

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2013

Diane M. Fremgen
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. 2013AP1588

Cir. Ct. No. 2012TR10340

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DODGE COUNTY,

PLAINTIFF-RESPONDENT,

V.

GIOVANINA LOUISE RAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ Giovanina Ray appeals a judgment convicting her of inattentive driving in violation of WIS. STAT. § 346.89(1). The sole issue on appeal is whether falling asleep while driving constitutes inattentive

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

driving under § 346.89(1). I conclude that falling asleep while driving constitutes inattentive driving under § 346.89(1), and I therefore affirm the judgment of the circuit court.

BACKGROUND

¶2 The relevant facts are not in dispute. At 10:00 p.m. on October 31, 2012, sixteen-year-old Giovanina Ray was driving home after a long day of school and extracurricular activities. Ray was tired, and she fell asleep while driving. Her vehicle crossed the center line, and she drove off the road. Ray's vehicle came to a stop in a marsh 100 yards off of the roadway. Ray was not injured, and no other vehicles were involved in the accident. Ray called 911 and told the dispatcher that she had fallen asleep while driving.

¶3 After investigating the accident, the Dodge County Sheriff's Department issued Ray a citation for inattentive driving under WIS. STAT. § 346.89(1). Ray requested a court trial on the inattentive driving citation. At trial, Ray argued that § 346.89(1) does not apply to a driver who falls asleep while driving. Rather, Ray argued that the statute only applies to a driver who is engaged or occupied in an activity that interferes with his or her safe driving, and that falling asleep is not the same as being engaged or occupied in an activity.

¶4 The circuit court held that WIS. STAT. § 346.89(1) applies to a driver who falls asleep while driving, and that the evidence showed that Ray fell asleep while driving. The circuit court therefore convicted Ray of inattentive driving under § 346.89(1). Ray now appeals.

DISCUSSION

¶5 This case requires that this court interpret WIS. STAT. § 346.89(1) and apply it to undisputed facts. The interpretation and application of a statute are questions of law that this court reviews de novo. *Barritt v. Lowe*, 2003 WI App 185, ¶6, 266 Wis. 2d 863, 669 N.W.2d 189. We construe statutory language based on its common and ordinary meaning. *Id.* If the language is plain and unambiguous, the analysis stops there. *Kangas v. Perry*, 2000 WI App 234, ¶8, 239 Wis. 2d 392, 620 N.W.2d 429. In conducting this analysis, we read the statutory language not in isolation, but rather in conjunction with the statute as a whole. *Id.* In addition, we interpret statutes whenever possible to avoid unreasonable or absurd results. *Hines v. Resnick*, 2011 WI App 163, ¶12, 338 Wis. 2d 190, 807 N.W.2d 687.

¶6 WISCONSIN STAT. § 346.89(1) provides: “No person while driving a motor vehicle shall be so engaged or occupied as to interfere with the safe driving of such vehicle.” For the reasons that follow, I conclude that the plain language of § 346.89(1) refutes Ray’s argument that falling asleep while driving does not constitute inattentive driving under the statute.

¶7 On appeal, Ray contends that a driver must be distracted by some “external factor,” to be engaged or occupied with something external, in order to be guilty of inattentive driving under WIS. STAT. § 346.89(1). The plain language of § 346.89(1) contradicts this contention. Under the plain language of § 346.89(1), a driver is prohibited from being “so engaged or occupied” that he or she cannot safely drive a vehicle. Because the words “internal” and “external” do not appear in § 346.89(1), an “internal versus external factor” distinction is not supported by the plain language of the statute, and this court will not read such a

distinction into the statute. Accordingly, I conclude that Ray's contention that § 346.89(1) requires distraction by an "external factor" is contrary to the statute's plain language. Rather, the plain language prohibits any behavior that diverts the driver's attention from the task of safe driving, which includes sleeping.

¶8 Dodge County argues that interpreting the language of WIS. STAT. § 346.89(1) in relation to the statute as a whole supports this plain meaning. I agree. When § 346.89(1) is read in conjunction with the statute as a whole, it is apparent that § 346.89(1) serves as a catch-all, under which any behavior or activity that "interfere[s] with the safe driving of [the] vehicle" is prohibited. The other subsections of § 346.89 prohibit specific conduct that diverts the driver's attention from the task of safe driving: driving while watching a television broadcast; driving while composing or sending a text message or an email; and, if the driver holds a probationary license or learner's permit, driving while talking on a cellular phone. WIS. STAT. § 346.89(2)-(4). WISCONSIN STAT. § 346.89(1) is necessarily broader, as it would be impractical for the legislature to specifically prohibit in the statute every behavior or activity that could interfere with the safe driving of a vehicle. As the County notes, all of the subsections of § 346.89, including the "catch-all" subsection of § 346.89(1), have a common thread: "penalizing [a driver] whose attention is diverted from the task of driving so as to increase the risk of injury [to the driver and others] and damage to property."

¶9 Moreover, interpreting WIS. STAT. § 346.89(1) as Ray suggests—to mean that sleeping while driving does not constitute inattentive driving under the statute—would lead to unreasonable and absurd results, contrary to the canon of statutory construction that, whenever possible, statutes should be interpreted to avoid unreasonable or absurd results. *Hines*, 338 Wis. 2d 190, ¶12. As a matter of common sense, sleeping while driving "interfere[s] with the safe driving of

[the] vehicle.” Falling asleep while driving is extremely dangerous.² A driver who is asleep at the wheel cannot respond to changing traffic patterns, cannot notice whether the traffic in front of him or her is slowing down, and cannot tell that he or she is approaching a stop sign or a red light. For these reasons, concluding that falling asleep while driving does not constitute inattentive driving under § 346.89(1) would lead to unreasonable and absurd results.

¶10 Dodge County has moved for costs and attorney fees under WIS. STAT. RULE 809.25(3) on the ground that Ray’s appeal is frivolous because it has no reasonable basis in law or equity and is not supported by a good faith argument for an extension, modification, or reversal of existing law. This presents a question of law. *Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. “In order for a party to be entitled to fees under WIS. STAT. RULE 809.25(3), every issue raised on appeal must be frivolous.” *Kohl v. DeWitt, Ross & Stevens*, 2005 WI App 196, ¶34, 287 Wis. 2d 289, 704 N.W.2d 586. Although I decide against Ray on the proper construction of WIS. STAT. § 346.89(1), I conclude that her position on that issue is not frivolous. I therefore deny Dodge County’s request for costs and attorney fees.

CONCLUSION

¶11 For the reasons stated above, I affirm the judgment of the circuit court convicting Ray of inattentive driving under WIS. STAT. § 346.89(1).

² According to the National Highway Traffic Safety Administration, driver fatigue causes approximately 100,000 crashes each year, resulting in an estimated 1,550 deaths, 71,000 injuries, and \$12.5 billion in monetary losses. *Facts and Stats*, NAT’L SLEEP FOUND., <http://drowsydriving.org/about/facts-and-stats/> (last visited Oct. 30, 2013).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT.
RULE 809.23(1)(b)4.

