STATE OF MINNESOTA
IN COURT OF APPEALS
A07-870

James Terrell, as trustee for the heirs
and next-of-kin of Talena Terrell, deceased,
Appellant,

vs.

Brek Andrew Larson, individually and in his
capacity as an Anoka County Sheriff's Deputy,
Respondent.

Filed May 27, 2008
Affirmed
Johnson, Judge

Anoka County District Court
File No. 02-C4-01-009200

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Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Talena Terrell died as the result of a collision at the intersection of Highway 65 and County Road 18 in Anoka County when the car she was driving was struck by a

pickup truck driven at high speeds by a deputy sheriff in response to a report of a potentially violent domestic dispute. Five years later, Terrell's husband, James Terrell, commenced this lawsuit against Deputy Sheriff Brek Andrew Larson, the driver of the pickup truck. The district court denied Deputy Larson's motion for judgment on the pleadings based on the statute of limitations, but the district court later granted Deputy Larson's motion for summary judgment based on official immunity.

We conclude that Terrell's claim is not time-barred because the applicable statute of limitations was tolled by a federal statute. We further conclude that summary judgment was proper because neither a state statute nor Anoka County policies required Deputy Larson to refrain from responding to the domestic disturbance report or to drive through the intersection at slower speeds. Therefore, we affirm the entry of summary judgment in favor of Deputy Larson.

FACTS

On the evening of December 29, 2000, at approximately 10:00 p.m., the Anoka County Sherriff's Office (ACSO) received a report of a domestic disturbance in East Bethel. The caller reported that his wife had locked herself and their small child in a room at their residence and had threatened to harm the child. The report was categorized as "level three," which means "very high priority."

Deputy Larson and a trainee, Deputy Shawn Longen, were at the Ham Lake substation when they heard the report. The East Bethel residence was in an area for which Deputy Larson had back-up responsibility. Deputy Larson radioed to the dispatcher to say that he and Deputy Longen would back up the responding squad. A

second squad that was closer to the residence notified the dispatcher that it would provide back-up. The dispatcher then radioed to Deputy Larson's squad, saying, "You can cancel." Deputy Larson replied by saying to the second squad and the dispatcher, "We'll continue." The dispatcher reiterated the information by saying, "I covered you." Deputy Larson repeated his earlier statement, "We'll continue."

Deputy Larson rushed toward East Bethel in a sheriff's department pickup truck at speeds as high as 90 to 95 m.p.h. as he drove north on Highway 65, with flashing lights and sirens activated. There was slush on the road that evening. As he approached the intersection with County Road 18 (also known as Crosstown Boulevard), he observed flashing yellow lights, which are located approximately two-tenths of a mile before the intersection, indicating that the stoplight soon would turn red. According to Deputy Larson, he slowed down so that by the time he was halfway between the flashing lights and the intersection, he had reduced his speed to between 30 and 45 m.p.h., but he then accelerated after ascertaining that it was safe to do so. According to certain evidence offered by Terrell (which is discussed in more detail below), Deputy Larson did not slow down as he approached the intersection. In any event, it is undisputed that Deputy Larson proceeded through the intersection after the light had turned red.

At the intersection, Talena Terrell pulled forward into the intersection from east to west after her stoplight turned green. Deputy Larson's pickup truck struck the Terrell car on the driver-side door at an estimated speed of 60 to 65 m.p.h. Tragically, Terrell soon died of injuries sustained in the collision. *See Terrell v. Larson*, 396 F.3d 975, 977 (8th Cir. 2005) (en banc).

In July 2001, Talena Terrell's husband, James Terrell, sued Deputy Larson in the United States District Court for the District of Minnesota pursuant to 42 U.S.C. § 1983. The federal district court denied Deputy Larson's motion for summary judgment based on qualified immunity. On February 4, 2005, on interlocutory appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court, holding that Deputy Larson was entitled to qualified immunity. *Terrell*, 396 F.3d at 980-81. On remand, the federal district court dismissed the federal claims in an order dated May 19, 2005, and the state-law claims in a second order, dated August 24, 2005.

