permitting an intoxicated person to drive a motor vehicle falls outside the scope of discretionary conduct. This is another way of asserting that Officer Wheeler had a ministerial duty to prevent an intoxicated person from driving. The plaintiffs also argue that the "known and compelling danger" exception to § 893.80(4), STATS., applies here.

Perhaps a police officer has such a duty, but the plaintiffs have produced no evidence to show that Officer Wheeler *knew* that Craig Fuller, the person he permitted to drive, was intoxicated or that Officer Wheeler was aware of a known and compelling danger. Instead, the plaintiffs have

submitted evidence from persons who believed that Fuller would have or should have exhibited signs of intoxication, and who, themselves, believed that Fuller was intoxicated.

For a duty to lose its discretionary nature, the public officer must know of the danger. ***Barillari***, 194 Wis.2d at 260-61, 533 N.W.2d at 764. Officer Wheeler was deposed and testified that he did not know that Fuller was intoxicated. He testified that when he stopped the car, he could detect a little odor of intoxicants on the driver's, William Masche's, breath but that no other factors of intoxication were present. Officer Wheeler observed unopened cans of beer in the back of the car and Masche, Donald Lange and Fuller admitted that they had been drinking earlier. Officer Wheeler did not cite Masche for operating a motor vehicle while under the influence of an intoxicant but instead cited him for failure to stop for a flashing red light and operating after revocation.

Fuller and Lange both volunteered to drive the car and Officer Wheeler gave them a preliminary breath test (PBT) because he wanted to show them their results to demonstrate to them whether or not they were able to drive. Lange took the test first and it registered a .17. Officer Wheeler then had trouble getting the machine back down to .00. Fuller took the test next and it slowly registered .06, .07, .08, .09 and back to .08. Officer Wheeler was surprised by the results because he could not detect any odor of intoxicants on Fuller's breath and he thought the machine was acting "unusual." He noted that Fuller's eyes were clear, he responded well to questions, his speech was not slurred, and he had good balance. This information would not have supported an arrest for operating a motor vehicle while intoxicated. Section 346.63(1)(a), STATS.; ***State v. Swanson***, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991). Officer Wheeler concluded that Fuller was not intoxicated and that he could drive.

The majority points out that Officer Wheeler testified that he only administered a PBT when he already had probable cause to arrest someone for

operating a motor vehicle while under the influence of an intoxicant. But Officer Wheeler explained that in this case, he gave Lange and Fuller the tests because "[t]he individuals stated that they were interested—that they would be able to drive and to show them that they were able or not, I was going to let them see the results on the PBT." Moreover, while the majority notes that Officer Wheeler testified that a reading of .05 can cause impaired driving, Officer Wheeler stated that the results of the PBT were "unusual" because he did not think that the machine was working properly. Instead, he relied upon his observations of Fuller. Officer Wheeler knew Wisconsin law: a PBT result of .05 or even .09 is not a prohibited alcohol concentration under § 346.63(1)(b), STATS. Fuller was driving legally if his alcohol concentration was actually any of those registered on the PBT.

The majority's assertion that I would confer immunity on Officer Wheeler because of his status is incorrect. I would confer immunity on Officer Wheeler because there is no evidence that he knew of Fuller's intoxication, which would bring Officer Wheeler's actions within one of the three exceptions to § 893.80(4), STATS. The concepts of negligence and immunity are separate. ***Kimps***, slip op. at 9. Because Officer Wheeler did not know that Fuller was driving a motor vehicle with either a prohibited alcohol concentration or while under the influence of an intoxicant, he is immune from liability pursuant to § 893.80(4). Perhaps Officer Wheeler should have known that Fuller was intoxicated, but "should have known" is a negligence concept. *See* RESTATEMENT (SECOND) OF TORTS § 12 cmt. a (1965). Negligence is presumed when considering questions of immunity. ***Kimps***, slip op at 9. The majority, not I, confuses the issues of negligence and immunity.

I conclude that there is no evidence in the record from which we could infer that Officer Wheeler knew of Fuller's intoxication or that Officer Wheeler faced a known and compelling danger. Thus, the actions are immune from liability and the trial court's grant of summary judgment should be affirmed. I recognize that in cases such as this, it will be difficult to show that the police officer had actual knowledge of the facts from which an injury

develops. But the result I would reach here is the result intended by the legislature and by ***Barillari***—an affirmance of the trial court's grant of summary judgment. I, therefore, respectfully dissent.