2020 VT 23

No. 2019-036

Paul Civetti	Supreme Court
v.	On Appeal from Superior Court, Grand Isle Unit, Civil Division
Selby L. Turner, Jr. and Town of Isle La Motte	May Term, 2019

Robert A. Mello, J.

Pietro J. Lynn, Sean M. Toohey, and Kienan D. Christianson of Lynn, Lynn, Blackman & Manitsky, P.C., Burlington, for Plaintiff-Appellant.

Brian P. Monaghan and James F. Conway, III of Monaghan Safar Ducham PLLC, Burlington, for Defendants-Appellees.

PRESENT: Reiber, C.J., Skoglund, Robinson, Eaton and Carroll, JJ.

¶ 1. **ROBINSON, J.** The central issue in this case is whether a town may be held indirectly liable for damages pursuant to 24 V.S.A. § 901 or § 901a for alleged negligence by the Town Road Commissioner. The trial court dismissed plaintiff's negligence action against the Town of Isle La Motte and the Town Road Commissioner on the grounds that (1) because the Road Commissioner is an "appointed or elected municipal officer," plaintiff was required by § 901(a) to bring his action against the Town, rather than the Road Commissioner, and (2) the Town is, in turn, immune from suit based on municipal immunity. We conclude that if the Road Commissioner was negligent in performing a ministerial function, the Town assumes the Road Commissioner's place in defending the action and therefore may not assert municipal immunity from the claim pursuant to § 901(a) or § 901a, and that dismissal of this claim on the basis of

qualified immunity would be premature. We accordingly reverse and remand for further proceedings.

¶ 2. In his complaint, plaintiff alleged that: the Town has formally adopted road standards for its town roads; the Road Commissioner is responsible for assuring that the Town's roads meet those standards; Main Street did not comply with those standards, including standards relating to the "width and shoulder"; the Road Commissioner knew or should have known that Main Street does not comply; and plaintiff was injured in a motor vehicle accident because of the non-compliant road.[1] Defendants separately moved to dismiss under Vermont Rule of Civil Procedure 12(b) and (c). Following oral argument, the court granted defendants' motions.

¶ 3. In dismissing the claim against the Road Commissioner, the trial court explained that under 24 V.S.A. § 901(a), an action against "any appointed or elected municipal officer" must be brought against "the town in which the officer serves." Because the Road Commissioner was an appointed or elected municipal officer, he was not properly named as a defendant. The court further concluded that municipal immunity barred plaintiff's claim against the Town—including the claim against the Road Commissioner directed at the Town pursuant to § 901(a). It reasoned that the Town was entitled to municipal immunity because the allegedly negligent acts—involving the design of roads—were governmental acts. It further concluded that the Town was entitled to "discretionary-function" immunity with respect to its discretionary decision regarding whether and how to comply with its road standards. The court thus dismissed plaintiff's claim against the Town. Plaintiff appealed.

¶ 4. On appeal, plaintiff argues that we should abolish the governmental/proprietary distinction in municipal tort immunity law so that the Town can be held directly liable in this case;

[1] We assume, for purposes of reviewing the motion to dismiss, that Main Street is a town highway and not a state highway. Cf. 12 V.S.A. § 5601(e)(8) (providing that State remains immune under Vermont Tort Claims Act from claims "arising from the selection of or purposeful deviation from a particular set of standards for the planning and design of highways").

that the Town's municipal immunity does not insulate it from indirect liability arising from a claim against the Road Commissioner pursuant to § 901(a) and/or § 901a; and that the trial court's determination that discretionary-function immunity applies here is premature.

¶ 5. We review the court's dismissal of plaintiff's complaint without deference. Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575, 959 A.2d 990 (mem.). "[W]e take all facts alleged in the complaint as true." Id. "Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle the plaintiff to relief." Id. For the reasons set forth below, we decline to abolish the governmental/proprietary-function distinction, and thus conclude that the Town is immune from direct suit in this case. However, pursuant to 24 V.S.A. § 901a and § 901(a), the Town essentially steps into the Road Commissioner's shoes for the purposes of defending the suit and paying a judgment; we conclude that it is not entitled to invoke its municipal immunity in that context. Finally, we agree with plaintiff that on the basis of the bare pleadings, we cannot conclude that qualified immunity for discretionary acts applies as a matter of law.

I. The Governmental/Proprietary-Function Distinction

¶ 6. Pursuant to well-established common law, a municipality is generally immune from suit based on the negligent performance of "governmental" functions. Lorman v. City of Rutland, 2018 VT 64, ¶ 9, 207 Vt. 598, 193 A.3d 1174. Designing and building roads is a core governmental function. We recognize that the governmental/proprietary distinction has come under fire, but decline plaintiff's invitation to abandon the distinction at this juncture. Accordingly, we conclude that the Town is immune from direct suit arising from the design and construction of a town road.

¶ 7. Vermont continues to apply the longstanding common-law doctrine of municipal immunity. See Hillerby v. Town of Colchester, 167 Vt. 270, 272, 706 A.2d 446, 447 (1997) (discussing history of municipal immunity in Vermont, dating back to mid-1800s); see also D.

Dobbs, et al., The Law of Torts § 343 (2d ed.) (noting that while municipalities are "corporations chartered by the state" and not "sovereigns," "a peculiar history led courts to recognize a distinct municipal immunity, which followed a course of its own" (footnote omitted)).

¶ 8. Pursuant to Vermont's common law of municipal immunity, "[a]bsent insurance coverage, those functions which are governmental are protected by the doctrine of sovereign immunity, while, in contrast, the governmental unit will be liable for injuries caused or sustained in furtherance of its proprietary function." Lorman, 2018 VT 64, ¶ 9 (quotation omitted). See Town of Stockbridge v. State Hwy. Bd., 125 Vt. 366, 369, 216 A.2d 44, 46 (1965) (recognizing "dual character" of municipal corporation: (1) "governmental, public or legislative" and (2) "corporate, private, ministerial or proprietary"). "The rationale for this is that municipalities perform governmental responsibilities for the general public as instrumentalities of the state; they conduct proprietary activities only for the benefit of the municipality and its residents." Lorman, 2018 VT 64, ¶ 9 (quotation omitted); see also Mark v. City & Cty. of Honolulu, 40 Haw. 338, 341 (1953) ("The theory is that the State being sovereign, no suit can be brought against it without its consent and a municipality in performing governmental functions is the agent of the State and, therefore, exempt from suit.").

¶ 9. "Building and maintaining streets . . . are generally governmental functions, and no liability for injuries suffered as a result of such activities may attach." Graham v. Town of Duxbury, 173 Vt. 498, 499, 787 A.2d 1229, 1232 (2001) (mem.) (citing cases); accord McMurphy v. State, 171 Vt. 9, 14 n.2, 757 A.2d 1043, 1047 n.2 (2000) ("This Court has long held that the maintenance of highways is a governmental function." (citing cases)). Accordingly, based on a common-law analysis, the Town is immune from direct suit.

¶ 10. We recognize that the governmental/proprietary-function distinction is imperfect. Vermont is one of few states that continue to apply the distinction. Lorman, 2018 VT 64, ¶ 9. And we have recognized that "[t]he application of this doctrine has produced anomalous results in

particular cases." Marshall v. Town of Brattleboro, 121 Vt. 417, 423, 160 A.2d 762, 766 (1960); see also Mark, 40 Haw. at 341-42 (asserting that "cases are in hopeless confusion and even in the same jurisdiction often impossible to reconcile").

