STATE OF MINNESOTA
IN COURT OF APPEALS
A09-328

Michael James Stein,
Respondent,

vs.

City of Lino Lakes,
Appellant.

Filed November 10, 2009
Reversed and remanded
Connolly, Judge

Anoka County District Court
File No. 02-CV-08-2487

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Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's denial of its motion for summary judgment based on official immunity and argues that the district court erred in granting respondent leave to amend his complaint. Because the evidence in the record fails to

identify a specific ministerial duty owed or that such a duty was violated, we reverse and remand for entry of summary judgment in favor of appellant.

FACTS

As part of required continuing education, the Lino Lakes Police Department conducted a mandatory "active threat training" exercise on March 29, 2005 at Centennial Lakes Middle School. The active threat training exercise was designed to instruct officers on how to respond to a "school shooting" scenario, similar to what occurred at Columbine High School. The exercise consisted of eight scenarios and involved officers responding to a call for assistance; a team supervisor who was assigned to monitor groups of three to four officers proceeding through the training exercise; persons playing the role of "students"; and persons playing the role of the "bad guys." In the training groups, an officer-in-training was designated as the lead officer to enter the scenario. The officers then entered the scenario in a tactical formation chosen by the officer-in-training. At the end of a scenario, officers were pulled back, debriefed, and moved on to the next scenario.

Officers-in-training were given simunition guns and rounds to use during the exercise. Live ammunition cannot be shot through simunition guns, only "simunition rounds."[1] Simunition rounds leave a mark and/or splatter, which enables the officers to

[1] Similar to a paint ball, a simunition round is smaller, has a plastic housing, and has a soap content.

determine whether their shot was accurate. Reserve officers were assigned to be bad guys.[2] Bad guys were given "red guns," which are non-functional training guns.

Sergeant Bill Hammes of the Lino Lakes Police Department developed the training lesson plan, which provided the general guidelines and parameters for the active threat training exercise and accompanied the memorandum informing officers of the mandatory training. This lesson plan is the center of this lawsuit. Included in the lesson plan was an outline of the duties and responsibilities of safety officers. Among these duties, safety officers were to "[c]heck each participant involved in a scenario for eye protection. (Must be eye protection, not eye glasses.)" Safety officers were further instructed that "any time a training weapon is upholstered [sic], eye protection must be worn."

Sergeant Hammes also prepared a training checklist, which outlined the individual training exercises and equipment and staffing needs. This document also described the roles and responsibilities of safety officers, including:

> - Minimum of two (2) safety officers will be utilized for this training session. (It will be the responsibility of every officer involved in this training for their safety and that of others involved.)
>
> . . . .
>
> - Check each participant involved in a scenario for eye protection. (Must be eye protection, not eye glasses.)
>
> - Any time a training weapon is unholstered, eye protection must be worn.

[2] Reserve officers are not licensed police officers. This is a volunteer position in which persons assist police officers.

Neither the original training lesson plan nor the subsequent training checklist defines the term "participant." Officers in attendance stated that officers-in-training and bad guys wore eye protection, including some who wore face shields.

In developing the training exercise, Sergeant Hammes decided to increase the number of individuals playing the role of students in order to make it more realistic, thereby improving on similar past trainings. This is the first time that numerous individuals playing the role of students were placed in classrooms where officers would be entering and controlling the active shooter. Sergeant Hammes sought individuals similar in age to middle-school or high-school students.

On the night of the active threat training exercise, approximately 20-30 youths appeared to play the role of students. Some of them were from the Forest Lake School District; others were children or relatives of participating police officers or reserve officers. Respondent, Michael James Stein, volunteered to participate in the exercise as a part of an extra-credit project for a class. Persons playing the role of students were directed to the library or auditorium. There, instructions were given to the student role players. Respondent recalled being told that projectiles would be fired during the exercise. Respondent also recalled being told to keep his head down and his arms up around his head ("fetal position") and that he was told he had to remain in that position until he was told otherwise.

Reserve officers also served as role player coordinators. Role player coordinators were in charge of the role players. The lesson plan also defined the duties and responsibilities of role player coordinators. Among other things, role player coordinators

were to "[e]xplain the rules to the role players"; "[a]ssign different players to the scenarios throughout the evening"; and "[s]upervise role players." These duties did not include checking anyone for eye protection. After giving the students instructions, the role player coordinators guided the students around the school to the various scenarios.

