

Case No. A040097

**STATE OF MINNESOTA
SUPREME COURT**

Michael Schroeder and Kimarie Schroeder,
for the Heirs and next of Kin
of Joshua Schroeder, Decedent

Appellants,

v.

St. Louis County and
Stephen Paul Ario,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. **Whether statutory immunity applies to a government entity when the dangerous condition was created by the government entity, that government entity had actual notice of the dangerous condition, and that government entity failed to warn of the known dangerous condition.**

Most apposite cases and most apposite constitutional and statutory provisions:

Christensen v. Mower County, 587 N.W.2d 305 (Minn. App. 1998).

Conlin v. City of St. Paul, 605 N.W.2d 396 (Minn. 2000).

Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

2. **Whether the trial court was in error in determining that no genuine issues of material fact existed on Plaintiff's claim and in granting Defendants' motion that statutory immunity applies. The award of summary judgment should be reversed.**

The trial court was in error when it granted defendants' motion for summary judgment by concluding in its memorandum the long standing practice of the county entitles it to a finding of a policy.

Most apposite cases and most apposite constitutional and statutory provisions:

M.S.A. § 466.02

Zank v. Larson, 552 N.W.2d 719 (Minn. 1996).

Steinke v. City of Andover, 525 N.W.2d 173 (Minn. 1994).

Olmanson v. LeSur County, 673 N.W.2d 506 (Minn. App. 2004).

3. **Whether the trial court was in error in determining that no genuine issue of material fact existed on Plaintiff's claim and in granting Defendants' motion that official immunity applies. The award of summary judgment should be reversed.**

The trial court was in error when it granted defendants' motion for summary judgment and stated in its memorandum whether or not Mr. Ario's lights were on at the time of the accident is not material to the question of whether his actions were ministerial.

Most apposite cases and most apposite constitutional and statutory provisions:

Anderson v. Anoka Hennepin Indep. Sch. Dist. 11, 698 N.W.2d 651 (Minn. 2004).

Olson v. Ramsey County, 509 N.W.2d 368 (Minn. 1993).

Watson v. Metropolitan Transit Commission, 553 N.W.2d 406 (Minn. 1996).

STATEMENTS OF THE CASE AND FACTS

I. STATEMENT OF THE CASE.

Plaintiffs/Appellants brought a wrongful death claim against Defendants/Respondents. The trial court assigned to the case was the District Court of the 6th District, St. Louis County, Civil Division, the Honorable Terry C. Hallenbeck, Judge of District Court, presiding. The District case No. was C6-02-600619. Plaintiffs appealed Summary Judgment entered on January 5, 2004, pursuant to an Order filed January 5, 2004, granting Defendants' Motion for Summary Judgment. The hearing on the Summary Judgment Motion was argued December 30, 2003. Appellants next appealed to the Minnesota Court of Appeals, who affirmed the District Court Order granting Summary Judgment.

Appellants were granted the right to appeal to the Minnesota Supreme Court by Order dated December 22, 2004. Appellants contend that genuine issues of material fact exist as to whether Immunity applies, and that the Court erred as a matter of law in granting Summary Judgment based on Immunity.

II. STATEMENT OF THE FACTS

Joshua Marcus Schroeder was killed as a result of a collision on Highway 29 in Floodwood, in rural St. Louis County, Minnesota. Transcript, Page 27. Schroeder was traveling north in the northbound lane at the time of the collision. Jeremy Hurd Affidavit, Exhibit A. Respondents' vehicle was traveling southbound in the northbound lane. The collision occurred on November 19, 2000. T-27. The time of the collision is contested, occurring at approximately 5:00 P.M. or 5:15 P.M. T-22, 28. According to the U.S. Naval Observatory sunset on November 19, 2000 for Floodwood, Minnesota was 4:44 P.M. Id. Respondents admit an issue of fact exists as to the issue

of whether Respondent's vehicle had headlights operating at the time of the collision. Id.

On November 19, 2000, Highway 29 was under a reclamation project. T-14. The usual paved surface had been removed. Id. The surface was gravel the date of the accident. Id. The location of Highway 29 and the accident is in rural St. Louis County. As such, the roadway is banked with trees. Hurd Affidavit, Exhibit A. Ario had made one pass on Highway 29, grading with traffic, and was repeating the process a second time, grading against traffic, when the collision occurred. Id.

Spott: [t]ell me what you did from the time you started on Highway 29 up until the accident itself.

Ario: Okay. I picked up at the Sokal Road (on Highway 29) heading North. I graded going north in the northbound lane. Got to the bridge area. Turned around. Caught the windrow and feathered it back to the west sides of the highway. After looking at the road, there was still quite a few potholes and then larger chunks of blacktop that were off on the - - in the windrow. So when I got to the Sokal Road again, I thought I better do it one more time.

Spott: Okay and that's when the accident happened?

Ario: That's right.

Id. Page 4, Line 7-16, 23, 24.

The last known person to observe both the grader and Schroeder prior to the accident was Aaron Vanderveer. Aaron Vanderveer Affidavit. Vanderveer drove south in the southbound lane on Highway 29 only moments prior to the collision. Id. As Vanderveer passed the grader, he did not observe headlights on the grader. Id. Vanderveer states that had the grader been in the

southbound lane he would have struck the grader. Id.

Vanderveer passed Schroeder on Highway 29 moments after passing the grader. Id. Schroeder was operating his vehicle with headlights on. Hurd Affidavit, Exhibit A. Schroeder continued northbound oblivious to the grader operating in the northbound lane of travel. T-29. The evidence demonstrates Schroeder never saw the grader. Id.

Spott: To your knowledge, based on what you saw, did he break at all?

Ario: There were no skid marks. Looked like he has constant speed.

Hurd Affidavit, Exhibit A. Page 119, Line 9-12.

The grader remained in the northbound lane after observing Schroeder's vehicle approaching. Id.¹ The grader took no affirmative act to avoid the collision, despite having time to move into the southbound lane. Id.

Spott: Okay. And in fact, one of your options was to change lanes, wasn't it?

Ario: Yah, that was an option.

Spott: Okay. Does the grader have any kind of horn of any kind?

Ario: Yah, it is just a little, like, a car horn.

Spott: Okay. And you did not sound the horn did you?

Ario: No.

Id., Pages 121, 122, Line 22-25, 1, 2, 17-19. The grader remained in the northbound lane. Id. The width of the grader blocked the entire lane of travel for Schroeder. Id.

The grader was invisible to Schroeder given the time of day, type of road, trees banking the road, a cloud cover day, and the lack of lights on the grader. T-25. Schroeder struck the front

¹Schroeder's vehicle was operating with headlights on.

mounted blade of the grader. Id. The collision killed Joshua Marcus Schroeder. T-27.

