

CASE NO. A11-187

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Timothy William Klausler and City of Lakeville,

Appellants,

vs.

Angelique Marie Curtis,

Respondent.

**APPELLANTS TIMOTHY WILLIAM KLAUSLER
AND CITY OF LAKEVILLE'S REPLY BRIEF**

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INTRODUCTION

The record establishes that Appellants are entitled to wild animal immunity because the accident was directly caused by a wild animal in its natural state. In an attempt to avoid the application of immunity, Respondent misstates the challenged conduct, the law of immunity, and the record. In so doing, Respondent has failed to raise any legal arguments or genuine issues of material fact that would preclude application of the wild animal immunity statute. As a result, the district court's denial of summary judgment should be reversed.

LEGAL ARGUMENT

I. WILD ANIMAL IMMUNITY BARS RESPONDENT'S CLAIM BECAUSE THE RECORD ESTABLISHES THAT A WILD ANIMAL, IN ITS NATURAL STATE, CAUSED THE ACCIDENT.

Respondent has raised no legal arguments or set forth any genuine issues of material fact to preclude summary judgment in favor of the City on the grounds of wild animal immunity pursuant to Minn. Stat. §3.736, subdiv. 3(e). Municipalities are entitled to wild animal immunity pursuant to Minn. Stat. § 3.736, subdiv. 3(e) and § 466.03, subdiv. 15 when a wild animal, in its natural state, causes the loss in question. Here, the record is undisputed that a deer, in its natural state, directly caused the accident between Appellant and Respondent.

A. Respondent attempts to manufacture questions of material fact where none exist by misstating and distorting the record.

Throughout her brief, Respondent devotes ample time and energy describing how questions of fact remain which preclude summary judgment. However, Respondent's

‘questions of fact’ are misstatements and disingenuous distortions of the undisputed record. For example, Respondent states that “the deer . . . cross[ed] both northbound lanes as well as the center median lane, before being struck by Klausler’s van.”

Respondent’s Brief p. 3. In doing so, Respondent insinuates that Klausler’s vehicle struck the deer. Any such claim is completely unsupported by the record. Both eyewitness testimony and the physical evidence establish that the deer crossed the road and ran into and partially through the driver’s side door of Appellant’s vehicle.

Deposition of Angelique Curtis (hereinafter *Curtis Depo.*) pp. 27-28 (*App.* 16-18);

Deposition of Timothy Klausler (hereinafter *Klausler Depo.*) p. 23 (*App.* 24); *Deposition*

Photo Exhibits 3H through 3K inclusive, 4S through 4V inclusive, and 5H (*App.* 45-48,

64-66, 78).

Moreover, Respondent also claims “Klausler and his passenger testified that they cannot even recall where their vehicle was on Highway 5. . .” *Respondent’s Brief* p. 12. Likewise, this statement misstates the undisputed facts from the record. Klausler and his passenger knew exactly where they were in the moments prior to impact: they were in Burnsville, adjacent to a residential development located near Highway 5 near the location of the Old Orchard golf course. *Klausler Depo.* pp. 13-14 (*App.* 22). It is immaterial whether Klausler knew the exact number of the cross street he had just passed prior to the collision. The undisputed facts remain that Klausler knew he was heading southbound on Highway 5 by the Old Orchard golf course prior to the accident.

Respondent further states “Appellants’ claim that Klausler, who admitted he did not see the deer, could not have seen the deer because it came from behind his fast-

moving vehicle . . .” Respondent’s *Brief* p. 12. Again, this statement misstates and distorts the record. Appellants do not claim the deer struck Klausler’s vehicle from behind. Appellants cite with undisputed support from the record, that the deer partially crossed Highway 5 and before striking Klausler’s van on the left side of the vehicle: near the A-pillar of the driver’s door. *Klausler Depo. p. 23 (App. 24); Deposition Photo Exhibits 3H through 3K inclusive, 4S through 4V inclusive, and 5H (App. 45-48, 64-66, 78)*. Appellants’ clarification of undisputed facts does not adversely affect application of immunity. It does however support Appellants’ argument that because a wild deer in its natural state hit the van and knocked the driver unconscious causing the van to collide with Ms. Curtis’s vehicle, Respondent’s claims are barred by wild animal immunity.

