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STATE OF WISCONSIN
SUPREME COURT

Eileen W. Legue,

Plaintiff-Appellant,

and

Department of Health and Human Services and
Farmers Insurance Exchange,

Involuntary-Plaintiffs,

v.

City of Racine and Amy L. Matsen

Defendants-Respondents.

APPEAL FROM CIRCUIT COURT OF RACINE COUNTY,
Honorable Charles H. Constantine, Circuit Court Judge, Presiding
AND UPON CERTIFICATION TO THE SUPREME COURT
Circuit Court Case No. 2011-CV-002090
Court of Appeals Case No. 2012AP2499

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT, EILEEN W. LEGUE

SUBMITTED BY:

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STATEMENT OF THE ISSUES

In this case, the jury determined that Officer Amy Matsen did not exercise "due regard under the circumstances" and attributed fifty percent (50%) of the fault for the automobile accident to Officer Matsen.

Officer Matsen filed motions after verdict essentially all of which asked the Trial Court to change the answers, overturn the verdict, etc. on the theory that Officer Matsen was entitled to discretionary immunity. Therefore, the issue in this case is as follows:

Despite the determination by the jury that Officer Matsen did not exercise "due regard under the circumstances" and was fifty percent (50%) at fault for causing this accident, is Officer Matsen, nonetheless, entitled to a finding of no liability based upon the concept of discretionary immunity?

Answered by the Trial Court on motions after verdict: Yes.

Certified by Wisconsin Court of Appeals District II to the Wisconsin Supreme Court on October 2, 2013 – Certification Accepted on November 26, 2013.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND.

From a procedural standpoint this was a straight forward case. The matter was tried to a jury on July 17th, 2012. The jury rendered its verdict on July 18th, 2012 finding that Officer Matsen did not exercise due regard under the circumstances, that Eileen Legue likewise was negligent, and attributed causal fault fifty percent (50%) each. They awarded damages of $129,799.72. (R. 59-2).

Officer Matsen filed motions after verdict and asked the Trial Court for the following:

1. Pursuant to Wis. Stat. § 805.14(5)(d), for a directed verdict or a change of answer on the grounds that there is no credible evidence to support a finding of responsibility in answering Question 3 based upon the fact that the officer reduced her speed, had no indication that anyone would violate her right of way, had her lights and siren engaged and is immune from the consequences of her decision to enter the intersection.

2. Pursuant to Wis. Stat. § 805.14(5)(c), for a directed verdict or to change the answer to Question 4 from "yes" to "no" on the grounds there is no evidence to support the jury's answer because the evidence shows the only way to avoid this accident was for the officer to stop before entering the intersection and the officer does not have to stop but only needs to reduce her speed under Wis. Stat. § 346.03(2)(b).

3. Pursuant to Wis. Stat. § 805.14(5)(b), for a judgment notwithstanding the verdict on the grounds that the officer is immune from the consequences of her discretionary decision to enter the intersection at her chosen speed because there is no way to avoid this accident in light of Legue's failure to hear the emergency signal and yield the right of way.

4. Pursuant to Wis. Stat. § 805.14(5)(b), for a judgment notwithstanding the verdict on the grounds of public policy because this situation has no just stopping point since the officer had no notice that her emergency signals were going to be ignored and to require a responding officer who has reduced her speed, is operating in an otherwise safe manner when entering an intersection, to be liable for damages because the officer did not further

adjust her actions to accommodate an unknown risk that her right of way would be ignored places too great a burden upon the responding officer to avoid an accident but still perform her duty to respond to an emergency.

5. Pursuant to Wis. Stat. § 805.14(5)(b), on the grounds that Wis. Stat. § 346.03(5), only makes the officer responsible for the consequences of her reckless disregard for the safety of others and there is no evidence of reckless behavior.

6. Pursuant to Wis. Stat. § 805.14(5)(c), for a directed verdict or to change the answer on Question 5 so that the comparison between Legue and the defendant is 51/49 on the grounds that the negligence of Legue in failing to hear the siren and in failing to yield the right of way to the officer is a greater cause of the accident than the officer's speed at the time of the accident.

7. Pursuant to Wis. Stat. § 805.15, for a new trial in the interests of the justice because the evidence is contrary to the great weight and clear preponderance of the evidence which shows that: the officer reduced her speed before entering the intersection; that at all times she had her lights and siren on responding to an emergency; that she had a clear view of the intersection and no notice that someone was not going to observe her right of way; that there was nothing in the intersection as the officer entered the intersection that would be affected by the officer's actions; and that she had done everything necessary to warn the public that the officer was going to enter the intersection against the light.

8. Pursuant to Wis. Stat. § 805.15, for a new trial due to the following errors of the court:

a. Allowing testimony about the speed of the squad 10 seconds before the accident and allowing impeachment of the officer on her answer to the speed estimation the officer provided in her deposition on the grounds that said evidence was irrelevant to the issue in the case and produced prejudice that the officer made impetuous decisions.

b. Allowing testimony that the officer was not responding to an emergency since this was clearly a discretionary act; that this evidence prejudiced the defendants by creating a suggestion that this was not the type of emergency that warranted the actions of the officer; and that this prejudice was manifested in the 1st Question by the jury to review the transcript of the dispatches received by the officer.

c. Failing to instruct the jury upon the defendant's requested instruction that it could not find the officer negligent for the actions before the officer enters the intersection and providing the Legislature's rationale for extending such a privilege to officers.

d. Failing to instruct the jury that the officer does not have to stop before going into the intersection.

e. For providing an instruction, drafted by the court, that improperly established conditions for the exercise of due regard and which

created an improper standard not supported by the law.

9. For a new trial pursuant to Wis. Stat. § 805.15, in the interests of justice, due to the cumulative effect of the errors of the court. (R. 60-4).

There were various motions in limine and rulings during the trial with regard to the evidence that Legue was able to present in this case. Suffice it to say that at the start of the trial the Trial Court ruled that Legue had greater latitude in introducing evidence of the facts and circumstances leading up to the crash. However, during the course of the trial itself, the Trial Court began to limit evidence over objection of Legue. For instance, at one point Legue was able to introduce the fact that approximately 13 seconds before impact, Officer Matsen was traveling nearly 70 miles per hour despite prior sworn testimony that she never exceeded 40 miles per hour. By the end of trial, the Trial Court prohibited any further reference to that evidence, instructed the jury it could only consider her conduct in the 2 to 3 seconds before impact, (that was the net effect of the instruction) and ruled as a matter of law that she was responding to an emergency. (R. 88-132 at Page 61). That said, Legue does not believe that any of those rulings truly adversely affected the outcome of this case. It may have cost Legue a few percentage points in the comparison of negligence question but we are not before this Court because of those rulings.

At the argument on motions after verdict, the Trial Court took all of Officer Matsen's motions after verdict and surmised that what Officer Matsen was really arguing, just in various forms, is that given the facts and circumstances of the accident, she was entitled to discretionary immunity and, as a matter of law, could not be found liable for her actions that day. Officer Matsen agreed. (R. 89-34 at Pages 31-32). The Trial Court

eventually issued a decision focusing solely and only on the discretionary immunity issue and took the verdict away from Legue ruling that she was entitled to discretionary immunity. (R. 64-11; P-App. 101-111).

As such, this Court is not going to be asked to sit down and look at every evidentiary ruling to see if it was correct or incorrect under the circumstances. Rather, it is this global concept of discretionary immunity that must be addressed.

The matter was then appealed to District II of The Court of Appeals which certified the case to this Court. District II of The Court of Appeals submitted that there exists unanswered a question as to how do your reconcile the concepts of discretionary immunity and liability for breach of the duty to operate with due care.

II. STATEMENT OF THE FACTS

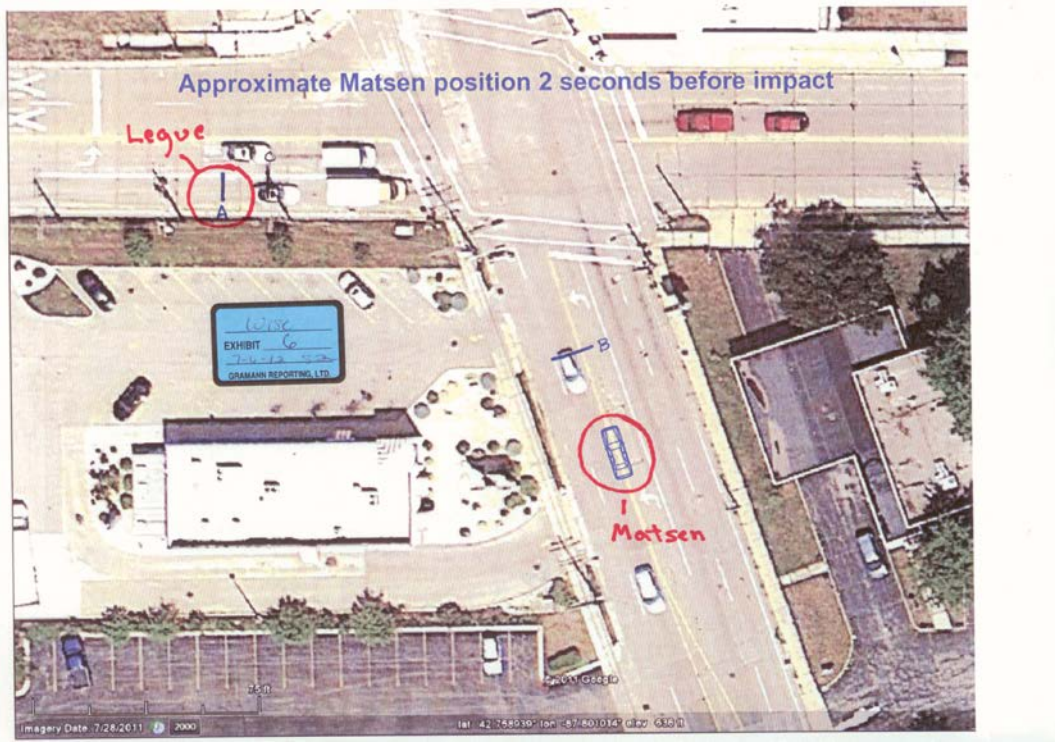
This matter arises out of a motor vehicle accident which took place on July 27th, 2009 at 12:03 p.m. at the intersection of Douglas Avenue and South Street in the City of Racine. At the time of the accident Officer Amy Matsen was responding to a motor vehicle accident with "unknown injuries." In response to the call she engaged her lights and siren and proceeded to the accident scene which happened to be approximately one block north of where the Legue/Matsen collision occurred. (R. 87-255 at Pages 124, 127, 149, 153).

As she proceeded northbound on Douglas and approached the intersection of Douglas and South, northbound traffic was stopped at a red light. In order to proceed around that traffic and through the red light, ***Matsen moved her vehicle into the southbound lane of traffic and proceeded into the intersection in the southbound lane of traffic on Douglas***. (R. 87-255 at Pages 153-155). An aerial view of the intersection

was marked as Exhibit "6" to the videotaped deposition of Adam B. Wise, P.E. and marked as Exhibit 21 at trial. The blue outlined car demonstrates the position of the Matsen vehicle two seconds before impact. For ease of reference for this Court, the Matsen vehicle has been circled in red and labeled "Matsen." (See photo at Page 8). At that time, she would have been 84 feet from the point of impact and traveling 30 miles per hour. (R. 251-55; Wise at Page 25). Translating miles per hour to feet per second meant that at that point, Matsen was traveling approximately 44 feet per second. All this information was gathered from Matsen's "black box" and the PCM data that Adam Wise testified to. (***Id.*** at Page 26).

