

NO. A04-2221

State of Minnesota
In Court of Appeals

KELLY EVE BROWN,

Appellant,

v.

CITY OF BLOOMINGTON, a Minnesota Municipality;
OFFICER DANIEL RUEBEN DUERKSEN, personally,
and in his capacity as a Bloomington Police Officer;
OFFICER MIKE TAYLOR, personally, individually, and in
his capacity as a Bloomington Police Officer,
JANE DOE AND RICHARD ROE, unknown and
unnamed Bloomington Police Officers, personally and in
their capacities as Bloomington Police Officers,
and ROGER WILLOW,
Chief of Police, personally and in his official capacity,

Respondents.

APPELLANT'S BRIEF AND APPENDIX, VOLUME I

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STATEMENT OF THE LEGAL ISSUES

1. DID THE DISTRICT COURT ERR IN ITS APPLICATION OF OFFICIAL IMMUNITY TO THE ACTIONS OF RESPONDENT OFFICERS WHEN SUCH ACTIONS WERE CLEARLY MINISTERIAL, AND NOT DISCRETIONARY?

2. DID THE DISTRICT COURT ERR WHEN IT APPROVED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT DESPITE THEIR BEING LEGITIMATE FACTUAL DISPUTE WITH RESPECT TO WHETHER APPELLANT'S ACTIONS WERE PROTECTED BY OFFICIAL IMMUNITY OR PLAINLY INCOMPETENT OR MINISTERIAL?

STATEMENT OF THE CASE

1. Procedural background

Respondent's moved for summary judgment on or about January 6, 2003. An oral argument regarding summary judgment was heard before the Honorable Judge Marilyn Brown Rosenbaum, Hennepin County District Court, on September 1, 2004. The district court, Honorable Judge Marilyn Rosenbaum, ordered summary judgment on September 23, 2004. This is an appeal of the district court judgment in favor of Respondents following its order for summary judgment. Appellant's make this appeal pursuant to Rule 103.03 of the Minnesota Rules of Civil Appellate Procedure.

2. The Appellant

Kelly Brown is a natural person and resident of the State of Minnesota, County of Hennepin, and City of Bloomington.

3. Factual and Procedural Background

Appellant, Kelly Brown was shot by Bloomington police officers at her home in December of 2000. Brown suffers from a plethora of emotional and mental illness issues and a chemical dependency. On the evening in question, Bloomington officers had responded to a call via “911” that a woman was threatening herself or another with a knife. Upon arriving at the scene, Officers encountered Ms. Brown, who was at the rear door of her trailer home – apparently holding a knife to her own throat. After several commands to come out, Ms. Brown came out through glass doors, in a state of emotional distress, and Officer Duerksen, believing that he deployed “less than lethal” shotgun rounds, shot Appellant with a potentially lethal slug round from Bloomington Officer Duerksen’s shotgun. The shotgun round caused severe injury to Ms. Brown. Ms. Brown was tried in Hennepin County District Court for Assault. Ms. Brown was acquitted by a jury before the Honorable Isabel Gomez, Judge of Hennepin County District Court.

Appellant commenced a federal court action which included claims under 42 U.S.C. Section 1983. The federal district court found that claims sounding primarily in negligence did not meet the standard for civil rights violations under 42 U.S.C. Section 1983 and dismissed and remanded to state court for the determination of Appellant Ms. Brown’s remaining claims.

Following further discovery, the district judge ruled that the officer’s actions, including misloading a shotgun with lethal slug rounds intended to be “less lethal” (beanbag) rounds, were entitled to official immunity. This appeal is based on the district court’s failure to properly apply official immunity doctrine in the summary judgment context.

STATEMENT OF THE FACTS

Summary Judgment Factual Disputes

On December 1, 2000, Bloomington Police Officers were called to a trailer park. At that location was Appellant Kelly Brown, who suffers from clinical depression and who at the time and date was neither medicated nor sober. See Defts. Memo. At p. 2; Appellant's deposition at 4 and 17, both attached hereto in Appendix pages A35, A391.

The particular and specific facts disputed are as follows: On December 1, 2000, Bloomington Police Officers were called to a trailer park. At that location was Appellant Kelly Brown, who suffers from clinical depression and who at the time and date was neither medicated nor sober. See Defts. Memo at p. 2; Appellant's deposition at 4 and 17, both attached hereto in Appendix at pages A35, and A391.