Respondent was injured in "Scenario #7". For his student role, respondent was seated on the floor in the fetal position with his back partially against a science table. The bad guy was pacing behind the table. The students were warned that the officers-in-training were coming. The bad guy then began firing blank shots. When the officers-in-training entered the room, respondent peeked with his left eye in order to watch, and he was hit with a projectile approximately three-quarters of an inch below the eye. Respondent was not wearing eye protection at the time he was injured. There is no evidence in the record that the officers-in-training intentionally shot respondent.

Respondent sustained a cut to the area initially, and some vision difficulty in the following month or two due to blood clots. Respondent has since recovered full vision in his left eye and has been told he has 20/20 vision. However, respondent still experiences a white "flash" in his left eye from time to time and occasional dryness.

Respondent sued appellant and Forest Lake Independent School District #831, alleging that the Lino Lakes police officers carelessly and negligently discharged a weapon and the projectile from the weapon struck respondent, causing permanent irreversible damage.[3] Appellant moved for summary judgment on respondent's

[3] The parties subsequently stipulated to dismissal of defendant Forest Lake Independent School District #831.

negligence claim on the basis of (1) assumption of the risk; (2) vicarious official immunity; and (3) causation. In his responsive memorandum, served November 11, 2008, respondent sought to amend his complaint to add a negligent supervision claim, alleging "[s]aid accident and injury also occurred as a direct result of defendant City's police department in its conduct and supervision of said hostage exercise."

At the hearing, the district court orally granted respondent's motion to amend; took appellant's motion for summary judgment under advisement; and left the record open for the parties to submit limited supplements on the new theory of negligent supervision. The district court then issued a written order granting respondent's amendment; granting partial summary judgment to appellant as to the original negligence claim on the basis of official immunity; and denying summary judgment as to the negligent supervision claim.

As for the negligent supervision claim, the district court held in its accompanying memorandum:

> In determining whether to allow the amendment to proceed to trial, under Minn. R. Civ. Proc. 56, the Court must draw the following reasonable inferences in favor of Plaintiff when it analyzes the common law official immunity and statutory discretionary immunity defenses set forth by Defendant:
>
> a. All "participants" in the hostage exercise were required to be checked for and provided with protective eyewear.
>
> b. Defendant City's written protocol does not define "participant" for purposes of the exercise. It is therefore a reasonable inference that students participating in the exercise like Defendant [sic] Michael Stein are to be considered "participants."

c. Defendant City's verbal/unwritten protocol that only officers and ["]bad guys["] were "participants" in the hostage exercise was: (1) not clear to all officers; (2) in direct conflict with the written protocol requiring all "participants" to be checked for and provided with protective eyewear.

d. Defendant City conducted the hostage training exercise under two protocols: (1) all participants, including hostages like Michael Stein, must be checked for and provided with protective eyewear and (2) students/hostages like Michael Stein were not to be placed in the line of fire between ["]bad guys["] and officers.

e. It can be reasonably inferred that the City negligently failed to conduct the hostage exercise according to its protocol when it placed participant Michael Stein without protective eyewear in the line of fire between the "bad guy" and the officers, and therefore Plaintiff should be entitled to attempt proof of the same.

The above inferences in favor of Plaintiff support an argument that because the Defendant arguably committed negligence at the ministerial/operational level it has not met its burden of showing that as a matter of law it is entitled to immunity under official immunity principles. It can therefore be reasonably inferred that that [sic] Defendant does not enjoy statutory discretionary immunity.

This appeal follows.

D E C I S I O N

I. Because the underlying legal issue is the availability of official immunity, this court may review the district court's order granting respondent's negligent supervision amendment.

Pursuant to Minn. R. Gen. Pract. 115.01(a)(2), a motion to amend the pleadings is a non-dispositive motion. Generally, an order granting or denying a motion to amend is not immediately appealable. *See* Minn. R. Civ. App. P. 103.03. Orders denying

summary judgment on certain grounds, such as immunity, are immediately appealable under the federal collateral order doctrine, which Minnesota has adopted. *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 240 (Minn. 2002). However, additional issues in immunity appeals should not be reviewed, unless those issues are inextricably intertwined with the immunity issues. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 1212 (1995).