On cross-examination, Adam Wise established the location of the Legue vehicle two seconds prior to impact. She likewise was traveling 30 miles per hour. (***Id.*** at Pages 28-29). For ease of reference that has been circled in red and labeled "Legue." The building shown on Exhibit "6" is a Kentucky Fried Chicken. That building essentially makes this intersection a blind intersection until you are approximately in the position of the Legue and Matsen vehicles. Again, at 30 miles an hour, that puts both vehicles only two seconds away from impact with each other.

With regard to Legue, at the time of the accident, she was heading eastbound on South Street and had the green light. She had her windows up, the air-conditioning on, and the radio on. She concedes she never saw or heard Officer Matsen's squad. (R. 87-255 at Pages 197-99).



The undisputed facts, admissions, and concessions obtained by Legue from Officer Matsen and other relevant facts are as follows:

1. The City of Racine has written policies and procedures that address responses to traffic accidents. (R. 87-255 at Page 129; R. 33-2; Exhibit No. 3).

2. Department Vehicle Policy No. 812 was the policy and procedure in effect at the time of accident, was the policy that she would have seen prior to the motor vehicle accident, was the policy that she was obligated to operate under, and was in fact the policy and procedure that she was following when she responded to the accident at Douglas and Shoreland. (***Id.*** at Pages 129-30; 132).

3. Exhibit No. 3 contains the following sentence:

> The operator of an emergency vehicle shall ensure that he or she

has due regard for the safety of all occupants of his or her vehicle as well as the safety of pedestrians and other occupants of other vehicles. (***Id.*** at 132)

4. Exhibit No. 3 contains the following language:

> Keep in mind the exceptions granted above do not relieve department members from the duty to drive with due regard under the circumstances for the safety of all persons, taking into consideration:
>
> a. The type, actions, and speed of the vehicle being pursued.
>
> b. The geographic area of pursuit and its population density.
>
> c. The time of day and the day of the week.
>
> d. The vehicular and pedestrian traffic present in the area.
>
> e. The road and weather conditions, and
>
> f. The officer's familiarity with the area of pursuit.
>
> Although the conditions are identified individually, each can have an impact on another; therefore, the totality of the circumstances should be considered. Their value and decision making purposes is enhanced when considered in combination. (***Id.*** at 133-134).

5. Officer Matsen conceded the application of those factors in this case. (***Id.*** at 140, 147-49).

6. Officer Matsen stated that she takes into consideration due regard of pedestrians and vehicles for the safety of those person. (***Id.***).

7. She testified:

> **Question:** **The vehicular and pedestrian traffic present in the area. That, clearly, is something that you have to take into account to make sure that you are operating with a duty to drive with due regard under the circumstances for**

the safety of all persons, fair?

Answer: **Yes.** (***Id.*** at 149).

8. She testified:

Question: **Given the fact of your testimony right here, do you agree, Ms. Matsen, based on your training, your experience, the policies and procedures that were in place, that just because you were a police officer and just because you had your red lights and sirens on, that did not give you the absolute right to do whatever you wanted that day?**

Answer: **Correct.**

Question: **You understand that if you're going to run or go through a red light, you could only do it after you are taking into account the safety of all persons, including vehicular traffic, fair?**

Answer: **Fair.**

Question: **And can you and I agree that in order to do that, before you can go through a red light, that you've got to make sure that there aren't cars coming through on a green?**

Answer: **Correct.** (***Id.*** at 150).

9. She testified:

Question: **You would agree that, given those duties and obligations that you just testified to, that means you have to keep an efficient look out, fair?**

Answer: **Yes.**

Question: **Pretty much a vigilant look out, right?**

Answer: **Yes.**

Question: **And proper management and control of your vehicle, correct?**

Answer: **Correct.**

Question: **Can you and I agree that going through a red light in a busy intersection in the middle of the day could be particularly dangerous for you and other vehicular traffic?**

Answer: **Yes.**

Question: **South and Douglas where this accident took place - - your accident - - Douglas and South is a busy intersection, isn't it?**

Answer: **Correct.**

Question: **Time of day was noon, right?**

Answer: **Correct.**

Question: ***Would you agree, Officer Matsen, that in order to properly exercise your duty of care that day, that in taking into account the safety of other vehicles on the road that day, that you would have to operate your vehicle at a speed which allows you the time to make observations as to what the vehicular traffic actually is that you're encountering?***

Answer: ***Yes.*** (***Id.*** at 151-53).

10. She testified:

Question: **Did you stop at the red light before you proceeded?**

Answer: **No.**

Question: **Did you see the Legue vehicle heading down South Street before you proceeded through the intersection?**

Answer: **No.**

Question: **Regardless of what you were responding to, you still have to follow those rules and procedures, fair?**

Answer: **Fair.**

Question: **Be it a personal injury, be it a homicide, be it whatever, you've still got to follow the rules, right?**

Answer: **Yes.** (***Id.*** at 155-156).

11. She testified:

Question: **That tape clearly shows that you did not stop at the red light, right?**

Answer: **I did not stop.**

Question: **And just so the record is clear, Officer Matsen. There was absolutely nothing in the world preventing you from bringing your car to a complete stop to check that intersection first, fair?**

Answer: **Fair.**

...

Question: **You're aware that our accident reconstruction expert says that you were going at least 27? You're aware of that, fair?**

Answer: **Yes.**

Question: **Could you have been going at least 27 miles an hour?**

Answer: **It's possible.** (***Id.*** at 167-69).

12. She testified:

Question: **Officer Matsen, you just testified in front of this jury that prior to this motor vehicle accident you knew that there was a risk that people might ignore your siren and your light, fair?**

Answer: **Yes.**

Question: **So on the day when you flipped on your siren and your light and you chose to run through that red light, you knew that there was a risk that people might ignore that, fair?**

Answer: **Yes.** (***Id.*** at 184).

...

Question: **Did you see Mrs. Legue before you went through the intersection?**

Answer: **I did not.**

Question: **Do you have any explanation for why not?**

Answer: **No.** (***Id.*** at 185).

13. Adam Wise, Legue's accident reconstruction expert, testified Officer Matsen's speed when she entered the intersection was 27 miles per hour. The defense, though they retained a like expert, did not present any expert at trial to refute Wise. (R. 51-55 at Pages 16-17).

14. Wise established that in order to convert miles per hour to feet per second one multiplies miles per hour by 1.46.

15. Officer Matsen activated her video camera so we have a video of her entire route before impact. When the tape of the accident was shown, it demonstrated a white vehicle which, approximately 2.5 seconds before impact, turned right off of South onto Douglas and by looking at the movement of the vehicle, a reasonable inference is that, though it pulled over to the side, it was more of a "panic" pulling over based on the fact that the operator did not see nor hear the Matsen vehicle and it was but 2.5 seconds from impact keeping in mind that Matsen had moved over into the southbound lane of traffic. (***Id.*** at 190; A copy of the video showing approximately 15 seconds before impact can be found at P-App. 112).

STANDARD OF REVIEW/APPLICABLE LAW

I. LEGAL STANDARD OF REVIEW.

A. The Motion for Judgment Notwithstanding the Verdict.

The party against whom the Verdict has been rendered may move for judgment notwithstanding the verdict. See Wis. Stats. § 805.14(5)(b). The purpose of this motion, known at common law as a motion for judgment non obstante veredicto (JNOV), is to avoid a new trial and secure a final judgment in favor of the movant. See ***State vs. Escobedo***, 44 Wis.2d 85, 90-91, 170 N.W.2d 709 (1969). A JNOV motion is not the proper tool to use when a party believes that the evidence is insufficient to support the verdict. A party wishing to challenge the sufficiency of the evidence should either move to change the jury's answers under Wis. Stat. § 805.14(5)(c) or renew a previously made motion for a directed verdict under Wis. Stat. § 805.14(5)(d).

The party moving for JNOV must establish that, for reasons evident in the record that bear upon matters not included in the verdict, the moving party should have judgment. Because the court will assume that all the findings in the verdict are true when considering the motion for JNOV, the moving party must present grounds that the jury never considered. See ***Kolpin v. Pioneer Power and Light Company***, 162 Wis.2d 1, 28, 469 N.W.2d 595 (1991).

A motion for JNOV should be granted if the jury verdict is proper but other reasons evident in the record entitle the moving party to judgment. The court will assume that the facts as found by the jury are true and then determine, as a matter of law, whether those facts are sufficient to permit recovery. See ***Logterman v. Dawson***, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Wis. App. 1994**).** When deciding a motion for JNOV, a court will

not weigh the evidence or assess the credibility of witnesses. See ***Herro v. DNR***, 67 Wis. 2d 407, 413-14, 227 N.W. 2d 456 (1975). Instead, the court will examine the record for other reasons that entitle the moving party to judgment.

B. Motion to Change Answer.

A party may move the court to change an answer in the verdict on the ground that the evidence is insufficient to sustain the answer. See Wis. Stat. § 805.14(5)(c). A motion to change an answer in the jury's verdict challenges the sufficiency of evidence to support the verdict. The motion, therefore, must be considered in the context of the jury instructions. In deciding a motion to change an answer on the verdict, the trial court must view the evidence presented at trial in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. See ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Wis. App. 1996)**.** When more than one reasonable inference can be drawn from the evidence, the court must accept the inference drawn by the jury. See ***Meurer v. ITT General Controls***, 90 Wis. 2d 438, 450-51, 280 N.W. 2d 156 (1979).

C. Renewed Motion for a Directed Verdict or Dismissal.

If a party has previously moved for a directed verdict or dismissal and the trial court has not ruled on the motion pending return of the verdict, the party may renew the motion after the verdict has been rendered. See Wis. Stat. § 805.14(5)(d). A renewed motion for a directed verdict tests the sufficiency of the evidence. A party renews a previous motion for directed verdict or dismissal after the verdict is rendered, the court will use the same standard it would have used to decide the motion before the verdict was

rendered; the court will deny the motion if it finds any credible evidence that could support a verdict to the contrary. See ***Page v. American Family Mutual Insurance Company***, 42 Wis. 2d 671, 681-82, 168 N.W.2d 65 (1969). If any credible evidence exists that, under any reasonable view, fairly admits of an inference that supports a jury's finding, the court may not overturn a jury's finding. ***Id.*** The court must view the evidence in the light most favorable to the party against whom the verdict is sought. See ***Thompson v. Howe***, 77 Wis. 2d 441, 448, 253 N.W. 2d 59 (1977). The court should not direct a verdict if the evidence is within the province of the jury; for example, the court must allow the jury to accept one version of a witness' testimony and reject a contradictory version, even if the same witness offered both versions. See ***Graves v. Travelers Insurance Company***, 66 Wis. 2d 124, 136-37, 224 N.W. 2d 398 (1974).

II. LAW REGARDING OPERATION OF EMERGENCY VEHICLES

This Court is very much aware of Wis. Stat. § 893.80(4) which, in general, affords immunity to municipal employees for discretionary acts performed within the scope of their employment. There is not however, immunity for the performance of ministerial duties.

