

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1647**

J.R. and J.R. on behalf of M.R., minor child,
Respondents,

vs.

City of St. Paul, Division of Parks and Recreation,
Appellant,

Deryl Fredrick Baysinger,
Defendant.

**Filed June 22, 2010
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge**

Ramsey County District Court
File No. 62-CV-08-2299

Philip G. Villaume, Jeffrey D. Schiek, Villaume & Schiek, P.A., Bloomington,
Minnesota (for respondents)

Gerald T. Hendrickson, Interim St. Paul City Attorney, Lawrence J. Hayes, Jr., Assistant
City Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Willis,
Judge.*

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant City of St. Paul (city) brings this interlocutory appeal challenging the district court's denial of its motion for summary judgment. The city argues that the district court erred by holding that its affirmative defenses of statutory immunity and vicarious official immunity to the tort claims alleged by respondents J.R. and J.R. fail as a matter of law. Because we conclude that the city is entitled to the defense of statutory immunity from respondents' claims of negligence, negligent supervision, and negligent retention against the city, we reverse and remand the district court's order in part. But because we conclude that the city is not entitled to vicarious official immunity from respondents' claim of respondeat superior/vicarious liability based on defendant Deryl Baysinger's conduct, we affirm the district court's denial of summary judgment on that ground.

FACTS

Baysinger began working at the Baker Recreational Center in St. Paul in 2003; his primary responsibility was to conduct activities at the center. Baysinger had two supervisors: Tom Russell, the director, and Linda Flynn, the district supervisor. On April 15, 2004, a parent contacted Baker staff. The parent, who wished to remain anonymous, stated that "her child had been hanging around with . . . Baysinger downtown on the weekends" and that a group of kids had met Baysinger and "discussed some things having to do with pornography." On April 21, 2004, Russell discussed this report with Baysinger and directed him not to meet with minors outside of the Baker Recreational

Center and to engage in only appropriate conversations with the minors. Russell told Baysinger that if another complaint was made, Baysinger would be subject to disciplinary action.

In October 2005, Flynn received a voicemail message from a family therapist who stated that “he was treating a 13-year-old client and the client had mentioned that there was a staff person at Baker who was having the kids stay after hours to participate in recreation activities.” Flynn was not given the name of the 13-year-old client. Flynn forwarded the message to Mike Hahm, the park-and-recreation manager, who called the family therapist and learned that Baysinger was keeping Baker open after hours and had invited a minor to his home. It was around this time that Flynn and Hahm learned about the 2004 complaint involving Baysinger.

Flynn and Hahm met with Baysinger on October 10, 2005. At the meeting, Baysinger admitted that he met with minors outside of Baker. Baysinger also informed Hahm that a 17-year old had stayed at his apartment at the request of the minor’s mother because his mother was in an abusive relationship. But Baysinger denied that groups of minors had been to his apartment, stating that kids sometimes approached him when he was downtown. Baysinger also stated that he occasionally kept the center open after hours to continue traditional Baker activities with the kids, i.e., ping-pong and cards. Hahm informed Baysinger that his conduct was inappropriate.

Following this meeting, Hahm exchanged a series of e-mails with James Vollmer, a labor-relations specialist in the human-resources department. The two discussed the issues raised by the family therapist and the meeting with Baysinger, the appropriate level

of discipline, and the information that could be provided to law enforcement based on data practices and employment regulations. In an e-mail dated October 13, 2005, Vollmer stated: “I am concerned . . . that perhaps this needs to be turned over to law enforcement for further investigation in order to reduce any liability the City may encounter.” Vollmer also told Hahm to send Baysinger a letter addressing the fact that Baysinger kept the center open after hours but to “hold off for a couple days” on a letter directed at the fact that Baysinger allowed a minor to stay at his home. Hahm drafted a letter of discipline and sent the draft to Vollmer, Flynn, Gail Langfield, the St. Paul City attorney, and Bob Bierscheid, the recreational-services manager.

