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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1921

Xia Yang, et al.,
Respondents,

vs.

Terry Scott,
Defendant,

Lee S. Vague, et al.,
Appellants.

Filed September 2, 2008
Affirmed in part, reversed in part, and remanded.
Lansing, Judge

Ramsey County District Court
File No. 62-CX-06-009723

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Considered and decided by Worke, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

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

LANSING, Judge

A Woodbury police officer and the City of Woodbury appeal the denial of their summary judgment motions on the grounds of official immunity and vicarious official immunity in a negligence action brought by a driver and two passengers who were severely injured when the car of a fleeing criminal suspect struck their sport utility vehicle. We conclude that genuine issues of material fact exist on the application of the city's pursuit policy and the provision of the policy governing activation of emergency equipment. But we conclude, as a matter of law, that the remaining contested policy provisions describe discretionary conduct that is protected by official immunity. We therefore affirm in part, reverse in part, and remand.

F A C T S

Xia Yang was driving her sport utility vehicle in the area of I-94 and White Bear Avenue in east St. Paul in September 2004 when she was struck by a speeding car driven by a fleeing criminal suspect. Yang and two passengers, Por Chee Vang and Ker Yang, brought damages claims against Terry Scott, the driver of the car that struck them; Lee Vague, a Woodbury police officer; and Vague's employer, the City of Woodbury. The complaint alleged that Vague had engaged in a high-speed pursuit of the suspect and caused the collision.

Vague was one of three officers who had responded in separate squad cars to a dispatcher's call reporting a theft in progress at a Woodbury Target store. In an updated report, the dispatcher told the officers that the suspects "are now leaving in a green Ford

Taurus bearing Minnesota plate KHM-017." The dispatcher also relayed information on the vehicle's direction of travel, that the "[v]ehicle lists to [a particular address] in St. Paul," and that the suspects had taken "a few hundred dollars worth of baby food or baby formula" from the store.

Acting on the information of the vehicle's direction of travel, Vague proceeded to I-94 westbound. He testified that once he reached I-94, he noticed a dark-colored car traveling at approximately ninety miles an hour. The evidence is disputed on whether at that point Vague began a pursuit of the vehicle or had only had time to contemplate a pursuit. Scott, who was driving the fleeing vehicle, testified that, when he saw a police car approaching from behind, he accelerated and prepared to exit I-94.

As Scott started up the exit ramp, he was traveling at about seventy miles an hour. The traffic light at the top of the exit ramp was red, but Scott was unable to stop. He struck Yang's car as it moved across the intersection on the green light. Vague reached the intersection shortly after the collision and reported the accident to the dispatcher.

In their negligence claim against Vague, Yang and her passengers alleged that Vague's conduct in pursuing the fleeing car "was illegal, negligent, reckless, willful, malicious, and unnecessary," and that the city was vicariously liable for Vague's conduct. Vague asserted the defense of official immunity, and the city asserted vicarious official immunity. Both Vague and the city moved for summary judgment. The district court denied the summary-judgment motion, and Vague and the city appeal.

D E C I S I O N

The common-law doctrine of official immunity is intended to enable "public employees to perform their duties effectively, without fear of personal liability that might inhibit the exercise of their independent judgment." *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). Under the doctrine, a police officer has a defense to state-law claims and may not be held personally liable for damages if the claims arise from his performance of job duties that call for the exercise of his judgment or discretion and if his performance of those duties was neither willful nor malicious. *Id.* When a police officer's actions are protected by official immunity, vicarious official immunity generally extends to the officer's governmental employer for claims based on those actions. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006).

The duties of police officers in emergency situations have typically been characterized as discretionary, but "the existence of a policy that sets a sufficiently narrow standard of conduct will make a [police officer's] conduct ministerial if he is bound to follow the policy." *Mumm*, 708 N.W.2d at 491. If the claims against an officer arise from a failure to perform a ministerial act, as opposed to a discretionary act, the officer is not entitled to official immunity, and the governmental employer is not entitled to vicarious official immunity. *Id.* (employer's vicarious official immunity); *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006) (police officer's official immunity).

Vague and the city argue that the district court's denial of their summary-judgment motion should be reversed for two reasons. First, they contend that the evidence

conclusively establishes that Vague was not engaged in a pursuit of the fleeing vehicle and therefore the city's pursuit policy does not apply to his conduct. Second, and alternatively, they contend that even if Vague engaged in a pursuit that triggered the policy, the provisions at issue are not ministerial, but discretionary, and therefore Vague's conduct is protected by official immunity.

