STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0378

Darl Gillespie,
Respondent,

vs.

Ramsey County, et al.,
Appellants.

Filed March 11, 2008
Affirmed
Crippen, Judge[*]

Ramsey County District Court
File No. C9-05-12697

Michael A. Feist, W-1610 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (for respondent)

Susan Gaertner, Ramsey County Attorney, C. David Dietz, Anna D. Scanlan, Assistant County Attorneys, 50 West Kellogg Blvd., Suite 560, St. Paul, MN 55102 (for appellants)

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

CRIPPEN, Judge

Appellants Ramsey County, et al., challenge the district court's order that denies in part their motion for summary judgment. The court concluded that appellants were not immune from suit brought by an inmate claiming personal injuries suffered while in the outside exercise yard of a correctional facility. We affirm.

FACTS

Respondent Darl Gillespie, an inmate at the Ramsey County Correctional Facility, or "the workhouse," was injured in the facility's outside exercise yard, a fenced-in area of approximately 30,000 square feet. At the time respondent was injured, a softball diamond was located in the northwest corner, but a dirt walking path skirted the perimeter of the yard. The walking path and the baselines converged as a shared pathway. Softball players routinely paused to accommodate walkers approaching the third-base line while a game was in progress.

On September 21, 1999, inmates were playing "kittenball," a softball game that uses a larger and softer ball, and respondent was walking on the path with two other inmates. According to respondent's description of events, the walkers stopped at third base and waited for the pitcher to waive them through to home plate. The first two walkers proceeded down the baseline and turned left behind home plate. Respondent followed them, walking between home plate and the catcher standing behind it. When respondent rounded home plate, an inmate swung his bat and unintentionally struck

respondent in the face. Workhouse guards immediately assisted respondent, who was taken to the hospital and treated for his injuries.

Respondent sued appellants Ramsey County, Ramsey County Department of Corrections, and workhouse guards for the personal injuries he sustained.[1] He alleged that appellants breached their duty to keep inmates safe when they designed the exercise area, breached their duty to train and supervise staff, and were negligent per se due to violation of statutory duties to keep inmates safe.

Appellants moved for summary judgment, arguing that the workhouse guards are entitled to official immunity and that Ramsey County is entitled to vicarious official immunity, discretionary immunity, and recreational-use immunity. The district court denied summary judgment as to all of appellants' immunity claims and dismissed two of respondent's claims as a matter of law.

D E C I S I O N

1. Standard of Review

A party may immediately appeal pretrial denial of an immunity defense "because immunity from suit is lost if a case is erroneously allowed to go to trial." *Habeck v. Ouverson*, 669 N.W.2d 907, 909 (Minn. App. 2003), *review denied* (Minn. Dec. 23, 2003). On an appeal from summary judgment, we ask whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "The applicability of immunity is a

[1] Respondent also sued the inmate who swung the bat, but he is not a party to this appeal.

question of law, which this court reviews de novo." *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004). The party claiming immunity from suit must present evidence showing that it is entitled to immunity. *Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204, 209 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). "In reviewing a denial of summary judgment based on a claim of immunity, this court presumes the truth of the facts alleged by the nonmoving party." *Id*. (citing *Burns v. State*, 570 N.W.2d 17, 19 (Minn. App. 1997)).

2. Recreational-Use Immunity

Appellants challenge the district court's conclusion that they are not entitled to recreational-use immunity under Minn. Stat. § 466.03, subd. 6e (2006). Ramsey County is considered a municipality for purposes of tort liability. Minn. Stat. § 466.01, subd. 1 (2006). "[E]very municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties . . . ." Minn. Stat. § 466.02 (2006). But liability does not extend to "[a]ny claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services." Minn. Stat. § 466.03, subd. 6e.

Appellants argue that because they provide recreational services to inmates by way of the workhouse exercise yard, the plain language of subdivision 6e applies to bar respondent's claims. The district court rejected this argument on the basis that

"[a]pplying immunity to the recreation yard in this case does not support the overall purpose of the recreational[-use] immunity exception."

