STATE OF MINNESOTA
IN COURT OF APPEALS
A10-223

Donald Morris Fernow,
Respondent,

vs.

Michael Donald Gould, et al.,
Appellants.

Filed September 7, 2010
Affirmed
Kalitowski, Judge

Douglas County District Court
File No. 21-CV-09-776

Lee R. Bissonette, Kathleen M. Loucks, Hellmuth & Johnson, PLLC, Eden Prairie, Minnesota (for respondent)

John E. Hennen, James J. Mongé III, League of Minnesota Cities, St. Paul, Minnesota (for appellants)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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

KALITOWSKI, Judge

Appellants City of Alexandria and Michael Donald Gould challenge the district court's order denying their motion for summary judgment in respondent Donald

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

Fernow's personal-injury negligence claim, brought after a city snowplow driven by Gould collided with respondent's truck. Appellants argue that (1) statutory discretionary immunity bars respondent's claim because Gould exercised discretion in implementing the city's snow-removal policy; (2) common-law official immunity bars the claim because snowplow operation involves the exercise of discretion; and (3) snow and ice immunity bars the claim. We affirm.

D E C I S I O N

Although a party generally may not appeal from an order denying a motion for summary judgment, an exception exists when the order denies summary judgment based on immunity claims, because "immunity from suit is effectively lost if a case is erroneously permitted to go to trial." *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 218 (Minn. 1998). On appeal from a summary judgment decision, we must determine whether the district court erred in its application of law and whether there are any genuine issues of material fact. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). But "when predicate facts are in dispute, we cannot determine whether . . . immunity applies until the factual disputes are resolved." *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 675 (Minn. 2006). The applicability of immunity is a question of law that we review de novo. *Sletten v. Ramsey Cnty.*, 675 N.W.2d 291, 299 (Minn. 2004). The party asserting an immunity defense has the burden of demonstrating entitlement to that defense. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

I.

Statutory Immunity

In general, a municipality may be subject to liability for its tortious conduct and for the tortious conduct of its officers and employees acting within the scope of their employment. Minn. Stat. § 466.02 (2008). But under the doctrine of statutory 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).

To determine whether certain conduct is protected by statutory immunity, we distinguish between planning and operational decisions. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988). Planning decisions involving questions of public policy are protected as discretionary actions, but operational decisions relating to the day-to-day government operations are not. *Id.* This court's primary concern when determining if a decision is protected 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 statutory immunity is to identify the governmental conduct being challenged. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994).

Here, the challenged conduct was Gould's action in crossing over the centerline into oncoming traffic while operating a snowplow. Appellants claim that the district court erred by concluding that this conduct was operational driver error rather than Gould's implementation of the snow-removal policy. We disagree.

The district court correctly concluded that Gould's conduct was nonprotected operational conduct. There was no evidence that Gould's act of crossing the centerline into oncoming traffic was to implement city policy in snowplowing; Gould himself stated that the act was not purposeful. City policy affirmatively requires snowplow drivers to obey traffic laws; violation of this policy is only permitted when it is necessary, and where safety is not sacrificed. Appellants presented no evidence that Gould crossed over the centerline to plow, that he did so to implement policy, or that such action was necessary or safe. As the district court determined, because Gould was "not purposefully acting in accordance with the City policy on snowplowing at the time he crossed over the center line, the existence of that City policy—and its alleged allowance for violation of traffic laws . . . . —has no bearing on Gould's alleged conduct[.]" *C.f. Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 505 (Minn. 2006) (finding statutory immunity for city's policy decision to permit graders to grade against traffic).

We conclude that the district court properly determined as a matter of law that Gould's alleged act of crossing over the centerline was operational-level conduct that is

not protected by statutory immunity. Therefore, the district court did not err by denying appellants' motion for summary judgment on the statutory-immunity claim.

II.

Common-Law 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). But official immunity does not protect officials when their acts are ministerial, not independent or discretionary. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). The purpose of providing immunity for discretionary acts is to guard against "fear of personal liability that might deter independent action." *Janklow v. Minn. Bd. of Examiners for Nursing Home Adm'rs*, 552 N.W.2d 711, 715 (Minn. 1996) (quotation omitted).

Ministerial duties are those that are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Wiederholt*, 581 N.W.2d at 315 (quotation omitted). In contrast to ministerial acts, official immunity protects discretionary decisions made at the operational level. *In re Alexandria Accident*, 561 N.W.2d 543, 549 (Minn. App. 1997), *review denied* (Minn. June 26, 1997).

Appellants claim that the district court erred in determining that Gould's actions were not discretionary, and thus appellants were not entitled to summary judgment on the basis of official immunity. We disagree.

