STATE OF MINNESOTA
IN COURT OF APPEALS
A07-232

Neng Por Yang,
Appellant,

vs.

Terry Nutter,
Defendant,

Minneapolis Police Department,
Respondent.

Filed January 22, 2008
Affirmed
Willis, Judge

Hennepin County District Court
File No. 27-CV-06-5454

Neng Por Yang, 420 Queen Avenue North, Minneapolis, MN 55405 (pro se appellant)

Jay M. Heffern, Minneapolis City Attorney, C. Lynne Fundingsland, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402 (for respondent)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright, Judge.

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

WILLIS, Judge

Pro se appellant alleges that the district court erred by granting respondent City of Minneapolis's motion for summary judgment. Because the district court properly applied the law, we affirm.

FACTS

On November 8, 2004, the brother of appellant Neng Por Yang called the Minneapolis Police Department for help and reported that Yang had "mental issues, that [he] had been to the hospital for mental issues, and that [he] was a very dangerous male." About ten minutes later, Yang's sister-in-law called the police and told them that she was afraid of Yang and that Yang was threatening to kill members of her family.

Officers Terry Nutter and Anthony Leone arrived at the home where Yang lived and were met by members of Yang's family. Yang's relatives told the officers that Yang had stopped taking his medication and that he needed mental-health treatment. After the officers found Yang in the home's basement, Officer Nutter placed Yang in handcuffs. Officer Leone also discovered a box of 9-mm handgun ammunition in the basement.

The officers then took Yang to Hennepin County Medical Center for evaluation on a protective hold. Yang remained at the hospital until his release in January 2005.

Proceeding pro se, Yang sued the Minneapolis Police Department and Officer Nutter in July 2006 for claims based on the November 2004 incident. Although Yang's claims were "difficult to ascertain from his pleadings," the district court characterized them as alleged violations of the Fourth Amendment to the United States Constitution

brought under 42 U.S.C. § 1983 and state-law tort claims, including false arrest and battery. In October 2006, Yang voluntarily dismissed his claims against Officer Nutter. The district court determined that the city was the proper defendant because a police department, as a subdivision of a municipal corporation, cannot be sued. In January 2007, the district court granted the city's motion for summary judgment, and Yang appeals.

D E C I S I O N

Although Yang's arguments on appeal are not altogether clear from his brief, it appears that he contends that the district court improperly applied the law and that it relied on dates that are unsupported by the record when it granted the city's motion for summary judgment. We address first Yang's claim that the district court improperly applied the law.

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). No genuine issue of material fact exists when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). We review the evidence in the light most favorable to the party against whom judgment was granted. *Fabio*, 504 N.W.2d at 761.

I. The district court properly applied the law in granting summary judgment to the city.

A. Yang's federal claim

Yang argues that the district court erroneously granted summary judgment to the city on his claim that the police officers unreasonably seized him. The district court determined that Yang's complaint did not include "any factual allegations upon which any inference can be drawn that the conduct complained of resulted from an unconstitutional policy or custom." And because the district court concluded that a city cannot be held liable on a respondeat superior theory unless the plaintiff alleges that officers acted according to an official policy or custom, the district court determined that the city was not vicariously liable for the actions of its officers, relying on *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037 (1978).

In what the district court characterized as a § 1983 claim, Yang alleges that the officers violated his Fourth Amendment rights by handcuffing him and taking him to the hospital. The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Notwithstanding these rights, a municipality "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037. Instead, it is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, 98 S. Ct. at 2037-38. A plaintiff must prove, therefore,

that a municipal policy or custom was the "moving force [behind] the constitutional violation." *Id*. at 694-95, 98 S. Ct. at 2037.

Yang did not allege, much less prove, that his seizure was the result of an official policy or custom that violated his constitutional rights. The term "official policy" means a "deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters." *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). Yang's complaint is devoid of any allegations that police policy required the officers to act in a manner that would violate Yang's constitutional rights. Yang's complaint alleges only that the individual officers improperly arrested and detained him.

Because Yang's complaint does not allege that the officers were acting in accordance with a policy that violated his constitutional rights, we next consider whether Yang alleged that the officers acted in accord with an unconstitutional municipal custom. *Mettler*, 165 F.3d at 1204. A plaintiff must satisfy three requirements to show an unconstitutional municipal custom: (1) the existence of a continuing, widespread, and persistent pattern of unconstitutional misconduct by the government entity's employees; (2) deliberate indifference to, or tacit authorization of, such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) injury to the plaintiff by acts in accordance with the governmental entity's custom, that is, proof that the custom was the moving force behind the constitutional violation. *Id.*; *Jane Doe A v. Special Sch. Dist.*, 901 F.2d 642, 646 (8th Cir. 1990).

