IN THE SUPREME COURT OF IOWA

NO. 22-1026

IOWA DISTRICT COURT
FOR MADISON COUNTY
CASE NO. LACV035142

JAMES R. PENNY,
Plaintiff-Appellant,

v.

CITY OF WINTERSET and
CHRISTIAN DEKKER,
Defendants-Appellees

APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION FILED JUNE 7, 2023

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QUESTION PRESENTED FOR REVIEW

1) DID THE COURT OF APPEALS ERR IN OVERTURNING THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF OFFICER DEKKER AND THE CITY OF WINTERSET ON PLAINTIFF'S CLAIM OF RECKLESSNESS UNDER IOWA CODE § 321.231.

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STATEMENT SUPPORTING FURTHER REVIEW

"Recklessness is a difficult standard to meet in Iowa." *Martinez v. State*, 986 N.W.2d 121, 125 (Iowa 2023) (citation omitted). The majority erred in finding that Officer Christian Dekker's operation of his vehicle in emergency response mode could constitute recklessness under Iowa Code § 321.231. As noted by the Honorable Judge Sharon Greer in dissent, "In the worst case, Dekker's actions were negligent, but there is no showing that elevates that behavior to recklessness." (Ct. App. Op. 21, Greer, J. dissenting).

The majority opinion directly conflicts with this Court's jurisprudence under Iowa Code § 321.231, including specifically *Bell v. Community Ambulance Service Agency for Northern Des Moines County*, 579 N.W.2d 330 (Iowa 1998), which holds that recklessness requires more than "the mere unreasonable risk of harm in ordinary negligence." The same principles were recently affirmed by this Court in *Martinez v. State*. 986 N.W.2d at 125 ("[I]dentifying recklessness as the standard in section 321.231, as the legislature did, reflects a policy choice to impose a heightened burden on the plaintiff.").

Likewise, the decision conflicts with the recent 8th Circuit case of *Fritz v. Henningar*, which was recently cited approvingly by this Court in

Martinez. See Fritz v. Henningar, 19 F.4th 1067 (8th Cir. 2021) (affirming *Estate of Fritz v. Hennigar*, No. C19-2046-LTS, 2020 WL 6845944 at *5 (N.D. Iowa Nov. 20, 2020) (noting that recklessness "is proceeding to act in a negligent manner, despite knowing, or reasonably foreseeing, that harm is likely to occur.")).

"[A]ssuring police protection free from the chilling effect of liability for split-second decisions is an important policy justification for curtailing liability." *Morris v. Leaf*, 534 N.W.2d 388, 391 (Iowa 1995) (internal quotations and citations omitted). The Court should grant further review due to this dramatic departure from the standard of liability of law enforcement officers operating their vehicles in emergency response mode under Iowa Code § 321.231. Further review is required to ensure uniformity in this area of law, and that the will of the legislature is being followed in only allowing recovery for reckless conduct, as opposed to merely negligent conduct. Allowing the opinion to stand will result in a dilution of the heightened recklessness standard and could have a dramatic impact on liability of law enforcement officers and municipalities across the State.

BRIEF

I. STATEMENT OF THE CASE

This case arises out of an automobile accident on the evening of March 30, 2018, at the intersection of Highway 92 and North 10th Street in Winterset, Iowa. (App. 7-8, Petition, ¶¶ 7-8). Plaintiff is James "Judd" Penny. Defendants are Officer Christian Dekker, a Winterset Police Officer, and the City of Winterset, his employer. (*Id.*, Petition ¶¶ 2, 8).

Officer Dekker was at home, on his dinner break, when he received a call regarding an unresponsive female in the parking lot at the Super 8 on Cedar Bridge Road. (App. 43, Dep. Dekker 29:24 – 30:16; App. 51). He considered this to be an emergency call because it concerned an unconscious person. He did not know if the female was breathing or had a pulse. (App. 48, Dep. Dekker 50:15-23).

Traffic was very light as he drove toward the Super 8. (*Id.*, Dep. Dekker 50:24 – 51:12). He was driving with his overhead lights and siren on. (*Id.*, Dep. Dekker 52:10-12). He had no reason to believe other motorists would not hear his siren, and he had no reason to believe other motorists would not see his overhead lights. (*Id.*, Dep. Dekker 52:13-18). Had there been any other traffic, those motorists would have been obligated to yield. Based on his experience in law enforcement, Officer Dekker

believed that had there been any drivers in the area, they would yield to him. (App. 48-49, Dep. Dekker 52:22 – 53:4).

As Officer Dekker drove north on 10th Street approaching the intersection with Highway 92, Mr. Penny was westbound on Highway 92. (App. 74). Mr. Penny saw an emergency vehicle with lights flashing approaching at a high rate of speed from the west. *Id.* He slowed, moved to the right and stopped several hundred yards from the intersection and watched this other vehicle turn left and go north on 10th Street, somewhere near the area on Highway 92. (*Id.*; App. 61, Dep. Penny 26:4-12).

When that happened, he resumed driving west toward 10th Street. (App. 74). He reached a speed of 50-55 mph as he entered the 10th Street intersection. (App. 71, Dep. Penny 66:23 – 67:21). As he entered the intersection, he was looking to his right, at the first emergency vehicle that had been approaching him from the west. (App. 62, Dep. Penny, 30:19-24, 32:7-9). He did not look to the left, in the direction from where Officer Dekker was approaching (*Id.*, Dep. Penny 32:10).

As Officer Dekker approached the intersection, there were no vehicles stopped on the shoulder on either road. (App. 48, Dep. Dekker 51:13-19). He had a clear view of the intersection. (*Id.*, Dep. Dekker 51:20-22). He could see to his right for 1/4 – 1/2 mile. (App. 51). He did not see any

vehicles approaching from his right. (*Id.*). He saw a single light that he believed was part of a farmhouse on the north side of the highway. (*Id.*).

He looked to his left and "cleared the intersection," seeing only one vehicle that was far enough away that it was not a factor. (App. 48, Dep. Dekker, 51:23 – 52:9; App. 51). Officer Dekker had no reason to think that the way he was driving was likely to result in harm or cause an accident. He did not know that James Penny was approaching from his right. (App. 49, Dep. Dekker 53:5-15).

Officer Dekker had slowed to approximately 25 mph as he entered the intersection. (App. 79). Neither party saw the other and their vehicles collided in the middle of the intersection. Had Officer Dekker seen Mr. Penny, he would have stopped. (App. 42, Dep. Dekker 25:7-9; App. 62-63, Dep. Penny 31:5-7, 34:14-18).

Plaintiff initially filed suit on August 22, 2018, in Madison County Case No. LACV034834. Plaintiff dismissed the case without prejudice on January 30, 2019. On March 27, 2020, Plaintiff refiled this current suit. Plaintiff has alleged a claim of recklessness against Christian Dekker and a claim of vicarious liability against the City of Winterset. Defendants filed an answer on May 1, 2020.

On April 5, 2022, Defendants filed for summary judgment. Hearing was held on the motion on May 9, 2022. The district court granted Defendants' motion on June 3, 2022, and Plaintiff filed his notice of appeal on June 14, 2022. On June 7, 2023 the Court of Appeals reversed the judgment of the district court in a 2 to 1 majority decision.

Defendants urge that this Court grant further review of the Court of Appeals decision as the majority erred in reversing the decision of the district court.

II. ARGUMENT

A. Standard For Further Review

Under Iowa R. App. P. 6.1103(1)(b), further review is a matter of judicial discretion. Considerations for granting further review include whether "(1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter; (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court; (3) The court of appeals has decided a case where there is an important question of changing legal principles; (4) The case presents an issue of broad public importance that the supreme court should ultimately decide."

This case arises out of an automobile accident that occurred on March 30, 2018 between Plaintiff James Penny and Officer Christian Dekker, who was operating in emergency response mode. As mentioned, the majority opinion conflicts with the recklessness standard that has been previously articulated by this Court in *Bell v. Community Ambulance Service Agency for Northern Des Moines County* and *Martinez v. State*.

Although this Court has considered a handful of recklessness cases, there are very few cases considering the issue of recklessness as to emergency responses, when compared to the cases dealing with high-speed chases. (*See* Ct. App. Op. p. 9 n.6) (*Bell* and *Fritz* "appear to be the only cases under section 321.231 on the issue of recklessness in an emergency response" other than the "cases implicating the statute that involve high-speed chases . . . ."). As such, recklessness continues to be an important area that needs to be explored and solidified under Iowa law. If this opinion is allowed to stand, it will be cited by litigants and relied on by lower courts across the state when determining if there is evidence of recklessness in cases involving law enforcement and emergency responders.

