

NO. A06-1852

State of Minnesota
In Court of Appeals

Raymond L. Semler,

Appellant,

vs.

Erick Klang, Crow Wing County Sheriff,
Rick Koop, Chief Investigator for Crosby Police Department,
John A. Bolduc, Chief of Brainerd Police Department,
Kyle Huber, Chief of Staples Police Department,

Respondents.

**BRIEF AND APPENDIX OF RESPONDENTS
RICK KOOP, JOHN A. BOLDUC AND KYLE HUBER**

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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).

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STATEMENT OF LEGAL ISSUES

I. HAS APPELLANT STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED?

The District Court held in the affirmative.

Apposite Authority:

Minnesota Rule of Civil Procedure 12.02(e)
Elzie v. Commissioner of Public Safety, 298 N.W.2d 29 (Minn. 1980)

II. ARE APPELLANT'S CLAIMS TIME-BARRED BY THE STATUTE OF LIMITATIONS?

The District Court did not address this issue.

Apposite Authority:

Minnesota Statutes § 541.07
Wild v. Rarig, 234 N.W.2d 775, 793 (Minn. 1975)

III. ARE RESPONDENTS ENTITLED TO ABSOLUTE IMMUNITY FOR DISCLOSURES MADE AS LAW ENFORCEMENT OFFICERS?

The District Court did not address this issue.

Apposite Authority:

Bol v. Cole, 561 N.W.2d 143 (Minn. 1997)
Carradine v. State, 511 N.W.2d 733 (Minn. 1994)

IV. WERE DISCLOSURES BY RESPONDENTS IN COMPLIANCE WITH MINNESOTA STATUTES § 244.052?

The District Court held in the negative.

Apposite Authority:

Minnesota Statutes § 244.052

V. ARE RESPONDENTS ENTITLED TO THE PROTECTION OF OFFICIAL IMMUNITY?

The District Court held in the affirmative.

Apposite Authority:

Anderson v. Anoka Henn. Ind. Sch. Dis. 11, 678 N.W.2d 651 (Minn. 2004)

Sletten v. Ramsey County, 675 N.W.2d 291 (Minn. 2004)

Dokman v. County of Hennepin, 637 N.W.2d 286 (Minn. App. 2001)

STATEMENT OF THE CASE

This matter stems from mandatory public notifications involving Appellant Pro Se Raymond Semler, a sex offender who resided or planned to reside in the cities of Brainerd, Staples and Crosby, Minnesota. Semler alleges Respondents Brainerd Police Chief John Bolduc, Staples Police Chief Kyle Huber and Crosby Police Investigator Rick Koop violated his rights by publishing these notifications.

Semler commenced this suit against Respondents Bolduc, Huber and Koop claiming they provided incorrect information contained in an End-of-Confinement Review Committee risk assessment report to the Minnesota Department of Corrections and alleges Respondents violated his rights by putting incorrect, erroneous and false statements in a Community Notification Handout.

On August 15, 2006, District Court Judge Frederick J. Casey granted Respondents' Motion to Dismiss under Minnesota Rule of Civil Procedure 12.02(e) determining Semler failed to state a claim upon which relief could be granted. *R-1*. Additionally, the District Court determined Respondents were entitled to official immunity. *Id.* Judgment was entered on September 26, 2006. *R-10*.

On September 25, 2006, Semler served and filed a Notice of Appeal.

STATEMENT OF FACTS

Appellant Raymond Semler was convicted of 4th Degree Criminal Sexual Conduct and Kidnapping in March 1997. *R-14*. Semler's conviction stemmed from an incident during which he grabbed a female who had been riding her bicycle, told her not to scream, touched her breast, and forced her to walk toward his truck. *R-29*. The victim was able to escape when another person came upon the scene. *Id.* As a result of this conviction, Semler was confined to the Minnesota Correctional Facility at Moose Lake ("MCF-Moose Lake"). *Id.* Semler's expected release date was December 31, 2001. *Id.*

Prior to Semler's release from MCF-Moose Lake, the facility's End-of-Confinement Review Committee ("ECRC") prepared a risk assessment report on Semler. *Id.* In the report the ECRC categorized Semler as a level II sex offender. *Id.* In categorizing Semler as a level II sex offender, the ECRC outlined prior incidents involving Semler. *Id.* The outlined incidents include a 1993 incident during which Semler "grabbed [a 17-year-old girl] and pushed and pulled her through a wooded area. He told her that if she screamed he would kill her. He then raped her and ejaculated on her stomach." *Id.* Another incident outlined by the ECRC occurred in October 1989. *Id.* Semler was "investigated for grabbing a 14-year-old female and dragging her across a road toward a house." *Id.* Though Semler was not convicted in either of the incidents outlined by the Committee, the

Committee described these behaviors as evidence of a “pattern of behavior.” *Id.*

Semler was released from MCF-Moose Lake on December 31, 2001. *R-14.*

STANDARD OF REVIEW

“On an appeal from summary judgment, this Court determines whether there are genuine issues of material fact and whether the district court erred in applying the law.” *Watson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 411 (Minn. 1996).

