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STATE OF MINNESOTA

IN COURT OF APPEALS

No.: A08-750

Joan M. Krieger,

Plaintiff-Respondent,

vs.

City of St. Paul,

Defendant-Appellant.

RESPONDENT'S BRIEF AND APPENDIX

Wilbur W. Fluegel, #30429
FLUEGEL LAW OFFICE
150 South Fifth Street
Suite 3475
Minneapolis, MN 55402
(612) 238-3540
Co-Counsel for Plaintiff-Respondent

Lawrence J. Hayes, Jr., #42821
ST. PAUL CITY ATTORNEY'S OFFICE
750 City Hall & Court House
15 West Kellogg Blvd.
St. Paul, MN 55102
(651) 226-8728
Attorney for Defendant-Appellant

Mark J. Fellman, # 28782
FELLMAN LAW OFFICE
400 North Robert Street
Suite 1740
St. Paul, MN 55101
(651) 225-5600
Attorney for Plaintiff-Respondent

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ISSUES

1. Whether the trial court erred as a matter of law in determining that genuine fact issues existed on the elements of recreational immunity.

   The trial court held in the negative.

Apposite Authority: *Noland v. Soo Line R.R. Co.*, 474 N.W.2d 4, 6 (Minn. App. 1991), *review denied* (Minn., Sept. 13, 1991) (Restatement § 335(a)(ii) can be proven when the municipality has constructive notice a hazard carries the risk of substantial bodily injury).

2. Whether the trial court erred as a matter of law in determining that the City had failed to prove it exercised discretion in failing to warn of the defect in its sidewalk.

   The trial court held in the negative.

Apposite Authority: *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000) (low cost of warning signs fall outside statutory discretionary immunity); *Unzen v. City of Duluth*, 683 N.W.2d 875 (Minn. App. 2004), *review denied* (Minn., Oct. 27, 2004) ("When a known danger may be corrected through relatively inexpensive remedies, such as warning signs, it may not be necessary for the municipality to make any policy decisions regarding the allocation of resources.").

3. Whether the trial court erred as a matter of law in determining that the City failed to prove its employees exercised discretion in failing to warn of the defect in its sidewalk.

   The trial court held in the negative.

Apposite Authority: *Terwilliger v. Hennepin County*, 561 N.W.2d 909, 913 (Minn. 1997)(official immunity "protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties."); *Meier v. City of Columbia Heights*, 686 N.W.2d 858, 863 (Minn. App. 2004)("official immunity must be extended before granting vicarious official immunity, [so] it is necessary to determine if official immunity was appropriate" first).

STATEMENT OF THE CASE

This is a trip and fall case occurring on a temporary bituminous sidewalk placed at the entry of a public building owned by the City of St. Paul. Plaintiff tripped upon leaving the building in the dark after teaching a community education class, as she was traversing from the building's exit to the public parking lot.

The City raised statutory discretionary immunity under Minn. Stat. § 466.03, subd. 6, "official act immunity"[1] and so-called recreational immunity under Minn. Stat. § 466.03, subd. 6e as affirmative defenses.

It appears from the Notice of Appeal dated April 30, 2008, that only the order of April 22, 2008, filed April 23, 2008, is the subject of the appeal, but in part that order relied on the earlier denial of summary judgment on September 6, 2007 (RA-119), as part of the law of the case. At a minimum, the earlier order will therefore be necessary as background, but since it also denied the same immunities that the later order denied, unless the earlier order is also reviewed on this appeal for the Appellant, the September 6, 2007 order would still stand as a denial of immunities even if the April 22, 2008 order were reversed.

Second Judicial District Ramsey County District Court, Hon. Teresa R. Warner as to the order of September 6, 2007 and Hon. Steven D. Wheeler as to the order of April 22, 2008, denied the motions for summary judgment. The City appealed from the latter.

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[1] The City contended in both summary judgment motions that it was entitled to official act immunity. That doctrine actually protects employees of a municipality. The doctrine of vicarious official immunity protects the governmental entity.