Further, Defendants urge that even though Iowa Code § 321.231 was amended in 2022 and the prior version of the statute is controlling in this case, the amendments should not operate to defeat this application for

further review, as the language of the statues is similar, and the amendments have reaffirmed that the standard for liability in such cases is recklessness. *Compare* Iowa Code § 321.231(6) (2023) ("The provisions of this section shall not relieve the driver of an authorized emergency vehicle or the rider of a police bicycle from the duty to drive or ride with due regard for the safety of all persons, nor shall such provisions protect the driver or rider from the consequences of the driver's or rider's reckless disregard for the safety of others."); *with* Iowa Code § 321.231(5) (2020) (same); *see Martinez v. State*, 986 N.W.2d 121, 125 n.1 (Iowa 2023) ("Amendments to § 321.231 in 2022 further reinforced the legislature's policy choice of 'recklessness as the standard of care. The word "recklessly" was added to § 321.231(3)(b) to state that drivers of emergency vehicles may "[e]xceed the maximum speed limits so long as the driver does not recklessly endanger life or property.").

B. The Court of Appeals Erred in Overturning Summary Judgment on Plaintiff's Claim Of Recklessness

1. Recklessness in Iowa

"As the statute's text announces, the legal standard of care for claims brought under section 321.231 is recklessness." *Martinez v. State*, 986 N.W.2d 121, 124 (Iowa 2023) (citing *Hoffert v. Luze*, 578 N.W.2d 681, 685 (Iowa 1998)). "To prove recklessness under the statute, a plaintiff must show that the officer 'has intentionally done an act of an unreasonable character in

disregard of a risk known to [the officer] or so obvious that [the officer] must be taken to have been aware of it.'" *Id.* (quoting *Morris v. Leaf*, 534 N.W.2d 388, 391 (Iowa 1995)) (alterations in original). "And even then, the officer can be liable only if the dangerous act was "so great as to make it highly probable that harm would follow." *Id.*

Contrary to the Court of Appeals decision, the district court correctly found that no reasonable jury could find that Officer Dekker was reckless on the date of this accident.

2. Officer Dekker's Conduct Does Not Rise to the Level of Recklessness under Iowa Law

The Iowa Supreme Court has recently confirmed that "recklessness is a difficult standard to meet in Iowa." *Martinez*, 986 N.W.2d at 125 (quoting *Fritz v. Hennigar*, 19 F.4th 1067, 1069-70 (8th. Cir. 2021). In fact, there are no cases in Iowa—including any cited by the majority—that could lead to a finding that Officer Dekker's conduct in driving through the intersection was reckless on the date of this accident. At most, Officer Dekker's conduct was negligent, which is not sufficient to sustain a claim of recklessness.

The two most apposite cases, *Bell v. Community Ambulance Service Agency for Northern Des Moines County* and *Fritz v. Henningar*, were discussed extensively by the lower courts.

In *Bell*, the Iowa Supreme Court was faced with whether an ambulance driver's conduct in responding in emergency mode could rise to the level of recklessness. In upholding the district court's granting of the ambulance defendants' motion for judgment notwithstanding the verdict, the Iowa Supreme Court stated as follows:

> [T]he ambulance had a clear lane through which it could proceed through the intersection . . . All other witnesses who were also in the vicinity of the intersection clearly saw or heard, or both saw and heard, the ambulance. . . Hinson could not know that Susan Bell would attempt to traverse this intersection in front of the path of this ambulance. Hinson had no warning or actual knowledge that a dangerous situation was about to be created by Plaintiff's actions. Immediately prior to and at the time of the collision, Hinson was alert, careful, cognizant of his environment and the surrounding traffic . . . Under no stretch of the imagination can it be concluded that the driver of the ambulance was reckless.

Bell, 579 N.W.2d at 337.

In *Estate of Fritz v. Hennigar*, 2020 WL 6845944 (N.D. Iowa 2020) (affirmed, *Fritz v. Henningar*, 19 F.4th 1067 (8th Cir. 2021)), a West Union police officer was responding to a call requesting assistance at an apartment complex known to be a problem area, where tenants were arguing. The officer approached the busy intersection of two highways at which there was a four-way stop, at speeds of 44-51 mph. He cleared the intersection and

proceeded through without stopping. Thereafter, he accelerated, reaching speeds as high as 60 mph, before colliding with a motorist seeking to cross the road from left to right to enter a gas station on the opposite side of the road. The ensuing collision proved fatal to the crossing motorist. 2020 WL 6845944 at * 2-3.

The Estate filed suit, alleging that the officer was reckless under Iowa Code § 321.231. Defendants moved for summary judgment. The District Court, in granting the motion, found that "no reasonable jury could find Hennigar knew, or should have known, that his driving was so obviously dangerous that it was likely to cause an accident." 2020 WL 6845944 at * 6. "He did not know, nor was it reasonably foreseeable, that a vehicle was likely to pull into his path." *Id*. He was driving in emergency mode so others were obligated to yield, and it was reasonable for the officer to believe that they would. *Id*. "The material issue is whether Hennigar knew, or had reason to know, that a nearby driver, such as Willys, was likely to be unaware that he was approaching. While a momentary obstruction to Hennigar's vision should have alerted him of the need to proceed with more caution, there is insufficient evidence to find that proceeding as Hennigar did constituted recklessness." *Id*.

In summary, the Court found that the officer had no reason to believe nearby motorists would fail to hear or see him or that they were unlikely to yield. He had no reason to believe his driving was "likely to result in harm to another." *Id*. at *7. Thus, even if he was negligent, no reasonable jury could find that he was reckless. *Id*.

In analyzing Officer Dekker's conduct, the district court acknowledged the factual difference regarding the presence of a traffic control signal, but still found that "The undisputed evidence is very similar in this case to the facts of the *Bell* case above." (App. 103). The district court stated as follows in comparing Officer Dekker's conduct to the officer in *Fritz*:

> [T]he Court finds that Officer Dekker's driving was more reasonable than that of Officer Hennigar above. Officer Dekker slowed considerably as he approached the intersection, the traffic on the roadway was much lighter, Officer Dekker did not navigate his way through traffic, and he did not accelerate as he went through the intersection. Similar to *Fritz*, 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. 104, Dist. Ct. Op. 8).

Yet, the majority somehow distinguished the cases of *Bell* and *Fritz* using the following rationale:

> Here, however, it was not safe for Dekker to assume the path in front of him was clear or would be clear because of motorists' duty to yield to him. Dekker claimed that he looked to his right before proceeding through the stop sign at the intersection but did not see Penny approaching. He recalled seeing only one stationary light, which he thought was a farmhouse some distance away from the intersection.
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> . . .
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> Viewing this evidence in the light most favorable to Penny, a reasonable jury could find that Penny was visible to Dekker and that Dekker did not sufficiently scan the intersection—if at all—before accelerating through the stop sign without braking.
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> . . .
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> If Dekker went through the intersection without sufficiently assessing it, which is a legitimate inference from the evidence showing that Penny was visible from Dekker's vantage point and traveling at a non-yielding speed, then doing so could be considered an intentional act in disregard of a risk so obvious that Dekker must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

(Ct. App. Op. 12-13).

Respectfully, this analysis misses the mark for two compelling reasons. First, the suggestion that Dekker might not have scanned the intersection "at all" completely ignores the undisputed record evidence in this case. There is no claim by any person—including Plaintiff's experts—that Officer Dekker did not scan the intersection prior to driving through it.[1]

To the contrary, the only evidence in the record is that Dekker testified he had a clear view of the intersection. (App. 48, Dep. Dekker 51: 20-22). He could see to his right for 1/4 – 1/2 mile. (*Id.*, Dep. Dekker 52:1-9; App. 51). He slowed down leading up to the intersection, scanned the intersection, and looked both ways. (*Id.*). He did not see any vehicles approaching from the right and saw a single light that he believed was part of a farmhouse on the north side of the highway. (*Id.*). Equally, the idea that Officer Dekker did not look well enough simply because there was an accident is not evidence or even an "legitimate inference." (Ct. App. Op. 13). It is just argument.

Second, and crucially, while "looking but not seeing" might constitute negligence, it does not rise to the level required to prove recklessness. As

[1] The suggestion that Penny "disputed whether Dekker 'look[ed] to the east before crossing Hwy 92 in derogation of the stop sign on 10th St., because if he had looked he would have seen Judd Penny's truck on the highway'" comes from Plaintiff's statement of disputed facts. Such a statement is argument that is unsupported by any record evidence.

this Court recently observed in the case of *Martinez*, recklessness "requires proof of an act 'in *disregard of* a risk' so known to the officer or '*so obvious* that he must be taken to have been aware of it.'" 986 N.W.2d at 125 (quoting *Morris v. Leaf*, 534 N.W.2d 388, 391 (Iowa 1995) (emphasis original)).

