STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2235

Jane Doe,
individually and Jane Doe as mother and natural guardian of
John Doe,
Respondent,

vs.

Independent School District No. 2154 (Eveleth-Gilbert Schools),
Appellant.

Filed September 14, 2010
Affirmed
Stoneburner, Judge

St. Louis County District Court
File No. 69VICV08848

Joseph Leoni, The Trenti Law Firm, Virginia, Minnesota (for respondent)

Kay Nord Hunt, Ehrich L. Koch, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

A kindergarten student was sexually assaulted in appellant school district's elementary school during school hours. Respondent, mother and natural guardian of the child, sued appellant, alleging negligent supervision and negligent enforcement of and/or

failure to adopt appropriate school security policies. Appellant moved for summary judgment based on official and statutory immunity. The district court granted partial summary judgment based on statutory immunity, dismissing all but respondent's claim for negligent supervision. Appellant challenges the district court's determination that official immunity does not apply to the negligent supervision claim. In a related appeal, respondent challenges the grant of summary judgment on the remaining claims. We affirm.

FACTS

On April 4, 2007, John Doe (the child), a kindergarten student at an elementary school in appellant Independent School District No. 2154 (school district), did not want to go outside with his class for recess. Arrangements were made for the child to stay in the detention room, which was supervised by an aide, Elaine Rauzi. Another adult, Gretchen Ray, who was not a school employee but who worked with younger students, was also present in the detention room.

When the child arrived in the detention room, he told Rauzi that he needed to use the restroom.[1] There is a restroom in the detention room, but Rauzi told the child to use the restroom that is two rooms down the hall from the detention room, across the hall from the school's administrative offices. Rauzi then left the detention room to make some copies. When she returned, Ray told her that the child had not returned from the restroom. Rauzi set out to check on the child but encountered teacher Dina Scheib in the

[1] The record reflects that there was some delay in the child's getting from the lunch room to the detention room and that the child may have been unsupervised during that delay.

hallway, and Scheib agreed to check on the child. Scheib stood in the opening of the boy's restroom and could see a child sitting on the floor of a stall. She said the child's name and he peeked out from under the stall door. She asked if he was all right. The child said that he was all right, crawled out of the stall underneath the door, and returned to the detention room and later to his classroom.

School officials later learned that while the child was in the restroom he had been sexually assaulted by a recent graduate of the high school, Timothy Paige, who had recently been at the school several times. On the day of the assault, Paige entered the school through a side door and spoke to the school secretary about his desire to interview the school principal for a community-college assignment. The secretary told him that the principal was unavailable. Paige returned to his car and smoked a cigarette and then reentered the school to attempt to set up an appointment with the principal with the secretary, but the secretary did not know the principal's schedule. Paige was not asked to sign in and was not given a visitor's badge. Paige left the office and went into the boy's restroom where he sexually assaulted the child. Paige said that "a couple teachers" saw him leave the school, but he was not questioned by anyone at that time. The child told his mother that he had seen Paige in the school before the day of the assault, cleaning chalkboards and restroom mirrors, and thought that Paige was a janitor.

Paige had attended the elementary school for fourth, fifth and sixth grades and completed junior and senior high school in the district. He was known to school district employees as a polite young man who had never been a discipline problem. When he was in twelfth grade, Paige worked in the district mail room and delivered mail to the

elementary school almost every day: teachers and staff at the elementary school knew him well.

A week before the assault, the school secretary was concerned about an individual who had entered the first-floor restroom and had remained there for an unusual amount of time. She called the custodian, who went into the restroom and asked what was "going on." Approximately ten minutes after the custodian initially entered the restroom, Paige exited. Paige had not signed in and was not wearing a visitor's badge. A few days before the assault Paige had entered the elementary school twice: he saw the school secretary on both occasions but was not required to sign in or wear a visitor's badge.

At the time of the assault, the school district had several policies in place regarding staff supervision of students. Principal Lynn Bol testified by deposition that teachers are expected to know all of the rules and regulations and to follow them. Under the heading "Supervision of Students," the faculty handbook provides:

> Supervision of students inside and outside the classroom is necessary. The law holds that the person in charge of students is responsible and the courts will rule against negligent personnel. Therefore, students must be supervised at all times. The liability insurance furnished by your association dues and school board is a great help but is of small comfort in the event of a serious accident.

Bol agreed that, according to the policy, students must be supervised at all times and that there are no exceptions to the rule.

