STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1384

Wade Sotona and Kristine Sotona,
as co-trustees for the next-of-kin of Brody Sotona, decedent,
Appellants,

Connor Macklin,
Appellant,

vs.

Andrew Wayne Gibbs, et al.,
Respondents.

Filed May 8, 2017
Affirmed in part and reversed in part
Toussaint, Judge*

Hennepin County District Court
File No. 27-CV-15-17705

William L.H. Lubov, Lubov Anderson, LLC, Golden Valley, Minnesota; and Michael J. Brose, Doar, Drill & Skow, S.C., New Richmond, Wisconsin (for appellants)

Lori Swanson, Attorney General, Kathryn Iverson Landrum, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Bratvold, Presiding Judge; Kirk, Judge; and Toussaint, Judge.

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

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

TOUSSAINT, Judge

Appellants Wade Sotona, Kristine Sotona, and Connor Macklin challenge the summary-judgment dismissal of their negligence and wrongful-death claims against respondents Minnesota State Patrol and State Trooper Andrew Gibbs. The claims arose from a high-speed police pursuit that ended in an automobile collision that killed the Sotonas' son, Brody Sotona, and injured Macklin. Because the doctrine of official immunity bars suit against Trooper Gibbs and because the State Patrol is entitled to statutory immunity with respect to appellants' negligent-supervision claim, we affirm in part. But because the district court erred in determining that a genuine issue of material fact exists as to whether Gibbs's squad car experienced an equipment failure, we reverse in part.

D E C I S I O N

This court reviews summary-judgment decisions de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). This court must "determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I.

The Sotonas and Macklin argue that the district court erred by concluding that Trooper Gibbs was entitled to official immunity.[1] "Under the doctrine of official immunity, a public official charged by law with duties which call for the exercise of his or her judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014) (quotation omitted). The doctrine provides immunity from suit, not just from liability. *Id.* But the doctrine "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) (footnote omitted).

Whether official immunity applies is a question of law appellate courts review de novo. *Vassallo*, 842 N.W.2d at 462. In determining whether the doctrine applies, the court must consider: "(1) the conduct at issue; (2) whether the conduct is discretionary or ministerial and, if ministerial, whether any ministerial duties were violated; and (3) if discretionary, whether the conduct was willful or malicious." *Id.*

The Sotonas and Macklin maintain that the conduct at issue here was Trooper Gibbs's decision to continue pursuit of a fleeing motorist in the face of clear and

[1] The Sotonas and Macklin do not challenge the district court's conclusion that the State Patrol is entitled to vicarious official immunity for Trooper Gibbs's conduct if he is entitled to official immunity. *See Watson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 415 (Minn. 1996) ("Where an employee or agent is protected by official immunity, the government entity will not be called on to indemnify that individual nor will the government entity be liable under the doctrine of respondeat superior.").

unreasonable danger. The record shows that on the early morning of September 9, 2013, Trooper Gibbs was in his squad car monitoring westbound traffic on I-94 near the Huron Boulevard ramp. At around 12:53 a.m., he clocked a vehicle driven by Yia Her traveling approximately 15 miles over the posted speed limit. Trooper Gibbs followed Her and noticed that he was having difficulty staying in his lane. Suspecting that Her might be impaired, Trooper Gibbs initiated a traffic stop. He exited his squad car and attempted to approach Her's vehicle on foot when Her suddenly sped away. Trooper Gibbs notified dispatch, ran back to his squad car, and began pursuit with his siren, emergency lights, and Opticom system[2] activated.

Her exited I-94 and headed westbound on 11th Street into downtown Minneapolis. Trooper Gibbs followed and attempted to stop Her's vehicle using a PIT maneuver.[3] Trooper Gibbs made contact with Her's vehicle, but Her was able to correct his vehicle and continued traveling northbound on 2nd Avenue. Trooper Gibbs continued pursuing Her, who reached speeds of 80 miles per hour and ran several red lights. When Her slowed down while turning onto 4th Street, Trooper Gibbs moved into position to attempt another PIT maneuver. Before he could complete the maneuver, Her slammed his brakes, causing the squad car to rear-end Her's vehicle. Following the collision, Trooper Gibbs reported to

[2] An Opticom system allows emergency vehicles to gain the right-of-way when approaching intersections controlled by traffic lights by changing the color of the light to green.

