

STATE OF MINNESOTA
IN SUPREME COURT

No.: A04-1050

Kristen Thompson,

Respondent,

vs.

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

Appellants,

and

Michael Litz,

Defendant.

RESPONDENT'S BRIEF & APPENDIX

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ISSUES

1. Whether the district court erred as a matter of law in determining that the police were protected from liability by official act immunity when they admittedly departed from mandatory dictates of a pursuit policy that had been enacted at a policy level by their supervisors.

The district court held in the negative and the Court of Appeals reversed.

Apposite Authority: *Meier v. City of Columbia Heights*, 686 N.W.2d 858 (Minn. App. 2004) (official act immunity is inapplicable when an official departs from the policy set by his supervisors); *Nelson v. Wrecker Services, Inc.*, 622 N.W.2d 399, 401 (Minn. App. 2001) (“the city’s policy governing emergency responses could establish a ministerial duty to activate sirens and lights. We can see no distinction between the policy decision of the city and the evident policy of the legislature that the freedom to disregard a semaphore arises only in the event that the driver employs both the siren and lights.”); *Robinson v. Hollatz*, 374 N.W.2d 300, 303 (Minn. App. 1985) (decision on when to plow snow can be established as a discretionary policy entitled to immunity, whereas the individual judgment of a plow operator on whether to plow to the outer edges of a road is “ministerial” and not entitled to immunity).

2. Whether the district court erred as a matter of law in determining that the municipality was immune from liability under the vicarious application of official act immunity when its officers failed to follow their established protocol.

The district court held in the negative and the Court of Appeals reversed.

Apposite Authority: *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992).

STATEMENT OF THE CASE

This is a personal injury claim arising from a November 29, 2001 collision between a pedestrian and a vehicle being chased by a police van for having run a red light. The police officers and their municipality moved for summary judgment based on common law “official act” immunity and “vicarious official immunity” respectively. No statutory immunity was raised.

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 Schmidt and Blackey on immunity grounds, and a Stipulation and Order facilitating the appeal resulted in the entry of final judgment on April 26, 2004.¹

Plaintiff timely appealed, and on January 18, 2005, the Court of Appeals reversed the district court and remanded the matter for trial on its merits, finding that the officers’ violation of mandatory policies established by their policy-making superiors deprived them of the right to the “official act” immunity that the district court had granted. The Supreme Court granted review on March 15, 2005. The City timely submitted its brief on April 14, 2005. This is Respondent’s responsive brief.

¹ The parties entered into a stipulation of “no just reason for delay” in the entry of final judgment and the district court signed an order making the same finding consistent with MINN R. CIV. P. 54.02 on April 20, 2004. Such a “final judgment” is expressly made appealable by MINN.R.CIV.APP.P. 103.03(a).

STATEMENT OF FACTS

1. Summary of issues in dispute.

Policy-makers at the Minneapolis Police Department developed a Pursuit Policy that provided that a pursuit must not be initiated or continued unless there was a constant use of lights and siren to alert the public to the presence of rapidly moving vehicles, and mandated that a signal must be given that a pursuit has been discontinued by pulling the police vehicle off the road, so that the driver being chased would know to ease their speed.²

While other portions of the Pursuit Policy involve the exercise of judgment,³ the

² The relevant policies include ¶ 7-406.01 (“All department employees involved in a vehicle pursuit shall follow the procedures listed in this section. . . . 1) Activate red lights and siren”) (A-4), *Id.* at ¶ 7-405 (“Officers shall use red lights and siren in a continuous manner for any emergency driving or pursuits”) (A-3); *Id.* at ¶ 7-404 pursuit is “considered to be terminated when the officer discontinues the use of all emergency equipment and slows the squad car to the posted speed limit and turns off the pursuit route at the next available intersection.”)(A-3); *Id.* at ¶ 7-408 (Upon termination of pursuit, the officers “shall notify dispatch and: 1. Reduce speed to the posted speed limits. 2. Turn off emergency lights and sirens. 3. Turn off the pursuit route at the next available intersection.”)(A-5).

³ For example, officers are vested with discretion in certain respects relative to whether a pursuit should be begun or ended. *See, e.g.*, ¶ 7-403 (“The initiation and continuation of any pursuit are predicated on factors known to the officer such as the seriousness of the violation, the consequences of not apprehending the suspect, the probability of apprehending the suspect without undue risk to the public at large, and the potential for continued criminal activity, if not apprehended.” “They shall 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 traffic volume, time of day, weather, circumstances of the emergency and the type of violation when becoming involved in pursuits.”) (A-1), ¶ 7-405 (“Officers shall not initiate a pursuit or shall discontinue a pursuit in progress whenever . . . 1) The pursuit poses an unreasonable risk to the officers, and/or the general public, or the seriousness of the offense(s) is such that continued pursuit creates an unreasonable risk to the officers

mandate requiring the use of lights and siren and the requirement of turning off the road to signal the end of a pursuit are ministerial in that they are required and capable of ready execution without the exercise of any discretion.

When the City and its officers moved for summary judgment based on “official act” immunity, Plaintiff resisted the motion on the basis that the conduct of the accused officers was ministerial and thus fell outside the scope of common law “official act immunity.”

The focus at the summary judgment motion was thus on whether the officer’s conduct deviated from the policies prescribed by their policy-making supervisors. The district court held that the officers had the discretion at an operational level to violate the policy established by their policy-making supervisors. The Court of Appeals disagreed.