Respondent further contends that because Klausler does not precisely remember when he lost consciousness, a disputed fact remains as to how the accident with Respondent occurred. *Respondent’s Brief* pp. 13-14. However, the undisputed facts in the record are that Klausler was immediately physically unresponsive after the deer collision. *Klausler Depo. p. 19 (App. 23); Deposition of James Schiffman (hereinafter Schiffman Depo.) pp. 18-19 (App. 31); Schiffman Affidavit ¶¶4-6 (Add. 4-5)* Moreover, Klausler does not remember anything after the impact with the deer until he later regained consciousness in the ambulance. *Klausler Depo. pp. 19, 21 (App. 23-24)*. This fact is undisputed. Klausler does not remember what occurred during this short period of time because the undisputed record illustrates that he was at the time unconscious or otherwise medically incapacitated.

In addition to distorting the factual record, Respondent attempts to create inapplicable hypothetical scenarios in an effort to manufacture genuine issues of material fact and preclude the application of wild animal immunity. Respondent outlines a myriad of alternative factual scenarios aimed at persuading this Court. *Respondent's Brief* pp. 8-9. However, arguing about possible outcomes given different sets of factual circumstances does not change the facts of this case or the language Minn. Stat. §3.736, subdiv. 3(e). Here, the undisputed facts clearly illustrate that this accident was directly caused by a wild animal in its natural state. Analyzing the applicability of wild animal immunity in hypothetical scenarios does not change this undisputed fact.

B. Immunity is immunity from suit not only liability, and mere allegations alone cannot defeat immunity.

It is well settled law that immunity is intended to make municipal actors immune from the claim itself. *See Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004) (holding immunity is immunity from suit, not just immunity from liability); *see also Stone v. Badgerow*, 511 N.W.2d 747, 751 (Minn. Ct. App. 1994) (“immunity is immunity from suit, not just a defense to liability.”); *see also Duellman v. Erwin*, 522 N.W.2d 377, 379 (Minn. Ct. App. 1994) (“immunity is immunity from suit and the question may be properly resolved on summary judgment.”). Immunity is effectively lost if the case is erroneously permitted to go to trial. *Sletten*, 675 N.W.2d at 299.

Despite this clear and well-established jurisprudence, Respondent attempts to avoid the application of immunity by suggesting this is a complex case and a determination of whether immunity applies “requires a fact-intensive analysis of

Appellant Klausler's failure to see the deer . . ." Respondent's *Brief* p. 4. Contrary to Respondent's arguments, this case does not require a fact-intensive inquiry. Instead, under the clear and unambiguous language of the statute, only one factual inquiry is necessary: did a wild animal, in its natural state, cause the accident? Here, it is undisputed that a wild deer, in its natural state, ran into the driver's side of Appellant Klausler's van, causing the accident. *Deposition Photo Exhibits 3H through 3K inclusive, 4S through 4V inclusive, and 5H* (App. 45-48, 64-66, 78); *Klausler Depo. p. 23* (App. 24). The legislature by enacting immunity statutes, and district and appellate courts by applying those statutes, intended to protect municipalities from a fact intensive analysis focused on the distribution of potential liability. Immunity is immunity from suit and it is effectively lost if the case is erroneously permitted to go to trial. *See Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004); *see also Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 218 (Minn. 1998); *Fear v. Indep. Sch. Dist.*, 911, 634 N.W.2d 204, 209 (Minn. App. 2001); *Bloss v. University of Minn. Bd. of Regents*, 590 N.W.2d 661, 666 (Minn. App. 1999) (noting "immunity also protects a governmental entity from having to defend claims.").

