STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1425

Eric Reetz,
Relator,

vs.

City of St. Paul,
Respondent.

Filed May 26, 2020
Reversed
Rodenberg, Judge
Dissenting, Smith, Tracy M., Judge

City of St. Paul

Francis J. Rondoni, Christopher P. Renz, Gary K. Luloff, Chestnut Cambronne PA, Minneapolis, Minnesota (for relator)

Lyndsey M. Olson, St. Paul City Attorney, Kyle Citta, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Smith, Tracy M., Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Relator Eric Reetz challenges respondent City of St. Paul's determination that relator is not entitled to defense and indemnification in connection with a personal-injury lawsuit alleging that his conduct while providing security for a homeless shelter caused or contributed to injuries from a stabbing incident. We reverse.

FACTS

Relator is employed as a police officer for the City of St. Paul. He also worked as an independent contractor for Catholic Charities at the Dorothy Day Center, providing security services for the center in downtown St. Paul. Relator's contract with the center required him to patrol the building, search the center's clients for banned items like weapons, and help the center's staff "secur[e] a safe and hospitable environment." It required him to "remov[e] and/or trespass[] dangerous or predatory individuals" and "writ[e] police reports for incidents that may occur." The contract also required relator to defend and indemnify Catholic Charities against any claims arising from his performance under the contract.

Although the city was not a party to the contract between relator and the Catholic Charities, the city required relator to have approval from the city to work at the center, consistent with department policy. Relator also asserts—and the city does not dispute—that he wore his police uniform and used his squad car while working at the center, consistent with the city's requirements for police officers doing work of this sort. Respondent's policy governs the uniforms that officers doing work of this sort are

permitted to wear, requiring them to comply with "department personal appearance standards" and stating that "[o]ff-duty officers will be subject to inspection." The city's policy also requires officers to get approval for off-duty squad-car use.

On December 30, 2016, an individual attacked a woman at the Dorothy Day Center with a knife. The attacker is alleged to have entered the center while relator was working, but the attack took place around 9:45 p.m., after relator's shift had ended around 9:30 p.m. Relator began a 10-hour shift for the St. Paul Police Department at 10:00 p.m. that evening.

The stabbing victim sued Catholic Charities, the Dorothy Day Center, and relator, claiming among other allegations that relator had negligently allowed the attacker into the center with a knife and that this negligence led to her injuries. Relator tendered the defense of the lawsuit to the city. The city considered relator's request and concluded that it was not obligated to defend or indemnify him. It determined that relator's off-duty employment activities were not law-enforcement duties and that relator was not acting in the performance of his duties as a police officer at the time of the events underlying the lawsuit. It also cited the St. Paul Police Department policy, which states that "[l]iability during off-duty employment rests with the off-duty officer and off-duty employer, not the City of Saint Paul."

Relator requested that the city reconsider its decision. The city confirmed its decision denying the request for defense and indemnity.[1]

[1] The parties indicate on appeal that the underlying lawsuit has been resolved and that indemnification of relator is no longer an issue. The remaining issue concerns the city's duty to have defended relator. In real terms, the question is who is responsible for relator's costs of defending the lawsuit. As discussed below, Minnesota law tethers the duties of

Relator appeals by writ of certiorari.

D E C I S I O N

A municipality "shall defend and indemnify any of its officers and employees" if the officer or employee "(1) was acting in the performance of the duties of the position; and (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith." Minn. Stat. § 466.07, subd. 1 (2018).

A city's decision not to defend and indemnify an employee under Minn. Stat. § 466.07 is a quasi-judicial decision. *Anzures v. Ward*, 890 N.W.2d 127, 134 (Minn. App. 2017), *review denied* (Minn. Mar. 28, 2017). Appellate courts "review a quasi-judicial decision rendered by a city under a limited and 'nonintrusive' standard of review." *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 635 (Minn. 2012). Appellate courts will not substitute their "own findings of fact for those of a city, or engage in a de novo review of conflicting evidence." *Id.* "[Q]uasi-judicial determinations will be upheld unless they are unconstitutional, outside the [city]'s jurisdiction, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious." *Cole v. Metro. Council HRA*, 686 N.W.2d 334, 336 (Minn. App. 2004) (quotation omitted).

