STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1278

Kelley Leeroy Mielke,
Respondent,

vs.

Wayne Richard Miller, et al.,
Appellants.

Filed April 5, 2011
Reversed
Bjorkman, Judge

Wabasha County District Court
File No. 79-CV-09-1257

James S. Ballentine, Mark H. Gruesner, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota (for respondent)

Thomas H. Schaefer, Erstad & Riemer, P.A., Minneapolis, Minnesota (for appellants)

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Considered and decided by Wright, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

BJORKMAN, Judge

Appellants Wayne Richard Miller and Wabasha County challenge the district court's denial of their motion for summary judgment based on common-law official immunity. We reverse.

FACTS

On the afternoon of December 4, 2007, Miller, a snowplow driver for Wabasha County, was sanding and salting hills and intersections on his assigned routes. At approximately 2:20 p.m., Miller was traveling westbound on County Road 17, sanding and salting with his wing blade engaged. Snow was falling, but he was able to see. Miller approached the intersection with Highway 63, which has a stop sign for traffic on County Road 17. Traffic on Highway 63 is not required to stop. The Wabasha County snow and ice removal policy does not require snowplow drivers to obey every traffic regulation, allowing drivers to use "professional judgment and discretion to determine the best course of action to complete plowing and sanding and salting responsibilities consistent with public and driver safety."[1] Miller understood that he has discretion to proceed through stop signs when it was unsafe to stop. He knew from experience that stopping at an intersection can leave piles of sand and salt and cause the snowplow to "lurch[]." As he approached the intersection, Miller did not see any vehicles on Highway

[1] General traffic regulations do not apply "to persons, motor vehicles, and other equipment while actually engaged in work upon the highway." Minn. Stat. § 169.035, subd. 1 (2010).

63, so he lifted his wing blade, slowed to approximately 10 mph, and continued sanding through the intersection.

Respondent Kelley Mielke was traveling southbound on Highway 63. As he began descending from the top of a knoll preceding the intersection with County Road 17, he noticed the snowplow approaching the intersection. Just prior to reaching the intersection, Mielke realized the snowplow was not going to stop. He applied his brakes but could not avoid colliding with the snowplow's wing blade in the middle of the intersection. When Mielke asked Miller why he didn't stop, Miller said he "did not see" Mielke coming.

Mielke suffered injuries as a result of the accident and commenced this action. Appellants moved for summary judgment on the basis of common-law official immunity. The district court denied appellants' motion, concluding that appellants are not protected by official immunity because the "obligation to maintain a proper lookout is a ministerial function of driving a motorized vehicle and that obligation exists independently of the discretionary decisions related to snow removal and sanding." This appeal follows.

D E C I S I O N

"Summary judgment is appropriate when a governmental entity establishes that its actions are immune from liability." *In re Alexandria Accident*, 561 N.W.2d 543, 546 (Minn. App. 1997), *review denied* (Minn. June 26, 1997). "While denial of a motion for summary judgment is not ordinarily appealable, an exception to this rule exists when the denial of summary judgment is based on rejection of a statutory or official immunity defense." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655

(Minn. 2004). This is because "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).

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 the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When reviewing a denial of summary judgment based on a claim of immunity, we assume the facts alleged by the nonmoving party are true. *Burns v. State*, 570 N.W.2d 17, 19 (Minn. App. 1997). Whether immunity applies is a legal question we review de novo. *Gleason*, 582 N.W.2d at 219. The party asserting immunity has the burden of demonstrating entitlement to that defense. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

I. Miller's discretionary actions while operating the snowplow are entitled to common-law official immunity.

"The common law doctrine of official immunity provides that a public official who is charged by law with duties calling for the exercise of judgment or discretion is not personally liable to an individual for damages unless the official is guilty of a willful or malicious act."[2] *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). 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." *Anderson*, 678 N.W.2d at 655 (alteration in original) (quotation omitted).

[2] Mielke does not contend that Miller acted willfully or maliciously.

Official immunity protects the kind of discretion that is exercised on an operational, rather than a policymaking, level. *Alexandria Accident*, 561 N.W.2d at 549.