"In reviewing an appeal from the grant or denial of official immunity on summary judgment, we must determine whether there are genuine issues of material fact and whether the [district] court erred in applying the law." *Thompson*, 707 N.W.2d at 673. Although the determination of whether a police officer is entitled to official immunity may depend on the factual circumstances, the applicability of official immunity—when the material facts are not in dispute—is a question of law. *Id.* When there is a genuine dispute on predicate facts material to a determination of whether immunity applies, those fact issues are submitted for trial. *Id.* at 675.

I

We first address Vague and the city's argument that they are entitled to summary judgment because the record conclusively demonstrates that Vague did not engage in a pursuit of the fleeing car and, therefore, the pursuit policy did not impose a ministerial duty on Vague. The city's policy defines when a pursuit occurs:

> A pursuit is considered to have begun when an officer makes a vehicular attempt to apprehend the occupant(s) of a motor vehicle when the driver has been requested or signaled to stop and is resisting apprehension by maintaining or increasing the vehicle's speed or otherwise maneuvering the vehicle in a manner to elude the officer.

Scott testified that, as he was fleeing on I-94, he initially drove at about sixty-five miles an hour to avoid drawing attention to his car and that he did not increase his speed to eighty or eighty-five miles an hour until he saw a police car approaching behind him with its emergency lights and siren activated. Scott said that as he drove down I-94 the police car came closer and closer, that he believed he was being chased by the police, that he did not stop "[b]ecause [he] had just done a crime," that he would not have exited I-94 if the police car had not been behind him, and that the police car was only three to four car lengths behind him when he exited I-94. Vague also stated that he had his emergency lights and siren activated when he entered and drove on I-94.

Based on this testimony and the fact that police commonly use their lights and siren to signal a car to stop, a fact-finder could reasonably infer that Vague engaged in a pursuit under the language of the policy because Vague made a vehicular attempt to apprehend Scott by closing the distance between his car and Scott's car, because Vague requested or signaled Scott to stop by chasing him with his lights and siren activated, and because Scott resisted apprehension by increasing his speed and exiting I-94.

Other evidence, however, could support a finding that Vague did not engage in a pursuit of Scott. Vague testified that he never pursued the suspect vehicle on I-94 and that he had merely been "searching for the suspects who were fleeing the scene of a crime." He said that very little time—only about five seconds—passed between the time he first saw the suspect vehicle and when it exited from I-94; that his lights and siren had been activated throughout his search for the suspect vehicle; that he did not have time to accelerate; and that, as Scott's vehicle exited I-94, he was "still trying to figure out if that

[was] even the suspect vehicle." Thus, a fact-finder could determine that Vague did not engage in a pursuit of Scott under the policy because Vague did not signal or request Scott to stop or make a vehicular attempt to apprehend him.

We therefore conclude that the district court properly rejected Vague and the city's argument that, as a matter of law, the pursuit policy did not apply to Vague's actions. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (reasoning that genuine issue of material fact exists which precludes summary judgment when evidence permits reasonable persons to draw different conclusions on elements of claim).

II

In the alternative, Vague and the city argue that, even if a fact-finder determined that the pursuit policy applied to Vague's conduct, they would nevertheless be entitled to official immunity because the pursuit policy creates discretionary duties, not ministerial duties, and because Vague did not forfeit his immunity by acting willfully or maliciously. Vague and the city contend that the district court relied on four provisions of Woodbury's Motor Vehicle Pursuit Policy each of which addresses when pursuit should be terminated and that it incorrectly characterized these duties as ministerial rather than discretionary.

"[T]he existence of a policy that sets a sufficiently narrow standard of conduct will make a public employee's conduct ministerial if he is bound to follow the policy." *Mumm*, 708 N.W.2d at 491. To determine whether a policy provision is sufficiently narrow to make an employee's conduct ministerial, we examine whether the duty imposed by the provision "is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Id.* at 490

(quotations omitted). If the policy provision "leaves nothing to discretion" and "is a simple, definite duty arising under and because of stated conditions," it imposes a ministerial duty. *Id.* (quotations omitted). By contrast, a duty imposed by a policy "is discretionary if it involves more individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Id.* at 490-91 (quotations omitted).