Baysinger received a letter of reprimand dated October 14, 2005. The letter summarized the October 10 interview and stated that Baysinger admitted that he had remained at Baker after hours to continue playing games with minors despite the fact that he knew this action was wrong. The letter concluded: “From this point forward you are directed to refrain from using City facilities after hours and to abide by all related policies concerning the appropriate use of City equipment and facilities. Failure to do so will result in further disciplinary action up to and including discharge.”

Baysinger received a letter of suspension on October 17, 2005. The letter stated that Baysinger would be suspended without pay for two working days and that his suspension was based on his admitted social contact with minors outside Baker, including “[t]rips to the mall,” “[v]isits to your apartment to download music from the Internet,” “[i]nstances where participants from the recreation center would ‘stop by’ your apartment,” and “[a]n instance where you allowed a 17 year old to temporarily reside at

your apartment at the request of his mother.” The letter also mentioned the 2004 incident and Russell’s directive to Baysinger that he not have contact with minors outside of Baker. The letter of suspension concluded with: “Please take this directive seriously, as a failure to follow it will result in further disciplinary action up to and including discharge. A continuance of your admitted behavior of socialization with minor participants puts the City at risk for complaints and possible allegations of abuse.” Mike Windey, Baysinger’s union representative, discussed the disciplinary action with Hahm but Hahm told Windey that he would not reduce or alter the disciplinary measure. Flynn informed Baysinger of the dates of his two-day suspension.

Flynn testified in her deposition that, at this time, she had no concerns that Baysinger might be engaging in abusive conduct with minors. She also testified that the comments in the letter regarding allegations of abuse had to do with the fact “that sometimes kids make up stories, so [we warn our staff not to] put yourself in a situation where a child could accuse you of doing something inappropriate.” After speaking with Vollmer and a city attorney, Hahm gave information regarding this report to the St. Paul Police and requested a criminal-history check of Baysinger. No criminal history was found for him.

Shortly after serving his two-day suspension, Baysinger engaged in his first sexual encounter with M.R., although M.R. had stayed overnight at Baysinger’s home on a prior occasion. M.R. testified that he met Baysinger at Baker in December 2005, and they walked to Baysinger’s apartment and then went to a movie. Afterward, the two returned to Baysinger’s apartment and M.R. spent the night. The first sexual act took place during

that night. The second sexual encounter occurred in January 2006, in the same fashion as the first sexual encounter.

After the second incident, M.R. told one of his friends what had happened between Baysinger and him. Eventually, M.R.'s parents were informed of the assault by M.R.'s friend's mother. M.R.'s parents called the police and on February 9, 2006, M.R. was interviewed about the sexual assault by St. Paul police. In order to assist with the investigation, M.R. was asked to call Baysinger and arrange another overnight. M.R. complied; and after the phone call police arrested Baysinger. He subsequently pleaded guilty to sexual assault.

Respondents, on behalf of M.R., sued the city and Baysinger. The first four counts of negligence, negligent supervision, negligent retention, and respondeat superior/vicarious liability name the city as a defendant.

In its answer, the city asserted the defenses of statutory and vicarious official immunity. The city moved for summary judgment. The district court denied the city's motion on the ground that immunity was not a defense. This appeal follows.

D E C I S I O N

Although a party generally may not appeal from an order denying a motion for summary judgment, “[a]n order denying an immunity defense is appealable as of right because immunity from suit is effectively lost if a case is erroneously permitted to go to trial.” *Gleason v. Metro. Council Transit Operations*, 563 N.W.2d 309, 314 (Minn. App. 1997), *aff'd in part*, 582 N.W.2d 216 (Minn. 1998). On appeal from summary judgment, we must determine whether the district court erred in its application of law and whether

there are any genuine issues of material fact. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “The applicability of immunity is a question of law, which this court reviews de novo.” *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004) (addressing official immunity). The party asserting an immunity defense has the burden of demonstrating that it is entitled to that defense. *Gleason*, 563 N.W.2d at 314.

