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**SUPREME COURT OF WISCONSIN**

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STATE OF WISCONSIN,  
Plaintiff-Respondent-Respondent

v.

Appeal No.: 2024AP000524

COLIN R. DOWLING,  
Defendant-Appellant-Petitioner

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**PETITION FOR REVIEW**

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## **TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES .....</b>	<b>4</b>
<b>INTRODUCTION .....</b>	<b>6</b>
<b>STATEMENT OF ISSUES PRESENTED FOR REVIEW.....</b>	<b>6</b>
<b>STATEMENT OF CRITERIA SUPPORTING REVIEW .....</b>	<b>7</b>
<b>STATEMENT OF THE CASE .....</b>	<b>8</b>
<b>A.    NATURE OF THE CASE AND PROCEDURAL           HISTORY.....</b>	<b>9</b>
<b>B.    STATEMENT OF FACTS.....</b>	<b>10</b>
 <b>ARGUMENT</b>	
<b>I.    The Court Of Appeals Incorrectly Concluded The       Trial Court Properly Ruled Dowling’s Reduced Speed       Impeded “The Normal And Reasonable Movement Of       Traffic.” .....</b>	<b>14</b>
<b>II.   The Test Of The “Necessary For Safe Operation”       Exception In § 346.59(1) Adopted By The Court Of       Appeals Is Not Supported By The Context Of Its Use       In The Statute Or By Case Law In Wisconsin Or In Any Other       Jurisdiction. The Test Is In Direct Conflict With A Decision       By The North Carolina Supreme Court And Its Application       Would Result In Severe Hardships To Motorists Of All       Types.....</b>	<b>26</b>

**CONCLUSION .....30**

**CERTIFICATION .....31**

## **TABLE OF AUTHORITIES**

### **WISCONSIN CASES:**

<b><i>Slattery v. Lofy</i></b> , 172 N.W.2d 341, 45 Wis.2d 155 (Wis. 1969) ) .....	<b>8, 18, 21, 26-2</b>
<b><i>State v. Baudhuin</i></b> , 416 N.W.2d 60, 141 Wis.2d 642 (Wis. 1987) ) .....	<b>17, 18</b>
<b><i>State v. Booker</i></b> , 717 N.W.2d 676, 2006 WI 79 (Wis. 2006) .....	<b>15</b>
<b><i>State v. Fields</i></b> , 2000 WI App 218, 239 Wis.2d 38, 619 N.W.2d 279 .....	<b>19</b>
<b><i>State v. Rejholec</i></b> , 2021 WI. App. 45, 398 Wis.2d 729, 963 N.W.2d 121 .....	<b>16</b>

### **WISCONSIN STATUTES:**

<b>Wis. Stat. § 346.59(1)</b> .....	<b><i>passim</i></b>
<b>Wis. Stat. § 346.04(2t)</b> .....	<b>9,12</b>
<b>Wis. Stat. § 347.26(11)(a)</b> .....	<b>16, ftnt. 5</b>
<b>Wis. Stat. § 805.17(2)</b> .....	<b>15</b>

### **CASES FROM OTHER JURISDICTIONS:**

<b><i>Com. v. Robbins</i></b> , 441 Pa. Super. 437, 657 A.2d 1003 (1995) .....	<b>25, ftnt. 7</b>
<b><i>Conard v. Miller Motor Express, Inc.</i></b> , 265 N.C. 427, 144 S.E.2d 269 (N.C. 1965) .....	<b>27, 28</b>
<b><i>Johnson v. Sprynczynatyk</i></b> , 2006 ND 137, 717 N.W.2d 586 (N.D. 2006) ) .....	<b>24</b>

<b><i>People v. Beeney</i></b> , 694 N.Y.S.2d 583, 181 Misc.2d 201 (N.Y. Dist. Ct. 1999) .....	<b>21-23</b>
<b><i>People v. Isaac</i></b> , 780 N.E.2d 777, 335 Ill. App.3d 129, 269 Ill. Dec. 305 (Ill. App. 2002) .....	<b>21, 22</b>
<b><i>People v. Lucynski</i></b> , 509 Mich. 618, 983 N.W.2d 827 (Mich. 2022) .....	<b>25</b>
<b><i>People v. Parisi</i></b> , 222 N.W.2d 757, 393 Mich. 31 (Mich. 1974) .....	<b>24</b>
<b><i>Salter v. N. Dakota Dep't of Transp.</i></b> , 505 N.W.2d 111, (N.D. 1993) .....	<b>23-24</b>
<b><i>State v. Bacher</i></b> , 867 N.E.2d 864, 170 Ohio App.3d 457, 2007 Ohio 727 (Ohio App. 2007) .....	<b>24</b>
<b><i>State v. Brown</i></b> , 509 N.W.2d 69, 71 (N.D.1993) .....	<b>19</b>
<b><i>State v. Hannah</i></b> , 259 S.W.3d 716 (Tenn. 2008) .....	<b>20-21</b>
<b><i>State v. Reynolds</i></b> , 272 Mont. 46, 899 P.2d 540 (1995) .....	<b>19</b>
<b><i>State v. Wiese</i></b> , 525 N.W.2d 412 (Iowa 1994) ) .....	<b>19</b>
<b><i>Texas Dept. of Public Safety v. Gonzales</i></b> , 276 S.W.3d 88 (Tex. App. 2008) .....	<b>24</b>