2. Detox van chases an SUV that went through a red light.

On November 29, 2001, Officer Schmid was the operator of a police detox van stopped at a red light at Fourth and Nicollet, headed southbound on Nicollet, when he saw the Litz SUV (Depo at 19, f. 6 - 20, f. 5) (A-22), as it ran a red light for traffic on Fourth shortly after the light for the police van had turned to green for traffic on Nicollet. (Depo at 20, f. 6-24.) (A-22)

and/or the public. 2) The officer can establish the identification of the offender so that an apprehension can be made at another time 3) Risks due to . . . vehicle and/or pedestrian traffic outweigh the necessity to immediately arrest the suspect. 4) Immediate medical assistance is needed by anyone injured as a result of the pursuit 8) Situations in which the primary pursuit marked squad loses visual contact of the offender for a significant period of time (approximately 10-15 seconds).”) (A-3-A-4)

3. **Police begin pursuit despite a known danger to the public.**

While Litz' passage through the red light was within the speed limit and did not endanger any vehicles, Officer Schmid was concerned with the potential danger to "pedestrian traffic because it was around 1:00, the lunch hour, [and] there was a lot of pedestrians on all four corners." (Depo at 21, f. 7-9) (A-23). The officer was aware that "[p]edestrian traffic would be slightly higher during the lunch hours." (Depo at 32, f. 12-13) (A-25).⁴ He thus began a pursuit to pull Litz over, stop and arrest him for the traffic light violation.⁵

⁴ Plaintiff did not challenge the discretion of the officers to begin a pursuit. "[I]f you see a traffic violation" it "would be discretionary [based] on the level of the crime . . . [whether] to get involved" (Schmid Depo at 17, f. 11-25).

⁵ In addition to arguing that they carefully conducted a pursuit, the officers also contended that they never actually began a "pursuit." The Minneapolis police pursuit policy provides that "[a] vehicular pursuit occurs whenever an officer pursues a driver of a vehicle who has been given a signal to stop by the activation of red lights and siren, and the suspect or violator fails to comply and attempts to elude the officer by taking evasive action." Pursuit Policy at § 7-404. "When Litz ran the red light, the officers signaled him to stop by activating their vehicle's lights and siren. Litz did not stop, but instead speeded up and 'continu[ed] to drive erratically.' Schmid testified that he believed that Litz was fleeing. Schmid also testified that he was following Litz with the intention of making 'a traffic law enforcement stop,' and that his objective was to question or arrest Litz." *Thompson v. City of Minneapolis*, A04-1050, *slip op.* at 8.

The Minneapolis police pursuit policy does not define "pursue," so the Court of Appeals applied the common usage of the term. *See, e.g., State v. Hicks*, 583 NW.2d 757, 759 (Minn. App. 1998), *review denied* (Minn., Oct. 20, 1998). According to the AMERICAN HERITAGE DICTIONARY 1471 (3d ed. 1992), *pursue* means "[t]o follow in an effort to overtake or capture[.]" "The officers were, therefore, pursuing Litz within the plain meaning of the term." *Thompson v. City of Minneapolis*, A04-1050, *slip op.* at 8.

4. **Police lost sight of the pursued vehicle.**

Officer Schmid gave chase, but very quickly the officers “lost sight of it” when it turned to the right onto Second Avenue from Fourth Street (Depo at 22-23) (A-23) and did not regain visual contact until the suspect’s SUV turned right at Fourth Avenue from Sixth Street (Depo at 23) (A-23).

5. **Police do not operate red lights and siren continually.**

Moreover Officer Schmid did not operate the van’s red lights and siren during the pursuit, except at intersections when the detox van passed through red traffic lights itself. (Depo at 37, f. 1 - 39, f. 10)(A-27). He did not re-activate his red lights again “until . . . I observed . . . a pedestrian down” at Seventh Street and Fourth Avenue (Depo at 41, f. 17-20) (A-28), who had been struck by the fleeing Litz SUV.

6. **Police were consciously aware of mandatory policy requiring no pursuits when the public was endangered, constant visual contact and continual operation of red lights and siren.**

Officer Schmid was aware that the established mandatory police policy required continuous display of lights and continual activation of siren “whenever an officer pursues a driver of a vehicle who has been given a signal to stop by the activation of red lights and sirens, and the suspect or violator fails to comply or attempts to allude the officer by taking evasive actions.” (Depo at 70, f. 21 - 71, f.2) (A-35). He was aware that “under the Minneapolis Police Department policy of police pursuits, that if you were in pursuit you were to use your lights and siren on a continuous basis.” (Depo at 69, f. 18-22) (A-35). The same

policy required discontinuation of pursuit where visual contact is lost. *See* ¶ 7-405(8) (lost “visual contact” for “10-15 seconds”) (A-4). He nonetheless continued the pursuit without lights or siren despite having lost sight of the SUV.

It was also evident to Officer Schmid that once the police began their pursuit, the SUV accelerated above the 30 m.p.h. posted limit it had previously operated under (Depo at 20, f. 6-24) (A-22), and exceeded 30 m.p.h. at the mid-block point between Nicollet and Marquette on Fourth Street (Depo at 24, f. 15-20) (A-23), continuing to accelerate until the police lost sight of him when he turned to the right to go south on Second Avenue, reaching a speed of 45-50 m.p.h. (Depo at 24, f. 24 - 25, f. 6) (A-23, A-24) in the 30 m.p.h. zone (Depo at 20, f. 23-24)(A-22) with pedestrians at each corner. (Depo at 21, f. 7-9)(A-23) The Litz’ SUV generally would accelerate to 45-50 m.p.h. by the mid-block point after a turn. (Depo at 29, f. 17 - 30, f. 7) (A-25). Officer Schmid also observed the Litz’ SUV drive recklessly in response to the pursuit. (Depo at 25, f. 9 - 28, f. 18) (A-24).