The dissent drilled down to the heart of this issue as follows:

> Here, traffic was almost non-existent, it was dark out, and Officer Dekker was driving with flashing overhead lights and his siren on. He looked both ways before entering the intersection of North 10th Avenue and Highway 92 and spotted a light that he believed came from a farmhouse on the north side of Highway 92. Given that assessment, he believed no traffic to be coming from that direction that would impede his free travel through the intersection. From the other view, he recognized an approaching vehicle but assessed it as too far away to be a concern. It is unrefuted in the record that he believed the intersection was clear of any potential danger before entering. To me, these facts support Dekker's negligence, just as Penny was negligent for failing to see Dekker and pull over, and the lack of care on each of their parts did not involve intentionality as they both believed the intersection was clear.

(Ct. App. Op. 18, Greer, J., dissenting).

Based on the record evidence, the majority erred in finding that Officer Dekker's conduct could constitute recklessness on the date of this accident.

In finding that the issue of recklessness should be decided by a jury, the majority relies on out of state cases and the 1933 case of *Siesseger v. Puth*, 248 N.W. 352 (Iowa 1933), which considered recklessness in the context of the now-defunct guest statute. (Ct. App. Op. 14). Yet, there are no Iowa cases holding that recklessness cases cannot be decided at the summary judgment stage, and the recent opinion of *Martinez* shows this Court's willingness to rule on the issue of recklessness at summary judgment. Further, a simple review of these cited cases exemplifies how Officer Dekker's conduct did not meet the heightened standard of recklessness on the date of this accident.

The out of state cases are "distinguishable to this case because they involve congested intersections where an intent to enter with less than full vision of possible traffic involved a potentially reckless choice by the emergency vehicle operator." (Ct. App. Op. 18, Greer, J., dissenting). In citing the case of *Oddo v. City of Buffalo*, 72 N.Y.S.3d 706, 708 (N.Y. App. Div. 2018) the majority opinion notes that there was an "issue of whether [the] officer sufficiently slowed down before the intersection." (Ct. App. Op. 14). However, the consideration on cross appeal in *Oddo* was not whether the officer sufficiently slowed down, but whether the officer not slowing down at all constituted recklessness. *See* 72 N.Y.S.3d at 708 (where there

was also a dispute as to the color of the traffic light which will "determine the standard of care…."). Likewise, in *Corallo v. Martino,* 58 A.D.3d 792 (N.Y. App. Div. 2009), there was a question as to whether the officer "slowed down his police vehicle [at all] prior to entering the intersection against a red light, checked for oncoming traffic before entering the intersection, and activated the siren[,]" and in the unreported case of *Zapata v. City of Gonzales*, No. 13-18-00065-CV, 2020 WL 486489 at *5 (Tex. App. Jan. 30, 2020), evidence that the officer "drove through the intersection on a red light without slowing his vehicle or waiting for the cross-traffic to yield."[2]

Here, the evidence is undisputed that Officer Dekker braked repeatedly, slowed down before entering the intersection, and looked both ways when approaching the intersection.

In examining the case of *Siesseger v. Puth*, 248 N.W. 352 (Iowa 1933) under the now defunct guest statute, the facts supporting recklessness are entirely distinguishable from Officer Dekker's conduct in the present case:

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[2] Although *Glenn v. Columbus*, 72 N.E.3d 124 (Ohio Ct. App. 2016) denied summary judgment to the officer, it was granted to the municipality under Ohio law. Further, the Court was focused on the busy intersection, the fact that there was conflicting testimony as to whether the electronic siren was activated, and an observable vehicle moving toward the busy intersection. 72 N.E.3d at 132. Here, there is no dispute as to Dekker's lights and sirens being activated and the intersection was clear.

> The jury might find from the evidence that the defendant did not have his car under control for about a half mile; that during that time it was swerving from one side of the road to the other; that he was intentionally driving in violation of the speed laws; that he was driving down grade without slackening his speed; that he was an inexperienced driver; and that he made no attempt to slacken the speed of his car until long after it got beyond his control, and that instead of doing anything at that time to slacken its speed or get it under control he inadvertently put his foot on the gas instead of the brake.
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> Although more than negligence must be shown to constitute recklessness, all of these matters when considered together may be sufficient to warrant the jury in finding that the defendant was guilty of more than negligence; that he was proceeding without heed of or concern for consequences….

Siesseger, 248 N.W. at 357. (emphasis added).

Not only does *Siesseger* provide guidance as to how the conduct of Officer Dekker does not rise to the level of recklessness, but a considerable number of other cases interpreting the recklessness standard under the guest statute discuss the type of conduct that could rise to a finding of recklessness, which were cited in Defendants' opening brief:

In *Krell v. May*, 149 N.W.2d 834 (Iowa 1967), the Iowa Supreme Court was faced with the question of "whether evidence of [the Defendant driver's] actions regarding speed and control, his awareness of the situation, and the circumstances then and there existing, was sufficient to sustain a

finding of recklessness. . . .” *Id.* at 839. The driver in *Krell* was on a “joyride” after work, where he drove so fast on a winding road that the passenger thought he was not going to make the bridge but drive into the trees. *Id.* He blew through stop signs, and it was determined that the driver was a “mind apparently bent on showing off to thrill or frighten the girls in the car.” *Id.* at 840.

In *Lewis v. Baker*, the Iowa Supreme Court found that there was a jury question on the issue of recklessness where the Defendant was operating at 110 to 115 miles per hour leading up to the scene of the accident. *Lewis*, 104 N.W.2d 575, 577 (Iowa 1960). The Plaintiff informed Defendant to slow down. *Id.* In response, Plaintiff laughed at Defendant’s suggestion and there was not any change in speed. *Id.* There was traffic, the weather was dark, and there were curves in the roadway. *Id.* at 578. The Iowa Supreme Court ultimately concluded that “[t]here was a probability rather than a mere possibility of danger.” *Id.* (citations omitted).

In *Winkler v. Patten*, 175 N.W.2d 126 (Iowa 1970), which has previously been cited by Plaintiff for the proposition that the goal in a recklessness case 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” (Pl. Br. At 15-16), the Iowa Supreme Court discussed the driver’s conduct as

follows: “traveling at a high and excessive rate of speed for several miles, the last part of which was in excess of 85 miles per hour in a 35-mile zone, and was travelling at such speed when he entered the curve which he failed to negotiate, that he was familiar with the road or street in this area and made no effort to reduce his speed until he had entered the curve. *Winkler*, 175 N.W.2d at 128 (internal quotations omitted); *see also Bell*, 579 N.W.2d at 336 (discussing *Winkler*).

Unlike the Defendant drivers in every recklessness case under the guest statute, Officer Dekker was a police officer operating his vehicle in emergency response mode in accordance with the laws in the State of Iowa.

Further, based on the record evidence, the current facts are not even remotely similar to those in *Siesseger, Krell, Winkler*, and *Lewis*. Nor do the facts parallel the cases of *Tuttle v. Longnecker* and *Oehlert v. Kramer*. *See Tuttle v. Longnecker*, 138 N.W.2d 851, 853-55 (Iowa 1965) (where driver was swerving the vehicle back and forth across the gravel roadway with a smile on his face); *Oehlert v. Kramer*, 205 N.W.2d 723, 724-25 (Iowa 1973) (vehicle traveling 90 miles per hour in a 50 mile per hour zone and proceeded through four curves before crashing).

Here, Dekker had no knowledge that any driver was unable to see or hear his approach or that any driver was going to fail to yield to his

emergency vehicle. There are no aggravating circumstances such as intoxication or cell phone use. There is no evidence that he was swerving, joy riding, thrill seeking, or a "mind apparently bent on showing off to thrill or frighten." In fact, there is no evidence that he was even distracted.

"This would be a far different case if the officer saw the car coming and wanted to beat it, went through a busy intersection without checking for vehicles that could not be seen, or assumed that a car would stop just because of the activated emergency lights and sirens—all behavior that might be considered reckless." (Ct. App. Op. 18, Greer, J., dissenting). No such conduct is present here.

The simple fact remains there is no published case in Iowa, including and especially any case law under Iowa Code § 321.231, tending to indicate that a jury could find Defendant Dekker's conduct reckless. To the contrary, the fact that Officer Dekker made the decision to brake repeatedly, slow down as he approached the intersection, and look both ways for oncoming traffic is indication that Dekker appreciated the risk—not that he disregarded it. *See Martinez v. State*, 986 N.W.2d 121, 125 (Iowa 2023) (noting that the officer's "decision to shut down his pursuit when he saw [the suspect] shift into the left lane demonstrates an *appreciation*—not disregard—of the

distinct risk that Grimes's decision to drive against the flow of traffic presented." (emphasis original)).

Plaintiff urges and the majority relies on the material from Plaintiff's purported experts. However, as correctly noted by the dissent, "the recklessness standard is a legal question—not to be decided by an expert." "'[Q]uestions such as whether a defendant was negligent or not negligent are improper because experts are not to state opinions as to legal standards.'" (Ct. App. Op. 19, Greer, J., dissenting) (quoting *Haskenhoff v. Homeland Energy Sols.*, LLC, 897 N.W.2d 553, 600 (Iowa 2017)).