Under the heading "Routine Responsibilities for Teachers," the faculty handbook provides:

> The following responsibilities are emphasized to develop consistent faculty policy for effective operation of the school.
>
> . . . .
>
> 3. Teachers shall be in their classrooms when students are in the classrooms. Students should never be left unattended. Please use the "buddy system" when you must leave your students. Tell a colleague to check your room or use a person who is on prep time to check on your students. It only takes a second to have a catastrophe.
>
> . . . .
>
> 6. Students are not to leave classrooms during class time except when absolutely necessary. Teachers shall keep track of students leaving class so that should it become necessary to account for students' times and whereabouts it will be possible. Keep restroom breaks to a minimum and, when possible, take your entire class for restroom breaks.

Rauzi testified by deposition that, although she had been an aide at the school for twenty years, she was not sure if she had ever read the faculty handbook and did not remember reading the policy on supervision of students.

Under the heading "Visitors/Salespersons," the faculty handbook provides:

> We welcome parents and authorized visitors to the school. All visitors will register with the office upon entering the building. Visitors must wear a name badge indicating they are a VISITOR while on the school property. Please direct all visitors to the office if you see them without a name badge.

Bol agreed that there is no exception to the policy that all visitors are to register with the office upon entering the building. But Bol admitted that on the day of the assault the school did not follow the policy of having visitors register at the front office because Paige never signed in or obtained a visitor's badge.

Respondent, the child's mother (Doe), individually and as the child's natural guardian, initiated this action against the school district alleging that the school district's

and its employees' negligence caused injury to the child. In response to discovery, the school district produced, in addition to the faculty handbook, numerous school district safety and security policies, including: Inappropriate Contact and Sexual Activity Policy; Extra-Curricular Activities Policy, which includes policies relating to racial/religious/sexual harassment/violence and hazing; Use of Peace Officers and Crisis Teams to Remove Students with IEP's[2] from School Grounds Policy; Keys, Locks and Associated Security Hardware Policy; Crisis Management Policy; Predatory Offender School Access Policy; Harassment and Violence Prohibition Policy; Weapons and Assaultive Behavior Policy; Bullying Prohibition Policy; and the Franklin Elementary Crisis Management Manual.

School district superintendent Michael Lang testified by affidavit that the policies balance a number of interests including: state and federal mandates; staffing to effectuate the policies; and community mores, standards, and expectations. Lang stated that staffing levels do not allow for direct supervision of all students at all times. Lang also stated that at the time of the assault, installation of security cameras was approved for all buildings in the school district as finances allowed, but that the timing of implementation was controlled by available budget and manpower for installation. Due to these limitations, the school district had to prioritize where to begin the installation process and decided to first install cameras at the junior- and senior-high schools where property crimes and student conflicts were more prevalent than at the elementary school.

[2] IEP is an acronym for "individualized education plan."

The school district moved for summary judgment, asserting that official and statutory immunity precluded Doe's action. The district court granted summary judgment to the school district on count two of the complaint (failure to enact and/or enforce appropriate rules, regulations and policies), and paragraph seventeen of count one (alleging that the "[school district] failed or refused to enact a security policy that would protect elementary children under their supervision from uninvited intruders"). The district court denied summary judgment for the remainder of count one (failure to provide adequate supervision, protection and security), concluding that official immunity does not apply to the acts of the school-district employees who allowed the child to use the hallway restroom by himself and that the school district is therefore not entitled to vicarious official immunity for that conduct.

The school district appeals the partial denial of its summary-judgment motion based on official immunity. Doe, in a related appeal, challenges dismissal of count two and paragraph seventeen of count one of the complaint.

D E C I S I O N

I. Standard of Review

> Although denial of a motion for summary judgment is not ordinarily appealable, an exception to this rule arises when the order denies summary judgment based on statutory or official immunity. The ground for the exception is that immunity from suit is effectively lost if a case is erroneously permitted to go to trial.

Gleason v. Metro. Council Transit Operations, 582 N.W.2d 216, 218 (Minn. 1998) (citation omitted). On appeal from summary judgment, we must determine whether there

are any genuine issues of material fact and whether the district court erred in its application of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "The applicability of immunity is a question of law, which this court reviews de novo." *Sletten v. Ramsey Cnty*, 675 N.W.2d 291, 299 (Minn. 2004) (addressing official immunity). The party asserting an immunity defense has the burden of demonstrating sufficient facts to show as a matter of law that it is entitled to that defense. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

II. The district court did not err by concluding that official immunity does not apply to Doe's claims of negligent supervision, protection and security, and that the school district is therefore not entitled to vicarious official immunity for those claims.

