

STATE OF MINNESOTA  
IN SUPREME COURT

No.: A04-1050

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Kristen Thompson,

*Respondent,*

v.

City of Minneapolis, Officer Thomas  
Schmid, Officer Gordon Blackey,

*Appellants,*

and

Michael Litz,

*Defendant.*

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APPELLANTS' BRIEF & APPENDIX

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## LEGAL ISSUES

1. Whether the Appellant police officers are protected by common law official immunity for their decisions about whether and how to pursue a suspect.

The District Court held: The officers' decisions were discretionary and the officers were granted official immunity.

The Court of Appeals held: The officers failed to perform a ministerial duty imposed upon them by City policy and they are not entitled to official immunity.

2. Whether the City of Minneapolis has vicarious official immunity for the acts of the Appellant police officers.

The District Court held: The City is entitled to vicarious official immunity for the acts of its employees as it is inconsistent for the City to be liable for the very same acts for which the officers received immunity.

The Court of Appeals held: Because of the denial of official immunity to the police officers, the City is not entitled to vicarious official immunity.

## STATEMENT OF THE CASE

Respondent sued for injuries incurred on November 29, 2001, when she was struck by a motor vehicle driven by Defendant Appellant Michael Litz as he attempted to evade Minneapolis police officers. Respondent sued Mr. Litz, the individual police officers and the City of Minneapolis. The City and the police officers moved for summary judgment based on official immunity and vicarious official immunity.

An Order for Partial Summary Judgment dated March 23, 2004, was entered by the Hennepin County District Court, the Honorable Ann L. Alton, in favor of the City of Minneapolis and Officers Schmid and Blackey on immunity grounds. A stipulation and order making Rule 54.02 findings was entered on April 20, 2004, resulting in the entry of final judgment on April 26, 2004. Respondent timely appealed pursuant to Minn. R. Civ. App. P. 103.03(a) from the final judgment entered pursuant to the stipulation and order.

In an opinion filed January 18, 2005, the Court of Appeals reversed the District Court and remanded the matter. Appellants petitioned this Court for review. The petition for review was granted by Order dated March 15, 2005.

## STATEMENT OF FACTS

On November 29, 2001, at about 1:25 p.m., Officer Thomas Schmid was driving a Minneapolis Police Department police detox van. (Schmid Dep. at 13) (A-126) (Blackey Dep. at 12-13, 35) (A-46-47, 69). Officer Gordon Blackey was a passenger in the van. (Schmid Dep. at 13) (A-126) (Blackey Dep. at 35) (A-69). The Detox van is primarily used to locate and transport intoxicated persons to their homes or to a detoxification center. (Blackey Dep. at 13) (A-47) (Schmid Dep. at 13) (A-126). The detox van is fully marked with police insignia, as a police squad car would be. (Blackey Dep. at 13) (Resp. A-47) (Schmid Dep. at 14) (A-134).

While traveling southbound on Nicollet Avenue the officers observed a tan/blue Ford Bronco V10 driving eastbound on 4<sup>th</sup> Street and then running a red light at Nicollet Avenue, directly in front of them. (Blackey Dep. at 20-21) (A-54-55) (Schmid Dep. at 19-20) (A-132-33). The officers later learned that the vehicle had been stolen and was being operated by Michael Litz. The officers decided to attempt to stop the vehicle. The officers turned onto 4<sup>th</sup> Street and activated the detox van's emergency lights and siren. (Schmid Dep. at 35-39) (A-148-152) (Blackey Dep. at 50-52; 61-63) (A-84-86, 95-97). Soon after turning onto 4<sup>th</sup> Street, the officers observed Litz pick up speed and continue to drive erratically through several more red lights while eastbound on 4<sup>th</sup> Street (Blackey Dep. at 27) (A-61) (Schmid Dep. at 25) (A-138-39). Officers estimate that Litz's rate of travel reached 40-50 mph. (Blackey Dep. at 27) (A-61) (Schmid Dep. at 25) (A-138). According to the officers, they did not exceed the speed limit as they followed the vehicle driven by Litz. (Blackey Dep. at 46, 47, 49) (A-8-89) (Schmid Dep.

