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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1061**

Anthony P. Jacobson,  
Respondent,

vs.

City of Bloomington, et al.,  
Appellants.

**Filed June 3, 2008  
Reversed  
Johnson, Judge**

Hennepin County District Court  
File No. 27-CV-06-15222

Mark B. Sarenpa, 1700 West Highway 36, Suite 222, Roseville, MN 55113; and Charles A. Beckjord, 1715 Ford Parkway, St. Paul, MN 55116 (for respondent)

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Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Collins,  
Judge.\*

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**JOHNSON**, Judge

While responding to an emergency in her squad car, Bloomington Police Officer Kay Berthiaume collided with a car driven by Anthony P. Jacobson at the intersection of Portland Avenue and 90th Street. Jacobson sued the city and Officer Berthiaume, who moved for summary judgment on the grounds of official immunity and statutory immunity. The district court denied the motion. On interlocutory appeal, we conclude that there are no genuine issues of material fact and that the city and Officer Berthiaume are entitled to summary judgment. Therefore, we reverse.

### FACTS

On March 6, 2006, Officer Berthiaume received a crime-in-progress call from a 911 dispatcher, who stated that an adult male was smashing car windows with a hammer. Officer Berthiaume informed the dispatcher that she would respond, and she activated the squad car's emergency lights and Opticom, which activates solid or flashing white lights when a squad car approaches intersections and automatically changes stoplights from green to red.

Officer Berthiaume traveled eastbound on 90th Street in the left lane. As she approached the intersection with Portland Avenue, she noticed that there was little traffic, that the stoplight was green, and that the white light had been activated by the Opticom. She saw a vehicle, which was driven by Jacobson, stopped at the intersection in her lane. Officer Berthiaume drove around the left side of Jacobson's vehicle. Just before she passed Jacobson, she saw his left turn-signal light, but she had no chance to respond.

Jacobson turned left, into the passenger-side door of the squad car. Officer Berthiaume testified that she was driving approximately 30 miles per hour and was slowing down as she went through the intersection. Jacobson testified that she was speeding.

Jacobson commenced this lawsuit against the city and Officer Berthiaume in July 2006, alleging that Officer Berthiaume was negligent and that he sustained injuries, which were not specified. The city and Officer Berthiaume moved for summary judgment on the grounds of official immunity and statutory immunity. The district court denied the motion. The city and Officer Berthiaume appeal.

## **D E C I S I O N**

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “On appeal, [we] must view the evidence in the light most favorable to the party against whom judgment was granted.” *Id.* If there are genuine issues of material fact, such as predicate facts material to the qualified immunity issue, summary judgment will be reversed. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 675 (Minn. 2006). Furthermore, the applicability of official immunity is a question of law that we review de novo. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004).

### **I. Official Immunity**

The doctrine of official immunity protects government officials from liability based on discretionary acts taken by them in the course of their official duties. *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998). The doctrine “protects public

officials from the fear of personal liability that might deter independent action and impair effective performance of their duties.” *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988). A discretionary act is one that requires “the exercise of individual judgment in carrying out the official’s duties.” *Kari*, 582 N.W.2d at 923. A ministerial act, in contrast, is an act taken pursuant to a duty that is “absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.” *Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937) (quoting *People v. May*, 251 Ill. 54, 57, 95 N.E. 999, 1000 (1911)). A government official is not protected by immunity when he or she fails to perform a ministerial act or when his or her performance of a discretionary act is willful or malicious. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

The doctrine of official immunity applies to decisions made by police officers in the course of responding to emergencies. Official immunity exists because “the community cannot expect its police officers to do their duty and then to second-guess them when they attempt conscientiously to do it.” *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992). For example, in *Pletan*, a police officer’s decision to engage in and continue a high-speed car pursuit was protected by official immunity. *Id.* at 41. Similarly, in *Elwood*, police officers responding to a domestic disturbance were protected by official immunity. 423 N.W.2d at 678. Police responses “constitute emergency situations in which official immunity normally applies.” *Nelson v. Wrecker Servs., Inc.*, 622 N.W.2d 399, 401 (Minn. App. 2001).

### **A. Officer Berthiaume**

The district court reasoned that “what constitutes an emergency is generally an issue for the trier of fact.” Jacobson argues that the crime-in-progress call was not an emergency, or that it was an emergency with a lesser degree of urgency such that Officer Berthiaume should have driven more slowly. Officer Berthiaume did not know all of the details about the incident at the time she responded to the call, but the record indicates that ongoing violence had been reported. The high-speed chase in *Pletan* began because of a property crime, but the supreme court nonetheless held that the officer’s conduct was protected by official immunity. 494 N.W.2d at 39, 41. Thus, the nature of the crime-in-progress call created an emergency situation such that Officer Berthiaume was permitted to use her discretion by deciding to respond to the call.