Testimony of the Appellant, Kelly Eve Brown

The facts now show that Bloomington officers had received at least two 911 calls on the evening/early morning hours preceding the shooting. (D17)¹

Appellant Kelly Brown states that she has been diagnosed with clinical depression and is taking the prescription medicine Paxil, an anti-depressant. (D4) She also states that she is on SSI for her depression through a legal proceeding six or seven years ago, (D8), and that depression is the sole reason for the SSI. (D9)

At the time of the December 1, 2000 incident, Appellant Brown says that she was suffering from depression which manifested itself as crying and feelings of isolation and

¹ "D __" signifies a page number from the Deposition of Kelly Eve Brown taken October 16, 2002. Appendix pages A391-A404.

that she had called 911 for assistance to get to the Crisis Center. (D17) She believes that the police came as a result of her 911 call, (D18, 37, 41) and that she told Jim (Mr. Luban) to talk to the police. (D20) She says she had been drinking on December 1, 2000. (D20) Appellant states that the last thing she remembers before the police showed up on December 1, 2000 is having a knife to her own throat (D20) which she describes as a cry for help; she did not want to kill herself but was asking for help with her severe depression. (d21) Brown recalls that she had the knife to her throat for about 7 minutes before the police arrived and that she did not threaten Mr. Luban with the knife. (D21) She describes the knife as a regular kitchen butcher knife. (D21)

Her reason for holding the knife to her throat was her severe depression and her hope when she called 911 was that she would be helped to the crisis center so she could get her medication and "everything straightened out" (D22). Ms Brown says that she had the flu which caused her to go off her medication which was Paxil, the anti-depressant. (D23)

Appellant recalls that when the police arrived she repeatedly heard someone say, "step out of the trailer" three or four times. She recalls walking out of the trailer onto the deck holding her knife to her throat with her right hand, and as she came out of the trailer, and when she was outside of the trailer, (D34), she heard "Drop the knife. Drop the knife. Drop the knife." She was shot in the right leg, with what she later learned was a bean bag, which she says "stung pretty bad." (D24) Appellant says she twisted; the knife went down and within 3 seconds was shot from behind with a live round. (D25, 27, 30,

31). She describes herself as falling down as she twisted, dropping the knife and being shot again. (D30, 38, 39)

She says that when the officers told her to drop the knife she did not drop it right away because of the shock of seeing she did not know how many policemen with shotguns raised at her, police cars and lights. She was afraid to move. (D25, 29, 33)

Brown says she did not threaten the policemen or take a step in their direction, that she did not wave the knife or jab the knife. (D285, 33) When she was hit with the bean bag round she says she was about 2 feet out of the front door and 6 feet from the edge of the deck. (D27) Appellant states that she does not remember saying "Back the fuck off" or "You little shit. What are you doing hiding back there," and she does not believe she made the latter statement. She does recall crying after being shot. (D28)

She also denies telling any officers that she would "stick them" if they came into the trailer. Her depression does not make her want to hurt anyone and she knows herself well enough to know she would not say that to someone. (D29, 33)

Appellant feels there was no reason for the officer to shoot her. (D30, 40) Appellant states that the police officers were ten feet away from her when she was shot, (D30), and that Officer Duerksen was off the deck while she was on the deck when he fired the bean bag round hitting her in the front of the right thigh. (D37) After being shot, she heard officers say or wonder where the knife was. (D32) Ms. Brown does not recall where Mr. Luban was when she heard the officer say "step out of the trailer." (D36)

Appellant did not tell the officers to shoot her nor did she make a statement that she wanted to die. (D49) At the time of the December 1, 2000 incident, Appellant Brown

says that she has physical problems as a result of the incidents which is the subject of this lawsuit. These problems include not being able to lift over 30 pounds, the inability to bend over without bending her knees due to missing muscles in her left thigh, shoulder problems from having to lean to the right, and walking with a limp. (D9) She also fears her problems will worsen with age based on what she has been told by a physician or physicians. (D10) Brown states that she suffers constant back pain since the shooting which sometimes sends her to the emergency room. (D11) She is suffering from severe back pain which is a result of the December 1, 2000 incident. (D12) She also states that because there is no muscle in her left thigh, the calf of that leg swells, and that her right hand, calf and thigh, go numb, (D12), that in fact her whole right leg goes numb. (D13) Appellant lists other changes in her life stemming from the December 1, 2000 incident. These include never skiing again due to the lack of muscle, the inability to roller blade, or ride a bike, limits on playing with her 12-year-old son, and no longer wearing a bathing suit or shorts. (D14).

Testimony of Respondent, Officer Daniel Duerksen²

Officer David Duerksen testified to both at the jury trial acquitting Ms. Brown and at his January 7, 2003 deposition in this case. His testimony contradicts Ms. Brown's in key aspects. Duerksen testified he arrived there at the request of other officers who had indicated on the police radio that they were dealing with an uncooperative female.