On February 1, 2006, approximately five months after the federal district court's dismissal of the state-law claims, Terrell commenced this action against Deputy Larson in the Anoka County District Court. In July 2006, the district court denied Deputy Larson's motion seeking dismissal based on the statute of limitations. But in March 2007, the district court granted Deputy Larson's motion for summary judgment, holding that Deputy Larson's actions were protected under the doctrine of official immunity.

Terrell appeals from the grant of summary judgment in favor of Deputy Larson. By notice of review, Deputy Larson appeals from the district court's denial of his earlier motion for judgment on the pleadings.

D E C I S I O N

I. Official Immunity

The district court granted Deputy Larson's motion for summary judgment on the ground that his actions were protected by the doctrine of official immunity. Generally, when law enforcement officers respond to emergencies, their conduct is shielded by the

doctrine of official immunity because "emergency conditions" offer "little time for reflection" and often involve "incomplete and confusing information" so that the situation requires "the exercise of significant, independent judgment and discretion." *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992). But Terrell argues that summary judgment was improper because a state statute and ACSO department policies imposed ministerial duties on Deputy Larson in two ways: first, to discontinue his response to the report upon learning that other squads would respond before him and, second, to slow down and remain at a slow speed while driving through the intersection.

Summary judgment is appropriate where "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." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "On appeal, [we] must view the evidence in the light most favorable to the party against whom judgment was granted." *Id.* If there are genuine issues of material fact, such as predicate facts material to the qualified immunity issue, summary judgment will be reversed. *See Thompson v. City of Minneapolis*, 707 N.W.2d 669, 675 (Minn. 2006). Furthermore, the applicability of official immunity is a question of law that we review de novo. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004).

Under the doctrine of official immunity, "a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988) (quotations omitted). An official may be held liable, however, for injuries resulting from the execution of ministerial duties,

which are duties that are "absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Id.* (quotations omitted). A ministerial duty may arise from either written policies or unwritten protocols. *See Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998) (holding that city ordinance imposed ministerial duty on sidewalk inspector to immediately repair broken sidewalk slabs); *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 657-59 (Minn. 2004) (holding that unwritten protocol imposed ministerial duty on high school teacher concerning safe operation of table saw). The purpose of the official immunity doctrine is to free officials from the fear of personal liability that might "deter independent action and impair effective performance of their duties." *Elwood*, 423 N.W.2d at 678.

The supreme court recently considered the doctrine of official immunity in two cases arising from accidents caused by law-enforcement vehicles driving at high speeds. In *Thompson v. City of Minneapolis*, a police department policy provided that "officers shall use red lights and siren in a continuous manner for any emergency driving or vehicular pursuit." 707 N.W.2d at 674 n.2. Police officers conducted a high-speed chase without continuously operating their siren and emergency lights, and the driver of the vehicle being chased ran a red light and hit a pedestrian. *Id.* at 671. The supreme court held that the written policy imposed a ministerial duty on officers such that they were not entitled to official immunity from suit for injuries resulting from a failure to comply with the policy. *Id.* at 675. The court reasoned that the police department's policy was

"absolute, certain, and imperative" because it left officers no discretion as to whether to operate emergency lights and siren during pursuit of a suspect. *Id.* at 674-75.

Similarly, in *Mumm v. Mornson*, 708 N.W.2d 475 (Minn. 2006), the policy at issue provided that officers "shall not initiate a pursuit or shall discontinue a pursuit in progress whenever . . . the officer can establish the identification of the offender so that an apprehension can be made at another time unless the crime is" a violent one. *Id.* at 491. The officers confronted a suicidal woman in her therapist's parking lot and pursued her after she drove away. *Id.* at 479. The officers conceded that they knew the driver's identity and did not suspect her of any violent crimes. *Id.* at 491. The supreme court held that the department policy imposed a narrow, definite, and mandatory duty to refrain from, or to discontinue, pursuit. *Id.* at 491-92. Thus, the court held that police officers were not entitled to official immunity when they pursued an identified suspect because a policy prohibited pursuit of the car of a suspect whose identity is known. *Id.* at 492.