[3] A Pursuit Intervention Technique (PIT) is a controlled, low-speed contact between a squad car and a pursued vehicle that is intended to cause the pursued vehicle to become disabled.

dispatch that his squad car was "becoming disabled." The squad car was "shaking a little bit" from "side to side," but he was still able to "steer, brake, [and] accelerate."

Despite the damage to his squad car, Trooper Gibbs continued to follow Her as he headed northbound on 3rd Avenue. When Her slowed, Trooper Gibbs tried a third PIT maneuver, which also proved unsuccessful. Her then drove through two more red lights. As Her ran the second red light, he crashed into the driver's side of a car containing Brody Sotona and Connor Macklin. Sotona died as a result of the collision. Macklin survived but suffered significant injuries.

The Sotonas and Macklin argue that Trooper Gibbs violated a ministerial duty imposed by the Minnesota State Patrol Pursuit Policy (pursuit policy), which provides that a "[p]ursuit[] will be immediately discontinued . . . when there is a clear and unreasonable danger to the Trooper, fleeing motorist, or other persons." A ministerial duty is a duty that is "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Anderson,* 678 N.W.2d at 656 (quotation omitted); *see also Williamson v. Cain*, 310 Minn. 59, 61, 245 N.W.2d 242, 244 (1976) (characterizing a ministerial duty as being "simple and definite"). A government 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." *Vassallo*, 842 N.W.2d at 463. In contrast, "[a] discretionary duty involves individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Id.* at 462 (quotation omitted).

We conclude that the duty imposed by the pursuit policy to terminate the pursuit "when there is a clear and unreasonable danger" is discretionary. Trooper Gibbs needed to

assess the location and speed of the pursuit, the amount of pedestrian and vehicle traffic, and Her's driving behavior to determine whether continuing the pursuit posed a "clear and unreasonable danger." These relevant circumstances were not "fixed and designated facts." Instead, Trooper Gibbs was required to use his professional judgment to assess a changing situation. The duty is therefore discretionary, not ministerial.

Our conclusion that the duty to discontinue pursuit "when there is a clear and unreasonable danger" is discretionary is informed by supreme court caselaw considering similar duties. For example, in *Vassallo* the supreme court held that a duty requiring officers to "slow down as necessary for safety" when approaching a stop sign or signal was "a textbook example of the exercise of discretion" because it involved the officer's professional judgment under the circumstances. 842 N.W.2d at 463. Similarly, in *Pletan v. Gaines*, the supreme court noted that, with respect to an officer's decision to engage in a car chase or continue a chase, it was "difficult to think of a situation where the exercise of significant, independent judgment and discretion would be more required." 494 N.W.2d 38, 41 (Minn. 1992). The Sotonas and Macklin argue these cases are distinguishable because they "involved police pursuits where an officer was responding to an ongoing emergency and attempting to apprehend the criminals causing the emergency" and that Trooper Gibbs was not responding to an emergency. We find the argument unconvincing because, as the supreme court has previously noted, "police pursuits by definition are emergency situations." *Mumm v. Mornson*, 708 N.W.2d 475, 493 (Minn. 2006).

Because the duty to discontinue the pursuit "when there is a clear and unreasonable danger" is discretionary, the final step of the official-immunity analysis requires us to

consider whether the trooper's conduct was willful or malicious. *Vassallo*, 842 N.W.2d at 465. "Malice is not negligence," but rather "the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Id.* (quotation omitted); *see also Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) ("In the official immunity context, wilful and malicious are synonymous."). "The exception to immunity for malicious acts allows liability only when an official intentionally commits an act that he or she then has reason to believe is prohibited." *Vassallo*, 842 N.W.2d at 465 (quotation omitted). "In order to find malice, the court must find that the wrongful act so unreasonably put at risk the safety and welfare of others that as a matter of law it could not be excused or justified." *Id.* (quotation omitted).

