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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1593**

Brent Bartman,
as Trustee for the heirs and next of kin of Patrick Bartman,
Respondent,

vs.

City of Worthington,
Appellant,

Lorain Township,
Respondent,

Worthington Township,
Defendant.

**Filed May 3, 2011
Reversed
Peterson, Judge**

Nobles County District Court
File No. 53-CV-09-1006

Kevin John Wetherille, Jaspers, Moriarty & Walburg, P.A., Shakopee, Minnesota (for respondent Bartman)

Rylee Johannah Retzer, League of Minnesota Cities, St. Paul, Minnesota (for appellant)

William Lawrence Davidson, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent Lorain Township)

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Appellant city challenges an order denying its motion for summary judgment in a wrongful-death action on the ground of official immunity, arguing that the public-works superintendent is protected by official immunity because he exercised discretionary decision-making in deciding to remove guardrails from a bridge and replace them with reflective delineators. We reverse.

FACTS

This lawsuit arose out of an accident in which two people died when the car that they were in left Bridge 2267 (the bridge) and went into a creek. The bridge is located on Read Avenue, a gravel road that runs north and south along the border between Worthington Township and respondent Lorain Township. The bridge is a one-lane, concrete structure that had iron railings running along both sides of its 25-foot span when it was originally constructed in 1936. Under a 2005 agreement between Worthington Township and appellant City of Worthington (the city), the city agreed to maintain and plow the road surface of Read Avenue. Lorain Township continued to be responsible for the bridge structure. James Laffrenzen, the city's public-works superintendent, testified that the 2005 agreement was an oral agreement entered into by the city administrator and that he was not present when the agreement was made.

Beginning in 1982 and continuing through 2003, bridge-inspection reports described the railings as "racked and bent." After the city assumed responsibility for maintaining Read Avenue, Laffrenzen looked at the bridge and noticed that the railings

were damaged. Laffrenzen's job description includes having "functional responsibility for the maintenance and improvement of all city streets."

Laffrenzen testified in a deposition that he sought expert advice about the damaged railings from City Engineer Dwayne Haffield on whether repairs were needed and who would be responsible for any repairs. Laffrenzen testified:

I noticed that bridge and I noticed the railings. Not knowing whose responsibility, I had no knowledge of who was taking care of it, I went to the city engineer and asked him if he was aware under his expertise of do we handle this, does Nobles County handle this? I don't know whose responsibility it is, I have no idea.

Haffield contacted Steve Schnieder, a Nobles County engineer, about the bridge railings. Haffield testified in a deposition that he contacted Schnieder because the city relies "on the county for their expertise in bridge inspections and reporting to us on what we have jurisdiction over, [so] it was logical to go to the best resource we had available." Haffield testified that he was seeking "a recommendation as the proper way to handle it."

Schnieder sent Haffield an e-mail that states:

What I saw from the pictures on file, the railing has not been maintained and does not provide for any safety for vehicles due to the design. I recommend that the railings be removed since they present a hazard in their current condition. A more important item is the installation of the bridge end delineators. Getting the delineators replaced should be the concern. The delineators can be installed back to back on the same post at opposite corners of the structure. This saves on posts and allows for wider loads to zigzag around the delineators. Having no delineators is the greater liability than the railings.

Based on Schnieder's recommendation, Laffrenzen instructed a city employee to remove the railings from and install delineators on the bridge. When asked about the city taking on this project when another entity had always been responsible for the bridge, Laffrenzen testified: "[W]e work cooperatively together. I mean we work with Nobles County, Nobles County works with us. We work with Worthington Township, Worthington Township works with us. So there's always that cooperative -- unwritten cooperative agreement that we do." Laffrenzen explained that, although his department is governed by written policies, it also operates under policies that have been discussed but not formally approved. Laffrenzen testified that after the delineators were installed, he did not have the understanding that the city would continue maintaining the bridge and that he assumed another entity would have that responsibility because he did not receive any reports on the bridge.

Respondent Brent Bartman (respondent), as trustee for the heirs and next of kin of Patrick Bartman, brought this wrongful-death action against the city, Lorain Township, and Worthington Township, alleging that negligent maintenance of the bridge caused Patrick Bartman's death. The district court dismissed the claim against Worthington Township because there was no evidence that Worthington Township exercised any control or authority over the bridge. The city and Lorain Township moved for summary judgment on the grounds of statutory and vicarious official immunity and insufficient evidence to create a genuine issue of material fact on causation. The district court denied the summary-judgment motions based on its conclusions that the evidence was sufficient to create a genuine issue of material fact as to whether the lack of guardrails on the bridge

caused the accident; there was no evidence that Lorain Township ever considered replacing the guardrails, so immunity could not apply to Lorain Township because no decision was ever made; and Laffrenzen was not protected by official immunity and, therefore, the city was not protected by vicarious official immunity because the decision to remove the railings was made by a county engineer, not by Laffrenzen.

