STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2015

Linda VanDenBoom,
Appellant,

vs.

City of Waseca, et al.,
Defendants,

State of Minnesota,
Respondent.

Filed July 14, 2009
Affirmed
Bjorkman, Judge

Waseca County District Court
File No. 81-CV-07-736

William A. Erhart, Erhart & Associates, L.L.C., 316 East Main Street, Suite 110, Anoka, MN 55303 (for appellant)

Lori Swanson, Attorney General, Sarah McGee, Assistant Attorney General, 1100 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Stauber, Presiding Judge; Toussaint, Chief Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

On appeal from summary judgment, appellant argues that the district court erroneously determined that respondent is entitled to statutory immunity from appellant's negligence claims and owed appellant no legal duty. We affirm.

FACTS

Appellant Linda VanDenBoom suffered injuries in a motorcycle accident in Waseca on June 24, 2006. The accident occurred when appellant's husband lost control of the motorcycle they were riding after he drove over a pothole in the right-of-way on Minnesota State Highway 13 at the intersection with 22nd Avenue. Appellant sued the City of Waseca, respondent State of Minnesota, and her husband. All three defendants moved for summary judgment. The district court concluded that the city and the state were entitled to statutory immunity and that, because there was no evidence that they knew or should have known of the pothole, they owed no legal duty to appellant. The district court denied husband's motion. After the negotiated dismissal of the claims against husband, judgment was entered. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court determines whether genuine issues of material fact exist and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we "view the evidence in the light most favorable to the party against whom [summary] judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Whether a government entity is

protected by statutory immunity is a legal question, which we review de novo. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996).

The state is generally liable for injury caused by its employees. Minn. Stat. § 3.736, subd. 1 (2008). However, "the state and its employees are not liable for . . . a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b) (2008). This statutory immunity for discretionary acts is interpreted narrowly and with the purpose of preserving the separation of powers. *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988). "In defining what is a discretionary act, appellate courts distinguish between planning and operational decisions." *Minder v. Anoka County*, 677 N.W.2d 479, 484 (Minn. App. 2004) (citing *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." *Id.* "The critical inquiry is whether the conduct involved a balancing of policy objectives." *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994).

To determine whether statutory immunity applies, we first identify the governmental conduct being challenged. *Zaske ex rel. Bratsch v. Lee*, 651 N.W.2d 527, 531 (Minn. App. 2002). Appellant challenges the state's maintenance of the road and failure to warn of or repair the pothole. We note that appellant's claims are markedly similar to those presented in two of our previous cases. In *Minder*, we considered whether Anoka County was entitled to statutory immunity from the negligence claims of

a motorcyclist who was injured when he drove over a pothole and lost control of his motorcycle. 677 N.W.2d at 482. The motorcyclist alleged failure to maintain the roadway and failure to warn of or repair the pothole. *Id.* We concluded that the county was entitled to statutory immunity from all claims. *Id.* at 487. Similarly, in *Zaske* we concluded that statutory immunity barred the claim of a motor vehicle accident victim based on Kanabec County's alleged negligence in failing to detect and replace a missing stop sign. 651 N.W.2d at 529-30, 533. Because of their similarity to the present case, *Minder* and *Zaske* guide our analysis here.[1]

I. The state is entitled to statutory immunity from appellant's negligent maintenance claim.

In *Minder*, we stated that "[s]tatutory immunity protects a government's road maintenance and inspection procedures if they are based on a policy that balances policy objectives, such as safety and economic considerations." 677 N.W.2d at 484. Here, the state submitted the affidavit and deposition testimony of its highway-maintenance supervisor for the Waseca area as evidence that the state had adopted a policy of "informal road checks and [a] response-to-complaint system" for discovering road maintenance and repair needs in that area. The supervisor explained that she implemented the policy "to balance safety considerations with the limited financial resources and personnel available" because the state's three full-time Waseca-area

[1] Although *Minder* and *Zaske* involved immunity claims asserted by counties under Minn. Stat. § 466.03, subd. 6, rather than an immunity claim asserted by the state under Minn. Stat. § 3.736, subd. 3(b), those cases apply here. *Cf. Terwilliger v. Hennepin County*, 561 N.W.2d 909, 912 (Minn. 1997) (stating that in reviewing section 466.03, subdivision 6, the court will be guided by decisions under section 3.736, subdivision 3(b)).

employees have numerous responsibilities, including maintaining and repairing 58 lane miles of highway; maintaining shoulders, turn lanes, ramps, and frontage roads in the Waseca area; and assisting other areas with larger projects. The district court concluded that adoption of the maintenance policy "required the weighing of economic, social, and safety considerations" and that the policy "embodies the type of decision making protected by statutory immunity."

Appellant challenges the district court's conclusion but largely does not dispute the determination that the highway maintenance policy reflects a balancing of budgetary, safety, and personnel considerations. Instead, appellant points to the state's "longstanding policy of checking for and repairing potholes on State Highway 13 every Friday" and argues that the district court erred in describing the checks as informal. This argument fails for several reasons. First, it does not address the sole criterion for determining whether the state is entitled to statutory immunity—whether the maintenance policy in question reflects a balancing of competing policy objectives. Second, appellant's argument is not supported by the evidence, which unambiguously demonstrates that Waseca-area employees had a practice of usually checking roads more deliberately on Fridays but there was no formal policy requiring them to do so. And finally, even if the maintenance policy included formal road checks every Friday, such a description of the policy does not change the fact that the decision to follow this policy required the balancing of various policy considerations.

Appellant also asserts that the state failed to follow its maintenance policy, which we construe to be an argument that the state's actual maintenance and inspection

procedures were not "based on a policy that balances policy objectives," as discussed in *Minder*, 677 N.W.2d at 484. But appellant has not identified any evidence supporting her claim that the state failed to follow its maintenance policy. Rather, appellant suggests that the state must not have followed the policy because it argued to the district court that it was not responsible for maintaining the portion of road at issue. The district court rejected this alternative argument, and the state does not challenge that decision on appeal. The state's arguments before the district court are not evidence of the state's policy or procedures with regard to maintaining the road.

Because the undisputed evidence establishes that the state, through its Waseca-area supervisor, balanced financial, safety, and personnel considerations in adopting the maintenance policy in question, the state is entitled to statutory immunity from negligent maintenance claims.

II. The state is entitled to statutory immunity from appellant's claims of negligent failure to warn or repair.

In both *Minder* and *Zaske*, the absence of evidence showing actual knowledge of a dangerous condition was central to our decision that the governmental entities were protected from claims that they failed to warn of or repair the condition. *Minder*, 677 N.W.2d at 486; *Zaske*, 651 N.W.2d at 532. We determined that a governmental entity's failure to warn of or repair a dangerous condition cannot be challenged on the basis of constructive knowledge, because such a claim "is really challenging a [governmental entity's] inspection and maintenance policy." *Minder*, 677 N.W.2d at 486 (citing *Zaske*, 651 N.W.2d at 532-33). Unless a governmental entity has actual knowledge of a

dangerous condition, it is immune from failure to warn or repair claims when the maintenance policy is protected by statutory immunity. *Id.*

Appellant concedes that there is no evidence that the state had actual knowledge of the pothole at issue and contends that this is a constructive-knowledge case. Under *Minder* and *Zaske*, appellant's constructive-knowledge argument is another challenge to the state's maintenance policy. Accordingly, the district court properly granted the state summary judgment based on statutory immunity.[2]

Affirmed.

[2] Because we conclude that summary judgment was appropriate based on statutory immunity, we need not address the district court's alternative conclusion that the state owed appellant no legal duty to warn of or repair the pothole.