"The starting point for analysis of an immunity question is the identification of the precise governmental conduct at issue." *Gleason*, 582 N.W.2d at 219 (quotation omitted). Official immunity protects only an official's discretionary actions; it does not protect an official's performance of ministerial duties. *Anderson*, 678 N.W.2d at 655. Discretionary acts involve "more individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Wiederholt*, 581 N.W.2d at 315. Ministerial duties are those that are "absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts," where "nothing is left to discretion." *Id.* (quotation omitted). Official immunity does not apply when "a ministerial duty is either not performed or is performed negligently." *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 505 (Minn. 2006).

In the principal snowplow case, *Alexandria Accident*, we concluded that official immunity protected a snowplow operator whose decisions while snowplowing comported with the state's snow removal policy and "involved discretion and balancing of several factors." 561 N.W.2d at 549. We held that the actions were "not purely ministerial" because the operator had to consider road and weather conditions and determine an appropriate speed, time, and manner for plowing, and that such decisions "involved sufficient discretion to fall within the protection of official immunity." *Id.*

But not all acts performed within the scope of a broader discretionary function are entitled to immunity. In *Schroeder*, the supreme court distinguished between a road

grader's act of grading against traffic and his operation of the grader after sunset without activating the lights. 708 N.W.2d at 506-07. The supreme court held that grading against traffic, which county policy permitted, involved the exercise of discretion and warranted official immunity. *Id.* at 506. In contrast, the supreme court concluded that "the nature, quality, and complexity" of the operator's decision not to activate the lights is "clearly ministerial." *Id.* at 507-08.

Mielke argues that the precise governmental conduct at issue is Miller's "failure to maintain a reasonable lookout" while operating the snowplow. In doing so, Mielke does not dispute that Miller's decision to continue sanding and salting through the stop sign necessarily involved the exercise of discretion, but contends that the duty to keep a reasonable lookout is ministerial and independent from Miller's discretionary actions. Appellants argue that it is inappropriate to "focus on one factor" of the snowplow operator's conduct to avoid acknowledging the discretionary nature of the larger act of snowplowing, which involves a "multitude of factors." We agree.

Mielke urges, and the district court employed, a more "precise" analysis emphasizing the independence of the duty to keep a reasonable lookout from other conduct leading to the accident. But carving out and isolating this aspect of Miller's operation of the snowplow parses the official immunity analysis too thin. Not only does Mielke fail to cite precedential support for his argument, but the weight of authority disfavors taking a narrow view of the actions involved in snow removal.[3] To isolate the

[3] Mielke relies, in part, on a recent unpublished decision affirming a district court's denial of official immunity for a snowplow operator where the lack of evidence of any

obligation to keep a proper lookout from the other aspects of protected discretionary snowplow activities would frustrate the very purpose of immunity—to "protect[] public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Anderson*, 678 N.W.2d at 655 (alteration in original) (quotation omitted). We decline the invitation to limit the scope of official immunity. Accordingly, we conclude that Miller's failure to see Mielke prior to entering the intersection cannot become the basis for finding a separable ministerial duty that overcomes official immunity for Miller's undisputed discretionary actions.

As in *Alexandria Accident*, the record establishes that Miller was acting within the scope of the county's snow removal policy, and that he contemporaneously considered several factors as he proceeded through the intersection. He adjusted his speed, lifted his wing blade to prevent plowing snow onto highway 63, looked for, but did not see, cross traffic, and elected to continue sanding and salting to prevent "lurching" and leaving "uneven" piles of sand and salt in the intersection. Further, unlike in *Schroeder*, all of the challenged conduct occurred at the time of the accident.

II. Wabasha County is entitled to vicarious official immunity.

"[V]icarious official immunity [is appropriate] in situations where officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions." *Id.* at 664. Generally, when a public official

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discretionary conduct was undisputed. But this case is neither precedential nor analogous, as Mielke concedes that Miller was engaged in "discretionary snowplow activities" at the time of the accident.

is entitled to official immunity from suit, the official's government employer will be entitled to the defense of vicarious official immunity from claims arising from the official's conduct. *Schroeder*, 708 N.W.2d at 508. Because we conclude that official immunity applies in this case, Wabasha County is entitled to vicarious official immunity, and we reverse the district court's denial of summary judgment.

Reversed.