Actual Notice of Dangerous Condition.

Respondents were aware of the life threatening, dangerous condition that was created by their own actions. The St. Louis County Attorney's Office warned of this type of accident two years prior to its occurrence. Hurd Affidavit, Exhibit A. In a 1998 memo, Civil Division head Michael Dean wrote that operating graders on the left of the roadway center was both a "clear violation of Minnesota Law" and "life threatening". Id., Exhibit D. The memo was directed to the St. Louis County Public Works Director/Highway Engineer, Richard Hanson. Id.

The County was also aware of an accident involving a private citizen and a grader operating against traffic, as well as what was called "near misses." There is no factual dispute that Respondents were aware and had actual notice of the dangerous condition. Respondents coined the activity "life threatening." Respondents were also aware of at least one other accident and several near misses prior to Schroeder's collision

Grading Process is Operational.

A grader "cuts" gravel and "feathers" gravel across the road. The feathered material is called the "windrow". The next time the road is graded the operator reverses the process by "picking up the windrow" and feathering it across to the other side. It is not required or necessary for an operator to grade against traffic to properly grade a gravel road. T-27; Floerke Affidavit, Paragraph 2; Strukel Deposition, Page 33.

Hurd: What you're saying is you're not necessarily grading against traffic, but part of your machine may be over the centerline grading against traffic?

Strukel: Right.

Id., Page 33, Lines 9-13.

Spott: ...they're not required to blade against traffic, are they?

Strukel: They're learned a method of doing it and they're following - they're doing - doing it that way.

Strukel Deposition, Page 32, Line 19-22.

St. Louis County does not have a policy which requires an operator to either grade against traffic or grade with traffic. Hurd Affidavit, Exhibit A. There is no policy, rule or regulation which requires an operator to grade against traffic. Id.

Spott: [H]as any ever told you, listen, we want you to save a few minutes and grade against traffic as opposed to going to the other end of the road and grading with traffic? Has anybody addressed that to you and discussed it with you and instructed you on what to do?

Ario: No one has ever told me not to grade against traffic as a routine operation.

Spott: Is there any rule, regulation, policy of any kind that you would have been violating, had you, on your second pass on November 9, 2000 decided rather than grading against traffic, go all the way to the other side of the road and grade with traffic on the second pass?

Ario: I don't believe there is any rule.

Id., Pages 108, 109, Lines 12-19, 15-21.

Hurd: Do you know of any policy that prohibits grader operators from deadheading or grading - - only grading with traffic?

Strukel: There is no (sic) policies for grading.

Floerke Affidavit, Paragraph 2; Strukel Deposition, Page 5, Lines 16-19.

Defendant Does Not Have a Grading Policy

Respondents rely upon a *de facto* policy based on a 1985 memo written by Joe Varda to support their assertion that they had a policy regarding grading. A careful review of the memo reveals that the specific conduct of grading against traffic is not addressed in the memo. Hurd Affidavit, Exhibit A. T-33. ² Mr. Varda was a deputy county engineer who has never been a heavy equipment operator. Id. Mr. Varda admits to not having authority to create a policy of St. Louis County, and does not recall a policy, practice, or procedure for grading in St. Louis County. Id.

Spott: You, yourself, did not have the power in your position in 1985 to make policy, did you?

Varda: No, not really.

Varda Deposition, Page 13, Line 9-11. ³

Hurd: You said you are not aware of any written policy by St. Louis County regarding grading?

Strukel: No.

²St. Louis County admits there is no written policy.

Hurd: Are you aware of any written policies St. Louis County has regarding grading?

Rautanan: No written policies that I know of.

Rautanan Deposition, Page 21, Line 17-19.

³ The Joe Varda deposition was accepted into the court file at the motion for summary judgment.

Hurd: So this (1985 memo) is not a written policy for grading by St. Louis County?

Strukel: No

Strukel Deposition, Page 17, Line 7-10, 17-19. It is undisputed that the 1985 memo of Joe Varda is not a policy and that St. Louis County has no written policy.

Defendant Has Not Conducted A Policy Analysis

St. Louis County has not shown a balancing of policy objectives required to formulate and create a policy. St. Louis County alleges that sometime after the 1998 Michael Dean memo in which he calls the County's activity "life threatening and a clear violation of Minnesota Law," "policy review" was conducted by the district superintendents of St. Louis County. T-11, 12.

However, the district superintendents admit there has never been a meeting to specifically discuss grading against traffic. T-35. The only time the grading activity was discussed was at a general meeting. They also admit that no policy was created at any district superintendent meeting. Shawn Floerke Affidavit, Paragraph 2.

Hurd: Do you know of any policy that was created that day?

Schelde: None.

Schelde Deposition, Page 26.

Hurd: At the meetings where the issue of grading against traffic came up, do you recall whether or not you reached a consensus on a policy that the (sic) St. Louis County would put forward on allowing graders to operate against traffic?

Peterson: [d]id we or they come up with a policy? No.

Peterson Deposition, Page 15, Line 16-23.

Hurd: [We] have this meeting in the 1990's we talked about between you and Skelton and the other superintendents. After this meeting - - and correct me if I am wrong - - that no policy was created at this meeting?

Strukel: Correct.

Id. Page 24, Lines 8-13.

Respondents allege they formulated a policy by balancing the political, social, and economic factors necessary to create a policy which allows operators to grade against traffic. The superintendent's testimony is that no such meeting was ever held.

Hurd: In any event, you don't know of any meeting where budgetary concerns and economic concerns and social concerns were addressed to come up with this unwritten policy which allows grading against traffic?

Garden: Other than it's common knowledge with anybody familiar with the procedure that it would be a lot more expensive and a lot higher cost to perform the maintenance.

Garden Deposition, Page 24, 25, Lines 23-25, 1-4.

In fact, superintendent Garden has been employed with Respondents since 1976 and he is unaware of any meeting when the issue of grading against traffic and a policy creation was ever held.

Id. T-12. Respondents' sole reason for operating in "clear violation of Minnesota Law" and in a "life threatening" manner was to save time. Hurd Affidavit, Exhibit A.

Spott: And the only advantage then would be saving time driving to the other end of the project? That's the only advantage to grading against traffic as opposed to grading with traffic?

Ario: Basically.

Id. Page 107, Lines 21-25. The time saved by St. Louis County is unknown but minimal.

Spott: How long would it take driving with the grade up to get from one side of the project on Highway 29 to the?

Ario: I suppose, five, six minutes.

Id., Page 106, Lines 10-13.