This case involves the application of Minn. Stat. § 466.07, subd. 1, to a set of largely undisputed facts. And, to the extent that some marginally significant facts are in dispute, we accept the facts as determined by the quasi-judicial decision-maker. *Sawh*, 823 N.W.2d at 635. Application of a statute to the undisputed facts of a case involves a question of law,

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defense and indemnity. We therefore discuss both duties in this opinion, despite the duty to defend being the parties' only real concern.

which we review de novo. *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, 400 n.6 (Minn. App. 2001), *aff'd mem.*, 644 N.W.2d 425 (Minn. 2002). We therefore review de novo whether the city erred in applying the law to the facts of this case.

Because this case involves no claim, argument, or evidence concerning any "malfeasance . . . willful neglect of duty, or bad faith" on relator's part, *e.g. Queen v. Minneapolis Pub. Sch., Spec. Sch. Dist. No. 1*, 481 N.W.2d 66, 68 (Minn. App. 1992) (affirming decision that a teacher guilty of malfeasance in office was not entitled to a defense from the school district), the sole issue on appeal relates to the city's denial of relator's request for defense and indemnity based upon the city's determination that relator was not acting in the performance of the duties of his position while working at the center.[2] Relator argues that he was in uniform, with his squad car, and that he was performing official duties by keeping the peace, all with the approval of the city. The parties also cite two published Minnesota cases in support of their arguments, neither of which involve officer indemnification.[3]

In the first case, *State v. Childs*, the Minnesota Supreme Court considered, in the context of a challenge to the constitutionality of a search incident to arrest, whether an off-

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[2] The city's denial also stated it was denying relator's request for indemnity and defense because relator was not present when the attack occurred. But, as relator points out, this fact is not relevant to whether relator "was acting in the performance of the duties of the position" when he did not detect the attacker's knife. The city does not appear to be defending on appeal this alternative basis for its decision.

[3] The parties discuss *State v. Yeazizw*, No. A03-0075, 2004 WL 556738 (Minn. App. Mar. 23, 2004), *review denied* (Minn. June 15, 2004), and *State v. Carter*, No. C6-00-1514, 2001 WL 1117568 (Minn. App. Sept. 25, 2001). Both are unpublished cases and not precedential. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

duty and uniformed officer who arrested a shoplifter while providing private-security services for a drugstore was acting in the role of a peace officer. 269 N.W.2d 25, 26-27 (Minn. 1978). The supreme court held that the off-duty officer assumed the role of a police officer—in addition to his role as private security—"for purposes of the arrest." *Id.* at 27. The officer's "dual capacity" permitted the officer to arrest the shoplifter, even though the officer would not have had that authority if he had been only a drugstore employee. *Id.*

The second case, *State v. Ivy*, involved a hospital visitor's assault-of-a-peace-officer conviction for assaulting a uniformed, off-duty officer who was providing private security at a hospital. 873 N.W.2d 362, 366-67 (Minn. App. 2015). The defendant in *Ivy* had gone to the hospital to visit a friend, but security was called when the defendant began yelling profanities and became verbally aggressive toward hospital staff. *Id.* at 366. The off-duty officer came to escort the defendant out of the hospital, at which point she rushed at the officer and ripped some of his clothing. *Id.* at 366-67. The two struggled, and the defendant scratched the officer. *Id.* at 367. The officer sprayed her with mace and then arrested her. *Id.*

We held in *Ivy* that the evidence was sufficient to support the conviction of fourth-degree assault, concluding that when the uniformed officer went to the emergency room "to escort appellant out of the room, he was executing a duty imposed by law." *Id.* at 369; *see also* Minn. Stat. § 609.2231, subd. 1 (2012) (providing that "[w]hoever physically assaults a peace officer . . . is guilty of a gross misdemeanor"). We determined that "a peace officer working as a privately employed security officer who has probable cause to

arrest an individual is executing a duty imposed by law" and "is acting in his capacity as a peace officer." *Ivy*, 873 N.W.2d at 369.

Although neither of these published opinions concerns the question of officer indemnification, the parties appear to agree that the dual-capacity doctrine of *Childs* provides the path to the resolution of this dispute. Relator analogizes his case to both *Childs* and *Ivy*, claiming that he was acting in a dual role providing both private security and working as an officer engaged in the official police conduct of maintaining the peace. The city, for its part, appeared to concede at oral argument that an off-duty officer would be entitled to defense and indemnification from the city under factual circumstances like those in *Ivy*—where the officer actually escorted a disorderly person from an area of the hospital and eventually arrested that person. But the city argues that *Childs* and *Ivy* each involve an off-duty officer taking additional action beyond simply wearing a uniform and badge and driving a police squad car.