The school district argues that the district court erred by concluding that the defense of official immunity does not shield the school district's employees and staff and that, therefore, vicarious official immunity does not shield the school district from liability for allegedly failing to provide adequate supervision, protection and security for the child. "[O]fficial immunity protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of a willful or malicious wrong." *Watson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 414 (Minn. 1996) (quotation omitted). If a government employee is entitled to official immunity for a discretionary act, the government employer is generally entitled to vicarious official immunity for the acts of the employee. *Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204, 216 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

In order to determine whether the school district is entitled to vicarious official immunity, we examine the challenged conduct of the school district's employees that gave rise to the cause of action to determine whether the employees are entitled to official immunity. *S.W. & J.W. ex rel. A.M.W. v. Spring Lake Park Sch. Dist. No. 16*, 580 N.W.2d 19, 21 n. 2 (Minn. 1998) (noting that only if the public official is entitled to official immunity will the government entity be entitled to vicarious official immunity).

> The purpose of official immunity is to protect public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties. Consistent with this purpose, common law official immunity does not protect officials when they are charged with the execution of ministerial, rather than discretionary, functions, that is, where 'independent action' is neither required nor desired.

Anderson v. Anoka Hennepin Indep. Sch. Dist. 11, 678 N.W.2d 651, 655 (Minn. 2004) (quotation and footnote omitted). *Anderson* rejected the argument that a duty can only be ministerial if it is a duty "imposed by law," concluding that a sufficiently narrow policy or protocol governing employee conduct may create a ministerial duty. *Id*. at 659.

Analysis of official immunity begins with identification of the specific conduct at issue and then moves to analysis of whether the conduct involved ministerial or discretionary acts. *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). In this case, the specific conduct underlying Doe's negligent supervision claim is the conduct of school employees in (1) allowing the unaccompanied child to use a restroom outside of the detention room that was equipped with a restroom and (2) allowing Paige to be in the school without signing in or obtaining a visitor's badge.

The school district argues that due to funding and staffing issues, school district staff was required to exercise discretion in meeting the supervision requirement, making the conduct involved in this case discretionary. But given the school district's clear policies requiring that students should not be left unattended and should be supervised at all times, we agree with the district court that the specific conduct underlying the negligent supervision claim is ministerial, even though the execution of the policy involves some discretion.

"A ministerial act is one that is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Id*. at 490 (quotation omitted). But "[a]n act involving some discretion may nonetheless be a ministerial task." *Fear*, 634 N.W.2d at 215 (citing *Williamson v. Cain*, 310 Minn. 59, 61, 245 N.W.2d 242, 244 (1976)). In *Williamson*, employees of a state agency were to dismantle and remove a house. 310 Minn. at 59, 245 N.W.2d at 243. In the process, they damaged another house. *Id*. The supreme court concluded that the actions of demolishing a house were ministerial even though the employees carrying out the task needed to make some decisions, stating:

> While the discretionary-ministerial distinction is a nebulous and difficult one because almost any act involves some measure of freedom of choice as well as some measure of perfunctory execution, the acts of the defendants here are clearly ministerial. Their job was simple and definite—to remove a house. While they undoubtedly had to make certain decisions in doing that job, the nature, quality, and complexity of their decision-making process does not entitle them to immunity from suit.

Id. at 61, 245 N.W.2d at 244. Similarly, the act of supervising students is one that involves the execution of a specific duty even though some discretion may be involved in carrying out that duty. We conclude, as did the district court, that the school district's arguments create a genuine fact issue about the reasonableness of the supervision provided to the child under the circumstances of this case, but do not change the nature of the conduct from ministerial to discretionary.