ARGUMENT

When reviewing a grant of summary judgment, the Court must determine whether there are any genuine issues of material fact in dispute and whether the district court erred as a matter of law. State by Cooper v. French, 460 N.W.2d 2 (4) (Minn. 1990). The Court must view the evidence in the light most favorable to the non-moving party. State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571 (Minn. 1994).

By statute, a municipality generally is liable for its torts, but the municipality may assert immunity as to a claim based upon the performance or the failure to exercise or perform a discretionary function or duty. M.S.A. § 466.02, 466.03, subd. 6 (2002). For immunity purposes, discretionary acts are planning-level actions that require evaluating such factors as the financial, political, economic, and social effects of a given plan. Holmquist v. State, 425 N.W.2d 230, 232 (Minn. 1980). Operational-level decisions, in contrast, are those actions involving the ordinary, day-to-day operations of the government, and are entitled to immunity. Id.

I. Statutory Immunity does not apply to a government entity when a dangerous condition was affirmatively created by the government entity, the government entity had actual notice of the dangerous condition, and the government entity failed to warn of the known dangerous condition.

Whether government action is protected by statutory immunity is a question of law which is reviewed *de novo*. Conlin v. City of St. Paul, 605 N.W.2d 396, 403 (Minn. 2000). To analyze a failure-to-warn claim to determine whether statutory immunity applies, it is implicit that the governmental body must have created or had actual notice of the alleged dangerous condition. Ostenderf v. Kenyon, 347 N.W.2d 834, 838 (Minn. App. 1984); Minder v. Anoka County, 677 N.W.2d 479, 487 (Minn. App. 2004). In Ostenderf, the states placement of warning signs on the highway was not a discretionary act after the state had knowledge of a dangerous situation where warning could be provided by additional or better signs.

Where the Respondent has actual notice of a dangerous condition, the Respondent is not entitled to statutory immunity on a failure to warn claim. Id. In the present case, it is undisputed the Respondent was aware of the dangerous condition that existed by grading against traffic. Additionally, the Respondent did not perform a balancing of competing political, social and economic factors necessary to create discretionary immunity. Garden Deposition, Page 25, Lines 1-4.

To analyze a failure to warn claim to determine whether statutory immunity applies to protect the governmental agency from tort suit, the government must have either created or had actual notice of the dangerous conditions. In the present case, the Respondent both created and had actual notice of the dangerous condition. Respondent believed the practice was so dangerous they called it “life

threatening”.

The case of Christensen v. Mower County, 587 N.W.2d 305, (Minn.App.1998), is on point to the issue of whether discretionary immunity applies. In Christensen, Mower County had seal-coated a section of State Aid Highway 7. The process involved covering the road with oil and limestone chips. A roller then passed over the seal-coated segment to press the limestone chips into the oil. The limestone chips were left for one to three weeks, so traffic could press more chips into the pavement. A sweeper would then remove the excess limestone chips.

While applying the oil and limestone chips, the County marked the highway with “Road - Work Ahead” and “Fresh Oil” signs. According to the County’s Engineer, the county followed past practice and the unwritten policy by removing the signs immediately after the roller had passed. The following day, Christensen was driving north on highway 7 and came upon the section that had been seal-coated the previous day. As she approached an S-Curve, she saw the road surface was covered with loose chips. She tapped her brakes but lost control of her car and was injured.

The County Engineer testified that they followed an existing practice and the “unwritten policy” to remove signs marking seal-coated roads once the roller had passed. He also stated that the adhering to the existing practice they (Mower County) considered the availability of signs that would be necessary, the added “man-hour” cost of installing the signs, the actual cost of the signs, the cost of the phone call to place the signs safely, and the perceived minimal threat to driver safety.

The County in Christensen, offered the same evidence as does Respondent in the present case. Like Respondent, Mower County had no written policy. Like Respondent, Mower County, followed existing practice. Like Respondent, Mower County offers evidence concerning sign usage. The Court of Appeals stated that Mower County’s consideration of the cost of keeping warning signs

on seal-coated roads until the danger of loose limestone chips was eliminated was not a meaningful exercise of discretion because the cost of sign usage appears to be de minimis and Mower offered no facts that the cost of leaving signs in place was more than de minimis.

The Court of Appeals has stated, “such relatively inexpensive remedies as guardrails or warnings signs may not require a policy decision regarding the allocation of resources. Nguyen v. Nguyen, 565 N.W.2d 721, 724 (Minn. App. 1997). The Respondent has failed to offer evidence incurred by signs, to warn motorist of a machine as large as a grader which is blocking an entire lane of travel, reached a level of policy-making significance. Respondent has thus failed to meet its burden of proving that it considered policy making factors sufficiently meaningful to make discretionary immunity.

Respondent has submitted mere averments that relate to competing political, social and economic factors in formulating its maintenance policy. The evidence shows that there was never a true balancing of policy objections. The superintendents who were at the general meeting state that no such a balancing of competing factors occurred; other than its common knowledge with anybody familiar with the procedure that it would be a lot more expensive and a lot higher cost to perform the maintenance. Id. A review of that evidence demonstrates mere conclusory allegations that are insufficient to establish policy-level decision-making. Christensen v. Mower County, 587 N.W.2d 305 (Minn. App. 1998).

Appellant does not concede the existence of a policy review claimed by Respondent. Appellant has hotly contested the existence of such a policy review and contend that a fact issue exists as to that issue. The superintendent testimony discussed above demonstrates the lack of such a policy analysis. Appellants argument that there is evidence in the record to defeat immunity is

discussed below. However, without the existence of that fact issue, Respondents argument of discretionary immunity fails.

Further, even if the Court should determine that there is no genuine issue of material fact as to whether a policy decision was made to grade against traffic, Respondent has offered nothing in the record to suggest the same public policy considerations were made in the failure to warn about the life threatening act of grading against traffic. The case law is clear that the burden is on the municipality to “produce evidence [that] its conduct was a policy-making nature.” Zank v. Larson, 522 N.W.2d 719, 721 (Minn. 1996).

In the present case the record is clear that the Respondent knew about the life threatening condition for years. Despite this knowledge, no signs or other warnings were provided to the public concerning the dangerous condition. When a known danger may be corrected through relatively inexpensive remedies, such as warning signs, it may not be necessary for the municipality to make policy decisions regarding the allocation of resources. Nguyen v. Nguyen, 656 N.W.2d at 724. Further, for statutory immunity to protect a governments warning sign decision, an actual decision has to have been made in light of a protected policy. Nusbaum v. Blue Earth County, 422 N.W.2d 713, 723 (Minn. 1988).

