STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0042

Gale George Spatenka,
Respondent,

Susan K. Spatenka,
Respondent,

vs.

City of Owatonna,
Appellant.

Filed August 18, 2009
Affirmed
Schellhas, Judge
Dissenting, Johnson, Judge

Steele County District Court
File No. 74-CV-07-2040

Steven S. Fuller, Fuller Law Firm, 206 Fourth Street Southeast, Rochester, MN 55904; and

Jeffrey A. Hanson, Hanson Law Firm, 400 South Broadway, Suite 203, Rochester, MN 55904 (for respondents)

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Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's denial of its motion for summary judgment based on common-law official immunity. Because the district court was correct in determining that genuine issues of material predicate facts must be resolved before deciding the legal question of whether official immunity applies, we affirm.

FACTS

Respondents Gale George Spatenka (Spatenka) and Susan K. Spatenka are plaintiffs in this negligence action against appellant City of Owatonna. In June 2006, as a volunteer member of the Claremont Fire Department, Spatenka was injured fighting a fire at St. John's Lutheran Church in Claremont. Four fire departments responded to the fire, including the departments of Claremont and Owatonna. Respondents allege that when Spatenka was injured he was acting under the direction of the City of Owatonna (the city) and that the city was negligent because it failed to (1) communicate the decision to fight the fire in a defensive mode and (2) advise Spatenka to move away from a wall before it collapsed on him.

The city moved for summary judgment on the basis that Owatonna Fire Commander Kevin Sedivy's actions at the fire scene were protected by common-law official immunity because they were discretionary, and that the city was protected against liability by vicarious official immunity.

Respondents opposed the city's summary-judgment motion on the bases that (1) genuine issues of fact precluded summary judgment and (2) Sedivy's fire-scene

decisions not to communicate the firefighting mode and not to advise Spatenka to move away from the wall that collapsed were ministerial, not discretionary, actions. Respondents argued that when a fire is fought in a defensive mode, firefighters focus on containing and suppressing the fire from a distance outside the collapse zone, which is an area next to a burning structure equal to one and one-half times the height of the structure. Respondents argued that because Sedivy made the decision to fight the fire in a defensive mode, his decision allowing Spatenka to fight the fire in the collapse zone was not a discretionary action.

In considering the city's motion, the district court considered various deposition testimony. Spatenka testified that after he arrived at the fire scene he spoke with the Claremont chief, Tim Kruckeberg. Kruckeberg gave Spatenka no information about the firefighting mode, and, at Kruckeberg's direction, Spatenka took over operation of a hose within the collapse zone on the south side of the church. While fighting the fire in the collapse zone on the south side of the church, Spatenka decided to try to save some stained-glass windows. Spatenka told Sedivy that he wanted to break some small windows in the church so that he could spray water into the church for the purpose of saving the larger stained-glass windows. Sedivy responded to Spatenka's request by calling for a pole. Owatonna firefighters brought a pole and broke the smaller windows, and Spatenka approached the church to spray water through the broken windows. While Spatenka worked near the broken windows, part of the south wall of the church collapsed on him.

According to Spatenka's testimony, Kruckeberg had turned over control of the fire scene to Sedivy, and Kruckeberg had asked Sedivy to turn his radios to a "mutual aid" channel so that everyone at the scene could communicate. Sedivy allegedly refused to turn his radios to a mutual-aid channel, stating that his department would keep its radios on an Owatonna channel. Kruckeberg testified that he did not say anything to Spatenka about fighting the fire in a defensive mode because by the time Spatenka arrived, Sedivy had taken control of the scene. According to Kruckeberg, Sedivy, as the commander at the scene, was responsible for instructing firefighters to keep away from the wall that collapsed on Spatenka.

Sedivy testified at his deposition that firefighting in a defensive mode does not include keeping away from the exterior walls of a structure. According to Sedivy, firefighting in a defensive mode means not entering a structure. Sedivy testified that there was "probably something" in training or policy materials regarding a firefighter staying a certain distance away from an exterior wall. Sedivy was quoted by a newspaper as having said that firefighters would not normally be close to a burning wall, but were allowed to be close to the wall at this fire scene because "of the significance the windows held." When asked at his deposition about this quote, he testified that he did not recall making the statement.