The issue of the application of Wis. Stat. § 893.80(4) to the emergency operation of police vehicles and/or high speed pursuit was addressed by this Court in ***Estate of Cavanaugh by Cavanaugh vs. Andrade***, 202 Wis. 2d 290, 550 N.W. 2d 103 (1996). This Court in ***Estate of Cavanaugh, Id.*** determined that Wis. Stat. § 346.03(6) imposed a ministerial duty on the city to provide written guidelines for its officers that considers certain factors. ***Id.*** at 301-302. That is not the issue in this case. It is undisputed that the City of Racine fulfilled that obligation with the creation of a written policy. The written

policy in effect at the time of this accident was introduced into evidence, with no objection, as Exhibit No. 3. Officer Matsen testified at trial as follows:

Question: **Could you identify for the record what Exhibit No. 3 is?**

Answer: **Emergency operation of Department Vehicle No. 812.**

Question: **And this was the policy and procedure in effect at the time of your accident, correct?**

Answer: **Correct.**

Question: **And this would have - - this is a policy and procedure that you would have seen prior to the motor vehicle accident in question?**

Answer: **Correct.**

Question: **And the one that you are obligated to operate under, fair?**

Answer: **Yes.**

Mr. Knurr: **Offer into evidence Exhibit No. 3, your Honor.**

The Court: **Any objection?**

Mr. Devine: **No.**

The Court: **Received.**

Question: **And would this be the policy and procedure that you were, in fact, following on July 27, 2009, as you responded to the Douglas and Shoreland accident?**

Answer: **Yes.** (R. 87-255 at Page 129)

The crux of ***Estate of Cavanaugh, Id.*** as applied to this case is this Court's interpretation of how it is to be applied (immunity) in light of Wis. Stat. § 346.03(5) which stated then (and states now):

(5) **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.**

This Court started by holding in the absence of an expression of clear legislative intent to abolish discretionary act immunity in the context of Wis. Stat. § 346.03(5). That Section does not preclude the defense of immunity for the discretionary act of initiating or continuing pursuit. ***Id.*** at 317.

This Court specifically explained:

> **Our holding that Section 893.80(4) provides immunity for an officer's decision to initiate or continue pursuit does not mean, as suggested by the dissent to this Section, that officers are afforded blanket immunity from all liability by virtue of their involvement in a pursuit. We agree with the Court of Appeals that an officer may be negligent pursuant to Section 346.03(5) for failing to physically operate his or her vehicle with due regard for the safety of others.**
>
> **This distinction between an officer's discretionary decision to initiate and continue a pursuit and the physical operation of the vehicle has been recognized by other jurisdictions interpreting language similar to Section 346.03(5).**

Id. at 317

This Court continued at page 319:

> **In sum, despite the general discretionary act of immunity set forth in Section 893.80(4), a negligence action may be sustained against an officer involved in a high speed pursuit on the grounds that he or she breached the duty to operate the vehicle with "due regard under the circumstances" under Section**

> **346.03(5). However, the negligent operation under 346.03(5) does not include the discretionary decisions to initiate or continue a pursuit; such discretionary decisions continue to be afforded immunity under Section 893.80(4).**

It was in the framework of that Statute and ***Estate of Cavanaugh, Id.*** that Wisconsin JI-Civil 1031 was created which is entitled: "Conditional Privilege of Authorized Emergency Vehicle Operator." Relevant to this case, Wisconsin JI-Civil 1031 would have informed the jury that Officer Matsen was entitled to exercise the privilege if they found the following relevant factors:

1. At the time of the accident, Officer Matsen was operating an authorized emergency vehicle and was responding to an emergency call.
2. At the time of the accident, Officer Matsen was giving visual and audio signals by means of operating emergency lights and siren.
3. Officer Matsen operated the authorized emergency vehicle with due care under the circumstances for the safety of all persons.

The defense suggested that the case of ***Brown v. Acuity***, 342 Wis.2d 236, 815 N.W.2d 719 (2012) somehow changed "the ball game" and expanded discretionary immunity. Legue argued it changed nothing and Legue asserts that was confirmed by this Court's decision reversing the Court of Appeals in ***Brown v. Acuity***, 348 Wis. 2d 603, 833 N.W. 2d 96 (2013).

There never was nor has there been an argument that Officer Matsen did not have the right to proceed through a red light. Counsel for Officer Matsen repeatedly made statements in closing argument that Legue was arguing that "Officer Matsen had to stop at each and every red light." That argument was countered by a specific statement by counsel for Legue that never once did we argue that Officer Matsen had to stop at every

traffic light or even the light in question. Legue's only argument was that, once the decision was made to proceed through a red light, then and in that event, she had the duty and obligation to exercise due regard for the safety of others; the very same duties that Officer Matsen conceded she was obligated to exercise in order to fulfill the duty to exercise due regard.

ARGUMENT

I. THERE WAS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S DETERMINATION THAT OFFICER MATSEN DID NOT EXERCISE DUE REGARD UNDER THE CIRCUMSTANCES AND AS SUCH THE TRIAL COURT ERRED IN OVERTURNING THE VERDICT AND APPLYING THE CONCEPT OF DISCRETIONARY IMMUNITY.

This Court can see from examining the Trial Court's Decision on the motions after verdict that Judge Constantine is simply looking at the facts of the case and making a determination that everything she did with regard to the accident that day was discretionary in nature and therefore immune. At the end of the Decision the Trial Court makes the following statement:

> **The court does not see any actual negligence on the part of Officer Matsen, even after she entered the intersection.**

The jury disagreed. The jury was specifically given a due regard jury instruction and found that Officer Matsen did not exercise due regard. Now, the question that this Court must examine is:

> In what respect did Officer Matsen fail to exercise due regard for the safety of vehicular traffic?

Well, that very question is why this case is so important to plaintiffs injured in motor vehicle accidents with emergency vehicles. The facts, concessions and admissions by

Officer Matsen regarding what she recognized her duty and obligation to be in order to fulfill the "due regard" standard seem to be the very same facts and circumstances that the Trial Court determined were wholly discretionary and afforded Officer Matsen immunity.

We go back to the proposition that a City of Racine policy to which Officer Matsen conceded she was bound specifically states that the operator of an emergency vehicle shall ensure that he or she has due regard for the safety of all occupants of his or her vehicle as well as the safety of pedestrians and other occupants of other vehicles. To do that, it continued that you have to take into account geographic area, population density, time of day and week, vehicular and pedestrian traffic, road and weather conditions, and the officer's familiarity with the area of pursuit. The most important concession by Officer Matsen was the following:

Question:	**Would you agree Officer Matsen, that in order to properly exercise your duty of care that day, that in taking into account the safety of other vehicles on the road that day, that you would have to operate your vehicle at a speed which allows you the time to make observations as to what the vehicular traffic is that you are encountering?**
Answer:	**Yes.**

Legue reads ***Estate of Cavanaugh, Id.*** as standing for the proposition that in order to fulfill this due regard under the circumstances standard you essentially do have to look at the ordinary common duties of care attributable to all operators of motor vehicles (i.e. speed, lookout, management and control, and the like). Legue demonstrated multiple instances of "negligence" on the part of Officer Matsen. We must remember that the defense argued that Legue was negligent for not hearing and/or not seeing Officer

Matsen's vehicle. The flip side of that is Officer Matsen conceded she never saw the Legue vehicle. However, what she did see, after she pulled her car into the northbound lane, was a white vehicle that entered the intersection, made a right hand turn despite only being 2.5 seconds from impact and that this white vehicle appeared to react abruptly to the presence of the Matsen vehicle when it pulled to the curb. In other words, in taking the evidence in the light most favorable to Legue, as argued to the jury, it would appear that this person had not seen or heard Officer Matsen's vehicle either which should put Officer Matsen on notice of a potential problem.

Legue cannot think of any decision in the world with regard to the operation of a motor vehicle that couldn't in some form or fashion be characterized as "discretionary." The analysis of the Trial Court really begs the question of: If this is not a case of failure to exercise due regard for the safety, then other than under an absurd set of facts, when can the operator of an emergency vehicle ***ever*** be found liable?

At the end of the day, what the jury heard and obviously ultimately determined was the basis for its finding that Officer Matsen failed to exercise "due regard" is the following:

1. She was responding to a motor vehicle accident where injuries were unknown and was traveling through an area she was familiar with; and was familiar with the traffic patterns at that time of day;
2. She was traveling through a very busy intersection at noon on a work day and had to move over into the southbound lane to avoid stopped northbound traffic;
3. The intersection in question is essentially a blind intersection until only

moments before impact which would dictate the exercise of due care;

4. She was only a block away from the reported accident;

5. Officer Matsen conceded she had to maintain a vigilant lookout and exercise that lookout at a speed which allows her to do so efficiently;

6. She pulled into the southbound lane of traffic and before impact saw another vehicle turning into the intersection and into her path despite her lights and siren which should have put her on notice of potential problems and at a time where she still had the opportunity to substantially slow if not stop her vehicle;

7. She proceeded through the intersection at 27 miles per hour; a speed too fast under the circumstances to exercise her duty of look out; and

8. She never saw the Legue vehicle before impact indicative of improper lookout.

All of those facts must be examined within the context of the previously cited concessions and admissions of Officer Matsen as to what she had to do to properly exercise her duty and obligation of due regard. Taking all those factors into consideration and examining them in the light most favorable to Legue as the Trial Court and this Court must, that all substantiates the jury's verdict. Her conduct that day in the actual operation of her squad car was a failure of lookout, a failure of speed, and a failure of management and control. The manner and fashion in which she entered the intersection prevented her from exercising due regard for the safety of Legue as to all three of those negligence factors.

II. THE *ESTATE OF CAVANAUGH* ALREADY ADDRESSES THE ISSUE AT HAND AND PUBLIC POLICY ISSUES HAVE ALREADY BEEN RESOLVED.

The public policy issue regarding operation of emergency vehicles has already been addressed both by the Wisconsin Supreme Court in the ***Estate of Cavanaugh, Id.*** and by the language of Wis. Stat. § 346.03(5) which requires "due regard." This Court already took a long hard look at the interplay between discretionary immunity and Wis. Stat. § 346.03(5) and, in doing so, analyzed many of the public policy factors addressed in cases from other jurisdictions. After that review, this Court determined there could be liability for the negligent operation of an emergency vehicle. Legue does not even believe a public policy analysis is appropriate in this case.

Lastly, Legue is unaware of any empirical data that would support an argument that finding liability in this case (or others) would have some chilling effect on emergency responders. Though not part of this record, neither the participants in this case nor this Court can ignore every day observations made in life. If Wisconsin JI –Civil 190 tells jurors to make their decision in light of reason and common sense, then so too should we and we cannot ignore what we observe many days of our lives in the city. Of course now the undersigned watches what every emergency responder does in the city (Racine, Milwaukee, and Madison) and not one has ever blown through a red at 27 mph. Though Legue has never argued Matsen was required to stop, every day observation reveals they almost all do or at minimum, reduce their speed to almost nothing. That is reality and there will be nothing about this Court's decision that will in any way change that reality.

If this Court chooses to do a public policy analysis, this court is obviously very familiar with the six public policy factors that are to be considered. When each is analyzed, Legue contends that the only conclusion is that liability must stand.

The first factor to be considered is whether or not the injury is too remote from the negligence. No, this is a car accident arising from the negligent operation of a motor vehicle. The negligence was primarily failure of lookout (failed to even see Legue) and speed (27 mph through a red light at noon at a busy intersection at a blind intersection).

Second, is the injury out of proportion to the tortfeasor's culpability? No, again, applying the same analysis as in factor one, this is what happens when you negligently operate your motor vehicle.

Third, in retrospect does it appear too highly extraordinary that the negligence brought about the harm? No, again, this is what happens when you operate your motor vehicle in this fashion.