When analyzing whether a particular official is protected by official immunity, a court must identify the “precise governmental conduct at issue.” *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). Here, the governmental conduct at issue is Officer Berthiaume’s decision to enter the oncoming lane of traffic and pass Jacobson on his left side while responding to the crime-in-progress call. After informing the dispatcher that she would be responding to the crime-in-progress call, Officer Berthiaume had to make a number of decisions. She decided to turn on her red lights and Opticom but not her siren because she did not want to alert the suspect. Officer Berthiaume observed traffic conditions and considered her visibility to other drivers and their likely reactions to her maneuvers. Because of the potential danger, she slowed down at the intersection and kept Jacobson’s vehicle in focus. Officer Berthiaume decided to enter the oncoming lane

of traffic because, in her experience, most drivers react to an approaching law-enforcement vehicle by moving to the right. She also decided that she would be more visible in the oncoming lane of traffic and would have more options to maneuver in that lane. Thus, the record reflects that Officer Berthiaume exercised professional judgment and discretion in responding to the crime-in-progress call.

Jacobson makes two additional arguments why official immunity does not apply. First, he argues that Officer Berthiaume had a duty to comply with a state statute prohibiting a vehicle from passing another vehicle within 100 feet of a city intersection. *See* Minn. Stat. § 169.18, subd. 5(b)(2) (2006). Jacobson argues that no state statute specifically exempts law enforcement vehicles from that statute. Although emergency vehicles are exempt from compliance with certain traffic regulations, such as stopping at red lights and speed limits, *see* Minn. Stat. §§ 169.03, subd. 2, .17 (2006), those statutes are not the sole exemptions for emergency vehicles responding to emergencies. *See Kari*, 582 N.W.2d at 924-25 (holding that statutes do not contain exclusive list of traffic regulations that emergency vehicles may disregard). Official immunity does “not turn on whether specific traffic regulations do or do not apply to public employees driving an emergency vehicle responding to an emergency.” *Id.* at 925. Thus, the absence of a specific exemption for passing a vehicle at an intersection does not create a ministerial duty for Officer Berthiaume. Second, Jacobson argues that Officer Berthiaume had a duty to drive with “due regard” for the safety of others. *See* Minn. Stat. § 169.17. But that statute does not impose a duty on Officer Berthiaume that is “absolute, certain, and

imperative,” *Cook*, 200 Minn. at 224, 274 N.W. at 167, which would be necessary for us to conclude that she was negligent in performing a ministerial act.

Thus, Jacobson has failed to identify a ministerial duty that applied to Officer Berthiaume at the time of the accident. Jacobson does not argue that Officer Berthiaume’s actions were willful or malicious. Therefore, Officer Berthiaume is entitled to official immunity as a matter of law.

## **B. The City**

If an individual public official is found to be immune from liability for particular conduct, her “government employer will enjoy vicarious official immunity from a suit arising from the employee’s conduct.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006). In particular, the supreme court has held that a police officer’s official immunity extends to the officer’s public employer. *Pletan*, 494 N.W.2d at 43. The court noted that if vicarious official immunity did not apply,

then the purpose of official immunity, which is to shield an officer’s exercise of independent judgment from civil adjudication, [would,] as a practical matter, [be] defeated. Police officers may justifiably think their own employment performance is being evaluated and consequently may decline to engage in pursuit when pursuit is indicated.

*Id.* at 42. As a consequence of our conclusion that Officer Berthiaume is entitled to official immunity, the city is, as a matter of law, entitled to vicarious official immunity.

## **II. Statutory Immunity**

Statutory immunity (which often is referred to as discretionary immunity) protects cities from liability for claims “based upon the performance or failure to exercise or

perform a discretionary function or duty, whether or not the discretion is abused.” Minn. Stat. § 466.03, subd. 6 (2006). Courts have recognized a distinction between “planning” and “operational” decisions. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994). Planning decisions involve public policy issues and the weighing of competing social, economic, and political factors and are protected because they involve discretionary decisions. *Id.* Operational decisions are connected to the day-to-day operation of government and are not protected as discretionary decisions. *Id.*; *Watson ex rel. Hanson v. Metropolitan Transit Comm’n*, 553 N.W.2d 406, 412 (Minn. 1996). Courts also should consider whether “exposing the municipality to tort liability would undermine public policy.” *Norton v. County of Le Sueur*, 565 N.W.2d 447, 450 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Aug. 5, 1997); *see also Johnson v. State*, 553 N.W.2d 40, 47 (Minn. 1996) (recognizing that imposing statutory liability for discretionary decisions regarding how much liberty to afford parolees would undermine public policy).

The district court did not address the city’s statutory immunity argument, and Jacobson’s brief makes only a fleeting argument that the city should not be protected by statutory immunity because driving is a ministerial act. The city argues that it balanced competing social, economic, political, and safety considerations in formulating policies that permit officers such as Officer Berthiaume to exercise their discretion when responding to emergencies. Jacobson has not marshaled any evidence or cited any caselaw that would overcome the city’s argument. Thus, as a matter of law, the city is protected by statutory immunity. *See Schroeder*, 708 N.W.2d at 505 (holding that county

protected by statutory immunity for decision to permit road grader operators to grade against traffic); *Watson*, 553 N.W.2d at 413 (holding that transit operator protected by statutory immunity for decision to not place security personnel on bus).

In sum, the district court erred when it denied the city's and Officer Berthiaume's motion for summary judgment.

**Reversed.**