Officer Wukawitz had requested that the next arriving officer bring in the less lethal

² "d__" signifies Duerksen federal deposition testimony. "D__" signifies his State Court deposition testimony. Appendix pages A126-A160.

rounds. (d8) He removed his police issued shotgun from his vehicle. (d10) Officer Wukawitz told him that he had a party that was uncooperative, that she had threatened officers with a knife. Officer Wukawitz asked him if the officers were at a vantage point where they could use less lethal force. (d11) Officer Duerksen was also told that Ms. Brown had been threatening the other party in the trailer and that she had been threatening the officers with the knife. (d12)

When he reached Officer Taylor he removed four double aught rounds from the tube in his shotgun and put them in his left pants pocket. (d13) He then asked Officer Taylor to confirm that he had a less lethal round and held it with his thumb and index finger. Id. The less lethal round looks like a standard shotgun shell and has a white casing. Id. After Taylor confirmed the round, Duerksen loaded his shotgun with the one less lethal round, and “chambered” the gun. Id. He then gave Officer Taylor four lethal rounds from the plastic sleeve outside the gun and then topped off the shotgun with two rounds which were actually slug rounds. (d14)

At this point, Duerksen was unsure what was going on in the trailer but he believes the heard one officer tell Brown “Drop the knife.” (d15)

At the time that Duerksen approached the trailer, he was unable to see anything in the female’s hands as she stood inside the trailer door. (d18)

At some point, Taylor and Bohr stepped away from the trailer door and Duerksen was the last one to leave the porch. (d19) It is clear the officers were seeking to have Kelly Brown come out of the trailer. (d68) As officers backed from the staircase on the

porch of the trailer, Kelly Brown walked out onto the porch and Duerksen does not recall her saying or doing anything except holding the knife over her head. (d20)

Duerksen determined that Brown was making an aggressive move towards "us." (d21) At that point he fired both a bean bag round and a second slug round. (d21, 22) Duerksen never intended to use lethal rounds on Ms. Brown. (d32, 33) He recognized that he had no intention to kill Kelly Brown because the situation did not call for it. (d41) He did not hear any verbal commands to Ms. Brown nor did he give any. (d42) Nobody said "drop the knife or we'll shoot." (d46, 48)

Duerksen did not complete a Use of Force Report (consistent with Bloomington Police policy requirements) on the orders of his supervisor. (d51) It is clear that Kelly Brown stopped at the top of the stairs of the trailer home before Duerksen fired less lethal and lethal rounds into her body. (d71, 72) And once she had stopped, no one gave her any verbal commands according to the recollection of Officer Duerksen. (d73, 74) Officer Duerksen and his fellow officers had not discussed in advance what would happen when Kelly Brown came out of the trailer. (d112)

In his State Court Deposition, Duerksen admitted that he was the officer detailed to bring the less lethal munitions or shotgun to the scene of the confrontation. He described the non-discretionary act of (improperly) loading the less lethal rounds in his Remington pump shotgun that evening:

Q. What you ended up really doing is not unloading all the slug rounds from the shotgun, isn't that correct?

A. That's correct.

Q. Okay. And there's a policy now that would prevent you from doing that if you were transitioning from lethal to less lethal, right?

A. Yes.

D(17)

Duerksen went on to describe the fact that it was error to not remove the lethal rounds from the Remington:

1 Q. You realize that you made an error when you didn't
2 take all the slug rounds out, correct?

3 A. I did not remove all the slug rounds from the side
4 carrier of the shotgun that night.

5 Q. That's what you intended to do, correct?

6 A. It was my intention to completely remove all the
7 rounds of lethal ammunition from that shotgun.

8 Q. Did that intention ever change up until the time that
9 you shot Kelly Brown?

10 A. No, it did not. Just so I've –

D(18)

Duerksen acknowledged the options available to him had he and other officers intended to use lethal force against Ms. Brown on December 1, 2000:

2 Q. Okay. Would it be fair to say one of the primary
3 reasons that you came forward to the scene into a
4 forward position near the rear of the trailer was

5 because you were carrying what you believed to be less
6 lethal munitions, correct?

7 A. The officer at the scene had requested that the next
8 officer arriving at that location bring less lethal.

9 I was the next officer arriving at the scene.

10 Q. So you were cooperating with your fellow officers to
11 do that, right?

12 A. Right.

D(19)

He then admitted that there was no discretion or judgment exercised in the act of retrieving and loading according to his training the "less lethal shotgun":

4 Q. When you go retrieve a less lethal shotgun at the
5 request of Officer Taylor, you're not exercising a
6 tactical judgment or discretion at that time, are you?

7 A. No. If he calls for it, if that what he needs I am
8 going to help him and grab it.

9 Q. Right. If he expects you to come back with a less
10 lethal shotgun, you're not going to come back with a
11 shotgun loaded with lethal slug rounds, are you?

12 A. He requested something and I did what he asked where I
13 grabbed the weapon that had the less lethal round on
14 it.

D(25)

Further, it is plain that Duerksen's testimony creates a fact question as to whether he needed to fire a second time at Ms. Brown after he hit her with the first bean bag round:

16 Q. Okay. What did you say to Kelly Eve Brown on that
17 night before you shot her?

18 A. I don't recall.

19 Q. You don't recall?

20 A. I don't believe I said anything to her.

21 Q. You don't believe or you didn't, which is it?

22 A. To the best of my memory, I don't think I had any – I
23 don't think I had the opportunity to say anything to
24 her.