Fourth, allowing a recovery would place too unreasonable a burden upon the tortfeasor. Officer Matsen conceded that in order for her to fulfill her duty to operate with due care, she must operate at a speed which allows her the opportunity to assess whether traffic is entering on a green light. The statute already imposes the burden to operate with due care, as does Racine's written policy. This Court has already stated she cannot negligently operate her vehicle and yet escape liability. Protecting the citizenry during emergency responses from negligent operation of an emergency vehicle does not place too high a burden on emergency responders.

Fifth, would allowing this claim open up our system to fraudulent claims? No, not even close on this one.

Sixth, would allowing recovery result in a situation where there is no just nor sensible stopping point? Absolutely not in the sense that this Court has already recognized that immunity deprives wrongfully injured citizens of this State of a right and just recovery. Though it does involve the operation of an emergency vehicle, all this does is reaffirm that the operator still must employ reasonable methods of operation including, lookout, management and control, and speed.

CONCLUSION

This is a case that went to verdict before a twelve person Racine County jury. The jury heard the facts, was properly instructed and rendered a verdict finding that Officer Matsen did not exercise due regard for the safety of Legue and found her fifty percent (50%) at fault.

When this Court examines the evidence in the light most favorable to Eileen W. Legue, that evidence clearly supports the jury's verdict. Evidence supports a finding that Officer Matsen's actual physical operation of the vehicle that day with regard to speed, look out, and management and control is negligent constituted a failure to exercise due regard.

Furthermore, there is nothing about public policy that should concern this Court that somehow its decision is going to have an adverse impact on emergency responders operation of their vehicles. In fact, public policy supports Legue. They are already charged by statute and in most cases by written policy with the duty to exercise due regard and we see them doing that every day in the city. Common knowledge and experience and observations tell all of us that in cities at noon at busy intersections you

don't see emergency responders going through red lights at 27 miles an hour. Officer Matsen was not responding to a bank robbery, or an attempted murder, or a case of absolute known extreme distress; she was responding to a motor vehicle accident with unknown injuries and was but a block away. There's absolutely no evidence in the record that after that initial dispatch informing her of the accident that it actually was an accident with severe injuries, that an ambulance was needed, or anything of the like. As far as Legue is concerned, this Court in the ***Estate of Cavanaugh, Id.*** already addressed all of the public policy factors when they adopted the standard in the first instance. Lastly, discretionary immunity, in Legue's opinion, should be abolished across the board as it really represents the minority position amongst the states.

The Court of Appeals for District II in its certification poses the following question: 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? No, it is part and parcel of the actual operation of the motor vehicle and decisions made to stop, or not stop, or proceed and at what speed are part and parcel of the duty and obligation to exercise due care in the actual operation of the emergency vehicle. To rule otherwise, in Legue's opinion, eliminates the ability of any person injured by the operator of an emergency vehicle (who otherwise complies with the stated requirements) to recover for injuries sustained. Put another way and as pointed out by District II in its certification, if this Court accepts the arguments of Matsen, Legue, who has a meritorious claim as dictated by a jury verdict, "…..would be denied compensation simply because she had the misfortune of being injured by a public official."

Legue contends that the Trial Court erred when it took the verdict away from her on motions after verdict. Legue respectfully requests that this Court reverse the Trial Court and reinstate the verdict finding liability on the part of Officer Matsen.

Respectfully submitted this 16th day of December, 2013.

By:_____

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CERTIFICATION PURSUANT TO SECTIONS 809.19(8)(d) AND 809.63, *STATS*.

Pursuant to sections 809.19(8)(d) and 809.63, *Stats.*, I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with using the following font: Proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points, and maximum of 60 characters per full line of body text. The length of this brief is 7,969 words.

Signed:_____

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CERTIFICATION PURSUANT TO
SECTION 809.19(12) AND 809.63, *STATS*.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12) and 809.63, *Stats.*

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed:_____

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STATE OF WISCONSIN
SUPREME COURT

EILEEN W. LEGUE,

Plaintiff-Appellant,

And

DEPARTMENT OF HEALTH AND
HUMAN SERVICES and
FARMERS INSURANCE EXCHANGE,

Involuntary-Plaintiffs,

-v-

CITY OF RACINE and
AMY L. MATSEN,

Defendants-Respondents,

Appeal From The Racine County Circuit Court
The Honorable Charles Constantine, Presiding
And Upon Certification to the Supreme Court
Circuit Court Case Number 11-CV-02090
Court of Appeals Case No. 2012AP2499

BRIEF OF DEFENDANTS-RESPONDENTS, CITY OF RACINE AND AMY L. MATSEN

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STATEMENT OF ISSUES

ISSUE NO. 1:

Is the officer immune from liability for the decision to operate her emergency vehicle through a red light?

ANSWERED BY THE COURT: YES.

ISSUE NO. 2

Is the officer entitled to a directed verdict on the issues of negligence and cause?

ANSWERED BY THE COURT: YES.

STATEMENT OF THE CASE

This appeal arises from a July 27, 2009, motor vehicle accident involving a pickup truck operated by Plaintiff-Appellant, Eileen Legue, and a City of Racine Police Department squad car operated by Defendant-Respondent, Officer Amy Matsen, at the intersection of Douglas Avenue and South Street in Racine.[1] (R. 52:1.) Ms. Legue filed this action, alleging that Officer Matsen was negligent, and seeking damages as a result of injuries sustained in the accident. (R. 2.) The matter was tried to a jury on July 17 and July 18, 2012. (R. 87–88.) The jury rendered a verdict finding both Ms. Legue and Officer Matsen 50% negligent and awarding damages. (R. 22.) The trial court granted Officer Matsen's motions after verdict and Judgment was entered dismissing Ms. Legue's Complaint. (R. 64, 82.)

The evidence at trial demonstrated that the facts surrounding the subject accident were relatively straightforward, particularly in light of the fact that the collision was recorded by a dash-mounted camera in the squad car. Prior to the subject accident, Officer Matsen was on duty and was dispatched to a motor vehicle accident, at the intersection of Douglas and Shoreland, in the City of Racine. (R. 87:169.) Because it was unknown whether that accident involved injuries, Officer Matsen engaged a full emergency response, which meant that she activated her emergency lights and siren. (*Id.* at 170–71.) Officer Matsen traveled

[1] The issues present in this appeal are equally applicable to Officer Matsen and the City of Racine. For the sake of simplicity, the Brief discusses the respondents in terms of Officer Matsen.

northbound on Douglas Avenue to respond to the accident. (*Id.* at 153.) As Officer Matsen approached the intersection with South Street, she increased the tempo of her siren and also activated her bullhorn. (*Id.* at 173.) She observed vehicles in the vicinity of the intersection heed her emergency lights and siren by stopping their vehicles. (*Id.* at 173–76.) Officer Matsen testified that she observed nothing to suggest that people in the vicinity of the intersection did not hear her siren; that someone was going to ignore the siren; or any other specific danger associated with entering the intersection on the red light. (*Id.* at 177.) Due to traffic stopped in her lane of travel, Officer Matsen made her way into the southbound lane of Douglas Avenue approximately four seconds before impact. (*Id.* at 174.) She applied her brakes and slowed the vehicle prior to entering the intersection. (*Id.* at 178.) While there was a dispute regarding the precise speed Officer Matsen was traveling at the time she entered the intersection, an expert retained by Ms. Legue expressed the opinion that Officer Matsen's speed was, at most, 27 miles per hour (mph), which was less than the 30 mph speed limit. (R. 51:16.)

Ms. Legue was heading eastbound on South Street, traveling at the 30 mph speed limit, in the lane closest to the curb. (R. 87:197–98, 214.) At no time prior to impact, did she hear Officer Matsen's siren or see the squad car. (*Id.* at 198–99.) She did not apply the brake or slow her vehicle at any point prior to entering the intersection with Douglas Avenue. (*Id.* at 212.) She offered the following testimony relative to the timing of the impact vis-à-vis entering the intersection:

Q. When you entered the intersection, it was an instant between entering the intersection and colliding with the squad car, right?
A. Yes.
Q. That time frame would have been some portion of a second, right?
A. I believe so.
Q. Your vehicle struck the passenger side of the squad; is that correct?
A. Yes.
Q. Approximately in the area of the driver's door.
A. Yes.

(*Id.* at 214–15.)

Officer Matsen filed motions after verdict, including in pertinent part: a renewed motion for a directed verdict relative to the cause issue and motions for judgment notwithstanding the verdict pursuant to § 805.14(5)(b), Wis. Stats., on the basis that Officer Matsen was immune from the consequences of her discretionary decision to enter the intersection and on public policy grounds. (R. 60.) In a well-reasoned decision, the trial court determined that Officer Matsen's decision to enter the subject intersection against the red light at 27 mph constituted a discretionary decision subject to immunity. (R. 64:10.) Additionally, the trial court determined that, while Officer Matsen had the duty to exercise reasonable care once she made the decision to enter the intersection,

> [T]here was no time to exercise that duty because her vehicle was struck immediately upon entry into the intersection. Thus, to the extent that there is an argument that Officer Matsen was negligent, similar to *Estate of Cavanaugh v. Andrade,* 202 Wis. 2d 290, 550 N.W.2d 103 (1996), that negligence would not have been causal.

(R. 64:9–10.) Finally, the trial court determined that there were strong public policy reasons for overturning the jury's verdict. Specifically, the court noted:

> Emergency situations are designed to protect members of the public in need. The members of the public can be individuals who are victims of burglaries, car accidents, or officers needing aid. Some emergencies may be greater than others, but to the extent that police officers have to quantify how fast they are going as

> they approach an intersection could lead to officers not responding in a timely fashion to emergencies. The dangers articulated by Justice Geske in *Cavanaugh* could very well come true.

(R. 64:10.) Judgment dismissing the Complaint was subsequently entered and this appeal followed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED JUDGMENT NOTWITHSTANDING THE VERDICT BASED ON DISCRETIONARY IMMUNITY GROUNDS.

A. The Standard Of Review.

A motion for judgment notwithstanding the verdict does not challenge the sufficiency of the evidence to support the verdict. *Danner v. Auto-Owners Ins.*, 2001 WI 90, ¶ 41, 245 Wis. 2d 49, 629 N.W.2d 159 (citing *Mgmt. Comp. Serv. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996)). Instead, the motion is properly granted where, "for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment." *Id.* While that determination is a matter of law which is reviewed *de novo*, this Court benefits from the trial court's analysis. *Id.*

B. Officer Matsen Is Immune For Her Discretionary Decision To Enter The Intersection Against The Red Light And Has No Liability Because The Accident Happened Immediately Upon Her Entry Into The Intersection.

1. All The Factors Argued To Be "Due Regard" Under The Circumstance Are The Same Factors Considered By The Officer To Determine If She Will Enter The Intersection.

In *Estate of Cavanaugh v. Andrade,* 202 Wis. 2d 290, 550 N.W.2d 103 (1996), the officer's vehicle was not involved in the accident. The *Cavanaugh* Court immunized the officer's decision to pursue a vehicle but permitted the question of operating of the vehicle posed under § 346.03(5), Wis. Stats. However, the Court found that the issue of speed was covered by the immunity the officer had for the discretionary decision to continue the high speed chase. *Id.* at 320. Even if the officer was negligent in choosing to speed, he could not be liable because of the effect of § 893.80(4), Wis. Stats. *Id.* at 316.

Legue's only suggestion of negligence is found at page 23 of her brief.

> "7. [Officer Matsen] proceeded through the intersection at 27 miles per hour; a speed too fast under the circumstances to exercise her duty of lookout; and
> 8. She never saw the Legue vehicle before impact indicative of improper lookout."