at 36, 38, 43, 44) (A-149, 151, 156, 157). From 4<sup>th</sup> Street, the Litz vehicle made a wide right turn to go south on 2<sup>nd</sup> avenue. (Schmid Dep. at 24-25) (A-137-38) (Blackey Dep. at 27) (A-61). After turning onto 2<sup>nd</sup> Avenue, Litz sped out of sight of the officers. (Schmid Dep. at 29, 41) (A-142; A-154) (Blackey Dep. at 33) (A-67). After Litz's vehicle accelerated away from them and turned a corner out of sight, the officers did not consider themselves in pursuit of the vehicle. They deactivated the lights and siren, except when going through intersections. (Schmid Dep. at 37-42) (A-150-155) (Blackey Dep. at 49-51) (A-83-85) (Blackey Dep. at 60-63) (A-97-97) (Schmid Dep. at 64) (A-177). Litz, on the other hand, testified that he believed that the officers were in pursuit of him as he traveled through downtown. (Litz Dep. at 15-19).

The officers followed Mr. Litz' course of travel onto 2<sup>nd</sup> Avenue. When they got to the intersection with 6<sup>th</sup> Street they observed his vehicle heading eastbound on 6<sup>th</sup> Street. (Schmid Dep. at 29-30) (A-142-43) (Blackey Dep. at 33) (A-67). The officers followed eastbound on 6<sup>th</sup> Street. While proceeding on 6<sup>th</sup> Street, the officers observed the Litz vehicle turn southbound onto 4<sup>th</sup> Avenue. They broadcast that Litz turned onto 4<sup>th</sup> Avenue over the police radio. The tape of that transmission shows that their siren was in activated. (MECC tape, Moore Aff. Exh. 13). When the officers got to 4<sup>th</sup> Avenue, they again followed Mr. Litz' course of travel. As they made the turn they observed a crowd of people one block south, near the intersection of 4<sup>th</sup> Avenue and 7<sup>th</sup> Street. When the officers got to the intersection they observed Plaintiff-Appellant Kristen Thompson on the ground. She had been a pedestrian and was struck by Litz's vehicle as she tried to cross 4<sup>th</sup> Avenue. (Blackey Dep. at 40) (A-74) (Schmid Dep. at 48) (A-161).

Eyewitness testimony varies greatly as to how long it was after Ms. Thomson was struck before the detox van arrived at the scene. (Toner Dep. at 13, 21-24; Desjardin Dep. at 13-15; N. Cape Dep. at 21-22; S. Cape Dep. at 12-13; Tack Dep. at 27-28; Nelson Dep. at 11, 17-18; Geary Dep. at 2, 31; Jensen Dep. at 21-22; Frost Dep. at 18-26). Officer Schmid exited the vehicle and remained on the scene with Ms. Thompson while Officer Blackey began driving in search of Litz. (Blackey Dep. at 43) (A-77) (Schmid Dep. at 48-49) (A-161-62). Litz had crashed the Bronco at the corner of 4<sup>th</sup> Avenue and 8<sup>th</sup> Street and abandoned it there. He was apprehended on foot shortly thereafter.

## ARGUMENT

### I. STANDARD OF REVIEW.

This Court's reviews de novo the Court of Appeals' denial of official immunity and vicarious official immunity to Defendants City of Minneapolis, Thomas Schmid and Gordon Blackey. Kari v. City of Maplewood, 582 N.W.2d 921, 923 (Minn. 1998).

This matter comes before this Court upon an appeal of the grant of summary judgment to Appellants in the District Court and the subsequent reversal of that order by the Court of Appeals. Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from a district court's grant of summary judgment, the evidence is viewed in the light most favorable to the nonmoving party and the appellate court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). However, an adverse party "may not rest upon mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05; Carlisle v. City of Minneapolis, 437 N.W.2d 712 (Minn. App. 1989).

Where governmental immunity is asserted as a defense, the case should be decided as early as possible in the proceeding upon a motion for summary judgment. "[I]mmunity' is an *immunity from suit*, rather than a mere defense and immunity is

effectively lost if a case is erroneously permitted to go to trial.” Anderson v. City of Hopkins, 393 N.W.2d 363, 364 (Minn. 1986), *quoting* Mitchell v. Forsyth, 472 U.S. 511 (1985) (emphasis in original).

## **II. THE COURT OF APPEALS ERRED IN FAILING TO AFFORD OFFICERS BLACKKEY AND SCHMID OFFICIAL IMMUNITY**

The Court of Appeals made a fundamental error in failing to give proper recognition to the emergency nature of circumstances faced by the police officers and the objective reasonableness of their actions in the face of the emergency. The Court of Appeals failed to address the primary inquiry mandated by this Court in Kari v. City of Maplewood, 582 N. W. 2d 921 (Minn. 1998). Kari requires analysis of whether the officers conduct so unreasonably put at risk the safety and welfare of others that as a matter of law it could not be excused or justified. Instead, the Court of Appeals characterized a complex decision making process as ministerial and denied the officers official immunity. The police officers’ decisions in these emergency circumstances must be entitled to official immunity if the doctrine is to have continued viability for police officers.