It does not make logical reasoning that a government entity may create an inherently dangerous and life threatening condition and simply not be required to warn it citizens of that affirmatively created dangerous condition. For example, a government entity may dig up and massive whole during road construction and not be required to give any warning of the danger by claiming to have made a “policy decision” that warning signs would cost to much or be ineffective.

II. The trial court was in error in determining that no genuine issues of material fact existed on Plaintiff's claim and granting Defendant's motion that statutory immunity applies. The award of summary judgment should be reversed.

Whether government action is protected by statutory immunity is a question of law which is reviewed *de novo*. Conlin v. City of St. Paul, 605 N.W.2d 396, 403 (Minn. 2000). The party asserting an immunity defense has the burden of demonstrating facts showing that it's entitled to immunity. Fear v. Indep. Sch. Dist. No. 911, 634 N.W.2d 204, 219 (Minn. App. 2001), review denied (Minn. Dec. 11, 2001). In review of summary judgment, the evidence is reviewed in the light most favorable to the non-moving party. City of Mounds View, 518 N.W.2d 567, 571.

The Minnesota Tort Claims Act holds governmental units liable for their torts and those of their officers, employers, and agents acting within the scope of their employment duties. M.S.A. § 466.02 (2002). "The statute enumerates an exception to the general rule for any claim based upon the performance or failure to exercise or perform a discretionary function or duty." M.S.A. 466.03 subd. 6 (2002). Because discretionary immunity is an exception to the general rule of governmental liability, it must be narrowly construed. Koellin v. Nexus Residential Treatment Facility, 494 N.W.2d 914, 919 (Minn. App. 1993), review denied (Minn. Mar. 22, 1993).

Statutory immunity was intended by the legislature to reinforce the separation of powers by preventing judicial second-guessing of legislative or executive policy decisions through the medium of tort suits. Nusbaum v. Blue Earth County, 422 N.W.2d 713, 719 (Minn. 1998) (stating, "[j]udicial review of major executive policies for 'negligence' or 'wrongfulness' could disrupt the balance of separation of the three branches of government." Prossor & Keaton on Torts § 131 at 1039 (5th Edition 1984)). Thus, the threshold analysis is whether this lawsuit requires the Court to review a

discretionary policy decision protected by immunity. The evidence before the Court clearly indicates that there was no discretionary policy decision, and therefore the County is not entitled to statutory immunity.

The Minnesota Supreme Court has recognized that “almost every act involves some measure of discretion, and yet undoubtedly not every act of government is entitled to discretion [e.g. statutory] immunity.” Cairl v. State 323 N.W.2d 20, 23 (Minn. 1982). In determining whether statutory discretionary immunity shields Defendant from liability:

[t]he issue is not whether the government action involved the exercise of a discretion in a general sense, because almost every government function does involve some exercise of discretion, but rather whether the challenged activity “**involved a balancing of policy objectives**”. Discretionary immunity protects the government **only when it can produce evidence its conduct was of a policy-making nature involving social, political, or economic considerations**, rather than merely professional or scientific judgments.

Zank v. Larson, 552 N.W.2d 719, 721 (Minn. 1996) (citations omitted) (emphasis added).

Additionally, discretionary immunity is afforded to some government decision, but not all government decisions. The courts distinguish between “operational decisions” and “planning decisions” in deciding whether statutory discretionary immunity applies. Steinke v. City of Andover, 525 N.W.2d 173, 175 (Minn. 1994). Operational decisions relate to the day to day operation of government and do not receive protection, while planning decisions involve questions of public policy and receive protection as discretionary decisions. Id.

At the same time, discretionary immunity for planning decisions would afford little comfort if it did not extend to some of the consequences of the policy itself. Pletan v. Gaines, 494 N.W.2d

38, 44 (Minn. 1992). Until people carry out a governmental policy, by doing or not doing something, the policy is a dead letter. *Id.* Thus, “[w]hether certain consequences are immune depends ... on whether the consequence conduct involves the balancing of public policy considerations in the formation of policy.” *Id.* Defendants do not have a policy which entitled a finding of immunity.

Defendants have the burden of proving they are entitled to statutory discretionary immunity by producing evidence that the conduct in question was of a policy-making nature involving social, political, or economical considerations. *Nusbaum*, 422 N.W.2d at 722. To find a governmental entity is entitled to statutory discretionary immunity, it must be remembered that because it is an exception for the general rule of governmental liability, discretionary immunity must be narrowly construed. *Larson v. Independent School District #314*, 285 N.W.2d 112, 121 (Minn. 1979). Defendant has failed to present sufficient evidence to prove the policy to grade against traffic entirely blocking the lane of oncoming traffic was discretionary.

1. There is evidence in the record disputing Defendants’ claim that St. Louis County had a policy regarding grading against traffic.

The District Court erred in determining St. Louis County had a policy. There is evidence in the record from which a finder of fact could have determined that no policy existed. Former St. Louis County Superintendent, Dennis Peterson, began employment with St. Louis County in 1962 and became a district supervisor in 1985. Peterson was involved in the superintendent safety meetings which are the basis for Respondents’ allegation of policy analysis.

Peterson worked with graders as part of his job duties prior to becoming a district superintendent. Peterson was shown no policy or instructions regarding the manner of grading.

Hurd: When you started the St. Louis County, did anyone ever tell you you have

to grade a certain way or you can't grade this way?

Peterson: No.

Hurd: No one ever said here's what you can and can not do?

Peterson: No.

Floerke Affidavit, Paragraph 2. Page 10, 11, Line 20-25, 2-4.

Peterson became a superintendent in 1985 the same year the Varda memo was created and circulated.⁴ Hurd Affidavit, Paragraph 18. Respondents allege that sometime after the 1985 memo a "policy review" occurred with the district superintendents. Peterson's testimony contradicts this assertion and creates an issue of fact that makes Summary Judgment improper.

Hurd: And St. Louis County doesn't have a policy concerning grading against traffic, do they?

Peterson: ... Not to my knowledge.

Hurd: Are you aware of any policy that St. Louis County has about grading against traffic?

Peterson: No.

Floerke Affidavit, Paragraph 2. Page 16, 22, Lines 10-13, 16-18. Peterson acknowledges Respondents did not have any policy for the operation of graders against traffic. Peterson's testimony creates an issue of fact which precludes Summary Judgment.

The testimony of superintendent Garden is also supportive of a lack of any policy analysis. Garden is unaware of any budgetary, economic, or social discussions that relate to grading against traffic. Id., Pages 24 and 25. He is unaware of any meeting dating back to his start of employment

⁴ Defendants admit the 1985 memo was not a policy or created a policy.

with Respondent, in 1976, and where such a meeting was held.