"When interpreting a statute, we first look to see whether the statute's language, on its face, is clear or ambiguous." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Language is ambiguous if it is reasonably subject to more than one interpretation. *Halverson v. Halverson*, 381 N.W.2d 69, 71 (Minn. App. 1986). Statutory words are not to be disregarded under the pretext of pursuing their spirit when the words are free from ambiguity "in their application to an existing situation." Minn. Stat. § 645.16 (2006). The words of the recreational-use immunity provision are clear, but contrary to appellants' assertion, the provision as applied to this situation does not protect appellants from liability.

The recreational-use provisions addresses municipal park and recreation properties, and the ordinary meaning of this language suggests that immunity applies to areas open to the public. *See, e.g.*, *Habeck*, 669 N.W.2d at 912 (holding that recreational-use immunity applies to fair-board-sponsored transportation of county fair visitors within the fairgrounds); *Lundstrom v. City of Apple Valley*, 587 N.W.2d 517, 519 (Minn. App. 1998) (noting that recreational-use immunity applies to a city that operates and maintains tennis courts in a sports arena). As the district court noted, there is no precedent indicating that recreational-use immunity has ever been invoked to prevent an inmate's personal injury suit against a correctional facility. A review of caselaw from all jurisdictions reveals that no such case exists. Recently, this court concluded that recreational-use immunity extended to a golf-course clubhouse, because on the facts of

that case, the "property as a whole was intended for golf, undisputedly a recreational activity under the statute." *Unzen v. City of Duluth*, 683 N.W.2d 875, 879 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). We held that "[c]overage under subdivision 6e is thus not based on what the injured person was doing, but on the intended recreational function of the property." *Id.*

Although the workhouse yard provides exercise opportunities, the intended function of the property as a whole is to detain and confine inmates. Minn. Stat. § 241.021, subd. 1 (2006). The department of corrections requires jail facilities to provide inmates with an area where they have "access to recreational opportunities and equipment" and have "opportunities for physical exercise." Minn. R. 2911.3100, subp. 7 (2005). This mandate is dispositive. The workhouse yard is part of the workhouse facility, a property designed and used for correctional purposes. Moreover, as the district court observed, the recreational-use provision is aimed at preserving the choice to provide recreational services, a situation that differs from mandated action. The district court correctly found that applying recreational-use immunity for a correctional program would subvert the overriding purpose of the exception, and appellants are not entitled to immunity under Minn. Stat. § 466.03, subd. 6e.

3. Discretionary Immunity

Appellants next challenge the district court's conclusion that they are not entitled to discretionary immunity under Minn. Stat. § 466.03, subd. 6 (2006). Under this statute, municipalities are immune from "[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." *Id.* The purpose of the discretionary exception is to "protect[] legislative and executive policy decisions from judicial review through tort actions." *Norton v. County of Le Sueur*, 565 N.W.2d 447, 449 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). For a party to successfully claim immunity from suit under this provision, it "must meet its burden of establishing that the conduct challenged by [the plaintiff] was of a public policy-making nature involving social, political, or economical considerations." *S.W. v. Spring Lake Park Sch. Dist. No. 16*, 580 N.W.2d 19, 22 (Minn. 1998). Immunity does not apply to day-to-day operational decisions. *Norton*, 565 N.W.2d at 450. In addition to determining the nature of appellants' decisions, we must also determine whether "exposing the municipality to tort liability would undermine public policy." *Id.* (quotation omitted); *see also Johnson v. State*, 553 N.W.2d 40, 47 (Minn. 1996) (recognizing that imposing statutory liability for discretionary decisions regarding how much liberty to afford parolees would undermine public policy).

Appellants argue that they are immune from respondent's claims because "policymakers exercised discretion in planning and designing the recreation yard." The district court found that appellants "failed to provide [any] evidence that discretion was exercised in planning and/or designing the yard or in determining the manner in which the yard would be used." The record confirms the district court's analysis.