The Sotonas and Macklin maintain that Trooper Gibbs acted maliciously because he "acknowledged that he should have terminated the chase." But a review of Trooper Gibbs's deposition testimony reveals that he made no such acknowledgement:

> I remember, you know, constantly scanning the area. I remember thinking that it was very well-lit downtown, little to no traffic. I don't remember seeing any people downtown.
> . . . .
> [A]gain, if this was, you know, noon on a Sunday, this would have been discontinued due to, you know, people being all over downtown. I remember not seeing a lot of people—actually, I don't remember seeing a single pedestrian.
> I remember just seeing a few vehicles, but I remember he wasn't swerving to avoid anybody; I wasn't swerving to avoid anybody. I remember not feeling that we were in danger, and I just remember thinking that this person is impaired and I need to stop him soon.

Trooper Gibbs testified that after he collided with Her's vehicle, he was concerned that "something [wa]s wrong with [his] car," but he nevertheless "wanted to keep a visual until support units arrived."

Trooper Gibbs's testimony shows that he adequately considered the safety of others. Because the Sotonas and Macklin have failed to present sufficient evidence showing that the decision to pursue Her was malicious, the district court did not err by granting summary judgment on the basis of official immunity.

II.

By cross-appeal, the State Patrol and Trooper Gibbs challenge the district court's determination that a fact issue exists as to whether Trooper Gibbs violated a ministerial duty by continuing pursuit after his vehicle was damaged. The pursuit policy imposes a duty to discontinue a pursuit "when there is an equipment failure involving an emergency signal device, radio, brakes, steering, or other essential mechanical equipment." The parties dispute whether this provision creates a ministerial duty or a discretionary duty. We do not resolve the issue, however, because even assuming the duty is ministerial, the Sotonas and Macklin fail to present sufficient evidence that the squad car experienced an equipment failure.

The Sotonas and Macklin argue that Trooper Gibbs was required to discontinue pursuit when his squad car was damaged after colliding with Her's vehicle. In support of their position, they rely on Trooper Gibbs's statement to dispatch that his car was "becoming disabled." But Trooper Gibbs subsequently testified that that characterization was "a very poor choice of words" and that he was in fact "not disabled." He stated that

although his vehicle was "shaking a little bit" from "side to side," he was nevertheless still able to "steer, brake, [and] accelerate." Trooper Gibbs testified that he was later informed that his squad car's contact with Her's vehicle resulted in "a broken tie rod," but he could not recall who provided him with that information. The tie-rod testimony therefore contains inadmissible hearsay, *see* Minn. R. Evid. 801(c), which cannot support a conclusion that a genuine issue of fact exists. *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976). Finally, the dash-cam video of the pursuit confirms that the squad car was operating well enough to maintain sight of Her's vehicle.

Viewing the evidence in the light most favorable to the Sotonas and Macklin, there is insufficient evidence that Trooper Gibbs's squad car experienced an equipment failure. Although Trooper Gibbs's squad car may have been damaged, as evidenced by his statement that his car was "becoming disabled" and was "shaking," the Sotonas and Macklin do not identify which piece of equipment ultimately failed. Without evidence that there was an equipment failure specifically involving "an emergency signal device, radio, brakes, steering, or other essential mechanical equipment," they could not show that Trooper Gibbs violated the pursuit policy. The district court therefore erred by finding that a genuine issue of material fact existed as to whether Trooper Gibbs violated a ministerial duty by continuing pursuit after his squad car was damaged.[4]

[4] Because we conclude that no genuine issue of material fact exists as to whether Trooper Gibbs's squad car experienced an equipment failure, we do not address the district court's alternative holding that Trooper Gibbs's alleged negligence was not the proximate cause of the accident as a matter of law.

III.