In examining the specifics of each of these expert opinions,

> First, Hall opined "there is no evidence 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." Again, Officer Dekker did not exercise due care when he failed to see Penny, but this failure does not lead to a recklessness finding, so Hall's report offers no evidence of recklessness.
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> . . .
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> Again, all evidence confirmed that Officer Dekker was traveling in excess of the speed limit on an emergency call, but his speed is not reckless behavior under the circumstances without more. Assuming the intersection was clear of all traffic, as he and Penny believed, no one would label Dekker's speed alone as reckless.

> Finally, most of the forensic expert Billington's opinions discussed Dekker's speed and that he failed to react appropriately to the Penny vehicle before reaching the intersection because he did not see Penny—noting Dekker was required to "expect the unexpected." The opinions that Dekker should have seen Penny are those that support negligence and so while Penny's experts point out potentially negligent actions of Officer Dekker, they do not present a factual pattern that resembles reckless behavior as a matter of law. While it is clear both Dekker's and Penny's actions raise questions of negligence for failing to see each other, that negligent behavior cannot be elevated to recklessness without the intent requirement expressed in our case law.

(Ct. App. Op. 20-21, Greer, J., dissenting) (emphasis added).

Under Iowa law, "[A]ssuring police protection free from the chilling effect of liability for split-second decisions is an important policy justification for curtailing liability." *Morris v. Leaf*, 534 N.W.2d 388, 391 (Iowa 1995) (internal quotations and citations omitted). "In the end, all parties concede that Dekker was responding to an emergency call involving a non-responsive person, had emergency lights and sirens in operation, both parties failed to see the other before colliding, and Dekker was traveling in excess of the speed limit but slowed as he approached the intersection controlled by a stop sign impacting Dekker's travel. In the worst case, Dekker's actions were negligent, but there is no showing that elevates that behavior to recklessness." (Ct. App. Op. 21, Greer, J., Dissenting).

CONCLUSION

Based on the record evidence, the Court of Appeals erred in finding that a reasonable jury could find that Defendant Dekker was reckless on the date of this incident. Defendants/Appellees Officer Christian Dekker and the City of Winterset respectfully urge that this Court grant further review, overturn the judgment of the Court of Appeals and affirm the judgment of the District Court.

CERTIFICATE OF COMPLIANCE

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

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/s/ Zachary D. Clausen June 27, 2023

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IN THE COURT OF APPEALS OF IOWA

No. 22-1026
Filed June 7, 2023

JAMES R. PENNY,
Plaintiff-Appellant,

vs.

CITY OF WINTERSET and CHRISTIAN DEKKER,
Defendants-Appellees.

Appeal from the Iowa District Court for Madison County, Stacy Ritchie, Judge.

A plaintiff appeals an adverse summary judgment ruling that dismissed his claims for injuries sustained after a collision with a police cruiser. **REVERSED AND REMANDED.**

Gary Dickey of Dickey, Campbell & Sahag Law Firm, PLC, Des Moines, for appellant.

Zachary D. Clausen and Douglas L. Phillips of Klass Law Firm, L.L.P., Sioux City, for appellees.

Heard by Greer, P.J., and Badding and Chicchelly, JJ.

BADDING, Judge.

In this appeal from an adverse summary-judgment ruling, we are asked to decide whether the district court erred in concluding as a matter of law that a police officer who was responding to an emergency was not reckless in driving through a stop sign at a highway intersection and crashing into a vehicle. *See* Iowa Code § 321.231 (2020). Because reasonable minds could differ on how this issue should be resolved, we reverse the court's ruling and remand for further proceedings.

I. Background Facts and Proceedings

The crash that led to this litigation occurred just after sunset on an overcast evening in March 2018 at the intersection of Highway 92 and N. 10th Street in Winterset. The speed limit on Highway 92, which runs east to west and has no traffic control devices, is fifty-five miles per hour. N. 10th Street has a twenty-five-mile-per-hour speed limit, with stop signs controlling north- and south-bound traffic. N. 10th Street turns into Cedar Bridge Road north of Highway 92. The following image depicts the intersection, marked by the red pin, where the collision occurred:

At roughly 8:20 p.m., Officer Christian Dekker of the Winterset Police Department was at home eating supper when he received an emergency service

call for an unconscious person at a nearby motel on Cedar Bridge Road. The crash occurred minutes later while Dekker was responding to that call.

Traffic was light as Dekker headed north-bound on N. 10th Street toward its intersection with Highway 92 in his police cruiser—with his emergency lights and sirens activated. Meanwhile, James "Judd" Penny was traveling west-bound on Highway 92 in his 1967 Chevrolet pickup, on his way to a high school rugby game. When Penny was a few hundred yards away from the intersection at N. 10th St., he stopped for a second unit that was also responding to the emergency.[1] Penny got back on the highway and "was back up to full speed"—fifty to fifty-five miles per hour—"fairly quickly after that." As Penny neared the intersection, Dekker blew through the stop sign at N. 10th Street and into the highway without stopping, broadsiding Penny's pickup with the cruiser's front end. Neither saw the other coming. Dekker suffered a laceration to his scalp, while Penny's injuries were more severe.

In March 2020, Penny sued the City of Winterset and Dekker, alleging Dekker's recklessness in the scope of his employment as a police officer caused Penny damages. In time, the defendants moved for summary judgment, arguing "[t]here is no evidence from which a reasonable jury could find that . . . Dekker was reckless." They claimed it was undisputed that Dekker "believed he had a clear view of the intersection" with "no reason to think that the way he was driving was likely to result in harm to someone, or cause an accident" because he "did not know that James Penny was approaching from his right."

[1] The approximate point where Penny thought he pulled over for the other unit is shown by the blue dot on the above image.

In support of that claim, the defendants pointed to a witness statement Dekker wrote a couple of hours after the crash, in which Dekker said:

> Approximately 3-4 blocks from the intersection of Highway 92 and 10th Street, I saw as Officer Camp turned north onto Cedar Bridge road also running code. I looked east to clear traffic, you can see west bound traffic for 1/2–1/4 mile as you approach the intersection. I didn't see any vehicles approaching. I remember seeing 1 single light, however, I believed it was part of a farm house on the North side of 92. As I approached the intersection of 10th & 92, I cleared left (East Bound) and proceeded into the intersection. As I entered the intersection, there was a loud bang . . . .

At his deposition, Dekker explained that by "clearing the intersection," he meant

> that I looked to my right, to my left. Typically I would look several times. In this instance I can see right for quite a ways, and so once I cleared right and I determined there was nothing approaching me from the right, then I went left, saw . . . one vehicle to the left and determined it was far enough away and then proceeded through the intersection.

Dekker's deposition ended with his conclusion "that there was nobody there. Obviously Mr. Penny was there, but it was my determination that he was not there when I cleared to the right." Based on these facts, the defendants argued in their supporting brief that Dekker drove "with due regard for the safety of all persons" and not with "reckless disregard for the safety of others," so the defendants could not be held liable. *See id.* § 321.231(5).

Penny resisted, arguing a genuine issue of material fact existed and should be resolved by a jury on whether Dekker acted recklessly. He disputed whether Dekker "look[ed] to the east before crossing Hwy 92 in derogation of the stop sign on 10th St., because if he had looked he would have seen Judd Penny's truck on the highway." And Penny contended that Dekker "did not look for cross traffic for

a sufficient period of time to perceive whether any cars were on Hwy 92 before crossing against the stop sign."

In support of his resistance, Penny offered a crash data retrieval graph from Dekker's cruiser, which showed that Dekker was traveling at nearly sixty miles per hour with the accelerator throttled at about thirty-five percent fifteen seconds before the crash. The brake was applied in four separate intervals in the thirteen seconds right before the crash, with vehicle speed decreasing to about thirty miles per hour in that interval. But in the last second before the crash, Dekker agreed at his deposition that he accelerated through the intersection, explaining: "I was braking on the way down the hill, and then once I would deem that the intersection was clear, I would cover the accelerator with my foot until I believed it was okay to proceed through that intersection and then I would accelerate through the intersection, yes." The technical collision investigation from the Iowa State Patrol confirmed Dekker's recollection, noting that data from the cruiser's "black box" showed

> that approximately 5 seconds before the crash, Officer Dekker was traveling at 44 mph and was applying the brake. Approximately 2 seconds before the crash, Officer Dekker was traveling 30 mph with no brake applied. At the time of the collision, Officer Dekker was traveling approximately 25 mph with no brake applied.

