**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 8, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2008AP1299** **Cir. Ct. No. 2006CV595**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**OWEN S. DURIGAN,**

**PLAINTIFF-APPELLANT,**

**AUDREY A. DURIGAN,**

**PLAINTIFF,**

**V.**

**RANDAL PODRATZ, PAUL S. MILBRATH AND COUNTY OF JEFFERSON,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from orders of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed and cause remanded for further proceedings.*

Before Dykman, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Owen Durigan appeals a summary judgment order dismissing his[1] lawsuit against a deputy sheriff, the Sheriff of Jefferson County and Jefferson County, and an order taxing costs against him. Both sides seek costs and attorney fees on the grounds that the other side's arguments on appeal are frivolous. We affirm for the reasons discussed below and award costs and attorney fees to the respondents pursuant to WIS. STAT. RULE 809.25 (2007-08).[2]

¶2 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court.[3] ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

> We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law.… [Next,] we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted). We view the materials in the light most favorable to the party

[1] Although both Owen and Audrey Durigan filed suit, only Owen has appealed.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Durigan's brief does not follow the standard summary judgment methodology of starting with the sufficiency of the complaint before proceeding to consider the summary judgment materials. However, this opinion is organized according to the standard summary judgment methodology, which we are required to follow. As a result of Durigan's failure to follow the required legal methodology, his brief includes a number of arguments relating to whether the summary judgment materials have created factual disputes on various points. We do not reach these issues, however, in light of our conclusion that the complaint fails to state a claim upon which relief could be granted.

opposing the motion. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751.

¶3 In this case, we need to go no further than the first step in the summary judgment methodology because—even assuming that all of Durigan's allegations are true—the complaint fails to state a claim upon which relief could be granted. According to the complaint, Durigan and his wife were traveling west on I-94 when they came upon a squad car with its emergency lights flashing, parked partially on the shoulder but blocking about half of Durigan's lane. The squad car had been parked there by Jefferson County Deputy Sheriff Randal Podratz. There were no flares or other warning devices behind the squad car and, due to heavy traffic, Durigan did not see the squad car until the cars in front of him quickly pulled into the other lane. Durigan then had to take drastic evasive action at highway speed to avoid a collision, missing the squad car by about a foot. The Durigans were both terrified and shaken by this event, and dwelled for weeks on how close they had come to death or permanent injuries.

¶4 When Durigan complained to Jefferson County Sheriff Paul Milbrath about acts the deputy had taken within the scope of his employment, Sheriff Milbrath informed him that Deputy Podratz's actions were proper. The district attorney and a circuit court judge also refused to act upon Durigan's request that criminal charges be issued.

¶5 Durigan's complaint raised ten claims: (1) ordinary negligence, premised upon WIS. STAT. § 346.03(5) (requiring operators of emergency vehicles to exercise "due regard under the circumstances for the safety of all persons"); (2) criminal negligence premised upon WIS. STAT. § 939.25; (3) criminal recklessness premised upon WIS. STAT. § 939.24; (4) first-degree reckless

endangerment premised upon WIS. STAT. § 941.30(1); (5) second-degree reckless endangerment premised upon WIS. STAT. § 941.30(2); (6) reckless driving premised upon WIS. STAT. § 346.62(2) (prohibiting a person from endangering the safety of any person by the negligent operation of a vehicle); (7) negligent operation of a vehicle premised upon WIS. STAT. § 941.01; (8) negligent supervision and training of the deputy by the sheriff and county; (9) respondeat superior liability for the sheriff and county based on the deputy's alleged negligence; and (10) negligent infliction of emotional distress. Durigan requested multiple forms of relief based on these claims, including a suspension, prison sentence and community service for the deputy; a reduction in pay or fine for the sheriff; the implementation of new policies and procedures for the Jefferson County Sheriff's Department with regard to the parking of emergency vehicles; compensation for the Durigans' emotional distress; punitive damages to be put in a special fund for training by the State Highway Patrol; and the costs of the action.

¶6 Durigan's claims can be separated into two categories for the purpose of explaining why the relief he sought was unavailable.

¶7 First, Claims 2, 3, 4, 5 and 7 relate to criminal statutes. As a private citizen, however, Durigan had no standing to bring a criminal complaint. *See generally* WIS. STAT. § 968.02 (setting forth procedures by which district attorney or circuit court judge can issue criminal charges). Nor could he appeal the wholly discretionary decisions of the district attorney and circuit court judge as to whether to issue criminal charges. Therefore, Claims 2, 3, 4, 5 and 7 were properly dismissed as outside the scope of a civil lawsuit.

¶8 Second, Claims 1, 6, 8, 9 and 10 were premised upon various theories of negligence and/or vicarious liability for negligence stemming from acts

committed by Deputy Podratz, Sheriff Milbrath or Jefferson County—all of whom were public officials or entities immune from liability by statute. Specifically, WIS. STAT. § 893.80(4) shields municipalities and their public officials from liability for injuries resulting from the negligent performance of acts within the scope of their public office. *See also* ***Santiago v. Ware***, 205 Wis. 2d 295, 338, 556 N.W.2d 356 (Ct. App. 1996).