I. Did the district court err by concluding that the city’s defense of statutory immunity fails as a matter of law?

The city argues that the district court erred by concluding that the defense of statutory immunity fails to shield the city from liability for its allegedly negligent conduct related to the investigation and discipline of Baysinger. In general, a municipality may be subject to liability for its tortious conduct and for the tortious conduct of its officers and employees acting within the scope of their employment. Minn. Stat. § 466.02 (2008). But under the doctrine of statutory immunity, municipalities are immune from liability for claims “based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.” Minn. Stat. § 466.03, subd. 6 (2008). The Minnesota Supreme Court has stated that “[i]f a governmental decision involves the type of political, social and economic considerations that lie at the center of discretionary action, including consideration of safety issues, financial burdens, and possible legal consequences, it is not the role of the courts to second-guess such policy decisions.” *Watson by Hanson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 412 (Minn. 1996).

In determining whether a discretionary act is protected by statutory immunity, appellate courts distinguish between planning and operational decisions. *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000). While planning decisions involving questions of public policy are protected as discretionary actions, operational decisions relating to the day-to-day government operations are not protected. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988). This court’s primary concern when determining if a decision is protected by statutory immunity is “to consider whether a government entity has demonstrated the balancing and evaluation of policymaking factors and effects of a given plan.” *Doe v. Park Ctr. High Sch.*, 592 N.W.2d 131, 136 (Minn. App. 1999). The first step in analyzing a claim of statutory immunity is to identify the governmental conduct being challenged. *Gleason*, 563 N.W.2d at 315.

The parties dispute what government conduct is challenged by respondents’ causes of action against the city. The city argues that respondents’ claims of negligence, negligent supervision, and negligent hiring challenge the conduct related to the city’s investigation and discipline of Baysinger after the April 2004 and October 2005 complaints. But respondents contend that the challenged conduct is Baysinger’s decision to meet with minors outside the Baker Recreational Center. In order to determine the precise conduct at issue, we must look to the pleadings. *See id.*

With respect to respondents’ claims of negligence, negligent supervision, and negligent retention, we agree with the city that the challenged conduct is related to the city’s investigation and discipline following the 2004 and 2005 complaints. Respondents’ complaint specifically refers to the city’s failure to “take adequate

precautions,” such as notifying parents about Baysinger’s conduct; its failure to have “adequate supervision” for Baysinger; and its decision to retain Baysinger after receiving the two complaints. Thus, we conclude that the precise government conduct at issue in the three negligence claims against the city pertains to the investigation and discipline of Baysinger and not to Baysinger’s conduct with minors or M.R.

We must next determine whether the challenged conduct of the city was ministerial in nature, or whether the conduct was discretionary and thus entitled to the defense of statutory immunity. *Id.* In *Doe*, we addressed the issue of whether a school district could assert the defense of statutory immunity to a cause of action for negligent retention of a teacher. 592 N.W.2d at 134. The appellant’s claim arose out of the school district’s investigation of an allegation of sexual misconduct between a teacher and a student. *Id.* at 133-34. Following the allegation, the school district was required to consider policy issues, including weighing the credibility of the sources of information, the safety of students, any legal ramifications, and the procedure of the investigation. *Id.* at 135. We concluded that the school district’s response to the allegation was a discretionary act that was entitled to statutory immunity. *Id.*

Similarly, in *Oslin v. State*, we addressed whether the St. Peter Regional Treatment Center, a state institution, was entitled to the defense of statutory immunity against claims of negligent retention and supervision. 543 N.W.2d 408, 415 (Minn. App. 1996), *review denied* (Minn. Apr. 1, 1996). As in *Doe*, we stated that after hearing allegations of misconduct by two of its employees, “the center took action to investigate and determine what should be done,” and such actions “were necessarily beset with

policy-making considerations.” *Id.* at 416. We thus held that statutory immunity applied to shield the state center from liability for any negligence related to the investigation and discipline of its employees. *Id.*