### **A. Official immunity should apply to the present case in order to effectuate the purposes of the doctrine.**

This Court has declared that “[o]fficial immunity is provided because the community cannot expect it police officers to do their duty and then to second-guess them when they attempt conscientiously to do it.” Pletan v. Gaines, 494 N.W.2d 38, 41 (Minn. 1992). The Court of Appeals decision in this case erodes this broad protection. Under Minnesota law, “[a] public official charged by law with duties which call for the

exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.” Pletan, at 40; Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn. 1988), *quoting* Sulsa v. State, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976). Duties of law enforcement and crime prevention by police officers are considered discretionary duties entitling them to official immunity. Johnson v. Morris, 453 N.W.2d 31, 41-42 (Minn. 1990). State law immunity rests on the same rationale as federal qualified immunity: courts must insure that the threat of suit does not inhibit public officials' exercise of discretion in discharging their duties. Rico v. State, 472 N.W.2d 100, 107 (Minn. 1991); Holmquist v. State, 425 N.W.2d 230, 233 n.1 (Minn. 1988).

In the instant case, Appellant officers were acting in good faith and in a reasonable manner in attempting to address the public safety hazard that Mr. Litz was creating. The Court of Appeals never got to the point where it addressed these facts because of its focus on the policy violation. This sort of analysis eviscerates official immunity. The exercise of discretion by public officials will be chilled if the law will punish them for taking action if they violate any policy in doing so, even if the violation of the policy is unintentional.

**B. The officers were performing discretionary duties when pursuing the suspect.**

As a general matter, police charged with the duty to prevent crimes and enforce the law are not purely ‘ministerial officers’ and many of their duties are of an executive character involving the exercise of discretion. Elwood, 423 N.W.2d at 678. To encourage responsible law enforcement, police are afforded a wide degree of discretion

precisely because a more stringent standard could inhibit action. Elwood, 423 N.W.2d at 678. Despite these general rules, the Court of Appeals found that the Appellant officers' decisions were ministerial. The Court of Appeals concluded that, in certain respects, the officers' conduct was dictated by the Minneapolis Police Department's pursuit policy. Because the Court found that the officers were not in strict compliance with the terms of the policy, they are not entitled to official immunity.

The Court of Appeals noted that the pursuit policy requires continuous use of red lights and siren whenever officers "pursue" a vehicle. Appellant officers testified that they deactivated red lights and siren when they initially lost sight of Mr. Litz' vehicle. From that point, they did not consider themselves to be in pursuit of the vehicle. (Schmid Depo. p. 64; Blackey Depo. pp. 64-65). The Court of Appeals observed that the policy does not define "pursue". Consequently, the Court applied a dictionary definition to conclude that the officers were, indeed, pursuing Mr. Litz. This sort of post hoc evaluation is problematic. Whether or not the officers were engaged in a "pursuit" subject to the policy is precisely the sort of semantic issue that should not defeat official immunity. The fact that we can now, in the quietude of a courtroom, argue that "monitoring" equates with "pursuit" under the policy points up the need for immunity for the officers. The officers did not have the time to review the precise language of the Police Department's pursuit policy or to debate its application to the circumstances. Instead, they did what they thought, in the exercise of sound discretion, was the safest, best course of action. They used their discretion to follow the suspect in a way that they thought created the least risk of injury to the public, taking into account the incomplete

information they had available to them and the safety factors of the situation. Even if they were wrong about the applicability of the policy to their actions, the mistake was reasonable. Their actions were reasonable. They should be entitled to immunity.

Rote application of municipal policy to defeat official immunity in emergency circumstances will lead to inconsistent and absurd results. The Minneapolis Police Department's pursuit policy seeks to balance the complex public policy questions inherent in police pursuits. There are no easy answers for policy makers in this arena. The complexity of the issue is precisely the reason that this Court has decided official immunity questions by focusing on the situation and the behavior of the public official in that particular context.

