STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0011

Douglas W. Wenker, et al.,
Respondents,

vs.

Le Sueur County,
Appellant,

Shoreland Recreational Cooperative,
d/b/a Shoreland Country Club,
Defendant.

Filed July 22, 2019
Reversed
Johnson, Judge

Le Sueur County District Court
File No. 40-CV-18-145

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Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Peterson, 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

JOHNSON, Judge

Douglas W. Wenker was injured while snowmobiling alongside County Road 21 in Le Sueur County. He and his wife sued the county and a nearby landowner for negligence. The county moved for summary judgment on the grounds of statutory discretionary immunity, common-law official immunity, and statutory highway right-of-way immunity. The district court denied the county's motion with respect to each of the county's immunity defenses. We conclude that the county is not entitled to statutory discretionary immunity but is entitled to common-law official immunity and statutory highway right-of-way immunity. Therefore, we reverse.

FACTS

The Shoreland Country Club is located in Le Sueur County near the city of St. Peter. The country club's golf course is bisected by County Road 21, which runs along a southwest-northeast axis at a slightly higher elevation than the golf course. In the 1980s, the country club built a tunnel under County Road 21 to allow golfers to travel between the two parts of the golf course without concern for vehicle traffic on the road. Because the county owns a right-of-way easement on both sides of the county road, the country club requested and received permission from the county to build the tunnel and install a concrete culvert, with the county's supervision and according to the county's specifications. The concrete culvert is large enough for a golf cart. At both ends of the concrete culvert is a paved cart path, which is below grade near the culvert but gradually conforms to the elevation of the golf course.

Since the 1970s, the county has maintained a standard policy of not marking objects that are located in the rights-of-way along county roads. The county adopted this standard policy for various reasons, including financial considerations and the safety of motorists. The person who served as county engineer from the mid-1970s until 1993 described the reasons for the standard policy as follows:

> There are several culverts in every mile in Le Sueur County. It would be a huge financial burden to try to mark each of these culverts. Additionally, these objects are not marked because everything you put in a ditch creates another hazard. Placing hundreds of culvert markers in the ditches could create distractions for the traveling public, including snowmobilers. Such distraction poses a greater risk than the culvert itself.

The person who served as county engineer from 1999 to 2017 had discretion when he began work in that position "to determine the County's policy regarding whether to erect or place a marker or delineator" at culverts in the county, without the need to discuss the matter with the county's board of commissioners. He explained his decision to retain the county's pre-existing policy as follows:

> When I became County Engineer, I decided to continue the County's longstanding policy concerning culvert signage. This was based on several common sense considerations, including the sheer number of locations where such markers or delineators would be needed (there are hundreds of culverts that cross under County roads), the cost of placement and maintenance of such markers or delineators, the hazards created by such markers or delineators (generally speaking, the fewer structures motorists can hit the better), the risk of distraction posed by such markers or delineators, the potential for overuse of markers or delineators to dilute their effectiveness and the effectiveness of other signs, the difficulty of maintaining such markers or delineators, the difficulty of maintaining the road and the road right-of-way if such markers or delineators were used (they get in the way of snow plows),

> and the need to use the road right-of-way for non-road uses such as utilities and drainage.

In 2000, there was a snowmobile accident at the tunnel and culvert under County Road 21 that connects the two parts of the country club, and the accident gave rise to a lawsuit that was appealed to this court and later was reviewed by the supreme court. *See Olmanson v. Le Sueur County*, 673 N.W.2d 506 (Minn. App. 2004), *aff'd*, 693 N.W.2d 876 (Minn. 2005). The county engineer described the events following that accident as follows:

> I was the County Engineer when the *Olmanson* accident and subsequent lawsuit occurred. The issue whether to install markers at culverts was discussed within the County because of allegations in that lawsuit. I determined that the rationale for not signing that culvert or any other of the many culverts in the County, had not changed. It simply is not good engineering practice to do so, in my opinion. Furthermore, it is important to understand that a road authority signs for the benefit of the public travelling on the road. We do not sign or mark every potential hazard in the ditches that may be problematic for people driving snowmobiles or ATVs. There are signed, maintained snowmobile routes for use by snowmobiles; County ditches are not designed or maintained for that purpose.