25 Q. So would it be – is it your testimony that you never
1 said to Kelly Brown stop, is that true?

2 A. I don't think that I did.

D(27-28)

In fact, Duerksen is uncertain whether Ms. Brown took steps toward him after he hit her with the first round – before firing the second (lethal) round:

1 Q. Thank you. The testimony is not real clear to me from
2 the criminal trial, and from your statement, and maybe
3 even from the previous deposition but is it still your

4 testimony that after you shot Kelly Eve Brown the
5 first time with the less lethal round that she
6 continued to come at you?

7 A. She did not drop the knife.

8 Q. **Okay. The question I'm asking you and what I want to**
9 **respond to, did she continue to come towards you?**

10 A. **No.**

11 Q. Okay. And the purpose of less lethal is in fact or at
12 least one of the purposes is to stop the suspect or
13 the person of interest, the subject, from advancing
14 and create a further threat to the officer or to
15 others, is that correct?

16 A. Yes.

17 Q. Okay. Did you retreat at all after you fired the
18 first shot?

19 A. No.

20 Q. And I again, it's a little foggy in my mind and I
21 think this is fairly related to Request Number 9. You
22 say she didn't drop the knife. But the knife was no
23 longer up over her head as you testified it was at the
24 criminal trial after you shot the first round of less
25 lethal, correct?

1 A. I guess I don't recall if it was still -- she still
2 had the knife in her hand, I don't recall if it was
3 above her head. I think it was probably head high.

4 Q. You think it was probably head high?

5 A. (Witness indicated affirmatively.)

6 Q. Is that a yes?

7 A. Yes.

8 Q. You didn't see the knife down at her side?

9 A. No.

10 Q. And you didn't see her body turned away from you?

11 A. No.

D(31-32) (emphasis added).

Duerksen's recollection as to these events was not aided by a review of his own expert's interpretation of the "facts":

22 Q. Then he says, after a moment or two she again started
23 to advance towards the officers' position, is that
24 true, that last part, that last sentence?

25 A. **She stood up, she still had the knife and I felt that
1 she was going to advance.**

2 Q. **You felt she was going to advance but she didn't, did
3 she?**

4 A. **Sitting here today, I can't recall.**

5 Q. Okay. You had racked a round by the time she stood up
6 again, is that correct?

7 A. Yes.

8 Q. You had a rack a round, this is a Winchester pump?

9 A. Remington pump.

10 Q. I'm sorry, pardon me Mr. Remington. You racked the
11 Remington shotgun pump, correct?

12 A. Yes.

13 Q. You had it racked by the time she stood up again, is
14 that correct?

15 A. Yes.

16 Q. And you fired in a continuous motion, let me ask it
17 like this, was it a sequential action after you racked
18 the gun at your shoulder you fired immediately, is
19 that correct?

20 A. I racked the second round in preparation for deploying
21 a second round.

22 Q. Did you rack it at your shoulder?

23 A. Yes.

24 Q. And you were still on target or aiming drawing down if
25 you will on Ms. Brown when you racked that second
1 round, correct?

- 2 A. Correct.
- 3 Q. You fired immediately, correct?
- 4 A. When I realized that she had not dropped the knife, I
5 fired a second round.
- 6 Q. But not because she was advancing, correct, is that
7 correct, I'm sorry, I thought you maybe didn't hear
8 me?
- 9 A. I believe she was advancing.
- 10 Q. How was she advancing?
- 11 A. She brought the knife back up and she was going to
12 take two more steps – or steps towards us.

D(33-35) (emphasis added).

Plainly, Duersken has created a factual dispute in the warp and woof of his own testimony. This leads not only to the fact of his negligent carrying out of the simple act of loading the less lethal munitions into the shotgun, but also the secondary question as to whether he acted properly – as opposed to recklessly and willfully in firing his shotgun **at all the second time.**

Therefore, Duersken's testimony presents three issues of negligence for a jury or fact finder: 1) His individual negligence in failing to properly unload and load the Remington pump shotgun after being told to bring less lethal munitions to the scene following the joint decision of Wukawitz and Taylor; 2) The municipality's apparent negligence in failing to properly train and/or supervise Duerksen at the operational level

respecting less lethal munitions; and 3) Duerksen's reckless and willful act in shooting Kelly Brown a second time (at all), given the fact that she was going to the ground after being hit by the first bean bag round. See Depo. Of Kelly Brown at pages 30, 38-39.

Bloomington Police Force Police/Procedure and Training on Less Lethal

Munitions

Respondents lack expert affidavit³ support for their bare contention that the Bloomington Police Use of Force Policy is "consistent" with Minnesota Statutes. There is no factual record support for this statement properly under submission to the Court, therefore, the Respondents have failed to meet their summary judgment burden; therefore, these unsupported conclusions may be disregarded by the Court in considering the motion before it.

In the absence of evidence admissible at trial, moving Respondents have no basis for this Court to consider its argumentative, rhetorical assertions as "fact" or even "expert opinion;" therefore, Respondents have not met their initial burden required by Rule 56⁴ as

³ Respondents rely on unsworn expert reports apparently.