¶ 11. Nevertheless, we reject plaintiff's request that we abolish the governmental/proprietary distinction in municipal tort immunity law. We recently reaffirmed that the distinction applies. See Lorman, 2018 VT 64, ¶¶ 10, 20 (continuing to apply governmental/ proprietary distinction despite its flaws but reiterating that "it would be beneficial for the Legislature to act in this area"). While we will not uncritically perpetuate common-law precedent for its own sake, we continue to believe that the Legislature is best suited to balance the competing considerations at play in reevaluating municipal immunity. See O'Connor v. City of Rutland, 172 Vt. 570, 570-71, 772 A.2d 551, 552-53 (2001) (mem.) (similarly rejecting argument that Court should abolish governmental/proprietary distinction, reiterating earlier holding that Legislature's "fact-finding and problem-solving process is better suited for the task in this area of the law") (quoting Hillerby, 167 Vt. at 276, 706 A.2d at 449); Marshall, 121 Vt. at 424, 160 A.2d at 767 (declining to abolish distinction despite "divergent consequences in cases factually similar," explaining that "in over 110 years the doctrine has become so firmly established in our law that it cannot be lightly set aside").[2]

II. Road Commissioner's Liability and 24 V.S.A. § 901 and § 901a

¶ 12. The central question in this appeal is whether, pursuant to either 24 V.S.A. § 901 or § 901a, the Legislature has waived municipal immunity for the negligent actions of municipal officers or employees while performing governmental functions.[3]

[2] Because we conclude that plaintiff's direct claim against the municipality is barred because the challenged acts are governmental in nature, we need not address the argument that the claim against the municipality is also barred because the challenged acts involved discretionary decisions.

[3] Our conclusion rests on our analysis of two modern statutes that supersede preexisting case law to the extent that it supports a contrary view—24 V.S.A. § 901, as amended in 1974, and

¶ 13. Section 901 provides that suits against municipal officers should be brought against the municipality. Nobody disputes that the Road Commissioner is a municipal officer covered by this statute. See 17 V.S.A. § 2646(16) (identifying town officers, including "[o]ne or two road commissioners" who are either "elected by ballot" or "appointed by the selectboard" pursuant to 17 V.S.A. § 2651 for a one-to-three-year term); id. § 2651(a) (stating that "[u]nless the town votes to elect road commissioners, the selectboard shall appoint forthwith one or two road commissioners"). The only contested question with respect to § 901 is whether § 901(a) amounts to a waiver of municipal immunity for suits against municipal officers, limiting a municipality's defenses to those that would be available to the officer.

¶ 14. Section 901a, enacted more recently, applies to municipal employees. That statute expressly provides that the municipality "may assert all defenses available to the municipal employee, and the municipality shall waive any defense not available to the municipal employee, including municipal sovereign immunity." 24 V.S.A. § 901a(c). This statute unquestionably waives municipal immunity for suits against municipal employees. The contested question with respect to § 901a is whether the Road Commissioner qualifies as a municipal employee for the purposes of this statute.

¶ 15. We conclude that § 901(a) amounts to a waiver of municipal immunity, essentially placing the Town in the shoes of its municipal officers, armed with the defenses available to those officers. Alternatively, even if § 901(a) was not intended to operate as we understand it, we conclude that the more-recently enacted § 901a defines the class of employees subject to the statute broadly enough to include the Road Commissioner. In either event, the Town may be liable to plaintiff—subject to any defenses, such as qualified immunity, available to the Road Commissioner. Under either approach, the potential exposure of municipal coffers to judgments

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24 V.S.A. § 901a. Accordingly, although the holdings of the various nineteenth-century decisions cited by the dissent may provide helpful context, see post, ¶¶ 43-48, they are not determinative of the issue before us in this case.

arising from the acts of municipal officers remains narrow—the qualified-immunity defense continues to shield municipalities from claims based on the acts of municipal officers, employees, and agents acting in good faith within the scope of their authority while performing discretionary, as opposed to ministerial, acts.

A. 24 V.S.A. § 901(a)

¶ 16. For several reasons, we conclude that § 901 effects a limited waiver of municipal immunity, placing the Town in the Road Commissioner's shoes in a case like this. Our view is consistent with the language and structure of the statute; the history of the statute, as amended in 1974; and this Court's historical understanding of the statute. Any other construction of the statute would create an inexplicable incongruity in the law, leaving no recourse for a narrow class of plaintiffs who are injured by municipal officers negligently performing ministerial, governmental functions. We discuss these considerations in more detail below.

¶ 17. Although the language of § 901 could be (much) clearer, the Legislature's intent is apparent on the face of the statute. The statute provides:

> (a) Where an action is given to any appointed or elected municipal officer or town school district officer, the action shall be brought in the name of the town in which the officer serves and in the case of a town school district officer in the name of the town school district. If the action is given against such officers, it shall be brought against such town or town school district, as the case may be.
>
> (b) The municipality shall assume all reasonable legal fees incurred by an officer when the officer was acting in the performance of his or her duties and did not act with any malicious intent.

24 V.S.A. § 901 (emphasis added).

¶ 18. Several aspects of this text contribute to our understanding that this statute is intended to place the Town in the shoes of the defendant town officer. The operative provision, the second sentence of § 901(a), follows a sentence describing how a case brought by, or "given to," a municipal officer should be captioned. It follows that the second sentence relates to which party stands in a municipal officer's shoes when the municipal officer is the defendant. Nothing

in the second sentence suggests that it serves the more consequential purpose of extending municipal immunity to claims against a municipal officer. Had the Legislature intended, in directing that suits against municipal officers be "brought against" the Town, to thereby bar any recovery for plaintiffs injured by municipal officers engaging in governmental acts—whether discretionary or ministerial—it would have said so. Moreover, § 901(b), which was added in 1974 when § 901(a) was amended to apply to municipal officers generally, reinforces that the last sentence of § 901(a) is essentially a defend-and-indemnify provision for actions undertaken in good faith by municipal officers in the course of their employment. See 1973, No. 235 (Adj. Sess.), § 1.

¶ 19. The history of this 1974 amendment reinforces this understanding. Prior to that amendment, § 901 applied to a limited set of defined municipal officers. In 1974, the Legislature amended the statute to require that actions against any municipal officer be brought against the municipality, and to require the municipality to assume reasonable legal fees. The sponsor's statement of purpose appearing on the face of the bill, as enacted, stated, "It is the purpose of this bill to provide that a municipality assume the liability for damages and legal fees incurred by an officer in the performance of [the officer's] duties." The Legislature did not adopt the initially proposed language expressly providing that the municipality assumed the officer's liability, but instead added language requiring municipalities to "secure insurance to cover liabilities which may accrue to the municipality under section 901 of this title." See 1973, No. 235 (Adj. Sess.), § 2 (amending 24 V.S.A. § 1092).[4] This language reflects that the Legislature understood § 901, as amended, to impose additional liability on municipalities, rather than to expand the shield of sovereign immunity to a broader class of claims.

[4] In 1975, the Legislature amended § 1092 again to make the acquisition of insurance to cover liabilities that may accrue to the municipality under § 901 discretionary rather than mandatory. 1975, No. 122 § 1.