¶9 Although this governmental immunity doctrine is qualified by several exceptions, none of the exceptions applies here. Immunity is not available: (1) if the conduct was malicious, willful and intentional, *see* ***C.L. v. Olson***, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988); (2) if the conduct involved a non-discretionary, ministerial duty imposed by law, *see* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 300-01, 240 N.W.2d 610 (1976); (3) if there existed a known present danger of such force that the time, mode and occasion for performance left no room for the exercise of judgment, *see* ***Pries v. McMillon***, 2008 WI App 167, ¶18, 314 Wis. 2d 706, 760 N.W.2d 174; or (4) any discretion involved was non-governmental in nature, *see* ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 686-87, 292 N.W.2d 816 (1980).

¶10 The first exception does not apply because the conduct challenged here was alleged to have been negligent, not intentional and malicious.

¶11 The second exception does not apply because the deputy's training and his operation of his squad car in response to a potential hazard near a highway were both matters of discretion. In other words, there was no ministerial duty to park a squad car in a particular position or to use a specific configuration of warning devices, aside from the flashing lights, when responding to a specific situation, and no ministerial duty to train officers that squad cars should be parked

only on the shoulder of a highway regardless of the situation. Instead, determining whether a particular situation warrants blocking a lane of traffic requires precisely the sort of exercise of judgment which characterizes a discretionary act. Contrary to Durigan's apparent belief, WIS. STAT. § 346.03(5), which sets forth a standard of care for operators of emergency vehicles, does not create an additional exception to the rule of immunity for discretionary acts. Rather, cases which have applied WIS. STAT. § 346.03(5) have first passed the threshold of determining that the act in question was ministerial in nature. *See e.g.*, ***Estate of Cavanaugh by Cavanaugh v. Andrade***, 202 Wis. 2d 290, 550 N.W.2d 103 (1996) (holding that required protocols for high-speed chases were ministerial in nature). The deputy's actions in the present case were not ministerial in nature, and thus § 346.03(5) does not come into play.

¶12 The third exception does not apply because the complaint did not identify any known present danger to which the officer was responding and to which there could be only one time, place and mode of performance. Contrary to Durigan's apparent belief, this exception does not go to whether the deputy himself created a dangerous situation by the way he parked his squad car—that inquiry would go to the ultimate question of negligence, not the threshold issue of whether the deputy was immune from liability. Rather, we know from additional summary judgment materials that the danger to which the officer was responding was an injured deer in the median of the highway. Even if Durigan had specified the danger posed by the deer in his initial complaint, this would not be the type of situation to which there could be only one time, place and mode of performance.

¶13 Finally, the fourth exception does not apply because Durigan alleged that the deputy was acting in the scope of his governmental duties as the basis for his respondeat superior claims against the sheriff and county. Accordingly,

Claims 1, 6, 8, 9 and 10 were all properly dismissed based upon governmental immunity.

¶14 Turning to the issue of costs in the circuit court, we note that the clerk of the circuit court is required upon the application of the prevailing party to tax the costs of the action against the other party. WIS. STAT. § 814.10. Durigan did not dispute that the respondents incurred the amount of costs they claimed and has supplied no relevant legal authority for his request that costs not be imposed against him on public policy grounds. Therefore, there is no basis on appeal to challenge the circuit court's order upholding the clerk's taxation of costs.

¶15 Finally, WIS. STAT. RULE 809.25(3) authorizes this court to award a respondent costs, fees and attorney fees upon finding that an appeal was frivolous—meaning either that it was filed in bad faith, or that the appellant knew or should have known that it was without reasonable basis in law or equity and could not be supported by a good faith argument for the extension, modification or reversal of existing law. We will not impose costs unless the entire appeal is frivolous. ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. It is possible for an entire appeal to be frivolous, notwithstanding a meritorious argument on one or more issues, if the appellant could not prevail on the appeal as a whole even if he or she prevailed on any meritorious arguments. We conclude that is the case here.

¶16 Durigan's brief offers a number of potentially meritorious arguments regarding why the deputy's placement of his car could be considered negligent, and why certain facts relating to that alleged negligence were still in dispute. Specifically, he claims his summary judgment materials created factual disputes regarding how the deputy's squad car was actually parked; whether the manner in

which the squad was parked was necessary or reasonable; whether the Durigans or other oncoming traffic would have been able to see the emergency lights on the squad car; whether flares should have been used or the entire lane of traffic blocked off; and whether the deputy's training was adequate. None of these disputed facts relating to the issue of negligence were *material* to the summary judgment decision, however, if the respondents were all immune from liability for negligence in the first instance. In other words, Durigan could not prevail on appeal based on his arguments regarding negligence alone.

¶17 Durigan's arguments on appeal as to why the respondents were not immune are contrary to all existing law regarding the distinction between ministerial and discretionary acts, and are not supported by any good faith argument for the extension, modification or reversal of the existing law. His claim that immunity does not apply to claims for declaratory judgment is irrelevant, since his complaint did not state a claim for declaratory judgment, but rather sought criminal penalties, monetary damages and injunctive relief. As we have already noted, Durigan provided no relevant authority to support his challenge to the taxation of costs by the circuit court. We therefore conclude that the entire appeal was in fact frivolous, and award the respondents their costs, fees and attorney fees. It follows that we also reject Durigan's claim that the respondents' arguments were frivolous.

¶18 The clerk of this court may make the standard assessment of the respondents' claimed costs and fees on appeal. However, because this court is not in a position to make factual findings, we must remand to the circuit court for a determination as to the amount and reasonableness of the respondents' attorney fees on appeal, with directions that the court issue an additional judgment in the respondents' favor.

*By the Court.*—Orders affirmed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.