When considering a motion to dismiss pursuant to Minnesota Rule of Civil Procedure 12.02(e), the only question before the district court is whether the complaint sets forth a legally sufficient claim for relief. *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980). But when the district court considers matters outside the pleadings, “the motion to dismiss shall be treated as one for summary judgment.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 12.02).

Summary judgment is appropriate where there are no issues of material fact. Minnesota Rule of Civil Procedure 56.03 requires a Motion for Summary Judgment be granted if there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. The United States Supreme Court has emphasized the importance of summary judgment in resolving civil litigation:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather, as an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In following *Celotex*, the Minnesota Court of Appeals reiterated the appropriateness of summary judgment against a party who fails to establish an essential element of that party's case. *See Davis v. Midwest Discount Securities*, 439 N.W.2d 383 (Minn. App. 1989).

A party opposing summary judgment must present specific facts showing there is a genuine issue of material fact for trial and cannot rely upon mere unsupported allegations of fact. Minn. R. Civ. P. 56.05; *see also Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985). A fact issue is material if it affects the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The existence of some alleged factual dispute or evidence that is merely colorable or not significantly probative will not prevent the granting of summary judgment. *Id.* at 249-50.

ARGUMENT

I. SEMLER FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The District Court dismissed Semler's case pursuant to Minnesota Rule of Civil Procedure 12.02(e). *R-1*. In his Brief, Semler claims the District Court erred in dismissing his claims pursuant to Rule 12 for failure to state a claim. However, he offers no legal or factual argument as to how the dismissal was in error. Instead, he simply claims he had an arguable claim and then offers an unsupported opinion the dismissal of his claims should not have been granted because it was untimely. In the absence of any legal or factual support for his opinion, the District Court's dismissal should be affirmed.

When a court considers a motion to dismiss pursuant to Minnesota Rule of Civil Procedure 12.02(e), the only question becomes whether the complaint sets forth a legally sufficient claim for relief. *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980). Furthermore, pursuant to Rule 12.02(e), "a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Brakke v. Hilgers*, 374 N.W.2d 553, 555 (Minn. App. 1985), quoting *Elzie*, 298 N.W.2d at 32. A complaint that fails to state a claim upon which relief can be granted must be dismissed. *Tollefson*

Development, Inc. v. McCarthy, 668 N.W.2d 701, 703 (Minn. App. 2003) (quoting Minn. R. Civ. P. 12.02(e)).

Semler's Complaint fails to provide facts which support his claims against Respondents Bolduc and Huber. Semler claims Bolduc and Huber "violated Mr. Semler's rights" by including incorrect, erroneous, and false statements in a "Consumer Notification Handout." *RA-02 – RA-03*. Semler fails to specify which rights were violated and what "incorrect, erroneous and false" information was disclosed. Semler's Answer to Respondents' Interrogatory request regarding paragraph 5 of the Complaint again failed to specify the incorrect information. *R-20*. Semler's Answer to Respondents' Interrogatory request regarding paragraph 7 of the Complaint states "he would not have minded the Community Notification, if it did not contain the false, incorrect, and erroneous statements about him," but again Semler fails to specify any false information. *R-21 – R-22*.

Semler's Complaint likewise fails to provide facts which support his claims against Respondent Koop. Semler claims Respondent Koop "violated Mr. Semler's rights" by sending false information to the Minnesota Department of Corrections and the Crow Wing County Sheriff's Office. *RA-02*. Semler's Complaint fails to specify which rights were violated, the falsity contained in the information, and the dates upon which Respondent Koop sent the information. Semler's Answer to Respondents' Interrogatory request regarding paragraph 6 of

the Complaint also fails to specify which rights were violated or the falsity contained in the information. *R-21*.