2. The District Court erred in determining the challenge activity involved the balancing of policy objectives.

Statutory immunity protects the government only when it can produce evidence its conduct was of a policy-making nature involving social, political, or economic considerations, rather than merely professional or scientific judgments. Cairl v. State 323 N.W.2d 20, 23 (Minn. 1982). The basis for Respondents' alleged policy stems from two sources; First, a 1985 memo, and second, what has been coined a "policy review". Both the 1985 memo and the policy review did not contain the balancing necessary to create a policy. Instead scientific or professional judgment was relied upon.

...."it's common knowledge with anybody familiar with the procedure that it would be a lot more expensive and a lot higher cost to perform the maintenance." Id at 25.

The 1985 memo is the only written documentation Respondents have provided which addresses grader operation. Respondents admit the 1985 Varda memo is not a policy and that there is no written policy. T at 7. The author of the memo was a deputy county engineer, he was never a heavy equipment operator, he does not recall a policy concerning grading against traffic, and was not in a position to make policy for Defendants.

Spott: You, yourself, did not have the power in your position in 1985 to make policy did you?

Varda: No, not really.

Varda Deposition, Page 15, Lines 12-23. The Respondents' superintendents acknowledged there is no written policy. Floerke Affidavit, Paragraph 2; Schelde Deposition, Page 13; Strukel

Deposition, Page 17; Rautanan Deposition, Page 21; Peterson Deposition, Page 22. Further, a careful review of the 1985 memo makes it clear it does not address operation of a grader in an entire lane of travel against traffic.

Respondent has the burden to produce evidence that the conduct was of a policy-making nature. They must show a balancing of political, social, and economical objectives in creating policy. Respondent cannot show a balance necessary to create a policy.

In response to the 1998 memo from St. Louis County Attorney in which he states grading against traffic is “life threatening”, the County Highway Engineer responds by writing “we should probably formulate a policy”. The highway engineer of 30 + years unequivocally stated in 1998 he believed Respondents should formulate a policy. Importantly, he states Respondents should formulate a policy, not just a written policy.

Respondents state that the operation of a grader over the center line has occurred since graders were first pulled with horses. Appellant is not in a position to comment on the veracity of this statement. However, the historical practice in operation of a grader, even since they were first pulled by horses, does not equate to the balancing of objectives that is required to create a policy within the meaning of statutory immunity. The historical practice of grading is irrelevant.

Floerke: So was your position, at least in January of 2001, that the longstanding practice, through not contained in a written policy ... was the policy?

Strukel: Yeah.

Floerke Affidavit, Paragraph 2; Strukel Deposition, Page 28, Lines 16-21.

In contrast to the District Courts Findings, it is undisputed Respondent does not have a written policy. It is undisputed that in 1998 the highway engineer states the Respondents should

formulate a policy. Respondents' supporting evidence identified generalized concern without incorporating specific facts demonstrating that any decision or policy was made.

Respondent failed to produce one specific fact concerning a deliberate process that led to a "policy" decision to grade against traffic. Instead, the Respondents' decision to grade against traffic is an established practice merely passed down since "graders were pulled by horses".⁵ Following a practice because the county has always followed that practice, is not enough to prove that a policy was established through a deliberative process weighing social, economic, and political factors. Olmanson v. LeSur County, 673 N.W.2d 506, 515 (Minn. App. 2004). The superintendents who were involved with the alleged policy review do not provide any information that evidences the requisite balancing of policy objectives. Garden Deposition. Their testimony is that they have always graded in this particular manner and therefore it is a policy. Id. The January 2, 2001 memo of district superintendent John Strukel is illustrative of this point. Strukel states "Don't we have a grading policy already? Just think about it, we have been grading roads this way for as long as I have been working with St. Louis County and how many years before that, wouldn't this be a policy?" Case law is clear, the practice or passing down a manner of operation is not a policy within the meaning of statutory immunity. Id. Defendants rely on this testimony to meet their burden of proving a policy existed, and that said policy was the product of the weighting of social, economic and political factors. However, Defendants' reliance is in error. The belief of some of the superintendents that there is a policy does not make it so. The lack of any discussion or debate over the social, economic and political issues involved in grading against traffic establishes that whatever

⁵Hansen states the policy was formulated as shown in the 1985 Varda memo. Hansen Deposition, Page 26.

policy Defendants claim to have is not protected by statutory immunity.

The only supporting evidence Respondents have produced to show a policy discussion is in the form of an Affidavit of David Skelton. The affidavit is in support of the contention Respondents balanced the social, political, and economic considerations necessary to establish a grading policy. Interestingly, the superintendents affirmatively state they never attended a budgetary or economic meeting as described in Skelton's Affidavit. Garden at 25. The supporting evidence supplied by Respondents is for the year 2000, not 1998, the year Respondents allege the safety meetings occurred. It was never discussed by the district superintendents. There is no evidence to suggest the balancing criteria was ever talked about prior to the collision which killed Schroeder. ⁶ It remains undisputed that there was never a meeting whereby a policy was created. Floerke Affidavit, Paragraph 2.

The issue of grading was discussed amongst several topics and was discussed very briefly. There was never a meeting where the issue of grading was the sole or primary issue. The only time the issue of grading was discussed was at general meetings where many issues were discussed, and the particular issue of grading was never discussed in detail or at length.

Respondent states a balancing of political, economical, and social factors was considered at the general meeting. It is not logical to conclude the superintendents conducted a balancing of all the necessary factors at the general meeting when the issue of grading lasted only a few minutes. It is not logical to conclude the superintendents conducted a balancing of all the necessary factors at the general meeting when they do not even recall such a meeting. The facts demonstrate the

⁶ The factors discussed in Skelton's affidavit relate to the year 2000. The 2000 numbers are irrelevant to the 1998 meeting.

superintendents at best decided that grading against traffic was how it has always been conducted and that they would continue on in such a fashion. At best, the superintendents stated that a change in the process “would be a lot more expensive and a lot higher cost to perform the maintenance”. Id. at 25. When the testimony of the district superintendent is reviewed, it is clear a balancing was not discussed and a balancing did not take place, and the district superintendent’s opinion is merely a professional judgment and not the product of any discussion or balancing.