Furthermore, Respondent's unsupported allegations do not, and cannot, defeat the application of immunity. Respondent states "Ms. Curtis is alleging that Klausler was negligent in the operation of his motor vehicle . . . It is his negligence that is the subject of the Respondent's lawsuit." *Respondent's Brief* pp. 9-10. Without support from the record, simply alleging negligence on the part of Klausler does not change the facts of the case. A wild deer crashed into and partially through the driver's side door of the van

Klausler was driving, rendering him unconscious thereby causing the accident with Respondent. *Deposition Photo Exhibits 3H through 3K inclusive, 4S through 4V inclusive, and 5H; (App. 45-48, 64-66, 78); Klausler Depo. p. 23 (App. 24)*. Under the language of § 3.736, subdiv. 3(e), the question for this Court is not whether Klausler was negligent, but whether Appellants are entitled to immunity from suit. To hold that immunity does not apply simply because Respondent alleges negligence on the part of Appellant would eviscerate well-established immunity jurisprudence.

C. The application of § 3.736, subdiv. 3(e) does not lead to an absurd or unreasonable result, nor does it depart from the legislative purpose of the statute.

As part of their argument, Respondent suggests that following the plain language of the statute would result in an absurd or unreasonable result and would not comport with the purpose of the statute. *Respondent's Brief p. 8* (citing *Nash v. Wollan*, 656 N.W.2d 585, 590 (Minn. App. 2003)). Respondent's reliance on *Nash v. Wollan* is misplaced. The Supreme Court's decision in *Nash* has been commented on and criticized in subsequent Minnesota Supreme Court decisions. Clarifying their stance, in a post *Nash* decision, the Supreme Court stated, "in the past, [we have] 'looked beyond the statutory language to other indicia of legislative intent' when 'the literal meaning of the words of a statute would produce an absurd result' . . . We have said, however, that '[w]e can disregard a statute's plain meaning only in rare cases where the plain meaning utterly confounds a clear legislative purpose.'" *Toth v. Arason*, 722 N.W.2d 437, 441-42 (Minn. 2006) (emphasis added) (citing *Weston v. McWilliams & Assocs. Inc.*, 716 N.W.2d 634, 639 (Minn. 2006)).

Minnesota Appellate Courts have specifically held that the judiciary must enforce the plain meaning of an unambiguous statute. “Words of a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary.” *Humenansky v. Minnesota Bd. of Medical Examiners*, 525 N.W.2d 559, 564 (Minn. App. 1994). Although there may be good policy reasons for not enforcing the unambiguous language of a statute, that does not make enforcement “utterly absurd.” *See Hyatt v. Anoka Police Dep’t*, 691 N.W.2d 824, 827-28 (Minn. 2005) (stating that the court may disregard a statute’s plain meaning only in “rare cases where the plain meaning ‘utterly confounds’ a clear legislative purpose.”). “Where the intention of the legislature is clearly manifested by plain and unambiguous language, we have neither the need nor the permission to engage in statutory interpretation.” *Id.* at 828; *see also* Minn. Stat. § 645.16 (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”). Accordingly, in order to look outside the clear language of an unambiguous statute the facts must present a rare case where enforcement would be utterly absurd and contrary to the legislative purpose. Here, application of wild animal immunity is completely consistent with both the plain language of the statute and the statute’s legislative purpose.

Minn. Stat. § 3.736, subdiv. 3(e) grants immunity to governments when a wild animal, in its natural state, causes a loss. It is unambiguous that the legislature intended such immunity to apply when a wild animal was to blame for the loss. Granting immunity to Klausler and the City is wholly consistent with the legislative intent and

does not ‘utterly confound a clear legislative purpose.’ *Hyatt*, 691 N.W.2d at 827-28.

The legislative purpose of providing immunity from liability for cases in which an accident is caused by a wild animal is not frustrated where the undisputed evidence shows that a wild animal collision with a vehicle directly caused that accident.

Applying the unambiguous language of § 3.736, subdiv. 3(e) is consistent with other immunity statutes as well. In the snow and ice immunity context this Court, examining another immunity statute, held that cities are entitled to snow and ice immunity when snow and ice conditions cause or contribute to motor vehicle accidents even if those conditions are not the sole cause of the accident. *See Koen v. Tschida*, 493 N.W.2d 126, 128 (Minn. App. 1992). In construing and applying snow and ice immunity as set forth in Minn. Stat. § 466.03, subdiv. 4, this Court in *Koen v. Tschida* held “to remove the immunity granted by the statute merely because a party alleges causal facts other than the weather in its claim would render the statute ineffective.” Similarly, in this case to remove wild animal immunity granted by Minn. Stat. §§ 466.03, subdiv. 15 and 3.736, subdiv. 3(e) merely because Respondent alleges that causal facts other than a wild animal crashing into and partially through the driver’s side door of a vehicle contributed to causing the accident would also render those immunity statutes ineffective.¹

¹ The Minnesota Supreme Court has held that application and analysis of different immunity statutes in prior cases can lend support in determining the immunity issue at hand. *See Johnson v. Washington County*, 518 N.W.2d 594, 600 (Minn. 1994).