Accordingly, the parties appear to agree that if relator had actually invoked his dual capacity as a public officer while working at the Dorothy Day Center—for example, by escorting from the center the person bringing a knife into it or arresting that person—he would have been "acting in the performance of the duties of the position" and section 466.07 would require the city to defend and indemnify relator. The remaining question is, therefore, whether relator's status as a police officer necessitated that he first have initiated some active intervention, or if his ability to have actively intervened if necessary and appropriate, is sufficient.

Of the published cases discussed by the parties, *Ivy* provides the broadest description of the dual-capacity doctrine. We concluded in that case that, if an off-duty officer is working security in a hospital and has probable cause to arrest someone, the officer is engaged in a duty imposed by law. *Ivy*, 873 N.W.2d at 368-69. This rule applies even if the officer initially decides not to exercise his or her power of arrest. The uniformed officer in *Ivy* chose first to escort the defendant out of the hospital, even though the officer appears to have had probable cause to arrest the defendant for trespassing when the defendant did not leave the hospital when asked to do so by hospital personnel. *Id.* at 369. We pointed out in that case that escorting the defendant out of the hospital was "protecting the health and safety of the hospital's patients and preventing breach of the peace." *Id.* at 368. We concluded that the off-duty officer was still "executing a duty imposed by law," even though the officer chose not to actually exercise the power of arrest until after the defendant had attacked him. *Id.* at 369.

We recognize that the language at issue in this case, whether relator "was acting in the performance of the duties of the position," Minn. Stat. § 466.07, subd. 1, is different than the statutory language at issue in *Ivy*, which was whether the off-duty officer was "executing any other duty imposed by law," *see* Minn. Stat. § 609.2231, subd. 1 (fourth-degree assault). We conclude, however, that the difference between these two phrases, if there is one, is slight.

Relator's off-duty conduct in this case has some but not all of the characteristics highlighted in *Ivy*. Relator was protecting the safety of the occupants of the center by searching people entering the center for banned items like weapons. He was also dressed

in uniform, used his squad car, and was expected to help in activities at the center that included protecting the health and safety of persons at the center and keeping the peace, securing a safe and hospitable environment, and "removing and/or trespassing dangerous or predatory individuals." He was expected to "writ[e] police reports for incidents that may occur." His uniform and the badges of his authority as a police officer were employed with the specific consent of the city under its policies. Relator also retained his authority under *Childs* to arrest individuals if there was probable cause to do so. But a consideration we highlighted in *Ivy* does not appear here: relator did not know of sufficient facts to have probable cause to make any arrest when the eventual attacker entered the Dorothy Day Center. So relator's off-duty conduct is similar but not identical to the conduct at issue in *Ivy*. In our view, the similarities of the facts here to those in *Ivy* outweigh the differences.

The city also raises the possibility that the answer to the question presented here can be found by analogizing to federal caselaw. The federal "nexus test" determines that an off-duty officer's conduct occurs in an official capacity—"under color of law"—only if a "nexus exists between the official's public position and the official's harmful conduct." *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009). Factors to consider in determining whether an officer acted under color of law include: "whether the officer is on duty and in uniform, the motivation behind the officer's actions, whether the officer had access to the victim because of his position, and whether the officer threatened official

conduct in the future." *Magee v. Trs. of Hamline Univ., Minn.*, 747 F.3d 532, 535 (8th Cir. 2014).[4]

We are unaware of any Minnesota courts applying the federal nexus test to determine whether an off-duty police officer was acting in performance of his or her duties. And many of the federal nexus-test factors are of little assistance in the factual scenario here. The federal test includes factors such as whether an off-duty officer accessed and threatened a victim, factors that are not present here. The parties dispute relator's motivations under the federal nexus test, but this disagreement largely parallels the broader disagreement: the city argues that relator was financially motivated by personal interest because he was performing a private job, while relator argues that he was motivated to keep the peace and maintain a safe environment at the center in much the same way that he would do in his ordinary capacity as a police officer.

This is a very close case. Applying the *Ivy* considerations, we think the similarities between this case and *Ivy* predominate over the dissimilarities. Applying the law to the undisputed facts of the case, we conclude that relator was "acting in the performance" of his duties as a police officer.