⁴ Minnesota courts have frequently adverted to federal procedure in analyzing the denial of summary judgment. See DLH Inc. v. Russ, 566 N.W.2d 60, 69 (Minn.1997). "The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. Cf. 6 Moore ¶ 56.15[3], pp. 56-466; 10A Wright, Miller & Kane § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, ----, 91 L.Ed.2d 202 (1986), and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 W.S. 144, 158-159, 90 S.Ct. 1598, 1608-09, 26 L.Ed. 2d 142 *1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. See 10A Wright, Miller & Kane §2721, p. 44; See, e.g., Stephanischen v. Merchants Dispatch Transportation Corp., 722 F.2d 922, 930 (CA1 1983); Higgenbotham v.

to Appellant's claim that Bloomington operated with a negligent use of force policy or procedure as to less lethal munitions on December 1, 2000.

To the Contrary, Appellant's Expert Affidavit sets forth facts which indicate that the Bloomington procedure was fraught with risk and thus reckless in its inception and execution:

14. The Bloomington Police Department had an apparently very unsafe practice of shotgun handling. IN my opinion it was a practice designed to create an unreasonable tactical situation in which the wrong type of round could very easily be introduced into a tactical situation. The Police Department had elected to introduce less lethal tools to the field force and deployed them about 4-5 months prior to this incident. They decided to use one shotgun for both less lethal and lethal encounters, which is generally not the practice in other police agencies. The agency deployed the shotguns with three (3) different types of munitions. The shotgun was supposed to be loaded with four (4) double buck rounds in the shotgun and none chambered. A device was attached to the shotgun with four (4)

Ochsner Foundation Hospital, 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (1983), rev'd on other grounds sub nom. See also Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986) ("[i]f...there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment...723 F.2d, at 258.") FN2, Celotex Corp. v. Catrett, 477 U.S. 317, 331, 106 S.Ct. 2548, 2556 (1986).

more double buck rounds and two (2) rifled slugs. All of these are lethal rounds. Another device was attached to the shotgun containing five (5) beanbag less lethal rounds. The double buck rounds were red in color, while the slugs and beanbags rounds were forms of white in color with black lettering.

See Reiter Affidavit Para. 14.

Here, Officer Duerksen has testified that in using and deploying less lethal on Kelly Brown, he was “relying on his training.” See d47.

Therefore, because Respondents have failed in meeting their initial summary judgment burden as to the Appellant’s negligence claims and Appellant has presented evidence by way of her proffered expert review and testimony; the summary judgment request must fail. In the instant case, there is a clear causal link that can be demonstrated between the policy, procedure or custom of improperly and unsafely deploying “less lethal” force and the grossly negligent use of lethal force in the form of a live shotgun slug on Ms. Brown. Therefore, Appellant submits that her claims for negligence both against the City of Bloomington, as well as Officer Duerksen, must necessarily be trial-worthy.

Appellant had the following claims against the named Respondents following the order for remand by the federal court dated on August 26, 2003:

1. Common Law Assault (Count One);
2. Common Law Battery (Count Two);
3. Intentional Infliction of Emotional Distress (Count Three);

4. Negligent Infliction of Emotional Distress (County Four);
5. Negligence by City of Bloomington (Count Eight);
6. Negligence by Officer Duerksen (Count Nine);
7. Negligence by Officer Taylor (Count Ten);
8. Negligent Supervision (Count Twelve); and
9. Violations of the Minnesota Human Rights Act (Count Fourteen).

Appellant submitted the following documents as a part of her Opposition to Respondents' Motion of Summary Judgment in the trial court below:

1. The Deposition of Respondent Daniel Duerksen taken on August 6, 2004 (without exhibits. Appendix pages A90-A125.
2. The Deposition of Daniel Rueben Duerksen dated the 7th day of January, 2003 (without exhibits). Appendix pages A126-A160.
3. The Deposition of Michael D. Taylor dated the 7th day of January, 2003 (without exhibits). Appendix pages A160-A174.
4. The Deposition of Todd Bohrer. Appendix pages A177- A205.
5. The Deposition of Jerome Wukawitz. Appendix pages A206-A233.
6. The Deposition of James Ousley. Appendix pages A234-259.
7. The Deposition of Michael Utecht. Appendix pages A260-A278.
8. Expert Affidavit/Declaration of Mr. Lou Reiter. Appendix pages A279-A291.
9. The Complaint. Appendix pages A291-A309.
10. Answer to Complaint. Appendix pages A310-A317.

11. Respondent's Answers to Appellant's Interrogatories and Requests for Production of Documents to Respondent Officers. Appendix pages A318-A327.
12. Use of Less Lethal Projectiles "Lesson Plan" for Bloomington Police department dated May, 200 (Bates stamped Bloom.295-307). Appendix pages A328-A340.
13. Photographs of the Remington Shotgun deployed against Ms. Brown. (Bates stamped Bloom.329-339). Appendix pages A341-A345.
14. *Elfstrand v. City of Brooklyn Center*, 1998 WL 887470 (Minn. App.) (Unpublished decision). Appendix pages A346-348.