When an appellant seeks to raise additional issues in an interlocutory appeal, the proper procedure is to petition for discretionary review of those issues under Minn. R. Civ. App. P. 105.01. Appellant has not petitioned this court for permission to review the district court's order granting respondent's amendment pursuant to Minn. R. Civ. App. P. 105.01. Notwithstanding appellant's procedural error, the appellate courts may review any order affecting the order from which the appeal is taken. Minn. R. Civ. App. P. 103.04. Further, the rule governing the scope of review on appeal also states that appellate courts "may review any other matter as the interests of justice may require." *Id.*

The issue of respondent's amendment is inextricably tied to the appeal of the district court's order denying summary judgment to appellant on grounds of official immunity. Without addressing the amendment issue, this court would not be able to reach the central immunity issue, as the amendment allowed the claim for which appellant sought summary judgment on the basis of official immunity and was denied, leading to this appeal. Therefore, pursuant to Minn. R. Civ. App. P. 103.04, this court will review the district court's order granting respondent's amendment.

II. The district court did not abuse its discretion in permitting respondent to amend his complaint.

"The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). "Leave to amend should be freely granted unless it results in prejudice to the other party." *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 272 (Minn. 2008).

Respondent sought to amend his original complaint by inserting a few lines into his memorandum of law opposing appellant's motion for summary judgment and attaching an amended complaint. Respondent's request came nine days before the hearing on appellant's motion for summary judgment.

Rule 15.01 of Minn. R. Civ. P. provides that:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 115.01(a)(2) of Minn. R. Gen. Pract. classifies a motion to amend the pleadings as a non-dispositive motion. Under Minn. R. Gen. Pract. 115.04(a), non-dispositive motions are to be filed "at least 14 days prior to the hearing."

Technically, respondent failed to comply with the time restrictions set forth in Minn. R. Gen. Pract. 115.04(a), serving his motion 9 days before the hearing, instead of

the required 14 days. However, as argued by respondent at the hearing, the district court's scheduling order was silent as to the deadlines for filing non-dispositive motions, addressing only dispositive or evidentiary motions.

In *LaSalle Cartage Co. v. Johnson Bros. Wholesale Liquor Co.*, the Minnesota Supreme Court held that the district court did not abuse its discretion in granting the plaintiff's motion to amend to add an additional claim, despite the fact that the motion came after the case was called for trial. 302 Minn. 351, 357, 225 N.W.2d 233, 237 (1974). The supreme court opined that:

> Defendant has failed to establish prejudice resulting from the amendment. The prayer for relief was not increased and the issues with respect to damages are practically the same under either theory. With respect to liability, both the conversion theory and the lease-termination theory involve questions of the agreements, acts, and intentions of the same four persons who in fact testified. In the absence of a showing of prejudice going to the merits, allowing the amendment was not an abuse of discretion.

Id. at 358, 225 N.W.2d at 238.

LaSalle Cartage Co. is instructive in this matter. Respondent's "new" negligent supervision claim did not increase the prayer for relief and the underlying negligence issues remained nearly the same under the new theory. Additionally, when considering whether to grant respondent's motion, the district court engaged in the following exchange with the parties:

> THE COURT: But let's just say hypothetically that I'm going to allow them to amend the Complaint. I mean, arguably I can either try to address all of those issues today or I could rule on the Motion for Summary Judgment, and if I were to deny it she could—and then allow you to amend the Complaint, arguably procedurally you could turn around and file another Motion for Summary Judgment to address the new Amended

> Complaint and you're back here in a few months basically arguing the same legal theories. And I guess what I'm asking for judicial efficiency and quite frankly for your own ease of life if you want me to resolve it all today. The only way for me to do that would be for me to rule on the amendment to the Complaint first and then have that negligent supervision theory included as part of the Motion for Summary Judgment. And you've indicated that makes economical judicial sense to you?
> PLAINTIFF'S COUNSEL: Yes.
> DEFENDANT'S COUNSEL: Your Honor, that would be fine. . . .

Further, after granting respondent's motion, the district court left the record open for a period of time, allowing the parties to submit limited supplements on the new theory of negligent supervision.

Because respondent's amendment did not (1) increase the amount of damages; (2) significantly alter the underlying legal theories; or (3) proceed in direct violation of the scheduling order, and because granting the amendment promoted judicial economy, the district court did not abuse its discretion in allowing respondent to amend his complaint in order to assert an additional claim.

III. The district court erred in denying appellant's motion for summary judgment on the basis of official immunity with respect to respondent's negligent supervision claim.

"Although denial of a motion for summary judgment is not ordinarily appealable, an exception to this rule arises when the order denies summary judgment based on statutory or official immunity." *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 218 (Minn. 1998). "The ground for the exception is that immunity from suit is effectively lost if a case is erroneously permitted to go to trial." *Id.* On appeal from summary judgment, "[w]e review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs.*,

Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002). "When reviewing a summary judgment ruling, we must consider the evidence in the light most favorable to the nonmoving party." *Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006).