¶ 20. This Court's understanding of the statute since this 1974 amendment is also consistent with the understanding that § 901(a) operates as a defend-and-indemnify provision. In 1993, in the case of Holmberg v. Brent, the Court explained, "§ 901(a) mandates that any action brought against municipal officers be brought against the municipality, which amounts to an assumption of the officer's liability." 161 Vt. 153, 156, 636 A.2d 333, 336 (1993). More recently, we noted that § 901(a) covers actions "in which the interest of the officer is coextensive with the interest of the town such that substitution of the town's name with the officer's name does not alter the nature of the action." Stone v. Town of Irasburg, 2014 VT 43, ¶ 46, 196 Vt. 356, 98 A.3d 769. The imposition of absolute immunity for negligence in the execution of governmental functions would dramatically "alter the nature of [plaintiff's] action" against the Road Commissioner. Id. And most recently, in Nelson v. Town of St. Johnsbury Selectboard, we said the following:

> As required under 24 V.S.A. § 901(a), an action against an "appointed or elected municipal officer" must be brought instead against the town. The Town here never raised this statute, although the original complaint appeared to have violated it. We read the statute as dictating which entity the plaintiff may sue but not restricting the theory of liability or the defenses available. Thus, plaintiff can raise against the Town the same theories of liability he can raise against the selectboard members, and the Town is entitled to defenses that can be raised by members of the selectboard, including qualified immunity. Cf. § 901a(b), (c).

2015 VT 5, ¶ 61, n.11, 198 Vt. 277, 115 A.3d 423.

¶ 21. None of these decisions turned on the critical question of how § 901(a) works, and these decisions have not established binding authority as to the proper interpretation of the statute, but these discussions do reinforce that this Court's longstanding understanding of § 901(a) is that the statute shifts the officer's liability and defenses to the town, which stands in the officer's shoes.

¶ 22. Finally, we find it hard to imagine that in amending § 901 in 1974, the Legislature intended to expand the class of Vermonters denied relief for injuries caused by municipal officers performing ministerial acts in the course of their employment. The 1974 amendment to § 901 was clearly designed to expand the class of municipal officers protected from personal liability for their

negligent acts in the course of their municipal work, but we see no evidence that the Legislature intended to do so at the expense of Vermonters injured by municipal officers negligently performing ministerial acts. If we concluded otherwise, a driver grievously injured as a result of a municipal officer's driving on the wrong side of the road in the course of municipal work would have no recourse, regardless of the extent of the municipal officer's negligence and the potential plaintiff's injuries. We doubt this was the Legislature's intent in the absence of any indication that the Legislature sought to eliminate remedies for those injured due to the negligent acts of town officers.

B. 24 V.S.A. § 901a

¶ 23. Alternatively, we conclude that even if § 901 did not waive municipal immunity in this case, § 901a, which expressly waives municipal immunity and puts the town in the shoes of its employees in the context of claims for negligence, applies to claims against the Road Commissioner. The text of the statute, its history and purpose, and the precept that statutes should be construed to avoid absurd results all support this conclusion.

¶ 24. The municipal tort claims act provides that claims against municipal employees arising from injuries they cause while acting within the scope of their employment shall be made exclusively against the municipality and not the municipal employee. 24 V.S.A. § 901a(b). The municipality assumes the place of the municipal employee, waiving any defenses not available to the municipal employee, including municipal sovereign immunity, and assuming all defenses available to the municipal employee. Id. § 901a(c).

¶ 25. This law applies to "municipal employees," defined expansively to mean:

> [A]ny person employed for a wage or salary by a municipality; a volunteer whose services have been requested by the legislative body of a municipality; a volunteer whose services have been requested by a municipal officer; or a volunteer whose services have been requested by an employee of the municipality acting within the scope of the employee's authority.

Id. § 901a(a). This definition includes any person employed for a wage or salary by a municipality—as well as volunteers whose services have been formally requested by municipal officers, employees, or legislative bodies. Id. § 901a(a). This broad definition of "municipal employee" contains no qualification suggesting an intent to exclude people employed for a wage or salary by a municipality when they are statutory town officers. In construing a statute, "we look first to the plain meaning to derive the intent of the Legislature." Northfield Sch. Bd. v. Wash. S. Educ. Ass'n, 2019 VT 26, ¶ 13, __ Vt. __, 210 A.3d 460 (quotation omitted). The plain meaning here is unambiguous. The Road Commissioner is undisputedly employed by the municipality for a wage or salary, and thus falls within the definition of "employee" for purposes of this statute.[5]

¶ 26. Although the plain language of § 901a(a) is sufficiently clear to resolve the question, the history and purpose of that statute reinforce our conclusion. The statute was a direct response to the decision of this Court in the case of Morway v. Trombly, 173 Vt. 266, 789 A.2d 965 (2001). In that case, we considered whether an injured plaintiff could pursue a negligence claim against a town snowplow operator whose alleged negligence while plowing snowdrifts caused plaintiff's injuries. The Court began by contrasting the laws relating to torts committed by state employees and municipal employees, noting that the state is obligated to defend state

[5] The dissent would look beyond the plain meaning of the definition of "employee" in the statute and instead construe the term narrowly, to exclude municipal employees who also serve as municipal officers. In doing so, it suggests that because § 901(a) already dealt with claims against municipal officers, we should disregard the broad definition of "employee" in § 901a and instead construe that statute to apply to a more limited class of municipal employees—those who are not also municipal officers. Post, ¶ 57. The dissent relies on the principle that a more specific statutory enactment generally trumps a more general one in the face of a conflict. Post, ¶ 40; see Hartford Bd. of Library Trs. v. Town of Hartford, 174 Vt. 598, 599, 816 A.2d 512, 515 (2002) (mem.) (recognizing "general rule[] of statutory construction that a specific statute governs over a more general one"). Although the language of § 901a is clear enough that we need not resort to maxims of statutory construction, we are mindful that we generally give effect to more recent statutes when they are in tension with pre-existing law. See id. (noting also that "a statute enacted later in time generally governs over an earlier statute"). For the reasons set forth above, we conclude in any event that the provisions of § 901a and § 901(a) are consistent in that both place the municipality in the municipal officer's shoes in defending against claims arising from the officer's acts in the course of employment.

employees and indemnify them for judgments based on acts or omissions in the scope of their employment, whereas there are situations in which municipal employees performing ministerial tasks associated with governmental functions may be personally liable even though the municipality is immune from suit for those same acts. Id. at 270-271, 789 A.2d at 968-969. Concluding that the snowplow operator performed the allegedly negligent acts in the course of ministerial, as opposed to discretionary, acts, the Court determined that he was not entitled to qualified immunity and could therefore be held liable for his alleged negligence. Id. at 273-74, 789 A.2d at 970-971. The Court acknowledged that "it may seem unfair to some that a municipal snowplow operator may be subject to personal liability for doing a difficult job under difficult circumstances," but concluded that it could not ignore "the principles behind the policy of providing limited immunity from suit to government employees." Id. at 273, 789 A.2d at 971.

¶ 27. The concurring justice noted the majority's "identification of potential legislative responses to the quandary of exposure of municipal employees to tort liability in situations in which the town is immune from suit," suggested additional, narrower legislative fixes targeted specifically at weather-related activities, and noted that he joined because "current law compels the result—not because the result ma[de] sense." Id. at 276 (Amestoy, C.J., concurring).

¶ 28. The legislative response was immediate. Within several weeks, a majority of the legislators in the House introduced a bill to change the applicable law. H.568, 2001-2002 Gen. Assem., Bien. Sess. (Vt. 2002). The bill as enacted directed the Legislature's lawyers to prepare a comprehensive report examining Vermont's statutory and common law concerning municipal sovereign immunity and qualified immunity, "and how these provisions affect the rights of municipal officers and employees and persons injured by municipal officers and employees." 2001, No. 130 (Adj. Sess.), § 2(a)(1). Among other things, the lawyers were instructed to "examine options to protect personal assets of municipal employees and volunteers from work-related claims, while preserving remedies for injured parties for these claims." Id. § 2(a)(6). The

Legislature was clearly responding to the unpopular outcome of potentially subjecting a municipal employee to personal liability for acts committed in the course of municipal employment, but was determined to respond in a way that preserved remedies for injured parties. Its focus at that point was broad and comprehensive.