After the *Olmanson* accident, the country club asked the county to install a fence or sign at the culvert, and the county declined the request because of its standard policy.

In the late afternoon of January 22, 2016, Wenker was driving his snowmobile along the northwest side of County Road 21 in a southwesterly direction. He was thrown off the snowmobile and was discovered by a passing motorist near the country club's culvert. Because of his injuries, Wenker does not recall the incident or any event that occurred after he left his home in the city of Elysian, approximately 20 miles away. A photograph of the scene taken shortly after the incident shows a track in the snow indicating that he drove his

snowmobile to the right of the culvert but straight into the steep northeast-facing embankment beside the cart path.

In February 2018, Wenker and his wife commenced this action against the county and the Shoreland Recreational Cooperative, which owns and operates the country club and its golf course. The Wenkers asserted a claim of negligence against each defendant. They alleged that the county had a "duty to inspect and maintain the property subject to the easement to ensure entrants are not exposed to unreasonable risks of harm," which required the county to "repair [dangerous] conditions, or provide [entrants] with adequate warnings of the actual conditions or the risks involved in entering the property," and that the county breached its duty.

In September 2018, the county moved for summary judgment, arguing that it is immune from suit on the grounds of statutory discretionary immunity, *see* Minn. Stat. § 466.03, subd. 6 (2018); the common-law doctrine of vicarious official immunity; and statutory highway right-of-way immunity, *see* Minn. Stat. § 466.03, subd. 22. In November 2018, the district court issued a 15-page order in which it denied the county's motion with respect to each of the three immunities. With respect to statutory discretionary immunity, the district court reasoned that the county was not immune because it did not submit sufficient evidence that it engaged in a deliberative process resulting in a policy-level decision. With respect to common-law official immunity, the district court reasoned that the county was not immune from suit because it did not submit sufficient evidence that it made a discretionary decision to not mark objects alongside county roads. With respect to statutory highway right-of-way immunity, the district court reasoned that the county was

not immune from suit because of genuine issues of material fact concerning the county's knowledge of constant intrusions by snowmobilers and the inherent dangers posed by the culvert. The county appeals.

D E C I S I O N

The county argues that the district court erred by denying its motion for summary judgment and contends that it is entitled to three types of immunity.

As a general rule, a municipality "is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." Minn. Stat. § 466.02 (2018). But the general rule is subject to limitations and exceptions, including certain immunities contained in chapter 466. *See id.*; *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006); *Unzen v. City of Duluth*, 683 N.W.2d 875, 882 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). Because immunity from liability implies immunity from suit, a municipality may assert immunity in a pre-trial motion. *Anderson v. City of Hopkins*, 393 N.W.2d 363, 363-64 (Minn. 1986). A district court's ruling on such a pre-trial motion is immediately appealable because, if a case were to go to trial, a valid immunity defense effectively would be lost. *Id.* at 364; *see also Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996).

A district court must grant a motion for summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01 (2018). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving

party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to the district court's legal conclusions on summary judgment and views the evidence in the light most favorable to the party against whom summary judgment was granted. *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

I. Statutory Discretionary Immunity

The county argues that the district court erred by denying its motion for summary judgment with respect to its defense of statutory discretionary immunity.

Statutory discretionary immunity protects municipalities 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. A municipality is immune from liability for its "planning" decisions but not for its "operational" decisions. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994). A planning decision is one that involves issues of public policy and the weighing of competing social, economic, or political factors. *Id.* An operational decision is one that is connected to the day-to-day operation of government. *Id.*; *Watson ex rel. Hanson v. Metropolitan Transit Comm'n*, 553 N.W.2d 406, 412 (Minn. 1996).