## INTRODUCTION

This case concerns a conviction for violating Wis. Stat. § 346.59(1), Wisconsin's "minimum-speed" statute. The issues presented, described in detail below, are whether the trial court's findings of fact, considered in the light of the undisputed evidence of the surrounding circumstances, support the conviction. If so, was the electric car's reduced speed "necessary for safe operation," an exception to a violation of § 346.59(1).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Were the trial court's express findings that at the time of his alleged violation of Wis. Stat. § 346.59(1): (1) the only two vehicles observed by the officer in the area "approached from the back and went around" Dowling's car to pass; and, (2) the speed of Dowling's car was "somewhere in the forties;" sufficient to establish a violation of § 346.59(1), given the undisputed evidence that: (a) Dowling's car was traveling in the right lane of the two westbound lanes of Interstate 90 with no minimum speed limit on a clear winter night with its headlights and emergency flashers on; (b) there was testimony either car braked or slowed down before moving into the left lane to pass; (c) there was no evidence as to how far either car was from Dowling's car before passing; (d) there was no other traffic in the area or in the left lane specifically and overall traffic was light.

a. Trial Court Answer: "Yes."

b. Court of Appeals Answer: "Yes."

1. Was Dowling's reduced speed of approximately 45 m.p.h. "necessary for safe operation" where his electric vehicle's computer system instructed him to drive no faster than 45 m.p.h. to reach the next exit, approximately 5 miles away, because the battery was draining abnormally fast?

- a. Trial Court Answer: Not addressed by the trial court.
- b. Court of Appeals Answer: "No." The court of appeals held the defense of "necessary for safe operation" is "available, if, but only if, causing the vehicle to function as the traffic-impeding speed is logically unavoidable under the circumstances as a whole to limit the risk of danger, harm, or loss." (Pet. App. p. 10, ¶24)

## **STATEMENT OF CRITERIA FOR REVIEW**

This case presents two issues which have not been addressed in prior decisions in Wisconsin.

Wisconsin cases have not directly addressed what adverse effect on traffic, at a minimum, must be established to prove that a vehicle's reduced speed impeded "the normal and reasonable movement of traffic." Existing Wisconsin case law does, however, provide some assistance in resolving this question. The clear consensus in other jurisdictions with minimum-speed statutes identical or substantially the same as § 346.59(1) is that the type of interaction Dowling's car had with other traffic does not constitute impeding. Many of the cases involved motions to suppress criminal evidence discovered in a traffic stop for impeding traffic.

No prior Wisconsin case has considered the “necessary for safe operation” exception, particularly as applied to an impeding charge where the vehicle’s reduced speed was attributable to mechanical or other system malfunctions. The test adopted by the court of appeals conflicts with the treatment of the companion exception in § 346.59(1) for reduced speed “necessary to comply with the law” in ***Slattery v. Lofy***, 172 N.W.2d 341, 45 Wis.2d 155 (Wis. 1969). The North Carolina Supreme Court has concluded in an analogous fact situation that the “necessary for safe operation” exception to violation of a posted minimum speed limit protected the driver of a slow-moving vehicle against civil liability for a rear-end collision. The court of appeals’ test would have far reaching adverse effects on drivers of vehicles experiencing malfunctions and, as well, on drivers of trucks and other vehicles who may have to drive at reduced speeds under certain circumstances.

Review of this case will provide guidance to Wisconsin motorists, law enforcement, litigants and courts on these important matters.

## **STATEMENT OF THE CASE**

### **A. Nature Of The Case And Procedural History**

Dowling and his family were driving their Tesla on I-90 to Lake Delton on the night of January 19, 2023. The Tesla’s battery began dissipating faster than normal and the car’s computer instructed Dowling to drive at a reduced speed to reach the next available exit, which, in fact, was the Lake Delton exit. He passed a parked state trooper about 5 miles from the exit, who, after observing two cars “move around” the Tesla further down the highway, left his parked position to pull the Tesla over. Dowling was



travelling at 45 m.p.h. in the right lane with the emergency flashers on. He was cited for impeding traffic in violation of Wis. Stat. § 346.59(1). He was also charged with violating Wis. Stat. § 346.04(2t) for “failing to stop his ... vehicle as promptly as safety reasonably permits” since he delayed stopping his car while driving 27 m.p.h. on the shoulder in the hope he could have the 991 operator ask the trooper to follow them to the upcoming exit.

The § 346.04(2t) charge was tried to a jury on November 27, 2023, with the parties agreeing to have the trial court adjudicate the impeding traffic citation based on the evidence presented in trial. The jury returned a guilty verdict and the court set December 20, 2023 for sentencing on the § 346.04(2t) conviction and disposition of the impeding traffic citation.

Dowling filed an “Argument in Support of a Not Guilty Verdict,” addressing both the impeding question and the “necessary for safe operation” exception. (Doc. 15) The court also heard argument from the parties. The trial court found Dowling guilty of violating § 346.59(1). In doing so, it found that the evidence showed the trooper saw “a slow-moving vehicle in the right lane and wasn't quite sure exactly how slow it was at that point, but cars approached from the back and went around, and he thought he saw two of them do that.” The trial court also concluded that when the trooper observed the Tesla “it was doing someplace in the forties.” (Cir. Ct. Doc. No. 31, pp. 8-10; Pet. App., pp. 20-22). It did not address the “necessary for safe operation” exception.

Dowling appealed his § 346.59(1) conviction. He contended the trial court’s express findings of fact did not establish a violation of § 346.59(1) as a matter of law and that, in any event, his reduced speed was necessary for the safe operation. In its decision of May 1, 2025 the court of appeals affirmed his conviction. It treated the appeal as contesting the sufficiency of the evidence to support the conviction and held there was sufficient evidence

in the record. It also held the "necessary for safe operation" exception was available "if, but only if, causing the vehicle to function at the traffic-impeding speed is logically unavoidable under the circumstances as a whole to limit the risk of danger, harm, or loss." (Pet. App. p. 12, ¶24) It concluded the Tesla's reduced speed of 45 m.p.h. was not logically unavoidable because Dowling could have prophylactically stopped on the shoulder and called for roadside assistance.<sup>1</sup> (*Id.*, at p. 17, ¶37)

On May 20, 2025 Dowling filed a Motion for Reconsideration. The Motion was denied on May 22, 2025.