As a result, “if it is not ‘possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded,’ the claim will be dismissed.” *Noske v. Friedberg*, 670 N.W.2d 740, 743 (Minn. 2003) (*quoting Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (citations omitted)). Accordingly, this Court should affirm the District Court’s decision to dismiss Semler’s case for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e).

II. SEMLER’S CLAIMS ARE TIME-BARRED BY THE STATUTE OF LIMITATIONS.

Although the District Court did not address the statute of limitations, Respondents argued at Summary Judgment to the extent this Court determined Semler had asserted actionable claims for defamation against Respondents, the claims are time-barred by the statute of limitations. Minnesota Statutes § 541.07 requires plaintiffs file tort-based claims within two years of the event giving rise to the cause of action. Defamation claims must be filed within two years pursuant to § 541.07. *Wild v. Rarig*, 234 N.W.2d 775, 793 (Minn. 1975). The limitations period in defamation claims starts to run on the date the defamatory material was published. *Id.* at 794. “Lack of knowledge on the part of the defamed will not toll the statute [of limitations].” *Id.* Claims initiated after the expiration of the

limitations period are barred. *Wallin v. Minnesota Dept. of Corrections*, 598 N.W.2d 393, 399 (Minn. App. 1999).

Semler alleges Bolduc “violated Mr. Semler’s rights by putting erroneous, incorrect, and false statements in the Community Notification Handout . . . on the date of July 1st, 2003.” *RA-03*. Semler alleges Respondent Huber violated his rights by “putting these false statements in the Community Notification Handout” on August 20, 2003. *RA-02*. Semler alleges Respondent Koop violated his rights by sending “incorrect, erroneous, and false statements to the Minnesota Department of Corrections, [and] the Crow Wing County Sheriff’s Department, so that it could be placed on plaintiff’s Community Notification Handout, when Mr. Semler was released from prison/or jail (confinement) at any time after December 31st, 2001.” *Id.* Assuming arguendo Respondent Koop did provide information as alleged by Semler, logically Respondent Koop would have had to provide the information prior to December 31, 2001, for the information to be published after that date. Semler originally filed his Complaint in this action on October 12, 2005. Therefore, tort claims that arose prior to October 12, 2003, are time-barred by the statute of limitations. As set forth above, Semler’s allegations against Respondents Bolduc, Huber and Koop all arose prior to October 12, 2003. Accordingly, even if Semler’s claims against Respondents are actionable, his claims are time-barred by the statute of limitations.

In response to this argument, Semler cites Minnesota Statutes § 541.06 and argues actions against “a sheriff, coroner, or constable for any act done in an official capacity and in virtue of an office, or for any omission of an official duty, including the nonpayment of money collected or received on a judgment or execution” shall be commenced within three years. As set forth in Semler’s Complaint, John Bolduc is the Brainerd Chief of Police, Kyle Huber is the Staples Chief of Police and Rick Koop is Chief Investigator for the Crosby Police Department. Therefore, there can be no dispute Respondents Bolduc, Huber, and Koop are *not* sheriffs, coroners or constables because Minnesota courts have never expanded the scope of § 541.06 to include police officers. Semler, however, concludes a constable is also a police officer.

Chapter 541 does not define the term “constable.” However, *Black’s Law Dictionary* 305 (Bryan A. Garner ed., 7th ed., West 1999) defines constable as “[a] peace officer responsible for minor judicial duties, such as serving writs and warrants, but with less authority and smaller jurisdiction than a sheriff.” Minnesota cases involving constables embrace this definition. *Dahl v. Halverson*, 226 N.W. 405 (Minn. 1929); see also *Hall v. Swenson*, 67 N.W. 1024 (Minn. 1896) (ruling that sheriffs and constables are *protected* under the three-year statute of limitations for official actions in collecting on and executing writs). In *Dahl*, the Minnesota Supreme Court applied the three year statute of limitations to *protect* a

constable from liability arising out of writ execution. Minnesota courts have never expanded the application of § 541.06 to expose sheriffs or constables to additional liability and certainly have never applied § 541.06 to defamation claims or to police officers. Accordingly, Semler's creative, yet unsupported argument regarding a three year statute of limitations fails and, as a matter of law, his case was properly dismissed.