¶ 29. The following biennium, the Legislature passed a law "relating to tort claims against municipal employees"— the statute codified at 24 V.S.A. § 901a. In passing a municipal tort claims act, the Legislature sought to ensure more comprehensive protection against tort liability for municipal employees, analogous to that enjoyed by state employees. See 12 V.S.A. §§ 5601, 5602 (waiving State's sovereign immunity with respect to certain suits arising out of injuries caused by state employees, and providing that such actions must be brought against State rather than state employee). But it clearly did not intend to expand that protection at expense of injured parties. Nothing about this history supports the inference that in protecting municipal employees from personal liability, the Legislature intended to leave injured Vermonters without any remedy in the narrow class of cases in which a municipal employee who is also a municipal officer negligently inflicts injury in the course of performing ministerial acts relating to governmental functions. Based on the language of § 901(a) and this Court's interpretation of that statute, the Legislature may have assumed that municipal officers were already covered by a defend-and-indemnify provision; but it nevertheless used language broad enough to sweep town officers into the more explicit and comprehensive municipal tort claims act.

¶ 30. A contrary construction of this facially clear statute would also lead to an inexplicable state of affairs: an individual injured as a result of the Road Commissioner negligently driving through a red light would have no recourse, but an individual injured as a result of the road foreman, who works under the Road Commissioner's supervision, negligently running a light would have recourse against the town pursuant to § 901a. There is no reason to imagine that the Legislature would seek to distinguish these two scenarios. It may be the case that claims against

a Road Commissioner are more likely to bump up against qualified immunity for discretionary acts; but with respect to non-discretionary, ministerial acts, there is no basis for barring recovery in one case and not the other. We would effectuate such an anomalous outcome if compelled by unambiguous statutory language, but the clear text of the statute does not support such a baffling result. See State v. Quinn, 165 Vt. 136, 140, 675 A.2d 1336, 1338 (1996) ("[W]e must avoid construing statutory language in a way that produces an irrational result.").

¶ 31. We note that our understanding of these statutes does not give rise to mystifying or undesirable results. All parties agree that municipalities cannot invoke municipal immunity as a defense to cases arising from the negligence of municipal employees who are not also municipal officers; in this decision, we simply recognize that claims against municipal employees who are also municipal officers are subject to the same treatment. Moreover, as discussed briefly below, claims against municipal officers, like claims against other municipal employees, are still subject to the potential defense of qualified immunity. See, e.g. Morway, 173 Vt. at 271-72, 789 A.2d at 969 ("Under the doctrine of qualified official immunity, which we have applied in cases involving municipal employees, lower-level government employees are immune from tort liability when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority." (quotation omitted)).

III. Qualified Immunity for Discretionary Acts

¶ 32. Plaintiff's claims against the Town, via § 901 and § 901a, are subject to the Road Commissioner's legal defenses. Among those defenses is qualified immunity for certain discretionary acts. Based on the bare pleadings, we cannot conclude that, as a matter of law, plaintiff's claims are barred on the basis of qualified immunity.

¶ 33. Because the Town essentially stands in the shoes of its officers and employees in defending against claims of negligence arising from the officers' and employees' governmental acts, it can raise those officers' and employees' legal defenses. See 24 V.S.A. § 901a(c) ("When

a municipality assumes the place of a municipal employee in an action as provided in subsection (b) of this section, the municipality may assert all defenses available to the municipal employee, and the municipality shall waive any defense not available to the municipal employee, including municipal sovereign immunity."); Nelson, 2015 VT 5, ¶ 61, n.11 (explaining that under § 901(a), plaintiffs "can raise against the Town the same theories of liability [they] can raise against the selectboard members, and the Town is entitled to defenses that can be raised by members of the selectboard, including qualified immunity"). Cf. 12 V.S.A. § 5601(e)(1) (providing under state tort claims act that State's waiver of sovereign immunity does not extend to claims "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty").

¶ 34. One legal defense available to the Road Commissioner is qualified immunity, which protects "[l]ower-level officers, employees and agents" who act in good faith within the scope of their authority and "who perform[] discretionary, as opposed to ministerial, acts." Levinsky v. Diamond, 151 Vt. 178, 183-85, 559 A.2d 1073, 1078-79 (1989), overruled on other grounds by Muzzy v. State By & Through Rutland Cty. State's Attorney, 155 Vt. 279, 583 A.2d 82 (1990). We have recognized that qualified immunity may apply to municipal officers and employees. See, e.g., Hudson v. Town of E. Montpelier, 161 Vt. 168, 171, 638 A.2d 561, 563 (1993) (analyzing whether town employees were protected by qualified immunity in connection with suit against them for negligently repairing a town road and noting that "this Court had applied the doctrine of qualified official immunity in prior cases involving the liability of municipal officers"). But qualified immunity does not bar claims against local officials for decisions that do not involve the kind of weighing of public policy considerations that would warrant shielding them from liability. Id. at 175, 638 A.2d at 566 (affirming trial court's denial of qualified immunity defense to municipal employee who negligently covered with gravel an exposed ledge protruding from a dirt road). Whether a particular act qualifies as "discretionary" turns on a specific examination of the nature of the act to determine whether the employee's action "involved the type

of policy considerations not suitable for review under the judicial system's traditional tort standards." Id.[6]

¶ 35. In this case, plaintiff has alleged that Isle La Motte formally adopted road standards for its town roads; that the Road Commissioner is responsible for assuring that the town roads meet these standards; that Main Street does not comply with the standards, "including but not limited to the width and shoulder road standards"; that the Road Commissioner knew or should have known Main Street is noncompliant, creating a foreseeable risk of harm; and that plaintiff was injured as a result of the noncompliance.

¶ 36. Defendant argues that the Road Commissioner's decision not to correct a perceived defect in the road was the kind of discretionary decision protected by qualified immunity. See, e.g., Estate of Gage v. State, 2005 VT 78, ¶¶ 5-7, 178 Vt. 212, 882 A.2d 1157 (concluding based on extensive summary judgment record that state employee's decision regarding protective measures at site of accident reflected an exercise of discretion such that State's statutory waiver of sovereign immunity did not apply).

[6] The dissent suggests that the majority has not addressed "discretionary-function immunity" or discussed how our holding affects the ongoing vitality of this doctrine. Post, ¶ 54 n.9. Because we agree that the municipality is immune from direct suit based on the fact that the challenged acts were governmental in nature, we need not determine whether the municipality is also immune from direct suit based on the alternate rationale that the challenged municipal acts were discretionary in nature. Because the municipality stands in the shoes of a municipal officer defendant, and qualified immunity for certain discretionary acts is an available defense to municipal officers, qualified immunity provides the correct framework for assessing defendant's liability. Moreover, even if we did address the argument that the municipality is immune from direct suit on the alternate basis that the underlying acts were discretionary, that analysis in this case would be essentially the same as the analysis of whether the town officer defendant is entitled to qualified immunity; both analyses turn on the same question of whether the officer or town's decision "required a weighing of the type of public policy considerations that would warrant shielding [the officer or town] from liability." Hudson 161 Vt. at 175, 638 A.2d at 566 (stating test for qualified immunity); cf. Lorman, 2018 VT 64, ¶ 21 (quoting same test for municipal immunity based on discretionary-functions). Nothing about this decision undermines the continuing existence of municipal immunity based on the exercise of discretionary functions as recognized in Lorman. 2018 VT 64, ¶ 20.