## **B. Statement Of Facts**

On the evening of January 19, 2023 Dowling, his wife and two children, ages 4 and 3 were traveling in their Tesla car from their home in the Chicago area to spend a couple of nights in Lake Delton, Wisconsin. (Doc. 30, pp. 92-93; 119) The Tesla is an all-electric vehicle with a sophisticated computer system. Among other things, the computer provides information about the current battery level, the % of charge needed to reach a specified destination and the expected remaining battery level on arriving at the destination. (Doc. 30, pp. 106-07, 120-22)

They added charge to the Tesla in Kenosha. (Doc. 30, p. 94) As they neared Madison the battery level was 12% , which the computer advised was sufficient to reach the Lake Delton exit, where there was a Tesla charger. Nonetheless, Dowling and his wife decided to stop and charge it in Madison to 20% to provide a greater safety cushion. (Doc. 30,

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<sup>1</sup> The court of appeals also stated Dowling could have taken an earlier exit (Pet. App. p.18, ¶39), but the Tesla was travelling at 65 m.p.h. when it passed exit 106, the last exit before the Lake Delton exit. (Doc. 30, pp. 126-27, 131-33)

pp. 106-07, 109,128-29) They would fully charge the battery overnight.  
(Doc. 30, pp. 106-07, 109,128-29, 149-50)

After driving for a while at the prevailing speed of traffic. the computer advised Dowling to reduce the speed to 70 m.ph to reach the Lake Delton exit. A while later, the display indicated he should reduce the speed to 65 m.p.h., which he did while staying in the right lane. Later, the computer directed him to reduce the speed to 60 m.p.h., which he did. He put the emergency flashers on at this point. A short distance later and before reaching Exit 106, the last exit before the Lake Delton exit, the computer indicated the speed could be increased to 65 m.p.h. He increased his speed accordingly and turned off the emergency flashers. (Doc. 30, pp. 128-133)

After passing Exit 106 the computer once again instructed him to reduce speed to 60 m.p.h. He did so, put the emergency flashers back on and remained in the right lane. About four miles later the computer indicated in quick succession the speed should be reduced to 55 m.p.h. and then 50 m.ph. The battery charge was dissipating faster than normal. At that point they were about six miles past Exit 106. He drove at 50 m.p.h. for a while but shortly before reaching the “97 crossover” the computer directed him to reduce the speed to 45 m.p.h. The Lake Delton exit, Exit 92, was approximately 5 miles away.<sup>2</sup> (*Id.*)

Dowling used cruise control to stay at the recommended speeds and he made a point of checking for vehicles approaching from behind in the right lane. No vehicles had any problems in simply moving to the left lane to pass. (Doc. 30, pp. 99,133-34) (Doc. 30, pp. 99, 133)

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<sup>2</sup> Included at page 23 of the Petitioner’s Appendix is a “Map of Relevant Portions Of Interstate I90 and Relevant Landmarks,” (App. Doc. No. 38).

Dowling and his wife had never experienced this problem before and there was no issue during their trip until then. In their experience the computer was quite accurate in calculating the charge needed to reach a destination. (Doc. 30, pp. 103-04, 93, 119, 164)

A short time after passing the 97 crossover Dowling noticed a vehicle coming up behind him. As the vehicle got closer he recognized it as a police squad. The squad came up very close to the Tesla and turned on its overhead lights. Dowling pulled onto the right shoulder and reduced the Tesla's speed to 27 m.p.h. At the same time, he called 911 in an attempt to ask for assistance from the officer to follow them to the Lake Delton exit, which was only a few miles away. (Doc. 30, pp. 100,134-35)

He called 911 because the reported battery level was near 0%. He and his wife were afraid that if they stopped the Tesla at that low of a battery level there would not be enough charge left to get it moving again, which would leave them stranded on the shoulder until a flat-bed tow truck could take it to the Tesla charger. After briefly describing the situation to the 911 operator, he was transferred to a State Patrol dispatcher. While Dowling was again trying to try to describe the situation the dispatcher realized another dispatcher was on the line with the trooper. The dispatcher Dowling was speaking with told him he needed to stop the Tesla, which he promptly did. (Doc. 30, pp. 100-02,135-36,140-41,163)

The trooper charged Dowling with violating Wis. Stat. § 346.04(2t). He also cited Dowling for impeding traffic in violation of Wis. Stat. § 346.59(1). At Dowling's request the trooper followed him on the shoulder to the Lake Delton exit. (Doc. 30, p. 161)

Dowling was able to retrieve historical data from the Tesla's computer regarding various information, including location, speed and battery level.

The data was assembled in a spread sheet marked as Exhibit 14 at trial. (Doc. 73; Doc. 30, pp. 123-24)

The trooper, on duty for less than a year and a half, testified he observed a slow-moving Tesla approach the 97 crossover where he was parked. (Doc. pp. 14, 25, 31-32) It was in the right lane with its emergency lights on. As the Tesla passed him no other vehicles around. (*Id.*). When the Tesla drove further up the road he saw two cars travelling at “highway speed” approach the Tesla in the right lane and then move into the left lane to pass.<sup>3</sup> (*Id.*, pp. 31-32, 88-89) They were the only vehicles in the area. That was the entirety of his testimony regarding the interaction between the Tesla and the two cars. He did not testify to observing either car braking or slowing down as they approached the Tesla. Nor did he testify as to how far each car was from the Tesla before moving into the left lane.