STATEMENT OF THE FACTS

1. Incident occurred at City's Building. Plaintiff, 78 year-old Joan Krieger was injured when she tripped on a hole in a temporary bituminous walkway outside the North Dale Community Center on March 3, 2004, at approximately 9:00 p.m. as she departed a community education class she had taught there. It was dark out and there was no external lighting provided along the length of the temporary walking surface. *Arntson Affidavit* ¶ 3 (RA-002).

2. Property was open to public during a period of remodeling and construction. The City of St. Paul was in the process of making certain improvements to real property to North Dale Community Center, including apparently modifications to the grounds and parking lot at the building whose grounds were then under construction. The building construction had been completed but the landscaping was not. The grounds around the building had been leveled and were being prepped during the day for landscaping. There were no warning signs or markers indicating areas that were unsafe to walk across. It is alleged that as Mrs. Krieger was walking across the temporary bituminous walkway in the darkness to get to her car, she was unable to see that there was a hole or a large gouge in the temporary pavement surface where she was walking. *Arntson Affidavit* ¶ 3 (RA-002).

4. Fall was prompted by a gouge in the temporary walkway. Through the course of the construction and/or remodeling project at Northdale Community Center, 1414 North St. Albans in St. Paul, a gouge, indentation or "hole" was created in the temporary

bituminous walkway from an adjacent parking lot to with the public building owned by the City of St. Paul, and while leaving the building during an evening after teaching a community education class, given the limited lighting available to her, Plaintiff Joan Krieger encountered the gouge, indentation or hole in the temporary bituminous walkway resulting in tripping and sustaining an injury. *Arntson Affidavit* ¶ 5 (RA-003).

5. Gouge was created by a construction machine. The gouge, indentation or hole in the temporary bituminous walkway on which Plaintiff Joan Krieger tripped, was created by the bucket of a bobcat-type piece of machinery being scraped across the surface of the bituminous walkway. *Arntson Affidavit* ¶ 9 (RA-004).

6. It is foreseeable that a building user can be distracted by activities during their visit and forget a hazard observed during daylight hours. It is readily foreseeable that in using a building, a person may enter the building for a period of time to engage in business, and after completing their business, exit the building into a different lighting condition and being distracted by their transaction of business, even if they had seen and appreciated a hazard in a walkway at the time of the entrance, they may not recall, observe, or appreciate the hazard upon exiting the building. *Arntson Affidavit* ¶ 6 (RA-003).

7. Property owner owes duty to assure property is safely maintained or hazards are warned against. When a building owner retains control and possession of its property during a construction and/or remodeling project and continues to hold the building open for use by members of the public, it owes a continuous and ongoing duty of reasonably

inspection to ascertain the assurance and nature of any tripping hazard and at a minimum to place adequate warnings of those hazards until they can be corrected so that foreseeable users may safely enter and exit that property. *Arntson Affidavit* ¶ 7 (RA-004).

8. City ultimately argued that it placed poor lighting because of a lack of funds.

The City had received complaints about inadequate lighting before Mrs. Krieger fell,[2] and initially defended its lighting as adequate,[3] but then argued generally that it had a limited budget. Given the assertion of an "economic" justification for lack of lighting, Plaintiff argued that inadequate lighting should simply be taken into account as an explanation of why she did not detect the hazard upon exiting the building in the dark, and not as the basis for a claim against the City itself.[4]

9. Plaintiff's theory focused on lack of a warning of the hazard. While Plaintiff

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[2] *See Plaintiff's Answers to Defendant City of St. Paul's Interrogatories, Set One*, at 3, ¶ 22, (Dec. 2003 - Jan. 2004 complaint), A-57; *Affidavit of Brian Tourtelotte*, ¶ 9, (Nov. 20, 2003 complaint), A-64; *Affidavit of Brian Tourtelotte*, Ex. B (Nov. 20, 2003 complaint), A-68 .