III. RESPONDENTS ARE ENTITLED TO ABSOLUTE IMMUNITY.

To the extent this Court determines Semler's claims are actionable and not time-barred, Respondents Bolduc, Huber and Koop are absolutely immune from civil liability for defamatory statements made in police reports. To establish a claim for defamation, Semler must prove: (1) the statement was false; (2) it was communicated to another; and (3) it tended to harm his reputation. *Bol v. Cole*, 561 N.W.2d 143, 146 (Minn. 1997). In *Carradine v. State*, 511 N.W.2d 733, 736-37 (Minn. 1994), the Minnesota Supreme Court ruled police officers are absolutely immune from civil liability for allegedly defamatory statements made in police reports. Where officers must report information destined for public disclosure, the Supreme Court recognized "unless the officer in question is absolutely immune from suit, the officer will timorously, instead of fearlessly, perform the function in question and, as a result, government--that is, the public--will be the ultimate loser." *Id.* at 735.

Respondent alleges Defendants Bolduc, Huber and Koop all included “incorrect, false, and erroneous statements” in reports disclosed internally and to the public. RA-02 – RA-03. However, Semler fails to specify any false information and fails to allege any harm to his reputation. At most, he argues the information did not arise from a conviction. The mere fact he was not convicted has no impact on the veracity of the victims’ claims which were set forth in police reports. Therefore, Semler’s Complaint fails to establish a claim for defamation.

Even if this Court determines Respondents did disclose this information, and the information was somehow defamatory, pursuant to the holding in *Carradine*, Respondents are absolutely immune from civil liability. Accordingly, as a matter of law, the District Court did not err in dismissing Semler’s claims.

IV. ANY DISCLOSURE BY RESPONDENTS COMPLIED WITH MINNESOTA STATUTES § 244.052.

To the extent this Court determines Semler’s claims are timely, actionable, and Respondents Bolduc, Huber and Koop are not absolutely immune from those claims, Respondents acted in accordance with Minnesota’s predatory offender notification requirements. Minnesota Statutes § 244.052 subdivision 2 (2001), requires the Commissioner of Corrections create an end-of-confinement review committee to assess the public risk posed by predatory offenders upon the termination of their confinement. Prior to the predatory offender’s release from confinement, the Committee must prepare a risk assessment report which specifies

the risk level of the offender and the reasons underlying the Committee's assessment. *Id.* at subdiv. 3(f). Law enforcement agencies in areas where predatory offenders reside, expect to reside, are employed, or are regularly found "**shall** disclose to the public any information contained in the [risk assessment report] that is relevant and necessary to protect the public and to counteract the offender's dangerousness[.]" *Id.* at subdiv. 4(a) (emphasis added).

The Community Notification Handout released to the public contained the same disclosure on July 1, 2003, and August 20, 2003. Semler alleges these disclosures were based on information provided to the Minnesota Department of Corrections by Defendant Koop. *RA-03*. In both instances, Semler's offense history was disclosed in the following manner: "Offender has a history of forced sexual contact with females (ranging in age from 14 to adult). The contact includes fondling and penetration. The offender uses physical force to gain compliance. The offender was unknown to the victims." *R-34 – R-35*.

The risk assessment report contained the information disclosed in the Community Notification Handout. The report noted Semler's "two sexual assaults have been very similar in nature." *R-29*. Committee member Stephen Huot's assessment detailed Semler's past incidents:

[Semler] was charged with at least one other sexual assault, which occurred in November, 1993. A 17-year-old female reported that she was walking outdoors when Mr. Semler passed her[.] [Semler] eventually grabbed her and pushed and pulled her through a wooded

area. He told her that if she screamed he would kill her. He then raped her and ejaculated on her stomach. . . . In October 1989 [Semler] was investigated for grabbing a 14-year-old-female and dragging her across a road toward a house.

The report also contained information pertaining to Semler's criminal sexual conduct and kidnapping convictions in 1997, which involved Semler grabbing his victim, telling her not to scream, and touching her breast. *Id.* Therefore, the risk assessment report refers to forced sexual contact with females, fondling and penetration, and the use of physical force to gain compliance.

The information disclosed was relevant and necessary to protect the public from Semler. As the risk assessment report notes, "a pattern of behavior is evident." *Id.* The commission members took Semler's "pattern of behavior" into account when determining his risk level. The information contained in the Community Notification Handout's summary of Semler's offense history is relevant to articulating Semler's pattern of behavior to the public which is necessary to ensure the public is aware of the potential risk Semler may pose to particular groups of citizens. Alerting the public to the risks posed by sexual predators, like Semler, is the primary purpose of Minnesota Statutes § 244.052.

Accordingly, although the District Court held otherwise, Respondents respectfully submit they complied with Minnesota Statutes § 244.052 and are immune from civil liability pursuant to § 244.052, Subdivision 7.