In this case, the county contends that its decision to not mark the culvert was made pursuant to its decades-long standard policy of not marking objects located in the rights-of-way along all county roads. The county contends that its county engineer used discretion when originally adopting the standard policy and that a successor county engineer used discretion when deciding to retain the standard policy.

In *Olmanson*, the county made a very similar argument in support of its assertion of statutory discretionary immunity in response to a very similar claim of negligence concerning the very same culvert. But this court rejected the argument. The county argued then that "its decision to leave off-road culverts unmarked was established by balancing numerous policy considerations." 673 N.W.2d at 514. The county submitted affidavits of the then-current county engineer and two former county engineers, who collectively stated that the county's standard policy was based on multiple factors, which were summarized by this court as follows:

> (1) placing objects in a culvert or ditch creates a greater hazard; (2) snow may cover the object and create a dangerous obstacle; (3) off-road objects present a limited risk to pedestrians; (4) overuse of signs can result in general disregard for all traffic control devices; (5) the county's limited financial resources; and (6) the culverts' lack of impact on the width or layout of the road.

Id. at 516. We reasoned that, in light of that evidence, the county

> failed to produce even one specific fact concerning a deliberative process that led to a "policy" decision to leave off-road culverts unmarked. Instead, as counsel for respondent conceded at oral argument, the engineer's decision to leave off-road culverts unmarked more closely resembles an established practice merely passed down from one county engineer to the next. This is borne out by current engineer Pettis's deposition testimony that he was told of this policy by the "sign man." An engineer's action in following a practice because the county has always followed that practice is not enough to prove that the policy was established through a deliberative process weighing social, economic, and political factors.

Id. at 515. We concluded that the county was not entitled to statutory discretionary immunity "because the county failed to produce evidence to prove when and how the

county went through a deliberative process balancing social, political, or economic considerations and not merely professional or scientific judgments to establish its policy." *Id*. at 516.

In this case, the county's evidence supporting its argument that it made a planning-type discretionary decision to not mark culverts in 2016 is substantially the same as its evidence in *Olmanson*. The same person was county engineer in 2000 and in 2016, and he has stated in an affidavit that, after becoming county engineer in 1999, he "decided to continue the County's longstanding policy concerning culvert signage" and did so because "the rationale for not signing that culvert or any other of the many culverts in the County had not changed." His deposition testimony is consistent with his affidavit: the county maintained its standard policy after the *Olmanson* accident and lawsuit for the same reasons that motivated the original adoption of the standard policy. The county's attorney asked the former county engineer, "Was there thought given after the *Olmanson* case to do anything different with that particular . . . crossing?" He answered simply, "No." This evidence fails to satisfy the legal standard we articulated in *Olmanson* because it is, as a practical matter, nothing more than a reiteration of the evidence that was inadequate in *Olmanson*, without any evidence of a different or an enhanced decision-making process.

For essentially the same reasons that were stated in our *Olmanson* opinion, we conclude that the county is not entitled to statutory discretionary immunity.

II. Official Immunity

The county also argues that the district court erred by denying its motion for summary judgment with respect to its defense of official immunity.

The common-law doctrine of official immunity provides that "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." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014) (alteration in original) (quotation omitted). The purpose of the official-immunity doctrine is to ensure that "individual government actors [are] able to perform their duties effectively, without fear of personal liability that might inhibit the exercise of their independent judgment." *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599-600 (Minn. 2016) (quotation omitted); *see also Elwood v. County of Rice*, 423 N.W.2d 671, 678 (Minn. 1988).