Owatonna firefighter Matthew Kath testified at his deposition that Sedivy told him that they were fighting in a defensive mode and that some Claremont firefighters wanted to try to save some windows. Kath opined that Sedivy sounded like he disagreed with the Claremont firefighters' attempt to save the windows but, as Kath testified, "it's one of

those where it's mutual aid, we did not want to question what they wanted to do." Kath testified that he understood defensive firefighting to include staying out of the collapse zone and that Sedivy had spoken with him and other Owatonna firefighters to "clarify it with us" to "stay out of the collapse zone." After testifying that Sedivy said "it's a defensive fire," Kath was asked, "When he told you that then, you then knew you were not going to go into the collapse zone?" Kath answered, "Right."

Owatonna firefighter Robert Hager also understood that to fight a fire in a defensive mode includes staying out of the collapse zone. And Owatonna firefighter Mark Gauthier testified that it is standard practice for the commander to make it clear to firefighters what mode to use in fighting a fire. Substitute Owatonna commander Todd Ulrich, who was at the fire scene, testified that it is part of the function of a commander at a fire scene to determine whether the fire will be fought in an offensive or defensive mode and to communicate that to firefighters.

Spatenka submitted an affidavit to the district court from Gary Smith, an assistant Rochester fire chief from 1980 to 1998, who addressed standard procedures in firefighting. Based on his experience, Smith opined that the fire in this case had progressed to a state where a defensive mode was required; using a defensive mode included staying out of the collapse zone; and standard operating practices and procedures required that the mode be communicated to firefighters.

The district court denied the city's summary-judgment motion, concluding that there were "sufficient factual disputes" regarding whether the acts by the city were discretionary. Specifically, the district court concluded that a genuine issue of material

fact exists about whether defensive firefighting includes staying out of the collapse zone and noted that manuals located "at the fire station which establish proper procedures for fires" had not been presented to the court. This appeal follows.

D E C I S I O N

"An order denying summary judgment on immunity grounds is immediately appealable." *Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006). A court reviewing denial of summary judgment must determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Id.* A genuine issue of fact exists when the evidence permits "reasonable persons to draw different conclusions." *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008) (quotation omitted). "When reviewing a summary judgment ruling, we must consider the evidence in the light most favorable to the nonmoving party." *Mumm*, 708 N.W.2d at 481.

"Immunity is a legal question that is reviewed de novo." *Id.* "The party asserting immunity has the burden of showing particular facts demonstrating an entitlement to immunity." *Meier v. City of Columbia Heights*, 686 N.W.2d 858, 863 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004). Common-law official immunity provides a public official with a defense to tort claims. *Mumm*, 708 N.W.2d at 490. "If a public official is entitled to immunity for a discretionary act, the employing entity is generally entitled to vicarious official immunity as well." *Fear v. Indep. Sch. Dist. No. 911*, 634 N.W.2d 204, 216 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). Official immunity prevents "'a public official charged by law with duties which call for the

exercise of his judgment or discretion'" from being held personally liable for damages, unless the official has committed some willful or malicious act. *Mumm*, 708 N.W.2d at 490 (quoting *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988)). Official immunity does not protect from liability related to the exercise of ministerial duties. *Id.* at 491.

"Before we analyze the application of official immunity, we must first identify the precise governmental conduct at issue." *Id.* at 490 (citing *Anderson v. Anoka Hennepin Indep. Sch. Dist. No. 11*, 678 N.W.2d 651, 656 (Minn. 2004)). Because appellant makes no claim that Sedivy acted willfully or maliciously, we need only address whether the conduct identified involved ministerial or discretionary acts.

Identification of Precise Governmental Conduct

Respondents identify the specific governmental conduct at issue as Sedivy's decision not to communicate the defensive firefighting mode to Spatenka and his decision to allow Spatenka to fight the fire in the collapse zone.

Ministerial or Discretionary

The city challenges the district court's decision that there were genuine issues of material fact as to whether Sedivy's duties were discretionary or ministerial, arguing that the issue presents only a question of law, not of fact, and, regardless, there is no genuine issue of fact because the record demonstrates that Sedivy had discretion in the decisions he made at the fire scene.

For an act to be discretionary for purposes of official immunity, the discretion exercised must be on "an operational level" and be "something more than the

performance of merely 'ministerial' duties." *Fear*, 634 N.W.2d at 215. A discretionary act involves "the exercise of individual judgment in carrying out the official's duties." *Id.* "A ministerial act is one that is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Mumm*, 708 N.W.2d at 490 (quotation omitted).