The first analytical step when applying the doctrine of official immunity is to determine the governmental conduct at issue. *Id.* at 490. Terrell alleges that Deputy Larson violated ministerial duties on the night of the accident in two ways: first, continuing his response to the report of a domestic disturbance even though other squads were responding and, second, not slowing down but re-accelerating before driving through the intersection. We will discuss each argument in turn.

A. Deputy Larson's Decision to Respond to Report

The district court held that Deputy Larson's decision to continue to respond to the domestic-disturbance report was within his discretion and, thus, protected by official

immunity. On appeal, Terrell does not challenge Deputy Larson's initial decision to respond to the report. It appears unassailable that Deputy Larson reasonably determined that the report of a domestic disturbance is within the ACSO's definition of "an emergency." But Terrell argues that a written policy of the sheriff department imposed a ministerial duty on Deputy Larson to discontinue his response after he learned that other squads were responding and would arrive at the scene before him.

The ACSO policy manual, in a section entitled "Reasons to Cancel," states as follows:

> a. Supervisor advises to cancel
> 1. Too many squads responding to call
> 2. Squad responding is leaving an assigned area when a squad for that area is free
> b. Central Communications
> 1. Receives information you are not needed from the complainant, fire, rescue, ambulance, or alarm []
> c. Other squads
> 1. After evaluating scene, the squad on scene may determine no other squads are needed
> d. Self
> 1. Squad problems
> 2. After checking status of deputies on scene, find out you are not needed
> 3. The need to respond to another priority call
> 4. Find higher priority incident while en route

Terrell appears to rely primarily on part (b) by arguing that the dispatcher "cancelled" Deputy Larson's response and that Deputy Larson then had a ministerial duty to discontinue.

This policy did not impose a ministerial duty on Deputy Larson to discontinue his response to the report of a domestic disturbance. As an initial matter, the language used

in the policy does not support Terrell's argument that Deputy Larson's response was cancelled by someone else. Rather, the title of the policy—"reasons to cancel"—indicates that the policy merely provides reasons why an officer may decide to cancel his or her own response. This meaning is confirmed by the words used by the dispatcher to Deputy Larson: "you can cancel." Generally, the policy does not contain mandatory language, such as "shall," but, rather, uses language strongly suggesting that an officer may use his or her discretion in deciding whether to cancel his or her own response to an emergency. *Cf. Mumm*, 708 N.W.2d at 491 (holding that ministerial duty applied because policy provided that officers "shall not initiate a pursuit or shall discontinue a pursuit in progress whenever" the offender can be identified); *Thompson*, 707 N.W.2d at 673 (holding that ministerial duty applied because policy provided that "officers shall use red lights and siren in a continuous manner" during pursuit). Thus, the language used in part (b) does not support Terrell's argument that Deputy Larson was required to discontinue his response upon learning from the dispatcher that other squads were responding and would arrive sooner than Deputy Larson. Furthermore, Deputy Larson testified that the call from the dispatcher was not an order to cancel but merely an offer to cancel that he could have accepted. Both Deputy Larson and Deputy Longen testified that only a supervisor on duty could order the squad to cancel. Part (a) of the policy reflects that type of directive.

Terrell relies on an affidavit of an expert witness, Lou Reiter, a former Los Angeles Police Department officer, which was executed in January 2002 for purposes of the federal action. The district court did not mention Reiter's affidavit in its order, and

there is no indication that the district court ruled on the admissibility of Reiter's testimony. To the extent that the district court's silence on the matter indicates that it deemed the evidence inadmissible, we would affirm that ruling. Reiter offered the opinion that a "dispatcher's directions to a deputy are binding" because the dispatcher "acts as a 'quarterback.'" He recited an "axiom in law enforcement . . . that the directions from the dispatcher are equivalent to a command from the Chief of Police." For these statements, Reiter relied on his "experience as a law enforcement officer and knowledge of standard law enforcement procedures." Reiter's experience with other law-enforcement departments is an insufficient basis for an opinion concerning ACSO protocols that are not stated in its written policies. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (stating that, to be admissible, expert testimony must be relevant and helpful to the trier of fact); *Larson v. Anderson, Taunton & Walsh, Inc.*, 379 N.W.2d 615, 620 (Minn. App. 1985) (stating that expert testimony "must be based on facts sufficient to form an adequate foundation for an opinion"), *review denied* (Minn. Mar. 14, 1986). Although we do not question Reiter's experience in law enforcement, he did not have a basis to give opinion testimony concerning ACSO policies, especially where that testimony is inconsistent with ACSO written policies, which may be understood by jurors without expert testimony. Thus, we would affirm the district court's implicit conclusion that Reiter's expert testimony is inadmissible. *See* Minn. R. Evid. 702. Furthermore, the district court would have been entitled to conclude that the evidence simply has "no probative value." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