To determine whether a public official is entitled to official immunity, courts conduct a three-step inquiry. At the first step, courts identify "the conduct at issue." *Kariniemi*, 882 N.W.2d at 600. At the second step, a public official's conduct will be deemed discretionary in nature if it "requires the exercise of individual judgment in carrying out the official's duties." *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998). A public official's conduct will be deemed ministerial in nature if it arises from duties that are "'absolute, certain, and imperative, [and] involv[e] merely execution of a specific duty arising from fixed and designated facts,'" thereby "leaving nothing to the discretion of the official." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999) (alteration in original) (quoting *Cook v. Trovatten*, 274 N.W. 165, 167 (Minn. 1937)). At the third step of the analysis, a public official who engaged in discretionary conduct will be entitled to official immunity, unless his or her conduct was willful or malicious. *Kariniemi*, 882 N.W.2d at 600; *Kelly*, 598 N.W.2d at 664. Meanwhile, a public official

who engaged in ministerial conduct will be entitled to official immunity unless the ministerial duty "was either not performed or was performed negligently." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 660 (Minn. 2004). The doctrine of vicarious official immunity sometimes, but not always, protects a municipality from liability based on the conduct of an employee who is protected by official immunity. *Id.* at 663-65; *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998); *Meier v. City of Columbia Heights*, 686 N.W.2d 858, 866-67 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

In *Olmanson*, the county argued that its standard policy to not mark culverts in its rights-of-way was protected by the doctrine of vicarious official immunity. *Olmanson*, 673 N.W.2d at 516. This court rejected the argument, stating that "the creation of a policy is a planning-level decision and not operational conduct protected by official immunity." *Id.* at 516-17. We explained, "Official immunity would protect the county official who makes a discretionary operational decision while implementing the policy established at the planning level" but that "the record does not reveal, and the county does not argue, that any county employee made a discretionary decision in implementing the county's practice to leave off-road and small culverts unmarked." *Id.* at 517.

In this case, the county argues that it is entitled to official immunity for two reasons. First, it argues that its county engineer made discretionary decisions at the "operational level." Specifically, the county contends that its county engineer made a discretionary operational decision when, shortly after the *Olmanson* accident, he declined the country club's request to mark the culvert because, as the county asserts in its brief, "the specific

circumstances of this particular culvert did not warrant deviating from the County's general policy."

This contention is not supported by the evidentiary record. The county's evidence describing its standard policy does not indicate that the standard policy is subject to exceptions that may be made at the discretion of the county engineer. Rather, the county's evidence describing its standard policy indicates that the standard policy is *not* subject to such exceptions. But even if we were to accept the county's premise that its standard policy permits discretionary exceptions, there simply is no evidence that the county engineer actually exercised discretion when declining the country club's request after the *Olmanson* accident. An affidavit of a country club representative indicates that the county declined the request solely because "the County had chosen not to place signs or markers at any of the culverts in the County." The county has no other evidence on that issue because its then-county engineer has stated that he has no recollection of those communications between the county and the country club. In fact, his statement tends to contradict the county's contention because he stated, "If a conversation took place . . . , that conversation would be consistent with County policy." Thus, the county is not entitled to vicarious official immunity based on a discretionary operational decision to not make an exception to its standard policy when responding to the country club's request to mark the culvert.

Second, the county argues in the alternative that, even if its county engineer did not engage in discretionary operational conduct, he engaged in ministerial conduct for which he is entitled to official immunity on the ground that he complied with the county's standard policy. In support of its alternative argument, the county cites *Anderson*, which

was decided by the supreme court four months after this court's *Olmanson* opinion. The supreme court held in *Anderson* that a public official may be protected by official immunity for ministerial conduct "if that ministerial conduct was required by a protocol established through the exercise of discretionary judgment that would itself be protected by official immunity," unless the ministerial duty "was either not performed or was performed negligently." *Anderson*, 678 N.W.2d at 660; *see also Meier*, 686 N.W.2d at 863-64. The supreme court reasoned that a contrary rule would unfairly deny immunity to public employees who follow standard protocols and might discourage public entities from using professional judgment in establishing standard protocols. *See Anderson*, 678 N.W.2d at 660. As a consequence, a claim that a public employee should be liable for engaging in ministerial conduct by following a standard protocol "is in reality a challenge to the protocol itself," which raises the question "whether the adoption of the protocol was discretionary in the sense necessary" for official immunity. *Id.* at 661.