The city appealed, challenging the district court's conclusions on causation and official immunity but not statutory immunity. Lorain Township filed a notice of related appeal, challenging the district court's conclusion on causation but not immunity. This court dismissed the challenges to causation because the issue was not inextricably intertwined with the immunity issue.

D E C I S I O N

“An order denying summary judgment on immunity grounds is immediately appealable.” *Mumm v. Morrison*, 708 N.W.2d 475, 481 (Minn. 2006). A court reviewing denial of summary judgment must determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Id.* A genuine issue of fact exists when the evidence permits “reasonable persons to draw different conclusions.” *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008) (quotation omitted). “When reviewing a summary judgment ruling, [this court] must consider the evidence in the light most favorable to the nonmoving party.” *Mumm*, 708 N.W.2d at 481.

Whether official immunity applies is a question of law, which this court reviews de novo. *Sletten v. Ramsey Cnty.*, 675 N.W.2d 291, 299 (Minn. 2004). But a court

cannot decide the legal question of immunity until genuine disputes regarding predicate facts are resolved. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 675 (Minn. 2006). “The party asserting immunity has the burden of showing particular facts demonstrating an entitlement to immunity.” *Meier v. City of Columbia Heights*, 686 N.W.2d 858, 863 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

“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. Cnty. of Rice*, 423 N.W.2d 671, 678 (Minn. 1988). “If a public official is entitled to immunity for a discretionary act, the employing entity is generally entitled to vicarious official immunity as well.” *Fear v. Indep. Sch. Dist. No. 911*, 634 N.W.2d 204, 216 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

Official immunity involves discretion that is exercised on an operational rather than a policymaking level. *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 901 (Minn. App. 2009). “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. Ministerial duties have been defined as “absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.” *Id.* (quotation omitted). To determine whether conduct

is discretionary or ministerial, a court must examine the “nature, quality and complexity” of a decision-making process. *Duellman v. Erwin*, 522 N.W.2d 377, 379 (Minn. App. 1994) (quotation omitted), *review denied* (Minn. Dec. 20, 1994).

Citing Laffrenzen’s testimony that he “was not making a decision” and was “not making that judgment call,” respondent argues that Laffrenzen is not protected by official immunity because he acted on the county engineer’s recommendation and Laffrenzen’s conduct was to instruct another city employee to cut the railings off the bridge. We disagree. After seeing that the bridge railings were in disrepair, Laffrenzen sought advice from the city engineer about what entity was responsible for making repairs, and the city engineer obtained a recommendation from a county engineer about how to proceed. In making the recommendation, the county engineer was merely giving advice, and the district court, therefore, erred in concluding that the county engineer made the decision to remove and not replace the railings. It was Laffrenzen who made the decision, based on the information he had collected, to follow the county engineer’s recommendation, and that decision was discretionary conduct protected by official immunity. *See Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 506 (Minn. 2006) (concluding that, when county had policy permitting but not requiring graders to be operated against traffic, operator’s decision to operate grader against traffic was discretionary); *Ireland v. Crow’s Nest Yachts, Inc.*, 552 N.W.2d 269, 272-74 (Minn. App. 1996) (concluding that official immunity applied to traffic engineer’s decisions regarding whether to post advisory speed plate before curve, where to place stop-ahead sign, and maintenance and repair of rumble strips), *review denied* (Minn. Sept. 20, 1996).

Citing *Janklow v. Minn. Bd. of Exam'rs for Nursing Home Adm'rs*, 552 N.W.2d 711, 715 (Minn. 1996), respondent argues that even if Laffrenzen made a discretionary decision, official immunity does not apply because the decision was outside the course of his official duties. But it is undisputed that the city was responsible for maintaining the roadway's surface. In carrying out that responsibility, Laffrenzen saw that the bridge railings were in disrepair and decided to address the problem. Laffrenzen determined that doing so was within his authority under the informal cooperative agreement between the city and other municipal entities. The essence of an informal agreement is that its terms are not clearly defined, and, therefore, Laffrenzen's determination that he had authority to repair the bridge was discretionary. Even if Laffrenzen incorrectly determined the extent of his authority under the informal agreement, the record contains no evidence that indicates that he did so willfully. The district court, therefore, erred in determining that Laffrenzen's conduct was not protected by official immunity and denying the city's summary-judgment motion.¹

Reversed.

¹ Respondent does not dispute that, if Laffrenzen's conduct was protected by official immunity, the city is entitled to vicarious official immunity. We, therefore, need not address that issue.