Yang has satisfied none of these requirements. Although he believes that federal and state law-enforcement officers, in combination with his brother, are conspiring against

him, he has not alleged that officers have falsely arrested him in the past or that the police department wrongly seizes individuals as a matter of custom. And because Yang has not alleged an unconstitutional municipal custom, he necessarily has not alleged a pattern of misconduct to which the officers' supervisors could act with deliberate indifference or tacitly authorize. And finally, Yang has not alleged that he suffered any injury as a result of a municipal custom that violated his constitutional rights. Because Yang's complaint lacks the specific allegations that are required to maintain a § 1983 claim against the city, the district court did not err by granting summary judgment to the city.

B. Yang's state-law claims

Yang argues next that the district court erred by granting summary judgment to the city on his state-law tort claims. Minnesota's Tort Claims Act allows a municipality, such as the city, to be held liable for the torts of its officials, subject to certain exceptions. *See* Minn. Stat. § 466.02 (2006). But if official immunity protects the government official from personal liability, then the municipality "will not be liable for its employee's torts under [section 466.02] or under common law respondeat superior." *Watson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 414 (Minn. 1996). Whether official immunity applies is a question of law, which this court reviews de novo. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006).

Official immunity shields a public official from liability when the official is "charged by law with duties which call for the exercise of his judgment or discretion . . . unless he is guilty of a willful or malicious wrong." *Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988) (quotation omitted). Official immunity ensures that "the

threat of potential liability does not unduly inhibit the exercise of discretion required of public officers in the discharge of their duties." *Watson*, 553 N.W.2d at 414 (quotation omitted). Official immunity attaches when government officials engage in conduct that requires "something more than the performance of ministerial duties." *Id.* (quotation omitted). That is, official immunity does not apply if an official's acts are merely ministerial. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). An official's conduct is ministerial when it is "'absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.'" *Watson*, 553 N.W.2d at 414 (quoting *Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937)).

We conclude that the officers are protected by official immunity here. The officers were performing discretionary—not ministerial—acts when they detained Yang and transported him to the hospital. *See Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998) (describing a discretionary act as one involving professional judgment by officials based on the specific "factors of a situation"). The officers' decision to handcuff Yang and take him to the hospital was based on specific information the officers had received regarding the situation that they faced. Yang's family had reported to police that Yang had physically threatened them, was mentally unstable, and refused to take his medication. *Cf. Elwood*, 423 N.W.2d at 678-79 (concluding that the police detention of individuals in a potentially violent domestic dispute was a discretionary act that was protected by official immunity); *Hyatt v. Anoka Police Dep't*, 700 N.W.2d 502, 508 (Minn. App. 2005) (holding that officers' release of a police dog to assist in arrest was a

discretionary act and protected by official immunity). Because police officers need latitude to resolve dangerous and unpredictable situations, we conclude that the officers' acts here were discretionary.

But we must also consider whether the officers' acts were willful or malicious wrongs. *See Elwood*, 423 N.W.2d at 677; *Watson*, 553 N.W.2d at 414 n.3. The terms "willful" and "malicious" are synonymous in the official-immunity context. *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). Those terms refer to "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). To defeat summary judgment, a plaintiff must do more than rely on mere allegations of malice; he must present specific facts showing that the official knew what he was doing lacked legal justification. *Reuter v. City of New Hope*, 449 N.W.2d 745, 751 (Minn. App. 1990), *review denied* (Minn. Feb. 28, 1990).

Yang has not alleged facts to establish that the officers knew that what they were doing lacked legal justification when they handcuffed him and transported him to the hospital on November 8, 2004. And it is undisputed that Yang's relatives had called for police assistance because Yang was threatening to kill them. The officers, therefore, had reason to believe that Yang was a danger to himself and others. Even viewing the facts in the light most favorable to Yang, no reasonable jury could find that the officers' acts were willful or malicious wrongs. *See DLH, Inc.*, 566 N.W.2d at 69.

Because the police officers here were performing discretionary acts and because there is no evidence that they acted maliciously, we conclude that they are protected from liability by official immunity. And because the officers are protected by official immunity,

the city is not vicariously liable for their actions. *See Watson*, 553 N.W.2d at 414. The district court did not err by granting summary judgment to the city on Yang's state-law claims.

II. Minor factual errors in the district court's order did not prejudice Yang.

Yang also claims that there are several erroneous dates in the district court's order granting summary judgment to the city. While it appears that there are in fact typographical errors in several dates that appear in the order, this court will reverse a district court ruling only if an appellant can show both error and prejudice. *See, e.g.*, *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *State v. Thomas*, 467 N.W.2d 324, 326-27 (Minn. App. 1991). Because Yang does not show any prejudice resulting from the typographical errors in the order, we decline to reverse on this basis.

Affirmed.