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

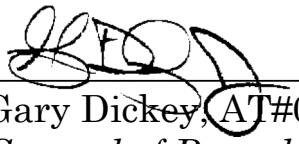
FINAL REPLY BRIEF FOR APPELLANT

Gary Dickey
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

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.



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PH: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

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REPLY ARGUMENT

A JURY QUESTION EXISTS AS TO WHETHER OFFICER DEKKER DISREGARDED A RISK SO OBVIOUS AND SO GREAT AS TO MAKE IT HIGHLY PROBABLE THAT HARM WOULD FOLLOW

A. Several factual disputes remain about Dekker's operation of his motor vehicle

Any trial attorney worth their salt knows, as Sam Cooke explained, "you've got to accentuate the positive – eliminate the negative." Sam Cooke, *Ac-Cent-Tchu-Ate the Positive* (Keen Records 1958). That general principle, however, does not apply to summary judgment. Instead, at the summary judgment stage, the nonmoving party is entitled "every legitimate inference that [can be reasonably deduced] from the evidence." *Lawrence v. Grinde*, 534 N.W.2d 414, 418 (Iowa 1995). Dekker and the City's merits brief ignores this rule and instead presents the facts as they would like the jury to accept them while omitting facts favorable to James Penny. "Such a mode of presentation is unhelpful to the court." *Vodak v City of Chicago*, 639 F.3d 738, 740 (7th Cir. 2011).

The linchpin of Defendants' argument that Dekker "looked to his left and 'cleared the intersection,' seeing only one vehicle

that was far enough away that it was not a factor." (Appellee Br. at 8, 14). Penny's accident reconstructionist, Todd Hall, directly contradicts Dekker's assertion. Specifically, Hall opined that "there is no evidence to indicate that Officer Dekker was unable to see Judd Penny in the several seconds leading up to the collision." (App. at 110). Hall further concluded that Dekker "had enough time to stop because Penney was able to be seen." (App. at 110). On this evidence, a reasonably jury would be free to accept Hall's opinion and reject Dekker's claim to have "cleared the intersection." *See* Iowa State Bar Ass'n, Iowa Civil Jury Instruction 100.9 ("In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witnesses' testimony"). Pull the loose thread of Dekker's self-serving testimony from Defendants argument, and the analysis unravels.

Another cornerstone of Defendants' argument is their insistence that Dekker "had no reason to believe his driving was likely to result in harm to another." (Appellee Br. at 14). This is odds with the evidence in the record. For starters, Dekker

admittedly drove through a stop sign without stopping. (App. at 41-42). And, he was intentionally speeding at the time. (App. at 108). Indeed, the manner in which Dekker operated his squad car violated the policies of the City of Winterset Police Department. (App. at 112). More importantly, based on his training and experience, Dekker would have known "of the danger of failing to stop for a stop sign." (App. at 113-114). In the opinion of Penny's other accident reconstructionist expert, Daniel Billington, Dekker's failure to employ his knowledge of the risks of the manner in which he operated his vehicle "demonstrates a clear lack of regard for the safety of others." (App. at 113). A reasonably jury, faced with this evidence, could conclude that the risk of collision with cross-traffic having the right-of-way was so great that it was highly probable harm would follow.

In an effort to win this case, Defendants attempt to reframe the standard of proof to require that Dekker had a subjective awareness of Penny's vehicle and willfully disregarded the risk of collision. This incorrectly states the law. Iowa's recklessness standard contains an objective component that requires the court

to evaluate whether the risk of collision was "so obvious" that a reasonable person in the situation should "have been aware of it" and so great as to make it highly probable that harm would follow. *Morris v. Leaf*, 534 N.W.2d 388, 391 (Iowa 1995); *see also State v. Torres*, 495 N.W.2d 678, 682 (Iowa 1993) (explaining that "an objective standard must of necessity in practice be applied" to the evaluation of whether an act was reckless). Recklessness is the combination of a "high degree of danger" coupled with a probability that harm "will flow from the act." *Torres*, 495 N.W.2d at 681 ("Simply put, for recklessness to exist the act must be fraught with a high degree of danger"). Viewed in the light most favorable to Penny, as the Court must at this stage, a reasonable jury could conclude that driving through a stop sign while speeding and in violation of police department policy is the type of conduct fraught with a high degree of danger. Accordingly, a jury question exists on the issue of recklessness.