We therefore conclude that the applicable ACSO policy did not require Deputy Larson to discontinue his response to the report of a domestic disturbance.

B. Deputy Larson's Speed

The district court held that Deputy Larson did not have a ministerial duty to approach the intersection in a particular manner. Terrell contends that Minnesota law and ACSO policies imposed such a ministerial duty on Deputy Larson.

1. Minn. Stat. § 169.03

Terrell relies on a statute that provides, in part:

> **Stops.** The driver of any authorized emergency vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety, but may proceed cautiously past such red or stop sign or signal after sounding siren and displaying red lights.

Minn. Stat. § 169.03, subd. 2 (2000). Terrell argues that the words "shall slow down as necessary for safety" imposed a ministerial duty on Deputy Larson, leaving him no discretion to not slow down.

Terrell emphasizes the statute's use of the word "shall," but the phrase "as necessary for safety" is a significant qualifier. That phrase indicates that the degree to which an officer must slow down depends on conditions that the officer perceives at that time. This is a classic example of the use of discretion. The statute further indicates that it may not be "necessary" to slow down at all if "safety" does not require it. Thus, the statute does not create an "absolute, certain, and imperative" duty to slow down, *Elwood*, 426 N.W.2d at 677, which means that Terrell cannot rely on the statute to show that

Deputy Larson violated a ministerial duty. *See Travis v. Collett*, 218 Minn. 592, 595, 17 N.W.2d 68, 71 (1944) (interpreting "as necessary" language in section 169.03 to be "an elastic standard" that "plainly does not impose an absolute duty upon the driver of an emergency vehicle to slow down in every situation" upon approaching stop signal). Furthermore, the statute permits an officer to "proceed cautiously," which further indicates that an officer retains discretion as to the speed of his or her vehicle.

Terrell relies on an investigative report prepared by ACSO personnel, which concluded that Deputy Larson "did not slow down when approaching [the] intersection." Deputy Larson argued to the district court, and argues again on appeal, that this statement is inadmissible hearsay and, furthermore, not capable of creating a genuine fact dispute because it is not factually supported by another investigative report or by four witness statements on which the conclusion purportedly is based. The district court did not make a ruling concerning the admissibility of the report. Rather, the district court concluded that it was unworthy of any weight because the materials on which the report is based do "not indicate that any of the witnesses ever told investigators that Larson failed to slow down when he approached the intersection." In any event, to resolve Terrell's argument based on section 169.03, subdivision 2, it is unnecessary to determine whether Deputy Larson actually slowed down before reaching the intersection. What is significant is that the statute afforded him the discretion to decide whether to slow down, and if so, how much.

2. ACSO Department Policies

Terrell also contends that Deputy Larson had a ministerial duty to slow down at the intersection because of department policies. On appeal, Terrell cites both written and unwritten policies.

a. Written Policies

Section 4100:213 of the ACSO Policy Manual provides, "Pursuant to Minnesota Statutes 169.03, when a member is responding to an emergency, he/she shall slow down when approaching a controlled intersection where the deputy will be disregarding traffic controls and proceed cautiously." The language of the independent clause of this sentence is similar to Minn. Stat. § 169.03, subd. 2, though not identical. The introductory phrase ("Pursuant to Minnesota Statutes 169.03, . . .") indicates that the policy is intended merely to incorporate the terms of the statute, which, as stated above, require an officer to "slow down *as necessary for safety*." Minn. Stat. § 169.03, subd. 2 (emphasis added); *see also Travis*, 218 Minn. at 595, 17 N.W.2d at 71. We believe that the most reasonable interpretation of this policy is that it simply reiterates the requirements of the state statute.