LEGAL ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

The question of whether the district court erred in their order for summary judgment and in their finding of official immunity for Respondents' are questions of law, and therefore are subject to de novo review by the Court of Appeals. *TRWL Fin. Establishment v. Select Int'l Inc.*, 527 N.W.2d 573 (Minn. Ct. App. 1995).

II. THE DISTRICT COURT ERRED WHEN THEY ORDERED SUMMARY JUDGMENT BECAUSE THERE WERE FACTUAL ISSUES REGARDING RESPONDENTS' NEGLIGENCE IN DISPUTE

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if an, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Minnesota Rules of Civil Procedure, Rule 56(3).

Summary judgment may be granted only if, after taking the view of the evidence most favorable to the nonmoving party, the movant has clearly sustained his burden of showing that there is no genuine issue as to any material fact and that he entitled to judgment as a matter of law. *Dempsey v. Jaroscak*, 290 Minn. 405, 188 N.W.2d 779 (Minn. 1971). In the case before the district court, there were genuine issues regarding the negligence of Officer Duerksen (and his co-Respondent Taylor) regarding the improper deployment of the less lethal weapon by its improper loading; the firing of the second shot, at all – whether lethal or less lethal; and improper training of Bloomington officers – constituting negligent supervision.

In reviewing facts on a motion seeking or opposing summary judgment, the district court's grant of summary judgment is examined de novo, applying the same standard as that court applied, and viewing the evidence in the light most favorable to the Appellant. See *Ludwig v. Anderson*, 54 F.3d 465, 470 (8th Cir. 1995). In this case, the district court should have viewed the evidence in favor of Kelly Brown, the nonmoving party, and draw all justifiable inferences in her favor. See *Schrader v. Royal Caribbean Cruise Line, Inc.*, 952 F.2d 1008 (8th Cir. 1991). The district court should have inquired 'whether the evidence presented a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' See *Id.* at 470 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986), cited in *Thomson v. Hubbard*, 257 F.3d 896, 898 to 257 F.3d 896,899.)

The salutary purpose and useful function of summary judgment proceedings as a means of securing the just, speedy and inexpensive determination of the action (Rule 1) is

well recognized, but resort to summary judgment was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists. In other words, a summary judgment is proper where there is no issue to be tried but is wholly erroneous where there is a genuine issue to try. See *Louwagie v. Witco Chemical Corp.*, 378 N.W. 63, 66 (Minn. Ct. App. 1985). In this case, although there were significant factual issues precluding summary judgment on Appellant's claims against Officer Duerksen the district court ruled in favor of summary judgment, in error, and this Court must correct this mistake.

Moreover, a cursory review of the trial court opinion reflects that the the district judge never applied the ministerial/deliberative analysis required to determine if official immunity applies. Rather, it simply stated that in its view the officer(s) acted in good faith. Further, the court below failed to *narrowly* apply or construe the doctrine of immunity when granting summary judgment—thus, it engaged in errors of both law and in determining facts in the summary judgment context.

III. THE INDIVIDUAL POLICE OFFICERS, INCLUDING DUERKSEN, ARE NOT ENTITLED TO OFFICIAL IMMUNITY AS TO APPELLANT'S TORT CLAIMS.

In order to present the motion for summary judgment at the district court level, Appellant needed only to present enough evidence to permit a reasonable jury to conclude that Duerksen's (as well as Bloomington's) actions were negligent and incompetent.

The expert analysis in this case was conducted by Appellant's expert, former Los Angeles California Deputy Chief of Police Lou Reiter.

Reiter's affidavit and expert report are unequivocal:

14. The Bloomington Police Department had an apparently very unsafe practice of shotgun handling. In my opinion it was a practice designed to create an unreasonable tactical situation in which the wrong type of round could very easily be introduced into a tactical situation. The Police Department had elected to introduce less lethal tools to the field force and deployed them about 4-5 months prior to the incident. They decided to use one shotgun for both less lethal and lethal encounters, which is generally not the practice in other police agencies. The agency deployed the shotguns with three (3) different types of munitions. The shotgun was supposed to be loaded with four (4) double buck rounds in the shotgun and non-chambered. A device was attached to the shotgun with four (4) more double buck rounds and two (2) rifled slugs. All of these are lethal rounds. Another device was attached to the shotgun containing five (5) beanbag less lethal rounds. The double buck rounds were red in color, while the slugs and beanbag rounds were forms of white in color with black lettering.