The Minneapolis Police Department's pursuit policy was amended by the Chief of Police by Special Order issued November 20, 2001, just days before the incident in question. (A-188). The relevant substance of the policy, however, remained unchanged. The policy admonishes officers to "use reasonable professional judgment in deciding when, where, and to what extent they will initiate pursuits of suspects in motor vehicles." Officers are required to "...continuously weigh the need and desirability for apprehension against the risk created for the officers and the general public. The officers must also take into account factors such as the traffic volume, time of day, weather, circumstances of the emergency and the type of violation when becoming involved in pursuits." Section 7-405 of the policy sets forth circumstances in which officers shall discontinue a pursuit in progress. As might be expected, many of the circumstances call for the exercise of independent professional judgment by the involved officers. Section 7-405 also

establishes the requirement at issue here for officers to “...use red lights and siren in a continuous manner for any emergency driving or vehicular pursuit.”

The Court of Appeals determined that the policy requiring continuous use of red lights and siren established a ministerial duty, the performance of which was a predicate for the application of official immunity. The Court of Appeals acknowledged the emergency nature of the circumstances facing the Appellant officers. The Court stated: “[w]hen an official must make decisions with little time for reflection and on the basis of incomplete information, [i]t is difficult to think of a situation where the exercise of significant independent judgment and discretion would be more required.” (A-8, citing Pletan v. Gaines). Nevertheless, the Court of Appeals found that “...such discretion may be conditioned on the performance of a ministerial duty.” (A-8, citing Nelson v. Wrecker Servs., Inc., 662 N.W.2d 399, 413 (Minn. App. 2001)). The Court found a ministerial duty in the red lights and siren requirement of the Police Department’s policy.

This ruling promotes form over substance and undermines the doctrine of official immunity. In Kari v. City of Maplewood, 582 N.W.2d 921, 925 (Minn. 1998) this Court rejected an argument that emergency vehicle drivers needed to comply with the statute requiring vehicles to yield to pedestrians in a crosswalk. Kari held that:

[f]or public employees driving on emergency missions, immunity should not turn on whether specific traffic regulations do or do not apply to public employees driving an emergency vehicle responding to an emergency, but rather on whether the wrongful act so unreasonably put at risk the safety and welfare of others that as a matter of law it could not be excused or justified.

Kari at 925.

Here, the Court of Appeals acknowledged this pronouncement and further noted the Kari Court's "concern that public officials not be subjected to second-guessing when required to make split-second decisions in the face of changing circumstances when responding to emergencies." (A-10, citing Kari at 923-24). Nevertheless, the Court of Appeals chose not to follow Kari, but instead distinguished it on the basis that it "focused on the specifics of the situation." (A-10). This distinction misses the essence of the Kari decision.

It is true that Kari considered the specific facts of the situation involved in that case. The Court noted:

Everson's [the ambulance driver] deposition testimony reveals that he was enroute to assist an unconscious person and was not thinking about whether he had the right of way to proceed through the crosswalk. He explained that as he approached the crosswalk he made eye contact with Kari and believed she had seen his emergency vehicle before she moved in front of it.

Kari at 925.

From these specific facts this Court concluded "...that even if Everson failed to yield the right of way to Kari, given the circumstances—the nature of the emergency, the precautions taken in activating emergency lights and sirens, and Everson's cautious driving as he approached the crosswalk—the failure to yield was justified." *Id.* at 925.

In the instant action the Court of Appeals never addressed the question posited by Kari: whether the actions of the Appellant officers so unreasonably put at risk the safety and welfare of others that as a matter of law they could not be excused or justified? Had it done so, the Court could only conclude that, like Mr. Everson in Kari, the officers' actions were justified. Their actions were appropriately cautious and showed due regard

for the safety of others. We should not lose sight of the fact that it was Mr. Litz, not the officers, who created that danger and struck Ms. Thompson.

The Court of Appeals found that the instant matter is comparable to Nelson v. Wrecker Services, Inc., 622 N.W.2d 399 (Minn. App. 2001). Nelson, in turn, is based on Nadeau v. Melin, 260 Minn. 369, 110 N.W.2d 29 (1961). In Nadeau, the court held that a fire department's emergency vehicle had no special rights or privileges when it entered an intersection against a red semaphore without operating its emergency lights and siren and struck another vehicle. Nadeau, 110 N.W.2d at 39. The court stated that it is not the fact that the vehicle is on an emergency run alone that gives it a privilege to enter through a highway without stopping, but the right must be coupled with a compliance with the requisite warning that it is an emergency vehicle on an emergency run. Id.