In addition to the textual reasons for this interpretation, a contrary interpretation would tend to eviscerate the general purpose of the official immunity doctrine. A governmental entity's internal policy does not necessarily create a ministerial duty; such a policy merely "can influence whether a duty is classified as ministerial or discretionary." *Mumm*, 708 N.W.2d at 491. Furthermore, the supreme court has suggested that the official immunity doctrine should not hinge on a literal parsing of

statutes when applied to "public employees driving on emergency missions." *Kari v. City of Maplewood*, 582 N.W.2d 921, 925 (Minn. 1998) (asking "whether the [allegedly] wrongful act" of a paramedic who struck a pedestrian while responding to an emergency "so unreasonably put at risk the safety and welfare of others that as a matter of law it could not be excused or justified"). The supreme court noted that to deny official immunity "would have a chilling effect on the discretion to be exercised by emergency vehicle drivers en-route to medical emergencies, and would conflict with our well-established law respecting the independent judgment that must be exercised by public servants in emergency situations." *Id.* at 925. In this case, an overly literal interpretation of section 4100:213 of the ACSO Policy Manual would penalize officers of law-enforcement agencies that take care to adopt policies to promote safety and thereby discourage such written policies, which generally assist officers in the exercise of their discretion and enhance public safety.

If Terrell were correct that the written policy imposed a ministerial duty by stating that an officer "shall slow down," without qualification, such an interpretation would beg the question whether Deputy Larson did slow down as he approached the intersection. The district court record contains excerpts from the transcripts of the depositions of both Deputy Larson and Deputy Longen. When asked about his speed approaching the intersection, Deputy Larson testified that he "started slowing down as soon as the yellow indicator lights came on." Deputy Longen testified that after the indicator light turned yellow, "We started to decelerate as we approached the intersection."

Terrell relies on the ACSO internal investigative report, which concluded that Deputy Larson violated section 4100:213 because he did not "slow down" and did not "proceed cautiously." This conclusion is based on a prior report prepared by a state trooper, who conducted an accident reconstruction. According to the ACSO internal report, the state trooper concluded that Deputy Larson's vehicle "did not appear to be 'slowing' on approach." Based on that conclusion, but apparently without reviewing the four witness statements on which the trooper's conclusion was purportedly based, the ACSO investigative report reached the same conclusion, that Deputy Larson "did not slow down when approaching [the] intersection." The ACSO report also concluded that Deputy Larson violated a written policy concerning "judgment" because he "did not use good judgment in carrying out his duties and responsibilities" and did not "properly weigh[] the consequences of his actions."

In his reply papers filed in the district court, Deputy Larson challenged both the admissibility and the evidentiary weight of the investigative report. Deputy Larson submitted copies of the four witness statements on which the investigative report purportedly was based to show that the four witnesses did not say that Deputy Larson did not slow down. Deputy Larson's inadmissibility argument implicates Minn. R. Evid. 803(8), which governs "public records and reports." The rule no doubt applies and makes the report presumptively admissible. *See* Minn. R. Evid. 803. But the rule makes an exception when "sources of information or other circumstances indicate lack of trustworthiness." Minn. R. Evid. 803(8). Although Deputy Larson brought this exception to the attention of the district court, the district court did not exclude the report,

either in whole or in part, nor did the district court make any ruling concerning admissibility. Because we review evidentiary rulings for an abuse of discretion, *see Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997), we will not overturn the district court's implicit ruling by holding that this part of the report is inadmissible.

Accepting, for purposes of our analysis, that the report is admissible to the extent that the investigator stated that Deputy Larson did not slow down (and this part of our analysis assumes a very strict interpretation of section 4100:213), the district court was not required to credit all statements contained in the ACSO report. In reasoning that the report did not create a genuine issue of material fact, the district court quoted from one of our prior cases, which stated that a party opposing summary judgment must offer more than "evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of [the] case to permit reasonable persons to draw different conclusions." *Gunderson v. Harrington*, 632 N.W.2d 695, 703 (Minn. 2001) (quotation omitted). We believe that the district court properly analyzed the evidence. The investigative materials in the evidentiary record were internally inconsistent. The district court properly concluded that it would be unreasonable for a factfinder to rely on the conclusory statements in the ACSO investigative report while rejecting the underlying materials on which it is purportedly based where the underlying materials do not in fact provide factual support for the report. *See DLH*, 566 N.W.2d at 73 n.9 (stating that reliance on "internally inconsistent" evidence would be "misplaced"); *Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424, 429

(Minn. App. 1999) (holding that affidavit that contradicted deposition testimony did not create material fact issue), *review denied* (Minn. Jan. 25, 2000).