In *Alexandria Accident*, a snow-removal case addressing a claim of official immunity, this court noted that the plow operator had to exercise judgment and discretion about the proper equipment, speed, time, and manner for plowing, based on road and weather conditions. *Id.* And the court held that those decisions "involved sufficient discretion to fall within the protection of official immunity." *Id.*

Unlike the facts in *Alexandria Accident*, here, the undisputed facts in the record support the district court's conclusion that the accident was not caused by Gould's discretionary acts, but rather ministerial ones. There is no evidence that, at the time of the collision, Gould made decisions regarding speed, time, and manner of plowing. Rather, Gould testified that "[i]t was just a freaky deal," "[t]he truck took off to the left," and "[t]here is no explanation for it." Further, respondent's claim is based on negligence and driver error, and a claim of negligent performance of a nondiscretionary duty is not protected by official immunity. *See Schroeder*, 708 N.W.2d at 505.

Appellants also claim that the district court erred by breaking down the process of snowplowing into discrete acts, arguing that the court must look at snowplowing as a whole as a discretionary act, rather than assessing whether the specific actions that caused the accident were nondiscretionary. Appellants cite unpublished opinions of this court that conclude that snowplowing is a discretionary act at the operational level, and thus that such actions are entitled to official immunity. But these cases are not precedential.

Further, they are distinguishable. In those cases, the discretionary nature of the actions taken by snowplow drivers was undisputed.

Because the record shows that Gould's actions were not discretionary, we conclude that the district court did not err as a matter of law by denying appellants' motion for summary judgment on official immunity.

Vicarious Official Immunity

Generally, when a public official is entitled to official immunity from suit, the official's government employer is entitled to vicarious official immunity. *Schroeder*, 708 N.W.2d at 508. The city is only entitled to vicarious official immunity if an employee is protected by official immunity. *See Wiederholt*, 581 N.W.2d at 315. Because we conclude that Gould is not protected by official immunity, the city is not entitled to vicarious official immunity.

III.

Snow and Ice Immunity

Appellants claim that the district court erred by determining that there were genuine issues of material fact regarding whether there was snow and ice on the road, and whether it contributed to the accident. Government entities and their employees are immune for "[a]ny claim based on snow or ice conditions on any highway or public sidewalk . . . except when the condition is affirmatively caused by the negligent acts of the municipality." Minn. Stat. § 466.03, subd. 4 (2008). Interpreting a virtually identical statute protecting the state and its employees, this court recognized that "statutory snow and ice immunity protects government entities from liability for damages caused by the

natural consequences of snow plowing when the plowing was done pursuant to established snow-removal policies and the claimants have shown no willful acts or malfeasance." *Alexandria Accident*, 561 N.W.2d at 549. In *Alexandria Accident*, the injured drivers asserted that the snowplow operator created white-out conditions when snowplowing. *Id.* This court concluded that because the operator had not violated plowing policies, and the conditions were caused by nature, not a negligent act, statutory snow and ice immunity barred the claims. *Id.*

In *Koen v. Tschida*, 493 N.W.2d 126, 127 (Minn. App. 1992), *review denied* (Minn. Jan. 28, 1993), the injured parties sued Carlton County alleging various omissions, including failure to salt and sand the highway and failure to trim trees to prevent ice accumulation on the highway. This court affirmed the district court's decision that the county was protected by statutory snow and ice immunity, stating that although "other alleged negligent acts may have contributed to the accident, Minn. Stat. § 466.03, subd. 4, does not condition immunity on the snow or ice condition being the *sole* basis for the claim." *Id.* at 128. Courts in other cases have similarly found government entities to be protected by snow and ice immunity where snow and ice was merely a factor in an accident. *See, e.g.*, *In re Heirs of Jones*, 419 N.W.2d 839, 840-41 (Minn. App. 1988).

Here, the evidence in the record supports the district court's determination that there are genuine issues of material fact that preclude summary judgment. The officer who responded to the accident testified that there was no precipitation at the time of the collision, that it was a clear day, and that there were no severe crosswinds. In addition, a

witness who was traveling directly behind the snowplow gave a statement to police that the street at the site of the accident was "wet, but it was clean." Gould also described the road conditions at the time of the accident as being "fair" and "not [] treacherous or anything like that. The sun was out." Gould stated that there was some slush on the road, but described the driving lanes as being clear. A deputy described the road as merely slushy. Another city snowplow driver testified that he had plowed Nokomis Street three times that day, the last time being approximately two hours before the collision. Gould gave varying descriptions of the cause of the accident and the road conditions that day. He described the conditions as wet and sloppy, but stated that any snowdrifts were pushed to the side of the road before the collision. Further, he indicated that he did not know why the snowplow just "took off to the left," and told someone at the scene of the crash that he drove the plow into the curb.

In *Alexandria Accident, Koen,* and *Heirs of Jones*, there was no dispute about whether snow and ice conditions contributed to the accident. In those cases, although the appellants claimed that other factors contributed to the accident, it was undisputed that snow and ice were clearly a factor. Here, there is a genuine issue of material fact as to whether respondent's claim was in any part "based on snow or ice." *See* Minn. Stat. § 466.03, subd. 4.

On this record, we cannot say that the district court erred by concluding that there were genuine issues of material fact to defeat appellants' motion for summary judgment on the issue of snow and ice immunity.

Affirmed.