(Appellant's Br. 23.) Officer Matsen she did make an observation of the intersection, and adjusted her speed and slowed before she entered the intersection. She clearly exercised her discretion to determine that she could proceed into the intersection at 27 mph. There was nothing about her operation of the vehicle after she proceeded into the intersection that is at issue. The focus of Legue's argument is upon actions and decisions made by Officer Matsen before

she entered the intersection. (*See* Appellant's Br. 20–23.) Officer Matsen's vehicle was struck at the moment it entered the intersection. All of the decision-making before entering the intersection involves the discretion to enter the intersection, which should be immune. If Legue's position is accepted, the officer's immunity is illusionary because, under the facts of this case, the officer did not have an opportunity to operate the vehicle after her decision to enter the intersection.

2. Section 346.03(5), Wis. Stats., Does Not Create A Ministerial Duty That Eliminates The Effect Of § 893.80(4), Wis. Stats., And The Specific Requirement Of § 346.03(2), Wis. Stats.

Section 346.03(5), Wis. Stats., states that the right to avoid the rules of the road does not relieve the operator of

> "... a duty to drive 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, § 346.03(2), Wis. Stats., requires that the emergency vehicle operator slow down as may be necessary for safe operation. A ministerial duty involves 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 that nothing remains for judgment or discretion." *Kimps v. Hill,* 200 Wis. 2d 1, 11, 546 N.W.2d 151 (1996). The only specific task contained in the statutes is the responsibility to slow down found in § 346.03(2), Wis. Stats. Here, Legue is arguing that in addition to slowing, the officer had to ascertain that all other

drivers were obeying their obligation to yield the right of way. Almost every urban intersection has blind spots. If an emergency vehicle operator must proceed through a red light assuming that there is some unseen driver ignoring the obligation to yield, then every emergency vehicle operator will need to stop before going into an intersection against a red light. This obligation is significantly greater than the slowing down required in § 346.03(2)(b), Wis. Stats. A public policy of requiring stops, rather than the legislative choice of slowing, will ensure longer response times for police emergency vehicles. It could be the trade-off that subjects victims to greater injury and offer offenders to more time to flee.

3. The City of Racine Police Department Policy Does Not Create a Ministerial Duty.

Section 893.80(4), Wis. Stats., states that no suit may be brought against any municipality or its officers or employees for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." The Court has long interpreted this statute to afford immunity from liability upon governmental actors engaged in discretionary acts. *See Estate of Cavanaugh v. Andrade*, 202 Wis. 2d 290, 299, 315, 550 N.W.2d 103 (1996). There are four exceptions to this immunity: "1) the performance of ministerial duties imposed by law; 2) known and compelling dangers that give rise to ministerial duties on the part of public officers or employees; 3) acts involving medical discretion; and 4) acts that are malicious, willful, and intentional." *Brown v. Acuity*, 2013 WI 60, ¶42, 348 Wis.

2d 603, 833 N.W.2d 96 (quoting *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶24, 253 Wis. 2d 323, 646 N.W.2d 314).

The Court recently reiterated the law on the ministerial duty exception to governmental immunity in the *Brown* case. 2013 WI 60. "A public officer's duty is ministerial only when it is 'absolute, certain and imperative,' involving the 'performance of a specific task' that the law imposes and defines the 'time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.'" *Id.* at ¶43 (citing *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)). "The duty imposed by statute, regulation, or procedure must conform to all elements of a ministerial duty." *Brown*, 2013 WI at ¶44 (internal citations omitted).

Throughout Legue's brief, she refers to City of Racine Police Department Policy 812 (R. 33), which addresses emergency operation of a department vehicle when "responding to an emergency call or actively involved in a pursuit." (R. 33-1.) This policy is consistent with the contents of § 346.03, Wis. Stats., including requirements for officers to engage lights and sirens and operate with due regard for the safety of others. (*Id.*) The policy further adds a list of circumstances for officers to "keep in mind." (*Id.*) Although not explicitly, Legue seems to argue that this policy in combination with the language of § 346.03, Wis. Stats., imposed a ministerial duty on Officer Matsen, while operating her vehicle and responding to an emergency call, to "maintain a vigilant lookout and exercise that lookout at a speed which allows her to do so efficiently." (*Id.* at 23.) Essentially, Legue

makes the argument that Officer Matsen violated a ministerial duty to stop at the red light.

Officer Matsen approached the intersection with her lights and siren activated. She also slowed to a speed below the limit before proceeding into the intersection. A building blocked Officer Matsen's view of traffic from the direction Legue was travelling and Officer Matsen did not see Legue's vehicle before impact. However, using her knowledge and experience as a police officer, Matsen made the decision to enter the intersection against the red light. To hold that Officer Matsen failed to abide by a ministerial duty to "maintain a vigilant lookout and exercise that lookout at a speed which allows her to do so efficiently" (Appellant's Br. 23), when her only other option would have been to stop, would result in absurdity. Even Legue seems to acknowledge that the argument is counterintuitive by stating she "cannot think of any decision in the world of operation of a motor vehicle that couldn't in some form or fashion be characterized as 'discretionary.'" (Appellant's Br. 22.)

It is Officer Matsen's contention that her decision to proceed through the red light, after slowing down and with her lights and siren engaged, was a protected discretionary act, akin to the decision to engage and persist in pursuit in the *Cavanaugh* case. *See Estate of Cavanaugh*, 202 Wis. 2d at 317 ("In the absence of an expression of clear legislative intent to abolish discretionary act immunity in the context of § 346.03, Wis. Stats., we conclude that § 346.03(5), Wis. Stats., does not preclude the defense of immunity for the discretionary acts of

initiating or continuing a high-speed pursuit."). Holding that Officer Matsen's duty to stop at the red light was so "absolute, certain and imperative" that "nothing remain[ed] for judgment or discretion" would defeat the purpose of § 346.03, Wis. Stats., and result in ludicrous outcomes. *Brown*, 2013 WI at ¶43 (internal citations omitted).

C. The Only Time That An Officer Is Responsible For The "Consequences" Of His Or Her Actions Under § 346.03(5), Wis. Stats., Is When The Officer Was Reckless.

"Statutory interpretation requires [the Court] to determine the statute's meaning, which is assumed to be expressed in the language chosen by the legislature." *Bostco, LLC v. MMSD*, 2013 WI 78, ¶45, 350 Wis. 2d 554, 835 N.W.2d 160 (citations omitted). Section 346.03(5), Wis. Stats., read in its entirety, suggests a duty of due regard for an emergency vehicle operator, but goes on to subject the operator to "consequences" only for reckless behavior. *Estate of Cavanaugh* defined due regard as a negligence standard, which applies to the operation of the vehicle. *Estate of Cavanaugh v. Andrade,* 202 Wis. 2d 290, 317, 550 N.W.2d 103 (1996) ("[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."). This Court has already decided that the evaluation of the interests of officer immunity is a matter of statutory interpretation. *Id.* However, the *Cavanaugh* Court failed to weigh the second half of § 346.03(5), Wis. Stats., which disallows protection of "such operator from the consequences of his or her reckless disregard for the safety of others." *See Estate of* Cavanaugh, 202 Wis. 2d

at 315–19. In evaluating the entire statute, the language of § 346.03(5), Wis. Stats., only imposes liability for reckless behavior, not mere negligence. The statute suggests there is a duty of due regard but does not impose any liability for consequences for its violation unless reaching the level of recklessness.

Other courts have criticized this omission in interpretation[2] and have alternatively found that operators of emergency vehicles are only liable for reckless conduct. Officer Matsen argues that the recklessness standard better balances the need to protect the public with the need to allow emergency vehicle operators to responsibly perform their jobs without fear of personal liability.[3] Moving to a recklessness standard would also avoid "judicial second-guessing of many split-second decisions that are made in the field under highly pressured conditions," similar to Officer Matsen's decision here. *Saarinen v. Kerr*, 84 N.Y.2d 494, 502, 644 N.E.2d 988 (1994).

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[2] *See, e.g., City of Amarillo v. Martin*, 971 S.W.2d 426, 430, 41 Tex. Sup. Ct. J. 870 (1998) ("[A]ny construction of this section to impose a standard of care less than recklessness would make the 'reckless disregard' clause ineffectual surplusage."); *Rochon v. Vermont*, 2004 VT 77, ¶11, 177 Vt. 144, 862 A.2d 801 ("[T]he courts determined that the statute permitted negligence claims after examining only the 'due regard' language, without reference to the 'reckless disregard' language.").

[3] *See, e.g., Ayers v. O'Brien*, 13 N.Y.3d 456, 459, 923 N.E.2d 578 (2009) (citing *Saarinen v. Kerr*, 84 N.Y.2d 494, 644 N.E.2d 988 (1994)) ("The reckless disregard standard, which requires that a plaintiff show 'more than a momentary judgment lapse' on the part of the defendant, allows emergency personnel to act swiftly and resolutely while at the same time protecting the public safety."); *Rochon v. Vermont*, 2004 VT 77, ¶13, 177 Vt. 144, 862 A.2d 801("Predicating emergency vehicle operator liability on the higher standard of recklessness strikes the best balance between the competing interests of allowing emergency personnel to respond to an emergency situation without unduly compromising public safety.").

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS NO EVIDENCE OF CAUSE.

A. The Standard Of Review.

The standard of review relative to a motion to change a verdict answer is *de novo*; the Court follows the same rules as the trial court. *Richards v. Mendivil*, 200 Wis. 2d 665, 671–72, 548 N.W.2d 85 (Ct. App. 1996). The Court views the evidence most favorable to the verdict and affirms if it is supported by any credible evidence. *Id.* Here, the trial court correctly determined that there could be no evidence of cause because the collision occurred immediately following Officer Matsen's discretionary decision to enter the intersection on the red light.

B. There Is No Evidence That Any Negligence On The Part Of Officer Matsen Following The Discretionary Decision To Enter The Intersection Was An Equal Cause Of The Accident When Legue Failed To Yield The Right Of Way.

If the Court determines that a negligence claim can be advanced against Officer Matsen, then it should determine that, as a matter of law, when a driver fails to yield the right of way to the officer, he or she is more negligent than the officer for causing the accident. There are competing issues at play in this fact pattern. Legue never yielded the right of way nor saw the emergency vehicle. The officer never saw Legue's vehicle. The jury's determination that each is 50% at fault belies the ultimate comparison between the drivers. The officer had a right to use the roadway and had the right of way. Typically, the person with the right of way is entitled to the use of the roadway until he or she becomes aware that the right of way will not be given. *Sabinasz v. Milwaukee & Surburban Transport*

Co., 71 Wis. 2d 218, 238 N.W.2d 99 (1976). The officer should be entitled to believe that all other users of the roadway will yield the right of way. *See* Wis. Stat. § 346.19. Since the officer is entitled to proceed through the red light per § 346.03(2), Wis. Stats., she should be entitled to the use of the roadway. There are no facts in this case to suggest Officer Matsen knew that Legue would not yield. Under these facts, Legue is more negligent than Officer Matsen.

Furthermore, even if Officer Matsen was not operating with due regard, there is no authority to suggest that she would somehow lose her superior status as the operator of an emergency vehicle under § 346.19, Wis. Stats. Under all circumstances, operating with due regard or not, Officer Matsen had the right of way and Legue had the duty to yield to her. Legue was undeniably the greater cause of the collision.