Respondent claims that the walking path and the baselines evolved into a shared pathway without any conscious design by appellants. On this record, no evidence exists to refute his claim. Appellants admit that they have no information regarding the design or installation of the yard as used in 1999, and acknowledge that they cannot show that

the walking path and the baselines were not shared at that time. Appellants also have not disputed that the inmates developed their own routine when walkers and softball players had to use the common pathway. Although Lieutenant Jeffrey Good, who managed recreational activities in 1999, "allowed inmates to walk around the field . . . [and] play 'kittenball,'" appellants have not shown that Good's allowance was based on social, political, or economical considerations.

"[I]t is essential that discretionary immunity protect the government *only when it can produce evidence* that its conduct was of a policy-making nature." *Olmanson v. Le Sueur County*, 673 N.W.2d 506, 514 (Minn. App. 2004), *aff'd*, 693 N.W.2d 876 (Minn. 2005). We find no evidence in this record that any person exercised any sort of discretionary decision-making with respect to the walking path and the baselines. Without any evidence that appellants even considered implementing a policy, we cannot "define the outer limits of the immunity at issue." *S.W.*, 580 N.W.2d at 23. The supreme court has stated that "conduct flowing from a governmental entity's failure or refusal to enact a policy is conduct at an operation level." *Id*. Protecting appellants from liability in this situation is akin to "providing [them] an incentive to avoid making difficult decisions." *Id*. Thus, appellants are not entitled to immunity under Minn. Stat. § 466.03, subd. 6.

4. Official and Vicarious Official Immunity

Appellants also challenge the district court's conclusion that the workhouse guards are not entitled to common-law official immunity and that Ramsey County is not entitled to vicarious official immunity.

Official immunity protects a public official "charged by law with duties which call for the exercise of his judgment or discretion," unless the official acts willfully or maliciously. *State by Beaulie v. City of Mounds View*, 518 N.W.2d 567, 569 (Minn. 1994) (quoting *Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988)). In contrast to discretionary immunity, official immunity "involves the kind of discretion which is exercised on an operational rather than a policymaking level." *Johnson*, 553 N.W.2d at 46. "A discretionary decision involves individual professional judgment that necessarily reflects the facts of a situation and the professional goal." *Sletten*, 675 N.W.2d at 306. Official immunity does not apply to ministerial decisions, which are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Johnson*, 553 N.W.2d at 46.

In determining whether official immunity applies, we focus on the precise government conduct at issue. *Sletten*, 675 N.W.2d at 307. Respondent claims that the workhouse guards failed "to perform basic employment duties," presumably with respect to the shared pathway around the softball diamond. Appellants argue that the guards exercised their discretion by "allow[ing] inmates to walk on the dirt walking path around the recreation yard while other inmates played kitten ball." The district court rejected that argument, finding that appellants did not present any evidence to support it. Again, the record bears out the court's analysis of the issue. There is no evidence to indicate that the guards made any decisions regarding the maintenance, formation, or oversight of the shared walking path and baselines. Appellants have not shown that the guards implemented or monitored the inmates' routine of accommodating walkers and softball

players. The workhouse guards are not entitled to official immunity, leaving Ramsey County without vicarious official immunity. *See S.W.*, 580 N.W.2d at 23 (stating official immunity is the root of vicarious rights).

5. Other Claims

Appellants do not address the district court's conclusion that a genuine issue of material fact exists as to whether a duty of safekeeping was created by Minn. Stat. § 14.38 (2006) and Minn. R. 2911.3100 (2005), whether the duty was violated, and whether the violation caused respondent's injuries. "[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). The district court's analysis stands.

Also, respondent sought review of the portion of the district court's order that dismissed two of his claims as a matter of law. "A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review." Minn. R. Civ. App. P. 106. This notice "gives [this] court the discretion to review an issue not independently appealable where the case is already before [us]." *Anderson by Anderson v. City of Coon Rapids*, 491 N.W.2d 917, 922 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993). We affirm the district court's conclusions that count 2 of respondent's complaint regarding training of staff, is barred by discretionary immunity, and that respondent failed to raise a genuine fact-issue as to

whether appellants' failure to enforce what he described as the "5-foot rule" caused his injuries.

Affirmed.