The trooper’s squad camera begins recording and storing video, including video of the prior 30 seconds. when the overhead lights are turned on. When the video begins the squad in the left lane and it then moves into the right lane as it catches up with the Tesla. The Tesla with its emergency flashers on can be seen from the very beginning of the video.<sup>4</sup>

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<sup>3</sup> As discussed further herein, he first used the term ‘swerved’ but thereafter used the phrases “moving over” and “moving around” the Tesla.

<sup>4</sup> The flash drive containing the video was marked as Exhibit 1 at trial and accompanied the Sauk County Certificate of Aug. 19, 2024. (Doc. No. 38). The flash drive has two videos on it. The one showing the events up to the completion of the traffic stop is titled 19012023215258.wmv.

## **ARGUMENT**

### **I. The Court Of Appeals Incorrectly Concluded The Trial Court Properly Ruled Dowling's Reduced Speed Impeded "The Normal And Reasonable Movement Of Traffic."**

Wis. Stat. § 346.59(1) states:

- (1) No person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or is necessary to comply with the law.

The first issue raised in this Petition for Review involves the general prohibition in § 346.59(1) against driving so slow as to impede "the normal and reasonable movement of traffic."

However, before discussing the relevant law and its correct application to the record it is first necessary to note some significant errors in the court of appeal's analysis of Dowling's appeal and of the record. The court erroneously characterized Dowling's appeal as challenging the sufficiency of the evidence. (Pet. App. p.4, ¶1) To the contrary, his position was the trial court's express findings of fact made at the December 20, 2023 hearing were insufficient as a matter of law to support his conviction. See Statement of Issue No. 2 and Argument Section II of Dowling's Brief below. It also misinterpreted Dowling's argument that a slow-moving vehicle has to do more than cause following vehicles to slow before passing to mean that if two cars were slowed down before passing that would be sufficient. (Pet. App. pp. 7-8, ¶12)

As a result, the decision does not mention the trial court's express finding that the two cars which passed the Tesla "approached from the back and went around." Instead, it pointed to the following to conclude the trial court could have found the passing vehicles were slowed beforehand:

1. The trial court's clearly inaccurate comment during trial that the squad video showed vehicles "' whip[p]ing around' or 'whipping past' the Tesla while it was still in the right lane, not yet having pulled onto the shoulder.'" (Pet. App. p. 5, ¶5 )
2. The trooper first stated in his testimony the two cars "swerved" around the Tesla. (*Id.* at p. 8, ¶13 )
3. The trooper's unsolicited speculation the passing drivers did not know "how slow the [Tesla] was actually going." (*Id.*)
4. The court of appeals asserted the trial court made a finding that "other vehicles passed the Tesla at a very high rate of speed.'" (*Id.*, p.9 , ¶16 )

The trial court was well within its rights to find the two cars simply "went around" rather than "swerved" around the Tesla. Circuit court findings of fact are not to be disturbed unless they are clearly erroneous. Wis. Stat. § 805.17(2). ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. It reviewed the transcript of the trooper's testimony and the squad video prior to the December 20, 2013 hearing. (Doc. 31, pp. 8, 10; App. pp. 3, 5). Although the trooper initially used the term "swerved" (Doc. 14, p. 32), thereafter he

described their action as only “mov[ing] over to the left lane” and “moving around him.” (Id., p. 32-33, 88-89).<sup>5</sup>

“Swerving” and “went around” (or even “moving over”) are not synonyms. They have drastically different connotations. The court could also rely on the absence of any evidence either car braked before passing and as to how close the cars came before passing and the fact the left lane was unobstructed.

The court of appeals placed great weight on the circuit court’s inaccurate comment about the squad video. However, as pointed out as pages 4 to 5 of Dowling’s Reply Brief, the trooper expressly confirmed the squad video did not show any cars moving around the Tesla. (R. 14, pp. 88-89; App., pp. 88-89). Further, the squad video does not show any vehicles other than the Tesla until the Tesla is moving on to the shoulder at approximately the 41 second mark. Then, one sees a truck traveling in the left lane. Appellate courts are as competent as the circuit court in reviewing video evidence. See, ***State v. Rejholec***, 2021 WI. App. 45, ¶17, 398 Wis.2d 729, 963 N.W.2d 121.

The trooper’s comment as to the state of mind of the two drivers was rank speculation. He could only testify to what he observed and

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<sup>5</sup> Emergency flashers are “**used for the purpose of warning the operators of other vehicles of the presence of a vehicular traffic hazard requiring the exercise of unusual care in approaching, overtaking or passing** .... These warning lights shall be visible from a distance of **not less than 500 feet** under normal atmospheric conditions at night.” Wis. Stat. § 347.26(11)(a). (Emphasis added)

The Tesla’s emergency flashers warned approaching drivers of the need to exercise unusual care in approaching and overtaking it. It would have taken a vehicle travelling 70 m.p.h. about 13 ½ seconds to close a 500 foot gap to the Tesla travelling at 45 m.p.h. (70-45 = 25 m.p.h. or 36.7 feet per second), ample time for a driver to easily pass the Tesla.



what he offered in that respect was extremely sparse. His speculation is seriously undermined by his own ability while parked to observe the Tesla during the entire sequence of events and the fact the Tesla with its emergency flashers is clearly observable from the very beginning of the squad video.

The trial court's statement that "other vehicles passed the Tesla 'at a very high rate of speed'" is a partial quote from the December 20, 2023 hearing which must be read in the proper context. The court made it only for the purpose of showing there was some, not "zero," traffic, because the video showed 2 or 3 tractor-trailers passing the Tesla while it was traveling on the shoulder. (Doc. 31, p. 10; Pet. App. p.22 )

The court of appeal's decision did not consider any Wisconsin cases in which § 346.59(1) was discussed. However, there are two such cases which are useful in analyzing whether Dowling's interaction with the two passing cars rose to the level of impeding "the normal and reasonable movement of traffic."