¶ 37. Whether official qualified immunity provides the Town, standing in the Road Commissioner's shoes, a defense in this case depends on further factual development and cannot be resolved on these pleadings alone. A motion to dismiss shall not be granted unless "there exist no facts or circumstances" under which the nonmovant may be entitled to relief. Richards v. Town of Norwich, 169 Vt. 44, 48, 726 A.2d 81, 85 (1999) (quotation omitted). Although the Town may marshal evidence that the decision to depart from the Town's established standards reflected an exercise of discretion by the Road Commissioner, that conclusion does not flow inexorably from plaintiff's complaint. Plaintiff may develop evidence that the Road Commissioner had no authority to deviate from the alleged town standards,[7] or that the Road Commissioner simply overlooked the alleged fact that Main Street did not comply with the Town's standards. The assessment of defendant's qualified-immunity defense will require consideration of a host of factors not evident from the bare pleadings. See Hudson, 161 Vt. at 171-76, 638 A.2d at 564-67 (discussing factors relevant to qualified immunity determination).

Plaintiff's claim is reversed and remanded for further proceedings in the trial court.

FOR THE COURT:

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Associate Justice

¶ 38. **CARROLL, J., dissenting.** The Legislature has enacted a specific provision, 24 V.S.A. § 901(a), governing suits against municipal officers. Pursuant to this statute, actions given

[7] We note that the town selectboard, not the Road Commissioner, has "general supervision and control" of town highways, 19 V.S.A. § 303, including the authority to "see that town highways and bridges are properly laid out, constructed, maintained, altered, widened, vacated, discontinued, and operated, when the safety of the public requires, in accordance with the provisions of [Title 19, V.S.A.]," id. § 304. "Road commissioners, elected or appointed, . . . have only the powers and authority regarding highways granted to them by the selectmen." Id. § 304(16).

to and against any "appointed or elected municipal officer" must "be brought in the name of the town in which the officer serves." Id. As recognized by the plain language of the statute and our longstanding case law, the municipality is the real party in interest in such suits. As such, it is entitled to rely on its defenses, including municipal immunity. Where the challenged acts involve a "governmental" function, no liability can be imposed against the municipality.

¶ 39. The majority has rewritten § 901(a) rather than construing it. See In re 204 N. Ave. NOV, 2019 VT 52, ¶ 6, __ Vt. ___, 218 A.3d 24 ("In general, we will not read something into a statute that is not there unless it is necessary to make the statute effective." (quotation omitted)). Nowhere in § 901(a) does it state that a municipality stands in the shoes of its officers. The statute does not limit the defenses a municipality may raise. There is nothing to suggest that the law waives municipal immunity for certain kinds of cases, cf. ante, ¶ 15, or that it otherwise modifies the common law, see Jacobs v. State Teachers' Ret. Sys. of Vermont, 174 Vt. 404, 408, 816 A.2d 517, 521 (2002) (recognizing that state may waive sovereign immunity, but "[s]uch waiver must be accomplished expressly by statute"); see also Langle v. Kurkul, 146 Vt. 513, 516, 510 A.2d 1301, 1303 (1986) ("The common law is changed by statute only if the statute overturns the common law in clear and unambiguous language, or if the statute is clearly inconsistent with the common law, or the statute attempts to cover the entire subject matter."). When the Legislature has intended a waiver of municipal immunity, it has said so explicitly, as it did for suits against municipal employees. See 24 V.S.A. § 901a(c) (stating that "municipality assumes the place of a municipal employee" in suits against municipal employees under § 901a and "waive[s] any defense not available to the municipal employee, including municipal sovereign immunity").

¶ 40. Section 901a does not apply here. The Legislature distinguishes between municipal employees and municipal officers and it expressly intended to maintain this distinction when it enacted § 901a. Even if the Road Commissioner could arguably fit within the broad definition of "employee" under § 901a, the more specific statutory provision governing officers—§ 901(a)—

controls. "It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later-enacted statute covering a more generalized spectrum." F. M. Burlington Co.–Mondev Burlington, Inc. v. Comm'r of Taxes, 134 Vt. 515, 518, 365 A.2d 531, 533 (1976) (quotation omitted).

¶ 41. Under the majority's construction of the law, plaintiffs can now recover against a municipality for injuries arising out of governmental functions—as long as they can identify a municipal officer to sue. This undermines the doctrines of municipal immunity and municipal discretionary-function immunity, two separate and distinct legal doctrines that shield municipalities from liability. The trial court relied on both doctrines in dismissing plaintiff's complaint. We have never before recognized municipal liability for "ministerial, governmental functions," ante, ¶ 16, and we should not do so now. "[W]e must apply the statute as the Legislature wrote it and not how we wish they had written it." Yustin v. Dep't of Pub. Safety, 2011 VT 20, ¶ 16, 189 Vt. 618, 19 A.3d 611 (mem.) (Dooley, J., dissenting).

¶ 42. Applying the plain language of § 901(a), I would affirm the dismissal of plaintiff's complaint on immunity grounds. I therefore dissent.

¶ 43. "Municipal immunity is a common-law doctrine dating back in Vermont to the mid-1800s." Lorman v. City of Rutland, 2018 VT 64, ¶ 9, 207 Vt. 598, 193 A.3d 1174 (quotation omitted)). The operative language of § 901(a)—requiring that a suit "given to" or "against" a municipal officer be brought against the town—also dates to the 1800s. See 1817, p. 1134, R.S. 78, § 18; G.S. 85, § 16; R.L. § 2752. We have long recognized that when a town officer is sued for his or her official governmental acts, the real party in interest is the town. See Overseers of Poor of Guilford v. Overseers of Poor of Jamaica, 2 D. Chip. 104, 105 (Vt. 1824) (recognizing that suit against "overseer of the poor"—a named officer under predecessor statute—is suit against "person who by reason of his official character is made the representative, agent or trustee of the party in interest, such party being a body politic"); see also Welsh v. Village of Rutland, 56 Vt.

228, 233 (1883) (considering "[t]he question of the liability of quasi corporations for the negligence, non-feasance or mis-feasance of the officers and agents through whose instrumentality their various functions are performed").

¶ 44. It has been long established at common law "that an individual cannot sustain an action against a political subdivision of the State based upon the misconduct or non-feasance of public officers." Welsh, 56 Vt. at 234. The "more modern and broader" basis for this rule is that municipal corporations "are mere instrumentalities for the administration of public government and the collection and disbursement of public moneys, raised by taxation for public uses, and which cannot lawfully be applied to the liquidation of damages caused by wrongful acts of their officers." Id. (citing cases). This rule applies to the extent that its rationale does, that is, so far as "the acts done are governmental and political in their character and solely for the public benefit and protection; or the negligence or non-feasance are in respect of the same matters." Id. at 234-35 (also recognizing what is effectively discretionary-function immunity for municipalities, explaining that "[t]he immunity goes a step farther and protects such corporations in a total neglect to perform certain functions which are concededly for the public benefit and convenience," and also protects them for "defects or insufficiencies in the plans adopted for [sewers or waterworks] or other public improvements; and this is upon the ground that in such matters the corporation is discharging a legislative or quasi judicial function and its action is not reviewable by the law courts").

¶ 45. In Welsh, we considered whether a municipality should be held liable for injuries resulting from a fire-department engineer's negligence in thawing out a hydrant. During the thawing process, water from the hydrant escaped and created ice on the street; a traveler fell on the ice and was injured. We held that the fire department and the services it provided were governmental in nature and that the municipality was not liable for the alleged negligence of the officers of the fire department. We emphasized that the benefit of these services accrued "directly

to the public" and that the fire department employees, "while acting in the line of duty prescribed for them, [are] not agents of the corporation in the sense which renders [the village] liable for their acts, but are in the discharge of an official duty as public officers." Id. at 237. "To such," we continued, "it is held in many cases that the doctrine of respondeat superior does not apply, and for their acts no liability can be imposed upon the corporation except by statute." Id. (citing cases).