[3] *See* BRIEF OF CITY at 6 (June 14, 2007) ("existing design of the lighting system adequately lit the area and sufficiently protected the safety of the users"), A-24, *citing Affidavit of Brian Tourtelotte*, ¶¶ 11-12 & Ex. C, A-64, A-69.

[4] While the City's appellate brief notes that no amendment was ever made to Plaintiff's complaint, her Complaint did not sue for negligent lighting, but rather recited the lack of lighting as a factor limiting Plaintiff's ability to detect hazards. *Complaint*, ¶ 7, A-3; *Amended Complaint*, ¶ 7, A-13. Plaintiff conceded that lighting was a budget issue subject to discretion. *See Arntson Affidavit*, ¶ 8 (RA-004) ("[A] governmental entity often has the discretion to spend its budget as it sees fit, including the cost of exterior lighting, it must take into account any limited lighting in weighing the need for any warning it should post about tripping hazards and the need for inspections to ascertain tripping hazards which may not be visible during evening hours, absent proper lighting.").

believed that the City should have repaired the gouge in the walkway, she did not sue on that theory either - - fearing the City would again claim poverty to repair the tripping defect. Instead, having dropped the inadequate lighting theory, Plaintiff focused on the fact that the City - - even if it couldn't afford to light the area or repair the hazard, could inexpensively warn of it to alert foreseeable users of the hazard.

10. Reasonable low- or no-cost warning methods existed for the City. The presence of a gouge, indentation or hole in the temporary bituminous walkway represents a temporary hazard that with such maintenance responsibility, an owner should reasonably warn its entrants (such as by placing of a cone over the gouge) of a foreseeable risk of injury it created for which the owner of the property who is in possession and control of it remains ultimately responsible and accountable. *Arntson Affidavit* ¶ 10 (RA-004).

11. The injury occurred at an artificial condition maintained by the City about which a hazard of serious injury existed that a user would benefit from being warned about. Given questionably adequate exterior lighting, the City had to be aware that those entering or leaving the building may not discover the gouged condition of the temporary walkway in the dark and that they would obviously benefit by a warning.

12. Both trial courts concluded that since the facility was used regularly by the elderly, whether or not the City should anticipate that they could be seriously injured in a fall was a fact issue for the jury. Both trial judges ruled that a genuine issue of predicate fact existed on the question of whether the City should have anticipated elderly users of the

walkway could sustain serious bodily injury from tripping on the gouge.

SUMMARY OF ARGUMENT

On the evening of March 3, 2004, as she was leaving the community education class she had taught, Plaintiff Joan M. Krieger tripped on an indentation in the temporary bituminous walkway at the North Dale Community Center, located at 1414 North St. Albans in St. Paul. The building had undergone re-construction and its grounds were still being finished, such that the walkway involved was not the permanent concrete sidewalk ultimately intended for the property, but just a temporary one, created to facilitate movement by building entrants from the adjacent city parking lot to and from the building itself.

Apparently the bucket of a bobcat-like piece of construction machinery scraped or gouged into the tar surface of the walkway as the machine crossed that area during some phase of the ground work that had been completed about two months before Plaintiff's mishap.

Discovery failed to reveal whether the bobcat involved was owned or operated by the landscaper, the site preparation contractor, the general contractor or someone else. Thus, Plaintiff stipulated to voluntarily dismiss the three entities - - Larson Contracting, Inc., d/b/a Larson Excavating, Monette Construction Company, Inc., and Dew Corporation - - being unable to attribute the negligent operation or supervision of the bobcat to any one of them. Instead, Plaintiff focused her claim only on the City as the owner of the property and thus as the entity required to maintain it in a reasonably safe condition for ordinary use and to warn

against hazards on its premises.[5]

The City did not dispute its legal responsibility to safely maintain its property, but rather sought summary judgment on three "immunity" grounds. Plaintiff opposed the City's motions and the trial judges denied them because:

1. "Recreational immunity" is in fact, not "immunity," but rather under MINN. STAT. § 466.03, subd. 6e, a City's duty of care is reduced to that which a landowner owes a trespasser when all elements of the "trespasser standard" are shown by *prima facie* evidence to apply. Here both district judges concluded that genuine issues of material fact existed on the elements of the so-called "trespasser standard," and denied the motion.