Penny submitted two expert reports with his resistance. Forensic expert David Billington discussed Dekker's speed in the seconds before the collision and found that he "made no effort to stop or proceed with caution at the stop sign, but rather enter[ed] the intersection with approaching cross traffic at a speed which was higher than the posted 25 mph speed limit." He also concluded "[t]he evidence is clear that Mr. Penny was approaching the intersection and was fully available to

be seen by Officer Dekker," and Dekker "did not afford himself the time necessary to properly discern [whether] the lights he saw was a building or an approaching vehicle." Billington believed Dekker should have slowed down, assessed the intersection, and determined whether approaching vehicles were yielding. He concluded that Dekker caused the collision "by a lack of experience or the intentional disregard for the safety of the general motoring public" and stated his actions were reckless.

Penny's other expert witness, accident reconstructionist Todd Hall, said that after reviewing law enforcement documents and video,[2] he would "[o]pine 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." At his deposition, when asked whether his truck's headlights were working, Penny testified: "I know in the video you can see the lights pretty clearly . . . ." Later, he reiterated that he had reviewed "a video of the approaching police car, and you can see my—my truck and the two lights." Penny continued: "The camera shows [a] full view of the highway. He would have had full view of me. He was up on the hill, like an eagle eye view. He could see everything." For his part, Penny said that he was "just proceeding through the intersection as [he] always would" with no expectation that somebody would "be coming through the stop sign." As he looked back on the accident, Penny "counted the seconds and from the time that [Dekker] was coming down the hill and would have seen me and the rate of speed that I was going, there was just no time."

[2] No videos, from the police cruiser's dash cam or otherwise were submitted to the district court as part of the summary judgment record.

A brief hearing was held in May 2022, following which the district court issued a ruling granting the defendants' motion for summary judgment and dismissing the action. Relying on *Bell v. Community Ambulance Service Agency for Northern Des Moines County*[3] and *Estate of Fritz v. Henningar*,[4] the court reasoned that because Dekker did not have to navigate through traffic, did not accelerate as he went through the intersection, and "did not have reason to believe that any vehicle nearby was unlikely to yield to his emergency lights and siren," "his assumption that the path in front of him would remain clear was reasonable." The court concluded that "no reasonable jury could find that [Dekker's] driving was reckless under Iowa Code section 321.231." Penny appeals.

II. Standard of Review

"The standard of review for district court rulings on summary judgment is for correction of errors of law." *Kunde v. Est. of Bowman*, 920 N.W.2d 803, 806 (Iowa 2018). Summary judgment is appropriate only when the moving party has shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). "In determining whether a grant of summary judgment was appropriate, we examine the record in the light most favorable to the nonmoving party, drawing all legitimate inferences that may be drawn from the evidence in his or her favor." *Homan v. Branstad*, 887 N.W.2d 153, 163–64 (Iowa 2016). "Where reasonable minds can differ on how an issue should be resolved, a fact question has been generated,

[3] 579 N.W.2d 330 (Iowa 1998).
[4] 19 F.4th 1067 (8th Cir. 2021); No. C19-2046-LTS, 2020 WL 6845944 (N.D. Iowa Nov. 20, 2020).

and summary judgment should not be granted." *GreatAm. Fin. Servs. Corp. v. Natalya Rodionova Med. Care, P.C.*, 956 N.W.2d 148, 153 (Iowa 2021) (citation omitted).

III. Analysis

Iowa Code section 321.231(1) "provides liability protections to drivers of emergency vehicles in certain situations," including where, as here, the driver of an authorized emergency vehicle is "responding to an emergency call." *Martinez v. State*, 986 N.W.2d 121, 123 (Iowa 2023). Police vehicles using an audio or visual signaling device, like Dekker was, may "[p]roceed past a . . . stop sign, but only after slowing down as may be necessary for safe operation," and "[e]xceed the maximum speed limits so long as the driver does not endanger life or property."[5] Iowa Code § 321.231(3), (4). These protections do not, however, "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 . . . reckless disregard for the safety of others." *Id.* § 321.231(5). "An emergency vehicle operator who harms another person by driving with reckless disregard for the safety of others thus may be held liable for civil damages." *Martinez*, 986 N.W.2d at 124.

A plaintiff seeking recovery based on actions of a driver of an authorized emergency vehicle must show the protected actions were performed in a reckless manner. *See Hoffert v. Luze*, 578 N.W.2d 681, 685 (Iowa 1998).

> To prove recklessness under the statute, a plaintiff must show that the officer "has intentionally done an act of an unreasonable

[5] It is undisputed that Dekker was driving an emergency vehicle with his lights and siren activated while responding to an emergency call.

> character in disregard of a risk known to [the officer] or so obvious that [the officer] must be taken to have been aware of it." And even then, the officer can only be liable if the dangerous act was "so great as to make it highly probable that harm would follow."

Martinez, 986 N.W.2d at 124 (alterations in original) (internal citation omitted). This is a difficult standard to meet, *id.* at 125, as shown by the two cases the district court relied on in entering summary judgment against Penny—*Bell* and *Fritz*.[6]

Bell involved the question of whether an ambulance driver acted recklessly when transporting a patient to a medical center. *See* 579 N.W.2d at 331. On his way to the center, the driver radioed dispatch "and requested the traffic lights on Roosevelt Avenue be changed from the normal traffic cycle to flashing red in all directions." *Id.* at 322. Dispatch complied with the request, and the driver proceeded south on Roosevelt Avenue at about forty miles per hour. *Id.* At the same time, the plaintiff was traveling west on Kirkwood Street, with "her windows rolled up and her radio on." *Id.* "As she approached the flashing red lights at the intersection of Kirkwood and Roosevelt, traffic was heavy." *Id.* The plaintiff

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[6] These appear to be the only cases under section 321.231 on the issue of recklessness in an emergency response. There are other cases implicating the statute that involve high-speed chases but, because of the factual differences between that type of situation versus emergency responses, they provide little guidance on the question presented here. *See Martinez*, 986 N.W.2d at 122–23; *Morris v. Leaf*, 534 N.W.2d 388, 388–91 (Iowa 1995); *Dooley v. City of Cedar Rapids*, No. 09-1926, 2011 WL 1135794, at *1–6 (Iowa Ct. App. Mar. 30, 2011).

McClennan v. Orlando Ramirez is an emergency response case, but the section 321.231 protections did not apply there because the officer was not using his lights or siren. *See* No. 18-1974, 2019 WL 2375244, at *3–4 (Iowa Ct. App. June 5, 2019). *Hoffert* is an emergency response case as well, but it only clarified that recklessness is the applicable standard of care, without applying that standard. *See* 578 N.W.2d at 685. Because *Hoffert* overruled the negligence standard that had been applied in past cases, the emergency response cases predating *Hoffert* are also not that helpful. *See id.* (*overruling Rush v. Sioux City*, 240 N.W.2d 431 (Iowa 1976), *City of Cedar Rapids v. Moses*, 223 N.W.2d 263 (Iowa 1974), *and Wetz v. Thorpe*, 215 N.W.2d 350 (Iowa 1974)).

stopped at the intersection and checked for traffic in both directions but, due to traffic, neither she nor the ambulance driver could see each other. *Id.* The plaintiff proceeded into the intersection and was hit by the ambulance. *Id.*

The plaintiff filed suit and successfully obtained a verdict in her favor, with a jury finding that the ambulance driver's conduct was reckless. *See id.* However, the district court granted the defendants' motion for judgment notwithstanding the verdict, finding there was insufficient evidence to support the verdict. *Id.* at 333. In its ruling, the court noted the evidence showed it was daytime and sunny, traffic was heavy, the ambulance slowed down while approaching the intersection, red lights were flashing at the intersection, the ambulance driver checked traffic in both directions before proceeding, "other vehicles were able to either hear or see the ambulance as it approached," and the ambulance driver "had a clear view of the intersection and all traffic was stopped as he approached it." *Id.* at 334–35. On these facts, the court reasoned the driver did not create "a situation in which the risk of harm to others was probable." *Id.* at 337. The supreme court agreed in summary fashion, concluding: "The evidence in this case cannot be said to constitute substantial evidence of recklessness" to support the jury's verdict. *Id.* at 338.

Fritz also involved an emergency response at an intersection where the plaintiff was subject to a traffic control device. 2020 WL 6845944, at *2. In that case, a police officer was responding to a fight in progress. *Id.* The officer entered a two-lane highway, Highway 150, traveling north and "accelerated quickly with his lights and siren activated." *Id.* At least two vehicles, one traveling north and one traveling south, pulled off to the side of the roadway as the officer traversed the

highway. *Id.* The intersection of Highways 150 and 18 is a busy four-way stop. *Id.* The officer "claim[ed] he slowed slightly as he approached the intersection, which was clear, and made eye contact with [the plaintiff] who was stopped on the east side of the intersection before continuing through it." *Id.* Thinking that the plaintiff would yield to him, the officer "accelerated through the intersection, reaching speeds as high as 60 mph, and collided with [the plaintiff] approximately 272 feet north of it." *Id.*

> Leading up to the accident, [the plaintiff] was waiting at the stop sign of a business turnoff on the west side of Highway 150. He waited for over 15 seconds to let three vehicles pass, one northbound and two southbound. As the second southbound vehicle was passing, [the plaintiff] began driving straight across Highway 150 toward a gas station on the opposite side. A little more than four seconds later, [the plaintiff's] truck was broadsided by [the officer's] police SUV while crossing the northbound lane of Highway 150.