D. The Accident Reconstruction Report by Kenneth J. Drevnick is inadmissible under Rule 56 and does not raise any genuine issues of material fact to deprive the City of summary judgment.

Rule 56.03 is clear and unequivocal:

Judgment should be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law. A fact is material only if its outcome will affect the outcome of the case.

Illinois Farmers' Insurance Co. v. Tapemark, Co., 273 N.W.2d 630, 634 (Minn. 1978). *See also Pishke v. Kellen*, 384 N.W.2d 201, 205 (Minn. App. 1986). The Accident Reconstruction Report (hereinafter Report) by Respondent's expert Kenneth Drevnick fails to raise any genuine issue of material fact. The Report's conclusions, as they apply to whether the driver could or should have seen the deer pre-accident, are not based on any subject area upon which Mr. Drevnick is qualified to provide an "expert" opinion, and do not preclude application of wild animal immunity.

A party cannot create the appearance of factual support for a legal theory by persuading an unqualified expert to endorse a legal theory in an affidavit and then offer it as evidence to defeat summary judgment. *See* Minn. R. Evid. 704, Committee Comment:

In determining whether or not opinion would be helpful or of assistance under these rules a distinction should be made between opinions as to factual matters and opinions involving a legal analysis or mixed question of law and fact. Opinions of the latter nature are not deemed to be of any use to the trier of fact.

The Minnesota appellate courts have consistently criticized and rejected conclusory "expert" opinions as insufficient to defeat summary judgment. *See Gutwin v. Edwards*, 419 N.W.2d 809, 812 (Minn. App. 1988) and *Potter v. Pohlada*, 560 N.W.2d 389, 394-95

(Minn. App. 1997) (concluding that an expert's affidavit must contain more than conclusory assertions about ultimate legal issues to defeat summary judgment). In *Stringer v. Minnesota Vikings Football Club*, 686 N.W.2d 545, 553 (Minn. App. 2004) *affirmed* 705 N.W.2d 746 (Minn. 2005), the Minnesota Court of Appeals stated, “conclusory statements in an expert affidavit do not necessarily preclude summary judgment, and will not remedy a legally deficient claim.”²

i. Kenneth Drevnick is not a qualified expert as to either Appellant Klausler’s “focus” or the average speed of deer.

Before expert testimony is admissible for any purpose, the party proposing the witness must establish that the witness is “qualified as an expert.” Minn. R. Evid. 702; *see also* Minnesota Rules of Civil Procedure 56.05 (requiring that the “. . . affiant is competent to testify to the matters contained therein.”). Whether a proffered witness is qualified to offer testimony is a preliminary question in determining the admission of expert testimony. Minn. R. Evid. 704. The Minnesota Supreme Court has held that expert testimony should be excluded when the expert lacks the basic educational and professional training to provide a general foundation for the testimony. *See Reinhart v. Coulton*, 337 N.W.2d 88, 93 (Minn. 1983) (citing *Cornfield v. Tongen*, 262 N.W.2d 684, 694 (Minn. 1977)).

While Mr. Drevnick may have some learning and experience, his qualifications as an accident reconstructionist are irrelevant to driver attentiveness and application of wild

² *See also* Minnesota Rules of Civil Procedure 56.05. (“supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts *as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein*”) (*emphasis added*).

animal immunity. Mr. Drevnick cannot say whether the deer, as it started crossing Highway 5, was traveling faster or slower than his estimate of the “average speed” of deer in general, or the path the deer actually took before it jumped into the driver’s side door and window.