Numerous eyewitnesses confirmed that the Litz’ vehicle was not within sight of the police van, that it was being chased in excess of the posted speed limit with numerous pedestrians around, and without its red lights and siren’s operating, so that pedestrians had no warning that a chase was in progress.⁶

⁶ *See* Statement of Michael Litz, at 4-5, 7 (A-41, A-42, A-44) (the driver of the fleeing vehicle, he saw the police turn off their flashing lights as they followed him and he did not see flashing lights behind him during the chase and never heard a siren, as the police followed him a total of eight blocks at a distance of one half to a full block during the pursuit, during which he drove at speeds up to 50 mph through downtown, running 3-

5 more red lights); Statement of Lamie Pilnoek, at 5-6 (A-49, A-50) (an independent witness stopped for a red light, she was surprised how fast the police were at the scene, as she didn't realize they were chasing the SUV, because they did not have lights on as the police van pulled up to the scene); Police Statement of Laura Toner, at 1, 3 (A-52, A-54) (she was an eyewitness as well, seeing police arrive within 45-50 seconds after the SUV struck the plaintiff in a crosswalk, having never heard a siren or seen any flashing lights); Police Statement of Todd Desjardin, at 1 (A-56) (a witness standing near the Government Center, he saw the SUV turn from 6th onto 4th at high rate of speed, southbound on 4th, and run a red light at 7th and the police vehicle attempting to catch up at 6th and 4th, using its lights and siren only at that intersection); Statement of Sandra Cape, at 3-4, 5-6 (A-61, A-62, A-63, A-64) (she was witness in a vehicle on 7th and saw the SUV speeding at about 50 m.p.h. or more strike the pedestrian, then observed the police van for 1/3 to 1/2 block, traveling over the speed limit as well, displaying no flashing lights or siren); Statement of Neal Cape, at 2-3 (A-70, A-71) (an eyewitness on 7th, he saw the SUV strike the pedestrian at about 45-50 mph and then afterwards saw the police van approximately 1/2 block back, observing it turn on its siren and lights after the pedestrian was hit); Statement of Thomas Jensen, at 4-6 (A-80 - A-82) (an eyewitness on the corner of 7th Street and 4th Avenue, he saw the SUV run a red light, hit the pedestrian as she was in the middle of the crosswalk and then saw the police van 1/2 to 1 block back, approach without its siren or flashing lights); Police Statement of Curtis Nelson, at 2-4 (A-87 - A-89) (he was westbound on 7th when he saw the SUV going 40-45 mph run a red light and strike the pedestrian as she was in the crosswalk, seeing the police arrive within 30 seconds, but never heard a siren or saw flashing lights); Police Statement of Rich Gearey, at 1 (A-90) (he was a pedestrian who saw the SUV go through the intersection at 40-45 m.p.h.); Statement of Rich Geary, at 3 (A-95) (the police told him they had been chasing the SUV) Deposition of Rich Geary, at 22-23 (A-101) (the police van was not using its lights or siren); Statement of Christopher Frost, at 2, 4 (A-107, A-109) (he was an eyewitness, standing on 6th street when he heard an SUV coming; He does not recall any siren or flashing lights on police van) Police Statement of Christopher Frost, at 2 (A-112) (the police van followed within 60 seconds and while he did not see it chasing the SUV, he heard the police say that they were); Statement of Peter James Tack, at 2, 4-6 (A-115, A-117 - A-119) (he was standing in front of Lutheran Brotherhood Building when he saw an SUV going 55-65 mph and then the police detox van arrived as the first police vehicle at the scene doing 40 mph; the police from the van told him they were trying to stop the SUV for running a red light); Statement of Kristine Renjeske, at 2 (A-122) (she was in the skyway over 4th when she saw the speeding SUV; she was surprised how quickly the police were at scene as a detox van was there less than a minute after impact, as she didn't realize it was being chased); Statement of Ann Vars, at 4-5 (A-134, A-135)

The mandatory Pursuit Policy regarding chases provided expressly that officers could not begin a chase unless they continually operated their red lights and siren:

¶ 7-406.01 Vehicular Pursuit Procedures: Role of Officers in the Primary Pursuit Vehicle. “All department employees involved in a vehicle pursuit shall follow the procedures listed in this section. . . . 1) Activate red lights and siren”

¶ 7-405 Initiating or Continuing a Pursuit. “Officers shall use red lights and siren in a continuous manner for any emergency driving or pursuits.”

Officer Schmid confirms that these policies were violated. (Depo at 69, f. 18 - 71, f.2) (A-35).

(she was in the skyway when she saw an SUV weaving through traffic and saw the police van arrive after the pedestrian was struck; it had no siren or lights, which struck her as odd since it was “obviously” pursuing the SUV); Statement of Floyd Clutter, at 5-6 (A-142-A-143) (he had just gotten off a bus when he saw the SUV turn from 6th onto 4th and rocked back and forth as it made a wide turn at 30-35 mph; after the impact with the pedestrian he heard the police say that the SUV had run a red light and that they had tried to pull him over and he had run and so the police followed him; he did not hear a siren, or see any flashing lights); Statement of Kristin Lamerman, at 2-4 (A-145-A-147) (she was on 10th floor of Lutheran Brotherhood Building when she heard screeching tires or brakes and saw a person laying in street at intersection 7th and 4th Avenue, then observed a police van parked to left of person on street, but never heard any sirens before she looked outside, as it was the squealing tires or brakes that prompted her to look; when she looked outside, she did not see flashing lights); Statement of Mike Whitman, at 2-3, 5 (A-150, A-151, A-153) (he was walking down 8th crossing 4th when he heard screeching tires and a revving motor and saw a pedestrian flying through the air after being hit by the SUV; then saw the police van approach behind the SUV and heard it turn on its siren after the pedestrian was hit, and the flashing lights were turned on at the same time; he overheard two police officers talking, saying they had been following SUV for some distance); Statement of Patrick Cape, at 3, 6-8 (A-157, A-160-A-162) (he was a 10th grader in a truck with his parents when he saw an SUV going 30-40 mph run a red light on 4th and strike a pedestrian, then saw a police van coming down 4th, swerving in traffic, going approximately the same speed, about ½ block back at the time of impact; he heard a police officer say they were chasing SUV).