Id. at *3 (internal citations and footnote omitted).

The defendants in *Fritz* moved for summary judgment, arguing the claim of recklessness failed as a matter of law. *Id.* at *3. Though some of the evidence was disputed, like whether the officer's view was obstructed, the federal district court concluded "no reasonable jury could find [the officer] knew, or should have known, that his driving was so obviously dangerous that it was likely to cause an accident." *Id.* at *6. The court observed his "lane was clear as he approached and accelerated through the intersection"; "[h]e did not know, nor was it reasonably foreseeable, that a vehicle was likely to pull into his path"; "nearby vehicles were obligated to yield and it was reasonable for [the officer] to believe that they would do so." *Id.* The Eighth Circuit agreed with this reasoning on appeal, finding "the circumstances are almost identical" to *Bell*, since both involved an emergency

vehicle traversing a straight and clear lane while nearby motorists could hear a siren or see flashing lights. *Fritz*, 19 F.4th at 1070. If *Bell* did not involve recklessness, the court reasoned, then neither could *Fritz*. *Id.*

The district court likewise concluded that if neither *Bell* nor *Fritz* involved recklessness, then this case does not either. The court reasoned: "Similar to *Fritz*, 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." But, unlike the plaintiffs in *Bell* and *Fritz*, Penny was not subject to a traffic control device and he was traveling at a high rate of speed on the highway that Dekker was attempting to cross. This is a key factual distinction from those cases on the question of recklessness.

With cross-traffic already stopped and the emergency vehicles using lights and sirens, it was safe for the emergency drivers in *Bell* and *Fritz* to assume that the clear lanes ahead of them would remain that way. As a result, they cannot be said to have unreasonably acted in disregard of a known risk "so great as to make it highly probable that harm would follow." *See Martinez*, 986 N.W.2d at 124 (citation omitted). The risk was created by the civilian drivers—who had been stationary—unforeseeably pulling out in front of the emergency vehicles, despite being subject to a traffic control device with the added duty to yield to the emergency vehicle under Iowa Code section 321.324.

Here, however, it was not safe for Dekker to assume the path in front of him was clear or would be clear because of motorists' duty to yield to him. Dekker claimed that he looked to his right before proceeding through the stop sign at the

intersection but did not see Penny approaching. He recalled seeing only one stationary light, which he thought was a farmhouse some distance away from the intersection. Yet opinions from Penny's experts state that Penny was fully visible from Dekker's vantage point and that Dekker should have seen him. *See Feld v. Borkowski*, 790 N.W.2d 72, 80–81 (Iowa 2010) (finding an expert's affidavit gave rise to a reasonable inference of recklessness in summary judgment proceedings). Penny testified to the same at his deposition, pointing out that Dekker was coming down a hill, from which he would have had an "eagle eye" view of the highway and Penny's approaching headlights, which were visible on video from the crash. The defendants offered no evidence to dispute these facts, aside from Dekker's conclusory statement that he "determined that nobody was there," even though Penny was. And it was undisputed that Penny was traveling around the speed limit of fifty-five miles per hour—a speed at which he would have trouble yielding to an emergency vehicle unexpectedly entering the highway from his left.

Viewing this evidence in the light most favorable to Penny, a reasonable jury could find that Penny was visible to Dekker and that Dekker did not sufficiently scan the intersection—if at all—before accelerating through the stop sign without braking. While Penny had a statutory duty to yield to Dekker under section 321.324(3), his failure to do so does not relieve Dekker "from the duty to drive with due regard for the safety of all persons using the highway." Iowa Code § 321.324(4). Emergency drivers can only run stop signs "after slowing down as may be necessary for safe operation," *see id.* § 321.231(3)(a), which could include coming to a full stop if the circumstances demand it, like where a vehicle that is not subject to a traffic control device is traveling at a high rate of speed on a highway

the emergency driver is trying to cross. If Dekker went through the intersection without sufficiently assessing it, which is a legitimate inference from evidence showing that Penny was visible from Dekker's vantage point and traveling at a non-yielding speed, then doing so could be considered an intentional act in disregard of a risk so obvious that Dekker must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. *Martinez*, 986 N.W.2d at 124.

Overall, we find a genuine issue of material fact remains on whether Dekker sufficiently scanned the intersection before proceeding through the stop sign consistent with his "duty to drive . . . with due regard for the safety of all persons," or whether his failure to do so amounted to "reckless disregard for the safety of others." Iowa Code § 321.231(5). Because reasonable minds could differ on whether Dekker acted recklessly, this is a triable issue for the jury to decide. *See Siesseger v. Puth*, 248 N.W. 352, 357 (Iowa 1933) ("Recklessness is an inference of fact to be drawn from the evidence offered, and is a matter for the determination of the jury."); *cf. Oddo v. City of Buffalo*, 72 N.Y.S.3d 706, 708 (N.Y. App. Div. 2018) (finding issue of whether officer sufficiently slowed down before intersection "presents an issue of fact whether he acted with reckless disregard for the safety of others"(citation omitted)); *Corallo v. Martino*, 873 N.Y.S.2d 102, 103 (N.Y. App. Div. 2009) (affirming denial of summary judgment where issues of fact remained on whether officer, against a red light, "checked for oncoming traffic before entering the intersection"); *Glenn v. Columbus*, 72 N.E.3d 124, 132 (Ohio Ct. App. 2016) (affirming denial of summary judgment because reasonable jury could conclude that emergency vehicle entering intersection against a red light "despite an

observable vehicle continuing to move toward the intersection, constituted reckless conduct"); *Zapata v. City of Gonzales*, No. 13-18-00065-CV, 2020 WL 486489, at *5 (Tex. App. Jan. 30, 2020) ("Under this version of events, Officer Tunis drove through the intersection on a red light without slowing his vehicle or waiting for the cross-traffic to yield. This evidence raises a fact issue as to whether Officer Tunis's conduct was reckless.").

IV. Conclusion

We reverse the entry of summary judgment and remand for further proceedings, concluding genuine issues of material fact remain that preclude the defendants' entitlement to judgment as a matter of law.

REVERSED AND REMANDED.

Chicchelly, J., concurs; Greer, P.J., dissents.

GREER, Judge (dissenting).

I dissent from the majority opinion and would affirm the grant of summary judgment given the application of these facts to the legal issues presented. Drilling down to the core issue, the city of Winterset and its police officer Christian Dekker argued there was no evidence from which a reasonable jury could find Dekker was reckless. The district court agreed. On appeal, James "Judd" Penny argues the district court referenced the correct standard of review but failed to apply it when it did not consider the facts in the light most favorable to Penny. With due consideration of that argument, the facts do not support a finding of recklessness on the part of the driver, Officer Dekker, and so summary judgment as a matter of law was appropriate.

To start, there is strong evidence that Officer Dekker's conduct was negligent in the operation of his police vehicle on the night of the accident with Penny. But that concession does not answer the question presented here. The key to this decision is the application of Iowa Code section 321.231, which gives Dekker, as the driver of an authorized emergency vehicle, certain privileges. *See* Iowa Code § 321.231(1) (2020). The driver of a police vehicle may (a) "[p]roceed past a . . . stop sign, but only after slowing down as may be necessary for safe operation" and (b) "[e]xceed the maximum speed limits so long as the driver does not endanger life or property." *Id.* § 321.231(3)(a), (b). Yet, the emergency vehicle driver must drive "with due regard for the safety of all persons," and the statute does not "protect the driver . . . from the consequences of the driver's . . . *reckless disregard* for the safety of others." *Id.* § 321.231(5) (emphasis added). While I recognize that this statute comes with "limitations that balance public safety

interests," the standard of care for claims under this section is "recklessness." *See Martinez v. State*, 986 N.W.2d 121, 123–24 (Iowa 2023).