Based on Nadeau, the Nelson Court found that official immunity did not protect the driver of a police vehicle in an emergency who struck an innocent third party because the driver failed to comply with the ministerial duty of sounding the vehicle's siren when passing through a red light. Nelson v. Wrecker Services, Inc., 622 N.W.2d at 401. Although the ministerial duty in Nelson was premised upon Minn. Stat. § 169.03, subd 2, the court also stated that a "city's policy could establish a ministerial duty to activate sirens and lights." Id. at 403.

Nelson is distinguishable from the instant case. It involved the squad car striking a third party because of the failure to deploy lights and siren. Here, Respondent was struck by the vehicle being driven by Mr. Litz. There is no evidence that the Appellant officers violated any statute regulating their driving.

Here, the Court of Appeals held, based on Nelson and Anderson v. Anoka Hennepin Indep. Sch. Dist. 11, 678 N.W.2d 651 (Minn. 2004), that a municipal policy may give rise to a ministerial duty. The Court went on to conclude that the red lights and siren policy created such a duty in this case. The Court of Appeals erred in this latter conclusion.

As argued above, the imposition of a ministerial duty in this context will chill the exercise of independent judgment by public officials acting in emergency circumstances. Moreover, the Court of Appeals decision will have a chilling impact on the development of municipal policies. If the decision stands, municipalities will have motivation to promulgate minimally restrictive policies in order to avoid the exposure to liability that the existence of specific policies might engender. For example, the Minneapolis policy could be rewritten to retain the subjective factors to be considered by officers in initiating and continuing vehicle pursuits, but removing provisions that dictate a particular action. In this way, the City could avoid the creation of ministerial duties while still satisfying its role to provide policies to guide its officers. Such a result is clearly not in the public interest. As a matter of public policy, municipal policy makers should develop and refine policies that are designed to promote the public safety. The public wants police departments to experiment with solutions to the complex issues involved in police vehicular pursuits. It does not serve the public interest to punish with liability those municipalities that adopt objective policies.

The purposes of official immunity are undermined where, as here, the analysis focuses on the policy dictates of the particular municipality rather than the conduct of the

public official involved. Official immunity should not turn on where a police officer is employed, but on **how** the officer behaved in a particular instance.

**C. Officers Blackey and Schmid did not engage in a willful or malicious wrong.**

Because the officers were performing a discretionary function, their official immunity can only be defeated by proof that they committed a willful or malicious wrong. Watson v. Metropolitan Transit Commission, 553 N.W.2d 406, 414 (Minn. 1996). In this context, malice means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right. Rico v. State, 472 N.W.2d 100, 107 (1991). A high standard has been established for finding a willful or malicious wrong in the context of official immunity, by requiring the defendant to have reason to know the challenged conduct is prohibited. Id. The exception anticipates liability only when an official intentionally commits an act that he or she then has reason to believe is prohibited. Id.

A plaintiff must do more than allege malice or willfulness. The plaintiff must present specific facts showing that the official knew that what he or she was going lacked legal justification. Reuter v. City of New Hope, 449 N.W.2d 745, 751 (Minn. App. 1990); Frank's Livestock and Poultry Farm, Inc. v. City of Wells, 431 N.W.2d 574, 578 (Minn. App. 1988). The official immunity question, including the 'willful and malicious wrong' issue, is appropriately resolved on summary judgment as a matter of law. Rico, 472 N.W.2d at 100 (summary judgment granted on official immunity grounds despite allegation of malice).

The willful or malicious wrong exception to official immunity contemplates something more than accepting that a jury could make inferences favorable to a plaintiff and find that a defendant acted for an improper purpose. The measure of proof for “malice” that defeats official immunity resembles the measure of proof necessary to defeat federal qualified immunity, that is, the plaintiff must prove that the defendant knowingly violated a clearly established law at the time he acted:

[T]he willful or malicious wrong exception to official immunity ... does not impose liability merely because an official *intentionally* commits an act that a court or jury subsequently determines is wrong. Instead the exception anticipates liability only when an official intentionally commits an act that he or she then has reason to believe is prohibited.

Rico, 472 N.W.2d at 107 (emphasis in original). A conclusory allegation of malice will not defeat the immunity. Greiner v. City of Champlain, 816 F. Supp. 528, 546 (D. Minn. 1993) (citing Krypke v. Burlington N. R.R., 928 F.2d 285, 287 (8<sup>th</sup> Cir. 1991) *aff'd* 27 F.3d 1346 (8<sup>th</sup> Cir. 1994).