Thus, even if section 4100:213 were interpreted to require an officer to slow down for every intersection when responding to an emergency, without regard for whether slowing down is "necessary for safety," Terrell's evidence nonetheless is insufficient to defeat official immunity. As a matter of law, the investigatory report does not create a genuine issue of material fact as to whether Deputy Larson slowed down as he approached the intersection. Rather, based on the deposition testimony of Deputy Larson and Deputy Longen, the evidentiary record supports only one conclusion on the issue—that Deputy Larson *did* slow down as he approached the intersection. Thus, Deputy Larson did not violate the ministerial duty that arguably was imposed on Deputy Larson by section 4100:213 of the ACSO Field Manual.

b. Unwritten Protocols

Terrell refers to several other portions of the internal investigative report in an attempt to show that Deputy Larson did not adhere to certain unwritten standards concerning how slowly an officer should drive when approaching an intersection. Specifically, Terrell relies on a portion of the investigative report that recites the unsworn statement of Deputy Robert Elmer, who was the ACSO field training officer who trained Deputy Larson and other ACSO deputies. Deputy Elmer informed the ACSO investigator that Deputy Larson was trained to slow "to almost a stop . . . and then crawl through the intersection at a speed of approximately 10 to 20 mph." Terrell also relies on a portion of the investigative report that recites the unsworn statement of Dave Schultz,

the director of the Minnesota Highway Safety Center. Schultz apparently provided training to Deputy Larson at the Alexandria Technical College in 1995, approximately three years before Deputy Larson joined the ACSO. Schultz stated that he trained Deputy Larson and others to slow down enough so that one "can stop immediately." In Mr. Schultz's opinion, "that is a maximum speed of 15 mph."

On appeal, Terrell argues that this training regime evidences an unwritten protocol of the ACSO that imposed a ministerial duty on Deputy Larson that he breached. *See Anderson*, 678 N.W.2d at 657-58 (holding that staff practice created unwritten, established "protocol" regarding the use of a table saw, which imposed a ministerial duty on shop teacher). But Terrell did not present *any* argument to the district court concerning *unwritten* protocols. In his memorandum opposing Deputy Larson's motion for summary judgment, Terrell relied solely on *written* policies of the ACSO. In neither the statement of facts nor in the argument of his responsive memorandum did Terrell even mention these portions of the investigative report. The responsive memorandum did contain a brief statement that "Plaintiff refers the [District] Court to its submissions that comprise the record . . . , which are incorporated as if fully set forth herein." But this statement is not a substitute for argument based on the applicable facts and the applicable law. It is a well-established general rule that this court does not consider arguments that were not made in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Nonetheless, even if we were to address Terrell's argument based on alleged unwritten protocols, we would reject it. In the absence of an evidentiary ruling by the district court with respect to Deputy Larson's training, this court would need to determine

in the first instance the admissibility of that evidence. Although the investigator's statements in his report may be admissible hearsay, *see* Minn. R. Evid. 803(8), the statements of Deputy Elmer and Schultz constitute a second level of hearsay. No exception to the hearsay rule is apparent for the second level.