With the standard at hand, we focus on Dekker's behavior to see if he willfully or wantonly disregarded the safety of others and whether the danger was so obvious from the facts that Dekker should have known or reasonably foreseen that harm would flow from his actions. *See Bell v. Cmty. Ambulance Serv. Agency for N. Des Moines Cnty.*, 579 N.W.2d 330, 335 (Iowa 1998). To set out examples of recklessness, *Bell* described two scenarios. In one case, a driver operated a vehicle with actual knowledge the brakes were virtually useless although earlier warned not to drive it. *Id.* at 335 (referencing *State v. Cox,* 500 N.W.2d 23, 26 (Iowa 1993)). Similarly, in the other case, a driver operated a vehicle knowing about its deteriorated brakes that caused him to run through a stoplight and into a school zone crosswalk, hitting a child. *Id.* (referencing *State v. Conyers,* 506 N.W.2d 442 (Iowa 1993)). As these cases highlight, the recklessness standard requires that we look to find if the actor "has *intentionally* done an act of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it, and so great as to make it highly *probable* that harm would follow." *Thompson v. Bohlken,* 312 N.W.2d 501, 504–05 (Iowa 1981) (emphasis added) (quoting William L. Prosser, *Handbook of the Law of Torts* § 34 (4th ed.1971)). Requiring more than negligence or want of ordinary care, finding reckless behavior requires "evidence of defendant's knowledge, actual or chargeable, of danger and proceeding without any heed of or concern for consequences." *Bell*, 579 N.W.2d at 336. To support a fact question over recklessness, the majority lists cases involving intersection crashes in jurisdictions

where a recklessness standard applies and where summary judgment was denied. I find those distinguishable to this case because they involve congested intersections where an intent to enter with less than full vision of possible traffic involved a potentially reckless choice by the emergency vehicle operator.

Here, traffic was almost non-existent, it was dark out, and Officer Dekker was driving with flashing overhead lights and his siren on. He looked both ways before entering the intersection of North 10th Avenue and Highway 92 and spotted a light that he believed came from a farmhouse on the north side of Highway 92. Given that assessment, he believed no traffic to be coming from that direction that would impede his free travel through the intersection. From the other view, he recognized an approaching vehicle but assessed it as too far away to be a concern. It is unrefuted in the record that he believed the intersection was clear of any potential danger before entering. To me, these facts support Dekker's negligence, just as Penny was negligent for failing to see Dekker and pull over, and the lack of care on each of their parts did not involve intentionality as they both believed the intersection was clear.

This would be a far different case if the officer saw the car coming and wanted to beat it, went through a busy intersection without checking for vehicles that could not be seen, or assumed that a car would stop just because of the activated emergency lights and sirens—all behavior that might be considered reckless. "[R]ecklessness is a difficult standard to meet in Iowa." *Martinez*, 986 N.W.2d at 125 (citation omitted). It has not been met here.

Finally, I address Penny's argument that the facts in the light most favorable to him preclude summary judgment because he has two experts that support a

recklessness finding, thus there is a factual dispute to resolve at a trial. In a motor vehicle collision case, opinions should help establish facts in dispute and not answer a legal question. "[Q]uestions such as whether a defendant was negligent or not negligent are improper because '[e]xperts are not to state opinions as to legal standards.'" *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 600 (Iowa 2017) (citation omitted) (second alteration in original). To that point, the reckless standard is a legal question—not to be decided by expert. Yet, as the majority notes, an expert may provide a basis for a "reasonable inference of recklessness" for summary judgment purposes. *See Feld v. Borkowski*, 790 N.W.2d 72, 80–81 (Iowa 2010) (noting the expert's attempt to replicate the occurrence involving the thrown baseball bat causing injury led him to a conclusion that the batter "must have deliberately released the bat in a very abnormal, contorted act of recklessness" (emphasis added)).

So, we review what facts we know in the light most favorable to Penny. Along with expert opinions that Penny brought to the table, a formal investigation confirmed Dekker's speeds. Iowa State Trooper David Wonders investigated and authored a technical collision investigation report. He could only do a speed determination for Dekker's vehicle and noted:

> SPEED DETERMINATION: On April 16th, 2018, the ACM and PCM[7] were downloaded from Officer Dekker's vehicle. PCM information shows that approximately 5 seconds before the crash, Officer Dekker was traveling at 44 mph and was applying the brake. Approximately 2 seconds before the crash, Officer Dekker was traveling 30 mph with no brake applied. At the time of the collision, Officer Dekker was traveling approximately 25 mph with no brake applied.

[7] The only reference to explain these codes in the record is that they go to the vehicle's "black box information."

Penny certified in answers to interrogatories that he was traveling "possibly" twenty-five miles per hour when he entered the intersection. Later in his deposition, he changed that answer to assert his speed upon entry to the intersection was more likely forty-five to fifty-five miles per hour. His expert's report had him traveling between fifty to fifty-five miles per hour. Neither Penny nor Dekker saw the other. Penny's experts—Daniel Billington, a forensic expert, and Todd Hall, a technical accident investigator—offer facts Penny asserts raise a fact question over the recklessness claim. First, Hall opined "there is no evidence 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." Again, Officer Dekker did not exercise due care when he failed to see Penny, but this failure does not lead to a recklessness finding, so Hall's report offers no evidence of recklessness. Next, Penny attached what appears to be a speed calculation graph (Crash Data Retrieval) but offered no report or affidavit that interprets the data or explains the findings. Again, all evidence confirmed that Officer Dekker was traveling in excess of the speed limit on an emergency call, but his speed is not reckless behavior under the circumstances without more. Assuming the intersection was clear of all traffic, as he and Penny believed, no one would label Dekker's speed alone as reckless.

Finally, most of the forensic expert Billington's opinions discussed Dekker's speed and that he failed to react appropriately to the Penny vehicle before reaching the intersection because he did not see Penny—noting Dekker was required to "expect the unexpected." The opinions that Dekker should have seen Penny are

those that support negligence and so while Penny's experts point out potentially negligent actions of Officer Dekker, they do not present a factual pattern that resembles reckless behavior as a matter of law. While it is clear both Dekker's and Penny's actions raise questions of negligence for failing to see each other, that negligent behavior cannot be elevated to recklessness without the intent requirement expressed in our case law. *See Dooley v. City of Cedar Rapids*, No. 09-1926, 2011 WL 1135794, at *5 (Iowa Ct. App. Mar. 30, 2011) ("[S]ection 321.231 requires a level of culpability beyond mere negligence to support liability."). In the end, all parties concede that Dekker was responding to an emergency call involving a non-responsive person, had emergency lights and sirens in operation, both parties failed to see the other before colliding, and Dekker was traveling in excess of the speed limit but slowed as he approached the intersection controlled by a stop sign impacting Dekker's travel. In the worst case, Dekker's actions were negligent, but there is no showing that elevates that behavior to recklessness.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
22-1026	Penny v. City of Winterset

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IN THE IOWA DISTRICT COURT FOR MADISON COUNTY

JAMES "JUDD" PENNY, Plaintiff, vs. CITY OF WINTERSET, CHRISTIAN DEKKER, Defendants.	)	LACV035142 **ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on Defendants' Motion for Summary Judgment. Plaintiff appeared by counsel Peter Sand. Defendants appeared by counsel Douglas Phillips. This matter was submitted on filings and arguments of counsel. The motion was taken under advisement. Having reviewed all filings, exhibits, attachments, arguments, and being fully advised in the premises, the Court now finds and orders as follows:

BACKGROUND

Plaintiff filed a Petition at Law with a Jury Demand in this matter on March 27, 2020 for claims of damages arising from an automobile accident between the Plaintiff and Defendant Christian Dekker on March 30, 2018. At the time of the collision, Officer Dekker was operating his police cruiser in emergency mode on his way to a call for assistance. The Plaintiff, Mr. Penny, was a civilian driver in the same area at that time. Mr. Penny pulled into the intersection where he was struck broadside by Officer Dekker.

Defendant filed his Motion for Summary Judgment on April 5, 2022. Trial is set for June 28, 2022. Plaintiff filed an Objection to Motion for Summary Judgment, asserting that the Defendant's Motion for Summary Judgment is untimely and should, therefore, be overruled.

TIMELINESS OF MOTION FOR SUMMARY JUDGMENT

The Plaintiff requests that the Defendants' Motion for Summary Judgment be denied due to it's untimely filing. In this case, the parties were required to file dispositive motions at least 90 days before the trial. The Defendants filed their Motion for Summary Judgment approximately five (5) days past that deadline.

The Court has discretion in whether to consider the merits of late filings. *Adams v. Frieden, Inc.*, 2002 WL 1842743, 1 (Iowa Ct. App. 2002). In this case, the Court finds that the ninety (90) day deadline for filing dispositive motions was entered on October 12, 2020 for a trial date scheduled for 2021. The trial date was continued but no further orders addressed the previously ordered ninety (90) day deadline. Here, the defense complied with the sixty (60) day prior to trial filing deadline provided for in Iowa Rule of Civil Procedure 1.981 and was a mere five (5) days late for the prior ninety (90) day deadline. The Plaintiff, in his Objection to Motion for Summary Judgment, asks the Court to overrule the motion for summary judgment but does not alert the Court to any prejudice to the Plaintiff by the late filing. Defense counsel asserts the parties had previously discussed that a motion for summary judgment would be filed by the defense in this case. Accordingly, the Court finds the Plaintiff is not prejudiced by the late filing. The Court will consider the merits of the motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). A question of fact exists "if reasonable minds can differ on how the issue should be resolved." *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 5 (Iowa 2008) (citations omitted). The evidence presented must be viewed

in the "light most favorable to the party opposing the motion for summary judgment." *Id.* (citing *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2000); *Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 276 (Iowa 1996)).