Respondents produced the following in the Affidavit of Skelton: The county has approximately 1,630 miles of gravel road in addition to the 1,630 miles of county and state aid highway roads. Defendants also maintain hundreds of miles of township gravel roads. Respondents claim to have graded 1,333 lane miles of gravel road in the summer season. Grading roads constitutes 20,300 hours of regular time and 440 hours of overtime each year. Respondents have 45 graders in operation daily. Additionally, the public works maintenance division performs other functions that compete for labor, equipment, and financial resources. The year of 2000 activity levels were:

- Spent approximately 33,352 hours plowing and sanding.
- Produced and applied approximately 570,661 cubic yards of gravel each season. That constitutes 57,000 truck loads of material being produced, hauled, and placed on the county system.
- Produced and stock piled approximately 98,000 tons of screen sand for winter road sanding.
- Assisted in applying and hauling 500,000 gallons of calcium chloride for summer dust control.
- Reclaimed an average of 18 miles of county roads each year. Reclamation consists of

stripping a road and rebuilding it.

- Supplied approximately 414,430 tons of bituminous material each season which takes approximately 13,463 person hours.
- Approximately 14,481 hours ditching along the county roads which amounts of 1,930 person days.
- Approximately 14,346 hours, constituting 1,912 person days on beaver control.
- Approximately 11,841 hours per year, constituting 1,579 person days, on culvert maintenance.
- Approximately 4,506 hours spent working on roadway shoulders which equals 600 person days.
- Approximately 10,341 hours, constituting 1,379 person days on mowing and brushing county road right-of-ways.
- Installed 23,369 total lineal feet of culvert.
- Defendants employed 151 employees in the year 2000 charged with accomplishing these maintenance duties.

Respondents' memoranda, Page 4, 5. The evidence is directly contradictory to the testimony of the superintendents who stated no budgetary, economic, or social meeting was ever held with regard to grading against traffic. Garden at 25.

Respondents state the district superintendents allegedly discussed various possibilities or options to grading against traffic. They allegedly discussed the possibility of using pilot vehicles to lead and follow graders. They allegedly determined that if they required pilot vehicles when grading, the county would need to purchase 94 additional pick-ups at a cost of approximately Two Million

Dollars (\$2,000,000.00) as well as radios for each pick-up and grader at a cost of Two Hundred Thousand Dollars (\$200,000.00). These figures would not reflect the costs of labor for drivers to operate the pilot vehicles, fuel, or motor pool and self-insurance costs. They allegedly estimated that signage for those vehicles alone would cost approximately One Hundred Thousand Dollars (\$100,000.00).

They allegedly discussed the possibility of deadheading. Respondents memorandum, Page 9, 10. They allegedly determined that in the Sixth District, which is the Virginia area, grading would take approximately 20% longer if they used dead-heading. The Third District, the Linden Grove, Cook, Crane Lake and Kabetogama area, would take 33% longer with deadheading. The increased percentage would be an actual days' work. The deadheading example they discussed was the Echo Trail, a single gravel roadway which took two days to grade. Deadheading on the Echo Trail would mean it would take 3.5 days to grade each time.

The superintendents allegedly discussed the possibility of advanced signing on gravel roads when grading. Id. They allegedly determined this would be unworkable because of the intermittent roads in upladding operation. (No financial figures were provided for this option). An example was the Fraser Bay Road. The Fraser Bay Road is 1.2 miles long. In that 1.2 miles, there are six intermittent entrances, two private roads and a public access to the lake. To sign just that 1.2 miles of gravel roads requires signs at every one of those access points, plus a sign at each end of the roadway. The public works department additionally claims that additional signs equate to people becoming accustomed to signs and no longer noticing them.

They allegedly discussed approaches which they could take with existing resources. Id. Among these resources were public service announcements, sign usage for practical, deadheading

more practical, reviewing how weather conducts this type of work, and approaching legislature. Id.

Despite the massive Affidavit of Skelton with massive information concerning the County's maintenance activity for 2000, the record remains undisputed the superintendents did not create any policy in 1998. The record also demonstrates they did not discuss or weigh any budgetary concerns in 1998. Garden at 25.

The testimony of the superintendents demonstrate that the facts of Skelton's Affidavit were not discussed at any safety meeting in 1998 or prior to that year. First, the superintendents do not recall such budgetary, economic, and social discussions and debates with respect to grading against traffic. Id., at 24 and 25. Second, the superintendent's undisputed testimony is that no policy was ever created from these alleged discussions.

Hurd: Was there ever a time when the six superintendents ... get together to discuss the issue of grading against traffic?

Peterson: I don't recall a meeting, no.

Hurd: And my understanding, then, is that while you don't recall a specific meeting ... you had meetings in general where issues of safety and possibly grading against traffic came up?

Peterson: Yes.

Hurd: At these meetings where the issue of grading against traffic came up, do you recall whether or not you reached any consciences or a policy that St. Louis County would put forward on allowing graders to operate against traffic?

Peterson: ... No.

Floerke Affidavit, Paragraph 2. Page 13, 15, Line 9-19, 4-9, 16-23.

The testimony of Peterson creates an issue of fact as whether Defendant had a policy.

Hurd: And St. Louis County doesn't have a policy concerning grading against traffic, do they?

Peterson: ... Not to my knowledge.

Hurd: Are you aware of any policy that St. Louis County has about grading against traffic?

Peterson: No.

Id., Page 16, 22, Lines 10-13, 16-18.

Hurd: Do you recall how long the first meeting lasted?

Strukel: I would say may an hour, hour and a half tops, because its usually - - we get there at 10:00, 10:30, and we are done before noon.

Hurd: And you said other business was discussed at this meeting?

Strukel: I am pretty sure there was.

Hurd: Okay. Do you recall how long you talked about the options you had for grading?

Strukel: I don't know for sure how long it was. I don't think it was very long, though.

Floerke Affidavit, Paragraph 2. Strukel Deposition, Page 26, Lines 9-15, 18-21.

If the foregoing had been discussed, and thereby a balancing of policy objectives made, certainly the district superintendents would remember something about these discussions during the meeting; certainly the meeting would have lasted more than a half an hour. There are no minutes produced by Respondents to prove the actual numbers and figures were addressed. There are no records to show what their costs were in 1998, the time of the alleged policy review. It is

inconceivable that all this alleged information would have been discussed, but no policy created, and the superintendents who attended the meeting would have no recollection of the meeting. It is equally inconceivable that the Respondents would not warn the public of a life-threatening activity created by the Respondent, if a true balancing of the factors was had. ⁷

The 2001 memo of Strukel is also supportive of the fact that no such information was discussed. He states in 2001, months after the accident, “don’t we already have a policy?” Strukel was one of the parties that allegedly discussed the policy implications in 1998. Yet, he also does not recall the detailed meeting as alleged in the Skelton Affidavit that occurred only a short time prior.