Even if the statements of Deputy Elmer and Schultz were admissible, the evidence would be insufficient to establish that the information communicated during Deputy Elmer's training was an unwritten protocol that had been adopted by the decisionmaking structure of the ACSO or was well accepted throughout the department, as opposed to merely reflecting Deputy Elmer's personal views. The statement of Schultz is even more tenuous a basis for such a conclusion because he apparently is not a member of the ACSO and because he stated that it was his own "opinion." It also is unclear whether Deputy Elmer and Schultz sought to induce conduct in strict conformance with their instructions or whether, in an abundance of caution, they encouraged their pupils to engage in conduct that went further than what was required by law, or whether they suggested impractical standards in the hope that their pupils would attain partial compliance. All in all, Terrell's evidence of an unwritten protocol is far weaker than the evidence in *Anderson*, where the record contained consistent testimony by the defendant's direct supervisor, another co-employee, and the defendant's own admission that "this is the way that it is done" and "[i]t's the way it's done throughout the [school] district." 678 N.W.2d at 657-58. Thus, the statements of Deputy Elmer and Schultz, even if admissible, would not establish an unwritten protocol of the ACSO that imposed a ministerial duty on Deputy Larson to slow down to "almost to a stop," "approximately 10

to 20 mph," or "a maximum speed of 15 mph" as he approached the intersection. Moreover, a ministerial duty based on the alleged unwritten protocol would be inconsistent with *Kari*, where the supreme court focused on "whether the [allegedly] 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." 582 N.W.2d at 925.

In sum, Terrell's evidence is insufficient to prove that Deputy Larson was required to comply with a ministerial duty. Thus, he was exercising his discretion when he engaged in the conduct for which Terrell seeks to hold him liable.

C. Willful and Malicious Exception

In two sentences, Terrell briefly argues that Deputy Larson's conduct was willful and malicious because he did not discontinue his response to the report and because he accelerated as he approached the intersection. Such a finding would remove the protection of the official immunity doctrine. *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). Terrell, however, does not develop the argument with legal analysis or citations to case law. The district court made a brief, conclusory statement that "the evidence is insufficient to support a claim that the manner in which Larson approached the intersection makes him guilty of a 'willful' or 'malicious' wrong." But this statement was gratuitous because Terrell did not even make any argument to the district court concerning willfulness or malice. Because Terrell did not make the argument in the district court, and because he has not made a complete argument on appeal, we decline to consider the issue. *See Thiele*, 425 N.W.2d at 582; *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) ("An assignment of

error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection."). In any event, the evidence plainly is insufficient to prove that Deputy Larson acted willfully and maliciously when he collided with Ms. Terrell.

II. Limitations and Tolling

Deputy Larson argues that the district court erred by denying his motion for judgment on the pleadings, which argued that Terrell's action is untimely. We review a denial of a motion to dismiss on the pleadings de novo. *Larson v. Wasemiller*, 738 N.W.2d 300, 303 (Minn. 2007). The construction and applicability of a statute of limitations is a question of law that we review de novo. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

A three-year limitations period applies to Terrell's action. Minn. Stat. § 573.02, subd. 1 (2000). Larson argues that Terrell did not satisfy the three-year limitations period because he commenced his state-court action more than five years after the accident. But Terrell cites a federal statute that provides:

> The period of limitations for any claim asserted under [supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [supplemental jurisdiction], shall be tolled *while the claim is pending and for a period of 30 days after it is dismissed* unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d) (emphasis added). This federal statute applies because the federal courts had supplemental jurisdiction over Terrell's state-law claims before declining to exercise that jurisdiction and dismissing those claims. In *Rothmeier v. Investment*

Advisers, Inc., 556 N.W.2d 590 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997). this court held that because the plaintiff had asserted a state-law whistleblower claim in federal court along with a federal age-discrimination claim, section 1367(d) "tolled [the] whistleblower claim while the age discrimination claim was pending in federal court." *Id.* at 593.

Here, the accident occurred in December 2000. Terrell asserted his state-law negligence claim no later than February 2002, when his third amended complaint was filed. That filing occurred approximately 14 months after the accident. Under section 1367(d), the limitations period on Terrell's state-law claim was tolled until the federal district court dismissed that claim in August 2005. Terrell commenced the present action in the Anoka County District Court approximately five months later, in January 2006. Thus, no more than approximately 19 months elapsed between the accident and the commencement of Terrell's state-court action, not counting the three-and-one-half years in which the state-law claims were pending in federal court. Because Terrell commenced his state-court action well within the three-year limitations period in Minn. Stat. § 573.02, his claim is not time-barred.

Affirmed.