"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 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). "Official immunity . . . protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Elwood v. County of Rice*, 423 N.W.2d 671, 678 (Minn. 1988). "Consistent with this purpose, common law official immunity does not protect officials when they are charged with the execution of ministerial, rather than discretionary, 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).

Accordingly, in determining the availability of official immunity, the "critical distinction" is whether the acts involved are discretionary or ministerial. *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).

A. Eye Protection Policy

"When a public employee has a ministerial duty to engage in certain conduct and fails to do so, his actions are not protected by official immunity." *Mumm*, 708 N.W.2d at 491. While the burden of proof as to the applicability of immunity remains with the party claiming its protection, *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997), the opposing party must still be able to articulate the specific, ministerial duty owed under a particular set of circumstances. The issue is one of both identification and definition: whether a specific duty has been identified *and* whether that duty has been adequately defined. *See Mumm*, 708 N.W.2d at 490 ("A ministerial duty leaves nothing to discretion; it is a simple definite duty arising under and because of stated conditions." (quotations omitted)).

Therefore, the proper focus in this case is on the duties and obligations of the officers running the active threat training. "[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.* "[I]t is inherent in the concept of ministerial duty that the duty must dictate the scope of the employee's conduct." *Anderson*, 678 N.W.2d at 659.

We now turn to whether the safety officers or role player coordinators had a clearly defined ministerial duty to provide eye protection to the students. Such a duty is not imposed on role player coordinators. As for safety officers, appellant's written lesson

plan only requires safety officers to "[c]heck each participant involved in a scenario for eye protection," and who is a "participant" is not clearly defined.

Sergeant Hammes acknowledged that the training lesson plan did not define "participant," but stated that the term

> has been defined [sic] the City as meaning the officers-in-training and the bad guys. The term "participant", thus, did not include role players playing the role of the students. Instead of issuing safety glasses to the role players, the scenarios were set up so that the role players were instructed to have their backs to the door, their heads down, and their arms over their head (as in a tornado drill) so that their heads, eyes, chest, facial area, and throat were protected. This method of sitting was intended to give the student protection to the majority of the vital organs. Because the students were required to be in this protected position (unlike the other persons who were standing, with vital organs exposed) they did not need safety glasses or other protective gear.

Similarly, Officer Kyle Leibel, one of the safety officers present at the active threat training exercise, articulated his understanding of "participant" as follows:

> PLAINTIFF'S COUNSEL: Okay. I underlined in red some areas where it talks about, "Check each participant involved in a scenario for eye protection." Who is referenced as a participant? When you say "participant," what does that mean?
> OFFICER LEIBEL: That would be the officers that are involved in the actual, I guess, the training scenario and the – the bad guys, so to speak.
> PLAINTIFF'S COUNSEL: So the participants would not include folks who may have been identified as role players?
> OFFICER LEIBEL: No. I don't believe so.

Likewise, when asked to explain what role players did, Reserve Officer Greg Lewis stated that "[t]he role players were the kids who provided the background screaming to make the scenarios as life-like as possible, to provide noise."

The plain language of the training memorandum, lesson plans, and deposition testimony implies that officers-in-training and bad guys are considered "participants" and

students are "role players." But students are not expressly excluded from the category of "participants." The essence of respondent's case is that since the word "participants" is not defined, and therefore might include respondent, a question of material fact is created as to whether or not respondent was entitled to receive eye protection. However, respondent cannot point to the violation of a clear ministerial duty owed to him because who gets eye protection involves a discretionary decision.

The absence of precise, articulated circumstances under which eye protection is to be provided necessarily precludes finding that providing eye protection was a ministerial duty. *Cf. Mumm*, 708 N.W.2d at 492 (holding that the "plain language" of the policy gave "officers no discretion to exercise independent judgment", but "impose[d] a narrow and definite duty on an officer facing a particular set of circumstances, rendering that officer's duty ministerial"). Because it is unclear who gets eye protection—role players, students, officers-in-training, participants, or some combination thereof—respondent has not met its burden in identifying and defining the specific ministerial duty that appellant allegedly failed to perform.

Moreover, even if respondent could establish that appellant owed a ministerial duty to provide eye protection to all "participants," respondent cannot show that "participants" necessarily includes student "role players" by definition. Ministerial duties are those duties that follow fixed and designated facts. *Anderson*, 678 N.W.2d at 657.