Applying *Anderson* to the county's alternative argument, we note that the evidence shows that the county engineer followed the county's standard policy at all relevant times with respect to the culvert at issue in this appeal. As far as the record reveals, he did so simply because the standard policy had been established. Accordingly, the county engineer's conduct must be deemed ministerial. *See Wiederholt*, 581 N.W.2d at 316. As the supreme court stated in *Anderson*, a municipal official or employee "does not forfeit official immunity because his or her conduct was ministerial if that ministerial conduct was required by a protocol established through the exercise of discretionary judgment that would itself be protected by official immunity." 678 N.W.2d at 660. A municipal official

or employee is not entitled to official immunity for his or her ministerial conduct only if "a ministerial duty was either not performed or was performed negligently." *Id.* In this case, there is no such evidence.

According to *Anderson*, the Wenkers' claims are, in reality, a challenge to the standard policy itself. *See id.* at 661. "The question then is whether the adoption of the protocol was discretionary in the sense necessary to give rise to common law official immunity." *Id.* In *Anderson*, the supreme court took pains to emphasize that the relevant question was "whether the adoption of the protocol involved operational-level discretion sufficient for common law official immunity," which is distinct from the question whether the protocol was a policy-level decision deserving of statutory discretionary immunity. *Id.* at 661 n.10. The supreme court answered that question in *Anderson* by reasoning that "both the decision to establish a protocol and the decision regarding the substance of the protocol . . . involved the exercise of . . . professional judgment." *Id.* at 661. "Therefore, professional judgment was required . . . ." *Id.* In essence, the operational-level decision, which otherwise might appear to be a ministerial action in light of an established protocol, is deemed to be discretionary in nature because of the discretionary nature of the formulation of the protocol. *See id.* at 661. The supreme court concluded that the employee was entitled to official immunity. *Id.* at 663. Similarly, this court in *Meier* applied *Anderson* toward the same end by reasoning that "the discretionary nature of adopting or creating" certain policies "is more than sufficient to satisfy the application of official immunity." 686 N.W.2d at 865.

To reiterate, "[t]he question . . . is whether the adoption of the [county's standard policy] was discretionary in the sense necessary to give rise to common law official immunity." *Anderson*, 678 N.W.2d at 661. To answer that question, we are naturally inclined to refer to our *Olmanson* opinion, in which we rejected the county's argument that it was entitled to vicarious official immunity. *See Olmanson*, 673 N.W.2d at 516-17. But our *Olmanson* opinion was issued before the supreme court's opinion in *Anderson*. The county suggests that this court would have decided *Olmanson* differently if we had had the benefit of *Anderson*, which, the county asserts, "clarified the nature of official immunity when acting in compliance with a governmental policy." The point is well taken. In fact, in *Meier*, this court recognized that *Anderson* made a significant change in the caselaw. We stated that "the supreme court expanded the application of official immunity to include ministerial duties, unless an employee fails to perform, or negligently performs, such a duty." 686 N.W.2d at 864. We also stated that "*Anderson* shifts the focus to the policy itself, not its application." *Id.*

In both *Anderson* and *Meier*, the discretionary adoption of a policy clothed a ministerial action made in conformance with the policy with the discretion necessary for the protection of the official-immunity doctrine. *See Anderson*, 678 N.W.2d at 660; *Meier*, 686 N.W.2d at 864. That reasoning is inconsistent with our reasoning in *Olmanson*, in which we stated that "the creation of a policy is a planning-level decision and not operational conduct protected by official immunity." *Olmanson*, 673 N.W.2d at 516-17. In effect, that part of our *Olmanson* opinion was overruled by *Anderson*. Consistent with *Anderson* and *Meier*, the county's adoption of its standard policy of not marking culverts

is sufficiently discretionary to protect the otherwise ministerial action of implementing the standard policy without exception, including the decision to not install a marker at the culvert when the country club requested it. *See Anderson*, 678 N.W.2d at 660; *Meier*, 686 N.W.2d at 864. Accordingly, the county engineer's ministerial conduct is entitled to official immunity.