Similarly, there is no factual support for Drevnick’s claim that because the deer ran across the road in front of Ms. Curtis, it must have also crossed in front of Mr. Klausler. There is testimony from Ms. Curtis that she saw a deer run across the road in front of her. *Curtis Depo.* pp. 27-28, 35, 39 (*App.* 16-17, 18, 19). There is however no testimony and no physical evidence that the deer ran across the road in front of the vehicle Klausler was driving. To the contrary, neither Mr. Klausler nor his passenger Jim Schiffman ever testified that they saw the deer in front of them. Ms. Curtis did not see the deer collide with the van that hit her and did not see the deer cross in front of the traffic lane which the van occupied. *Curtis Depo.* pp. 28-29 (*App.* 17). The undisputed record before the Court is that the deer crashed into and partially through the driver’s side door of the van. *Deposition Photo Exhibits 3H through 3K inclusive, 4S through 4V inclusive, and 5H* (*App.* 45-48, 64-66, 78); *Klausler Depo.* p. 23 (*App.* 24). *Klausler Affidavit* ¶ 12 (*Add.* 2).

Finally, Mr. Drevnick was not in the van with Mr. Klausler at the time of the accident and does not have any experience in any field that would allow him to provide expert testimony on Mr. Klausler’s focus or attention at the time of the accident.

In an attempt to manufacture a conclusory legal opinion that Appellant Klausler’s alleged lack of “due care” precludes application of wild animal immunity, Mr. Drevnick

relies on speculative assumptions about the path of the deer, the estimated or “average” speed of deer, and Mr. Klausler’s “attentiveness,” that are not factually supported in the record.

Because application of immunity is a question of law for the Court to decide (*J.E.B. v. Danks*, 785 N.W.2d 741, 746 (Minn. 2010)), Drevnick’s “opinions” about liability and negligence are inadmissible and do not raise any genuine issue of material fact precluding summary judgment on “wild animal” immunity grounds.

ii. Mr. Drevnick’s Report does not affect application of wild animal immunity.

Based on the undisputed material accident facts (accident caused by a deer crashing into and partially through the driver’s side door of the van rendering the driver unconscious) and the plain language of the wild animal immunity statute (immunity from “a loss caused by wild animals in their natural state”), Drevnick’s Report does not preclude application of wild animal immunity. Drevnick’s “opinion” that the van’s driver could or should have seen and avoided the deer that crashed through his door and window does not preclude application of immunity; it bolsters it. There is no “expert witness exception” to wild animal immunity. Respondent cannot defeat immunity by having an expert opine that the driver could or should have both seen and predicted the behavior of a wild deer before that deer crashed into the van he was driving, rendering him unconscious. Wild animal immunity does not depend on a municipality or its employee’s ability to predict what a wild animal in its natural state may do. When an accident is caused by a wild deer in its natural state, the City is immune whether it knew

of deer in the area and whether its driver should or could have seen the deer before the deer caused the accident.

In *Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996), Respondent Zank attempted to avoid application of statutory discretionary immunity as set forth in Minn. Stat. § 466.03, subdiv. 6 with an expert affidavit. In his affidavit the expert opined that the timing of a traffic control signal was a contributing factor to causing an accident. The Minnesota Supreme Court in its application of immunity disregarded Respondent's expert affidavit holding that the determination of whether governmental action is protected by statutory immunity is a question of law. *Id.* at 720-22. Similarly, this Court may also disregard Respondent's expert's affidavit because the question of whether Respondent's negligence claims are barred by wild animal immunity is also a question of law.

Any opinion by an "expert" witness that in addition to a wild animal causing an accident, that accident was also caused by a driver's failure to see or predict the possible behavior of that wild animal would create an exception to wild animal immunity that would swallow up the immunity. Immunity from suit presupposes both the possibility of negligence and immunity from all such negligence claims.

CONCLUSION

The district court erred when it denied summary judgment in favor of Appellants. Respondent raised no genuine issues of material fact with respect to the application of wild animal immunity. The City is entitled to summary judgment. Accordingly, the district court's order denying summary judgment should be reversed.

LEAGUE OF MINNESOTA CITIES

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