V. THE DISTRICT COURT PROPERLY DETERMINED RESPONDENTS ARE ENTITLED TO THE PROTECTION OF OFFICIAL IMMUNITY.

The District Court determined:

[Respondents] Klang, Bolduc, and Huber are entitled to official immunity for their discretionary acts leading to the disclosure of information pertaining to [Semler]. Moreover, Koop merely provided information the ECRC was entitled to receive. [Respondents] did not engage in willful or malicious disclosures to injure [Semler's] reputation. [Respondents] disclosed that information, which in their discretion, allowed them to protect the public.

R-9.

The Minnesota Supreme Court has affirmed the importance of applying the doctrine of official immunity to protect public officials from liability for discretionary action taken in the course of their official duties. *Anderson v. Anoka Hennepin Independent School District 11*, 678 N.W.2d 651, 655 (Minn. 2004); *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004).

The doctrine of official immunity is so broad as to “protect all but the plainly incompetent or those who knowingly violate the law.” *Dokman v. County of Hennepin*, 637 N.W.2d 281, 292 (Minn. App. 2001). “Only when officials act outside the scope of their charged authority can they be deemed to have waived this immunity and be held personally liable for their negligence.” *Id.* at 296 [see generally] *Janklow v. Minn. Bd. Of Exam'rs*, 552 N.W.2d 711, 715 (Minn. 1996). “Official immunity is provided because the community cannot expect its police

officers to do their duty and then second-guess them when they attempt conscientiously to do it.” *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992).

Official immunity is intended “to protect public officials from the fear of personal liability, which might deter independent action and impair effective performance of their duties.” *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988); *Janklow*, 552 N.W.2d at 715.

In determining whether conduct is discretionary for purposes of official immunity, the critical determination is whether the nature of the officer’s actions was discretionary or ministerial. Whether an act is discretionary is determined by the court as a matter of law. *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999). “A ministerial duty [is] one that is ‘absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.’” *Anderson*, 678 N.W.2d at 656 (Minn. 2004) (*quoting Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998) (citation omitted)). Generally, “police charged with the duty to prevent crime and enforce the laws are not purely ‘ministerial officers,’ in that many of their duties . . . (involve) the exercise of discretion.” *Elwood*, 423 N.W.2d at 678.

Here there is simply no evidence Respondents’ actions were anything but discretionary. Although Minnesota Statutes § 244.052 includes a number of requirements with regard to what must be reported, pursuant to Subdivision

4(b)(2), “if the offender is assigned to risk level II, the agency *may* disclose the information to agencies and groups that the offender is likely to encounter”

Moreover, the statute does not limit what Respondents may disclose, it only discusses the limits of immunity in the face of certain disclosures.

In order to avoid the application of official immunity, Semler must demonstrate Respondents acted willfully and maliciously. In defining the term “malicious,” the Minnesota Supreme Court has stated there must be an element of bad faith involved. *Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988). Relying on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Minnesota Court of Appeals has required plaintiffs to present “specific facts evidencing bad faith” rather than “bare allegations of malice.” *Reuter v. City of New Hope*, 449 N.W.2d 745, 751 (Minn. App. 1990). The Minnesota Supreme Court has determined in the official immunity context, willful and malicious are synonymous. “Malice means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.” *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (citations omitted).

Semler’s Complaint contains only a bare allegation Respondents acted with malice. With regard to the information pertaining to Semler, the District Court determined, “[Respondents] did not engage in willful or malicious disclosures to injure the [Semler’s] reputation. R-9. Instead, “[Respondents] disclosed that

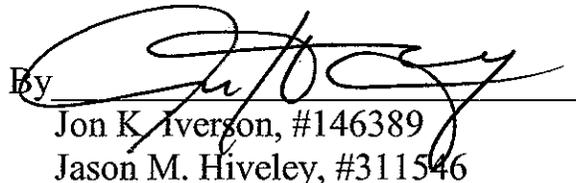
information, which in their discretion, allowed them to protect the public.” *Id. at*
9. Accordingly, in the absence of evidence of malice, Respondents are entitled to
the protection of official immunity for their discretionary acts of reporting
information regarding Semler’s reputation to protect the public.

CONCLUSION

For the above-mentioned reasons, Respondents respectfully request this
Court affirm the District Court’s granting of their Motion for Summary Judgment
and dismissal of Appellant Pro Se’s claims in their entirety.

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