2. While the City may assert "discretionary" statutory immunity from claims of inadequate exterior lighting that hid the hazard from Plaintiff's view as she left,[6] it asserted no exercise of discretion in maintaining the condition of the

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[5] The City resisted Plaintiff's efforts to dismiss the general contractor and so the issue of that entity - - Dew Corporation's - - responsibility to indemnify the City for the condition of the property also went before the trial court - - initially Judge Teresa R. Warner - - for disposition. Since the factual record showed indisputably that Dew had turned the property back over to the City under a certificate of occupancy following the substantial completion of its work, the court in a September 6, 2007 ruling dismissed Dew Corp. That ruling is apparently not challenged in this appeal, and is mentioned here only for purposes of background. The City voluntarily agreed to dismiss the other two contracting entities.

[6] Plaintiff alleged inadequate lighting as background to account for why she did not observe the hazard upon leaving. Plaintiff was not advancing a claim against the City for inadequate lighting. The inadequacy of lighting was also used to oppose any motion by the City based on an "open and obvious" defense, as the visibility of a hazard is a fact issue for a jury. *See Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005) ("whether a condition presents a known or obvious danger is a question of fact."). This issue and whether or not Plaintiff was foreseeably distracted upon leaving so as to create a further duty to warn, *see* RESTATEMENT (SECOND) OF TORTS, § 343A, Comment *f* (duty to warn is imposed if it is possible that a visitor to the property may have been foreseeably distracted away from the hazard or "forget what he has discovered, or fail to protect himself against it."), are not raised in this interlocutory "immunity" appeal.

walkway in a reasonably safe condition for ordinary and foreseeable use or in failing to post an inexpensive warning sign or cone at the location of the hazard.[7] The City adduced no evidence that it balanced financial, political, economic and social factors in deciding not to repair the gouge in the sidewalk or to place a warning. This is its obligation under *Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000), and as it failed to do so, both judges denied summary judgment.

3. The City has vicarious official act immunity for any discretionary acts of its employees that are done in the course of their employment in the execution of a municipal policy which brings about an injury, but again no policy was established to disregard the hazard and no showing was made that the City lacked the manpower or financial resources to repair the sidewalk gouge or to place an inexpensive warning sign or cone at the location of the hazard.[8] The district judges thus denied the motion.[9]

The decisions of the trial judges were proper and should be affirmed.

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[7] Placement of an inexpensive warning has been held to fall outside the costs associated with the exercise of policy-making that otherwise triggers immunity. *See Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000); *Christensen v. Mower County*, 587 N.W.2d 305 (Minn. App. 1998); *Nguyen v. Nguyen*, 565 N.W.2d 721, 724 (Minn. App. 1997).

[8] The City maintained that it was unaware of the existence of the tripping hazard before the incident, even though it was in daily occupation of the premises and the construction activities that had created the hazard had been concluded for months prior to the incident. In any event, the issue of adequate notice of a hazard to prompt a duty to act is not raised by the City as grounds for appeal in this matter.

[9] In the motions below, the City also disputed the Plaintiff's having established a *prima facie* case of defect in the sidewalk or how the hole that tripped the Plaintiff had been created. Plaintiff established this by the expert affidavit of a Certified Safety Professional named Raymond Arntson. The adequacy of his foundation or reliability of his opinion are not challenged in the City's interlocutory appeal.

STANDARD OF REVIEW

When a city moves for immunity, it has the burden of proof, *see Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994), and must submit nonconclusory sworn evidence to satisfy its obligation. *Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000). "Where the government has not provided any evidence as to how it made the decision for which it claims immunity, th[e] [supreme] court has held that the government was not entitled to statutory immunity." *Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000), *citing Angell v. Hennepin County Regional Rail Auth.*, 578 N.W.2d 343, 347 (Minn. 1998).