Discretionary immunity only protects the government when it can produce evidence its conduct was of a policy-making nature, rather than merely profession and scientific judgments. The meetings of the superintendents did not reach the level of a policy making decision. First, no policy was created. The testimony shows the superintendents may have discussed the issue of grading, but only their professional judgments on the best way to grade. This is not sufficient to create a policy that is protected by immunity. Christensen v. Mower County, 587 N.W.2d 305.

Lastly, Respondents now claim its policy is “we would review roads and situations on a case-by-case basis as warranted.” Skelton Affidavit, Paragraph 25. First, this is contrary to their claim that they must grade against traffic for economic and efficiency reasons. Second, Respondents have produced no evidence of a review for Highway 29 as required by their policy. Third, the very reason offered by Respondent for grading against traffic and their alleged policy constitutes circular reasoning. Respondents’ argument is that they must grade against traffic, without any warning to the public for economic reasons. However, they will leave the decision of whether to operate against

⁷ The testimony of Ario is that the time saved was five or six minutes.

traffic to each individual grader operator. By definition, the activity is operational and immunity does not apply. Respondents attempt to insulate an operational decision by cloaking an operational act under discretionary immunity.

Immunity does not apply to operational decisions. Operational decisions relate to the day-to-day operation of government and do not receive protection. The manner in which St. Louis County grades roads is entirely left to the discretion of each operator, and therefore not protected by immunity.

III. The trial court was in error in determining that no genuine issue of material fact existed on Plaintiff's claim and granting Defendant's motion that official immunity applies. The award of summary judgment should be reversed.

A review of official immunity from the district court is reviewed *de novo*. Johnson v. State, 553 N.W.2d 40, 45 (Minn. 1996). Official immunity is distinct from statutory immunity. In contrast to statutory immunity, official immunity determines whether individuals used discretion on an operational, rather than a policy-making level. Pletan v. Gaines, 494 N.W.2d 38, 40 (Minn. 1992); Riedel v. Goodwin, 574 N.W.2d 753, 758 (Minn. App. 1998), review denied (Minn. Apr. 30, 1998). Official immunity protects a governmental employee from “fear of personal liability that might deter an independent action.” Janklow v. Minn. Bd. Of Examiners for Nursing Home Adm.’rs, 552 N.W.2d 711, 715 (Minn. 1996). For example, official immunity has been employed to protect police, and vicariously their municipalities, when they use discretion to make an independent decision while in the line of duty. See City of Mounds View, 518 N.W.2d at 567; Leonzal v. Grogan, 516 N.W.2d 210 (Minn. App. 1994); review denied (Minn. Jul. 27, 1994).

Official immunity is a common law doctrine which is “intended to insure that the threat of

potential liability does not unduly inhibit the exercise of discretion required of public officials in a discharge of their duties.” Rico v. State, 472 N.W.2d 100, 107 (Minn. 1991). Governmental officials are accorded near complete immunity for their actions in the course of their official duties so long as they do not exceed the discretion granted them by law. Janklow, 552 N.W.2d at 716. If official immunity protects a government employee from suit, the government entity will not be liable for its employee’s torts. Watson v. Metropolitan Transit Commission, 553 N.W.2d 406, 414 (Minn. 1996). The common law doctrine of official immunity “protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of a wilful or malicious wrong. Id.

Unlike statutory discretionary immunity, official immunity protects the kind of discretion which is exercised on an operational level rather than a policy-making level. Id. However, the discretion still requires “something more than the performance of ministerial duties.” Id. Ministerial duties have been described as those that are “absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.” Rico, 472 N.W.2d at 107 (citing Cook v. Trovatten, 274 N.W. 165, 167 (Minn. 1937)). In determining whether a duty is ministerial, the “nature, quality, and complexity” of the decision making process must be examined. Duellman v. Erwin, 522 N.W.2d 377, 379 (Minn. Ct. App. 1994) (Pet. for review denied, December 20, 1994) (citing Williamson v. Cain, 245 N.E.2d 242, 244 (Minn. 1976)).

The Supreme Court in Anderson v. Anoka Hennepin Indep. Sch. Dist. 11, 678 N.W.2d 651 (Minn. 2004), altered the analysis of official immunity. At issue in Anderson was the official immunity of a teacher, as well as the issue of official immunity of the school district. Id., at 654-55. The Court stated that Anderson did not forfeit official immunity because his conduct was ministerial

if that ministerial conduct was required by a protocol (policy) established through the exercise of discretionary judgment that would itself be protected by official immunity. However, the Supreme Court stated, “[T]his holding preserves existing case laws that denies common law official immunity when the liability is alleged to arise from the failure to perform or form the negligent performance of a ministerial duty.” Id.

In Anderson, official immunity was held to apply because the teacher was properly acting in accordance with an established policy even though his actions were ministerial in nature. Id., at 663. Thus the application of official immunity was expanded to include ministerial duties, unless the employee fails to perform, or negligently performs, such a duty.

In the present case, Respondent has demonstrated that the Anderson decision does not bar their official immunity claim. First, Respondent has shown that no policy existed on behalf of Defendants. Defendants have failed to demonstrate that a policy existed. Defendants admit that no written policy exists. The only support for the existence of any policy stems from an Affidavit of Road Superintendent David Skelton. Skelton alleges a meeting of district superintendents occurred whereby a balancing of policy considerations were discussed. However, the district superintendents deny any such balancing of budgetary, economic, or social considerations ever take place. Garden Deposition at 25. Next, the district superintendents’ testimony is inconsistent regarding when and what was discussed. The only consistent testimony of the superintendents is that no policy was ever created.

Finally, there is evidence in the record that no policy exists for Respondents, whether written or unwritten. Peterson, Page 10.

Hurd: And St. Louis County doesn’t have a policy concerning grading against

traffic, do they?

Peterson: No to my knowledge.

Hurd: Are you aware of any policy that St. Louis County has about grading against traffic?

Peterson: No.

Peterson Deposition, Page 16, 22, Line 10-13, 16-18.

Even if this Court should determine an issue of fact does not exist with regard to whether or not the County conducted a policy analysis, official immunity does not apply. The policy alleged to exist by Respondent is to address particular roadways or areas of concern on a case-by-case basis, and therefore official immunity is inapplicable. Skelton Affidavit.

There has been no evidence of an analysis of Highway 29 where the accident occurred. Therefore, the alleged policy was not complied with. Next, the alleged policy is to safely grade Highway 29 on a case-by-case basis. There is no requirement or policy to grade against traffic. If the policy of Respondent was for operators to grade against traffic, then Anderson may apply. However, it is undisputed that operators are not required to grade against traffic. Therefore, official immunity does not apply to Respondent if he fails to perform, or negligently performs, a ministerial duty.