¶ 46. We observed that if liability were imposed under these circumstances, municipalities would become "virtually insurers of all property within their limits, and of their citizens, . . . provided any negligence or want of due care and skill could be established to the satisfaction of a jury." Id. at 239. We rejected such a result as untenable. See also Atken v. Village of Wells River, 70 Vt. 308, 313-14, 40 A. 829, 830-31 (1898) (concluding that village not liable for destroying plaintiff's property in connection with fixing washed-out highway, explaining that village was immune from suit because it "act[ed] in the matter in a governmental capacity, and, as it were, for and on behalf of the state, and therefore, in the absence of a statute making it otherwise, enjoys the same immunity from liability for the acts of its officers that the State itself would enjoy had it done the same thing by its own officers").

¶ 47. In Daniels v. Hathaway, 65 Vt. 247, 250, 26 A. 970, 972 (1892), we concluded that a town's selectmen could not be held personally liable for their failure to maintain a public highway when the town itself was not liable. In that case, the plaintiff alleged that the town selectmen had a duty to keep the highways in good repair, they failed to do so, and he was injured as a result. By law, the town had the ultimate duty to keep its highways in repair, and its duty was "to be performed for the benefit of the public, and not for any gain or advantage to the corporation or its officers." Id. at 250, 26 A. at 971. As we recognized in Welsh, the town could "perform this duty only through its agents," in this case, the selectmen. Id.[8] The Court determined that the Legislature

[8] See generally VLCT Handbook for Vermont Town Officers, Road Commissioner, (1999), http://waitsfieldvt.us/wp-content/uploads/2015/12/vlct_roadcommissioner_1999.pdf [https://perma.cc/Y4GZ-26VS] (discussing history of Office of Road Commissioner in Vermont

did not intend to hold the selectmen, as public officers, personally "liable to an individual for damages resulting from want of repairs upon a highway." Id.

¶ 48. The majority does not discuss these cases, although they certainly reflect "this Court's longstanding understanding" of how municipal immunity applies. Cf. ante, ¶ 21. As reflected above, this Court's understanding of the statute is not "consistent with the understanding that § 901(a) operates as a defend-and-indemnify provision." Ante, ¶ 20. The majority relies on case law that it acknowledges does not "turn on the critical question of how § 901(a) works" and is not "binding authority as to the proper interpretation of the statute." Ante, ¶ 21.

¶ 49. As previously noted, the operative language of § 901(a) has not changed since 1817—it referred both then and now to actions given to and given against officers. In light of the case law above, it cannot be the case that by using these words, the Legislature intended that a municipality "stands in a municipal officer's shoes" when the municipal officer is sued. Cf. ante, ¶ 18. That interpretation is inconsistent with our historical application of municipal immunity. I do not read § 901, moreover, to "extend[] municipal immunity to claims against a municipal officer." Ante, ¶ 18. Rather, the statute recognizes that, when a municipal officer is sued, the real party in interest is the municipality. As the real party in interest, the municipality is entitled to raise all of its defenses, including municipal immunity.

¶ 50. Mindful that the more recent cases do not squarely address § 901(a), I also disagree with the majority's interpretation of Stone v. Town of Irasburg, 2014 VT 43, ¶ 46, 196 Vt. 356, 98 A.3d 769. We noted in Stone that § 901(a) covers actions "in which the interest of the officer is

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and describing how responsibility for maintaining town roads changed from selectmen, to county commissioners, to town surveyors, and finally to road commissioners, who acted first with independent authority and later with selectboard oversight).

At the time Daniels was decided, the law provided "that, in the absence of any other officers or agents appointed by the town, or in the case of the refusal or neglect of such officers or agents to keep the highways and bridges in good repair, the selectmen of such town shall have charge of the same, and shall see to it that all highways and bridges in such town are kept in good and sufficient repair at all seasons of the year." 65 Vt. at 249, 26 A. at 971 (citing 1884, No. 23).

coextensive with the interest of the town such that substitution of the town's name with the officer's name does not alter the nature of the action." Rather than supporting the majority's conclusion, this proposition illustrates that a suit against an officer is in effect a suit against the town, as described above. Officers wield sovereign power of the municipality; this distinguishes them from mere employees. See Holmberg v. Brent, 161 Vt. 153, 156, 636 A.2d 333, 335 (1993) (recognizing that "[t]he distinguishing characteristic of a 'public officer' is that the officer carries out a sovereign function"); see also 3 McQuillin, The Law of Municipal Corporations, § 12.59 (3d ed. 2019) ("The essential characteristics which differentiate a public office from mere employment are said to be: (1) An authority conferred by law, (2) the power to exercise some portion of the sovereign functions of government, and (3) permanency and continuity." (footnotes omitted)). It is the exercise of the powers of the Office of the Road Commissioner—his authority, assuming it exists, to ensure roads are properly laid out—that is at issue in this lawsuit. See 19 V.S.A. § 304(16) (stating that road commissioners "have only the powers and authority regarding highways granted to them by the selectmen"); see also id. §§ 303, 304 (stating that town selectmen have "general supervision and control" of "[t]own highways," and describing those powers in more detail). This is a governmental function of the town.

¶ 51. The majority places great emphasis on the 1974 modification of § 901(a) to encompass all elected or municipal officers, rather than continuing to identify the same few officers originally named in 1817. It asserts that, in making this change, the Legislature could not have "intended to expand the class of Vermonters denied relief for injuries caused by municipal officers performing ministerial acts in the course of their employment." Ante, ¶ 22.

¶ 52. The problem with this argument is two-fold. First, it uses the language of qualified immunity rather than municipal immunity. Municipalities are immune from damages for injuries caused by governmental functions. Thus, individuals who are injured by officers performing functions that are not governmental are able to recover from the town (assuming that discretionary-

function immunity does not apply). See, e.g., Boguski v. City of Winooski, 108 Vt. 380, 389, 187 A. 808, 812 (1936) (rejecting argument that city was immune from negligence suit for polluting water that led to death of plaintiff's intestate, explaining that although pollution was caused when someone negligently left open by-pass valve that had been installed to facilitate firefighting (a governmental function), the negligence "did not arise out of the use of the by-pass for fire protection" but rather stemmed from "[t]hat part of the [city's] water business which consisted of supplying its inhabitants with water for domestic purposes," which "was private in character, and, for the negligent handling of it, the city is held to the same responsibility as an individual or private corporation"). There are many more officers, moreover, imbued with statutory authority than there were in 1817, and the modification of § 901(a) reflects that. Nothing about this change demonstrates an intent to modify existing practice and, going forward, to hold municipalities, through suits against their officers, liable for their "ministerial governmental" acts.

