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

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

(COURT OF APPEALS DECISION FILED JUNE 7, 2023)

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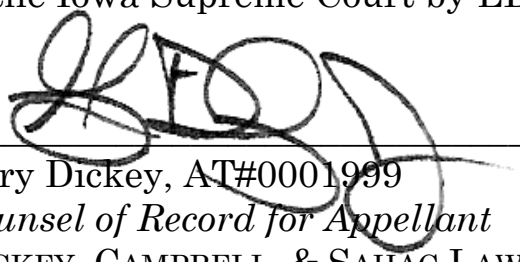
PROOF OF SERVICE & CERTIFICATE OF FILING

On July 7, 2023, I served this resistance 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 resistance with the Clerk of the Iowa Supreme Court by EDMS on July 7, 2023.



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STATEMENT OF ISSUES

IS FURTHER REVIEW WARRANTED ON THE NARROW, FACT-INTENSIVE ISSUE OF WHETHER CHRISTIAN DEKKER ACTED RECKLESSLY IN SPEEDING THROUGH A STOP SIGN AND COLLIDING WITH JAMES PENNY'S TRUCK

CASES

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OTHER AUTHORITIES

Iowa Code § 321.231 (2018)
Iowa State Bar Ass'n, Iowa Civil Jury Instruction 100.9

STATEMENT OPPOSING FURTHER REVIEW

The Court should deny further review because this appeal does not present an issue worthy of this Court's attention. Instead, the case involves a narrow, fact-intensive question: Did Christian Dekker act recklessly when he sped through a stop sign at the intersection of North 10th Street and Highway 92 and crashed into James Penny's truck. Winterset and Dekker contend that he was not reckless because he "looked to his left and 'cleared the intersection,' seeing only one vehicle that was far enough away that it was not a factor." (Further Review App. at 10). Several facts in the record call into question the veracity of Dekker's contention. For starters, had he truly "cleared the intersection," Dekker would not have crashed into Penny. Moreover, as the court of appeals noted, according to Penny's experts, he was fully visible from Dekker's vantage point, and Dekker should have seen him. (App. at 110, 113-114). The court of appeals correctly held that these disputed issues of material fact should be resolved in a jury room—not in a judge's chambers. Accordingly, further review should be denied.

STATEMENT OF THE CASE

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

On April 5, 2022, Defendants filed a motion for summary judgment asserting that no "reasonable jury could find that [Dekker] was reckless." (App. at 11). Following a hearing on the motion, the district court granted Defendants' motion. (App. at 97). This appeal followed. (App. at 107). The court of appeals reversed and remanded. *Penny v. City of Winterset*, No. 22-1026, 2023 Iowa App. LEXIS 480 (Iowa Ct. App. June 7, 2023).

STATEMENT OF THE FACTS

The summary judgment record, taken in the light most favorable to Penny, supports the following factual findings. On March 30, 2018, Christian Dekker was on duty as a police officer for the City of Winterset. (App. at 77). At approximately 8:22 p.m., Dekker was dispatched to respond to an unconscious female located at the Super 8 motel on Cedar Bridge Road. (App. at 77). While responding to the call, he initiated the emergency overhead lights and siren of his police cruiser. (App. at 77). Dekker proceeded northbound on North 10th Street, which is a blacktop road with stop signs controlling north and south bound traffic at its intersection with Highway 92. (App. at 77). At the same time, James Penny was traveling westbound on Highway 92, which is a blacktop road with no traffic control devices at its intersection with North 10th Street. (App. at 77-78). The speed limit along Highway 92 was 55 mph, and the speed limit for North 10th Street was 25 mph. (App. at 109, 110, 112).

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

The crash data report from Dekker's squad car indicates that he accelerated to 60 mph approximately twelve to thirteen seconds before entering the intersection of North 10th Street and Highway 92. (App. at 108). As he approached, Dekker initiated his brakes

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

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

On March 27, 2020, Penny filed the present suit against the City of Winterset and Dekker. (App. at 7-10). Defendants filed a motion for summary judgment asserting that no "reasonable jury could find that [Dekker] was reckless." (App. at 11). Following a hearing on the motion, the district court granted Defendants' motion. (App. at 97). Penny filed a timely notice of appeal. (App. at 107).