Minnesota law defines a "peace officer" as a law-enforcement employee "charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest." Minn. Stat. § 626.84, subd. 1(c)(1)

[4] The federal court describes the factors with respect to victims because it generally arises in the context 42 U.S.C. § 1983, which "imposes liability for certain actions taken under color of law that deprive a person of a right secured by the Constitution and laws of the United States." *Magee*, 747 F.3d at 535 (quotations omitted).

(2018). An officer's duties to prevent and detect crime—keeping the peace—go beyond the searches and seizures permitted by the Fourth Amendment. *See Ivy*, 873 N.W.2d at 368 (stating that the officer escorting the defendant out of the hospital was "protecting the health and safety of the hospital's patients and preventing breach of the peace"). Under *Childs*, relator would have had the authority to make arrests while working at the center, unlike a security guard not licensed as a peace officer, s*ee Childs*, 269 N.W.2d at 27, even if he had no occasion to use that authority in this case.

Not only was relator keeping the peace while in uniform at the center, but he was doing so as a visible representative of the city and its police department. With the city's express permission and approval, relator wore his badge and uniform and used his squad car. The city maintained control over relator's off-duty contracting, including imposing a requirement that he wear his uniform while working and that, at least as a matter of policy, he would be subject to uniform inspections. So it was the city, not relator, that dressed relator with the symbols of the city's authority while he worked at the center.

The parties dispute what benefit, if any, the city had as a result of relator wearing a uniform. The city claims the uniform requirement enables it to quickly call officers to action if needed, but that, unless and until the officer is called, the officer being in uniform is of no benefit to it. Relator claims that the requirement provides the city a uniformed presence at the center at no cost to the city and affords the city an officer standing by in uniform and ready to move immediately into the city's service.

At the very least, the uniform requirement provides the city the benefit of having a ready officer, available to be called on at presumably a moment's notice, whose readiness

is compensated by a third party. This is the evident and admitted purpose of the uniform requirement. As such, the city's uniform and other requirements, as they apply here, are the functional equivalent of the city's approval of relator's acting in the performance of official duties while being compensated by the center.

To be sure, relator was being paid by the center, and was primarily serving the center's interests while he worked there. But, as *Childs* makes clear, a police officer working private security may occupy a "dual capacity" of being "both a [private] employee and a peace officer." 269 N.W.2d at 27. And on the record here, it was the city's decision, for good and sufficient reasons of its own, that relator was uniformed and fully outfitted as a police officer while he worked at the center.

The city also argues that its decision should be affirmed under *Graalum v. Radisson Ramp, Inc.*, 71 N.W.2d 904 (Minn. 1955). *Graalum* was a precursor to *Childs* and *Ivy* and addressed a garage owner's argument that the city, not the garage owner, should be liable for a plaintiff's personal injury that occurred when she was crossing the garage's driveway and fell. *Id.* at 906-07. The City of Minneapolis had assigned an officer to control traffic in and out of the garage. *Id.* at 906. But while Minneapolis paid the officer's salary, the garage owner reimbursed Minneapolis for that cost each month. *Id.* The supreme court held that the evidence was inconclusive as to whether the officer was acting in his public capacity or his private capacity, stating that the question was appropriately left to the jury. *Id.* at 907-08. Here, the city argues that, because it is the factfinder in this case, we should defer to its decision concerning whether relator was acting within his official duties. As discussed above, we are mindful that the city's quasi-judicial decision is entitled to some

deference. But that deference does not extend to misapplication of the law. *Walser Auto Sales*, 635 N.W.2d at 400 n.6. The supreme court in *Graalum* considered the officer's role in a personal-injury dispute in which there were questions of fact for resolution. This case involves the interpretation and application of a statute, which is reviewed de novo. *Id.*

This court is an error-correcting court. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). We apply the best law available to us. *State v. Kelley*, 832 N.W.2d 447, 456 (Minn. App. 2013). We conclude that relator was acting in the performance of the duties of his position as a peace officer while he was providing security at the Dorothy Day Center under the relevant legal standard. The city's decision to the contrary is "based on an erroneous legal theory," *Cole*, 686 N.W.2d at 336 (quotation omitted), and relator is therefore statutorily entitled to defense and indemnity.

Reversed.

SMITH, TRACY M., Judge (dissenting)

I respectfully dissent.