¶ 53. This argument also ignores the fact that the application of municipal immunity itself sometimes leads to absurd results and, as with any immunity doctrine, leaves injured Vermonters without a remedy. See, e.g., Hudson v. Town of E. Montpelier, 161 Vt. 168, 177 n.3, 638 A.2d 561, 567 n.3 (1993) (recognizing arbitrariness of governmental/proprietary distinction, noting that under Vermont law, "a person who drives a car into an excavation on a town street may sue the town if the hole is the result of a repair to a sewer or water line but not if the hole is the result of a repair to the street" (citations omitted)); Marshall v. Town of Brattleboro, 121 Vt. 417, 423, 160 A.2d 762, 766 (1960) (recognizing arbitrary results in municipal tort suits, noting case where plaintiff denied recovery for injuries where hazard created by village fireman conducting "routine thawing operation," a governmental function, and case where recovery allowed because car skidded on ice formed by leak in village water main, a proprietary function); see also Hillerby v. Town of Colchester, 167 Vt. 270, 284, 706 A.2d 446, 453-54 (Johnson, J., dissenting) (recognizing that governmental/proprietary distinction is "inherently unsound" and has resulted in "terrible

inequities and inconsistencies" (quotation omitted)); id. at 282, 706 A.2d at 452 (recognizing that application of governmental/proprietary distinction in this particular case "denie[d] plaintiff a legal remedy for his injuries solely because the manhole cover he ran over happens to service only the Town's street and not its sewer system"); see also Lorman, 2018 VT 64, ¶ 1 (no recovery against town for damages caused by overflowing sewers); Rochon v. State, 2004 VT 77, ¶¶ 5, 16, 177 Vt. 144, 862 A.2d 801 (no recovery against State for injuries negligently inflicted by police officer in pursuit of suspect). It is the application of the municipal immunity doctrine itself that creates an "inexplicable state of affairs" and "baffling result[s]," cf. ante, ¶ 30, and we should remain mindful of this as we interpret statutes that implicate this doctrine.

¶ 54. We recognized in Marshall that denying someone "the right to recover for injuries negligently inflicted requires a strong policy to support it." 121 Vt. at 423, 160 A.2d at 766. We continue to adhere to the doctrine of municipal immunity because we recognize that "there are functions carried out by municipalities so necessary and so vital to the inhabitants thereof, that the municipality itself ought to be immune from liability for the methods it uses in performing such functions." Id. at 424, 160 A.2d at 766-67. Designing and building roads is one of those functions. The fact that there is an elected or appointed public official who oversees this process is inherent in the operation of a municipality; it always has been. The ability to identify a public officer in charge of the particular governmental function should not expose a municipality to liability for injuries caused in the exercise of its governmental functions. If there comes a time when municipal immunity should be abolished because it leads to arbitrary results, the Legislature should do so expressly; we should not do so by allowing "indirect" suits against municipalities stemming from the exercise of governmental functions, which effectively undermines the continued viability of this doctrine.[9] While I am sympathetic to those who lack a civil remedy in similar circumstances,

[9] As indicated above, the trial court dismissed plaintiff's complaint on two separate grounds: municipal immunity and discretionary-function immunity. Discretionary-function immunity is a form of immunity related to but "distinct from the governmental/proprietary

I agree with the majority that "the Legislature is best suited to balance the competing considerations at play in reevaluating municipal immunity." Ante, ¶ 11.

¶ 55. Thus, as reflected above, I would hold that in laying out the road or reviewing the road's layout (assuming that he did so), the Road Commissioner was carrying out a sovereign function for the Town that is governmental in nature. His interest "is coextensive with the interest

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distinction." Lorman, 2018 VT 64, ¶ 12 (citing Restatement (Second) of Torts § 895C cmt. g (1979); Owen v. City of Independence, 445 U.S. 622, 644–50, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (discussing these two distinct common law doctrines that afford municipal corporations some measure of protection from tort liability, and explaining that governmental/proprietary distinction is grounded on principle of sovereign immunity while discretionary-decision immunity is based on concern for separation of powers); 18 E. McQuillin, Municipal Corporations § 53:63 (3d ed.) ("[T]he discretionary-ministerial distinction is grounded in concerns over constitutional separation of powers rather than in the common-law sovereign immunity rule which grounds the governmental-proprietary distinction.").

As indicated above, discretionary-function immunity arises out of separation-of-powers concerns. See id. "As in the case of a State, a local governmental entity is immune in the exercise of those administrative functions that involve the making of a basic policy decision." Id. (quotation and alteration omitted). This type of immunity encompasses "decisions made at the planning level or . . . [in] the forming of an executive judgment," but not "routine administrative activities in the operation of the government." Id. (quotation omitted). It "is based on the theory that some governmental functions are of a type that should not be subject to review and second-guessing by the courts in a tort action." Id. (quotation omitted).

This form of immunity, which protects municipalities from liability, contemplates actions by individual officers and it is not clear how the majority's holding affects this doctrine. In Lorman, for example, we considered claims against a city stemming from sewage overflow. We held that "the design of the sewer system and the City's decision to slip-line the damaged pipes rather than replace the system entirely . . . required a weighing of the type of public policy considerations that would warrant shielding [the City] from liability." Id. ¶ 21 (alteration in original) (quotation omitted). Obviously, an individual, or group of individuals, made the decisions challenged in Lorman. Under the majority's reasoning, the city now might be subject to liability for these decisions if the particular decisionmakers could be identified and if the acts in question are deemed "ministerial, governmental functions."

In the instant case, the trial court cited our recent decision in Lorman, and concluded that, as in that case, plaintiff's challenge to the Town's decision as to how and why to comply with road standards involved the same kind of discretionary policy judgments at issue in Lorman and thus the Town was immune from liability—direct or indirect—for such a claim.

The majority discusses qualified immunity but not discretionary-function immunity, and it does not address how its holding affects the continued viability of this doctrine. See ante, ¶¶ 32-37 (discussing qualified immunity).

of the town such that substitution of the town's name with the officer's name does not alter the nature of the action." Stone, 2014 VT 43, ¶ 46 (concluding that Legislature intended § 901(a) to cover such actions); see also Hee v. Everlof, 812 F. Supp. 1350, 1351 (D. Vt. 1993) (dismissing claim against city police department because city was entity that must be sued under § 901, recognizing that "municipal department enjoys no greater separate identity from the municipality than would an official acting in his official capacity," and "[i]t is now well accepted that suits against officers acting in their official capacities are simply another way of pleading an action against a governmental entity" (quotations omitted)); Hafer v. Melo, 502 U.S. 21, 25 (1991) (emphasizing that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," and "[s]uits against state officials in their official capacity therefore should be treated as suits against the State," and recognizing that "when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation" (quotation omitted)). The Town cannot be held liable for the acts of its officers where the function at issue is governmental. Allowing plaintiff to pursue an "indirect" claim against the Town for its governmental acts undermines the doctrine of municipal immunity.

¶ 56. Nothing in the remaining portion of § 901 indicates a contrary result. Section 901(b) requires a municipality to "assume all reasonable legal fees incurred by an officer when the officer was acting in the performance of his or her duties and did not act with any malicious intent." This language protects officers from having to bear such costs in the event they are sued despite the plain language of the statute. Thus, in this case, the Road Commissioner would be entitled to be reimbursed for any legal fees that he incurred prior to his dismissal from this case. Given the discussion above, this provision does not support the notion that § 901(a) is a "defend-and-indemnify" statute. Cf. ante, ¶ 18.

¶ 57. The majority erroneously relies on § 901a as an alternative basis for reversing the trial court's decision. As previously noted, § 901a governs suits against municipal employees. While the definition of "employee" is broad, it does not supersede the more specific provision applicable to "appointed or elected municipal officers" in § 901(a). Even aside from basic principles of statutory construction, the legislative history of § 901a makes this point clear. The majority does not address the clear and unequivocal statements of purpose made during committee hearings on the bill that became § 901a, although they bear squarely on the "history and purpose" of § 901a. Ante, ¶ 23. We have recognized that "it is always appropriate to focus on legislative intent in statutory interpretation, including when applying plain-language analysis." State v. Berard, 2019 VT 65, ¶ 12, n.1, 220 A.3d 759; see also State v. Reed, 2017 VT 28, ¶ 21 n.6, 204 Vt. 399, 408, 169 A.3d 1278, 1285 (2017) (relying on "testimony of the drafter of the bill" in ascertaining legislative intent "because it is likely to be the most relevant").