In general, summary judgment may be granted if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact. MINN. R. CIV. P. 56.03. A fact is material when it aids the establishment of a claim so as to have an effect on the claim's outcome. *See, e.g., Brenner v. Nordby*, 306 N.W.2d 126, 127 (Minn. 1981). All doubts and inferences about the facts are resolved against the moving party. *See Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). Evidence is construed in a light most favorable to the party who resists the motion. *See Grondahl v. Bullock*, 318 N.W.2d 240, 242 (Minn. 1982).

The trial court does not decide or resolve the fact issues at the summary judgment hearing. *See Rathburn v. W.T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974). Instead its role is to determine if there exists room for an honest difference of opinion among

reasonable people, and denies the motion where such a debate is possible. *See Trepanier v. McKenna*, 267 Minn. 145, 149-50, 125 N.W.2d 603, 606 (1963). Where there is room for an honest difference of opinion, summary judgment should be denied, because it is considered a "blunt instrument," that should only be used when it is perfectly clear that no fact issue exists. *See Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966). While the tool of summary judgment can promote "just, speedy, and inexpensive determination of an action," because it is a "blunt instrument," appellate courts have cautioned that it can be employed "only where it is perfectly clear that no issue of fact is involved." *DLH, Inc. V. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

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

ARGUMENT

I. Recreational Immunity was Properly denied because of Factual Predicates

The Minnesota legislature passed the Municipal Tort Liability Act in 1963, imposing liability on every municipality for its torts. MINN. STAT. § 466.02. A city, such as Appellant, is defined as a "municipality" by the Act. *Id.* § 466.01, subd. 1. The Act enumerates, however, a number of specific exceptions to municipal tort liability, including so-called "recreational immunity." *Id.* § 466.03, subd. 6e. The supreme court has explained that, while recreational immunity does not wholly absolve cities from liability, "it enables them to treat visitors, in the tort context, as trespassers rather than licensees or invitees." *Sirek by Beaumaster v. State, Dept. of Natural Resources*, 496 N.W.2d 807, 809 (Minn. 1993) (analyzing recreational immunity from tort liability granted the state under § 3.736, subd. 3(h)).

"Recreational immunity" is thus not immunity, but a reduced standard of care that prohibits the following claims:

> Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purpose, or for the provision of recreational services * * * if the claim arises from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for **conduct that would entitle a trespasser to damages** against a private person.

MINN. STAT. § 466.03, subd. 6e (emphasis added). The supreme court has indicated that the elements of the so-called "trespasser standard" of care set by § 335 of the RESTATEMENT are

used to resolve the applicability of the "immunity." *See Hanson v. Bailey*, 249 Minn. 495, 500, 83 N.W.2d 252, 257 (1957) (adopting the predecessor of section 335).

The RESTATEMENT provides:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land if
>
> (a) the condition
>
> (i) is one which the possessor has created or maintains and
>
> (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
>
> (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

RESTATEMENT (SECOND) OF TORTS, § 335 (2d ed. 1965). An entrant bears the burden of establishing that each of the factual elements of section 335 to defeat a claim of "immunity." *Martinez v. Minnesota Zoological Gardens*, 526 N.W.2d 416, 418 (Minn. App. 1995), *review denied* (Minn., Mar. 29, 1995).

The elements are:

1. Entrants regularly use the subject property including the hazard area
2. There is a hazard involving an "artificial" or man-made condition
3. The City created or maintains the subject property
4. The hazard is likely to cause serious injury
5. Entrants are unlikely to discover the hazard without a warning, and
6. The City could reasonably have provided a warning

As to these elements, almost any public property meets the test of regular use and a sidewalk is an "artificial" condition, that was created for and maintained by the City. Given

the darkened condition of the property and the late hours of the building's operation, it is clear that entrants may not see the hazard in the dark, and the affidavit of Plaintiff's expert reflects the utility of an inexpensive warning cone or sign placed over the hazard. The only element disputed by the City was whether the gouge mark was "likely to cause death or serious bodily harm." RESTATEMENT § 335(a)(ii).

