STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1397

Steven G. Mlnarik,
Appellant,

vs.

Hennepin County,
Respondent.

Filed February 9, 2010
Affirmed
Stoneburner, Judge

Hennepin County District Court
File Nos. 27CV0818313; 27CR05056912; 27CV0818312

Steven G. Mlnarik, Mound, Minnesota (pro se appellant)

Michael O. Freeman, Hennepin County Attorney, Julie K. Bowman, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

Appellant challenges dismissal of his claims against respondent county for money damages arising out of his September 2006 arrest and vehicle seizure for fleeing a police officer in a motor vehicle and his January 2007 arrest on a bench warrant for failure to appear in court. The district court dismissed all of appellant's claims as barred by

vicarious official and statutory immunity and having no merit. Because the district court did not err in granting summary judgment to the county, we affirm.

FACTS

Appellant Steven G. Mlnarik was arrested on September 29, 2006, for fleeing a peace officer in a motor vehicle because he failed to stop when a Hennepin County Sheriff's deputy, who had determined that Mlnarik's driver's license was suspended and that his license-plate light was not operating, pursued him with emergency lights and siren activated. According to the deputy, Mlnarik increased his speed, travelled approximately one-and-one-half blocks further, turned into his driveway, got out of his vehicle, and began walking to his house.

The deputy arrested Mlarnik for fleeing a peace officer in a motor vehicle and placed him in the back of the squad car. The deputy's affidavit states that Mlnarik began to kick at the squad door, so, with the help of other deputies who had arrived at the scene, Mlnarik was removed from the squad, and his legs were hobbled before he was transported to the Hennepin County Adult Detention Center.[1] His vehicle was seized and towed to the Hennepin County Sheriff's Patrol Office. Mlnarik was served with a copy of a "Notice of Seizure of Motor Vehicle for Fleeing Police Officer," informing him of the right to a hearing within 96 hours of the seizure and setting a hearing date, time, and

[1] In his pro se brief on appeal, Mlnarik denies that he was kicking at the squad car, but the record on appeal does not contain any affidavits or other admissible evidence from Mlnarik concerning his version of the September incident.

place. The form is marked "refused" in the space labeled: "Received by (Defendant)," but the deputy's affidavit states that the form was explained to Mlnarik.[2]

In an unrelated matter in January 2007, a bench warrant was issued for Mlnarik's arrest when he failed to appear for a scheduled preliminary conference on a misdemeanor public-nuisance charge brought by the City of Mound for an incident that allegedly occurred in July 2006. On January 30, 2007, Mlnarik was arrested at his home pursuant to the warrant and was transported to the detention center for booking. There is no evidence in the record about what occurred after his arrest, but Mlnarik asserts in his pro se brief on appeal that he was told by a district court judge that the warrant was "improper."

In July 2008, Mlnarik sued respondent Hennepin County (the county) for the September 2006 arrest and vehicle seizure and for the January 2007 arrest, seeking $10,000 for "kidnapping,"[3] $50,000 for improper seizure of his vehicle, and $100,000 for mental anguish. The county moved for summary judgment, arguing that the actions of

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[2] Mlnarik was subsequently informed that the Hennepin County Attorney's Office had declined to prosecute him for fleeing a peace officer in a motor vehicle, and he was told by telephone call and letter how to retrieve his vehicle before March 12, 2007, by scheduling a time to pick up the vehicle and paying for the towing fees. Mlnarik wrote a letter indicating that he would pick up his vehicle but never scheduled a time to do so and took no further actions to retrieve his vehicle, even after it was released to the towing company on March 13, 2007. The towing company sent two notices to Mlnarik instructing him how to reclaim his vehicle. Due to Mlnarik's inaction, the vehicle was destroyed in October 2007. Mlnarik challenges only the initial seizure of his vehicle. The district court held that, to the extent Mlnarik's claims related to the county's vehicle seizure policy, the county is entitled to statutory discretionary-policy immunity. Mlnarik does not challenge this holding on appeal.