***State v. Baudhuin***, 416 N.W.2d 60, 141 Wis.2d 642 (Wis. 1987), held there was reasonable cause to stop the defendant for impeding traffic and, therefore, evidence of his intoxication discovered during the stop should not be excluded. The defendant was travelling at about 17 m.p.h. on a street with a 25 m.p.h. speed limit. The officer followed him for six or seven block. When the officer stopped the defendant eight to ten vehicles were backed up behind the officer. No vehicles were ahead of the defendant and there was no indication the defendant's car was having any mechanical problems or other condition to explain its slow speed. 141 Wis.2d at 645-46.

***Slattery v. Lofy***, 172 N.W.2d 341, 45 Wis.2d 155 (Wis. 1969). was a civil action for damages resulting from a rear-end collision. The plaintiff, Slattery, had made a right turn from his driveway onto Highway 53, a two lane, undivided highway, with a speed limit of 65 m.p.h. at the location of the collision. There was no minimum speed limit. Slattery traveled some 400 to 500 feet but only reached a speed of 15 to 18 m.p.h. when he was rear-ended. The defendant, who already on the highway, applied her brakes but was unable to stop in time. The on-coming traffic lane was free of traffic. The collision took place just before the speed limit dropped to an unspecified limit entering the village of Trego. 45 Wis.2d at 157-59.

The Court upheld the trial court's directed verdicts finding Slattery not negligent and finding Lofy causally negligent. The Court noted § 346.59(1) has an exception to an impeding traffic violation when reduced speed is "necessary to comply with the law." In upholding the directed verdict in favor of Slattery, the court stated:

Not only is it undisputed that plaintiff was entering an area where reduced speed was required, but **it is also undisputed that the left or passing lane was free of oncoming traffic. Miss Lofy could have simply passed the plaintiff in the left lane without danger and without incident.** Under these circumstances the plaintiff's speed could not have been a cause of the accident. We are therefore of the opinion that the trial court properly directed the verdict in favor of the plaintiff as to the liability issue.

45 Wis.2d at 160. (Emphasis added)

In our case the two passing cars did not have to worry about oncoming traffic. The left lane was clear. And, unlike the slow moving cars in ***Baudhuin***, *supra*, and ***Slattery***, *supra*, the Tesla's emergency flashers alerted traffic approaching from behind of its presence and the need to exercise caution in approaching it.

Another Wisconsin case of interest is **State v. Fields**, 2000 WI App 218, 239 Wis.2d 38, 619 N.W.2d 279. Just before midnight an officer stopped Fields for remaining stopped too long at a stop sign. There was no other traffic. The officer discovered Fields' license was revoked. The circuit court denied Fields' suppression motion. On appeal the State put forth a number of different rationales to justify the stop, although a violation of § 346.59(1) was not one of them. However, in the course of rejecting those rationales the court of appeals looked at several impeding traffic cases from other jurisdictions to see "how other courts view analogous scenarios." Its review of those cases included the following observations:

In **State v. Wiese**, 525 N.W.2d 412 (Iowa 1994), slow driving in the absence of erratic driving, interference with traffic, or the posted limit did not constitute grounds for a stop. In **State v. Brown**, 509 N.W.2d 69 (N.D.1993), driving at a slower than usual speed did not by itself create reasonable suspicion of driving while under the influence. In **State v. Reynolds**, 272 Mont. 46, 899 P.2d 540 (1995), waiting seven to ten seconds at an intersection plus 'bordering on traveling too fast' did not support particularized suspicion of wrongdoing.

2000 WI App ¶20.

The court of appeals stated, "These cases support the conclusion that something more was required in order to lawfully stop Fields' vehicle." *Id.* at ¶21.

The consensus of courts in other jurisdictions with statutes identical or substantially similar to § 346.59(1) is that a slow-moving vehicle which only causes a limited delay in passing it or minor inconvenience to other motorists does not give rise to a reasonable suspicion justifying a traffic stop. In addition to the cases cited in **Fields**, *supra*, the following cases are particularly instructive.

In ***State v. Hannah***, 259 S.W.3d 716 (Tenn. 2008), the state appealed the suppression of evidence of drug possession obtained in a traffic stop for violating Tennessee's impeding traffic statute. The defendant was travelling approximately 20 m.p.h. in the left lane of a four-lane highway at 1:00 a.m. The speed limit was 35 m.p.h. There was no minimum speed limit. The officer followed the defendant's car and testified other vehicles coming up behind them braked fairly quickly before passing. Traffic was moderate and most traffic was travelling at 50 miles m.p.h.<sup>6</sup> *Id.*, at 719.

The trial court and the court of appeals suppressed the evidence on the grounds the vehicles had not been forced to actually stop. The Supreme Court rejected that view. It observed other jurisdictions, including Wisconsin, having statutes nearly identical to Tennessee's statute, "...have focused on whether a driver's slow speed blocked or otherwise backed-up traffic." *Id.*, at 722. (Citations omitted) It then noted the same reasoning had led courts to conclude that if a driver's slow speed does not affect other motorists then the driver is not impeding traffic. *Id.*, at 722. (Citations omitted)

In remanding the court provided the following guidance for trial courts reviewing whether a slow driver impeded traffic:

[W]hile not an exhaustive list, . . . [a trial court] should consider how slow the driver's automobile was traveling, the posted maximum speed limit, the posted minimum speed limit, if any, the effect on traffic, the duration of the effect on traffic, and the normal and reasonable flow of traffic in that area. Also, the trial court should consider whether other traffic could safely pass the slow-moving automobile ...."