7. **The record fails to show any exigent circumstance that would justify an emergency departure from mandatory policy to protect lives.**

On certain rare occasions officers face a split-second “life or death” choice that elects between options deemed necessary to protect either their lives or those of others.⁷ The record here fails to indicate any exigency or authority for the officers to violate the policy established by their policy-making superiors. Litz did not threaten the lives of the officers and the officers admitted that no immediate threat was presented to the pedestrian population by Litz having run the red light.⁸ At the point the pursuit began, therefore, the record failed to show any reason why the mandatory protocol for continuous use of red lights should have been excused.⁹ Similarly, the City did not develop any record of why the abandonment of the pursuit should not have followed that corresponding mandatory protocol.

⁷ For example, in *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 665 (Minn. 1999), though the police conduct was governed by extensive regulations, statutes, and case law, officers responding to dispatch of a “loud party” call or making an arrest of unruly party-goers were deemed to be engaging in discretionary conduct because they were required to make split-second decisions based on incomplete information about whether a certain guest posed a hazard to the health of themselves and others and needed to be immediately and forcefully restrained, notwithstanding a “use-of-force” protocol that arguably dictated a lower level response.

⁸ Officer Schmid confirmed that Litz’ passage through the initial red light did not endanger any vehicles. Schmid Depo at 20-21 (A-22, A-23). Moreover, the Litz’ vehicle did not pose a danger until the officers commenced their pursuit, at which point it exceeded the speed limit. Schmid Depo at 20, f. 6-24 (A-23).

⁹ For example in *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000), the Supreme Court ruled that merely asserting conclusory allegations that conduct was “discretionary” without showing how it had balanced social, political, economic and other factors would deprive the city of the use of claimed immunity.

8. Conclusion.

Since the police violated their own policy at a ministerial level, Plaintiff contends the district court erred in granting immunity to the officers and by extending it vicariously to the department.

SUMMARY OF ARGUMENT

The judicial branch of government does not “second guess” the policy decisions of the municipalities that constitute part of the executive branch of government. When a municipality makes a policy decision, the courts enforce that policy even when the policy is improvident. Whether an administratively-enacted policy is sound or unsound, the courts must not interfere with its enforcement.

Here, the City of Minneapolis Police Department enacted a pursuit policy. That policy vested its officers with some discretion and judgment as to certain matters (like when to start a chase or when to end it), but importantly it mandated that its officers do certain things absolutely, imperatively and definitely. Among the mandated items were the requirement that red lights and siren must be used continuously during any pursuit. No exception. It mandated that when a pursuit was abandoned that the officers must give the person being pursued a clear signal that the chase was over (so the person would slow down), by pulling off the roadway with their police vehicle.

Official act immunity applies when an officer follows either a good or a bad policy made by his superiors. If the officer departs from the policy, he is not protected by it and his conduct is not subject to immunity. Since vicarious immunity merely extends the officer’s immunity to his employer, if the officer is not immune, neither is the employer.

Here, the officers admitted that they knew the City’s policy mandated that they continuously operate lights and siren in a pursuit and that when they abandoned a pursuit that

they pull off the road. Here, the officers admitted that they did not use lights and siren continuously, and that they did not pull off the road. Since their chasing the defendant's car was for the purpose of arresting him for running a red light, their driving after him at high speed with intermittent use of red lights and siren was clearly a "pursuit" in the common use of that term. The officers thus clearly violated the mandatory policy enacted at a policy level by their superiors.

What the Court must decide in this case is: do field-level officers have the inherent right to exercise discretion to such a degree that they may override the policies enacted by the executive branch of government that employs them. The Court of Appeals held the answer to be "no," consistent with decades of interpretative case law. The City contends the answer must be "yes," because of the "emergency" nature of all police work (even the "emergency" created by chasing someone who has run a red light).

If the answer is "yes," however, the Court will be making a marked change in the separation of powers it has meticulously enforced since the first recognition of "immunity" to the executive branch and its employees. If the Court grants the Appellant relief, it will actually be undercutting the right of the officer's policy-making superiors to make and expect adherence to the policy the executive branch has made. If officers - - who are not policy-makers - - can "make policy" contrary the policy their superiors - - who are policy-makers - - have made, then the executive branch does not truly have the capacity to exercise its discretion to make policy. Moreover, since it would be the Court which would effectively

take that discretion away, the judicial branch would essentially decree its power to deprive the executive branch of the free exercise of its will and to replace it with the judgment of line officers.

Now if the City wanted to give its officers that level of authority - - to make “emergency” decisions at variance with their established policies - - it certainly could have said that in the policy, or at least used “wiggle words” that suggested its officers held that discretion. It didn’t.

Contrary to other areas of the policy where discretion is clearly vested, here the two key provisions involved - - continuous use of light and siren and a visual signal that the chase was ended - - are “absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.” *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). That means that they must be followed by officers in order to gain official act immunity, as otherwise they are merely “ministerial.”

Finally, since the City failed to develop any record to justify why an exigent circumstance might justify their officers’ departure from its mandatory protocol as the chase began, those decisions which justify official misdeeds based on “emergencies” do not apply.

Since the City declared the relevant policies at issue to be mandatory and the City’s officers admittedly declined to follow them in circumstances where no discretion to violate policy was conferred by the City, immunity must be denied.