[3] Because there is no civil action for kidnapping, the county and the district court treated this assertion as a claim for unlawful arrest.

the Hennepin County deputies involved in both incidents are protected from suit by official immunity, entitling the county to vicarious official immunity from suit; the county is protected from suit for actions under its vehicle-seizure policy by statutory immunity; and Mlnarik failed to state actionable claims on the merits. The district court agreed and granted summary judgment to the county. This pro se appeal, challenging only official immunity, followed.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court [] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d, 2, 4 (Minn. 1990). A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *Id*.

The applicability of governmental immunity is a question of law subject to de novo review. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004) (regarding official immunity).

The common-law doctrine of official immunity protects government officials from liability for discretionary actions done in the course of their official duties. *Janklow v. Minnesota Bd. of Examiners for Nursing Home Adm'rs*, 552 N.W.2d 711, 716 (Minn.

1996). Discretionary acts involve "the exercise of individual judgment in carrying out the official duties." *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998). Generally, official immunity applies vicariously to the municipal employer of peace officers who are entitled to official immunity. *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992). Summary judgment is appropriate when a governmental entity has established that its actions are immune from civil liability. *Gutbrod v. County of Hennepin*, 529 N.W.2d 720, 723 (Minn. App. 1995); *see Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997) (stating that the party asserting immunity has the burden of showing that it is entitled to the immunity).

Peace officers are generally classified as discretionary officers entitled to official immunity. *See, e.g.*, *Elwood v. County of Rice*, 423 N.W.2d 671, 677–79 (Minn. 1988) (applying the official immunity doctrine to trespass and battery claims brought against peace officers). The record supports, and Mlnarik does not dispute, that the deputies involved in both incidents in this case are peace officers who were acting in furtherance of their official duties performing actions that involved the exercise of individual judgment and discretion generally entitled to official immunity.

Official immunity, however, does not apply to malicious conduct. *Id*. at 677. Malice is the intentional doing of a wrongful act without legal justification. *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). We read Mlnarik's pro se assertion of "conduct . . . so atrocious, it passes the boundries [sic] of decency and is utterly intolerable to civilized community" to be an argument that, in both the September 2006 incident and the January 2007 incident, the deputies involved acted with malice and therefore are not entitled to

official immunity. Whether conduct is malicious is generally a fact issue for the jury, but where no reasonable jury could find that officers acted with bad faith or malice, summary judgment is appropriate. *Elwood*, 423 N.W.2d at 679.

Despite Mlnarik's use of language that appears to assert that the deputies acted with malice, as the district court correctly noted, Mlnarik has not presented any evidence that any of the deputies involved in either incident acted with malice. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (stating that to defeat a summary judgment motion, the nonmoving party cannot rely on denials or general averments, but must offer specific facts to show that there is a genuine issue of material fact for trial).

I. The September 2006 arrest and vehicle seizure

Regarding the September 2006 arrest, Mlnarik appears to argue that the deputy who arrested him for fleeing acted maliciously because Mlnarik travelled only a short distance before signaling a turn into his driveway. Mlnarik asks: "Since when did peace officers start seizing and charging people for fleeing when the vehicle doesn't pull over in one block?"[4]

But Mlnarik does not dispute the arresting deputy's affidavit testimony stating that Mlnarik's vehicle sped up and did not stop when the deputy signaled for him to stop, and Mlnarik admitted to the officer that his driver's license was suspended. Fleeing includes increasing speed and failing to stop with intent to elude a peace officer following a signal given by the officer to the driver of a motor vehicle. Minn. Stat. § 609.487, subd. 1

[4] Mlnarik was arrested for fleeing in a motor vehicle but was never charged with that offense.

(2008) (defining the term "flee" for the purposes of section 609.487, which makes it a crime for a person to flee a peace officer in a motor vehicle). Under the undisputed facts of this case, the district court did not err in concluding that there is no evidence in the record that would support a finding that the deputy's conduct in arresting Mlnarik involved malice. The deputy is therefore entitled to official immunity, and the county is entitled to vicarious official immunity for all claims arising out of Mlnarik's September 2006 arrest for fleeing a peace officer in a motor vehicle.