The Sotonas and Macklin argue that the district court erred by concluding that the State Patrol was entitled to statutory immunity with respect to their negligent-supervision claim. Generally, government entities are liable for their torts unless an exception applies. *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 718 (Minn. 1988). One statutory exception is the discretionary-function exception, which precludes liability 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) (2016). The exception is rooted in "the notion that the judicial branch of government should not, through the medium of tort actions, second-guess certain policy-making activities that are legislative or executive in nature." *Nusbaum*, 422 N.W.2d at 718. In applying the exception, the supreme court has drawn a distinction between "planning level" conduct, which is protected, and "operational level" conduct, which is not. *Id.* at 719. Operational-level conduct "involve[s] decisions relating to the ordinary day-to-day operations of the government." *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988). On the other hand, planning-level conduct "involv[es] questions of public policy," including "the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy." *Id.* Ultimately, the fundamental inquiry in distinguishing between the two types of conduct is "whether the challenged governmental conduct involved a balancing of policy objectives." *Nusbaum*, 422 N.W.2d at 722. If "the challenged decision involves a policymaking decision entrusted to the political branches of government," we will not second-guess that decision. *Holmquist*, 425 N.W.2d at 232.

By statute, Minnesota law-enforcement agencies are required to "make reasonable efforts to guide their officers in the safe and responsible performance of their emergency response duties." Minn. Stat. § 626.8458, subd. 1 (2016). The Board of Peace Officer Standards and Training is required to develop a "model policy governing the conduct of peace officers who are in pursuit of a [fleeing] vehicle." *Id.*, subd. 2 (2016). The model policy must contain, among other things, the "various responsibilities of the pursuing officers, the officer supervising the pursuit, the dispatcher, and air support." *Id.*, subd. 2(4). Every state and local law-enforcement agency must also develop their own written policies complying with the model policy. *Id.*, subd. 3 (2016).

The pursuit policy at issue here requires dispatchers to "[n]otify the concerned supervisors in the chain of command when a pursuit is initiated." State Patrol Major Cheri Frandrup testified that the State Patrol uses on-call supervisors at certain times because of resource limitations. Major Frandrup explained that the State Patrol must work within its budget, and, given financial limitations, the State Patrol must "attempt to do the best [it] can with the hiring and staffing of supervisors."

The Sotonas and Macklin challenge the State Patrol's decision to use on-call supervisors instead of on-duty supervisors available at all times. They assert that "[a]ccording to the [pursuit] [p]olicy, as well as testimony, nothing excused the [State Patrol] from having a supervisor on duty 24 hours per day, seven (7) days per week." But the argument is built on a false premise; nothing in the pursuit policy *requires* on-duty supervisors at all times. Because the State Patrol's decision to use on-call supervisors involved the balancing of policy objectives, including financial considerations, it was a

planning-level decision and the discretionary-function exception applies. *See Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 413 (Minn. 1996) (holding that a transit authority's decision on how to "most effectively . . . deploy security resources constitutes planning level conduct, which is protected by statutory immunity").

The Sotonas and Macklin also argue that the State Patrol violated the pursuit policy because no supervisor was "involved" during the pursuit. The pursuit began at approximately 12:55 a.m. and ended at 12:58 a.m. The dispatcher was able to reach the on-call supervisor at 1:01 a.m., roughly three minutes after the pursuit had ended. The Sotonas and Macklin's argument is unconvincing because nothing in the pursuit policy mandates that a supervisor must be "involved" while the pursuit is still ongoing. Rather, the pursuit policy requires dispatchers to *notify* the appropriate supervisor "when a pursuit is initiated." The parties do not dispute that the on-call supervisor in this case was notified of the pursuit. The pursuit policy does not contain a specific timeframe for when the notification must occur, but nothing in the record suggests that the dispatcher here was anything but diligent in attempting to reach the on-call supervisor as soon as possible. Because the pursuit policy does not require a supervisor to be involved during the pursuit, and because the on-call supervisor was in fact notified shortly after the pursuit was initiated, the State Patrol did not violate the pursuit policy.

Affirmed in part and reversed in part.