

No. 22-1026
Madison County No. LACV035142

IN THE
SUPREME COURT OF IOWA

JAMES R. PENNY,
Plaintiff - Appellant,

v.

CITY OF WINTERSET AND CHRISTIAN DEKKER,
Defendants - Appellees.

*ON APPEAL FROM THE IOWA DISTRICT COURT
FOR MADISON COUNTY
STACY RITCHIE, DISTRICT COURT JUDGE*

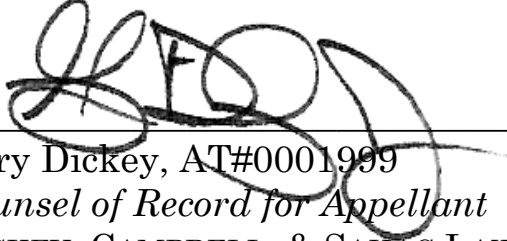
FINAL BRIEF FOR APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On January 6, 2023, I served this brief on all other parties by EDMS to their respective counsel, and I emailed a copy of this brief to appellant.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on January 6, 2023.



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STATEMENT OF ISSUES

WHETHER THE DISTRICT COURT'S SUMMARY JUDGMENT RULING MUST BE REVERSED BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER DEKKER ACTED RECKLESSLY IN CAUSING THE COLLISION WITH PENNY'S TRUCK

CASES

Anderson v. City of Massillon, 983 N.E.2d 266 (Ohio 2012)

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OTHER AUTHORITIES

Iowa Code § 321.231 (2018)

Iowa R. Civ. P. 1.981

ROUTING STATEMENT

Transfer to the court of appeals is appropriate under Iowa R.
App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

James Penny filed a petition in the Iowa District for Madison County seeking to recover damage resulting from an automobile collision at the intersection of Highway 92 and North 10th Street in Winterset. (App. at 7). The petition named two defendants: (1) the City of Winterset; and (2) Christian Dekker, a Winterset police officer. (App. at 7). At the time of the collision, Officer Dekker was operating his police cruiser in emergency mode on his way to a call for assistance. (App. at 77). As Penny entered the intersection, Officer Dekker's police cruiser struck Penny's truck broadside causing serious injuries. (App. at 77).

On April 5, 2022, Defendants filed a motion for summary judgment asserting that no "reasonable jury could find that [Dekker] was reckless." (App. at 11). Following a hearing on the motion, the district court granted Defendants' motion. (App. at 97). This appeal follows. (App. at 107).

STATEMENT OF THE FACTS

The summary judgment record, taken in the light most favorable to Penny, supports the following factual findings. On

March 30, 2018, Christian Dekker was on duty as a police officer for the City of Winterset. (App. at 77). At approximately 8:22 p.m., Officer Dekker received a call regarding an unconscious female located at the Super 8 motel on Cedar Bridge Road. (App. at 77). While responding to the call, he initiated the emergency overhead lights and siren of his police cruiser. (App. at 77). While Officer Dekker proceeded northbound on North 10th Street, James Penny was traveling westbound on Highway 92. (App. at 77). North 10th Street is a blacktop road with stop signs controlling north and south bound traffic. (App. at 77). Highway 92 is an east/west, blacktop road with no traffic control devices. (App. at 78). The speed limit along Highway 92 was 55 mph. (App. at 109). The speed limit for North 10th Street was 25 mph. (App. at 110, 112).



As Penny approached the intersection, he observed another emergency response vehicle traveling eastbound toward him on Highway 92 with lights and siren on. (App. at 59-60). He slowed and pulled off on the side of the road to yield to that emergency vehicle. (App. at 59-60). The emergency vehicle turned north at the intersection. (App. at 59-60). Thereafter, Penny moved back onto the road, accelerated, and travelled into the intersection. (App. at 60).

The crash data report from Officer Dekker's squad car indicates that he accelerated to 60 mph approximately twelve to thirteen seconds before the collision. (App. at 108). As he

approached the intersection, he initiated his brakes several times. (App. at 108). Officer Dekker entered the intersection without stopping and collided with Penny's truck. (App. at 77). At the time of the collision, Officer Dekker was traveling approximately 31 mph. (App. at 108, 111).

After impact, Penny's vehicle rolled one time before coming to rest in the northwest ditch of the intersection. (App. at 77). He sustained a traumatic brain injury, a lower-back fracture, and injury to his right knee. (App. at 64). Officer Dekker's vehicle spun and entered the northwest ditch backwards. (App. at 77). He was transported by ambulance to the hospital with cuts and abrasions to his head. (App. at 79).

On April 5, 2022, Defendants filed a motion for summary judgment asserting that no "reasonable jury could find that [Dekker] was reckless." (App. at 11). Following a hearing on the motion, the district court granted Defendants' motion. (App. at 97). Plaintiff filed a timely notice of appeal. (App. at 107).

