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Do Police Officers Have Immunity for Running a Red Light and Causing an Accident?

On October 2, 2013, the Wisconsin Court of Appeals certified *Legue v. City of Racine*, 2012AP2499, a case involving a police officer who caused an accident after running a red light while responding to an emergency. In certifying the case, the Court of Appeals asked to the Supreme Court to review the legal relationship between statutory government immunity, a public officer's statutory privilege to violate rules of the road during emergencies, and the public officer's duty to act with "due regard" while doing so.

The accident at issue occurred in July 2009, when Racine Police Officer Amy Matsen received a dispatch calling her to the scene of a motor vehicle accident. Officer Matsen engaged her lights and sirens and headed toward the scene at a high rate of speed, sounding her horn periodically. As she approached an intersection, she saw that the light was red, slowed down to 27 mph (in a 30 mph zone) and drove through. At that moment, Eileen Legue was entering the intersection on a green light. A building on the corner of the intersection blocked Legue's view of Officer Matsen and Legue did not hear any sirens or horn because she had her windows up and music playing. The vehicles collided and both Legue and Matsen were injured.

Legue sued Officer Matsen and the City of Racine. Officer Matsen responded by asserting governmental immunity under Wis. Stat. § 893.80(4), which immunizes public officers against liability for damages caused by "acts done in exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." This statute generally provides immunity for a public officer's "discretionary" actions taken within the scope of their employment.

Officer Masten also asserted the public officer's privilege to violate traffic laws under Wis. Stat. § 346.03(2)(b) and (3), which allow police officers to disobey stop signs and red lights when responding to emergencies or pursuing suspects, so long as they slow the vehicle "as may be necessary for safe operation" and activate lights and sirens.

Legue argued that Officer Masten should not be protected from immunity because a separate statutory provision, Wis. Stat. § 346.03(5), creates a "duty to drive or ride with due regard under the circumstances for the safety of all persons" and does not protect responders from the consequences of driving with "reckless disregard for the safety of others." Legue argued that although Matsen's decision to enter the intersection was discretionary, her duty to operate the vehicle with "due regard under the circumstances" was "ministerial," and thus, not protected by statutory immunity.

A jury trial was held, and the jury concluded that both Legue and Officer Matsen were negligent and that each was equally at fault. However, the circuit court ultimately concluded that Matsen was immune from liability for damages resulting from her discretionary decision to enter the intersection. Legue appealed to the Wisconsin Court of Appeals.

In its decision to certify the immunity question to the Wisconsin Supreme Court, the court of appeals explained that, "gener-

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Presumption of 66-Foot Wide Unrecorded Streets Includes Sidewalks

In a recent court of appeals decision recommended for publication, the court held that an unrecorded "highway" includes land for sidewalks. *Village of Brown Deer v. Balisterri*, 2013 WI App 137 (October 29, 2013). The Village of Brown Deer adopted a street improvement plan. It contended that the improvements could be made without condemning additional land because they would be located on public highways within the meaning of Wis. Stat. §82.31(2)(a). Some of the adjoining property owners challenged the village's assertion, but the circuit court ruled in the village's favor. On appeal, the property owners argued that the circuit had erred in interpreting § 82.31(2)(a) and that the statute is unconstitutional.

Section 82.31(2)(a) provides that any unrecorded highway (the term "highway" in the statutes includes all "public thoroughfares" including streets, roads, bridges, etc. that are open to public use) that has been worked for 10 years or more is presumed to be 66 feet wide. The parties agreed that the streets in question met those criteria. The property owners had the burden to overcome that presumption by the preponderance of the evidence. The circuit court found that the presumption had been overcome with respect to three properties which had buildings that encroached on the 66 foot width. The village did not challenge that finding on appeal.

The remaining property owners argued that the 66-foot presumption only allowed the village to use the land for paved road surface, but not for sidewalks. They relied on the definition of "highway" found in Wis. Stat. § 340.01(22), which refers to the width open to public use "for the purposes of vehicular travel." In contrast, the definition of "highway" in Wis. Stat. § 990.01(12) is much broader and expressly includes sidewalks. The court of appeals rejected the property owners' argument, noting that the definition in Chapter 340, by its express terms, applies only to Chapters 340 to 349 and 351 governing automobiles and Wis. Stat. § 23.33 governing the operation of ATVs. Therefore, the general definition in Chapter 990 applied to § 82.31.