But "[a]n act involving some discretion may nonetheless be a ministerial task." *Fear*, 634 N.W.2d at 215 (citing *Williamson v. Cain*, 310 Minn. 59, 61, 245 N.W.2d 242, 244 (1976)). In *Williamson*, the supreme court concluded that tearing down a house was ministerial even though those carrying out the task had to make "certain decisions." 310 Minn. at 61, 245 N.W.2d at 244. The court explained:

> While the discretionary-ministerial distinction is a nebulous and difficult one because almost any act involves some measure of freedom of choice as well as some measure of perfunctory execution, the acts of the defendants here are clearly ministerial. Their job was simple and definite–to remove a house. While they undoubtedly had to make certain decisions in doing that job, the nature, quality, and complexity of their decision-making process does not entitle them to immunity from suit.

Id.

Generally, "[w]hether actions of governmental employees are protected by official immunity is a question of law." *Fear*, 634 N.W.2d at 215. But to determine if actions are discretionary for purposes of official immunity, a court must examine the "nature, quality and complexity" of a decision-making process. *Duellman v. Erwin*, 522 N.W.2d 377, 379 (Minn. App. 1994) (quotation omitted), *review denied* (Minn. Dec. 20, 1994). A court cannot decide the legal question of immunity until genuine disputes regarding

predicate facts are resolved. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 675 (Minn. 2006); *see also Elwood*, 423 N.W.2d at 678 (stating that whether a police officer's actions are covered by immunity "turns on the facts of each case").

In this case, the disputed fact that is predicate to the legal question of whether Sedivy's actions were ministerial or discretionary is whether the city had policies that limited a fire-scene commander's discretion. "The existence of a government policy mandating certain conduct by public officials can influence whether a duty is classified as ministerial or discretionary." *Mumm*, 708 N.W.2d at 491. "[T]he existence of a policy that sets a sufficiently narrow standard of conduct will make a public employee's conduct ministerial if he is bound to follow the policy." *Id.* Policies need not be written to limit the discretion of a government actor. *Anderson*, 678 N.W.2d at 657-58.

In *Anderson*, the supreme court concluded that a teacher's instruction to a student to disengage a blade guard on a power saw was conduct governed by a "protocol" that was "unwritten," but evidenced by affidavits, a deposition, and other materials submitted to the district court that included a test given to students that reflected the protocol. *Id.* In *Anderson*, the supreme court rejected an "overbroad generalization . . . that virtually every decision a teacher makes is sufficiently discretionary" and stated that "immunity analysis must focus on the particular conduct at issue." *Id.* at 657 n.6.

The city's reliance on *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 665 (Minn. 1999) for the proposition that police officers responding to dispatch must exercise independent judgment is misplaced. Later supreme court decisions have rejected arguments that classify actions of a class of officials in broad terms that make virtually

any decision by the officials discretionary. For example, in *Mumm*, the court rejected an argument that "all police conduct in emergency situations is discretionary," distinguishing *Kelly* as a case that did not involve a policy governing the emergency situation at issue in the case. 708 N.W.2d at 492. Following *Anderson* and *Mumm*, we focus on the "particular conduct at issue."

Here, the district court determined that a genuine issue of material fact exists regarding whether the city's policies limited a commander's discretion at a fire scene. We agree. Several firefighters testified that a defensive mode of firefighting includes staying out of the collapse zone. According to Ulrich and Smith, a fire-scene commander has a duty to communicate the firefighting mode. Sedivy's testimony differs. He acknowledged that policy and training materials may address the distance between firefighters and a burning structure, but stated that a fire-scene commander has discretion in the placement of firefighters at a fire scene and that defensive firefighting does not necessarily include staying out of the collapse zone. The conflicting testimony about firefighting protocol, particularly defensive-mode firefighting, and whether protocols existed, constitute genuine issues of material fact. If such protocols existed, the district court must determine whether they limited Sedivy's discretion. The genuine issue of material facts must be resolved before the district court can determine as a matter of law whether Sedivy's conduct at the fire scene was discretionary or ministerial.

Because the legal question of common-law official immunity cannot be resolved until the predicate facts in dispute are resolved, the district court did not err in denying the city's motion for summary judgment.

Affirmed.