*Id.* at 722-23.

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<sup>6</sup> The court stated traffic traveling above the posted maximum speed should not be construed as "normal and reasonable" by a trial court. *Id.* at 723, ftnt. 5. Also see ***Agreda v. State***, 152 So.3d 114, 117 (Fla. App., Sec. District, 2014), *infra*.

One would certainly add to that non-exhaustive list which lane the slow-moving vehicle was in and whether it had its emergency flashers on. (There was no indication the defendant in **Hannah** had emergency flashers on.)

As noted in **Hannah**, *supra*, the ability of faster traffic to simply pass a slow-moving vehicle, even if it not immediately possible, is an important, and often dispositive, factor, in determining whether traffic was actually impeded. The open oncoming traffic lane was noted in **Slattery v. Lofy**, *supra*, 45 Wis.2d 155 at 160.

Cases where no impeding was found since faster traffic had available an open left lane going in the same direction include: **Agreda v. State**, 152So.3d 114 (Fla. App., Sec. District, 2014); **People v. Isaac**, 780 N.E.2d 777, 335 Ill. App.3d 129, 269 Ill. Dec. 305 (Ill. App. 2002); and **People v. Beeney**, 694 N.Y.S.2d 583, 181 Misc.2d 201 (N.Y. Dist. Ct. 1999). The availability of passing on a two-lane highway, even though delayed, precluded a finding of reasonable suspicion in **Salter v. North Dakota Dept. of Transp.**, 505 N.W.2d 111 (N.D. 1993).

The defendant in **Agreda v. State**, *supra*, was a passenger in a car travelling at 45 m.p.h. in the right lane of two lanes going in the same direction. The speed limit was 65 m.p.h. and with a posted minimum speed of 40 m.p.h. The officer observed several vehicles behind the car and stopped it for impeding traffic. Criminal evidence implicating the passenger was discovered. The passenger appealed the denial of his suppression motion and subsequent conviction.

Florida's impeding statute reads substantially the same as § 346.59(1). Noting that traffic was light and nothing prevented vehicles from passing in the left lane, the appellate court concluded "Manifestly, the vehicle was not being driven at such a slow speed as to impede or block the normal

flow of traffic in violation of [the statute.]" 152 So.3d at 116. The court also rejected a "community-caretaker" justification for the stop and reversed the passenger's conviction.

In ***People v. Isaac***, *supra*, the defendant was traveling 30 m.p.h. at 3:00 a.m. in one of the two westbound lanes. The posted speed limit was 40 m.p.h., although traffic was regularly traveling at 45 to 50 m.p.h. The officer followed the defendant and stopped her for impeding traffic after six vehicles backed up behind him. The defendant's motion to suppress criminal evidence was denied.

The appellate court observed there were no reported cases in Illinois where a violation of Illinois' impeding traffic law was the basis for a stop. The law prohibited driving "at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation of [a] vehicle or in compliance with law ." In looking to other jurisdictions, the court observed "[C]ases from other jurisdictions have held that impeding traffic' statutes may be the basis for a valid traffic stop if there is evidence that a defendant's slow driving was directly responsible for slowing other traffic." 780 N.E.2d at 779-80. (Citations omitted.).

The appellate court applied that reasoning and overruled the denial of the suppression motion, concluding:

Here, it was not reasonable to believe that defendant was violating the statute against impeding traffic. Although at least six cars were driving behind her, it appears that they simply could have gone around her in the other westbound lane.

Id. at 780. (Emphasis added)

The defendant in ***People v. Beeney***, *supra*, was convicted of violating New York's impeding traffic statute. The statute is substantially the same as § 346.59(1). 181 Misc.2d at 203. Beeney had been traveling in the right-

hand lane of three-lane super-highway with a speed limit of 55 m.p.h.. When first observed by the officer, his estimated speed was 30 m.p.h. with three vehicles behind him. The officer finished a traffic stop and when he caught up with Beeney he saw two different vehicles now behind Beeney and estimated their speed as 45 m.p.h.

On appeal the district court, lacking New York precedent, looked to other jurisdictions for guidance. It noted several states had impeding traffic laws with language virtually identical to New York's. After examining the relevant case law in those states, the district court concluded

According to the courts of Pennsylvania, North Dakota, Michigan and Illinois, the dispositive factor when determining whether slow speed is a violation (or may serve as reasonable articulable suspicion for a stop) is its effect upon other drivers. In other words, whether the slowness impedes traffic so as to pose a real danger to other motorists, as opposed to potential danger or temporary inconvenience.

181 Misc.2d at 206. (Citations omitted) (Emphasis added)

Continuing, the court observed “[T]here was nothing in the record to suggest that the vehicles traveling behind Mr. Beeney were not free to pass him,” as evidenced by the fact the first group of three cars had passed by the time the officer caught up with Beeney. *Id.*, at 207. The court concluded the record “fails to show as a matter of law that there existed a substantially dangerous condition as created by Mr. Beeney’s below speed limit driving that not just impeded traffic, but as required by law, impeded the normal and reasonable movement of traffic.” *Id.* at 208. (Emphasis added.)

The plaintiff in ***Salter v. North Dakota Dept. of Transp.***, 505 N.W.2d 111 (N.D. 1993), was stopped for violating North Dakota’s impeding traffic statute, which, again, is almost identical to § 346.59(1). 505 N.W.2d at 113. At 3:00 a.m. Salter was travelling 30 to 35 m.p.h. in a no-passing zone on a

two lane rural highway with a 50 m.p.h. speed limit but no minimum speed. After observing other vehicles come up behind Salter, the officer stopped him. Evidence of intoxication was discovered, and his license was suspended. The Supreme Court affirmed the lower court's dismissal of the suspension. It held "The minimal facts in this record do not support a conclusion that [the officer] had a reasonable and articulable suspicion that Salter was impeding traffic in violation of the statute." *Id.*, at 114.