By a 2 to 1 vote, a panel of the Iowa Court of Appeals reversed. *Penny*, No. 22-1026, 2023 Iowa App. LEXIS 480 at *19. As relevant here, the majority observed that a "plaintiff seeking recovery based on actions of an authorized emergency vehicle must show the protected actions were performed in a reckless manner." *Id.* at *10. It further noted that recklessness "is a difficult standard to meet." *Id.* at *11. Thereafter, the majority considered and distinguished the decisions in *Bell v. Cmty. Ambulance Serv. Agency*, 579 N.W.2d 330 (Iowa 1998), and *Estate of Fritz v. Henningar*, 19 F.4th 1067 (8th Cir. 2020). *Id.* at *11-15. After reviewing the summary judgment record in the light most favorable to Penny, the majority concluded that "a genuine issue of material fact remains whether Dekker sufficiently scanned the intersection before proceeding through the stop sign" and "whether his failure to do so amounted to reckless disregard for the safety of others." *Id.* at 18 (quotations omitted).

Judge Greer dissented. *Penny*, 22-1026, 2023 Iowa App. LEXIS at *20. She found "strong evidence" that Dekker was negligent in the operation of his police vehicle. *Id.* In particular,

she noted that "all evidence confirmed that Officer Dekker was traveling in excess of the speed limit" but he "[a]ssum[ed] the intersection was clear of all traffic." *Id.* at *26. But, according to Judge Greer, "no one would label Dekker's speed alone as reckless." *Id.*

ARGUMENT

THE COURT OF APPEALS CORRECTLY DECIDED THAT GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER DEKKER ACTED RECKLESSLY IN SPEEDING THROUGH THE STOP SIGN AND CRASHING INTO PENNY'S VEHICLE

A. Applicable Legal Principles

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

> 1. The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected perpetrator of a felony or in response to an incident dangerous to the public or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section.
>
> * * *
>
> 3. The driver of a fire department vehicle, police vehicle, rescue vehicle, or ambulance, or a peace officer riding a police bicycle in the line of duty, may do any of the following:

> a. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.
>
> b. Exceed the maximum speed limits so long as the driver does not endanger life or property.
>
> 4. The exemptions granted to an authorized emergency vehicle under subsection 2 and to a fire department vehicle, police vehicle, rescue vehicle, or ambulance as provided in subsection 3 shall apply only when such vehicle is making use of an audible signaling device meeting the requirements of section 321.433 or a visual signaling device. . .
>
> 5. The provisions of this section shall not relieve the driver of an authorized emergency vehicle . . . from the duty to drive . . . with due regard for the safety of all persons, nor shall such provisions protect the driver . . . from the consequences of the driver's . . . rider's reckless disregard for the safety of others.

Iowa Code § 321.231 (2018). "The statute sets forth certain exemptions from the rule of the road that drivers of emergency vehicles may exercise when responding to emergency calls." *McClellan v. Ramirez*, 2019 Iowa App. LEXIS 543 at *8 (Iowa Ct. App. June 5, 2019). It allows the recovery against an emergency responder who violates the duty to drive with due regard for the safety of others. *Hoffert v. Luze*, 578 N.W.2d 681, 683 (Iowa 1998). The standard of care, however, is one of recklessness rather than

negligence if an emergency responder uses emergency lights or siren. *Id.*; *Morris v. Leaf*, 534 N.W.2d 388, 390 (Iowa 1995) ("The plain language of section 321.231(5) provides that a police officer should not be civilly liable to an injured third party unless the officer acted with 'reckless disregard for the safety of others'"). Thus, if an "emergency responder uses emergency lights or siren, the threshold for recovery is recklessness." The use of those lights and/or siren "gives notice to the other drivers on the road that an emergency vehicle is approaching." *McClellan*, 2019 Iowa App. LEXIS 543 at *9. "Other drivers are then required by law to pull over to avoid interfering with the emergency vehicle." *Id.*