The first provision states, "Pursuits shall be terminated under . . . [s]ituations in which the officer knows or reasonably should know that the probability of harm to persons arising from the pursuit outweighs the need for immediate apprehension or the potential harm threatened by the escaping offender." This provision expresses the professional goals of an officer in pursuit and leaves the officer with considerable discretion to assess the "probability of harm," the "need for immediate apprehension," and the "potential harm threatened by the escaping offender" and to balance these considerations. Policy provisions require "exercise of significant, independent judgment and discretion" when they require officers to assess the "present danger, seriousness of the crime, length of the pursuit, . . . possibility of identifying the suspect at a later time," the "clear danger to the pursuing officers or the public," and "whether the seriousness of the violation reasonably warrants continuation of the pursuit." *Pletan v. Gaines*, 494 N.W.2d 38, 41 & n.3 (Minn. 1992). Because this provision does not set forth a simple, definite duty arising under and because of stated conditions, it imposes a discretionary, not a ministerial, duty.

The second provision states, "Pursuits shall be terminated [when] . . . [t]he driver or passenger is not suspected of a violent felony and attempts to evade in a reckless

manner." This policy provision poses a closer question on the discretionary/ministerial division than the first provision.

The first part of the provision states a condition in a simple, straightforward manner. It poses a question to the officer that has, in most cases, an obvious yes or no answer: Is the driver or passenger suspected of a violent felony? These types of provisions have been found to create ministerial duties under certain conditions. *See Mumm*, 708 N.W.2d at 491-92 (holding that policy imposed ministerial duty when it required officer to terminate pursuit when fleeing person was not suspected of committing violent crime).

But the second part of the policy provision changes this "simple, definite duty arising under and because of stated conditions" into a discretionary duty. *Id.* at 490 (quotations omitted). The policy provision requires the officer to exercise professional judgment to determine whether the driver is attempting to evade in a reckless manner. The remaining sentences of the policy provision provide examples that allow the officer to assess whether the driver is proceeding at "excessive speeds with respect to environmental concerns" or "running red lights and stop signs without slowing significantly." These examples inject an element of judgment that equates to discretion. The duty to terminate the pursuit is therefore no longer triggered by a question with an obvious yes or no answer. Unlike other policy provisions that have been determined to impose ministerial duties, this policy provision deliberately leaves officers with discretion to determine whether the driver is attempting to evade in a reckless manner. *Cf. Thompson*, 707 N.W.2d at 675 (determining that policy provision requiring officers to

"use red lights and siren in a continuous manner for any emergency driving or vehicular pursuit" was ministerial because officers have no discretion to do otherwise). This policy provision therefore also imposes a discretionary, not a ministerial, duty.

The third policy provision at issue states, "Pursuits shall be terminated . . . [a]ny time the pursuing officer is required to give medical aid." In their brief, Yang and her passengers admit that no actual prejudice was suffered because of Vague's alleged failure to comply with this provision. Thus, they implicitly concede that a violation of this provision would not provide them with an independent basis for recovery, and Vague and the city's motion for summary judgment cannot be denied on the basis of this provision.

The fourth policy provision at issue states, "Pursuits shall be terminated [if] . . . [t]he suspect's identity has been established to the point that later apprehension can be accomplished and there is no longer a need for immediate apprehension." Thus, if Vague knew Scott's identity at the time of the alleged pursuit, this provision would likely impose a ministerial duty. In *Mumm v. Mornson*, the supreme court determined that a ministerial duty is created by a policy that provides: "Officers shall not initiate a pursuit . . . [when] the officer can establish the identification of the offender so that an apprehension can be made at another time." 708 N.W.2d at 491-93.

This case, however, is distinguishable from *Mumm* because there is no evidence in the record that Vague knew Scott's identity. The record indicates only that Vague knew the address for the registered owner of the vehicle that the suspects were driving. Although it is possible that this address could later enable apprehension of the suspect, it was not certain. In contrast to the officers in *Mumm* who had no discretion under the

policy because they knew the suspect's identity, Vague had discretion to determine whether "[t]he suspect's identity ha[d] been established to the point that later apprehension [could] be accomplished." It would be unreasonable to expect a police officer to calculate with precision the point at which he has enough information that later apprehension can be accomplished. Rather this policy provision requires a police officer to exercise professional judgment. Under the circumstances of this case, the policy provision did not set forth a duty that was "absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Id.* at 490 (quotation omitted). This policy provision therefore also imposes a discretionary, not ministerial, duty.