The question remains whether the county is entitled to vicarious official immunity. *See Anderson*, 678 N.W.2d at 663-65. In *Anderson*, the supreme court decided that the school district was entitled to vicarious official immunity because it had proactively taken steps to adopt a protocol "based on the collective knowledge and experience of the staff." *Id.* at 664. Similarly, the county engaged in a discretionary process of establishing and maintaining a standard policy of not marking culverts in its rights-of-way based on identified factors. Even if the formation of that standard policy did not involve the "balancing [of] social, political, or economic considerations," *Olmanson*, 673 N.W.2d at 516, it is sufficiently discretionary to warrant the application of vicarious official immunity, s*ee Anderson*, 678 N.W.2d at 660.

Thus, the county is entitled to vicarious official immunity.

III. Statutory Highway Right-of-Way Immunity

The county argues that the district court erred by denying its motion for summary judgment with respect to its defense of statutory highway right-of-way immunity.

One of the statutory exceptions to municipal liability is highway right-of-way immunity, which provides as follows:

> Any claim for a loss involving or arising out of the use or operation of a recreational motor vehicle, as defined in section 84.90, subdivision 1, within the right-of-way of a road or highway as defined in section 160.02, subdivision 26, except that the municipality is liable for conduct that would entitle a trespasser to damages against a private person.

Minn. Stat. § 466.03, subd. 22. The term "recreational motor vehicle" is defined in section 84.90, subdivision 1, to expressly include snowmobiles. Minn. Stat. § 84.90, subd. 1 (2018).

In this case, the parties dispute the applicability of the last clause of the statute, which refers to conduct that would allow a trespasser to recover damages. The liability-to-trespassers standard is incorporated into other statutory immunities, including the statutory immunity for the construction, operation, and maintenance of municipal parks and recreational areas. *See* Minn. Stat. § 466.03, subd. 6e (2018). In applying the liability-to-trespassers exception in subdivision 6e, the supreme court has adopted section 335 of the *Restatement (Second) of Torts*. *See Steinke*, 525 N.W.2d at 176; *Johnson v. Washington County*, 518 N.W.2d 594, 599 (Minn. 1994). Section 335 provides:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if
>
> (a) the condition
>
> (i) is one which the possessor has created or maintains and
>
> (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and

> (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Steinke, 525 N.W.2d at 176-77 (quoting Restatement (Second) of Torts § 335 (1965)).

The district court rejected the county's argument for statutory highway right-of-way immunity on the ground that there were genuine issues of material fact with respect to "the County's knowledge of the frequency of snowmobile traffic" and "the County's knowledge with regard to the inherent dangers concerning this particular culvert." On appeal, the county challenges the district court's analysis of those two issues, and the county also renews its argument that the culvert was obvious and visible.

We begin with the county's argument that it had no knowledge that trespassers constantly intruded on its highway right-of-way. The county contends that there is no evidence in the summary-judgment record that the county knew of constant intrusions by snowmobiles in the location of the culvert or knew of facts that should have caused the county to know of constant intrusions. In response, the Wenkers contend that "[f]acts within the County's knowledge establish, at minimum, constructive knowledge of constant intrusion by snowmobilers." We note that constructive knowledge is not the applicable standard. The term "constructive knowledge" generally means the "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law." *Black's Law Dictionary* 1004 (10th ed. 2014). To apply the constructive-knowledge standard would impose on the county a duty to inquire into whether snowmobilers were