ARGUMENT

I. Grant of Immunity by Summary Judgment is Reviewed De Novo.

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law. MINN. R. CIV. P. 56.03. On appeal from summary judgment, the court must determine (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. *City of Virginia v. Northland Office Props.*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991).

The question of whether official immunity applies may be appropriately resolved by summary judgment. *Reuter v. City of New Hope*, 449 N.W.2d 745, 751 (Minn. App. 1990), *review denied* (Minn. Feb. 28, 1990). Whether official immunity applies is a question of law reviewed *de novo*. *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998).

The City and its officers argued to the district court that official immunity applied to the operation of the police detox van in chasing the Litz' SUV, asserting that official immunity applies to the conduct of all public officials who are required to exercise discretion in carrying out their official duties and that it is particularly applicable in cases where public officials are performing police activities, as they have the capacity to involve "emergency conditions with little time for reflection and often [are done] on the basis of incomplete and confusing information." *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992).

Plaintiff-Respondent is cognizant of the general rule, but asserts that the case must not be addressed hypothetically, but with awareness of the precise factual situation confronted by the officers. Where the facts reflect that the issue was not whether to chase, but how to chase, ministerial departures from mandatory policies governing how chases are to be conducted should not be subject to immunity. When the City failed to develop a record of why its officers were justified in departing from its mandatory protocol,¹⁰ the courts may not extend “official act” immunity to insulate the officers or city from accountability for their negligence.

II. Generally Official Act Immunity Protects only those Official Functions that are Subject to the Exercise of Discretion.

A. Official Act Immunity Exists to Assure Discretionary Functions Won’t be Imperiled by “Second-Guessing.”

A person is a public official if he or she performs governmental duties directly related to the public interest. *See Hirman v. Rogers*, 257 N.W.2d 563, 566 (Minn. 1977). The doctrine of official immunity protects public officials from liability for discretionary actions taken in the course of their official duties. *Janklow v. Minn. Bd. of Exam’rs for Nursing Home Adm’rs*, 552 N.W.2d 711, 716 (Minn. 1996). Official immunity exists “to protect public officials from the fear of personal liability that might deter independent action and

¹⁰ In *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000), the Supreme Court ruled that merely asserting conclusory allegations that conduct was “discretionary” without showing how it had balanced social, political, economic and other factors would deprive the city of the use of claimed immunity.

impair effective performance of their duties.” *S.L.D. v. Kranz*, 498 N.W.2d 47, 50 (Minn. App. 1993), quoting *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988)(citation omitted).

B. Official Immunity does not Protect Ministerial Acts that Officials are Mandated to Perform by their Policy-Making Superiors.

Official immunity applies when the public official's conduct involves the exercise of discretion, but it does not protect ministerial acts or malicious conduct. *Kari, supra*, 582 N.W.2d at 923. A discretionary act requires the exercise of individual judgment. *Id.* A ministerial act is “absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.” *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991).

C. A More Generous Grant of Discretion Exists to Officials Engaged in “Emergency Conditions.”

While public policy would not condone an official’s creating an emergency merely to garner the broader protections afforded to his decisions made in that environment, public officials responding to emergencies are granted added discretion in light of the fact that in such situations they often face circumstances that, by their nature, require the exercise of discretion. Accordingly, Minnesota appellate courts have held that the doctrine of official immunity applies in a variety of circumstances where official duties require public officials to respond to emergencies. In *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 665 (Minn. 1999), officers responding to a “loud party” deemed it necessary to make an arrest of unruly

party-goers, making “split-second” decisions based on incomplete information about whether a certain guest posed a hazard to the health of themselves or others. *See Kari, supra*, 582 NW.2d at 924 (ambulance driver responding to report of unconscious person); *Pletan, supra*, 494 NW.2d at 41 (police officer's decision to engage in high-speed pursuit of criminal suspect); *Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988) (police officers responding to report of domestic dispute); *Frank's Livestock & Poultry Farm, Inc. v. City of Wells*, 431 N.W.2d 574, 578 (Minn. App. 1988) (volunteer fire department responding to report of fire), *review denied* (Minn. Jan. 25, 1989).

D. No Discretion to Depart from Mandatory Rules is Afforded in Non-Emergent Situations, or Emergencies Created by the Official.

Whether official immunity applies to a public official's conduct is a two-step inquiry. *Dokman v. County of Hennepin*, 637 N.W.2d 286, 296 (Minn. App. 200 1), *review denied* (Minn. Feb. 28, 2002). The court must first determine whether the challenged conduct was discretionary or ministerial and then must determine whether the challenged conduct, even though of the type normally subject to official immunity, was malicious or willful and therefore not subject to the protections of official immunity. *Id.*

At issue here is the conduct of the police detox van crew in attempting to pursue and stop the Litz' SUV that went through a red light. The district court concluded that the conduct was discretionary like the decision to chase the felon in *Pletan*, even though it violated established mandatory protocols, like those applicable to intubation of a victim by a fire emergency crew in *Bailey v. City of St. Paul*, 678 N.W.2d 697 (Minn. App. 2004). Do

all police actions constitute emergency situations in which official immunity will apply? The district court concluded that an officer engaged in “emergency” actions has immunity not only with respect to matters such as speed and control, but also as to a decision to disregard a red semaphore with or without displaying red lights on the vehicle or sounding the siren as commanded by the departmental mandatory pursuit policy or state statute.¹¹

The first case to decide the issue of whether a police officer had the discretion to disobey express rules set down to control his own conduct was *Nelson v. Wrecker Services, Inc.*, 622 N.W.2d 399, 401 (Minn. App. 2001). All prior cases dealing with official immunity in responding to emergency calls involved circumstances in which the driver of the emergency vehicle had activated both the lights and the siren. *See, e.g., Kari v. City of Maplewood*, 582 N.W.2d 921, 925 (Minn. 1998) (recognizing immunity of a paramedic who hit pedestrian in crosswalk where witnesses testified paramedic had activated emergency lights and siren); *Nisbet v. Hennepin County*, 548 N.W.2d 314, 319 (Minn. App. 1996), (recognizing immunity of ambulance driver who hit another vehicle, but had “lights flashing and siren sounding”).