Reiter's Affidavit goes on to say:

15. Officer Duerksen used extremely deficient and unsafe tactical techniques in the arming of his shotgun. He attempted to manage the rearming at different locations and while he was moving to the scene from his patrol car. He stated he asked Officer Taylor to confirm that the first round he inserted into the shotgun was a less lethal round. He did not do so when he then inserted the remaining two (2) live slug

rounds into the weapon. While he testified that he was apparently hasted in his actions, this would have only been his own making. **There was no immediate threat when he came upon the scene.** There was no need for him to undertake these unsafe loading techniques in the manner he did. These loading techniques were not the actions of an objectively reasonable well-trained officer; nor were they simply negligent – **but reflect plain incompetence in the use of less lethal munitions.** Further, it is plain from deposition testimony of both Officer Duerksen and Detective Taylor that in recognition of this, the Bloomington Police Department has altered their policy on less lethal munitions (now requiring officers to leave all “lethal” munitions in their vehicle before deploying to use less lethal force).

See Reiter Affidavit Paragraphs 14-15, emphasis not in original.

Clearly, the officers at the scene answer the question as to whether any immunity should be accorded Duerksen’s actions. The evidence shows that Officer Bohrer called for less lethal to be brought to the scene. Officer Taylor “relayed” this message and Respondent Duerksen responded with less lethal. (See Respondents Memo pg. 5).

Plainly, these three officers objectively acted in a manner (and apparently subjectively believed) that the appropriate “risk of harm” to place Ms. Brown in was that risk of being shot with “less lethal” rounds. They, the Respondents, assessed the circumstances and concluded that this was the proper balance; therefore, there existed no further substantial justification for using a live slug round, and plainly, to do otherwise was reckless and negligent.

Moreover, whether or not the action was allegedly “mistaken” is irrelevant to the legal inquiry at hand. Clearly, as required by the precedents, Officer Duerksen had a duty to act competently and his actions in loading and unloading the Remington shotgun was a non-discretionary action. He intentionally and purposefully responded to a request to retrieve and deploy “less lethal” from fellow officers to confront and engage Kelly Brown. However, the risk of harm to Ms. Brown was caused by arbitrary, grossly negligent, reckless, and improper conduct of Officer Duerksen prior to choosing to fire his weapon; therefore, it should remain a jury to decide if his negligence harmed Appellant, Kelly Brown. When the district court ordered summary judgment in this case, they erred and did not consider the clear factual issues still in dispute with respect to official immunity and the officers’ conduct. For this reason, the Court must now correct this err, and rule in favor of Appellant.

IV. BLOOMINGTON POLICE OFFICERS, INCLUDING OFFICER DUERKSEN, ARE NOT ENTITLED TO OFFICIAL IMMUNITY AS TO APPELLANT’S TORT CLAIMS.

The heart of the error committed by the district court below was its patent failure to even engage in an appropriate analysis of the ministerial act / discretionary act analysis required in the official immunity context. To determine whether official immunity applies requires the court to focus on the nature of the particular act in question. *Larson v. Indep. School Dist. No. 314*, 289 N.W.2d 112, 120 (Minn. 1979). The particular act in this case was the proper loading and deployment of less lethal munitions in the form of

the shotgun requested by the lead officers at the trailer home scene. Appellant contended that she already showed, as a matter of law, that the actions of Respondents' were "plainly incompetent" therefore; their actions are not protected by official immunity, and whether or not their actions were malicious is inapposite in these circumstances. See *Dokman v. Hennepin County*, 637 N.W. 2d 286, 292 (Minn. Ct. App. 2001). However, apart from the fact that these plainly incompetent actions may not be cloaked with official immunity, they are also outside of its reach because the action of loading a shotgun (as admitted by Officer Duerksen himself) required no act of discretion, deliberation, or judgment – that is – these are not the acts which the policy motivating or dictating official immunity support.

To define the proper scope of official immunity, the Minnesota Supreme Court distinguishes between discretionary duties, which are not immunized, and ministerial duties, for which the officer remains liable. *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). The Minnesota Supreme Court has defined a ministerial duty as, "one that is absolute, certain, and imperative, involving merely the execution of a specific duty arising a fixed and designated facts." *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651 (Minn. 2004). In this case, that duty was implicated when Officer Duerksen was ordered or requested to get "less lethal" and bring it to the scene of the confrontation at the trailer home.

The Minnesota Supreme Court has discussed the difficulty in determining what actions are ministerial.

“While the discretionary-ministerial distinction is a nebulous and difficult one because almost any act involves some measure of freedom of choice as well as some measure of perfunctory execution, the acts of the Respondents here are clearly ministerial. Their job was simple and definite – to remove a house. While they undoubtedly had to make certain decisions in doing that job, the nature, quality, and complexity of their decision-making process does not entitle them to immunity from suit.” *Williamson v. Cain, et al.*, 245 N.W.2d 242, (Minn. 1976).

Although in the present case the issue is the loading of a shotgun, and not the moving of a house, the same analysis applies as that in *Williamson*. Loading a gun, like moving a house, is a ministerial task. Indeed, like the Court simply states above, “all they had to do was move a house.” All the Respondents’ had to do in the present case was to load their shotgun with “less than lethal” ammunition. It was a procedure they had done many times before, and although there were decisions to be made, i.e., where to load, how much, etc., it was still a definite and certain action or procedure, and not a purely discretionary act.