With regard to the policy that visitors must sign in and wear a badge, the school district argues that the policy does not apply to someone, like Paige, known to the school district, who comes directly to the administrative offices to conduct business and then leaves. The school district also asserts that "signing in and having a visitor's pass certainly would not have changed anything" in this case. The first argument raises a fact issue about the scope of the policy, and the second argument asserts lack of causation. Neither argument implicates official immunity, therefore denial of summary judgment on the claim that the school district's negligence with regard to this policy caused injury to the child is not properly before this court on appeal. *See Gleason*, 582 N.W.2d at 218 (stating that an immunity challenge is an exception to the rule that a party may generally not appeal from denial of a summary-judgment motion). We therefore do not address the school district's arguments about this policy except to disagree that, as a matter of law, the visitor policy is not related to the incident. A reasonable jury could find that the policy applied to Paige and that the child was misled into believing that Paige was a school employee because he had been at the school several times without a visitor's

badge. Whether the policy applied to Paige and whether violation of the visitor policy is causally related to the incident are questions for the jury.

III. The district court did not err in granting summary judgment to the school district dismissing Doe's remaining claims based on statutory immunity.

In a related appeal, Doe argues that the district court erred in dismissing the claims in paragraph seventeen of count one and all of count two of Doe's complaint based on statutory immunity. Those claims involved the school district's failure "to enact a security policy that would protect elementary children under [its] supervision from uninvited intruders" (count one, paragraph seventeen), and failure "to enforce and/or adopt appropriate school policies . . . designed to protect students . . . from harm and to keep intruders out of the building" (count two).

The applicability of statutory immunity is a question of law subject to de novo review. *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 900 (Minn. App. 2009). In Minnesota, a municipality, including a school district, is exempt from tort liability for "[a]ny claim 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. §§ 466.01, subd. 1, .03, subd. 6 (2008). This statutory discretionary immunity applies where the governmental entity's conduct "was of a policy-making nature involving social, political or economic[] considerations." *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 722 (Minn. 1988).

In determining what constitutes a discretionary function or act, there is a distinction between "planning level" conduct and "operational level" conduct. *Id*. at 719.

Planning-level functions "require evaluating such factors as the financial, political, economic, and social effects of a given plan." *Unzen v. City of Duluth*, 683 N.W.2d 875, 882 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). "Operational-level decisions, in contrast, are those actions involving the ordinary, day-to-day operations of the government." *Id.* Only planning-level functions are protected by statutory immunity. *Nusbaum*, 422 N.W.2d at 722. But the legislature did not intend to immunize government entities for their failure to put policies in place. *S.W.*, 580 N.W.2d at 23. "[C]onduct flowing from a governmental entity's failure or refusal to enact a policy is conduct at an operational level and therefore is not entitled to statutory immunity under Minn. Stat. § 466.03, subd. 6." *Id.*

To determine whether discretionary immunity applies, the courts must "identify the precise government conduct being challenged." *Nusbaum*, 422 N.W.2d at 722. The district court concluded that the conduct involved in these claims is the wording of the school district's security policies rather than a failure or refusal to enact security policies, noting the numerous school district policies addressing supervision of students, emergency procedures, non-staff entrants, general safety, accidents and injuries, locks and keys, sexual assault/contacts, and the presence of sexual offenders on school properties. We agree, and we do not find merit in Doe's insistence that the lack of a specific policy titled "Security Policy" equates to the district's *refusal* to enact a security policy, stripping the district of statutory immunity.

In *S.W.*, the school district either consciously decided not to have a security policy or had never considered having a security policy. 580 N.W.2d at 22. The supreme court

recognized that "public policy decisions, even bad or misguided ones, are entitled to immunity under the statute," but held that the "failure or refusal to enact a policy is conduct at an operational level" not entitled to statutory immunity. *Id*. at 23. In contrast, the school district in this case produced evidence of a myriad of policies dealing with security. Doe's dismissed claims address the school district's decisions about the content of the policies and their titles, rather than a refusal or failure to have any security policies.

The general rule is that the government has the burden to prove that it engaged in planning or policy-making activities entitling it to immunity. *Conlin v. City of Saint Paul*, 605 N.W.2d 396, 402 (Minn. 2000). Here, the school district produced evidence that the planning and policy-making by the school district balanced social, political and economic considerations. We conclude that the district court did not err in dismissing Doe's claims challenging the school district's failure to have and implement a separately titled security policy as barred by statutory discretionary immunity.

Doe argues that even if this court determines that a security policy was in place, it would be poor public policy to extend immunity to the school district because the school district did not enforce its policies. Doe's argument on this issue is not well-developed. Doe's expert witness's report criticized the school district's policies as being written in such a manner that they are left open to individual interpretation. But the manner in which the district's policies are written is within the discretion of the district and entitled to statutory immunity.

Affirmed.