B. The cases upon which Defendants rely do not answer the question presented under the unique facts in the summary judgment record

As a fallback position, Defendants attempt to analogize the facts of this case to those in which Iowa appellate courts have decided that drivers were not reckless as a matter of law. Initially, Defendants cite to *Bell v. Cmty. Ambulance Serv. Agency*, 579 N.W.2d 330 (Iowa 1998), in which the Iowa Supreme Court ruled that an ambulance driver did not act recklessly. (Appellee's Br. at 12). At least four fundamental factual differences set apart the outcome in *Bell* from this case. First, in *Bell* "the facts [were] not disputed." *Id.* at 337. In contrast, Dekker's allegation that he looked to his right and cleared the intersection is disputed by expert testimony establishing that he would have had a clear line of sight to see Penny's vehicle as well as sufficient time to stop. (App. at 110). Second, *Bell* involved an intersection controlled in all four directions by flashing red lights whereas Penny had no stop sign in his path. Indeed, the court in *Bell* highlighted the fact that the plaintiff driver "proceeded in the face of flashing red traffic control lights" as an important "distinction" from cases in

which there was a jury question as to recklessness. *Id.* Unlike in *Bell*, Dekker had reason to believe that rolling through the stop sign into cross-traffic that with the right-of-way would create pose a substantial danger. (App. at 113) (Dekker's "training would have exposed him to the knowledge of the danger of failing to stop at a stop sign"). Third, the speed of the ambulance in *Bell* "was not excessive" under the conditions. *Bell*, 579 N.W.2d at 337. In contrast, the crash data from Dekker's squad car indicates that he accelerated to 60 mph approximately twelve to thirteen seconds before the collision. (App. at 108). At the time of the collision, Officer Dekker was traveling approximately 31 mph in an area where the posted speed limit was 25 mph. (App. at 52, 108). Fourth, Penny offered the opinions of two accident reconstruction experts that:

- There is no evidence to indicate that Officer Dekker was unable to see Judd Penny in the several seconds leading up to the collision – that he had enough time to stop because Penny was able to be seen;

- 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 he saw as a building or an approaching

vehicle. Had Officer Dekker slowed to a speed which would allow him to stop or otherwise evade a collision in the event that cross traffic did not stop, the collision could have been avoided with ease; however, his high speed and intentional decision to not stop or slow to a safe speed for the stop sign constituted a violation of the police policy.

- [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 caused collisions by failing to stop at or yield from a stop sign.

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

(App. at 110, 112-113). This is competent, if not compelling, evidence of recklessness. The plaintiff in *Bell* did not offer similar expert testimony into the record.[1] If the *Bell* decision is the best

[1] The plaintiff in *Bell* attempted to introduce the opinion of a former certified law enforcement instructor that the ambulance driver's "actions fell well below the accepted standard of care for emergency vehicles" but the district court excluded the testimony. *Bell*, 579 N.W.2d at 332. The Iowa Supreme Court held that the district court did not abuse its discretion in excluding the evidence. *Id.* at 338.

Defendants have to offer, it is not much. In all these respects, *Bell* offers no guidance.

Defendants' reliance on the decision in *Estate of Fritz v. Henningar*, 2020 U.S. Dist. LEXIS 217848 (N.D. Iowa Nov. 20, 2020), fails for similar reasons. Most importantly, the police officer defendant in *Fritz* had the right-of-way while the plaintiff pulled out into traffic. *Id.* at *6-7. And, the officer personally saw the plaintiff's vehicle at the stop sign and expected him to yield since he was operating in emergency mode. *Id.* at *8. Accordingly, the officer's "assumption that nearby vehicles would yield to him, and thus keep the path directly ahead of him clear, was reasonable." Here, the shoe was on the other foot. Penny had the right-of-way and no reason to believe a speeding vehicle would run the stop sign. Moreover, Dekker did not see Penny approach the intersection. A reasonable factfinder, therefore, could conclude that he did not maintain a proper lookout or "did not afford himself the time necessary" to see Penny's truck. (App. at 112).[2]

[2] The mere fact that Dekker asserts he "cleared the intersection" before entering does not entitle him to summary judgment. As the Eleventh Circuit explained, "If a witness were

It also bears repeating that the manner in which Dekker operated his squad car violated department policy. (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"). Defendants attempt to find a foothold in the *Fritz* decision is unavailing. *Fritz* bears no resemblance to the present case.

Defendants' extended detour into the *Bell* and *Fritz* cases does have some value. It shines a spotlight on the central flaw of the district court's analysis. Like Defendants, the court below failed to view the disputed facts in the light most favorable to

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to testify that he ran a mile in a minute, that could not be accepted, even if undisputed." *United States v. Chancey*, 715 F.2d 543, 546 (11th Cir. 1983). A reasonable jury could find Dekker's testimony equally incredible.

Penny and made no mention of the opinions of his accident reconstruction experts. Cherry-picking facts that are favorable to the moving party while omitting facts helpful to the plaintiff is clear legal error.

CONCLUSION

For the reasons articulated herein, the district court's summary judgment ruling must be reversed.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $6.00, 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:

> [x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 1,960 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com