Further, the actions of Officer Duerksen, in using force that was not the least necessary force as required by law are not protected by official immunity.” Officer Duerksen exercised no discretion in availing himself of the use of “lethal force;” his testimony shows that he intended to employ “less lethal.” Duerksen Deposition at pages 26-28; Defts. Memorandum at page 5.

Therefore, his actions were not entitled to official immunity because they were: a) plainly incompetent and not objectively reasonable, and, b) not involving the exercise of discretionary acts or judgment, and the district court should not have found Respondents’ entitled to official immunity with respect to Appellant’s state tort claims.

When this Court reviews this appeal of the district court's finding of summary judgment based on official immunity, it must presume the truth of the facts alleged by the non-moving party. See *Burns v. State*, 570 N.W.2d 17, 19 (Minn. Ct. App. 1997). Both forms of immunity (statutory and official) are exceptions to the general rule of liability, both are construed narrowly. See *Johnson v. Nicollet County*, 387 N.W.2d 209, 211 (Minn. App. 1986). Consistent with this purpose, common law official immunity does not protect officials when they are charged with the execution of ministerial, rather than discretionary, functions, that is, where "independent action" is neither required nor desired.

Because the district court erred, and found that both the individual and Bloomington officers were entitled to official immunity, this court must reverse the district court's decision and find that Respondents' actions were not the sort covered by official immunity, because they were not discretionary, but instead ministerial. Moreover, even if the action of loading the shotgun negligently and improperly (the act that caused harm and injury when it was fired) could be construed as "deliberative", it was nevertheless so incompetently carried out as to negate any claimed immunity defense—including official immunity.

CONCLUSION

The district court erred when it ordered summary judgment. The district court judge also erred when she found that Ms. Brown's claims against the officer's should be dismissed based on official immunity. In defining the scope of official immunity, the Minnesota Supreme Court distinguishes between discretionary duties, which are

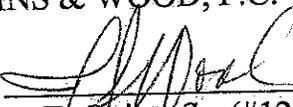
immunized, and ministerial duties, for which the officer remains liable. *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). The Minnesota Supreme Court has defined a ministerial duty as, “one that is absolute, certain, and imperative, involving merely the execution of a specific duty arising a fixed and designated facts.” *Anderson v. Anoka Hennepin Independent School Dist.* 11, 678 N.W.2d 651 (Minn. 2004).

In the present case, the negligent and/or incompetent act of Officer Duerksen, of improperly loading his shotgun when seeking to implement “less than lethal” force was a ministerial, as opposed to discretionary act, and therefore not the type of act that official immunity would protect. Moreover it was plainly incompetent—thus, not afforded the narrowly drawn protection of official immunity.⁵

Therefore, Appellant, Kelly Eve Brown, asks this Court to reverse the judgment of the district court and find that Respondents’ actions were not entitled to official immunity, and to hold that the district court erred in this finding, and in its order for summary judgment.

Respectfully submitted,

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DATED: 3/2/05

⁵ Appellant contends that factual issues likewise inhere and remain as to whether a “second shot” was even appropriate in this situation. That issue also should be a part of this Court’s de novo review on summary judgment appeal. There are factual disputes in the record to show that Ms. Brown was falling to the ground before Officer Duerksen fired the negligently loaded lethal slug round into Appellant’s backside.

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STATE OF MINNESOTA
IN COURT OF APPEALS

KELLY EVE BROWN,

Appellant

vs.

CITY OF BLOOMINGTON, a municipality;
OFFICER DANIEL RUEBEN DUERKSEN,
personally, and in his capacity as a Bloomington
Police officer; OFFICER MICHAEL DAVID
TAYLOR, personally and in his capacity as a
Bloomington Police officer; JANE DOE and
RICHARD ROE; unknown and unnamed
Bloomington Police officers, personally, and in
Their capacities as Bloomington Police officers;
And ROGER WILLOW, Bloomington Chief of
Police, personally and in his official capacity,

Respondent

TRIAL COURT CASE NUMBER:
01-2292

JUDGE:

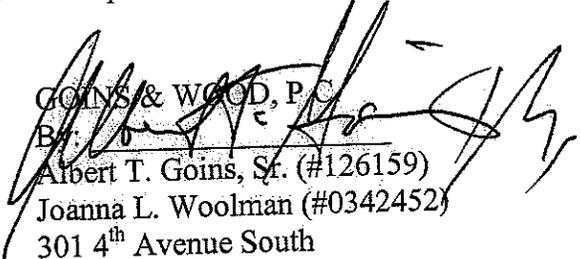
APPELLATE COURT CASE

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief confirms to the requirements of Minn. R. Civ. App. P. 132.01, Subs 1 and 3, for a brief produced with a monospaced proportional font. The length of this brief is 7,491 words. This was prepared used Word 2000 in 13 point font.

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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).