Here, the case law includes the ruling in *Johnson v. State*, 478 N.W.2d 769 (Minn. App. 1991), in which an otherwise able-bodied adult female tripped and sustained some injury when her foot encountered a raised sidewalk joint at a government travel-information center while stopping there to pick up a map. The City obviously emphasized this case in both arguments to the trial court. The argument failed twice because the judges recognized that here we are dealing with some fairly aged users of the property who enter to attend (or teach) various community education classes, like Mrs. Krieger's quilting class. The 78 year-old fell and was badly hurt. To the extent that elderly patrons regularly use the facility creates the need for the government to be aware that people who could sustain the life-threatening injury of a fractured hip would be using the grounds.

The core concept of premises liability is that a duty of reasonable care **under the circumstances** is exacted of possessors. *See Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972). Given the proof of the **circumstances** of entry and of the age of entrants, the trial judges both felt that a *prima facie* showing was made by Plaintiff that the risk of serious bodily injury existed here, whereas it did not in a daylight fall on an open and

obvious raised sidewalk joint to healthy entrants in *Johnson*. The courts' decisions ruling that a genuine fact issue existed on the risk of "serious bodily injury" is not inherently wrong and should be affirmed.

At one point the City had also argued that it had not received notice of the involved fall and that the sidewalk gouge was repaired before it could study the hazard, but the record shows that such notice was promptly given within a week of the incident.[10] The record also shows that the gouge was likely made by a bucket truck,[11] and that these pieces of construction equipment were off the subject property - - which had been turned over by the contractors to the City - - for nearly a year before Plaintiff's March 3, 2004 fall.[12] The City would thus have had at least such an interval to apprise itself of the existence of the hazard on the main walkway from its public parking lot to its public building. This provides constructive notice to the City of the hazard, as it is legally charged with an awareness of what would have been in plain sight. *See Ljungberg v. North Mankato*, 87 Minn. 484, 92 N.W. 401 (1902) (knowledge is imputed to a City for what had to be known given the length

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[10] One week after the March 3, 2004 incident, on March 10, 2004, Plaintiff advised the City of the "injury , and . . . explained where and how [she] . . . got hurt," *see Plaintiff's Answers to Defendant City of St. Paul's Interrogatories, Set One*, at 3, ¶ 4-1d, A-51, and she then followed up with formal written notice on July 26, 2004. *See Plaintiff's Response to Requests for Admission*, ¶ 12, A-44.

[11] *Arntson Affidavit* ¶ 9 (RA-004).

[12] *See City's Answers to Plaintiff's Interrogatories*, ¶ 15(b), at 9 (RA-055) (Certificate of Substantial Completion completed on April 16, 2003, with "punch list" of minor items completed 1n August 2005).

a hazard has existed).[13]

Since the trial judges did not commit errors of law by ruling that a genuine fact issue existed on whether the nature of entrants into the property was such that the gouge - - which existed for almost a year or longer - - created a condition that could likely cause severe bodily injury, the ruling denying "recreational immunity" should be affirmed.

II. Statutory, Discretionary Immunity only applies to Challenges to Policy when the Government shows it Weighed and Balanced Social, Political and Economic Decisions in not Placing a Warning Sign.

The Municipal Tort Liability Act grants immunity to a city for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." MINN. STAT. § 466.03, subd. 6. "Whether governmental action is protected by statutory immunity is a question of law, which th[e] court reviews *de novo*." *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000). The burden of proving immunity is on the government, *id.* at 402, and the court has expressed the principle that it will interpret the discretionary-function exception to grant immunity

[13] There is an ambiguity in the Restatement section 335(a)(ii) as to whether a claimant must show actual or constructive knowledge of the risk that a hazard could cause serious bodily injury, and initially the court of appeals interpreted the language to require actual knowledge by the government, as opposed to a constructive knowledge standard. *See Henry v. State*, 406 N.W.2d 608, 611 (Minn. App. 1987), *review denied* (Minn., Aug. 12, 1987); *Lawler v. Soo Line R.R. Co.*, 424 N.W.2d 313, 317 (Minn. App. 1988), *review denied* (Aug. 24, 1988). But in 1991, this court altered course and applied a constructive knowledge standard to section 335(a)(ii). *Noland v. Soo Line R.R. Co.*, 474 N.W.2d 4, 6 (Minn. App. 1991), *review denied* (Minn., Sept. 13, 1991). The supreme court has not since ruled on this issue.

narrowly. *Id.* at 400.