Elaborating, the Court noted:

There is no evidence of the length of the no-passing zone, nor do we know if there was one, five, or ten cars coming up behind Salter and [the officer]. We do not know if Salter was truly impeding traffic in violation of the statute, or if Salter's relatively slow speed only momentarily delayed some drivers from traveling at higher speeds while they traveled through a short no-passing zone.

*Id.* (Emphasis added)

Courts in jurisdictions with statutes essentially the same as § 346.59(1) have also have explicitly stated slow speed alone does not give rise to a "reasonable suspicion." See, for example: ***People v. Parisi***, 222 N.W.2d 757, 393 Mich. 31 (Mich. 1974) (Criminal evidence obtained in a traffic stop made solely because the defendant was traveling 25 m.p.h. in a 45 m.p.h. zone at 3:00 a.m. excluded.); ***Johnson v. Sprynczynatyk***, 2006 ND 137, 717 N.W.2d 586 (N.D. 2006) Stopping of a motorist at 12:43 a.m. solely for driving 8-10 m.p.h. in a 25 m.p.h. zone was not based on a reasonable suspicion); ***Texas Dept. of Public Safety v. Gonzales***, 276 S.W.3d 88 (Tex. App. 2008). (No impeding violation where driver was going 45 m.p.h. in a 65 m.p.h. zone at 4:00 a.m.); and ***State v. Bacher***, 867 N.E.2d 864, 170 Ohio App.3d 457, 2007 Ohio 727 (Ohio App. 2007) (No reasonable suspicion to stop a driver going 43 m.p.h. on an interstate highway with a posted limit of 65 m.p.h. at 3:00 in the morning)



It should be noted that in none of the forgoing cases did the slow-moving vehicle have its emergency flashers on, even though many of the stops occurred during the night. The absence of emergency flashers was not discussed and was not a factor considered by the courts.<sup>7</sup>

In the course of its ruling finding Dowling guilty of violating § 346.59(1), the trial court made the following cryptic comment: “Now, this is a traffic citation. And it would appear there was a significantly reduced speed and not enough to cause vehicles unable in the dark to get a clear understanding of how slow the vehicle was going to kind of come around it.” (Doc. 31, p. 10; Pet. App. p. 22 ) It is unclear what the trial court meant but It appears it believed the Tesla’s reduced speed could potentially impede other motorists under other circumstances. Such a belief does sustain his conviction.

§ 346.59(1), by its terms, only applies to actual impeding. The clear consensus of other jurisdictions is that actual, non-*de minimis*, impairment of traffic must be shown. Also, see, ***People v. Lucynski***, 509 Mich. 618, 983 N.W.2d 827 (Mich. 2022), which expressly rejected the concept of potential impeding, holding

[T] the statute is not violated if the normal flow of traffic was never impeded, blocked, or interfered with. In short, in order to interfere with the normal flow of traffic, some traffic must have actually been disrupted or blocked.

*Id.* at 648-49. (Emphasis added)

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<sup>7</sup> The only impeding traffic case found where emergency flashers were mentioned is ***Com. v. Robbins***, 441 Pa. Super. 437, 657 A.2d 1003 (1995). However the comment was on the absence of emergency flashers on a vehicle backing up 17 to 20 cars in a no-passing zone. 657 A.2d at 1004.

**II. The Test Of The “Necessary For Safe Operation” Exception In § 346.59(1) Adopted By The Court Of Appeals Is Not Supported By The Context Of Its Use In The Statute Or By Case Law In Wisconsin Or In Any Other Jurisdiction. The Test Is In Direct Conflict With A Decision By The North Carolina Supreme Court And Its Application Would Result In Severe Hardships To Motorists Of All Types.**

As noted earlier, the trial court did not address Dowling’s claim that his reduced speed was “necessary for safe operation.” The court of appeals held the “necessary for safe operation” exception “is available if, but only if, causing the vehicle to function at the traffic-impeding speed is logically unavoidable under the circumstances as a whole to limit the risk of danger, harm, or loss.” (Pet. App. p. 10, ¶24) In applying its test to Dowling, the court of appeals held he should have stopped the Tesla on the shoulder and wait for assistance rather than continuing to drive 45 m.p.h. in the right lane with the emergency flashers on. (*Id.*, p. 15, ¶37)

No legal authority was cited for this test. Instead, the court relied upon a strict dictionary definition of the word “necessary” without considering the context of the word’s use in § 346.59(1) and the effects of its test. The test imposes duties not found in the statute.

The court of appeal’s construction of “necessary” as used in § 346.59(1) is inconsistent with the Wisconsin Supreme Court’s discussion of the “necessary to comply with the law” exception in ***Slattery v. Lofy***, *supra*. In concluding the trial court properly directed a verdict in favor of Slattery, the Court observed it was “undisputed that plaintiff was entering an area where reduced speed was required.” 45 Wis.2d at 160.

If the court of appeals construction of “necessary” were applied to the facts in ***Slattery*** one could reasonably argue Slattery’s reduced speed was

not “necessary to comply with the law” since the collision occurred where the speed limit was still 65 m.p.h. *Id.*, at 158-59. Slattery could have easily driven a higher speed than 18 m.p.h. until he was about to enter the lower speed limit zone, at which point he could apply his brakes to slow down as needed.