The Supreme Court has previously held that the rights and privileges of the driver of

¹¹ MINN. STAT. § 169.03, subd. 2, provides that, “The driver of any authorized emergency vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety, but may proceed cautiously past such red or stop sign or signal after sounding siren and displaying red lights.” (emphasis added).

an emergency vehicle to proceed without stopping at a controlled intersection is no greater than any other driver, unless the siren and lights have been activated. *Nadeau v. Melin*, 260 Minn. 369, 384, 110 N.W.2d 29, 39 (1961). Although *Nadeau* confines its holding to the rights and privileges of the emergency vehicle driver for purposes of determining fault, its logic is compelling in determining whether the driver can use the “emergency response” rule to establish official immunity. *Nadeau* makes it evident that failure to use sirens and lights when passing through a stop sign is more than mere negligence; it destroys a claim of privileges and rights arising out of an emergency. *Id.* at 384, 110 N.W.2d at 39 (“It is not the fact that the vehicle is on an emergency run alone that gives it a privilege to enter a through highway without stopping, but the right must be coupled with a compliance with the requisite warning [siren and lights] that it is an emergency vehicle on an emergency run.”).

In *Nelson* the Court of Appeals said that the mandate for sounding the emergency-vehicle siren and displaying its lights does more than establish a standard of care, because the requirement “conditions the freedom attendant to discretion” on the officer’s “activat[ing] the siren and red lights,” which the court said was a “ministerial” requirement and not subject to discretion. *Nelson, supra*, 622 N.W.2d at 401, citing *Kari, supra*, 582 N.W.2d at 923 (defining a ministerial act as “absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts”); see *Waste Recovery Coop. v. County of Hennepin*, 517 N.W.2d 329, 333 (Minn. 1994) (holding that duties fixed by the requirements of statute or municipal policy are ministerial and, thus, not protected by official

immunity).

“It follows from the foregoing precedents,” said the Court in *Nelson*, “that the city's policy governing emergency responses could establish a ministerial duty to activate sirens and lights. We can see no distinction between the policy decision of the city and the evident policy of the legislature that the freedom to disregard a semaphore arises only in the event that the driver employs both the siren and lights.” *Id.* The *Nelson* court expressly rejected the city's contention that “the city could not impose ministerial duties to restrict the driver's freedom in responding to emergency situations,” saying “[t]here is no precedent supporting such a conclusion.” *Id.*

The *Nelson* court concluded that “[w]ithout compromising the law in any respect regarding the importance of police discretion in emergency circumstances, there can be no question that immunity may be dependent on ministerial duties.” *Id.*

E. While Some Police Decisions are Invariably Discretionary, There is no Discretion to Violate Mandatory Policy, Particularly in the Absence of an Exigent Circumstance Involving Split-Second “Life and Death” Decisions.

The record here shows that at the time the pursuit was begun there was no exigent “life and death” issue that would have justified a departure from the mandatory protocol's requirement for initiating continuous use of lights and siren.¹² “Where the government has

¹²This is one of the potential distinguishing characteristics of another “police pursuit” case to which the Supreme Court recently also granted review. See, *Mumm v. Mornson*, 2004 WL 2794921 (Minn. App. 2004) *review granted* (Minn., Feb. 23, 2005). In *Mumm*, the police arguable faced an emergency at the outset – a psychotic driver.

not provided any evidence as to how it made the decision for which it claims immunity, th[e] [supreme] court has held that the government was not entitled to statutory immunity.” *Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000) , citing *Angell v. Hennepin County Regional Rail Auth.*, 578 N.W.2d 343, 347 (Minn. 1998).

A variety of cases expound upon this “lack of evidence” standard,¹³ but perhaps the most illustrative is *Conlin*, in which the government contended it was entitled to statutory immunity for exercising discretion that allegedly weighed economic, political, and social factors in choosing whether to place a sign that would have warned a motorcyclist: “Tow Away Zone, No Parking, Street Oiling 7 am to 5 pm,” so that he could have driven onto the involved road surface slowly and more cautiously. The City submitted as evidence to support and attempt to prove this “balancing” approach an administrator’s testimony by affidavit, but the Supreme Court said:

[T]he Erichson affidavits are conclusory. The affidavits merely identify generalized concerns and seemingly parrot back language from our case law without incorporating specific facts demonstrating that a decision was in fact made. For example, while the city claims it considered the “minimal public safety concerns” associated with the project, it does not explain what these

¹³ See, e.g., *Angell, supra*, 578 N.W.2d at 347 (“the record is completely devoid of any evidence establishing that the failure to install access restrictions was based on policy decisions involving economic, political, and social factors” so statutory immunity was denied); *Holmquist v. State*, 425 N.W.2d 230, 234 (Minn. 1988) (“The State has not shown, indeed it has made no attempt to show, that the absence of a warning sign at the location in question was the result of a policymaking decision,” so statutory immunity was denied); *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 723 (Minn. 1988) (state “presented no evidence that the placement of the ‘End 45 Mile Speed’ sign involved a balancing of policy objectives,” so statutory immunity was denied).

concerns might be and how they factored into the decision. . . . [T]he overall lack of explanation and detail in the affidavits leaves too many questions unanswered.