C. Any Negligence Of Lookout Happened Before Officer Matsen Entered The Intersection.

Legue argues failure to maintain lookout as a cause of the accident. Lookout is the requirement of observation before a driver undertakes an action.

> "To satisfy this duty of lookout, the driver must use ordinary care to make observation from a point where the driver's observation would be effective to avoid the accident."

Wis. JI-Civil 1055, Lookout. The only point of view that would allow Officer Matsen to see the Legue vehicle was in the intersection. If Officer Matsen is entitled to be moving at any speed while going into the intersection, this accident inevitably occurs. Even though Legue suggests that her position require the

emergency vehicle to actually stop before entering the intersection, her lookout argument is not causal unless it is coupled with a requirement of stopping before proceeding. A lookout made by Officer Matsen at any moving speed while entering the intersection would have resulted in the collision.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS NO EVIDENCE OF NEGLIGENCE.

A. The Standard Of Review.

The standard of review relative to a motion to change a verdict answer is *de novo*; the Court follows the same rules as the trial court. *Richards v. Mendivil*, 200 Wis. 2d 665, 671–72, 548 N.W.2d 85 (Ct. App. 1996). The Court views the evidence most favorable to the verdict and affirms if it is supported by any credible evidence. *Id.* Here, the trial court correctly determined that there is insufficient evidence to support a finding of negligence.

B. The Court Should Find That There is No Claim Based On Public Policy.

If the officer is not immune because of her discretionary act, then the Court should consider the issue of negligence. Negligence can be an issue of public policy. *Alvarado v. Sersch.*, 2003 WI 55, ¶16, n.2, 262 Wis. 2d 74, 662 N.W.2d 350. The question posed by these facts is why an officer should have to pay any damages to the driver of a car that ignores the officer's right of way. Generally, public policy looks at 6 factors:

> "(1) The injury is too remote for the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because of recovery would place too unreasonable

> a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point."

Id. at ¶17.

Here, forcing an officer to perform a lookout to see any hidden or unseen vehicles at each intersection, alley, and blind parking lot is a significant responsibility. This obligation is wholly out of proportion to the officer's culpability, unduly burdensome to the officer and has no just stopping point. Courts have acknowledged that police officers are challenged by a difficult set of considerations:

> "(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).

By operating an emergency vehicle, Officer Matsen is acting with a risk of harm. She is heading through a red light. If liability and damages stem from not slowing down enough, how can an officer know how much slowing is acceptable? Here, Officer Matsen was traveling at 27 mph. Is 26 mph acceptable? When is it clear she did slow not down enough? What is the slowest speed that would guarantee no criticism? If an officer is concerned they will have to pay damages for a claim against him or her, even if another driver failed to yield the right of way, the officer may choose not to accept the emergency responder role. They

will feel that they must stop before entering every intersection to avoid criticism. Emergency response times will deteriorate. The officer is already risking injury by acting as an emergency vehicle operator. To make the officer financially responsible for failing to see something that could not be seen is wholly out of proportion to the officer's culpability and significantly affects the performance of their duties.

Additionally, forcing an officer to pay damages when the officer is operating an emergency vehicle proceeding through a red light has no just stopping point. The likelihood of invisible vehicles in an urban intersection is high. Creating liability based on lookout for the unseen danger shifts the burden to the emergency vehicle operator to avoid all the potential dangers that are created by its avoiding the rules of the road. The officer is given the protection of an emergency vehicle operator's right of way, which is then nullified by creating the financial obligation for failing to see something that could not be seen. To protect themselves, every emergency vehicle operator will need to stop before entering an intersection. Additionally, the officer may incur liability, because even though he or she stopped, a vehicle is missed. Legue's proposed lookout obligation opens the door to unlimited financial recovery to drivers that have not yielded the right of way.

Finally, the demand of lookout articulated by Legue is unduly burdensome to the officer. The protections of § 346.19, Wis. Stats., and § 346.03(2)(b), Wis. Stats., evaporate if every move into an intersection creates a question of fact

concerning lookout. Every traffic accident where the plaintiff did not yield creates a financial burden for the officer. If Legue's position is accepted, this officer, who had the right of way, slowed before entering the intersection, and diligently ascertained the condition of traffic when she entered the intersection, would still be responsible for damages to the person that did not yield the right of way. The financial burden placed on officers to anticipate the unseen wrongdoer and avoid them should be unacceptable.

C. Section 346.03(5), Wis. Stats., Does Not Create A Ministerial Duty For Lookout When Proceeding Through A Red Light Because The Requirements Are Not Exact.

In *Brown v. Acuity,* 2013 WI 60, 348 Wis. 2d 603, 833 N.W.2d 96, the Court found that the requirement of the siren and lights was exact enough to be ministerial. *Id.* at ¶ 54. The rules of the road are also exact enough to eliminate discretion. *Id.* at ¶ 49. Legue argues that making a lookout at an intersection is also sufficiently ministerial to avoid immunity. To support this assertion, Legue cites to the very honest testimony of a competent officer about accepting a duty of lookout and adjusting speed to satisfy conditions. Every competent police officer should answer these questions precisely as Officer Matsen did. There is no question that there is a balance that has to be struck between the need for emergency response and the fact that the emergency puts officers and others at risk while driving. Legue wants to be compensated because she did not hear the warning that she was obligated to hear, and caused an accident with an officer. There is the compassionate view which says Legue could be anyone of us—we

have all driven with the music too loud. We all drive with our windows up at times. What could she have done to avoid the accident? But an officer responding to an emergency has to hope that other drivers will recognize her presence and yield. Importantly, the emergency vehicle statute, § 346.19, Wis. Stats., does not condition the emergency vehicle's right of way on other drivers actually hearing or seeing the warning.

Officer Matsen testified she made observations of the intersection. She testified that she believed she needed to be aware of what is happening in the intersection before she goes into the intersection. Everything she said she did is consistent with due regard under the circumstances. She has met the vague suggestion in § 346.03(5), Wis. Stats., by performing the very activities demanded by a careful officer. If she is negligent because she did not see what she could not see, then the demand of § 346.03(5), Wis. Stats., goes too far. Legue argues that the lookout limitations made Officer Matsen negligent for going into the intersection. Had Legue had a red light which she failed to recognize because of sun glare or the distraction of other driver actions, she would not have the same sense of exoneration. Legue is arguing that because she was unseen, she is entitled to be one of those who are generally benefited by § 346.03(5), Wis. Stats., so that the officer must assume she is there and assume she will not yield. However, at the time that Officer Matsen was evaluating the intersection, Legue was nowhere to be seen and only became visible the moment Officer Matsen entered the intersection. In this sense, Legue's actions are akin to running a red

light because she was obligated to yield the right of way. The lookout responsibility argued by Legue should not be deemed ministerial under § 346.03(5), Wis. Stats.

D. The § 346.03(2), Wis. Stats., Requirement For Slowing Down Controls What Is Safe When Entering An Intersection.

Legue complains that traveling into the intersection at 27 mph made an effective lookout impossible. However, there is no speed other than 0 mph that would have avoided this accident. Consequently, there is no safe speed that avoids this accident. Section 346.03(2)(b), Wis. Stats., requires slowing down "as may be necessary for safe operation" when proceeding through a red light. None of the other privileges identified in § 346.03(2), Wis. Stats., contain a similar limitation. Section 346.03(5), Wis. Stats., talks about "due regard under the circumstance...." Obviously, § 346.03(2), Wis. Stats., is more focused than the general section of due care in § 346.03(5), Wis. Stats. There is no reason to interpret § 346.03(5), Wis. Stats., to impose a greater limitation on the privilege found in § 346.03(2)(b). Section 346.03(2)(b), Wis. Stats., should control. Consequently, the operator's responsibility to slow down (if that is a ministerial duty) is not a responsibility to stop. Because any speed that Officer Matsen chose would result in an accident, neither lookout nor speed is a ministerial responsibility.

IV. JUDGMENT NOTWITHSTANDING THE VERDICT BASED ON PUBLIC POLICY GROUNDS IS PROPER.

A. The Standard Of Review.

As indicated above, the standard of review relative to a motion for judgment notwithstanding the verdict is *de novo*, though this Court benefits from the trial court's analysis. *Danner v. Auto-Owners Ins.*, 2001 WI 90, ¶41, 245 Wis. 2d 49, 629 N.W.2d 159 (citing, *Mgmt. Comp. Serv. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996)).

B. Public Policy Precludes Liability.

1. Officer Matsen Is Immune Because She Did Not Negligently Operate Her Vehicle When The Collision Occurred.

Estate of Cavanaugh held that all the decision-making leading up to the decision of the chase was discretionary and therefore immune. 202 Wis. 2d at 317. In this case, Officer Matsen engaged in all the pertinent balancing and decision-making, including the speed she would enter the intersection, before she actually entered the intersection. It is important to understand that lookout and management and control are different and inconsistent duties. *Compare* Wis. JI-Civil 1105, Management and Control, *with* Wis. JI-1005, Lookout. Had Legue been stopped in the intersection and Officer Matsen been unable to operate her vehicle to miss Legue, Officer Matsen would arguably be negligent in the management of the vehicle. If Officer Matsen got into the intersection and hit a pedestrian that was in the intersection, she would arguably have failed to manage

her vehicle. But Legue is claiming failure to maintain lookout, which is not management of the vehicle.

The only time Officer Matsen could have made an observation of the Legue vehicle that would have been effective to avoid this accident was before she entered the intersection. Even if her lookout was negligent before she entered the intersection, she is immune for making the decision based on that observation. To then create the "duty" for lookout at the exact moment she enters the intersection eviscerates the discretionary immunity she is entitled to for making the decision in the first place. More importantly, her "failure to see the vehicle" is not the management of the vehicle in the intersection. Based on the facts of this case, there simply is no operation of the vehicle in the intersection.

2. The Due Regard Standard Of § 346.03(5), Wis. Stats., Is Not Consistent With The Common Law Requirement Of Lookout When An Emergency Vehicle Is Enters An Intersection.

Legue argues that due regard is really just a reiteration of the common law duties for the operation of a motor vehicle. (Appellant's Br. 22–23.) However, these duties do not translate well into an evaluation of an emergency vehicle that is violating the rules of the road. In particular, lookout and management and control are affected since the vehicle is speeding and going through controlled intersections. The emergency vehicle cannot stop as efficiently as a car going the speed limit. An emergency vehicle operator cannot maintain lookout that is as precise as a law-abiding driver because it is moving quickly and things will be

hidden. Consequently, suggesting that the duties of Legue and the officer are the same ignores the fact the officer confronts a much more difficult challenge. It is why emergency vehicle operators' decisions are discretionary and immune.

The balancing of all the elements, which Officer Matsen did before entering the intersection, does not make the elaborate process ministerial. Part of due care is a value judgment by the officer. *Cavanaugh* establishes that this process is discretionary. *Estate of Cavanaugh v. Andrade*, 202 Wis. 2d 290, 317, 550 N.W.2d 103 (1996). However, if the officer were to choose a speed for heading through the intersection that did not allow her to negotiate the turn so she hit a motor vehicle or pedestrian then she violated the due care requirement because she operated her vehicle in such a fashion as to cause an accident. If she was given enough notice of a vehicle's presence, so she could stop or miss it even though she was traveling at a higher speed, she might have violated the due care standard.