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. In my view, Spatenka does not have evidence sufficient to establish that Sedivy, Owatonna's fire commander on the scene at the time of Spatenka's injury, had a ministerial duty toward Spatenka so as to defeat the city's assertion of vicarious official immunity.

I begin with the principle that emergency personnel, given the nature of their jobs, possess broad discretion in the performance of their duties. As the supreme court has noted, "emergency situations" require public servants to "exercise significant independent judgment." *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988) (considering actions of police officer). Independent judgment is necessary because a person "responding to an emergency must weigh myriad factors in making virtually instantaneous decisions about how to respond." *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998) (considering actions of ambulance driver). Emergency response personnel inevitably have "little time for reflection" and often must act "on the basis of incomplete and confusing information." *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992) (considering actions of police officer). For these reasons, emergency response personnel are "afforded a wide degree of discretion precisely because a more stringent standard could inhibit action." *Elwood*, 423 N.W.2d at 678. To expose emergency response personnel or their governmental employers to the prospect of civil liability is to encourage them "to exchange prudent caution for timidity in [an] already difficult job." *Pletan*, 494 N.W.2d at 41. The facts of this case -- a multitude of firefighters from four fire departments battling a fire in a large structure in the middle of the night -- present a

classic example of a multifaceted, chaotic emergency scene that warrants application of the official immunity doctrine.

Notwithstanding these general principles, an emergency response employee does not possess unlimited discretion if his or her governmental employer has so decided. As the supreme court has noted, "governmental entities have the authority to eliminate by policy the discretion of their employees," thereby determining that those employees "should not have unfettered discretion in emergency situations." *Mumm v. Mornson*, 708 N.W.2d 475, 493 (Minn. 2006). To carve out an exception from the doctrine of official immunity, such a policy must "set[] a sufficiently narrow standard of conduct" and must be one that the employee is "bound to follow." *Id.* at 491. In the emergency-response context, the supreme court has recognized this type of exception only if the governmental employer has a written policy whose "plain language" reserves "no discretion to exercise independent judgment" but rather "imposes a narrow and definite duty on an officer facing a particular set of circumstances, rendering that officer's duty ministerial." *Id.* at 492 (holding that police officer and city not entitled to official immunity for death of pedestrian struck during high-speed chase that violated internal written policy); *see also Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673-75 (Minn. 2006) (holding that police officer and city not entitled to summary judgment on defense of official immunity for injury of pedestrian struck during pursuit that violated internal written policy). The supreme court has made clear, however, that a governmental entity's policy does not impose a ministerial duty if it "reserve[s] substantial discretion" to a governmental officer or contains "vague terms" that give "little specific guidance" and "set few limits on

[governmental officers'] independent exercise of judgment." *Mumm*, 708 N.W.2d at 492, 493.

The supreme court once held that an *un*written policy may be the basis of a ministerial duty. *See Anderson v. Anoka Hennepin Sch. Dist. 11*, 678 N.W.2d 651, 657-58 n.7 (Minn. 2004) (holding that school's unwritten policy concerning use of blade guard on power saw imposed ministerial duty on teacher when instructing students). But *Anderson* did not concern emergency response personnel. *Id.* at 654-55. In addition, *Anderson* was not a case of *non*compliance with an unwritten policy, *id.* at 659-63, and the supreme court ultimately held that both the employee and employer were entitled to immunity because the employee complied with the policy, *id.* at 662-65. Thus, *Anderson* should not be extended to this case.

In this case, there is no written policy in the district court record. There is only evidence that the Owatonna fire department maintains certain "manuals" that may speak to the issues raised by Spatenka. The district court noted that the manuals were not in the summary judgment record and apparently relied on their absence as a ground for denying the motion. To the extent that the district court denied summary judgment because Spatenka might introduce documentary evidence at trial that might support his argument that Sedivy had a ministerial duty, the district court engaged in unjustified speculation. *See Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) ("Mere speculation, without some concrete evidence, is not enough to avoid summary judgment.").

The only evidence in the summary judgment record concerning the Owatonna fire department's written policies indicates that those policies do *not* constrain a fire commander's discretion in the manner argued by Spatenka. Sedivy testified that the fire department maintains "training materials and policy materials" that contain "[s]tandard operating guidelines" that he "tend[s] to follow." But Sedivy further testified that the training and policy materials do not describe the circumstances in which a firefighter should maintain a certain distance from a burning structure because "[e]very situation is different." Sedivy's testimony about the city's written policies is insufficient to establish that he was bound by "a sufficiently narrow standard of conduct" that reserved "no discretion to exercise independent judgment" but rather "impose[d] a narrow and definite duty" on him. *Mumm*, 708 N.W.2d at 492.