Recklessness is more than "the mere unreasonable risk of harm in ordinary negligence." *Bell v. Cmty. Ambulance Serv. Agency*, 579 N.W.2d 330, 335 (Iowa 1998). Rather, an emergency responder acts recklessly when he or she has "intentionally done an act of an unreasonable character in disregard of a risk known to or so obvious that he [or she] must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Morris*, 534 N.W.2d at 391. For example, "a persistent

course of conduct to show no care coupled with disregard of consequences" is sufficient to establish recklessness. *Winkler v. Patten*, 175 N.W.2d 126, 130-31 (Iowa 1970). In evaluating the elements of recklessness, the primary objective is to determine "the driver's mental attitude as disclosed by his acts and conduct immediately prior to and at the time of the accident." *Bell*, 579 N.W.2d at 337.

B. Several factual disputes remain about whether Dekker acted in disregard of an obvious risk of harm to others

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). Winterset and Dekker's application ignores this cardinal rule and instead presents the facts as they would like the jury to accept them while omitting facts favorable to 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 their further review request is that Dekker "scanned the intersection," "looked both ways," and "did not see

any vehicles approaching from the right." (Further Review App. at 19). But, 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 Penny 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 their argument, and the analysis unravels.

Another cornerstone of Winterset and Dekker's argument is their insistence that he "had no reason to believe his driving was likely to result in harm to another." (Further Review App. at 17 14). This is at 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). In the very least, 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.

C. The court of appeals' decision does not conflict with any decision addressing recklessness under Iowa Code section 321.231

As a fallback position, Winterset and Dekker attempt to analogize the facts of this case to those in which appellate courts have decided that Iowa emergency responders 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 the driver in *Bell*, Dekker had reason to believe that rolling through the stop sign into cross-traffic that with the right-of-way would 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] In all these respects, *Bell* offers no guidance.

Winterset and Dekker's reliance on the decision in *Estate of Fritz v. Henningar*, 19 F.4th 1067 (8th Cir. 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.

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[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 trial court excluded the testimony, and this Court held that it was not an abuse of discretion. *Id.* at 338.

Estate of Fritz v. Henningar, 2020 U.S. Dist. LEXIS 217848 at *6-7 (N.D. Iowa Nov. 20, 2020). 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 is 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 and "did not afford himself the time necessary" to see Penny's truck. (App. at 112).[2] 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

[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 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.

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"). Winterset and Dekker's attempt to find a foothold in the *Fritz* decision is unavailing. *Fritz* bears no resemblance to the present case.

CONCLUSION

The majority opinion of the court of appeals is correct because it faithfully applies the proper summary judgment analysis. That is, viewed in the light most favorable to Penny, a reasonable factfinder could decide that Officer Dekker operated his vehicle recklessly when he sped through the stop sign at the intersection of North 10th Street and Highway 92. Accordingly, the Court should deny further review.

REQUEST FOR ORAL ARGUMENT

If further review is granted, Penny requests to be heard in oral argument.

COST CERTIFICATE

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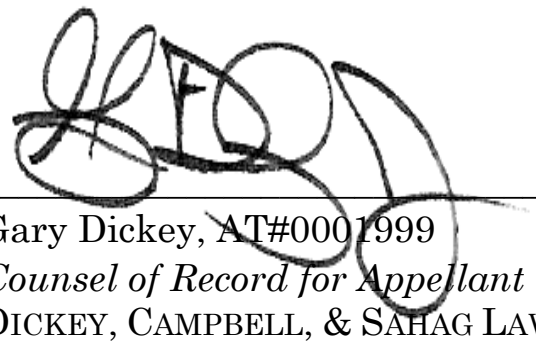

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