The legal basis of Mlnarik's argument about the seizure of his vehicle is not entirely clear. He asserts that seizure of his vehicle was "unreasonable" and that the deputy's "abuse of authority is clear as he [cannot] prove his actions for seizing [Mlnarik's] vehicle." Mlnarik asks "what factual evidence [the county] has to support and justify seizing of his vehicle," noting that he "was not prosecuted for the reasons his vehicle was seized."

But we conclude that the deputy's conduct in seizing Mlnarik's vehicle is also plainly protected by official immunity, entitling the county to vicarious official immunity for the seizure. To be entitled to summary judgment based on immunity, the county is not required to prove that the seizure was lawful under Minn. Stat. § 609.5312, subd. 4 (2008): the county merely needs to establish that the officer was, without malice, performing a discretionary act in his official capacity, entitling him to official immunity and the county to vicarious official immunity. *See Gutbrod*, 529 N.W.2d at 723 (holding that summary judgment is appropriate when a governmental entity has established that its

actions are immune from civil liability.); *see also Rehn*, 557 N.W.2d at 333 (the party asserting immunity has the burden of showing that it is entitled to the immunity).

Minn. Stat. § 609.5312, subd. 4 (2008), provides that a motor vehicle is subject to forfeiture if it is used to flee a peace officer in violation of Minn. Stat. § 609.487 (the crime for which Mlnarik was arrested) "and endanger life or property." Forfeiture is judicially determined, and Mlnarik's vehicle was never forfeited. At issue is whether the seizure of Mlnarik's vehicle involved a discretionary act done in the course of the deputy's official duties. The county presented evidence of its vehicle seizure policy. The policy plainly states that an officer must use "good judgment" in executing the policy. An officer's use of judgment in executing a policy means that the officer must exercise discretion. As discussed above, there is no evidence in the record that would support a finding that the deputy acted with malice in seizing Mlnarik's vehicle even if the seizure constituted an abuse of discretion. The deputy is, therefore, entitled to official immunity for the seizure, and the county is entitled to vicarious official immunity.

II. The January 2007 arrest

Regarding the January 2007 arrest, Mlnarik argues that the deputies "willfully ignor[ed]" that the bench warrant was "improper" because the warrant contains the issuing judge's typewritten, rather than handwritten, signature. We read this to be an assertion that the deputies acted with malice. But Mlnarik provided no authority, legal argument, or admissible evidence to the district court to support his mere assertion that the warrant is, on its face "improper."

On appeal, Mlnarik has similarly failed to present any evidence or legal authority supporting his assertion that that the warrant was invalid on its face or that the deputies who executed the warrant had any reason to suspect that the warrant was not valid. Issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997).

We conclude that the deputies who executed the warrant are entitled to official immunity, and the county is entitled to summary judgment based on vicarious official immunity absent evidence that the warrant was invalid on its face and that the deputies acted with malice in its execution.

In rejecting an argument that officers were not entitled to official immunity for executing a search warrant that was later held to be invalid, we stated that:

> [t]he willful or malicious wrong exception to official immunity "does not impose liability merely because an official *intentionally* commits an act that a court or jury subsequently determines is wrong. Instead, the exception anticipates liability only when an official intentionally commits an act that he or she has reason to believe is prohibited."

Johnson v. County of Dakota, 510 N.W.2d 237, 240–41 (Minn. App. 1994) (quoting *Rico*, 472 N.W.2d at 107, and holding that deputies who executed an invalid search warrant were entitled to official immunity).

The record contains the affidavits of the deputies who executed the arrest warrant. The deputies stated that they arrested Mlnarik pursuant to the bench warrant and that, when executing a bench warrant, they believe the warrant to be legal and valid on its face. Mlnarik has presented no evidence that the deputies acted with malice; therefore,

their conduct in executing the warrant is shielded from liability by official immunity, and the county is shielded by vicarious official immunity.

Affirmed.