The Appellant officers were required to make myriad operational decisions when they encountered the vehicle driven by Mr. Litz. In the initial instance, they had to decide whether to ignore or stop the vehicle for running the red light. Because of the dangerous driving conduct and their concerns for public safety, they decided to attempt to stop the vehicle. This decision was entirely reasonable under the circumstances. The events that ensued were, to a large degree, beyond the officers' control. The Appellant officers were quickly faced with an emergency of Litz' making. Litz fled at a high rate of speed after being signaled to stop. He took a right turn from the left lane in front of two lanes of cars waiting for a semaphore at the intersection of Fourth Street and Second

Avenue. This sort of driving behavior downtown, during the noon hour, certainly escalated the situation and presented a risk to the public. No doubt it also raised concerns for the officers that more was involved here than just skidding through a stoplight at Second and Nicollet.

The Respondent officers' subsequent decisions had to account for the ongoing recklessness of Litz. Their approach to the situation took into account both the facts as they knew them to be and a concern for public safety.

The Appellant officers tried to monitor Mr. Litz without going at a high rate of speed themselves. To do so, they chose to use red lights and/or siren only to clear intersections as they proceeded. Their hope was that their reduced speed would be greeted accordingly by Litz. They are now criticized for that use of discretion. Ironically, had they simply made the outright decision to engage in high-speed pursuit there would be no question that official immunity would apply.

As determined by the District Court, the officers did not commit a willful or malicious wrong. There is no evidence in the record that the officers violated any law or knew that their actions were prohibited. There is also nothing in the record to indicate that the officers were acting without legal justification or excuse. The officers witnessed violations of the law that have been admitted by Litz and they acted with constant concern for the threat to public safety that Litz posed. As stated by the District Court, whether or not the officers acted appropriately within department guidelines for police pursuits is best left to the Minneapolis Police Department.

### **III. VICARIOUS OFFICIAL IMMUNITY APPLIES TO THE MUNICIPAL EMPLOYER OF THE POLICE OFFICERS.**

Because of its denial of official immunity to the police officers in this case, the Court of Appeals did not address the issue of vicarious official immunity. In Pletan, this Court specifically held that “with respect to high-speed police pursuits, the officer’s official immunity extends to the officer’s public employer.” 494 N.W.2d at 43.

Whether to extend official immunity to the governmental employer is a policy question. Id. at 42. The need to protect the public must be balanced against the concern that the public not be put unduly at risk. Id. As stated in Pletan:

If vicarious official immunity does not apply, the conduct of the immunized police officer must still be reviewed in order to impose liability on the employer. But then the purpose of official immunity, which is to shield an officer’s exercise of independent judgment from civil adjudication, is, as a practical matter, defeated. Police officers may justifiably think their own employment performance is being evaluated and consequently may decline to engage in pursuit when pursuit is indicated.

Id. at 42.

Respondent may argue that S.W. v. Spring Lake Park School District, 592 N.W.2d 870 (Minn. App. 1999) affirmed 606 N.W.2d 61 (Minn. 2000), stands for the proposition that a government entity should sometimes pay for damage it caused, notwithstanding the official immunity afforded its employees. S.W. is entirely distinguishable.

S.W. involved a failure by school district employees to recognize and act upon a safety hazard presented by a stranger in the building. The employees had been given no policies or directives on how to address such a situation. Although the employees had official immunity for their discretionary duty, the Court denied vicarious official

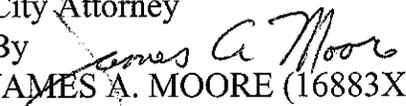
immunity. However, it was the institutional failure to adopt policies that defeated vicarious immunity. The failure of the school district at issue was different in kind from that of its employees.

The policies in question in this case are the same as those in Pletan. Vicarious official immunity should be granted to the municipal employer. This case presents a challenge to the officers' exercise of independent judgment. The case does not involve a failing by the municipality separate and apart from the actions of its officers. If vicarious official immunity is denied, it will tend to "exchange prudent caution for timidity in the already difficult jobs of responsible law enforcement." Pletan, 494 N.W.2d at 41.

**CONCLUSION**

Officers Schmid and Blackey exercised judgment and discretion in an emergency situation while performing their official duties. The officers did not act in malicious disregard of the law. Therefore, both the officers and the municipality enjoy official immunity from suit. This Court should reverse the Court of Appeals decision and affirm the District Court's grant of summary judgment to Defendant City of Minneapolis, Gordon Blackey and Thomas Schmid.

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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).