As in *Doe* and *Oslin*, the undisputed facts here reflect that the city’s responses to the 2004 and 2005 complaints about Baysinger involved policy-making considerations. Supervisors interviewed Baysinger after both complaints. The first time, Baysinger was given a directive not to engage in the behavior that led to the complaint. Following the second incident, Hahm discussed possible discipline, information that could be provided to law enforcement, data practices, and other employment regulations with the human-resources department. Because Baysinger was a member of the union, Hahm had to discuss the investigation and resulting disciplinary action with Windey. Hahm also discussed the matter with the St. Paul City Attorney’s office and the recreational-services manager.

The city’s response to the allegations of Baysinger’s misconduct involved policy-making considerations and was not a simple, ministerial task. Therefore, we conclude that the city is entitled to the defense of statutory immunity for respondents’ claims of negligence, negligent supervision, and negligent retention. *See Gleason*, 563 N.W.2d at 320 (“We have previously determined that decisions involving supervision and retention of employees are discretionary acts entitled to statutory immunity.”).

II. Did the district court err by concluding that the city’s defense of vicarious official immunity fails as a matter of law?

The city further argues that the district court erred in denying its summary-judgment motion on the ground that it is not entitled to the defense of vicarious official immunity. The city contends that it is entitled to vicarious official immunity from liability for respondents’ claim of respondeat superior/vicarious liability for Baysinger’s conduct. “The common law doctrine of official immunity provides that a public official who is charged by law with duties calling for the exercise of judgment or discretion is not personally liable to an individual for damages unless the official is guilty of a willful or malicious act.” *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). But official immunity does not protect officials who engage in ministerial functions, “that is, where ‘independent action’ is neither required nor desired.” *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). Generally, when a public official is entitled to official immunity from suit, the official’s government employer will be entitled to the defense of vicarious official immunity from claims arising from the official’s conduct. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006).

In order to determine whether the city is entitled to vicarious official immunity, we must first analyze whether Baysinger’s actions giving rise to the claim were discretionary in nature, entitling him to official immunity. *See Wiederholt*, 581 N.W.2d at 315. “A discretionary decision is one involving more individual professional judgment that necessarily reflects the professional goal and factors of a situation.” *Id.* Conversely, “a

ministerial duty is one in which nothing is left to discretion; it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.” *Id.* (quotation omitted).

Respondents’ cause of action for respondeat superior/vicarious liability is premised on Baysinger’s sexual assault of M.R. Therefore, in order for Baysinger to be immune from liability for this conduct, his decision to engage in the assaultive behavior must have been discretionary. Baysinger was given a specific directive in 2004 and again in 2005 to have no contact with minors outside of the Baker Recreational Center. Baysinger had no room for discretion or professional judgment in carrying out these directives; the directives were absolute. Accordingly, none of Baysinger’s actions related to his interaction with minors outside of Baker entitles him to a defense of official immunity.¹

Because Baysinger is not entitled to the defense of official immunity, we conclude that the city is not entitled to the defense of vicarious official immunity against the claim of respondeat superior/vicarious liability that arises out of Baysinger’s conduct. *See id.* at 316; *see also J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 903 (Minn. App. 2009) (holding that the appellant’s respondeat superior claim against a school district survived summary judgment when the district’s employee’s actions were not entitled to the defense of official immunity).

¹ We note that the city never argued that Baysinger’s conduct related to M.R. was discretionary in nature. Instead, the city’s argument was focused on immunity for the city’s investigation and discipline.

In summary, because we conclude that the city is entitled to the defense of statutory immunity from respondents' claims of negligence, negligent supervision, and negligent retention, we reverse and remand the district court's denial of the city's summary-judgment motion on that ground. But because the city is not entitled to the defense of vicarious official immunity for causes of action arising out of Baysinger's conduct, we affirm the district court's denial of summary judgment to the city on that theory.

Affirmed in part, reversed in part, and remanded.