The courts have recognized that the government exercises two types of discretionary functions : planning level and operational level. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994). Only planning-level functions are protected by statutory immunity under Minnesota law. *Id.* Thus the inquiry for a reviewing court is whether the purported exercise of discretion was with regard to planning-level functions - - and thus protected by immunity - - or merely an operation-level or so-called "ministerial" function, and thus not protected by immunity.

Planning-level functions "require evaluating such factors as the financial, political, economic, and social effects of a given plan." *Unzen v. City of Duluth*, 683 N.W.2d 875, 882 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). "Operational-level decisions, in contrast, are those actions involving the ordinary, day-to-day operations of the government . . . ," *id.*, and "consist of conduct which merely puts into effect a predetermined plan." *Gonzales v. Hollins*, 386 N.W.2d 842, 845 (Minn. App. 1986), *citing Hansen v. City of St. Paul*, 298 Minn. 205, 211-12, 214 N.W.2d 346, 350 (1974). A task is still considered operational or "ministerial" even though the employees who carry it out "undoubtedly had to make certain decisions in doing that job [so long as], the nature, quality and complexity of their decision-making process" is simple and definite, representing the ministration of a program adopted at the planning level, and undertaken to make it operational or put it into effect. *Williamson v. Cain*, 310 Minn. 59, 61, 245 N.W.2d 242, 244 (1976).

In approaching the government's request for immunity on the basis of a discretionary function the court must "identify the conduct at issue" before it can determine whether it is protected. *Conlin, supra,* 605 N.W.2d at 400. Next, the court must determine whether that conduct is operational or policy-making. *Angell v. Hennepin County Reg'l Rail Auth.*, 578 N.W.2d 343, 347 (Minn. 1998). Policy-making or

> [p]lanning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic and social effects of a given plan or policy.

Holmquist v. State, 425 N.W.2d 230, 232 (Minn. 1988).

Here, there was no evidence submitted by the City that it balanced "financial, political, economic and social effects of a given plan or policy" in deciding not to place a cone over the gouge mark. Indeed, at the motion, the City took the position it was unaware that the gouge mark even existed - - despite its having had to be there for about a year.[14] No one can seriously be heard as suggesting that they met and discussed not addressing a hazard that they contend they were unaware of.

That should end the inquiry because the City has the burden to show that it weighed and balanced the "financial, political, economic and social effects of a given plan or policy" **on the conduct at issue** - - failure to place a warning cone - - and they did not do so.

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[14] Since the gouge was made by a bucket truck and those were off the property when it was turned over at the point of "substantial completion" in April of 2003 and the fall occurred in March of 2004, the bucket gouge had to be made before April of 2003 - - 11 months before the incident in question.

Indeed, the court has said that "[w]hen a known danger may be corrected through relatively inexpensive remedies, such as warning signs, it may not be necessary for the municipality to make any policy decisions regarding the allocation of resources." *Unzen v. City of Duluth*, 683 N.W.2d 875 (Minn. App. 2004), *review denied* (Minn., Oct. 27, 2004); *see Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000).

No evidence exists in the record produced by the movant that the City weighed and balanced the cost of an orange cone over the gouge as too prohibitive. The trial judges were correct in denying summary judgment on the ground of statutory discretionary immunity.

III. Official Act Immunity is Unavailable to the City

At both motions for summary judgment, the City requested "official act" immunity. That common law doctrine protects **employees** of a governmental entity. It is the doctrine of **vicarious** official immunity which insulates the governmental entity, but it turns on the availability of official immunity to government employees.

