

STATE OF MINNESOTA

IN SUPREME COURT

No.: A04-1050

Kristen Thompson,

Respondent,

v.

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

Appellants,

and

Michael Litz,

Defendant.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities	ii
Argument	1
I. Respondent’s reliance on statutory immunity cases is misplaced and her policy arguments must therefore be rejected	1
II. Respondent’s arguments that official immunity should not apply on the facts of the instant matter should be rejected	3
Conclusion	4

TABLE OF AUTHORITIES

CASES

<i>Angell v. Hennepin County Regional Rail Authority</i> , 578 N.W.2d 343 (Minn. 1998)	2
<i>Conlin v. City of St. Paul</i> , 605 N.W. 2d 396 (Minn. 2000)	2
<i>Holmquist v. State</i> , 425 N.W.2d 230 (Minn. 1988)	2
<i>Kari v. City of Maplewood</i> , 582 N.W.2d 921 (Minn. 1998)	4
<i>Nusbaum v. County of Blue Earth</i> , 422 N.W.2d 713 (Minn. 1988)	2
<i>S.L.D. v. Krantz</i> , 498 N.W.2d 47 (Minn. App. 1993)	4
<i>Snyder v. City of Minneapolis</i> , 441 N.W.2d 781 (Minn. 1989)	2

OTHER AUTHORITIES

Minn. Stat Sec. 466.02, Subd. 6	1
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ARGUMENT

I. RESPONDENT'S RELIANCE ON STATUTORY IMMUNITY CASES IS MISPLACED AND HER POLICY ARGUMENTS MUST THEREFORE BE REJECTED.

Respondent makes a common, but problematic, mistake in her brief. She confuses the doctrine of official immunity, at issue in this case, with the doctrine of statutory immunity. Respondent's entire argument hinges upon the public policy issues implicit in statutory immunity analysis. Her reliance on statutory immunity case law results in an incorrect analysis that muddles the distinct lines of authority on these two separate types of immunity and improperly limits the application of official immunity.

Statutory immunity is derived from Minn. Stat Sec. 466.02, Subd 6.; which creates an immunity from municipal liability for: "... [a]ny claim based on the performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." The case law interpreting this statute draws a distinction between policy-making level decisions (for which statutory immunity attaches) and operational decisions (for which statutory immunity is unavailable).

Respondent begins her arguments by properly noting that official immunity analysis examines whether "... challenged conduct was discretionary or ministerial..." (Respondent's brief, p. 18). However, Respondent digresses in apparent confusion because of the use of the word "discretionary" in this context. Unlike in statutory immunity analysis, "discretionary" when used in the context of official immunity does not refer to policy-making. It refers to the day-to-day decisions that society asks its public officials to make and for which society

imbues them with official immunity, lest the public good be harmed by the chilling effect of liability on the official. Respondent's misunderstanding leads them to argue that Appellants aren't entitled to official immunity because they have not laid the requisite factual record to support a claim for statutory immunity. (Respondent's Brief at 22, citing *Conlin v. City of St. Paul*, 605 N.W. 2d 396 (Minn. 2000); *Angell v. Hennepin County Regional Rail Authority*, 578 N.W.2d 343 (Minn. 1998); *Holmquist v. State*, 425 N.W.2d 230 (Minn. 1988) and *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713 (Minn. 1988)). These cited cases have no bearing on the instant action and Respondent's argument should be ignored. As argued in Appellant's initial Brief, the reaction of the Appellant officers to Mr. Litz' violations of the law present the paradigm for official immunity.

Respondent further improperly relies on a statutory immunity case to argue that "[t]he purpose of immunity is to bar the courts from second-guessing the policy set by the policy-makers." (Respondent's Brief at 24, citing *Snyder v. City of Minneapolis*, 441 N.W.2d 781 (Minn. 1989)). Respondent's argument in this regard is confusing because Respondent has not challenged the City's policy in this case. Indeed, Respondent relies on the established pursuit policy in her attempt to defeat official immunity. The argument, however, misstates the purpose behind official immunity. The doctrine is not intended to avoid judicial interference with policy making decisions of the executive branch. The purpose of official immunity is to promote independent action and performance of discretionary duties of public officials. Respondent's policy arguments based on statutory immunity must be rejected.

II. RESPONDENT’S ARGUMENTS THAT OFFICIAL IMMUNITY SHOULD NOT APPLY ON THE FACTS OF THE INSTANT MATTER SHOULD BE REJECTED.

Respondent argues that the Appellant police officers are not entitled to official immunity because they were not faced with an emergency, they were not required to make “split second” decisions and they had complete knowledge or information from which to make decisions. (Respondent’s brief, pp. 21, 25). These arguments must be rejected.

Respondent claims that the incident that gave rise to the purported “pursuit” was a simple, non-dangerous semaphore violation. This myopic view of the circumstance is unwarranted on the record. The police officers’ signal to Mr. Litz to stop propelled him into indisputably dangerous driving on his part. The officers had to decide how best to address this problem. Respondent’s argument amounts to a second-guess that it would have been safer to do nothing at all. Such a second-guess is precluded by official immunity.

Respondent next argues that the pursuit policy requires termination of a pursuit after officers lose visual contact with a fleeing vehicle for 10-15 seconds. The record does not support the conclusion that the officers ever lost visual contact for that period. Nevertheless, Respondent seems to argue that any break in visual contact somehow infused the situation with time for reflection such that the officers cannot claim a necessity for “split second” decision-making. This argument ignores the ongoing nature of the decision-making required of the officers as the situation unfolded. As the officers came to intersections where they could observe the continuing hazard posed by Mr. Litz, they had to decide what to do next.

It is unfair to the officers to characterize this circumstance as one in which they had time for quiet contemplation.

Finally, Respondent contends that the officers had “complete information” because they knew whether or not their lights and siren were activated. They didn’t know, however, why Mr. Litz was doing what he was doing or whether he would persist in his dangerous behavior. It is the danger that he posed that drove the decision-making process. A process that should, as a matter of sound public policy, be immune from liability.

CONCLUSION

The policy that underlies the official immunity doctrine compels dismissal of this lawsuit. Respondent acknowledges that “[o]fficial immunity exists ‘to protect public officials from the fear of personal liability that might deter independent action and impair performance of their duties’” Respondent’s brief at 16-17, *citing, S.L.D. v. Krantz*, 498 N.W.2d 47, 50 (Minn. App. 1993). Respondent ignores, however, the holding of the most apposite official immunity case: *Kari v. City of Maplewood*, 582 N.W.2d 921 (Minn. 1998). *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 924 (emphasis added). Using the *Kari* standard, the only reasonable conclusion is that Appellants are entitled to official immunity in this case.

Appellants respectfully request that this Court reverse the Court of Appeals and affirm the District Court decision in the matter.

Dated: May 25, 2005

JAY M. HEFFERN
City Attorney

By,

A handwritten signature in cursive script that reads "James A. Moore". The signature is written in black ink and is positioned over the printed name of James A. Moore.

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