**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1838**

LaVerne Irene Augusta Dickhudt, et al.,
Respondents,

vs.

City of St. Paul,
Appellant.

**Filed July 7, 2009**
**Affirmed**
**Connolly, Judge**

Ramsey County District Court
File No. 62-CV-07-1170

James S. Ballentine, William A. Crandall, Schwebel, Goetz and Sieben, P.A., 5120 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondents)

John J. Choi, Saint Paul City Attorney, Lawrence J. Hayes, Jr., Assistant City Attorney, 750 City Hall and Courthouse, 15 West Kellogg Boulevard, St. Paul, MN 55102 (for appellant)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Peterson, Judge.

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

**CONNOLLY**, Judge

Appellant appeals from a district court order denying its motion for summary judgment. Because there are material facts in dispute, we affirm.

## FACTS

Respondent LaVerne Irene Augusta Dickhudt[1] attended a St. Paul Saints game on the night of May 26, 2006. After attending the game, respondent fell off a sidewalk that surrounded the stadium. Pictures in the record indicate that there was an approximately six-inch drop-off from the edge of the sidewalk to a grassy area the parties and the district court refer to as a "boulevard." Respondent suffered a fractured kneecap as a result of her fall, which occurred sometime after 10:00 p.m.

Respondent and her husband brought a variety of claims against appellant City of St. Paul. Appellant moved for summary judgment, arguing that the doctrines of recreational and discretionary immunity insulated it from liability.[2] The district court denied appellant's motion. Addressing appellant's claim of recreational immunity, the district court stated that it believed that if the boulevard "was part of a park or an open area for recreational purposes, or for the provision of recreational services," then the doctrine of recreational immunity would apply. However, the district court went on to explain that:

> The problem with [appellant's] argument is that there is conflicting sworn testimony regarding that issue. There is also inconsistency between the actions of the Public Works Department and the City Parks Department as to who was responsible for the relevant area. Based upon the materials submitted, the Court cannot rule as a matter of law that the

[1] LaVerne's husband, Herbert Dickhudt, is also a respondent in this case. For ease of reference, "respondent," as it is used in this opinion, will refer only to LaVerne Dickhudt unless specifically indicated otherwise.

[2] Appellant also argued that respondent failed to establish that it had constructive notice of the dangerous condition. The district court rejected this defense. Appellant is not challenging this decision on appeal.

> area where the accident happened falls under the Recreational Immunity Doctrine.

When denying appellant's claim of discretionary immunity, the district court explained its rationale by stating that it "accepted" appellant's argument that there was no claim for boulevard maintenance.

Appellant contends the district court erred in denying its claims for recreational and discretionary immunity. This appeal follows. *See McGovern v. City of Minneapolis*, 475 N.W.2d 71, 72 (Minn. 1991) (holding that an order denying summary judgment based on an assertion of immunity is immediately appealable).

## D E C I S I O N

When reviewing an order denying summary judgment on immunity grounds, an appellate court will conduct a de novo review to determine "whether there are genuine issues of material fact and whether the lower court erred in applying the law." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

### I. The district court did not err in denying appellant's claim of recreational immunity.

A municipality is immune from liability for

> [a]ny claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Minn. Stat. § 466.03, subd. 6e (2008).

Appellant argues that it is entitled to recreational immunity because the boulevard that respondent fell on was dedicated as recreational property. As evidence of this fact, appellant points to the affidavit of Vincent P. Gillespie, the manager of special services for the Park and Recreation Department of the City of St. Paul. In his affidavit, Gillespie makes the conclusory assertion that "the City of St. Paul pursuant to Chapter 13 of the St. Paul Legislative Code acquired and dedicated for park purposes the property upon which Midway Stadium was built including the boulevard area where [respondent] claims to have fallen." While it is possible that this statement is true, there is no support for it in the record presently before the court. Appellant's lease with the Saints does not indicate that the boulevard is stadium property.[3] While the St. Paul Legislative Code gives it the authority to dedicate city property for recreational purposes, there is no indication in the record that the St. Paul City Council has done so with respect to the boulevard. We are also mindful that, when reviewing a motion for summary judgment, we must view the evidence in the light most favorable to the party against whom summary judgment would be granted. *City of Minneapolis v. Ames & Fischer Co. II, LLP*, 724 N.W.2d 749, 754 (Minn. App. 2006). Given this consideration, and the record's complete lack of support for Gillespie's statement, we conclude that there is a

[3] The lease states: "The portions of the Stadium, which are to be leased are as set forth in Exhibit A, attached hereto and incorporated herein." As appellant's counsel conceded at oral argument, Exhibit A is not part of the record.

material factual dispute with respect to whether the boulevard was dedicated by appellant as recreational property.

We do note that if additional evidence comes to light, then the district court is free to revisit this issue. Additionally, we note that the name of the department responsible for maintaining the boulevard is not dispositive on the issue of whether the boulevard is recreational property because, regardless of the particular department tasked with maintaining the boulevard, it is appellant who bears ultimate responsibility for its upkeep.

## II. The district court did not err in denying appellant's claim of discretionary immunity.

Under the doctrine of discretionary 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 defining what a discretionary act is, 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 involve questions of public policy and are protected as discretionary actions, operational decisions relate to the day-to-day

government operation and 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 discretionary 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 discretionary immunity is identifying what governmental conduct is being challenged. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994).

Here, the conduct challenged by respondent is appellant's alleged failure to maintain the boulevard in a safe manner. Appellant claims to have a policy in place for sidewalk repair, but there is nothing in the record to indicate that the policy regarding sidewalk repair in any way addresses boulevard repair. Nothing in the record indicates that appellant has a plan in place for maintaining its boulevards that was arrived at after weighing the applicable "political, social and economic considerations," *Watson*, 553 N.W.2d 406 at 412. Put simply, there is nothing in the record to indicate that appellant had a policy in place regarding boulevard repair, let alone one that is protected by discretionary immunity. As a result, the district court did not err in rejecting appellant's claim of discretionary immunity and denying its motion for summary judgment.

**Affirmed.**