The district court's summary-judgment determination also addressed a fifth duty that is imposed by the city's pursuit policy and emergency-operations policy. The policies require, respectively, that an officer use his siren when engaged in a pursuit of a suspect and when responding to an emergency call. The district court, in its order denying summary judgment, twice states that there is contradictory evidence on whether the lights and sirens on Vague's squad car were activated, and the evidence includes four witness statements that support the district court's determination that the evidence is conflicting.

Vague and the city do not dispute that, under the city's policies, Vague had a ministerial duty to use his siren during his search and alleged pursuit of Scott. Thus, despite our conclusion that Vague and the city are entitled to immunity on four of the city's policy provisions, Vague and the city are not entitled to immunity on Vague's duty

to activate his siren. *See Thompson*, 707 N.W.2d at 673, 675 (providing that when policy "makes clear that officers have no discretion regarding the use of emergency lights and siren," it imposes ministerial duty that is not protected by official immunity).

Vague and the city argue that, even though they are not entitled to immunity on the siren issue, the district court's denial of summary judgment should be reversed because the evidence conclusively demonstrates that Vague activated his siren. But, in this interlocutory immunity appeal, our review is limited to issues of immunity. *See Pahnke v. Anderson Moving & Storage*, 720 N.W.2d 875, 885 (Minn. App. 2006) (noting that "[d]etermining whether there is a factual basis for the claims is unrelated to official immunity and is, therefore, not appealable in an interlocutory appeal" (quotation omitted)), *review denied* (Minn. Nov. 22, 2006).

Because we conclude that Vague's duty to terminate the pursuit under four of the policy provisions was discretionary, we also address the issue of whether Vague acted willfully or maliciously. Willful or malicious conduct is not protected by official immunity. *Thompson*, 707 N.W.2d at 673.

Malice is the "intentional doing of a wrongful act without legal justification." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). "In the official immunity context, wil[l]ful and malicious are synonymous." *Id.* The issue of malice has been characterized as an "objective inquiry into the legal reasonableness of an official's actions." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). "Mere allegations of malice are not sufficient to support a finding of malice, as such a finding must be

based on specific facts evidencing bad faith." *Semler v. Klang*, 743 N.W.2d 273, 279 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Feb. 19, 2008).

We conclude, as a matter of law, that the evidence is insufficient to prove that Vague acted willfully or maliciously. Viewed in the light most favorable to Yang and his passengers, the evidence shows that Vague sighted a fast-moving vehicle on I-94 westbound; that the driver of the suspect vehicle was initially traveling at about sixty-five miles an hour but accelerated to between eighty and ninety miles an hour when he saw Vague behind him; that Vague knew the suspect had taken "a few hundred dollars worth of baby food or baby formula"; that Vague knew the address for the registered owner of the car Scott was driving; that it was about 4:00 p.m. on a Saturday; that traffic conditions were light, road surfaces were dry, and there was no precipitation; that Vague closed the distance between the squad car and Scott's vehicle; that by the time Scott exited I-94 Vague was only three to four car lengths behind him; that after exiting I-94 at approximately seventy miles an hour Scott collided with Yang's vehicle; and that Vague entered the exit lane and followed Scott off I-94 without colliding with any cars.

These facts provide no basis for a finding of malice or bad faith. *See Pletan*, 494 N.W.2d at 41 (accepting concession that officer's conduct was not willful or malicious when he responded to report of shoplifting and decided to pursue driver in high-speed chase). Vague therefore is entitled to immunity for his performance of duties under four of the city's policy provisions. And because, "with respect to high-speed police pursuits, the police officer's official immunity extends to the officer's public employer," the city is

also entitled to official immunity with respect to the duties outlined in these four policy provisions. *Id.* at 43.

In summary, we conclude that genuine issues of fact exist on whether Vague had initiated pursuit. But regardless of the resolution of that fact issue, Vague and the city are entitled to immunity on Vague's discretionary duty to terminate the pursuit under four pursuit-policy provisions. Nevertheless we affirm the district court's denial of summary judgment because Vague and the city are not entitled to immunity on Vague's ministerial duty to activate his siren.

Affirmed in part, reversed in part, and remanded.