¶ 58. Prior to the enactment of 24 V.S.A. § 901a, lower-level municipal employees were protected from personal liability for acts within the scope of their employment only by the doctrine of qualified immunity. This doctrine protects "[l]ower-level officers, employees and agents" who act in good faith within the scope of their authority and "who perform[] discretionary, as opposed to ministerial acts." Levinsky v. Diamond, 151 Vt. 178, 183-85, 559 A.2d 1073, 1078-79 (1989), overruled on other grounds by Muzzy v. State By & Through Rutland Cty. State's Attorney, 155 Vt. 279, 583 A.2d 82 (1990).

¶ 59. We contrasted the limited nature of this protection with the protection afforded to municipalities in Morway v. Trombly, 173 Vt. 266, 270, 789 A.2d 965, 968 (2001). In that case, the plaintiff was injured by a town employee plowing town roads. The town was immune from suit based on municipal immunity because road maintenance is a governmental function. The snowplow driver, however, was subject to personal liability for his actions. Although he acted "in good faith within the scope of [his] employment," his acts were deemed ministerial, and thus, he

was not entitled to qualified immunity. Id. at 270-74, 789 A.2d at 968-71. We noted this "apparent aberration" stemming from "the current system of municipal immunity," and observed that the Legislature had not taken any steps "to protect lower-level municipal employees from tort suits in situations in which the town [was] immune from suit." Id. at 270, 789 A.2d at 969. We acknowledged, however, that as a general matter, employees were not in fact held personally liable because they were defended and indemnified through municipalities' insurance coverage. Id. at 271, 789 A.2d at 969.

¶ 60. The Legislature enacted 24 V.S.A. § 901a as a direct and narrow response to the issue identified in Morway. It codified the existing defend-and-indemnify practice described above, thereby eliminating any uncertainty for municipal employees. This intent was repeatedly expressed during House and Senate committee hearings on the bill. See Hearing on H.453 Before H. Comm. on Local Gvt., 2003-2004 Bien. Sess., CD No. 06–55 (Feb. 26, 2003) [hereinafter H. Comm.]; Hearing on H.453 Before the S. Comm. On Jud., 2003-2004 Bien. Sess., CD No. 03-72 (April 15, 2003) [hereinafter S. Comm.]. Thus, it was stated that the bill codified current practice and would have the effect of allowing employees to now be confident that they would not be held personally liable; the scope of the bill was limited; and that despite having reviewed and considered the report on municipal immunity, there were no clear solutions identified and committee members would leave for another day larger questions associated with municipal tort liability. See H. Comm., min. 24:19 (stating that bill codifies existing practice); 26:13 (stating that scope of bill is limited and Committee would leave for another day larger questions associated with municipal tort liability); 31:49 (same, noting that despite receiving report on municipal immunity, members had not identified better alternative to existing system); S. Comm., min. 16:10 (describing existing practice in which municipalities defended employees but noting stress caused to employees from process and variations in insurance coverage).

¶ 61. At these same committee hearings, it was also repeatedly emphasized that the bill would have no effect on municipal immunity or existing law governing municipal officers. This was stated expressly on multiple occasions and it was reiterated that this was a "simple bill" that was "narrowly crafted" and intended only to address employees sued in their individual capacities and the bill was not designed to change existing law beyond protecting employees from the scenario described in Morway. See H. Comm., min. 08:30; 10:42; 11:00 (stating that bill would have no effect on municipal immunity and treatment of municipal officers and no effect on 24 V.S.A. § 901); S. Comm., min. 21:01 (stating that this was "simple bill" intended to address employees sued in their individual capacities); 38:15 (stating that bill codifies existing practice); 39:25 (stating that bill is "narrowly crafted"); 42:03 (stating that bill not designed to change existing law beyond protecting employees from scenario illustrated in Morway).

¶ 62. Indeed, in the House Committee on Local Government, where the bill originated, lawmakers talked about the exact scenario presented here. See H. Comm., min. 11:41. In that hearing, a representative from the Legislative Council's Office was present to discuss questions raised by the Senate Judiciary Committee and to discuss possible changes in the draft bill in response to these questions. During this discussion, lawmakers asked if municipal employees would be treated in the same way as municipal officers. The Legislative Council representative explained that officers and employees were treated differently under existing law, and that § 901a would not change that result. If an employee was sued, he explained, the municipality could raise only the defenses available to the employee. If a municipal officer was sued, and the suit involved a governmental function, the injured person would have no recourse against the officer or the municipality based on municipal immunity. See id., min. 10:00-13:10. The committee members repeatedly recognized the distinction between officers and employees and the fact that officers were entitled to greater immunity, including immunity when the acts at issue were governmental. See id., min 14:55; 22:09 (stating that "statute deals only with employees"). Contrary to the

majority's assertion, the Legislature was indeed aware that there would be a class of individuals denied a remedy where governmental acts were at issue. Legislators acknowledged it and specifically stated that they did not intend, through § 901a, to change this result. See id., min 08:30, 10:42, 11:00, 11:41, 24:11, 26:13, 31:49.

¶ 63. Section 901a is not a comprehensive "municipal tort claims act," moreover, nor does it purport to be. Cf. ante, ¶ 29 ("In passing a municipal tort claims act, the Legislature sought to ensure more comprehensive protection against tort liability for municipal employees, analogous to that enjoyed by state employees."); see also Hillerby, 167 Vt. at 275, 706 A.2d at 448 (recognizing that municipal tort liability raises different issues than state tort liability and explaining that Vermont Tort Claims Act is comprehensive law that involves balancing of various policy interests, including financial considerations, and to this end, contains numerous exceptions and limitations, including cap on damages and exceptions from liability for particular claims). The Legislature made very clear in its discussion of § 901a that the bill was "narrowly crafted" to protect employees in cases like Morway and that it was leaving for another day the difficult questions associated with a comprehensive law addressing municipal tort liability. See generally H. Comm., min. 00:00-33:00; S. Comm., min. 44:06 (explaining that study commissioned by Legislature was helpful but provided no "clear cut answers" to issues and how to balance completing interests, and § 901a was crafted as "quickest, easiest fix that [did not] disrupt the law as it currently was"). The law contains none of the myriad exceptions and limitations set forth in the Vermont Tort Claims Act.

¶ 64. As noted above, even beyond its clear legislative history, it is a basic principle of statutory construction that a more specific statute controls over a more general one. F.M. Burlington Co.–Mondev Burlington, Inc., 134 Vt. at 518, 365 A.2d at 533. "[W]here two statutes cover the same subject and one is more specific than the other, we harmonize them by giving effect to the more specific provision according to its terms." Our Lady of Ephesus House of Prayer, Inc.

v. Town of Jamaica, 2005 VT 16, ¶ 16, 178 Vt. 35, 869 A.2d 145 (quotation omitted); see also State of Vt. Agency of Nat'l Res. v. Parkway Cleaners, 2019 VT 21, ¶ 40, __ Vt __, 210 A.3d 445 (recognizing "that a specific statute [dealing with the same subject matter] governs over a more general one"). The Road Commissioner is plainly an "appointed or elected municipal official" under § 901(a), and thus, the more "narrow, precise, and specific" law, F.M. Burlington Co.–Mondev Burlington, Inc., 134 Vt. at 518, 365 A.2d at 533, applies to him. Application of this law requires dismissal of plaintiff's suit on immunity grounds. I would affirm the trial court's decision.

¶ 65. I am authorized to state that Justice Eaton joins this dissent.

Associate Justice