Conlin, supra, 605 N.W.2d at 403. Specifically, the affidavits “attached pages from the City’s complaint log a[s] evidence of an established policy of responding to citizen complaints. However, . . . as the log does not demonstrate anything more than that the City has a practice of tracking street complaints . . . [r]ather than proof of a policy decision not to post warning signs . . . the log only shows the City has a longstanding practice of responding to any complaint regarding a city street.” *Id.*

To win immunity, a government may not rest on mere “conclusory” averments that it used “discretion,” but must produce evidence that it balanced cost and safety with some “specificity” that does not leave “too many questions unanswered.”

In *Pletan*, the Supreme Court held that vicarious official immunity protected a city from liability for the death of a pedestrian who was struck by a fleeing vehicle involved in a highspeed police chase. 494 N.W.2d at 41. The court reasoned that “[t]he decision to engage in a car chase and to continue the chase involves the weighing of many factors. . . . [T]hese questions must be resolved under emergency conditions with little time for reflection and often on the basis of incomplete and confusing information.” *Id.* While a useful general rule, every case must involve an analysis of the actual facts of the given case and assess whether the official actor: (1) confronted an emergency at the time pursuit was begun, and (2) was governed by a contrary mandatory policy at that time.

In *Kari*, the Supreme Court, applying the reasoning of *Pletan*, held that the conduct of government-employed ambulance drivers responding to an emergency was subject to official immunity because exposing them to civil liability would “tend to exchange prudent caution for timidity,” thereby hindering the performance of an already difficult job. *Kari, supra*, 582 N.W.2d at 924, *quoting Pletan, supra*, 494 N.W.2d at 41. That might be true when the official actor was not directed or governed by a mandatory policy that prescribed his specific and mandated actions, such that he had to “feel his way” through an emergency without pause for reflection. However, it is obvious, under *Nelson* that this is not the rule either where there does not exist an emergency situation or where there is a mandatory directive that an official must act in a given manner in a given situation.

The purpose of immunity is to bar the courts from second-guessing the policy set by policy-makers. *See Snyder v. City of Minneapolis*, 441 N.W.2d 781, 787 (Minn. 1989) (“judiciary should not, through tort actions, engage in second guessing policy-making activities that are legislative or executive in nature.”). The courts lack the authority to “veto” established government policy mandating lights and siren, by extending immunity to the acts of officials who are subject to those mandatory policies. If the courts could “override” government policy to the benefit of officials who violate it, they could “override” government policy to the benefit of victims who are injured by it.

A very few field-level actions taken by public officials may be discretionary even when there are extensive regulations that dictate procedure. *See Kelly v. City of Minneapolis*,

598 N.W.2d 657, 665 (Minn. 1999) (holding that, despite the fact that police conduct is governed by extensive regulations, statutes, and case law, officers responding to dispatch or making an arrest are engaging in discretionary conduct because they are required to make “split-second” decisions based on “incomplete information”). Here, the decision to continue the pursuit without visual contact was not a “split second” one, since the standard requires the absence of visibility for a prescribed period of 10-15 seconds, and the information or knowledge about whether one’s lights and siren are on or off is not “incomplete” – they are either “on” or “off.”

When a prescribed set of rules has already been formulated by the officer’s policy-making supervisors, there is no discretion to disregard those rules. If the courts had the authority to confer that privilege, they would be making a policy-maker’s mandatory requirement into a mere laudatory guideline. The function of immunity is to prohibit “second-guessing” about policy-making by the courts and to require them to effectuate the rules established by policy-makers.

The district court erred in imbuing the police officers with the discretion to disregard mandatory rules about the use of lights and siren in their pursuit. It is also clear that the decision about whether or not to act is a separate inquiry from how to act. Immunity has been given to officials engaged in the former, but not the latter. *See, e.g., Robinson v. Hollatz*, 374 N.W.2d 300, 302-03 (Minn. App. 1985) (The “decision as to whether a road should be plowed or whether plows should be deployed on any given day falls within the discretionary

function because it is made at the planning level. The job of plowing itself, however, is an operational function because it is simple and definite.”).

Here the City had formulated a policy of how to act and the officers must be held to that standard. The decision of the district court must be reversed.

III. Vicarious Official Immunity is Unavailable Absent Official Immunity

“Vicarious official immunity” is a doctrine in which the governmental entity that employed the accused negligent employees asserts indirectly or “vicariously” the immunity that inures to insulate its employees from liability.

Obviously, for the City to avail itself of vicarious official immunity, the officers must first have recourse to official act immunity. *See Swint v. Chambers County Comm’n*, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 1212 (1995); *Meier v. City of Columbia Heights*, 686 N.W.2d 858 (Minn. App. 2004). Since official act immunity is inapplicable to the actions of the officers in this case, the doctrine of vicarious official immunity is unavailable to the City.

Assuming, however, that a governmental employee or officer is granted official immunity, his employer may still not automatically also be afforded that protection, according to the Supreme Court in the case of *Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992):

There have been numerous cases in this court where municipalities have, impliedly at least, received the benefit of their employees' personal immunities. Generally, if the employee is found to have immunity, the claim against the municipal employer has been dismissed without an explanation. [citations omitted] Recently, however, in *Holmquist v. State*,

425 N.W.2d 230, 233, n.1 (Minn. 1988), we noted, "[n]ot infrequently a governmental entity is required to compensate for harm done by a public official even though the official is not held personally liable.