I agree with the majority's thoughtful analysis and conclusion that, in the absence of directly applicable authority, we should be guided by the dual-capacity analysis reflected in *State v. Childs*, 269 N.W.2d 25 (Minn. 1978), and *State v. Ivy*, 873 N.W.2d 362 (Minn. App. 2015). I also agree that, because the facts are essentially undisputed, we must determine whether relator Eric Reetz was acting "in the performance of the duties of [his peace officer] position" under Minn. Stat. § 466.07, subd. 1 (2018), as a matter of law. And I agree that this as a close case. But my assessment of the facts as a whole leads me to conclude that, at the time of the alleged negligence giving rise to the claim against relator, relator was acting only as a privately retained security guard and not as a peace officer. I therefore would affirm the City of Saint Paul's decision to deny relator's request for defense and indemnification.

As the majority observes, there are facts favoring the determination that relator was performing the duties of a peace officer. Consistent with requirements of city policy and with the approval of the city, relator was in uniform and had apparently been issued a squad car to use during his security work at the Dorothy Day Center. And, as a security officer, he was tasked by the center with maintaining a safe and secure environment.

As a whole, however, I believe that the facts weigh in favor of the conclusion that relator was not performing duties as peace officer during the relevant time period in this case. Relator was off duty from his job as a peace officer. He was providing security services to a private entity and was being paid by Catholic Charities under an independent-

contractor agreement that did not include the city as a party. City policy made explicit that the city would not defend and indemnify peace officers for their liability in connection with their off-duty employment.

Most importantly, with respect to the alleged negligence at the heart of this case, relator had no authority to act as a peace officer. As alleged by the victim's complaint, relator's negligent conduct was his failure to "see, search for or detect" and "prevent the entry" of a knife into the center. (Relator was not alleged to have been present when the client of the center who brought in the knife later attacked the victim.) At the time the client entered the center, relator's only authority to stop clients and search them for weapons was grounded in his role as a security officer enforcing the center's no-weapons policy, not in his role as a peace officer. There are no facts demonstrating that, at the point that the client was entering the center, any peace officer on the premises would have had the authority to conduct a stop of the client. *See State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) ("[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." (quotation and citation omitted)). Nor are there facts demonstrating that a peace officer on the premises would have had the authority to execute a search of the client. *State v. Rohde*, 852 N.W.2d 260, 263 (Minn. 2014) (explaining that warrantless searches are unreasonable under the Fourth Amendment unless an exception to the warrant requirement applies). Relator's alleged failure to detect that the client possessed a weapon in violation of the center's policy thus related only to his work as a security guard, not to his authority as a peace officer.

At oral argument, in support of his argument that he was performing the duties of a peace officer, relator pointed out that a peace officer could have asked the client for consent to a search, just as a private security guard would do when asking persons to consent to a search as a condition of entry to an establishment. But this kind of parallel could be drawn between almost any activities relator might have engaged in as a security guard. It is insufficient to show that relator had some authority to act as a peace officer.

Apart from the absence of authority to stop or search the client, the complaint did not allege—nor did relator present any facts demonstrating—that, at the time that relator failed to detect the knife, the client was acting out or refusing to leave, such that a peace officer on the premises could have exercised authority to arrest the client for breach of the peace or remove the client as a trespasser. In this critical respect, the circumstances are different from those in *Childs* and *Ivy*. In *Childs*, the off-duty officer actually arrested a suspected shoplifter at the store where the officer was providing private-security services. *Childs*, 269 N.W.2d at 26-27. And, in *Ivy*, the off-duty peace officer, working as a privately employed security officer at a hospital, had probable cause to arrest a visitor in the emergency room who was "disturbing the peace and engaging in disorderly conduct" and who had been asked to leave and was being escorted out by the officer. *Ivy*, 873 N.W.2d at 368-69.

It is true that the city's public-safety interests are served by the readiness of a uniformed off-duty police officer to spring into action when called on to perform peace-officer duties. It is also true that the center benefits from that readiness. But the statute requiring the city to defend and indemnify a city officer is not triggered by the officer's

readiness to perform duties; it is triggered by the "performance" of those duties. *See* Minn. Stat. § 466.07, subd. 1. And it is in that circumstance that the city is obligated to defend and indemnify the officer. When an off-duty officer is not performing the duties of a peace officer, the city is not responsible for that officer's negligence or defense costs arising from the officer's private employment.

Because, on the whole, the facts establish that relator was not performing the duties of a peace officer when he did not detect that a client entered the center with a knife in contravention of center policy, I would affirm the city's decision to deny relator's request for defense and indemnification.