The property owners also argued that the village had not used the portion of the right-of-way outside of the paved area and, consequently, was limited to improving that area. They contended that their fences and trees encroached within the area planned for sidewalks and limited the area that had been acquired for public use. Here, the court of appeals distinguished between highways created "by user" through adverse use and highways that were laid out by a governmental entity. With respect to the former, the law provides that the width of the easement is limited to the area actually used adversely. In the latter case, the presumption is 66 feet regardless of the amount actually used by the governmental entity at any given time.

The property owners brought a facial challenge to the constitutionality of § 82.31(2)(a). This means that they had to prove that it was unconstitutional beyond a reasonable doubt. They relied on two Minnesota cases that involved a statutory presumption of 33 feet on each side of a public highway. The court in *Brown Deer* held that Wisconsin's rebuttable presumption of width distinguished it from the Minnesota statute and therefore the Minnesota cases were inapplicable. The court further held that the property owners had not met their burden of proving the statute unconstitutional beyond a reasonable doubt.

The property owners have filed a petition for review.

— Mark J. Steichen

Should a Police Officer Have Immunity

Continued from front page

ally speaking, the discretionary decision to violate the rules of the road during an emergency response is immune from suit." "At the same time, however, we are informed that the officer's manner of operating the vehicle outside the context of the discretionary decision does not qualify for immunity."

The court of appeals explained that it was not clear whether Officer Matsen's decision to proceed through the intersection at 27 mph was a "discretionary" decision or a "ministerial" one. The answer was not clearly resolved by two Wisconsin Supreme Court decisions on the issue. In the Supreme Court's 1996 decision in *Estate of Cavanaugh v. Andrade*, the Court held that an officer was immune from liability for his discretionary decision to engage in a high-speed pursuit. The officer's decision to pursue was clearly discretionary, and his decision to speed was inherent in the decision to pursue.

In contrast, a public officer's decision to run a red light without activating lights and sirens is not a discretionary decision. In a 2013 case, *Brown v. Acuity*, the Wisconsin Supreme Court held that a firefighter was liable for injuries he caused when he ran a red light because the firefighter failed to activate any lights or sirens required by law. The Supreme Court explained that the required lights and sirens violated a ministerial duty, not a discretionary one, because the standards were set forth precisely in the statute.

In this case, Officer Matson satisfied her ministerial duty to slow down and activate visual and audible signals before proceeding through the intersection. However, liability depends on a question left open by *Estate of Cavanaugh* and *Brown*: "does immunity apply if an officer's manner of proceeding against a traffic signal fulfills the ministerial duties . . . but arguably violates the duty to operate the vehicle 'with due regard under the circumstances?'"

"The ramifications of this decision are huge," the appeals court concluded. "If the answer is that immunity for the manner of entering the intersection is subject to the 'due regard' condition, then immunity is, we submit, just an empty shell if an accident results. This is because there will always be exposed to a lawsuit in the case of an accident, the very thing that immunity is designed to prevent."

If the Supreme Court declines to review the case at this stage, the case will go back to the court of appeals for a decision.

— Sarah B. Painter

Presumption of Tax Assessment Accuracy Does Not "Burst"

In March 2006, Bonstores, Inc. bought out 142 department stores from Saks. The purchase included the store in the Mayfair Mall in the City of Wauwatosa. In 2009, the city assessed the property at $25.5 million. After an appeal to the board of review was unsuccessful, Bonstores brought an action in the circuit court for a trial *de novo*, claiming that the fair market value was only $11 million. The city's expert witness opined that the value was $27.6 million. The appellate decision includes an expansive discussion of the differences in the evidence offered by the two sides. *Bonstores Realty One, LLC*, 2013 WI App 131 (October 8, 2013)(Ordered for publication). Ultimately, the circuit court concluded that Bonstores had not overcome the statutory presumption of the validity of the assessor's valuation.