ARGUMENT

THE DISTRICT COURT'S SUMMARY JUDGMENT RULING MUST BE REVERSED BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER DEKKER ACTED RECKLESSLY IN CAUSING THE COLLISION WITH PENNY'S TRUCK

Error Preservation

Penny preserved the issues presented in this appeal by resisting the moving for summary judgment and obtaining a ruling in which the court necessarily decided the issues. (App. at 80, 97).

Standard of Review

This Court reviews the district court's ruling on a motion for summary judgment for correction of errors of law. *Thompson v. Kaczinski*, 774 N.W.2d 829, 832 (Iowa 2009). A party is entitled to summary judgment when the record shows no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3). On a motion for summary judgment, the Court must: (1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably

deduced from the record.” *Hoyt v. Gutterz Bowl & Lounge, L.L.C.*,
829 N.W.2d 772, 774 (Iowa 2013).

Analysis

A. Applicable Legal Principles

The liability for emergency responders is governed by Iowa Code section 321.231, which provides in pertinent part:

1. The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected perpetrator of a felony or in response to an incident dangerous to the public or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section.

* * *

3. The driver of a fire department vehicle, police vehicle, rescue vehicle, or ambulance, or a peace officer riding a police bicycle in the line of duty, may do any of the following:

a. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.

b. Exceed the maximum speed limits so long as the driver does not endanger life or property.

4. The exemptions granted to an authorized emergency vehicle under subsection 2 and to a fire department vehicle, police vehicle, rescue vehicle, or ambulance as provided in subsection 3 shall apply only

when such vehicle is making use of an audible signaling device meeting the requirements of section 321.433 or a visual signaling device. . .

5. The provisions of this section shall not relieve the driver of an authorized emergency vehicle . . . from the duty to drive . . . with due regard for the safety of all persons, nor shall such provisions protect the driver . . . from the consequences of the driver's . . . rider's reckless disregard for the safety of others.

Iowa Code § 321.231 (2018). “The statute sets forth certain exemptions from the rule of the road that drivers of emergency vehicles may exercise when responding to emergency calls.”

McClellan v. Ramirez, 2019 Iowa App. LEXIS 543 at *8 (Iowa Ct. App. June 5, 2019). It allows the recovery against an emergency responder who violates the duty to drive with due regard for the safety of others. *Hoffert v. Luze*, 578 N.W.2d 681, 683 (Iowa 1998). The standard of care, however, is one of recklessness rather than negligence if an emergency responder uses emergency lights or siren. *Id.*; *Morris v. Leaf*, 534 N.W.2d 388, 390 (Iowa 1995) (“The plain language of section 321.231(5) provides that a police officer should not be civilly liable to an injured third party unless the officer acted with ‘reckless disregard for the safety of others’”).

Thus, if an “emergency responder uses emergency lights or siren,

the threshold for recovery is recklessness.” The use of those lights and/or sire “gives notice to the other drivers on the road that an emergency vehicle is approaching.” *McClellan*, 2019 Iowa App. LEXIS 543 at *9. “Other drivers are then required by law to pull over to avoid interfering with the emergency vehicle.” *Id.*

Recklessness is more than “the mere unreasonable risk of harm in ordinary negligence.” *Bell v. Cmty. Ambulance Serv. Agency*, 579 N.W.2d 330, 335 (Iowa 1998). Rather, an emergency responder acts recklessly when he or she has “intentionally done an act of an unreasonable character in disregard of a risk known to or so obvious that he [or she] must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.” *Morris*, 534 N.W.2d at 391. For example, “a persistent course of conduct to show no care coupled with disregard of consequences” is sufficient to establish recklessness. *Winkler v. Patten*, 175 N.W.2d 126, 130-31 (Iowa 1970). In evaluating the elements of recklessness, the primary objective is to determine “the driver’s mental attitude as disclosed by his acts and conduct

immediately prior to and at the time of the accident.” *Bell*, 579 N.W.2d at 337.

B. The district court erred in failing to consider the unrefuted expert testimony that Officer Dekker’s driving demonstrated a clear lack of regard for the safety of others

Penny’s prima facie case of recklessness under Iowa Code section 321.231 includes three elements:

1. Dekker intentionally acted in an unreasonable manner;
2. Dekker acted in disregard for a risk so obvious that he must have been aware of it;
3. The risk was so great as to make it highly probable that harm would follow.

Morris, 534 N.W.2d at 391. Competent and compelling evidence in the summary judgment record supports each of these elements. For starters, Officer Dekker intentionally exceeded the speed limit. (App. at 108). Specifically, he accelerated to a speed of 60 mph in an area of Winterset with a speed limit of 25 mph in which there were numerous business and multiple driveways present. (App. at 52, 108). Likewise, he intentionally entered the intersection without obeying the posted stop sign;

Q. But you would also agree with me that 10th Street has a stop sign and you did not obey the stop sign?

A. 10th Street does have a stop sign, and at that point in time, I did not stop at the stop sign completely, no.

(App. at 41-42). Penny's accident reconstructionist expert, Daniel

Billington, explained:

Approaching the stop sign, [Officer Dekker] made no effort to stop or proceed with caution, rather entering the intersection with approaching cross traffic at a speed which was higher than the posted 25 mph speed limit.