To establish a ministerial duty, Spatenka also relies on the affidavit of a putative expert witness, Gary Smith, who previously was a member of the fire department of the city of Rochester. Smith's affidavit also is insufficient to establish that Sedivy had a ministerial duty toward Spatenka. The affidavit does not reflect that Smith has any first-hand knowledge of the policies of the Owatonna fire department. The affidavit identifies certain "standard operating practices and procedures" in firefighting. But there is no evidence in the record that the practices and procedures identified by Smith have been adopted by the city of Owatonna. A governmental policy "will make a public employee's conduct ministerial *if he is bound to follow the policy*." *Mumm*, 708 N.W.2d at 491 (emphasis added). In the absence of evidence that the firefighting protocols identified by Smith actually were adopted by the city of Owatonna so as to be binding on

Sedivy, Spatenka cannot establish that Sedivy was subject to a ministerial duty. *See Conlin v. City of Saint Paul*, 605 N.W.2d 396, 404 n.2 (Minn. 2000) (stating that, on summary judgment, "affiant must be competent to testify about the matter" and affidavit must be "based on the affiant's personal knowledge" and "must set forth facts that would be admissible in evidence").

The majority opinion describes the assortment of evidence in the summary judgment record and reasons that its inconsistencies preclude summary judgment. Indeed, ten persons who were present at the fire scene gave deposition testimony, and they appear to have just as many viewpoints about what occurred that night and what should have occurred. If the pertinent legal issue were whether Sedivy breached a known duty, or whether Sedivy's breach of a known duty was the proximate cause of Spatenka's injuries, there is no doubt that summary judgment would be inappropriate. And if the issue on appeal were solely whether a governmental policy that limits an employee's discretion has been triggered, summary judgment also would be inappropriate. For example, in *Thompson*, the supreme court reasoned, "If the officers initiated a vehicular pursuit, the language of Pursuit Policy section 7-405 clearly imposed a ministerial duty upon them." 707 N.W.2d at 674. The supreme court held that summary judgment was inappropriate because of genuine disputes of material fact concerning whether the police officers initiated a pursuit that was covered by the pursuit policy. *Id.* at 675.

The central issue in this case, however, is anterior to the issue whether a previously identified policy applies. The central issue is whether a policy exists and, if so, what the policy provides. To successfully resist summary judgment, Spatenka must

offer evidence capable of establishing that Sedivy was subject to a ministerial duty that was "'absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.'" *Mumm*, 708 N.W.2d at 490 (quoting *Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937)). Unlike *Thompson*, the issue here is not whether "fixed and designated facts" existed, thereby causing a known duty to "aris[e]." *Id.* (quotations omitted). Rather, the issue is whether a "specific duty" has been identified and adequately defined. *Id.* (quotations omitted). I believe that these criteria cannot be satisfied without a written policy. Even if an unwritten policy may be the source of a ministerial duty in the emergency-response context, *cf. Anderson*, 678 N.W.2d at 659, the evidence in the summary judgment record is insufficient because the alleged policy cannot be stated in "plain language" and does not "impose[] a narrow and definite duty" in "a particular set of circumstances." *Mumm*, 708 N.W.2d at 492. Furthermore, even if Spatenka's evidence could establish that Sedivy owed a ministerial duty to Owatonna firefighters, Spatenka cannot establish that the ministerial duty extended to him, a member of the Claremont fire department, which was assisting the Owatonna fire department pursuant to a mutual-aid agreement. When the issues are framed in this way, it is apparent that there are no genuine disputes of *material* fact precluding summary judgment. *See* Minn. R. Civ. P. 56.03.

"Official immunity provides immunity from suit, not just from liability," and "the immunity is effectively lost if the case is erroneously permitted to go to trial." *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004). If this case is permitted to go to trial based on the evidence in the summary judgment record, the doctrines of official

immunity and vicarious official immunity are of little use to municipalities with unwritten policies, which, presumably, includes most, if not all, municipalities in the state. I would reverse the decision of the district court and remand for entry of summary judgment in favor of the city.