However, lookout is not directly related to the physical operation of the vehicle when the danger cannot be seen. The ordinary driver need only keep a lookout around them, which Officer Matsen did. However, the ordinary law-abiding driver is never traveling through a red light. Consequently, the ordinary driver has no similar lookout requirement because no amount of lookout would allow the ordinary driver to go through the red light. *Brown v. Acuity,* 2013 WI 60, ¶ 54, 348 Wis. 2d 603, 833 N.W.2d 96. If the ordinary driver never encounters the circumstance, how can the ordinary obligation of lookout apply? Taken to its logical conclusion, Legue's argument actually suggests there is no lookout

responsibility because there is no corresponding obligation found in the ordinary experience.

Legue argues that before the emergency vehicle operator enters an intersection, he or she must slow down or stop to ascertain that all unseen vehicles will abide its right of way. (Appellant's Br. 22–23.) This places an undue burden on the emergency vehicle operator and is not in any way involved with the physical operation of the vehicle. Consequently, it is not part of the due care this Court discussed in *Cavanaugh.* 202 Wis. 2d at 317–19.

CONCLUSION

The Respondents are entitled to judgment dismissing the Appellant's Complaint.

Dated January 6, 2014.

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., as modified by the court's order, for a brief and appendix produced with a proportional serif font. The length of this brief is 6,107 words. I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Wis. Stats. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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STATE OF WISCONSIN
SUPREME COURT

Eileen W. Legue,

Plaintiff-Appellant,

and

Department of Health and Human Services and
Farmers Insurance Exchange,

Involuntary-Plaintiffs,

v.

City of Racine and Amy L. Matsen

Defendants-Respondents.

APPEAL FROM CIRCUIT COURT OF RACINE COUNTY,
Honorable Charles H. Constantine, Circuit Court Judge, Presiding
AND UPON CERTIFICATION TO THE SUPREME COURT
Circuit Court Case No. 2011-CV-002090
Court of Appeals Case No. 2012AP2499

REPLY BRIEF OF PLAINTIFF-APPELLANT, EILEEN W. LEGUE

SUBMITTED BY:

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INTRODUCTION

Legue is going to focus on a number of statements made by Officer Matsen in her brief. The boldface statements below are taken directly from her brief.

ARGUMENT

While there is a dispute regarding the precise speed Officer Matsen was traveling at the time she entered the intersection, an expert retained by Ms. Legue expressed the opinion that Officer Matsen's speed was, at most, 27 miles per hour (mph), which was less than the 30 mph speed limit.

There is no dispute. The only expert testimony entered on the subject was that she was traveling not less than 27 mph. Officer Matsen retained an accident reconstruction expert prior to trial but no opinions were offered at trial.

Officer Matsen filed motions after verdict, including in pertinent part: a renewed motion for a directed verdict relative to the cause issue and motions for notwithstanding the verdict pursuant to § 805.14(5)(b), Wis. Stats., on the basis that Officer Matsen was immune from the consequences of her discretionary decision to enter the intersection and on public policy grounds.

Legue has consistently and uniformly stated this case is not about her discretionary decision to enter the intersection in the first instance.

She clearly exercised her discretion to determine that she could proceed into the intersection at 27 mph. There was nothing about her operation of the vehicle after she proceeded into the intersection that is at issue.

This just misses the point. It is everything about her operation of the motor vehicle that caused this accident; you can't just focus on the seconds after she's already in the

intersection. It's about entering a partially blind intersection at 27 mph, in the oncoming lane of traffic that causes this accident in the first instance. It is the "decision" in the actual operation of her motor vehicle as she approached the intersection that constitutes the negligence and lack of due regard. With regard to operation of her vehicle, she conceded it must be operated at a speed which, under the circumstances then confronting her, allows her to exercise her heightened duty of lookout. The jury determined she didn't do that and thus, found her responsible for this accident.

A public policy of requiring stops, rather than the legislative choice of slowing, will ensure longer response times for police emergency vehicles.

Legue will state again what she has stated numerous times; namely, she is not now arguing, nor ever has argued, that Officer Matsen was required to stop at all red lights or even the red light in question. What an emergency responder is required to do will be dictated by all of the factors found in Racine's policy (and other department policies), namely; time of day, traffic, road conditions, etc. If all of those factors dictate that you stop in order to exercise due care to protect other vehicle traffic, then so be it.

The duty imposed by statue, regulation, or procedure must conform to all elements of a ministerial duty.

In ***Estate of Cavanaugh v. Andrade***, 202 Wis. 2d 290, 550 N.W. 2d 103 (1996), this Court talked about how emergency responders can be found "negligent" with regard to the actual operation of their vehicle. The requirement is due care under the circumstances. Well, due care regarding what? The only things involved are speed, lookout and management and control; all duties of care that are mandated by statute and law. What else can be measured with regard to her actual operation of her vehicle against a red light?

Essentially, Legue makes the argument that Officer Matsen violated a ministerial duty to stop at the red light.

No, that is not Legue's argument as pointed out too many times.

A building blocked Officer Matsen's view of traffic from the direction Legue was traveling and Officer Matsen did not see Legue's vehicle before impact.

That's true, she didn't. However, that building does not completely block the view of that intersection. It is only because she was traveling 27 mph that she didn't have time to see what was coming once the building no longer would block her view.

To hold that Officer Matsen failed to abide by a ministerial duty to "maintain a vigilant lookout and exercise that lookout at a speed which allows her to do so efficiently", when her only other option would be to stop, would result in absurdity.

First, her "only other option" was not just stopping. As she approached this busy, partially blind, intersection at noon, on a red, she could have and was mandated to slow to a speed to allow her to make sure other traffic was not entering on a red. Absurd? Legue thinks it's absurd and highly dangerous to do anything other than that. Legue assumes most emergency responders don't have a death wish and don't want to injure or kill the public. That is why, in reality, you just don't ever see responders running through red lights at 27 mph.

If the Court determines that a negligence claim can be advanced against Officer Matsen, then it should determine that, as a matter of law, when a driver fails to yield the right of way to the officer, he or she is more negligent than the officer for causing the accident.

Why? There is a specific jury instruction addressing the duties and responsibilities of operators of emergency vehicles necessarily implying that the law of this state is that these present issues of fact. In ***Estate of Cavanaugh, Id.***, this Court recognized that a responder can be negligent in the actual operation of their emergency vehicle; again, a question of fact for the jury to decide.

The only point of view that would allow Officer Matsen to see the Legue vehicle was in the intersection.

That simply is not true. All you have to do is look at the sight lines available as shown in the photograph of the intersection entered as evidence as part of Adam Wise's testimony. (Photograph shown at page 8 of Legue's primary brief).

Here, forcing an officer to perform a lookout to see any hidden or unseen vehicles at each intersection, alley, and blind parking lot is a significant responsibility. This obligation is wholly out of proportion to the officer's culpability, unduly burdensome to the officer and has no just stopping point.

We have to be fact specific when addressing this argument. We are talking about a busy intersection, at about noon, with partial visibility blocked and the officer is moving into oncoming traffic to run through a red light at 27 mph. As stated previously, Legue presumes that emergency responders don't have death wishes and care about not harming others. Officer Matsen conceded that it's entirely possible that people will not see or hear her coming. Given that, one would assume Officer Matsen would gladly accept the "burden" to make sure the intersection is safe to proceed through not only to "exercise due care for other" but to keep herself safe and sound.

To make the officer financially responsible for failing to see something that could not be seen is wholly out of proportion to the officer's culpability and significantly affects the performance of their duties.

Since when would a police officer be personally financially responsible for negligent acts performed in the scope of their employment? See e.g. Wis. Stat. § 895.46.

Finally, with regard to public policy arguments in general, as argued before, Legue firmly believes that those issues have already been addressed by the mere existence of Wis. Stat. § 346.03(2) and this Court's decision in ***Estate of Cavanaugh, Id.***

CONCLUSION

For these reasons and the reasons stated in Legue's primary brief, Legue respectfully requests that this Court reinstate the jury's verdict and reverse the trial court's decision.

Respectfully submitted this 13th day of January, 2014.

By:_____

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CERTIFICATION PURSUANT TO SECTIONS 809.19(8)(d) AND 809.63, *STATS.*

Pursuant to sections 809.19(8)(d) and 809.63, *Stats.*, I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with using the following font: Proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points, and maximum of 60 characters per full line of body text. The length of this brief is 1,731 words.

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CERTIFICATION PURSUANT TO SECTION 809.19(12) AND 809.63, *STATS.*

I hereby certify that I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12) and 809.63, *Stats.*

I further certify that this electronic brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

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SUPREME COURT
Appeal No. 2012AP2499

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Eileen W. Legue,

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and

Department of Health and Human Services and
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Involuntary-Plaintiffs,

v.

City of Racine and Amy L. Matsen,

Defendants-Respondents.

Certification by the Court of Appeals, District II, on October 2, 2013
Appealing a Judgment and Order of the
Circuit Court of Racine County,
The Honorable Charles H. Constantine, Presiding
Circuit Court Case No. 2011-CV-2090

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I. THE COURT SHOULD ACCEPT THE BALANCED APPROACH TO GOVERNMENTAL LIABILITY EMBODIED IN WIS. STAT. § 893.80 AND REJECT THE FLAWED DOCTRINE OF DISCRETIONARY IMMUNITY.

A. The Language And History Of Wis. Stat. § 893.80 Confirm That It Is A Claims Statute Which Embodies A Rule Of Governmental Liability Subject To Narrow Exceptions And Specific Limitations And Procedures.

The "ancient, fallacious ... and patently unfair" Doctrine of Governmental Immunity was abrogated by this Court in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 18 (1962). The court stated unequivocally, "so far as governmental responsibility for torts is concerned the rule is liability – the exception is immunity." The rule of liability was subject to only narrow exceptions for conduct involving, "legislative or judicial or quasi-legislative or quasi-judicial functions." In rejecting the Doctrine of Governmental Immunity the *Holytz* court noted, "This doctrine has been shot to death on so many different battle fields that it would seem utter folly now to resurrect it." Forty-four other jurisdictions have abrogated governmental immunity.

The *Holytz* court expressly invited the Legislature to reinstate immunity, if it so chose. Rather than overturning the rule of liability enunciated in *Holytz*, the Legislature codified it in what is now Wis. Stat. § 893.80.

The *Holytz* decision has never been overruled. The language of Wis. Stat. § 893.80 remains intact and continue to reflect precisely the same rule

of liability subject to narrow exceptions enunciated in *Holytz*. Despite claims to the contrary, Wis. Stat. § 893.80 is plainly a claim statute setting forth limits and procedure to regulate the manner in which claims are brought and the amounts that can be paid for those claims. The statute strikes a reasonable balance between the rights of the injured and the needs of public bodies. There is no language in the statute that can reasonably be read as creating the sort of broad based immunity the Defendants in this case urge upon the Court.

The Defendants here rely upon the Doctrine of Discretionary Immunity. The doctrine has effectively reinstated governmental immunity without overruling *Holytz* and despite the plain language of Wis. Stat. § 893.80. Discretionary immunity effectively resurrected and indeed broadened the concept of governmental immunity without offering any persuasive rationale for doing so. In effect, the doctrine that was shot to death on so many battlefields, has now been resurrected on our own.

The Doctrine of Discretionary Immunity flows from two decisions, *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976) and *Lifer v. Raymond*, 80Wis. 2d 503, 259 N.W.2d 537 (1977). Neither case involved a claim under Wis. Stat. § 893.80 or its predecessor. Neither addressed the *Holytz* decision or advanced any principled basis for abandoning the rule of governmental liability embodied in *Holytz* and in the statutes.