"[O]fficial immunity must be extended before granting vicarious official immunity, [so] it is necessary to determine if official immunity was appropriate" first. *Meier v. City of Columbia Heights*,686 N.W.2d 858, 863 (Minn. App. 2004).

Vicarious immunity applies in situations where, if it were not granted, the purpose of official immunity would be defeated.[15] "Traditionally, the application of official immunity

[15] *See Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269, 272 (Minn. App. 1996), *review denied* (Minn., Sept. 20, 1996). As to when that is, it should be noted that the Supreme Court has said that vicarious official immunity is not "automatically" applied to

in Minnesota 'protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties.'" *Id., quoting Terwilliger v. Hennepin County*, 561 N.W.2d 909, 913 (Minn. 1997).

No employee is being sued here. If one were, it would be for the failure to place a warning cone over a tripping hazard. Once again, the City took the position that its employees were **unaware** of the gouge. They could not, therefore, possibly have exercised discretion **not to protect against a hazard** that they were unaware existed.

For official act immunity to be implicated, someone has to have done an act involving the exercise of discretion or judgment. Here, the City admits it didn't act and maintains it failed to do so - - not because of the exercise of any discretion at the operational level, but because it says no one was aware of the hazard.

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protect the city even when its employee is shown to be entitled to official immunity. In *Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992), in which the Court said:

> There have been numerous cases in this court where municipalities have, impliedly at least, received the benefit of their employees' personal immunities. Generally, if the employee is found to have immunity, the claim against the municipal employer has been dismissed without an explanation. [citations omitted] Recently, however, in *Holmquist v. State*, 425 N.W.2d 230, 233, n.1 (Minn. 1988), we noted, "[n]ot infrequently a governmental entity is required to compensate for harm done by a public official even though the official is not held personally liable."

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

There is no analog in Minnesota law for applying official immunity to insulate an employee for failing to act because he was unaware of the need to do so. Case law grants official immunity to discretionary acts by operational level employees when they acted or failed to act in the light of **knowledge**.

There was no legal basis for the grant of official (or vicarious official) act immunity. The trial judges were correct in denying summary judgment on the basis of this common law immunity.

CONCLUSION

The decisions of the two trial judges to deny immunity to the City via summary judgment should be affirmed. There is a genuine issue of material fact on the City's knowledge of whether the gouge represented a likelihood of substantial bodily injury, given the nature of the entrants into this public building, such that "recreational immunity" is unavailable.

Also, the City failed to produce any evidence that it weighed "financial, political, economic, and social effects of" not placing a warning cone over the gouge. That would be necessary for statutory discretionary immunity. It failed to do so because it contends it was unaware of the existence of the hazard - - despite at least 11 months to observe it.

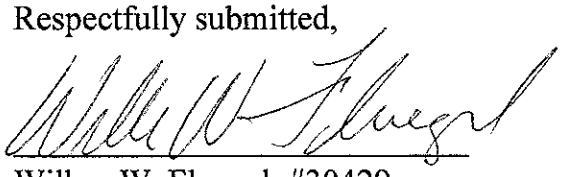
Its employees alleged lack of awareness of the hazard also deprives the City of official act (or vicarious official) immunity. The reason: an employee cannot exercise the judgment not to warn of something that the employee also maintains he is unaware of. Since

Plaintiff's theory of liability was the negligent failure to place a warning cone and the City maintains it was unaware of any hazard to place a cone over, it cannot be heard to argue that its workers opted in the exercise of their professional judgment not to place a cone for some sound or logical justification based on discretion at the operational level. No one in government has the discretion to fail to observe what is in plain sight during daylight hours. The low cost of placing a warning cone has been held to fall outside the range of the exercise of discretion.

For these reasons, the trial courts' denial of summary judgment should be affirmed.

Respectfully submitted,

DATED: 7-2-08



Wilbur W. Fluegel, #30429
FLUEGEL LAW OFFICE
150 South Fifth Street
Suite 3475
Minneapolis, MN 55402
(612) 238-3540
Co-Counsel for Plaintiff-Respondent