ANALYSIS

The parties provided affidavits, deposition transcripts, and reports for the Court's consideration of the motion for summary judgment. While there is some disagreement as to the facts, many of the facts are undisputed between the parties. They are noted herein.

On March 30, 2018, Defendant, Officer Christian Dekker, was on duty as a police officer for the City of Winterset. During his shift, he received a call regarding an unresponsive female located at the Super 8 motel on Cedar Bridge Road. In responding to the location of the female, Officer Dekker was operating the emergency overhead lights and siren of his police cruiser. As the officer drove north on 10th Street, Mr. Penny was driving west on Highway 92. Both parties were approaching the intersection of 10th Street and Highway 92. Officer Dekker was subject to a stop sign at the intersection. There were no traffic control devices on Highway 92 directing Mr. Penny's travel.

Officer Dekker was traveling at approximately sixty (60) miles per hour between ten (10) and fifteen (15) seconds before the collision. As he approached the intersection, he braked several times. While the graph provided to the Court by Mr. Penny which documents the police car's operation prior to the collision is not extremely detailed as to time, it shows that the officer had slowed considerably to forty (40) miles per hour at approximately four (4) seconds before the accident and to twenty-five (25) miles per hour at the time of the impact. Officer Dekker testified that he looked both directions before entering the intersection and did not see Mr. Penny's truck. Officer Dekker, believing the intersection was clear, proceeded to cross Highway 92.

As Mr. Penny approached the intersection, he observed another emergency response vehicle traveling east toward him on Highway 92 with lights and siren on. He slowed and pulled off on the side of the road to yield to that emergency vehicle. The emergency vehicle turned north onto 10th Street at the intersection. When the first emergency vehicle turned off the roadway, Mr. Penny moved back onto the road, accelerated and travelled into the intersection. His deposition indicated that he looked at the roadway straight ahead and he looked right where the first emergency vehicle had travelled but he does not remember looking to the left where Officer Dekker was approaching. Despite the lights and siren, Mr. Penny did not see or hear Officer Dekker's approach and proceeded into the intersection.

Officer Dekker collided with Mr. Penny's truck. Neither party saw the approach of the other until it was too late to avoid contact. Officer Dekker was transported to the hospital for treatment of a laceration to his scalp. Mr. Penny testified that he injured his back and right knee and sustained a traumatic brain injury.

The liability of a person operating an emergency vehicle while responding to a call for assistance is governed by Iowa Code section 321.231 which states as follows:

> 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 ... reckless disregard for the safety of others.

The Iowa Supreme Court has addressed the applicable standard for a violation of Iowa Code section 321.231. "We hold that the legal standard of care applicable to the conduct of an ambulance driver as a driver of an authorized emergency vehicle under Iowa Code section 321.231 is to drive with due regard for the safety of all persons, but the threshold for recovery for violation of that duty is recklessness, not negligence." *Hoffert v. Luze*, 578 N.W.2d 681, 685 (Iowa 1998) (citations omitted).

If an officer is responding to an emergency call without lights and siren, the standard of care reverts to negligence. *McClellan v. Orlando Ramirez*, 928 N.W.2d 894 (Table), 2019 WL 2375244 (Iowa Ct. App. 2019). If the officer has his lights and siren activated as is required in Iowa Code section 321.231(4), then the officer's behavior must rise to the level of recklessness to allow for recovery. *Id.*

Recklessness is more than "the mere unreasonable risk of harm in ordinary negligence." *Bell v. Community Ambulance Service Agency for Northern Des Moines County*, 579 N.W.2d 330, 335 (Iowa 1998) (citations omitted). "It is proceeding to act in a negligent manner despite knowing, or reasonably foreseeing, that harm is highly likely to occur. It is this conscious disregard for, or indifference to, the rights and safety of others that elevates conduct from negligence to recklessness." *Id.* at 336. (citations omitted).

"But recklessness is a difficult standard to meet in Iowa. The estate must show that Henningar 'intentionally [committed] an act of unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it.' And even then,

Henningar is only liable if the dangerous act was 'so great as to make it highly probable that harm [would] follow.'" *Fritz v. Henningar*, 19F.4th 1067, 1070 (8th Cir. 2021) (citations omitted).

In the *Bell* case, an ambulance driver was sued for damages caused when he collided with a civilian driver during an emergency response trip. *Bell*, 579 N.W.2d at 332. The ambulance was travelling approximately forty (40) miles per hour with emergency lights and siren on as it approached an intersection controlled at that time by four-way flashing red lights. *Id.* at 334. Bell proceeded into the intersection in front of the ambulance. *Id.* at 332. Having her radio on with her windows up, she was unable to hear or see the emergency vehicle approaching. *Id.* The ambulance driver could not see Ms. Bell's approach due to traffic. *Id.* at 334. The ambulance slowed as it approached the intersection but did not stop. *Id.* Seeing no traffic in front of it in the intersection, the ambulance collided with Ms. Bell's vehicle as she entered the intersection in front of the ambulance. *Id.* After trial, a jury found the Defendants liable for Ms. Bell's damages. *Id.* at 333. The Court granted Defendant's motion for judgment notwithstanding the verdict. *Id.* The Supreme Court upheld the actions of the trial court, stating, "We have carefully reviewed the evidence and analysis by the trial court and arrive at the same conclusion. The evidence in this case cannot be said to constitute substantial evidence of recklessness in the driving conduct of Hinson to support the jury's verdict of defendants' liability to plaintiff. Although it is always a difficult judicial task to negate a jury's verdict, the district court was correct in granting the defendants' motion for judgment notwithstanding the verdict." *Id.* at 338.

The undisputed evidence is very similar in this case to the facts of the *Bell* case above. One difference between the matter currently before the Court and the *Bell* case is that Ms. Bell had a flashing red traffic light while Mr. Penny was not subject to any traffic control devices. There is another case with similar facts. In *Estate of Fritz v. Hennigar*, 2020 WL 6845944 (N.D. Iowa 2020), Officer Hennigar was operating an emergency vehicle with lights and siren activated through an intersection where he collided with civilian driver Mr. Fritz. *Id.* at 3. In that case, the trial court granted Defendants' motion for summary judgment. *Id.* at 7.

Officer Hennigar's operation of his police vehicle in emergency mode was less cautious than the actions of Officer Dekker in the current case. Officer Hennigar was driving through heavy traffic at a high rate of speed. *Id.* at 2. As he approached one car from behind, that civilian driver pulled off the road out of fear of being hit by the officer. *Id.* Officer Hennigar crossed the centerline as he navigated his way through the roadway traffic, causing a civilian driver on the other side of the road to pull off out of concern. *Id.* Officer Hennigar's crash data retrieved from his car indicated that he accelerated from forty-seven (47) miles per hour to sixty (60) miles per hour as he approached the intersection. *Id.* at 3. Additionally, there was some evidence that the officer turned his siren off as he entered the intersection. *Id.* The trial court granted the motion for summary judgment, stating, "Because Hennigar had no reason to believe that nearby vehicles did not hear or see his approach, his assumption that nearby vehicles would yield to him, and thus keep the path directly ahead of him clear, was reasonable. Similarly, because Hennigar did not have reason to believe that any nearby vehicle, seen or unseen by him, was unlikely to yield, he did not know that his driving was likely to result in harm to another. Thus, even

if Hennigar's speed under the circumstances was unreasonable and negligent, no reasonable jury could find that his driving was reckless under Iowa Code § 321.231." *Id.* The United States Court of Appeals, Eighth Circuit, affirmed the trial court's decision, stating, "[w]e agree with the district court that the evidence in this case does not even get past the first of these two steps. This conclusion follows from a case that the Iowa Supreme Court decided nearly a quarter of a century ago. *See Bell v. Cmty. Ambulance Serv. Agency for N. Des Moines Cnty.*, 579 N.W.2d 330 (Iowa 1998)." *Fritz v. Henningar*, 19 F.4th 1067, 1070 (8th Cir. 2021).

Accordingly, the Court finds that Officer Dekker's driving was more reasonable than that of Officer Hennigar above. Officer Dekker slowed considerably as he approached the intersection, the traffic on the roadway was much lighter, Officer Dekker did not navigate his way through traffic, and he did not accelerate as he went through the intersection. Similar to *Fritz*, 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.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' motion for summary judgment is granted in its entirety. The Plaintiff's cause of action against the Defendants is dismissed with prejudice. Trial scheduled for June 28, 2022 is hereby cancelled. All court costs incurred herein are assessed to the Plaintiffs. The Clerk of Court shall close this case.

State of Iowa Courts

Case Number	**Case Title**
LACV035142	JAMES PENNY V. CITY OF WINTERSET
Type:	DISMISSED W/ PREJUDICE

So Ordered

Stacy Ritchie

Stacy Ritchie, District Court Judge
Fifth Judicial District of Iowa

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