Id. at 42. The Supreme Court indicated that "courts appear to be denying vicarious official immunity on the grounds that a governmental entity can take advantage of its own immunities," if they exist. *Id.* The Court stressed "the need to protect the public must be balanced against the concern that the public not be put unduly at risk." *Id.*

The Court of Appeals in *S.W. v. Spring Lake Park School District*, 592 N.W.2d 870 (Minn. App.1999), *affirmed by an equally divided court*, 606 N.W.2d 61 (Minn. 2000), allowed official immunity to school teachers who negligently allowed a male stranger to enter the girls' locker room, but declined to extend the immunity vicariously to the school that employed them, noting that "[f]requently, governmental entities must provide compensation for harm caused by a public official, despite the absence of personal liability on the part of the official," *Id.*, quoting *SLD v. Kranz*, 498 N.W.2d 47, 51 (Minn. App. 1993), and the key to determining application of vicarious official immunity is whether the threat of liability against the government would unduly influence the employees in the pursuit of legitimate public policy choices. *Id.*, citing *Olson v. Ramsey County*, 509 N.W.2d 368, 372 (Minn. 1993) (inquiry is whether the failure to apply immunity will "focus a stifling attention on the [employees'] performance, to the detriment of that performance").

Whether a governmental employer may share the immunity of its employee by way of vicarious official immunity is a policy question. *Nisbet v. Hennepin County*, 548 N.W.2d

314, 319 (Minn. App. 1996) (stating vicarious immunity, as a matter of public policy, is aimed at avoiding impairment of police functions). Here, whether or not the city is made to pay for the severe injuries sustained by the innocent pedestrian will have no bearing on the conformity of other police employees to the rules of conduct prescribed in writing by the city. The officers here departed from written guidelines by initiating the chase without lights and siren. This does not discourage officers from abiding by the written rules that require that procedure.

Even if official immunity were granted to the officers, it should be denied to the city.

IV. If Immunity is Unexpectedly Conferred, the Case must still be Remanded for Resolution of the Genuine Factual Issue of the Police' "Willful" Actions.

The Court of Appeals did not reach the issue of "wilfulness" as an exception to the doctrine of "official act" immunity, because it had ruled that immunity was inapplicable. Plaintiff had, however, appealed this question, and thus should immunity unexpectedly be granted by the Supreme Court, the case would still have to be remanded to the district court to resolve the "wilfulness" question.

This is because the common law provides that a "public official charged by law with duties which call for the exercise of his judgment of discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988), quoting *Susla v. State*, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976).

While official immunity has been applied to a police officer's decision "to engage in

and to continue vehicular pursuit of fleeing criminal suspects,”¹⁴ “[w]hen the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial” and not subject to discretion. *Romsdahl v. Town of Long Lake*, 175 Minn. 34, 36, 220 N.W. 166, 167 (1928), *quoted in Silver v. City of Minneapolis*, 284 Minn. 266, 269, 170 N.W.2d 206, 208 (1969). That aspect of the case has already been analyzed in the sections above.

What remains is an analysis of the “willful” act exception to common law immunity, as assuming *arguendo* that the court does not find the officers’ departure from established policy to be sufficient to justify denial of immunity, their “willful” act of pursuit in the presence of an actual awareness that the written policy prohibited it, also justifies the denial of immunity.

As defined by our courts,

To qualify for official immunity under Minnesota law, the public official must be “charged with duties which call for the exercise of his judgment or discretion” and not be “guilty of a wilful or malicious wrong.”

Nelson v. County of Wright, 162 F.3d 986, 991 (8th Cir. 1998), *quoting Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988).

The Minnesota Supreme Court has indicated that willful and malicious are synonymous in the official immunity context and mean “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.”

¹⁴ *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992) (pursuit of shoplifter by police, running red lights, striking vehicles and killing a child in a crosswalk).

Id., quoting *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (citations omitted) (emphasis added). “This is a subjective standard,” so that the court must weigh the officer’s appreciation of the victim’s rights and whether he purposefully ignored them. 162 F.3d at 991, citing *Elwood, supra*, 423 N.W.2d at 676-79. The officer involved in this case stated his subjective and personal awareness that he must continually use red lights and siren, yet proceeded nonetheless.

The subjective perceptions of someone, particularly as they relate to issues of the person’s intent or good faith, are notoriously inappropriate for resolution by summary judgment, and rather call for a jury’s deliberations. *See, e.g., Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 185 (8th Cir. 1976). A “court should give credence to the evidence favoring the nonmovant as well as evidence supporting the moving party that is uncontroverted and unimpeached” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 2106 (2000). Here, a number of disinterested eyewitnesses indicated the absence of lights and siren on the chasing vehicle and their surprise at the absence of those warnings. Here it is uncontroverted that the police did not have their siren or red lights on during large portions of the chase, and that large numbers of pedestrians and vehicular traffic were placed at risk by the pursuit. Here it is clear that the officers had an actual subjective awareness that the city’s pursuit policy, being required to keep up to date on any revisions via on-line analysis, *see Depo of Officer Schmid at 69 (A-35)*, and being aware that a chase was defined as “whenever an officer pursues a driver of a vehicle who has

been given signal to stop,” *id.* at 70, *quoting* ¶ 7-404 (A-35).

The “willful” continuation of the pursuit in the presence of a clear directive that it should not be begun or continued without lights or siren, at a minimum creates a jury question on the officers’ subjective state of mind, which requires submission of issues to a fact-finder and denial of summary judgment.

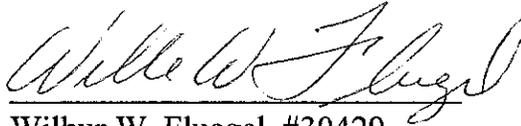
CONCLUSION

The district court erred in extending official immunity to police officers who deviated from mandatory rules established by their policy-making superiors, since the officers did not confront an “emergency response” situation and lacked the discretion to violate express policy, but rather were required to adhere ministerially to the rules established by the policies. It was a further error to determine a lack of factual debate on the element of “willfulness” in the officer’s conduct, which would defeat immunity if it were found to exist. Finally, by extending the officer’s “immunity” vicariously to the City, the district court committed a final error.

The grant of immunity by summary judgment should be reversed and the matter remanded for trial on its merits.

Respectfully submitted,

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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).