constantly intruding on its highway right-of-way near the culvert and to impute to the county knowledge of any such constant intrusions, even if the county was not actually aware of constant intrusions and not actually aware of facts from which constant intrusions may be inferred. Such a duty is inconsistent with the statute and the caselaw interpreting the statute. Section 335 of the *Restatement* does not impose a duty to inquire but, rather, is concerned only with actual knowledge. The relevant inquiry is whether a possessor of land "'knows, or from facts within [its] knowledge should know, that trespassers constantly intrude upon a limited area of the land.'" *Steinke*, 525 N.W.2d at 176-77 (quoting Restatement (Second) of Torts § 335 (1965)). The two standards are different. *See Ariola v. City of Stillwater*, 889 N.W.2d 340, 355-56 (Minn. App. 2017), *review denied* (Minn. Apr. 18, 2017).

The Wenkers contend that, in several ways, the record contains evidence sufficient to create a genuine issue of material fact on this issue. Their primary contention is that personnel associated with the country club were aware of constant intrusions by snowmobilers and that, "if Shoreland was well aware, the county had every reason to be well aware too." This contention stretches the evidence too far. Regardless what knowledge Shoreland had concerning constant intrusions by snowmobilers on the county's highway right-of-way at the culvert tunnel, there is no basis for imputing Shoreland's knowledge to the county without evidence that Shoreland actually informed the county of constant intrusions or facts from which constant intrusions should have been inferred. As the county argues, there is no evidence that Shoreland personnel did so. During depositions, the Wenkers' counsel asked one Shoreland employee, the head

superintendent, whether he had informed the county of constant snowmobile intrusions, and he answered in the negative. To be sure, the county was aware of one intrusion, which led to the *Olmanson* lawsuit. But one intrusion in a 16-year period is an insufficient basis from which to prove constant intrusions. The Wenkers simply do not have any evidence that the country club informed the county of constant intrusions by snowmobilers or informed the county of facts from which such constant intrusions should have been inferred.

The Wenkers also contend that the county had the requisite knowledge on the ground that the ditches alongside County Road 21 are "open to view from the roadway" such that "any County officer or employee travelling, snowplowing, or otherwise maintaining the road" would know of constant intrusions by snowmobilers. The mere fact that it is possible for county personnel to observe the ditches along County Road 21 does not mean that they actually did so. The Wenkers' contention would require a factfinder to speculate as to whether county personnel driving on County Road 21 actually looked at the ditches and to further speculate about what such persons might have observed.

The Wenkers contend further that the county is aware that snowmobilers in general often travel on ditches alongside county roads. But the Wenkers must prove that the county knew or should have known that "'trespassers constantly intrude *upon a limited area of the land*,'" which means the particular place at which Wenker was injured, not any and all highway rights-of-way throughout the county. *See Steinke*, 525 N.W.2d at 176-77 (emphasis added) (quoting Restatement (Second) of Torts § 335 (1965)). The Wenkers cannot satisfy their burden with evidence that is only generally concerned with

snowmobiling along county roads throughout the county. If that were so, counties rarely would receive the benefits of the statutory highway right-of-way immunity.

Thus, the Wenkers do not have evidence sufficient to create a genuine issue of material fact as to whether the county "kn[ew], or from facts within [its] knowledge should [have] know[n], that trespassers constantly intrude[d] upon a limited area of the land," *i.e.*, that snowmobilers constantly used the ditch alongside County Road 21 in the location of the country club's culvert tunnel. *See Johnson*, 518 N.W.2d at 599 (quotation omitted). That is a sufficient basis for the conclusion that the county is entitled to statutory highway right-of-way immunity. Accordingly, we need not consider the county's arguments that the culvert was not inherently dangerous or that the culvert was obvious and visible.

In sum, the district court did not err by denying the county's summary-judgment motion with respect to its assertion of statutory discretionary immunity. But the district court erred by denying the county's summary-judgment motion with respect to its assertion of common-law official immunity and statutory highway right-of-way immunity.

Reversed.