On appeal, Bonstores challenged the circuit court's application of the presumption in Wis. Stat. § 70.49(1) that the all of the properties in the city had been "justly and equitably assessed." Bonstores argued that, once it had offered substantial evidence to dispute the assessment, the presumption terminated. This "bursting bubble" theory of presumptions was part of the 1942 Model Code of Evidence. In 1974, Wisconsin adopted the Uniform Rules of Evidence on presumptions, which is codified in Wis. Stat. § 903.01. Under this rule, once the party asserting the presumption proves the "basic facts" to a preponderance of the evidence, the presumption comes into effect. In *Bonstores*, the basic facts consisted of the parties' stipulation that the assessment was $25.5 million and that the assessor had signed the statutorily required affidavit attesting to the validity of the amount. Once the presumption arises, the burden shifts to the opposing party to produce evidence that proves to a preponderance of the evidence that the assessed value is incorrect. Merely introducing substantial evidence is insufficient if it does not tip the scales in favor of an alternate valuation. However, the ultimate burden of proof rests with the municipality. If the challenger overcomes the presumption alone, then the municipality must offer sufficient evidence to prove by a preponderance that the assessment (or another figure) is the correct value.

Bonstores also objected to the circuit court's consideration of two items of evidence on grounds of relevance. The first was the real estate transfer tax return that Bonstores filed in connection with the purchase in 2006 in the amount of $32.7 million. The circuit found that this was a public representation by Bonstores of the value of the property and was sufficiently close in time to be of some value in determining the store's value in 2009. The second was an appraisal report done for Saks as part of the sale. Bonstores relied on the appraised value of $32.7 million assigned to the Wauwatosa stores in obtaining mortgage financing for the purchase. The circuit court found that Bonstore's reliance on the reported value in 2006 was also relevant in weighing the conflicting evidence.

The appellate decision is worth reading for its detailed discussion of the methods for valuing commercial property, including distinguishing between the values attributable to real estate versus the operation of the business.

— Mark J. Steichen

Towns Lack Shoreland Zoning Authority

In *Hegwood v. Town of Eagle Zoning Board of Appeals*, 2013 WI 118 (September 25, 2013), the court of appeals ruled that towns do not have the statutory authority to adopt shoreland zoning ordinances. In *Hegwood*, both the Town of Eagle and Waukesha County had adopted shoreland zoning ordinances with a 20-foot setback requirement. A property owner applied to the county for a variance allowing a pergola and fireplace within the setback. The county granted the variance with some restrictions. The property owner then applied to the town board of zoning appeals for a similar variance, but the application was denied. He then brought a certiorari action against the board. The principal issue in the lawsuit was whether the town had the statutory authority to adopt shoreland zoning. The board argued that Hegwood had to raise that issue in a separate declaratory judgment action. The court of appeals rejected that defense. It noted that one of the factors a court must consider in a certiorari action is whether the board proceeded under the correct theory of law. Whether the town had shoreland zoning authority is an issue of law applicable to the case.

The court then engaged in an extensive statutory analysis of shoreland zoning. It began with Wis. Stat. § 281.31, the "Navigable Waters Protection Law." Subsection (2)(c) defines a "municipality" as "a county, village or city." Next, the court turned to Wis. Stat. § 59.692 governing county shoreland zoning. That section provides in subsection (1m) that "each county shall zone by ordinance all shorelands in its unincorporated area." It goes on to say that county shoreland zoning ordinances do not have to be approved by and are not subject to rejection by any town. The court contrasted these statutes with the general county zoning statute, Wis. Stat. § 59.69, which allows towns to approve or reject county zoning ordinances. The court acknowledged that towns have the authority to enact general zoning ordinances by adopting village powers under Wis. Stat. § 60.22 and then applying Wis. Stat. § 61.35 to exercise city zoning authority under Wis. Stat. § 62.23. However, because the statutes treat shoreland zoning separately from general zoning and deliberately place the authority in the hands of counties and not towns, the Town of Eagle could not adopt or enforce its own shoreland zoning.

The Town of Eagle has filed a petition for review.

— Mark J. Steichen

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