Here, the district court construed all factual inferences in favor of respondent and found that it was a reasonable factual inference that respondent was a "participant"; that this inference supported respondent's argument that appellant arguably committed

negligence at a ministerial level by failing to provide eye protection; and, therefore, appellant had not shown it was entitled to official immunity. We disagree. Official immunity is first and foremost a legal question. *Mumm*, 708 N.W.2d at 481. Therefore, the district court erred in performing this analysis because the evidence in the record is insufficient to support the specific identification and definition of a ministerial duty owed by appellant to provide eye protection. *See Anderson*, 678 N.W.2d at 656 (emphasizing the importance of identifying the specific conduct at issue when performing an official immunity analysis). Since the evidence in the record cannot be said to impose on appellant a narrow, absolute, and certain duty to provide eye protection to respondent, we hold that the district court erred in denying appellant's motion for summary judgment.

B. Line of Fire

As previously discussed, "[a] discretionary decision is one involving more individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Wiederholt*, 581 N.W.2d at 315. On the night of the active threat training exercise, role player coordinators were to supervise the role players. Included in these responsibilities were "[e]xplain[ing] rules to role players" and "[g]et[ting] scenarios setup ASAP."

In preparing for the active threat training exercise, Sergeant Hammes prepared an Active Threat Scenario Plan, describing the scenarios in which the officers-in-training were to participate. While the plan provided a general description as to what each scenario should consist of, the training staff was ultimately responsible for staging the scenarios based on their own judgment and discretion.

Reserve Officer Lewis was the role player coordinator supervising respondent. Reserve Officer Lewis did not recall receiving any "scripted act" as to where role players were to be placed within a scenario:

> PLAINTIFF'S COUNSEL: Well, do you know whether or not the folks that were participants were given, for lack of a better phrase, let's call it a scripted act in terms of where they were actually to be in a room at a particular time when the officers came in?
> RESERVE OFFICER LEWIS: Not to my—no. I don't know.

Reserve Officer Lewis agreed that one of the safety concepts was to have the students not be in a direct line of fire of any of the shooters. However, Reserve Officer Lewis did not recall receiving any training plan or memorandum prior to the active threat exercise on March 29, 2005.

Assistant Police Chief Steve Mortenson, who was the supervisor of the Lino Lakes Police Department at the time of the active threat training exercise and a team supervisor at the event, stated that the role players were

> to be completely out of the scenario. And when I say "completely out of the scenario," it is—nowhere should they be in the line of fire. The scenarios are set up that they would like be off to the side and the bad guys and the officers would be off to an opposite side.

Sergeant Hammes also stated at his deposition that "we tried to separate the students from the scenario."

While the record reflects that one of the considerations in staging the scenarios was to keep students out of the line of fire, placement of student role players within a given scenario was not specifically articulated to the role player coordinators. Role player coordinators were to "supervise" the role players and "setup" the scenarios. These

responsibilities required each role player coordinator to exercise his or her discretion in helping to achieve the training objectives and create realistic situations with consideration as to the effects of a particular individual's placement, including whether that individual would be in the line of fire. As Reserve Officer Lewis stated in his deposition, he did not recall receiving specific instructions on where students should be placed, but agreed one of the concerns was that students were to be outside the line of fire. Absent appellant dictating each student's placement, role player coordinators necessarily had to exercise their own judgment in placing student role players within a scenario.

Because appellant exercised professional judgment in placing the student role players in the scenarios in order to carry out the training goals of the active threat training exercise, appellant is protected by official immunity as to whether respondent was placed in the line of fire. *Wiederholt*, 581 N.W.2d at 315.

Accordingly, we reverse the district court's order denying appellant's motion for summary judgment on respondent's negligent supervision claim and remand for entry of summary judgment on the basis of official immunity in favor of appellant on two grounds.[4] First, the record is insufficient to establish that a specific ministerial duty to provide eye protection has been identified and defined. Second, appellant's placement of

[4] "When applicable, vicarious official immunity protects the government entity from suit based on the official immunity of its employee." *Wiederholt*, 581 N.W.2d at 316. "Put another way, vicarious liability has to apply in situations when, if vicarious immunity to the employer were not granted, the purpose of official immunity would be defeated." *Fedke v. City of Chaska*, 685 N.W.2d 725, 731 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004). Because our opinion finds that the officers involved were entitled to official immunity, it follows that appellant is entitled to vicarious official immunity.

student role players within a given scenario involved the exercise of professional judgment.

Reversed and remanded.