***Conard v. Miller Motor Express, Inc.***, *supra*, was a civil damages suit arising from a rear-end collision involving two tractor-trailer trucks on a four-lane dual interstate highway in South Carolina shortly after midnight. There was a minimum speed limit of 40 m.p.h., but the opinion does not state what the maximum was. The operator of the rear-ended truck had pulled onto the shoulder on the downward slope of a hill about five-tenths of a mile from the site of the collision. He did so because one of the tires on the dual-wheels had blown. However, because of narrowness of the shoulder he did not have sufficient room to remove the wheel and replace the tire. He then turned on the “red blinkers” and all the other lights and proceeded down the highway in the right lane at about 30-35 m.p.h. It was his intention to pull over at the bottom of the hill where there was more space to change the tire. Evidence showed the blinkers and other lights would have been visible for at least 1,000 feet. An expert testified standard procedure required the truck be driven to a place of safety to make the repairs and that safety required the speed not exceed 30-35 m.p.h. because the remaining single tire might blow out at a higher speed.

The plaintiff argued the driver was at fault because the truck’s speed was below the posted minimum. In rejecting that argument the supreme court noted there was an exception in the South Carolina statute applicable to violating minimum speed limits. The statute is not violated if the lower speed was “necessary for safe operation or in compliance with law.” The supreme court concluded the case was exactly what the exception was

intended to cover. Accordingly, it affirmed the trial court's declaration of a "nonsuit" in the favor of the defendant at the close of the evidence. 144 S.E.2d at 429-30.

If the court of appeals test were applied to **Conard** then one would argue the driver of the disabled truck should have remained on the shoulder and waited for a tow.

The court of appeals test for when reduced speed is "necessary for safe operation" would inflict significant hardship on drivers who cannot always drive at highway speeds because of the inherent nature of their vehicle, because they are towing a trailer or because the vehicle is having a mechanical or system malfunction which warrants a reduced speed. What is a tractor-trailer driver who must reduce its speed to 45 m.p.h. to go up a long incline or steep hill supposed to do? Should the driver pull onto the shoulder and wait for a tow over the crest? Must a driver towing a U-Haul trailer only travel on highways with speed limits not exceeding 55 m.p.h., U-Haul's recommended speed limit?<sup>8</sup> What if a car equipped with a "temporary spare" suffers a flat tire at night on a rural interstate highway with a 70 m.p.h. speed limit? Must the driver forget about changing the tire and, instead, wait on the shoulder for an unknown period for assistance since, typically, a car with temporary spare should not be driven faster than 50 m.p.h.<sup>9</sup>

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<sup>8</sup> See <https://www.uhaul.com/Tips/Towing/Trailer-User-Instructions-122/> ("The **maximum recommended speed is 55 mph** when towing a U-Haul trailer.") (Last checked 6/22/25)

<sup>9</sup> See, for example, <https://cluballiance.aaa.com/the-extra-mile/advice/car/how-far-can-you-drive-on-a-spare-tire> ("Drivers should always keep speeds at **50 miles per hour** or less while driving on a temporary spare tire."); <https://www.discounttire.com/blog/change-spare-tire> ("Discount Tire recommends going no faster than 50mph for more than 50 miles on a temporary spare tire."); and [28](https://www.autozone.com/diy/trustworthy-advice/how-</a></p></div><div data-bbox=)

These unnecessary hardships would be avoided if the court of appeals had looked to Wisconsin jury instruction on impeding traffic, WIS JI-CIVIL 1300, “Speed: Impeding Traffic,” for guidance. The instruction only requires “ordinary care under the circumstances,” not extraordinary care.

The court of appeals’ test discounts the real risks of stopping on a highway shoulder and waiting an indeterminate time for assistance, particularly at night in the winter on a rural section of an interstate highway with no artificial illumination. Non-emergency vehicles, like the Tesla, are not protected by Wisconsin’s “Move Over” law, Wis. Stat. § 346.072, even if their flashers are on.<sup>10</sup> Striking a car stopped on the shoulder at 70 m.p.h. is far worse than rearending a car where the speed differential is only 25 m.p.h. Unlike a driver travelling at a reduced speed, a driver parked on the shoulder cannot even attempt evasive action if a collision is threatened.

When Dowling followed the Tesla’s direction to reduce its speed to 45 m.p.h. approaching the 97 crossover he was 5 miles from the next exit, the exit the Tesla advised he would be able to reach by maintaining that speed. At 45 m.p.h. it would have taken approximately seven minutes to reach the exit. Traffic was light and he was driving in the right lane with the emergency flashers on. He had been monitoring traffic approaching from behind and there had been no problems. It was far safer for him under those circumstances to reach the exit as soon as possible rather than waiting on the shoulder for a tow truck to arrive, during which time the Tesla battery

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[long-can-i-drive-on-a-spare-tire](#) (“Keep your speed under **50 mph** when driving on a temporary spare to avoid damaging the tire or losing control.”) (All last checked 6/22/25)

<sup>10</sup> Even with the benefit of the “Move Over” law, 326 on duty emergency workers were injured and five were killed in 2022 in circumstances covered by the law. <https://wisconsindot.gov/Pages/about-wisdot/newsroom/law/110123-November-LOM-move-over.aspx>. (Last checked 6/22/25)

might die and leave it with no emergency flashers and other lights, thereby making it even more dangerous.

### **CONCLUSION**

For the reasons stated herein, Dowling respectfully requests the Wisconsin Supreme Court to grant review of the court of appeals decision of May 1, 2025.

Dated this 23rd day of June, 2025.

Electronically signed by Robert G. Dowling

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**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19 (8) (b), (bm), and (c) and § 809.62(4) for a Petition for Review. The length of this Petition for Review is 31 pages and contains 7,904 words.

Dated this 23rd day of June, 2025.

Electronically signed by Robert G. Dowling

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