Again, it is essential to identify the precise governmental conduct at issue before analyzing whether immunity applies. Olson vs. Ramsey County, 509 N.W.2d 368, 371 (Minn. 1993). As previously mentioned, this lawsuit arose from the operation of a grader against traffic after sunset without lights at the time of the accident. Defendants insist that Ario's conduct was not ministerial and involved an exercise of discretion by Ario and an ultimate decision to proceed in the fashion that

he did. On this basis, Defendants argue that they are is entitled to vicarious official immunity.

There are two problems with this argument. First, Respondent's duties were ministerial. Once the County became aware of the local road conditions, Respondent's duties were absolute, certain and imperative: he was to grade the roads. Ario's duties involved the mere execution of a specific duty (cutting and feathering gravel) arising from fixed and designated facts (gravel roads that were not smooth).

The fact that Respondent's actions involved the exercise of discretion in a general sense does not mean that he was performing a non-ministerial duty. If that were the case, there would be no such thing as a ministerial duty, because "almost everything a government employee does, **from driving a grader** to formulating toxic waste disposal regulations, involves the exercise of some discretion." Holmquist v. State, 425 N.W.2d, 230, 231 (emphasis added). Instead, the routine performance of a government employee's usual job functions is ministerial. See, e.g., Olson v. Ramsey County, 509 N.W.2d 368, 372 (Minn 1993) (implementation of social worker's case plan was ministerial where it involved the mere execution of assigned tasks); (Duellman v. Erwin, 522 N.W.2d 377 (Minn. Ct. App. 1994) (pet. for review denied), December 20, 1994) (police officer's decision to park his squad car with his headlights on facing oncoming traffic was ministerial); Larson v. Independent School District No. 314, 289 N.W.2d 112, 120-21 (Minn. 1979) (supervising and teaching a gymnastics exercise is a ministerial duty); Williamson v. Cain, 245 N.W.2d 242, 244 (Minn. 1976) (dismantling an abandoned house is a ministerial duty). Surely the social worker in Olson, the police officer in Duellman, the gymnastics teacher in Larson, and the construction workers in Williamson exercised some discretion in how they performed their duties, but these duties were ministerial nonetheless. As the Williamson court said:

. . . “the acts of the Defendants here are clearly ministerial. Their job was simple and definite - - to remove a house. **While they undoubtedly had to make certain decisions in doing that job**, the nature, quality, and complexity of their decision-making process does not entitle them to immunity from suit.” Williamson, 245 N.W.2d at 244 (emphasis added).

The real question is whether the government employee engaged in the type of operational decision-making that involved the exercise of significant independent judgment. See, e.g., Watson, 553 N.W.2d 406 (Minn. 1996) (bus driver’s exercise of judgment in a volatile emergency situation involving an assault on a passenger was protected by official immunity); Johnson v. State, 553 N.W.2d 40 (Minn. 1996) (discretionary decision relating to the release and supervision of a parolee protected by official immunity); Olson v. Ramsey County, 509 N.W.2d 368 (Minn. 1993) (county social worker’s exercise of judgment in the formulation of a case plan for a mother and an abused child protected by official immunity because it involved judgment at more than a ministerial level); Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992) (police officer’s decision to pursue fleeing suspect’s vehicle was protected by official immunity because it involved the exercise of significant independent judgment and discretion); Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988) (decisions by police officers responding to a report of a possibly armed man threatening himself and his ex-wife involved significant independent judgment and were protected by official immunity). Compared with the preceding cases, it is clear that Ario’s negligent conduct was not the result of the type of operational decision-making involving the exercise of significant independent judgment that is shielded by official immunity.

The case of Olson v. Ramsey County, 509 N.W.2d 368 (Minn. 1993) is particularly helpful in demonstrating the distinction between protected operational decision-making and unprotected ministerial duties. In Olson, the mother of a two-year-old boy admitted to a Ramsey County child

protection intake worker that she beat her son. Id. at 369. The case was referred to a social worker, who formulated a CHIPS “case plan” involving therapy for the mother and bi-weekly contact with the social worker. Id. at 370. The social worker saw the mother and her son a week later, but several other attempts at personal contact were unsuccessful. Id. Months later, the mother beat her son to death. Id. In a wrongful death suit brought by the child’s trustee, the social worker was accused of negligence in formulating and implementing the case plan. Id. At 371.

In holding that the social worker’s formulation of the case plan was protected by official immunity, the Minnesota Supreme Court said:

Creating the Case Plan involved professional planning at the operational level in the discharge of an assigned governmental duty, and we have no difficulty holding that Defendant White [the social worker] was protected by official immunity in her formulation of the case plan.

Id. at 372. However, the Court correctly held that the implementation of that plan was a ministerial duty not protected by the doctrine of official immunity. The Court reasoned:

The Case Plan defines the duties of care owed by Ramsey County to Karen Olson and her children. To recapitulate, the Case Plan called for Kimaka White [the social worker] to monitor Olson’s treatment and her progress in the Wilder program and with Lutheran Social Services, and to “contact” Olson bi-weekly. White was also to monitor David’s progress by “contacts” with Lutheran Social Services and the consulting therapist. Here the operational planning has already been completed. These remaining duties involve the execution of assigned tasks, and are ministerial in nature. We hold that implementation of the Case Plan is not protected by official immunity.

The function of turning headlights on when it is dark is a ministerial duty. Therefore, official immunity does not apply.

The time of the collision is disputed, occurring either shortly after 5:00 P.M. or 5:15 P.M. Sunset on November 19, 2000 in Floodwood, Minnesota was 4:44 P.M. Hurd Affidavit, Paragraph 2. Highway 29 was gravel and banked with trees. Hurd Affidavit, Exhibit A. Ario admits it was

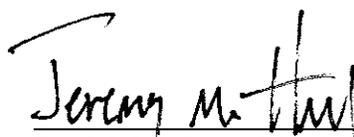
a cloudy day. Id. Despite all these factors, Ario did not have headlights on at the time of the accident. Vanderveer Affidavit. Whether to turn on one's lights when it is dark is a ministerial decision that is not protected by official immunity.

Respondents' analysis that the act of turning on lights as discretionary, places any act taken by a public official as discretionary and thus protected. If this were the case, Respondents could make any decision under any circumstance with complete confidence of protection under official immunity. One could only pierce the official immunity doctrine by showing malice.

CONCLUSION

Respondents are not entitled to immunity. Respondents have relied upon general statements and has shown no warning to the public concerning the dangerous condition. There is no evidence Respondent conducted a policy meeting whereby the balancing of social, political, and economical factors were addressed. The grant of summary judgment was improper and constitutes reversible error.

Dated this 20 day of January, 2005.



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).