The *Lifer* court, in dicta, concluded that because things which are legislative judicial, quasi-legislative or quasi-judicial are discretionary in nature, anything which involves the exercise of discretion must be regarded as legislative, judicial, quasi-legislative or quasi-judicial. Although the logic is patently flawed, it has been adopted without analysis or meaningful consideration in subsequent decisions.

Wis. Stat. § 893.80 is titled, "Claims against governmental bodies or officers, agents or employees; notice of injuries; limitation of damages and suits." The statute expressly grants a right to maintain claims subject to specific limits and procedures. The term "discretionary immunity" appears nowhere in the statute and the concept is antithetical to the language and purpose of the statute.

Had the Legislature intended to create the sort of broad based immunity encompassed under the rubric of discretionary immunity the Legislature would have said so clearly and unequivocally.

Courts have a right to construe statutes. That right, however, is not unfettered. The rules governing statutory construction are well established. In *State v. Soto*, 2012 Wis. 93, 243 Wis. 2d 43, 817 N.W.2d 848 the court observed that the purpose of statutory construction is to determine the meaning of the statute which the courts assume is expressed in the language chosen by the Legislature. The language chosen here could hardly be clearer. There is nothing in that language that supports the notion that the

Legislature by enacting Wis. Stat. § 893.80 intended to confer discretionary immunity upon the everyday conduct of public employees such as operating an emergency vehicle.

Both Wis. Stat. § 893.80 and its companion Wis. Stat. § 893.82, which governs claims against state employees create a reasoned, balanced approach to those claims which permits them subject to certain procedures and limits on the extent of recovery. The relatively elaborate structure of those statutes would be wholly unnecessary if the intent of the Legislature were to grant blanket immunity. Courts construe statutory language reasonably to avoid a result which contravenes the purpose of the statute. The construction the Defendants wish to place on Wis. Stat. § 893.80 is contrary to the statute's clear purpose.

It must be presumed that when the Legislature created Wis. Stat. § 893.80 it weighed competing interests. Wis. Stat. §§ 893.80 and 895.46, which indemnifies public employees against personal liability, create a proper balance between protecting governmental employees against personal liability and permitting injured persons to obtain redress. The Doctrine of Discretionary Immunity ignores both the language of the statutes and the appropriate balance which they strike.

The Doctrine of Discretionary Immunity has been roundly and justifiably criticized by justices of this Court. In *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691

N.W.2d 658 Justice Prosser commented: "when the *Holytz* court abrogated the principle of governmental immunity in 1962 and saw its decision promptly codified by the Wisconsin Legislature, it could not have imagined that a successor court would assert that it was actually expanding immunity ...". In *Scott v. Savers Property and Cas. Ins. Co.*, 262 Wis. 2d 27, 663 N.W.2d 715 Justice Bablich said "a doctrine of governmental immunity that has caused such injustice and inequity, in this case and others cannot, and I predict will not, stand much longer".

Justice Abrahamson noted in her concurrence in *Scott, supra,* that the Doctrine of Discretionary Immunity had created jurisprudential chaos. In *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, 120, 235 Wis. 2d 409, 465, 611 N.W.2d 693 Justice Prosser stated: "the law on governmental immunity has become so muddled that it no longer provides reasonable guidance". This Court is all too well aware how warranted those criticisms are, and how frequently this Court is called upon to sort through the muddle.

Proponents of discretionary immunity defend the doctrine by citing stare decisis. We would note if that principle had been honored at the inception of the doctrine, it would have been stillborn. The *Holytz* decision has never been overruled or distinguished in any meaningful way. Our courts have recognized they are not inextricably bound by stare decisis if a decision is flawed, as is clearly the case with *Lifer*. *Green Bay Packaging*

v. DILHR, 72 Wis. 2d 26, 240 N.W.2d 422 (1976). It is the logic of *Holytz* embodied in Wis. Stat. § 893.80, not the flawed logic of the *Lifer* decision which should govern.

B. Sound Public Policy Is Not Served By Ignoring The Language Of Wis. Stat. § 893.80 And Perpetuating The Flawed Doctrine Of Discretionary Immunity.

The public policy of the state is presumed to be set forth in its statutes. The language and the overall scheme of Wis. Stat. §§ 893.80 and 895.46 demonstrate a clear legislative intent to provide a balanced approach to claims against governmental employees. The plain language of Wis. Stat. § 893.80 does not bar such claims but authorizes them subject to clearly articulated limits and procedures.

The public policy of our state favors compensation for persons who are injured through the negligence of others. Two concerns underlie that policy. The first is to provide redress for those who have been injured. The second is to deter conduct which fails to evince a due regard for the safety of others.

What the Defense seeks from this Court is a near absolute shield against liability for conduct which a jury concluded did not show due regard for the safety of the public. A doctrine which leaves the public wholly unprotected against the negligent acts of public employees and shields those employees, or more properly their insurers, against all

potential liability for such acts does not serve the interest of the public, nor does it comport with the public policy of our state.

II. THE COURT SHOULD RATIFY THE BALANCED APPROACH REFLECTED IN THE STATUTES GOVERNING EMERGENCY VEHICLES, THE APPLICABLE JURY INSTRUCTION, AND THE JURY VERDICT.

A. Both The Statutes Governing The Operation Of Emergency Vehicles And The Jury Instruction Are Couched In Terms Of A Conditional Privilege, Not Blanket Immunity.

The statutes which govern the operation of emergency vehicles are part of the rules of the road. They are safety statutes intended to secure the safety of all members of the public utilizing the roadways, including public officers and employees.

Wis. Stat. § 346.03 is addressed specifically to the applicability of the rules of the road to authorized emergency vehicles. Wis. Stat. § 346.03(2) provides that operators of authorized emergency vehicles may "proceed past a red or stop signal or stop sign, but only after (emphasis supplied) slowing down as may be necessary for safe operation".

The Defense asserts this language should be read as immunizing conduct prior to the entry into the intersection. That ignores the plain language of the statute which expressly requires the operator of the emergency vehicle to enter the intersection only after slowing down as may be necessary for safe operation. It would also render the statutory language meant to promote safety virtually meaningless.

In this case the police officer was traveling in the left hand lane at a speed just under 30 MPH. The other motorist was approaching the intersection at approximately the same speed. Both had limited visibility. Under those circumstances, there was no meaningful opportunity to avoid an accident once the police officer had entered the intersection. Common sense tells us that would be so in many, if not most, intersection accidents. Both the language of the statute and the rules of the police department demand the exercise of due care before entering the intersection.

Wis. Stat. § 346.03(5) states that the conditional privileges granted the operator of an authorized emergency vehicle under Wis. Stat. § 346.03 "do not relieve such operator from the duty to drive or ride with due regard under the circumstances for the safety of all persons ...". The language is manifestly intended to ensure the safety of all persons upon the roadway including the operators of emergency vehicles. The language cannot reasonably be read as granting a police officer carte blanche to enter an intersection without first exercising due regard for other persons who may be using that intersection.

The Defense argues that Wis. Stat. § 346.03(5) only requires that the operator of an emergency vehicle refrain from reckless driving. The Defense construction would render the language surplusage which imposes a duty to drive with due regard for the safety of all. If the Legislature had

wanted to limit the duty created by the statute as the Defense contends, they would not have expressly imposed a duty of due regard.

The language of the statutes is clear. They afford a conditional privilege, not blanket immunity.

That approach was confirmed by the drafters of Wis. JI-Civil 1031 which is titled "Conditional Privilege of Authorized Emergency Vehicle Operator". The instruction expressly acknowledges the conditional nature of the privilege and asks the jury to determine whether the police officer operated the authorized emergency vehicle with due care, under the circumstances, for the safety of all persons.

What the Defense seeks to substitute for these very specific provisions is the flawed Doctrine of Governmental Immunity, which they claim can be read into Wis. Stat. § 893.80. That is inconsistent with the rules which govern statutory interpretation. A cardinal rule of statutory construction is to save and not destroy. *U.S. Bank National Ass'n v. City of Milwaukee*, 2003 WI App. 220, 267 Wis. 2d 718, 672 N.W.2d 492. The Defendants' approach effectively destroys the duty created by Wis. Stat. § 346.03. Honoring the requirements of Wis. Stat. § 346.03 is perfectly consistent with the language and purpose of Wis. Stat. § 893.80.

It is also axiomatic that when two statutes deal with the same subject matter the more specific statute controls. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628. Even were Wis. Stat. § 893.80 to be read as

an immunity statute, contrary to its language and purpose, that statute is far more general and would have to give way to the specific language and purpose of Wis. Stat. § 346.03.

The statutes and the jury instruction represent a balanced approach to potential liability stemming from the operation of an emergency vehicle. The operator of the emergency vehicle will not be subject to blanket liability as the Defense suggests. In fact, as is evident from this case, a jury is perfectly capable of weighing the instruction and then apportioning responsibility for an accident having due regard for both the safety of the public at large and the conditional privilege granted operators of emergency vehicles. The driver is shielded from any personal liability by Wis. Stat. § 895.46.

What the Defense wishes to do is ignore the language of the statutes and the instruction, sweep aside the determination of the jury, and substitute a rule of near absolute immunity which is legally unsupportable and patently unfair.

B. Public Policy Does Not Support A Broad Based Grant Of Immunity.

The public policy of this state is embodied in its statutes. In this case the provisions of Wis. Stat. § 346.03 are clearly intended to protect the rights of both members of the public and the operators of emergency vehicles. The statutes and instructions reflect the clear intent of the

Legislature to strike a balance between those rights. Sound public policy requires this Court to adopt the balance struck by the Legislature, rather than to substitute a broad and amorphous immunity which contravenes the language of the statutes and the jury instruction.

The Defense asserts that police officers will be hindered in the performance of their duty, rendering the public less safe. They insist, initially, that an officer will be required to stop in every instance before entering an intersection against a red light. There is nothing in the statute which requires that. There are many instances where an officer will be able to make sufficient observation of the surrounding area before entering the intersection and will not need to stop or even slow significantly.

In the present case nobody argues that the officer had to stop. Slowing to 10 – 15 MPH before entering the intersection might well have been sufficient. In any event, the time required to slow significantly or even stop would have been a matter of a few seconds. There is no evidence with respect to this case, or generally, that a delay of a few seconds in responding to the vast majority of police calls would unduly delay response or endanger the public.

Here the officer not only failed to make it to the call she was responding to, but also caused injury to another motorist. An officer's statutory responsibility is not to get to the scene of a call as quickly as possible. It is to drive in a manner which shows due regard for the safety of

others. The Legislature and the officer's department recognized what the Defense fails to acknowledge. Sound public policy requires a careful balancing of safety consideration, not carte blanche immunity which encourages the operators of emergency vehicles to operate without due regard for the safety of the public and themselves.

There is no possibility of personal liability for a police officer. Municipalities routinely have insurance to cover the limited liability permitted under Wis. Stat. § 893.80. It is not, in fact, the public purse that is protected by grants of blanket immunity, but the coffers of insurance companies.

The public policy of our state is designed first and foremost to secure the safety and welfare of its citizens. The conditional privilege granted the operators of emergency vehicles is subject to the requirement that they operate with due regard for the safety of others on the roadway. That approach recognizes the importance of protecting both the operators of emergency vehicles and others on the roadway from harm. The course urged upon this Court by the Defense would make both police officers and members of the public less safe.

Respectfully submitted this 4th day of February, 2014.

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WORD LIMIT CERTIFICATION AND ELECTRONIC FILING CERTIFICATION

I hereby certify that this brief conforms to the rules contained Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 13 pages and 2,780 words.

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Respectfully submitted this 4th day of February, 2014.

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