(App. at 112). According to Billington, Dekker's "high speed and intentional decision to not stop or slow to a safe speed for the stop sign constituted violation of the [policies of the City of Winterset Police Department]." (App. at 112); *see also Seide v. State*, 875 A.2d 1259, 1272 (R.I. 2005) ("evidence of defendants' failure to comply with a reasonable police pursuit policy can support a finding that defendants acted in reckless disregard for the safety of others"); *Anderson v. City of Massillon*, 983 N.E.2d 266, 274 (Ohio 2012) ("it is well established that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wonton, or reckless conduct, but may

be relevant in determining the culpability of a course of conduct”). Moreover, Officer Dekker’s training and experience undoubtedly would have placed him on notice of the risks and dangers inherent in his conduct. On this point, Billington observed:

[Officer Dekker] would have had 14 years of driving experience when this collision occurred. *Such training would have exposed him to the knowledge of the danger of failing to stop for a stop sign.* It would also be reasonable to expect that Officer Dekker had likely investigated motor vehicle accidents for the general public wherein operators had collisions by failing to stop at or yield from a stop sign. . . . Officer Dekker should have had extensive training in emergency vehicle operation as part of his academy training, and his time with the City of Winterset and any other agency wherein he was employed.

(App. at 113-114)(emphasis added). From these facts, Billington offered the following opinion:

Officer Dekker’s failure to employ this knowledge in this case *demonstrates a clear lack of regard for the safety of others.*

(App. at 113)(emphasis added).

The central flaw in the district court’s summary judgment analysis is its wholesale failure to consider Billington’s expert opinions. Indeed, the court’s ruling makes no mention of Billington’s report. This omission alone constitutes reversible

error because his findings directly refute the district court's conclusions. For example, in its ruling the district court made the following finding as to the recklessness of Officer Dekker's conduct:

while the officer's failure to see Mr. Penny's approach into the intersection may constitute negligence, he did not have reason to believe that any vehicle nearby was unlikely to yield to his emergency lights and siren, thus resulting in harm to another. Because Officer Dekker had no reason to believe that any traffic present did not hear or see his approach, his assumption that the path in front of him would remain clear was reasonable. Further, no reasonable jury could find that his driving was reckless under Iowa Code section 321.231.

(App. at 104). But, Billington's opinions squarely contradict the district court's finding:

The evidence is clear that Mr. Penny was approaching the intersection and was fully available to be seen by Officer Dekker. The officer claimed he looked to the right, saw lights, but believed the lights were from a pharmacy. This suggests the officer did not afford himself the time necessary to properly discern the lights as he saw a building or an approaching vehicle.

(App. at 112). Thus, the district court did not consider the evidence in the light most favorable to Penny and did not draw all reasonable inferences in his favor.

Whether a driver acts recklessly is a fact-specific question that ordinarily is for the trier of fact. *Goutierrez v. St. Paul Ins. Co.*, 136 So.3d 322, 325 (La. Ct. App. 2014) (“Whether a driver of an emergency vehicle has acted with reckless disregard for the safety of others is a factual question normally resolved by trial on the merits”); *Hunter v. City of Columbus*, 746 N.E.2d 246, 252 (Ohio Ct. App. 2000) (“the issue of wanton misconduct is normally a jury question”). Here, Penny produced evidence to establish the following facts:

- Officer Dekker intentionally traveled at speeds as high as 60 mph along a road on which the speed limit was 25 mph;
- At least one emergency responder was ahead of Officer Dekker en route to the call regarding an unconscious person;
- Officer Dekker intentionally disregarded the stop sign at the intersection of North 10th Street and Highway 92, but instead he merely slowed to 31 mph;
- Officer Dekker did not afford himself enough time while approaching the intersection to discern a moving vehicle’s lights from a stationary building light;
- Officer Dekker’s training and experience was sufficient for him to have known that traveling

through the intersection in the manner in which he did would create an obvious risk to drivers approaching the intersection; and

- Officer Dekker's conduct violated the City of Winterset's Police Department's emergency response policy.

From this evidence, a jury reasonably could infer that Officer Dekker was reckless in the operation of his vehicle through the intersection of Highway 92 and North 10th Street. Accordingly, the issue of recklessness was a determination for the jury.

CONCLUSION

For the reasons set forth above, the district court's summary judgment ruling must be reversed.

REQUEST FOR ORAL ARGUMENT

Appellant requests to be heard in oral argument.

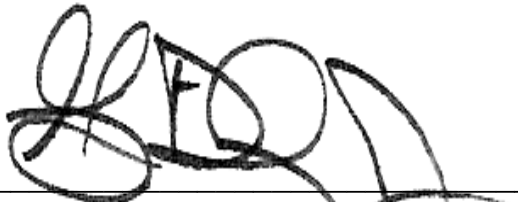
COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was \$8.25, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 2,779 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



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